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# BANKRUPTCY—MIMSY WERE THE BOROGOVES: A “RIDE THROUGH” THE LOOKING GLASS WITH THE 2005 BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT

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BANKRUPTCY—MIMSY WERE THE BOROGOVES: A “RIDE-THROUGH” THE LOOKING GLASS WITH THE 2005 BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT

INTRODUCTION

“‘When *I* use a word’, Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less.’”<sup>1</sup>

“‘The question is’, said Alice, ‘whether you *can* make words mean so many different things.’”<sup>2</sup>

Such is the dilemma faced by courts both prior to and after enactment of 2005’s Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA).<sup>3</sup> Interpreting the statute’s meaning may at times feel like trying to interpret the words uttered by the Mad Hatter in Lewis Carroll’s beloved book. BAPCPA’s purpose was to end abuse of the bankruptcy system and, purportedly, to help consumers.<sup>4</sup> Yet BAPCPA appears to have ended one of the easiest ways for consumer debtors to keep their vehicles when they file for Chapter 7 bankruptcy, at least if that debtor was lucky enough to live in a jurisdiction that allowed auto loans that were not in default to “ride-through” a Chapter 7 bankruptcy proceeding.<sup>5</sup>

Prior to BAPCPA’s passage, the U.S. Circuit Courts of Appeals was split regarding the options available to Chapter 7 debtors wishing to retain their automobiles.<sup>6</sup> The debate over this issue

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1. LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE (1871), *reprinted in* ALICE’S ADVENTURES IN WONDERLAND THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 125, 188 (Elibron Classics 2001).

2. *Id.*

3. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

4. H.R. REP. NO. 109-31, pt. 1, at 2-3, 10-18 (2005) (“The purpose of [BAPCPA] . . . is to . . . ensure that the system is fair for both debtors and creditors.”).

5. The “ride-through” option, even in circuits that allowed it, was only available to debtors who were current on their loan payments. *See In re Price*, 370 F.3d 362, 379 (3d Cir. 2004); *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998); *In re Boodrow*, 126 F.3d 43, 51 (2d Cir. 1997); *In re Belanger*, 962 F.2d 345, 347 (4th Cir. 1992); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989).

6. The First, Fifth, Seventh, and Eleventh Circuits did not allow the “ride-through” option. *See, e.g., In re Burr*, 160 F.3d 843, 847-48 (1st Cir. 1998); *In re Johnson*, 89 F.3d 249, 252 (5th Cir. 1996); *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993); *In re*

centered on the language found in section 521(2) of the Bankruptcy Code.<sup>7</sup> This language, depending upon how the deciding court interpreted it, offered either three or four options for debtors wanting to retain their vehicles.<sup>8</sup> In circuits that offered debtors three choices, a debtor had to reaffirm,<sup>9</sup> redeem,<sup>10</sup> or surrender<sup>11</sup> her vehicle.<sup>12</sup> In circuits that allowed the so-called “fourth option,” however, debtors had the additional alternative of ignoring the three above-listed options and continuing to make payments on their vehicles as they had prior to filing for Chapter 7.<sup>13</sup> This fourth option is popularly known as the “ride-through.”

Section 521(2) of the pre-BAPCPA Bankruptcy Code clearly spelled out the three options of reaffirmation, redemption, or surrender.<sup>14</sup> The issue that perplexed courts was whether a debtor was *limited* to one of these three options. Courts split over the language of the statute, which required the debtor to choose one of these options “if applicable.”<sup>15</sup> Depending on each court’s interpretation of the statute, debtors in different jurisdictions had different rights. This did not lend itself to the uniformity promised by Article I Sec-

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Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990). The Second, Third, Fourth, Sixth, Ninth, and Tenth Circuits did allow the “ride-through” option for Chapter 7 debtors. *See, e.g., In re Price*, 370 F.3d at 379; *In re Parker*, 139 F.3d at 673; *In re Boodrow*, 126 F.3d at 51; *In re Belanger*, 962 F.2d at 347; *Lowry Fed. Credit Union*, 882 F.2d at 1547; *In re Bell*, 700 F.2d 1053 (6th Cir. 1983).

7. 11 U.S.C. § 521(2) (2000), amended by 11 U.S.C. § 521(a)(2) (2006).

8. *Id.*

9. Reaffirmation is an agreement made between a debtor and a creditor in which the debtor is allowed to keep the collateral in exchange for promising to repay a debt that would otherwise be discharged during bankruptcy. *See* BLACK’S LAW DICTIONARY 1378 (9th ed. 2009).

10. A debtor “redeems” his vehicle by paying the outstanding balance owing on the collateral. *Id.* at 1390.

11. “Surrender” is just what it sounds like: the debtor chooses to give up the collateral. *Id.* at 1581.

12. 11 U.S.C. § 521(2).

13. *See In re Price*, 370 F.3d 362, 379 (3d Cir. 2004); *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998); *In re Boodrow*, 126 F.3d 43, 51 (2d Cir. 1997); *In re Belanger*, 962 F.2d 345, 347 (4th Cir. 1992); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989).

14. 11 U.S.C. § 521(2).

15. *Id.* § 521(2)(A) (stating that “the debtor shall file . . . a statement of his intention with respect to the retention or surrender of such property and, *if applicable*, specifying . . . that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property” (emphasis added)); *see In re Price*, 370 F.3d at 375; *In re Burr*, 160 F.3d 843, 847-48 (1st Cir. 1998); *In re Parker*, 139 F.3d at 673; *In re Boodrow*, 126 F.3d at 51; *In re Johnson*, 89 F.3d 249, 252 (5th Cir. 1996); *In re Taylor*, 3 F.3d 1512 (11th Cir. 1993); *In re Belanger*, 962 F.2d at 348; *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990); *Lowry Fed. Credit Union*, 882 F.2d at 1547.

tion 8 of the Constitution, which promises "uniform Laws on the subject of Bankruptcies throughout the United States."<sup>16</sup> The debtor was to choose one of the specified options "if applicable."<sup>17</sup> But when did this choice become applicable? If the debtor chose to keep the car? Or only if the debtor chose to keep the car by redemption or reaffirmation?

This Note will examine how BAPCPA has affected debtors and creditors, and how the "ride-through" option has been a source of contention in determining their rights and responsibilities. Section I will examine the options available to debtors prior to BAPCPA. Section II will give an overview of how BAPCPA came to be and how it has affected consumer debtors in general. Section III will examine how BAPCPA has affected the "ride-through" option for Chapter 7 debtors and how courts have interpreted the Code using plain language and legislative purpose. This Note proposes that it is time for the courts to be less deferential to the text of the statute, and to reach an interpretation of its provisions that is consistent with both the text *and* the purpose of the Act. Such a common-sense approach is necessary to reach a consistent body of law that debtors, creditors, and courts can rely on.

#### I. DOWN THE RABBIT HOLE: A LOOK AT THE OPTIONS AVAILABLE TO DEBTORS WISHING TO KEEP THEIR VEHICLES BEFORE BAPCPA

The Bankruptcy Code that was enacted prior to BAPCPA spelled out three options available to Chapter 7 debtors having secured loans.<sup>18</sup> Debtors could surrender their property, redeem it, or reaffirm their agreement with the secured lender.<sup>19</sup> When the secured property at issue was the debtor's car, it was often very

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16. U.S. CONST. art. I, § 8.

17. 11 U.S.C. § 521(2)(A).

18. In Chapter 7 bankruptcy, debtors, upon approval, are able to discharge their debt and begin with a clean slate. *See* 11 U.S.C. § 727. All of the debtor's property goes into a bankruptcy estate, and a trustee liquidates the debtor's assets, using the proceeds to pay creditors. *Id.* § 704. A debtor may, however, redeem or reaffirm the debt on certain property. *See generally id.* §§ 722, 524(c). When a debtor grants a security interest in collateral to a creditor, which is essentially a lien on the property, this is a secured loan. BLACK'S LAW DICTIONARY 1475 (9th ed. 2009). In Chapter 13 bankruptcy, debtors do not liquidate their assets, but instead commit to a payment plan in which their disposable income is used to pay off their debts for a specified number of years. *See generally* 11 U.S.C. § 1322.

19. 11 U.S.C. § 521(2).

important to the debtor not to lose it.<sup>20</sup> However, redeeming the vehicle was impossible for most debtors filing for bankruptcy.<sup>21</sup> Reaffirming with the secured lender was a possibility, though not a right; secured lenders could refuse to reaffirm the loan with the debtor.<sup>22</sup> Alternatively, the secured lender could offer terms that were harsher than the original terms of the contract.<sup>23</sup>

#### A. *Not Applicable? Confusion Over the Alternatives*

Section 521(2)(A) of the pre-BAPCPA Code stated, “the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, *if applicable*, specifying . . . that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.”<sup>24</sup>

Courts allowing the “ride-through” based their decisions on the plain language of the statute,<sup>25</sup> the perceived notice-giving function of section 521,<sup>26</sup> the lack of remedy if a debtor did not choose

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20. See, e.g., *In re Husain*, 364 B.R. 211, 216 (Bankr. E.D. Va. 2007) (noting that “debtors desperately desire to retain their vehicles and that they will continue making their regular payments because transportation is such a crucial element for a ‘fresh start’”); see also Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Home, and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 522, 526-30 (2005) [hereinafter *Rash and Ride-Through Redux*].

21. See *In re Boodrow*, 126 F.3d 43, 51 (2d Cir. 1997) (stating that “a debtor’s only real choices would be either to reaffirm the debt under whatever new terms the creditor requires or to surrender the property”); *In re Belanger*, 962 F.2d 345, 347 (4th Cir. 1992) (stating that debtors would be “unlikely to be able to redeem the collateral in a lump sum”).

22. See *In re Belanger*, 962 F.2d at 348 (stating that “reaffirmation requires the consent of the creditor in order to comply with [section] 524(C)”).

23. See *In re Boodrow*, 126 F.3d at 51 (stating that “[b]ecause reaffirmation involves negotiation between parties with unequal bargaining power and requires voluntary agreement by both debtor and creditor, it gives a creditor an effective veto on the ‘fresh start’”).

24. 11 U.S.C. § 521(2)(A) (emphasis added).

25. *In re Price*, 370 F.3d 362, 379 (3d Cir. 2004); see also *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998) (stating that “[w]e see no reason to reach beyond this plain language”); *In re Belanger*, 962 F.2d at 347.

26. *In re Price*, 370 F.3d at 379; see also *In re Boodrow*, 126 F.3d at 50-51 (finding that § 521(2) is meant to provide notice, not to confine debtor to listed options); *In re Belanger*, 962 F.2d at 347.

one of the listed options,<sup>27</sup> and the “fresh start”<sup>28</sup> policy behind bankruptcy law in general.<sup>29</sup>

Section 521(2) of the pre-BAPCPA Bankruptcy Code clearly required a debtor to file a statement of intention and to perform this intention with respect to secured debts.<sup>30</sup> But if a debtor chose to keep his car, when did the options of redemption or reaffirmation become “applicable”? Five circuits held that the words “if applicable” meant that the debtor was not confined to the options of surrender, redemption, or reaffirmation.<sup>31</sup>

The Second Circuit recognized the dilemma facing debtors, who, by virtue of filing for bankruptcy, would be unlikely to have the funds available to redeem their automobile.<sup>32</sup> In *In re Boodrow*, Mr. Boodrow filed a Chapter 7 bankruptcy petition, and, pursuant to section 521(2), he timely filed a statement of intention that indicated his plan to continue making payments on the car.<sup>33</sup> The credit union that had given Mr. Boodrow the loan claimed that Mr. Boodrow was not in compliance with section 521(2), since he did not choose one of the three options specifically articulated.<sup>34</sup> The lender, Capital Communications Federal Credit Union (hereinafter Capital), wanted to repossess the car and moved to have the automatic stay lifted.<sup>35</sup> Capital further contended that it had the right to accept or reject a debtor’s attempted reaffirmation, and that it should have the opportunity to negotiate an agreement on new terms.<sup>36</sup>

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27. *In re Price*, 370 F.3d at 379; see also *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1546 (10th Cir. 1989) (“Congress provided neither a penalty for a debtor’s failure to comply with § 521(2) nor a specific remedy for a creditor as a consequence of such a failure.” (footnote omitted)).

28. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-45 (1934) (noting that the purpose of bankruptcy is helping debtors to achieve a “fresh start”).

29. *In re Price*, 370 F.3d at 378 (determining that “we believe that our reading comports best with the ‘fresh start’ policy of the Code”); *In re Boodrow*, 126 F.3d at 51.

30. 11 U.S.C. § 521(2) (2000), amended by 11 U.S.C. § 521(a)(2) (2006).

31. *In re Price*, 370 F.3d at 379; *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998); *In re Boodrow*, 126 F.3d at 51; *In re Belanger*, 962 F.2d at 347; *Lowry Fed. Credit Union*, 882 F.2d at 1547.

32. *In re Boodrow*, 126 F.3d at 51.

33. *Id.* at 45.

34. *Id.* at 46.

35. *Id.* The automatic stay becomes effective when a debtor files for bankruptcy, and it bars all collection efforts aimed at the debtor of any kind. See BLACK’S LAW DICTIONARY 1548 (9th ed. 2009). Its purpose is to “protect[ ] a debtor’s assets during the administration of a bankruptcy case.” *In re Boodrow*, 126 F.3d at 46.

36. *In re Boodrow*, 126 F.3d at 49.

The court concluded that “[section] 521(2)(A) was intended specifically to eliminate the problem that secured creditors could not determine what a debtor who had filed for bankruptcy was going to do with collateral securing a debt,” thus agreeing with other circuits and allowing the “ride-through” as a fourth, unspecified, option.<sup>37</sup> In reaching its decision, the court also looked at the policy behind the Bankruptcy Code.<sup>38</sup> Specifically, the court stated

[t]he policy embodied in the Code that a debtor discharged from bankruptcy should receive a “fresh start” has been emphasized time and again by the Supreme Court and this court . . . . Confining an individual Chapter 7 debtor to the choices of surrender, redemption or reaffirmation can severely interfere with providing the debtor a fresh start . . . . Thus, if the options listed in [section] 521(2) were exclusive, a debtor’s only real choices would be either to reaffirm the debt under whatever new terms the creditor requires or to surrender the property. Because reaffirmation involves negotiation between parties with unequal bargaining power and requires voluntary agreement by both debtor and creditor, it gives a creditor an effective veto on the “fresh start.” Yet, surrender may deprive a debtor of much needed property, such as disabled debtor Boodrow’s vehicle in this case.<sup>39</sup>

Circuits finding that there existed a “ride-through” option also found other sections of the Code to lend support to their position. Section 521(2)(C) stated that sections 521(2)(A) and (B), requiring debtors to state their intention and perform their stated intention, would not “alter the debtor’s . . . rights with regard to such property under this title.”<sup>40</sup> Courts allowing the “ride-through” interpreted this to mean that those sections were notice-giving only; these courts also found section 521(2)(C) “to be of enormous aid in [the interpretation] of section 521(2)(A),” reading sections 521(2)(A) and (B) as “not . . . impinging on the substantive rights guaranteed by other provisions.”<sup>41</sup> The Fourth Circuit reasoned that, since prior to the enactment of section 521(2) at least one bankruptcy court had held that a debtor who was current on his payments could continue making those payments without resorting to redemption or reaffirmation, and since section 521(2)(C) did “not alter the

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37. *Id.* at 51.

38. *Id.*

39. *Id.*

40. 11 U.S.C. § 521(2)(C) (2000), amended by 11 U.S.C. § 521(a)(2)(C) (2006).

41. *In re Price*, 370 F.3d 362, 372 (3d Cir. 2004).

debtor's rights with regard to the collateral," the bankruptcy court could allow debtors this same option.<sup>42</sup> Otherwise, the court concluded, the section *would* alter a debtor's rights.<sup>43</sup>

B. *Applicable Indeed—No Other Options Available*

Other circuit courts held that no "ride-through" option existed.<sup>44</sup> These courts read the "if applicable" language of section 521(2) to mean that if a debtor chose not to surrender the property, then he must choose either redemption or reaffirmation, as these were then "applicable."<sup>45</sup> Further, in interpreting section 521(2)(C), these courts decided that a right to keep property by remaining current on the existing agreement was *not* one of the "substantive rights guaranteed."<sup>46</sup> Despite bankruptcy's policy of giving debtors a "fresh start," some courts refused to allow a "ride-through" that would give debtors a "head start" by allowing secured loans to become nonrecourse loans for which the debtor assumed no personal liability.<sup>47</sup> The Eleventh Circuit, for example, found "[n]othing in the plain language of the statute provides a debtor with an option to retain the property and to continue to make payments."<sup>48</sup> It found no reason, then, to allow a debtor this "head start" in which "the debtor effectively converts his secured obligation from recourse to nonrecourse with no downside risk for failing to maintain or insure the lender's collateral."<sup>49</sup>

The First Circuit joined those circuits that did not allow the "ride-through" option for debtors.<sup>50</sup> When James and Katherine Burr sought to keep their three-year-old minivan without paying a lump sum or entering into a new formal new agreement with their

42. *In re Belanger*, 962 F.2d 345, 347 (4th Cir. 1992); see 11 U.S.C. § 521(2) (2000), amended by 11 U.S.C. § 521(a)(2) (2006).

43. *In re Belanger*, 962 F.2d at 347.

44. See *In re Burr*, 160 F.3d 843, 847-48 (1st Cir. 1998); *In re Johnson*, 89 F.3d 249, 252 (5th Cir. 1996); *In re Taylor*, 3 F.3d 1512, 1516 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990).

45. See, e.g., *In re Burr*, 160 F.3d at 848 ("[Congress] intended chapter 7 debtors to elect surrender or retention, and then, 'if' retention is 'applicable,' to specify which of the following . . . retention options they intend to employ.").

46. *Id.*

47. *In re Taylor*, 3 F.3d at 1516. In a nonrecourse loan, the creditor would be able to repossess the collateral in the event the debtor stopped making payments or otherwise violated the agreement (such as by failure to maintain insurance), but in the likely event that the collateral fetched a price lower than the amount still owed under the agreement, the lender would have no remedy against the debtor. See *id.*

48. *Id.*

49. *Id.*

50. *In re Burr*, 160 F.3d at 849.

lender, First National Bank of Boston (hereinafter the Bank), sought to compel them to choose one of the listed options.<sup>51</sup> The Burrs had not fallen behind on their payments to the Bank, despite financial difficulties that caused them to file a Chapter 7 petition.<sup>52</sup> The Bank sought relief from the automatic stay in the event that the Burrs failed to select reaffirmation, redemption, or surrender of the minivan.<sup>53</sup>

Siding with the dissenting opinion in *Boodrow*, the court

agree[d] that it . . . [was] perfectly good English[ ] for Congress to have phrased [section] 521(2)(A) in the way it did because it intended chapter 7 debtors to elect surrender or retention, and then, “if” retention is “applicable,” to specify which of the following three retention options they intend to employ.<sup>54</sup>

After all, the court reasoned, “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 . . . nor resuscitates personal liability for the underlying debt.”<sup>55</sup> In light of the fact that this “unspecified . . . option . . . would be almost universally employed” if it were allowed, the court reasoned that Congress would not have been silent about it.<sup>56</sup>

In addition, the First Circuit Court of Appeals stressed “that a chapter 7 discharge is a benefit that comes with certain costs.”<sup>57</sup>

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. Nor do we doubt that some . . . creditors may use their superior bargaining power to attempt to impose additional, creditor-friendly terms in any new agreement. But strictly speaking, debtors are never “forced” to enter into reaffirmation agreements; they can always surrender the property and be discharged of the underlying debt.<sup>58</sup>

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51. *Id.* at 844.

52. *Id.*

53. *Id.*

54. *Id.* at 848; *see also In re Boodrow*, 126 F.3d 43, 57-58 (2d Cir. 1997) (Shadur, J., dissenting).

55. *In re Burr*, 160 F.3d at 847.

56. *Id.*

57. *Id.* at 848.

58. *Id.*

The court also reasoned that the Burrs could not perform this fourth option within forty-five days, as required by section 521(2)(B).<sup>59</sup> While section 521(2)(A) required a debtor to state his intentions, section 521(2)(B) required a debtor to “perform his intention with respect to such property” within forty-five days.<sup>60</sup> Since it was impossible for the Burrs to finish paying by installment under the original agreement terms within forty-five days, this clearly was not an option contemplated by the statute.<sup>61</sup> The Burrs, unlike Mr. Boodrow, could not use the “ride-through.”

Finally, the First Circuit addressed the issue of voluntariness. If a debtor fails to choose one of the three options, the court noted that involuntary surrender is perceived as a contradiction to the protection offered by the automatic stay.<sup>62</sup> The court was unconcerned, however, because it recognized “that most secured creditors in circumstances such as these will prefer to enter reaffirmation agreements containing identical terms to the old agreements over the costs associated with accepting back, and then disposing of, surrendered collateral.”<sup>63</sup> The court did acknowledge that it “perhaps would have cause for concern if, in fact, the effect of [this section] were that most debtors were forced to surrender their collateral.”<sup>64</sup>

### C. *The Importance of the “Ride-Through” Debate to Debtors and Creditors*

The controversial “ride-through” benefitted debtors in several ways. First, it allowed debtors to keep their vehicles on the same terms as they had prior to filing.<sup>65</sup> This was important for many reasons. It kept creditors from preying on debtors’ fear of losing

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59. *Id.* at 847; 11 U.S.C. § 521(2)(B) (2000), amended by 11 U.S.C. § 521(a)(2)(B) (2006).

60. 11 U.S.C. § 521(2)(A)-(B) (2000), amended by 11 U.S.C. § 521(a)(2)(A)-(B) (2006).

61. *In re Burr*, 160 F.3d at 847.

62. *See id.* at 848.

63. *Id.*

64. *Id.*

65. *See Rash and Ride-Through Redux*, *supra* note 20, at 462. In jurisdictions allowing “ride-through,”

so long as a debtor remains current on a secured debt and meets other obligations, such as insuring and maintaining the collateral, the bankruptcy court will not lift the automatic stay and allow the creditor to repossess or foreclose on the collateral merely because the debtor’s personal liability on the debt will be erased by bankruptcy.

*Id.*

their transportation by raising the interest rates on their loans.<sup>66</sup> Debtors were often willing to accept harsh terms for the sake of keeping their cars<sup>67</sup> because getting to work and taking care of a family are easier with an automobile.<sup>68</sup> Debtors who lost their current vehicle might have a hard time getting financing for another vehicle if they lost their current one, as lenders would not look favorably on the bankruptcy.<sup>69</sup>

Although reaffirmation might be a hardship, debtors often fight to prove that they are able to make their car payments.<sup>70</sup> Even when consumers owe more than the vehicle is worth, they frequently reaffirm their debt.<sup>71</sup> In *Coastal Federal Credit Union*, for example, debtors, the Hardimans, owed \$20,000 on a Chevrolet only worth \$9,000 due to depreciation.<sup>72</sup> The family, which included three children, did not wish to lose “their only reliable means of transportation.”<sup>73</sup> Because their other debts were being discharged, the family “thought they could make the monthly payments on the Chevrolet. [They] acknowledged, however, that it would be hard sometimes.”<sup>74</sup> In deciding that it was not in the Hardimans’ best interest to reaffirm their agreement with the creditor, the court nevertheless allowed the Hardimans to keep the

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66. See *In re Price*, 370 F.3d 362, 378 (3d Cir. 2004) (stating that without the “ride-through” option, “debtors would either have to accept possibly onerous terms set by the creditor or surrender the property”).

67. See, e.g., *In re Husain*, 364 B.R. 211, 213-14 (Bankr. E.D. Va. 2007) (debtor agreed to pay \$15,438 on his vehicle that had a value of \$8,415, at an interest rate of 15.6%); see also Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 522, 526-30 (1993) (noting that debtors employ various means in attempting to hold on to collateral).

