GRAND THEFT AUTO 2.0: BANKRUPTCY COURTS ALLOW AUTO TITLE LENDERS TO RIDE OFF IN CONSUMER DEBTORS' VEHICLES AND RIP OFF THE CASH PAYOUT OWED TO UNSECURED CREDITORS

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ABSTRACT

Online and in person, a consumer who owns a vehicle can quickly obtain a loan from a lender that secures the loan by taking possession of the vehicle's certificate of title. When consumers obtain these loans, known as auto or car title loans, consumers retain physical possession of their vehicles but must repay the loans in a single balloon payment in 30 days or less. Most consumers cannot repay these triple-digit-interest-rate loans by the due date. As a result, most consumers end up in a long-term cycle of paying fees that extend a loan's due date but do not reduce the principal balances owed. Because title lenders obtain security interests in the vehicles, these lenders are secured creditors under the Uniform Commercial Code and can, therefore, take possession of the consumers' vehicles if they fail to repay.

To prevent this, some consumers file for chapter 13 bankruptcy relief, state their intention to retain possession of their cars, and propose plans that treat title lenders as secured creditors and pay off their loans in full. However, because consumers sign loan documents that refer to a title loan as a "pawn," title lenders assert, under various state pawnshop laws, they are pawnbrokers who own the consumers' vehicles and, therefore, have the right to sell the vehicles and keep any surplus proceeds from the sale.

Prior to 2005, a consumer debtor's vehicle was treated as property of the bankruptcy estate because the title lender merely held a security interest in the vehicle, not ownership of it. However, when the U.S. Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), it included a provision that excludes "pledged goods" from becoming property of the bankruptcy estate if, among other things, the pawnbroker has possession of the goods prior to the bankruptcy filing. This provision should not be applied in chapter 13 cases involving car title loans.

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In almost every case, consumer debtors, at the time of the bankruptcy filing, still have possession of their vehicles—the purportedly pledged goods. As a result, bankruptcy courts should easily interpret the law to allow the debtor to retain the vehicle, as "property of the estate," while simultaneously repaying the title lender the debt owed via the chapter 13 plan.

This Article, however, exposes the harsh reality that numerous courts, including the U.S. Court of Appeals for the Eleventh Circuit, ignore the plain language of several relevant statutes to facilitate "Grand Theft Auto 2.0"—allowing title lenders to take ownership of debtors' vehicles and keep all the equity after selling them. This Article analyzes several laws to demonstrate how the Eleventh Circuit and its progeny have violated several canons of statutory construction and have, thereby, obstructed a debtor's ability to obtain the relief Congress intended. These courts have repeatedly failed to recognize the debtors' property rights in secured transactions, which come into the bankruptcy estate. As a result, courts have stripped away the debtors' ownership rights and have allowed car title lenders to rob debtors of valuable vehicles (e.g., seize a vehicle worth $22,000 to satisfy a $9,300 debt). These flawed interpretations also result in title lenders robbing the debtor's unsecured creditors of payouts they are entitled to receive from the vehicle's surplus equity.

This Article proposes that Congress amend BAPCPA to include provisions expressly allowing chapter 13 debtors to keep their vehicles while they pay off their title loans and pay surplus equity to their unsecured creditors. This is the result that gives debtors the fresh financial start Congress intended.

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INTRODUCTION

Imagine seeing a man holding up a bag stuffed with cash while he drives off in a "sweet ride." A few feet away is a woman sobbing: "Please don't take my car." Next to her is a small crowd of people—the woman's creditors—yelling: "This ain't right!" Nothing is right about "grand theft auto."[1] The following bankruptcy case explains how such theft is facilitated by some courts.

Desperate for cash in 2019, Lisa Snyder borrowed $3,500 from TitleMax of Georgia, Inc., which in exchange for the loan took a security interest in Ms. Snyder's 2016 Nissan Pathfinder.[2] As is typical of these loans, referred to as "auto title" or "car title" loans, Ms. Snyder surrendered the vehicle's certificate of title to TitleMax and agreed to repay the loan, which carried a triple-digit interest rate and was due in a single payment in only 30 days.[3] Unable to repay the full amount by the due date, Ms. Snyder

[1] Professor Nathalie Martin was the first to use the video game "Grand Theft Auto" in reference to auto title lending. *See* Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 MO. L. REV. 41, 74 (2012) (discussing title lending practices and its profitability).

[2] TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 905–906 (Bankr. S.D. Ga. 2022).

[3] *Id.* at 905, 924 (stating that title loans have short terms, usually due in 30 days, and

ended up following the typical path of many title loan borrowers.[4] She paid multiple "roll over" fees that extended the due date of the loan but did *not* reduce the principal owed.[5] After paying rollover fees for nearly *two years*, Ms. Snyder's $3,500 loan had mushroomed into a debt of $9,231.64.[6] Hoping to keep her vehicle and better manage this large debt, Ms. Snyder filed a chapter 13 bankruptcy petition, listed TitleMax as a secured creditor, and proposed a 60-month plan to repay TitleMax's debt *in full* via monthly payments of $350 at 6 percent interest.[7]

TitleMax, however, was not satisfied with this plan—being treated as a secured creditor and getting paid in full.[8] Instead, TitleMax argued that its loan constituted a "pawn" transaction and that it *owned* the Nissan outright.[9] Specifically, it argued that once Ms. Snyder failed to pay the

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carry triple-digit annual percentage interest rates); Martin & Adams, *supra* note 1, at 71 (stating that most title loans have a 30-day duration).

[4] *See* Creola Johnson, *Prosecuting Creditors and Protecting Consumers: Cracking Down on Creditors that Extort via Debt Criminalization Practices*, 80 LAW & CONTEMP. PROBS. 211, 252 n.250 (2017); *see also, e.g.*, State of Maine, Dep't of Prof. and Fin. Reg. Bureau of Consumer Credit Protection, *Short-Term, Small-Dollar Loan Study,* app. E at 9 (Dec. 1, 2021), https://www.maine.gov/pfr/consumercredit/pub/2021shorttermsmalldollarstudy.pdf (discussing borrowers' inability to pay off loan by its initial due date and their need to pay rollovers to extend the loan's due date and finding that among Maine residents with car title loans, 83 percent still owed money on the title loan six months after obtaining the loan).

[5] *See Snyder*, 635 B.R. at 924 (noting that "notwithstanding the '30-day' period of these contracts, many borrowers, like the Debtor in this case, renew their loans and extend the maturity date several times").

[6] *Id.* at 906.

[7] *Id.*

[8] *See id.* at 905 (stating that TitleMax filed a motion for relief from stay so that it could take possession of the vehicle). For reasons unknown to the author, TitleMax often does *not* assert it owns the vehicles but it actually files proofs of claims, under which it states that it is a secured creditor and, thereby, implicitly agrees to have its debt treated as an allowed secured claim. *See, e.g.*, TitleMax of Ala., Inc. v. Deakle, No. CV 1:20-335-JB-N, 2021 WL 1759302 (S.D. Ala. Mar. 31, 2021) (citing numerous chapter 13 cases in which TitleMax filed secured claims), *appeal dismissed sub nom. In re* Deakle, No. 21-11447-JJ, 2021 WL 8315636 (11th Cir. Nov. 29, 2021). TitleMax often does *not* file objections to debtors' chapter 13 plans and accepts being treated as a secured creditor. Sometimes, it files objections after receiving payments under a plan. *See, e.g.*, *In re* Cottingham, 618 B.R. 555, 566 (Bankr. N.D. Ala. 2020) (holding "TitleMax waived its right to assert its ownership under state law when it failed to raise the issue of ownership before plan confirmation, and further demonstrated its waiver by accepting payments pursuant to the confirmed plan").

[9] *See Snyder*, 635 B.R. at 906 n.3 (stating that the document signed by Ms. Snyder was

amount owed to "redeem" her vehicle under Georgia's pawnbroker statute, the vehicle ceased to be a part of the bankruptcy estate and that complete ownership of her vehicle was forfeited to TitleMax.[10] A bankruptcy court ultimately agreed with TitleMax and allowed it to take Ms. Snyder's vehicle worth $22,000 and permitted it to keep the surplus, namely the remaining proceeds after selling the vehicle to satisfy the debt owed.[11]

The above ruling is a disastrous outcome for consumer debtors, especially for those in bankruptcy cases filed in Georgia and Alabama.[12] TitleMax and other title lenders have in essence implemented a business

titled "Pawn Transaction Disclosure Statement and Security Agreement").

[10] *Id.*

[11] *Id.* at 924; *see* U.C.C. §§ 9-611, 9-623; *see also infra* notes 247–283 and accompanying text.

[12] For further discussion, see *infra* Part II.C and D. Courts in other states have also sided with title lenders. *See, e.g.*, Bolton v. Quick Cash Title Loans (*In re* Bolton), 466 B.R. 831, 838–39 (Bankr. S.D. Miss. 2012) (citing to § 541(b)(8) and holding that the debtor's vehicle was not property of the estate because under the Mississippi Title Pledge Act, the debtor forfeited ownership of her vehicle by failing to pay the loan amount due by the end of the redemption period). Title loans are legal in only a handful of states; however, title lenders are not content to restrict their lending to consumers residing in states where their loans are legal. As a result, title lenders have been sued by numerous authorities for issuing unlawful loans in violation of state laws. *See, e.g.*, Press Release, Michelle Henry, Pa. Att'y Gen., *Vehicle Loan Consumers Will Get Back $705,000 from Predatory Title Loan Company via AG Settlement*, (May 17, 2023) https://www.attorneygeneral.gov/taking-action/vehicle-loan-consumers-will-get-back-705000-from-predatory-title-loan-company-via-ag-settlement/ (announcing a settlement of a lawsuit against Delaware-based Auto Equity Loans of DE, LLC, which agreed to refund $705,000 in fees charged for alleged unlawful title loans issued to Pennsylvania residents, who had loans with APRs averaging more than 200 percent); Press Release, Mass. Att'y Gen'l, *AG Healey Secures Over $900,000 Including Debt Relief and Restitution for Consumers From Auto Title Lending Company*, (June 29, 2022) https://www.mass.gov/news/ag-healey-secures-over-900000-including-debt-relief-and-restitution-for-consumers-from-auto-title-lending-company (stating that an investigation revealed that the title lender had issued Massachusetts residents approximately 2,745 title loans, which "contained usurious interest rates of up to 300 percent"); Lynn Larowe, *AG Settles Suit over Car-Title Loans*, TEXARKANA GAZETTE (Jan. 1, 2016), https://www.arkansasonline.com/news/2016/jan/01/ag-settles-suit-over-car-title-loans-20/ (stating that Arkansas AG reached a settlement requiring pawnshop owner to stop issuing title loans with interest rates as high as 240 percent and permanently voids all outstanding title loans held by the pawnshop). For a list of other enforcement lawsuits, see *infra* note 157 and accompanying text.

practice referred to here as "*Grand Theft Auto 2.0*."[13] Title lenders have not only increased the billions in rollover fees that they derive annually from their triple-digit-interest-rate loans,[14] but they have convinced some federal courts to ignore the plain meaning of a bankruptcy statute to erroneously allow title lenders to repossess consumer debtors' vehicles and keep all their equity.[15]

Part I of this Article discusses the dual status claimed by car title lenders both as secured creditors under the Uniform Commercial Code (UCC) and as pawnbrokers under state pawnshop statutes.[16] Under Article 9 of the UCC, title lenders obtain the status of perfected secured creditors; however, lenders cannot use that status to deprive borrowers of certain basic rights.[17] Article 9 of the UCC has been adopted in all 50 states, and it affords debtors several rights, including the right of redemption and the right to surplus funds after the post-default sale of their property.[18] Unwilling to concede that debtors have UCC rights, title lenders often persuade courts to ignore the real essence of the title loan, which constitutes a secured transaction under the UCC, and, instead, characterize title loans as pawn transactions under state pawnbroker laws.[19] As pawnbrokers, title lenders assert that after a debtor fails to pay amounts necessary to redeem

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[13] *See* Martin & Adams, *supra* note 1, at 49 (labelling title loans as grand theft auto and describing how title lenders allow borrowers to pay fees to obtain a loan extension, rollover, or refinancing—all synonymous terms that essentially extend the loan's due date and keep borrowers trapped in a long-term cycle of debt).

[14] *Id.* at 47 (describing the car title lending as a multi-billion dollar industry); *see also The Debt Trap of Triple-Digit Interest Rate Loans: Payday, Car-Title, and High-Cost Installment Loans,* Ctr. For Responsible Lending, March 2019, available at https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-finfairness-payday-mar2019.pdf (last visited April 16, 2021).

[15] *See infra* Part II.C and D.

[16] *See infra* Part I.B and C.

[17] *See infra* notes 65–109 and accompanying text (explaining how title lenders become secured creditors with perfected security interests in the debtors' vehicles); U.C.C. §§ 9-609–10. These rights are subject to certain restrictions. One such restriction is that the secured creditor can only repossess the collateral after the debtor has defaulted either (1) pursuant to judicial process or (2) pursuant to a peaceful repossession. U.C.C. § 9-609(b). Another restriction is that the secured creditor can only dispose of the property in a commercially reasonable manner and, if such creditor fails to do so, it may be liable to the debtor for monetary damages. U.C.C. §§ 9-610(b), 9-625.

[18] *See infra* Part I.B.

[19] *See infra* Part I.C.

their vehicles, title lenders own *outright* the vehicles and, therefore, have the right to keep surplus funds from the sale of the vehicles.[20] As a result, title lenders seek to avoid the burdens of the UCC while they enjoy all of the benefits of pawnbroker laws—in essence having their proverbial cake and eating it too.[21]

Part II explains why title lenders argue that they should be treated as pawnbrokers, not as secured creditors, in a debtor's chapter 13 bankruptcy case.[22] Generally-speaking, for a chapter 13 debtor to be able to retain property in which a secured creditor has an interest, the debtor must show that she has a legal or equitable interest in the property and, therefore, the property qualifies as "property of the estate."[23] Prior to 2005, courts recognized the debtor's vehicle as estate property; however, buried in the hundreds of pages of a bankruptcy reform law enacted in 2005, the U.S. Congress included a provision, which states that "pledged goods" are not "property of estate" if, among other things, the pledged goods are in the possession of the pawnbroker.[24] Because debtors retain possession of their vehicles when they obtain a title loan, this Article contends that the lack of possession by the title lender means (1) the vehicles do not constitute "pledged goods," (2) the debtors' vehicles constitute property of the estate, and (3) the debtors have the right to retain their vehicles while they pay back their title loans.[25] However, as fully explained in Part II, the U.S. Court of the Appeals for the Eleventh Circuit and its progeny have failed

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[20] *See infra* Part I.D.

[21] *See* TitleMax of Ala., Inc. v. Deakle, No. CV 1:20-335-JB-N, 2021 WL 1759302 (S.D. Ala. Mar. 31, 2021) (stating that TitleMax accepted payments via a debtor's chapter 13 plan which treated TitleMax as a secured creditor, but subsequently TitleMax filed a motion seeking a court order that would confirm TitleMax's purported ownership of the car), *appeal dismissed sub nom. In re* Deakle, No. 21-11447-JJ, 2021 WL 8315636 (11th Cir. Nov. 29, 2021).

[22] *See infra* Part II.C.

[23] *See infra* Part II.B.

[24] *See* 11 U.S.C. § 541(b)(8); *see also infra* Part II.B.

[25] *See, e.g.*, ALA. CODE § 5-19A-2 (defining pawn transaction as "[a]ny loan on the security of pledged goods or any purchase of pledged goods on condition that the pledged goods are left with the pawnbroker"). Unlike other state pawnbroker statutes, Georgia appears to have the only state pawnbroker statute that expressly identifies motor vehicles as goods that may be pawned to pawnbrokers. *See* GA. CODE ANN. § 44-12-130(5) (West). For further discussion of these of the statutes, see *infra* Part I.C–D.

to apply the plain meaning of the 2005 statutory provision at issue and have violated several canons of statutory construction followed by the U.S. Supreme Court.[26] For example, these courts have incorrectly concluded that the lenders' possession of the vehicles' certificates of title constitutes constructive possession of the vehicles.[27] As result, these courts have erroneously held that constructive possession is superior to the debtors' *actual physical* possession of their vehicles and that constructive possession prevents the vehicles from becoming property of the estate.[28] These courts have in essence stripped away the debtors' ownership rights under the UCC[29] and have allowed lenders to rob debtors of their vehicles (e.g., repossess a vehicle worth $22,000 to satisfy a $9,300 debt).[30]

Part III explains that because some courts have incorrectly interpreted bankruptcy law by ignoring canons of statutory construction, they have permitted car title lenders to completely frustrate fundamental goals of the bankruptcy system to the detriment of unsecured creditors.[31] For example, one fundamental goal of the bankruptcy system is to treat similarly-situated creditors equally.[32] Under their own loan contracts, title lenders are secured creditors, and that means they are entitled to have their secured claims paid via the debtor's chapter 13 plan.[33] However, title lenders have persuaded some courts to treat them as pawnbrokers while ignoring the reality that the debtor is still in possession of the vehicle and still owns it.[34] Such a result gives title lenders preferential treatment over

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[26] *See infra* Part II.D.

[27] *See infra* Part II.C (analyzing bankruptcy cases in Alabama).

[28] *See infra* Part II.D.

[29] *See infra* Part II.C and D.

[30] *See infra* notes 247–284 and accompanying text.

[31] *See infra* Part III (discussing several canons of statutory construction and providing examples of how courts failed to follow these canons).

[32] *See* Redstone Fed. Credit Union v. Brown, No. 5:18-CV-00161-MHH, 2019 WL 582459, at *5 (N.D. Ala. Feb. 13, 2019) (stating that federal bankruptcy law affords to debtors "a fresh start regardless of whether they file for Chapter 7 or Chapter 13" and achieves "equality of treatment among similarly situated creditors") (citations omitted); *see also* Moses v. CashCall, Inc., 781 F.3d 63, 72 (4th Cir. 2015) ("Grounded in the Constitution, bankruptcy provides debtors with a fresh start and creditors with an equitable distribution of the debtor's assets.").

[33] *See infra* notes 65–80 and accompanying text (explaining how a title loan constitutes a secured transaction because title lenders obtain a security interest in a debtor's motor vehicle and the steps lenders take to perfect the security interest).

[34] *See infra* Parts II.C and D.

ordinary secured creditors.[35] These courts have also blocked debtors from achieving a financial "fresh start"—the other fundamental goal of the bankruptcy system—which allows debtors in chapter 13 cases to keep essential assets, such as cars and homes, while paying back their creditors.[36]

As explained fully in Part IV, if these bankruptcy courts had correctly treated title lenders as secured creditors, then debtors' unsecured creditors would have been entitled to a payment from some of the remaining equity.[37] Under the "best interest of the creditors" test, Ms. Snyder's general unsecured creditors would have been entitled to receive, as a payout through her chapter 13 plan, approximately $8,000 of the Nissan's fair market value.[38] However, because the court held that Ms. Snyder forfeited ownership of her car, the court allowed TitleMax to take her vehicle and keep the equity, and thereby circumvent the Bankruptcy Code's requirement that unsecured creditors receive a payout through the plan.[39]

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[35] *See infra* notes 351–371 and accompanying text (explaining how title lenders and auto financing lenders—the lenders that finance a consumer's purchase of a vehicle—are very similar in that they both obtain perfected security interest in the debtor's vehicle, but the debtor retains possession of it).

