A CONTEMPORARY APPROACH TO RIDE-THROUGH, *IPSO FACTO* CLAUSES, AND THE NONDEFAULTING DEBTOR

Lawrence Ponoroff*

SOONER OR LATER, EVERYTHING OLD IS NEW AGAIN**

Prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, one of the most vexing and controversial questions in the consumer bankruptcy arena was whether a debtor who was current on her payments to a secured lender could retain the collateral both during and after the bankruptcy case by continuing to make the scheduled payments on the loan and otherwise avoid any act or omission that might pose a threat to the value or security of the collateral. No fewer than nine of the eleven circuit courts of appeals addressed this question and split as evenly as nine courts possibly could (5-4). The practice is known as "ride-through" and the 2005 Act, itself a screed against perceived debtor abuse of the bankruptcy law, set out to resolve the matter by eliminating the practice. However, as was true in connection with many other areas that the legislation addressed, Congress made a hash of it. The result has been nearly 15 years of continued litigation and even more confusion, unpredictably, and inconsistency than pervaded prior to the 2005 Act as courts have struggled to make sense of the poorly and illogically drafted amendments. The current situation compromises the integrity of the system and exposes debtors and creditors alike to costly uncertainty. Recognizing that the law governing individual bankruptcy needs to be tailored to have predictable and sensible consequences, this Article, after considering the myriad permutations that ride-through cases have taken since 2005, maps out a solution that it is contended takes into account of the legitimate interests of creditors as well as debtors. It also measures the consonance of the proposed approach for court-protected ride-through within the framework of the larger normative goals of the consumer bankruptcy system.

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* Professor of Law & Dean Emeritus, Michigan State University College of Law.
** STEPHEN KING, THE COLORADO KID 45 (2005).

INTRODUCTION

On March 8, 2019, Judge Mark X. Mullin, a United States Bankruptcy Judge for the Northern District of Texas, rendered an opinion in a fairly run-of-the-mill consumer bankruptcy case that draws attention to an issue that could have significant consequences for consumer bankruptcy writ large. The opinion is *In re Seiffert*,[1] involving the joint chapter 7 case of Leroy and Rosaleta Seiffert. The Seifferts' bankruptcy petition was filed in August of 2018, and, as of that time, they were still indebted to 21st Mortgage Company under the terms of a 2005 retail installment credit contract for the purchase of their mobile home for $43,200, which was secured by a properly perfected purchase money security interest in the mobile home.[2] As of the date of filing of the petition, and at all times thereafter, the Seifferts were current on this indebtedness and otherwise in compliance with all other contractual obligations.[3]

In accordance with the requirements of § 521(a)(2)(A) of the Bankruptcy Code,[4] the debtors initially filed a statement indicating their intention to retain

[1] *In re* Seiffert, No. 18-43114, 2019 WL 1284299 (Bankr. N.D. Tex. Mar. 8, 2019).

[2] *Id.* at *1. A mobile home is regarded as a "good," including a fixture, that may be encumbered in accordance with Article 9 of the Uniform Commercial Code. *See* U.C.C. §§ 9-102(a)(53), 9-311(a)(2) (AM. L. INST. & UNIF. L. COMM'N 2010). If it becomes a fixture, it may also be encumbered by a real property mortgage, in which case priority is sorted out under U.C.C. § 9-334(e)(4) (AM. L. INST. & UNIF. L. COMM'N 2010).

[3] *In re Seiffert*, 2019 WL 1284299, at *1–2.

[4] 11 U.S.C. § 521(a)(2). References in this Article to the "Code" or the "Bankruptcy Code" are to the current law of bankruptcy, which is found in Title 11 of the United States Code. 11 U.S.C. § 101 (originally enacted as Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92

the mobile home by entering into a reaffirmation agreement with 21st Mortgage on the underlying debt.[5] Subsequently, on advice of their lawyer, the Seifferts decided not to seek reaffirmation of the debt, and filed an amendment to their earlier § 521(a)(2) statement reflecting their decision now to "surrender" the property.[6] In fact, it seems reasonable to assume that the debtors had no intention of actually relinquishing their mobile home. Instead, it is quite likely that their plan was to "ride-through" bankruptcy and retain possession of their property,[7] effectively turning the 21st Century Mortgage debt into a nonrecourse obligation.[8] Turns out the Seifferts had a pretty fair bankruptcy lawyer.

Sniffing out the plan, before the Seiffert's discharge could be entered, 21st Mortgage filed two motions with the bankruptcy court.[9] The first sought to compel compliance with the amended statement of intention, i.e., require the Seifferts to hand over the mobile home.[10] The second motion requested a delay in entry of the Seifferts' discharge until such time as 21st Mortgage had, in fact, taken possession of the mobile home.[11] The March 8 opinion was Judge Mullin's ruling on these two motions.

After careful analysis of the multiple statutory provisions at issue, the court denied both motions.[12] In so doing, the court provided yet more fuel to the fire over whether "ride-through" survived enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "2005 Act").[13] Ride-through is the term used for a technique by which debtors who are not in default on a secured debt might retain the collateral both during and after bankruptcy, so long as they remain current on their installment payments and commit no other acts of default, save for the filing of the bankruptcy case itself.[14]

Stat. 2549). It was enacted on November 6, 1978, as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, (referred to in text as the "1978 Act") and governs all cases filed on or after October 1, 1979. *Id*.

[5] *In re Seiffert*, 2019 WL 1284299, at *1.

[6] *Id*. at *2.

[7] *See infra* note 14 and accompanying text.

[8] 21st Century Mortgage's *in personam* claim against the Seifferts would be cut off by the bankruptcy discharge. *See* 11 U.S.C. §§ 524(a), 727(a).

[9] *In re Seiffert*, 2019 WL 1284299, at *1–2.

[10] *Id*. at *3.

[11] *Id*.

[12] *Id*. at *7.

[13] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 201, 119 Stat. 23, 42 (codified as amended in scattered sections of 11 U.S.C.) (referred to in text as the "BAPCPA" or the "2005 Act"). Most of the provisions of BAPCPA became effective for cases filed on or after October 17, 2005. *See id*. § 1501.

[14] Ride-through was predicated on a construction of former § 521(2)(A) that regarded it as procedural mechanism for giving notice to secured creditors if the debtor intended to surrender the property, reaffirm the debt, or redeem the property, but not as creating a substantive obligation limiting the debtor's options to those three alternatives, including the option to remain current on payments and other obligations, effectively riding through bankruptcy with court protection. *See In re* Belanger, 118 B.R. 368, 370–72 (Bankr. E.D.N.C.), *aff'd*, Home Owners

The answer to the question of whether ride-through still exists has significant real-life consequences for the hundreds of thousands of individual debtors who file for chapter 7 relief year-in-and-year-out,[15] and that impact, in turn, has significant implications for the effectiveness of bankruptcy fresh start policy.[16] Concomitantly, the answer also has profound ramifications for the consumer bankruptcy system generally, a system that has labored without much success to find its normative epicenter and strike the optimum balance between debtor protection and creditor rights. This Article answers the question of whether ride-through remains alive with a categorical and unequivocal "yes" and "no." Of hopefully greater utility, it also sets out the reasons why the answer is so ambivalent and then proposes a solution that, it is submitted, represents a superior outcome than that produced by the current state of affairs, both from a micro and a macro perspective. That is to say, a more desirable result from the vantage point of systemic efficiency as well as debtor rehabilitation.

To this end, Part I of this Article provides a high-level overview of the waxing and waning of consumer bankruptcy policy from enactment of the Code to present. Next, Part II directs attention specifically on the ride-through controversy that emerged under the Code prior to the enactment of BAPCPA. Part III examines the serpentine and, frankly, clumsy manner in which Congress set out to resolve the squabbling over ride-through in BAPCPA by seemingly eliminating it as an option. Part IV then reviews the post-BAPCPA jurisprudence about ride-through, including the recent *Seiffert* decision, revealing how profoundly Congress failed if its objective was to bury ride-through for good. Mindful of the damage to the system that the current jumbled state of affairs causes, Part V examines some solutions that have already been proposed in the literature and, concluding that they fall short of the mark, offers an alternative approach for remediating that situation. Finally, Part VI takes a step back and considers the implications of that solution from the perspective of the larger goals of the consumer bankruptcy system.

I. BACKGROUND

Although historically a creditor's remedy,[17] over the past 120-plus years the consumer bankruptcy system has wobbled nervously between the ultimately

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Funding Corp. of Am. v. Belanger, 128 B.R. 142, 145 (E.D.N.C. 1990), *aff'd*, *In re* Belanger, 962 F.2d 345, 349 (4th Cir. 1992); *see also infra* note 43 and accompanying text.

[15] According to statistics maintained by the Administrative Office of the United States Court, in calendar year 2018, 475,575 chapter 7 cases were filed. *Table F-2. U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2018*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2018.pdf [https://perma.cc/YD9M-TKEU]. The overwhelming number of which would have been individual consumer cases. *See id.*

[16] *See infra* Part VI.

[17] Indeed, voluntary bankruptcy and the concept of "discharge" are relatively recent features of the bankruptcy law, both not becoming part of the legal landscape until the Bankruptcy Act

irreconcilable goals of relief for overburdened debtors, on the one hand, and the realization of creditors' rights collectively to maximize payment of their claims, both contractual and non-consensual, on the other.[18] Nonetheless, in an effort to provide at least a semblance of equilibrium, the past several decades have witnessed numerous attempts to offer up an overarching theoretical justification for the consumer bankruptcy system.[19] No single explanation, however, has emerged

of 1841, ch. 9, 5 Stat. 440, 443 (1841) (repealed 1843). *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1395 n.5 (1985) (recognizing "[t]he comparative newness of the fresh-start policy in bankruptcy law"); John C. McCoid, II, *Discharge: The Most Important Development in Bankruptcy History*, 70 AM. BANKR. L.J. 163, 163–65 (1996); Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law: A Comparison of the Recent Bankruptcy Acts of Italy and the United States*, 31 MINN. L. REV. 401, 406–08 (1947).

[18] The bankruptcy law is intended to serve simultaneously as a more efficient and effective debt collection device for creditors as well as a mechanism to provide relief to the financially distressed debtor. *See* Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 225 (1918) ("All bankruptcy law . . . no matter when or where devised and enacted, has at least two general objects in view. . . . [It] seeks to protect the creditors, first, from one another and, secondly, from their debtor. A third object, the protection of the honest debtor from his creditors, by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law."); Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 VA. L. REV. 155, 155, 162–63 (1989) (examining the distributional effects of bankruptcy against the traditional value maximization model imagined under the *ex ante* bargain among creditors).

[19] *See, e.g.*, Barry Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. LEGAL STUD. 585, 587 (2000) (proposing that "consumer bankruptcy is best justified as partial wage insurance"); John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 397, 399 (2000) (contending that the bankruptcy discharge is essential to fostering entrepreneurship); KAREN GROSS, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 91–97 (1997) (emphasizing forgiveness as the explanation for the bankruptcy discharge); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 62 (1986) (reviewing the literature up to that time, and noting that in the evolution of the fresh start, there has been "a continuing reliance on the notion that relief measures served the public welfare by restoring the overburdened debtor to economic productivity"); Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1048 (1987) (suggesting that discharge is necessary to restore the debtor to a participation in an open credit economy); Richard M. Hynes, *Why (Consumer) Bankruptcy?*, 56 ALA. L. REV. 121, 124 (2004) ("[B]y amending non-bankruptcy collections laws, society could largely replicate the fresh start offered by the bankruptcy discharge without any formal proceeding at all."); Jackson, *supra* note 17, at 1403, 1406, 1410, 1414–15, 1417–18 (viewing financial failure in the market as stemming from inherent volitional disabilities or cognitive biases of individuals, which only a "paternalistic," "socially mandated" rule—such as a nonwaivable discharge—can solve by giving creditors the incentive to police debtors' credit decisions); Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 612 (2018) (proposing automatic discharge of debts); Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 595 (2010) (proposing a "consumer utility" theory of consumer bankruptcy); Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 90 (1990) (reviewing the literature and concluding that the

as predominant, although there is at least no longer any serious opposition to the idea that fresh start, an abstraction that has no analog under state collection law,[20] is a necessary component of bankruptcy policy.[21] However, that feature of the bankruptcy system is in a ceaseless dogfight for hegemony with competing (and sometimes even conflicting) policies. Thus, while the ideation of a fresh start for individual debtors may be beyond cavil, what the debtor brings with her to this fresh start, in terms of property, rights, and entitlements, remains the subject of some serious disagreement.[22]

On the legislative front, recent decades have seen a significant contraction in the circumstances under which chapter 7 relief may be sought, and by whom.[23] As originally enacted, the Bankruptcy Reform Act of 1978 had signaled a major

discharge is the inducement necessary to secure the debtor's cooperation in locating, collecting, and liquidating assets).

[20] In another context, I described the fresh start as "neither a formal legal status nor a cognizable right in the usual sense of the terms. Instead, it represents an aspiration of the bankruptcy system. It is the condition that is intended to result from application of specific bankruptcy rules in particular cases." Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 TUL. L. REV. 2515, 2519, 2519 n.10 (1996).

[21] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (acknowledging that "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' " (quoting Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))). The Court was quick to add, however, that this opportunity for an unencumbered new beginning was reserved for " 'the honest but unfortunate debtor.' " *Id.* at 287 (quoting *Loc. Loan Co.*, 292 U.S. at 244); *see also* Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68 (2006) ("The principal theory of consumer bankruptcy in America is that it provides a 'fresh start' to debtors." quoting Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1047, 1059 (1987))); Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 1050 (2004) (observing that, "Clearly no consensus exists as to the justification for the bankruptcy discharge and the debtor's corresponding fresh start. Theories abound—some are competing, some are complementary. Interestingly, there does seem to be agreement approaching consensus among many (but not all) academics that the discharge generally is justified, that current law has it about right . . . .").

[22] This question plays itself out on a variety of fronts beyond loan modification, most notably including in connection with exemption policy under § 522 and dischargeability exceptions under § 523. 11 U.S.C. §§ 522–523; *see* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 116–17 (2017) (examining the tension between the exceptions to discharge and fresh start policy); Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 357, 360–61 (2014) (urging adoption of uniform federal exemptions so as to promote the bankruptcy policies of equity, equality, and rehabilitation).

[23] *See* Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1301–03 (2006) (discussing the credit industry's efforts to nullify the 1978 Act's "perceived liberalization of personal bankruptcy"); *see also* Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511, 512 (2009) (discussing the dramatic expansion of control exercised by secured creditors in chapter 11 over the preceding decade).

shift away from the state law bargain and the state law of creditors remedies.[24] While hardly revolutionary,[25] the 1978 Act represented, particularly when viewed in light of subsequent amendments, the high-water mark in terms of the law's solicitude for debtors and debtor relief.[26] This change in emphasis did not go unnoticed by commentators or creditors' groups, and the 1978 Act rather quickly began to take flak for what some perceived as the new bankruptcy law's disdain for the contractual rights of creditors, and, in particular, secured creditors.[27]

The perceived consumer-friendly provisions of the 1978 Act were also pilloried for causing a sharp spike in bankruptcy filings.[28] Critics of the 1978 Act

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[24] Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198, 1203–04 (9th Cir. 2005) ("Bankruptcy law accomplishes equitable distribution through a distinctive form of collective proceeding. This is a unique contribution of the Bankruptcy Code that makes bankruptcy different from a collection of actions by individual creditors. In a world of individual actions, each creditor knows that if he waits too long, the debtor's assets will have been exhausted by the demands of the quicker creditors and he will recover nothing. . . . Federal bankruptcy law seeks to avoid this scenario by 'creat[ing] a whole system under federal control which is designed to bring together and adjust all of the rights and duties of creditors and embarrassed debtors alike.' " (quoting MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 914 (9th Cir. 1996) (alteration in original))).

[25] Professor Howard has pointed out that

> The history of bankruptcy law shows a steady alteration of the rights of secured creditors, undertaken for the purposes of achieving equality of distribution and assuring the debtor a fresh start. No revolution occurred with passage of the Bankruptcy Code (the Code) in 1978; rather, the Code continued a progression that began in 1898.

Margaret Howard, *Dewsnupping the Bankruptcy Code*, 1 J. BANKR. L. & PRAC. 513, 527 (1992) (footnotes omitted); *see also* Frank R. Kennedy, *Statutory Liens in Bankruptcy*, 39 MINN. L. REV. 697, 698–702 (1955) (noting that, well before enactment of the 1978 Act, American bankruptcy law has moved in the direction of increasing distributions to unsecured creditors by decreasing the portions that go to secured and priority claimants).

[26] *See* Hallinan, *supra* note 19, at 52 ("In the context of consumer bankruptcies, the Code is most notable for its significant expansion of the protection afforded to bankrupt debtors."); David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 328 (1999) (pointing out that "[c]ritics of the current consumer bankruptcy system argue that the Bankruptcy Reform Act of 1978 made filing both easier and more attractive"); *see also infra* note 29.

[27] In the first sentence in his article, *The New Bankruptcy Code: The Death of Security Interest?*, Professor Peter F. Coogan wryly commented,

> When I first heard of Grant Gilmore's *The Death of Contract* my initial expectation was that he would point out the extent to which the exercise by Congress of its power to enact law on the subject of bankruptcy already had, and through the then current proposals for a new Bankruptcy Act probably would, cut down or change the effect that the parties thought they could provide for under prevailing state contract law.

Peter F. Coogan, *The New Bankruptcy Code: The Death of Security Interest?*, 14 GA. L. REV. 153, 153 (1980) (footnotes omitted).

[28] *See* Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle over Problem Definition*, 33 U. MEM. L. REV. 509, 515 (2003) (identifying the increased trend of consumers filing for bankruptcy protection as igniting the debate over the need to amend the Bankruptcy Code); Jeffrey W. Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 WM. & MARY L. REV. 91, 163 (1985)

argued that the liberal provisions of the new law, coupled with the reduced costs associated with bankruptcy, made filing easier, less stigmatizing and thus more attractive to the average prospective debtor than had been the case under prior law.[29] Lenders also complained that so-called "can pay" debtors were receiving chapter 7 discharges without making any effort or attempt to satisfy creditor claims against them.[30]

What the disparagers of the 1978 Act overlooked (or, perhaps in some cases chose to ignore) was that, in its contemporary form, bankruptcy is intended to be a mechanism for nonfulfillment of most state law contract and tort obligations without consequence; or at least without being subjected to the liability that would normally attend nonfulfillment of such duties.[31] A sophisticated, credit-

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(observing that many of the amendments relating to consumer bankruptcy in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (the "1984 Act") reflected "consumer credit industry's [successful] efforts to persuade Congress that the Bankruptcy Reform Act of 1978 went too far in protecting the interest of debtors at the expense of creditors"). Critics also argued that the 1978 had removed the stigma that previously had been a restraint on bankruptcy filing and that this, too, ignited a surge in consumer filings. *See, e.g.*, Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEVS. J. 481, 485–88 (2006) (associating the rise in bankruptcy filings with the decline in stigma); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 177 BYU L. REV. 177, 215–21 (1999) (discussing the decline in shame and stigma associated with a bankruptcy filing). *But see* Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 233–47 (2006) (contesting the argument that change in stigma accounted in any meaningful way for the higher rate of bankruptcy filings over the past two decades).

[29] For example, according to Vern McKinley, writing for a Cato Institute publication, "[a] clear culprit [of] the rise in bankruptcies is the Bankruptcy Reform Act of 1978, [that] moved [the Code] in a decidedly pro-debtor direction" as part of the consumer movement of that period. Vern McKinley, *Blame for Ballooning Bankruptcies*, CATO INST. (Mar. 9, 1998), https://www.cato.org/publications/commentary/blame-ballooning-bankruptcies [https://perma.cc/4MN8-ANE3]. *But see* Moss & Johnson, *supra* note 26, at 330–31 (offering several explanations debunking the belief that the explosion in consumer filings was attributable to the 1978 Act, including shifts in the volume and distribution of consumer credit); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1467 (2005) (noting that until the 1978 Act bankruptcy filings used to rise and fall with underlying economic conditions, but thereafter escalated dramatically largely uncorrelated with prosperity or downturn).

[30] *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 502–04 (2005) (discussing studies commissioned by the credit industry purporting to demonstrate that a significant percentage of debtors that chose chapter 7 could have paid a substantial portion of their debts, and the skeptical reaction to them); *see also* Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 231 (2018) (pointing out that the allegation that can-pay debtors were taking advantage of chapter 7 was "contradicted by decades of robust empirical evidence"); Elizabeth Warren, *A Principled Approach to Consumer Bankruptcy*, 71 AM. BANKR. L.J. 483, 493 (1997) (pointing up that the empirical evidence suggested that, overwhelmingly, bankruptcy was being used by American families facing grave financial circumstances).

[31] In return for this advantage, debtors subject themselves to a court-supervised procedure whereby their assets are marshalled for liquidation in an orderly fashion designed to maximize overall value for creditors and then distribute that value equitably, in contrast with the "winner

based market economy requires some mechanism to deal with financial catastrophe.[32] Unless as a society we are prepared to subsidize the costs of financial failure from the public fisc, achievement of enhanced debtor protection necessarily has to come largely at the expense of the debtor's creditors.[33] Moreover, it has been argued that allocation of bankruptcy losses to the credit industry has the added benefit of incentivizing professional creditors to exercise more caution and restraint before engaging in high-risk loans.[34] In any case, the 1978 Act's pursuit of a more robust fresh start for debtors, greater creditor equality, and enhanced prospects for debtor survival through reorganization, all pressed for less deference to state law distributional rules and creditor remedies than theretofore had been the case.[35]

Consistent with Newton's third law of motion,[36] ever since promulgation of the 1978 Act the focus of most so-called bankruptcy reform legislation has been to halt, and then begin to reverse, the swing of the pendulum in favor of debtor relief and ratable distribution among creditors.[37] The culmination of this trend

take all" mode of state collection law and remedies. *See* CHARLES JORDAN TABB, LAW OF BANKRUPTCY 4–6 (4th ed. 2016) (comparing state law collection remedies and bankruptcy); *see also supra* note 24 and accompanying text.

[32] The notion is best captured in former astronaut and former CEO of the bankrupt Eastern Airlines Frank Borman's quip that, "Capitalism without bankruptcy is like Christianity without hell." FORBESQUOTES, https://www.forbes.com/quotes/3057 [https://perma.cc/2URT-KTTV].

[33] *See* Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 361 (1993) (discussing as one of the normative functions of the bankruptcy law a desire to constrain externalization of losses to parties not dealing with the debtor firm). Of course, the creditor response is that the impact of internalization of cost is higher costs of credit *ex ante*. *See* Anthony Sexton, *Indubitably Uncertain:* Philadelphia Newspapers *and the Role of Valuation Uncertainty in Attempted Cramdown of All-Equity Plans*, 28 EMORY BANKR. DEVS. J. 55, 68 (2011). The extent to which that is true is the subject of some debate. *See infra* notes 274–75.

[34] *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 235–37 (1986) (postulating that the discharge is necessary to protect debtors as a class from extending themselves financially beyond any realistic ability to repay by creating an incentive for creditors to make the judgment—a judgment he contends creditors are better equipped to make—of whether any particular credit transaction is one that the debtor is suited financially to undertake).

[35] *E.g.*, Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 781–88 (1987).

[36] "For every action, there is an equal and opposite [reaction]." *See* Glenn Rsch. Ctr., *Newton's Laws of Motion*, NAT'L AERONAUTICS & SPACE ADMIN., https://www.grc.nasa.gov/www/k-12/airplane/newton.html [https://perma.cc/UPH5-AEZC].

[37] The process was likely aided by the fact that the one major attempt to create a unified theory of bankruptcy, grounded in the law and economics tradition, emphasized a contractual approach to the subject. *See* JACKSON, *supra* note 34, at 8–20 (setting forth basic principles of bankruptcy law and presenting bankruptcy as a system of contracts between creditors); Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 831–33 (1987) (advocating for a view of bankruptcy that would preserve in bankruptcy proceedings the rights and relations creditors have outside of bankruptcy law). Jackson's creditors' bargain theory posits that bankruptcy law should try to emulate the bargain that creditors would have made themselves had circumstances permitted. This model was

was BAPCPA, illustrating the related adage that when the pendulum does swing back, rarely does it stop at dead center. BAPCPA was widely (and not without cause) criticized as having been bought and paid for by the consumer credit industry.[38] While this may be a bit of an overstatement, and despite the "consumer protection" language in its title, no one would honestly claim that BAPCPA was anything other than a pro-creditors' bill.[39] Moreover, by almost every account, it was "confusing, overlapping, and sometimes self-contradictory" and "introduce[d] new and undefined terms that resemble, but are different from,

appealing to the credit industry. *See supra* notes 26–27 and accompanying text. It is worth noting that 2019 finally saw the enactment of sensible, nonpartisan bankruptcy legislation. *E.g.*, Family Farmer Relief Act of 2019, Pub. L. No. 116-51, 133 Stat. 1075; Honoring Veterans in Extreme Need Act of 2019, Pub. L. No. 116-52, 133 Stat. 1076; Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079. This offers some hope that future bankruptcy reform legislation, including the proposal made in this treatment, might proceed in a more balanced and less special-interest oriented fashion.

