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# Coastal Federal Credit Union v. Hardiman: You Can Still Ride-Through the Eastern District of North Carolina

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## ***Coastal Federal Credit Union v. Hardiman: You Can Still “Ride-Through” the Eastern District of North Carolina\****

### INTRODUCTION

From its biblical<sup>1</sup> and constitutional<sup>2</sup> roots, American bankruptcy law has developed to provide significant protection to financially overextended debtors. In the nineteenth century, Congress repeatedly responded to national economic difficulty by passing bankruptcy legislation.<sup>3</sup> In the last quarter of the twentieth century, Chapter 11 bankruptcies frequently prevented the disappearance of major airlines,<sup>4</sup> curbing massive employment losses and the resulting impact on the national economy.<sup>5</sup> Events of recent years, such as the proliferation of variable-rate mortgages,<sup>6</sup> the large numbers of layoffs,<sup>7</sup> the rising number of individuals without health insurance,<sup>8</sup>

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1. See *Deuteronomy* 15:1 (“At the end of every seven years you must cancel debts.”).

2. U.S. CONST. art. I, § 8, cl. 4; see also THE FEDERALIST NO. 42, at 208 (James Madison) (Terence Ball ed., 2003) (“The power of establishing uniform laws of bankruptcy, is so intimately connected with the regulation of commerce . . . that the expediency of it seems not likely to be drawn into question.”).

3. See DAVID A. SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 24 (2001) (“In times of economic crisis, Congress rushed to pass bankruptcy legislation to alleviate widespread financial turmoil. Once the crisis passed, so too did the need for a federal bankruptcy law. Like Penelope and her weaving, Congress quickly undid its handiwork on each occasion, only to start all over again when hard times returned.”).

4. See Christopher Elliott, *For Passengers, a Weary Feeling of Bankruptcy Fatigue*, N.Y. TIMES, Sept. 15, 2005, at C4 (“Since the deregulation of the United States airline industry in 1978, almost two-thirds of the major airlines have landed in bankruptcy court at least once.”).

5. See Mark C. Mathiesen, *Bankruptcy of Airlines: Causes, Complaints, and Changes*, 61 J. AIR L. & COM. 1017, 1044 (1996).

6. See David Leonhardt & Motoko Rich, *The Trillion-Dollar Bet: Homeowners Take Risks in a Bid for Lower Mortgage Payments*, N.Y. TIMES, June 16, 2005, at C1.

7. Christopher S. Rugaber, *New Unemployment Claims Reach 26-Year High*, USA TODAY, Dec. 11, 2008, [http://www.usatoday.com/money/economy/2008-12-11-jobless\\_N.htm](http://www.usatoday.com/money/economy/2008-12-11-jobless_N.htm).

8. See Julie Appleby, *Ranks of Uninsured Americans Grow*, USA TODAY, Aug. 30, 2006, at B1, available at [http://www.usatoday.com/money/industries/health/2006-08-29-health-insurance-coverage\\_x.htm?POE=NEWISVA](http://www.usatoday.com/money/industries/health/2006-08-29-health-insurance-coverage_x.htm?POE=NEWISVA).

and the rapid decline of the stock market in the fall of 2008,<sup>9</sup> show the unpredictable and tenuous nature of the financial health of modern Americans.

By providing an opportunity for a “discharge”—or a “freeing of the debtor of all legal responsibility for certain obligations and/or debts”—the Bankruptcy Code<sup>10</sup> prevents insolvency from becoming a financial death sentence for individuals who are unable to meet their debt obligations.<sup>11</sup> The primary justification for the discharge of a bankrupt individual’s debts is the concept of the “honest debtor”<sup>12</sup> who has been unlucky and/or unwise in her financial affairs but deserves the opportunity to “start afresh.”<sup>13</sup> In addition, bankruptcy discharges provide benefits to creditors through the orderly distribution of the debtor’s non-exempt assets prior to discharge<sup>14</sup> and the post-discharge opportunity to conduct business with the rehabilitated debtor.<sup>15</sup> Furthermore, the potential for bankruptcy protection encourages investment.<sup>16</sup> On a national level, bankruptcy provides a safety net to investors who know that the failure of a business venture will not permanently harm their financial health.<sup>17</sup>

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9. Ben Steverman, *Stock Market Crash: Understanding the Panic*, BUS. WK., Oct. 10, 2008, [http://www.businessweek.com/investor/content/oct2008/pi2008109\\_360708.htm?chan=rss\\_topStories\\_ssi\\_5](http://www.businessweek.com/investor/content/oct2008/pi2008109_360708.htm?chan=rss_topStories_ssi_5).

10. 11 U.S.C. §§ 101-1532 (2006).

11. NORTON DICTIONARY OF BANKRUPTCY TERMS § D100 (Hon. William L. Norton, Jr. & William L. Norton III eds., 2010).

12. See Christopher M. Hogan, Note, *Will the Ride-Through Ride Again?*, 108 COLUM. L. REV. 882, 885-87 (2008) (discussing the “rise” of the “honest debtor”).

13. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“One of the primary purposes of the [B]ankruptcy [A]ct is to ‘relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.’”) (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915)).

14. See Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors’ Bargain*, 75 VA. L. REV. 155, 158 (1989) (“A primary objective of any bankruptcy process is to regulate the inherent conflicts among different groups having separate claims against a debtor’s assets and income stream.”).

15. See *Local Loan Co. v. Hunt*, 292 U.S. at 244 (“This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”) (emphasis omitted).

16. See K. Matthew Wong, *Bankruptcy as a Risk Management Tool: Economic and Social Implications*, 24 REV. BUS. 46, 48 (2003).

17. See Sang M. Lee & Suzanne J. Peterson, *Culture, Entrepreneurial Orientation, and Global Competitiveness*, 35 J. WORLD BUS. 401, 408 (2000) (discussing the stimulating effect that liberal bankruptcy laws have on entrepreneurship).

Despite the benefits of bankruptcy, there is an inherent conflict of interest between debtors and creditors: creditors want to collect the money owed by a debtor, while the insolvent debtor, by definition, cannot satisfy the claims of all his creditors.<sup>18</sup> A perception of debtor dishonesty exacerbates this conflict.<sup>19</sup> Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005<sup>20</sup> (“BAPCPA”) in response to concerns regarding the abuse of bankruptcy protection by dishonest debtors.<sup>21</sup> BAPCPA primarily amended the Bankruptcy Code in creditor-friendly ways<sup>22</sup> and is best known for its introduction of the “means test”<sup>23</sup> in Chapter 7 bankruptcies.<sup>24</sup> The “means test” uses a formula based on a debtor’s

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18. See 11 U.S.C. § 101(32) (2006) (“The term ‘insolvent’ means . . . financial condition such that the sum of such entity’s debts is greater than all of such entity’s property.”).

19. See Hogan, *supra* note 12, at 890–91 (discussing how the rapid increase in bankruptcy filings between 1979 and 1997, despite the overall growth of the national economy, increased the public perception of the dishonesty of bankruptcy debtors).

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

21. As he introduced BAPCPA at a Senate hearing, Senator Charles Grassley commented:

The vast majority of people believe that individuals who file for bankruptcy should be required to pay back some of their debts if they have the means to do so. This is precisely what the bankruptcy reform legislation does. Most people think it should be more difficult for people to file for bankruptcy. Americans have had enough; they are tired of paying for high rollers who game the current system and its loopholes to get out of paying their fair share.