68. See, e.g., *In re Lorenz*, 368 B.R. 476, 479 (Bankr. E.D. Va. 2007) (noting debtor needed vehicle for “travel[ing] to and from work,” and “shopping for groceries,” among other everyday tasks).

69. See William C. Whitford, *Consumer Bankruptcy and Credit in the Wake of the 2005 Act: A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, 145 (“One important reason [why a debtor will want to retain their vehicle] is that the debtor, with an impaired credit rating, can expect difficulty replacing a repossessed vehicle with a vehicle of similar quality.”).

70. See, e.g., *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 166 (E.D. N.C. 2008) (indicating that even though the debtors showed a negative net monthly income, they tried to reaffirm their debt on the car).

71. *Id.* at 166; *In re Husain*, 364 B.R. at 213-14 (debtor agreed to pay \$15,438 on his vehicle that had a value of \$8,415, at an interest rate of 15.6%).

72. *Coastal Fed. Credit Union*, 398 B.R. at 165.

73. *Id.* at 166.

74. *Id.* (footnote omitted) (citation omitted).

Chevrolet as long as they continued making their payments and complied with other requirements, such as maintaining insurance.<sup>75</sup>

Creditors had several complaints about the unfairness of the "ride-through" option. Debtors keeping their property by means of "ride-through" were no longer personally liable for these debts.<sup>76</sup> While lenders did not lose their right to repossess the property if the debtors stopped paying, they had no recourse if the property was damaged or destroyed.<sup>77</sup> Creditors were therefore forced into an involuntary and unfavorable new agreement.<sup>78</sup> In a voluntary reaffirmation, debtors still would be personally liable despite their discharge in bankruptcy. Moreover, if debtors did not like the terms the lender offered in this voluntary reaffirmation, they could file under Chapter 13, instead.<sup>79</sup> Creditors, such as Capital, argued that a debtor without personal liability on the loan would have "no incentive to maintain the collateral in good condition or to continue making payments if the value of the collateral drops below the amount outstanding on the loan."<sup>80</sup> The court in *Boodrow* agreed with the debtor, however, who argued that "there is a great incentive . . . to maintain current on the debt and to preserve the auto since he has no means to acquire another auto."<sup>81</sup> Courts allowing

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75. *Id.*

76. See *In re Boodrow*, 126 F.3d 43, 52 (2d Cir. 1997) (stating that "a debtor's discharge from bankruptcy eliminates personal liability on the loan, thereby theoretically limiting the amount a creditor could recover if the debtor defaults").

77. See *In re Edwards*, 901 F.2d 1383, 1386 (7th Cir. 1990) (finding that "[w]hen 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"); Michael P. Alley, *Redemption, Reaffirmation, Exemption, and Retention in Chapter 7 Bankruptcy: Extinction Looms Near for the Free Ride*, 47 U. KAN. L. REV. 683, 687 (1999).

[T]he collateral . . . may be in good saleable condition at the time the debtor files for Chapter 7 protection. If the debtor subsequently defaults after the bankruptcy case closes and the collateral has rapidly depreciated through the neglect of a disinterested debtor, secured lenders lose their best opportunity to sell the collateral at a favorable price and apply the proceeds against the debt.

*Id.*

78. See Ned W. Waxman, *Redemption or Reaffirmation: The Debtor's Exclusive Means of Retaining Possession of Collateral in Chapter 7*, 56 U. PITT. L. REV. 187, 203 (1994) (stating that creditors are forced "into a new [involuntary] contractual arrangement" that gives the creditor no protection in the case of the debtor's default).

79. See *In re Burr*, 160 F.3d 843, 848 (1st Cir. 1998). Chapter 13, however, requires a debtor to commit their disposable income for a specified time period to paying back their debts, offering less of a "fresh start." See generally 11 U.S.C. § 1322(a) (2006).

80. *In re Boodrow*, 126 F.3d at 51.

81. *Id.* at 52 (internal quotation marks omitted).

the “ride-through” were less than sympathetic to creditors’ protests.<sup>82</sup>

## II. BAPCPA—IT’S NO WONDERLAND

Given that this disagreement created a circuit split lasting fifteen years,<sup>83</sup> when BAPCPA was enacted it was a logical opportunity for Congress to clarify and definitively state whether it intended to allow the “ride-through” or not.<sup>84</sup> Congress, however, failed to take advantage of this opportunity.<sup>85</sup> The “if applicable” language remained in the new Code.<sup>86</sup> Once again, courts were left to decipher the statute with inadequate guidance. Once again, Congress’s intent was unclear.<sup>87</sup> Once again, consumers were faced with a nonuniform application of Bankruptcy law.

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82. *Id.*; see also *In re Carpinella*, 201 B.R. 34, 36 (Bankr. D. Conn. 1996).

Once a debtor’s discharge is entered and the subject collateral ceases to be property of the bankruptcy estate, the secured creditor can freely exercise the same rights against its collateral that it possessed prior to the bankruptcy filing . . . in accordance with [its] agreements and applicable non-bankruptcy law.

*Id.* (footnote omitted).

83. See *Lowry Fed. Credit Union*, 882 F.2d 1543, 1547 (10th Cir. 1989) (first decision to allow the “ride-through”); *In re Edwards*, 901 F.2d 1383, 1386 (7th Cir. 1990) (denying the existence of this fourth option).

84. See Chadwick M. Werner, *Still Applicable: An Examination of BAPCPA’s Perplexing Response to the Ride-Through Debate*, 16 J. BANKR. L. & PRAC. 1 ART. 3 (2007).

It seemed a mere matter of time before this widespread circuit split would be sorted out by the Supreme Court. Congress, however, beat the court to it . . . or so it seemed. While it appears that Congress may have sought to settle the issue by amending the language of section 521, it unfortunately did little more than add fuel to the fire.

*Id.* (alteration in original).

85. See generally Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified in scattered sections of 11 U.S.C. § 101).

86. 11 U.S.C. § 521(a)(2)(A) (2006).

87. See *In re Donald*, 343 B.R. 524, 528-29 (Bankr. E.D.N.C. 2006).

Unfortunately, the BAPCPA amendments do not provide a clear answer. The amendments are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. . . . Deciphering this puzzle is like trying to solve a Rubik’s Cube that arrived with a manufacturer’s defect.

*Id.* at 529.

A. Congress Attempts Bankruptcy Reform

Congress made several attempts to update the Bankruptcy Code before finally enacting BAPCPA in 2005.<sup>88</sup> In 1997, the "Responsible Borrower Protection Bankruptcy Act" was introduced.<sup>89</sup> This Act "set out the rudimentary elements of means testing<sup>90</sup> for consumer debtors as well as other provisions protective of consumer creditor interests."<sup>91</sup> While means testing was not a new idea,<sup>92</sup> these attempts at reform show Congress's growing concern for the rights of creditors. The fact that bankruptcy filings were increasing throughout the 1990s may have influenced this trend.<sup>93</sup>

The Bankruptcy Reform Act of 1998 was introduced in the House in February of that year.<sup>94</sup> Many witnesses testified at the hearings on this reform, including the Consumer Bankruptcy Re-

88. See Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 486 (2005). The National Bankruptcy Review Commission was formed in 1994. *Id.* Its purpose was to

- (1) investigate and study issues and problems relating to the Bankruptcy Code;
- (2) evaluate the advisability of proposals and current arrangements with respect to such issues and problems;
- (3) prepare and submit to Congress, the Chief Justice, and the President a report within two years; and
- (4) "solicit divergent views of all parties concerned with the operation of the bankruptcy system."

*Id.* (quoting Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 1994 U.S.C.A.N. (108 Stat.) 4106, 4147). This Commission issued a report containing recommendations for changes to the 1978 Bankruptcy Code. *National Bankruptcy Review Commission Report: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 54-55 (1997). "The conceptual framework of some of these recommendations was ultimately reflected in BAPCPA . . . ." Jensen, *supra* note 87, at 487.

89. H.R. 2500, 105th Cong. (1997); Jensen, *supra* note 88, at 493.

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90. Means testing, which is a method for calculating income to determine who is eligible to file Chapter 7 and who must file Chapter 13, was eventually introduced by BAPCPA. See Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1307 (2006) [hereinafter *A Fresh Start*]; Jensen, *supra* note 88, at 493.

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91. Jensen, *supra* note 88, at 493.

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92. In 1932, President Herbert Hoover proposed that "[t]he discretion of the courts in granting or refusing discharges should be broadened" to give more protection to creditors. Jensen, *supra* note 88, at 490 (quoting President's Special Message to the Congress on Reform of Judicial Procedure, 69 Pub. Papers 83, 90 (Feb. 29, 1932)).

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93. Jensen, *supra* note 88, at 495. Representative George W. Gekas (R-PA), testified that "[t]he bankruptcy crisis is epidemic. A record 1.3 million or more Americans are expected to declare bankruptcy this year, more than double the number a decade ago . . . ." *Id.* (citing *National Bankruptcy Review Commission Report: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 2-3 (1997)).

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94. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998); Jensen, *supra* note 88, at 496.

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form Coalition, comprising many consumer creditors, such as banks and finance companies, which “would play a major role in the effort to effect consumer bankruptcy reform.”<sup>95</sup> Meanwhile, the Senate was also working on its own legislation in this area.<sup>96</sup> The House and Senate worked together to reconcile the two acts, but while the House adopted the amended version, the Senate failed to take action before Congress adjourned.<sup>97</sup>

A year later, Congress took up bankruptcy reform once again, introducing the Bankruptcy Reform Act of 1999.<sup>98</sup> Lawmakers supporting this Act were motivated by “the increase in bankruptcy filings, perceived loopholes in the law that encourage abuse, the need to ‘reinstill a sense of personal responsibility,’ and the cost of abusive bankruptcy filings.”<sup>99</sup> A later version of this Act was eventually vetoed by President Clinton, who cited concerns over the lack of balance in holding debtors and creditors accountable; Congress adjourned without overriding the veto.<sup>100</sup>

President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act into law on April 20, 2005.<sup>101</sup> Interestingly, some commentators felt “the bankruptcy community, the bench and the bar, were effectively shut out of this particular bankruptcy bill.”<sup>102</sup> Critics agree that the Act was poorly drafted, leading to “greater interpretive challenges” than under the prior Act.<sup>103</sup>

95. Jensen, *supra* note 88, at 499. This coalition “also obtained the services of some of the most prominent lobbyists in Washington, D.C. to make its case to Congress.” *Id.*

96. S. REP. NO. 105-253 (1998); Jensen, *supra* note 88, at 512.

97. Jensen, *supra* note 88, at 513-18; *see* S. REP. NO. 105-253.

98. Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. (1999); *see* Jensen, *supra* note 87, at 519.

99. Jensen, *supra* note 88, at 519-20 (footnotes omitted) (quoting *Bankruptcy Reform Act of 1999-Part I: Hearing on H.R. 833 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 106th Cong. 32 (1999)) (statement of Rep. Steven Rothman (D-NJ)).

100. *Id.* at 539; *see* Bankruptcy Reform Act of 2000, H.R. 2415, 106th Cong. (1999).

101. Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

102. Symposium, *Old Code, New Code: Views on Bankruptcy From the Bench and Bar: Panel 3: BAPCPA: What Do We Know and When Did We Know It?*, 4 DEPAUL BUS. & COM. L.J. 597, 597 (2006) (also referring to the Act as “BAP-CRAPA”); *see also* *A Fresh Start*, *supra* note 90, at 1305 (“[C]redit industry lobbyists and their most dedicated supporters in Congress knew that opening up the drafting process would provide an opportunity for rethinking policy choices, so even the legislation’s typos and technical flaws were not addressed.”).

103. George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV.

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## B. *The 2005 Act and Its Effect on Consumer Debtors*

When BAPCPA was finally passed in 2005, it changed the landscape for creditors and consumers. To illustrate the overall effect of the Act, this Note will briefly discuss general changes to the Bankruptcy Code and how these changes have affected those filing. Filings spiked shortly before BAPCPA went into effect,<sup>104</sup> presumably because people feared the effect BAPCPA would have on their ability to file.

