Back to the Basics: Leaving the Hanging Paragraph Hanging

Nicholas M. Hudalla

Follow this and additional works at: https://via.library.depaul.edu/bclj

Recommended Citation
Nicholas M. Hudalla, Back to the Basics: Leaving the Hanging Paragraph Hanging, 7 DePaul Bus. & Com. L.J. 357 (2009)
Available at: https://via.library.depaul.edu/bclj/vol7/iss2/6

This Comment is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Business and Commercial Law Journal by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
Back to the Basics: Leaving the Hanging Paragraph Hanging

Nicholas M. Hudalla*

“A ready way to lose your friend is to lend him money. Another equally ready way to lose him is to refuse to lend him money. It is six of one and a half dozen of the other.”

—George Jean Nathan

I. INTRODUCTION

Strongly resembling the concept of *jus in bello*, the Bankruptcy Code dictates the acceptable practices in the creditor/debtor financial war. However, unlike a true combat situation, under the Bankruptcy Code, each class of participants in a bankruptcy proceeding is guided and limited by its own unique set of standards. Once these standards are drawn, or amended, a creditor’s right to strike is molded by the hands of our judicial system. Like the *jus ad bellum*, the nation is often split as to whether certain hostilities are justified. Consequently, one jurisdiction may provide a creditor with modernized artillery while a neighboring jurisdiction heavily restrains the acceptable creditor practices.

In 2005, Congress amended 11 U.S.C. § 1325 (“Section 1325”) adding an unnumbered paragraph below Section 1325(a). This paragraph has commonly been referred to as the “hanging paragraph.” In relevant part, this hanging paragraph restricts the applicability of 11 U.S.C. § 506 (“Section 506”) with respect to a creditor who: (1) has a purchase-money security interest securing the debt that is the subject of the claim; (2) is owed a debt incurred within a 910-day period preceding the filing of the bankruptcy petition; and (3) has a security interest in a motor vehicle for personal use. After the adoption of this amendment, judiciaries in the majority of jurisdictions provided credi-

* B.S.: Political Science, 2005, Roosevelt University; J.D. Candidate, May 2009, DePaul University College of Law. I would like to thank my family and friends for their generosity, motivation, and support throughout all of my academic endeavors.


2. See Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror,* 54 UCLA L. REV. 1815, 1843 (2007) (defining the *jus ad bellum* as “the decision whether engaging in hostilities is justified”).

tors with a combative entitlement, granting a “910-day creditor”\(^4\) with full authority to thwart a debtor’s attempt to bifurcate a 910-day claim into a secured and unsecured portion.\(^5\)

This article will argue that a fair reading of the hanging paragraph indicates that the paragraph’s language lays the framework for a more passive, pro-debtor interpretation of the Code. Part II of this article discusses the flawed majority interpretation of the hanging paragraph, which acts to bar application of Section 506 to a 910-day claim while finding secured status through the application of state law.\(^6\) Part III clarifies the majority’s misinterpretation of *Dewsnup v. Timm* and, even more importantly, of Section 506.\(^7\) Finally, Part IV emphasizes that although the Eastern District of Louisiana created a solid framework for applying secured status to a 910-day claim, this jurisdiction failed to give full effect to the hanging paragraph’s limitations on a 910-day creditor’s rights.\(^8\)

II. THE MAJORITY VIEW

In 1989, in *United States v. Ron Pair Enterprises, Inc.*, the United States Supreme Court expressly stated that “Section 506 . . . governs the definition and treatment of secured claims.”\(^9\) In 2006, the majority of the circuit courts broadly applied the newly adopted hanging paragraph, finding that Section 506 no longer applied to 910-day claims.\(^10\)


\(^5\) See *id.* at 350 (stating that claims under the hanging paragraph cannot be bifurcated into secured and unsecured claims); *In re Johnson*, 337 B.R. 269, 272 (Bankr. M.D. N.C. 2006) (asserting that a 910-day creditor is entitled to the full claim or the return of the vehicle); *In re Bufford*, 343 B.R. 827, 831 (Bankr. N.D. Tex. 2006) (stating, “No doubt, the drafters of the 910-day provision intended to eliminate the ability of debtors to bifurcate, or ‘strip down’ secured claims on these recently purchased vehicles.”); *In re Montgomery*, 341 B.R. 843, 845 (Bankr. E.D. Ky. 2006) (providing that a court may not confirm a debtor’s confirmation plan providing for the bifurcation of a 910-day claim); *In re Fleming*, 339 B.R. 716, 722 (Bankr. E.D. Mo. 2006) (asserting that bifurcation over an undersecured 910-day creditor’s objection is impermissible); *In re Vega*, 344 B.R. 616, 620 (Bankr. D. Kan. 2006) (entitling the creditor to the underlying value of the claim under applicable state law).

\(^6\) *Dewsnup v. Timm*, 502 U.S. 415 (1992); see infra Part II.

\(^7\) *In re White*, 352 B.R. 633 (Bankr. E.D. La. 2006); see infra Part III.

\(^8\) See infra Part IV.


Combining this broad application with the asserted purpose of Section 506 would seemingly create the simplistic effect of removing secured status from 910-day claims. This simplicity, however, was shunned by the same courts that created the broad application. Instead, these courts adopted the theory that Section 506 is not a definitional provision, and, therefore, it is not the basis for secured status.\footnote{See, e.g., Brooks, 344 B.R. at 421 (asserting that § 506(a) is a method of valuing an allowed secured claim, it is not a definitional provision).}

As this anti-definitional approach directly contradicts Justice Blackmun's assertion in Ron Pair,\footnote{Ron Pair, 489 U.S. at 238-39.} the courts needed to find a way to maneuver around Ron Pair. This maneuvering came through heavy reliance on Dewsnup v. Timm.\footnote{Dewsnup, 502 U.S. 410 (1992).} In Dewsnup, the debtor filed for Chapter 7 bankruptcy.\footnote{Id. at 413.} The debtor's assets included real property, valued at $39,000, which was used to secure an approximately $120,000 loan.\footnote{Id.} Relying on Section 506(a), the debtor asserted that she was able to cram down this debt into a secured portion of $39,000 and an unsecured portion of $81,000.\footnote{Id. at 416.} The debtor then looked to Section 506(d) and asserted the $81,000 unsecured portion was not an allowed secured claim, and therefore that the court should void this portion, ultimately stripping down the lien to the $39,000 secured claim.\footnote{Dewsnup, 502 U.S. at 415-16.}

