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## BANKRUPTCY—CONFUSION AND AMBIGUITY: THE POST-BAPCPA UNCERTAINTY CONCERNING THE RIDE-THROUGH OPTION IN THE EIGHTH CIRCUIT

### I. INTRODUCTION

Imagine Tim “the trickster” Thompson, who recently purchased a new home fully aware that he could not afford it. At that time, Tim took out a mortgage on the home with State Bank, and State Bank took the appropriate steps to ensure that its loan was secured. However, Tim filed bankruptcy in a jurisdiction that allowed the ride-through option. Consequently, Tim was able to continue making payments to State Bank throughout the bankruptcy while his personal liability for the debt would be discharged at the end of the bankruptcy. At that point, State Bank could only repossess the home if Tim defaulted, and if Tim did not take care of the home, State Bank likely would not recover the amount owed for the loan.

Now imagine Grandma Betty, who has worked and sacrificed for her family for many years. In fact, for years she has consistently made payments on her mortgage to ensure that her children and grandchildren would have a place to live. However, Grandma Betty recently realized that she could not afford to continue paying her bills, so she filed bankruptcy. She wanted to keep her home, but she could not afford to redeem the debt. And because Grandma Betty filed bankruptcy in a jurisdiction that did not allow the ride-through option, her only choice was to negotiate a reaffirmation agreement with the Second Bank, the mortgagee. However, Second Bank refused to reach a reasonable agreement. As a consequence, poor, sweet Grandma Betty had no option but to accept an agreement on unfavorable terms and lose the “fresh start” that bankruptcy is meant to provide.

As this imaginary scenario indicates, the ride-through option is consequential to both secured creditors and bankruptcy debtors. Unfortunately, the current status of the ride-through option in the Eighth Circuit is unclear. The Eighth Circuit Court of Appeals has not heard the issue, and the intra-circuit split has never been resolved.<sup>1</sup> Additionally, Congress amended the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) in a way that has since created more un-

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1. *In re Covell*, 474 B.R. 702, 704 (Bankr. W.D. Ark. 2012). In 2004, the United States Bankruptcy Appellate Panel of the Eighth Circuit upheld a bankruptcy court’s decision to lift the automatic stay after a debtor had attempted to use the ride-through option. *Sanabria v. Am. Nat’l Bank (In re Sanabria)*, 317 B.R. 59 (B.A.P. 8th Cir. 2004). However, in so deciding, the court did not consider the existence of the ride-through option. *Id.* at 60–61. Rather, the court merely discussed the issue of whether the bankruptcy court abused its discretion. *Id.*

certainty.<sup>2</sup> As a result, when a debtor attempts to retain property by using the ride-through option within the Eighth Circuit, the ability of the debtor to discharge personal liability for certain secured debts is uncertain.

This note will discuss this Eighth Circuit issue and argue for a limited ride-through option for both real and personal property. Part II.A will describe the basic law surrounding the controversy.<sup>3</sup> Part II.B will provide a background for the ride-through option by discussing pre-BAPCPA statutes and decisions from Eighth Circuit bankruptcy courts.<sup>4</sup> Part II.C will discuss BAPCPA and changes that occurred to the Bankruptcy Code as a result.<sup>5</sup> Part II.D will discuss post-BAPCPA Eighth Circuit bankruptcy court decisions.<sup>6</sup> Finally, Part III will analyze why the courts within the Eighth Circuit should apply a limited ride-through option for both real and personal property.<sup>7</sup>

## II. BACKGROUND

### A. The Basic Law Surrounding the Controversy

The controversy surrounding the ride-through option involves the statutory requirements for the statement of intention under 11 U.S.C. § 521(a)(2).<sup>8</sup> The statement of intention is a document that the debtor must file with the bankruptcy court that indicates whether the debtor intends to surrender or retain certain encumbered property.<sup>9</sup> This statement of intention must be filed within thirty days after filing a petition for bankruptcy.<sup>10</sup> If the debtor chooses to retain the property, then “if applicable,” the debtor must “specify[] [in the statement of intention] 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.”<sup>11</sup>

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

3. *See infra* Part II.A.

4. *See infra* Part II.B.

5. *See infra* Part II.C.

6. *See infra* Part II.D.

7. *See infra* Part III.

8. 11 U.S.C. § 521(a)(2) (Supp. 2011).

9. *See id.* For a discussion of this section and the statement of intention, see GEORGE M. TREISTER, ET AL., FUNDAMENTALS OF BANKRUPTCY LAW, 343, 345, 347 (6th ed. 2006).

10. *Id.*

11. *Id.* The statutory language of this section is as follows:

The debtor shall (2) if an individual debtor’s schedule of assets and liabilities includes 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 of this title 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, file with the clerk a

Reaffirmation—as provided in § 521(a)(2)—is defined in § 524(c).<sup>12</sup> Section 524(c) specifically provides that a reaffirmation agreement is “[a]n 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 . . . .”<sup>13</sup> Put simply, the debtor and creditor enter into a new agreement for the secured debt in which they can contemplate new or similar terms. However, the reaffirmation agreement must be completed before discharge of the debt in order to be effective.<sup>14</sup> If performed correctly, the debtor will continue to face personal liability not only for the collateral but also for the entire debt after her bankruptcy case is discharged.<sup>15</sup>

Redemption—as provided in § 521(a)(2)—is defined by certain requirements in § 722.<sup>16</sup> Section 722 provides that the debtor meet three primary requirements for redemption.<sup>17</sup> First, the property that the debtor chooses to redeem must be “intended primarily for personal, family, or household use.”<sup>18</sup> Second, the property must have been abandoned by the bankruptcy trustee or able to be exempted by the debtor.<sup>19</sup> Third, the debtor

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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.

*Id.*

12. 11 U.S.C. § 524(c) (2006); *see also* Nancy C. Dreher, *Reaffirmation*, in *BANKRUPTCY MANUAL* § 8:4 (Clay Mattson, et al. eds., 5th ed. 2012) (providing a discussion of reaffirmation agreements).

13. 11 U.S.C. § 524(c).

14. *Id.* at § 524(c)(1).

15. *See* Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 *AM. BANKR. L.J.* 709, 714–15 (1999); 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, 188 (1994). In order for the reaffirmation to be effective, certain procedures provided by the bankruptcy code must be followed. *See* 11 U.S.C. § 524(c). Specifically, disclosures must be provided to the debtor before the reaffirmation agreement becomes binding, *id.* at § 524(c)(2); the reaffirmation agreement along with an affidavit certifying certain requirements must be filed with the bankruptcy court, *id.* at § 524(c)(3)(A)–(C); the debtor cannot rescind the agreement before a sixty day deadline, *id.* at § 524(c)(4); and the court must approve the agreement if the debtor is not advised by an attorney throughout the reaffirmation process and the agreement is secured by personal property, *id.* at § 524(c)(6)(A). If the parties follow these procedures, the reaffirmation agreement becomes effective, the debtor can retain the property as long as the payments for the debt are made, and the debtor will be personally liable for the debt after the bankruptcy. Culhane & White, *supra* note 15, at 714.

16. 11 U.S.C. § 722 (2006); *see also* Nancy C. Dreher, *Redemption*, in *BANKRUPTCY MANUAL* § 10:20 (Clay Mattson, et al., eds., 5th ed. 2012) (providing a discussion of redemption).

17. 11 U.S.C. § 722.

18. *Id.*

19. *Id.*

must pay the secured creditor “the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption.”<sup>20</sup> If all three of these requirements are met, then the debtor will be able to retain the property free and clear of that lien after bankruptcy.<sup>21</sup>

Exemption—as provided by § 521(a)(2)—is defined by various portions of state and federal law.<sup>22</sup> Under these laws, the debtor is able to perform exemption by retaining certain property or a certain amount of the proceeds from the property.<sup>23</sup> Exemptions under state law “vary by state” and typically include common exemptions such as a homestead exemption—where the debtor is able to keep no more than a certain amount of the value of the homestead—and personal property exemptions—where the debtor is able to keep no more than a certain amount of the value of personal property.<sup>24</sup> Federal exemptions provide similar allowances.<sup>25</sup>

Although § 521(a)(2) explicitly provides only that the debtor may choose redemption, reaffirmation, or exemption, many courts have struggled with whether these options are exclusive.<sup>26</sup> Several courts have indicated that the debtor may take advantage of the non-statutory ride-through option.<sup>27</sup> The ride-through option allows a debtor whose payments on the debt are up-to-date to retain the collateral that secures the debt without filing a statement of intention or obtaining the creditor’s consent.<sup>28</sup> In doing so, the debtor must continue making payments for the debt throughout the bank-

20. *Id.*

21. *Id.*

22. Daniel A. Austin, *Bankruptcy and the Myth of “Uniform Laws”*, 42 SETON HALL L. REV. 1081, 1094–96 (2012); Paul M. Hoffmann & Jerald S. Enslein, *Overview of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 62 J. MO. B. 300, 302–03 (2006); see also Joan N. Feeney, *Exemption*, in BANKRUPTCY MANUAL § 5:34 (Clay Mattson, et al eds., 5th ed. 2012) (providing a discussion of exemption).

