

CASE NO. 99-11-985-AA

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: PAMELA L. TANNER, DEBTOR

PAMELA L. TANNER

PLAINTIFF-APPELLANT

v.

FIRSTPLUS FINANCIAL, INC., f/k/a
REMODELERS NATIONAL FUNDING

DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
98-916-Civ-Orl-22C

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

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STATEMENT OF INTEREST OF NACBA

AS AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a nonprofit organization of more than 1,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. Eleventh 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 which 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. Such wage-earners often purchase homes by obtaining purchase money mortgages that are fully secured by the value of their homes. These individuals

may, at a later date, have their homes encumbered by a junior lien as part of a debt consolidation or home repair loan transaction. In many instances, the creditors are aware that there is no equity to support the lien at the time the loan is made, but insist upon the lien solely for the leverage it provides through the threat of foreclosure.

By permitting the strip off of wholly unsecured mortgages in Chapter 13 proceedings, debtors can preserve their homes by directing payments to purchase money mortgages and can more effectively satisfy the terms of their Chapter 13 plans. If these debtors are barred from modifying such claims, they will be forced to fully pay junior unsecured lienholders under the threat of stay relief and foreclosure of their homes even when the creditor's lien is completely without value.

The Court's ruling in this case is critical to individual debtors who wish to retain their homes and successfully complete their Chapter 13 plans. NACBA is particularly interested in participating in this matter because of the importance of the relevant issue and additionally notes that this issue has not yet been decided by a Circuit Court of Appeals.

SUMMARY OF ARGUMENT

Reversal of the courts below is mandated by the Supreme Court's decision in Nobelman v. American Sav. Bank, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993), and the plain language of

the Bankruptcy Code. The Supreme Court found that the Code provisions relevant to this matter, § 506(a) and § 1322(b)(2), are not in conflict.

In determining whether a home secured claim is entitled to protection from modification under § 1322(b)(2), a court must first look to § 506(a) for a valuation of the claim's secured and unsecured components. If the claim is supported by at least some security, the lien holder is the "holder of a secured claim" and its claim may be entitled to protection under § 1322(b)(2). On the other hand, if the lien has no true economic value based on the underlying collateral and is therefore totally unsecured, then the exception does not come into play and the claim may be modified. This reading of the statute gives effect to both subsections.

In reversing the courts below, this Court would be following the overwhelming majority of case law on this issue. Contrary to the argument made by the bankruptcy court below, the process for determining whether a claim is wholly secured is not burdensome as bankruptcy courts are accustomed to conducting valuation hearings and such value determinations are often made by agreement of the parties. The bankruptcy court's concern that too much emphasis would be placed on valuation hearings, such that decisions may turn on a "onedollar differential", is also misguided. This fails to recognize that in setting bankruptcy policy, Congress has imposed many brightline tests throughout

the Bankruptcy Code.

Reversal of the decision below is also compelled by the policies enunciated by Congress in enacting the Bankruptcy Code.

These policies include preserving the debtor's fresh start in the face of a valueless security and equity among creditors.

ARGUMENT

I. THE DEBTOR'S POSITION THAT A WHOLLY UNSECURED LIEN MAY BE STRIPPED OFF IS SUPPORTED BY THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE, THE SUPREME COURT'S DECISION IN THE NOBELMAN CASE, AND THE OVERWHELMING MAJORITY OF RELEVANT CASE LAW.

This case turns on the "interplay between" § 506(a) and § 1322(b)(2) of the Bankruptcy Code as determined by the Supreme Court in Nobelman v. American Sav. Bank, 508 U.S. 324, 124 L.Ed.2d 228, 233 (1993). Nobelman makes clear that § 506(a) is essential to the preliminary determination of whether the anti-modification protection should be invoked at all.¹

The general rule set forth in § 1322(b)(2) is that a debtor's Chapter 13 plan may "modify the rights of a holder of a secured claim." See In re Witt, 113 F.3d 508, 510 (4th Cir. 1997). Based on the plain language of the statute, the narrowly drawn language which follows containing the anti-modification

¹ The Court in Nobelman was asked to decide the scope of § 1322(b)(2) in relation to a lienholder having at least some partial security. The Court did not decide the effect of § 1322(b)(2) on a totally unsecured lienholder. See Johnson v. Asset Management Group, LLC, 226 B.R. 364 (D. Md. 1998); In re Lam, 211 B.R. 36 (9th Cir. BAP 1997).

clause can therefore apply only to a holder of a "secured claim."