In response to the complaint, the creditors, joined by the United States as amicus curiae, argued against stripping down liens through Section 506(d).\footnote{See Michael J. Herbert, Understanding Bankruptcy 208-09 (1995) (explaining the “pass-through rule”); see also infra notes 34-39 and accompanying text.} To support this argument, the creditors relied on legislative history reflecting the intent to retain the pre-Code bankruptcy law which preserved creditors' liens beyond discharge\footnote{Id. at 416.} (the "pass-through rule").\footnote{Id.} The creditors asserted that Section 506(a) is not definitional, and therefore, the allowed secured claim referenced in Section 506(d) is not an indivisible term of art with respect to the allowed secured claim referenced in Section 506(a).\footnote{Dewsnup, 502 U.S. at 415-16.} With the "pass-through rule" as a backdrop, the creditors then urged the Court to define a
Section 506(d) allowed secured claim in two phases: (1) whether it is "allowed" under 11 U.S.C. § 502 ("Section 502"); and (2) whether the claim is "secured" by a state law lien.\[22\] This piecemeal analysis would ensure preservation of the "pass-through rule." A claim against the debtor personally could be crammed down within the bankruptcy proceeding under Section 506(a) by allocating secured status to the value of the collateral and allocating unsecured status to the excess debt.\[23\] Furthermore, a claim outside of bankruptcy against the debtor's property (a state law lien) would be unaffected by the bankruptcy proceeding as Section 506(d) would prohibit stripping down the lien by ensuring that the entire claim would retain status as an allowed secured claim outside of the bankruptcy proceeding.\[24\]

The Court asserted that there were difficulties in the creditor's analysis, but relying heavily on the Congressional intent to preserve the "pass-through rule," the Court refused to permit the debtor's strip down technique.\[25\] The Court reasoned that Section 506(d) did not permit the debtor to strip down the claim because the debt was secured by a lien and allowed pursuant to Section 502.\[26\]

Through a great deal of judicial craftsmanship, numerous courts have vastly manipulated this narrow Dewsnup analysis and created the answer to the roadblock imposed by Ron Pair on a 910-day creditor's secured status.\[27\] These courts assert that under Dewsnup, Section 506 is not definitional;\[28\] however, because of the "pass-through rule," state law defines the secured status of bankruptcy claims.\[29\] Therefore, although under a broad application of the hanging paragraph the majority of circuit courts assert that Section 506 does not apply to 910-day claims, under this interpretation, a 910-day claim retains secured status in a bankruptcy proceeding through state law.\[30\]

---

\[22\] Id.
\[25\] Dewsnup, 502 U.S. at 417 (asserting that "respondents' alternative position, espoused also by the United States, although not without its difficulty, generally is the better of the several approaches.") (emphasis added).
\[26\] Id. Ultimately, this holding focused primarily on adopting the two phase analysis under Section 506(d) proposed by the creditors.
\[29\] See, e.g., In re Shaw, 341 B.R. 543, 546 (Bankr. M.D. N.C. 2006) ("creditor's secured status is dictated by state law while the treatment of secured claims is dictated by the Bankruptcy Code").
\[30\] See, e.g., In re Trejos, 352 B.R. 249, 263 (Bankr. D. Nev. 2006) (stating that creditors with liens on estate property remain secured, the hanging paragraph simply affects the amount to be paid to these creditors).
III. BEYOND THE NARROW Dewsnup HOLDING AND INTO THE DEPTHS OF THE CODE

A. Distinguishing “Allowed Secured Claims”

In Dewsnup, the Court made clear it was not taking on a full-scale adoption of the creditors’ analysis.\(^{31}\) Rather than outline these difficulties, however, the Dewsnup Court focused strictly on the need to preserve the “pass-through rule.”\(^{32}\) Therefore, the Court presented an oversimplified analysis of the significance of Section 506. However, by developing a thorough understanding of the “pass-through rule,” Section 506, and Dewsnup, it becomes abundantly clear how limited the Dewsnup holding truly is. Dewsnup in no way asserts, or even implies, that Section 506 is a non-definitional provision.\(^{33}\)

First, it is essential to understand the “pass-through rule.” The rule focuses on the lien beyond discharge, beyond the bankruptcy proceeding.\(^{34}\) Upon a bankruptcy petition’s expiration, unsatisfied obligations are discharged—the obligations cease to be binding on the debtor personally.\(^{35}\) Thus, upon discharge, a creditor loses the right to proceed against a debtor personally.\(^{36}\) However, if a trustee abandons property and the creditor bypasses the bankruptcy proceeding, the debtor retains possession of, and title to, the property.\(^{37}\) In this circumstance, the “pass-through rule” is implicated. Although the unsatisfied obligations are not binding on the debtor personally, the lien passes through the bankruptcy proceeding unaffected. The creditor retains rights against the debtor’s property, and the creditor is entitled to foreclose on the asset.\(^{38}\) As provided by Michael J. Herbert, “what survives the bankruptcy is the lien, not the secured claim.”\(^{39}\)

The next step is analyzing Section 506 in general terms. The simplest way to conceptualize Section 506 is to consider the specific elements of subsections (a) and (d) and define how each can be satisfied.

Section 506(a) is comprised of two elements. The first, “an allowed claim of a creditor secured by a lien on property in which the estate

---

31. Dewsnup, 502 U.S. at 417 (stating that the creditors’ position, “although not without its difficulties, generally is the better of the several approaches.”)
32. Id.
33. Furthermore, it is evident that the Dewsnup holding does not rely on state law to define secured status during the bankruptcy proceeding.
34. Herbert, supra note 20, at 208.
35. Id. at 207.
36. See id.
37. In re Penrod, 50 F.3d 459, 461 (7th Cir. 1995); Herbert, supra note 20, at 208.
38. Herbert, supra note 20, at 208.
39. Id. at 208.
has an interest," will be referred to as the "lien-liability element." The lien-liability element is satisfied (the claim is an allowed secured claim) if the claim is allowed under Section 502 and is secured by a lien on the debtor's property. Consequently, the lien-liability element is not satisfied (the claim is not an allowed secured claim) if the claim is either disallowed under Section 502 or the claim is not secured by a lien on the debtor's property.

The second element of Section 506(a) is encompassed within the following text:

[a]n allowed claim . . . 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 that the value of such creditor's interest . . . is less than the amount of such allowed claim.

This element, which will be referred to as the "personal-liability element," only arises if the lien-liability element is satisfied. If so, the value of the creditor's interest and the value of the property at issue must be determined. If the property at issue has retained value, the creditor's claim is allocated secured status to this extent, and the personal-liability element is satisfied (the claim is an allowed secured claim). Then, after subtracting the property value from the creditor's interest, the remaining value is allocated unsecured status; therefore, to this extent, the personal-liability element is unsatisfied (the claim is not an allowed secured claim).

