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11 U.S.C. Section 521(2)(A): Fresh Start Or Head Start

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11 U.S.C. Section 521(2)(A): Fresh Start or Head Start?

Section 521 of title 11, United States Code, requires the individual bankrupt debtor to file a schedule of assets and liabilities detailing the debtor's property and debts existing at the time the debtor filed for bankruptcy.[1] Those assets and liabilities make up the bankruptcy estate which is automatically created upon filing the bankruptcy petition.[2] If any of the listed liabilities is a consumer debt secured[3] by any of the listed property of the estate, section 521(2)(A) requires the debtor to file a statement of intent as to whether he or she will keep or surrender such property.[4]

If applicable, section 521(2)(A) further requires the debtor to indicate whether such property is exempt, whether the debtor intends to redeem that property, or whether the debtor intends to reaffirm the debt secured by that property.[5] Redemption is satisfied by payment of the fair market value of the property up to the

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1. 11 U.S.C. § 521 (1988).

2. Bankruptcy Code section 541 provides that all of the debtor's property, wherever located and by whomever held, whether legal or equitable, becomes property of the estate unless provided otherwise. 11 U.S.C. § 541 (1988).

3. Secured property is property that has been pledged to assure payment of an obligation. Such property is intended to be used to satisfy that obligation should the debtor fail to make payment. BLACK'S LAW DICTIONARY 1354 (6th ed. 1990).

4. Section 521(2)(A) of the Bankruptcy Code provides that:

> (2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate-
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> > (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, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.

Id. § 521(2)(A) (1988).

5. *Id.* Bankruptcy Code section 522 provides that the debtor may exempt certain property from estate property. 11 U.S.C. § 522 (1988). Once declared as exempt, the property may not be seized to satisfy the debtor's liabilities in a manner that impairs the debtor's exemption. *Id.*

amount of the debt.[6] Reaffirmation requires the negotiation of a new agreement with the creditor under which the debtor assumes personal liability of the debt secured by the property.[7]

It is the requirement which directs the debtor to indicate his or her intent to redeem the property or reaffirm the accompanying debt which has given rise to a split of authority among the circuit courts. The ambiguous language "if applicable,"[8] makes it unclear whether this requirement is applicable only if the debtor chooses one of the stated alternatives or if the debtor must choose one of the stated alternatives with the one thus chosen becoming "applicable." Some courts have interpreted the debtor's choices to be limited to redemption or reaffirmation, if the debtor intends to retain estate property that serves as security to one of the debtor's consumer debts.[9] This means the debtor who intends to keep such property must either redeem the property by paying the fair market value or enter an agreement with the creditor to reaffirm his or her personal liability for the accompanying debt.[10] Conversely, other courts have held that redemption and reaffirmation are not the debtor's only alternatives.[11] These courts maintain that redemption or reaffirmation is applicable only if the debtor actually chooses to do one or the other.[12] Jurisdictions adhering to this approach permit the debtor to continue making installment payments as provided under the original consumer debt agreement, thus giving debtors a third choice not explicitly provided in section 521.[13]

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6. Section 722 of the Bankruptcy Code provides that: "An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt. . . ." *Id.* § 722 (1988).

7. Bankruptcy Code section 524(c) provides that a reaffirmation is an agreement between the debtor and a claim holder. 11 U.S.C. § 524(c) (1988). The consideration for this agreement is a dischargeable debt. *Id.* The agreement must be entered in good faith and requires the court's approval. *Id.*

8. 11 U.S.C. § 521(2)(A). *See supra* note 4.

9. *See infra* notes 46-105 and accompanying text (cases illustrating all-inclusive interpretation).

10. *Id.*

11. *See infra* notes 106-143 and accompanying text (cases illustrating noninclusive interpretation).

12. *Id.*

13. *Id.*

Part I of this Comment will set forth the legislative history in order to determine and analyze the legislative intent of section 521.[14] The contradictory interpretations of section 521 will then be discussed in Part II through recent case history.[15] Based on the foregoing analysis, Part III will explore the effects of making the statement of intent to redeem or reaffirm mandatory and the effects of making the choices discretionary.[16] This Comment will then conclude that the proper interpretation is that the options of redemption and reaffirmation are the only options available to the individual bankrupt debtor who opts to retain estate property which serves as the security for a consumer debt.

I. THE LEGISLATIVE HISTORY OF SECTION 521

Prior to the 1984 bankruptcy amendments, the debtor was required to file a schedule of assets and liabilities detailing his property and debts at the time of filing a bankruptcy petition.[17] There was no corresponding duty upon the debtor to disclose his or her intended disposition of any listed property which secured the repayment of any of the listed liabilities.[18]

When possession of the secured property was maintained by the debtor, the creditor was placed at a disadvantage due to the automatic stay, which becomes effective immediately upon the filing of the bankruptcy petition.[19] The automatic stay prohibits any contact, prior to discharge, between the creditor and the debtor.[20] Thus, from the time the bankruptcy petition was filed until the debtor received a discharge, the creditor was usually left

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14. *See infra* notes 16-42 and accompanying text.

15. *See infra* notes 43-143 and accompanying text.

16. *See infra* notes 144-157 and accompanying text.

17. S. REP. NO. 446, 97th Cong., 2d Sess. 41 at 6. (1982). The 1984 Bankruptcy amendments provided for the renumbering of the original paragraphs of section 521 as (1), (3), (4) and (5) and the addition of a new subsection (2). 11 U.S.C. § 521 (1988).

