

DOCKET NO.: 01-1426

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

IN THE MATTER OF ANITRA BANKS MASSEY,

Debtor,

ANITRA BANKS MASSEY,

Plaintiff-Appellant,

ROBERT E. HYMAN, U.S. Trustee; GREGG R. NIVALA, U.S. Trustee;
HENRICO FEDERAL CREDIT UNION,

Parties in Interest.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS
IN SUPPORT OF THE PLAINTIFF-APPELLANT**

John Rao
Elizabeth Renuart *
National Consumer Law Center, Inc.
18 Tremont St., Suite 400
Boston, MA 02108
(617)-523-8010
* Counsel of Record

ATTORNEYS FOR *AMICUS CURIAE*,
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF NACBA AS AMICUS CURIAE	1
ARGUMENT.....	2
I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE MAKES CLEAR THAT A CHAPTER 13 PLAN MAY PROVIDE FOR THE SEPARATE CLASSIFICATION AND FAVORED TREATMENT OF A CODEBTOR CLAIM WITHOUT CONSIDERATION OF THE UNFAIR DISCRIMINATION TEST	2
A. This Court's Inquiry Need Go No Further Than An Examination Of The Plain Language Of The Code	2
B. If It Were Congress' Intent To Simply Clarify That Codebtor Claims May Be Separately Classified, It Would Have Placed Such A Clarification In The Code Using Other Language.....	7
II. THE BANKRUPTCY CODE'S PURPOSES AND POLICIES ARE EFFECTUATED BY APPLYING THE PLAIN MEANING OF 11 U.S.C. § 1322(b)(1)	9
A. The Legislative History of 11 U.S.C. § 1322(b)(1) Makes Clear That the Amendment Was Intended To Encourage The Use Of Chapter 13	9
B. Favored Treatment Of Codebtor Claims Is Consistent With A Related Section Of The Code And The Overall Statutory Scheme Of Chapter 13	16
CONCLUSION	20

TABLE OF AUTHORITIES

FEDERAL CASES

<u>In re Applegarth</u> , 221 B.R. 914 (Bankr. M.D. Fla. 1998)	8
<u>Barnes v. Whelan</u> , 689 F.2d 193 (D.C. Cir. 1982).....	8
<u>Cabell Huntington Hospital, Inc. v. Shalala</u> , 101 F.3d 984 (4th Cir. 1996)	6
<u>Capital Committee Federal Credit Union v. Boodrow (In Re Boodrow)</u> , 126 F.3d 43 (2d. Cir. 1997)	1
<u>In re Chacon</u> , 202 F.3d 725 (5th Cir. 1999).....	5, 6
<u>In re Cook</u> , 26 B.R. 187 (D.N.M. 1982)	8
<u>In re Crago</u> , 4 B.R. 483 (Bankr.S.D.Ohio 1980).....	8
<u>In re Dondero</u> , 58 B.R. 847 (Bankr.D.Or. 1986)	10
<u>In re Dornon</u> , 103 B.R. 61 (Bankr.N.D.N.Y. 1989).....	5, 10
<u>Garcia v. United States</u> , 469 U.S. 70.....	10
<u>In re Hill</u> , 255 B.R. 579 (Bankr.N.D. Cal. 2000).....	5
<u>In re Iacovoni</u> , 2 B.R. 256 (Bankr.D.Utah 1980).....	8
<u>In re Easley</u> , 72 B.R. 948 (Bankr.M.D.Tenn. 1987)	6
<u>Kawaauhau v. Geiger</u> , 118 S. Ct. 974 (1998)	1
<u>McCarty v. Bronson</u> , 500 U.S. 136, 111 S. Ct. 1737, 114 L. Ed. 2d 194 (1991).....	18
<u>In re McKown</u> , 227 B.R. 487 (Bankr.N.D. Ohio 1998).....	13

