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REDEMPTION AND REINSTATEMENT IN CHAPTER 7 CASES

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The Bankruptcy Code gives debtors a chance to redeem certain personal property from their secured creditors for the appraised value of the collateral, even though the unsecured deficit claim of the secured creditors remains unpaid. Insofar as debtors are concerned, this right is a considerable improvement from state law which requires the secured party's entire debt to be paid. [*FN:* See U.C.C. § 9−506 (1990) (requiring that individual in order to redeem must fulfill all obligations secured by collateral as well as secured party's reasonably incurred expenses).] The redemption right in bankruptcy, however, is surprisingly complex when considered in conjunction with other provisions of the Bankruptcy Code.

This Article attempts to put in context all issues related to the redemption right in Bankruptcy Code section 722. [*FN:* See 11 U.S.C. § 722 (1994) (authorizing individual debtor to redeem tangible property intended for personal, family, or household use).] In pursuit of this goal, Part I of this Article describes the various elements of the redemption right and how they have been interpreted. Among other things, it will relate redemption to the controversial topic of bifurcation−−the ability or inability of debtors in bankruptcy to split an undersecured claim into two diverse, unrelated claims−−one perfectly secured and one perfectly unsecured. Redemption will be shown to rely heavily on a theory of bifurcation even as the United States Supreme Court has disapproved of bifurcations in other contexts. [*FN:* See Dewsnup v. Timm, 502 U.S. 410, 416 (1992) (Blackmun, J.) (finding that § 506(d) would not allow debtor to "strip down" lien on real property).]

Part II considers the injunctive theory which, quite apart from section 722, permits a debtor to retain collateral over the opposition of secured parties on condition that the debtor stays current on the payments due under a prepetition agreement. Part III tries to calculate the effect that the mysterious and ineffectual section 521(2) has on redemption and related pro−debtor theories for bailing out collateral from the clutches of undersecured creditors. The Article concludes with a discussion of reaffirmation of security agreements and its interaction with the redemption right.

I. Redemption in General

In 1979, the Bankruptcy Code introduced individual debtors to a new redemption right in chapter 7. [*FN:* See generally Robert A. Hessling, Reaffirmation and Redemption 299−305 (1994) (discussing new redemption right based upon recommendations of Commission on Bankruptcy Laws of United States and UCC § 9−506).] According to section 722:

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien. [*FN:* 11 U.S.C. § 722.]

The debtor's unilateral power to retrieve collateral for its appraised value must be compared to the less generous redemption right under Uniform Commercial Code ("UCC") section 9−506. [*FN:* UCC § 9−506 provides: At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9−504 or before the obligation has been discharged under Section 9− 505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses. U.C.C. § 9−506.] The principal difference is that, under the Bankruptcy Code, the total claim of the secured party can remain largely unpaid, and yet the debtor may still bail out individual items of collateral by paying the appraised value of the item in question. [*FN:* See generally *In re* Jones, 152 B.R. 155, 186−88 (Bankr. E.D. Mich. 1993) (Spector, J.) (discussing how debtor reacquires items of collateral for its fair market value).] Under the UCC, however, not the tiniest shard of collateral can be saved unless the entire claim of the secured party is paid in full. [*FN:* See *In re* Cruseturner, 8 B.R. 581, 588 (Bankr. D. Utah 1981) (Mabey, J.) ("UCC 9−506 requires that all obligations secured by collateral . . . must be paid to redeem while Section 722 gives the debtor the right to redeem by payment of the amount of the allowed secured claim, or the market value of the property . . . ").]

The elements of redemption under the Bankruptcy Code are as follows. First, the collateral must be tangible. [*FN:* See 11 U.S.C. § 722 (allowing for redemption of "tangible personal property") ; Redding v. Signal Consumer Discount Co. (*In re* Redding), 34 B.R. 971, 972 (Bankr. M.D. Pa. 1983) (Woodside, J.) (finding automobile to be tangible property but not "household goods").] Unlike Lady Macbeth's dagger, it must be as sensible to feeling as it is to sight. Second, the property must be personal, not real, property−−though a few courts have stretched personal property to include fixtures. [*FN:* See, e.g., *In re* Walker, 173 B.R. 512, 516 (Bankr. M.D.N.C. 1994). In Walker , Judge William Stocks found that aluminum siding to a house was personal property because the parties so intended. See id. This agreement was evidenced from the sales contract's reference to the siding as sale of "goods." See id. Next time, however, a secured party may be able to evade § 722 by declaring in the agreement that the fixture is to be considered real property. Meanwhile, in Montgomery Ward & Co. v. Hall (In re Hall) , 11 B.R. 3 (Bankr. W.D. Mo. 1980), the parties did intend for a fence to become a fixture. See id. Nevertheless, the courts permitted redemption because the parties contemplated that, in case of default, the fence could be severed from the real property and become personal property once again. See id. at 4.] Third, the collateral must be intended primarily for personal, family, orhousehold use. [*FN:* Some older cases have held that business items, like farm equipment and livestock, might be redeemed. See Sprecher v. Bank of Yates City (*In re* Sprecher), 65 B.R. 598 (Bankr. C.D. Ill. 1986) (Altenberger, J.). Such cases were not founded on § 722, however. See id. at 601 n.1. Rather, such cases were based on the theory that, under § 506(d), a debtor could avoid an undersecured party's lien for the unsecured deficit. See id. For example, if collateral is worth $80 and the secured party claims $100, a debtor could bifurcate the claim into an $80 secured claim and a $20 unsecured claim and, under § 506(d), could avoid the lien for any part of the $20 unsecured claim. Sprecher went further by allowing the debtor to redeem the collateral by a cash payment to the secured party. See id. at 601−02. A redemption right of this sort was specifically negated in Lindsey v. Federal Land Bank (In re Lindsey) , 823 F.2d 189 (7th Cir. 1987) (Posner, J.), and eventually, the Supreme Court ruled that § 506(d) could not be used to bifurcate undersecured claims at all −− at least by debtors in chapter 11. See Dewsnup v. Timm, 502 U.S. 410, 416 (1992) (Blackmun, J.). Hence, the theories upon which Sprecher were based are now completely foreclosed. On the meaning of Dewsnup v. Timm , see David Gray Carlson, Bifurcation of Undersecured Claims in Bankruptcy , 70 Am. Bankr. L.J. 1 (1996).] Even a mobile home is eligible for redemption, [*FN:* See Terre Haute First Nat'l Bank v. Davis (*In re* Davis), 20 B.R. 212, 212−13 (C.D. Ill. 1982) (Baker, J.) (treating mobile home as eligible for redemption but denying debtor opportunity to redeem mobile home by installment payments).] though, of course, real estate is expressly eliminated in section 722. Apparently, the collateral need not have been used by the debtor for these purposes prior to bankruptcy, but, rather, must be intended for such use after redemption. [*FN:* See *In re* Pipes, 78 B.R. 981, 983−84 (Bankr. W.D. Mo. 1987) (Koger, J.) (finding debtor could not redeem auto not intended for own personal use).]

Fourth, the debt secured by the collateral to be redeemed must be a consumer debt. This is defined as a "debt incurred by an individual primarily for a personal, family, or household purpose." [*FN:* 11 U.S.C. § 101(8) (1994); see Hessling , supra note 4, at 307−10 (discussing definition of consumer debt); see also Boitnott v. United Va. Bank (*In re* Boitnott), 4 B.R. 122, 124 (Bankr. W.D. Va. 1980) (Pearson, J.) (consumer status survived consolidation of two debts).] Fifth, the debtor must be entitled to a discharge from any unsecured deficit claim the secured party might have against the debtor. [*FN:* See *In re* Blount, 4 B.R. 92, 97 (Bankr. M.D. Tenn. 1980) (discussing elements of redemption).] As applied to security interests under Article 9, the redemption right might be destroyed if the debtor made false representations in order to obtain credit [*FN:* See 11 U.S.C. § 523(a)(2).] or forgot to schedule the secured claim as required by section 521(1). [*FN:* See id. § 523(a)(3).] In addition, various acts unrelated to the secured party's claim may have been committed which would result in the loss of a discharge against any claim. In such a case, the debtor would also lose the right to redeem. For example, if the debtor made a fraudulent conveyance, hid or destroyed property within a year of bankruptcy, [*FN:* See id. § 727(a)(2).] has hidden, falsified, or failed to keep records, [*FN:* See id. § 727(a)(3).] has committed bankruptcy crimes, [*FN:* See id. § 727(a)(4).] has refused to explain how property disappeared, [*FN:* See 11 U.S.C. § 727(a)(5), (6).] or has received a general dischargein any bankruptcy case within the previous six years, [*FN:* See id. § 727(a)(9) (unless creditors received 100 cents on−the−dollar, or, under reorganization plan presented and executed in good faith, 70 cents on−the−dollar).] then the redemption right disappears.

The rule of dischargeability creates an inherent conflict in the Bankruptcy Code's timing rules. According to section 521(2), added in the 1984 amendments to the Bankruptcy Code, a debtor must file a statement of an intent to redeem or surrender collateral within thirty days of a chapter 7 bankruptcy petition (or before a creditors' meeting, if earlier). [*FN:* See id. § 521(2)(A).] The debtor must execute that intent forty−five days thereafter. [*FN:* See id. § 521(2)(B); *In re* Logan, 124 B.R. 729, 733 (Bankr. S.D. Ohio 1991).] Meanwhile, a creditor has sixty days after a creditors' meeting to file an objection to discharge. [*FN:* See Fed. R. Bankr. P. 4004(a).] If no objection is filed, all debts are discharged. [*FN:* See id. 4004(c); see also id. 4005 (placing burden of proving objection to discharge on plaintiff).] Hence, a debtor must redeem before it is known whether the underlying debt is dischargeable. To solve this contradiction, one judge has recommended that debtors ignore the time limits under section 521(2). [*FN:* See *In re* Cassar, 139 B.R. 253, 254 (Bankr. D. Colo. 1992) (Brumbaugh, J.) (stating that debtor's motion to redeem is premature until "the time limit has expired for the filing of § 523 complaints and/or the time limit has expired for the filing of objections to the debtor's claimed exemptions (or the property has been abandoned.")] Another judge has ruled that redemption can occur provisionally even though discharge might be denied at a later time. [*FN:* See *In re* Pipes, 78 B.R. 981, 983 (Bankr. W.D. Mo. 1987) (Koger, J.) (allowing redemption even though debt might not be dischargeable). This aspect of Pipes is discussed infra in the text accompanying notes 66− 69.]

The sixth and final element of redemption is that the property to be redeemed must be exempt or abandoned by the bankruptcy trustee. [*FN:* See 11 U.S.C. § 722.] These types of property are discussed in the following two sections.

As a final matter, section 722 implies a deadline by which a bankruptcy petition must be filed in order to preserve the right to redeem. Since section 722 refers to redeeming personal property "from a lien," the lien must still exist. Thus, a prepetition foreclosure sale would terminate the lien and hence the right of the debtor to redeem. Mere repossession of the personal property, however, would have no such effect; repossessed collateral may still be redeemed. [*FN:* See Karr v. General Motors Acceptance Corp. (*In re* Karr), 129 B.R. 498, 501−02 (Bankr. S.D. Ohio 1991) (Sellers, J.) (finding that secured party had "repossession" certificate of title issued as to motor vehicle, but debtor could still redeem).]

A. Exempt Property

If property is exempt, certain security interests can be avoided altogether under section 522(f)(1)(B). [*FN:* See generally David Gray Carlson, Security Interests on Exempt Property After the 1994 Amendments to the Bankruptcy Code , 4 Am. Bankr. Inst. L. Rev. 57 (1996) [hereinafter Carlson, After the 1994 Amendments]; David Gray Carlson, Security Interests on Exempt Personal Property: Their Fate in Bankruptcy , 3 J. Bankr. Law & Prac . 247 (1993) [hereinafter Carlson, Their Fate in Bankruptcy). A debtor can avoid nonpurchase money and nonpossessory security interests in designated property. A pledge therefore survives avoidance under § 522(f)(1)(B) but it is subject to redemption under § 722 provided all the elements of § 722 are met. See *In re* Ridner, 102 B.R. 247, 248−50 (Bankr. W.D. Okla. 1989) (allowing redemption of jewelry from creditor with possessory security interest).] If a security interest is partly avoided, and if the debtorwishes to redeem the exempt property, only the valid part of the security interest need be paid.

This follows from section 722's requirement that the debtor may redeem property "from a lien." If a secured creditor has lost part of her lien to an avoidance theory, then the debtor need only pay off the lien that the creditor still owns. On the other hand, if the *trustee* avoids a security interest (because it is, for example, a voidable preference), [*FN:* See 11 U.S.C. § 547(b).] the lien belongs to the trustee. [*FN:* See id. § 551.] The debtor must still pay *this* lien, even though the secured party has been deprived of it by avoidance and preservation. [*FN:* If a debtor voluntarily conveys a voidable security interest on exempt property, and if that security interest survives debtor avoidance under § 522(f)(1)(B), the debtor forfeits the exemption, and the trustee succeeds to the avoided security interest. See 11 U.S.C. § 522(g)(1)(A); Carlson, Their Fate in Bankruptcy , supra note 31, at 255−59.]