41. It is important to note that the basis for breaking down Sections 506(a) and (d) into separate elements derives from the assertion in Dewsnup that the use of the phrase "allowed secured claim" is not an indivisible term of art. See Dewsnup v. Timm, 502 U.S. 415 (1992).
42. In re White, 352 B.R. 633, 643 (Bankr. E.D. La. 2006) ("Under § 502, the allowed claim is calculated by taking the sums due as of the petition date, and specifically excluding unmatured interest or unaccrued other charges due under the contract or state law. If a claim is not otherwise subject to objection, the claim is allowed").
43. 11 U.S.C. § 506(a)(1) (2007) (requiring that the claim is "secured by a lien on property in which the estate has an interest").
44. Id. § 506(a).
45. White, 352 B.R. at 643 (asserting that a claim can only be deemed secured for the purposes of bankruptcy if the claim is allowed and secured by a valid lien that is attached to property of the estate) (emphasis added).
46. It is important to note that the creditor and debtor will undertake different approaches to determine the value of creditor's interest and the property at issue. See Stacey L. Molison, A Look at Disparate Approaches to Valuation under Section 506 and its Relationship to Section 1325, 15 ABI L. REV. 659, 659-60 (2007). Ultimately, the bankruptcy court will make the final determination; however, differing jurisdictions apply differing approaches. Id.
47. 11 U.S.C. § 506(a)(1) (stating that the claim "is a secured claim to the extent of the value of [the] creditor's interest in the estate's interest in [the] property").
48. Id. (asserting that the claim "is an unsecured claim to the extent that the value of [the] creditor's interest . . . is less than the amount of [the] allowed claim").
Section 506(d) contains only one element, "a lien secur[ing] a claim against the debtor that is not an allowed secured claim." This component, which will be referred to as the "voidance element," allows a debtor to avoid a creditor's lien if the lien secures an interest but the claim is not allowed under Section 502. In other words, this element cannot be used to void a lien if the lien secures a claim which is allowed under Section 502. Therefore, the voidance element is satisfied (the claim is an allowed secured claim) if the claim is allowed under Section 502, and the claim is secured by a lien on the debtor's property. Furthermore, the voidance element is unsatisfied (the claim is not an allowed secured claim) if the claim is either disallowed under Section 502 or not secured by a lien on the debtor's property.

The next step is to apply this Section 506 breakdown to the Court's oversimplified analysis of the hanging paragraph in Dewsnup. In Dewsnup, the debtor was trying to strip down the creditor's claim. In accordance with the element terminology, the debtor asserted that the unsecured portion of the creditor's claim meant the personal-liability element was not satisfied, and therefore, the unsecured portion was not an allowed secured claim. Furthermore, the debtor asserted that the allowed secured claim referenced under the personal-liability element is analogous to the allowed secured claim under the voidance element. Thus, the debtor argued that because the unsecured portion was unsatisfied with respect to the personal-liability element, the unsecured portion was also unsatisfied with respect to the voidance element and could be stripped down and voided.

Without much analysis, the Court disagreed with the debtor's interpretation. As asserted by the debtor, analogizing the allowed secured claim of the personal-liability element with that of the voidance element would effectively strip the value of the unsatisfied (unsecured) portion of the personal-liability element from the creditor's lien. Heavily relying on its intent to preserve the state-law lien, the Court refused to analogize the personal-liability element to the void-

49. Id. § 506(d).
52. Satisfaction of this element is noticeably similar to satisfaction of the lien liability element.
53. Dewsnup, 502 U.S. at 413.
54. See id.
55. Id. at 417 (providing the debtor's assertion that "the words 'allowed secured claim' must take the same meaning in § 506(d) as in § 506(a)").
56. Id. at 414.
57. Id. at 417.
58. Id.
The Court stressed that such an analogy would infringe on the congressional intent to preserve the "pass-through rule." Accordingly, an allowed secured claim under the personal-liability element is not equivalent to an allowed secured claim under the voidance element.

By firmly establishing the need to retain the "pass-through rule," the Dewsnup Court enforced the impermissibility of analogizing the allowed secured claim under the personal-liability element with the allowed secured claim under the voidance element. As noted above, the "pass-through rule" focuses on the lien outside of bankruptcy. Consequently, Dewsnup stands for the proposition that the personal-liability element is restricted from affecting the "pass-through rule," and accordingly, the personal-liability element is restricted from limiting the lien outside of bankruptcy. Thus, the effectiveness of the personal-liability element is narrow—it is only permitted to affect the status of claims inside the bankruptcy proceeding. The effectiveness of the voidance element is broader because its purpose is to preserve the "pass-through rule," so its effectiveness is focused on retaining the status of the lien outside of the bankruptcy proceeding. Upon delineating these limitations, however, the Dewsnup Court did not compare the lien-liability and voidance elements.

By comparing the scope of the three elements under Section 506, it becomes clear that the allowed secured claim referenced under the lien-liability and the voidance elements are analogous. As Dewsnup established, the scope of the voidance element has a broader basis than the personal-liability element. Furthermore, it is clear from the text of Section 506(a) that the personal-liability element only arises if the lien-liability element is satisfied. When the lien-liability element is satisfied, however, the personal-liability element effectively divides the lien-liability element into two parts to place a limit on one portion of the lien-liability element within the bankruptcy proceeding.

60. Id.
61. Id.
62. HERBERT, supra note 20, at 208.
63. Dewsnup, 502 U.S. at 417.
64. HERBERT, supra note 20, at 208.
65. Dewsnup, 502 U.S. at 417.
66. HERBERT, supra note 20, at 207.
67. In re White, 352 B.R. 633, 643 (Bankr. E.D. La. 2006) (asserting that a claim can only be deemed secured for the purposes of bankruptcy if the claim satisfies the lien liability elements, it is allowed and secured by a valid lien that is attached to property of the estate).
68. In re Tanner, 217 F.3d 1357, 1358-59 (11th Cir. 2000) ("Section 506 allows bifurcation of claims into secured and unsecured components").
Therefore, because the personal-liability element acts as a divider within the context of a lien-liability element, the lien-liability element is broader than the personal-liability element.

By considering the two broad elements—lien-liability and voidance—it becomes apparent that the requirements to satisfy the elements are identical. Pursuant to the Dewsnup analysis, the allowed secured claim under the voidance element refers to preserving secured status outside of bankruptcy after the claim has been allowed in to the bankruptcy proceeding.\(^69\) To satisfy this element, the claim must be permissible under Section 502 and it must be secured by a lien on the debtor's property.\(^70\) To satisfy the lien-liability element, the claim must be allowed under Section 502 and it must be secured by a lien on the debtor's property.\(^71\) Thus, the voidance element and the lien-liability element have the same satisfaction requirements. The inevitable consequence of this is that if one allowed secured claim exists, the other must exist; if one does not exist, the other cannot exist. Consequently, the allowed secured claim under the voidance element is analogous to the allowed secured claim under the lien-liability element and not the personal-liability element as asserted by the debtor in Dewsnup.\(^72\)

Ultimately, the only difference between the voidance element and the lien-liability element is the purpose of each. Under Section 506(a), the personal-liability element is not implicated unless the lien-liability element is met; thus, the latter acts as a gatekeeper regulating whether a claim may enter a bankruptcy proceeding.\(^73\) Under Section 506(d), however, the purpose of the voidance element is to preserve the "pass-through rule," so this element regulates the lien post-bankruptcy.\(^74\) Together the allowed secured claims under the lien-liability element and the voidance element regulate the status of the claim at the entrance and the exit of the bankruptcy proceeding. The personal-liability element is not implicated until after the claim enters by satisfying the lien-liability element,\(^75\) and it is restricted from having an effect beyond the bankruptcy proceeding due to the voidance ele-

