Taming the Bankruptcy Code's Toothless Tiger, 11 U.S.C. § 521(2)

Julio M. Zapata
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Abstract: Federal appellate courts are divided on whether a debtor who files a Chapter 7 bankruptcy petition and is current on the underlying contractual obligation secured by collateral is able to retain the collateral without redeeming it or reaffirming the debt under section 521(2) of the Bankruptcy Code. The Fourth and Tenth Circuits hold that the Code’s options are not exclusive. Thus, the debtor may retain the collateral and continue under the terms of the contract as long as the payments are current. In contrast, the Seventh and Eleventh Circuits hold that a debtor’s only options are those listed in section 521(2): surrender, redeem, or reaffirm. After examining the history and impact of redemption and reaffirmation, and the circuit court decisions, this Comment argues that the options listed in section 521(2) are not exclusive and urges the adoption of the Fourth and Tenth Circuits’ reasoning. Adopting the non-exclusive approach does not alter the substantive rights of the debtor, supports the proposition that section 521(2) is primarily a notice requirement, and promotes the Bankruptcy Code’s underlying policy of providing a fresh start to the debtor.

Joe and Jane purchased an automobile financed by XYZ finance company on an installment plan. The finance company took a security interest in the car. Previously, Joe and Jane had established good credit but accumulated several debts. After this purchase, they experienced financial difficulty and filed for relief under Chapter 7 of the Bankruptcy Code. Joe and Jane’s payments were not current on some debts; but they were current on the automobile. In their Chapter 7 case, Joe and Jane filed a statement of intent, as required by 11 U.S.C. § 521(2)(A), indicating that they would retain the automobile. Joe and Jane did not, however, indicate that they intended to redeem the collateral by paying the creditor the market value of the car, or that they intended to reaffirm the debt by signing an agreement with the creditor renegotiating the terms of the loan and remaining personally liable for the loan after discharge. Instead, the debtors sought to continue making timely payments under the terms of their original agreement.

In response, XYZ finance company moved the bankruptcy court to compel Joe and Jane either to give up the car, pay off the debt, or reaffirm the debt. The company argued that section 521(2)(A) restricts debtors to these options. The debtors countered that they had met the requirements of section 521(2)(A) by stating their intent both to retain the automobile and remain current on the note. They asserted that if they had not filed for bankruptcy, XYZ finance company could not have repossessed or invoked other realization remedies because they were current on their obligations. Thus, they argued that XYZ company should
not be able to force them either to surrender, redeem, or reaffirm on a loan that was not in default simply because they had filed for Chapter 7 relief.

This scenario is a common one. In 1996, the total number of nonbusiness bankruptcies exceeded 1.1 million. Creditors attempt to force debtors to redeem or reaffirm when debtors are current on their payments and elect to retain the collateral. Many of these cases go uncontested because the collateral does not have great monetary value. Thus, even though these items may be essential to a debtor's livelihood, the cost of litigation generally outweighs the cost of replacement.

Courts are divided on whether section 521(2) simply imposes a notice requirement on debtors or substantially alters their rights. Currently, four federal courts of appeals disagree on this question. Specifically, they disagree about whether a Chapter 7 debtor who is current on installment payments to a lender (and not otherwise in default) may retain collateral securing a dischargeable consumer debt without either redeeming the collateral under section 722 or reaffirming the debt under


3. See infra note 21 (discussing high replacement cost).

4. 11 U.S.C. § 521(2) (1994). 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) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property 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, for cause, within such forty-five day period 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 or the trustee's rights with regard to such property under this title.


6. See infra notes 58, 78 and accompanying text.

section 524, by merely continuing to make timely payments under the contract.

The differences among the courts turn on the interpretation of the phrase "if applicable," which precedes the redeem or reaffirm options in the statute. The nonexclusive approach suggests that these options are not "applicable" when debtors elect to retain the collateral and are current on their payments. Conversely, the exclusive approach suggests that the options are "applicable" if the debtors choose to retain the collateral, regardless of whether debtors are current on their payments. Neither the Ninth Circuit nor five other circuit courts have addressed this issue. The conflicting approaches have a significant impact on debtors and creditors. Thus, this issue is ripe for U.S. Supreme Court review or clarification by Congress.

This Comment supports the nonexclusive approach and argues that debtors who remain current on installment contracts should not be limited to the options listed in section 521(2) if they choose to retain their collateral. Part I addresses the statutory framework and the impact of redemption and reaffirmation. Part II examines the scant legislative history pertaining to section 521. Part III discusses the split among the federal courts. Part IV argues for the adoption of the nonexclusive approach based on the reasoning of the Fourth and Tenth Circuits.

I. STATUTORY FRAMEWORK AND DEFINITION OF TERMS

A. Policies Underlying the Bankruptcy Code

Chapter 7 bankruptcy serves primarily to equitably distribute a debtor’s assets among creditors and, where appropriate, to discharge certain obligations and leave the debtor without personal obligation as to those debts. In contrast, Chapter 13 bankruptcy allows a debtor to file a

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

10. The First, Second, Third, Sixth, Eighth, and Ninth Circuits have not addressed whether debtors current on their secured debts may retain collateral without redeeming or reaffirming their debts, although several bankruptcy courts within the respective circuits have done so.
plan to provide for full repayment, in deferred cash payments, to a creditor.\textsuperscript{11} Under either form of bankruptcy, the underlying goal is to provide a fresh start for debtors and restore debtors' capacities as productive participants in the economy.\textsuperscript{12}

The U.S. Supreme Court has identified two primary purposes underlying the Bankruptcy Act: "to convert the estate of the bankrupt into cash and distribute it among creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched."\textsuperscript{13} These policies, according to the Court, are of "great public interest, in that [they secure] to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life."\textsuperscript{14}

