Ipso Facto Clauses and Chapter 7 Bankruptcies: Superfluous Contract Provisions, Enforceable Prenuptials, or Contrary to the Fresh Start?

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Once upon a time in America, a gentleman from Virginia financed a shiny new Oldsmobile through a neighborhood bank, thus becoming a debtor.\footnote{The text at notes 1–10 is adapted from In re Ballance, 33 Bankr. 89 (Bankr. E.D. Va. 1983).} Sometime later, while the car loan was still outstanding, the debtor’s financial affairs took a turn for the worse, prompting him to file a bankruptcy petition under chapter 7 of the Bankruptcy Reform Act of 1978.\footnote{11 U.S.C. §§ 101–1330 (1988).} At the time of his bankruptcy petition, the debtor was current on his monthly car payments to the bank and was not otherwise in default—a rarity in chapter 7 proceedings at the time, but not an unprecedented scenario today.\footnote{The Ballance court facetiously suggested that a chapter 7 debtor rarely enters bankruptcy without having defaulted on an outstanding installment loan, such as a car loan. See Ballance, 33 Bankr. at 89. This scenario is not as rare as the court might have imagined, however, as numerous cases have arisen involving this same fact scenario. See, e.g., In re Edwards, 901 F.2d 1383, 1384 & n.2 (7th Cir. 1990); Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1545 (10th Cir. 1989); General Motors Acceptance Corp. v. Bell, 700 F.2d 1053, 1054 (6th Cir. 1986).}

Upon learning of the debtor’s bankruptcy, the bank became quite concerned. Although the debtor had made all of his payments to date, the bank feared that he might not do so in the future. Moreover, the bank realized that by filing bankruptcy the debtor had reduced the legal remedies the bank could pursue if the debtor eventually did default. No longer would the bank be able to collect any outstanding balance from the debtor if he defaulted on the loan because, after his discharge in bankruptcy, the debtor would no longer be personally liable for the amount due.\footnote{In most chapter 7 cases, a debtor receives a discharge under section 727 at the close of the bankruptcy proceedings. Discharge extinguishes the debtor’s personal liability for most pre-petition debt and permanently enjoins creditors from seeking recovery of such debt from the debtor. 11 U.S.C. §§ 727(b), 524(a) (1988).} Rather, the bank’s sole remedy in the event of a default by the debtor would be to repossess the Oldsmobile and attempt to sell it for an amount sufficient to cover the outstanding loan balance.\footnote{See Ballance, 33 Bankr. at 89. Although a debtor’s personal liability is discharged in bankruptcy, the creditor’s lien survives the bankruptcy proceeding. Thus, after discharge the}
Recognizing that the Oldsmobile was not getting more valuable with time, and fearing that the debtor might decide to discontinue his payments when the car was no longer of much value, the bank decided to repossess the car immediately unless the debtor exercised a Bankruptcy Code remedy to retain it. The debtor, on the other hand, wished to retain possession of the car by simply continuing his contract payments as if his bankruptcy had never occurred. Unable to reach a compromise, the parties brought their dispute before a bankruptcy judge.

In a happy turn of events for the debtor, the bankruptcy judge ruled in the 1983 case of In re Ballance that the debtor could retain possession of the prized Oldsmobile so long as he fulfilled his contractual obligations to the bank. The judge ruled that a chapter 7 debtor who has not defaulted on an outstanding installment retail contract cannot be forced to resort to a Bankruptcy Code remedy in order to retain the collateral securing such a loan. The judge acknowledged that the debtor would no longer be personally liable on the loan and that, consequently, the bank's sole remedy upon default would be to repossess a potentially depreciated Oldsmobile, but the judge also noted that the debtor had not done anything wrong. "A debtor having filed bankruptcy has not committed a cardinal sin," the judge declared. In addition, the judge advised the bank that, as "bride to be," it should be grateful for a paying customer. And thus our heroes were betrothed, presumably to lead their lives happily ever after.

In order to avert such shotgun marriages as the type consummated in In re Ballance, creditors have resorted to including a sort of prenuptial contract term known as an ipso facto clause in their installment retail contracts. Ipso facto clauses, also known as "bankruptcy clauses" or "default upon filing clauses," contractually provide that a debtor's bankruptcy filing will constitute default, thereby accelerating the outstanding loan balance and triggering the cred-

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9 See Ballance, 33 Bankr. at 91.
8 See id. at 90–91.
7 See id. at 91.
6 See Ballance, 33 Bankr. at 91.

creditor can proceed in rem against its collateral to enforce its lien. See In re Crouch, 104 Bankr. 770, 772–73 (Bankr. S.D.W. Va. 1989).
ito's default remedies, including the remedy of repossession. To the extent that *ipso facto* clauses are enforceable, a debtor who has not otherwise defaulted on an installment retail contract is forced to resort to a Bankruptcy Code remedy in order to avert creditor repossession efforts.\(^1\)

A significant division exists among the courts regarding the enforceability of *ipso facto* clauses in chapter 7 consumer bankruptcy proceedings. A number of courts have held such clauses invalid, ruling that it would be contrary to the policies of the bankruptcy law to require non-defaulting debtors to resort to the Bankruptcy Code remedies in order to retain their liened property after bankruptcy.\(^2\) Other courts have held *ipso facto* clauses enforceable, reasoning that the risks that accompany the loss of a debtor's personal liability on an installment loan warrant a creditor's use of an *ipso facto* clause to protect its interest in the collateral securing such a loan.\(^3\) Still other courts have suggested that *ipso facto* clauses are superfluous, holding that the Bankruptcy Code itself requires all debtors, defaulting and non-defaulting alike, to resort to one of the Code remedies in order to retain liened collateral after bankruptcy.\(^4\)

The language of *ipso facto* clauses varies. The following are two noteworthy examples: "Default—You will be in default if you die, file for bankruptcy, or become insolvent . . . ." In re West, 101 Bankr. 648, 649 (D. Colo. 1989), aff'd, Lowry Fed. Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989); "If Customer-Debtor becomes voluntary[sic] or involuntary[sic] bankrupt . . . then in any of the aforesaid cases all installments of said note shall, at the option of the Secured Party, without notice of said option to anyone become at once due and payable . . . ." In re Whately, 16 Bankr. 394, 394 (Bankr. N.D. Ohio 1982).

\(^{13}\) See generally In re Schweitzer, 19 Bankr. 860, 865, 868 (Bankr. E.D.N.Y. 1982). In Chapter 7 proceedings, section 722 redemption and section 524(c) reaffirmation are the Code remedies available to the debtor. See 11 U.S.C. §§ 722, 524(a) (1988). For a discussion of these remedies, see infra notes 21-53 and accompanying text.

\(^{14}\) See, e.g., In re Peacock, 87 Bankr. 657, 659 (Bankr. D. Colo. 1988) (*ipso facto* clauses penalize debtors for exercising right to file bankruptcy and frustrate debtors' fresh start); In re Winters, 69 Bankr. 145, 147 (Bankr. D. Or. 1986) (refusing to enforce *ipso facto* clause); In re Brock, 23 Bankr. 999, 1002 (Bankr. D.D.C. 1982) (insolvency clauses are not favored under the Code's fresh start policy).


\(^{16}\) See, e.g., In re Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990) (holding that 11 U.S.C. § 521(2) requires all Chapter 7 debtors to choose between exercising a Code remedy or surrendering secured collateral); In re Chavariya, 117 Bankr. 582, 585 (Bankr. D. Idaho 1990) (same). But see Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989) ("nothing within the Code makes [redemption or reaffirmation] exclusive").
This note considers the enforceability of *ipso facto* clauses in chapter 7 proceedings. Section I examines the Code remedies of redemption and reaffirmation that *ipso facto* clauses attempt to trigger. This section briefly discusses the legislative history of the Code remedies and examines their procedural requirements as well. Section II considers whether the Code requires all chapter 7 debtors to resort to the Code remedies in order to retain liened property after bankruptcy or whether the Code only imposes this requirement on debtors who enter bankruptcy in default. Section III examines whether creditors can enforce *ipso facto* clauses to limit a debtor's options for retaining liened property to the Code remedies of redemption and reaffirmation. This section focuses on the various policy considerations that courts have cited in deciding whether to enforce *ipso facto* clauses. Section IV analyzes whether the Code itself requires debtors to resort to the Code remedies, concluding that the Code does not expressly impose this requirement. This section further analyzes whether creditors can force debtors to resort to the Code remedies by enforcing *ipso facto* clauses, concluding that *ipso facto* clauses should be enforced in chapter 7 proceedings. Finally, section V suggests that Congress should enact two amendments to the Bankruptcy Code to eliminate the confusion regarding a debtor's options in bankruptcy and to enhance the Code remedies that are available to chapter 7 debtors.

