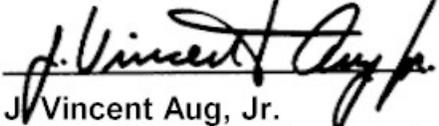


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: April 29, 2008


J. Vincent Aug, Jr.
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In re
Dawn S. and John R. Shockley,
Debtors

Case No. 07-15884
Chapter 13 (Judge Aug)

ORDER GRANTING OBJECTION TO CONFIRMATION

This matter is before the Court on Creditor DaimlerChrysler Financial Services Americas LLC's objection to confirmation (Docs. 14, 22) and the Debtors' memorandum (Doc. 26). A hearing was held on April 15, 2008.

We are yet another court to be faced with the issue of whether the "hanging paragraph" of 11 U.S.C. §1322(b)(2) allows a debtor to modify the rights of a holder of a secured claim on a "910 car" when the purchase price of the financed vehicle includes the financing of the "negative equity" of the trade-in vehicle.

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), and under 11 U.S.C. §506(a), a chapter 13 debtor was permitted to bifurcate a secured claim into secured and unsecured components. Thus, prior to BAPCPA, a chapter 13 debtor could buy a vehicle, soon thereafter file bankruptcy, and retain the vehicle as long as the debtor paid the present value of the vehicle, which was often substantially less than the amount owed on the loan.

This was all changed by BAPCPA's "hanging paragraph," which reads as follows:

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 [sic] 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 . . .

The cases to date addressing the issue of negative equity have fallen into three categories. One line of cases, beginning with *In re Peaslee*, 358 B.R. 545 (Bankr. W.D. N.Y. 2007)¹ holds that any negative equity “transforms” the entire purchase money security interest into something else, therefore nullifying the protection afforded to creditors by the hanging paragraph. See also *In re Sanders*, 377 B.R. 836 (Bankr. W.D. Tex. 2007)(hanging paragraph is narrow exception to general rule) followed by *In re Mitchell*, 379 B.R. 131 (Bankr. M.D. Tenn. 2007).

The second line of cases, best exemplified by *In re Westfall*, 376 B.R. 210, (Bankr. N.D. Ohio 2002) adopt a “dual status” rule giving the creditor protection to the extent of the value loaned, less the amount of negative equity financed. The rationale is that the transformation rule is too strict.

The third line of cases, with which we agree, holds that negative equity does not defeat the protection afforded to creditors by the hanging paragraph. This line of cases is best exemplified by *Graupner v. Nuvel Credit Corporation*, 2007 WL 1858291 (M.D. Ga. 2007) and *Peaslee II*, 373 B.R. 252 (W.D. N.Y. 2007), which are also the only two district court cases to have addressed the issue.

Under Ohio law, which tracks the Uniform Commercial Code, “[a] security interest in goods is a purchase-money security interest . . . [t]o the extent that the goods are purchase-money collateral with respect to that security interest.” O.R.C. §1309.103(B)(1). “ ‘Purchase-money collateral’ means goods . . . that secure[] a purchase-money obligation incurred with respect to that collateral.” O.R.C. §1309.103(A)(1). “ ‘Purchase-money obligation’ means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.” O.R.C. §1309.103(A)(2). Comment 3 to §9-1033 of the Uniform Commercial Code states that “[t]he concept of ‘purchase-money security interest’ requires a close nexus between the acquisition of collateral and the secured obligation.”

¹ *In re Peaslee* was reversed at *General Motors Acceptance Corporation. v. Peaslee*, 373 B.R. 252 (D. W.D. N.Y. 2007)(hereinafter “*Peaslee II*”).

We hereby adopt the cogent reasoning of the *Graupner* court:

[T]he price of the collateral included the negative equity. The trade-in of the vehicle was an integral part of the sales transaction. The value of the trade-in along with its accompanying debt affected the ultimate price that was paid for the new [vehicle]. The negative equity is inextricably intertwined with the sales transaction and the financing of the purchase. This close nexus between the negative equity and this package transaction supports the conclusion that the negative equity must be considered as part of the price of the collateral.

2007 WL 1858291 at *2.

This holding is consistent with the albeit sparse legislative history of this Code change, as specifically recognized by the Sixth Circuit, that the “hanging-sentence architects intended only good things for car lenders and other lienholders.” *In re Long*, 519 F.2d 288 (6th Cir. 2008)(quoting Keith M. Lundin, Chapter 13 Bankruptcy, 3d ed. 451.5-1 (2000 & Supp. 2007-1)). *See also Peaslee II*, 373 B.R. at 261 (Congressional intent seems to be to protect creditors from abuse of cram-down).

This holding is consistent with the language of the hanging paragraph which protects the creditor “if the creditor has a purchase money security interest securing the debt that is the subject of the claim.” The Debtors’ interpretation requires the addition of the word “entire” as a modifier of the word “debt.” *See Peaslee II*, 373 B.R. at 261 (“By its terms, the hanging paragraph prohibits the bifurcation of *any* claim if the debt is secured by a PMSI”)(emphasis in original).

The Debtors contend that the paying off of the negative equity on the trade-in vehicle was a secondary purpose of the transaction and that one does not have to trade in a vehicle to purchase a different vehicle. The reality is that in many cases, a debtor does not have the financial wherewithal to purchase a new vehicle unless the lender agrees to pay off the balance on the old vehicle. Further, the “entire amount which was lent was for the purpose of acquiring a vehicle, regardless of whether some portion thereof was used to pay off a previous lien on the trade-in.” *In re Brei*, 2007 WL 4104884 (Bankr. D. Ariz. 2007).

At the hearing, it was argued that *Graupner* and *Peaslee II* are distinguishable

because in both those cases, the courts looked at other state statutes² that define a “cash sales price” as including negative equity and that Ohio has no such parallel statute. As we read *Graupner* and *Peaslee II*, these additional statutes were not determinative of the courts’ decisions; the additional statutes merely supported the decisions. We believe both courts would have reached the same conclusion absent the additional statutes, as do we. Further, other courts have so interpreted the hanging paragraph without reference to a separate statutory definition of case sales price. *See In re Burt*, 378 B.R. 352 (Bankr. D. Utah 2007); *In re Dunlap*, 383 B.R. 113 (Bankr. E.D. Wis. 2008).

Accordingly, the creditor’s objection to confirmation is hereby GRANTED.

The Debtors shall have 20 days from the entry date of this Order to file an amended plan consistent with this decision, or the case may be dismissed.

IT IS SO ORDERED.

copy to:

Debtors
David Kruer, Esq.
Gregory Stout, Esq.
Chapter 13 trustee
U.S. Trustee

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² The *Graupner* court looked at the Georgia Motor Vehicle Sales Finance Act and the *Peaslee II* court looked at the New York Motor Vehicle Retail Installment Sales Act.