CASE NO. 06-50204

IN THE
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

IN RE ELGIN F. GENTRY and SANDRA K. GENTRY, *Debtors*

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN OPPOSITION TO THE OBJECTION TO CONFIRMATION FILED BY EASTMAN CREDIT UNION

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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 3,100 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 thousands 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); *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

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 an opportunity to address this debate as it pertains to the surrender of these vehicles. The impact of the court's determination surely will be felt by NACBA's members across the country.

SUMMARY OF ARGUMENT

A plain reading of the statutory language of the new paragraph added to the end of section 1325(a) demonstrates that the amendment has 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 decisions and policy.

By contrast, most court decisions to date have either assumed that the hanging paragraph prevent bifurcation or completely ignore the longstanding majority position that the term "allowed secured claim" in section 1325(a)(5) refers to a claim determined by section 506(a). The conclusion of these courts leads to the nonsensical result that the term "allowed secured claim" contained within a single subsection— 1325(a)(5) —now carries two different meanings. One meaning is defined with reference to section 506(a) and the other is not.

In the alternative, if Creditor is found to have an allowed secured claim in the full amount of the debt, it cannot also obtain the benefit of section 1325(a)(4) which is applicable only to holders of allowed unsecured claims. Further, 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. As a result, the Debtor may surrender the collateral in full satisfaction of the claim.

ARGUMENT

I. 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 plain language of the "hanging paragraph" following section 1325(a)(9) renders section 506 inapplicable for the purposes of 1325(a)(5).

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 Underwriters 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 in the hanging paragraph following section 1325(a)(9) results in an outcome that is neither absurd nor demonstrably at odds with the intentions of Congress.

The new paragraph added to the end of section 1325(a)(9) (hereinafter the "hanging paragraph") 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 for purposes of section 1325(a)(5) to a claim based on a purchase money security interest in a motor vehicle obtained within 910 days of the filing of the petition. Because section 506 is not applicable, claims described in the hanging paragraph cannot obtain the status of "allowed secured claims" and are not entitled to treatment under 1325(a)(5). *See* 8 Collier on Bankruptcy ¶ 1325.06 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2005).

B. The "allowance," "status" and "treatment" of claims require three distinct inquiries under the Bankruptcy Code.

Holders of "allowed secured claims" provided for in a chapter 13 plan are accorded special "treatment" of their claims under 11 U.S.C. § 1325(a)(5). Specifically, section 1325(a)(5) states that the court shall confirm a proposed chapter 13 plan if,

> (5) with respect to each **allowed secured claim** provided for by the plan—
> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that—
> (I) the holder of such claim retain the lien securing such claim until the earlier of—
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328; and
> (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such a claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments, shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than the amount sufficient to provide to the holder of such claim adequate protection during the period of the plan;

(C) the debtor surrenders the property securing such claim to such holder. (emphasis added)

To achieve the status of a holder of an "allowed secured claim" and obtain the benefits of section 1325(a)(5) requires the operation of state law and sections 502 and 506 of the Bankruptcy Code.

State Law. Whether or not the amount owed to a creditor is secured by a lien on property is determined in accordance with the applicable law of the state in which the debtor resides or where the contract was formed. Similarly, the classification of such a lien as a "purchase money security interest" is also determined by state law. *See, e.g., In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006).

Bankruptcy Code. The "allowance", "status" and "treatment" of that creditor's claim in the context of a federal bankruptcy proceeding is determined not under state law, but by the provisions of the Bankruptcy Code. Only after the claim has been "allowed" under section 502(a) and its secured "status" determined under section 506, can the claim be afforded the "treatment" specified in section 1325(a)(5). *See Ron Pair*, 489 U.S. 235, 238-39 (1989)(explaining that section 506 "governs the definition and treatment of secured claims."); *In re Fareed*, 262 B.R. 761 (Bankr. N.D. Ill. 2001)(explaining that the "'secured claim', arising from collateral valuation under section 506, if allowed under

section 502, authorizes a secured creditor to demand the plan treatment specified in section 1325(a)(5)").

"Claim allowance" is determined by section 502, which establishes the amount of the creditor's allowed claim.[1] Section 502 does not address the status or treatment of a secured claim in a case, but merely creates a threshold for determining whether an asserted claim or interest is eligible for distribution from the estate, and if so, in what amount.