<u>Pennsylvania Department of Public Welfare v. Davenport</u> , 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990)	3
<u>Public Finance Corp. v. Freeman</u> , 712 F.2d 219 (5th Cir. 1983)	8
<u>Ramirez v. Bracher (In re Ramirez)</u> , 204 F.3d 595 (5th Cir. 2000)	4, 6, 7, 13
<u>In re Thompson</u> , 191 B.R. 967 (Bankr.S.D. Ga. 1996).....	13
<u>Toibb v. Radloff</u> , 501 U.S. 157, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991)	3, 10
<u>United Savings Association of Texas v. Timbers of Inwood Forest Associate, Ltd.</u> , 484 U.S. 365, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988).....	18
<u>United States v. Barial</u> , 31 F.3d 216 (4th Cir. 1994)	6
<u>United States v. Nordic Village</u> , 503 U.S. 30, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992)	5
<u>United States v. Ron Pair Enterprises, Inc.</u> , 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989).....	3
<u>United States v. Barial</u> , 31 F.3d 216 (4th Cir. 1994)	7
<u>Zuber v. Allen</u> , 396 U.S. 168	10

FEDERAL STATUTES

11 U.S.C. § 1301.....	11
11 U.S.C. § 1322(b)(1)	<i>passim</i>
11 U.S.C. § 523(a)(15).....	14

LEGISLATIVE HISTORY

H.R. Rep. 595, 95th Cong., 1st Sess. 121-123 (1977)	17
S. Rep. No. 65, 98th Cong., 1st Sess., pp 17-18 (1983).....	10, 15
130 Cong.Rec. H 1807 (daily ed. Mar. 21, 1984).....	15

MISCELLANEOUS

8 <u>Collier on Bankruptcy</u> , ¶ 1322.05[1] at 1322-14 (15th ed. rev'd 2000).....	12
American Heritage Dictionary (1994).....	4

**CORPORATE DISCLOSURE STATEMENT
AND STATEMENT OF INTEREST OF NACBA
AS AMICUS CURIAE**

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1,400 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. Fourth Circuit NACBA members file many thousands of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); Capital Comm. Fed. Credit Union v. Boodrow (In Re Boodrow), 126 F.3d 43 (2d. Cir. 1997).

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage earners. Many of those wage earners seek to obtain relief from their financial problems under Chapter 13 of the Bankruptcy Code. Often times, and for the very

reasons that Congress cited in amending §1322(b)(1) of the Code, these debtors have debts that have been cosigned by friends and family members and they justifiably seek to provide for favored treatment of such claims in their Chapter 13 plans. NACBA members are very concerned that affirmance of the decisions below, which effectively read the amendment to § 1322(b)(1) out of the Code, will greatly discourage debtors from seeking needed relief under Chapter 13. This case is also of great interest to NACBA members because only one other circuit court has addressed the treatment of codebtor claims in Chapter 13 since the 1984 amendment to § 1322 (b)(1), and its opinion contains conflicting statements concerning the application of the amendment.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE MAKES CLEAR THAT A CHAPTER 13 PLAN MAY PROVIDE FOR THE SEPARATE CLASSIFICATION AND FAVORED TREATMENT OF A CODEBTOR CLAIM WITHOUT CONSIDERATION OF THE UNFAIR DISCRIMINATION TEST.

A. This Court's Inquiry Need Go No Further Than An Examination Of The Plain Language Of The Code.

The issue in this case is whether, pursuant to 11 U.S.C. § 1322(b)(1), a Chapter 13 debtor's plan providing for favored treatment an unsecured

consumer claim that has been cosigned by another may be confirmed by the bankruptcy court without application of the unfair discrimination test.

As in all cases of statutory construction, the starting point in this case must be the statutory language. Toibb v. Radloff, 501 U.S. 157, 111 S.Ct. 2197, 115 L.Ed. 2d 145 (1991); Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 110 S.Ct. 2126, 2130, 109 L.Ed. 2d 588 (1990); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989). "The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters." Ron Pair, 109 S.Ct. at 1031 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

In this case, the language of the Code is clear. Section 1322(b)(1) provides that a Chapter 13 plan may designate separate classes of unsecured claims, provided that the treatment of such classes does not result in unfair discrimination. In 1984, this statute was amended. The amendment singled out a particular class of debts, those involving codebtors, and explicitly gave debtors the authority to provide for favored treatment of such claims without the need to prove that any resulting discrimination would be fair. Thus, the

statute as amended expressly provides that codebtor claims are exempt from the unfair discrimination test.