**I. THE CODE REMEDIES: REDEMPTION AND REAFFIRMATION**

The Bankruptcy Code provides two alternative remedies by which a chapter 7 debtor can retain possession of liened property after bankruptcy. Under section 722, a debtor can redeem such property by paying the creditor the fair market value of the property or, if less, the remaining loan balance due. Section 722 re-

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16 *See infra* notes 21–53 and accompanying text.
17 *See infra* notes 54–78 and accompanying text.
18 *See infra* notes 79–149 and accompanying text.
19 *See infra* notes 151–165 and accompanying text.
20 *See infra* notes 166–186 and accompanying text.
21 Section 722 provides in relevant part:

An individual debtor may, whether or not such debtor has waived such right, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt . . . by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

demption requires a lump-sum payment and the remedy is available to the debtor as a matter of right.22

Alternatively, under section 524(c), the debtor can enter into a reaffirmation agreement with the creditor, pledging to repay in installments all or part of the outstanding loan balance in exchange for the continued right to possession of the liened collateral.23 A reaffirmation gives rise to renewed personal liability on the part of the debtor and can be enforced against the debtor notwithstanding his or her discharge from bankruptcy.24 In addition, reaffirmation under section 524(c) requires a voluntary agreement between debtors and creditors. Thus, debtors cannot exercise this remedy without first obtaining creditor consent.25

A. Commission's Proposals

The Bankruptcy Code remedies of redemption and reaffirmation are somewhat different from the debtor remedies that were proposed to Congress by the Commission on Bankruptcy Laws of the United States ("the Commission") that drafted the original version of the 1978 Act.26 Citing the potential for creditor over-reaching in obtaining reaffirmations,27 the Commission recommended

22 Section 722 itself indicates that the remedy is available to a debtor as a matter of right, providing that a debtor may redeem "whether or not such debtor has waived such right." 11 U.S.C. § 722 (1988) (emphasis added). Although the statute itself does not indicate what form of payment section 722 requires, courts have consistently construed section 722 as requiring a lump-sum payment. For a discussion of these opinions, see infra notes 38–53 and accompanying text.

23 Section 524(c) provides in relevant part:

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


24 See id.; see also In re Hunter, 121 Bankr. 609, 612 (Bankr. D. Ala. 1990).

25 See General Motors Acceptance Corp. v. Bell, 700 F.2d 1053, 1056 (6th Cir. 1983) ("[section] 524(c) envisions execution of an 'agreement' which, by definition is a voluntary undertaking").


27 The Commission reported that, under prior law, creditors were often able to use coercive tactics, such as the threat of repossession, in obtaining reaffirmations from debtors. See Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 93rd Cong., 1st Sess., Pt. 1, at 10, 169 (1973) [hereinafter "Commission's Report Part I"]: Often, the Commission noted, the value of a debtor's personal property was much greater to the debtor, due to high replacement costs, than the price it would bring to the creditor at a foreclosure sale. See Report of the Commission on the Bankruptcy Laws
that reaffirmation agreements be disallowed under the Bankruptcy Code\(^2\)\(^8\) and that debtors be provided with a redemption remedy instead.\(^2\)\(^9\) The Commission's proposed redemption provision provided debtors with two alternatives.\(^3\)\(^0\) Under the first alternative, a debtor could redeem encumbered property by tendering a lump-sum payment to the creditor for the fair market value of the property or the amount of the creditor's claim, whichever was less.\(^3\)\(^1\) This remedy was to be available to the debtor as a matter of right and would not require the creditor's consent.\(^3\)\(^2\)

Alternatively, a debtor could enter into a consensual agreement with the creditor to redeem the collateral in installment payments.\(^3\)\(^3\) Such installment redemption agreements were to be enforceable against the debtor notwithstanding his or her discharge from bankruptcy, but the debt incurred by the debtor under such agreements
was not to exceed the lesser of the fair market value of the property or the amount of the creditor's claim.\textsuperscript{34}

After significant deliberation, Congress rejected the Commission's recommendation that reaffirmations be prohibited under the 1978 Act.\textsuperscript{35} Congress did, however, impose certain restrictions on the use of reaffirmations in order to protect debtors from burdensome agreements.\textsuperscript{36} In addition, Congress adopted the Commission's recommendation that debtors be provided with a redemption remedy. This remedy is set forth in section 722.\textsuperscript{37}

\textbf{B. Installment Redemption versus Lump-Sum Redemption}

In enacting section 722, Congress failed to specify whether that section requires debtors to tender a lump-sum payment in order to exercise their section 722 redemption rights or whether debtors can redeem in installment payments as well.\textsuperscript{38} One or two early cases addressing this issue held that installment redemption is permitted under section 722.\textsuperscript{39} The vast majority of courts, however, have held that section 722 requires a lump-sum payment.\textsuperscript{40}

One reason courts have cited for refusing to permit installment redemption under section 722 is that chapter 7 lacks the necessary procedural mechanisms for enforcing installment redemption.
plans. Unlike chapter 13, which allows a debtor to redeem in installments but which postpones the debtor's discharge until all payments under the plan are completed, chapter 7 makes no provision for postponing the debtor's discharge. Consequently, under a chapter 7 installment redemption scheme, the debtor's installment payment schedule would likely extend beyond discharge, after which the debtor could discontinue the installment payments without encountering personal liability. Thus, because installment redemption would expose the creditor to the risk of default, leaving the creditor with repossession of a potentially worthless collateral as its only recourse, a number of courts have required a lump-sum payment under section 722.

For example, in the 1982 case of In re Hart, the United States District Court for the Northern District of New York held that a lump-sum payment was required under section 722 in order to ensure a creditor's recovery of its secured claim. In Hart, the bankruptcy court had permitted the debtor to redeem her automobile by paying its $2,200 fair market value in monthly installments of $100. The district court reversed, holding that section 722 requires a lump-sum payment.

In requiring lump-sum redemption under section 722, the Hart court first determined that the value of a secured creditor's claim should be fixed as of the date of the debtor's bankruptcy filing. The court further noted that Congress had taken measures in several sections of the Code to ensure the secured creditor full recovery of its secured claim. The court then addressed whether the bank-
ruptcy court’s installment redemption order would ensure the creditor such recovery.

The *Hart* court found that the bankruptcy court's order did not adequately ensure that the creditor would recover the full value of its secured claim.\(^{50}\) In particular, the court considered the consequences that would result if the debtor discontinued her installment payments after discharge. If such a default were to occur six months after discharge, the court hypothesized, it was likely that the car securing the loan balance would have depreciated more than the $600 paid to the creditor under the installment redemption plan.\(^{51}\) Consequently, even after repossessing the car, the creditor's total recovery under the installment redemption scheme would be less than if the debtor had been required to redeem in a lump-sum payment during the bankruptcy proceeding.\(^{52}\) Thus, because Congress had sought to preserve the claims of secured creditors in bankruptcy, and because installment redemption would potentially undermine this objective, the *Hart* court concluded that section 722 requires a lump-sum payment.

Today it is well-settled that section 722 requires a lump-sum payment.\(^{53}\) In part, courts have come to this conclusion because of the risks that installment redemption would pose to creditors. For debtors who are unable or unwilling to redeem under section 722, the Code provides the alternative remedy of reaffirmation. Although this remedy was opposed by the Commission on Bankruptcy Laws, Congress chose to allow reaffirmation agreements, subject to certain restrictions, under section 524(c).

II. The Debate: When Are The Code Remedies Necessary?

Although the procedural requirements of section 722 and section 524(c) are no longer much in doubt, considerable controversy

\(^{50}\) *See id.* at 1022-23.

\(^{51}\) *Id.*

\(^{52}\) *See id.* at 1023.

\(^{53}\) *See, e.g.*, General Motors Acceptance Corp. v. Bell, 700 F.2d 1055, 1056 (6th Cir. 1983); *Hart*, 8 Bankr. at 1023; *In re Schweitzer*, 19 Bankr. 860, 862 (Bankr. E.D.N.Y. 1982); *In re Whately*, 16 Bankr. 394, 396 (Bankr. N.D. Ohio 1982); *see also In re Pendlebury*, 94 Bankr. 120, 122 (1988); *In re Peacock*, 87 Bankr. 657, 660 (Bankr. D. Colo. 1988).
exists as to when a debtor must resort to these Bankruptcy Code remedies. Specifically, courts are divided as to whether the Code requires all chapter 7 debtors to redeem or reaffirm in order to retain liened collateral or whether the Code only imposes this requirement on debtors who enter bankruptcy in default.\(^{54}\) The Code section at the center of this debate is section 521(2).

Section 521(2)(A) requires every chapter 7 debtor to file a statement of intention with respect to his or her liened property, indicating whether the debtor intends to retain or surrender the property and, "if applicable," whether the debtor intends to redeem or reaffirm.\(^{55}\) Section 521(2)(B) further requires the debtor to perform his or her stated intention within forty-five days of filing a statement under section 521(2)(A).\(^{56}\) Finally, section 521(2)(C) provides that a debtor's rights to the liened property are not altered by subparagraphs (A) and (B).\(^{57}\)

Some courts have held that section 521(2) sets forth the exclusive means by which a debtor can retain possession of property that secures an outstanding installment loan.\(^{58}\) For example, the United States Court of Appeals for the Seventh Circuit held in the 1990

\(^{54}\) Compare In re Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990) (section 521(2) requires all debtors to choose between redeeming, reaffirming, or surrendering their collateral) and In re Chavarria, 117 Bankr. 582, 584–85 (Bankr. D. Idaho 1990) (same) with Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989) (Bankruptcy Code does not make redemption or reaffirmation exclusive means of retaining liened collateral) and In re Belanger, 118 Bankr. 368, 372 (Bankr. E.D.N.C. 1990) (chapter 7 debtor has alternatives other than the Code remedies). See also Bell, 700 F.2d at 1058 (suggesting that redemption and reaffirmation are Chapter 7 debtors' only alternatives for retaining liened collateral after bankruptcy).

