HOW AMENDING SECTION 521 TO INCLUDE A STATUTORY RIDE-THROUGH PROVISION WOULD RESOLVE ASSET RETENTION PROBLEMS IN CONSUMER BANKRUPTCY

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INTRODUCTION

When Maria Perez filed for chapter 7 bankruptcy in March 2010, she, like most other debtors, sought a "fresh start."[1] Unfortunately Perez could not simply liquidate all her assets, obtain a discharge and start over. Perez needed her automobile to get to work.[2] Prior to filing for bankruptcy, Perez had been making regular payments on a 2005 Chevrolet Equinox. At the time she filed her bankruptcy petition, she still owed the creditor, DT Credit Company, $11,471.30 on the Equinox.[3]

Chapter 7 debtors universally have three options available with respect to treatment of personal property secured by an outstanding debt. Under section 521(a)(6) of the Bankruptcy Code ("the Code"), the debtor may surrender the collateral to the secured creditor to satisfy the outstanding debt.[4] Alternatively, the debtor may redeem the collateral by paying the creditor a lump sum amount equal to the collateral's full liquidation value within thirty days following the petition.[5] Finally, the debtor may reaffirm the debt by renegotiating the loan terms and renewing the debtor's personal liability for the collateralized property.[6] However, if the debtor fails to make a scheduled payment or defaults in any other manner, the creditor may repossess the collateral, sell it and the debtor becomes personally liable for any deficiency despite any previously granted bankruptcy discharge.[7] Unfortunately, all of these options present significant drawbacks for chapter 7 debtors.[8]

For Perez, none of the abovementioned options were permissible. She needed her car to get to work, so surrendering it was out of the question. She did not have the means to redeem the car. And, the reaffirmation her attorney and DT Credit negotiated was unenforceable because it presented an undue hardship for Perez.[9] However, because Perez filed for bankruptcy in the Tenth

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[1] *In re* Perez, No. 7-10-11417, 2010 WL 2737187, at *1 (D.N.M. July 12, 2010).

[2] *Id.* at *2.

[3] *Id.* at *1.

[4] *See* 11 U.S.C. § 521(a)(6) (2012) (stating that debtor shall "not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property").

[5] 11 U.S.C. § 521 (a)(2); *see also* Amber J. Moren, *Debtor's Dilemma: The Economic Case For Ride-Through in the Bankruptcy Code*, 122 YALE L.J., 1594, 1597 (2013) (describing scenario where chapter 7 debtor can pay creditor value of car to payoff debt and keep personal property).

[6] 11 U.S.C. § 521 (a)(2); *see also* Moren, *supra* note 5.

[7] *See* Moren, *supra* note 5, at 1598 (explaining that reaffirming method leaves debtor exposed to repossession of personal property upon missed payment).

[8] *See id.* at 1597.

[9] Although the Equinox was only worth $10,775, Perez agreed to reaffirm the remaining $11,471.30 of debt at an interest rate of 25.917%. However, because Perez's attorney refused to certify that the reaffirmation agreement did not impose an undue hardship on the debtor or a dependent of the debtor,

Circuit, she had an alternative option available—"ride-through" the automobile.[10] The ride-through allows debtors, in certain circumstances, to retain their property during and after bankruptcy by continuing to make regular payments according to the pre-bankruptcy loan agreement, thereby preventing creditors from imposing harsher reaffirmation terms on debtors.[11] "The effect is to transform the claim into a nonrecourse debt. The debtor's personal liability is discharged, but the lien lives on as a strong incentive to voluntary payment."[12]

Several circuits are at odds as to whether ride-through is a permissible option for debtors.[13] Although enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[14] was expected to solve this circuit split, it did not. Much debate continues as to whether Congress removed the ride-through. This Article examines how the BAPCPA had a minimal effect on the ability to ride-through and argues that amending the Code to include a statutory ride-through would cure the doctrinal defects and circuit split that survived BAPCPA.[15] Part I discusses the policy issues that debtors and creditors face by only having reaffirmations and non-statutorily defined ride-throughs. Part II explores the history of the ride-through by comparing the pre-BAPCPA application of ride-throughs to the post-BAPCPA application. Part III argues that amending the Code is the most logical solution to fix this problem. Lastly, Part IV discusses the policy favoring these statutory amendments.

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the bankruptcy court refused to approve the reaffirmation. *In re* Perez, No. 7-10-11417, 2010 WL 2737187, at *2, *10 (D.N.M. July 12, 2010).

[10] *Id.* at *5–6.

[11] *See In re* Jones, 397 B.R. 775, 781 (S.D.W. Va. 2008) (explaining effects of ride-through doctrine).

[12] Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 719 (1999); *see also* U.C.C. § 9-615 (2011).

[13] *Compare In re Perez*, 2010 WL 2737187 at *5–6, Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161, 182–83 (E.D.N.C. 2008) (permitting ride-through post-BAPCPA), *In re* Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008), *In re* Baker, 390 B.R. 524, 530 (Bankr. D. Del. 2008), *In re* Moustafi, 371 B.R. 434, 439 (Bankr. D. Ariz. 2007), *and In re* Blakeley, 363 B.R. 225, 231–32 (Bankr. D. Utah 2007), *with* Dumont v. Ford Motor Credit Co. (*In re* Dumont), 383 B.R. 481, 485 (B.A.P. 9th Cir. 2008) (refusing to permit ride-through post-BAPCPA), *In re* Rowe, 342 B.R. 341, 343 (Bankr. D. Kan. 2006), *In re* Steinhaus, 349 B.R. 694, 703 (Bankr. D. Idaho 2006), *In re* Norton, 347 B.R. 291, 298–99 (Bankr. E.D. Tenn. 2006), *and In re* Anderson, 348 B.R. 652, 658 (Bankr. D. Del. 2006).