Many exemptions are limited in dollar amount. Nevertheless, all security interests on such an item may be discharged through redemption. For example, under section 522(d)(2), the debtor may exempt "[t]he debtor's interest, not to exceed $2,400 in value, in one motor vehicle." [*FN:* See 11 U.S.C. § 522(d)(2).] If the debtor owns a Rolls Royce worth $80,000, the whole amount may be redeemed because it is "exempt property," [*FN:* See H.R. Rep. No. 95−595, at 381 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6337.] even though only a fender and perhaps the hood ornament would have exhausted the monetary limit of the exemption.

When exempt property is described by a quantitative dollar amount, as well as by a qualitative aspect (as the car is under section 522(d)(2)), the general creditors may have an interest in the exempt property once the valid senior security interest and the exemption amount are subtracted. Returning to the Rolls Royce example, suppose it is encumbered by a $70,000 purchase money security interest, as well as a $2,400 exemption. The general creditors would then enjoy an interest of $7,600. In such a circumstance, it should be understood that the trustee as a hypothetical judicial lien creditor under section 544(a)(1) has a lien on the car just as the secured creditor does. Thus, to redeem the car, the debtor must pay $70,000 to the secured party and $7,600 to the chapter 7 trustee.

Similarly, if the trustee incurs "the reasonable, necessary costs and expenses of preserving, or disposing of, such property," the trustee can recover those expenses"from property" under section 506(c). [*FN:* See 11 U.S.C. § 506(c).] As this constitutes a trustee's superpriority lien on the collateral, the debtor will have to pay the section 506(c) expenses to redeem the property as well. [*FN:* See*In re* EES Lambert Assocs., 62 B.R. 328, 338 (Bankr. N.D. Ill. 1986) (providing that superpriority creditor claim is paid before attorney's fees incident to bankruptcy proceeding).]

One problem the debtor faces is that the unilateral right to redeem over the opposition of the creditor requires that the lien the debtor pays off must secure a "dischargeable consumer debt." [*FN:* See 11 U.S.C. § 722.] Yet the trustee's hypothetical judicial lien may not, and the trustee's section 506(c) definitely will not, involve "debt incurred by an individual primarily for a personal, family, or household purpose." [*FN:* See id. § 101(8).] Therefore, the debtor must obtain the trustee's consent before successfully redeeming property in which the bankruptcy estate has an interest. Only creditors whose claims are consumer loans are forced to take redemption payments against their will.

B. Abandoned Property

A debtor may redeem nonexempt property if the trustee has abandoned it. [*FN:* See id. § 722 (allowing for redemptions if such property "has been abandoned under section 554").] In a chapter 7 case, this implies the collateral is overencumbered and the debtor's equity in it is valueless.

After collateral is abandoned, [*FN:* See id. § 554.] the secured party is still barred from taking action because the automatic stay continues to apply until such time as the debtor's discharge is granted or denied. [*FN:* See id . § 362(c)(2); see General Motors Acceptance Corp. v. Bell (*In re* Bell), 700 F.2d 1053, 1057 (6th Cir. 1983) (Krupansky, J.);*In re* Cruseturner, 8 B.R. 581, 592 (Bankr. D. Utah 1981) (Mabey, J.).] Of course, before that time, the stay could be lifted by motion of the secured party if there is no adequate protection. [*FN:* See 11 U.S.C. § 362(d)(1). But see Riggs Nat'l Bank v. Perry (*In re* Perry), 729 F.2d 982, 985 (4th Cir. 1984). Riggs is discussed infra notes 117−137 and accompanying text. Professor Joann Henderson notes that, based on the language of § 362(d)(2), a secured party is entitled to have a stay lifted after abandonment, even though the debtor may wish to redeem property or negotiate a reaffirmation. She argues that these legitimate debtor purposes ought to be further reason, not mentioned in § 362(d), to prevent lifting the automatic stay. See Joann Henderson, The Gaglia−Lowry Brief: A Quantum Leap from Strip Down to chapter 7 Cram Down , 8 Bankr. Dev. J. 131, 146−47, 163−65 (1991).]

Abandonment requires that the trustee or some other party in interest move the court for an abandonment order and the court grant such motion. [*FN:* See 11 U.S.C. § 554; Fed. R. Bankr. P. 6007.] The requirement of an accomplished abandonment solves a conceptual problem with redemption. Ordinarily, when a debtor pays down a secured claim on property, the event tends to enrich the unsecured creditors, who now may look to the disencumbered part of the collateral for their recovery. [*FN:* See*In re* Union Meeting Partners, 160 B.R. 757, 769 (Bankr. E.D. Pa. 1993) (Scholl, J.).] Of course, if the debtor's payment of a securedcreditor only serves to enrich the unsecured creditors, the debtor will never redeem. Section 722 does not expressly preclude a bankruptcy trustee from laying claim to the new debtor equity created by the debtor's payment of the secured claim. Once the property has been abandoned, however, the estate's interest in the property no longer exists. [*FN:* See*In re* J.A.V. AG. Inc., 154 B.R. 923, 926 n.5 (Bankr. W.D. Tex. 1993) (Clark, J.) (noting that effective abandonment removes property from bankruptcy estate); see also*In re* Argiannis, 156 B.R. 683, 688 (Bankr. M.D. Fla. 1993) (Proctor, J.) (stating that abandonment divests bankruptcy estate of control over abandoned property and revests title in debtor).] Therefore, any disencumbrance through payment adheres solely to the debtor personally. Under these conditions, redemption becomes economically rational for debtors.

Suppose, however, that some payments by the debtor occurred before abandonment. As the estate will still have an interest in the property, do these pre−abandonment payments adhere to the benefit of unsecured creditors? The answer should be no, on the following basis: we should not conceive of the debtor as *paying* the secured claim, but rather, *buying* it. Standing in the shoes of the senior secured party, the unsecured creditors could not then claim any debtor equity. Rather, the property is still overencumbered, in part by a security interest retained by the secured party (for the unpaid amount) and in part by a security interest that the debtor has bought. The overencumbrance will lead to the property's abandonment, at which point the debtor can complete the redemption process. [*FN:* I have suggested this same concept solves the contradiction between the fact that a secured creditor's right to postpetition interest under § 506(b) is limited to the amount of the equity cushion and the fact that a secured creditor might receive cash payments on interest or principal, thereby expanding the cushion.

See David Gray Carlson, Oversecured Creditors Under Bankruptcy Code Section 506(b): The Limits of Postpetition Interest, Attorneys' Fees, and Collection Expenses , 7 Bankr. Dev. J . 381, 387−94 (1990).]

One difficult redemption puzzle involves converting a chapter 13 case to chapter 7, where the debtor will have paid some dollars to an undersecured creditor. [*FN:* See, e.g., Liberty Nat'l Bank and Trust v. Burba (*In re* Burba), No. 93−6479, 1994 WL 709314, at *1 (6th Cir. Nov. 10, 1994) (discussing whether debtor may redeem property from lien by paying remaining balance on chapter 13 and converting to chapter 7).] Recent legislation indicates clearly enough that the disencumbered collateral cannot be viewed as security for the unsecured deficit claim of the secured party. [*FN:* See 11 U.S.C. § 348(f)(2). This legislation is discussed in Carlson, supra note 11, at 35.] Dollars paid to reduce the secured claim thus create an equity that belongs to the debtor, not to the secured party. The amendment, however, does not eliminate the possibility that payments under the chapter 13 plan disencumber the property for the benefit of the undersecured creditors. One court of appeals opinion has suggested as much. [*FN:* See Burba , 1994 WL 709314, at *17.] If, however, the chapter 13 payments are viewed as not paying the secured claim, but rather buying it, the *debtor* will then be the beneficiary of the payments−−not the chapter 7 bankruptcy trustee.

Another puzzle arises from the terminology of section 722, which does not quite work with regard to abandoned property. Section 722 requires a debtor to pay asecured creditor "the amount of the allowed secured claim." An "allowed secured claim" presupposes that the secured creditor (or someone on her behalf) [*FN:* See 11 U.S.C. § 501 (granting such power to trustees, debtors and subrogees).] has filed a proof of claim. [*FN:* See id. § § 502(a), 506(d)(2).] If no proof of claim has been filed, then no "allowed secured claim" exists, and redemption would seem to be impossible. Furthermore, section 506(a) implies that an "allowed secured claim . . . is a secured claim to the extent of such creditor's interest in *the estate's interest in such property* . . . " [*FN:* See id. § 506 (emphasis added).] If property has been abandoned, the property is no longer "of the estate." It has occasionally been held that, after abandonment, the bankruptcy court has no jurisdiction to value non−estate assets. [*FN:* See Associates Commercial Corp. v. Rash (*In re* Rash), 90 F.3d 1036, 1045−47 (5th Cir. 1996) (King, J.) (en banc) (finding § 506(a) does not apply to exempt property because it is not "of the estate"); Dewsnup v. Timm (*In re* Dewsnup), 908 F.2d 588, 590−92 (10th Cir. 1990) (per curiam), aff'd , 502 U.S. 410 (1992); contra Gaglia v. First Fed. Sav. & Loan Ass'n, 889 F.2d 1304, 1308 n.5 (3d Cir. 1989) (Hutchinson, J.).] Such a position, if asserted in the context of redemption, would make impossible the redemption of abandoned property, unless the debtor presciently obtained a valuation prior to abandonment. [*FN:* See Henderson, supra note 44, at 147 (arguing that these procedural niceties be ignored in order to effectuate post−abandonment redemption).] In any case, the debtor faces the further problem that redemption implies that the secured creditor has an "allowed secured claim." Hence, if these definitions are to be taken seriously, it may also be necessary that the secured creditor (or some other party authorized to file for the secured creditor) have filed a timely proof of claim in conjunction with the valuation. Yet, oddly, if the property is non−exempt, the debtor is not even entitled to redeem it until the property "has been abandoned." If the exact words of the Bankruptcy Code are to be honored, a court must be willing to value collateral in anticipation of an abandonment. As a debtor is entitled to notice of a trustee's motion to abandon, it should be valid grounds to deny abandonment until such time as the collateral is properly valued, so that the debtor's redemption right might be vindicated.

C. Bifurcation

Under state law, a partial payment of an unsecured claim has the ordinary effect of improving the security of the creditor, as payment increasingly shrink the unsecured deficit and leaves the collateral intact. [*FN:* This assumption has been used to rule that, as a matter of law, payment of unencumbered dollars to an undersecured creditor are always preferential, when the debtor is insolvent at the time. See Barash v. Public Fin. Corp., 658 F.2d 504, 509 (7th Cir. 1981); see generally David Gray Carlson, Security Interests in the Crucible of Voidable Preference Law , 1995 U. Ill. L. Rev. 211, 269−79.] Redemption under section 722 could not have such an effect because, otherwise, the debtor would have to pay the entire secured claim before the collateral were truly redeemed from the lien. [*FN:* See Terre Haute First Nat'l Bank v. Davis (*In re* Davis), 20 B.R. 212, 214 (C.D. Ill. 1982) (Baker, J.) (contrasting § 722 and UCC § 9−506).] Section 722 would then be identical to the mediocre rule of UCC section 9−506.

Yet section 722, by its terms, defines redemption as "paying the holder . . . the amount of the *allowed secured claim* . . . " [*FN:* See 11 U.S.C. § 722 (emphasis added).] Thus, if a secured creditor claims $100 and the collateral is worth a mere $80, the redemption is accomplished by paying the secured creditor $80, "the amount of the allowed secured claim." In effect, redemption presupposes that the $100 claim is bifurcated into two parts, with the lien on the collateral entirely null and void for the $20 deficit. The payment therefore extinguishes (or perhaps buys) the secured portion, and the collateral never again becomes collateral for the unsecured deficit.

In *Dewsnup v. Timm,* [*FN:* 502 U.S. 410 (1992).] the Supreme Court ruled that, for the purposes of section 506(d), "allowed secured claim" means $100. [*FN:* See id. at 417.] If this definition were to export itself into section 722, then the Bankruptcy Code's liberal redemption provision would revert back to the harsher UCC provision. The *Dewsnup* opinion, however, also made clear that, under section 506(a), the phrase "allowed secured claim" refers only to $80. Which of these two definitions applies to section 722? [*FN:* Justice Blackmun does not refer to § 722 in his opinion, except to say that the lower court had ruled that a debtor's use of § 506(d) to bifurcate an undersecured claim would turn § 506(d) into a redemption provision, thereby rendering § 722 useless. See id. at 414. Justice Scalia, in his dissent, spends some effort to show that permanent bifurcation by use of § 506(d) would not deprive § 722 of all turf. See id. at 428.]

There seems to be an unstated but universal agreement that, insofar as section 722 is concerned, "allowed secured claim" takes the meaning of section 506(a). In the above example, the debtor could redeem the collateral for $80. This in turn implies that the redemption rests upon a foundation of final bifurcation.