Thus, before reaching the question of whether the § 1322(b)(2) exception to modification applies, the creditor must hold a secured claim. It is this initial determination that requires the application of § 506(a).

The Supreme Court in Nobelman clearly recognized the need to turn to § 506(a) first to determine whether the creditor ~~is~~ a secured claim:

Petitioners were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim.

It was permissible for petitioners to seek a valuation in proposing their Chapter 13 plan since § 506(a) states that '[s]uch value shall be determined ... in conjunction with any hearing ... on a plan affecting such creditor's interest.' But even if we accept petitioners' valuation, the bank is still the 'holder' of a 'secured claim,' because petitioners' home retains \$23,500 of value as collateral.

Nobelman, 113 S.Ct. at 2210.

Nobelman correctly assumes that after conducting a § 506(a) valuation, a partially secured claim will be divided into its secured and unsecured claim components. Nobelman, 113 S.Ct. at 2210 ("The portion of the bank's claim that exceeds \$23,500 is an 'unsecured claim componen[t]' under § 506(a),..." *quoting* United States v. Ron Par Enterprises, Inc., 489 U.S. 235, 239, n. 3, 103 L.Ed. 2d 290, 109 S.Ct. 1026 (199)). The ultimate holding in Nobelman is simply that the anti-modification clause, to the

extent it is otherwise applicable, relates to both the secured and unsecured components of a partially secured lienholder's claim, thereby preventing bifurcation in a Chapter 13 plan.

The lower courts in this case wrongly extrapolate from the Nobelman holding that even a claim having no secured component is entitled to protection. Collier on Bankruptcy, § 1322.06[1][a] at 1322-21 (15th Ed. 1997) (the Nobelman opinion "strongly suggests ... that if a lien is completely undersecured, there would be a different result"). As a matter of common sense, a lien that attaches to nothing provides no security to the lienholder.

The minority view completely dismisses the role of § 506(a). The bankruptcy court below instead found that the "rights" of a home mortgage creditor contained in the mortgage instruments must be unequivocally enforced; the mere existence of a lien controls rather than "the value of the residence subject to the lien." In re Tanner, 223 B.R. 379, 382 (Bankr.M.D.Fla. 1998), citing In re Bauler, 215 B.R. 628 (Bankr.D.N.M. 1997). This position, however, cannot be reconciled with the Nobelman directive that courts are "correct in looking to § 506(a) for judicial valuation" of the collateral. Nobelman, 113 S.Ct. at 2210. If the "rights" of a home mortgage holder are protected in all circumstances, as the courts below would have it, then what purpose would such a valuation serve? For this statement in Nobelman to have any meaning at all, it must follow that a

§ 506(a) valuation to determine that a claim is at least partially secured is a necessary prerequisite before turning to § 1322(b)(2). In re Sanders, *supra*, 202 B.R. at 989 ("... the § 506(a) analysis approved of by Nobelman would be superfluous if any lien claim ... were protected..."); In re Williams, 161 B.R. 27, 29-30 (Bankr.E.D.Ky. 1993).

To the extent "rights" are to be protected under § 1322(d)(2), they must attach to a lien having at least some minimum economic value. A home mortgage holder cannot be a "holder of a secured claim" for § 1322(b)(2) purposes simply because its mortgage documents say it is.

By ignoring § 506(a), the lower court decisions refuse to read § 506(a) and § 1322(b)(2) *in pari materia*. This ignores the fundamental tenet of Nobelman that the two statutes should be read together such that a § 506(a) valuation becomes an essential element of the anti-modification analysis. In re Hornes, 160 B.R. 709, 713 (Bankr.D.Conn. 1993) ("the Nobelman Court interpreted the two provisions in such a way as to give effect to each"); Johnson v. Asset Management, 226 B.R. at 368. ² Affirmance of the decisions below would prevent application of § 506(a) in a situation where Congress obviously intended it to be applied.

