No. 08-20583

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

In The Matter Of: REBECCA ANN DALE, also known as, Dale Enterprises, also known as, Becky Dale, Debtor

FORD MOTOR CREDIT COMPANY, LLC
Appellee

v.

REBECCA ANN DALE
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION
HON. GRAY H. MILLER, UNITED STATES DISTRICT JUDGE
USDC No. 4:07-CV-3176
Bankr. No. H-07-32451

***AMICUS CURIAE* BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION AND NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF APPELLEE FORD MOTOR CREDIT COMPANY SUPPORTING AFFIRMANCE OF THE DISTRICT COURT**

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

In compliance with 5th Cir. R. 29.2 and 28.2.1, *amici curiae,* American Financial Services Association and National Automobile Dealers Association, provide this supplemental statement of interested persons in order to fully disclose all those with an interest in the *amicus* brief.

(1) *Ford Motor Credit Company, LLC v. Rebecca Ann Dale,* United States Court of Appeals for the Fifth Circuit No. 08-20583.

(2) The undersigned counsel of record certifies that the following supplemental list of persons and entities as described in the fourth sentence of 5th Cir. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Amicus curiae American Financial Services Association is a trade association that has no parent company, and no publicly held company holds 10% or more of an interest in the American Financial Services Association. *Amicus curiae* National Automobile Dealers Association that has no parent company, and no publicly held company holds 10% or more of an interest in the National Automobile Dealers Association.

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I.

IDENTITY AND INTEREST OF *AMICUS* AMERICAN FINANCIAL SERVICES ASSOCIATION

American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies. The association represents financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA has provided services to its members for more than 90 years. The association's officers, board, and staff are dedicated to continuing this legacy of commitment through the addition of new members and programs, and increasing the quality of existing services.

AFSA has a vital interest in the outcome of this case. The members of AFSA are primarily motor-vehicle installment-sale financers. The 2005 amendments to § 1325(a) of the United States Bankruptcy Code added an unenumerated, hanging paragraph at the end of that section that deals with certain claims secured by motor vehicles. The effect of this paragraph has been widely debated by creditors, debtors, counsel, and commentators, and there is a split of authority in the courts. This case affords the Court an opportunity to address this debate as it pertains to the question whether a creditor's claim is covered by the hanging paragraph where a portion of the financing is used to pay off negative equity from a trade-in vehicle and to purchase gap insurance and extended warranty coverage related to the new vehicle.

IDENTITY AND INTEREST OF *AMICUS* NATIONAL AUTOMOBILE DEALERS ASSOCIATION

Founded in 1917, the National Automobile Dealers Association ("NADA") is a non-profit trade organization whose members hold franchises to sell at retail passenger cars and trucks, and related goods and services, as authorized dealers of the various motor-vehicle manufacturers and distributors doing business in the United States. As of December 1, 2008, there were 20,211 franchised motor vehicle dealers in the United States of which 18,522 are members of NADA. Among other services provided, NADA advises members of relevant legal and regulatory issues. NADA closely monitors federal statutes, state statutes, and court rulings interpreting such laws. NADA appears before and submits briefs to courts and other tribunals as an *amicus curiae* to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

II.

SOURCE OF AUTHORITY TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Fed R. App. P. 29(a), AFSA and NADA requested consent of the parties to this appeal to file an *amicus curiae* brief in support of Ford Motor Credit Company, LLC ("Ford Credit"). Consent was given by Chris Naylor, counsel for the appellee, but **consent was denied by Reese Baker, counsel for the appellant**. The *amici curiae* are therefore filing a motion for leave with this brief.

STATEMENT OF THE ISSUE

AFSA and NADA adopt the Statement of the Issue in the Brief for the appellee, Ford Credit, filed with this Court on December 24, 2008. The defined terms used in Ford Credit's brief filed with this Court are used with the same meaning in this *amicus curiae* brief.

SUMMARY OF ARGUMENT

The question raised on appeal is whether the District Court erred in finding that Ford Credit's security interest in Dale's vehicle was a "purchase-money security interest" as that term is used in § 1325(a) of the Bankruptcy Code, to the extent that the seller advanced sums to pay off the unpaid indebtedness on Dale's trade-in vehicle as well as sums necessary to purchase gap insurance and extended warranty coverage related to the Vehicle that Dale purchased from the dealer. *Amici curiae*, AFSA and NADA, believe that the District Court correctly held that Ford Credit's security interest was a "purchase-money security interest" in its entirety and was therefore not subject to bifurcation and cramdown in Dale's Chapter 13 wage-earner plan. AFSA and NADA urge this Court to affirm the decision of the District Court.