### 1. General Changes that Adversely Affect Debtors

Many of BAPCPA’s changes illustrate the “Bankruptcy Abuse Prevention” aspect of the Act. Supporters of the new Act claimed that this new test, introduced in BAPCPA, was to benefit debtors as well as creditors by stopping the majority of debtors from paying the increased costs of credit caused by those abusing the system.<sup>105</sup>

In the pre-BAPCPA Bankruptcy Code, section 707(b) stated, “[t]here shall be a presumption in favor of granting the relief requested by the debtor.”<sup>106</sup> This sentence does not appear in the new version.<sup>107</sup> Further, section 707(b) in its older form required the court to find “substantial abuse” of the system as one reason for a court to dismiss a bankruptcy case.<sup>108</sup> BAPCPA merely requires the court to find “abuse,” a presumably easier standard to meet.<sup>109</sup>

Another important change introduced by BAPCPA affects repeat filers—those debtors who file for bankruptcy more than once within a given year.<sup>110</sup> Section 362(c)(3) shortens the reprieve granted a debtor by the automatic stay that takes effect when a

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297, 304 (2006). Singer goes on to state that this is “due to the imprecise language frequently utilized by Congress and other drafting issues that do not in many cases clearly articulate Congressional intent.” *Id.*

104. *Press Release, Chapter 7 Bankr. Filings in Mass. Soar to Highest Level in Four Years*, THE WARREN GRP. (Oct. 15, 2009), <http://www.thewarrengroup.com/portal/Solutions/PressReleases/tabid/190/newsid751/2350/Default.aspx>. Bankruptcy filings are back up to their highest level in four years in Massachusetts and Connecticut. *Id.*

105. *See, e.g.*, 151 CONG. REC. S1855. According to Sen. Grassley, sponsor of the means test, the implementation of this test would prevent “high rollers who game the current bankruptcy system and its loopholes to get out of paying their fair share.” *Id.* This causes other “hard-working, law-abiding Americans . . . to pay higher prices . . . because somebody else did not make good on their obligations.” *Id.* at S1856.

106. 11 U.S.C. § 707(b) (2000) (amended 2006).

107. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 707(b) (2006).

108. *Id.*

109. *Id.*

110. 11 U.S.C. § 362(c)(3).

debtor files for bankruptcy.<sup>111</sup> In both Chapter 7 and Chapter 13 cases, if the debtor has filed another bankruptcy case within one year of the current case, the automatic stay, rather than being in effect until discharge or dismissal, terminates thirty days from the time of filing.<sup>112</sup> A debtor may avoid this early lifting of the automatic stay if he can show that the previous filing was done in good faith, and not in an attempt to merely hold off creditors.<sup>113</sup> If a debtor files three or more times within the year, no automatic stay goes into effect at all unless the debtor can show he filed in good faith.<sup>114</sup> Although debtors were more likely to be repeat filers in order to keep secured creditors at bay with respect to real estate, repeat filers were detrimental to automobile lenders as well, because they increased administrative costs.<sup>115</sup>

In the name of consumer protection, BAPCPA requires debtors to undergo a course on financial management.<sup>116</sup> This and other requirements for credit counseling<sup>117</sup> “are intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating . . . .”<sup>118</sup> There is debate, however, on whether this requirement can really help a debtor who is already seriously considering bankruptcy.<sup>119</sup>

111. *Id.* § 362(c)(3)(A).  
112. *Id.*  
113. *Id.* § 362(c)(3)(B).  
114. *Id.* § 362(c)(4)(A)(i) and 362(c)(4)(B).  
115. *See* Whitford, *supra* note 69, at 152-53.

Not only were lenders hindered by the automatic stay if they were to seek repossession, but each time a debtor filed a bankruptcy case the lender incurred an administrative expense: the lender had to note the existence of the case in appropriate company records, so that the lender did not inadvertently violate the automatic stay, and had to file a proof of claim with the bankruptcy court. For this reason most importantly, the expected impact of BAPCPA on the number of refilings, especially chapter 13 refilings, should significantly benefit auto lenders.

*Id.* at 153 (footnote omitted).

116. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 109(h) (2006).

117. *Id.* §§ 101, 109(h), 526-28.

118. H.R. REP. NO. 109-31, pt. 1, at 18 (2005).

119. *See* Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 365-66 (2008) [hereinafter *A Guide to Interpretation*].

Credit counseling might work for more debtors if they could get it earlier, before their debt loads become unmanageable, but the required briefing comes too late, typically after a debtor visits a bankruptcy lawyer . . . and learns of the requirement. By this time, most debtors already are in deep debt

## 2. BAPCPA's Effect on Chapter 13

Although this Note focuses mainly on BAPCPA's impact on Chapter 7 debtors wishing to retain their vehicles, it is important, in order to fully appreciate how BAPCPA has changed the playing field for debtors and creditors, to briefly discuss how Chapter 13 filings were also affected by the 2005 Act. Prior to BAPCPA's enactment, Chapter 13 debtors choosing to keep certain collateral utilized a process called "cramdown" to pay less than what they still owed under the original contract.<sup>120</sup> Essentially, debtors would only have to pay what the collateral was worth, not the full amount owed on the loan.<sup>121</sup> Debtors could achieve this result by bifurcating their loan into secured and unsecured sections.<sup>122</sup> If a lender was lucky enough to have a Chapter 13 debtor who owed less than the vehicle was worth, that lender was oversecured.<sup>123</sup> In this case, the lender would be paid what was owed under the original loan agreement.<sup>124</sup> Because automobiles and other vehicles depreciate rapidly, however, it was more likely that a debtor was left owing more than what his vehicle was worth.<sup>125</sup> In this case, a lender was undersecured.<sup>126</sup> Being undersecured meant that the "secured creditor [could only] receive the value of the collateral at the time of filing . . . plus interest."<sup>127</sup> In other words, the amount of the obligation that equaled the value of the vehicle was treated as a secured loan, while any amount in excess of the value was treated as an unsecured obligation; this severely hampered the lender's ability to receive payment on that portion of the debt.<sup>128</sup> In this

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trouble and have terrible credit ratings, so that they may actually improve access to new credit by filing in bankruptcy.

*Id.* (footnote omitted).

120. For a discussion of BAPCPA's effect on cramdown, see *Rash and Ride-Through Redux*, *supra* note 20, at 464-65.

121. *Id.*

122. 11 U.S.C. § 506(a) (2006). When a debtor grants a security interest in collateral to a creditor, which is essentially a lien on the property, this is a secured loan. BLACK'S LAW DICTIONARY 1475 (9th ed. 2009).

123. Whitford, *supra* note 69, at 145.

124. *Id.*

125. The topic of valuation is outside the scope of this Note. For discussion of how courts decide the value of vehicles in bankruptcy proceedings, both pre- and post-BAPCPA, see *Rash and Ride-Through Redux*, *supra* note 20, at 463-67.

126. Whitford, *supra* note 69, at 145.

127. *Id.* at 146.

128. See Richardo I. Kilpatrick & Marla A Zain, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 834 (2005); Whitford, *supra* note 69, 145-46.

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case, a lender must get in line with other unsecured creditors, making it unlikely that they would collect this portion of the debt.

BAPCPA changes how Chapter 13 functions with respect to secured collateral such as automobiles. Section 1325(a) states that

[S]ection 506 shall not apply to a claim described [in paragraph 5] if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] preceding the date of the filing . . . and the collateral for that debt consists of a motor vehicle . . . acquired for the personal use of the debtor, or 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.<sup>129</sup>

In cases where the debtor has acquired his vehicle within the previous 910 days, that debtor will be forced to pay the full amount owed under the secured agreement when filing under Chapter 13, which is a definite improvement in creditors’ pre-BAPCPA position with newer cars.

Chapter 13 debtors, “[a]lthough . . . well-meaning and optimistic” often did not complete their repayment plans prior to BAPCPA.<sup>130</sup> BAPCPA’s means test anticipated forcing more debtors to file under Chapter 13.<sup>131</sup> With more debtors filing under Chapter 13, especially when their first choice may have been to file under Chapter 7, it appeared that there could be fewer bankruptcy discharges.<sup>132</sup> Indeed, as many as two-thirds of debtors who begin a Chapter 13 plan are unable to complete it and obtain a discharge.<sup>133</sup>

### 3. BAPCPA’s Changes to Chapter 7 Provisions

BAPCPA introduced changes to Chapter 7 as well making it more difficult for some debtors to file under Chapter 7, which was the only option that provided any hope of a “ride-through” in the first place.

129. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 1325(a) (2006). This is the “famous ‘hanging paragraph’” in the Code, coming right after section 1325(a)(9), but having no designation of its own. David Gray Carlson, *The Res Judicata Worth of Illegal Bankruptcy Reorganization Plans*, 82 TEMP. L. REV. 351, 359 (2009). It is a prime example of the poor draftsmanship and editing that went into BAPCPA.

130. *A Fresh Start*, *supra* note 90, at 1297-98.

131. *See Rash and Ride-Through Redux*, *supra* note 20, at 459 n.9.

132. *A Fresh Start*, *supra* note 90, at 1298 (“Now, Chapter 13 is less voluntary and, for several reasons, even less promising as a way for debtors to deal effectively with their problems.”).

133. *Id.* at 1297-98.

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The biggest change BAPCPA made affected which debtors were eligible to file for Chapter 7 relief. In an effort to curb abuse of the system, BAPCPA introduced a "means test" to determine the eligibility of debtors to file under Chapter 7.<sup>134</sup> If a debtor attempts to file under Chapter 7 and has income in excess of the applicable median family income for her state, that debtor will have to overcome a presumption of abuse.<sup>135</sup> Courts may also look at "whether the debtor filed the petition in bad faith"<sup>136</sup> and at the "totality of circumstances" in evaluating whether there is such abuse.<sup>137</sup> BAPCPA requires looking at a debtor's income, but his "current monthly income" is calculated by looking at income over the previous six months.<sup>138</sup> Thus, a debtor may purposely make less in the six months prior to filing.<sup>139</sup> A debtor might also think ahead and buy property on secured credit, which would be deductible from his income.<sup>140</sup> Ironically, BAPCPA may "make access to bankruptcy difficult for all while permitting relatively well-off persons who plan ahead to shelter both income and assets from their creditors."<sup>141</sup>

Despite the many changes BAPCPA made to the Bankruptcy Code, Congress did *not* change the "if applicable" language that was the main source of controversy surrounding the previous version of the act as applied to the "ride-through" option for debtors wishing to keep their automobiles.<sup>142</sup> Since these words caused so much contention and ambiguity, the drafting of BAPCPA would

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134. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 707(b)(2) (2006).

135. *Id.*; see DAVID J. LIGHT, UNDERSTANDING BANKRUPTCY REFORM 2005 12 (LRP Publications ed., 2005) ("The purpose of the means test is to create a presumption of abuse.").

136. 11 U.S.C. § 707(b)(3)(A). While "bad faith" is not defined in the Bankruptcy Code, a debtor who conceals assets is a prime example of a filer in "bad faith." See, e.g., *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374-75 (2007) (finding that debtor who concealed a home in Maine had filed for Chapter 7 in "bad faith" and was "not entitled to the relief available to the typical debtor").

137. 11 U.S.C. § 707(b)(3)(B).

138. *Id.* § 101(10A); *A Fresh Start*, *supra* note 90, at 1315.

139. *A Fresh Start*, *supra* note 90, at 1316 ("[A] small businessperson could simply take on less work for a period before filing, or an employee could take a lower paying job for all or part of the six months before filing.").

140. *Id.* ("[B]uying a new car or a bigger house is a way to pass the presumed abuse test.").

141. *Id.* at 1306. A new decision by the Supreme Court may allow Bankruptcy courts to again use their discretion, however, by allowing them to take a more forward-looking approach that considers expected events in the debtor's life. See *generally* *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

142. 11 U.S.C. § 521.

have seemed an opportune time to clarify this language.<sup>143</sup> Yet, Congress chose not to change these words, perhaps counting on other changes to make its intentions regarding the “ride-through” option clearer.