18. S. REP. No. 446, 97th Cong., 2d Sess. 41 at 17 (1982).

19. *Id. See* 11 U.S.C. § 362 (1988) (automatic stay provision).

20. *Id.* § 362 (1988). The creditor may not commence any proceedings against the debtor which may have been commenced prior to the time the debtor filed his bankruptcy petition. *Id.*

in the dark, unsure of what was to happen to his or her collateral. Would it be returned to the creditor? Would it be lost or destroyed?

Following the debtor's discharge, the secured creditor's lien on the secured property remained in place.[21] However, in the absence of a redemption or reaffirmation by the debtor, the creditor's ability to protect his or her interest in that property was limited and unappealing. For instance, the creditor could seek judicial relief from the automatic stay in order to enforce the lien.[22] However, this process could take several weeks or even months, and could actually cost more than the value of the secured property itself.[23] Meanwhile, the property would remain in the debtor's possession subject to the risks of loss, theft or destruction.[24] Additionally, the property would continue to depreciate.[25]

Another means purportedly available to protect the creditor's interest in secured property was the affirmative duty imposed upon the bankruptcy trustee to obtain and deliver the secured property to the creditor.[26] In practice, however, the trustee did not generally comply with this duty.[27] The costs incurred in the retrieval of such property from the debtor were assessed against the already limited estate assets.[28] This had a detrimental effect on unsecured creditors whose pro rata distribution from the remaining estate assets were proportionately reduced by the amount of such expenditures. Furthermore, the trustee was not likely to be fully compensated for his or her efforts to retrieve such property.[29] Thus the retrieval was solely for the benefit of the secured creditor.[30] The trustee, therefore, generally refused to use estate assets in this manner.[31]

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21. S. REP. No. 446, 97th Cong., 2d Sess. 41 at 17 (1982).
22. *Id.* at 17-18.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* The trustee is the estate representative and as such may sue and be sued. 11 U.S.C. § 323 (1988).
27. S. REP. No. 446, 97th Cong., 2d Sess. 41 at 17 (1982).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

Consumer bankruptcy cases were on the rise. In the wake of the 1978 Bankruptcy Code amendments, the number of consumer bankruptcy cases had more than doubled, increasing from 196,976 cases in 1978 to 452,145 cases in 1981.[32] The estimated bankruptcy losses for 1981 exceeded $6 billion.[33] The short term effect of this dramatic increase resulted in a shift of credit costs from the debtor to the creditor.[34] Creditors, unable to recover from the debtor's bankruptcy estate, were forced to incur estimated bankruptcy losses during 1981 in excess of $6 billion.[35] Creditors' reactions to this were varied. Some creditors implemented stricter standards for extending credit, such as higher income requirements for the potential borrower, effectively denying credit to less affluent debtors.[36] Other creditors raised their lending interest rates, shifting the burden of increased credit costs to the nonbankrupt debtor who was able to meet his or her obligations.[37] Thus, the long term costs of rising bankruptcy losses are borne by the bankrupt and nonbankrupt debtors alike, assuming the debtor is able to obtain credit at all.[38]

In response to the spiraling costs associated with consumer bankruptcy cases, the debtor's duties were revised by Congress. Revisions to the debtor's duties were originally proposed by a coalition of bankers, credit unions, finance companies, oil companies and retailers.[39] Members of that coalition appeared before the Subcommittee on the Courts of the Committee on the Judiciary to present a proposal aimed at eliminating the perceived defects of the 1978 code.[40] This proposal was designed to ensure

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32. *Id.* at 3.

33. *Id.* at 6 n.3.

34. *Id.* at 6.

35. *Id.* at 6 n.3.

36. *Id.* at 6; PROPOSED CONSUMER BANKRUPTCY IMPROVEMENT ACT OF 1981: HEARINGS BEFORE THE SUBCOMM. ON COURTS OF THE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 11 at 2-4 (1981) (statement of Senator Robert J. Dole, Chairman).

37. S. REP. NO. 446, 97th Cong., 2d Sess. 41 at 6 (1982).

38. *Id.*

39. *Id.*

40. *Id.* at 7. PROPOSED CONSUMER BANKRUPTCY IMPROVEMENT ACT OF 1981: HEARINGS BEFORE THE SUBCOMM. ON COURTS OF THE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 11 at 1-4 (1981) (statement of Senator Robert J. Dole, Chairman).

equity between debtors and creditors, particularly with regard to secured consumer debts.[41]

The ultimate result of those hearings was the 1984 bankruptcy amendments, which included revisions to the debtor's duties under section 521.[42] The new subsection 2 of section 521 requires the individual bankrupt debtor to file a statement as to whether he or she intends to keep or surrender any property of the bankrupt estate which serves as collateral to a consumer debt.[43] This statement is to be filed with the clerk within thirty days after filing a petition under chapter 7 of title 11.[44] If applicable, the statement must also indicate whether the debtor will redeem property from the accompanying debt or enter an agreement with the creditor to reaffirm the associated debt.[45]

II. THE CONTRADICTORY INTERPRETATIONS OF SECTION 521

Section 521(2)(A) requires the individual bankrupt debtor to file a statement indicating whether the debtor intends to keep or surrender property which serves as collateral for one of the debtor's liabilities.[46] If the debtor intends to retain the property, the debtor must then, if applicable, file a statement indicating whether he or she will pay the accompanying debt or whether he or she will enter into an agreement with the creditor to reaffirm that debt.[47] It is this latter requirement that has given rise to the conflicting interpretations of section 521.[48]

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41. PROPOSED CONSUMER BANKRUPTCY IMPROVEMENT ACT OF 1981: HEARINGS BEFORE THE SUBCOMM. ON COURTS OF THE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 11 at 63 (1981) (statement of Professor Jonathan M. Landers, University of Illinois, Claude Rice, attorney and Alvin O. Wiese, Jr., attorney, setting forth general concerns with the then-current Bankruptcy Code).

42. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 352 (1984) (codified in part at 11 U.S.C. § 521(2)(A) (1988)).

43. 11 U.S.C. § 521(2)(A) (1988).

44. *Id.*

45. *Id.*

46. *Id. See supra* note 4 and accompanying text (discussing debtor's duties).

47. *Id.*

48. *See infra* notes 46-143 and accompanying text (discussing opposing interpretations).

A. The All-Inclusive Interpretation

Jurisdictions adhering to the all-inclusive interpretation maintain that the debtor who chooses to retain estate property that secures a loan has only two options: he or she must either redeem the property or reaffirm the underlying debt.[49] The courts support this conclusion with a variety of reasons which include the plain meaning of the statute, the distinction between a chapter 7 and a chapter 13 bankruptcy proceeding, as well as the ramifications of deciding otherwise.[50]

In *General Motors Acceptance Corp. v. Bell*,[51] a case decided before the 1984 Bankruptcy Code amendments, the debtor sought to redeem estate property by making monthly installment payments.[52] The Sixth Circuit concluded that the sole permissible means of redemption was a lump sum payment to the creditor.[53] A debtor unable to make the lump sum redemption could continue to make installment payments only after executing a court-approved consensual reaffirmation agreement.[54]

Prior to the 1984 amendments, section 521 did not impose an express duty upon the debtor to choose between redemption or reaffirmation. The mechanics of these options were, however, set forth in sections 722 and 524(c), respectively.[55] The *Bell* court reasoned that the redemption option, found in section 722, was

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49. *See infra* notes 46-105 and accompanying text (cases illustrating all-inclusive interpretation).

50. *See infra* notes 48-105 and accompanying text (setting forth cases in support of the all-inclusive interpretation). A chapter 7 bankruptcy proceeding provides the debtor with relief from burdensome debts through liquidation of the debtor's assets. *See generally* 11 U.S.C. §§ 701-766 (1988) (setting forth chapter 7 bankruptcy provisions). A chapter 13 bankruptcy proceeding provides the debtor relief from burdensome debts through a rehabilitation plan. *See generally* 11 U.S.C. §§ 1301-1330 (1988) (setting forth chapter 13 bankruptcy provisions).

51. 700 F.2d 1053 (6th Cir. 1983).

52. *Id.* at 1054.

53. *Id.* at 1058. The lump sum was the fair market value of the collateral or the balance of the creditor's interest in the collateral, whichever was less. *Id.* at 1055. *See also In re* Zimmerman, 4 Bankr. 739 (Bankr. S.D. Cal. 1980); *In re* Hart, 8 Bankr. 1020 (Bankr. N.D. N.Y. 1981) (cases supporting lump sum definition of redemption).

54. *Bell*, 700 F.2d at 1056.

55. 11 U.S.C. §§ 524(c), 722 (1988). *See supra* notes 6-7 and accompanying text (describing sections 722 and 524(c) respectively).

intended to encompass the lump sum requirement provided under Uniform Commercial Code section 9-506, upon which section 722 was based.[56]

Moreover, the court examined section 722 in light of the reaffirmation option found in section 524(c).[57] A section 524(c) reaffirmation agreement is one negotiated between the debtor and the creditor which creates anew the debtor's personal liability for the property at issue.[58] The debtor, with the court's approval, is able to make installment payments under such an agreement.[59] Redemption by installments would render the reaffirmation provision superfluous since debtors could retain secured estate property without the requisite personal liability of a reaffirmation agreement.[60]

The *Bell* court recognized that an insolvent debtor may be financially incapable of redeeming his or her property by making the requisite lump sum payment. However, the court maintained that the debtor's inability to exercise the option of redemption was not sufficient grounds to ignore the plain meaning of the statute.[61] Thus, in order to retain collateralized estate property, the debtor could either make a lump sum redemption or make installment payments pursuant to a consensual reaffirmation agreement.[62] An installment redemption was not possible when section 722 and section 524(c) were read together.[63]

Following the 1984 amendments, courts have continued to sustain the conclusion that installment payments are only permitted

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56. *Bell*, 700 F.2d at 1055. *See* U.C.C. § 9-506 (1990) (debtor's right to redeem collateral); *In re* Schweitzer, 19 Bankr. 860, 862 n.4 (contrasting 11 U.S.C. section 722 redemption and U.C.C. section 9-506 redemption).

57. *Bell*, 700 F.2d at 1055. *See* 11 U.S.C. § 722 (1988); *id.* § 524(c) (1988) (redemption and reaffirmation provisions). *See also supra* notes 6-7 (text of reaffirmation and redemption provisions).

58. 11 U.S.C. § 524(c) (1988). *See supra* note 7 and accompanying text (reaffirmation provision).

59. *Bell*, 700 F.2d at 1055.

60. *Id.* at 1056.

61. *Id.* at 1057.

62. *Id.* at 1058.

