No. 10-cv-10870-DJC
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re CHRISTOPHER R. BELL,
Debtor.

CHRISTOPHER R. BELL,
Debtor-Appellant

— v. —

JOHN FITZGERALD,
Trustee-Appellee

On appeal from an order of the United States Bankruptcy Court for the District of Massachusetts

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF CHRISTOPHER R. BELL AND SEEKING REVERSAL OF THE BANKRUPTCY COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

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Amicus Curiae the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

TABLE OF AUTHORITIES

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STATEMENT OF INTEREST OF AMICUS

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of more than 4,800 consumer bankruptcy attorneys nationwide.

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., Schwab v. Reilly*, 560 U.S. —, 130 S.Ct. 2652 (2010); *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *In re Scarborough*, 461 F.3d 406 (3d Cir. 2006).

The NACBA membership has a vital interest in the outcome of this case. Above median debtors with zero or negative disposable income who nonetheless wish to pay as much as they can afford to their creditors through a chapter 13 plan, should be permitted to make use of options available under the plain language of BAPCPA. It is essential to such debtors that where Congress has left open avenues of relief those avenues not be foreclosed by judicial intervention.

Summary of Argument

This case presents the question of whether a debtor is entitled to confirmation of a plan that provides for payment of an allowed secured claim through the issuance of a new Note and Mortgage. In order to create a plan that is both feasible and that seeks to repay creditors to the maximum extent possible, Debtor has proposed a plan through which he would bifurcate his non-residential mortgage and pay 89.5% of the unsecured amount through the plan. The secured portion of the debt would be satisfied outside the plan by issuing a new note and mortgage to be paid over thirty years at 6.75% interest.

Misconstruing the significance of the debtor's proposed property distribution, the court found that the thirty year mortgage specified in the new note violated the modified claim period set forth in section 1325(b)(4) by providing for the terms of the new mortgage to extend beyond the term of the plan.

Argument

I. Section 1325(a)(5)(B)(ii) Permits Debtor to Fully Satisfy a Debt in a One-Time Payment by Issuance of a New Note and Mortgage

As in any action involving application of a statute, the starting point for the court's inquiry is the statutory language. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). It is 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).

Section 1325(a)(5)(A)-(C) provides that a plan "shall" be confirmed if any of three requirements are met. First, the creditor may accept the treatment of its claim under the plan. Second, the debtor may surrender the property securing the claim. Finally, a plan may provide for the creditor to retain the lien and pay the debt through the plan. Under the third scenario, "the value, as of the effective date of the plan, of *property to be distributed* under the plan on account of such claim [may not be] less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5)(B)(ii) (emphasis added). In proposing to fully satisfy Eastern's secured claim by issuing a new note representing the present value of the claim, Bell's plan relies upon the third option.[1]

> Analysis under this option of section 1325(a)(5)(B)(ii)
>
> requires a bankruptcy court to make at least three separate determinations. First, a court must determine the allowed amount of the claim. Second, a court must determine what is the "property" to be distributed under the plan. Third, a court must determine the "value, as of the effective date of the plan," of the property to be distributed.

Till et ux v. SCS Credit Corporation, 541 U.S. 465, 486 (2004) (Justice Thomas concurring). It is the second determination, that of the "property to be distributed," which is at issue here.

Section 1325(a)(5)(B)(ii) does not require that the debt be satisfied with cash payments. Rather, it requires distribution of "property" which *may* take the form of deferred cash payments, or may be in the form of any other distribution of property the value of which "is not less than the allowed amount of such claim." 11 U.S.C. §

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[1] Section 506(a) mandates that an allowed secured claim be bifurcated into secured and unsecured portions and treated accordingly in the debtor's chapter 13 plan. Section 1322(b)(2) permits modification of a secured claim that is not secured solely by an interest in the debtor's residence. 11 U.S.C. § 1322(b)(2). Under these provisions modification may take the form of bifurcation of an undersecured claim into secured and unsecured portions and treated accordingly in the plan.

1325(a)(5)(B)(ii). The Supreme Court has long interpreted "property" in broad terms. *Russello v. United States*, 464 U.S. 16, 21 (1983); *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972) (" 'property' denotes a broad range of interests"). As explained by Justice Thomas in his concurring opinion in *Till*, "property" within the meaning of section 1325(a)(5)(B)(ii) may be in the form of a new note and mortgage.

> Although "property" is not defined in the Bankruptcy Code, nothing in § 1325 suggests that "property" is limited to cash. Rather, "'property' can be cash, *notes*, stock, personal property or real property; in short, anything of value." 7 Collier on Bankruptcy ¶ 1129.03[7][b][i], p. 1129-44 (15th ed. 2003) (discussing Chapter 11's cram down provision). And if the "property to be distributed" under a Chapter 13 plan is a note (i.e., a promise to pay), for instance, the value of that note necessarily includes the risk that the debtor will not make good on that promise.