BAPCPA changed section 521(a)(2)(C) so that it now states “nothing in subparagraphs (A) and (B) . . . shall alter the debtor’s . . . rights with regard to such property . . . *except as provided in section 362(h).*”<sup>144</sup> Section 362(h)(1)(A) states that if a “debtor fails . . . to file timely any statement of intention required under section 521(a)(2) with respect to such personal property, or to indicate in such statement that the debtor . . . if retaining such personal property, [will] redeem such personal property . . . [or] enter into an agreement of the kind specified” the automatic stay will be terminated.<sup>145</sup>

Section 362(h)(1)(B) does appear to give debtors the right to reaffirm on the same agreement they had with a secured lender before filing for bankruptcy.<sup>146</sup> It provides that the automatic stay will *not* be lifted in cases where a debtor attempts to reaffirm on the original terms of the agreement and the creditor refuses.<sup>147</sup> This new language appears to protect both creditors and consumers. Creditors will still have a secured loan agreement, making debtors still personally liable for their debt if they choose to keep their vehicles. Debtors, on the other hand, while losing the benefit of keeping their vehicle without personal liability on the amount still owed, as the “ride-through” allowed pre-BAPCPA, can avoid higher interest rates or other adverse changes to their agreements that creditors may otherwise attempt to impose.<sup>148</sup> This seems to be a win-win situation, as it protects creditors from damage to, or loss of, the collateral and it protects debtors from being forced into agreements that are less favorable than the original agreement. As this Note will argue, this solution fits well into an approach that looks at the language and the purpose of the Bankruptcy Code.<sup>149</sup>

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143. Werner, *supra* note 84, at 1.

144. 11 U.S.C. § 521(a)(2)(C) (emphasis added).

145. *Id.* § 362(h)(1)(A).

146. *Id.* § 362(h)(1)(B).

147. *Id.*

148. See *Rash and Ride-Through Redux*, *supra* note 20, at 478.

149. See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (considering the purpose of bankruptcy law and not text alone); see also *In re Dumont*, 581 F.3d 1104, 1122 (9th Cir. 2009) (Graber, J., dissenting) (citing *Marrama* that the principal purpose of the bankruptcy act is to provide a “fresh start”).

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### III. THROUGH THE LOOKING GLASS—HOW BAPCPA HAS AFFECTED THE “RIDE-THROUGH” OPTION IN PRACTICE

BAPCPA has certainly affected how debtors and their attorneys approach bankruptcy cases. It has also led to varied reasoning among the courts as they try to interpret the new Code. Most courts agree that BAPCPA ended the “ride-through” previously available to debtors, at least in those circuits that allowed the option and relied only on debtor silence to trigger its protection.

Circuits that had read the older version of the Code to disallow consumer “ride-through” for automobiles were unlikely to change their views under the new Code. The “if applicable” language that these courts had understood as foreclosing the possibility of “ride-through” was still in place, and with the additional requirements of section 362(h), it was doubtful these courts would change their minds.

The circuits that had allowed the “ride-through” option to debtors in Chapter 7 bankruptcy cases have had the steepest learning curve in applying the new Code.<sup>150</sup> Nevertheless, some courts have continued to allow at least a limited “ride-through.”<sup>151</sup> While these decisions are not based on the same reasoning as the courts used to allow the “ride-through” pre-BAPCPA, they do offer a more limited group of consumer debtors the same benefits.

When courts attempt to interpret BAPCPA they often look at the plain meaning of the text to reach a determination of how each section should be applied. This plain meaning approach, however, was the leading cause of the pre-BAPCPA circuit split.<sup>152</sup> With the enactment of BAPCPA, courts are still unable to agree on the plain meaning of sections relevant to this very important issue facing debtors and creditors alike.

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150. *Cf. In re Dumont*, 581 F.3d 1104; *Coastal Fed. Credit Union*, 398 B.R. 161 (Bankr. E.D. N.C. 2008); *In re Chim*, 381 B.R. 191 (Bankr. D. Md. 2008); *In re Blakeley*, 363 B.R. 225 (Bankr. D. Utah 2007); *In re Ertha Rice*, No. 06-10975 (JFK), 2007 WL 781893 (Bankr. E.D. Pa. Mar. 12, 2007); *In re Hue Huu Tran*, No. 07-12512-SSM, 2007 WL 4210559 (Bankr. E.D. Va. Nov. 27, 2007); *In re Husain*, 364 B.R. 211 (Bankr. E.D. Va. 2007); *In re Lorenz*, 368 B.R. 476 (Bankr. E.D. Va. 2007); *In re Donald*, 343 B.R. 524 (Bankr. E.D. N.C. 2006); *In re Hinson*, 352 B.R. 48 (Bankr. E.D. N.C. 2006); *In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006); *In re Steinhaus*, 349 B.R. 694 (Bankr. D. Idaho 2006).

151. *See Coastal Fed. Credit Union*, 398 B.R. at 187-88; *In re Chim*, 381 B.R. at 199; *In re Moustafi*, 371 B.R. 434, 439 (Bankr. D. Ariz. 2007); *In re Husain*, 364 B.R. 219 n.15. *But see In re Hue Huu Tran*, 2007 WL 4210559, at \*3 (granting debtor the chance to amend the statement of intention to choose one of the listed options, but holding that the “ride-through” no longer exists as a fourth option).

152. *See supra* note 25.

A. *Applying the 2005 Act to the “Ride-Through”: The Journey So Far*

Congress did not resolve the issue of whether the “ride-through” was still a viable option to some debtors.<sup>153</sup> There is still disagreement over a debtor’s options.<sup>154</sup> For debtors, creditors, and their attorneys, this has led to uncertainty. Prior to BAPCPA, experienced attorneys could let prior decisions guide their actions on behalf of their clients. After BAPCPA’s passage, it was up to the attorneys to interpret the new provisions and advise their clients to the best of their ability. Attorneys could no longer rely on their own experience in this area of the law, and the courts could provide no guidance at this early stage. Assumptions regarding the 2005 Act have led to decisions that have surprised consumers.<sup>155</sup> Creditors were also in for some surprises.<sup>156</sup>

Many courts have decided that the new language in section 521(a) together with the addition of section 362(h) has eliminated

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153. See *In re Dumont*, 581 F.3d at 1120 (Graber, J., dissenting).

The Fourth Circuit suggested simple alternative text that Congress could have used if the options were exclusive . . . [yet t]he all-important “if applicable” phrase—the very source of disagreement among . . . courts . . . remains intact. Congress not only declined to adopt the . . . suggested text, it declined to make any change whatsoever.

*Id.*

154. Compare *In re Dumont*, 581 F.3d at 1108 (noting BAPCPA abrogated ride-through of personal property), and *In re Blakeley*, 363 B.R. at 227-28 (holding that BAPCPA has eliminated the ride-through), and *In re Ertha Rice*, 2007 WL 781893, at \*1 (holding that BAPCPA “eliminated ride-through”), and *In re Donald*, 343 B.R. at 540 (“The court is convinced that termination of the ‘ride-through’ option is what Congress intended.”), and *In re Rowe*, 342 B.R. at 345-46 (holding that there is no fourth option post-BAPCPA), and *In re Steinhaus*, 349 B.R. at 703 (holding that post-BAPCPA a debtor may not choose a ride-through option), with *Coastal Fed. Credit Union*, 398 B.R. at 187-88 (holding that ride-through is available to some debtors), and *In re Chim*, 381 B.R. at 199 (holding that ride-through is available where the court rejects a reaffirmation agreement), and *In re Hue Huu Tran*, 2007 WL 4210559, at \*2 n.2 (acknowledging that BAPCPA “largely eliminate[d]” ride-through but noting *Husain* exception), and *In re Husain*, 364 B.R. at 219 (holding that even where reaffirmation is rejected by the court a creditor may only repossess in the event of default), and *In re Hinson*, 352 B.R. at 52 (holding that creditor could not repossess the car because the debtor offered to reaffirm on original terms and was current).

155. In *Dumont*, for example, the debtor had her car repossessed with no warning, several months after her discharge, and while she was making payments that the creditor was silently accepting. *In re Dumont*, 581 F.3d at 1104.

156. See 11 U.S.C. § 521(a)(6) (2006); *In re Moustafi*, 371 B.R. at 438 (creditor was not allowed to repossess vehicle because it did not have an “allowed claim” for the vehicle as technically required); see also Christopher M. Hogan, *Will the Ride-Through Ride Again?*, 108 COLUM. L. REV. 882, 914 (2008) (“Typically, for a claim to be allowed, courts have ruled that a proof of claim must be filed, which does not occur in ‘no-asset’ Chapter 7 cases.”).

the “ride-through” for Chapter 7 debtors.<sup>157</sup> A secured creditor is thus granted relief from the automatic stay if the debtor does not choose one of the listed options—surrender, redemption, or reaffirmation.<sup>158</sup> On the other hand, while the “ride-through” is no longer available as widely or easily as it was prior to the 2005 Act, some courts have held it is still available.<sup>159</sup> Now that courts have begun devising new ways for debtors to take advantage of this option, debtors and creditors alike will at least be able to move forward knowing what to expect.<sup>160</sup> Since case law in this area is still evolving, however, it may be some time before debtors and creditors are on as solid a footing as they were prior to BAPCPA’s enactment.

### 1. *Ipsa Facto*

BAPCPA removed one of the major obstacles creditors faced prior to its enactment. Prior to 2005, creditors could not rely on *ipso facto* clauses<sup>161</sup> to give them any rights to collateral under the Bankruptcy Code.<sup>162</sup> BAPCPA changes that, as section 521(a)(6) removes the automatic stay in cases where a debtor fails to meet the

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157. See generally *In re Dumont*, 581 F.3d at 1108; *In re Ertha Rice* 2007 WL 781893, at \*1; *In re Donald*, 343 B.R. at 540.

158. 11 U.S.C. §§ 362(h)(1)(B), 521(a)(2); *Fees v. Ford Motor Co.*, No. CV07-389-S-EJL, 2008 WL 4630668, at \*4 (D. Idaho Oct. 17, 2008); *In re Hue Huu Tran*, 2007 WL 4210559, at \*1; *In re Rowe*, 342 B.R. at 345-46.

159. See, e.g., *Coastal Fed. Credit Union*, 398 B.R. at 164-65 (allowing debtors to keep their vehicle when the court refuses to approve their attempted reaffirmation with creditor).

160. In both *Coastal* and *Moustafi*, for example, creditors did not file a “proof of claim” because this was not a typical step taken in Chapter 7 bankruptcy cases. *Coastal Fed. Credit Union*, 398 B.R. at 176; *In Re Moustafi*, 371 B.R. at 438. According to these courts, however, this step now was critical in order for creditors to have a chance at reclaiming the collateral. *Coastal Fed. Credit Union*, 398 B.R. at 178; *In re Moustafi*, 371 B.R. at 438; see also Hogan, *supra* note 156, at 914 (“Typically, for a claim to be allowed, courts have ruled that a proof of claim must be filed, which does not occur in ‘no-asset’ Chapter 7 cases.”).

161. An “*ipso facto* clause” in a contract “specifies the consequences of a party’s bankruptcy.” BLACK’S LAW DICTIONARY 905 (9th ed. 2004). Secured agreements will often have such a clause stating that filing for bankruptcy is sufficient reason to cause the filing party to be in default and to allow the creditor to repossess the collateral. See Bob Eisenbach, *Are “Termination on Bankruptcy” Contract Clauses Enforceable?*, IN THE (RED) THE BUSINESS BANKRUPTCY BLOG (Sept. 16, 2007), <http://bankruptcy.cooley.com/2007/09/articles/business-bankruptcy-issues/are-termination-on-bankruptcy-contract-clauses-enforceable/>.