[38] *See, e.g.*, 151 CONG. REC. S2216 (daily ed. Mar. 8, 2005) (statement of Sen. Dick Durbin); 151 CONG. REC. H2084 (daily ed. Apr. 14, 2005) (statement of Rep. Jim McDermott); *see also* Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 193 n.6, 195–202 (1999) (suggesting that the legislation that ultimately was enacted as BAPCPA was reputed to originally have been written by one law firm retained by the credit industry, Morrison & Foerster, and noting that experts' efforts to fix its many flaws were thereafter largely resisted by credit industry for fear it might invite closer scrutiny and a reworking of the amendments most dear to the industry). In fairness, if one looks hard enough, one does find some scraps of consumer protection, such as the additional protection for retirement assets in §§ 522(b)(3)(C) and 541(b)(7), greater controls over reaffirmations in § 524(k), expansion of the discharge injunction in § 524(i) to include the proper crediting of payments, and elevated protection in several areas for domestic support obligations, such as elevating the priority of such claims in §§ 507(a)(1)(A) and (B). Of course, in the last example the parties who have to make good on those domestic obligations are "consumers," too, and they likely do not regard most of these provisions as providing them with greater relief. Also, at least one skeptic (or realist) has wondered aloud how much of the motivation had to do with grabbing an opportunity for "positive political public relations." *See* TABB, *supra* note 31, at 677.

[39] For an overview of credit industry spending on studies, lobbying, and campaign contributions from 1998 until shortly before passage of BAPCPA, see Landry, *supra* note 28, at 516–22; *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231–32 (2010) (noting that Congress enacted BAPCPA in order "to correct perceived abuses of the bankruptcy system"); *In re* Ott, 343 B.R. 264, 266 n.4 (Bankr. D. Colo. 2006) (noting, in response to a statement in a House Report (H.R. Rep. No. 31, 109th Cong., 1st Sess., at 2 (2005), reprinted in 2005 U.S.C.C.A.N. at 88–89) to the effect that BAPCPA's purpose was to ensure that the system is fair for both debtors and creditors, that "[t]his statement, in the context of BAPCPA's creditor-friendly language throughout, aptly illustrates the tone and substance of BAPCPA—it is to remedy a perceived imbalance in the Code favoring debtors. Regardless of whether that perception was accurate or not, Congress clearly adjusted the perceived imbalance in favor of creditors."). For a more nuanced view of BAPCPA that argues the pure industry capture explanation is incomplete, see generally A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861 (2006); *cf.* Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 365 (2008) (pointing out that the consumer protection goals in BAPCPA reflect "a combination of ignorance about the facts and wishful thinking about likely effects of the measures adopted").

established terms that are well understood."[40] A model of legislative drafting it was not.[41]

II. RIDE-THROUGH IN THE PRE-BAPCPA ERA

Section 521(2) was not part of the Bankruptcy Code as originally enacted. Rather, it was added to the Code by § 305 of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[42] Intended as a response to complaints from

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[40] *In re* Donald, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) (describing the process of deciphering BAPCPA as "like trying to solve a Rubik's Cube that arrived with a manufacturer's defect"); *see* Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 (2007) ("The problems with the 2005 Act are breathtaking. There are typos, sloppy choices of words, hanging paragraphs, and inconsistencies." (footnotes omitted)); Ralph Brubaker, *Supreme Court Adopts the Forward-Looking Approach to Projected Disposable Income in Chapter 13*, 30 BANKR. L. LETTER 2, Aug. 2010, Westlaw, 30 No. 8 BLL 2 ("BAPCPA is a poorly drafted statute. What's more, Congress knew that it was a poorly drafted statute and was warned repeatedly about all of the difficulties that it would pose for the courts . . . . Congress just did not care, though, and enacted BAPCPA without attempting to fix even the most glaring drafting gaffes."); Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24 AM. BANKR. INST. J., Sept. 2005, at 1, 70 ("The list of drafting errors and incomprehensible provisions grows every day as bankruptcy professionals digest BAPCPA. Especially the consumer parts, this legislation was not written or vetted by the practitioners and scholars usually involved in bankruptcy legislative efforts."); Lawrence Ponoroff, *Reclaim This! Getting Credit Seller Rights in Bankruptcy Right*, 48 U. RICH. L. REV. 733, 733–34 (2014) (describing BAPCPA as "clumsily drafted, unnecessarily prolix, internally inconsistent, and annealed in a cauldron of special interest pressures" (footnotes omitted)); *see also* John Rao, *Testing the Limits of Statutory Construction Doctrines: Deconstructing the 2005 Bankruptcy Act*, 55 AM. U. L. REV. 1427, 1427 (2006) ("Most bankruptcy practitioners, scholars, and courts readily agree on one thing: the 2005 Bankruptcy Act . . . is poorly drafted."); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 191–92 (2005) (noting that prior to BAPCPA the bankruptcy experts drafted previous amendments to title 11, and also that the BAPCPA drafters refused to make technical corrections to the statute).

[41] Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104, 1110 (9th Cir. 2009) (wryly observing that "BAPCPA is hardly the very model of a well-drafted statute"). Judge—now Professor—Markell made the same point by citing Lewis Carroll. *In re* Trejos, 352 B.R. 249, 253–54 (Bankr. D. Nev. 2006) ("Making practical sense . . . of much of BAPCPA requires bankruptcy judges to adopt the approach of the White Queen, and believe in 'as many as six impossible things before breakfast.' " (quoting LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 157 (Bantam Classic ed. 1981) (1865))).

[42] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 305, 98 Stat. 333, 352–53. The bill was sponsored by consumer creditor organizations, resisted by debtor-oriented groups, and debated extensively in the Congress. *In re* Weir, 173 B.R. 682, 685–86 (Bankr. E.D. Cal. 1994). The legislative pulling and hauling over the section is described in considerable detail in the case of *In re Weir*, in which the court said of former § 521(2)

> It is evident that section 521(2) bears scars from crippling wounds suffered in hard-fought battles. Its text is so enigmatic, particularly in light of the rejected version, that the most that can be said in its defense is that the Congress settled upon a calculated ambiguity to resolve an intractable difference of opinion.

In re Weir, 173 B.R. at 685.

secured creditors over the potentially prejudicial effects resulting from unreasonable delay by debtors in exercising their rights with respect to collateral,[43] § 521(a)(2)(A) required that, in the case of consumer debts secured by property of the estate, an individual debtor must provide prompt notification[44] of her intentions "with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property."[45] Subparagraph (B) then called for the debtor to perform in accordance with that stated intention no later than forty-five days following the filing of the notice of intent under subparagraph (A).[46]

A question quickly arose over whether this new provision was properly read as limiting the debtor's options to one of the three specified alternatives: (i) surrender, (ii) retention with redemption of the collateral (if available[47]), or

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[43] At the same time, creditors contended that they could not obtain such information on their own initiative without running the risk of engaging in prohibited or unauthorized communications, particularly with *pro se* debtors. This uncertainty forced creditors to either incur the expense of proceeding with what might later turn out to have been an unnecessary action for relief from the stay or stand fast and risk a significant decline in the value of the collateral. *In re* Gregory, 572. B.R. 220, 228 (Bankr. W.D. Mo. 2017) (explaining creditor frustration in having to file motions for stay relief only to learn that the debtor intended to redeem or reaffirm the debt); *In re* Castillo, 209 B.R. 59, 69–72 (Bankr. W.D. Tex. 1997), *rev'd on other grounds*, Gov't Emps. Credit Union v. Castillo, 213 B.R. 316 (W.D. Tex. 1997); *In re* Belanger, 118 B.R. 368, 371–72 (Bankr. E.D.N.C. 1990), *aff'd*, Home Owners Funding Corp. of Am. v. Belanger (*In re* Home Owners Funding Corp. of Am.), 128 B.R. 142 (E.D.N.C. 1990), *aff'd*, Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345 (4th Cir. 1992). For an alternative (or at least additional) explanation, see *In re* Lair, 235 B.R. 1, 35 (Bankr. M.D. La. 1999) ("The 1984 Consumer Finance Amendments to the Bankruptcy Code were intended, *inter alia*, to protect creditors from the risks of quickly depreciating assets and to keep credit costs from escalating because of the too-ready availability of discharge.").

[44] The Statement of Intention (Official Form No. 8) must be filed at the earlier of thirty days after the petition is filed or the date of the first meeting of creditors. *See infra* note 45 and accompanying text.

[45] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, sec. 305, 98 Stat. 333, 352 (current version at 11 U.S.C. § 521(a)(2)(A)).

[46] *Id.* sec. 305, 98 Stat. at 352–53 (current version at 11 U.S.C. § 521(a)(2)(B)).

[47] Under § 722, redemption is only an option with respect to "tangible personal property intended primarily for personal, family, or household use . . . [and] securing a dischargeable consumer debt," and redemption requires full payment of the allowed amount of the lender's secured claim as of the time of redemption. *See* 11 U.S.C. § 722. Section 327 of BAPCPA put this option even further out of reach of the ordinary debtor by amending § 506(a)(2) to require that the value of personal property securing a claim in the case of an individual in chapter 7 will always be based on the cost to the debtor of replacing the property without deduction for costs of sale or marketing. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 327, 119 Stat. 23, 99–100. This effectively overruled the holding of the Supreme Court in Assocs. Com. Corp. v. Rash, which had used retail value as the *starting point*, but then suggested a deduction for items the debtor does not receive when he retains the collateral, such as "warranties, inventory storage, and reconditioning." 520 U.S. 953, 965 n.6 (1997); *see In re* Tripplett, 256 B.R. 594, 597–98 (Bankr. N.D. Ill. 2000) (reflecting the pre-BAPCPA majority interpretation that the value of collateral for purposes of redemption

(iii) retention with reaffirmation of the debt.[48] As for the answer to this question, there was a decided and disturbing lack of consensus.

Five circuit courts of appeal, the Second,[49] Third,[50] Fourth[51] Ninth,[52] and Tenth,[53] adopted the view that the designated alternatives in former § 521(2) were neither exclusive nor mandatory.[54] These courts came to the conclusion that a debtor who was otherwise current on a secured consumer debt had what came to be known as a "fourth option," which was to retain the collateral, continue making timely payment of regularly scheduled obligations, and otherwise perform in accordance with the terms of the applicable loan documentation.[55] The creditor's right of repossession and foreclosure would then only be triggered, if at all, upon the occurrence of a postbankruptcy event of default.

By and large, these decisions rested their interpretation on two separate provisions in § 521(2). First (and probably foremost), they relied on the use of the

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should be measured by what the creditor would receive upon repossession). With respect to personal property acquired for consumer purposes, the second sentence of § 506(a)(2) now directs that replacement value means the amount a retail merchant would charge for property of comparable age and condition. *See* 11 U.S.C. § 506(a)(2). The pre-BAPCPA majority interpretation that the value of collateral for purposes of redemption should be measured by what the creditor would receive upon repossession. *See In re Tripplett*, 256 B.R. at 597–98.

[48] The debtor was also required to specify, as is still true, if the property was claimed as exempt. FED. R. BANKR. PRO. 4003. This was (and remains) necessary for the trustee to be able to evaluate the estate's interest in circumstances where there is equity over and above the sum of nonavoidable liens against the property. In such a case, unless the property is exempt, the debtor's decision to retain the property is without is prejudice to the trustee's rights in the property on behalf of the estate. *See* former 11 U.S.C. § 521(2)(C); *see also infra* note 91 and accompanying text.

[49] Cap. Commc'ns Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 53 (2d Cir. 1997), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. The court concluded that former § 521(2) was ambiguous on the question of whether Congress intended the stated options to be exclusive, and, thus, resolved the issue by reference to the legislative history and policy considerations. *Id.*

[50] Price v. Del. State Police Fed. Credit Union U.S. Tr. (*In re* Price), 370 F.3d 362, 372 (3d Cir. 2004), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[51] Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 347 (4th Cir. 1992), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[52] McClellan Fed. Credit Union v. Parker (*In re* Parker), 139 F.3d 668, 673 (9th Cir. 1998), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[53] Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1547 (10th Cir. 1989), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[54] *Id.* at 1546 ("We are in accord with the district and bankruptcy courts that the mere filing of the petition has not put [the lender] in any more jeopardy than that which existed prior to the filing of the petition."). The court did not affirmatively rule on the enforceability of the *ipso facto* clause because it believed it was not necessary to do so in order to allow the debtor to retain the vehicle, but alluded that it might well be problematic. *Id.* at n.5 (citing Riggs Nat'l Bank v. Perry (*In re* Perry), 729 F.2d 982, 984–85 (4th Cir. 1984)).

[55] *See, e.g.*, *In re Price*, 370 F.3d at 375.

phrase "if applicable" in subparagraph (A) as imposing an obligation on a debtor to declare his intention to redeem or reaffirm *only if* the debtor in fact intended to exercise one of those alternatives.[56] In effect, they regarded inclusion of this language in former § 521(2)(A) as signaling that there is an obligation to *disclose* an intent to employ one of the statutory options when such an intent exists, but no *duty* to choose exclusively from among those options as a condition to retaining the collateral.[57] Second, many of the courts that construed the options in § 521(2) as nonexclusive emphasized former subparagraph (C), which provided that "nothing in subparagraphs (A) and (B) . . . shall alter the debtor's or the trustee's rights with regard to such property under this title."[58] These courts quite reasonably pointed out that constraining the debtor to redemption, reaffirmation, or surrender did "alter" the debtor's rights with respect to the property in direct contravention of the interdiction in subparagraph (C).[59] Bolstering their statutory construction rationales, some courts also grounded their determination of the existence of a fourth option on core bankruptcy policy, most notably the fresh start policy.[60]

In a near Mexican standoff, four other circuit courts of appeals came to just the opposite conclusion, construing former § 521(2) as requiring the debtor to

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[56] *E.g.*, *In re Parker*, 139 F.3d at 673 ("Our interpretation of that language is that the only mandatory act is the filing of the statement of intention, which the debtor 'shall' file. Then, 'if applicable,'—that is, if the debtor plans to choose any of the three options listed later in the statute . . .—the debtor must so specify in the statement of intention."). In a journal article, Bankruptcy Judge Pappas argued that reading the statutory language this way created a meaning that was not supported by plain English, and that the "if applicable" phrase should be read to refer to the options listed in the statute, as opposed to other non-specified choices. Jim D. Pappas, *Section 521(2) of the Bankruptcy Code: The Creditor's Predicament in Getting Paid as Agreed*, 99 COM. L.J. 45, 61–62 (1994). Several courts of appeal agreed with Judge Pappas. *See* cases cited *infra* note 61 and accompanying text. In light of the centrality of this language to the disagreement in the case law over ride-through, remarkably, BAPCPA did not change the language in any way. *See infra* text accompanying note 89.

[57] *See* Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 348 (4th Cir. 1992) (noting that the debtor must choose one of the referenced options if, and only if, one of them is applicable (citing 3 COLLIER ON BANKRUPTCY § 521.09A, at 521–49 (Lawrence P. King ed., 15th ed. 1991))).

[58] *Id.* at 346–47 (criticizing the authorities that regarded the three options as exclusive for ignoring or failing to give effect to § 521(2)(C) and legislative history that disclosed Congress rejected a proposal to lift the automatic stay if the debtor did not timely redeem or reaffirm).

[59] For example, in *In re Ogando*, 203 B.R. 14, 16 (Bankr. D. Mass. 1996), the court observed, "[a]mazingly, courts restricting the debtor to redemption or reaffirmation refer not at all to subparagraph (C). Yet its meaning is plain, especially in light of its location in a statute whose other paragraphs all relate to procedure and not substance."

[60] *See, e.g.*, *In re Price*, 370 F.3d at 378 (noting that this reasoning conforms most closely with the bankruptcy fresh start principle); Cap. Commc'ns Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 50–51 (2d Cir. 1997) (admitting that the plain language of the statute could support both interpretations and deciding in favor of a fourth option based on the fundamental premise of a fresh start for debtors overburdened with debt), *superseded by statute*, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

choose among, and only among, the three options stated in the statute.[61] The effect, of course, was to mandate redemption or reaffirmation as a necessary condition to the debtor's ability to retain possession of the collateral.[62] These courts emphasized that allowing an additional alternative under which a debtor could retain the property subject only to performance of the duties specified in the security agreement would give the debtor not just a fresh start, but a "head start."[63] In terms of the "if applicable" language of former § 521(2)(A), the courts rejecting the fourth option subscribed to the view that this language related only to the choices between surrender and retaining, and not to permitting alternatives beyond the three specified options.[64] Put another way, these courts construed the language as requiring the debtor to state whether she planned to redeem or reaffirm the debt if the debtor had indicated an intention to retain as opposed to surrender the property. They also justified this interpretation on the basis that in these circumstances the debtor, having been relieved from personal liability for the debt by the discharge, would have no incentive to preserve and maintain the collateral if ride-through were permitted, thus placing the creditor's interest

[61] Bank of Bos. v. Burr (*In re* Burr), 160 F.3d 843, 849 (1st Cir. 1998); Johnson v. Sun Fin. Co. (*In re* Johnson), 89 F.3d 249, 252 (5th Cir. 1996); Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1516 (11th Cir. 1993); *In re* Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990). Lower courts in the Eighth Circuit were split on the issue. *Compare In re* Canady-Houston, 281 B.R. 286, 287–88 (Bankr. W.D. Mo. 2002) (recognizing ride-through), *with In re* Kennedy, 137 B.R. 302, 304 (Bankr. E.D. Ark. 1992) (declining to recognize ride-through). *See* Sanabria v. Am. Nat'l Bank (*In re* Sanabria), 317 B.R. 59, 60–61 (B.A.P. 8th Cir. 2004) ("The issue has not been addressed in the Eight [sic] Circuit at an appellate level and the trial courts within this circuit are split. While a definitive ruling on that issue might be helpful in this circuit, the issue is not properly before this Court." (footnotes omitted)); Philip R. Principe, *Did BAPCPA Eliminate the Fourth Option for Individual Debtors Secured Personal Property?*, AM. BANKR. INST. J. n.5 (Oct. 2005), https://www.abi.org/abi-journal/legislative-update-did-bapcpa-eliminate-the-fourth-option-for-individual-debtors-secured [https://perma.cc/F3AB-CD2J] (describing the position of courts in the Eighth Circuit on ride-through0. The other circuit without a decision from its court of appeals was the Sixth Circuit. However, most of the lower courts in the circuit concluded that redemption and reaffirmation constituted the exclusive mechanisms for a debtor to retain possession of secured collateral based on another Sixth Circuit decision deciding prior enactment of former § 521(2). Gen. Motors Acceptance Corp. v. Bell (*In re* Bell), 700 F.2d 1053, 1055 (6th Cir. 1983) (rejecting installment redemption); *see, e.g.*, *In re* Chubb, 351 B.R. 478, 481–83 (Bankr. E.D. Tenn. 2004).

[62] *In re Taylor*, 3 F.3d at 1516 ("Allowing retention of the property without reaffirmation or redemption would be tantamount to forcing the creditor into a *de facto* reaffirmation agreement with no recourse against the debtor." (quoting Bank S. v. Horne (*In re* Horne), 132 B.R. 661, 663–64 (Bankr. N.D. Ga. 1991))); *see also id.* at 1515 (citing several cases supporting the proposition that debtors are limited to the three statutory options).

[63] *See In re Taylor*, 3 F.3d at 1516 ("[I]t is clear when the options of redemption and reaffirmation would not be applicable. This language does not apply to a debtor's surrender of the property; it therefore must apply to a debtor's retention of property. If a debtor retains secured property, then the options of redemption and reaffirmation are applicable, and the debtor is required to redeem or reaffirm.").

[64] *Id.*; *see also* Pappas, *supra* note 56, at 61–62 (observing that, "while courts liked to argue the point, the language of the statute appears clearly mandatory in its terms" in requiring the debtor to make an election, and "[i]t would be curious for Congress to order a debtor to perform, but not to restrict the possible options available to the debtor.").

unfairly in jeopardy.[65] The courts rejecting ride-through further ruled that the language in former § 521(2)(C) did not alter the debtor's responsibility to elect only from among the three stated options, pointing out that subdivision (C) "merely [functioned] to make supreme over the directives of § 521(2)(A) and (B) rights conferred upon the trustee and debtor *elsewhere in the Bankruptcy Code*," not to displace those directives in the first instance.[66]

III. THE 2005 ACT

A. *The Road to BAPCPA*

In 1994, Congress created a blue-ribbon commission, the National Bankruptcy Review Commission (the "Commission"), to study and recommend changes to the Code.[67] In its 1997 Report, the Commission proposed that ride-through not be permitted,[68] but that recommendation cannot be fully understood except in the context of the Commission's companion recommendations regarding reaffirmation.

The Commission originally resolved to prohibit reaffirmation entirely.[69] However, after hearing from creditor groups and deliberating further on the implications of reaffirmation from the perspective of the goals of equality of distribution,[70] encouraging filings under chapter 13,[71] and protecting debtors from abusive reaffirmation practices,[72] the Commission changed course and recommended that reaffirmations only be eliminated as to *unsecured* debt.[73] Then, to

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[65] *See In re Edwards* 901 F.2d at 1386 ("When a debtor is relieved of personal liability on loans secured by collateral, the debtor has little or no incentive to insure or maintain the property in which a creditor retains a security interest. The value of the collateral may fall below the level of the loan, leaving the creditor undersecured and driving up future costs of credit."). This point is a staple in the anti-ride-through playbook. *See infra* Section V.A.1. The point was made most forcefully by Judge Drake in *In re Horne*, 132 B.R. at 664 (opining that "debtors would have no incentive to keep the property in good condition or to continue making payments if the value of the collateral declined below the amount of the debt or was destroyed. Such an arrangement is contrary to the language of the Code." (citation omitted)).

[66] *See In re Burr*, 160 F.3d at 848; *see also* Cap. Commc'ns Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 59 (2d Cir. 1997) (Shadur, J., dissenting) (explaining that limiting a chapter 7 debtor to the three options in former "[§] 521(2)(A) is perfectly consistent with the qualifying language of [former §] 521(2)(C)").

[67] *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, sec. 603, 108 Stat. 4106, 4147.

[68] 1 NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 4 (1997).

[69] *Id.* at 148. The thinking was that any restructuring of long-term debts should occur under chapter 13. Clearly, the Commission's views were influenced by evidence of coercive creditor practices, noting that reaffirmations were almost banned by Congress in 1978. *Id.* at 146.

[70] *Id.* at 158–59.

[71] *Id.* at 159–60.

[72] *Id.* at 156.

[73] *Id.* at 160 (stating that "current reaffirmation practices are inconsistent with promoting repayment in Chapter 13, equal treatment of creditors, and financial rehabilitation of debtors"). The Commission also admonished debtors' attorneys to "narrowly and strictly" construe the

be consistent with that position, the Commission also recommended that reaffirmations of secured debt be limited to the value of the underlying collateral.[74] In this way, the Commission reasoned that secured creditors would either receive the property itself upon surrender or the equivalent cash value of that property over time, which is generally the way in which "secured claims" are treated in the bankruptcy process generally.[75]

"When the Commission initially recommended a complete ban on reaffirmations, it also recommended that the Code explicitly recognize ride-through."[76] The thinking was that a ban on reaffirmations, coupled with ride-through, would enable a debtor to retain property while discharging personal liability, provided that the debtor was current on the obligation when she filed for bankruptcy (or the creditor was inclined to waive the default). After the Commission shifted gears and decided to support reaffirmation rights for the secured portion only (i.e., the value of the collateral) of secured debts, "it then became logical to reverse its position on ride-through."[77]

Specifically, the Commission's concern over debtors reaffirming debt in excess of the value of the collateral and/or beyond their ability to pay in order to avoid losing essential property were largely addressed by the ban on unsecured debt reaffirmation.[78] At the same time, creditors with debts secured by personal property would retain their *in rem* rights against the collateral and, responding to one of the principal creditor objections to ride-through,[79] would be protected against depreciation of that collateral faster than amortization of the loan by the debtor's continued personal liability to the extent of the value of the collateral. In the case of partially secured creditors, the unsecured portion of the debt would be treated like all other unsecured debts and discharged. Of course, in return for this protection creditors would sacrifice the possibility that ride-through might have produced a *greater* overall return,[80] but, on balance, the compromise seemed to be a fair and equitable one. After all, creditors who complained bitterly about ride-through to begin with hardly had standing to object to the proposal on the basis it deprived them of the possibility of a full recovery on a less than fully-secured loan.

"best interest of the debtor" requirement as a critical component of zealous representation. *Id.* at 161.

74 *Id.* at 160.

75 *Id.* Under § 506(a) a creditor is only deemed to have a secured claim to the extent of the value of its collateral. 11 U.S.C. § 506(a). The excess of the obligation over and above that value is treated as an unsecured claim. *Id.* at § 506(b). Thus, by limiting the reaffirmation of debt to the value of the property securing the debt, these creditors would receive the full value of their secured claims.

76 NAT'L BANKR. REV. COMM'N, *supra* note 68, at 166.

77 *Id.* at 167.

78 *Id.* at 160.

79 *See supra* note 65.

80 NAT'L BANKR. REV. COMM'N, *supra* note 68, at 167.

These quite sensible recommendations, along with most of the Commission's other recommendations, were essentially ignored, as the lobby for consumer creditor organizations anticipated and attempted to ambush the majority report by pressing furiously for the introduction of bipartisan legislation that advanced the views of the four dissenting members of the Commission.[81] They were ultimately successful. That legislative proposal, and its successors, dominated the conversation over the next several years, and eventually resulted in the enactment of the 2005 Act.[82]

B. Enter BAPCPA

The relatively sparse legislative history accompanying BAPCPA did not speak directly to the ride-through question.[83] Nevertheless, given the overall tenor of the statute,[84] it is fanciful to imagine that it was *not* Congress's desire (or, more accurately, the desire of the financial services industry that drove the BAPCPA bus) to eliminate ride-through without exception.[85] The question is

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[81] *Id.* at 1043, *et seq.* (Individual Commissioners' views); *see, e.g.*, Dickerson, *supra* note 39, at 1865 (noting that before the NBRC's Report was even filed, the credit lobby found supporters in the 105th Congress to sponsor legislation adopting the views of the dissenting Commissioners); Landry, *supra* note 28, at 517–18 (2003) (explaining that credit industry lobbyists turned to Congress after failing to induce National Bankruptcy Review Commission to produce a report aligned with their interests).

