CASE NO. 05-bk-38219

IN THE
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVSION

IN RE: LARRY E. EZELL and REGINA A. EZELL, *Debtors*

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN OPPOSITION TO THE OBJECTION TO CONFIRMATION FILED BY JPMORGAN CHASE BANK, N.A.

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STATEMENT OF INTEREST OF NACBA AS AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,400 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 600,000 bankruptcy cases filed each year. NACBA members in the Eastern District of Tennessee file many hundreds of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *Capital Comm. Fed. Credit Union v. Boodrow (In re Boodrow),* 126 F.3d 43 (2d Cir. 1997).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The 2005 amendments to section 1325(a) added an unenumerated, hanging paragraph at the end of the section that deals with certain claims secured by motor vehicles. The effect of this paragraph has been widely debated by creditors, debtors, counsel and commentators. This case affords the court one of the first opportunities to address this debate. The impact of the court's determination surely will be felt by NACBA's members across the country.

SUMMARY OF ARGUMENT

If as Creditor argues its claim is fully secured and within the scope of section 1325(a)(5), then the Debtors' surrender of the collateral fully satisfies Creditor's claim. The 2005 amendments to section 1325(a) in no way alter the applicability of section 1325(a)(5)(C) to allowed secured claims provided for by the plan. Nothing in the language of the statute or the legislative history suggests that Creditor is entitled to a "secured deficiency claim" to be paid in full pursuant to section 1325(a)(5).

A plain reading of the statutory language of the new paragraph added to the end of section 1325(a), however, demonstrates that the amendment eliminated the applicability of section 1325(a)(5) to certain claims. For secured claims falling outside of the scope of 1325(a)(5), debtors may modify those claims subject to the dictates of good faith and other provisions of the Code. Such a result is logical and consistent with longstanding bankruptcy policy.

ARGUMENT

I. The 2005 amendments to section 1325(a) do not alter the debtor's ability to fully satisfy an allowed secured claim by surrendering the property securing that claim pursuant to section 1325(a)(5)(C).

Section 1325(a)(5) sets forth the criteria for the treatment of allowed secured claims provided for by the plan. A plan is entitled to confirmation if, with respect to each allowed secured claim, 1) the creditor accepts the plan; 2) the debtor surrenders the collateral; or 3) the debtor treats the claim as provided for in section 1325(a)(5)(B).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") amended section 1325(a) by adding a new unenumerated paragraph immediately following section 1329(a)(9). Creditor argues that this new paragraph eliminates the debtor's ability to cramdown, or bifurcate, Creditor's claim, and therefore, Creditor has a "secured claim for the deficiency." Creditor's Memorandum of Facts and Law, at 5 (hereinafter "Creditor's Memorandum"). Creditor further asserts that such secured claim must be "paid in full pursuant to the provisions of 11 U.S.C. § 1325." Creditor's Memorandum, at 4. In essence, Creditor seeks a determination that its claim is fully secured, but that the Debtors' surrender of the property securing the claim only reduces the claim by the value of the collateral. Such a result is not only bizarre, it is not supported by either the plain language of the statute or the legislative history of the 2005 amendments to the Code.

Assuming *arguendo*[1] that Creditor's claim is a fully allowed secured claim and within the scope of section 1325(a)(5), section 1325(a)(5)(C) clearly permits the debtor to fully satisfy the secured claim by surrendering the motor vehicle. There is no question

[1] Section II argues that the effect of the added paragraph at the end of section 1325(a)(9) is to remove certain claims from the ambit of section 1325(a)(5).

