

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

No. 07-cv-6037

GENERAL MOTORS ACCEPTANCE CORP.
Creditor/Appellant,

v.

FAITH ANN PEASLEE,
Debtor/Appellee

**Brief of Amicus Curiae National Association of
Consumer Bankruptcy Attorneys**

Appeal from the United States Bankruptcy Court for the
Western District of New York

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STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *In re Scarborough*, 461 F.3d 406 (3rd Cir. 2006); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The 2005 amendments to section 1325(a) 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. 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 pay off negative equity from a trade-in vehicle.

ARGUMENT

I. **In light of longstanding bankruptcy policies, the provisions of the “hanging paragraph” of section 1325(a) should be construed narrowly.**

The two main objectives of the Bankruptcy Code are to provide a fresh start for the debtor and the fair and orderly repayment of creditor to the extent possible. To foster a debtor’s fresh start, the Bankruptcy Code generally permits debtors to modify the rights of secured and unsecured creditors. 11 U.S.C. § 1322(b)(2). To ensure the fair repayment of creditors longstanding bankruptcy policy favors equality of distribution among like creditors. *See* 11 U.S.C. §§ 1322(a)(3); 1322(b)(1).

Debtor’s frequently modify the rights of secured creditors by splitting, or “bifurcating,” the creditor’s claim into two parts: the secured portion which is equal to the value of the collateral and an unsecured portion represented by any amount owed over the value of the collateral. 11 U.S.C. § 506. The 2005 enactment of the “hanging paragraph” at the end of section 1325(a) arguably¹ created an exception to this common method of dealing with secured creditors. The exception at issue in this case, however, is carefully limited 1) in time, 2) by type and use of the goods, and 3) by the type of claim protected. Specifically, the debt must have been incurred within 910 days of the filing of the petition, 2) the collateral must be a motor vehicle acquired for personal use of the debtor and 3) the creditor must have a purchase money security interest securing the debt that is the subject of the claim. 11 U.S.C. § 1325(a)(9).

¹ Courts have significantly disagreed on the meaning of the hanging paragraph which makes section 506 inapplicable to certain claims. *See, e.g., In re Carver*, 338 B.R. 521 (Bankr. S.D. Ga. 2006)(910 car claims not “allowed secured claims”); *In re Brooks*, 344 B.R. 417 (Bankr. E.D.N.C. 2006)(910 car claims are allowed secured claims in the full amount of the debt); *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006)(910-car creditor does not have an “allowed secured claim” but has an allowed claim for the entire prepetition debt without post-petition interest).

As an exception to the general rules favoring equal treatment of creditors and permitting debtors to modify claims, the elements of the hanging paragraph should be construed narrowly. *See Howard Delivery Serv., Inc. v. Zurich Am. Ins., Co.*, 126 S. Ct. 2105, 2116 (2006)(equal distribution objective underlying the Bankruptcy Code requires that preferences be tightly construed)(citations omitted); *Trustees of Amalgamated Ins. Fund v. McFarlin's Inc.*, 789 F.2d 98 (2d Cir. 1986)(“Because presumption in bankruptcy is that the debtor’s limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed.”). Exceptions to general bankruptcy rules, including those related to dischargeability,² priority payments,³ and the automatic stay,⁴ have all been narrowly construed to promote the fundamental underlying purposes of the Bankruptcy Code. Similarly, the hanging paragraph’s preference in favor of a certain class of creditors should be strictly interpreted. Every claim granted protection under the paragraph necessarily reduces funds available to pay unsecured creditor and may diminish the recovery of other secured creditors.⁵ *See Howard Delivery*, 126 S. Ct. at 2116.

² *See, e.g., In re Kaspar*, 125 F.3d 1358, 1361 (10th Cir. 1997)(“[e]xceptions to discharge are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor’s favor), *citing In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986).

