



Legal Studies Research Paper Series

Paper No. 1020

June 2006

A History of the Automobile Lender Provisions  
of BAPCPA

William C. Whitford

This paper can be downloaded without charge from the  
Social Science Research Network Electronic Paper Collection at:

<http://ssrn.com/abstract=907086>

DO NOT QUOTE OR CITE WITHOUT PERMISSION OF AUTHOR

## **A History of the Automobile Lender Provisions of BAPCPA**

By William C. Whitford\*

### **Table of Contents**

I. The Status of the Auto Lender Under the Previous Law

II. The Status of the Auto Lender Under BAPCPA

A. Improvements in the Auto Lenders' Position.

1. Limitation on Cramdown in Chapter 13
2. Eliminating Chapter 20's
3. Limiting Refilings
4. Limitation on Ride Through
5. Valuation Standards
6. Direct Payment of Adequate Protection in Chapter 13
7. Automobile Leases

B. Changes Potentially Adverse to Auto Lenders

1. The Means Test
2. Reaffirmations
3. Equal Payments to Secureds in Chapter 13

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

III. How Did This Happen?

A. Some General Perspectives

B. An Overview of the Reform Process

\* \* Emeritus Professor of Law, University of Wisconsin. [Whitford@mailplus.wisc.edu](mailto: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, Kenneth Doran, Scott Norberg, and one reader who wishes to remain anonymous. All errors are mine alone.

### C. A History of the Provisions Directly Affecting Auto Lenders

1. The Commission Period
2. The First House Bills
3. The First Senate Bill, and the Abraham Amendment
4. The First Conference Report, and Subsequent Changes in the Means Test
5. Scaling Back the Abraham Amendment
6. The Equal Payments Provision
7. The Failure to Include an Interest Rate Provision

### IV. What Does This All Mean?

#### A. The “What If” Questions

1. Questioning the Strategies of BAPCPA Opponents
2. Questioning the Strategies of the Creditor Coalition

#### B. The Future

#### C. On Democracy

-----

In this article I will discuss the changes made by BAPCPA to the rights of auto lenders. They are the group of secured creditors whose rights have been most substantially affected, mostly favorably to them, by the new law. Moreover, the change that most benefits the auto lenders, the limitation of cramdown in chapter 13, is one of the changes in the Bankruptcy Code made by the consumer bankruptcy provisions of BAPCPA that most alter 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 this or that Bill. There are many ambiguities in both the current legislation and its predecessor drafts, but it is not my intent in 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 towards the end of the article what possible utilities I believe there are to 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 to a chapter 13

proceeding. In chapter 7, the bankruptcy trustee normally asserted no interest in the collateral. 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. 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.<sup>1</sup> Aware of this capacity, 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. 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.<sup>2</sup> Even in the common situation in which the value of the collateral was less than the amount owing (i.e., the lender was undersecured), the debtor would very often agree to pay the entire amount owing. This is because the value to the debtor of his/her vehicle is commonly greater than whatever market value can be assigned to the collateral, for any of several possible reasons. An important one is that the debtor, with impaired credit rating, can expect difficulty replacing a repossessed vehicle with a vehicle of similar quality.

In the majority of cases, therefore, an auto lender emerged from chapter 7 either with the collateral or with a reaffirmation for the entire amount owing, including any deficiency.<sup>3</sup> In

---

<sup>1</sup> 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), but to save the paperwork and court costs, it was more common to wait for the discharge to be granted – a period of three to six months usually – at which time the automatic stay automatically terminated for property in which the trustee asserted no interest. *Id.* at §362(c)(2)(C). In the rare cases in which the trustee had an interest in the car, the debtor was often allowed to pay the trustee the excess of the equity value over the exemption amount, in order 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. *Ibid.* Finally, if the trustee did force a sale of the car, the auto lender's security interest guaranteed that it 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).

<sup>2</sup> 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 on behalf of 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.

<sup>3</sup> An important limitation on auto lenders' rights in chapter 7 was ride through, discussed

chapter 13, by way of contrast, the auto lender was rarely able to repossess the collateral, and it would be paid the entire amount owing only if fortunate enough to be oversecured at the time of filing. Relief from the automatic stay could rarely be obtained because almost always continued possession of the vehicle by the debtor was deemed essential to success of the plan.<sup>4</sup> If the auto lender was undersecured, a very common circumstance, the standards for confirmation of the plan provided only that a secured creditor received the value of the collateral at the time of filing (called the “allowed secured claim”), plus interest.<sup>5</sup> The balance of the amount owing, the deficiency, was deemed an unsecured claim – the creditor’s claim was said to be “bifurcated”. As a result, in what was called “lien stripping” or “cramdown”, in a chapter 13 case a debtor with collateral worth less the entire amount owing could release a security interest by paying only the allowed secured claim,<sup>6</sup> a result to be contrasted with chapter 7 where a debtor normally needed to reaffirm the entire amount owing in order to keep the collateral. And to make matters worse, the statute did not specify what interest rate was to be paid on deferred payments in chapter 13. Secured creditors preferred the contract rate, and many districts so required as a condition of confirmation of a chapter 13 plan, but other districts permitted the debtor to pay a lesser interest rate. 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.*<sup>7</sup>, rejected, 5-4, the auto lenders’ preference for the contractual rate, endorsing instead a formula

---

at notes *infra* 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. 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).

<sup>4</sup> Often this was because the debtor needed the vehicle to get to work, but 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, which as a practical matter meant that the debtor needed to maintain insurance on the vehicle and, in most districts, make payments to an undersecured creditor that at least compensated for any decline in the value of the collateral over time. Whitford, *Secured Creditors*, *supra* note 1, at 351

<sup>5</sup> 11. U.S.C. §1325(b).

<sup>6</sup> 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 Scott F. Norberg & Andrew J. Velkey, *Debtor Fresh Start and Creditor Repayment in Chapter 13*, CREIGHTON L.REV. (Forthcoming)(hereinafter cited as Scott F. Norberg & Andrew J. Velkey, *Debtor Fresh Start*).

<sup>7</sup> 541 U.S. 465 (2004). Hereinafter this case will be referred to as the *Till* case.

for choosing the interest rate – the prime rate plus an upward adjustment for risk --- that normally provides a considerably lower interest rate.

The two preceding paragraphs describe the most important differences between chapter 7 and 13 cases from the perspective of an auto lender, but there are many details that must be noted in order later to explain the significance of changes made by BAPCPA. One important detail concerns the standards for valuing collateral.<sup>8</sup> Under the 1978 Code the statutory standard for valuation was left deliberately vague. 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. Standard reference books widely used in the industry – the so-called “blue books” – provide the wholesale and retail market values in different locations for vehicles in good condition.<sup>9</sup> In 1997, just before Congress began considering bankruptcy reform, in *Associates Commercial Corp. v. Rash*<sup>10</sup> the Supreme Court addressed the valuation issue in the context of a chapter 13 case and came down in favor of a “replacement value” standard. However, the opinion was worded in a vague manner. The replacement value standard seems to suggest use of the retail value figure in the 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”.<sup>11</sup> Faced with this concern as a matter of practice many courts took an average of the retail and wholesale figures, a position many courts took before the *Rash* decision as well.<sup>12</sup>

The valuation standard was important in chapter 13 cases, since it set the amount that had to be paid to an unsecured auto lender. 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”,<sup>13</sup> an amount which is established by

---

<sup>8</sup> 11 U.S.C. §506(a).

<sup>9</sup> 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 less good condition than the reference books presumed.

<sup>10</sup> 520 U.S. 953 (1997). Hereinafter this case will be referred to as the *Rash* case.

<sup>11</sup> *Id.* at 965n.6.

<sup>12</sup> There is irony in this result since 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 Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After Rash*, 102 DICK. L.REV. 763 (1997).

<sup>13</sup> 11 U.S.C. §722.

the valuation standard for collateral when the creditor is undersecured. The opinion in *Associates Commercial Corp. v. Rash* was unclear as to whether the replacement standard it set for chapter 13 cases should also be applied in chapter 7 redemption cases, and many courts decided to apply a wholesale value standard in that context.<sup>14</sup> The redemption provision has always been interpreted to require payment in a lump sum, however. Historically, few debtors initially filing a chapter 7 case were able to even this lower amount. Over the past decade, a growing redemption financing industry emerged providing debtors loans to enable them to redeem at a wholesale value standard, taking in return a security interest in the vehicle relieved of its prior security interest as a result of the redemption.<sup>15</sup> 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 – sometimes called colloquially a “chapter 20”. In most bankruptcy districts debtors are allowed to provide in a chapter 13 plan that secured creditors be paid before any payments are made to unsecured creditors.<sup>16</sup> Once the allowed secured claim on a motor vehicle was paid off, the debtor could convert the proceeding to a chapter 7, where the formerly secured creditor would have only an unsecured claim for a deficiency, readily dischargeable in chapter 7. Alternatively a debtor would convert the chapter 13 case to chapter 7 at a time when the amount remaining owing on allowed secured claim was low enough that the debtor could afford to redeem the collateral by lump sum payment in chapter 7.<sup>17</sup>

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 payments were maintained according to the contractual schedule. This result bothered the auto lenders. The discharge effectively converted the original loan to a non-recourse loan, since the discharge obviated the debtor’s personal liability on the loan, meaning that he/she could not be sued for any deficiency if default and subsequent repossession later occurred. The auto lenders preferred that the debtor reaffirm their obligation for the entire amount owing as a precondition to being allowed to keep the collateral after a bankruptcy filing, since that would make the debtor personally liable for any deficiency if repossession later

---

<sup>14</sup> *Triad Fin. Corp. V. Weathington (In re Weathington)*, 254 B.R. 895 (B.A.P. 6<sup>th</sup> Cir., 2000). See 6 COLLIER ON BANKRUPTCY ¶ 722.05[1] (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev., 2006).

<sup>15</sup> See <http://www.722redemption.com>.

<sup>16</sup> 8 COLLIER ON BANKRUPTCY ¶ 1322.08 (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev., 2006)(hereinafter cited as 8 COLLIER).

<sup>17</sup> Any payments to the secured creditor made through a chapter 13 plan were generally accompanied by a trustee’s fee of 10% or more, making it cheaper to pay off the allowed secured claim through redemption under chapter 7 when that became a viable option. Such payments are made directly to the creditor and not through any trustee’s account.

occurred. The lenders were able to achieve this result in many districts because of the provisions of section 521(a)(2) of the Bankruptcy Code. This section required debtors to file a statement, within 30 days of filing a chapter 7 case, indicating whether they intended to surrender collateral, redeem it, or reaffirm debts secured by the property, and within another period to perform whatever intention was stated. “Ride through” was not listed as an option. The provision was interpreted by many courts as entitling the secured creditor to relief from the stay if the debtor failed to perform its stated intention. 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.<sup>18</sup> But the statute failed to specify the consequences of the failure to perform a stated intention, or to specifically exclude the possibility of ride through, and 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.<sup>19</sup>

## II. The Status of 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 lenders’ 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. It has been often observed that BAPCPA contains many provisions presenting interpretive difficulties. I will note some but not all 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.