[14] Pub. L. No. 109–8, 119 Stat 23 (2005).

[15] Because consumer debt is generally repaid over short-term periods, by the time many cases reach an appellate court, debtors have typically repaid the outstanding loan. As a result, many circuit courts have not yet considered whether BAPCPA eliminated the ride-through since the original parties no longer have standing on appeal. *See* Moren, *supra* note 5, at 1630 n.157 and accompanying text.

I. PROBLEMS WITH SECTION 521 AND THE UNDERLYING POLICY

For Perez and many chapter 7 debtors the three options available for treatment of secured personal property under the Code are dismal. Debtors are reluctant to merely surrender their property. Likewise, creditors do not want debtors to surrender either. Creditors prefer to continue collecting payments rather than repossess and sell the collateral, often at a significantly reduced price from the debtor's personal value for the item.[16] This also creates a deadweight loss that is never recovered by creditors as the bifurcated unsecured claim is typically discharged.[17]

Alternatively, in order to retain collateral, debtors must redeem it or accept a reaffirmation agreement.[18] In theory, redemption is the best option for debtors. It is a relatively inexpensive method of collateral retention, requiring only retail value to be paid as opposed to the full outstanding debt amount.[19] However, in practice, redemption is simply infeasible. Bankruptcy-debtors are, by their nature, liquidity-constrained. If debtors had sufficient cash to pay the full amount of outstanding debts while preserving adequate protection for other creditors, they likely would not be in bankruptcy in the first place.

Reaffirmations are rare in practice as well.[20] There are several explanations for the rarity of reaffirmation. First, transaction costs of reaffirmation often outweigh any benefit the debtor or creditor would realize.[21] The cost of complying with the requisite disclosures, income schedules and affidavits,[22] as well as negotiating and drafting the agreement typically offset any potential surplus the creditor would otherwise collect. Plus, as an individual chapter 7 debtor case, the amount at stake is generally very small.[23] Second, courts regularly refuse to approve reaffirmation agreements because they fail to comply with section 524(c), specifically the requirement that it be in the debtor's best interests.[24] This further increases the relative financial burden of

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[16] *See* Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & ECON. 117, 139–40 (1983) (discussing repossession and collateral value destruction).

[17] *See* Moren, *supra* note 5, at 1610.

[18] *See* 11 U.S.C. § 521(a)(2) (2012).

[19] *See* Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 468 (2005).

[20] *See* Moren, *supra* note 5, at 1611.

[21] *See id.* at 1612 (indicating that reaffirmation agreements are costly and as a result "financial burden may outweigh any surplus obtained through reaffirmation").

[22] *See infra* Part II.B (discussing section 524 of the Code).

[23] It has been estimated that the average amount at stake for automobiles is only $4,000. *See* Christopher M. Hogan, *Will the Ride-Through Ride Again?*, 108 COLUM. L. REV. 882, 992 (2008).

[24] *See* Moren, *supra* note 5, at 1611 n.77.

reaffirmation agreements on creditors, who spend "a few hundred to several thousand dollars for each agreement" only to have a judge refuse approval.[25]

In sum, this leaves debtors between a rock and a hard place. Because the debtor is unlikely to have the cash to redeem his property and is unwilling to surrender it, reaffirmation is the only option. The debtor is therefore at the mercy of his creditors, which creates significantly unequal bargaining positions that creditors are quick to capitalize on by offering harsh, often unreasonable terms that the debtor must simply accept to retain his or her property.[26] Debtors ultimately discerned a loophole in the Code—the ride-through. However, whether the ride-through was, or still is allowed under chapter 7 is a matter of contention among the circuits.[27]

II. HISTORICAL ANALYSIS OF RIDE-THROUGH

A. Pre-BAPCPA Applicability of the Ride-Through

To gain a better understanding of the ride-through, the treatment of section 521 of the Code pre- and post-BAPCPA must be examined. The issue of whether ride-through existed developed around the interpretation of several sections of the pre-BAPCPA Code, specifically section 521(2).[28] Under that section, for debts secured by personal property, subparagraph (A) required that the debtor file "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[.]"[29] Subparagraph (B) further required that "within forty-five days after the filing of a notice of intent . . . the debtor shall perform his intention with respect to such property . . . and [that] (C) *nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's . . . rights* with regard to such property under this title[.]"[30] The circuit

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[25] Scott B. Ehrlich, *The Fourth Option of Section 521(2)(A) – Reaffirmation Agreements and the Chapter 7 Consumer Debtor*, 53 MERCER L. REV. 613, 616 (2002).

[26] *See id.* at 616–17 ("[I]f debtors *must* reaffirm to retain property, creditors are elevated to an unfair bargaining position where they can demand fees and changes in payment terms as a condition to agreeing to the reaffirmation.") (emphasis in original).

[27] *See supra* note 13 and accompanying text.

[28] Hogan, *supra* note 23, at 893–94.

[29] *See* 11 U.S.C. § 521(2) (2000) (emphasis added).