For this reason, Judge John Ninfo, in *In re Lombardi,* [*FN:* 195 B.R. 585 (Bankr. W.D.N.Y. 1996).] could rule that a junior secured claim might be valued at zero, for redemption purposes, where the senior secured party was under water. This opinion accords with the notion that the "allowed secured claim" takes on the meaning of section 506(a). Indeed, Judge Ninfo went too far in insisting that the redemption price was $10, to cover the secured party's cost of releasing the lien. The price of redemption should be the amount of the allowed secured claim. The $10 cost is no part of the allowed secured claim, when the secured party enjoys no equity cushion in the collateral. [*FN:* If an equity cushion existed, the secured party might claim the $10, if the contract commits the debtor to pay it. See 11 U.S.C. § 506(b). Absent the equity cushion, the $10 cost is not part of the secured party's allowed claim −− secured or unsecured.] Indeed, it is the secured party's affirmative duty to execute the proper release of the

security interest. [*FN:* See N.Y. Veh. & Traf. Law § 2121 (McKinney 1996).] Therefore, Judge Ninfo set the price−−which should have been zero−−at too high a level.

One case suggests that redemption does not imply a final bifurcation. In *In re Pipes,* [*FN:* 78 B.R. 981 (Bankr. W.D. Mo. 1987).] Judge Frank Koger ruled that redemption could occur even if a debt turned out later to be nondischargeable. [*FN:* See id. at 983.] This alone seems questionable because section 722 makes dischargeability of debt a precondition to section 722 redemption. [*FN:* See 11 U.S.C. § 722 (stating that individual debtor may redeem tangible personal property intended to be utilized mainly for "personal, family or household use" from lien securing dischargeable consumer debt).] It, then, appears that a court must find a debt dischargeable before redemption can proceed; redemption then should serve as res judicata as to the question of dischargeability, at least as far as the secured party is concerned. But, in discussing the effect of a later ruling that the secured claim is not dischargeable, Judge Koger wrote:

Obviously, if discharge is eventually denied to the debtor under Section 727; or if a debt secured by a non−purchase money, non−possessory security interest in household goods is held non−dischargeable, the rights of the creditor remain intact as to enforcement of the payment of the money due, and in the case of Section 727, remain intact in all aspects. [*FN:* Pipes , 78 B.R. at 983.]

This dictum could be interpreted to mean that a later denial of discharge repeals the bifurcation implicit in section 722. Such an implication should be rejected. Discharge has nothing to do with bifurcation. The former refers to the existence of unsecured debt. The latter identifies which claims encumber property. Discharge is an in personam consideration, while the finality of bifurcation is strictly in rem. [*FN:* See Johnson v. Home State Bank, 501 U.S. 78, 84 (1991) (Marshall, J.) (noting that bankruptcy discharge "extinguishes only one mode of enforcing a claim −− an in personam action"); *In re* Jones, 152 B.R. 155, 177 (Bankr. E.D. Mich. 1993) (stating that 11 U.S.C. § 506(a) allows debtor to discharge in personam liability of post−bifurcation unsecured claim).] Therefore, prior to authorizing a redemption, a court should find that the debt secured by collateral is dischargeable. Such a ruling should be res judicata as to the secured creditor and should not later be revoked. Even if it could be revoked, bifurcation under section 722 is final. The failure of discharge would make the former secured party an unsecured creditor for the unpaid deficit, but this same creditor would have no security interest on the collateral that the debtor has redeemed. At best, the creditor could obtain a judicial lien through the ordinary judicial process against the redeemed property. [*FN:* One bifurcation issue could prove troublesome to a secured creditor. If two debtors jointly sign a security agreement and jointly own collateral, but only one debtor is bankrupt, the bankrupt debtor may redeem the collateral up to her joint interest in the collateral. See, *e.g.* , Sprecher v. Bank of Yates City (*In re* Sprecher), 65 B.R. 598 (Bankr. C.D. Ill. 1986) (Altenberger, J.). The secured party is then left only with a security interest on the nonbankrupt debtor's half. Obviously, this development decreases the value of the collateral to the secured party and incidentally lowers the redemption price the bankrupt debtor has to pay −− on the assumption that a buyer at a foreclosure sale would pay less than 50% of a thing's worth if the buyer remains a cotenant of the thing with some stranger. See id. at 601. Because of bifurcation, the secured party cannot claim to reach the whole of the collateral through the part ownership of the nonbankrupt debtor. See id.]

D. Valuations

Redemption ultimately requires a judicial valuation of collateral. Valuation in turn requires standards. [*FN:* See David Gray Carlson, Secured Creditors and the Eely Character of Valuations in Bankruptcy , 41 Am. U. L. Rev. 63 (1991); see also Robert M. Lawless & Stephen P. Ferris, Economics and the Rhetoric of Valuation , 5 J. Bankr. L. & Prac. 1 (1995).] Two different Bankruptcy Code provisions arguably apply to guide valuations in the context of redemption. First, since allowed secured claims are at stake, section 506(a) might apply. That section states:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . 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. [*FN:* 11 U.S.C. § 506(a).]

As we have seen, however, some have suggested that this provision can only govern property "of the estate." Property that the trustee has abandoned or that the debtor has exempted is not "of the estate." [*FN:* See supra notes 54−55 and accompanying text.]

Another possible standard is section 522(a)(2), which applies to exempt property. According to this section:

"value" means far market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate. [*FN:* 11 U.S.C. § 522(a)(2).]

This definition, however, is only valid "[i]n this section"−−meaning section 522. The definition might not be exportable to section 722 redemption. In any case, redemption applies to nonexempt property that the trustee has abandoned. There is no good reason to use section 522(a)(2)'s definition for nonexempt property.

In *General Motors Acceptance Corp. v. Bell (In re Bell)*, [*FN:* 700 F.2d 1053 (6th Cir. 1983).] Judge Robert Krupansky, in dictum, suggested that section 506(a) should be the guiding beaconof valuation, in spite of the above problems. [*FN:* See id . at 1055 n.3 (citing First Bank & Trust Co. v. Hart (*In re* Hart), 8 B.R. 1020, 1022 n.2 (N.D.N.Y. 1981) (MacMahon, J.)); see also *In re* Jones, 152 B.R. 155, 186 n.40 (Bankr. E.D. Mich. 1993) (Spector, J.).] This implicates redemption in a debate currently raging amongst the courts: should the market value represent what the secured party would have realized in a foreclosure sale under state law, or should the debtor's actual use of the collateral be taken into account. Some courts think that the first sentence of section 506(a) limits the secured party to the liquidation (or wholesale) value of the collateral. Others think that the second sentence requires a higher replacement value, because the debtor, intending to use the collateral, would otherwise have to replace it. [*FN:* The 5th Circuit recently debated this question with nine judges favoring the privilege of § 506(a)'s first sentence −− lading to wholesale value. See Associates Commercial Corp. v. Rash (*In re* Rash), 90 F.3d 1036 (5th Cir. 1996) (King, J.) (en banc). Six judges favored replacement value on the strength of § 506(a)'s second sentence. See id. at 1061.]

In the context of redemption, some courts have set the redemption at wholesale value. [*FN:* See *In re* Penick, 170 B.R. 914, 917 (Bankr. W.D. Mich. 1994) (Stevenson, J.); Redding v. Signal Consumer Discount Co. (*In re* Redding), 34 B.R. 971, 973 (Bankr. M.D. Pa. 1983) (Woodside, J).] Other courts have set the redemption price at an even lower amount−−the amount a secured party would take away from a foreclosure sale after sales expenses are covered. [*FN:* See *In re* Walker, 173 B.R. 512, 516 (Bankr. M.D.N.C. 1994) (Stocks, J.) (deducting cost of removing fixtures from secured claim); see also Pierce v. Industrial Savs. Co. (*In re* Pierce), 5 B.R. 346, 347 (Bankr. D. Neb. 1980) (Crawford, J.) (declaring intent of § 722 is to put creditor in same position it would have been in if allowed to repossess).] Such a standard need not imply a distress auction; [*FN:* See *In re* Waters, 122 B.R. 298, 301 (Bankr. W.D. Tex. 1990) (Clark, J.) (expressing concern that such standard would serve as inducement for debtors to file for bankruptcy and that consumer credit would dry up as consequence).] rather, it might imply what the UCC refers to as a "commercially reasonable sale." [*FN:* See *In re* Ridner, 102 B.R. 247, 249 (Bankr. W.D. Okla. 1989).] This succeeds in putting the creditor in the same position as she would have been if the foreclosure sale went forward, a criterion strongly supported by the legislative history of the 1978 Bankruptcy Code. According to the legislative history:

Under [section 722], the debtor may redeem from a secured creditor property that would be exempt in the absence of the security interest, or property that the trustee abandons, if the debtor pays the secured creditor the allowed amount of the creditor's secured claim. This right amounts to a right of first refusal on a foreclosure sale of the property involved. *It allows the debtor to retain his necessary property and avoid high replacement costs, and does not prevent the creditor from obtaining what he is entitled to under the terms of his contract*. [*FN:* H. Rep. No. 95−595, at 127 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5913 (emphasis added).]

At least one court has criticized this standard because, although it is supported by a legislative history that wished to save debtors the expense of replacing the redeemed item, it nevertheless served as an inducement for debtors to file for bankruptcy just to write down their debts by the amount of transaction costs of a sale. [*FN:* See Penick , 170 B.R. at 917.]

In defining the standard of commercially reasonable sale, Judge Leif Clark, in *In re Waters,* [*FN:* 122 B.R. 298 (Bankr. W.D. Tex. 1990) (Clark, J.).] refused to increase the redemption price because the secured party was a used furniture seller that could obtain a retail price. [*FN:* See id. at 300−01 (finding that debtor is permitted to redeem property at value substantially equivalent to price yielded by commercially reasonable sale).] Judge Clark pointed out that a retail sale involves the overhead of a sales force and show room, the cost of a warranty and of secured financing offered to buyers. These expenses had to be subtracted in order to obtain the redemption price under section 722. Instead of the commercially reasonable disposition, Judge Clark chose a price that represented what the secured party would have turned over to an owner of furniture who consigned it to the secured party for sale−−a lesser amount. [*FN:* See id. at 303.]

The most pro−creditor courts insist on replacement value of the item−−though reduced by the overhead, sales commissions, and profit. [*FN:* See McQuinn v. Dial Fin. Co. (*In re* McQuinn), 6 B.R. 899, 900 (Bankr. D. Neb. 1980) (Crawford, J.) (determining replacement value as retail value less dealer's overhead, salesman's commissions and dealer's profit).] This, of course, reduces replacement value into something resembling wholesale value. [*FN:* See id. at 900 (suggesting calculation for replacement value); see also Steven L. Pottle, Note, Bankruptcy Valuation Under Selected Liquidation Provisions , 40 Vand. L. Rev. 177, 220 (1987) (noting that replacement value minus commissions and dealer profit equals wholesale value).] At least one court has charged what the debtor would have to pay a willing seller to buy the collateral. This approach puts the secured party in a better position than she would be in a foreclosure posture, because it gives the secured party those amounts saved because a foreclosure sale was unnecessary. [*FN:* See Catholic Credit Union v. Siegler (*In re* Siegler), 5 B.R. 12 (Bankr. D. Minn. 1980) (Owens, J.) (valuation set at liquidation value plus two−thirds of difference between liquidation and retail value).]

Often, valuation of property the debtor will redeem is not contested by secured creditors because the amount at stake does not warrant the lawyer's time to show up in court. As a result, debtors have moved to value collateral at impossibly low amounts hoping that the motion will not be contested. [*FN:* See *In re* Ridner, 102 B.R. 247, 250 (Bankr. W.D. Okla. 1989) (Lindsey, J.) (discussing need to discourage insupportable low valuations).] To combat these bad faith valuations, Judge Paul Lindsey imposed Rule 11 sanctions on the debtor's lawyer of 50 percent of the difference between the debtor's bad faith value and the "true" value imposed by the court. [*FN:* See id. at 250.]

E. Timing of Valuation

Valuation is a function of time, [*FN:* See generally David Gray Carlson, Time, Value, and the Rights of Secured Creditors in Bankruptcy, or, When Does Adequate Protection Begin? , 1 J. Bankr. L. & Prac. 113 (1992) (explaining effect of time on valuation process).] and so one must consider as of when the collateral is valued. As we shall see, section 521(2) more or less requires a debtor to declare an intention to redeem within 30 days of bankruptcy and to perform within forty−five days after that. [*FN:* See supra note 23−24 and accompanying text.] The amount of time implied in section 521(2) is therefore perhaps economically insignificant. Still, automobiles crash and home furnishings might be involved in accidents, in which case, substantial depreciation might manifest itself.