### A. Improvements in the Auto Lenders’ 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, it appears to provide that, in order to qualify for confirmation, a chapter

---

<sup>18</sup> However, even in circuits that did not formally allow ride through, auto lenders would frequently not file reaffirmation agreements with the Bankruptcy Court, rendering them unenforceable. The practical effect was to establish a practice of informal ride through. See note 3 *supra* and authorities cited therein.

<sup>19</sup> The competing interpretations of section 521(2) under the old law are detailed in CHARLES TABB, *THE LAW OF BANKRUPTCY* at 139 (1997). A listing of leading Circuit Court decisions before BAPCPA permitting or rejecting ride through is provided in Jean Braucher, *Rash and Ride-Through Redux: The Terms For Holding On to Cars, Homes and Other Collateral Under the 2005 Act*, 13 *ABI L. Rev.* 457, 461n.17 (2005)(hereinafter cited as Jean Braucher, *Rash and Ride-Through Redux*).



13 plan must provide for payment of the entire amount owing, plus interest, to any secured creditor which makes a purchase money loan within 910 days<sup>20</sup> of filing and takes as collateral a motor vehicle acquired by the debtor for “personal” purposes. If the debt is older than 910 days at filing, then the traditional cram down rules apply; the undersecured auto lender’s claim is bifurcated and the creditor is entitled only to the value of the collateral, plus interest, on account of its “allowed secured claim”. The secured creditor shares pro rata with other unsecured creditors on any deficiency. If the vehicle is acquired for other than “personal” purposes, then the availability of cramdown is limited only if the debt was incurred within one year of filing, and this same one year rule applies to purchase money secured claims where the collateral is anything other than motor vehicles.

There remains ambiguity at the time of this writing whether this provision of BAPCPA will have its intended effect because of its peculiar wording. The provision is an otherwise unnumbered paragraph (sometimes called the “hanging” paragraph) at the end of §1325(a). It provides that “section 506 shall not apply” to the secured claims described in §1325(a)(5). Section 506 defines the “allowed secured claim” as the lower of the amount owed or the value of the collateral. However, the hanging paragraph does not provide a substitute definition for “allowed secured claim” to the one provided by section 506, and section 1325(a)(5), defining the prerequisites to confirmation for secured claims, uses that term. This interpretive difficulty has been noted before, with very respectable scholars suggesting interpretations that allow continuation of the lien stripping of undersecured claims, based on the prevailing textualist traditions for interpreting the Bankruptcy Code.<sup>21</sup> Courts will surely struggle with this provision,<sup>22</sup> and I cannot be certain about its ultimate interpretation. Nonetheless, for the balance of this article I will presume that they will come to some interpretation that is basically consonant with the obvious intent of the provision to limit cramdown in chapter 13.

There are other interpretive difficulties with the section as well. Importantly, the longer 910 day lookback period applies only to vehicles acquired for “personal” purposes. Normally when the Code wants to identify property acquired for consumer purposes, it uses the phrase “primarily for personal, family or household” use. This raises question whether the 910 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

---

<sup>20</sup> 910 days is 2 years, 6 months, less 2 or 3 days (depending on whether there is a leap year involved).

<sup>21</sup> 8 COLLIER, *supra* note 16, at ¶1325.06[1][a]; Jean Braucher, *Rash and Ride-Through Redux*, *supra* note 19, at 471-74 (2005).

<sup>22</sup> The early decisions, not surprisingly, are conflicting. *Compare In re: Carver*, No. 05-51909, 2006 WL 563321 (Bankr.S.D.Ga., March 6, 2006) (allowing bifurcation of secured claims within the 910 day lookback period) *with In re: Johnson*, No. 05-14449 (Bankr.M.D.N.C., Feb. 2, 2006) (no bifurcation).

limited by only a one year lookback period. Nor is there any guidance about whether to apply the longer or shorter lookback period to vehicles acquired for mixed business/personal (or perhaps family/personal) use, or to vehicles acquired exclusively for personal or business purposes and then converted to another or mixed use.<sup>23</sup> Still another interpretive difficulty is whether 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. It is highly unlikely that such a result was the intention of the drafters but there is sound textual argument, now supported by a well reasoned court decision, that surrender of the collateral satisfies the full claim even though the value of the collateral is clearly less than the amount owed.<sup>24</sup> It is unclear at the time of this writing how much the interpretive difficulties outlined in this paragraph will limit the impact of the provision limiting cramdown.

## 2. Eliminating Chapter 20's.

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.<sup>25</sup> This means that upon dismissal, the creditor retains a security interest in the collateral for any sum still owing, which is governed by non-bankruptcy law that generally allows repossession for non-payment of any part of that amount. Furthermore, upon conversion to chapter 7, the secured creditor is entitled to a new valuation of the collateral, for purposes of determining what part of the amount still owing is deemed an allowed secured claim.<sup>26</sup> 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 the chapter 13. The revaluation of the collateral in chapter 7 will undercut the utility of what was called 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 successively sought by many creditor interests in BAPCPA was a

---

<sup>23</sup> These interpretive difficulties are explored in Jean Braucher, *Rash and Ride-Through Redux*, *supra* note 19, at 470.

<sup>24</sup> *In re: Ezell*, No. 05-38219 (Bankr. E.D.Tenn, March 13, 2006). Amicus Curiae briefs were filed on both sides in this case, including one by the National Association of Consumer Bankruptcy Attorneys.

<sup>25</sup> 11. U.S.C. §1325(a)(5)(B)(i).

<sup>26</sup> 11 U.S.C. §348(f).

limitation on refilings. The limitation does not take the form of a prohibition on multiple filings, but the length of the automatic stay is greatly limited if one or more cases were filed and dismissed in the preceding year.<sup>27</sup> This is particularly important to secured creditors. Before BAPCPA an important reason that debtors chose repeat filings was to delay or avoid repossession or foreclosure upon collateral. Most commonly the concern was foreclosure on real estate, or eviction from a residential lease, and a chapter 13 filing was the method.<sup>28</sup> The debtor would dismiss the proceeding after the immediate threat of foreclose or eviction was lifted, only to refile months later when the creditor reinitiated efforts to foreclose. The limitations on the length of the automatic stay contained in BAPCPA should effectively restrict 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. But whether or not that was a reason for refilings, the pre-BAPCPA volume of refilings adversely impacted auto lenders. Not only were the lenders hindered by the automatic stay if they were to seek repossession, but each time a bankruptcy case is filed they must incur an administrative expense, noting the existence of the case in appropriate company records so that they do not inadvertently violate the automatic stay and filing a proof of claim with the Bankruptcy Court. 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 filing by the debtor of a statement of intention in chapter 7 with respect to collateral, has been amended to provide that the debtor must perform whatever intention is stated within 45 days of the first meeting of creditors. If he/she does not, then, unless the trustee claims an interest, the automatic stay lifts and the collateral ceases

---

<sup>27</sup> 11 U.S.C. §§362(c)(3); 362(c)(4); 363(d)(4)(2005). The limitations vary in different circumstances and differ in their methods of enforcement or validation. These details are beyond the scope of this article.

<sup>28</sup> The extent of pre-BAPCPA refilings in chapter 13 is well documented in Scott F. Norberg & Thomas J. Velkey, *Debtor Fresh Start*, *supra* note 6, at . Norberg & 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 National Bankruptcy Review Commission. NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS*, v.1, at 281-287 (1997)(hereinafter cited as NBRC REPORT). Chapter 13 was the chapter 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). Second, a chapter 13 proceeding could not be dismissed as an abuse of process but only after the debtor failed to filing a confirmable plan or failed to make payments under a confirmed plan. Compare 11 U.S.C. §707(b) with 11 U.S.C. §1307.

immediately to be part of the bankruptcy estate.<sup>29</sup> As a result the creditor can quickly resort to repossession remedies under non-bankruptcy law, even in cases in which the debtor is not in arrears on payments providing the underlying contract specifies the filing of a bankruptcy proceeding as a default.<sup>30</sup> It has been cogently argued that nothing in the new Act 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 not to repossess in such situations even though the debtor refuses to reaffirm.<sup>31</sup> To the extent creditors so behave, there will still be “voluntary” ride through under the new Act, but the practice will now depend on creditor acquiescence in the debtor’s continued retention of the collateral.

## 5. Valuation Standards.

The section defining valuation standards of property subject to a security interest, previously worded in a vague manner, has been amended to provide that in chapter 7 and 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.” 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.<sup>32</sup> These valuation standards will be applied in chapter 13 to measure the “allowed secured claim” in those circumstances where cramdown is still allowed, as well as to determine the price that the debtor must pay to redeem the property in chapter 7. The section strengthens the position of creditors established in the *Rash* case, decided by the Supreme Court in 1997 as Congressional consideration of bankruptcy reform was just getting started.<sup>33</sup> First, the section clearly extends the replacement value standard standards to chapter 7 redemption proceedings, something that had been left unsettled in the *Rash* opinion itself.<sup>34</sup> Second, BAPCPA clarifies the *Rash* standards in two minor ways

---

<sup>29</sup> 11. U.S.C. §521(a)(6). See also 11 U.S.C. §362(h). The stay lifts, and the property ceases to be part of the estate, automatically, without the need for a creditor to file a motion seeking such relief.

<sup>30</sup> 11 U.S.C. §521(d) (2005) now provides that nothing in bankruptcy law invalidates an ipso facto or bankruptcy default clause. These provisions are discussed in Ricardo Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Protection Act of 2005*, 79 AM. BANK. L.J. 817, 827-28 (2005)(hereinafter cited as Ricardo Kilpatrick, *Selected Creditor Issues*).

<sup>31</sup> Jean Braucher, *Rash and Ride Through Redux*, *supra* note 19, at 475-77.

<sup>32</sup> 11. U.S.C. §506(a)(2)(2005).

<sup>33</sup> See notes 10-12 *supra* and accompanying text.

<sup>34</sup> Many courts had continued to apply a wholesale value standard in redemption cases. See note 14 *supra* and accompanying text.

favorable to secured creditors. It makes clear that the retail value provided in the bluebooks is the starting point for measuring replacement value for property acquired for consumer purposes, and it provides that no deduction need be made for sales or marketing costs. Both results could have been reached by most courts applying the *Rash* decision itself, 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 retains his vehicle, items such as warranties, inventory storage, and reconditioning,” as stated in *Rash*.<sup>35</sup> So it seems likely that courts will apply the new section by subtracting something from the bluebook 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 have 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, and they represent a clear improvement for the position of secured creditors in chapter 7 redemption proceedings.

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

In a provision of relatively minor importance, the Act provides that debtors filing chapter 13 must, within 30 days, make direct payments to secured creditors of whatever is necessary to provide adequate protection of the creditor’s security interest.<sup>36</sup> This amount will generally be the estimated decline in the value of the collateral. Under the old Act the debtor was not required to make any payments until later, and then the payments were made to the chapter trustee, who might not redistribute them to a secured creditor for some time.<sup>37</sup>

## 7. Automobile Leases

Leasing has become a much more important part of automobile finance than it was

---

<sup>35</sup> The quote is from the *Rash* opinion, cited in note 10 *supra*.

<sup>36</sup> 11 U.S.C. §1326(a)(1)(C).

