

CASE NO. : 98-9007

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

IN RE: JAMES E. BURR and KATHERINE A. BURR

Debtors.

BANK BOSTON, N.A.

Appellant.

v.

JAMES E. BURR and KATHERINE A. BURR,

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE FIRST CIRCUIT
BAP NO. M.W. 97-010

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

John Rao, Esq.
National Consumer Law Center, Inc.
18 Tremont St., Ste. 400
Boston, MA 02108
(617) 523-8010

ATTORNEY FOR AMICUS CURIAE,
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

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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 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. First 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 can not 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 a brief in a similar case, 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. In many instances, wage-earners 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 face a secured creditor who refuses to reaffirm a secured debt or is unwilling to reaffirm on terms reasonably favorable to the debtor. Accordingly, *amicus* supports affirmance of the BAP's

limited holding concerning the application of § 521(2).

Additionally, *amicus* urges this Court to approve of the practical and limited use of the option of retention of secured property with continuing payments.

Additionally, NACBA membership is gravely concerned about potential creditor misuse in consumer bankruptcy cases of a ruling such as BankBoston 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 overturning 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 appellant's brief is complete and correct.

STATEMENT OF ISSUES PRESENTED

Amicus accepts the statement of the issues presented as contained in the brief of the appellees, James and Katherine

Burr.

STATEMENT OF THE CASE AND FACTS

Amicus accepts the statement of the case and facts as contained in the brief of the appellees, James and Katherine Burr.

SUMMARY OF ARGUMENT

In determining the requirements imposed on a debtor by § 521(2), the BAP applied an appropriate construction of this section of the Bankruptcy Code. The decision below gives effect to the plain language of § 521(2), which provides that a debtor must file a statement of intention concerning secured property and specify one of the options listed in the statute, "if applicable." By the use of the phrase "if applicable" in subparagraph (A) of the statute, and the express directive found in subparagraph (C) that the statute shall in no way alter debtors' property rights, 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, the decision below correctly concluded that § 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 made.

Affirmance of the decision below is also compelled by the legislative history relating to the enactment of § 521(2) as part of the 1984 amendments to the Bankruptcy Code. The legislative history of § 521(2) evinces a strong Congressional intent that the substantive rights available to debtors with regard to secured property were not to be abrogated by the amendments. The sole purpose of the amendment was to foster better communications between debtors and secured creditors by requiring notice of the debtor's intentions. As such, the legislative history makes clear that § 521(2) is principally a procedural notice statute which does not confer or take away any substantive rights available to debtors or creditors.

Finally, though the BAP left unanswered the specific question of whether a non-defaulting debtor may elect to retain secured property by continuing to make post-petition payments, *amicus* respectfully urges that this Court not leave the issue for another day and expressly authorize the option in this case. *Amicus* contends 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 abrogates the principle that bankruptcy should afford a fresh start for debtors.

ARGUMENT

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

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

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)).

Given its ordinary meaning, § 521(2)(A) requires that a debtor file with the clerk a statement of intention with regard

to the retention or surrender of secured property. Additionally, if applicable, the debtor's statement should specify that such property is claimed as exempt, that the debtor intends to redeem the property, or that the debtor intends to reaffirm the debt secured by such 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. 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, ¶ 521.09A[2] at 521-50 (15th ed. 1996) (emphasis in original). As Collier notes, in some cases none of the listed options may be applicable. Id. at 521-49.

This explicit statutory language 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:

But if these options are not applicable, the notice need not specify one of them. The options in the statute are not exclusive.

Belanger, 962 F.2d at 347.

The Ninth Circuit likewise found the statutory language to

be unambiguous, recently concluding that "the only mandatory act is the filing of the statement of intention" McClellan Federal Credit Union v. Parker (In re Parker), 139 F.3d 668, 673 (9th Cir. 1998).

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)). The BAP below was correct in concluding that § 521(2) requires debtors to state whether they intend to retain or surrender secured property - "*and nothing more.*" In re Burr, 218 B.R. 267, 273 (1st Cir. BAP 1998)(emphasis added).

