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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	ID-12-1397-JuKiKu
)		
CLAYTON HOYT WAGES and)	Bk. No.	8:11-bk-40249-JDP
ANDREA S. WAGES,)		
)		
Debtors.)		
<hr/>			
CLAYTON HOYT WAGES; ANDREA S.)		
WAGES,)		
)		
Appellants,)		
v.)		
)		
J.P. MORGAN CHASE BANK, N.A.;)		
UNITED STATES TRUSTEE,)		
)		
Appellees.)		
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O P I N I O N

Argued and Submitted on November 22, 2013
by video conference

Filed - March 7, 2014

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Appearances: Brent Taylor Robinson, Esq., Robinson, Athone & Tribe, argued for appellants Clayton Hoyt Wages and Andrea S. Wages; Jon A. Stenquist, Esq., Moffatt Thomas Barrett Rock & Fields, Chtd., argued for appellee J.P. Morgan Chase Bank, N.A.

Before: JURY, KIRSCHER, and KURTZ, Bankruptcy Judges.

Opinion by Judge Jury
Dissent by Judge Kurtz

1 JURY, Bankruptcy Judge:
2

3 Debtors, Clayton Hoyt Wages and Andrea S. Wages, appeal
4 from the bankruptcy court's order denying confirmation of their
5 chapter 11¹ plan in which they sought to modify the terms of a
6 mortgage on their real property held by appellee-creditor, J.P.
7 Morgan Chase Bank, N.A. (Creditor).

8 At issue is whether the anti-modification provision under
9 § 1123(b)(5) applies to any loan secured only by real property
10 that the debtor uses as a principal residence or whether it is
11 limited to those claims secured by property used only as a
12 debtor's principal residence. The issue is one of statutory
13 construction and of first impression in this Circuit. We hold
14 that the anti-modification provision in § 1123(b)(5) applies to
15 any loan secured only by real property that the debtor uses as a
16 principal residence. Accordingly, we AFFIRM.

17 **I. FACTS²**

18 In 1999, debtors purchased property consisting of a house,
19 buildings and eleven acres near Heyburn, Idaho (property).
20 Initially, they used approximately four acres for raising feed
21 or crops, five acres for pasturing livestock and two acres for
22 residential purposes. At that time, debtors' employment
23

24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
26 and "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

27 ² Many of the undisputed underlying facts are taken from
28 the bankruptcy court's decision In re Wages, 479 B.R. 575
(Bankr. D. Idaho 2012).

1 consisted of raising roping stock on the property to rent out
2 for rodeos and roping events. About a year later, debtors
3 purchased a truck to haul their livestock, and income from use
4 of their truck became a component of their business income.

5 Between 2004 and 2006, debtors sold all their livestock to
6 raise money to stave off a foreclosure against the property.³
7 Since then, debtors have not used the property at all to
8 generate income from livestock. Debtors leased an additional
9 truck and began hauling commodities for others.

10 At some time, their former livestock/trucking business
11 became a trucking-only business. Mr. Wages drives one of the
12 trucks; Mrs. Wages secures permits, keeps the books for the
13 business, and handles other administrative chores from an office
14 in debtors' home. When they are not being used on the road,
15 debtors park the two trucks and trailers on the property.

16 On March 4, 2011, debtors filed their chapter 11 petition
17 to allow them to retain their residence. At the time, they were
18 using a portion of the property to operate the business,
19 including a small office in the house and enough adjoining space
20 to park two truck tractors and up to three trailers.

21 In May 2011, Creditor⁴ filed a \$127,418.31 secured claim in
22 debtors' bankruptcy case based on a mortgage debt. Under the
23 mortgage note's terms, debtors agreed to make monthly payments
24

25 ³ Apparently in an effort to stop the foreclosure process,
26 debtors filed for bankruptcy protection in 2005 and in 2006.
27 Both of those cases were dismissed.

28 ⁴ Creditor purchased the loans and other assets of
Washington Mutual Bank.

1 through April 1, 2029, at an annual interest rate of 7.5%. The
2 debt was secured by a mortgage on the property.

3 In November 2011, debtors filed a chapter 11 plan. Under
4 the plan, debtors proposed to modify the terms of Creditor's
5 mortgage by reducing the interest rate to 5.0% per year and
6 extending the payoff date to March 1, 2032. Creditor objected
7 to confirmation of the plan, arguing that it does not meet the
8 confirmation requirements of §§ 1129(a)(1) and 1123(b)(5).

9 On June 12, 2012, the bankruptcy court held an evidentiary
10 hearing on the confirmation of debtors' proposed plan. At the
11 end of the hearing, the court took the matter under advisement.