23. Austin, *supra* note 22, at 1094–95.

24. *Id.*

25. *Id.* (“The Bankruptcy Code also has an exemption schedule, which is set forth in § 522(d).”).

26. See Christopher M. Hogan, Note, *Will the Ride-Through Ride Again?*, 108 COLUM. L. REV. 882, 893–94 (2008).

27. See, e.g., *Price v. Del. State Police Fed. Credit Union U.S. Tr.* (*In re Price*), 370 F.3d 362, 378–79 (3d Cir. 2004), *superseded by statute*, 11 U.S.C. § 362(h); *McClellan Fed. Credit Union v. Parker* (*In re Parker*), 139 F.3d 668, 673 (9th Cir. 1998), *superseded by statute*, 11 U.S.C. § 362(h); *Capital Commc’ns Fed. Credit Union v. Boodrow* (*In re Boodrow*), 126 F.3d 43, 53 (2d Cir. 1997), *superseded by statute*, 11 U.S.C. § 362(h); *Home Owners Funding Corp. of Am. v. Belanger* (*In re Belanger*), 962 F.2d 345, 349 (4th Cir. 1992) *superseded by statute*, 11 U.S.C. § 362(h); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989) *superseded by statute*, 11 U.S.C. § 362(h).

28. *In re Covell*, 474 B.R. 702, 704 (Bankr. W.D. Ark. 2012); 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, 475 (2005) [hereinafter Braucher, *Rash*].

ruptcy.<sup>29</sup> Once the debtor's bankruptcy case has ended and the debtor has received a discharge of all remaining debts, the debtor maintains no personal liability for the secured debt for which she "rode-through."<sup>30</sup> At that point, the creditor's only available remedy is to repossess the collateral when the debtor defaults.<sup>31</sup>

## B. Condition of the Ride-through in the Eighth Circuit

Currently, the condition of the ride-through option in the Eighth Circuit is unclear. The Eighth Circuit Court of Appeals has never ruled on the issue,<sup>32</sup> and the bankruptcy courts' decisions—both pre- and post-BAPCPA—remain in conflict.<sup>33</sup> Additionally, Congress amended the Bankruptcy Code with BAPCPA in such a way that has added to the confusion.<sup>34</sup> This section details this history and current standing of the ride-through option in the Eighth Circuit.

### 1. Bankruptcy Courts Hold the Ride-through Options Available

Prior to BAPCPA, the Eighth Circuit bankruptcy courts were not in agreement on whether the ride-through option was allowable.<sup>35</sup> Some bankruptcy courts determined that debtors could utilize the ride-through option,<sup>36</sup> while others concluded the opposite.<sup>37</sup> Those bankruptcy courts that determined that the ride-through option was a valid tool for the bankruptcy debtor did so by considering the specific language of §§ 521(2)(A)<sup>38</sup> and

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29. See Allyson MacKenna, Note, *Bankruptcy—Mimsy Were the Borogoves: A "Ride-Through" the Looking Glass with the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act*, 33 W. NEW ENG. L. REV. 657, 666–67 (2011).

30. *Id.* at 667.

31. Marianne B. Culhane & Michaela M. White, *But Can She Keep the Car? Some Thoughts on Collateral Retention in Consumer Chapter 7 Cases*, 7 FORDHAM J. CORP. & FIN. L. 471, 478 (2002).

32. *In re Covell*, 474 B.R. at 704.

33. *See id.* at 704 n.2.

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

35. Compare *In re Canady-Houston*, 281 B.R. 286, 288–89 (Bankr. W.D. Mo. 2002), and *In re Parker*, 142 B.R. 327, 328–31 (Bankr. W.D. Ark. 1992), and *In re Manring*, 129 B.R. 198, 199–200 (Bankr. W.D. Mo. 1991), with *In re Gerling*, 175 BR. 295, 298 (Bankr. W.D. Mo. 1994), and *In re Kennedy*, 137 B.R. 302, 305 (Bankr. E.D. Ark. 1992), and *In re Griffin*, 143 B.R. 535, 537 (Bankr. E.D. Ark. 1991).

36. *E.g.*, *In re Canady-Houston*, 281 B.R. at 288–89.

37. *E.g.*, *In re Gerling*, 175 BR. at 298.

38. *See In re Canady-Houston*, 281 B.R. at 289; *In re Parker*, 142 B.R. at 328; *In re Manring*, 129 B.R. at 199. Prior to BAPCPA, what is currently § 521(a)(2), was labeled § 521(2)(A).

521(2)(C),<sup>39</sup> the enforceability of ipso facto clauses,<sup>40</sup> and the legislative history of the statute.<sup>41</sup>

These bankruptcy courts first considered the statutory language of § 521(2)(A) in a way that allowed them to determine that the “if applicable” statutory language should mandate the ride-through.<sup>42</sup> However, each of these courts did so in a slightly different manner.<sup>43</sup> For example, in *In re Parker*,<sup>44</sup> the bankruptcy court explained that the language was “poorly drafted and ambiguous” and supported at least two interpretations.<sup>45</sup> Because of this, the court was able to analyze the factors that indicated the ride-through was allowed.<sup>46</sup> On the other hand, in *In re Canady-Houston*,<sup>47</sup> the court determined that because the language “lack[ed] two things: (1) an inflexible time schedule, and (2) a penalty for failure to comply,” the language did not create “mandatory parameters,” and the ride-through should have been allowed.<sup>48</sup> In the end, these courts looked to factors other than the statutory language that allowed them to determine that a ride-through option was necessary.<sup>49</sup>

Another consideration was the language of § 521(2)(C).<sup>50</sup> The original § 521(2)(C) stated 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.”<sup>51</sup> In *Parker*, the bankruptcy court determined that if the court restricted the debtor to only the three statutory options, the debtor’s rights would be altered as expressly prohibited in § 521(a)(2)(C).<sup>52</sup> The

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39. See *In re Parker*, 142 B.R. at 329.

40. See *In re Canady-Houston*, 281 B.R. at 288–89; *In re Manring*, 129 B.R. at 199.

41. See *In re Parker*, 142 B.R. at 328–29.

42. See *In re Canady-Houston*, 281 B.R. at 288–89; *In re Parker*, 142 B.R. at 328; *In re Manring*, 129 B.R. at 199.

43. *In re Canady-Houston*, 281 B.R. at 288–89; *In re Parker*, 142 B.R. at 328; *In re Manring*, 129 B.R. at 199.

44. *In re Parker*, 142 B.R. 327.

45. *Id.* at 328.

46. *Id.* at 328–31.

47. *In re Canady-Houston*, 281 B.R. 286.

48. *Id.* at 289.

49. *Id.* at 288–89; *In re Parker*, 142 B.R. at 328; *In re Manring*, 129 B.R. 198, 199 (Bankr. W.D. Mo. 1991). For example, in *Parker*, after noting that the statutory language was “poorly drafted and ambiguous,” the court explained that 11 U.S.C. § 521(2)(A) could be interpreted as explicitly providing only reaffirmation, redemption, or exemption, or implicitly providing a non-statutory ride-through option. *In re Parker*, 142 B.R. at 328. On the other hand, in *Canady-Houston*, the court never explicitly stated that the language was ambiguous, but it determined that the ride-through was available by relying on other factors. *In re Canady-Houston*, 281 B.R. at 288–89.

50. *In re Parker*, 142 B.R. at 329.

51. *Id.* (quoting 11 U.S.C. § 521(2)(C)) (internal quotation marks omitted).

52. *Id.* (“Therefore, interpreting § 521(2)(A) and (B) literally to limit a debtor’s alternatives would, in effect, result in a tacit repeal of the permissive nature of the rights conferred



bankruptcy court explained that the bankruptcy provisions concerning the ride-through option had a “permissive nature,” and this would be altered if the statutory language was read as providing only reaffirmation, redemption, or exemption.<sup>53</sup> As a result, the statutory language of § 521(2)(C) could also reflect the idea that the ride-through option was permissible.<sup>54</sup>

After considering the statutory language, the Eighth Circuit bankruptcy courts also considered the enforceability of ipso facto clauses in bankruptcy.<sup>55</sup> Ipso facto clauses usually provide that “the mere filing of a bankruptcy petition—be it Chapter 7, Chapter 11, or Chapter 13—was an event of default, created an immediate acceleration of any and all sums due . . . and allowed the creditor to deem itself insecure and repossess the collateral.”<sup>56</sup> When considering these clauses, the bankruptcy courts in *Canady-Houston* noted that eliminating the ride-through had the same effect.<sup>57</sup> Lifting the automatic stay and allowing a creditor to obtain the collateral when the debtor was up-to-date on her payments could be considered essentially identical in effect to an ipso facto clause.<sup>58</sup> However, because the Bankruptcy Code did not allow for the enforceability of ipso facto clauses, eliminating the ride-through and creating a situation similar in effect was not permissible.<sup>59</sup>

The Eighth Circuit bankruptcy courts also considered the legislative history and intent of § 521(a)(2).<sup>60</sup> Evidence from legislative hearings created the impression that § 521(a)(2) was intended primarily to be a notice provision.<sup>61</sup> In *Parker*, the bankruptcy court explained that under the original Bankruptcy Code creditors were unable to determine the debtors’ intentions for the creditors’ collateral without lifting the automatic stay.<sup>62</sup> Based on the legislative history, the court determined that the statement of intention was created simply to remedy this problem.<sup>63</sup> Thus, if this provision was created for providing notice to the debtor, the options in § 521 of redemption, reaf-

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upon a debtor by 11 U.S.C. §§ 524 and 722. There is no clear indication that Congress ever intended to repeal portions of sections 524 and 722.”).