[30] *Id.* (emphasis added).

courts split five-to-five on how to interpret the "if applicable" language and section 521(2)(C).[31]

The five circuit courts that allowed ride-through held that the "if applicable" language implied that the three options in 521(2) were not exclusive.[32] These circuits also considered the language in 521(2)(C) that "nothing in subparagraphs (A) and (B) . . . shall alter the debtor's . . . rights with regard to such property" persuasive in finding that the debtor's options were not foreclosed to redemption or reaffirmation to retain secured personal property.[33] However, while some courts found the statutory language alone sufficient to establish a ride-through,[34] others relied on general bankruptcy policy, Congress' intent, and legislative history to find that these three options were not intended to be exclusive.[35]

The other five circuit courts interpreted section 521(2) as providing three exclusive options to chapter 7 debtors.[36] The "if applicable" language applied if the debtor chose not to surrender his collateral, in which case the choice of redemption or reaffirmation then became applicable.[37] The courts examined the language in section 521(2)(C) and determined that "rights . . . *under this title*" did not permit a right to retain property via a ride-through, thereby not affecting the requirement that a debtor choose one of the three options under section

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[31] The Eighth Circuit never addressed the ride-through in its decisions. *See, e.g.*, Sanabria v. Am. Nat'l Bank (*In re* Sanabria), 317 B.R. 59, 60–61 nn.2–3 (8th Cir. B.A.P. 2004) (citing various circuit court decisions addressing the issue).

[32] *See, e.g.*, Price v. Del. State Police Fed. Credit Union (*In re* Price), 370 F.3d 362, 375 (3d Cir. 2004) (stating that debtor's options are not limited to three stated options of redemption, reaffirmation, or surrender).

[33] *See* 11 U.S.C. § 521(2) (2000).

[34] *See* McClellan Fed. Credit Union v. Parker (*In re* Parker), 139 F.3d 668, 673 (9th Cir. 1998) (finding no reason to look beyond the plain language of section 521).

[35] *See, e.g.*, *In re* Price, 370 F.3d at 376–78 (finding that ride-through of secured personal property comports with underlying policies of Bankruptcy Code); Capital Commc'ns Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 50–51 (2d Cir. 1997) (holding that limited legislative history of section 521(2) implied that it was not necessarily restricted to listed substantive options available to debtors); Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989) (relying on omission of a penalty for debtors or a remedy for creditors for failure to comply with section 521(2) to infer Congress' intent).

[36] *See, e.g.*, Johnson v. Sun Fin. Co. (*In re* Johnson), 89 F.3d 249, 252 (5th Cir. 1996) (limiting debtors to three options specified by statute); Taylor v. Age Fed. Credit Union (*In re* Taylor), 3 F.3d 1512, 1516–17 (11th Cir. 1993) (noting plain language of statute does not provide debtor with fourth option to retain property and continue to make payments); *In re* Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990) (finding debtor must choose between reaffirmation, redemption or surrender of property); *see also* Hogan, *supra* note 23, at 896–97.

[37] *See* Bank of Boston v. Burr (*In re* Burr), 160 F.3d 843, 848 (1st Cir. 1998) (holding that Congress "intended chapter 7 debtors to elect surrender or retention, and then, 'if' retention is 'applicable,' to specify which of the . . . three retention options they intend to employ[]"—reaffirmation, redemption, or exemption).

521(2)(B).[38] This left debtors in the five non-ride-through circuits with limited options with respect to retaining secured personal property.

Subsequently, some debtors and creditors reached reaffirmation agreements outside of court. In 1997, a study conducted by Professors Marianne Culhane and Michaela White found that although over seventy percent of debtors indicated an intention to reaffirm their automobiles, two-thirds of them never filed reaffirmation agreements in court.[39] By tracing motor vehicle records and finding that "quite a few" were still registered to non-reaffirmed debtors, Culhane and White concluded that many of the parties had reached asset retention agreements outside of section 521 and the courts' supervision altogether.[40]

At first glance, converting to chapter 13 appears an attractive option. Whereas chapter 7 provides discharge on unsecured debts and requires debtors to surrender, redeem or reaffirm secured debts,[41] chapter 13 allows debtors to retain their assets and pay a portion of post-petition income to creditors for a specified period of time.[42] Moreover, chapter 7 permits debtors to convert to chapter 13 at any time.[43] In theory, debtors wishing but unable to retain secured property should have flocked to chapter 13. However, pre-BAPCPA evidence suggests that no correlation existed between non-ride-through circuits and higher chapter 13 filing rates.[44]

B. Code Changes Implemented by BAPCPA

In 2005, Congress enacted the BAPCPA.[45] It was the largest change to bankruptcy law since 1978. Although BAPCPA left the Bankruptcy Code's core intact, it added the means test,[46] imposed several new procedural safeguards,[47]

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[38] *See id.* at 848 (emphasis in original).

[39] Culhane, *supra* note 12, at 739–40.

[40] *Id.* at 741.

[41] *See* Pratt v. Gen. Motors Acceptance Corp. (*In re* Pratt), 462 F.3d 14, 17–18 (1st Cir. 2006).

[42] *See In re* Harris III, 491 B.R. 866, 870 (W.D. Tex. 2013) ("The Chapter 13 bankruptcy . . . enables the debtor to maintain possession of the property while catching up on payments through a court-approved repayment plan.").

[43] 11 U.S.C. § 706(a) (2012).