---

\(^69\). See supra notes 64-65 and accompanying text.
\(^70\). Dewsnup, 502 U.S. at 417.
\(^71\). White, 352 B.R. at 643 (explaining that Section 502 provides for a claims allowance, and stating that Section 506 assumes that the claim is allowed and secured by a valid lien).
\(^72\). Dewsnup, 502 U.S. at 417.
\(^73\). White, 352 B.R. at 643 ("Section 506 begins by assuming that the claim has been allowed and is secured by a valid lien. It then requires that the lien attach to property of the estate. Only in this event is the claim deemed a 'secured claim' for purposes of the Bankruptcy Code").
\(^74\). See supra note 64 and accompanying text.
\(^75\). See supra note 45 and accompanying text.
ment. Therefore, the allowed secured claim under the personal-liability element covers the ground between the lien-liability element and the voidance element. Consequently, the personal-liability element regulates the status of the claim during the bankruptcy proceeding.

Courts in the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have relied on elements of Dewsnup to assert that secured status in a bankruptcy proceeding is dictated by state law. Relying on state law to define secured status spawns from a clearly fictitious assessment in Dewsnup that undermines the value of Section 506. Two types of secured claims are permissible under Section 506: (1) the allowed secured claim relied on to construct the lien-liability element and the voidance element; and (2) the allowed secured claim relied on to construct the personal-liability element. In Dewsnup, the Court simply created a distinction within the ambiguousness of the term "allowed secured claim." In doing so, the Court merely established that: (1) the allowed secured claim under the voidance element is distinct from that under the personal-liability element; and (2) the voidance element focuses on the status of the claim outside of the bankruptcy proceeding. Based on Dewsnup, the corollary of this delineation is that the allowed secured claim under the personal-liability element must be restricted to the bankruptcy proceeding. This distinction, however, provides no basis to assert that state law defines the secured status of a claim within a bankruptcy proceeding. Rather, when considering the status of a claim inside a bankruptcy proceeding, one must directly consult the personal-liability element because—as asserted in Ron Pair—Section 506, and more specifically the personal-

76. See supra note 62 and accompanying text.
77. See In re Brooks, 344 B.R. 417, 422 (Bankr. E.D. N.C. 2006) (citations omitted) ("the determination of property rights in the assets of a bankrupt's estate is left to state law"); In re Bufford, 343 B.R. 827, 832 (Bankr. N.D. Tex 2006) ("A claim... determined to be either 'secured' or not pursuant to state law"); In re Duke, 345 B.R. 806, 809 (Bankr. W.D. Ky. 2006) ("The determination of property rights in assets of a bankrupt estate is left to state law."); In re Zehrung, 351 B.R. 675, 677 (Bankr. W.D. Wis. 2006) (citations omitted) ("The 'determination of property rights in the assets of a bankrupt's estate' is left to state law."); In re Fleming, 339 B.R. 716, 724 (Bankr. E.D. Mo. 2006) (The creditors "argue that state law defines their rights. This is true."); In re Henry, 353 B.R. 261, 263 (Bankr. D. Or. 2006) (citations omitted) ("The 'determination of property rights in assets of a bankrupt's estate' is left to state law.").
78. See 11 U.S.C § 506(a) and (d) (2007).
80. See supra notes 58-63 and accompanying text.
81. As noted above, the lien liability element regulates entrance into the bankruptcy proceeding, and the voidance element regulates beyond bankruptcy; therefore, the personal-liability element regulates during the bankruptcy proceeding.
liability element, defines the secured status of a claim within a bankruptcy proceeding, not state law.\textsuperscript{82}

B. Dewsnup Was Filed Under Chapter 7, Not Chapter 13

As noted by the bankruptcy court in \textit{In re White}, Dewsnup involved a Chapter 7 issue; however, the hanging paragraph is a Chapter 13 provision.\textsuperscript{83} Chapter 7 is the platform for liquidation. In accordance with the process of Chapter 7, "individuals relinquish all their nonexempt assets, as of the date of the bankruptcy petition, to a bankruptcy trustee."\textsuperscript{84} Chapter 13, on the other hand, relies on a "pay out" concept in which the debtor is entitled to retain its assets, but in exchange, must commit a portion of its postpetition income to the payment of prepetition debts.\textsuperscript{85} This Chapter 13 process is referred to as reorganization.

Because a Chapter 7 debtor relinquishes non-exempt property through liquidation and a Chapter 13 debtor retains property as it enters reorganization, each claim requires a different analysis. Furthermore, Chapter 7 cases are generally inapplicable to the analysis in a Chapter 13 case.\textsuperscript{86} Thus, under most circumstances, a Chapter 7 holding has no place in the examination of a Chapter 13 provision such as the hanging paragraph. There are, however, two circumstances in which a Chapter 7 debtor retains property—reaffirmation\textsuperscript{87} and redemption.\textsuperscript{88} These procedures are comparable to a Chapter 13 reorganization plan.

Reaffirmation and redemption arise almost exclusively when an asset is either exempt from liquidation under 11 U.S.C. § 522 ("Section 522") or it is abandoned by the trustee.\textsuperscript{89} Section 522 exemptions, however, have no impact on a 910-day creditor's rights. A debtor may claim a limited motor vehicle exemption, not exceeding $3,225 in an

\textsuperscript{83} See \textit{In re White}, 352 B.R. 633, 642 n. 19 (Bankr. E.D. La. 2006); see also Dewsnup, 502 U.S. at 413.
\textsuperscript{85} Id. at 258.
\textsuperscript{86} \textit{In re DeSimone}, 21 B.R. 631, 632 (Bankr. E.D. Penn. 1982).
\textsuperscript{87} \textsc{Herbert}, supra note 20, at 228-31 (explaining reaffirmation).
\textsuperscript{88} Id. at 203-05 (explaining redemption).
\textsuperscript{89} Id. ("To be eligible for redemption, the property must either be exempt under section 522 or must have been abandoned by the trustee to the lienholder"); Id. at 230 ("reaffirmation agreements are used almost exclusively as a way of allowing the debtor to keep encumbered property that would otherwise be lost to the creditors").
automobile; however, a creditor with a valid lien is entitled to enforce this lien before the debtor is entitled to invoke this exemption. Therefore, a debtor can only retain possession of a vehicle through redemption or a reaffirmation agreement if the trustee abandons the property. In Chapter 7, a trustee will abandon property if it is encumbered, meaning that the property's value is less than the debt owed on it. Consequently, a Chapter 7 holding could rationally play a role in a Chapter 13 hanging paragraph analysis when the property is encumbered and the debtor has reaffirmed or redeemed the debt. However, neither occurrence places a limitation on the definitional status of Section 506.