53. *Id.*

54. *See id.*

55. *In re Canady-Houston*, 281 B.R. 286, 288–89 (Bankr. W.D. Mo. 2002); *In re Manring*, 129 B.R. 198, 199 (Bankr. W.D. Mo. 1991).

56. *In re Canady-Houston*, 281 B.R. at 289.

57. *Id.*; *see also In re Manring*, 129 B.R. at 199 (mentioning the comparison between ipso facto clauses and the prohibition of the ride-through option).

58. *In re Canady-Houston*, 281 B.R. at 289.

59. *Id.*

60. *In re Parker*, 142 B.R. 327, 328–29 (Bankr. W.D. Ark. 1992).

61. *Id.*

62. *Id.* at 328.

63. *Id.*



firmation, and exemption were probably not meant to be exclusive, and the ride-through should be permitted.<sup>64</sup>

Overall, several Eighth Circuit bankruptcy courts determined that debtors could ride-through bankruptcy when they were up-to-date on the payments of the debt.<sup>65</sup> These courts analyzed factors such as the statutory language of the pre-BAPCPA provisions of §§ 521(2)(A) and 521(2)(C), the similarity of ipso facto clauses to the interpretation that the ride-through did not exist, and legislative history.<sup>66</sup> In discussing the factors, the courts determined that the ride-through option was clearly supported and that holding otherwise would inhibit the legislature's intent in creating the Bankruptcy Code.<sup>67</sup>

## 2. *Bankruptcy Courts Hold Ride-through Option Unavailable*

Prior to BAPCPA, other Eighth Circuit bankruptcy courts interpreted § 521(2)(A) as also providing three mandatory options of reaffirmation, redemption, and exemption, indicating that the ride-through option was not available to debtors.<sup>68</sup> These courts analyzed factors including the plain language of the statute<sup>69</sup> and the similarity between the ride-through option and reaffirmation agreements made with continuing installation payments.<sup>70</sup>

Each of these bankruptcy courts determined that the plain language of 11 U.S.C. § 521(2)(A) did not mandate the ride-through.<sup>71</sup> For example, in *In re Gerling*,<sup>72</sup> the bankruptcy court adopted the view of *In re Taylor*<sup>73</sup> and determined that the statutory language of § 521(2)(A) clearly indicated that redemption, reaffirmation, and exemption were the only options available to

64. *See id.*

65. *In re Canady-Houston*, 281 B.R. 286, 289 (Bankr. W.D. Mo. 2002); *In re Parker*, 142 B.R. at 331; *In re Manring*, 129 B.R. 198, 200 (Bankr. W.D. Mo. 1991).

66. *In re Canady-Houston*, 281 B.R. at 288–89; *In re Parker*, 142 B.R. at 328–31; *In re Manring*, 129 B.R. at 199–200.

67. *In re Canady-Houston*, 281 B.R. at 289; *In re Parker*, 142 B.R. at 331; *In re Manring*, 129 B.R. at 200.

68. *In re Gerling*, 175 BR. 295, 298 (Bankr. W.D. Mo. 1994); *In re Kennedy*, 137 B.R. 302, 305 (Bankr. E.D. Ark. 1992); *In re Griffin*, 143 B.R. 535, 537 (Bankr. E.D. Ark. 1991); *see also In re Podnar*, 307 B.R. 667, 670 n.3 (Bankr. W.D. Mo. 2003) (stating that the ride-through option should not be available to debtors); *In re Thomas*, 186 B.R. 470 (Bankr. W.D. Mo. 1995) (noting that the best interpretation is that where the ride-through is not available).

69. *In re Gerling*, 175 B.R. at 297–98; *In re Kennedy*, 137 B.R. at 304; *In re Griffin*, 143 B.R. at 537.

70. *In re Gerling*, 175 B.R. at 298–99; *In re Kennedy*, 137 B.R. at 304; *In re Griffin*, 143 B.R. at 537.

71. *In re Gerling*, 175 B.R. at 297–98; *In re Kennedy*, 137 B.R. at 304; *In re Griffin*, 143 B.R. at 537.

72. *In re Gerling*, 175 BR. 295.

73. *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir. 1993).

the debtor.<sup>74</sup> In citing *Taylor*, the court noted several phrases within the statutory language of § 521 that indicated the statute did not allow the ride-through option.<sup>75</sup> First, the Bankruptcy Code provided that the language “if applicable” clearly indicated that when the debtor does not surrender the collateral, filing a statement of intention becomes “applicable” at that point.<sup>76</sup> The bankruptcy court explained that “since a debtor could not redeem or reaffirm with respect to property that is surrendered, the phrase ‘if applicable’ can only refer to the redemption of property or the reaffirmation of the debt.”<sup>77</sup>

Second, the court indicated that the debtor could not meet the requirement that debtors “perform their intention within forty-five days after the Statement of Intent is filed” pursuant to the original § 521(2)(B) when choosing the ride-through option.<sup>78</sup> When the debtor retains the property by ride-through, the debtor does not perform any action.<sup>79</sup> Thus, the forty-five day deadline could not be met.<sup>80</sup> As a result, the bankruptcy court determined that the language of the code provided an exclusive list of options of reaffirmation, redemption, and exemption from which the debtor may choose.<sup>81</sup>

These bankruptcy courts also considered the similarity of the ride-through option to reaffirmation agreements made by continuing installation payments.<sup>82</sup> In *In re Griffin*,<sup>83</sup> the bankruptcy court adopted the opinions of *In re Bell*<sup>84</sup> and *In re Edwards*.<sup>85</sup> In *Bell* and *Edwards*, the Sixth and Seventh Circuit Courts of Appeals explained that the ride-through is—in essence—a reaffirmation agreement made through installation payments.<sup>86</sup> However,

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74. *In re Gerling*, 175 B.R. at 297–98 (citing *In re Taylor*, 3 F.3d at 1516); see also *In re Griffin*, 143 B.R. at 537 (adopting the reasoning of *In re Edwards*, 901 F.2d 1383 (7th Cir. 1990), and determining that redemption, reaffirmation, and exemption were the only options available to the debtor when retaining collateral).

75. *In re Gerling*, 175 B.R. at 297–98.

76. *Id.* at 297–98. In *In re Kennedy*, the bankruptcy court also explained that “if applicable” indicated that the statement of intention is required when the debtor chose not to surrender the property. 137 B.R. at 304. The court explained that “if the debtor chooses to retain the collateral, he must specify whether the collateral is exempt, whether it will be redeemed or the debt reaffirmed.” *Id.* at 304 (citing 11 U.S.C. § 521(2)(A)). The court was essentially following the precedent set by the court in *In re Griffin*, 143 B.R. at 537. *In re Kennedy*, 137 B.R. at 304.

77. *In re Gerling*, 175 B.R. at 298.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *In re Griffin*, 143 B.R. 535, 537 (Bankr. E.D. Ark. 1991).

83. *In re Griffin*, 143 B.R. 535.

84. *Gen. Motors Acceptance Corp. v. Bell (In re Bell)*, 700 F.2d 1053 (6th Cir. 1983).

85. *In re Edwards*, 901 F.2d 1383 (7th Cir. 1990).

86. *In re Edwards*, 901 F.2d at 1386; *In re Bell*, 700 F.2d at 1055.

both courts noted that this “negates the voluntarism [of reaffirmation agreements] contemplated by the statute. No debtor would reaffirm personal liability unless required to do so.”<sup>87</sup> For that reason, the ride-through could not be allowed.<sup>88</sup>

Overall, these Eighth Circuit bankruptcy courts determined that the ride-through was not an available option because of the meaning of the plain language of § 521(a)(2) and the position that the ride-through is similar to reaffirmation by installation payments.<sup>89</sup> As a result of analyzing these factors, the bankruptcy courts determined that debtors could not utilize the ride-through option.

### C. BAPCPA and Changes to the Ride-through Option

In 2005, BAPCPA was enacted into law, and many sections of the Bankruptcy Code were amended and added.<sup>90</sup> Important changes were made to the ride-through option as a result of BAPCPA; however, the primary change occurred to the ride-through option for personal property.<sup>91</sup> Several scholars and courts have indicated that the statutes affecting the ride-through option were amended in such a way that seems to eliminate the personal property ride-through option.<sup>92</sup>

The first indication of the changes to the personal property ride-through option can be found in § 521.<sup>93</sup> The controversial language concerning the

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87. *In re Edwards*, 901 F.2d at 1386 (citation omitted).

88. *Id.* at 1387.

89. *In re Gerling*, 175 B.R. 295, 299 (Bankr. W.D. Mo. 1994); *In re Kennedy*, 137 B.R. 302, 305 (Bankr. E.D. Ark. 1992); *In re Griffin*, 143 B.R. 535, 537 (Bankr. E.D. Ark. 1991).

90. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.). BAPCPA was enacted primarily because legislators were concerned that the bankruptcy system was being abused. See Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 349 (2008) (“The title is a statement of two worthy purposes: abuse prevention and consumer protection. Legislative history supports finding these two purposes to be primary, along with a third purpose—fairness to creditors and debtors.”) [hereinafter Braucher, *Guide*]; Sean C. Currie, Article, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy’s Social Insurance Function After BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241, 248 (2009) (“Four of the Commissioners on the [National Bankruptcy Review Commission] prepared a lengthy dissent opposing the report; they argued the recommendations for consumer bankruptcy: (1) did not ‘go far enough to penalize or deter abuse;’ . . . and (5) failed to ‘meaningfully restrict abusive refilings or misuse of the automatic stay to prevent evictions.’”). In an effort to quell this abuse, the legislators created BAPCPA which was “more than 500 pages long, changes 83 sections of the Bankruptcy Code, and adds 17 new sections and one new chapter to the Bankruptcy Code.” See Hoffmann & Enlein, *supra* note 22, at 300.

91. Braucher, *Rash*, *supra* note 28, at 479.

92. *Id.* at 479.

93. 11 U.S.C. § 521 (2006 & Supp. 2011).

ride-through option remains largely the same;<sup>94</sup> however, three specific changes to other parts of § 521 affected the ride-through option.<sup>95</sup> The first important change was the addition of § 521(a)(6) to the Bankruptcy Code.<sup>96</sup> Section 521(a)(6) now indicates that a debtor cannot retain any personal property “as to which a creditor has an allowed claim for the purchase price” in a chapter 7 bankruptcy unless he or she has either reaffirmed or redeemed the debt.<sup>97</sup> Additionally, an enforcement mechanism for § 521(a)(6) has been provided in § 521(a)(7).<sup>98</sup> Under § 521(a)(7), if the debtor retains the property referred to in § 521(a)(6), then the automatic stay can be lifted.<sup>99</sup>

The second important change affecting the personal property ride-through option is the addition of § 521(d).<sup>100</sup> Section 521(d) now provides

94. *See id.* at § 521(a)(2) (Supp. 2011).

95. *See id.* at §§ 521(a)(6), (a)(2)(B), (d) (2006 & Supp. 2011).

96. *Id.* at § 521(a)(6) (2006). This section provides the following:

The debtor shall in a case under chapter 7 of this title in which the debtor is an individual, 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 unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or (B) redeems such property from the security interest pursuant to section 722.

*Id.*

97. *Id.*

98. 11 U.S.C. § 521(a)(7).

99. *Id.* This section provides the following:

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor’s interest, and orders the debtor to deliver any collateral in the debtor’s possession to the trustee.

*Id.* Under this section, the debtor cannot “retain possession of personal property to which the creditor has an *allowed claim for the purchase price.*” *Id.* at § 521(a)(6) (emphasis added). Some courts have interpreted this language as meaning that it is only applicable when the debtor retains property where the “creditor has an allowed claim for the purchase price.” *See* Hogan, *supra* note 26, at 914; MacKenna, *supra* note 29, at 682–83. If this were true, then the ride-through would be allowed when the debtor retained property in which the creditor does not have an “allowed claim for the purchase price.” Hogan, *supra* note 26, at 914; *see* MacKenna, *supra* note 29, at 682–83. However, even if this is the correct and § 521(a)(6) only applies to certain claims, § 362(h)—as discussed below—still provides that the automatic stay will be lifted when the debtor retains any personal property that acts as collateral without redeeming or reaffirming. 11 U.S.C. § 362(h) (2006).

100. 11 U.S.C. § 521(d).

that an ipso facto clause will become enforceable if the debtor does not file a statement of intention and perform those intentions as required for personal property.<sup>101</sup> Because of this provision, the secured creditors are able to then consider the filing of the bankruptcy petition as a default under the contract.<sup>102</sup> This is an important addition because prior to BAPCPA, ipso facto clauses were considered unenforceable.<sup>103</sup>

The third change can be found in § 521(a)(2)(B).<sup>104</sup> Similarly to the pre-BAPCPA Bankruptcy Code, this provision explains that “nothing . . . of this paragraph shall alter the debtor’s or the trustee’s rights with regard to such property under this title. . . .”<sup>105</sup> However, after the word “title” BAPCPA added the language, “except as provided in section 362(h).”<sup>106</sup> Section 362(h) presents a major change to the bankruptcy code by allowing the automatic stay to be lifted if the debtor does not file a statement of intention for personal property as required under the new § 521(a)(2)<sup>107</sup> and does

101. *Id.* This section provides the following:

If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

*Id.*

102. *See id.*

103. Hogan, *supra* note 26, at 902; MacKenna, *supra* note 29, at 679.

104. 11 U.S.C. § 521(a)(2)(B) (Supp. 2011). This section provides the following:  
within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; except 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, except as provided in section 362(h).

*Id.*

105. *Id.*

106. *See id.*

107. *Id.* at § 362(h)(1)(A) (2006). This section provides the following:

In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind

not perform that intention in a “timely” manner.<sup>108</sup> In other words, if the debtor does not choose one of the three options of reaffirmation, redemption, or exemption as specified under § 521(a)(2) for personal property and perform one of these three options, then the automatic stay can be lifted, and the creditor can attempt to repossess the collateral without violating the Bankruptcy Code.<sup>109</sup> However, § 362(h)(1)(B) was amended to indicate that if the debtor proposes a reaffirmation agreement on the same terms of the original security agreement and the creditor refuses the offer, the debtor has essentially performed his intention as required.<sup>110</sup>

Each of these amendments alters only the ride-through for personal property.<sup>111</sup> BAPCPA added to and created provisions in which either the automatic stay can be lifted<sup>112</sup> or debtors can be considered in default of their agreements with secured creditors when the debtor does not fulfill the requirements of § 521(a)(2) as to personal property.<sup>113</sup> However, it is unclear exactly how the real property ride-through has been affected.<sup>114</sup> In the end,

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specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and (B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor’s intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

*Id.*

108. *Id.* at § 362(h)(1)(B).

109. *Id.* at § 362(h)(1)(B). Several courts have indicated that a creditor can obtain the property after the automatic stay is lifted and the ipso facto clause becomes enforceable only if state law allows. *E.g.*, *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*3 (Bankr. W.D. Mo. Oct. 12, 2006). In *Riggs*, the court explained the following:

Section 521(d) does not create a new statutory remedy to be used by creditors, and does not write *ipso facto* clauses into contracts where none exist . . . . Creditors still must ensure that the contract, and their efforts to enforce the terms in it, do not run afoul of any applicable state laws.

*In re Riggs*, 2006 WL 2990218, at \* 3 (quoting *In re Donald*, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006)) (internal quotation marks omitted).

110. 11 U.S.C. § 362(h)(1)(B).

111. Braucher, *Rash*, *supra* note 28, at 479. Although the primary changes to the affected Bankruptcy Code dealt with personal property, one change did affect real property. *See* 11 U.S.C. § 524(j). Now, under § 524(j), the secured creditor may remain in contact with the debtor after the debtor’s discharge when the creditor has “retain[ed] a security interest in real property that is the principle residence of the debtor,” contacting the debtor is in the “ordinary course of business,” and contacting the debtor is for the primary purpose of “obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.” *Id.*

112. *Id.* at § 362(h)(1)(A)–(B).

113. *Id.* at § 521(d).

114. Braucher, *Rash*, *supra* note 28, at 482; Hogan, *supra* note 26, at 902–03; MacKenna, *supra* note 29, at 694.

by looking at the amendments and the current Bankruptcy Code, the implications of these changes are still unclear.<sup>115</sup>

#### D. Eighth Circuit Bankruptcy Court Rulings Post-BAPCPA

Since BAPCPA, Eighth Circuit bankruptcy courts have held that the personal property ride-through option has been effectively eliminated<sup>116</sup> and the real property ride-through option is available.<sup>117</sup> This section provides a brief discussion of the cases dealing with the ride-through option post-BAPCPA and explains their ultimate holdings.

##### 1. *Post-BAPCPA Personal Property Ride-Through in the Eighth Circuit*

Few bankruptcy courts within the Eighth Circuit have examined the personal property ride-through option post-BAPCPA.<sup>118</sup> In *In re Covell*,<sup>119</sup> the bankruptcy court discussed—in dicta—that the personal property ride-through option had been eliminated.<sup>120</sup> However, in *In re Riggs*,<sup>121</sup> the bankruptcy court allowed the personal property ride-through after the court determined that the reaffirmation agreement could not be approved.<sup>122</sup>

In *Covell*, the bankruptcy court considered the validity of the personal property ride-through option when a debtor whose home was secured by a mortgage attempted to use the ride-through option to retain her home.<sup>123</sup> Although the debtor was attempting to use the real property ride-through option, the court mentioned the current status of the personal property ride-through option in dicta, noting that it had been eliminated.<sup>124</sup>

In analyzing the availability of the personal property ride-through, the court discussed the circuit split prior to BAPCPA and BAPCPA's amend-

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115. Hogan, *supra* note 26, at 902–03; MacKenna, *supra* note 29, at 694.

116. See, e.g., *In re Covell*, 474 B.R. 702, 708 (Bankr. W.D. Ark. 2012); *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*4 (Bankr. W.D. Mo. Oct. 12, 2006).