\textbf{B. \hspace{1em} Debtors' Duties Under Section 521}

Filing for Chapter 7 bankruptcy triggers many duties under section 521.\textsuperscript{15} These duties allow creditors to obtain critical information regarding the collateral, thereby suggesting that the primary purpose of the section is notice. Section 521(2) requires debtors to declare within thirty days after the date of the filing whether they intend to retain or surrender the collateral in question, and to perform their intention within forty-five days of filing.\textsuperscript{16} If debtors choose to surrender the property, then all personal obligations for the debt are extinguished. If, on the other hand, debtors choose to retain the collateral, then section 521(2) requires the debtor, "if applicable, [to specify] such property... as exempt... redeem such property, or... reaffirm debts secured by such property."\textsuperscript{17}

\begin{itemize}
  \item \textsuperscript{11} 11 U.S.C. § 1321 (1994).
  \item \textsuperscript{12} \textit{See generally} Douglass G. Boshkoff, \textit{Fresh Start, False Start, or Head Start?}, 70 Ind. L.J. 549 (1995) (discussing brief history of bankruptcy legislation in United States and development of fresh start policy).
  \item \textsuperscript{13} Burlingham v. Crouse, 228 U.S. 459, 473 (1913); \textit{see also} Traer v. Clews, 115 U.S. 528, 541 (1885).
  \item \textsuperscript{14} Stellwagen v. Clum, 245 U.S. 605, 617 (1918).
  \item \textsuperscript{15} 11 U.S.C. § 521(1) (1994).
  \item \textsuperscript{17} 11 U.S.C. § 521(2)(B) (1994).
  \item \textsuperscript{18} 11 U.S.C. § 521(2)(A).
\end{itemize}
C. Redemption and Reaffirmation

It is first necessary to understand the options available to the debtor. Redemption is one of the three options section 521(2) suggests for a debtor. In contrast, reaffirmation is the alternative that arises when debtors choose to retain collateral and remain current on their payments.

1. Redemption

a. Background

Under section 722,19 a Chapter 7 debtor may redeem certain secured property by paying the creditor the approximate fair market value of the property or the amount of the lien, whichever is less.20 Section 722 gives debtors an option to retain goods essential to their households, thereby avoiding the high cost of replacement if the property is repossessed by secured creditors.21 Section 72222 allows an individual debtor in a Chapter 7 case to redeem tangible personal property, intended primarily for personal, family, or household use, from a lien securing a consumer debt.23 Redemption is only available, however, if a debtor's interest in the property is exempt24 or has been abandoned.25

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20. See Ford Motor Credit Co. v. Polk (In re Polk), 76 B.R. 148, 150 (B.A.P. 9th Cir. 1987); General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053, 1055 n.3 (6th Cir. 1983).
22. See supra note 7.
23. “Consumer debt” means debt incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8) (1994) (e.g., automobiles, refrigerators, televisions, and general appliances).
24. See 11 U.S.C. § 522 (1994) (outlining deductions for certain collateral that debtor may retain). There are several exemptions that are limited by a dollar amount. See Carlson, supra note 21, at 293. The debtor pays the market value or loan amount, whichever is less.
25. See 11 U.S.C. § 722 (1994) (allowing redemption if property “has been abandoned under section 554”). A debtor may also redeem property if the bankruptcy trustee has abandoned it. The trustee is a representative of the creditors. See generally David G. Epstein et al., Bankruptcy § 1-4, at 6–8 (1993). Generally, the trustee will abandon property if the collateral is over-encumbered and the debtor's equity holds no value.
b. **Lump-Sum Versus Installment Redemption**

In enacting section 722, Congress failed to specify whether a debtor may redeem by installment payments or through a lump-sum payment. The federal circuit courts are divided on the issue.\(^2\) In re Clark and In re Carroll are good examples of courts providing for redemption by installment under section 722.\(^2\) These courts reason that "the right to redeem is meaningless if the debtor cannot exercise it."\(^2\) The purpose behind bankruptcy is to rehabilitate debtors. Thus, the method of payment, absent legislative intent, does not affect creditors' rights.\(^3\)

However, the majority of courts have found the interest of protecting a creditor's recovery of its secured claim sufficient to require lump-sum payment under section 722.\(^3\) In re Hart,\(^3\) for example, the court first determined that the value of a secured creditor's claim should be fixed as of the date of the debtor's filing of bankruptcy.\(^3\) The court cited a House report indicating that once a creditor's secured claim is determined, the court is required to ensure that the creditor's collateral is not eroded by

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26. See General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053, 1055 (6th Cir. 1983) ("[Section] 722 is facially silent as to the mechanics of redemption and, particularly, on whether the redemption may be accomplished through installment payments.").


29. Clark, 10 B.R. at 607; see also Carroll, 7 B.R. at 909.

30. Carroll, 7 B.R. at 909.


33. Id. at 1022.
delay or use by the estate. Specifically, the court considered the consequences that would result if the debtor discontinued installment payments after the discharge. The court hypothesized that if the debtor were paying one hundred dollars per month, it was likely that the car securing the loan balance would depreciate more than six hundred dollars if default occurred at six months. Thus, the court reasoned that the creditor would be better off with lump-sum redemption. These courts, therefore, have emphasized creditor interests.

2. Reaffirmation

Discharge from bankruptcy ordinarily relieves a debtor of personal liability for any pre-bankruptcy debts. Reaffirmation is the process of negotiating a voluntary agreement between the creditor and debtor whereby the creditor retains personal liability for the contract after discharge. Often a debtor may wish to remain in good standing with a creditor by negotiating an agreement stating that the debtor shall pay the creditor despite past or future financial problems.

a. Creditor Usually Seeks Identical Contract Terms

If a debt is properly reaffirmed, 11 U.S.C. § 524(c) provides that the debt may be enforced against the debtor even after a discharge is granted. Thus, the personal liability that discharge would have eliminated is retained under a reaffirmation agreement.

Creditors prefer to have debtors reaffirm because they can reestablish principle, interest, payments, and duration identical to the original

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34. Id.
35. Id. at 1022–23.
36. Id. at 1023.
38. Although the issue is outside the scope of this Comment, “ipso facto” or default clauses arguably trigger an event of default even if payments are current. See General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053 (6th Cir. 1983) (stating that ipso facto clause exists only in bankruptcy). But see 11 U.S.C. § 541(c)(1)(B) (1994) (providing that ipso facto clauses are void in bankruptcy); Riggs Nat'l Bank v. Perry (In re Perry), 729 F.2d 982, 984–85 (4th Cir. 1984) (holding ipso facto clause unenforceable as matter of law); In re Kunstler, 38 B.R. 207, 209–10 (Bankr. M.D. La. 1984) (suggesting in dicta that § 524(c) renders ipso facto clauses void even after discharge); First & Merchants Nat'l Bank v. Ballance (In re Ballance), 33 B.R. 89, 90–91 (Bankr. E.D. Va. 1983) (finding ipso facto clauses invalid, and noting that such clauses are contrary to fresh start policy).
Consequently, if a debtor reaffirms a note securing collateral, it is as if the debtor never filed for bankruptcy. One commentator observed that by obtaining a reaffirmation, a creditor is actually in a better position than before the debtor filed for bankruptcy because after the debtor has been discharged, the debtor is precluded from obtaining another discharge within six years. Conversely, debtors are worse off because they lose the ability to discharge their debts.

b. Both Parties Must Agree to Reaffirmation

Generally, reaffirmation agreements are scrutinized to protect a debtor from an overreaching creditor. This minimizes the possibility of the creditor coercing the debtor and allows the debtor to be fully informed. To fulfill this objective, Congress created an enforcement mechanism. Enforceability requires that the reaffirmation agreement: (1) be entered into before a discharge is granted; (2) contain a clear and conspicuous statement concerning the debtor’s right to rescind the agreement at any time before discharge or within sixty days after the agreement is filed with the court, whichever is later; (3) be filed with the court; (4) not have been rescinded by the debtor; and (5) be an informed, voluntary agreement by the debtor and one that does not impose an undue hardship on the debtor or the debtor’s dependents. Court approval is required when the debtor is not represented by an attorney. These provisions ensure that the parties have reached a consensual agreement.

