No. 12-054

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

In re LOUIS B. BULLARD,
Debtor

LOUIS B. BULLARD,
Appellant
-v.-

HYDE PARK SAVINGS BANK,
Appellee

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS, NO. 10-23503-WCH

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

NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

On Brief: David Barnes
November 19, 2012

CERTIFICATE OF CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure 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.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. NONE.

4) In all bankruptcy appeals, counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant. NOT APPLICABLE.

/s/Tara Twomey

Dated: November 19, 2012

CERTIFICATION UNDER FED. R. APP. 29(c)(5)

I certify as follows: (a) That no party's counsel authored the foregoing Amicus Curiae Brief in whole or in part; (b) That no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (c) That no person, other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

Dated: November 19, 2012

/s/ Tara Twomey

NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

Table of Contents

Table of Authorities

Cases

Statutes

Legislative History

STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of approximately 4,800 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. First Circuit NACBA members file many 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 appellate courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Marrama v. Citizens Bank of Massachusetts,* 127 S.Ct. 1105 (2007); *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010*); In re Weinstein*, 164 F.3d 677 (1st Cir. 1999).

This case is of vital interest to NACBA members as debtors frequently file Chapter 13 bankruptcy petitions for the primary purpose of saving their homes

while paying creditors to the extent they are able. Section 1322(b)(5) has long allowed debtors to save property from foreclosure by permitting them to cure any arrearage and maintain post-petition payments during the case. Contrary to the decision of the Bankruptcy Court, nothing in section 1322 establishes a new maturity date for full payment of a long-term obligation or requires the "maintenance of payments" to continue until the original loan maturity date. Nor does this section control the date on which the contractual obligation will in fact be paid in full. If the holding of the Bankruptcy Court were to stand, it would be impossible for most debtors to save their homes from foreclosure through bankruptcy because the mortgage loan would have to be paid in full within no more than five years.

ARGUMENT

I. THE DEBTOR'S PLAN COMPLIES WITH 11 U.S.C. § 1322(b)(5) BY PROPOSING TO MAINTAIN PAYMENTS ON THE CREDITOR'S SECURED CLAIM.

Section 1322 delineates the boundaries for the contents of a chapter 13 plan. Section 1322(a) sets forth what a plan "shall" do. Subsections 1322(b)(1)-(10) provide a non-exclusive list of what a plan "may" do, and subsection (b)(11) permits a chapter 13 plan to "include any other appropriate provision not inconsistent with this title." Section 1322(b)'s list of things that a plan may do is

cumulative: they are joined together with "and," meaning that using one provision does not exclude use of another. *Fed. Nat. Mtg. Ass'n. v. Ferreira*, 223 B.R. 258, 261 (D. R.I. 1998). Each listed element may be included in a plan at the option of the debtor. *See* In re *Nosek* 544 F. 3d 34, 44 (1st Cir. 2008). The flexibility permitted in the formulation of chapter 13 plans is central to congressional efforts to encourage the use of chapter 13. H.R. Rep. No. 95-595, 9th Cong., 1st Sess. 117-18 (1977).

A. Debtor's plan complies with section 1322(b)(5) because debtor proposes to make contractually due payments as they become due throughout the life of the plan.

Among those things that a plan may do is cure arrearages and maintain payments on a creditor's secured claim under section 1322(b)(5).

> (b) Subject to subsections (a) and (c) of this section the plan may–
>
> * * *
>
> > (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and ***maintenance of the payments*** while the case is pending ***on any*** unsecured claim or ***secured claim*** on which the last payment is due after the date on which the final payment under the plan is due.

Section 1322(b)(5) has long allowed debtors to save property from foreclosure by permitting them to cure any arrearage and maintain post-petition payments during the case.

Section 1322(b)(5) expressly applies to a creditor's "secured claim." Determination of the creditor's secured claim requires the application of 506(a). *See In re Mann*, 249 B.R. 831, 837 (B.A.P. 1st Cir. 2000); *see also, e.g., In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001).

Section 506(a) is designed to deal with the situation, as in this case, where lien amounts exceed the current value of the property. In relevant part, section 506(a) provides:

> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest…is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property…and is an unsecured claim to the extent that the value of such creditor's interest…is less than the amount of such allowed claim.

11 U.S.C. § 506(a). "[T]his section separates an undersecured creditor's claim into two parts—he has a secured claim to the extent of the value of his collateral; he has an unsecured claim for the balance of his claim." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 356 (1977) (section 506 effectively "abolishes the use of the terms 'secured creditor' and 'unsecured creditor' and substitutes in their places the terms 'secured claim' and 'unsecured claim.'"). In this case, the value of the debtor's property (between $245,000 and $285,000) is the amount of the "secured claim."

