RASH AND RIDE-THROUGH REDUX: THE TERMS FOR HOLDING ON TO CARS, HOMES AND OTHER COLLATERAL UNDER THE 2005 ACT

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INTRODUCTION

This article is a case study of what can go wrong when an interest group uses its muscle to pass a complex piece of legislation without a careful, expert drafting process.[1] Although the credit industry apparently paid for the initial drafting of the bankruptcy package finally passed in 2005,[2] the actual language of the statute leaves more than a few crumbs on the table for debtors. The focus here is on just one area where this is true, treatment of collateral in individuals' bankruptcies in chapters 7 and 13.

Absent corrective legislation, the courts and bankruptcy lawyers will struggle with the many ambiguities and nonsensical twists of the 2005 Act[3] for years to

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[1] Once members of Congress have voted for legislation, they tend to stand behind their votes and avoid admitting that the legislation has flaws. *See* Hon. Keith N. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, AM. BANKR. INST. J., Sept. 2005, at 70 (noting "[t]he list of drafting errors and incomprehensible provisions grows every day as bankruptcy professionals digest BAPCPA. Especially the consumer parts, this legislation was not written or vetted by the practitioners and scholars usually involved in bankruptcy legislative efforts."); Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 193 n.6, 200–02 (1999) (suggesting legislation was reputedly written by one law firm retained by the credit industry, Morrison & Foerster of San Francisco, and noting that experts' efforts to fix its many flaws were thereafter largely resisted by credit industry); *see also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 493–518 (2005) (describing speedy and limited congressional consideration of various bills introduced in 1997-1998, before members of Congress voted).

[2] *See* Warren, *supra* note 1, at 193 n.6; *see also* Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509, 517–18 (2003) (suggesting credit industry lobbyists turned to Congress after failing to induce National Bankruptcy Review Commission to produce report aligned with their interests); Philip Shenon, *Hard Lobbying on Debtor Bill Pays Dividend*, N.Y. TIMES, Mar. 13, 2001, at A1 ("A lobbying campaign led by credit card companies and banks that gave millions of dollars in political donations to members of Congress and contributed generously to President Bush's 2000 campaign is close to its long-sought goal of overhauling the nation's bankruptcy system.")

[3] The act carries a misleading name, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 19 Stat. 23 (2005) [herinafter BAPCPA] (to be codified at 11 U.S.C.). Because it is so complex and badly drafted and makes so many dubious policy choices, experts have taken to calling it by the fanciful acronym BARF (BAnkruptcy ReForm Act). In this article it will be referred to neutrally as "the 2005 Act." *See also In re* Kaplan, 2005 WL 2508151, at *1 (Bankr. S.D. Fla. Oct. 6, 2005) ("Implementing the changes [of the 2005 Act] will present a daunting challenge to judges, clerk's offices, attorneys and the parties who seek relief . . . ."). *See generally* Lundin, *supra* note 1, at 70 (listing ten most egregious errors of BAPCPA); 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 (2005) (discussing some of the major issues that will confront consumer debtors' lawyers).

come. In litigation, it will probably not be a winning argument that Congress would have passed legislation effectively saying "the creditor wins" in answer to any possible question and therefore a creditor should win despite what the statute actually says. One problem is that "the creditor wins" rule does not work where different creditors have conflicting interests; an example is whether to inflate undersecured creditors' secured claims, to the detriment of purely unsecured creditors. Another problem with assuming congressional intention to favor creditors over debtors is that the credit industry resisted cleaning up the legislation. Its representatives knew that opening up the drafting to close examination might have led to rethinking of many issues, large and small. Given this legislative history, the most appropriate approach to statutory interpretation could be a legislative corollary of a principle of contract interpretation, construction against the drafter. In instances where creditors' hired hands failed to draft statutory language under which creditors win, courts should not help them after the fact.

Reviewing courts are likely to delight in taking a "plain meaning" approach to this legislation when the result goes against creditor interests. Indeed, one of the first bankruptcy court decisions under the new law noted that there had been congressional testimony to the effect that the act "was so perfect that not a word need be changed."[4] The court then applied "the unambiguous statute as written" so as to protect a debtor against creditors, even though "it makes little sense . . . ."[5]

Holding on to collateral is a major objective of many individuals in bankruptcy.[6] The supposed central purpose of the 2005 Act is to prevent debtors who could afford to repay their debts from getting a quick fresh start and instead

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[4] *See In re* McNabb, 326 B.R. 785, 791 (Bankr. D. Ariz. 2005) (holding that new section 522(p)(1) setting a homestead cap in certain instances involving "electing" exemptions under state law, did not apply to use of state exemptions in a state that opted out of federal exemptions, so that no election was possible and only state exemptions could be used, and also noting that "it makes little sense" to have this cap only apply to the few states that have not opted out of federal exemptions, as permitted by 11 U.S.C. § 522(b)(2)); *see also* Lundin, *supra* note 1, at 71 (arguing "plain meaning" rather than claims about what was intended should be the starting point when applying the statute). *But see In re* Kaplan, No. 05-14491-BKC-RAM, 2005 WL 2508151, at *4–5 (Bankr. S.D. Fla. Oct. 6, 2005) (disagreeing with *In re* McNabb, because court believed legislative history of 2005 Act showed Congress intended homestead exemption cap to apply to all states, not just non opt-out states).

[5] *See In re McNabb*, 326 B.R. at 791; *In re Kaplan*, 2005 WL 2508151 at *3 (agreeing homestead exemption provisions make little sense, however refusing to apply plain-meaning approach)

[6] *See* Jean Braucher, *An Empirical Study of Debtor Education in Bankruptcy: Impact on Chapter 13 Completion Not Shown*, 9 AM. BANK. INST. L. REV. 557, 565 (2001) (noting that chapter 13 plans often fail in part because debtors are unwilling to give up homes and cars they cannot afford); Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 522, 526–530 (1993) [hereinafter Braucher, *Lawyers and Consumer Bankruptcy*] (reporting that keeping homes, cars, and household goods was typically a high priority for debtors and describing numerous strategies used to accomplish this goal); *see also* Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 430 (1999) (finding that chapter 13 plans typically pay little to unsecured creditors, so that secured debt repayment is main accomplishment of most chapter 13 cases).

push them into repayment plans in chapter 13.[7] But the legislation does not take into account how the goal of keeping cars and homes will cut against more use of the reconfigured chapter 13. Furthermore, under the old law, most debtors who filed in chapter 13 were in just as bad financial shape as debtors in chapter 7; they chose chapter 13 primarily to hold on to collateral and because they were seeking a way to repay what they could.[8] Another way to put this is that most chapter 13 filers under the old law were well below median income and could easily pass the new law's means test.[9] To the extent that chapter 13 now requires higher repayment to retain cars and other personal property collateral,[10] fewer debtors will be able to afford to make repayment for collateral plus also repay some of their unsecured debt. This is a major reason why a higher percentage of filers are likely to choose chapter 7 under the new law. Of course, if the real purpose of the legislation was to use new paperwork and other hurdles for debtors and their lawyers to reduce filing in general, even by the worst off, it may be easier to count it a success, particularly in the short run.[11]

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[7] *See* BAPCPA § 102 (to be codified at 11 U.S.C. § 707(b)) (creating means test for use of chapter 7); *see also* H.R. REP. NO. 109-31, pt. 1, at 2 (2005) (stating "[t]he heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford.").

[8] *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS 77, 239–40 (1989) (noting similar debt/income ratios of debtors in chapter 7 and chapter 13 and that debtors were sorted randomly between two chapters rather than according to ability to pay).

[9] Prior to its enactment, most analysis of probable effects of legislation focused on percentage of chapter 7 debtors who would be forced into chapter 13 rather than on chapter 13 debtors who would instead opt for chapter 7. *See* Marianne B. Culhane and Michaela M. White, *Taking the New Consumer Bankruptcy Model For A Test Driving: Means Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 33 (1999) [hereinafter Culhane & White, *Means Testing*] (finding more than 95 percent of chapter 7 debtors would pass means test under one version of proposed legislation). However, with most debtors failing to complete chapter 13 plans even under the old law, it is predictable that with higher repayment requirements for some collateral in chapter 13, many debtors who would have filed in chapter 13 before will now file in chapter 7. *See* Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407, 417–18 (2001) (noting problem of "can't pay" debtors who file for chapter 13, try to pay, and fail to do so); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 410–11 (1994) (showing variance in chapter 13 practice, including in percentage of cases filed in chapter 7 as opposed to chapter 13 and in percentage repayment proposed in chapter 13, as evidence of differences in local legal culture, with some districts adopting practices that encouraged debtors' lawyers to steer clients into chapter 13, resulting in high chapter 13 failure rates).

[10] *See infra* Section IC (discussing valuation of cars and other personal property for cramdown in chapter 13).

[11] *See* Lundin, *supra* note 1, at 69:

> [The 2005 Act] reduces access to bankruptcy relief by making bankruptcy more costly, more complicated and less efficient. Add up all of the new documents, new certificates, the new deadlines, the new hearings, the new obstacles to chapter 7 entry and to chapter 13 confirmation—[the act] requires a lot more work for debtors' attorneys . . . . Debtors will pay for that work, and some debtors will simply be priced out of bankruptcy.