\(^{55}\) 11 U.S.C. § 521(2)(A) (1988). Section 521(2) provides:

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate-

(A) the debtor shall file . . . a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court . . . fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's . . . rights with regard to such property . . . .

\(^{56}\) Id. § 521(2)(B).

\(^{57}\) Id. § 521(2)(C).

\(^{58}\) See, e.g., In re Edwards, 901 F.2d 1383, 1387 (7th Cir. 1990); In re Chavarria, 117 Bankr. 582, 584–85 (Bankr. D. Idaho 1990).
case of *In re Edwards* that section 521(2) requires all debtors to choose between redeeming, reaffirming or surrendering liened collateral. In *Edwards*, the debtor had two automobile loans outstanding at the time she filed bankruptcy. Edwards was not in default on either loan and she sought to retain the vehicles by continuing her contract payments without reaffirming the underlying loans.

Relying in part on the language of section 521(2), the *Edwards* court held that the options outlined in section 521(2) are exclusive. The court noted that the language of section 521(2) is mandatory in that it states that a debtor "shall file" a statement of intention with respect to liened collateral. The court further noted that section 521(2)(B) contemplates that the debtor "shall perform" one of the alternatives outlined in section 521(2)(A). These alternatives, the court observed, did not include a payment scheme of the sort proposed by Edwards.

In addition to concluding that Edwards's proposed payment scheme did not satisfy the language of section 521(2), the *Edwards* court also determined that Edwards's proposal was contrary to the purposes of that section as well. Noting that Congress added section 521(2) to the Code as part of the Consumer Finance Amendments to the Bankruptcy Code, the *Edwards* court observed that one purpose of these amendments was to protect creditors from the risks associated with rapidly depreciating collateral. Permitting Edwards to retain the vehicles without personal liability would potentially undermine this objective, the court reasoned, because without personal liability for the loans Edwards would have little incentive to maintain or insure the vehicles. If the value of the vehicles fell below the level of the loan balance, the court noted, the creditor would be left undersecured. The court concluded that Congress's goal of protecting creditors from depreciation of their assets supported the conclusion that section 521(2) sets forth the exclusive remedies for retaining liened collateral.

In contrast to the *Edwards* court, some courts have held that the options outlined in section 521(2) are not exclusive. For ex-

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59 901 F.2d at 1387.
60 Id. at 1384.
61 Id. at 1387.
62 Id. at 1386.
63 Id.
64 Id.
65 See id. at 1386–87.
66 See, e.g., *In re Hunter*, 121 Bankr. 609, 617 (Bankr. N.D. Ala. 1990) (non-defaulting
ample, in the 1990 case of *In re Belanger*, the United States Bankruptcy Court for the Eastern District of North Carolina held that chapter 7 debtors who had not defaulted on an outstanding installment loan had the option of retaining the loan’s collateral by simply continuing their contract payments. In *Belanger*, the collateral at issue was the debtors’ residence, a mobile home.

The debtors in *Belanger* had remained current on their mobile home payments despite their financial difficulties. Upon entering bankruptcy, the Belangers filed a statement of intention pursuant to section 521(2)(A) indicating that they intended to retain the mobile home. The Belangers did not indicate, however, whether they intended to redeem the mobile home or reaffirm the underlying loan. Rather, the Belangers proposed to retain the property by simply keeping their payments current.

In considering whether the Belangers had satisfied the requirements of section 521(2), the *Belanger* court construed that section as imposing two independent requirements. First, the court determined that section 521(2) requires every debtor to file a statement of intention indicating whether he or she intends to retain or surrender the collateral in question. The court noted that the Belangers had complied with this requirement. Second, the court concluded that section 521(2) requires a debtor to indicate whether he or she intends to redeem, reaffirm or surrender the collateral, but only if one of these options is “applicable.” In *Belanger*, the court noted, none of these options was applicable because the Belangers did not intend to redeem, reaffirm or surrender the collateral. Rather, they intended to retain the mobile home by keeping their contract payments current. The court thus concluded that the debtors had satisfied the literal requirements of section 521(2).

The *Belanger* court also determined that the purposes of section 521(2) did not necessitate the conclusion that the remedies outlined in that section are exclusive. The court observed that the primary

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67 118 Bankr. at 372.
68 Id. at 369.
69 Id.
70 See id. at 369.
71 Id.
72 See id. at 369–70.
73 Id.
74 Id.
purpose of section 521(2) was to ensure that the secured creditor receive notice of a debtor's intentions with respect to the creditor's collateral.\textsuperscript{75} Thus, the court reasoned, when a debtor intends to redeem, reaffirm or surrender the creditor's collateral, section 521 requires the debtor to notify the creditor of this intention. But, the court held that section 521 was not intended to limit a debtor's options to the options listed in the statute.\textsuperscript{76} The court concluded that chapter 7 debtors have other options as well, including the continued contract payment option that the Belangers intended to pursue.

Finally, the Belanger court addressed the concern raised by the Seventh Circuit in \textit{In re Edwards} that without personal liability debtors will lack incentive to insure or maintain a creditor's collateral.\textsuperscript{77} The court concluded that there was little basis for this concern in Belanger because the collateral in question was the debtors' home. The court reasoned that it was unlikely that the debtors would fail to insure and maintain their home simply because they were no longer personally liable on the loan. Moreover, the court noted that if the debtors did fail to maintain or insure the collateral the creditor would be justified in declaring a default and exercising its default remedies. The court therefore concluded that the debtors could retain the mobile home by keeping their contract payments current.\textsuperscript{78}

In sum, courts are divided over whether section 521(2) sets forth the exclusive means by which a debtor can retain possession of liened collateral after bankruptcy. This split of authority stems in part from the "if applicable" language in section 521(2)(A) itself.
But the division among the courts appears to run deeper than a disagreement over principles of statutory construction. Courts are also divided over whether limiting a non-defaulting debtor’s options to the Code remedies is consistent with bankruptcy policy.

III. FORCING THE ISSUE: *IPSO FACTO* CLAUSES

In order to overcome the absence of a clear Code directive triggering the redemption, reaffirmation or repossession scenario in chapter 7 cases involving non-defaulting debtors, creditors have attempted to create the necessary default by employing *ipso facto* clauses in their installment retail contracts. *Ipso facto* clauses purport to place debtors in default upon filing bankruptcy, thereby triggering creditor repossession rights. Such clauses not only raise the issue of whether a creditor can actually repossess, however. *Ipso facto* clauses also call into question whether creditors can use the threat of repossession as a means of persuading a debtor to redeem or reaffirm. Courts are divided over whether *ipso facto* clauses can be enforced at all.

A. Code Restrictions on Pre-Discharge Enforcement of *Ipso Facto* Clauses

The division among the courts concerning the enforceability of *ipso facto* clauses has generally focused on whether such clauses can be enforced after a debtor’s discharge. This focus is likely due to the fact that prior to discharge the Code presents a number of barriers to the enforceability of *ipso facto* clauses.\(^79\) Perhaps the

\(^79\) In addition to section 362(d), discussed *infra* notes 80–98 and accompanying text, section 541(c) also calls into question whether *ipso facto* clauses are enforceable in chapter 7 bankruptcy proceedings. Section 541(c) provides that all of a debtor's nonexempt assets become property of the bankruptcy estate upon the debtor's filing of bankruptcy, notwithstanding any *ipso facto* clause to the contrary. See 11 U.S.C. § 541(c) (1988). In the 1983 case of *General Motors Acceptance Corp. v. Bell*, the United States Court of Appeals for the Sixth Circuit indicated that section 541(c)’s prohibition against *ipso facto* clauses was only intended to ensure the ability of the bankruptcy trustee to collect chapter 7 debtors’ property for disposition. Once the property has been collected for the estate and subsequently abandoned to the debtor, the court held, section 541(c)’s prohibition on *ipso facto* clauses is no longer operative. See *General Motors Acceptance Corp. v. Bell*, 700 F.2d 1053, 1058 (6th Cir. 1983).

Not all courts have embraced the *Bell* court's analysis of section 541(c)’s impact on *ipso facto* clauses. In 1983 the United States Bankruptcy Court for the Eastern District of Virginia held in *In re Ballance* that *ipso facto* clauses do not recover from section 541(c)’s initial invalidation. 33 Bankr. 89, 90 (Bankr. E.D. Va. 1983). Without analysis, the *Ballance* court rejected as "utterly ridiculous" the idea that *ipso facto* clauses "breathe new life" after initial invalidation under section 541(c). *Id.* at 90. Accord *In re Kunstler*, 38 Bankr. 207, 209–10


most formidable of these barriers is section 362's automatic stay.80

The automatic stay is triggered immediately upon a debtor's bankruptcy filing and shields the debtor from all creditor recovery efforts, including repossession, during the administration of the bankruptcy case.81 Professor White aptly noted the breadth of the protections afforded by the stay, stating that "[u]pon filing of the petition the creditor may continue to eat, sleep, and breathe; perhaps he can smile at the debtor, but he may do little else."82 As part of that "little else," a creditor can motion to lift the stay pursuant to section 362(d).83 This motion presents one opportunity for creditors to enforce ipso facto clauses.

Section 362(d)(1) provides that a creditor can motion to lift the stay for "cause," including a lack of adequate protection of its in-

(M.D. La. 1984) (stating in dicta that section 524(c) renders ipso facto clauses void and "not simply unenforceable until abandonment").