Press Release, Senator Charles Grassley, Opening Statement of Sen. Charles Grassley at the Bankruptcy Reform Hearing (Feb. 10, 2005), *available at* [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=9716](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=9716).

When he signed BAPCPA into law President George W. Bush echoed Congress’s concerns about debtor dishonesty. Press Release, President George W. Bush, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html> (“In recent years, too many people have abused the bankruptcy laws. They’ve walked away from debts even when they had the ability to repay them.”).

22. See *In re Sosa*, 336 B.R. 113, 114 (Bankr. W.D. Tex. 2005) (“Those responsible for the passing of the Act did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country.”).

23. 11 U.S.C. § 707(b) (2006).

24. Most consumer, or individual, bankruptcies are either “Chapter 7” or “Chapter 13” proceedings, which are named for the respective chapters of the Bankruptcy Code that govern their administration. Chapter 7 bankruptcies are “liquidations” where a trustee distributes a debtor’s non-exempt assets to creditors. See NORTON DICTIONARY OF

assets, liabilities, and demographic information to force some above-median-income debtors into Chapter 13 proceedings.<sup>25</sup>

Many observers believed another creditor-friendly aspect of BAPCPA was the elimination of the “ride-through” option for personal property in Chapter 7 bankruptcies.<sup>26</sup> “Ride-through”<sup>27</sup> occurs when a debtor retains secured personal property during and after a bankruptcy without “reaffirming” the underlying debt.<sup>28</sup> If the debtor complies with bankruptcy rules and procedures, his debts—including non-reaffirmed secured debts—are discharged at the end of his bankruptcy.<sup>29</sup> Therefore, after a ride-through the personal-property creditor can no longer collect the debt from the former debtor, even though the former debtor still has possession of the property in question.<sup>30</sup> Nevertheless, the discharge of this debt does not mean the creditor in a ride-through will necessarily, or even

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BANKRUPTCY TERMS, *supra* note 11, § L70. The “vast majority” of Chapter 7 bankruptcies are “no-asset” cases, Ed Flynn & Gordon Bermant, *A Day in Bankruptcy*, AM. BANKR. INST. J., June 2003, at 20, 20, where there are no non-exempt assets to distribute to creditors.

25. § 707(b). Chapter 13 bankruptcies require a full or partial repayment of debts over a period of three to five years. COLLIER ON BANKRUPTCY ¶ 1.07[5][e] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

26. See *In re Rowe*, 342 B.R. 341, 351 (Bankr. D. Kan. 2006) (“[T]he Court finds that Congress by amending §§ 521 and 362 intended to and was successful in eliminating [ride-through] . . . .”); *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 . . . ‘ride-through’ for property securing a consumer debt.”); 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, 462 (2005) (“In the 2005 Act, Congress appears to have clarified that there is in general no court-protected ride-through for cars and other personal property.”).

27. “Ride-through” takes its name from the fact that it is most often associated with the treatment of motor vehicles during a bankruptcy, *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 171 (E.D.N.C. 2008), and is also known as the “fourth option,” see Philip R. Principe, *Did BAPCPA Eliminate the “Fourth Option” for Individual Debtors’ Secured Personal Property?*, AM. BANKR. INST. J., Oct. 2005, at 6, 6, and “retain and pay,” see *In re Hardiman*, No. 07-00954-5-ATS, 2007 Bankr. LEXIS 4648, at \*5 (Bankr. E.D.N.C. Nov. 20, 2007). The debtor’s three statutory options are reaffirmation, redemption, and surrender. 11 U.S.C. § 521(a)(2)(A) (2006). Ride-through is a “fourth option” that was judicially recognized through interpretation of the relevant statutes. See *infra* Part I.A.

28. When a debtor “reaffirms” a debt he “agrees, in a writing, to remain liable for a debt that would otherwise be subject to the discharge.” COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 1.07[1][i].

29. See 11 U.S.C. § 727 (2006).

30. *In re Belanger*, 962 F.2d 345, 349 (4th Cir. 1992), *superseded by statute*, BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005), *as recognized in In re Donald*, 343 B.R. 524, 539–40 (Bankr. E.D.N.C. 2006). During the administration of his bankruptcy, the debtor is protected from repossession by the “automatic stay.” See 11 U.S.C. § 362 (2006).

usually, have to write off the discharged debt as a loss.<sup>31</sup> While the former debtor's personal liability disappears with his discharge, the lien on his personal property is not eliminated, thus affording the creditor with a means of recourse.<sup>32</sup> If the debtor does not continue making scheduled payments or maintain insurance, the creditor can repossess the property under the lien after the conclusion of the bankruptcy proceeding.<sup>33</sup>

The opinion of the United States District Court for the Eastern District of North Carolina in *Coastal Federal Credit Union v. Hardiman*<sup>34</sup> shows that, while Congress changed some relevant statutory provisions and limited the availability of the option, ride-through is not forbidden under the BAPCPA amendments to the Bankruptcy Code. After examining the pre-BAPCPA history of ride-through, this Recent Development provides an argument in favor of the district court's decision in *Hardiman* because ride-through is consistent with the plain language of the current Bankruptcy Code and the primary bankruptcy goal of a "fresh start" for an "honest debtor." In addition, despite their protests to the contrary, creditors' interests are not significantly harmed by ride-through. Finally, this Recent Development concludes with an argument that, despite the *Hardiman* discussion of the limited nature of the post-BAPCPA ride-through, the potential to use ride-through is still available in many Chapter 7 bankruptcies.

## I. RIDE-THROUGH AND BAPCPA

### A. Ride-Through Before BAPCPA

A debtor's ability to ride-through a bankruptcy developed out of judicial interpretations of the Bankruptcy Reform Act of 1978,<sup>35</sup> the most recent complete revision of American bankruptcy law.<sup>36</sup> While

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31. See *In re Price*, 370 F.3d 362, 377 (3d Cir. 2004) ("The loss of personal liability does not necessarily mean that creditors are vulnerable.").

32. See *Belanger*, 962 F.2d at 349. In other words, the debtor's in personam liability is discharged, but the property's in rem liability is not.

33. *Id.*

34. 398 B.R. 161 (E.D.N.C. 2008).

35. Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in 11 U.S.C. and elsewhere).

36. See generally John Kevin Poorman, Commentary, *Bankruptcy Reform Act of 1978*, 32 OKLA. L. REV. 583 (1979) (explaining features of the new Bankruptcy Code). While BAPCPA significantly changed many rules for bankruptcy proceedings, it did so by amending the 1978 Act rather than completely rewriting the entire Code. H.R. REP. NO. 109-31, at 47-155 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 119-212.

the Bankruptcy Reform Act did not expressly offer debtors the option of ride-through, courts held that the plain language did not require a debtor who was not in default on a personal property loan at the filing of her bankruptcy to reaffirm the debt or “redeem”<sup>37</sup> the property in order to retain it after receiving her discharge.<sup>38</sup> Creditors complained that under the Bankruptcy Reform Act, a Chapter 7 debtor was not even required to give notice of how the property would be handled during the bankruptcy.<sup>39</sup> In 1984, Congress responded to the complaints of “a coalition of bankers, credit unions, finance companies, oil companies and retailers”<sup>40</sup> about the treatment of personal property during a Chapter 7 bankruptcy with the addition of section 521(2) to the Bankruptcy Code.<sup>41</sup>

The first subsection of section 521(2) required debtors to reveal how they would handle property subject to creditors’ liens.<sup>42</sup> Section 521(2)(B) provided a forty-five day time limit for the debtor to perform his intention stated pursuant to section 521(2)(A).<sup>43</sup> Section 521(2)(C) also stated, however, that “nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor’s or the trustee’s rights with regard to such property under this title.”<sup>44</sup> Interpretation of section 521(2) led to an almost even split among the United States Courts of Appeal over the ability of a debtor to ride-through.<sup>45</sup> In

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37. To “redeem” the property the debtor would pay either the balance of the debt or the fair market value of the property to the creditor. COLLIER ON BANKRUPTCY, *supra* note 25, ¶ 1.07[1][h]. The debtor also has the option of surrendering the property to the creditor, but would then not have possession of the property after the bankruptcy. *See* 11 U.S.C. § 521(a)(2)(A) (2006).