B. If It Were Congress' Intent To Make The Options Listed In Section 521(2) Exclusive It Would Not Have Included The Words "If Applicable".

As a guiding principle of statutory construction, "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).

In construing § 521(2), the words "if applicable" must not be ignored. Given the placement of the phrase "if applicable" in § 521(2)(A), the words could only have been intended to preface the subsequent language in the sentence so as to make clear that the debtor need not specify one of the listed options that follow if it is not applicable. Given the common usage of the phrase "if applicable" and its location in the pertinent sentence, the

words can only be construed in a non-limiting fashion so as to make clear that the listed options which follow the phrase (exemption, redemption, or reaffirmation) are not exclusive.

In Belanger, the court placed great emphasis on the words "if applicable" in the statute:

The phrase 'if applicable' is redundant if, contrary to Collier and the district court, the options given to the debtor are considered to be exclusive. If this were so, § 521(2)(A) would have simply provided: 'and specifying that such property is claimed as exempt, that the debtor intends to redeem such, or that the debtor intends to reaffirm debts secured by such property.' The 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.

Belanger, supra, 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").

Another court reviewing this language concluded that if Congress intended that debtors may choose 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 on the options must be selected *if applicable*." In re Crouch, 104 B.R. 770, 772 (Bankr.S.D.W.Va. 1989) (emphasis in original). See also 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).

Courts which have disagreed with Belanger about the interpretation of § 521(2)(A) have either largely ignored or underestimated the significance of the phrase "if applicable," or have misconstrued its meaning. Of the circuit courts which have held that a non-defaulting debtor may not retain collateral with continuing payments, the so-called "fourth option," only the Eleventh Circuit in In re Taylor, 3 F.3d 1512 (11th Cir. 1993) squarely addressed the "if applicable" language.¹

In Taylor, the court's analysis actually seems to confirm Belanger's view that any other interpretation of the statute makes the words "if applicable" redundant or meaningless. The Taylor court states that if one refers to the language preceding the words "if applicable," it becomes clear that the options of redemption and reaffirmation do not apply to a debtor's surrender of the property and that they therefore must apply to a debtor's retention of the property. In re Taylor, supra, 3 F.3d at 1516.

While this may be a possible result, it certainly is an awkward construction of the statutory language and does not necessarily lead to the conclusion that the options listed in the statute are exclusive.

¹ The Fifth Circuit in Matter of Johnson, 89 F.3d 249 (5th Cir. 1996) simply adopted the reasoning of the Eleventh Circuit in Taylor in holding that debtors are limited to the three options listed in § 521(2). The Seventh Circuit in Matter of Edwards, 901 F.2d 1383 (7th Cir. 1990) did not consider the "if applicable" language and only briefly discussed the statutory construction of § 521(2). The Sixth Circuit in In re Bell, 700 F.2d 1053 (6th Cir. 1983) was decided prior to the enactment of § 521(2) in 1984.

Nonetheless, the Taylor court concludes from this analysis, as does BankBoston herein, that a debtor who intends to retain secured property has only two options, redemption or reaffirmation. This construction completely ignores, however, that § 521(2) also provides that a debtor may specify another intention in the statement, that the property "is claimed as exempt." This is an option which would apply to a debtor's retention of secured property.² And it would be applicable, as in this case, where a non-defaulting debtor seeks to retain property with continuing payments.

As further evidence that the Taylor construction is flawed and that the options listed in the statutory language were not intended to be exclusive, there exists at least one other option available to a debtor seeking to retain property, in addition to the so-called "fourth 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. Although BankBoston argues that this lien avoidance option is covered in § 521(2) under the phrase "such property is claimed as exempt," it is not likely that Congress would have chosen such general language to describe this option when it simply could have

² Curiously, BankBoston repeatedly refers to 521(2) as providing only two specific retention options, providing only a brief reference to the "exemption" option and then dismissing it as simply not applicable to this case. BankBoston's Brief, p. 7, f.n 6.

provided more limiting and precise language (consistent with the other two listed options) such as "the debtor intends to avoid the lien securing such property." 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.³

C. 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

³ 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 recently 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."

or her assets and liabilities, income and expenses, and prepare a statement of financial affairs. If any of the 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.

