HOLDING ON TO CREDITORS' RIGHTS UNDER THE HANGING PARAGRAPH OF BAPCPA: ANALYSIS OF *IN RE WRIGHT*, 492 F.3D 829 (2007)

Kyle Christopher Oehmke*

I. INTRODUCTION

On April 20, 2005, President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)[1] into law and effectively brought about "the most sweeping changes" to the arena of bankruptcy law in nearly thirty years.[2] Unfortunately, the confusing language of the Act has led to a great deal of judicial migraine and subsequent criticism of its many amendments.[3] In fact, one court has held that "deciphering [the Act's] puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect."[4] Perhaps no piece of legislation defines this alleged enigma more than the "hanging paragraph" that was added to § 1325(a)(5) of the Bankruptcy Code.[5] Indeed, with the paragraph's unnumbered status and lack of relation to the provisions immediately surrounding it, the statute contains a certain mystery.[6]

With the distinct aura of the hanging paragraph, it is only appropriate that the statute is the cause of a wide divide among the nation's bankruptcy and district courts.[7] In short, the paragraph addresses the treatment of a motor vehicle purchased within 910 days, or roughly two and a half years, of the

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1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).
2. MARTIN A. FREY, ET. AL., INTRODUCTION TO BANKRUPTCY LAW 6 (West Legal Studies 5th ed. 2007) (1990) [hereinafter Frey].
3. *See*, *e.g.*, *In re* Donald, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006).
4. *Id*.
5. 11 U.S.C. § 1325(a)(5) (2006).
6. Oddly enough, the hanging paragraph can be found under § 1325(a)(9), which requires a debtor to file his federal, state, and local taxes before achieving confirmation of his bankruptcy plan. However, the paragraph clearly deals with § 1325(a)(5), discussed in Section II of this Casenote. As such, relevant cases and this Casenote refer to the statute as falling under § 1325(a)(5). *Id*.
7. *See In re* Wright, 492 F.3d 829, 830–31 (7th Cir. 2007).

filing of a Chapter 13 bankruptcy.[8] While the paragraph is ripe with issues, this Casenote focuses on what happens when a debtor surrenders a "910 vehicle"[9] to the creditor, and the outstanding balance of the vehicle (at the time of debtor's Chapter 13 filing) is greater than its resale value.[10] While a clear majority of courts have found that the statute's language does not allow for a deficiency claim by the creditor, a minority have upheld such a claim for the remaining balance.[11]

In an effort to address the issue surrounding surrender and possibly provide much needed remedy to the federal divide, Chief Judge Easterbrook and the Seventh Circuit provided the first relevant United States Court of Appeals decision in *In re Wright*.[12] The court ultimately sided with the minority of bankruptcy and federal district courts in holding that "by surrendering the car, debtors gave their creditor the full market value of the collateral. Any shortfall [difference between remaining balance on the vehicle and said fair market value] must be treated as an unsecured debt."[13] The court based its reasoning largely on the United States Supreme Court decision of *Butner v. United States*,[14] a windfall rationale,[15] and the minimal legislative history of the hanging paragraph.[16]

Before diving into *Wright*, it is first necessary to examine the existing law and legal background that led up to the case. Accordingly, Section II of this Casenote addresses bankruptcy law in general (both before and after BAPCPA), the hanging paragraph and its legal underpinnings, and the majority and minority cases that defined the holding in *Wright*. Section III offers a detailed exposition of *Wright*. Following such exposition, Section IV offers an analysis of the case. The underlying theme of this analysis is that, while the *Wright* court made the right decision, it employed largely unpersuasive reasoning. The analysis then details why the minority

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8. 11 U.S.C. § 1325(a)(5). Section II of this Casenote contains the full text of the hanging paragraph as well as a discussion of its relevant components.
9. Robin Miller, Annotation, *Effect of "Hanging" or "Anti-Cramdown" Paragraph Added to 11 U.S.C.A. § 1325(a) by Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)*, 19 A.L.R. FED. 2D 157, § 2 (2007) [hereinafter Miller]. "Most of the cases applying the hanging paragraph have involved a claim by a motor vehicle purchased within 910 days of the bankruptcy filing. Courts have referred to such a claim as a '910 claim,' a '910-day vehicle claim,' and a '910-day car claim.' The vehicle has been called a '910 vehicle,' a '910-day car,' and a '910-day vehicle.' The creditor has been designated as a '910 creditor' who extended a '910 car loan.'"
10. *In re* Kenney, No. 06–71975–A, 2007 WL 1412921, at *5 (Bankr. E.D. Va. May 10, 2007).
11. *Id*. at *4–5.
12. *Wright*, 492 F.3d at 831.
13. *Id*. at 833.
14. 440 U.S. 48 (1979).
15. To understand why the "windfall rationale" is so named, *see infra* text accompanying note 102.
16. *Wright*, 492 F.3d at 832.

perspective is nevertheless the correct vantage point. Finally, the analysis will briefly explore the importance of *Wright*, as well as the hanging paragraph's place within modern bankruptcy law. Section V finishes with a conclusion that will serve as summary of this Casenote's thesis.

II. EXISTING LAW AND LEGAL BACKGROUND

In order to gain a full understanding of the decision reached by the *Wright* court, it is necessary to review the relevant statutes and case law. Part A of this section takes a general look at the history and practice of American bankruptcy law before and after BAPCPA. Part B delves into the hanging paragraph, the law underscoring that statute, and pre-BAPCPA judicial practices which led to its enactment. Finally, Part C examines the majority and minority views regarding the paragraph as a means of uncovering the cause of current divide among the courts and as an appropriate segue to exposition of *Wright*.

A. American Bankruptcy Law Before and After the 2005 Act

The Bankruptcy Act of 1898 served as the basis of early twentieth century American bankruptcy law.[17] As the years passed, its lack of true codification, outdated language, and poor organization demanded total overhaul of one of the more nuanced and complicated areas of law.[18] Congress and President Jimmy Carter answered the call by ensuring passage of the Bankruptcy Reform Act of 1978, also known as the Bankruptcy Code (Code).[19] Congress recognized that different types of debtors existed, as well as the need for proper codification; accordingly, Chapters 7, 9, 11, and 13 of the Code were organized so that each covered a different category of bankruptcy.[20]

A number of amendments serve as evidence to the belief that the Code required tweaking over the years.[21] Critics primarily attacked the Code's "debtor friendly" provisions and, at least from 1978 to 1984, its perceived

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17. FREY, *supra* note 2, at 4.
18. *Id*.
19. *Id*. at 4–5.
20. *Id*. For example, Chapter 7 deals with liquidation. In a Chapter 7 proceeding, the debtor's estate is converted into money and disseminated among his creditors. Individuals, partnerships, and corporations may rely on this chapter of the Code.
21. *Id*. at 6. Some examples include the Bankruptcy Amendments and Federal Judgeship Act of 1984, the 1991 Revision of the Bankruptcy Rules and Official Forms, and the Bankruptcy Reform Act of 1994.

philosophy of "bankruptcy on demand."[22] These criticisms ultimately led to the recent enactment of BAPCPA, which carried the following twin aims upon its 2005 passage: "(1) to curtail perceived abuse of the bankruptcy process by individual debtors; and (2) to enhance the consumer protection provisions of the Bankruptcy Code."[23] Several means attempted to bring about such ends. For instance, if one wishes to file for Chapter 7 liquidation, they must now pass a "means test" or be presumed to be in abuse of that chapter's provisions.[24] Requirements concerning debtor education have also now been laid down for every individual bankruptcy petition filed after October 17, 2006.[25]

While BAPCPA exemplified the desire for change of the Code, the transition has not been a very smooth one. The Act itself has been the subject of a great deal of criticism, particularly its language.[26] Perhaps one bankruptcy judge summed it up best in writing that "the amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood."[27] In the midst of this statutory mess, the hanging paragraph lays waiting.

