

No. 07-2185

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

IN RE TELEPHIUS LETOINNE PRICE AND SHAWANA DENISE PRICE,
Debtors.

WELLS FARGO FINANCIAL ACCEPTANCE,
Appellant – Cross-Appellee

— v. —

TELEPHIUS LETOINNE PRICE AND SHAWANA DENISE PRICE
Appellees – Cross-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA, No. 5:07-cv-00133

**BRIEF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS SEEKING AFFIRMANCE, IN PART, AND
MODIFICATION OF THE DISTRICT COURT DECISION**

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April 22, 2008

CORPORATE DISCLOSURE STATEMENT

Wells Fargo Financial Acceptance v. Price , No. 07-2185

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1 *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?.
NO.
2. Does party/amicus have any parent corporations? **NO.**
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? **NO.**
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
NO.
5. Is party a trade association? (amici curiae do not complete this question)
NOT APPLICABLE.
6. Does this case arise out of a bankruptcy proceeding? **Yes. To the best of NACBA's knowledge the chapter 13 trustee in this case in John F. Logan, Office of the Chapter 13 Trustee, PO Box 61039, Raleigh, NC 27661, and there is no creditors' committee.**

s/ Tara Twomey

Tara Twomey, Esq.

Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: April 22, 2008

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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 250,000 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. The answer to that question will

determine whether many debtors are able to keep, or will have to surrender, their vehicles.

SUMMARY OF ARGUMENT

The 2005 amendments created a narrow exception to the general rule under which debtors are permitted to modify the right of creditors. The exception created by the “hanging paragraph” at the end of section 1325(a) is carefully limited in time, by type and use of the goods, and by the type of claim protected. Specifically, one requirement is that the creditor must have a purchase money security interest securing the debt that is the subject of the claim.

An upside-down car is one in which in which the value of the car is less than the amount owed on it. It is not unusual for owners with longer-term loans, low or no down payments, and/or cars that are depreciating rapidly to be “upside-down.” When an owner of an upside-down car wants to trade-in that car and buy a new car, not only must he pay the purchase price of the new car, the negative equity on the old car must also be paid off. While it is common for debtors to finance the payoff of the negative equity, funds advanced to pay off negative equity for a trade-in vehicle do not constitute a purchase money obligation under the Uniform Commercial Code. Such funds are not part of the cash price of the vehicle, nor are they obligations for expenses incurred in connection with acquiring right in the collateral. The financing of negative equity may be convenient but it is not necessary to acquire rights in the new collateral.

The Creditors seek 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. A ruling in favor of Creditor on this issue paves the way for them to manipulate transactions in ways that would permit the creditor to transform an otherwise unsecured debt into one that could not be modified in bankruptcy, by simply insisting that refinancing the additional unsecured debt is a condition of granting a purchase money loan. Furthermore, the Creditor erroneously relies on definitions contained in consumer protections statutes and nonexistent legislative history to support its conclusion.

This Court should hold that the financing of negative equity does not constitute a purchase money obligation. This Court should further hold that the hanging paragraph is only applicable where the entire debt is “purchase money.” Because Creditors’ claims are not entirely purchase money, the District Court’s decision should be modified to permit debtors to bifurcate the Creditor’s entire claims pursuant to section 506.

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 to reflect what they would receive in a liquidation of the debtor’s assets. 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).

Debtors 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

¹ Courts have 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).

type and use of the goods, and 3) by the type of claim protected. Specifically, for motor vehicles, 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).

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

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).

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 since granting 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.

The language of the hanging paragraph, with its clearly defined time frame and specification of covered claims, indicates that Congress was concerned with the rapid initial depreciation of motor vehicles and other personal property securing debts incurred to purchase that property. Congress felt that the limited class of creditors identified in the hanging paragraph should not be subject to a cramdown shortly after the purchase. 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 the Creditor's suggestion to the contrary, there is simply no legislative history with respect to the hanging paragraph that supports the creditors' position that they should receive a

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.

windfall from financing unsecured antecedent debt along with the purchase price of the new vehicle.⁶ *See* Section III, *supra*. Indeed, a ruling in favor of the 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 It would also allow a creditor to manipulate a transaction in away that would permit the creditor to transform an initially unsecured debt into one that could not be modified in bankruptcy, by simply insisting that refinancing of additional unsecured debt is a condition of granting a purchase money loan.

⁶ The legislative history merely mirrors the language of the statute. For example, the House 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 72, 109th Cong., 1st Sess. (2005).

⁷ *In re Peaslee*, 358 B.R. 545, 556 (Bankr. W.D.N.Y. 2006)[Peaslee I], *rev'd by* 373 B.R. 252 (W.D.N.Y. 2007)[Peaslee II], *appeal docketed*, No. 07-3962 (2d Cir. Sept. 14, 2007).

II. Funds advanced to pay off negative equity for a trade-in vehicle do not constitute a purchase money obligation under the Uniform Commercial Code.