<sup>37</sup> There are difficulties in the application of this provision post-confirmation, since 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 post-confirmation may well come to be made exclusively through the trustee, the statute notwithstanding. This problem is more fully explored in 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, 227-230 (2005)(hereinafter cited as Henry J. Sommer, *Trying to Make Sense Out of Nonsense*); 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).

previously. Under the previous Act, the position of the automobile lessor was stronger than the secured creditor, because the Bankruptcy Code provided nothing like cram down. Normally, under the previous law, a trustee, whether in chapter 7 or 13, would express no interest on behalf of the estate in the lease. Thereafter, the lessor was free to repossess the vehicle or make a new arrangements with the lessee to continue the lease. But there were procedural difficulties in proceeding in either manner, and the new Act seeks to ease the lessor's burden with respect to these technicalities. More specifically, the new Act provides for automatic termination of the automatic stay with respect the leased property if the debtor does not express an intention to assume the lease within a specified time, generally 45 days after the first meeting of creditors.<sup>38</sup> And it provides that an agreement by the debtor to assume the lease is enforceable without the need for any court approval.<sup>39</sup> In the latter respect the position of the automobile lessor is superior to the secured creditor, because reaffirmations of loans are subject to statutory regulation not required of lease assumptions.<sup>40</sup>

## B. Changes Potentially Adverse to Auto Lenders

### 1. The Means Test.

By far the greatest threat to the interest of secured creditors is what is usually billed as the centerpiece of BAPCPA, the means test that 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.<sup>41</sup> 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.<sup>42</sup>

It is beyond the scope of this article to explain all the intricacies of the means test.<sup>43</sup> But

---

<sup>38</sup> 11 U.S.C. §§521(d), 362(h), 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 he/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.

<sup>39</sup> 11 U.S.C. §365(p)(2). See Ricardo Kilpatrick, *Selectd Creditor Issues*, *supra* note 30, at 828.

<sup>40</sup> See 11 U.S.C. §524(c)&(d).

<sup>41</sup> 11 U.S.C. §707(b)(2005).

<sup>42</sup> One important reason for a preference for chapter 7 is that the auto lender is not likely to be paid the contractual rate of interest in chapter 13. See note 46 *infra* and accompanying text.

<sup>43</sup> The definitive explanation of the mechanics of the means test is Eugene R. Wedoff,

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 he/she must go through extensive calculations to determine whether anticipated disposable income over a 5 year period exceeds \$10,000.<sup>44</sup> In calculating anticipated disposable income, there may be subtracted from anticipated revenue a variety of expenses. In what is a very generous provision from the point of view of secureds, these expenses include “all amounts scheduled as contractually due to secured creditors” over the 5 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 his/her primary residence, motor vehicle, or some other property.<sup>45</sup> One possible purpose in allowing deductions of payments 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 though the secured claim would be subject to cram down in chapter 13. Second, the amounts “contractually due” include interest at the contractual rate, yet even a secured creditor exempted 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*.<sup>46</sup>

The provision for deduction of anticipated payments to secureds 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 amount contractually due to secureds, and when that happens the provisions of chapter 13 will govern what the secured creditor gets, usually some amount less than what is “contractually due”. But the provision makes it more likely that a debtor who owes a lot of money to secureds can pass the means test and stay in chapter 7, which a motor vehicle secured creditor will normally prefer. And this is true even though unsecureds would receive substantial payments if a chapter 13 plan were file. Furthermore, in what strikes me as ironic, it 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, and in that way acquiring title to a new asset (perhaps a motor vehicle, or even a vacation home)<sup>47</sup>, instead of making

---

*Means Testing in the New §707(b)*, 79 AM. BANKR.L.J. 231 (2005). See also Henry Sommer, *Trying to Make Sense Out of Nonsense*, *supra* note 37, at 193-203.

<sup>44</sup> 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 \$6,000. So the threshold can range between \$6,000 and \$10,000, depending 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. 11 U.S.C. §707(b)(2)(B).

<sup>45</sup> 11. U.S.C. §707(b)(2)(A)(iii).

<sup>46</sup> See note 7 *supra* and accompanying text.

<sup>47</sup> 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

payments to unsecureds through a chapter 13 plan.<sup>48</sup>

## 2. Reaffirmations

Reaffirmations of the full amount owing have long been a key strategy for auto lenders when faced with a chapter 7 petition. In the deliberations of the National Bankruptcy Review Commission, serious consideration was given to prohibiting reaffirmations entirely. 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. 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.<sup>49</sup>

The Review Commission recommendations in this respect do not appear to have received serious consideration by the Congress. In this respect the motor vehicle finance industry dodged a bullet, and they should regard the new Act's position on reaffirmations as favorable. The Code's provisions do compel compliance with significant formalities in the making of reaffirmation agreements, however, and in some respects those formalities have been strengthened by BAPCPA. Most importantly they require the creditor to make more specific and more prominent disclosures than previously.<sup>50</sup> I believe that most commentators do not expect

---

even if it is not covered by exemption laws.

<sup>48</sup> 11 U.S.C. §526(a)(4) prohibits 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. 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. §707(b)(1).

<sup>49</sup> NBRC REPORT, *supra* note 28, Recommendation 1.3.1, at 145-161. The dissent from his recommendation is in the separate statement of Commissioners Edith Hollan Jones & James I. Shephard, at pp. 27-34. See also notes 89-102 *infra* and accompanying text.

<sup>50</sup> 11 U.S.C. §524(k)(2005). The additional disclosures were already required in many districts as the result of local rules. See Ricardo Kilpatrick, *Selected Creditor Issues*, *supra* note 30, 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. The new law also requires, in what is a new provision, 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", and in some circumstances these estimates disclosure require information and calculations in addition to those required by the many schedules, etc., that a debtor must file with any bankruptcy petition. 11



these additional disclosures will have much impact on debtors' receptivity to reaffirmation of the entire amount owing to the motor vehicle lender, but it could have some impact and make debtors more inclined simply to surrender the collateral and discharge the unpaid deficiency.<sup>51</sup>

### 3. Equal Payments to Secureds in Chapter 13.

An obscure addition to the requirements for chapter 13 plan confirmation with respect to secured claims requires that periodic payments to secureds "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."<sup>52</sup> This provision will prevent a practice that existed in many districts under the old Act of delaying payments to secured creditors until the debtors' 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 its collateral declined in value and it was receiving no payments.<sup>53</sup> If the chapter 13 plan later failed, the secured creditor could be left with no payments under the chapter 13 plan and rights to collateral of lesser value.

To the extent described above, this provision is clearly favorable to secured creditors, and as I will describe below,<sup>54</sup> they sought it. 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 it were to be so interpreted, it would foreclose a common practice for chapter 13 plans to allocate payments in the early parts of a chapter 13 plan to secureds, with unsecureds receiving their payments after allowed secured plans were paid. Such a practice makes it more likely that

---

U.S.C. §524(k)(6)(A) (2005).

<sup>51</sup> There was a claim made by creditors that the additional disclosures will impose substantial compliance costs on creditors. Statement of George J. Wallace, representing the Coalition for Responsible Bankruptcy Laws, Hearings Before the Committee On the Judiciary, House of Representatives on H.R. 333, 107<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 133, 134 (Feb. 7 & 8, 2001)("The bill creates extensive, new regulation fo reaffirmation agreements....[W]e ... are concerned that the compliance cost will be significant – cost we pass on to our customers in higher credit prices.").

<sup>52</sup> 11 U.S.C. §1325(a)(5)(B)(iii)(2005). Further addressing this problem is a provision in BAPCPA. 11 U.S.C. §1326(a)(1)(C)(2005), requiring the debtor in chapter 13 to make direct payments of adequate protection to the creditor within 30 days of filing and even before confirmation of a plan.

<sup>53</sup> This problem is described more fully in Ricardo Kilpatrick, *Selected Creditor Issues*, *supra* note 30, at 835-37, and NORTON BANKRUPTCY LAW & PRACTICE, §122:8 (2005). The equal payments provision also prevents a sometimes practice of providing for a balloon payment to a secured creditor sometimes towards the end of the plan.

<sup>54</sup> Notes 133-34 *infra* and accompanying text.

if a chapter 13 plan fails, at least the secured claims are paid, sparing the debtor the risk of repossession.<sup>55</sup> If “equal payments” means that payments of the same amount must be made to secureds throughout the plan, the effect would be to release money for payments to unsecureds earlier in the plan (because the payments to secureds early in the plan would be less),<sup>56</sup> making it more likely that unsecureds would 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 in that event.<sup>57</sup>

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 that required that only whatever payments made to secureds be equal in amount is both plausible and more consistent with the intent of the proponents of the provision. But in this age of textualist interpretations of the Bankruptcy Code, we cannot totally discount an interpretation that a plan which provides for payments of \$x for y months and payments of zero 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 new 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, they would appear to be the commercial creditor group that has most improved their position.

The most important factor in reaching that conclusion is the improvement in the auto lenders’ position in chapter 13 because of the limitations on cram down. I do not have reliable estimates of what percentage of auto loans will be included in the new restrictions on lien

---

<sup>55</sup> 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 note 25 *supra* and accompanying text.

<sup>56</sup> Some adjustment would have to be made in the cases when spreading payments throughout the plan in equal amounts would provide the creditor with less than adequate protection in the early months of the plan, when the value of the collateral will probably be declining at a greater rate than later in the plan.

<sup>57</sup> For these reasons the Bankruptcy Review Commission, both the majority and the dissent, endorsed a requirement that payments to secureds be spread throughout the plan, in equal amounts. NBRC REPORT, *supra* note 28, at 262 (Recommendation 1.5.3).

stripping. Vehicles acquired more than 2.5 years before filing, whether new or used at acquisition, are still subject to lien stripping, as are vehicles not acquired for “personal” purposes if acquired more than one year before filing. But it is a reasonable guess that a considerable majority of the encumbered cars owned by consumer debtors at the time of a chapter 13 filing will not be subject to cramdown.<sup>58</sup>

Another important factor in assessing the impact of BAPCPA on auto lenders is whether chapter 13 cases will decline as a percentage of overall consumer bankruptcy filings. At this time the answer is unclear. The percentage of filers electing chapter 13 is important in assessing the impact of the Act because it remains the case that chapter 7 is more attractive to auto lenders than chapter 13. Important in this respect is the failure of the new Act to include a provision providing for payment of contractual rates of interest on secured claims.<sup>59</sup> As a result chapter 7, in the usual case when the auto lender can secure a reaffirmation for the entire amount owing, is more advantageous even in the circumstance when cramdown is not possible in chapter 13. 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 13s will decline under BAPCPA.<sup>60</sup>

---

<sup>58</sup> 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. See note 24 *supra* and accompanying text. If this interpretation becomes established, 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 of the new cramdown limitations. However, some debtors may have difficulty 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 (“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, elimination of involuntary ride through) ... will harm those rural debtors....”).

<sup>59</sup> As one would expect, the lower courts are applying *Till*, *supra* note 7, under BAPCPA. *E.g.*, *In re: Robinson*, No. 05-71899, 2006 WL 349801 (Bankr.W.D.Mo. Feb. 10, 2006). *In re: Wright*, No. 05-34240-DHW, 2006 WL 547824 (Bankr.M.D.Ala., Feb. 28, 2006).