When the dust settles in a few years, perhaps we will be ready for simplification that puts all debtors into one chapter, requires repayment from those who can afford it,[12] and answers straightforwardly questions about what collateral debtors can keep and on what terms. Until then, courts called upon to interpret the 2005 Act will have their work cut out for them, with no enlightening formal legislative history to aid in the task.[13]

Id.; *see also* BAPCPA §§ 227, 228 (to be codified at 11 U.S.C. §§ 526, 527, 528) (imposing disclosure and substantive requirements on "debt relief agencies").

[12] Other countries, such as Canada and Australia, provide for a conditional discharge that requires some repayment for debtors with means. *See* Rosalind Mason, *Consumer Bankruptcies: An Australian Perspective*, 37 OSGOODE HALL L.J. 450, 466 (1999) (discussing 12-month "contribution assessment" period added to Australian law in 1991, requiring debtors with income above threshold amount to pay half the excess to the trustee for that period); Jacob S. Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison*, 37 OSGOODE HALL L.J. 205, 213 (1999) (noting 1997 amendments to Canadian bankruptcy law requiring a surplus income payment prior to discharge).

[13] There is no Senate committee report, and the House Judiciary Committee report contains only a paraphrase of the provisions addressing ride-through and valuation, BAPCPA §§ 304, 306 (to be codified at 11 U.S.C. §§ 362, 506, 521, 722 and 1325):

> *Sec. 304. Debtor Retention of Personal Property Security.* Section 304(1) of the Act amends section 521(a) of the Bankruptcy Code to provide that an individual who is a chapter 7 debtor may not retain possession of personal property securing, in whole or in part, a purchase money security interest unless the debtor, within 45 days after the first meeting of creditors, enters into a reaffirmation agreement with the creditor, or redeems the property. If the debtor fails to so act within the prescribed period, the property is not subject to the automatic stay and is no longer property of the estate. An exception applies if the court: (1) determines on motion of the trustee filed before the expiration of the 45-day period that the property has consequential value or would benefit the bankruptcy estate; (2) orders adequate protection of the creditor's interest; and (3) directs the debtor to deliver any collateral in the debtor's possession. Section 304(2) amends section 722 to clarify that a chapter 7 debtor must pay the redemption value in full at the time of redemption.
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> *Sec. 305. Relief from the Automatic Stay When the Debtor Does Not Complete Intended Surrender of Consumer Debt Collateral.* Paragraph (1) of section 305 of the Act amends Bankruptcy Code section 362 to terminate the automatic stay with respect to personal property of the estate or of the debtor in a chapter 7, 11, or 13 case (where the debtor is an individual) that secures a claim (in whole or in part) or is subject to an unexpired lease if the debtor fails to: (1) file timely a statement of intention as required by section 521(a)(2) of the Bankruptcy Code with respect to such property; or (2) indicate in such statement whether the property will be surrendered or retained, and if retained, whether the debtor will redeem the property or reaffirm the debt, or assume an unexpired lease, if the trustee does not. Likewise, the automatic stay is terminated if the debtor fails to take the action specified in the statement of intention in a timely manner, unless the statement specifies reaffirmation and the creditor refuses to enter into the reaffirmation agreement on the original contract terms. In addition to terminating the automatic stay, this provision renders such property to be no longer property of the estate. An exception pertains where the court determines, on the motion of the trustee made prior to the expiration of the applicable time period under section 521(a)(2), and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders adequate protection of the creditor's interest, and directs the debtor to deliver any collateral in the debtor's possession.

This article investigates what the 2005 Act actually says on two major sets of issues concerning collateral in individuals' cases in chapters 7 and 13. Section I discusses issues concerning valuation of personal property collateral for purposes of cramdown in chapter 13 or redemption in chapter 7.[14] In *Associates Commercial Corp. v. Rash*,[15] the U.S. Supreme Court failed to give clear guidance on collateral valuation in chapter 13. The 2005 Act has now made a further hash of this and other valuation questions. Section II discusses a set of issues concerning whether debtors can opt for "ride-through" of secured debts for cars and homes in chapter 7, a topic that is, if anything, more muddled than valuation.[16] Probably because major legislation has been pending since 1997, the U.S. Supreme Court never agreed to take a ride-through case, leaving in place a 5-4 split in the circuits on the issue of court-protected ride-through. Five circuits protect ride-through of secured debts in chapter 7, and four do not.[17] Ride-through with court protection is one of two forms

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> Section 305(2) amends section 521 of the Bankruptcy Code to make the requirement to file a statement of intention applicable to all secured debts, not just secured consumer debts. In addition, it requires the debtor to effectuate his or her stated intention within 30 days from the first date set for the meeting of creditors. If the debtor fails to timely undertake certain specified actions with respect to property that a lessor or bailor owns and has leased, rented or bailed to the debtor or in which a creditor has a security interest (not otherwise avoidable under section 522(f), 544, 545, 547, 548 or 549 of the Bankruptcy Code), then nothing in the Bankruptcy Code shall prevent or limit the operation of a provision in a lease or agreement that places the debtor in default by reason of the debtor's bankruptcy or insolvency.
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> *Sec. 306. Giving Secured Creditors Fair Treatment in Chapter 13.* Subsection (a) of section 306 of the Act amends Bankruptcy Code section 1325(a)(5)(B)(i) to require—as a condition of confirmation—that a chapter 13 plan provide that a secured creditor retain its lien until the earlier of when the underlying debt is paid or the debtor receives a discharge. If the case is dismissed or converted prior to completion of the plan, the secured creditor is entitled to retain its lien to the extent recognized under applicable nonbankruptcy law.
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> Section 306(b) adds a new paragraph to section 1325(a) of the Bankruptcy Code specifying that Bankruptcy Code section 506 does not apply to a debt incurred within the two and one-half year period preceding the filing of the bankruptcy case if the debt is secured by a purchase money security interest in a motor vehicle acquired for the personal use of the debtor within 910 days preceding the filing of the petition. Where the collateral consists of any other type of property having value, section 306(b) provides that section 506 of the Bankruptcy Code does not apply if the debt was incurred during the one-year period preceding the filing of the bankruptcy case.

H.R. REP. NO. 109-31, pt. 1, at 70–72 (2005)

[14] *See* BAPCPA § 306 (to be codified at 11 U.S.C. § 1325(a)(5)) (provision for secured debt repayment, including cramdown in some instances, meaning payment of collateral value rather than full debt amount); BAPCPA § 304 (to be codified at 11 U.S.C. § 722) (redemption provision).

[15] 520 U.S. 953 (1997).

[16] *See* BAPCPA §§ 106, 304, 315, 316, 446(A) (to be codified at 11 U.S.C. § 521(a)(2)) (requiring statement of intention by individual debtor concerning collateral).

[17] *See In re* Price, 370 F.3d 362, 379 (3d Cir. 2004); McClellan Federal Credit Union v. Parker (*In re* Parker), 139 F.3d 668, 673 (9th Cir. 1998); Capital Comm. Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 51 (2d Cir. 1997); Home Owners Funding Corp. of America v. Belanger (*In re* Belanger), 962 F.2d 345, 347 (4th Cir. 1992) (deciding section 521(2) does not limit debtor's options); Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1547 (10th Cir. 1989). These five circuits all took the position that section

of secured debt ride-through. Under this approach, 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.[18] Never clearly sorted out in this court-protected ride-through analysis was the question of what rights creditors have in rem against the collateral after bankruptcy, although bankruptcy courts have sometimes enjoined repossession so long as debtors "remain current on the payments, provide adequate insurance and are not otherwise in default of their contractual obligations,"[19] suggesting that court protection could extend beyond discharge and the closing of the case.[20] Even if bankruptcy court protection lapses upon closing of the bankruptcy case, state law might provide relief, for example on a lender liability theory or based on the equitable nature of foreclosure.[21] Also, in many cases, temporary protection is enough to make the creditor acquiesce in accepting full debt payment rather than seeking to repossess or foreclose.

This brings us to the other form of ride-through, by creditor acquiescence, in which the creditor simply accepts continued payment of secured debts and does not pursue the collateral even though it could. In the 2005 Act, Congress appears to have clarified that there is in general no court-protected ride-through for cars and other personal property.[22] At the same time, however, it seems to have blessed ride-through by creditor acquiescence. Ride-through by creditor acquiescence has been common in circuits that did not interpret the pre-2005 Bankruptcy Code to provide

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521(2) of the old law was procedural, requiring notice, but not substantive, and thus the debtor could ride-through on secured debts with court protection if the debtor remained current on repayment and other obligations, such as insuring the collateral. Four circuits took the substantive approach and rejected the idea of court protection for the ride-through option, finding that debtors' options were limited to reaffirmation, redemption or surrender of the collateral. *See* Bank of Boston v. Burr (*In re* Burr), 160 F. 3d 843, 849 (1st Cir. 1998); Johnson v. Sun Fin. Co. (*In re* Johnson), 89 F.3d 249, 252 (5th Cir. 1996); Taylor v. Age Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1516 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990).

[18] *See* 11 U.S.C. § 524(a)(2) (2000).

[19] *See Lowry Fed. Credit Union*, 882 F.2d at 1545 (finding that since debtors were not in default of their obligations, they are not required to reaffirm the debt or redeem the collateral).