This case is a by-product of the 2005 amendments to the Bankruptcy Code. Those amendments, titled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, are known in bankruptcy practice as "BAPCPA." Before BAPCPA, a debtor who owed $15,000 on a car worth only $10,000 could, in a wage-earner's plan under Chapter 13, keep his car by paying only $10,000 to his secured creditor. In a procedure inelegantly known as a "cramdown," the debtor could divide his creditor's claim into a $5,000 unsecured claim and a $10,000 secured claim. He would then keep the car by paying $10,000 over time to his creditor on the secured obligation and give the creditor little or nothing on the $5,000 unsecured claim.

BAPCPA restricted this right to cramdown. For vehicles financed within 910 days of bankruptcy, the debtor was denied the power to divide his debt into secured and unsecured portions. To keep his car, the debtor had to pay the full amount to his creditor, even if the value of the collateral (the car) was acknowledged to be less than the remaining balance on the debt.

This inartfully drafted provision of BAPCPA reflects a balancing of the interests of consumer creditors who specialize in secured credit (car creditors) and those other consumer creditors who specialize in unsecured credit (credit-card issuers).

The issue in this case and in similar cases elsewhere is whether the entire debt secured by the new car is to be treated as a "purchase-money security interest." To the extent that the security interest is not purchase-money, the creditor does not enjoy the protection of the new provision and the debtor may cramdown. If the security interest is purchase-money, cramdown is prohibited. As noted above, the issue has caused a significant split among courts and commentators. To date only one federal circuit court has ruled on this issue, and this ruling favors the position Ford Credit has taken. *See Graupner v. Nuvell Credit Corp.*, 537 F.3d 1295 (11th Cir. 2008). This appears to be the emerging majority and national trend. *See GMAC v. Horne*, 390 B.R. 191, 198 (E.D. Va. 2008); *In re Vinson*, 391 B.R. 754, 757 (Bankr. D. S.C. 2008).

What is so hard about the term "purchase-money security interest"? Quite a bit, it turns out. Like many things in the Bankruptcy Code, and in commercial law generally, there is more than meets the eye. In recent times, it has become commonplace for debtors to pay for their cars over five or even seven years. Typically, cars depreciate at a rate faster than the principal balance of the debt is paid down. When that happens, the debtor is said to have a "negative equity" in his car or to be "upside down;" he owes more on the debt than the car is worth.

The problem, as in this case, comes when the debtor returns for a new vehicle before he has paid off the debt on the old one. When he buys the new car, he incurs a new debt that includes not only the sticker price on the new vehicle, but also payments for dealer-provided products and services (such as gap insurance and extended service contracts), license fees, assorted taxes, ***and*** an amount to cover the "negative equity." The "negative equity" is the amount by which his debt against the trade-in exceeds the value of the trade-in. This secured transaction only works if the price paid to acquire the new vehicle covers the expense incurred to satisfy the negative equity.

The question is whether a security interest that secures both the sticker price on the new car and the remaining balance on the old car is to be regarded as a "purchase-money security interest." Similarly, if the purchaser elects to purchase gap insurance and extended warranty coverage related to the new vehicle, and if the dealer makes advances to purchase these protections, is the security interest that secures these advances a "purchase-money security interest"? Dale, of course, says no; Ford Credit says yes. The District Court correctly held that the security interest covering Dale's vehicle was a purchase-money security interest in its entirety and was therefore entitled to the new protection in BAPCPA against cramdown.

Although it is stuffed with definitions, the Bankruptcy Code has no definition of "purchase-money security interest." It seems likely that Congress intended the term to have a federal law meaning drawn from the language, from inferences about

Congressional intent, from commercial practice, and by analogy to state law and to other federal law. It is also possible that Congress intended to use state-law definitions. Whether one regards the words as federal or state, the outcome is the same. Even if Congress intended a federal definition, that definition would have to lean heavily on state statutes that define the term. If Congress wanted to adopt state-law definitions, those same statutes would be applied directly.

ARGUMENT AND AUTHORITIES

I.

THE LANGUAGE OF THE STATUTE AND THE CONGRESSIONAL PURPOSE FAVOR FORD CREDIT

A. Congress's Purpose

As its name proclaims, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was designed both to make it more difficult for consumers to cancel their debt and to require debtors with means to repay their bills. The Act came at the end of a twenty-year spike in bankruptcy filings from 250,000 in 1978 to more than 1,500,000 filings in 2004. All but a small number of these filers were consumer debtors.