<sup>60</sup> Many informed observers of consumer bankruptcy share this opinion. *E.g.*, Henry Sommer, *Trying to Make Sense Out of Nonsense*, *supra* note 37, at 221 (“[I]t seems quite likely that the chapter 13 cases will go down, rather than up, as percentage of bankruptcy filings”); Jean Braucher, *Rash and Ride Through Redux*, *supra* note 19, at 459 (“[A] higher percentage of

Under the previous Code, the most common reasons for debtors voluntarily to select chapter 13 had to do with the greater relief from the claims of secured creditors that was available.<sup>61</sup> 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 automatic stay to prevent foreclosure. Under BAPCPA chapter 13 remains useful to debtors for this reason,<sup>62</sup> but there are no significant limitations on the repeated use of chapter 13 for this purpose that will reduce the number of chapter 13 cases.<sup>63</sup> Probably the second most important reason, pre-BAPCPA, 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 what were called “chapter 20’s” 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 his/her attorney in chapter 13 to file various documents throughout the course of the plan.<sup>64</sup> Filing burdens have been increased dramatically for chapter 7 as well, but proportionately the burdens have increased more for chapter 13. 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.<sup>65</sup>

Balanced against these disincentives voluntarily to choose chapter 13s are a number of other considerations that will effect the relative proportions of chapter 7 and 13 proceedings. Most importantly, there is the question of 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 before the Act was passed about how many bankruptcy filers under

---

filers are likely to choose chapter 7 under the new law.”)

<sup>61</sup> See William Whitford, *Has the Time Come To Repeal Chapter 13?*, 65 IND. L.J. 85, 99-101 (1989); Lynn LoPucki, “*Encouraging*” *Repayment Under chapter 13 of the Banruptcy Code*, 18 HARV. J. ON LEGIS. 347 (1981).

<sup>62</sup> 11 U.S.C. §§1322(b)(2) & (5).

<sup>63</sup> See notes 27-28 *supra* and accompanying text.

<sup>64</sup> For a description of some of the distinctive chapter 13 filing requirements, see Henry Sommer, *Trying to Make Sense Out of Nonsense*, *supra* note 37, at 214-27 (“The new law makes ... chapter 13 much more difficult and expensive....” *id.* at 221).

<sup>65</sup> That a debtor’s attorney fees are no longer payable through exclusive allocation of the first chapter 13 payments to administrative expenses, see notes 40-41 *supra* and accompanying text, could also affect the proclivity of debtor attorneys to recommend chapter 13.

There are other reasons as well why the number of voluntary chapter 13s will fall. A potentially important one is the virtual elimination of the superdischarge. 11 U.S.C. §1328(a)(2005).

the old Code would have been “caught” by the means test had it been in effect, with different empirical studies giving different results. Some estimates were quite low, however, even less than 5% of filers altogether.<sup>66</sup> Perhaps more importantly, the means test as constructed provides a number of potential opportunities for pre-bankruptcy planning in order to avoid a forced chapter 13.<sup>67</sup> So the percentage of filers who actually fail the means test is likely to be lower than the percentages estimated on the basis of a sample of pre-Act filers. On the other hand there are some considerations that may make chapter 13 more attractive than it has been previously to debtors considering whether to choose it voluntarily. Most importantly, in this respect, the “best efforts” test in chapter 13 now appears to rely on the debtors income before filing in setting the minimal payments that must be paid into a chapter 13 plan rather than an estimate of future income. For debtors who are expecting an increase in income over time, chapter 13 may now require reduced payments into the plan for unsecured creditors than it did previously.<sup>68</sup>

A final consideration is assessing the impact of BAPCPA on auto lenders is the widely anticipated reduced number of total filings. The new Act will clearly increase the cost of bankruptcy to debtors, whether they elect 7 or 13. It would be a remarkable reversal of the

---

<sup>66</sup> Marianne B. Culhane & Michaela A. White, *Taking the New Consumer Bankruptcy Model For a Test Driving: Means Testing Read Chapter 7 Debtors*, 7 AM.BANK.INST.L.REV. 27, 33 (finding that more than 95% would pass means test under one version of the proposed legislation).

<sup>67</sup> I have already mentioned the possibility of loading up on secured debt, which if done in contemplation of filing and for purposes of passing the means test is likely illegal, but may happen nonetheless. Other pre-bankruptcy 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, since 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.

<sup>68</sup> This issue is discussed in Henry Sommer, *Trying to Make Sense Out of Nonsense*, *supra* note 37, at 221-227; 8 COLLIER, *supra* note 16, at ¶1325.08[5]. It concerns the interpretation of 11 U.S.C. §1325(b). There is an interpretive difficulty. The section defines “disposable income” in term of “current monthly income”. 11 U.S.C. §1325(b)(2). “Currently monthly income” is a phrase taken from the means test and refers to average monthly income over the six months preceding filing. But the section also compels commitment of “projected disposable income” to the plan. 11 U.S.C. §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 (Bankr.,N.D.TX, March 6, 2006). If that interpretation does not emerge as the majority rule, however, one chapter 13 trustee told me that he expects a much higher percentage of zero payment plans under the new Act than under the old Act.

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 something we do not know, but it will not be zero.<sup>69</sup> It is widely assumed that unsecured creditors believe they will benefit from reduced filings, and 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.<sup>70</sup> The benefits to automobile lenders will not be so great, however, and could even be negative. To be sure, outside bankruptcy an automobile lender can threaten to repossess collateral, and this threat commonly secures a renewed commitment to repay the entire amount owing, perhaps even a reaffirmation that refinances payment arrears on more favorable terms (to the creditor) than the original contract. And there are some bankruptcy costs to a secured creditor than are avoided outside bankruptcy. But in bankruptcy a debtor commonly discharges unsecured debt, meaning that there is less competition for payments out of future income that ultimately are the only source for repayment of reaffirmed obligations. If it were possible to control for debtor creditworthiness, a study might show that an auto lenders' collection rate on reaffirmation agreements negotiated within a chapter 7 case is higher than the comparable rate for agreements made outside bankruptcy. If so, then reduced bankruptcy filings overall could have a modestly negative effect on the interests of auto lenders, to be balanced against the likely gains to these interests from the debtors who do file under the new Act. Moreover, at this date we have no idea what the impact of BAPCPA will be on total filings.

### III. How Did this Happen?

#### A. Some General Perspectives

To creditors bankruptcy reform was not a zero sum game, by which I mean they 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 that 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 affected in this way than would have been possible without these changes; (2) collect more in bankruptcy by steering debtors who do file into chapter 13 and structuring chapter 13 so that a greater percentage of the debts are repaid than previously occurred; and (3) reduce the costs of participating in bankruptcy cases for creditors. BAPCPA has provisions directed at all three strategies.

---

<sup>69</sup> Another reason to anticipate a reduction in total filings are the provisions eliminating many of the incentives for repeat chapter 13 filings. See notes 27-28 *supra* and accompanying text.

<sup>70</sup> See note 140 *infra* and accompanying text

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 the reform, but it is unclear how much will be collected by creditors from these undischarged debts. With respect to the third approach, there could be substantial savings if the total number of consumer bankruptcy cases is substantially reduced. Each case requires creditors to maintain records about the case, in part so that they do not violate the automatic stay. There are also a few provisions that will reduce the transaction costs of participating in a bankruptcy case for creditors, though these savings will be minor.<sup>71</sup>

By the far 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.<sup>72</sup> There is also reason to question whether creditors as a group will collect more per case from those chapter 13 cases that are filed. Debtors will be less inclined to dismiss or convert chapter 13 plans after paying secured claims because of the provisions designed to eliminate "chapter 20s", which will tend to increase total chapter 13 payments. Some chapter 13 plans are required to be five year plans,<sup>73</sup> but pre-BAPCPA a high percentage of chapter 13 debtors voluntarily elected five year plans,<sup>74</sup> so it not clear that this provision will have any effect. Most importantly, the best efforts test for determining the total amount of future income that a debtor must contribute to a chapter 13 plan has been redefined in a way that may actually lessen total payments into the plan.<sup>75</sup> One chapter 13 trustee predicted to me that as a consequence there would be many more plans under BAPCPA than previously that made payments just 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 get them? It is conceptually possible, of course, that the various creditor groups will be equally benefited. But I believe that auto lenders are likely to do better than most other groups, and that necessarily means that some other groups of creditors will do less well, not necessarily as compared to their position under the old Act, but as compared to

---

<sup>71</sup> One example is the provision that in notices to creditors the debtor include the creditors' account number and that the notice be sent to an address at which the creditor has requested correspondence be sent. 11 U.S.C. §342(c)(2)(2005). This should improve a creditor's efficiency in complying with the automatic stay.

<sup>72</sup> See notes 60-68 *supra* and accompanying text.

<sup>73</sup> 11. U.S.C. 1325(b)(4)(2005).

<sup>74</sup> See Scott F. Norberg & Andrew F. Velkey, *Debtor Fresh Start*, *supra* note 6, at .

<sup>75</sup> See note 68 *supra* and accompanying text.

what might hypothetically have been their position if BAPCPA contained rules that distributed the increases equally among creditor groups. That in turn raises the question of how BAPCPA came to favor automobile finance interests. One possibility is that there was inter-creditor bargaining and negotiations about what provisions to include in the new Act, and that the results of those negotiations had considerable influence on the content of the resulting statute. But there are other possibilities. Various groups claiming to represent debtor or civic interests participated throughout the reform process, and they may have influenced Congress to prefer reforms that favor automobile creditors over other groups, perhaps inadvertently. And the decision-makers themselves, first the Commissioners of the Bankruptcy Review Commission and ultimately the 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 what was proposed 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.<sup>76</sup> I have also sought to interview a number of the persons actively involved as staff to the Bankruptcy Review Commission and to Congress, and as 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 reviews. Unfortunately, lawyer/lobbyists representing different creditor groups have mostly declined to be interviewed, depriving me of evidence of some developments by active participants in them, as will be noted at appropriate points as my explanation proceeds.

## B. An Overview of the Reform Process.

In this section I will provide a brief overview of important events in the reform process.<sup>77</sup>

---

<sup>76</sup> I have been tremendously benefitted 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, WI, where I live and work. He has been an acquaintance for some time. During the period of 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 8 years of Congressional deliberations, though the material in the files is not as extensive during this period.

<sup>77</sup> 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. BANK. L.J. 485 (2005)(hereinafter cited as Susan Jensen, *A Legislative History*). Another useful summary of the history of legislative developments is in Melissa B. Jacoby, *Negotiating*



In the succeeding part I will provide a detailed account of developments affecting automobile lending interests.