³ *See, e.g., Trustees of Amalgamated Ins. Fund v. McFarlin's Inc.*, 789 F.2d 98 (2d Cir. 1986); *In re HLM Corp.*, 183 B.R. 852 (D. Minn)(presumption exists favoring equal distribution of debtor’s limited resources and statutory priorities within the Bankruptcy Code should be narrowly construed), *aff'd*, 62 F.3d 224 (8th Cir. 1995).

⁴ *See, e.g., In re Miller*, 454 F.3d 899 (8th Cir. 2006)(“Section 549(c) serves as an exception to the automatic stay imposed when a bankruptcy petition is filed, and as such, it should be construed narrowly”).

⁵ Distribution of the debtor’s assets in bankruptcy is almost always a zero-sum game because the claims against the debtor typically far exceed the value of the estate.

The language of the hanging paragraph, with its clearly defined time frame and specification of covered claims, demonstrates that Congress was concerned with the rapid initial depreciation of motor vehicles securing debt. Creditor, however, seeks to expand the very narrow exception created by Congress far beyond its intended scope—by converting the unsecured negative equity from a trade-in vehicle into a purchase money obligation that is protected from bifurcation. Despite Creditor’s suggestion to the contrary, there is simply no legislative history with respect to the hanging paragraph that supports the Creditor’s position that it should receive a windfall from financing unsecured antecedent debt along with the purchase price of the new vehicle.⁶ Indeed, a ruling in favor of Creditor would “transform knowingly refinanced unsecured negative equity debt into secured debt not supported by collateral value, and then require it to be paid in full to the detriment of other unsecured creditors.”⁷

⁶ The legislative history merely mirrors the language of the statute. For example, the House of Representatives' Judiciary Committee Report concerning the hanging paragraph summarizes the change as follows: Section 306(b) adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506 does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days preceding the filing of the petition. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case. H.R. Rep. 109-31, Pt. 1, at 71-72, 109th Cong., 1st Sess. (2005).

⁷ *In re Peaslee*, 358 B.R. 545, 556 (Bankr. W.D.N.Y. 2006).

II. Terms used in consumer protection statutes, such as the federal Truth In Lending Act and the Georgia MVSFA, enacted for entirely different purposes than the UCC, should not control the meaning of “purchase money obligation.

A. Funds advanced to pay off negative equity for a trade-in vehicle do not constitute a purchase money obligation.

The vast majority of courts considering whether funds advanced to pay off negative equity on a trade-in vehicle constitute a purchase money obligation have concluded that they do not.⁸ In New York, as in most other states, the definition of a purchase money security interest is contained in § 9-103 of the Uniform Commercial Code. N.Y. U.C.C. § 9-103. The starting point for defining a “purchase money security interest” is a “purchase money obligation” which means “an obligation of an obligor incurred as all or part of the price of the collateral or for given value to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.” N.Y. U.C.C. § 9-103(a)(2), (b). The terms “price” and “value given” in § 9-103 are nearly synonymous. The former is used in credit sales transactions in which the seller extends credit to the buyer and the latter is used in loan transactions in which a third-party lender loans funds to the buyer to purchase goods from the seller. By the plain terms of the § 9-103, a purchase-money obligation in a credit sale can be part of the price of the collateral,

⁸ See *Citifinancial Auto v. Hernandez-Simpson*, 2007 WL 1464258 (D.Kan. May 17, 2007)(excess trade-in balance is an unsecured antecedent debt which is not entitled to purchase money treatment under § 1325(a)); *In re Acaya*, 2007 WL 1492475 (Bankr. N.D. Cal. May 18, 2007); *In re Bray*, 2007 WL 1095435 (Bankr. W.D. Tenn. Apr. 11, 2007)(financing of negative equity not included within creditor’s purchase money security interest); *In re Westfall*, 2007 WL 981730 (Bankr. N.D. Ohio Mar. 30, 2007); *In re Price*, 2007 WL 664534 (Bankr. E.D.N.C. Mar. 6, 2007); *In re Peaselee*, 358 B.R. 545 (Bankr. W.D.N.Y. 2006). Even the *Graupner* court in Georgia noted the “seemingly obvious conclusion” that Creditor “does not hold a purchase money security interest”. *In re Graupner*, 356 B.R. 907, 917 (Bankr. M.D. Ga. 2006).

or it can be the whole price of the collateral, but is not an obligation that is greater than the price of the collateral.