12 On July 24, 2012, the bankruptcy court entered its
13 Memorandum of Decision, sustaining Creditor's objection to
14 confirmation of debtors' proposed chapter 11 plan. On the same
15 day, the court entered the order denying confirmation of
16 debtors' chapter 11 plan. Debtors timely appealed and filed a
17 motion for leave to appeal with this court. On September 10,
18 2012, a motion's panel granted leave to appeal.

19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction over this proceeding
21 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction
22 under 28 U.S.C. § 158.

23 **III. ISSUES**

24 A. Whether the anti-modification provision under
25 § 1123(b)(5) applies to any loan secured only by real property
26 that the debtor uses as a principal residence; and

27 B. Whether the bankruptcy court erred when it used the
28 petition date as the date to determine whether the deed of trust

1 or mortgage could be modified.⁵

2 **IV. STANDARD OF REVIEW**

3 We review the bankruptcy court's statutory construction of
4 § 1123(b)(5) de novo. BAC Home Loans Serv., LP v. Abdelgadir
5 (In re Abdelgadir), 455 B.R. 896, 900 (9th Cir. BAP 2011).

6 **V. DISCUSSION**

7 **A. Amended Statement Of Issues Is Proper**

8 Appellants' Statement of Issues (SOI) on appeal filed on
9 December 5, 2012, listed only the first issue stated above, but
10 their opening brief contained both issues. Appellee argued that
11 the second issue was waived because it had not been included in
12 Appellants' SOI. In response, Appellants amended their SOI to
13 include the second issue and filed it with the bankruptcy court.
14 Appellee objected to the amended SOI again asserting that issues
15 not included in an SOI are waived under the holding in Marshack
16 v. Orange Commercial Credit (In re Nat'l Lumber & Supply, Inc.),
17 184 B.R. 74 (9th Cir. BAP 1995). A motions panel deferred
18 resolution of the waiver issue to the hearing on the merits.

19 We conclude that Appellants did not waive the second issue.
20 The rule in In re Nat'l Lumber was abrogated by the Ninth
21 Circuit's holding in Office of the U.S. Tr. v. Hayes (In re
22 Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 104 F.3d
23 1147, 1148 (9th Cir. 1997). There, the Ninth Circuit held that
24 arguments not specifically listed in an SOI are not waived. The
25 court reasoned that an SOI required by Rule 8006 "does not
26 impact upon issue statements required by the court of appeals.

27 _____
28 ⁵ The propriety of this second issue is addressed below.

1 The two are separate in nature and distinct in result.” Id.
2 The Ninth Circuit’s reasoning is equally applicable to appeals
3 in this court. Therefore, the second issue is not waived and
4 will be addressed on the merits. However, for purposes of flow,
5 since this second issue has impact on the first, the order will
6 be reversed in this opinion.

7 **B. The Bankruptcy Court Did Not Err When It Used the Petition
8 Date As the Date to Determine Whether The Deed Of Trust
9 Could Be Modified**

9 Debtors raise an issue that is now settled in this court.
10 In In re Abdelgadir, 455 B.R. at 902-903, this court held that
11 the petition date is the appropriate date for determining
12 whether the anti-modification provision of § 1123(b)(5) applies
13 to a secured claim. We later applied the same reasoning to the
14 identical wording in § 1322(b)(2) in Benafel v. One W. Bank, FSB
15 (In re Benafel), 461 B.R. 581 (9th Cir. BAP 2011). As we are
16 bound to follow our published decisions, Salomon N. Am. v.
17 Knupfer (In re Wind N’ Wave), 328 B.R. 176, 181 (9th Cir. BAP
18 2005), we use the petition date, rather than the loan
19 transaction date, for determining whether the anti-modification
20 provision of § 1123(b)(5) applies to Creditor’s claim.

21 **C. The Anti-Modification Provision Under §1123(b)(5) Applies
22 To Any Loan Secured Only By Real Property That The Debtor
23 Uses As A Principal Residence**

23 A bankruptcy court shall confirm a plan only if it complies
24 with the applicable provisions of chapter 11. See § 1129(a)(1).
25 One such applicable provision is § 1123(b)(5) which states:

- 26 (b) Subject to subsection (a) of this section, a plan
27 may—
28
(5) modify the rights of holders of secured
claims, other than a claim secured only by a

1 security interest in real property that is
2 the debtor's principal residence

3 This provision, known as the anti-modification provision,
4 prevents a debtor from modifying claims that are secured only by
5 a debtor's primary residence.⁶

6 Our task of resolving the parties' dispute over the meaning
7 of § 1123(b) (5) begins with the language of the statute itself.
8 United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241
9 (1989). Where the statute's language is plain, the inquiry ends
10 and our sole function is to enforce it according to its terms.

