Docket No. 08-60037

In the

United States Court of Appeals

For the

Ninth Circuit

IN RE MARLENE PENROD,

Debtor,

AMERICREDIT FINANCIAL SERVICES, INC.,

Appellant,

v.

MARLENE PENROD,

Appellee.

Appeal from a decision of the United States Bankruptcy Appellate Panel for the Ninth Circuit,
Nos. 07-1360, 07-1368
Appeal from a decision of the United States Bankruptcy Court for the Northern District of California,
No. 07-30252 · Honorable Thomas E. Carlson

AMICUS BRIEF OF GMAC LLC, FORD MOTOR CREDIT COMPANY LLC, WELLS FARGO BANK, N.A., BANK OF AMERICA, N.A., AMERICAN HONDA FINANCE CORPORATION and TOYOTA MOTOR CREDIT CORPORATION IN SUPPORT OF AMERICREDIT FINANCIAL SERVICES, INC.

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1, GMAC LLC, Ford Motor Credit Company, LLC, Wells Fargo Bank, N.A., Bank of America, N.A, American Honda Finance Corporation and Toyota Motor Credit Corporation (the "Industry Group") make the following disclosure:

General Motors Corp. owns 100% of GM Finance Co. Holdings LLC, which owns 49% of GMAC LLC, and FIM Holdings, LLC owns 51% of GMAC LLC.

Ford Motor Credit Company LLC is a wholly-owned subsidiary of Ford Holdings LLC. Ford Holdings LLC is a wholly-owned subsidiary of Ford Motor Company.

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AUTHORITY FOR FILING

This brief is filed pursuant to Fed. R. App. P. 29(a). All parties consent to its filing, as demonstrated by the Stipulation filed February 4, 2009.

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STATEMENT PURSUANT TO FRAP 29(c)(3)

The members of the Industry Group are assignees of retail installment sale contracts ("RISCs") from dealerships who provide financing for consumers that purchase motor vehicles from them on an installment sale basis. They have been directly impacted by a voluminous amount of litigation involving the issue of whether the Hanging Paragraph ("HP") applies to a RISC that includes debt attributable to the financing of negative equity ("NE") on a trade-in vehicle. The HP prohibits cramdowns of certain claims secured by motor vehicles "if the creditor has a purchase money security interest [PMSI] securing the debt that is the subject of the claim . . . ." Members of the Industry Group have been actively involved in litigating this issue and have a large financial interest in its resolution.

SUMMARY OF THE ARGUMENT

Background

This case arises out of a motor vehicle retail installment sale transaction in which the Debtor financed her purchase of a Ford Taurus ("Taurus") on an installment sale basis pursuant to a RISC she entered into with Hansel Ford L/M (the "Dealer"). Consistent with the federal Truth in Lending Act ("TILA") and the California Automobile Sales Finance Act ("CASFA"), the RISC signed by the Debtor included debt attributable to NE (the "net NE obligation") in the "Total

Cash Price," the "Amount Financed" and the "Total Sale Price."[1] The issue presented is whether the security interest granted to the Dealer in connection with its retail installment sale of the Taurus was not a PMSI because the amount financed included the net NE obligation. The resolution of this question depends on whether the net NE obligation was a purchase money obligation ("PMO").

The question presented must be resolved by reference to the statutory text and the cramdown-abuse prevention goal sought to be achieved by the enacting Congress – subjects that AmeriCredit Financial Services, Inc. ("AmeriCredit") has addressed fully in its brief. (AmeriCredit Br. at 14-25). Additionally, although the Bankruptcy Code does not define a "PMSI", this does not mean that Congress legislated in a vacuum.

Congress is deemed to have enacted the HP with an awareness of pertinent existing law,[2] which is considerably broader than the BAP decision suggests.

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[1] As reflected in the RISC Itemization of the Amount Financed ("Itemization"), and as disclosed in accordance with an official staff interpretation of the TILA, the portion of the NE that was financed by the Debtor (the "net NE obligation") was $3,137.42. The net NE amount is equal to the difference between the gross trade-in allowance and the payoff amount paid by the Dealer to discharge the lien on the trade-in vehicle ($6,000 less $13,137.42, or a negative $7,137.42), less any cash down payment and/or cash rebate ($4,000.00). (*See* RISC, Itemization, Items 1H, 6A-6G (E.R., pg. 00115); *see generally* 12 C.F.R. Pt. 226, Supp. I, ¶¶ 2(a)(18)-3, at 458, 18(j)-3, at 548 (2008) (Add. A); Board of Governors of the Federal Reserve System, Official Staff Interpretation, 64 Fed. Reg. 16614, 16614-17 (Apr. 6, 1999) (Add. B)).

[2] *E.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("Congress is knowledgeable about existing law pertinent to the legislation it enacts").

