



IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: September 13, 2004

**ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
DAVID R. ELKINS and)	Case No. 00-14416
MICHELLE D. ELKINS)	Chapter 7
)	
Debtors.)	
)	

**ORDER DENYING FORD MOTOR CREDIT COMPANY'S
MOTION TO MODIFY STAY**

This matter is before the Court on Ford Motor Credit Company's motion for relief from the automatic stay, 11 U.S.C. § 362.¹ The Court has jurisdiction over this contested matter.²

Factual Background

Debtors filed this case as a Chapter 13 in 2000. In their Third Amended Plan, the debtors

¹ Unless otherwise noted, all subsequent statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq.

² 28 U.S.C. § 157(b)(1) and (b)(2)(G); Fed. R. Bankr. P. 4001 and 9014(a).

valued their 1996 Geo Prizm at \$6,700 and provided for payment of that amount to Ford Motor Credit Corporation (FMCC), plus interest, over the life of the plan. FMCC was to retain its lien in the Prizm and the balance of its claim would be treated as unsecured. Debtors converted their case to Chapter 7 on January 26, 2004, after they had paid in full the \$6,700 to FMCC under the plan.

After the conversion, FMCC filed a motion to modify the automatic stay to enforce its lien in the Prizm. Debtors objected, asserting that by retiring the amount of the secured claim while the case proceeded in Chapter 13, they had paid FMCC's lien in full and that the lien should be released of record. The Court directed counsel to submit letter briefs with authority pertinent to the effect of conversion on a paid-in-full allowed secured claim and whether such payment entitled the debtors to the lien's release. Both counsel having complied, the Court has reviewed the file, determined that there is no issue of fact requiring trial, and is ready to rule.

Analysis

FMCC argues that the United States Supreme Court's logic in *Dewsnup v. Timm*³ extends to, and precludes, a "strip-down by conversion" as in this case. In *Dewsnup*, the Supreme Court held that a chapter 7 debtor could not avail himself of § 506(d) to "strip down" an undersecured creditor's lien on real property to the amount of the value of the collateral. Because *Dewsnup* affirmed an appeal from a decision of the United States Court of Appeals for the Tenth Circuit,⁴ FMCC asserts that the Circuit might well take a similar view of a strip-down by conversion, potentially holding that such an act would be an "expansion of debtors rights far beyond what is contemplated in the Code."⁵

Debtors argue that because FMCC agreed (or at least did not object) to accept the \$6,700 with

³ 502 U.S. 410, 112 S.Ct. 773, 116 L. Ed. 2d 903 (1992).

⁴ 908 F.2d 588 (10th Cir. 1990).

⁵ 908 F.2d at 592.

interest as full payment of its allowed secured claim, FMCC cannot now be permitted to, in essence, secure its unsecured claim with the same collateral.

While each party cited a number of cases from other jurisdictions, neither party addressed the impact of 11 U.S.C. § 348(f)(1)(B), enacted after *Dewsnup* and effective October 22, 1994.⁶ This subsection states:

(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, *with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.*⁷

The plain language of this statute makes clear that to the extent an allowed secured claim has been paid in a Chapter 13 case prior to conversion, the claim is reduced. This is necessarily consistent with the concept of making Chapter 13 valuations applicable in the ensuing case. As noted by treatise author Judge Lundin, “[i]f the debtor pays the allowed amount of a secured claim in full during the Chapter 13 case, § 348(f)(1)(B) says the allowed secured claim is reduced to zero in the Chapter 7 case at conversion.”⁸

Since § 348(f)(1)(B)’s enactment, only a few courts have directly addressed its effect in cases

⁶ The historical and statutory notes to § 348 indicate that the amendment applied prospectively and did not govern bankruptcy cases commenced prior to October 22, 1994. *See* 11 U.S.C. § 348, Historical and Statutory Notes (West 2004).

⁷ 11 U.S.C. § 348(f)(1) (West 2004) (Emphasis added).

⁸ 4 Keith Lundin, CHAPTER 13 BANKRUPTCY, § 320.1 (3rd ed. 2004).

with facts similar to those in the case at bar. In *In re Archie*,⁹ the bankruptcy court was presented with a nearly identical scenario. There, the debtors had paid the allowed secured claim secured by their vehicle in full during a Chapter 13 case and had also paid nearly 60 per cent of the creditor's unsecured claim. The debtors then converted their case to Chapter 7. They sought to redeem the vehicle during the Chapter 7 case and requested that the court order the creditor to turn over the title to their vehicle. The creditor responded that allowing a post-conversion redemption on these terms would enable the debtors to redeem in installments contrary to the Code and would also give debtors an incentive to abuse the Code by giving them the means to circumvent *Dewsnup*'s prohibition on lien-stripping in Chapter 7.