40. See generally Oliver B. Pollak, Reaffirmation and Retention in Bankruptcy: Conflict in the Circuits over Protecting the Secured Creditor, 111 Banking L.J. 302 (1994).
43. 11 U.S.C. § 524(c). Rule 4008 of the Rules of Bankruptcy Procedure provides that the court may not hold a discharge hearing pursuant to § 524(d) more than 30 days after entry of an order granting or denying a discharge without at least 10 days notice to the debtor and the trustee, and the debtor’s motion for approval of any reaffirmation agreement must be filed at or before the hearing.
D. The Nonexclusive Approach Conforms to Section 521(2)

Under the nonexclusive approach, debtors file for Chapter 7 bankruptcy and list all debts they owe to creditors pursuant to section 521. At such time, debtors file a statement of intent, as required by this section, stating that they intend to retain the collateral and remain current on the payments to the particular creditor. The debtors are unlikely to seek redemption because a lump sum payment would be significantly higher than the monthly amount being paid. Reaffirmation is unlikely because the debtors do not need to renegotiate the agreement with creditors, for they are current on the note and complying with the terms of the agreement.

Moreover, providing notice to the creditor that the debtor intends to retain the collateral and keep current on the agreement gives the creditor the information required to know what will happen with the collateral. If the debtor were to later default on the agreement, the creditor could rely on state remedies to repossess the collateral. Of course, the creditor would not have the ability to obtain a personal deficiency, but neither would the creditor have this option at the time of bankruptcy. More importantly, for policy reasons Congress has determined that debtors deserve a fresh start to pull themselves back up and again become productive citizens in the community.

II. LEGISLATIVE HISTORY OF 11 U.S.C. § 521(2)

The legislative history of section 521(2) is minimal. Several proposed amendments, however, shed some light on the purposes behind the section.

Congress added section 521(2) to the Bankruptcy Code when it passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. Commentators describe this section as essentially a notice requirement permitting secured creditors to ascertain debtor intentions early in bankruptcy proceedings. The idea for section 521(2)(A) originated from a proposal by a coalition of bankers, credit unions, finance

companies, retailers, and oil companies. At Senate subcommittee hearings in 1981, witnesses appearing on behalf of the coalition and the American Bankers Association voiced their concern that creditors holding secured claims in consumer Chapter 7 cases often had no information regarding their collateral. The witnesses argued that because the automatic stay prohibited contact with debtors, secured creditors typically knew nothing about the status of the collateral. Secured creditors wanted to avoid incurring the expense of filing a motion to lift the stay, only later to learn that the debtors always intended to surrender the property without a contest. They proposed a solution requiring debtors to disclose their intentions with respect to the property at an early stage.

48. See Jim D. Pappas, Section 521(2) of the Bankruptcy Code: The Creditor’s Predicament in Getting Paid as Agreed, 99 Com. L.J. 45, 47 (1994). Pappas writes that Congress enacted § 521(2) because “a vocal coalition of consumer creditors advocated numerous changes and additions to the Code concerning consumer credit in particular. After vigorous debate, some of the suggested changes became law as a package known as the ‘Consumer Credit Amendments.’” Id.; see also Elizabeth Warren, Reducing Bankruptcy Protection for Consumers: A Response, 72 Geo. L.J. 1333 (1984) (writing that Consumer Credit Amendments were due in large part to concerted effort on part of creditor lobbying groups who believed that 1978 Act favored debtors); Ned W. Waxman, Redemption or Reaffirmation: The Debtor’s Exclusive Means of Retaining Possession of Collateral in Chapter 7, 56 U. Pitt. L. Rev. 187 (1994) (proposing that Congress add “retention” category, which would make debt nondischargeable and allow debtor to retain collateral without redeeming or reaffirming).


50. Id. at 39–106 (testimony of Prof. Jonathan Landers, Claude Rice, and Alvin O. Wiese, Jr., coalition consultants), 144–53 (statements of Walter W. Vaughan and A. Thomas Small, American Bankers Ass’n).

51. See generally id. at 44–46. Claude Rice and Alvin O. Wiese, Jr., representing the consumer credit coalition, explained why the amendment to § 521 was necessary:

Mr. Rice: It is a debtor’s statement of what he intends to do. Then impose a duty on him to do whatever he suggests. At the present time... the debtor is not required to do a thing but just sit back and stonewall it. That causes an unnecessary burden.

Mr. Wiese: The thing we have seen under the new code is the inability between debtors and creditors to communicate with each other. It is our perception that a great many of the adversary proceedings that are clogging the court system... could be resolved if the debtor was made to undertake the responsibility of giving creditors information before the first meeting of creditors, as to what they intend to do with the collateral. Do they intend to redeem it, surrender it, reaffirm the obligation, or what.

Id. at 44, 46 (emphasis added).

The consumer amendments and consumer bankruptcy amendments proposed by the Senate Judiciary Committee in 1982 and 1983 were the subject of considerable debate. The Senate report stated that the proposed amendments to section 521 “encourage the debtor and creditor to settle issues involving secured debt without judicial proceedings... and identify disputed matters at an early stage so that they may be resolved at the meeting of creditors. This will avoid the time and expense of separate and delayed proceedings.”

No Senate or House report accompanied the Bankruptcy Amendments and Federal Judgeship Act of 1984, which ultimately included section 521(2). One court described the legislative history as “woefully inadequate.” The only explanation of the rights reserved to the debtor and trustee under section 521(2) was made by Chairman Rodino. According to Rodino, the duty imposed under section 521(2) “does not affect the substantive provisions of the code which may grant the trustee or debtor rights with regard to such property.” Whether section 521(2) does, in fact, alter a debtor’s rights is precisely the issue on which the courts are divided.

