

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

IN RE LISA LYNNE HERNANDEZ-SIMPSON;  
LINDA GRACE WALLACE; BRETT BURGESS;  
JANICE M. BURGESS; CHRISTINE A. PARKER;  
MICHAEL SCHEERER and GUADALUPE SCHEERER,

Debtors.

---

LISA LYNNE HERNANDEZ-SIMPSON;  
LINDA GRACE WALLACE; CHRISTINE A. PARKER;  
MICHAEL SCHEERER and GUADALUPE SCHEERER,

Appellants,

and

BRETT BURGESS and JANICE M. BURGESS,

Appellants/Cross-Appellees,

vs.

CITIFINANCIAL AUTO,

Appellee,

and

FORD MOTOR CREDIT COMPANY,

Appellee/Cross-Appellant.

---

Appeal From the United States District Court For the District of Kansas

Hon. Julie A. Robinson, District Court Judge

District Court Case Nos. 06-2527-JAR, 06-2528-JAR,  
06-2530-JAR, 06-2531-JAR, 07-2085-JAR

---

AMICUS BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION  
AND NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
IN SUPPORT OF CROSS-APPELLANT FORD MOTOR CREDIT COMPANY'S  
REQUEST FOR REVERSAL ON NEGATIVE EQUITY ISSUE

---

Thomas J. Lasater - #11440 (KS)  
FLEESON, GOING, COULSON & KITCH, L.L.C.  
1900 Epic Center, 301 N. Main  
Wichita, Kansas 67202  
(316) 267-7361

James J. White - #P22255 (MI)  
625 South State Street  
Ann Arbor, Michigan 48109  
(734) 764-9325

## **CORPORATE DISCLOSURE STATEMENT**

The American Financial Services Association and National Automobile Dealers Association are trade associations. Neither organization has a parent company and there are no publicly held companies that hold 10% or more of an interest in either organization.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iv
IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE .....	2
I. IDENTITY AND INTEREST OF AMICUS AMERICAN FINANCIAL SERVICES ASSOCIATION .....	2
II. IDENTIFY AND INTEREST OF AMICUS NATIONAL AUTOMOBILE DEALERS ASSOCIATION .....	3
III. SOURCE OF AUTHORITY TO FILE AMICUS BRIEF .....	3
STATEMENT OF ISSUES .....	4
SUMMARY OF ARGUMENT .....	5
ARGUMENT AND AUTHORITIES .....	8
I. THE LANGUAGE OF THE STATUTE AND THE CONGRESSIONAL PURPOSE FAVOR FORD CREDIT .....	8
A. Congress' Purpose .....	8
B. Congress' Language .....	11

C.	Both The Language and Congress' Purpose Support a Reading Favorable to Ford Credit .....	14
1.	Excluding Certain Creditors .....	14
2.	"Purchase-money Security Interest" Is Broader Than "Principal Balance" .....	15
II.	THE DEFINITIONS IN FEDERAL TRUTH IN LENDING LAW AND REGULATIONS SUPPORT FORD CREDIT .....	18
III.	STATE LAW, COMMERCIAL PRACTICE AND PUBLIC POLICY AFFIRM FORD CREDIT'S READING .....	20
A.	The Uniform Commercial Code .....	20
B.	Commercial Practice and Public Policy .....	23
	CONCLUSION .....	25
	CERTIFICATE OF COMPLIANCE .....	27
	DIGITAL SUBMISSION CERTIFICATE .....	28
	CERTIFICATE OF SERVICE .....	29

## TABLE OF AUTHORITIES

### CASES:

<i>Fuller v. Norton</i> , 86 F.3d 1016 (10th Cir.1996) .....	22
<i>General Motors Acceptance Corp. v. Peaslee</i> , 373 B.R. 252 (W.D.N.Y. 2007) .....	17 22-23
<i>Gustafson v. Alloyd Co.</i> , 513 U.S. 561 (1995) .....	22
<i>In re Weiser</i> , No. 07-40174, 2007 WL 4570917 (Bankr. W.D. Mo. Dec. 18, 2007) .....	23
<i>Quality Tooling v. United States</i> , 47 F.3d 1569 (Fed. Cir. 1995) .....	18
<i>Smith v. Midland Brake, Inc.</i> , 180 F.3d 1154 (10 <sup>th</sup> Cir. 1999) .....	22