Once a claim is allowed its "secured status" is determined in accordance with section 506. *See In re Bailey*, 153 F.3d 718 (4th Cir. 1998)(table, unpublished)("[t]he determination of an allowed claim's **secured status is an independent inquiry governed by 11 U.S.C. § 506**")(emphasis added). Absent the operation of section 506, the creditor does not obtain the status of a holder of an "allowed secured claim" under the federal bankruptcy law. However, the hanging paragraph only makes section 506 inapplicable with respect to section 1325(a)(5). As a result, the creditor with a purchase money security interest securing a debt described in the hanging paragraph has an allowed secured claim for purposes of chapter 13 with one exception. Under that exception the creditor is simply not entitled to the special treatment specified in section 1325(a)(5). To hold otherwise, would be to completely disregard the plain language of the statute.

[1] A proof of claim or interest that is filed in accordance with 11 U.S.C. section 501 is deemed allowed unless a party in interest objects. If an objection is made under section 502(b), the bankruptcy court is authorized only to determine if the claim should be allowed or disallowed. If allowed, the court may then determine the amount of such claim.

C. Most court decisions to date have either assumed the hanging paragraph prevents bifurcation or completely ignore the longstanding majority position that the term "allowed secured claim" in section 1325(a)(5) refers to a claim determined by section 506(a).

Since the enactment of the BAPCPA amendments, several courts have considered the meaning of the hanging paragraph and its effect on covered claims. Early decisions on the issue assumed that claims covered by the hanging paragraph were fully secured without offering much analysis to support the assumption. *See, e.g., In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala. 2006)("Simply put, the claims of these creditors must be treated as fully secured under the plan'); *In re Horn*, 338 B.R. 110 (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)("The statute simply provides that debtor may not bifurcate the claims of lenders with purchase money security interests in vehicles purchased within 910 days of bankruptcy for the debtor's personal use.").

In re Carver, 338 B.R. 521 (Bankr. S.D. Ga. 2006), was the first decision to squarely consider the interplay between section 506, section 1325(a)(5) and the hanging paragraph. The *Carver* court correctly held that without the application of section 506 there could be no "allowed secured claim." *Id*. at 526. Consequently, the court found that section 1325(a)(5) was inapplicable to claims covered by the hanging paragraph. The *Carver* court went further and held such claims could not be "treated as secured under a chapter 13 plan." *Id.* at 526. This conclusion that covered claims are unsecured and not entitled to treatment as "allowed secured claims" or "secured claims" under other

sections of the Code goes too far because the limitations of the hanging paragraph only apply to section 1325(a)(5).

More recent court decisions have simply failed to give any meaning to the term "allowed secured claim." *See, e.g., In re Bufford*, 2006 WL 1677160 (Bankr. N.D. Tex. June 13, 2006); *In re Brooks*, 2006 WL 168478 (Bankr. E.D.N.C. 2006); *In re Brown*, 339 B.R. 818 (Bankr. S.D. Ga. 2006). Relying heavily on the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), these courts hold that a claim allowed under section 502 and for which the creditor has a valid lien pursuant to state law is sufficient to create a "allowed secured claim."

In essence, these courts seek to extend the very narrow and limited holding in *Dewsnup*,[2] which held that a chapter 7 debtor could not use section 506(d) to strip down an undersecured lien bifurcated by section 506(a). In the process, they overreach in their attempts to apply the *Dewsnup* opinion to chapter 13 where it has long been held that the term "allowed secured claim" in section 1325(a) does have the section 506(a) meaning—a meaning the *Dewsnup* court rejected for purposes of section 506(d) in chapter 7 cases. *See, e.g., Bank One, Chicago, NA v. Flowers*, 183 B.R. 509 (N.D. Ill. 1995)("had the Supreme Court intended *Dewsnup* to apply specifically to chapter 13 proceedings, it most likely would have stated such in *Nobelman*"); *In re Gray*, 285 B.R. 379 (Bankr. N.D. Tex. 2002)(stating that a majority of courts have taken the position that *Dewsnup* is not controlling in chapter 13 cases); *see also In re Zimmer*, 313 F.3d 1220 (9th Cir. 2003)(applying section 506 and determining mortgagee not "holder of secured claim"

[2] The *Dewsnup* majority opinion is explicitly limited to the facts of that particular case. *See Dewsnup*, 502 U.S. at 417 n. 3 (Accordingly, we express no opinion as to whether the word "allowed secured claim" have different meaning in other provisions of the Bankruptcy Code.")

within the ambit of section 1322(b)(2); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Dickerson*, 222 F.3d 924 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000). A thorough review of *Dewsnup*, *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993), and the relevant legislative history demonstrate that sections 506, 1322(b)(2), and 1325(a)(5), when viewed as a whole, imply that the words "allowed secured claim" are defined by section 506(a) in chapter 13 proceeding. *See Flowers*, 183 B.R. at 517.

