

## WILL THE RIDE-THROUGH RIDE AGAIN?

Christopher M. Hogan

*The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) fundamentally changed many aspects of the Bankruptcy Code, but its impact on certain parts of the law remains unclear. The “ride-through” is one of these parts. The ride-through provides debtors with a fourth option for their property; other than surrendering, reaffirming, or redeeming property, debtors can retain their property by continuing to make pre-bankruptcy payments. The pre-BAPCPA ride-through’s scope, however, was limited, as only five circuit courts of appeals recognized its existence, while five others held it was not a part of the Bankruptcy Code. This circuit split was not resolved before Congress passed BAPCPA, which modified the Bankruptcy Code sections relating to the ride-through. While some courts and commentators believe that BAPCPA eliminated the ride-through, a close look at its changes shows that this is far from clear. In addition, the elimination of the ride-through would strike at the heart of basic congressional intent in passing BAPCPA and could seriously injure low-income debtors. While the ride-through was not eliminated, BAPCPA also did not endorse its expansion by changing its language to expand the ride-through. This Note argues that because of this lack of clear change from BAPCPA, courts should continue to perform the ride-through based on the pre-BAPCPA circuit split until Congress makes a clear change to the Bankruptcy Code.*

### INTRODUCTION

Why would Akhter Husain agree to pay \$15,438 on a Toyota Avalon valued at only \$8,415, with a staggering annual interest rate of 15.6%?<sup>1</sup> Most likely,<sup>2</sup> it is because he needed his car and had no other options. Husain filed for Chapter 7 bankruptcy hoping to obtain what almost every debtor seeks: a “fresh start.”<sup>3</sup> But he still needed his car, and his creditor was willing to let him have it only if he reaffirmed his debt on the creditor’s terms. For many Americans, the automobile is one of the most, if not *the* most, important pieces of property they own;<sup>4</sup> it is needed for everything from employment to education, grocery shopping to religious worship.<sup>5</sup>

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1. See *In re Husain*, 364 B.R. 211, 213–14 (Bankr. E.D. Va. 2007) (describing background of Akhter Husain’s bankruptcy).

2. This Introduction’s hypothetical scenario is derived only from the facts discussed in this case, not from any interviews with Husain or his creditors.

3. See *infra* Part I.A.1 (discussing “fresh start” idea).

4. See, e.g., Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *Fordham L. Rev.* 2257, 2358 (2002) (“[M]ost Americans view their cars as mini-homes on wheels, important symbols of autonomy and achievement, as well as necessities in a public-transportation poor world.”).

5. See, e.g., *In re Lorenz*, 368 B.R. 476, 479 (Bankr. E.D. Va. 2007) (describing debtor’s reliance on automobile for “travel to and from work or job sites,” “driv[ing] . . .

Had Husain filed for bankruptcy only two years earlier,<sup>6</sup> he would have been able to use the “ride-through.” The ride-through allows bankrupt individuals to keep their property during and after bankruptcy by remaining current on their payments, which prevents creditors from imposing harsher terms on debtors during the bankruptcy process.<sup>7</sup> A court in Husain’s district, however, held that the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”)<sup>8</sup> eliminated the ride-through from the Bankruptcy Code.<sup>9</sup> This ruling forced Husain, in an effort to keep his car, to return to his creditors, who offered him the unfavorable terms described above.<sup>10</sup> Husain had two choices. He could file for Chapter 13 bankruptcy instead of Chapter 7, and spend the next few years paying all his disposable income to his creditors. Or he could accept the new terms and try to pay off the loans with a possible raise and longer working hours.<sup>11</sup> Husain sought court approval to reaffirm his debt under terms so harsh that his attorney refused to certify them.<sup>12</sup> In fact, satisfying the terms appeared to be mathematically impossible.<sup>13</sup> Undoubtedly, other debtors will have to agree to similar terms or be forced to file for Chapter 13 bankruptcy—all because BAPCPA removed the ride-through.

But did BAPCPA actually remove the ride-through? The answer is far from clear. BAPCPA is the result of years of pressure on Congress to change the Bankruptcy Code to force well-off Chapter 7 filers to file for Chapter 13 bankruptcy, requiring them to pay creditors with their dispos-

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child to and from school,” “shopping for groceries,” and “driv[ing] . . . to and from Church”).

6. As discussed *infra* notes 105–115 and accompanying text, a circuit split existed regarding the ride-through before 2005. As Husain filed in the Eastern District of Virginia, he would have been governed by Fourth Circuit law, which allowed the ride-through before 2005. See *Home Owners Funding Corp. of Am. v. Belanger* (In re *Belanger*), 962 F.2d 345, 347 (4th Cir. 1992) (allowing ride-through).

7. See *infra* Part I.D.

8. Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

9. See *In re Kissal*, No. 06-10264-SSM, 2006 WL 1868513, at \*1 (Bankr. E.D. Va. June 29, 2006) (“Among the many changes to consumer bankruptcy practice made by [BAPCPA] was the enactment of language that commentators agree was intended to eliminate the . . . ‘ride-through’ for property securing a consumer debt.”).

10. Technically, Husain could redeem his car or surrender it under the Bankruptcy Code. As a bankrupt individual, however, he is unlikely to have enough money to redeem the car. In addition, surrendering the car would make it nearly impossible to get a new car on loan because Husain’s credit rating would reflect his bankruptcy.

11. See *In re Husain*, 364 B.R. 211, 214 (Bankr. E.D. Va. 2007) (quoting statement from Husain that he would make payment with “an expected raise and through working more hours”).

12. See *id.* at 214 (noting that Husain was not able to get reaffirmation terms certified by bankruptcy attorney, and hence needed court approval).

13. *Id.* at 217 (stating that Husain would be \$3,000 short a month for payments under reaffirmation plan).

able income for several years.<sup>14</sup> In 2005, lawmakers enacted this long-sought change by adding the “means test” to the Bankruptcy Code.<sup>15</sup> This test forces judges to convert upper class debtors’ Chapter 7 filings to Chapter 13 filings, providing creditors with more assets from so-called “strategic filers” of bankruptcy.<sup>16</sup> BAPCPA’s means test, in the words of its sponsor, Senator Charles Grassley, was supposed to protect the lower and middle classes by stopping the “high rollers who game the current bankruptcy system and its loopholes to get out of paying their fair share.”<sup>17</sup>

Several recent court decisions, however, have subverted this goal of BAPCPA, hurting the same lower class individuals BAPCPA was supposed to protect.<sup>18</sup> These courts found that BAPCPA eliminated the ride-through option available to some filers of Chapter 7 bankruptcy.<sup>19</sup> This interpretation of BAPCPA will prevent many of these individuals from filing Chapter 7 bankruptcy and force them into a less desirable Chapter 13 bankruptcy. Thus, while BAPCPA’s supporters contend that the Act will stop “hard-working, law-abiding Americans [from having] to pay higher prices . . . because somebody else did not make good on their obligations,”<sup>20</sup> these same Americans will feel the detrimental effects of court rulings finding that BAPCPA removed the ride-through.

This Note argues that BAPCPA did not clearly change the ride-through from its pre-BAPCPA form. Though BAPCPA changed several Bankruptcy Code provisions related to the ride-through, those changes are susceptible to different readings and neither prevent nor mandate the ride-through’s continued existence. This Note concludes that the ride-through should continue to operate in its pre-BAPCPA form until Congress or the Supreme Court provides a clear answer on its status. Part I examines the Bankruptcy Code, congressional attempts to rein in strategic bankruptcy filers, and the ride-through’s history. Part II analyzes the impact of BAPCPA on the ride-through, how courts and commentators have interpreted BAPCPA so far, and what effect removing the ride-through would have on Chapter 13 filings and the cost of credit. Part III explains why courts should hold that BAPCPA neither removed nor mandated the ride-through, and why the pre-BAPCPA framework for the ride-

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14. For a history of efforts to change the Bankruptcy Code in this fashion, see generally Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 *Am. Bankr. L.J.* 485 (2005).

15. BAPCPA’s “means test” requires some bankruptcy filers to file for Chapter 13 bankruptcy instead of Chapter 7 bankruptcy. 11 U.S.C. § 707(b) (2000 & Supp. V 2005); see also *infra* Part I.C (discussing means test).

16. See *infra* Part I.C.

17. 151 Cong. Rec. S1855 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley).

18. For an examination of the court rulings, see *infra* Part II.B. For an explanation of the effects of the rulings, see *infra* Part II.C.

19. Even before BAPCPA, the ride-through was unavailable to many individuals, due to a circuit split over whether the provision existed. See *infra* Part I.D.1.

20. 151 Cong. Rec. S1856 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley).

through should operate despite BAPCPA's changes to the Bankruptcy Code.

## I. THE RISE AND FALL OF THE HONEST DEBTOR

BAPCPA represents the culmination of a decades-old movement to stop debtors from using bankruptcy as a strategic measure to remove debts that could be repaid.<sup>21</sup> The ride-through, however, is more recent; courts did not recognize it until after the last major revisions to the Bankruptcy Code.<sup>22</sup> To understand the ride-through and the passage of BAPCPA, it is important to understand the foundations of bankruptcy law and its shift from protecting the "honest debtor" to protecting creditors from debtor abuse. Part I.A examines the "fresh start" and the ideological underpinnings of bankruptcy and looks briefly at the two most common forms of bankruptcy protection. Part I.B discusses the impact of bankruptcy fraud and the move toward forcing individuals to file for Chapter 13 bankruptcy. Part I.C studies the culmination of these efforts in BAPCPA's means test. Finally, Part I.D discusses the ride-through's history and operation before the passage of BAPCPA.

### A. *The Honest Debtor's Rise*

The creation of modern bankruptcy protection in the United States centered on protecting "the honest debtor." The assumption of the honest debtor allowed for the development of better protection for debtors in the Bankruptcy Code but also laid the seeds for the imposition of harsher measures when this assumption proved to be somewhat false.

1. *The Fresh Start*. — The Supreme Court has stated that "[i]t is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched."<sup>23</sup> While discussing an estate's conversion and distribution to creditors is beyond the scope of this Note, the idea of a "fresh start" for debtors is central to BAPCPA and the ride-through. This envisioned fresh start ensured that, in exchange for turning over all nonexempt assets to creditors, a debtor receives an unconditional "discharge" of his

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21. See generally Jensen, *supra* note 14 (describing history of general bankruptcy reform and specific efforts to pass BAPCPA); Stephen W. Sather, *The Great Bankruptcy Rush of 2005 and Its Aftermath: The View from Texas*, *Am. Bankr. Inst. L. Rev.*, Sept. 2006, at 34, 34 ("According to its stated intent, Congress passed BAPCPA to deter 'abusive' filings of [C]hapter 7 liquidation proceedings and to encourage debtors to repay their debts through Chapter 13 repayment plans.").

22. See *infra* Part I.D.1 (describing ride-through background).

23. *Burlingham v. Crouse*, 228 U.S. 459, 473 (1913).

debts.<sup>24</sup> This “hallmark[ ] of American bankruptcy law”<sup>25</sup> has been the primary focus behind many bankruptcy developments.<sup>26</sup>

The rationale for the fresh start is twofold. First, it provides enormous benefit to a debtor who, “no matter how well intentioned, [is] not going to be able to pay off [his] debt.”<sup>27</sup> With his debt liquidated, the debtor is then free of future obligations and essentially able to begin his financial life anew. Most commentators, legislators, and judges have based this rationale on a crucial assumption: that the debtor was an “innocent” individual, not a strategic filer.<sup>28</sup> The Supreme Court has referred to a bankruptcy filer as an “honest but unfortunate debtor.”<sup>29</sup> When Congress passed the first major bankruptcy act in 1898, it stressed that the bill sheltered those sincerely in need of protection.<sup>30</sup> Still today, bankruptcy casebooks examine those stricken by unforeseeable misfortune when discussing Chapter 7 filers.<sup>31</sup> But when many debtors are considered dishonest filers, the fresh start’s philosophical backbone—the presumption of an honest debtor—vanishes, allowing calls for changes to the Bankruptcy Code to gain strength.<sup>32</sup>

24. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

25. See Eugene R. Wedoff, Means Testing in the New § 707(b), 79 Am. Bankr. L.J. 231, 232 (2005).

26. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93137, pt. 1, at 71, 79–80 (1973); see also Karen Gross, Failure and Forgiveness: Rebalancing the Bankruptcy System 91 (1999) (discussing use of “fresh start” language by many commentators). The fresh start has a long history, and can even be found in the Bible. See Elijah M. Alper, Note, Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up, 107 Colum. L. Rev. 1908, 1913 (2007) (“The concept of a fresh start, offering debtors relief from a potential lifetime of crippling debt and giving them a new opportunity at success, dates back to biblical times.” (citing Deuteronomy 15:1–2 (New Int’l ed.) (“At the end of every seven years you must cancel debts. This is how it is to be done: Every creditor shall cancel the loan he has made to his fellow Israelite. He shall not require payment from his fellow Israelite or brother . . .”))).

27. See Douglas G. Baird, *The Elements of Bankruptcy* 34 (4th ed. 2006).

28. See *infra* notes 55–56 and accompanying text (discussing concept of strategic filer).

29. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This is not the only time early Supreme Court language portrayed the debtor in such a positive light. See, e.g., *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) (“The federal system of bankruptcy . . . as a main purpose of the act[ ] intends to aid the *unfortunate* debtor by giving him a fresh start in life . . .” (emphasis added)).

30. See H.R. Rep. No. 55-65, at 32 (1897) (“[W]hen an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.”).

31. See Baird, *supra* note 27, at 34 (“A person might be stricken with a catastrophic illness or lose a well-paying job and be unable to cut back on expenses before being overwhelmed by debt.”).

32. See *infra* Part I.B. But see Charles G. Hallinan, The “Fresh Start” Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory, 21 U. Rich. L. Rev. 49, 66–68 (1986) (discussing sympathetic public sentiment toward filers who “failed to rationally evaluate the costs and risks of borrowing and whose use of credit was frequently an aid to the pursuit of foolish, illusory, or overvalued goals”).

The second rationale for providing debtors with a fresh start was the benefit to creditors. The first discharge laws that appeared in England were designed to maximize returns to creditors,<sup>33</sup> and stayed on the books to promote efficient collection.<sup>34</sup> The advantage to the creditor remains in today's bankruptcy law. Discharging the debt of an individual who would never be able to pay back his obligations would have "only a small cost on creditors" and would provide the creditor with a state-funded trustee to scrutinize the bankruptcy and ensure the creditor received his fair payment.<sup>35</sup> While other justifications for debtor discharge have been developed,<sup>36</sup> protection of honest debtors and creditor assistance were the primary inspirations that shaped the Bankruptcy Code.

2. *The Two Roads of Bankruptcy Protection.* — The policies of helping debtors while securing assets for creditors have taken shape in two different forms of personal bankruptcy: Chapter 7 bankruptcy and Chapter 13 bankruptcy.

a. *Chapter 7 Bankruptcy.* — Chapter 7 bankruptcy<sup>37</sup> provides a debtor with the opportunity to quickly discharge his debt. In exchange, the debtor surrenders his property, unless a reaffirmation,<sup>38</sup> redemption,<sup>39</sup> or "ride-through"<sup>40</sup> of the property occurs. By surrendering current assets, the debtor ensures that creditors do not take future earnings.<sup>41</sup>

33. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 *Harv. L. Rev.* 1393, 1395 n.5 (1985) (discussing historical origins of debt discharge); see also Hallinan, *supra* note 32, at 54 (same).

34. See Hallinan, *supra* note 32, at 54 ("[R]espected authorities continued to argue that the protection and payment of creditors was the only legitimate point of permitting legal relief through bankruptcy."); Harold Remington, *Bankruptcy Law and Peaceable Settlements of Business Failures*, 18 *Yale L.J.* 590, 595 (1909) ("The object of Bankruptcy Law in the beginning was solely the protection of the creditor . . . [T]o-day [that] is its chief bulwark and stay.").

35. See Baird, *supra* note 27, at 34–35.

36. For a social utility argument for debtor discharge, see Hallinan, *supra* note 32, at 57 (discussing "an approach . . . founded on a perception of insolvent debtors as potentially valuable contributors to the nation's economic development, whose participation in the economy was impeded by the hopelessness of their financial conditions"). For a variety of other justifications for discharge, see generally Jackson, *supra* note 33.

37. See generally 11 U.S.C. §§ 301, 701–728 (2000).

38. The definition of a reaffirmation agreement is an "agreement between the debtor and a creditor by which the debtor promises to repay a prepetition debt that would otherwise be discharged at the conclusion of the bankruptcy." *Black's Law Dictionary* 1291–92 (8th ed. 2004).

39. A redemption is defined in 11 U.S.C. § 722, which reads:

An individual debtor may . . . redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt . . . by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

40. For a more thorough discussion of this, see *infra* Part I.D.

41. See 11 U.S.C. § 541(a)(6) (removing from property of estate "earnings from services performed by an individual debtor after the commencement of the [bankruptcy action]").