Accordingly, the issue also should be analyzed in light of the laws reflecting industry practices prevailing at the time the HP was enacted. Congress legislated against a backdrop that featured three sets of laws allowing for the inclusion of NE in motor vehicle RISCs – (i) TILA and its implementing Regulation Z; (ii) regulatory laws and decisions in at least 37 states expressly authorizing NE to be included in the amount financed as part of the purchase money package that is a RISC (Add. C); and (iii) the UCC definitions of a "PMSI" and a "PMO" (Add. D). These statutes regulate various aspects of automobile installment sales and therefore properly can be read *in pari materia*. They, and the industry practices which they allow, informed the Congressional understanding of the term "PMSI" used in the HP.

<u>The Reasoning of the BAP Decision</u>

The BAP decision resolved the issue presented solely by reference to the UCC definition of a PMO and the related Official Comment ("Comment"). Although the decision is lengthy, its analytical underpinnings consist of relatively few assertions. The BAP stated that the UCC reference to "the price of the collateral" "'need not be given some exotic meaning . . . to sweep up more than the common understanding of the phrase is intended to convey'" because "'[w]e can tell what part was used to buy something by simply looking at the price of the thing purchased.'" 392 B.R. at 848-49 (quoting *In re Sanders*, 377 B.R. 853, 853

(D. Tex. 2007)). Thus did the BAP effectively assume the conclusion, employ a circular definition of "the price," disregard the remainder of the PMO definition and the related Comment and, as in the famous quote about pornography, essentially assert that one knows it when one sees it.

Similarly, in concluding that debt attributable to NE was not "value given to enable the debtor to acquire rights in the collateral," the BAP stated that "[t]he distinction that *Sanders* makes between debt incurred to acquire the car and debt incurred to finance the car is relevant."[3] 392 B.R. at 851-52 (discussing distinction drawn in *Sanders* between value used "to acquire *rights* in the collateral" and "*enabling* the transaction"). This "distinction" contradicts the "close nexus" and "in connection with" standards established by the UCC Comment for determining purchase-money status and the statutory reference to value given to "enable" the acquisition of collateral. Moreover, the purported distinction between debt

[3] The BAP discussed "a fanciful example" of a dealership offering "to pay off a car buyer's second mortgage as a promotional campaign . . . , and roll[ing] the amount of the mortgage into the amount financed . . . ." 392 B.R. at 852. The BAP failed to explain how its "fanciful" example was comparable to the commonplace example of indebtedness attributable to NE with respect to a trade-in.

The debt in the mortgage payoff hypothetical does not bear a "close nexus" to the purchase of the vehicle and could not have been included in a RISC under the CASFA. *See* CAL. CIV. CODE § 2982. Moreover, the mortgage payoff hypothetical used by the BAP is materially different from a trade-in scenario in which the buyer's trade-in indebtedness is reduced by a trade-in allowance. The description of the mortgage payoff hypothetical as "fanciful" was apropos because the fictitious practice would serve no commercial purpose.

incurred to purchase and debt incurred to finance is one without a difference particularly where, as here, the Dealer sold the vehicle on an installment sale basis.

The BAP also concluded that the secured NE obligation did not constitute "value given to enable" the Debtor to acquire her Taurus and/or that the requisite "close nexus" required by the UCC Comment did not exist between the secured NE obligation and the purchase of the Taurus because:

- "there are simply 'two separate financial transactions memorialized on a single retail installment contract document'";
- the secured NE obligation "is nothing more than a refinancing of the preexisting debt owed on the trade-in. There is no necessary connection between this refinancing and the car's acquisition";
- the secured NE obligation "is the auto seller's assumption of one of the debtor's antecedent debts"; and
- the secured NE obligation is "essentially another creditor's unsecured claim" and subjecting it to the HP alleged would have the effect of converting an unsecured deficiency claim of the holder of the existing obligation into a secured claim protected by the HP.

Id. at 842, 848-49, 852 (citations omitted). Similarly, the BAP concluded that the net NE obligation was not an "expense[] incurred in connection with acquiring rights in the collateral" because:

- "such a major part of the purchase price can hardly be a form of 'expense' incurred to acquire the car";
- NE "is not similar in nature or scope to the other 'expenses incurred in connection with acquiring rights in the collateral'";
- the secured NE obligation "is the auto seller's assumption of one of debtor's antecedent debts"; and

- "given that financing [NE] is increasingly common, it was not likely an oversight that the reporters for Article 9 did not include [NE] in Comment 3's list of 'expenses incurred in connection with acquiring rights in the collateral.'" (*But see* AmeriCredit Br. at 41-43).

Id. at 848-49 (citations omitted).

Finally, after acknowledging that the CAFSA defined the "cash price" to include the "payment of a prior credit or lease balance remaining on property being traded in," the BAP concluded that the *in pari materia* doctrine was not applicable because: (i) the UCC term "price of the collateral" is not ambiguous;[4] (ii) the UCC and the CAFSA "do not relate to the same subject matter or serve the same purpose"; (iii) it would be "too convoluted" an interpretive approach to use "a state law based interpretive rule to construe how a federal statute would incorporate a state statute"; and (iv) the CAFSA does not apply to loans made by banks, thus "raising the possibility of a difference of application due solely to the status of the creditor . . . ." *Id.* at 849-50.