² The Nobelman Court's attempt to reconcile the two provisions is warranted given that Congress expressly declared that § 506(a) is to apply in Chapter 13 proceedings. *See*, 11 U.S.C. § 103(a).

In sum, the failure of the courts below to properly consider the role of § 506(a) deprives that section of any meaning in this case. *Amicus* respectfully requests that this Court construe these two subsections in the manner set forth in Nobelman and the overwhelming majority of cases.³

II. THE BANKRUPTCY COURT BELOW'S CONCERN ABOUT THE ROLE OF VALUATION HEARINGS IN STRIP OFF PROCEEDINGS IS MISGUIDED.

The argument most commonly made against strip off in this

³ The following cases represent the majority position. Appellate court decisions: Johnson v. Asset Management Group, LLC, 226 B.R. 364 (D.Md. 1998); In re Yi, 219 B.R. 394 (E.D.Va. 1998) (Chapter 7 case); In re Lam, 211 B.R. 36 (9th Cir. BAP 1997); In re Purdue, 187 B.R. 188 (S.D. Ohio 1995); Wright v. Commercial Credit Corp., 178 B.R. 703 (E.D.Va. 1995). Bankruptcy court decisions: In re Cerminaro, 220 B.R. 518 (Bankr.N.D.N.Y. 1998); In re Bivvins, 216 B.R. 622 (Bankr.E.D.Tenn. 1997); In re Scheuer, 213 B.R. 415 (Bankr.N.D.N.Y. 1997); In re Cervelli, 213 B.R. 900 (Bankr.D.N.J. 1997); In re Geyer, 203 B.R. 726 (Bankr.S.D.Cal. 1996); In re Sanders, 202 B.R. 986 (Bankr.D.Neb. 1996); In re Vaillancourt, 197 B.R. 464 (Bankr.M.D.Pa. 1996); In re Howard, 184 B.R. 644 (Bankr.E.D.N.Y. 1995); In re Mitchell, 177 B.R. 900 (Bankr. E.D. Mo. 1994); In re Castellanos, 178 B.R. 393 (Bankr.M.D. Pa. 1994); In re Thomas, 177 B.R. 750 (Bankr. S.D. Ga. 1995); In re Lee, 177 B.R. 715 (Bankr.N.D. Ala. 1995); In re Woodhouse, 172 B.R. 1 (Bankr. D.R.I. 1994); In re Sette, 164 B.R. 453 (Bankr. E.D. N.Y. 1994); In re Moncrief, 163 B.R. 492 (Bankr. E.D. Ky. 1993); In re Lee, 161 B.R. 271 (Bankr. W.D. Okl. 1993); In re Kidd, 161 B.R. 769 (Bankr. E.D. N.C. 1993); In re Williams, 161 B.R. 27 (Bankr. E.D. Ky. 1993); In re Hornes, 160 B.R. 709 (D.Conn. 1993); Matter of Plouffe, 157 B.R. 198 (Bankr.D.Conn. 1993).

The following cases represent the minority position. American General Finance, Inc. v. Dickerson, 229 B.R. 539 (M.D.Ga. 1999); In re Tanner, 223 B.R. 379 (Bankr.M.D.Fla. 1998); In re Lewandowski, 219 B.R. 99 (Bankr.W.D.Pa. 1998); In re Bauler, 215 B.R. 628 (Bankr.D.N.M. 1997); (M.D.Ga. 1999); In re Fraize, 208 B.R. 311 (Bankr.D.N.H. 1997); In re Barnes, 207 B.R. 588 (Bankr.N.D.Ill. 1997) In re Barrett, 188 B.R. 285 (Bankr.D.Or.1995); In re Neverla, 194 B.R. 547 (Bankr.W.D.N.Y. 1996); In re Barnes, 199 B.R. 256 (Bankr.W.D.N.Y. 1996); In re Jones, 201 B.R. 371 (Bankr.D.N.J.1996).