38. *See, e.g., In re Perry*, 25 B.R. 817, 822 (Bankr. D. Md. 1982); *In re Ballance*, 33 B.R. 89, 91 (Bankr. E.D. Va. 1983).

39. *In re Belanger*, 118 B.R. 368, 370 (Bankr. E.D.N.C. 1990), *aff’d*, 962 F.2d 345 (4th Cir. 1992), *superseded by statute*, BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005), *as recognized in In re Donald*, 343 B.R. 524, 539-40 (Bankr. E.D.N.C. 2006).

40. *Belanger*, 118 B.R. at 370.

41. *Id.*; *see also* 11 U.S.C. § 521(2) (1988), *amended by* BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005).

42. § 521(2)(A) (1988) (“[W]ithin thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property [securing debt] and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.”).

43. § 521(2)(B) (1988).

44. § 521(2)(C) (1988).

45. Five circuits recognized the ride-through option. *See In re Price*, 370 F.3d 362, 379 (3d Cir. 2004); *In re Parker*, 139 F.3d 668, 673 (9th Cir. 1998); *In re Boodrow*, 126 F.3d 43, 51 (2d Cir. 1997); *In re Belanger*, 962 F.2d 345, 347-48 (4th Cir. 1992) *superseded by*

ride-through circuits, section 521(2)(A) was read to impose a notice requirement only and not to affect a debtor's substantive options with regard to the property.<sup>46</sup> The Fourth Circuit noted that "[t]he phrase 'if applicable' [in section 521(2)(A)] is redundant if . . . the options given to the debtor are considered to be exclusive."<sup>47</sup> Nevertheless, several circuits held the options to be exclusive and required debtors to reaffirm or redeem debts in order to prevent repossession of secured personal property.<sup>48</sup> It is important to note that even in the circuits that did not allow the option of ride-through to the debtor, "[r]ide-through by creditor acquiescence [was] common."<sup>49</sup> While the United States Supreme Court never settled the circuit split on ride-through,<sup>50</sup> many observers believed that BAPCPA did.<sup>51</sup>

### B. Ride-Through After BAPCPA: A Statutory Survival Story

Interpreting the various "confusing, overlapping, and sometimes self-contradictory" BAPCPA changes related to ride-through "is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect."<sup>52</sup> The first step to determine whether ride-through survived the BAPCPA amendments is to look at the changes to section 521.<sup>53</sup> At first glance, the initial subsections of section 521 relevant to ride-

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statute, BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005), as recognized in *In re Donald*, 343 B.R. 524, 539–40 (Bankr. E.D.N.C. 2006); *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1547 (10th Cir. 1989). Five circuits limited debtors to the statutory options. See *In re Burr*, 160 F.3d 843, 849 (1st Cir. 1998); *In re Johnson*, 89 F.3d 249, 252 (5th Cir. 1996) (per curiam); *In re Taylor*, 3 F.3d 1512, 1517 (11th Cir. 1993); *In re Edwards*, 901 F.2d 1383, 1387 (7th Cir. 1990); *In re Bell*, 700 F.2d 1053, 1054–55, 1058 (6th Cir. 1983).

46. See, e.g., *Price*, 370 F.3d at 379; *Boodrow*, 126 F.3d at 51; *Belanger*, 118 B.R. at 372.

47. *Belanger*, 962 F.2d at 348.

48. See, e.g., *Burr*, 160 F.3d at 849; *Edwards*, 901 F.2d at 1387.

49. Braucher, *supra* note 26, at 462–63. If the debtor is not allowed to ride-through, refuses to reaffirm, and cannot or will not redeem the property, the creditor's only options are to take the property and forego any future payments on the debt or to allow an informal ride-through. See *id.* at 476 (discussing the "painful choice" of creditors in non-ride-through circuits between reclaiming the property or collecting full payments, including interest).

50. *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 171 (E.D.N.C. 2008).

51. See *In re Rowe*, 342 B.R. 341, 351 (Bankr. D. Kan. 2006); *In re Kissal*, No. 06-10264-SSM, 2006 WL 1868513, at \*1 (Bankr. E.D. Va. June 26, 2006); Braucher, *supra* note 26, at 462.

52. *In re Donald*, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006). Similar criticism can be leveled at the entirety of the BAPCPA amendments, which are an example "of what can go wrong when an interest group uses its muscle to pass a complex piece of legislation without a careful, expert drafting process." Braucher, *supra* note 26, at 457.

53. 11 U.S.C. § 521 (2006).



through look identical to the pre-BAPCPA versions;<sup>54</sup> however, as one continues to read this section, important changes appear. Section 521(a)(2)(C) still states that “nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor’s or the trustee’s rights with regard to such property under this title,” but Congress added a caveat: “except as provided in section 362(h).”<sup>55</sup> In addition, there is an entirely new subsection, section 521(a)(6), which also discusses the debtor’s obligations with regard to secured debts.<sup>56</sup>

After section 521(a)(7), there is a new, unnumbered paragraph that explicitly gives creditors recourse to “applicable nonbankruptcy law” if the debtor fails to comply with section 521(a)(6).<sup>57</sup> The amended section 521 provides two new hurdles for a debtor who wants to ride-through: (1) the completely new section 521(a)(6) (in conjunction with the new unnumbered paragraph after section 521(a)(7)), and (2) the “except as provided in section 362(h)” caveat in section 521(a)(2)(C).<sup>58</sup>

Section 521(a)(6) and the unnumbered paragraph appear to forbid ride-through. The debtor cannot retain personal property unless he either “enters into [a reaffirmation] agreement with the

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54. The minor changes to the initial subsections of section 521 include numeration changes (so former section 521(A)(2) is now section 521(a)(2)(A)), additional duties for the debtor (and, by extension, his attorney) in section 521(a)(1), deletion of the word “consumer” before “debts which are secured by property of the estate” in section 521(a)(2), and a change in the time limit for the debtor to perform his stated intention from forty-five to thirty days in section 521(a)(2)(B). *See* § 521. While these changes are of concern to practicing bankruptcy attorneys, they do not answer the question of the status of ride-through.

55. § 521(a).

56. *Id.* (“[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 by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either: (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or (B) redeems such property from the security interest pursuant to section 722.”).

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

58. *Id.*; *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 172–73 (E.D.N.C. 2008).

creditor” or redeems the property.<sup>59</sup> The new unnumbered paragraph expressly states that if the debtor fails to exercise one of these non-ride-through options he will lose the protection of the automatic stay regarding the property, and the creditor will be free to exercise his nonbankruptcy remedies, presumably including repossession.<sup>60</sup>

Nevertheless, statutory construction involves more than a superficial reading of a statute. Courts use the “plain meaning rule” and “‘consider the context in which the statutory words are used because [courts] do not construe statutory phrases in isolation; [courts] read statutes as a whole.’”<sup>61</sup> An important aspect of section 521(a)(6) under plain meaning analysis is the inclusion of two bankruptcy terms of art: “allowed claim” and “purchase price.”<sup>62</sup> For a claim to be “allowed,” a creditor must file a “proof of claim” with the bankruptcy court.<sup>63</sup> Creditors generally do not file proofs of claim in no-asset Chapter 7 bankruptcies.<sup>64</sup> In addition, the “allowed claim” must be for the “purchase price” and “[a] plain meaning construction . . . indicates a claim for the full purchase price.”<sup>65</sup> Thus, section

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59. § 521(a)(6).