63. *Id.* at 1055-56.

under a consensual reaffirmation agreement.[64] The Seventh Circuit, in *In re Edwards*,[65] held that when an individual bankrupt debtor chooses to retain property which secures a consumer debt, his or her only options are to either redeem the property from the accompanying debt or expressly reaffirm the underlying debt.[66] The court further held that redemption is satisfied only by a lump sum payment of the debt or the property's fair market value, whichever is less, and not by continued installment payments.[67]

In that case, Edwards filed a statement indicating her intent to reaffirm the debt.[68] However, she never executed the corresponding reaffirmation agreement.[69] Instead, Edwards continued to make the regularly scheduled payments in accordance with the original debt agreement.[70] Nonetheless, the creditor who held the promissory notes for the property in question sought to have Edwards compelled to perform in accordance with her original statement of intent to reaffirm.[71]

In reaching its decision, the *Edwards* court relied on several factors. The court looked to the plain meaning of section 521, which states "[t]he debtor *shall* file . . . a statement of his intention."[72] The court interpreted the word "shall" as imposing a mandatory duty upon the debtor to choose between the provided options of redemption and reaffirmation, rather than giving the debtor the ability to do neither.[73] The choice of doing neither would have been a plausible inference had the statute instead read "the debtor *may* file a statement of his intention."

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64. *See infra* notes 62-76 (discussing *Edwards*); *In re* Edwards, 901 F.2d 1383 (7th Cir. 1990) (holding that the debtor's options are limited to reaffirmation and redemption, and redemption is fulfilled by lump sum payment only).

65. 901 F.2d 1383 (7th Cir. 1990).

66. *Id.* at 1387.

67. *Id.* at 1385 (quoting General Motors Acceptance Corp. v. Bell, 700 F.2d 1053, 1055 (6th Cir. 1983)).

68. *Edwards*, 901 F.2d at 1384.

69. *Id. See* 11 U.S.C. § 524(c)(2) (providing that the debtor may rescind a reaffirmation agreement at any time prior to discharge or within 60 days after filing such agreement with the court, whichever is later).

70. *Edwards*, 901 F.2d at 1384.

71. *Id.*

72. *Id.* at 1386 (citing 11 U.S.C. § 521) (emphasis added).

73. *Id.*

The court next pointed out the specific period of time for performance indicated in section 521(2)(B).[74] That subsection provides that the debtor must perform his or her stated intention under section 521(2)(A) to redeem or reaffirm within forty-five days after filing such notice of intent or within additional time granted by the court.[75] Thus, the limited time for performance eliminated the possibility of installment payments, which by their nature spread over an extended period of time.[76]

Citing *Bell*, the *Edwards* court emphasized the intended voluntariness of reaffirmation agreements.[77] When the debtor continues to make installment payments without reaffirming his or her personal liability and without the creditor's consent, the debtor has in effect imposed a new arrangement on the creditor.[78] This arrangement is contrary to the intended voluntariness of section 524(c), which requires the creditor to consent to reaffirmation agreements.[79]

Additionally, the court examined the legislative history of the 1984 Bankruptcy Code amendments and the societal ramifications that would flow from not limiting the debtor's choices to redemption and reaffirmation.[80] The effect of bankruptcy is to release the debtor from personal obligations by discharging his or her debts.[81] In the absence of a redemption or reaffirmation, following such a discharge, the debtor is no longer personally liable

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74. *Id. See* 11 U.S.C. § 521(2)(B) (1988). The 1984 amendments to the bankruptcy code provide that:

> [W]ithin forty-five days after the filing of a notice of intent under this section, or within such additional times as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph.

Id.

75. *Edwards*, 901 F.2d at 1386 (citing 11 U.S.C. § 521). *See* 11 U.S.C. § 521(2)(B) and *supra* note 71 (setting forth time limits for performance of debtor's stated intent).

76. *Edwards, 901 F.2d at 1386.*

77. *Id.* at 1385 (quoting General Motors Acceptance Corp. v. Bell, 700 F.2d 1053, 1056 (6th Cir. 1983)).

78. *Edwards*, 901 F.2d at 1385.

79. *Id.*

80. *Id.*

81. *Id.*

on loans that are secured by property of the bankrupt estate.[82] Where the debtor retains possession of such property, the creditor's only means of recourse in the event of the debtor's subsequent default is to seek repossession.[83] In the meantime, the secured property at issue remains in the possession of the debtor, who, due to the discharge, is no longer legally obligated to maintain or insure the property.[84] If the value of the property drops below the balance of the loan, the creditor becomes undersecured and bears the risk of additional exposure.[85] The creditor in turn increases the cost of future credit to society in general to ensure adequate protection from such risks.[86] The court concluded that the legislative intent of the amendments was to provide increased creditor protection from those risks, while stabilizing the rising costs of credit by requiring the debtor to either redeem secured property by a lump sum payment or reaffirm his or her personal liability.[87]

The *Edwards* court concluded that the debtor who chooses to retain estate property that secures a consumer loan must then choose to either redeem the property or reaffirm the underlying debt.[88] Although the court held that there were no other options available to the debtor in such a situation, the court did not compel the debtor to choose reaffirmation over redemption, as requested by the creditor.[89] The court justified this rationale by pointing to the perceived need to protect the debtor from the burden of

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id. See* S. REP. No. 446, 97th Cong., 2d Sess. 41 at 6 (1982)(discussing creditor's reactions to rising bankruptcy costs). *See also* PROPOSED BANKRUPTCY IMPROVEMENT ACT OF 1981: HEARINGS BEFORE THE SUBCOMM. ON COURTS OF THE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 11 (1981) (statement of Mr. Andrew F. Brimmer, president, Brimmer & Co., Inc., Washington, D.C., economic and financial consultants, discussing costs of spiraling bankruptcy cases).