My history 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 Bankruptcy Reform Act of 1994, but it was the spring of 1996 before the Commission became active. It quickly began holding hearings, receiving suggestions from various interest groups, and developing proposals. A key hearing was held in December, 1996, in a House Office Building. Prior to that the Commission had structured their public hearings so that presentations were made by a diverse range of interests, including bankruptcy professionals like chapter 13 trustees, spokespeople for both debtor and creditor interests, and a variety of academics and professional associations who were not representing anybody with a direct financial stake in the outcome<sup>78</sup> At the December 1996 meeting, however, creditor groups asked for and received a full day to make a presentation to the Commission 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 been formed, called the National Consumer Bankruptcy Coalition (NCBC).<sup>79</sup> At the December meeting spokespersons for this group insisted that all consumer creditors “spoke with a single voice” and would present and advocate for a single set of proposals.<sup>80</sup> 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. By the summer of 1997, however, the Commission had taken a number of key votes, and the NCBC was not pleased. On July 14, 1997 it sent a public letter to all members of Senate and House judiciary and banking committees, basically preemptively rejecting the forthcoming Commission Report. That Report was filed on October 20, 1997. Its key consumer bankruptcy recommendations were adopted by a 5-4 vote, and as the NCBC letter predicted, the majority’s proposals did not please the NCBC.

---

*Bankruptcy Legislation Through the News Media*, 41 HOUSTON L. REV. 1091, 1095-1107 (2004).

<sup>78</sup> 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.

<sup>79</sup> At different times the same coalition went by different names, including the Consumer Bankruptcy Reform Coalition and the Coalition for Responsible Bankruptcy Laws.

<sup>80</sup> 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/lobbyist Michael McEnaney 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. *Ibid.*

One month *before* the Commission filed its final report, the Congressional process got started, with the introduction in the House of a reform bill, which became known as the McCollum bill.<sup>81</sup> This bill concerned almost exclusively with consumer bankruptcy and contained many of the NCBC's favored positions, including means testing. Most of the provisions of the McCollum bill were later incorporated into a more comprehensive successor bill, introduced in Jan., 1998, which I will call the Gekas bill.<sup>82</sup> The consumer bankruptcy provisions of these bills were based on a draft prepared by representatives of the NCBC and contained all or most of their wish list.<sup>83</sup> It is not unusual for lobbyists to participate in legislative drafting. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U.L.Rev. 575, 610-613 (2002) (“Every staffer we talked to said that lobbyists were involved in at least some drafting of statutory language.” *Id.* at 610). Legislative staffers often insist that a staffer reviews the contributions of the lobbyist and does 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. On the Senate side developments were different. The day after the Commission Report, a bipartisan bill was co-introduced by Senator Grassley and Senator Durbin and became known as the Grassley/Durbin bill.<sup>84</sup> 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, but the Senate bill had broader bipartisan support, as later

---

<sup>81</sup> H.R.2500, 105<sup>th</sup> Cong. (1997). Congressman McCollum, after whom H.R.2500 is named, was its principal though not only sponsor.

<sup>82</sup> H.R. 3150, 105<sup>th</sup> 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 the two bills was that H.R. 3150 included provisions reforming business bankruptcy as well.

<sup>83</sup> See Bill McAllister, *Reopening Chapter 7*, Washington 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 Tassez Goes for Broke; Jeffrey Tassez*, 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.

<sup>84</sup> S. 1301, 105<sup>th</sup> 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.

developments demonstrated. What was clear from both bills, however, was that the Commission's majority recommendations on consumer bankruptcy were for the most part ignored. From even before the Commission's Report was released, both the House and Senate were focused on bills that resembled more closely the Commission 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 legislation.<sup>85</sup> In July 1998, the House passed the Gekas bill, as amended, by a veto proof majority (308-118), with almost half the Democrats joining all the Republicans in support of the legislation. The Grassley/Durbin bill, significantly amended, passed the Senate in September 1998, with only one dissenting vote. The two bills were quite different, so a conference committee was appointed, which was controlled by Republicans. On many key provisions, the Conference adopted the House proposals. 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 60 votes needed to overcome a filibuster. Congress was also preoccupied during the fall of 1998 with the impending impeachment of President Clinton, and so simply scheduling floor time for Senate debate was difficult.

In the Spring of 1999 both Houses renewed consideration of bankruptcy reform. In the House, the bill that was introduced 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, but as I will relate subsequently, not in ways that altered the key provisions affecting automobile lenders. It was adopted by the House in May 1999, with vote totals similar to the veto-proof majority supporting the legislation in the preceding Congress. In the Senate, the initial bill was introduced by Senator Grassley and differed significantly from the conference report the preceding autumn. Many Democrats who had supported the Senate bill in 1998 had decided to oppose the bill after the subsequent conference had adopted the House approach on most issues, including importantly the means test. Senator Grassley apparently attempted to moderate the conference report somewhat by introducing changes that would help maintain at some Democratic support for the legislation. Senator Grassley's Bill was debated on the floor in November 1999, and it was at this time that an amendment was adopted making certain debts arising from abortion protest activities non-dischargeable. This amendment was to play a very important role in subsequent Congressional deliberations. The Senate adopted the amended legislation by a veto-proof majority (83-14) but the legislation differed in many important ways from the House legislation. There were complicated procedural maneuvers in the appointment of a Conference Committee, which was not appointed until September 2000, but the Conference then quickly adopted a compromise between the two Bills that had been negotiated exclusively,

---

<sup>85</sup> The subsequent summary of the Congressional Proceedings in general draws heavily on Susan Jensen, *A Legislative History*, *supra* note 77. Readers are referred to that excellent article for a fuller account of these proceedings, and for citations to support the statements made in the rest of this Section.

in private, by Republicans even before the Conference was formed.<sup>86</sup> The resulting conference report was quickly adopted in the House but in the Senate it was not possible to obtain the votes needed to prevent a filibuster (60) until December, 2000.<sup>87</sup> The conference report was then passed by a veto-proof majority, but the time of enactment was close enough to final adjournment of that Congress (the 106<sup>th</sup>) that it allowed President Clinton to pocket veto the legislation and he did so.

When the 107<sup>th</sup> Congress convened in January 2001, there was a new Republican President and the specter of a veto no longer existed. The conference report from the preceding Congress was reintroduced in both the House and the Senate as new bills. It proceeded to passage in the House rather quickly with only minor amendment. 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 and establishment of federal homestead exemption caps. The amended bill was passed in the Senate in March 2001, but before a Conference Committee could be appointed, political control of the Senate changed to the Democrats.<sup>88</sup> As a consequence the Democrats constituted a majority of the Senate members of the resulting Conference Committee, and we had the first, and only, public meetings of a conference committee during the entire legislative process of bankruptcy reform. The resulting Conference Report was a true compromise on many issues. The House position prevailed to a great extent on the homestead exemption cap issue, as this was a matter of great concern to key Republicans in the House. And fatefully the Senate position on the abortion protest liabilities issue largely prevailed. When the conference report was

---

<sup>86</sup> See Susan Jensen, *A Legislative History*, *supra* note 77, at 535-36.

<sup>87</sup> 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*, NATIONAL JOURNAL, CONGRESS DAILY, Nov. 1, 2000. Cloture was finally successfully passed in a post-election session, by a vote of 67-31. *Senate Cuts Off Debate on Bankruptcy: Will Vote Thursday*, NATIONAL JOURNAL, CONGRESS DAILY, 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. 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.

<sup>88</sup> As a result of Senator Jeffords 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.

introduced in the House, it failed, as a number of pro-life Republicans sided with Democrats opposed to the bankruptcy reform legislation to defeat the Report. For all practical purposes that vote killed the legislation for that Congress.

The conference report that failed of enactment in 2002 because of the abortion related provisions was for all practical purposes the last time that bankruptcy-related matters, other than the abortion provision, were considered and revised in the course of considering the reform legislation. In the next Congress (the 108<sup>th</sup>), a bill substantial identical to the 2002 Conference Report but without the abortion liability provision was introduced and passed by the House. The Senate remained in control of the Democrats, however, and bankruptcy legislation did not get considered in that body. In the 2004 elections the Republicans regained control of the Senate. Bankruptcy reform moved to the top of the legislative agenda in the 109<sup>th</sup> Congress. 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. The House proceeded to approve the Senate bill without amendment, so as to obviate the need for a conference committee. The President signed the legislation on April 20, 2005, and it became effective six months later.

### 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, representations or suggestions were made to the Commission by many creditor groups, and this included the most important of the auto lender interests, the finance companies owned by the automobile manufacturers.<sup>89</sup> 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,<sup>90</sup> provision of adequate protection payments to secured

---

<sup>89</sup> The representations were often made on behalf of an organization called the American Financial Services Association (AFSA), a broad based organization of non-bank financial services providers. AFSA included small loan companies, such as Household Finance (now HSBC North America), and non-bank 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 mostly to be made by an employee of one of the captive automobile finance such as Ford Motor Credit. In later years spokespersons for AFSA tended to be other lawyer/lobbyists, such as George Wallace and Jeff Tasse, 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. For more information on AFSA, see <http://www.afsaonline.org/sitepages/factsheet.cfm>.

<sup>90</sup> The Supreme Court's decision in *Rash* was not made until 1997. See note 10 *supra* and accompanying text. Before then the Circuits varied widely in their valuation approaches,

creditors before plan confirmation in chapter 13, and provision of contractual rates of interest on the allowed secured claim in chapter 13 plans.<sup>91</sup>

Perhaps the biggest concern of the automobile financial interests, however, was that the Commission would recommend changes that would worsen their position in bankruptcy. From the beginning of their deliberations the Commission gave consideration to proposals that would effectively allow debtors to strip automobile liens in chapter 7 as well as chapter 13. The form which additional lien stripping came to be seriously discussed by the Commission was through consideration of “basic bankruptcy”, a concept circulated for discussion purposes by Professor Elizabeth Warren, the Commission’s Reporter. The concept of basic bankruptcy was to require all debtors with the means to do so to make limited payments into a collective fund for creditors for a limited period of time, less than the three year period then the minimum period chapter 13 plans. Basic bankruptcy, however, also provided for lien stripping for all collateral – basically the chapter 13 scheme at the time – allowing a debtor to retain collateral from a lien by paying only the allowed secured claim over time. The automobile finance companies opposed basic bankruptcy. So did almost all other creditor and even many debtor groups, and the idea waned. But about the same time the Commission began considering proposals to restrict reaffirmations in chapter 7. The Commission’s concern was sparked by a well known scandal involving Sears Roebuck & Company, in which Sears was securing reaffirmation agreements from chapter 7 debtors without informing the latter of their rights, contacting the debtors’ attorneys, or seeking court approval of the reaffirmation agreements as required by the Bankruptcy Code.<sup>92</sup> 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.<sup>93</sup>

---

with many adopting a lower standard of valuation. The automobile finance companies advocated a uniform federal standard at the higher measure.

<sup>91</sup> *E.g.*, Issues of Secured Vehicle Creditors Presented to the National Bankruptcy Review Commission For Consideration in Conjunction With its Meeting of Oct. 18-19, 1996 (hereinafter Issues of Secured Vehicle Creditors)(on file with author)(hereinafter cited as Issues of Secured Vehicle Creditors); Testimony of Leonora K. Baughman on behalf of the secured vehicle lenders and the AFSA, National Bankruptcy Review Commission, Dec. 17, 1996 (on file with author)(Ms. Baughman was an employee of Chrysler Financial Corporation).

<sup>92</sup> See *In re Latanowich*, 207 B.R. 326 (Bankr.D.Mass., 1997); Ricardo Kilpatrick, *Selected Creditor Issues*, *supra* note 30, at 825-26.