In the previous section, two sources of valuation standards were identified−−section 506(a) and section 522(a)(2). Neither applied to redemption by their terms. It is significant that section 506(a) notoriously sets no timing rule. But section 522(a)(2) does−−the time of the bankruptcy petition. [*FN:* Section 522(a)(2) also specifies that, when exempt property is not initially property of the estate, the timing rule should be the time at which the bankruptcy estate acquired the exempt item (prior to the debtor's actual exemption of it). This supplemental rule contemplates a bankruptcy trustee's postpetition recovery of exempt property under an avoidance power. See 11 U.S.C. § 522(g), (h) (1994).] In any case, courts seem to favor section 506(a) as the governing rule in redemption cases, in spite of its technical inapplicability. That section sets no timing rule. Some of the cases that have addressed the timing issue have valued collateral as it existed on the day of the bankruptcy petition. [*FN:* See Taylor v. Albany Gov't Employees Fed. Credit Union (*In re* Taylor), 146 B.R. 41, 43 n.3 (M.D. Ga. 1992) (Fitzpatrick, J.) (requiring value be assessed at time petition is filed), rev'd on other grounds sub nom. Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1517 (11th Cir. 1993); Kinser v. Otasco Inc. (*In re* Kinser), 17 B.R. 468, 469 (Bankr. N.D. Ga. 1981) (Norton, J.) (holding that any redemption must be for fair market value as of time petition is filed);*In re* Adams, 2 B.R. 313, 314 (Bankr. M.D. Fla. 1980) (Proctor, J.) (declaring that in light of creditors reasonable expectations relevant date for valuation is day petition is filed).] Such a timing rule makes the debtor responsible for any damage done to the collateral after the bankruptcy petition has been filed. [*FN:* See*In re* King, 75 B.R. 287, 290 (Bankr. S.D. Ohio 1987) (Sellers, J.) (implying that needed repairs which caused collateral's value to decline since petition was filed was debtor's responsibility).] It accords with at least one theory of adequate protection that the secured party has a right to it once the bankruptcy proceeding has commenced. [*FN:* See Carlson, supra note 93, at 115−27.] A few other courts have adopted the rule of "here and now," thereby relieving the debtor of responsibility for depreciation between the bankruptcy petition and valuation. [*FN:* See King , 75 B.R. at 290; van Holt v. Commerce Bank of Bolivar (*In re* van Holt), 28 B.R. 577, 578 (Bankr. W.D. Mo. 1983) (Pelofsky, J.) (using time of hearing for valuation); Pierce v. Industrial Savs. Co. (*In re* Pierce), 5 B.R. 346, 347 (Bankr. D. Neb. 1980) (Crawford, J.) (noting that using filing date would place creditor in better position than it would have been had it repossessed in ordinary course).] Such a timing rule may not interact well with the secured party's right of adequate protection. Secured parties are supposed to be protected against postpetitiondepreciation. Yet courts are quite divided over when adequate protection rights begin. [*FN:* See Carlson, supra note 93, at 115−25 (discussing different approaches to determining when adequate protection rights commence).] Many courts believe that the secured party has no right to adequate protection unless she asks for it by moving to lift the automatic stay. [*FN:* See*In re* Hinckley, 40 B.R. 679, 681 (Bankr. D. Utah 1984) (Clark, J.) (requiring secured creditor to ask for adequate protection). See also Carlson, supra note 93, 142−43 (discussing cases requiring secured creditor to request adequate protection).] When no such request has been made, this theory of adequate protection requires that the secured party take the loss. [*FN:* See Carlson, supra note 93, at 115−25.] On the other hand, some courts think that the right to adequate protection is automatic. [*FN:* See, e.g, Lincoln Nat'l Life Ins. Co. v. Craddock−Terry Shoe Corp. (*In re* Craddock−Terry Shoe Corp.), 98 B.R. 250, 255 (Bankr. W.D. Va. 1988) (Anderson, J.) (providing that secured creditor is entitled to adequate protection from commencement of case); see also Carlson, supra note 93, at 142−44 (discussing cases which find adequate protection when petition is filed).] If such a theory is followed, the secured party may have a superpriority remedy against the bankruptcy estate for failed adequate protection. [*FN:* See Carlson, supra note 93, at 115−25.]

Even if a court believes that a secured creditor is entitled to adequate protection immediately upon the filing of a bankruptcy petition, courts often require that the section 507(b) superpriority for failed adequate protection be coupled with a showing that the depreciation expense benefited the estate within the meaning of section 503(b). [*FN:* See Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 865−66 (4th Cir. 1994) (Michael, J.); Smith v. Dairymen Inc. (*In re* Smith), 75 B.R. 365, 369−70 (W.D. Va. 1987) (Michael, J.);*In re* Plunkett, 191 B.R. 768, 780 (Bankr. E.D. Wis. 1995) (Clevert, C.J.);*In re* Ralar Distribs. Inc., 166 B.R. 3, 8−9 (Bankr. D. Mass. 1994) (Queenan, J.), aff'd sub nom. Baybank−Middlesex v. Ralar Distribs. Inc. (*In re* Ralar Distribs. Inc.), 182 B.R. 81 (D. Mass.), aff'd , 69 F.3d 1200 (1st Cir. 1995).] Where the debtor has *personally* banged up the collateral and caused extra amounts of depreciation, such a showing may be difficult to establish, because such depreciation has hardly benefited the bankruptcy estate. Therefore, a secured party might have a difficult time recovering on the theory that adequate protection of the collateral has not been provided.

II. Reinstatement of Security Agreements Compared

A. Lump Sum Redemption

Can an individual debtor redeem property through installment payments, or must redemption occur by livery of a single lump sum? When courts consider classic redemption under section 722, they tend to require a lump sum payment from the debtor. [*FN:* Some early cases asserted that § 722 authorizes redemption by installment. See van Holt v. Commerce Bank of Bolivar (*In re* van Holt), 28 B.R. 577, 578 (Bankr. W.D. Mo. 1983) (Pelofsky, J.) (permitting debtor to redeem collateral in installments, provided debtor complies with all other terms and conditions of underlying agreement and pays interest while redeeming);*In re* Carroll, 7 B.R. 907 (Bankr. D. Ariz. 1981) (Maggiore, J.) (permitting installments directly under § 722, provided interest on value of automobile was paid); Montgomery Ward & Co. v. Hall (*In re* Hall), 11 B.R. 3, 5 (Bankr. W.D. Mo. 1980) (Pelofsky, J.) (permitting redemption by installment).] In *Bell*, Judge Robert Krupansky ruled that only lump sum paymentscould be used to redeem collateral. [*FN:* See General Motors Acceptance Corp. v. Bell (*In re* Bell), 700 F.2d 1053, 1058 (6th Cir. 1983) (Krupansky, J.). In Lowry Federal Credit Union v. West , 882 F.2d 1543 (10th Cir. 1989), Judge Moore distinguished Bell on the grounds that Bell dealt with redemption, and West dealt with an injunction preventing repossession by the secured party, so long as the debtor continued to meet payments required by the prepetition security agreement. See id. at 1547 n.7.] Judge Krupansky thought that, otherwise, the reaffirmation agreements described in section 524(c) would be reduced to an "exercise in legislative futility." [*FN:* See Bell, 700 F.2d at 1056; see also *In re* Edwards, 901 F.2d 1383, 1386−87 (7th Cir. 1990) (Cudahy, J.) (declining to follow Lowry reasoning).] Furthermore, he observed that chapter 7 is ill equipped to supervise the installments, as the case may end before the last installment is due. [*FN:* See Bell , 700 F.2d at 1056; see also Hessling, supra note 4, at 331−33. Other courts reject the availability of chapter 13 as a reason why debtors should not retain collateral so long as the debtor meets the payments required under a prepetition security agreement. According to Judge John Butzner in Home Owners Funding Corp. of America v. Belanger (In re Belanger) , 962 F.2d 345 (4th Cir. 1992), "Chapter 13 envisions a new arrangement among the debtor and creditors, not a continuation of a contract to which the creditor and debtor have already agreed." See id. at 349. This may be true, but the installment idea is undoubtedly present in chapter 13, which undoubtedly becomes a powerful alternative to lump sum redemptions.]

When *Bell* is combined with the view that the automatic stay must always be lifted if there is no debtor equity and no reorganization, [*FN:* See 11 U.S.C. § 362(d)(2) (1994).] the secured party is empowered to repossess the collateral as soon as the court orders the stay to be lifted. Repossession under state law, of course, requires a default by the debtor. Typically, a security agreement defines a bankruptcy petition as an event of default. [*FN:* Bankruptcy ipso facto clauses "are based on the premise that a bankruptcy discharge causes a material change in the contract between lender and borrower." See *In re* Thomas, 186 B.R. 470, 474 (Bankr. W.D. Mo. 1995) (Federman, J.). For a review of the Bankruptcy Code's regulation of ipso facto clause, arguing that such a clause is valid when collateral is outside the jurisdiction of the bankruptcy court, see Ned W. Waxman, Redemption or Reaffirmation: The Debtor's Exclusive Means of Retaining Possession of Collateral in chapter 7 , 56 U. Pitt. L. Rev. 187, 199−201 (1994).] Whereas these "ipso facto" clauses are declared void in bankruptcy, [*FN:* See 11 U.S.C. § 541(c)(1)(B) (providing that any property interest of debtor becomes property of estate notwithstanding existence of ipso facto or bankruptcy provision).] they are or ought to be perfectly good under state law. [*FN:* In *In re* Weir, 173 B.R. 682 (Bankr. E.D. Cal. 1994), the security agreement did not have an ipso facto clause in it. See id. at 684. Meanwhile, the debtors had failed, per § 521(2), to indicate whether they would redeem, reaffirm or surrender, but they did indicate that they intended to remain current on the obligation. See id. The secured party did not wish to terminate the automatic stay because no default existed under state law. See id. Instead, the secured party sought to have the chapter and case "dismissed" as to itself only −− whatever that may have meant. See id. Judge Christopher Klein ruled that lifting the automatic stay is the sole remedy for violation of § 521(2) and therefore declined to "dismiss" the case as to the secured party. *In re* Weir , 173 B.R. at 693. Another case in which the security agreement contained no ipso facto clause is *In re* Thomas, 186 B.R. 470 (Bankr. W.D. Mo. 1995). In this case, Judge Arthur Federman ruled that the debtor had the option under Missouri law to cure the default by bringing the debt current, since the secured part had not taken action to "accelerate" the debt when payments were late. See id. at 477. Therefore, Judge Federman granted the debtor's motion to "reaffirm" the security agreement upon cure of the default. See id. at 477. This was not reaffirmation under § 524(c), since the secured party refused to cooperate. See id. at 476. Nor was it even reaffirmation within the meaning of § 521(2) since that latter section applies to consumer debtors and the debtors were farmers. See id. Rather, it was in the nature of a declaratory relief that, if certain payments were made, no defaults would exist under state law. See Thomas, 186 B.R. at 477. The debtors hoped the chapter 7 trustee would abandon the mortgaged premise back to them, and then they would just keep payments current on the mortgage. See id. at 472.]

B. Reinstatement

Although redemption under section 722 requires lump sum payments, at least two Circuit Courts of Appeals have permitted installment payments on quite a different theory. In these two circuits−−the Fourth and the Tenth−−debtors can, in effect, reinstate the security agreement over the opposition of the secured party. [*FN:* The seminal cases are Home Owners Funding Corp. of America v. Belanger (In re Belanger) , 962 F.2d 345, 348 (4th Cir. 1992) (Butzner, J.) and Lowry Federal Credit Union v. West , 882 F.2d 1543, 1547 n.7 (10th Cir. 1989) (Moore, J.). A 7th Circuit case hints that a bankruptcy court has discretion, but is not required, to follow the Lowry case. In *In re* Edwards , 901 F.2d 1383 (7th Cir. 1990), Judge Richard Cudahy remarked, " Lowry , of course, is distinguishable because here the bankruptcy court did not exercise its discretion to permit retention of collateral without reaffirmation." See id . at 1386. While he went on to criticize Lowry's view of § 521, he did not suggest that the Lowry injunction was contrary to law.] This is a privilege accorded debtors in reorganization. [*FN:* On reinstatement in reorganization, see David Gray Carlson, Rake's Progress: Cure and Reinstatement of Security Agreements Under the Bankruptcy Code , 13 Bankr. Dev. J. (1996) (forthcoming).] The reorganization chapters each have a provision specifically authorizing reinstatement. [*FN:* See 11 U.S.C. § 1124, 1225(b)(5), 1325(b)(5).] chapter 7 has no such provision.

The history of this policy begins with *Riggs National Bank v. Perry (In re Perry)*, [*FN:* 729 F.2d 982 (4th Cir. 1984).] where a secured party moved to lift the automatic stay in order to repossess an automobile based on a lack of adequate protection with regard to the collateral. [*FN:* See id. at 983−84.] Judge Albert Bryan implied that, so long as the debtor met the installment payments, the secured party was adequately protected. [*FN:* See id.] This ruling basically guaranteed the debtor the right to keep the car in exchange for installment payments. Judge Bryan conceded that a choice must be made eventually between reaffirming the security agreement under section 524(c) and redeeming the property under section 722. [*FN:* See id. at 986.] The deadline for this choice, he thought, was the granting or denial of discharge, because at that time the automatic stay lapses. [*FN:* See Riggs , 729 F.2d at 986 (citing 11 U.S.C. § 362(c)(2)(C)). Some courts have denied that grant or denial of discharge is the deadline for redemption. See infra note 228 and accompanying text.] He did notdecide, however, whether section 722 redemptions might be accomplished by installment payments. But, in the meantime, the installment payments provided for in the security agreement constituted adequate protection and these payments reduced the secured claim over time. [*FN:* See Riggs , 729 F.2d at 984 (noting that because defendant was making payment plaintiff was not in any more precarious position than customary).]