87. *Edwards*, 901 F.2d at 1386.

88. *Id.*

89. *Id.* Although the court viewed the options as mandatory, the court would not place further restrictions upon the debtor which could impair the debtor's ability to obtain a fresh start. *Id.* at 1384.

improvident reaffirmation agreements.[90] The choice between redemption and reaffirmation is the debtor's alone.[91]

In re Chavarria,[92] a case quite similar to *Edwards*, supports the conclusion that the debtor who wants to keep estate property that secures an installment loan must choose between the exclusive options of redemption and reaffirmation.[93] The *Chavarria* court then addressed the court's power to enforce the debtor's adherence to the debtor's stated choice. The court described the Bankruptcy Code as an attempt to equalize the naturally opposing interests of debtors and creditors.[94] A discharge in bankruptcy relieves the debtor from personal liability on loans secured by estate property.[95] When the debtor retains such property without redeeming or reaffirming, the creditor is burdened with all the risks of the debtor's continued possession.[96] Installment payments, in the absence of a reaffirmation agreement, permit the debtor to benefit from retention without assuming the risks of personal liability.[97] The court would not create such an alternative that shifted the balance in the debtor's favor.[98] The court reasoned that if a chapter 7 debtor seeking relief through the liquidation of his or her liabilities wished to make installment payments, then the debtor's proper remedy was a chapter 13 bankruptcy proceeding, which provides relief through reorganization of the debtor's liabilities.[99]

As in *Edwards*, the *Chavarria* court then looked to the statutory language. Section 521(2)(A) provides the debtor with a minimum of thirty days after filing a bankruptcy petition to state his or her intent to either redeem or reaffirm.[100] Once the debtor states his

90. *Id.*
91. *Id.* at 1385.
92. 117 Bankr. 582 (Bankr. D. Idaho 1990)
93. *Id.* at 583.
94. *Id.* at 584.
95. *Id.* (quoting *In re* Edwards, 901 F.2d 1383, 1386 (7th Cir. 1990)).
96. *Chavarria*, 117 Bankr. at 584.
97. *Id.*
98. *Id.* at 584-85.
99. *Id.* at 585.
100. *See* 11 U.S.C. § 521(2)(A) (1988); *see also supra* note 4 (text of section 521(2)(A)).

or her intent, section 521(2)(B) provides the debtor a minimum of forty-five days thereafter in which to perform his or her stated intent.[101] In addition, the Code specifically permits an extension of those time limits in certain circumstances, upon request.[102] The court concluded that the minimum time constraint of seventy five days provides the debtor ample time to determine which option best suits him or her and to perform accordingly.[103] The court reasoned that these time restraints gave the debtor sufficient protection from the danger of making improvident financial decisions.[104]

Despite the lack of any express language of enforcement, the *Chavarria* court concluded that it had the power to order the debtor to choose between redemption and reaffirmation and to perform accordingly.[105] This interpretation is consistent with the Code's purpose of balancing the competing interests of the debtor and creditor, while providing the debtor ample time in which to perform.[106] The debtor also has the option of converting to a chapter 13 bankruptcy proceeding.[107] The court reasoned that any other interpretation would render section 521 ineffectual.[108]

In summary, the all-inclusive interpretation is based on the plain meaning of section 521 and the legislative history and purpose of that section. The plain meaning creates a mandatory choice between redemption and reaffirmation for the debtor who desires to retain collateralized estate property. The plain meaning also makes redemption by installments impossible due to the forty-five day limit on performance found in section 521(2)(B). This interpretation furthers the legislative intent of the 1984 amendments to equalize the contrasting interests of debtors and creditors. The

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101. *Chavarria*, 117 Bankr. at 585. *See* 11 U.S.C. § 521(2)(B) (1988); *see also supra* note 71 (text of section 521(2)(B)).

102. *Chavarria*, 117 Bankr. at 585. *See* 11 U.S.C. § 521(2)(A) - (B) (1988); *supra* notes 4 and 71 (text of section 521(2)).

103. *Chavarria*, 117 Bankr. at 585.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

all-inclusive interpretation complies with the intended voluntariness of reaffirmation agreements by prohibiting installment payments without the creditor's prior consent. In the absence of the creditor's consent, the debtor can continue making installment payments only under a chapter 13 bankruptcy. Otherwise, a debtor can procure a redemption only by a lump sum payment.

B. The Noninclusive Interpretation

Jurisdictions adhering to the noninclusive interpretation maintain that the bankrupt debtor seeking to retain collateralized estate property is not limited to the options of redemption and reaffirmation.[109] In *Lowry Federal Credit Union v. West*[110] the Tenth Circuit Court of Appeals held that the debtor is only required to file a statement of intent as to whether he or she will keep or surrender the collateralized property.[111] A further statement indicating an intent to redeem the property or to reaffirm the loan is only required if the debtor actually chooses one of those options.[112] Thus, in a *Lowry* jurisdiction, the debtor who chooses to retain estate property that secures an installment loan has three options.[113] The debtor can redeem the property, reaffirm the debt or continue to make the regularly scheduled installment payments.[114]

