A HISTORY OF THE AUTOMOBILE LENDER PROVISIONS OF BAPCPA

*William C. Whitford**

In BAPCPA, the automobile lenders won a dramatic curtailment of lien stripping of auto loans in chapter 13 proceedings. After reviewing this and other BAPCPA provisions affecting auto lenders, the author concludes that automobile lenders probably will benefit from BAPCPA more than most other creditor groups, including the credit card interests who played such a substantial role in securing enactment of the legislation.

The author then provides a political and legislative history of BAPCPA provisions affecting automobile lenders, drawing on numerous sources, including interviews with participants in the process. When new bankruptcy legislation was first considered by the National Bankruptcy Review Commission, automobile lender interests did not seek restriction of lien stripping in chapter 13, nor was such a proposal contained in the first bills introduced in Congress. The idea was added to the legislation in May 1998, by adoption of an amendment offered by Senator Spencer Abraham of Michigan during Senate Judiciary Subcommittee proceedings. The author speculated that other creditor groups were surprised by this amendment, which was not in their interest, but decided not to oppose it in order to maintain the apparent unity of a broad creditor coalition supporting the legislation. Later in the legislative process the limitations of lien stripping that had been proposed by Senator Abraham were scaled back modestly, but at the behest of debtor interests and without the active support of creditor interests whose interests are compromised by the limitations of lien stripping.

The article concludes with speculation about why the various interests lobbying for the legislation acted as they did, whether the content of BAPCPA would be different if these interests had acted differently, and what the future might bear. Finally the author offers a few

* Emeritus Professor of Law, University of Wisconsin. Whitford@mailplus.wisc.edu. I am grateful for valuable research assistance from Bonnie Cosgrove and Michael Lauterbach, both of whom received a J.D. degree from Wisconsin Law School in May 2006. I am thankful for the time and cooperation of the many persons who agreed to be interviewed and provided information for this article. I received helpful comments on earlier drafts from Jean Braucher, David Carlson, Kenneth Doran, Lynn LoPucki, Scott Norberg, and one reader who wishes to remain anonymous. All errors are mine alone.

comments about the lessons of this experience for how bankruptcy policy should be made.

In this article I will discuss the changes made by the Bankruptcy Abuse Prevention and Consumer Prevention Act (BAPCPA) of 2005[1] to the rights of auto lenders. Auto lenders comprise the group of secured creditors whose rights have been most substantially affected, mostly favorably, by the new law. Moreover, the change that most benefits the auto lenders, the limitation of cramdown in chapter 13,[2] is one of the changes made by the consumer bankruptcy provisions of BAPCPA that most alters the fundamental structural principles of the former law.

The history that I most want to provide is a political history—an account of how and why the changes came to be. In the course of this account I will discuss in some detail the legislative process, including different versions of the provisions under discussion that were contained in various bills. There are many ambiguities in both the current legislation and its predecessor drafts, but it is not the intent of this article to explore how these ambiguities might be interpreted. Nor do I expect, in this day when textualism appears to reign supreme in the interpretation of bankruptcy statutes, that the political history that I provide will be much help in the interpretation of these ambiguities. I will discuss near the end of this article possible utilities for the kind of political history that I provide.

I. THE STATUS OF THE AUTO LENDER UNDER THE PREVIOUS LAW

Under the old law an auto lender almost invariably preferred a chapter 7[3] proceeding to a chapter 13[4] proceeding. The auto lender is typically undersecured, meaning that in chapter 7 the bankruptcy trustee typically asserted no interest in the collateral.[5] Even where the auto lender was oversecured (meaning that the value of the collateral exceeded the amount owing to the lender), the debtor's equity in the collateral was commonly protected by exemption laws.[6] As a result the trustee had no interest in the collateral, and within a reasonable time after filing the auto lender could repossess the collateral.[7] Aware of this ca-

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

2. *See* Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 478 (2006).

3. 11 U.S.C. §§ 701–784 (2000 & Supp. III 2003).

4. *Id.* §§ 1301–1300 (2000 & Supp. III 2003).

5. Technically, the trustee abandoned the collateral, as representing no value to the bankruptcy estate. CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY 545 (1997).

6. *See, e.g.*, W. VA. CODE § 38-10-4 (2005).

7. If the trustee had no interest in the collateral, the auto lender could request relief from the automatic stay. 11 U.S.C. § 362(d)(2) (2000). However, to save paperwork and court costs, it was more common to wait for the discharge to be granted—usually a period of three to six months—at which time the automatic stay terminated for property in which the trustee asserted no interest. *Id.* § 362(c)(2)(C). In the rare cases in which the trustee had an interest in the car, the debtor was often

pacity, sometime after filing debtors commonly agreed to reaffirm their debt to the auto lender, in return for the lender's agreement not to repossess the vehicle.[8] Many auto lenders refused to relinquish their repossession rights, however, unless the debtor signed a reaffirmation agreement for the entire amount owing, at no less than the contract rate of interest.[9] Even in the common situation in which the value of the collateral was less than the amount owing (that is, the lender was undersecured), the debtor would very often agree to pay the entire amount owing.[10] This is because the debtor's value in her vehicle is commonly greater than whatever market value is assigned to the collateral, for any of several possible reasons. One important reason is that the debtor, with an impaired credit rating, can expect difficulty replacing a repossessed vehicle with a vehicle of similar quality.[11]

Therefore, in the majority of cases an auto lender emerged from chapter 7 either with the collateral or with a reaffirmation for the entire amount owing, including any deficiency.[12] By contrast, in chapter 13 the auto lender was rarely able to repossess the collateral, and would be paid the entire amount owing only if fortunate enough to be oversecured at the time of filing.[13] Relief from the automatic stay could rarely be obtained because continued possession of the vehicle by the debtor was al-

---

allowed to pay the trustee the excess of the equity value over the exemption amount, to prevent the trustee from selling the car for the benefit of the estate. Once again, the secured creditor could repossess the car once the automatic stay terminated at discharge with respect to the debtor's property. *Id.* Finally, if the trustee did force a sale of the car, the auto lender's security interest guaranteed that the lender would receive its principal from the estate. The lender in these circumstances was also usually paid interest, at the contract rate, from the date of filing until receipt of sale proceeds. *See* William C. Whitford, *Secured Creditors and Consumer Bankruptcy in the United States*, 37 OSGOODE HALL L.J. 339, 344–45, 349–50 (1999).

8. *See, e.g.*, W. Va. Office of the Att'y Gen., What Are My Legal Rights During and After Bankruptcy?, http://www.wvs.state.wv.us/wvag/faq/consumer/bankruptcy_legalrights.htm (last visited Sept. 24, 2006) (noting the option to reaffirm debt after filing bankruptcy to keep possession of an automobile).

9. In a situation in which the debtor was unwilling to reaffirm for the full amount owing, but would reaffirm for a lesser amount that still exceeded the amount the creditor would realize after repossession, a creditor would have a short-term interest in agreeing to a reaffirmation at the lesser amount. Many auto lenders, however, adopted a policy of reaffirming only for the full amount owing, perhaps to establish bargaining credibility in other negotiations. Reaffirmations were commonly negotiated by bankruptcy attorneys representing debtors, and as repeat players they would often have knowledge of the usual bargaining stances of auto lenders. Hence the rationality for auto lenders to invest in their reputation by occasionally taking a pass on a reaffirmation offer that would otherwise be profitable for them.

10. Whitford, *supra* note 7, at 352.

11. *Id.*

12. An important limitation on auto lenders' rights in chapter 7 was ride through, discussed at *infra* notes 42–50 and accompanying text. It also appears that many auto lenders who negotiated reaffirmation agreements did not file them with the bankruptcy court, as required by 11 U.S.C. § 524 (2000). The practical effect of not filing agreements, in cases where the debtor received a chapter 7 discharge, was that the lender could not collect any deficiency if it later repossessed the vehicle. However, the lender could still repossess the vehicle if the debtor did not abide by the unfiled reaffirmation agreement. *See* Marianne B. Culhane & Michaela M. White, *Debt After Discharge: An Empirical Study of Reaffirmation*, 73 AM. BANKR. L.J. 709, 738–44 (1999).

13. Whitford, *supra* note 7, at 345.

most always deemed essential to success of the plan.[14] If the auto lender was undersecured, a very common circumstance, the standards for confirmation of the plan provided only that a secured creditor receive the value of the collateral at the time of filing (called the "allowed secured claim"), plus interest.[15] The balance of the amount owing, the deficiency, was deemed an unsecured claim—the creditor's claim was said to be "bifurcated."[16] As a result, in a chapter 13 case a debtor with collateral worth less than the entire amount owing could obtain release from a security interest by paying only the allowed secured claim, a process called "lien stripping" or "cramdown."[17] Contrast that process with chapter 7, where a debtor normally needed to reaffirm the entire amount owing in order to keep the collateral.[18] To make matters worse, the statute did not specify what interest rate was to be paid on deferred payments in chapter 13.[19] Secured creditors preferred the contract rate, and many courts required the contract rate as a condition of a chapter 13 plan confirmation.[20] However, other courts permitted the debtor to pay a lesser interest rate.[21] The proper interest rate was in continual litigation until 2004, just months before the enactment of BAPCPA, when the U.S. Supreme Court, in *Till v. SCS Credit Corp.*,[22] rejected, 5-4, the auto lenders' preference for the contractual rate.[23] Instead, the Court chose to endorse a formula for choosing the interest rate—the prime rate plus an upward adjustment for risk—that usually provides a considerably lower interest rate.[24]

The two preceding paragraphs describe the most important differences that existed between chapter 7 and chapter 13 cases from the perspective of an auto lender, but there are many other details that must be

14. Often this was because the debtor needed the vehicle to get to work. However, even when that was not the case, courts sustained the idea that the debtor's commitment to continue with the plan was dependent on retention of the collateral. Relief from the automatic stay could only be obtained, therefore, if the secured creditor was not provided adequate protection. As a practical matter, this meant that the debtor needed to maintain insurance on the vehicle and, in most districts, make payments to an undersecured creditor that at least equaled any decline in the value of the collateral over time. *Id*. at 351.

15. 11 U.S.C. § 1325(a)(5)(B) (2000). Alternatively, under the plan the debtor could surrender the collateral to the secured creditor, as sometimes happened. *Id.* § 1325(a)(5)(C).

16. Whitford, *supra* note 7, at 345.

17. The creditor was entitled to share pro rata with other unsecured creditors on its deficiency claim, but under most chapter 13 plans unsecured creditors received less than full payment even if the plan was completed. *See* Norberg & Velkey, *supra* note 2, at 523–25.

18. *See supra* notes 8–11 and accompanying text.

19. The statutory language required determination of the present value of the payments under the plan on account of the secured claim. 11 U.S.C. § 1325(a)(5)(B). There was no statutory provision for how to determine this present value, which requires a discounting of the future payments by a presumed interest rate. *See* TABB, *supra* note 5, at 940–41.

20. *See* Green Tree Fin. Servicing Corp. v. Smithwick (*In re* Smithwick), 121 F.3d 211, 214 (5th Cir. 1997); Gen. Motors Acceptance Corp. v. Jones, 999 F.2d 63, 70–71 (3d Cir. 1993).

21. *See* Gen. Motors Acceptance Corp. v. Valenti (*In re* Valenti), 105 F.3d 55, 64 (2d Cir. 1997).

22. Till v. SCS Credit Corp., 541 U.S. 465 (2004).

23. *Id.* at 471, 477.

24. *See id.* at 478–81.

noted to explain the significance of changes made by BAPCPA. One important detail concerns the standards for valuing collateral.[25] Under the 1978 Code, the statutory standard for valuation was left deliberately vague.[26] With respect to motor vehicles as collateral for consumer loans, courts around the country reached varying results, with some applying a wholesale market value, others a retail market value, and many choosing some point between these values.[27] Standard reference books widely used in the industry—so-called blue books—provide the wholesale and retail market values in different locations for vehicles in good condition.[28] In 1997, just before Congress began considering bankruptcy reform, the Supreme Court addressed the valuation issue in the context of a chapter 13 case, *Associates Commercial Corp. v. Rash*,[29] and ruled in favor of a "replacement value" standard.[30] However, the opinion was vaguely worded. The replacement value standard seems to suggest use of the retail value figure in blue books, but the Court indicated that account needed to be taken "of items the debtor does not receive when he retains his vehicle, items such as warranties, inventory storage, and reconditioning."[31] Faced with this concern, many courts took, as a matter of practice, an average of the retail and wholesale figures, a position widely adopted before the *Rash* decision as well.[32]

The valuation standard was important in pre-BAPCPA chapter 13 cases because it set the amount that had to be paid to an unsecured auto lender.[33] In a less important way, the valuation standard affects some chapter 7 cases as well. Debtors in chapter 7 have the right to redeem the collateral from the security interest by paying the "allowed secured claim,"[34] an amount which is established by the valuation standard for collateral when the creditor is undersecured. The Court's opinion in *Rash* was unclear as to whether the replacement standard it set for chapter 13 cases should also be applied in chapter 7 redemption cases; many courts decided to apply a wholesale value standard in chapter 7 con-

25. 11 U.S.C. § 506(a) (2000).

26. TABB, *supra* note 5, at 549–50 ("Congress consciously decided *not* to decide . . . [who] should capture the difference between liquidation value and going concern value . . . .").

27. The conflicting decisions are discussed in *id.* at 549–53, and in the Supreme Court decision in *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 959 (1997).

28. Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After* Rash, 102 DICK. L. REV. 763, 779 (1998). Adjustments to the market values provided by the blue books were allowed for the particular condition of the vehicle concerned, which more often than not was deemed in worse condition than the reference books presumed.

29. *Rash*, 520 U.S. 953.

30. *Id.* at 964–65.

31. *Id.* at 965 n.6.

32. There is irony in this result because the Court specifically rejected the split-the-difference solution in its *Rash* decision. *Id*. at 964–65. For an excellent discussion of the many interpretive issues raised by the vague opinion in *Rash*, see Braucher, *supra* note 28.

33. 11 U.S.C. § 1325(a)(5)(B) (2000) required that the present value of chapter 13 plan payments be "not less than the allowed amount of [the secured] claim," an amount determined by the valuation standard. *See* TABB, *supra* note 5, at 941–42; *supra* text accompanying note 15.

34. 11 U.S.C. § 722 (2000).

texts.[35] However, courts have usually interpreted the redemption provision to require payment in a lump sum.[36] Historically, few debtors initially filing a chapter 7 case were able to pay even this lower amount.[37] Over the past decade, a growing redemption-financing industry emerged, providing debtors loans which enabled redemption at a wholesale value standard. In return, the financer gained a security interest in the vehicle, relieved of its prior security interest as a result of a redemption for less than the full amount owing.[38] The redemption provision in chapter 7 sometimes became part of a lien stripping strategy in another way as well. Sometimes debtors filed successive chapter 13 and chapter 7 cases—referred to colloquially as a "chapter 20." In most bankruptcy districts, debtors were allowed to provide in a chapter 13 plan that secured creditors be paid before any payments were made to unsecured creditors.[39] Once the allowed secured claim on a motor vehicle was paid off, the debtor could convert the proceeding to a chapter 7, in which the formerly secured creditor would have only a readily dischargeable, unsecured claim for a deficiency.[40] Alternatively, a debtor could convert the chapter 13 case to chapter 7 at a time when the amount still owing on the allowed secured claim was sufficiently low that the debtor could afford to redeem the collateral by lump sum payment.[41]

Although secured creditors were generally better off when the debtor initially selected a chapter 7 case, in many parts of the country they faced one difficulty called "ride through." "Ride through" meant that a debtor who was current on payments at the time of filing could retain the collateral so long as the debtor maintained payments according to the contractual schedule.[42] This result bothered auto lenders. The discharge effectively converted the original loan to a nonrecourse loan, because the discharge obviated the debtor's personal liability on the loan; she could not be sued for any deficiency if default and repossession oc-

35. Triad Fin. Corp. v. Weathington (*In re* Weathington), 254 B.R. 895 (B.A.P. 6th Cir. 2000); *see* 6 COLLIER ON BANKRUPTCY ¶ 722.05[1] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006).

36. *See, e.g.*, Gen. Motors Acceptance Corp. v. Bell (*In re* Bell), 700 F.2d 1053, 1055, 1057–58 (6th Cir. 1983); *see also* TABB, *supra* note 5, at 559–60.

37. TABB, *supra* note 5, at 559–60; Barkley Clark et al., *"Rent-to-Own" Agreements in Bankruptcy: Sales or Leases?*, 2 AM. BANKR. INST. L. REV. 115, 140–41 (1994).

38. *See, e.g.*, 722 Redemption Funding, Inc., Redemption Program, http://www.722redemption.com/debtor__redemption.aspx (last visited Oct. 2, 2006).

39. 8 COLLIER ON BANKRUPTCY, *supra* note 35, ¶ 1322.08.

40. Conversion to chapter 7 is authorized by 11 U.S.C. § 1307(a) (2000).

41. Any payments to the secured creditor made through a chapter 13 plan were generally accompanied by a trustee's fee of ten percent or more, making it cheaper to pay off the allowed secured claim though redemption under chapter 7 when that became a viable option. Redemption payments are made directly to the creditor and not through any trustee's account. The value of a secured claim in chapter 7 when the case was converted from chapter 13 was based on the value of the collateral at the time of the original chapter 13 filing less any payments made to the secured creditor through the chapter 13 plan. 11 U.S.C. § 348(f).