If the installment payments constitute adequate protection, the secured party cannot obtain the removal of the automatic stay under section 362(d)(1) which authorizes removal "for cause, including the lack of adequate protection." But what of section 362(d)(2)? [*FN:* 11 U.S.C. § 362(d)(2).] This latter provision requires removal if "(A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization." [*FN:* See id.] We are in the realm of overencumbered collateral in chapter 7 liquidations. Therefore, in *Riggs*, section 362(d)(2) should have been a valid alternative ground for lifting the automatic stay. Extraordinarily, Judge Bryan held that section 362(d)(2) does not apply to security interests on personal property:

While this clearly applies to real property mortgage foreclosures, we cannot believe the Congress intended that we modify a section 362(a) stay every time the value of a debtor's personal property drops below the balance due on the outstanding loan. [*FN:* Riggs , 729 F.2d at 985.]

Judge Bryan cited the legislative history, [*FN:* See id.] which in illustrating the mechanics of section 362(d)(2), happened to assume that the collateral might be real estate. [*FN:* See id. (citing S. Rep. No. 95−989, at 5 (1978), reprinted in 1978 U.S.C.C.A.N., 5787, 5791).] From this he drew the dubious lesson that Congress intended that section 362(d)(2) could never apply in personal property cases. [*FN:* See id. at 987−88 (Widener, J., concurring and dissenting). Judge Emory Widener dissented because the district court had negated the bankruptcy court's order that the debtor continue to stay current on installment payments related to the car. In short, he agreed with the majority that § 362(d)(2) is not of a binding nature. See id.] Taken seriously, this remark implies that a bankruptcy trustee may always retain personal property collateral even though no reorganization is afoot and even though the collateral is overencumbered.

The automatic stay dissolves of its own accord once the trustee abandons overencumbered collateral [*FN:* See 11 U.S.C. § 362(c)(1).] and once a discharge is granted. [*FN:* See id. § 362(c)(2)(C). If property is abandoned and the discharge is not yet granted, it would appear that the automatic stay still continues, because § 362(c)(5) prevents "any act to create, perfect, or enforce against property of the debtor any lien . . . " In contrast, § 362(c)(1) eliminates the stay as to property of the estate , but does not eliminate the stay as to property of the debtor .] Therefore, *Riggs*benefits a debtor only during the pendency of the automatic stay. [*FN:* See Henderson, supra note 44, at 164. According to Federal Rule of Bankruptcy Procedure 2003(a), a creditors' meeting should be set within forty days of the petition −− probably a reference to Noah in Genesis . After this meeting, creditors have sixty days to object to discharge. The discharge is supposed to be granted promptly thereafter, unless an adversary proceeding has begun over the discharge. See Fed. R. Bankr. P. 4004(c). Of course, throughout the process the court has authority to extend the time limits, and so the debtor has a certain incentive to stall before actually obtaining the discharge. If the debtor succeeds, the benefit of Riggs can be extended.] The secured creditor in *Riggs* had argued that the automatic stay should be lifted simply because the bankruptcy proceeding itself was an event of default under the security agreement. [*FN:* See Riggs , 729 F.2d at 984 (invalidating clause of sales agreement that would cause debtor to be in default if they filed for bankruptcy).] Judge Bryan quite properly ruled that default could never, standing alone, serve to justify lifting the stay. [*FN:* See id. at 984−85.]

Seizing upon this holding, the debtor in *Wilson v. Colonial American National Bank (In re Wilson)*, [*FN:* 97 B.R. 285 (Bankr. W.D. Va. 1989).] claimed that *Riggs* stands for the proposition that defaults based on bankruptcy petitions (ipso facto clauses) were entirely illegal even outside of bankruptcy. [*FN:* See id. at 287.] On this view, once the automatic stay dissolved of its own accord, the security agreement had to be viewed as not in default. Accordingly, a debtor could retain collateral so long as she continued to meet the payments under the contract. Judge Ross Krumm, however, refused to extend *Riggs* beyond the pendency of the automatic stay's natural life, [*FN:* See Wilson , 97 B.R. at 287−88. Judge Widener's concurring opinion in Riggs specifically stated that, so far as he was concerned, the majority opinion did not imply that the ipso facto clause was invalid under state law. See Riggs , 729 F.2d at 987.] and so the secured party was presumably free to repossess the collateral as soon as the automatic stay had dissipated. [*FN:* Eaton v. First American Bank , 134 B.R. 178 (E.D. Va. 1991), is probably in accord with Wilson . In Eaton , the debtor had obtained some sort of court order stating that a secured party could not repossess the collateral so long as the debtor stayed current on payments required by a prepetition security agreement. See id. at 178. Judge Rebecca Beach Smith did not say whether the order purported to extent beyond the natural life of the automatic stay. She reversed, however, on the theory that the debtor was attempting to redeem by installments which was not allowed. See id. at 180−81. She did say that, if the security agreement was not in default, the debtor could retain the collateral but declined to rule on whether such a default exists. Riggs was cited for the proposition that, if the security agreement was not in default, the debtor could stay in possession −− an obvious state−law proposition. See id. at 179 n.2.]

Riggs, however, may have been extended beyond its narrow scope in *Home Owners Funding Corp. of America v. Belanger (In re Belanger).* [*FN:* 962 F.2d 345 (4th Cir. 1992).] In *Belanger*, a secured party tried to force a debtor to declare whether the debtor, who wished to retain collateral, would redeem it or would negotiate a reaffirmation agreement with the secured party under section 524(c). [*FN:* See id. at 346. This was done under the jurisdiction of § 521(2), added by Congress in 1984, after the Riggs decision was handed down. See discussion infra Part III.] Judge A. Thomas Small read *Riggs* asholding that ipso facto clauses were not valid−−the very extension Judge Krumm refused to make. [*FN:* See *In re* Belanger, 118 B.R. 368, 369 n.1 (Bankr. E.D.N.C.), aff'd sub nom. Home Owners Funding Corp. of Am. v. Belanger, 128 B.R. 142 (E.D.N.C. 1990), aff'd , 962 F.2d 345 (4th Cir. 1992). Actually, the security agreement was not introduced into evidence. See id. Judge Small simply observed that, if the security agreement contained an ipso facto clause, it was utterly invalid. See id. Most security agreements, however, can be counted on to have ipso facto and acceleration clauses. Waxman, supra note 111, at 187 n.2.] Judge Small then granted a discharge, which would have ended the automatic stay. Under a narrow reading of *Riggs*, the secured party should have been able to repossess the collateral, provided the security agreement contained an ipso facto clause.

On appeal, Judge John Butzner affirmed, emphasizing that the debtor could retain the collateral if not in default. [*FN:* See Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 347 (4th Cir. 1992).] He did not indicate *whether* the debtor was in default. [*FN:* See id. at 348.] But in affirming Judge Small's opinion, Judge Butzner could be taken as ruling that ipso facto clauses are invalid even outside bankruptcy. [*FN:* See id. at 347.]

This same view was expressly taken in *Lowry Federal Credit Union v. West,* [*FN:* 882 F.2d 1543 (10th Cir. 1989).] where Judge John P. Moore upheld an injunction preventing a secured party from repossessing collateral so long as the debtor made current payments on its prepetition security agreement. [*FN:* See id. at 1547.] This order specifically extended beyond the natural life of the automatic stay. [*FN:* See id. at 1543.] Although Judge Moore denied that he was declaring the security agreement to be free of default, in spite of the presence of an ipso facto clause, [*FN:* See id. at 1546 n.5.] no other interpretation seems available to explain why the debtor is entitled to an injunction that endures beyond the termination of the automatic stay. [*FN:* See *In re* Laubacher, 150 B.R. 200, 203 (Bankr. N.D. Ohio 1992) (Williams, J.) (following Lowry reasoning in real estate case); see also *In re* Thomas , 186 B.R. 470, 473−77 (Bankr. W.D. Mo. 1995) (Federman, J.) (stating in dictum that in that agreement had no ipso facto clause); *In re* Parlato, 185 B.R. 413, 417 (Bankr. D. Conn. 1995) (Krechevsky, J.) (denying secured party's motion for order to compel reaffirmation, redemption or surrender and agreeing with Lowry's reasoning).] Judge Moore also hinted that no evidence existed that the collateral would depreciate faster than the amortization rate of the debt; [*FN:* See Lowry , 882 F.2d at 1546 (reasoning there was nothing in record indicating depreciation would occur particularly rapidly).] such evidence, if it existed, might therefore count as an argument against such an injunction in the 10th Circuit.

The *Lowry* holding should be compared to the treatment of an executory contract with an ipso facto clause in it. According to section 365, a trustee can assume and cure an executory contract, in spite of the presence of an ipso factoclause. [*FN:* See 11 U.S.C. § 365(b)(1) (1994) (allowing trustee to assume executory contract provided she cure but no cure required for breach of ipso facto clause).] A trustee may also sell the executory contract to a third party for value. [*FN:* See id. § 365(f).] Once this occurs, the ipso facto clause cannot be asserted against the assignee as an excuse for the contract creditor not to perform. [*FN:* See id. § 365(f)(3).] *Lowry* in effect provides the same treatment for security agreements, even though they are "executed," not "executory," contracts. [*FN:* See Lowry , 882 F.2d at 1546; see also Northwest Airlines Inc. v. Klinger (*In re* Knutson), 563 F.2d 916, 917 (8th Cir. 1977) (per curiam) (defining "executory" contract as "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other").] Thus, *Lowry* allows a debtor to *assume* and *cure* a security agreement over the opposition of a secured creditor, a right the Bankruptcy Code expressly gives to debtors in reorganization. [*FN:* See 11 U.S.C. § § 1124, 1222(b)(3), 1222(b)(5), 1322(b)(3), 1322(b)(5) (allowing debtor to provide for curing or waiving of default under chapters 11, 12 and 13 respectively).] A key distinction would exist, though, between classic cure of a loan agreement in reorganization and the theory that *Lowry* sets forth. In reorganization cases, if a contract is cured and reinstated, it is not discharged. [*FN:* See, e.g., General Elec. Mortgage Corp. v. South Village Inc. (*In re* South Village Inc.), 25 B.R. 987, 998 (Bankr. D. Utah 1982) (Mabey, J.) (allowing debtor to cure and reinstate contract leaving creditor unpaired).] The debtor would be personally liable on it if the contract later goes into default. [*FN:* See 11 U.S.C. § § 1228(a)(1), 1228(c)(1), 1328(a)(1), 1328(c)(1).] The *Lowry* theory should have no such implication. The debtor is discharged, and the secured party's repossession is simply enjoined so long as the debtor stays current on the loan agreement. If the debtor defaults, the secured party has no in personam remedies against the debtor, but the collateral itself is collateral for the full prepetition amount of the claim.

Professor Joann Henderson has suggested that waiver and estoppel support the *Lowry* result. That is, by voluntarily accepting payments on the installment contract, a secured party admits that the security agreement is not in default. [*FN:* See Henderson, supra note 44, at 168−69; contra *In re* Whitaker, 85 B.R. 788, 794 n.13 (Bankr. E.D. Tenn. 1988).] *Lowry*, however, goes further than an estoppel theory, because the *Lowry* injunction can prevent repossession even if the creditor refuses to accept any payment. Henderson further suggests that *Lowry* replicates what a debtor might do surreptitiously anyway. Suppose a debtor filing for bankruptcy simply does not schedule a secured party claiming collateral. So long as the secured party remains in the dark, the debtor might keep current on installments, using postpetition earnings, thereby retaining the collateral. [*FN:* See Henderson, supra note 44, at 172.] If a debtor is likely to achieve this result by stealth, why not permit the debtor to accomplish the same end in the light of day?

Because *Lowry* establishes a right to assume and cure, it should be apparent that the entire claim of an undersecured party must be paid−−not just the post−bifurcationsecured claim, based upon a valuation of the collateral. [*FN:* See*In re* Harper, 143 B.R. 682, 684−85 (Bankr. W.D. Tex. 1992) (Kelly, C.J.) (suggesting that, where installment plan is allowed in chapter 7, debtor would have to pay both secured and unsecured deficit claim because such plan is not redemption).] This may be compared to section 722, which allows for the redemption of collateral if the amount of the "allowed secured claim" is paid.

It follows, then, that *Riggs* and *West* do not really deal with redemption under section 722 at all. They do, however, deal with the automatic stay, with the validity of ipso facto clauses or with specific injunctions that are separate from the automatic stay.

C. Chapter 13 and chapter 20

In *General Motors Acceptance Corp. v. Bell (In re Bell)*, [*FN:* 700 F.2d 1053 (6th Cir. 1983) (Krupansky, J.).] Judge Robert Krupansky ruled that redemption under section 722 must be accomplished by a lump sum payment. Ominously, he also suggested:

Debtors posit that preclusion of installment redemption will precipitate situations wherein a chapter 7 debtor will possess no viable method of retaining possession of secured collateral. However, a debtor may avoid such an untenuous position by initially filing a petition for bankruptcy under chapter 13 or converting an existing chapter 7 proceeding to a chapter 13 proceeding. [*FN:* Id . at 1057.]