In addition to section 541, some courts have addressed whether section 365 precludes creditors from enforcing ipso facto clauses in installment retail contracts. See, e.g., In re Rose, 21 Bankr. 272, 274-75 (Bankr. D.N.J. 1982); In re Whately, 16 Bankr. 394, 397-98 (1982). Section 365 invalidates ipso facto clauses in executory contracts. See 11 U.S.C. § 365 (1988). Courts have generally agreed that installment retail contracts such as car loans do not constitute executory contracts within the meaning of section 365. See Rose, 21 Bankr. at 274-75; Whately, 16 Bankr. at 397-98. Some courts, however, have indicated that even though section 365 might not directly invalidate ipso facto clauses in installment retail contracts, that section, along with section 541 and section 363(1), which provides that the trustee can use, lease, or sell certain property of the estate notwithstanding any ipso facto clause to the contrary, see 11 U.S.C. § 363(1) (1988), evinces a congressional policy disfavoring the use of ipso facto clauses in Bankruptcy. See, e.g., In re Brock, 23 Bankr. 998, 1003 & n.10; Rose, 21 Bankr. at 275-76.


(a) . . . a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of —

(5) any act to . . . enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . . .


81 Id.


83 11 U.S.C. § 362(d) (1988) provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . . .

Id.
terest in property. In the 1984 case of *Riggs National Bank of Washington v. Perry*, the United States Court of Appeals for the Fourth Circuit addressed whether a default predicated on a debtor's breach of an *ipso facto* clause constituted "cause" within the meaning of section 362(d)(1). The court concluded that such a default did not constitute "cause" and the court further stated that *ipso facto* clauses are unenforceable as a matter of law.

The creditor in *Perry*, Riggs National Bank of Washington ("Riggs"), held a security interest in Perry's Audi sedan. In attempting to persuade the court to lift the automatic stay, Riggs argued that by filing bankruptcy Perry had breached the default-upon-filing clause in the parties' security agreement. This default, Riggs argued, constituted "cause" within the meaning of section 362(d)(1) and warranted modification of the automatic stay.

The *Perry* court denied Riggs's motion to lift the stay, noting that the protections of the automatic stay constitute an essential step in a debtor's journey toward a fresh start after bankruptcy. If the filing of bankruptcy could alone suffice as "cause" justifying a modification of the automatic stay, the court reasoned, a debtor could not file bankruptcy to seek the protections of the stay without concurrently triggering its demise. The court thus concluded that the *ipso facto* clause was unenforceable as a matter of law.

In addition to holding that the filing of bankruptcy could not constitute "cause" within the meaning of section 362(d)(1), the *Perry* court also concluded that the automatic stay would continue in effect until Perry's discharge was granted or denied, thus providing him with the opportunity to redeem or reaffirm. The court reasoned that Perry's continued contract payments would adequately protect Riggs' interest in its collateral during the bankruptcy pro-

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84 Id.
85 729 F.2d. 982, 984–85 (4th Cir. 1984).
86 Id.
87 Id. at 984.
88 Id.
89 Id. at 985.
90 Id. at 984–85.
91 Id. at 985.
92 See id. at 986. Riggs had also argued that it was entitled to relief from the stay because its collateral was inadequately protected. See *Perry*, 729 F.2d at 985–86. Riggs cited the prospect of Perry's discharge, as well as the possibility that its collateral could depreciate, in support of this motion. The court rejected Riggs's argument, however, stating that Riggs's position was "no more fragile, due to the Chapter 7 filing alone, than that of any lender under an installment sales contract." Id. at 984.
ceeding. The court, however, expressly withheld judgment on whether Perry would be required to redeem or reaffirm in order to retain possession of his car after the termination of the automatic stay. Thus, although the Perry court stated that ipso facto clauses are unenforceable as a matter of law, the Perry court only addressed the more limited issue of whether such clauses can be enforced during the automatic stay.

Other courts are in accord with the Perry court's conclusion that the automatic stay precludes creditors from enforcing ipso facto clauses during the pendency of a debtor's discharge. Despite repeated assertions by creditors that adequate protection is lacking when a debtor fails to redeem or reaffirm, courts have generally agreed that a debtor's continued contract payments adequately protect a creditor during the automatic stay. The automatic stay, however, only continues in effect until discharge. Thus, even though a creditor can do little more than smile at the debtor while

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93 See id. at 985-86.
94 Id. at 986.
95 In a separate opinion, Judge Widener emphasized that the court had not ruled on the ultimate validity of the ipso facto clause. Judge Widener stated that the court's ruling that the ipso facto clause was unenforceable extended only to enforcement attempts during the bankruptcy case. After the stay was lifted and the bankruptcy case closed, Judge Widener reasoned, the ultimate validity of the ipso facto clauses would be a matter of state law. See id. at 986-87 (Widener, J., concurring in part, dissenting in part).
96 See generally In re Wilson, 97 Bankr. 285, 286-88 (Bankr. W.D. Va. 1989) (noting that ipso facto clauses are not enforceable during the automatic stay); cf. General Motors Acceptance Corp. v. Bell, 700 F.2d 1053, 1057 (6th Cir. 1983) (automatic stay continues in effect until the case is closed, dismissed, or discharge is granted or denied); In re Cruseturner, 8 Bankr. 581, 592 (Bankr. D. Utah 1981) (automatic stay grants debtor time to enforce rights in property under sections 722 and 524(c)).

A surprising number of cases involving ipso facto clauses have arisen on creditor motions to lift the stay. See, e.g., In re Peacock, 87 Bankr. 657, 657 (Bankr. D. Colo. 1988); Ballance, 33 Bankr. at 89; Rose, 21 Bankr. at 272. Typically, creditors have argued that the prospect of a debtor's discharge, combined with the possibility that the debtor might default and that the collateral might depreciate, entitles a creditor to relief from the stay and enforcement of an ipso facto clause unless the debtor redeems or reaffirms. See, e.g., Ballance, 33 Bankr. at 89-90; Rose, 21 Bankr. at 272, 277-78. But, even a court that has held ipso facto clauses enforceable has noted that such motions are premature, as one purpose of the automatic stay is to provide debtors with the opportunity to decide whether to redeem or reaffirm. See In re Morrow, 66 Bankr. 162, 169 (Bankr. D. Nev. 1986). Moreover, it should be noted that the risks that ipso facto clauses attempt to avert do not arise until the debtor has actually received his or her discharge.
the automatic stay is in effect, that smile might very well convey the message that the creditor intends to enforce its *ipso facto* clause once the stay is lifted.

B. Post-Discharge Concerns: Balancing Creditor Risk and the Debtor's Fresh Start

Courts are sharply divided over whether *ipso facto* clauses are enforceable after discharge.99 The Bankruptcy Code itself does not address this precise issue.100 Consequently, in considering whether to enforce *ipso facto* clauses, most courts have focused on the policy implications of enforcing such clauses. These courts have balanced the risks that non-enforcement would pose to creditors against the burdens that enforcement would impose on debtors. Ultimately, the disagreements among the courts arise over which factors weigh more heavily in the balance.

1. *Ipso Facto* Clauses and Debtor Burdens

The courts that have refused to enforce *ipso facto* clauses have expressed their dissatisfaction with the options that *ipso facto* clauses present to debtors. Some courts have noted that, although *ipso facto* clauses attempt to force debtors to elect between redeeming, reaffirming or surrendering their liened property, most chapter 7 debtors are financially unable to redeem in a lump-sum payment.101 Consequently, these courts point out that enforcing *ipso facto* clauses has the practical effect of requiring debtors to choose between reaffirming their debts or surrendering their liened property.102 Allowing creditors to repossess, these courts hold, would penalize


100 A few courts have suggested that section 524(a)(2) precludes creditors from enforcing *ipso facto* clauses after bankruptcy. See, e.g., *In re Hughes*, 95 Bankr. at 23; *In re Peacock*, 87 Bankr. at 661 n.5; *In re Brock*, 23 Bankr. 998, 1002–03 (Bankr. D.D.C. 1982). Section 524(a)(2) does not preclude a creditor from enforcing its lien by proceeding *in rem*, however, and thus these decisions have seemingly rested on findings that creditors' threats to proceed *in rem* were actually attempts to impose personal liability on debtors as well.


102 Id. at 146–47.
For example, in the 1988 case of In re Peacock, the United States Bankruptcy Court for the District of Colorado reasoned that enforcing an *ipso facto* clause to require a non-defaulting debtor to reaffirm would be contrary to the Bankruptcy Code's fresh start policy. In *Peacock*, the collateral at issue was the debtor’s van. The Peacocks were current on their loan payments and they sought to retain the van by continuing their payments without reaffirming. The creditor, on the other hand, sought to repossess the van unless the debtors redeemed or reaffirmed.

The Peacock court addressed the reaffirmation alternative, expressing two concerns with this remedy. First, the court noted that, in negotiating the terms of a reaffirmation, the Peacocks would be in a weak bargaining position, as the creditor could reject any reaffirmation proposal it found unacceptable. Indeed, the court stated that the Peacocks would be at the “mercy” of the creditor in negotiating a reaffirmation. Second, the court reasoned that the renewed personal liability that would result from the agreement would “cloud” the Peacocks' fresh start if they were to default in the future. Thus, because requiring the Peacocks to reaffirm would be contrary to the Code’s fresh start policy, the court held they could retain the van as long as they kept their contract payments current.

