

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

In re: :  
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BARRY PRESS and :  
ALICIA PRESS, : Case No.06-10978-BKC-JKO  
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Debtors. : Chapter 13  
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**ORDER ON DEBTORS' MOTION TO VALUE COLLATERAL  
AND STRIP LIEN OF DRIVE FINANCIAL SERVICES, LP**

This case requires the Court to interpret and apply the “hanging paragraph” at the end of § 1325(a) of the Bankruptcy Code as enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) which provides for differentiated treatment of certain car loans. The question presented is whether the loan made to the Debtor Barry Press is or is not such a loan.

Barry Press bought a used 2003 Chrysler Voyager from CarMax – Fort Lauderdale on October 15, 2004, and agreed to pay interest at the rate of 18.75% on the secured loan’s principal amount of \$12,545.77. CarMax thereafter assigned the loan to Drive Financial Services, LP

(“Drive”), the Respondent here. Barry Press and his wife, the Debtor Alicia Press, filed their joint petition under chapter 13 on March 21, 2006. The Debtors have now moved to value the car under 11 U.S.C. § 506 with the stated intent of paying the actual value of the car, which they contend is worth \$8,000, with interest at the *Till* rate<sup>1</sup> of prime plus 2%, or 9 ½%, under their chapter 13 plan.

Section 1325 of the Code sets forth the requirements for the confirmation of a chapter 13 plan. In order to be confirmed, the plan must provide for one of three treatments for secured creditors: (1) provide the secured creditor with treatment which the secured creditor has accepted; (2) provide for the surrender of the collateral to the secured creditor; or (3) keep the collateral and provide the secured creditor with a stream of payments whose value is equal to the amount of the secured claim. 11 U.S.C. § 1325(a)(5).

Under pre-BAPCPA law, § 506 allowed the debtor to bifurcate claims of secured creditors, including car loans, into secured and unsecured portions by valuing the collateral. The stripped down secured claim would be treated under one of the three options set forth above, and the unsecured deficiency balance would be treated as an unsecured claim.

BAPCPA made a significant change to § 1325(a) regarding car loans. At the end of § 1325(a)(9), BAPCPA added the following language in what cases refer to as the “hanging paragraph:”

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 (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. [Emphasis added.]

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<sup>1</sup>*Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

Section 506(a)(1) provides that “[a]n 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 such property....” Accordingly, the language contained in the hanging paragraph makes the value of the collateral irrelevant in determining the allowed amount of a claim secured by a purchase money security interest in a vehicle acquired within 910 days prior to the bankruptcy filing for the personal use of the debtor. Unless the amount of the claim is subject to reduction for reasons other than collateral value, the hanging paragraph requires that the creditor’s allowed secured claim is fixed at the amount of the underlying debt under nonbankruptcy law regardless of the value of the collateral.<sup>2</sup>

Drive contends that the Debtors may not strip its lien under § 506 but must instead pay the full claim,<sup>3</sup> which Drive contends in its brief and in Claim 2 filed in this case is \$10,410.62, because of the provisions of the “hanging paragraph” in new § 1325(a).

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<sup>2</sup>See *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006), generally holding that if a chapter 13 debtor elects to surrender a vehicle obtained within 910 days of the bankruptcy filing, that surrender is deemed to satisfy the creditor’s claim in full regardless of the value of the collateral because the prohibition on the application of § 506 works both ways, and thus the creditor retains no deficiency to assert as an unsecured claim.

<sup>3</sup>Neither party was asked to, and neither party did, address in the briefs what interest rate would be applicable if lien stripping were prohibited here. The Supreme Court addressed the issue of interest rates under § 1325 pre-BAPCPA in *Till*, *supra*, and cases holding that the anti-lien-stripping provision of § 1325(a) to be applicable under the facts there have held that the proper interest rate in such situations is not the contract rate but is instead the *Till* rate. *In re Lowder*, 2006 WL 1794737 (Bankr. D. Kan. 2006); *In re Fleming*, 339 B.R. 716, 720 (Bankr. E.D. Mo. 2006); *In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala. 2006); *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Mo. 2006); *In re Johnson*, 337 B.R. 269 (Bankr. M.D. N.C. 2006). This Court believes these decisions correctly found the *Till* interest rate to be applicable in situations in which lien stripping is prohibited by the hanging paragraph.