The BAP concluded that the *in pari materia* doctrine would fail in any event because the CASFA is "part of a regulatory network based on disclosure" whereas the HP is a creditors' rights measure that "effectively enriches car [creditors] at the expense of the debtor's unsecured creditors." *Id.* at 850. Moreover, the BAP

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[4] The BAP's suggestion that the UCC term "price of the collateral" is unambiguous is belied by the length of its opinion and is inconsistent with its threshold observation that "[m]uch ink has been spilled over the proper characterization and treatment of [NE] in secured claims subject to the" HP. 392 B.R. at 842.

interpreted CAL. COM. CODE § 9201(b) "to mean that both acts operate independently, thereby essentially negating any legislative intent that similar provisions in each be construed identically."[5] *Id.* at 850 (citations omitted).

Summary of the Argument

The reasoning of the BAP decision is erroneous, conclusory, selective in nature, contradictory of the authority upon which it purports to rely and premised upon a self-described "fanciful" hypothetical. The net NE obligation was a PMO that was incurred in connection with the Debtor's acquisition of her Taurus. The Debtor acquired her vehicle in a single installment sale transaction evidenced by a single RISC, securing a single asset. All of the indebtedness evidenced by the RISC was intimately related to her purchase of the Taurus. Indeed, the NE expense would not have been incurred absent the purchase of the Taurus.

This conclusion is consistent with industry practice and is supported by TILA, which defines the "Amount Financed" and the "Total Sale Price" in a credit sale transaction to include the net NE obligation. (*See* Sections I & n. 1, § II *infra*).

It also is consistent with the UCC definition of a PMO, which is an obligation incurred: (i) to pay all or part of the "price" of the collateral; or (ii) as part of the "value given to enable" the debtor to purchase the collateral. The "price" of the collateral and the "value given to enable" are defined by an Official

[5] CAL. CIV. CODE § 9201(b) states that a "transaction subject to [UCC Article 9] is

Comment to include any "[o]bligations for expenses incurred **in connection with** acquiring rights in the collateral" and any other secured obligations that bear a "close nexus" to the purchase of a new vehicle. UCC § 9-103 cmt. 3 (2001) (emphasis added) (Add. D). Amounts financed under a RISC for NE clearly qualify as such obligations.

The BAP decision imposed a non-existent requirement that an "expense incurred in connection with" the acquisition of rights in the collateral be "similar" to the other items specified test. It did so by reading the UCC Comment reference to "obligations for expenses incurred in connection with acquiring rights in the collateral" as if it were a title heading for the litany of expenses specified thereafter. This reading failed to recognize that "obligations for expenses incurred" is a separate and free-standing category of expenses that constitute part of the "price" of the collateral and the "value given to enable" its acquisition and, thus, contradicted the text of the Comment by depriving the language if its free-standing nature. *Id.* at 848.

The conclusion that the net NE obligation is a PMO is reinforced by the CASFA, which should be read *in pari materia* with the UCC definition of a PMO. It authorizes the inclusion of NE charges in the amount financed and as part of the "cash price" under a RISC. *See* CAL. CIV. CODE § 2981(e) (Add. E). The

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subject to . . . the Automobile Sales Finance Act . . .."

California legislature thus has determined that debt attributable to NE benefits consumers and is sufficiently related to the installment sale transaction to permit its inclusion in RISCs. (AmeriCredit Br. at 44-52).

The BAP also erroneously failed to consider the import of the CASFA NE authorization in the context of: (i) the UCC "close nexus" test that establishes the standard for determining purchase money status; and (ii) the free-standing reference in the Comment to "obligations incurred ***in connection with*** acquiring rights in the collateral." (emphasis added). The CASFA provision authorizing the inclusion of NE in a RISC is a statutory acknowledgement of: (i) the fact that the net NE obligation is compensation for an "expense incurred in connection with acquiring" the new vehicle; and (ii) the intimate relationship between the net NE obligation and a retail installment sale.

The BAP's characterization of the NE as "antecedent debt" and the "conversion of unsecured claims into secured claims" misleadingly suggests that it is comparable to a series of sales financed by the same creditor to whom the existing debt is owed. 392 B.R. at 842, 849. The instant case is materially different from antecedent debt cases such as *In re Matthews*, 724 F.2d 798 (9th Cir. 1984). Cases like *Matthews* involve existing debt owed to a creditor who is extending additional credit, such as a lender who consolidated multiple PMOs owed to it or a credit card issuer who finances a series of multiple purchases. In

contrast, the Debtor's existing vehicle finance obligation was not owed to the Dealer,[6] who created the new net NE obligation by giving new value in the amount of the NE payoff advance order to satisfy her existing obligation to a third party.

