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**THE “CURE” TO THE HOMEOWNER’S BANKRUPTCY
BLUES: AN ANALYSIS OF A HOMEOWNER’S ABILITY TO
CURE HIS MORTGAGE DEFAULT UNDER § 1322(B)(5) OF
THE BANKRUPTCY CODE**

ABSTRACT

Chapter 13 bankruptcy is often defaulted homeowners’ only avenue to avoid foreclosure and remain in home. Debtors seeking to save their homes usually rely on § 1322(b)(5) which provides that a debtor may “cure” a default. Many mortgage lenders object to debtors’ plans proposing to cure the mortgage default on the grounds that the plan is modification of their rights, forbidden by § 1322(b)(2). The Bankruptcy Code neither defines “cure” nor “modification,” leaving it up to the courts to draw the line between what constitutes a permissible cure and a forbidden modification.

The Circuit courts interpret the curative powers broadly: granting the debtor the ability to provide provisions in his plan that would restore him to his pre-default conditions. However, in a recent decision, the Fourth Circuit split from the other circuits’ interpretation. The Fourth Circuit narrowed the scope of the debtor’s curative powers to allow the debtor to only decelerate the mortgage debt and continue making his monthly mortgage payments. The Fourth Circuit erred in interpreting the curative provisions so narrowly. The court failed to thoroughly apply tools of statutory interpretation and address key points in its analysis.

A correct and thorough interpretation of the statute supports a broad interpretation of the curative powers, unrestricted by the anti-modification provision in § 1322(b)(2). To avoid further error in the courts, Congress should amend the Code to include a provision that defines a cure as a debtor’s ability to nullify the consequences of default and restore the debtor to his pre-default conditions. Subsequently, Congress should amend the anti-modification provision in § 1322(b)(2) to include that a cure of a default under paragraphs (3) and (5) of this subsection is not a modification of the creditor’s rights for purposes of this section.

INTRODUCTION

Homeownership—the quintessential American Dream. Purchasing a home is not only regarded as a sound investment, but homeownership provides an individual with a strong sense of pride, personal attachment, and community. However, for many, the American Dream has become a daunting nightmare in the face of the possibility (or reality) of foreclosure. High unemployment rates, predatory lending practices by the mortgage companies, and other financial hardships have made it increasingly difficult for many homeowners to satisfy their mortgage terms.¹ For instance, between 2007 and 2010, approximately two to three million Americans lost their homes in foreclosure. An additional two million homeowners were in default and facing the possibility of foreclosure.²

Foreclosure is a detriment to all parties involved. Lenders must bear the burden of high transaction costs and legal fees associated with the foreclosure proceedings. The value of neighboring properties declines.³ Worst of all, the foreclosed homeowner must bear the monetary and emotional costs associated with displacement. Filing for chapter 13 bankruptcy is often a last resort for individuals seeking to avoid foreclosure, and possibly homelessness.⁴ Approximately ninety-six percent of debtors that file chapter 13 are homeowners, and seventy-nine percent of chapter 13 plans provide for the payment of mortgage arrearages.⁵

Chapter 13 bankruptcy helps a debtor save his home in three ways.⁶ First, chapter 13 stays foreclosure proceedings and allows a debtor to create a repayment plan to pay his arrearages.⁷ Second, the debtor may be able to

¹ Michelle J. White & Ning Zhu, *Saving Your Home in Chapter 13 Bankruptcy*, 39 J. LEGAL STUD. 33, 34 (2010). The sub-prime mortgage crisis was characterized by a number of bad lending practices including mortgages with balloon payments for low-income individuals; extending loans to individuals with poor credit histories; and approving individuals for loan amounts that they simple could not afford to repay based on their debt-to-income ratios. R. Travis Santos, Comment, *The Legal Way to Defeat Optimus Sub-Prime*, 25 EMORY BANKR. DEV. J. 285 (2008).

² White, *supra* note 1, at 34.

³ See Ken Kahan, Comment, *Home Foreclosures under Chapter 13 of the Bankruptcy Reform Act*, 30 UCLA L. REV. 637 (1983); see also *Chapter 13 Bankruptcy Basics*, U.S. CT., <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> (last visited Feb. 12, 2017).

⁴ Kahan, *supra* note 3, at 638. See also *Chapter 13 Bankruptcy Basics*, *supra*, note 3.

⁵ In comparison, only about nine percent of plans provide for the payment of unsecured debt. White, *supra* note 1, at 34.

⁶ White, *supra* note 1, at 37.

⁷ Debtors must simultaneously make their current monthly payments as they become due during the life of the plan. See 11 U.S.C. § 1322 (2012). This can be an incredibly difficult for the debtor who is experiencing financial hardship such as the loss of a job. White, *supra* note 1, at 37.

challenge excessive fees and penalties imposed by his home mortgage lender.⁸ Third, the debtor may also be able to discharge some of his unsecured debt, allowing him to allocate more income to the payment of his home mortgage lender.⁹

This Comment focuses on the first of the three ways that chapter 13 serves as a vehicle for the debtor to save his home: the plan. Section 1322 of the Bankruptcy Code (the Code) provides guidance on the contents of a chapter 13 plan.¹⁰ Among the permissive provisions listed in § 1322(b), the Code provides that a debtor may cure any default.¹¹ Most chapter 13 debtors rely on these provisions to save their homes. Debtors seeking relief from second mortgages or almost-matured first mortgages may rely on § 1322(b)(3).¹² Most mortgage payments are spread out over twenty to thirty years, and will not have matured during the life of plan. Therefore, debtors seeking to save their homes predominately rely on § 1322(b)(5).¹³ The debtor's ability to cure the default on his mortgage loan is not completely unchecked, however. Though a debtor may propose a plan that cures the mortgage default, § 1322(b)(2) prohibits a debtor from modifying the rights of his home mortgage lender.

Many mortgage lenders have objected to provisions in debtors' plans regarding their mortgage loans. The objection arises from a debtor attempting to cure the default and the creditor claiming that the debtor is, in fact, modifying their rights.¹⁴ The Code, however, neither defines the phrase "cure a default" in § 1322(b)(5), nor provides guidance on what "rights" § 1322(b)(2) prohibits a debtor from modifying.¹⁵ The lack of guidance from the Code has left it up to the courts to draw the line between what constitutes a permissible cure or a forbidden modification.¹⁶

⁸ White, *supra* note 1, at 38.

⁹ *Id.*

¹⁰ Section 1322(a) lists the provisions that all chapter 13 plans must contain. Section 1322(b) lists the permissive provisions that a chapter 13 plan may contain. 11 U.S.C. § 1322(a)–(b) (2012).

¹¹ 11 U.S.C. § 1322(b)(3)–(5) (2012).

¹² 8 COLLIER ON BANKRUPTCY ¶ 1322.07 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

¹³ Paragraph (5) is the focus of this Comment. However, the analysis is applicable to paragraph (3) as well. *Id.* at ¶ 1322.09.

¹⁴ See *In re Taddeo*, 685 F.2d 24, 26 (2d Cir. 1982); *Grubbs v. Houston First American Sav. Ass'n*, 730 F.2d 236, 238 (5th Cir. 2016); *In re Clark*, 738 F.2d 869, 871 (7th Cir. 1984); *Anderson v. Hancock*, 820 F.3d 670, 671 (4th Cir. 2016).

¹⁵ *E.g.*, *In re Clark*, 738 F.2d at 871.

¹⁶ See *In re Taddeo*, 685 F.2d at 26; *Grubbs*, 730 F.2d at 238; *In re Clark*, 738 F.2d at 871; *Anderson*, 820 F.3d at 671.

Most mortgages contain an acceleration clause.¹⁷ This clause provides that in the event of default, the mortgage lender has the right to declare the entire mortgage debt due.¹⁸ Though acceleration of debt is a common consequence of default, it is not the only consequence that a homeowner may face if he defaults on his home mortgage loan. Some mortgage instruments also contain a default interest clause.¹⁹ This clause requires that if the borrower fails to make his monthly mortgage payment per the terms of the mortgage instrument, the borrower must pay an increased interest rate for the remainder of the loan.²⁰

The courts generally agree that though the debtor's promissory note may grant the creditor rights to accelerate the mortgage, decelerating the mortgage debt and allowing a debtor to continue making his monthly payments, is a permissible cure.²¹ In doing so, the circuits have defined the curative power broadly. Such a grant of curative power may allow a debtor to return to his pre-default conditions.²² However, in April 2016, the Fourth Circuit interpreted the phrase, "cure the default" in § 1322(b)(5) more narrowly. The Fourth Circuit definition applies when the debtor's default resulted in a higher interest rate in addition to the acceleration of his mortgage.²³ The court did three things in its decision in *Anderson v. Hancock*. First, the court restricted the definition of "cure" to *only* allow the debtor to decelerate his mortgage debt that had been previously accelerated pursuant to the acceleration clause in the mortgage instrument.²⁴ Next, the court held that when a debtor attempts to undo any other events triggered by default, it is a modification of the creditor's rights forbidden by § 1322(b)(2).²⁵ Ultimately, the court refused to confirm the debtor's plan that allowed the debtor to continue making mortgage payments at pre-default interest rates.

Consider the following illustration that demonstrates the distinction between the board and narrow interpretation of curative powers: Deborah Debtor purchases Blackacre. Her promissory note provides that if she fails to

¹⁷ Alex S. Moe, *Against Accetturo and Beyond Bukowski: Litigating Notices in Illinois Foreclosures*, 48 LOY. U. CHI. L.J. 949, 958

¹⁸ DEBTOR-CREDITOR LAW § 51.08 (Theodore Eisenberg ed., 2017).

¹⁹ *Mortgage and Note In Default: A Primer On Late Fees And Default Interest*, GRAY ROBINSON http://www.gray-robinson.com/Elerts/100224_Mortgage_and_Note_in_Default.pdf (last visited Oct. 6, 2017).

²⁰ See Steven W. Bender, *The Enforceability of Default Interest in Real Estate Mortgages*, 43 REAL PROP. TR. & EST. L.J. 199.

²¹ See *In re Taddeo*, 685 F.2d at 26; *Grubbs*, 730 F.2d at 238; *In re Clark*, 738 F.2d at 871.

²² See *In re Taddeo*, 685 F.2d at 26; *Grubbs*, 730 F.2d at 238; *In re Clark*, 738 F.2d at 871.

²³ *Anderson*, 820 F.3d at 674.