11 Id.

12 According to its plain language, the prohibition against
13 modification of the rights of the holders of secured claims in
14 § 1123(b) (5) has three distinct requirements: first, the
15 security interest must be in real property; second, the real
16 property must be the only security for the debt; and third, the
17 real property must be the debtor's principal residence. Here,
18 there is no dispute that the first two requirements have been
19 met. Creditor's claim is secured by debtors' real property and
20 debtors do not assert that anything other than the real property
21 secures the claim. Therefore, our focus is on the last
22 requirement - whether the real property is debtors' principal
23 residence. If it is, debtors may not modify the claim secured

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25 ⁶ The wording of § 1123(b) (5) is identical to the anti-
26 modification provision in chapter 13's § 1322(b) (2). Since
27 these sections contain the same statutory language, the panel
28 considers the decisions interpreting either provision as
persuasive in interpreting the other. See Benafel, 461 B.R. at
586-87.

1 by their property.

2 Debtors do not dispute that the house on the property was
3 being used as their principal residence on the petition date.
4 Under our plain meaning analysis, the inquiry should end there.
5 Nonetheless, relying on non-binding case law, debtors contend
6 there is an uncodified exception to § 1123(b)(5) that applies
7 when the property is used not only as the debtors' residence,
8 but also for a commercial use. In this case, debtors use part
9 of their residence for a home office to run their business and
10 they also park trucks and trailers that they use in the business
11 on the property.

12 Straying from the plain words of the statute, courts have
13 taken different approaches in resolving whether real property
14 should be considered a "debtor's principal residence" when the
15 property also has a commercial use. Parties are subject to
16 these different approaches and hence different results. Courts
17 disagree on what factors should be applied, how they should be
18 applied, and even what they mean.

19 One line of cases equates the term "real property" with
20 "debtor's principal residence." See Scarborough v. Chase
21 Manhattan Mortg. Corp. (In re Scarborough), 461 F.3d 406, 411
22 (3d Cir. 2006) (focusing on Congress' use of the word "is" in
23 the phrase "real property that is the debtor's principal
24 residence," and finding that, by using "is," Congress equated
25 "real property" and "principal residence," meaning that, for the
26 anti-modification provision to apply, the property "must be only
27 the debtor's principal residence" and have no other use
28 (emphasis in original)); Adebanjo v. Dime Sav. Bank of N.Y., FSB

1 (In re Adebajo), 165 B.R. 98, 103-04 (Bankr. D. Conn. 1994)
2 (same).

3 We disagree with the Third Circuit's parsing of the words
4 of the statute in Scarborough because it disregards the
5 bankruptcy code's definition of "debtor's principal residence"
6 in § 101(13A).⁷ The term "means a residential structure if used
7 as the principal residence by the debtor, including incidental
8 property, without regard to whether that structure is attached
9 to real property."⁸ The definition avoids defining "real
10 property" and also clarifies that whether a structure is a
11 principal residence is independent of whether it might be real
12 property. Simply put, the definition does not equate the term
13 "real property" with "debtor's principal residence." Therefore,
14 an analysis which equates the two is misplaced.

15 Another line of cases follows a totality of the
16 circumstances or case-by-case approach. Under this approach,
17 the intention of the parties is what matters most. See Brunson
18 v. Wendover Funding, Inc. (In re Brunson), 201 B.R. 351, 353

20 ⁷ Section 101(13A) was amended in December 2010 pursuant to
21 the Bankruptcy Technical Corrections Act of 2010. See Pub.L.
22 111-327, 124 Stat. 3557 (Dec. 22, 2010). The 2010 amendment
23 added the phrase "if used as the principal residence by the
24 debtor," and was intended to clarify "that [this] definition
25 pertains to a structure used by the debtor as a principal
26 residence." See Pawtucket Credit Union v. Picchi (In re
27 Picchi), 448 B.R. 870, 872 (1st Cir. BAP 2011) (citing 156 Cong.
28 Rec. H7158 (daily ed. Sept. 28, 2010)).

⁸ Section 101(13A)(B) states that the "debtor's principal
residence" includes an individual condominium or cooperative
unit, a mobile or manufactured home, or trailer if used as the
principal residence by the debtor. Neither party asserts that
this section applies to this matter.

1 (Bankr. W.D.N.Y. 1996) ("each case must turn on the intention of
2 the parties").⁹ Such intent may be discerned by examining the
3 underlying mortgage documents.