ARGUMENT

I Congress Was Aware Of The Industry Practice Of Including NE In Vehicle Financings.

Although the BAP acknowledged that NE financing is "increasingly common," it failed to acknowledge that the practice was sufficiently well established at the time the HP was enacted to have informed the Congressional understanding of the term "PMSI" used in the HP. 392 B.R. at 848. A study published by the FDIC before the enactment of the HP indicates that 38% of new car buyers have NE in their trade-ins.[7] The Official Staff Commentary to Federal Reserve Board Regulation Z also reflects this industry practice, providing automotive creditors with detailed guidance regarding how they should disclose NE in the itemization of the "Amount Financed" and their calculations of the "Total Sale Price." (*See* Section II *infra*.)

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[6] The BAP's statement that "we treat AmeriCredit and Hansel as the same," furthers this mischaracterization. 392 B.R. at 838. Factually and legally AmeriCredit and Hansel are distinct entities.

[7] *See* FDIC Supervisory Insights, *The Changing Landscape of Indirect Automobile Lending*, June 23, 2005 ("J.D. Power and Associates estimates that approximately 38 percent of new car buyers have [NE] at trade-in . . ..")

Courts themselves have noted that NE commonly is financed in connection with the purchase of a new vehicle. *See, e.g., In re Hill*, 328 B.R. 490, 507 (Bankr. S. D. Tex. 2005) ("It is quite common . . . that a debtor's car note is . . . higher than the value of the vehicle"). Other courts have relied on the prevalence of the practice in protecting NE from cramdown under the HP: "When BAPCPA was enacted, it was already common industry practice, sanctioned by state motor vehicle finance law, and [TILA], for automobile dealers to offer buyers packaged financing, which included the payoff of debt on the trade-in vehicle . . . ." *In re Schwalm*, 380 B.R. 630, 634 (Bankr. M.D. Fla. 2008).

Given the prevalence of the practice, it is illogical to conclude that Congress did not intend for the HP to extend to the net NE obligation. Had Congress intended to preclude cramdown protection for this prevalent feature of vehicle financing, it surely would have said so. Moreover, the UCC, a body of "national commercial law," was an important source of guidance for Congress when it selected the term "PMSI." An express interpretive policy of the UCC – "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties" – instructs this Court to interpret the UCC in a manner that respects the contract of the parties and the industry practices at issue. CAL. COM. CODE § 1103(a)(2).

II Congress Knew That Existing Law Linked Purchase-Money Financing Of Vehicles With NE For Trade-Ins.

Congress is presumed to have known about other pertinent laws relating to motor vehicle retail installment sales when it enacted the HP. (*See* note 2 *supra.*) These laws included TILA and its uniform cost of credit disclosure requirements. *See* 15 U.S.C. § 1601 *et seq.*; 12 CFR Pt. 226. (AmeriCredit Br. at 26-27). In 1999, the Federal Reserve Board amended the Commentary to Regulation Z to include detailed guidance authorizing automotive creditors to disclose NE as part of the "Amount Financed" and the "Total Sale Price" under a RISC. *See* note 1 *supra*.

Moreover, "PMSI" is a term of art derived from the national body of commercial law that is the UCC. Congress is deemed to have been aware of its "close nexus" and "in connection with" requirements for determining purchase money status. (AmeriCredit Br. at 34-35). Additionally, existing state consumer credit regulatory laws and decisions in 37 states expressly authorized NE to be included in the purchase money package that is a motor vehicle RISC. (*See* Add. C); CAL. CIV. CODE § 2981(e). Thus, the existing law of which Congress presumptively was aware acknowledged the close nexus between NE and the "Amount Financed" and the "Total Sale Price" under motor vehicle RISCs.

After concluding that the CASFA definition of the "cash price" was of no moment because the CASFA was "part of a regulatory network based on

disclosure," the BAP inconsistently relied upon TILA as support for ***excluding*** NE from the definition of a PMO because "Regulation Z . . . does not explicitly include NE as part of the 'cash price.'" 392 B.R. at 850 n.18. In doing so, the BAP failed to acknowledge that TILA requires that NE be disclosed in an installment sale transaction as part of the "Amount Financed" and the "Total Sale Price." Having failed to explain how debt attributable to NE is disclosed under TILA, the BAP proffered no explanation as to why the TILA definition of "Cash Price" was the more relevant term. Its footnoted reference to TILA thus is selective, incomplete and not instructive with respect to how debt attributable to NE is disclosed under TILA. The TILA and CASFA provisions authorizing, respectively, the disclosure and the inclusion of debt attributable to NE in the "Total Sale Price" and the "Cash Price" are regulatory acknowledgements of: (i) the fact that a trade-in payoff advance is an expense "incurred in connection with acquiring" the new vehicle; and (ii) the intimate relationship between debt attributable to NE and a retail installment sale.

III The Expansive UCC Definition of "PMSI" Includes NE.