42. 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, 474–78 (2005).

curred subsequently. Auto lenders preferred that the debtor reaffirm her obligation for the entire amount owing as a precondition to keeping the collateral after a bankruptcy filing, because reaffirming the obligation would make the debtor personally liable for any deficiency if repossession later occurred. Lenders were able to achieve this result in many jurisdictions because of the provisions in the Code requiring debtors to file a statement, within thirty days of filing a chapter 7 case, indicating whether they intended to surrender collateral, redeem it, or reaffirm debts secured by the property,[43] and specifying another period in which debtors were to perform their stated intentions.[44] "Ride through" was not listed as an option. Many courts interpreted the provision as entitling the secured creditor to relief from the stay if the debtor failed to perform his or her stated intention.[45] If relief from the stay was available, the secured creditors could normally persuade the debtor to reaffirm for the entire amount owing, for reasons explained above.[46] However, the statute failed to specify the consequences of the failure to perform a stated intention, or to specifically exclude the possibility of ride through. Five circuit courts relied on these omissions to permit the practice of ride through to continue for debtors not in default at the time of filing.[47]

II. THE STATUS OF THE AUTO LENDER UNDER BAPCPA

In this Part, I will describe the changes made by BAPCPA that affect the position of an auto lender in a consumer bankruptcy. I will begin with the sections which represent a clear improvement in the auto lender's position, then turn to provisions which may compromise that position, and conclude with an overall assessment of BAPCPA from the perspective of the auto lender. Commentators have often observed that BAPCPA contains many provisions presenting interpretive difficulties.[48] I will note some but not all of the interpretive difficulties contained in the provisions that I discuss. For the most part I adopt the interpretation that I believe reflects the self-evident legislative intention.

43. 11 U.S.C. § 521(2)(A) (current version at 11 U.S.C.A. § 521(a)(2)(A) (West 2006)).

44. *Id.* § 521(2)(B) (current version at 11 U.S.C.A. § 521(a)(2)(B) (West 2006)).

45. *See, e.g.*, BankBoston, N.A. v. Claflin (*In re* Claflin), 249 B.R. 840, 849 (B.A.P. 1st Cir. 2000); *see also infra* note 47.

46. However, even in circuits that did not formally allow ride through, auto lenders would frequently fail to file reaffirmation agreements with the bankruptcy court, rendering them unenforceable. The practical effect was to establish a practice of informal ride through. *See supra* note 12.

47. The competing interpretations of § 521(2) under the old Code are detailed in TABB, *supra* note 5, at 139. A listing of leading pre-BAPCPA circuit court decisions permitting or rejecting ride through is provided in Braucher, *supra* note 42, at 461 n.17.

48. *E.g.*, Henry J. Sommer, *Trying to Make Sense out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005).

A. Improvements in the Auto Lender's Position

1. Limitation on Cramdown in Chapter 13

The most important provision affecting the position of the auto lender was clearly intended to limit the availability of cramdown against the undersecured auto lender in chapter 13. More particularly, the provision limiting cramdown appears to provide that to qualify for confirmation, a chapter 13 plan must provide for payment of the entire amount owing, plus interest, to any secured creditor who makes a purchase money loan within 910 days of filing[49] (called a 910-day lookback period) and takes as collateral a motor vehicle acquired by the debtor for "personal" purposes.[50] If the debt is older than 910 days at filing, the traditional cramdown rules apply.[51] If the vehicle is acquired for purposes other than "personal" purposes, the availability of cramdown is limited only if the debt was incurred within one year of filing (called a one-year lookback period).[52] This same one-year rule applies to purchase money secured claims where the collateral is anything other than motor vehicles.[53]

There remains ambiguity at the time of this writing whether this provision of BAPCPA will have its intended effect because of its peculiar wording.[54] The provision is an otherwise unnumbered paragraph (sometimes called the "hanging" paragraph) at the end of § 1325(a).[55] It provides that "section 506 shall not apply" to the secured claims described in the preceding paragraph.[56] Section 506 defines the "allowed secured claim" as the lower of the amount owed or the value of the collateral.[57] However, the hanging paragraph does not provide a substitute definition of "allowed secured claim" for the definition provided in § 506, and § 1325(a)(5), defining the prerequisites to chapter 13 confirmation with respect to secured claims, uses that term. This interpretive difficulty has been noted before, with very respectable scholars suggesting interpretations, based on the prevailing textualist traditions for interpreting the Bankruptcy Code, that allow continuation of the lien stripping of all un-

49. Nine hundred ten days is two years, six months, less two or three days (depending on whether there is a leap year involved).

50. *See* BAPCPA, Pub. L. No. 109-8, § 306(b), 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a)).

51. This means that the undersecured auto lender's claim is bifurcated, the creditor is entitled only to the value of the collateral, plus interest, on account of the creditor's "allowed secured claim," and the secured creditor shares pro rata with other unsecured creditors on any deficiency. 11 U.S.C.A. § 506(a)(1) (West 2006); *see supra* notes 15–16 and accompanying text.

52. BAPCPA § 306, 119 Stat. at 80.

53. *Id.*

54. Braucher, *supra* note 42, at 469–70.

55. BAPCPA § 306(b).

56. *Id.*

57. 11 U.S.C.A § 506(a)(1) (West 2006).

dersecured claims in chapter 13.[58] Courts will surely struggle with this provision,[59] and I cannot be certain about its ultimate interpretation. Nonetheless, for the balance of this article I will presume that the courts will come to some interpretation that is consonant with the provision's obvious intent to limit cramdown in chapter 13 when the proceeding is filed within 910 days, or in some cases one year.

There are other interpretive difficulties presented by the section as well. Importantly, the longer 910-day lookback period applies only to vehicles acquired for "personal" purposes.[60] The Code typically uses the phrase "primarily for personal, family or household" use when identifying property acquired for consumer purposes.[61] This raises the question of whether the 910-day lookback period applies only to vehicles acquired for personal, as opposed to family or household, use. If so, bifurcation of secured claims for vehicles acquired for the latter purposes would be limited to only a one-year lookback period.[62] There is also no guidance concerning whether the longer or shorter lookback period applies to vehicles acquired for mixed business and personal (or perhaps family and personal) use, or to vehicles acquired exclusively for personal or business purposes and then converted to another single or mixed use.[63] Still another interpretive difficulty is whether an auto lender coming within the 910-day period retains an unsecured claim for the deficiency when, pursuant to a chapter 13 plan, the debtor surrenders the collateral.[64] It is highly unlikely that the drafters intended an auto lender to forfeit the deficiency in this circumstance, but there is a sound textual argument, now supported by a well-reasoned court decision, that a debtor's surrender of the collateral satisfies the full claim even though the value of the collateral when surrendered is clearly less than the amount owed.[65] It is unclear at the time of this writing to what extent the interpretive difficulties outlined in this paragraph will limit the impact of the provision limiting cramdown.

58. 8 COLLIER ON BANKRUPTCY, *supra* note 35, ¶ 1325.06[1][a]; Braucher, *supra* note 42, at 471–74.

59. Not surprisingly, the early decisions are conflicting. *Compare In re* Carver, 338 B.R. 521, 528 (Bankr. S.D. Ga. 2006) (allowing bifurcation of secured claims within the 910 day lookback period), *with In re* Johnson, 337 B.R. 269, 273 (Bankr. M.D.N.C. 2006) (no bifurcation).

60. BAPCPA § 306(b).

61. *See* 11 U.S.C. §§ 365(d)(10), 722 (2000); BAPCPA § 231(b), 119 Stat. at 73 (codified at 11 U.S.C. § 101(41A)).

62. *See* BAPCPA § 306(b).

63. These interpretive difficulties are explored in Braucher, *supra* note 42, at 470.

64. Surrender of the collateral through a plan is an alternative method to satisfy the chapter 13 confirmation prerequisites with respect to secured claims. 11 U.S.C. § 1325(a)(5)(C).

65. *In re* Ezell, 338 B.R. 330, 333 (Bankr. E.D. Tenn. 2006). Amicus curiae briefs were filed on both sides in this case, including one by the National Association of Consumer Bankruptcy Attorneys.

2. *Eliminating Chapter 20s*

A series of related provisions are intended to improve the status of secured creditors generally (not just auto lenders) when a chapter 13 plan is not completed. The creditor's security interest in any collateral remains valid until the entire amount owing to the creditor is paid in chapter 13, even if there has been full payment of the amount of the allowed secured claim held by an undersecured creditor still subject to bifurcation.[66] This means that upon dismissal of a chapter 13, the creditor retains a security interest in the collateral for any sum still owing. This security interest is then governed by nonbankruptcy law that generally allows repossession for nonpayment of any part of that amount.[67] Furthermore, upon conversion to chapter 7, the secured creditor is entitled to a new valuation of the collateral in order to determine what part of the amount still owing is deemed an allowed secured claim.[68] Formerly, upon conversion, the amount of the allowed secured claim would be based on the valuation of the collateral at the time of the chapter 13 filing, less whatever amount was paid in chapter 13.[69] The revaluation of the collateral in chapter 7 will undercut the utility of what was referred to as a chapter 20—the strategy of paying all or most of the allowed secured claim in chapter 13, then converting to chapter 7 and redeeming any unpaid amount of the original allowed secured claim. Redemption of collateral in chapter 7 after conversion from chapter 13 is now more expensive.

3. *Limiting Refilings*

A major change successfully sought by many creditor interests in BAPCPA is the limitation on refilings. The limitation does not prohibit multiple filings, but the length of the automatic stay is greatly limited if one or more cases have been filed and dismissed in the preceding year.[70] This is particularly important to secured creditors. Before BAPCPA, an important reason that debtors chose repeat filings was to delay or avoid repossession of, or foreclosure on collateral. A debtor's most common concern was foreclosure on real estate, or eviction from a residential lease, and chapter 13 was the filing method of choice.[71] The debtor

66. *See* BAPCPA § 306(a), 119 Stat. at 80 (codified at 11 U.S.C. § 1325(a)(5)(B)(i)).

67. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 25-4, at 890–91 (5th ed. 2000).

68. 11 U.S.C.A. § 348(f) (West 2006).

69. 11 U.S.C. § 348(f) (2000) (amended 2005).

70. BAPCPA § 302(3), 119 Stat. at 75–77 (codified at 11 U.S.C. § 362(c)(3)–(4)); *id.* § 303(a)(3), 119 Stat. at 77–78 (codified at 11 U.S.C. § 363(d)(4)). The limitations vary in different circumstances and differ in their methods of enforcement or validation. These details are beyond the scope of this article.

71. The extent of pre-BAPCPA refilings in chapter 13 is well documented in Norberg & Velkey, *supra* note 2, at 475–77. Norberg and Velkey do not discuss the reasons for the refilings. The use of refilings to prevent real estate foreclosure or eviction from rental property was addressed by the Na-

would dismiss the proceeding after the immediate threat of foreclosure or eviction was lifted, only to refile months later when the creditor reinitiated efforts to foreclose.[72] The limitations on the length of the automatic stay contained in BAPCPA should effectively deter this practice.

It is not at all clear that many debtors choose to file or refile a bankruptcy case solely to forestall motor vehicle repossession. Regardless whether debtors refiled for that reason, the pre-BAPCPA volume of refilings adversely impacted auto lenders. Not only were lenders hindered by the automatic stay if they were to seek repossession, but each time a debtor filed a bankruptcy case the lender incurred an administrative expense: the lender had to note the existence of the case in appropriate company records, so that the lender did not inadvertently violate the automatic stay, and had to file a proof of claim with the bankruptcy court.[73] For this reason most importantly, the expected impact of BAPCPA on the number of refilings, especially chapter 13 refilings, should significantly benefit auto lenders.

4. Limitation on Ride Through

Section 521, which provides for the chapter 7 filing of the debtor's statement of intention with respect to collateral, has been amended to provide that the debtor must perform the stated intention within forty-five days of the first meeting of creditors. If she does not perform, then unless the trustee claims an interest with collateral, the automatic stay lifts and the collateral immediately ceases to be part of the bankruptcy estate.[74] As a result, the creditor can quickly resort to repossession remedies under nonbankruptcy law, even in cases in which the debtor is not in arrears on payments, if the underlying contract specifies the filing of a bankruptcy proceeding to be a default.[75] Commentators have co-

---

tional Bankruptcy Review Commission. NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 281–87 (1997) [hereinafter NBRC REPORT], *available at* http://govinfo.library.unt.edu/nbrc/reportcont.html.

Chapter 13 was preferred by debtors for this purpose, for at least two reasons. First, only in chapter 13 is it possible to maintain the automatic stay while curing arrears on a mortgage on a personal residence. 11 U.S.C. § 1322(b)(5) (2000). Second, unlike chapter 7, a chapter 13 proceeding could not be dismissed as an abuse of process. A chapter 13 proceeding could be dismissed only for failure to fulfill a specific statutory requirement, such as when the debtor failed to file a confirmable plan or failed to make payments under a confirmed plan. *Compare* 11 U.S.C. § 707(b) (2000) (amended 2005), *with id*. § 1307.

72. *See* NBRC REPORT, *supra* note 71, at 234.

73. *See, e.g.*, Henry E. Hildebrand III, *Consumer Corner: Consolidating Creditor Data in Chapter 13 Cases*, AM. BANKR. INST. J., Sept. 2004, at 10.

74. 11 U.S.C.A. § 521(a)(2)(B), (6) (West 2006); *see also id.* § 362(h). The stay lifts, and the property automatically ceases to be part of the estate, without the need for a creditor to file a motion seeking such relief.

75. 11 U.S.C.A. § 521(d) (West 2006) now provides that nothing in bankruptcy law invalidates an ipso facto or bankruptcy default clause. These provisions are discussed in Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 827–28 (2005).

gently argued that nothing in BAPCPA forces auto lenders to repossess when the debtor is keeping payments current, and that there is reason to expect that auto lenders will often prefer to not repossess in such situations even though the debtor refuses to reaffirm.[76] To the extent creditors so behave, there will still be "voluntary" ride through under BAPCPA, but the practice will depend on creditor acquiescence in the debtor's continued retention of the collateral.

5. Valuation Standards

The section defining valuation standards for property subject to a security interest, 11 U.S.C. § 506(a), previously vaguely worded,[77] has been amended to provide that in chapter 7 and chapter 13 cases involving individual debtors, the value of the property shall be measured by the replacement value "without deduction for costs of sale or marketing."[78] The section goes on to state that with respect to property acquired for consumer purposes, replacement value shall mean the price a retail merchant would charge for similar property.[79] These valuation standards will be applied in chapter 13 to measure the "allowed secured claim" in those circumstances where cramdown is still allowed,[80] as well as to determine the price that the debtor must pay to redeem the property in chapter 7.[81]

Section 506(a)(2), as amended by BAPCPA, strengthens the position of creditors established in *Associates Commercial Corp. v. Rash*, decided by the Supreme Court in 1997 as Congress was just beginning to consider bankruptcy reform.[82] First, the section clearly extends the replacement value standards to chapter 7 redemption proceedings, something that had been left unsettled in *Rash*.[83] Second, the section clarifies the *Rash* standards in two minor ways that are favorable to secured creditors. It makes clear that the blue book retail value is the starting point for measuring the replacement value of property acquired for consumer purposes, and it provides that no deduction need be made for sales or marketing costs.[84] Both results could have been reached by most courts applying the *Rash* decision; but, now there is less uncertainty.