III. COURTS DISAGREE ON THE EXCLUSIVITY OF SECTION 521(2) OPTIONS

A. A Majority of Courts Holds that Section 521(2) Options Are Not Exclusive

The majority of courts holds that a debtor’s options are not limited to those listed in 11 U.S.C. § 521(2). The Fourth and Tenth Circuits
embrace the view that debtors may retain secured property without making an election under section 521(2)(A) provided they meet two requirements. First, the debtors may not otherwise be in default prior to discharge. Second, apart from bankruptcy filing, no grounds may exist that would authorize repossess of the collateral. 59

Lowry Federal Credit Union v. West 60 is representative of these cases. In West, the debtors filed a voluntary petition under Chapter 7 approximately fourteen months after securing a loan to finance the purchase of a pick-up truck from Lowry Federal Credit Union. 61 Both before and after the time of filing, the debtors were current on their payments and had maintained insurance on the vehicle. 62 The debtors filed a statement of intent declaring that they planned to retain the truck; however, they failed to state within forty-five days of filing whether they intended to redeem the vehicle or reaffirm the loan. 63 Lowry threatened to repossess the vehicle if the debtors did not elect one of the options listed in the statute. 64 The bankruptcy court found that the debtors were not in default and therefore enjoined Lowry from repossessing the truck so long as the debtors stayed current on their payments, kept adequate

§ 521(2), and choices listed in section are not exclusive); In re Ogando, 203 B.R. 14, 15 (Bankr. D. Mass. 1996) (holding that § 521(2) is merely procedural statute, which by its own terms is not intended to infringe upon any rights debtor has with respect to collateral, and debtor may retain collateral and keep current on payments or default and risk repossession by creditor); Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow), 197 B.R. 409, 412 (N.D.N.Y. 1996) (concluding that options listed in § 521 are not exclusive); In re Parlatore, 185 B.R. 413, 417 (Bankr. D. Conn. 1995) (holding that debtors may retain secured property if they are not otherwise in default); In re Weir, 173 B.R. 682, 693 (Bankr. E.D. Cal. 1994) (holding that options are not exclusive, and outlining legislative history); First Nat'l Bank of Union Co v. Shubert (In re Shubert), 147 B.R. 618, 619 (Bankr. N.D. Ga. 1992) (affirming debtor's right to retain property); In re Parker, 142 B.R. 327, 331 (Bankr. W.D. Ark. 1992) (holding that § 521 permits Chapter 7 debtors to retain property); In re Donley, 131 B.R. 193, 196 (Bankr. N.D. Fla. 1991) (holding that debtors have right to maintain possession of collateral); In re McNeil, 128 B.R. 603, 608 (Bankr. E.D. Pa. 1991) (permitting retention of secured property by debtor); In re Crcuch, 104 B.R. 770, 773–74 (Bankr. S.D. W. Va. 1989) (upholding debtor's right to retain secured property in accordance with longstanding bankruptcy principles).

59. West, 882 F.2d at 1545.
60. Id. at 1543.
61. Id. at 1545.
62. Id.
63. Id.
64. Id.
insurance, and were not otherwise in default. The district court affirmed, and Lowry appealed to the Tenth Circuit.

The Tenth Circuit examined the language of the statute and concluded that while the requirements of section 521(2) were mandatory, nothing in section 521(2) gave a secured creditor an automatic right to repossess collateral if a debtor chose not to exercise one of the options listed in the statute. The court explained that, "while a debtor may redeem property, subject to 11 U.S.C. § 722, or reaffirm a debt, subject to 11 U.S.C. § 524(c)(4), nothing within the Code makes either course exclusive." Therefore, the court reasoned, the creditor would not be prejudiced by the debtor's retaining the vehicle after discharge because the creditor could resort to state remedies upon default.

The Fourth Circuit followed West in In re Belanger. The Belangers had purchased a mobile home financed by Home Owners Funding Corporation of America, and in bankruptcy they filed a statement of intention pursuant to section 521(2)(A) indicating that they would retain the mobile home. The finance company moved the bankruptcy court to compel the Belangers to choose one of the options listed in section 521(2), arguing that these options were exclusive. The court denied the motion, finding that the Belangers had complied with section 521(2)(A) by giving notice of their intent to retain the property while continuing to make payments in accordance with their contract. On appeal, the Fourth Circuit held that section 521(2) was essentially a procedural device that did not prevent a Chapter 7 debtor from retaining collateral after discharge and making required timely loan payments without either

65. Id.
67. West, 882 F.2d at 1545–46.
68. Id. at 1546.
69. Id.
70. Home Owners Funding Corp. of Am. v. Belanger (In re Belanger), 962 F.2d 345 (4th Cir. 1992).
71. Id. at 346.
72. Id.
73. See id. at 347; see also Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow), 197 B.R. 409, 412 (Bankr. N.D.N.Y. 1996); In re Parker, 142 B.R. 327, 329 (Bankr. W.D. Ark. 1992) (providing that notice and time limitations are not intended to abrogate debtor's substantive rights).
redeeming the collateral or reaffirming the debt.\textsuperscript{75} The court focused on
the phrase "if applicable," reasoning that it allowed the debtor to choose
one of the options in the statute, but if these options were not applicable,
the debtor need not have specified them.\textsuperscript{76} In so holding, the Fourth
Circuit specifically rejected the idea that a debtor desiring to retain
collateral and maintain current installment payments had to seek relief
under Chapter 13 rather than Chapter 7, reasoning that there would have
been little justification in promulgating section 521(2) if Chapter 13 were
intended by Congress "to be the sole remedy for a debtor who wished to
abide by contractual obligations."\textsuperscript{77}

B. A Minority of Courts Holds that Section 521(2) Options Are
Exclusive

The minority view requires the debtor to choose between surrender,
redemption, or reaffirmation,\textsuperscript{78} even though the debtor is not in default
under the loan or security agreement. Courts adopting this reading have
generally maintained that the plain language\textsuperscript{29} of section 521(2)(A)
requires a debtor to choose one of the listed options and to perform the

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\item \textsuperscript{75} Belanger, 962 F.2d at 349. The court adopted the principle that § 521(2) "affect[s] only
procedure and not substantive rights of the debtor." Id. at 347 (quoting 3 Lawrence P. King, Collier on Bankruptcy ¶ 521.09A, at 521-48 (15th ed. 1991)). King writes:

[Section 521(2)(C)] was inserted to make clear that the primary purpose of section 521(2) is one
of notice, to remedy creditors' complaints to Congress that they could not reach debtors'
attorneys and were not permitted to contact pro se debtors at all. . . By giving the trustee the
duty of ensuring that actions are taken in a timely manner, Congress interposed a more neutral
party, vested with the trappings of the court, to contact the debtor.