situation is that the result is subject to an "all or nothing" determination; that a holder of an undersecured claim with a value of \$1.00 may be fully protected by the anti-modification exception while a claim unsecured by a mere \$1.00 will be subject to modification. See, e.g., In re Jones, supra, 201 B.R. at 374 (modification of a mortgage "could hinge on merely one dollar of value"). The bankruptcy court below felt that this could "yield absurd results." Tanner, 223 B.R. at 383. This view fails to recognize that there are many brightline tests found in the Bankruptcy Code that rely upon monetary valuations that turn on the slimmest of margins. While these cutoff points may appear arbitrary, they must not be taken out of context from the broader policy goals advanced by Congress in balancing the many competing interests in bankruptcy proceedings.

For example, § 547(c)(8) provides that a trustee or debtor in a case involving primarily consumer debts may not avoid a preference totaling less than \$600 to a single creditor. For a preference involving exactly \$599.99, none of this amount may be subject to avoidance. However, since a creditor receiving a preference may not retain the initial amounts under the statutory floor, a preference totaling one penny more (\$600.00) may be fully avoided. See, In re Via, 107 B.R. 91 (Bankr.W.D.Va. 1989); In re Vickery, 63 B.R. 222, 223 (Bankr. E.D.Tenn. 1986) (the statute "clearly makes \$600 a cutoff point").

Similarly, a debtor having less than \$269,250 in unsecured

debt may qualify to file a Chapter 13 bankruptcy based on the test established in § 109(e). The same debtor having one dollar more in unsecured debt is barred from filing a Chapter 13. Under § 523(a)(2)(c), a consumer debt or cash advance over \$1,075 owed to a single creditor that is incurred within 60 days of the bankruptcy filing is presumed to be nondischargeable. If this same debt totaled exactly \$1,075 or was incurred 61 days before the filing, the creditor would lose the presumption.

The most recent example where Congress has set a brightline test can be found in the Religious Freedom and Charitable Donation and Protection Act of 1998. Under this Act, a pre-petition charitable donation of less than or equal to 15% of the debtor's gross income is not avoidable by the trustee under § 548(a)(2). But such a transfer which is \$1.00 over than the 15% of gross income test is fully avoidable. See, In re Zohdi, 234 B.R. 371 (Bankr.M.D.La.1999).⁴

There is no reason to conclude that permitting stripping under the statutory scheme set out in § 506(a) and § 1322(b) is at odds with the Congressional intent of these statutes simply because, by "looking to § 506(a) for a judicial valuation" as

⁴ The court in Zohdi points to other examples where Congress has set specific time deadlines that can have a drastic impact on parties in bankruptcy proceedings. Zohdi, 234 B.R. at 383. The preference section found at § 547 of the Code provides an extraordinarily powerful tool to trustees to avoid transfers occurring within 90 days of the petition. Nonetheless, a transfer made 91 days pre-petition is not recoverable. The same would apply to a fraudulent transfer under § 548 made one year and one day prior to the bankruptcy filing.

Nobleman directs, there might exist a "onedollar differential " Tanner, 223 B.R. at 383. It is more consistent with the purposes of Chapter 13 that a creditor having a lien with no economic value, even if only by onedollar, should not treated as the "holder" of a "secured claim." See Section III, *infra*; also Johnson v. Asset Management Group, LLC 226 B.R. 364, 369 (D.Md. 1998) ("The fact that courts may be concerned with drawing sharp lines with harsh effects does not excuse the need for doing so").

The bankruptcy court below and several courts adopting the minority position have also expressed concern that strip off proceedings such as this will depend too heavily upon valuations.

Tanner, 223 B.R. at 383; see also, In re Fraize, 208 B.R. at 813. As the court in In re Hornes correctly noted, market valuations of real property are a "constant feature in today's commercial world," and that creditors should not be surprised by this particularly in the bankruptcy context. In re Hornes, *supra*, 160 B.R. at 716 ("The code frequently protects, modifies, or abrogates important rights based on property valuations...").