This passage could be read as inviting debtors to file for chapter 13 with no intention of *completing* the plan−−only completing enough payments to disencumber collateral before converting to chapter 7. [*FN:* See Carlson, supra note 11, at 51.] Conversion to chapter 7 is a chapter 13 debtor's right [*FN:* See 11 U.S.C. § 1307(a) (1994).] −−though courts may find offense and cause to discipline debtors who so abuse chapter 13. [*FN:* See id . § 707.]

Another possibility, however, presents itself to debtors−−the chapter 20 option. Chapter 20 refers to a chapter 7 proceeding coupled by a quick chapter 13 filing. These two chapters are thus wittily summed together to produce "chapter 20."

According to this strategy, the chapter 7 proceeding results in a debtor's discharge from any unsecured deficit claim of a secured party. The collateral is then abandoned to the secured party, who is now a nonrecourse creditor. Before the foreclosure sale, however, the debtor files the chapter 13 plan. Under a chapter 13 plan, the debtor may have the collateral valued (as in redemption). The debtor maythen pay that value to the secured party over time. [*FN:* See id. § 1325(a)(5)(B)(ii).] chapter 13 plans may last three (and with court permission, up to five) years. [*FN:* See id. § § 1222(d), 1322(d).] Of course, the debtor must qualify for chapter 13, by having a regular income, unsecured debts of less than $250,000 and secured debts of less than $750,000. [*FN:* See id. § 109(e).]

chapter 20 has received an endorsement of sorts by the Supreme Court in *Johnson v. Home State Bank*. [*FN:* 501 U.S. 78 (1991).] In this case, the collateral was a home. After the mortgage was changed into a nonrecourse claim in chapter 7, the debtor filed for chapter 13 and proposed to retire the mortgage (for the value of the house) over time. [*FN:* The court even permitted no principal payments and a balloon payment at the end of the plan. See id. at 81.] The creditor, inter alia, protested that sequential proceedings were unfair. But, wrote Justice Thurgood Marshall:

We disagree. Congress has expressly prohibited various forms of serial filings. *See, e.g.,* 11 U.S.C. õ 109(g) (no filings within 180 days of dismissal); õ 727(a)(8) (no chapter 7 filing within six years of a chapter 7 or chapter 11 filing); õ 727(a)(9) (limitation on chapter 7 filing within six years of chapter 12 or chapter 13 filing). The absence of a like prohibition on serial filings of chapter 7 and chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions, convinces us that Congress did not intend categorically to foreclose the benefit of chapter 13 reorganization to a debtor who previously has filed for chapter 7 relief. [*FN:* See id. at 87.]

Justice Marshall went on, however, to suggest that the chapter 13 plan had to be founded in good faith, [*FN:* 11 U.S.C. § 1325(a)(3) ("the plan has been filed in good faith and not by any means forbidden by law").] leaving open the possibility that crude chapter 20 strategies might still fall apart. Some courts have found that mere ability to achieve the chapter 13 plan proves that it is in good faith. [*FN:* See, e.g., Society Nat'l Bank v. Barrett (*In re* Barrett), 964 F.2d 588 (6th Cir. 1992) (Martin, J.); see generally Henderson, supra note 44, at 173−80.] To be distinguished is the slightly different question of whether the chapter 13 *petition* (not the plan) was filed in good faith. Some courts seem open to the chapter 20 strategy in general. [*FN:* See*In re* Manderson, 121 B.R. 617 (Bankr. N.D. Ala. 1990) (Wright, J.).] It has been suggested that sequential petitions are not *per se* bad faith, per *Johnson*, but that they are *evidence* of bad faith and might help justify dismissal. [*FN:* See Blatnick v. Sanders (*In re* Sanders), 198 B.R. 326, 329 (Bankr. N.D. Cal. 1996) (Bowie, J.);*In re* Herrera, 194 B.R. 178, 187 (Bankr. N.D. Ill. 1996) (Squires, J.).] It has also been suggested that good faith is *never* grounds to dismiss a bankruptcypetition−−rather, it is grounds only to reject a plan or lift the automatic stay for "cause." [*FN:* See*In re* Victoria Ltd. Partnership, 187 B.R. 54 (Bankr. D. Mass. 1995) (Queenan, J.).]

The greatest utility of the chapter 20 strategy had been with regard to home mortgages. Thus, a home might be "redeemed" for its value in chapter 13. Section 1322(b)(2) prevents the modification of claims secured by home mortgages. A prominent school of thought held that, while the "secured claim" could not be modified, the unsecured deficit (discharged in the earlier chapter 7 case) certainly could. This premise was destroyed by the Supreme Court in *Nobelman v. American Savings Bank*, [*FN:* 508 U.S. 324 (1993) (Thomas, J.).] which held that the entire mortgage debt had to be paid−−not just the value of the house. [*FN:* See Carlson, supra note 11, at 14−16.] Nevertheless, chapter 20 remains a viable alternative to redeem personal property on the installment plan. Thus, even if a court refuses a *Lowry*−style injunction unilaterally reinstating the security agreement, [*FN:* See supra notes 114−159 and accompanying text.] a chapter 20 strategy might achieve largely the same thing.

III. Section 521(2) and its Effect

In 1984, Congress added section 521(2) to the Bankruptcy Code with the idea of forcing the debtor either to *redeem* or *settle* with the secured party through a postpetition "reaffirmation" agreement. [*FN:* According to § 521(2): if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate −− (A) within thirty days after the date of the filing of a petition under chapter 7 . . . or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property. (B) within forty−five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty−five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and (C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title. 11 U.S.C. § 521(2) (1994).] Section 521(2) requires a consumer debtor to file, within thirty days of bankruptcy, a statement of intent to retain or surrender [*FN:* See *In re* Logan, 124 B.R. 729, 735 (Bankr. S.D. Ohio 1991) (Cole, J.) (reasoning that where debtor's ex−husband has taken collateral, debtor has no duty to get it back so intention to surrender can be effectuated);*In re* Bayless, 78 B.R. 506, 511 (Bankr. S.D. Ohio 1987) (Waldron, J.) (finding that loss of possession did not excuse debtor's failure to file statement of intent); cf. *In re* McKinney, 199 B.R. 43, 45−46 (N.D. Ill. 1996) (where debtor did not possess collateral at time of bankruptcy petition there was no need to file under § 521(2)).] collateral. [*FN:* See 11 U.S.C. § 521(2)(A).] If the former, the debtor must state her intention, "ifapplicable," to redeem the property under section 722 or reaffirm an agreement with the creditor under section 524(c)−−a process which requires the secured party to agree. [*FN:* See*In re* Edwards, 901 F.2d 1383, 1386 (7th Cir. 1990) (Cudahy, J.); General Motors Acceptance Corp. v. Bell (*In re* Bell), 700 F.2d 1053, 1056 (6th Cir. 1983) (Krupansky, J.).] If the debtor chooses to surrender or retain the property, the debtor has forty−five additional days to execute that intention. [*F*N: See 11 U.S.C. § 521(2)(B). Thus, where the debtor chooses to surrender the collateral, a creditor cannot force an earlier surrender than the forty−five days legislated in § 521(2)(B). See *In re* Grace, 85 B.R. 464, 466−67 (Bankr. S.D. Ohio 1988) (Seller, J.). The debtor has a right to retain the collateral for the full 45 day period regardless of a failure to file a statement of intention or a failure to surrender the collateral. See id. at 466;*I*n re Simpson, 147 B.R. 14, 16 (Bankr. E.D.N.C. 1992) (Small, J.) (holding debtor not accountable under § 521(2)(B) for costs arising from alleged failure to fulfill her intention until full 45 day period had elapsed).] All time periods are capable of being extended by the court. [*FN:* Fed R. Bankr. P. 9006(b)(1). Rule 9006(b)(1) allows the court, for cause, discretion to extend any time period specified by the bankruptcy rules before expiration of the period of after expirations of the period, where failure to act was the result of excusable neglect. See id.] If the debtor files the proper statement of intent, the statement itself serves as a reason not to lift the automatic stay upon motion of the secured party. [*FN:* Cf. CCNB Bank v. Elicker (*In re* Elicker), 100 B.R. 180, 183 (Bankr. M.D. Pa. 1989) (Woodside, J.) (lifting stay because no statement of intent was filed); but see Logan , 124 B.R. at 734 (suggesting that appeal to trustee and order to force action by trustee was condition precedent to lifting stay). In*In re* McNeil , 128 B.R. 603, 608 (Bankr. E.D. 1991), Judge David Scholl ruled that failure to redeem or reaffirm within forty− five days, per § 521(2)(B), was not grounds to lift automatic stay as those options do not exhaust the debtor's menu for keeping the collateral. As to whether these options are exclusive, see infra notes 202−09 and accompanying text.]

Section 521(2), by its terms, has been taken to imply that its effect is limited to chapter 7 bankruptcies. [*FN:* See Hessling , supra note 4, at 363 (stating that § 521(2) applies only in chapter 7 cases).] Thus, the statement of intent must be filed "within thirty days after the date of the filing of a petition under chapter 7 . . . or on or before the date of the meeting of creditors, whichever is earlier." [*FN:* 11 U.S.C. § 521(2)(A).]

Oddly, a few chapter 13 references to section 521(2) exist. Section 1302(b)(1) [*FN:* *Id.* § 1302(b)(1).] requires a chapter 13 trustee to perform the duties listed in section 704(3). [*FN:* See id.] Section 704(3), in turn, requires the trustee to "ensure that the debtor shall perform his intention as specified in section 521(2)(B)." [*FN:* See id. § 704(3).] Section 1307(c)(10) [*FN:* *Id.* § 1307(c)(10).] makes the debtor's failure to file a section 521(2) grounds for a chapter 13 trustee to move for the conversion of a chapter 13 case to chapter 7 or the outright dismissal of the chapter 13 petition, though it also indicates that only the chapter 13 trustee may make a motion to dismiss on such grounds. [*FN:* See 11 U.S.C. § 1307(c)(10). While subsection (c) generally allows either "a party in interest" or "the United States Trustee" to convert to chapter 7 or dismiss, paragraphs (9) and (10) limit such conversion or dismissal to action by the United States Trustee only. See id. § 1307(c)(9), (10).]

In this regard, it may be noted that section 521(2)'s deadline is thirty days after the chapter 7 petition *or*, alternatively, before the date of the creditor's meeting, whichever is earlier. [*FN:* See id. § 521(2)(B).] chapter 13 is subject to the requirement of a creditor's meeting, just like chapter 7. [*FN:* See id. § 341(a) ("Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside over a meeting of creditors.").] Perhaps, then, Congress intended section 521(2) to apply in chapter 13 after all. [*FN:* More confusingly, Federal Rule of Bankruptcy Procedure 1019(1)(B) implies that, when a chapter 13 case is converted to chapter 7, the "statement of intention" presumably referring to the § 521(2) statement, can be filed thirty days after the order of conversion, "if required." See Fed. R. Bankr. P. 1019(1)(B). Such a rule seems to contradict the statute, if the reference to the creditors' meeting can be taken to imply that § 521(2) applies in chapter 13.] Yet the requirement makes no sense. Chapter 13 permits the debtor to retain *all* property−−not just the property described in section 722. [*FN:* See 11 U.S.C. § 1306(b).] The requirement that the debtor state an intention whether to retain or surrender collateral is therefore nonsensical. The leading treatise on redemption states that the chapter 13 references to section 521(2) are "drafting errors," [*FN:* See Hessling , supra note 4, at 363.] but the specific reference in section 1307(c)(10)−−failure to file is grounds for dismissal−−makes this judgment rather too boldly and peremptorily. It must be noted, however, that no court has ever tried to discipline a chapter 13 debtor for not filing under section 521(2). Perhaps this is because chapter 13 plans themselves must be filed before the section 521(2) statement is due, [*FN:* See Fed. R. Bankr. P. 3015(b). Rule 3015(b) states: "[T]he debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter .... If a case is converted to chapter 13, a plan shall be filed within 15 days thereafter...." *Id.*] and the plan should entirely duplicate the information section 521(2) tries to force. Indeed, the plan itself may be taken as the debtor's full compliance with section 521(2).

