CASE NO. 6:05-bk-14070

IN THE
UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVSION

IN RE: THOMAS WILLIAM SAINLAR and SHERYL A. SAINLAR, *Debtors*

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN OPPOSITION TO OBJECTION TO DEBTORS' HOMESTEAD EXEMPTION FILED BY BANK ONE KENTUCKY, N.A.

Tara Twomey, Esq
National Association of Consumer Bankruptcy Attorneys
2300 M. Street, Suite 800
Washington, DC 20037
(202) 331-8535

Douglas W. Neway, Esq.
Principal Attorney for amicus curiae
Fla. Bar. No.: 709948
Bond, Botes & Neway, P.C.
135 W. Central Blvd, Suite 310
Orlando, Florida 32801
(407) 999-2242

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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 3,000 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 Middle District of Florida 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 are homeowners. For homeowner-debtors homestead exemptions provide stability and certainty of shelter that is necessary to obtain a "fresh start."

Application of section 522(p) to increases in equity resulting from market appreciation would have a broad impact on debtors across the country who live in rapidly appreciating real estate market. It would effectively, create a federal homestead cap in

such areas and subject even owners of modest homes to forced sales for the benefit of creditors.

SUMMARY OF ARGUMENT

Resolution of this dispute should begin and end with the plain language of the statute. Given its legal and ordinary meaning section 522(p)(1) does not apply where the debtor has purchased his or her homestead property more than 1215 days prior to filing for bankruptcy. Any other construction is demonstrably at odds with Congress's legislative intent in enacting the homestead cap. Indeed, given the number of rapidly appreciating real estate markets around the country, the application of 522(p) to mere increases in equity would have the effect of creating a broad federal homestead cap by judicial construction, a cap that Congress never enacted. Additionally, in light of the exception to the homestead cap in 522(p)(2)(B), an interpretation of section 522(p)(1) in which debtor's equity resulting from market appreciation is subject to the $125,000 homestead cap would have the absurd result of encouraging debtors to purchase more expensive homes on the eve of bankruptcy.

The interpretation of section 522(p)(1) urged by *amicus* preserves a fresh start to honest debtors without sacrificing the safety and security of their homestead properties and without undermining the efforts of Congress to limit homestead exemptions for debtors engaged in misconduct and abuse of the bankruptcy system.

ARGUMENT

I. The underlying purposes of the bankruptcy exemption scheme, in general, and the homestead exemption, in particular, require that homestead provisions be construed liberally in favor of the debtor.

As a general rule, all property in which the debtor has a legal or equitable interest becomes property of the bankruptcy estate at the commencement of a case. *See* 11 U.S.C. § 541(a)(1). This general proposition, however, is limited by the language of section 522 , which permits a debtor to exempt certain property from the estate pursuant to the federal exemptions, listed in 11 U.S.C. § 522(d), or the applicable state exemptions. The purpose of this exemption scheme is to provide "adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start." H.R. Rep. No. 95-595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078.

Florida, like a majority of other states, has "opted-out" of the federal exemption scheme. As a result, Florida domiciliaries are limited to state law exemptions, which include, among other things, an unlimited homestead exemption. *See* Fla. Const. art. X, § 4; Fla. Stat. § 222.201, et seq. The public policy furthered by the Florida homestead exemption is to "promote the stability and welfare of the state by securing to the householder a home, so that the homeowner and his or her heirs may live beyond the reach of financial misfortune." *Public Health Trust of Dade County v. Lopez*, 531 So.2d 946, 948 (Fla. 1988). Similar policy rationales underlie the homestead exemption in other states. *See, e.g., Jones v. Williams*, 902 So.2d 1154, 1159 (La. App. 2005)(citations omitted); *Neel v. First Federal Sav. and Loan Assoc. of Great Falls*, 675 P.2d 96, 102 (Mont. 1984); *Blankenau v. Landess*, 626 N.W.2d 588, 595 (Neb. 2001); *Maki v. Chong*, 75 P.3d 376, 377 (Nev. 2003); *Strong v. Laubach*, 89 P.3d 1066, 1070 (Okla. 2004);