In *Lowry*, the debtors filed a statement of intent indicating their plan to retain the truck that served as collateral for an installment loan.[115] The debtors made no indication as to whether they would redeem the property or reaffirm the associated debt.[116] However, the debtors did remain current on the regularly scheduled payments under the original installment agreement.[117] The court held that

109. *See infra* notes 107-143 and accompanying text (discussing noninclusive interpretation).
110. 882 F.2d 1543 (10th Cir. 1989)
111. *Id.* at 1544-45.
112. *Id.* at 1546.
113. *Id.*
114. *Id.*
115. *Id.* at 1544-45.
116. *Id.*
117. *Id.* at 1545.

the debtors' choice of retaining the property while continuing to make installment payments was valid.[118]

In its analysis, the court looked to the language of the debtor's duties set forth in section 521.[119] Although the court found the choice between redemption and reaffirmation obviously mandatory under the plain meaning of section 521, the court noted that there was nothing in the Code to indicate that these were the debtor's exclusive choices.[120] Furthermore, the court took notice of the lack of any means of enforcement should the debtor fail to fully comply with the requirements of section 521(2).[121] While the bankruptcy trustee is vested with the responsibility to ensure the debtor's compliance, the trustee has no corresponding power of enforcement.[122] Additionally, section 521(2) does not provide any debtor penalties or creditor remedies in the event of the debtor's noncompliance.[123] The court concluded that since Congress did not provide any penalties for the debtor's noncompliance, nor any means to enforce section 521(2), there was no congressional intent to limit the debtor to redemption or reaffirmation.[124] Therefore, even in the face of the debtor's noncompliance with the clearly mandatory language of section 521(2), the creditor was not entitled to seek repossession of the property at issue.[125] So long as there was no evidence to indicate that either party would be prejudiced, the court concluded that it was within the discretion of the bankruptcy court to permit retention so long as the debtor continued to perform in accordance with the original security agreement.[126] Thus, the debtor was not limited exclusively to the options of redemption and reaffirmation.[127]

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118. *Id.* at 1546.

119. *Id.* at 1545-47. *See infra* notes 117-124 and accompanying text (discussing *Lowry*).

120. *Lowry*, 882 F.2d at 1545-47.

121. *Id.* at 1545.

122. *Id. See* 11 U.S.C. § 323 (1988) (role and capacity of trustee provision); *see also supra* note 25 (defining trustee's capacity).

123. *Id.* at 1545. *See infra* notes 4 and 71 (text of section 521(2)).

124. *Lowry*, 882 F.2d at 1546.

125. *Id.*

126. *Id.* at 1547.

127. *Id.* at 1546.

In *In re Belanger,*[128] a similar case, the debtors expressed their intent to retain their mobile home while continuing to make monthly payments in accordance with the original debt agreement.[129] In reaching its decision, the court again looked to the statutory language and the legislative history of the 1984 amendments to section 521.[130]

In examining the statutory language, the court focused on the term "if applicable," which precedes the choices of redemption and reaffirmation.[131] The court interpreted this to mean that redemption and reaffirmation were applicable only if the debtor chose to do one or the other.[132] Thus, the debtor who opts to continue making installment payments is not required to state his or her intent to redeem or reaffirm because these options do not become applicable if the debtor does not chose one of them.[133]

The court's examination of the legislative history focused on the motive behind the 1984 amendment to section 521.[134] Secured creditors wanted to know the debtor's intended disposition of their secured property.[135] However, the automatic stay prohibited any contact between the creditor and the debtor after the bankruptcy petition had been filed.[136] The creditor would often engage in costly and time-consuming court proceedings in an effort to determine the debtor's intent, only to discover that the debtor intended to surrender the property all along.[137] Thus, the

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128. 118 Bankr. 368 (Bankr. N.C. 1990).

129. *Id.* at 369.

130. *See infra* notes 128-142 and accompanying text (discussing *In re* Belanger).

131. *Belanger,* 118 Bankr. at 369-70. Bankruptcy Code section 521(2)(A) provides that if the debtor chooses to retain collateralized estate property, the debtor must, if applicable, indicate that the property is exempt, that he or she intends to redeem the property, or that he or she intends to reaffirm the underlying debt. 11 U.S.C. § 521 (1988). *See supra* note 4 (text of section 521(2)(A)).

132. *Belanger,* 118 Bankr. at 369-70.

133. *Id.*

134. *Id. See infra* notes 132-139 and accompanying text (discussing court's interpretation of legislative history).

135. *Belanger,* 118 Bankr. at 370 (quoting H. Sommer, *The 1984 Changes in Consumer Bankruptcy Law,* 31 PRACTICAL LAWYER 45, 55 (1985)).

136. *Id.* at 370-71. *See* 11 U.S.C. § 362 (1988) (automatic stay provision); *see also supra* note 19 (discussing the automatic stay provision).