\item \textsuperscript{76} Belanger, 962 F.2d at 348.

\item \textsuperscript{77} Id.

\item \textsuperscript{78} See Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d 1512, 1517 (11th Cir. 1993)
(holding that Chapter 7 debtors could not retain collateral securing their consumer debt without
either redeeming property or reaffirming debt); General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053, 1056–58 (6th Cir. 1983) (discussing debtor's options, and referring to § 521(2)
in dicta); Schmidt v. Old Kent Bank & Trust Co. (In re Schmidt), 145 B.R. 543, 545 (Bankr. W.D.
Mich. 1992) (finding that reaffirmation or redemption is required to hold on to property); In re
Kennedy, 137 B.R. 302, 304–05 (Bankr. E.D. Ark. 1992) (relying on plain language setting forth
alternatives); In re Griffin, 143 B.R. 535, 537 (Bankr. E.D. Ark. 1991) (requiring debtor to reaffirm,
redeem, or surrender property); Bank South, N.A. v. Horne (In re Horne), 132 B.R. 661, 663 (Bankr.
N.D. Ga. 1991) (limiting debtor to choices identified in § 521(2)(A)); In re Chavarria, 117 B.R. 582,
(In re Johnson), 89 F.3d 249 (5th Cir. 1996) (adopting reasoning of In re Edwards, 901 F.2d 1383,
1387 (7th Cir. 1990)). Edwards was distinguishable from Johnson, however, in that the debtor was
in default at the time of filing.

\item \textsuperscript{79} See cases cited infra note 124.

1208
intended action within a specified period of time. The Seventh and Eleventh Circuits have opted for this approach.

*In re Edwards* is representative of these cases. The debtors filed for Chapter 7 bankruptcy and requested approval to continue payments and retain two cars without reaffirming the debts. At the time of filing, the debtors were current on their obligations. After the petition was filed, Edwards filed a statement of intention, stating a plan to reaffirm the debts to Merchants National Bank, the holder of the note. However, Edwards failed to execute the corresponding reaffirmation agreements within the time period set out in 11 U.S.C. § 521(2)(B). The bankruptcy court ordered Edwards to choose between reaffirming the debt, redeeming the collateral, or surrendering the vehicles to the bank.

On appeal, the Seventh Circuit cited a Sixth Circuit decision, *In re Bell,* in holding that a debtor who wishes to retain secured property must either redeem or reaffirm, and that redemption cannot be accomplished through installment payments. The Sixth Circuit's opinion in *In re Bell,* however, stands only for the proposition that redemption cannot be accomplished through installment payments; its comments relating to section 521 are dicta. The *Edwards* court also reasoned that reaffirmation is a voluntary negotiation and agreement between creditor and debtor. On the other hand, permitting a debtor to retain property while keeping up installment payments, without reaffirmation of personal liability, would impose a new arrangement on a creditor and negate the voluntary nature of reaffirmation contemplated by the statute. The court concluded that if such an outcome were permitted, "no debtor would reaffirm personal liability unless required to do so."
In addition, the *Edwards* court noted that "'[t]he 1984 Consumer Finance Amendments to the Bankruptcy Code were intended, inter alia, to protect creditors from the risk of quickly depreciating assets and to keep credit cost from escalating because of the too-ready availability of discharge.'" This legislative purpose strongly suggested to the court that permitting debtors to improve their positions against secured creditors by relieving them of personal liability would remove the incentive to insure and maintain the property. This result would further depreciate the collateral and drive up the future cost of credit. The court also reasoned that the plain language of the Bankruptcy Code and the spirit of the 1984 amendments support the exclusive approach, stating that the nonexclusive holding in *West* renders the statutory scheme set up by section 521 and section 524 (the specific reaffirmation provision) nugatory.

In *In re Taylor*, the creditor, AGE Federal Credit Union, held a first lien on the Taylors' vehicles. The Taylors were current with their payments to AGE upon filing the bankruptcy petition and remained current thereafter. The Taylors promptly filed a statement of intent with respect to the property as required by 11 U.S.C. § 521(2). At the meeting of creditors, the Taylors stated their intention to retain the vehicles and remain current on their obligations to AGE without reaffirming or redeeming the debt.

AGE filed a motion to compel the Taylors to comply with section 521 by specifying their intention to either redeem the vehicles or reaffirm the debts secured by the vehicles. The Chapter 7 trustee also filed a motion to compel and adopted AGE's position. The bankruptcy court entered an order compelling the Taylors to enter into a reaffirmation agreement or redeem the property. The district court reversed the bankruptcy court's order, after which the Taylors appealed.

90. *Id.* (quoting *In re White*, 49 B.R. 869, 872 (Bankr. W.D.N.C. 1985)). 91. *Id.*

92. *Id.* This argument, however, may be empirically weak. Currently, Chapter 7 bankruptcies are at an all-time high while the cost of credit is near an all-time low. See *Bankruptcy Filings Reach All-Time High*, supra note 1, at 9; Irby Park, *Home Sales "Rock Solid" Say Realtors; Totals Down, but Market Favors Buyers*, Chattanooga Free Press, Aug. 24, 1997, at M1.


95. *Id.* at 1513–14.

96. *Id.* at 1514.


98. *Id.*
The circuit court rejected the Taylors' argument that the phrase "if applicable" allows a debtor to retain secured property without selecting one of the options listed in the statute. The court concluded that the plain language of section 521 required the opposite result. The court reasoned that if the language did not apply to a debtor's surrender of the property, then it must apply to a debtor's retention of property. The "if applicable" clause, therefore, would identify any situation in which the debtor retained the collateral. Furthermore, the court adopted the reasoning from In re Horne that allowing retention of the property without reaffirmation or redemption would be tantamount to forcing the creditor into a de facto reaffirmation agreement with no recourse against the debtor. Finally, the court recognized Congress's intent to provide a debtor with a "fresh start" by allowing the debtor to discharge debts while retaining assets that are exempt, but argued that allowing a debtor to retain property without reaffirming or redeeming gives the debtor not a "fresh start" but a "head start" because the debtor effectively would be converting a secured obligation from recourse to nonrecourse debt.