Significantly, however, the new valuation standard does not obviate the need to take account "of items the debtor does not receive when he

76. Braucher, *supra* note 42, at 475–77.
77. 11 U.S.C. § 506(a) (2000) (current version at 11 U.S.C.A. § 506(a)(1)–(2) (West 2006)); *see supra* note 26 and accompanying text.
78. BAPCPA, Pub. L. No. 109-8, § 327, 119 Stat. 23, 99–100 (codified at 11 U.S.C. § 506(a)(2)).
79. *Id.*
80. *See* 11 U.S.C.A. § 1325(a)(5)(B)(ii) (West 2006); *see supra* notes 49–53 and accompanying text.
81. *See* 11 U.S.C.A. § 722 (West 2006).
82. *See supra* notes 29–32 and accompanying text.
83. *See supra* note 35 and accompanying text (noting that many courts had continued to apply a wholesale value standard in redemption cases).
84. 11 U.S.C.A. § 506(a)(2) (West 2006).

retains his vehicle, items such as warranties, inventory storage, and reconditioning," as stated in *Rash*.[85] It therefore seems likely that courts will apply § 506(a)(2) by subtracting something from the blue book retail value, as those values presume some reconditioning of the vehicle. Perhaps some courts will continue to average the wholesale and retail prices, as they had been doing before BAPCPA. If so, BAPCPA's valuation standards will not constitute a clear improvement for secured creditors in chapter 13 proceedings, but they will not harm those interests either. On the other hand, the valuation standards represent a clear improvement for the position of secured creditors in chapter 7 redemption proceedings, where previously wholesale values were commonly used.[86]

6. *Direct Payment of Adequate Protection in Chapter 13*

In a provision of relatively minor importance, BAPCPA provides that within thirty days of filing a chapter 13 proceeding, debtors should make direct payments to secured creditors of whatever is necessary to provide adequate protection of the creditor's security interest.[87] This amount will generally be the estimated decline in the value of the collateral.[88] Under the old Code, the debtor was not required to make any payments for a longer period,[89] and payments were made to the chapter 13 trustee, who might not redistribute them to a secured creditor for some time.[90]

7. *Automobile Leases*

Leasing has become a much more important part of automobile finance. Under the previous Act, the position of the automobile lessor was stronger than the secured creditor, because the Bankruptcy Code provided nothing like cramdown. A trustee, whether in chapter 7 or chapter 13, would usually express no interest on behalf of the estate in the lease.[91] Thereafter, the lessor was free to repossess the vehicle or make a new arrangement with the lessee to continue the lease. However,

---

85. Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 965 n.6 (1997).
86. *See supra* note 35 and accompanying text.
87. BAPCPA, Pub. L. No. 109-8, § 309(c)(2), 119 Stat. 23, 83–84 (codified in part at 11 U.S.C. § 1326(a)(1)(C)).
88. *See* Sommer, *supra* note 48, at 228.
89. 11 U.S.C. § 1326(a)(1) (2000) (requiring payments to begin within thirty days of the filing of a plan).
90. There are difficulties in the application of this provision postconfirmation because it authorizes continued direct payments to the creditor, outside the plan. Chapter 13 trustees are not likely to appreciate such behavior, as it reduces their fees. In practice, payments postconfirmation may well come to be made exclusively through the trustee, notwithstanding the statute. This problem is more fully explored in Sommer, *supra* note 48, at 227–30; Henry E. Hildebrand III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 378–80 (2005).
91. *See* Kilpatrick, *supra* note 75, at 828.

there were procedural difficulties in proceeding in either manner. BAPCPA seeks to ease the lessor's burden with respect to these technicalities. More specifically, BAPCPA provides for automatic termination of the automatic stay with respect to the leased property if the debtor does not express an intention to assume the lease within a specified time, generally forty-five days after the first meeting of creditors.[92] BAPCPA also provides that an agreement by the debtor to assume the lease is enforceable without the need for court approval.[93] In this latter respect, the position of the automobile lessor is superior to that of the secured creditor because reaffirmations of loans are subject to statutory regulation.[94]

B. Changes Potentially Adverse to Auto Lenders

1. The Means Test

By far the greatest threat to the interest of secured creditors is the means test usually billed as the centerpiece of BAPCPA.[95] The test requires that a chapter 7 petition be dismissed or converted to chapter 13 if it is determined that a debtor with primarily consumer debts will be able to pay unsecured creditors a specified amount in a chapter 13 plan.[96] This provision is a threat to auto lenders because it is designed to force some debtors into chapter 13 when they would prefer chapter 7. Despite the new limitations on lien stripping in chapter 13, it remains the case that an automobile lender will usually prefer chapter 7 to chapter 13.[97]

It is beyond the scope of this article to explain all the intricacies of the means test.[98] However, one provision bears importantly on the interests of secured creditors. If a debtor is not protected by a safe harbor from a presumption of abuse in filing a chapter 7 case, then the debtor must go through extensive calculations to determine whether anticipated disposable income over a five-year period exceeds $10,000.[99] In calculat-

92. BAPCPA § 305(1)(C), 119 Stat. at 79–80 (codified at 11 U.S.C. § 362(h)); *id.* § 305(2)(D), 119 Stat. at 80 (codified at 11 U.S.C. § 521(d)); *id.* § 309(b), 100 Stat. at 82 (codified in part at 11 U.S.C. § 365(p)(1), (3)). There are a number of interpretive difficulties with these sections, particularly with regard to the interaction of the trustee's right to assume the lease for the benefit of the estate (rarely exercised) and the debtor's obligation to indicate whether she will assume the lease after the trustee rejects it. Previously a lessor needed to file a motion for relief from the stay, even after the lease was rejected by the trustee.

93. BAPCPA § 309(b) (codified in part at 11 U.S.C. § 365(p)(2)); *see* Kilpatrick, *supra* note 75, at 828.

94. *See* 11 U.S.C. § 524(c)–(d) (2000).

95. *See* Kilpatrick, *supra* note 75, at 818.

96. BAPCPA § 102(a), 119 Stat. at 27–32 (codified at 11 U.S.C. § 707(b)).

97. One important reason to prefer chapter 7 is that the auto lender is not likely to be paid the contractual rate of interest in chapter 13. *See also infra* note 102 and accompanying text.

98. The definitive explanation of the mechanics of the means test is Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005). *See also* Sommer, *supra* note 48, at 193–203.

99. BAPCPA § 102(a)(2)(C), 119 Stat. at 27–32 (codified in part at 11 U.S.C. § 707(b)(2)(A)(i)). Technically the threshold amount is 25% of nonpriority unsecured claims or $10,000, whichever is lower, but in no event lower than $6000. So the threshold can range between $6000 and $10,000, de-

ing anticipated disposable income, a variety of expenses may be subtracted from anticipated revenue. In what is a very generous provision from the secured creditor's point of view, these expenses include "all amounts scheduled as contractually due to secured creditors" over the five-year period, *plus* any arrears in payments overdue at the time of filing that would have to be included in a chapter 13 plan if the debtor is to retain possession of her primary residence, motor vehicle, or other property.[100] One possible purpose in allowing deductions of payments owed to secured creditors is to prevent forcing a debtor into chapter 13 if payments under a chapter 13 plan would only go to secured creditors. From that perspective, however, the provision for deduction of all payments "contractually due" to secured creditors is overly generous in two important respects. First, it allows deduction of all amounts "contractually due," even if the secured claim would be subject to cramdown in chapter 13.[101] Second, the amounts "contractually due" include interest at the contractual rate, yet even a secured creditor protected from lien stripping would be paid a lesser rate of interest in chapter 13. This is because no provision in BAPCPA overturns the Supreme Court's decision in *Till v. SCS Credit Corp*.[102]

The provision for deduction of payments owed to secured creditors does not totally avoid the harmful effects of the means test on secured creditors. Certainly a debtor can still fail the means test even after subtracting amounts contractually due to secured creditors. If that happens, the provisions of chapter 13 will govern what the secured creditor gets, usually some amount less than what is "contractually due."[103] However, the deduction provision makes it more likely that a debtor who owes a lot of money to secured creditors can pass the means test and remain in chapter 7, a result which a motor vehicle secured creditor will usually prefer. This can be true even when unsecured creditors would benefit from the reduced payments to secureds under a chapter 13 plan. Furthermore, in what strikes me as ironic, the provision gives debtors seeking to avoid chapter 13 an incentive to incur new secured debt sometime before filing. After all, a debtor could prefer paying a secured creditor, thereby acquiring title to a new asset (perhaps a motor vehicle, or even a

pending on the amount of the debtor's nonpriority unsecured claims. The presumption of abuse that arises if these limits are exceeded is very difficult to overcome. *See id.* (codified in part at 11 U.S.C. § 707(b)(2)(B)).

100. *Id.* (codified in part at 11 U.S.C. § 707(b)(2)(A)(iii)).

101. Sommer, *supra* note 48, at 224.

102. Till v. SCS Credit Corp., 541 U.S. 465 (2004). For a discussion of the *Till* decision, see *supra* notes 19–24 and accompanying text.

103. This is partly because of the interest rate rule discussed above. *See supra* note 102 and accompanying text. In addition, auto lenders can have their security interests crammed down even under BAPCPA. *See supra* notes 51–65 and accompanying text.

vacation home),[104] instead of making payments to unsecured creditors through a chapter 13 plan.[105]

2. *Reaffirmations*

Reaffirmations of the full amount owing have long been a key strategy for auto lenders when faced with a chapter 7 petition.[106] The National Bankruptcy Review Commission seriously considered prohibiting reaffirmations entirely.[107] In the end, the Commission voted 5-4 to limit reaffirmations for secured claims to the amount of the allowed secured claim, and to prohibit reaffirmation of unsecured claims entirely.[108] Part of the rationale for limiting reaffirmations was to give debtors who wanted to keep collateral or repay creditors an incentive to file chapter 13, where all creditors, not just the ones the debtor wished to prefer, would benefit.[109]

The Review Commission's recommendations in this respect do not appear to have received serious consideration by Congress.[110] Thus, the motor vehicle finance industry dodged a bullet and should regard BAPCPA's position on reaffirmations as favorable. However, the Code's provisions compel compliance with significant formalities in the making of reaffirmation agreements, and in some respects those formalities have been strengthened by BAPCPA. Most importantly, the formalities require the creditor to make more specific and more prominent disclosures than previously required.[111] I believe that most commentators

104. So long as the secured claim equals or exceeds the value of the collateral at the time of the chapter 7 filing, the debtor would not need to worry about losing the newly acquired asset even if it is not covered by exemption laws.

105. 11 U.S.C.A. § 526(a)(4) (West 2006) prohibits a debtor's attorney from advising the debtor to incur additional debt in contemplation of filing a bankruptcy petition. It remains to be seen how effectively this provision forecloses the bankruptcy planning strategy identified in the text. The provision was recently held unconstitutional by a lower court. Hersh v. United States, 347 B.R. 19 (N.D. Tex. 2006). It remains to be seen if this decision will be confirmed by appellate courts.

Bankruptcy judges also retain the authority to dismiss a chapter 7 filing as "an abuse" even if the means test is satisfied, and no doubt many judges would act under this provision if exemptions planning were too extensive or obvious. Unlike pre-BAPCPA law, a creditor may file a motion asking a court to dismiss a case under this discretionary abuse standard. 11 U.S.C.A. § 707(b)(1) (West 2006).

106. NBRC REPORT, *supra* note 71, at 152.

107. *Id.* at 148.

108. *See id.* at 1072 (noting concern of four dissenting commissioners regarding unequal treatment of creditors).

109. *Id.* at 145–61 (Recommendation 1.3.1). The dissent from this recommendation is in the separate statement of Commissioners Edith Hollan Jones and James I. Shephard. *Id.* at 27–34; *see also infra* notes 190–209 and accompanying text.

110. *See infra* notes 199–214 and accompanying text.

111. BAPCPA, Pub. L. No. 109-8, § 203(a)(2), 119 Stat. 23, 43–49 (codified at 11 U.S.C. § 524(k)). The additional disclosures were already required in many districts as the result of local rules. *See* Kilpatrick, *supra* note 75, at 825–27. In those districts there is not really a change here, though putting the requirements in statutory form obviates any possible argument that the Bankruptcy Official Form was invalid as going beyond the requirements of the statute. BAPCPA also requires, in a new provision of the Code, that the debtor prepare an estimate of future income and expenses, as a way of showing that the reaffirmation agreement will not impose an "undue hardship." In some circum-

do not expect that these additional disclosures will have much impact on a debtor's behavior, but the disclosures could make some debtors more inclined to surrender the collateral and discharge the unpaid deficiency.[112]

3. Equal Payments to Secured Creditors in Chapter 13

An obscure addition to the requirements for chapter 13 plan confirmation with respect to secured claims requires that periodic payments to secured creditors "shall be in equal monthly amounts" and that they "shall not be less than an amount sufficient to provide [the creditor] adequate protection during the period of the plan."[113] This provision will prevent the pre-BAPCPA practice, used in many districts, of delaying payments to secured creditors until the debtor's attorney fees and other administrative expenses were paid in full. In such districts a secured creditor could be barred from seeking relief from the stay while the collateral declined in value and the creditor received no payments.[114] If the chapter 13 plan later failed, it was possible for the secured creditor to be left with no payments under the chapter 13 plan and rights to collateral of lesser value.

By preventing the practice just described, the equal payments provision is clearly favorable to secured creditors, and as I will describe below secured creditors sought it.[115] It remains to be determined, however, whether this provision could be interpreted to require equal payments throughout the period of the chapter 13 plan. If the provision were so interpreted, it would foreclose a common practice for chapter 13 plans of allocating payments in the early parts of a chapter 13 plan exclusively to secured creditors, and paying unsecured creditors only after allowed secured plans were paid. Such a practice makes it more likely that if a chapter 13 plan fails, at least the secured claims are paid, sparing the

stances, these estimates require disclosure of information additional to that required by the many schedules that a debtor must file with any bankruptcy petition. BAPCPA § 203(a)(2) (codified in part at 11 U.S.C. § 524(k)(6)(A)).

112. There was a claim made by creditors that the additional disclosures will impose substantial compliance costs on creditors. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2001: Hearing on H.R. 333 Before the H. Comm. on the Judiciary*, 107th Cong. 133–34 (2001) (statement of George J. Wallace, Coalition for Responsible Bankruptcy Laws) ("The bill creates extensive, new regulation of reaffirmation agreements. . . . [W]e . . . are concerned that the compliance cost will be significant—cost we pass on to our customers in higher credit prices.").

113. BAPCPA § 309(c)(1)(C), 119 Stat. at 83 (codified at 11 U.S.C. § 1325(a)(5)(B)(iii)). Further addressing this problem is a provision in BAPCPA requiring the debtor in chapter 13 to make direct payments of adequate protection to the creditor within thirty days of filing and even before confirmation of a plan. *See id.* § 309(c)(2), 119 Stat. at 83–84 (codified in part at 11 U.S.C. § 1326(a)(1)(C)); *supra* note 87 and accompanying text.

114. This problem is more fully described in Kilpatrick, *supra* note 75, at 835–37, and WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW & PRACTICE § 122:8 (2d ed. 2006). The equal payments provision also prevents an occasional practice of providing for a balloon payment to a secured creditor near the end of the plan.

115. *See infra* notes 287–89 and accompanying text.

debtor the risk of repossession.[116] If "equal payments" means that payments of the same amount must be made to secured creditors throughout the plan, money will be released for payments to unsecured creditors earlier in the plan (because the payments to secured creditors early in the plan would be less).[117] This makes it more likely that unsecured creditors will receive something even in the event of plan failure. Furthermore, it would give debtors a greater incentive not to let a chapter 13 plan fail, as they would face a greater risk of losing collateral.[118]

It is not at all clear that the equal payments provision will be interpreted as requiring a spreading of payments throughout a chapter 13 plan. An interpretation requiring only that secured-creditor payments greater than zero be equal in amount is both plausible and more consistent with the intent of the proponents of the provision. In this age of textualist interpretations of the Bankruptcy Code, however, we cannot totally discount an interpretation that a plan which provides for payments of $*X* for *Y* months, and payments of $0 thereafter does not meet the requirement that "periodic payments . . . shall be in equal monthly amounts." If a secured creditor receives nothing in a particular month, does it receive a "payment?" If the answer is yes, then the equal payment provision will, inadvertently, harm the interests of motor vehicle secured creditors.

C. Adding It Up: Why the Auto Lenders Are Probable Winners

It is far too soon after the effective date of BAPCPA to have reliable empirical data about the long-term impact of the Act on various interests. Nonetheless there is reason to believe that when the dust clears, the position of the auto lenders will be considerably better than it was under the previous Code. From today's perspective, auto leaders would appear to be the commercial creditor group that has most improved its position.

The most important factor in reaching that conclusion is the improvement in the auto lender's position in chapter 13 because of the limitations on cramdown. It is a reasonable guess that a considerable majority of the encumbered cars owned by consumer debtors at the time of a

116. When a secured claim can still be bifurcated, the benefits of this practice are limited under the new Act because of the provision that the lien will not be discharged until completion of a chapter 13 plan or payment of the entire amount owing. *See supra* note 66 and accompanying text.

117. Some adjustment would have to be made in the cases where spreading payments throughout the plan in equal amounts would provide the creditor with less than adequate protection in the early months of the plan, a time when the value of the collateral will probably be declining at a greater rate than later in the plan.

118. For these reasons the Bankruptcy Review Commission, both the majority and the dissent, endorsed a requirement that payments to secured creditors be spread throughout the plan, in equal amounts. NBRC REPORT, *supra* note 71, at 262 (discussing Recommendation 1.5.3).

chapter 13 filing will not be subject to cramdown.[119] However, vehicles acquired more than 2.5 years before filing, whether new or used at acquisition, are still subject to lien stripping,[120] as are vehicles not acquired for "personal" purposes if acquired more than one year before filing.

Another important factor in assessing the impact of BAPCPA on auto lenders is whether the percentage of chapter 13 cases in overall consumer bankruptcy filings will decline. At this time the answer is unclear. The percentage of filers electing chapter 13 is important in assessing the impact of the Act because chapter 7 is still more attractive to auto lenders than chapter 13. In this respect, it is important that BAPCPA does not include a provision in chapter 13 providing for payment of contractual rates of interest on secured claims.[121] As a result, chapter 7, where usually the auto lender can secure a reaffirmation for the entire amount owing without contractual rates of interest, is more advantageous than chapter 13 even when cramdown is not possible. Further, in some respects chapter 7 is even more advantageous to the auto lender than it was previously; the restrictions on ride through and the adoption of a retail valuation standard for redemptions are most important in this respect.