The price of the collateral for purposes of defining a “purchase money obligation” may include obligations for expenses incurred in connection with acquiring right in the collateral, sales taxes, duties, finance charges, freight charges, costs of storage interest, demurrage, administrative charges, expenses of collection and enforcement, and attorney’s fees. N.Y. U.C.C. § 9-103 (Comment 3). Price may also include other obligations that are similar to those items on the enumerated list. *Id.* The pay off of antecedent debt is not included in this list, nor is it an obligation similar to those provided.⁹

The creditor’s suggestion that negative equity fits squarely within the term “expenses” is not only against the overwhelming weight of authority, it is also absurd. Paying off negative equity is no more closely related to the purchase price than funds advanced to the borrower to pay off, for example, other consumer debt to satisfy a creditor’s underwriting requirements. Does the payoff of \$10,000 in unrelated consumer debt become an “expense incurred in connection with acquiring rights in the collateral” if the creditor both requires the debt to be paid off as a condition of extending financing and offers to give the debtor the funds for that purpose? Of course, not. Similarly, a creditor’s acceptance of a trade-in vehicle on the condition that the negative equity be paid off and the creditor’s willingness to extend the funds to do so does not make it an “expense incurred” to acquire rights in a new vehicle. The creditor’s requirement that the

⁹ *Citifinancial Auto v. Hernandez-Simpson*, 2007 WL 1464258 (D.Kan. May 17, 2007); *In re Bray*, 2007 WL 1095435 (Bankr. W.D. Tenn. Apr. 11, 2007); *In re Westfall*, 2007 WL 981730 (Bankr. N.D. Ohio Mar. 30, 2007); *In re Price*, 2007 WL 664534 (Bankr. E.D.N.C. Mar. 6, 2007).

debtor retire an existing obligation and providing the debtor the means to do so, does not change the “price” of the new vehicle debtor seeks to purchase. The financing of negative equity may be convenient but it is not necessary to acquire rights in the new collateral.

B. The definition of “total sale price” under the federal Truth In Lending Act has no bearing on the definition of “purchase money obligation” under the UCC.

In 1968, Congress enacted the Truth In Lending Act (“TILA”) as part of the Consumer Credit Protection Act. Pub. L. No. 90-321 (May 29, 1968). TILA is primarily a disclosure statute that compels creditors extending credit to consumers to disclose the cost of the credit using a standardized format and terminology defined by the Act itself and by the Federal Reserve Board. The primary goal of TILA is to promote the informed use of credit and encourage comparison shopping by prescribing a uniform standard for disclosing the true cost of credit. In order to achieve this goal, TILA adopts an expansive view of the cost of credit, which includes negative equity, insurance products, and any other cost associated with borrowing money.¹⁰

- i. “Total sale price” describes the amount a buyer would pay in exchange for the ability to pay an obligation over time, not the actual price of the item purchased.

The “total sale price” is not, and has never been, a term that defines a “purchase money security interest” or “purchase money obligation” under the UCC. Rather, it used expansively to advise consumers of the true cost of credit in credit sale transactions.

¹⁰ The cost of credit under TILA is referred to as the finance charge, and it includes “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.” 12 C.F.R., § 226.4(a).