Chapter 7 bankruptcy closely resembles the fresh start for debtors and is by far the most popular choice of those filing for bankruptcy.<sup>42</sup>

b. *Chapter 13 Bankruptcy.* — In certain instances, a debtor will choose not to liquidate his assets, but instead to surrender a portion of his future wages. This arrangement occurs under Chapter 13 bankruptcy,<sup>43</sup> sometimes called the “wage earner plan.”<sup>44</sup> Typically, the debtor will pay, for a number of years, all of his disposable income to the creditor.<sup>45</sup> Creditors benefit from Chapter 13 bankruptcy, as they are guaranteed in most cases at least the amount that they would have received if Chapter 7 bankruptcy had been filed.<sup>46</sup>

### B. *Questioning Honesty: Movement Toward a Forced Chapter 13*

Chapter 13 bankruptcy became popular with creditors,<sup>47</sup> and correspondingly unpopular with many debtors,<sup>48</sup> because it guarantees creditors at least the amount they would have received from assets liquidated under Chapter 7, and sometimes much more.<sup>49</sup> Thus, when creditors began to think that debtors were abusing Chapter 7 filing, a creditor-supported push began for a mechanism to force individuals to file for Chapter 13 bankruptcy.<sup>50</sup>

42. See Scott B. Ehrlich, *The Fourth Option of Section 521(2)(A)—Reaffirmation Agreements and the Chapter 7 Consumer Debtor*, 53 *Mercer L. Rev.* 613, 613 (2002) (“Approximately seventy percent of . . . consumer filings were Chapter 7 liquidation cases . . .”).

43. See generally 11 U.S.C. §§ 301, 1301–1330.

44. See Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything?*, 3 *Rutgers Bus. L.J.* 2, 5 (2006) (“Chapter 13 is often referred to as the ‘wage earners plan.’” (quoting Richard Mark Hynes, *Three Essays on Consumer Bankruptcy and Exemptions* 14 (1998) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the *Columbia Law Review*))); Reginald W. McDuffie, *The Wage Earner’s Plan in Practice*, 15 *Vand. L. Rev.* 173, 175–76 (1962) (discussing Chapter 13 as the wage earner’s plan).

45. Disposable income is defined as income “not reasonably necessary to be expended for the maintenance or support of the debtor or a dependant of the debtor.” 11 U.S.C. § 523(a)(15)(A).

46. See Baird, *supra* note 27, at 58 (asserting that under Chapter 13, “creditors are no worse off than they would be if the debtor filed under Chapter 7”).

47. See *id.* (discussing how 11 U.S.C. § 1325(a)(4) requires that creditors receive at least as much as they would have under Chapter 7 filing, thus leaving them often better off); see generally McDuffie, *supra* note 44 (explaining that creditors receive more back under Chapter XIII than Chapter VII, which are the predecessors to Chapter 13 and Chapter 7).

48. See Eric A. Posner, *Should Debtors Be Forced into Chapter 13?*, 32 *Loy. L.A. L. Rev.* 965, 968 (1999) (explaining desirability of Chapter 7 for debtors because Chapter 13 “can result in much larger payments to creditors than they would receive in Chapter 7”); see also Wedoff, *supra* note 25, at 232–33 (stating that Chapter 13 “can result in much larger payments to creditors than they would receive in Chapter 7”).

49. See Baird, *supra* note 27, at 58 (describing how “priority claims” may receive more under Chapter 13 than under Chapter 7).

50. See Jensen, *supra* note 14, at 490–94 (describing move toward means testing from 1932 forward).

Chapter 7 bankruptcy's underlying assumption is that a person who has more assets will typically be better able to pay off his debts in the future.<sup>51</sup> Thus, if a filer has many assets, large amounts of debt, and a significant annual income, both Chapter 7 and Chapter 13 bankruptcy provide similar results: Creditors either acquire a large amount of the debtor's property or take a large amount of future earnings equal to at least the amount creditors would have gotten under Chapter 7 liquidation. However, when currently held assets no longer reflect future earning potential, the prospect for abuse arises. A good example (suggested by at least one prominent bankruptcy scholar) would be a recent law school graduate who just started work at a large law firm following graduation.<sup>52</sup> The young attorney would have a large amount of debt,<sup>53</sup> few assets, and a potentially large future income.<sup>54</sup> This individual certainly has the ability to pay off his future debts, but instead opts to file for Chapter 7 bankruptcy. With hardly any assets, he will lose little in the bankruptcy proceeding, and after the bankruptcy's completion, he will still have significant income without the burden of his original debt.<sup>55</sup> Thus, far from being an "honest" or "misfortunate" debtor, the young lawyer would be considered a strategic filer: an individual who takes advantage of bankruptcy laws.<sup>56</sup>

This problem strongly influenced efforts to reform the Bankruptcy Code.<sup>57</sup> As early as 1932, President Hoover recommended that courts be "authorized to postpone discharges for a time and require bankrupts . . .

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51. See Baird, *supra* note 27, at 35–36 (discussing "self-sorting mechanism" that connects Chapter 7 filing with assets, not income, and how doubt has arisen about operation of this mechanism).

52. See *id.* at 36 (using recent law school graduate with \$100,000 debt as example).

53. See, e.g., Kara Spak, *Chi. Daily Herald*, No, Young Prosecutors Aren't Rich Lawyers, Nov. 2, 2006, at 7 (declaring that average "debt load for a 2006 University of Chicago Law School graduate was \$114,000").

54. See, e.g., Ameet Sachdev, *Raising the Bar for Legal Salaries*, *Chi. Trib.*, Jan. 27, 2007, at 1 (discussing how starting salaries at some New York firms reach \$160,000).

55. See Baird, *supra* note 27, at 36.

56. A person taking advantage of these benefits is also called an opportunistic debtor. For a definition, see Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 *Tex. L. Rev.* 1481, 1484 (2006) ("The opportunistic debtor borrows with an eye on the Bankruptcy Code and files for bankruptcy when she has maximized her debt and, consequently, the beneficial effect of the bankruptcy discharge."). For an examination of these strategic benefits, see generally Michelle J. White, *Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change*, 65 *U. Chi. L. Rev.* 685 (1998) (discussing how strategic behavior brings benefits to nearly all debtors); see also Todd J. Zywicki, *Bankruptcy Law as Social Legislation*, 5 *Tex. Rev. L. & Pol.* 393, 406–08 (2001) (discussing rewards in bankruptcy system for strategic filers).

57. See, e.g., 151 *Cong. Rec.* S1813 (daily ed. Mar. 1, 2005) (statement of Sen. Frist) (stating that bankruptcy is "just another method . . . [or] tool just to get out of debt" and that "[s]ome folks have even been known to plan their bankruptcy"); H.R. Rep. No. 95-595, at 130–31 (1977), reprinted in 1978 *U.S.C.C.A.N.* 5963, 6091–92 (discussing how fraudulent filings make it difficult to continue "fresh start" policy).

to make some satisfaction out of after-acquired property as condition to the granting of a full discharge."<sup>58</sup> Later, a bill was introduced in Congress that would have mandated that Chapter 7 bankruptcy filers persuade the court that adequate relief could not be obtained under Chapter 13 bankruptcy.<sup>59</sup> These proposals, however, never became law, and, as late as 1977, Congress explicitly rejected the addition of a forced Chapter 13.<sup>60</sup> The honest debtor remained protected under American law.

Proponents of bankruptcy reform did achieve one major change in the law: the addition of § 707(b) to the Bankruptcy Code in 1984.<sup>61</sup> This provision allowed a bankruptcy judge to dismiss a Chapter 7 filing if there was a finding of "substantial abuse," and was meant to affect high-income filers who had the ability to repay their debts.<sup>62</sup> Despite this addition to the Code, problems remained with the use of § 707(b) and creditors remained dissatisfied.<sup>63</sup>

In the years following the 1984 Bankruptcy Code reforms,<sup>64</sup> many commentators and industry figures were upset with the condition of bankruptcy law in the United States—particularly the increased frequency of filings—and pressed for further reforms.<sup>65</sup> Statistics supported their arguments: Between 1979 and 1997, the number of bankruptcies in America increased by 400%.<sup>66</sup> This figure was staggering because the in-

58. President's Special Message to the Congress on Reform of Judicial Procedure, 69 Pub. Papers 83, 90 (Feb. 29, 1932); see also Jensen, *supra* note 14, at 490–91 (discussing Hoover's bankruptcy recommendations).

59. Hearings on H.R. 1057 and H.R. 5771 Before the Subcomm. No. 4 of the H. Comm. on the Judiciary, 90th Cong. 73 (1967).

60. See H.R. Rep. No. 95-595, at 380 (1977). This provision reads:

The section [on grounds to dismiss a Chapter 7 filing] does not contemplate . . . that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal. To permit [this] would . . . enact a non-uniform mandatory chapter 13 . . . . The Committee has rejected that alternative in the past, and there has not been presented any convincing reason for its enactment in this bill.

*Id.*

61. See 11 U.S.C. § 707(b) (1988); Wedoff, *supra* note 25, at 233 (describing § 707(b)'s adoption).

62. See Wedoff, *supra* note 25, at 233 (discussing § 707(b)'s original intentions).

63. See *id.* at 233–34 (describing difficulties associated with application of § 707(b), such as presumption of granting relief to debtor, and fact that only court or U.S. trustee could bring motion for provision's operation); see also Jensen, *supra* note 14, at 492–93 (noting limitations on parties able to bring § 707(b) motions and vague standards for "substantial abuse").

64. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (reforming bankruptcy provisions).

65. See generally Jensen, *supra* note 14 (describing history of bankruptcy reform leading to BAPCPA, including push following 1984 changes to Bankruptcy Code).

66. See Teresa A. Sullivan et al., *The Fragile Middle Class: Americans in Debt 3* (2000) [hereinafter Sullivan et al., *Fragile*] (noting "spectacular" increase in bankruptcy during the 1980s and 1990s).

crease in filings occurred during years of impressive economic growth.<sup>67</sup> This strange pattern reinforced the idea that many filers were not honest debtors, and later reformers often relied on these statistics to justify change.<sup>68</sup>

C. *The Fall of the Honest Debtor: BAPCPA's Means Test*

The concerted efforts of certain commentators, creditors, and lawmakers to respond to the perceived abuses of Chapter 7 bankruptcy resulted in the 2005 passage of BAPCPA and its “means test,”<sup>69</sup> ending the universal presumption of the honest debtor. Instead of giving judges discretion over whether an individual should be forced to file a Chapter 13 bankruptcy, the means test established an explicit mathematical formula that requires courts to push “dishonest” filers of Chapter 7 bankruptcy into Chapter 13 bankruptcy.<sup>70</sup> While the test itself is rather detailed,<sup>71</sup> there are two important stages of determining who will be forced to file for Chapter 13 bankruptcy. First, no debtor whose income is less than his state’s median income for a family of the same size will be forced to file under Chapter 13.<sup>72</sup> This stage should exempt the vast majority of Chapter 7 filers—eighty-five percent of all filers are predicted to be below this line.<sup>73</sup>

If a debtor’s income exceeds his state’s median income, the means test moves to a second phase, which examines several aspects of the filer’s finances. Based on the filer’s expenses, income, and debts, this phase removes a large portion of those who have more than their state’s median income from the test’s target group.<sup>74</sup> Only if the debtor “fails” the means test’s two phases is there a presumption of abuse that requires the

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67. See *id.* (“The upsurge in personal bankruptcies during the mid-1990s was especially striking because it occurred during a widespread economic recovery.”); Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 *Nw. U. L. Rev.* 1463, 1474 (2005) (“Although the American economy set new records for economic growth, low unemployment, and low interest rates, this same period was also marked by record-high bankruptcy filings.”); see also 151 *Cong. Rec.* S1814 (daily ed. Mar. 1, 2005) (statement of Sen. Frist) (“The total number of bankruptcies more than doubled during the 1980s and then doubled, once again, from 1990 to 2003.”).

68. See, e.g., 151 *Cong. Rec.* S1814 (daily ed. March 1, 2005) (statement of Sen. Frist) (“[Bankruptcies] were generally tied to whatever the business cycle might have been. In the past two decades, the number of bankruptcies have skyrocketed, actually accelerating during the economic boom, speeding up during the boom of the 1980s and the 1990s.”).

69. For a detailed legislative history of the means test and BAPCPA, see generally Jensen, *supra* note 14.

70. For a thorough examination of how exactly to apply the means test to an individual debtor, see generally Wedoff, *supra* note 25.

71. See generally *id.* (describing means test).

72. 11 U.S.C. § 707(b)(6)–(7) (2000 & Supp. V 2005).

73. David W. Allard, *Means Testing, Dismissal and Conversion Under the New Law*, *Am. Bankr. Inst. J.*, July/Aug. 2005, at 8, 69.

74. For a more detailed description of this test, see *id.* at 69–72.

court to assume that the debtor has “sufficient debt-paying ability.”<sup>75</sup> This presumption leads to dismissal of the Chapter 7 filing or its conversion to Chapter 13.<sup>76</sup> The means test’s stringent requirements should keep the number of people pushed into Chapter 13 bankruptcy rather low (likely three to ten percent)<sup>77</sup> and primarily affect the upper middle and upper classes.<sup>78</sup>

Thus, for the first time in American bankruptcy history, a device exists that would mechanically push many individuals out of Chapter 7 and into Chapter 13 bankruptcy. In 2005, Congress easily passed this enlarged scope for Chapter 13 bankruptcy: BAPCPA received 74 of 99 votes in the Senate<sup>79</sup> and 302 of 428 votes cast in the House of Representatives.<sup>80</sup> The passage of BAPCPA and the means test was hardly destined, as a similar proposal had been rejected only years before.<sup>81</sup> How did BAPCPA, centered on this previously resisted means test, pass with such support? Republican control of Congress played a role (every House and Senate Republican voted for the measure),<sup>82</sup> but it was not the sole factor, as seventy-three Democrats in the House and nearly two dozen Democrats in the Senate also voted for the bill.<sup>83</sup>

The answer may lie in the Act’s characterization. The bill’s sponsors ensured that BAPCPA focused not only on providing benefits to creditors, but on providing benefits to ordinary Americans—specifically the lower class and lower middle class.<sup>84</sup> The means test would not target typical lower class filers<sup>85</sup> who had truly exhausted all other options; in-

75. See Wedoff, *supra* note 25, at 234.

76. See John C. Anderson, Highlights of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—Part 1—Consumer Cases, 33 S.U. L. Rev. 1, 3–4 (2005) (describing consequences of failing means test).

77. See Sather, *supra* note 21, at 76 (stating that means test established by BAPCPA should push only three to ten percent of filers from Chapter 7 to Chapter 13 bankruptcy).

78. See generally Tedra Hobson, Note, The Bankruptcy Abuse *Creation* Act?: Curing Unintended Consequences of Bankruptcy Reform, 40 Ga. L. Rev. 1245 (2006) (examining means test and its anticipated effects).

79. 151 Cong. Rec. S2474 (daily ed. Mar. 10, 2005).

80. 151 Cong. Rec. H2075–77 (daily ed. Apr. 14, 2005).

81. See *supra* note 60 and accompanying text (describing defeat of means test proposal in previous Congress); see also Jensen, *supra* note 14, at 486–18 (detailing difficulty of passing measure from 1993 through 1999).

82. See 151 Cong. Rec. H2076 (daily ed. Apr. 14, 2005) (showing every House Republican voting in favor of BAPCPA); 151 Cong. Rec. S2474 (daily ed. Mar. 10, 2005) (same for Senate Republicans); see also Jensen, *supra* note 14, at 566 (“All [House] Republican Members voted for the bill . . .”).

83. See 151 Cong. Rec. H2075–77 (listing House Democrats voting for BAPCPA); 151 Cong. Rec. S2474 (same for Senate Democrats); see also Jensen, *supra* note 14, at 566 (“[S]eventy-three Democratic Members [voted for BAPCPA].”).

84. See, e.g., 151 Cong. Rec. S1813–15 (daily ed. Mar. 1, 2005) (statement of Senator Frist) (discussing benefits of BAPCPA to various Americans); *id.* at S1854–57 (statement of Sen. Grassley) (same).

85. “Typical” is a debatable term in this sense. At least one study has suggested that bankruptcy filers, even if they consider themselves to be middle class, are “not, however, in the middle class by almost any standard, and they could pay nothing to satisfy their

stead, it would aim at those “debtor[s] [who] file Chapter 7 . . . but . . . still drive a luxury sedan, may have a boat in the driveway, and even sport expensive jewelry and clothing.”<sup>86</sup> Senate Majority Leader Bill Frist stated that BAPCPA would stop a “bankruptcy tax” under the current system, under which “[t]he people who are hurt . . . are the low-income earners.”<sup>87</sup> The sponsor of BAPCPA in the Senate, Senator Charles Grassley, stated that the current system harmed “hard-working, law-abiding Americans.”<sup>88</sup> When signing the bill into law, President Bush, too, painted BAPCPA as helping the typical American worker, stating that the old system “made credit less affordable and less accessible, especially for low-income workers,” and promising that “[t]hose who fall behind their state’s median income will not be required to pay back their debts.”<sup>89</sup> While a certain amount of political posturing by these politicians must be assumed, it is clear that BAPCPA was never intended to punish honest, lower class bankruptcy filers. Courts interpreting BAPCPA, however, may have contravened this goal by holding that the Act removed a crucial tool for many Chapter 7 bankruptcy filers: the ride-through.

#### D. *The Ride-Through Before BAPCPA*

The addition of the means test is the central point of BAPCPA and has been the most discussed change to the Bankruptcy Code,<sup>90</sup> but Congress also made other changes to the Code. Some of these changes have caused courts to rule that BAPCPA removed the ride-through for Chapter 7 bankruptcy filers, while others believe that BAPCPA’s impact on the Code is unclear.<sup>91</sup> It is important to understand what the ride-through is, how it developed, and how it operated before BAPCPA, to assess how the recent bankruptcy legislation has impacted its operation.