[36] *See* Harris v. Viegelahn, 575 U.S. 510, 513–14 (2015) (stating that "[t]he Bankruptcy Code provides diverse courses overburdened debtors may pursue to gain discharge of their financial obligations, and thereby a 'fresh start'" and explaining that debtors in Chapter 13 cases achieve a fresh start by retaining their property and obtaining court approval of their plans that require them to repay their debts over a three- to five-year period); *In re* Blendheim, 803 F.3d 477, 485 (9th Cir. 2015) ("Unlike Chapter 7 proceedings, where a [consumer] debtor's nonexempt assets are sold to pay creditors, Chapter 13 permits debtors to keep assets such as their home and car so long as they make the required payments and otherwise comply with their obligations under their confirmed plan of reorganization.").

[37] *See infra* Part IV.B.

[38] *See infra* notes 371–87 and accompanying text. *See generally In re* Guillen, 972 F.3d 1221, 1224 (11th Cir. 2020) ("The test measures unsecured creditors' recovery under a Chapter 13 plan against what those creditors would have received in a hypothetical Chapter 7 liquidation. The bankruptcy court must find the recovery under the plan to be at least as great as what those creditors would have received in the liquidation."). For further discussion, see *infra* Part IV.B.

[39] TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 924 (Bankr. S.D. Ga. 2022) (stating that "the Court finds that nothing in the Bankruptcy Code permits a Chapter 13 debtor to modify a title pawn contract under Georgia law by treating the pawnbroker as a secured creditor[.]"). *But see generally Matter of* Wickstrom, 113 B.R. 339, 349 (Bankr. W.D. Mich. 1990) ("A fundamental purpose of the bankruptcy laws is to distribute

Such a court holding allows car title lenders to be treated not only *better than* any other secured creditor but to also rob general unsecured creditors of a payout they were entitled to receive under bankruptcy law.[40] A first-year law student can easily recognize that the title lending industry has persuaded some courts to essentially ignore traditional contract law principles by giving the non-breaching party a windfall (e.g., a car worth $22,000) instead of expectation damages, which would place the non-breaching party in the position of full performance (e.g., $9,300).[41]

Part V proposes solutions to prevent car title lenders from obliterating the debtors' fresh start and robbing unsecured creditors of their just payout in chapter 13 cases.[42] Car title loans are considered predatory loans because they carry triple-digit interest rates and are due in full, via a single balloon payment, within 30 days.[43] Part V recommends specific revisions to the bankruptcy statute at issue to make clear that a title lender must have actual physical possession of a debtor's vehicle prior to the debtor's bankruptcy filing to prevent the vehicle from coming into the estate.[44] Under the proposed revision, if the lender only has possession of the vehicle's certificate of title, then the lender cannot satisfy the bankruptcy statute at issue.[45] That would mean that the debtor's vehicle would belong to the bankruptcy estate, and the debtor would have the ability to use her

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property pro rata to creditors; the statute would become seriously deficient if construed to allow a creditor or a transferee of property to defeat its purpose and obtain an advantage over other creditors").

[40] *See infra* Part IV.B.

[41] *See generally* Jennifer S. Martin, *Opportunistic Resales and the Uniform Commercial Code*, 2016 U. ILL. L. REV. 487, 506 (2016) (stating "courts tend to label as windfalls only those gains that are so unjust they must be avoided or disgorged" (quoting Christine Hurt, *The Windfall Myth,* 8 GEO. J. L. & PUB. POL'Y 339, 345 (2010)); *see also infra* notes 251–284 and accompanying text (explaining how the court's holding in *Snyder* allowed the title lender to circumvent Article 9 of the UCC and take the debtor's car and keep all the surplus equity).

[42] *See infra* Part V.

[43] *See infra* Part V.B; *see also*, *e.g.*, *In re* Lewis, No. 18-31573, 2019 WL 2158832, at *1–4 (Bankr. W.D. La. May 16, 2019) (stating that the case involved "a predatory lender which charged an annual percentage rate equal to 209.81% for a loan secured by a vehicle" and holding that the title lender, Money Mayday Loans, Inc., egregiously violated bankruptcy law and the UCC when it forged documents to make it appear it had sold the debtor's repossessed vehicle and refused to return the vehicle to the debtor).

[44] *See infra* Part V.B.

[45] *See infra* notes 401–410 and accompanying text.

chapter 13 plan to pay the lender's allowed secured claim while simultaneously keeping her car.[46] Also, through the chapter 13 plan, the debtor's general unsecured creditors would receive, as a payout, a portion of the debtor's equity in the car.[47] Thus, the two fundamental goals of the bankruptcy system would be met because (1) the creditors would be treated equitably and receive a distribution in accordance with bankruptcy law and (2) the individual debtor would receive a fresh start, a new financial beginning with her motor vehicle.[48]

I. AUTO TITLE LENDERS CLAIM TO HAVE RIGHTS BEYOND THOSE AFFORDED TO SECURED CREDITORS

Auto title lenders rely on their written contracts to conveniently claim to have extensive rights as secured creditors under the UCC and as pawnbrokers under state pawnshop laws.[49] Before explaining how that is possible, this Article provides below a brief overview of auto title loans.[50]

A. AUTO TITLE LOANS ARE EASY TO OBTAIN, BUT VERY DIFFICULT TO REPAY

Since the 1990s, auto title lenders have grown into a billion-dollar industry by marketing their loans as a short-term solution to consumers desperate for cash to deal with a financial crisis.[51] In a typical auto title loan,

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[46] *See infra* notes 162–180 and accompanying text (explaining how a debtor can use a chapter 13 plan, as Congress intended, to repay secured creditors will retaining assets, such a car, that a necessary for the debtor's rehabilitation).

[47] *See infra* notes 372–389 and accompanying text.

[48] *See In re* Wagner, No. ADV 08-2242 BM, 2009 WL 8556812, at *2 (Bankr. W.D. Pa. Sept. 15, 2009 ("Bankruptcy has two fundamental purposes, one equitable and the other rehabilitative. On the one hand, it provides an efficient means for efficient and equitable distribution of a debtor's assets to creditors. On the other, it is a device for providing a debtor with a 'fresh start' by relieving the debtor of outstanding debts and permitting the debtor to reorganize his or her affairs.") (citing Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 251 (3d Cir. 2001))); *infra* Part IV.

[49] *See infra* Part I.B (explaining how title loans constitute secured transactions under Article 9 of the UCC) and *infra* Part I.C (discussing the differences in state pawnshop laws and explaining when a title loan constitutes a pawn transaction).

[50] *See infra* notes 51–63 and accompanying text.

[51] *See* Martin & Adams, *supra* note 1, at 49–50; CONSUMER FEDERATION OF

a consumer gets approved for loan, usually within minutes, after proving her ownership of a vehicle outright or proof that she owes only a small amount on a prior loan.[52] In either case, the title lender usually only lends an amount equal to a fraction of the value of the vehicle, to ensure that a large amount of equity exists to satisfy the debt if the vehicle is later repossessed and sold.[53] When the title lender issues the loan, the consumer signs a writing that grants the lender a security interest in the vehicle.[54] The lender then takes the vehicle's certificate of title and, after noting its interest on the certificate, the lender files the certificate with the state's motor vehicle department in order to perfect its interest.[55] The taking of the certificate of title has huge implications, as later explained in this Article.[56]

AMERICA, CAR TITLE LOAN REGULATION (November 16, 2016), available at https://consumerfed.org/wp-content/uploads/2017/01/11-16-16-Car-Title-Loan-Regulation_Chart.pdf (hereinafter CAR TITLE LOAN REGULATION).

[52] *See* Martin & Adams, *supra* note 1, at 47–48 (describing how consumers can obtain a title loan within minutes and without undergoing a credit check); E. Napoletano, *What Are the Easiest Loans to Get?*, U.S. NEWS & WORLD REPORT, Mar. 23, 2023 (identifying car title loans as one of the quickest consumer loans to obtain but describing them as a "double-edged sword").

[53] In a 2010 opinion, the U.S. Court of Appeals for the Eleventh Circuit recognized the predatory nature of car title loans:

> [These loans] are the latest, fast-growing form of high cost, high risk loans targeting cash strapped American consumers. Storefront and online lenders advance a few hundred to a few thousand dollars based on the titles to paid-for vehicles. Loans are usually for a fraction of the vehicle's value and must be repaid in a single payment at the end of the month. Loans are made without consideration of ability to repay, resulting in many loans being renewed month after month to avoid repossession. Like payday loans, title loans charge triple digit interest rates, threaten a valuable asset, and trap borrowers in a cycle of debt.

Midwest Title Loans, Inc. v. Mills, 593 F.3d 660, 662 (7th Cir. 2010) (quoting Jean Ann Fox & Elizabeth Guy, *Driven into Debt: CFA Car Title Loan Store and Online Survey* 1 (Nov. 2005) www.consumerfed.org/pdfs/Car_Title_Loan_Report_111705.pdf); *see also* Michael S. Barr, *Banking the Poor*, 21 YALE J. REG. 121, 164–66 (2004).

[54] *See*, *e.g.*, *In re* Schwalb, 347 B.R. 726, 733 (Bankr. D. Nev. 2006).

[55] *See, e.g.*, *Mills*, 593 F.3d at 663 (describing how a title lender perfected its security interest in a debtor's vehicle by filing the vehicle's certificate with Indiana Bureau of Motor Vehicles and explaining that by surrendering a clean certificate of title, the debtor provided proof of ownership and that no other creditor had a lien or claim against the vehicle).

[56] *See infra* Part I.B.

Title lenders do not assess the consumer's ability to repay the loan but structure the loan's repayment terms in a manner that make repayment of the loan difficult, and sometimes impossible, for many consumers.[57] For instance, title lenders charge triple-digit interest rates averaging 300 percent, or more, per annum.[58] Although some lenders allow consumers to pay off the loan in roughly four installments, the majority of lenders require consumers to pay back their loans *in full* in *one single* payment, also known as a balloon payment, within 30 days.[59]

Because the majority of consumers cannot afford to pay the loan in a single balloon payment by the initial due date, they usually enter into a cycle of paying fees, called rollover or refinancing fees (collectively, "rollover fees"), that essentially extend the loan's due date for additional 30 days but do *not* reduce the principal owed.[60] In several states with laws aimed at limiting rollovers and imposing other restrictions, title lenders often skirt these laws by disguising their rollover practices and claiming their loans are something else.[61]

If the consumer fails to pay the full amount owed or fails to pay

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[57] *See* Martin & Adams, *supra* note 1, at 47–48; *see also Mills*, 593 F.3d at 662.

[58] *See* Martin & Adams, *supra* note 1, at 48.

[59] *See, e.g.*, Wis. Auto Title Loans, Inc. v. Jones, 714 N.W.2d 155, 160 (Wis. 2006) (discussing a borrower's title loan, which was due in less than 30 days and required a single payment of $1,197.08, which included a finance charge of $243.08).

[60] *See, e.g.*, TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 902 (Bankr. S.D. Ga. 2022) (stating that Ms. Snyder paid TitleMax rollover fees for nearly two years). The rollover trap may actually be by design. *See*, *e.g.*, Margaret Coker, *Inside the Controversial Sales Practices of the Nation's Biggest Title Lender*, PROPUBLICA, Jan. 19, 2023, https://www.propublica.org/article/inside-sales-practices-of-biggest-title-lender-in-us (reporting that two former managers at TitleMax locations stated that they were trained to urge borrowers to continue making interest payments only and not to pay off the loans).

[61] For example, Nevada has a consumer protection law that limits title loans to a term of a maximum of 210 days, prohibits rollovers, and caps the interest rate lenders are allowed to charge. *See, e.g.*, Dep't of Bus. & Indus., Fin. Institutions Div. v. TitleMax of Nevada, Inc., 495 P.3d 506, 510 (Nev. 2021). TitleMax engaged in a practice of issuing a "new" loan at the end of the initial 210-day period and increased the interest rate above the rate allowed under state law, but TitleMax claimed that this new loan was not a refinancing in violation of state law. *Id.* at 507–08. The Supreme Court of Nevada disagreed. *Id.* at 512 (holding that TitleMax's practice amounted to a refinancing of its title loans in violation of Nevada where the practice involved "the same lender and the same borrower" and the principal amount was given to the borrower only once); Briana Erickson, *Nevada Says TitleMax Used Refinanced Loans to Skirt State Law*, LAS VEGAS REV. J. (May 12, 2021).

another rollover fee, then the lender has the right to repossess the consumer's car.[62] Data show that title lenders repossess vehicles from one out of five consumer borrowers, and current technologies make it easy for them to locate and remotely disable the vehicles.[63] Based on the foregoing, auto title loans are considered predatory and, as discussed fully in Part III, should not be able to rely on variations in state law to defeat Congress's intent to provide, via chapter 13 cases, a uniform national remedy for consumers to repay their debts.[64]

B. BORROWERS GRANT AUTO TITLE LENDERS SECURITY INTERESTS IN THEIR VEHICLES

When consumers borrow money from a title lender, they may not realize it but they are agreeing to a transaction that is enforceable under the UCC.[65] The writing signed by the consumer is often titled "pawn ticket"

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[62] *See* Martin & Adams, *supra* note 1, at 48–49 ("Repossessions are rampant and to aid in the process, lenders usually request copies of car keys, and some lenders install a GPS tracking device so they can find and repossess the car.") (citations and footnotes omitted).

[63] *See* Ann Baddour, Jamie Tegeler-Sauer, & Deborah Fowler, Tex. Appleseed, Payday and Auto Title Lending in Texas 3 (2016), https://www.texasappleseed.org/sites/default/files/Payday-Auto-Title-Lending-Tx_MktOv-Trends2012-2015Rev.pdf ⟦https://perma.cc/4C3B-YYYF⟧ (discussing repossession data). *See generally*, Press Release, Advocates Praise Governor Pritzker for Protecting Consumer Financial Security, Call for Further Action, WOODSTOCK INST., Mar. 30, 2020, https://woodstockinst.org/media/press-release/press-release-advocates-praise-governor-pritzker-for-protecting-consumer-financial-security-call-for-further-action/ (announcing that Illinois Governor JB Pritzker had issued Executive Order 2020-16, a COVID-19 pandemic related order, which placed a temporary moratorium on vehicle repossessions and use of "starter interrupters, or 'kill switches,' through which a lender can remotely stop a borrower from being able to start a car or truck after falling behind on payments").

[64] *See infra* Part III (analyzing how some bankruptcy courts have erroneously relied on state pawnbroker statutes to hold that consumer debtors have forfeited ownership of their vehicles to title lenders in chapter 13 cases).

[65] The average consumer is not likely to realize they are granting the lender a security interest because the paper document they sign often is not entitled "security agreement." *See*, *e.g.*, *In re* Schwalb, 347 B.R. 726, 733 (Bankr. D. Nev. 2006) (stating that the debtor signed a pawn ticket, which was a pre-printed "simple 5–inch–by–83–inch form, with text front and back" and had on the frontside "blanks for describing the property pawned, for the amount of the loan and for the repayment date").

and usually uses the term "pawn."[66] As explained below, however, a car title loan meets all the UCC's requirements to constitute a secured transaction and, therefore, grants the lender a security interest in the consumer's vehicle.[67]

Article 9 of the UCC governs a "secured transaction," which is a transaction that creates a "security interest" in personal property.[68] For a security interest to be enforceable, three requirements must be satisfied.[69] First, the creditor must give value.[70] Second, the debtor must have rights in the personal property offered as collateral.[71] Finally, the debtor must either sign or authenticate a security agreement describing the collateral *or* must give the creditor possession of the collateral.[72]

Because Article 9 of the UCC applies to a secured transaction, regardless of its form, it applies to car title loans even if the writing is labeled a "pawn ticket."[73] The title lender gives value in the form of a cash loan to the debtor,[74] who, as the owner of the vehicle, has rights in the collateral.[75] Finally, the debtor authenticates a security agreement (e.g., signs the pawn ticket) identifying the vehicle and stating that the lender retains an interest in it to secure the debtor's repayment of the loan.[76] As held by the

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[66] *See, e.g.*, *id.* at 733.

[67] *See, e.g.*, *id.* at 748–49.

[68] U.C.C. § 9-109(a)(1).

[69] *Id.* § 9-203(b).

[70] *Id.* § 9-203(b)(1).

[71] *Id.* § 9-203(b)(2).

[72] *Id.* § 9-203(b)(3)(A). Note that although a creditor could take possession to obtain an enforceable interest under subparagraph (B), it is not necessary for the security interest to attach if the debtor authenticates a security agreement under subparagraph (A). *Id.* § 9-203(b)(3)(A)–(B).

[73] *See, e.g.*, *In re* Womack, 616 B.R. 420, 426 (Bankr. M.D. Ala. 2020) (discussing the parties' written contract, entitled "Pawn Ticket and Security Agreement," and holding the contract "agreement unequivocally evidence[d] both Debtor's and TitleMax's intentions to create a security interest" under Alabama's version of the UCC), *aff'd sub nom.* TitleMax of Ala., Inc. v. Womack, No. 2:20-CV-416-WKW, 2021 WL 1343051 (M.D. Ala. Apr. 9, 2021), *aff'd sub nom. In re* Womack, No. 21-11476, 2021 WL 3856036 (11th Cir. Aug. 30, 2021).

[74] *See, e.g., In re* Schwalb, 347 B.R. 726, 741 (Bankr. D. Nev. 2006) (applying Nevada's version of the UCC and finding that "[v]alue is present in the form of the loans extended by [the title lender] to Ms. Schwalb") (Judge Bruce Markell).

[75] *See, e.g., id.*

[76] *See, e.g., id.* at 741–42.

bankruptcy court in *In re Schwalb*, the debtor's signed pawn ticket providing that "you are giving a security interest" constitutes an authenticated security agreement and no formalistic wording is required.[77] Because the title lender does not take possession of the vehicle, the lender's interest is, therefore, characterized as a *non*-possessory security interest.[78]

To ensure that it has a legal interest that is enforceable against third parties, including a bankruptcy trustee, the title lender must perfect its security interest by a method permitted under Article 9.[79] To perfect an interest in a motor vehicle owned by an individual, the secured party notes its interest on the vehicle's certificate of title and then files the certificate with the state's bureau or department of motor vehicles ("DMV").[80]

Title lenders attempt to make a big deal out of their possession of a certificate of title.[81] However, as acknowledged by several courts, under the UCC, the lender's possession of the vehicle's certificate of title *alone* does *not* constitute perfection of a security interest and *never* constitutes possession of the motor vehicle itself.[82] More importantly, a title lender's perfection—that is, filing of the certificate of title with the DMV—does *not* give the lender an ownership interest.[83] As in all secured transactions, the

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[77] *Id.* at 742 (stating that the lender's "insistence on formal words of grant or transfer is inconsistent with the structure and intent of Article 9" of the UCC).

[78] U.C.C. § 9-203(b)(3) (stating that the debtor authenticates a writing describing the collateral). *See, e.g.*, *Schwalb*, 347 B.R. at 737; *In re* Hambright, 635 B.R. 614, 660–61 (Bankr. N.D. Ala. 2022).

[79] *See, e.g.*, *Schwalb*, 347 B.R. at 752; *Hambright*, 635 B.R. at 644 (stating the general rule that "a public filing by the secured party or some other action is required to perfect the secured party's Article 9 security interest").

[80] U.C.C. § 9-311(a)(2). *See, e.g.*, *Hambright*, 635 B.R. at 623 ("A secured party's possession of a certificate of title that records the secured party as the first lienholder is necessary to render the secured party's first-priority security interest in the subject vehicle invulnerable to interests subsequently created by the record owner."); *Schwalb*, 347 B.R. at 746 (applying Nevada's version of UCC Article 9 and stating that usually "the only way to perfect an interest in a car or other vehicle is to note the secured party's interest on the certificate of title").