B. The Hanging Paragraph and the Law that Lies Beneath

The hanging paragraph applies only to Chapter 13 of the Code, which addresses the "adjustment of debts of an individual with regular income."[28] Chapter 13 is not available to all debtors. Since this type of bankruptcy requires regular payments from the debtor, one may file under Chapter 13 only

22. *Id*.
23. *Id*.
24. 11 U.S.C. § 707(b)(2) (2006). A great deal of legal literature discusses the "means test" and its ramifications. *See, e.g.*, Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test,* 31 S. ILL. U. L.J. 463, 463–64 (2007). This anti-debtor presumption stands in stark contrast to the law before 2005, which allowed for "generous, immediate, and largely available Chapter 7 discharge." If the debtor cannot rebut this presumption, his case must either be dismissed or voluntarily converted to a Chapter 13 filing. *Id*.
25. *See* Nathalie Martin & Ocean Tama y Sweet, *Mind Games: Rethinking BAPCPA's Debtor Education Provisions*, 31 S. ILL. U. L.J. 517, 518 (2007). Specifically, the new law mandates the following two requirements: a "credit briefing" prior to any bankruptcy filing and, if one is filing under either Chapter 7 or 13, enrollment in a "post-filing management course." *Id*. at 518–19.
26. *See, e.g.*, *In re* Donald, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006).
27. *Id*.
28. 11 U.S.C. § 1301 (2006).

if he or she has regular income.[29] Further, the petitioner's unsecured debt may not exceed $336,900, and his secured debt must be less than $1,010,650.[30] As one would expect, Chapter 13 bankruptcy carries both significant advantages and disadvantages to its filers.[31]

To make sense of any legal problem, it is important to focus on the source of confusion. Added by BAPCPA in 2005 and currently nestled under § 1325(a)(5) of the Bankruptcy Code, the hanging paragraph provides, in relevant part, as follows:

> For purposes of paragraph (5), section 506 [of the Bankruptcy Code] 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 [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle . . . acquired for the personal use of the debtor.[32]

By its very words, the paragraph presupposes knowledge of corresponding law. As a result, before making heads or tails of the hanging paragraph, it is imperative to explore the other statutes called into question and the practice of courts prior to the paragraph's enactment.

1. Creation of Claims

The allowance of filed claims in a bankruptcy case is governed by § 502.[33] Claims filed by creditors are allowed unless there is an objection by a party in interest or an enumerated exception exists.[34] If a creditor successfully evades these two methods of disallowance, the only remaining hurdle lies in the application of the state's non-bankruptcy law.[35]

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29. 11 U.S.C. § 101(30) (2006). This section of the Code defines an "individual with regular income" as one "whose income is sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13 of this title, other than a stockbroker or commodity broker."
30. 11 U.S.C.A. § 109(e) (West 2007). The differences between secured and unsecured debt are discussed in Section II.
31. FREY, *supra* note 2, at 349. Some advantages include retention of nonexempt assets that would be surrendered in a Chapter 7, discharge of certain debts that could be potentially nondischargeable in filing under another chapter, and less stigma than a Chapter 7 filing. Disadvantages include a tight family budget for the typical three to five year existence of the Chapter 13, higher attorney's fees, and a fee to the Chapter 13 trustee.
32. 11 U.S.C. § 1325(a)(5) (2006).
33. 11 U.S.C. § 502 (2006); *In re* Particka, 355 B.R. 616, 620 (Bankr. E.D. Mich. 2006).
34. *Particka*, 355 B.R. at 620.
35. *Id*.

While § 502 discusses claim allowance, § 506 of the Code takes the process one step further by determining when an allowed claim may be treated as secured. The statute states:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.[36]

Basically, § 506 permits bifurcation of a creditor's claim into secured portions, which are comprised of the value of the property, and unsecured portions, which are represented by the difference between the collateral's replacement value and the original amount contracted by the parties.[37] Section 506 is also the substantive provision concerning the valuation of such claims.[38]

2. Treatment of Claims

In filing under Chapter 13 of the Code, a debtor has one of three options regarding treatment of allowed secured claims. Section 1325(a)(5)(A) allows for plan confirmation if the creditor holding the secured claim approves the debtor's proposed plan.[39] Under § 1325(a)(5)(B), a debtor can retain the collateral by making a series of payments that satisfies the amount of the allowed secured claim.[40] Finally, § 1325(a)(5)(C) permits the plan's confirmation if the property is surrendered to the creditor holding the claim.[41]

While all three options appear fairly straightforward, there is more to the process than meets the eye. Before BAPCPA, when a debtor's plan did not gain the approval of the holder of the secured claim and he wished to retain the property, "the debtor could retain the vehicle, use § 506 to bifurcate the secured and unsecured portions of the claim, and then use § 1325(a)(5)(B) to pay the creditor . . . the value of the collateral under § 506."[42] In other words, the debtor would get away with only having to pay the property's depreciated value, while the creditor was left with an unsecured claim for the deficiency.[43]

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36. 11 U.S.C. § 506(a)(1) (2006).
37. *Particka*, 355 B.R. at 621.
38. *Id*. at 622.
39. 11 U.S.C. § 1325(a)(5)(A) (2006); *In re* Particka, 355 B.R. 616, 618 (Bankr. E.D. Mich. 2006).
40. 11 U.S.C. § 1325(a)(5)(B); *Particka*, 355 B.R. at 618.
41. 11 U.S.C. § 1325(a)(5)(C); *Particka*, 355 B.R. at 618.
42. *Particka*, 355 B.R. at 622.
43. *Id*.