[20] *See* BAPCPA § 302 (to be codified at 11 U.S.C. § 362(c)); 11 U.S.C. § 362(c)(1) (2000) (both continuing automatic stay until property is no longer property of the estate).

[21] *See, e.g.*, K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 761 (B.A.P. 6th Cir. 1985) (setting reasonableness standard for declaring default); Brown v. Avemco Inv. Corp., 603 F.2d 1367, 1379 (9th Cir. 1979) (demanding jury consider reasonableness of creditor's acceleration of debt upon default by debtor); *see also* PETER F. COOGAN ET AL., 1B SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 8–35 (2003) (stating statutory argument under UCC for good faith limitations even on use of specific default provisions is "persuasive"); CAROLYN L. CARTER ET AL.., REPOSSESSIONS AND FORECLOSURES 553–555 (2002) (discussing equitable nature of foreclosure actions and defenses to foreclosure based on equitable considerations such as good faith and sufficiency of collateral to satisfy the debt).

[22] *See* BAPCPA § 304 (to be codified at 11 U.S.C. § 521(a)(6)); BAPCPA § 305 (to be codified at § 362(h)(1)(B)) (generally providing for termination of the stay if debtor retains possession of personal property collateral without redeeming or reaffirming and leaving creditor to pursue non-bankruptcy remedies); *see also* discussion *infra* section IIA and B.

court protection for ride-through.[23] It is now likely to be used in all circuits by debtors seeking to retain cars and other personal property in and after chapter 7. Changes in reaffirmation law are beyond the scope of this article, but it should be noted that the increased costs of compliance with the new disclosure requirements for an enforceable reaffirmation agreement[24] are likely to increase the willingness of creditors to acquiesce in ride-through. Furthermore, to the extent that chapter 13 becomes a less hospitable environment in general, and for retaining personal property collateral in particular, chapter 7 ride-through will be the key debtor strategy to hold on to cars. For homes, Congress has failed to resolve the split in the circuits concerning court-protected ride-through, arguably endorsing the majority approach favoring ride-though.

I. VALUATION OF CARS AND OTHER PERSONAL PROPERTY

Under the 2005 Act, there will be less cramdown and less redemption of cars and other personal property, but the law of valuation has been made considerably more complex and ambiguous. Furthermore, to the extent that retention of personal property collateral by cramdown in chapter 13 or redemption in chapter 7 becomes more expensive and thus infeasible for more debtors, they will be more likely to opt to try for ride-through by creditor acquiescence in chapter 7 as discussed in section II.

For homes, there has been no change in the law concerning cramdown or redemption. Now as before the 2005 changes, chapter 13 does not allow debtors to cramdown debts that are exclusively secured by the debtor's principal residence and where the loan term extends beyond the end of the plan, and redemption under section 722 continues to be limited to personal property collateral. [25]

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[23] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 6, at 528 (noting creditors in Ohio would often accept payments even though they could have repossessed collateral, achieving what debtors in Texas accomplished with court protection); Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 AM. BANKR. INST. L. REV. 165, 184 (1997) (explaining ways that debtors can keep possession of collateral in chapter 7 case); Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 740–41 (1999) [hereinafter Culhane & White, *Reaffirmation*] (finding many debtors in Nebraska remained in possession of their cars after bankruptcy even without reaffirming or redeeming).

[24] *See* BAPCPA § 203 (to be codified at 11 U.S.C. § 524(c)(2), (k)) (adding new disclosure requirements creditors must comply with before debtor signs reaffirmation); H.R. REP. NO. 109-31, pt. 1, at 57–58 (2005) (explaining changes in disclosure requirements in connection with reaffirmation agreements); David B. Wheeler & Douglas E. Wedge, *A Fully-Informed Decision: Reaffirmation, Disclosure, and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 789, 790–91 (2005) (highlighting changes in section 524(c)(2), (k) that require creditors to make more stringent disclosure requirements).

[25] *See* BAPCPA § 224 (to be codified at 11 U.S.C. § 1322(b)(2), (c)(2)); BAPCPA § 304 (to be codified at 11 U.S.C. § 722); 11 U.S.C. § 722 (2000); *see also* HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE 227–29 (2004) (discussing availability of cramdown on home loans where the last payment is due before the end of the chapter 13 plan or where there is other collateral); 8 COLLIER ON BANKRUPTCY ¶ 1322.06[1](a) (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005) [hereinafter COLLIER].

A. Changes in Section 506(a)

In 1997, the U.S. Supreme Court decided *Rash*, which raised a question of interpretation of section 506(a) as applied to section 1325(a)(5) (valuation of collateral for chapter 13 cramdown purposes).[26] The Court held that a "replacement value standard" was the correct way to value personal property collateral retained by a chapter 13 debtor.[27] The debtor was using the collateral, a truck, for the business purpose of freight hauling, and it was unclear whether this was a key element of the holding.[28] While adopting a replacement value standard, the Court left to the bankruptcy courts the question how to measure replacement value.[29] The Court noted that if retail value were used as the starting point, it would be appropriate to deduct "the value of items the debtor does not receive when he retains" collateral, "items such as warranties, inventory storage and reconditioning."[30]

Even though the Supreme Court in *Rash* specifically rejected the midpoint of retail and wholesale value as the correct way to value collateral,[31] most bankruptcy courts responded to the case by continuing to use this method as the presumptive way to value motor vehicles, absent evidence of different value.[32] The midpoint approach has the distinct advantage of being a simple and cheap way to value vehicles, because one need only average wholesale and retail book values.

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[26] *See* Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 955 (1997) (holding that correct way to value personal property in chapter 13 is by using a "replacement value standard").

[27] *See id*. at 956; *see also* 11 U.S.C. § 506(a) (2000) (addressing determination of value of secured claim); *see generally* 4 COLLIER, *supra* note 25, ¶ 506.03 (discussing valuation).

[28] *See Rash*, 520 U.S. at 963 (noting that truck was used to generate income stream); *see also* Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After* Rash, 102 DICK. L. REV. 763, 770 (1997) [hereinafter Braucher, *Wholesale*] (suggesting that use of vehicle in business should not affect valuation for chapter 13 cramdown purposes).

[29] *See Rash*, 520 U.S. at 965 n.6 (leaving discretion to bankruptcy courts, as triers of fact, to determine replacement value); *see, e.g.*, First Merit N.A./Citizens Nat. Bank v. Getz (*In re* Getz), 242 B.R. 916, 919 (6th Cir. 2000) (using *Rash* analysis as starting point for valuation determination); Lucian Arye Bebchuk and Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARV. L. REV. 2386, 2397 n.41 (2001) (noting that *Rash* did not provide clear guidance for determination of replacement value).

[30] *Rash*, 520 U.S. at 965 n.6 (stating adjustments typically needed when retail value is used as starting point for determining replacement value, specifically deducting items the debtor does not receive when the debtor retains a vehicle, such as warranties, inventory storage and reconditioning); *see* Braucher, *Wholesale*, *supra* note 28, at 773–74 (reasoning that wholesale is the amount left once everything is deducted that the debtor does not receive when the debtor retains her own un-reconditioned car); *id*. at 776–81 (discussing case law after *Rash*).

[31] *See Rash*, 520 U.S. at 964 (declining to adopt midpoint valuation); *see* Kenneth L. Reich, *Continuing the Litigation of Collateral Valuation in Bankruptcy*: Associates Commercial Corp. v. Rash, 26 PEPPERDINE L. REV. 655, 668 (1999) (discussing the court's rejection of midpoint valuation).

[32] *See* Lee Dembart & Bruce A. Markell, *Alive at 25? A Short Review of the Supreme Court's Bankruptcy Jurisprudence, 1979-2004*, 78 AM. BANKR. L.J. 373, 384 (2004) (maintaining most courts still apply midpoint valuation); Braucher, *Wholesale*, *supra* note 28, at 776–81 (discussing various methods of valuation used in bankruptcy cases decided in wake of *Rash*).

Congress has amended section 506(a), to make old subsection (a) into (a)(1) and to add a new paragraph 506(a)(2), so that section 506(a) now provides:

> (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff[33] is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.
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> (2) If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.[34]

In individual cases in chapter 7 or 13, the first sentence of new paragraph 506(a)(2) applies to business property, while the second sentence applies to property acquired for consumer purposes (personal, family or household purposes). Thus, a distinction is made between the *Rash*-type case, involving a truck used in business, and household collateral, such as a family truck or car.

For business collateral owned by an individual, the first sentence of new paragraph 506(a)(2) overrides *Rash*'s direction to deduct costs of sale and marketing.[35] However, particularly by comparison to the second sentence, the first sentence seems to preserve the idea that full retail value is not the right measure. By implication, it calls for deduction of the retailer's profit, which is not a cost of sale or marketing. Furthermore, it seems to be implicit in the first sentence that the

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[33] The only change in this paragraph, previously section 506(a) instead of section 506(a)(1), is that "setoff" has been edited to be one word rather than two. BAPCPA § 327 (to be codified at 11 U.S.C. § 506(a)(1)).

[34] BAPCPA § 327 (to be codified at 11 U.S.C. § 506(a)(1)–(2)).

[35] *See Rash*, 520 U.S. at 965 n.6.

replacement value of "such property" means the value given its age and condition, as is made explicit for consumer collateral in the second sentence.

