IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

IN RE:	)	
	)	Chapter 13
LARRY ALBERT HURLBURT,	)	Case No.: 16-01964-5-SWH
DEBTOR.	)	
	)	
	)	
LARRY ALBERT HURLBURT,	)	
PLAINTIFF,	)	
	)	Adversary Proceeding
v.	)	No.: 16-00031-5-SWH
	)	
JULIET J. BLACK,	)	
DEFENDANT.	)	

AMICUS CURIAE BRIEF ON BEHALF OF PLAINTIFF LARRY HURLBURT BY NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

The issue this amicus brief by the National Association of Consumer Bankruptcy Attorneys (1NACBA) addresses is whether a debtor may apply U.S.C. §§506(a), 1322(c)(2), and §1325(a)(5) to reduce a claim secured by a debtor's principal residence to the value of the residence and pay the claim at the Till rate over the life of a Chapter 13 plan, when the debtor has no personal liability on the claim. The issue may be moot in this case since the Court held in its December 5, 2016 order that the secured creditor has a claim extending beyond the value of the collateral. The Court held that North Carolina's anti-deficiency judgment statute (N.C. Gen. Stat. §45-21.38) applies only when the seller-financed property has been foreclosed upon.

NACBA respectfully submits that the Court should reconsider that holding. The North Carolina Supreme Court stated in Adams v. Cooper, 340 N.C. 242, 460 S.E.2d 120 (1995) the following:

> Our cases interpreting and applying the anti-deficiency statue have consistently held that the 1933 General Assembly intended to prevent any suit on such a purchase money obligation other than one to foreclose upon the real property securing the obligation.

Id. at 121. In Adams, the Court cites Realty Co. v. Trust Co., 296 N.C. 366, 371 S.E. 2d 271, 274 (1979), for the proposition that the anti-deficiency statute prevents an action for personal judgment on the note and limits the creditor to the property conveyed in the deed of trust. Id. at 121. See also Barnaby v. Boardman, 314 N.C. 565, 330 S.E.2d 600 (1985). There is no doubt that pursuant to N.C. Gen. Stat. §45-21.38 Larry Hurlburt has no personal liability to Juliet J. Black.

NACBA's interest in this issue extends beyond the anti-deficiency statute. The more likely scenario in which this issue will arise is when a debtor has discharged his personal liability on a mortgage debt in a Chapter 7, and subsequently files a Chapter 13. Such "Chapter 20" cases are sanctioned in the Fourth Circuit In re Davis. 716 F.3d 331(4th Cir. 2013).

A thorough analysis of the issue entails the interpretation of not only §§506(a), 1322(b)(2), 1322(c)(2), and 1325(a)(5), but also the Supreme Court's opinion in Nobelman v. American Savings Bank, 113 S.Ct. 2106 (1993) and the Fourth Circuit's opinion in Witt v. United Companies Lending Corp., 113 F.3d 508 (4th Cir. 1997).

The analysis must begin with §506(a)(1) and §1322(b)(2) which provide in pertinent part as follows:

> **§506(a)(1)** An allowed claim of a creditor secured by a lien on property in which the estate has an interest…is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property…

> **§1322(b)** Subject to subsections (a) and (c) of this section, the plan may…(2) modify the rights of the holders of secured claims, other than a claim secured

> only by a security interest in real property that is the debtor's principal residence…

In reconciling the application of these provisions, the issue arose as to the proper treatment of a claim secured by the debtor's principal residence in which the claim is partially secured pursuant to the application of §506(a). Is a debtor permitted to utilize §506(a) to reduce the amount of a principal-residence claim and then pay that reduced claim pursuant to the terms of the original loan, or does §1322(b)(2)'s prohibition on modification prevent the application of §506(a) to reduce the amount of the claim? Some courts held that the debtor could reduce the amount of the secured claim pursuant to §506(a), and *once reduced*, the debtor could pay the resulting claim without further modification through the plan. See In re Bellamy, 962 F.2d 176, 180 (2d Cir. 1992). Other courts disagreed and held that a partially secured claim could not be modified. See In re Chavez, 117 B.R. 733 (Bankr. S.D. Fla. 1990).

The Supreme Court settled this issue in Nobelman v. American Savings, supra. The Court had no issue with the application of §506(a) to reduce the amount of the secured claim, but focused on the fact that despite the bifurcation of the claim into two claims, secured and unsecured, the lender was still the holder of a secured claim, and as the holder of such a claim, §1322(b)(2) prohibited the modification of its rights. Those rights included the right to be paid in conformity with the terms of the loan. The Court concluded that the claim protected from modification by §1322(b)(2) referred "to the lienholder's entire claim, including both the secured and unsecured components of the claim." 113 S.Ct. at 2111.

In the aftermath of Nobelman, the courts have not interpreted its holding to prohibit the application of §506(a) to every claim secured by a debtor's principal residence. The courts have almost unanimously held that debtors may file motions or adversary proceedings to value

collateral pursuant to §506(a) to determine whether a claim secured by a lien on a debtor's principal residence is partially secured or wholly unsecured. If the court determines the claim is wholly unsecured, then the creditor is not the holder of a secured claim and Nobelman's interpretation of §1322(b)(2) does not operate to prevent modification of the claim. The Bankruptcy Court for the Eastern District of North Carolina was the second court to so hold. In re Kidd, 161 B.R. 769 (Bankr. E.D.N.C. 1993). Every Circuit Court that has considered the issue, including the Fourth Circuit, First Mariner v. Johnson, (In re Johnson) 407 Fed. Appx. (4th Cir. 2011), has so held.

