## LOU JONES BREAKFAST CLUB

## 910 CLAIMS–"THE HANGING PARAGRAPH"–"ANTI-CRAM DOWN PARAGRAPH"–910 PARAGRAPH"

**August 15, 2006** → Maria Lazar
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**11 U.S.C. §1325 Confirmation of plan.**

Beneath paragraph (a)(9)

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

## VARIOUS ISSUES WITH THE PARAGRAPH (not including its lack of number)

### 1. Claim Classification

#### A. Bifurcation procedure under §506 is inapplicable to 910-vehicle claims

In re Montoya, 341 B.R. 41 (D. Utah 2006)

"The majority of courts interpreting the hanging paragraph hold that it precludes a Chapter 13 debtor from using §506 to cram down a 910-day vehicle. This Court agrees with the majority."

In re Johnson, 337 B.R. 269 (M.D. N.C. 2006)

910 vehicles can't be stripped down

"the statute simply provides that debtors may not bifurcate the claims of lenders with purchase money security interests in vehicles purchased within 910 days of bankruptcy for the debtor's personal use. Such a creditor is entitled to the full payment of his contractual claim or to the return of the vehicle:"

In re Robinson, 338 B.R. 70 (W.D. Mo. 2006)

§506 does not apply to 910 claims; "these creditors are entitled to secured claims for the total amount of their claims."

In re Horn, 338 B.R. 110 (M.D. Ala. 2006)

In re Ezell, 338 B.R. 330 (E.D. Tenn. 2006)

"When the creditor files its claim as secured, the Anti-Cramdown Paragraph precludes the use of Revised §506(a) to reduce or bifurcate that claim into secured and unsecured components."

Also – "surrender satisfies an allowed secured claim in full."

In re Fleming, 339 B.R. 716 (E.D. Mo. 2006)

In re Jackson, 338 B.R. 923 (M.D. Ga. 2006) (currently under appeal.)

**B. An entirely new class was created**

In re Carver, 338 B.R. 521, 528 (S.D. Ga. 2006) in which the court also examined 910 claims and created – in its own words – an "awkward and cumbersome rule" by which 910 claims are no longer secured or unsecured claims, but rather are now a "new and unique class of claims." In re DeSardi, 340 B.R. 790, 812, (S.D. Tex. 2006) (the court therein disagreed "with the conclusions in Carver" finding it "unlikely that Congress would create a new, undefined type of a claim, and then furnish no guidance as to how such a claim should be handled.")

**C. But see the following cases which decline to follow Carver:**

In re Montoya, 341 B.R. 41 (D. Utah 2006) ("Were this Court to adopt the reasoning in Carver, which renders §1325(a)(5) completely inapplicable to 910-day vehicle claims, the introductory phrase and its subsequent provisions would be rendered meaningless.")

In re Scruggs, 342 B.R.571, 575 (E.D. Ark. 2006) (the reasoning in Carver is not sound, and the Court declines to follow it")

In re Brooks, 344 B.R. 417, 422 (E.D. N.C. 2006) (the court "decline[d] to adopt the reasoning in Carver or the judicial remedy proposed in that case")

In re Lowder, slip opinion, 2006 WL 1794737 *6 (Bankr. D. Kan. June 28, 2006) ("this Court has been unable to find any written decisions adopting the Carver analysis.").

2. **Interest–Till or otherwise**

A. **Till still applies**

In re Deleon, E.D. Wis. Case No. 05-45819-13-PP (March, 2006)

In re Robinson, 338 B.R. 70 (W.D. Mo. 2006)

In re Fleming, 339 B.R. 716 (E.D. Mo. 2006)

"Till still controls what interest rate is required to ensure present value under Section 1325a)(5)(B)(ii)"

In re Johnson, 337 B.R. 269 (M.D. N.C. 2006)

In re Wright, 338 B.R. 917 (M.D. Ala. 2006)

"Till has not been abrogated by the BAPCPA amendments."

B. **Contract Rate**

C. **No interest whatsoever**

3. **Personal Use**

A. **Personal Means exclusive, actual, physical use by the Debtor**

In re Jackson, 338 B.R. 923 (M.D. Ga. 2006) (currently under appeal.)

a debtor could acquire a vehicle for his wife and then exclude it from the provisions of the hanging paragraph of 11 U.S.C. §1325(a).

B. **Personal Use is a category of debt**

"Personal use" is a category of debt, just like "business use," or "agricultural use"

Under the Wisconsin Uniform Commercial Code, this transaction is a "consumer goods transaction" in that the obligation was incurred primarily for personal, family or household purposes. Wis. Stats. §409.102(fs).

Dewsnup v. Timm, 502 U.S. 410, 415, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) which counseled bankruptcy courts that otherwise statutorily undefined words in the Bankruptcy Code are not necessarily defined by reference to technical, definitional provisions of the Bankruptcy Code. See e.g. In re Brown, 339 B.R. 818, 821 (S.D. Ga. 2006) (holding that "it is neither necessary nor appropriate to contort [the words of the 1325(a)(5) Bankruptcy Code] into a definitional provision.").

In re Runski, 102 F.3d 744, 746 (4th Cir. 1996). The court held that "personal use" is not any individual use of property by the debtor (i.e., "property . . . used for the purpose of conducting a business . . . is not intended primarily for personal . . . use within the meaning of [11 U.S.C. §] 722.") Id.

In the statutory framework of 11 U.S.C. §1325(a) regarding personal use, it is the use and not the user which controls that statutory treatment of the claim. See e.g., Zeagler v. Custom Auto Inc., 880 F.2d 1284, 1286 (11th Cir. 1989) in which the court held that the use of the vehicle (i.e., business/commercial versus non-business/non-commercial/non-profit) controlled in ruling whether individuals were "consumers" entitled to claim protection under the Alabama Deceptive Trade Practices Act.

"personal use" is meant to be a term of limitation restricting use to "exclusive," "individual" or "sole" use of the specific Debtor or that use by someone other than the Debtor removes the transaction from being a personal use transaction. See In re Sidore, 41 B.R. 206, 210 (W.D. N.Y. 1984) ("personal use" means use which is not "business use"); In re Barnes, 11 UCC Rep. Serv. 670 (D.Me. 1972); In re SFW, Inc., 83 B.R. 27 (S.D. Ca. 1988) (loan extended to "family" business, i.e., a "family farm" is not a consumer debt transaction so as to give rise to protection of co-debtor stay).