That is not to say that the birth of the Act was easy or quick. The original form of BAPCPA was first introduced in 1998. In the succeeding years, it passed the House six times, passed the Senate four times, and cleared both houses of Congress in the same form twice. It once even reached the President's desk, only to suffer President Clinton's pocket veto.

The opponents in Congress were as persistent and clever in opposing the Act as the proponents were determined and united in support. Among the principal creditor advocates for the bill were credit-card companies.[1] By 2005, it was claimed that the credit-card industry had spent over $100 million in lobbying and other activity to promote the bill. In general, credit-card companies make unsecured loans and fare poorly in Chapter 7 consumer liquidations. Many consumer Chapter 7's are "no asset" cases. A "no asset" debtor shields all of his assets by smart use of the exemption laws and therefore makes no distribution to any unsecured creditor. To attempt to get something from some of the Chapter 7 debtors, the credit-card companies and other unsecured creditors hoped to force some of those debtors into Chapter 13 where they would be required to give up a part of their wages for up to five years.

To the extent that changes in bankruptcy law take assets that the debtor would have kept for himself under the old law, the changes have the potential to benefit all creditors. But to the extent that a change in the law leaves the debtor with the same assets as he would have had under the old law, the change merely improves one creditor's lot at the expense of another creditor. Since, by hypothesis, most debtors in bankruptcy are insolvent, any change in an existing bankruptcy law has the high

[1] Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, N.Y. TIMES, Dec. 11, 2005, at Section 1.

probability of taking from one creditor and giving to another without any change in the debtor's status. The provision in § 1325 that is the subject of this case was most likely intended to protect ***secured*** consumer creditors from the loss that they might otherwise suffer from debtors' migration from Chapter 7 to Chapter 13.

The secured creditors, particularly the auto creditors, must have feared that their interests would be injured by a bill that would move many debtors from Chapter 7 (liquidation) into Chapter 13 (wage-earner plans). Secured creditors' concerns would arise principally because of the probability of a cramdown in Chapter 13. In Chapter 7, by comparison, debtors frequently sign "reaffirmation" agreements under which they are obliged, even after the bankruptcy, to pay the full amount due on their cars, whatever their value. Thus, a large-scale move out of Chapter 7 and into Chapter 13 — of the kind hoped for by the credit-card issuers — would favor the credit-card companies (by giving them a five-year share of the debtor's future wages) and would injure the auto creditors (by substituting low-pay cramdowns for high-pay reaffirmation agreements).

When one considers the parties to the Congressional debate (unsecured creditors who would benefit from Chapter 13 growth vs. secured creditors who would suffer), the goals of the principal creditor advocates (credit-card issuers who openly advocated expansion of Chapter 13) and the evolving language of the Act (*see* Section I.B. below), it is unmistakable that Congress intended to protect creditors who finance consumer vehicle purchases from cramdowns in Chapter 13. Congress appears to have been persuaded by the auto financiers' argument that, unless the anti-cramdown provision was added to the law, the increased costs of cramdown would ultimately be borne by consumers — including, in particular, some who would be priced out of the market as a result. *See Bankruptcy Abuse Prevention and Consumer Protection Act of 2001: Hearings Before the Committee on the Judiciary, House of Representatives*, 107th Cong. 371-72 (2001). That Congressional purpose is best served by a decision in favor of Ford Credit.

B. Congress's Language

The earliest response in the history of BAPCPA to secured creditors' concern is a provision in the 1998 House bill. That provision barred cramdowns, but it was quite narrow. It was not limited to motor vehicles, but it covered only:

> the unpaid principal balance of the purchase price of the personal property acquired [within 180 days of the filing] and the unpaid interest and charges at the contract rate . . .

H.R. 3150, 105th Cong. § 128 (1998).

That provision would not have protected from cramdown much of the debt that is covered by a purchase-money security interest in a car. It would not have protected amounts attributable to title and taxes or negative equity on trade-ins, and, of course, it would not have touched any secured transaction that was completed more than six months before the bankruptcy filing.

Meanwhile, an amendment proposed by Senator Abraham of Michigan, inserting a different anti-cramdown provision, was adopted by the Senate Judiciary Committee. This amendment prohibited cramdowns for all security interests of whatever kind and whenever incurred. S. Rep. No. 105-253, at 7 (1998) (prohibiting cramdown of "an allowed claim [in a Chapter 13 case] that is secured under applicable non-bankruptcy law . . .").