This tactic, employed by many debtors in the pre-BAPCPA era, became known as "cram-down" and allowed "Chapter 13 debtors pre-BAPCPA to retain a financed vehicle by paying only the depreciated value of the vehicle instead of the full debt."[44] As will be discussed, cram-down contributed to the hanging paragraph's enactment. On the other hand, when a debtor went with § 1325(a)(5)(C) and opted to surrender the property, the creditor maintained the recourse obligation of an unsecured deficiency claim on the collateral.[45] Whether that right still exists upon surrender is the focus of this Casenote. It should be noted that BAPCPA did not change the text of claim treatment under § 506(a)(1) in any respect.[46]

C. Current Divide Among the Nation's Bankruptcy and District Courts

As mentioned, the ambiguity and arguably poor drafting of the hanging paragraph has led to a variety of issues and an array of judgments from just one statutory sentence.[47] Due to the specific issue addressed within *Wright*, this Casenote is only concerned with surrender of the "910 vehicle" when the creditor's claim is viewed as secured.[48] However, even such a narrowing of our focus does not curb the rampant debate among the bankruptcy and federal district courts. This part of the Casenote therefore explores whether the creditor is entitled to an unsecured deficiency claim following surrender. There are two competing views: the majority position, which holds in favor of full satisfaction of the debt upon surrender of the vehicle, and the minority viewpoint, which holds that the creditor retains an unsecured deficiency claim for the balance due. While Subsection 1 first looks at the majority position through the lens of a specific case, it then turns to the reasoning of other courts in the majority for perspective. Subsection 2 visits the minority viewpoint by first exploring *Butner v. United States*, a Supreme Court case on which many of the minority courts, including *Wright*, rely. Following analysis of *Butner*, Subsection 2 then focuses on a specific case and the general ideals that have carved out a minority position on the hanging paragraph.

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44. *Id*.
45. *See id*. at 627.
46. *Id*. at 621 n.3.
47. *See* Miller, *supra* note 9, § 5, § 9. For example, when a debtor retains a 910 vehicle, bankruptcy courts differ on whether the claim must be paid in full when the creditor fails to object to the plan. Another issue surrounding retention of the collateral is whether the debtor must pay interest on the claim when the contractual rate of interest is lower.
48. While some courts have held that creditor's claim is not secured, none of these cases, at least thus far, share the underlying focus of *Wright*: surrender of the collateral. *Id*. at § 5.

1. The Majority Take on the Hanging Paragraph

Prior to the decision in *Wright*, a majority of both bankruptcy and federal district courts held that, if a debtor surrenders a "910 vehicle" as part of his Chapter 13 plan, the debtor is thereafter unable to assert a deficiency claim against the debtor following sale of the collateral.[49] This position draws its support largely from principles of statutory construction and a plain reading of the hanging paragraph. Perhaps no case articulates this position better than *In re Ezell*, which brought a "narrow question before the court [that raised] an issue of first impression with precedential ramifications."[50] As one will see, *Ezell* indeed brought about such ramifications through the case law that followed.

a. *In re Ezell*

In *Ezell*, the debtors, Larry and Regina Ezell, commenced a Chapter 13 bankruptcy filing in November 2005.[51] As part of their confirmation plan, they proposed the surrender of a 2003 Nissan Xterra as full satisfaction of the $25,000 claim held by the vehicle's creditor, JP Morgan Chase Bank.[52] Chase filed an objection to the plan shortly thereafter on the grounds that the value of the vehicle fell below the amount owed.[53] Since the debtors purchased the vehicle within two and a half years of filing bankruptcy, resolution of the issue turned on interpretation of the hanging paragraph of § 1325(a)(5).[54]

Both parties agreed that, had the debtors retained the Xterra, the creditor would have been entitled to a secured claim for $25,000.[55] However, while the debtors argued that the claim upon surrender only went as far as the amount realized upon liquidation, the creditor contended that a deficiency balance up to $25,000 remained.[56]

The court first determined whether the hanging paragraph applied to both § 1325(a)(5)(B) and § 1325(a)(5)(C).[57] While the court found the statutory language to be "not particularly ambiguous," it did find its construction to be

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49. *See, e.g.*, *In re* Kenney, No. 06–71975–A, 2007 WL 1412921, at *5 (Bankr. E.D. Va. May 10, 2007).
50. *In re* Ezell, 338 B.R. 330, 343 (Bankr. E.D. Tenn. 2006).
51. *Id*. at 332.
52. *Id*.
53. *Id*.
54. *Id*. at 335.
55. *Id*.
56. *Id*.
57. *Id*. at 340

"at best, confusing."[58] Nevertheless, the court relied on precedent dealing with statutory construction and held that both subsections were subject to equal application of the hanging paragraph.[59]

This finding was the beginning of the end for Chase. Due to such equal application, the creditor was determined to be fully secured, regardless of the amount obtained upon liquidation.[60] Removal of § 506(a) meant "there can be no deficiency balance, either secured or unsecured, and surrender satisfies an allowed secured claim in full."[61] The court supported this assertion by reasoning that a creditor is no more disadvantaged by surrender than retention of the collateral in that both allow for payment of the full amount of the allowed secured claim.[62] With respect to the possibility of discrepancy between the value of the collateral and the allowed secured claim, the parties always had the option of negotiation via § 1325(a)(5)(A).[63] Accordingly, the court confirmed the debtor's Chapter 13 plan.

b. Cases Following *Ezell*'s Lead

The decision in *Ezell* soon became commonplace. For example, the court in *In re Payne* echoed the *Ezell* decision by emphasizing the plain language of the hanging paragraph.[64] The *Payne* court even turned to the statute's minimal legislative history. Nothing indicated legislative intent to limit the scope of the paragraph to certain provisions of § 1325(a)(5); subsequently, the court held that "silence in the legislative history cannot be utilized to create an ambiguity in the statutory language."[65] Again, due to the disallowance of § 506 bifurcation, there could be no unsecured deficiency claim. The court noted, "While this may appear to be inconsistent with the overall goals of BAPCPA to provide greater protections to creditors, the Court is not prepared to say that this is an absurd result in light of the sparse guidance from Congress."[66]

Many cases that follow the majority approach address the "flaws" behind the reasoning of the minority view, which allows for an unsecured claim by

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58. *Id*.
59. *Id*. at 341–42 (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989)). If the language of a statute is plain and unambiguous, "the sole function of the courts is to enforce it according to its terms."
60. *Id*. at 342.
61. *Id*.
62. *Id*.
63. *Id*.
64. *See In re* Payne, 347 B.R. 278, 282 (Bankr. S.D. Ohio 2006).
65. *Id*. at 282.
66. *Id*. at 283.

emphasizing the priority of rights under state law.[67] One court held that, although nonbankruptcy law may dictate whether a claim is secured, valuation of a secured claim is determined by bankruptcy law.[68] As a result, "Congress is within its rights to prohibit the bifurcation of claims in bankruptcy typically allowed for in § 506 as it sees fit."[69] The court in *In re White* held much more broadly in ruling that, since Congress defined "secured claim" in § 506, it follows that the legislature is free to alter this definition and its application.[70] The hanging paragraph simply represents one such alteration. Another bankruptcy court disallowed any unsecured claim by holding that the Bankruptcy Code trumps state law with regard to modification of creditor's rights.[71]

Regardless of the amount of reasoning or criticism of the minority approach, the majority of courts share one common factor in their analysis: a premium on the plain meaning of the hanging paragraph. If a creditor is fully secured for retention purposes as an alleviation of cram-down, the same is said for surrender. In other words, "what is good for the goose is good for the gander."[72]

2. The Minority Perspective

Direct influence can be traced from the pre-*Wright* minority views on the hanging paragraph to the ultimate decision reached by that court. In order to appropriately chronicle this lineage, one must first look at *Butner v. United States*, the concepts of which have been relied on by some of the minority, especially the *Wright* court. It is then necessary to turn to specific application of this position, via *In re Duke*, and finish with other general considerations proffered by the viewpoint.