60. § 521(a); *Hardiman*, 398 B.R. at 173. While this author endorses the majority of the ride-through analysis in *Hardiman*, one flaw in the reasoning is Judge Dever’s repeated conclusion that the creditor’s nonbankruptcy options include repossession and a deficiency judgment for the unpaid balance of the debt. *See id.* at 173–74, 176. The unnumbered paragraph at the end of section 521(a) terminates the automatic stay “with respect to the personal property of the estate or of the debtor which is affected” and allows the creditor to “take whatever action as to such property as is permitted by applicable nonbankruptcy law.” § 521(a). This paragraph does not allow the creditor to take action toward the debtor during the bankruptcy. *See id.* As a result, unless the debtor executes a reaffirmation agreement or the bankruptcy court issues an order excepting this particular debt from discharge, the debtor’s pre-petition debts, including secured debts treated as ride-through and secured property surrendered to or repossessed by the creditor, are discharged at the close of his bankruptcy. *See* 11 U.S.C. § 727(b) (2006) (“Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter . . . .”); *see also In re Blakeley*, 363 B.R. 225, 231 (Bankr. D. Utah 2007) (“If the Court rejects the reaffirmation agreement, Debtor will not be liable for any deficiency in the event that Debtor defaults under the contract and the vehicle is repossessed.”); Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 719 (1999) (“[W]hile a Chapter 7 debtor’s personal liability will be discharged, a secured creditor will retain its lien on the collateral.”).

61. *Hardiman*, 398 B.R. at 167 (quoting *Ayes v. U.S. Dep’t of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006)).

62. § 521(a)(6).

63. *In re Donald*, 343 B.R. 524, 536 (Bankr. E.D.N.C. 2006).

64. *Id.* Generally, creditors do not have a reason to file proofs of claim in no-asset bankruptcies because there are no assets to distribute.

65. *Id.* (relying on the definition of “purchase price” in BLACK’S LAW DICTIONARY 1235 (6th ed. 1990) and Congress’s use of different terms, such as “purchase money

521(a)(6) is not applicable unless the secured creditor files a proof of claim, which creditors rarely do in no-asset cases, and the claim is for the full purchase price of the property, which could only occur if the debtor had made no payments on the debt prior to filing bankruptcy.<sup>66</sup>

While the relevant changes to section 521 appear to only bar ride-through in a small percentage of Chapter 7 bankruptcies, section 362(h) has more general applicability. Section 362(h)<sup>67</sup> provides

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security interest” and “any portion of the purchase price,” to indicate less than the full purchase price in other areas of the Bankruptcy Code).

66. *Id.* at 537–38. These interpretations, reading section 521(a)(6) as limited to claims for the full purchase price and requiring filed proofs of claim, are plausible. Congress might have wanted to bar the ride-through option for debtors who are presumably abusing the Bankruptcy Code by filing a petition immediately after purchasing property secured by a lien, prior to making any payments. *See In re Blakeley*, 363 B.R. 225, 229 (Bankr. D. Utah 2007). Similarly, requiring a filed proof of claim provides the court with documentation of the amount and validity of the claim as well as details about the contractual agreement between the parties, such as the existence of an ipso facto clause. *Hardiman*, 398 B.R. at 179; *see infra* note 92 (discussing ipso facto clauses). In *Hardiman*, the credit union did not file a proof of claim or have a claim for the full purchase price, so section 521(a)(6) did not apply. *In re Hardiman*, No. 07-00954-5-ATS, 2007 Bankr. LEXIS 4648, at \*10 (Bankr. E.D.N.C. Nov. 20, 2007).

67. 11 U.S.C. § 362(h) (2006). Section 362(h) states:

(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2):

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

exceptions to the general bar of abrogation of the debtor's rights by the requirements of sections 521(a)(2)(A) and (B).<sup>68</sup> This section is not limited to "allowed claims" for the full "purchase price,"<sup>69</sup> but instead applies to "personal property of the estate or of the debtor securing in whole or in part a claim."<sup>70</sup> Paragraph A requires the debtor to indicate his intention to either surrender or retain the property.<sup>71</sup> If he intends to retain, he must redeem, "enter into an agreement of the kind specified in section 524(c)," or assume a lease.<sup>72</sup> Paragraph B requires the debtor to perform his announced intention.<sup>73</sup> Ride-through is not one of the debtor's listed options here: the debtor must surrender, redeem, assume, or "enter into an agreement of the kind specified in section 524(c)."<sup>74</sup> What exactly does it mean, then, to "enter into an agreement of the kind specified in section 524(c)"?

Section 524(c)<sup>75</sup> lists requirements for valid reaffirmation agreements.<sup>76</sup> Some of these requirements differ based on whether

68. 11 U.S.C. § 521(a)(2) (2006).

69. § 521(a)(6).

70. § 362(h).

71. § 362(h)(1)(A).

72. *Id.*

73. § 362(h)(1)(B). While section 362(h) appears to require the debtor to perform one of the listed options for her secured property and the options do not include ride-through, paragraph B also apparently includes one way for ride-through to occur: the debtor does not have to perform his intention if it was to reaffirm the debt on the original contract terms and the creditor refuses to reaffirm. *Id.*; see *In re Hoisington*, 383 B.R. 369, 372 (Bankr. D.S.C. 2008) (indicating ride-through would be appropriate where the debtor indicates intention to reaffirm and the creditor refuses, but refusing to allow ride-through where the debtor's intention was "retain and pay" and the creditor refused to reaffirm). This exception would not apply to the Hardimans, whose creditor did agree to reaffirmation. *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 166 (E.D.N.C. 2008).

74. § 362(h)(1)(A).

75. 11 U.S.C. § 524(c).

76. *Id.* This section provides:

An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if:

- (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
- (2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;
- (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that:

the debtor was “represented by an attorney during the course of negotiating an agreement under this subsection.”<sup>77</sup> If an attorney assists the debtor with the agreement, section 524(c) calls for his certification that, among other things, the reaffirmation will not impose an “undue hardship” on the debtor.<sup>78</sup> If the debtor is not represented by an attorney during his negotiations with the creditor, the court must approve the agreement for it to be valid.<sup>79</sup> The court should approve the agreement if it is not an “undue hardship” and it is in the debtor’s “best interest.”<sup>80</sup>

## II. *HARDIMAN*: POST-BAPCPA RIDE-THROUGH IN ACTION

In *Coastal Federal Credit Union v. Hardiman*,<sup>81</sup> the United States District Court for the Eastern District of North Carolina was asked to interpret the effect of the BAPCPA amendments on ride-through where a reaffirmation agreement by an unrepresented debtor was rejected by the bankruptcy court.<sup>82</sup> When the Hardimans filed Chapter 7 bankruptcy on May 2, 2007, they owned a 2005 Chevrolet

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(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of:

- (i) an agreement of the kind specified in this subsection; and
- (ii) any default under such an agreement

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as:

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

77. *Id.*

78. § 524(c)(3)(B).