Contemporary press reports made the unsurprising claim that Senator Abraham was responding to the interests of the "industry." The language proposed by Senator Abraham was presumably intended to protect the interests of an important group of constituents — the auto companies and their auto finance arms.

By 1999, the Senate version covered a claim where the debt that is the subject of the claim was incurred within the 5-year period preceding the filing of the petition and the collateral for that debt consists . . . of a motor vehicle . . . acquired for the personal use of the debtor . . . S. Rep. No. 106-49, at 224 (1999). Note that the 1999 Senate version does not refer to a "purchase-money security interest" and that one infers that the legislation deals with the ***purchase*** of a motor vehicle only from the use of the verb "acquired," but the provision is now limited to motor vehicles bought for personal use.

The purchase-money language appears for the first time in 2000 when the section covers:

> a claim . . . 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 5-year period preceding the filing of the petition, and the collateral for that debt consists of a motor vehicle . . . acquired for the personal use of the debtor . . .

H.R. Rep. No. 106-970, at 57 (2000) (Conf. Rep.).

As finally enacted, the Abraham amendment is an unnumbered "hanging paragraph" attached to 11 U.S.C. § 1325(a), sometimes now labeled 1325(a)(*):

> 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 910-day 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, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the one year period preceding that filing.

C. Both The Language and Congress's Purpose Support a Reading Favorable to Ford Credit

There are two notable insights buried within Congress's choice of words and in the progression from the early House language to the words that are now part of § 1325(a). First, is the probability that Congress chose the current language to exclude a certain kind of secured creditor from the Section's protection, and not to deal with the scope of "purchase-money." Second, is the breadth of the traditional purchase-money security interest.

1. Excluding Certain Secured Creditors

The drafters may have chosen the purchase-money language to exclude non-purchase-money security interests in vehicles already owned by the debtor. Non-purchase-money security interests in property already owed by consumer debtors are frequently disfavored under the law. (*See* 16 C.F.R. § 444.2(a)(4), where taking a non-purchase-money security in certain household goods is an unfair trade practice, and 11 U.S.C. § 522(f)(1)(B), in the Bankruptcy Code, avoiding nonpossessory non-purchase-money security interests against certain consumer goods).

After the original House language, which referred to “purchase-money,” was replaced with the 1999 version of the Abraham amendment, a non-purchase-money secured creditor who took a security interest in a car that the debtor had purchased outright within five years of the filing could have claimed the benefit of the provision. The automobile financiers — purchase-money creditors — had no interest in enriching non-purchase-money secured creditors who take security interests in property already owned by a consumer debtor, nor would the consumer advocates have wished to benefit these creditors. So, it is plausible that the purchase-money language was inserted only to deprive these non-purchase-money creditors from using the Section, not to draw any distinction between parts of a secured debt incurred in the acquisition of the collateral. If that is the purpose of the language, *i.e.*, to exclude a class of secured creditors, its presence does not justify the omission of negative equity, gap insurance, and extended warranty coverage from its protection against cramdown.

2. "Purchase-Money Security Interest" Is Broader Than "Principal Balance"

By using the generic term "purchase-money security interest" instead of the original House term "unpaid principal balance of the purchase price attributable" to property acquired within 180 days, Congress must have intended to include some parts of the debt that would have been omitted by the original House language. The House language, "unpaid principal balance . . . attributable to the goods purchased," identifies the particular type of ***debt*** that is covered, whereas "purchase-money security interest" refers to a type of ***security interest***.

No purchase-money security interest is limited to the principal balance and unpaid interest. At a minimum, fees and taxes owed on the purchase of a motor vehicle would be covered and secured by any "purchase-money security interest." *See, e.g.*, UCC § 9-103, cmt. 3. But it would be easy to find that a claim for fees, taxes, negative equity, gap insurance, and extended warranty coverage was not part of the "unpaid principal balance" or "interest." So, the words of the House and Senate versions are different, and the words of the Senate version bar cramdowns on more kinds of debt than the words of the House would bar.

Conceding that the Senate language is broader than the House language, can one infer that the Senate intended to treat negative equity, gap insurance, and extended warranty amounts as covered by "purchase-money security interests"? Yes. Representatives of the debtors and creditors must have known of the practice of rolling negative equity amounts from trade-ins into debts secured by purchase-money security interests on new cars. By 2005, as many as 38 percent of all new car purchasers rolled some part of the exiting debt on a trade-in into the new debt incurred to buy the new car.[2] This is not an obscure practice; it is commonplace and would have been well known to any informed debtor or creditor representative. By 2004, the practice was specifically permitted in the Motor Vehicle Sales Acts of at least 36 states, including Texas. The purchase of gap insurance and extended warranty coverage related to the new vehicle likewise had been part of vehicle sales and financing transactions for decades and was also specifically authorized by state law.

