UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

WELLS FARGO FINANCIAL NORTH CAROLINA 1, INC.	)	
vs.	)	Civil Action No. 5:07-CV-133-BR
TELEPHIUS LETOINNE PRICE and SHAWNA DENISE PRICE	)	

BRIEF AMICUS CURIAE OF AMERICAN FINANCIAL SERVICES ASSOCIATION

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APPELLATE JURISDICTION

Amicus adopts Appellant's statement of appellate jurisdiction, as stated in Appellant's Brief.

ISSUES PRESENTED AND STANDARD OF REVIEW

A. Issue Presented.

Did the Bankruptcy Court err in finding that the entire security interest on Appellant's vehicle for the debt of $16,901.33 did not constituted a "purchase-money security interest" as that term is used in Section 1325(a) of the Bankruptcy Code?

B. Standard of Review.

"In deciding an appeal from a bankruptcy court, the district court sits as an appellate court, reviewing the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*." *Swinney v. Turner,* 309 B.R. 638, 639 (M.D. Ga. 2004).

"[O]n appeal from a bankruptcy court, the district court will not set aside the bankruptcy court's findings of fact unless they are clearly erroneous." Fed. R. Bankr. 8013

STATEMENT OF THE CASE

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." This case is one of a handful of similar cases that are bubbling up through the federal court system from many bankruptcy courts[1].

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

[1] *See, e.g. Graupner v. Nuvell Credit Corp.*, 2007 U.S. Dist. LEXIS 46144 (M.D. Ga. 2007); *In re Brown*, 339 B.R. 818 (Bankr. S.D. Ga. 2006); *In re Bufford*, 2006 WL 1677160 (Bankr. N.D. Tex. 2006); *In re Curtis*, 345 B.R. 756 (Bankr. D. Utah 2006); *In re Durham* 361 B.R. 206 (Bankr. D. Utah 2007); *In re Ezell* 338 B.R. 330 (Bankr. E.D.Tenn. 2006); *In re Honeycutt*, Case No. 06-48771 (Bankr. E.D. Mich. 11/2/06); *In re Particka* 355 B.R. 616 (Bankr. E.D. Mich. 2006); *In re Peaslee,* 2006 WL 3759476 (Bankr. W.D.N.Y. 2006).

creditor. In a procedure inelegantly known as a "cramdown" or "lien stripping", the debtor could divide his creditor's claim into a $5000 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 peanuts on the $5000 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 crudely drafted provision of BAPCPA was probably the offspring of a liaison between consumer creditors who specialize in secured credit (car creditors) and other consumer creditors who specialize in unsecured credit (credit card issuers). The provision also has some DNA from consumer/debtor representatives.

The issue in this case and in similar cases elsewhere is whether the entire interest 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.

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. Often these 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, having already enjoyed the accelerated gratification of a fancy pickup purchased on credit, returns for a new pickup before he has paid off the debt on the old one. When he buys the new pickup, he incurs a new debt that includes not only the sticker price of the new vehicle, but also payments for extended warranties, other dealer provided services (such as special paint coatings), 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. In effect, the dealer has to raise the price of the new pickup to cover the expense incurred to satisfy the negative equity.

Now there is a problem. Is a security interest that secures not only the sticker price on the new car but the remaining balance on the old car regarded as a "purchase-money security interest?" The debtor, of course, says no. The creditor says yes. Relying principally on North Carolina state law for the definition of purchase money, the court below held that the security interest covering the negative equity and gap insurance was not a purchase money security interest that prevented the enforcement of the new protection in BAPCPA against cramdown.

Although it is stuffed with definitions, the bankruptcy code has no definition of "purchase-money security interest." It seems likely that Congress intended the term to have a federal law meaning drawn from the language, from inferences about Congressional intent, from commercial practice, and by analogy to state law and to other federal law. It is also possible that Congress intended to use state law definitions. Whether one regards the words as federal or state, the outcome is the same. Even if Congress intended a federal definition, that definition would have to lean heavily on state statutes that define the term. If Congress wanted to adopt state law definitions, those same statutes would be applied directly.

ARGUMENT

I. THE LANGUAGE OF THE STATUE AND THE CONGRESSIONAL PURPOSE FAVOR WELLS FARGO

A. Congress' Purpose

As its name proclaims ("Bankruptcy Abuse Prevention") the 2005 Act was designed to make things tougher for debtors and easier for creditors. 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 are consumer debtors.

Academic commentators argued that the increased filings resulted principally from debtors' illness, loss of jobs and similar unanticipated and uncontrollable events, not from any rise in consumer profligacy or decline in consumer moral fiber. To the extent that the increase in filings seemed associated with consumers' new-found taste for credit card, home equity and other debt, the academic commentators blamed the creditors, not the debtors. In the eyes of the academic apologists, the children grew fat not because of the indulgence of their sweet tooth but because the candy store was too long open. In enacting the law, Congress disregarded all of these academic defenses of consumer behavior; Congress intended to administer strong medicine.