79. § 524(c)(6)(A).

80. *Id.* It is worth noting that neither “undue hardship” nor “best interest” is defined in the statute.

81. 398 B.R. 161 (E.D.N.C. 2008).

82. *See Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 165 (E.D.N.C. 2008).

Equinox.<sup>83</sup> This vehicle was valued at approximately \$9,000 and burdened by a lien in favor of Coastal Federal Credit Union.<sup>84</sup> The regular monthly payments on the Equinox loan were \$479.69 and approximately \$20,000 was outstanding when the Hardimans filed bankruptcy.<sup>85</sup> The Hardimans sought to keep their vehicle and entered into a reaffirmation agreement with the credit union.<sup>86</sup>

Since the Hardimans were not represented by an attorney in the negotiation of their reaffirmation agreement, the bankruptcy court was required to approve the agreement as not imposing an undue hardship and as being in the debtors' best interest.<sup>87</sup> While the reaffirmation agreement indicated that the Hardimans had \$1,390 available in their budget to pay the monthly car payment of \$479.69, their initial Chapter 7 filings indicated a deficit in their monthly budget of \$1,200.<sup>88</sup> The Hardimans told the bankruptcy judge, Judge Small, that, although it might be difficult at times, they thought they could make the payments required by the reaffirmation agreement.<sup>89</sup> In addition, the court considered the relatively large discrepancy between the fair market value of the car, approximately \$9,000, and the remaining balance of the loan that was to be reaffirmed, approximately \$20,000.<sup>90</sup> Judge Small decided not to approve the reaffirmation, finding it was an "undue hardship" and not in the debtors' best interest "[b]ecause of the uncertainty of the debtors' ability to pay and the size of the potential deficiency."<sup>91</sup>

The credit union believed that the failure of the reaffirmation agreement would result in the termination of the automatic stay and allow repossession of the Hardimans' vehicle under the "ipso facto" clause in their loan agreement.<sup>92</sup> Coastal Federal argued that the

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83. *Id.* at 165–66.

84. *Id.* at 165.

85. *Id.*

86. *Id.* at 166.

87. *Id.*

88. *In re Hardiman*, No. 07-00954-5-ATS, 2007 Bankr. LEXIS 4648, at \*3–4 (Bankr. E.D.N.C. Nov. 20, 2007).

89. *Id.* at \*3.

90. *Id.* at \*3–4.

91. *Id.* at \*4.

92. *Id.* at \*11–12. An ipso facto clause declares the borrower to be in default on a loan if he files for bankruptcy protection. *See Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 165–66 (E.D.N.C. 2008). Prior to BAPCPA, ipso facto clauses were unenforceable in the Fourth Circuit as contrary to the bankruptcy goal of a fresh start for debtors. *See Riggs Nat'l Bank v. Perry*, 729 F.2d 982, 984–85 (4th Cir. 1984). BAPCPA added section 521(d), which states that if a debtor "fails timely to take the action specified" in sections 521(a)(6) or 362(h):

Hardimans were required to reaffirm the debt to avoid the operation of section 521(d), and since the bankruptcy court refused to approve the reaffirmation, the debtors had failed to “take the action specified” and the ipso facto clause was enforceable.<sup>93</sup> Coastal Federal also claimed the bankruptcy court could not allow the Hardimans to ride-through because that option had been eliminated by BAPCPA.<sup>94</sup> In response, the Hardimans argued that sections 521(a)(2) and 362(h) only required them to “enter into an agreement,” which they had done.<sup>95</sup> The bankruptcy court agreed with the debtors, pointing out that “[t]he Code does not require the debtors to enter into a reaffirmation agreement and obtain court approval in order to comply with §§ 521(a) and 362(h).”<sup>96</sup> Therefore, the bankruptcy court held that the automatic stay remained in place, the credit union could not invoke the ipso facto clause, and, as a result, a more limited version of ride-through survived the BAPCPA changes to the Bankruptcy Code.<sup>97</sup>

Coastal Federal challenged this ruling on appeal to the district court by arguing for exceptions to the plain meaning rule.<sup>98</sup> Coastal Federal asked Judge Dever of the district court to reject the plain language of the Bankruptcy Code provisions at issue because the results of the ruling were “absurd” and contrary to congressional intent for the application of the BAPCPA amendments.<sup>99</sup> While the

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nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor.

11 U.S.C. § 521(d) (2006). So, after BAPCPA, if a debtor “fails timely to take the action specified” regarding his secured personal property, the ipso facto clause would be enforceable. *In re Hardiman*, 2007 Bankr. LEXIS 4648, at \*11 (quoting § 521(d)).

93. *In re Hardiman*, 2007 Bankr. LEXIS 4648, at \*11–12 (quoting § 521(d)).

94. *Id.* at \*5.

95. *Id.*

96. *Id.* at \*12.

97. *Id.* at \*13, 18.

98. *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 167 (E.D.N.C. 2008). By challenging the plain meaning of the BAPCPA amendments to the Bankruptcy Code, Coastal Federal took the ironic position of arguing against the wording of a piece of legislation that was initially written by creditor representatives, *see Braucher, supra* note 26, at 457, and heavily influenced by creditor lobbyists, *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).

99. *Hardiman*, 398 B.R. at 167. Although Coastal Federal argued that the bankruptcy court’s statutory interpretation was incorrect, *see* Appeal Brief for Appellant Coastal Federal Credit Union at 6, *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161 (E.D.N.C. 2008) (No. 5:08-cv-00017-D) (arguing that the bankruptcy court’s interpretation

plain meaning rule is the “cardinal canon” of statutory construction and “courts must presume that a legislature says in a statute what it means and means in a statute what it says there,”<sup>100</sup> there are “two narrow exceptions” known as the “absurd[ity]” exception and the “intent” exception.<sup>101</sup> For the absurdity exception to apply, the results of the plain meaning analysis “must be so gross as to shock the general moral or common sense.”<sup>102</sup> The intent exception applies “in rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.”<sup>103</sup> In *Hardiman*, Judge Dever acknowledged the existence of these exceptions as well as their limited applicability.<sup>104</sup>

Coastal Federal argued that Congress generally intended to eliminate ride-through in BAPCPA and sought exceptions to the plain meaning rule in various areas of Judge Small’s statutory interpretation.<sup>105</sup> Judge Dever had little trouble discarding Coastal Federal’s absurdity exception arguments as insufficient to overcome the presumption in favor of the statute’s plain language<sup>106</sup> because “it is not [the] court’s role to determine whether Congress could have done a better job in drafting BAPCPA” when the plain language result is “plausible.”<sup>107</sup>

Nevertheless, the district court also had to deal with the creditor’s intent exception arguments, which appeared to have strong

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of “entering into an agreement” pursuant to § 524(c) was “hyper-technical”), Judge Dever’s opinion treated these arguments as pleas for exceptions to the plain meaning interpretation. See *Hardiman*, 398 B.R. at 167.

100. Conn. Nat’l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

101. *In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004).

102. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930); see also *United States v. Kirby*, 74 U.S. 482, 486 (1868) (holding that a statute forbidding willful obstruction of a mail carrier did not apply when the mail carrier had been indicted for murder even though there was no express exception in the statute).

103. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); see also *Scurto v. Le Blanc*, 184 So. 167, 174 (La. 1938) (concluding that a statute allowing impeachment of a witness “in any unlawful way” was a scrivener’s error and that the legislature intended for impeachment to be lawful).

104. *Hardiman*, 398 B.R. at 167–69.

105. *Id.* at 178–88.

