

III.



“Ride-Through”

Prior to BAPCPA, chapter 7 debtors in many districts could omit making any selection and simply retain the collateral while continuing to make payments. This was known as the “fourth option,” or “ride-through.”⁴⁴ As long as the debtor stayed current with his or her payments, the automatic stay barred the creditor from taking action against the collateral. If the debtor later defaulted for nonpayment, the creditor could obtain relief from stay and repossess the collateral (or the debtor would surrender the collateral), but the debtor would not be liable for any deficiency because of the bankruptcy discharge. While not all circuits permitted ride-through, many circuits did, and ride-through was an important option for many debtors.

Courts generally agree that §§ 521(a)(6) and 362(h), enacted as part of BAPCPA, were intended to eliminate ride-through for personal property by compelling debtors to choose one of three options: surrender, redeem or reaffirm.⁴⁵ As already noted, the stay terminates without further action if the debtor fails to timely select and perform one of those three options. But do these provisions completely eliminate ride-through? Not necessarily.

1. Ride-through still exists where the debtor agrees to reaffirm a debt according to its original terms, but the creditor nevertheless refuses to agree to reaffirm.⁴⁶
2. Ride-through still exists where the debtor in good faith submits a signed reaffirmation agreement,

44 See, e.g., *In re Price*, 370 F.3d 362, 364 (3d Cir. 2004).

45 See, e.g., *In re Dumont*, 581 F.3d 1104, 1117 (9th Cir. 2009) (“[S]ection 521(a)(2)(C), in conjunction with section 362(h), disallows ride-through.”).

46 11 U.S.C. § 362(h)(1)(B).

but the court refuses to approve the agreement. In such instances, the stay termination provisions of §§ 362(h), 521(a)(6) and 521(d) do not apply.⁴⁷

3. Ride-through still exists where the debtor resides in a state in which *ipso facto* clauses are not enforceable.⁴⁸ In this circumstance, the debtor may decline to select any of the three statutory options and simply acknowledge on the Statement of Intention that he or she will retain the collateral and pay in accordance with the agreement. Although the bankruptcy stay will be terminated per § 362(h) or 521(a)(6), the creditor must still enforce its remedies under the law of the state where the debtor resides.⁴⁹ If the applicable state law prohibits a creditor from repossessing the collateral solely on the grounds that the debtor has filed for bankruptcy, then the termination of the automatic stay in bankruptcy has no practical consequence. The debtor may retain the collateral as long as he or she makes the payments, and at the same time obtain the benefit of the bankruptcy discharge for the underlying debt. Of course, the creditor still has recourse in state law remedies, such as repossession, in the event of default for nonpayment.
4. Similar to the effect in states that prohibit *ipso facto* clauses, if the financing agreement has no

47 *In re Chim*, 381 B.R. 191 (Bankr. D. Md. 2008); *Coastal Federal Credit Union v. Hardiman*, 398 B.R. 161, 189 (E.D.N.C. 2008); *In re McKnight*, 363 B.R. 225 (Bankr. D. Utah 2007); *In re Mowry*, 2010 WL 256583 (Bankr. D. Wyo. Jan. 21, 2010).

48 An overview of state *ipso facto* laws is set forth in Appendix F.

49 See, e.g., *In re Riggs*, No. 06-60346, 2006 LEXIS 2732 at *13 (Bankr. W.D. Mo. Oct. 12, 2006) (under 15 Mo. Stat. Ann. § 40.552, lender may repossess motor vehicle only if borrower fails to make payment, or lender shows prospect of payment on collateral significantly impaired).

ipso facto clause, and the debtor is otherwise current on payments and in compliance with all other requirements of the agreement, then the termination of the bankruptcy stay likewise has no practical effect. In this case, the debtor may opt to retain the collateral and make payments without selecting any of the three standard options.

5. Depending on the circumstances of the individual case, many creditors may prefer to continue accepting payments from a debtor rather than attempt to repossess the collateral if the debtor does not reaffirm. Typically, a lender recovers only about 40 to 60 percent of the loan balance when a vehicle is repossessed.⁵⁰ Ford and GM both report an average loss of more than \$10,000 per repossessed new vehicle. For used vehicles, the average loss per repossession is more than \$8,400.⁵¹ Nevertheless, consumer bankruptcy attorneys from around the country have reported that certain auto lenders, as well as some credit unions, will resolutely—to the extent state law allows—repossess vehicles if the debtor attempts to retain the collateral without reaffirming the debt, even if payments are current. Therefore, as a practical matter, whether ride-through still exists due to creditor forbearance may very well depend on the creditor.

It should be noted that ride-through continues to exist with respect to real property in those jurisdictions

50 “The Grim Repo: Record Defaults Expected in '08,” *Motortrend* Forum, forums.motortrend.com/70/7075567/the-general-forum/the-grim-repo-record-defaults-expected-in-08/index.html. Accessed on Oct. 18, 2008.

51 *Id.*

where that right existed prior to BAPCPA. Neither § 362(h) nor 521(a)(6) apply to real property. As the court in *In re Caraballo*, Case No. 07-32469, *6 (Bankr. D. Conn. April 29, 2008), opined, “when Congress eliminated the ride-through option for personal property in the BAPCPA, Congress was aware that there was a ride-through option for real property and intended to leave it intact post-BAPCPA.”⁵²

52 See also *In re Wilson*, 372 B.R. 816, 820 (Bankr. D. S.C. 2007) (“court finds that...controlling precedent in the Fourth Circuit...provides for a ‘ride through’ option for real property that was unaffected by the BAPCPA amendments.”); *In re Bennett*, No. 06-80241, 2006 WL 1540842, at *1 (Bankr. M.D.N.C. May 26, 2006) (“Debtors continue to have the right...to retain real property without being required to reaffirm or redeem, so long as payments to the creditor are current.”).