Section 521(2) has been described as a "toothless" tiger. [*FN:* See*In re* Weir , 173 B.R. 682, 683 (Bankr. E.D. Cal. 1992). Judge Christopher Klein goes on to observe: It is evident that section 521(2) bears scars from crippling wounds suffered in hard−fought battles. Its text is so enigmatic, particularly in light of the rejected version, that the most that can be said in its defense is that the Congress settled upon a calculated ambiguity to resolve an intractable difference of opinion. Id . at 685. In *In re* Weir , Judge Klein relates the story of how the Senate's version of § 521(2), containing an automatic lapse of the stay, was greatly weakened by the House of Representatives. See id. at 684−89.] Yet at least some courts have been willing to punish debtors for failing to comply with section 521(2). Some courts have entertained the dissolution of the automatic stay as a remedy. [*FN:* See, e.g., CCB Bank v. Elicher (*In re* Elicher), 100 B.R. 180, 183 (Bankr. M.D. Pa. 1989) (granting creditor's motion to lift automatic stay for failure of debtors to file statement of intention). See also *In re* Irvine, 192 B.R. 920, 922 (Bankr. N.D. Ill. 1996) (DeGunther, J.) (dictum); *In re* Tameling, 173 B.R. 627, 628 (Bankr. W.D. Mich. 1994) (Gregg, J.) (dictum); *In re* Bracamortes, 166 B.R. 160, 162 (Bankr. S.D. Cal. 1994) (Hargrove, J.) (dictum); *In re* Weir, 173 B.R. at 690 (dictum).] Courts have issued orders "compelling" the debtor to file the requisite statement. [*FN:* See, e.g., Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512 (11th Cir. 1993); *In re* Kennedy, 137 B.R. 302 (Bankr. E.D. Ark. 1992) (Scott, J.); *In re* Griffin, 143 B.R. 535 (Bankr. E.D. Ark. 1991) (Fussel, J.); *In re* Chavarria, 117 B.R. 582, 585 (Bankr. D. Idaho 1990) (Pappas, J.). But see Irvine , 192 B.R. at 922 (Bankr. N.D. Ill. 1996) (DeGunther, J.) (stating that motion to vacate automatic stay not motion to compel was proper remedy for debtor's failure to file statement of intention).] If the debtor does not obey this order, sanctions−−including dismissal of the chapter 7 proceeding under section 707(a)−−might follow. [*FN:* See, e.g., *In re* Green, 119 B.R. 72 (Bankr. D. Md. 1990) (Derby, J.); cf. Tameling , 173 B.R. at 628 (Gregg, J.) (providing that finding debtor in contempt for failure to comply with order to amend statement of intention "is absurd and akin to swatting a mosquito with a sledgehammer").]

Other courts, however, have refused to dismiss a chapter 7 proceeding as a remedy, [*FN:* See Weir , 173 B.R. at 691−92; *In re* Crooks, 148 B.R. 867, 873 (Bankr. N.D. Ill. 1993). Section 1307(c)(10) strangely makes failure to file a statement of intention grounds to dismiss a chapter 13 proceeding. See 11 U.S.C. § 1307(c)(10) (1994). It is, however, far from clear that § 521(2) even applies to chapter 13. See supra note 199 and accompanying text.] have refused damages, [*FN:* See *In re* Manderson, 121 B.R. 617, 620−21 (Bankr. N.D. Ala. 1990) (Wright, J.).] or have refused to deny a discharge from unsecured claims. [*FN:* See *In re* Logan, 124 B.R. 729, 734 (Bankr. S.D. Ohio 1991) (Cole, J.); National Bank of Commerce v. Barriger (*In re* Barriger), 61 B.R. 506, 508−10 (Bankr. W.D. Tenn. 1986) (Leffler, J.).] Courts have denied that creditors even have standing to complain of the debtor's failure to comply with section 521(2), declaring instead that only the trustee has standing to do so. [*FN:* See Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989) (Moore, J.); Crooks , 148 B.R. at 872; Manderson , 121 B.R. at 621. Once again, § 1307(c)(10) allows only the chapter 13 trustee [or debtor] to move for the conversion or dismissal of a chapter case, if the debtor fails to file a statement of intention. See 11 U.S.C. § 1307(c). Though § 521(2) would not appear to be relevant in chapter 13, the requirement bolsters the idea that only trustees have standing. There are also cases finding that creditors have standing to seek sanctions. See Taylor , 3 F.3d at 1512; *In re* Edwards, 901 F.2d 1383, 1386 (7th Cir. 1990) (Cuddahy, J.); Chavarria , 117 B.R. at 584−85 (remarking that if creditor had no standing system would be "oddly inefficient"). A peculiar standing case is McLellan Fed. Credit Union v. Parker (In re Parker) , 193 B.R. 525 (B.A.P. 9th Cir. 1996) (Russell, J.), where the debtor and secured party agreed to reaffirm both a secured claim and an unrelated unsecured claim. See id. at 526−27. On behalf of the debtor, the bankruptcy court refused to approve of this reaffirmation, apparently, on the authority of Lowry and Belanger . See id. at 527. The secured party appealed, only to find that it was not an "aggrieved" party with standing to pursue the appeal. The court pointed out that such agreements could only be approved if in the debtor's best interest. See id. at 525. The debtor, however, had not appealed the reaffirmation refusal, proving that the agreement should not have been reaffirmed in the first place. See id. at 528.] Courts have allowed redemption to proceed in spite of the debtor's failure to file a statement of intention, [*FN:* See *In re* Cassar, 139 B.R. 253 (Bankr. D. Colo. 1992); *In re* Eagle, 51 B.R. 959 (Bankr. N.D. Ohio 1985); *In re* Hawkins, 136 B.R. 649 (Bankr. W.D. Va. 1991) (allowing redemption subsequent to reaffirmation and after discharge order was entered). In Hawkins , Judge Ross Krumm allowed redemption after a discharge order was entered. See Hawkins , 136 B.R. at 651 ("The Code is silent as to when the debtors must exercise their option to redeem under 11 U.S.C. § 722."). Why § 521(2)(B) does not constitute legislation on that question was not explained.] suggesting that the failure is meaningless. Judge Roland Brumbaugh has even

remarked that debtors "should not be overly concerned if they cannot meet the deadlines set forth in section 521 and other sections of the Code." [*FN:* See Cassar , 139 B.R. at 254. This remark is based on inherent conflicts in the timing rules between § 521(2) and objections to discharge of debt. See id. Since § 722 redemption requires a finding that the underlying secured claim is dischargeable, Judge Brumbaugh found it impossible for the court to find dischargeability of the underlying debt before the § 521(2) deadline had lapsed. See id.]

Some courts have questioned the standing of a creditor to seek sanctions when a debtor neglects to meet the deadlines in section 521(2). Section 704(3) imposes on a chapter 7 trustee the duty to "insure that the debtor shall perform his intention as specified in section 521(2)(B) of this title." From this requirement courts have deduced that only the trustee can enforce section 521(2)−−not creditors. [*FN:* See *In re* McNeil, 128 B.R. 603, 609 (Bankr. E.D. Pa. 1991) (Scholl, J.); *In re* Bayless, 78 B.R. 506, 511 (Bankr. S.D. Ohio 1987) (Waldron, J.); *In re* Williams, 64 B.R. 737, 738 (Bankr. S.D. Ohio 1986) (Perlman, J.).]

Suppose a debtor, pursuant to section 521(2), elects to retain collateral but cannot negotiate a reaffirmation agreement with the secured party. In *In re Crooks,* [*FN:* 183 B.R. 867 (Bankr. N.D. Ill. 1993).] a secured party reasoned that, since section 521(2) requires either reaffirmation *or* redemption, the debtor was *forced* to redeem upon the failure of reaffirmation. [*FN:* See id. at 872.] Judge Jack Schmetterer sensibly ruled that the debtor *could* change his mind. [*FN:* See id. at 872−73.] The debtor was allowed to surrender the collateral in lieu of making the lump sum payment, in spite of an earlier intent to retain it. [*FN:* Accord Hawkins , 136 B.R. at 649.] In *In re Gregg,* [*FN:* 199 B.R. 404 (Bankr. W.D. Mo. 1996).] debtors who changed their minds near the end of the forty−five day period of section 521(2)(B) claimed they should have another forty−five days to surrender the collateral. Judge Frank Koger disagreed and awarded the secured party adequate protection payments starting from the time the forty−five day period ended. [*FN:* See id. at 409.]

Since section 521(2) was enacted in 1984, courts have been newly inspired to hold that unilateral reinstatement of the security agreement is not permitted. Rather, if the debtor wishes to retain the collateral in the absence of a bilateral reaffirmation, the debtor must redeem under section 722 by means of a lump sum payment. [*FN:* See Johnson v. Sun Fin. Co. (*In re* Sun Fin. Co.), 89 F.3d 249 (5th Cir. 1996) (per curiam); Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1516 (11th Cir. 1993) (Dubina, J.); *In re* Edwards, 901 F.2d 1383 (7th Cir. 1990) (Cudahy, J.); Ford Motor Credit Co. v. Polk (*In re* Polk), 76 B.R. 148, 150 (B.A.P. 9th Cir. 1987) (Meyers, J.); Dever v. Internal Revenue Serv. (*In re* Dever), 164 B.R. 132, 136 (Bankr. C.D. Cal. 1994) (Fenning, J.);*In re* Gerling, 175 B.R. 295 (Bankr. W.D. Mo. 1994);*In re* Tucker, 158 B.R. 150 (Bankr. W.D. Mo. 1993);*In re* Kennedy, 137 B.R. 302 (Bankr. E.D. Ark. 1992) (Scott, J.);*In re* Chavarria, 117 B.R. 582, 584 n.2 (Bankr. D. Idaho 1990) (Pappas, J.).] In support of this view, note that section 521(2)(B) states:

within forty−five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty−five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph . . . . [*FN:* 11 U.S.C. § 521(2)(B) (1994).]

Redemption or reaffirmation can be performed in this forty−five day period, but retention on the installment plan probably cannot, thereby indicating a congressional intent to bar such a practice. [*FN:* See Taylor , 3 F.3d at 1516.] Other courts reacting to section 521(2) have complained that the installment plan would put the creditor at the nonrecourse mercy of the debtor, who would have little incentive to take care of the collateral. [*FN:* See id. at 1516 (quoting Bank South, N.A. v. Horne, (*In re* Horne), 132 B.R. 661, 663−64 (Bankr. N.D. Ga. 1991) (Drake, J.)). Judge Robert Littlefield responds that such a view is "uninformed with regard to the realities of the typical chapter 7 case." See*In re* Boodrow, 192 B.R. 57, 59 (Bankr. N.D.N.Y. 1995), aff'd , 197 B.R. 409 (N.D.N.Y. 1996). He thinks that, because chapter 7 debtors cannot replace their existing automobile, they have a great incentive to care for the vehicle, to the benefit of the secured party. See id. at 58.] Debtors would never have the incentive to reaffirm with the creditor's consent if the debtor could unilaterally force a creditor to accept installments. [*FN:* See Polk , 76 B.R. at 150; Kennedy , 137 B.R. at 304.] Furthermore, if redemption, reaffirmation or surrender were not the only options, there is no good explanation for why Congress even bothered to enact section 521(2). [*FN:* See Taylor , 3 F.3d at 1516.] Finally, courts have not blushed to announce that the installment plan is a "head start, not a fresh start." [*FN:* See id. at 1516.; Debra S. Friedman, Comment, 11 U.S.C. § 521(2)(A): Fresh Start or Head Start? , 22 Pac. L.J. 1239 (1991).]

According to this view, if the chapter 7 debtor wishes to retain the collateral and pay installments, she may do so only by reaffirming the security agreement in the postpetition agreement described in section 524(c). [*FN:* See Liberty Nat'l Bank & Trust v. Burba (*In re* Burba), No. 93−6479, 1994 WL 709314, at *15 (6th Cir. Nov. 10 1994) (Contie, J.);*In re* Edwards, 901 F.2d 1383, 1386 (7th Cir. 1990) (Cudahy, J.); General Motors Acceptance Corp. v. Bell (*In re* Bell), 700 F.2d 1053, 1056 (6th Cir. 1983) (Krupansky, J.). In Burba , Judge Leroy Contie makes the point that if installments could be used to redeem property under § 722, then a debtor would never have an incentive to reaffirm under § 524(c), thereby rendering the latter provision superfluous −− an interpretive no−no. See Burba , 1994 WL 709314, at *15. That is, if collateral is overencumbered, the redemption price would always be cheaper than the reaffirmation price, and debtors would always choose to redeem. This is supposed to prove that installments are not allowed under § 722. Judge Contie, however, overlooks the fact that § 524(c) still has utility, even if installments are possible under § 722. If a debtor equity exists in the collateral, and if the contract rate is lower than the market rate, then the debtor has an incentive to use § 524(c). Hence, installments under § 722 do not quite render § 524(c) completely useless.] This, however, requires the full consent and cooperation of the secured party, who may not be compelled to reinstate the security agreement. [*FN:* See Polk , 76 B.R. at 150.] Thus, the only option for a debtor who wishesto pay installments is to file for chapter 13 and confirm a plan providing for such a mode of payment. [*FN:* See Bell , 700 F.2d at 1056 (stating that chapter 7 is poorly equipped to supervise debtor defaults on installments);*In re* Gerling, 175 B.R. 295, 298 (Bankr. W.D. Mo. 1994) (Federman, J.) (finding that debtor desiring retention without reaffirmation should file "under one of the reorganization chapters").]

These implications of section 521(2) are belied, however, by section 521(2)(C), which provides that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title . . . " [*FN:* 11 U.S.C. § 521(2)(C) (1994).] This subsection certainly suggests that whatever rights the debtor had before, she still has them after the enactment of section 521(2). Hence, section 521(2)(C) cannot comprise a *new* excuse to rule against retention without redemption or reaffirmation. [*FN:* See *In re* Harper, 143 B.R. 682, 684 (Bankr. W.D. Tex. 1992) (Kelly, J.). According to a statement made by Congressman Peter Rodino, the purpose of § 521(2) was to preserve the right of the debtor to exempt property and the right of the trustee to use avoidance powers. See 130 Cong. Rec. 6204 (1984). Rodino did not list amongst his examples the right of a debtor to retain collateral so long as the prepetition terms of the agreement were being followed.]