1. *Background.* — One of the major unsettled questions before the passage of BAPCPA was whether a ride-through, or “fourth option,” ex-

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creditors without being pressed below the poverty level.” See Phillip Shuchman, *New Jersey Debtors 1982–1983: An Empirical Study*, 15 *Seton Hall L. Rev.* 541, 544–45 (1985). Others suggest that most filers are not lower class but are better characterized as middle class. See Sullivan et al., *Fragile*, supra note 66, at 6 (“[B]ankruptcy is a largely middle-class phenomenon.”).

86. 151 Cong. Rec. S1814 (daily ed. Mar. 1, 2005) (statement of Sen. Frist).

87. *Id.* This bankruptcy tax amounted to about \$400 a person according to the Senator. *Id.*

88. *Id.* at S1856 (statement of Sen. Grassley).

89. Press Release, White House Press Office, *President Signs Bankruptcy Abuse Prevention, Consumer Protection Act* (Apr. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html> (on file with the *Columbia Law Review*); see also Jensen, supra note 14, at 566–67 (describing congressional and executive support for BAPCPA).

90. See Wedoff, supra note 25, at 231 (“Perhaps the best-known and most discussed feature of [BAPCPA] is its means test.”).

91. See *infra* Part II.B.1–2 (discussing courts’ and commentators’ positions on BAPCPA’s impact on the ride-through).

isted for Chapter 7 bankruptcy filers.<sup>92</sup> This issue developed around the interpretation of several sections of the pre-BAPCPA Bankruptcy Code, primarily § 521(2).<sup>93</sup> Section 521(2) required that “the debtor . . . file [a statement of intentions regarding] 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 . . . such property.”<sup>94</sup> In addition, § 521(2)(C) stated that “nothing in [§ 521(A) or (B)] shall alter the debtor’s . . . rights with regard to such property under this title.”<sup>95</sup> When deciding whether the three options listed in § 521(2) (surrender, redeem, reaffirm) were exclusive, the circuit courts split five-to-five on how to interpret the “if applicable” language and § 521(2)(C).<sup>96</sup>

Five circuit courts held that the three options listed in § 521(2) were not exclusive, and that the section was procedural.<sup>97</sup> These courts believed that the phrase “if applicable” meant that, in some circumstances, the debtor did not have to choose to redeem or reaffirm his debt or surrender his property.<sup>98</sup> Also, the courts considered it important that § 521(2)(C) stated that the language used in § 521(2)(A) and (B) “shall not alter the debtor’s . . . rights.” If § 521(2)(A) and (B) did not alter debtors’ rights, then the sections must have been purely procedural and thus did not foreclose any additional options.<sup>99</sup> While some courts found

92. See Ned W. Waxman, *Redemption or Reaffirmation: The Debtor’s Exclusive Means of Retaining Possession of Collateral in Chapter 7*, 56 U. Pitt. L. Rev. 187, 187 (1994) (referring to issue as “[t]he most controversial consumer credit issue arising in cases under the United States Bankruptcy Code”); see also Philip R. Principe, *Did BAPCPA Eliminate the “Fourth Option” for Individual Debtors’ Secured Personal Property?*, Am. Bankr. Inst. J., Oct. 2005, at 6, 6 (discussing importance of issue).

93. 11 U.S.C. § 521(2) (2000).

94. *Id.* § 521(2)(A) (emphasis added).

95. *Id.* § 521(2)(C).

96. The Eighth Circuit, however, never addressed the ride-through in its decisions. See *Sanabria v. Am. Nat’l. Bank (In re Sanabria)*, 317 B.R. 59, 60–61 & nn.2–3 (8th Cir. 2004).

97. See *Price v. Del. State Police Fed. Credit Union U.S. Tr. (In re Price)*, 370 F.3d 362, 379 (3d Cir. 2004); *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668, 673 (9th Cir. 1998); *Capital Commc’ns Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43, 51 (2d Cir. 1997); *Home Owners Funding Corp. of Am. v. Belanger (In re Belanger)*, 962 F.2d 345, 347 (4th Cir. 1992) (deciding § 521(2) does not limit debtor’s options); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989).

98. See, e.g., *In re Parker*, 139 F.3d at 673 (“Then, ‘if applicable,’—that is, if the debtor plans to chose any of the three options listed later in the statute . . . [t]he debtor’s other options remain available . . . .”); *In re Belanger*, 962 F.2d at 348 (“[I]f the phrase ‘if applicable’ is given effect . . . the debtor must specify a choice of the options if applicable. But if these options are not applicable, the debtor need not specify them.”).

99. See, e.g., *In re Price*, 370 F.3d at 372 (“We view [§ 521(C)(2)] to be of enormous aid in our reading of section 521(2)(A). Here, Congress has directed that courts . . . not . . . read section 521(A) or (B) as impinging on the substantive rights guaranteed by other provisions.”).

that this language alone delineated the possibility of a fourth option,<sup>100</sup> other courts considered factors such as general bankruptcy principles,<sup>101</sup> legislative history,<sup>102</sup> and the lack of penalty for failing to comply with § 521(2)<sup>103</sup> as signs that Congress did not intend for these three options to be exclusive.

Thus, these five circuits reached the conclusion that the three options listed in § 521(2) were not the exclusive options for debtors, opening the door for another option: Instead of opting for redemption, reaffirmation, or surrender of property, a debtor filing under Chapter 7 could simply remain current on his payments for property.<sup>104</sup> As this was an additional choice not explicitly listed in § 521(2), it became known as

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100. See, e.g., *In re Parker*, 139 F.3d at 673 (“We see no reason to reach beyond this plain language. The legislative history is of little assistance . . .”).

101. See, e.g., *In re Price*, 370 F.3d at 378 (“[W]e believe that our reading comports best with the ‘fresh start’ policy of the Code . . .”); *In re Boodrow*, 126 F.3d at 51 (claiming that a failure to allow ride-through “gives a creditor an effective veto on the ‘fresh start’”).

102. See, e.g., *In re Price*, 370 F.3d at 376 (“[Chairman of the House Judiciary Committee] Rodino [stated on the House floor] that ‘this section is designed to make it clear that the newly imposed duty on the debtor to act promptly with regard to property which is security for a creditor’s claim does not affect the substantive provisions of the code . . .’”); *In re Boodrow*, 126 F.3d at 50–51 (quoting lower court as stating that “limited legislative history points to the general conclusion that Section 521(2) is meant to be a notice provision” and agreeing that “§ 521(2) appears to serve primarily a notice function, not necessarily to restrict the substantive options available to a debtor”).

103. See, e.g., *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1546 (10th Cir. 1989) (“Congress provided neither a penalty for a debtor’s failure to comply with § 521(2) nor a specific remedy for a creditor as a consequence of such a failure.” (footnote omitted)).

104. With such division as to the existence of the ride-through, it is important to examine the difference between a ride-through of collateral and a reaffirmation of debt. Perhaps the most important distinction is that in many cases a ride-through places a debtor in a better position than had he reaffirmed his debt. First, a debtor is ensured of the terms that he originally signed onto for the loan. See *supra* Part I.D.1 (explaining definition of ride-through). During a reaffirmation, there is a chance that the creditor, knowing that the debtor is now free of his other debts, will try to push less advantageous terms for the debtor; the ride-through prevents this. See *In re Price*, 370 F.3d at 378 (stating that if ride-through were not allowed, “debtors would either have to accept possibly onerous terms set by the creditor or surrender the property” and that without ride-through “the [Bankruptcy] Code does not prohibit creditors from conditioning reaffirmation on the debtor’s agreement to reaffirm additional, unsecured debts”). Second, the debtor will not reassume personal liability during a ride-through. See *In re Boodrow*, 126 F.3d at 52 (“[A ride-through] eliminates personal liability on the loan, thereby theoretically limiting the amount a creditor could recover if the debtor defaults.”). If a debtor undertakes a ride-through but fails to remain current on his payments, the collateral will be repossessed but the creditor will not face liability for the remaining debt. See Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 *Am. Bankr. L.J.* 709, 719–20 (1999) [hereinafter *Culhane & White, Debt After Discharge*] (“Ride-through is advantageous to debtors in that they need not reassume personal liability. If later they cannot continue the payments, they may lose the collateral, but will not be liable for a deficiency.”). Thus, a debtor usually will prefer a ride-through to a reaffirmation to retain his original payment plan and to lessen his personal liability to the creditor.

the “fourth option”<sup>105</sup> or “ride-through.”<sup>106</sup> The circuits agreed that this option would be fairer to debtors without unduly damaging creditors.<sup>107</sup> The courts believed that limiting § 521(2) to only three options left the debtor at the mercy of his creditors, because, during bankruptcy, he is unlikely to have the money necessary to redeem his property<sup>108</sup> and will not want to surrender vital property such as a home or a car. Without the ride-through, the debtor’s only remaining option<sup>109</sup> under Chapter 7 would be a potentially crippling reaffirmation. This position creates unequal bargaining power, and creditors that offer substantially harsher terms during a reaffirmation would force debtors into bad agreements simply to maintain crucial property.<sup>110</sup> At least one court thought that the fourth option should be allowed because, though it benefits debtors, it does not strongly impact creditors, who would retain the same interest rates while the debtor would be even more likely to stay current on payments.<sup>111</sup>

These five circuits, and their decision that a “fourth option” exists, were opposed by five circuits that believed that the three options in

105. See *Bank of Boston v. Burr* (In re Burr), 160 F.3d 843, 847 (1st Cir. 1998) (referring to this choice as “unstated fourth option”); *In re Boodrow*, 126 F.3d at 57 (discussing “so-called ‘fourth option’”); 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, *Ride-Through*] (discussing argument for “the fourth option of court-protected ride-through[s]”). Some have rejected this title as making the option seem illegitimate. See *In re Price*, 370 F.3d at 372 (“This choice is not a ‘fourth option,’ fashioned as a novel exception to the Code.”).

106. See Braucher, *Ride-Through*, supra note 105, at 461 (discussing “whether debtors can opt for [a] ‘ride-through’ of secured debts”); Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 Am. Bankr. L.J. 749, 758 (2005) (discussing BAPCPA’s effect on “the ‘ride-through’ option permitted by some courts”). It is also sometimes, though more rarely, referred to as “pay and drive.” See Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 Am. Bankr. L.J. 817, 827 (2005) (discussing “fourth option, sometimes called ‘ride-through’ or ‘pay and drive’”).

107. See, e.g., *In re Price*, 370 F.3d at 377–78 (stating fear that creditors will never be paid back is “overstated and entirely hypothetical” and that debtors need the ride-through to maintain benefits of a “fresh start”); *In re Boodrow*, 126 F.3d at 51–52 (discussing benefits of ride-through to debtor and limited impact of decision on creditor).

108. *Home Owners Funding Corp. of Am. v. Belanger* (In re Belanger), 962 F.2d 345, 348 (4th Cir. 1992) (stating that debtor “is unlikely to be able to redeem the collateral in a lump sum required by § 722”).

109. See *In re Boodrow*, 126 F.3d at 51 (“[A] debtor’s only real choices would be either to reaffirm the debt under whatever new terms the creditor requires or to surrender the property.”).

110. See *id.* at 719. For an example of this, see *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*6 (Bankr. W.D. Mo. Oct. 12, 2006) (examining a situation where reaffirmation agreement required debtor to agree to high interest rate of 18.9% to maintain her vehicle).

111. See, e.g., *In re Boodrow*, 192 B.R. 57, 59 (Bankr. N.D.N.Y. 1995) (“[D]ebtors are generally likely to have a *greater* incentive than nondebtors to stay current on payments and to maintain the value of collateral.”).

§ 521(2) were the exclusive options for Chapter 7 filers.<sup>112</sup> The core of the split was the circuits' different interpretation of § 521(2)'s "if applicable" language and of § 521(2)(C)'s role in the Code. These latter circuits read this language as affecting only the choice of whether to surrender the property<sup>113</sup>—if the property was not surrendered, the options of redemption or reaffirmation became applicable and had to be used. Examining the language in § 521(2)(C), the courts believed that "rights . . . under this title"<sup>114</sup> did not include a freestanding right to retain property in a ride-through, and thus did not affect § 521(2)(B)'s requirement of choosing one of three options.<sup>115</sup> Thus, for these circuits, the choices of redemption, reaffirmation, or surrender were exclusive, and no fourth option was available to debtors in Chapter 7.

2. *Narrowing the Ride-Through's Scope.* — While the ride-through described above is a broad device with many facets, two important phenomena limited its applicability for the purposes of this Note: creditor acquiescence to a ride-through in many cases, and the special position of real property in Chapter 7 bankruptcies.<sup>116</sup>

Creditor acquiescence removed the need for a court-protected ride-through where a creditor and debtor reached an agreement outside of the courts. Even in those circuits that never blessed the ride-through, debtors and their creditors could agree, unofficially, that they would allow the property in question to stay with the debtor as long as he remained current on his payments.<sup>117</sup> This arrangement is known as a "voluntary ride-through,"<sup>118</sup> a "creditor acquiescence,"<sup>119</sup> or an "informal reaffirmation."<sup>120</sup> A Marianne Culhane and Michaela White study of

112. See *Bank of Boston v. Burr* (In re *Burr*), 160 F.3d 843, 847–48 (1st Cir. 1998); *Johnson v. Sun Fin. Co.* (In re *Johnson*), 89 F.3d 249, 252 (5th Cir. 1996); *Taylor v. Age Fed. Credit Union* (In re *Taylor*), 3 F.3d 1512 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990); see also *Gen. Motors Acceptance Corp. v. Bell* (In re *Bell*), 700 F.2d 1053, 1056–58 (6th Cir. 1983) (concluding that "[t]he sole method of redemption available to a Chapter 7 debtor under § 722 is a lump sum redemption").

113. See, e.g., *In re Burr*, 160 F.3d at 848 (stating Congress "intended [C]hapter 7 debtors to elect surrender or retention, and then, 'if' retention is 'applicable,' to specify which of the following three retention options they intend to employ" and that this reading is a "perfectly conventional usage").

114. 11 U.S.C. § 521(2)(C) (2000).

115. See, e.g., *In re Burr*, 160 F.3d at 848 (finding § 521(2)(C) does not affect § 521(2)(B)'s options).

116. See Braucher, *Ride-Through*, *supra* note 105, at 474–81 (discussing creditor acquiescence and difference between personal and real property for ride-through purposes).

117. See *id.* at 462–63 (describing this practice of "creditor acquiescence" where debtor and creditor agree to voluntary ride-through).

118. See William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. Ill. L. Rev. 143, 154 (using term "'voluntary' ride through").

119. *Id.* (using term "creditor acquiescence").

120. See, e.g., Teresa A. Sullivan et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* 319 (1989) ("In addition to formal reaffirmations, we found considerable evidence of *informal reaffirmations*, by which we mean an arrangement where

bankruptcies in Nebraska<sup>121</sup> found that fifty-three percent of all cars in bankruptcies were never redeemed, reaffirmed, or surrendered; years later, many debtors still possessed the same cars they had when they filed for bankruptcy.<sup>122</sup> While it is impossible to determine if all of these instances involved creditor acquiescence to the ride-through, the study's authors believed that such acquiescence explained many of the cars that never followed the three paths of redemption, reaffirmation, or surrender.<sup>123</sup> This phenomenon has been documented in other jurisdictions as well.<sup>124</sup> Creditors may acquiesce to a ride-through for a few reasons: Transaction costs for reaffirmations can outweigh any benefit the creditor would receive,<sup>125</sup> only small amounts are at stake for each individual car,<sup>126</sup> and the creditor will still usually receive more than the total collateral's value without renegotiating the ride-through.<sup>127</sup> After BAPCPA's changes to the Bankruptcy Code, some commentators have predicted there will be a substantial increase in creditor acquiescence to ride-through agreements,<sup>128</sup> though no data yet shows this increase.

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the debtor just keeps paying and the creditor goes along, without a formal agreement.” (emphasis added)); see also Karen Gross, *Perceptions and Misperceptions of Reaffirmation Agreements*, 102 *Com. L.J.* 339, 347–48 (1997) (analyzing usage of term “informal reaffirmations”).

121. The District of Nebraska is part of the Eighth Circuit, which never definitively recognized or declined to recognize the ride-through. Lower bankruptcy courts in the circuit split on the issue. Compare *In re Canady-Houston*, 281 B.R. 286, 288 (Bankr. W.D. Mo. 2002) (recognizing ride-through), with *In re Kennedy*, 137 B.R. 302, 304 (Bankr. E.D. Ark. 1992) (declining to recognize ride-through). While the Eighth Circuit has commented on this split, it has never resolved it. See *Sanabria v. Am. Nat'l Bank* (*In re Sanabria*), 317 B.R. 59, 60–61 (B.A.P. 8th Cir. 2004) (“The issue has not been addressed in the Eight [sic] Circuit at an appellate level and the trial courts within this circuit are split. While a definitive ruling on that issue might be helpful in this circuit, the issue is not properly before this Court.”); see also Principe, *supra* note 92, at 6 n.5 (describing Eighth Circuit's position on ride-through).

122. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 740–41.

123. *Id.* at 741. The authors had difficulty tracking down many of the cars because of Department of Motor Vehicles (DMV) privacy regulations and a lack of official vehicle identification numbers (VIN) for cars in the database.

