No. 13-9002

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re VIRGINIA A. TRAVERSE,
Debtor

VIRGINIA A. TRAVERSE,
Debtor-Appellant

-v.-

MARK G. DEGIACOMO,
Chapter 7 Trustee-Appellee

ON APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT, NO. 12-25

BRIEF OF THE *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF THE DEBTOR APPELLANT AND SEEKING REVERSAL OF THE BANKRUPTCY APPELLATE PANEL'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:
Ray DiGuiseppe, Esq.
July 10, 2013

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
Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: July 10, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,000 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 700,000 bankruptcy cases filed 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 routinely filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *In re Puffer*, 674 F.3d 78 (1st Cir. 2012).

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom file under Chapter 7 and maintain the mortgage obligations on their home to ensure that they will be able to remain in the home when they emerge from bankruptcy. Thus, any

issue concerning a trustee's ability to sell the home despite the maintenance of the underlying mortgage obligations is of great significance to all such debtors.

STATEMENT UNDER FED. R. APP. P. 29(c)(5)

(a) No party's counsel authored this Amicus Curiae Brief in whole or in part;

(b) No party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and

(c) No person, other than the amicus curiae, it members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Applying each relevant section of the Bankruptcy Code, §§ 704, 541(a), 551, and 544, demonstrates that upon avoidance and preservation of a lien the trustee stands in the shoes of the former lienholder. The Code is clear about the consequences of lien avoidance. Both bankruptcy court and the bankruptcy appellate panel failed to walk through the applicable statutory analysis, and as a result reached erroneous conclusions regarding the effect of lien avoidance.

Traverse entered into bankruptcy having honored all the obligations underlying the mortgages on her principal residence, she claimed the homestead exemption, and she has continued maintaining her mortgage obligations so as to ensure she would still have her home when she emerges from bankruptcy. But the trustee seeks to sell her home anyway, simply because he successfully avoided and preserved for the estate a mortgage that the lender had failed to perfect. The lower court has authorized him to do so, reasoning that the trustee's exercise of the "strong arm" power to avoid and preserve the unperfected mortgage placed him in the shoes of Traverse with respect to the home.

That is an untenable result unsupported by the Code. The plain meaning of the applicable Code provisions makes clear that the trustee's avoidance and preservation of the unperfected mortgage placed him merely in the same position as the former mortgagee, with the same rights that the mortgagee held against

Traverse as defined by state law – no more, no less. Under that law, the home can be sold in satisfaction of the mortgage only upon Traverse's default. Any other result stands to provoke a new wave of foreclosures, unfairly and improperly taking away the primary residences of an untold number of debtors.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE AND INTENT OF THE CODE, THE TRUSTEE MAY NOT SELL TRAVERSE'S HOME UNLESS AND UNTIL SHE DEFAULTS ON THE UNDERLYING MORTGAGE OBLIGATIONS

A. Upon Avoidance and Preservation of a Lien, the Trustee Steps into the Shoes of the Former Lienholder and Holds Only Those Rights that the Former Lienholder Held Against the Debtor, As Defined by State Law

Stepping carefully through the relevant Bankruptcy Code sections, 704(a)(1), 541, 544, and 551, demonstrates that upon avoidance and preservation of a lien the trustee stands in the shoes of the former lienholder.

• Section 704(a)(1) authorizes the trustee to collect and reduce to money *property of the estate*.

• Section 541(a) defines *property of the estate* and includes any interest in property preserved for the benefit of the estate under sections 550 and 551.

• Sections 550 and 551 provide that a *transfer* avoided under section 544, in this case a lien, is preserved for the benefit of the estate. Section 101(54) defines a *transfer* to include the creation of a lien.

• Section 544 permits the trustee to avoid transfers of the debtor's property in certain circumstances, including the debtor's creation of a lien on her property.