117. See, e.g., *In re Covell*, 474 B.R. at 708.

118. See e.g., *In re Covell*, 474 B.R. at 708; *In re Root*, No. 06-00090, 2006 WL 1050687, at \*3–4 (Bankr. N.D. Iowa Apr. 11, 2006); *In re Riggs*, 2006 WL 2990218, at \*4; *In re Van Westen*, No. 06-01006S, 2006 WL 3354997, at \*2 (Bankr. N.D. Iowa Oct. 26, 2006). This note focuses on *Covell* and *Riggs*. *Covell* provides the most recent analysis and explicitly discusses the law in regards to both the real and personal property ride-through options.

119. 474 B.R. 702 (Bankr. W.D. Ark. 2012).

120. *Id.* at 707.

121. *In re Riggs*, 2006 WL 2990218, at \*1. *Riggs* is an unpublished opinion. However, it demonstrates how some courts within the Eighth Circuit are holding.

122. *Id.* at \*6–7.

123. *In re Covell*, 474 B.R. at 703.

124. *Id.* at 708.



ments and additions to the Bankruptcy Code.<sup>125</sup> The court noted that as a result of the new provisions, when the debtor wants to retain personal property, “the remaining requirements . . . become *applicable*—she must specify that the property is claimed as exempt, that she intends to redeem the property, or that she intends to reaffirm the debt . . . .”<sup>126</sup> If the debtor then attempts to ride-through, the automatic stay can be lifted, and the debtor can be held as in default if the security agreement includes the applicable provisions.<sup>127</sup> As a result, the personal property ride-through had been eliminated.<sup>128</sup>

On the other hand, in *Riggs*, the bankruptcy court rejected a reaffirmation agreement on debt secured by the debtor’s vehicle.<sup>129</sup> In analyzing the reaffirmation, the court noted that the personal property ride-through option had essentially been eliminated.<sup>130</sup> The court began by explaining that when the debtor does not choose reaffirmation, redemption, or exemption, the automatic stay can be lifted, and the creditor can enforce an ipso facto clause within the security agreement.<sup>131</sup> Despite this, the court noted that a creditor can enforce the ipso facto clause only when state law allows.<sup>132</sup>

After noting that the personal property ride-through option had been eliminated by BAPCPA, the *Riggs* court then evaluated the reaffirmation agreement and determined that it imposed an undue burden on the debtor.<sup>133</sup> As a result, the debtor was able to obtain a modified or limited ride-through option.<sup>134</sup> The court explained that because the reaffirmation agreement was denied, the creditor could no longer enforce the agreement and “seek a deficiency against the [d]ebtor if she default[ed]. [Also], since the [d]ebtor . . . performed her duty under § 521(a)(2) in filing her statement of intention and signing and filing the reaffirmation agreement within the prescribed time limits, § 362(h) and § 521(c)(6) [were] not applicable.”<sup>135</sup> At that point, the debtor was able to retain the property in a way similar to a ride-through option.<sup>136</sup>

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125. *Id.* at 704–09.

126. *Id.* at 708.

127. *Id.*

128. *Id.*

129. *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*1 (Bankr. W.D. Mo. Oct. 12, 2006).

130. *Id.*

131. *Id.* at \*3.

132. *Id.* at \*4.

133. *Id.* at \*6.

134. *Id.*

135. *In re Riggs*, 2006 WL 2990218, at \*6.

136. *Id.*

Overall, the holdings of the Eighth Circuit bankruptcy courts generally illustrate two interpretations of the personal property ride-through option.<sup>137</sup> The *Covel* court determined that the personal property ride-through option had been effectively eliminated while the *Riggs* court determined that the personal property ride-through option could be allowed when a debtor complied with the requirements of the Bankruptcy Code.

## 2. *Post-BAPCPA Real Property Ride-Through*

Since BAPCPA, *Covel* is the only case in the Eighth Circuit concerning the issue of the existence of the real property ride-through option.<sup>138</sup> In *Covel*, the bankruptcy court determined that the real property ride-through option is available to debtors.<sup>139</sup> According to the court, because BAPCPA primarily altered the ride-through option for personal property and left the ride-through option for real property untouched, Congress intended for debtors to be able to ride-through debts secured by real property.<sup>140</sup> The court explained that “Congress was aware that there was a ride through option for real property and intended to leave it intact post-BAPCPA.”<sup>141</sup>

Nevertheless, the bankruptcy court also explained that once a debtor chooses to ride-through, the creditor can still obtain relief in certain circumstances.<sup>142</sup> In cases involving a real property ride-through, the creditor is not “precluded from requesting and obtaining relief from the automatic stay if the creditor has an interest in real property and believes the provisions of § 362(d) providing relief from the automatic stay have been met.”<sup>143</sup> In other words, if the creditor can meet the requirements of § 362(d) and the court grants the motion for relief from the automatic stay, the creditor can take certain actions to obtain the collateral.<sup>144</sup>

In the end, the court held that the debtor met the requirements for the real property ride-through.<sup>145</sup> The collateral was real property, and the debtor

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137. See Marc S. Stern, *Reaffirmation Under BAPCPA: Did the Ride-through Survive?*, No. 1 NORTON BANKR. L. ADVISER 3, Jan. 2007, at 3; Hogan, *supra* note 26, at 903–06. Some courts outside of the Eighth Circuit have indicated that the ride-through is also available where the creditor agrees. See *In re Jensen*, 407 B.R. 378, 389–90 (Bankr. C.D. Cal. 2009). Other courts have indicated that the ride-through is available where state law allows. See *In re Rowe*, 342 B.R. 341, 351 (Bankr. D. Kan. 2006). However, these courts are relatively few in number.

138. *In re Covel*, 474 B.R. 702, 709 (Bankr. W.D. Ark. 2012).

139. *Id.*

140. *Id.* at 708.

141. *Id.* (quoting *In re Caraballo*, 386 B.R. 398, 402 (Bankr. D. Conn. 2008)) (internal quotation marks omitted).

142. *Id.*

143. *Id.* at 709.

144. *In re Covel*, 474 B.R. at 709.

145. *Id.*

had filed a statement of intention indicating that she was choosing the ride-through.<sup>146</sup> Additionally, the creditor had never filed a motion for relief from automatic stay pursuant to § 362(d).<sup>147</sup> Therefore, the debtor was able to retain the property and continue making payments.<sup>148</sup>

Although the bankruptcy court in *Covel* held that Congress intended the real property ride-through as an option for debtors, some courts in other circuits have still held that this option is not available.<sup>149</sup> These courts embrace the fact that BAPCPA did not alter the language of § 521(a)(2) as an indication that the interpretation of the statute has never changed.<sup>150</sup> As a result, these courts utilize their circuits' pre-BAPCPA interpretation of § 521 that debtors cannot obtain the ride-through option.<sup>151</sup>

For example, in *In re Linderman*<sup>152</sup> the bankruptcy court evaluated the availability of the real property ride-through option when a debtor attempted to ride-through and retain his home.<sup>153</sup> In doing so, the court noted that the language of § 521(a)(2) had not been altered and the bankruptcy amendments affected only the personal property ride-through option.<sup>154</sup> Additionally, the court explained that bankruptcy courts that had considered the issue of the real property ride-through after BAPCPA “ultimately rested their opinions upon the established law that existed in their particular jurisdiction prior to BAPCPA.”<sup>155</sup>

As a result, the bankruptcy court rejected the debtor's argument that Congress implicitly approved the real property ride-through option through BAPCPA.<sup>156</sup> The court explained that because “[t]he Eleventh Circuit clearly has stated that a Chapter 7 debtor must either redeem or reaffirm a debt if the debtor wants to keep the collateral,” the real property ride-through was not an option.<sup>157</sup>

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146. *Id.*

147. *Id.*

148. *Id.*

149. *See, e.g., In re Steinberg*, 447 B.R. 355 (Bankr. S.D. Fla. 2011); *Habersham Bank v. Harris (In re Harris)*, 421 B.R. 597 (Bankr. S.D. Ga. 2010); *In re Linderman*, 435 B.R. 715 (Bankr. M.D. Fla. 2009).

150. *See, e.g., In re Steinberg*, 447 B.R. at 357; *In re Harris*, 421 B.R. at 600; *In re Linderman*, 435 B.R. at 717–18.

151. *In re Steinberg*, 447 B.R. at 357; *In re Harris*, 421 B.R. at 600; *In re Linderman*, 435 B.R. 717–18.

152. *In re Linderman*, 435 B.R. 715.

153. *Id.* at 715.

154. *Id.* at 716–17.

155. *Id.* at 718.

156. *Id.*

157. *Id.* The Eleventh Circuit's interpretation was that “section 521(2) clearly provides that a debtor shall retain the property and reaffirm the debt, retain the property and redeem, or surrender the property.” *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1514 (11th Cir. 1993).

Since BAPCPA, the controversy surrounding the real property ride-through remains largely unchanged. No single uniform interpretation of the real property ride-through exists, and therefore, the application of the ride-through remains confusing and controversial.