Nothing is said in paragraph 506(a)(2) about collateral acquired by individuals for mixed business and consumer purposes. As will be discussed below,[36] valuation of mixed purpose collateral is addressed differently in section 722 on redemption and section 1325(a) on cramdown, with the latter provision creating a good deal of ambiguity. The courts will have to struggle with the issue of whether to use the lower value for business collateral or the higher value for consumer collateral.

For consumer collateral, the direction is to use retail value, taking into account the age and condition of the property. This means not deducting the retailer's profit or costs from retail price. However, retail book values for vehicles will routinely be too high. In the case of the National Automobile Dealers Association Guide, the retail values given are for a dealer-reconditioned vehicle,[37] so some deduction from retail book needs to be made to account for the fact that the debtor is retaining an un-reconditioned vehicle. In the case of the Kelley Blue Book, listed retail values are asking prices, not the amounts actually charged in sales and for a "fully reconditioned" vehicle.[38] Deductions from retail book values need to be made to get to the statutory test, which is not the asking price for a reconditioned vehicle, but rather the amount of a retailer's actual charge attributable to a sale of the vehicle in an un-reconditioned state.

Given that retail book values for vehicles include retailers' profits and are inflated in the ways mentioned above (including reconditioning and using asking prices), for business collateral, bankruptcy courts could continue to use midpoint of retail and wholesale book value as a practical presumed value.[39] For vehicles that are consumer collateral, bankruptcy courts could presume a percentage discount from retail book value, for example of 10 percent, to reflect the value of reconditioning and the difference between asking prices and actual sale prices. It is important to have simple, cheap ways to resolve valuation issues in individual cases, where the costs of proof can exceed the amount in controversy between use of one or another approach to valuation.[40]

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[36] *See infra* text after note 43; *see also infra* note 54 and accompanying text.

[37] *See* N.A.D.A. Official Used Car Guide, published monthly in regional editions by a subsidiary of the National Automobile Dealers' Association, an industry trade association, *available at* http://www.nadaguides.com; *see also* Braucher, *Wholesale*, *supra* note 28, at 766 n.17, 777–83 (discussing differences between retail book values and the *Rash* replacement value standard).

[38] *See* 79 KELLEY BLUE BOOK USED CAR GUIDE 4 (Sept.-Oct. 2005) (stating Kelley Blue Book's suggested retail values represent "dealers' asking price" and this value "assumes that the vehicle has been fully reconditioned . . . .").

[39] *See* Braucher, *Wholesale*, *supra* note 28, at 777–78 (discussing post-*Rash* bankruptcy cases using midpoint of retail and wholesale book values); *see also In re* Franklin, 213 B.R. 781, 783 (Bankr. N.D. Fla. 1997) ("[T]he Supreme Court has allowed bankruptcy courts to move the appropriate measure of replacement value back to some point between wholesale and retail values.")

[40] *See In re* Hoskins, 102 F.3d 311, 314–17 (7th Cir. 1996) (holding midpoint standard is simple rule which reduces costs of litigation); Braucher, *Wholesale*, *supra* note 28, at 777–78 (discussing method of using midpoint of retail and wholesale book values).

For collateral other than vehicles, new paragraph 506(a)(2) provides no easy solution to valuation because there is typically no book value to use as a starting point. To provide proof of the appropriate value, one might have to find a retailer of used property of that type and consider whether the condition of the particular collateral calls for a deduction. However, retailers do not sell many sorts of used consumer goods, yet paragraph 506(a)(2) calls for use of the price of a "retail merchant" for property of that age and condition. Yard sales and many flea markets involve consumer-to-consumer sales, not sales by retail merchants. Old section 506(a) could flexibly make use of any available proof, but new paragraph 506(a)(2) inflexibly seems to call for a non-existent retail merchant's price. Arguably, the test in such cases produces a value of zero, or perhaps a nominal amount. With some retailers taking security interests on credit card receipts,[41] there are more and more nominal security interests for used consumer items, such as used clothes (socks and underwear, for example), small appliances (such as waffle irons and toasters), towels, and toys. If no retail merchant sells these items used, the value of them at retail could fairly be said to be zero.

B. Value for Purposes of Redemption in Chapter 7

The changes in section 506(a) described above also apply to redemption in chapter 7 under section 722. Section 722 provides for redemption by an individual of "tangible personal property intended primarily for personal, family, or household use . . . ."[42] The 2005 Act also codifies the case law to the effect that redemption must be in a lump sum and cannot be by installment payments.[43]

Because section 722 only authorizes redemption for personal property that is "primarily" consumer collateral, the operative valuation language under the 2005 legislation seems to be in the second sentence of section 506(a)(2). This is not crystal clear, however, because section 506(a)(2) sets one value for business collateral and another for consumer collateral and does not say what to do about mixed business and consumer collateral. If the collateral is primarily for consumer purposes, but in part for business purposes, it can be redeemed, but section 506(a)(2) does not necessarily call for using the consumer valuation method alone

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[41] *See* NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS 169–70 (Oct. 20, 1997) [hereinafter NBRC REPORT] (noting increasing use of sales slips to take security interest in everything purchased under retail charge card); Susan L. DeJarnatt, *Once is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L.J. 455, 467 n.75 (1999) ("It is becoming quite common for credit card companies to take security interests in every item purchased with the card."); Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA. L. REV. 569, 612 (1998) ("[M]any store credit cards create purchase money security interests with language on the back of the charge slip.").

[42] 11 U.S.C. § 722 (2000).

[43] *See* BAPCPA § 304 (to be codified at 11 U.S.C. § 722) (allowed secured claim must be paid "in full at the time of redemption.").

in such circumstances. Arguably, the valuation should be pro rated, with the percentage of intended business use valued by the lower valuation method. Courts could dodge this complexity and simply use the consumer valuation method for the property as a whole, but the statutory language is not clear. Assuming valuation only by the method for consumer collateral, to redeem collateral used primarily for consumer purposes, then, the debtor would have to pay what a retailer would charge for that property, taking into account its age and condition. For cars, this means a deduction must be made from retail book values, as discussed above, to reflect the fact that book retail values are for vehicles reconditioned by the dealer and in the case of one book, are dealer asking prices, not prices actually charged.[44]

Thus, section 722 and section 506(a)(2) together call for a higher price for redemption than under case law prior to the 2005 Act, permitting redemption at wholesale value.[45] The bankruptcy courts have interpreted *Rash* as favoring a lower valuation for redemption in chapter 7 than for cramdown in chapter 13. This analysis makes sense because the Supreme Court's reasoning in *Rash*, a chapter 13 case, emphasized the fact that the debtor was retaining the vehicle, while the creditor had not yet been paid in full and remained at risk both for default and for depreciation of the collateral.[46] Because a debtor who redeems in chapter 7 pays the secured claim immediately in full, the creditor does not face continuing risk of default or depreciation, justifying use of wholesale value under the reasoning of *Rash*.[47]

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[44] *See supra* notes 37–38 and accompanying text.

[45] *See* Triad Fin. Corp. v. Weathington (*In re* Weathington), 254 B.R. 895, 899 n.1 (B.A.P. 6th Cir. 2000) (equating wholesale and "liquidation value," which court noted is the amount the creditor can recover on repossession and sale in the manner most beneficial to the creditor); *In re* Bouzek, 311 B.R. 239, 242 (Bankr. E.D. Wis. 2004) (following majority of courts by ruling wholesale value is appropriate valuation standard in section 722 cases); *In re* Dobler, No. 02-30016, 2002 Bankr. LEXIS 1837, at *10 (Bankr. N.D. June 20, 2002) (stating wholesale or liquidation value is appropriate validation standard under section 722); *In re* Ballard, 258 B.R. 707, 709 (Bankr. W.D. Tenn. 2001) (holding appropriate valuation of debtor's car for redemption purposes was its liquidation or wholesale value); COLLIER, *supra* note 25, ¶ 506.03[6][c] (indicating courts have allowed secured claim to be valued at published wholesale value in redemption cases). Actual foreclosure sales to third parties after repossession are likely to be at prices lower than wholesale because of the time-pressure and inferior marketing typical of a foreclosure sale; however, the real return to a secured creditor upon foreclosure is typically wholesale value, less the costs of obtaining it. *See* Braucher, *Wholesale*, *supra* note 28, at 785–86 (noting secured creditors typically engage in title-clearing foreclosure sale to themselves followed by real sales at wholesale, so that their actual recovery is wholesale value, less costs of repossession and making the two sales).

[46] *See Rash*, 520 U.S. at 962 (noting if debtor keeps property, creditor faces risk of debtor defaulting again or deterioration of property due to use by debtor); *see also In re* Donley, 217 B.R. 1004, 1007 (Bankr. S.D. Ohio 1998) (describing double risk creditor incurs if debtor retains property).

[47] *See Rash*, 520 U.S. at 962; *see also* Smith v. Household Auto. Fin. Corp., 313 B.R. 267, 270–71 (N.D. Ill. 2004) (noting that if chapter 7 creditor receives value of property at time of redemption, there will be no continuing risk of default or depreciation); *In re* Dunbar, 234 B.R. 895, 898 (Bankr. E.D. Tenn. 1999) (reiterating *Rash*'s discussion on "cram down situation" dual risk to creditor if debtor is allowed to retain property).