162. See, e.g., *Riggs Nat’l Bank of Wash. D.C. v. Perry*, 729 F.2d 982, 985 (4th Cir. 1984) (holding that *ipso facto* clauses were unenforceable).

requirements of section 524(c) or section 362(h).<sup>163</sup> Section 521(a) goes on to state that

[i]f the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property . . . which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law.<sup>164</sup>

Thus, if a creditor has a default provision in its agreement with the debtor, this clause may be enforced. Creditors must still comply with applicable state laws, however, in any efforts to regain their collateral.<sup>165</sup>

Prior to BAPCPA, section 365(e)(1)(B) of the Bankruptcy Code prohibited secured lenders from deeming a contract in default solely because the debtor had filed for bankruptcy.<sup>166</sup> Section 521(d), however, provides that

[i]f the debtor fails timely to take the action specified . . . with respect to property . . . as to which a creditor holds a security interest . . . nothing in this title shall prevent or limit the operation of a provision in the underlying . . . agreement that has the effect of placing the debtor in default under such . . . agreement by reason of . . . existence of a proceeding under this title.<sup>167</sup>

After BAPCPA, *ipso facto* clauses were no longer useless in bankruptcy proceedings. Once the debtor fails to reaffirm or redeem the vehicle, nothing in the Bankruptcy Code itself prohibits the creditor from acting on the default provision in its contract with the consumer that allows it to repossess the car.<sup>168</sup> The secured

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163. 11 U.S.C. § 521(a)(6).

164. *Id.* § 521(a).

165. *See, e.g., In re Donald*, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006) (“Creditors still must ensure that the contract . . . [complies with] any applicable state laws.”); *In re Rowe*, 342 B.R. 341, 351 (Bankr. D. Kan. 2006) (discussing applicable state law regarding *ipso facto* provisions).

166. 11 U.S.C. § 365(e)(1)(B) (2000) (amended 2006).

167. *Id.* § 521(d) (2006).

168. *In re Dumont*, 581 F.3d 1104, 1106 (9th Cir. 2009). The court did caution, however, that “where there is no *ipso facto* clause in the contract, [the BAPCPA provision] does not allow [the secured] creditor to pencil one in.” *Id.* The court also gave no credence to the debtor’s argument that a bankruptcy case was not a “proceeding” and would therefore not trigger section 521(d). *Id.* at 1117.

It would be bizarre if the right to declare someone in default on her car loan depended on the happenstance of a proceeding (in the technical sense) being initiated for whatever reason in her case . . . . Accordingly, we hold that the

creditor still must comply with state law.<sup>169</sup> However, "federal bankruptcy law no longer prevent[s]" the repossession.<sup>170</sup> What is especially troubling about this change in the Bankruptcy Code is that once this clause kicks in, the debtor may have no way to cure a default, even if state law would normally provide her options to do so.<sup>171</sup>

## 2. *Coastal's* Surprise

The plain language of section 521(2) of the old Code led to different interpretations among the courts.<sup>172</sup> After BAPCPA's passage, a plain language reading of the statute has also led to differing interpretations. This has, once again, led to confusion and nonuniform application of the statute. Not only have courts looked at the "if applicable" language in applying a plain meaning, but courts have also applied a plain meaning to several other terms, such as "allowed claim" and "purchase price."<sup>173</sup>

The "ride-through" option is still available to some debtors in some circuits. In *Coastal Federal Credit Union v. Hardiman*, the district court held that a modified version of the "ride-through" was available, at least for debtors without an attorney, if that debtor "timely enter[ed] into a reaffirmation agreement concerning personal property with their creditor and submit[ted it] to the bankruptcy court, but the bankruptcy court refuse[d] to approve the reaffirmation agreement."<sup>174</sup> Coastal believed that the failure of the court to find that the reaffirmation was in the debtors' best interest meant that the automatic stay was lifted and that it could

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debtor's filing of a Chapter 7 petition initiates a 'proceeding' for the purposes of section 521(d).

*Id.*

169. *Id.* at 1115.

170. *Id.*

171. The Fourth Circuit recently held that since BAPCPA ended the "ride-through," a creditor had the right to repossess the debtor's car without giving notice of default and a right to cure required under state law, since the filing of the bankruptcy petition, which caused the default, cannot be cured. *In re Jones*, 591 F.3d 308, 313 (4th Cir. 2010).

172. Compare *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998) (holding that debtor must choose one of the listed options only "if applicable" and stating, "[w]e see no reason to reach beyond this plain language"), with *In re Edwards*, 901 F.2d 1383, 1384 (7th Cir. 1990) (holding that debtor must choose one of the listed options based on the plain language of the Bankruptcy Code).

173. *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 178-84 (E.D.N.C. 2008) (using the plain meaning of the statute to require creditors meet the technical requirements of having an "allowed claim" for the "purchase price").

174. *Id.* at 165.

repossess the car.<sup>175</sup> The district court affirmed the decision of the bankruptcy court and held that the automatic stay was still in place.<sup>176</sup> The district court, applying the reasoning of the bankruptcy court, reached this decision “[b]ecause court approval of a reaffirmation agreement is not an element of [sections] 521(a)(2) and 362(h)(1).”<sup>177</sup> Although the reaffirmation was ultimately not approved by the bankruptcy court, “the debtors complied with the requirements of the Code by doing everything within their control to reaffirm the debt to Coastal. While ‘ride-through’ is not a stand-alone option . . . it may, in limited circumstances, occur as a result of a debtor’s attempt to reaffirm.”<sup>178</sup>

Coastal argued that the plain meaning of the applicable provisions should not apply because “they lead to absurd results, and . . . they run manifestly counter to clearly expressed Congressional intent in BAPCPA’s legislative history.”<sup>179</sup> The court rejected the application of the absurdity exception to the relevant provisions because “[e]ven if the result compelled by the plain language is ‘anomalous,’ ‘unreasonable,’ or even ‘quite unreasonable,’ it must stand if Congress could plausibly have made that choice.”<sup>180</sup> The court also rejected the intent exception proposed by Coastal, stating “the intent exception does not apply merely because a statute appears to be unreasonable in light of general bankruptcy policy.”<sup>181</sup> In order to successfully show that the plain meaning is not what Congress intended, “the party challenging the plain language must affirmatively show that the plain language is demonstrably contrary to the legislature’s intentions.”<sup>182</sup>

Section 521(a)(6) of the Code requires a creditor to have an “allowed claim” for the “purchase price” of the collateral.<sup>183</sup> Technically, in order to have an “allowed claim,” a creditor must file a “proof of claim,” something that was not done prior to BAPCPA in Chapter 7 cases.<sup>184</sup> Further, the “purchase price” for the collateral

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175. *Id.* at 166.

176. *Id.*

177. *Id.*

178. *Id.* at 166-67.

179. *Id.* at 167.

180. *Id.* at 168 (quoting *In re Sunterra Corp.*, 361 F.3d 257, 267-68 (4th Cir. 2004)).

181. *Id.*

182. *Id.*

183. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 521(a)(6) (2006).

184. Hogan, *supra* note 156, at 914.

is technically the full amount for which the collateral is sold.<sup>185</sup> Some courts, however, have found that these terms should not be read literally.<sup>186</sup>

The *Coastal* court found that “purchase price” was different from “purchase money security interest.”<sup>187</sup> “Purchase price” only applied to the full purchase price.<sup>188</sup> This was a blow to secured creditors of vehicles because once a creditor had received even one payment on an auto loan, they no longer had a claim for the “purchase price.”<sup>189</sup> Under these plain meaning interpretations, *Coastal* did not have an “allowed claim” for the “purchase price” as required by section 521(a)(6).<sup>190</sup> Applying the literal meaning to these terms was not absurd, as *Coastal* contended.<sup>191</sup>

There are at least two possible purposes to be served in applying the phrase “allowed claim” in section 521(a)(6) as written . . . . First, filing a proof of claim will establish whether the creditor has an ipso facto clause that it can invoke. Second, filing a proof of claim will establish whether the underlying contract and lien are valid, enforceable, and perfected.<sup>192</sup>

Congress could therefore plausibly “have chosen the statutory language” in question.<sup>193</sup> *Coastal* also argued that nowhere in the Congressional record does it state that Congress meant this section to apply only to “allowed claims.”<sup>194</sup> The court reasoned, however,

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185. *Id.*

186. *In re Steinhaus*, 349 B.R. 694, 706-07 (Bankr. D. Idaho 2006) (“[I]t appears unmistakable that Congress drafted, or allowed to be drafted by others and then enacted, provisions with ‘loose’ and imprecise language.”); *In re Rowe*, 342 B.R. 341, 349 (Bankr. D. Kan. 2006) (finding that “the intentions of the drafters, rather than the strict language, [should] control[ ]”).

187. *Coastal Fed. Credit Union*, 398 B.R. at 176. The court relied on the reasoning in *Donald*, which noted that “Congress had used ‘purchase money security interest’ elsewhere in BAPCPA, but did not do so in section 521(a)(6) . . . . Congress knew how to use commercial-law terms of art, and chose not to do so in section 521(a)(6).” *Id.*; see *In re Donald*, 343 B.R. 524, 536-38 (Bankr. E.D.N.C. 2006).

188. *Coastal Fed. Credit Union*, 398 B.R. at 176-77.

189. *Id.* at 168.

190. *Id.* at 178-80. *But cf. In re Chim*, 381 B.R. 191, 197 (Bankr. D. Md. 2008) (assuming that creditor did have an “allowed claim” for the “purchase price”). See generally *In re Rowe*, 342 B.R. 341 (interpreting what is meant by “allowed claim”).

191. *Coastal Fed. Credit Union*, 398 B.R. at 178.

192. *Id.* The court also noted that, “[a]s [the judge] reasoned in *Donald*, ‘it is not too much to require that the secured creditor file a proof of claim’ before it attempts to take property from a debtor who is not behind on payments.” *Id.* (quoting *In re Donald*, 343 B.R. at 536).

193. *Coastal Fed. Credit Union*, 398 B.R. at 179.

194. *Id.*

that Congress did not need “to clearly express its intent *in favor* of the plain language in BAPCPA’s legislative history . . . . The plain language in section 521(a)(6)—including the phrase ‘allowed claim’—is the best evidence of Congress’ [sic] intent.”<sup>195</sup>

Concerning the “purchase price,” the court reasoned that Congress could have meant only “to curb the most abusive of bankruptcy practices: . . . enjoying the personal property [one has purchased on credit] while making no payments whatsoever, and then filing for bankruptcy immediately before repossession.”<sup>196</sup> Therefore, the court found such a plain language reading plausible.

Coastal also tried to argue that it had not “entered into” an agreement as required by section 362(h)(1)(a).<sup>197</sup> The debtors contended that approval of the agreement by the court was not required under the section, and that they had, therefore, “entered into” an agreement as required.<sup>198</sup> The court agreed with the debtors.<sup>199</sup>

#### B. *Words or Purpose? How to Fairly Apply the Code*

There is debate over whether courts should look at a “plain meaning” interpretation or whether courts should look at the purpose of the Bankruptcy Code.<sup>200</sup> Traditionally, courts have interpreted bankruptcy law according to its plain meaning.<sup>201</sup> However, choosing a strict interpretation without flexibility does not always lead to fair results.

195. *Id.* at 179-80.

196. *Id.* at 180.

197. *Id.* at 177.

198. *Id.*

199. *Id.*; *see also In re Husain*, 364 B.R. 211, 218-19 (Bankr. E.D. Va. 2007) (concluding that reaffirmation agreement does not have to be enforceable for debtors to satisfy meaning of “agreement” under BAPCPA).

200. *A Guide to Interpretation*, *supra* note 119, at 350 (stating that in a 2007 decision, “the Supreme Court . . . sen[t] a strong message to lower courts to keep purposes of bankruptcy law in the foreground as they interpret it”); 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, 202 (2007) (“Although the Supreme Court has repeatedly resolved statutory interpretation issues involving bankruptcy by reference to the ‘plain meaning’ of the text, a candid assessment of this body of law finds confusion, if not contradiction, in the methodology of these decisions.”).