[81] *See, e.g.*, *Schwalb*, 347 B.R. at 747; *Hambright*, 635 B.R. at 666.

[82] *See, e.g.*, *Schwalb*, 347 B.R. at 746 (discussing the purpose of statutes governing certificates of title and stating that "[t]he upshot of this is that mere possession of the certificate of title is of little legal significance under Article 9; that possession neither creates a security interest nor perfects one otherwise granted in the vehicles").

[83] *See, e.g.*, *id.* at 746 (noting that the title lender's possession of the certificates of title did not divest the debtor of her ownership interest in the vehicles); *Hambright*, 635 B.R. at 657 (same).

title lender receives a security interest only, not an ownership interest. In other words, if the debtor is the owner of the collateral at the time the security interest is granted, the debtor remains the owner.[84] The title lender's interest as noted on certificate of title gives *notice* to the world that the lender has a perfected security interest, [85] but the debtor continues to own his or her vehicle and has the right to retain possession of the vehicle.[86]

In addition to the debtor's ownership and possessory rights, the UCC confers on the debtor several rights that cannot be waived in order to protect creditors from overreaching and getting debtors to agree to terms deemed unfair.[87] For instance, although a secured party has the right to repossess the car *after* the debtor's default, the debtor is protected from a

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[84] Sometimes, a car title lender will have a state's DMV reissue the certificate of title with the lender listed as the owner of the debtor's vehicle. *See generally Schwalb*, 347 B.R. at 747 (stating that issuance of a certificate of title facilitates the lender's perfection but does not transfer ownership to the lender). However, reissuance alone does not transfer ownership of the vehicle to the title lender. *See Hambright*, 635 B.R. at 657 (stating that although the title lender received a new certificate of title naming it as a lienholder, that new certificate did not transfer ownership of the debtor's vehicle to the title lender).

[85] *See, e.g.*, *Hambright*, 635 B.R. at 657 (stating that to transfer ownership, the new certificate of title must be accompanied by a bill of sale or other evidence indicated a voluntary absolute transfer of ownership).

[86] *See, e.g.*, *id.* at 670–75 (holding that the title lender did not obtain an ownership in the debtor's vehicle as she was still in possession of the vehicle on the petition date and debtor had not executed any document that constituted a voluntary transfer of ownership in her vehicle).

[87] *See* U.C.C. § 9-602 (containing several rights and responsibilities that are non-waivable). The drafters of Article 9 were concerned about overreaching by secured parties, as noted in the official comments to § 9–602:

> [O]ur legal system traditionally has looked with suspicion on agreements that limit the debtor's rights and free the secured party of its duties. As stated in former Section 9–501, Comment 4, "no mortgage clause has ever been allowed to clog the equity of redemption." The context of default offers great opportunity for overreaching. The suspicious attitudes of the courts have been grounded in common sense. This section, like former Section 9–501(3), codifies this long-standing and deeply rooted attitude. The specified rights of the debtor and duties of the secured party may not be waived or varied except as stated.

Cmt. 2, U.C.C. § 9-602.

violent repossession.[88] That means if a debtor has defaulted, a secured party can repossess the collateral only if it can do so without breaching the peace.[89] And any contract provision that states a lender has an unfettered right to repossess would be unenforceable.[90]

Besides requiring peaceful repossessions, the UCC requires lenders to sell the collateral in a commercially reasonable manner;[91] however, the UCC affords to debtors the right to redeem their property by paying the secured party the full amount owed.[92] The debtor's right of redemption cannot be waived prior to default.[93] As discussed later, this redemption right is important if the court relies on a state's pawnbroker statute to determine the right of redemption because the pawnbroker statute typically has a shorter time period for a debtor to redeem than under Article 9 of the UCC. [94] Moreover, title lenders argue that if a debtor fails to timely pay the full redemption amount required under the pawnbroker statute, the debtor forfeits ownership of the vehicle.[95] However, under the UCC, if a debtor fails to redeem and the vehicle is eventually sold, the debtor has several rights, including the right to notice of disposition prior to the sale,[96] the right

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[88] *See* U.C.C. § 9-609(b) (requiring that a secured party conduct a self-help repossession without breaching the peace).

[89] *See id.*

[90] *Id.* § 9-602(6) (providing that a debtor cannot waive "Section 9-609," which "imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace").

[91] Under the UCC, the secured creditor must dispose (*e.g.*, sell) of the property in a commercially reasonable manner and, if the secured creditor fails to do so, it may be held liable for monetary damages under the UCC. *See id.* §§ 9-610(b), 9-625. This duty cannot be waived. *See id.* § 9-602(7).

[92] *Id.* § 9-623(a) ("A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral.").

[93] *Id.* § 9-602(11); *see, e.g.*, C.I.T. Corp. v. Haynes, 212 A.2d 436, 438 (Me. 1965) (holding that the purported waiver of right of redemption in a conditional sales contract was unenforceable as against public policy).

[94] Generally speaking, a debtor has the right to redeem prior to the sale of the collateral. *See* U.C.C. § 9-623(c). However, a pawnbroker statute usually gives a debtor only 30 days, after default, to redeem the property. *See, e.g.*, ALA. CODE § 5-19A-6. *But see infra* Part I.D. and accompanying text (explaining that the debtor's redemption rights should be based on the UCC).

[95] *See, e.g.*, ALA. CODE § 5-19A-6 (2023) ("Pledged goods not redeemed within 30 days following the originally fixed maturity date shall be forfeited to the pawnbroker and absolute right, title, and interest in and to the goods shall vest in the pawnbroker.").

[96] U.C.C. § 9-614 (mandating the contents of notices of disposition in cases where the

to an accounting of the distribution of the proceeds from the sale,[97] and the right to any surplus funds remaining after the sale.[98]

Notably, the UCC affords debtors specific protections against strict foreclosure—that is, protection that prevents lenders from claiming to assume ownership of a debtor's property in full satisfaction of the debt owed.[99] Car title lenders usually have in their contracts a provision stating that the debtor forfeits all rights in the vehicle if the debtor fails to pay the loan by the due date, and, if applicable, by the end of any statutorily provided grace period.[100] By forfeiture, the title lender means the debtor loses all rights, including the right to any surplus money after the lender sells the vehicle.[101] Under the UCC, this title loan forfeiture clause is in reality an unlawful *pre*-default strict foreclosure clause.[102]

Under the UCC, strict foreclosure cannot be forced onto a *consumer* debtor after her default.[103] In other words, the consumer debtor must consent, after default, in writing to a strict foreclosure.[104] However, through their contract provisions, title lenders are essentially attempting to circumvent the UCC's prohibitions on strict foreclosure—i.e., forfeiture—and the UCC's requirement that the lender distributes to the debtor any

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debtor is a consumer).

[97] *See id.* § 9-616.

[98] *Id.* § 9-615(d).

[99] *Id.* § 9-620; *see also In re* Schwalb, 347 B.R. 726, 750 (Bankr. D. Nev. 2006) (citing to Nevada's version of the UCC and stating that "a secured party's ability to engage in a strict foreclosure with respect to a consumer is heavily circumscribed.").

[100] *See, e.g.*, *Schwalb*, 347 B.R. at 749 (stating that title lender claimed to own the debtors' vehicles "through operation of the forfeiture clause in its pawn ticket").

[101] *Id.* at 739 (rejecting lender's argument that it owned the car outright under pawnbroker law and could keep any surplus).

[102] U.C.C. § 9-602(10).

[103] *Id.* § 9-620(c) (stating that debtors may only consent to acceptance of collateral in full or partial satisfaction of their debt obligations after default); *see also Schwalb*, 347 B.R. at 748–51 (recognizing that the forfeiture provisions in the title loan contract at issue would have "obliterated ⟦[debtor's]⟧ right to prohibit ⟦[the title lender's]⟧ strict foreclosure of her interest in the vehicles, as well as her right to redeem the vehicles after default and repossession").

[104] *See* U.C.C. § 9-620(c) (describing the steps to achieve a debtor's consent). Note that in consumer transactions, the UCC prohibits a secured party from taking the collateral if "60 percent of the principal amount of the obligation secured has been paid in the case of a non-purchase-money security interest in consumer goods"). *See id.* § 9-620(e)(2).

surplus funds remaining after the sale of the car.[105]

Courts that allow title lenders to take the vehicle and keep the equity have in effect eviscerated (1) a debtor's protection against strict foreclosure, (2) a debtor's right of redemption, and (3) a debtor's right to surplus funds. These rights are significant protections afforded debtors under the UCC.[106]

In summary, because car title loans are secured transactions under the UCC, borrowers who obtained these loans have all the foregoing rights.[107] Notably, the UCC has been adopted in every state and, therefore, affords all debtors the foregoing rights.[108] However, as demonstrated later, car title lenders have persuaded numerous courts to rely only on pawnbroker statutes to the exclusion of UCC Article 9. This approach severely limits the rights of borrowers and often results in them forfeiting ownership of their vehicles.[109]

C. RELYING ON STATE PAWNBROKER LAWS, TITLE LENDERS CLAIM OWNERSHIP OF DEBTORS' VEHICLES AFTER LOAN DEFAULT

Although the UCC affords debtors basic protections from acts and

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[105] *See, e.g.*, TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 924 (Bankr. S.D. Ga. 2022) (allowing the title lender to take the debtor's 2016 Nissan Rogue—then worth $22,000—and to keep all the equity after selling it). *But see, e.g.*, *In re* Hambright, 635 B.R. 614, 624 (Bankr. N.D. Ala. 2022) (holding "that, under the Alabama UCC, Alabama common law, and the Alabama Certificate of Title Act, [the debtor] held both record and equitable title to the [v]ehicle on the bankruptcy petition date . . . as well as UCC surplus and redemption rights" and that Alabama's common law and UCC voided any pre-default contract provisions that purport to destroy the debtor's redemption and surplus equity rights or protections against strict foreclosure).

[106] *See, e.g.*, *Schwalb*, 347 B.R. at 734–45 (collecting cases that hold a debtor in a pawn transaction retains the rights afforded to debtors under Article 9).

[107] *See supra* notes 83–106 and accompanying text.

[108] Kenneth Misken, *Survey of Legislation: Revised Article 9*, 24 U. ARK. LITTLE ROCK L. REV. 415, 415 (2002).

[109] *See, e.g.*, *In re* Hamilton, 635 B.R. 877, 881 (Bankr. S.D. Ga. 2022) (failing to cite to or even mention the UCC and holding that the debtor forfeited ownership of her car by failing to pay the amount owed to redeem her car); Jenkins v. TitleMax of Ga. Inc. (*In re* Jenkins), 641 B.R. 282 (Bankr. M.D. Ga. 2022) (failing to discuss or cite to any provision of the UCC and holding that debtor forfeited ownership of her car seized by the TitleMax after the debtor filed bankruptcy).

practices deemed unfair in secured transactions,[110] title lenders attempt to circumvent these protections by contending that their loans qualify as pawn transactions.[111] Even though only 16 states permit car title lending,[112] title lenders either misrepresent state laws or seek to exploit gaps in those laws to claim that their loans are pawn transactions in order to assert ownership of the vehicles when debtors fail to pay their loans.[113]

In a traditional pawn transaction, the pawnbroker gives money to a customer, who in exchange gives actual possession of a tangible item (e.g., guitar) that he or she owns to the pawnbroker.[114] If the loan is repaid on time, the pawnbroker gives the item back to the customer.[115] If the customer does not pay the loan either (1) by the loan's due date or (2) by an additional grace period allowed under state law to redeem the item, the pawnbroker gets to keep the item.[116] In other words, the borrower forfeits ownership if he or she fails to repay the loan before the end of the redemption period.[117]

Car title loans are *not* traditional pawn transactions because the borrower keeps possession of the tangible good—the motor vehicle.[118] Some

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[110] *See supra* notes 83–106 and accompanying text.

[111] *See infra* notes 112–136 and accompanying text.

[112] CAR TITLE LOAN REGULATION, *supra* note 51. Currently, 26 states either strictly regulate or ban car title lending altogether. *Id.*; *In re* Hambright, 635 B.R. 614, 653 n.21 (Bankr. N.D. Ala. 2022).

[113] *See infra* notes 145–157 and 208–283 and accompanying text (discussing cases in which title lenders argue that their loans constitute pawn transactions under state pawnbroker statutes even though the title lenders do not take possession of the debtors' property).

[114] *See* 47 C.J.S. INTEREST & USURY § 577 (2022 update) (citing sources that do not consider car title loans as traditional pawn transactions because the debtor-pawnor retains possession of his or her property).

[115] *Id.*

[116] *Id.*

[117] *Id.* ("One who pawns property does not transfer ownership to a third party, but pledges it, transferring temporary possession of the property and a security interest in it; the pledgor still owns the property and title does not pass to the pawnbroker unless the pledgor fails to redeem the pledge by repaying the loan and any applicable charges within the specified loan period.").

[118] *See generally id.* ("'Pawning' one's goods differs from lending against them; in a typical pawn, a debtor deposits goods with the pawnbroker and receives money in return, and if the customer does not 'redeem' the pawn within a specified time, the power to sell the goods deposited automatically passes to the pawnbroker, who takes the loss if subsequent sale of the goods does not cover the loan, but keeps the surplus if the goods are

courts have correctly interpreted pawnbroker statutes to exclude car title loans.[119] For instance, in *In re Schwalb*, the title lender argued that its loan to the debtor constituted a pawn transaction even though Nevada's pawnbroker statute was silent about whether a motor vehicle qualified as item that could be pawned.[120] Noting that the title lender did *not* take possession of the debtor's vehicles when it issued her a loan, the court described the title lender's argument as "unavailing" and based on mere "extrapolations of existing state and local regulations."[121] The *Schwalb* court held that because the title lender did not actually take possession of the debtor's vehicles, the loan did not constitute a pawn transaction but instead constituted a secured transaction under the UCC.[122] This holding prevented the lender from succeeding with its argument that the debtor had forfeited ownership of her vehicles under the pawnbroker statute.[123] That meant that the debtor had the right to retain possession of her vehicles while she paid the debts she owed to the lender, as a secured party, through her chapter 13 plan.[124]

Like Nevada's pawnbroker statute, Alabama's pawnbroker statute does not mention motor vehicles, but several courts in Alabama have incorrectly interpreted the statute.[125] Alabama law provides that a pawn transaction is "[a]ny loan on the security of pledged goods or any purchase of pledged goods on condition that the pledged goods are *left with the pawnbroker* and may be redeemed or repurchased by the seller for a fixed price within a fixed period of time."[126] Alabama law also defines "pledged goods" as "[t]angible personal property other than choses in action,

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sold for more than the money lent.").

[119] *See, e.g.*, *In re* Schwalb, 347 B.R. 726, 736, 739 (Bankr. D. Nev. 2006).

[120] *Id.* at 734.

[121] *Id.* at 736.

[122] *Id.* at 739–41 (holding that a title loan constituted a secured transaction because all the elements for attachment of a security interest had been met).

[123] *Id.* at 752 (holding that UCC Article 9's default standards applied, not the forfeiture provisions in the pawn tickets signed by the debtor).

[124] *Id.* at 758 (holding that the debtor's plan had to pay the title lender's allowed secured claim "over time, an amount equal to the present value of the replacement cost of each vehicle").

[125] *See, e.g.*, *In re* Thompson, 609 B.R. 443, 449–50 (M.D. Ala. 2019), *aff'd sub nom.* Thompson v. TitleMax of Ala., Inc., 621 B.R. 267 (M.D. Ala. 2020), and *aff'd sub nom.* Daniel v. TitleMax of Ala., Inc., 621 B.R. 278 (M.D. Ala. 2020).

[126] ALA. CODE § 5-19A-2(3) (2023) (emphasis added).

securities, or printed evidences of indebtedness, which property is purchased by, *deposited with*, *or otherwise actually delivered into the possession of, a pawnbroker in connection with a pawn transaction*."[127]

Based on the plain language of the above definitions, a motor vehicle cannot be a pledged good in Alabama, and a car title loan cannot constitute a pawn transaction because the debtor retains possession of the vehicle.[128] Yet several Alabama courts have ignored the plain language and have concluded that vehicles subject to title loans constitute pledged goods and that title loans qualify as pawn transactions.[129] As discussed in Part II.C of this Article, these erroneous interpretations have also led courts to incorrectly conclude that the debtors have forfeited ownership of their vehicles in bankruptcy cases.[130] As a result, these courts have caused debtors to lose reliable transportation and deprived debtors of the ability manage their debts in bankruptcy proceedings.[131]

While Alabama and other states have traditional pawnbroker statutes that require the broker to take possession of the item pawned, Georgia appears to be the only state with a pawnbroker statute expressly

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[127] ALA. CODE § 5-19A-2(6) (2023) (emphasis added).

[128] *See, e.g.*, *In re* Hambright, 635 B.R. 614, 671 (Bankr. N.D. Ala. 2022) (holding that TitleMax's title loan did not constitute a pawn transaction because "the Alabama Pawnshop Act requires a pawnbroker's possession of pledged goods and a pawnor's dispossession of pledged goods").

[129] *See, e.g.*, *Thompson*, 609 B.R. at 449–50 (holding that because TitleMax had possession of the vehicles' certificates of title, the title loans constituted transactions covered by Alabama's pawnbroker statute even though the debtors retained possession of their vehicles). *But see Hambright*, 635 B.R. at 650–57 (analyzing Alabama's pawnbroker statute and the Alabama's version of the UCC and holding that "[a] certificate of title is not a substitute for the vehicle described therein"). A few state authorities have issued statements making it clear that car title loans are not covered by the state's pawnbroker statute. *See, e.g.*, Advisory Notice, Comm'r of Fin. Regulation, Vehicle Title Loan Providers in the State of Maryland Are Subject to Consumer Lending Laws (Aug. 30, 2017), https://www.dllr.state.md.us/finance/advisories/advisory-vehicletitleloan.pdf (announcing, in 2017, an advisory notice issued by the Maryland Commissioner of Financial Regulation defining "vehicle title loan" and clarifying that a vehicle title loan is not a pawn transaction under the state's pawnbrokers statute).

[130] *See infra* notes 210–246 and accompanying text.

[131] *See supra* notes 65–106 and accompanying text (describing the UCC's debtor protection against strict foreclosure and the debtor's UCC rights, including the right of redemption and right to surplus funds).

stating that motor vehicles are included in the definition of pledged goods.[132] Specifically, Georgia's pawnbroker statute states that "pledged goods" are defined as "tangible personal property, including, without limitation, *all types of motor vehicles or any motor vehicle certificate of title*, which property is purchased by, deposited with, or otherwise actually delivered into the possession of a pawnbroker in connection with a pawn transaction."[133] Moreover, a lender's possession of a vehicle's certificate of title constitutes constructive possession of the motor vehicle itself even though the debtor has actual possession of the vehicle.[134] Thus, if a title lender takes possession of the vehicle's certificate of title, the title loan qualifies as a pawn transaction in Georgia even though the debtor retains actual possession of the vehicle at the time the loan is issued.[135] A debtor's failure to pay the redemption amount by the end of the grace period results in the debtor's forfeiture of ownership in the vehicle under Georgia law.[136]

D. IN ALMOST ALL STATES, THE DEBTORS' UCC RIGHTS, INCLUDING THE RIGHT OF REDEMPTION, ARE NOT REPLACED BY PAWNBROKER LAWS

At this point, one may question whether it is possible that a state's pawnbroker statute has displaced or preempted that state's version of UCC Article 9 and its protections afforded to debtors in a secured transaction.[137] The answer in most states is "no"![138] As stated previously, Article 9 of the

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[132] After researching and reviewing numerous cases, the author could not find any state, other than Georgia, that expressly states motor vehicles can constitute pledged goods.