It cannot be said that the cramdown provision on motor vehicles traveled below Congress's radar. The topic was controversial; as shown in Section I.B. above, the provision was modified several times in different ways.[3] And, while it was one of the continuing points of dispute between the debtor and the creditor interests between

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[2] *See, e.g.,* FDIC Supervisory Insights, *The Changing Landscape of Indirect Automobile Lending*, June 23, 2005.

[3] *See., e.g.,* H.R. Rep. No. 107-617 (2002) (Conf. Rep.).

1998 and 2004, ultimately, the language adopted reflected a compromise worked out over several years to gain the secured lenders' support.

Most importantly, the language chosen by Congress has a meaning found in practice and in state law (*see* Section III below). That law and practice show that a "purchase-money" interest reaches not only a car's cash price but also other amounts that may be folded into the total purchase price. That this language was chosen in lieu of the more restrictive language of the House buttresses the argument for a broad definition of "purchase-money". That Congress was apparently adopting Senator Abraham's approach to help car creditors gives further support for the broad reading as a federal definition. As recently stated by the United States Court of Appeals for the Sixth Circuit: "Based upon the legislative history, there is little doubt that the 'hanging-sentence architects intended only good things for car lenders and other lien holders.'" *In re Long*, 519 F.3d 288, 294 (6th Cir. 2008); *See also*, *GMAC v. Peaslee*, 373 B.R. 252, 261 (W.D. N.Y. 2007) ("By its terms, the hanging paragraph prohibits the bifurcation of *any* claim if the debt is secured by a PMSI. To adopt the Trustee's position would in effect undo [BAPCPA]") (emphasis in original).

II.

THE DEFINITIONS IN THE FEDERAL TRUTH IN LENDING LAW AND REGULATIONS SUPPORT FORD CREDIT

When Congress enacted BAPCPA in 2005, it is presumed to have known about other pertinent federal law governing purchase-money financing of motor vehicles.[4] The Truth in Lending Act ("TILA") (15 U.S.C. § 1601, *et seq*.) and the Act's regulation, Regulation Z (12 C.F.R. § 226), deal generally with the disclosures that are required in both consumer credit card debt (open ended credit) and purchase-money debt for items of personal property (closed end credit). Although that law does not give a definition as such of "purchase-money security interest," the law does explain the kind of disclosures that must be made in a purchase-money transaction that generates a purchase-money security interest.

In 1999, the Federal Reserve Board amended the Official Staff Interpretations of Regulation Z to clarify how purchase-money vehicle financers should disclose negative equity. Those amendments direct creditors to incorporate negative equity as a part of the "total sale price" of a new vehicle in a single financing transaction. 64 Fed. Reg. 16614-01, 16617 (adopting revisions to 12 C.F.R., Pt. 226, Supp. I, & 18(j)-

[4] *See Quality Tooling v. United States*, 47 F.3d 1569, 1584 (Fed. Cir. 1995) ("When Congress enacts legislation, it is presumed to know the pertinent law.").

3). The Staff Interpretations define the Total Sale Price to include negative equity as follows:

> *18(j) Total sale price.*
>
> 3. *Effect of existing liens.* When a credit sale transaction involves property that is being used as a trade-in (an automobile, for example) and that has a lien exceeding the value of the trade-in, the total sale price is affected by the amount of any cash provided. (See comment 2(a)(18)-3.) To illustrate, assume a consumer finances the purchase of an automobile with a cash price of $ 20,000. ***Another vehicle used as a trade-in has a value of $ 8,000 but has an existing lien of $ 10,000, leaving a $ 2,000 deficit that the consumer must finance.***
>
> *i.* ***If the consumer pays $ 1,500 in cash, the creditor may apply the cash first to the lien, leaving a $ 500 deficit, and reflect a down payment of $ 0. The total sale price would include the $ 20,000 cash price, an additional $ 500 financed under § 226.18(b)(2), and the amount of the finance charge.*** Alternatively, the creditor may reflect a downpayment of $ 1,500 and finance the $ 2,000 deficit. In that case, the total sale price would include the sum of the $ 20,000 cash price, the $ 2,000 lien payoff amount as an additional amount financed, and the amount of the finance charge.
>
> ii. If the consumer pays $ 3,000 in cash, the creditor may apply the cash first to extinguish the lien and reflect the remainder as a downpayment of $ 1,000. The total sale price would reflect the $ 20,000 cash price and the amount of the finance charge. (The cash payment extinguishes the trade-in deficit and no charges are added under § 226.18(b)(2).) Alternatively, the creditor may elect to reflect a downpayment of $ 3,000 and finance the $ 2,000 deficit. In that case, the total sale price would include the sum of the $ 20,000 cash price, the $ 2,000 lien payoff

amount as an additional amount financed, and the amount
of the finance charge.