The UCC definition of a "PMSI" focuses on the purchase-money "obligation" that is secured by purchase money collateral.[8] CAL. COM CODE § 9103(a), (b)(1) (West 2001). The UCC defines a PMO as "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." *Id.* § 9103(a)(2). This definition contains alternative prongs: (i) ***the price of the collateral***; and (ii) ***value given to enable the debtor to buy the collateral.*** Under both prongs, AmeriCredit has a PMSI and the BAP's conclusion to the contrary is analytically unsustainable. (*See* AmeriCredit Br. at 31-38).

IV The Net NE Obligation Is Not An Antecedent Debt.

The BAP held,[9] in conclusory fashion, that financing NE "is the auto seller's assumption of one of the debtor's antecedent debts." 392 B.R. at 849. The nature of a NE obligation cannot be determined conclusorily in the abstract, without pausing to ask "how was the secured obligation created?" and "to whom was the

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[8] The UCC definitions of a PMSI and a PMO, and the related Official Comments, are identical in all 50 states. For ease of reference, however, the UCC citations used herein are to the California Commercial Code.

[9] Throughout its decision, but particularly here, the BAP relies on *In re Pajot,* 371 B.R. 139 (Bankr. E.D.Va. 2007), and *In re LaVigne,* 2007 WL 3469454 (Bankr. E.D. Va. 2007), both of which were reversed with respect to their holdings that NE is not a PMO. *GMAC v. Horne* 390 B.R. 191 (E.D.Va. 2008).

security interest granted?" The issue must be analyzed from the perspective of the secured party to whom the security interest was granted and in the context of the installment sale transaction that gave rise to the secured obligation.

This case involves the nature of the security interest that the Debtor granted to the Dealer to secure the net NE portion of her retail installment sale obligation. That obligation, in the amount of $3,137.42, was created pursuant to the RISC when the Dealer gave present consideration by advancing funds to pay off her existing vehicle finance obligation to Ford Motor Credit ("FMC") and subtracted the trade-in allowance, her cash downpayment, and a manufacturer's rebate from the gross payoff amount. (*See* RISC Itemization, Lines 1H & 6A-G; E.R. 00115.) Consistent with TILA, the CASFA, and the underlying RISC, the Dealer financed the remainder of this transaction-specific payoff expense by including the net NE in the "Total Cash Price," the "Amount Financed" and the "Total Sale Price." The RISC thus demonstrates that the net NE obligation was an entirely new obligation vis-à-vis the Dealer, which is the entity to whom the Debtor granted the security interest whose nature is at issue. It was for a new net NE amount that was owed initially to a new secured party (as opposed to the holder of the existing obligation) and was secured by a new piece of collateral. That obligation was a child of the new secured transaction.

A district court recently explained the import of these facts:

> The amount Muldrew financed to pay off the [NE] on his trade-in vehicle involved ***a new, smaller amount, a new lender, a new piece of collateral, and a new contract. In short, it was not "antecedent debt."*** The [NE] was part of the bargained-for total cash price of the new vehicle Muldrew financed with Graff, as well as the value Graff gave to enable Muldrew to gain rights to and enjoy use of the collateral. A closer nexus to the collateral can hardly be imagined.

In re Muldrew, 396 B.R. 915, 926 (E.D. Mich. 2008) (emphasis added). An obligation that is new, vis-à-vis the security interest of the Dealer whose nature is at issue, cannot be characterized as "antecedent."

This conclusion also is supported by Official Comment 2 to Former UCC § 9-107, which was the predecessor to Revised UCC § 9-103. Former UCC Section 9-107 provided that a security interest is a PMSI to the extent that it is:

> (a) taken . . . by the ***seller*** of the collateral to secure all or part of its ***price***; or (b) taken by a person who by ***making advances*** or incurring an obligation ***gives value to enable*** the debtor to acquire rights in or the use of collateral if such value is in fact so used.

Former UCC § 9-107 (1972) (emphasis) (Add. F). The Comment to the predecessor definition explained that "[u]nder this section a seller has a [PMSI] if he retains a security interest in the goods; ***a financing agency has a [PMSI] when it advances money to the seller***, taking back an assignment of chattel paper." *Id.* cmt. 1 (emphasis added).

Comment 2 explained the PMSI definition with respect to purchase money lenders as follows:

> [w]hen a purchase money interest is claimed by a secured party who is ***not*** a seller, he ***must*** of course ***have given present consideration***. This section therefore provides that the purchase money party must be one who gives value '***by making advances or incurring an obligation'; the quoted language excludes from the purchase money category any security interest taken as security for*** or in satisfaction of a preexisting claim or ***antecedent debt***."