[82] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). BAPCPA became fully effective for cases filed on or after Oct. 17, 2005. *See* Jensen, *supra* note 30, at 512–15 (tracing the progression of the bills, beginning with the 1997 bill that preempted the Commission's Report, that eventually resulted in the passage of BAPCPA).

[83] H.R. REP. NO. 109-31, at 3 (2005) (no corresponding Senate report); *see* Jean Braucher, Rash *and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 460–61 n.13 (2005); DaimlerChrysler Fin. Servs. Ams., Inc. v. Miller (*In re* Miller), 570 F.3d 633, 639 (5th Cir. 2009) (discussing the dearth of legislative history for many provisions of BAPCPA).

[84] *See supra* notes 38–41 and accompanying text; *see also* Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy's Social Insurance Function After BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241, 251 (2009) (suggesting that contrary to the stated goals of the proponents of BAPCPA, "the negative impact of BAPCPA illustrates a starkly different goal, which is not to prevent abuse, but instead to prevent or deter filing for bankruptcy altogether").

[85] *See, e.g.*, Currie, *supra* note 84, at 266–67 (contending that the BAPCPA amendments were to respond to creditor dissatisfaction with ride-through and assure debtors could not retain secured property without reaffirming the entire debt); Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 9 ("The enactment of BAPCPA marked the successful culmination of over two score years of intense, fervent, and well-funded lobbying by the consumer credit industry."); Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376 ("[BAPCPA] radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors."); William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 150–56 (describing changes particularly favorable to auto lenders); *see also supra* note 39. *But see* Christopher M. Hogan, Note, *Will the Ride-Through Ride Again?*, 108 COLUM. L. REV. 882, 920 (2008) (accepting as a given that

whether Congress accomplished what it set out to do, the answer to which is, I believe, certainly not, or at least not entirely. In order to explain that assertion, it is necessary to begin by reviewing the myriad amendments made by BAPCPA bearing on the ride-through puzzle.

Instead of taking a clean and direct route to eliminating the ride-through, such as adding a new ground for objecting to the dischargeability of a particular debt,[86] in the inelegant fashion so characteristic of BAPCPA generally,[87] Congress adopted or amended a dizzying array of Code provisions in a tumble. First, although re-codified as § 521(a)(2)(A), Congress largely left intact the threshold requirement of former § 521(2)(A) that an individual chapter 7 debtor must file a statement of intention to either surrender or retain property of the estate that serves as security for a debt,[88] *including* the "if applicable" language that proved so nettlesome under the prior version of the statue.[89] The only change to former § 521(2)(B) (now denominated as § 521(a)(2)(B)) was to shorten the time for the debtor to perform in accordance with her stated intention from forty-five to thirty days.[90] Notably, Congress also modified the language of former § 521(2)(C) (re-codified by BAPCPA as § 521(a)(2)(C))[91] by adding to the end of the sentence reading that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property" the provision "except as provided in section 362(h)." A new provision, § 362(h)(1), calls for the termination of the automatic stay with respect to personal property serving as collateral for a claim, and ejection of such property from the estate, without the necessity of court order in the event of an individual debtor's failure to file a statement of intention in accordance with § 521(a)(2)(A), or failure to perform in accordance with that statement as required by § 521(a)(2)(B).[92] Subsection 362(h)(2) allows the trustee an opportunity to avoid having the property removed from the estate under subsection (h)(1) upon a showing that the personal property

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BAPCPA was intended to protect rather than injure the lower and middle classes by curbing high-income abusers).

[86] Adding failure to comply with the debtor's duties as specified in § 521(a)(2) as one of the exceptions to discharge in § 523(a) would have done the trick. Alternatively, Congress could have addressed the ambiguity of the "if applicable" language in § 521(a)(2)(A) by making clear it referred only to the choice between redemption and reaffirmation if the debtor elected not to surrender the collateral. *See supra* note 56.

[87] *See supra* notes 38–40.

[88] The only change was to drop the word "consumer" before the word "debtor," which was of minimal impact.

[89] *See supra* text accompanying notes 56 & 64.

[90] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. 3, sec. 305, § 521(a)(2)(B), 119 Stat. 23, 79–80.

[91] Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, sec. 2(a)(16)(A)(iii), 124 Stat. 3557, 3559 (striking the "designator" (C) from § 521(a)(2), and added the words "except that" to the beginning of the phrase relating to not altering the rights of the debtor or the trustee).

[92] Note that this section does not itself impose any penalty or sanction for noncompliance with § 521(a) other than to terminate the stay. The actions that the creditor may then take with respect to the collateral is determined by applicable (usually state) nonbankruptcy law.

has consequential value or benefit to the estate, and that the creditor's interest is adequately protected. If such a showing is made, then the debtor is required to deliver the property to the trustee. If not, the consequences spelled out in subsection (h)(1) ensue at the conclusion of the hearing on the trustee's motion.

Notably, subdivision (1)(A) of § 362(h) does not state that the debtor *must* choose one of the three options delineated in § 521(a)(2)(A).[93] It simply particularizes the consequences of the failure to comply with the statutory directive. Moreover, subdivision (B) of § 362(h)(a)(1) contains a proviso carving out an exception to the lifting of the stay where the debtor proposes reaffirmation "on the original contract terms and the creditor refuses."[94] In short, § 362(h) does not definitely declare or affirm, and arguably cannot fairly be read to imply, that ride-through is eliminated any more than it can be read to indicate that the option still exists. Rather, it seems to represent yet another missed opportunity by BAPCPA to make legislative intent on the question, for better or worse, manifold.

Next, Congress added a new subdivision (6) to § 521(a) stipulating that in a consumer chapter 7 case the debtor may not retain possession of personal property "as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property," unless, within forty-five days after the first meeting of creditors, the debtor either enters into an agreement to redeem such property or reaffirms the debt.[95] Failure to act within the

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[93] It provides only that the failure to file the required statement of intention "or to indicate in such statement that the debtor will either surrender such personal property or retain it." 11 U.S.C. § 362(h)(1)(A). The leading bankruptcy treatise suggests that the use of the term "or" in the above formulation is an indication that Congress left open options beyond those stated. *See* 3 COLLIER ON BANKRUPTCY ¶ 362.11 (16th ed. 2020), LexisNexis (database updated Sept. 2020) ("Moreover, in light of the apparent purpose of section 362(h) to encourage debtor compliance with section 521, there is no reason to conclude that Congress intended to limit the options under section 521(a)(2) with the enactment of section 362(h), and the two subsections should be read together in a manner that gives effect to both.").

[94] This exception where ride-through seems explicitly authorized, is itself unusual in that it conflicts with the creditor equality principle so central to the bankruptcy regime, at least where the lender is undersecured. That is, by effectively forcing the debtor, as the only way to avoid lifting of the stay, to reaffirm a debt in excess of the value of the collateral, § 362(h) awards the unsecured portion of the lender's claim priority over other unsecured creditors. There is a question of whether a debtor who offered to reaffirm on the original contract term is also protected by the discharge injunction after the discharge is entered and the case is closed. *See* Braucher, *supra* note 83, at 478. For discussion of application of this exception where the debtor seeks an accommodation beyond the original contract terms, such as additional postpetition credit, see also *infra* note 168 and accompanying text.

[95] There is some disagreement in the case law about meaning of language in § 521(a)(6) referring to "an allowed claim for the purchase price" of the collateral. *Compare In re* Donald, 343 B.R. 524, 536–37 (Bankr. E.D.N.C. 2006) (relying on the BLACK'S LAW DICTIONARY (rev. 6th ed. 1990), definition of the term "purchase price" to conclude that the plain meaning of the term "claim for the purchase price" means claim for the full purchase price), *with In re* Steinhaus, 349 B.R. 694, 706–07 (Bankr. D. Idaho 2006) (finding that the legislative history indicates an intention that § 521(a)(6) should encompass purchase money security interests and concluding that "creditors with purchase money security interests in personal

forty-five-day period does not implicate § 362(h), but, in a floating paragraph oddly following § 521(a)(7), the consequences of failing to comply with § 521(a)(6) are spelled out.[96] In particular, these include the automatic removal of the property from the estate and immediate lifting of the stay so as to permit the creditor to take whatever action may be appropriate under applicable non-bankruptcy law.[97] The relationship between §§ 521(a)(2) and 521(a)(6) is a bit of a mystery.[98] Clearly, in many cases both provisions will be in play, and it's not clear how the thirty-day period in subsection (a)(2) and the forty-five-day period of subsection (a)(6) were intended to link up and relate.[99] As for the limitation to *personal* property, perhaps the explanation is that the perceived threat to creditors caused by ride-through is generally thought to be far less of a concern when the collateral is real estate.[100] In any case, the limitation to personal property is an important piece of the argument that ride-through did persist, and perhaps has even now been formally authorized, post-BAPCPA as to real estate-backed loans, as discussed more fully below.[101]

Moving along, and of singular importance, is § 521(d). Prior to BAPCPA, there was no specific statutory provision inhibiting or precluding the enforceability of a "bankruptcy filing" or "insolvency" default provision in a security agreement or consumer credit contract once the stay was terminated.[102] This

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property . . . qualify for the protection of § 521(a)(6) even if their claim is for less than the full purchase price"). It is also odd that § 521(a)(6) only applies to creditors that possess an "allowed claim," which generally means its protections will not apply in no asset cases where creditors are typically advised that there is no need to file a claim. *See* TABB, *supra* note 31, § 7.4, at 654. However, based on a strict reading of the statute, several courts have come to just that result. *See, e.g.*, *In re* Miller, 443 B.R. 54, 57 (Bankr. D. Del. 2011) ("The interpretation advocated by the Debtor would mean that section 521(a)(6) of the Bankruptcy Code is unavailable for secured creditors in no-asset cases. Although that may seem a strange result, the plain meaning of the statute requires such a conclusion."); *In re* Blakeley, 363 B.R. 225, 229 (Bankr. D. Utah 2007); *cf. infra* text accompanying note 281.

[96] 11 U.S.C. 521(a)(7).

[97] As in § 362(h), there is a proviso if the trustee, on motion, can demonstrate that the property has consequential value or benefit to the estate, in which case, if the lender's interest is adequately protected, the debtor is required to deliver the property to the trustee. 11 U.S.C. § 521(a)(*). Notably, there is no requirement of delivery to the creditor, a fact that took on significance in *Seiffert*. *See infra* text accompanying notes 272–273.

[98] *See* TABB, *supra* note 31, at 141 (referring to the two provisions as "confusingly overlapping").

[99] In neither case, however, is there a remedy for noncompliance beyond termination of the stay. *See In re* Frazier, 599 B.R. 275, 281–82 (Bankr. D.S.C. 2019) (observing that the Code does not confer the bankruptcy courts with "authority to craft remedies to assist a creditor in enforcing nonbankruptcy law remedies," nor do they create a remedy if one does not exist under applicable nonbankruptcy law).

[100] Obviously, real property values tend to be more stable than personal property, and lenders might further be protected via other means, such as required mortgage insurance.

[101] *See infra* Section IV.C.

[102] Under § 362(c), the stay remains in effect until the earliest of: the time the case is closed, the time the case is dismissed, or, in a case involving an individual, the time discharge is granted or denied. 11 U.S.C. § 362(c).

potentially afforded the secured lender with the opportunity and ability to exercise its state law remedies, including repossession, regardless of whether there was a financial default or significant threat to the collateral once the stay was no longer in place.[103] Of course, these sorts of so-called *ipso facto* clauses are generally reproved of in bankruptcy,[104] and specifically made unenforceable by the Code in certain designated contexts.[105] Therefore, in the circuits that endorsed ride-through,[106] the courts relied, directly or indirectly, on the general disapprobation of *ipso facto* clauses to conclude that the bankruptcy courts had the discretionary authority to permit debtors to retain collateral indefinitely so long as they remained current on the underlying indebtedness and committed no other postbankruptcy default.[107] Section 521(d) reverses the bias against the

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[103] The qualification of only "potentially affording" lenders the ability to invoke nonbankruptcy remedies is that a number of jurisdictions do not recognize "bankruptcy filing," "insolvency," or other forms of *ipso facto* clauses to alone form a sufficient basis to trigger acceleration, repossession, or other state law default remedies. *See infra* note 234 and accompanying text.

[104] *E.g.*, *In re* Residential Cap., LLC, 508 B.R. 851, 862 (Bankr. S.D.N.Y. 2014) (noting that, while not per se invalid, *ipso facto* clauses are disfavored). Although generally regarded as suspect both in bankruptcy and under state law, *see infra* notes 234 & 240 and accompanying text, such clauses are ubiquitous professional lenders' loan documents. *See* Andrea Coles-Bjerre, *Ipso Facto: The Pattern of Assumable Contracts in Bankruptcy*, 40 N.M. L. REV. 77, 77 (2010) (describing the *ipso facto* clause as "a standard and widespread state law tool").

[105] *See* 11 U.S.C. § 541(c)(1)(B) (*ipso facto* clauses ignored in defining property of the estate); 11 U.S.C. § 365(e)(1) (prohibiting termination or modification of executory contract or unexpired lease based on, *inter alia*, the filing of a bankruptcy case); 11 U.S.C. § 545(1) (allowing the trustee to avoid the fixing of a statutory lien that arises either on commencement of a bankruptcy case, the debtor's insolvency, or when the debtor's financial condition falls below a specified level). For discussion on the question of enforceability of *ipso facto* clauses in bankruptcy beyond these specified circumstances, see *infra* note 241 and accompanying text.

[106] *See supra* notes 49–53.

[107] Many of the court of appeals decisions only discussed tangentially why the *ipso facto* clause remained unenforceable after the termination of the automatic stay and the closing of the case. For example, in *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1545–46 (10th Cir. 1989), the bankruptcy court ruled that the debtor's "discharge in bankruptcy did not put the creditor at risk sufficient to invoke the default clause in the security agreement," and enjoined the lender "from repossessing the vehicle so long as the debtors 'remain current on the payments, provide adequate insurance, and are not otherwise in default of their contractual obligations.' " In affirming the district court's affirmance of the bankruptcy court's order, the court of appeals stated, "We are in accord with the district and bankruptcy courts that the mere filing of the petition has not put [the Lender] in any more jeopardy than that which existed prior to the filing of the petition. . . . [W]e can see no harm resulting to [the Lender] from the order of the bankruptcy court." *Id.* at 1546. The effect of the bankruptcy court's ruling is to put the parties where they were prior to bankruptcy. In effect, the ruling in *Lowry* and other cases rendered *ipso facto* clauses as alone ineffective to serve as grounds for lifting stay, as long as the creditor was adequately protected, *and* ineffective as a basis to invoke state law remedies to act postdischarge. The basis for barring enforcement of state law remedies postdischarge was articulated much more directly in *BankBoston v. Sokolowski* (*In re Sokolowski*), 205 F.3d 532 (2d Cir. 2000). Three months after the chapter 7 case was closed, the secured creditor gave notice of intent to repossess the debtor's vehicle based solely on the breach of a default-on-filing clause. *Id.* at 534. The debtor reopened her case, and the bankruptcy court

enforceability of an *ipso facto* clause in this situation, providing that if a debtor fails to comply with § 521(a)(6), or the stay is lifted pursuant to § 362(h), then nothing in subsection (d) or elsewhere in the Code shall be deemed to prevent or limit the operation of such a provision.[108]

Finally, while only relatedly but still importantly relevant to the question of the continued existence of ride-through, BAPCPA made a number of changes to the reaffirmation provision of the Code, the sum of which make reaffirmation more difficult, costly, and arguably less likely to be successful.[109] To begin with, new subparagraph (2) to § 524(c) requires that the debtor receive an extensive set of disclosures called for by new subsection § 524(k). While the only requirement is that the debtor receive these disclosures, subparagraph (6) of § 524(k) affirmatively instructs that the debtor sign, prior to filing any reaffirmation agreement, a statement of income and expenses, together with the resulting balance available to pay the obligation proposed to be reaffirmed.[110] If the statement reflects that the debtor has insufficient income to make the scheduled payments required under the reaffirmation agreement, a sixty-day presumption of undue hardship arises under § 524(m)(1) that requires court review and that may serve as grounds for the court to reject the proposed agreement in cases where the debtor is unable to bear the burden of rebutting the presumption to the court's

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held that the clause was unenforceable and enjoined repossession. *Id*. The district court affirmed. *Id*. On further appeal to the Second Circuit, the court affirmed on the grounds that enforcement would intolerably interfere with the debtor's fresh start and the court's earlier interpretation in *Capital Communications Federal Credit Union v. Boodrow* (*In re Boodrow*), 126 F.3d 43 (2d Cir. 1997), of former § 521(2) as a notice statute only. *In re Sokolowski*, 205 F.3d at 534–36. For additional support of the argument that *ipso facto* clauses are not simply stayed but invalidated in chapter 7 (at least until 2005), see Scott B. Ehrlich, *The Fourth Option of Section 521(2)(A)—Reaffirmation Agreements and the Chapter 7 Consumer Debtor*, 53 MERCER L. REV. 613, 691 (2002). Moreover, the enforceability of default-on-filing and other kinds of *ipso facto* clauses varies from state to state. *See infra* text accompanying notes 234–235.

[108] As Judge Small noted early on after BAPCPA, § 521(d) "does not create a new statutory remedy . . . [nor] write *ipso facto* clauses into contracts where none exist[; r]ather, it enables creditors to proceed under contractual default clauses without limitations imposed by the Bankruptcy Code" and, in the case of ride-through, Code interpretation in cases like *Sokolowski*. *See In re* Donald, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006); *accord In re* Steinhaus, 349 B.R. 694, 709–10 (Bankr. D. Idaho 2006) (noting that § 521(d) only removes any bankruptcy impediment to the enforceability of an *ipso facto* clause).

[109] *See* Gregory M. Duhl, *Divided Loyalties: The Attorney's Role in Bankruptcy Reaffirmations*, 84 AM. BANKR. L.J. 361, 380–81 (2010) (discussing the bankruptcy court's decision in *In re* Minardi, 399 B.R. 841, 850 (Bankr. N.D. Okla. 2009)).

[110] 11 U.S.C. § 524(k)(6). *See generally* Ryan W. Johnson, *24 Variations of a Reaffirmation Agreement and the Corresponding Actions Required by the Court*, AM. BANKR. INST. J., Feb. 2018, at 26; Lisa A. Napoli, *Reaffirmation After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Many Questions, Some Answers*, 81 AM. BANKR. L.J. 259 (2007).

satisfaction.[111] Moreover, when the presumption of undue hardship in § 524(m)(1) arises, the debtor's attorney must further certify, in addition to the affidavit of "no undue hardship" required by § 524(c)(3)(B), that she believes that the debtor will be able to make the payments called for under the reaffirmation agreement.[112]

Originally, under the 1978 Act, the bankruptcy judge was charged with the responsibility to make a determination that a proposed reaffirmation was in the debtor's best interest and would not impose an undue hardship.[113] In response to complaints that bankruptcy judges were too inclined to find reaffirmation inadvisable, the 1984 Act shifted that responsibility to the debtor's attorney, so that the court's involvement in ascertaining whether the reaffirmation was in the debtor's best interest or imposed an undue hardship was limited to cases where the debtor was unrepresented in the negotiation of the reaffirmation agreement.[114] Section 524(m)(1) now gets the bankruptcy court back in the game,[115] and that fact, coupled with the requirement of an additional certification from the debtor's attorney when the presumption of undue hardship arises,[116] makes it less likely that a borderline reaffirmation agreement will ultimately obtain the necessary approval. This, in turn, has opened the door to what has come to be known as "backdoor" ride-through, as will be discussed below.[117]

The final change to the reaffirmation statute bearing on the ride-through issue is § 524(k)(3)(J)(i)(7), which, in addition to being rather difficult to commit to memory, calls for the required disclosure statement to inform the debtor that "[e]ven if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor *may* still have the right to take the property securing the lien *if you do not pay the debt or default on it*."[118]

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[111] 11 U.S.C. § 524(m)(1). Under the wording of § 524(m)(1), disapproval, which can only occur after notice and a hearing, oddly is not mandatory if the debtor fails to rebut the presumption, but it is fair to imagine that it is most probably likely. *See In re* Laynas, 345 B.R. 505, 515 (Bankr. E.D. Pa. 2006) (pointing out that the statute does not state that the court "shall" disapprove if the presumption of undue hardship is not rebutted, and speculating that use of the word "may" might be intended to signal a more generalized discretion to disapprove an agreement even if the presumption has been rebutted, or that "may" could mean only that the court retains discretion to approve an agreement even if the undue hardship presumption has not been rebutted).

[112] *See* 11 U.S.C. § 524(k)(5)(A).

[113] 11 U.S.C. § 524(c)(4) (1978).

[114] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 354; 11 U.S.C. § 524(c)(6)(A), (d)(2).

[115] *See In re Laynas*, 345 B.R. at 511 ("[A]fter the enactment of BAPCPA, the [Bankruptcy] Code 'no longer envisions a reaffirmation agreement standing alone, supplemented only by the certification of counsel that the debtor understands the agreement and that it imposes no undue hardship.' " (quoting David B. Wheeler & Douglas E. Wedge, *A Fully Informed Decision: Reaffirmation, Disclosure and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 789, 800 (2005))).

[116] *Supra* note 112 and accompanying text.

[117] *See infra* text accompanying notes 183–191.

[118] 11 U.S.C. § 524(k)(3)(J)(i)(7) (emphasis added).

Obliquely, this seemed to suggest that a debtor who is not in default of a secured debt may retain the property if she stays current on the obligation.[119] To date, however, it has not been so construed,[120] but it looms as yet another basis on which to pin the argument that ride-through is far from dead and buried.

IV. POST-BAPCPA, PRE-*SEIFFERT* APPROACHES TO RIDE-THROUGH

A. *Majority View*

While the above provisions would never be held up as an exemplar of clarity in legislative prescription,[121] given the strongly pro-creditor tenor of the 2005 Act,[122] initially, courts reacted to the changes wrought by BAPCPA with the view that ride-through was kaput,[123] which is almost certainly what the supporters of

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[119] *See In re* Husain, 364 B.R. 211, 219 n.15 (Bankr. E.D. Va. 2007) (citing *In re* Donald, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006)) (suggesting that this language supports the view that the issue of whether to disapprove the reaffirmation agreement is separate and distinct from the question whether the debtor satisfied the performance requirements of §§ 521(a)(2) and 362(h) *and* the continued viability of ride-through). The court in *Donald*, however, questioned if this was really the intent. *In re Donald*, 343 B.R. at 539 ("Presumably, the disclosures [including this one] are intended to advise debtors of the correct state of the law, but here the disclosure appears to be incorrect, or at the very least, misleading.").

[120] *E.g.*, Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104, 1117–18 (9th Cir. 2009) (suggesting that the language is too vague to support the position that ride-through survived, concluding that, "we decline to read one ambiguous sentence as an endorsement of ride-through where Congress provided explicit information about the statutorily authorized alternative to reaffirmation, redemption.").

[121] *See id.* at 1110 ("BAPCPA is hardly the very model of a well-drafted statute."); Patrick M. Flatley, *BAPCPA: It's No Gettysburg Address*, 25 AM. BANKR. INST. J., Dec./Jan. 2007, at 10; *see also supra* note 41.

[122] *See supra* note 39. It is, however, important to bear in mind that "creditors" come in different genres. They are not interchangeable, meaning that in a zero-sum game, an advantage conferred on one type of creditor must come at the expense, at least to some degree, of other creditors. *See* Lawrence Ponoroff, *Bankruptcy Preferences: Recalcitrant Passengers Aboard the Flight from Creditor Equality*, 90 AM. BANKR. L.J. 329, 353 (2016) ("[T]ypically, a debtor's creditors are not an undifferentiated, monolithic horde. Creditors come in many flavors, secured and unsecured, consensual and nonconsensual, commercial and consumer, just to name a few.").

[123] *See, e.g.*, *In re* Craker, 337 B.R. 549, 550–51 (Bankr. M.D.N.C. 2006); *In re* Miller, 443 B.R. 54, 57 (Bankr. D. Del. 2011); *In re* Rice, No. 06-10975, 2007 WL 781893, at *3 (Bankr. E.D. Pa. Mar. 12, 2007); *In re* Ruona, 353 B.R. 688, 691 (Bankr. D.N.M. 2006); *In re* Steinhaus, 349 B.R. 694, 700–06 (Bankr. D. Idaho 2006); *In re* Anderson, 348 B.R. 652, 659–60 (Bankr. D. Del. 2006); *In re Donald*, 343 B.R. 524, 538 (Bankr. E.D.N.C. 2006); *In re* Rowe, 342 B.R. 341, 345–46 (Bankr. D. Kan. 2006). While ride-through turned out not to be quite as dead as some courts thought early on, the view that BAPCPA fundamentally altered the nature of the so-called "fourth option," remains prevalent. *See, e.g.*, *In re* McCray 578 B.R. 403, 408 (Bankr. E.D. Mich. 2017) ("BAPCPA 'specifically rejected' the 'ride through' or 'stay and pay' option." (citing Ford Motor Credit v. Hall, No. 16-13333, 2017 WL 3084373, at *4 (E.D. Mich. July 20, 2017))).

BAPCPA and their lobbyists intended.[124] Gradually, however, some doubt began to creep into the equation.[125] *In re Seiffert*[126] provides a clear and powerful illustration of how, whatever the intent may have been, Congress not only failed to get the job done with the provisions described above, but actually exacerbated the confusion and disorder over ride-through. Thus, it merits returning to that opinion in more detail, but before doing so a review of post-BAPCPA ride-through jurisprudence is necessarily in order to understand the disorderly backdrop against which *Seiffert* was argued and decided.