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103 Id.; In re Rose, 21 Bankr. 272, 277 (Bankr. D.N.J. 1982); see also Brock, 23 Bankr. 998, 1003 ("to permit repossession by sole reliance on [a] bankruptcy clause would in effect result in a forfeiture, which courts of equity traditionally abhor").

104 See, e.g., Peacock, 87 Bankr. at 661 (forcing reaffirmation would “cloud” debtors’ fresh start); Winters, 69 Bankr. at 146–47 (enforcing *ipso facto* clause would threaten debtor’s fresh start).

105 See In re Hughes, 95 Bankr. 20, 23 (Bankr. E.D.N.Y. 1989) (post-discharge enforcement of *ipso facto* clause violates section 542(a)(2)).


107 Id. at 657.

108 Id. In addition to relying on an *ipso facto* clause, the creditor in *Peacock* argued that section 521(2)(A) required the debtors to redeem, reaffirm, or surrender the collateral. The *Peacock* court rejected this argument, however, holding that section 521(2)(A) is “essentially procedural” and does not narrow a non-defaulting debtor's rights with respect to retaining collateral. Id. at 658–60. For a discussion of section 521(2), see supra notes 54–65 and accompanying text.

109 Peacock, 87 Bankr. at 661.

110 Id.

111 Id.
While the Peacock court held that requiring a non-defaulting debtor to reaffirm would violate the Code’s fresh start policy, the United States Bankruptcy Court for the District of New York held in In re Hughes that a creditor’s post-discharge attempt to enforce an ipso facto clause violated the Bankruptcy Code itself. In Hughes, the court held that a creditor’s post-discharge attempt to enforce an ipso facto clause violated section 524(a)(2)’s prohibition on actions to collect repayment from a debtor of a debt that has been discharged.

The debtor in Hughes sought to retain possession of his car, the fair market value of which was $3,600 less than the outstanding loan balance due to Chrysler Credit Corporation. Although Hughes had remained current on his contract payments throughout his bankruptcy proceeding, Chrysler invoked an ipso facto clause and attempted to repossess the car after Hughes had been discharged. In response, Hughes petitioned the court to reopen his discharge hearing so that he could take advantage of an earlier reaffirmation agreement with Chrysler that he had subsequently rescinded.

In addressing whether it was necessary for Hughes to reaffirm in order to retain possession of the vehicle, the court questioned Chrysler’s motives for threatening to repossess. Noting that Chrysler would suffer a loss if it actually reposessed the vehicle, and that Chrysler had never claimed that the vehicle was depreciating faster than the loan balance was being paid down, the court concluded that Chrysler’s specific intent in threatening to repossess was to coerce Hughes into reaffirming the outstanding loan. Employing the clause for this purpose, the court reasoned, was akin to seeking repayment from Hughes of his discharged obligations, an objective specifically prohibited by the discharge provisions of section 524(a)(2). The court concluded that because repossession served no economically sound purpose other than to obtain a reaffirmation from Hughes, Chrysler could not rely on Hughes’ bankruptcy filing as a basis for declaring default.

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113 Id. at 23.
114 Id. at 21.
115 Id. at 21–22.
116 Id. at 22.
117 Id. at 23.
118 Id.
In contrast to those courts that have found the Code remedies unduly burdensome to debtors, at least one court has regarded the availability of the Code remedies as a factor weighing in favor of enforcing *ipso facto* clauses. In the 1982 case of *In re Schweitzer*, the United States Bankruptcy Court for the Eastern District of New York held an *ipso facto* clause enforceable after noting that the debtor had the option of reaffirming if he wished to retain the liened property.119 The court stated that although it might not enforce *ipso facto* clauses in all instances, it would enforce such clauses where doing so would not deprive a debtor of needed property.120

The debtor in *Schweitzer* had not defaulted on his car payments to Chrysler Credit Corporation and he sought to retain possession of his car by continuing his contract payments.121 Chrysler, on the other hand, argued that Schweitzer had breached a default-upon-filing clause in the parties' security agreement and therefore was required to redeem in lump-sum, reaffirm the loan or surrender the car.122

The *Schweitzer* court, which was addressing the issue prior to the enactment of section 521(2), first determined that nothing in the Bankruptcy Code required a non-defaulting debtor to exercise a Code remedy in order to retain liened property.123 The court stated that such a requirement could not be implied solely from the existence of the Code remedies themselves. The court then reasoned that in the absence of a controlling Code provision the rights of the parties were to be gleaned in the first instance from their security agreement. In *Schweitzer*, the security agreement provided that Chrysler could accelerate the loan and repossess the collateral if Schweitzer filed bankruptcy. Thus, the issue became whether this contract provision could be enforced.

In holding the *ipso facto* clause enforceable, the *Schweitzer* court balanced the impact of enforcing the *ipso facto* clause against the risks that non-enforcement would pose to Chrysler. The court noted that enforcement in this instance would not necessarily deprive

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120 Id.
121 See id. at 864–65. Schweitzer had originally sought to continue his contract payments until he had paid the vehicle's $5,000 redemption value. The court rejected this payment proposal, however, holding that installment redemption is impermissible in chapter 7 proceedings. See id. at 861–64.
122 See id. at 866–67.
123 Id. at 865.
Schweitzer of his car because he still had the option of redeeming or reaffirming. On the other hand, the court noted that, if it refused to enforce the *ipso facto* clause, Chrysler would be exposed to the risk that its collateral would rapidly depreciate after discharge. The court concluded that it would enforce the *ipso facto* clause provided that Chrysler did not unreasonably withhold its consent if Schweitzer offered to reaffirm. Thus, the *Schweitzer* court concluded that it was not unduly burdensome to require a non-defaulting debtor to reaffirm.

Although the *Schweitzer* decision turned on the fact that the debtor had the option of reaffirming, another bankruptcy court has noted that section 524(c) reaffirmation is not the only option available to debtors who cannot afford to redeem in lump-sum. In the 1982 case of *In re Whately*, the United States Bankruptcy Court for the Northern District of Ohio noted that debtors have the option of converting to a chapter 13 case as well. In chapter 13 proceedings, debtors have the option of redeeming in installments without obtaining creditor consent. The *Whately* court noted this option in concluding that a creditor that refused to enter into a reaffirmation agreement could nevertheless enforce an *ipso facto* clause.

In *Whately*, the debtor was employed as a meat wrapper, a job that provided the sole means of support for herself and her child. Whately worked as a “floater” in a three-county area, substituting part-time for other employees who were sick or unable to work. Her car was a necessity to her employment.

At the time she filed bankruptcy, Whately was current on her contract payments to the bank. In addition, she maintained collision and property damage insurance on the vehicle, as well as credit life and disability insurance, which would protect the bank if Whately became ill, disabled or if she died. Nevertheless, the creditor, BancOhio, sought to enforce an *ipso facto* clause to repossess the vehicle unless Whately redeemed. BancOhio refused to enter
into a reaffirmation agreement because it was against the bank's policy to enter into reaffirmations with chapter 7 debtors.

In an attempt to retain possession of her car, Whately petitioned the court for an order to allow her to continue her payments pursuant to the original installment contract. The court denied her request, however, reasoning that, because section 524(c) contemplates a voluntary agreement, the court could not order BancOhio to agree to a reaffirmation. Alternatively, section 722 redemption required a lump-sum payment, a requirement that Whately's proposed payment plan did not satisfy. The court stated that if Whately wished to pay the vehicle's fair market value in installments she could have filed a petition under chapter 13. But by filing chapter 7, the court reasoned, Whately was bound by the requirements of section 722 and section 524(c). Thus, the court concluded that unless Whately exercised her right to redeem in lump-sum, or unless she converted to a chapter 13 proceeding, BancOhio would be permitted to enforce its *ipso facto* clause and repossess the vehicle.

2. *Ipso Facto* Clauses and Creditor Risk

In addition to disagreeing whether *ipso facto* clauses impose undue burdens on debtors, courts have also disagreed whether allowing non-defaulting debtors to retain collateral without redeeming or reaffirming poses undue risks to creditors. The courts that have refused to enforce *ipso facto* clauses have regarded the risks that accompany the loss of a debtor's personal liability as minimal. Some courts have noted that the prospect that a non-defaulting debtor will suddenly default or waste the creditor's collateral after discharge is entirely speculative. Other courts have noted that, if a default were to occur, the creditor would be entitled to repossess its collateral immediately. Finally, some courts have reasoned that

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132 *See id.* at 395–97.
133 *See id.* at 395–96.
134 *Id.* at 397.
135 *Id.*
136 *See id.* at 398.
137 *See, e.g.*, Lowry Fed. Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989) (labeling creditor's arguments concerning the risks that the continued contract payment option presents as "speculative"); *In re Belanger*, 118 Bankr. 368, 372 (Bankr. E.D.N.C. 1990) ("It is doubtful that a debtor would fail to insure or maintain [collateral] ... simply because he no longer has personal liability for the underlying debt.").
any loss that a creditor suffers as a result of depreciation of its collateral is simply a risk of doing business, a risk for which creditors can compensate by charging higher interest rates or requiring larger down-payments.\(^{139}\)

In contrast, courts that have enforced *ipso facto* clauses have cited creditor risk as their primary reason for doing so.\(^{140}\) These courts have reasoned that a debtor's continued contract payments only serve to provide adequate protection for a creditor's interest in its collateral prior to discharge.\(^{141}\) According to these courts, after a debtor's discharge has been granted the continued contract payment option exposes creditors to risks that warrant the enforcement of *ipso facto* clauses.\(^{142}\)

Indeed, some courts have indicated that, absent redemption or reaffirmation by a debtor, a creditor can declare a default upon discharge even in the absence of an *ipso facto* clause.\(^{143}\) For example,

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\(^{140}\) See, e.g., *In re Mitchell*, 85 Bankr. 564, 566 (Bankr. D. Nev. 1988) (citing the possibility of depreciation or destruction of creditor's collateral as basis for enforcing *ipso facto* clause); *In re Sparago*, 31 Bankr. 552, 554 (Bankr. E.D.N.Y. 1983) ("In view of the depreciating value of the security and the possibility of its total destruction or disappearance . . . the right of repossession is not one which should be lightly denied.").