With regard to § 521(2), this view is codified in subparagraph (C), 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 concur with the lower courts in Belanger that § 521(2) is a "procedural provision requiring notice...." Belanger, 962 F.2d at 347. See also, 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."); In re Parker, 142 B.R. 327 (Bankr.W.D.Ark. 1992).

The significance 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.

³ Collier on Bankruptcy, ¶ 521.09A[5] at 521-52 (15th ed. 1996).⁴

In this case, BankBoston's position 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). As the BAP below correctly concluded, redemption or reaffirmation can not possibly be the debtor's exclusive options as compelling the debtor to do either would violate § 521(2)(C): "whatever § 521(2)(B) means, its operation is limited by § 521(2)(C)." Burr, 218 B.R. at 272-273.

See also Parker, 139 F.3d at 673.

II. THE LEGISLATIVE HISTORY OF 11 U.S.C. § 521(2) SUPPORTS AFFIRMANCE.

A. Although The Legislative History On § 521(2) Is Limited, It Makes Clear That The Statute Is Procedural In Scope And Not Intended To Abrogate Any Substantive Rights Available To Debtors.

When the plain meaning of a statute is evident, there is no

⁴ 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 521-53.

need to look beyond the statute itself to determine what it means. Toibb v. Radloff, 501 U.S. 157, 162, 111 S.Ct. 2197, 2200, 115 L.Ed. 145 (1991). In this case, the statute is clear that it does not preclude a bankruptcy court from permitting a non-defaulting debtor to retain secured property upon continuing payments and therefore reference to the legislative history is unnecessary. However, to the extent that there is any ambiguity on this point, the legislative history clearly establishes that § 521(2) is a notice requirement provision which was not intended to alter the rights of debtors.

Section 521(2)(A) was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984. At the time of its enactment, no Senate or House Report was submitted with the Act. See In re Hunter, 121 B.R. 609 (Bankr.N.D.Ala. 1990). However, the following exchange between Congressmen Synar and Rodino has often been cited as encompassing the legislative intent behind § 521(2):

[Mr. SYNAR.] Could the gentleman explain what rights are reserved to the debtor and the trustee under section 521(2)(C)?

Mr. RODINO. Mr. Chairman, will the gentleman yield?

Mr. SYNAR. I yield to the chairman of the committee.

Mr. RODINO. Mr. Chairman, this section is designed to make clear that the newly imposed duty on the debtor to act promptly with regard to property which is security for a creditor's claim does not affect the substantive provisions of the code which may grant the trustee or debtor rights with regard to such property. For example, the debtor may have the right to exempt such property under section 522 of the code, and this right is not affected by the new provisions.

In re Barriger, 61 B.R. 506, 509 (Bankr.W.D.Tenn. 1986), quoting In re Eagle, 51 B.R. 959 (Bankr.N.D.Ohio 1985), citing 130 Cong. Rec. H1810 (daily ed. March 21, 1984). See also In re Belanger, 118 B.R. 368, 372 (Bankr.E.D.N.C. 1990).

In Boodrow, the Second Circuit also considered other expressions of legislative intent as described by the bankruptcy court in Belanger. Specifically, the Second Circuit found persuasive the comments of creditors' groups at several subcommittee hearings in which they expressed concern about the lack of information concerning debtors' intentions and explained that § 521(2) was needed so that debtors will "have the responsibility of giving creditors information ... as to what they intend to do with the collateral." Boodrow, 126 F.3d 51, citing Belanger, 118 B.R. at 370, f.n. 5.⁵ It is this legislative history which led the Second Circuit to conclude that § 521(2) "appears to serve primarily a notice function" Boodrow, 126 F.3d 51.