### FEDERAL STATUTES, REGULATIONS AND RULES:

12 C.F.R. Pt. 226, Supp. I, ¶ 18(j)-3 .....	18
12 C.F.R. § 226.18(b) .....	12,20
15 U.S.C. § 1600, <i>et seq.</i> .....	18
16 C.F.R. § 444.2(a)(4) .....	14
64 Fed. Reg. 16614-01 .....	18-19
Bankruptcy Code § 1325(a) .....	2,4,5,10 13-14

Bankruptcy Code § 506(5) .....	13
Bankruptcy Code § 522(f)(1)(B) .....	14
FED. R. APP. P. 29(a) .....	3
FED. R. APP. P. 32(a)(7)(C) .....	27

**FEDERAL LEGISLATIVE HISTORY:**

<i>Bankruptcy Abuse Prevention and Consumer Protection Act of 2001: Hearings Before the Committee on the Judiciary, House of Representatives, 107th Cong. 371-72 (2001)</i> .....	11
H.R. 3150, 105th Cong. § 128 (1998) .....	11
H.R. REP. NO. 106-970 (2000) (CONF. REP.) .....	13
H.R. REP. NO. 107-617 (2002) (CONF. REP.) .....	17
S. REP. No. 105-253 (1998) .....	12
S. REP. No. 106-49 (1999) .....	13

**STATE STATUTES AND REGULATIONS:**

KAN. ADMIN. REG § 75-6-26 .....	20
KAN. STAT. ANN. § 16a-6-117 .....	20
KAN. STAT. ANN. § 84-1-102(1) .....	25
KAN. STAT. ANN. § 84-1-102(2)(b) .....	25
KAN. STAT. ANN. § 84-9-103(a)(1) .....	21

KAN. STAT. ANN. § 84-9-103(a)(2) .....	21
KAN. STAT. ANN. § 84-9-103(b)(1) .....	21
KAN. STAT. ANN. § 84-9-103, cmt. 3 .....	21-22

**OTHER AUTHORITIES:**

FDIC Supervisory Insights, <i>The Changing Landscape of Indirect Automobile Lending</i> , June 23, 2005 .....	17
Timothy Egan, <i>Newly Bankrupt Raking in Piles of Credit Offers</i> , N.Y. TIMES, Dec. 11, 2005, at Section 1 .....	10
UCC § 9-103 cmt. 3 .....	17

Nos. 07-3173 & 07-3187

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

IN RE LISA LYNNE HERNANDEZ-SIMPSON, et al.,  
Debtors.

---

LISA LYNNE HERNANDEZ-SIMPSON, et al.,  
Appellants/Cross-Appellees,

vs.

CITIFINANCIAL AUTO and FORD MOTOR CREDIT COMPANY,  
Appellees/Cross-Appellant.

---

AMICUS BRIEF OF AMERICAN FINANCIAL SERVICES ASSOCIATION  
AND NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
IN SUPPORT OF CROSS-APPELLANT FORD MOTOR CREDIT COMPANY'S  
REQUEST FOR REVERSAL ON NEGATIVE EQUITY ISSUE

---

The American Financial Services Association and the National Automobile Dealers Association submit this amicus brief in support of cross-appellant Ford Motor Credit Company. Specifically, amici support Ford Motor Credit Company's request, in the case involving the Burgess debtors, that this Court reverse the District Court's determination that "negative equity" financed as part of a new vehicle purchase is not included in the seller's purchase money security interest (PMSI).