It is entirely possible that the percentage of chapter 13 filings will decline under BAPCPA.[122] Under the previous Code, the most common reasons for debtors to select chapter 13 voluntarily had to do with the availability of greater relief from the claims of secured creditors.[123] Most important in this respect, chapter 13 provided the only way to obtain an extension in time to pay arrears on a home mortgage while using the

119. BAPCPA, Pub. L. No. 109-8, § 306(b), 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a)(5)(B)).

120. One court has already held under BAPCPA that if a chapter 13 debtor surrenders an encumbered vehicle, even within the 910-day lookback period, there is no liability for the deficiency. *In re* Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); *see supra* text accompanying note 65. If this interpretation is followed, savvy chapter 13 debtor attorneys may use the leverage created by a threat of surrender to induce secured creditors to agree to a chapter 13 plan providing payment of less than the full amount owing (so long as it is more than the creditor could obtain from reselling a surrendered vehicle). If such a practice becomes widespread, it could significantly undercut the benefits to auto lenders gained from the new cramdown limitations. However, some debtors may have difficult in credibly threatening to surrender their vehicles. It has been observed that debtors residing in rural areas are especially likely to be dependent on continued possession of their vehicle. *See* Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969, 1026 (2005) ("Because rural people have few or no public transportation options, losing a car threatens to leave rural debtors completely stranded. . . . These new provisions of the Bankruptcy Code[, cramdown limitations and elimination of involuntary ride through,] . . . will harm those rural debtors . . . .") (footnote omitted).

121. As one would expect, the lower courts are applying *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), under BAPCPA. *See, e.g.*, *In re* Wright, 338 B.R. 917 (Bankr. M.D. Ala. 2006); *In re* Robinson, 338 B.R. 70 (Bankr. W.D. Mo. 2006).

122. Braucher, *supra* note 42, at 459 ("[A] higher percentage of filers are likely to choose chapter 7 under the new law."). Many informed observers of consumer bankruptcy share this opinion. *See, e.g.*, Sommer, *supra* note 48, at 221 ("[I]t seems quite likely that Chapter 13 cases will go down, rather than up, as a percentage of bankruptcy filings.").

123. *See* Lynn LoPucki, *"Encouraging" Repayment Under Chapter 13 of the Bankruptcy Code*, 18 HARV. J. ON LEGIS. 347 (1981); William Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 99–101 (1989).

automatic stay to prevent foreclosure.[124] Under BAPCPA, chapter 13 remains useful to debtors for this reason, but there are significant limitations on the repeated use of chapter 13 for this purpose that will reduce the number of chapter 13 cases.[125] Before BAPCPA, probably the second most important reason to choose chapter 13 was to obtain the benefit of the lien stripping provisions regarding motor vehicles. That use of chapter 13 will become less common. Even in those instances in which lien stripping is still possible under chapter 13, the provisions designed to prevent "chapter 20s" reduce the benefits of lien stripping in chapter 13. Still another reason to avoid chapter 13 are the new requirements imposed on the debtor and her attorney to file various documents throughout the course of the plan.[126] Filing burdens have been increased dramatically for chapter 7 as well,[127] but not as much The result could be a relatively greater increase in attorney fees for chapter 13, and perhaps a greater tendency of debtor attorneys to encourage debtors to choose chapter 7 to avoid the extra costs and burdens.[128]

Balanced against these disincentives to choose chapter 13 voluntarily are a number of other considerations that will affect the relative proportions of chapter 7 and chapter 13 proceedings. Of great importance is the effectiveness of the means test in preventing debtors from choosing chapter 7 when they could make the specified payments in chapter 13. There was great controversy when Congress was debating BAPCPA about how many bankruptcy filers would be "caught" by the means test, with different empirical studies giving different results.[129] Some estimates were quite low; one study estimated even less than five percent of pre-BAPCPA filers would have been caught by the means test.[130] Moreover, the means test provides a number of potential opportunities for prebank-

124. *See* 11 U.S.C. § 1322(b)(2), (5) (2000).

125. *See supra* notes 82–83 and accompanying text.

126. For a description of some of the distinctive chapter 13 filing requirements, see Sommer, *supra* note 48, at 214–27. "The new law makes . . . chapter 13 much more difficult and expensive . . . ." *Id.* at 221.

127. Many of them concern the Code's designation of debtor attorneys as "debt relief agencies" and requiring various disclosures to clients. *See* 11 U.S.C.A. §§ 526–528 (West 2006); Catherine E. Vance, *Overview of the BRA: New Rules for Bankruptcy Lawyers*, *in* ATTORNEY LIABILITY IN BANKRUPTCY 4–7 (Corinne Cooper & Catherine E. Vance eds., 2006). Other filing burdens concern court filings about a debtor's financial circumstances. 11 U.S.C.A. § 521(a) (West 2006).

128. That a debtor's attorney fees are no longer payable through exclusive allocation of the first chapter 13 payments to administrative expenses, *see supra* notes 94–96 and accompanying text, could also affect the proclivity of debtor attorneys to recommend chapter 13. There are also other reasons the number of voluntary chapter 13 filings may fall. A potentially important one is the virtual elimination of the superdischarge. BAPCPA, Pub. L. No. 109-8, § 314, 119 Stat. 23, 88 (codified at 11 U.S.C. § 1328(a)).

129. *See* Marianne B. Culhane & Michaela A. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 29 n.8 (1999).

130. *See id.* at 33 (finding that more than ninety-five percent of debtors would pass the means test under one version of the proposed legislation).

ruptcy planning in order to avoid a forced chapter 13 proceeding.[131] Therefore the percentage of filers who actually fail the means test is likely to be lower than the percentage estimated on the basis of a sample of pre-BAPCPA filers. On the other hand, there are some considerations that may make chapter 13 more attractive than it has been previously. Most importantly, in this respect, the "best efforts" test in chapter 13 now appears to rely exclusively on the debtor's prefiling income, rather than an estimate of future income, for the purpose of setting the minimal payments that must be paid into a chapter 13 plan. For debtors expecting an increase in income over time, chapter 13 may now require lower payments into the plan for unsecured creditors than it did prior to BAPCPA.[132]

A final consideration in assessing the impact of BAPCPA on auto lenders is the widely anticipated reduction in the number of total filings. The new provisions will clearly increase the cost of bankruptcy to debtors, whether they elect chapter 7 or chapter 13. It would be a remarkable reversal of the normal rules of economics if these increased costs did not reduce the number of filings to some extent. The price elasticity of a bankruptcy discharge is unknown, but it will not be zero.[133] It is widely assumed that unsecured creditors believe they will benefit from reduced filings. It is also commonly suspected that this effect, not the benefits of an increased percentage of chapter 13 cases, was the major intended benefit sought by the representatives of many unsecured creditors, especially credit card interests.[134] The benefits to automobile lenders from reduced filings will not be so great, however, and could even be negative. To be sure, outside of bankruptcy an automobile lender can threaten to repossess collateral, and this threat commonly secures a renewed com-

131. I have already mentioned the possibility of loading up on secured debt. If done in contemplation of filing and for purposes of passing the means test, it may be illegal but it may happen nonetheless. *See supra* notes 104–05 and accompanying text. Other prebankruptcy planning practices with greater legal validity are being discussed and worked out by the bankruptcy bar at this moment. They include such practices as dropping extra jobs in the months before filing, because the means test is premised on the average monthly income in the six months preceding filing, and loading up on expenses, such as health insurance, that can be deducted before determining how much would be available in a chapter 13 proceeding. Having a relative move into the household before filing can also be helpful.

132. This issue is discussed in Sommer, *supra* note 48, at 221–27 and 8 COLLIER ON BANKRUPTCY, *supra* note 35, ¶ 1325.08[5]. It concerns the interpretative difficulties of 11 U.S.C.A. § 1325(b) (West 2006). The section defines "disposable income" in terms of "current monthly income." *Id.* § 1325(b)(2). "Current monthly income" is a phrase taken from the means test and refers to average monthly income over the six months preceding filing. However, the section also compels commitment of "projected disposable income" to the plan. *Id.* § 1325(b)(1)(B). This phrase sounds forward looking and possibly could lead creative courts to set a standard for minimal payments to a chapter 13 plan that is not based on the means test standard. One court has already so held. *In re* Hardacre, 338 B.R. 718, 721–23 (Bankr. N.D. Tex. 2006). One chapter 13 trustee told me that if the interpretation in *Hardacre* does not emerge as the majority rule, he expects a much higher percentage of zero payment plans under BAPCPA than under the old Code.

133. Another reason to anticipate a reduction in total filings are the provisions eliminating many of the incentives for repeat chapter 13 filings. *See supra* notes 70–71 and accompanying text.

134. *See infra* note 299 and accompanying text.

mitment to repay the entire amount owing. The threat may even produce a reaffirmation that refinances payment arrears on more favorable terms (to the creditor) than the original contract. Additionally, there are some costs that a secured creditor avoids outside of bankruptcy. However, in bankruptcy a debtor commonly discharges unsecured debt, meaning that there is less competition for payments out of future income that is ultimately the only source for repayment of reaffirmed obligations. If it were possible to control for debtor creditworthiness, a study might show that an auto lender's collection rate on reaffirmation agreements negotiated within a chapter 7 case is higher than the comparable rate for agreements made outside of bankruptcy. If so, an overall reduction in bankruptcy filings (which is likely) could have a modestly negative effect on the interests of auto lenders. This effect must then be balanced against the likely gains to auto lenders from the debtors who do file under the new Act.

III. HOW DID THIS HAPPEN?

A. Some General Perspectives

To creditors, bankruptcy reform was not a zero sum game, by which I mean creditors did not perceive that providing gains for automobile lenders necessarily meant that other creditor groups fared worse than they did under the previous law. The overall creditor strategy in this reform effort was to increase the pie that creditors divide. There were basically three approaches to increasing the pie: (1) deter bankruptcy filings and increase exceptions to discharge, in the expectation that outside bankruptcy creditors would be able to collect more from debtors than would have been possible without these changes; (2) collect more in bankruptcy by steering debtors who do file into chapter 13 and structure chapter 13 so that a greater percentage of the debts are repaid; and (3) reduce the costs of participating in bankruptcy cases for creditors. BAPCPA contains provisions directed at advancing all three strategies.

It remains to be seen how successful these strategies will be in increasing the creditors' pie. There may well be more undischarged debts in the future than there would have been without reform, but it is unclear how much of these undischarged debts creditors will collect. With respect to the reduction of bankruptcy costs, there could be substantial savings if the total number of consumer bankruptcy cases is substantially reduced. Each proceeding requires creditors to maintain records,[135] in part so that they do not violate the automatic stay.[136] There are also a few

135. *See, e.g.*, Hildebrand III, *supra* note 73, at 10 (stating that creditors must retain records consistent with terms of chapter 13 plans).

136. *See* 11 U.S.C. § 362 (2000) (amended 2005) (describing the application and operation of the automatic stay).

provisions that will reduce the creditor's costs of participating in a bankruptcy, though these savings will be minor.[137]

By far the greatest uncertainty in assessing the effect of BAPCPA on the size of the creditors' collective pie is whether creditors as a group will receive more payments from bankruptcy estates. I have earlier suggested that as a percentage of total bankruptcy filings, chapter 13 proceedings may decline.[138] There is also reason to question whether creditors as a group will collect more per case from chapter 13 cases under BAPCPA. Debtors will be less inclined to dismiss or convert chapter 13 plans after paying secured claims because of the provisions designed to eliminate "chapter 20." This in turn will tend to increase total chapter 13 payments. Under BAPCPA some chapter 13 plans are required to be five-year plans,[139] but prior to BAPCPA a high percentage of chapter 13 debtors voluntarily elected five-year plans.[140] It is therefore not clear that this provision will have any effect. Most importantly, the best efforts test for determining the total amount of future income a debtor must contribute to a chapter 13 plan has been redefined in a way that may actually lessen total payments into the plan.[141] One chapter 13 trustee predicted that, as a consequence of the redefinition, there would be many more plans under BAPCPA than under the old Code that only make payments to secured and priority creditors—so-called zero payment plans.

Even if the creditors' pie increases under BAPCPA, there remains another question that will be a primary focus of the balance of this article: to the extent that there are increased revenues, which creditors will receive them? It is conceptually possible, of course, that the various creditor groups will benefit equally. However, I believe that auto lenders are likely to do better than most other groups. Other groups of creditors will therefore not do as well, not necessarily as compared to their position prior to BAPCPA, but as compared to what might hypothetically have been their position if BAPCPA contained rules that equally distributed the increases among creditor groups. This in turn raises the question of how BAPCPA came to favor automobile finance interests. One possibility is that bargaining and negotiations among creditor groups over proposed provisions had considerable influence on the content of the resulting statute. There are, however, other possibilities. Various groups claiming to represent debtor or civic interests participated throughout the reform process, and these groups may have influenced

137. One example is the provision requiring that notices from a debtor to a creditor include the creditor's account number and that the notice be sent to an address at which the creditor has requested correspondence be sent. BAPCPA, Pub. L. No. 109-8, § 315(a)(1)(C), 119 Stat. 23, 88 (codified at 11 U.S.C. § 342(c)(2)). This should improve a creditor's efficiency in complying with the automatic stay.

138. *See supra* notes 122–32 and accompanying text.

139. BAPCPA § 318(3), 119 Stat. at 93–94 (codified at 11 U.S.C. § 1325(b)(4)).

140. *See* Norberg & Velkey, *supra* note 2, at 526.

141. *See supra* note 132 and accompanying text.

Congress to prefer reforms that favor automobile creditors over other groups, perhaps inadvertently. Additionally, the decision makers themselves, first members of the Bankruptcy Review Commission and later members of Congress, may have exerted some independent agency in deciding the substantive content of BAPCPA.

In this Part, I will provide an account of how the interests of automobile lenders were considered at various stages in the reform process. This description will include a detailing of proposals at various stages in the process. I seek also to provide, to the extent that I am able, a political history of these proposals and the final enacted provisions, by which I mean an account of what interests and persons influenced or dictated the changes that I describe. In the course of developing this political history, I have drawn upon whatever secondary sources I have been able to find.[142] I have also sought to interview a number of the persons actively involved, such as congressional staff, Bankruptcy Review Commission staff, and lobbyists or representatives of some group interested in the outcome of the reform process. Most of my interviewees have requested that they not be cited by name, foreclosing some of the footnoting of sources that is customary in law review articles. Unfortunately, lawyers and lobbyists representing different creditor groups have mostly declined to be interviewed, depriving me of evidence of some developments, as will be noted at appropriate points in this article.

B. *An Overview of the Reform Process*

This Section provides a brief overview of important events in the reform process.[143] The succeeding Section provides a detailed account of developments affecting automobile lending interests.

My discussion of the history of BAPCPA begins with the appointment of the National Bankruptcy Review Commission (NBRC). Certainly the full story about the most important reforms contained in BAPCPA, such as means testing, began long before that, but one has to begin a history somewhere. The Commission was authorized by the

142. I have been tremendously benefited in this endeavor by generous access provided me to files maintained by Brady Williamson, the Chair of the National Bankruptcy Review Commission. Mr. Williamson is a lawyer in Madison, Wisconsin, where I live and work. He has been an acquaintance for some time. During the period of the Commission he maintained files that contain a mixture of material, all of it "public" but often hard to find. This includes submissions to the Commission by various interests, correspondence to and from Mr. Williamson relating to Commission business, newspaper clippings, and the like. Mr. Williamson continued to maintain the files through the nearly eight years of congressional deliberations, though the material in the files is not as extensive during this period.

143. For a much fuller, extensive, and excellent account of developments, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005). Another useful summary of the history of legislative developments is in Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1095–1106 (2004).

Bankruptcy Reform Act of 1994,[144] but did not become active until the spring of 1996. The Commission quickly began holding hearings, receiving suggestions from various interest groups, and developing proposals. The Commission had structured their early public hearings so that presentations were made by a diverse range of interests, including bankruptcy professionals such as chapter 13 trustees, spokespeople for both debtor and creditor interests, and a variety of academics and professional association representatives who were not representing any particular interest but were knowledgeable about bankruptcy.[145] At a December 1996 meeting, however, creditor groups asked for, and received, a full day to make a presentation to the Commission, conducted solely by their chosen representatives and without the need to interact with representatives of other interests. In the months preceding the December meeting, a coalition of creditor groups had formed, called the National Consumer Bankruptcy Coalition (NCBC).[146] At the meeting, spokespersons for the NCBC insisted that all consumer creditors "spoke with a single voice" and would present and advocate for a single set of proposals.[147] Over the course of the following spring, a subcommittee of the Commission, called the Consumer Working Group, developed and debated a series of consumer bankruptcy proposals, interacting frequently with various representatives of the NCBC.[148] By the summer of 1997, the Commission had taken a number of key votes, and the NCBC was not pleased with the results. On July 14, 1997, the NCBC sent a public letter to all members of the judiciary and banking committees in the Senate and House, preemptively rejecting the forthcoming commission report.[149] That report was filed on October 20, 1997. The report's key consumer bankruptcy recommendations were adopted by a 5-4 vote,[150] and as the NCBC letter predicted, the majority's proposals did not please the NCBC.

One month *before* the Commission filed its final report, the congressional process began with the introduction in the House of a reform bill, which became known as the McCollum bill.[151] This bill almost exclusively concerned consumer bankruptcy and contained many of the

144. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended in scattered sections of 11 U.S.C.).

145. Candor requires that I disclose that I participated in a few of these "mixed" discussions during the Commission phase of the reform process. My direct participation in the reform process ended in the spring of 1997, well before publication of the NBRC Report. NBRC REPORT, *supra* note 71.

146. At different times the same coalition went by different names, including the Consumer Bankruptcy Reform Coalition and the Coalition for Responsible Bankruptcy Laws.