Id. § 9-107(b) cmt. 2 (emphasis added). Courts that have relied upon Former Section 9-107 and the related Comments to support their characterization of NE as antecedent debt have failed to analyze the predecessor provision, thereby glossing over material factual distinctions and misapplying the law.[10]

There were separate PMSI definitions for installment sellers (§ 9-107(a)) and for purchase money lenders (§ 9-107(b)) under the predecessor provision, with the distinction between antecedent and present debt being drawn only in the context of the PMSI definition for a lender. There was no need to drawn this distinction with respect to an installment seller because the PMSI definition for an installment seller contemplated an interest taken to secure the price of the collateral. The Debtor's purchase in the present case was an installment sale transaction evidenced by a RISC that the Dealer assigned to AmeriCredit. AmeriCredit therefore stands in the shoes of the Dealer, the installment seller who retained a security interest in the vehicle to secure its price. Accordingly, former

[10] *See e.g. In re Johnson*, 380 B.R. 236, 247 (Bankr. D. Or. 2007); *In re Munzberg*, 388 B.R. 529, 539-40 (Bankr. D. Vt. 2008).

UCC § 9-107(a) compels the conclusion that the net NE obligation that was payable initially to the Dealer is a PMO.

In any event, however, former UCC § 9-107(b) compels the same result even assuming *arguendo* that the trade-in payoffs made by the Dealer were analyzed under the "value given to enable" prong. This is the case because the trade-in payoff advance constituted the furnishing of present consideration by the Dealer. The furnishing of present consideration by making an advance is what Comment 2 to former UCC § 9-107(b) identified as the distinguishing feature of a PMO arising under the "value given to enable" prong. *Id.* § 9-107(b) cmt. 2 (the purchase money party must be one who has given present consideration "by making advances or incurring an obligation"). The net NE obligation was a new obligation to the Dealer that was created pursuant to the RISC when the Dealer furnished present consideration by making the payoff advance to the holder of the existing obligation. Prior thereto, the Debtor owed the Dealer nothing.

V The BAP Failed to Recognize Material Distinctions Between the Secured Obligation at Issue in the Present Case and the Refinancing Scenario in *Matthews*, Which Defines A PMSI in a Manner that Supports AmeriCredit

The BAP mischaracterized the Dealer's installment sale financing of the net NE obligation as "nothing more than a refinancing of the pre-existing debt owed on the trade-in" and asserted that "[t]here is no necessary connection between this refinancing and the car's acquisition." 392 B.R. at 852. This mischaracterization

stems from its misplaced reliance on *In re Matthews*, 724 F.2d 798 (9th Cir. 1984), which it invoked in concluding "that a refinance constitutes value to enable debtors to pay off a loan, not to acquire rights in the collateral." 392 B.R. at 852.

The BAP failed to understand the import of *Matthews*, which defines a PMSI in a manner that supports AmeriCredit's position. In *Matthews*, Transamerica Financial Services made a loan to the debtors that enabled them to buy a piano and a stereo. 724 F.2d at 799. Transamerica subsequently refinanced its loan by making a new loan "to pay net balance due" and included in the new loan an additional advance and an insurance premium. The new loan was secured by the piano and stereo that the debtors had purchased previously. The debtors subsequently sought to avoid the lender's security interest in the piano and the stereo under Section 522(f) of the Bankruptcy Code, which allows lien avoidance with respect to exempt consumer goods in which the lender has a "non-[PMSI]."[11] *Id.* at 800.

This Court held that the lender's refinancing of the loan extinguished its purchase money character:

> ***The Matthews did not use the loan proceeds to acquire rights in or the use of the piano or stereo. They already owned them.*** The new

[11] This avoidance provision is designed to protect debtors from potential *in terrorem* repossession threats by creditors with respect to collateral, such as household goods, that is valuable to the debtor but would yield little return to the creditor if it were repossessed and sold. *See* H.R. REP. NO. 95-595, 95th Cong., 1st Sess. at 127-128 (1977).

> security interest in the piano and stereo taken by Transamerica at the time of the refinancing was therefore not a "[PMSI]" . . . .

Id. at 800 (emphasis added.) Prior ownership of the collateral continues to be the hallmark of a non-PMSI. This point is also made in Comment 3 to UCC 9-103, which offers the following example of a security interest that would not satisfy the "close nexus" standard:

> Thus, a security interest does not qualify as a [PMSI] if the debtor acquires property on unsecured credit ***and*** **subsequently** ***creates the security interest to secure the purchase price.***

UCC § 9-103 cmt. 3 (emphasis added). In this example, the security interest could not be a PMSI because the debtor already owned the collateral when the debtor created the security interest in it.

The security interest at issue in the present case is ***not***, however, the security interest that FMC once held in the trade-in vehicle. That security interest was satisfied when the Dealer made the payoff advance to clear the title to the trade-in. What is at issue here is the security interest that the Dealer retained in the Taurus in connection with **its** sale of the Taurus. This distinguishes the present case from the *Matthews* scenario involving the refinancing of collateral already owned by the debtors. The Debtor did not own the Taurus when she granted the Dealer a security interest in the Taurus in connection with its purchase.