The general obligation of the trustee is to "administer the chapter 7 estate expeditiously in the best interests of the estate . . ." *In re Thompson*, 965 F.2d 1136, 1145 (1st Cir. 1992); 11 U.S.C. § 704. To that end, the trustee is "to collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. § 704(a)(1). If property is not property of the estate, the trustee cannot administer it.

"Property of the estate" includes any interest that "the trustee recovers under section . . . 550 . . . of this title" and any interest "preserved for the benefit of or ordered transferred to the estate under section . . . 551 of this title." 11 U.S.C. §§ 541(a)(3) & (a)(4). Sections 550 and 551 in turn provide that such interests include pre-bankruptcy transfers by the debtor subject to being avoided under section 544 (among other sections). 11 U.S.C. §§ 550(a) & 551.

Section 544 grants the trustee "the rights and powers" of a creditor with respect to property as to which the creditor could have obtained a judicial lien at the commencement of the case, including the right to avoid a transfer of property or an obligation of the debtor "that is voidable by" such a creditor. 11 U.S.C. § 544(a)(1) & (b)(1). That is, the trustee may generally avoid pre-bankruptcy

transfers by the debtor that could have been avoided by a judgment lienholder or a bona fide purchaser. This is the so-called "strong arm" power. *In re Carvell*, 222 B.R. 178, 178 (B.A.P. 1st Cir. 1998). The most frequent use of this power is to avoid unrecorded or unperfected security interests, such as the unperfected mortgage interest at issue in this case.

A trustee's strong arm power to avoid and preserve liens for the benefit of the estate is an exception to the general rule that liens pass through bankruptcy unaffected. *In re Haberman*, 516 F.3d 1207, 1209 (10th Cir. 2008) (citing *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) and *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991)). The Code sets out specifically the consequences of lien avoidance and is clear about the limited effect of exercising this avoiding power. Section 550 provides that the trustee may recover the transfer (the mortgage lien) or its value *from the transferee (i.e. the mortgage holder).* Section 551 "merely states that a lien avoided under section 544 (and the other enumerated sections) is 'preserved for the benefit of the estate...' Preservation is just that. It simply puts the estate in the shoes of the creditor whose lien is avoided. It does nothing to enhance (or detract from) the rights of that creditor viz-a-viz [*sic*] other creditors." *In re Carvell*, 222 B.R. 178, 180 (B.A.P. 1st Cir. 1998). Instead, "the trustee, on behalf of the entire estate, assumes the original lienholder's position in the line of secured creditors . . ." *In re Haberman*, 516 F.3d at 1210. In other words, the

effect of section 551 "is to place the estate automatically in the shoes of the avoided creditor (*i.e.* giving the avoided lien to the estate) and preserve the avoided lien's priority." *In re Brooks*, 452 B.R. 809, 814 (Bankr. D. Kan. 2011). Neither the trustee nor the court below has cited any Code provision that gives him greater rights after a transfer is avoided.

The principal reason for preserving avoided liens is to prevent junior lienholders from improving their position at the expense of the estate. 5 Collier on Bankruptcy ¶¶ 551.01, 551.02 Alan N. Resnick & Henry J. Sommer, eds., (16th ed. 2013). In fact, the Tenth Circuit Court of Appeals recently addressed this particular issue in *In re Trout* 609 F.3d 1106, 1109 (10th Cir. 2010). There, the trustee had claimed that his avoidance of an unperfected lien automatically gave him the right to sell the underlying collateral to realize its value. *Id.* at 1109-10. In rejecting this claim, the Tenth Circuit reaffirmed that '"under § 551 the trustee 'steps into the shoes of the former lienholder, with the same rights in the collateralized property that the original lienholder enjoyed,'" *id.* at 1110 (quoting *In re Haberman*, 516 F.3d at 1210), and explained that this rule is important to ensure "that a trustee avoiding a senior lien moves into that priority position and the estate is not trumped by the interest of a junior lien." *Trout*, 609 F.3d at 1110.