\(^{141}\) See, e.g., *Mitchell*, 85 Bankr. at 565 (the concept of adequate protection does not apply once the stay is terminated); *In re Morrow*, 66 Bankr. 162, 163 (Bankr. D. Nev. 1986) (same); see also *Sparago*, 31 Bankr. at 554 (finding that adequate protection would be lacking if debtor were permitted to retain collateral after discharge without redeeming or reaffirming).

\(^{142}\) See *Mitchell*, 85 Bankr. at 565 (enforcing *ipso facto* clause); *In re Morrow*, 66 Bankr. 162, 163 (Bankr. D. Nev. 1986) (same); *Sparago*, 31 Bankr. at 554 (same).

\(^{143}\) In the 1983 case of *General Motors Acceptance Corp. v. Bell* the Sixth Circuit indicated that a creditor could declare a default after a debtor's discharge based on a security agreement provision that stated "[debtor] shall be liable for a deficiency." 700 F.2d 1053, 1058 (6th Cir. 1983). The court indicated that a discharge of the debtor's personal liability through bankruptcy "constructively vitiates" the parties' security agreement by negating the creditor's right to seek personal liability against the debtor. See id.

Similarly, in the 1984 case of *In re Kunstler*, the United States Bankruptcy Court for the Middle District of Louisiana stated in dicta that a creditor can declare a default after a debtor's discharge regardless of whether the debtor has remained current on his or her contract payments. See 38 Bankr. 207, 209-10 (1984). The *Kunstler* court indicated that the right to seek personal liability against a debtor is implied in virtually every installment loan secured by property and that the loss of this right is a sufficient basis for declaring a default. See id. at 210. The court reasoned that allowing a debtor to retain collateral after discharge without personal liability would would raise "serious constitutional problems" because it would place the creditor in "a very precarious position . . . and one to which [it] did not agree or contract." Id.

Significantly, both the *Bell* and *Kunstler* courts addressed the enforceability of *ipso facto* clauses. In *Bell*, the court indicated that the creditor in that case could rely on an *ipso facto*
in the 1989 case of *In re Whitaker*, the United States Bankruptcy Court for the Eastern District of Tennessee indicated that a creditor could declare a default upon discharge notwithstanding that the debtors had remained current on their contract payments. The court stated that it would be “wholly inequitable” to permit the debtors’ to retain the creditor’s collateral by continuing their payments without personal liability.

In *Whitaker*, the collateral at issue was the debtors’ car, the fair market value of which exceeded the loan balance by $1,000. The debtors were current on their loan payments and they sought to retain the car by simply keeping their contract payments current. The *Whitaker* court rejected the debtor’s proposed payment scheme, however, reasoning in part that, upon receiving their discharge, the debtors would be in default of a provision in their security agreement which specifically contemplated that they would be liable if they defaulted on their loan. The court indicated that this default would empower the creditor to repossess its collateral.

In addition to finding that the debtors would be in default upon receiving their discharge, the *Whitaker* also noted that, if the debtors were permitted to retain the car by continuing their contract payments, the debtors would not only enjoy the benefits of discharge, they would enjoy “unhindered” use of the creditor’s collateral as well. The creditor would be exposed to risk, the court reasoned, because the debtors could fail to maintain the car, or could subject it to improper use, and they would not be responsible for any resultant depreciation if they later defaulted on their payments. In the meantime, the court observed, the creditor could do nothing but wait for a default. Moreover, the court pointed out that

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1. See *Bell*, 700 F.2d at 1057-58. In *Kunstler*, the court stated that *ipso facto* clauses are unenforceable in bankruptcy but that a creditor can declare a default solely on the basis of a debtor’s discharge. See *Kunstler*, 38 Bankr. at 209-10.

Strictly speaking, there is some basis for distinguishing between *ipso facto* clauses and contract provisions that allow creditors to declare a default at discharge. *Ipso facto* clauses designate the debtor’s bankruptcy filing, as opposed to the debtor’s bankruptcy discharge, as the relevant event of default. Given that the Code precludes creditors from enforcing *ipso facto* clauses prior to discharge, however, and given that the risks that *ipso facto* clauses attempt to avert do not arise until a debtor has been discharged, the two types of contract provisions are, as a practical matter, virtually the same.

144 85 Bankr. 788, 793 (Bankr. E.D. Tenn. 1988).

145 Id.

146 Id.

147 See id.

148 Id.
if a default were eventually to occur the creditor would be left to salvage what, if anything, remained of its collateral. In order to avert these risks, the Whitaker court concluded that the debtors must redeem or reaffirm in order to retain the car after discharge.149

In sum, courts are divided over whether ipso facto clauses are contrary to the policies of the Bankruptcy Code. The courts that have refused to enforce such clauses have expressed dissatisfaction with the Code remedies that the clauses attempt to trigger. In addition, these courts have regarded the risks that ipso facto clauses attempt to avert as insubstantial. In contrast, the courts that have enforced ipso facto clauses have done so primarily because of the risks that creditors would otherwise be forced to endure. These courts have also reasoned that the availability of the Code remedies mitigates any burdens to debtors that ipso facto clauses might otherwise impose.

IV. ANALYSIS OF NON-DEFAULTING DEBTORS’ OPTIONS IN CHAPTER 7 PROCEEDINGS

"A debtor having filed bankruptcy has not committed a cardinal sin" declared the court in In re Ballance.150 Certainly, few would contest this sentiment. But a debtor’s bankruptcy filing does have consequences for the debtor’s pre-petition creditors, consequences that in most instances are governed by the Bankruptcy Code. The first issue that ipso facto clauses raise is whether the Bankruptcy Code already requires what the clauses attempt to accomplish.

A. Code Requirements

Section 521 of the Bankruptcy Code is titled “Debtor’s duties.”151 In subsection (2), section 521 provides that a debtor in possession of liened collateral “(A) shall file . . . a statement of his [or her] intention with respect to the retention and surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property.”152

One possible construction of section 521(2)(A) is that it sets forth two independent requirements. First, every debtor is required

149 See id. at 793–94.
152 Id. § 521(2)(A).
to file a statement of intention specifying whether he or she intends to retain or surrender his or her liened property. Second, if the debtor intends to claim the property as exempt, redeem the property or reaffirm the debt, the debtor is also required to specify this intention. The bankruptcy court in In re Belanger155 construed section 521(2)(A) in this manner and several other courts have advanced this construction as well.154

One problem with the Belanger court's construction of section 521(2), however, is that it leaves unanswered why a debtor who intends to retain liened property is only required to indicate how he or she intends to do so in three limited instances. If section 521(2) is essentially a notice requirement, as the Belanger court concluded it is,155 one would expect that a debtor would be required to notify the creditor of what remedy he or she intends to pursue in all instances, not only when he or she intends to redeem, reaffirm or claim the property as exempt.

An additional problem with the Belanger court's construction of section 521(2) arises under subparagraph (B), which provides that within forty-five days of filing a statement of intention under subparagraph (A) the debtor must perform his or her stated intention.156 If the Belanger court is correct that only those debtors who intend to redeem, reaffirm or claim the property as exempt are required to specify this intention under subparagraph (A), it would follow that only these debtors would be required to perform their stated intention under subparagraph (B). Thus, under the Belanger court's construction of section 521(2), non-defaulting debtors would not only be excused from having to notify creditors of their specific intentions, they would be excused from having to perform them as well.

An alternative construction of section 521(2)(A) is that the section first requires a debtor to elect between retaining or surrendering his or her liened property. Then, if the debtor chooses to retain the property, the debtor must choose between one of the remedies

154 See, e.g., In re Hunter, 121 Bankr. 609, 612 (Bankr. S.D. Ala. 1990); In re Crouch, 104 Bankr. 770, 771-72 (Bankr. S.D.W. Va. 1989); see also In re Peacock, 87 Bankr. 657, 660 (Bankr. D. Colo. 1988) ("The words 'if applicable' in section 521(2)(A) do not narrow the rights or options of a non-defaulting debtor with respect to collateral."); In re Winters, 69 Bankr. 145, 147 (Bankr. N.D. Cal. 1986) ("The 'if applicable' language in [section 521(2)(A)] destroys the argument that Congress [restricted a non-defaulting debtor's options] . . . ").
156 Belanger, 118 Bankr. at 370.
set forth in section 521(2)(A), i.e., redeeming, reaffirming or claiming the property as exempt. In other words, under this construction, the options listed in subparagraph (A) are exclusive and are "applicable" whenever a debtor elects to retain liened collateral. A number of courts have construed section 521(2) in this manner, including the Seventh Circuit in In re Edwards.\textsuperscript{157}

The Edwards court's construction of section 521(2) avoids the problems that arise under the Belanger court's approach but it encounters one problem of its own. Subparagraph (C) of section 521(2) provides that nothing in subparagraphs (A) or (B) affects a debtor's rights with respect to his or her liened property.\textsuperscript{158} Thus, although subparagraphs (A) and (B) seem to contemplate that a debtor who intends to retain collateral must redeem or reaffirm in order to do so, subparagraph (C) prevents this expectation from rising to the level of a substantive requirement. In other words, because subparagraph (C) expressly states that section 521(2) does not affect a debtor's rights to his or her liened property, section 521(2) cannot correctly be construed as imposing conditions on a debtor's right to retain such property. Therefore, the Edwards court's conclusion that section 521(2) requires chapter 7 debtors to exercise a Code remedy in order to retain liened property after bankruptcy appears to be incorrect.