The first circuit court decision addressing the issue, *In re Dumont*,[127] was characteristic of the tenor of the early post-BAPCPA decisions and, paradigmatically, involved an automobile loan.[128] The debtor filed her § 521(a)(2)(A) statement indicating an intent to retain the vehicle and continue making payments.[129] The debtor's attorney declined the lender's request to reaffirm and, after the debtor's discharge was granted, the case was closed.[130] The lender thereupon repossessed the vehicle and the debtor moved to reopen the case and obtain a determination that the lender's actions constituted a violation of the discharge injunction.[131]

Even though the debtor was current on the obligation, the bankruptcy court held that the Ninth Circuit's earlier decision recognizing ride-through in *In re Parker*[132] had been effectively overruled by BAPCPA and denied the motion.[133] On appeal, the Bankruptcy Appellate Panel affirmed, noting that every reported bankruptcy court decision to that point giving attention to the issue had

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[124] *In re* Gregory, 572 B.R. 220, 230 (Bankr. W.D. Mo. 2017) (noting that Congress intended to fix the ride-through loophole); *In re Donald*, 343 B.R. at 540 ("The court is convinced that termination of the 'ride-through' option is what Congress intended."); *see* Mantas Valiunas, *Anything but Automatic: Dismissal Under § 521*, 28 EMORY BANKR. DEVS. J. 231, 234 (2011) (pointing up that "Congress passed BAPCPA in response to growing concerns of abuse of bankruptcy procedures by dishonest debtors" and "[the act] is scattered with creditor-friendly language to remedy a perceived imbalance in the Bankruptcy Code favoring debtors"); Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 173–74 (2005) (concluding that, post-BAPCPA, non-consensual ride-through for personal property would be prohibited).

[125] *See infra* Sections IV.C. & D.; *see also In re Gregory*, 572 B.R. at 231 (wryly pointing out that Congress's attempt to abrogate ride-through was a failure); *infra* note 148 and accompanying text.

[126] *In re* Seiffert, No. 18-43114, 2019 WL 1284299, at *1 (Bankr. N.D. Tex. Mar. 8, 2019).

[127] Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104 (9th Cir. 2009).

[128] See *infra* note 308, for a possible explanation of why so many of these cases involve vehicle loans.

[129] *In re Dumont*, 581 F.3d at 1107.

[130] *Id.*

[131] *Id.* at 1107–08.

[132] McClellan Fed. Credit Union v. Parker (*In re* Parker), 139 F.3d 668 (9th Cir. 1998).

[133] *In re Dumont*, 581 F.3d at 1108.

determined that ride-through was eliminated by the 2005 Act.[134] On further appeal to the Ninth Circuit, the majority of the panel, after analyzing the changes made to §§ 521 and 362 by BAPCPA,[135] concluded that the secured lender was free to repossess the collateral in question, *provided* that a right to do so existed under applicable state law, and affirmed the lower court decisions.[136] Interestingly, as part of its rationale, the court cited the constitutional requirement that bankruptcy clauses be "uniform,"[137] and noted that it would "raise serious constitutional questions" to reach a conclusion that Congress intended to perpetuate the very nonuniform situation that existed pre-BAPCPA due to the circuit split over ride-through.[138] In light of the confusing muddle soon to emerge over ride-through in the post-BAPCPA era, that sentiment would prove ironic indeed.[139]

Presaging that inconsistency, in a dissenting opinion,[140] Judge Graber expressed her disagreement with the *Dumont* majority's assumption that Congress intended to ban ride-through on a national basis, and, instead, reasoned that Congress, wittingly or not, actually perpetuated the circuit split.[141] She based this conclusion on the fact that, when it legislates, Congress is presumed to be aware of the current interpretation of a statute and yet, in this instance, Congress chose to continue the "if applicable" language in § 521(a)(2)(A) that was so pivotal to

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134 Dumont v. Ford Motor Credit Co. (*In re* Dumont), 383 B.R. 481, 489–90 (B.A.P. 9th Cir. 2008). In fact, however, by the time of the BAP's decision several courts had already found a loophole in BAPCPA through which ride-through might continue under certain circumstances. *See, e.g.*, *In re* Bower, No. 07-60126, 2007 WL 2163472, at *3 (Bankr. D. Or. July 26, 2007); *In re* Moustafi, 371 B.R. 434, 439–40 (Bankr. D. Ariz. 2007) ("The Reaffirmation Agreement is not in the Debtor's best interest and, therefore, will not be approved. . . . [S]he may retain the Nissan as long as she is current on her payments and insurance obligations."); *In re* Stevens, 365 B.R. 610, 613 (Bankr. E.D. Va. 2007); *In re* Riggs, No. 06-60346, 2006 WL 2990218, at *6 (Bankr. W.D. Mo. Oct. 12, 2006); *In re* Quintero, No. 06-40163TK, 2006 WL 1351623, at *3 (Bankr. N.D. Cal. May 17, 2006).

135 *In re Dumont*, 581 F.3d at 1109–10.

136 *Id.* at 1115 (highlighting that § 521(d) provides lenders with no substantive remedial rights). Having concluded "that [§] 521(a)(2)(C), in conjunction with [§] 362(h), disallows ride-through," the court found it unnecessary to rule on "whether ride-through may also have been terminated" by virtue of § 521(a)(6). *Id.* at 1118; *cf. In re* Miller 443 B.R. 54, 57 (Bankr. D. Del. 2011) (finding that § 521(a)(6) is unavailable for secured creditors in no-asset cases because, by its terms, it only pertains to creditors who hold "allowed claims").

137 *In re Dumont*, 581 F.3d at 1112 (citing U.S. CONST. art. I, § 8, cl. 4).

138 *Id.* Ironically, that is exactly what BAPCPA has done. *See infra* Section IV.B. The court also rejected the debtor's attempt to rely on § 524(k)(3)(J)(i)(7) as evidence that Congress intended ride-through to continue after BAPCPA. *In re Dumont*, 581 F.3d at 1117–18; *see also supra* notes 119 & 120 and accompanying text.

139 *See infra* Part IV.

140 *In re Dumont*, 581 F.3d at 1119 (Graber, J., dissenting). A similar view is expressed in Hogan, *supra* note 85, and discussed further, *infra* text accompanying notes 335–342.

141 *In re Dumont*, 581 F.3d at 1120 (Graber, J., dissenting) ("In my view, the changes to the text indicate an intent to *perpetuate* the extant circuit split, not *resolve* it." (emphasis in original)).

the reasoning of the pre-BAPCPA courts that had approved of ride-through.[142] Noting that while the generally pro-creditor tenor and direction of the statute may have been clear, that alone should not be a basis for reading a statute in a particular fashion.[143] Therefore, in the absence of any clearer indication of congressional intent, the dissent concluded that it should be assumed that Congress simply decided to side-step the ride-through issue entirely. For this reason, Judge Graber believed *Parker* had not been superseded, and, guided by bankruptcy's overriding purpose to provide the debtor with a fresh start, should continue to be followed.[144]

Much more recently, a district court in another circuit that had prior to-BAPCPA recognized the fourth option,[145] agreed with the bankruptcy courts of its district that Congress intended in 2005 to put a stake through the heart of the ride-through option, and was successful in doing so.[146] This view seems to be the most widely-accepted interpretation in the post-BAPCPA case law,[147] at least in the case of personal property collateral and when the debtor did not enter into an agreement reaffirming the debt or offer to do so on the original contract terms.[148] Some courts, however, expressed reticence and, even early on, there was no unanimity of opinion.[149] Given the inelegant and circuitous approach employed by Congress in addressing ride-though,[150] these doubts concerning a sweeping abolition of ride-through should come as no great surprise. It also explains why the

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[142] *Id.* at 1120–21. Judge Graber observed that the five-four circuit split on ride-through was well known and, yet, Congress failed to provide a clear indication of an intent to resolve the split one way or another when it left the critical phase "if applicable" in § 521(a)(2)(A) unaltered. *Id.* at 1121; *cf. In re* Gregory, 572 B.R. 220, 232–33 (Bankr. W.D. Mo. 2017) (holding that BAPCPA did not change the majority interpretation of § 521(a)(2) as a notice statute with respect to home mortgages).

[143] *In re Dumont*, 581 F.3d at 1121–22.

[144] *Id.* ("But the general 'direction and tenor' of a statutory amendment is not the correct inquiry.").

[145] Price v. Del. State Police Fed. Credit Union U.S. Tr. (*In re* Price), 370 F.3d 362, 378–79 (3d Cir. 2004).

[146] Toyota Motor Credit Corp. v. Dunn (*In re* Dunn), 589 B.R. 253, 256–57 (E.D. Pa. 2018).

[147] *See supra* note 123.

[148] *See In re* Gregory, 572 B.R. 220, 231 (Bankr. W.D. Mo. 2017) (stating that most courts agree that the BAPCPA amendments eliminated ride-through on personal property); *In re* Jensen, 407 B.R. 378, 389 (Bankr. C.D. Cal. 2009) (holding that "BAPCPA eliminated the debtor's right to elect ride-through in cases where secured creditors object").

[149] *See, e.g.*, *In re* Husain, 364 B.R. 211, 219 (Bankr. E.D. Va. 2007) ("[W]hether the reaffirmation Agreements should be disapproved or deemed enforceable is an issue that is separate and distinct from the issue of whether the Debtors' act of entering into those Agreements satisfied the 'performance' requirements of § 362(h) and § 521(a) of the Bankruptcy Code."); *In re* Laynas, 345 B.R. 505, 517 (Bankr. E.D. Pa. 2006) (determining that it didn't need to decide what the court described as "the difficult issues relating to 'ride-through' "); *In re* Donald, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006) (although following the reasoning of earlier decisions concluding that ride-through had been terminated, the court noted that "[t]here are good arguments that the 'ride-through' option still is available to chapter 7 debtors"); *see also supra* note 125; *infra* notes 183–191 and accompanying text (discussing "backdoor" ride-through).

[150] *See supra* Section III.B.

circumstances under which ride-through is found to persist continue to propagate, as illustrated by *In re Seiffert* and like cases that preceded it.[151]

In the only other court of appeals decision to address the question so far, *In re Jones*, the debtor indicated in his § 521(a)(2) statement of intention that he planned to "Continue Payments" with respect to a purchase money vehicle loan.[152] As in *Dumont,* the debtor filed a statement of intent to retain his vehicle and continue payments throughout and after the forty-five-day period in § 521(a)(6).[153] Rather than relying on automatic termination, in an abundance of caution, the lender moved to confirm that the stay was terminated so that it might repossess the vehicle by virtue of the *ipso facto* clause in its security agreement.[154] The lender's motion was granted, and the lender proceeded, without notice, to repossess the vehicle.[155] The debtor (and his nondebtor spouse) responded by bringing an adversary proceeding challenging the lender's actions.[156] The bankruptcy court, relying on pre-BAPCPA Fourth Circuit authority,[157] ruled that the lender did not have the right to repossess the vehicle.[158] The district court reversed[159] and, on further appeal, the Fourth Circuit panel held that its earlier decision on the issue recognizing a fourth option under former § 521(2)(A) had been superseded by BAPCPA.[160] Specifically, the court focused on the "except as provided in section 362(h)" addition to the language of former § 521(2)(C),[161] as well as the two new provisions, §§ 521(a)(6) and 362(h), in support of the conclusion the ride-through that had been sanctioned by its earlier decision in *Belanger* was now proscribed by virtue of BAPCPA.[162]

As to the next issue, whether the lender possessed the authority to repossess based solely on the *ipso facto* clause, the court cited new § 521(d) as establishing an exception to the general prohibition against enforcement of such clauses in consumer loan agreements in circumstances, such as those present in this case,

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151 *In re* Seiffert, No. 18-43114, 2019 WL 1284299 (Bankr. N.D. Tex. Mar. 8, 2019); *see infra* Section IV.D.
152 DaimlerChrysler Fin. Servs. Ams., LLC v. Jones (*In re* Jones), 591 F.3d 308, 309 (4th Cir. 2010). In other words, the statement of intention did not mention anything about redemption or reaffirmation.
153 *Id.* at 309–10.
154 *Id.* at 310.
155 *Id.*
156 *Id.*
157 *Id.* at 310–12 (citing Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 347–49 (4th Cir. 1992)).
158 *Id.* at 310. The bankruptcy court held that state law required the lender to first give the Joneses notice of the right to cure default before repossessing the vehicle. *Id.*
159 DaimlerChrysler Fin. Servs. Ams., LLC v. Jones (*In re* Jones), 397 B.R. 775, 795 (S.D.W. Va. 2008), *aff'd*, 591 F.3d 308 (4th Cir. 2010).
160 *In re Jones*, 591 F.3d at 311–12.
161 *See supra* text accompanying note 91.
162 *In re Jones*, 591 F.3d at 310–12. The court also noted that the facts did not support the exception to this conclusion that some bankruptcy courts had identified where the debtor substantially complies with §§ 521(a)(2) and 362(h). *Id.* at 311 n.3; *see infra* notes 194–210.

when the loan is secured by personal property and the debtor has failed to comply with §§ 521(a)(6) and 362(h).[163] The court also rejected the debtor's argument that the lender's acceptance of a payment after expiration of the forty-five-day period to redeem or reaffirm amounted to a waiver of the *ipso facto* clause, noting that it was a telephone-system payment made prior to the bankruptcy court's order confirming the lender's right to repossess.[164] Finally, the court found that the repossession was not improper by virtue of the lender's failure to give the Joneses notice and an opportunity to cure, as required by West Virginia law, since this omission was obviated by the fact that the default in the case—the act of filing bankruptcy—could simply not be cured.[165]

B. Not so Fast

While most post-BAPCPA courts concluded that the language of the Code was no longer amendable to creating a ride-through by means of a fourth option in the manner that the debtors in *Dumont* and *Jones* had attempted, that did not mean that ride-through was relegated to the scrap heap of history—far from it.[166] First, of course, was an exception that BAPCPA itself established in circumstances where the secured creditor rebuffs the debtor's attempt to reaffirm the debt on the original contract terms.[167] This seemingly straightforward rule can, in fact, become tricky inasmuch as reaffirmations are essentially negotiations. The stipulation that the offer to reaffirm must be on the original contract terms limits the ambiguity to some degree. However, if the debtor offers to reaffirm on the terms of the original deal, but on condition the lender provide an additional postpetition credit accommodation, has the exception been triggered? Alternatively, if the lender dangles an additional extension of credit as inducement for reaffirmation of an existing debt, as is not uncommonly the case,[168] and the

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[163] *In re Jones*, 591 F.3d at 312 (citing *In re* Donald, 343 B.R. 524, 538–39 (Bankr. E.D.N.C. 2006)). Outside, however, of § 521(d), the rule in the Fourth Circuit remains that "an *ipso facto* clause in an installment loan contract is 'unenforceable as a matter of law.' " *In re* Husain, 364 B.R. 211, 218 (Bankr. E.D. Va. 2007) (quoting Riggs Nat'l Bank v. Perry (*In re* Perry), 729 F.2d 982 (4th Cir. 1984)).

[164] *In re Jones*, 591 F.3d at 312 (finding that acceptance of a single automated telephone payment was insufficient to establish the relinquishment of a known right).

[165] *Id.* at 313. This was the basis for the bankruptcy court's holding. *Id.* at 310.

[166] *In re* Reed, No. 10-67727, 2011 WL 6328677, at *5 (Bankr. E.D. Mich. Dec. 14, 2011) (relying on § 524(k) in support of the proposition that BAPCPA implicitly recognizes the existence of ride-through). Even in *Dumont*, the court qualified its statement that ride-through was no longer available for debtors with the proviso at least among those who did not seek reaffirmation. Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104, 1112 (9th Cir. 2009).

[167] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, sec. 305, 119 Stat. 23, 79 (codified as amended in 11 U.S.C. § 362(h)(1)(B)).

[168] *See* 1 NAT'L BANKR. REV. COMM'N, *supra* note 68, at 154–55; *infra* note 373; *see also In re* Jensen, 407 B.R. 378, 389–90 (Bankr. C.D. Cal. 2009) ("[N]othing in BAPCPA prevents debtors and secured creditors from engaging in what scholars have variously described as 'voluntary ride-through,' 'creditor acquiescence,' or 'informal reaffirmations.' ").

debtor declines, has the exception in § 362(h) been satisfied? There is no case law one way or the other, but certainly an argument that it has can credibly be made based on the plain language of the statute, particularly in the case when the additional consideration is insisted upon by the lender.

Next, in terms of a fissure in the wall BAPCPA had attempted to erect to bar ride-through, there is nothing in the legislation that prevents what might be termed *de facto* ride-through in situations where, both during and after bankruptcy, the secured lender decides that, so long as the debtor is and remains current on payments and there is no particular uninsured threat to the collateral, it might be better off simply staying its hand.[169] Indeed, given the costs associated with repossession and foreclosure, coupled with the notoriously low values received in distress sales, it should not come as a surprise that creditor acquiescence in *de facto* ride-through is much more common than might have been presumed given the level of creditor chirping about the unfairness of ride-through.[170] As discussed below, the prevalence of this not insignificant phenomenon plays an important role in the justification for a more uniform and principled approach to ride-through proposed in this treatment than certainly exists under the current decisional law.[171]

Recall that BAPCPA also made reaffirmations more difficult (and expensive).[172] This has opened the door, although that was surely not the intent, to yet another means for accomplishing ride-through even after BAPCPA, sometimes referred to as "backdoor ride-through," as it entails a sort of end-run around the statute.[173] In the first case to raise the possibility of this exception, *In re Laynas*, the bankruptcy court was faced with a situation where the debtor stated an intention to redeem the debt and, in fact, entered into an agreement with the secured lender.[174] However, the debtor's financial schedules demonstrated that the debtor's current monthly income less expenses was not adequate to service the scheduled payments under the agreement.[175] Thus, the sixty-day presumption of undue hardship arose under § 524(m)(1) and was not successfully rebutted by the debtor at the hearing.[176] In considering whether it would be in the debtor's best interest to reaffirm the debt, the court took notice of, in addition to the

[169] Sections 362(h) and 521(a)(6) terminate the stay; they do not impose any additional remedial consequence and certainly do not compel the secured creditor to exercise its applicable nonbankruptcy remedies. 11 U.S.C. §§ 362(h), 521(a)(6).
[170] *See infra* text accompanying notes 267, 372–373.
[171] *See infra* Section V.C.
[172] *See supra* text accompanying notes 109–120.
[173] The first appearance of the term, although not the first application, seems to be in the district court's opinion in *DaimlerChrysler Financial Services Americas, LLC v. Jones* (*In re Jones*), 397 B.R. 775, 788 (S.D.W. Va. 2008), *aff'd*, 591 F.3d 308 (4th Cir. 2010), a case in which, ironically, the facts did not support this limited ride-through option. *See also supra* text accompanying notes 183–191.
[174] *In re* Laynas, 345 B.R. 505, 508 (Bankr. E.D. Pa. 2006).
[175] *Id.* at 513.
[176] *See supra* text accompanying note 111.

burden of the required payments, the usual necessity of an automobile to the ability to earn a living and the risk that the debtor would lose the vehicle to repossession once the stay was terminated.[177] As part of its reasoning in determining ultimately to withhold approval nonetheless, the court observed that it was not at all clear that ride-through had been eliminated and, thus, equally unclear that the debtor would not be able to retain possession of the property as long as the debtor remained current on the debt.[178]

The facts of *Laynas* could also have supported ride-through on the alternative theory alluded to by the court.[179] That is, because the debtor had complied with all of her obligations under § 521(a)(2) and 521(a)(6)—she had made a proper statement of intention and then did everything in her power to perform in accordance therewith—automatic termination of the stay under §§ 521(a)(6) and 362(h) was never triggered. That being the case, post-bankruptcy repossession under the *ipso facto* clause could not be justified under the savings language of § 521(d) because the conditions necessary for that provision to come into play had not been satisfied.[180] In fact, several courts have endorsed precisely this reasoning in stifling a secured lender's efforts to repossess free of the automatic stay during bankruptcy and immune from the discharge injunction once the stay is

[177] *See Laynas*, 345 B.R. at 516 (citing *In re* McGrann, 6 B.R. 612 (Bankr. E.D. Pa. 1980)) (commenting on the fact that in many households the availability of an automobile is a necessity and has alone been found to be the basis to find reaffirmation in the debtor's best interest).
[178] *Id.* at 517. The court also observed that applicable state law might bar repossession based on an *ipso facto* clause. *Id.* (citing *In re* Rowe, 342 B.R. 341, 349–51 (Bankr. D. Kan. 2006)); *see also infra* note 234.
[179] *In re Laynas*, 345 B.R. at 517.
[180] *See supra* note 108.

terminated.[181] However, as discussed below,[182] enjoining the lender under the automatic stay while the case is pending is quite different from enjoining the lender *after* the case is closed and the stay is terminated.

A more illustrative decision evincing this willingness to bar the lifting of the stay on substantial compliance with §§ 521(a)(2) and (a)(6), and, by so doing, effectively sanctioning ride-through, is *In re Perez*.[183] The debtor in *In re Perez* timely filed her § 521(a)(2)(A) statement of intention, indicating a desire to retain and reaffirm, and proceeded to enter into a reaffirmation agreement with the lender who had earlier financed her vehicle purchase.[184] At the hearing on reaffirmation, the debtor testified that she was current on payments, had insurance, and needed the car in order to get to work.[185] After reviewing the facts, the court concluded that the reaffirmation agreement was unenforceable because the counsel who had represented the debtor in the negotiation of the agreement had not

181 *See, e.g.*, *In re* Reed, No. 10-67727, 2011 WL 6328677, at *4 (Bankr. E.D. Mich. Dec. 14, 2011) ("Since Congress didn't remove 'if applicable' with passage of BAPCPA even though this language was heavily relied upon by courts to justify ride-through provisions, such congressional inaction, while not dispositive, suggests a lack of intention to eliminate the ride-through option espoused by many courts."); *In re* Nelson, No. A08-00285-HAR, 2008 WL 8652595, at *1 (Bankr. D. Alaska Sept. 12, 2008) (explaining the concept of backdoor ride-through); Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161, 182–83 (E.D.N.C. 2008) (determining that entering into a reaffirmation agreement does not require the debtor to enter into an enforceable agreement); *In re* Baker, 390 B.R. 524, 528–30 (Bankr. D. Del. 2008) (holding that substantial compliance with § 521 is sufficient to prevent the lifting of the stay, and in effect, permits a backdoor ride-through); *id.* at 529–30 (finding ride-through permitted where debtor filed a statement of intention—though the statement did not indicate an intent to reaffirm—and timely entered into a reaffirmation agreement); *In re* Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008) (holding that creditor could not exercise its remedies where the debtor timely complies with the requirements of § 521 and § 362(h) even if the court declines to approve the reaffirmation agreement); *In re* Moustafi, 371 B.R. 434, 439 (Bankr. D. Ariz. 2007) (holding that because the debtor complied with the requirements of § 521, creditor could not repossess the vehicle as long as the debtor remained current on payments and insurance obligations); *In re* Blakeley, 363 B.R. 225, 231–32 (Bankr. D. Utah 2007) ("Because the Debtor has fully complied with the requirements under § 521(a)(2), § 521(a)(6), § 521(d), and § 362(h), the remedies contained in each of the subsections are not triggered."); *see also* Mimi Faller, *BAPCPA's Challenge to Debtors and Creditors Alike: The Murky Law of the "Backdoor Ride-Through" and Enforceability of Ipso Facto Clauses in Consumer Bankruptcies*, 23 NORTON J. BANKR. L. & PRAC. 380, 381(2014) ("BAPCPA did not clear up whether the ride-through option is still available to debtors."). *But see In re* Wright, No. 19-63318, 2020 WL 5823346, at *10 (Bankr. D. Or. Sept. 9, 2020) (holding that, in a case where the reaffirmation agreement was unenforceable because of the absence of the debtors' attorney's certification under § 524(c)(3), the debtor did not satisfy her obligations under §§ 521(a)(2) and 362(h)(1) and ride-through would not be permitted).

182 *See infra* text accompanying notes 207–214.

183 *In re* Perez, No. 7-10-11417, 2010 WL 2737187, at *6 (Bankr. D.N.M. July 12, 2010).

184 *Id.* at *1–2, *6. Notably, the collateral was a five-year old Chevy Equinox, and the courts recitation of the facts indicate that the debtor had "agreed to reaffirm [the] debt in the amount of $11,471.30, that the interest rate on the reaffirmed debt is 25.917%, and that the original purchase price of the [Equinox] was $13,104.29." *Id.* at *2. The debtor "estimated" the value of the vehicle to be $10,000. *Id.*

185 *Id.*

certified that reaffirmation of the debt would not impose an undue hardship on the debtor or her dependents as required by § 524(c)(3).[186]

The court turned next to the question of ride-through. Observing that, even though the reaffirmation agreement could not be approved, the debtor had complied with her obligations under § 521(a)(2) inasmuch as she had timely filed her statement of intention and then did everything that was within her control to perform in accordance with that intention.[187] For this reason, the court concluded that the secured lender was not entitled to relief under either § 521(d) or § 362(h), noting that the express prerequisites for those provisions to become operational; namely, failure to comply with the requirements of § 521(a)(2) or (6), had not been met.[188]

The court in *Perez* continued that "the Bankruptcy Code provides no relief to [the lender] as a result of there not being an enforceable reaffirmation agreement," and that the lender "is precluded by the automatic stay from exercising any remedies, including the immediate enforcement of any *ipso facto* clause that may exist in the underlying contract pursuant to 11 U.S.C. § 521(d) or 11 U.S.C. § 362(h)."[189] Effectively, under a literal interpretation of the statute, an approach so favored by the Supreme Court in bankruptcy cases,[190] the debtor, who was

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[186] *Id.* at *2, *4–5. The debtor's lawyer signed Part C of the reaffirmation agreement, "certifying that 'this agreement represents a fully informed and voluntary agreement by the debtor' and that he 'fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.' " *Id.* at *2. However, the lawyer crossed out the second certification contained in Part C; namely, that the agreement did not impose an undue hardship on the debtor or a dependent of the debtor. *Id.* The debtor's counsel also did not check the box on Part C stating that, although a presumption of undue hardship had been established, in counsel's opinion, the debtor was able to make the payment required under the agreement. *Id.*; *see infra* text accompanying notes 116–117.