[44] *Comparing* Hogan, *supra* note 23, at 909 (observing that a loose correlation between circuits and chapter 13 filings existed), *with* Culhane, *supra* note 12, at 726 (citing an empirical study finding any correlation "unfounded"). *See also* Moren, *supra* note 5, at 1613 (discussing correlation between non-ride-through circuits and chapter 13 filing rates).

[45] Pub. L. No. 109–8, 119 Stat 23 (2005).

[46] *See e.g.*, Eugene R. Wedoff, *Means Testing in the New Section 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005) (suggesting "means test" may be best-known and most discussed feature of BAPCPA).

[47] *See, e.g.*, Moren, *supra* note 5, at 1603 (stating BAPCPA increased cost of reaffirmation by imposing procedural safeguards).

and incorporated a distinct line between personal and real property by re-codifying section 521(2)(A) as section 521(a)(6) and adding section 362(h).[48] The BAPCPA also included several pro-creditor amendments with respect to secured personal property.[49] While the terms of surrender remained unchanged, the cost of redemption and reaffirmation increased.[50]

The increased costs of reaffirmation derive from new procedural requirements that BAPCPA imposed. Under section 524(c), debtors are required to receive specific disclosures, the debtor's lawyer must file a declaration certifying that the "agreement represents a fully informed and voluntary agreement by the debtor; . . . does not impose an undue hardship on the debtor or a dependent . . . and . . . the attorney fully advised the debtor of the legal effect and consequences" of reaffirmation and any default thereafter.[51] Section 524(c)(6) further requires the court to review the agreement (i) if the debtor's lawyer refuses to sign the certification, (ii) if the debtor's income falls short of reaffirmation payments, or (iii) if the debtor is pro se.[52] Section 524(c)(6) also requires that the court reject any reaffirmation agreement that "impose[s] an undue hardship" or is not "in the best interest of the debtor."[53]

Although section 521(a)(2) preserved the "if applicable" language of section 521(2),[54] sections 521(a)(6) and 362(h) introduce additional procedures. To determine whether a debtor may retain collateral and pay the debt according to the pre-petition loan agreement, courts analyze four subsections of the post-BAPCPA Code: 521(a)(2), 521(a)(6), 521(d) and 362(h).[55] Sections 362(h) and 521(a)(6) provide creditors relief from the automatic stay if the debtor plans to reaffirm a debt, but fails to satisfy certain requirements set forth in sections 521(a)(2) and (a)(6).[56]

Under section 521(a)(2), an individual debtor electing to reaffirm a secured debt must "1) file a statement of intention within a specified time stating the debtor's intention to reaffirm the debt secured by the property; and 2) perform that intention with respect to the property within a specified time."[57]

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[48] *See id.*; Hogan, *supra* note 23, at 899.

[49] *See* Moren, *supra* note 5, at 1605 (noting argument that consumer creditor coalitions may have played major role in BAPCPA reform).

[50] *See id*. at 1603 n.35.

[51] *See* 11 U.S.C. § 524(c)(3).

[52] *See* Moren, *supra* note 5, at 1603–04.

[53] 11 U.S.C. § 524(c)(6)(A).

[54] *Compare* 11 U.S.C. § 521(2) (2000), *with* 11 U.S.C. § 521(a)(2) (2012).

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

[56] *See id.* at *6 (discussing stay relief in favor of creditors if debtor fails to satisfy specific duties set forth in 11 U.S.C. § 521(a)(2)).

[57] *Id.*

> To perform the intention to reaffirm the debt, a debtor who is represented by counsel must (i) be[] willing to enter into a reaffirmation agreement with the creditor on the original contract terms, (ii) cooperate with the creditor in executing a reaffirmation agreement on the original contract terms, or on other terms if mutually acceptable to the debtor and creditor; and (iii) appear at any hearing on disapproval of the reaffirmation agreement, and at the hearing honestly respond to questions and not ask that the agreement be disapproved.[58]

The debtor does not need to obtain an attorney's certification under section 524(c)(3) in order to perform his intention of reaffirming the debt.[59]

Under section 521(a)(6) an individual chapter 7 debtor may not retain personal property unless (i) a creditor has an allowed claim (ii) for the purchase price of the property and (iii) the debt is "secured in whole or in part by an interest in such personal property."[60] Moreover, in order for the debtor to preserve the automatic stay without surrendering or redeeming his personal property, section 362(h) requires that the debtor "(i) timely file a statement of intention indicating an intent to reaffirm the debt; and (ii) timely take the action to reaffirm the debt (unless the debtor is willing, but the creditor refuses to agree to an agreement under the original contract terms)."[61] If the abovementioned 521(a)(2), (a)(6) and 362(h) conditions are met, then the debtor *must* enter into a reaffirmation agreement with the creditor.[62]

C. How BAPCPA Affected Debtors' Ability to Retain Collateral by Riding-Through

Still, these revisions provide little clarity as to whether ride-through survived BAPCPA. The legislative record does not help either. There is no Senate committee report[63] and the House Judiciary Committee report does not contain the phrase "ride-through" at all.[64] Once again, courts are left to interpret

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[58] *Id.* at *7.
[59] *See id.*
[60] 11 U.S.C. § 521(a)(6).
[61] *In re* Perez, 2010 WL 2737187, at *9.
[62] *See id.* at *7 (stating debtors must do all within their power and control to complete an enforceable reaffirmation agreement).
[63] *See* Braucher, *supra* note 19, at 460 n.13.
[64] *See* Moren, *supra* note 5, at 1604 (pointing to Congress' failure to include any committee reports discussing its intention to allow or disallow ride-through).

the Code and Congress' undocumented intentions to determine whether the ride-through lived.