Critical to the interpretation of § 1322(b)(1) is the meaning of the word “however.” In the 1984 amendment, Congress chose to preface the added clause with this adverb:

[the plan may] designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; *however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;*

11 U.S.C. § 1322(b)(1) (*emphasis added*).

Given its plain meaning, the word “however” is defined as “in spite of that; nevertheless” and “on the other hand; by contrast.” *American Heritage Dictionary* (1994). Thus, the language following the word “however” must be construed **in contrast** to the preceding clause. This leads to the inescapable conclusion that when Congress stated in the “however” clause that codebtor claims are to be treated “differently”, it could only mean in contrast to other separately classified claims that are subject to the unfair discrimination test as set forth in the preceding clause. See Ramirez v. Bracher (In re Ramirez), 204 F.3d 595, 599 (5th Cir. 2000) (Benavides, J., *specially concurring*) (“To give the word ‘however’ operative effect, we

must interpret it as indicating that the second clause is somehow in contrast to the first clause”).

In other words, the general condition imposed on separately classified claims, that there may not be unfair discrimination, simply does not apply to codebtor claims. In re Hill, 255 B.R. 579, 580 (Bankr.N.D. Cal. 2000) (“The use of the word ‘however’ creates an unambiguous exception to the general requirement of fairness.”); In re Dornon, 103 B.R. 61, 64 (Bankr.N.D.N.Y. 1989) (plain language of amendment “automatically sanctions different and favored treatment” for cosigned claims and “constitutes a ‘carve out’ to the ‘unfair discrimination’ standard”).

This construction of the “however” clause is consistent with the guiding principle of statutory construction, that "a statute must, if possible, be construed in such fashion that every word has some operative effect." United States v. Nordic Village, 503 U.S. 30, 36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992).

The sole circuit court that has interpreted this amendment has criticized lower courts that have effectively read the “however” clause out of the statute. The Fifth Circuit in In re Chacon, 202 F.3d 725 (5th Cir. 1999) noted that these courts erroneously construe the word “differently” in the

“however” clause as having the same meaning as “not discriminate unfairly”:¹

The argument for applying the unfair discrimination test even to a cosigned consumer debt is that the word ‘differently’ must be given a meaning different from ‘unfair discrimination’, and reading the ‘however’ clause as an exception would not do so. *See, e.g.*, [In re Easley, 72 B.R. 948, 956 (Bankr.M.D.Tenn. 1987)]. This rationale is wholly unconvincing. In its desire not to give any two distinct words or phrases the same meaning, it reads out the ‘however’ clause. If a cosigned debt could be prioritized only if it does not discriminate, then the ‘however’ clause serves no purpose whatsoever.

In re Chacon, 202 F.3d at 726.

That Congress intended the word “differently” to have a meaning separate from “not discriminate unfairly” is supported by another rule of statutory construction. As this Court has stated, “[w]here Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect.” Cabell Huntington Hospital,

¹ Though the Chicon court expressed the view that the normal unfair discrimination test that would apply to all other unsecured claims was not applicable to cosigned debt, the opinion does contain conflicting statements about whether some other test should apply, namely that the debtor must show that the treatment of cosigned debt will “rationally further a legitimate interest of the debtor” and not “disproportionately benefit the cosigner.” Chacon, 202 F.3d at 726. This less stringent test was curiously viewed by another panel of the Fifth Circuit as an application of the normal unfair discrimination test. In re Ramirez, 204 F.3d 595, 596 (5th Cir. 2000) (*per curiam*).

Inc. v. Shalala, 101 F.3d 984, 988 (4th Cir. 1996), *quoting* United States v. Barial, 31 F.3d 216, 218 (4th Cir. 1994); *see also* Ramirez, 204 F.3d at 599 (Benavides, J., *specially concurring, citation omitted*) (construing the word “differently” to have the same meaning as “unfair discrimination” violates the “well settled rule of statutory construction that where different language is used in the same connection in different parts of a statute it is presumed that the Legislature intended a different meaning and effect.”). If Congress intended codebtor claims to be subject to the “unfair discrimination” test, it would have used these same words in the amendment.