The *Archie* court made short work of these arguments, pointing out that the clear language of § 348(f) requires: (1) that valuations reached in Chapter 13 cases still apply after the case is converted; and (2) that the allowed secured claims allowed in Chapter 13 cases are reduced to the extent paid under the plan.¹⁰ The *Archie* court also noted that both *Collier* and *Norton*, the leading bankruptcy treatises, are in accord that the 1994 amendment to § 348 indicates Congress' rejection of the decisions relied on by FMCC that held debtors seeking redemption in a converted case had to pay the full value of the property and essentially forfeit the payments made in the Chapter 13 case.¹¹

Turning to the facts before it, the *Archie* court noted that the plan had provided for the creditor

⁹ 240 B.R. 425 (Bankr. S.D. Ala. 1999).

¹⁰ *Id.* at 430.

¹¹ See 3 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 348.07[4] (15th ed. rev. 2004); 5 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 2D § 125:3 (2d ed. 2003 & Supp. 2004).

to receive payment of its allowed secured claim with interest, as required by § 1325.¹² By receiving interest, the creditor was left in essentially the same position it would have occupied had the debtors filed a Chapter 7 in the first place. Further, the debtors had paid part of the creditor’s unsecured claim, arguably more than the creditor would have received had the case been filed as an original Chapter 7. Answering the creditor’s charge that its ruling would open up converted cases to abuse, the court responded that the Code “provides sufficient methods to deal with bad faith bankruptcy filings, conversions, or redemption requests.”¹³ The court then outlined the various tools at its disposal for use in policing bad faith filings: § 707(a) (“for cause” dismissals); § 707(b) (“substantial abuse” dismissals); § 1325(a)(3) (precluding confirmation of a plan not offered in good faith); and § 348(f)(2) (including in the converted chapter 7 estate, property accumulated by debtors between filing of their Chapter 13 case and its bad faith conversion). Concluding that adoption of the creditor’s view “would discourage debtors from filing chapter 13 and attempting to pay their debts over time from future income,” the *Archie* court allowed the redemption requested.¹⁴

In short, the *Archie* court held that the enactment of § 348(f)(1)(B) effectively nullifies the line of cases cited by FMCC, starting with *In re Burba*,¹⁵ nearly all of which were decided prior to the

¹² It was unclear from the order confirming the plan whether the amount of the creditor’s allowed secured claim included interest but the creditor did not object to the plan and the order confirming the plan had become final. 240 B.R. at 430.

¹³ *Id.* at 431.

¹⁴ *Id.*

¹⁵ 1994 WL 709314 (6th Cir., Nov. 10, 1994), 42 F.3d 1388 (Table). FMCC also cited cases involving attempted real estate stripdowns in Chapter 7, cases which fall clearly within the *Dewsnup* precedent, but which are factually dissimilar to the case at bar.

effective date of the 1994 amendment or decided without reference to it at all.¹⁶ This Court is persuaded by and adopts the well-reasoned opinion in *Archie* as the only supportable view on the point.¹⁷

Here, the Elkins paid their allowed secured claim in full, with interest. The only factual divergence from *Archie* is the fact that none of FMCC's unsecured claim had been paid prior to conversion. FMCC makes no allegation of bad faith or substantial abuse and offers no evidence of other miscreant conduct on the part of the debtors. Instead, it relies on the authority of *Dewsnup* to support its position.

But resort to *Dewsnup* is of little value to FMCC. First, the case is inapposite on its facts. Here, debtors seek to protect their vehicle from stay relief and foreclosure because they have paid in full the allowed secured claim of FMCC in the Chapter 13. In *Dewsnup*, debtor sought to avoid the creditor's real estate mortgage to the extent the value of the property was less than the mortgagee's debt. Because the property in question was realty, § 722 redemption was not in play. The enactment of § 348(f)(1)(B) lay two years in the future. The Supreme Court in *Dewsnup* essentially held that the use of the words "allowed," "secured," and "claim" in one phrase did not, for the purposes of § 506(d) make "allowed secured claim" a term of art. Rather, it held that § 506(d) merely avoided liens which did not secure "allowed claims." The majority held that the so-called ambiguity in § 506,

