

CASE NO. 03-2084

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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IN RE: MICHAEL B. PRICE and CHRISTINE R. PRICE

*Debtors*

MICHAEL B. PRICE

*Appellant*

v.

DE STATE POLICE FEDERAL CREDIT UNION,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE  
C.A.NO. 02-1339 JJF

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BRIEF OF NATIONAL ASSOCIATION OF  
CONSUMER BANKRUPTCY ATTORNEYS AND  
THE CONSUMER BANKRUPTCY PROJECT  
AS AMICI CURIAE IN SUPPORT OF APPELLANT

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## STATEMENT OF INTEREST OF AMICI CURIAE

### NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1,200 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 150,000 bankruptcy cases filed each year. Third 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. NACBA has filed *amicus curiae* briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors, including the filing of briefs in cases involving the issues before this court. See In re Burr, 160 F.3d 843 (1st Cir. 1998); Capital Comm. Fed. Credit Union v. Boodrow (In re Boodrow), 126 F.3d 43 (2d Cir. 1997), *cert. denied*, 522 U.S. 1117, 118 S.Ct. 1055, 140 L.Ed.2d 118 (1998).

## **CBAP**

The Consumer Bankruptcy Project (“CBAP”) is presently the primary provider of legal representation in chapter 7 bankruptcy cases to the low income population of the City of Philadelphia. CBAP was formed in 1992 by leaders of the Eastern District of Pennsylvania Bankruptcy Conference in collaboration with colleagues from the Bankruptcy Committee of the Business Law Section of the Philadelphia Bar Association in order to such representation. The need for a specialized pro bono project arose due to reduced funding for Community Legal Services, Inc. (“CLS”), the non-profit entity which has traditionally provided general civil legal services to low income residents in the City of Philadelphia, which in turn necessitated service cutbacks by CLS.

Since its formation, CBAP has represented low-income clients in approximately 200 chapter 7 bankruptcy cases each year. Case referrals are made to CBAP by several legal services, housing and social service agencies in Philadelphia County. Representation is provided to clients primarily through a pool of volunteer attorneys, who represent the clients pro bono, in the chapter 7 case. In addition, a small part-time staff handles some of the cases filed by eligible clients. CBAP coordinates the referral of cases to the

private, volunteer attorneys and provides training and support to the volunteers.

The NACBA membership and CBAP each have a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners while CBAP volunteer attorneys exclusively represent low-income individuals. In many instances, such persons desiring to retain secured property may not have the ability to exercise the redemption procedures in the Code and a chapter 13 filing may not be feasible. They may also be confronted with a secured creditor who refuses to reaffirm a secured debt or is unwilling to reaffirm on terms reasonably favorable to the debtor. Accordingly, *amicus* urge reversal of the lower court's holding concerning the application of § 521(2). *Amicus* urge this Court to approve the practical and limited use of the option of retention of secured property with continuing payments.

Additionally, *amici* are gravely concerned about potential creditor misuse in consumer bankruptcy cases of a ruling such as appellee seeks in this case which would expressly prohibit debtors who are current on secured obligations from retaining collateral by continuing to make payments on the debt. Since consumer debtors are often in great need of retaining certain consumer purchases, such as automobiles which may be necessary for

continued employment, a ruling affirming the decision below could be used by creditors to coerce the signing of reaffirmation agreements and potentially jeopardize a debtor's opportunity to get a true fresh start.

### **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

The statement of subject matter and appellate jurisdiction contained in the appellants' brief is complete and correct.

### **STATEMENT OF ISSUES PRESENTED**

*Amici* accept the statement of the issues presented as contained in the brief of the appellants.

### **STATEMENT OF THE CASE AND FACTS**

*Amici* accept the statement of the case and facts as contained in the brief of the appellants.

### **SUMMARY OF ARGUMENT**

The decision below fails to give effect to the plain language of the

statute. Section 521(2)(A) provides that a debtor must file a statement of intention concerning secured property and specify one of the options listed in the statute, if any of the options are applicable. By the use of the phrase “if applicable” in subparagraph (A), and the express directive found in subparagraph (C) that the statute shall in no way alter debtor’s rights in the secured property, Congress clearly intended that the options noted in the statute were provided for illustrative purposes and were not the only options available to the debtor to the exclusion of all others. Accordingly, § 521(2) does not limit a debtor's options in electing to retain secured property but simply requires that a declaration of the debtor's intentions whether to retain or surrender secured property be filed with the court.