124. See Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 *Am. Bankr. L.J.* 501, 528 (1993) [hereinafter Braucher, *One Code*] (examining creditor acquiescence to ride-through in Ohio); Braucher, *Ride-Through*, *supra* note 105, at 462–63 (describing the practice as common in all non-ride-through jurisdictions).

125. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 742–43 (discussing transaction costs of reaffirmation).

126. See *infra* note 297 and accompanying text (examining average values of cars in ride-throughs).

127. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 719 (“[T]o keep the collateral, the debtor will have to make all the payments required by the original contract, even if the collateral is worth much less.”).

128. See Braucher, *Ride-Through*, *supra* note 105, at 462–63 (“[I]t should be noted that the increased cost of compliance with the new disclosure requirements for an enforceable reaffirmation agreement are likely to increase the willingness of creditors to acquiesce in ride-through.” (footnote omitted)).

Also, BAPCPA's language and creditors' special treatment of real property makes the ride-through generally unnecessary for homes. To begin, creditors are much more willing to acquiesce to a ride-through on a home than personal property.<sup>129</sup> There are business reasons for such a distinction: Many states protect homes with antideficiency laws that render reaffirmation agreements void,<sup>130</sup> private mortgage insurance<sup>131</sup> provides creditors more protection,<sup>132</sup> and real property collateral tends to retain value and appreciate as compared to personal property.<sup>133</sup> The Culhane and White study mentioned above also found evidence that real property ride-through agreements existed for up to sixty percent of all homes.<sup>134</sup>

BAPCPA incorporated this line between personal and real property in its changes to the Bankruptcy Code. In the new Code, § 362(h) and § 521(a)(6)<sup>135</sup> relate only to personal property and not to real property. Some courts and commentators have recognized that this explicit distinction supports the ride-through for real property.<sup>136</sup> The newly-added distinction between real and personal property strongly suggests that courts will protect the real property ride-through.<sup>137</sup> With this distinction, the most disputed area of the ride-through's application becomes personal property, most notably vehicles. Therefore, this Note examines the dispute about the ride-through's existence with respect to personal property after the passage of BAPCPA.

BAPCPA is the largest change in bankruptcy law since 1978,<sup>138</sup> effectively signaling the end of the universal honest debtor presumption in

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129. See *id.* at 480–81 (describing ride-through agreements in relation to real property).

130. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 746 (“[I]f a jurisdiction has antideficiency laws for housing, reaffirmation would have no legal effect.”).

131. Private mortgage insurance provides insurance for creditors on mortgages issued. For a detailed look at private mortgage insurance, see generally Quintin Johnstone, *Private Mortgage Insurance*, 39 *Wake Forest L. Rev.* 783 (2004).

132. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 746 (“[M]any lenders on traditional homes are protected either by private mortgage insurance or government guarantee programs. The insurance and guarantees greatly limit the lenders' exposure to loss in event of default by their debtors.” (footnote omitted)).

133. See *id.*; Braucher, *Ride-Through*, *supra* note 105, at 481.

134. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 745–47.

135. For a more detailed discussion of these sections, see *infra* Part II.A.

136. See, e.g., *In re Bennet*, No. 06-80241, 2006 WL 1540842, at \*1 (Bankr. M.D.N.C. 2006) (“[T]he sections in BAPCPA designed to limit ride-through apply to personal property only . . . .”); Braucher, *Ride-Through*, *supra* note 105, at 479 (“There is an excellent argument that new section 521(a)(2), particularly in light of changes in sections 521(a)(6) and 362(h), provides for ride-through with court protection for real estate collateral . . . .”).

137. For a closer examination of real property ride-throughs, see Braucher, *Ride-Through*, *supra* note 105, at 479–81.

138. See *In re Tomco*, 339 B.R. 145, 151 (Bankr. W.D. Pa. 2006) (“The 2005 Act was signed into law on April 20, 2005, thereby enacting the most sweeping changes to this country's bankruptcy laws since the Bankruptcy Code was adopted in 1978.”).

bankruptcy law. Its passage has altered many facets of bankruptcy law, including the ride-through. This Part has discussed bankruptcy policy, its relationship to the honest debtor, and how the ride-through has operated in the past. The next Part examines whether, and if so how, BAPCPA has changed the ride-through, and what effect those changes may have on individual filings for bankruptcy.

## II. WHAT DID BAPCPA DO TO THE BANKRUPTCY CODE, AND WHAT WILL IT DO TO DEBTORS?

BAPCPA made many changes to the Bankruptcy Code, principally by adding the means test to subvert opportunistic debtors. Less clear, however, is how BAPCPA affected the ride-through that five circuits recognized before the law was passed.<sup>139</sup> Part II.A examines the precise changes to the Bankruptcy Code's language under BAPCPA. Part II.B describes how courts have viewed these changes and their impact on the ride-through. Part II.C.1 assesses the ride-through's impact on debtors by examining the relative frequency of Chapter 13 filings in different circuits, Part II.C.2 examines other studies and what they reveal about the ride-through's effects, and Part II.C.3 analyzes the ride-through's effect on the ex ante cost of credit.

### A. BAPCPA's Changes to the Ride-Through

Courts relied on several Bankruptcy Code sections in holding, before BAPCPA, that the ride-through existed.<sup>140</sup> This subpart describes changes to these former provisions and pertinent new provisions in the Code.

1. *Section 521(a)(2)*. — Before the passage of BAPCPA, the strongest argument in favor of the ride-through<sup>141</sup> was that the "if applicable" language in the previous Code's § 521(2)(A)<sup>142</sup> allowed for a fourth option.<sup>143</sup> BAPCPA made a small change to this section, now relabeled § 521(a)(2)(A)<sup>144</sup>—the removal of the word "consumer" before "debts." However, this minor change has not modified the important "if applicable" language, which remains in its previous form.<sup>145</sup>

2. *Section 521(a)(2)(C)*. — Courts have also relied on § 521(2)(C)<sup>146</sup> when recognizing the fourth option.<sup>147</sup> Unlike the new § 521(a)(2)(A),

139. See *supra* note 97 (listing circuits allowing ride-through).

140. See *supra* notes 93–99 and accompanying text.

141. See Braucher, *Ride-Through*, *supra* note 105, at 475 ("Five circuits relied on the 'if applicable' language in section 521(2)(A) . . . to find that section 521(2) was procedural . . . [and] did not limit the debtor's rights.")

142. 11 U.S.C. § 521(2)(A) (2000).

143. See *supra* note 97–98 and accompanying text.

144. 11 U.S.C. § 521(a)(2) (2000 & Supp. V 2005).

145. *Id.*

146. 11 U.S.C. § 521(2)(C) (2000).

147. See *supra* note 99 and accompanying text.

however, the new § 521(a)(2)(C) provision has changed significantly: Congress added the exception that nothing in § 521(a)(2)(A) limits debtor's rights "except as provided in section 362(h)."<sup>148</sup> Thus, examining § 362(h) is important in determining whether the ride-through has been affected.

3. *Section 362(h)*. — Some courts have relied on § 362(h)<sup>149</sup> when holding that BAPCPA removed the ride-through.<sup>150</sup> Section 362(h)(1)(A) states that debtors can have their bankruptcy stay<sup>151</sup> terminated if they do not file a timely statement of intentions under § 521(a)(2).<sup>152</sup> With a stay removed, a debtor's property is open to creditor repossession. Thus, some courts have found that, if the stay is removed because of a failure to file one of the choices under § 521, this change to the Code must remove the ride-through since, during a ride-through, a debtor does not file for one of the three § 521 options.

4. *Section 521(a)(6)*. — Courts also cite § 521(a)(6) as a change that removed the ride-through. It states that if a debtor does not reaffirm or redeem his debt, the bankruptcy stay is terminated and the debtor shall "not retain possession" of the property in dispute.<sup>153</sup> For this provision to apply, however, the claim must be "an allowed claim for the purchase price."<sup>154</sup>

5. *Section 521(d)*. — One of the major changes that may affect the ride-through after BAPCPA is the addition of § 521(d).<sup>155</sup> This section

148. 11 U.S.C. § 521(a)(2)(C) (2000 & Supp. V 2005).

149. *Id.* § 362(h).

150. See, e.g., *In re Ertha Rice*, No. 06-10975, 2007 WL 781893, at \*2-\*4 (Bankr. E.D. Pa. Mar. 12, 2007) (discussing how § 362(h) helped to eliminate ride-through); *In re Parker*, 363 B.R. 621, 625 (Bankr. M.D. Fla. 2007) ("The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has eliminated a debtor's ability to 'ride-through' bankruptcy by adding Sections 362(h) . . .").

151. The Bankruptcy Code provides a debtor with an automatic stay to prevent immediate property repossession by creditors. 11 U.S.C. § 362(a) (2000).

152. The provision reads:

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 . . . either redeem such personal property . . . enter into an agreement [under § 524(c)] . . . or assume such unexpired lease . . . .

11 U.S.C. § 362(h)(1) (2000 & Supp. V 2005)

153. *Id.* § 521(a)(6) ("If the debtor fails to [redeem or reaffirm his property] within the 45-day period . . . the stay under section 362(a) is terminated . . .").

154. *Id.* ("[A debtor shall] not retain possession of personal property as to which a creditor has *an allowed claim for the purchase price* . . . ." (emphasis added)); see *infra* notes 237-244.

155. 11 U.S.C. § 521(d).

states that if a debtor does not redeem or reaffirm property while holding collateral, the bankruptcy stay is terminated and the creditor can retake the property if there is a default-on-filing clause.<sup>156</sup> This change is substantial, as some courts previously ruled that these bankruptcy default clauses, sometimes called ipso facto clauses, were unenforceable under the Code.<sup>157</sup> Section 521(d), by contrast, explicitly makes such clauses enforceable.<sup>158</sup> However, for a clause to become enforceable, the debtor must first run afoul of either § 521(a)(6) or § 362(h).<sup>159</sup> It is important to note that this change does not add ipso facto clauses into loan agreements, but simply provides that they are enforceable if already written into a contract. Further, while this change may allow ipso facto clauses under federal law, different state laws may still prevent these clauses from being enforced, as discussed below.<sup>160</sup>

6. *Section 524(k)*. — Another addition to the Bankruptcy Code under BAPCPA was § 524(k),<sup>161</sup> which appears implicitly to discuss the ride-through's current status. This section does not itself permit the ride-through or even discuss the ride-through specifically. Instead, it sets disclosure requirements. However, a change in the section's language suggests the ride-through's continued presence. Disclosure required under § 524(k)(3) states that, even if a debtor "do[es] not reaffirm and [his] personal liability on the debt is discharged, because of the lien [his] creditor may still have the right to take the security property if [he] do[es] not pay the debt or default on it."<sup>162</sup> While this provision does not affect any substantive rights that may be at issue during a ride-through, it does seem to suggest that, if a debtor remains current on the payment plan already in place, his property may be retained in a ride-through.

Courts have used all of the above provisions in discussing the ride-through. The effect that these changes have had on the Bankruptcy

156. A default-on-filing clause, sometimes called an ipso facto clause, "renders a debtor in default upon the filing of a bankruptcy petition, regardless of whether the debtor continues to remain current in payments to the secured creditor and in compliance with other obligations under the loan documents." In re Steinhaus, 349 B.R. 694, 709 (Bankr. D. Idaho 2006).

157. See, e.g., Riggs Nat'l Bank of Wash. D.C. v. Perry, 729 F.2d 982, 985 (4th Cir. 1984) (finding that default-on-filing clauses are unenforceable as matter of law).

158. See, e.g., In re Anderson, 348 B.R. 652, 659 (Bankr. D. Del. 2006) (finding that ipso facto clause was allowable under BAPCPA's § 521(d)).

159. See 11 U.S.C. § 521(d). The provision reads:

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), . . . 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 . . . .

Id.

160. See In re Donald, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006) ("Creditors still must ensure that the contract . . . do[es] not run afoul of any applicable state laws."); In re Rowe, 342 B.R. 341, 351 (Bankr. D. Kan. 2006) (examining Kansas state law on ipso facto clauses).

161. 11 U.S.C. § 524(k)(3)(J)(i).

162. Id.

Code is, however, unclear. As discussed below, different courts have read the above provisions differently—and the status of the ride-through depends on these readings. Therefore, understanding these court decisions, in addition to the statutory language, is critical to examining the future of the ride-through.

### B. *The Courts Look for the Ride-Through*

All of the above sections have been important parts of recent court decisions regarding the ride-through.<sup>163</sup> So far, only bankruptcy courts and one bankruptcy appellate panel have had the opportunity to look at the future of the ride-through.

1. *BAPCPA Ended the Ride-Through*. — Many cases examining the ride-through after BAPCPA have stated unequivocally that the ride-through did not survive the changes to the Bankruptcy Code. The first case dealing on-point with the ride-through<sup>164</sup> was *In re Rowe*.<sup>165</sup> After examining the changes to BAPCPA, the court found that the ride-through had been removed<sup>166</sup> independently by three changes to the Code.<sup>167</sup> First, the court stated that § 521(a)(2)(C)'s change to force compliance with § 362(h) removed the ride-through by mandating a choice of reaffirmation, redemption, or surrender.<sup>168</sup> Second, the court found that § 521(a)(6) required that a debtor choose one of the three options as well, even if the creditor did not have an “allowed claim,” as required under § 521(a)(6).<sup>169</sup> Third, the court found that § 521(d) allows the use of an ipso facto clause, which permits default upon filing status, in the loan.<sup>170</sup> While the creditor did not gain possession of the

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163. See, e.g., *In re Anderson*, 348 B.R. at 655–60 (examining ride-through after BAPCPA); *In re Donald*, 343 B.R. at 529–40 (same); *In re Rowe*, 342 B.R. at 344–50 (same).

164. Earlier cases did discuss the interplay of § 521(a)(2) and § 362(h) but did not explicitly state whether the ride-through survived BAPCPA. See *In re Craker*, 337 B.R. 549, 551 (Bankr. M.D.N.C. 2006) (finding debtor who filed her statement of intentions, but neglected to state whether she was surrendering, redeeming, or reaffirming her property, was in violation of § 362(h)); *In re Faught*, No. 05-43548, 2006 WL 151884, at \*1 (Bankr. W.D. Ky. Jan. 16, 2006) (stating that “[r]etaining property and continuing to make regular payments is not one of the options available under the Bankruptcy Code”).

165. 342 B.R. at 343.

166. As the District of Kansas is part of the Tenth Circuit, it previously had allowed the ride-through before BAPCPA. See *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1545–46 (10th Cir. 1989) (stating that choices of reaffirmation, redemption, and surrender were not exclusive choices in Chapter 7 filing).

167. *In re Rowe*, 342 B.R. at 351 (“In conclusion, the Court finds that Congress . . . intended to and was successful in eliminating the ‘fourth option’ . . .”).

168. See *id.* at 345 (“The ‘fourth option,’ which would otherwise still be allowed . . . is prohibited by § 362(h)(1)(A) . . .”).

169. *Id.* at 347–49. For a discussion of § 521(a)(6), see *supra* Part II.A.4.

170. *Id.* at 350–51.

collateral in court,<sup>171</sup> the automatic stay was removed and the ride-through eliminated.

Later, other courts found that BAPCPA removed the ride-through using similar reasoning. *In re Steinhaus* looked at all three of the provisions that *In re Rowe* examined and reached similar conclusions.<sup>172</sup> *In re Norton* held that the language in § 521(a)(6) eliminated the ride-through.<sup>173</sup> *In re Anderson* also determined that the ride-through does not exist under BAPCPA, but concentrated primarily on § 362(h) and § 521(d), rather than § 521(a)(6).<sup>174</sup> While other bankruptcy court cases have also examined the question of the ride-through,<sup>175</sup> these four are generally representative of their holdings.

The only non-bankruptcy court decision so far has been the Ninth Circuit Bankruptcy Appellate Panel's *In re Dumont*.<sup>176</sup> Ultimately, the panel agreed that BAPCPA's changes to the bankruptcy code eliminated the "ride-through."<sup>177</sup> The panel closely examined § 521(a)(2), § 362(h), § 521(a)(6), and § 521(d), and found that the both § 362(h) and § 521(a)(6) independently had disallowed the ride-through,<sup>178</sup> and overturned the Ninth Circuit's previous *In re Parker* decision.<sup>179</sup> Importantly, the panel stated that what was "most telling on this issue is the fact that every available bankruptcy court decision has concluded that the . . . the 'ride through' option was eliminated."<sup>180</sup> While the panel cited over a dozen cases,<sup>181</sup> it failed to mention several cases, discussed below, that have disagreed with *In re Dumont*'s conclusions.

2. *BAPCPA May Have Ended the Ride-Through.* — Several courts have questioned or disagreed with the conclusion that BAPCPA eliminated the

171. The court ruled that the stay had been lifted, but that nothing in the new Bankruptcy Code entitled the creditor to repossession, and directed the parties to state court for that issue. See *id.* at 351–352.

172. 349 B.R. 694, 697–711 (Bankr. D. Idaho 2006).

173. 347 B.R. 291, 298–99 (Bankr. E.D. Tenn. 2006) ("As an initial matter, based upon the statutory language of § 521(a)(6), BAPCPA extinguished the 'ride though' option . . .").

174. 348 B.R. 652, 654–61 (Bankr. D. Del. 2006).