### III. ARGUMENT

Because of the lack of direction from the Eighth Circuit Court of Appeals and BAPCPA's amendments to the Bankruptcy Code, the proper application of the ride-through option for both personal and real property is unclear.<sup>158</sup> Recent cases have offered that the personal property ride-through option was virtually eliminated,<sup>159</sup> but have also explained that bankruptcy courts should allow the personal property ride-through option in certain limited circumstances.<sup>160</sup> These cases also indicate that the real property ride-through option is currently available.<sup>161</sup> This section provides analysis of those cases, proposes a way that courts can apply a limited ride-through option in order to benefit all parties, and describes how this proposal remedies all concerns of both creditors and debtors.

#### A. Personal Property Decisions

The dicta in *Covel*<sup>162</sup> and the holding in *Riggs*<sup>163</sup> regarding the personal property ride-through option were both correct. As both opinions explained, the 2005 statutory amendments and additions to the Bankruptcy Code concerning the personal property ride-through option indicate that choosing between reaffirmation, exemption, and redemption when filing a statement of intention is now in the debtor's best interest.<sup>164</sup>

Although the original language surrounding the controversy was left unchanged by BAPCPA,<sup>165</sup> the amended provisions now indicate that the

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158. See *supra* Part II.D.

159. E.g., *In re Covel*, 474 B.R. 702, 708 (Bankr. W.D. Ark. 2012); *In re Root*, No. 06-00090, 2006 WL 1050687, at \*2-4 (Bankr. N.D. Iowa Apr. 11, 2006); *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*4 (Bankr. W.D. Mo. Oct. 12, 2006); *In re Van Westen*, No. 06-01006S, 2006 WL 3354997, at \*2 (Bankr. N.D. Iowa Oct. 26, 2006).

160. *In re Riggs*, 2006 WL 2990218, at \*6-7.

161. *In re Covel*, 474 B.R. at 708-09.

162. *Id.* at 707.

163. *In re Riggs*, 2006 WL 2990218, at \*6-7.

164. *In re Covel*, 474 B.R. at 708; *In re Riggs*, 2006 WL 2990218, at \*3-4. See also Braucher, *Guide*, *supra* note 90, at 394 ("In chapter 7, the 2005 law eliminates ride-through with court protection on loans secured by personal property. . . ."); Stern, *supra* note 137, at 3; Currie, *supra* note 90, at 267 ("BAPCPA amended the Bankruptcy Code to achieve these desired ends by precluding debtors from riding through the bankruptcy process while maintaining possession of collateral with a nonrecourse loan.").

165. See 11 U.S.C. § 521(a)(2) (2006).

personal property ride-through option has been largely eliminated.<sup>166</sup> If the debtor attempts to retain personal property through the use of the ride-through, the bankruptcy court can lift the automatic stay,<sup>167</sup> the ipso facto clause in the original security agreement can become enforceable,<sup>168</sup> and the secured creditor can gain the opportunity to repossess the collateral.<sup>169</sup>

Despite this, bankruptcy courts can still allow the personal property ride-through option in limited situations<sup>170</sup> while complying with the Bankruptcy Code.<sup>171</sup> For example, the bankruptcy court can allow the personal property ride-through option after the bankruptcy court's rejection of a reaffirmation agreement.<sup>172</sup> The automatic stay can be lifted, and any ipso facto clauses in the original security agreement become enforceable only when the debtor does not file a statement of intention indicating a choice of reaffirmation, redemption, or exemption and carry out that intention within thirty days.<sup>173</sup> However, at the point in the bankruptcy proceedings where the court considers the reaffirmation agreement, the debtor has filed an appropriate statement of intention and performed the actions indicated in the statement.<sup>174</sup> As a result, the debtor has completed all statutory requirements.

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166. Braucher, *Guide*, *supra* note 90, at 394.

167. 11 U.S.C. § 362(h) (2006).

168. *Id.* at § 521(d).

169. *In re Riggs*, 2006 WL 2990218, at \*3.

170. Stern, *supra* note 137, at 3 (“These new provisions point to a conclusion that the former ‘fourth option’ or ‘ride-through’ is no longer permitted; however, as a recent bankruptcy court decision points out, that conclusion does not necessarily mean that a secured creditor of personal property gets to repossess collateral.”).

171. *See In re Chim*, 381 B.R. 191, 197–98 (Bankr. D. Md. 2008); *In re Husain*, 364 B.R. 211, 218 (Bankr. E.D. Va. 2007); *In re Moustafi*, 371 B.R. 434, 438–39 (Bankr. D. Ariz. 2007); *In re Quintero*, No. 06-40163 TK, 2006 WL 1351623, at \*3 (Bankr. N.D. Cal. May 17, 2006). The personal property ride-through option might also be allowed when the creditor agrees. *See Braucher, Rash supra* note 28, at 474–77.

172. *See In re Riggs*, 2006 WL 2990218, at \*6–7.

173. *Id.* at \*6.

174. *Id.* (“And, since the Debtor has performed her duty under § 521(a)(2) in filing her statement of intention and signing and filing the reaffirmation agreement within the prescribed time limits, § 362(h) and § 521(c)(6) are not applicable.”).

175. *Id.* Christopher Hogan explained the following in *Will the Ride-through Ride Again?*:

Sections 362(h) and 521(a)(6) both impose penalties only after a Chapter 7 filer has failed to surrender, redeem, or reaffirm his debt. If a debtor chooses one of the three options, these sections cannot affect him. Thus, courts could open this backdoor ride-through: allow the debtor and his creditor to file a reaffirmation agreement, and then deny the agreement for not being in the best interest of the debtor or presenting an undue hardship on the debtor.

Hogan, *supra* note 26, at 917–18.

It is important to note, however, that in order for this limited ride-through option to be effective, courts should conduct an aggressive review and reject reaffirmation agreements when necessary.<sup>176</sup> Generally, courts are able to review reaffirmation agreements if the presumption of an undue hardship arises.<sup>177</sup> This occurs “if the debtor’s monthly income less the debtor’s monthly expenses as shown on the debtor’s completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt.”<sup>178</sup> However, different courts consider the agreements differently.<sup>179</sup> Some courts perform a much more in depth review of the income and expenses while others choose only to review the debtor’s statement in support.<sup>180</sup> For this limited ride-through option to be effective, a more in depth review is appropriate.<sup>181</sup> “Some courts have embraced the backdoor ride-through to protect debtors from unreasonable reaffirmations. Consistent refusal of reaffirmations with worse terms could force creditors to offer reaffirmations with the same or better terms, which would prevent debtors from being forced into Chapter 13 bankruptcy.”<sup>182</sup>

A second version of the limited option is also possible. Bankruptcy courts can allow a limited personal property ride-through option when the debtor offers to enter into a reaffirmation agreement with the creditor on the same terms as the original security agreement, and the creditor refuses the offer.<sup>183</sup> Section 362(h)(1)(B) now provides that after a debtor files a statement of intention, the automatic stay can be lifted when the debtor does not “take timely the action specified in such statement . . . unless such statement specifies the debtor’s intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.”<sup>184</sup> This indicates that as long as the debtor has attempted to enter into a reaffirmation agreement with the creditor for the same terms as the original security agreement, the requirements of § 521(a)(2) have been met.<sup>185</sup> Thus, the personal property ride-through should be allowed at that point.

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176. See Hogan, *supra* note 26, at 918.

177. Lisa A. Napoli, *Reaffirmation After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Many Questions, Some Answers*, 81 AM. BANKR. L.J. 259, 265 (2007).

178. *Id.*

179. See *id.* at 267–70.

180. See *id.*

181. Hogan, *supra* note 26, at 918 (indicating that some believe that the allowance of this limited ride-through is considered judicial activism).

182. *Id.* at 919.

183. *Id.* at 916.

184. 11 U.S.C. § 362(h)(1)(B) (2006).

185. See *id.*

Both of these instances indicate that the personal property ride-through could be available in limited circumstances. However, the debtor must first attempt to fully comply with the Bankruptcy Code. If this is done properly, then the debtor can obtain the benefit of the ride-through option in some situations.

#### B. Real Property Decision

In considering the real property ride-through option, the decision in *Covel* should be reevaluated. In *Covel*, the bankruptcy court initially applied the correct analytical framework for the issue; however, the court erred in determining that the original “if applicable” language allowed an unfettered real property ride-through option.<sup>186</sup> Rather, the court should have determined that the language of the Bankruptcy Code provides that the debtor must choose between reaffirmation, redemption, and exemption when filing a statement of intention, but once the debtor completes the requirements of § 521, a limited real property ride-through can be available in certain situations.<sup>187</sup>

The language concerning the current real property ride-through option is much the same as the language for the original combined real and personal property ride-through options for both real and personal property prior to BAPCPA.<sup>188</sup> Accordingly, the statutory interpretation also remains the same.<sup>189</sup> However, because the Eighth Circuit Court of Appeals has not interpreted the statutory language,<sup>190</sup> the lower courts must attempt to do so.

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186. *In re Covel*, 474 B.R. 702, 705 (Bankr. W.D. Ark. 2012).

187. *See generally* United States v. Cacioppo, 460 F.3d 1012, 1016 (8th Cir. 2006) (explaining that when interpreting statutory language, start with the plain meaning of the statute).