The trustee may therefore preserve for the benefit of the estate only those rights that the former lienholder held against the debtor – no more, no less. *In re*

Kors, Inc., 819 F.2d 19, 23 (2d Cir. 1987) ("While § 544(a)(1) enables the trustee in bankruptcy to step into the shoes of a hypothetical lien creditor to avoid unperfected liens in the debtor's property, he may, pursuant to § 551, preserve only those rights which existed against the bankrupt."); *In re Bremer*, 408 B.R. 355, 360 & n. 22 (B.A.P. 10th Cir. 2009) ("The Trustee was not entitled to any more than the [former lienholders] had by virtue of the transfers."); *In re Wyatt*, 440 B.R. 204, 213 (Bankr. D. D.C. 2010) ("By reason of § 551, [the trustee] stepped by way of subrogation into the shoes of [the creditor] with respect to its lien rights.").

The ability to stand in the shoes of the lienholder is the extent of the power that the Code affords a trustee with respect to avoided liens preserved for the benefit of the estate. *In re Carmichael*, 439 B.R. 884, 890 (Bankr. D. Kan. 2010) ("As to lien avoidance, under § 544, the Code provides the Trustee no specific remedies other than automatic lien preservation under § 551."). "[The Trustee] receives only the bundle of rights given him by Congress in the Bankruptcy Code [preservation of the lien]." *In re Bremer*, 408 B.R. at 361 (quoting *In re Haberman*, 516 F.3d at 1212). Other rights of the former lienholder remain "undisturbed" and do not become part of the estate upon preservation of the lien itself. *In re Brooks*, 452 B.R. at 816; *see also In re Haberman*, 516 F.3d at 1208 (the trustee "does not automatically assume other rights the original lienholder may have against the debtor"); *In re Carmichael*, 439 B.R. at 890-91 (quoting 5 *Collier*

on Bankruptcy § 551.02) (‘“Related ancillary rights held by the party whose lien has been avoided are not preserved for the benefit of the estate.”’).

The trustee’s mere exercise of this limited strong arm power also does not define or affect the nature of the rights and priorities that the trustee assumes in this capacity. Rather, “state law is used to determine what the lien creditor’s priorities and rights are.” *In re Kors*, 819 F.2d at 22-23; *accord In re Haberman*, 516 F.3d at 1210; *In re Brouilette*, 389 B.R. 214, 218 (Bankr. D. Kan. 2008); *In re Ellis*, 345 B.R. 11, 16 (Bankr. D. Mass. 2006) (‘“applicable law’ refers to state or federal law that would govern the existence of a debt (or other claim) outside the bankruptcy context”); *In re Crichlow*, 322 B.R. 229, 234 (Bankr. D. Mass. 2004) (“applicable nonbackruptcy law” is state law within the meaning of section 1322(c)(1) governing the conduct of foreclosure sales); *In re Crowder*, 225 B.R. 794, 796 (Bankr. D. N.M. 1998) (state law is the “applicable law” for determining a trustee’s status as a substituted “bona fide purchaser” under section 554(a)(3)); *In re Mirant Corp.*, 675 F.3d 530, 535-536 (5th Cir. 2012) (state law determines the effect of fraudulent transfers); *see generally Butner v. United States*, 440 U.S. 48, 55 (1979) (property rights are treated in bankruptcy as “created and defined by state law,” so as to maintain uniformity in their treatment and discourage forum shopping).

Thus, it is clear from the plain language and purpose of the applicable Code sections that a trustee only has the power to sell collateral underlying an avoided lien to the extent the former lienholder could have done so under state law. It follows then that where the avoided lien interest is an unperfected mortgage interest in real property, the trustee's rights with respect to the property, including the power to dispose of it on account of the underlying mortgage obligations, are the same as the rights of the former mortgage holder as defined by state law.