a. The Bedrock of the *Wright* Court: *Butner v. United States*

In *Butner v. United States*, the U.S. Supreme Court had to decide "whether the right to such rents [are] determined by a federal rule of equity or by the law of the State where the property is located."[73] The case presented

67. Section II of this Casenote fully explores the pre-*Wright* minority understanding.
68. *In re* Kenney, No. 06–71975–A, 2007 WL 1412921, at *11 (Bankr. E.D. Va. May 10, 2007).
69. *Id*.
70. *See In re* White, 352 B.R. 633, 643 (Bankr. E.D.L.A. 2006).
71. *See In re* Steakley, 360 B.R. 769, 773–74 (Bankr. E.D. Tenn. 2007).
72. *In re* Particka, 355 B.R. 616, 622 (Bankr. E.D. Mich. 2006).
73. 440 U.S. 48, 49 (1979).

a dispute between a bankruptcy trustee and a second mortgagee[74] over right to rents collected over the period between the mortgagor's[75] bankruptcy filing and foreclosure sale of the property that had been mortgaged.[76]

In *Butner*, Golden Enterprises, Inc. (hereinafter Golden) made arrangements under Chapter 11[77] of the Bankruptcy Code to acquire a second mortgage from Butner in the amount of $360,000.[78] Golden needed this second mortgage after the bankruptcy judge consolidated various liens on the company's North Carolina real estate.[79] Butner did not receive a security interest in any rents to be earned by the property.[80] Golden's arrangement plan, which called for an agent to collect the rents and distribute them under the direction of the court, never achieved confirmation because the corporation was adjudicated as bankrupt shortly thereafter.[81] Both the first and second mortgages were in default, and the properties were ultimately sold to reduce Golden's indebtedness to Butner from $360,000 to $186,000.[82] Meanwhile, since an order had been made to collect and retain all of Golden's rents for use in bankruptcy court, the trustee had a fund of $162,000.[83] Seeking repayment of the $186,000 outstanding, Butner filed a motion that claimed a security interest in the fund.[84]

The bankruptcy court denied Butner's motion and held that the balance due represented a general unsecured claim.[85] While the district court reversed this decision, the court of appeals reinstated the bankruptcy judge's holding "because . . . petitioner had not . . . taken the kind of action North Carolina law required to give the mortgagee a security interest in the rents collected after the bankruptcy adjudication."[86] The Supreme Court granted certiorari, but stressed that it would not decide whether the court of appeals had applied North Carolina law correctly.[87] Rather, the court confined itself to "the proper

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74. One to whom property is mortgaged; the mortgage creditor, or lender. BLACK'S LAW DICTIONARY 1034 (8th ed. 2004).
75. One who mortgages property; the mortgage-debtor, or borrower. *Id*.
76. *Butner*, 440 U.S. at 50.
77. 11 U.S.C. § 1101, *et seq*. (2006).
78. *Butner*, 440 U.S. at 50.
79. *Id*.
80. *Id*.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id*. at 51.
85. *Id*.
86. *Id*.
87. *Id*.

interpretation of the federal statutes governing the administration of bankrupt estates."[88]

Not unlike the Seventh Circuit in *Wright*, in order to decide *Butner*, the Supreme Court had to address a split among the courts. The Second, Fourth, Sixth, Eighth, and Ninth Circuits composed a majority that touted state law as the resolution to whether a security interest in property extended to rents and profits coming from that property.[89] On the other hand, the Third and Seventh Circuits comprised a minority view which adopted a "federal rule of equity" that always afforded a secured interest in rents even when state law held to the contrary.[90] The latter circuits reasoned "that since the bankruptcy court has the power to deprive the mortgagee of his state-law remedy, equity requires that the right to rents not be dependent on state-court action that may be precluded by federal law."[91]

In the end, the Supreme Court sided wth the majority.[92] In justifying its decision, the Court noted that "the constitutional authority of Congress to establish uniform Laws on the subject of Bankruptcies throughout the United States would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate. But Congress has not chosen to exercise its power to fashion any such rule."[93] Justice Stevens placed special emphasis on the fact that Congress generally left the creation, definition, and determination of property rights of a bankrupt's assets to state law.[94] Further, even if the end result may be different in different states, state laws are only suspended to the extent of actual conflict with the Code.[95]

In reaching its ruling, the Court made short work of the minority position. The minority of courts did not rely on any "congressional command" or "identifiable federal interest;" instead, their view stemmed from "their perception of the demands of equity."[96] The Court recognized that the equity powers of the bankruptcy court often serve an important purpose in resolving the individualized problems presented to judges.[97] However, *Butner*'s "*undefined* considerations of equity" provided no grounds for the

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88. *Id*.
89. *Id*. at 52.
90. *Id*. at 53.
91. *Id*.
92. *Id*. at 54.
93. *Id*. This "constitutional authority" stems from Article I, Section 8, Clause 4 of the U.S. Constitution.
94. *Id*. at 54.
95. *Id*. at 54 n.9.
96. *Id*. at 55.
97. *Id*. at 55–56.

minority or its argument in favor of automatic interest in rents upon a mortgagor's bankruptcy.[98]

The *Butner* Court made an important policy argument as well. Its decision "[avoided] the . . . inequity of depriving a mortgagee of his state-law security interest when bankruptcy intervenes."[99] Federal bankruptcy courts should take the necessary steps to make sure that a mortgagee is afforded the same protection as if no bankruptcy had been filed.[100] Uniformity in the treatment of property interests between state and federal courts "[reduces] uncertainty, [discourages] forum shopping, and [prevents] a party from receiving a *windfall* merely by reason of the happenstance of bankruptcy."[101] In a "properly administered scheme," where the federal rule is the governance of state law, any interest of the mortgagee stems from state law and its application by federal judges "who deal regularly with [such] questions."[102]

b. *In re Duke*

Turning back to the hanging paragraph, the case of *In re Duke* laid the groundwork for what was to become the minority position on the hanging paragraph. In *Duke*, the court had to decide the effect of Jerry Joe and Deidre Lee Duke's proposed surrender of a 2005 Ford Escape in their Chapter 13 filing.[103] The vehicle's value was undoubtedly less than the secured claim of its creditor, Branch Banking & Trust Company.[104] The hanging paragraph unquestionably applied, and confirmation of the plan therefore turned on the court's interpretation of the statute.