175. See, e.g., *In re McFall*, 356 B.R. 674, 675–77 (Bankr. N.D. Ohio 2006) (discussing elimination of ride-through under BAPCPA); *In re Ruona*, 353 B.R. 688, 690–92 (Bankr. D.N.M. 2006) (same); *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*1–\*2 (Bankr. W.D. Mo. Oct. 12, 2006) (same); *In re Quintero*, No. 06-40163 TK, 2006 WL 1351623, at \*1–\*3 (Bankr. N.D. Cal. May 17, 2006) (same).

176. Antoinette Dumont v. Ford Motor Credit Co. (*In re Dumont*), Nos. SC-07-1155-BaMoD, 06-00980-JM7, 2008 WL 485040 (B.A.P. 9th Cir. Feb. 6, 2008).

177. *Id.* at \*2 ("BAPCPA amended sections 521(a)(2) and 362(h) and added new sections 521(a)(6) and 521(d). These changes effectively eliminated the . . . 'ride through' . . .").

178. *Id.* at \*2–\*4 (examining four BAPCPA changes to Bankruptcy Code).

179. *Id.* at \*2 ("These changes effectively eliminated the so called fourth option or 'ride through' authorized by *Parker*.").

180. *Id.* at \*4 (footnote omitted).

181. *Id.* at \*4 n.16 (citing bankruptcy court cases declaring ride-through eliminated by BAPCPA).

ride-through. First, not all courts finding the ride-through to be eliminated have been thoroughly convinced that BAPCPA was in fact designed for that purpose. The best example of this is *In re Donald*.<sup>182</sup> While the court ultimately determined that BAPCPA eliminated the ride-through,<sup>183</sup> it was uncertain of this decision. The court rejected the idea that either § 521(a)(6) or § 362(h) eliminated the ride-through and recognized that the language in § 521(a)(2) and § 524(k) suggests that the ride-through remained intact following the passage of BAPCPA.<sup>184</sup> The court also stated that, despite its finding that the ride-through does not exist, “[t]here are good arguments that the ‘ride-through’ option still is available to chapter 7 debtors.”<sup>185</sup>

While *In re Donald* ultimately found that the ride-through had been eliminated,<sup>186</sup> several cases have allowed creditors to maintain possession of their collateral so long as they maintain prebankruptcy payments, despite BAPCPA’s changes. The first case to do this was *In re Laynas*, which did not approve the reaffirmation agreement under § 522(m)(1).<sup>187</sup> The debtor agreed to a reaffirmation, and the court sought to determine that it was “in the best interest of the debtor.”<sup>188</sup> The court refused to approve the reaffirmation agreement, finding that there was “legal uncertainty” as to whether the ride-through existed.<sup>189</sup> Because “it is not obvious that court disapproval of the reaffirmation agreement would necessarily result in creditor efforts to take possession of the vehicle if the Debtor [stays current on] her monthly payments,” the court determined that it was in the debtor’s interest not to approve the reaffirmation.<sup>190</sup> While never explicitly stating that the ride-through survived BAPCPA,<sup>191</sup> it did find enough legal uncertainty to refuse reaffirmation approval.

At least seven courts have allowed the ride-through to continue<sup>192</sup> through the use of what this Note has termed the “backdoor ride-

182. 343 B.R. 524 (Bankr. E.D.N.C. 2006).

183. See *id.* at 539 (“[T]he court agrees with the conclusion [that BAPCPA eliminated the ride-through.]”).

184. See *id.* at 533 (“The change to § 521(2)(B)[, now redesignated § 521(a)(2)(B),] does not affect the ‘ride-through’ option.”); *id.* (“§ 362(h) does not on its own eliminate the “ride-through” option.”); *id.* at 535 (“There are a number of reasons why [§ 521(a)(6)] will rarely be applicable in chapter 7 cases.”); *id.* at 539 (“One of the required disclosures contained in § 524(k) seems to expressly recognize the continued vitality of the ‘ride-through’ option.”).

185. *Id.* at 539.

186. *Id.* at 539–40 (discussing BAPCPA’s sections and concluding “[t]he court is convinced that termination of the ‘ride-through’ option is what Congress intended.”).

187. 345 B.R. 505, 515–17 (Bankr. E.D. Pa. 2006) (discussing reasons for not approving reaffirmation agreement).

188. *Id.* at 515.

189. *Id.* at 517.

190. *Id.*

191. The court declined to answer this question. See *id.* (“I find it unnecessary to decide the difficult issues relating to ‘ride through’ under BAPCPA . . .”).

192. See *In re Chim*, 381 B.R. 191 (Bankr. D. Md. 2008); *In re Bower*, No. 07-60126-fra7, 2007 WL 2163472 (Bankr. D. Or. July 26, 2007); *In re Moustafi*, 371 B.R. 434 (Bankr.

through.”<sup>193</sup> All the cases followed the same pattern. First, the court examines a reaffirmation agreement, which, under § 524(m), the court has to find is in the debtor’s best interest.<sup>194</sup> The court finds that the reaffirmation agreement does not meet § 524(m)’s requirements and refuses to approve the reaffirmation agreement.<sup>195</sup> With the reaffirmation agreement not approved, the debtor still complied with § 521(a)(6), § 521(a)(2), and § 362(h), and can maintain his collateral so long as he does not default.<sup>196</sup> The denial of a reaffirmation agreement, along with debtor compliance with BAPCPA provisions, allowed the courts to continue the ride-through after BAPCPA.<sup>197</sup>

Commentators too are unclear on the ride-through’s status: A 2005 American Bankruptcy Institute online poll showed that more than a quarter of those surveyed strongly disagreed with the suggestion that BAPCPA eliminated the ride-through, and only thirty-two percent of those surveyed agreed strongly with that proposition.<sup>198</sup>

As no direct authority states that the ride-through survived BAPCPA, some courts may take this silence as a signal that the ride-through does not exist. Before reaching such a conclusion, however, it is important to understand the effect that the ride-through has on Chapter 13 filings and the ex ante cost of credit.

D. Ariz. 2007); *In re Stevens*, 365 B.R. 610 (Bankr. E.D. Va. 2007); *In re Husain*, 364 B.R. 211 (Bankr. E.D. Va. 2007); *In re Riggs*, No. 06-60346, 2006 WL 2990218 (Bankr. W.D. Mo. Oct. 12, 2006); *In re Quintero*, No. 06-40163 TK, 2006 WL 1351623 (Bankr. N.D. Cal. May 17, 2006).

193. See *infra* notes 262–274 and accompanying text.

194. 11 U.S.C. § 524(m) (2000 & Supp. V 2005); see, e.g., *In re Riggs*, 2006 WL 2990218, at \*5 (“[T]he court must conduct a hearing and determine that the reaffirmation agreement does not impose an undue hardship . . . . In determining whether the agreement imposes an undue hardship on the debtor, the court starts with § 524(m) . . . .”).

195. See, e.g., *In re Chim*, 381 B.R. at 198 (declining reaffirmation agreement and finding “Debtor fully complied with the deadlines of Sections 521(a)(2), 521(a)(6) and 362(h) by filing timely the statement of intention and by signing timely the Reaffirmation Agreement. . . . [T]he vehicle remains property of the estate, the debtor is not obligated to turn over possession of the vehicle . . . .”).

196. See, e.g., *In re Moustafi*, 371 B.R. at 439–40 (“The Reaffirmation Agreement is not in the Debtor’s best interest and, therefore, will not be approved. . . . [S]he may retain the Nissan as long as she is current on her payments and insurance obligations.”); *In re Husain*, 364 B.R. at 217 (refusing to approve reaffirmation agreement after finding it “would still leave the Debtors with a deficit of expenses over income of approximately \$3,000.00 per month”).

197. See, e.g., *In re Chim*, 381 B.R. at 199 (“There is no reason to conclude that the rationale of *Belanger* [, the pre-BAPCPA Fourth Circuit case allowing the ride-through,] should not apply with equal vigor to post-BAPCPA cases where a debtor complies with Section 521(a)(2) but the Court rejects the reaffirmation agreement.”).

198. See Principe, *supra* note 92, at 6 (discussing results of online poll).

C. *Do Debtors Even Need It? The Ride-Through's Effect on Debtors*

BAPCPA's effect on the ride-through will have a substantial impact on lower and lower middle class debtors who hope to retain their cars after a bankruptcy. The automobile is a crucial piece of property for many individuals and integral to most Americans' daily lives.<sup>199</sup> Especially considering the low-to-middle class status of most bankruptcy filers,<sup>200</sup> the car is of particular importance: If the individual lives in an area with poor mass transit,<sup>201</sup> the automobile is the only way to retain employment or seek education anywhere far from the home.<sup>202</sup> When a debtor files for bankruptcy, his car will be one of the most, if not the most, important pieces of property that he will want to keep. Without the ride-through, however, the debtor might face a dilemma since a creditor may agree to reaffirm a car loan only on unfavorable terms for the debtor. If the debtor is unable or unwilling to accept worse terms offered in a reaffirmation, and a deal cannot be reached with the creditor, he will be unable to keep his car. If this happens, the filer will find it difficult to secure a new automobile because of his credit status. With no ride-through in place, the debtor then has only one realistic avenue available—other than accepting worse reaffirmation terms—to retain his automobile: filing for Chapter 13 bankruptcy.<sup>203</sup> Doing so would allow the debtor to retain his property and is a highly attractive choice for those lower and lower middle class individuals who need their cars but cannot afford to reaffirm on new terms. As discussed below, national bankruptcy statistics appear to support this theory.

1. *The Rate of Chapter 13 Filings in Ride-Through Circuits.* — If the ride-through works as described above, one would expect to find that, before the passage of BAPCPA, circuits in which the ride-through was recognized would have different bankruptcy patterns than circuits in which the ride-through was not allowed. With the ride-through option removed, one would expect three possible changes. First, there could be an increase in reaffirmations, as debtors are forced to reaffirm debts in situations where they would have used the ride-through. Second, there could

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199. For a general examination of the automobile's effect on America, see Mark S. Foster, *A Nation on Wheels: The Automobile Culture in America Since 1945* (2003).

200. See *supra* note 85 (discussing typical bankruptcy filer's class status).

201. Cf. Michael E. Lewyn, *Are Spread Out Cities Really Safer? (Or, Is Atlanta Safer Than New York?)*, 41 *Clev. St. L. Rev.* 279, 293 (1993) (discussing possible reasons underlying lack of mass transportation access in "spread out" cities).

202. Cf. Patrick Moulding, Note, *Fare or Unfair? The Importance of Mass Transit for America's Poor*, 12 *Geo. J. on Poverty L. & Pol'y* 155, 166 (2005) (stating that lower class individuals without access to car "are at a disadvantage in seeking educational, employment, or recreational opportunities that cannot be reached on foot or public transportation").

203. See Jean Braucher, *Counseling Consumer Debtors to Make Their Own Informed Choices—A Question of Professional Responsibility*, 5 *Am. Bankr. Inst. L. Rev.* 165, 174 (1997) [hereinafter Braucher, *Counseling*] ("[A] lawyer can instead push chapter 13 as the way to save collateral.").

be an increase in informal deals, as creditors and debtors work around the established legal rule of the circuit. Third, and most significantly, there could be an increase in Chapter 13 filings, as debtors who receive disadvantageous terms on reaffirmations are forced to file for Chapter 13 bankruptcy instead of Chapter 7 to retain their automobiles or other crucial property. This Note examines this third possible variation. While other factors will certainly change the relative level of bankruptcy filings,<sup>204</sup> if the ride-through's removal was forcing debtors into filing for Chapter 13, one would expect increased rates of Chapter 13 filings in jurisdictions where the ride-through has been removed.

The total percentage of Chapter 13 filings in each individual circuit following a circuit court ruling on the status of the ride-through suggests that the ride-through is correlated with the rate of Chapter 13 filings. As shown in Figure 1,<sup>205</sup> the bankruptcy statistics available at the federal judiciary's website<sup>206</sup> indicate that three of the four jurisdictions with the highest percentage of Chapter 13 filings do not recognize the ride-through.<sup>207</sup> Also, three of the four jurisdictions with the lowest number

204. Even without different legal regimes in operation across the country, the way in which the bankruptcy laws are applied varies significantly among jurisdictions. See David T. Stanley & Marjorie Girth, *Bankruptcy: Problem, Process, Reform* 2–3 (1971) (“There are wide variations . . . from one district to another . . . despite the uniform federal law and court structure. . . . Even among the federal bankruptcy courts there are striking differences in policies.”); Culhane & White, *Debt After Discharge*, supra note 104, at 712 (“Profound local variations in substance and practice under a supposedly uniform federal statute make the quality of the fresh start depend on the place of filing.”); see also Teresa A. Sullivan et al., *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 *Harv. J.L. & Pub. Pol’y* 801, 839–57 (1994) (discussing how local legal actors influence local bankruptcy filing practices).

205. Figure 1 is in an appendix following this Note. Figure 1 arranges the information into three categories: circuits that allowed for the ride-through, circuits that did not allow for the ride-through, and circuits that either never ruled on the issue (Eighth Circuit), or ruled on it too late (Third Circuit). The national average is also included in this last category. The Third Circuit is listed as not applicable because it decided the issue in 2004, too close to the passage of BAPCPA (in 2005) to notice the decision's effects. See *In re Price*, 370 F.3d 362, 378–79 (3d Cir. 2004) (construing statute to allow for ride-through). The individual circuit figures were collected using data starting the year after the circuit's decision on whether to allow the ride-through, though the earliest any figures were collected from a circuit was 1990. All figures conclude after the year 2004. This end date was picked because of the bankruptcy filing changes that resulted from anticipation of BAPCPA's passage in 2005. For the national average, the Third Circuit, and Eighth Circuit, the totals are all bankruptcies from 1990–2004.

206. Federal Judiciary, *Bankruptcy Statistics*, available at <http://www.uscourts.gov/bnrptcystats/bankruptcystats.htm> (last visited Feb. 21, 2008) (on file with the *Columbia Law Review*). The graph is based on the percentage of Chapter 13 filings that took place in a circuit on average every year after that circuit's ruling on BAPCPA. For those circuits that never ruled on BAPCPA, or for the national average, the statistics encompass all bankruptcy filings since 1990. Also, circuits that decided the issue before 1990 (7th Cir., 10th Cir.) only have information from 1990 onward, as information before then is unavailable.

207. The Fifth, Sixth, and Eleventh Circuits did not permit the ride-through, while the Fourth Circuit did.

of Chapter 13 filings allow the ride-through.<sup>208</sup> Those jurisdictions that did not rule on the issue (the Eighth Circuit), or decided the issue only the year before the passage of BAPCPA (the Third Circuit) fell between the two groups, as did the national average. This evidence is not conclusive—the Fourth and Seventh Circuits do not fall where this theory predicts they would—but the results do show a pattern: Circuits that allow the ride-through have lower rates of Chapter 13 filings.

In addition, a year-to-year analysis comparing circuits indicates that the ride-through impacts the rate of Chapter 13 bankruptcies. Figure 2 compares the total amount of filings in all of the circuits that had decided on the ride-through and breaks them into two groups: circuits that allowed the ride-through and those that did not.<sup>209</sup> The evidence again suggests that the ride-through's availability is correlated with the rate of Chapter 13 filings: As a group, those circuits that allowed the ride-through had a lower rate of Chapter 13 bankruptcies than those that did not. While again not conclusive, these figures suggest that those circuits that allow the ride-through will have lower rates of Chapter 13 bankruptcies. Thus, when examining the circuits, either individually or as a group, evidence suggests that denying the ride-through does force more debtors into filing for Chapter 13 bankruptcy.

2. *Other Studies of the Ride-Through.* — In addition to the above data, another study appears to confirm that the ride-through does have some impact upon the patterns of bankruptcy filings. The Culhane and White study referred to above<sup>210</sup> discussed the impact of the ride-through on filing rates. Looking solely at automobiles, the study found that jurisdictions that did not recognize the ride-through had a much higher rate of reaffirmations.<sup>211</sup> This conclusion again confirms that the ride-through does impact bankruptcy decisions; its absence pushes more individuals into either disadvantageous reaffirmations or Chapter 13 filings to retain possession of their cars. The authors also found that while fifty-five percent of all agreements settling bankruptcy claims ended in a ride-through, the ride-through's usage was much more common in those states that recognized that right than those that did not.<sup>212</sup> Figures 1 and

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208. The Second, Ninth, and Tenth Circuits did permit the ride-through, while the Seventh Circuit did not.

209. Figure 2 is in an appendix following this Note. Figure 2 compares the weighted averages of the rate of all the circuits permitting the ride-through with the rate of all the circuits that did not permit the ride-through. As the graph begins in 1990, and many of the circuits made their rulings after this time, a circuit's rate is only added to the weighted average in the year following the circuit's ruling on the ride-through. The graph terminates in 2004 for the same reasons discussed in Figure 1. See *supra* note 205.

210. See Culhane & White, *Debt After Discharge*, *supra* note 104.

211. *Id.* at 727 (“[J]udicial recognition of ride-through appears to have a strong correlation to motor vehicle reaffirmation rates . . . Debtors in Georgia and Wisconsin, where ride-through was prohibited, were eight times more likely to reaffirm car debt than debtors in Colorado[, where the ride-through was allowed].”).