147. *See* Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 196 (1999). At the conclusion of this meeting, one of the principal spokespersons for the NCBC, lawyer and lobbyist Michael McEneney, stated publicly that if any creditor group deviated from the common position of the NCBC, he wanted to be the first to know about it. *Id*.

148. NBRC REPORT, *supra* note 71, at 61.

149. *Id.* at 1180 n.159.

150. *Id.* at vi.

151. H.R. 2500, 105th Cong. (1997). Congressman McCollum, after whom H.R. 2500 is named, was its principal sponsor.

NCBC's recommended positions, including means testing.[152] Most of the provisions of the McCollum bill were later incorporated into a more comprehensive successor bill, introduced in January 1998, which I will call the Gekas bill.[153] The consumer bankruptcy provisions of these bills were based on a draft prepared by George Wallace, a representative of the NCBC, and therefore contained all or most of the NCBC's wish list.[154]

It is not unusual for lobbyists to participate in legislative drafting.[155] Legislative staffers often insist that they review the contributions of the lobbyist and do not simply accept it without question. It is likely that such review occurred with the McCollum and Gekas bills, but I have no idea what changes, if any, were made in the Wallace draft before those bills were introduced.

Developments were different in the Senate. The day after the Commission filed its report, Senator Charles E. Grassley and Senator Richard J. Durbin co-introduced a bipartisan bill that became known as the Grassley/Durbin bill.[156] Its provisions were quite different from the House bills. The Grassley/Durbin bill did contain a means testing proposal but it was significantly different from the test in the Gekas bill, as more fully explained below. Both bills had bipartisan sponsors,[157] but the Senate bill had broader bipartisan support, as later developments demonstrated.[158] The Review Commission's majority recommendations on consumer bankruptcy were for the most part ignored by both bills. Even before the Commission's report was released, both the House and Senate were focused on bills that resembled more closely the Commission's dissent than its majority.

During the spring of 1998, the relevant subcommittees of both the Senate and House Judiciary Committees held extensive hearings on the

152. *Id.*

153. H.R. 3150, 105th Cong. (1998). Congressman Gekas, after whom I have named H.R. 3150, was chair of the subcommittee of the House Judiciary Committee that has jurisdiction over bankruptcy legislation. A principal difference between H.R. 2500 and H.R. 3150 was that H.R. 3150 included provisions reforming business bankruptcy as well.

154. *See* Bill McAllister, *Reopening Chapter 7*, WASH. POST, Jan. 1, 1998, at A23 ("George J. Wallace . . . drafted a bill for AFSA that is similar to the measure that McCollum introduced."); *see also* Barry Rehfeld, *Top Creditor Lobbyist Tassey Goes for Broke*, AM. BANKER, May 17, 2001, at 1 ("The AFSA hired George Wallace, a lawyer and bankruptcy expert, who wrote a report that could serve as a model for bankruptcy legislation . . . . Mr. Wallace's work became Rep. McCollum's framework for a new bill."). George Wallace was one of the key organizers and spokespersons for the NCBC throughout its existence, making frequent representations to the Bankruptcy Review Commission, as well as before Congress throughout the legislative process.

155. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 610–13 (2002) ("Every staffer we talked to said that lobbyists were involved in at least some drafting of statutory language.").

156. S. 1301, 105th Cong. (1997). Senator Grassley was chair of the relevant subcommittee of the Senate Judiciary Committee, and Senator Durbin was the ranking minority member of that subcommittee.

157. *See* Jensen, *supra* note 143, at 494–96.

158. *See id.* at 500.

legislation.[159] In June 1998, the House passed the Gekas bill, as amended, by a veto-proof majority (306-118), with almost half of the Democrats joining all of the Republicans in support of the legislation.[160] The Grassley/Durbin bill, significantly amended,[161] passed the Senate in September 1998, with only one dissenting vote.[162] The two bills were quite different, so a Republican-controlled conference committee was appointed. On many key provisions, the conference committee adopted the House proposals.[163] As a result, the broad Democratic support for the legislation in the Senate dissipated. The conference report was never considered further in the Senate, perhaps because of difficulties in obtaining the sixty votes needed to overcome a filibuster. Congress was also preoccupied during the fall of 1998 with the impending impeachment of President William J. Clinton,[164] so simply scheduling floor time for Senate debate was difficult.

There was a new Congress in 1999. Both Houses quickly renewed consideration of bankruptcy reform. The House bill mirrored the conference report from the preceding autumn. This bill was debated extensively in both committee and on the floor. It was amended in many respects,[165] but as I will relate subsequently, not in ways that altered the key provisions affecting automobile lenders. The House adopted the bill in May 1999, with vote totals similar to the veto-proof majority supporting the legislation in the preceding Congress.[166] In the Senate, Senator Grassley introduced a bill that differed significantly from the earlier conference report.[167] Many Democrats who had supported the 1998 Senate bill had decided to oppose the bill after the conference committee adopted the House approach on most issues,[168] including, importantly, the means test.[169] Senator Grassley apparently attempted to moderate the conference report somewhat by introducing changes that would help maintain at least some Democratic support for the legislation. In November 1999, the Senate debated Senator Grassley's bill and adopted an amendment that made certain debts arising from abortion protest activities nondischargeable.[170] This amendment was to play a very important role in subsequent congressional deliberations. The Senate adopted the

159. In general, the subsequent summary of the congressional proceedings draws heavily on Jensen, *supra* note 143. Readers are referred to that excellent article for an expanded account of these proceedings, and for citations to support the statements made in the rest of this Section.

160. 144 CONG. REC. H4442 (daily ed. June 10, 1998); Jensen, *supra* note 143, at 512.

161. *See* Jensen, *supra* note 143, at 515.

162. 144 CONG. REC. S10767 (daily ed. Sept. 23, 1998); *see* Jensen, *supra* note 143, at 515.

163. 144 CONG. REC. H9140 (daily ed. Sept. 28, 1998); *see* Jensen, *supra* note 143, at 516.

164. *See* H.R. REP. NO. 105-830 (1998); 144 CONG. REC. S11333 (daily ed. Oct. 2, 1998); Jensen, *supra* note 143, at 497.

165. *See* Jensen, *supra* note 143, at 521–28.

166. 145 CONG. REC. H2771 (daily ed. May 5, 1999); Jensen, *supra* note 143, at 528.

167. S. 625, 106th Cong. (1999); Jensen, *supra* note 143, at 528.

168. *See* Jensen, *supra* note 143, at 532–34.

169. *See id*. at 529–30.

170. *See id.*

amended legislation by a veto-proof majority (83-14),[171] but the legislation again differed in many important ways from the House legislation. The conference committee, though delayed by complicated procedural maneuvers until September 2000, quickly adopted a compromise that had been negotiated exclusively, in private, by Republicans even before the committee was formed.[172] The House quickly adopted the resulting conference report language, but the Senate was unable to obtain the votes needed to prevent a filibuster (60) until December 2000.[173] Even though the Senate also passed the conference report version by a veto-proof majority, because the passage occurred so near the adjournment of the 106th Congress, President Clinton was able to pocket veto the legislation.[174]

When the 107th Congress convened in January 2001, a new Republican President was in office and the specter of a veto no longer existed.[175] The conference report language from the preceding Congress was reintroduced in both the House and the Senate as new bills.[176] The language proceeded to passage in the House rather quickly with only minor amendment.[177] Once again, the legislative process in the Senate was more difficult. Several amendments were adopted in committee and on the floor, including restoration of the provision excepting abortion protest liabilities from discharge[178] and establishment of federal homestead exemption caps.[179] The Senate passed the amended bill in March 2001.[180] However, before a conference committee could be appointed, political control of the Senate changed to the Democrats.[181] As a consequence, the Democrats constituted a majority of the Senate members on the re-

171. *See id.* at 531.

172. *See id.* at 535–36.

173. The first cloture vote was taken on November 1, 2000, but failed to pass. The vote in favor of cloture was 53-30. One of the reasons for the failure of cloture was the large number of Senators absent because of the proximity of the forthcoming election. Pamela Barnett, *Bankruptcy Cloture Vote Defeated with Senators Absent*, CONGRESSDAILY, Nov. 1, 2000, at 3. Cloture was finally successfully passed in a postelection session, by a vote of 67-31. *Senate Cuts Off Debate on Bankruptcy: Will Vote Thursday*, CONGRESSDAILY, Dec. 6, 2000.

Complicating enactment of the conference report in the Senate was the deletion in conference of the provision in the enacted Senate bill excepting abortion protest liabilities from discharge. Jensen, *supra* note 143, at 536. Another significant concern of some Senators dealt with federal caps on homestead exemptions, where the Senate had adopted a fairly stringent cap ($100,000), and the House had continued to allow states to opt out of any federal limitations on homestead exemptions. The conference report capped the homestead exemption only if the property had been acquired by the debtor within two years of filing, a compromise that bothered some members of the Senate. *Id.* at 537.

174. *See* Jensen, *supra* note 143, at 538–39.

175. *See id.* at 539.

176. *See* 147 CONG. REC. S2344 (daily ed. Mar. 15, 2002) (statement of Sen. Sessions).

177. *Id.* at S2348.

178. Jensen, *supra* note 143, at 544.

179. 147 CONG. REC. S2345 (daily ed. Mar. 15, 2002).

180. *Id.* at S2379.

181. As a result of Senator Jeffords's decision to leave the Republican Party and caucus with the Democrats, though he officially remained an Independent, control of the Senate reverted to the Democrats.

sulting conference committee. This committee held the only public meetings of a conference committee during the entire legislative process concerning bankruptcy reform. The resulting conference report constituted a true compromise on many issues. The House position prevailed to a great extent on the homestead exemption cap issue,[182] as this was a matter of great concern to key Republicans in the House. Fatefully, the Senate position on the abortion protest liabilities issue largely prevailed.[183] When the conference report language was introduced in the House, it failed, as a number of pro-life Republicans sided with Democrats opposed to the bankruptcy reform legislation.[184] For all practical purposes that vote killed the legislation for the 107th Congress.[185]

The conference report language that failed to be enacted in 2002 was, for all practical purposes, the last time that bankruptcy-related matters, other than the abortion provision, were revised in the course of considering bankruptcy reform legislation. In the 108th Congress, the House passed a bill substantially identical to the 2002 conference report, though missing the abortion liability provision.[186] The Democrat-controlled Senate, however, did not consider the legislation. In the 2004 elections, the Republicans regained control of the Senate. Bankruptcy reform moved to the top of the legislative agenda in the 109th Congress. Once again, a bill similar to the 2002 conference report was introduced in the Senate, absent the abortion-related provision. After minor amendments both in committee and on the floor, the Senate passed the bill by a large majority in March 2005.[187] The House proceeded to approve the Senate bill without amendment, so as to obviate the need for a conference committee.[188] The President signed the legislation, BAPCPA, on April 20, 2005,[189] and most of its provisions became effective six months later.[190]

C. A History of the Provisions Directly Affecting Auto Lenders

1. The Commission Period

During 1996, the first year in which the Commission actively met, many creditor groups, including automobile manufacturer-owned finance companies—the most important of the auto lender interests—made rep-

182. Jensen, *supra* note 143, at 550.
183. *Id.* at 550–55.
184. Philip Senon, *Vote on Bankruptcy Bill Is Stalled by Abortion Provision*, N.Y. TIMES, July 30, 2002, at C2.
185. *Id.*
186. H.R. 975, 108th Cong. (2003).
187. 151 CONG. REC. S2474 (daily ed. Mar. 10, 2005).
188. *Id.* at H2076 (daily ed. Apr. 14, 2005).
189. *See* BAPCPA, Pub. L. No. 109-8, 119 Stat. 23.
190. *Id.* § 1501, 119 Stat at 216. *But see, e.g.*, *id.* § 434(b), 119 Stat. at 111 indicating that (section 434(a) amendments "shall take effect 60 days after the date on which rules are prescribed"); *id.* § 601(c), 119 Stat. at 120 (specifying that section 601 amendments "shall take effect 18 months after . . . enactment").

resentations or suggestions to the Commission.[191] A number of issues were raised, but the basic principle that undersecured claims in chapter 13 would be bifurcated was not questioned. High on the wish lists of the automobile finance interests were elimination of involuntary ride through, establishment of a retail value standard for collateral,[192] a provision for adequate protection payments to secured creditors before plan confirmation in chapter 13, and a provision for contractual rates of interest on the allowed secured claim in chapter 13 plans.[193]

Perhaps the biggest concern of the automobile financing interests, however, was that the Commission would recommend changes that would worsen the automobile industry's position in bankruptcy. From the beginning of their deliberations, the Commission considered proposals that would effectively allow debtors to strip automobile liens in chapter 7 as well as chapter 13.[194] Additional lien stripping came to be seriously discussed by the Commission through consideration of "basic bankruptcy," a concept paper circulated for discussion purposes by Professor Elizabeth Warren, the Commission's Reporter.[195] Basic bankruptcy would have combined different features of chapters 7 and 13 into a single procedure, which would have allowed lien stripping for all motor vehicles—basically the chapter 13 scheme at the time—allowing a debtor to release collateral from a lien by paying over time only the value of the collateral at time of filing.[196] The automobile finance companies opposed basic bankruptcy,[197] as did almost all other creditor groups and even

191. The representations were often made on behalf of an organization called the American Financial Services Association (AFSA), a broad-based organization of nonbank financial services providers. AFSA included small loan companies, such as Household Finance (now HSBC North America), and nonbank credit card issuers like Capital One and MBNA, as well as many lenders specializing in automobile finance. During 1996, AFSA's representations to the Commission seemed to be made mostly by an employee of one of the captive automobile finance companies, such as Ford Motor Credit. In later years spokespersons for AFSA tended to be lawyer-lobbyists, such as George Wallace and Jeff Tassey, who appeared to be speaking for a broader creditor group than just the automobile finance companies and were not directly associated with any single creditor interest group within the broad AFSA membership. *See generally* McAllister, *supra* note 154; Rehfeld, *supra* note 154. For more information on AFSA, see Am Fin. Servs. Assoc., AFSA Fact Sheet, http://www.afsaonline.org/sitepages/factsheet.cfm (last visited Oct. 3, 2006).

192. The Supreme Court did not decide *Rash* until 1997. Assocs. Commercial Corp. v. Rash, 520 U.S. 953 (1997). Before then, the circuits varied widely in their valuation approaches, with many adopting a lower standard of valuation. The automobile finance companies advocated a uniform federal standard at the higher measure.

193. *See, e.g.*, Issues of the Secured Vehicle Creditors Presented to the National Bankruptcy Review Commission for Consideration in Conjunction with Its Meeting October 18 and 19, 1996 (on file with author) [hereinafter Issues of Secured Vehicle Creditors]; Leonora K. Baughman, Testimony Before the National Bankruptcy Review Commission Scheduled for December 17, 1996 (on file with author) (testimony of Ms. Baughman, a former employee of Chrysler Financial Corp., on behalf of the secured vehicle lenders and the AFSA).

194. NBRC REPORT, *supra* note 71, at 35 (discussing Recommendation 2.6.3).

195. Memorandum from Elizabeth Warren to the Nat'l Bankr. Review Comm'n (July 23, 1996) (on file with author).

196. *Id.*

197. Memorandum from Hon. Edith H. Jones to Participants in Conference Call, Summary of Conference Call with Automobile Finance Companies Regarding Basic Bankruptcy Concept for Con-

many debtor groups;[198] thus, the idea waned. However, the Commission began considering proposals to restrict reaffirmations in chapter 7 at about the same time.[199] The Commission's concern was sparked by a well-known scandal involving Sears Roebuck & Company, in which Sears secured reaffirmation agreements from chapter 7 debtors without informing them of their rights, contacting the debtors' attorneys, or seeking court approval for the reaffirmation agreements as required by the Bankruptcy Code.[200] However, the Commission's concern quickly went beyond the specific abuses by Sears to consideration of a proposal to ban reaffirmations of unsecured debt entirely and to limit reaffirmations of secured debt to the value of the collateral at the time of filing.[201]

As indicated in the preceding Section, December 1996 marked the moment when creditors made a point of presenting a united front, through the National Consumer Bankruptcy Coalition.[202] From that period forward, one point of emphasis was resistance to the proposals to limit reaffirmations.[203] For purposes of this article, it is noteworthy that while seeking to preserve reaffirmations in chapter 7, creditors never questioned the basic bifurcation principle in chapter 13.[204] They continued to advocate for a contract interest rate on secured claims in chapter 13[205] and to oppose involuntary ride through.[206]

---

sumer Bankruptcy (Aug. 30, 1996) (on file with author). The Honorable Edith H. Jones was a member of the Bankruptcy Commission.

198. Letter from Gary Klein, Staff Att'y, Nat'l Consumer Law Ctr., to the Nat'l Bankr. Review Comm'n (Oct. 9, 1996) (on file with author).

199. Memorandum from Elizabeth Warren & Melissa B. Jacoby to the Consumer Bankr. Working Group (Jan. 14, 1997) (on file with author).

200. *See In re* Latanowich, 207 B.R. 326 (Bankr. D. Mass. 1997); Kilpatrick, *supra* note 75, at 825–26.