By its terms, section 1322(b)(5) only applies to claims "on which the last payment is due after the date on which the final payment under the plan is due." That is, it is intended to apply to obligations that mature after the term of the chapter 13 plan. The Code does not require that these long-term obligations be paid in full during the life of the plan. Instead maintenance payments are made only during the plan. The Bankruptcy Court correctly stated that section 1322(b)(5) only requires the maintenance of payments "while the case is pending." *Bullard,* 475 B.R. at 313. The Bankruptcy Court, however, erred in concluding that in this case "maintenance payments" would continue beyond the life of the plan. Maintenance payments on any secured claim treated under section 1322(b)(5) do not continue beyond the plan. Upon completion of the plan, the debtor must continue to make principal and interest payments on the creditor's secured claim as they become due under the contract, not under the plan. When the secured claim is paid in full at a later date, the creditor must release its lien.

To comply with section 1322(b)(5), post-petition payments on the creditor's secured claim must be maintained; that is, they must be paid as they become due. The Code does not define "maintenance of payments," but courts have held that such treatment requires "keeping the same contract [interest] rate and the same payments of principal and interest called for by the note during the life of the plan

and during such further period of time as is necessary to have the total principal payments equal to the amount of the secured claim..." *In re Kheng*, 202 B.R. 538, 539 (Bankr. D. R.I. 1996). *See also In re Elibo*, 447 B.R. 359 (Bankr. S.D. Fla. 2011) (change in monthly payment amount does not constitute "maintenance of payment"), *citing In re McGregor*, 172 B.R. 718, 721 (Bankr. D. Mass. 1994).

Here, the Debtor's plan proposes to maintain payments on Creditor's secured claim while the case is pending by paying the principal and interest payments as they become due under the terms of the note. There can be no question that the Debtor's proposed plan complies with section 1322(b)(5).

B. The five-year limitation in section 1322(d) does not require secured claims treated under 1322(b)(5) to be paid in full during the life of the plan.

The Bankruptcy Court erred in concluding that "11 U.S.C. 1322(b)(5) contemplates a due date for the secured claim's final payment." *Bullard*, 475 B.R. at 313. In effect, the Bankruptcy Court held that secured claims treated under section 1322(b)(5) must be paid in full within five years. Applying the Bankruptcy Court's holding, it would be impossible for most debtors to save their homes from foreclosure through bankruptcy because the mortgage loan would have to be paid in full within no more than five years. Such a conclusion is not supported by the language of the statute or long-standing bankruptcy practice.

Nothing in section 1322(b)(2), 1322(b)(5) or 1322(d) establishes a new maturity date for full payment of a long-term obligation or requires the "maintenance of payments" to continue until the original loan maturity date. Nor do these sections control the date on which the contractual obligation will in fact be paid in full. All section 1322(b)(5) requires is that the debtor cure any arrearage and make payments on the creditor's secured claim according to the contract during the life of the plan. Section 1322(b)(2) is permissive allowing debtor's to modify certain claims. Section 1322(d) limits the life of the plan to five years. These sections do not require the debtor to pay the claim in full while the case is pending, nor do they preclude the debtor from making payments on the long-term obligation after the plan has been completed.

II. THE DEBTOR'S PLAN MAY MAINTAIN PAYMENTS ON CREDITOR'S SECURED CLAIM REGARDLESS OF WHETHER THE CREDITOR'S RIGHTS HAVE BEEN MODIFIED PURSUANT TO SECTION 1322(B)(2).

Section 1322(b)(2) provides that the plan may modify the rights of holders of secured claims other than claims secured only by a security interest in the debtor's principal residence. Section 1322(b)(5) permits debtors to cure and maintain payments on long-term debts. The plain language of the Code does not

support the Bankruptcy Court's conclusion that these sections are mutually exclusive. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations omitted) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") As noted above, the list of provisions in section 1322(b) are cumulative. There are no words of exclusion that explicitly prohibit the use of sections 1322(b)(2) and 1322(b)(5) in the debtor's plan. To the contrary, the prefatory language of section 1322(b)(5)—"notwithstanding paragraph (2)"—on its face indicates that a plan may cure and maintain a long-term debt regardless of whether or not the rights of a holder of a secured claim are modified under (b)(2).

In *Fed. Nat. Mtg. Ass'n. v. Ferreira*, 223 B.R. 258, 261 (D. R.I. 1998), the court stated:

> The notwithstanding clause does not limit the scope of subsection (b)(5) by excluding claims referred to in subsection (b)(2) other than claims secured by the debtor's principal residence. On the contrary, the clause makes it clear that subsection (b)(5)'s reach extends to claims secured by the debtor's principal residence even though such claims are not subject to modification under subsection (b)(2). If Congress had intended to make subsection (b)(5) inapplicable to all other claims that are modified pursuant to subsection (b)(2), it easily could have said that.