106. See *id.* at 179 (concluding that requiring claims to be filed with the bankruptcy court is not absurd due to the possible congressional purposes of obtaining proof of an ipso facto clause and the existence of an enforceable lien); *id.* at 180 (stating that limiting applicability of section 521(a)(6) to full purchase price is not absurd because it could “apply as written to curb the most abusive of bankruptcy practices: buying personal property on credit by taking advantage of a ‘no money down, no payments for X days’ offer, enjoying the personal property while making no payments whatsoever, and then filing for bankruptcy immediately before repossession”).

107. *Id.* at 184.



support in the legislative history of BAPCPA. While it is plausible that Congress intended to limit the applicability of section 521(a)(6) to deter the most flagrant abusers of bankruptcy protection, the legislative history of BAPCPA indicates otherwise.<sup>108</sup> House Report 31 states that BAPCPA “amends section 521(a) of the Bankruptcy Code to provide that an individual who is a chapter 7 debtor may not retain possession of personal property securing, in whole or in part, a purchase money security interest.”<sup>109</sup> This language appears to contradict those who interpret “purchase price” to mean the *full* purchase price.<sup>110</sup>

Judge Dever’s first argument against using the intent exception here—questioning if the quoted portion of House Report 31 actually “contravenes” the language of the statute because “all claims for the full purchase price will involve a purchase money security interest”<sup>111</sup>—is not entirely convincing because the “in whole or in part” language of House Report 31 does appear to directly contradict the conclusion that “purchase price” means full purchase price. Judge Dever then pointed out that House Report 31 shows that Congress knew how to indicate a claim for less than the whole purchase price but did not do so in section 521(a)(6); thus rejecting the intent exception argument, Judge Dever re-emphasized the heavy burden carried by those seeking to overcome the plain language of a statute.<sup>112</sup> To further support this conclusion, Judge Dever could have pointed out that the quoted portion of House Report 31 does not reference section 521(a)(6) specifically.<sup>113</sup> The language from House Report 31 could be in reference to section 521(a)(2), which refers to “debts which are secured by property” without mentioning the “purchase price.”<sup>114</sup>

Coastal Federal also challenged the bankruptcy court’s conclusion that the credit union cannot use the ipso facto clause

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108. H.R. REP. NO. 109-31, at 70–71 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 139.

109. *Id.*

110. See *supra* note 65 and accompanying text.

111. *Hardiman*, 398 B.R. at 180–81. Judge Dever appears to have ignored the “in whole or in part” language and focused instead on the use of “purchase money security interest,” another term of art in the Bankruptcy Code that does not require claims to be for the full purchase price. See *In re Donald*, 343 B.R. 524, 536–37 (Bankr. E.D.N.C. 2006). While Judge Dever was correct that a claim for the full purchase price would involve a purchase money security interest, a purchase money security interest securing a debt “in part” would not be for the full purchase price.

112. *Hardiman*, 398 B.R. at 181.

113. The House Report references section 521(a) without indicating specific subsections. See H.R. REP. NO. 109-31, at 70.

114. 11 U.S.C. § 521(a)(2) (2006).

under section 521(d) to repossess the vehicle under the intent exception.<sup>115</sup> House Report 31 states that BAPCPA “terminates the automatic stay with respect to personal property if the debtor does not timely reaffirm the underlying obligation or redeem the property.”<sup>116</sup> Nevertheless, Judge Dever pointed out that House Report 31 does not go into as great detail as the statute in discussing the specific operation of the BAPCPA amendments on an unrepresented debtor.<sup>117</sup> He read the legislative history as emphasizing the duty of the debtor to enter into a reaffirmation agreement and concluded that the intent argument did not overcome the substantial judicial deference given to the plain language of the statute.<sup>118</sup>

Overall, the court determined that “Coastal attempt[ed] to mix the absurdity exception, the intent exception, and the circumstances surrounding BAPCPA’s passage to concoct a ‘this is what Congress really should have done’ exception to the plain meaning rule [even though] [t]here is no such exception.”<sup>119</sup> Even if Coastal Federal’s position was more sympathetically described as supporting a “this is what it occasionally seems Congress wanted to do” exception or a weak intent exception argument, it was not “the most extraordinary showing of contrary intentions from [legislative history that] would justify a limitation on the ‘plain meaning’ of the statutory language.”<sup>120</sup> In addition, another general intent of BAPCPA was to limit judicial discretion, which encourages reliance on the plain language of BAPCPA’s provisions.<sup>121</sup>

### III. THE POTENTIAL OF POST-BAPCPA RIDE-THROUGH

The facts of *Hardiman* show that ride-through can benefit both debtors and creditors and that the doctrine is more available post-BAPCPA than many observers believe. For the Hardimans, the practical result of Judge Dever’s opinion was that they were allowed to retain possession of their car without personally guaranteeing the

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115. *Hardiman*, 398 B.R. at 187.

116. See H.R. REP. NO. 109-31, at 17.

117. *Hardiman*, 398 B.R. at 187–88.

118. *Id.* at 188.

119. *Id.*

120. *Garcia v. United States*, 469 U.S. 70, 75 (1984).

121. See *Musselman v. Ecast Settlement Corp.*, 394 B.R. 801, 812 (E.D.N.C. 2008) (rejecting a creditor’s argument against the plain language of “projected disposable income” in 11 U.S.C. § 1325(b) because Congress “also sought to impose objective standards on Chapter 13 determinations, thereby removing a degree of judicial flexibility in bankruptcy proceedings”).

loan.<sup>122</sup> While they were obligated to continue making regular payments on the loan to maintain possession, Coastal Federal's remedy in the event of a default was limited to repossession of the vehicle.<sup>123</sup> Allowing the Hardimans to keep their vehicle while freeing them from the threat of a significant deficiency judgment is consistent with the bankruptcy goal of a "fresh start."<sup>124</sup> An insolvent debtor's release from personal liability for an automobile loan provides relief from stress with a psychological "fresh start."<sup>125</sup> Further, if the Hardimans and other insolvent debtors were forced to reaffirm and become liable for the deficiency, they could conceivably be in a worse economic position post-discharge because of the Bankruptcy Code's limitations on filing a future bankruptcy.<sup>126</sup> Their "fresh start" would thus lead to a dead end.

Moreover, ride-through does not significantly harm the creditor in most situations. While Coastal Federal lost the ability to pursue a deficiency judgment against the Hardimans personally, ride-through allows the creditor to collect more than the value of the vehicle, which would not be possible if the credit union invoked the ipso facto clause and repossessed the vehicle.<sup>127</sup> Ride-through also provides an intangible benefit to the credit union from the discharge of the Hardimans' unsecured debts in their bankruptcy.<sup>128</sup> Since the bankruptcy discharge reduces their overall monthly debt payments and frees up additional money for the car payment, the Hardimans' "gain in creditworthiness may more than offset the creditor's loss of

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122. *Hardiman*, 398 B.R. at 188.

123. *Id.* The Hardimans also have to continue to meet other obligations under the lien (such as maintaining insurance) to retain possession. *Id.*

124. See *In re Wilhelm*, 369 B.R. 882, 883 (Bankr. M.D.N.C. 2007) ("Reaffirmation agreements are generally not favored by courts as they are contrary to one of the primary goals of the Bankruptcy Code: to provide a debtor with a fresh start.").

125. See Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 95 (1990) ("The [humanitarian theory of bankruptcy discharge] focuses on the need to recognize and facilitate the intrinsic self-worth of the individual debtor, a self-worth severely undermined by oppressive debt obligations.").

