No. 06-3321

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE VINCENT J. CONNORS
Debtor

VINCENT J. CONNORS
Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST CO., ET AL.
Appellees.

ON APPEAL FROM A FINAL JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CASE NO. 06-3321

BRIEF OF NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Vincent J. Connors v. Deutsche Bank National Trust Co., No. 06-3321

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, 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 publicy 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/ Scott F. Waterman Dated: December , 2006
Scott F. Waterman, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 600,000 bankruptcy cases filed each year. Third Circuit NACBA members file many thousands of bankruptcy cases each 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 Scarborough*, 461 F.3d 406 (3rd Cir. 2006); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom are homeowners. Homeowners' ability to avoid foreclosure and cure mortgage defaults is a critical component of chapter 13 bankruptcy. The New Jersey Bankruptcy Court is divided on the question of when a New Jersey home is

considered "sold" for the purposes of 11 U.S.C. § 1322(c)(1), a statute which was intended by Congress to allow debtors to save their home by curing mortgage defaults through chapter 13 plans. This case affords the court an opportunity to address the issue of whether a debtor's possession of a right of redemption, in a case where the foreclosure process has not been concluded under state law, is sufficient to invoke the protection of section 1322(c)(1). While, this case focuses on New Jersey law, its outcome could impact NACBA members and their clients across the country.

SUMMARY OF ARGUMENT

In adding section 1322(c)(1) to the Bankruptcy Code in 1994, Congress provided that a mortgage default on a debtor's principal residence could be cured in a chapter 13 plan "...until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law." 11 U.S.C. § 1322(c)(1). At issue in this case is whether the term "sold" in section 1322(c)(1) refers to the completion of a foreclosure sale under "non-applicable bankruptcy law," and the point at which completion of such a sale occurs in New Jersey.

Under New Jersey law a foreclosure sale is completed when the sheriff delivers a deed to the purchaser. After a sheriff's auction, which establishes the highest bidder, the sheriff must wait for a ten-day redemption period to elapse and for the bidder to actually tender the bid amount in cash. Only after the bid amount has been paid and the redemption period has expired may the sheriff deliver the deed to the buyer. Upon delivery of the sheriff's deed the former homeowner is divested of his equity of redemption and thereby precluded from curing the mortgage default under 11 U.S.C. § 1322(c)(1). This application of section 1322(c)(1) is consistent with Congressional intent and the remedial nature of the 1994 amendment, which was to allow homeowners to *pay* their mortgage debts and avoid foreclosure.

ARGUMENT

I. CONGRESS INTENDED THE WORD "SOLD" IN 11 U.S.C. § 1322(C)(1) TO MEAN AN ACTUAL COMPLETED SALE.

In 1994 Congress clarified that the federal law of bankruptcy preempted the state law of foreclosure by adding a new section 11 U.S.C. § 1322(c):

"(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date upon which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title."

Congress explained that the reason for adding section 1322(c) was to overrule the results in the decisions *In re Roach*, 824 F.2d 1370 (3rd Cir. 1987) and *First National Fidelity Corp. v Perry*, 945 F. 2d 61 (3rd Cir. 1991). *See* H.R. REP. 103-835 at 52 (1994). *In re Roach* had held that a New Jersey foreclosure judgment in state court prevented the debtor from curing the mortgage default using federal remedies in the United States Bankruptcy Court, even if the debtor held a right of redemption. *In re Roach*, 824 F.2d at 1378-79. *Perry* held that, after a sheriff's auction, the homeowner was prohibited from repaying the mortgage in full in a

bankruptcy payment plan.[1] Both *Roach* and *Perry* involved debtors who filed chapter 13 bankruptcies after the sheriff's auction, but during the ten-day redemption period allowed under New Jersey law. Thus in 1994 when Congress explicitly abrogated the results in *Roach* and *Perry,* Congress must have intended the word "sold" to mean the end, not some intermediate point in the foreclosure process.