Other courts have ruled that, section 521(2) notwithstanding, a debtor might retain collateral by staying current on the prepetition security agreement. [*FN:* See Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1547 (10th Cir. 1989) (Moore, J.) (finding court had jurisdiction to let debtor keep collateral while debtor kept current on debt);*In re* Boodrow, 192 B.R. 57, 58 (Bankr. N.D.N.Y. 1995) (Littefield, J.) (allowing debtor to avoid making election while retaining collateral), aff'd , 197 B.R. 409 (N.D.N.Y. 1996); Harper , 143 B.R. at 684 (stating § 521(2) permits debtor to retain collateral provided debtor remains current on payments as required by loan terms);*In re* Parker, 142 B.R. 327, 329 (Bankr. W.D. Ark. 1992) (same);*In re* Manning, 129 B.R. 198, 199 (Bankr. W.D. Mo. 1991) (permitting debtor to retain collateral without reaffirmation);*In re* McNeil, 128 B.R. 603, 608 (Bankr. E.D. Pa. 1991) (prohibiting creditor from repossessing collateral). The Collier treatise supports this line of reasoning by pointing out that earlier versions of § 521(2) provided that the automatic stay would be deemed lifted if the debtor defaulted on her obligation to state her intentions to surrender or retain collateral. By eliminating this remedy, Congress is supposed to have revealed its intent that the debtor's options for retention are not limited to redemption or reaffirmation. See 3 Collier on Bankruptcy , ô 521.09A[5], at 521 − 48 to − 49 (Lawrence P. King ed., 15th ed. 1996). Professor Ned Waxman properly refers to the rejection of the automatic stay lapse as merely a procedural question −− not one that goes to the substance of the debtor's right to retain collateral. Thus, nothing can be learned from the weakening of the remedy. See Waxman, supra note 111, at 195−96. The Collier treatise has a better argument in pointing out that an earlier version of § 521(2) much more specifically limited a debtor's options than did the final version of § 521(2). The earlier draft required the debtor to "perform his intention . . . by surrendering such property to the creditor or the trustee, redeeming such property by paying the redemption price, or reaffirming the debt." H.R. 4786, 97th Cong. § 7 (1981). By rejecting this language for the less specific language of § 521(2), Congress supposedly showed that it intended the debtor to have more options. See 3 Collier , supra , ô 521.09A[5], at 521 − 49. Waxman responds that, if Congress intended for there to be more options, why didn't it say so? See Waxman, supra note 111, at 196. Of course, it could be that Congress intended a "common law" of debtor rights to develop without its guidance. Hence, Professor Waxman does not score as effectively against Collier in this respect.] On this view, section 521(2) requires the debtor to notify the secured party of her intention to redeem or reaffirm "if applicable." [*FN:* See*In re* Boodrow, 192 B.R. at 58−59.] This does not imply, however, that theseare the only options available. Otherwise, the phrase "if applicable" would be read out of the Bankruptcy Code. [*FN:* See Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 348 (4th Cir. 1992) (Butzner, J.). For authorities rejecting the notion that "if applicable" hints that options other than redemption or reaffirmation exist, see Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1516 (11th Cir. 1993) (Dubina, J.); Lowry , 882 F.2d at 1545 n.2 (but finding that § 521(2) nevertheless does not make redemption or reaffirmation only modes of retaining collateral); Waxman, supra note 111, at 193−94 (arguing that statute would not make sense without "if applicable," because then debtors intending to surrender collateral would still have to state whether they are redeeming or reaffirming).] In addition, it has been pointed out that debtors may avoid certain security interests under section 522(f)(1)(B); [*FN:* 11 U.S.C. § 522(f)(1)(B).] yet this option is not mentioned in section 521(2). This omission implies that section 521(2) was *not* intended to limit the debtor's options to exemption, redemption and reaffirmation. [*FN:* See Harper , 143 B.R. at 684.] Thus, even after section 521(2), courts are still badly split over whether redemption by lump sum or reaffirmation with creditor consent are the only mode by which debtors might continue to retain collateral. [*FN:* Judge Jim Pappas points out that "if applicable" may not bring in choices other than redemption, reaffirmation, or exemption. Rather, it simply points out that perhaps only a subset of these options are applicable to a given debtor. So conceived, "if applicable" is quite consistent with the view that the debtor is strictly limited to these choices. Jim D. Pappas, Section 521(2) of the Bankruptcy Code: The Creditor's Predicament in Getting Paid as Agreed , 99 Com. L.J. 45, 59 (1994).]

IV. Reaffirmation

Section 521(2)(A) invites a debtor to "reaffirm debts." [*FN:* See 11 U.S.C. § 521(2)(A).] It is universally assumed that this phrase invokes the jurisdiction of section 524(c), which actually governs *any* agreement between a debtor and a holder of a prepetition claim, whether or not the agreement can be characterized as a "reaffirmation" of a prior claim. [*FN:* According to § 524(c): An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if −− (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title; (2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and (B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection; (3) such agreement has been filed with the court and [if applicable, that the debtor's attorney made certain statements to the debtor explaining the consequences of the debtor's decision]; (4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; (5) the provisions of subsection (d) of this section have been complied with; and (6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as −− (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and (ii) in the best interest of the debtor. (B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property. *Id.* § 524(c). Subsection (d) −− to which subparagraph (5) refers −− governs certain procedures the court must follow at a discharge hearing.] This section requires that the agreement be enforceable at state law. [*FN:* See id. State law usually upholds a promise to repay a debt discharged in bankruptcy on the theory that the debtor is "morally" obligated to repay. Restatement (Second) of Contracts § 83 (1979).] It further regulates such contracts by requiring that the agreement be reached before the discharge is actually granted, by insuring plenty of notice to the debtor that such agreements are not mandatory, and by giving the debtor a period during which to change her mind. [*FN:* See 11 U.S.C. § 524(c).]

One of the options that section 521(2)(A) mentions is reaffirming debts. [*FN:* See id. § 521(2)(A).] If the debtor and creditor cannot agree on a reaffirmation, then, under at least one view of section 521(2)'s meaning, the debtor must either redeem the property in a lump sum or surrender the collateral. [*FN:* See *In re* Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990) (Cudahy, J.) (holding that § 521 requires debtor choose between reaffirmation, redemption, or surrender of property abandoned from estate or exempted from discharge); accord *In re* Griffin, 143 B.R. 535 (Bankr. E.D. Ark. 1991) (Fussell, J.).] As we have seen, however, many courts have ruled that these options are not exhaustive; the debtor may retain property in exchange for unilaterally meeting payments on the prepetition security agreement. [*FN:* See supra notes 202−08 and accompanying text.]

Assuming that a court thinks that section 521(2) has teeth, the question arises whether the language of section 521(2)(A)−−"reaffirm debts"−−restricts the reasons a secured party may have in refusing to reach an agreement with the debtor. In *In re French,* [*FN:* 185 B.R. 910 (Bankr. M.D. Fla. 1995).] Judge Karen Jennemann considered whether a secured party could simply hold up a debtor for extra entitlements, in exchange for the reaffirmation agreement. [*FN:* See id. at 912.] In her opinion, a debtor will have met the requirements of section 521(2)(A) when the debtor unilaterally signs a reaffirmation agreement, where the secured party makes unreasonable demands for extra compensation:

If a debtor attempts to negotiate an agreement with the creditor, reaches an impasse, and then signs a reaffirmation agreement which (i) meets the requirements for approval articulated in Section 524(c) of the Bankruptcy Code, (ii) binds the debtor to the terms of the parties' prior agreement, and (iii) is enforceable by the creditor, the debtor has taken sufficient acts to perform his or her intention to reaffirm the debt. In summary, if a debtor is willing to reaffirm the terms of the original agreement, has attempted in good faith to negotiate a reaffirmation agreement with the creditor, and has taken all acts otherwise necessary to reaffirm a debt under Section 524 of the Code, then this Court would deem that the debtor has complied with the requirements of Section 521 as required by the 11th Circuit Court of Appeals. . . . [*FN:* Id . at 914 (citing Taylor v. AGE Fed. Credit Union (*In re* Taylor), 3 F.3d 1512 (11th Cir. 1993) (Dubina, J.)).]

Thus, Judge Jennemann hints that reaffirmation agreements might be *imposed* on a secured party when the secured party overreaches and tries to obtain more than a mere reaffirmation of the old security agreement. [*FN:* Accord *In re* Greer, 189 B.R. 219, 221 (Bankr. S.D. Fla. 1995) (Mark, J.) (agreeing with Judge Jennemann's conclusion in *In re* French but holding that, where collateral secures several different claims, debtor must offer to reaffirm all secured claims). Judge Federman has strongly asserted that a debtor might reaffirm the old security agreement over the opposition of a secured creditor. See *In re* Thomas, 186 B.R. 470, 476 (Bankr. W.D. Mo. 1995). But his statements should be limited to the facts of the case where the debtor had a privilege under state law to negate all defaults by curing the defaults. In essence, Judge Federman was ruling that a bankruptcy court might make a declaration that, under state law, a security agreement was not in default. It should also be emphasized that the security agreement had no ipso facto clause in it.]

In *French*, the secured party had demanded payment of attorneys' fees, which the prepetition security agreement had called for. [*FN:* See French , 185 B.R. at 911.] The debtor had refused to pay the fee demanded. [*FN:* See id.] Judge Jenneman did not view the attempted extortion of the attorneys' fee as any kind of illegal overreaching. [*FN:* See id. at 913.] Thus, Judge Jennemann ordered the debtor to redeem, surrender or reach a qualified reaffirmation agreement within fifteen days. [*FN:* See id. at 914.] At least one court, however, has held that insisting on an attorneys' fee is indeed overreaching. Judge Sidney Brooks, in *In re Hutchins,* [*FN:* 99 B.R. 56 (Bankr. D. Colo. 1989).] rewrote the reaffirmation agreement to lower the amount of the agreed attorneys' fee to an amount that seemed more reasonable to Judge Brooks. [*FN:* See id. at 58.] He then imposed the agreement on the secured party−−a second case in which reaffirmation agreements reflected an involuntary element. [*FN:* See id. at 59 .]

According to these two cases, it is not accurate to think that secured parties must consent to reaffirmation agreements. Other courts, however, give secured parties unfettered discretion to refuse reaffirmation agreements with debtors. [*FN:* See*In re* Brady, 171 B.R. 635 (Bankr. N.D. Ind. 1994) (Dees, J.) (finding secured party could condition reaffirmation of secured claim on reaffirmation of different unrelated claim).]

Section 524(c) requires that the debtor have the right to rescind the reaffirmation agreement within sixty days from the time the agreement is filed with the bankruptcy court. [*FN:* See 11 U.S.C. § 524(c)(4) (1994).] Suppose a debtor does rescind, what then is the status of the collateral which the debtor had initially intended to retain?

If the automatic stay has lapsed, then the secured party, of course, can repossess the collateral under state law. The stay will have lapsed in a chapter 7 case if (a) the trustee has abandoned the collateral to the debtor and if (b) the debtor has already obtained a discharge from debt. [*FN:* See id. § 362(c).] By contrast, in a chapter 13 case, discharge occurs only at the end of the plan itself, which could last up to five years. [*FN:* See id. § § 1322(d), 1328(a).] In chapter 13, the secured party would have to seek relief from the automatic stay. [*FN:* See id. § § 362(c)(2)(C), 1328. This would be necessary in order to avoid the potentially extended completion of the plan.] Since rescission implies nunc pro tunc treatment of the relations between the parties, the secured party's right−−if it exists−−to have the stay lifted for the debtor's failure to perform her intention within forty−five days, as required by section 521(2)(B), might kick in automatically. [*FN:* As to whether failure to meet § 521(2)(A) or (B) constitutes grounds to lift the automatic stay, see supra notes 199−200 and accompanying text.] At this late date, could a debtor redeem the collateral for its appraised value? Since the debtor had forty−five days to perform and did not, the debtor has no certain right to redeem. If courts believe that section 521(2) has teeth, the debtor might not be able to resist the secured party's motion to lift the automatic stay.

Conclusion

The redemption right in section 722, is important largely for automobile financing and for its indirect role in shaping bankruptcy law in other contexts, [*FN:* Bifurcation under § 506(d) was a bitterly fought issue in the late 1980's, and whether § 722's turf would be stolen by § 506(d) was a major weapon in that duel. See generally Henderson, supra 44, at 187−93.] also makes for a fascinating jurisprudential study. Congress sculpted the rather generous right in 1979, but courts and lawyers, using a great deal of creativity, have greatly expanded debtor rights through the use of chapter 13 "installment plans" [*FN:* See Carlson, supra note 11, at 51.] and the extension of the automatic stay which is supposed to end when a debtor is discharged. Congress attempted to stem this tide by enacting section 521(2), which supposedly makes debtors choose between redemption, reaffirmation or surrenderof the collateral. But, section 521(2) hardly succeeded in stemming the tide of judicial creativity in favor of debtors. The courts have shown themselves quite capable of picking apart section 521(2) to exploit contradictions. They have not been shy in ignoring it outright. Although not all courts have swum with this tide, enough have done so to make one think that bankruptcy jurisprudence has a superstatutory life of its own, and congressional reform of the practice is harder to manage than is sometimes thought.