As required for any other judicial decision, the evidence must be evaluated, when necessary, so that the best possible decision may be reached. ⁵

For undersecured creditors other than those protected by the

⁵ Setting a bright line which requires a decision at either extreme creates an environment for close cases in which the parties have every incentive to consider compromise.

§ 1322(b) exception, bifurcation of their claims through § 506(a) valuation proceedings is a common occurrence. Proceedings involving relief from the automatic stay, objection to debtor's exemptions, determination of redemption rights, and entitlement to interest on secured claims are but a few other examples where valuation determinations are frequently made by bankruptcy courts. In fact, bankruptcy courts are accustomed, perhaps more so than any other forum, to conducting judicial valuations.

This argument also ignores the practical reality of bankruptcy practice that most valuations are made consensually without a contested hearing. In almost every recorded decision on the strip off issue, including the instant case, an agreement was reached between the parties as to the value of the property and there was not even a remote possibility that a one dollar difference in property value would be of any consequence. Quite simply, this concern is "unfounded." See, In re Cervelli, *supra*, 213 B.R. at 909, citing In re Lam, *supra*, 211 B.R. at 41. ⁶

III. PERMITTING MODIFICATION OF A CLAIM THAT IS SECURED IN NAME

⁶ Some courts have expressed concern that a debtor may intentionally not pay the first mortgage pre-petition so as to increase the lien and improve the possibility of strip off of junior liens. This concern finds no support in the factual record in this case or in most, if not all, of the recorded decisions on this issue. Even if this type of manipulation might occur in the rare case, the bankruptcy court may disallow strip off on the basis of the good faith provision of Chapter 13. 11 U.S.C. § 1325(a)(3).

ONLY, AND THAT IS NOT SUPPORTED BY ANY TRUE ECONOMIC VALUE, IS CONSISTENT WITH THE PUBLIC POLICY GOALS OF THE BANKRUPTCY CODE.

A. The Bankruptcy Code's Policy Is To Treat Similarly Situated Creditors Equally.

For claims that are not entitled to protection under § 1322(c)(2), bifurcation into their secured and unsecured components is an integral part of the Code's balance between the rights of secured and unsecured creditors. United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd. 484 U.S. 365, 108 S.Ct. 626 (1988). Bifurcation ensures that wholly unsecured creditors receive the same treatment for their claims as partially secured creditors receive for the unsecured portion of their claims. In Timbers, relying both on the language and structure of the Code as well as preCode practice, the Court declined to adopt a result that would permit undersecured creditors to receive interest on their allowed secured claims before unsecured creditors received any payment. "To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors." Timbers, 484 U.S. at 373, 108 S.Ct. at 631, citing Vanston Bondholders Protective Committee v. Green 329 U.S. 156, 164, 67 S.Ct. 237, 240 (1946).

In this case, a lienholder seeks to enforce its prepetition mortgage documents without modification so as to obtain principal and interest on a claim that is in reality totally unsecured, and

to be paid prior to any payment to other unsecured creditors. If the creditor is successful in these efforts, this would violate the principle of equity among similarly situated creditors. Every additional dollar paid to an unsecured lienholder delays or prevents a payment to the general unsecured creditors.⁷

Affirmance of the decisions below would encourage certain lenders to obtain liens that are worthless in an economic sense simply to subvert the Chapter 13 scheme in the event the borrower files bankruptcy. These lenders would be guaranteed a stream of payments in Chapter 13 that they would not otherwise be entitled to but for the documents creating the illusory lien. The fair and orderly administration of claims in Chapter 13 should not depend upon "the existence of a piece of paper purporting to give a creditor rights...." In re Hornes, 160 B.R. at 715. Such gaming of the bankruptcy system should not be condoned.

The strip off of wholly unsecured claims through application of § 506(a) recognizes the real world economic rights of creditors in relation to the debtor's property at the time of a bankruptcy case. Creditors are given the special treatment accorded by the Code to holders of secured claims only to the extent they have security that has some economic value. Beyond

⁷ Chapter 13 debtors must commit all of their disposable income to payments under their plan. 11 U.S.C. § 1325(b). Unless debtors can afford to pay 100% of their unsecured creditors, larger payments to secured creditors will always reduce payments to unsecured creditors on a dollar for dollar basis.

that, the bankruptcy policy of equity among creditors dictates that they be treated identically with other wholly unsecured creditors.