*Amici* also contend that when the interests of debtors in having the option to retain secured property with continuing payments is weighed against the potential harm to creditors, this Court may properly conclude that bankruptcy courts should have the discretion to approve this option in appropriate cases. This rational approach furthers the goals of the Bankruptcy Code. Moreover, any other result could have serious consequences for debtors by potentially forcing them to reaffirm secured debts and re-establish personal liability for pre-petition debts even where there has been no default in payments. This is contrary to the clear

Congressional mandate that reaffirmation agreements are to be voluntary and it further erodes the goal of bankruptcy to provide debtors with a fresh start.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE MAKES CLEAR THAT THE OPTIONS STATED IN § 521(2) ARE NOT EXCLUSIVE.

#### **A. If Congress Had Intended To Make The Options Listed In Section 521(2) Exclusive, It Would Not Have Included The Words “If Applicable.”**

As in all cases of statutory construction, the starting point in this case must be the statutory language. Kelly v. Robinson, 479 U.S. 36, 43, 107 S.Ct. 353, 357, 93 L.Ed.2d 216 (1986). When the language of a statute is unambiguous, that language should be enforced as long as "the statutory scheme is coherent and consistent." In re Anes, 195 F.3d 177 (3rd Cir. 1999), *citing* Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997).

Given its ordinary meaning, § 521(2)(A) requires that a debtor file a statement of intention as to whether the debtor intends to retain or surrender secured property. Additionally, the debtor's statement shall specify one of

the options listed in the statute, but only if one of these options is applicable.

The non-exclusive<sup>1</sup> list of options provided in § 521(2)(A) includes that the debtor may state an intention to claim the property as exempt, to redeem the property, or to reaffirm the debt secured by the property.

The statutory language does not place any substantive requirements on the debtor in choosing whether to retain or surrender secured property, or in effectuating the debtor's ultimate choice. It merely requires that the debtor provide notice of his or her intention. McClellan Federal Credit Union v. Parker (In re Parker), 139 F.3d 668, 673 (9th Cir. 1998) (“Our interpretation of that language is that the only mandatory act is the filing of the statement of intention, which the debtor ‘shall’ file.”).

Likewise, nothing in § 521(2)(A) dictates that a debtor must elect one of the listed options. The statute simply requires a statement “of whether the debtor intends to choose any of those options, *if applicable*.” 3 Collier on Bankruptcy, ¶ 521.10[2] at 521-36 (15th ed. revised 2003) (*emphasis in original*). If the debtor plans to choose any of the three options listed in the statute, then the debtor shall state that preference in the statement of intention. Parker, 139 F.3d at 673.

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<sup>1</sup> Section 521 links the stated options with the word “or”. A basic statutory rule of construction in the Bankruptcy Code is that the word “or” is not exclusive. 11 U.S.C. § 102(5).

The court below's interpretation of § 521(2)(A) effectively reads the words "if applicable" out of the statute. The precise location of the words "if applicable" in § 521(2)(A), coming directly before the listed options, suggests that the words could only have been intended to clarify that the debtor need not specify any of the listed options that follow if none are applicable. Given its common usage, the phrase "if applicable" must be construed in a non-limiting fashion so that the listed options (exemption, redemption, or reaffirmation) that follow the phrase are not exclusive.

This construction of the "if applicable" words in the statute led the Fourth Circuit Court of Appeals in In re Belanger, 962 F.2d 345 (4th Cir. 1992) to conclude that the examples provided in § 521(2) of the options available to the debtor were intended to be illustrative and not binding:

[t]he fact that the statutory options are stated in the disjunctive shows that the words "if applicable" are unnecessary under a construction of the statute that makes the options exclusive. But if the phrase "if applicable" is given effect, it plays an important role.... [T]he debtor must specify a choice of the options if applicable. But if these options are not applicable, the debtor need not specify them.

Belanger, 962 F.2d at 348. *See also* Parker, 139 F.3d at 673 (the "if applicable" language means "if the debtor plans to choose any one of the three options listed later ..., - the debtor must so specify in the statement of

intention"); In re Peacock, 87 B.R. 657, 660 (Bankr.D.Colo. 1988) (the words "if applicable" do not "narrow" the rights or options of a debtor).