²⁴ *Id.*

²⁵ See *id.*

make her monthly mortgage payment within thirty days from the due date she is in default. The promissory note goes on to state that if she defaults, the mortgage company may accelerate the debt and require her to pay her monthly mortgage payments in two installments per month rather than one.

When applying the broad interpretation of the curative powers, Deborah Debtor would be able to create a repayment plan that provides for the repayment of her arrearages and a return to her pre-default conditions: unaccelerated debt and paying her monthly mortgage payment in one installment per month. However, under the narrow interpretation of a cure proffered by the Fourth Circuit in *Anderson*, Deborah Debtor would be able to create a plan that decelerates the debts and allows her to continue making payments on Blackacre. She would have to continue making those payments in two installments per month, rather than one. The Fourth Circuit's narrow definition of a cure further handicaps the debtor's attempts to remain in the debtor's home and avoid foreclosure. The stakes are too high to leave it to chance that other circuits will adopt and apply this narrow definition to debtors seeking to save their homes.

Congress should amend the Code to include a provision that defines a cure as a debtor's ability to nullify the consequences of default and restore the debtor to his pre-default conditions. Additionally, Congress should amend the anti-modification provision in § 1322(b)(2) to include that a cure of a default under paragraphs (3) and (5) of this subsection is not a modification of the creditor's rights for purposes of this section.

First, this Comment will provide a brief overview of chapter 13 bankruptcy and a history of the treatment of homeowners in chapter 13. It will then explore what "rights" the Supreme Court has held that § 1322(b)(2) exempts from modification. Next, this Comment will discuss how the circuits have interpreted "cure" as used in section § 1322(b)(5) and how the recent Fourth Circuit decision narrowed that interpretation. Finally, this Comment will critique the Fourth Circuit's analysis employed to interpret the statute, and apply various intrinsic and extrinsic methods of statutory interpretation to support the broad interpretation of a "cure" and the amendment to the Code that this Comment proffers.

I. BACKGROUND

A. Overview of Chapter 13 Bankruptcy

Chapter 13 of the Code is titled “Adjustments of Debts of an Individual With Regular Income.”²⁶ In order to qualify for relief under chapter 13, the debtor must either reside, be domiciled, or have property in the United States; the debtor must have regular income; and the debtor must have debts falling below certain statutory thresholds.²⁷ Unlike chapter 7, the other chapter commonly used by individual debtors, chapter 13 allows the debtor to remain in possession of his assets and pay his creditors using his future income, rather than using the proceeds from the liquidation of his assets.²⁸

All debtors are required to file a plan, in which they proposes how to repay creditors over the duration of the bankruptcy.²⁹ The debtor is given a great deal of discretion in developing his plan.³⁰ Section 1322(a) lists only four mandatory provisions that the plan must include, while § 1322(b) lists ten permissive provisions, including among them a catchall provision stating that a plan may “include any other appropriate provision not inconsistent with this title.”³¹ The presiding judge holds a confirmation hearing to determine whether the debtor’s proposed plan is feasible and if it meets the statutory requirements

²⁶ 8 COLLIER, *supra* note 12, at ¶ 1300.01; *see, e.g.*, 11 U.S.C., ch. 13. (title of chapter) (2012).

²⁷ DEBTOR-CREDITOR LAW, *supra* note 18, at § 34.02.

²⁸ DEBTOR-CREDITOR LAW, *supra* note 18, at § 34.01. Chapter 13 is similar to a reorganization for businesses available under chapter 11 of the Code. 8 COLLIER, *supra* note 12, at ¶ 1300.01.

²⁹ 11 U.S.C. § 1321 (2012); DEBTOR-CREDITOR LAW, *supra* note 18, at § 34.10.

³⁰ DEBTOR-CREDITOR LAW, *supra* note 18, at § 34.10.

³¹ 11 U.S.C. § 1322(a)–(b) (2012); DEBTOR-CREDITOR LAW, *supra* note 18, at § 34.10. The provisions required to be in every debtor’s plan are as follows:

(a) The plan—

(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a claim agrees to a different treatment of such claim;

(3) if the plan classifies claims, shall provide the same treatment for each claim within a class; and

(4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor’s projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1322(a) (2012).

or otherwise violates another provision of the Code.³² The debtor's creditors are also given an opportunity to object to provisions in the plan.³³

If the court confirms the plan, the debtor makes the payments in accordance with his plan to the trustee.³⁴ The trustee then distributes the funds to the creditors.³⁵ Sometimes, a change in the debtor's circumstance may impede the debtor's ability to continue making payments as outlined in his plan. In this event, the debtor may be permitted to modify his plan.³⁶

If a debtor fails to satisfy the obligations of his plan, the debtor may either convert his case to chapter 7 or seek a hardship discharge under § 1328(b).³⁷ The hardship discharge is available to a debtor if he fulfills three elements. First, the debtor must show that failure to make the plan payments is due to circumstances beyond his control and there must also be no fault on the part of the debtor. Second, the debtor must show that creditors have received at least what they would have received in a hypothetical chapter 7 bankruptcy. Lastly, the debtor must show modification of the plan is impossible.³⁸ For example, if the debtor gets seriously injured, and is unable to work and generate the income necessary to fund the plan, that may be grounds for a hardship discharge.³⁹ If the debtor fails to satisfy the obligations of his plan and does not pursue one of these options, his case is usually dismissed.⁴⁰

If the debtor successfully satisfies the obligations of his repayment plan, however, the debtor receives a discharge under § 1328(a).⁴¹ This discharge frees the debtor from liability for all debts provided for by the plan or disallowed under § 502.⁴² Certain debts are not dischargeable, which unfortunately include long-term obligations such as a mortgage. For non-dischargeable debts, the debtor must continue making payments on these obligations once the bankruptcy case is closed.⁴³

³² *Chapter 13 Bankruptcy Basics*, *supra*, note 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 11 U.S.C. § 1328(b) (2012); 8 COLLIER, *supra* note 12, at ¶ 1300.01.

³⁸ *Chapter 13 Bankruptcy Basics*, *supra*, note 3.

³⁹ *Id.*

⁴⁰ 8 COLLIER, *supra* note 12, at ¶ 1300.01.

⁴¹ 11 U.S.C. § 1328(a) (2012); 8 COLLIER, *supra* note 12, at ¶ 1300.01.

⁴² *Chapter 13 Bankruptcy Basics*, *supra*, note 3.

⁴³ Other debts that are not dischargeable under § 1328(a) include "debts for alimony or child support, certain taxes, debts for most government funded or guaranteed educational loans or benefit overpayments,

Chapter 13 maximizes relief to the debtor by not requiring him to liquidate his assets and allowing him to create his own repayment plan with a tremendous amount of flexibility.⁴⁴ Additionally, chapter 13 allows debtors to remain in far better credit standing than chapter 7 debtors because they are viewed as less of a risk by the credit industry.⁴⁵ Further, chapter 13 “satisfies many debtors’ desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one’s obligations.”⁴⁶ In addition to benefiting the debtor chapter 13 also promotes creditor’s interests by allowing them to recover from future income of the debtor that would otherwise be unavailable to the creditors.⁴⁷

B. History of Chapter 13 Plans

Chapter XIII of the Bankruptcy Act of 1898 preceded what is known today as chapter 13 bankruptcy. Chapter XIII allowed debtors to make periodic payments to a trustee, under the protection of the bankruptcy court, that then distributed the funds to all the debtor’s creditors until his debts were paid.⁴⁸ Chapter XIII, however, was “seriously defective.”⁴⁹ Congress recognized that chapter XIII plans disregarded their primary purpose of providing the debtor relief and a fresh start while maximizing recoveries for creditors.⁵⁰

Chapter 13 of the Bankruptcy Reform Act of 1978 sought to remedy the shortcomings of its predecessor.⁵¹ Congress recognized that allowing a debtor to create a plan tailored to his unique circumstances yielded the maximum

debts arising from death or personal injury caused by driving while intoxicated or under the influence of drugs, and debts for restitution or a criminal fine included in a sentence on the debtor’s conviction of a crime.” *Id.*

⁴⁴ 8 COLLIER, *supra* note 12, at ¶ 1300.36.

⁴⁵ H.R. Rep. No. 95-595, at 118 (1977).

⁴⁶ *Id.*

⁴⁷ The general property of the estate provision of the Code excludes the wages of the debtor earned after the commencement of the case from coming in to the bankruptcy as property of the estate. 11 U.S.C. § 506(a)(2) (2012). Therefore, creditors generally would not be able to recover from the future earnings of the debtor. However, the chapter 13 property of the estate provision of the Code includes post-petition property and post-petition earnings as property of the estate. 11 U.S.C. § 1306(a) (2012). *See also* 8 COLLIER, *supra* note 12, at ¶ 1300.36.

⁴⁸ S. REP. NO. 95-989, at 12 (1978).

⁴⁹ *Id.* at 13. Some of the defects of Chapter XIII plans under the Bankruptcy Act of 1898 included the exclusion of self-employed individuals; the deauthorization of spousal joint petitions; the requirement that unsecured creditors approve the plan; the duration of the plan was left unrestricted; the role of the trustee was not clearly defined; and discharge relief was arbitrarily withheld for at least three years from a debtor who was unable to complete his payments due to circumstances for which the debtor should not be held accountable. 8 COLLIER, *supra* note 12, at ¶ 1300.36.

⁵⁰ *Id.*

⁵¹ S. REP. NO. 95-989, at 13.

return to creditors while maximizing relief for the debtor.⁵² Congress enacted chapter 13 with the intention of encouraging a chapter 13 plan as the most effective means of improving debtor relief and creditor recoveries in bankruptcy for an individual.⁵³

Under the Bankruptcy Act of 1898, chapter XIII plans did not provide an effective avenue for the debtor to keep his home. For example, a chapter XIII plan could not be confirmed unless the debtor's mortgage lender and all other secured creditors consented to the plan. Also, chapter XIII plans could not include claims secured by interests in chattel or real property. One of the "innovation[s]" of chapter 13 under the new Code "was enabling the debtor to cure defaults on secured claims through the repayment of loan arrearages over time, even if the terms of the loan or non-bankruptcy law did not give the borrower this right."⁵⁴ By contrast, § 1322(b)(3) allows the debtor to include provisions in his repayment plan that will allow him to cure any default. Section 1322(b)(5) extends the curative powers granted in § 1322(b)(3) to claims on which the final payment will become due after the conclusion of the plan period. These provisions allow homeowners to avoid foreclosure and remain in their homes.