⁵ BankBoston dismisses these statements of creditor witnesses because they were made in subcommittee hearings held in 1981 with respect to a "completely different bill." BankBoston's Brief, p. 12. Of course, the fallacy with this position is that it wrongly assumes that bills are never reintroduced from one Congressional session to the next, or that the legislative history of earlier versions of the same bill is not relevant. In fact, as noted by one bankruptcy court in a detailed discussion of the legislative history, though various versions of the amendment were introduced over the period between 1981 to 1984, the final § 521(2)(A) is "nearly a carbon copy" of the original 1981 bill. In re Castillo, 209 B.R. 59, 68-71 (Bankr.W.D.Tex. 1997), rev'd Government Employees Credit Union v. Castillo, 213 B.R. 316 (W.D.Tex. 1997).

This legislative history makes clear that the procedural notice requirements of § 521(2) were not intended to abrogate debtors' substantive rights with regard to property secured by consumer debts.

B. In Enacting § 521(2), Congress Expressly Rejected More Onerous Provisions Which Would Have Supported The Appellant's Position In This Case.

Prior to the enactment of § 521(2), a coalition of consumer lenders submitted in 1981 various proposed amendments to the Bankruptcy Code which provided the genesis for § 521(2). These proposals were subsequently debated at hearings held in 1982 and 1983 before the Senate Judiciary Committee. See In re Belanger, 118 B.R. at 371.

Several of the amendments proposed by the lending industry sought to restrict the rights of debtors and impose punitive measures for perceived abuses. One proposal required debtors to state their intention with regard to secured property at or before the conclusion of the section 341 meeting and the failure to carry out the stated intention by a specified period would have resulted in the immediate lifting of the automatic stay. See In re Eagle, 51 B.R. at 961, *citing* S. 1208, 97th Cong., 2d Sess., 129 Cong.Rec. S5342-43 (daily ed. Apr. 27, 1983); 3 Collier on Bankruptcy, ¶ 521.09A[5] at 521-52 (15th ed. 1996), *citing* H.R. 4786, 97th Cong., 1st Sess. § 7 (1981) and 130 Cong. Rec. H1810 (remarks of Rep. Rodino). As the court in Eagle

observed, since such provisions were not adopted by Congress, § 521(2) as enacted is a "subdued version" of earlier proposals. Eagle, 51 B.R. at 961.

Other expressions of legislative intent lead to the same conclusion. In determining that § 521(2) does not prohibit a non-defaulting debtor from retaining secured property by continuing to pay the secured debt, Collier places great emphasis on the fact that a contrary proposal was rejected by Congress. In enacting § 521(2), Congress did not accept "the proposition, embodied in earlier bills, that the debtor was required to choose among only the options of surrendering the property, redeeming it, or reaffirming the debt." Collier, ¶ 521.09A[5] at 521-52-53, *citing* H.R. 4786, 97th Cong., 1st Sess. § 7 (1981)(proposed legislation restricted a debtor's options to "surrendering such property to the creditor or the trustee, redeeming such property by paying the redemption price or reaffirming the debt").

Therefore, the appellant in this matter should not be allowed to use the courts to effect a revision to the Bankruptcy Code which had been previously considered and rejected by Congress. *See, e.g., Bennett v. Kentucky Dept. of Education*, 470 U.S. 656,665 at n. 3, 105 S.Ct. 1544, 84 L.Ed. 2d 590 (1985); New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 544 at n. 44, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979).

III. THE OPTION OF RETENTION WITH CONTINUING PAYMENTS IS

CONSISTENT THE BANKRUPTCY CODE'S PURPOSES AND POLICIES.

Before addressing the relative interests of the debtor and creditor 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 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 contract rate. Also, as provided under the terms of the security agreement, the debtor will continue 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.

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

BankBoston has argued that creditors will be prejudiced by a debtor's exercise of the retention with continuing payments

option primarily because BankBoston believes that debtors will have no incentive post-petition to maintain the collateral or keep it insured. It is this speculation which has led 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, "reflect[ing] a perspective which is uninformed with regard to the realities of a typical Chapter 7 case." Boodrow, 192 B.R. at 59. 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 greater incentive than nondebtors to stay current on payments and to maintain the collateral." *Id.*; see also In re Belanger, 118 B.R. at 372. As an additional incentive, the debtor may also 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 creditors. *Amicus*

notes that while this issue has been raised by creditors in numerous cases, including In re Edwards, no lenders, including BankBoston herein, have pointed to any concrete evidence to support this speculation.