In general, those jurisdictions that permitted ride-through pre-BAPCPA continue to permit ride-through.[65] However, to qualify for ride-through, or now termed "backdoor ride-through," the debtor must comply with the abovementioned requirements set forth in sections 524, 521, and 362.[66] If the debtor fully complies, and the court finds the reaffirmation agreement unenforceable, then a black hole remains in the Bankruptcy Code. Any remedies that might otherwise have been available to the creditor under sections 521 and 362 are no longer permissible.[67] The debtor may retain possession of the property at issue and the secured creditor retains a nonrecourse lien on the collateral, but is precluded by the automatic stay from exercising any other remedies that the pre-petition loan contract may have otherwise provided.[68]

The result is a ride-through similar in form to pre-BAPCPA ride-throughs. So long as the debtor remains current on payments and does not default in any other way, the creditor will generally allow the debtor to retain possession of the collateral.[69] However, if the debtor defaults, the creditor may repossess the collateral, but has no claim against the debtor to recover any deficiency.[70]

III. SOLVING THE CIRCUIT SPLIT

A. Problems with the Current Version of the Bankruptcy Code—Why Code Revisions are Necessary

The Constitution mandates Congress enact "uniform Laws on the subject of Bankruptcies throughout the United States."[71] Although only one Bankruptcy Code is currently enacted, disagreement among circuit courts has prevented a "uniform" application of the laws and created geographic inequalities for debtors and creditors.[72] A debtor that files in Maryland wishing to retain

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[65] *See In re* Perez, 2010 WL 2737187, at *6; *see also* Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161, 183 (E.D.N.C. 2008); *In re* Baker, 390 B.R. 524, 530 (Bankr. D. Del. 2008); *In re* Chim, 381 B.R. 191, 199 (Bankr. D. Md. 2008); *In re* Moustafi, 371 B.R. 434, 439 (Bankr. D. Ariz. 2007); *In re* Bower, No. 07-60126-fra7, 2007 WL 2163472, at *3 (Bankr. D. Or. July 26, 2007); *In re* Blakeley, 363 B.R. 225, 232 (Bankr. D. Utah 2007).

[66] *See supra* Part II.B.

[67] *In re* Perez, 2010 WL 2737187, at *9 (stating no relief is available to creditor when debtor fulfills statutory obligations).

[68] *See id.*

[69] *See* Hogan, *supra* note 23, at 906 (describing the requirements of a backdoor ride-through).

[70] *See* Moren, *supra* note 5, at 1623 n.137.

[71] U.S. CONST. art. I, § 8, cl. 4.

[72] *See* Daniel A. Austin, *Bankruptcy and the Myth of "Uniform Laws"*, 42 SETON HALL L. REV. 1081, 1088 (2012) (describing discrepancies in bankruptcy case law precedent).

possession of a vehicle,[73] for instance, will have the option to ride-through his vehicle, whereas a debtor that files in Tennessee will only have the three options explicitly prescribed in section 521.[74]

Jurisdictional inequities aside, sections 521, 524 and 362 of the current Code are wasteful and provide debtors and creditors little certainty with respect to retention of secured personal property. As discussed above,[75] the three options provided by section 521 are insufficient for many debtors' needs. Backdoor ride-through presents its own policy issues as well. Although it allows debtors to retain secured property without redeeming or reaffirming, backdoor ride-through forces debtors, creditors, and courts to participate in economically and procedurally wasteful behavior.[76] In addition to the superfluous transactional costs associated with negotiating and drafting a reaffirmation agreement that the parties have no actual intention of being approved, backdoor ride-through also requires that the court refuse enforcement of the reaffirmation.[77] Alternatively, if the creditor refuses to reaffirm on the original loan terms and the debtor makes every effort to act upon his "intention" to reaffirm the debt, then backdoor ride-through is also permitted.[78] Either way, there is no sensible policy rationale for requiring or even permitting such wasteful behavior in bankruptcy. The Bankruptcy Code was developed with the central focus of quick and efficient resolution of a debtor's insolvency.[79] To solve these policy inconsistencies would require amendment of the Code. The following subsection discusses such possible amendments.

B. Statutory Ride-Through: Suggested Amendments to the Code

To avoid inefficient behavior and reestablish uniform application of bankruptcy laws relating to the retention of secured personal property, Congress should amend the Code to include ride-through as a fourth option. Although rational arguments exist for replacing reaffirmation with ride-through altogether,[80] this section demonstrates that reaffirmation would still have a place in the Code as well.

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[73] *See, e.g., In re* Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008) (permitting ride-through).

[74] *See, e.g., In re* Norton, 347 B.R. 291, 298-99 (Bankr. E.D. Tenn. 2006) (refusing to permit ride-through).

[75] *See supra* Part I .

[76] *See supra* Part II.B.

[77] *See* Hogan, *supra* note 23, at 917–18 (explaining backdoor ride-through requires court to deny reaffirmation agreement).

[78] *See* Moren, *supra* note 5, at 1616–17.

[79] *See id.* at 1618.

[80] *See, e.g., id.* at 1625–27 (describing proposed modifications for section 521 to replace reaffirmation with statutory ride-though, and advantages to doing so).