C. How the Courts Interpret "Modify the Rights"

The anti-modification provision provides that a chapter 13 plan may not "modify the rights" of a creditor secured by a lien on the debtor's principal residence.⁵⁵ The Code, however, does not define which rights of the creditor may not be modified.⁵⁶

In *Nobelman v. American Savings Bank*, the Supreme Court interpreted the anti-modification provision in § 1322(b)(2).⁵⁷ The Court reasoned that since

⁵² S. REP. NO. 95-989, at 13.

⁵³ 8 COLLIER, *supra* note 12, at ¶ 1300.02. Congress further demonstrated its preference for chapter 13 bankruptcy for individual debtors in subsequent bankruptcy acts. In the Bankruptcy Amendments and Federal Judgeship Act of 1984 Congress added a provision to the Code requiring that a chapter 7 debtor certify in his bankruptcy petition that he had been advised on the availability chapter 13. Congress also added a provision that in all consumer liquidation cases the debtor's attorney must certify that he has advised the debtor of relief available under chapter 13 and the clerk must also give notice to the debtor of the availability of chapter 13 relief. *Id.* at ¶ 1300.36.

⁵⁴ John Eggum et al., *Saving Homes in Bankruptcy: Housing Affordability and Loan Modification*, 2008 UTAH L. REV. 1123, 1155 (2008).

⁵⁵ 11 U.S.C. § 1322(b)(2) (2012).

⁵⁶ 8 COLLIER, *supra* note 12, at ¶ 1322.06.

⁵⁷ The Supreme Court interpreted the anti-modification provision in § 1322(b)(2) as it related to the treatment of an undersecured mortgage claim holder's bifurcated claim under § 506 (a). The Supreme Court

the Code was silent as to the definition of “rights” it should be interpreted according to rights granted to creditors by state law.⁵⁸ Therefore, the creditor’s rights are those contractual rights reflected in the mortgage instruments.⁵⁹ These rights include:

the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the line until the debt is paid off, the right to accelerate the loan upon default and to proceed against [the debtor’s] residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure.⁶⁰

The Court justified its reliance on state law to define what rights of home mortgage creditors may not be modified under § 1322(b)(2) by the fact that property interests are the creation of state law.⁶¹

In the next paragraph, the Court acknowledged that the Code does impose some limits on the rights of home mortgage creditors in other provisions.⁶² The Court mentioned the automatic stay provision that limits the creditor’s power to enforce its rights to foreclosure on the debtor’s property in the event of default.⁶³ The Court also mentioned the curative provision in § 1322(b)(5) as a “check” on the rights of the creditor.⁶⁴

D. How the Circuits Interpret “Cure a Default”—Circuit Split

The Code provides that a chapter 13 debtor may include in his plans provisions that:

- (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of any class of claims;
- (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and

emphasized § 1322(b)(2)’s focus on the *rights* of mortgage creditors, rather than the *claims* of the mortgage creditors. *Nobelman v. American Sav. Bank*, 508 U.S. 324, 326–27 (1993). Also, some parts of *Nobelman* have been superseded by statute because of the passage of § 1322(c)(2).

⁵⁸ *Id.* at 329.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 330.

⁶³ *Id.*

⁶⁴ *Id.*

maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.⁶⁵

The circuits have analyzed whether certain provisions in debtors' plans constituted a forbidden modification or a permissible cure.⁶⁶ In their analysis, each circuit has attempted to fill the hole in the Code by defining what a "cure" is.⁶⁷ The Second, Fifth, and Seventh Circuits have interpreted the debtor's power to cure his default broadly.⁶⁸ The Fourth Circuit split from the other circuits in *Anderson*, defining cure more narrowly.⁶⁹

1. Broad Interpretation of a Cure—Second, Fifth, and Seventh Circuits

The Second, Fifth, and Seventh Circuits have had to resolve the tension between the curative and anti-modification provisions. In distinguishing between what constitutes a permissible cure and a forbidden modification, each of the courts has interpreted the debtor's ability to cure his default broadly.

a. Second Circuit

In *In re Taddeo*, the Second Circuit considered whether a cure under § 1322(b) of the Code allows a debtor to pay arrearages on a mortgage loan secured only by the debtor's principal residence.⁷⁰ The Taddeos defaulted, and per the acceleration clause in their mortgage, the Taddeos' mortgage lender accelerated their mortgage debt and initiated foreclosure proceedings.⁷¹ The Taddeos then filed a chapter 13 petition.⁷² The Taddeos' repayment plan proposed that they cure their default under § 1322(b)(5) by paying off their arrearages in installments of \$100 per month over the life of the plan.⁷³ The debtor's lender objected, contending that this was a prohibited modification of its rights, in violation of § 1322(b)(2) of the Code.⁷⁴

⁶⁵ 11 U.S.C. §§ 1322(b)(2)–(5) (2012).

⁶⁶ See *In re Taddeo*, 685 F.2d at 26; Grubbs, 730 F.2d at 238; *In re Clark*, 738 F.2d at 871; *Anderson*, 820 F.3d at 671.

⁶⁷ See *In re Taddeo*, 685 F.2d at 26; Grubbs, 730 F.2d at 238; *In re Clark*, 738 F.2d at 871; *Anderson*, 820 F.3d at 671.

⁶⁸ See *In re Taddeo*, 685 F.2d at 26; Grubbs, 730 F.2d at 238; *In re Clark*, 738 F.2d at 871.

⁶⁹ See *Anderson*, 820 F.3d at 671.

⁷⁰ *In re Taddeo*, 685 F.2d at 26.

⁷¹ *Id.* at 25.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 26.

The bankruptcy court held that the Taddeos' plan to pay their arrearages and decelerate their mortgage debt was a permissible cure under § 1322(b)(5).⁷⁵ The bankruptcy court reasoned that despite the lender's right to accelerate the mortgage debt under New York State law, the Code's plain language and legislative history clearly indicate that "when [§ 1322(b)(2) and § 1322(b)(5)] are juxtaposed, it is clear that the debtor is permitted to modify the rights of holders of claims secured by the debtor's principal residence to the extent necessary to effect a cure of existing defaults."⁷⁶ The bankruptcy court's holding was affirmed in the district court.⁷⁷ The district court held that the bankruptcy court's interpretation of the curative and anti-modification provisions was in line with "the spirit" of chapter 13 bankruptcy: to rehabilitate the debtor while simultaneously protecting the interests of the debtor's creditors.⁷⁸

On appeal, the Second Circuit held that the debtor's plan may provide for the paying of the arrearages on the mortgage to cure the default.⁷⁹ The court interpreted the statute to conclude that curing a default means "returning the debtor to [its] pre-default conditions."⁸⁰ The court rejected the creditor's argument that its rights as a creditor could not be modified in this way because of § 1322(b)(2).⁸¹ The court stated, "[w]e do not believe that the Legislature labored for five years over this controversial question only to remit consumer debtors—intended to be primary beneficiaries of the Code—to the harsher mercies of state law."⁸²

The court also argued that a cure and a modification are separate and distinct things.⁸³ The court rejected the idea that the power to cure is a subset of a modification, despite § 1322(b)(5)'s preface "notwithstanding paragraph (2) of this subsection . . . ," because the legislative history and purpose did not support such an interpretation.⁸⁴ The court went as far as saying that the "notwithstanding" clause was "unnecessary."⁸⁵ The court cited Congress'

⁷⁵ *In re Taddeo*, 9 B.R. 299, 306 (Bankr. E.D.N.Y. 1981).

⁷⁶ *Id.* at 305.

⁷⁷ *In re Taddeo*, 15 B.R. 273, 276 (E.D.N.Y. 1981).

⁷⁸ *Id.* at 275.

⁷⁹ *In re Taddeo*, 685 F.2d 24, 26 (2d Cir. 1982).

⁸⁰ *Id.*

⁸¹ *Id.* at 25.

⁸² *Id.*

⁸³ The court however, did not interpret the phrase "modify the rights" in § 1322(b)(2), nor did the courts explain how a cure and modification are distinctly different. *Id.* at 27.

⁸⁴ *Id.*

⁸⁵ *Id.*

decision to structure § 1322(b) to designate the curative powers and anti-modification provisions in separate paragraphs to support its conclusion as well as testimony by secured creditors in the legislative history in which secured creditors distinguished a modification from a cure.⁸⁶

b. Fifth Circuit

In *Grubbs v. Houston First American Sav. Association* the court considered whether § 1322(b) of the Code allowed a debtor to include a provision in his plan to pay the mortgage arrearages, when the mortgage had been accelerated prior to the debtor filing his chapter 13 petition.⁸⁷ The debtor took out a second mortgage on his home. Grubbs' promissory note provided that upon default, the second mortgage lender could accelerate the loan, requiring payment in full of the remaining balance on the note.⁸⁸ After defaulting, Houston First informed Grubbs that it had accelerated the loan and initiated foreclosure proceedings.⁸⁹ Grubbs filed a chapter 13 petition, in which he filed a plan proposing to pay off the delinquent and matured amounts on his mortgage over the life of the plan.⁹⁰ Houston First objected, contending that a loan secured by a lien on the debtor's residence that had been accelerated and matured could not be reinstated under § 1322(b)(2).⁹¹

The bankruptcy court held that the Grubbs' proposal to pay off his mortgage arrearages over the life of the plan was a forbidden modification.⁹² The bankruptcy court reasoned that § 1322(b)(2)'s anti-modification provision prohibited debtors from curing their defaulted mortgage after the lender had exercised its rights to accelerate the mortgage debt and initiated foreclosure proceedings.⁹³ Consequently, the bankruptcy court refused to confirm the debtor's proposed repayment plan.⁹⁴ The district court confirmed the bankruptcy court's holding.⁹⁵

The Fifth Circuit overturned the bankruptcy court's and the district court's decisions. The court relied on an extensive analysis of the legislative history

⁸⁶ *In re Taddeo*, 685 F.2d at 28.

⁸⁷ *Grubbs*, 730 F.2d at 237.

⁸⁸ *Id.* at 237–38.