Under the original version of TILA, credit sellers were required to disclose the “deferred payment price” which represented the total amount the borrower would pay in return for the ability to pay the obligation in installments. 12 C.F.R. § 226.8(c)(8)(ii)(1980). *See McGowan v. King, Inc.*, 569 F.2d 845 (5th Cir. 1978)(failure to use term “deferred payment price” violated Old. 12 C.F.R. § 226.8(c)(8)(ii)). The term “deferred payment price” was later changed to “total sale price” but the meaning remains the same. The “total sale price” is defined as the sum of 1) the cash price; 2) amounts that are financed by the creditor and are not included in the finance charge (e.g., title fees, credit insurance premiums); and, 3) the finance charge. 12 C.F.R. § 226.18(j). Notably this definition distinguishes between the “cash price” and the “total sale price.” Under the Federal Reserve Board’s Official Supplemental Staff Commentary the financing of negative equity on a trade-in vehicle is included in the “total sale price,” (i.e., the true cost of credit), but it is not included in the cash price of the new automobile. *See Official Staff Commentary § 226.2(a)(18)-3 (Supp. 1 to Part 26)*(describing how to calculate the “total sale price” for a vehicle with a “cash price” of \$20,000, negative equity from a trade-in of \$2,000, a down payment of \$1500).

- ii. The term “total sale price” only applies to credit sale transactions and not to enabling loans which may be considered purchase money obligations under the UCC.

In a credit sale, a transaction in which the seller extends the credit, the “total sale price” must be disclosed using that term. Disclosure of the “total sale price” is not required, and is not relevant, to loan transactions. 12 C.F.R., § 226.2(a)(16). Since the term “total sale price” is not applicable to a large category of potential purchase money

transactions under the UCC, (i.e, loan transactions), it is difficult, if not impossible, to see how the term is equivalent to purchase money obligation under the UCC.

In attempting to link “total sale price” to “purchase money obligations,” Creditor erroneously states that disclosure of the “total sale price” is required for all “closed end loans.” *See* Creditor Brief at 18. This is simply an inaccurate statement of the law.

- iii. Creditor’s are permitted to choose the method by which “total sale price” is determined, with one method resulting in a higher “total sale price.”

In 1999, the Federal Reserve Board issued Commentary to address situations in which the borrower makes a down payment and trades in a vehicle with negative equity.¹¹ The Federal Reserve Board’s Supplemental Staff Commentary allows the creditor to use either a “netting” or “non-netting” approach when dealing with negative

¹¹ Official Staff Commentary § 226.2(a)(18)-3 (Supp. 1 to Part 26) provides: *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 downpayment 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.

equity and down payments.¹² The “netting” method results in a lower “total sale price” than if the netting was not performed. Based on the example in the Staff Commentary the netting approach would yield a “total sale price” of \$23,500 and the non-netting approach would yield a “total sale price” of \$25,000.¹³

Creditor attempts to link the treatment of negative equity in the Commentary to “purchase money obligations” by conveniently omitting critical language from the Commentary. Creditor Brief at 17-18, n.15. However when the comment is viewed as a whole, it is clear that purchase money obligations under the UCC cannot depend on the “total sale price” as used in TILA where the creditor can choose whether the “total sale price” should be higher or lower in transactions involving the trade-in of vehicles with negative equity.

C. Similarly, Motor Vehicle Sales Financing Acts are a wholly inappropriate standard for defining “purchase money obligations” and “purchase money security interests.”

Like the Truth In Lending Act, the New York Motor Vehicle Retail Instalment Sales Act (MVRISA) is a consumer protection statute that was primarily designed to require sellers to disclose costs of credit sales transactions involving motor vehicles. In addition, MVRISA substantively limits the cost of such transactions. The New York MVSA was originally enacted in 1956.¹⁴ From its enactment until today, no New York court has ever suggested that provisions of the UCC should be interpreted based on the

¹² Netting” means that the cash down payment would be applied, or “netted” against the negative equity.

¹³ The “total sale price” is the sum of the “cash price” [\$20,000] plus other charges [\$500 prior lien pay-off in the “netted” approach] or [\$2,000 lien payoff in the non-netted approach] plus the finance charge. See 12 C.F.R. § 226.18(j).