188. 11 U.S.C. § 521(a)(2) (Supp. 2011); *see also In re Steinberg*, 447 B.R. 355, 357 (Bankr. S.D. Fla. 2011) (applying pre-BAPCPA precedent); *Habersham Bank v. Harris (In re Harris)*, 421 B.R. 597, 600 (Bankr. S.D. Ga. 2010) (applying pre-BAPCPA precedent); *In re Linderman*, 435 B.R. 715, 718 (Bankr. M.D. Fla. 2009) (applying pre-BAPCPA precedent).

189. *See In re Harris*, 421 B.R. at 600; *In re Linderman*, 435 B.R. at 718. “Each of the bankruptcy courts that have addressed the propriety of allowing a ride through with regard to real property after the enactment of the BAPCPA has relied on the earlier precedent of its respective circuit court . . .” *In re Covel*, 474 B.R. 702, 708 n.10 (Bankr. W.D. Ark. 2012); *see also In re Sosa*, 443 B.R. 263, 269 (Bankr. D.R.I. 2011) (relying on pre-BAPCPA precedent); *In re Hart*, 402 B.R. 78, 83 (Bankr. D. Del. 2009) (relying on pre-BAPCPA precedent); *In re Caraballo*, 386 B.R. 398, 402 (Bankr. D. Conn. 2008) (relying on pre-BAPCPA precedent); *In re Steinberg*, 447 B.R. at 357 (relying on pre-BAPCPA precedent); *In re Waller*, 394 B.R. 111, 114 (Bankr. D.S.C. 2008) (relying on pre-BAPCPA precedent); *In re Wilson*, 372 B.R. 816, 819 (Bankr. D.S.C. 2007) (relying on pre-BAPCPA precedent).

190. *In re Covel*, 474 B.R. at 704.



The *Covel* court appropriately first considered the statutory language.<sup>191</sup> At this point, however, the bankruptcy court began to err. As the Eighth Circuit explained in *United States v. Cacioppo*,<sup>192</sup> “[w]here the language is plain, we need inquire no further.”<sup>193</sup> In *Covel*, the bankruptcy court chose to analyze the legislative intent and, in turn, incorrectly interpreted the statute as implicitly allowing the real property ride-through option.<sup>194</sup>

Although the language of § 521(a)(2) is often suggested to be ambiguous, the language is actually plain, and the explicit reading of the statute provides the most sensible interpretation.<sup>195</sup> The meaning behind the “if applicable” language does not imply that the three statutory options of reaffirmation, redemption, or exemption are “applicable” when a non-statutory ride-through option is not chosen by the debtor.<sup>196</sup> Rather, when retaining by reaffirmation, redemption, or exemption, the chosen option becomes applicable and must be specified in the statement of intention while the other two do not.<sup>197</sup> This is not only the most realistic reading but is also the reading that best interprets the “plain English” of the statute.<sup>198</sup>

In *Section 521(2) of the Bankruptcy Code, the Creditor’s Predicament in Getting Paid as Agreed*, Jim Pappas—who argued against the real property ride-through option—also accurately interpreted the statutory language as follows:

[T]he “if applicable” phrase can also be read to refer to the options listed in the statute, as opposed to other non-specified choices.

....

... [T]he debtor may be unable to redeem an asset, or unable to exempt it, or denied the right to reaffirm the debt. Nonetheless, the debtor must list the debt and property in the Section 521(2) statement of intention. In all these situations, then, the “if applicable” provision of Section 521(2) simply refers to whether the debtor may lawfully elect to redeem, exempt

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191. *Id.* at 704–06.

192. *Cacioppo*, 460 F.3d 1012.

193. *Id.* at 1016.

194. *In re Covel*, 474 B.R. at 708.

195. See Jim D. Pappas, *Section 521(2) of the Bankruptcy Code: The Creditor’s Predicament in Getting Paid as Agreed*, 99 COM. L.J. 45, 56 (1994); Michael P. Alley, Comment, *Redemption, Reaffirmation, Exemption, and Retention in Chapter 7 Bankruptcy: Extinction Looms Near for the Free Ride*, 47 U. KAN. L. REV. 683, 744–45 (1999); see also Kenneth P. Coleman, *When a Chapter 7 Debtor Owes Secured Consumer Debt: Is There a Fourth Option in Addition to Surrender, Redemption, and Reaffirmation?*, 115 BANKING L.J. 377, 383–84 (1998) (indicating why the explicit reading of the statute is the most sensible interpretation of the statute).

196. Pappas, *supra* note 195, at 62.

197. *Id.*

198. *Id.* at 56.

or reaffirm. The debtor is directed to make an election of those options listed in Section 521(2) that are applicable to the facts of the case.<sup>199</sup>

Reading the language contrary to this interpretation creates meaning that is not supported by “plain English.”<sup>200</sup>

Despite this interpretation, a limited real property ride-through option can be applied in limited circumstances while still complying with the plain language of the Bankruptcy Code.<sup>201</sup> For example, when a debtor and creditor enter into a reaffirmation agreement, but the agreement is not approved by the bankruptcy court,<sup>202</sup> the real property ride-through option should be allowed. The resulting ride-through option is similar to that proposed for personal property, but the analysis of the statutory language is different.<sup>203</sup> For real property, the Bankruptcy Code requires only that the debtor file a statement of intention and “perform his intention with respect to such property.”<sup>204</sup> The Bankruptcy Code indicates that the automatic stay can be lifted, and the ipso facto clauses can become enforceable for personal property.<sup>205</sup> Thus, if the debtor files a statement of intention and performs that intention, then the debtor has fully complied with the Bankruptcy Code, and nothing more is required.<sup>206</sup> As a consequence, allowing the real property ride-through option after the court rejects the proposed reaffirmation agreement or determines that the reaffirmation is not enforceable does not violate the plain language of the Bankruptcy Code.

On the other hand, bankruptcy courts probably would not allow the real property ride-through option after the debtor proposes similar terms for the reaffirmation as were in the original security agreement and the creditor refuses to agree.<sup>207</sup> Under § 362(h)(1)(B), this is available only when the

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199. *Id.* at 62.

200. *Id.* at 56.

201. *See* Waxman, *supra* note 15, at 203 (“Therefore, perhaps it is time for appropriate legislative reform to resolve the issue in an evenhanded manner both for debtors and creditors. . . . The debtor wants to keep the collateral; the creditor wants what he bargained for—the debtor’s personal obligation on the debt.”).

202. Although § 524(c)–(d) now explains that reaffirmation agreements that involve real property no longer have to be approved by the court, § 524(m) still requires that these agreements be approved in certain circumstances. “Under section 524(m), a rebuttable presumption of undue hardship arises if the difference between the debtor’s income and expenses is less than the payment on the reaffirmed debt. . . . Unlike the provisions discussed above, section 524(m) applies to consumer debts secured by real property.” *In re Hart*, 402 B.R. 78, 86 (Bankr. D. Del. 2009).

203. *See supra* Part III.A.

204. 11 U.S.C. § 521(a)(2)(B) (Supp. 2011).

205. *See supra* Part II.C.

206. 11 U.S.C. § 521(a)(2).

207. *See supra* Part III.A.

collateral is personal property.<sup>208</sup> Because of this, the bankruptcy court's allowance of this option would rely solely on its interpretation of the Bankruptcy Code and whether the debtor has sufficiently "perform[ed] his intention" as required by § 521(a)(2)(B).<sup>209</sup>

When dealing with reaffirmation agreements, courts have interpreted exactly what a debtor must do to "perform his intention" in different ways. Some courts have indicated that if a debtor proposed terms for a reaffirmation agreement, but the creditor rejected those terms, that the debtor had adequately complied with § 521(a)(2).<sup>210</sup> Other courts have held that, in order to comply with § 521(a)(2), the parties must actually enter into a reaffirmation agreement.<sup>211</sup> Despite these interpretations, the plain language of the Bankruptcy Code seems to contemplate that the parties must enter into a reaffirmation agreement rather than merely negotiate. Section 521(a)(2)(A) states that a debtor can indicate on his or her statement of intention the "inten[t] to reaffirm debts secured by such property,"<sup>212</sup> while section 521(a)(2)(B) states that the debtor must "perform his intention with respect to such property."<sup>213</sup> In looking at this language, it is clear that the debtor must "perform his intention" to "reaffirm debts secured" by the property, rather than take steps or make an effort to reaffirm the property.<sup>214</sup> Consequently, this option is likely not available when the collateral is real property.

Overall, debtors should be able to obtain the real property ride-through option in limited circumstances. The language of the Bankruptcy Code indicates that the debtor must initially comply with the requirements of § 521(a)(2), and if these actions are adequately completed, the debtor may be able to retain their real property in limited situations.

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208. 11 U.S.C. § 362(h)(1)(B) (2006).

209. 11 U.S.C. § 521(a)(2)(B) (Supp. 2011). The limited ride-through also complies with other sections of the code. *See supra* note 101.

210. *See Price v. Del. State Police Fed. Credit Union U.S. Tr. (In re Price)*, 370 F.3d 362, 372 (3d Cir. 2004) ("Section 521(2)(B) should not be read as mandating that debtors must entirely consummate their stated intention within forty-five days.").