In concluding that Transamerica's security interest lost its purchase money character because the PMO was refinanced, this Court also relied upon the "antecedent debt" discussion in Official Comment 2 to old UCC 9-107(b):

> When a [PMSI] is claimed by a secured party who is not a seller, he must of course have given present consideration. This Section therefore provides that a purchase money party must be one who gives value "by making advances or incurring an obligation: the quoted language *excludes from the purchase money category any security interest taken as security for or in satisfaction of a pre-existing claim or antecedent debt.*

724 F.2d at 801 (emphasis in original). As explained in Section IV *supra,* however, the net NE obligation at issue herein was not "antecedent debt." The trade-in payoff amount was not already owed to the Dealer, who was the creditor under the RISC who gave present consideration for the net NE obligation by making the trade-in payoff advance as part of the retail installment sale at issue. Prior to the trade-in payoff advance made by the Dealer and her execution of the RISC, the Debtor owed the Dealer nothing with respect to the trade-in vehicle.

Matthews thus is distinguishable in that: (i) it involved not a seller but a lender that refinanced its own loan; and (ii) the debtors already owned the collateral when they granted Transamerica a security interest in it in connection with the refinancing. The BAP's erroneous characterization of the financing of the net NE obligation as "nothing more than a refinancing of the preexisting debt owed on the trade-in" is based upon its failure to recognize these distinctions.

VI The BAP Mischaracterized the Net NE Obligation As "Another Creditor's Unsecured Claim."

The BAP mischaracterized the debt attributable to the NE as "essentially another creditor's unsecured claim" and criticized the financing of NE in connection with a retail installment sale as "the conversion of unsecured claims into secured claims." 392 B.R. at 842. The amount that the Debtor owed to FMC for the trade-in vehicle was a PMO that was secured by the trade-in. That secured obligation was satisfied when the Dealer made the trade-in payoff advance to FMC. The net NE obligation that was payable initially to the Dealer was created when the Dealer and the Debtor included this expense item in the "Total Cash Price" under their RISC for the purchase of the Taurus, at which time it became secured by the Taurus. Thus, notwithstanding its conclusory assertion to the contrary, the BAP was plainly incorrect in characterizing the installment sale transaction at issue as one that involved "the conversion of unsecured claims into secured claims."

The BAP attempted to infuse its criticism of NE financing with meaning by noting that "[b]ankruptcy has a long history of distrust of the conversion of unsecured claims into secured claims." 392 B.R. at 842 (citing *Dean v. Davis*, 242 U.S. 438 (1917)). This is another instance of its misplaced reliance on cited authorities.

The debtor in *Davis* paid off an unsecured creditor by obtaining a loan secured by a mortgage on his house. Justice Brandeis stated that "The mortgage was not voidable as a preference under § 60b. Preference implies paying or securing a preexisting debt of the person preferred. ***The mortgage was given to secure Dean for a substantially contemporary advance***." *Id.* at 443 (emphasis added). Similarly here, the security interest in the Taurus was given to the Dealer to secure the present advance that gave birth to the net NE obligation. Accordingly, the net NE obligation secured was not a preexisting obligation to the Dealer and the scenario was not one involving the conversion of unsecured debt into secured debt.

Davis concluded that the payment to the unsecured creditor was, under the facts presented, a fraudulent transfer. It therefore supports the "distrust" proposition asserted by the BAP only when unsecured debt is converted into secured debt with the intent to hinder, delay or defraud other creditors. That is not the case here and rarely, if ever, would be the case in a retail installment sale.

VII The CAFSA, Which Authorizes the Financing of NE as Part of An Installment Sale Transaction, Should be Read *In Pari Materia* with the UCC Definition of a "PMO".

The CAFSA expressly authorizes motor vehicle dealers, in their capacity as installment sellers, to include debt attributable to NE in the "cash price" and the "amount financed" as part of the purchase money package that is a retail

installment sale.[12] CAL. CIV. CODE §§ 2982(A)(1), (8) (West 2006). The statutory authorization to finance these amounts as part of a motor vehicle retail installment sale constitutes a legislative acknowledgement of the close relationship between such a sale and indebtedness attributable to NE.

The BAP erred in refusing to apply the doctrine on *in pari materia*. The BAP refused to use CASFA as an interpretive aid because it believed the UCC term "price of the collateral" was unambiguous – an assertion belied by the length of its opinion. The BAP further noted that the doctrine "would require us to use a state-law based interpretive rule to construe how a federal statute would incorporate a state statute." 392 B.R. at 850. This statement disregards the fact that Congress legislated against a backdrop that included numerous state credit regulatory laws authorizing the inclusion of NE in RISCs. (*See* Add. C). Additionally, having viewed the PMO interpretive issue as one of state law, the BAP was not at liberty to disregard state rules of statutory construction as

[12] The UCC definition of the "price of the collateral" is broader than the CAFSA "cash price" definition even in states like California where the definition of "cash price" includes NE. This is the case because the "cash sale price" is defined generally to mean the amount that the Dealer would charge in a comparable cash transaction, thereby excluding finance charges. *Compare* CAL. CIV. CODE § 2982(A)(1) (West 2006) (defining "cash sale price" to include NE) *with* UCC § 9-103, cmt. 3 (defining "price of collateral" to include finance charges and interest). Accordingly, state retail installment sale definitions of the "cash price" invariably will be narrower than the UCC notion of "the price of the collateral," which also includes any expense incurred in connection with acquiring rights in the collateral.

involving "too convoluted" an interpretive approach. *See Peaslee*, 547 F.3d at 180 (referring PMO interpretive issue to NYS Court of Appeals for resolution).