A reaffirmation agreement entitles a debtor to retain property in exchange for his agreement to pay off a debt over a specified period of time. Facially, this arrangement appears comparable to a Chapter 13 reorganization plan, but courts analyze Chapter 7 reaffirmation agreements in a unique way.

An effective reaffirmation agreement requires the creditor and debtor to enter a valid contract in which both parties mutually assent to its terms. A reaffirmation agreement is unlike a Chapter 13 reorganization plan because under Chapter 13, the creditor generally plays no role in forming the plan. Under reaffirmation, the parties work together to modify the terms of the agreement; under reorganization, the debtor develops the reorganization plan under bankruptcy law guidelines. The significance of this distinct reaffirmation contract requirement is critical to the development of reaffirmation analysis.

11 U.S.C. § 524 ("Section 524") regulates the validity of a reaffirmation agreement. However, once Section 524 is satisfied, the agreement is considered a contract. At this point, the valid reaffirmation agreement is pulled outside of bankruptcy analysis and state law gov-

90. See 11 U.S.C. § 522(d)(2) (2007) (a vehicle owner is only entitled to exempt a value not exceeding $3,225 in one motor vehicle).
92. NIMMER, supra note 84, at 255.
93. In re Buck, 331 B.R. 322, 324 (Bankr. N.D. Ohio 2005) ("a reaffirmation may be paid over time, as opposed to a one lump-sum payment which is required when redeeming property").
94. In re Turner, 156 F.3d 713, 718 (7th Cir. 1998).
95. HERBERT, supra note 20, at 358.
97. HERBERT, supra note 20, at 358 ("the contents of the plan are almost entirely set by the statutory requirements for confirmation").
erns. The court’s role is no longer to define a bankruptcy claim, but rather to interpret a contract. In this situation, neither Section 506 nor any other bankruptcy provision is relevant because the bankruptcy court’s role in defining a bankruptcy claim is unnecessary. Therefore, it is impermissible to rely on a Chapter 7 reaffirmation analysis to assert Section 506 does not define the secured status of a bankruptcy claim because a valid reaffirmation agreement does not involve a “bankruptcy claim”—it involves a contract governed by state law.

A Chapter 7 debtor may also retain possession of property through redemption. According to Michael Herbert, “redemption simply means that the debtor may buy out the lien and thus become the owner of the property.” A debtor considering redemption may initiate the process by filing a notice of intent to redeem with the court. In some instances, the debtor and creditor will agree on the price to buy out the lien. If a disagreement arises, bankruptcy courts will step in to settle the differences. In doing so, the court will require the debtor to pay the amount of the “allowed secured claim.” As noted above, the phrase “allowed secured claim” can refer to: (1) the lien at the entrance or exit of the bankruptcy proceeding, as it does in the context of the lien-liability and voidance elements; or (2) the secured status of a claim within the bankruptcy proceeding as it does in the context of the personal-liability element. Accordingly, with respect to Section 506, the redemption process requires determining which allowed secured claim is referenced in 11 U.S.C. § 722 (“Section 722”).

The allowed secured claim referenced in Section 722 is equal to the fair market value of the collateral at issue. The only value referred to by the allowed secured claim created under the lien-liability ele-

---

100. In re Gitlitz, 127 B.R. 397, 400 (Bankr. S.D. Oh. 1991) (asserting that matters beyond the reaffirmation agreement are “clearly within the province of the state court”).
101. Id. at 400 (asserting that bankruptcy court involvement ceases beyond Section 525(c) and (d)).
102. Id. at 400 (“It was contemplated that disputes between parties to reaffirmation agreements would take place in non-bankruptcy courts using non-bankruptcy law.”).
103. Herbert, supra note 20, at 203.
104. Id. at 205.
105. Id.
106. Id.
108. See supra notes 72-74.
109. See supra note 74.
110. In re Bell, 700 F.2d 1053, 1055 n.3 (6th Cir. 1983).
ment and the voidance element is that of the original lien.\textsuperscript{111} Therefore, the allowed secured claim of the lien-liability element and the voidance element can be equated to the fair market value of the collateral when the value of the collateral and the value of the original lien are equal. However, this will only occur in rare occasions given that the fair market value of the collateral fluctuates, while the lien is stagnant. Because this allowed secured claim does not fluctuate with the fair market value of the collateral, these values cannot be generally classified as equal. Thus, the allowed secured claim referenced in Section 722 does not refer to the allowed secured claim encompassed by the lien-liability element and the voidance element.

Since the allowed secured claim referenced by these elements is clearly not the Section 722 allowed secured claim, one can rationally expect that Section 722 concerns the allowed secured claim embraced by the personal-liability element. Analyzing the personal-liability element, confirms this expectation. Section 506(a) encompasses the personal-liability element under the phrase, "[a]n allowed claim... 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 that the value of such creditor's interest... is less than the amount of such allowed claim."\textsuperscript{112} This text has been interpreted to allow the debtor to bifurcate the creditor's claim into a secured portion, based on the value of the collateral, and an unsecured portion, based on the value of the creditor's claim exceeding the value of the property.\textsuperscript{113} Accordingly, if the property at issue retains value, this value represents an allowed secured claim under the personal-liability element.\textsuperscript{114}

Like the collateral under Section 722, the allowed secured claim under the personal-liability element is based on the fluctuating value of the property. This value is calculated based on the fair-market value of the property.\textsuperscript{115} Therefore, the allowed secured claim under Section 722—which is equivalent to the fair market value of the property—refers to the allowed secured claim under the personal-liability element. Consequently, the allowed secured claim relied on in Section 722 during redemption is not defined by state law, but rather, it is defined by Section 506(a).

\textsuperscript{111} 11 U.S.C. § 506(a) (creating the lien liability element referencing the value of "a lien on property in which the estate has an interest"); id. § 506(d) (creating the voidance element referencing the value "to the extent that a lien secures a claim against the debtor").

\textsuperscript{112} Id. § 506(a).

\textsuperscript{113} See, e.g., In re Beard, 45 F.3d 113, 120 (6th Cir. 1995).

\textsuperscript{114} See supra note 46 and accompanying text.

A Chapter 7 analysis generally will not have any effect on a Chapter 13 claim because Chapter 7 involves liquidation, whereas Chapter 13 involves reorganization. In contrast to this generality is the argument that a Chapter 7 analysis may provide guidance when a Chapter 7 debtor retains property through reaffirmation or redemption. However, the analysis that coincides with a reaffirmation agreement cannot be applied to a Chapter 13 claim because a valid reaffirmation agreement is a contract, which means it is removed from the parameters of bankruptcy law. Furthermore, with respect to redemption agreements, the secured status of a creditor's claim is clearly governed by the personal-liability element of Section 506(a). Thus if the analysis in a Chapter 13 case relies on a Chapter 7 redemption case, such a case can only further support the position that Section 506 is a definitional provision.