541 U.S. at 488 -89 (J. Thomas concurring) (emphasis added) *See also,* 8 Collier on Bankruptcy ¶1325.06[3][b][ii], p 1325-34 (16th ed. 2011) (The word "property" is undefined and "altogether unrestricted in scope and unquestionably encompasses any and all kinds of property of the estate and property of the debtor.").

Justice Thomas's opinion is in accordance with the legislative history of section 1325.

> Section 1325(a)(5)(B) of the House amendment modifies the House bill and Senate amendment to significantly protect secured creditors in chapter 13. Unless the secured creditor accepts the plan, the plan must provide that the secured creditor retain the lien securing the creditor's allowed secured claim in addition to receiving value, as of the effective date of the plan of property to be distributed under the plan on account of the claim not less than the allowed amount of the claim. To this extent, a secured creditor in a case under chapter 13 is treated identically with a recourse creditor under section 1111(b)(1) of the House amendment except that the secured creditor in a case under chapter 13 may receive *any property of a value* as of the effective date of the plan equal to the allowed amount of the creditor's secured claim rather than being restricted to receiving deferred cash payments.

124 Cong. Rec. H11107 (Sept. 28, 1978; S 17,423 (daily ed. Oct. 6, 1978), reprinted in U.S.C.C.A.N. 95th Cong. 2d Sess. 5787, 6482 (1978) (emphasis added).

The legislative history of this section, as well as Justice Thomas' discussion in *Till*, support a reading of section 1325(a)(5)(B) that permits the one-time payment of a secured debt through issuance of a new note.

An examination of similar language in chapter 11 further supports this conclusion. One of the primary purposes behind the 2005 enactment of BAPCPA was to steer debtors out of chapter 7 liquidation and encourage them, instead, to reorganize their debts and pay them off to the extent they are able. *Ransom v. FIA Card Services, Inc.*, 562 U.S. —, 131 S.Ct. 716, 723-24 (2011). Individual debtors may reorganize under chapter 13 or, in some circumstances, under chapter 11. With respect to section 1325(a)(5)(B)(ii), chapter 11 has a corollary "cramdown" provision at section 1129(a)(7)(A)(ii) which provides:

> **(7)** With respect to each impaired class of claims or interests—
> **(A)** each holder of a claim or interest of such class—
> * * *
> **(ii)** will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date

Section 1129(a)(7)(A)(ii) is nearly identical to section 1325(a)(4) which relates to valuation of unsecured claims. *In re Beguelin,* 220 B.R. 94, 99 (B.A.P. 9th Cir. 1998) ("Sections 1129(a)(7) and 1325(a)(4) contain virtually identical language, and the effect of the provisions is the same."). As in section 1325(a)(5)(B)(ii), both section 1129(a)(7)(A)(ii) and section 1325(a)(4) use the broad term "property" rather than "payments." *In re Sherman,* 157 B.R. 987, 991 (Bankr. E.D. Tex 1993) (noting that 1129(a)(7)(A)(ii), 1325(a)(4) and 1325(a)(5)(B)(ii) share common elements relating to

value of property to be distributed in reorganization). Because section 1325(a)(5)(B)(ii) shares language with section 1129(a)(7)(A)(ii) that differs from subsequent and more limiting language employed in section 1325(a)(5)(B)(iii), and both statutes relate to cram down in reorganization, it stands to reason that the parameters of the two statutes should be interpreted similarly. *See Northcross v. Bd of Ed. Memphis City Schools 8212 1164*, 412 U.S. 427, 438 (1973) (per curiam) ("[S]imilarity of language . . . is, of course, a strong indication that . . . two statutes should be interpreted pari passum"); *Roosevelt Campobello Intern. Park Com'n v. U.S. E.P.A.,* 711 F.2d 431 (1st Cir. 1983).

In the interest of effectuating a feasible plan that maximizes payment to creditors, cramdown under chapter 11 frequently involves the issuance of a new note that may lower the interest rate, extend the term, or delete late charge payments. Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 Wis. L. Rev. 565, 580 n.40 (2009) (noting that the language of section 1325(a)(5)(B)(ii) is comparable to section 1129(a)(7)(A)(ii) under which "[t]he payment of a secured debt with a new note is frequently done"); Alan Steven Wolf, *The Effect of Forced Loan Modification* http://www.wolffirm.com/publications/13.htm, California Trustee's Association Newsletter (Winter 1996); *In re Mirant Corp*. 334 B.R. 800 (Bankr. N.D. Tex. 2005) (noting similar language and treatment between sections 1325(a)(5)(B)(ii) and 1129(a)(7)(A)(ii)); *In re River Village Associates*, 161 B.R. 127, 135 (Bankr. E.D. Pa 1993) (same); *In re Kuljis Seafood,* 73 B.R. 659 (Bankr. S.D. Mississippi, 1986) (Section 1129(a)(7)(B)(ii) satisfied by issuance of new note and only issue to be determined by the court is value of the new note).