137. *Belanger,* 118 Bankr. at 371. *See* S. REP. No. 446, 97th Cong., 2d Sess. (1982) (discussing creditors' concerns).

creditors' proponents advocated placing an affirmative duty upon the debtor to disclose his intended disposition by filing a statement of intent.[138]

The court viewed the statement of intent as a mere notice requirement.[139] The required early disclosure of intent regarding retention or surrender would reduce expenses and improve judicial efficiency by permitting the creditor to identify potentially disputed matters at an early stage.[140] The court believed that a debtor would not likely fail to make payments or maintain the property simply because the debt had been discharged, since such action would enable the creditor to repossess the property.[141] Thus, further creditor protection was not needed. Furthermore, the court held that an interpretation of section 521 which restricted the debtor to the exclusive options of redemption and reaffirmation would impair the debtor's rightful fresh start.[142]

The court concluded that the plain meaning of the statutory language and the legislative history of section 521 indicated that the benefit to creditors was merely a right to early notice regarding the debtor's intended disposition of secured property.[143] Accordingly, the court held that the debtor was only required to disclose his or her intent to redeem or reaffirm if the debtor actually so intended.[144] If the debtor intended to do neither, the debtor had the additional option of remaining current on the regularly scheduled installment payments.[145]

In summary, the noninclusive approach is predicated upon the language of the statute. This language does not explicitly require

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138. *Belanger*, 118 Bankr. at 371.

139. *Id.* at 370.

140. *Id.* at 371. SEE PROPOSED CONSUMER BANKRUPTCY IMPROVEMENT ACT OF 1981: HEARINGS BEFORE THE SUBCOMM. ON COURTS OF THE COMM. ON THE JUDICIARY, 97th Cong., 1st Sess. 11 at 63 (1981) (statement of Professor Jonathan M. Landers, University of Illinois, Claude Rice, attorney, and Alvin O. Wiese, Jr., attorney) (discussing benefits of required early disclosure).

141. *Belanger*, 118 Bankr. at 371.

142. *Id.* at 370. A fresh start is "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

143. *Belanger*, 118 Bankr. at 370.

144. *Id.* at 372.

145. *Id.*

a choice between redemption and reaffirmation as indicated by the words "if applicable."[146] Nor does this language specifically prohibit the debtor from making installment payments in lieu of a redemption or reaffirmation. Moreover, the language does not provide any enforcement provisions or sanctions for noncompliance. Thus, the courts adhering to the noninclusive approach have held that section 521 grants them the discretion to permit the continuance of regularly scheduled installment payments. Additional support is found in the legislative history which indicates that creditors, seeking early disclosure of the debtor's intended disposition of collateralized estate property, merely sought to impose a notice requirement upon the debtor. Thus, the debtor need only disclose his or her intent to redeem the property or reaffirm the debt if the debtor actually intends to choose one of those options. If not, the debtor has the third option to continue the regularly scheduled installment payments.

III. THE ALL-INCLUSIVE AND NONINCLUSIVE APPROACHES COMPARED

The underlying purpose of the Bankruptcy Code is to provide the overburdened debtor a "fresh start" financially.[147] In a chapter 7 proceeding, this is accomplished by liquidating the debtor's assets in order to satisfy the debtor's creditors.[148] To the extent that the debtor's liabilities cannot be satisfied from those assets, the debtor receives a discharge.[149] Following the discharge, the debtor is no longer personally liable on any debts that remain unsatisfied.

Although the debtor's personal liability has been discharged, pre-bankruptcy liens on the debtor's property remain in force to the

146. *See* 11 U.S.C. § 521 (1988) ("if applicable" language).

147. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (defining "fresh start").

148. *See supra* note 47 and accompanying text (defining chapter 7 bankruptcy).

149. *See* 11 U.S.C. 727 (1988) (providing that the debtor shall be granted a discharge unless certain specified conditions, beyond the scope of this Comment, exist).

extent that such liens do not impair the debtor's exemptions.[150] When the debtor chooses to retain estate property that secures a loan, a conflict arises between the interests of the debtor in obtaining a fresh start and those of the creditor in limiting his or her potential exposure.[151] Section 521(2) sets forth the debtor's duties under such circumstances and adds to the confusion regarding the competing interests of the debtor and creditor.[152]

The options of surrender or redemption or reaffirmation arise in two situations: when the trustee abandons estate property because the fair market value of that property is less than the lien that is attached to the property, and when the debtor claims certain estate property or a portion thereof as exempt.[153] When the debtor chooses to retain such property, the split between the circuits demonstrates that it is not clear whether the debtor must then either redeem the property or reaffirm the underlying debt in order to retain the property.[154]

A. The All-Inclusive Interpretation

The all-inclusive interpretation, which limits the debtor to the alternatives of redemption and reaffirmation, best promotes the spirit of the Bankruptcy Code. The all-inclusive interpretation enables the debtor to achieve his or her desired fresh start, yet prevents the debtor from obtaining a head start at the expense of his or her secured creditors.

Interpreting the options of redemption and reaffirmation as all-inclusive does not leave the debtor without options. Although redemption may be satisfied only with a lump sum payment, the

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150. *See* 11 U.S.C. § 522(f) (1988) (avoidance of judicial liens or nonpossessory, nonpurchase-money security interests in certain property provision).

151. *See supra* notes 43-143 and accompanying text (cases illustrating all-inclusive and noninclusive approaches).

152. *See* 11 U.S.C. § 521 (1988) (setting forth debtor's duties) and *infra* notes 43-143 and accompanying text (illustrating the conflicting approaches).

153. *See supra* note 5 and accompanying text (exemption provision). *See also* 11 U.S.C. 722 (1988) (historical and revision notes discussing when the right of redemption is available to a bankrupt debtor).

154. *See supra* notes 43-143 and accompanying text (illustrating conflict).

debtor has the ability to make installment payments under a consensual, court-approved reaffirmation agreement. Had Congress intended to give the debtor the option of an installment redemption, the reaffirmation provision would not have been necessary. To read such an option into the section 722 redemption would render the section 542(c) reaffirmation agreement useless.