⁸⁹ *Id.* at 238.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Grubbs v. Houston First American Sav. Ass'n*, 718 F.2d 694, 695 (5th Cir. 1983).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

and intent behind the enactment of § 1322(b) in its analysis.⁹⁶ The Fifth Circuit adopted the Second Circuit's interpretation of a "cure," quoting the language in *Taddeo* quoted in the previous section.⁹⁷ Similarly to the Second Circuit, the court also stated the anti-modification provision in § 1322(b)(2) should not be read to restrict the curative powers granted to debtors in § 1322(b).⁹⁸

c. Seventh Circuit

In *In re Clark* the Seventh Circuit considered whether a debtor who filed a petition for bankruptcy under chapter 13 after a state court had entered a foreclosure judgment was entitled to cure a default under § 1322(b).⁹⁹ The Clarks filed for chapter 13 bankruptcy before the sale of their property but after the court entered a judgment of foreclosure against them.¹⁰⁰ The Clarks' plan proposed to pay the mortgage arrearages over the life of the plan, in addition to their post-petition payments.¹⁰¹ The bank argued that approval of the Clarks' plan to pay their arrearages was a prohibited modification of their rights as creditors under § 1322(b)(2).¹⁰² The Clarks asserted that the plan was permissible under the curative powers granted to debtors in § 1322(b)(5).¹⁰³

The bankruptcy court confirmed the Clarks' plan, holding that the Clarks' proposal to pay their arrearages over the life of the plan and reinstate their mortgage was a permissible cure under § 1322(b)(5).¹⁰⁴ The bankruptcy court relied on the interpretation of the curative and anti-modification provisions in *Taddeo*.¹⁰⁵ It also reasoned that § 1322(b) was analogous to § 1124(2) of the Code, which allows acceleration clauses to be nullified in chapter 11 corporate reorganizations.¹⁰⁶ The district court reversed the bankruptcy court's decision.¹⁰⁷ The district court distinguished this case from *Taddeo*.¹⁰⁸ Unlike in

⁹⁶ Grubbs, 730 F.2d at 238.

⁹⁷ *Id.* at 241.

⁹⁸ *Id.* at 246 (quoting *In re Taddeo*, 685 F.2d 24, 27 (2d Cir. 1982) ("the notwithstanding clause was added to emphasize that defaults in mortgages could be cured notwithstanding § 1322(b)(2))).

⁹⁹ *In re Clark*, 738 F.2d at 870.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 870–71.

¹⁰² *Id.* at 871.

¹⁰³ *Id.* at 872.

¹⁰⁴ *In re Clark*, 32 B.R. 711, 712 (W.D. Wis. 1983).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 712–13.

¹⁰⁷ *Id.* at 716.

¹⁰⁸ *Id.*

Taddeo, the Clarks' lender had already obtained a judgment of foreclosure against the debtors.¹⁰⁹

To determine whether the plan proposed by the Clarks was a permissible cure or a forbidden modification, the Seventh Circuit interpreted the phrase "cure the default."¹¹⁰ The court interpreted the provision according to its plain meaning, stating:

Ordinarily, the means by which one cures a default is by paying all amounts due and owing; however, "cure" is the end and not the means, and what the term refers to is the restoration of the way things were before the default. Thus, the plain meaning of "cure," as used in § 1322(b)(2) and (5) is to remedy, rectify or restore matters to the *status quo ante*.¹¹¹

Based on this interpretation of a cure, the court reasoned that § 1322(b) allows a debtor to pay arrearages over the life of a plan to cure a default.¹¹² The court also reasoned that the legislative history supported this interpretation of a cure.¹¹³

The court acknowledged that "modify" and "cure" are not defined in the Code.¹¹⁴ However, the court stated that Congress clearly intended them to mean something different.¹¹⁵ The court supported this conclusion with a canon of statutory construction that the court should avoid an interpretation of a

¹⁰⁹ The court analyzed the reasoning in *Taddeo's* holding. The court then went on to explain why *Taddeo's* analysis did not extend to the facts in *Clark*.

In *Taddeo*, the court rested its holding on a number of factors: the legislative history that indicated the Congressional intent to allow debtors to cure defaults and repeal the contractual consequences; the many similar provisions in the Bankruptcy Code for the curing of defaults under § 1110(a)(2) (for example, a trustee may continue in possession of aircraft and ships by curing defaults and making payments in original lease or contract); the policy reasons for encouraging good faith negotiations among debtors in the *Taddeo's* situation; fear of the threat that "the mortgagee will tip the balance irrevocably by accelerating,;" the concern that "[c]onditioning a debtor's right to cure on its having filed a [c]hapter 13 petition prior to acceleration would prompt unseemly and wasteful races to the courthouse,;" and, finally, the conclusion that restricting debtors to cure only as provided under state law would leave them with fewer rights under the new Bankruptcy Code than they would have had under the old Act.

None of these factors supports an expansion of the right to cure beyond the entry of judgment. *Id.* at 715.

¹¹⁰ *In re Clark*, 738 F.2d at 871.

¹¹¹ *Id.* at 872.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 871.

¹¹⁵ *Id.* at 872.

statutory provision that would render another provision superfluous.¹¹⁶ Though the court stated that a modification and a cure are distinctly different from each other, the court did not explore what the distinctions were.¹¹⁷

2. *Narrow Interpretation—Fourth Circuit*

In *Anderson v. Hancock* the Fourth Circuit considered whether a cure under § 1322(b) of the Code allows a debtor to pay his mortgage arrearages post-acceleration *and* keep its pre-default interest rate.¹¹⁸ In *Anderson*, the debtors purchased a home financed by a loan of \$255,000 at an interest rate of five percent over a span of thirty years.¹¹⁹ The promissory note provided that if the debtors defaulted the lender could accelerate the debt and initiate foreclosure proceedings.¹²⁰ Alternatively, if the lender decided not to pursue those avenues, the debtors' interest rate would increase to seven percent until the loan was paid in full.¹²¹ The applicable provision in the note provided:¹²²

In the event borrower has not paid their monthly obligation within 30 days of the due date, then borrower shall be in default. Upon that occurrence, the borrower's interest rate shall increase to Seven percent (7%) for the remaining term of the loan until paid in full

As an alternative to an increase in interest rate upon default . . . lender may, in the lender's sole discretion either 1) require borrower to pay immediately the full amount of principal which has not been paid and all their interest [the debtor] owe[s] on that amount . . . or 2) pursue any other rights available to lender under North Carolina Law.¹²³

After failing to make their mortgage payment within 30 days of it becoming due, the Andersons were notified that they were in default and that their new payments would reflect the default interest rate of seven percent.¹²⁴ The

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Anderson*, 820 F.3d at 671.

¹¹⁹ *Id.* at 672.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

debtors failed to make their mortgage payments and, on August 30, 2013, the mortgage lender initiated foreclosure proceedings.¹²⁵

The Andersons filed a chapter 13 bankruptcy petition the following month.¹²⁶ The plan proposed that they pay off the arrears over the life of the plan while making their post-petition monthly payments at a five percent interest rate: the pre-default interest rate.¹²⁷ The Hancocks objected to the Andersons' plan, arguing that post-petition payments should be made at the default interest rate of seven percent.¹²⁸

The bankruptcy court held that the Andersons' proposed plan to continue making payments at their pre-default interest rate constituted a modification prohibited by § 1322(b)(2).¹²⁹ Relying on *Nobelman's* definition of what creditors' rights are protected by § 1322(b)(2), the bankruptcy court reasoned that though a debtor can cure its default, it cannot do so "beyond the four corners of the document."¹³⁰ Since the Andersons' mortgage instrument stated that upon default, their interest rate would increase, the Andersons' repayment plan could not restore them to their pre-default interest rate.¹³¹ The district court confirmed the bankruptcy court's decision, but for different reasoning.¹³² The district court argued that whether the Andersons could return to their pre-default interest rate required a construction of the "maintenance of payments" language in § 1322(b)(2), rather than an interpretation of the term "cure."¹³³ The court held that "maintenance of payments" means "making the same principal and interest payments in the note."¹³⁴ Consequently, the Andersons could not restore pre-default interest rate.¹³⁵

On appeal, the Fourth Circuit considered whether restoring the debtors to their pre-default interest rate was either a permissible cure under § 1322(b)(5) or a prohibited modification under § 1322(b)(2) of the Code.¹³⁶ The court

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *In re Anderson*, No. 13-05843-8-SWH, 2014 Bankr. LEXIS 3770, at *24 (Bankr. E.D.N.C. Sept. 5, 2014).

¹³⁰ *Id.* at *21.

¹³¹ *Id.* at *23.

¹³² *Jernigan v. Logan (In re Anderson)*, No. 5:14-CV-690-FL, 2015 U.S. Dist. LEXIS 49059, at *14 (E.D.N.C. Apr. 6, 2015).

¹³³ *In re Anderson*, 2015 U.S. Dist. LEXIS 49059, at *11.

¹³⁴ *Id.* (citing *In re Martin*, 444 B.R. 538, 544 (Bankr. M.D.N.C. 2011)).

¹³⁵ *Id.* at *12.

¹³⁶ *Anderson*, 820 F.3d at 673.

interpreted the anti-modification provision to prohibit a plan from altering the contractually agreed upon interest rate, including an interest rate following a default by the debtor.¹³⁷ The court reasoned, primarily by relying on tools of statutory interpretation, that the power to cure a default granted in § 1322(b) “does not undo this protection of residential mortgage lender’s fundamental rights.”¹³⁸ The court concluded that the phrase “cure a default” only gave a debtor the power to decelerate his debt and continue making payments on his loan to avoid foreclosure.¹³⁹

The Fourth Circuit rejected the debtor’s argument that based on a prior decision by the Fourth Circuit in *Litton v. Wachovia*, a cure of a default should restore a debtor to its pre-default conditions.¹⁴⁰ In *Litton* the court stated “a ‘cure’ merely reinstates a debt to its pre-default position, or it returns the debtor and creditor to their respective positions before the default”¹⁴¹ The court in *Anderson* rejected the debtor’s assertion that this return to pre-default conditions was nothing more than a deceleration of debt and maintenance of payments.¹⁴² The court rejected the debtor’s attempt to return to their pre-default interest rate and ordered that the post-petition payments should reflect the default rate of interest provided in the note: seven percent.¹⁴³

II. STATUTORY INTERPRETATION

Widely used and accepted methods of statutory interpretation support a broad interpretation of “cure.” The statute’s text, legislative history, and policy considerations show that Congress intended that a debtor should be able to restore himself to his pre-default conditions, notwithstanding the anti-modification provision in § 1322(b)(2). The statute shows the debtor’s ability to cure his default includes, but is not restricted to, simply decelerating his mortgage debt and continuing making payments. Thus, the Fourth Circuit erred in holding that the debtors’ plan to continue making payments at their pre-default interest rate was a forbidden modification, rather than a permissible cure.

¹³⁷ *Id.* at 675.

¹³⁸ *Id.* at 674.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 675.

¹⁴¹ *Litton v. Wachovia (In re Litton)*, 330 F.3d 636, 644 (4th Cir. 2003).