that prior to the enactment of BAPCPA and based on the plain language of the statute, a chapter 13 debtor could surrender property securing a claim in full satisfaction of the creditor's allowed secured claim. *See, e.g., In re* Eubanks, 219, B.R. 468, 473 (B.A.P. 6th Cir. 1998)("Section 1325(a)(5)(C) permits a Chapter 13 debtor to satisfy an 'allowed secured claim' by surrendering the property securing the claim."); *In re* Fareed, 262 B.R. 761, 764 (Bankr. N.D. Ill. 2001)(same); *In re* Day, 247 B.R. 898, 901 (Bankr. M.D. Ga. 2000)(same). No amendments were made to the provisions of section 1325(a)(5)(C) as part of BAPCPA. No legislative history supports the existence of a "secured deficiency claim" subsequent to the debtor's surrender of collateral. And, no gaping loophole exists which, assuming creditors act timely to enforce their rights, would allow consumers to benefit from the use of "a new car for two years for a mere sum of one monthly payment." Creditor's Memorandum, at 7. In sum, nothing has changed the application of section 1325(a)(5)(C) to allowed secured claims provided for by the plan. *See* Johnson v. First Nat. Bank of Montevideo, Minn., 719 F.2d 270 (8th Cir. 1983)(and cases cited)("[A]bsent a clear manifestation of contrary intent, a newly enacted or revised statute is presumed to be harmonious with existing law and its judicial construction.")

Creditor argues that it should have the benefit of a fully secured allowed claim, but not the consequences. Such a position, if adopted, would not only frustrate debtors' attempts to obtain a "fresh start" but also would violate the longstanding bankruptcy policy of equity among creditors.[2] *See* United Savings Ass'n of Texas v. Timbers of

[2] Creditor's position would encourage certain lenders, particularly used car lenders, to obtain liens that are worthless in an economic sense simply to subvert the chapter 13 scheme in the event the borrower files bankruptcy. These lenders would be guaranteed a stream of payments in chapter 13 that they would not otherwise be entitled to outside of bankruptcy.

Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626 (1988). Accordingly, if the Creditor is determined to have a claim that is fully secured, then the Debtor may surrender the collateral in full satisfaction of the claim.

II. The plain language of section 1325(a) makes clear that the provisions of section 1325(a)(5) do not apply to Creditor's claim, and therefore, debtor may modify such claim subject to the dictates of good faith and other Code provisions.

A. The basic rules of statutory construction require the court to give effect to the plain language of the statute.

The starting point for the court's inquiry should be the statutory language itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004); *Toibb v. Radloff*, 501 U.S. 157, 160, 111 S.Ct. 2197, 2199 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31 (1989); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). In interpreting the statutory language, the court must assume that Congress said in the statute what it meant and meant in the statute what it said. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, it has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwirters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotations omitted). A result will only be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999), *citing Public Citizen v. Dept of Justice*, 491 U.S. 440,

109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989). A plain reading of the statutory language results in an outcome that is neither absurd nor demonstrably at odds with the intentions of Congress.

B. The 2005 amendments to the Code, abrogate the applicability of section 1325(a)(5) to certain claims.

Section 1325(a)(5) relates exclusively to allowed secured claims.[3] The 2005 amendment to the Code effectively removes certain claims from the protective provisions of section 1325(a)(5). Specifically, Congress added a new paragraph at the end of section 1325(a)(9) which states in relevant part:

> 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 debtor that is the subject of the claim, the debt was incurred within the 910-day preceding the date of 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…

This paragraph plainly and clearly makes section 506 inapplicable to a claim based on a purchased money security interest in a motor vehicle obtained within 910 days of the filing of the petition. Because section 506 is not applicable, such claims cannot be determined to be "allowed secured claims" under section 506(a) and are not within the ambit of section 1325(a)(5). See 8 Collier on Bankruptcy ¶ 1325.06 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2005). However, that does not mean the claim cannot be modified. The plain language of section 1322(b)(2) allows modification of "secured

[3] "Only a claim filed pursuant to section 501 or section 1305(a), allowed pursuant to section 502, enforceable against the trustee under sections 544 through 549, and determined to the extent permitted by subsections 506(a) and (b) comes within the protective provisions of section 1325(a)(5)." 8 Collier on Bankruptcy ¶ 1325.06 (A. Resnick and H. Sommer, eds.,, et al ed., 15th ed. Rev. 2005)

claims," not "allowed secured claims," with certain exceptions. Modification of claims not covered by section 1325(a)(5), however, continues to be limited by the dictates of good faith and other provisions of the Code.[4] *See id.* There is no absurdity or ambiguity to such a result. Rather the revised Code provisions produce logical results in a manner consistent with longstanding bankruptcy policy.