Another difficult and controversial issue arose out of the circumstances in which the entire balance of a mortgage loan secured by a debtor's principal residence came due prepetition or during the term of the Chapter 13 plan, either through an acceleration clause or a contractual balloon payment. Some courts held that §1322(b)(2)'s anti-modification provision prevented a debtor from paying the claim over the life of the plan, and required the debtor to pay the claim in full upon the due date. In re Seidel, 752 F.2d 1382 (9th Cir. 1985); Estate of Pasteur v. Burton, 172 B.R. 533 (M.D.N.C. 1993, *aff'd* 35 F.3d 555(4th Cir. 1994). Other courts disagreed. Gruubs v. Houston First American Savings Ass'n, 731 F.2d 236 (5th Cir. 1984).

Congress addressed the issue in the Bankruptcy Reform Act of 1994. It added §1322(c)(2) to the Bankruptcy Code, which provides:

> (c) Nothwithstanding subsection (b)(2) and applicable non-bankruptcy law—
>
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

Section 1322(c)(2) applies to that narrow class of mortgage loans in which the payment comes due prepetition or during the term of the plan. The plain language of §1322(c)(2) excludes this class of claims them from the application of §1322(b)(2) and the holding in Nobelman, which prohibits the modification of the payment of a loan pursuant to §1325(a)(5).[1] The vast majority of the courts have construed §1322(c)(2) to do so. Am. Gen. Fin. Inc. v. Paschen (In re Paschen) 296 F.3d. 1203, 1207 (11th Cir. 2002); First Union Mortg. Corp. v. Eubanks (In re Eubanks), 219 B.R. 468, 471 (6th Cir. BAP 1998); In re Tekavec, 476 B.R. 555 (Bankr. E.D. Wis. 2012); In re Mattson, 210 B.R. 157 (Bankr. D.Minn. 1997).

However, the Fourth Circuit has been given a more restrictive interpretation of the provision. In In re Witt v. United Companies Lending Corp., (In re Witt), 113 F.3d 508 (4th Cir. 1997), the Court held that §1322(c)(2) did not completely overrule Nobelman for this class of claims and does not exclude this class of claims from the application §1322(b)(2). Witt, 113 F.3d at 513-14.

In light of the overwhelming criticism of Witt[2], it is important to analyze the Court's precise holding. Following the lead of the Supreme Court in Nobelman, the Fourth Circuit focused on whether §1322(c)(2) allows the modification of payments or the modification of the claim. The Court held that the debtor can modify the payments, but not the claim. In an analysis similar to the one employed by the Supreme Court in Nobelman in holding that an undersecured lienholder is still a holder of a secured claim and as such is protected from modification of its rights by §1322(b)(2), the

[1] Payment of a claim pursuant to §1325(a)(5) automatically brings §506(a) into play. It provides for the payment of a "secured claim", and §506(a) dictates how the amount of a secured claim is determined.

[2] See Paschen and other cases cited in previous paragraph.

Fourth Circuit held that the undersecured lienholder has a claim comprised of two components, one secured and one unsecured, and that "§1322(c)(2) does not permit the bifurcation of an undersecured loan into secured and unsecured claim, if the only security for the loan is a lien on the debtor's principal residence." Witt, 113 F.3d at 513-14.

The debtor does not seek to bifurcate Ms. Black's claim into secured and unsecured claims. There is no unsecured claim. Her only claim is a secured claim. Debtor seeks only to modify the *payment* of that claim as specifically permitted by §1322(c)(2) and Witt. Since the lender is the holder of only a secured claim and no unsecured claim, applying §506(a) does not bifurcate the claim into secured and unsecured claims. Rather, application of §506(a) only determines the *amount* of the secured claim, which is a necessary component of paying that claim pursuant to §1325(a)(5), in compliance with §1322(c)(2), without running afoul of the holding in Witt. Just as the courts have refused to extend Nobelman's protection of holders of secured claims to apply to the holder of a mortgage whose claim is wholly unsecured, this court should refuse to extend Witt"s prohibition on bifurcation of a claim into secured and unsecured claims to apply to the mortgage holder whose only claim is secured.

In the case of In re Hubbell, 496 B.R. 784 (Bankr. E.D.N.C. 2013), this Court limited the reach of Witt's restrictive interpretation of §1322(c)(2) to allow the reduction of the interest rate as permitted by §1325(a)(5)(B). This case presents another circumstance in which the reach of Witt should be curtailed. The

interpretation orh§1322(c)(2) proposed by NACBA in this brief adheres to the plain language of the statute without violating the underlying holding in Witt.

In anticipation of the argument that permitting the debtors to apply §1322(c)(2) in this fashion will allows some debtors to achieve a result they could not achieve had they not obtained a Chapter 7 discharge, the debtor notes the Fourth Circuit has explicitly held that a debtor can utilize a chapter 20 to strip a wholly unsecured mortgage secured by a debtor's principal residence. In re Davis, 716 F.3d 331 (4th Cir. 2013).

Repectfully submitted, this the 6th day of February, 2017.

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CERTIFICATE OF SERVICE

I, Darlene Hill of The Brewer Law Firm, do hereby certify that I served the attached Amicus Curiae Brief On Behalf Of Plaintiff upon the parties listed below by mailing a copy thereof to said parties at the address indicated below with its proper postage attached and deposited in an official depository under the exclusive care and custody of the United States Post Office in Raleigh, North Carolina or by the ECF System as allowed by law.

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This the 6th day of February, 2017.

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