In sum, although subparagraphs (A) and (B) of section 521(2) suggest that redemption and reaffirmation are a chapter 7 debtor's only options for retaining liened collateral after bankruptcy, subparagraph (C) does not permit the conclusion that section 521(2) itself limits a debtor to these Code remedies. Thus, although the Belanger court's construction of subparagraphs (A) and (B) is somewhat suspect, the Belanger court's conclusion that section 521(2) does not preclude non-defaulting debtors from pursuing the continued contract payment option appears to be correct. This conclusion leaves unanswered, however, whether the continued contract payment option is consistent with the other sections of the Code.

Two Code sections that courts seemingly have overlooked in considering whether to permit debtors to pursue the continued contract payment option are sections 101(4) and section 502(b). Section 101(4) defines a bankruptcy "claim."\textsuperscript{159} That section pro-

\textsuperscript{157} See Edwards, 901 F.2d 1383, 1386 (7th Cir. 1990); In re Chavarria, 117 Bankr. 582, 584 (Bankr. D. Idaho 1990). For a discussion of Edwards, see supra notes 59–65 and accompanying text.


\textsuperscript{159} Id. § 104.
vides that a "claim" is a "right to payment, whether or not such right is . . . matured . . . ". In turn, section 502 provides that unmatured claims are recoverable in bankruptcy. These Code provisions are significant because they suggest that, regardless of whether a debtor has defaulted on an outstanding installment loan, the debtor’s bankruptcy filing itself triggers the creditor’s claim. This conclusion is in turn significant because, as the district court noted in *In re Hart*, to the extent that the creditor’s claim is secured by collateral, the Code undertakes to safeguard the value of that claim. The continued contract payment option, however, threatens to undermine this objective.

The continued contract payment option presents the same risks to creditors as the installment redemption payment scheme that is impermissible in chapter 7 proceedings. Indeed, the sole distinction between the two payment schemes is that the installment redemption scheme contemplates payments in the amount of the redemption value of the collateral, i.e., the lesser of the value of the collateral or the amount of the creditor’s claim, whereas the continued contract payment scheme contemplates payments equaling the remaining balance due under the contract. Both payment schemes contemplate payment schedules that extend beyond discharge. Consequently, both payment schemes expose the secured creditor to the risk that, if the debtor’s installment payments fail to keep pace with the depreciation of the creditor’s collateral, the

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100 Id. § 104(A).
102 This conclusion is further supported by the legislative history of the Bankruptcy Code. The House Report specifies that "bankruptcy operates as the acceleration of the principal amount of all claims against the debtor." H.R. REP. No. 595, 95th Cong. 1st Sess. 353 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6309.
103 For a further discussion of *Hart*, see *supra* notes 45-52 and accompanying text. As the *Hart* court noted, the legislative history of the Bankruptcy Code supports the conclusion that Congress sought to safeguard the value of secured claims in bankruptcy. See *In re Hart*, 8 Bankr. 1020, 1022 n.4 (N.D.N.Y. 1981). The House Report states that “once the secured claim is determined, the court must insure that the holder of the claim is adequately protected. The secured creditor is entitled to realize his claim, and not have his collateral eroded by delay or use by the estate.” H.R. REP. No. 595, 95th Cong., 1st Sess. 181 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6141.
104 For a discussion of the risks that installment redemption poses to creditors, see *supra* notes 41-52 and accompanying text.
105 No court has articulated this distinction, but in *In re Avia* the Bankruptcy Panel for the Ninth Circuit acknowledged the difference between installment redemption and the continued contract payment option. See *In re Avia*, 83 Bankr. 6, 7-8 (Bankr. 9th Cir. 1987) (holding that installment redemption is impermissible in chapter 7 proceedings but stating that continued contract payments option is permissible).
creditor's recovery upon default will be less than if it had been permitted to realize on its security at the time of the debtor's bankruptcy. Thus, there is a strong basis for concluding that, like installment redemption, the continued contract payment option is inconsistent with Congress's objective of safeguarding the value of secured claims in bankruptcy. Unfortunately, however, few courts have explored this line of reasoning. Rather, due to the prevalence of *ipso facto* clauses, most courts have focused on whether creditors can foreclose the continued contract payment option by enforcing *ipso facto* clauses.

**B. The Enforceability of *Ipso Facto* Clauses**

The Bankruptcy Code clearly precludes creditors from enforcing *ipso facto* clauses during the administration of a debtor's bankruptcy case. But, the Code does not expressly preclude creditors from enforcing *ipso facto* clauses after discharge. Thus, the issue ultimately presented by *ipso facto* clauses is whether they are contrary to the policies of the Bankruptcy Code.

Given that the Bankruptcy Code itself is "an attempt to balance the interests of debtors and creditors," any decision whether to enforce *ipso facto* clauses must take into account the interests of both creditors and debtors. For the secured creditor, the interest that an *ipso facto* clause attempts to further is the creditor's interest in safeguarding the value of its secured claim. For the debtor, the interest at stake is the fresh start that bankruptcy is intended to provide. Congress has recognized both interests as significant.

It is clear that the continued contract payment option poses significant risks to creditors. Moreover, these risks are not simply, as some courts have suggested, "ordinary risks of doing business," at least not in the sense that they are risks that creditors bargain for when entering into a contract with a debtor. Although it is true

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166 See *supra* notes 79–98 and accompanying text for a discussion of the Code barriers to pre-discharge enforcement of *ipso facto* clauses.

167 See *supra* note 100 and accompanying text for a discussion of this issue.


169 The legislative history of the Bankruptcy Code is replete with references to the Code's fresh start policy. See, e.g., H.R. REP. No. 595, 95th Cong., 1st Sess. 117–18 (1977), reprinted in U.S. CODE CONG. & ADMIN. NEWS 5787, 6078 (1978) (essence of modern bankruptcy law is fresh start for the debtor; the Code ensures that bankruptcy will provide the debtor a fresh start). Similarly, the legislative history also highlights the importance of safeguarding the value of a secured creditor's claim in bankruptcy. See *supra* note 163 for a discussion of this legislative history.

170 See *supra* note 139 and accompanying text.
that a creditor that secures an installment loan with depreciable collateral bargains for the risk that its collateral will depreciate over the course of the loan, the creditor enters this bargain with the expectation that, in the event of default, it will have the right to pursue the debtor for any deficiency. After the debtor has received his or her discharge in bankruptcy, however, the creditor is precluded from recovering any deficiency that results from the collateral’s depreciation. Thus, the risks of depreciation after discharge are qualitatively different from the risks of depreciation a creditor would otherwise face. Consequently, creditors certainly have a legitimate reason for attempting to enforce *ipso facto* clauses.

Balanced against the risks that the continued contract option presents to creditors are the burdens that *ipso facto* clauses impose on debtors. Some courts, such as the bankruptcy court in *In re Peacock*, have suggested that requiring a non-defaulting debtor to resort to the Code remedies tends to frustrate the debtor’s fresh start. This view is hard to reconcile, however, with the fact that the Code remedies are the very means by which Congress envisioned debtors would obtain a fresh start.

The *Peacock* court’s concern apparently stems from the fact that, because most debtors are financially unable to redeem in a lump-sum payment, section 524(c) reaffirmation is the only viable remedy in chapter 7 proceedings. Indeed, the *Peacock* court expressed two concerns with the reaffirmation remedy. First, the court reasoned that the renewed personal liability that would result from a reaffirmation would cloud the debtors’ fresh start. Second, the court stated that enforcing an *ipso facto* clause would place the debtors at the “mercy” of the creditor in negotiating a reaffirmation. Both concerns warrant further analysis.

Although it is true that, by reaffirming a dischargeable debt (and thereby undertaking renewed personal liability), a debtor loses the benefits of discharge, this burden is simply a trade-off the debtor

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171 See General Motors Acceptance Corp. v. Bell, 700 F.2d 1053, 1056 n.4 (6th Cir. 1983) (noting that, although creditors typically face the risks of depreciation and default even in the absence of a debtor’s bankruptcy filing, the debtor’s discharge changes the nature of these risks).

172 For a discussion of the *Peacock* case, see supra notes 106–111 and accompanying text.


174 See S. REP. No. 989, 95th Cong., 1st Sess. 7 (1977), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS, 5787, 5793 (indicating that section 722’s redemption remedy was added to the Code to aid debtors in obtaining a fresh start).