In recent years, lenders have made redemption financing for vehicles available.[48] Under the pre-2005 Bankruptcy Code, the commercial feasibility of such lending was enhanced by the fact that the debtor only needed to pay the wholesale value to redeem. Wholesale value, less costs of repossession and sale, is what a redemption lender can recover if it has to pursue the collateral.[49] Given collection costs and risk of more rapid depreciation than pay-down of debt, such a lender could end up undersecured, but could charge high rates against this risk. With redemption only possible at retail under the 2005 bankruptcy law changes, a redemption financer would face a greater risk of being undersecured if it lent the full amount necessary for redemption at retail value. It remains to be seen if redemption financing will dry up or become much less frequent. If redemption declines, debtors will be more inclined to try ride-through with creditor acquiescence to try to hold on to their cars, as discussed below in section II.

C. Valuation for Cramdown in Chapter 13

The valuation puzzle is considerably more complex when one moves to the question of cramdown in chapter 13.[50] Only to a limited degree does the valuation analysis for that purpose pick up the changes in section 506(a)(2). This is because section 1325(a) adds this new language at the end:

> For purposes of paragraph (5), section 506 does not apply to a claim described in that paragraph 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 of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) 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.[51]

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[48] *See In re* Ray, 314 B.R. 643, 646 (Bankr. M.D. Tenn. 2004) (noting debtors redeemed their vehicles due to loans from 722 Redemption Funding, Inc., which has made redemption loans to more than 15,000 debtors); *In re* Ballard, 258 B.R. at 708 (stating debtor had redeemed using loan from 722 Redemption Funding, Inc.); *Redemption financing helps debtors keep cars without reaffirmation*, CONSUMER BANKR. NEWS, Sept. 2, 2004, at 1, 4 (reporting that banks are reluctant to make loans to chapter 7 debtors, but that 722 Redemption Funding, Inc. meets demand by debtors who want to keep their cars and pay over time).

[49] *See Weathington*, 254 B.R. at 899 (stating creditors can expect to recover wholesale value upon repossession of collateral); Braucher, *Wholesale*, *supra* note 28, at 785–86 (noting secured creditors typically buy the collateral themselves at a foreclosure sale and then make a real sale at wholesale, so that their actual recovery is wholesale value, less costs of obtaining it).

[50] *See* BAPCPA §§ 306(a)(b), 309(c) (to be codified at 11 U.S.C. § 1325(a)(5)(B)(ii)) (providing for chapter 13 cramdown, meaning payment of allowed amount of secured claim, that is, collateral value, rather than full debt amount).

[51] BAPCPA § 306 (to be codified at 11 U.S.C. § 1325(a)) (leaving out the word "period" after "910-day").

This language sets up two categories of collateral where value is not to be determined using section 506(a) and a third category of any other collateral, which is valued under section 506(a). The first is secured claims involving a purchase money security interest for a debt incurred within the 910 days (about two and a half years) before filing for a motor vehicle for personal use. The second category is secured claims if collateral consists of any other thing of value and the debt was incurred within one year before filing. The third category is any other secured debt of a chapter 13 debtor, who must be an individual, and then section 506(a) does apply to determine value.[52]

Before discussing these three categories, it should be noted that some collateral is acquired for mixed purposes. Unlike section 722, permitting redemption of collateral intended "primarily for personal, family or household use,"[53] the new language at the end of section 1325(a) concerning recently acquired motor vehicles acquired for personal use does not use the word "primarily."[54] Thus, there is even more ambiguity about what to do about valuation of a vehicle acquired for mixed business and personal purposes. In addition, the vehicles covered are only those acquired for the "personal" use of the debtor and not for "personal, family or household use," as in section 722, suggesting that a vehicle acquired for family or household use more than a year before filing, rather than for individual personal use, should be valued using section 506(a).

Even without the issues raised by mixed business and consumer use purposes, there is plenty of complexity. First, consider secured debts in the third category, where section 506(a) applies to determine the value of the secured claim. One example is a debt secured by a car or truck acquired exclusively for business use more than a year before filing. In such a case, the first sentence of section 506(a)(2) applies to the language of section 1325(a)(5)(B)(ii). As a result, the debtor must pay for the car or truck an income stream equal to the present value of the replacement value, without deduction for sales and marketing costs of the retailer but with deductions for the retailer's profit and for the condition, which in the case of retention by the debtor of his car or truck means a vehicle that is not reconditioned by a dealer (contrary to the assumptions of the various retail "book" guides).[55] For business collateral of an individual, midpoint of wholesale and retail

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[52] *See* 11 U.S.C. § 109(e) (2000); 11 U.S.C. § 109(e) (as amended by BAPCPA) (providing only individual may be debtor under chapter 13).

[53] *See* 11 U.S.C. § 722 (2000); 11 U.S.C. § 722 (as amended as amended by BABCPA) ("An individual debtor may . . . redeem tangible personal property intended primarily for personal, family, or household use . . . .").

[54] *See* BAPCPA § 306 (to be codified at 11 U.S.C. § 1325(a)) (providing that section 506(a) does not apply to certain secured debts for motor vehicles "acquired for the personal use of the debtor," and omitting the qualifier "primarily").

[55] *See supra* notes 34–40 and accompanying text; *see also* BAPCPA § 327 (to be codified at 11 U.S.C. § 506(a)(2)) (providing that value of personal property collateral in the case of an individual debtor in chapter

book would be a reasonable presumed value, because of the need for a simple and cheap valuation method, subject to adjustment based on proof of an actual different replacement value for the car or truck in its un-reconditioned state.[56]

Another example of the third category is a car acquired three years ago exclusively for personal use. Then the second sentence of section 506(a)(2) applies to the language of section 1325(a)(5)(B)(ii). As a result, the debtor must pay retail value, meaning what a retailer charges for a car of that age and condition. If retail book value is used as a starting point, deductions must be made because book values assume a reconditioned vehicle and sometimes use dealer asking prices rather than actual retail sales prices. It would be reasonable for courts to use a presumption of a 10 percent discount from retail book values, again because of the need for a simple and cheap valuation method, subject to adjustment based on proof of a different actual retail value for an un-reconditioned vehicle of the age and actual condition in question.

Now, let us return to the first two categories of secured debt, which get some other treatment than valuation of the secured claim using section 506(a). In the first category are secured loans incurred in the two and a half years before filing to acquire vehicles for personal use.[57] In the second category are secured debts incurred by an individual in the last year before filing and secured by a business-purpose vehicle or by other property, such as a computer for business use or an appliance for personal use. The new language at the end of section 1325(a) applies to these two categories of cases and provides that section 506(a) does not apply to set the value for cramdown purposes. However, section 1325(a)(5)(B)(ii) still applies to these cases, and it is unchanged in wording from prior law; this language has long been read as calling for payment of the present value of the allowed secured claim (because "such claim" in that paragraph refers back to "allowed secured claim" in the preamble of section 1325(a)). By virtue of the new language at the end of section 1325(a), however, the valuation for cramdown of the allowed amount of a secured claim in the two categories of cases covered has been unhinged from the code provision that otherwise defines value of a secured claim, section 506(a). This is a bizarre thing to do, and the courts will have to figure out what to make of this odd statutory language.

Courts may reach different conclusions about what the new final language of section 1325(a) contemplates as the appropriate method of valuation of secured claims in the categories of secured debt to which that language applies. Perhaps the intent was to require full payment of these debts, even when dramatically undersecured because of the depreciation that occurs right after purchase, when the goods become used, but perhaps not. A large problem with the argument that the

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7 or 13 "shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing.").

[56] *See supra* notes 37–40 and accompanying text.

[57] The motor vehicles covered do not include mobile homes because of the incorporation of a definition of motor vehicle from 49 U.S.C. § 30102 (2000). *See* 8 COLLIER, *supra* note 25, ¶ 132506[1](a).

intention was to dictate full debt repayment for certain recently acquired collateral is that section 1325(a) nowhere says that. Lawyers for secured creditors may claim that these debts must be treated as fully secured, even though the reality is that the debt is undersecured.[58] However, it would have been much easier to say that chapter 13 debtors must pay in their plans the full debt amount for certain recently acquired collateral. Thus, it hardly seems appropriate to read the bizarre approach actually taken in that way.

Worse still for the full debt repayment argument, section 1325(a)(5) itself shows that Congress knows how to say "payment of the underlying debt," when it wants to, because this language appears in section 1325(a)(5)(B)(i)(I)(aa).[59] This provision sets an alternative for how long the lien must last, that is, until payment of the underlying debt, as opposed to lasting until discharge of the debt under section 1328, when the debtor does not pay the full underlying debt, but rather pays only the present value of the allowed amount of the secured claim, under section 1325(a)(5)(B)(i)(bb) and (ii). The debtor can provide in a plan for release of the lien upon payment of the underlying debt when, for example, the debtor proposes to pay the full debt in one lump sum at the outset of the case, something the debtor might do if the collateral is clearly worth more than the debt, or in periodic payments before the end of the plan.[60] Where the debtor chooses the other alternative, paying the present value of the allowed amount of the secured claim and having the lien last until discharge, however, it is hard to argue that "value" of the secured claim means the same thing as "payment of the underlying debt," language that appears just a little earlier in the same subsection.