Specific requirements that form the grounds for ride-through must be introduced into the Code to implement a statutory ride-through provision that functions in the same manner as backdoor ride-through, but also avoids the subsequent wasteful behavior. First, ride-through should be an election made by the debtor similar to surrender, redemption and reaffirmation. Once the debtor states his intention to ride-through secured personal property,[81] he must notify the creditor of this intention. The creditor's consent would not be required.[82]

Second, the debtor must cure any monetary or bankruptcy-related default and continue making scheduled payments in full using post-petition earned income excluded from the estate under section 541(a)(6).[83] If a non-monetary default has occurred, then the creditor may object to ride-through by showing a court that substantial injury to the creditor has or would likely result in irreparable damages. For example, if the loan agreement requires that the debtor insure an automobile, but debtor fails to purchase insurance, then the creditor may ask the court to reject ride-through upon notice, hearing and evidence showing that the creditor was injured or is likely to be injured by the debtor's failure. In general, debtors should be able to pay the debt post-bankruptcy, since other debts will have been discharged, thereby "freeing income to pay the existing contract's balance."[84]

Third, within 45 days after the first meeting of creditors under section 341(a), the debtor must obtain certification from his attorney, or the trustee, if the debtor is unrepresented. The certification must state that (1) the debtor is fully informed and has voluntarily elected to ride-through the debt; (2) ride-through does not *impose* an undue hardship on the debtor or a dependent of the debtor; and (3) the debtor is fully advised of the legal effect and consequences of (i) electing to ride-through the debt; and (ii) any default.[85] Although the Code does not define "undue hardship," in *In re Melendez* the bankruptcy court held that a reaffirmation would be deemed "to cause a debtor 'undue hardship' where it would result in a significant, but otherwise avoidable, obstacle to the attainment or retention of necessaries by the debtor or the debtor's dependents."[86] Moreover, if the debtor's post-petition expenses will exceed his

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[81] *Cf.* 11 U.S.C. § 521(a)(2) (2012) (debtor is required to file with clerk statement of intention to retain secured property).

[82] *Cf. id.* (creditor consent is not required for debtor to surrender or redeem secured personal property).

[83] Debtor must use post-petition income to make scheduled payments, otherwise other creditors (or the trustee) could claim that debtor is providing inadequate protection or has made preferential transfers of estate property to the secured creditor. *See* 11 U.S.C. §§ 361, 547 (2012).

[84] Hogan, *supra* note 23, at 923.

[85] *Cf.* 11 U.S.C. §§ 521(a)(6), 524(c)(3) (2012).

[86] *In re* Melendez, 224 B.R. 252, 261 (Bankr. D. Mass. 1998).

income or the debt exceeds the replacement value of the collateral,[87] then other factors, such as the type of collateral, should be considered. For example, if the debtor wishes to reaffirm an automobile, it is more likely to be justifiable because automobiles are "items of indisputable necessity and substantial value regardless of the terms offered by the creditor . . . ."[88] Whereas if the collateral is a household item, then "necessity" must be evaluated in light of the replacement cost, "particularly if age, obsolescence or other factors might render such value de minimus."[89] This analysis is analogous for ride-through, except that a hardship amelioration exception should also be incorporated. The exception would state that even if the debtor faces an undue hardship under the *Melendez* analysis, a court may still permit ride-through if the debtor proves that riding-through the debt would ameliorate the debtor's hardship. For instance, if a debtor wishes to ride-through his automobile, but his post-petition pre-ride-through expenses exceed his income by $1,000, then theoretically without this exception the ride-through would not be permitted. However, if ride-through of the automobile would allow the debtor to drive to work and as a result, his expenses would only exceed his income by $250, then a court should permit ride-through.

Fourth and most important, *the terms of ride-through must be the same as the original security agreement*. However, the creditor may require that the debtor provide adequate protection of the secured property post-petition by obtaining reasonable insurance and/or maintenance.[90] Adequate protection under section 361 would not apply here. Instead, maintenance and/or insurance should absorb most of the creditor's potential loss caused by a decrease in the collateral's value.[91] This "original terms" requirement is why reaffirmation must remain in the Code as currently written. If the parties wish to change any of the original loan terms, then they must reaffirm the debt. For example, if the parties want to shorten or lengthen the repayment schedule,[92] change the interest rate, add any default terms, besides maintenance or insurance, or make any other changes to the loan, then ride-through would not be available. Also, since ride-

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[87] Replacement value is the cost that debtor would likely incur for comparable or replacement property.

[88] *In re Melendez*, 224 B.R. at 263.

[89] *In re* Melendez, 235 B.R. 173, 197 (Bankr. D. Mass. 1999).

[90] *See infra* Part IV.

[91] Although maintenance and insurance will not cover all of the collateral's decreased value, the creditor will be receiving regular loan payments, which should compensate the creditor for decreases in the collateral's value. These loan payments are analogous in form to section 361 cash payments. *Cf.* 11 U.S.C. § 361 (2012).

[92] Concededly, if the debtor wishes to pay within a shorter period than outlined in the original agreement, he could keep the original terms and simply pay off the debt in less time, thereby allowing him to take advantage of statutory ride-through.

through is based on the original loan terms, the abovementioned undue hardship test should not present a barrier for debtors to ride-through debts, unless the original terms were unreasonable and continued satisfaction of the debt is unequivocally not in the debtor's (or his dependents') best interests.