The First and Eleventh Circuits have suggested a construction of the “if applicable” words that is at odds with the statute’s plain meaning. These courts conclude that since the listed options of exemption, redemption and reaffirmation do not apply to a debtor's surrender of the property, the words “if applicable” are intended to apply only to a debtor's retention of the property. In re Burr, 160 F.3d 843, 848 (1st Cir. 1998); In re Taylor, 3 F.3d 1512, 1516 (11th Cir. 1993). These courts effectively rewrite the statute to say that the debtor may elect surrender or retention, and “then, ‘if’ retention is ‘applicable,’” the debtor shall specify one of the three listed options. Burr, 160 F.3d at 848. The fundamental flaw with this analysis is that Congress knew how to say “if retention is applicable” and chose not to do so.<sup>2</sup>

In addition, this reading of the “if applicable” phrase is inconsistent with the grammatical structure of the sentence. It suggests that the words “if applicable” exclusively modify “retention” and not the immediately

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<sup>2</sup> One court has also suggested that if Congress intended for debtors to be limited to only one of the three options noted in the statute, § 521(2)(A) should have included the phrase “*whichever is applicable*,” rather than to indicate that one of the options must be selected *if applicable*.” In re Crouch, 104 B.R. 770, 772 (Bankr.S.D.W.Va. 1989) (*emphasis in original*).

preceding words “surrender of such property.” This strained interpretation violates the well-accepted doctrine of statutory construction, the rule of last antecedent. McCullagh v. Dean Witter Reynolds, Inc., 177 F.3d 1307 (11th Cir. 1999) (construing contract in a manner that “fits with the grammatical rule that modifiers should be placed next to that which they modify”), *citing* William Strunk, Jr., & E.B. White, *The Elements of Style* 28-31 (3d ed.1979).

The Burr court’s interpretation is also falsely premised on the view that the three listed options which follow the “if applicable” words apply only when the debtor elects to retain the secured property. This ignores the not uncommon situation where secured property "is claimed as exempt" and the debtor surrenders the property to the trustee. This would occur, for example, where a debtor owns an auto valued at \$12,000 that is subject to a secured claim of \$4,000 and the debtor has claimed the property as exempt up to an available exemption amount of \$2,775. *See* 11 U.S.C. § 522(d)(2). In this situation, another subsection of the same statute, § 521(4), provides that the debtor shall “surrender” the auto to the trustee, for eventual liquidation and administration of the property.<sup>3</sup>

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<sup>3</sup> Since the word “surrender” is used in both § 521(2) and § 521(4), and § 521(2) does not specify that the surrender of property contemplated by that subsection shall be made to a secured creditor, a debtor’s election of a “surrender” and “exempt” option is consistent

Similarly, if Congress intended “surrender” in § 521(2)(A) to mean surrender of the property made to the secured creditor rather than the trustee, then the three listed options could not possibly be exclusive as it would eliminate the power of the trustee to sell encumbered non-exempt or partially exempt property of the estate, as this is not one of the specified options. In re Parker, 142 B.R. 327, 330 (Bankr.W.D.Ark. 1992)(“For example, the trustee frequently sells encumbered property and, if there is equity in the property, pays the secured claim from the sale proceeds and distributes the remaining proceeds to unsecured creditors. In this common scenario, none of the three so-called mandatory alternatives listed in 11 U.S.C. § 521 have occurred.”).

As further evidence that Congress did not intend the options listed in the statutory language to be exclusive, there exists another option available to a debtor seeking to retain property, in addition to the retain with continuing payments option, which is not specifically referenced in § 521(2). Under 11 U.S.C. § 522(f), a debtor may in certain situations retain secured property by invoking the lien avoidance procedures contained in that section.

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with the meaning of § 521(2). See United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988) (statutory terms are often "clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes [their] meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law") (*citation omitted*).