201. *A Guide to Interpretation*, *supra* note 119, at 352-53. The author “rejects the notion that a good strategy for dealing with the 2005 law, with all its drafting problems and empirically unsupported assumptions, is to latch onto ‘plain meaning,’ catching Congress at its drafting errors and using them to try to help hapless debtors.” *Id.*

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### 1. The Supreme Court Speaks: Lessons From *Marrama*

In *Marrama v. Citizens Bank of Massachusetts*, a debtor sought to convert his bankruptcy case from Chapter 7 to Chapter 13.<sup>202</sup> Under section 706(a), a “debtor may convert a case under [Chapter 7] to a case under chapter . . . 13 of this title at any time.”<sup>203</sup> The debtor in this case was motivated to convert because he was caught hiding the value of real property he owned, and Chapter 13 would allow the debtor to keep this property while Chapter 7 would not. Nevertheless, the debtor insisted that he had an absolute, one-time right to convert his case to Chapter 13 under the Bankruptcy Code.<sup>204</sup> The First Circuit denied *Marrama* this right because he had filed in bad faith.<sup>205</sup> Bankruptcy courts have the power to dismiss Chapter 13 filings “upon a showing of bad faith,” and the First Circuit did not see why Congress would allow a debtor the “absolute right” to convert to Chapter 13 when the court could dismiss the petition immediately.<sup>206</sup> The Supreme Court agreed.<sup>207</sup> The Court looked to the purpose behind the Bankruptcy Code in determining that *Marrama* was “not a member of the class of ‘honest but unfortunate debtor[s]’” to be protected.<sup>208</sup> Since his attempt to hide property was “prepetition bad-faith conduct,” and since “[b]ankruptcy courts . . . routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized,” *Marrama* would fail to qualify as a debtor under Chapter 13.<sup>209</sup> Section 706(d) denies a debtor the right to convert “unless [he] may be a debtor under such chapter.”<sup>210</sup> Prior to the Court’s decision lower courts had disagreed about how to interpret the relevant sections.<sup>211</sup>

202. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 368-69 (2007).

203. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 706(a) (2006).

204. *Marrama*, 549 U.S. at 370. This case was decided under the pre-BAPCPA Code.

205. *Id.* at 365, 370. The Court in *Marrama* held that because the request to convert was made in an attempt to hide property, and was thus in bad faith, granting the request “would constitute an abuse of the bankruptcy process.” *Id.* at 369.

206. *Id.* at 370-71.

207. *Id.* at 371.

208. *Id.* at 374 (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)).

209. *Id.* at 373.

210. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 706(d) (2006); *see also Marrama*, 549 U.S. at 373.

211. *Marrama*, 549 U.S. at 371; *see* 11 U.S.C. § 706(a) (“The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title *at any time* . . . (emphasis added)); *id.* § 706(d) (“[A] case may not be converted to a case under another chapter of this title *unless the debtor may be a debtor under such chapter.*” (emphasis added)).

The Court stated, “[t]he *principal purpose* of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”<sup>212</sup> By stating the purpose of bankruptcy law from the opening sentence, the Court illustrated that the purpose of bankruptcy law plays a crucial role in its interpretation.<sup>213</sup> By referring again to this purpose in holding that Marrama did not have the right to convert his case to Chapter 13, despite the plain text of the Code, the Supreme Court has made clear that courts should apply rationality to their interpretation of the Code.<sup>214</sup>

In *Marrama*, the Court determined that inquiry should be made into the legislative intent behind an act, and that this legislative purpose should be the guiding principle used to determine the proper reading.<sup>215</sup> Unfortunately for courts looking to use BAPCPA’s purpose to help them make sense of the Act, there is little to assist them.<sup>216</sup> According to the Ninth Circuit,

[T]he purposes of the bankruptcy code [do not] provide much aid. Bankruptcy law serves two central but often conflicting interests . . . . [B]ankruptcy law aims to protect the “honest but unfortunate debtor.” On the other hand, since ancient times, bankruptcy has also been seen as promoting creditor interests as well.<sup>217</sup>

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212. *Marrama*, 549 U.S. at 367 (emphasis added) (quoting *Grogan*, 498 U.S. at 286-87).

An issue that has arisen with disturbing frequency is whether a debtor who acts in bad faith prior to, or in the course of, filing a Chapter 13 petition by, for example, fraudulently concealing significant assets, thereby forfeits his right to obtain Chapter 13 relief . . . . [S]ome courts have suggested that even a bad-faith debtor has an absolute right to convert at least one Chapter 7 proceeding into a Chapter 13 case even though the case will thereafter be dismissed or immediately returned to Chapter 7. We granted certiorari to decide whether the Code mandates that procedural anomaly.

*Id.* at 367-68.

213. *A Guide to Interpretation*, *supra* note 119, at 356 (“The opinions in *Marrama* show rather than tell lower courts and litigants that the Supreme Court, to a greater or lesser extent, is nearly always likely to take a purposive approach to bankruptcy law interpretation; even the dissenters . . . consider purpose.”).

214. *Marrama*, 549 U.S. at 370-71 (“We can discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first instance.”).

215. *Id.* at 371-72.

216. *In re Dumont*, 581 F.3d 1104, 1111 (9th Cir. 2009) (noting “that, in general, legislative history is not an able guide here”).

217. *Id.* (citation omitted); *see Grogan*, 498 U.S. at 286-87.

In *Marrama*, the Supreme Court emphasized the “purposes and policy” of bankruptcy law to aid in its interpretation.<sup>218</sup> The Court used purpose, text, and congressional intent to reach its commonsense conclusion, but it seemed to consider purpose foremost.<sup>219</sup> However, the Court has been inconsistent in the methodology it has applied to bankruptcy cases.<sup>220</sup> This means that lower courts have not had a consistent example in interpreting bankruptcy law.

Courts will make the fairest decisions when they look at the text of the statute in light of congressional purpose and the policy behind the Bankruptcy Code. Some experts think “that apparent ‘plain meaning’ should be checked against congressional purposes and policy effects on the bankruptcy system . . . , and not just when there is facial ambiguity in the text.”<sup>221</sup> This might be taking the *Marrama* decision too far, however, when there is no ambiguity in the text. In cases where there is a question about the correct meaning of a provision, looking at the Code’s purpose may provide courts with an equitable solution for both debtors and creditors. This is especially critical to both debtors and creditors when it comes to vehicles, which are one of the largest purchases consumers will make in their lives. Debtors rely on their cars. Creditors do not wish to lose valuable collateral to a debtor having no personal liability, and thus no incentive to properly maintain the car.

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218. *A Guide to Interpretation*, *supra* note 119, at 350 (“The Court’s emphasis on purposes and policy as the primary basis of interpretation, and its de-emphasis of statutory language, could not have come at a more dramatically significant time in the history of bankruptcy law.”); *Marrama*, 549 U.S. at 367, 371-72. R

219. *Marrama*, 549 U.S. at 367; *A Guide to Interpretation*, *supra* note 119, at 355 (“[T]he Court . . . de-emphasiz[es] the text of the statute itself, calling it merely ‘adequate authority’ for its conclusion.”). R

220. *A Guide to Interpretation*, *supra* note 119, at 356. The author discusses another Supreme Court case in which the Court R

insists that there is a “plain meaning” to a bankruptcy provision with a clear drafting error as well as language that the majority concedes “may well be surplusage” under the Court’s reading. The [Court] takes the position, however, that when there is a choice between an interpretation of a statute that treats part of it as surplusage and a reading that the statute is ambiguous, it is preferable to find surplusage in order to conclude that there is a plain meaning!

*Id.* at 356-57 (discussing *Lamie v. U.S. Trustee*, 549 U.S. 526, 534-36 (2004)).

221. *Id.* at 357.

## 2. The Ninth Circuit Weighs In: The *Dumont* Decision

The Ninth Circuit was the first appellate court to rule on the “ride-through” issue after the passage of BAPCPA.<sup>222</sup> In allowing Ford Motor Credit Company to repossess a consumer’s automobile, the court first looked to the plain meaning of the Code.<sup>223</sup> The court did not let plain meaning overrule commonsense, however. The court agreed “that BAPCPA is hardly the very model of a well-drafted statute. However, it is our task to interpret the laws as passed by Congress without attempting to force them to cohere more than their words allow.”<sup>224</sup> The Ninth Circuit also noted that “[b]ecause of the importance of secured lending to the nation’s economy, secured creditors have been the subject of particular congressional solicitude. This policy can be seen in other provisions of BAPCPA, including one change which clearly reflects congressional concern for auto lenders.”<sup>225</sup> The court looked to the changes in the cramdown provision of Chapter 13, which no longer allows debtors who had purchased a vehicle within 910 days of filing to pay the actual value of the vehicle.<sup>226</sup> Instead, these debtors are responsible for the full purchase price of the vehicle.<sup>227</sup>

The Ninth Circuit looked to the United States Constitution to “observe that congressional power over bankruptcy affairs is limited by the constitutional requirement that the bankruptcy laws be ‘uniform.’”<sup>228</sup> The court then concluded that Congress intended to eliminate the “ride-through.”<sup>229</sup>

It would raise serious constitutional questions for us to conclude that Congress affirmatively intended to promote the non-uniform system caused by the circuit split over ride-through . . . . Given the amendment of section 521(a)(2) and the enactment of section 362(h), it is unlikely that Congress failed to foresee that BAPCPA would have a major impact on ride-through. Accordingly, we assume that Congress intended to make ride-through available in all circuits, or none. The direction and tenor of the

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222. *In re Dumont*, 581 F.3d at 1104.

223. *Id.* at 1111.

224. *Id.* at 1110-11.

225. *Id.* at 1111.

226. *Id.*

227. Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 1325(a)(5) (2006).

228. *In re Dumont*, 581 F.3d at 1112; U.S. CONST. art 1, § 8, cl. 4 (giving Congress the power “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”).

229. *In re Dumont*, 581 F.3d at 1112.

changes, which place new duties on debtors and create new sanctions for failure to comply, suggest that Congress did not intend to increase access to ride-through by passing BAPCPA.<sup>230</sup>

The court thus had no choice but to overturn its pre-BAPCPA decision in *In re Parker*.<sup>231</sup>

In allowing the “ride-through” prior to BAPCPA’s passage, the Ninth Circuit relied on the fact that section 521(2) stated that it did nothing to change the rights of the debtor respecting the collateral.<sup>232</sup> The court noted that a debtor must not only file a statement of intention, but now the debtor “must indicate ‘either’ surrender ‘or’ retention and if he chooses the latter, he must indicate ‘either’ redemption [or] reaffirmation.”<sup>233</sup> BAPCPA’s new language made it clear to the Ninth Circuit that the “ride-through” was no more. Antoinette Dumont, the debtor in question, had chosen the retention option, but had failed to choose one of the listed alternatives.<sup>234</sup> She instead continued making payments for several months only to have her car repossessed without warning after her discharge.<sup>235</sup> The court concluded that the discharge injunction did not protect her as a result of her failure to state one of the listed intentions.<sup>236</sup>

The court in *Dumont* also relied on the fact that BAPCPA’s changes expressly granted debtors an exception to application of section 362(h) if the debtor attempted “to reaffirm on the original contract terms but was unable to complete such a reaffirmation due to the creditor’s refusal.”<sup>237</sup>

Ride-through is functionally indistinguishable from reaffirmation on the original terms except for the lack of personal liability in the former. The careful carve-out of reaffirmation on the contract terms—a return to the status quo ante bankruptcy—implies that debtors who attempt to ride-through are subject to section

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230. *Id.*

231. *Id.* at 1113. In *Parker*, the court found “that the only mandatory act is the filing of the statement of intention.” *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998).

232. 11 U.S.C. § 521(2) (2000), amended by 11 U.S.C. § 521(a)(2) (2006).

233. *In re Dumont*, 581 F.3d at 1109; 11 U.S.C. § 521(a)(2)(C) (2006); 11 U.S.C. § 362(h)(1)(A). The Ninth Circuit also noted that “the ‘either . . . or’ disjunction has always meant that one of the listed alternatives must be satisfied.” *Id.*

234. *In re Dumont*, 581 F.3d at 1114.