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 it 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 Democrats in Congress were as persistent and clever in opposition to the Act as the Republicans were determined and united in support. A late game ploy by Senator Schumer was

to bar bankruptcy discharge for certain liability arising from obstruction of abortion clinics[2]. This, of course, was an attempt to split the right wing support for the bill by turning the right to life senators against it. Throughout the process the opponents offered alternative bills and succeeded in making many amendments to the majority's proposal.

The popular and financial press[3] reported that the principal creditor advocates for the bill were credit card companies. By 2005 it was claimed that the credit card industry had spent over $100 million in lobbying and other activity to promote the bill. The reality is probably not so stark. Many issuers of credit card debt also issue debt secured by cars and other consumer assets, and many credit card issuers also issue other forms of unsecured consumer debt. But in general credit card companies make unsecured loans and fare poorly in Chapter 7 consumer liquidations. Many consumer Chapter 7's are "no asset" cases. A "no asset" debtor shields all of his assets by smart use of the exemption law 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 5 years.

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

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[2] 145 Cong. Rec. S14191
[3] Egan, Timothy "Newly Bankrupt Raking in Piles of Credit Offers." The New York Times, Dec. 11, 2005.

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' concern 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 the pay the full amount due on their cars, whatever the car's 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 v. 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* I B below) it is unmistakable that Congress intended to protect creditors who finance consumer vehicle purchases from cramdowns in Chapter 13. That congressional purpose is served by a decision for Wells Fargo.

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..." (Sec 128. H.R.3150, 105th Cong. (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 done more than 6 months before the bankruptcy filing.

Meanwhile Senator Abraham, a Republican from Michigan, inserted a different anti-cramdown provision in the Senate version of the bill. His amendment prohibited cramdowns for all security interests of whatever kind and whenever incurred:

> Any "allowed claim [in a Chapter 13 case] that is secured under applicable non-bankruptcy law..." (Sec 302 1998 S. 1301)

Contemporary press reports made the unsurprising claim that Senator Abraham was responding to the interests of the "industry." As a conservative Republican, Senator Abraham was politically and ideologically aligned with his important 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...(Sec 306 1999 S. 625)

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..." (emphasis added) (Sec. 306 2000 S. 3186)

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 Wells Fargo

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.

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 secured creditors who take blanket security in a debtor's goods are the pariahs of consumer credit. (See 16 CFR 444.2(a) (4) taking a non-purchase money security in certain household goods is an unfair trade practice, and 522(f) (1) (B) of the Bankruptcy Code, 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 blanket security interests in a debtor's goods, nor would the consumer advocates have wished to benefit these pariahs. So it

is plausible that the purchase money language was inserted only to deprive blanket, non-purchase money creditors from using the section, not to draw any distinction between parts of the secured debt. 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.

"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 minimum fees and taxes owed on the purchase of a motor vehicle would be covered and secured by any "purchase-money security interest." 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 that 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 much 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[4]. 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 sufficiently notorious to be specifically addressed in the Motor Vehicle Sales Acts of more than 34 states.

And it cannot be said that the cramdown provision on motor vehicles traveled below the Congress' radar. The topic was controversial; as we show in Section I B above, the provision was modified several times in different ways[5]. It was one of the continuing points of dispute between the debtor and the creditor interests between 1998 and 2004.

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 sticker price but also other amounts that may be folded into the 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 doing Senator Abraham's bidding to help car creditor's gives further support for the broad reading as a federal definition.

II. THE DEFINITIONS IN FEDERAL TRUTH IN LENDING LAW AND REGULATIONS SUPPORT WELLS FARGO

When Congress enacted BAPCPA in 2005, it is presumed to have known about other pertinent federal law governing purchase-money financing of motor vehicles.[6] The Truth in Lending Act (TILA) (15 U.S.C. §1600 et seq.) and the Act's regulation, Regulation Z (12 CFR 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).

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

[5] *See e.g.*, H.R. Rep. No. 107-617, 147 Cong. Rec. S2234-35.

[6] *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.")

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 Regulation Z to show how purchase-money vehicle financers should disclose negative equity. Those amendments direct creditors to incorporate negative equity as a part of the "total sale price" of a new vehicle in a single financing transaction. 64 F.R. 16614-01, 16617 (adopting revisions to § 226.18(j) (3), Official Staff Interpretations). The Staff Interpretations define the Total Sale Price to include negative equity as follows:

18(j) Total sale price.