Finally, the BAP suggested that the application of the *in pari materia* doctrine would be inappropriate because the CASFA "does not apply to car loans extended by . . . banks, thereby raising the possibility of a difference of application due solely to the status of the creditor . . . ." 392 B.R. at 850 (citation omitted). However, the BAP failed to cite another California statute that might yield a different result with respect to loans made by banks and the Industry Group is unaware of any such statute. The only California consumer credit regulatory statute identified by either the BAP or the parties is the CASFA and it compels the result advocated by AmeriCredit.

The BAP stated that the doctrine would fail in any event because the CASFA is a disclosure-based statute. *Id.* However, as AmeriCredit explained in its opening brief, only a relatively small portion of the CASFA is devoted to disclosure. The CASFA is predominantly a substantive consumer regulatory statute that regulates motor vehicle retail installment sales, and the RISCs that evidence them, virtually from cradle to grave. (*See* AmeriCredit Br. at 44-45).

The BAP claimed that the CASFA and the HP are not *in pari materia* because the "function [of the CASFA] is starkly different" than that **of the HP**. This statement reflects a misunderstanding of the *in pari materia* argument, which

is that the UCC definition of a "PMO" and the CASFA definition of the "cash price" should be read *in pari materia*. Moreover, the applicability of the *in pari materia* doctrine turns on whether the statutes involved relate to the same or similar subject matter, not whether they have the same "function" or the same "effects and goals." (AmeriCredit Br. at 45). UCC § 9-103 deals generally with the subject of a PMSI in goods and the CASFA regulates the permissible contents of a particular type of purchase-money security agreement – a purchase-money package that is memorialized in a RISC. The two statutes plainly relate to the same or similar subject matter, as is further evident from the fact that the UCC refers to the CASFA. *See, e.g.*, CAL. COM. CODE § 9201(b). Indeed, the HP and the CAFSA also relate to the same or similar subject matter in that both deal with PMOs under motor vehicle RISCs.

Finally, the BAP erroneously read CAL. COM. CODE § 9201(b), which states that a transaction subject to the UCC is also subject to CASFA, "to mean that both acts operate independently." 392 B.R. at 850. This provision actually acknowledges the overlapping and related nature of UCC Article 9 and the CASFA. An Official Comment provides that "[s]ubsection (b) makes clear that certain transactions, although subject to this Article [9], also are subject to other applicable laws relating to consumers or specified in that subsection" and "that the other law is controlling in the event of a conflict . . . ." CAL. COM. CODE § 9201,

cmt. 3; *accord id.* § 9201(b), (c). Thus, Section 9201 is effectively a legislative mandate to interpret the two statutes *in pari materia* to the extent that they don't conflict with one another.

The BAP also was myopic in its focus on the "price" prong of the UCC PMO definition. The CASFA NE authorization also is a legislative determination that financing NE constitutes "value given to enable" the acquisition of the vehicle. CAL. COM. CODE § 9103(1)(b). The related UCC Comment states that the term "value given to enable" includes "obligations for expenses incurred in connection with acquiring rights in the collateral." By defining a NE payoff amount as part of the "cash price" in a retail installment sale, the CASFA also confirms that the trade-in payoff advance made by the Dealer was "value given to enable" the Debtor's acquisition of the new vehicle and represents "an expense incurred in connection with acquiring" the new vehicle.

Moreover, under either prong of the UCC definition of a "PMO," the "close nexus" standard is the standard that must be met in order for the secured obligation in question to qualify as a PMO. *See* UCC § 9-103(a)(2) cmt. 3 (2001). By its terms, the "close nexus" standard merely requires a close nexus between the acquisition of the vehicle and the secured obligation. Although the BAP failed to consider the point, the CASFA plainly reflects an express legislative

acknowledgement of an intimate relationship between the secured NE obligation and the retail installment sale of which it is a part.

VIII Conclusion

The Industry Group urges this Court to apply the HP to protect AmeriCredit's entire claim from cramdown as a PMSI.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Federal Rules of Appellate Procedure 29(d) and 28.1(e)(2)(A)(i) that the Brief herein complies with the type-volume limitation contained in that rule. This Brief contains 6,999 words as calculated by the word processor with which this brief was produced, Microsoft Office Word 2003.