(emphasis added).

The highlighted portions of the quoted paragraphs show that the Federal Reserve intended that any negative equity amount be added to the cash price on the new vehicle to be shown as a single amount in the "total sale price" disclosure. Elsewhere, the Regulation requires that negative equity amounts be shown as part of the "Amount Financed." 12 C.F.R. § 226.18(b). Similar treatment is dictated for charges related to gap insurance and extended warranty coverage. 12 C.F.R. Part 226, Supp. I, Para. 18(b)(2)-1 (1999). The implication to the buyer and to the creditor from this single disclosure of the "total price" and "amount financed," (*i.e.*, amount secured) is that the negative equity, gap insurance, and extended warranty coverage will have the same status as the cash price of the new vehicle. Since the seller's security interest for the cash price of the new vehicle is indisputably a "purchase-money security interest," it follows that the Federal Reserve's direction to bundle the negative equity, gap insurance, and extended warranty coverage with the cash price is a direction to secure it with a "purchase-money security interest."

III.

STATE LAW, COMMERCIAL PRACTICE, AND PUBLIC POLICY AFFIRM FORD CREDIT'S POSITION IN THIS CASE

A. The Uniform Commercial Code

Whether Congress intended a federal definition or a state definition, state law is a rich source of help. First, consider the breadth of the "purchase-money" umbrella under Article 9 of the UCC. Article 9 is the law of every state. The provisions at issue here have not been modified by Texas or any other state. It is, therefore, tantamount to uniform federal law on this issue.

The Texas UCC provides that "[a] security interest in goods is a purchase-money security interest . . . to the extent that the goods are purchase-money collateral with respect to that security interest." Tex. Bus. & Comm. Code Ann. § 9.103(b)(1) (Vernon 2002). "Purchase-money collateral" is defined as "goods . . . that secur[e] a purchase-money obligation incurred with respect to that collateral." *Id.* at § 9.103(a)(1). A "purchase-money obligation" is defined, in turn, as "an obligation … incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used." *Id.* at § 9.103(a)(2).

Comment 3 to § 9.103 explains that "purchase-money obligation" reaches more than just the listed price of the item purchased:

> As used in subsection (a)(2), the definition of "purchase-money obligation," the "price" of collateral or the "value given to enable" includes ***obligations for expenses incurred in connection with acquiring rights in the collateral***, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage,

> administrative charges, expenses of collection and enforcement, attorney's fees, and other similar obligations. The concept of "purchase-money security interest" requires a close nexus between the acquisition of collateral and the secured obligation.

(emphasis added). Notably, the phrase, "obligations of expenses incurred in connection with acquiring rights in the collateral" stands by itself; it is not followed by limiting words like "including" or "such as." It must, therefore, be regarded as a separate and independent obligation that may be part of the price of the collateral and therefore included in the purchase money obligation and purchase money security interest.[5]

The federal district court in *Peaslee* found the phrase "obligations for expenses incurred in acquiring rights" to be broad enough to include negative equity:

> [I]n addition to the specific items listed in Comment 3, the comment also includes "obligations for expenses incurred in connection with acquiring rights in the collateral." Since

[5] This is further illustrated by the fact that the list ends with the catch-all phrase, "and other similar obligations." This drafting convention demonstrates that the first item in the list of obligations for expenses incurred—is not limited to obligations that are similar to the listed items that follow. Otherwise, the first and last items in the list would be redundant. *See Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161 (10th Cir. 1999) (in interpreting statutes, courts will "avoid a reading which renders some words altogether redundant" or "makes any part superfluous") (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) and *Fuller v. Norton*, 86 F.3d 1016, 1024 (10th Cir.1996)); *Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (Texas courts "give effect to all the words of a statute and [do] not treat any statutory language as surplusage[,] if possible."); *Salaymeh v. Plaza Centro LLC (In re Mohyadein)*, 361 B.R. 822, 828 (Bankr. S.D. Tex. 2007) (It is a cardinal rule of statutory interpretation that a statute must be interpreted so that no provision is surplusage) (citing *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant")).