¹⁴ N.Y. Laws 1956, c. 633 § 1.

definition of terms used in this consumer protection statute which was enacted to promote disclosure of the true cost of credit and limit finance charges.

Across the country during the late 1950s and 1960s, states enacted laws regulating the use of retail sales contracts out of concern for protection of consumers from unconscionable business practices.¹⁵ Historically, general usury statutes applied only to loans, not to sales of goods on credit.¹⁶ As a result, lenders were avoiding usury restrictions by buying consumer paper at a discount from retailers rather than issuing loans for the purchase of goods. Retail installment statutes, such as the New York MVRISA, addressed this loophole that allowed lenders to exploit unwary consumers. These special usury laws set limits on the charges assessed in credit sale transactions typically required disclosure of the cost of credit.¹⁷

Like the New York MVRISA, many of these state laws provide a definition of “cash sale price” and “time sale price,” the former being the price which would be paid if the buyer used cash or its equivalent, and the latter being the invariably higher price

¹⁵ See Retail Instalment Sales Legislation, 58 Colum. L. Rev. 854, 855 (1958)(“there have recently been expressions of concern over the rising quantity of consumer credit, deterioration in the qualify of consumer credit, and the oppressive business practices form which consumers need protection”).

¹⁶ See, e.g., *Thomas v. Knickerbocker Operating Co.*, 108 N.Y.S. 2d 234 (N.Y. Sup. Nov. 19, 1951)(“mere fact of variation between cash price and time selling price which was greater than 6 per cent did not render transaction usurious”; usury must be founded on loan or forbearance of money; installment agreement did not constitute forbearance of money); *Bryant v. Securities Inv. Co.*, 102 So. 2d 701 (Miss. 1958)(fact that time price shown in conditional sales contract for sale of automobile and cash price exceeded percentage of interest permitted by usury laws did not render contract usurious).

¹⁷ As originally enacted the New York MVRISA established three classes of motor vehicles and established a maximum credit service charge for each class. The 1980 amendments to the Act substituted the rate or rates agreed to by the retail seller and the buyer for the previous schedule of rates. N.Y. Laws 1980, c. 883 § 73.

which the buyer would pay in return for the ability to pay in installments.¹⁸ Traditionally, the difference between the time price and the cash price was not legally recognized as interest, but was instead considered a “time-price differential.” Many state statutes define the difference between the cash sale price and the time sale price as the “finance charge.”¹⁹

In 1994, New York amended its MVRISA to provide that the “cash sale price” (and concomitantly the “time sale price”) could include amounts used to pay off negative equity on a trade-in vehicle.²⁰ This amendment, which allows sellers to treat negative equity as part of the cash or time sale price, parallels the 1999 Supplemental Staff Commentary to TILA. It permits credit sellers to finance such negative equity and like TILA, instructs that such negative equity should be included in determining the cost of the credit. There is no indication in the statute or the legislative history that the 1994 amendment to the term “cash sale price” in the MVRISA was intended to modify the traditional understanding of a purchase money obligation under the UCC. *Cf. In re Acaya*, 2007 WL 1492475, *5 (Bankr. N.D. Cal. May 18, 2007).

¹⁸ See N.Y. Pers. Prop. Law § 301(4) (Time sale price is the cash sale price plus insurance, official fees, and the credit service charge).

¹⁹ See, e.g., Ga. Code Ann. § 10-1-33 (Georgia’s Motor Vehicle Sale Finance Act limits the finance charge in certain transactions)

²⁰ N.Y. Laws 1994, c. 1, § 45.

III. By its plain language the hanging paragraph at the end of section 1325(a)(9) only applies when the creditor holds a purchase money security interest with respect to the entire debt.