The 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 North Carolina, as in most other states, the definition of a purchase money security interest is contained in § 9-103 of the Uniform Commercial Code. N.C. Gen. Stat. § 25-9-103. 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.C. Gen. Stat. § 25-9-103(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

⁸ See, e.g., *In re Look*, 383 B.R. 210 (Bankr. D. Me. Mar. 6, 2008); *In re Mitchell*, 379 B.R. 131 (Bankr. M.D. Tenn. 2007); *In re Hayes*, 376 B.R. 655 (Bankr. M.D. Tenn. 2007); *In re Sanders*, 377 B.R. 836 (Bankr. W.D. Tex. 2007); *In re Acaya*, 369 B.R. 564 (Bankr. N.D. Cal. 2007); *In re Bray*, 365 B.R. 850 (Bankr. W.D. Tenn. 2007); *In re Westfall*, 365 B.R. 755 (Bankr. N.D. Ohio 2007); *In re Price*, 363 B.R. 734 (Bankr. E.D.N.C. 2007). 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), *aff’d*, *Graupner v. Nuvell Credit Corp.*, 2007 WL 1858291 (M.D. Ga. June 26, 2007).

funds to the buyer to purchase goods from the seller. *See* N.C. Gen. Stat. § 25-9-103; former § 9-107 (1962)(clearly delineating the difference between seller financed transactions and those financed by third parties). **Creditor incorrectly states that these are two alternatives and it prevails if it satisfies either prong. The prong used is based on whether the transaction is a credit sale (which uses “price”) or a loan transaction (which uses “value given to enable”).** *See* Wells Brief at 36-40. Because the transaction at issue in this case is a credit sale the only issue is whether the financed negative equity is part of the “price” of the collateral. There is no need to consider the related, but distinct inquiry into whether value was given to enable the debtor to purchase the collateral.⁹

Clearly, payments to pay off a debtor’s prior loan do not constitute part of the cash price for the vehicle. Instead Creditor relies solely on an expansive reading of the comment to § 9-103 to find that payoff of negative equity constituted an obligation for expenses incurred in connection with acquiring rights in the collateral. *See* N.C. Gen. Stat. § 25-9-103 (Comment 3). Specifically, “price” 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

⁹ At creditors urging, some courts have mistakenly attempted to apply both tests without regard to whether the transaction is a credit transaction or loan transaction. *See, e.g., In re Conyers*, 279 B.R. 576 (Bankr. M.D.N.C. 2007).

interest, demurrage, administrative charges, expenses of collection and enforcement, and attorney's fees. N.C. Gen. Stat. § 25-9-103 (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.¹⁰

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, credit card debts to satisfy a creditor's underwriting requirements. Does the payoff of \$10,000 in 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. *See, e.g., Laubach v. Fidelity Consumer Finance Co.*, 686 F. Supp. 504 (E.D. Pa. 1988)(describing a car finance transaction in which lender required Mr. Copin, a 75-year old borrower, to pay off home mortgage and liens against home and financed the entire transaction), *rev'd* 898 F.2d 907 (3d Cir. 1990)(reversed on preemption grounds). Similarly, a creditor's acceptance of a trade-in vehicle on the condition that the negative equity be paid off and the

¹⁰ *See* cases cited, *supra* note 8.

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 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.

III. 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.¹¹ 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

¹¹ No weight should be given to the fact that some state Retail Installment Sales Acts include negative equity in “total sale price.” *See* Wells Brief at 33. Like the Truth In Lending Act, Retail Installment Sales Acts are consumer protection statutes that were primarily designed to require sellers to disclose the cost of credit sales transactions. 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. *See* Retail Installment 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 quality of consumer credit, and the oppressive business practices from which consumers need protection”). Historically, general usury statutes applied only to loans, not to sales of goods on credit. 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. *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). Retail installment statutes 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. Following the lead of the Federal Reserve Board in 1999, many states added the financing of negative equity as the component of the finance charge to ensure the accurate disclosure of the true cost of the credit.

includes negative equity, insurance products, and any other cost associated with borrowing money.¹²

- A. “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. *See In re Pajot*, 371 B.R. 139, 150 (Bankr. E.D. Va. 2007)(TILA disclosure statute does not presume to address the nature or extent of security interests under state or federal law or serve to define the relative priorities of creditors). Rather, it is used expansively to advise consumers of the true cost of credit in credit sale transactions. 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

¹² 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). To determine the cost of credit, all amounts in a transaction must be categorized as either finance charges or amounts that are financed. It is for that purpose that TILA include amounts used to pay off of additional debts with the price of the item purchased.

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 amount being financed), 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).

- B. Creditors 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.¹³ The Federal Reserve Board’s Supplemental Staff Commentary allows the creditor to use either a “netting” or “non-netting” approach when dealing with negative equity and down payments.¹⁴ The “netting” method results in a lower

¹³ 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.

¹⁴ Netting” means that the cash down payment would be applied, or “netted” against the negative equity.

“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 \$25,000.¹⁵

The Official Staff Commentary makes 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. The term “total sale price” only applies to credit sale transactions and not to enabling loans that 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).