¹⁴² *Anderson v. Hancock*, 820 F.3d 670, 675 (4th Cir. 2016).

¹⁴³ *Anderson*, 820 F.3d at 676.

A. *Intrinsic Methods of Statutory Interpretation*

When a statute is ambiguous, tools of statutory interpretation can be employed to determine how the Legislature intended courts to interpret the statute.¹⁴⁴ In employing these tools of statutory interpretation, the text of the statute itself is always the starting point.¹⁴⁵

1. *Plain Meaning*

Absent evidence to the contrary, words in a statute should be interpreted in accordance with their plain meaning.¹⁴⁶ Dictionaries are instructive on the plain meaning of operative words in a statute.¹⁴⁷ In *Clark*, the Seventh Circuit determined that “cure” meant “to remedy, rectify, restore” based on the definition of cure found in Webster’s Third International Dictionary.¹⁴⁸ Similar to the definition proffered by the Second Circuit, Merriam-Webster’s dictionary defines “cure” as “to deal with in a way that eliminates or rectifies” or “to free from something objectionable or harmful.”¹⁴⁹ Black’s Law Dictionary defines cure in the context of maritime law, as the “restoration to health after disease or injury.”¹⁵⁰ Though the context is different than the one at issue here, Black’s definition is consistent, in that a cure restores conditions to what they were before a particular occurrence.¹⁵¹

In *Taddeo* the court described a default as “an event in the debtor-creditor relationship which triggers certain consequences.”¹⁵² The plain meaning of “cure” requires that the curative provisions in § 1322(b) be interpreted to allow a debtor to include provisions in his plan to restore him to his pre-default conditions.¹⁵³ Most promissory notes provide that the creditor can accelerate the debt if the homeowner defaults.¹⁵⁴ Though acceleration is the most common consequence when a homeowner fails to make his mortgage payment, it may not be the only consequence.¹⁵⁵ Therefore, restoring the debtor to his

¹⁴⁴ *United States v. Dickerson*, 310 U.S. 554, 562 (1940) (“The meaning to be ascribed to an Act of the Legislature can only be derived from a considered weighing of every relevant aid to construction.”).

¹⁴⁵ *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 696–97 (1985).

¹⁴⁶ *In re Clark*, 738 F.2d at 872.

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ CURE, <http://www.merriam-webster.com/dictionary/cure> (last visited Oct. 22, 2016).

¹⁵⁰ *Cure*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁵¹ *See id.*

¹⁵² *In re Taddeo*, 685 F.2d at 26.

¹⁵³ *In re Clark*, 738 F.2d at 872.

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

pre-bankruptcy conditions may require more than deceleration of his mortgage debt.¹⁵⁶ For example, in *Anderson*, restoring the debtors to their pre-bankruptcy conditions required that they be allowed to make their post-petition payments at their pre-default interest rate in addition to mortgage deceleration.¹⁵⁷

2. Avoidance of Redundancy

There is a presumption that Congress is not redundant when drafting and enacting statutes.¹⁵⁸ Therefore, reviewers and courts should give effect to every word in the statute.¹⁵⁹ The curative power provision in § 1322(b)(5) begins with the phrase “notwithstanding § 1322(b)(2) of this subsection.”¹⁶⁰ To disregard this phrase goes against the presumption that Congress avoids redundancy.¹⁶¹ Congress included the “notwithstanding” clause to remedy the tension between the cure and modification provisions, demonstrating Congress’ recognition that a cure may, sometime, modify the creditors’ contractually agreed upon rights.¹⁶² The notwithstanding clause establishes that the scope of a cure is not restricted by the modification prohibition in § 1322(b)(2).¹⁶³

3. Consistent Usage

When words are used more than once in a statute, they should be interpreted to have the same meaning each time they are used.¹⁶⁴ The broad interpretation of a cure is consistent with the way the term is used throughout the Code.

Section 365 of the Code allows a trustee to assume executory contracts and unexpired leases.¹⁶⁵ However, if the debtor has defaulted on the contract or lease, § 365(b)(1)(A) states that a trustee may not assume the contract or lease, unless at the time of assumption the debtor “cures, or provides adequate

¹⁵⁶ *Contra Anderson*, 820 F.3d at 674.

¹⁵⁷ *See id.* at 670.

¹⁵⁸ *See id.* at 674 (citing *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991) (“ . . . giving effect to each and every word and making every effort not to interpret a provision in a manner than renders other provisions . . . inconsistent, meaningless, or superfluous.”))

¹⁵⁹ *Id.*

¹⁶⁰ 11 U.S.C. § 1322(b)(5) (2012).

¹⁶¹ *See Anderson*, 820 F.3d at 674.

¹⁶² *Cf. Grubbs*, 730 F.2d at 246.

¹⁶³ *In re Taddeo*, 685 F.2d at 28.

¹⁶⁴ *Boise Cascade Corp. v. United States EPA* 942 F.2d 1427, 1432 (9th Cir. 1991).

¹⁶⁵ 11 U.S.C. § 365 (2012).

assurance that the trustee will promptly cure, such default.”¹⁶⁶ Under § 365(b)(1)(A), the debtor’s ability to cure is not restricted by the terms and period provided for in the contract.¹⁶⁷ As such, the debtor’s curative power is broad.¹⁶⁸ The result of the debtor curing the default on his lease or contract is that the contractual consequences of the default are repealed, consistent with the broad interpretation of a cure.¹⁶⁹

Chapter 11 of the Code also discusses the debtor’s ability to cure a default.¹⁷⁰ Section 1124 of the Code outlines when a class of claims is not impaired and consequently is permitted to vote on a chapter 11 plan.¹⁷¹ Under § 1124(1) the plan can leave a class of claims unimpaired by not altering the legal, equitable, and contractual rights of the creditor.¹⁷² Section 1124(2)(A) provides that:

(2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default—

(A) cures any such default that occurred before or after the commencement of the case under this title, other than a default of a kind specified in section 365(b)(2) of this title or of a kind that section 365(b)(2) expressly does not require to be cured;¹⁷³

The preface of paragraph two emphasizes the debtor’s power to cure despite the contractual rights of the creditor that would otherwise be enforceable under state law.¹⁷⁴

Despite the preface in § 1124(2), courts have rejected the idea that a cure under this provision only applies to debt that has been accelerated due to default.¹⁷⁵ The Ninth Circuit stated that the natural reading of references to default in § 1123 and § 1124 is that “plans may cure all defaults without

¹⁶⁶ 11 U.S.C. § 365(b)(1)(A) (2012).

¹⁶⁷ 8 COLLIER, *supra* note 12, at ¶ 365.06.

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See* 11 U.S.C. § 1124(2012).

¹⁷¹ 8 COLLIER, *supra* note 12, at ¶ 1124.01.

¹⁷² *Id.*

¹⁷³ 11 U.S.C. § 1124(2)(A) (2012).

¹⁷⁴ David J. Oliveiri, Annotation, *Right of debtor to “de-acceleration” of residential mortgage indebtedness under Chapter 13 of Bankruptcy Code of 1978 (11 U.S.C.A. § 1322(b))*, 67 A.L.R. FED. 217 (1984).

¹⁷⁵ 8 COLLIER, *supra* note 12, at ¶ 1124.04.

impairing the creditor's claim, and that such defaults include, but are not limited to, those defaults resulting in acceleration."¹⁷⁶ The Ninth Circuit emphasized that the curative provision in § 1124(2)(A) allows a debtor to avoid all of the consequences of default, not just acceleration.¹⁷⁷ Under § 1124(2)(A), a cure returns the debtor and the creditor to their pre-default positions, consistent with the broad interpretation of a cure.¹⁷⁸

B. *Extrinsic Methods of Statutory Interpretation*

1. *Legislative History*

The Supreme Court has emphasized importance of the spirit of the law, in addition to the letter, when interpreting a statutory provision.¹⁷⁹ A statute's legislative history that "shows genesis and evolution" can provide insight on how Congress intended the courts to interpret the provision.¹⁸⁰ The legislative history surrounding § 1322's enactment supports a broad interpretation of a cure.

a. *The Drafting Process*

The Legislature created the Commission on the Bankruptcy Laws of the United States in 1970 to help develop the Bankruptcy Code of 1978.¹⁸¹ In 1973 the Commission issued a report containing its findings and recommendations, and a draft of a bill to reflecting their findings and recommendations.¹⁸² The Commission's version of § 1322 stated that a plan:

¹⁷⁶ *Id.* (citing *Great W. Bank & Trust v. Entz-White Lumber & Supply (In re Entz-White Lumber & Supply)*, 850 F.2d 1338, 1341 (9th Cir. 1988)).

¹⁷⁷ *Great W. Bank & Trust v. Entz-White Lumber & Supply (In re Entz-White Lumber & Supply)*, 850 F.2d 1338, 1342 (9th Cir. 1988).

¹⁷⁸ *See* 8 COLLIER, *supra* note 12, at ¶ 1124.04 (citing *In re Centre Court Apartments, Ltd.*, 85 B.R. 651 (Bankr. N.D. Ga. 1988)). In *Centre Court* the debtor's promissory note stated that if the creditor had to seek payment of the debt by law or through an attorney the debtor must pay the creditor reasonable attorney's fees and costs of collections. The court considered whether the creditor was entitled to these costs after the debtor cured the mortgage. The court held that the creditor was not entitled to attorney's fees because the cure and reinstatement returned the parties to a point in time prior to the default and acceleration.

¹⁷⁹ *Treat v. White*, 181 U.S. 264, 267–68 (1901) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) ("There are times when the mere letter of a statute does not control, and that a fair consideration of the surroundings may indicate that which is within the letter is not within the spirit, and therefore must be excluded from its scope.")).

¹⁸⁰ *Anderson*, 820 F.3d at 674.

¹⁸¹ *Grubbs*, 730 F.2d at 238.

¹⁸² *Grubbs*, 730 F.2d at 238.

(2) May include provisions dealing with claims secured by personal property severally, on any terms, and may provide for the curing of defaults within a reasonable time and otherwise alter *or modify the rights of the holders of such claims.*

(4) May include provisions for the curing of defaults within a reasonable time while the case is pending on claims secured by a lien on the debtor's residence and on unsecured claims or claims secured by personal property on which the last payment is due after completion by the debtor of all payments made under the plan.¹⁸³

In an explanatory note the Commission emphasized the powers granted to debtors under paragraph (4).¹⁸⁴ The Commission stated that the provision allowed debtors to "keep current on long-term debt by provisions in the plan for curing defaults and maintaining payments."¹⁸⁵ In this report, the Commission highlighted the maintenance of payments and the debtor's ability to cure his default as interrelated but separate things.¹⁸⁶

The Fourth Circuit in *Anderson*, insisted that the curative powers only allowed a debtor to continue making payment on what would have otherwise been matured debt.¹⁸⁷ However, the Commission clearly did not intend for the curative powers to be restricted in this way. Otherwise, it would have been redundant for the Commission's version of the provision and explanatory note to emphasize the debtor's ability to cure *and* maintain his payments.