Fifth, the ride-through election is to be rescinded at any time prior to discharge or within ninety days after the first meeting of creditors under section 341(a), whichever occurs later, if the debtor (1) gives notice of rescission to the creditor and the trustee, or (2) materially defaults on the debt, which includes, but is not limited to (i) failure to make a scheduled payment, and (ii) failure to reasonably insure or maintain the secured property, if so required.[93] Theoretically, the ride-through election provides a procedural safety valve for debtors that reaffirmation does not. If the debtor fails to make a scheduled payment prior to discharge or within 90 days after the first meeting of creditors, then the ride-through election is deemed to cause an "undue hardship" and the ride-through is rescinded.[94] However, the debtor may still retain possession of the secured property by redeeming or reaffirming, which then allows the parties to renegotiate the original loan terms.[95]

Lastly, the secured creditor's deficiency claim against the debtor shall be discharged, but the creditor's lien shall remain in effect. This provides the creditor the right to repossess the collateral post-discharge, but does not allow the creditor to collect any deficiency.[96] A draft of the proposed Code amendments may be found in the Appendix of this Article.

IV. POLICIES FAVORING STATUTORY RIDE-THROUGH

Implementation of a statutory ride-through would solve most of the asset retention problems discussed above[97] and better ensure that the three underlying policy objectives of bankruptcy—ensuring a fresh start, protecting creditors, and

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[93] Although, in theory, the undue hardship analysis (in the proposed third element) is only performed once, this fifth element introduces a procedural safeguard. By automatically rescinding the ride-through election if the debtor fails to make a scheduled payment, ride-through has a procedural safety valve, which confirms that it does not cause the debtor an undue hardship on a regular basis (based on the original loan agreement's payment schedule).

[94] Although the "90 days" requirement seems arbitrary, it was determined based on 45 days after the latest time that the debtor's attorney may submit certification or the trustee must meet with the debtor. *See infra* Appendix, specifically the section discussing amended-section 521(a)(7)(E).

[95] Element (2) of the seventh requirement mandating that the ride-through election be rescinded if the debtor fails to make a scheduled payment is not essential to the successful implementation of a statutory ride-through. Even if the debtor fails to make a scheduled payment or otherwise defaults, the creditor has an available remedy—repossession. The purpose of this requirement is to allow the debtor to explore other section 521 retention options.

[96] *See supra* Part II.C.

[97] *See supra* Part I.

promoting uniformity—are satisfied.[98] Although scholars, judges and policymakers generally recognize ride-through as a pro-debtor policy,[99] there is persuasive evidence that it is also a pro-creditor policy.

Under the current Code, debtors and creditors expend significant resources negotiating, drafting and filing reaffirmation agreements without any certainty as to whether it will yield a reaffirmation or backdoor ride-through.[100] Introducing a statutory ride-through into the Code would limit this uncertainty. Because statutory ride-through would allow the debtor to retain secured collateral by simply following a prescribed set of steps,[101] there would be far less need for creditor, trustee, or court intervention. This in turn would foster more predictable treatment of secured debt under section 521 and avoid much of the wasteful expenditure of resources by all parties involved. However, the cost of statutory ride-through should not be overlooked. Although the transactional costs associated with reaffirmation would be avoided, the requirement that ride-through be reviewed by the debtor's counsel or the trustee would still impose an administrative expense.[102] Nonetheless, statutory ride-through would promote uniformity by abolishing the current circuit split and cure the fresh start problem that reaffirmation poses for debtors if they default on the reaffirmed debt post-bankruptcy.

Economically, reaffirmation and ride-through pose very similar recuperation opportunities for creditors. If the debtor defaults on a reaffirmed debt, the creditor may collect up to the original lien value.[103] However, as discussed above, "[t]he cost to the creditor of processing the reaffirmation agreement and the nominal increase in value received by establishing [and collecting upon] the debtor's post-discharge personal liability rarely justify the effort" and resources consumed.[104] Ride-through, on the other hand, allows the creditor to collect the liquidation value of the collateral plus any loan payments made by the debtor post-petition.[105] Therefore, even if the debtor defaults post-bankruptcy, so long

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[98] *See* Moren, *supra* note 5, at 1618.

[99] *See id.* at 1628 (noting indirect and direct benefits of ride-through for debtors).

[100] *See, e.g.*, Ehrlich, *supra* note 25, at 616 (positing costs of reaffirmation agreements may even outweigh benefits of reaffirmation).

[101] *See supra* Part III.B.

[102] The decreased transactional costs should more than offset any additional administrative expenses associated with ride-through.

[103] *See* Moren, *supra* note 5, at 1601 ("Reaffirming would allow the [Debtors] to retain their vehicles, but if they missed a scheduled payment the [Creditors] could repossess.").

[104] Ehrlich, *supra* note 25, at 696.