212. See *id.* at 740 tbl.9. The authors examined seven states. In jurisdictions that protected the ride-through in 1995, when the study was conducted, the ride-through rate

2 support these findings by demonstrating that circuits without the ride-through tended to have much higher rates of Chapter 13 bankruptcies. Thus, the Culhane and White study and the data presented in this Note show that the decision to allow the ride-through correlates with decreased Chapter 13 filings, and that removing the ride-through can lead to debtors being forced to accept unfavorable reaffirmation terms or filing for Chapter 13 bankruptcy to retain their vehicles.<sup>213</sup>

3. *The Ride-Through's Ex Ante Effect on Credit.* — Even if debtors may be harmed by the removal of the ride-through ex post, a further concern is the ex ante effect on the cost of credit. In a transparent and competitive credit market, a creditor's increased ability to collect should lead, in theory, to better terms and lower interest rates for debtors ex ante.<sup>214</sup> If better terms are available because of the ride-through's removal, this may benefit debtors as a whole.<sup>215</sup> Eric Posner has gone as far as to suggest that debtors in general may be better off by binding themselves to Chapter 13 in order to secure lower rates for loans.<sup>216</sup>

This economic theory, however, may not work in practice. To begin, it is unclear that credit markets are truly competitive, which means that an ex post advantage to the creditor may not translate into benefits for

was higher (68% in Colorado, 60% in North Carolina) than in jurisdictions that did not protect the ride-through (39% in Georgia, 46% in Wisconsin).

213. There is, however, one academic study limited to two districts' bankruptcy rates that does not support the theory that allowing the ride-through will cause Chapter 13 filings to fall: Jean Braucher's examination of two Ohio and two Texas cities, and their respective districts (the two cities in Texas were Austin and San Antonio, both in the Western District of Texas; the two Ohio cities were Dayton and Cincinnati, both in the Southern District of Ohio). See Braucher, *One Code*, supra note 124, at 514–15. Braucher found that, even though judges in the Texas courts at the time allowed a form of the ride-through, the rates of Chapter 13 filings were much higher than in Ohio, where judges did not allow the ride-through. See *id.* at 528 (showing Southern District of Ohio with a 27% Chapter 13 rate, while Western District of Texas had a 45% Chapter 13 rate). These findings, however, may not be inconsistent with the idea that the lack of a ride-through increases Chapter 13 filings. To start, when the survey was done, the Texas courts' circuit had not ruled on the status of the ride-through, which may have affected the level of Chapter 13 filings. The Western District of Texas is in the Fifth Circuit, which did not rule on the matter of the ride-through until 1996. See *Johnson v. Sun Fin. Co.*, 89 F.3d 249 (5th Cir. 1996). In addition, the regional variations in creditor practice and judicial approaches make any single district-to-district comparison problematic. See supra note 204 and accompanying text. In the study, the Southern District of Ohio had an unusually low rate of Chapter 13 filings to begin with—its rate was more than 10% lower than that of its circuit the same year. The Sixth Circuit, of which the Southern District of Ohio is part, had a Chapter 13 filing rate of nearly 39% in 1993. See supra note 206 (including Sixth Circuit Chapter 13 filing rates for 1993).

214. See Barry E. Adler, *The Soft-Landing Fallacy and Consumer Debtors*, 7 *Fordham J. Corp. & Fin. L.* 499, 500 (2002) (“At least if the credit market is competitive and transparent, any increase in ex post creditor collection translates to more favorable loan terms, such as a lower interest rate, for a debtor ex ante.”).

215. *Id.* (stating “it is plausible to assume that debtors would prefer a retention process favorable to creditors ex post” (emphasis omitted)).

216. See Posner, supra note 48, at 972–73.

debtors.<sup>217</sup> Without sufficient bargaining power, consumers could be disadvantaged when setting *ex ante* terms,<sup>218</sup> and creditors would reap all of the benefits from better collection. Thus, the anticipated benefit to debtors *ex ante* may never occur even though creditors may benefit *ex post* from the ride-through's demise.

In addition, positive externalities could result from the ride-through's use. As discussed above, there is a correlation between Chapter 13 filings and the lack of a ride-through.<sup>219</sup> When a debtor is forced to file for Chapter 13 bankruptcy, a large portion of his earnings is paid back to creditors for several years.<sup>220</sup> With disposable income being given to creditors, a debtor's incentives to work hard and participate in the economy decrease.<sup>221</sup> The fresh start and the benefits that come with it can be delayed for years.<sup>222</sup> Some scholars have deemed these considerations to be "sufficiently compelling to outweigh the virtues of freedom of contract,"<sup>223</sup> as the long-term benefits to society are greater than the loss to creditors.<sup>224</sup> There are, however, no complete studies examining any correlation between the cost of credit and the presence of a ride-through, and, with the competitive and transparent nature of credit markets uncertain,<sup>225</sup> it is difficult to say whether the removal of a ride-through will lead to any benefit to debtors *ex ante*.

BAPCPA's impact on the ride-through has confused both courts and commentators, as the language of the Act provides mixed signals about the ride-through's future. While the future of the ride-through may not have been settled, it is clear that its status will be important to debtors. Data from this Note and another study show a correlation between the lack of a ride-through and the increase in Chapter 13 filings. This correlation provides evidence that debtors may be forced into filing for Chapter 13 by creditors in order to maintain possession of their vehicles. This change would be to the detriment of debtors and go against the message

217. See, e.g., Richard M. Hynes, *Non-procrustean Bankruptcy*, 2004 U. Ill. L. Rev. 301, 336 n. 228 (recognizing that "[c]redit markets may not be perfectly competitive"). But see, e.g., Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 Wash. & Lee L. Rev. 1071, 1133 n.255 (2005) (stating that "consumer credit markets today are extremely competitive").

218. See Barry E. Adler et al., *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. Legal Stud. 585, 601-05 (2000) [hereinafter Adler et al., *Regulating Consumer Bankruptcy*] (examining consequences of renegotiations on *ex ante* efficiency).

219. See *supra* Part II.C.1.

220. See *supra* Part I.A.2.b.

221. See 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, 473 (2002) [hereinafter Culhane & White, *Can She Keep*] ("An overburdened debtor . . . has little incentive to work.").

222. *Id.* at 473-74 (stating that "wage slavery" stunts incentives to work that come with a fresh start).

223. Adler et al., *Regulating Consumer Bankruptcy*, *supra* note 218, at 600.

224. Culhane & White, *Can She Keep*, *supra* note 221, at 473-74.

225. See *supra* note 217 and accompanying text.

presented by the supporters of BAPCPA. Thus, resolving the ride-through puzzle created by BAPCPA's ambiguous language may have a major impact on debtors. This Note seeks to solve that puzzle.

### III. BAPCPA'S MAJOR CHANGE TO THE RIDE-THROUGH: NO CHANGE AT ALL

The ride-through's status remains unclear, as courts have differed as to BAPCPA's impact on it. This Note engages in a close reading of BAPCPA's statutory changes to the ride-through and examines congressional intent and bankruptcy policy in order to settle the ride-through's status. After this examination, this Note's conclusion differs from that of both courts and commentators: that BAPCPA's changes neither mandated nor eliminated the ride-through. Instead, it left it as a circuit split. Part III.A establishes how statutory interpretation does not support the proposition that the ride-through has been removed. Part III.B discusses how congressional intent disfavors the certain removal of the ride-through. Part III.C examines how wider bankruptcy policy supports continuing the ride-through after the passage of BAPCPA. Finally, Part III.D concludes that courts should find that the ride-through still operates in its pre-BAPCPA form.

#### A. *Statutory Interpretation*

Central to the proposition that BAPCPA did not eliminate the ride-through is the fact that BAPCPA's exact language, strictly read, does not foreclose its existence.<sup>226</sup> This subpart discusses how the statutory changes to the Bankruptcy Code made under BAPCPA do not necessarily eliminate the ride-through.

1. *Currently Relied-On Provisions.* — The courts that have found that BAPCPA eliminates the ride-through have relied on three provisions of the Bankruptcy Code: § 362(h), § 521(a)(6), and § 521(d). However, none of these sections necessarily conflicts with the continued use of the ride-through.

a. *Section 362(h).* — Some courts examining BAPCPA have found that § 362(h) removed the ride-through, but this conclusion is questionable.<sup>227</sup> To begin, there is a serious question as to whether § 362(h) limits

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226. See *supra* Part II.B.2. This assumes that the ride-through was allowed by the Code before the passage of BAPCPA, which is by no means certain. See *supra* Part I.D.

227. See, e.g., *In re Steinhaus*, 349 B.R. 694, 701 (Bankr. D. Idaho 2006) (stating that when correctly construing § 362(h) "the 'ride-through' option on personal property securing an individual's debt is seriously impacted if not 'eliminated' outright"); *In re Boring*, 346 B.R. 178, 180 (Bankr. N.D. W. Va. 2006) (holding automatic stay terminated under § 362(h)(1) when debtor attempted to utilize ride-through and did not indicate that she would either redeem property, surrender property, or reaffirm debt); *In re Bennett*, No. 06-80241, 2006 WL 1540842, at \*1 (Bankr. M.D.N.C. May 26, 2006) ("In the BAPCPA . . . Congress included language in § 362(h)(1) . . . designed to limit a debtor's right to ride-through.").

the options of a debtor to reaffirmation, redemption, or surrender. The leading authority on bankruptcy, *Collier on Bankruptcy*,<sup>228</sup> suggests that the provision was added to “encourage debtor compliance with section 521,”<sup>229</sup> not to force a debtor into one of the three choices. Any support for § 362(h) removing the ride-through would come from § 362(h)(1)(A), which requires that the debtor “file timely any statement of intention required under section 521(a)(2) . . . or to indicate in such statement that the debtor will either surrender such personal property or retain it.”<sup>230</sup> This language, however, does not necessarily affect the ride-through: *Collier* states that, under this chapter’s applicable rules of construction,<sup>231</sup> the use of “or” here implicitly states that there are more than just the stated options available.<sup>232</sup> If the three choices are not exclusive, then nothing in the provision would limit the use of the ride-through, as it would again be a “fourth option.” At least one court, however, has rejected this interpretation, finding that *Collier* misconstrued the provision’s language.<sup>233</sup>

Section 362(h)(1)(B) provides additional support in § 362(h) to show that the Code did not remove the ride-through. This provision ensures that the stay on a debtor’s estate remains in place when a debtor proposes “to reaffirm such debt on the original contract terms and the creditor refuses.”<sup>234</sup> The addition of this provision to the Code reveals an effort on the part of Congress in drafting BAPCPA to ensure that creditors do not make a reaffirmation worse than the original loan agreement. If the creditor does not offer contract terms that are the same or better than the original agreement, courts now have the power to continue the stay until such an agreement is reached. Also, many commentators and courts have agreed that § 362(h) does not eliminate the ride-through.<sup>235</sup> Thus, § 362(h) should not constrain a court from finding that BAPCPA did not remove the ride-through.

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228. See Waxman, *supra* note 92, at 193 (describing *Collier on Bankruptcy* as “the leading authority on bankruptcy law”).

229. 3 *Collier on Bankruptcy* ¶ 362.10A, at 362-120 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006).

230. 11 U.S.C. § 362(h)(1)(A) (2000 & Supp. V 2005).

231. For this title’s applicable rule of construction, see 11 U.S.C. § 102(5) (2000).

232. 3 *Collier on Bankruptcy* ¶ 362.10A, at 362-120. But see *In re Donald*, 343 B.R. 524, 534 n.3 (Bankr. E.D.N.C. 2006) (disagreeing with *Collier on Bankruptcy*’s interpretation of Code).

233. *In re Donald*, 343 B.R. at 534 n.3 (stating that “the problem with [*Collier*’s] analysis is that although the word ‘or’ is construed to be, pursuant to § 102(5), non-exclusive, § 362(h) uses the construction ‘either . . . or’ which would be construed to set forth choices that are exclusive”).

234. 11 U.S.C. § 362(h)(1)(B).

235. See, e.g., *In re Donald*, 343 B.R. at 533 (“[Section] 362(h) does not on its own eliminate the ‘ride-through’ option.”); Braucher, *Ride-Through*, *supra* note 105, at 477-78 (“There is a good argument that [§ 362(h)] provides court-protected ride-through in these circumstances.”).

b. *Section 521(a)(6)*. — In addition to using § 362(h), several courts that have ruled that BAPCPA eliminated the ride-through have relied on § 521(a)(6).<sup>236</sup> A close reading of the provision, however, shows that § 521(a)(6) does not eliminate the ride-through in nearly all cases. To start, § 521(a)(6) only applies to allowed claims.<sup>237</sup> Typically, for a claim to be allowed, courts have ruled that a proof of claim must be filed, which does not occur in “no-asset” Chapter 7 cases.<sup>238</sup> A no-asset case occurs when a debtor lists no assets for bankruptcy protection, so the creditor cannot file claims to any assets.<sup>239</sup> As many Chapter 7 filings are no-asset cases<sup>240</sup> or cases where the creditor neglected to file a proof of claim, the majority of cases are exempt from § 521(a)(6).

In addition to not applying to non-allowed claims, § 521(a)(6) only operates when claims are “for the purchase price.”<sup>241</sup> According to *Black’s Law Dictionary*, the term “purchase price” is the price “agreed upon as a consideration for which property or goods are sold and purchased,”<sup>242</sup> meaning that it must be the *full* purchase price. If Congress

236. See, e.g., *In re Steinhaus*, 349 B.R. 694, 703 (Bankr. D. Idaho 2006) (“Section 521(a)(6) . . . does not allow a debtor to choose a ‘retain-and-pay’ or a ‘ride-through.’”); *In re Norton*, 347 B.R. 291, 298–99 (Bankr. E.D. Tenn. 2006) (“[B]ased upon the statutory language of § 521(a)(6), BAPCPA extinguished the ‘ride-through’ option . . . .”); *In re Rowe*, 342 B.R. 341, 348–50 (Bankr. D. Kan. 2006) (stating that, in certain cases, it appears that 521(a)(6) eliminates ride-through). But see *In re Donald*, 343 B.R. at 534–39 (examining § 521(a)(6) and concluding that it is rarely applicable to most bankruptcy filings).

237. 11 U.S.C. § 521(a)(6) (“[I]n a case under chapter 7 of this title in which the debtor is an individual, [the debtor shall] not retain possession of personal property as to which a creditor has an allowed claim . . . .” (emphasis added)); see also *In re Anderson*, 348 B.R. 652, 656–57 (Bankr. D. Del. 2006) (determining that, despite creditor argument otherwise, allowed claim is needed for § 521(a)(6) claim); *In re Donald*, 343 B.R. at 535 (“First, [in a claim under § 521(a)(6)], the creditor must have ‘an allowed claim.’”). But see *In re Rowe*, 342 B.R. at 349 (concluding that allowed claim is not needed for § 521(a)(6) claim).

238. See *In re Donald*, 343 B.R. at 536 (“Typically, for a claim to be an allowed claim, a proof of claim must be filed. In no-asset chapter 7 cases, creditors do not file proofs of claim and do not have ‘allowed’ claims.” (footnote omitted)).

239. Cf. *Miller v. United States*, 363 F.3d 999, 1008 (9th Cir. 2004) (“Gust then filed for ‘no asset’ Chapter 7 bankruptcy protection. Because he listed no assets, his creditors did not file any claims . . . .”).

240. See, e.g., *In re Rainbow Press of Fredonia*, 197 B.R. 428, 430 (Bankr. W.D.N.Y. 1996) (“Of all Chapter 7 cases filed in this district, over 95 percent are ‘no asset cases.’”); Ed Flynn, *A Day in Bankruptcy*, Am. Bankr. Inst. J., June 2003, at 20, 20 (“The vast majority of [Chapter 7 filings] (96–97 percent) are closed as no-asset cases . . . .”).

241. 11 U.S.C. § 521(a)(6) (“[I]n a case under chapter 7 of this title in which the debtor is an individual, [the debtor shall] not retain possession of personal property as to which a creditor has an allowed claim *for the purchase price* secured in whole or in part . . . .” (emphasis added)); see also *In re Donald*, 343 B.R. at 536 (“[E]ven if a creditor does file a proof of claim and the claim is deemed allowed, the claim must be ‘for the purchase price’ of the personal property at issue.”). But see *In re Steinhaus*, 349 B.R. at 706–07 (disagreeing with *In re Donald*’s conclusion about purchase price).

242. *Black’s Law Dictionary* 1235 (6th ed. 1990). This term has been removed from more recent versions of *Black’s Law Dictionary*, but it almost certainly has not changed in

had wanted this section to apply to something other than the full purchase price, it would have used different terminology, as it did in many other parts of the Code, to signal such a desire.<sup>243</sup> Several courts have agreed with this “purchase price” interpretation as well.<sup>244</sup> By requiring a claim for the full purchase price, § 521(a)(6) cannot apply to nearly all bankruptcy filings, and so does not remove the ride-through.

This interpretation of § 521(a)(6) has not been universally embraced. Some bankruptcy courts have stated that the interpretation of § 521(a)(6) is one of the “rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”<sup>245</sup> The plain meaning of these terms prevents § 521(a)(6) from applying to almost all bankruptcy filings, and if such a reading is considered to be “absurd,” rules of statutory interpretation would require the terms be given more reasonable meanings.<sup>246</sup> Using these rules of construction, one court held that a strict reading of “allowed claim” should not be given its plain language meaning,<sup>247</sup> while another court has done the same for the term “purchase price.”<sup>248</sup>

This alternative interpretation, however, could be considered flawed. The Supreme Court has stated that when “the statute’s language is plain, ‘the sole function of the courts is to enforce [legislation] according to its terms,’”<sup>249</sup> and other courts have determined that the plain meaning of § 521(a)(6) should apply.<sup>250</sup> In addition, for the plain language interpretation of this section to be considered “absurd,” there would need to be some indication of clear congressional intent for § 521(a)(6) to apply

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meaning since that point. See *In re Donald*, 343 B.R. at 536 n.8 (discussing removal of “purchase price” from recent editions of *Black’s Law Dictionary*).