[133] GA. CODE ANN. § 44-12-130(5) (2023) (emphasis added).

[134] *Id.*

[135] *Id.*; GA. CODE ANN. § 44-12-130(3) (2023). Mississippi's law is similar in that the title lender is not obligated to take possession of the vehicle. *See* MISS. CODE. ANN. § 75-67-403 ("The title pledge lender shall take physical possession of the certificate of title for the entire length of the title pledge agreement, but shall not be required to take physical possession of the titled personal property at any time.").

[136] *See* GA. CODE ANN. § 44-14-403(b)(3) (2023) (providing for the automatic extinguishment of any "ownership interest of the pledgor or seller . . . as regards the pledged item" upon the debtor's failure to redeem prior to expiration of the statutory grace period for redeeming).

[137] *See, e.g.*, *In re* Schwalb, 347 B.R. 726, 738–39 (Bankr. D. Nev. 2006); *In re* Hambright, 635 B.R. 614, 649–50 (Bankr. N.D. Ala. 2022).

[138] *See infra* notes 140–154 and accompanying text.

UCC has been adopted in every state.[139] However, generic language contained in UCC § 9-201(b) allows each state to modify the general rule that transactions subject to UCC Article 9 may also be subject to other state statutes establishing different rules for consumers.[140] The generic language of UCC § 9-201(b) reads as follows:

> (b) [[Applicable consumer laws and other law.]] A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and [[insert reference to (i) any other statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and (ii) any consumer-protection statute or regulation]].[141]

As an example of a variation, compare the generic language above to Illinois' version of § 9-201(b), where a transaction subject to UCC Article 9 "is subject to any applicable rule of law, statute, or regulation which establishes a different rule for consumers …. including the Illinois Pawnbroker Regulation Act."[142] In contrast to Illinois, neither Alabama[143] nor Georgia[144] lists the state's pawnbroker statute among those that may displace or preempt that state's version of UCC Article 9.

In fact, in *In re Schwalb*, Judge Bruce Markell identified only three states—California, Illinois, and North Carolina—that have excluded some or all of the state's pawnbroker laws from being subject to UCC Article 9.[145]

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[139] *See* Misken, *supra* note 108.

[140] *See* U.C.C. § 9-201(b).

[141] *See id.*

[142] *See* 810 ILL. COMP. STAT. 5/9-201(b)(7) (2023).

[143] Alabama's version of UCC § 9-201(b) has the same generic language. *Compare* U.C.C. § 9-201(b) *with* ALA. CODE § 7-9A-201(b) (2023) ("A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and to (i) any other statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and (ii) any consumer-protection statute or regulation.").

[144] *See* GA. CODE ANN. § 11-9-201(b) (2023) (providing that in Georgia: "Applicable consumer laws and other law. A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and is subject to Chapter 3 of Title 7; Chapter 4 of Title 7; and Article 1 of Chapter 1 of Title 10."). None of the forgoing references is to Georgia's pawnbroker statute. *See generally* GA. CODE ANN. § 44-12-130(5) (2023) (defining pledged goods and pawn transactions).

[145] *See, e.g.*, *In re* Schwalb, 347 B.R. 726, 738–39 (Bankr. D. Nev. 2006) (citing to CAL.

Citing to Judge Markell's decision in *Schwalb*, Judge Jennifer Henderson in *In re Hambright* also recognized the fact that Alabama's version of § 9-201(b) makes no reference to the state's pawnbroker statute and that, therefore, the "Alabama Pawnshop Act does not repeal or replace any provision of the Alabama UCC."[146] As a result, both courts *in Schwalb* and in *Hambright* are correct in recognizing that, except in a few states, the debtor has continuing rights under UCC Article 9 even when the debtor has also signed a car title loan that is subject to a pawnbroker statute. [147]

Unfortunately, the U.S. Court of Appeals for the Eleventh Circuit and some bankruptcy courts incorrectly believe the pawnbroker statutes in Alabama and Georgia are essentially the same.[148]

By analyzing the relevant statutory provisions in each state's pawnbroker statutes, one can see that the two statutes are not comparable at all. Motor vehicles do not qualify as pledged goods in Alabama, [149] but they do in Georgia.[150] An auto title loan does not qualify as a pawn transaction in Alabama,[151] but it does in Georgia.[152] A lender's possession of a vehicle's certificate of title gives the lender constructive possession of the vehicle itself under Georgia law,[153] but not under Alabama law.[154]

COMM. CODE § 9201(b) (2006) (exempting California's Pawnbroker Law, CAL. FIN. CODE §§ 21000 et. seq. from Article 9)); 810 ILL. COMP. STAT. § 5/9–201(b)(5) (2006) (exempting Illinois' Pawnbroker Regulation Act); N.C. GEN. STAT. 25–9–201(b) (2006) (exempting North Carolina's Pawnbrokers Modernization Act of 1989 (Chapter 91A of North Carolina's General Statutes)).

[146] *See In re* Hambright, 635 B.R. 614, 649–50 (Bankr. N.D. Ala. 2022) (citing ALA. CODE § 7-19A-201(b)).

[147] *See Schwalb*, 347 B.R at 740–42; *Hambright*, 635 B.R. at 656–60.

[148] *In re* Womack, No. 21-11476, 2021 WL 3856036, *3 (11th Cir. Aug. 30, 2021). Both *Snyder* and *Hambright* have criticized *Womack*'s conclusion that Alabama and Georgia pawn law are indistinguishable and have explained the sharp distinctions between the two states' pawn laws. *See* TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 920–21 (Bankr. S.D. Ga. 2022); *Hambright*, 635 B.R. at 654.

[149] *See infra* notes 208–246 and accompanying text and ALA. CODE § 5-19A-2(6) (2023).

[150] *See* GA. CODE ANN. § 44-12-130(5) (2023).

[151] *See* ALA. CODE § 5-19A-2(3) (2023).

[152] *See* GA. CODE ANN. § 44-12-130 (2023).

[153] *See* TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 923 (Bankr. S.D. Ga. 2022) (failing to cite any provision of the UCC even though the court acknowledges TitleMax obtained a security interest).

[154] *See In re* Hambright, 635 B.R. 614, 649–50 (Bankr. N.D. Ala. 2022) (citing ALA. CODE § 7-19A-201(b)).

As explained further below, the Eleventh Circuit and several bankruptcy courts have failed to see the differences between the states' pawnbroker statutes.[155] Moreover, these courts have incorrectly relied on *state* laws to interpret a provision in federal bankruptcy law and, as a result, have stripped debtors of ownership of their vehicles and have deprived unsecured creditors of their share of an equity payout based on the value of the vehicles.[156] While the discussion thus far has focused on bankruptcy court decisions in Alabama and Georgia, one should be aware that title lending is problematic nationwide for consumer debtors and military personnel, in light of the numerous civil and criminal enforcement actions brought against title lenders.[157]

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[155] *See, e.g.*, *In re* Jones, 544 B.R. 692 (Bankr. M.D. Ala. 2016); *infra* notes 210–246 and accompanying text.

[156] *See infra* Part II.B and accompanying text.

[157] For example, in 2023, the U.S. Consumer Financial Protection Bureau ordered TMX Finance, the parent company of TitleMax and several related corporate entities, to pay a $10 million fine for allegedly violating several laws, including the Military Lending Act (MLA), when it illegally issued thousands of car title loans to members of the military over a five-year period and charged interest rates substantially in excess of the 36 percent interest rate allowed under the MLA. *See* Press Release, Con., Fin. Prot. Bureau, CFPB Orders TitleMax to Pay a $10 Million Penalty for Unlawful Title Loans and Overcharging Military Families, Feb. 23, 2023, https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-titlemax-to-pay-a-10-million-penalty-for-unlawful-title-loans-and-overcharging-military-families/. Similarly, attorneys general have obtained either settlements with or judgments against car title lenders allegedly illegally issuing loans to residents in the District of Columbia and several states, including Colorado, Illinois, Massachusetts, Michigan, North Carolina, Pennsylvania, Texas, and Virginia. *See, e.g.*, Press Release, Mass. Att'y Gen., AG Healey Secures Over $900,000 Including Debt Relief and Restitution for Consumers From Auto Title Lending Company (June 29, 2022), https://www.mass.gov/news/ag-healey-secures-over-900000-including-debt-relief-and-restitution-for-consumers-from-auto-title-lending-company (stating the state attorney general sued a the title lender that had allegedly issued Massachusetts residents approximately 2,745 title loans, which "contained usurious interest rates of up to 300 percent" and reported that the lender had agreed to a settlement under which the lender would pay $500,000 in restitution and penalties, forgive in excess of $400,000 in outstanding loans, and remove all liens on motor vehicles that served as collateral for the loans); Press Release, Pa. Office of the Att'y Gen.l, Attorney General Josh Shapiro Announces Victories in Cases Against Out-of-State Car Title Lenders (Nov. 10, 2021) https://www.attorneygeneral.gov/taking-action/attorney-general-josh-shapiro-announces-victories-in-cases-against-out-of-state-car-title-lenders/ (stating that the AG obtained a state court judgment against a title loan company making loans with most interest

II. TO GAIN OWNERSHIP OF DEBTORS' VEHICLES, CAR TITLE LENDERS MAINTAIN A DUPLICITOUS POSITION IN CHAPTER 13 BANKRUPTCY CASES

Although car title loans qualify as secured transactions in every state[158] but only as pawn transactions in a few states,[159] car title lenders often assert that they are deserving of favorable treatment as pawnbrokers once their borrowers file for bankruptcy relief.[160] Before discussing the details of this erroneous assertion, this section provides a high-level overview of bankruptcy law so one can understand how bankruptcy law affords effective relief to debtors while requiring them to pay their secured debts.[161]

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rates over 200 percent and some higher than 360 percent and reporting a federal court victory against a different car title company which sued the AG in an attempt to block a consumer protection investigation); Press Release, Co. Att'y Gen., AG Coffman Announces Significant Relief for Victims of Illegal Auto Title Loan Scheme (Nov. 30, 2016), https://stopfraudcolorado.gov/about-consumer-protection/press-releases/2016-11-30-000000/ag-coffman-announces-significant-relief.html (stating that the state AG secured a judgment against a group running illegal title loan schemes in Colorado with some interest rates exceeding 300 percent and reporting that defendants must pay restitution, penalties, release liens filed against consumers' vehicles, and return titles to every affected consumer in Colorado); Press Release, Mich. Dep't of Att'y General, AG Nessel Announces $1.8M Settlement from Predatory Online Lender (Aug. 26, 2020) https://www.michigan.gov/ag/News/press-releases/2020/08/26/AG-Nessel-Announces-1-8M-Settlement-from-Predatory-Online-Lender (stating the Michigan Attorney General reached a settlement for $1.8 million with a foreign online title loan car company that did business in Michigan with interest rates often in excess of 231 percent APR and reporting that the company also pled no contest to 21 counts of larceny by false pretenses); Press Release, North Carolina Att'y Gen., Attorney General Josh Stein Wins More than $600,000 in Financial Relief for NC Borrowers (May 28, 2021) https://ncdoj.gov/attorney-general-josh-stein-wins-more-than-600000-in-financial-relief-for-nc-borrowers/ (announcing that the NC Attorney General won a default judgment against a title loan company that abruptly shut its doors and announcing that borrowers would have their outstanding loan balances canceled and liens filed against their vehicles released).

[158] *See supra* notes 65–78 and accompanying text.

[159] *See supra* notes 112–129 and accompanying text.

[160] *See infra* Part II.B.

[161] *See infra* Part II.A.

A. CHAPTER 13 BANKRUPTCY CASES AFFORD CONSUMER DEBTORS A FRESH START BY ALLOWING THEM TO REPAY THEIR DEBTS WHILE RETAINING THEIR PROPERTY

Consumer debtors typically file for bankruptcy relief under either chapter 7 or chapter 13.[162] Both chapters afford debtors automatic stay protection[163] and a chance at obtaining a "fresh start," a new financial life.[164]

Because the debtors at issue in this Article want to keep their vehicles, a chapter 13 case offers debtors specific options that are not available in a chapter 7 case, thereby making a chapter 13 case preferable to a chapter 7 case.[165] A chapter 13 bankruptcy case requires debtors to pay creditors with perfected security interests up to the value of the collateral securing their claims, but it allows debtors to keep the secured property (e.g.,

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[162] *See* 11 U.S.C. § 109(b) and 109(e).

[163] *See* 11 U.S.C. § 362. Debtors with title loans benefit immensely from the automatic stay because the stay prevents car title lenders from repossessing the debtors' vehicles unless the lenders first file a motion providing a legal justification for the court to lift the automatic stay. Despite the Bankruptcy Code's prohibition on non-bankruptcy debt collection actions, title lenders have occasionally been held liable for violating the automatic stay. *See*, *e.g.*, *In re* Lewis, No. 18-31573, 2019 WL 2158832, at *12 (Bankr. W.D. La. May 16, 2019) (holding that the title lender, Money Mayday Loans, Inc., egregiously violated bankruptcy law when, after repossessing the debtor's car, the lender forged documents to make it appear it had sold the debtor's vehicle and refused to turn over the vehicle to the debtor).

[164] *See* Harris v. Viegelahn, 575 U.S. 510, 513–14 (2015) (stating that "Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets" while "Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three- to five-year period"). For an explanation of the fresh start, see generally BANKR. PRACTICE HANDBOOK § 4:2 (2d ed. 2019).

[165] *See generally* Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 412 (2009) ("Bankruptcy provides a debtor with many economic benefits, such as the ability to stop collection efforts and retain property, discharge monetary obligations, and have property exempted (or keep basic assets) necessary for the debtor's fresh start.") (citations and footnotes omitted). In a chapter 7 case, consumer debtors keep their exempt assets and surrender all non-exempt assets for a liquidation sale to take advantage of a discharge of general unsecured debts, which a debtor usually receives within four months of filing the chapter 7 case. *See* BANKR. PRACTICE HANDBOOK § 4:2 (2d ed. 2019).

car).[166] Moreover, in a chapter 13 case, debtors are allowed to modify most secured debts to make their debt payments feasible.[167] This modification option enables debtors to restructure their secured debts into affordable monthly payments over several years so they can keep big-ticket items, such as homes and cars.[168] The interest payable to the secured creditor is typically at a low rate and is "based on ensuring the chapter 13 plan pays the creditor the present value of its secured claim—not the parties' contract interest rate."[169]

Based on the foregoing, chapter 13 affords debtors with title loans the perfect type of debt relief.[170] Title lenders have perfected secured claims on the debtors' vehicles;[171] however, the debtors owe debts that are too large to pay back in a single payment as required in a typical title loan.[172] A

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[166] 11 U.S.C. § 1306(b)(2) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."). *See Harris*, 575 U.S. at 514 ("Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three-to five-year period."); *In re* Hambright, 635 B.R. 614, 634–35 (Bankr. N.D. Ala. 2022) (stating that "the allowed amount of an undersecured creditor's secured claim may be "stripped down" to the value of the creditor's collateral in a chapter 13 plan (provided the debtor is eligible for a discharge)) (citing 11 U.S.C. §§ 506(a) and 1325(a)(5); *In re* Paschen, 296 F.3d 1203, 1205–07 (11th Cir. 2002)). In certain instances, a chapter 13 debtor may be required to pay the full value of a claim secured by a motor vehicle, regardless of the value of the motor vehicle. *See* 11 U.S.C. § 1325(a)(9) (hanging para.).

[167] 11 U.S.C. § 1322(b)(2) (providing that chapter 13 plans may "modify the rights of holders of secured claims"); *see also In re* Northington, 876 F.3d 1302, 1309 (11th Cir. 2017) (citations omitted). Debtors are not allowed to modify the monthly contractual payments on loans that are secured by a mortgage on the debtor's primary residence. 11 U.S.C. § 1322(b)(2).

[168] *In re* Michael, 699 F.3d 305, 318 (3d Cir. 2012) ("Generally, the benefits available to a debtor under a Chapter 13 plan of reorganization are the saving of a residence from foreclosure, the curing a mortgage delinquency over time with more affordable payments, the maintaining of possession and use of an automobile or other personal property, and the automatic stay.").

[169] *Hambright*, 635 B.R. at 635 (citing 11 U.S.C. § 1325(a)(5)(B)(ii); Till v. SCS Credit Corp., 541 U.S. 465, 474 (2004)).

[170] *See, e.g.*, *In re* Schwalb, 347 B.R. 726, 750–59 (Bankr. D. Nev. 2006) (holding that lender's title loans constituted a secured transaction, not a pawn transaction, and confirming debtor's chapter 13 plan which proposed to pay back the loans as allowed secured claims at interest rate of 10 percent over a three-year plan).

[171] *See, e.g.*, *id.* at 759.

[172] *See, e.g.*, *id.* (stating that the debtor owed the title lender $16,600 for two loans and confirming debtor's plan payout of $530.28 per month over a 36-month plan).

chapter 13 case empowers the debtor to keep her vehicle while paying off the lender's claim in affordable monthly payments via a three-to-five-year payment plan approved by the bankruptcy court.[173] Because title loans usually comprise a fraction of the vehicles' value, title lenders have oversecured claims and are entitled to have their claims paid in full—at a low interest rate, not the triple-digit interest rates required under the contracts.[174]

Consider, for example, the aforementioned case in which TitleMax objected to Ms. Snyder's chapter 13 plan.[175] Because her vehicle was worth $22,000 (more than the debt owed), she proposed a plan to pay TitleMax the full amount owed (nearly $9,300) via monthly payments of $350 at an interest rate of 6 percent, not TitleMax's contracted triple-digit interest rate.[176] The court held that Ms. Snyder had forfeited, prepetition, ownership of her vehicle.[177] If Ms. Snyder had been allowed to make all required debt payments, including the payments owed to TitleMax, the court would have entered a discharge order—thereby permitting Ms. Snyder to emerge from bankruptcy with her car and begin her financial fresh start.[178] The bottom line is that chapter 13 is supposed to allow debtors, like Ms. Snyder, to achieve the fresh start by retaining possession of the vehicle while paying back their debts at a reasonable pace (e.g., over three years) and in amounts that are affordable (e.g., $350 per month).[179]

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[173] *Id.*

[174] *See, e.g.*, *id.* (stating that the lender's practice was to lend cash in amounts equaling 30 percent of the vehicle's value and confirming the debtor's plan which propose to pay the title lender's secured claims totaling $16,600 at interest rate of 10 percent, not the triple-digit loan contract rate, and permitting the debtor to keep two vehicles worth a total of $36,500).

[175] *See supra* notes 2–11 and accompanying text.

[176] TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 906 (Bankr. S.D. Ga. 2022).

[177] *Id.*

[178] *See generally* 11 U.S.C. § 1328(a) (stating that "the court shall grant the debtor a discharge of all debts provided for by the plan" after the debtor has completed the payments required under the plan); Gorman v. Cantu, 713 F. App'x 200, 201 (4th Cir. 2017) ("If the bankruptcy court approves the plan and the debtor completes the payments, then the remaining debt is discharged and the debtor receives a fresh start.") (citing 11 U.S.C. §§ 1325, 1328).