> the items following that term -- sales taxes, duties, etc. -- are not set off by the words "such as," "including," or a similar phrase, they are apparently not listed as *examples* of such expenses, but as *additional* components of the "price" of the collateral, or of "value given" by the debtor. It is not apparent why a refinancing of rolled-in negative equity on a trade-in as part of a motor vehicle sale could not constitute an "expense[ ] incurred in connection with acquiring rights in" the new vehicle. If the buyer and seller agree to include the payoff of the outstanding balance on the trade-in as an integral part of their transaction for the sale of the new vehicle, it is in fact difficult to see how that could ***not*** be viewed as such an expense.

373 B.R. at 258-59 (emphasis in original).

Comment 3, quoted above, adopts a "close nexus" test in determining whether charges and expenses are "purchase-money obligations" under § 9.103. Current commercial practices, discussed below, recognize negative equity owed on a trade-in as a routine "expense incurred in connection with acquiring" the new vehicle, and the financing of the remaining debt on the trade-in has more than a "close nexus" to the acquisition of the new vehicle. Since buyers with negative equity on their trade-ins seldom have cash to pay off the amount owed, inevitably that amount must be financed by the creditor on the new vehicle or by some other creditor. So, in many cases, the "nexus" is so close that the new car cannot be acquired without financing from the new purchase-money creditor to retire the negative equity. As stated by the 11th Circuit in *Graupner*:

> We believe there is such a "close nexus" between the negative equity in Debtor's trade-in vehicle and the purchase of his new vehicle. The financing was part of the same transaction and may be properly regarded as a "package deal." Payment of the trade-in debt was tantamount to a prerequisite to consummating the sales transaction, and utilizing the negative equity financing was a necessary means to accomplish the purchase of the new vehicle. As the district court held in affirming the bankruptcy court, the negative equity was an "integral part of," and "inextricably intertwined with," the sales transaction. To hold otherwise would not be a fair reading of the UCC.

537 F.3d at 1302.

More recently, in commenting on negative equity, the United States District Court for the Eastern District of Michigan observed that "[a] closer nexus to the collateral can hardly be imagined." *Nuvell Credit Co., LLC v. Muldrew*, 396 B.R. 915, 2008 U.S. Dist. LEXIS 77752, *32 (E.D. Mich. 2008).

B. The Texas Motor Vehicle Installment Sales Act

The end of World War II saw an explosive growth in consumer credit in the United States. A significant part of that consumer credit was installment credit to purchase motor vehicles. To govern that market, many states passed laws called Motor Vehicle Sales Finance Acts. Texas adopted such an Act as part of its Finance Code.

Although they have similar names, these acts are not uniform (they were not promulgated by the Uniform Law Commissioners), but all of the acts appear to be copied from the same basic template. Because they preceded the federal disclosure law, Truth In Lending, all of them have disclosure requirements similar to those now found in the federal law. For example, it is common for these acts to require a specific size of type and to enumerate a list of items that must be expressed in a retail installment sales contract. But these acts went beyond disclosure requirements. They typically establish maximum interest rates, and they often prohibit certain contract terms and forbid certain creditor behavior. In addition, they specifically list the charges that may be imposed in a vehicle installment sales transaction based upon industry practice, consumer preference, and a legislative determination that these charges are closely related to vehicle purchases and are therefore appropriate.

It appears that the state legislatures intended these acts to comprehensively deal with the sale of automobiles where the seller or third party financial institution was to be paid in installments. In many ways, these acts have controlled the behavior of automobile financiers and have shaped their contracts since their enactment in the 1950's and 1960's.

With the advent of negative equity financing in the 1990's, many states amended their acts to deal with that practice. Texas is a good example. The Texas Motor Vehicle Installment Sales Act ("MVSA"), Tex. Fin. Code Ann. §§ 348.001-413 (Vernon 1998 & Supp. 2003), authorizes negative equity to be included as part of the "total sales price," "credit price," or "time price" in the sale of an automobile.

Tex. Fin. Code Ann. § 348.006 (Vernon 1998 & Supp. 2003). MVSA also specifically adopts the Truth-In-Lending Act and Regulation Z treatment of negative equity as part of the "total sales price" of an automobile. Tex. Fin. Code Ann. § 348.009 (Vernon 1998 & Supp. 2003)[6] Similar treatment is dictated by MVSA for charges related to gap insurance and extended warranty coverage. Tex. Fin. Code Ann. § 348.006 (Vernon 1998 & Supp. 2003).