<sup>93</sup> The Commission majority ultimately endorsed this proposal. NBRC REPORT, *supra* note 28, Recommendation 1.3.1, at 145-161. The dissent from his recommendation is in the separate statement of Commissioners Edith Hollan Jones & James I. Shephard, at pp. 27-34. 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

As indicated in the preceding section, December 1996 marked the moment when the creditors made a point of presenting a united front, through the National Consumer Bankruptcy Coalition.<sup>94</sup> From that point forward a considerable point of emphasis was resistance to the proposals to limit reaffirmations.<sup>95</sup> For purposes of this paper, it is noteworthy that while seeking to preserve reaffirmations in chapter 7, the creditors never questioned the basic bifurcation principle in chapter 13.<sup>96</sup> They continued to advocate for a contract interest rate on secured claims in chapter 13 and to oppose involuntary ride through.<sup>97</sup>

The Commission's Report was a big disappointment to creditors generally, and to the automobile lender interests in particular. The limitations on reaffirmations in chapter 7 were endorsed,<sup>98</sup> and the Commission majority further recommended reversal of the Supreme Court's holding in *Rash* and setting the valuation standard for allowed secured claims, where the collateral is personalty, at a wholesale market price.<sup>99</sup> In chapter 13 the Commission

---

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 159-160.

<sup>94</sup> Note 80 *supra* and accompanying text.

<sup>95</sup> This was also a great concern of the credit unions as well, though their concern was more with the proposal to prohibit reaffirmations of unsecured debts entirely.

<sup>96</sup> There is brief mention in one submission by the secured automobile lenders in October, 1996, to preventing cram down for vehicles purchased within 90 days of filing. Issues of Secured Vehicle Creditors, *supra* note 90, at 3. The proposal is headed "bad faith" purchases, and it explicitly links the proposal to section 523(a)(2)(c), 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.

<sup>97</sup> Memorandum to the National Bankruptcy Review Commission from the National Consumer Bankruptcy Coalition, April 16, 1997, commenting on "Consumer Bankruptcy Draft No. 1" (copy on file with author).

<sup>98</sup> The Commission recommendation 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 28, Recommendation 1.3.1, at p. 3.

<sup>99</sup> NBRC REPORT, *supra* note 28, Recommendation 1.5.2, at p. 7. See *id.* at pp. 243-58 for the Commission majority's discussion of the valuation issue.

unanimously recommended a requirement that payments to secureds be spread throughout the plan, which would delay the repayment of the allowed secured claim.<sup>100</sup> The Commission majority recommended that a fixed interest rate be set for payments to secureds in chapter 13, rejecting the industry's advocacy of the contractual rate of interest.<sup>101</sup> In the industry's one victory before the Commission, prohibition of involuntary ride through was endorsed.<sup>102</sup>

## 2. The First House Bills

The first bills introduced into the House (the McCollum and Gekas bills) contained provisions that were much more favorable to secureds than the Commission proposals. Most of these provisions concerning secureds also essentially remained unchanged throughout the Congressional process. This was true for valuation standards, the provisions designed to deter chapter 20's, 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 secureds in chapter 13, nor did such a provision ever appear in any subsequent bill.<sup>103</sup> With respect to reaffirmations, these bills dropped any restrictions on the substantive terms of reaffirmations, as had been proposed by the Commission, and the idea of such a limitation on the amount of a reaffirmation was not raised again during the rest of the Congressional process.<sup>104</sup>

The means test that was proposed in the McCollum and Gekas bills included the provision permitting deduction of all payments to become "contractually due" to motor vehicle creditors in determining what could be contributed to unsecureds in chapter 13. While there were many changes in the definition of the means test in subsequent bills, this provision

---

<sup>100</sup> NBRC REPORT, *supra* note 28, Recommendation 1.5.3, at p. 7.

<sup>101</sup> *Ibid.* For the Commission majority's discussion of the interest rate issue, see *id.* at 258-62.

<sup>102</sup> *Id.* at 4 (Recommendation 1.3.3). For the Commission 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 Bankruptcy Working Group, February 23, 1997 Draft, at 4 (on file with author).

<sup>103</sup> There is one minor exception to the text statement. 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 the secured creditor was entitled to contractual rates of interest. See notes 107-08 *infra* and accompanying text.

<sup>104</sup> There was variation in the many subsequent Congressional bills on the disclosures that needed to accompany reaffirmations, and when there needed to be court approval that reaffirmation would not impose undue hardship and was in the best interests of the debtor.



remained unchanged throughout.<sup>105</sup> 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, was not added until several years later.

There are two other issues affecting secureds where the position taken in these initial bills were subsequently altered. First, nothing appeared in these bills concerning the requirement of equal payments in secureds in chapter 13. That provision first appeared by an amendment adopted in the Senate in 1999, as will be detailed below. Second, and most significantly, there was a cramdown limitation in these bills but it was fundamentally different from the final legislation. The provision applied only to collateral acquired within a 180 lookback period from the date of filing, and was limited to purchase money security interests in personal property.<sup>106</sup> It amended section 506, not section 1325, of the Bankruptcy Code, meaning that bifurcation was eliminated in both chapters 7 and 13, and that the debtor's right of redemption was affected as well as the minimum amounts payable to secured creditors in chapter 13.<sup>107</sup> And 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."<sup>108</sup>

---

<sup>105</sup> There is one exception to the text statement. The Grassley/Durbin bill introduced in the Senate at about the same time utilized a different approach to the means test, which did not fully allow for all payments to become due to secureds. See note 110 *infra* and accompanying text. However, this alternative approach to the means test was dropped at the time of the first conference report, in 1998, and it never reappeared.

<sup>106</sup> The sections did not make explicit reference to the problem of loading up debt on the eve of bankruptcy, which had sparked the one suggestion during the Commission phase that bifurcation of secured claims be eliminated (in that instance with a 90 day lookback period). See note 96 *supra*. Nonetheless the provision appears to reflect that type of concern.

<sup>107</sup> H.R. 2500, 105<sup>th</sup> Cong. §110,(1997); H.R. 3150, 105<sup>th</sup> Cong. §128, (1998).

<sup>108</sup> The entire language of the section, including provisions for contingencies that illustrates 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, 105<sup>th</sup> Cong.

**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;

The provisions in these first House bills were based on drafts prepared by representatives of the National Consumer Bankruptcy Coalition, the umbrella creditor group.<sup>109</sup> I have not been able in my interviews to learn how these set of provisions came to be included in these 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 retrenchment in their position that had been recommended by the Commission. Perhaps that reflected some explicit discussion with auto lender interests. Whether or not those discussions occurred, almost certainly the drafting reflected a concern to provide benefits to this important creditor group in order to maintain the broad creditor coalition that had been formed during the Commission phase of the reform process.

### 3. The First Senate Bill, the Abraham Amendment

The Grassley/Durbin bill, as introduced in the Senate, was not as comprehensive bankruptcy reform legislation as was being considered in the House and did not contain many of the provisions affecting secured creditors that are discussed above. The approach taken to a means test was also quite different. Instead of establishing a rigid formula for determining what the debtor could pay in chapter 13, the provision simply directed the judge to estimate whether

---

"(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 that is filed by or against the debtor in the 2-year period beginning on the date the petition is filed in 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)."

<sup>109</sup> Notes 83 *supra* and accompanying text.

the debtor could repay twenty percent of unsecured claims in chapter 13.<sup>110</sup> While 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 unsecureds in chapter 13, the debtor would subtract from income on account of payments to secureds 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.

As introduced, the Grassley/Durbin bill included no provisions concerning cramdown of secured debt. But important cramdown provisions were added as the legislation made its way through the legislative process. At the Senate Judiciary Subcommittee level, an amendment was added that limited cramdown for purchase money loans where the collateral was obtained within 90 days of filing.<sup>111</sup> Like the House bill, this amendment was to section 506 of the Code, and hence applied to chapter 7 redemptions as well as chapter 13 plans. Then at the markup session before the full Judiciary Committee, Senator Abraham successfully introduced an amendment that became the basis of the more extensive limitation of chapter 13 cramdowns that is contained in the final legislation. The Abraham amendment, as it was called, was to section 1325 and contained the “hanging paragraph”, now in the law, stating that “section 506 shall not apply” to secured claims.<sup>112</sup> And it applied to all secured claims, no matter when incurred and whether or not they were purchase money secured claims. The legislation that passed the Senate later that Congress 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.<sup>113</sup> 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. He told me that most amendments to be offered at the markup session were circulated the day before, to allow Senators and their staffs time to prepare, including checking with lobbyists when they so desired. Apparently Senator Abraham just

---

<sup>110</sup> See Susan Jensen, *A Legislative History*, *supra* note 77, at 513-14.

<sup>111</sup> Janet Seiberg, *Senate Panel Approves Bankruptcy Reform Bill*, *American Banker*, April 3, 1998, Vol. 163, Issue #63.

<sup>112</sup> S.1301, 105th Cong., §302(a) (1998). Ironically, the Grassley/Durbin bill, as enacted, also included the amendment to section 506 prohibiting cramdown for purchase money security interests in personalty incurred within 90 days of filing, though that provision became redundant after the Abraham amendment. S. 1301, 105<sup>th</sup> Cong., §302(c) (1998).

<sup>113</sup> Harry Stoffer, *Lobbyists Push Industry’s Problems with “Cramdown” Into the Spotlight*, *Automotive News*, Issue # 5790, Oct. 26, 1998. (“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.”)

reserved a spot to make an amendment, without indicating the subject matter until the day of the markup session.

While 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. Surely the auto lenders 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 non-bank creditor interests including many lenders specializing in auto finance,<sup>114</sup> in testimony prepared for the relevant subcommittee of the House Judiciary Committee stated that the 180 day lookback period on cramdowns then in the House bill “should be substantially extended for secured vehicle lenders, as they suffer the greatest losses on cramdown in the early years of the vehicles life when depreciation is greatest.”<sup>115</sup> 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 were provided by the 180 day lookback period then proposed by the House bill. No changes were made in the House bill as a result of the testimony quoted above. And one week before the quoted testimony, another representative of AFSA presented testimony in both the House and Senate and did not specifically mention the need to extend the cramdown protection for auto lenders.<sup>116</sup>

One has to 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. Their representatives very likely paid close attention to the drafting of the House legislation being considered at the same time that the Abraham amendment was introduced. The House

---

<sup>114</sup> For more detail on the AFSA, see note *supra*.

<sup>115</sup> Statement of Jeffrey A. Tasse, Senior Vice President of Government and Legal Affairs, American Financial Services Association, Hearings Before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 105<sup>th</sup> Cong., 2d Sess., March 18, 1998, at 85. Mr. Tasse later became the principal spokesperson for the Coalition for Responsible Bankruptcy Laws, as the NCBC came to be called in later Congresses.