175 See *Peacock*, 87 Bankr. at 661.

176 *Id.*
must make for the privilege of paying a creditor for its collateral in installments. Congress expressly sanctioned this sort of trade-off when it enacted section 524(c). Moreover, given that most consumer borrowers are expected to pledge personal liability on their installment loans, there is no reason to believe that requiring the same concession from discharged debtors is unfair. Even the Commission on Bankruptcy Laws, which opposed reaffirmations, recognized that such a trade-off is equitable. The Commission's proposed installment scheme, which was to serve as a substitute for reaffirmations, specifically contemplated that debtors would be personally liable for their installment payments after discharge. Thus, the Peacock court's suggestion that renewed personal liability is contrary to the fresh start is misplaced.

The Peacock court's second concern, that enforcing ipso facto clauses places debtors at the "mercy" of creditors in negotiating reaffirmations, raises more difficult issues. To the extent that the court was concerned that enforcing ipso facto clauses would expose debtors to creditor over-reaching in negotiating reaffirmations, this concern is also somewhat misplaced. Section 524(c) itself provides several safeguards to ensure that debtors do not enter into unduly burdensome reaffirmation agreements. Moreover, debtors are not without a bargaining chip of their own when negotiating reaffirmations. Specifically, a debtor can threaten that, if the creditor does not negotiate in good faith, the debtor will surrender the collateral and thereby burden the creditor with the task of finding another buyer. Most creditors would likely prefer to deal fairly with a paying customer rather than risk entering the business of selling second-hand property.

But, although there is little basis for the concern that debtors will fall victim to creditor over-reaching in negotiating reaffirmations, debtors are at the "mercy" of creditors in another sense. Specifically, a debtor has no guarantee that a creditor will agree to a reaffirmation at all. Consequently, a debtor might be entirely willing to enter into a reaffirmation agreement but nevertheless suffer repossession at the hands of an unwilling creditor. Thus, the remaining issue presented by ipso facto clauses is whether courts should enforce such clauses when a creditor refuses to reaffirm.

177 See Commission's Report, supra note 27, pt. II, at 131. For the text of the Commission's proposed section 4-504(b) see supra note 30.

178 See 11 U.S.C. § 524(c) (1988). For a discussion of section 524(c)'s safeguards see supra note 36b and accompanying text.
In *In re Schweitzer*, the bankruptcy court suggested a flexible approach to enforcing *ipso facto* clauses. In that case the court enforced an *ipso facto* clause but indicated that it might not do so in situations where a creditor unreasonably refuses to reaffirm. At first glance, this approach appears to be an equitable resolution to the *ipso facto* clause debate, as the approach ensures that debtors are able to retain their liened collateral while, at the same time, ensuring that creditors are not exposed to risk. There are, however, two problems with the *Schweitzer* court's approach.

First, the *Schweitzer* approach would require courts to monitor reaffirmation negotiations to assess the "reasonableness" of a creditor's negotiating position. Congress, however, amended section 524(c) to reduce courts' participation in overseeing reaffirmations. Second, and more importantly, the *Schweitzer* court's approach requires creditors to relinquish one right in order to protect another. Section 524(c) contemplates that creditors can refuse to enter into reaffirmation agreements for whatever reason they see fit. The *Schweitzer* court approach would, in effect, nullify the voluntary nature of section 524(c).

The *Schweitzer* court is not the only court that has addressed whether *ipso facto* clauses should be enforced when a creditor refuses to reaffirm. In *In re Whately*, the bankruptcy court directly confronted a situation in which a debtor sought to retain her automobile by reaffirming, but was unable to obtain the creditor's consent. The creditor's refusal to reaffirm in that case appears to have been particularly unreasonable given that Whately was current on her payments, she maintained collision and credit life insurance on the vehicle, and she needed the car to support her family. Nevertheless, the court permitted the creditor to enforce an *ipso facto* clause to repossess its collateral. The court indicated that, if Whately was financially unable to redeem in a lump-sum payment, and if she was unable to obtain the creditor's consent to a reaffirmation, she should have filed a chapter 13 case where she could redeem in installments over the objection of the creditor.

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179 For a discussion of *Schweitzer* see supra notes 119–126 and accompanying text.
181 For a discussion of this amendment, see supra note 36.
182 See *General Motors Acceptance Corp. v. Bell*, 700 F.2d 1053, 1056 (6th Cir. 1983) ("[section] 524(c) envisions execution of an 'agreement' which, by definition is a voluntary undertaking").
183 For a discussion of *Whately*, see supra notes 127–136 and accompanying text.
184 See *In re Whately*, 16 Bankr. 394, 398 (Bankr. N.D. Ohio 1982).
185 Id. at 397.
Although the Whately decision may appear somewhat harsh, the court's approach was ultimately correct. In choosing to file a chapter 7 proceeding, a debtor has notice of the Code remedies that are available for retaining liened collateral. The fact that a creditor exercises its rights under one of these Code remedies is not a sufficient reason for permitting a debtor to pursue the continued contract payment option. Debtors who are unable, or unwilling, to redeem or reaffirm can convert to a chapter 13 proceeding. Creditors should not be penalized for a debtor's unwillingness to resort to these Code options.

Thus, in sum, creditors are justified in enforcing ipso facto clauses. Given that section 101(4) of the Bankruptcy Code itself indicates that a debtor's bankruptcy filing triggers a creditor's claim,186 ipso facto clauses appear to do little more than what the Code already contemplates. The Bankruptcy Code provides several means by which debtors can retain their liened property after bankruptcy. Although these Code remedies may be imperfect, they more equitably balance the interests of creditors and debtors than the continued contract payment option, which only accounts for the interests of debtors.

V. PROPOSAL FOR AMENDMENTS TO THE BANKRUPTCY CODE

Litigation concerning ipso facto clauses reveals two voids in the Bankruptcy Code. First, the Code is not clear whether the Code remedies are the exclusive means by which a debtor can retain liened property after bankruptcy. Second, the Code remedies themselves do not adequately serve the interests of debtors. Congress could avert a significant amount of litigation by making two simple amendments to the Bankruptcy Code.

First, Congress could amend section 521(2) to make it clear that the Code remedies are the exclusive means by which a debtor can retain liened property after bankruptcy. This amendment could be accomplished by striking subsection 2(C) of section 521(2), which provides that nothing in section 521(2) affects a debtor's rights to his or her liened property, and inserting language indicating that the options listed in subsection 2(A) are exclusive.187 This amend-

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187 Of course, this amendment would substantially alter the meaning of section 521(2)(C) because that section currently provides that nothing in subparagraphs (A) or (B) of that section affects a debtor's rights to his or her liened property. 11 U.S.C. § 521(2)(C) (1988). The magnitude of this change, however, is hard to determine. The purpose of section
ment would put an end to any confusion regarding whether section 521(2) is mandatory and, moreover, this amendment would ensure that a debtor's options in bankruptcy are not dependent on the presence or absence of an *ipso facto* clause.

In addition to amending section 521(2), Congress could also amend section 524(c) to grant debtors who have not defaulted on an outstanding installment contract the right to reaffirm that contract at the original contract terms. Under this amendment, a debtor would still be free to redeem in lump-sum, or to negotiate a more favorable reaffirmation, but the debtor could fall back on the reaffirmation right if the other remedies proved unfruitful. Moreover, although this amendment would eliminate the consensual aspect of the present reaffirmation provision, creditors would have no basis for objection because they would continue to receive the same contract terms, as well as the debtor's accompanying personal liability, that they enjoyed prior to bankruptcy.188 In short, under this proposed amendment, creditors and debtors would be able to proceed as if the debtor had not filed bankruptcy at all.

**Conclusion**

The Bankruptcy Code is unclear whether the Code remedies of redemption or reaffirmation are the exclusive means by which chapter 7 debtors can retain liened collateral after bankruptcy. Creditors have responded to this ambiguity in the Code by attempting to enforce *ipso facto* clauses to place non-defaulting debtors in default upon entering bankruptcy. Some courts have strongly opposed such clauses, indicating that they are contrary to the spirit, if not the letter, of the Bankruptcy Code.

*Ipso facto* clauses, however, attempt to do no more than ensure that debtors utilize the remedies set forth by Congress for retaining liened collateral after bankruptcy. This objective can hardly be considered contrary to the policies of the Bankruptcy Code. Consequently, given the risks that the continued contract payment alternative presents to creditors, creditors are justified in enforcing *ipso facto* clauses.

521(2)(C) is somewhat of a mystery and, as several courts have noted, the legislative history is "woefully inadequate." See *In re Belanger*, 118 Bankr. 368, 371 (Bankr. E.D.N.C. 1990).

188 By obtaining a reaffirmation a creditor is actually in a better position than it occupied prior to bankruptcy because, after the debtor has been discharged, the debtor is precluded from obtaining another discharge within six years. See 11 U.S.C. § 727(8) (1988). Moreover, once the debtor has been discharged for other pre-petition debts, the debtor's ability to make the payments under the reaffirmation agreement might actually be enhanced.
Regardless of their enforceability, the litigation that *ipso facto* clauses have prompted highlights some weaknesses in the Bankruptcy Code. Congress could address these weaknesses by clarifying the options available to chapter 7 debtors and perhaps by providing non-defaulting debtors with a reaffirmation right as well. These amendments would ensure that all post-discharge marriages between debtors and creditors are indeed happy.

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