This parallel statutory framework, as well as the legislative history, and Justice Thomas's concurring opinion in the plurality decision in *Till*, support honoring the plain language of the statute which is clearly broad enough to encompass the plan proposed by the debtor.

II. The Time Limitation Imposed by the Bankruptcy Court is Inapplicable to a One Time Payment in Full of the Underlying Debt

The bankruptcy court based its ruling upon the finding that, although a new note and mortgage may satisfy the distribution of property component of subparagraph (B)(ii), the terms of the new mortgage must be limited to the plan period set forth in section 1325(b)(4). Other courts deciding the issue have likewise found that proposed treatment of a modified claim by payment with a new note is prohibited if the terms of the new note extend beyond the applicable commitment period in section 1325(b)(4). *See Russell v. Bank of New York Mellon,* 2010 U.S. Dist. LEXIS 135516 (E.D. Va. Dec. 21, 2010); *In re Hayes*, 2011 Bankr. LEXIS 248 (Bankr. M.D. N.C., Jan. 25, 2011); *In re Hines*, 2011 Bankr. LEXIS 236 (Bankr. M.D. N.C. Jan. 21, 2011); *In re Valdes,* 2010 Bankr. LEXIS 3564 (Bankr. S.D. Fla. Oct. 4, 2010); *In re Santiago*, No. 08-15360 (Bankr. S.D. Fla. October 29, 2009); *In re McGregor*, 172 B.R. 718 (Bankr. D. Mass. 1994) (pre-BAPCPA case addressing cure and maintenance rather than one-time distribution of property).[2]

These holdings misconstrue the nature of the issuance of the new note by equating it with a provision for continuing payments under the plan, rather than treating it as a

[2] One bankruptcy court appears to have rejected the debtor's plan based upon a finding that issuance of a new note is prohibited because the note is not "equivalent to periodic cash payments." *In re Martin*, 2011 Bankr. LEXIS 314 (Bankr. M.D. N.C. Jan. 26, 2011). That "periodic cash payments" are not required under section 1325(a)(5)(B)(ii) is clear from the language of the statute and does not appear to be the basis for the bankruptcy court's decision in this case.

one-time distribution of property the value of which is equal to the value of the secured claim.

The time limitation applies to plans which propose to pay a debt in periodic payments over the course of the plan. Section 1325(a)(5)(B)(iii) provides that "*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." It is that provision that is subject to the time constraint found in section 1325(b)(4):

> For purposes of this subsection, the "applicable commitment period"—
> **(A)** subject to subparagraph (B), shall be—
> **(i)** 3 years; or
> **(ii)** not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than [median]—

The use of the conditional, "if," with respect to "periodic payments" in subparagraph (iii), recognizes the existence of alternatives to "periodic payments." Subparagraph (ii) provides that alternative in the form of a "distribution of property." If no alternative to "periodic payments" is recognized then the "if" of section 1325(a)(5)(B)(iii) becomes surplusage; a result abhorrent to well-established canons of statutory interpretation. *Dewsnup v. Timm*, 501 U.S. 410, 425 (1992) (Justice Scalia dissenting). Thus, it is only if the claim is to be paid through deferred cash payments that the payments must be made within the applicable commitment period. A one-time payment through distribution of property need not comply with the equal payments over the applicable commitment period mandated by sections 1325(a)(5)(B)(iii) and 1325(b)(4).

Under debtor's plan, Eastern Bank, the mortgage claim holder, receives a new mortgage for the fair market value of the property at an appropriate rate of interest over a

reasonable time (the time being a typical term of a mortgage loan). Permitting the debtor to issue a new note for the secured claim creates a new debt which would not be discharged in the current bankruptcy either as to debtor's *in personam* liability or with respect to the property itself, therefore the creditor would have recourse against the debtor as well as the ability to foreclose against the property in the event of a later default. Additionally, as is evidenced by the extensive trading in the securities market, the creditor would have property of value that could be sold to investors.

Conclusion

Based upon well-established canons of statutory interpretation as well as legislative history and Justice Thomas's opinion in *Till*, a one-time distribution of property in the form of a new note may include payment terms extending beyond the completion of the chapter 13 plan. This Court should reverse and remand the decision of the bankruptcy court.

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Dated: June 10, 2011

/s/ Walter Oney