As originally drafted by the House of Representatives, paragraphs (2) and (5) of § 1322 stated that a plan may:

(2) modify the rights of holders of secured claims or of holders of unsecured claims;

(5) provide for the curing or waiving of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;¹⁸⁸

¹⁸³ BANKRUPTCY LAWS COMMISSION REPORT, H.R. DOC. NO. 93-137, at 204 (1973) (emphasis added).

¹⁸⁴ *Id.* at 205-06.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Anderson*, 820 F.3d at 674.

¹⁸⁸ A Bill to Establish a Uniform Law on the Subject of Bankruptcies, H.R. 6, 95th Cong. § 1322(b)(2), (5) (as referred to the S. Comm. on the Judiciary, Jan. 4, 1977).

The Senate amended paragraph (2), prohibiting modifications of the rights of holders of claims secured by a mortgage of real property.¹⁸⁹ Congress generally wanted to afford added protections from modifications to home mortgage lenders for the valuable service that they provide to society: making homeownership attainable.¹⁹⁰ Consequently, paragraph (2) was amended once more to restrict the modification prohibition only to claims secured by a mortgage on real property that was the debtor's principal residence.¹⁹¹

Congress recognized that the modification prohibition in paragraph (2) and the debtor's curative power granted in paragraph (5) were in tension with each other. In some circumstances, a cure of a default may require that a creditor's rights be modified. Consequently, Congress amended paragraph (5) to include a provision that the curative powers remained intact "notwithstanding" the modification prohibition in paragraph (2).¹⁹² This "notwithstanding" clause emphasized Congress' intention that the debtor's ability to cure his default not be restricted by the modification prohibition of paragraph (2). Though Congress intended to afford some protection to mortgage lenders, it did not intend to do so at the expense of inhibiting the debtor's ability to cure his default.¹⁹³

b. The Congressional Hearings

During the initial phases of the drafting process of chapter 13, Congress heard testimony from individuals who represent some of the biggest secured creditors in the nation.¹⁹⁴ The representatives did not advance concerns about the debtor's ability to cure his default under the proposed bill.

Walter Vaughn, Vice President of the American Security Bank and Chairman of both the American Bankers Association Task Force on Bankruptcy and the Consumer Bankers Association, presented his concerns on the Commission's draft recommendations.¹⁹⁵ One year prior to Walter Vaughn's testimony, state and national banks had outstanding consumer loans

¹⁸⁹ S. REP. NO. 95-989, at 141.

¹⁹⁰ *See* Grubbs, 730 F.2d at 245.

¹⁹¹ 95 H.R. CONG. REC. 11, 76 (September 28, 1978).

¹⁹² 95 S. CONG. REC. 17, 423 (October 28, 1978); Grubbs, 730 F.2d at 246 (5th Cir. 1984).

¹⁹³ *Id.*

¹⁹⁴ *See id.* at 245.

¹⁹⁵ *Hearings before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate*, 94th Cong. 124 (1975) (statement of Walter Vaughn, Chairman, American Bankers Association & Consumer Bankers Association Task forces on Bankruptcy).

totaling approximately eighty-four billion dollars.¹⁹⁶ The member banks of the organizations Vaughn represented accounted for a significant majority of that eighty-four billion dollars of outstanding loans.¹⁹⁷

Vaughn raised concerns about the portion of the Commission's bill that allowed the rights of secured creditors to be modified and the debtor to cure his default.¹⁹⁸ Though Vaughn had some concerns about secured creditors' ability to protect their rights, Vaughn stated that he and the banks he represented supported the provision.¹⁹⁹ The only amendment suggested by Vaughn dealt with the preservation of the value of the claims under the plan.²⁰⁰ He did not, however, raise concerns about the debtor's ability to cure his default, so long as the value of the creditor's claim was not impaired.

Alvin Wiese, Chairman of the Subcommittee on Bankruptcy of the Law Forum of the National Consumer Finance Association and attorney specializing in creditor's rights and consumer bankruptcy, also presented on behalf of the interests of secured creditors.²⁰¹ Mr. Wiese was extremely critical of the Commission's bill. Mr. Wiese accused the Commission's bill of being slighted in favor of the debtor.²⁰² He stated

The objective of the Commission is admirable but it must be legislatively balanced to insure the continued availability of home financing and consumer credit upon which our economy is, so dependent, and it must be structured so as to preserve and protect the rights of creditors to their collateral and against those who abuse the bankruptcy process through fraud, deception, or dishonesty. Further, it should be structured to encourage sound money management practices by consumers.²⁰³

Mr. Wiese believed that the Commission's bill promoted bankruptcy and excused fraud, and he feared this would result in an increase in the amount of individuals filing for bankruptcy.²⁰⁴ He urged Congress against creating a bankruptcy regime that would result in the erosion of credit morality (which is

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 131.

¹⁹⁸ *Id.* at 130.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 139 (1975) (statement of Alvin. O. Wiese, Chairman, Subcommittee on Bankruptcy of the Law Forum of the National Consumer Finance Association).

²⁰² *See id.* at 140.

²⁰³ *Id.*

²⁰⁴ *Id.*

the presumption that the consumer is honest and intends to repay his debt, of which the creditor relies on in extending loans to consumers).²⁰⁵ He warned that the Commission's bill, as written, would lead to a decline in the amount of home mortgage and other consumer loans creditors were willing to extend to individuals.²⁰⁶

Despite Mr. Weise's immense criticism of the bill, he did not raise any issues about the cure provisions that became § 1322(b)(5) of the Code.²⁰⁷ Even when questioned about his criticism of chapter 13 following his address to Congress, Mr. Weise never mentioned the curative provisions.²⁰⁸

2. *Public Policy*

The public policy behind the enactment of a statute, along with the policy implications of interpreting a statutory provision in a particular manner, also provides guidance on the meaning of a statutory provision.²⁰⁹ An understanding of the policy goals of a statutory provision sheds lights on its meaning because “[l]aws are not abstract propositions,” rather, “[t]hey are expressions of policy arising out of specific situations and addressed to the attainment of particular ends.”²¹⁰

a. *The Goal of Bankruptcy: Relief to the Debtor*

One of the primary goals of bankruptcy is to provide a fresh start for the “honest but unfortunate” debtor.²¹¹ One leading bankruptcy scholar has said:

Consumer bankruptcy has become part of America's economic landscape. Once regarded as an unlikely legal alternative chosen by only a few desperate families, bankruptcy has become a refuge for one in every 96 American families by the time the National Bankruptcy Review Commission filed its report.²¹²

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 139.

²⁰⁷ *See id.* at 141–46.

²⁰⁸ *See id.* at 173–84.

²⁰⁹ 73 AM. JUR. 2D STATUTES § 68 (2014).

²¹⁰ BANKRUPTCY DESK GUIDE, § 1:5 (2016).

²¹¹ Anderson, 820 F.3d at 676.

²¹² DAVID G. EPSTEIN, BRUCE A. MARKELL, STEVE H. NICKLES & LAWRENCE PONOROFF, BANKRUPTCY: DEALING WITH FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESSES 18 (4th ed. 2015).

A fresh start will give the debtor “a new opportunity in life, free from the pressure and discouragement of pre-existing debts.”²¹³ There are several justifications for the fresh start policy.²¹⁴

First, the fresh start policy protects society from the honest but unfortunate debtor.²¹⁵ An overwhelmed debtor with no avenue for relief may eventually lose his will to be productive at all, and society will have to bear the burden of the debtor's unproductivity.²¹⁶ The debtor's unproductivity may result in an inability to support himself and his dependents.²¹⁷ Society would then have to allocate resources to the support of the debtor.²¹⁸ Additionally, the debtor may experience personal hardships, such as divorce or even suicide, because of his lack of relief from unmanageable debt.²¹⁹ These things would also have a negative and costly effect on society.²²⁰ By providing the debtor with a fresh start, bankruptcy seeks to avoid these costs for society and restore the debtor to a state of productivity.²²¹

Second, the fresh start policy protects the honest but unfortunate debtor from himself.²²² The fresh start policy recognizes that bad judgment is inevitable to the human condition.²²³ Consequently, a debtor may incur excessive debt as a result of overestimating his abilities to repay his debts or underestimating the risk of incurring the debt.²²⁴ Additionally, the fresh start policy protects the debtor who may lack the sophistication and knowledge necessary to make wise financial decisions, and to protect the debtor from predatory lending.²²⁵

Third, the fresh start policy protects the creditor. Secondary to providing a fresh start for the debtor, the other goal of bankruptcy is to distribute the debtor's assets equitably amongst his creditors.²²⁶ When a debtor experiences a

²¹³ Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?* 71 TUL. L. REV. 139, 174 (1996).

²¹⁴ *Id.*

²¹⁵ *See id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 175.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ BANKRUPTCY DESK GUIDE, § 1:5 (2016).

financial hardship, he more than likely has many creditors to which he owes a debt. Under state law, to collect on a defaulted debt, a creditor must obtain a judgment lien on property of the debtor and seize the property.²²⁷ Not only is this process time consuming and costly but by the time a creditor obtains the judgment, the property may be encumbered by another creditor's lien, also seeking to collect on a defaulted debt.²²⁸

The narrow interpretation of a cure proffered by the Fourth Circuit in *Anderson* is inconsistent with the fresh start policy. By restricting the debtor's curative power, the court denied the debtors the opportunity to have a fresh start. The court chose not to restore the debtor to its pre-bankruptcy conditions, robbing them of an opportunity to have a fresh start, contrary to the policy goals that the Code was enacted to advance.

b. The Cost of Foreclosure

Though about ninety-six percent of chapter 13 debtors are homeowners and seventy-nine percent of chapter 13 plans provide for payment of arrearages, only one percent of those debtors successful save their homes.²²⁹ The other debtors are left to the mercy of state law and their mortgage companies. The result is often foreclosure. However, researchers and policy-makers agree that foreclosure should be avoided whenever possible because of the high costs to all parties involved.²³⁰ Foreclosure is not only costly to the debtor, but it is also extremely costly for the mortgage lender and society.²³¹

Foreclosure is taxing on a borrower tangibly and intangibly. The borrower must bear the financing costs of relocating.²³² Additionally, the borrower must bear the emotional burdens of being displaced: guilt, embarrassment, and sometime depression.²³³ Children may have to change schools or school districts, possibly mid-academic year.²³⁴ The borrower must deal with the loss

²²⁷ EPSTEIN, *supra* note 212, at 3–4.