Because MVSA and Article 9 deal with the same general subject matter, they should be read *in pari materia*. Both MVSA and Article 9 treat charges for negative equity, gap insurance, and extended warranty coverage as part of the "total sales price," "credit price," and "time price" in the sale of an automobile. In MVSA, the Texas state legislature specifically approved these charges as closely allied with the sale of automobiles in Texas. They therefore clearly satisfy the "close nexus" test of Article 9.

AFSA and NADA therefore respectfully submit that charges for negative equity, gap insurance and extended warranty coverage are "purchase-money

6 The Texas Administrative Code also provides that the "[t]erm 'amount financed' may be substituted for the term 'principal balance' whenever the amount financed, computed in accordance with Regulation Z, is the same as the principal balance, computed in accordance with [MVSA]." 7 Tex. Admin. Code § 84.803(d) (2008). The Texas Supreme Court sanctioned this type of reference to the Truth In Lending Act in making disclosures under the Texas Consumer Credit Code, Tex. Rev. Civ. Stat. Ann. Art. 5069-7.01, *repealed by* Acts 1997, 75th Leg., ch. 1008, § 6(a), eff. Sept. 1, 1997. *See Yates Ford, Inc. v. Ramirez*, 692 S.W.2d 51, 53-54 (Tex. 1985).

obligations" under Article 9 and are protected from bifurcation and cramdown under the hanging paragraph.

C. Commercial Practice and Public Policy

Since all decisions interpreting commercial law have the capacity to facilitate or impair commercial activity, courts should be sensitive to commercial practice when they are interpreting federal and state statutes. The commercial practice, in this case, supports the proposition that including negative equity, gap insurance, and extended warranty coverage into a new contract creates a purchase-money security interest. So far as one can tell from reading the cases, the law review literature, and the contracts, the consumer and creditor parties to these transactions treat these charges in exactly the same way as every other part of the debt. They regard it as secured by the newly-sold vehicle in exactly the same way as every other part of the debt. Presumably, Dale chose this mode of financing her debt over other alternatives because she was charged no interest on the financing she obtained from the dealer. This was undoubtedly far below the rate she would have paid had she borrowed the money on an unsecured basis from a bank or finance company.

In evaluating the commercial practice that underlies these cramdown cases, one should remember that these debtors are always employed (otherwise they would not be in Chapter 13), and are always the owners of vehicles. These cases do not involve powerless consumers who must accept anything a creditor offers. Here, the dealer's financing offer was knowingly, and quite understandably, accepted by Dale.

Dale traded in her used vehicle for a new 2006 Ford pickup truck; she bought the new vehicle less than 9 months before she filed in Chapter 13 and after she had made only 8 payments on the Contract. The dealer's willingness to finance the negative equity of $6,260 on her used vehicle enabled her to complete the deal as she chose. It undoubtedly enabled her to finance the $6,260 advance at a better annual percentage rate than she could have obtained elsewhere. In any case, it facilitated her purchase of the new vehicle that she was under no obligation to purchase.

It is a basic principle of American commercial law—learned from Karl Llewellyn, father of the Uniform Commercial Code—that the law should follow practice, not the other way around. This principle is particularly powerful where the practice appears to have been freely chosen by parties who had other alternatives. *See* Tex. Bus. & Comm. Code Ann. § 1.103 (Vernon 2002) (The UCC "must be liberally construed and applied to promote its underlying purposes and policies," including "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties").

CONCLUSION

The words, the statutory history, the Congressional intent, the analogies to the federal Truth in Lending law, and the breadth of the "purchase-money" umbrella under Texas Uniform Commercial Code direct this Court to affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,754 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain the count and it is Microsoft Word 2003.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Circuit Rule 32.1, and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in Microsoft Word 2003 in 14 point Times New Roman font (footnotes in 12 point Times New Roman font).

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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DATED December 31, 2008

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I hereby certify that the document submitted herewith in digital form to the Clerk and counsel is, with the exception of signatures, an exact copy of the written document filed with the Clerk. I further certify that the digital submission has been scanned for viruses using the following program: McAfee VirusScan Enterprise Workstation (Version 8.0.0.1039), all updated not earlier than December 31, 2008 at 9:25:10 a.m. and that, according to said program, the submission is free of viruses.

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I hereby certify that on December 31, 2008, two true and correct paper copies and one digital copy of the above and foregoing *Amicus Curiae* Brief were mailed and/or e-mailed to:

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