243. See *In re Donald*, 343 B.R. at 537 (discussing use of “purchase price” in Bankruptcy Code, and examining other areas in Code where Congress used differing language).

244. See, e.g., *In re Moustafi*, 371 B.R. 434, 438 (Bankr. D. Ariz. 2007) (agreeing with definition of “purchase price” as being full purchase price of collateral); *In re Hinson*, 352 B.R. 48, 51–52 (Bankr. E.D.N.C. 2006) (same); *In re Donald*, 343 B.R. at 536–37 (same).

245. *In re Rowe*, 342 B.R. 341, 349 (Bankr. D. Kan. 2006) (quoting *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989)).

246. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (discussing how plain language should be used when reading a statute so long as the result is not “absurd” (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000))).

247. See, e.g., *In re Steinhaus*, 349 B.R. 694, 704 (Bankr. D. Idaho 2006) (quoting *In re Rowe*, 342 B.R. at 349) (concluding that interpretation of § 521(a)(6) should be “one of those rare cases where the literal application of the statute’ should be replaced with an application closer to the statute’s intended ends”).

248. See, e.g., *In re Steinhaus*, 349 B.R. at 706–07 (declining to follow plain meaning of “purchase price” and adopting a looser interpretation).

249. *Ron Pair Enters.*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

250. See, e.g., *In re Anderson*, 348 B.R. 652, 657 (Bankr. D. Del. 2006) (following plain language of statute); *In re Donald*, 343 B.R. 524, 535–36 (Bankr. E.D.N.C. 2006) (same).

more broadly than its plain meaning would allow. As discussed below, without any congressional record on the section, there can be no such clear intent.<sup>251</sup> Thus, again substantial disagreement exists regarding a key provision cited for removing the ride-through.

c. *Section 521(d)*. — With § 521(a)(6) and § 362(h) inapplicable in nearly all Chapter 7 cases, § 521(d) loses its ability to function. For an ipso facto clause to operate under § 521(d), the debtor must first fail to take the necessary action under § 521(a)(6) or § 362(h).<sup>252</sup> If a debtor does not violate these two provisions, § 521(d) has no application, and clearly would not operate to stop the ride-through.

Of the three provisions that courts have relied on to pronounce the end of the ride-through following BAPCPA, not one shows that the ride-through has actually been removed. With competing valid interpretations about those Code provisions, one must examine other additions to the Code to determine the ride-through's status.

2. *New Changes to the Code*. — New changes to the Bankruptcy Code from BAPCPA also support the possibility of a continued ride-through. The first of these, the addition of § 362(h)(1)(B) and its protection for debtors to keep the original terms of their agreements in a reaffirmation, has been outlined above.<sup>253</sup> BAPCPA also changed § 524 of the Bankruptcy Code regarding disclosure, and the additions to § 524(k) seem to suggest Congress recognizes the continued existence of the ride-through.<sup>254</sup> The section implies that, after a debtor discharges his debt, he can retain his possessions by simply remaining current on payments—the essence of the ride-through. While one court has regarded the change as incorrect or misleading,<sup>255</sup> the Supreme Court has stated that, as a rule of construction, a “change of [statutory] language is some evidence of a change of purpose.”<sup>256</sup> Thus, Congress's addition of two provisions that implicitly rely on the ride-through appears to indicate the procedure's continued existence after BAPCPA.

3. *Failure to Change Parts of the Bankruptcy Code*. — Finally, Congress's failure to change many previously relied-upon provisions of the

251. See *infra* note 290 and accompanying text (discussing how there is no clear legislative history for BAPCPA).

252. See 11 U.S.C. § 521(d) (2000 & Supp. V 2005) (stating that 521(d) only applies “when debtor fails timely to take action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h)"); see also *In re Hinson*, 352 B.R. 48, 51 (Bankr. E.D.N.C. 2006) (“[I]n order for an ipso facto clause to be made operative [under § 521(d)] the debtor must have failed to have timely taken action under § 521(a)(6) or § 362(h)(1)–(2).” (citation omitted)).

253. See *supra* notes 234–235 and accompanying text.

254. 11 U.S.C. § 524.

255. *In re Donald*, 343 B.R. at 539 (stating that disclosure in § 524(k) “appears to be incorrect, or at the very least, misleading”).

256. *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (quoting *Johnson v. United States*, 255 U.S. 405, 415 (1912)); see also *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106–08 (1941) (stating that material changes to legislation cannot be assumed to have been made without significance).

Bankruptcy Code may indicate that Congress did not intend for BAPCPA to remove the ride-through. To begin, the continued presence of language from § 521(a)(2) indicates congressional approval of the ride-through; all five circuits that found the ride-through to exist relied heavily upon the language “if applicable” contained in the previous § 521(2)(A),<sup>257</sup> now labeled § 521(a)(2).<sup>258</sup> It became the primary point of debate between competing ride-through interpretations. Yet, in the BAPCPA amendments to the Bankruptcy Code, Congress made no changes to this language. The Supreme Court has been reluctant to draw inferences from congressional inaction,<sup>259</sup> so a failure to act in this situation cannot be read as *proof* of Congress’s desire to maintain the ride-through. However, the Supreme Court has also stated that Congress is generally presumed to know the pre-BAPCPA Bankruptcy Code interpretation, and how it affected the ride-through.<sup>260</sup> With this knowledge, if Congress were sending a signal that BAPCPA eliminated (or, alternatively, mandated) the ride-through, one of the strongest ways to send it would have been to eliminate this language. Instead, Congress chose to retain it—a signal it would not have sent if it wanted clearly to change the ride-through’s status.

4. *Alternate Methods for the Ride-Through.* — Arguably, the statutory language of BAPCPA can still accommodate the ride-through. If, however, a court chooses to adopt the reading of § 362(h), § 521(a)(6), and § 521(d) that previous courts have used,<sup>261</sup> the ride-through could still operate in a less direct fashion.

a. *Deny the Reaffirmation.* — The first alternate way to keep the ride-through operational involves court denial of reaffirmation agreements and will be labeled the “backdoor ride-through.” 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

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257. 11 U.S.C. § 521 (2000).

258. See *supra* note 99 and accompanying text (describing courts’ interpretation of § 521(A)(2)).

259. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993) (“As a general matter, we are ‘reluctant to draw inferences from Congress’ failure to act.” (citations omitted)).

260. This follows from a Supreme Court canon of construction that it is presumed that Congress is knowledgeable about existing law pertinent to the legislation it enacts. See, e.g., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (stating that Congress is presumed to be knowledgeable about existing law pertinent to legislation it enacts); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988) (“We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.”).

261. See *supra* Part II.B.1.

the best interest of the debtor<sup>262</sup> or presenting an undue hardship on the debtor.<sup>263</sup> The ride-through would then be granted: Having filed a reaffirmation agreement, the debtor will be free to continue making his payments without his property being repossessed, as he is in compliance with the Bankruptcy Code.<sup>264</sup> One court has engaged explicitly in this practice in order to provide a debtor—who was being forced to pay more than she had—a ride-through by denying her filed reaffirmation agreement.<sup>265</sup> As discussed above, several courts have already engaged in this backdoor ride-through.<sup>266</sup>

This backdoor ride-through could be accused of bordering on judicial activism,<sup>267</sup> or at least operating contrary to congressional intent.<sup>268</sup> Such an allegation would hardly be baseless, as there is no clear indication in the limited amount of legislative history on BAPCPA that Congress envisioned such a regime during the passage of BAPCPA. Allegations of judicial activism, however, assume that this backdoor ride-through conflicts with Congress's desires when passing BAPCPA. As discussed previously,<sup>269</sup> the congressional intent behind BAPCPA can support the continued existence of the ride-through. Also, at least one court has noted that, "[i]f Congress had intended to completely eliminate [the] ride-through, it could have done so [by stopping the backdoor ride-through],"<sup>270</sup> but it chose not to. Congress knew that courts had the

262. See 11 U.S.C. § 524(c)(6)(A) (2000 & Supp. V 2005) (stating that reaffirmation agreement is enforceable only if it does "(i) not [impose] an undue hardship on the debtor or a dependant of the debtor; and (ii) [is] in the best interest of the debtor").

263. Under two sections of the current Bankruptcy Code, all reaffirmation agreements must be examined by a bankruptcy judge to see if a presumption of undue hardship arises. *Id.*; *id.* § 524(m)(1); see also *In re Laynas*, 345 B.R. 505, 512 (Bankr. E.D. Pa. 2006) (discussing use of § 524(m)(1)).

264. See *In re Quintero*, No. 06-40163 TK, 2006 WL 1351623, at \*3 (Bankr. N.D. Cal. May 17, 2006) (refusing to allow creditor to repossess car after debtor filed reaffirmation agreement that was denied by court).

265. *In re Moustafi*, 371 B.R. 434, 439–40 (Bankr. D. Ariz. 2007) (granting ride-through after denying approval of reaffirmation agreement).

266. See *supra* notes 192–197. But see *In re Donald*, 343 B.R. 524, 540–41 (Bankr. E.D.N.C. 2006) (disagreeing with this conclusion). Once the courts deny the reaffirmation, then the creditor can only repossess the car if there is a default or impairment of interests. See, e.g., *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*6 & n.21 (Bankr. W.D. Mo. Oct. 12, 2006) ("Once the discharge is entered, Super Cars may repossess the vehicle only if there is a payment or insurance default, or if its position has been significantly impaired.").

267. It is beyond the scope of this Note to judge whether or not this backdoor ride-through would be judicial activism, as the definition of the term can vary. See generally Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 Cal. L. Rev. 1441 (2004) (giving account of evolution of term "judicial activism").

268. See *In re Donald*, 343 B.R. at 540 (stating that "to adopt [this interpretation] would be tantamount to abrogating the requirements of [the Bankruptcy Code]").

269. See *infra* Part III.B (explaining congressional intent of BAPCPA and its impact on ride-through).

270. *In re Moustafi*, 371 B.R. at 439.

power to review reaffirmation agreements<sup>271</sup> and even expanded this power under BAPCPA.<sup>272</sup> Yet, Congress still drafted § 521(a)(6), § 362(h), and § 521(d) knowing that a court could circumvent these provisions by finding that the agreement was not in the best interest of the debtor.<sup>273</sup> Some courts have embraced the backdoor ride-through to protect debtors from unreasonable reaffirmations.<sup>274</sup> 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.

b. *Using State Law.* — Another way to keep the ride-through in operation would be through the use of state law. In order for the ride-through to be eliminated, a creditor must be able to repossess a vehicle when a debtor refuses to choose any of § 521's three options. While § 521(d) appears to assist creditors by removing any federal prohibition on default-on-filing clauses, the section does not override state law protections. In many states, laws prevent a creditor from repossessing his property unless the debtor impairs the collateral.<sup>275</sup> In these states, a debtor who stays current on his payments without defaulting would almost certainly not impair a creditor's rights to his collateral, and several courts have already found this protection to exist in state law.<sup>276</sup>

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271. This power was in the Bankruptcy Code long before BAPCPA. See 11 U.S.C. § 524(m) (2000).

272. See *In re Laynas*, 345 B.R. 505, 512 (Bankr. E.D. Pa. 2006) (explaining that, unlike before BAPCPA, courts now have to review reaffirmation agreements that had participation by bankruptcy counsel). Under the Supreme Court's canons of construction, Congress is always presumed to know about existing law when passing a new law. See *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

273. See *supra* note 262 and accompanying text. Taking this idea one step further, one could argue that with this approach open to bankruptcy judges, this backdoor ride-through should always operate. 11 U.S.C. § 524(c)(6)(A) (2000 & Supp. V 2005) requires that the reaffirmation be in the interests of the debtor. Yet, it has been established that a ride-through places a debtor in a better *ex post* position than a reaffirmation and that not approving the reaffirmation will create a ride-through. See *supra* notes 107–111 and accompanying text. Thus, if denying the reaffirmation will almost always be in the "best interest of the debtor," then all reaffirmation agreements should be rejected in order to allow the ride-through. Of course, judicial acceptance of this proposition is unlikely since it would radically change the Bankruptcy Code as currently interpreted.

274. See, e.g., *In re Moustafi*, 371 B.R. at 439–40 (denying approval to reaffirmation that would impose hardship on debtor, and then declaring ride-through allowed for creditor based on denial of reaffirmation); *In re Riggs*, No. 06-60346, 2006 WL 2990218, at \*6 (Bankr. W.D. Mo. Oct. 12, 2006) (refusing to reaffirm agreement where creditor required interest payments over 18%).

275. See, e.g., *In re Rowe*, 342 B.R. 341, 350 (Bankr. D. Kan. 2006) (discussing Kansas law preventing creditor repossession of vehicle until collateral is "significantly impaired").

276. See, e.g., *In re Donald*, 343 B.R. 524, 539 (Bankr. E.D.N.C. 2006) ("Creditors still must ensure that the contract, and their efforts to enforce the terms in it, do not run afoul of applicable state laws."); *In re Rowe*, 342 B.R. at 350–52 (refusing to allow creditor to repossess a vehicle because of state law protection of debtor).

The statutory language of BAPCPA, as shown above, does not remove the ride-through for Chapter 7 filers, and future courts could use one of the three outlined methods—narrowly reading BAPCPA’s changes to the Code, denying the reaffirmation to allow the backdoor ride-through, or using state law to deny repossession—to prevent filers from being forced into Chapter 13 bankruptcy.

### B. *Congressional Intent*

The Supreme Court has emphasized that, in statutory construction questions, the text of the statute controls.<sup>277</sup> However, in cases where the text is unclear or open to multiple interpretations, the Court has used the legislative history and intent of Congress to guide its understanding of a statute.<sup>278</sup> As courts have interpreted the pertinent provisions of BAPCPA in different ways, congressional intent can play an important role in examining the ride-through.

The overarching congressional intent behind BAPCPA supports the continued existence of the ride-through. The primary goal of BAPCPA was to prevent upper and upper middle class bankruptcy abuse: President Bush, Senate Majority Leader Frist, and BAPCPA sponsor Senator Grassley<sup>279</sup> all spoke of BAPCPA as legislation designed to protect rather than injure the lower and middle classes.<sup>280</sup> BAPCPA’s sponsors sought to achieve this goal by pushing higher income filers into Chapter 13 instead of Chapter 7. To do so, they created the means test, a provision at the heart of BAPCPA.<sup>281</sup> The means test excludes many people from being forced into Chapter 13, but one group—those who earn less than their state’s median income—is of particular importance.<sup>282</sup> By excluding this group of lower and lower middle class individuals, Congress signaled that it wanted BAPCPA to force only the well-off into Chapter 13 filing.

Accordingly, courts that read the BAPCPA amendments as removing the ride-through contravene congressional intent. As discussed above, the existence of the ride-through appears to affect the level of bankruptcy

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277. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (stating “the authoritative statement is the statutory text, not the legislative history or any other extrinsic material”).

278. See, e.g., *id.* (“Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”).

279. It is important that Senator Grassley was involved in the statements of intention, as the Supreme Court has stated that his interpretation of the bill, as its sponsor, is entitled to weight. See *Lewis v. United States*, 445 U.S. 55, 63 (1980) (explaining that statements of bill’s sponsor are “entitled to weight”).

280. See *supra* notes 84–89 and accompanying text.

281. See Allard, *supra* note 73, at 8 (“Means testing is the heart of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.”).

282. See *supra* notes 69–89 and accompanying text.

filings.<sup>283</sup> If it is removed, individuals in the lower and middle class who require access to their vehicles will be forced into filing Chapter 13 because they are unable to keep the rates to which the creditor previously agreed. Removing the ride-through would, in practice, be akin to skewing the lines of the means test to cause it to swallow large amounts of those below the median income of their states. The resulting forced Chapter 13 filings would flout Congress's intention for BAPCPA.

Criticism of this view could come from three angles:<sup>284</sup> that this interpretation of the intent is not broad enough, that it is too broad, or that it doesn't reflect Congress's actual intent. First, many commentators believe that the broad goal of BAPCPA was to ensure that creditors reach the best result in bankruptcy filings.<sup>285</sup> This belief, however, is oversimplified. A "creditor-friendly" interpretation ignores the fact that the law was intended to stop affluent debtors' strategic filing and to benefit lower class bankruptcy filers.<sup>286</sup> As one court has stated, it is important to remember that "BAPCPA includes in its title the phrase 'consumer protection.'"<sup>287</sup> Creditors were given new powers, but against those who were keeping luxury cars and boats in their garage,<sup>288</sup> not those with \$3,900 remaining on a 2000 Saturn LS.<sup>289</sup>

Another criticism could be that the specific intent of Congress regarding the ride-through should be examined rather than the intent of the entire act. Such an examination, however, is impossible. There is no legislative history to guide a court regarding the ride-through, as no Senate Report was published and the House Report simply paraphrases the legislation.<sup>290</sup> With no specific congressional statement about the re-

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283. See *supra* Part II.C.