The House Report further states:

> " This decision [*In re Roach*] is in conflict with the fundamental bankruptcy principle allowing the debtor a fresh start through bankruptcy.
>
> This section of the bill safeguards a debtor's rights in a chapter 13 case by allowing the debtor to cure home mortgage defaults at least through completion of a foreclosure sale under applicable nonbankruptcy law. However, if the State provides the debtor more extensive "cure" rights (through, for example, some later redemption period), the debtor would continue to enjoy such rights in bankruptcy."

H.R. REP. 103-835 at 53 (1994). The use of the past tense "sold" in section 1322(c)(1), combined with the use of the language "completion of the foreclosure sale" in this legislative history, points to a plain language meaning of "sold"— a *completed* foreclosure sale where the sheriff has delivered a deed to a buyer who

[1] *Roach* and *Perry* have inconsistent rationales: *Roach* held that the mortgage had merged into the foreclosure judgment and was no more, while *Perry* held that post sheriff sale the creditor still has a security interest in real property which cannot be modified. *See In re Roach,* 824 F.2d at 1377; 11 U.S.C. § 1322(b)(2). For a critique of *In re Roach* see, Louis Novellino, "A Serious Case of Metaphysics: When *In Re Brown* Was Roach'd," *95 Com. L.J. 97,* Spring 1990. *Roach* overlooked *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502 (1938). The controlling modern New Jersey decisions are also inconsistent with the *Roach* "merger" rationale, see Part II, *infra*.

actually paid the amount bid at the auction. After that delivery date, it would be too late to cure a default because the New Jersey debtor would no longer own the property. Before the delivery of the deed, however, the debtor is still the owner. *See* Part II, *infra*. It does not make grammatical sense to speak of a property being "sold" unless and until the sale is actually consummated with a transfer by deed.

The language and legislative history show that section 1322(c) is a remedial statute which should be liberally construed to benefit the class of homeowners whom Congress wished to help avoid foreclosure by paying their debts in bankruptcy payment plans. Such a construction is in line with well-established principles of bankruptcy law that give debtors who still hold a right of redemption an opportunity to cure their mortgage default.

For example, in *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502 (1938), the Supreme Court held that so long as a debtor still has a right of redemption at the time bankruptcy is filed, then that interest is property of the bankruptcy estate and federal bankruptcy law may be used to cure a mortgage default. In that case, there were two parcels of land subject to foreclosure. On the first parcel, an 80-acre tract, a judgment of foreclosure had been entered, a judicial sale held, the redemption period lapsed, and a sheriff's deed was executed. *Id.* at 508. The Court held that this parcel was not part of the bankruptcy estate because it was "completely divorced from any title of the debtor." *Id.* at 509. By contrast, the

Court held that a second parcel with respect to which the debtor had a right of redemption was subject to the jurisdiction of the bankruptcy court. *Id.* at 510-11. Accordingly, until a debtor is entirely divested of his right of redemption by conveyance of sheriff's deed--the final step in the foreclosure process--bankruptcy's superseding federal remedies can save the debtor's property from foreclosure. *See Wright,* 304 U.S. at 508-9, 512-18. *Wright* and the legislative history of section 1322(c) are in harmony. Congress, like the Supreme Court in *Wright,* recognized a federal interest preserving homeownership by favoring payment plans over forfeiture.

II. UNDER THE "APPLICABLE NONBANKRUPTCY LAW" OF NEW JERSEY, A PROPERTY CANNOT BE SAID TO BE "SOLD" UNTIL THE DEBTOR IS DIVESTED OF HIS EQUITY OF REDEMPTION BY DELIVERY OF A SHERIFF'S DEED.

The statutory language and legislative history of section 1322(c)(1) leave to state law the question of when a foreclosure sale has been completed. 8 *Collier on Bankruptcy* ¶ 1322.15 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2005). In New Jersey foreclosure proceedings, a homeowner is not foreclosed (not divested of his ownership and right of redemption) until all of the following steps have taken place: (1) acceleration, (2) foreclosure suit, (3) foreclosure judgment, (4) sheriff auction, (5) expiration of a 10-day redemption period for objections, with no redemption and no objections filed, (objections may also be made "at any time