B. Section 1322(b)(2) Was Not Intended To Protect The High Loan-To-Value Home Mortgage Lending Industry.

FirstPlus argued in the courts below that the anti-modification provision in § 1322(b)(2) is intended to protect all home mortgage lenders, so as to promote "the flow of capital into the home lending market," citing to the concurring opinion of Justice Stevens in Nobelman. See Nobelman, 508 U.S. at 327. The majority of courts that have considered this brief reference to policy considerations in Nobelman have questioned whether Congress intended to protect the entire home mortgage lending industry.

These courts have noted a distinction between the first and second mortgage markets. As the Ninth Circuit BAP observed in Lam, "because second mortgagees are not in the business of lending money for home purchases, the same policy reasons for protection of first mortgagees under section 1322(b)(2) do not exist for second mortgagees." In re Lam, *supra*, 211 B.R. at 41; see also In re Cervelli, *supra*, 213 B.R. at 909; In re Plouffe, *supra*, 157 B.R. at 200.

These remarks are especially relevant in light of the recent

expansion of the high loan-to-value (LTV) mortgage market.⁸ In issuing a warning to lenders about the risks involved with such loans in comparison to traditional mortgage loans, the Office of Thrift Supervision described the practice as follows:

An increasing number of lenders are aggressively marketing home equity and debt consolidation loans, where the loans, combined with any senior mortgages, are near or exceed the value of the security property.... Until recently, the high LTV home mortgage market was dominated by mortgage brokers and other less regulated lenders. Consumer groups and some members of Congress have expressed concern over the growth of these loans, and the mass marketing tactics used by some lenders.

Thrift Bulletin TB 72, Office of Thrift Supervision, Department of the Treasury, August 27, 1998, at 1.

Lenders who make such high LTV loans, or no equity loans (often referred to as "125% LTV loans"), take their illusory security in the debtor's home not for its economic value or the ability to foreclose, but for the threat of foreclosure. This was clearly recognized by the Office of Thrift Supervision:

When the combined LTV exceeds 90 percent, however, the proceeds from the sale of the security property will likely not be sufficient to fully liquidate the home equity loan and any outstanding senior liens. The

⁸ This can be seen in the recent growth of 125% LTV loans. In 1995, home equity lenders had made \$1 billion in such loans. By 1997, the amount of these loans had increased to \$8 billion. High-Loan-To-Value Lending, General Accounting Office, GAO/GGD-98-169, August, 13, 1998; "Paines's High LTV Specialist is Out", National Mortgage News, October 27, 1997, 1997 WL 12863567.

portion of such loans that exceeds 100% of value is effectively unsecured, so lenders are likely to suffer a complete loss if they make a mistake in assessing a borrower's credit and the borrower subsequently defaults.... High LTV lenders state that they recognize that these loans are more or less unsecured, and it is not likely they will benefit from foreclosure.

Thrift Bulletin TB 72, *supra*, at 2.

Lenders who make such loans have limited remedies upon default not unlike credit card lenders or other unsecured creditors. Bankruptcy policy should not be used to protect lenders who would not otherwise be protected outside of bankruptcy and who knowingly make high or 125% LTV loans aware of their many risks. Any other result will create a perverse incentive for lenders to make negative equity loans knowing that they will gain an unfair advantage in bankruptcy. In re Lam, *supra*, 211 B.R. at 41.⁹

⁹ Even Judge Lundin's treatise, which has sided with the minority courts on this issue, has noted that "[i]ronically, Nobleman takes a permissive power of a Chapter 13 debtor in § 1322(b)(2) and turns it into a substantial incentive for lenders to take security interests in a borrower's residence even where there is no value in the residence for the lender.... Lundin, Chapter 13 Bankruptcy § 4.46, p. 4-59 (2d.ed.1994).

CONCLUSION

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

Respectfully submitted,

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