There is no question here that Drive holds a purchase money security interest in a car securing debt incurred within the 910 days prior to the filing of the Debtors' petition, thereby satisfying two of the three requirements of the hanging paragraph. The parties dispute whether the car was "acquired for the personal use of the debtor," Barry Press, within the meaning of the statute.

The Debtors contend that the car was in fact acquired, and is used, by Barry Press' wife and co-Debtor, Alicia Press, and was thus not acquired for the "personal use of the debtor."<sup>4</sup> Drive argues, by contrast, (1) that "[t]his is a jointly-filed case and even if the vehicle was not acquired for the personal use of Debtor Barry S Press, it was acquired for the personal use of Debtor Alicia S Press;" and (2) that under 11 U.S.C. § 102(7), Rules of Construction, "the singular includes the plural which implies that the use of the term 'debtor' includes the plural form of the word and would include the word 'debtors' in its usage, meaning, and practical application" of the hanging paragraph. Drive further argues that it is not credible that the car is not for the use and benefit of Barry Press because it is the family's only vehicle,<sup>5</sup> but that in any event, "his wife is a joint debtor, and the car is for her personal use." Thus, Drive relies for its position that the car was "**acquired for the personal use of the debtor**" Barry Press upon two contentions: (1) that it is implausible that Barry Press doesn't make some use of the car, and (2) that the use of the car by Alicia Press is enough to bring the car under the ambit of the hanging paragraph.

The term "personal use" is nowhere defined in the Bankruptcy Code, although the term "personal, family or household use" appears repeatedly throughout the Code. When Congress wants

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<sup>4</sup>As noted above, Barry Press is the only debtor to Drive.

<sup>5</sup>Drive's actual argument is as follows: "The Debtors' argument that this vehicle is not for Mr. Press' personal use or benefit is an insult on the intelligence of this Court and is frivolous and without merit." The Court demurs.

to include family or household use within the scope of the Bankruptcy Code, it knows how to do so, and, indeed, did so in BAPCPA amendments to § 506(a)(2). For example, § 101(8) provides that “[t]he term ‘consumer debt’ means debt incurred by an individual primarily for a personal, family, or household purpose,” 11 U.S.C. § 101(8). The phrase appears in § 365(d)(5) regarding performance of obligations under an unexpired lease; in § 506(a)(2), inserted by BAPCPA, regarding valuation of certain property; in § 507(a)(7) regarding priority claims for deposits for goods and services; and in various places in § 522 regarding exempt property. Consequently, the omission of “family or household” from the hanging paragraph means as a matter of statutory construction that the phrase “personal use” standing alone has a different meaning. *United States National Bank v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993).

“Personal” is defined as “[o]f or relating to a particular person; private,” American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000). There is no implication in the plain meaning of the word “personal” in this context that includes the concepts of “family” or “household,” and there is nothing in the plain meaning of the statute that allows Drive to pull Barry Press under a penumbra cast by his wife, Alicia Press, such that a car acquired for **her** “personal use” is transmuted into a car acquired for anyone other than her.

Drive’s response to the Debtors’ argument on this point is telling. Drive argues that it “believes that the facts at hand are so one-sided in favor of this Creditor that there is no need for it to try to explain the Congressional intent for omitting the words ‘family’ and ‘household’ from being similarly coupled with the word ‘personal’ in this context.” In other words, Drive has no explanation whatever. Since the applicable rules of statutory construction require this Court to interpret “personal use” as something different from “personal, family or household use,” the Court

concludes that the words “personal use” are more limiting. In the context of this case, the words “personal use” refer to use by Alicia Press alone.

