

**November 19, 2009**

**Barbara A. Schermerhorn**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE SHANNON RILEY MILLER  
and ANASTASIA CHRISTINE  
MILLER, also known as Ana C. Miller,  
also known as Ana C. Lockmann, also  
known as Anastasia C. Lochmann, also  
known as Ana C. Lockman,

Debtors.

BAP No. KS-09-003

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FORD MOTOR CREDIT COMPANY  
LLC,

Appellant,

v.

SHANNON RILEY MILLER,  
ANASTASIA CHRISTINE MILLER,  
and JAN HAMILTON, Trustee,

Appellees.

Bankr. No. 08-40935  
Chapter 13

OPINION\*

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Appeal from the United States Bankruptcy Court  
for the District of Kansas

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Before BROWN, THURMAN, and ROMERO, Bankruptcy Judges.

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ROMERO, Bankruptcy Judge.

Ford Motor Credit Company appeals the Order of the Bankruptcy Court for the District of Kansas confirming the Amended Chapter 13 Plan of Debtors Shannon Riley Miller and Anastasia Christine Miller (the "Millers"). We

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\* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

REVERSE.

## I. BACKGROUND FACTS

On April 10, 2007, Debtors Shannon Riley Miller and Anastasia Christine Miller (the “Millers”) purchased a 2007 Ford Fusion automobile from a dealership, Laird Noller Ford, Inc. The Millers entered into an installment sales contract to finance the purchase of the vehicle (the “Contract”).<sup>1</sup> The Contract was later assigned to Appellant Ford Motor Credit Company (“Ford”). Pursuant to the Contract, the Millers financed both the price of the vehicle, \$19,700, and additional charges.<sup>2</sup> The additional charges included payoff of the “negative equity” in the Millers’ trade-in vehicle in the amount of \$5,668.18, GAP insurance<sup>3</sup> in the amount of \$595.00, a vehicle service contract in the amount of \$1,075.00, and a dealer’s administrative fee of \$249.95.<sup>4</sup> Further, the Millers financed license, title, and registration fees of \$5.00 and taxes of \$597.86, which amounts are not at issue before this Court.

The Millers filed their Chapter 13 bankruptcy petition on July 9, 2008.<sup>5</sup> On the petition date, the Millers owed \$23,684.99 under the Contract. The Millers’ amended Chapter 13 plan, filed August 21, 2008, proposed to bifurcate Ford’s claim into secured and unsecured portions, paying as a secured claim the asserted value of the vehicle, with the remainder of the claim to be treated as an unsecured

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<sup>1</sup> *Kansas Simple Interest Vehicle Retail Installment Contract*, in Appellant’s Appendix at 15.

<sup>2</sup> *Id.*

<sup>3</sup> According to Ford, “gap protection” provides for waiver of the uncovered indebtedness if the vehicle were lost or damaged and the Millers’ insurance was not enough to repay the indebtedness under the Contract. *Appellant’s Brief* at 3.

<sup>4</sup> *Contract and Stipulation of Facts*, in Appellant’s Appendix at 15 and 92.

<sup>5</sup> *Voluntary Petition*, in Appellant’s Appendix at 17-68.

claim.<sup>6</sup> Ford objected to the Millers' amended plan, asserting the Millers must pay the full contract balance of \$23,684.99, pursuant to the "hanging paragraph" of 11 U.S.C. § 1325(a)(\*),<sup>7</sup> because the Ford Fusion was purchased within 910 days of the petition date.<sup>8</sup>

On December 2, 2008, the Bankruptcy Court issued an Order denying confirmation of the Millers' amended plan, but also denying Ford's objection.<sup>9</sup> The Bankruptcy Court found the negative equity, service contract, GAP insurance and administrative fees did not constitute part of Ford's purchase money security interest. However, the Bankruptcy Court also held the plan could not be confirmed because the proposed plan did not provide for the payment, as a secured debt, of the full value of the vehicle less the sums found not to be included in the purchase money security interest.<sup>10</sup>

On December 23, 2008, the Millers and Ford entered into an Agreed Order under which they agreed the amended plan should be interpreted to provide Ford with payment of \$16,096.86, instead of the original \$15,900.00.<sup>11</sup> On January 16, 2009, the Bankruptcy Court entered its Order confirming the amended plan.<sup>12</sup>

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<sup>6</sup> *Amended Chapter 13 Plan*, in Appellant's Appendix at 78-84.