Osloond v. Farrier, 659 N.W.2d 20, 23 (S.D. 2003); *1018-3rd St. v. State*, 331 S.W.2d 450, 453-454 (Tex. Civ. App. 1959); *Sanders v. Cassity*, 586 P.2d 423, 425 (Utah 1978); *Great N.W. Fed. Sav. and Loan Ass'n v. T.B. & R.F. Jones, Inc.*, 596 P.2d 1059, 1060 (Wash. 1979). The purpose of homestead exemptions requires that they be construed liberally in favor of the debtor. *See In re Kwiecinski*, 245 B.R. 672, 675 (10th Cir. B.A.P. 2000); *In re McCambry*, 327 B.R. 469, 472 (Bankr. D. Kan. 2005); *In re Melber*, 315 B.R. 181, 189 (Bankr. D. Mass. 2004); *In re Roberge*, 307 B.R. 442, 446 (Bankr. D. Vt. 2004); *In re White*, 293 B.R. 1, 6 (Bankr. N.D. Iowa 2003); *In re Johnson*, 880 F.2d 78, 83 (8th Cir. 1989); *In re Wells*, 29 BR 688, 689 (Bankr. D. Colo. 1983); *In re Wood*, 8 BR 882, 886 (Bankr. S.D. 1981). This maxim applies equally to state and federal homestead provisions. *See In re Russell*, 80 B.R. 662, 664 (Bankr. D. Vt. 1987).

II. The plain language of the statute provides that the $125,000 exemption cap in section 522(p) does not apply where the debtor has purchased his or her homestead more than 1215 days before filing a bankruptcy petition.

As in all cases of statutory construction, the starting point must be the language of the statute. *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.") (*quoting Merritt v. Dillard*, 120 F.3d 1181, 1185 (11th Cir.1997)). The plain meaning of the statute should be "conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of

the drafters." *Ron Pair*, 480 U.S. at 242 (*quoting Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250 (1982)).

Section 522(p)(1) states that:

> Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in –
>
> (A) real or personal property that the debtor or a dependent of the debtor uses as a residence;
> (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
> (C) a burial plot for the debtor or a dependent of a debtor; or
> (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

The statute provides that any amount of interest acquired by the debtor in the 1215-day period prior to filing his or her petition for bankruptcy is subject to the exemption cap. Conversely, the $125,000 homestead exemption limit does not apply where the debtor acquired his or her interest in homestead property more than 1215 days prior to filing a petition for bankruptcy.

A. Given both its legal and ordinary usage, to "acquire an interest" in property is to acquire ownership of one or more rights with respect to that property.

"[O]ne does not actually 'acquire' equity in a home. One acquires title to a home." *In re Blair*, 334 B.R. 374, 376 (N.D. Tex. 2005). The proposition is so obvious that courts applying, and commentators discussing, section 522(p) have not belabored the point. Rather, most have simply assumed that section 522(p)(1) does not apply where the debtor purchased his or her homestead property more than 1215 days prior to filing a

bankruptcy petition. *See, e.g., In re Virissimo*, 332 B.R. 201, 207 (Bankr. D. Nev. 2005)("The monetary cap applies if the debtor acquired such property within the 1,215-day period preceding the filing of the petition."), *citing* H.R. Rep. No. 109-31, at 148 (2005); *In re* McNabb, 326 B.R. 785, 788 (Bankr. D. Ariz. 2005)("Code § 522(p), as added by BAPCPA, applies a $125,000 cap on a homestead if [the homestead] was acquired by the debtor within 1215 days prepetition."). *See also* 4 Collier on Bankruptcy ¶ 522.13[2] (Lawrence P. King , et. al. ed., 15th ed. Rev. 2005)("section 522(p) should not apply to any amount of interest in the debtor's homestead that is acquired through no affirmative action of the debtor, such as an appreciation in the homestead's value resulting solely from changes in the real estate market during the 1215-day period"); Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 Am. Bank. L.J. 397, 402 (Spring 2005) ("it is evident by its terms that it only applies to mansions acquired within approximately 40 months of bankruptcy.")