B. Under the Applicable Non-bankruptcy Law of Massachusetts, the Trustee Cannot Sell Traverse's Home Because She Is Not in Default on Any of Her Obligations Underlying the Mortgage

Here, the parties agree that the applicable non-bankruptcy law is that of Massachusetts. *In re Traverse*, Appellee's Brief at 13. Under Massachusetts law, the lienholder (mortgagee) merely holds defeasible legal title to the real property and the debtor (mortgagor) retains the rights to the property itself in the form of equitable title. *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637, 649, 941 N.E. 2d 40 (2011). The mortgagor's right to foreclose upon the mortgage and sell the property is not triggered unless and until the debtor defaults on the underlying contractual obligations. *Eaton v. Federal National Mortgage Association*, 462 Mass. 569, 576, 969 N.E. 2d 1118 (2012) (the mortgagee may foreclose "upon any default in the performance or observance of the mortgage [citation] including, of course,

nonpayment of the underlying mortgage note"); *In re Cormier*, 434 B.R. 222, 227, n. 6 (Bankr. D. Mass. 2010) ("the mortgagee may enter into possession of the mortgaged premises upon default . . ."). The Trustee actually acknowledges this as well, saying that "in his role as the holder of Chase's preserved mortgage the Trustee could liquidate this asset by foreclosing on the Mortgage *if there was a default by the Debtor*." Appellee's Brief at 14 (italics added); *see also id.* at 13 (quoting *In re Fadili*, 365 B.R. 7, 14-15 (Bankr. D. Mass. 2007) (brackets original; italics added) ("'[U]nder the laws of the Commonwealth [of Massachusetts], a mortgage is a deed of conveyance transferring a fee interest to the mortgagee *which is defeasible upon the performance of the conditions in the mortgage*.'").

It is undisputed that Traverse was not in default on the payment obligation or any other obligation underlying the mortgage, either at the commencement of the case or at the time the trustee avoided the unperfected mortgage. So Chase, as the original mortgagee, had no right to foreclose upon the mortgage and the trustee, who merely "stepped into the shoes" of Chase and "succeeded to those rights, no more and no less," also has no right to foreclose upon or otherwise dispose of the home while Traverse is maintaining her obligations. *In re Bremer*, 408 B.R. at 360 & n. 22. Instead, the trustee preserved for the benefit of the estate only those rights that Chase had held against Traverse, which was the right to dispose of the home in

satisfaction of the mortgage interest *in the event of* Traverse's default on the obligations of underlying the mortgage. *In re Kors, Inc.*, 819 F.2d at 23.

Thus, the trustee's mere exercise of the "strong arm" power to avoid and preserve Chase's unperfected mortgage interest does not grant him the right to sell the home out from underneath of Traverse. The trustee stands in no better position than a bank holding a mortgage on which the borrower is current, with at most a *future* right to foreclose or otherwise dispose of the property *if and when* there is a default on an obligation. He stands right where Chase used to be -- which is precisely where the Code intended to place him. *See In re Trout*, 609 F.3d at 1109.

In finding that the trustee nevertheless has the power to sell Traverse's home, the Bankruptcy Appellate Panel (BAP) characterizes the trustee's rights in the home as being directly on par with Traverse's interests in the home, opining that the trustee correctly argues he "now is in the shoes of a *homeowner*" with all of the same rights Traverse had to sell the property as an individual before she filed bankruptcy. BAP Opn. at 8-9 (italics added.) Specifically, the BAP reasons that, because Traverse could have sold her home before bankruptcy, her right to do so transferred to the estate subject to the unperfected mortgage, and once the trustee avoided the mortgage he was left standing in her shoes. *Id.* The BAP cites no authority for the notion that the avoidance and perseveration of an unperfected mortgage places the trustee in the homeowner's shoes with the right to sell the

home simply because the homeowner could have sold it had she chosen to do so. This would require that the trustee hold ownership of the property itself, and neither the trustee nor the BAP has provided any explanation for how the trustee could have obtained anything beyond the interest in the unperfected mortgage.