Rather than view this as an oversight on the part of Congress, the absence of any specific reference to the lien avoidance option more accurately evinces the Congressional intent that the options contained in § 521(2) are not exclusive and that the statute is not intended to alter any substantive rights available to the debtor.<sup>4</sup>

The Burr court dismissed the relevance of the lien avoidance option by stating that “it is not, in and of itself, a retention option.” Burr, 160 F.3d at 849. On the contrary, it is hard to imagine a more direct and definitive method for a debtor to retain secured property as it can result in the complete elimination of the creditor’s lien. While the option requires that a debtor take some procedural steps to carry out the option, by filing a motion and

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<sup>4</sup> Although the lien avoidance option is not referred to in § 521(2)(A), it was explicitly provided for in the Official Bankruptcy Form implementing the statute's notice requirements under the following category which the debtor could check off: "lien will be avoided pursuant to § 522(f) and property claimed as exempt." See former Official Form 8. The form was amended in 1997 to allow the debtor even more options in setting forth a statement of intention with regard to property to be retained. The form now includes a broad category not limited to lien avoidance which the debtor may check off: "property is claimed as exempt," which obviously can include lien avoidance. The instructions to new Form 8 now also state that the debtor may "check *any* applicable statement" (emphasis added). Although the Judicial Conference's Advisory Note which accompanied the 1997 changes to Form 8 state the form "is not intended to take a position regarding whether the options stated on the form are the only choices available to the debtor," citing the split of authority on this issue, the Note provides that "the form is amended to conform more closely to the language of the statute."

establishing that the lien impairs a claimed exemption in the property, the reaffirmation and redemption options are also not self-effectuating.<sup>5</sup>

Moreover, it is not plausible that Congress would have purposely excluded the lien avoidance option if it intended the list of options in § 521(2) to be exclusive since it is the option of first preference, if not the exclusive option of choice, for debtors will regard to certain types of secured property. For example, a debtor whose home is encumbered with judicial liens or whose personal property is subject to a nonpossessory, nonpurchase-money security interest will almost certainly list lien avoidance on his or her statement of intention as to those secured debts.

The debtor's right to exempt secured property,<sup>6</sup> and to avoid liens on exempt property, are both retention options that are consistent with the language in § 521(2)(A) that the statement may list secured property as "claimed as exempt." Courts which find that the debtor has only two retention options, redemption and reaffirmation, contort the statutory language by ignoring the exemption option. In essence, these courts hold

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<sup>5</sup> If the debtor and secured creditor cannot agree on the value of collateral to be redeemed or the creditor refuses to consent to redemption, the debtor must file a motion to obtain court authorization. *See* Fed. R. Bankr. P. 6008. Similarly, a reaffirmation agreement is invalid unless it conforms to the numerous procedural requirements listed in § 524(c) and is filed with the bankruptcy court.

<sup>6</sup> The debtor may claim his or her interest in the secured property to be exempt even if the debtor has no equity in the property.

not only that the debtor who seeks to retain property must choose one of the three listed options. They hold that the debtor must choose from only two of the three options, since they require the debtor to choose either reaffirmation or redemption.<sup>7</sup> Even if the debtor were required to choose from one of the three options listed, there is no possible justification in the statutory language for then precluding the choice of the exemption option.

Since the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." Ron Pair, 109 S.Ct. at 1030 (*quoting Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Section 521(2) requires debtors to state whether they intend to retain or surrender secured property - and nothing more. Parker, 139 F.3d at 673 ("We see no reason to reach beyond this plain language.").

**B. When Section 521(2) Is Read In Its Entirety, It is Clear That The Statute Was Not Intended To Alter The Substantive Rights Of Debtors In Secured Property.**

Section 521 of the Code sets forth the duties of a debtor in compiling and disclosing information necessary to complete the required bankruptcy schedules. It requires a debtor to list his or her assets and liabilities, income and expenses, and prepare a statement of financial affairs. If any of the

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<sup>7</sup> Even a debtor who has no equity in property may claim the debtor's more limited possessory and other interests in the property as exempt. See 11 U.S.C. § 522(d), which speaks of the debtor's "interest in property".

debtor's assets are secured by consumer debts, the debtor must prepare a statement of his or her intention with regard to the property. In sum, the statute deals solely with the disclosure of information and does not set forth any substantive rights affecting the treatment of assets or liabilities in the bankruptcy case.

This view is codified in subparagraph (C) of § 521, which provides:

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title.