thereafter before the delivery of the conveyance"), or if objections are filed, the right of redemption continues until the Court confirms the sale), (6) payment of the balance of the bid by the purchaser, and finally (7) the sheriff conveys title by delivering the deed to the purchaser. *See* N.J. Court Rule 4:65-5; *Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508, 267 A.2d 495 (N.J. 1970). After the sheriff's auction and during the redemption period, New Jersey's highest courts classify the debtor as "the mortgagor," *Hardyston*, 56 N.J. at 513, and as the "owner-mortgagor" *Lobsenz v. Micucci Holdings, Inc.*, 127 N.J. Super. 50, 316 A.2d 59 (N.J. Super. A.D. 1974)(term "owner-mortgagor" used 9 times). This "right of redemption is a valuable right and is subject to transfer and conveyance [by the mortgagor] just as is any other right, title or interest in real estate". *Lobsenz*, 127 N.J. Super. at 52.

If a house burns down after the sheriff's auction, but during the redemption period, the homeowner may collect on the fire insurance because he or she is still the owner of the property. *See Marts v. Cumberland Ins. Co.*, 44 N.J.L. 478 (1882); *see also In re Johnson*, 141 B.R. 838 (Bankr. D.N.J. 1992). More recently, a New Jersey appellate court considered the rights of a mortgage lender and homeowner when a fire destroyed the property during a redemption period after the sheriff's auction. *Liberty Mut. Ins. Co. v. Alexander*, 374 N.J. Super. 340, 864 A.2d 1127 (N.J. Super. A.D. 2005). The court held that, even after the sheriff's

auction, the lender was still the mortgage holder entitled to be paid the mortgagee's interest from the fire insurance policy and the debtor was still the homeowner entitled to be paid his remaining equity interest. The court stated that

> "A judicial sale without an actual transfer of title is merely a contract for sale that does not extinguish the insured's interest in his or her homeowner's fire insurance policy. *Marts v. Cumberland Ins. Co.*, 44 N.J.L. 478, 482 (Sup. Ct. 1882). The mortgage debt remains, and the homeowner is entitled to use the property to pay off the debt. *Ibid."*

Id. at 348-49. "A judgment of foreclosure did not extinguish either [the debtor's] debt or [the mortgage holder's] interest in the property." *Id.* at 354; *see also Sovereign Bank, FSB v. Kuelzow*, 297 N.J. Super. 187, 687 A.2d 1039 (N.J. Super. A.D. 1997)("The foreclosure action, although already the subject of a judgment, is not totally concluded until the defendant's equity of redemption is cut off by the delivery of the sheriff's deed."). Likewise, a foreclosure-sale bidder became the owner of a condominium unit, and thus liable to pay Association fees, only on the date it received the sheriff's deed, not the earlier date of the sheriff's auction. *See CKC Condominium Assoc. v. Summit Bank*, 335 N.J. Super. 385, 762 A.2d 674 (N.J. Super. A.D. 2000).

For at least ten days after the sheriff's auction[2] in New Jersey the debtor is still the "owner." Logically one cannot say that the property has been "sold" at a time when the debtor is still the legal owner. Rather the property is transferred and "sold" only at the point when the debtor no longer has an interest, and that is the date the sheriff delivers the deed to the purchaser.

At the auction, the Sheriff merely establishes the highest bidder, and collects a downpayment on the sale price. There is no consummated sale unless and until the purchaser pays the Sheriff the balance of the bid price. There are many reasons why foreclosure sales are not completed: inability of the high bidder to raise funds, a low appraisal, or newly discovered problems with the property. When the high bidder fails to tender the bid price, no deed is conveyed, a new auction must be conducted, and the debtor has a new right of redemption. The auction is thus an intermediate step in the foreclosure process not the end.[3] The longstanding rule in New Jersey is that a home is not *sold* until the homeowner is divested of ownership by Sheriff's deed. *Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508, 267 A.2d 495 (N.J. 1970); *Vanderbilt v. Brunton Piano Co.*, 111 N.J.L. 596, 169 A. 177 (N.J. 1933)("a foreclosure sale is not fully a sale until confirmed by court order"); *Marts*

[2] The right of redemption may be extended beyond ten days by a timely valid objection or a compelling equitable reason. *Compare Mercury Capital Corp. v Freehold Office Park*, 363 N.J. Super. 235, 832 A.2d 369 (N.J. Super. Ch. 2003) *with Brookshire Equities v. Montaquiza*, 346 N.J. Super. 310, 787 A.2d 942 (N.J. Super. A.D. 2002).