211. *In re Anderson*, 348 B.R. 652, 658 (Bankr. D. Del. 2006) (indicating that the plain language meant that the debtors had to actually reaffirm the debt in order to "perform their stated intention"); *In re Edwards*, 236 B.R. 124, 126 (Bankr. D.N.H. 1999) ("This Court also noted that if a Chapter 7 debtor chooses to retain estate property through reaffirmation, not only must he or she reaffirm the relevant debt within the § 521(2) time constraints in order to avoid establishing cause allowing relief from the stay, but the reaffirmation agreement must be executed before discharge for it to be enforceable.").

212. 11 U.S.C. § 521(a)(2)(A) (Supp. 2011).

213. *Id.* at § 521(a)(2)(B).

214. *See id.*

### C. Policy Concerns

In addition to being statutorily sound, the limited personal and real property ride-through options also remedy many policy concerns. Prior to BAPCPA, many courts expressed concern that allowing a general ride-through option infringed on certain interests of the debtors,<sup>215</sup> while other courts expressed concern that disallowing the ride-through also infringed on certain interests of the creditors.<sup>216</sup>

In considering disallowing the ride-through option, courts have specifically explained that if debtors are restricted to the three statutory options of reaffirmation, redemption, or exemption, debtors will be forced into an unfavorable position.<sup>217</sup> Specifically, debtors would not be able to obtain a “fresh start.”<sup>218</sup> As one bankruptcy court noted, most debtors would not be able to afford redemption by paying the entire remaining amount of the debt, and surrender would “deprive a debtor of much needed property.”<sup>219</sup> Additionally, reaffirmation can be completed only with the creditor’s approval.<sup>220</sup> As a result, the “reaffirmation [would] involve[] negotiation between parties with unequal bargaining power,” and the creditor would obtain “an effective veto on the ‘fresh start.’”<sup>221</sup>

Other bankruptcy courts have expressed concern that allowing the ride-through option implicates the creditor’s position.<sup>222</sup> Specifically, if debtors are allowed to ride-through in any way, it would be unlikely that many would choose reaffirmation.<sup>223</sup> No debtor would choose reaffirmation and maintain personal liability when they can ride-through and eventually have no personal liability.<sup>224</sup> Additionally, when a debtor is allowed to ride-through and obtain a discharge of the personal liability, debtors often lose motivation to care for the property.<sup>225</sup> In the end, many courts believe that the ride-through option essentially gives the debtor a “head start” rather than a “fresh start” and “effectively converts his secured obligation from recourse

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215. *E.g.*, *In re Canady-Houston*, 281 B.R. 286 (Bankr. W.D. Mo. 2002). Because most of these concerns were expressed pre-BAPCPA, the ride-through option considered at the time was a general ride-through option for both real and personal property.

216. *E.g.*, *In re Gerling*, 175 B.R. 295 (Bankr. W.D. Mo. 1994); *In re Kennedy*, 137 B.R. 302 (Bankr. E.D. Ark. 1992).

217. *See In re Canady-Houston*, 281 B.R. at 289.

218. *Id.* (quoting *Capital Commc’ns Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 51 (2d Cir. 1997)).

219. *Id.* (quoting *In re Boodrow*, 126 F.3d at 51).

220. *Id.*

221. *Id.* (quoting *In re Boodrow*, 126 F.3d at 51).

222. *E.g.*, *In re Kennedy*, 137 B.R. 302, 304 (Bankr. E.D. Ark. 1992).

223. *Id.*

224. *Id.*

225. *In re Gerling*, 175 B.R. 295, 297 (Bankr. W.D. Mo. 1994) (citing *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1515–16 (11th Cir. 1993)).

to nonrecourse with no downside risk for failing to maintain or insure the lender's collateral."<sup>226</sup>

A limited ride-through option would solve most of the Eighth Circuit bankruptcy courts' policy concerns. First, the limited ride-through option would effectively balance the bargaining power between the debtor and creditor.<sup>227</sup> A creditor will be more willing to agree to favorable terms while negotiating a reaffirmation agreement because it will realize that its rejection of reaffirmation agreements in certain situations or the court's general rejection of a reaffirmation agreement could result in the ride-through and the debtor's discharge of personal liability.<sup>228</sup> Because of this, a debtor would be able to obtain a fresh start and could not be forced into any unfavorable reaffirmation agreement at the same time.<sup>229</sup>

Also, the limited ride-through option would ensure that debtors continue to enter into reaffirmation agreements.<sup>230</sup> Without the ride-through option, the debtor would have no other alternative than to choose between the statutory options of reaffirmation, redemption, and exemption.<sup>231</sup> Generally, because debtors want to retain the property as a whole and cannot afford to redeem the property, reaffirmation would become the most favored choice.<sup>232</sup>

Last, this option would safeguard the creditor's interest in the collateral.<sup>233</sup> With the limited ride-through option, the debtor would be able to retain the property only if the debtor chose redemption or reaffirmation.<sup>234</sup> In both of these cases, the creditor's interest is fully protected.<sup>235</sup> After redemption, the debt is completely paid off, while after reaffirmation the debtor retains personal liability.<sup>236</sup> As a result, the creditor's ability to collect on the debt would not be diminished in any way, unless the creditor knowingly attempted to force the debtor into an unfavorable reaffirmation agreement.

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226. See *In re Taylor*, 3 F.3d at 1516.

227. See *In re Canady-Houston*, 281 B.R. 286, 289 (Bankr. W.D. Mo. 2002) (discussing the problem of lack of bargaining power).

228. See discussion *supra* Part III.A.

229. See *In re Canady-Houston*, 281 B.R. at 289.

230. See *In re Kennedy*, 137 B.R. 302, 304 (Bankr. E.D. Ark. 1992) (discussing how debtors would not enter into reaffirmation agreements when the ride-through is available).

231. See *id.*

232. *In re Canady-Houston*, 281 B.R. at 289 (citing Capital Commc'ns Fed. Credit Union v. Boodrow (*In re Boodrow*), 126 F.3d 43, 51 (2d Cir. 1997)).

233. *In re Gerling*, 175 B.R. 295, 297 (Bankr. W.D. Mo. 1994) (citing *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512, 1515 (11th Cir. 1993)) (discussing how debtors often do not take care of property after using the ride-through option).

234. See *supra* Part III.B.

235. See *In re Gerling*, 175 B.R. at 297.

236. See *supra* Part II.A.

The limited ride-through option is the most functional compromise for both debtors and creditors. It not only correctly applies the statutory language, but also takes into consideration both debtors' and creditors' best interests. Debtors are able to obtain a fresh start and are not forced into unfavorable reaffirmation agreements. Also, debtors will continue to attempt to reaffirm the debt, and the collateral is adequately protected. In the end, the limited personal property ride-through is the best option.

#### IV. CONCLUSION

Throughout the years, the application of the ride-through option within the Eighth Circuit has been unclear. Prior to the enactment of BAPCPA, the Eighth Circuit bankruptcy courts were split. Some courts interpreted § 521(a)(2) as allowing a ride-through option, while others interpreted the statute as not allowing it. Then, in 2005, BAPCPA greatly amended and added to the Bankruptcy Code, and, in doing so, the ride-through option was slightly altered. Despite this, the confusion has remained.

Since BAPCPA, some Eighth Circuit bankruptcy courts have ruled on the issue; however, their holdings have not created a clear set of rules for the ride-through option. Those courts that considered the current standing of the personal property ride-through option determined that the ride-through option had been generally eliminated. However, one court still held that the personal property ride-through option could be allowed in limited circumstances. On the other hand, one court determined that the real property ride-through was available to debtors.

These courts' holdings concerning the personal property ride-through were correct. Because of the BAPCPA amendments, the Bankruptcy Code now allows the automatic stay to be lifted and ipso facto clauses to become enforceable when the debtor does not comply with § 521(a)(2). As a result, the use of the personal property ride-through was eliminated. However, the Bankruptcy Code does allow the ride-through when a debtor complies with the provisions of § 521(a)(2). If the debtor files a statement of intention and performs that intention within a certain period of time, the automatic stay is not lifted, and the ipso facto clauses do not become enforceable. Thus, when the debtor enters into a reaffirmation agreement with the secured creditor, and the court rejects the reaffirmation agreement, then the debtor should be able to ride-through. Additionally, § 362(h)(1)(B) now provides that if a debtor offers the creditor to reaffirm the debt on the original terms, and the creditor rejects the offer, the automatic stay is not lifted. Consequently, the ride-through should be allowed. These options are clearly supported by the language of the Bankruptcy Code and policy concerns.

On the other hand, the holding that the real property ride-through is available to debtors was incorrect. The language concerning the real proper-

ty ride-through clearly indicates that debtors can choose only reaffirmation, redemption, or exemption for retention when filing a statement of intention. However, a limited option can be available in certain circumstances. If the debtor chooses reaffirmation and the parties enter into a reaffirmation agreement, when the bankruptcy court rejects the agreement, the debtor should be allowed to ride-through. At that point, the debtor will have performed all that was required under § 521(a)(2). This option is also supported by the language of the Bankruptcy Code and policy concerns.

In the end, the limited ride-through option for both real and personal property should be implemented in the Eighth Circuit. This option clearly applies the plain language of the Bankruptcy Code and considers the concerns of both the debtors and the creditors. Thus, the result allows an optimal situation for both parties.

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