The starting point for the court's inquiry should be the statutory language itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31 (1989); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). In interpreting the statutory language, the court must assume that Congress said in the statute what it meant and meant in the statute what it said. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, it has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotations omitted). A result will be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999), *citing Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989). A plain reading of the statutory language makes clear that the hanging paragraph only applies when the creditor holds a purchase money security interest in the entire debt.

The new paragraph added to the end of section 1325(a)(9) (hereinafter the "hanging paragraph") states in relevant part:

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 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...

The word “debt” appears five times in the hanging paragraph. On none of those occasions is the word modified by language such as “to the extent” or “portion of.” Congress could easily have provided that the hanging paragraph applied to the extent that debt was secured by a purchase money obligation, but it did not do so. By contrast, in other sections of the Code, Congress specifically used the words “to the extent” or “any portion” to indicate applicability to all or part of a debt, claim, payment, property or lien at issue. *See, e.g.*, 11 U.S.C. § 329 (“return of any such payment, **to the extent** excessive,...”); 11 U.S.C. § 365(j)(“recovery of **any portion** of the purchase price...”); 11 U.S.C. § 506(b)(“**To the extent** that an allowed secured claim is secured by property...”); 11 U.S.C. § 506(d)(“**To the extent** that a lien secures a claim...”); 11 U.S.C. § 522(o)(3)(“**to the extent** such value is attributable to **any portion** of any property...”). “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.” *Rusello v. United States*, 464 U.S. 16, 23 104 S. Ct. 296, 300 (1983)(citation and quotation omitted). Also, “[w]here Congress knows how to say something but chooses not to, its silence is controlling.” *In re Griffith*, 206 F.3d 1389, 1394 (11th Cir. 2000)(citation and quotations omitted).

Indeed, the legislative history of the bankruptcy amendments demonstrates that Congress specifically rejected language that would have limited bifurcation if creditor’s

claims were attributable, in whole or in part, to a purchase money obligation. For example, section 122 of the Bankruptcy Reform Act of 1999 provided that “subsection (a) [of § 506] shall not apply to an allowed secured claim to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor within 5 years of filing of the petition.”(emphasis supplied). *See also* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 128 (1998). Similarly, the 1997 version of the bill provided that “Subsection (a) [of § 506] shall not apply to an allowed secured claim to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor during the 90-day period preceding the date of filing of the petition.”(emphasis supplied). Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 302(c) (1997). Surely, had Congress intended to prevent the bifurcation of claims for which creditors held a partial purchase money security interest, it could have easily done so. The change from the prior version shows that Congress did not intend for the hanging paragraph to apply to debts that consist of non-purchase money obligations. *Transcontinental & W. Air, Inc. v. Civil Aeronautics Bd.*, 336 U.S. 601, 696 (1949)(relying on legislative history to prior unenacted bill for clarification of language used in bill that was ultimately enacted). In this case, the result of applying the plain language does not produce a result that is absurd, bizarre, or demonstrably at odds with Congressional intent. If, however, Congress “enacted into law something different from what it intended, then it should amend the statute to conform to its intent.” *Lamie*, 540 U.S. at 1034.

If this court effectively rewrites the statute so that the word “debt” in the phrase “purchase money security interest securing the debt” applies to “any portion of the debt”

or “the debt, in whole or in part” then each other occurrence of the word “debt” in the section must be similarly construed. *See Ratzlaf v. U.S.*, 510 U.S. 135, 143 S. Ct. 655 (1994)(“a term appearing in several places in a statutory text is generally read the same way each time it appears”). Such judicial revisionism would potentially expand the applicability of the hanging paragraph far beyond the plain language of the statute. A broad construction of the hanging paragraph would also violate principles of statutory construction and longstanding bankruptcy policy which dictate that exceptions to general rules be construed narrowly.

CONCLUSION

For the reasons stated above, this court should affirm the bankruptcy court decision and find that the hanging paragraph of section 1325(a) is not applicable to creditor’s claim.

Respectfully submitted,
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