4 The Court must focus on the predominant character of
5 the transaction, and what the lender bargained to be
6 within the scope of its lien. If the transaction was
7 predominantly viewed by the parties as a loan
8 transaction to provide the borrower with a residence,
9 then the antimodification provision will apply. If,
10 on the other hand, the transaction was viewed by the
11 parties as predominantly a commercial loan
12 transaction, then stripdown will be available.

13 Id. at 354. See also In re Zaldivar, 441 B.R. 389 (Bankr. S.D.
14 Fla. 2011) ("character of the transaction" and substance of what
15 the lender bargained for are paramount).

16 We reject this approach as it is inconsistent with our
17 recent case law. We do not delve into the parties' intentions
18 on the loan transaction date when the appropriate time for
19 determining whether property is a debtor's principal residence
20 is the petition date. See Benafel, 461 B.R. at 585 and
21 Abdelgadir, 455 B.R. at 898; compare Lievsay v. W. Fin. Sav.
22 Bank, F.S.B. (In re Lievsay), 199 B.R. 705, 709 (9th Cir. BAP
23 1996) (modification under § 1123(b)(5) was denied when debtor
24 failed to show that a home office added significant value to his
25 property, or that the bank relied on the additional security
26 offered by his home office in making the loan secured by the
27 property).

28 Finally, there is the bright-line approach taken by the

⁹ The Brunson court also developed a long list of factors
to use in case-by-case determinations of whether property is
commercial or the debtor's principal residence. 201 B.R. at
353.

1 bankruptcy court in In re Macaluso, 254 B.R. 799, 800 (Bankr.
2 W.D.N.Y. 2000). The court held that the anti-modification
3 exception in § 1322(b)(2) applies to any property that is used
4 as the debtor's principal residence, notwithstanding the fact
5 that the debtor's property in that case included a second
6 residential unit and a store.¹⁰ We conclude that the bright-line
7 approach is most consistent with the plain language of
8 § 1123(b)(5).

9 As noted by the bankruptcy court, the plain language of
10 § 1123(b)(5) does not protect from modification "claim[s]
11 secured only by a security interest in real property that is
12 exclusively the debtor's principal residence," or "claim[s]
13 secured only by a security interest in real property that is the
14 debtor's principal residence, unless the debtor also uses the
15 property for significant commercial purposes." Wages, 479 B.R.
16 at 581 (emphasis in original). We agree with the bankruptcy
17 court's assessment that there is nothing in the bankruptcy code
18 indicating that, once a commercial use of a property becomes
19 sufficiently "significant," that property ceases being the
20 debtor's principal residence – either a property is a debtor's
21 principal residence or it is not.

22 The adoption of an objective rule eliminates line drawing
23 and promotes certainty in the home mortgage lending market.
24 Wages, 479 B.R. at 582 (citing In re Bulson, 327 B.R. 830, 842

25
26 ¹⁰ Macaluso employed a simple two part test compared to our
27 three prong analysis; the claims excepted from modification
28 under § 1322(b)(2) are those (1) secured only by a parcel of
real estate which (2) the debtor uses for his principal
residence. 254 B.R. at 800.

1 (Bankr. W.D. Mich. 2005)). However, the downside is that a
2 bright line rule may sometimes lead to harsh results.
3 Nonetheless, "the potential for harsh results can not be used as
4 an excuse by the Court to torture the Code's language to reach a
5 different rule in this case. Even if the Court does not agree
6 with all of the possible outcomes produced by the statutory
7 language, it is Congress, not this Court, that must repair any
8 problems with the Code." Wages, 479 B.R. at 583 (citing Lamie
9 v. U.S. Tr., 540 U.S. 526, 538, 542 (2004) ("Our unwillingness
10 to soften the import of Congress' chosen words even if we
11 believe the words lead to a harsh outcome is longstanding. It
12 results from deference to the supremacy of the Legislature, as
13 well as recognition that Congressmen typically vote on the
14 language of a bill. . . . If Congress enacted into law
15 something different from what it intended, then it should amend
16 the statute to conform to its intent. It is beyond our province
17 to rescue Congress from its drafting errors, and to provide for
18 what we might think . . . is the preferred result.") (internal
19 quotation marks and citations omitted)).

20 Finally, in support of their argument, debtors contend that
21 the bankruptcy court's bright line construction of § 1123(b)(5)
22 "seems to eliminate the use of the word 'only'." This textual
23 argument is unpersuasive. Essentially debtors add a second
24 "only" into the statutory language to further limit the
25 application of § 1123(b)(5).