IV. THE SECTION 521(2) ISSUE SHOULD BE RESOLVED IN FAVOR OF THE NONEXCLUSIVE APPROACH

A. The Nonexclusive Approach Is Correct

The nonexclusive approach, that the redemption or reaffirmation options are applicable only when triggered by the debtor's election or some other event, is supported by at least three arguments. First, the scant legislative history suggests that this section is merely procedural. Second, section 521(2)(C) indicates that debtors' rights in regard to property are not to be altered by the section's requirements. Third, the nonexclusive approach arose out of the congressional policy against forced reaffirmation. Therefore, as the foundation of the Code, the fresh start policy mandates adopting the nonexclusive approach.

The fresh start policy underlying the Code acknowledges that secured obligations will be converted from recourse to nonrecourse debt. Courts that have adopted the nonexclusive approach support this view because

99. Id. at 1516.
100. Id.
101. Id.
103. Taylor, 3 F.3d at 1516 (citing Horne, 132 B.R. at 663-64).
104. Id.
of the voluntary nature of reaffirmation agreements. In contrast, courts that have adopted the exclusive approach unjustifiably fear that allowing debtors to convert recourse debt into nonrecourse debt will put the debtor in a "head start" position. The Code recognizes that debtors need a new opportunity in life and an opportunity for future growth, unhampered by the pressure of existing debt. This is the balance that the legislature has struck, a balance that is especially valid considering that the creditor still receives everything it bargained for under state law except for the ability to maintain a deficiency judgment.

1. Section 521(2) Is Merely a Procedural Device

The primary purpose of section 521(2) is notice. The statute was intended to give creditors information regarding their property without the hassle of having to reach the debtor's attorney or engage in unauthorized communication with a pro se debtor. Furthermore, subsections 521(2)(A) and (B) explicitly state a time period within which the debtor shall give notice and perform with respect to a creditor's property. However, there is nothing in the statute to suggest that the time periods are anything more than procedural guidelines.

Nonetheless, some courts have relied on subsection (B) to support their holdings that the options listed in section 521(2) are exclusive. The section requires the debtor to perform its intention stated in subsection (A) within forty-five days after the filing of the statement, or within such additional time as the court may allow. Because ordinarily to "perform" means to fulfill, carry out, or complete, and it may not be possible to perform the act of retaining and keeping current within forty-five days, subsection (B) would arguably preclude such an option for the debtor. However, an alternative interpretation of this subsection is more consistent with the legislative intent to provide notice to creditors.

There are, in fact, two such alternative readings of subsection (B). First, the reference to the "intention with respect to such property, as specified by subparagraph (A)" refers only to the intentions specified

105. 4 King, supra note 75, ¶ 521.10[5], at 521-37.
106. Id.
108. See Taylor, 3 F.3d at 1515-16.
109. Id. at 1516.
in that subsection, namely reaffirmation or redemption, and imposes no similar time deadline for other intentions not specified in subparagraph (A), such as retention without redemption or reaffirmation. Alternatively, retention coupled with continued performance on the loan obligation could constitute performance within forty-five days. As a recent bankruptcy court stated, "[T]he debtor can continue to make the payments as called for under the loan agreement, at least one of which is likely to become due within that 45-day period." Furthermore, the subsequent payment is likely to be due after the debtor's discharge. Therefore, "the creditor has a ready remedy in the event of a subsequent default in continued performance—it can simply repossess the collateral and pursue its nonbankruptcy remedies, unimpeded by the automatic stay, which expires as to the debtor and its exempt property upon the entry of the debtor's discharge." This interpretation is consistent with Congress’s primary intentions in enacting section 521(2)(A)—affording the creditor notice of the debtor’s intentions with respect to the collateral so that the creditor can take appropriate steps to protect its interests.

Section 521(2)(C) states that the substantive rights of the debtor with respect to the property are not to be affected by subsections (A) and (B). Thus, when the debtor fails to comply with these subsections, "the expiration of those time periods can serve as a signal to the creditor that it may be time to take action to enforce its lien rights against the collateral," satisfying the notice requirement under section 521(1). The creditor, at such time, may move for relief from stay to foreclose upon its collateral, or, in the case of personal property, to repossess; alternatively, the creditor may wait until the debtor has been granted a discharge under

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111. *In re Castillo*, 209 B.R. 59, 74 (Bankr. W.D. Tex. 1997), rev’d sub nom. Government Employees Credit Union v. Castillo (*In re Castillo*), No. EP-97-CA-206-H, 1997 WL 613073 (W.D. Tex. July 29, 1997). In reversing *Castillo*, the Texas district court limited the debtor to the three options set out in § 521(2)(A), but the district court did not take into consideration the distinguishing fact that the *Castillo* debtors were current on their payments to the creditor.

112. *Id*.

113. Arguably, as long as the debtor remains current on the obligation to the creditor, the monthly payment will always be paid within 45 days, thereby satisfying subsection (B). The creditor agreement generally is for the debtor to make timely payments under the contract.


section 524 and pursue its in rem rights against the collateral under state law.118

Another reason for interpreting section 521(2) as a notice section is that holding otherwise would restrict the trustee’s ability to sell encumbered nonexempt property. If there is equity in the property, the trustee may sell the collateral, pay the secured claim from the sale proceeds, and distribute the remaining proceeds to unsecured creditors. In such cases, none of the three so-called mandatory alternatives listed in section 521 has occurred. Therefore, strictly applying the argument that section 521 is exclusive would remove the trustee’s power to sell encumbered nonexempt property of the estate.119

2. The Plain Meaning of Section 521(2) Supports a Nonexclusive Reading

Section 521(2)(C) itself supports the view that the options listed in the statute are not exclusive. The federal appellate courts that have addressed the issue, however, have paid little attention to section 521(2)(C), which provides: “nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor’s or the trustee’s rights with regard to such property under this title.”120 Instead, these courts have relied on subsections (A) and (B) to make their interpretations of the statute plausible.121

Nothing in subparagraphs (A) and (B) is meant to alter any of the debtor’s property rights under Title 11.122 Restricting the debtor’s retention options to redemption or reaffirmation would undoubtedly alter the debtor’s rights.123 Some courts have reasoned that if the language of a statute is plain and unambiguous, then judicial interpretation is not necessary and the court’s only function is to enforce the statute according to its terms.124

120. 11 U.S.C. § 521(2)(C).
123. This conclusion is persuasive particularly in light of subsection (C)’s location in a statute whose other subsections all relate to procedure and not substance. See Ogando, 203 B.R. at 16.
124. See Patterson v. Shumate, 504 U.S. 753, 761 (1992) (finding that clear statutory language obviates need for judicial construction of Bankruptcy Code); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) (same); Caminetti v. United States, 242 U.S. 470, 485 (1917) (noting that function of courts need not extend to statutory interpretation when language of statute is plain and has only one
Reading subsection (C) in conjunction with subsections (A) and (B) gives clear and unambiguous meaning to the term "if applicable." The courts adopting the exclusive approach state that the phrase "if applicable" refers to any election to retain. Thus, under this view, retention requires redemption or reaffirmation. Conversely, the courts adopting the nonexclusive approach give "if applicable" its more general and natural meaning in the context—that the requirement for the debtor to specify whether it will redeem or reaffirm is imposed only if the debtor in fact intends to redeem or reaffirm. These courts appropriately reason that "if applicable" is otherwise redundant because the option of redemption or reaffirmation is phrased in the disjunctive. Thus, both subsection (C) and the plain meaning of the phrase "if applicable" support the nonexclusive approach.