235. *Id.* at 1107.

236. *Id.* at 1114. The automatic stay remains in effect until a case is closed, dismissed, or discharge is granted or denied. Upon discharge, there will be a new stay in effect under section 524. See 11 U.S.C. § 524.

237. *In re Dumont*, 581 F.3d at 1114; 11 U.S.C. § 362(h)(1)(B).

362(h). If ride-through existed, any lawyer who advised his client to make a reaffirmation offer on the original contract terms would be guilty of malpractice, and any bankruptcy judge who approved such a reaffirmation from a pro se litigant would be seriously derelict in his duties. For why would one ever choose reaffirmation on such terms and thus incur the risk of personal liability when one could safely achieve the same ends by ride-through? . . . Congress presumably would not have created an “exception” to provide access to an option all debtors had in the first place.<sup>238</sup>

Looking at the statutory construction, the court then concluded that “ride-through” was not an option for a debtor making no attempt to reaffirm her agreement with the creditor.<sup>239</sup>

The Ninth Circuit relied on Congressional intent to help make its decision. The question raised by Judge Graber in her dissent, however, is what part of the intent should be analyzed?<sup>240</sup> Is it the intent of Congress in making the bankruptcy law uniform, as the majority concludes? Is it the intent of Congress relating to resolution of the circuit split? Or is it the intent of bankruptcy law in general?

Judge Graber argued that Congress did not change the “if applicable” language of section 521(a)(2)(A) from the language of the old section 521(2), even though it must have known of the existing circuit split.<sup>241</sup> “The legislative history is *completely silent* on the issue [of ride-through], with nary a reference to the vigorous public debate by the courts and commentators. In my view, the changes to the text indicate an intent to *perpetuate* the extant circuit split, not *resolve* it.”<sup>242</sup>

### 3. Moving Toward Uniformity

Traditionally, bankruptcy law has relied upon the plain language rule of statutory construction in interpreting its provisions. This approach has led to mass confusion in interpreting what is considered “plain language,” causing a disservice to debtors and creditors doing their best to understand their rights. *Marrama* can be

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238. *In re Dumont*, 581 F.3d at 1114.

239. *Id.* at 1118.

240. *Id.* at 1119-22 (Graber, J., dissenting).

241. *Id.* at 1120-21.

242. *Id.* at 1120. The dissent also points out that more than one circuit had suggested language that Congress could have used to make its intentions regarding the availability of the “ride-through” option clear. *Id.*; see *In re Price*, 370 F.3d 362, 371 (3d Cir. 2004); *In re Belanger*, 962 F.2d 345, 348 (4th Cir. 1992).

used to support the importance of considering purpose. Supporters of such a reading would apply a commonsense approach.

For a not inconsiderable part of our history, the Supreme Court held that the "letter" (text) of a statute must yield to its "spirit" (purpose) when the two conflicted. Traditionally, the Court's "purposivism" rested on the following intuitions: In our constitutional system, federal courts act as faithful agents of Congress; accordingly, they must ascertain and enforce Congress's commands as accurately as possible . . . . Ordinarily, a statutory text will adequately reflect its intended purpose . . . . It is said that just as individuals sometimes inadvertently misstate their intended meaning, so too does Congress.<sup>243</sup>

In these cases, where commonsense dictates, courts must use all tools necessary and available to reach a fair reading of the statute. Following this reasoning, when confronted with such a "misstatement," it is up to the courts to try to apply the statute in question in the way in which Congress intended.<sup>244</sup>

On the other side of the debate are those who believe that the plain meaning of the statute should be honored. They argue that "the final wording of a statute may reflect an otherwise unrecorded legislative compromise" that the courts should not second-guess.<sup>245</sup> Only a statute's text, not its legislative history, is approved by both the House and the Senate.<sup>246</sup>

Clearly, analyzing this issue from a plain meaning or an intent standpoint is not enough. Looking at the words, intent, and the overarching purpose of the Code, to give a fresh start to the "honest but unfortunate debtor"<sup>247</sup> and balancing this with fairness to creditors, as well, is the only way to reach a result that is predictable and fair for all. If courts use this approach, debtors and creditors

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243. John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 71-72 (2006) (footnote omitted).

244. *Id.* at 72 ("[T]he Court long assumed that when the clear import of a statute's text deviated sharply from its purpose . . . a judicial faithful agent could properly adjust the enacted text to capture what Congress . . . intended . . .").

245. *Id.* at 74. "In place of traditional conceptions of 'actual' legislative intent, modern textualists urge judges to focus on what they consider the more realistic—and objective—measure of how a 'skilled, objectively-reasonable user of words' would have understood the statutory text in context." *Id.* at 75 (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 65 (1998)).

246. Waldron & Berman, *supra* note 200, at 204 ("[The] focus on purpose was critiqued as inconsistent with the process the Constitution provides for a bill to become law . . .").

247. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007).

would go into bankruptcy proceedings understanding their rights. They would not have to fear courts interpreting provisions in creative ways, leading to uncertainty and possible loss of valuable property.

There is also a fine line between allowing people to make their own decisions and being paternalistic. Debtors are entitled to make their own decisions and their own mistakes. If a debtor who decides to file for bankruptcy has been able, despite her other financial woes, to keep current on her automobile loan, then she should be allowed to keep her car in most cases. It is likely that the debtor has already been making sacrifices to do so; presumably she understands the consequences of her decision.

Yet at the same time, debtors whose bankruptcy schedules indicated that there is insufficient money in the budget to meet all of their necessary living expenses while continuing to make car payments may be unrealistic in attempting to hold on to an automobile.<sup>248</sup> But this is precisely the type of debtor who may still get the benefit of the “ride-through.” This seems like an absurd result. It is hard to believe that Congress intended those debtors who might have the hardest time continuing to make car payments to do so without fear of repossession. Since Congress did not provide a remedy for this situation, however, this is exactly the strange result with which we are left. Precisely that debtor who may be *least* able to afford her vehicle gets to keep it per a nonrecourse loan with an unwilling lender.

Secured creditors should be allowed to make their own determinations on how much risk they are willing to assume. Cars should not take on such mythic proportions to consumers that they are valued out of all relation with reality. Courts do take into account, when approving or disapproving reaffirmation agreements, how far the debtor works from home, whether there are children or an ill family member involved, and other variables.<sup>249</sup> These all factor into the equation when courts make their decisions to approve or deny reaffirmation agreements. Even when a court disagrees

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248. When a debtor's expenses exceed their income, a presumption of undue hardship arises, and courts are likely to review any attempted vehicle reaffirmations closely. See Lisa A. Napoli, *Reaffirmation After the Bankruptcy Abuse Prevention Consumer Protection Act of 2005: Many Questions, Some Answers*, 81 AM. BANKR. L.J. 259, 264-68 (2007).

249. See 11 U.S.C. § 524(c)(6)(A) (2006). The court must review reaffirmation agreements for unrepresented debtors to determine such agreements are “not imposing an undue hardship on the debtor or a dependent of the debtor.” *Id.* Further, the court must determine that such agreement is “in the best interest of the debtor.” *Id.*

with a debtor’s perceived ability to pay and the risk of being liable for the full debt under reaffirmation, it may still approve an agreement when all factors are considered. There is a very fine line between being too paternalistic and watching out for debtors who are not sophisticated in bankruptcy and financial management in general. Pro se debtors, whose agreements courts must always review, are the best example of this.

It is unclear what real effect denying a reaffirmation agreement will have, even in places where the “ride-through” is not an option. Secured lenders who are being paid may not feel motivated to repossess.<sup>250</sup> While debtors whose reaffirmations are denied may be riskier, this risk might be worth it to a creditor whose only other option is to get what it can after incurring the costs of repossession. It is a gamble that could well pay off if a debtor manages to at least pay more than what the vehicle would fetch at auction.

The downside is that debtors like Dumont, who may be struggling to make payments they can ill afford to begin with, may end up throwing that money away when they wake up months later to find their car unexpectedly gone. This leads to the debtors living with the same financial anxiety they had prior to filing, however, and is not very conducive to a “fresh start.” Maybe bankruptcy should cost consumers this price in exchange for forgiveness of their debts. This is nothing new for debtors living in non-“ride-through” states, after all. Perhaps Chapter 13 is a better option for those who are unwilling to live with such uncertainty while still retaining their cars.

There is no easy solution. Nevertheless, it seems that the “ride-through” is ended with the passage of BAPCPA. Looking at the relevant sections together, the intent seems clear. If debtors are allowed to keep their cars with the protection of the automatic stay when their reaffirmation is not in their best interest, more harm than good may result. Who knows where else the debtors are cutting corners, perhaps on healthcare or food, in order to keep what is, after all, just an object.

Most of all, commonsense tells us there must be some reason to go through the reaffirmation process—one that makes the debtor aware of the consequences of her actions. Why does section

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250. Repossession costs creditors about \$8000 per vehicle. *Behind on Car Payments? BBB Advice on How to Avoid the Repo Man*, BETTER BUSINESS BUREAU (Sept. 4, 2009), <http://centralflorida.bbb.org/WWWRoot/preview.centralflorida.bbb.org/article/behind-on-car-payments-bbb-advice-on-how-to-avoid-the-repo-man-12364>.

524(k) dictate all the precise language that must be included in such agreements if it does not matter?<sup>251</sup> It seems that, sparse legislative history or not, looking objectively at all these sections put together, the next move after reaffirmation is denied should be decided by the creditor. Just as giving up nonexempt assets is the price a Chapter 7 debtor must pay to be given her “fresh start,” this is another consequence of having her other debts wiped out.

#### CONCLUSION

It seems that courts interpreting BAPCPA will still face challenges, as there are so many ways to interpret what is supposedly “plain language.”<sup>252</sup> Courts relying solely on a “plain meaning” interpretation may circumvent even Congress’s known intentions by using their own words against them. As courts struggle to apply the Code, it is clear that relying on the “plain meaning” has not served bankruptcy law well, and has led to uncertainty on the part of debtors and creditors. By looking instead to the purpose behind the Bankruptcy Code, and using it to fairly interpret the provisions of the Act, courts may have an opportunity to provide more guidance for those impacted by bankruptcy law.

Keeping their vehicles is critical for some debtors to get the “fresh start” that bankruptcy promises. There is a potential resolution to the “ride-through” issue that has split the courts for so long; courts must interpret BAPCPA in a way consistent with its name. Such an interpretation would strike a balance between those who would provide debtors with the option of keeping their vehicles as long as they are and remain current on their payments, and those who think it is only fair that creditors should have more protection for such a potentially valuable piece of secured property. The

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251. 11 U.S.C. § 524(k) (giving detailed requirements for creditor disclosure in reaffirmation agreements).

252. See Napoli, *supra* note 248, at 261.

It will be interesting to see whether courts that have been instructed to strictly follow the plain language of the statute adhere to that rule in interpreting the new provisions, leaving it to Congress to fix any mistakes. Of course, some judges who profess to follow that method of statutory interpretation seem to do so only when it brings about the result they desire.

*Id.* (quoting 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, 192 (2005)). On the other hand, this author points out that a “redeeming fact [of the Act] is that the legislation will not be interpreted or implemented by those who wrote it, but rather by reasonable human beings.” *Id.*

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*A "RIDE-THROUGH" THE LOOKING GLASS*

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Ninth Circuit, although denying the debtor the ability to keep her car, got it right.

Allowing debtors the "ride-through" option only when a creditor refuses to reaffirm on the same terms forestalls creditors from taking advantage of consumer debtors. By forcing debtors to reaffirm and still be personally liable for this debt if they wish to retain their vehicle, debtors cannot take the easy way out and take advantage of creditors. Courts that look to the congressional purpose in revising the Bankruptcy Code, as well as to the purpose of bankruptcy law in general, will create a solution that is as close to optimal as possible under the circumstances. It may not be a perfect system, but it is as good as it gets on this side of the looking glass.

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\* J.D., Western New England University School of Law, 2011. Thank you to my family for your constant support.