The plain meaning of the 1984 amendment is that codebtor claims are expressly excepted from the unfair discrimination test. Where the statute's language is plain, as in this case, "the sole function of the courts is to enforce it according to its terms." Ron Pair, *supra*, 109 S.Ct. at 1030 (*quoting* Caminetti v. United States, 242 U.S. 470, 485 (1917)).

B. If It Were Congress' Intent To Simply Clarify That Codebtor Claims May Be Separately Classified, It Would Have Placed Such A Clarification In The Code Using Other Language.

Courts that have failed to give effect to the 1984 amendment misconstrue its purpose. These courts suggest that the amendment was intended simply to clarify that a debtor may separately classify a codebtor

claim. *See, e.g., In re Applegarth*, 221 B.R. 914, 915 (Bankr. M.D. Fla. 1998) (Congress intended to overrule the “majority of cases” that refused to permit separate classification of codebtor claims).²

The more logical basis for the amendment, consistent with the statutory language itself, is that Congress intended to overrule both the cases that denied separate classification and favored treatment of codebtor claims. If Congress intended only to clarify that codebtor claims may be separately classified, the task of amending the statute could have been easily accomplished with the mere addition of a clarifying phrase *before* the unfair discrimination language, such as:

² In fact, this interpretation of the legislative intent may not place the pre-amendment caselaw in proper perspective. The two circuit courts that had ruled on codebtor claims reached different conclusions on whether codebtor claims could receive favored treatment, but both unequivocally found that § 1332(b)(1) permitted a debtor to separately classify codebtor claims. *See Barnes v. Whelan*, 689 F.2d 193, 201 (D.C. Cir. 1982)(section 1322(b)(1) does not prohibit the debtor from “grouping his unsecured obligations according to whether or not a codebtor is present” provided the plan does not unfairly discriminate); *Public Fin. Corp. v. Freeman*, 712 F.2d 219 (5th Cir. 1983) (favored treatment of codebtor claims permitted). In addition, several of the district and bankruptcy court opinions rejecting favored treatment based on the unfair discrimination test nevertheless held that separate classification of codebtor claims was permissible, *e.g., In re Cook*, 26 B.R. 187 (D.N.M. 1982) (rejecting the restrictive view of § 1322(b)(1) taken in *In re Iacovoni*, 2 B.R. 256 (Bankr.D.Utah 1980)), while others were ambiguous in their reasoning, *e.g., In re Crago*, 4 B.R. 483 (Bankr.S.D.Ohio 1980).

“... designate a class or classes of unsecured claims, as provided in section 1122 of this title, *including claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor*, but may not discriminate unfairly against any class so designated.”

In fact, there would be no reason to create a separate class of debts if this does not mean that debtors may treat such debts differently. The whole point of separately classifying cosigned claims is to pay such claims in full in order to hold the codebtor harmless.

In sum, the plain language does not support the conclusion that the purpose of the amendment was merely to allow cosigned debt to be separately classified, as the added phrase would not have been placed after the unfair discrimination language and would not be prefaced with the word "however."

II. THE BANKRUPTCY CODE’S PURPOSES AND POLICIES ARE EFFECTUATED BY APPLYING THE PLAIN MEANING OF 11 U.S.C. § 1322(b)(1).

A. The Legislative History of 11 U.S.C. § 1322(b)(1) Makes Clear That the Amendment Was Intended To Encourage The Use Of Chapter 13.

Though reliance on the legislative history of the amendment is unnecessary in this case because the statutory language is unambiguous,

Toibb v. Radloff, 501 U.S. 157, 162 (1991), the debtor's position is further supported by a Senate Report related to the amendment. This Report highlights the practical implications of the treatment of cosigned debt:

Although there may be no theoretical differences between codebtor claims and others, there are important practical differences. Often, the codebtor will be a relative or friend, and the debtor feels compelled to pay the claim. If the debtor is going to pay the debt anyway, it is important that this fact be considered in determining the feasibility of the plan. Sometimes, the codebtor will have posted collateral, and the debtor will feel obligated to make the payment to avoid repossession of the collateral. In still other cases, the codebtor cannot make the payment, and the effect of nonpayment will be to trigger a chapter 7 or chapter 13 petition by the codebtor, which may have a ripple effect on other parties as well. For these reasons, separate classification is often practically necessary.