¹⁶ *Hoffman Farms v. Pokela (In re Hoffman Farms)*, 195 B.R. 80 (D. S.D. 1996); *Gammon v. Chrysler Credit Corp. (In re Gammon)*, 155 B.R. 15 (W.D. Okla. 1993); *In re Bennett*, 2004 Bankr. LEXIS 1187 (Bankr. W.D. Ky. Jul. 26, 2004); *Crain v. PSB Lending Corp. (In re Crain)*, 243 B.R. 75 (Bankr. C.D. Cal. 1999); *In re Jordan*, 164 B.R. 89 (Bankr. E.D. Mo. 1994); *McDonough v. Plaistow Cooperative Bank (In re McDonough)*, 166 B.R. 9 (Bankr. D. Mass. 1994); *In re Jones*, 152 B.R. 155 (Bankr. E.D. Mich. 1993). The Court appreciates FMCC's counsel's providing lists of cases on either side of the point.

¹⁷ Two other courts have followed *Archie*, adopting a similar analysis of § 348(f)(1)(B) and reaching the same conclusion. See *In re Rodgers*, 273 B.R. 186, 193 (Bankr. C.D. Ill. 2002); *In re Dean*, 281 B.R. 912, 915 (Bankr. W.D. Tenn. 2002).

combined with the lack of any other reference to strip-down in either the Code or the legislative history, meant that Congress intended to preserve the pre-Code status quo—that liens passed through a bankruptcy case unscathed.¹⁸ The Supreme Court also limited the application of its decision by stating, “[w]e therefore focus upon the case before us and allow other facts to await their legal conclusion on another day.”¹⁹

In light of its factual differences and the Supreme Court’s expressed narrow holding, this Court concludes that extension of the “*Dewsnup*” effect to this case is thwarted by the enactment of § 348(f)(1)(B) and the availability of § 722 redemption now that debtors are in Chapter 7.

Of course, this Court would not permit Chapter 7 debtors to redeem personalty in installments and, by paying the allowed secured claim in full in a Chapter 13 plan and then converting, these debtors have effectively done exactly that. FMCC’s argument that it should retain its lien until the debtors have completed their duties under the Chapter 13 plan (*i.e.*, paid their disposable income to the trustee for the benefit of the unsecured creditors for the life of the plan) is compelling, but unsupported by the Code. Congress left § 722 undisturbed in 1994 when it enacted § 348(f)(1)(B). This Court finds no authority for the proposition that a debtor is precluded from exercising his or her redemption right under § 722 after conversion no matter what debtor may have paid pre-conversion. The preservation of pre-conversion valuation and recognition of pre-conversion payments seem to contemplate that such redemption would readily be granted.

Absent enactment of § 348(f)(1)(B), § 506(a) would control the timing of valuation and ostensibly permit a re-valuing of the creditor’s collateral at the time of “any hearing on . . . disposition or use of [the collateral].” FMCC could arguably claim that it was entitled to a re-valuation of the

¹⁸ See former 11 U.S.C. § 67d (1977).

¹⁹ *Dewsnup*, 112 S.Ct. at 778.

Prizm and payment of its current value were debtors to seek redemption. Section 348(f)(1)(B) gives the pre-conversion valuation effect after conversion and, in the absence of any statutory restriction on converted debtors exercising § 722 redemption, this Court can only conclude that such redemption would be available here.

While FMCC's lien technically still exists, the debtors are entitled to redeem their vehicle by paying nothing because they have already satisfied the allowed secured claim in their Chapter 13 case. Because FMCC has received the ultimate adequate protection, repayment in full, with interest, of the value of its collateral, cause for relief under § 362(d)(1) does not exist. While debtors lack equity in the collateral, nothing prevents them from redeeming it without further payment. Granting FMCC's motion would, in essence, allow FMCC a "double-dip" resulting in the debtors paying not only what the car was worth when the Chapter 13 plan was confirmed, but also being held liable to pay the unsecured balance or some portion thereof in order to retain their vehicle. This would defy § 348(f)(1)(B)'s clear meaning that pre-conversion payments reduce allowed secured claims and nullify its express provision that pre-conversion valuations control post-conversion.

FMCC's motion for relief from stay is DENIED, without prejudice, pending debtors' promptly filing a Motion to Redeem the vehicle.

IT IS SO ORDERED.

#