²²⁸ *Id.* at 5.

²²⁹ White, *supra* note 1, at 37.

²³⁰ Eric S. Belsky, et al., *In or out of Mortgage Trouble? A Study of Bankrupt Homeowners*, 85 AM. BANKR. L. J. 291, 295 (2011).

²³¹ White, *supra* note 1, at 34.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

of his ties to his neighborhood and his sense of community.²³⁵ In more extreme cases, the cost of foreclosure for the borrower is homelessness.²³⁶

Foreclosure is also costly for the mortgage lender.²³⁷ Foreclosure imposes high transaction costs on the mortgage lender.²³⁸ During the sub-prime mortgage crisis, between 2006 and the first quarter of 2007, twenty-three lenders filed for bankruptcy as a result of defaulting debtors in foreclosure and the associated transaction costs.²³⁹ Additionally, homes typically are resold at foreclosure auctions for much less than the actual value of the home.²⁴⁰

Further, foreclosure's effect on the housing industry has a domino effect on the insurance industry.²⁴¹ A reduction in homeownership results in a reduction of the demand for homeowner's insurance coverage.²⁴² Moreover, foreclosure increases the rate of insurance fraud.²⁴³ For example, desperate homeowners sometime resort to arson to avoid foreclosure.²⁴⁴ Temporal pressures imposed by state law can often lead to settlements and big pay-outs by the insurance companies without a thorough investigation.²⁴⁵

Society also suffers as a result of foreclosures.²⁴⁶ Foreclosed homes are often left unattended and unmaintained, making it an eyesore for the surrounding neighborhood and a magnet for illegal activity and squatters.²⁴⁷ These blighted, foreclosed homes can drive down the property value of the homes surrounding it.²⁴⁸ A study showed that every foreclosed home reduced the property value of the other homes in the neighborhood by one percent.²⁴⁹

²³⁵ Michelle J. White & Ning Zhu, *Saving Your Home in Chapter 13 Bankruptcy*, 39 J. LEGAL STUD. 33, 34 (2010).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ R. Travis Santos, Comment, *The Legal Way to Defeat Optimus Sub-Prime*, 25 EMORY BANKR. DEV. J. 285, 295 (2008).

²⁴⁰ Brandon Cornett, *How to Buy a Foreclosure Home*, HOME BUYING INST. (last visited Oct. 6, 2017), <http://www.homebuyinginstitute.com/buying-foreclosed-home.php> ("When you buy a foreclosed home, there is a good chance you'll pay less than market value for the house. According to data compiled by RealtyTrac from 2010–2011, foreclosure homes are selling for an average discount of 27%, when compared to non-distressed / non-foreclosed properties.").

²⁴¹ Santos, *supra* note 239, at 297.

²⁴² *Id.* at 285.

²⁴³ *See id.* at 297.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *See* White, *supra* note 1, at 34.

²⁴⁷ *See id.*

²⁴⁸ Santos, *supra* note 239, at 295.

²⁴⁹ *Id.* at 297.

Foreclosure also reduces the amount of property tax payments in a locality.²⁵⁰ This is inimical to municipalities who rely on property taxes to fund things like education.²⁵¹ Additionally, foreclosure forces down the price of homes, making it more difficult for homeowners to refinance their loans, and ultimately leading to more foreclosures.²⁵²

The societal cost of foreclosure is best summarized as a no-win situation for everyone. Therefore, it is absurd to interpret § 1322(b) in a manner that would make foreclosure a more likely result for chapter 13. Restricting a debtor's ability to cure his default to only deceleration of his debt makes a debtor's small chances of saving his home even smaller, particularly when acceleration was not the only consequence of default. The broad interpretation of a cure is more consistent with the policy goal of avoiding the high costs of foreclosure to the borrower, creditor, and society.

III. CRITICISM OF THE FOURTH CIRCUIT'S REASONING IN *ANDERSON*

The Fourth Circuit in *Anderson*, based its narrow interpretation of a cure on its analysis of the text of the statute, legislative history, and policy concerns. The court's reasoning, however, was rooted in a failure to apply tools of statutory interpretation correctly and thoroughly.

A. *Anderson's Textual Analysis of § 1322(b)(2)*

The Court in *Anderson* decided to interpret the text of § 1322(b)(2). In doing so, the Fourth Circuit asserted that the statute should be read "as a whole, giving effect to each and every word and making every effort not to interpret a provision in a manner that renders other provisions . . . inconsistent, meaningless, or superfluous."²⁵³ The court reasoned that Congress did not intend for a cure to allow debtors to return to their pre-default interest rate because such a reading would "inexplicably make (b)(2) inoperative by means of a capacious power to cure written only a few sentences later."²⁵⁴

Respectfully, the Fourth Circuit was gravely incorrect. An interpretation of cure that would restore the debtors to their pre-default condition would not make the modification prohibition in § 1322(b)(2) inoperative. For example,

²⁵⁰ White, *supra* note 1, at 34.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Anderson*, 820 F.2d at 673.

²⁵⁴ *Id.*

§ 1322(b)(2)'s protection for home mortgage lenders against cramdown would remain unscathed by the debtor's curative power.²⁵⁵ Cramdown, the most common treatment of secured creditors in chapter 13 cases, allows a debtor to mimic foreclosure and give the secured creditor other property equal to the present value of the collateral.²⁵⁶ A debtor's obligation to pay his secured creditor can be crammed down by property such as promissory notes and other obligations of the debtor.²⁵⁷ Cramdown also advances the fresh start for the debtor policy goal of bankruptcy at the expense of secured creditors.²⁵⁸ Section 1322(b)(2)'s modification prohibition exempts home mortgage lenders from this type of disadvantageous treatment²⁵⁹

Additionally, a debtor may only cure a default. Any alteration in the contractually agreed upon obligations of the debtor proposed in the plan not for the sole purpose of returning the debtor to his pre-default conditions is forbidden by § 1322(b)(2). For example, a debtor cannot propose a plan that lowers his interest rate on his home mortgage loan simply because it is more desirable than his current interest rate.²⁶⁰

The Fourth Circuit was incorrect in its reasoning that a broad interpretation of the debtor's curative powers would render § 1322(b)(2)'s modification prohibition inoperative. Restoring a debtor to his pre-default conditions does not interfere with § 1322(b)(2)'s safeguards afforded to home mortgage creditors from cramdown and modifications by debtors seeking mortgage terms more desirable than those that they originally negotiated with their lender.

It is a principle of statutory interpretation that the same meaning is intended each time a term is used in a statute, unless the statute explicitly states otherwise. The Fourth Circuit's narrow interpretation of a cure in § 1322(b) would lead to inconsistencies if applied to other provisions in the Code that use the term. The narrow interpretation of a cure proffered in *Anderson* only

²⁵⁵ BRUCE A. MARKELL & LAWRENCE PONOROFF, A SHORT & HAPPY GUIDE TO BANKRUPTCY 222 (2016).

²⁵⁶ *Id.* at 218.

²⁵⁷ *See id.* at 219.

²⁵⁸ Monica Hartman, *Selecting the Correct Cramdown Interest Rate in Chapter 11 and Chapter 13 Bankruptcies*, 47 UCLA L. Rev. 521, 522 (1999).

²⁵⁹ MARKELL, *supra* note 255, at 222.

²⁶⁰ *See, e.g., In re Bradshaw*, 56 B.R. 742, 745 (S.D. Ohio, 1985) ("Such a reduction is 'basic' . . . [A] change in the interest rate is the type of alteration encompassed by the term 'modify,' as it is used in section 1322(b)(2). Since the Huntington's claim is secured only by the debtors' principal residence, it cannot be modified under the express exception contained in section 1322(b)(2).")

permits a debtor to decelerate his debt.²⁶¹ This interpretation does not make sense in the context of § 365(b)(1)(A), since acceleration is not a consequence of default under executory contracts and leases. Congress would not intend “cure” to mean one thing in one part of the Code and something different in another part of the Code without expressly saying so.²⁶²

B. *Anderson’s Legislative History Analysis*

After performing a textual analysis, the court analyzed the legislative history to determine the intent of the legislature when it enacted § 1322(b)(2). The court in *Anderson* also justified its narrow interpretation of “cure” with the legislative history surrounding § 1322(b)’s enactment.²⁶³ However, the court did not actually cite any legislative history directly.²⁶⁴ Instead, it relied on the Fifth Circuit’s analysis of the legislative history in *Grubbs*.²⁶⁵ *Grubbs*’ analysis of the legislative history was framed around the question of whether allowing debtors to pay arrearages on previously accelerated debt was a permissible cure or forbidden modification.²⁶⁶ Therefore, the court in *Anderson* should have expounded on *Grubbs*’ analysis, focusing on what the history says about where Congress intended to draw the line when the consequences of default went beyond acceleration of the mortgage debt.

The Fourth Circuit also quotes the language in *Grubbs* that during Congress’ meetings, home mortgage creditors’ “attacks concentrated upon provisions that permitted modification of a secured claim by reducing the amount of periodic installments due thereupon.”²⁶⁷ Congress’ response to the concerns of home mortgage creditors was not to limit the curative powers of the debtor in the way the Fourth Circuit claims.²⁶⁸ Rather, as discussed above, the Legislature responded by exempting home mortgage creditors from cramdown, which would have otherwise reduced the installment amounts that debtors were required to pay over the life of the plan from the value of the outstanding debt to the present value of the collateral.²⁶⁹

²⁶¹ See 8 COLLIER, *supra* note 12, at ¶ 365.06.

²⁶² See *Boise Cascade Corp.* 942 F.2d at 1432.

²⁶³ See *Anderson*, 820 F.2d at 674.

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *Grubbs*, 730 F.2d at 237.

²⁶⁷ *Anderson*, 820 F.2d at 674 (citing *Grubbs*, 730 F.2d at 245).

²⁶⁸ See MARKELL, *supra* note 255.

²⁶⁹ *Id.* at 218–19.