While the *Duke* court did not directly rely on *Butner*, its holding found footing in cases that espoused similar principles. Since "the determination of property rights in assets of a bankrupt estate is left to state law" and "state law controls to the extent such rights are not modified by the Bankruptcy Code," the disappearance of § 506 meant the creditor's state law remedies were unmodified, including the traditional right to an unsecured deficiency claim.[105] Subsequently, the court could not confirm the debtor's plan, which would result in an abrogation of the creditor's remedies under state law.[106] The court

98. *Id*. at 56 (emphasis added).
99. *Id*.
100. *Id*.
101. *Id*. at 55 (emphasis added).
102. *Id*. at 58.
103. *See In re* Duke, 345 B.R. 806, 807 (Bankr. W.D. Ky. 2006).
104. *Id*.
105. *Id.* at 809.
106. *Id*.

also found, upon a review of case law, ambiguity in the hanging paragraph and subsequent need for a review of its legislative history.[107] Although admittedly not very expansive, this history revealed that the title of the hanging paragraph's enacting statute was "Giving Secured Creditors Fair Treatment in Chapter 13 . . . Restoring the Foundation for Secured Credit."[108] The court found that this title served as evidence against bankruptcy abuse and in support of creditor protection.[109] Finally, the court reasoned that public policy would not allow for surrender to serve as a release because if Congress had wanted an anti-deficiency provision, "it would have made its intentions very clear in the statute."[110] While much of the majority position stressed a plain reading of the hanging paragraph, the *Duke* court held an anti-deficiency provision as "far beyond" any such reading.[111]

c. Additional Considerations Proffered by the Minority

Other pre-*Wright* decisions offer additional justification for the right of creditors to an unsecured deficiency claim when the hanging paragraph is involved. Take *In re Zehrung*, for example. There, the court claimed that the majority holdings "ignore the fact that 'allowed secured claim' in § 1325 is used in the sense that the claim is allowed under § 502 and secured by some collateral, not in the § 506 sense of the term."[112] From this premise, the court reasoned that § 506 only applies when the bankruptcy estate has an interest in the collateral and such interest ceases upon surrender; accordingly, the creditor is left with his state law remedy of an unsecured claim.[113] The *Zehrung* court stressed that its holding avoided the "unlikely" anomaly of a significant expansion of creditor's rights in § 1325(a)(5)(B) and their simultaneous reduction under § 1325(a)(5)(C).[114] The court also believed that, since an unsecured claim is common recourse for a creditor upon non-fulfillment of contract, its holding was consistent with the original expectation of the parties.[115]

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107. *Id*.
108. *Id*. (quoting: Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23, 80 (codifed as amended in scattered sections of 11 U.S.C.)).
109. *Id*.
110. *Id*.
111. *Id*.
112. *In re* Zehrung, 351 B.R. 675, 678 (Bankr. W.D. Wis. 2006).
113. *Id*.
114. *Id*.
115. *Id*.

The court in *In re Particka* latched onto the reasoning of *Zehrung* but expanded the minority reasoning even further. *Particka* viewed § 506 as a means of valuation when the bankruptcy estate retains interest in the property, something that is lost upon surrender.[116] While § 506 was alive and well for use under § 1325(a)(5)(B), surrender meant disappearance of the estate's interest and availability of the creditor's unsecured deficiency claim.[117] The *Particka* court observed that § 506 "merely [allocates] the undersecured creditor's claim into secured and unsecured portions," and the majority cases proceeded "from the incorrect assumption that it is only somehow because of § 506 that an under-secured 910 creditor has a right to pursue a deficiency claim."[118] Through its logic and avoidance of "sweeping and major change[s] in the law" and "anomalous results," *Particka* no doubt fine-tuned the minority view and set the stage for *In re Wright*, the centerpiece of this Casenote.[119]

III. EXPOSITION OF *IN RE WRIGHT*

In the case of *In re Wright*, the United States Court of Appeals for the Seventh Circuit addressed the issue of "what happens when, as a result of the hanging paragraph, § 506 vanishes from the picture."[120] Siding with a minority view of bankruptcy and federal courts, the Seventh Circuit decided that the absence of § 506 left the parties to their original contract and subsequently upheld the bankruptcy court's denial of the Chapter 13 plan proposed by the debtors.[121] Part A of this section looks at the facts and procedural history of the case. Part B chronicles the court's actual opinion.

A. Facts and Procedural Posture

On August 10, 2005, Craig Wright and LaChone P. Giles-Wright (hereinafter "debtors") purchased a 2006 Dodge Magnum financed by Drive Financial Services (hereinafter "creditor").[122] Shortly thereafter, on October 18, 2006, the debtors filed for relief under Chapter 13 of the Bankruptcy

116. *See In re* Particka, 355 B.R. 616, 624 (Bankr. E.D. Mich. 2006).
117. *Id*.
118. *Id*. at 625–26.
119. *Id*. at 626–27. Section IV of this Casenote fully explores the sound legal reasoning and policy rationale of *Particka*.
120. *In re* Wright, 492 F.3d 829, 830 (7th Cir. 2007).
121. *Id*. at 832–33.
122. Brief of the Creditor-Appellee Drive Financial Services, now known as Santander Consumer USA, Inc. at 5–6, *In re* Wright, 492 F.3d 829 (7th Cir. 2007) (No. 07–1483) [hereinafter Appellee Brief].

Code.[123] Unfortunately, they owed more on the car loan than the vehicle itself was worth.[124] Since the purchase occurred within 910 days of the bankruptcy proceeding, the hanging paragraph of § 1325(a)(5) applied to the debtors' bankruptcy filing.[125]

In their petition declaring bankruptcy, the debtors submitted a plan in which surrender of the vehicle equated to full satisfaction of the debt.[126] The debtors reasoned that, in the absence of § 506 and subsequent claim bifurcation, the vehicle is "fully secured for all purposes" and no unsecured claim may result.[127] Having resold the car at a price less than the amount still owed by the debtors, the creditor filed its objection to debtors' plan on November 17, 2006.[128] The National Association of Consumer Bankruptcy Attorneys appeared in the matter as *amicus curiae*.[129] The Association, siding with the debtors in this matter, made the "bold argument" that only § 506 permits allowed secured claims and its inapplicability here rendered the entire debt unsecured and unrecoverable.[130] This argument also implied that the creditor could not collect on any post-petition interest.[131]

Turning to the procedural posture of the case, the bankruptcy court initially denied confirmation of the debtors' Chapter 13 plan.[132] This rejection resulted from the bankruptcy judge siding with the minority view on the effect of the hanging paragraph and the debtors' proposition to not pay any financial shortfall.[133] While the next stop in the appeals process would ordinarily be the appropriate district court or Bankruptcy Appellate Panel, an amendment of BAPCPA[134] allows for direct appeal from the bankruptcy court to the federal appeals court if certain criteria are met.[135] The bankruptcy judge certified that the instant case satisfied the following subsections of this procedural amendment:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the

123. *Id.* at 5.
124. *Wright*, 492 F.3d at 831.
125. *Id*.
126. *Id*.
127. Appellee Brief, *supra* note 122, at 7.
128. *Id*. at 6.
129. *Wright*, 492 F.3d at 832.
130. *Id*.
131. *Id*.
132. *Id*. at 831.
133. *Id*.
134. 28 U.S.C. § 158(d)(2)(A) (2006).
135. *Wright*, 492 F.3d at 831.

> Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; . . .[136]

Shortly thereafter, a motions panel of the appellate court accepted the appeal for similar reasons of first impression and importance.[137] The court noted that the issue arose "in a large fraction" of Chapter 13 proceedings and a "clear answer" was the most obvious remedy to heal the divide among the courts.[138] Judge Easterbrook further justified review of the case on the grounds that "lower litigation costs for thousands of debtors and creditors [could] be achieved by expediting appellate consideration of [the] case."[139]

B. Opinion of the Court

Coming down on the side of a minority of bankruptcy and federal district courts, the Seventh Circuit ultimately rejected the arguments of the debtors and *amicus curiae*.[140] Treating the financial shortfall as unsecured debt, the court held that the debt "need not be paid in full, any more than the Wrights' other unsecured debts, but it can't be written off *in toto* while some other unsecured creditors are paid some fraction of their entitlements."[141]

The primary ammunition of the court came from *Butner v. United States*. While Judge Easterbrook acknowledged that § 506 allows for the bifurcation of claims, he made the important distinction that it is not the only means of claim allowance for a deficiency judgment in cases involving insufficient collateral.[142] He called special attention to *Butner*, where the Court ruled "that state law determines rights and obligations when the Code does not supply a federal rule."[143] Applying this state law approach to the facts of the case, the *Wright* court turned to the original contract between the parties. This agreement was very specific: "If the debt is not paid, the collateral may be seized and sold. Creditor 'must account to Buyer for any surplus. Buyer shall

136. 28 U.S.C. § 158(d)(2)(A).
137. *Wright*, 492 F.3d at 831.
138. *Id*.
139. *Id*. at 831–32.
140. *Id*. at 833.
141. *Id*.
142. *Id*. at 832.
143. *Id*. (citing Butner v. United States, 440 U.S. 48, 54–55 (1979)).

be liable for any deficiency.'"[144] The contract even included state adoption[145] of a Uniform Commercial Code provision[146] which provided "that the obligor must satisfy any deficiency if the collateral's value is insufficient to cover the amount due."[147] The *Wright* court reasoned that *Butner*, alongside the recourse provided explicitly in the contract between the parties, did not permit surrender as full satisfaction of the debt.[148]

The court also based its holding on a windfall rationale and the legislative history of the statute. With regard to the former, the court did not see any reason why any financial shortfall on a 910 vehicle should be treated differently when a Chapter 13 bankruptcy is filed.[149] In other words, if surrender without filing leads to an unsecured debt, then surrender after filing should lead to a similar result since no operative section of the Bankruptcy Code states otherwise.[150] Finally, despite the scarcity of the hanging paragraph's legislative history, the court looked back at its enactment.[151] The enacting paragraph was captioned "Restoring the Foundation for Secured Credit."[152] The *Wright* court reasoned that this title implied support for original agreements between debtors and creditors in the absence of "contract-defeating" § 506, which allows judges to set the market value of the collateral or simply prevent repossession.[153] Further, the court noted that "[the] debtors [did] not offer any argument that 'the Foundation for Secured Credit' could be 'restored' by making all purchase-money secured loans non-recourse, . . . that non-recourse lending is common in consumer transactions, and . . . that Congress took such an indirect means of making non-recourse lending *compulsory*."[154]

In sum, in holding that § 506 is not necessary for the creation or allowance of security interests, the Seventh Circuit dismissed the arguments of the debtors and *amicus curiae* in one fell swoop.[155] The *Wright* court indicated that both parties missed the key issue of the case: "what happens

144. *Id*.
145. 810 ILL. COMP. STAT. 5/9–615(d)(2) (2006).
146. U.C.C. § 9–615(d)(2) (2000).
147. *Wright*, 492 F.3d at 832.
148. *Id*. at 833.
149. *Id*. at 832.
150. *Id*.
151. *Id*.
152. *Id*.; Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23, 80 (codifed as amended in scattered sections of 11 U.S.C.).
153. *Wright*, 492 F. 3d at 832.
154. *Id*. (emphasis in original).
155. *Id*. at 833.

when § 506 does not apply" in a Chapter 13 bankruptcy proceeding.[156] The disappearance of § 506 did not allow for non-recourse secured debt as contended by the debtors or no security interest as maintained by *amicus curiae*. Instead, simple contract law took over, which allowed for an unsecured deficiency judgment for the amount that the creditor was shorted upon surrender.[157]

IV. ANALYSIS

The holding of the *Wright* court undoubtedly stands in stark contrast to how the majority of bankruptcy and federal district courts have interpreted the hanging paragraph. While this holding will have an obvious impact on the debtors, creditors, and courts bound by the rulings of the Seventh Circuit, the decision's outside reach depends in considerable degree on its judicial soundness. Before gauging such reach, Parts A and B of this section will explore the persuasiveness of its three layers of reasoning: reliance on *Butner*, a windfall rationale, and the paragraph's legislative history. While the *Wright* court ruled correctly in allowing the creditor's unsecured deficiency claim, its reasoning remains unpersuasive due to improper reliance on *Butner* and the hanging paragraph's legislative history. Accordingly, Part C describes how the minority's reasoning is correct but is best articulated by *Particka*, not *Wright*. Part D discerns the significance of *Wright* and explores the hanging paragraph's place in modern bankruptcy law.

A. Did the *Wright* Court Properly Rely on *Butner*?

At a mere five pages, there is very little meat to the *Wright* decision. By the time Judge Easterbrook lays out a brief history of the hanging paragraph and discusses the procedural posture of the case, very little room remains to back up his holding. However, with the reasoning that does exist, the vast majority of it is dedicated to *Butner* and its "state law fallback."[158] Of course, this begs one to ask whether such emphasis was appropriate. For the reasons that follow, it becomes clear that *Wright*'s reliance on *Butner* was ultimately inapposite.

A number of facial differences exist between the facts of *Wright* and *Butner*. First, the confirmation plan in question in *Wright* was under Chapter

156. *Id*.
157. *Id*.
158. *Id*.

13 of the Code.[159] In fact, the hanging paragraph is confined to Chapter 13 filings.[160] On the other hand, *Butner* involved a Chapter 11 filing, a section of the Code that is more aligned with Chapter 7 than Chapter 13.[161] Secondly, while *Wright* dealt with the right to an unsecured deficiency claim for a creditor of a 910 vehicle, the Supreme Court in *Butner* addressed the right to rents of a mortgagor.[162] Finally, although neither the court nor the briefs of the parties listed the amount of the claim in *Wright*, the outstanding balance on the 2006 Dodge Magnum at issue was likely less than the disputed $186,000 in *Butner*.[163]

What do these facial differences mean? At the very least, it seems clear that *Butner* is not binding authority over the *Wright* court. At best, the decision in *Butner* merely serves as persuasive authority for any court interpreting the hanging paragraph. While several legal arguments and cases are arguably made and decided on the basis of persuasive authority, the reliance in the *Wright* decision deserves special attention since such a large stake is placed in *Butner*. For instance, even one unversed in bankruptcy law would likely speculate that there is a correlation between amount of a claim in a bankruptcy proceeding and the court's willingness to grant allowance of that claim. With *Wright*'s great reliance on *Butner*, one would simply expect there to be greater factual harmony between the two cases.