When the creditor's claim is secured only by property that is the debtor's principal residence, then modification under section 1322(b)(2) is not available. If the creditor's claim may not be modified, the debtor may still cure arrearages and maintain payments on a long-term debt under section 1322(b)(5). However, it does not follow that claims that may be modified under section 1322(b)(2) may not be treated according to section 1325(b)(5). As the *McGregor* court stated:

> Subsection (b)(5) does not require the plan proponent to avoid modification of the "rights" of the secured claim holder. Its command is complied with so long as payments are maintained on the "secured claim." The amount of the secured claim is determined by valuation pursuant to section 506(a).

172 B.R. 718, 721 (Bankr. D. Mass. 1994).

III. *NOBLEMAN* PERMITS MODIFICATION OF A SECURED CREDITOR'S RIGHTS UNDER 11 U.S.C. §1322(b)(2), AND BIFURCATION INTO SECURED AND UNSECURED CLAIMS UNDER 11 U.S.C. §1322(b)(5).

In *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106 (1993), the Court held that the Chapter 13 debtors' proposed bifurcation of the mortgage holder's claim modified the holder's rights as a residential mortgagee in violation of 11 U.S.C. § 1322(b)(2). Section 1322(b)(2) *permits* a plan to "modify *the rights of holders of secured claims*, *other than* a claim secured only by a security interest [in the debtor's homestead]." The Chapter 13 debtor in *Nobelman*

argued that bifurcation of a mortgagee's claim into its secured and unsecured portions, according to 11 U.S.C. § 506(a), did not modify the secured claim, and was thus permissible under section 1322(b)(2). The Court did not disagree with the assertion that bifurcation does not modify secured claims. It concluded that (b)(2) did not address modification of secured claims; precluding instead modification of the rights of holders of such claims:

> That provision does not state that a plan may modify "claims" or that the plan may not modify "a claim secured only by" a home mortgage. Rather, it focuses on the modifications of the "*rights of holders*" of such claims.

For this and the policy basis for this provision, the Supreme Court reasoned that the "rights of the holder" of a mortgage on a primary residence were impermissibly modified by a proposed bifurcation of those rights.

Nobelman makes it clear that section 1322(b)(2) addresses the *rights* of secured claim holders, and not the "secured claim" itself.

> Congress chose to use the phrase "claim secured . . . by" in §1322(b)(2)'s exception, rather than repeating the term of art "secured claim."

508 U.S. at 331; *see also In re Mann*, 249 B.R. 831, 837 (B.A.P. 1st Cir. 2000) (section 506(a) defines what a secured claim is and what it is not). Because the rights of the holder of a covered mortgage cannot be modified, the claim of the

holder cannot be bifurcated under section 506(a) for the purpose of applying subsection (b)(5).

Section 1322(b)(2) does not preclude modification of the rights of the holder of any other secured claim. Section 1322(b)(5) accordingly authorizes a plan to maintain payments on such a bifurcated secured claim.

> It is true that *Nobelman* holds a proposal of payments pursuant to bifurcation constitute modification of the "rights" of the holder of the secured claim within the meaning of section 1322(b)(2). Presumably, if only subsection (b)(2) were applicable, the payments would have to be completed within five years. But subsection (b)(5) provides independent support for such a plan. Subsection (b)(5) does not require the plan proponent to avoid modification of the "rights" of the secured claim holder. Its command is complied with so long as payments are maintained on the "secured claim." The amount of the secured claim is determined by valuation pursuant to section 506(a). This wording avoids the fine distinction made in Nobelman, based on the wording of subsection (b)(2), between modification of the "rights" of a secured claim holder and modification of the "secured claim." Subsection (b)(5), moreover, provides that its provisions control "notwithstanding paragraph (2) of this subsection."

McGregor, 172 B.R. at 721. Because the Bankruptcy Court misinterpreted *Nobelman*, the decision is in error and must be reversed.

CONCLUSION

Based on the arguments above, the decision of the bankruptcy court should be reversed.

Respectfully submitted,

/s/ Tara Twomey
NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains fewer than 5350 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font, except for footnotes and electronic signatures.

Dated: November 19, 2012.

/s/ Tara Twomey
NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256

CERTIFICATE OF SERVICE

I hereby certify that I served the within Brief of Amicus Curiae, The National Association of Consumer Bankruptcy Attorneys, on counsel for all parties, electronically through the ECF System, on this 20th day of November, 2012.

David G. Baker, Bankruptcy Counsel
236 Huntington Ave.
Suite 302
Boston, MA 02115-0000

Ronald Dunbar, Jr.
Dunbar Law PC
197 Portland St.
5th Floor
Boston, MA 02114

/s/ Tara Twomey
NATIONAL ASSOC. OF CONSUMER BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
BY ITS ATTORNEY
TARA TWOMEY, ESQ.
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda
San Jose, CA 95126
(831) 229-0256