[187] *In re Perez*, 2010 WL 2737187, at *7 ("To perform the intention to reaffirm the debt, a debtor who is represented by counsel must (i) be willing to enter into a reaffirmation agreement with the creditor on the original contract terms, (ii) cooperate with the creditor in executing a reaffirmation agreement on the original contract terms, or on other terms if mutually acceptable to the debtor and creditor; and (iii) appear at any hearing on disapproval of the reaffirmation agreement, and at the hearing honestly respond to questions and not ask that the agreement be disapproved."). Anything else would be beyond her control. *Id.* at *7, *9.

[188] *Id.* at *9. The court concluded it would be absurd to interpret performance under § 521(a)(2)(B) to require that the debtor do things beyond the debtor's power and control, such as compel her counsel to make the necessary certifications or compel the court to approve the agreement. *Id.* at *7.

[189] *Id.* at *9 (noting that the only relief provided by the Code is relief from stay, the conditions for which were not satisfied in this case).

[190] *See* Chase Manhattan Mortg. Corp. v. Shapiro (*In re* Lee), 530 F.3d 458, 470 (6th Cir. 2008) ("The common theme in the Supreme Court's bankruptcy jurisprudence over the past two decades is that courts must apply the plain meaning of the Code unless its literal application would produce a result demonstrably at odds with the intent of Congress." (citing Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992); U.S. v. Ron Pair Enters., 489 U.S. 235, 241 (1989))). *See generally* Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195 (2007).

current in her payments and who had entered a reaffirmation agreement, would be permitted to retain the vehicle so long as she committed no acts of default other than violation of the *ipso facto* clause.[191] The fact that the court had refused to approve the reaffirmation agreement was a separate matter that, in the view of the court, in no way altered the conclusion concerning ride-through.[192]

It will be recalled that § 362(h)(2) provides an exception to the automatic lifting of the stay in circumstances where the creditor refuses to agree to reaffirmation on the original contract terms.[193] In turn, this would also negate application of § 521(d), which becomes operational only upon the debtor's noncompliance with § 521(a)(6) or § 362(h). A peculiar variation on this theme, as well as on the cases permitting ride-through when the court disapproves the proposed reaffirmation agreement, is illustrated by the relatively recent opinion in *In re Nuckoles*.[194] The case arose out of the debtor's stated intention to retain her personal vehicle and reaffirm the underlying debt to Ford Motor Credit Co.[195] The reaffirmation agreement prepared by Ford reflected a presumption of undue hardship based on the debtor's budget.[196] Accordingly, while the debtor and her attorney signed the agreement, her lawyer declined, as in *In re Perez*, to make the certification regarding no undue hardship.[197] Ford's counsel advised the debtor's attorney that the § 524(k) disclosures were not complete.[198] The debtor's lawyer provided some explanation and requested that the agreement be signed by Ford and returned for filing.[199] Ford's counsel declined to do so, refusing to endorse or file with the court an agreement he believed to be materially deficient.[200]

The debtor was granted her discharge, the case closed, and the stay lifted, all on the same day.[201] Thereafter, Ford repossessed the vehicle.[202] The debtor then moved to reopen her case in order to obtain relief for what she contended was Ford's violation of the discharge injunction.[203] The debtor's argument was that, having timely agreed to reaffirmation, she had complied with her statutory duties

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[191] *In re Perez*, 2010 WL 2737187, at *9. The court found that § 521(a)(6) was no barrier to ride-through because the secured creditor had not filed a proof of claim. *Id*. at *8. The court did not explain how this conclusion applied to the discharge injunction *as well as* the automatic stay. *See also supra* note 107.

[192] *In re Perez*, 2010 WL 2737187, at *7.

[193] *See supra* note 94 and accompanying text.

[194] Nuckoles v. Ford Motor Credit Co. (*In re* Nuckoles), 546 B.R. 651 (Bankr. W.D. Va. 2016).

[195] *Id*. at 652.

[196] *Id*.

[197] *Id*.; *see* 11 U.S.C. § 524(k)(5)(A).

[198] *In re Nuckoles*, 546 B.R. at 652.

[199] *Id*.

[200] *Id*.

[201] *Id*. at 652–53.

[202] *Id*. at 653.

[203] *Id*. The debtor had, at all times, maintained insurance on the vehicle and never missed a payment to Ford. *Id*. The discharge injunction is imposed by § 524(a) of the Code. *Id*. at 657.

under §§ 521(a) and 362(h), thus depriving Ford of the protection of § 521(d) in relation to the enforceability of its *ipso facto* clause.[204] Ford countered that compliance with § 362(h) required the debtor to propose an *approvable* reaffirmation agreement, and that there had been no point to submitting an agreement that the court was certain to reject.[205] The court sided with the debtor based on the fact that, just as in the case where the court affirmatively rejects the reaffirmation agreement, the debtor has no control over whether the agreement was enforceable; in other words, she had done all she could.[206] Thus, because the debtor had fulfilled all of her statutory duties, § 521(d), by its terms, was never pressed into service to preserve Ford's *ipso facto* clause.

The *Nuckoles* court's reasoning to this point was on very solid ground and in accordance with the overwhelming weight of precedent.[207] When the court turned, however, to the explanation as to why Ford's actions violated the discharge injunction once the stay had terminated by operation of law,[208] things get a little more obscure. Ford argued that in repossessing the vehicle it had merely exercised its *in rem* rights against the property, and thus had not taken action to collect on the obligation as a personal liability of the debtor within the meaning of § 524(a)(2).[209] The court, however, disagreed, finding that Ford's repossession was effectively an unsanctioned *in personam* action against the debtor "because Ford attempted to enforce a contractual provision [the *ipso facto* clause] voided during . . . bankruptcy."[210]

But how was the clause *voided* by the bankruptcy process? Again, the court's reasoning was that once a debtor complied with her statutory obligations under §§ 362(h) and 521(a), § 521(d) was no longer applicable, so the *ipso facto* clause on which Ford relied to justify its repossession was void.[211] While it is true that § 521(d) only springs to life *if* the debtor fails to take timely action under those provisions, what is activated is the language in the subsection that nothing in the Code should be regarded as limiting the operation of an *ipso facto* clause,[212] and nothing in § 521(d) itself should be regarded as justifying limiting such a clause in any other circumstance. In other words, the effect of § 521(d), when

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[204] *Id.*
[205] *Id.* The court could not have approved the agreement without the certification of the debtor's attorney, just as in *Perez*. *See supra* text accompanying note 186.
[206] *In re Nuckoles*, 546 B.R. at 655 ("After depriving Nuckoles of the chance to file the Agreement with the Court, Ford cannot turn around and claim that she failed to comply with sections 362(h) and 521(a).").
[207] *See* authorities cited *supra* note 181.
[208] *In re Nuckoles*, 546 B.R. at 656–57. Of course, whether the debtor's substantial compliance with her duties under §§ 521(a) and 362(h) also should preclude repossession and foreclosure after the case is closed is a somewhat different question, a point the court overlooked. *See supra* note 107.
[209] *In re Nuckoles*, 546 B.R. at 657.
[210] *Id.*
[211] *Id.* at 654–55.
[212] 11 U.S.C. § 521(d).

applicable, is to save an *ipso facto* clause if one existed in the underlying loan documents, but there is nothing in the provision that can fairly be read to suggest it has an affirmative consequence—voiding an *ipso facto* clause—when it does not apply because of the nonsatisfaction of the perambulatory language that controls its operation.[213] This is consistent with the received wisdom that, even when applicable, § 521(d) does not *create* an *ipso facto* provision if one was not included in the original loan documentation.[214]

In fairness, § 521(d) is hardly a model of clarity, an observation that is true of much of BAPCPA.[215] Indeed, it is a rather strange provision in the first place because it neither adds nor subtracts an *ipso facto* clause to a consumer credit contract, and if one does exist it does not necessarily make it enforceable; that determination is made under applicable nonbankruptcy law.[216] Therefore, as discussed below as part of the discussion of a principled resolution for the broader issue of ride-through,[217] it is largely a provision in hopeless pursuit of a purpose that is out-of-step with bankruptcy policy generally, and thus should be mercifully repealed. For now, the point is that reading a negative implication into § 521(d) when its terms are never activated would seem to stretch the language beyond all reason.

Rather, in circumstances where the debtor has satisfied all of her statutory obligations in relation to collateral under §§ 521(a) and 362(h), the existence of ride-through *vel non* should depend on the state of the law addressing that question in the jurisdiction pre-BAPCPA,[218] and in certain cases, on state law.[219] One

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[213] Other cases on which the *Nuckoles* court relied have made the same unwarranted leap of faith. *See, e.g.*, *In re* Perkins, 418 B.R. 680, 681–82 (Bankr. M.D.N.C. 2009) (voiding *ipso facto* clause when debtor "timely complied with the requirements of section 524(c) and 521(a)(2), and in all respects agreed to reaffirm the debt on the original terms of the contract," but creditor failed to timely file reaffirmation agreement); *In re* Baker, 390 B.R. 524, 531–32 (Bankr. D. Del. 2008) (holding that the debtor's compliance with §§ 362(h) and 521(a) precluded the creditor from repossessing the collateral without violating the discharge injunction, absent a subsequent payment or insurance default), *aff'd*, 400 B.R. 136 (D. Del. 2009). Other courts take the position that once an asset is taken from the bankruptcy estate, even an express invalidation of the prohibition against bankruptcy termination clauses is no longer operative. *See* Cahaba Forests, LLC v. Hay, No. 11-CV-423, 2012 WL 380126, at *9 (M.D. Ala. Feb. 6, 2012) (citing Thomas Am. Stone & Bldg., Inc. v. White, 142 B.R. 449 (Bankr. D. Utah 1992)) (involving an *ipso facto* clause invalidated under § 365(e)(1)).

[214] *See supra* note 108.

[215] *See supra* notes 40 & 121.

[216] *See supra* text accompanying note 108; *see also* Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104, 1115 (9th Cir. 2009) (noting that if "there is no *ipso facto* clause in the [loan documents]," § 521(d) does not allow Ford to "pencil one in" for the lender).

[217] *See infra* Section V.C.

[218] If the jurisdiction had been a ride-through jurisdiction pre-BAPCPA, then the debtor should be able to retain the collateral as long as there is no subsequent monetary default or threat to the collateral. *See infra* note 230 and accompanying text.

[219] *See infra* notes 233–235 and accompanying text.

of the cases that the *Perez* court relied upon, *In re Chim*, showcases the point.[220] *In re Chim* involved (as these cases typically do) a secured auto loan.[221] The debtor, who was current on the obligation, stated her intent to reaffirm, and in fact executed a reaffirmation agreement with the lender.[222] Although the agreement raised a presumption of undue hardship, at the reaffirmation hearing her lawyer expressed his concern that if the court refused to approve the agreement, the lender would declare a default and repossess the vehicle under its *ipso facto* provision once the stay was terminated.[223]

The court nonetheless proceeded to reject the agreement as not in the debtor's best interest.[224] However, as to the concern about losing the vehicle, the court observed that because the debtor had timely complied with all of her obligations under §§ 521(a)(2), 521(a)(6), and 362(h), the stay would remain in place for the duration of the case, the vehicle would remain property of the estate, the debtor would not be obliged to surrender the vehicle, and the lender would be precluded from exercising any remedies based on the *ipso facto* clause.[225]

Turning to the more interesting question of what would happen post-discharge when the stay was lifted by operation of law,[226] the court pointed out that the debtor's timely discharge of her duties under § 521(a)(2) negated application of the new BAPCPA provisions that would have allowed the lender to exercise its state law remedies.[227] That being so, the court found that it would be necessary to resort to pre-2005 Act precedent to resolve the issue.[228] In this case, because the bankruptcy court was situated in the Fourth Circuit, the governing precedent was the circuit court's decision in *In re Belanger*.[229] In that decision, of course, the court recognized the fourth option under former § 521(2) and held that a debtor who is current on the payments under the loan secured by the property may retain the property without reaffirming the debt by remaining current and that "a default-on-filing clause in an installment loan contract was unenforceable

[220] *In re* Perez, No. 7-10-11417, 2010 WL 2737187, at *6 n.15 (Bankr. D.N.M. July 12, 2010) (relying upon *In re* Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008)).

[221] *In re Chim*, 381 B.R. at 192. That fact is likely not coincidence. *See infra* note 308 and accompanying text.

[222] *Id*. at 193.

[223] *In re Chim*, 381 B.R. at 193–94.

[224] *Id*. at 195, 199. The debtor conceded that the presumption of undue hardship in § 524(m)(1) applied in the case and was unable to rebut it to the court's satisfaction. *Id*. at 195.

[225] *Id*. at 198 (citing *In re* Husain, 364 B.R. 211 (Bankr. E.D. Va. 2007); *In re* Stevens, 365 B.R. 610 (Bankr. E.D. Va. 2007) (noting this holding was in accord with several other bankruptcy court decisions); *In re* Moustafi, 371 B.R. 434 (Bankr. D. Ariz. 2007)).

[226] *See* 11 U.S.C. § 362(c)(2) (providing that the stay terminates on the earliest of the time the case is closed, the time the case is dismissed, or in the case of an individual debtor, the time a discharge is granted or denied).

[227] *In re Chim*, 381 B.R. at 199.

[228] *Id*.

[229] *See id*. at 198–99.

as a matter of law."[230] Thus, ride-through would be allowed in the instant case, but *not* because § 521(d) had *voided* the *ipso facto* clause, but because § 521(d) was not applicable on the facts to save the *ipso facto* clause, and circuit precedent rendered such a clause invalid.[231] Moreover, and somewhat oddly, ride-through would be permitted notwithstanding the Fourth Circuit's own holding that its decision in *In re Belanger* had been supplanted by BAPCPA.[232] But what about cases arising in one of the four circuits that did *not* recognize the fourth option? In those situations, bankruptcy law would not invalidate an *ipso facto* clause as a matter of law. Thus, the determination of the creditor's right to repossess the collateral would depend on state law.[233] As should not come as a surprise, state law is decidedly mixed about enforceability of provisions making insolvency or the filing of bankruptcy an event of default in connection with consumer credit contracts. For example, in Massachusetts, a default provision in a retail installment credit contract is only enforceable to the extent that the default is material and consists of the buyer's failure to make a required payment or the occurrence of an event that substantially impairs the value of the collateral.[234] By contrast, if no such prohibition exists in a particular jurisdiction, then a secured lender would presumably be successful in seizing the collateral based on the argument that Ford Motor relied on *Nuckoles*.[235] This fact illustrates the critical importance of the distinction between saying § 521(d) voids an *ipso facto* clause and saying § 521(d) does not apply because the debtor fulfilled all of her duties under § 521(a). Not to be overlooked, of course, is that the former statement, if true, would provide a single uniform result. The latter statement, which is sadly true,

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230 Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 348 (4th Cir. 1992) (citing Riggs Nat'l Bank v. Perry (*In re* Perry), 729 F.2d 982, 984–85 (4th Cir.1984)).

231 *In re Chim*, 381 B.R. at 199.

232 DaimlerChrysler Fin. Servs. Ams., LLC v. Jones (*In re* Jones), 591 F.3d 308 (4th Cir. 2010); *see supra* text accompanying notes 152–165.

233 *See In re* Rowe, 342 B.R. 341, 350 (Bankr. D. Kan. 2006) ("Upon termination of the stay, however, the Creditor's rights are those under applicable nonbankruptcy law."). Applicable nonbankruptcy law in this case was Kansas state law, which like many states, requires either that the consumer fails to make a payment required by the agreement or the prospect of payment or realization of collateral is significantly impaired in order for a creditor to enforce the terms of a consumer credit contract. *Id.*; *see also infra* note 234 and accompanying text.

234 MASS. GEN. LAWS ch. 255B, § 20A(a) (2019), https://malegislature.gov/laws/general-laws/partiii/titleiv/chapter255b/section20a [https://perma.cc/XV5L-HLE8]. The Uniform Consumer Credit Code, which has been adopted in eleven states, contains a similar provision. U.C.C.C. § 5.109 (REFS & ANNOS 1974). This provision was applicable in *Rowe*. *See supra* note 223. Other states permit a creditor to declare a default and repossess based on the filing of bankruptcy or other nonmonetary default not involving a threat to the collateral. A table comparing state *ipso facto* laws is set forth in DANIEL A. AUSTIN & DONALD R. LASSMAN, REAFFIRMATION AGREEMENTS IN CONSUMER BANKRUPTCY CASES 147–56 (Am. Bankr. Inst. 2d. ed. 2010) (Appendix F).

235 That is, that the creditor is simply exercising its *in rem* state law rights and remedies against the collateral. *See* Nuckoles v. Ford Motor Credit Co. (*In re* Nuckoles), 546 B.R. 651, 657 (Bankr. W.D. Va. 2016).

provides an inconsistent result dependent on the fortuity of where the case was filed and, in some instances, applicable nonbankruptcy law.[236]

Also, even among jurisdictions that recognize such provisions as enforceable, it is not uncommon for them to be closely regulated under doctrines like waiver and estoppel,[237] and given the jurisprudence regarding the nonenforceability on public policy grounds of clauses attempting to restrict a party's ability to file bankruptcy,[238] one might at least plausibly construct a similar argument with respect to a "default on bankruptcy filing" clause.[239] Though "disfavored" generally,[240] even the federal courts are not in unison about the enforcement of an *ipso facto* clause that is not specifically rendered inoperative by the Code.[241] In short, in addition to the lack of uniformity from circuit to circuit, even in those four circuits that did not recognize ride-through, as well the two circuits that did not address ride-through pre-BAPCPA, the extent of disuniformity and unpredictability is considerable to say the least.

236 *See supra* note 233 and accompanying text.

237 *See* Braucher, *supra* note 83, at 477.

238 *E.g.*, Cont'l Ins. Co. v. Thorpe Insulation Co. (*In re* Thorpe Insulation Co.), 671 F.3d 1011, 1026 (9th Cir. 2012) (holding that contractual terms that directly or indirectly proscribe seeking bankruptcy protection contravene public policy and are unenforceable); Nat'l Hockey League v. Moyes, No. CV-10-01036-PHX, 2015 WL 7008213, at *7 (D. Ariz. Nov. 12, 2015) (same).

239 Just such an argument was rejected in *110 Parklands, LLC v. Gillon*, but the filing that triggered the default was not by the defendant, a guarantor, but that of a third party, the primary obligor. 110 Parklands, LLC v. Gillon, No. CV-16-6028988-S, 2018 WL 1659663, at *3 (Conn. Super. Ct. Mar. 6, 2018).

240 *See supra* notes 104–105 and accompanying text.

241 *Compare In re* W.R. Grace & Co., 475 B.R. 34, 153 (Bankr. D. Del. 2012) (concluding that the bar on *ipso facto* clauses in bankruptcy extends beyond situations explicitly covered by the Code), *aff'd*, 532 Fed. Appx. 264 (3d Cir. 2013), *aff'd*, 729 F.3d 311 (3d Cir. 2013), *aff'd*, 729 F.3d 332 (3d Cir. 2013), *and In re* Husain, 364 B.R. 211, 218 (Bankr. E.D. Va. 2007) ("The general rule is that an *ipso facto* clause in an installment loan contract is 'unenforceable as a matter of law' " (quoting Home Owners Funding Corp. v. Belanger (*In re* Belanger), 962 F.2d 345, 348 (4th Cir. 1992))), *with* U.S. Bank Tr. Nat'l Ass'n v. AMR Corp. (*In re* AMR Corp.), 730 F.3d 88, 107 (2d Cir. 2013) (noting that the specificity of the provisions of the Code rendering *ipso facto* clauses nugatory demonstrate that Congress knows how to limit or negate the effect of such clauses when it chooses to do so), *and In re* Gen. Growth Props., Inc., 451 B.R. 323, 330 (Bankr. S.D.N.Y. 2011) (rejecting the argument that a contract provision imposing a default interest rate upon bankruptcy filing was an unenforceable *ipso facto* clause). The court in *In re General Growth* did, however, go on to suggest that there are circumstances where a court might decline to enforce a bankruptcy default provision, even in the absence of an express provision, where the clause in question impairs the debtor's ability to attain a fresh start. *In re General Growth*, 451 B.R. at 330. Because this is almost always going to be true in consumer cases—*In re General Growth* was not—it suggests a strong negative bias when it comes to *ipso facto* clauses.

C. Real-Property Collateral Ride-Through

Sections 521(a)(6) and 362(h), and by extension § 521(d),[242] are restricted to circumstances where the debtor not only is an individual but also where the collateral consists of personal property.[243] Collectively, these provisions are most plausibly read to suggest that ride-through with respect to real property collateral survived enactment of BAPCPA, at least in those circuits that had recognized court-protected ride-through prior to enactment of the 2005 Act.[244] The key to this conclusion hinges on the proper construction of § 521(d). On initial reading, that provision might be read as extending its imprimatur to all *ipso facto* clauses in situations where a debtor fails to comply with her obligations under § 521(a)(2)(A) & (B).[245] However, as my former colleague, the late Jean Braucher, correctly predicted, application of the savings provision of § 521(d) is limited to *ipso facto* clauses in the case of agreements covered by §§ 521(a)(6) and 362(h).[246] Of course, as noted, these two provisions, by their terms, only relate to and govern loans secured by personal property collateral.

The opinion of the bankruptcy court in *In re Waller* is illustrative. The debtors and the mortgagee on two loans encumbering the debtors' residence reached agreement on reaffirmation of the debts.[247] Because the debtors' income net of other expenses did not appear sufficient to support the scheduled payments under the reaffirmation agreements, the presumption of undue hardship arose under § 521(m)(1).[248] After the required hearing, the court determined that reaffirmation of the mortgage debts was not in the debtors' best interest and refused to approve them.[249] The court continued, however, that because the debtors were current on both obligations, this did not mean they would lose the property. Citing a decision rendered a year earlier that followed the logic described above,[250]

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[242] The actual terms of § 521(d) are not limited to personal property; however, as noted earlier in connection with the more common case where the court rejects a reaffirmation agreement, § 521(d) is catalyzed by the debtor's failure to comply with §§ 521(a)(6) and 362(h). *See supra* note 108.

[243] 11 U.S.C. §§ 521(a)(6), (d), 362(h). In contrast, § 521(a)(2) refers to debts secured by *any* property of the estate. *Id.* § 521(a)(2).

[244] *E.g.*, *In re* Gregory, 572 B.R. 220, 231–32 (Bankr. W.D. Mo. 2017) (noting that BAPCPA appears to codify ride-through in the case of a debtor's home).

[245] Section 521(d) refers to § 362(h), which in turn spells out the consequences of failing to comply with § 521(a)(2)(A) & (B), which apply to all secured debts. The key is that the language preceding the reference to termination of the stay for such failure is limited to personal property.

[246] *In re* Nelson, No. A08-00285-HAR, 2008 WL 8652595, at *2 (Bankr. D. Alaska Sept. 12, 2008) ("With respect to the Wells Fargo real estate loan, I do not believe [the Ninth Circuit's decision in] *Parker* has been overruled.").

[247] *In re* Waller, 394 B.R. 111, 112 (Bankr. D.S.C. 2008).

[248] *Id.*

[249] *Id.* at 113 (finding that the testimony of Mrs. Waller that she was now working part-time at a golf shop and occasionally did substitute teaching was not enough to rebut the presumption because of the sporadic and unreliable nature of the additional income).

[250] *In re* Wilson, 372 B.R. 816, 820 (Bankr. D.S.C. 2007).

and indulging the presumption that when Congress acts, it acts with knowledge of the law,[251] the court concluded that the changes made by BAPCPA did not eliminate ride-through with respect to real estate-based loans.[252]

How important to the outcome was it in *Waller* that debtors had entered into the reaffirmation agreements, even though they were not approved? Unlike in the case of personal property loans,[253] the answer seems to be "not essential." Consider the opinion of the bankruptcy court in *In re Wilson*, the case on which the *Waller* court relied.[254] The debtor initially indicated her intention to reaffirm two debts to the same lender, each secured by a mortgage on her Surfside, South Carolina, condominium.[255] Subsequently, her counsel notified the lender that, on further consideration, the debtor had decided not to reaffirm the two mortgage notes.[256] Instead, the debtor filed a statement that she intended to retain possession of the condominium and remain current on the two obligations.[257] The mortgagee responded with a motion seeking an order compelling the debtor to surrender the property, redeem, or reaffirm.[258]

The court conceded that BAPCPA appeared to limit ride-through in the case of personal property-secured loans.[259] However, as §§ 362(h) and 521(a)(6) do not apply to real property collateral, the court concluded that a debtor's rights with respect to loans secured by real property was unaffected by BAPCPA.[260] Thus, the fact that the debtor had not actually entered into a reaffirmation

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251 *In re Waller*, 394 B.R. at 114 (citing *In re* Bennet, No. 06–80241, 2006 WL 1540842, at *1 (Bankr. M.D.N.C. May 26, 2006)).

252 *Id.* To this extent then, the court concluded that the Fourth Circuit's decision in *Home Owners Funding Corp. of America v. Belanger* (*In re Belanger*), 962 F.2d 345, 349 (4th Cir. 1992), remains intact, recognizing the right of debtors to continue current payments on debts secured by real property and retain the collateral established. *Id.* Specifically, the addition of the proviso in § 521(a)(2)(C) "except as provided in section 362(h)" had no effect on the holding in *Belanger* because § 362(h), by its terms, only applies to *personal* property loans. *Accord In re* Hill, No. 15-02606-HB, 2015 WL 5194589, at *2 (Bankr. D.S.C. Sept. 3, 2015) ("[BAPCPA] made changes to the 'ride-through' option as it relates to personal property only and did not affect the viability of the 'ride-through' option for debts secured by real property."); *In re* Caraballo, 386 B.R. 398, 402 (Bankr. D. Conn. 2008) (holding that because pre-BAPCPA, Second Circuit precedent provided for the ride-through generally, the option for ride-through in the case of real property was unaffected by BAPCPA); *see also In re* Bennet, No. 06-80241, 2006 WL 1540842, at *1 (Bankr. M.D.N.C. May 26, 2006) (finding debtors can retain real property without redeeming or reaffirming as long as debtor remains current).