This language, when read in conjunction with the other provisions of the statute, led the Fourth Circuit to conclude that § 521(2) is merely a “procedural provision requiring notice....” Belanger, 962 F.2d at 347. *See also*, Boodrow, 126 F.3d at 51(Section 521(2) “appears to serve primarily a notice function....”); In re Belanger, 118 B.R. 368, 370 (Bankr.E.D.N.C. 1990)(Section 521(2) is "essentially a notice requirement to permit secured creditors to ascertain the debtor's intentions early in the case.").

The relevance of subparagraph (C) in § 521(2) has also been recognized by

Collier:

Section 521(2)(C) states that nothing in subparagraphs (A) and (B) of section 521(2) shall alter the rights of the debtor or the trustee with regard to the property securing the debtor's consumer debts. This section was inserted to

make clear that the primary purpose of section 521(2) is one of notice, to remedy creditors' complaints to Congress that they could not reach debtors' attorneys and were not permitted to contact *pro se* debtors at all. It was not intended in any way to limit the options available to debtors in dealing with secured creditors.

3 Collier on Bankruptcy, ¶ 521.10[5] at 521-39 (15th ed. revised 2003).<sup>8</sup>

The appellee's position in this case is founded on the argument that § 521(2)(B) forces a debtor to choose either redemption or reaffirmation in order to retain secured property. This argument must be rejected as it requires this Court to read into the statute substantive requirements affecting the rights of debtors, a result clearly not permitted under the express language contained in § 521(2)(C). Redemption or reaffirmation cannot possibly be a debtor's exclusive options as compelling the debtor to do either would violate § 521(2)(C). *See Parker*, 139 F.3d at 673("The debtor's other options remain available, as unambiguously stated in § 521(2)(C).").

The appellee argues that the statutory language could not possibly contemplate the retention with continuing payments option because § 521(2)(B) requires that the debtor "perform" his or her intention within 45

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<sup>8</sup> In this same section, Collier criticizes the Seventh Circuit in Matter of Edwards for ignoring the plain language of Section 521(2)(C) and its related legislative history in reaching the conclusion that Congress intended there to be only redemption and reaffirmation as available options where a debtor retains property. Collier, supra, at 521-42.

days after the filing of the statement of intention, and the debtor's payments under this option extend beyond the 45-day period. However, the same is true with regard to the reaffirmation option. *Amici* believe when the selected option requires that there be some form of continuing performance beyond the 45-day period, such as the requirement to make ongoing payments under a reaffirmation agreement, the performance required by the statute is simply that the terms and conditions of the option be finalized or approved by the court within the stated period.

## **II. THE OPTION OF RETENTION WITH CONTINUING PAYMENTS IS CONSISTENT THE BANKRUPTCY CODE'S PURPOSES AND POLICIES.**

Before addressing the relative interests of the parties in this matter, it is important to note exactly what rights and obligations exist under the option of retention with continuing payments. The option envisions that the debtor will remain current and continue to make payments in the same amount and according to the same schedule as contained in the original note. Thus, the total of payments will remain unchanged and the payments made by the debtor will include interest to the creditor at the original agreed-upon contract rate. Also, as provided under the terms of the security agreement, the debtor will continue to be required to maintain the collateral and provide

adequate insurance.

In the event that the debtor defaults post-discharge, the creditor's lien will not have been affected by the discharge and the creditor may proceed with any *in rem* remedies against the collateral available to it under state law, including the right to repossession. See In re Peacock, 87 B.R. at 659-660; In re Hunter, 121 B.R. at 616. But for the right to pursue a debtor for a potential deficiency, the creditor continues to receive all of the benefits of the original bargain. Boodrow, 126 F.3d at 52 (“We thus disagree that a creditor invariably, or even probably, will lose the benefit of its bargain under the original loan agreement when a bankruptcy court permits reinstatement.”).

**A. Secured Creditors' Claims Of Prejudice Are Based Upon Speculation And Innuendo.**

The court below found that creditors will be prejudiced by a debtor's exercise of the retain with continuing payments option based on the belief that debtors will have no incentive post-petition to maintain the collateral or keep it insured. Such speculation has led some courts and secured creditors to claim that the option provides debtors with a "head start" rather than a fresh start. See In re Taylor, *supra*, 3 F.3d at 1516.