Underlying the basic assumption that title not equity is acquired is our fundamental understanding of property rights. "Interests" in property vary, and so property rights have been likened to the metaphoric "bundle of sticks" in which each stick represents a right or stream of benefit. It is possible to own all of the rights in a certain property or only have a portion of them. The number of sticks or "amount of interest" one owns can vary widely. At one end of the spectrum is fee simple title and at the other end of the spectrum lie a variety of less-than-complete estates such as a life estate. The holder of any one of these rights has an "interest" in the property.

The amount of a debtor's interest in property must be distinguished from the value of that interest.[1] *Cf., e.g.,* 11 U.S.C. § 522(p)(1) (referring to "**any amount of interest**...in real or personal property that the debtor or dependent of debtor claims as a homstead")(emphasis added) *with* 11 U.S.C. § 522(o) (referring to "**value of an interest in**...real or personal property that the debtor or a dependent of the debtor claims as a homestead)(emphasis added). The existence of an interest in property generally is defined by state law. By contrast, the value of an interest in property is determined by a host of external factors. *See, e.g.,* Audie Blevins and Katherine Jensen, *Gambling as a Community Development Quick Fix*, 556 Annals Am. Acad. Pol. & Soc. Sci. 109, 117 (1998)(describing escalation in land prices due to speculaton about profits from building casinos after the legalization of gambling); Fred E. Foldvary, *Market-hampering Land Speculation: Fiscal and Monetary Origins and Remedies*, 57 Am. J. Econ. & Soc. 615, 622 (1998) (noting that "[s]peculators who anticipate where the next subway will be built or influence where government will lay out the infrastructure servicing a new development can reap the subsequent rents."); James Q. Wilson & Geroge L. Kelling, *Broken Windows*, Atlantic Monthly, Mar. 1982, at 29 (describing the negative neighborhood effect resulting from the persistence of minor disorders, such as broken windows). Thus, an interest in property is fundamentally different from the value of that interest.

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[1] For example, Schedule A clearly distinguishes between the debtor's interest in property and the value of such interest. Debtors are instructed to describe their interest in property as '"owner," "holder of life estate," etc." The instructions further describe an interest in property as "legal (such as when the debtor holds title, either alone or with another), equitable (such as when the debtor is the purchaser under a land contract), or future (such as when the debtor is the holder of a remainder interest subject to a life estate granted to another)." Debtors are instructed to separately list the value of the interest described.

In applying these principles to section 522(p)(1), it is clear that irrespective of the value, or change in value, of the debtor's property interest, the $125,000 homestead cap of section 522(p) does not apply to any amount of the debtor's interest in homestead property purchased more than 1215 days prior to filing.

B. In light of the exception to the homestead cap in 522(p)(2)(B), an interpretation of section 522(p)(1) in which debtor's equity resulting from market appreciation is subject to the $125,000 homestead cap would have absurd results.

Section 522(p)(2)(B) provides that

> For purposes of paragraph (1), any amount of such interest does not include any interest transferred from a debtor's previous principal residence (which was acquired prior to the beginning of such 1215-day period) into the debtor's current principal residence, if the debtor's previous and current residences are located in the same State.

This subsection provides a safe harbor for certain debtors rolling over proceeds from the sale of one homestead to another homestead in the same state. The statute effectively allows a state's long-term homeowners to freely transfer their equity from one property to another within the same state. Thus a debtor who takes proceeds from the sale of a homestead property purchased beyond the 1215-day period prior to filing and reinvests them in another homestead property within the prescribed period of section 522(p) is not subject to the homestead cap. *See In re Wayrynen*, 332 B.R. 479, 485-86 (Bankr. S.D. Fla. 2005).