201. The Commission majority ultimately endorsed this proposal. NBRC REPORT, *supra* note 71, at 145–61 (discussing Recommendation 1.3.1). The dissent from this recommendation is in the separate statement of Commissioners Edith Hollan Jones and James I. Shephard. *Id.* at 1127–34. The Commission's recommendation would not have forced automobile creditors to accept a reaffirmation for the value of the collateral, so it was expected that secured creditors would simply repossess, after obtaining relief from the automatic stay. Repossession would allow the secured creditor to obtain the value of the collateral immediately, at sale, rather than over time through a reaffirmation agreement. The Commission majority noted this expectation and argued that the reaffirmation limitations would consequently provide a greater incentive for debtors to file chapter 13, where of course undersecured creditors could also anticipate lien stripping. *Id.* at 159–60.

202. *See supra* note 158 and accompanying text.

203. This was a great concern of the credit unions as well, though their concern was more with the proposal to prohibit reaffirmations of unsecured debts entirely.

204. There is brief mention in one submission by the secured automobile lenders in October 1996, to preventing cramdown for vehicles purchased within ninety days of filing. Issues of Secured Vehicle Creditors, *supra* note 193, at 3. The proposal is headed "bad faith" purchases, and it explicitly links the proposal to 11 U.S.C. § 523(a)(2)(C) (2000) (amended 2005), excepting certain unsecured claims from discharge when the debt was incurred on the eve of bankruptcy. It was clear, therefore, that the proposal was not a general challenge to the idea of cramdown in chapter 13. Nor was the proposal mentioned again in presentations made to the Commission.

205. Memorandum from the Nat'l Consumer Bankr. Coal. to the Nat'l Bankr. Review Comm'n 3 (Apr. 16, 1997) [hereinafter Consumer Bankr. Memo] (on file with author).

206. *Id.* at 7 (commenting on "Consumer Bankruptcy Draft No. 1").

The Commission's report was a big disappointment to creditors generally, and to the automobile lender interests in particular. The report endorsed limitations on reaffirmations in chapter 7,[207] and the Commission majority further recommended reversal of the Supreme Court's holding in *Rash*, instead setting the valuation standard for allowed secured claims where the collateral was personalty at a wholesale market price.[208] The Commission unanimously recommended a requirement that payments to secured creditors in chapter 13 be spread throughout the plan.[209] This requirement would delay repayment of the allowed secured claim. The Commission majority also recommended that a fixed interest rate be set for payments to secured creditors in chapter 13, rejecting the industry's advocacy for the contractual rate of interest.[210] In the industry's single victory, the Commission endorsed a prohibition of involuntary ride through.[211]

2. *The First House Bills*

The first bills introduced into the House (the McCollum and Gekas bills)[212] contained provisions that were much more favorable to secured creditors than the Commission proposals. Most of these secured creditor provisions also remained essentially unchanged throughout the congressional process. This was true for valuation standards, the provisions designed to deter chapter 20 strategies, accommodations for vehicle lessors, prohibition of involuntary ride through, and direct payment of adequate protection to creditors in chapter 13. These bills contained no provision dealing with interest rates for secured creditors in chapter 13, and such a provision never appeared in any subsequent bill.[213] With respect to reaffirmations, these bills dropped any restrictions on the substantive terms of reaffirmations, rejecting the Commission's proposals, and the idea of

207. The Commission report included a recommendation that the amount reaffirmed, limited to the value of the collateral, could not be enhanced by "attorney fees, costs or expenses" of the creditor. NBRC REPORT, *supra* note 71, at 3 (discussing Recommendation 1.3.1).

208. *Id.* at 7. See *id*. at 243–58 for the majority's discussion of the valuation issue.

209. *Id.* at 7 (discussing Recommendation 1.5.3).

210. *Id.* For the majority's discussion of the interest rate issue, see *id.* at 259–62.

211. *Id.* at 4 (discussing Recommendation 1.3.3). For the majority's discussion of this issue, see *id.* at 165–69. At one time the Commission was considering a proposal to mandate the availability of involuntary ride through. Consumer Bankr. Working Group, February 23, 1997 Draft, at 4 (unpublished manuscript on file with author).

212. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. (1998); H.R. 2500, 105th Cong. (1997).

213. There is one minor exception to the statement in the text. In the original House bills, there was a cramdown limitation in chapter 13 for collateral purchased within 180 days of filing. If that cramdown limitation applied, the bills provided that the secured creditor was entitled to contractual rates of interest. *See infra* notes 220–21 and accompanying text.

substantive limitations on the amount of a reaffirmation was also not raised again during the rest of the congressional process.[214]

The proposed means test in the McCollum and Gekas bills included the provision permitting deduction of all payments to become "contractually due" to motor vehicle creditors for purposes of determining what could be contributed to unsecured creditors in chapter 13.[215] Though there were many changes in the definition of the means test in subsequent bills, this provision remained unchanged throughout the process.[216] However, the original House bills did not allow deduction of any arrears owed at the time of filing that would have to be paid in chapter 13 if the debtor wished to retain the collateral. That provision, contained in the final legislation,[217] was not added until several years later.

There are two other issues affecting secured creditors where the positions taken in the initial House bills were subsequently altered. First, nothing appeared in these bills concerning the requirement of equal payments to secured creditors in chapter 13. That provision first appeared by an amendment adopted in the Senate in 1999,[218] as detailed below. Second, and more significantly, though there was a cramdown limitation in these bills, it was fundamentally different from the final legislation. The cramdown provision applied only to collateral acquired within a 180-day lookback period from the date of filing and was limited to purchase money security interests in personal property.[219] The provision amended § 506, not § 1325, of the Bankruptcy Code, meaning that bifurcation was eliminated in both chapter 7 and chapter 13, and that the debtor's right of redemption was affected, as well as the minimum amounts payable to secured creditors in chapter 13.[220] Moreover, unlike the final legislation, the provision was well drafted, specifically stating that the "allowed secured claim shall be the sum of the unpaid principal balance of the purchase price and accrued and unpaid interest and charges at the contract rate."[221]

214. There was variation in the many subsequent congressional bills on the disclosures that needed to accompany reaffirmations, as well as when there needed to be court approval that reaffirmation would not impose undue hardship and was in the best interests of the debtor.

215. H.R. 3150.

216. There is one exception to this statement. The Grassley/Durbin bill, introduced in the Senate at about the same time, used a different approach to the means test, which did not fully allow for all payments to become due to secured creditors. *See infra* note 242 and accompanying text. However, this alternative approach to the means test was dropped at the time of the first conference report in 1998, and never reappeared.

217. *See* BAPCPA, Pub. L. No. 109-8, § 306, 119 Stat. 23, 80–81 (codified at 11 U.S.C. § 1325).

218. S. 625, 106th Cong. § 306 (1999).

219. The sections did not make explicit reference to the problem of loading up debt on the eve of bankruptcy. This concern had sparked the suggestion during the Commission phase that bifurcation of secured claims be eliminated (in that instance with a ninety-day lookback period). *See* Consumer Bankr. Memo, *supra* note 205. Nonetheless the provision appears to reflect that type of concern.

220. H.R. 3150, 105th Cong. § 128 (1998); H.R. 2500, 105th Cong. § 110.

221. The entire language of the section, including provisions for contingencies that illustrate reflective thought in the drafting of the provision, is as follows. The language was identical in both bills. This section was contained in H.R. 3150.

The provisions in these first House bills were based on drafts prepared by representatives of the NCBC, the umbrella creditor group.[222] I have not been able to learn in my interviews how these sets of provisions came to be included in the initial bills. In particular, I do not know to what extent the provisions reflected explicit bargaining between different creditor groups. It is clear, however, that this legislation contained many provisions favorable to auto lender groups, and avoided the Commission-recommended retrenchment of their position. Perhaps this reflected some explicit discussion with auto lender interests. Regardless of whether those discussions occurred, the drafting almost certainly reflected a concern for providing benefits to this important creditor group, for the purpose of maintaining the broad creditor coalition formed during the Commission phase of the reform process.

3. *The First Senate Bill and the Abraham Amendment*

The Grassley/Durbin bill,[223] as introduced in the Senate, was not as comprehensive as the bankruptcy reform legislation considered in the House and did not contain many of the provisions affecting secured creditors discussed in the preceding Section. The bill's approach regarding the means test was also quite different. Instead of establishing a rigid formula for determining what the debtor could pay through a chapter 13 plan, the provision simply directed the judge to estimate whether the debtor could repay twenty percent of unsecured claims through a chapter 13 plan.[224] Although this approach was deemed generally more favorable to debtors, it was in some ways not as favorable to auto lenders. In calculating how much could be paid to unsecured creditors in chapter 13, the debtor would subtract from income on account of payments to se-

SEC. 128. RESTRAINING ABUSIVE PURCHASES ON SECURED CREDIT.

Section 506 of title 11, United States Code, is amended by adding at the end the following:

"(e) In an individual case under chapter 7, 11, 12, or 13—

"(1) subsection (a) shall not apply to an allowed claim to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor within 180 days of the filing of the petition, except for the purpose of applying paragraph
(3) of this subsection;

"(2) if such allowed claim attributable to the purchase price is secured only by the personal property so acquired, the value of the personal property and the amount of the allowed secured claim shall be the sum of the unpaid principal balance of the purchase price and accrued and unpaid interest and charges at the contract rate;

"(3) if such allowed claim attributable to the purchase price is secured by the personal property so acquired and other property, the value of the security may be determined under subsection (a), but the value of the security and the amount of the allowed secured claim shall be not less than the unpaid principal balance of the purchase price of the personal property acquired and unpaid interest and charges at the contract rate; and

"(4) in any subsequent case under this title which is filed by or against the individual debtor within two years of the date of filing of the original case, the value of the personal property and the amount of the allowed secured claim shall be deemed to be not less than the amount provided under subparagraphs (2) and (3), as applicable.".

222. *See supra* note 154 and accompanying text.
223. S. 1301, 105th Cong. § 302(a) (1998).
224. *See* Jensen, *supra* note 143, at 513–14.

cured creditors only the amounts that would be paid in chapter 13 as secured claims. Because the Grassley/Durbin bill contained no significant limitations on cramdown nor a requirement that interest be paid at the contractual rate, that amount would be less than all payments "contractually due" to secured creditors.

The Grassley/Durbin bill, as introduced, included no provisions concerning cramdown of secured debt. However, important cramdown provisions were added as the legislation made its way through the legislative process.[225] At the Senate Judiciary Subcommittee level, an amendment was added that limited cramdown for purchase money loans where the collateral was obtained within ninety days of filing.[226] As in the House bill, this provision amended § 506 of the Code, and hence applied to chapter 7 redemptions as well as chapter 13 plans.[227] At the markup session before the full Judiciary Committee, Senator Spencer Abraham successfully introduced an amendment that became the basis of the more extensive limitation on chapter 13 cramdowns contained in the final legislation. The Abraham amendment,[228] as it was called, amended § 1325 and contained the "hanging paragraph," currently in force, stating that "section 506 shall not apply" to secured claims.[229] The hanging paragraph applied to all secured claims, no matter what collateral, when incurred or whether such claims were purchase money secured claims. The legislation that passed the Senate included the Abraham amendment in this form.

Senator Abraham, who represented the State of Michigan, introduced this critical amendment at the behest of the automobile finance industry.[230] I was told by one person who was monitoring the markup session at which the amendment was introduced that the amendment was introduced as a surprise. This person told me that most amendments offered at the markup session were circulated the day before to allow Senators and their staffs time to prepare, and to check with lobbyists if they so desired. Apparently Senator Abraham merely reserved a spot to make an amendment, without indicating the subject matter until the day of the markup session.

225. *See, e.g.*, S. REP. NO. 105-253, at 32–33 (as passed by House, June 10, 1998).

226. *Id.* at 31–32; Jaret Seiberg, *Senate Panel Approves Bankruptcy Reform Bill*, AM. BANKER, Apr. 3, 1998, at 1.

227. *See* S. 1301, § 302(c); H.R. 2500, 105th Cong. § 110 (1997).

228. *See* S. REP. NO. 105-253, at 33.

229. S. 1301, § 302(a). Ironically, the Grassley/Durbin bill, as enacted, also included the amendment to § 506 prohibiting cramdown for purchase money security interests in personalty incurred within ninety days of filing, though that provision became redundant after the Abraham amendment. *Id.* § 302(c).

230. Harry Stoffer, *Lobbyists Push Industry's Problems with 'Cramdown' into the Spotlight,* AUTOMOTIVE NEWS, Oct. 26, 1998, at 28. ("At the behest of the industry, Sen. Spencer Abraham, R-Mich., a member of the Senate Judiciary Committee, proposed an amendment to abolish cramming down when the bill was considered by the committee in May. The panel, on a near-party-line vote, approved the Abraham amendment.").

Although the precise amendment was apparently a surprise, the idea of providing greater protection to auto lenders in chapter 13 may not have been a complete surprise. The auto lenders surely knew that they were usually better off in chapter 7 than in chapter 13. Further, just two months before the Abraham amendment was introduced, a representative of the American Financial Services Association (AFSA), a trade association representing a broad array of nonbank creditor interests, including many lenders specializing in auto finance,[231] stated in testimony prepared for the relevant subcommittee of the House Judiciary Committee that the 180-day lookback period on cramdowns then in the House bill[232] "should be substantially extended for secured vehicle lenders, as they suffer the greatest losses on cramdown in the early years of the vehicles [sic] life when depreciation is the greatest."[233] However, it is likely that prior to the Abraham Amendment there was no consensus within the creditor community that the auto lenders should receive greater protection in chapter 13 than the protection provided by the proposed 180-day lookback period. No changes were made in the House bill as a result of the testimony quoted above. Additionally, one week before the quoted testimony, another representative of the AFSA presented testimony in both the House and Senate, but did not specifically mention the need to extend cramdown protection for auto lenders.[234]

One must wonder how the representatives of the bank credit card issuers felt about the Abraham amendment. These interests had been central to the effort to form the NCBC.[235] Their representatives very likely paid close attention to the drafting of the House legislation being considered at the same time the Abraham amendment was introduced. The House legislation, as described above, represented a careful balancing of the interests of secured creditors, including auto lenders, and the interests of unsecured creditors, including bank credit card lenders. Eliminating cramdown in chapter 13 significantly altered that balance.

231. For more detail on the AFSA, see *supra* note 191.

232. H.R. 3150, 105th Cong. § 128 (1998).

233. *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong., pt. 3, at 88 (1998) (statement of Jeffrey A. Tassey, Senior Vice President of Government and Legal Affairs, American Financial Services Association). Mr. Tassey later became the principal spokesperson for the Coalition for Responsible Bankruptcy Laws, as the NCBC came to be called in later Congresses.

234. These statements were made by George Wallace, who had previously been a principal spokesperson for NCBC but at this time appeared as a representative of just the AFSA, an important constituent group within NCBC. *The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to the Consumer Bankruptcy Crisis: Hearing on S. 1301 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 105th Cong. 34–41 (1998) (statement of George J. Wallace on behalf of the American Financial Services Association); *Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders and Borrowers Bankruptcy Accountability Act of 1998: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 105th Cong., pt. 2, at 56–63 (1998).

235. *See* Warren, *supra* note 147, at 196.

However, representatives of these disadvantaged interests did not protest publicly. The Committee approved the Abraham amendment in a largely party line vote, with Republicans supporting it.[236]

4. *The First Conference Report and Subsequent Changes in the Means Test*

The first conference report, in 1998, resolved the conflict over the definition of the means test in favor of the House approach.[237] The House definition included the provision providing for the deduction of all payments to become "contractually payable" to secured claimants over the next five years from the debtor's current monthly income.[238] At this time, the legislation did not include the additional deduction for arrears that must be paid in chapter 13 if the debtor wishes to retain his or her residence, motor vehicle, or property subject to a security interest. That language, also favorable to secured interests because it makes a chapter 13 case less likely, was not added to the legislation until the second conference, in 2000.[239] The additional language was added in an apparent effort to meet some of the objections to the legislation raised by the White House, which wanted the means test softened.[240] The legislation's proponents feared, quite rightly as it turned out, a Presidential veto.

The first conference report also accepted the broader cramdown limitation added by the Abraham amendment, but in modified form. The limitation took the form of the House bill,[241] which meant that the limitation became an amendment to § 506 and applied to chapter 7 redemptions as well as chapter 13 plans. The conference report also limited the cramdown prohibition to loans incurred within a lookback period,[242] whereas the Abraham amendment applied to all security interests.[243] However, the conference report adopted a five-year lookback period,[244] instead of the 180 days contained in the House bill.[245] As

236. Stoffer, *supra* note 230, at 28. The bill, including the anti-cramdown amendment, was reported out of the Senate Judiciary Committee two months later by a vote of 15-2, with all Republicans voting in favor. Jensen, *supra* note 143, at 513 n.149. Republicans were generally in favor of the bankruptcy reform legislation and in regular contact with the representatives of the NCBC.

237. H.R. REP. NO. 105-794 (1998) (Conf. Rep.).

238. H.R. 3150, 105th Cong. (1998); *see* 144 CONG. REC. H9954 (daily ed. Oct. 7, 1998) (statement of Rep. Gekas).

239. H.R. REP. NO. 106-970 (2000) (Conf. Rep.).

240. There was a major effort in the 106th Congress to soften the means test, led by the House Judiciary Committee Chairperson, Henry Hyde, a prominent Republican, joined by a majority of House Democrats. These efforts failed after extensive debate, with the NCBC strongly resisting the softening amendments. *See* Jensen, *supra* note 143, at 523–38. In floor debate, after it was clear that his position would not succeed, Representative Hyde stated, "Lastly, let me pay my respects to the creditor lobby. They are awesome." 145 CONG. REC. H2723 (daily ed. May 5, 1999).

241. Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 128 (1998).

242. H.R. REP. NO. 105-794, at 122 (Conf. Rep.).

243. S. REP. NO. 105-253, at 33 (1998).

244. H.R. REP. NO. 105-794, at 122 (Conf. Rep.).

in the House bill, the cramdown prohibition in the conference report was limited to purchase money security interests in personal property.[246] There was very little explanation in the conference report about this provision, which was characterized as a "compromise."[247] As reported above,[248] the House approved the conference report language but the Senate never voted on it.

5. *Scaling Down the Abraham Amendment*

The House bill introduced at the beginning of the next Congress, in February 1999, contained the language of the preceding year's conference report, including the "compromise" provisions respecting cramdown.[249] The House adopted a number of amendments that spring, but none of them dealt with the cramdown provision, which remained in the bill adopted by the House in May 1999.

In the Senate, however, matters progressed differently. In the preceding Congress, the Senate had proceeded in a truly bipartisan manner and the bill was enacted almost unanimously.[250] When the conference report tilted heavily to the House bill, especially with respect to the means test, many Democrats ceased to support the legislation.[251] This lack of support is one reason the Senate never voted on the conference report during the preceding year. Mindful of the need for some Democratic support to foreclose a filibuster, and wanting a bill that President Clinton might sign, Senator Grassley included modifications to the conference report designed to appeal to those entities.[252] Three significant changes were made in the cramdown provisions. First, the provision was removed from § 506 and placed once again in § 1325, where it had been placed by the Abraham amendment.[253] This meant that the cramdown limitation did not prevent lien stripping through redemption in a chapter 7 proceeding. Second, the five-year lookback period was limited to mo-

245. H.R. 3150, § 128.

246. H.R. REP. NO. 105-794, at 122 (Conf. Rep.).

247. Here is the entirety of the explanation: "The House bill prohibited cramdowns for certain secured debts incurred within 180 days prior to bankruptcy. The Senate bill contained an absolute prohibition on cramdowns in Chapter 13 cases. The Committee compromised by prohibiting cramdowns on debts securing personal property incurred within five years of filing for bankruptcy." H.R. REP. NO. 105-794, at 122 (Conf. Rep.).

248. *See supra* notes 163–64 and accompanying text.

249. Bankruptcy Reform Act, H.R. 833, 106th Cong. § 123 (1999).

250. *See* 144 CONG. REC. S10767 (daily ed. Sept. 23, 1998) (listing a 97-1 vote approving S. 1301).

251. In May 1999, the Clinton Administration issued a statement expressing opposition to the bill then pending in the House, which was essentially identical to the 1998 conference report. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY, H.R. 833—BANKRUPTCY REFORM ACT OF 1999 (1999), *available at* http://clinton2.nara.gov/OMB/legislative/sap/HR833-h.html; *see* Jensen, *supra* note 143, at 526.

252. *See* Jensen, *supra* note 143, at 528 ("Senator Grassley introduced . . . a bill that was more acceptable to the Clinton Administration than its House counterpart.").

253. S. 625, 106th Cong. § 306(b)(1999).

tor vehicles acquired for the personal use of the debtor.[254] For all other collateral, including motor vehicles acquired for other purposes, the lookback period was six months.[255] Third, the cramdown limitations for both motor vehicles and other property were not limited to purchase money security interests,[256] as they had been in the conference report from the preceding Congress.[257]

The proposed cramdown limitations produced extensive controversy in the 106th Congress, especially in the Senate. The creditor community appeared to remain united in support of the long lookback periods for motor vehicles. There is some irony in this behavior, because it was self-evident that, if adopted, the nearly total elimination of cramdown for motor vehicles implied by a five-year lookback period would reduce the payments to unsecured creditors in chapter 13 plans, including payments to bank credit card interests. Until this point in the process, the NCBC had placed great emphasis in its many presentations made to the Commission and to Congress on the importance of collecting money that debtors could afford to pay their unsecured creditors, and to accomplish that by using the means test to force debtors who could pay into chapter 13.[258] In my interviews with noncreditor representatives active in lobbying Congress during this period, I heard many people express the opinion that the representatives of bank credit card interests realized the impact that the proposed cramdown limitation would have on their interests but felt that they had to remain quiet in order to hold together the broad creditor coalition. These reports are consistent with press reports from the same period.[259] It is clear that Senator Abraham continued to fight for the long lookback period for motor vehicles, and it appeared that Senate Republicans generally deferred to Senator Abraham on this issue.[260] Perhaps the creditor coalition had no choice but to go along, as for the most part it was Republicans with whom they had influence.

254. *Id.*

255. *Id.*

256. S. 625, § 309(c) (deleting the proposed § 1308, which addressed purchase money security interests).

257. *See* H.R. REP. NO. 105-794, at 122 (1998) (Conf. Rep.).

258. This conflict led Brady Williamson, the chair of the Bankruptcy Review Commission, to comment to a *Wall Street Journal* reporter that the cramdown limitation constitutions one of the best examples of why this is legislation that is at war with itself." Tom Hamburger, *Auto Firms See Profit in Bankruptcy-Reform Bill Provision*, WALL ST. J., Mar. 13, 2001, at A28.

259. Steve France, *Bankruptcy Reform: Democrats to Try to Restore Cramdown Rule Weakened in House and Senate Reform Bills*, 12 Bankr. L. Rep. (BNA) No. 8, at 208, 209 (Feb. 24, 2000) ("[F]inancial firms with a greater interest in unsecured debt have so far accepted the anti-cramdown provisions as a tactical necessity in order to obtain other reforms.").

260. *See id*. ("Consumer advocates expect strong resistance [to efforts to limit the lookback period], from Abraham whose efforts on behalf of the Michigan auto industry have been supported by the GOP leadership. 'The Republicans can't easily take the five-year [rule] out,' a Democratic staffer said. 'He's in the middle of a tough re-election campaign and the industry isn't getting anything else out of this bill.'" (first alteration added)).

Great controversy about the cramdown limitations was raised by a variety of interests that never formed a formal coalition but whose interests coalesced on the cramdown issue. Women's groups mobilized to protest that the greater amounts that would have to be paid to auto lenders in chapter 13 plans would jeopardize payments of future support claims to women and children.[261] These groups claimed there would not be enough money to go around.[262] The White House supported this perspective with statements expressing concern about the pending limitations on cramdown.[263] The National Association of Chapter 13 Trustees (NACTT), a trade association of chapter 13 trustees, expressed concern about the probable decline in the number of chapter 13 cases, as the incentive for choosing chapter 13 to cramdown unsecured auto lenders was being eliminated.[264] The NACTT also conducted a study that showed that many debtors then choosing chapter 13 simply did not have enough income to fund all the proposed mandatory payments to secured and priority creditors.[265] Another active interest group was the National Association of Consumer Bankruptcy Attorneys (NACBA), a trade association of consumer bankruptcy lawyers primarily representing debtors. Many of these attorneys had substantial chapter 13 practices, and attorney fees for a chapter 13 case are higher than for a chapter 7 proceeding.[266] Many Senate Democrats expressed support for these sentiments. Senator Kohl drafted an amendment that would have scaled back the lookback period to six months.[267] However, there were many more politically notorious amendments offered by Senate Democrats. After the Democrats prevailed on another amendment that was an important concern of Senator Kohl—the national cap on homestead exemptions—he

261. *See, e.g.*, *Women Urge Senators to Reject Bankruptcy Bill*, ST. LOUIS POST-DISPATCH, July 14, 1999, at C2.

262. Joan Entmacher of the National Women's Law Center stated to one reporter: "[T]he priority status [for support claims] was useless against the new type of 'not really secured' secured creditors who will be able to 'cut to the head of the line, leaving the vast majority of children owed support with a "first priority" to nothing.'" Steve France, *Bankruptcy Reform: Reform Opponents Claim Anti-Cramdown Provision Favors Credit Cards Over Kids*, 11 Bankr. L. Rep. (BNA) No. 23, at 507, 508 (June 10, 1999).

263. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, S. 625—BANKRUPTCY REFORM ACT OF 1999 (1999), *available at* http://clinton3.nara.gov/OMB/legislative/sap/106-1/S625-s.html. The White House expressed support for the Kohl amendment, which would have reduced the lookback period, for all collateral, to 180 days.

264. Hamburger, *supra* note 258.

265. Memorandum from Hank Hildebrand, Chapter 13 Trustee, Survey Shows Big Impact of Anti-Lienstripping Provision in S. 625 (on file with author). Presumably these debtors could propose a confirmable chapter 13 plan if they surrendered collateral. Indeed the threat to do so might induce many secured creditors to accept less than full payment under a chapter 13 plan, providing that amount is more than the secured creditor is likely to receive upon liquidation of the collateral.

266. Sandra Block, *Filing Chapter 7 Bankruptcy Will Get Tougher Soon*, USA TODAY, Apr. 21, 2005, at 4B.

267. 145 CONG. REC. S14161 (daily ed. Nov. 5, 1999) (Amend. No. 2666 of Sen. Kohl).

decided not to insist on a vote on his proffered cramdown amendment.[268] In the end, the Senate approved the bill with the cramdown provision that had been drafted by Senator Grassley at the beginning of the session.[269]

The next stage in the legislative process was the informal conference to resolve differences on many issues between the Senate and House bills. This was another of the conferences on this legislation in which only Republican representatives participated. The White House loomed large at this time, however, because of the threat of a veto, and the conference made several gestures in the direction of White House concerns.[270] With respect to cramdown, the conference basically adopted the Senate position, which limited the antibifurcation principle of cramdown limitations to chapter 13[271] and applied the five-year lookback period only to motor vehicles acquired for "personal" purposes.[272] However, the conference extended the lookback period for other property to one year, and this change ultimately became part of the final legislation.[273] Finally, and significantly, the conference confined the cramdown limitations for both motor vehicles and other collateral to purchase money security interests, which had been the House position.

The Senate and House approved the conference report, but the legislation was pocket vetoed by President Clinton.[274] In the next Congress, the House quickly introduced and passed a bill replicating the positions of the previous year's conference report. The Republicans were deemed the majority party in the Senate only because of the tie-breaking authority of the Vice President. Perhaps to maintain enough support for the bill to overcome a filibuster, many amendments were proposed and adopted. One such amendment, proposed by Senator Leahy, the senior Democrat on the Judiciary Committee, reduced the lookback period to three years.[275] The Senate adopted the amendment by a voice vote after obtaining unanimous consent for an exception to the rules.[276] This suggests Republican support or at least acquiescence in the change. I can

268. France, *supra* note 259, at 209; *see also* Steve France, *Bankruptcy Reform: Timing of Senate Action Still Uncertain; Dems Expected to Target Cramdown Limits*, 11 Bankr. L. Rep. (BNA) No. 24, at 535, 535 (June 17, 1999) (discussing the proposed Kohl amendment).

269. 146 CONG. REC. S255 (daily ed. Feb. 2, 2000).

270. This included a modification of the means test advocated by the White House. *See supra* notes 239–40 and accompanying text.

271. Unfortunately, for ease in interpreting BAPCPA, this decision took the form of adopting the Senate bill's "hanging paragraph" addition to § 1325(a). *See supra* notes 58–65 and accompanying text.

272. BAPCPA, Pub. L. No. 109-8, § 306, 119 Stat. 23, 80 (codified at 11 U.S.C. § 1325(a)).

273. There has never been any official explanation for this change. One person whom I interviewed suggested that retail sellers of furniture and appliances on credit complained that they were not getting the same protection from cramdown as vehicle lenders, and this change may have been an accommodation to their interests.

274. *See supra* note 174 and accompanying text.

275. 147 CONG. REC. S2234–35 (daily ed. Mar. 13, 2001).

276. *Id.* at S2359 (daily ed. Mar. 15, 2001).

only speculate as to what accounted for Republican willingness to limit the lookback period when changes in the cramdown provision were resisted in the previous Congress. It may be significant that Senator Abraham was defeated in the November 2000 election[277] and that there was no longer a Michigan Senator on the Senate Judiciary Committee.

Before the Senate could finally pass the legislation, in May 2001, Senator Jeffords shifted caucuses and the Democrats became the controlling party in the Senate.[278] The bill passed, without further change in the cramdown provisions, but Democrats now had a majority of the Senate's conferees. The resulting conference reached compromises on many contentious provisions, including the cap on homestead exemptions[279] and the abortion clinic violence discharge exception.[280] There was also a need for compromise with respect to the cramdown limitation because the House bill contained a five-year lookback for motor vehicles and the Senate bill had only a three-year lookback. In what was described as a "compromise," the conference adopted a 910-day (2.5 years) lookback period.[281] The conference report contains no explanation for how 2.5 years can be considered a compromise between 3 and 5 years,[282] and my interviewees have not been able to offer me any insight into why the cramdown limitation was further scaled back in the conference committee.

The House ultimately defeated this conference report because of the abortion clinic violence discharge exception.[283] The conference report was reintroduced in the 108th and 109th Congresses as new bills, and ultimately passed.[284] Except for debates about the abortion clinic violence discharge exception, however, no change was made in the substantive provisions agreed to in the preceding conference report, including the cramdown provisions.[285] As one interviewee explained to me, the bill had become "calcified." The creditor coalition had Senator Leahy's signature on a conference report and did not wish to risk jeopardizing that support.

277. *See, e.g.*, *The Midwest*, WASH. POST, Nov. 9, 2000, at A39.

278. *See, e.g.*, *Jeffords Tips Senate Power; Democrats Prepare to Take Over as Vermont Senator Quits GOP*, WASH. POST, May 25, 2001, at A01.

279. H.R. REP. NO. 107-617, at 211 (2002) (Conf. Rep.).

280. *See* Jensen, *supra* note 143, at 554–55.

281. H. R. REP. NO. 107-617, at 210 (Conf. Rep.).

282. It has been reported that in this conference committee the House conferees generally deferred to the Senate position, except on the abortion clinic violence discharge exception and the cap on homestead exemptions. Jensen, *supra* note 143, at 549 n.404, 550–51. This may have reflected the political reality that support of the Democratic leadership in the Senate was a prerequisite to the ultimate success of the legislation in that Congress, and that there were Senate Democrats who would have been pleased to see the legislation die.

283. *See* 148 CONG. REC. H8824–25 (daily ed. Nov. 14, 2002).

284. *See* Jensen, *supra* note 143, at 558–66.

285. *See id.* at 558–59.

6. *The Equal Payments Provision*

The equal payments provision was not in the legislation proposed or passed in the first Congress to consider bankruptcy reform. The provision was added at a Senate Judiciary Committee markup session in April 1999, during the second Congress to consider the reform legislation.[286] It was apparently added at the behest of automobile lender interests, and was intended to reverse some cases that allowed debtors to delay initiating payments to secured creditors a year or more into the chapter 13 plan.[287] Once passed by the Senate, the provision appeared in all subsequent bills and conference reports, and in the final enactment.[288] Courts have not yet interpreted the provision to require spreading payments to secured creditors throughout the plan and may never do so.[289]

7. *The Failure to Include an Interest Rate Provision*

No version of BAPCPA ever included a provision concerning the interest rates paid to secured creditors in chapter 13, even though the four commissioners who dissented from the majority Commission report advocated such a provision.[290] In retrospect, it seems evident that auto lender interests reached at least an implicit bargain with unsecured creditors at the time the provisions of the original House bills (the McCollum and Gekas bills) were formulated. These bills contained many of the provisions on the wish lists of the auto lenders as presented to the Commission, and those provisions remained remarkably unchanged over more than seven years of Congressional deliberations. The auto lenders deviated from that implicit bargain in arranging for the limitation on cramdown in chapter 13, but there were probably practical limits on how far they could push their agenda. After all, if the auto lenders had pushed for contractual rates of interest in chapter 13, they would have received an even higher percentage of the money being paid into chapter 13 plans. Furthermore, the issue of the appropriate rate of interest to be paid to secured creditors in chapter 13 was then being litigated in the

286. S. REP. NO. 106-49, at 15, 30 (1999).

287. In some cases confirmed plans permitted balloon payments to be made to secured creditors towards the end of the plan, in the meantime preserving the automatic stay to prevent repossession. *See* NORTON, JR., *supra* note 114, § 122:8; Kilpatrick, *supra* note 75, at 835–37.

288. *See, e.g.*, 11 U.S.C.A. § 1325(a)(5)(B) (West Supp. 2006); H.R. 333, 107th Cong. § 309 (2001); H.R. REP. NO. 106-970, at 15 (2000) (Conf. Rep.).

289. Such an interpretation would need to be asserted at the time of plan confirmation by a chapter 13 trustee, which I think is unlikely to happen, or by an unsecured creditor seeking payments for itself earlier in the plan. It is questionable whether any unsecured creditor would ever have enough at stake to justify the cost of such a challenge. Debtors often prefer to frontload payments to secured creditors. *See supra* note 116 and accompanying text.

290. NBRC REPORT, *supra* note 71, at 2590, 2665–66 (Hon. Edith H. Jones & James I. Shepard, dissenting on behalf of four commissioners). There is one minor exception to the statement in the text. *See supra* note 213.

courts.[291] It was not until 2004 that it became clear that the secured creditors would lose that litigation, with the Supreme Court's decision in *Till*.[292] By that time, the substantive provisions of the reform legislation were calcified; the creditor coalition was determined to allow no alteration of the provisions of the 2002 conference report, except with respect to the abortion clinic violence discharge exception.