Moreover, whether or not Barry Press may have made use of the car is irrelevant under the statute, which speaks only in terms of a car “*acquired* for the personal use of the debtor.” Drive points to nothing to challenge the Debtor’s assertion that the car was “acquired” for the personal use of Alicia Press. Under the plain meaning of the hanging paragraph, once the car was acquired for the personal use of Alicia Press, incidental or even frequent use by Barry Press is not a consideration under the plain meaning of the statute.

Although a number of cases interpreting the meaning of the hanging paragraph have begun to appear in the last few months, many of them listed in footnote 3 above, the most analogous case to this one is *In re Jackson*, 338 B.R. 923 (Bankr. M.D. Ga. 2006), in which the Court held that a car acquired within 910 days of the debtor’s chapter 13 filing for the use of his non-debtor wife was outside the ambit of the hanging paragraph and was therefore subject to valuation and lien stripping under § 506. In *Jackson*, both the debtor and his non-debtor spouse had cars, and the car at issue, although titled solely in the debtor-husband’s name, was “hers.” The *Jackson* Court thus did not have a situation, as here, in which the husband and wife have only one car. This Court is nonetheless satisfied that where the car is acquired for the primary use of a non-debtor to the secured creditor, the car is not “acquired for the personal use of the debtor” within the meaning of the hanging paragraph in § 1325(a).

Drive argues that the rule of construction contained in 11 U.S.C. § 102(7), that “the singular includes the plural,” means that the use of the word “debtor” in the hanging paragraph is to be read as “debtors,” *i.e.*, as “acquired for the personal use of the *debtors*” where, as here, there are co-

debtors. This argument is fatally flawed. Only Barry Press is a debtor to Drive under the secured car loan. The filing of a joint petition by husband and wife under 11 U.S.C. § 302 does not create a single, substantively consolidated estate. Rather, consolidation (as distinct from joint administration) requires a separate judicial determination under § 302(b) to “determine the extent, if any, to which the debtors’ estates should be consolidated.” The rights of creditors of the different debtors’ estates are not affected by the joint administration, and creditors of one spouse are not entitled to proceeds of separate property belonging to the other spouse. *In re Hicks*, 300 B.R. 372 (Bankr. D. Idaho 2003). Absent substantive consolidation, which has not been sought in this case, the estates of the Debtors Barry Press and Alicia Press remain separate and distinct. *In re McCulley*, 150 B.R. 358 (Bankr. M.D. Pa. 1993); *In re Chandler*, 148 B.R. 13 (Bankr. E.D. N.C. 1992). The estates of a husband and wife may not be consolidated when the creditors of one estate will benefit to the detriment of creditors of the other, *In re Birch*, 72 B.R. 103 (Bankr. D. N.H. 1987). Accordingly, the rule of construction in § 102(7) does not provide Drive with the ability to argue<sup>6</sup>, as they do here, that “if a vehicle is acquired for the personal use of either Debtor then the personal use threshold is met per [the hanging paragraph] and the Debtors cannot move to value under § 506(a)(1).”

Based upon the foregoing, it is ORDERED

1. The Debtors’ motion to value collateral and strip lien of Drive Financial Services, LP, is hereby GRANTED.

2. The 2003 Chrysler Voyager owned by the Debtor Barry Press is hereby valued pursuant to 11 U.S.C. § 506(a)(1) at \$8,000.

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<sup>6</sup>Or perhaps better stated, to prevail in that argument.

3. Drive Financial Services, LP's secured claim is hereby DETERMINED to be and ALLOWED in the amount of \$8,000. Drive Financial Services, LP, is entitled to interest on that secured claim at 9½% simple interest for total payments of \$9,225.36 over 60 months under the Debtors' chapter 13 plan.

4. The balance of Drive Financial Services, LP's Claim 2, filed in the total amount of \$10,410.62, is hereby DETERMINED to be and ALLOWED as a general unsecured claim in the amount of \$2,410.62.

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