<sup>116</sup> These statements were by George Wallace, who had previously been a principal spokesperson for NCBC but at this time appeared as a representative of just the AFSA, which was an important constituent group within NCBC. *The Consumer Bankruptcy Reform Act: Seeking Fair and Practical Solutions to the Consumer Bankruptcy Crisis: Hearing before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, United States Senate on S. 1301*, 105th Cong. 34-41 (1998) (Statement of George J. Wallace on behalf of the American Financial Services Association). Hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 105<sup>th</sup> Cong., 2d Sess., March 12, 1998, at 58-63.

legislation, as described above, represented a careful balancing the of the interests of secured creditors, including auto lenders, and unsecured interests, including bank credit cards. Eliminating cramdown in chapter 13 significantly altered that balance. However, representatives of these interests did not protest in any public way. The Abraham amendment was approved in Committee largely on a party line vote, with Republicans supporting it.<sup>117</sup>

#### 4. The First Conference Report, and Subsequent Changes In the Means Test

The first conference report, in 1998, resolved the conflict in the definition of the means test in favor of House approach. That included the provision providing for the deduction of all payments to become “contractually due” to secured claimants over the next five years from the debtor’s current monthly income. At this time the legislation did not include the additional deduction for arrears that would need to be paid in chapter 13 if the debtor was to retain his/her residence, a motor vehicle and certain other property. 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. The additional language was added at that time in an apparent effort to meet some of the objections to the legislation by the White House, who wanted the means test softened.<sup>118</sup> The legislation’s proponents feared, quite rightly it turned out, a Presidential veto.

The first conference report also basically accepted the broader cramdown limitation added by the Abraham amendment, but in modified form. The limitation took the form of the House bill, which meant that it became an amendment to section 506 and applied to chapter 7 redemptions as well as chapter 13 plans. It limited the cramdown prohibition to loans incurred within a lookback period, whereas the Abraham amendment applied to all security interests. But it adopted a five year lookback period, instead of the 180 days contained in the House bill. As in the House bill, the cramdown prohibition was limited to purchase money security interests in personal property. There was very little explanation in the conference report about this provision, which was characterized as a “compromise”.<sup>119</sup> As reported above, this conference

---

<sup>117</sup> Stoffer, *supra* note 113, at 795. The bill, including the anti-cramdown amendment, was reported out of the Senate Judiciary Committee two months later by a vote of 15 to 2, with all Republicans voting in favor. Susan Jensen, *supra* note 60, at 513n.149. Republicans were generally in favor of the bankruptcy reform legislation and in regular contact with the representatives of the NCBC.

<sup>118</sup> There was a major effort in the 106<sup>th</sup> Congress to soften the means test, led by the House Judiciary Committee Chairperson, Henry Hyde, a prominent Republican, joined by a majority of the House Democrats. These efforts failed after extensive debate, with the NCBC strongly resisting the softening amendments. See Susan Jensen, *A Legislative History*, *supra* note 77, at 523-38. In floor debate, after it was clear that his position would not succeed, Congressperson Hyde stated: “Lastly, let me pay my respects to the creditor lobby. They are awesome.” 145 Cong. Rec. H2724 (May 5, 1999).

<sup>119</sup> Here is the entirety of the explanation.

report was approved by the House but never voted on in the Senate.

## 5. Scaling Down the Abraham Amendment

The bill introduced in the House at the beginning of the next Congress, in February, 1999, contained the language of the conference report from the preceding year, including the “compromise” provisions respecting cramdown. There were a number of amendments adopted in the House that Spring but none of them dealt with the cram down provision, which remained intact 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. When the conference report tilted heavily to the House bill, especially with respect to the means test, many Democrats ceased to support the legislation, which is one reason the Conference Report was never brought to a vote in the Senate during the preceding year. Mindful to the need for some Democratic support to foreclose a filibuster, and wanting a bill that President Clinton might sign, Grassley included modifications to the conference report designed to appeal to these groups. Three significant changes were made in the cramdown provisions. First, the provision was removed from section 506 and placed once again in section 1325, where it had been after the Abraham amendment. This meant that the cramdown limitation did not affect the cost of redemption to the debtor in chapter 7.<sup>120</sup> Second, the five year lookback period was limited to secured claims where the collateral was a motor vehicle acquired for personal use of the debtor. For other collateral, the lookback period was 6 months. Third, the cramdown limitations for either motor vehicles or other property were not limited to purchase money security interests, a limitation that had been included in the preceding Conference Report.

In this Congress (the 106<sup>th</sup>, 1999-2000), the cramdown limitations produced extensive controversy, especially in the Senate. The creditor community appeared to remain united in support of the long lookback periods for motor vehicles contained the cramdown limitations. 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, great emphasis had been made in the many presentations made by NCBC to the Commission and to Congress on the importance of collecting money that debtors could afford to pay their unsecured creditors by using the means

---

“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.”

<sup>120</sup> S. 625, 106<sup>th</sup> Cong. §306(b)(1999).

test to force those debtors into chapter 13.<sup>121</sup> In my interviews with non-creditor 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 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 period.<sup>122</sup> It is clear that Senator Abraham continued to fight for the long lookback period for motor vehicles, and it appeared that the Senate Republicans generally deferred to Senator Abraham on this issue.<sup>123</sup> Perhaps the creditor coalition had no choice but to go along, since for the most part it was Republicans with whom they had influence.

Great controversy about the cramdown limitations were 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 to that would have to be paid to auto lenders in chapter 13 plans would jeopardize payments of future support claims to women and children. There would just not be enough money to go around, they claimed.<sup>124</sup> And this perspective was supported in statements from the White House expressing concern about the pending limitations on cramdown.<sup>125</sup> The National Association of Chapter 13 Trustees

---

<sup>121</sup> This conflict led Brady Williamson, the chair of the Bankruptcy Review Commission, to comment to a Wall Street Journal reporter: "This (the cramdown limitations) is 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 Provisions*, Wall St. J., March 13, 2001, at A28.

<sup>122</sup> Steve France, *Bankruptcy Reform: Democrats to Try to Restore Cramdown Rule Weakened in House and Senate Reform Bills*, 12 Bankruptcy Law Reporter (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.").

<sup>123</sup> "Consumer advocates expect strong resistance from Abraham (to efforts to limit the lookback period), 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.'" *Id.* at p. 209.

<sup>124</sup> 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 Bankruptcy Law Reporter (BNA) No. 23 at 507, 508 (June 10, 1999).

<sup>125</sup> White House Statement, Nov. 8, 1999. The White House Statement can be found at: <http://clinton3.nara.gov/OMB/legislative/sap/106-1/S625-s.html>. The White House expressed support for the Kohl amendment that would have reduced the lookback period, for all collateral,

(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 in order to cramdown unsecured auto lenders was being eliminated. 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 mandatory payments proposed for a chapter 13 plan, to both secured and priority creditors.<sup>126</sup> Another active interest group was that National Association of Consumer Bankruptcy Attorneys (NACBA), a trade association of consumer bankruptcy lawyers representing primarily 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. Many Senate Democrats expressed support for these sentiments. Senator Kohl (D-WI) drafted an amendment that would have scaled back the lookback period to six months. However, there were many more politically notorious amendments offered by Senate Democrats, and after the Democrats prevailed on another amendment that was an important concern of Senator Kohl's – the national cap on homestead exemptions - he decided not to insist on a vote on his proffered amendment on cramdown in chapter 13.<sup>127</sup> 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.

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 mostly 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, including the change in the means test discussed above. With respect to cramdown, the conference basically adopted the Senate position, which limited the anti-burification principle of the cramdown limitations to chapter 13,<sup>128</sup> and applied the five year lookback period only to motor vehicles acquired for

---

to 180 days.

<sup>126</sup> Hank Hildebrand, "Survey Shows Big Impact of Anti-Lienstripping Provision in S.625" (memo on file with author summarizing the study). 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.

<sup>127</sup> Steve France, *Bankruptcy Reform: Democrats to Restore Cramdown Rule Weakened in House and Senate Reform Bills*, *supra* note 102, (2/24/00) at 209. See also Steve France, *Bankruptcy Reform: Timing of Senate Action Still Uncertain; Dems Expected to Target Cramdown Limits*, 11 Bankruptcy Law Reporter (BNA) No. 23 at 535, 535 (June 17, 1999) (discussing the proposed Kohl amendment).

<sup>128</sup> Unfortunately, for ease in interpreting BAPCPA, this decision took the form of



“personal” purposes. But the conference extended the lookback period for other property to one year, where it has remained ever since and is included in the final legislation.<sup>129</sup> Finally, and significantly, the conference limited the cramdown limitations for both motor vehicles and other collateral to purchase money security interests, which was the position of the House bill and had been the position of the preceding conference two years earlier.

This conference report was approved by both the Senate and House, but the legislation was pocket vetoed by President Clinton. When the next Congress (the 107<sup>th</sup>) reconvened in January 2001, there was a new Republican President and confidence by the creditor coalition that the legislation would finally be approved. In both the House and Senate, bills were introduced replicating the positions of the previous year’s conference report. The House bill was adopted rather quickly with only minor change, and no change in the cramdown provisions. Once again, things were more complicated in the Senate. The party division in the Senate was 50-50, and the Republicans were deemed the majority party only because of the tie-breaking authority of the Vice President. There was a political need to maintain enough support for the bill to overcome a filibuster, and perhaps for that reason many amendments were proposed and adopted. One concerned the cramdown provision for auto loans and reduced the lookback period to three years. It was proposed by Senator Leahy, the senior Democrat on the Judiciary Committee, and adopted on the floor by a voice vote after obtaining unanimous consent for an exception to the rules, all suggesting Republican support or at least acquiescence in the change.<sup>130</sup> I can only speculate what accounts for Republican willingness to limit the lookback period when in the previous Congress change in the cramdown provision was resisted. It may be significant that Senator Abraham had been defeated in the November 2000 elections and there no longer was a Michigan Senator on the Senate Judiciary Committee.

Before the Senate could finally enact the legislation during the 107<sup>th</sup> Congress, Senator Jeffords shifted caucuses and the Democrats became the controlling party in the Senate. The bill was passed, without further change in the cramdown provisions, but the Democrats had a majority of the Senate’s conferees, so that for the first and only time in the history of the legislation, a conference committee was not totally controlled by Republicans. The resulting conference met formally over several days and no doubt many more days informally. It bargained out compromises on many contentious provisions, including a cap on homestead exemptions and the abortion clinic violence discharge exception. There was also a need for a

---

adopting the Senate bill’s “hanging paragraph” addition to section 1325(a). See notes 21-24 *supra* and accompanying text.

<sup>129</sup> 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.

<sup>130</sup> 147 Cong. Rec. S. 2343, 2348 (daily ed., March 15, 2001).

compromise with the respect to the cramdown limitation, since the House Bill contained a 5 year lookback for motor vehicles and the Senate Bill had only a 3 year lookback. In what was described as a “compromise”, the conference adopted a 910 (2.5 years) lookback period.<sup>131</sup> The conference report contains no explanation for how 2.5 can be considered a compromise between 3 and 5,<sup>132</sup> 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.

This conference report was ultimately defeated in the House over the abortion clinic violence discharge exception. The report would be reintroduced in the next two Congresses, as new bills, and ultimately pass. 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. As one interviewee explained it to me, the bill had become “calcified”. The creditors’ coalition had Senator Leahy’s signature on a conference report, and they weren’t about to take any risk of jeopardizing that support.