26 Although the statute uses "only" to require the
27 secured creditor to have no other security for the
28 debt, the Debtors construe the statute also to require
that the residential structure serve only one
function, that of being their principal

1 residence. . . . The Debtor's argument finds no
2 support in the plain language of the Code. There
3 simply is no second "only" in the statutory language
4 of § 1123(b) (5), nor any way to read the one usage of
that term to limit the use of the property rather than
limiting the extent of the collateral for the secured
debt.

5 In re Schayes, 483 B.R. 209, 215 (Bankr. D. Ariz. 2012).

6 Because the language in § 1123(b) (5) is plain and
7 unambiguous, we have no need to look at legislative history or a
8 policy-driven analysis. We hold that the anti-modification
9 exception applies to any loan secured only by real property that
10 the debtor uses as a principal residence property, even if that
11 real property also serves additional purposes.

12 **VI. CONCLUSION**

13 For all these reasons, we AFFIRM.

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18 Dissent begins on next page.
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1 KURTZ, Bankruptcy Judge, Dissenting:

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3 I respectfully dissent. I disagree with the majority's
4 interpretation of the so-called plain meaning of the statute.
5 In my view, the majority takes the statutory phrase "claim
6 secured only by a security interest in real property that **is** the
7 debtor's principal residence" and recasts it as if the phrase
8 actually read "claim secured only by a security interest in real
9 property that **includes** the debtor's principal residence."

10 In lieu of the majority's analysis, I find persuasive and
11 would follow the reasoning and holding of Scarborough v. Chase
12 Manhattan Mortg. Corp. (In re Scarborough), 461 F.3d 406, 410-13
13 (3d Cir. 2006). In Scarborough, the Third Circuit Court of
14 Appeals held that the anti-modification provisions in
15 § 1322(b)(2) and § 1123(b)(5) do not apply to mortgaged real
16 property on which the debtor principally resides if the debtor
17 uses another part of the mortgaged real property to generate
18 income. Id.

19 Like the majority decision, supra, Scarborough considered
20 the statutory language to be unambiguous. However, Scarborough
21 reached a much different conclusion on the plain meaning of the
22 statute. Whereas the majority here has construed the anti-
23 modification provisions to apply to any mortgaged real property
24 the debtor uses as his or her principal residence, Scarborough
25 effectively construed the anti-modification provisions to apply
26 only to mortgaged real property the debtor uses exclusively as
27 his or her principal residence. That two appellate courts
28 could, after careful analysis, come to such divergent

1 conclusions on the plain meaning of the statute tends to support
2 the notion that the statute actually is ambiguous. In any
3 event, Scarborough points out that the legislative history
4 supports its construction of the statute. Id. at 413. The
5 majority decision herein makes no such claim.

6 The majority considered Scarborough but ultimately rejected
7 the Third Circuit's analysis. According to the majority,
8 Scarborough's construction of the statute conflicts with the
9 statutory definition of "debtor's principal residence" contained
10 in § 101(13A). The majority asserts that a conflict exists
11 because Scarborough's construction of § 1322(b)(2) and
12 § 1123(b)(5) equates the "debtor's principal residence" solely
13 with real property whereas the statutory definition of "debtor's
14 principal residence" may include personal property. But the
15 majority does not explain the practical significance of this so-
16 called conflict, nor do I perceive any. More importantly, to
17 the extent there is any tension between § 1322(b)(2) and
18 § 1123(b)(5) on the one hand and § 101(13A) on the other hand,
19 Congress created this tension - not Scarborough. Put another
20 way, Congress limited the scope of the anti-modification
21 provisions to real property by including in both provisions the
22 term "real property" but chose not to similarly limit the
23 definition of "debtor's principal residence." Thus, the
24 difference between the anti-modification provisions and the
25 statutory definition is a direct result of the different
26 language Congress chose to use in each instance. That
27 Scarborough's construction gives meaning to the different
28 language Congress used is not a persuasive basis for rejecting

1 Scarborough.

2 For the reasons set forth above, I respectfully dissent.¹

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21 _____
22 ¹ I also prefer Scarborough's ruling that the relevant date
23 for considering how the debtor uses the property is the loan
24 transaction date rather than the petition date. Id. at 412.
25 Nonetheless, I do not base my dissent on this ground. Rather, I
26 agree with the majority that our prior decisions in Benafel v.
27 One W. Bank, FSB (In re Benafel), 461 B.R. 581 (9th Cir. BAP
28 2011), and BAC Home Loans Serv., LP v. Abdelgadir
(In re Abdelgadir), 455 B.R. 896 (9th Cir. BAP 2011), are
controlling on this point and answer this question in favor of
the petition date. Even so, regardless of which date is used,
the result in this case would be the same because the mortgaged
real property was used for income generating purposes on both
the loan transaction date and the petition date.