C. *Anderson's Policy Analysis*

First, the Fourth Circuit also did a policy analysis of the narrow interpretation of cure that it proffered, focusing on the need to protect default interest rates.²⁷⁰ Subsequently, the court asserted that default interest rates benefit both creditors and consumers.²⁷¹ In asserting the dual benefit of the default interest rates, the court acknowledged default interest rates as serving two important purposes for creditors: to compensate creditors for the time value of money and to compensate creditors for the risk associated with extending credit.²⁷² However, the court warned that in the absence of the enforcement of default interest rates, creditors may issue loans with higher interest rates throughout the entire life of the plan or seek to foreclose on a defaulted debtor more quickly.²⁷³ Lastly, there was an argument provided by the court. The argument proffered that in order to incentivize secured creditors to make home mortgage loans available to consumers, Congress was compelled to legislate in a way that would assure lenders that their “expectations would not be frustrated.”²⁷⁴

The court’s analysis completely failed to address the policy implications of its narrow interpretation on the primary purpose of bankruptcy: to provide a fresh start for the poor and unfortunate debtor.²⁷⁵ In its analysis, the court claims that the fresh start policy goal of bankruptcy does not justify a reading of the statute that “must perforce to be inimical to the welfare of mortgage debtors.”²⁷⁶ The argument offered by the court states that Congress intended a reading of the statute inimical to the welfare of the debtor. Another argument offered by the court is that to avoid decreasing “the attractiveness of home mortgages as investment opportunities,” Congress intended to draft a provision that would promote the interests of the creditor. However, even as the provision benefits creditors, it operates at the expense of the debtor.²⁷⁷ In aggregate, the aforementioned arguments are inconsistent with the primary goal of bankruptcy.²⁷⁸

²⁷⁰ Anderson, 820 F.2d at 676.

²⁷¹ *See id.*

²⁷² *Id.*

²⁷³ *Id.* at 677.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 676.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 677.

²⁷⁸ *See Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”).

The court's policy analysis also aggrandizes default interest rates as a desirable alternative to foreclosure.²⁷⁹ On the contrary, for a defaulted debtor, higher interest rates further frustrate the debtor's ability to save his home. If the debtor experiences a financial hardship and defaults on the lower interest rate, it is almost certain that he will be unable to make the mortgage payments with the higher rate of interest. The debtor will fall further and further behind, the mortgage creditor will proceed with foreclosure proceedings, and the amount required to reinstate the debtor's mortgage will be higher because of the increased monthly mortgage payments, which reflect the higher interest rate.

Anderson's policy analysis also emphasizes the importance of allowing mortgage creditors to get exactly what they would have gotten outside of bankruptcy.²⁸⁰ If all creditors retained the same rights in bankruptcy as they did outside of bankruptcy, the Code "would have no provisions at all."²⁸¹ Therefore, it is irrational that Congress intended the statute to be interpreted in a manner where creditors could expect to be treated as if the debtor had never filed a petition.

Thus, *Anderson's* policy analysis fails to adequately address the effect of its interpretation of a cure on the consumer debtor and his ability to obtain relief. Rather, its policy analysis focuses on the furtherance of the creditor's interest to the detriment of the debtor.²⁸² The court in *Anderson* failed to thoroughly analyze the policy surrounding its interpretation.²⁸³ Consequently, the Fourth Circuit restricted the curative powers to be far narrower in scope than Congress intended.

D. *Anderson's Distinctions Between a "Cure" and a "Modification"*

Following the court's analysis of the legislative history, the court attempted to make distinctions between a "cure" and a "modification" for purposes of understanding § 1322(b)(2). The Fourth Circuit cited *Nobelman's* interpretation of the rights protected by the anti-modification provision in

²⁷⁹ *Anderson*, 820 F.2d at 677.

²⁸⁰ *See id.* ("It made this choice in the hopes that protection from modification would make home mortgages on affordable terms mores accessible to homeowners by assuring lenders that their expectations would not be frustrated.").

²⁸¹ Anthony J. Casey, *Bankruptcy's Endowment Effect*, 33 EMORY BANKR. DEV. J. 141–42 (2016).

²⁸² *Anderson*, 820 F.2d at 676.

²⁸³ *Id.*

§ 1322(b)(2).²⁸⁴ The court held that returning the debtors to their pre-default interest rate was a prohibited modification according to *Nobelman*, because doing so was a deviation from what was in the promissory note.²⁸⁵ The Fourth Circuit reasoned that the anti-modification provision in § 1322(b)(2) prohibited debtors from altering the mortgage lender's contractually agreed upon rights contained in the mortgage instrument.²⁸⁶

Next, the Fourth Circuit went on in the opinion to contradict its own analysis of *Nobelman*. The debtor's promissory note in *Anderson* not only provided that the creditor could increase the debtor's interest rate upon default, but also granted the creditors rights to accelerate the debtor's mortgage debt and commence foreclosure proceedings.²⁸⁷ The Fourth Circuit drew an arbitrary line between what contractual rights infringements of the creditor constitute a permissible cure and what infringements constitute a forbidden modification. Though the promissory note granted the creditor contractual rights to take either action against the defaulted debtor, the court held that a plan that provided for the deceleration of the mortgage debt constituted a cure, but a plan that provided for the restoration of the debtors to their pre-default interest rates constituted a forbidden modification.²⁸⁸

The Fourth Circuit also failed to address all the relevant arguments made by the Court in *Nobelman* regarding what rights § 1322(b)(2) protects from modification in a chapter 13 repayment plan.²⁸⁹ The Fourth Circuit quoted *Nobelman's* language stating that the protected rights are those that are “‘bargained for by the mortgagor and the mortgagee and enforceable under state law.’”²⁹⁰ In the subsequent paragraph, the Court in *Nobelman* stated:

This is not to say, of course, that the contractual rights of a home mortgage lender are unaffected by the mortgagor's [c]hapter 13 bankruptcy. The lender's power to enforce its rights—and, in particular, its right to foreclose on the property in the event of default—is checked by the Bankruptcy Code's automatic stay

²⁸⁴ *Anderson*, 820 F.3d at 673 (citing *Nobelman*, 508 U.S. at 329). The court went on to say, “courts have accordingly ‘interpreted the nomodification provision of § 1322(b)(2) to prohibit any fundamental alteration in a debtor's obligations, e.g., lowering monthly payments, converting a variable interest rate to a fixed interest rate, or extending the repayment term of a note.’” *Anderson*, 820 F.3d at 673 (quoting *In re Litton*, 330 F.3d at 643).

²⁸⁵ *Anderson*, 820 F.3d at 673.

²⁸⁶ *Id.* at 674.

²⁸⁷ *Id.* at 672.

²⁸⁸ *Id.* at 674–75.

²⁸⁹ *See id.* at 670.

²⁹⁰ *Anderson*, 820 F. 3d at 673.

provision In addition, § 1322(b)(5) permits the debtor to cure prepetition defaults on a home mortgage by paying off arrearages over the life of the plan “notwithstanding” the exception in § 1322(b)(2).²⁹¹

However, the Fourth Circuit in *Anderson* did not discuss this language in *Nobelman*, citing the automatic stay and curative provisions as permissible infringements on the creditor’s rights in its analysis.²⁹²

CONCLUSION

Filing chapter 13 bankruptcy is often a defaulted debtor’s only means of saving his home from foreclosure. Chapter 13 allows a homeowner debtor to construct a repayment plan that provides for the payment of his mortgage arrearages over the life of the plan, while maintaining the current payments as they become due. Debtors seeking to reinstate their defaulted mortgage rely on the power granted to them in § 1322(b)(3) and (5) of the Code to “cure” any defaults. This is best done by amending the anti-modification provision in § 1322(b)(2) to include that a cure of a default under paragraphs (3) and (5) of this subsection is not a modification of the creditor’s rights for purposes of this section.

Currently, the Code does not define “cure.” As a result of there being no clear definition of “cure,” it is left up to the courts to define the scope of curative powers. Until April 2016, before the Fourth Circuit’s opinion in *Anderson*, the circuits have interpreted the curative powers broadly, stating that a cure returns the debtor to the position that he was in prior to defaulting on his mortgage debt. In *Anderson*, however, the Fourth Circuit split from this interpretation, narrowing the scope of the curative powers to only decelerating the accelerated mortgage debt and allowing the defaulted debtor to continue making payments.

In *Anderson*, the Fourth Circuit held that restoring the debtors to their pre-default interest rate was a prohibited modification under § 1322(b)(2). The court arbitrarily drew a line between what constitutes a permissible cure under § 1322(b) and what constitutes a forbidden modification. The Fourth Circuit attempted to justify its position with an interpretation of the text of the statute, the legislative history surrounding § 1322(b)’s enactment, the policy implications, and the Supreme Court’s guidance on what “rights” are protected

²⁹¹ *Nobelman*, 508 U.S. at 330.

²⁹² *See Anderson*, 820 F. 3d at 673.

from modifications by § 1322(b)(2). However, the court failed to consider key points in its analysis to the detriment of the debtors.

The text of the statute, the legislative history, and public policy support a broad interpretation of a cure, unrestricted by the anti-modification provision in § 1322(b)(2). The plain meaning of the word “cure” supports an interpretation that would restore the debtor to his pre-default conditions. Also, a reading of the statute that gives effect to every word in the statute scrutinized and selected by the legislature demonstrates that when the curative and anti-modification provisions are in tension with each other, the anti-modification provision should not be read as a restriction on the debtor’s power to cure his default. This interpretation is also consistent with “cure” as it is used in other provisions of the Code. These interpretations of the text are supported by the series of amendments to the provisions during the legislative process, before it became law.

A broad interpretation of the debtor’s curative powers is also supported by its associated policy implications. Bankruptcy’s goal is to provide a fresh start for the overburdened debtor while simultaneously providing ratable recoveries to creditors. Therefore, the Code should not be interpreted in a way that advances the interests of the creditor to the detriment of the debtor, discouraging debtors from using bankruptcy as a tool of debt relief and hurting both debtor and creditor. Further, chapter 13 repayment plans are often a debtor’s only avenue for saving his home from foreclosure. Foreclosure is detrimental to the individual, the creditor, as well as the community. Therefore, the Code should be interpreted in a way that would avoid this detriment while benefiting everyone.

Congress should therefore amend the Code to include a provision that defines a cure as a debtor’s ability to nullify the consequences of default and restore the debtor to his pre-default conditions. Additionally, Congress should amend the anti-modification provision in § 1322(b)(2) to include that a cure of a default under paragraphs (3) and (5) of this subsection is not a modification of the creditor’s rights for purposes of this section.

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