C. Tying the Flaws Together

In the majority of jurisdictions, courts have found the hanging paragraph applies broadly, so these courts assert that Section 506 is entirely restricted from applying to a 910-day claim. However, under this broad application, courts continue to find that 910-day claims retain secured status because, under their flawed construction of Dewsnup, state law defines secured status in bankruptcy claims. The Dewsnup holding provides no basis for this assertion. Dewsnup establishes that the phrase "allowed secured claim" refers to a different value under the personal-liability element and the voidance element and ensures that the "pass-through rule" continues to preserve liens beyond bankruptcy. Accordingly, it is clear that courts must continue looking to Ron Pair for an understanding of the applicability of Section 506; therefore, the secured status of a bankruptcy claim is defined by Section 506.

Additionally, Dewsnup involved a Chapter 7 claim, not a Chapter 13 claim. Chapter 7 cases are generally inapplicable to Chapter 13 claims. With respect to the hanging paragraph, however, the analysis of a Chapter 7 redemption claim is comparable to the analysis of a Chapter 13 claim. Nonetheless, even if a Chapter 7 redemption claim is relied on as precedent for a Chapter 13 claim, the personal-liability element of Section 506(a) governs the secured status of the creditor's claim.

116. See supra note 5 and accompanying text.
117. See supra note 76 and accompanying text.
If the jurisdictions that rely on the broad application of the hanging paragraph would reconsider the true limitations of the Dewsnup holding, they would find that state law does not define the secured status of a bankruptcy claim. Furthermore, in relying on Section 506 as a definitional provision, these jurisdictions would find that under the broad application of the hanging paragraph, Section 506 does not apply to a 910-day claim, and therefore, 910-day claims cannot retain secured status.

IV. **In re White Revamps Section 506 but Fails to Fully Utilize the Hanging Paragraph**

A. **In re White Applies a Narrow Interpretation of the Hanging Paragraph**

In *In re White*, a car dealership financed the debtor's automobile purchase with an $11,126.50 loan at 22.85% interest over sixty months. The dealership then assigned its interest in, and all collateral securing, the loan to the creditor. Subsequently, the debtor filed for bankruptcy under Chapter 13. The debtor's confirmation plan bifurcated the claim under Section 506, proposing to pay the secured portion at the value of the vehicle, with eight percent interest over the life of the plan. The creditor objected to this proposal and asserted that bifurcation was no longer permissible. The creditor relied on the common understanding of the hanging paragraph, which provides secured status based on state law. The creditor asserted that it retained a secured claim based on the state law lien and that it was entitled to the full 22.85% interest rate or, in the alternative, an interest rate based on the *Till v. SCS Credit Corp.* plurality's "formula approach.

The court disagreed with the creditor and the debtor. The court found the hanging paragraph had no bearing on the secured status of

---

121. Id.
122. Id.
123. Id.
124. Id. at 638.
126. Id. at 638; *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (explaining that the formula approach defines the interest rate based on "the national prime rate, reported in the daily press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default.

a 910-day claim. Therefore, the creditors did not have secured status. However, the court also found that the creditor's assertion that this secured status derived from state law was inaccurate because secured status was defined by Section 506.

The court's analysis relied heavily on the specific language of the hanging paragraph, which states in relevant part, "for purposes of paragraph (5), 11 U.S.C. § 506 shall not apply to a claim." Based on this, the White court asserted that:

[T]he exclusion of § 506 is simply, and only, for purpose of determining if the plan, as proposed, satisfies the requirements of § 1325(a)(5). . . . § 506 is therefore otherwise applicable to these claims for all other purposes which would include the right to seek adequate protection pending confirmation and relief from the stay.

The court then applied this analysis, displaying what—compared to the majority view—can be interpreted as a highly limited hanging paragraph application.

The White court started its analysis with the assertion that Section 506 defines secured status, but also provides and imposes rights and limitations on secured claims. Specifically, Section 506(a) limits the value of the allowed secured claim to the value of the collateral, while Section 506(b) empowers the creditor to claim post petition interest. The court then asserted that Section 1325(a)(5) sets out the required treatment of a secured claim with respect to confirmation. In the absence of the hanging paragraph, under Section 1325(a)(5), a creditor with a purchase-money security interest is entitled to the value of the collateral and post-petition interest. However, under this limited interpretation, when the hanging paragraph applies, the rights and limitations of Section 506 do not apply to the Section 1325(a)(5) claim. Consequently, a 910-day creditor's claim is relieved from the Section 506 limitation, which restricts the amount of the claim to the value of the collateral; this claim is also prohibited.

128. Id. at 644 ("The exclusion of § 506's application is for purposes of § 1325(a)(5). Section 506 is therefore otherwise applicable to these claims for all other purposes").
129. White, 352 B.R. at 644.
130. Id. at 642 ("the notion that § 506 is not definitional is clearly at odds with Ron Pair").
133. See supra Part II for an analysis of the majority's broad application.
134. White, 352 B.R. at 645 (noting that § 506 grants rights and imposes limitations on secured claims vis a vis the confirmation process in chapter 13.").
135. Id. at 644.
136. Id. at 644-45.
137. Id. at 645.
138. Id.
from receiving post petition interest.\textsuperscript{139} Determining the actual value of the claim under this narrow interpretation, however, requires further analysis.

Under Section 502, the creditor is entitled to the amount due as of the filing date.\textsuperscript{140} Without Section 506, the debtor loses the bifurcation privilege of Section 506(a).\textsuperscript{141} Therefore, by negating the effect of Section 506(a), the White court made the creditor entitled to "the entire pre-petition, accrued and unpaid balance without reference to the value of the collateral."\textsuperscript{142} The next step is the calculation of interest.

According to White, in the absence of the hanging paragraph, Section 506(b) creates a basis for a creditor's entitlement to post petition interest based on the contract rate.\textsuperscript{143} However, Section 506(b) is the only basis for this post petition protection.\textsuperscript{144} Therefore, under the White analysis, as Section 506 rights are restricted, a creditor with a 910-day claim is not entitled to post petition interest.\textsuperscript{145} In the absence of post petition interest, the court created a valuation formula for the 910-day claim equal to the entire unpaid balance without entitlement to the contract-based interest.\textsuperscript{146} Relying on Till, however, the court noted this value was not representative of the amount due as of the filing date, as required by Section 502.\textsuperscript{147}

The Till Court established that because a reorganization plan permits payment through installments, the value of the creditor's claim is undermined as "the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment."\textsuperscript{148} To ensure the creditor received the allowed amount at the time of filing, the Till Court granted interest based on the formula approach.\textsuperscript{149} Therefore, under Till, the creditor in White was entitled to the value of the collateral plus interest based on the formula approach.\textsuperscript{150}

In White, the court emphasized that under Till, "an 'allowed secured claim' under § 1325(a)(5) was synonymous with the value of the coll-