The only court to consider the scope of 522(p)(2)(B) exception since its enactment in 2005, specifically recognized that the safe harbor language was "intended to afford protection to individuals like the Debtor who, rather than seeking to take advantage of Florida's exemption provisions to shelter illicitly – or improperly-obtained funds, simply have benefited as a result of their ownership of Florida real property and

the general appreciation of property values attributable to previous intra-state transactions." *Wayrynen*, 332 B.R. at 486. The court in *Wayrynen* held that to the extent the value of the debtor's present homestead is attributable to accrual of equity through ownership of previous homesteads located in the same state, the $125,000 cap of section 522(p)(1) did not apply. *See id.* The court found that the equity in a house purchased 44 days prior to the commencement of the debtor's case was protected under 522(p)(2)(B), even though the debtor had purchased his previous residence only 966 days before the start of the case, since the equity used to purchase both homes originally derived from a property purchased 5,824 days prior to the start of the debtor's bankruptcy case. *See id.* at 485-86.

Surely non-selling debtors who have owned their property for a long period of time should enjoy the same equity protection as those falling within the exception. *See In re Blair*, 334 B.R. 374, 376 (N.D. Tex. 2005). It would be an absurd result if a homeowner would be subject to a forced sale or administration by the trustee because he or she ***did not*** purchase a more expensive home on the eve of bankruptcy. Indeed, such a result is not only bizarre, but also demonstrably at odds with the intentions of Congress. *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 (1989).

III. The legislative history of section 522(p) demonstrates Congress did not seek to penalize long-time state residents but rather sought to curb debtors' ability to shield assets by purchasing property on the eve of bankruptcy in states with favorable homestead exemptions.

In supporting the homestead exemption cap set forth in section 522(p), Representative Sensenbrenner stated that this limit was intended to close the

"millionaire's mansion" loophole that allowed corporate criminals to shield their multi-million dollar homesteads even while filing for bankruptcy. *See* 151 Cong. Rec. H1993-01, 2048 (2005). The expansive nature of the homestead exemption in some states and the absence of any limit to the state exemption under the Bankruptcy Code led some seemingly wealthy debtors to purchase property in states with favorable homestead laws on the eve of bankruptcy thereby protecting their assets from creditors. Often cited were the tales of debtors such as Abe Gosman a health care and real estate magnate, who declared bankruptcy in 2001. Mr. Gosman declared debts of over $233 million while exempting the entire value of his 64,000 square foot "homestead" in West Palm Beach on a street known as "Billionaire's Row." *See* 147 Cong. Rec. S2324-02, S2329 (March 15, 2001)(statement of Sen. Kohl).

Despite these claims of abuse, Congress was unable to agree on a federal homestead cap that would apply in all cases. Instead, Congress chose to focus on particular fact patterns: fraudulent transfers – 522(o); interests acquired within 1215 days of filing – 522(p); and, debtors' misconduct – 522(q). *See* Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 Am. Bank. L.J. 397, 399-407 (Spring 2005). Specifically, Congress sought to limit the ability of debtors to move to states with generous homestead exemptions, or purchase expensive homesteads, shortly before filing for bankruptcy. *See id.* at 418. As stated by Senator Carper, "under current law, a wealthy individual in a State such as Florida or Texas can go out, if they are a millionaire, and take those millions of dollars and invest that money in real estate, a huge house, property, and land in the State, file for bankruptcy, and basically protect all of their assets . . .With the legislation we have before us, someone

has to figure out that 2 1/2 years ahead of time people are going to want to file for bankruptcy and be smart enough to put the money into a home . . ." 151 Cong. Rec. S2415-02, S2415-16 (March 10, 2005)(statement of Sen. Carper).