Looking beyond the facial differences of the two cases, a larger hurdle exists that the *Wright* court failed to address altogether: the explicit legal limitations of *Butner*'s holding. As made abundantly clear by the *Wright* court, *Butner* held that state law serves as remedy for a creditor in a bankruptcy proceeding when the Code does not provide a rule.[164] However, the *Wright* court neglected to discuss how the Supreme Court reached this decision. As discussed in Section II, the *Butner* Court either had to decide on behalf of state law as a remedial backdrop or "*undefined* considerations of [federal] equity"[165] that did not rely on any "congressional command" or "identifiable federal interest."[166] When phrased in such a manner, the conclusion reached in *Butner* seems not only logical but necessary.

The issue in *Wright* is not quite as simple. Here, the court discerns the hanging paragraph's impact, if any, on a creditor's right to an unsecured

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159. *Id*. at 830.
160. *See* 11 U.S.C. § 1325(a)(5) (2006).
161. *See supra* text accompanying note 77.
162. *Wright*, 492 F.3d at 831; Butner v. United States, 440 U.S. 48, 49 (1979).
163. *Butner*, 440 U.S. at 50–51.
164. *Wright*, 492 F.3d at 832.
165. *Butner*, 440 U.S. at 96 (emphasis added).
166. *Id*. at 95.

deficiency claim when the debtor surrenders a 910 vehicle.[167] The problem in reconciling *Wright* and *Butner* is the paragraph itself, which is arguably a "congressional command" that directs the courts on how to resolve this difficult issue. The majority interpretation of the hanging paragraph serves as a testament to this. The courts aligned with this viewpoint believe they have fulfilled their role by putting on their textualist hat and literally applying the Code as rewritten by BAPCPA. While not particularly well written, nothing could be more of a "congressional command" to them.[168] Even if one argues that the label of "congressional command" is too much of a stretch, it cannot be denied that the hanging paragraph represents more of a defined sense of equity than that espoused by the minority of courts in *Butner*. The mere existence of the paragraph itself places serious legal limitations on *Butner*'s availability and appropriateness.

B. *Wright*'s Other Reasoning: Windfall Rationale and Legislative History

In placing full faith in *Butner*, the *Wright* court dedicated little space to its remaining reasoning. The first line of such reasoning was on behalf of a windfall rationale, which argued that the creditor's ordinary right to an unsecured deficiency claim should not disappear just because the debtor has filed for bankruptcy.[169] Ironically enough, in this instance, reliance on *Butner* would not only have been appropriate but would have lent greater credence to such an argument. There, as aforementioned, the Supreme Court held that "uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a *windfall* merely by reason of the happenstance of bankruptcy.'"[170] Grounded in a ruling by the Supreme Court, this policy argument is one of many that presents problems for the majority perspective. Indeed, it appears that *Wright* seemingly relied on *Butner* for all the wrong reasons and none of the right ones.

The final bit of reasoning employed by *Wright* rested on the minimal legislative history of the hanging paragraph. Specifically, the court determined that the title of the hanging paragraph's enacting paragraph ("Restoring the Foundation for Secured Credit") did not support "contract-

167. *See Wright*, 492 F.3d at 830.
168. *See supra* note 59 and accompanying text.
169. *See Wright*, 492 F.3d at 832.
170. *Butner*, 440 U.S. at 55 (quoting Lewis v. Mfrs. Nat'l Bank, 364 U.S. 603, 609 (1961)) (emphasis added).

defeating" contentions of the debtors and the majority position in general.[171] Like the court's reliance on *Butner*, this reasoning is not well supported. *Wright* ignores the premise on which legislative history analysis rests: "ambiguity or . . . an unreasonable result [from the statute's plain reading]."[172] As will be discussed in Section IV of this Casenote, there is nothing ambiguous about the text of the hanging paragraph, and any reliance on its legislative history is therefore unnecessary. Assuming arguendo, any deduction made from the mere title of an enacting paragraph is inherently suspect. Furthermore, the title is not clear in its intention. It simply mentions "secured credit" and makes no reference to any unsecured claim of creditors. In fact, this lack of clarity causes both the majority and minority stances to cite the hanging paragraph's legislative history as support.[173] The only reasonable inference that can be drawn from this title is that it identifies a purpose conceded by both sides: elimination of cram-down on retention of 910 vehicles. Any legislative history argument with respect to surrender of such collateral is not only unnecessary but very speculative.

Looking back for a moment, where does this analysis leave *Wright*? With the exception of its brief windfall discussion, the reasoning that underscores the decision in *Wright* appears inapposite. This is not to say that the majority perspective is without flaw or is superior to the minority viewpoint; rather, this argument only seeks to uncover the shaky basis of the *Wright* court. Nevertheless, before assessing *Wright*'s influence, it is necessary to unveil the correct approach to the hanging paragraph.

C. Why the Minority View Is Correct in Spite of *Wright*

The problem with *Wright* is that it rests on very weak ground. Because of this, the case alone does not tell us which side of the federal divide is truly right. Fortunately, nearly eight months before the ruling in *Wright,* the case of *In re Particka* correctly decided the issue.

Through its detailed overview of the hanging paragraph and application of sound legal reasoning in resolving the dispute before it, *Particka* serves as a model example of case law. As discussed in Part II, *Particka* stressed that § 506 provides a means of valuation of collateral but *only when the estate*

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171. *See Wright*, 492 F.3d at 832.

172. *In re* Particka, 355 B.R. 616, 623 (Bankr. E.D. Mich. 2006) (quoting Chrysler Corp. v. Comm'r of Internal Revenue, 436 F.3d 644, 654 (6th Cir. 2006).

173. *See, e.g., In re* Payne, 347 B.R. 278, 282 (Bankr. S.D. Ohio 2006); *but see Particka*, 355 B.R. at 624.

retains interest in the property.[174] When a 910 vehicle is surrendered, it is no longer part of the bankruptcy estate and the availability of § 506 disappears.[175] All that remains after liquidation is the creditor's traditional right to the deficiency claim.[176] Upon inspection, this approach makes practical sense. Not only is it consistent with tradition by not altering the pre-BAPCPA rights of creditors upon surrender, but it is reconcilable with the express terms of the hanging paragraph in its non-application of § 506 (as the statute was not applicable from the outset). Section 506 never did create the right of a creditor to a deficiency claim; rather, this right stems from § 502, which is very much alive for 910 vehicle purposes.[177]

This is not to say that the hanging paragraph failed to bring about change. The *Particka* court acknowledged that "the hanging paragraph did work a change in the law with respect to 910 creditors, but only with respect to debtors who retain the collateral securing their debt."[178] Indeed, with *Particka*'s surrender analysis in mind, the hanging paragraph applies exclusively to § 1325(a)(5)(B) in an attempt to fix one of the biggest hurdles for creditors prior to BAPCPA: cram-down. As aforementioned, BAPCPA's enactment sought to curtail abuse of the system by debtors, which undoubtedly included cram-down on certain collateral.[179] In fact, bankruptcy courts have uniformly upheld this intended purpose.[180] The *Particka* court admitted that "it might have been more precise for the hanging paragraph to state that as to 910 creditors, § 506 no longer applies to § 1325(a)(5)(B)."[181] Nevertheless, the effect as written remains the same for 910 vehicles: cram-down is eliminated and the right to an unsecured deficiency claim under § 502 exists upon surrender.