**IDENTITY AND INTEREST OF AMICI CURIAE  
AND SOURCE OF AUTHORITY TO FILE**

**I.  
IDENTITY AND INTEREST OF AMICUS  
AMERICAN FINANCIAL SERVICES ASSOCIATION**

The American Financial Services Association (AFSA) is the national trade association for the consumer credit industry protecting access to credit and consumer choice. The Association encourages and maintains ethical business practices and supports financial education for consumers of all ages. AFSA has provided services to its members for over ninety 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.

The AFSA membership has a vital interest in the outcome of this case. AFSA members primarily represent motor vehicles installment sale financiers. The 2005 amendments to section 1325(a) of the Bankruptcy Code added an unenumerated, hanging paragraph at the end of the 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 whether a creditor's claim is covered by the hanging paragraph where a portion of the financing is used to payoff negative equity from a trade-in vehicle.

**II.**  
**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 November 27, 2007, there were 20,899 franchised motor vehicle dealers in the United States. Of those, 19,307 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 amicus curiae to advocate interpretations of federal and state statutes that will advance the interests of its members as a group.

NADA and its members have a substantial interest in this litigation, not only because it will impact franchised motor vehicle dealers in Kansas, but also because it may impact motor vehicle dealers across the country.

**III.**  
**SOURCE OF AUTHORITY TO FILE AMICUS BRIEF**

Pursuant to FED R. APP. P. 29(a), AFSA and NADA requested consent of the parties to this appeal to file an amicus brief in support of Ford Motor Credit

Company. Such consent has been received from Mr. David A. Reed, counsel for appellants/cross-appellees and Mr. Charles R. Hay, counsel for appellees/cross-appellant.

### **STATEMENT OF ISSUES**

AFSA and NADA adopt the Statement of the Issues in the Principal and Response Brief of Appellee and Cross-Appellant Ford Motor Credit Company ("Ford Credit") and Response Brief of Appellee Citifinancial Auto ("Citi") filed with this Court on February 13, 2008. The defined terms used in Ford Credit's opening brief filed with this Court are used with the same meaning in this Amicus Brief.

AFSA and NADA also concur with the arguments made by Ford Credit and Citi with respect to the issue raised in the Debtors' appeal—whether Congress repealed the requirement that the debtor pay interest on a secured claim by the enactment of the "hanging paragraph" to 11 U.S.C. §1325(a). AFSA and NADA believe that Congress did not repeal this requirement by the enactment of the hanging paragraph. This Amicus Brief, however, will address only the issue raised in Ford Credit's cross-appeal in the *Burgess* case—whether a seller of a motor vehicle has a purchase-money security interest under the hanging paragraph when, as part of the sale of the vehicle, the purchaser trades in another vehicle and the seller advances sums to discharge a pre-existing indebtedness on the trade-in vehicle.

## **SUMMARY OF ARGUMENT**

The question raised on appeal is whether the District Court erred in finding that the Ford Credit's security interest in the Burgesses' vehicle did not constitute a "purchase-money security interest" as that term is used in Section 1325(a) of the Bankruptcy Code, to the extent the seller advanced sums to pay off the unpaid indebtedness on the Burgesses' trade-in vehicle. Amici Curiae, AFSA and NADA, believe that the District Court erred in this regard and this Court should therefore reverse the decision of the District Court on this issue.

This case is a byproduct of the 2005 amendments to the Bankruptcy Code. Those amendments are titled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and are known to bankruptcy disciples as "BAPCPA." Prior to 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" or "lien stripping," 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 entire security interest is "purchase-money," cramdown is prohibited. As noted above, the issue has caused a significant split among courts and commentators. As of yet, the issue has not been addressed by any circuit court although several such appeals, including this one, are pending.

So what is so hard about "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 more quickly 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 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 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.

Now there is a problem. Is a security interest that secures both the sticker price on the new car and the remaining balance on the old car regarded as a "purchase-money security interest?" The Burgesses, of course, say "no." Ford Credit says "yes." The District Court held that the security interest covering the Burgesses' vehicle was not a purchase-money security interest and was therefore not entitled to the new protection in BAPCPA against cramdown to the extent the dealer advances sums to repay the negative equity on the Burgesses' trade-in vehicle.