S. Rep. No. 65, 98th Cong., 1st Sess., pp. 17-18 (1983).³

³ This Senate report was issued in connection with a version of the law introduced in an earlier session of Congress. Since the provision relating to codebtor claims adopted in the final enacted statute was substantially similar to the earlier version, its usefulness in eliciting the purpose and meaning of the amendment "cannot be underscored enough." In re Dornon, 103 B.R. 61, 64, n.1 (Bankr.N.D.N.Y. 1989); In re Dondero, 58 B.R. 847 (Bankr.D.Or. 1986). It is also of particular note that the pertinent legislative history came in the form of a Senate Report, an expression of intent not unlike a Committee Report. In Garcia v. United States, 469 U.S. 70, 76; 83 L. Ed 2d 472, 105 S. Ct 479 (1984), the Court stated:

In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'

The Senate Report provides compelling justification for the favored treatment of codebtor claims. By focusing on debtors' legitimate concerns over debt cosigned by others, it expresses the will of Congress to remove obstacles that discourage the filing of Chapter 13 cases.

The legislative history recognizes that the cosigner in many cases will be a friend or relative of the debtor. Whether out of embarrassment that a codebtor may learn of the debtor's bankruptcy or concern over the perceived breach of a friend or relative's trust, debtors typically feel compelled to pay a cosigned debt irrespective of any possible bankruptcy discharge.

Also noted in the legislative history, the debtor may feel even more obliged to pay cosigned debt where the codebtor has pledged security for the debt. To avoid repossession of the collateral, or the consequences of a threatened repossession, the debtor will likely pay the debt.⁴

Though not expressed in the legislative history, an equally compelling and more contemporaneous concern of debtors today is the potential impact that their failure to pay a cosigned debt will have on the credit standing of a

citing Zuber v. Allen, 396 U.S. 168, 186; 24 L.Ed. 2d 345, 90 S. Ct. 314 (1969).

⁴ As discussed in Section IIB of this Brief, the debtor may protect the codebtor from a creditor's efforts to repossess collateral or otherwise collect a debt to the extent that the debtor's plan proposes to pay the claim. 11 U.S.C. § 1301.

codebtor. With increased reliance by creditors upon credit reports for loan underwriting purposes, NACBA members frequently hear debtors express concern that their bankruptcy might negatively impact on a friend or relative's credit report.

The Senate Report astutely observes the impact of these considerations on the viability of Chapter 13 plans. If a debtor is not permitted to pay a codebtor claim more favorably as part of the Chapter 13 plan, the claim realistically will be paid anyway outside the plan. This will inevitably lead to the failure of the plan as the debtor attempts to maintain the required plan payments as well as side payments directly to the creditor on the cosigned debt. *See* 8 Collier on Bankruptcy, ¶ 1322.05[1] at 1322-14 (15th ed. rev'd 2000) (“If the debtor can be required to devote all disposable income to the plan, the conflicting desire to voluntarily make payments outside the plan on a cosigned debt may spell failure for the plan leaving insufficient income to keep up plan payments.”).

By clearly acknowledging that debtors will pay cosigned debts whether or not they are permitted to do so under their Chapter 13 plan, Congress could not have intended that courts should nevertheless put debtors to the burden of proving that any discrimination would be fair. A far more practical reading of the amendment that embraces the reality that debtors

will pay these debts is that Congress intended favored treatment of cosigned debt to be “per se” fair discrimination. In re Thompson, 191 B.R. 967, 971 (Bankr.S.D. Ga. 1996). As Judge Benavides noted in his concurring opinion in Ramirez:

After acknowledging that many debtors are ‘going to pay the [co-signed] debt anyway,’ it would be a meaningless exercise to continue to impose a burden of demonstrating that the classification did not unfairly discriminate. By expressly accepting this reality, it appears that Congress effectively relieved debtors of the burden of proving that such classifications did not result in unfair discrimination against other unsecured creditors.