[179] For examples of cases allowing debtors a chance at a fresh start, *see, e.g., In re* Schwalb, 347 B.R. 726, 746 (Bankr. D. Nev. 2006); *In re* Hambright, 635 B.R. 614, 657

The above textbook portrait of how chapter 13 should afford consumer debtors relief is achievable, according to the Eleventh Circuit Court of Appeals, *only* if the initial maturity date for the original loan has not expired.[180] However, if the debtor pays even one rollover fee to extend the loan's due date, some courts, including the Eleventh Circuit, hold that the debtor forfeits ownership of the vehicle. This approach allows title lenders to obliterate the consumer debtor's chance at a fresh start.[181]

B. THE BANKRUPTCY ESTATE INCLUDES THE DEBTOR'S OWNERSHIP IN THE VEHICLE

The obliteration of the debtor's chance at a fresh start begins with title lenders getting courts to misinterpret § 541(a)(1) of the Bankruptcy Code.[182] For a debtor to be able to retain property in a chapter 13 case, that property must qualify as "property of the estate."[183] Section 541(a)(1) defines "property of the estate," in relevant part, as "all legal or equitable interests of the debtor in property as of the commencement of the case."[184] This section is broadly interpreted to comply with congressional intent to

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(Bankr. N.D. Ala. 2022).

[180] *See, e.g.*, TitleMax of Ala., Inc. v. Womack (*In re* Womack), No. 21-11476, 2021 WL 3856036, at *1 (11th Cir. Aug. 30, 2021) (holding that because the debtor's contract with TitleMax was current—that is, the first 30-day period had not expired under Alabama's pawnshop law—the debtor could file a chapter 13 bankruptcy plan, treating the title loan due as a secured claim to be paid, in full and with interest, over the life of the plan); *see also In re* Arnett, 634 B.R. 1078 (Bankr. M.D. Ala. 2021) (following *Womack* but deciding that a debtor was current on a loan when she filed a chapter 13 petition shortly after refinancing the title loan and holding that TitleMax's contractual provision stating that the debtor did not intend to file a bankruptcy petition was unenforceable), *vacated and remanded sub nom.* TitleMax of Ala., Inc. v. Arnett, No. 2:21-CV-00840-RAH, 2022 WL 3587339 (M.D. Ala. Aug. 22, 2022).

[181] *See infra* notes 248–283 and accompanying text.

[182] For example, the majority in an appellate court case did not acknowledge that the debtor's ownership interest caused the vehicle to become part of the bankruptcy estate under § 541(a)). *See* TitleMax v. Northington (*In re* Northington), 876 F.3d 1302, 1313–20 (11th Cir. 2017) (stating that the debtor had a redemption interest, which became property of the estate on the petition date but later disappeared from the estate due to the debtor's failure to pay the redemption amount). The dissenting opinion disagreed, stating that the vehicle itself became property of the estate. *Id.* at 1323. *See infra* notes 275–283 and accompanying text.

[183] *See* 11 U.S.C. § 541(a).

[184] *See id.* § 541(a)(1).

bring in a wide range of property into the estate as long as the debtor has legal or equitable interests in the property.[185] Bankruptcy courts look to state law to determine what property rights the debtor may have.[186]

As explained in Part I.B, Article 9 of the UCC has been adopted in all 50 states and, therefore, constitutes the state law that is relevant in describing what rights debtors have under a car title loan, which constitutes a secured transaction.[187] As previously explained, if a creditor obtains and perfects a security interest in a debtor's property, that interest does not constitute an ownership interest in the debtor's property.[188] That perfected interest gives title lenders several rights, including the right to use self-help to peacefully repossess the collateral *after* the debtor's default, and the right to be paid ahead of others if its perfected security interest is in first position.[189] In almost all the reported bankruptcy cases involving title lenders, the debtors are in possession of their vehicles at the time of the bankruptcy filing.[190] That means on the date of the filing of their bankruptcy cases, debtors still have ownership and possessory rights under the UCC.[191] Therefore, bankruptcy courts should have easily concluded that

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[185] *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 204–05 (1983) (citing H.R. Rep. No. 95–595, 367 (1977)).

[186] Butner v. United States, 440 U.S. 48, 55 (1979).

[187] *See supra* notes 85–91 and accompanying text.

[188] *See, e.g.*, *In re* Schwalb, 347 B.R. 726, 753 (Bankr. D. Nev. 2006) (holding that the title loan did not constitute a pawn transaction under Nevada law, that the loan's forfeiture provisions were unenforceable, and that the lender was a "at best" a secured creditor under the UCC and the debtor was the owner of her vehicles).

[189] *See supra* notes 68–105 and accompanying text (describing the title lender's right to repossess and right to dispose of collateral under the UCC).

[190] All the car title loan cases discussed in this Article involve debtors that have actual possession of their vehicles. Courts have identified numerous cases in which the debtor has possession, but TitleMax has taken an inconsistent position; that is, has accepted being treated as a secured creditor—not the owner of the vehicles. *See, e.g.*, *In re* Deakle, 617 B.R. 709, 713 (Bankr. S.D. Ala. 2020) (identifying several cases and stating "TitleMax is a bankruptcy-savvy creditor which often accepts treatment as a secured creditor for its title pawns.") (footnotes and citations omitted), *aff'd sub nom.* TitleMax of Ala., Inc. v. Deakle, No. CV 1:20-335-JB-N, 2021 WL 1759302 (S.D. Ala. Mar. 31, 2021), *appeal dismissed sub nom. In re* Deakle, No. 21-11447-JJ, 2021 WL 8315636 (11th Cir. Nov. 29, 2021).

[191] *See, e.g.*, *Schwalb*, 347 B.R. at 353 (stating that the lender was a secured creditor under the UCC and holding that the debtor was the owner of her vehicles on the petition date).

the debtors' vehicles constituted property of the estate under § 541(a)(1).[192]

Instead of including debtors' vehicles as estate property under § 541(a)(1), some courts rely on § 541(b) to use state pawnbroker statutes to exclude the debtors' vehicles from property of the bankruptcy estate.[193] While the Bankruptcy Code broadly defines property of the estate in § 541(a)(1), it lists a few specific exclusions from the bankruptcy estate in § 541(b).[194] Generally, courts interpret § 541(b)'s specific exclusions from the bankruptcy estate narrowly.[195]

The exclusion relevant to this Article is contained in § 541(b)(8) and was added to the Bankruptcy Code in the 2005.[196] To support their assertion that debtors' vehicles are excluded from the bankruptcy estate, i.e., that the vehicles are not property of the estate, title lenders rely in part on § 541(b)(8), which provides:

> (b) Property of the estate does *not* include . . .
>
> (8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor *pledged or sold tangible personal property* (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—
>
> (A) the *tangible personal property is in the possession of the pledgee* or transferee;
>
> (B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the

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[192] *See generally In re* Hambright, 635 B.R. 614, 675 (Bankr. N.D. Ala. 2022) (holding that the debtor's estate had at a minimum a right to possession in the vehicle and that right caused the vehicle to become estate property).

[193] *See, e.g.*, *Schwalb*, 347 B.R. at 353 (stating that the lender was a secured creditor under the UCC and holding that the debtor was the owner of her vehicles on the petition date).

[194] *See* 11 U.S.C. § 541(b).

[195] *See generally* Gladstone v. U.S. Bancorp, 811 F.3d 1133, 1139–40 (9th Cir. 2016) ("In contrast to the broad scope of § 541(a), § 541(b) sets forth 'narrow exceptions to the interests of the debtor which are not considered as property of the estate.'") (quoting Southtrust Bank of Ala., N.A. v. Thomas (*In re* Thomas), 883 F.2d 991, 995 (11th Cir. 1989)).

[196] 11 U.S.C. § 541(b)(8) was enacted by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005, Pub.L.109–8, 119 Stat. 23.

> property at a stipulated price; *and*
>
> (C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b)[.][197]

Based on the language in § 541(b)(8), a debtor's vehicle is excluded from property of the estate, if the title lender has possession of the tangible personal property under subparagraph (A), the loan is a non-recourse loan under subparagraph (B), and the right of redemption has expired under the contract or state law under subparagraph (C).[198] Subparagraph (A) makes no reference to state law at all.[199] Title loan litigation usually focuses on subparagraphs (A) and (C).[200]

A leading treatise stated that although the word "pawn" is not used in § 541(b)(8), that section's "fundamental purpose is to declare that certain tangible personal property pledged to pawnbrokers is excluded from property of the estate."[201] Courts appear to have no problem recognizing this section applies to pledged goods; that is, goods actually left in the in the possession of a pawnbroker.[202] However, as explained below, several courts have decided erroneously that title lenders have constructive possession of a debtor's motor vehicle under state law and that such

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[197] 11 U.S.C. § 541(b)(8) (emphasis added). As at least one bankruptcy court noted, § 541(b)(8)'s language "is broad; it never explicitly uses the word 'pawn.' Nevertheless, 'its principal, if not, application is to pawn transactions between a borrower and a pawnbroker licensed under state law.'" TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 919 (Bankr. S.D. Ga. 2022) (quoting Drake, Bonapfel & Goodman, *Chapter 13 Practice and Procedure Vol. 2*, § 14:16, p. 73 (2021 ed.)).

[198] *See* 11 U.S.C. § 541(b)(8)(A)–(C).

[199] *Id.* § 541(b)(8)(A) (requiring that "the tangible personal property is in the possession of the pledgee or transferee").

[200] Subparagraph (B) of § 541(b)(8) is not at issue because title loans are structured to be non-recourse, which means the debtor does not have an obligation to repay the loan. *See, e.g.*, *In re* Northington, 876 F.3d 1302, 1306 (11th Cir. 2017) (stating that auto title loans are non-recourse loans).

[201] *See* ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 541.22D (15th ed. 2005).

[202] *See, e.g.*, *In re* Mosher, No. 07–60007–13, 2007 WL 1487399 (Bankr. D. Mont. May 17, 2007) (holding that pawned firearms left in the possession of the pawnbroker did not constitute estate property so that the automatic stay did not apply to them).

possession is superior to the debtor's actual possession of the vehicle.[203]

The discussion now turns to bankruptcy cases filed in Alabama and Georgia because those states are hotbeds of litigation over whether a debtor's vehicle is excluded from the property of the estate.[204] Note that TitleMax is the litigant in most of these cases presumably because it has sizable operations in those two states.[205] The discussion below begins with Alabama, a state with a traditional pawnbroker statute that does not mention motor vehicles.[206] The discussion then shifts to Georgia, the state with the only pawnbroker statute that expressly includes motor vehicles as goods that can be pledged.[207]

C. IGNORING THE PLAIN LANGUAGE OF THE ALABAMA PAWNSHOP ACT, BANKRUPTCY COURTS IN ALABAMA EXCLUDE THE DEBTOR'S VEHICLE FROM THE ESTATE

The Alabama Pawnshop Act (APA) provides, in relevant part, that a pawn transaction is a "loan on the security of pledged goods or any purchase of pledged goods on condition that the pledged goods are *left with the pawnbroker* and may be redeemed or repurchased … for a fixed price within a fixed period of time."[208] Alabama law defines "pledged goods," in relevant part, as "[*t*]*angible personal property … deposited with, or otherwise actually delivered into the possession of, a pawnbroker in connection with a pawn transaction*."[209]

Although both definitions above require that the lender take actual possession of the pawned item, only one bankruptcy court in Alabama has recently discussed at length and correctly applied the plain language of the APA.[210] Rejecting TitleMax of Alabama's argument that it owned a debtor's car, the bankruptcy court in *In re Hambright* held that the APA

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[203] *See infra* notes 208–283 and accompanying text.

[204] *See, e.g.*, *Northington*, 876 F.3d at 1302; *In re* Womack, No. 21-11476, 2021 WL 3856036 (11th Cir. Aug. 30, 2021); *In re* Hambright, 635 B.R. 614 (Bankr. N.D. Ala. 2022); TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901 (Bankr. S.D. Ga. 2022).

[205] *See* Erickson, *supra* note 61 (stating that TitleMax operates in 16 states and has more than 1,000 store locations).

[206] *See infra* Part II.C.

[207] *See infra* Part II.D.

[208] *See* ALA. CODE § 5-19A-2(3) (emphasis added).

[209] *See id.* § 5-19A-2(6) (emphasis added).

[210] *See In re* Hambright, 635 B.R. 614, 650–57 (Bankr. N.D. Ala. 2022).

did not apply because it "says nothing at all about title loans or certificate of title pledges" and the "[v]ehicle is not a pledged good within the meaning of the [APA]" in light of the fact that the debtor's vehicle "was not left with TitleMax or otherwise delivered into the possession of TitleMax." [211]

While the bankruptcy court in *Hambright* correctly applied the plain language of the APA, many other bankruptcy courts in Alabama have ignored its plain language and ruled in favor of title lenders.[212] For instance, in *In re Jones*,[213] TitleMax asserted that a debtor had forfeited ownership of her vehicle under the APA after she failed to pay the redemption amount.[214] Prior to filing for bankruptcy relief, the debtor had obtained from TitleMax a $4,000 loan with a due date of 30 days and had surrendered to TitleMax her vehicle's certificate of title.[215] Thereafter, she paid a rollover fee of $399 to extend the loan's due date.[216] Before the end of the second 30-day period, the debtor realized she could not repay the loan in a single balloon payment, filed a chapter 13 petition, and proposed a plan to pay TitleMax $4,500 at 4.25 percent interest via monthly plan payments of $89.[217]

Unfortunately, the bankruptcy court followed a complex path filled with incorrect interpretations of several relevant laws and held that the debtor forfeited ownership of her vehicle. Therefore, she could not pay TitleMax through her chapter 13 plan.[218]

The bankruptcy court quoted the relevant definitions of the APA but did not acknowledge or appear to realize that the APA does not apply

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[211] *Id.* at 659–60.

[212] *See, e.g.*, *In re* Eldridge, 615 B.R. 657 (Bankr. S.D. Ala. 2020), *aff'd*, 2021 WL 1759301, at *4 (S.D. Ala. 2021) (relying on an appellate court decision applying Georgia's pawnbroker statute, not the Alabama Pawnshop Act, and holding that debtor's vehicle was a pledged good covered by Alabama law and that debtor's ownership and redemption rights had expired prepetition even though debtor still possessed his vehicle on the petition date). For further discussion of courts incorrectly applying Alabama law, see *infra* notes 213–246 and accompanying text.

[213] *See In re* Jones, 544 B.R. 692 (Bankr. M.D. Ala. 2016).

[214] *Id.* at 701.

[215] *Id.* at 696.

[216] *Id.*

[217] *Id.*

[218] *Id.* (explaining that the court's analysis had to consider provisions of the Bankruptcy Code, the Alabama Pawnshop Act, the Alabama UCC, and the Alabama Uniform Certificate of Title and Antitheft Act).

to motor vehicles in title loan transactions because the vehicles remain in the possession of the debtors.[219] The bankruptcy court instead cited to *Floyd v. Title Exchange and Pawn of Anniston, Inc.*, a 1993 opinion from the Alabama Supreme Court which held that an automobile certificate of title was capable of possession as "tangible personal property" and, therefore, could become a pledged good under the APA.[220] In a later opinion, *Ex parte Coleman*, the Alabama Supreme Court made it clear that *Floyd* did *not* hold "that a pawnbroker's possession of the keys ⟦or⟧ an endorsed title certificate to a car constitutes the pawnbroker's constructive possession of the car itself."[221] Instead, the Alabama Supreme Court stated that "*Floyd* holds *only* that 'an automobile certificate of title is 'tangible personal property' within the meaning of the Alabama Pawnshop Act.'"[222]

The bankruptcy court in *Jones* never cited to *Ex parte Coleman* or stated that the Alabama Supreme Court had made it clear that *Floyd* narrowly held that a paper certificate of title is tangible personal property under the APA.[223]

The bankruptcy court then incorrectly applied a UCC provision that covers a "document of title."[224] Specifically, the court quoted § 2-401(3) of the UCC, which provides, in pertinent part, that "⟦i⟧f the seller is to deliver a tangible document of title, title passes at the time when and the place where he delivers such document."[225] The *Jones* court never explained why it looked to Article 2, which covers the sale of goods.[226] A car title loan does not involve the sale goods; the debtor is using her vehicle as collateral to obtain a loan.[227] Therefore, Article 2 did not apply at all and was irrelevant

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[219] *Id.* at 696–97.

[220] *Id.*

[221] *Ex parte* Coleman, 861 So. 2d 1080, 1086 (Ala. 2003) (emphasis added) (quoting Blackmon v. Downey, 624 So. 2d 1374, 1376 (Ala. 1993)).

[222] *Coleman*, 861 So. 2d at 1086.

[223] *See generally In re* Jones, 544 B.R. 692 (Bankr. M.D. Ala. 2016). *Cf. In re* Hambright, 635 B.R. 614, 661 (Bankr. N.D. Ala. 2022) (citing to Floyd v. Title Exch. & Pawn of Anniston, Inc., 620 So. 2d 576, 579 (Ala. 1993)) (stating that "the Alabama Supreme Court expressly rejected a title lender's theory of constructive possession, calling into question the viability of this theory").

[224] *Jones*, 544 B.R. at 698.

[225] *Id.* (quoting UCC provision as adopted in Alabama at ALA. CODE § 7–2–401(3)(a)).

[226] *See generally id.*

[227] *Id.* at 698.

in the *Jones* case.[228] Moreover, Article 2 defines "document of title," and that definition does *not* include a certificate of title for a motor vehicle.[229] Thus, the *Jones* court incorrectly imported the above Article 2 provision in order to justify its erroneous legal analysis.[230] The court stated that the lender's possession of the certificate of title enabled the lender to obtain ownership of the debtor's vehicle at the point in the time when the debtor's redemption right had expired under the APA.[231]

The court continued its erroneous legal analysis by holding that the debtor, Ms. Jones, no longer held title to her vehicle on the petition date.[232] This holding was not correct in light of the fact that Ms. Jones still had possession of the vehicle and the lender never claimed that it sold the vehicle to someone else.[233] As a result, Ms. Johnson still had possessory and ownership rights in her vehicle based on the UCC. The court never mentioned the fact that Article 9 states that a secured creditor's mere possession of the certificate of title does not transfer ownership of the debtor's vehicle to the secured creditor.[234] The court then continued its flawed legal analysis by stating that the debtor only had a right of

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[228] *See generally* U.C.C. § 2-102 ("Unless the context otherwise requires, this Article ⟦2⟧ applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.").

[229] U.C.C. § 1-201(b)(16) (listing documents that constitute a document of title but not including certificates of title in that list). Under the UCC, a document of title requires the involvement of a bailee; however, title loans do not have a bailee. *See* U.C.C. § 1-201(b)(16) ("'Document of title' includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.").

[230] *Jones*, 544 B.R at 698.

[231] *Id.* at 701.

[232] *Id.*

[233] *Id.* at 695; *see also In re* Giles, 340 B.R. 543, 552 (Bankr. E.D. Pa. 2006) (recognizing that the lender had not repossessed the debtor's vehicle and holding that "⟦i⟧t follows that the ⟦d⟧ebtor retained ownership ⟦of⟧ the ⟦a⟧utomobile").

[234] *See generally Jones*, 544 B.R. at 692.

redemption on the petition date—the day she filed for bankruptcy relief.[235] Because the debtor failed to pay the full amount owed to TitleMax by the end of the redemption period, the court held that the debtor's car "dropped" out of the bankruptcy estate.[236]

Unfortunately, for the debtor, the bankruptcy court in *Jones* apparently misunderstood § 541(b)(8) and conflated subparagraph (A), which requires that the lender have possession of the tangible personal property, *with* subparagraph (C), which requires that the debtor's right of redemption has expired under the contract or state law.[237] The court made four major errors.[238] First, the court failed to recognize that the APA did not apply at all to the motor vehicle because the lender did not have possession of it.[239] Second, the court failed to recognize that, under the UCC, a creditor's possession of the certificate of title does not constitute ownership or possession of the motor vehicle itself.[240] Third, the court erroneously extrapolated from UCC Article 2 provisions that apply to the sale of goods, and incorrectly relied on them to claim the debtor lost ownership of her vehicle.[241] Fourth, the court failed to acknowledge that under the plain language of subparagraph (A) in § 541(b)(8), the lender did not have possession of the vehicle—the tangible personal property at issue.[242] Therefore, not all of the subparagraphs of § 541(b)(8) had been satisfied.[243] Because TitleMax did *not* have possession of the tangible property (i.e., the motor vehicle), Ms. Jones's vehicle *did* constitute property of the estate.[244] However, because of the court's erroneous statutory interpretations of the Bankruptcy Code and Alabama law, Ms. Jones lost ownership of her vehicle, which meant TitleMax not only had the right to

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[235] *Id.* at 701.