The conclusion of the *Bufford*, *Brooks*, and *Brown* courts leads to the nonsensical result that the term "allowed secured claim" contained within section 1325(a)(5) now carries two different meanings. One meaning is defined with reference to section 506(a) and the other is not. That the *Dewsnup* majority disregarded the normal rules of statutory construction by giving identical word used in different parts of the same subsection distinct meaning is well known. *See Dewsnup*, 502 U.S. at 421 (Scalia, J., dissenting); *Sullivan v. Stroop*, 496 U.S. 478 (1990)(internal quotations omitted). However, neither the *Dewsnup* opinion nor any other authority can support the decisions such as *Bufford*, *Brooks*, and *Brown*, in which the same term "allowed secured claim" in the ***same*** section—1325(a)(5) —has two different meanings.

D. <u>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 hanging paragraph.</u>

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*, 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 section 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 hanging paragraph simply does not prove that Congress could not have intended the result reached by application of the plain language. *See Demarest v. Manspeaker*, 498 U.S. 184 (1991), *citing Griffin v. Oceanic Contract., Inc.*, 548 U.S. 564, 571 (1982).

Earlier versions of the 2005 bankruptcy legislation contained language that would have eliminated the bifurcation of certain claims pursuant to section 506(a), but would not have eliminated their status as allowed secured claims. *See, e.g.*, H.R. 833, 106th Cong. 1st Sess. section 122 (1999). For example, section 122 of the Bankruptcy Reform Act of 1999 provided that "**subsection (a)** [of section 506] 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). *See also* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. section 128 (1998). Similarly, the 1997 version of the bill provided that "**Subsection (a)** [of section 506] 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 during the 90-day period preceding the date of filing of the petition."(emphasis supplied) Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. section 302(c) (1997). Surely, had Congress intended only to prevent the bifurcation of claims under 506(a) while retaining the protections of section 1325(a)(5), it could have easily done so.

Indeed, Congress is fully aware of the language necessary to create an explicit exception to section 506. For example, under section 1111(b), the holder of a claim secured by a lien on property may elect that, notwithstanding section 506(a), such claim is a secured claim to the extent such claim is allowed. The fact that Congress considered but ultimately rejected similar language that would have simply eliminated bifurcation of certain claims further supports the conclusion that it did not intend such an effect. *See Till v. SCS Credit Corp*. 541 U.S. 465, 480 n.8 (2004).

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.

I**I. Alternatively, under amended section 1325(a), debtors may surrender property securing a claim described in the hanging paragraph in full satisfaction of that claim.**

A. Section 1325(a)(4) is inapplicable to creditors holding allowed secured claims in the full amount of the debt in a chapter 13 case.

Section 1325 is only applicable in chapter 13 cases and sets forth the conditions under which a court must confirm a debtor's chapter 13 plan. Assuming *arguendo*[3] that Creditor's claim is an allowed secured claim in the full amount of the debt because section 506 is inapplicable, the Creditor cannot also be the holder of an allowed unsecured claim in the same chapter 13 case.[4]

[3] Section I 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).

[4] As the holder of an allowed secured claim in the full amount of the debt, Creditor lacks standing to object to the confirmation of debtor's plan under section 1325(a)(4).

Section 1325(a)(4) states in pertinent part that "the court shall confirm a plan if ··· the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." This section permits holders of **allowed unsecured claims** to demand payment at least equal to what they would have received in a chapter 7 case. Because the creditor does not have an allowed unsecured claim, it is not untitled to the benefit of 1325(a)(4).

Apparently, Creditor takes the position that it has both an allowed secured claim in the full amount of the debt and an allowed unsecured claim for at least part of the debt. Such a result would give to creditors with claims falling within the purview of the hanging paragraph the benefit of a fully secured allowed claim, but not the consequences. In essence, they want to "eat their cake and have it too." Nothing in the plain language of the statute or the legislative history suggest the this new class of creditors is entitled to be the holder of both a fully secured claim and an allowed unsecured claim for purposes of section 1325 in the chapter 13 case.[5] Such a position, if adopted, would allow a creditor to have a secured claim and an unsecured claim that total far more than the amount owed to the creditor. This absurd result would not only frustrate debtors' attempts to obtain a "fresh start" but also would violate the longstanding bankruptcy policy of equity among creditors. *See United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 108 S. Ct. 626 (1988).

[5] In the event the debtors convert to chapter 7, the treatment of creditors claim would need to be reevaluated given that the hanging paragraph would no longer be applicable.

B. 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 hanging paragraph does not affect the debtor's ability to fully satisfy an allowed secured claim by surrendering the property securing that claim pursuant to 1325(a)(5)(C). *See In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

There is no question 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 and 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."). Accordingly, if the Creditor is found to have an allowed secured claim in

the full amount of the debt owed to the creditor, then the Debtor may surrender the collateral in full satisfaction of that claim.

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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