> 3. *Effect of existing liens.* When a credit sale transaction involves property that is being used as a trade-in (an automobile, for example) and that has a lien exceeding the value of the trade-in, the total sale price is affected by the amount of any cash provided. (See comment 2(a) (18)-3.) To illustrate, assume a consumer finances the purchase of an automobile with a cash price of $ 20,000. **Another vehicle used as a trade-in has a value of $ 8,000 but has an existing lien of $ 10,000, leaving a $ 2,000 deficit that the consumer must finance.**
> **i. If the consumer pays $ 1,500 in cash, the creditor may apply the cash first to the lien, leaving a $ 500 deficit, and reflect a down payment of $ 0. The total sale price would include the $ 20,000 cash price, an additional $ 500 financed under § 226.18(b) (2), and the amount of the finance charge**. (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 quoted paragraph shows that the Federal Reserve intended that any negative equity amount be added to the cash price on the new vehicle and that the total should be shown to the

buyer as a single amount, "total sale price." Elsewhere the Regulation (12 CFR 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."

III. STATE LAW, COMMERCIAL PRACTICE AND PUBLIC POLICY AFFIRM WELLS FARGO'S READING

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 and, thus tantamount to federal law. Comment 3 to 9-103 explains that "purchase- money security" 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 at 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**. Thus, a security interest does not qualify as a purchase-money security interest if the debtor acquires property on unsecured credit and subsequently creates the security interest to secure the new purchase. (emphasis added)

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.

B. The Motor Vehicle Sales Finance Acts

The end of World War II saw an explosive growth in consumer credit in the United States. A significant part of that consumer credit was installment credit to purchase motor vehicles. To govern that market, many states passed laws called Motor Vehicle Sales Finance Acts. Michigan adopted such an act in 1951; North Carolina adopted its act, known as the Retail Installment Sales Act, in 1971.

Despite similar names in many states, these acts are not uniform (they were not promulgated by the National Conference on Uniform Laws), but all of the acts appear to be copied from the same basic template. Because they preceded the federal disclosure law, Truth in Lending, all of them have disclosure requirements similar to those now found in the federal law. For example it is common for these acts to require a specific size of type and to enumerate a list of items that must be expressed in a retail installment sales contract.[7] But the acts went beyond disclosure requirements. They typically establish maximum interest rates, and they often prohibit certain contract terms and outlaw certain creditor behavior. For example the Michigan statute prohibits any clause that would allow a seller to accelerate the balance on a contract because the seller "deems himself to be insecure." (M.C.L. §492.114(b))

[7] *See, e.g.,* M.C.L. § 492.112(e), Cal. Civ. Code §2981.9, 69 P.S. § 613.D.

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

With the advent of negative equity financing in the 1990s, many states amended their acts to deal with that practice. North Carolina is a good example. North Carolina Gen. Stat. § 25A-9 includes as part of the definition of the "amount financed" by the contract, along with the cash price of the vehicle, as "the amount actually paid or to be paid by the seller pursuant to an agreement with the buyer to discharge a security interest or lien on property traded in." The quoted language deals explicitly with negative equity owed on cars that are traded in as part of the purchase money transaction. It includes the negative equity amount in the "amount financed" and so treats it exactly like the sticker price of the newly purchased car.

The North Carolina law so states a syllogism that leads to the conclusion that negative equity amounts rolled into new contracts are to be treated as covered by a "purchase-money security interest." It proceeds as follows: 1) negative equity amounts are part of the "amount financed;" 2) the "amount financed" is the price to be paid by the borrower under a "retail installment contract;" 3) a "retail installment contract" is one that creates a "purchase money security interest;" THEREFORE, the negative equity is secured by a purchase money security interest. If one pays attention to North Carolina law either directly or by analogy, he cannot escape the conclusion that negative equity, included in a new contract, is covered by a purchase-money security interest. In this case that law commands a decision for Wells Fargo, either directly or by analogy.

C. Commercial Practice and Public Policy

Since all decisions interpreting commercial law have the capacity to facilitate or impair commercial activity, courts should be sensitive to commercial practice when they are interpreting federal and state statutes. The commercial practice in this case supports the proposition that including negative equity 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 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 debtor chooses this mode of financing his debt over other alternatives because it is less expensive or more convenient than those alternatives.

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 they are always the owners of vehicles. These cases do not involve powerless consumers who must accept anything that a creditor offers. Here the creditor's offer is knowingly accepted by the debtor.

The Prices traded their 1997 Nissan Maxima on a 2001 Lincoln LS; they bought the Lincoln only one year before they filed in Chapter 13. The dealer's willingness to finance the negative equity of $2,837.96 on the Maxima enabled the Prices to complete the deal as they chose. It may have enabled the Prices to borrow the $2,837.96 at a better annual percentage rate than they could have had elsewhere. In any case, it facilitated their purchase of an expensive pickup 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.

IV. CONCLUSION

The words, the statutory history, the Congressional intent, the analogies to the federal Truth in Lending law and, not least, the explicit statement of the North Carolina legislature in its Retail Installment Sales Act direct the Court to reverse the Bankruptcy Court's decision and find in favor of Wells Fargo.

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Respectfully submitted,

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