C. Limiting the applicability of section 1325(a)(5) for certain claims is not demonstrably at odds with what is at best ambiguous legislative history regarding the new paragraph at the end of section 1329(a)(9).

The plain language of the statute should be conclusive, "except in 'rare cases [in which] the literal application will produce a result demonstrably at odds with the intentions of the drafters.'" Ron Pair Enters., Inc., 489 U.S. at 242; *see also* Lamie, 540 U.S. at 534-36; *In re* Eubanks, 219 B.R. 468 (B.A.P. 6th Cir. 1998)(concluding the provisions of 1322(c) permit modification of short term mortgages); *In re* Thomas, 179 B.R. 523 (Bankr. E.D. Tenn. 1995)(concluding § 362(b)(1) did not create an exception from the stay for actions against the property of the estate). Here, the sparse legislative history with respect to the new paragraph following section 1325(a)(9) simply does not demonstrate a different Congressional intent. To the contrary, earlier versions of the 2005 bankruptcy legislation contained language that eliminated section 506(a) bifurcation for certain claims, but did not eliminate their status as allowed secured claims. See, e.g., H.R. 833, 106th Cong. 1st Sess. § 122 (1999).[5] Surely, had Congress intended only to

[4] See 11 U.S.C. §§ 1322(b)(2), 1326(a)(1)(C).

[5] In relevant part section 122 of H.R. 833 in the 106th Congress of provided that "subsection [506](a) shall not apply to an *allowed secured claim* to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor within 5 years of filing of the petition."(emphasis supplied)

prevent the bifurcation of claims under 506(a) while retaining the protections of section 1325(a)(5), it could have easily done so.[6]

Creditor's references to various statements in the House Committee Report on BAPCPA related to serial filings, the homestead "mansion loophole," and the general effect of bankruptcy on creditors are insufficient to contradict the plain language of the statute. Similarly, assumptions by commentators that the amendment to § 1325(a) was intended to prevent cramdowns and stripdowns of certain claims are without support in the actual language of the statute or the Congressional record.

In amending section 1325(a), "if Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, 540 U.S. at 1034. Until that time, it is beyond the province of this court to refuse to give effect to the plain meaning of the statute where the result produced is neither absurd nor demonstrably at odds with the drafter's intent. As a result, in the case at bar, Creditor's claim falls outside the scope of 1325(a)(5), and Debtor should be permitted to modify such claim subject to the dictates of good faith and other provisions of the Code.

[6] By contrast, an undersecured creditor in Chapter 11 may elect to be treated "as if" its claim was fully secured, notwithstanding section 506(a). See 11 U.S.C. § 1111(b)(2).

CONCLUSION

For all the foregoing reasons, amicus respectfully requests that this Court deny the Creditor's objection to confirmation of Debtor's plan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia T. Lawson, certify that a true and correct copy of Brief of Amicus Curiae National Association of Consumer Bankruptcy Attorneys in Opposition to the Objection to Confirmation Filed by JPMorgan Chase Bank, NA has been served on the following by Email through electronic case filing (ECF) or by U.S. Mail, postage prepaid (USM) to the following:

Richard Mayer, Attorney for Debtor (ECF)
Christopher Kerney, Attorney for JPMorgan Chase Bank, NA (ECF)
Thomas Dickenson, Attorney for Creditors Amicus Curiae Brief (ECF)
Gwendolyn Kerney, Chapter 13 Trustee (ECF)

Dated : February 24, 2006

/S/ Cynthia T. Lawson
Cynthia T. Lawson