The final version of the amendments to the Bankruptcy Code enacted in 2005 did in fact create some limits on the ability of the debtor to claim an unlimited homestead exemption in property purchased on the eve of bankruptcy. First, Congress extended the length of time a debtor must be domiciled in a certain state from 180 to 730 days prior to filing bankruptcy before becoming eligible to be able to take advantage of that state's exemptions. *See* 11 U.S.C. § 522(b)(3)(A). Second, Congress further reduced "opportunity for abuse by ***requiring a debtor to own the homestead for at least 40 months*** before he or she can use the state exemption law. *See* H.R.Rep. No. 109-31, at 15-16 (2005)(emphasis added).

Congress created narrowly defined limits on state homestead exemptions to address what it viewed as specific acts of misconduct by debtors. Nothing in the legislative history suggests otherwise. Thus, it is clear that section 522(p) was not enacted to penalize honest debtors, who do not engage in any of these types of misconduct, and yet have realized appreciation in their homesteads. The application of 522(p) to mere increases in equity would have the effect of creating a broad federal homestead cap by judicial construction, a cap that Congress never enacted.

IV. Applying the 522(p) homestead cap to debtors who acquired title to their property more than 1215 days before filing would be disastrous for long-time homeowners who happen to live in rapidly appreciating real estate markets and would create a heavy administrative burden on bankruptcy courts across the country.

A. The recent, dramatic appreciation of real estate across the country would leave many long-term homeowners subject to the cap and facing a forced sale of their property.

Applying the 522(p)(1) homestead cap to increases in equity as a result of market appreciation within the 1215 days prior to filing could have disastrous effects on long-time residents of Florida and several other states. Across the country debtors could be forced to sell their homes if that home happened to be located in an area with rapidly rising real estate prices. Whether the debtor had lived in the same property for three years or thirty years would be irrelevant. For example, many homeowners living in the Orlando metropolitan area who purchased their homes in 2002 or earlier would already face the homestead cap of section 522(p)(1) based simply on market appreciation. There, the median sales price of an existing single-family home in 2002 was $136,600. By the third quarter of 2005, that price had risen to $261,300, a difference of $124,700. *See* National Association of REALTORS@, Median Sales Price of Existing Single-family Homes for Metropolitan Areas, available at http://www.realtor.org/Research.nsf/files/REL05Q3T.pdf/$FILE/REL05Q3T.pdf. [2]

Similarly, residents of 26 other metropolitan areas have seen the median single-family home prices increase by more than $100,000 in the last three years simply by

[2] Between the third quarter of 2005 and the third quarter of 2004, home prices in the Orlando area increased by 44.8%, a growth rate second only to Phoenix, Arizona (55.2%). *See id.*

virtue of a rapidly appreciating real estate market.[3] *See id.* In more than half of these areas, the equity increase realized by an average homeowner would easily exceed the $125,000 homestead cap. In markets where homes are significantly more expensive than Orlando, even a very modest home may have appreciated by more than that amount. Additionally, the Federal Deposit Insurance Corporation identified an unprecedented 55 "boom" real estate markets in 2004, up 72 percent from 2003. See FDIC, FYI: An Update on Emerging Issues in Banking, "U.S. Home Prices: Does Bust Always Follow Boom?" (February 10, 2005, rev. April 8, 2005) available at: http://www.fdic.gov/bank/analytical/fyi/2005/021005fyi.html. Such "boom" markets are defined as areas in which inflation adjusted home prices rose by at least 30% in a 3-year period. *See id.* It is likely that many of these markets will continue to show strong growth over the next few years. *See id.* A determination that a debtor's increase in equity[4] is subject to the 522(p) homestead cap, irrespective of when the debtor purchased the property, would certainly leave many owners of very modest homes facing forced