Several additional considerations underscored the *Particka* court's interpretation of the hanging paragraph. First, as mentioned, *Particka*'s holding avoided "sweeping and major change [to] the law" by keeping the pre-BAPCPA state right to an unsecured deficiency claim intact.[182] While *Particka* recognized, unlike *Wright*, that resort to the paragraph's legislative history is unnecessary, the court explained that nothing in the history even

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174. *Particka*, 355 B.R. at 625 (emphasis added).
175. *Id*.
176. *Id*.
177. *Id*. at 624.
178. *Id*. at 625.
179. *See supra* note 23.
180. Christopher W. Frost, *BAPCPA Hits the Courts of Appeal: Direct Appeals, Hanging Paragraphs, and Bad Faith*, 27 No. 10 BANKR. LAW LETTER 1, 4 (October 2007).
181. *Particka*, 355 B.R. at 625.
182. *Id*. at 626.

hinted at the abolishment of this right.[183] Second, the court noted that BAPCPA never made a change to the surrender proviso of § 1325(a)(5)(C).[184] This observation is not only significant on its face but especially when one considers that the Supreme Court "[does] not presume that [a] revision worked a change in the underlying substantive law unless an intent to make such [a] chang[e] is clearly expressed."[185] Third, *Particka* held that the majority position would "essentially . . . convert what was a recourse obligation under non-bankruptcy law into a non-recourse obligation upon the filing of the bankruptcy case."[186] This argument is very similar to the windfall theory proffered in *Wright*. As discussed in *Butner*, any interpretation of the Code that substantially alters the rights of creditors via the "happenstance" of bankruptcy filing may be immediately suspect. Finally, *Particka* explained that many "anomalous results" would stem from the majority's interpretation of the hanging paragraph.[187] For instance, if the surrender is viewed as full satisfaction, what happens if the debtor's plan is subsequently dismissed or converted by the court? Is the creditor's claim forever precluded?[188]

As one can see, the *Particka* decision gave serious consideration to the hanging paragraph and, in the process, unveiled several holes in the majority position. *Particka* wisely did not dispute the majority view's emphasis on the plain language of the hanging paragraph. The fact that the statute applies with equal force to all of § 1325(a)(5) is clear. However, it contextualized this approach by illustrating the effect of pre-BAPCPA surrender of collateral and its non-reliance on § 506. Any argument that the statute could be more narrowly tailored is difficult to buy into when the hanging paragraph itself is out of place under § 1325(a)(5).[189] Additionally, a great deal of policy considerations overwhelm the majority, which mistakenly assumes that its position does not lead to dangerous "unintended consequences"[190] or does not lead to any "absurd result."[191] While "it is tempting to find areas where symmetry seems to demand outcomes unfavorable to the lending industry,"

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183. *Id*.
184. *Id*. at 627.
185. *Id*. (quoting Keene Corp. v. United States, 508 U.S. 200, 209 (1993)).
186. *Id*.
187. *Id*.
188. *Id*. at 628.
189. *See supra* note 6
190. *See* Margaret Howard, *The Law of Unintended Consequences*, 31 S. ILL. U. L.J. 451, 454–55 (2007). After asking whether it was intended that a 910 creditor would not have a deficiency claim, the author answers "probably not, but not all unintended consequences are necessarily bad. Perhaps this outcome is the proper come-uppance for auto lenders getting greedy." *Id*.
191. *See In re* Kenney, No. 06–71975–A, 2007 WL 1412921, at *9 (Bankr. E.D. Va. May 10, 2007).

this opportunity simply does not exist with respect to the surrender of 910 vehicles.[192]

D. The Significance of *Wright* and the Hanging Paragraph in Modern Bankruptcy Law

The importance of *Wright* is undeniable. The case is only one of three opinions handed down by a circuit court over the spring and summer of 2007 that dealt with BAPCPA.[193] It is the first to reach a circuit court over interpretation of the hanging paragraph.[194] In penning his opinion, Judge Easterbrook noted the importance of the case and hoped that his decision would have an impact lowering litigation costs and congestion of the courts.[195] Even the case's procedural history, in its bypass of the usual district court or Bankruptcy Appellate Panel (BAP) levels, offers a hint to its importance.[196]

The importance of the *Wright* decision undoubtedly stems from the significance of its subject matter. In a way, the hanging paragraph stands for more than just the rights of creditors and debtors over 910 cars. The paragraph serves as one part of the behemoth that is BAPCPA, which already "present[s] a daunting challenge to judges, clerk's offices, attorneys, and the parties who seek relief in the bankruptcy court."[197] Many of the courts referenced in this Casenote have found the hanging paragraph to represent one of the worst case scenarios under BAPCPA: what to do when "the plain words of the statute should be given effect, particularly when the language produces an improbable result or is at odds with the statute's apparent intent?"[198] This is unfortunate. *Particka* shows us that a textualist approach may be given to the statute while not altering the traditional rights of creditors upon surrender. While *Wright* may very well keep this right alive, its reasoning raises eyebrows. Prior to BAPCPA, "the specificity, subject matter, and established meanings of words used in the Bankruptcy Code [lent] themselves to plain-meaning analysis" so that "the predictive quality of law [was] promoted,

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192. Christopher W. Frost, *BAPCPA Hits the Courts of Appeal: Direct Appeals, Hanging Paragraphs, and Bad Faith*, 27 No. 10 BANKR. LAW LETTER 1, 6 (October 2007).
193. *Id*. at 1.
194. Honorable Nancy C. Dreher, *BAPCPA in the Courts*, No. 9 BANKRUPTCY SERVICE CURRENT AWARENESS ALERT 10 (September 2007).
195. *See supra* text accompanying note 139.
196. *See supra* text accompanying note 136.
197. John Rao, *Testing the Limits of Statutory Construction Doctrines: Deconstructing the 2005 Bankruptcy Act*, 55 AM. U. L. REV. 1427, 1428 (2006).
198. *Id*.

maintained, and developed through its use."[199] Although any such uniformity is still a long way off in a post-BAPCPA world, the hanging paragraph and analysis from courts such as *Particka* show that there is light at the end of the tunnel.

V. CONCLUSION

Without a doubt, the case of *In re Wright* stands as a landmark in the modern bankruptcy arena. Although it took a serious split between federal bankruptcy and district courts over interpretation of the hanging paragraph, the Seventh Circuit ultimately decided to answer the call. While this Casenote argued that the reasoning of the Seventh Circuit is largely inapposite and that *In re Particka* more accurately resolved the issue, the *Wright* court still made the right decision in allowing the creditor to retain the right to an unsecured deficiency claim. As such, the decision has held welcome sway over the courts not bound by its decision. Additionally, the decision represents at least some understanding of BAPCPA, which has often "require[d] bankruptcy judges to adopt the approach of the White Queen, and believe in 'as many as six impossible things before breakfast.'"[200] Time will only tell as to whether Chief Judge Easterbrook's hope for lower litigation costs and court congestion will truly be realized. However, with bankruptcy attorneys and academics fast at work, those interested may not have to wait too long.

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199. Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289, 342 (1994).

200. *In re* Trejos, 352 B.R. 249, 254 (Bankr. D. Nev. 2006).