Ramirez, 204 F.3d at 600.

Application of the unfair discrimination test to codebtor claims typically leads to results that contravene the purpose behind the 1984 amendment. For example, courts that have eviscerated the 1984 amendment often require the debtor to submit proof as to the codebtor’s economic condition, as did the bankruptcy court below in this case. *See* Memorandum Opinion, Appendix p. 79-81; *see also, e.g., In re McKown*, 227 B.R. 487, 492-493 (Bankr.N.D. Ohio 1998). In addition to the potential privacy concerns implicated by requiring debtors to obtain personal financial information about cosigners, there is simply no support for this position in

the plain wording of the statute or in the legislative history.⁵ If Congress intended bankruptcy courts to engage in such review, it would have clearly said so in the statute as it has with other sections of the Code, such as 11 U.S.C. § 523(a)(15). More importantly, this application of the 1984 amendment is completely at odds with the stated legislative intent behind the amendment because the same reasons debtors feel compelled to pay cosigned claims apply regardless of whether the codebtor may be in a better position to pay the debt.

The Senate Report also discusses another strong policy justification for the favored treatment of codebtor claims. If debtors cannot satisfy cosigned claims in their Chapter 13 cases, collection actions instituted against the codebtors could produce a “ripple effect.” Codebtors who may be in a similar financial situation as the debtor and do not have the ability to pay the cosigned debt may themselves become candidates for a bankruptcy filing.

In balancing the concern over fairness in the treatment of creditors with the desire to promote the use of Chapter 13 by consumer debtors,

⁵ Requiring debtors to submit evidence at a confirmation hearing on this issue, as well as other requirements courts have imposed under the unfair discrimination test, also has a deterrent effect on use of Chapter 13 by increasing the litigation costs for debtors to get through the confirmation process.

Congress made a rational policy choice in providing this exception from the fairness principle for cosigned consumer debts.⁶ To encourage and facilitate Chapter 13 payment plans, Congress has declared that this limited class of debts is by its very nature different and that debtors may favor such claims without any further proof. As the Senate Report states: “A result which emphasizes purity in classifying claims does so at the price of a realistic plan. Neither debtors nor creditors benefit from such a rigid approach....” S. Rep. No. 65, 98th Cong., 1st Sess., pp. 17-18 (1983).

The chilling effect of decisions like those from the courts below limiting the favored treatment of codebtor claims is exactly the problem

⁶ That Congress sought to encourage the increased use of Chapter 13 with the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984) (BAFJA) is evidenced by the following floor comments:

. . . . Economic conditions cannot account for the high number of debtors who have chosen to discharge all their debt in a straight chapter 7 bankruptcy when they could have completed repayment of such debts under chapter 13.

* * * *

The changes incorporated in H.R. 5174 are badly needed and will go a long way toward curbing the increasing number of unnecessary chapter 7 straight bankruptcy filings and toward guaranteeing the continued availability of unsecured credit to the average American consumer.

130 Cong.Rec. H 1807 (daily ed. Mar. 21, 1984)
(statement of Representative Roukema).

Congress sought to address with the 1984 amendment. If debtors are unable to readily obtain plan confirmation in this situation, such as Ms. Massey in this case who proposed to pay in full a car loan that her mother helped her to acquire while at the same time paying other unsecured claims at the rate of 17%, they may find their only recourse to be the filing a Chapter 7 liquidation case and reaffirmation of the cosigned debt. This is a result that works to the detriment of other unsecured claimants who typically receive nothing in a Chapter 7. The holdings below if not reversed will surely prevent the application of § 1322(b)(1) in the manner that Congress obviously intended it to be applied.

B. Favored Treatment Of Codebtor Claims Is Consistent With A Related Section Of The Code And The Overall Statutory Scheme Of Chapter 13.