#### 6. The Equal Payments Provision.

The equal payments provision was not in the legislation proposed or enacted in the first Congress to consider bankruptcy reform. It was added at a Senate Judiciary Committee markup session in April 1999, during the second Congress to consider the reform legislation, apparently at the behest of automobile lender interests, and intended to reverse some cases that allowed for delayed payments to secured creditors, or even balloon payments a year or more into the chapter 13 plan.<sup>133</sup> Once passed by the Senate, the provision appeared in all subsequent bills and conference reports, and in the final enactment. It has not yet been interpreted to require spreading payments to secureds throughout the plan and it may never be.<sup>134</sup>

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

---

<sup>131</sup> H. R. REP. NO. 107-617, at 210 (2002).

<sup>132</sup> It has been reported that in this conference committee generally the House conferees deferred to the Senate position, except on the abortion clinic violence discharge exception and the cap on homestead exemptions. Susan Jensen, *supra* note , at 549,n.404. 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.

<sup>133</sup> See Ricardo Kilpatrick, *Selected Creditor Issues*, *supra* note 30, at 835-37; NORTON BANKRUPTCY LAW & PRACTICE, §122:8 (2005).

<sup>134</sup> 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 note 55 *supra* and accompanying text.

No version of the legislation ever included a provision concerning the interest rates paid to secureds in chapter 13, even though this was an issue often raised at the Commission and advocated by the four commissioners who dissented from the majority Commission report. In retrospect it seems evident that auto lender interests reached at least an implicit bargain with unsecureds 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 they remained remarkably unchanged over the seven plus years of Congressional deliberations. The auto lenders deviated from that implicit bargain in arranging for the limitation on cramdown in chapter 13, but probably there were 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 courts. It was not until 2004 that it became clear that the secured creditors would lose that litigation, with the Supreme Court's decision in the *Till* case. 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 arise 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 that comes 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 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. As a member of the coalition, the auto lenders had to support for a means test that was not in their immediate interest, but in return they received support for a number of other positions, even though the bank credit card interests were generally adverse to the auto lenders. 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.<sup>135</sup> If one had been made, would it have made a difference?

It is impossible to know for sure, but I think it is unlikely. Partly it is simply the institutional connections that auto lenders had formed before the bankruptcy reform process began. 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 bank 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, the BAPCPA opponenets were not monolithic in their 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 National Association of Consumer Bankruptcy Attorneys (NACBA). Many of the most prominent members of that group had a substantial chapter 13 practice, and their more well off clients probably benefitted the most from the ability to strip auto liens on relatively valuable cars in chapter 13.<sup>136</sup>

## 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 cram down, when they had already made a number of concessions against interest to the auto lenders. In fact, one suspects that the scaling back of the Abraham amendment that did occur was due in part to the failure of the creditor coalition to resist those limitations, at least vigorously. After all, when the creditor coalition decided to vigorously resist change to the original House bills, which they had great influence in drafting, they usually were quite successful.<sup>137</sup> One suspects that if the bank credit card interests

---

<sup>135</sup> 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 Dreazen, *Reform Pits Industries Against Each Other*, Wall Street Journal, April 20, 2000, p. A28 (“This whole bill is a case of one industry picking the pockets of another’, says Elizabeth Warren, a Harvard bankruptcy-law professor...”).

<sup>136</sup> NACBA also had an interest in maintaining the ability to frontload payment of debtor attorney fees in a chapter 13 plan. BAPCPA curtails this practice through the provision requiring equal payments to secureds, a provision successfully added to the legislation at the behest of auto lender interests. See notes 133-34 *supra* and accompanying text.

<sup>137</sup> 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.

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 tempted in other ways to redress the balance between secured and unsecured creditor interests that was established in the first House bills. For example, they could have pressed for a requirement that payments to secureds in chapter 13 be spread throughout the plan. This would have allowed unsecureds to collect payments earlier in chapter 13, and given debtors greater incentives to complete their chapter 13 plans. The Bankruptcy Review Commission had endorsed a requirement that payments to secureds be spread throughout the plan, which might have lent credibility to such a proposal.<sup>138</sup>

There are several reasons why the creditor coalition may not have chosen that path. It was obviously very difficult to get the legislation passed, and they must have feared that antagonizing any significant part of their broad coalition could have jeopardized ultimate enactment. Secondly, the interests with respect to chapter 13 cramdown of many participants or groups in the creditor coalition were mixed or complicated. 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.<sup>139</sup> Perhaps more than the support of the auto finance companies would have been at stake if the creditor coalition actively opposed the Abraham amendment.

Finally, and most importantly, the creditor coalition had an alternative strategy that they hoped would more than make up for the losses that bank credit card interests 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.<sup>140</sup> But that strategy could only be achieved if BAPCPA were enacted, and hence the reluctance to precipitate 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 they pay mortgage arrears over time.<sup>141</sup> I do not know that many debtors ever elected to

---

See note 98 *supra* and accompanying text.

<sup>138</sup> See note 100 *supra* and accompanying text.

<sup>139</sup> See Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box"*, this issue, at (note 51 in draft prepared for the conference).

<sup>140</sup> Many commentators have noted that this was a strategy of the creditor coalition. *E.g.*, DAVID SKEEL, *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.")

<sup>141</sup> 11 U.S.C. §1322(b)(5)(2005). This section was not amended by BAPCPA. Chapter

file bankruptcy principally to avoid repossession of a motor vehicle, but to the extent they have done so, their incentives to file are less now because of the cramdown limitations in chapter 13.<sup>142</sup>

## B. The Future

Among most members of Congress, there is probably little taste for additional consumer bankruptcy legislation in the near future. But 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 could certainly arise for some kind of legislative correction to prevent one or more provisions from being interpreted and applied in ways diametrically opposed to the intention of BAPCPA's promoters.<sup>143</sup>

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 cards. 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 in chapter 13, which sets the minimum standards for contributions to a chapter 13 plan in a way

---

13 is the only way in bankruptcy to avoid foreclosure of a mortgage in default.

<sup>142</sup> 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.

<sup>143</sup> 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, meaning that a textualist interpretation will introduce any number of absurdities into the law. And everybody must now be aware of the difficulty Congress will have in fixing this absurdities. My prediction that courts will respond by altering their interpretive strategies, in order 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*, this issue.

that may lower the contributions debtors must make.<sup>144</sup> If debtors will be paying less into chapter 13 plans and secured and priority<sup>145</sup> creditors will be getting more out of them, non-priority unsecured creditors will be receiving less. Such a development may create a demand for legislative correction by influential unsecured creditor interests, like 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 contributes to a chapter 13 plan, and their revenues will suffer if debtors pay lower amounts into their chapter 13 plans. Their 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 National Association of Chapter 13 Trustees (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 interests test in a more creditor-friendly manner. After all, Chapter 13 trustees, like all bankruptcy trustees, are considered fiduciaries for unsecured creditor interests, so such advocacy would be consistent with their assigned role.

Another interesting question is whether elements of the coalition that opposed cramdown limitations that are likely to resist a change in the best efforts test could form an alliance with elements of the former creditor coalition. It is not clear to me that the auto lenders have an interest in resisting a change in the best interests 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 and 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 13s, and perhaps discouraging the filing of bankruptcy altogether. And perhaps the auto lender interests will feel that continued loyalty to a broad creditor coalition is the price they must pay to maintain their newly acquired protections against cramdown in chapter 13.

### C. On Democracy.

It has been 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.<sup>146</sup> The influence of

---

<sup>144</sup> See note 68 *supra* and accompanying text.

<sup>145</sup> 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. §507(a)(1)(2005).

<sup>146</sup> DAVID SKEEL, *DEBT'S DOMINION*, *supra* note 140, *passim* (2001); Elizabeth Warren,

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.<sup>147</sup>

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 their apparently disciplined organization, relationships with key legislators, and ability to make strategic campaign contributions,<sup>148</sup> were unable to stop the Abraham amendment. What I will characterize as accidents of the legislative process seems to have played an important role in the outcome. For example, Senator Abraham was a member of the Senate Judiciary Committee. If there had not been a Michigan Senator on that Committee, would chapter 13 cramdown be 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 was no longer in 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. The vote was not taken until December, shortly before the Senate's final adjournment for that Congress, allowing the President to pocket veto the legislation. Proponents of BAPCPA had attempted to have an earlier vote on the conference report but they 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.<sup>149</sup> If an earlier vote had been taken, there would have been an opportunity for a veto ride, and 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 a five year lookback period, not the current 910 day period.

In some ways it is heartening to conclude that much maligned lawyer/lobbyists are not totally controlling the content of legislation, that elected members of Congress have some independent role in the decision-making process. But 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 is good policy for America. He was acting on behalf of an important industry in his constituency. That industry was benefitted by the accident of his membership on

---

*The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 190-92 (1999).

<sup>147</sup> *E.g., id.* at 200-02.

<sup>148</sup> 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 Magazine*, May 15, 2000, at p. 64.

<sup>149</sup> See note 87 *supra* and accompanying text.



the committee assigned bankruptcy reform legislation, a virtual accident in the political process.

Indeed, what characterizes the whole consideration of the chapter 13 cramdown limitations in the Congressional process was the lack of any consideration of basic bankruptcy policy considerations. The Bankruptcy Code has long contained financial incentives for debtors to choose voluntarily a chapter 13 plan. One can certainly argue, as I have in the past,<sup>150</sup> 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. In fact, the result under BAPCPA is an unruly and probably unprincipled compromise, for cramdown is not eliminated in chapter 13, it is just limited. It is hard to imagine 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. But I cannot just leap to the conclusion that it is a good thing.<sup>151</sup> Something needed to be done to prevent the creditors' coalition from the writing the new bankruptcy law without any checks or balances.<sup>152</sup> 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.<sup>153</sup> To be sure,

---

<sup>150</sup> William C. Whitford, *Secured Creditors and Consumer Bankruptcy in the United States*, 37 OSGOODE HALL L.J. 339, 363 (1999); William C. Whitford, *Has the Time Come To Repeal Chapter 13?*, 65 IND. L.J. 85, 99-101 (1989).

<sup>151</sup> 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 ("My analysis ... suggests that the quality and quantity of democratic consent to legislative action is far more attenuated and modest than the conventional view routinely supposes....[W]e ought to take a fresh look at the democratic legitimacy of legislatures [in the American system]...." *Id.* at ).

<sup>152</sup> It was frequently observed in the many years that BAPCPA was being considered by Congress that while lobbyists were heavily involved, the lobbying activities and power were much stronger on the creditor side than in the opposition forces. *E.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting*, *supra* note 83, at 613. They quote a legislative assistant to a member of the Senate Judiciary Committee as follows:

"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]."

<sup>153</sup> *E.g.*, Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, *supra* note 146, at 190-192.

professional organizations are self-interested, as Professor David Skeel has reminded us emphatically.<sup>154</sup> 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 for the most part nearly so well informed. Moreover, professionals must work with the resulting legislation on a daily basis, so 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, but I doubt that this incentive disciplines legislators to the same extent that incentives facing professionals discipline their work on legislation.

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

---

<sup>154</sup> DAVID SKEEL, *DEBT'S DOMINION*, *supra* note 140, especially pp. 89-98.