Given the language of the statute, a more plausible approach might be that, for the categories of secured debts excluded from the coverage of section 506(a), the plan can provide for the payment of the present value of the allowed secured claim by discharge, but that the court must figure out the value of the secured claim without benefit of section 506. Rather, it must interpret "value" of the secured claim under section 1325(a)(5)(B)(ii) on the basis of the meaning of the word in ordinary language and in light of bankruptcy policies. Furthermore, a reasonable assumption would be that some other meaning should be used than the meaning that section 506 would supply, given that the option of using section 506 has been expressly eliminated. Thus, replacement value for business collateral and retail value for consumer collateral would be wrong choices, because section 506 would

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[58] *See* Richardo I. Kilpatrick, *Selected Creditor Issues under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 834 (2005) (asserting without textual analysis that under the 2005 Act version of section 1325(a), in cases where section 506(a) does not apply, the debtor must pay the full amount of the debt).

[59] *See* BAPCPA § 306 (to be codified at 11 U.S.C. § 1325(a)(5)(B)(i)(I)(aa)).

[60] Under new section 1325(a)(5)(B)(iii)(I), periodic payments must be in equal monthly amounts, but there is no requirement that they extend for the full length of the plan. *See* 8 COLLIER, *supra* note 25, ¶ 1325.06[3](b) (noting there "does not seem to be any requirement that the equal monthly amounts extend throughout the plan.").

supply these meanings. This opens up the possibility that the word "value" in section 1525(a)(5)(B)(ii), when not defined by section 506(a) because of the new language at the end of section 1325(a), should be interpreted as meaning either wholesale value or mid-point of wholesale and retail value.

There are good policy reasons for choosing wholesale value, less the secured creditor's costs of obtaining it. If the purpose of the 2005 Act is to promote use of chapter 13, as was argued by the credit industry, then the intent could be to use low values for recently acquired collateral, where rapid depreciation is likely, resulting in a bigger gap between debt amount and retail or replacement value. The possibility of significant cramdown is a carrot to lure debtors into chapter 13. Furthermore, equality of treatment of unsecured creditors, conventionally thought to be an important bankruptcy policy,[61] cuts against inflation of values for collateral, which is likely to be pronounced if full debt repayment is required for recently purchased collateral that is likely to have undergone rapid depreciation. Purely unsecured creditors get less when undersecured creditors, who are unsecured in part, get more, undermining the equality principle.

Yet another policy favoring use of wholesale value less costs of obtaining it is to equalize what a secured creditor can obtain from collateral under state law and the Bankruptcy Code, to discourage uncooperative behavior that pushes debtors into bankruptcy. Typically, creditors who must sell collateral outside bankruptcy engage in title-clearing foreclosure sales, at which they purchase the collateral for a low amount, and then they make the real sale at wholesale price. As a result, their actual return is wholesale price, less costs of repossession and costs of the two sales (the clearing foreclosure sale, followed by the real sale at wholesale).[62] Thus, wholesale value less costs of obtaining it might be the appropriate way to value collateral when section 506 does not apply to valuation of a secured claim for cramdown purposes.

Collier on Bankruptcy presents another interpretation of the new language at the end of section 1325(a), that it means that claims covered by this language "cannot be determined to be secured claims under section 506(a) and are not within the ambit of section 1325(a)(5)."[63] However, if these claims cannot be determined to be secured under section 506(a), perhaps this means they are unsecured claims, entitled only to their pro rata share under the best interests and disposable income tests of section 1325.[64] COLLIER instead takes the position that these claims are still

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[61] *See* Begier v. Internal Rev. Serv., 496 U.S. 53, 58 (1990) (stating equality of distribution among creditors of equal priority is central policy of Bankruptcy Code); *see also* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 494 (1997) (noting equality of distribution principle as touchstone, absent applicable exception).

[62] *See supra* note 49 and accompanying text.

[63] *See* 8 COLLIER, *supra* note 25, ¶ 1325.06[1](a).

[64] *See* 11 U.S.C. § 1325(a)(4) (2000); 11 U.S.C. § 1325(a)(4) (as amended by BAPCPA) (requiring payment of pro rata share of chapter 7 liquidation value); BAPCPA § 102 (to be codified at 11U.S.C. §

secured, but their modification is no longer limited by section 1325(a)(5), so that they can be equitably modified under section 1322(b)(2): "A debtor is presumably bound only by the dictates of good faith and the other provisions of the Code in determining how such claims may be modified. Some courts, understandably, may look to prior law for guidance regarding what modifications are equitable."[65] One could quibble with this analysis, in that the language at the end of section 1325(a) does not say that section 1325(a)(5) does not apply to the covered claims, but rather it says that section 506(a) does not apply for purposes of section 1325(a)(5). However, there is little functional difference between the COLLIER analysis and the analysis presented in this article. Under either approach, courts must determine how much must be paid to secured creditors without using section 506(a). Both approaches reject the argument likely to be made by secured creditors, that there is a requirement of full debt repayment for the recently acquired collateral covered by the language at the end of section 1325(a). Rather, COLLIER and this article take the position that this new language gives courts great discretion to figure out a policy-based approach to how much must be paid to the covered secured creditors.

To the extent that secured creditors succeed with arguments that the new language at the end of section 1325(a) dictates full debt repayment to covered undersecured creditors in chapter 13, debtors would be less able to afford holding on to collateral in chapter 13 than they were before the 2005 Act. Therefore, more debtors likely would be driven to use chapter 7,[66] where they can generally discharge unsecured debts and then devote more of their post-discharge income to making payments for collateral, to the disadvantage of unsecured creditors who might be paid something in chapter 13. Debtors would be more likely to use ride-through in chapter 7 by creditor acquiescence, which will be discussed in section II.

II. RIDE-THROUGH OF SECURED DEBTS

Strong arguments can be made that ride-through by creditor acquiescence continues to be permitted under the reform act for personal property collateral, and that ride-through is court protected for real estate collateral and also for personal property collateral if the creditor refuses to reaffirm on the terms of the original contract.

A. Ride-Through for Cars and Other Personal Property Collateral with Creditor Acquiescence

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1325(b)) (providing for payment of disposal income, to which unsecured creditors are entitled to a pro rata share, with the disposal income test amended in complex ways beyond the scope of this article).

[65] *See* 8 COLLIER, *supra* note 25, ¶ 1325.06[1](a).

[66] *See* Henry E. Hildebrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 387, 387 n.70 (2005) (noting likely reduction in confirmable chapter 13 plans if debtors were required to pay car loans in full, although figure of 23 percent reduction was based on House bill covering cars acquired within five years).

Under prior law, the issue whether the Bankruptcy Code permits ride-through in chapter 7 involved interpreting section 521(2).[67] Old section 521(2)(A) required an individual debtor to file a statement of intention concerning collateral for consumer debts, specifically any intention to retain or surrender the collateral and "if applicable" any intention to redeem the collateral or reaffirm the debt.[68] Furthermore, section 521(2)(C) noted that nothing in the rest of section 521(2) altered the debtor's rights with regard to collateral.[69] Five circuits relied on the "if applicable" language in section 521(2)(A), together with the statement that the debtor's rights were not changed in section 521(2)(C), to find that section 521(2) was procedural and required notice of intentions concerning consumer collateral but did not limit the debtor's rights; four circuits found that this section did alter substantive rights and eliminated the option of retaining collateral without redeeming or reaffirming.[70] Thus, prior to the 2005 Act, the majority of circuits that had decided a case provided protection for debtors to retain consumer collateral so long as they remained current on their obligations, despite the fact that their personal liability would be discharged in bankruptcy.

New section 521(a)(2)[71] is largely unchanged from old section 521(2). There are, however, two changes of some significance. The first change is the deletion of the word "consumer" before the word "debts,"[72] so that an individual debtor now has to file a statement of intention as to any property of the estate securing a debt, not just as to consumer collateral. As a result, for example, a sole proprietor with a mortgaged business premises and equipment collateral now must file a statement of intention concerning that collateral for business debts.

The other change affects ride-through. Section 521(a)(2)(C)[73] now refers to new section 362(h) as changing rights with respect to collateral, an exception to the continuing general proposition that nothing in section 521(a)(2)(A) and (B) changes rights with respect to collateral. However, the reference in section 521(a)(2)(C) to section 362(h) strengthens the case that section 521(a)(2) is otherwise procedural, so that it does not limit a debtor's options to surrender of collateral, redemption or reaffirmation, and permits the fourth option of court-protected ride-through, except as section 362(h) now provides otherwise for personal property collateral by terminating the stay.[74] As will be discussed in Sections IIB and D below, section

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[67] *See* 11 U.S.C § 521(2) (2000) (requiring consumer debtor to state intentions concerning collateral); *see supra* note 17 (citing U.S. Court of Appeals decisions from nine circuits, which split 5-4 for court-protected ride-through under the pre-2005 Bankruptcy Code).

[68] *See* 11 U.S.C. § 521(2)(A) (2000) (requiring debtor with consumer debts secured by property of the estate to state intentions concerning that collateral).

[69] *See id.* § 521(2)(C) (preserving rights of debtor concerning property of the estate securing consumer debts).

[70] *See supra* note 17 (citing nine opinions of U.S. Circuit Courts of Appeal concerning ride-through).