That is, under § 9-103 a seller can obtain a purchase money obligation by financing all or part of the price or a third-party may obtain a purchase money obligation by giving value that enables the debtor to acquire rights in the collateral. N.C. Gen. Stat. § 25-9-103.

The term “total sale price” as used in the Truth In Lending Act applies only in the former type of transaction, not the later. Consequently, “total sale price”

¹⁵ 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).

could only be used in determining “purchase money obligations” in seller financed transactions. The result would be significant asymmetry in defining “purchase money obligations” in credit sales and loan transactions, which would run counter to the policies underlying the protections that the U.C.C. gives to all holders of purchase money security interests.¹⁶

IV. 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

¹⁶ The transactions covered by TILA do not generally include private sales. So while under the U.C.C. a private seller may have a purchase money security interest such a seller would not be covered by these consumer protection statutes. It simply makes no sense to borrow definitions from these consumer protections statutes when they only apply to a subset of transactions covered by the U.C.C. and the hanging paragraph.

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. *See In re Look*, 383 B.R. 210, 220 (Bankr. D. Me. 2008); *In re Mitchell*, 379 B.R. at 137-40; *In re Sanders*, 377 B.R. at 858-64.

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.” *See Sanders*, 377 B.R. at 860. 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.

V. The court’s best guess as to legislative intent is insufficient to overcome the plain language of the statute.

Despite the dearth of legislative history on the hanging paragraph, creditors have routinely argued in hanging paragraph cases that Congressional intent in enacting the provision was solely to benefit creditors. *See In re Kenney*, 2007 WL 1412921 (Bankr. E.D. Va. May 10, 2007)(“Creditors argue that the hanging paragraph should always be read to provide heightened protection to 910 secured creditors, as that was the intent of Congress”); *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006)(“Wells Fargo contends that the absurdity of the result originates from the fact that the changes in the Code wrought by BAPCPA were enacted to

enhance the rights of secured creditors in bankruptcy”). One court summarized the creditor’s argument on the hanging paragraph as follows:

The crux of Ford Motor Credit’s argument is that § 1325 was amended to protect the interests of the 910 creditor and thus the statute should be interpreted to give the interests of the secured 910 creditor increased protection. Ford Motor Credit is in essence requesting this Court to find that the statute on its face is contrary to the intent of the drafters.

In re Williams, 2007 WL 2122131 (Bankr. E.D. Va. Jul. 19, 2007). Several courts have adopted the creditors’ argument despite the absence of supporting legislative history. These courts have given significant weight to what they *perceive* as Congress’ intent. For example, in *Peaslee II*, the District Court, without any citation, stated that “the so-called ‘hanging paragraph’ of § 1325, was obviously intended to protect the interests of automobile dealers who provide financing for customers.” *Peaslee II*, 373 B.R. at 261; *see also In re Wright*, 492 F.3d 829, 832 (7th Cir. 2007); *In re Zehring*, 351 B.R. 675, 678 (W.D. Wis. 2006)(basing its decision on what it found to be the “likely” and “extremely unlikely” intent of Congress). But what makes this intent “obvious”? Certainly, the legislative history reflects no such intent. *See In re Quick*, 371 B.R. 459, 463 n.10 (B.A.P. 10th Cir. 2007)(“ Specifically, we do not agree that BAPCPA amendments that appear to benefit creditors must be interpreted in such a way as to benefit only creditors. In fact, many of the supposedly "pro-creditor" amendments appear

reflective of the normal give and take of the legislative process.”) To the extent such beliefs are based on the role of private groups advocating for the legislation, the Supreme Court has specifically counseled against inferring any such intent. Courts should not attribute to Congress an official purpose based on the motives of particular groups that lobbied for or against certain provisions. *See Circuit City Stores v. Adams*, 532 U.S. 105, 120, 121 S. Ct. 1302, 149 L.Ed 234 (2001)(private interest groups’ roles in lobbying for or against legislation provide a dubious basis from which to infer intent); *see also Garcia v. United States*, 469 U.S. 70, 76, 105 S. Ct. 479, 83 L.Ed.2d 474 (1984)(courts should look only to Committee Reports that “represent[] the considered and collective understanding of those [legislators] involved in drafting and studying the proposed legislation.”). This Court should reject the reasoning of the Creditor, which would lead to the unsupportable conclusion that they should always win in cases related to the 2005 amendments simply because creditors lobbied for the passage of the bill.

The language of the hanging paragraph should not be “interpreted” to match a court’s determination of what Congress “meant” to say. Rather the plain language of the statute should be conclusive, except in rare cases in which the literal application will produce a result *demonstrably* at odds with the intentions of the drafters.

CONCLUSION

For the reasons stated above, this Court should hold that the financing of negative equity does not constitute a purchase money obligation. Further, this Court should hold that the hanging paragraph is only applicable where the entire debt is “purchase money.” Because Creditor’s claim is not entirely purchase money, the District Court’s decision should be modified to permit debtors to bifurcate the Creditors’ entire claims pursuant to section 506.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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