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' Purpose**

As its name proclaims ("Bankruptcy Abuse Prevention") the 2005 Act was designed both to make it more difficult for consumers to cancel their debt and to require debtors with means to repay their bills. It came at the end of a twenty-year spurt 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, and cleared both houses of Congress in the same form twice. Once it even reached the President's desk, only to suffer President Clinton's pocket veto.

The opponents in Congress were as persistent and clever in opposition to the Act as the proponents were determined and united in support.

Among the principal creditor advocates for the bill were credit card companies.<sup>1</sup> 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 7s are "no asset" cases. A "no asset" debtor shields all of his assets by smart use of the exemption laws and so 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.

---

<sup>1</sup> Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Offers*, N.Y. TIMES, Dec. 11, 2005, at Section 1.



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 probability of taking from one creditor and giving to another without any change in the debtor's status. The provision in Section 1325 that is the subject of this case was probably 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 its value. So 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 5-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 served by a decision in favor of Ford Credit.

## **B. Congress' 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 on 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.) (emphasis added).

As finally enacted, the Abraham amendment is an unnumbered "hanging paragraph" attached to Section 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' Purpose Support a Reading Favorable to Ford Credit**

There are two notable insights buried within Congress' choice of words and in the progression from the early House language to the words that are now part of Section 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, 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 Bankruptcy Code § 522(f)(1)(B), avoiding nonpossessory nonpurchase-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 all—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 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*, not to a type of debt.

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, and negative equity 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 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.<sup>2</sup> 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.

---

<sup>2</sup> *See, e.g.*, FDIC Supervisory Insights, *The Changing Landscape of Indirect Automobile Lending*, June 23, 2005.

And it cannot be said that the cramdown provision on motor vehicles traveled below the Congress' radar. The topic was controversial; as shown in Section I. B. above, the provision was modified several times in different ways.<sup>3</sup> And, while it was one of the continuing points of dispute between the debtor and the creditor interests between 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 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 has been recognized by one of the federal district courts to address the issue, "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]." *GMAC v. Peaslee*, 373 B.R. 252, 261 (W.D.N.Y. 2007).

---

<sup>3</sup> *See., e.g.*, H.R. REP. No. 107-617 (2002) (Conf. Rep.).



**II.**  
**THE DEFINITIONS IN 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.<sup>4</sup> The Truth in Lending Act (TILA) (15 U.S.C. §1600, *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 financiers 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)-3). The Staff Interpretations define the Total Sale Price to include negative equity as follows:

---

<sup>4</sup> 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.").

*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.*** (emphasis added) Alternatively, the creditor may reflect a down payment 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 down payment 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 down payment 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.

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 (12 C.F.R. § 226.18(b)) requires that negative equity amounts be shown as part of the "Amount Financed." 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 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 with the cash price is a direction to secure it with a "purchase-money security interest." By reference, Kansas has adopted this view as to the treatment of negative equity in automobile sales and financing transactions. *See* KAN. STAT. ANN. 16a-6-117 and KAN. ADMIN. REGS. 75-6-26 (adopting provisions of TILA and Regulation Z).

### **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, the 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 Kansas or any other state. It is therefore tantamount to uniform federal law on this issue.

The Kansas 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." KAN. STAT. ANN. § 84-9-103(b)(1). "Purchase-money collateral" is defined as "goods . . . that secur[e] a purchase-money obligation incurred with respect to that collateral." KAN. STAT. ANN. § 84-9-103(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." KAN.. STAT. ANN. § 84-9-103(a)(2).

Comment 3 to KAN. STAT. ANN. § 84-9-103 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.<sup>5</sup>

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

(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 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

---

<sup>5</sup> 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—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 (10<sup>th</sup> 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 (10<sup>th</sup> Cir.1996)).

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).