The bankruptcy court in Boodrow succinctly addressed this concern and found it to be of little merit, noting that it "reflects a perspective which is uninformed with regard to the realities of a typical Chapter 7 case." In re Boodrow, 192 B.R. 57, 59 (Bankr.N.D.N.Y. 1995). The bankruptcy court correctly pointed out that the premise would be valid only if it were true that a debtor could easily obtain financing to purchase another car after filing bankruptcy. Since a debtor's ability to secure financing is negatively impacted by the bankruptcy filing, which would be further compounded if a debtor exercising the "fourth" option failed to maintain or insure the collateral, the bankruptcy court in Boodrow found that "debtors are generally likely to have a *greater* incentive than nondebtors to stay current on payments and to maintain the collateral." *Id.(emphasis in original); see also In re Belanger*, 118 B.R. at 372. As an additional incentive, the debtor may have equity in the secured property which the debtor would like to preserve.

This common sense approach reflects the practicalities facing consumer debtors in bankruptcy. It also refuses to unnecessarily react to the unfounded fears of secured creditors. *Amici* note that while this issue has been raised by creditors in numerous cases, no lenders, including the appellee herein, have offered any concrete evidence to support this

speculation. Moreover, the current practice of permitting the retention with continuing payments option has been in place in this Circuit without controversy since the enactment in 1984 of the statutory language in § 521.

**B. Secured Creditors Are In Many Instances Treated More Favorably Under The Retention With Continuing Payments Option.**

The appellee contends that it will be severely prejudiced unless the debtors choose one of three options; reaffirmation, redemption or surrender of the property. Other than perhaps reaffirmation, most creditors actually receive more favorable treatment under the retention with continuing payments option. *See In re Boodrow*, 192 B.R. 57, 59 (Bankr.N.D.Y. 1995).

If a debtor surrenders the collateral in an automobile loan transaction, the secured creditor will be left with collateral which it will be forced to dispose of under state law remedies (Revised Article 9 of the Uniform Commercial Code). Given industry practices, the automobile will be sold at auction for far less than its retail value, likely realizing an amount less than the outstanding balance on the loan. When the secured creditor's administrative costs in handling the returned vehicle and its lost interest payments from the debtor are also factored in, the loss to the secured creditor may be substantial.

If the debtor were to redeem the collateral, the secured creditor would be entitled only to a redemption amount based on the amount of the creditor's allowed secured claim under § 506 of the Code. 11 U.S.C. § 722. This amount will be limited to the liquidation value of the collateral. *See In re Weathington*, 254 B.R. 895 (6th Cir. 2000)(liquidation rather than replacement value used for redemption); *In re Henderson*, 235 B.R. 425 (Bankr.C.D.Ill. 1999)(vehicle valued at foreclosure sale value). Once again, this is likely to be less than the outstanding balance on the note. *See In re Harper*, 143 B.R. 682, 685 (Bankr.W.D.Tex. 1992). The creditor would also be deprived of any finance charges or other profit it was entitled to under the original bargain.<sup>9</sup>

If the debtor were to file a chapter 13 case, the secured creditor's allowed claim for purposes of distribution under the plan will again be reduced to the value of the vehicle under § 506 of the Code.<sup>10</sup> In addition, the secured creditor would receive the "present value" of its claim under §

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<sup>9</sup> The appellee argues that the retention with continuing payments option is unfair because it allows the debtor to effectuate a redemption in installments. This is simply not the case since the debtor exercising this option is paying the full outstanding balance under the note, including interest.

<sup>10</sup> The appellee erroneously contends that the debtors are seeking to achieve the same "cramdown" result they could obtain in Chapter 13 by electing the retention with continuing payments option. Once again, there can be no dispute that the debtors will pay the appellee's full claim under this option, not the allowed secured claim it would be limited to under § 506.

1325(a)(5)(B)(ii), General Motors Acceptance Corp. v. Jones, 999 F.2d 63 (3d Cir. 1993). The application of a market rate formula can sometimes result in a lower interest rate than the contract rate

Indeed, the lack of harm to creditors is evidenced by the fact that section 521(2) has been in the Bankruptcy Code since 1984, almost twenty years, and the practice in most , if not all, parts of this Circuit has been to use the retention with continued payments option. In all that time, no creditor has seen the need to challenge this practice. Even this challenge was not brought by one of the major automobile lenders, who seemed quite content with current practice.