3. **Treating Options in Section 521(2) as Nonexclusive Furthers the Congressional Policy Against Forced Reaffirmations**

Another reason for viewing the options listed in section 521(2) as nonexclusive is Congress's great concern that debtors be protected from creditors forcing reaffirmation upon them. In section 524(c), Congress tried to protect debtors by mandating that a reaffirmation agreement contain a "clear and conspicuous statement which advises the debtor that such agreement is not required." Imposing reaffirmation on the debtor who opts to retain collateral, but who does not redeem, makes reaffirmation in effect "required." This is clearly contrary to statutory intent and contrary to the plain language of the statute. Additionally, such a result would render illusory the right to a determination by the debtor's attorney that the debtor's reaffirmation is "voluntary."

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125. These courts view § 521(2) as an apparent congressional response to concerns of secured creditors in consumer bankruptcy cases. See supra note 48.
126. See Home Owners Funding Corp. of Am. v. Belanger (In re Belanger), 962 F.2d 345, 348 (4th Cir. 1992).
127. See supra note 21.
130. Id.
131. The 1984 amendments seriously weakened the protection against unwise reaffirmation by requiring attorneys to bargain with their own clients in the face of the clients' desire to retain material objects that convey the appearance of wealth, thus undermining the fresh start policy.
The practicalities of the section 521(2)(A) options make it unlikely that a Chapter 7 debtor will be able to redeem the collateral in a lump sum as required by section 722. Most debtors claiming Chapter 7 bankruptcy will not have the liquid assets to make such a payment, nor will most lenders make a loan to someone who is in or has filed for bankruptcy. Therefore, if the debtor seeks to retain the collateral, the only realistic option under the exclusivity approach is reaffirmation. However, reaffirmation requires the consent of the creditor in order to comply with section 524(c). In effect, the creditor is able to compel the debtor either to meet the creditor's terms of reaffirmation or to surrender the property. This undermines the purpose behind section 722—preventing coercive reaffirmation agreements.

4. The Fresh Start Policy Supports Adopting the Nonexclusive Approach

The primary policy of bankruptcy is to provide a debtor with a "fresh start." This policy would be undermined if redemption or reaffirmation were the only choices available to a debtor. The debtor would still be personally liable. Moreover, if debtors are pressured into reaffirming when current on debt payments, the debtors are in a worse position than they occupied prior to bankruptcy, because they are then precluded from obtaining another discharge within six years. Therefore, rather than providing debtors with a "fresh start," the exclusive approach would give debtors a "false start" due to their inability to use bankruptcy law for its intended purpose.

Fresh start policy concerns militate in favor of interpreting section 521(2) to allow the debtors to retain the collateral as long as debtors remain current on their contract agreements. Once a petition for


135. See generally Boshkoff, supra note 12. See also Debra S. Friedman, 11 U.S.C. Section 521(2)(A): Fresh Start or Head Start?, 22 Pac. L.J. 1239 (1991) (adopting view that labeling statute as mere notice would be contradictory, and proper approach should be exclusive options).

1216
bankruptcy is filed, the policy shifts from responsibility to forgiveness. Chapter 7 discharge provides debtors with a “fresh start,” leaving the debtors’ future income free and clear of discharged debts. Therefore, the “honest but unfortunate debtor . . . [is afforded a] new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” Mandating that the debtor reaffirm a debt, then, undermines the purpose of providing a “fresh start” to the debtor because personal liability attaches upon reaffirmation.

B. The Exclusive Approach Is Flawed

Under the nonexclusive approach, the creditor receives everything it bargained for under state law (collateral and payments) except the ability to maintain a deficiency judgment against a debtor. Congress struck this bargain in favor of debtors in order to make them productive citizens in the community. Some courts take the position that the debtor may neither insure nor care for the collateral after discharge, and thus punish the debtor by allowing creditors to impose reaffirmation upon the debtor. However, courts may be overstating this concern, for failing to insure or take care of collateral often constitutes a default in the original agreement, thus allowing repossession after discharge. As a practical matter, if the debtor has not elected to surrender the property, this strongly suggests that the debtor values the collateral and will very likely maintain it and pay it off.

1. The Exclusive Approach Imposes an Unwarranted Penalty on the Debtor

Since the creditor is generally unable to invoke state remedies over a debtor who is current on a debt, treating section 521(2) options as exclusive imposes a penalty on the debtor by forcing it to redeem or reaffirm, thereby creating a default when none exists under state law. Even though there is no default, adopting the exclusive approach may cause the debtor to lose the collateral at a time when the debtor’s ability to repurchase through credit is seriously impaired by the bankruptcy. Generally, redemption is not feasible because the debtor is unable to

136. See 11 U.S.C §§ 727, 1328 (1994). While some debts are excepted from discharge, exceptions are to be strictly construed. See 11 U.S.C. § 523 (1994); 4 King, supra note 75, ¶ 523.05, at 523-19 to 523-20.

provide a lump-sum payment. Consequently, the debtor will probably lose the collateral, even though the payments are current, or be forced into a reaffirmation agreement contrary to the voluntary nature of section 524. The creditor is thereby put in a higher position than it would be otherwise. The creditor receives everything under the contract, and potentially receives non-dischargeable debt. In contrast, relieving the debtor of personal liability does little to harm the interests of the creditor while fulfilling the underlying policy of the Bankruptcy Code.\footnote{138. Memorandum, Mar. 5, 1997 Draft, Consumer Bankruptcy Working Group, National Bankruptcy Review Comm'n. The memorandum provided:

A debtor who had filed for bankruptcy could continue to make payments on a secured loan according to the contract terms without further involvement of counsel or the court. This option would be available only if the debtor were not in default on the contract at the time of the bankruptcy (other than by the bankruptcy filing itself) or if the secured creditor had waived any defaults in writing. If the debtor ceased making payments or if the debtor defaulted on other contract obligations, such as the obligation to insure, the creditor would be entitled to seek relief from the stay prior to discharge or to repossess the collateral after the discharge. A creditor could contact a debtor directly regarding contract defaults, but a creditor could not enter into a contract with a debtor that would impose personal liability for the repayment of any claim dischargeable in bankruptcy.