\textsuperscript{139} White, 352 B.R. at 645.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 649.
\textsuperscript{143} Id. at 645.
\textsuperscript{144} White, 352 B.R. at 645. (noting that post petition interest is not included unless provided by a provision other than Section 506. However, "[n]o such provision exists.").
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 650.
\textsuperscript{148} Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004).
\textsuperscript{149} Id. at 480-81. See supra note 128 for an explanation of the formula approach.
\textsuperscript{150} White, 352 B.R. at 650.
lateral under § 506(c).”151 The White court further asserted that after the enactment of the hanging paragraph,152 Section 1325(a)(5)(B)(ii) continues to protect the creditor’s claim, but it now protects the value of the entire claim, not just the value of the collateral.153 Based on this interpretation, the White court provided the creditor with the same protection as that created by the Till analysis, which is interest based on the formula approach.154 However, under White, the formula approach is applied to the value of the entire claim, rather than just the value of the collateral. Therefore, the White court’s analysis of the hanging paragraph ultimately provides that a 910-day creditor is entitled to the pre-petition balance plus interest calculated from the day of filing under the formula.

B. White’s Major Flaw: The Privilege of Section 1325(a)(5)

According to White, Section 506 generally defines secured status.155 Furthermore, under the limited White interpretation of the hanging paragraph, the specific rights and limitations of Section 506 do not apply to the claim with respect to satisfaction of Section 1325(a)(5).156 Therefore, in White, a 910-day creditor takes on secured status through Section 506, and although certain rights are lost within Section 1325(a)(5), the secured status of the claim is relied on to pull the claim under Section 1325(a)(5). However, the White court fails to provide any justification for granting the privilege of Section 1325(a)(5) to a 910-day creditor.

In pertinent part, Section 1325(a)(5) states, “except as provided in subsection (b), the court shall confirm a plan if . . . with respect to each allowed secured claim provided for by the plan . . . ”157 Therefore, Section 1325(a)(5) is not universally applicable, but rather, the initial step in applying this provision requires reliance on Section 506 to determine whether a claim is an “allowed secured claim.” When a court begins to analyze Section 1325(a)(5), the court must first confront Section 506. However, under any interpretation of the hanging paragraph, narrow or broad, Section 506 is inapplicable to Section 1325(a)(5) with respect to a 910-day claim. Therefore, when the court begins to analyze Section 1325(a)(5), it should immediately find that

151. Id. at 648.
152. It is important to draw attention to the fact that the Till decision took place in 2004, prior to the 2005 enactment of the hanging paragraph.
154. Id. at 650.
155. Id. at 645.
156. Id. at 644.
the foundation for applying Section 1325(a)(5) to a 910-day claim, the reliance on Section 506, is prohibited by the hanging paragraph. This Section 506 foundation was necessary for the White court’s analysis, yet, under a proper reading of the hanging paragraph, this foundation was absent.

C. White’s Piecemeal Application of Section 506

After granting the privilege of Section 1325(a)(5) to the 910-day creditor, the White court applied Section 506 within Section 1325(a)(5), arguably choosing provisions that are beneficial to the creditor. As noted above, the court began by refusing to apply Section 506(a). By refusing to apply this section, a 910-day creditor is entitled to the full pre-petition balance of the claim, rather than the mere bifurcated value of the collateral allocated to all other creditors under Section 506(a). Then the court looked to Till as it moved into interest entitlement.

The court asserted that in Till, the allowed secured claim under Section 1325(a)(5) was equal to the value of the collateral. The court also asserted that in applying Section 1325(a)(5)(B)(ii), the Till Court relied on the principles of Section 506(c) to provide the creditor with interest at the formula rate, ultimately preserving the value of the collateral during the debtor’s repayment. From there, the White court moved into its own hanging paragraph analysis. According to White, under the hanging paragraph, the 910-day creditor’s allowed claim is equal to the pre-petition balance, not the value of the collateral. Thus, the court granted the 910-day creditor interest calculated at the formula rate based on the pre-petition balance rather than the value of the collateral. The court stated that the basis for this interest is the protection afforded under Section 1325(a)(5). However, Section 1325(a)(5) does not directly provide this protection. Rather, just as White provided in its interpretation of Till, the protection of formula

158. White, 352 B.R. at 645.
159. Id.
160. Id. at 649.
161. Id. (providing that “Section 1325(a)(5)(B)(ii) has been interpreted to require that the stream of payments provided by the plan equal the present value of the claim. Since an ‘allowed secured claim’ under Section 1325(a)(5) was synonymous with the value of the collateral under Section 506(c), the courts reasoned that interest was required to protect the creditor against the risk of loss in collateral value during the pendency of the case.”).
162. Id.
163. White, 352 B.R. at 650.
164. Id.
rate interest derives from Section 506(c) after Section 1325(a)(5) sets off that provision.\textsuperscript{165}

It is clear the White court did not fully commit to barring the applicability of Section 506 under Section 1325(a)(5). The court begins by allowing 910-day creditors their full pre-petition balance by barring the application of Section 506(a); however, the court permits reliance on Section 506(c) under Section 1325(a)(5) in order to provide a 910-day creditor with interest calculated at the formula rate. By failing to fully bar the applicability of Section 506 under Section 1325(a)(5), the White court's analysis negated the potential behind the court's assertion that Section 506 defines secured status.

D. The Effect of Eliminating White's Major Flaw

Section 1325 regulates the confirmation of a Chapter 13 reorganization plan. Along with providing all creditors the ability to object to the confirmation of a plan on the basis that the plan has not been proposed in good faith,\textsuperscript{166} Section 1325 also provides explicit and unique provisions for judicial consideration of secured and unsecured claims.\textsuperscript{167}

Unsecured claims are regulated by Section 1325(a)(4) and (b)(1). Pursuant to these provisions, an unsecured creditor is entitled to object to confirmation based on two tests. The first test is referred to as the "Best Interest of Creditors' Test,"\textsuperscript{168} and is encompassed by Section 1325(a)(4).\textsuperscript{169} This provision establishes the basis for an unsecured creditor's objection if the value to be distributed on each unsecured claim is less than the amount that would have been paid on the claim had the estate been liquidated under Chapter 7.\textsuperscript{170}

The second test providing a basis for an unsecured creditor's objection is referred to as the "Disposable Income Test,"\textsuperscript{171} and is encompassed by Section 1325(b)(1).\textsuperscript{172} This provision creates the basis for an unsecured creditor's objection if the plan fails to either: (1) propose to