Upon close inspection of these options other than reaffirmation, then, it appears that in most instances a secured creditor would obtain more favorable treatment under the option of retention with continuing payments. This may suggest that in most cases secured creditors are truly only interested in reaffirmation. Thus, a construction of § 521(2) that restricts debtors' options should not be adopted simply to further creditors' interest in securing reaffirmation agreements.

**C. The Policy Concerns Favoring The Debtor's Position Are Equal To, If Not Greater, Than Those Favoring The Secured Creditor And They Find Stronger Support In The Purposes Of The Bankruptcy Code.**

As recognized by the Second Circuit in Boodrow, the option of retention with continuing payments is consistent with the fresh start purpose of the Bankruptcy Code. Boodrow, 126 F.3d at 51-52. Given that many debtors in need of retaining significant consumer purchases such as automobiles may not be able to avail themselves of other options, this option reflects a necessary balancing of the rights of secured creditors and debtors in order to carry out the intent of the Code.

For most debtors, the right of redemption under § 722 in connection with property of considerable value such as an automobile is not a practical alternative. In fact, it is highly unlikely that a debtor who has just filed a Chapter 7 bankruptcy would have a substantial sum of money at his or her disposal in order to make a lump sum payment to redeem. Boodrow, 126 F.3d at 51; In re Ogando, 203 B.R. 14, 15 (Bankr.D.Mass. 1996) (payment of full amount of secured claim is "hardly feasible for the typical chapter 7 debtor").

If the debtor wishes to retain the property and cannot redeem, the opinion of the court below would restrict the debtor to reaffirmation.

Compliance with

§ 524(C), however, could pose impediments for some debtors. For instance, a debtor's attorney may be unwilling to certify that the reaffirmation will not

impose a hardship on the debtor even where the debtor has been current with payments on the loan, and the debtor may be reluctant to seek the approval of the court in this situation. See 11 U.S.C. §§ 524(c)(3) and 524(c)(5).

This is of particular concern to CBAP because its volunteer attorneys cannot in good conscience sign the reaffirmation certification given the low and often precarious incomes of their client debtors. The ruling below would not only add additional complications to their pro bono cases, but also would put those attorneys in the awkward position of being in conflict with their clients who would be desperate to reaffirm in order to retain property that is vitally important to them.

More importantly, § 524(c) requires that the creditor consent to the reaffirmation agreement. Given the unevenness of this bargaining situation, a creditor may simply "compel the debtor either to meet the creditor's terms of reaffirmation or to surrender the property." In re Belanger, 962 F.2d at 348; In re Boodrow, 126 F.3d at 51 (this "unequal bargaining power ... gives a creditor an effective veto on the 'fresh start'").

For the Sixth Circuit in Bell and the First Circuit in Burr, the solution to this problem is simple. If the debtor cannot redeem and a creditor is unwilling to reaffirm, then the debtor should file for relief under chapter 13.

Burr, 160 F.3d at 848; In re Bell, 700 F.2d 1053, 1057 (6th Cir. 1983).<sup>11</sup>

This fails to recognize that for many debtors, their income and expenses, including payments for secured loans, preclude them from presenting a plan that would meet the requirements for chapter 13 confirmation. Moreover, the decision to file a chapter 13 involves a weighing of various factors that the debtor should not be compelled to consider solely in the context of his or her need to retain certain property.

*Amici* are also concerned that affirmance of the decision below will place creditors in this Circuit in an even more powerful bargaining position than they currently have in negotiating reaffirmation agreements.<sup>12</sup> This may result in certain debtors entering into reaffirmation agreements for inappropriate reasons or for reasons contrary to the purpose of the Code.<sup>13</sup>

This was observed by the court in Peacock:

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<sup>11</sup> The Seventh Circuit in Matter of Edwards offered another solution to the dilemma facing a debtor who is unable to redeem and cannot obtain the consent of a creditor to reaffirm. The court suggests that "there is always the possibility of refinancing with a different lender." Matter of Edwards, *supra*, 901 F.2d 1386 at f.n. 9. This, of course, ignores the practical reality that a debtor in a pending Chapter 7 case is not likely to obtain financing.