[236] *Id.*

[237] *Id.* at 695.

[238] *Id.* at 698.

[239] *See supra* notes 208–209 and accompanying text (quoting the relevant provisions of the APA that show that the pawned item must be left in the possession of the pawnbroker).

[240] *Jones*, 544 B.R. at 698. *See supra* notes 68–80 and accompanying text (explaining how the lender must file the vehicle's certificate of title with the state's department of motor vehicles to perfect the lender's security interest in a motor vehicle owned by an individual).

[241] *Jones*, 544 B.R. at 698.

[242] *Id.*

[243] *Id.*

[244] *Id.*

take possession of the vehicle but the right to keep all of the surplus funds after selling it[245]—a result completely antithetical to the UCC.[246]

D. COURTS IN GEORGIA INCORRECTLY HOLD THAT A TITLE LENDER HAS CONSTRUCTIVE POSSESSION OF A DEBTOR'S VEHICLE AND THE DEBTOR'S FAILURE TO REDEEM RESULTS IN THE VEHICLE'S EXCLUSION FROM THE BANKRUPTCY ESTATE

Georgia's pawnbroker statute is more industry-friendly than the statute in Alabama, and, as a result, debtors with title loans in Georgia lose ownership of their vehicles nearly all the time.[247] However, as explained below, bankruptcy courts are incorrectly relying on Georgia's pawnbroker statute to allow title lenders to have *constructive* possession of the debtors' vehicles.[248]

Georgia's pawnbroker law defines "pledged goods" as "tangible personal property, including, without limitation, all types of motor vehicles."[249] Georgia law has an additional pro-industry provision, stating that "possession of any motor vehicle certificate of title which has come into the possession of a pawnbroker through a pawn transaction made in accordance with law shall be conclusively deemed to be possession of the motor vehicle."[250]

Recall Ms. Snyder, the Georgia resident featured in the beginning of

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[245] *Id.* at 700.

[246] *See supra* notes 103–105 and accompanying text (discussing a debtor's right to surplus funds remaining after deductions to pay off secured claims and the costs of repossession and sale). The debtor's right to the surplus cannot be waived by the lender's contract. *See* U.C.C. § 9-602(9).

[247] *See infra* notes 249–283 and accompanying text.

[248] *See, e.g.*, TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 909 (Bankr. S.D. Ga. 2022).

[249] *See* GA. CODE ANN. § 44-12-130 (2021).

[250] *See id.* Georgia's industry-friendly law is the result of lobbying efforts by the title lending industry. Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. REV. 589, 654 (2000) (stating that the "industry's legislative efforts have been predominately maintained by a private nationwide title lending company based in Atlanta, Georgia called Title Loans of America, Inc." and that the "[s]tates in which TLOA has successfully supported triple-digit title loan legislation include Georgia, Florida, and Tennessee") (citations omitted).

this Article, who had listed her $22,000 Nissan as property of the estate and proposed a plan to pay TitleMax's debt in full.[251] Despite subparagraph (A) of § 541(b)(8) not making any reference to state law, the bankruptcy court held that "under Georgia law, possession of a motor vehicle certificate of title is 'conclusively deemed' to be possession of the motor vehicle itself."[252] According to the court, TitleMax's constructive possession under Georgia's pawnbroker law "satisfie[d] the § 541(b)(8)(A) requirement that the pawnbroker be in possession of tangible personal property."[253] The court then held that Ms. Snyder forfeited ownership of her Nissan because she failed to pay the nearly $9,300 required to redeem her vehicle by the end of the latest applicable redemption period.[254] Under the court's reasoning, Ms. Snyder's vehicle was no longer property of the estate at the end of the redemption period.[255] This holding allowed TitleMax to take all the equity in a vehicle worth $22,000 and, thereby, deprived Ms. Snyder of the vehicle and deprived her unsecured creditors of a large payout from that equity.[256]

The court in *Snyder* relied on a 2017 opinion from the U.S. Court of Appeals for the Eleventh Circuit in *In re Northington*—where the circuit court considered "the interplay between the … Bankruptcy Code and a Georgia statute that defines state-law property rights."[257] In that case, one of the debtors gave his vehicle's certificate of title to TitleMax in exchange for a $4,400 loan.[258] He subsequently defaulted on that loan.[259] Shortly before the redemption period ended, the debtor filed a chapter 13 bankruptcy case.[260] The debtor's proposed chapter 13 plan treated TitleMax as a secured party and proposed making monthly payments of $175, which would ultimately pay the debt in full—a loan balance of $5,036 plus 5 percent interest.[261] The plan was confirmed without any objection

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[251] *Snyder*, 635 B.R. at 909.

[252] *Id.* at 920.

[253] *Id.* (citing GA. CODE ANN. § 44-12-130(5)).

[254] *Id.* at 923.

[255] *Id.*

[256] *Id.* at 924 (granting TitleMax's motion to lift the stay, thereby allowing TitleMax to take the debtor's vehicle).

[257] *See In re* Northington, 876 F.3d 1302, 1305 (11th Cir. 2017).

[258] *Id.* at 1306.

[259] *Id.* at 1305.

[260] *Id.*

[261] *Id.* at 1306.

filed by TitleMax.[262]

After plan confirmation, TitleMax filed a motion for relief from the automatic stay alleging that it could take possession of the car on the grounds that the debtor forfeited ownership of the vehicle.[263] The bankruptcy court denied the motion relying on § 1327(a), which provides that an order confirming a chapter 13 plan fixes the rights of all parties and binds them to the terms of the plan.[264] TitleMax appealed to the district court, which upheld the bankruptcy's decision on the same grounds.[265]

In a two-to-one panel decision, the Eleventh Circuit's majority sided with TitleMax.[266] The majority cited to but never quoted any part of § 541(b)(8).[267] The majority determined that, based on Georgia's pawnbroker law, "the car and the associated right of redemption initially became part of the Bankruptcy estate."[268] The majority also discussed the 30-day grace period allowed under Georgia's pawnbroker law for a defaulting debtor to pay the amount owed to redeem the vehicle.[269] The court then held the debtor obtained an extension of Georgia's grace period by another 60 days.[270] However, because the debtor in *Northington* failed to redeem the vehicle at the end of the additional 60-day grace period, the majority held that the debtor forfeited ownership of the vehicle.[271] Thus, while the debtor's vehicle initially entered into the bankruptcy estate, the majority held that it "dropped out of the bankruptcy estate (and vested in the pawnbroker) when the prescribed redemption period lapsed[.]"[272] Because the debtor's car dropped out of his bankruptcy estate, TitleMax owned the car outright.[273] "Simply put, following the expiration of the grace period,

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[262] *Id.*

[263] *Id.*

[264] *Id.* at 1307.

[265] *Id.*

[266] *Id.* at 1317.

[267] *Id.* at 1314.

[268] *Id.* at 1305.

[269] *Id.* at 1306.

[270] *Id.* at 1313 (holding that the debtor received an additional 60-day grace period because § 541(b)(8)(C) cites to § 108(b) of the Bankruptcy Code, which grants bankruptcy debtors additional time to redeem).

[271] *Northington*, 876 F.3d at 1316.

[272] *Id.* at 1306.

[273] *Id.*

the pawnbroker didn't have a mere 'claim' on the debtor's car—it had the car itself."[274]

In a lengthy dissent, Judge Charles R. Wilson first stated "[[t]]his should be an easy case."[275] According to the dissent, TitleMax's appeal should have been barred by § 1327(a) because TitleMax had already admitted that it failed to object to the debtor's plan before it was confirmed.[276] Therefore, TitleMax should have been bound by the terms of the debtor's plan.[277] The dissent stated further that even if TitleMax had properly and timely objected to the debtor's plan, TitleMax should have lost on the merits of the case.[278] The dissent quoted § 541(b)(8) and stated that the majority confused the case's "straightforward facts by characterizing this case as one of state law deference."[279] Based on the broad language of § 541(a)(1), the dissent stated that the debtor entered bankruptcy still holding "legal title to his car and a right to redeem it . . . [[both]] became property of the bankruptcy estate on that date."[280] Moreover, the dissent stated that § 541(b)(8)(A) did not apply because the debtor retained possession of his vehicle.[281] The dissent also stated the majority's decision was incorrect because it erroneously interpreted the Bankruptcy Code to allow the car to "appear" on the petition date and then "vanish" postpetition from an estate.[282]

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[274] *Id.*

[275] *Id.* at 1317 (Wilson, J., dissenting).

[276] *Id.* at 1320 (citing 11 U.S.C. § 1327). TitleMax's attorney also told the bankruptcy judge that it was not objecting to plan confirmation. *Id.* at 1319. Later, TitleMax made the "brazen suggestion" that the bankruptcy judge "should have treated [[its]] yet to be heard motion in the stead of an actual objection [[it]] could have easily asserted but chose not to assert at the proper time." *Id.* at 1322 (quoting Lamarch v. Miles, 416 B.R. 53, 60 n. 8 (Bankr. E.D.N.Y. 2009 (internal quotations omitted). The Bankruptcy Code binds creditors to avoid "rewarding litigants who sleep on their rights by failing to object to confirmation." *Id.* (citing United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 275 (2010) (internal quotations omitted)).

[277] *Northington*, 876 F.3d at 1317 ("The Bankruptcy Code provides—and the Supreme Court and this Circuit agree—that a confirmed Chapter 13 bankruptcy plan enjoys a preclusive, binding effect.").

[278] *Id.* at 1324.

[279] *Id.* at 1323.

[280] *Id.* at 1324.

[281] *Id.* at 1324–25.

[282] *Id.* at 1324 (stating further that "[[t]]hese provisions [[in § 541(a)]] support the supplementing of the bankruptcy estate, not the disappearing of property from it").

The dissent emphasized that Congress "did not intend, and did not write the Bankruptcy Code to allow, for Georgia title pawn lenders to *invent* loopholes in order to evade the jurisdiction of the bankruptcy courts."[283]

As demonstrated in the next section, the dissenting opinion was correct. Therefore, Congress needs to act to prevent courts from incorrectly interpreting the Bankruptcy Code.[284]

III. THE COURTS' PROPER USE OF CANONS OF STATUTORY INTERPRETATION WOULD ACCOMPLISH THE OBJECTIVES OF CHAPTER 13 CASES

TitleMax and other title lenders have effectively used pawnbroker laws in Alabama and Georgia as smoke and mirrors to detract judges' attention from the plain language of the Bankruptcy Code and, thereby, obliterate the debtor's fresh start.[285] Had the Eleventh Circuit and other courts applied the plain language of § 541(b)(8)(A) and followed traditional canons of statutory interpretation, they would have held that a car title lender cannot fall within the scope of that subparagraph because the debtor remains in possession of the vehicle.[286] As fully explained below, the bankruptcy statutory provision at issue does *not* direct courts to look to state law to determine whether the lender is in possession of the vehicle,[287] and nothing in the statute compels courts to treat a title lender's purported constructive possession of the vehicle's certificate of title as superior to a

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[283] *Id.* at 1325 (emphasis supplied).

[284] *See infra* Part III.

[285] *See supra* notes 210–283 and accompanying text.

[286] *See infra* notes 290–319 and accompanying text (discussing various canons of statutory interpretation and their application to § 541(b)(8)(A)).

[287] *See infra* notes 299–310 and accompanying text. Interestingly, before the more recent decisions finding in favor of TitleMax, Georgia's Northern Bankruptcy Court explicitly stated that, "because a title pawn transaction with regard to an automobile that remains in possession of the borrower does not meet that requirement ⟦(the possession requirement)⟧, § 541(b)(8) has no application here. Because bankruptcy law defines what 'property of the estate' includes the fact that ⟦Ga. Code Ann.⟧ § 44-12-130(5) provides that a pawnbroker is conclusively deemed to be in possession of a pawned vehicle is immaterial." Moore v. Complete Cash Holdings, LLC (*In re* Moore), 448 B.R. 93, 99 n.8 (Bankr. N.D. Ga. 2011).

debtor's actual possession of her vehicle itself.[288] As a result, Congress should address this issue and bring an end to title lenders obstructing the goals and purposes of chapter 13 bankruptcy cases.[289]

A. THE PLAIN MEANING CANON REQUIRES THAT THE WORDS "TANGIBLE PERSONAL PROPERTY" AND "POSSESSION" BE GIVEN THEIR ORDINARY MEANING

The road to the correct statutory interpretation starts with the language of the statute itself.[290] The Supreme Court follows a fundamental canon of statutory construction that undefined words in a statute are to be given their plain meaning; that is, "interpreted as taking their ordinary, contemporary, common meaning."[291]

Section 541(b)(8) states that property is not part of the bankruptcy estate when three subparagraphs—(A), (B) and (C)—are met.[292] Because Congress separated subparagraphs (B) and (C) with an "and," all three subparagraphs must be satisfied.[293] Subparagraph (A) states: "the tangible personal property is in the possession of the pledgee or transferee."[294] The Bankruptcy Code does not define the terms "tangible personal property" and "possession."[295] However, none of these words are ambiguous, and all should be given their ordinary meaning.[296]

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[288] *See infra* notes 311–319 and accompanying text.

[289] *See infra* Part V.B.

[290] *See, e.g.*, United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470 (1917)).

[291] *See* Burns v. Alcala, 420 U.S. 575, 580–581 (1975) (citing to Perrin v. United States, 444 U.S. 37, 42 (1979)); United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)) (stating that if the meaning is plain, then "the sole function of the courts is to enforce it according to its terms"). For instance, in *Ron Pair*, the Supreme Court held that an oversecured lienholder who lacks an agreement with the debtor—such as a governmental unit with an oversecured lien for unpaid taxes—is entitled to accrue postpetition interest on its claim based on a plain reading of § 506(b) of the Bankruptcy Code. *Ron Pair*, 420 U.S. at 580–81.

[292] *See* 11 U.S.C. § 541(b)(8).

[293] *Id.*

[294] *Id.* § 541(b)(8)(A).

[295] *See id.* § 541(b)(8). *See generally id.* § 101 (providing definitions of various terms used in the Bankruptcy Code).

[296] *See, e.g.*, *In re* Hambright, 635 B.R. 614, 672 (Bankr. N.D. Ala. 2022) (providing an in-depth discussion of § 541(b)(8) but not indicating any ambiguity exists and finding that

Black's Law Dictionary defines "tangible personal property" as physical things that can be perceived, touched, and weighed.[297] Indisputably, a motor vehicle is tangible personal property, and the purported pledgee or transferee (i.e., the title lender) is not in possession of the debtor's vehicle in most of the bankruptcy cases involving title lenders.[298] As a result, courts *should have* easily held that the debtors' vehicles constituted property of the estate and allowed the debtors to treat the title lenders as secured creditors entitled to be paid via the chapter 13 plans.

B. UNDER THE RUSSELLO DOCTRINE, COURTS SHOULD NOT LOOK TO STATE LAW TO DECIDE THE MEANING OF THE TERM "POSSESSION"

Rather than giving the words in subparagraph (A) their ordinary meaning, numerous courts, including the Eleventh Circuit, chose to look at state law to interpret "possession," thereby violating the *Russello* doctrine.[299] In *Russello v. United States*,[300] the Supreme Court explained that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[301]

Subsection (b) of § 541(a)(1) has several provisions, including (b)(8), that exclude certain interests from property of the estate yet only a few of those provisions make specific references to state law.[302] For example, §

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the Alabama Pawnshop Act is not ambiguous and only covers goods left in the actual possession of the pawnbroker).

[297] *See* BLACK'S LAW DICTIONARY, PROPERTY (11th ed. 2019) (defining "tangible personal property" as property "that can be seen, weighed, measured, felt, touched, or in any other way perceived by the senses, examples being furniture, cooking utensils, and book").

[298] *See, e.g.*, *Hambright*, 635 B.R. at 659–72 (collecting cases).

[299] *See* Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor, 875 F.3d 821, 825–26 (6th Cir. 2017) (referring to the statutory construction principle as "*Russello* structural canon" and the *Russello* doctrine and discussing Russello v. United States, 464 U.S. 16 (1983)).

[300] *See* Russello v. United States, 464 U.S. 16 (1983).

[301] *Id.* at 23.

[302] *See* 11 U.S.C. § 541.

541(b)(3) excludes from the estate any *state* license a debtor holds as an educational institution.[303] Similarly, § 541(b)(6) excludes a "529" college education account from the bankruptcy estate if certain contributions are made to a qualified *state* tuition program.[304] Likewise, under § 541(b)(7)(A)(ii), property of the estate does not include wages withheld by an employer for contribution to a debtor's health insurance plan if that plan is regulated under *state* law.[305]

Finally, *subparagraph (C)* in § 541(b)(8) explicitly references state law.[306] Subparagraph (C) requires that "neither the debtor nor the trustee have exercised any right to redeem provided under the contract or *State* law, in a timely manner as provided under *State* law and section 108(b)."[307] In contrast, subparagraph (A) in § 541(b)(8) does *not* contain any reference to state law.[308] Thus, based on the plain language of the statute and the *Russello* doctrine, Congress clearly expected the first subparagraph's words—"tangible personal property is in the possession of the pledgee or transferee"—to be given their ordinary meaning and did *not* require courts to look to state law for a different meaning.[309] Because the debtor is in physical possession of his or her on vehicle in the overwhelming majority of the cases involving title loans, bankruptcy courts should hold that the debtor's vehicle constitutes estate property and allow the debtor to retain possession of the vehicle and pay the title lender's claim just like any other

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[303] *See id.* § 541(b)(3) (excluding from property of the estate "any accreditation status or *State* licensure of the debtor as an educational institution") (emphasis supplied).

[304] *See id.* § 541(b)(6) (excluding from property of the estate "funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified *State* tuition program … not later than 365 days before the date of the filing of the petition in a case under this title") (emphasis supplied).

[305] *See id.* § 541(b)(7)(A)(ii) (excluding from property of the estate any funds "received by an employer from employees for payment as contributions . . . to a health insurance plan regulated by *State* law whether or not subject to such title") (emphasis supplied).

[306] *See id.* § 541(b)(8)(C).

[307] *Id.*

[308] *See id.* § 541(b)(8)(A) (requiring that "the tangible personal property is in the possession of the pledgee or transferee").