\textit{Id.}}

2. \textit{The Depreciating Value of Asset Argument Is Flawed}

The argument in favor of the exclusive approach—that creditors will be harmed by the declining value of the collateral\footnote{139. See \textit{In re} Edwards, 901 F.2d 1383 (7th Cir. 1990).}—fails to account for the payments that the creditors are continually receiving and the interest rate set by the financing agreement. The exclusive approach does not allow the debtor who is current on payments to keep the collateral absent reaffirmation.

Creditors are not left substantially more vulnerable than any other lender under a consumer installment sales contract. When a debtor is current on the debt, the creditor is in no worse position than it would have been but for the bankruptcy petition. In fact, a debtor is more likely to be able to pay the disputed debt after discharge of other debts. Furthermore, most debtors opting to retain collateral and keep current on their contracts do so because they need the assets for personal purposes. Finally, the reality of most secured loans is that the lender looks to its collateral, not the personal liability of the borrower, to guarantee repayment. For example, a prudent creditor who issues a loan for the purchase of a home will retain a reasonable down payment so that the
loan will amortize at a level below the value of the home. In case of
default, the creditor looks at foreclosure, not the personal liability of the
debtor, to obtain satisfaction on the loan. The remedies of foreclosure or
repossession are controlled by state law and are not affected by
bankruptcy. Thus, contrary to the fears expressed by the courts adopting
the exclusive approach, the collateral is adequately protected.\footnote{140}

Moreover, the creditor may eliminate the risk of the collateral
depreciating faster than the remaining loan amount by obtaining an
appropriate down payment. Assume, for example, that there is no
bankruptcy filing. The creditor's perceived risk of depreciating assets is
still present under its bargain with the debtor. In order to mitigate this
risk, the creditor may request a substantial down payment or incorporate
this risk in the interest rate it charges for the loan. In any event, the
creditor is unable to repossess the collateral, absent bankruptcy, even
though the asset is depreciating. Creditors who argue that depreciating
asset risk is a significant reason for demanding exclusive options are
therefore misguided. One court commented that "creditors scream bloody
murder when debtors have funds to redeem but say that they ought to
redeem when they can't."\footnote{141} A creditor should not be rewarded for failing
to adequately protect itself just because a debtor has filed for bankruptcy.

Realistically, a creditor secured by an asset that has depreciated below
the amount of the debt is not likely to be any better off with forced
redemption or reaffirmation. The trustee in such a case would probably
abandon the collateral because this decision makes the most economic
sense for the estate. Thus, the creditor's position might be improved if
the debtor were allowed to continue making regular payments. The
\textit{Edwards} court did not take this into account, but instead punished the
debtors for remaining current on their payments and filing for their legal
right of bankruptcy.

Lastly, the creditor may be concerned that the debtor who is allowed
to retain collateral without reaffirmation may in the future stop making
payments, and at that point the collateral may be worth less than at the
time of bankruptcy. However, this possibility exists absent bankruptcy,
as long as payments continue, and it provides no justification for altering
the terms of the original agreement with the debtor. If the debtor were to

\begin{footnotes}
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default, the creditor would be in the same position, except that it would have no personal liability against the debtor. Again, as a practical matter, the lack of personal liability under these circumstances should not carry much weight because it is likely the debtor would be judgment-proof; thus the creditor’s remedy would be limited to repossession. More important in these cases is the underlying fresh start policy which tips the balance in favor of the debtor.

In Edwards, the Seventh Circuit concluded that “when a debtor is relieved of personal liability on loans secured by collateral, the debtor has little or no incentive to insure or maintain the property in which a creditor retains a security interest.”142 It is unlikely that a debtor would fail to insure or maintain its investment simply because there is no longer personal liability for the underlying debt, especially in the case of collateral that is a home, vehicle, or other essential item. The debtor does not maintain the investment because the debtor has personal liability attached to it, but rather does so because the debtor desires the collateral for whatever personal reason(s) the debtor may have. Furthermore, failing to insure or maintain the collateral is a typical event of default, which would permit the secured creditor to accelerate the indebtedness or repossess the collateral.143 “In fact, default clauses which permit the lender to declare a default . . . are specifically authorized by the Uniform Commercial Code and may be exercised by a secured lender if it has a good faith belief that the prospect for payment is impaired.”144 Thus, the creditor is in no worse position than before filing for Chapter 7, and the fears of depreciation are exaggerated.

V. CONCLUSION

The express language of section 521(2) and the underlying policy of the Bankruptcy Code strongly suggest adopting the views expressed by the Fourth and Tenth Circuits: the options listed in the statute are not exclusive and therefore the debtor who is current on a debt may retain the collateral under section 521(2)(A). This section is primarily a notice requirement giving creditors information about the fate of the collateral. Section 521(C) also forbids the debtor’s substantive rights from being

142. Edwards, 901 F.2d at 1386.

143. Parker, 142 B.R. at 331 (holding that debtors were not required to redeem, reaffirm, or surrender mobile home but could retain mobile home and continue to make monthly payments without reaffirming debt).

altered. Finally, the fresh start policy underlying the Code is most consistent with this approach.

The Seventh and Eleventh Circuit's limitations of a debtor's options under section 521(2)(A) to redemption, reaffirmation, or surrender "[have] resulted in a narrow interpretation of the text of section 521(2)(A) without due regard for the statutory scheme and policy of the Code." This approach results in the substantive rights of the debtor being altered, contrary to the explicit language of section 521(2)(C). Additionally, this exclusive approach is premised on the misconception that a secured creditor's risk of loss is substantially increased by the debtor's discharge when there is an absence of mandatory redemption, reaffirmation, or surrender. This assumption fails to recognize both that the collateral retained after discharge continues to be governed by the original contract agreement, and that the lender still receives the benefit of the initial bargain in which the risk of a deficiency upon default is compensated by timely interest and loan payments.

The creditor's loss of its deficiency rights is outweighed by the Bankruptcy Code's purpose of providing a debtor with a fresh start. The current split in the circuits on this issue leads to a significant inequity because debtors are treated differently depending on where they live. For this reason, Congress or the U.S. Supreme Court should address this issue and resolve the division among the courts.


146. Edwards, 901 F.2d at 1386.

147. See generally Carroll, supra note 145, at 39.