<sup>12</sup> It is not uncommon, particularly in jurisdictions where the retention with continuing payments option is not available, that secured creditors will demand payment of excessive attorneys fees, or payment of other indebtedness, as a condition for consenting to a reaffirmation. *See, e.g.*, In re Hutchins, 99 B.R. 56 (Bankr.D.Colo. 1989); Matter of Brady, 171 B.R. 635 (Bankr.N.D.Ind. 1994).

<sup>13</sup> In a widely-cited opinion, Judge Kenner of the Massachusetts Bankruptcy Court discusses the reaffirmation agreement abuses of one national retailer. In re Lantanowich,

Forcing reaffirmation and creating renewed personal liability for a pre-petition debt, puts a creditor in a superior, improved bargaining position. First, the debtor would be forced to negotiate with the creditor to reaffirm the debt on the creditor's terms since the creditor could reject any reaffirmation agreement it found unacceptable. The debtor would then be at the mercy of the creditor in order to keep an asset which may be necessary for the debtor's living. Second, the reaffirmation would result in personal liability to the debtor should there be a future default which would cloud the debtor's fresh start.

In re Peacock, *supra*, 87 B.R. at 657.

Congress made clear in section 524 (c) and (d) that reaffirmation is meant to be a voluntary choice of the debtor and built important safeguards into the Code to protect debtors from coercion. See Collier on Bankruptcy ¶ 524.04. The ruling below would contravene this important policy, giving creditors a powerful tool with which to coerce reaffirmations.

**D. Approval of the Retention with Continuing Payments Option Will Not Deter Debtors From Entering Into Reaffirmation Agreements.**

The court below concluded that debtors will have no reason to enter into reaffirmation agreements if permitted to exercise the retention with continuing payments option. For many debtors, though, a reaffirmation agreement on an automobile installment contract may be seen as a positive means to re-establish credit standing after the filing of a Chapter 7. Other debtors who are not current on loan payments at the time of the bankruptcy

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207 B.R. 326 (Bankr.D.Ma. 1997). *See also*, In re Bruzzese, 214 B.R. 444 (Bankr.E.D.N.Y. 1997); Karen Gross, "Perceptions and Misperceptions of Reaffirmation Agreements," 4 Commercial Law Journal, Vol. 102 (1997).

filing may seek to negotiate a reaffirmation agreement that provides for the right to cure the arrearage and avoid default. In other cases, debtors may wish to reaffirm the original contract since it may have contained certain consumer protection provisions, perhaps as required by state law, such as a right to notice of default, a right to cure a default prior to repossession, and a right to redeem following repossession. *See* Boodrow, 126 F.3d at 52.

In addition, the debtor may elect to repay the entire debt through reaffirmation out of a sense of moral obligation or to protect a cosigner on the debt. The debtor may also wish to maintain an ongoing relationship with the creditor or membership status with a credit union. See *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81 (2d Cir. 1988).

There will also be many debtors who will pursue reaffirmation simply because the option of retention with continuing payments is not available to them. *Amici* contend that the availability of the option should be subject to the discretion of the bankruptcy court upon review based upon the relevant facts before the court. Factors such as a debtor's "previous payment record, a comparison of the value of the collateral and the amount of the debt, and other relevant facts" may be considered. Boodrow, 126 B.R. F.3d at 52, *quoting* lower court's decision in In re Boodrow, 197 B.R. 409, 412 (N.D.N.Y. 1996) and *citing* In re Lowry, 882 F.2d at 1547. Given this

judicial supervision and the limited availability of the retention with continuing payments, this option will not undermine the exercise of the reaffirmation provisions of the Code.

There are many reasons why debtors will select reaffirmation even if the retention with continuing payments option is available. Importantly, though, both of these options are intended to be exercised voluntarily by the debtor.

## **CONCLUSION**

For all the foregoing reasons, *amicus* respectfully request that this Court reverse the decision below and approve of the option of retention with continuing payments.

Respectfully submitted,

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### CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of the United States  
Court of Appeals for the Third Circuit.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this amicus brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 6,650 words printed in a proportionally spaced typeface.
2. This brief is printed in a proportionally spaced typeface, using Times New Roman 14-point font in text and Times New Roman 14-point font in footnotes; it was produced by Microsoft Word 2002.

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## CERTIFICATION OF SERVICE

I hereby certify that I served two copies of the foregoing Brief for Amici Curiae by first class mail, on September 8, 2003, addressed as follows:

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