253 In the case of personal property, the entering into a reaffirmation agreement (or willingness to do so) is necessary to establish compliance with § 521(a)(2); i.e. that the debtor did everything within her control. *See supra* text accompanying notes 179–190.

254 *In re Waller*, 394 B.R. at 113 (citing *In re Wilson*, 372 B.R. at 820).

255 *In re Wilson*, 372 B.R. at 817.

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.* at 818.

260 *Id.* at 819 ("Limiting a debtor to the three choices of surrender, redeem or reaffirm for real property would impair the debtor's ability to obtain a fresh start, which is one of the primary purposes of bankruptcy law.").

agreement, as would later be true of the debtors in *Waller*, would not prevent her from retaining her property so long as she stayed current on the obligations.[261]

Once more, however, this interpretation does not mean necessarily that ride-through for real property loans is permitted everywhere. That would be too easy. Instead, some courts have held that the fact that BAPCPA did not address ride-through for loans secured by real estate means that pre-BAPCPA circuit precedent still controls—in much the same way as it does in the cases involving back-door ride-through.[262] In those circuits where the court of appeals had held that former § 521(2) required the debtor to choose exclusively from the three options listed, ride-through was precluded without regard to the nature of the collateral.[263] Thus, these courts have concluded that, because the additions to the Code relating to ride-through established by BAPCPA relate only to personal property, this signals Congress's intention to abide by existing circuit precedent when the collateral is other than personal property.[264] Conversely, certainly the argument can be made with some force that if, with full knowledge of the ride-through disagreement among the circuits, Congress affirmatively only eliminated ride-through for personal property loans then, by implication, it sanctioned ride-through in the case of real estate loans.[265] Although the court in *In re Linderman* rejected just such an argument,[266] this construction is further buttressed by placing BAPCPA in its historical context, which was before the Great Recession of 2008, when it was still believed that real estate values generally only moved in one direction.[267] So, the final chapter has surely yet to be written.

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[261] *Id.* at 820.

[262] *See supra* text accompanying notes 218–223.

[263] *See supra* note 61.

[264] *In re* Harris, 421 B.R. 597, 600 (Bankr. S.D. Ga. 2010) (applying the holding and rationale of *Taylor v. AGE Federal Credit Union* (*In re Taylor*), 3 F.3d 1512, 1516 (11th Cir. 1993), and rejecting ride-through in the current case); *In re* Linderman, 435 B.R. 715, 718 (Bankr. M.D. Fla. 2009) (accepting the argument that when a debt is secured by real property, the pre-BAPCPA split among the circuits still exists and applicable circuit precedent controls).

[265] *See In re* Vistacare Grp., LLC, 678 F.3d 218, 226 (3d Cir. 2012) ("When Congress enacts legislation, it is presumed to act with knowledge of the 'existing law and judicial concepts.' " (quoting Farina v. Nokia Inc., 625 F.3d 97, 112 (3d Cir. 2010))).

[266] *In re Linderman*, 435 B.R. at 718.

[267] *See In re* Wilson, 372 B.R. 816, 819 (Bankr. D.S.C. 2007) (making the point that the risk of rapid depreciation of the collateral is far less pronounced for lenders with liens on real property, "as real property does not typically rapidly depreciate"); *see also* Marianne B. Culhane & Michaela M. White, *But Can She Keep the Car? Some Thoughts on Collateral Retention in Consumer Chapter 7 Cases*, 7 FORDHAM J. CORP. & FIN. L. 471, 478 (2002) (making the point that secured lenders commonly acquiesce in ride-through for home mortgage loans, presumably because of the "high value and low mobility of real estate collateral, plus mortgage insurance and state anti-deficiency laws make personal liability disposable to them" (footnote omitted)).

D. Seiffert *Redux*

In *Seiffert*, it will be recalled,[268] the secured lender, 21st Mortgage, filed two motions: to compel the debtors' compliance with their amended § 521(a)(2) statement, and to delay entry of discharge pending such compliance, respectively.[269] It should also be borne in mind that the Seifferts were current on their payments to 21st Mortgage and, of critical importance, the underlying loan documentation did not contain an *ipso facto* clause.[270] Turning first to the motion to compel the Seifferts to "surrender" the mobile home, as indicated in their amended statement of intention, 21st Mortgage contended that the debtors were obligated under both §§ 521(a)(2) and (a)(6) to relinquish possession of the mobile home, meaning literally to turn it over to 21st Mortgage.[271] The court disagreed, noting that the Code does not define the term "surrender."[272] Starting with the premise that Code provisions are to be construed in accordance with their ordinary meaning, the court found that, in the context of §§ 521(a)(2) and 362(h), the meaning of the term "surrender" is *not* interchangeable with the term "deliver," the latter being the term the Code intentionally employs when contemplating physical turnover of possession.[273]

The court next turned to § 521(a)(6), which applied because the security interest in question was a purchase money lien.[274] That provision provides, of

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[268] *See supra* text accompanying notes 1–14.

[269] *In re* Seiffert, No. 18-43114, 2019 WL 1284299, at *1 (Bankr. N.D. Tex. Mar. 8, 2019).

[270] This is unusual, indeed very rare, when the lender is a commercial entity regularly engaged in credit transactions. *See supra* note 104.

[271] *In re Seiffert*, 2019 WL 1284299, at *4 ("21st Mortgage argues that the term 'surrender' is sufficient, by itself, to enable this Court to order the Debtors to affirmatively deliver the Mobile Home to 21st Mortgage.").

[272] *Id.* at *4.

[273] *Id.* (citing Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 18–19 (1st Cir. 2006)); *see also In re* Frazier, 599 B.R. 275, 281 (Bankr. D.S.C. 2019) (holding that the Bankruptcy Code does not give the court the authority to craft remedies to assist a creditor in enforcing nonbankruptcy law remedies where no right to repossess exists because the debtor is current on payments); *In re* Gregory, 572 B.R. 220, 232 (Bankr. W.D. Mo. 2017) (observing that "when Congress intend[s] . . . a party [to] surrender property 'to' another [person or entity], it [knows] how to do so"); *In re* Stephens, No. 09-62630, 2013 WL 1305576, at *8 (Bankr. N.D.N.Y., Mar. 23, 2013) (holding that "surrender" is not synonymous with "delivery"); *cf.* Valez v. EZ Rent a Car Inc. (*In re* Valez), 601 B.R. 351, 363 (Bankr. M.D. Pa. 2019) (finding that a debtor's timely filing of a statement of intention to retain a vehicle and continue making payments was sufficient to satisfy § 521(a)(2)(A) such that the stay remained in place at least until thirty days following the first date set for the meeting of creditors). *But see In re* Marquez, No. 17-60594-RBK, 2017 WL 5438306, at *4 (Bankr. W.D. Tex. Nov. 13, 2017) (holding that "a violation of § 521(a)(2) should generally result in the stay being lifted, but in unusual circumstances, such as this [case], where the debtor has not even attempted to comply with his duties under [§ 521(a)(2) of] the Code," the court may take further action in order "to ensure that the Code and . . . [circuit precedent] are effectuated"); *In re* Trussel, No. 1:12-bk-10001-KSJ, 2015 WL 1058253, at *4 (Bankr. N.D. Fla. Mar. 5, 2015) (ruling that surrender may be compelled when a debtor does not "attempt, in good faith, to reach a reaffirmation agreement with the creditor").

[274] See *supra* note 95, concerning some uncertainty over when § 521(a)(6) applies.

course, that a debtor who has neither redeemed nor entered into a reaffirmation agreement *shall not retain possession* of the collateral.[275] Moreover, the final paragraph of the subsection provides that, on motion of the trustee, the debtor may be ordered to *deliver* the collateral.[276] Nonetheless, once more 21st Mortgage found itself thwarted. First, the court found that the remedy available to the secured creditor in § 521(a)(6) is not possession necessarily, but rather relief from stay so as to be able to exercise its state law rights, which could include the right to repossess.[277] Second, the requirement of *delivery* of collateral in the final paragraph is limited to delivery to the trustee; i.e., it does not provide a remedy for creditors.[278] Finally, the court noted that other decisions have circumvented the language in the first sentence of the subsection that a debtor "shall not retain possession" by holding that § 521(a)(6) is only applicable when the creditor is the holder of an "allowed claim."[279] Because this was a no-asset case 21st Mortgage was not required to and had not filed a claim.[280] However, the court did not rely on this technicality to deny 21st Mortgage relief, pointing out that this literal reading of the statute leads to an absurd result and that, in any event, it was not necessary to decide the applicability of § 521(a)(6) in this case based on the "allowed claim" argument given the court's ruling on the other grounds.[281]

Turning to § 521(d), the remedial provision for noncompliance with §§ 521(a)(6) and 362(h), the court noted that its terms allow for the creditor to exercise all of its state law rights and remedies free of the automatic stay, including enforcement of an *ipso facto* clause, *provided* one was included in the loan documents.[282] Because 21st Mortgage's retail installment credit contract did not include such a clause, and the Seifferts were not otherwise in default, 21st Mortgage would have no right to take action against the debtors or the mobile home under state law unless and until the occurrence of a subsequent event of default.[283] Thus, the relief available under the court's interpretation of § 521(a)(6)—relief from stay so as to be able to exercise state law rights—was of no present utility because 21st Mortgage had no state law right to seize the collateral.

Moving on to the companion motion to delay entry of discharge, the court observed, initially, that 21st Mortgage had no grounds to seek denial of discharge under § 727(a).[284] The Rules of Bankruptcy Procedure, in turn, call for the

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[275] 11 U.S.C. § 521(a)(6).
[276] *Id.*
[277] *In re Seiffert*, 2019 WL 1284299, at *6.
[278] *Id.* at *5.
[279] *Id.*; *see also supra* note 95 and accompanying text.
[280] *In re Seiffert*, 2019 WL 1284299, at *5.
[281] *Id.*
[282] *Id.* at *6.
[283] *Id.* at *2, *6. Thus, the remedy provided by § 521(d) did not benefit 21st Mortgage. *See In re* Steinhaus, 349 B.R. 694, 710 (Bankr. D. Idaho 2006) (pointing out that where there is no *ipso facto* clause in the contract, § 521(d) does not allow the secured lender to pencil one in).
[284] *In re Seiffert*, 2019 WL 1284299, at *6–7.

prompt entry of the order of discharge upon expiration of the time fixed for filing a complaint objecting to discharge, except in certain circumstances where entry may be delayed.[285] Because a debtor's failure to execute her duties under § 521(a)(2) is not among those specified circumstances warranting delay in entry of the discharge order, the court determined it had no alternative but to deny that motion as well.[286]

The logic and soundness of the reasoning in *Seiffert* is unassailable. While its holding will apply only in the rare circumstance where the consumer credit contract or security agreement is devoid of an *ipso facto* clause,[287] it represents yet another category of potential cases where ride-through has been found to endure notwithstanding BAPCPA. Thus, the chaos and serendipity surrounding when ride-through is available and when it is not continues to get worse, a state of affairs that serves only to undermine the effectiveness of the bankruptcy order for its participants and the integrity of the system overall. So, it seems clear something needs to be done.

V. WHAT TO DO?

A. *The Policy Cases for and Against Ride-Through*

1. *Pro-Creditor Position*

In response to the oft-cited lament that preclusion of installment redemption will inevitably lead to situations where a chapter 7 debtor will possess no viable method of retaining possession of critical secured collateral,[288] creditors point out that a debtor may avoid such an untenable position by initially filing a petition for bankruptcy under chapter 13 or converting an existing chapter 7 proceeding to a chapter 13 proceeding. Chapter 13 is designed to provide a debtor with a fresh start through rehabilitation; a debtor retains her property in return for an obligation to pay all or a portion of her debts from future income under a chapter 13 plan. By contrast, chapter 7 provides a fresh start through liquidation of the debtor's property. As such, under proper circumstances, chapter 13 authorizes redemption by installment payments over an objection by the creditor (a "cram

[285] FED. R. BANKR. P. 4004(c).
[286] *In re Seiffert*, WL 1284299, at *6 (describing the circumstances in Rule 4004(c) authorizing a delay in granting a discharge as "both specific and limited"). *But see In re* Linderman, 435 B.R. 715, 718 (Bankr. M.D. Fla. 2009) (ordering the debtor to select between the three available options and suspended discharge until the court could verify that the debtor had complied with the court's order).
[287] *See supra* note 104.
[288] *See* Cap. Commc'ns Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 51 (2d Cir. 1997) (sustaining ride-through based on the importance of the fresh start, the inadequacy of redemption and reaffirmation, and the importance of the collateral—often a vehicle—to the debtor's fresh start).

down"),[289] the very same result sought to be achieved in ride-through situations. Moreover, this opportunity exists even in a state of affairs where there has been a prebankruptcy default.[290]

Because repayment under chapter 13 is favored over chapter 7 liquidation as a matter of public policy,[291] the argument continues that permitting any ride-through in chapter 7 runs counter to the norms sought to be advanced under the current bankruptcy regime. Thus, creditors point out that not only is there is an alternative to ride-through, but one that affords secured lenders with greater protection since discharge is not granted until the debtor completes the plan.[292] Creditors also maintain that the existence of ride-through makes it unlikely that a debtor would ever elect to reaffirm a debt,[293] thus depriving them of a comparable level of protection as exists under chapter 13.[294]

Given the existence of a legislatively authorized mechanism by which a debtor may retain property by keeping payments current, the argument is that it would be improper, if not incongruous, to infer congressional approval of a "cram down" option in chapter 7 that offers creditors less protection and higher risk. As noted by Judge Shadur in his dissent in *In re Boodrow*, "when Congress

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[289] Under § 1325(a)(5), a plan is confirmable as to a secured claim if it proposes to pay the holder the value, as of the effective date of the plan, of not less than the allowed amount of the claim. 11 U.S.C. § 1325(a)(5). BAPCPA added the requirements that the payments be in equal installments and assure the secured party of adequate protection during the plan period. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. 3, sec. 309, § 1325(a)(5)(B), 119 Stat. 23, 83. The latter requirement could, in a situation where the collateral is depreciating rapidly in value, require payments actually in excess of the value of the secured claim within the meaning of § 506(a)(2). BAPCPA also made it more difficult to confirm a plan involving claims secured by vehicles by prohibiting strip down of the claim to the value of the collateral in most cases. *See infra* note 301.

[290] *See* 11 U.S.C. § 1322(b)(5).

[291] The legislative history to the 1978 Act provided as follows:

> The premises of the bill with respect to consumer bankruptcy are that use of the bankruptcy law should be a last resort; that if it is used, *debtors should attempt repayment* under chapter 13, Adjustment of Debts of an Individual with Regular Income; and finally, whether the debtor uses chapter 7, Liquidation, or chapter 13, Adjustment of Debts of an Individual, bankruptcy *relief should be effective*, *and should provide the debtor with a fresh start*.

H.R. REP. No. 95-595 (1977) (emphasis added), *reprinted in* 1977, 1978 U.S.C.C.A.N. 5963, 1977 WL 9628, at *118.

[292] *See* 11 U.S.C. § 1328(a). Under stringent conditions a "hardship discharge" may be granted prior to completion of the plan. 11 U.S.C. § 1328(b).

[293] *See In re Boodrow*, 126 F.3d at 60 (Shadur, J., dissenting) (observing that it would be the rare debtor indeed who would elect reaffirmation or redemption over the unstated fourth option, which neither requires a large lump sum payment (redemption) nor resuscitates personal liability for the underlying debt post-discharge (reaffirmation)).

[294] This is even more true after 2005, since BAPCPA adopted a number of amendments making chapter 13 more restrictive and less inviting for debtors and more favorable for creditors, particularly secured creditors. *See* Lawrence Ponoroff, *Rethinking Chapter 13*, 59 ARIZ. L. REV. 1, 9, 27 (2017) ("The cumulative effect of [the changes made to chapter 13 by BAPCPA] has been to make it more difficult to confirm and complete a chapter 13 plan. Moreover, even when a debtor is able to do so, these new advantages flowing to secured creditors largely come at the expense of their unsecured counterparts.").

wants to provide for a 'cram down' that enables a debtor to keep property over the objection of a secured creditor, it knows full well how to do so."[295]

The pro-creditor argument would also dismiss as chimerical the concern over a debtor's involuntary surrender of the collateral. Most secured creditors, it would be noted, will prefer to enter reaffirmation agreements containing identical terms to the original agreements so as to avoid the costs associated with accepting back, and then disposing of, surrendered collateral.[296] This would be particularly true in situations where the debtor is current in payments since it enhances the very real possibility that the creditor will actually receive more by agreeing to reaffirmation than it would if it liquidated the collateral now—even to the point of full satisfaction of the indebtedness. The point to be made from the perspective of secured creditors is that disallowance of nonconsensual ride-through is unlikely to result in the forced surrender of the debtor's property in very many cases.

The bottom line is that while most lenders would concede that redemption is rarely a realistic option,[297] they would maintain that the system allows for other alternatives that permit the debtor to avoid losing property that may be essential to earning a living or caring for dependents. To be sure, those alternatives may not be quite as attractive as complete immunity from personal liability on the underlying debt. Nonetheless, it would be pointed out that these less debtor-friendly options still accomplish the goal of facilitating retention of critical property, but do so without violently skewing the nature of the deal so as place on the secured lender the same quantum of noncontracted-for risk as is associated with ride-through. Finally, it would be argued that, by maintaining the debtor's *in personam* liability, the removal of ride-through aligns debtors' incentives in terms of protecting and maintaining collateral with the most favorable economic outcome for lenders. This, in turn, the creditors' position would continue, should

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[295] *In re Boodrow*, 160 F.3d at 60.

[296] This should come as no surprise. Requiring reaffirmation in cases where the debtor is current in payments and otherwise fulfilling the original bargain adds significant risk and expense to the debtor's fresh start without adding any additional value. *See* Ehrlich, *supra* note 107, at 663 ("Common sense, as well as commercial reality, lead to the conclusion that no rational secured creditor would declare a default, accelerate the balance due, and repossess collateral merely because the loan has become nonrecourse as a result of the debtor being legally released from liability, as in a bankruptcy discharge . . . ."). *But see infra* note 304.

[297] *See* Bank of Bos. v. Burr (*In re* Burr), 160 F.3d 843, 848 (1st Cir. 1998) ("We do not doubt that redemption is beyond the means of most chapter 7 debtors, and that chapter 7 debtors wishing to retain consumer goods on which they owe money will, as a practical matter, be compelled to enter into reaffirmation agreements with their secured creditors."). Indeed, a recent study found that only 1.2 percent of debtors in their national sample indicated an intent to redeem in their § 521(a)(2)(A) statement. *See* Pamela Foohey et al., *Driven to Bankruptcy*, 55 WAKE FOREST L. REV. 287, 313 fig.1 (2020). The authors found the low number is all the more remarkable in light of the growing market of lenders willing to finance chapter 7 debtor redemptions. *Id*. at 315.

lead to a lower cost of credit for debtors *ex ante*,[298] which, it would be urged, is good for debtors as a group and, a lower cost of capital, good for the economy as a whole.[299]

2. *Pro-Debtor Position*

As addressed above, the strongest (and loudest) argument in favor of ride-through is to protect debtors from involuntary and/or imprudent reaffirmations of unsecured debt as the only practicable way of retaining essential property, like a home or automobile.[300] It is true that the Code's mechanism for installment redemption in individual debtor cases is chapter 13. However, modification of home mortgage loans has always been prohibited by § 1322(b)(2), and BAPCPA itself imposed a serious impediment in the way of retaining an automobile in this fashion by precluding strip down of most consumer vehicle loans.[301] Consumer

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[298] *See* Barry E. Adler, *The Soft-Landing Fallacy and Consumer Debtors*, 7 FORDHAM J. CORP. & FIN. L. 499, 500 (2002) ("At least if the credit market is competitive and transparent, any increase in ex post creditor collection translates to more favorable loan terms, such as a lower interest rate, for a debtor ex ante."). Whether, in fact, the consumer credit market is truly competitive and transparent is the subject to some disagreement. *Compare* Lawrence A. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 70, 76 (1991) (arguing that in the case at least of credit cards, financial services institutions do not compete by offering lower rates), *with* Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 WASH. & LEE L. REV. 1071, 1131–32 (2005) (suggesting that if debtors were permitted to waive the right to discharge by contract *ex post* the debtor would enjoy better terms *ex ante*). *See infra* note 313.

[299] This is part of the longstanding debate in the literature to identify an efficiency justification for security in general. *See* Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209, 260 (1989). Although this article does not argue that security is necessarily efficient—and, indeed, continues to question the wisdom of Article 9, *see id.* at 243–54—it does argue that allowing early lending financers to contract for priority can, in fact, be efficient. *Id.* at 250. The efficiency debate is "efficiently" summarized in Jay L. Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, sec. VI.A, at 831–43 (2004).

[300] *See supra* note 297. This concern was discussed extensively by the Commission. *See* NAT'L BANKR. REV. COMM'N, *supra* note 68, at 154 ("As the legislators recognized in the 1970s, the economic effect of reaffirming a large amount of discharged debt can completely undermine the debtor's financial rehabilitation. In fact, the debtor can be substantially worse off than if the debtor paid higher interest rates for postpetition credit."); *cf.* Foohey et al., *supra* note 297, at 294 (concluding, based on empirical data, that people filing bankruptcy indicate overwhelmingly that they want to use bankruptcy as a tool to keep their automobiles).

[301] BAPCPA added a new subparagraph following 11 U.S.C. § 1325(a)(9), but it does not bear a separate letter or number. Hence it has come to be termed the "hanging paragraph" or § 1325(a)(*). Whatever the moniker, in substance the new provision provides that for purposes of § 1325(a)(5)—concerning the permissible treatment of secured claims in a chapter 13 plan—"[§] 506(a) shall not apply" to a claim described in § 1325(a)(5) if the creditor has: (1) "a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle" (sometimes referred to as "910 day vehicle loans"); or (2) "if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing." 11 U.S.C. § 1325(a)(*). By taking § 506(a) out of the equation, an undersecured lender's claim is not bifurcated and, therefore,

advocates would point out that this not only makes it more costly to retain a vehicle, but also could make it impossible for an individual debtor to propose a confirmable plan at all in a case involving a 910 vehicle loan.[302] Moreover, because chapter 13 is a zero-sum game, increasing the payout on secured claims necessarily will have an erosive impact on the amounts available for unsecured claimants.[303]

It is true, as the pro-creditor position posits, that the availability of ride-through, or the fourth option, makes it far less likely, although not inconceivable,[304] that a debtor would ever choose or be counseled to redeem or reaffirm a debt. However, the argument would carry far more prowess if indeed creditors somehow had a *right* to redemption or reaffirmation. They do not.[305] The former is an option that a debtor may elect when she deems it in her best interest to do so. The latter, reaffirmation pertains where both parties come to agreement on

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must be treated as fully secured for purposes of § 1322(b)(2). *See generally* Whitford, *supra* note 85, at 143 (predicting, accurately as it turned out, that automobile lenders are likely to benefit more than any other group under BAPCPA).

302 A "910 vehicle loan" is the phrase used to describe a loan covered by the hanging paragraph. Benjamin B. Coulter, *No Surrender: Debtors, Creditors, and the Surrender of "910-Vehicles" Under the "Hanging Paragraph" of the Bankruptcy Prevention and Consumer Protection Act of 2005*, 40 CUMB. L. REV. 879, 886 (2010). Treating the entire claim as secured, rather than just to the extent of the value of the collateral, may cause the payments required over the life of the plan to exceed the debtor's available income. In that case, the plan cannot be confirmed and the debtor will be relegated to chapter 7.

303 One of the principal ways in which unsecured creditors are protected in chapter 13 is for all of the debtor's income, over and above necessary expenses, including payments on account of secured debt, to be committed to payment of unsecured claims. Therefore, the greater the amount of monthly payments that must be made to secured claimholders in order to retain possession of the collateral, the less the surplus income that will be left for unsecured creditors. *See* Scott F. Norberg & Andrew Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 478–79 (2006) ("[T]he new provision limiting strip-down of certain purchase money security interests in Chapter 13 might be expected to further increase the share of Chapter 13 disbursements paid to secured creditors and to correspondingly reduce payments to unsecured creditors." (footnote omitted)); Ponoroff, *supra* note 122, at 333 n.19.

304 If, for instance, the obligation carries an above market interest rate and the debtor can refinance through a relative or other source, redemption would not be unexpected or irrational. The same would be true if the debtor had a prospective buyer for the goods willing to pay more than the redemption price. Neither scenario is likely to be common, the second even less than the first, but still such situations can and surely do arise. *See* Foohey et al., *supra* note 297, at 315 (describing a "cottage industry" of lenders who actually focus on providing credit to debtors seeking to redeem collateral).

305 Redemption under 11 U.S.C. § 722 is, by its terms, involuntary, in the sense that creditors can neither mandate redemption nor reject it if an offer to redeem is made. Reaffirmation under 11 U.S.C. § 524(c) is voluntary in the sense that a creditor does not have to agree to reaffirmation, although the lender that does so in response to an offer to redeem on the original contract terms does to its peril if the debtor is current on payments. *See supra* note 94. At the same time, creditors cannot require reaffirmation if the debtor chooses, for instance, to surrender the collateral. Thus, the intimation that ride-through would somehow deprive secured creditors of something to which there was an expectation or entitlement is to simply wave a flag that produces no breeze.

the terms on which the debtor's personal liability will continue, and, of course, is subject to numerous controls to assure that it is truly voluntary and consonant with the debtor's financial health. What creditors do have the right to in bankruptcy is the value of their secured claims, measured by the value of the collateral, and, in the case of undersecured claims, their pro rata share of any distributions made on account of unsecured claims. Ride-through does not in any way deprive secured lenders of these rights.[306] Moreover, it is, of course, only open to what is likely a small percentage of debtors—those who have committed no act of default other than filing bankruptcy.