The treatment of codebtor claims under Chapter 13 is not limited to § 1322(b)(1). Section 1301 provides a stay of action against codebtors and prohibits creditors from attempting to collect any part of a consumer debt of the debtor from any codebtor. Similar to the reasons articulated in the Senate Report for amending § 1322(b)(1), Congress felt compelled to add this provision to the Code because in many instances under the old Chapter XIII, codebtors were pursued by creditors soon after a debtor filed

bankruptcy, leading ultimately to failure of the Chapter XII plan. *See* H.R. Rep. 595, 95th Cong., 1st Sess. 121-123 (1977).⁷

Consistent with the policy objectives of § 1322(b)(1) is an exception to the codebtor stay for cosigned claims that the debtor does not intend to pay during the Chapter 13. Section 1301(c)(2) permits a creditor to request relief from the stay of action against a codebtor to the extent "the plan filed by the debtor proposes not to pay such claim." Thus, if a plan proposes to pay 20% of a cosigned claim, relief from the stay may be granted to the creditor as to the remaining 80% of the claim.

⁷ The legislative history includes the following support for the codebtor stay:

Most often, cosigners are relatives, friends, or co-workers of the debtor, who have signed as a favor to the debtor, without the full understanding of their ultimate liability on the debt. The moral pressure brought to bear on the debtor to protect his family and friends gives the creditor a significant advantage over other creditors in a way that is not related to legitimate financial considerations.

If the debtor falls on hard financial times, and seeks bankruptcy relief, the creditor is able to move against the codebtor. The debtor, not wishing to see his friends or relatives subjected to having to pay the debt, will make an agreement with the creditor to reaffirm the debt and pay it himself. This practice makes Chapter XIII plans difficult to consummate, because the debtor has the obligation to the creditor in addition to his other obligations under the plan.

H.R. Rep. 595, 95th Cong., 1st Sess. 122 (1977).

Since Congress was concerned that a codebtor who is not protected by the debtor's bankruptcy stay may jeopardize the success of the debtor's Chapter 13, it logically follows that Congress would permit a debtor to protect the codebtor by providing for favored treatment of the claim under § 1322(b)(1). By paying the cosigned debt in a separate class in full or at a higher disbursement rate than other unsecured debts, the debtor may ensure that the codebtor stay will remain in effect for the duration of the Chapter 13. In this way, both § 1322(b)(1) and § 1301(c)(1) produce the result intended by Congress.

Reading these sections in harmony provides further justification that Congress intended to permit favored treatment of codebtor claims. Even when applying a plain meaning analysis of a statute, a specific provision cannot be viewed in isolation. McCarty v. Bronson, 500 U.S. 136, 139, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991). This is particularly true in the case of a comprehensive statutory scheme such as the Bankruptcy Code. United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371, 98 L. Ed. 2d 740, 108 S. Ct. 626 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because . . . only one of the permissible meanings produces a substantive effect that is compatible with the rest of the

law”).

The stated policy underpinning for both of these sections is identical: the inability of a debtor to satisfy cosigned claims and protect codebtors ultimately discourages the filing of Chapter 13 cases and spells failure for those filed. By working in tandem to relieve pressure on debtors who are concerned about collection actions aimed at codebtors, these sections further the same goal of encouraging and removing obstacles to the use of Chapter 13 bankruptcy.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court reverse the decisions below.

Respectfully submitted,

John Rao
Elizabeth Renuart *
Attorneys for *Amicus Curiae*
National Consumer Law Center, Inc.
18 Tremont St., Suite 400
Boston, MA 02108
(617)-523-8010

* *Counsel of Record*

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 4,380 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 2000.
-

CERTIFICATE OF SERVICE

I hereby certify that I served 2 copies of this *Amicus Curiae* Brief of the National Association of Consumer Bankruptcy Attorneys by U.S. mail, postage prepaid, on this 12th day of June, 2001 to counsel for all parties and/or parties of interest at the following addresses:

Charles H. Krumbein, Esq.
Jason M. Krumbein, Esq.
Charles H. Krumbein & Associates
1650 Willow Lawn Drive, Suite 300
Richmond, VA 23230

Robert E. Hyman, Esp. U.S. Trustee
P.O. Box 1780
Richmond, VA 23218

Gregg Nivala, Esq., U.S. Trustee
11 S. 12th Street
Richmond, VA 23219

Henrico Federal Credit Union
Barbara Gendron, CEO
8611 Dixon Powers Drive
Richmond, VA 23228