[105] Moren, *supra* note 5, at 1622–23. Based on the suggested statutory amendments discussed above in Part III.B, the creditor should, at minimum, collect 90 days of interest assuming the debtor defaults on the first day following the ride-through rescission grace period. Under this paper's suggested

as the post-petition payments offset depreciation and any damages to the collateral, the creditor will likely be in a better position than had the debtor surrendered the collateral. Moreover, damage to or destruction of the collateral should not be a concern for the creditor for two reasons. First, by electing to ride-through, the debtor signals a strong interest in retaining and using the collateral, which implies that the debtor has little incentive to damage or destroy it.[106] Second, statutory ride-through would permit the creditor to require that the collateral be maintained and/or insured. By requiring the debtor to maintain and insure the collateral, the creditor essentially ensures that its post-bankruptcy value is protected by shifting the creditor's monitoring costs to the debtor. Therefore, even if the debtor defaults, the creditor is virtually guaranteed to at least collect the liquidation value of the secured asset.[107]

CONCLUSION

Backdoor ride-through presents a serious dilemma for secured creditors by introducing a gambling aspect to reaffirmation agreements.[108] It is almost certain that the creditor's lobbyists that shaped the BAPCPA amendments did not intend to allow backdoor ride-through.[109] Its emergence gives even more reason to adopt statutory ride-through. As some courts have stated,[110] "without the ride-through, the Code gives creditors a veto over the debtor's fresh start, denying him the very right that is at the heart of bankruptcy policy."[111] Implementing a statutory ride-through would protect debtors by ensuring a fresh start, simplifying the available options for asset retention, and lowering the cost of retaining secured assets for debtors and creditors. Moreover, by making ride-

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statutory amendments, if the debtor defaults within this 90-day period, then the ride-through may be rescinded. *See infra* Appendix.

[106] In *In re Price*, the Third Circuit held that any fear that debtors would intentionally damage ride-through assets is "overstated and entirely hypothetical." Debtors have the same incentive to destroy ride-through assets as they would reaffirmed assets. *See* Price v. Del. State Police Fed. Credit Union (*In re* Price), 370 F.3d 362, 377 (3d Cir. 2004). *See also* Moren, *supra* note 5, at 1623.

[107] *See* 1 NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 167 (1997). Even if a debtor destroys the collateral, if insurance was required by the creditor, then the debtor cannot prevent the creditor from collecting the insurance proceeds.

[108] *See* Moren, *supra* note 5, at 1631 (commenting "the circumstance in which a creditor is most likely to require reaffirmation is also that in which a court is most likely . . . [to] impos[e] backdoor ride-through . . . .").

[109] *Id.* at 1616.

[110] *See, e.g.*, Capital Commc'ns Fed. Credit Union v. Boodrow (*In re* Boodrow), 126 F.3d 43, 51 (2d Cir. 1997) (declaring that failure to allow ride-through "gives a creditor an effective veto on the 'fresh start.'").

[111] *See* Hogan, *supra* note 23, at 924.

through a statutory option, the Code would implement a uniform and predictable treatment of secured debt under section 521.[112]

[112] Moren, *supra* note 5, at 1632.

APPENDIX

PROPOSED AMENDMENT FOR STATUTORY RIDE-THROUGH

Section 521(a)(2)(A) should be amended. Before the word "and" at the end of subparagraph (A), the following provision should be added:
"or that the debtor intends to ride-through debts secured by such property pursuant to subparagraph (7) of this section;"

In section 521(a)(6), subparagraphs (A) and (B) should be changed to (B) and (C), respectively. Subparagraph (A) should read:
"notifies the creditor of its intention to ride-through the debt pursuant to subparagraph (7) with respect to the claim secured by such property;"

Subparagraph (7) in section 521(a) should be renumbered (8). Under subparagraph (7) the following provisions should be added:
(7) in a case under chapter 7 of this title in which the debtor is an individual, the debtor may retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such property, without court permission, *only if* —

(A) the debtor has cured any monetary or bankruptcy-related defaults;

(B) upon creditor's objection, the court, after notice and hearing, finds that ride-through has not and likely will not result in injury to creditor as a result of a pre-petition non-monetary default by debtor;

(C) the debtor has continued to make scheduled payments in full using post-petition income;

(D) the terms of ride-through are the same as the security agreement on the date of the filing of the petition in this case, except that the creditor may request the debtor to provide adequate protection of such property by —

(i) obtaining reasonable insurance;

(ii) providing reasonable maintenance;

(E) not later than 45 days after the first meeting of creditors under section 341(a), an attorney that represents the debtor shall submit to the trustee a declaration or an affidavit stating that, or if the debtor is not represented by an attorney, the trustee shall meet with the debtor and confirm that —

(i) the debtor is fully informed and voluntarily elected to ride-through the debt;

(ii) ride-through does not impose an undue hardship on the debtor or a dependent of the debtor; and

(iii) the debtor is fully advised of the legal effect and consequences of —

(I) electing to ride-through the debt; and

(II) any default;

The ride-through election shall be rescinded at any time prior to discharge or within ninety days after the first meeting of creditors under section 341(a), whichever occurs later, if the debtor gives notice of rescission to the holder of the claim and the trustee, or materially defaults on the debt, which includes, but is not limited to (i) failure to make a scheduled payment, and (ii) failure to reasonably insure or maintain such property, if required.

In section 524, paragraph (d) and all proceeding paragraphs should be renumbered and a new paragraph (d) should be added:

(d) In a case concerning an individual under chapter 7 of this title, if the debtor elects to ride-through pursuant to section 521(a)(7) of this title, a discharge pursuant to paragraph (a) of this section shall be granted, except that creditor may commence or continue an action or act to collect or recover from the debtor the property secured by the claim or if the property is unattainable, offset any such debt as a personal liability of the debtor for the value of the property less any value owned by the debtor.

Legislative Notes

The language in amended section 521(a)(7)(E)(ii) that "ride-through does not *impose* an undue hardship on the debtor or a dependent of the debtor" implies that ride-through should be permitted where it would ameliorate or lessen the debtor's hardship. A court shall determine whether ride-through ameliorates the debtor's hardship.