Without ride-through redemption remains an option. However, as a practical matter it is generally acknowledged that if the debtor has the cash to purchase the collateral at its current value, in most cases she likely would not be in bankruptcy in the first place.[307] The potential loss of a vehicle necessary to earn a living, a home in which to provide shelter, or other critical property represents a serious impediment when viewed against the backdrop of the fresh start and debtor rehabilitation principles that are supposed to be the animating features in consumer bankruptcy cases. The debtor is thus left with the Hobson's choice of reaffirm an undersecured debt or lose the property. The pro-debtor position would also emphasize that, typically, the value of the collateral at issue in these situations is modest,[308] but the stakes for individual debtors and, in the aggregate, for society at large are quite high.

In terms of the chapter 13 alternative, the pro-debtor polemic would surely draw attention to the inexplicable fact that, at the same time that Congress sought to force more debtors into chapter 13 through mechanisms like the means test,[309]

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[306] 11 U.S.C. § 506(a)(1) bifurcates the claim of a partially secured creditor into a secured portion (measured by the value of the collateral) and an unsecured portion (consisting of the amount by which the claim exceeds the value of the collateral).

[307] BAPCPA put redemption even further out of reach of most debtors by adoption of a new § 506(a)(2), which provides that personal property securing an allowed claim is to be determined based on replacement value *without deduction* for costs of sale and marketing. *See supra* note 47.

[308] Foohey et al., *supra* note 297, at 294 ("[P]eople in bankruptcy own cars of modest value and owe immodest sums against those cars."). In the case of personal property, often nonvehicle secured loans are mere leverage liens, in the sense that the lender never seriously considers repossession and foreclosure because the game's not worth the candle, *but* the threat of repossession might be enough to get a struggling debtor to prioritize the secured lender in fear of having personal possession repossessed. Real estate secured liens are a different story; hence ride-through is often permitted. *See supra* notes 100–101 and accompanying text. Vehicle loans fall somewhere in-between, and it is the existence of this value that accounts for why reported ride-through cases invariably involve a vehicle-secured loan. However, in most cases the vehicle in question is likely to have a value of $20,000 or less. At this level, foreclosure is often not likely to produce much more than a breakeven outcome for the lender, who not uncommonly will be the high bidder and then must turn around and re-sell. *See* Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. UNIV. L.Q. 69, sec. III.C.8.a, at 133–38 (1997) (discussing low values received on disposition sales of automobile collateral).

[309] 11 U.S.C. § 707(b).

which formed a central tenet of BAPCPA, Congress also made chapter 13 less attractive for debtors.[310] This not only made it more difficult to confirm a plan, but in some cases well neigh impossible.[311] The fact that lenders are amenable to reaffirmation provides little comfort, since these arrangements inevitably entail a negotiation in which the parties are hardly equally matched, to say the least. Moreover, while *de facto* ride-through may be quite common, it is not something that debtors can predictably rely upon, nor does it represent a means to avoid reaffirming a debt in excess of the value of the collateral. Finally, the assumption that lenders as a group would share the largesse they enjoy by elimination of ride-through with debtors generally in the form of a lower cost of credit *ex ante* is untested at best, and certainly no less established as a matter of fact than the assertion that permitting debtors to retain property without redemption or reaffirmation would drive up the cost of credit.[312] The equally likely scenario is that creditors would simply arrogate whatever benefits might be associated with higher rates of collection through coerced reaffirmations.[313]

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[310] *See* Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 221 (2005) ("The fact that Chapter 13 is made much less attractive reveals much about the true agenda of the bill's proponents, who proclaimed their desire for more debtors to file under that chapter. The real goal of the creditor lobby was to make bankruptcy of all types more difficult for debtors who need it. In fact, it seems quite likely that Chapter 13 cases will go down, rather than up, as a percentage of bankruptcy filings."); Ponoroff, *supra* note 294, at 16–17 (making the point that a debtor who cannot pass the means test for chapter 7 and is ineligible for relief under chapter 13 because of debts in excess of the ceilings in 11 U.S.C. § 109(e), would, for all intents and purposes, be left without access to bankruptcy relief of any sort given the restrictive rules BAPCPA adopted in relation to individual chapter 11 cases).

[311] *See supra* notes 289 & 302.

[312] *See supra* note 297; *see also In re* Edwards, 901 F.2d 1383, 1386–87 (7th Cir. 1990) (rejecting ride-through under § 521(2) as originally enacted on the basis that allowing debtors to exercise the "fourth option" violates legislative policy by driving up the costs of credit and failing to protect creditors from the risks of quickly depreciating assets). In addition, the point about credit rates assumes that lower credit costs are an end to be pursued at almost any cost, ignoring the need to account for the countervailing consideration of debtor rehabilitation in needy cases. As such, it's a self-defeating argument in much the same way as saying that insurance companies should deny meritorious claims inasmuch as a reduction in claims would reduce insurance premiums.

[313] *See* Hogan, *supra* note 85, at 911 (pointing up that due to a lack of sufficient bargaining power consumers are disadvantaged in setting *ex ante* terms, potentially allowing creditors to reap all of the rewards of enhanced collection). *But see* Zywicki, *supra* note 298, at 1132 (arguing that the cost of the mandatory (nonwaivable) bankruptcy discharge provision increases the rate of interest creditors must charge and "these costs will generally have their greatest impact on marginal borrowers—young lower-income, lower-wealth borrowers who are most likely to be turned down for credit as the cost and risk rises, who can least afford to pay higher credit costs, and who have the fewest number of credit options.").

3. *Analysis*

The policy-based arguments that have been mustered against the ride-through over the years are not concocted or without some force. However, they are also not unexpected. Creditors want to reduce risk and want to be paid. That's quite understandable. There was also something to secured creditors complaints prior to the 1984 Act that they were handicapped by not receiving prompt notice of the debtor's intentions regarding collateral.[314] Beyond that, however, it is again important to bear in mind that the bankruptcy system exists to allocate the costs of financial failure equitably and to restore individuals hopelessly in debt back to some measure of financial viability, even if consensus quickly breaks down when the question turns to just how much of a boost the honest but unfortunate debtor is entitled to receive.[315] In addition, it is important to stress that the creditor community is not a monolithic mob,[316] and BAPCPA has already put a heavy thumb on the scale for secured creditors at the expense of their unsecured (and typically less sophisticated and politically powerful) compatriots.[317] Not allowing undersecured creditors to further inflate their secured claims by nullifying ride-through, often to the detriment of purely unsecured creditors, would seem a positive step in moving the needle in a more equitable direction.

The claim that as long as the ride-through option is available a debtor will rarely, if ever,[318] elect to redeem or reaffirm is spurious to begin with because, as noted earlier,[319] these alternatives are not and were never intended to be options to which the secured creditor had an entitlement or cognizable right to in the first place. Moreover, the alarmist rhetoric ignores the fact that very few debtors are able to take advantage of ride-through in any form because, by the time

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[314] *See supra* note 43 and accompanying text; *see also* Ehrlich, *supra* note 107, at 640 ("[T]o the contrary [of some courts' commentary on the issue], a logical sequence of testimony, bills, and floor statements combine to lead to the conclusion that the intent behind section 521(2)(A) was to provide some procedural mechanisms that would provide creditors with meaningful information about the debtor's intentions, and reduce the costs to creditors of seeking relief from the stay when the debtor's intentions were either to surrender the collateral or reaffirm the debt.").

[315] As early as 1918, the Supreme Court discussed the fresh start for the unfortunate debtors as one of the two overriding polices of the bankruptcy system and of "great public interest." *See* Stellwagen v. Clum, 245 U.S. 605, 617 (1918); *see also* Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (describing the purpose of the bankruptcy law as giving the "honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt").

[316] *See supra* note 303.

[317] *See supra* note 122.

[318] In *In re Edwards*, the Seventh Circuit reasoned that because "[n]o debtor would reaffirm personal liability unless required to do so," allowing a debtor to retain collateral without redemption or reaffirmation effectively negates "the voluntarism contemplated by the statute" and enables the debtor to force a new arrangement upon his secured creditors. 901 F.2d 1383, 1386 (7th Cir. 1990) (citing *In re Bell*, 700 F.2d 1053, 1056 (6th Cir. 1983), although *In re Bell* was addressing a different issue—that redemption cannot be accomplished through installment payments—a point over which there is no real disagreement).

[319] *See supra* note 305 and accompanying text.

they reach bankruptcy, most debtors are already behind in their payment obligations. Additionally, as a practical matter, in most secured consumer debt cases not involving real estate or automobiles, the net resale value of the collateral will be a fraction of the loan balance.[320] Thus, the creditor is not only no worse off if the debtor chooses not to reaffirm but may actually wind up considerably better off since the full value of the lien survives and the sum of the continued payments may well exceed the redemption price.[321] That scenario is certainly just as likely to occur, if not more likely, than the narrative that the debtor will allow the collateral to depreciate rapidly and then default, leaving the lender with a net outcome that is worse than if the lender had been permitted to foreclose immediately. Finally, the suggestion that chapter 13 is the proper alternative for a debtor who is current on payments implicitly assumes a success rate in individual debt adjustment cases that is belied by reality.[322]

The point is that, in the vast number of consumer cases, the secured creditor never had a realistic expectation of recovering meaningful value from the collateral upon default.[323] Moreover, even in those relatively rare instances where preservation of the collateral is a legitimate concern, the creditor can protect itself with appropriate affirmative covenants in the security agreement relating to proper insurance, maintenance, and the like, with full rights to repossession and

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[320] While there are exceptions, of course, by and large most security interests in consumer goods are taken more for their leverage value. *See supra* note 308. This is the rationale for the Federal Trade Commission rule making it a deceptive trade practice for a lender to take a nonpossessory, nonpurchase-money security in most forms of consumer goods. *See* 16 C.F.R. § 444.2(a)(4) (2020); H.R. REP. NO. 95-595, 127 (1977), *reprinted in* 1977, 1978 U.S.C.C.A.N. 5963, 1977 WL 9628, at *2 (noting, in discussing changes made by the 1978 Act to chapter 13, "[i]n consumer cases, very often a secured creditor with a security interest in all of the debtor's property, including household and personal goods, uses the threat of foreclosure to obtain a reaffirmation of a debt. Otherwise, the secured creditor is able to deprive a debtor of even the most insignificant household effects . . . even though the items have little if any realizable market value. However, the goods do have a high replacement cost, and thus the creditor is able to use the threat of repossession, rarely carried out, to extract more than he would be able to if he did foreclose or repossess." (footnote omitted)).

[321] This also explains the coincidence of why ride-through is, for the most part, invariably challenged in connection with vehicle loans. In most real estate cases, the lender will be protected by a more stable value or are indifferent because of mortgage insurance or anti-deficiency legislation. *See supra* note 100.

[322] *See* Charles M. Foster & Stephen L. Poe, *Consumer Bankruptcy: A Proposal to Reform Chapters 7 and 13 of the U.S. Bankruptcy Code*, 104 DICK. L. REV. 579, 589 (2000) (noting only one-third of chapter 13 filers "were able to complete repayment plans, and many . . . were only able to make minimal repayments"); Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 113 (2011) (suggesting that chapter 13 is a "pretend solution" that "does not work as intended" and that has been a systemic failure for decades).

[323] While most of the reported decisions of course involve vehicles, in *Mayton v. Sears, Roebuck & Co.* (*In re Mayton*), 208 B.R. 61, 63 (B.A.P. 9th Cir. 1997) the collateral consisted of a sewing machine, a television and a "LXICU box/programmer" which the debtor had purchased with her secured Sears credit card. *See also In re* Ogando, 203 B.R. 14 (Bankr. D. Mass. 1996) (a case in which Sears held a purchase money security agreement covering a variety of household goods ranging from televisions to mattresses).

foreclosure triggered in the event of nonobservance. Thus, creditor anguish over the debtor's lack of incentive to maintain the collateral once personal liability has been discharged, even if well-founded to begin with,[324] is the proverbial straw man that has very little place in an honest debate about the issue.

Quite frankly, the end game for many creditors that seek to compel the debtor to choose among the three options listed in § 521(a)(2) is not knowledge of the debtor's intentions, as originally maintained,[325] but rather the effective reinstatement of personal liability for the dischargeable portion of an undersecured creditor's debt.[326] While this ulterior motivation may be understandable, it is hardly the way the system is supposed to work. In short, a complete banishment of ride-through in chapter 7 gives secured creditors undeserved leverage over the individual debtor. The effect in many instances would be to defeat fresh start policy by either depriving the debtor of property necessary to return to productivity (which the debtor will rarely be in a position to replace) or leaving the debtor saddled with unmanageable debt. Elimination of ride-through also gives partially secured creditors an unearned advantage over other general creditors, both pre and postpetition, with respect to the unsecured portion of their debts in contravention with the strong equality norm that pervades in bankruptcy.[327]

Accordingly, there is much to be said for permitting a nondefaulting debtor to ride a secured consumer loan through chapter 7 and pay it off postpetition without reaffirmation. The Commission offered the secured lending community half a loaf back in 1997, and it was shunned.[328] Given the current uncertain state of affairs, that may have been a mistake in terms of their own best interest. It most assuredly was a mistake from the perspective of the overall effectiveness and integrity of the bankruptcy system, as the outcome in ride-through cases today will depend upon a random mix of serendipitous factors that are devoid of any clear intentionality or coherence.

It is also important to recall that the ride-through option will not be available in the overwhelming number of cases involving personal property secured loans.[329] Ride-through has always been understood as limited to circumstances where the debtor is current on her payment obligations and not otherwise in

[324] *See* Cap. Commc'ns Fed. Credit Union v. Boodrow, 197 B.R. 409, 412 (Bankr. N.D.N.Y. 1996) (explaining why the debtor's lack of personal liability on a secured debt does not necessarily translate into a lack of incentive to take proper care of the collateral), *aff'd*, 126 F.3d 43 (2d Cir. 1997).
[325] *See supra* note 43.
[326] *See In re Mayton*, 208 B.R. at 67 (noting, in a pre-BAPCPA case, that Sears' real motivation in seeking an order compelling the debtor to amend her schedules was to obtain reaffirmation of the debt).
[327] *See supra* text accompanying note 303.
[328] *See supra* text accompanying notes 81–82.
[329] Kate Davidson, *Bankruptcy—Confusion and Ambiguity: The Post-BAPCPA Uncertainty Concerning the Ride-Through Option in the Eighth Circuit*, 36 U. ARK. LITTLE ROCK L. REV. 489, 498, 502–03 (2014).

default other than by having filed bankruptcy.[330] If there has been a prebankruptcy default, and the debtor wishes to cure the arrearage or modify the loan, the debtor would still be required to propose a repayment plan under chapter 13, with all of the attendant requirements and creditor protections, including court supervision.[331] On balance, then, the secured lender is, as a practical matter, in no worse position after bankruptcy than it was before, or at least not as a result of a nondefaulting debtor's decision to elect the ride-through option.

B. *Proposals*

In addition to Professor Braucher's early and prescient assessment of the impact of BAPCPA on ride-through,[332] the literature contains two quite thoughtful student Notes examining ride-through, one published in 2008 in the *Columbia Law Review*,[333] and the other in 2013 in the *Yale Law Journal*.[334] In the first Note, the author concludes that BAPCPA did not eliminate ride-through any more than it mandated ride-through.[335] Therefore, the suggestion is that BAPCPA did not alter or affect the state of the law as it existed in 2005. In other words, the author submits that the 5-4 split of the circuits that existed pre-BAPCPA still prevails and will continue to do so until resolved by the Supreme Court.[336]

The argument is a clever one, but, it suffers from some fundamental weaknesses, including the fact that it flies in the face of the decisional law that overwhelmingly holds that, at least in the case of personal property, ride-through is not an option where the debtor fails to comply substantially with § 521(a)(2) and the loan documents contain an *ipso facto* clause.[337] In fairness, the author's sample size was relatively small given that the work was done in the early years following BAPCPA, but the point remains that the argument has not proved persuasive. Second, and more troubling, it relies in significant measure on the dubious assumption that congressional intent underlying BAPCPA was to rein in those upper and upper-middle class debtors who were abusing the bankruptcy

[330] Braucher, *supra* note 83, at 462

[331] *See, e.g.*, Am. Nat'l Bank & Tr. Co. v. DeJournette, 222 B.R. 86, 96 (W.D. Va. 1998) (citing Beneficial N.Y., Inc. v. Bushey (*In re* Bushey), 204 B.R. 661, 663 (Bankr. N.D.N.Y. 1997)) (holding that ride-through is not available for a debtor who is not current on a secured obligation).

[332] *See* Braucher, *supra* note 83, at 477–80.

[333] Hogan, *supra* note 85, at 882.

[334] Amber J. Moren, Note, *Debtor's Dilemma: The Economic Case for Ride-Through in the Bankruptcy Code*, 122 YALE L.J. 1594 (2013).

[335] Hogan, *supra* note 85, at 924–25. This is also the position reached by the dissent in *Dumont v. Ford Motor Credit Company* (*In re Dumont*), 581 F.3d 1104, 1119 (9th Cir. 2009) (Graber, J., dissenting); *see supra* text accompanying notes 140–144.

[336] Hogan, *supra* note 85, at 924.

[337] *See supra* Section IV.B.

system, and, in doing so, actually to *protect* the lower and middle class filers.[338] While this may have been the rhetoric trumpeted at the time by some of the proponents of BAPCPA,[339] it is (as the author acknowledges but refuses to concede in reviewing the possible criticisms of his view[340]) a bit naïve, and it is most certainly belied by the overall tenor the Act, which rather clearly was intended to tilt the scales against debtors of all stripes.[341] Thus, the suggestion that these

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[338] Hogan, *supra* note 85, at 926 (asserting that the primary goal of BAPCPA was to prevent high-income filer abuse and to protect rather than injure the lower and middle classes). *But see* Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEVS. J. 407, 483 (2009) (commenting, in support of the proposition that BAPCPA is misnamed, that "[e]mpirical evidence has shown that the bankruptcy system was not being abused, and the measures within it do not protect consumers. The BAPCPA harms the poor both procedurally and substantively. . . . Unfortunately, the BAPCPA's failure to balance the rights of both debtors and creditors equally prejudices those who need the fresh start the most—the poor."); Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 642–43 (2018) (noting that the empirical evidence in support of the proposition that bankruptcy strategic players manipulating the system at the expense of more worthy debtors was scant).

[339] *See* 151 CONG. REC. E737 (daily ed. Apr. 22, 2005) (statement of Rep. Todd Tiahrt) ("[T]he United States cannot afford to continue down the path where high consumer debt is routinely directed toward bankruptcy as a first stop rather than a last resort."); 151 CONG. REC. S1854-56 (daily ed. Mar. 1, 2005) (statement of Sen. Charles Grassley); 149 CONG. REC. H1991, H1998 (daily ed. Mar. 19, 2003) (statement of Rep. Thomas Davis) ("Rather than an action of last resort, [bankruptcy] had evolved into a convenient vehicle to discharge debts through irresponsible financial practices."); 147 CONG. REC. H517, H523 (daily ed. Mar. 1, 2001) (statement of Rep. Frederick Boucher) ("Bankruptcy was never meant to be a financial planning tool, but it is increasingly becoming a first stop rather than a last resort . . . ."); 146 CONG. REC. H9826, H9833 (daily ed. Oct. 12, 2000) (statement of Rep. Edward Bryant) ("In recent years, bankruptcy has truly become a first stop rather than a last resort."); 144 CONG. REC. S10459, S10471 (daily ed. Sept. 17, 1998) (statement of Sen. Orrin Hatch) ("Bankruptcy has become a routine financial planning device used to unload inconvenient debts, rather than a last resort for people who truly need it."); *see also* Sousa, *supra* note 19, at 574 (noting that the credit industry cleverly framed the issue in the guise of high-income filers systematically abusing the system to the detriment of everyone else's financial well-being).

[340] Hogan, *supra* note 85, at 921 (rejecting the arguments that BAPCPA was about the best result in bankruptcy for creditors or that the expressions of intent by legislative supporters were not reflective of their true intent).

[341] *See* Foohey et al., *supra* note 30, at 232 ("BAPCPA punishes *everyone*, [but] especially lower-income households, increasing the financial distress of people who file bankruptcy." (emphasis added)); Jensen, *supra* note 30, at 498–99 (describing how a broad coalition of consumer creditors, who usually disagree on everything, represented by some of the most influential lobbyists in Washington D.C., came together in the effort to effect consumer bankruptcy reform favorable to their interests); Sousa, *supra* note 19, at 574 (identifying bowing to the special interests of the credit industry as perhaps the only sensible rationale for the enactment of BAPCPA). Empirical research done after this Note was published also suggests that the amendments created both structural and procedural barriers that may prevent some worthy individuals from filing. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17, 124–25 (2012); *cf*. Dickerson, *supra* note 39, at 1903 (asserting that the single industry capture explanation of BAPCPA provides an incomplete explanation and that the broad support BAPCPA enjoyed from liberal and conservative legislators alike was as much the product of the desire not to alienate women, members of the armed forces, veterans, and seniors as it was the hope of receiving support from the financial services industry); *see also supra* notes 84–85.

court cases that regard BAPCPA as having eliminated ride-through for some chapter 7 filers "have subverted this goal of BAPCPA, hurting the same lower class individuals BAPCPA was supposed to protect,"[342] is a tough pill to swallow.

In the second Note, the author concedes that what she designates as "common law ride-through," referring to the practice recognized in five circuit courts before 2005,[343] was eliminated by BAPCPA.[344] She contends, however, that it has been replaced by the more limited form of "backdoor ride-through,"[345] alluding to the willingness, as discussed earlier, of several post-BAPCPA courts to recognize ride-through where the debtor does enter into a reaffirmation agreement with the lender, but that is disapproved by the bankruptcy court.[346] After examining the inadequacy of the three § 521(a)(2)(A) options from an economic perspective,[347] and considering the sufficiency and suitableness of alternative asset retention alternatives (including chapter 13) in light of the policy goals of chapter 7,[348] the author concludes by advocating for the need for a third form of ride-through, which she denominates "statutory" ride-through.[349] Essentially, the idea would be to codify ride-through as a sanctioned alternative for any debtor who is current on the secured obligation, as well as for debtors who are able to cure any prepetition defaults within a reasonable time.[350] The author urges that this would promote uniformity and make ride-through available to a broader cohort of chapter 7 debtors, which is true,[351] and provide better outcomes for both debtors and secured lenders, which is a sketchier assertion.[352]

While impressed with both of these efforts,[353] I am nonetheless forced to conclude that they each fall short of presenting a realistic and satisfactory solution. The first is predicated on a flawed assumption about the true intent of the proponents who championed the 2005 Act, and, ultimately, fails to propose anything more than a return to the troublingly divided status quo ante. The second, while proffering an affirmative proposal, is inadequate to address all of the

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342 *See* Hogan, *supra* note 85, at 884.
343 *See supra* text accompanying notes 49–60.
344 Moren, *supra* note 334, at 1605–07.
345 *Id.* at 1616–17.
346 *See* text accompanying notes 70–71.
347 Moren, *supra* note 334, at 1609–12 (describing redemption as usually infeasible and reaffirmation as uncertain and costly).
348 *Id.* at 1617–25.
349 *Id.* at 1625–27.
350 *Id.* at 1626–27 ("[S]tatutory ride-through should be available to all debtors who are paid-to-date at the time of bankruptcy proceedings, and also to those who are able to cure any default on payments 'within a reasonable time' of filing the Chapter 7 petition."). The proposal also contemplates the deletion of § 362(h) from the Code and the portions of § 524 pertaining to reaffirmation, beginning with § 524(c), as no longer necessary. *Id.* at 1627.
351 *Id.* at 1627–28.
352 *Id.* at 1628–32.
353 Indeed, I found them each helpful in thinking through my own ideas about ride-through.

shortcomings that inhere in the current state of the law,[354] as well as problematic in its extension to noncurrent debtors through a cure right.[355] That is to say, it gives unduly short shrift to the legitimate interests of lenders by expanding ride-through to defaulted debtors. Therefore, I turn next to what I would maintain is a better option, although one that, as a practical matter, surely faces an uphill battle in the highly polarized political environment in which bankruptcy reform efforts have largely proceeded in the past.[356]

C. Alternative Proposal

While the legislative history of the 1984 Act did not definitively answer the question of whether former § 521(2)(A) was intended to restrict the substantive options available to a debtor who wished to retain collateral,[357] the circumstances, hearings, and testimony leading up to enactment of § 521(2), along with the language of the statute itself, all pointed to the general conclusion that § 521(2) was meant to be a notice provision.[358] In perhaps the most thoughtful analysis of the issue, Judge Small, in a decision ultimately affirmed by the Fourth Circuit, came to this conclusion based on detailed statements made at a congressional subcommittee hearing by "a coalition of bankers, credit unions, finance companies, oil companies and retailers."[359] Those statements indicated that

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[354] For instance, the proposal makes no distinction between situations where the underlying loan documentation does or does not contain an *ipso facto* provision, nor does it deal with the peculiarities that § 521(d), and courts' interpretations thereof, have introduced into the law. *See supra* text accompanying notes 102–108.

[355] Moren, *supra* note 334, at 1627. This ability to cure and reinstate mimics the options available to a debtor in chapter 13. *See* 11 U.S.C. § 1322(b)(3). As noted earlier, ride-through with respect to current debts is already subject to criticism as undermining chapter 13. *See supra* text accompanying note 71. This proposal would only exacerbate the situation.