[71] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(a)(2)).

[72] *See id*.

[73] *See id*. § 106 (to be codified at 11 U.S.C. § 521(a)(2)(C)).

[74] *See id*. § 305 (to be codified at 11 U.S.C. § 362(h)).

362(h) does not terminate the stay for personal property collateral when the creditor refuses to reaffirm on the original contract terms and also does not terminate the stay for real property collateral.

In non-ride-through circuits under the pre-2005 Bankruptcy Code, chapter 7 debtors frequently put creditors to the painful choice of either accepting full payment on the debt, with contract interest, or foreclosing on collateral. It is particularly difficult to choose foreclosure when the collateral is worth less than the debt. Therefore, when the debtor continued to pay the full debt without reaffirming, often the creditor would take the money and not foreclose, despite the fact that discharge makes the debtor no longer personally liable. This is ride-through by creditor acquiescence. Because the creditor would only recover wholesale value less repossession and sale costs if it exercised its in rem rights against personal property such as a vehicle,[75] often the creditor would accept the full payment with contract interest. The advantage for the debtor in ride-through, as opposed to reaffirmation, is that the debtor does not take on personal liability. In their study of redemption, Professors Culhane and White produced empirical evidence of considerable creditor acquiescence in ride-through.[76] In chapter 7, because a debtor typically gets a discharge of most unsecured debt, the debtor usually becomes better able to afford paying secured debts, and this gain in creditworthiness may more than offset the creditor's loss of recourse against the debtor personally after discharge.

As has been noted, the case for ride-through by creditor acquiescence for personal property is strengthened by the 2005 Act, in sections 521(a)(6) and 362(h).[77] Section 521(a)(6) states that if the debtor keeps personal property collateral without redeeming or reaffirming, then "the stay under section 362(a) is terminated with respect to the *personal property* of the estate or of the debtor 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* . . . ." [Emphasis added.] Section 362(h) repeats the point about the stay being terminated when an individual debtor keeps personal property collateral without redeeming or reaffirming, subject to an exception discussed below in section IIB.

By explicitly providing that the stay is lifted and the creditor may take whatever action is permitted by non-bankruptcy law, the statutory language strongly implies that there is no bankruptcy remedy other than termination of the automatic stay. This implication negates the idea that the debtor could be ordered by a bankruptcy court to surrender, redeem or reaffirm and then be denied a discharge or have her

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[75] *See supra* note 49 and accompanying text.

[76] *See* Culhane & White, *Reaffirmation*, *supra* note 23, at 738-47 (finding many missing reaffirmations for cars and homes, despite stated intention to reaffirm and evidence debtor still had collateral).

[77] *See* BAPCPA §§ 106, 305 (to be codified at 11 U.S.C. §§ 521(a)(6), 362(h)).

case dismissed for a failure to do so.[78] Rather, the only bankruptcy remedy mentioned in the language of the statute itself is lifting the stay.

Another piece of the puzzle is new section 521(d),[79] which provides that if a debtor holds on to personal property collateral but fails to reaffirm or redeem, with the result that the automatic stay is terminated, nothing in bankruptcy law negates a bankruptcy default clause. This provision makes it possible for a creditor who has such a clause in its agreement to make the choice to repossess personal property collateral and foreclose on it. The changes in sections 521(a) and (d) and section 362(h) all reinforce the idea that if the debtor rides through on personal property collateral, the creditor has a choice whether to acquiesce, on the one hand, or instead repossess and foreclose. In addition, the suggestion of section 521(d) is that the creditor had better have a bankruptcy default clause if it wants to be able to repossess and foreclose on that basis, despite the fact that the debtor is current on the debt and has met obligations to maintain and insure the collateral. Furthermore, under state law principles, if the creditor does not act promptly after the termination of the stay and continues to accept payments on the full debt, the creditor would probably be deemed to have waived the bankruptcy default or be estopped to assert it.[80]

B. Ride-through for Personal Property Collateral if the Creditor Refused to Reaffirm

Under the Bankruptcy Code prior to the 2005 Act, reaffirmation required both the debtor and the creditor to agree to it. While this is still the case under the 2005 Act, new section 362(h)(1)(B) provides that the stay is not terminated as to collateral when the debtor's statement of intention proposes "to reaffirm such debt on the original contract terms and the creditor refused to agree to the reaffirmation on such terms."[81] This means that a creditor who refuses to reaffirm on the original contract terms gets stuck with ride-through at least until the closing of the case. Unaddressed is whether new section 362(h)(1)(B) protects a debtor who proposes to

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[78] Thus, the 2005 Act undercuts the idea that there are bankruptcy law remedies, other than lifting the stay, that can be used against debtors who ride through, undermining the continuing validity of reasoning such as that in Johnson v. Sun Fin. Co., (*In re* Johnson) 89 F.3d 249, 252 (5th Cir. 1996) (ordering debtors to surrender, reaffirm, or redeem, and stating if debtors failed to comply, court could either dismiss under section 105 or deny discharge under section 727(a)(6) of pre-2005 Act); *cf. In re* Rathbun, 275 B.R. 434 (Bankr. D. R.I. 2001) (holding that where debtor failed to perform stated intention to reaffirm, appropriate remedy was lifting automatic stay to allow lender to pursue its state law remedies); *In re* Weir, 173 B.R. 682 (Bankr. E.D. Cal. 1994) (stating where debtor failed to file statement of intention to redeem, reaffirm debt, or surrender collateral, appropriate remedy was relief from automatic stay).

[79] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(d)) (concerning effectiveness of bankruptcy or insolvency default clauses in instances where debtor failed to take action as required under section 521(a)(6), a provision applicable to personal property).

[80] *See* COOGAN ET AL.., *supra* note 21, at 8-37, 8-42 (discussing frequent use of waiver and estoppel defenses to acceleration for late payment and noting these defenses are applicable to other types of default).

[81] *See* BAPCPA § 305 (to be codified at 11 U.S.C. § 362(h)(1)(B)).

cure a default and then reaffirm on the original terms. Certainly for debtors not in default, section 362(h)(1)(B) gives leverage to insist on terms no worse than those in the original contract; if that provision is interpreted to include proposed cure and reaffirmation on the original contract terms, the same would be true for any debtor who had the ability to cure and offered to do so.

Another unaddressed question is what happens after discharge if, during the case, the debtor proposed to repay on the original contract terms and the creditor refused to reaffirm. The issue is whether the debtor can keep paying on the original terms and continue to have court protection. There is a good argument that the amended law provides court-protected ride-through in these circumstances. Five circuits protected ride-through prior to the 2005 Act.[82] While new sections 521(a)(6) and 362(h)(1) terminate the stay as to personal property collateral absent surrender, redemption or reaffirmation, the act makes an exception in section 362(h)(1)(B) for personal property collateral where the debtor proposes to reaffirm on the original contract terms. The addition of a new explicit protection of the stay for a debtor who is proposing full repayment strengthens the case for court-protected ride-through as long as the debtor stays current on payments on the debt and meets other obligations under the contract.

C. An Explanation of Seeming Timing Anomalies

New section 521(a)(2)(B) gives the individual debtor 30 days from the first date set for the meeting of creditors to perform the debtor's intention concerning collateral.[83] The court can extend the 30-day period within that period for cause.[84] Section 521(a)(6) gives the individual debtor who retains personal property collateral 45 days after the first meeting of creditors to reaffirm or redeem or otherwise have the stay lifted.[85] The 45-day period can be read as referring to 45 days after the first meeting of creditors is actually held and perhaps completed, thus setting an outside limit on how much of an extension the court can give a debtor to perform the debtor's intention without triggering the termination of the stay as to personal property collateral.

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[82] *See* cases cited *supra* note 17 (showing as of 2004, five circuits protected ride-through).

[83] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(a)(2)(B)) (stating debtor has 30 days from first date set for meeting of creditors to perform debtor's intention); *see also* Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or against an Individual Debtor*, 79 AM. BANKR. L.J. 749, 757 (2005) (stating section 521(a)(2) requires chapter 7 debtor to perform his stated intention "within 30 days after the first date set for the meeting of creditors").

[84] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(a)(2)(B)) (allowing 30-day period to be extended "for cause"); *see also* H.R. REP. NO. 109-31, pt. 1, at 225 (2005) (reciting 11 U.S.C. § 521(a)(2)(B), which allows court to grant "additional time . . . for cause"); Napoli, *supra* note 83, at 759 (stating extension can be granted by court within 30-day period).

[85] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(a)(6)) (providing that stay lifts as to personal property if the debtor retains collateral, unless the debtor reaffirms or redeems within 45 days after the first meeting of creditors).

D. Ride-Through With Court Protection for Real Estate Collateral

There is an excellent argument that new section 521(a)(2), particularly in light of changes in sections 521(a)(6) and 362(h), provides for ride-through with court protection for real estate collateral, displacing rulings in some circuits and adopting the majority approach under the pre-2005 Bankruptcy Code.[86] The basis of this argument is that the new provisions undercutting court-protected ride-through are all limited to "personal property" collateral. Congress acted in full knowledge of the split in the circuits concerning ride-through, yet sections 521(a)(6) and 362(h) explicitly limit their language restricting ride-through to personal property collateral.