[3] The muse of Montclair, N.J. famously remarked "It ain't over til it's over." While Yogi Berra was referring to the last out of a baseball game, the N.J. foreclosure process also has a recognized end point, and the homeowner is not "out" until the sheriff's deed is delivered.

v. Cumberland Ins. Co., 44 N.J.L. 478 (1882)("The words "alienation" and "sale" import an actual transfer of title.").

Construing section 1322(c)(1) consistently with New Jersey law and holding that property is "sold" on the day that the sheriff's deed is delivered to the purchaser serves the remedial purpose Congress sought to achieve—giving homeowners a chance to save their homes from foreclosure. *See* H.R. REP. 103-835 at 52 (1994). New Jersey has an identical policy that favors the avoidance of forfeiture: "The ultimate question is one of policy. We think the answer should favor the mortgagor. The right to redeem was devised by equity to protect him from the forfeiture of his title. It is a favored right." *Hardyston Nat'l Bank,* 56 N.J. at 513.

Since 1994, the divided judges of New Jersey Bankruptcy Court have been conducting a unique experiment. If debtors are lucky enough to be assigned one of the judges who hold that "sold" in section 1322(c)(1) means the day of delivery of a sheriff's deed, those homeowners have an opportunity to save their homes. Other judges preclude debtors from curing defaults even when a sheriff's deed has not been delivered. In accordance with New Jersey law, as well as federal and state policies that seek to avoid forfeiture, all New Jersey debtors should have the right

to cure mortgage defaults until they have been divested of their rights of redemption.[4]

CONCLUSION

The Supreme Court in *Wright v. Union Central Life Ins. Co.*, 304 U.S. at 514-15, ruled that federal bankruptcy law allows debtors to pay their mortgage debts even after a sheriff's auction:

> "The debtor has a right of redemption of which the purchaser is advised, and until that right of redemption expires the rights of the purchaser are subject to the power of the Congress over the relationship of debtor and creditor and its power to legislate for the rehabilitation of the debtor. The person whose land has been sold at foreclosure sale and now holds a right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default; both are faced with the same ultimate prospect, either of paying a certain sum of money, or of being completely divested of their land."

Congress in 11 U.S.C. § 1322(c)(1) intended to give homeowners that same right to *pay* their mortgage arrears until the property is "sold" according to state law. In New Jersey the homeowner retains legal title until the day the sheriff delivers a deed to the purchaser. Debtor Vincent Connors, who filed a chapter 13 bankruptcy petition during the ten-day redemption period, is still the owner of his home, and has been given by Congress an opportunity to

[4] There is no indication that mortgage lending in New Jersey has suffered because debtors may have an opportunity to cure mortgage defaults in bankruptcy. Empirical research on a similar issue by the late Rutgers Professor Philip Shuchman, "Data on the Durrett Controversy," 9 *Cardozo L. Rev*. 605 (1987), found no correlation between court rulings favoring debtor-mortgagors in bankruptcy and any real world effect on the interest rates charged by mortgage lenders or volumes of loans made. Mortgage lending was robust in all jurisdictions.

repay his mortgage arrears. Accordingly, the judgment below should be reversed, and the case remanded to the Bankruptcy Court to consider the confirmation of the chapter 13 plan.

Respectfully submitted:

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CERTIFICATION OF BAR MEMBERSHIP

Counsel for amicus curiae, Scott F. Waterman, is a member of the bar of this Court of Appeals for the Third Circuit.

CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 3039 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

The text of the electronic brief and the hard copies are identical.

A virus check was performed on the electronic brief using _____ software and no virus was detected.

I certify under penalty of perjury that the foregoing is true and correct.

Date: December , 2006

/s/ Scott F. Waterman
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CERTIFICATE OF SERVICE

I hereby certify that on this day of December, 2006, an original and ten copies of the foregoing Brief of Amicus Curiae in Support of Appellant and Reversal were delivered by _____ to the Clerk of the Court of the Third Circuit and two copies mailed to counsel listed below:

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