[309] *See generally* Travieso v. Glock Inc., 526 F. Supp. 3d 533, 546 (D. Ariz. 2021), *appeal dismissed*, No. 21-15539, 2021 WL 4295762 (9th Cir. July 6, 2021) ("The meaningful variation canon states that where Congress uses certain language in one part of the statute and different language in another, the variation is presumed intentional and the different words should be given different meanings.").

allowed secured claim through the debtor's chapter 13 plan.[310]

C. THE SURPLUSAGE CANON REQUIRES THE TITLE LENDER TO SATISFY ALL § 541(B)(8)'S PROVISIONS, INCLUDING THE PHYSICAL POSSESSION PROVISION

The Supreme Court's surplusage canon supports the conclusion that title lenders must satisfy the physical possession requirement under § 541(b)(8)(A).[311] That canon provides that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." [312]

Car title lenders argue, and unfortunately the Eleventh Circuit and its progeny agree, that a lender's possession of a vehicle's certificate of title constitutes possession of the motor vehicle itself.[313] This interpretation would render § 541(b)(8)(A) wholly superfluous.[314] In title loan transactions, the debtor retains possession of the vehicle itself while the lender takes possession of the certificate of title as part of the process of perfecting its security interest.[315] To complete the steps necessary to perfect, a title lender has its security interest noted on the certificate of title, which is then filed with the state's department of motor vehicles.[316] If temporary possession of the certificate of title equals possession of the vehicle itself, as argued by title lenders, then in *every* bankruptcy case, title lenders would always have possession of the vehicle and that interpretation would,

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[310] *See, e.g.*, *In re* Hambright, 635 B.R. 614, 623–25 (Bankr. N.D. Ala. 2022) (holding that the debtor's motor vehicle constituted estate property because the debtor, on the petition date, still had ownership and possession of her vehicle and allowing the debtor to pay her title loan debt holder of an allowed secured claim under her chapter 13 plan because TitleMax had a "perfected first priority lien on the ⟦v⟧ehicle").

[311] *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004).

[312] *See id.* at 101. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 176 (West Group 2012) ("Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.").

[313] *See supra* Part II.C and D.

[314] *See infra* notes 314–319 and accompanying text.

[315] *See supra* notes 79–86 and accompanying text (explaining the perfection process, which includes the title lender taking and filing the vehicle's certificate of title with the state's department of motor vehicles).

[316] *See id.*

therefore, make subparagraph (A)'s requirement of actual possession of tangible personal property superfluous.[317] If Congress had intended possession of the certificate title to constitute constructive possession of the debtor's vehicle, it could have stated so.[318] Because Congress did not do so, courts do not have the prerogative to re-write the federal bankruptcy statute to rely on state law to hold constructive possession is a substitute for physical possession.[319]

D. CASE LAW FROM THE SUPREME COURT SUPPORTS THE CONCLUSION THAT A DEBTOR'S VEHICLE CONSTITUTES PROPERTY OF THE ESTATE

The Supreme Court's decision in *Fidelity Financial Services v. Fink* addresses a dispute analogous to the one in this Article and is instructive regarding when courts should not defer to state law to interpret a provision of the Bankruptcy Code.[320] There, the debtor, Diane Beasley, granted the lender a purchase money security interest in exchange for a loan that enabled her to purchase a car.[321] The lender perfected its security interest in Ms. Beasley's car 21 days later.[322] After Ms. Beasley filed bankruptcy, the trustee sought to avoid the lender's interest for failing to timely perfect under § 547(c)(3)(B).[323] At the time of this dispute, the Bankruptcy Code provided an "enabling loan exception," which would prevent the bankruptcy trustee from avoiding as a preference the lender's purchase

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[317] *See generally* Nielsen v. Preap, 139 S. Ct. 954, 969 (2019) (stating that the canon against surplusage means "every word and every provision is to be given effect ⟦and that n⟧one should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence"); Nw. Forest Res. Council v. Glickman, 82 F.3d 825, 833–34 (9th Cir. 1996), *as amended on denial of reh'g* (May 30, 1996) (discussing the canon that "a statute must be interpreted to give significance to all of its parts").

[318] *See generally* United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971) (explaining that "it is for Congress, not this Court, to rewrite ⟦a⟧ statute").

[319] *See* Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.") (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

[320] Fid. Fin. Servs., Inc. v. Fink, 522 U.S. 211, 212–13 (1998).

[321] *Id.* at 211.

[322] *Id.* at 213.

[323] *Id.*

money security interest so long as that interest was "perfected on or before 20 days after the debtor receives possession of such property."[324] Section 547(c)(3)(B) made no reference to state law.[325]

Despite failing to meet the Bankruptcy Code's 20-day perfection requirement, the lender argued it qualified for the enabling loan exception because it perfected within the 30-day period allowed under Missouri's version of the UCC "to qualify for the relation-back advantage."[326] In other words, Missouri law would treat the lender's security interest in Ms. Beasley's car as perfected and relate its perfection date back to the moment of the security interest's creation, as long as the lender perfected within 30 days (which it did).[327] Because Missouri's UCC would treat the lender as having perfected when the security interest was created, the lender claimed (and two circuit courts agreed) that the lender's security interest was perfected in a timely manner for purposes of the Bankruptcy Code's enabling loan exception.[328]

Rejecting the lender's statutory construction as "a poor fit with the text," Justice Souter, for a unanimous court, noted that the Bankruptcy Code "apparently impl[ies] that a transfer is perfected only when the secured party has done all the acts required to perfect its interest, not at the moment as of which state law may retroactively deem that perfection effective."[329] In other words, in a preference avoidance action, the Bankruptcy Code's perfection time period controls, not a state law which gives a longer time period to perfect and then retroactively deems when perfection is effective.[330] The Supreme Court's holding meant ultimately that the lender in *Fink* perfected its interest too late—beyond the 20-day period allowed under the Bankruptcy Code—and that the trustee could avoid that lender's interest as a preference, thereby leaving the lender with an unsecured claim.[331]

The Supreme Court's statutory construction in *Fink* should

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[324] *Id.* at 214 (citing 11 U.S.C. § 547(c)(3)(B)).
[325] *Fink*, 522 U.S. at 214.
[326] *Id.* at 215.
[327] *Id.* (quoting MO. REV. STAT. § 301.600(2)(1994)).
[328] *Fink*, 522 U.S. at 214–16.
[329] *Id.* at 216 (citation and internal quotations omitted).
[330] *Id.*
[331] *Id.* at 221.

persuade bankruptcy courts not to rely on Georgia law or any other state's pawnbroker statute to decide what possession means.[332] Just like the applicable provision in *Fink*, the provision in § 541(b)(8)(A) makes no reference at all to state law.[333] As a result, the words in subparagraph (A) should be given their ordinary meaning.[334] As stated repeatedly, in most cases involving car title loans, debtors, at the time of their bankruptcy filing, actually have possession of their vehicles—the tangible personal property.[335] Because title lenders fail to meet the physical possession requirement set forth in subparagraph (A) of § 541(b)(8), the debtors' vehicles belong to the estate and, therefore, title lenders' claims should be treated like any other allowed secured claim.[336]

The Supreme Court's decision in *Fink* recognizes Congress's intent to establish uniformity.[337] Specifically, by not referencing state law, Congress intended that subsection 547(c)(3)(B) create a uniform federal perfection period.[338] The Court stated further that lower courts' application of Missouri law "would *not* have brought uniformity to federal bankruptcy practice," and would have benefited *only* a small class of creditors in specific states with perfection periods longer than 20 days.[339] The Court then concluded that uniformity had to be a goal of Congress in enacting the statute.[340] Thus, the Supreme Court held that the lower courts should not look to state law to extend the 20-day perfection period in § 547(c)(3)(B).[341]

Similar to the lower courts in *Fink*, the Eleventh Circuit and several bankruptcy courts have failed to follow the plain language of § 541(b)(8)(A) and have thereby obstructed federal uniformity and have benefitted title lenders operating primarily in two states, Georgia and Alabama.[342] As

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[332] *See generally id.*

[333] *Id.*

[334] *Id.*

[335] *See* TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 920 (Bankr. S.D. Ga. 2022).

[336] *See Fink*, 522 U.S. at 216; *see also* discussion *supra* Part III.A.

[337] *See Fink*, 522 U.S. at 220.

[338] *Id.*

[339] *Id.*

[340] *Id.* at 218 (stating that it was unimaginable that "Congress meant to accomplish nothing more, and nothing uniform, by its effort").

[341] *Id.* at 220–21.

[342] *See supra* Part II.C and D (demonstrating that title lenders have been successful in Alabama and Georgia in persuading bankruptcy courts to rely on state pawnbroker statutes

discussed in Part I, only a few states permit car title lending at all, and, as a result, § 541(b)(8) should not come into play in the majority of bankruptcy courts.[343] Moreover, there is absolutely no basis to believe Congress intended that title lenders in only a handful of states could rely on state pawnbroker statutes to purportedly have constructive possession as a substitute for actual physical possession.[344] Thus, the Eleventh Circuit, along with courts in Alabama and Georgia, should have applied the plain meaning of the provision in § 541(b)(8)(A) to provide a uniform definition of possession that is "immune from alteration by state law."[345]

IV. TITLE LENDERS ARE NOT ENTITLED TO SUPER PRIORITY LIENHOLDER STATUS UNDER THE BANKRUPTCY CODE

Because courts have erroneously ruled in favor of car title lenders, they have essentially given title lenders a *super* priority lienholder status[346] and have simultaneously deprived unsecured creditors of a payout due to them under the debtor's chapter 13 plan.[347] It is worth reiterating that courts have allowed title lenders to obliterate chapter 13 debtors' chance at a fresh start[348] by holding that they have forfeited ownership of their vehicles to title lenders.[349] Moreover, as fully explained below, car title lenders have persuaded courts to essentially treat them better than other secured creditors and have, thereby, obstructed the bankruptcy system's second fundamental goal of treating similarly-situated creditors equally.[350]

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to determine in the debtor's vehicle is brought into the property of the estate).

[343] *See id.*

[344] *See supra* notes 198–211 and accompanying text (discussing how courts follow congressional intent by broadly construing § 541(a)(1) to bring into the bankruptcy estate all property interests, whether legal or equitable).

[345] *See Fink*, 522 U.S. at 220. *See generally* Thomas v. Reeves, 961 F.3d 800, 816 (5th Cir. 2020) ("It's the business of courts to take lawmakers at their word, and to presume they meant what they said.").

[346] *See infra* notes 351–371 and accompanying text.

[347] *See infra* notes 372–389 and accompanying text.

[348] *See supra* notes 165–179 and accompanying text (explaining the benefits of chapter 13 cases and how debtors with tile loans can use chapter 13 cases to obtain a fresh start).

[349] *See supra* notes 229–290 and accompanying text.

[350] *See infra* notes 351–371 and accompanying text.

A. BECAUSE CAR TITLE LENDERS HAVE REGULAR SECURITY INTERESTS, COURTS SHOULD NOT AFFORD THEM RIGHTS GREATER THAN AUTO LENDERS THAT HOLD PURCHASE MONEY SECURITY INTERESTS

Car title lenders are secured creditors and are very similar to "auto financing" lenders, yet car title lenders seek superior treatment in chapter 13 cases.[351] Recall the prior discussion explaining that a title lender obtains a perfected security interest when it has its lien noted on the vehicle's certificate of title and files it with the state's department of motor vehicles.[352]

The same steps title lenders use to perfect their security interests are the same steps finance lenders take to perfect a security interest in a vehicle purchased by an individual.[353] Because auto financing lenders extend loans that enable debtors to purchase a vehicle,[354] such lenders obtain a purchase money security interest ("PMSI") in the vehicle.[355] Like any PMSI creditor, an auto financing lender has the ability to perfect its interest to obtain first-priority status.[356] Specifically, if the auto financing lender perfects its PMSI within 20 days after the debtor takes possession of the vehicle, that lender's interest will be in first position and will be paid ahead of all competing interests if the vehicle is later sold after the debtor defaults.[357] If the debtor files for bankruptcy relief, then an auto financing lender with a perfected PMSI is given preeminent status because the debtor, via the chapter 13 plan, must pay that lender either in full or up to the value of the vehicle securing that interest.[358]

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[351] *Id.*

[352] *See supra* notes 68–80 and accompanying text (explaining the UCC's procedure for a lender to perfect its security interest in a vehicle owned by an individual).

[353] *Id.*

[354] *See, e.g.*, Field v. Lebanon Citizens Nat'l Bank (*In re* Knee), 254 B.R. 710, 713 n.2 (Bankr. S.D. Ohio 2000); Fid. Fin. Servs., Inc. v. Fink, 522 U.S. 211, 211 (1998) (stating that the debtor obtained a loan to finance the purchase of her vehicle).

[355] *See* U.C.C. § 9–103; *see also, e.g.*, *Fink*, 522 U.S. at 211 (stating that lender obtained a purchase money security interest in the debtor's vehicle).

[356] *See* U.C.C. § 9–317(e) (allowing a secured party to obtain first priority status if its PMSI is perfected within 20 days of the debtor's taking of possession of the property purchased).

[357] *Id.*

[358] *See In re* Hambright, 635 B.R. 614, 634–35 (Bankr. N.D. Ala. 2022); *see also Fink*, 522 U.S. at 212–14; 11 U.S.C. § 1325(a)(5), (a)(9) (hanging para.).

Unlike auto financing lenders, title lenders do not help debtors finance the purchase of their cars, but title lenders with perfected security interests would still be entitled to have their debts paid via a debtor's chapter 13 plan.[359] Title lenders typically only lend to debtors who own their cars outright.[360] And even though title lenders lend money on terms creating a substantial risk of debtors losing their vehicles, title lenders would still be paid via a chapter 13 plan and, thereby, receive the same treatment as an auto financing lender with a perfected PMSI.[361] Moreover, because title lenders lend money at a fraction of the value of the car, title lenders are oversecured creditors and, consequently, would receive full repayment of their debts.[362] It is, therefore, outrageous that title lenders are not satisfied with being treated like auto financing lenders with PMSI loans that receive full repayment of their debts (or at least payment to the value of the collateral) via a chapter 13 plan.[363] Title lenders want superior treatment—super priority status—by seeking court approval to take away the debtor's vehicle and all its equity even though the debtor most likely spent several years paying off an auto financing lender that enabled the debtor to purchase the vehicle in the first place.[364] In essence, title lenders want the right to take debtors' cars, sell them, and pocket any surplus from those sales (in other words, they want to strictly foreclose in violation of the UCC).[365] No other secured creditors are afforded such an extraordinary outcome in bankruptcy.[366]

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[359] *See* CFPB TITLE LENDING REPORT, *supra* note 51, at 4.

[360] *Id.*

[361] *See supra* Part I.A (explaining the basics of car title lending).

[362] *See Hambright*, 635 B.R. at 634.

[363] *See* 11 U.S.C. § 1325(a)(5), (a)(9) (hanging para.) (requiring that a debtor's chapter 13 plan pay in full debt owed to a creditor that has a perfected purchase money security interest in a vehicle owned by the debtor if that vehicle was purchased within 910 days of the bankruptcy petition date).

[364] *See infra* notes 367–371 and accompanying text.

[365] *See supra* notes 81–109 and accompanying text.

[366] *See* Steve Weise & Stephen L. Sepinuck, *Survey—Uniform Commercial Code—Personal Property Secured Transactions*, 67 BUS. LAW. 1311 (Aug. 2012). *See generally* Pension Benefit Guaranty Corp. v. Belfance (*In re* CSC Indus., Inc.), 232 F.3d 505, 508 (6th Cir. 2000) ("[A] fundamental objective of the Bankruptcy Code is to treat similarly situated creditors equally"); *In re* Schimmelpenninck, 183 F.3d 347, 351 (5th Cir. 1999) ("Ultimately, the interests of all creditors, foreign and domestic, are to be put on a level playing field, with like-situated claimants being treated equally.").

The table below summarizes the discussion thus far and visually demonstrates how some courts are treating title lenders *better than* auto financing lenders.[367] Assume that both types of lenders have taken the necessary steps to obtain and perfect their security interests. The "buts" in the table show why car title lenders want bankruptcy courts to incorrectly apply the law and erroneously conclude they own the debtors' vehicles even though, most of the time, the debtors have actual possession of them.[368]

Pertinent Questions	Auto Financing Lender: Loan enables the consumer debtor to buy the vehicle	Car Title Lender: Cash loans amount to only a fraction of the value of the debtor's paid-off vehicle
Does the lender have a security interest under the UCC?	Yes	Yes
Is the lender's security interest perfected under the UCC?	Yes	Yes
Does the lender have the UCC right to repossess if debtor defaults?	Yes	Yes
Does debtor have the UCC right to redeem if the lender repossesses the vehicle?	Yes	Yes, and if a pawnbroker statute is applied, the debtor has a limited time period to redeem
Does the lender have the UCC right to sale the vehicle after repossession to	Yes, and must comply with several minimum standards regarding notification	Yes, <u>but</u> if a pawnbroker statute is applied, the title lender does not have to sell

[367] *See infra* notes 367–371 and accompanying text.

[368] For a detailed discussion of the contents of the table, see *supra* notes 81–109 and notes 351–366 accompanying text.

satisfy the debt?	and a disposition of sale	and does not have to meet any minimum standards to sell
Does the debtor forfeit ownership of the vehicle under the UCC simply by failing to pay the amount necessary to redeem the vehicle?	No	Yes, but only if a pawnbroker statute is applied. If so, the title lender owns the vehicle outright after the debtor fails to redeem by the end of the grace period
Does the lender have the right under the UCC to keep any surplus funds—keep the debtor's equity—after selling the vehicle?	No	Yes, but only if a pawnbroker statute is applied. If so, the lender has the right to keep all surplus funds

As demonstrated in the above side-by-side comparison, the Eleventh Circuit and its progeny have treated title lenders far better than auto financing lenders with perfected PMSIs because these courts have completely ignored the UCC, which recognizes the debtors' ownership interests in their vehicles, and have incorrectly interpreted § 541(b)(8)(A) to cause the debtors to forfeit ownership of their vehicles.[369] Courts' application of Georgia law (and sometimes Alabama law) violates the fundamental policy of treating similarly-situated creditors equally.[370] If Congress wanted to give title lenders the right to take away a debtor's car—a right not afforded to auto financing lenders—Congress could have explicitly stated so in § 541(b)(8).[371]

[369] *See supra* Part II.

[370] *See* 11 U.S.C. § 507.

[371] *See generally* United States v. Thirty-seven (37) Photographs, 402 U.S. 363, 369 (1971) (explaining that "it is for Congress, not this Court, to rewrite ⟦a⟧ statute" (internal citations omitted)).

B. PROPER TREATMENT OF TITLE LENDERS' CLAIMS WOULD RESULT IN UNSECURED CREDITORS RECEIVING PARTIAL PAYMENT OF THEIR CLAIMS

The courts' incorrect interpretation of § 541(b)(8) have not only undermined Congress's efforts to ensure equal treatment of similar creditors but, as explained below, have deprived general unsecured creditors of a lawful payout in the debtor's chapter 13 case.[372]

To get a chapter 13 plan confirmed by the bankruptcy court, the debtor's plan must meet certain minimum standards related to the payment of claims held by priority and general unsecured creditors.[373] For example, the Bankruptcy Code lists numerous debts that qualify as priority unsecured claims, such as unpaid child support payments, and those priority unsecured claims must be paid in full over the life of the debtor's chapter 13 plan.[374]

In addition to owing debts that qualify as priority claims, chapter 13 debtors also owe debts that qualify as general unsecured claims (e.g., past-due utility bills), and the debtor's plan must pay those creditors whatever they are entitled to under the application of the "best interests of the creditors" test.[375] This test ensures that general unsecured creditors are treated fairly while the debtor retains non-exempt assets.[376] This test amounts to a "statutory quid pro quo" where "the debtor keeps his or her assets and creditors are assured of receiving what they would be paid in a chapter 7 liquidation." [377]

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[372] *See infra* notes 373–389 and accompanying text.

[373] *See generally* 11 U.S.C. §§ 1322, 1325.

[374] *See id.* § 1322(a)(2) (requiring that a chapter 13 plan "provide[s] for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim").