126. See, e.g., 11 U.S.C. § 727(a)(8) (2006) (forbidding a Chapter 7 discharge for a debtor who received a discharge within the previous eight years).

127. See Hogan, *supra* note 12, at 923. Moreover, even in cases where the debtor has decided to reaffirm, it is possible for the creditor to collect less money than it would have been paid through ride-through. See, e.g., *In re Eiler*, No. 07-26168, 2008 WL 2074043, at \*5 (Bankr. E.D. Wis. May 14, 2008) (holding that a creditor cannot collect arrearages due to error in a reaffirmation agreement, resulting in the creditor collecting less money through reaffirmation than would have been paid through ride-through).

128. See Braucher, *supra* note 26, at 476.

recourse against the debtor personally after discharge.”<sup>129</sup> Also, in subsequent ride-through situations Coastal Federal will be able to avoid the significant costs of reaffirmation<sup>130</sup> and the costs related to litigating the issue in *Hardiman*. While any creditor understandably would like the added security of the ability to collect (and threaten to collect) a deficiency personally through a reaffirmation agreement, a creditor’s position is not significantly weakened by ride-through.

In some instances, the creditor’s position is arguably improved by ride-through. This is the case, like in *Hardiman*, where the alternative to ride-through is an ipso facto clause repossession of a vehicle for which the loan balance is significantly greater than the fair market value of the vehicle.<sup>131</sup> If the district court had allowed Coastal Federal to repossess the Hardimans’ vehicle after rejecting the reaffirmation agreement, the credit union would not have been able to pursue a personal deficiency.<sup>132</sup> Ride-through enabled Coastal Federal to potentially collect over \$20,000 from the Hardimans, while repossession would have likely resulted in a collection of \$9,000 or less for the credit union. Thus, a post-BAPCPA ride-through option would benefit debtors and, at a minimum, not significantly harm creditor interests.

While Judges Dever and Small emphasized the limited nature of the new ride-through in their opinions,<sup>133</sup> on close examination and viewed in conjunction with related rulings by other courts, the new ride-through is not as limited as it may initially appear. The requirements for the new ride-through are: (1) an unrepresented debtor; (2) who attempts to reaffirm his personal property loan; (3)

129. *Id.*

130. See Hogan, *supra* note 12, at 923 (discussing the increased costs of reaffirmation under BAPCPA).

131. The Hardimans owed approximately \$20,000 on their Equinox, which was valued at about \$9,000. *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 165 (E.D.N.C. 2008). In this type of situation involving an “upside-down” loan, the creditor generally does not want to invoke the ipso facto clause and repossess because of the potential for a far larger total payment under the loan. The creditor simply wants to use the ipso facto clause to threaten the debtor with repossession and encourage him to reaffirm. See Culhane & White, *supra* note 60, at 742 (discussing how some debtors’ attorneys, “knowing that the lender does not really want to repossess,” fail to act on proposed reaffirmation agreements).

132. See *In re Blakeley*, 363 B.R. 225, 231 (Bankr. D. Utah); Culhane & White, *supra* note 60, at 719.

133. See *Hardiman*, 398 B.R. at 186 (describing post-BAPCPA ride-through as “a modified version of the fourth option that applies to certain uncounseled debtors in certain cases”); *In re Hardiman*, No. 07-00954-5-ATS, 2007 Bankr. LEXIS 4648, at \*18 (Bankr. E.D.N.C. Nov. 20, 2007) (“While ‘ride-through’ is not a stand-alone option . . . it may, in limited circumstances, occur as a result of a debtor’s attempt to reaffirm.”).

but is thwarted by a court that finds that the reaffirmation is an “undue hardship” and/or is not in the debtor’s best interest.<sup>134</sup> At first blush, these requirements appear to eliminate the majority of debtors. Most debtors file bankruptcy with the assistance of counsel.<sup>135</sup> Similarly, how often will reaffirming a loan that will allow a debtor to keep possession of a family vehicle be judged an “undue hardship”?

Upon closer examination, however, these requirements are not as limited as they appear. To take advantage of the *Hardiman* ride-through option, a debtor need not lack representation for her *entire* bankruptcy; her attorney simply cannot help her negotiate the reaffirmation agreement.<sup>136</sup> A debtor’s attorney can represent her client in all aspects of the bankruptcy case other than the negotiation of the reaffirmation agreement and the debtor will still be considered “unrepresented” for the purposes of ride-through.<sup>137</sup> The Hardimans had the assistance of counsel in their initial bankruptcy filing,<sup>138</sup> in their reaffirmation hearing in the bankruptcy court,<sup>139</sup> and on appeal to the district court.<sup>140</sup> So, the potential to be an “unrepresented” debtor for purposes of the ride-through is available to all debtors.

The *Hardiman* ride-through may also be available to debtors who are represented in their reaffirmation negotiations. In *In re*

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134. See *Hardiman*, 398 B.R. at 165–67.

135. Ed Flynn & Phil Crewson, *Data Show Trends in Post-BAPCPA Bankruptcy Filings*, AM. BANKR. INST. J., July/Aug. 2008, at 14, 14, available at [http://www.justice.gov/ust/eo/public\\_affairs/articles/docs/2008/abi\\_200808.pdf](http://www.justice.gov/ust/eo/public_affairs/articles/docs/2008/abi_200808.pdf) (reporting that less than six percent of 2007 Chapter 7 filings were pro se).

136. See 11 U.S.C. § 524(c)(6)(A) (2006); *In re Roberts*, 154 B.R. 967, 969 (Bankr. D. Neb. 1993) (“Reaffirmation hearings are not required as a condition to the enforceability of a reaffirmation agreement unless . . . the debtor is not represented by counsel . . .”).

137. See § 524(c)(6)(A) (“[I]n a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection . . .”).

138. *In re Hardiman*, 2007 Bankr. LEXIS 4648, at \*2–3.

139. *Id.* at \*3.

140. See Supplemental Appeal Brief for Appellee at 9, *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161 (E.D.N.C. 2008) (No. 5:08-cv-00017-D). While the legal strategy of not having the debtor’s attorney participate in reaffirmation negotiations worked in *Hardiman* and was apparently not questioned by the bankruptcy or district courts, this strategy is not without risks. At least one bankruptcy court has sanctioned the debtor’s attorney for failing to participate in reaffirmation negotiations on behalf of his client. See *In re DeSantis*, 395 B.R. 162, 167–72 (Bankr. M.D. Fla. 2008). Debtors’ attorneys planning to attempt a *Hardiman* ride-through, especially those in the Middle District of Florida, would be advised to delete the reference to assisting their clients with reaffirmation agreements from their standard client contracts and explain to the court their reasons for refusing to participate in negotiations. See *id.* at 165–66 (“The Law Firm never explained why the debtors would choose to represent themselves in these somewhat questionable and difficult reaffirmation negotiations when the debtors already had paid the Law Firm for this service.”).

*Donald*,<sup>141</sup> where the argument that was ultimately successful in *Hardiman* was previously made, there was some question whether the debtors were represented in the reaffirmation negotiations, but the court assumed they were not because neither party pressed the issue.<sup>142</sup> Nevertheless, *In re Donald* stated generally that, “if the reaffirmation agreement does not contain the attorney’s certification, the agreement is not enforceable unless there is also a motion for court approval, in which case a hearing will be scheduled.”<sup>143</sup> At this hearing the debtors will have the opportunity to argue against approval of their reaffirmation as the Hardimans did.<sup>144</sup> In addition, after BAPCPA the Bankruptcy Code requires the court to review any reaffirmation agreement that does not show sufficient income to make the required payments, regardless of the debtor’s representation.<sup>145</sup> Therefore, in light of related bankruptcy court rulings, the limitation of the *Hardiman* ride-through to unrepresented debtors does not exclude many debtors, regardless of the status of their counsel.