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[3] Those metropolitan areas are: Anaheim-Santa Ana, CA; Atlantic City, NJ; Baltimore-Towson, MD; Boston-Cambridge-Quincy, MA; Bridgeport-Stamford-Norwalk, CT; Deltona-Daytona Beach-Ormond Beach, FL; Kingston, NY; Las Vegas-Paradise, NV; Los Angeles-Long Beach-Santa Ana, CA; Miami-Fort Lauderdale-Miami Beach, FL; New Haven-Milford, CT; New York-Northern New Jersey-Long Island, NY-NJ-PA; New York-Wayne-White Plains, NY-NJ; NY: Edison, NJ; NY:Nassau-Suffolk, NY;NY: Newark-Union, NJ-PA; Palm Bay-Melbourne-Titusville, FL; Philadelphia-Camden-Wilmington, PA-NJ-DE-MD; Phoenix-Mesa-Scottsdale, AZ; Riverside-San Bernadino-Ontario, CA; Sacramento-Arden-Arcade-Roseville, CA; San Francisco-Oakland-Fremont, CA; San Diego-Carlsbad-San Marcos, CA; Sarasota-Bradenton-Venice, FL; Trenton-Ewing, NJ; and, Washington-Arlington-Alexandria, DC-VA-MD-WV.

[4] This is not to say that an increase in equity as a result of a large and unusual pay down of mortgage debt would not be subject to some limitation. Rather, the appropriate statutory section for addressing such attempts to shield assets from creditors in this manner is 522(o), not 522(p). *See, e.g., In re* Maronde, 332 B.R. 593, 600-601 (Bankr. D. Minn. 2005)(debtor's sale of nonexempt assets, the proceeds of which were used to pay off a second mortgage on his homestead property on the eve of bankruptcy warranted limitation of the homestead exemption).

sales of their homestead property. Certainly, Congress did not intend to penalize such long-time residents in its efforts to close the "mansion loophole."

B. Application of section 522(p) to increases in equity will create a heavy administrative burden on courts.

In geographic locations such as the Orlando metropolitan area where home prices have increased dramatically in the last few years, bankruptcy courts could be forced to conduct market valuation hearings for almost every debtor that is a homeowner. As noted above, even modest homeowners in the Orlando area have realized equity increases close to the $125,000 cap.

In addition, both debtors and creditors would be faced with mustering evidence to support the difference between present value and the value of debtor's interest in property as it was 1215 days prior to the commencement of the case. This opens the door to a slew of new issues to be litigated and more evidentiary hearings. For example, in a battle of the appraisers what method is the most appropriate for determining the home's value more than three years earlier? Is value resulting from home repairs subject to the cap? Is a distinction to be made for necessary home improvements (e.g., replacing a leaky roof) compared to "optional" home improvements (e.g., swimming pool installation)? Both the legislative history of the 2005 amendments and common sense make plain that this Pandora's Box is not one that Congress intended to open.

CONCLUSION

For all the foregoing reasons, amicus respectfully requests that this Court deny the creditor's objection to the debtors' exemption.

Respectfully submitted,

Douglas W. Neway, Esq.
Principal Attorney of record
for *amicus curiae*
Fla. Bar No. 709948
Bond Botes & Neway, P.C.
135 W. Central Blvd. Suite 310
Orlando, FL 32801
(407) 999-2242

Tara Twomey, Esq.
National Association of Consumer
Bankruptcy Attorneys
2300 M. Street, Suite 800
Washington, DC 20037
(202) 331-8535

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of Amicus Curiae was mailed by first-class US Mail or via electronic transmission this 30th day of January 2006 to the following:

United States Trustee, 135 W. Central Blvd., Ste. 620, Orlando, FL 32801;
Marie E. Henkel, Chapter 7 Trustee, 3560 S. Magnolia Ave., Orlando, FL 32806;
Robert H. Pflueger, Esq., Attorney for Debtor(s), 377 Maitland Ave., Ste. 1002, Altamonte Springs, FL 32701;
Kevin A. Reck, Esq., Attorney(s) for Creditor Bank One Kentucky, N.A., Foley & Lardner, LLP, PO Box 2193, Orlando, FL 32802-2193.

DOUGLAS W. NEWAY, ESQ.
Principal Attorney of record
for amicus curiae
Fla. Bar No.: 709948
Bond, Botes & Neway, P.C.
135 W. Central Blvd., Ste. 310
Orlando, FL 32801
(407) 999-2242