[356] *See supra* note 37.

[357] *See In re* Boodrow, 192 B.R. 57, 59 (Bankr. N.D.N.Y. 1995) ("A review of the legislative history does not assist [in] resolution of the matter . . . [N]either a Senate nor House report relating to Code § 521(2) became part of the record in connection with the Bankruptcy Amendments and Federal Judgeship Act of 1984."), *aff'd sub nom.*, Cap. Commc'ns Fed. Credit Union v. Boodrow, 197 B.R. 409 (Bankr. N.D.N.Y. 1996); *aff'd*, 126 F.3d 43 (2d Cir. 1997).

[358] *In re Boodrow*, 197 B.R. at 412 (finding that the legislative history points to the general conclusion that § 521(2) was meant to be a notice provision only); Ehrlich, *supra* note 107, at 637–40 (explaining, based on the legislative background of the statute, the procedural nature of § 521(2) as originally enacted in 1984); *see also supra* note 315.

[359] *In re* Belanger, 118 B.R. 368, 370 (Bankr. E.D.N.C. 1990), *aff'd sub nom.*, Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 128 B.R. 142 (E.D.N.C. 1990), *aff'd*, 962 F.2d 345 (4th Cir. 1992).

> The closest legislative statement interpreting § 521(2) is a statement made by Representative Rodino in response to a request by Representative Synar that he "explain what rights are reserved to the debtor and trustee under § 521(2)(C)." 130 Cong. Rec. H1810 (daily ed. Mar. 21, 1984). According to Chairman Rodino, the duty imposed under § 521(2) "does not affect the substantive provisions of the code which may grant the trustee or debtor rights with regard to such property." *Id*. It appears from that statement that the debtor's rights with respect to the property were to be left intact.

Id. at 372.

former § 521(2)(A), as originally enacted in 1984, was intended specifically to respond to the complaint of secured creditors that they could not readily determine what a debtor who had filed for bankruptcy was going to do with collateral securing a debt.[360] Instead, secured lenders pointed out that they were forced to spend time and money obtaining this information through judicial proceedings. Thus, the objective in advancing former § 521(2) was to place on the debtor "the responsibility of giving creditors information . . . as to what they intend to do with the collateral."[361]

This detailed review of the provenance of former § 521(2) made a strong case of course for the proposition that former § 521(2) was never intended to proscribe ride-through.[362] That being so, if the intent of the 2005 Act was to take the next step and eliminate ride-through entirely, which is a fair assumption,[363] the black letter of BAPCPA (which must ultimately control) did a rather poor job of it, as has been seen. The result is even greater confusion, uncertainty, and discordance than existed before BAPCPA, and that's saying something given the near fifty/fifty circuit split among the nine circuits to address the question.[364]

As a compromise proposal that seeks to address legitimate concerns on both sides of the creditor/debtor divide, as well as more faithfully serve core bankruptcy policy, I offer the following. First, leave § 521(a)(2) as is to respond to the concerns (noted above) that prompted the original adoption of § 521(2) in 1984. Second, leave § 362(h) in place as well as a mechanism for creditors to have a prompt and transaction cost-free remedy in the event the debtor fails to comply with her § 521(a)(2) duties in the case of personal property collateral. This of course would represent an enhancement of the rights of secured creditors beyond what had been afforded by the 1984 Act.

Next, repeal § 521(a)(6), and by so doing eliminate not only its internal confusion regarding holders of allowed claims,[365] but its perplexing relationship with § 521(a)(2) as well. Purchase-money lenders would not be prejudiced since they would have the same protection under §§ 521(a)(2) and 362(h). Finally, repeal § 521(d) and amend § 524(a)(2) by adding at the end of the provision

> including any action against property of the debtor securing a prepetition debt as to which the debtor was, at the time of entry of discharge, and thereafter remains, not in default other than by reason of a provision in an agreement, transfer

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[360] *Id.* at 370 n.5.

[361] *Id.* at 371 n.5.

[362] *See* Mayton v. Sears, Roebuck & Co. (*In re* Mayton), 208 B.R. 61, 67–68 (B.A.P. 9th Cir. 1997) (noting that "the only logical basis for reconciling the conflicting elements of [former] § 521(2)," specifically the prescriptions of subdivisions (A) and (C), was "to hold that it is essentially a notice statute"); *In re* Bracamortes, 166 B.R. 160, 162 (Bankr. S.D. Cal. 1994) (holding that an "N/A" designation effectively told the secured creditor all that it needs and was entitled to know with respect to the debtor's intentions).

[363] *See supra* notes 43–44 and accompanying text.

[364] *See supra* Part II.

[365] *See supra* note 95.

instrument, or applicable nonbankruptcy law that defines an event of default in relation to the debtor's financial condition or the commencement of a case under this title.

These last two steps obviously operate to authorize ride-through both during and after the bankruptcy case and take *ipso facto* clauses off the table in the same manner as the court did in *In re Nuckoles*,[366] except now with a proper statutory basis.[367] The abolition on the enforceability of *ipso facto* clauses in ride-through cases across the board would eliminate having the issue turn on the serendipity of circuit precedent and/or underlying state law. This would ensure equity *inter se* among debtors, regardless of where they happened to reside, and would advance the bankruptcy fresh start goal uniformly across the nation.[368] It would also endorse ride-through with respect to real-estate secured loans, with the added protection that the stay could not be lifted except upon a proper showing under § 362(d). Finally, given the widespread consolidation in the banking and financial services industry that has occurred over the past few decades, it would also synchronize credit practices in a fashion that would promote greater consistency and efficiency for many lenders, even if, all things being equal, they might have preferred a different substantive outcome.

In a practical sense, abrogating § 521(d) would not really change much since it is an odd provision, out of step with bankruptcy policy generally,[369] and really does nothing in and of itself even when it does apply.[370] The real change brought about by this proposal would be the amendment to make clear that exercise of a creditor's state law remedies based on violation of an *ipso facto* clause in a ride-through situation is prohibited by the discharge injunction. Again, however, while concededly debtor-friendly, it is really not that much of a boon for debtors nor a blow for creditors as might be perceived at first glance. First, as noted earlier, many states already limit the enforceability of *ipso facto* clauses.[371] Second, its application would be limited to cases where there was no other event of default, which is to say cases where there is no clear and present threat to the lender's prospect of being paid or to its collateral. Indeed, lenders should take some comfort in the fact that if the debtor managed somehow to keep current with payments and other loan obligations *before* bankruptcy, the debtor should be a pretty good bet now that most of her other obligations have been discharged.

Finally, the uncommon frequency of consensual or *de facto* ride-through, as first identified by Professors Culhane and White in their classic empirical study

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[366] Nuckoles v. Ford Motor Credit Co. (*In re* Nuckoles), 546 B.R. 651 (Bankr. W.D. Va. 2016).

[367] This was the element missing in *In re Nuckoles*. *See id*. at 654; *supra* notes 194–210 and accompanying text.

[368] *See infra* Part VI.

[369] *See supra* notes 104–05.

[370] *E.g.*, Dumont v. Ford Motor Credit Co. (*In re* Dumont), 581 F.3d 1104, 1115 (9th Cir. 2009) (holding that § 521(d) does not confer any substantive right on creditors to take action against collateral).

[371] *See supra* note 234.

of reaffirmations,[372] is evidence that, in reality, secured creditors are not unduly prejudiced by loss of the debtor's personal liability through discharge.[373] If they were, it is highly unlikely that, as rational economic actors, they would acquiesce in the debtor's continued possession of the collateral. A more contemporary study undertaken by Professors Foohey, Lawless, and Thorne has confirmed that debtors continue to use bankruptcy in overwhelming numbers in order to retain their most valuable car.[374] In their sample, only about 1.3% of debtors stated an intention to redeem, while 11.7% indicated they would surrender their vehicle.[375] This compared with 58.8% who stated they planned to reaffirm.[376] Despite the changes made to §§ 521and 362 by BAPCPA, seeking to mandate selection of one of the three options,[377] the authors discovered that nearly twenty percent of debtors make either no statement of intention or indicated an intent to retain with no explanation how they would do so. Coupled with the fact that BAPCPA has made reaffirmation more difficult,[378] the authors speculate that this high number may signal that a combination of what they term "rogue reaffirmations" and consensual ride-through persists.[379]

The reality is that the expenses associated with repossession and foreclosure, coupled with the notoriously low values received at distress sales, make exercise of the creditor's state law remedies unappealing in most cases. Thus, it is not surprising that, in practice, creditors often conclude that they are likely to be better off in the long-run by acquiescing in the ride-through, including keeping

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372 *See generally* Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709 (1999).

373 *Id.* at 740–41 (determining that many of the debtors in their study retained their cars after bankruptcy without reaffirming or redeeming); *see* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 528 (1993) (noting creditors in non-ride through jurisdictions would often accept payments even though they could have repossessed collateral); Whitford, *supra* note 85, at 154 (using the terms "voluntary ride-through" and "creditor acquiescence"); Karen Gross, *Perceptions and Misperceptions of Reaffirmation Agreements*, 102 COM. L.J. 339, 347–48 (1997) (using the term "informal reaffirmations"). In a voluntary ride-through, the secured creditor declines to exercise its legal remedies, allowing the debtor to retain the property provided the debtor continues making payments. *See In re* Jensen, 407 B.R. 378, 389–90 (Bankr. C.D. Cal. 2009) (finding that nothing in BAPCPA prevents debtors and secured creditors from engaging in "voluntary ride-through"). Nonetheless, Culhane and White also found a very high correlation between reaffirmations and jurisdictions where ride-through was not recognized. *See* Culhane & White, *supra* note 372, at 727.

374 *See* Foohey et al., *supra* note 297, at 294.

375 *Id.* at 318, 321 tbl.5.

376 *Id.*

377 *See supra* text accompanying notes 86–108.

378 *See supra* text accompanying note 109; *see also* Foohey et al., *supra* note 297, at 314 (attributing the post-BAPCPA decline in reaffirmations to the new procedures engrafted on the process by the 2005 Act).

379 Foohey et al., *supra* note 297, at 326 (opining that, if true, these phenomena would run counter to the goals of BAPCPA and might potentially be harmful to debtors as well). The authors suggest the testing of this hypothesis as a fruitful area for further study. *Id.*

alive the possibility of full payment with contract interest.[380] This is certainly true with respect to residential mortgage loans, given that many states already protect homes with antideficiency legislation.[381] The effect of these proposed changes therefore would, in the aggregate, codify *Seiffert* in all instances where there is no default save for the debtor having availed herself of bankruptcy relief, regardless of whether the loan documents contain an *ipso facto* clause.

VI. IMPLICATIONS OF THE RIDE-THROUGH PROPOSAL FOR THE CONSUMER BANKRUPTCY SYSTEM

Achieving consensus on the foundational goals of the consumer bankruptcy regime is a task doomed to failure, as it is an ecosystem composed of participants with fundamentally different interests who, perhaps most fatal to the effort, have a dog in the hunt. Moreover, scholarship aimed at attempting to explain or justify the consumer bankruptcy system, while robust,[382] has also failed to produce an overarching theory of widespread acceptance.[383]

I would submit that the difficulty in finding the normative center of consumer bankruptcy is what led the board of directors of the American Bankruptcy Institute, in its resolution creating a new Commission on Consumer Bankruptcy, to charge the Commission

> with recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure. These changes might include amendments to the Bankruptcy Code, changes to the Federal Rules of Bankruptcy Procedure, administrative rules or actions, recommendations on proper interpretations of existing law, and other best practices that judges, trustees, and lawyers can implement.[384]

The exploratory committee, which recommended the formation of the Commission, "determined that the project should be limited to a consideration of

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380 *See* Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & ECON. 117, 119 (1983) ("Repossession 'destroys value' because individual debtors commonly value goods in excess of their market prices but repossessing creditors at best resell at these prices. Because repossession imposes greater harms on debtors than it creates gains for creditors, it actually minimizes welfare.").

381 *See* Culhane & White, *supra* note 372, at 746–47 (explaining reasons creditors permit ride-through, including anti-deficiency statutes, private mortgage insurance, government guarantee programs, real estate values increasing over time, and sale of residential mortgages on secondary market); *see also supra* note 267.

382 *See supra* note 19.

383 *See* Sousa, *supra* note 19, at 560 (claiming that in one way or another all of the previous theories advanced for explaining the bankruptcy discharge fall short in that they prove to be too restrictive to account for, and rectify, all of the issues facing the individual debtor). Sousa then offers a utilitarian-derived theory to justify the discharge with the overall "good" to be maximized being the promotion of the debtor's holistic well-being, and by extension, that of all other debtors who file for bankruptcy protection each year. *Id.* at 591–602.

384 AM. BANKR. INST., FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY, at VIII (2019).

discrete issues arising in consumer bankruptcy cases."[385] In other words, nobody wanted to go down the rabbit hole of addressing the underlying nature of and purpose for the system *ab initio*.

This was a wise choice, as the effort would otherwise have bogged down in the impenetrable thicket of identifying the macroeconomic effects of debt relief and ascertaining how to maximize societal welfare, assuming consensus could be achieved that this should even be the purpose of the exercise in the first place. The tension between humanitarian impulses and economic utility in setting the needle on the distributional objectives of consumer bankruptcy are dreadfully hard questions and, ultimately, ones that only have answers in the political arena. This does not, however, prevent one from having a *view* about why we need a consumer bankruptcy system and what its goals ought to be.

Whether one regards it as social progress or pathology, the reality is that we live in a day and age of consumer credit that could not have been imagined even fifty years ago.[386] It is beyond contention that the use of consumer credit has become an integral part of American culture.[387] Over two decades ago, Professor Warren commented that: "Americans need a safety valve to deal with the financial consequences of the misfortunes they may encounter. They need a way to declare a halt to creditor collection actions when they have no reasonable possibility of repaying. They need the chance to remain productive members of society, not driven underground or into joblessness by unpayable debt."[388] Most of the debate over redistributive goals in bankruptcy has taken place in the context of business reorganizations where the tension has been between scholars who view bankruptcy as embodying substantive social goals[389] and those (dubbed "proceduralists") who eschew the suggestion that bankruptcy ought to serve a purpose other than maximizing returns overall for those holding cognizable legal

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385 *Id.* at VII.

386 *See* Lendol Calder, *The Meaning of Consumer Credit in the United States*, AM. BANKR. INST. J., Dec./Jan. 2001, at 52 (dating the advent of the modern system of credit for consumers somewhere 1915 and 1935); *see also* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 353 (2008) ("Continuing a trend begun in the early 1980s, the families in bankruptcy are much more deeply laden with debt. Their net worth, which has always been negative, sank further, and their debt-to-income ratios rose higher."). *See generally* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT (1999).

387 Lois R. Lupica, *The Consumer Debt Crisis and the Reinforcement of Class Position*, 40 LOY. U. CHI. L.J. 557, 603 (2009) ("Without a doubt, credit has become an essential part of the consumer economy and is relied upon by many as both a convenience and a necessity.").

388 Warren, *supra* note 30, at 492; *see also* Shu-Yi Oei, *Who Wins When Uncle Sam Loses? Social Insurance and the Forgiveness of Tax Debts*, 46 U.C. DAVIS L. REV. 421, 426 (2012) (examining the distributive consequences and social insurance function of "tax non-collection").

389 The traditionalist view is most commonly associated with the work of Elizabeth Warren and her frequent collaborator Jay Westbrook. *See, e.g.*, Warren, *supra* note 35, at 789–93; *see also* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 722–25 (1991).

claims against the debtor.[390] Nevertheless, the same tension pervades the consumer bankruptcy system, although the wealth transfer at issue is a bit simpler since it flows from creditors to debtors, and sometimes among creditors.[391] Ultimately, consumer bankruptcy represents a balancing act between a necessary social insurance function[392] and the strict enforcement of private contractual rights.[393]

While the search for an all-encompassing normative theory of bankruptcy is probably an idle and futile exercise, I still believe that relief from burdensome debt and the opportunity to return to economic viability are important societal goals that must be supported, even if, at times, at a cost to individual creditors. Exactly how far we should go in underwriting this debtor rehabilitation is a

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[390] *See* Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 576–80 (1998) (describing traditionalists as sharing a conviction that bankruptcy plays a special role in the legal system and proceduralists of the belief that a coherent bankruptcy law must recognize how it fits into the rest of the legal system and supports a vibrant market economy).

> No doubt, Thomas Jackson's path-breaking article, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, [91 YALE L.J. 857, 857–59 (1982),] marks the inception of the proceduralist academic school. The creditors' bargain theory, as further developed by both Jackson and Baird, featured a pseudo-Rawlsian contractarian core based on the idea that bankruptcy law generally reflects the hypothetical creditors' bargain that creditors would reach if they were to bargain before their extensions of credit.

Charles W. Mooney, Jr., *A Normative Theory of Bankruptcy Law: Bankruptcy as (Is) Civil Procedure*, 61 WASH. & LEE L. REV. 931, 948 (2004) (footnotes omitted).

[391] *See* Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1943, 1946–49 (2011) (describing BAPCPA as following the "well-worn" path of resistance to the redistributive element inherent in any welfare program). A key tenet of the proceduralist view is for nonbankruptcy entitlements (the state law bargain) not to be affected in bankruptcy, except as necessary to solve the collective action problem facing creditors under the first-in-time state law collection system. *See* Baird, *supra* note 390, at 582, 588. Thus, extension of the proceduralist approach in the consumer context would translate into a rejection of ride-through as ignoring its *ex ante* effects insofar as the cost of credit is concerned and intolerably altering the secured creditor's state law rights by allowing the debtor to retain the collateral without also accepting personal liability. "Balancing" may be the wrong term, as it implies that there is some point along the spectrum, perchance equidistant from the two antipodal ends, where the fulcrum can be placed to ensure perfect equipoise, as in a feat of mechanical engineering. *See supra* text accompanying notes 19–21.

[392] *Compare* Melissa B. Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001) ("In this Article, [the authors] consider the extent to which middle-class families have used bankruptcy as a safety net, or as insurance of last resort, in the financial aftermath of medical problems."), *with* Zywicki, *supra* note 298, at 1073–74 (2005) (offering an apologia for BAPCPA based on the dramatic increase in consumer bankruptcy filings, which the author attributes to: (1) an increase in benefits from filing at lower costs, (2) a change in social norms reducing the stigma associated with filing, and (3) changes in the nature of consumer credit that have rendered consumer credit increasingly impersonal).

[393] *See supra* note 303.

sociopolitical question over which policy makers will surely quibble.[394] There is no isonomy or point of perfect equipoise as one might reasonably expect to find in the physical world. The question entails assessment of fluid societal norms and mores, and, as such, differs from a feat of mechanical engineering or an analysis of fixed chemical properties. However, wherever the normative fulcrum is set, it only makes sense that an indispensable component of this effort to rehabilitate is the right to retain the tools that are essential to the ability to make the most of the bankruptcy fresh start; otherwise, the fresh start is an empty vessel.

Houses and cars fall squarely in that category in most cases, as usually do tools of the trade. Exemptions play this role vis-a-vis unsecured creditors,[395] but as the exemptions are subordinate to liens, and because perceived due process considerations constrain the ability to deprive secured creditors of their property interests,[396] additional techniques are needed. I believe ride-through for a limited class of debtors is one of those mechanisms. It may not alone be enough, but it is not too much, limited, as has been proposed, to those cases where the debtor has proved, through course of performance under the loan, that she is a good bet. For all the reasons noted above, the real redistributive impact is minor in the aggregate,[397] but vital to the debtor in individual cases, and to avoiding the creation of a hopelessly alienated debtor class.

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[394] Where the line should be drawn between the dual purposes of chapter 7 at any point in time will depend on larger moral and social value judgments, where unanimity of opinion will never be achieved and that, like public policy, will tend to wax and wane over time. The situation is complicated by the fact that the goal of most of those involved in bankruptcy reform is not to craft the optimal system, but rather to push for rules that favor their interests at the expense of others. *See, e.g.*, Susan Block-Lieb, *Congress' Temptation to Defect: A Political and Economic Theory of Legislative Resolutions to Financial Common Pool Problems*, 39 ARIZ. L. REV. 801, 801–02, 839–41, 856–59 (1997) (proposing a model for explaining bankruptcy legislation based on a combination of game theory and public choice theory, and demonstrating the effect that interest groups have in directing bankruptcy reform legislation away from the intended objects of the system).

[395] *See, e.g.*, William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt-Out" as Child of the First and Parent of the Second*, 71 AM. BANKR. L.J. 149, 163–70 (1997) (examining the purposes served by exemptions in general, and in bankruptcy in particular, and relating those purposes to the bankruptcy fresh start concept for the individual debtor); Lawrence Ponoroff & F. Stephen Knippenberg, *Debtors Who Convert Their Assets on the Eve of Bankruptcy: Villains or Victims of the Fresh* Start, 70 N.Y.U. L. REV. 235, 241 (1995) (identifying the discharge and exemptions as the two core constituents of the fresh start policy).

[396] *See* United States v. Sec. Indus. Bank, 459 U.S. 70, 75 (1982) ("The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)). *But see* Charles J. Tabb, *The Bankruptcy Clause, the Fifth Amendment, and the Limited Rights of Secured Creditors*, 2015 U. ILL. L. REV. 765, 766 (rejecting the argument that the Fifth Amendment Takings Clause necessarily entitles secured creditors to the full value of their collateral in bankruptcy cases, and concluding that the Bankruptcy Clause is the only limitation on Congress's power to modify the claims of secured creditors).

[397] In point of fact, there is only a negative distributive impact for secured creditors if the debtor, freed from personal liability on the obligation, fails to maintain the collateral,

Admittedly, consumers are not entirely without fault in the amassing unmanageable debt obligations.[398] Likewise, there is a moral hazard associated with any form of social insurance[399] but the conceptualization of the fresh start for the honest but unfortunate debtor as an essential component of the commercial regime is no longer open to question.[400] So, it just becomes a matter of degree. Moreover, debt is necessary to sustain our contemporary markets for consumer goods and services.[401] Taking account of the importance of consumer spending to the U.S. Gross Domestic Product and, thus, to the overall health of the economy,[402] giving debtors a fighting chance to return to financial well-being by retaining critical property is a small price to pay, even though we know without question that not all debtors are worthy or will use the opportunity wisely or as intended. While perhaps suffering a greater loss on any particular credit, collectively and over time, the credit industry itself is better off operating in a system that both recognizes the fresh start and implements it in as near to an optimal fashion as is possible in an imperfect world.

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ultimately resulting in a net lower recovery by the lender than would have been the case in the event of an immediate foreclosure. However, as the majority noted in *Capital Communications Federal Credit Union v. Boodrow* (*In re Boodrow*), 126 F.3d 43, 52 (2d Cir. 1997), a debtor discharged in bankruptcy has an even greater incentive to maintain the collateral because of the difficulty in obtaining credit to replace the property and in order to protect the debtor's own equity in the property. *See also* Ehrlich, *supra* note 107, at 665–66 (observing that personal liability has little impact on the debtor's incentive or disincentive to take proper care of the collateral); *supra* note 324.

398 *See* Lupica, *supra* note 387, at 575 ("[C]onsumers have voluntarily adopted and realized the illusion of a middle class identity in their willingness to acquire 'stuff' at any cost.").

399 It has been argued that broad access to the chapter 7 discharge causes debtors to borrow more heavily and accept riskier investments than they might otherwise make since the consequences of default will be less severe. F.H. Buckley & Margaret F. Brinig, *The Bankruptcy Puzzle*, 27 J. LEGAL STUD. 187, 195–96 (1998) (criticizing the work of TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS 133 (1989), for overlooking moral hazard concerns and their *ex ante* effects); Adam Feibelman, *Defining the Social Insurance Function of Consumer Bankruptcy*, 13 AM. BANKR. INST. L. REV. 129, 142, 167 (2005) (noting that the ready availability of a discharge in bankruptcy reduces incentives to curtail consumption in advance of financial distress or the incentives to exercise discipline in the aftermath of the losses incurred as a result of such distress). Feibelman goes on later to identify ways in which chapter 7 counteracts the potential harm caused by moral hazard. *Id.* at 166–70.

400 *See supra* note 20 and accompanying text.

401 *See* Lupica, *supra* note 387, at 601–02 (highlighting that debt became necessary to sustain the very existence of the markets for consumer goods and services, such that the continued existence of such markets required that incentives be offered to increase the level of consumer debt).

402 John D. Hawke, Jr., Comptroller of the Currency, Remarks before America's Community Bankers 7 (Nov. 5, 2002), https://ots.gov/news-issuances/speeches/2002/pub-speech-2002-86.pdf [https://perma.cc/JN4N-3ETJ] ("[C]onsumer spending—and borrowing—is crucial to the health of the banking system and the economy, present and future.").

CONCLUSION

In this treatment I have attempted to demonstrate that BAPCPA made the wrong decision about ride-through and then couldn't even get that right. If there was not already enough evidence of this, *Seiffert* has shown what a hash Congress has made of it. The resulting chaos, which can only get worse as courts encounter new fact situations, hardly promotes the integrity of the system or serves the interests of the participants in the bankruptcy process collectively, even if there may be discrete winners and losers in individual cases.

The solution I have proposed provides secured lenders with a quick and painless way to exercise their rights against collateral when a debtor fails to substantially comply with § 521(a)(2) and has already committed a material default. However, when the only default is the very act of filing bankruptcy, I have also proposed certain legislative changes that effectively give debtors the fourth option of retaining their property so long as they continue making payments and observe the other covenants contained in the loan documentation. Given the general disfavor in which *ipso facto* clauses are held, both in and outside of bankruptcy, and their relative unimportance in actually producing greater creditor returns, this seems a fair compromise to strike and one that holds the best hope for producing predictable results and rational consequences.