<sup>7</sup> Unless otherwise noted, all future statutory references in the text are to title 11 of the United States Code.

<sup>8</sup> *Objection to Confirmation*, in Appellant's Appendix at 87-88.

<sup>9</sup> *Memorandum Order and Opinion Denying Confirmation, But Also Denying Objection of Ford Motor Credit Company Regarding Negative Equity, GAP Insurance, Service Contract and Administrative Fee* ("Order Denying Confirmation"), in Appellant's Appendix at 112-28, reported at *In re Miller*, No. 08-40935, 2008 WL 5539811 (Bankr. D. Kan. Dec. 2, 2008) (slip copy).

<sup>10</sup> *Id.* at 13-14, in Appellant's Appendix at 124-25.

<sup>11</sup> *Agreed Order*, in Appellant's Appendix at 130-31.

<sup>12</sup> *Order Confirming Plan*, in Appellant's Appendix at 132-34.

Ford filed its appeal on January 26, 2009.<sup>13</sup>

## II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.<sup>14</sup> A decision is considered final “if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”<sup>15</sup> Here, the Bankruptcy Court’s Order confirming the Debtors’ Chapter 13 plan is a final decision for purposes of review.<sup>16</sup> Neither party elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have thus consented to appellate review by this Court.<sup>17</sup>

## III. STANDARD OF REVIEW

The Bankruptcy Appellate Panel of the Tenth Circuit reviews the factual findings of the bankruptcy court for clear error and its legal findings *de novo*.<sup>18</sup> The Bankruptcy Court’s interpretation of the “hanging paragraph” of 11 U.S.C. § 1325(a)(\*) is a question of law subject to *de novo* review.<sup>19</sup>

## IV. DISCUSSION

Section 506(a)(1) of the Bankruptcy Code, allowing bifurcation of claims, provides in relevant part:

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<sup>13</sup> *Notice of Appeal*, in Appellant’s Appendix at 135-36.

<sup>14</sup> 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

<sup>15</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

<sup>16</sup> *Interwest Bus. Equip., Inc. v. United States Trustee (In re Interwest Bus. Equip., Inc.)*, 23 F.3d 311, 315 (10th Cir. 1994).

<sup>17</sup> 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

<sup>18</sup> *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

<sup>19</sup> *See In re Gledhill*, 164 F.3d 1338, 1340 (10th Cir. 1999).

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property[.]<sup>20</sup>

However, Section 1325(a)(\*), the so-called "hanging paragraph" added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

("BAPCPA"), provides:

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 [period] preceding the date of the 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, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.<sup>21</sup>

Thus, a purchase money loan made for a vehicle destined for a debtor's personal use within 910 days of the filing of a bankruptcy petition is known as a "910 car loan." The question then arises what elements of such a loan may be considered in the nature of a purchase money security interest and therefore not be subject to bifurcation into secured and unsecured claims.

#### **A. Negative Equity Payment**

As noted by this Court in *In re Padgett*,<sup>22</sup> since enactment of BAPCPA in 2005, bankruptcy, district, and circuit courts throughout the country have wrestled with the issue of whether various state law definitions of purchase money security interest exclude negative equity.<sup>23</sup> In *Padgett*, we concluded negative equity is

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<sup>20</sup> 11 U.S.C. § 506(a)(1).

<sup>21</sup> 11 U.S.C. § 1325(a)(\*).

<sup>22</sup> *In re Padgett*, 408 B.R. 374 (10th Cir. BAP 2009).

<sup>23</sup> See *Graupner v. Nuvel Credit Corp. (In re Graupner)*, 537 F.3d 1295, 1300 (11th Cir. 2008) (collecting cases).

debt secured by a purchase money security interest, and the hanging paragraph of § 1325(a)(5) prevents debtors from cramming down a 910 vehicle claim including negative equity.<sup>24</sup>

On August 3, 2009, the Tenth Circuit Court of Appeals, addressing Kansas law, resolved the issue of negative equity in this circuit, concluding “the trade-in exchange is essentially a single transaction,” and including the payment of negative equity in a traded-in vehicle in a purchase money security interest.<sup>25</sup> The Tenth Circuit, in agreement with the Bankruptcy Court, pointed out “discharging negative equity is necessary to complete the trade-in because otherwise the dealer would take the old vehicle subject to a lien exceeding the vehicle’s value.”<sup>26</sup> The Tenth Circuit further held:

We conclude the trade-in exchange is essentially a single transaction. The expense incurred in retiring the lien on the trade-in vehicle, therefore, is an “expense[ ] incurred in connection with acquiring rights” in the new car. Kan. Stat. Ann. § 84-9-103 cmt. 3. There is also the requisite “close nexus” between the acquisition of the new vehicle and the secured obligation.” *Id.*<sup>27</sup>

Therefore, under this Court’s previous holding and now under the Tenth Circuit’s binding precedent, the negative equity of \$5,668.18 included as part of the Contract is part of Ford’s purchase money security interest, and may not be bifurcated under § 1325(a)(\*).<sup>28</sup>

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<sup>24</sup> *Padgett*, 408 B.R. at 381.

<sup>25</sup> *Ford v. Ford Motor Credit Corp. (In re Ford)*, 574 F.3d 1279, 1285 (10th Cir. 2009).

<sup>26</sup> *Id.* (citing *In re Ford*, 387 B.R. 827, 831 (Bankr. D. Kan. 2008)).

<sup>27</sup> *Id.* It should also be noted that, although the Tenth Circuit went on to state “[t]he entire debt incurred by the debtors is therefore a ‘purchase-money obligation[,]’” the Court had before it only the issue of whether the negative equity comprised part of the purchase money security interest, as the parties did not address additional items included in the financing. *Id.* at 1285.

<sup>28</sup> Most recently, the Fifth Circuit and Eighth Circuit Courts of Appeals have also found negative equity to be secured by a purchase money security interest.

(continued...)

## B. Additional Charges

The remaining question is whether the other disputed charges comprise part of the purchase money security interest, or whether they may be separated from the balance of the claim. As noted by the dissent in *Ford*, “Kansas has adopted the dual-status rule, which preserves a [purchase money security interest] to the extent it secures a purchase-money obligation and destroys it to the extent the [purchase money security interest] is overloaded.”<sup>29</sup> Specifically, the Kansas legislature’s 2001 revision of the Uniform Commercial Code to include Kansas Statute § 84-9-103 constituted adoption of the dual-status rule.<sup>30</sup> In addition, as noted above, Comment 3 to Kansas Statute § 84-9-103 further clarifies that certain “transaction costs,” such as “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” constitute part of a purchase money security interest, but mandates “a close nexus between the acquisition of collateral and the secured obligation.”<sup>31</sup> This Court must therefore analyze the remaining disputed costs in accordance

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<sup>28</sup> (...continued)  
*In re Dale*, 582 F.3d 568, 572 (5th Cir. 2009); *In re Mierkowski*, 580 F.3d 740, 743 (8th Cir. 2009); *In re Callicott*, 580 F.3d 753, 754 (8th Cir. 2009).

<sup>29</sup> *Ford*, 574 F.3d at 1290 (Tymkovich, J., dissenting).

<sup>30</sup> See *In re Vega*, 344 B.R. 616, 623 n.29 (Bankr. D. Kan. 2006); *In re Miller*, No. 08-40935, 2008 WL 5539811, at \*2 (Bankr. D. Kan. Dec. 2, 2008) (*Order Denying Confirmation*); Christopher Harry, Comment, *To be (Transformed), or Not to Be: The Transformation Versus Dual-Status Rules for Purchase-Money Security Interests Under Kansas’ Former and Revised Article 9*, 50 U. Kan. L. Rev. 1095, 1122 (June, 2002). See also *In re Billings*, 838 F.2d 405, 409 (10th Cir. 1988) (adopting the dual status rule, and noting “[district] and bankruptcy courts in this circuit, applying their understanding of the laws of most states in our circuit, have rejected the ‘transformation’ rationale, and have held that refinancing does not automatically transform a purchase money security interest.”).

<sup>31</sup> Kan. Stat. Ann. § 84-9-103 cmt. 3.

with these principles.<sup>32</sup>

### **1. GAP Insurance**

In its December 2, 2008, Order, the Bankruptcy Court noted neither party provided a copy of the GAP policy, and the stipulations of fact did not address the Debtors' allegations in their November 7, 2008, brief.<sup>33</sup> However, Ford's response brief did not dispute the Debtors' allegations with respect to the policy, and the Bankruptcy Court accepted them as accurate.<sup>34</sup> The Debtors' November 7, 2008, brief states:

The "GAP Agreement" is defined in the "Addendum to the Financing Agreement GAP Agreement." However, the definition is in the negative: It is defined as not insurance and not general liability coverage and not something that fulfills the requirements of financial responsibility laws and not something that will completely cancel the debt. It is further stated to be optional and, "has no bearing on the extension of credit, the terms of the credit, nor the terms of the sale of the vehicle." Furthermore, the reverse side of the agreement says that it may be canceled at any time, unless a "total loss" has occurred. This fee is noted to have been paid to Universal Underwriters.<sup>35</sup>

In its response brief, Ford acknowledges: "With regard to the extended service contract and GAP insurance, debtors are able to cancel their elected coverage simply by contacting the dealer."<sup>36</sup>

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<sup>32</sup> It must be noted that in at least two circuits, this distinction has been ignored. *In re Dale*, 582 F.3d 568 (5th Cir. 2009) (GAP insurance and extended warranty charge included in creditor's purchase money security interest with no analysis or discussion); *Wells Fargo Fin. Acceptance v. Price (In re Price)*, 562 F.3d 618 (4th Cir. 2009) (Court implicitly rejected North Carolina's "dual purpose" rule and held all charges connected with the purchase of a new vehicle fell within the creditor's purchase money security interest).

<sup>33</sup> *Order Denying Confirmation*, at 9 n.15, in Appellant's Appendix at 120.

<sup>34</sup> *Id.*

<sup>35</sup> *Brief Of Debtors Regarding Objection to Plan Filed by Ford Motor Credit Company LLC*, filed November 7, 2008, at ¶ 6, in Appellant's Appendix at 101.

<sup>36</sup> *Response Brief of Secured Creditor Ford Motor Credit Company in Support of Objection to Chapter 13 Plan Treatment*, filed November 17, 2008, in Appellant's Appendix at 108.

Therefore, based on the record, the GAP insurance policy is optional, not connected to the terms of the sale, and able to be canceled at any time. Accordingly, it does not have the requisite “close nexus between the acquisition of collateral and the secured obligation,” and thus, does not fall within the purview of “purchase money security interest.”

## **2. Service Contract**

A copy of the service contract, priced at \$1,075.00, is attached to the Debtors’ November 7, 2008 brief. As admitted in Ford’s November 17, 2008, brief, the contract provides, at the bottom of the section labeled “Vehicle Service Contract”: “The purchase of this contract is not required in order to purchase, register or obtain financing for this vehicle.”<sup>37</sup> As noted above, this contract, like the GAP policy, can be canceled at any time.<sup>38</sup> Thus, like GAP insurance, the service contract cannot be considered a portion of Ford’s purchase money security interest.

## **3. Dealer’s Administrative Fees**

The Kansas Simple Interest Vehicle Retail Installment Contract, attached as an exhibit to Ford’s Proof of Claim, reflects, as part of the amount financed, “Laird Noller Ford, Inc., Administrative Fee” in the amount of \$249.95. There is no specific information before the Bankruptcy Court as to what the fees covered.<sup>39</sup>

Comment 3 indicates a purchase money security interest “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

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<sup>37</sup> *Appellant’s Appendix* at 104.

<sup>38</sup> *Response Brief of Secured Creditor Ford Motor Credit Company in Support of Objection to Chapter 13 Plan Treatment*, filed November 17, 2008, in *Appellant’s Appendix* at 108.

<sup>39</sup> *See Order Denying Confirmation* at 13, in *Appellant’s Appendix* at 124.

enforcement, attorney's fees, and other similar obligations." Although the Millers argue Ford should be required to show any such expenses are mandatory for the Millers to purchase the vehicle, and the Bankruptcy Court placed the burden on Ford to prove the administrative fees were properly included as part of the purchase money security interest, neither Comment 3 nor the statute itself contain such directives. Rather, Comment 3 addresses expenses incurred in connection with the acquisition of the vehicle, including "administrative charges." Based on the record before the Court, the administrative fee in question meets that requirement.

The Millers' attempt to distinguish between "fees," which apply to their Contract, and "charges" referred to in the Comment, lacks merit. Even if there is a substantive difference between fees and charges, "fees" certainly constitute "other similar obligations." The administrative fee at issue thus should be included as part of Ford's purchase money security interest.

## **V. CONCLUSION**

For the reasons stated above, the Order of the Bankruptcy Court confirming the amended plan is hereby REVERSED to the extent it does not include the negative equity and the administrative fee of \$249.95 as a portion of Ford's purchase money security interest for purposes of 11 U.S.C. § 1325.