There is simply no support for the BAP's holding. As outlined above, according to the clear operation of the Code sections involved, the trustee steps merely into the shoes of the former lienholder, with the same rights as the lienholder whose ability to dispose of the property on account of the mortgage is dependent upon the debtor's default. Notably, the trustee has never argued that he is now in the shoes of *Traverse*. The trustee has simply argued that he is in the shoes of Chase, *the former mortgagee*. Appellee's BAP Brief at 13 (acknowledging he "only obtained the rights of the former mortgagee; i.e., defeasible legal title"); *Id.* at 14 (characterizing himself as acting "in his role as the holder of Chase's preserved mortgage"); *Id.* at 15 ("As a result of successfully avoiding and preserving the Mortgage, the Trustee now also holds the former-mortgagee's interest in the Property."). The parties agree on this point given the clear import of the Code sections involved. The subject of their debate is the effect of the trustee's stepping into *Chase's* shoes and whether his role in *that capacity* empowers him to sell the home. As explained, it does not because Traverse is not in default.

C. Permitting Such Sales Risks Exacerbating the Existing Foreclosure Crisis and Depriving Debtors of a Fair Process Through Which They Can Obtain the "Fresh Start" for Which Bankruptcy Was Designed

Under either the BAP's theory that the trustee "becomes" the debtor or the trustee's theory that the trustee obtains this power in his capacity as the former lienholder, the BAP's holding could have vast negative ramifications if upheld. This nation has been under the grip of a major foreclosure crisis for several years now, and that crisis continues as millions of homeowners still face losing their homes in the persistent wake of the conditions that led to the fallout of the market. Those conditions are largely the result of lenders' careless, overreaching, and even reckless practices in hastily issuing billions in inherently risky mortgage-backed securities to prop up and profit from an atmosphere of artificially inflated prices.

Many of the individuals entering into bankruptcy today are carrying mortgages issued by one of the major lending institutions involved in provoking this crisis. Given the careless and hasty manner in which these institutions have issued loans over the last several years, there is certainly reason to believe that they may have failed to complete one or more of the technical requirements necessary for perfection unbeknownst to the debtor, leaving the mortgage defective. Trustees commonly take advantage of a lienholder's failure to perfect its lien by avoiding and preserving it for the estate. *In re Bremer*, 408 B.R. 355, 357 (B.A.P. 10th Cir. 2009) ("It is commonplace in bankruptcy for trustees to avoid unperfected liens

and enforce them for the benefit of the estate."). So any of these debtors who just happen to be carrying one of these defective mortgages would face the prospect of losing their home should a trustee be permitted to sell the home merely because the mortgage was avoided on the account of the lender's mistake. This could provoke an untold number of additional foreclosures, worsening the crisis of widespread home loss for individuals and further impeding economic recovery.

Such a result is particularly untenable where, as here, the debtor is current on her mortgage obligations. Traverse was not only current when she entered into bankruptcy, but she has continued to make payments with the obvious intent of keeping the home, which she has declared and exempted as her homestead. Clearly, such efforts should be encouraged – indeed lauded – particularly since a debtor in *default* on a mortgage can use the bankruptcy process to shed personal liability and still avoid foreclosure through a later Chapter 13 case. *See In re Saylors*, 869 F.2d 1434, 1436-37 (11th Cir. 1989) and *In re Ligon*, 97 B.R. 398, 400 (Bankr. N.D. Ill. 1989) (explaining that debtors who have obtained a discharge of personal liability on a mortgage in Chapter 7 may then file under Chapter 13 "to force the mortgagee to accept a cure of all preexisting defaults on that mortgage during the life of a Chapter 13 plan with the view that the debtor would thereafter make current mortgage payments on a timely basis to avoid foreclosure.").