Additionally, the all-inclusive interpretation protects the creditor. In the absence of a redemption of the property or a reaffirmation of the debt, the creditor's only means of recourse would be repossession. Placing an affirmative requirement on the debtor to reaffirm or redeem protects the creditor in the event of the debtor's subsequent default or the destruction of the property. Courts supporting the noninclusive interpretation believe that the debtor would not be likely to default on payments since such action would allow the creditor to seek repossession.[155] While the threat of repossession may provide some incentive to remain current on the attached obligation, repossession provides little protection to the creditor. Should the property be lost, stolen, or destroyed, the debtor, who is no longer obligated to make payments or to maintain property insurance following his or her discharge, can simply walk away. The creditor is left holding the bill for property which the debtor possessed and enjoyed without interruption. The all-inclusive interpretation protects the legitimate interests of the creditor, while allowing the debtor to achieve a fresh start.

The all-inclusive approach does not prevent the debtor from achieving the legitimate benefit of the removal of onerous debt. The all-inclusive approach does, however, prevent the debtor from receiving the dual benefits of discharge and unfettered possession of the property that once secured a discharged debt, by requiring the debtor to choose between redeeming the property in question or reaffirming the associated debt.[156]

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155. *See* 11 U.S.C. §§ 524(c), 722; *supra* notes 6-7 and accompanying text (redemption and reaffirmation provisions).

156. *See supra* notes 46-105 and accompanying text (discussing all-inclusive interpretation).

B. The Noninclusive Interpretation

Courts adhering to the noninclusive interpretation have focused on the placement of the words "if applicable" in section 521(2)(A), which precede the requirement that the debtor state whether the property he or she intends to keep is exempt, whether he or she intends to redeem that property or whether he or she intends to reaffirm its underlying debt.[157] These courts have interpreted this language to mean that the choices provided after "if applicable" are optional, becoming applicable only if the debtor actually chooses one of them. Accordingly, these courts have held that section 521 grants them the discretion to fashion other alternatives, such as continued installment payments.

While the placement of the phrase "if applicable" is somewhat misleading, the noninclusive interpretation would render the section 524(c) reaffirmation agreement useless. Viewed in this light, it becomes clear that the phrase "if applicable" applies only to the requirement to indicate whether the property at issue is exempt. Such an interpretation leaves the debtor with the duty to choose between redemption and reaffirmation. Furthermore, the affirmative language "[t]he debtor shall" contradicts the noninclusive interpretation that the debtor's affirmative duty is made optional by the words "if applicable."[158]

The noninclusive courts find further support for their interpretation in the legislative history of the 1984 amendments.[159] Relying on the creditors' motivation in seeking the changes, these courts label the debtor's duty to indicate his or her intent to redeem or reaffirm as a mere notice requirement. If this were true, however, it would then follow that creditors would require similar notice of the debtor's intent to simply continue making installment payments. It seems more likely that creditors

157. *See* 11 U.S.C. § 521 (1988). *See also supra* notes 106-143 and accompanying text (discussing noninclusive interpretation).

158. *See* 11 U.S.C. § 521 (1988).

159. *See supra* notes 131-139 and accompanying text (discussing legislative history).

were motivated by more than the mere early disclosure of the debtor's intended disposition of secured property.

The noninclusive approach permits the debtor to make installment payments without executing a reaffirmation agreement, despite the creditor's objections. This enables the debtor to maintain possession of property that is subject to the creditor's lien with no personal liability. In effect, the debtor is permitted to form a new, one-sided arrangement with the creditor, which negates the intent that reaffirmation agreements be entered into voluntarily by both debtors and creditors.[160]

The long-term repercussions of such an approach, however, will come to bear on the debtor. The creditor, faced with increased costs and risks associated with consumer credit, will be forced to pass such costs along to consumers in general. Such costs could take the form of higher interest rates.

IV. CONCLUSION

Section 521 details some of the bankrupt debtor's duties. Included is a requirement to file a statement of intent disclosing the debtor's intended disposition of collateralized estate property. The Code provides further that, if applicable, the debtor must file a statement indicating his or her intent to redeem that property or reaffirm the associated debt.

This latter requirement is the subject of a split of authority among the circuits.[161] Some circuits hold that the debtor's exclusive options are to redeem the property with a lump sum payment or reaffirm the underlying debt. Others maintain that the debtor has yet a third option to continue to make the regularly scheduled installment payments.

The controversial language of section 521(2) was implemented as part of the 1984 Bankruptcy Code amendments, largely as an attempt to balance the scales of equity between debtors and secured

160. *See* 11 U.S.C. § 524(c) (1988); *supra* note 7 and accompanying text (defining reaffirmation agreement).

161. *See supra* notes 43-143 and accompanying text (discussing conflicting approaches).

creditors. To label the statute as a mere notice requirement and the provided options as noninclusive is self-contradictory. The debtor need only choose a course of action not provided by the statute in order to alleviate the need to provide notice. Such an interpretation would render section 521(2) superfluous and infer the unlikely conclusion that Congress intended the phrase to have no meaning at all. Thus, the proper approach is the all-inclusive interpretation.

The all-inclusive interpretation imposes a mandatory requirement upon the debtor desirous of retaining collateralized estate property to choose between the exclusive options of redemption and reaffirmation. This ensures the debtor's fresh financial start, yet prevents the debtor from receiving a head start at the expense of secured creditors. Such an interpretation advances the purpose of the amendments to balance the equities between debtors and creditors.

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