The current commercial practice, discussed below, recognizes 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. *See, e.g., In re Weiser*, No. 07-40174, 2007 WL 4570917, at \*3 (Bankr. W.D. Mo. Dec. 18, 2007) (finding a “close nexus” where “the rolling in of the negative equity was integral to the sale, such that one would not take place without the other”).

## **B. 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 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 the negative equity portion of the new debt 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 the Burgesses choose this mode of financing their debt over other alternatives, particularly since the rate they were charged in this transaction was below the rate they would have paid had they 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 the Burgesses.

The Burgesses traded in their used vehicle on a new 2004 Ford Taurus; they bought the Ford Taurus less than 910-days years before they filed in Chapter 13. The dealer's willingness to finance the negative equity of \$7,898 on their used vehicle enabled them to complete the deal as they chose. It undoubtedly enabled them to

finance the \$7,898 advance at a better annual percentage rate than they could have obtained elsewhere. In any case, it facilitated their purchase of the new vehicle that they were under no compulsion 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. That principle is particularly powerful where the practice appears to have been freely chosen by parties who had other alternatives. *See* KAN. STAT. ANN. 84-1-102(1) and (2)(b) (UCC to be liberally construed 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 Kansas Uniform Commercial Code direct this Court to reverse the decision of the District Court.

Respectfully submitted,

James J. White - #P22255 (MI)  
625 South State Street  
Ann Arbor, Michigan 48109  
Telephone: (734) 764-9325  
Facsimile: (734) 647-7349



-and-

/s/ Thomas J. Lasater

Thomas J. Lasater - #11440 (KS)

Lyndon W. Vix - #12375 (KS)

FLEESON, GOOING, COULSON & KITCH, L.L.C.

1900 Epic Center, 301 N. Main

Wichita, Kansas 67202

Telephone: (316) 267-7361

Facsimile: (316) 267-1754

e-mail: [tlasater@fleeson.com](mailto:tlasater@fleeson.com)

[lvix@fleeson.com](mailto:lvix@fleeson.com)

*Counsel for Amici Curiae American Financial  
Services Association and National Automobile  
Dealers Association*

**CERTIFICATE OF COMPLIANCE**

As required by FED. R. APP. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,788 words.

I relied on my word processor to obtain the count and it is WordPerfect 10.

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.

/s/ Lyndon W. Vix

Lyndon W. Vix

## **DIGITAL SUBMISSION CERTIFICATE**

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 programs:

Symantec Anti-Virus Corporate Edition, version 10.1.4.4000

Symantec Mail Security for Microsoft Exchange v. 4.6

SonicWall Email Security System 300 with firmware 6.0.1.9159

McAfee and SonicWALL Time Zero E-mail Anti-virus

Email Compliance Subscription

all updated not earlier than February 22, 2008, and that, according to said programs, the submission is free of viruses.

/s/ Lyndon W. Vix

Lyndon W. Vix

## **CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2008, two true and correct copies of the above and foregoing Appellee's Brief was mailed and/or e-mailed to:

David A. Reed  
ATTORNEY AT LAW  
3137 State Avenue  
Kansas City, Kansas 66102  
[bklaw@swbell.net](mailto:bklaw@swbell.net)

Charles R. Hay  
FOULSTON SIEFKIN LLP  
Bank of America Tower, Ste. 1400  
534 S. Kansas Ave.  
Topeka, Kansas 66603  
[dhay@foulston.com](mailto:dhay@foulston.com)

William M. Burke  
1811 Tanager Drive  
Costa Mesa, California 92626

and that on the same date, the original was e-mailed and mailed (along with seven copies) via United States Postal Service to:

Clerk of the United States Court of Appeals  
for the Tenth Circuit  
Byron White U.S. Courthouse  
1823 Stout Street  
Denver, CO 80257  
e-mail: [esubmission@ca10.uscourts.gov](mailto:esubmission@ca10.uscourts.gov)

/s/ Lyndon W. Vix  
Lyndon W. Vix