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

BankBoston argues that the debtor must choose one of three options; reaffirmation, redemption or surrender of the property.

If the debtor is unwilling or unable to elect one of these options, then BankBoston contends that the only other method available to the debtor for retaining the property is through the filing of a Chapter 13 case. Other than perhaps reaffirmation, though, most creditors actually receive more favorable treatment under the option providing for retention with continuing payments. 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 resell. Resale at retail would only be achievable at considerable expense with no guarantee that the creditor's costs will be recovered. More likely, given industry practices, the automobile will be sold at auction to a used car dealer for no more than its wholesale 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 the value of the property under § 722 of the Code, which may well 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 not be entitled to any finance charges as contracted for under the original bargain.

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. In addition, the secured creditor would receive the "present value" of its claim under § 1325(a)(5)(B)(ii), which has generally been held to be a "market rate" of interest plus some upward adjustment depending upon the circumstances of the case. In re Valenti, 105 F.3d 55, (2d.Cir.1997) (rate for treasury bills with term comparable to plan plus 1% to 3% risk factor); In re Giguere, 183 B.R. 27 (Bankr.D.R.I. 1995) (market rate of interest plus upward adjustment if warranted); In re Galvao, 183 B.R. 23 (Bankr.D.Mass. 1995). The application of a market rate formula can often result in a lower interest rate than the contract rate. See, e.g., In re Dingley, 189 B.R. 264 (Bankr.N.D.Y. 1995)

(court calculated market rate at 8.84% rather than 15.10% contract rate); In re Wilmsmeyer, 171 B.R. 63 (Bankr.E.D.Mo.1994) (local rule establishing present value interest rate at 9.55% upheld rather than 19.18% contract rate).

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) which 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. 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, then BankBoston would argue that the only other option is 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 feel uncomfortable in seeking the approval of the court in this situation. See 11 U.S.C. §§ 524(C)(3) and 524(C)(5).

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 courts such as the Sixth Circuit in Bell, the solution

to this problem is simple. If the debtor can not redeem and a creditor is unwilling to reaffirm, then the debtor should file for relief under Chapter 13. In re Bell, 700 F.2d 1053, 1057 (6th Cir. 1983).⁶ This fails to consider that for many debtors, their income and expenses, including payments for secured loans, preclude them from presenting a plan which would meet the requirements for confirmation or which would justify administration by a bankruptcy court. Moreover, the decision to file a Chapter 13 involves a weighing of various factors which the debtor should not be compelled to consider solely in the context of his or her need to retain certain property.

Amicus is also concerned that reversal of the BAP's decision in this case will place creditors in an even more powerful bargaining position in negotiating reaffirmation agreements.⁷

⁶ The Seventh Circuit in Matter of Edwards offered another solution to the dilemma facing a debtor who is unable to redeem and can not 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.

⁷ 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). Though BankBoston contends that it offered the debtor a reaffirmation based on terms in the original contract, this Court should be mindful that other creditors may not be so reasonable, as BankBoston concedes in f.n. 4 of its Brief, or that BankBoston may change its reaffirmation policy in light of an opinion overruling the decision below.

This may result in certain debtors entering into reaffirmation agreements for inappropriate reasons or for reasons contrary to the purpose of the Code.⁸ This was observed by the court in

Peacock:

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.

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

BankBoston argues that if the decisions below are affirmed, debtors will have no reason to enter into reaffirmation agreements. 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 filing may seek to negotiate a

⁸ In a widely-cited opinion, Chief Judge Kenner of the Massachusetts Bankruptcy Court discusses the reaffirmation agreement abuses of one national retailer. In re Lantanowich, 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).

reaffirmation agreement which would provide 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 (citing with approval brief filed by *Amicus* NACBA herein).

There will also be many debtors who will pursue reaffirmation simply because the option of retention with continuing payments is not available to them. *Amicus* contends 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.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm and additionally approve of the option of retention with continuing payments.

John Rao, Esq.
National Consumer Law Center, Inc.
18 Tremont St., Ste. 400
Boston, MA 02108
(617) 523-8010