Permitting a trustee to sell a principal residence out from underneath a debtor who is current on the mortgage obligations would not only discourage debtors from maintaining those obligations, but it would also unfairly and improperly impede the debtor's opportunity for a fresh start -- which is the Code's "overriding federal interest." *In re Demeter*, 478 B.R. 281, 292 (Bankr. E.D. Mich. 2012). "Bankruptcy is a rehabilitative proceeding, and one its primary purposes is to give the honest debtor a 'fresh start.'" *In re Bartlett*, 168 B.R. 488, 493 (Bankr. D. N.H. 1994) (quoting *Local Loan v. Hunt*, 292 U.S. 234, 244 (1934)). A debtor's claim of a homestead exemption represents the classic attempt to avail oneself of this important opportunity: "This 'fresh start' is only feasible if the debtor emerges from bankruptcy with a means of providing the necessities of life, including a roof overhead, and the homestead exemption is directed at making this attainable." *Bartlett,* 168 B.R at 493 (citing *Grogan v. Garner*, 498 U.S. 279, 286 (1991)). If the trustee could sell the homestead simply because it was subject to an unperfected lien avoided and preserved for the benefit of the estate, debtors would unfairly be deprived of the asset often most integral to '"enjoy a new opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of preexisting debt.'" *Bartlett,* 168 B.R at 493-94 (quoting *Garner* at 286.)

"Fairness" and "equity" are the driving principles in every bankruptcy case. *Braunstein v. McCabe*, 571 F.3d 108, 121 (1st Cir. 2009) (quoting *Bank of Marin v. England*, 385 U.S. 99, 104 (1966)) ("'there is an overriding consideration that equitable principles govern the exercise of bankruptcy jurisdiction"). There can be no fairness or equity in permitting a trustee to take away the home of a debtor who is current on all her mortgage obligations simply because *the lienholder* failed to satisfy *its* obligations in perfecting the underlying mortgage interest.

And, finally, it simply is not necessary for the trustee to sell the home to realize a benefit from having avoided and preserved the lien for the estate. Among the rights the trustee takes over from the former lienholder is the right to sell the lien itself, which in many cases would realize as much or more of a benefit to the estate, and sooner. The actual price a home will fetch and how long it will take to sell are inherently matters of speculation tied to the whims of an unpredictable real estate market already clogged with a glut of current and pending foreclosures. A mortgage, on the other hand, is simply a financial instrument whose value is fairly easily established and can be sold to a broader market with little time and expense.

Whatever additional return the trustee might believe is obtainable through a sale of the home itself in a particular case would not justify authorizing such a sale when the debtor has maintained all underlying mortgage obligations. There is no support for this action under the plain meaning of the Code, and permitting it

would not just undermine the spirit of the Code; it would have potentially devastating effects upon a housing market already beleaguered with foreclosures and the homeowners stuck carrying the defective products of overreaching lenders.

CONCLUSION

For these reasons, the BAP erred in holding that the trustee could proceed with the sale of Traverse's homestead, and thus its decision should be reversed.

Date: July 10, 2013

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 4,223 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: July 10, 2013.

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 on July 10, 2013, I electronically filed the foregoing document with the Clerk of the Court for First Circuit Court of Appeals by using the CM/ECF system.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system.

I further certify that some of the parties of record to this appeal have not consented to electronic service. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following parties: NONE

/s/Tara Twomey

TARA TWOMEY

STATUTORY ADDENDUM

11 U.S.C. § 704(a)(1)

(a) The trustee shall—
(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;…

11 U.S.C. § 541(a)

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—
  (A) under the sole, equal, or joint management and control of the debtor; or
  (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.
(3) Any interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title.
(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510 (c) or 551 of this title.
(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—
  (A) by bequest, devise, or inheritance;
  (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
  (C) as a beneficiary of a life insurance policy or of a death benefit plan.
(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 544

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)

(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 (e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548 (d)(3)) that is not covered under section 548 (a)(1)(B), by reason of section 548 (a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C. § 551

Any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724 (a) of this title, or any lien void under section 506 (d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.