Similarly, the requirements that the reaffirmation agreement represent an “undue hardship” and not be in the debtor’s best interest may appear difficult to meet, but are not in practice. In *Hardiman*, the reaffirmation agreement was rejected even though the agreement showed plenty of available money for the payments, and the debtors testified that they thought they could afford the payments.<sup>146</sup> Convincing a bankruptcy court that a reaffirmation is an unnecessary burden is easier if the alternative is a ride-through.<sup>147</sup> If a ride-through will be allowed after the reaffirmation agreement is rejected, the bankruptcy judge must decide which alternative is better

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141. 343 B.R. 524 (Bankr. E.D.N.C. 2006).

142. See *Donald*, 343 B.R. at 527.

143. *Id.*; accord *In re Mendoza*, 347 B.R. 34, 41 n.13 (Bankr. W.D. Tex. 2006) (“The lack of a[n attorney’s] signature is the equivalent of the debtor being unrepresented.”).

144. *In re Hardiman*, No. 07-00954-5-ATS, 2007 Bankr. LEXIS 4648, at \*3 (Bankr. E.D.N.C. Nov. 20, 2007).

145. See 11 U.S.C. § 524(m) (“[I]t shall be presumed that such agreement is an undue hardship on the debtor if the debtor’s monthly income less the debtor’s monthly expenses as shown on the debtor’s completed and signed statement in support of such agreement . . . is less than the scheduled payments on the reaffirmed debt.”); *In re Laynas*, 345 B.R. 505, 512 (Bankr. E.D. Penn. 2006) (“Now, under new § 524(m)(1), courts must review and decide whether to disapprove an agreement in which a presumption of undue hardship arises, regardless whether the debtor’s counsel participated in the formation of the reaffirmation agreement or properly counseled the debtor about the potential benefits and pitfalls of reaffirmation.”).

146. *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 166 (E.D.N.C. 2008).

147. See Hogan, *supra* note 12, at 919 n.273. This argument was also made to the court in *Donald*. See *Donald*, 343 B.R. at 526.

for the debtor.<sup>148</sup> The judge will be faced with two alternatives that will likely differ in only one respect: if the reaffirmation is approved, the debtor will have personal liability to the creditor, and if the agreement is not approved, he will not. Under either outcome, the debtor will continue paying the creditor on the same or similar terms as the original agreement and retain possession of the secured property.<sup>149</sup> Requiring a debtor to personally guarantee a debt to receive the same benefits he would receive without the personal guarantee is “undue hardship,” at least in the “unnecessary” sense. Nevertheless, even if the judge believes a reaffirmation would not qualify as an “undue hardship,” the second half of the test, where the judge must certify that the agreement is in the best interests of the debtor,<sup>150</sup> should lead to the rejection of the reaffirmation. This standard does not look at the interests of the creditor at all, and it is “[c]ertainly . . . in the best interest of the Debtor to be free from liability on a deficiency in the event that the vehicle is repossessed and sold for a deficiency.”<sup>151</sup> Therefore, the “limited” ride-through available after the BAPCPA amendments in *Hardiman* is not necessarily as limited as it may appear.<sup>152</sup> The Bankruptcy Code requires court approval of reaffirmation agreements when the debtor is unrepresented in negotiations,<sup>153</sup> the debtor’s attorney refuses to sign the agreement,<sup>154</sup> or the reaffirmation agreement does not show

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148. See *In re Blakeley*, 363 B.R. 225, 227 (Bankr. D. Utah 2007) (“For purposes of determining whether approval of the reaffirmation agreement is in the best interest of the Debtor, the Court will examine, from the Debtor’s point of view, whether the Debtor is better off with the reaffirmation agreement approved or denied by the Court.”).

149. A creditor’s ability to demand better reaffirmation terms than were in the original loan agreement is limited by a debtor’s statutory right to avoid performing his intention to reaffirm if the creditor refuses to reaffirm on the same terms as the original loan. 11 U.S.C. § 362(h)(1)(B).

150. *Id.* § 524(c)(6)(A)(ii).

151. *Blakeley*, 363 B.R. at 231.

152. In addition to the *Hardiman* ride-through, there are other ways to ride-through under the current Bankruptcy Code. A creditor may allow a ride-through even if it is not required. See Braucher, *supra* note 26, at 462–63. An unwise creditor could refuse to reaffirm on the original contract terms. See § 362(h)(1)(B). The failure of a creditor to provide the debtor with the statutorily required notices can result in a ride-through. See *In re Quintero*, No. 06-40163, 2006 WL 1351623, at \*2–3 (Bankr. N.D. Cal. May 17, 2006). A creditor’s acceptance of payments without a reaffirmation can be construed as a waiver of the right to oppose ride-through. See Braucher, *supra* note 26, at 477. Finally, a reaffirmation agreement might not be signed or filed prior to the debtor’s discharge. See Decision and Order Regarding Reaffirmation Agreement at \*1, *In re Herrera*, 2007 WL 4411258 (Bankr. W.D. Tex. 2007). Thus, it seems fair to say that the demise of ride-through under BAPCPA has been greatly exaggerated.

153. § 524(c)(6)(A).

154. *In re Donald*, 343 B.R. 524, 527 (Bankr. E.D.N.C. 2006).

income sufficient to pay the debt.<sup>155</sup> If the court subsequently determines that the debtor may have trouble making the payments required by the reaffirmation agreement or a default would result in a significant deficiency, the court should disapprove the agreement and allow ride-through.<sup>156</sup>

### CONCLUSION

In *Coastal Federal Credit Union v. Hardiman*, the opinion of the United States District Court for the Eastern District of North Carolina concluded that the ride-through option for personal property in a Chapter 7 bankruptcy had not been completely removed from the Bankruptcy Code by the BAPCPA amendments.<sup>157</sup> *Hardiman* endorses a limited ride-through option when the bankruptcy court finds a reaffirmation agreement is not in an unrepresented debtor's best interest and/or is an undue hardship. In addition, the *Hardiman* ride-through appears to be available to represented debtors and a strong argument can be made that it will always be in the debtor's best interest. The relationship of ride-through to a debtor's "fresh start," the lack of significant harm to creditors, and the imprecise drafting of the BAPCPA amendments may lead to more wide-spread availability of the "limited" option discussed in *Hardiman*. While post-BAPCPA ride-through may not be available to all debtors, the potential for this debtor-friendly option should be examined by bankruptcy practitioners prior to advising their clients to resume liability for personal property debts.<sup>158</sup>

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155. § 524(m).

156. *In re Hardiman*, No. 07-00954-5-ATS, 2007 Bankr. LEXIS 4648, at \*4 (Bankr. E.D.N.C. Nov. 20, 2007).

157. See *Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 165 (E.D.N.C. 2008).

158. No circuit court has ruled on the viability of post-BAPCPA ride-through in a situation similar to that in *Hardiman*. In a case decided January 11, 2010, a Fourth Circuit panel acknowledged the recognition by some courts of the type of ride-through used by the Hardimans, but had "no occasion to address the 'back door ride-through'" since the debtor did not attempt to reaffirm. See *In re Jones*, 591 F.3d 308, 312 n.3 (4th Cir. 2010).