Section 521(a)(6) refers to the debtor not retaining "*personal property* as to which a creditor has an allowed claim for the purchase price . . . [emphasis added]" without redeeming or reaffirming.[87] Section 362(h) terminates the stay as to "*personal property* of the estate or of the debtor [emphasis added]" securing a claim when the debtor does not state an intention to reaffirm or redeem or does not perform such an intention.[88] These provisions are in contrast to the broader language of section 521(a)(2) referring to "debts which are secured by property of the estate . . . ,"[89] language that is not limited to personal property and thus includes real property. Furthermore, the language in section 521(d), which preserves ipso facto clauses (clauses making bankruptcy an event of default), refers to such provisions in agreements covered by sections 521(a)(6) and 362(h), meaning only bankruptcy default provisions in personal property loans, not in real estate loans.

It might be argued that the last sentence of section 521(d) is a general saving provision for all ipso factor clauses, but the actual language of that sentence refers back to the previous sentence when it saves "such a provision." The "such a provision" saved is one in "*the* underlying lease or agreement," in short in the type of agreement addressed in the first sentence of section 521(d), an agreement subject to sections 521(a)(6) and 362(h), provisions that only apply to personal property collateral. In context, then, the language "such a provision" in the last sentence of 521(d) refers to ipso facto clauses in loans secured by personal property collateral, not to all ipso facto clauses.

Because new section 521(a)(2) is largely unchanged from old section 521(2) and because the three new provisions on ride-through, sections 521(a)(6), 521(d) and 362(h), only apply to personal property collateral, the 2005 Act provides a basis for finding protection of ride-through as to real property. Certainly the 2005 Act

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[86] *See supra* note 17 and accompanying text (indicating approach of majority circuits under pre-2005 Bankruptcy Code).

[87] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(a)(6)).

[88] *See id*. § 305 (to be codified at 11 U.S.C. § 362(h)(1)).

[89] *See id*. § 106 (to be codified at 11 U.S.C. § 521(a)(2)).

gives no explicit direction to end court-protected ride-through as to real property. Given the majority approach in the circuits favoring court-protection of ride-through, if Congress had meant to end this form of ride-through for real estate as well as for personal property collateral, one would expect language to that effect. Instead, sections 521(a)(6) and 362(h), terminating the stay when section 521(a)(2) obligations are not met, do not apply to real property collateral, so at a minimum the automatic stay would continue as to real property until the closing of the case under section 362(c). Where the debtor meets payment and other obligations before and during the bankruptcy case, the mortgage lender may be particularly unlikely at that point to foreclose, even if legally permitted to do so.[90] Even if bankruptcy law does not protect debtors after the case is closed, state law may do so, for example on a lender liability theory or based on equitable defenses to a foreclosure action.[91]

Furthermore, there is an indication in a new provision in the discharge section that the 2005 Act contemplates continued payment by debtors on home loans after discharge of the debt, even where there is no reaffirmation. Section 524(j) provides that there is no injunction barring a secured creditor on a principal residence from acts in the ordinary course of business to seek "periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien."[92] At a minimum, this section shows that the 2005 Act contemplates ride-through on homes with creditor acquiescence. But the provision could also be read as support for court-protected ride-though. It appears to authorize mortgage lenders to send bills and routine late notices before resorting to in rem rights after a payment default that could trigger foreclosure on a home that rode through a bankruptcy.

As with personal property collateral, debtors become more able to pay for homes after they get a discharge of unsecured debt in chapter 7, making ride-through by acquiescence to repayment generally good policy for the creditor.[93] This increased credit-worthiness likely more than compensates for the loss of personal liability. Thus, even if the 2005 Act is interpreted as only permitting ride-through on homes with creditor acquiescence once the case is closed, this form of ride-through will work as a means for many debtors to hold on to their homes, because

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[90] In light of new section 521(d), BAPCPA § 106 (to be codified at 11 U.S.C. § 521(d)), referring to effectiveness of bankruptcy default clauses, to the extent courts find that ride-through does not continue for real estate after the case is closed, creditors who do not have bankruptcy default clauses in their contracts may not have rights to foreclose. Even with such a clause, there may be state law impediments to exercising an ipso facto clause. *See supra* note 21.

[91] *See supra* note 21.

[92] *See* BAPCPA § 202 (to be codified at 11 U.S.C. § 524(j)(1)–(3)).

[93] *See* Culhane & White, *Reaffirmation*, *supra* note 23, at 744–48 (presenting and discussing evidence of creditor acquiescence in ride-through for home mortgages); Marianne B. Culhane & Michaela M. White, *But Can She Keep the Car? Some Thoughts on Collateral Retention in Consumer Chapter 7 Cases*, 7 FORDHAM J. CORP. & FIN. L. 471, 477–78 (2002) [hereinafter Culhane & White, *Collateral Retention*] (discussing creditor choice about whether to acquiesce in ride-through for home mortgages under pre-2005 Act in some circuits).

many creditors will acquiesce, particularly in light of the state law challenges to foreclosure against a debtor who is current on payments.

There is textual support for more than that—for ride-through with bankruptcy protection. In contrast to the treatment of personal property collateral, the automatic stay against foreclosure on a home is not lifted merely because of a failure to surrender or reaffirm and thus the stay remains in place during the chapter 7 case, even though the debtor does not reaffirm but keeps the home.[94] In addition, even after discharge, the creditor does not violate the discharge injunction by asking the debtor to pay personally before resorting to in rem remedies against a home, another sign favoring ride-through on homes.[95]

In addition, sound policy reasons exist for court-protected ride-though on homes, even when not provided generally for personal property collateral such as motor vehicles. The National Bankruptcy Review Commission recommended ride-through on homes, based largely on widespread practice of creditor acquiescence.[96] Compared to motor vehicles, homes are much less prone to depreciation at a rate faster than payment of the loan. Because homes usually appreciate and in the process make the mortgage lender ever more secure, there is a policy basis for ride-through with court protection. A debtor who is not in default on her home mortgage payments, or on other obligations such as maintaining required insurance, and who then discharges her unsecured debt becomes better able to pay the mortgage debt. The creditor faces little risk of a widening gap between collateral value and outstanding debt and is more likely to become gradually more secure. Many states already restrict collection of deficiency judgments on home loans, and the secondary mortgage market relies on down payments and mortgage insurance to protect against default risk.[97] Thus, personal liability of the borrower is not something the credit market relies on to a significant degree when extending home mortgages.[98]

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[94] *See* BAPCPA § 106 (to be codified at 11 U.S.C. § 521(a)(6)); *id*. § 305 (to be codified at 11 U.S.C. § 362(h) (limiting lifting of stay to personal property collateral).

[95] *See id*. § 202 (to be codified at 11 U.S.C. § 524(j)).

[96] *See* NBRC REPORT, *supra* note 41, at 167 (recommending ride-through on primary residences); *see also* Culhane & White *Reaffirmation*, *supra* note 23, at 746–47 (1999) (explaining reasons creditors permit ride-through, including anti-deficiency statutes, private mortgage insurance, government guarantee programs, real estate values increasing over time, and sale of residential mortgages on secondary market).

[97] *See* NBRC REPORT, *supra* note 41, at 168 (noting state restrictions on deficiency judgments from consumer debtors); John Mixon & Ira B. Shepard, *Antideficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455, 462–63, 477 (1992) (stating that down payments and mortgage insurance are the means by which the secondary mortgage market covers default risk, with little reliance on deficiency recovery); *see, e.g.*, CAL. CIV. PROC. CODE § 580(b) (Deering 1998).

[98] *See* BAPCPA § 202 (to be codified at 11 U.S.C. § 524(j)); *see also* Culhane & White, *Collateral Retention*, *supra* note 93, at 478 (noting that personal liability seems not to be key to mortgage lenders, who commonly acquiesce in ride-through); *cf.* Culhane & White, *Reaffirmation*, *supra* note 23, at 740–42 (commenting that car lenders also seem to disregard personal liability because they also approve ride-through).

CONCLUSION

This article presents the case that the 2005 Act does not necessarily say what conventional wisdom may claim that it says on some important issues concerning collateral in individual cases in chapters 7 and 13. Predictably, the circuits will split again on these issues.

Valuation questions have become much more complex, particularly for cramdown in chapter 13, and there is room for argument that certain recently acquired personal property collateral should be valued at wholesale, as outlined above in section IC. The Supreme Court left the bankruptcy courts to deal with a muddle after its *Rash* decision,[99] and Congress, egged on by credit industry lobbyists, has now created a bigger mess concerning valuation issues in individual bankruptcy cases.

In the case of ride-through, the 2005 Act does not cleanly resolve a five-four split in the U.S. Circuit Courts of Appeal. Instead, as described in section II, we are left with ride-through by creditor acquiescence as to personal property collateral in general, and good arguments for court-protected ride-through for real estate loans as well as loans secured by personal property collateral if the creditor refuses the debtor's offer to reaffirm on the original contract terms, perhaps including after cure of a default.

The U.S. personal bankruptcy system was too complex before the 2005 Act. Now it is more so, in these and other areas, and bankruptcy professionals will have to cope, with many surprising results likely. When Congress again turns its attention to the Bankruptcy Code, we can only hope it will have learned the lesson that personal bankruptcy law needs to be simplified to have predictable and sensible consequences.

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[99] *See* Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 955 (1997).