IV. WHAT DOES THIS ALL MEAN?

A. *The What If Questions*

One set of questions that arises from a history is whether it had to end this way. If various people or groups had acted differently at times, might we now have a different bankruptcy reform law, or perhaps no bankruptcy reform law at all?

1. *Questioning the Strategies of BAPCPA Opponents*

It seems to me that the big story from this history is that a broad creditor coalition held together and acted cooperatively throughout a ten-year period, even though there are obvious conflicts of interest between the different creditor groups, and in particular between auto lenders and unsecured creditors. This coalition was formed during the Commission period, at a time when the position of the auto lenders in particular was under attack.[293] As a member of the creditor coalition, the auto lenders supported a means test that was not in their immediate interest; but, in return they received backing for a number of other positions, even though the self-interest of the bank credit card issuers and the auto lenders often conflict.[294] Suppose at some time early in the process, the opponents of the means test had proposed an alliance to the auto lenders. They might, for example, have offered to support changes in chapter 13 favorable to auto interests, while dropping efforts to curtail the auto lenders' reaffirmation privileges in chapter 7. To my knowledge, no such offer was ever made.[295] If one had been made, would it have made a difference?

---

291. *See, e.g.*, Green Tree Fin. Servicing Corp. v. Smithwick (*In re* Smithwick), 121 F.3d 211, 214 (5th Cir. 1997); Gen. Motors Acceptance Corp. v. Valenti (*In re* Valenti), 105 F.3d 55, 64 (2d Cir. 1997); Koopmans v. Farm Credit Servs. of Mid-America, ACA, 102 F.3d 874 (7th Cir. 1996).

292. Till v. SCS Credit Corp., 541 U.S. 465, 478–80 (2004).

293. *See supra* Part III.C.1.

294. *See id.*

295. At various times, Professor Elizabeth Warren referred in conversations with the press to potential conflicts of interest within the creditor coalition. These comments could have been understood as a reference to conflicts between the auto lenders and bank credit card interests, and also as an invitation for the competing interests to stop their cooperative behavior. *E.g.*, Yochi J. Dreazen, *Bankruptcy Reform Pits Industries Against Each Other*, WALL ST. J., Apr. 20, 2000, at A28 ("'This whole bill is a case of one industry picking the pockets of another,' says Elizabeth Warren, a Harvard bankruptcy-law professor . . . .").

It is impossible to know for sure, but I think it is unlikely such an offer would have been accepted. The institutional connections that auto lenders had formed before the bankruptcy reform process began are partly to blame. From the beginning, the auto lenders spoke through the auspices of the American Financial Services Association, and that group represented a much broader group of creditors, including some important credit card interests, such as MBNA bank. Trust and loyalty matter, and it would not have been easy for the auto finance companies to break away from this association and its other relationships with members of the NCBC.

Moreover, BAPCPA opponents did not all have the same interests, and it would have been difficult for them to act collectively to offer the auto lenders an attractive deal. Such a deal would almost certainly have included a better outcome for auto lenders in chapter 13. Yet one important constituent group in the debtor coalition was the NACBA. Many of the most prominent members of that group had a substantial chapter 13 practice, and their more well-off clients probably benefited the most from the ability to strip auto liens on relatively valuable cars in chapter 13.

2. *Questioning the Strategies of the Creditor Coalition*

Another "what if" question that can be asked is whether the bank credit card interests needed to accept the Abraham amendment limiting cramdown, when they had already made a number of concessions, against their interest, to the auto lenders. In fact, one suspects that the scaling back of the Abraham amendment was due in part to the failure of the creditor coalition to resist those changes, at least vigorously. After all, when the creditor coalition decided to vigorously resist change to the original House bills, over which they had great influence in drafting, they were usually quite successful.[296] One suspects that if the bank credit card interests had joined with debtor groups and the Senate Democrats to resist more than minimal cramdown limitations in chapter 13, the cramdown limitations would have returned to the 180 day lookback period proposed in the original House bills. Alternatively, the bank credit card interests might have tried in other ways to redress the balance established in the first House bills between secured and unsecured creditor interests. For example, the bank credit card interests could have pressed for a requirement that payments to secured creditors in chapter 13 be spread throughout the plan. This would have allowed unsecured creditors to collect payments earlier in chapter 13 and given debtors greater incentives to complete their chapter 13 plans. The Bankruptcy Review

296. The outstanding example in support of the text is when Chairman Henry Hyde unsuccessfully attempted to soften the means test in a way opposed by the creditor coalition. *See supra* note 207 and accompanying text.

Commission had unanimously endorsed a requirement that payments to secured creditors be spread throughout the plan.[297] This endorsement might have lent credibility to such a proposal.

There are several reasons why credit card interests may not have chosen that path. It was obviously very difficult to get the legislation passed, and the credit card interests must have feared that antagonizing any significant part of their broad coalition could have jeopardized ultimate enactment. Secondly, the self-interest of many participants or groups in the creditor coalition, with respect to chapter 13 cramdown, was not clear. Many banks and credit unions have greater holdings in automobile loans than they do in credit card receivables, as the credit card business has become increasingly concentrated over time.[298] Perhaps more than the support of the auto finance companies would have been risked if the credit card interests actively opposed the Abraham amendment.

Finally, and most importantly, the credit card interests had an alternative strategy that they hoped would more than make up for the losses that they suffered when the cramdown limitation was introduced. That strategy was to deter bankruptcy filings overall by increasing the costs of filing for both chapter 7 and chapter 13.[299] However, that strategy could only be achieved if BAPCPA were enacted, hence the reluctance to risk division within the creditor coalition. Further, limiting cramdown of auto loans in chapter 13 could even be seen as consistent with this overall strategy. A significant reason that debtors file bankruptcy is to avoid foreclosure on a home, because chapter 13 allows such debtors to maintain the automatic stay while paying mortgage arrears over time.[300] I do not know whether many debtors have ever elected to file bankruptcy principally to avoid repossession of a motor vehicle, but to the extent they have done so, their incentives to file are now less because of the cramdown limitations in chapter 13.[301]

---

297. *See* NBRC REPORT, *supra* note 71, at 259.

298. *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375.

299. Many commentators have noted that this was a strategy of the creditor coalition. *See, e.g.*, DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 205 (2001) ("[T]he means test . . . would appreciably raise the cost of the bankruptcy process [because of the many filings it requires] . . . . The benefit to creditors is that the increased cost of bankruptcy could discourage some debtors who would otherwise be eligible to file for bankruptcy from doing so.").

300. 11 U.S.C. § 1322(b)(5) (2000). This section was not amended by BAPCPA. Chapter 13 is the only way in bankruptcy to avoid foreclosure of a mortgage in default. Melissa B. Jacoby, *Bankruptcy Reform and Homeownership Risk*, 2007 U. ILL. L. REV. 323.

301. The incentives are not entirely eliminated, however, even when the cramdown limitations apply. The interest rate in chapter 13 is often less than the contractual rate, and a chapter 13 plan can stretch out the payment period to three or even five years, which may be longer than the auto lender would agree to in a reaffirmation agreement reached outside of bankruptcy.

B. The Future

Among most members of Congress, there is probably little taste for additional consumer bankruptcy legislation in the near future. However, pressures for additional legislation may arise. The courts, and the promulgators of the bankruptcy rules, are struggling with the many ambiguities and uncertainties introduced by BAPCPA. They may come to sensible solutions in many instances, but given the Supreme Court's frequent endorsement and use of textualist interpretation approaches to bankruptcy legislation in recent years, the need may certainly arise for some corrective legislative to prevent one or more provisions from being interpreted and applied in ways opposed to the intention of BAPCPA's promoters.[302]

Other pressures for additional legislation may well arise if, as I suspect, the yield from chapter 13 plans turns out to be quite small for unsecured creditors, especially bank credit card issuers. This reduced yield, if it occurs, will be partly the result of the cramdown limitations discussed at such length in this article. It may also result from the redefinition of the "best efforts" test, which sets the minimum standards for contributions to a chapter 13 plan in a way that may lower the contributions debtors must make.[303] If debtors will be paying less into chapter 13 plans and secured and priority[304] creditors will be receiving more from those plans, nonpriority unsecured creditors will be receiving less. Such a development may create a demand for legislative correction by influential unsecured creditor interests, such as the bank credit card issuers.

If such a political development occurs, the alignment of political interests may be different than the remarkably stable coalitions that formed during the congressional consideration of BAPCPA. It is likely, for example, that unsecured creditor interests could find some support from groups that opposed the cramdown limitations now in BAPCPA. Chapter 13 trustees earn their fees as a percentage of what a debtor con-

302. Let me use a footnote to put forth a speculative hypothesis that some will find provocative. The hypothesis is that with BAPCPA the costs of a textualist approach to interpreting the Bankruptcy Code have increased dramatically, and as a consequence the courts will tend to revert back to an interpretive approach that emphasizes some combination of the intention of BAPCPA's proponents and fealty to time-tested bankruptcy principles. The costs of a textualist approach have increased because of all the drafting difficulties in BAPCPA. Textualist interpretations will often introduce absurdities into the law. Additionally, judges must now be aware of the difficulty Congress will have in fixing these absurdities. My prediction that courts will respond by altering their interpretive strategies, to make congressional action unnecessary, relies on the idea that courts have some tendency to gravitate to the more "efficient" result. It is a goal that I endorse in this circumstance, though not always. For advocacy of another approach to interpreting BAPCPA, see Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93.

303. *See supra* note 132 and accompanying text.

304. Another factor contributing to reduced yield for bank credit card issuers in chapter 13 is the new priority status for support claims that have been assigned to a governmental unit. 11 U.S.C.A. § 507(a)(1) (West 2006).

tributes to a chapter 13 plan,[305] thus their revenues will suffer if debtors pay lower amounts into chapter 13 plans. The trustees' revenues will suffer even more if the number of chapter 13 plans decline, because total consumer bankruptcy filings decline, because chapter 13 filings decline as a percentage of total consumer filings, or both. The NACTT, which joined the debtor coalition in battling the Abraham amendment, might be natural allies for an effort led by bank credit card interests to restate the best efforts test in a more creditor-friendly manner. After all, chapter 13 trustees, like all bankruptcy trustees, are considered fiduciaries for unsecured creditor interests.[306] Such advocacy therefore would be consistent with their assigned role.

Another interesting question is whether the auto lenders would resist a change in the best efforts test. If unsecured creditors are paid very little in chapter 13, then debtors have a greater incentive to choose chapter 13 voluntarily, to take advantage of cramdown when available as well as the lower interest rates on secured debt available in all circumstances. The auto lenders are still better off in chapter 7. Mandating increased debtor contributions to chapter 13 plans is one way to discourage voluntary chapter 13 filings, through a redefinition of the best efforts test, and perhaps to discourage the filing of bankruptcy altogether. Moreover, perhaps the auto lender interests will feel that continued loyalty to a broad creditor coalition is the price the auto lenders must pay to maintain their newly acquired protections against cramdown in chapter 13.

C. On Democracy

Commentators have frequently observed that, until BAPCPA, major congressional reforms of bankruptcy laws has been dominated by professional organizations, such as the National Bankruptcy Conference or the National Conference of Bankruptcy Judges.[307] The influence of such organizations on BAPCPA was much less. Observers of the process have often lamented that development, suggesting that the process under BAPCPA was not any more democratic but only dominated by different interests, the creditor coalition.[308]

In this study of the fate of auto lenders under BAPCPA, I have been struck by the apparent limits on the ability of organized interest groups to control the legislative process. The creditor coalition, despite its apparently disciplined organization, relationships with key legislators,

305. For example, a chapter 13 trustee administering bankruptcy cases in the Eastern District of Michigan collects a fee of 4.2%. *See* Office of the Chapter 13 Standing Trustee, Trustee Fee for FY 2007, http://www.det13.com/home.shtml (last visited Oct. 3, 2006).

306. *See* 11 U.S.C.A. §§ 704, 1302 (West 2004 & Supp. 2006).

307. SKEEL, JR., *supra* note 299, *passim*; Warren, *supra* note 147, at 190–92.

308. *See* Warren, *supra* note 147, at 200–02.

and ability to make strategic campaign contributions,[309] was unable to stop the Abraham amendment. What I will characterize as accidents of the legislative process seem to have played an important role in the outcome. For example, Senator Abraham, who represented the state of Michigan, was a member of the Senate Judiciary Committee.[310] If there had not been a Michigan Senator on that Committee, would chapter 13 cramdown be as limited today? I can only speculate, of course, but I note that efforts to scale back the cramdown limitations on auto loans did not succeed until after Senator Abraham left the Senate.

Another obvious example of the inability of the creditor coalition totally to control events was the scheduling of the Senate vote on the conference report in the autumn of 2000.[311] The vote was not taken until December,[312] shortly before the Senate's final adjournment, thus allowing the President to pocket veto the legislation.[313] Proponents of BAPCPA had attempted to call an earlier vote on the conference report but were unable to obtain enough votes to stop a filibuster because too many Senate supporters of the legislation were absent, campaigning for the November 2000 elections.[314] If an earlier vote had been taken, there would have been an opportunity for a veto override; after all, the conference report was ultimately adopted in the Senate by a veto proof majority. If the President's veto had been overridden, then the cramdown limitations in chapter 13 for auto loans would have had a five-year lookback period, not the current 910-day period.

In some ways it is heartening to conclude that much maligned lawyers and lobbyists are not totally controlling the content of legislation, and that elected members of Congress have some independent role in the decision-making process. However, a moment's reflection will reveal that such a reaction is far too simple. Senator Abraham was not, after all, reflecting some considered judgment about what was good policy for America. He was acting on behalf of an important industry in his constituency. That industry benefited from his membership on the committee assigned bankruptcy reform legislation, a virtual accident in the political process.

Indeed, what characterizes the whole congressional process of chapter 13 cramdown reform is the lack of any consideration of basic bankruptcy policy. The Bankruptcy Code has long contained financial incentives for debtors to choose a chapter 13 plan voluntarily. One can

309. *See* Donald L. Barlett & James B. Steele, *Soaked by Congress: Lavished with Campaign Cash, Lawmakers Are "Reforming" Bankruptcy—Punishing the Downtrodden to Catch a Few Cheats*, TIME, May 15, 2000, at 64.

310. Stoffer, *supra* note 230.

311. Jensen, *supra* note 143, at 538.

312. *Id.*

313. *Id.* at 539.

314. *See supra* note 173 and accompanying text.

certainly argue, as I have in the past,[315] that such incentives are inappropriate, because inevitably they compromise the interest of one creditor group for the benefit of another. The mere fact that I personally favor chapter 13 cramdown limitations for that reason, however, can hardly substitute for a principled debate or decision on the issue. The cramdown limitations under BAPCPA are an unruly and unprincipled compromise. What principle previously deemed relevant to good bankruptcy policy can justify a 910-day limit on the lookback period?

The independent contribution of elected representatives to the legislative product seems consistent with what we mean by democracy. I cannot, however, simply leap to the conclusion that it has been a good thing.[316] Yet something needed to be done to prevent the creditor coalition from writing the new bankruptcy law without any checks or balances.[317] Would we be better off if we returned to the day when professional organizations played a greater role in determining the outcome of the legislative process? It has been frequently observed that these organizations played a much more important role in previous bankruptcy reform statutes.[318] To be sure, professional organizations are self-interested, as Professor David Skeel has reminded us emphatically.[319] But professionals exhibit at least a pretense of commitment to some definition of public interest, independent of self-interest. Our legislators exhibit a similar pretense, of course, but they are not nearly, for the most part, so well informed. Moreover, professionals must work with the resulting legislation on a daily basis, and therefore have an incentive to come to workable resolutions. Legislators have an incentive to be sure that the legislative product is not so impracticable that they face political pressure to revise it immediately. I doubt, however, that this incentive disciplines legislators to the same extent that incentives facing professionals discipline their work on legislation.

315. William C. Whitford, *Has the Time Come to Repeal Chapter 13?*, 65 IND. L.J. 85, 99–101 (1989); Whitford, *supra* note 7, at 363.

316. Jane Schacter has written persuasively about the failures of accountability mechanisms to police the work of American legislatures. Jane S. Schacter, *Political Accountability, Proxy Accountability, and the Democratic Legitimacy of Legislatures*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 45, 73 (Richard W. Bauman & Tsvi Kahana eds., 2006) ("My goal has been to suggest that legislative accountability is far too thin, sporadic, and unequal to do the fundamental normative work [of legitimizing law].").

317. It was frequently observed in the many years that Congress considered BAPCPA that although lobbyists were heavily involved on both sides, those lobbying for the creditors were much more active and powerful than those lobbying for the opposition. One Senate Judiciary Committee member's assistant noted, "The bankruptcy bill is a poster child for what should not happen in Congress. Maybe when there are two opposing powerful [interest groups], you get a wash, but in the bankruptcy bill, there is a real imbalance [in money and firepower]." Nourse & Schacter, *supra* note 155, at 613 (alterations in original).

318. *See* Warren, *supra* note 147, at 190–92.

319. SKEEL, JR., *supra* note 299, at 89–98.

No conclusions on issues so large should be drawn from a limited study of the BAPCPA provisions affecting auto lenders. However, a study like this can help identify the questions.