[375] *See id.* § 1325(a)(4) (requiring that a chapter 13 plan pay "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date"); *see also In re* Guillen, 972 F.3d 1221, 1224 (11th Cir. 2020) ("The confirmation standard set forth in section 1325(a)(4) has traditionally been known as the 'best interests of creditors test.'") (quoting 8 Collier on Bankruptcy ¶ 1325.05 (16th ed. 2020)).

[376] *See In re* Cordes, 147 B.R. 498, 504 (Bankr. D. Minn. 1992) (stating that creditors have the "right to receive a meaningful, fair return on their claims").

[377] *In re* Pinkston, 134 B.R. 932, 933 (Bankr. D. Neb. 1991).

Consider the application of this best interest test in the case of the aforementioned Lisa Snyder,[378] whose 2016 Nissan Rogue was valued at $22,000.[379] Generally-speaking, after the secured debt is paid, the debtor is able to claim an amount allowed under applicable law as a motor vehicle exemption.[380] In her petition, Ms. Snyder claimed $1,462.50 as her motor vehicle exemption under state law.[381] That meant that if she had actually filed a chapter 7 case and sold her vehicle for $22,000, then $11,305.86 would have been left after paying off TitleMax and retaining her exemption amount (both amounts totaling $10,694.14).[382] Assume that after the bankrupt trustee deducted his or her fee for conducting the sale, $10,000 would been the remaining equity—that is, the remaining proceeds if the car had been sold.[383] In a chapter 7 case, Ms. Snyder's general unsecured creditors would have received from the trustee their pro rata share of $10,000.[384] Because this $10,000 amount would have been the payout in a hypothetical chapter 7 case, Ms. Snyder would have been required to pay $10,000 (i.e., the remaining equity) over the course of her chapter 13 plan to her general unsecured creditors.[385] Stated differently, if the court had correctly ruled that Ms. Snyder owned her vehicle and that she could treat TitleMax as a creditor holding an allowed secured claim, then the court would have held that, to obtain plan confirmation, Ms. Snyder would have been required to pay the remaining equity (e.g., $10,000) via the plan to her general unsecured creditors under the best interest of creditors test.[386]

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[378] *See supra* notes 2–11 and accompanying text.

[379] TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901 (Bankr. S.D. Ga. 2022).

[380] *Pinkston*, 134 B.R. at 933 ("In completing a hypothetical liquidation analysis under § 1325(a)(4) to determine how much an unsecured creditor would be paid in Chapter 7, exempt property is excluded since creditors would not be paid any funds from such property in a Chapter 7 case.").

[381] *Snyder*, 635 B.R. at 905.

[382] *Id.*

[383] *See, e.g.*, *In re* Keenan, BAP No. NM-08-089m 2009 WL 1743999, at *3 (B.A.P. 10th Cir. 2009) (performing the calculation for the best interest test that required a deduction for administrative costs that would be incurred in a liquidation and a deduction of "hypothetical trustee fees in the amount of $9,060").

[384] *See In re* Cloninger, 613 B.R. 461, 464 (Bankr. E.D. Ark. 2020) (applying the best interest test and confirming a debtor's plan proposing to pay general unsecured creditors a pro rata dividend, which was greater than the amount yielded from the best interest test).

[385] *See, e.g.*, *id.*

[386] *See* David Gray Carlson, *Car Wars: Valuation Standards in Chapter 13*

However, the sad reality is that instead of receiving $10,000, the general unsecured creditors got nothing and TitleMax was allowed to take possession of and keep a vehicle worth $22,000 to satisfy a $9,300 debt.[387]

Because the Eleventh Circuit and bankruptcy courts have incorrectly applied the plain meaning of § 541(b)(8)(A),[388] they have not only caused debtors to lose ownership of their vehicles but have deprived general unsecured creditors of a payout owed to them under the best interest of the creditors test.[389]

V. CONGRESS NEEDS TO ACT TO AFFORD CONSUMER DEBTORS A FRESH START AND TO TREAT CAR TITLE LENDERS AS ORDINARY SECURED CREDITORS

The solutions proposed in this section are modest. The easiest solution would be for the Eleventh Circuit to recognize its erroneous statutory interpretations of § 541(b)(8)(A) and overrule them. While lawyers for consumer debtors wait for the Eleventh Circuit to right its course, the title loan industry no doubt realizes that its legislative work has been highly successful in Georgia. As explained below, the industry has every incentive to try to maintain the status quo and get other states to pass a pawnbroker statute patterned after Georgia. Consumer debtors cannot afford to wait on the Eleventh Circuit. In light of courts allowing title lenders to obliterate the debtors' fresh start and to deprive general unsecured creditors of a justly due payout, Congress needs to act to help consumer debtors retain ownership of their motor vehicles.[390]

Bankruptcy Cases, 13 BANKR. DEV. J. 1, 7, 25, 58 (1996).

[387] TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 924 (Bankr. S.D. Ga. 2022) (holding that "[n]otwithstanding the onerous costs that many desperate consumers incur in pursuing title pawn transactions," the debtor in this case forfeited ownership of her vehicle by not paying the amount required to redeem it).

[388] *See supra* notes 257–283 and accompanying text.

[389] *See* 11 U.S.C. § 1325(a)(4) (requiring that the chapter 13 plan pay creditors at least as much as the creditors would receive in a chapter 7 liquidation; a requirement commonly referred to as the best interest of creditors test).

[390] *See infra* notes 399–410 and accompanying notes.

A. THE ELEVENTH CIRCUIT NEEDS TO RIGHT ITS COURSE BECAUSE TITLE LENDERS ARE INCENTIVIZED TO GET OTHER STATES TO FOLLOW GEORGIA

The Eleventh Circuit should reverse its erroneous holdings because they are likely to lead to more consumer debtors losing their vehicles. In *In re Womack*, the Eleventh Circuit stated that the pawnbroker statutes in Alabama and Georgia are "materially indistinguishable."[391] As one can see in the table below, nothing could be further from the truth and, therefore, the Eleventh Circuit has increased the chance that a bankruptcy court will incorrectly hold that Alabama residents with car title loans are subject to the forfeiture provisions of the Alabama pawnshop statute.[392]

Provisions at Issue	Alabama Pawnshop Act	Georgia
Do motor vehicles qualify as "pledged goods"?	No Alabama defines "*pledged goods*," in relevant part, as "[*t*]*angible personal property … deposited with, or otherwise actually delivered into the possession of, a pawnbroker in connection with a pawn transaction*."[393] This definition makes no reference at all to motor vehicles. Title loan	YES In Georgia, "pledged goods" are defined as "tangible personal property, including, without limitation, *all types of motor vehicles or any motor vehicle certificate of title*, which property is purchased by, deposited with, or otherwise actually delivered into the possession of a

[391] *In re* Womack, No. 21-11476, 2021 WL 3856036, at *3 (11th Cir. Aug. 30, 2021).

[392] Although coming to opposite conclusions about a debtor's ownership of a vehicle secured by a title loan, both the *Snyder* and *Hambright* courts criticized *Womack*'s conclusion that Alabama and Georgia pawnbroker laws were indistinguishable and explained the sharp distinctions between the two states' pawn laws. *See* TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 920–21 (Bankr. S.D. Ga. 2022); *In re* Hambright, 635 B.R. 614, 654 (Bankr. N.D. Ala. 2022).

[393] *See* ALA. CODE § 5-19A-2(6) (2023) (emphasis added).

	borrowers retain possession of their vehicles.	pawnbroker in connection with a pawn transaction."[394]
Does an auto title loan qualify as a pawn transaction?	NO Alabama defines a "*pawn transaction*" as a "loan on the security of pledged goods or any purchase of pledged goods on condition that the pledged goods are *left with the pawnbroker* and may be redeemed or repurchased … for a fixed price within a fixed period of time."[395]	YES In Georgia, a "pawn transaction" means "any loan on the security of pledged goods or any purchase of pledged goods on the condition that the pledged goods may be redeemed or repurchased by the pledgor or seller for a fixed price within a fixed period of time."[396]
Does a lender's possession of the vehicle's certificate of title constitute constructive possession of the vehicle itself?	NO Alabama makes no reference at all to motor vehicles or certificates of title.	YES "[F]or purposes of this Code section, possession of any motor vehicle certificate of title . . . shall be conclusively deemed to be possession of the motor vehicle, and the pawnbroker . . . shall not be required in any way to retain physical possession of the motor vehicle at any time."

The Eleventh Circuit's failure to even recognize huge distinctions between the pawnbroker statutes in Alabama and Georgia is a green light for title lenders to continue to misrepresent their rights under pawnbroker statutes similar to Alabama's. Relying on the Eleventh Circuit's decision in *Womack*, Alabama courts continue to erroneously conclude that a debtor's

[394] GA. CODE ANN. § 44-12-130(5) (2023) (emphasis added).
[395] *See* ALA. CODE § 5-19A-2(3) (2023) (emphasis added).
[396] GA. CODE ANN. § 44-12-130 (2023).

motor vehicle is a pledged good under Alabama's pawnbroker statute.[397] Moreover, because title lenders have been successful in getting the Eleventh Circuit to erroneously defer to state law, the title loan industry has an incentive to continue mobilizing to get other states to enact pawnbroker statutes like Georgia.

At this juncture, the Supreme Court is unlikely to take an appeal, and the Eleventh Circuit recently denied a consolidated direct appeal filed by several debtors with title loans.[398] Therefore, Congress should take action.

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[397]For example, in *In re Graham*, the bankruptcy court relied on *Womack* and failed to recognize that the debtor's vehicle did not qualify as pledged goods under Alabama law because she retained possession of the vehicle. *See In re* Graham, No. 21-11104-JCO, 2021 WL 4187953, at *1–2 (Bankr. S.D. Ala. Sept. 14, 2021) (failing to quote any provision of the Alabama Pawnshop Act). The debtor prevailed only because the loan's due date had not matured at the time of the bankruptcy filing and, as a result, the court held that she still retained legal title and could treat TitleMax as a secured creditor under the chapter 13 plain. *Id.* at *3 (quoting *Womack* and holding that because the title loan "did not mature pre-petition," the debtor's retained ownership of her vehicle and was allowed to have her plan confirmed over the objection of TitleMax). The district court, also relying on *Womack*, upheld the bankruptcy court's conclusion that the debtor's vehicle became property of the estate only because the debtor filed her chapter 13 case prior to the loan's maturity date and, therefore, retained ownership of her vehicle. *See* TitleMax of Ala., Inc. v. Graham, No. 1:21-CV-432-TFM-B, 2022 WL 4593091, at *5 (S.D. Ala. Sept. 29, 2022) (affirming the bankruptcy court's holding that TitleMax's rights may be modified under the debtor's chapter 13 plan, pursuant to § 1332(b)(2)); *see also* TitleMax of Ala., Inc. v. Barnett, No. 5:20-CV-00181-CLM, 2021 WL 426218, at *3 (N.D. Ala. Feb. 8, 2021) (applying incorrectly Alabama law and holding that a title lender has constructive possession of the debtor's vehicle, and such possession prevents the vehicle from coming into the estate). As explained in Part I.C., car title loans do not qualify as pawn transactions in Alabama and in most of the sixteen states that have pawnbroker statutes because the debtors retain possession of their vehicles at the time they obtain title loans. *See supra* notes 257–283 and accompanying text.

[398] In 2022, the Eleventh Circuit denied a petition for permission to appeal directly from several bankruptcy court decisions pursuant to 28 U.S.C. § 158(d) in cases involving title loans issued by TitleMax. *See* C. Cottingham, et al. v. TitleMax of Ala., Inc., Docket, No. 22-90010, Aug. 12, 2022 (11th Cir. 2022) (filing by petitioners Kacey Burrell, Michael Coleman, C. David Cottingham, Kelvin Crispin, John Gurtler, Nauquita L. Hambright, Willie Hargrove, Andrea Harrington, and Frances Myrick). For a complete analysis of how numerous courts have incorrectly interpreted a provision of the Bankruptcy Code, see *supra* Part III.C–D.

B. THE PROPOSED STATUTORY AMENDMENTS WOULD ENSURE THAT ALL DEBTORS HAVE THE CHANCE AT ACHIEVING A FRESH START BY RETAINING THEIR VEHICLES WHILE PAYING BACK THEIR TITLE LOANS

Under the current Bankruptcy Code, Congress already affords to consumer debtors the ability to use chapter 13 bankruptcy to keep their homes—the very roofs over their heads—while simultaneously paying their debts owed to mortgage lenders.[399] Similarly, Congress should amend the Bankruptcy Code to make it clear that consumer debtors in chapter 13 cases have the right to retain their vehicles while they repay their car title loans and, thereby, prevent title lenders from taking the second largest financial investment for many consumers and the asset essential for most consumers to survive.[400]

Although this Article argues that the text of § 541(b)(8)(A) clearly requires a debtor's vehicle—the "tangible personal property"—be in the "possession" of the title lender, that provision should be amended to make it clearer for courts like the bankruptcy court in *Snyder*.[401] Deciding that the statute applied to title lenders, the *Snyder* court stated that "if Congress intended to exclude from the exclusion of § 541(b)(8) title pawn transactions, it could have done so clearly."[402] Below is one way Congress could amend the statute to make it crystal clear for courts to apply.

Current Statute	Proposed Revised Statute
§ 541(b) Property of the estate does not include…	§ 541(b) Property of the estate does not include…
(8) subject to subchapter III of	(8) subject to

[399] *See generally* 11 U.S.C. § 1306(b) ("Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate."); *In re* Michael, 699 F.3d 305, 318 (3d Cir. 2012) ("Generally, the benefits available to a debtor under a Chapter 13 plan of reorganization are the saving of a residence from foreclosure, the curing a mortgage delinquency over time with more affordable payments, the maintaining of possession and use of an automobile or other personal property, and the automatic stay.").

[400] *See infra* notes 401–410 and accompanying text.

[401] *See* TitleMax of Ga., Inc. v. Snyder (*In re* Snyder), 635 B.R. 901, 919–23 (Bankr. S.D. Ga. 2022).

[402] *Id.* at 921.

chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--	subchapter III of chapter 5, any interest of the debtor in property where the debtor sold ~~pledged~~ or pledged tangible personal property, as defined in 11 U.S.C. §101, ~~(other than securities or written or printed evidences of indebtedness or title)~~ as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--
(A) the tangible personal property is in the possession of the pledgee or transferee;	(A) the tangible personal property is in the physical possession of the pledgee or transferee as of the commencement of the case;
(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and	(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and
(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b).[403]	(C) neither

[403] 11 U.S.C. § 541(b)(8).

	the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b).

The title lender's possession would need to be a lawful prepetition seizure, not an unlawful postpetition seizure.[404]

Also, the Bankruptcy Code currently lacks a definition for "tangible personal property" but should define it as follows:

> Tangible personal property means property which is purchased by, deposited with, or otherwise actually delivered into the physical possession of, a lender or pawnbroker in connection with a pawn transaction, and it excludes choses in action, certificates of title, securities, or printed evidences of indebtedness.[405]

This definition is a modification of the definition of "pledged goods" in Alabama's pawnbroker statute, and it makes clear that a certificate of title is *not tangible* personal property.[406]

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[404] *See, e.g.*, *In re* Lewis, No. 18-31573, 2019 WL 2158832, at *1–4 (Bankr. W.D. La. May 16, 2019) (finding that the title lender willfully violated the automatic stay by, among other things, seizing the vehicle postpetition).

[405] This recommended definition would make clear that a certificate of title is not "tangible personal property" under the Bankruptcy Code.

[406] Alabama's pawnbroker statute does not expressly exclude certificates of title. *See* ALA. CODE § 5-19A-2(3) (defining "pledged goods" as "[t]angible personal property other than choses in action, securities, or printed evidences of indebtedness, which property is purchased by, deposited with, or otherwise actually delivered into the possession of, a pawnbroker in connection with a pawn transaction"). That lack of clarity has led some Alabama courts to hold that a certificate of title is tangible personal property. *See*, *e.g.*, *Ex*

The above proposed revisions to subparagraph (A) in § 541(b)(8), together with the proposed definition of "tangible personal property" make it explicit that for a court to exclude a vehicle from property of the estate, the lender must have physical possession of the debtor's motor vehicle at the commencement of the case.[407] Given the reality that borrowers are allowed to retain possession of their cars, title lenders are not traditional pawnbrokers and, therefore, the proposed revisions do not treat them unfairly.[408] Title lenders are very similar to auto financing lenders in that both obtain a security interest when lending money to debtors but do not take possession of the debtors' vehicles.[409] Thus, just like auto financing lenders, title lenders are secured creditors only and should be treated as such under a debtor's chapter 13 plan.[410]

CONCLUSION

The title loan industry has a profitable business model that charges triple-digit interest rates on short-term loans issued to cash-strapped consumers who, in exchange for these loans, offer their vehicles as collateral. This business model, however, is disrupted when many consumers file for chapter 13 bankruptcy relief upon realizing that their title loans have become an unrelenting debt trap. Instead of living in fear of their vehicles being repossessed, consumer debtors propose chapter 13 plans that allow them to keep their vehicles while repaying their title loans *in full* over three-to-five years.

Dissatisfied with full payment via long-term plans, title lenders assert that, under various state pawnshop laws, the debtors have forfeited ownership of their vehicles, and the lenders have the right to take possession of them and retain any surplus money after selling them.

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parte Coleman, 861 So. 2d 1080, 1086 (Ala. 2003); *see also supra* notes 247–284 and accompanying text (explaining how Alabama courts have incorrectly interpreted state law to characterize motor vehicles in title loan transactions as "pledged goods").

[407] *See supra* notes 182–207 and accompanying text (explaining the disparate outcomes in chapter 13 cases based on the current version of § 541(b)(8)(A)).

[408] *See supra* notes 351–371 and accompanying text (explaining the similarities between title lenders and auto financing lenders and why the title lender should not be allowed to take possession of debtor's vehicle in chapter 13 cases).

[409] *See id.*

[410] *See id.*

Unfortunately for debtors, title lenders have convinced several courts, including the Eleventh Circuit Court of Appeals, to incorrectly conclude that the lenders' possession of the vehicles' certificates of title gives them constructive possession of the debtors' vehicles and that such constructive possession trumps the debtors' actual physical possession of their vehicles at the start of the bankruptcy case. Had these courts correctly interpreted state pawnshop laws, they would have concluded that, in most jurisdictions, a car title loan does not even qualify as a "pawn" transaction because debtors retain possession of their vehicles when they obtain the loans.

Moreover, because debtors usually enter bankruptcy still in possession of their vehicles, they have both legal ownership and possessory interests recognized under state commercial laws and those interests count as legal and equitable interests, thereby causing the vehicles to become property of the bankruptcy estate under § 541(a) of the Bankruptcy Code. These courts have incorrectly deferred to state laws, especially in Alabama and Georgia, that purportedly cause the vehicles to disappear from the estate. As a result, debtors have been prevented from legitimately using chapter 13 to fully repay their title loan debts while retaining possession of their vehicles.

Because several courts continue to incorrectly interpret the laws at issue, Congress needs to amend the Bankruptcy Code to give chapter 13 debtors the explicit right to keep the cars and repay their title loans. Otherwise, title lenders will continue to circumvent the purposes of the federal bankruptcy system by denying debtors a chance at a fresh financial start and robbing the debtors' unsecured creditors of a plan payout from the vehicles' equity. Congress already has Bankruptcy Code provisions that foster the policy of allowing chapter 13 debtors to retain their homes—typically the largest consumer investment—while curing mortgage defaults and making regular mortgage payments. Now Congress needs to adopt the recommended amendments to foster a policy of allowing chapter 13 debtors to repay their title loans while retaining their cars, the second largest consumer investment, and the assets deemed essential for most people to maintain employment and survive in the United States.