\textsuperscript{165} Id. at 649.
\textsuperscript{166} 11 U.S.C. § 1325(a)(3) (2007) ("the court shall confirm a plan if . . . the plan has been proposed in good faith").
\textsuperscript{167} See id. § 1325(a)(5) (defining confirmation requirements for "each allowed secured claim"); id. § 1325(a)(4) (explaining the valuation requirements for "each allowed unsecured claim"); id. § 1325(b)(1) (providing the plan requirements for "an allowed unsecured claim").
\textsuperscript{168} Herbert, supra note 20, at 362-63.
\textsuperscript{170} Herbert, supra note 20, at 363 (explaining the application of the "Best Interest of Creditors' Test").
\textsuperscript{171} Herbert, supra note 20, at 363.
\textsuperscript{172} 11 U.S.C. § 1325(b)(1).
pay the objecting unsecured creditor's claim in full; or (2) assert that "all of the debtor's projected disposable income for the three years beginning with the first payment due under the plan will be applied to make payments under the plan."\[173\]

A secured creditor's objection is limited to Section 1325(a)(5). Under Section 1325(a)(5), as long as the creditor has not accepted the plan\[174\] or surrendered the property securing the claim to the debtor,\[175\] the creditor can object based on insufficiency. The five requisite elements of a sufficient plan are: (1) the plan permits the secured creditor to retain the lien until the earlier of payment of the underlying debt under nonbankruptcy law or discharge under 11 U.S.C. § 1328;\[176\] (2) the plan provides that if the Chapter 13 claim is dismissed or converted without completion of the plan, the lien will be retained by the secured creditor;\[177\] (3) the value of the property to be distributed under the plan is not less than the allowed amount of the claim;\[178\] (4) the plan provides for payments in equal monthly amounts if it involves periodic payments;\[179\] and (5) if the claim is secured by personal property, the plan ensures payments sufficient to provide the secured creditor adequate protection during the period of the plan.\[180\]

The confirmation plan is based on priority status; secured claims are given favored treatment.\[181\] Since Section 506 defines secured status,\[182\] the debtor must consider the section when creating a reorganization plan. After composing the plan, "[t]he court is required to hold a hearing on confirmation. . . . Any party in interest may object to the confirmation."\[183\]

During the confirmation hearing, Section 1325 acts as the basis for confirmation, and Sections 1325(a) and (b) regulate the influential value of a creditor's objection. For instance, if a secured creditor objects to the reorganization plan, but the five Section 1325(a)(5) necessary elements of the plan are satisfied,\[184\] the court has full authority to confirm the plan over this creditor's objection. However, if the elements are not satisfied, the creditor's objection is highly influential.

\[173\] HERBERT, supra note 20, at 363.
\[175\] Id. § 1325(a)(5)(C).
\[177\] Id. § 1325(a)(5)(B)(i)(II) (2007).
\[180\] Id. § 1325(a)(5)(B)(iii)(II).
\[181\] HERBERT, supra note 20, at 358, 368.
\[183\] HERBERT, supra note 20, at 372.
\[184\] See supra notes 178-82 and accompanying text.
because the court can only confirm the plan over the creditor's objection "if the plan payments are sufficient to preserve the present value of the creditor's secured claim."\(^{185}\) From an unsecured creditor's standpoint, upon objection, the court has full authority to confirm the plan if both the Best Interest of Creditors' Test and the Disposable Income Test are met.\(^{186}\) If the debtor fails to satisfy either test, the unsecured creditor has an influential objection as the court is restricted from confirming the plan over this objection.\(^{187}\) Additionally, both secured and unsecured creditors facing a confirmation plan constructed in bad faith have an influential objection; under Section 1325(a)(3), the court may not confirm a plan unless it is proposed in good faith.\(^{188}\)

By overcoming White's flaw, it becomes apparent that a 910-day claim is secured. However, with respect to Section 1325(a)(5), Section 506 does not apply and the 910-day creditor loses its secured status. Section 1325(a)(5) provides a foundation strictly for secured creditor objections.\(^{189}\) As a 910-day creditor, although secured, does not retain secured status under Section 1325(a)(5), this creditor is afforded no influential value by presenting an objection under Section 1325(a)(5). In the event that the debtor's confirmation plan fails to satisfy any or all of the five necessary elements of Section 1325(a)(5),\(^{190}\) the 910-day creditor's objection carries no weight. Consequently, with respect to a 910-day claim, because of the hanging paragraph, Section 1325(a)(5) creates no obligation for the debtor when creating the reorganization plan.

It would seem that at this point, a 910-day creditor retains the minimal protections afforded to an unsecured creditor through Sections 1325(a)(4) and (b). But, under the narrow interpretation of the hanging paragraph, Section 506 is only prohibited with respect to Section 1325(a)(5).\(^{191}\) Thus, with respect to any other provision under Section 1325, a 910-day claim retains secured status. By making an objection under Section 1325(a)(4) or Section 1325(b), a 910-day creditor's objection receives no influential value because these provisions provide

\(^{187}\) HERBERT, supra note 20, at 363.
\(^{189}\) Id. § 1325(a)(5) (2007) (this provision explicitly regulates "each allowed secured claim").
\(^{190}\) See supra notes 178-82 and accompanying text.
\(^{191}\) In re White, 352 B.R. 633, 644 (Bankr. E.D. La. 2006) ("the exclusion of § 506 is simply, and only, for purpose of determining if the plan, as proposed, satisfies the requirements of § 1325(a)(5) as to the claim.").
a foundation for unsecured creditors. Accordingly, when creating the reorganization plan, Section 1325(a)(4) and (b) create no obligation for the debtor.

Under a sound analysis of the hanging paragraph, the 910-day creditor is not granted protection via the objections explicitly afforded to both secured and unsecured creditors under Section 1325(a). Therefore, the 910-day creditor's ability to make an influential objection should be limited to the use of Section 1325(a)(3), the good faith requirement.

V. Conclusion

By revisiting Dewsnup, it becomes apparent that Section 506, and not state law, defines the secured status of a bankruptcy claim. With this understanding, the foundation for the majority's broad application of the hanging paragraph deteriorates; accordingly, the narrow application under White rightfully obtains a position of precedence. However, even the White approach provides the creditor with the flawed privilege of Section 1325(a)(5), which in turn fails to give true effect to the potential limiting power contained within the hanging paragraph. Ultimately, under a proper reading of the hanging paragraph, the 910-day creditor's claim should be heavily restricted—good faith is the only objection available to creditors under a Chapter 13 confirmation plan.

Such a literal approach to the hanging paragraph stands in clear opposition to the bankruptcy policy of equality, as it would unreasonably restrain the rights of a 910-day creditor. However, with respect to automobile lenders, statutory analysis has already strayed far from equality. As noted by William Whitford, "[a]uto lenders comprise the group of secured creditors whose rights have been most substantially affected, mostly favorably, by the new law."192 Therefore, the foregoing analysis characterizes the overall notion that although bankruptcy law has strayed far from equality, (and more specifically, the hanging paragraph has been construed in a way to favor automobile lenders) under an in-depth, literal analysis, the hanging paragraph has the potential to heavily restrain the rights of automobile lenders. With equality, an established interest, as a backdrop, the legislature should strongly reconsider the need for, and the propriety of, the hanging paragraph.