284. There is also a potential fourth criticism if one includes the argument that statutory interpretation should not involve congressional intent. For an explanation of that argument, see Antonin Scalia, *in* *A Matter of Interpretation* 29–37 (Amy Gutmann ed. 1997).

285. See, e.g., Braucher, *Ride-Through*, *supra* note 105, at 457–58 (stating that many will argue amendments to be interpreted as "the creditor wins"); Robert J. Landry, III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 *Golden Gate U. L. Rev.* 91, 117 (1996) ("[T]here is considerable criticism of the new amendments as being too creditor friendly . . ."); Robert F. Reilly, *Valuation of Health Care/Pharmaceutical Entities for Bankruptcy Purposes*, *Am. Bankr. Inst. J.*, Mar. 2006, at 38, 39 ("[T]he new law is generally considered to be much more friendly to creditor/defendants.").

286. See *supra* notes 85–89 and accompanying text.

287. *In re Quintero*, No. 06-40163 TK, 2006 WL 1351623, at \*3 (Bankr. N.D. Cal. May 17, 2006).

288. See *supra* note 86 and accompanying text.

289. See generally *In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006) (discussing ride-through of 2000 Saturn LS instead of reaffirming debt of \$3,942.60).

290. See Braucher, *Ride-Through*, *supra* note 105, at 460 (stating that there is "no enlightening formal legislative history to aid" in interpreting BAPCPA); see also *In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005) (stating that "[l]egislative history is virtually useless as an aid to understanding the language and intent of BAPCPA").

removal of the ride-through, the law's general intent should govern, and it leads to the conclusion that the ride-through survived BAPCPA.

The final critique of this use of congressional intent is that the chosen statements do not reveal the true intent of Congress, but only of those representatives who expressed views on BAPCPA. This phenomenon has been described famously as "looking over a crowd and picking out your friends."<sup>291</sup> This critique, however, applies generally to the use of legislative history and is not specific to this use of congressional intent. Also, to assess the congressional intent of the legislation, this Note has examined the statements of BAPCPA's sponsor, Senator Charles Grassley<sup>292</sup> (whose views are entitled to more weight than those of an average member),<sup>293</sup> and the Senate Majority Leader, who was a leader in the bill's passage.<sup>294</sup> Relying on these statements for legislative history is hardly picking out "friends," but rather looking to members who were instrumental in BAPCPA's passage for guidance. Thus, if one considers the use of congressional intent relevant in how to interpret a statute, examining the intent of the strongest supporters of BAPCPA leads to the conclusion that the ride-through was not removed.

### C. Policy

Bankruptcy policy also dictates that the ride-through should still exist after the passage of BAPCPA. To begin, creditors face a limited burden if a court-protected ride-through is found to exist. At least one court originally assessing the ride-through before BAPCPA justified their findings partly on the fact that the ride-through's adoption would not harm creditors.<sup>295</sup> It is rare for more than a few thousand dollars to be at stake in ride-through cases.<sup>296</sup> An automobile industry executive has stated that the amount at stake for new car ride-throughs averages out to only about \$4,000.<sup>297</sup> Also, the transaction costs of organizing a reaffirmation are substantial to a creditor: In addition to ensuring court approval, the reaf-

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291. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *Iowa L. Rev.* 195, 214 (1983) (internal quotation marks omitted).

292. For BAPCPA sponsor Senator Charles Grassley's statements, see *supra* notes 17, 20, 84, 88 and accompanying text.

293. See *supra* note 279.

294. For Senate Majority Leader Frist's statements, see *supra* notes 57, 67–68, 86 and accompanying text.

295. See *supra* note 111 and accompanying text.

296. See, e.g., *In re Kissal*, No. 06-10264-SSM, 2006 WL 1868513, at \*1 (Bankr. E.D. Va. June 29, 2006) (describing reaffirmation of \$7,500 Jeep); *In re Laynas*, 345 B.R. 505, 509 (Bankr. E.D. Pa. 2006) (describing reaffirmation of \$3,942.60 Saturn); *In re Rowe*, 342 B.R. 341, 343 (Bankr. D. Kan. 2006) (describing reaffirmation with \$3,991 remaining on Dodge).

297. See *Culhane & White, Debt After Discharge*, *supra* note 104, at 741–42. While this amount is small per vehicle, it can add up to a more substantial figure if a creditor handles large amounts of bankruptcies involving vehicles.

firmation rates must be negotiated with the debtor.<sup>298</sup> Since the passage of BAPCPA, these costs have only increased, as the legislation imposes new disclosure requirements that increase costs.<sup>299</sup> Allowing a ride-through removes these costs for a creditor. Moreover, creditors can receive more than the current value of the collateral, as the total amount paid on the contract will often exceed the asset's value.<sup>300</sup> Debtors will also be better able to pay back the remaining contract amount after a ride-through, since, after the Chapter 7 filing, most of the debts the filer had will be removed, freeing income to pay the existing contract's balance. In addition, many creditors already acquiesce to such a practice, even in jurisdictions where the law does not require it.<sup>301</sup> With reported creditor acquiescence rates higher than fifty percent,<sup>302</sup> clearly most creditors have not found the process painful, and some commentators have gone as far as to ask why reaffirmations would ever occur instead of ride-throughs.<sup>303</sup>

On the other hand, removing the ride-through can severely damage debtors. Many will be forced into Chapter 13 filings, which are less advantageous to them than Chapter 7 filings.<sup>304</sup> Of those forced to file for Chapter 13, statistics show that the majority will likely fail to complete their plans and will face the problems associated with such an outcome.<sup>305</sup> With debtors bearing such a tough burden, and creditors fac-

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298. *Id.* at 742–43 (discussing transaction costs from reaffirmation).

299. See Braucher, *Ride-Through*, *supra* note 105, at 463 & n.24 (discussing increased costs for compliance with disclosure); David B. Wheeler & Douglas E. Wedge, *A Fully-Informed Decision: Reaffirmation, Disclosure and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 *Am. Bankr. L.J.* 789, 790–91 (2005) (discussing BAPCPA changes to disclosure requirements).

300. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 719 (“[T]o keep the collateral, the debtor will have to make all the payments required by the original contract, even if the collateral is worth much less.”).

301. See *supra* notes 121–128 and accompanying text.

302. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 740 (calculating in study that around fifty-five percent of cars in bankruptcy were not reaffirmed, redeemed, or surrendered, meaning there was likely ride-through).

303. *Id.* at 743 (“[T]here were 136 filed reaffirmations on cars. Why would there be any if things are as we suppose?”). The authors ultimately were unable to reach a conclusion about why reaffirmations occur, but considered the possibility that reaffirmations are handled by many different companies and “some may always insist on a formal reaffirmation” as a company policy, or simply desire formal documentation for legal purposes. See *id.*

304. See *supra* notes 46–49 and accompanying text.

305. See Culhane & White, *Debt After Discharge*, *supra* note 104, at 742 (“[T]wo Chapter 13 plans in three fail.”). A broad discussion of Chapter 13 and consequences of failing to complete it are beyond the scope of this Note, but include receiving no benefit for time spent in Chapter 13 bankruptcy in later proceedings, and ultimately losing any collateral that was saved under Chapter 13. See Braucher, *Counseling*, *supra* note 203, at 185–86 (“A debtor is not rewarded for struggling to pay for a year or two but failing to finish. . . . If arrearages have not been paid prior to the dismissal or conversion of the chapter 13 case, the debtor will ultimately lose the property . . . that was the reason for the struggle.” (footnotes omitted)). For more information, see generally Scott F. Norberg &

ing so few consequences, policy dictates that the ride-through be continued.

In addition to the above considerations, the very backbone of bankruptcy philosophy—the fresh start—supports continued recognition of the ride-through. When the ride-through is removed, debtors are essentially at the mercy of their creditors, who can refuse to reaffirm on original terms, leaving the debtor in one of three bad positions: He will either be saddled with a high interest rate in order to keep his property, will have surrendered his essential property, or will have been forced into Chapter 13. As some courts have stated,<sup>306</sup> without the ride-through, the Code gives creditors a veto over the debtor's fresh start, denying him the very right that is at the heart of bankruptcy policy. As debtors stand to lose so much more than creditors, most importantly the right to a fresh start, policy dictates that the ride-through be continued.

#### D. *The Future of the Ride-Through*

Statutory interpretation, congressional intent, and general bankruptcy policy show that declarations of the ride-through's demise have been premature. This fact leads to a difficult question: If the ride-through was not removed by BAPCPA, what happened to it? This Note has detailed all of the reasons why BAPCPA did not *eliminate* the ride-through, but, importantly, there is almost no support for the proposition that BAPCPA *requires* the ride-through either. While congressional intent<sup>307</sup> and policy<sup>308</sup> may favor continuing the ride-through, BAPCPA's statutory scheme does not. Only two changes to the Code reflect the ride-through's continued existence,<sup>309</sup> but these minor changes do not establish a statutory framework for the ride-through's required operation. Congress did not provide the courts any signal that it intended to extend the ride-through to all circuits.

As BAPCPA has neither eliminated nor mandated the ride-through, this Note argues that the only remaining option is to return to the pre-BAPCPA ride-through arrangement. Without clear statutory changes concerning the ride-through, and with a congressional record devoid of guidance,<sup>310</sup> courts that decided otherwise would be ruling without clear legislative authority as to the ride-through's existence. The lack of a clear signal suggests that Congress never meant to change the ride-through at all and that the circuit split will continue until resolved by the Supreme Court. It would not be the first time that Congress has passed vague legis-

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Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 Creighton L. Rev. 473 (2006) (describing study of Chapter 13 system).

306. See *supra* note 101 and accompanying text.

307. See *supra* Part III.B.

308. See *supra* Part III.C.

309. See *supra* Part III.A.2.

310. See *supra* note 290 and accompanying text (discussing lack of congressional record on BAPCPA).

lation or refused to clarify a circuit split: Congress has used this tactic before when contentious issues have prevented compromises from being passed.<sup>311</sup> Congress—split between supporting creditors and hurting “innocent debtors”—may have chosen to leave the ride-through unresolved, hoping that the courts would do their work for them. BAPCPA’s text supports this as well: The key wording that led to the circuit split on the ride-through—§ 521(2)’s “if applicable” language—remains unchanged following BAPCPA.<sup>312</sup> Had Congress wanted to change the ride-through, this section would have been the place to initiate that change, but Congress left the language in place. If Congress indeed failed to change the ride-through, the holdings of the pre-BAPCPA circuit cases would still apply, and courts in different circuits should continue to apply divergent rules.

While this disparate use of the ride-through depending on pre-BAPCPA cases may seem, at first, impossible, BAPCPA has provided a route for this application: the backdoor ride-through.<sup>313</sup> In pre-BAPCPA ride-through circuits, the backdoor ride-through allows a court to avoid ride-through roadblocks by allowing debtors to retain property with pre-bankruptcy payments while still meeting the requirements of § 521(a)(2), § 521(a)(6), and § 362(h). In other circuits, the lack of a pre-BAPCPA ride-through would mean the provision would still continue to not operate. Thus, despite all of BAPCPA’s changes, courts can, and should, ultimately determine that the ride-through continues to operate as it did before BAPCPA.

#### CONCLUSION

BAPCPA was a major change to the Bankruptcy Code, signaling a shift in both bankruptcy practice and philosophy through the introduction of the means test. For the first time in modern bankruptcy law, Congress ended the universal honest debtor presumption, and instead adopted a system that classified large swaths of individuals as presumptively dishonest, throwing them into Chapter 13. The very structure of the test and the statements of those who drafted and supported BAPCPA

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311. See, e.g., *Sample v. Keystone Carbon Co.*, 786 F. Supp. 527, 529 (W.D. Pa. 1992) (discussing Congress’s intentional failure to decide issue, and how decision was effectively transferred to courts); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 302 n.235 (2000) (“When members of Congress focus on a particular issue but fail to reach a collective decision about how to resolve it, they sometimes compromise by enacting intentionally ambiguous language that transfers the issue to the courts.”); Lawrence J. Cwik, Note, *Oil and Gas Leasing on Wilderness Lands: The Federal Land Policy and Management Act, the Wilderness Act, and the United States Department of the Interior, 1981–1983*, 14 *Envtl. L.* 585, 615 (1984) (discussing how Congress left language ambiguous so courts could decide issues applying “contemporary standards of social policy” (citation omitted)).

312. See *supra* Part III.A.3.

313. For a discussion of the backdoor ride-through, see *supra* notes 262–266 and accompanying text. For court applications of the backdoor ride-through, see *supra* notes 192–197 and accompany text.

show that the Act was intended to thwart well-off strategic bankruptcy filers while leaving bankruptcy protection in place for those who needed it. Indeed, one of the primary justifications for BAPCPA was how it would, in the end, save money for lower and middle class filers who were being harmed by having to pay for the costs created by bankruptcy abusers. Yet, despite such an emphasis on protecting the lower and middle classes, some courts have interpreted BAPCPA to eliminate a crucial protection for these Chapter 7 filers: the ride-through. Removal of the ride-through would push these worse-off filers into bad reaffirmations or into Chapter 13—a result rejected by the means test's explicit exclusion of these individuals from forced Chapter 13 filing. Because of these changes, individuals like Akhter Husain<sup>314</sup> would be unable to receive a fresh start, either because they are forced to sign unfavorable reaffirmation agreements that they have no possibility of fulfilling, or because they are forced to pay income for years to creditors under Chapter 13 in order to hold onto their cars.

This unfortunate result is unnecessary. As this Note has shown, BAPCPA's statutory language does not mandate elimination of the ride-through and congressional intent and policy both support the proposition that it was not removed by BAPCPA. However, while the ride-through was not eliminated, its continued existence was also not mandated. This situation has placed courts in a bind: It would be unfortunate if BAPCPA—whose sponsors explicitly promised that it would maintain and expand bankruptcy protection for the lower and middle classes—removed a crucial piece of protection for those whom it was intended to support, but the Act provided no additional support for the ride-through's permanent place in the Bankruptcy Code. Faced with two bad choices and no resolution of the ride-through question, courts have no choice but to return to the pre-BAPCPA framework and its attendant circuit split. Congress or the Supreme Court may one day resolve the ride-through debate, but that day has yet to come.

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314. See *supra* notes 1–12 and accompanying text.

FIGURE 1: RATE OF CHAPTER 13 BANKRUPTCIES

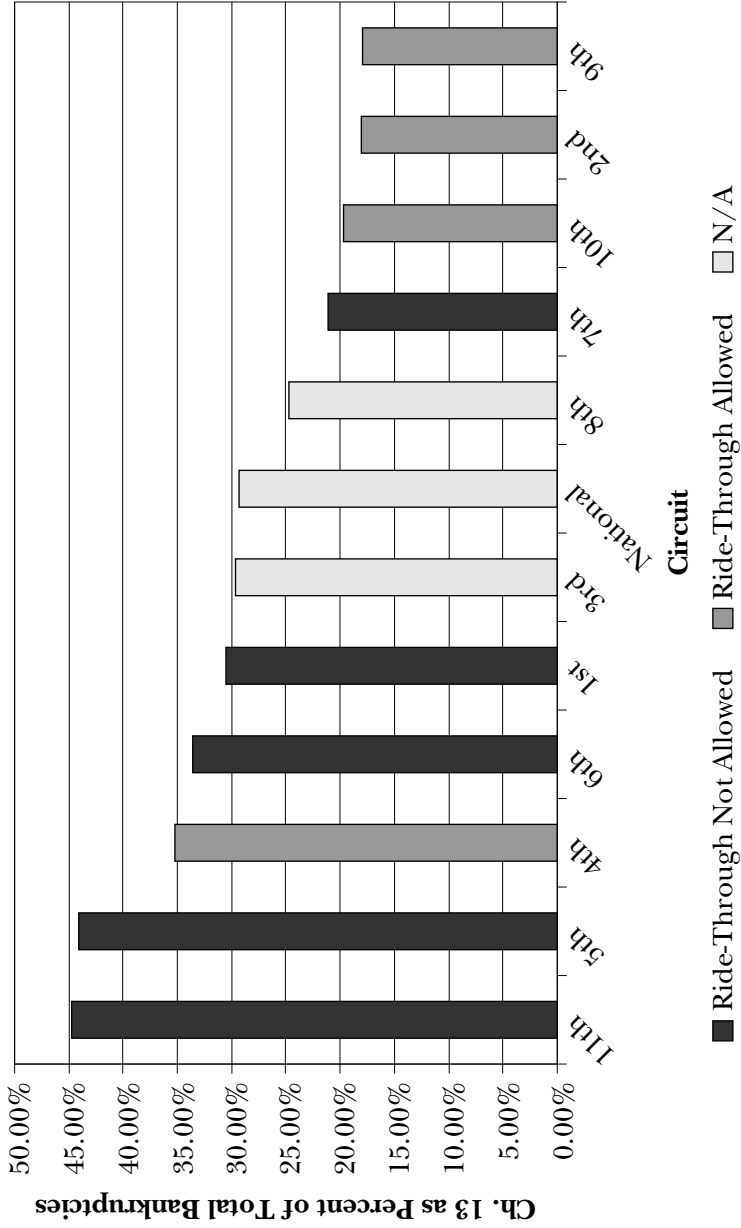


FIGURE 2: CHAPTER 13 RATE BASED ON RIDE-THROUGH STATUS

