

EXECUTORY CONTRACTS WITH FINANCIAL ACCOMMODATIONS: A PLEA FOR BIFURCATION UNDER 11 U.S.C. § 365

I. INTRODUCTION

Since the adoption of the Bankruptcy Code¹ (the Code) in 1978, courts and attorneys² have grappled with the issue of how to characterize executory contracts between debtors³ and other parties. Under Code section 365(a),⁴ a trustee⁵ may elect to assume⁶ or reject⁷ a debtor's⁸ executory contracts.⁹ The basic purpose of this provision is to allow the debtor to

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)).

2. According to several bankruptcy attorneys, parties to bankruptcy cases often hotly contest the characterization of executory contracts, though they usually do not litigate the issue.

3. When a company files a Chapter 11 petition, it technically assumes the title "debtor in possession." 11 U.S.C. § 1101(1) (1988). The "debtor in possession" usually retains possession of the company's assets and operates the business despite the bankruptcy filing. Entities filing under Chapter 7 or Chapter 13 retain the simple "debtor" designation.

4. Section 365(a) reads: "Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (1988).

5. 11 U.S.C. § 1107(a) (1988) provides that a debtor in possession has the rights and powers of a trustee subject to certain inapplicable exceptions. Therefore, in Chapter 11 cases, the debtor is the trustee, unless a party in interest or the United States Trustee persuades the court to appoint a trustee for cause or because it is in the best interests of creditors pursuant to 11 U.S.C. § 1104. A Chapter 13 debtor may elect to assume or reject executory contracts subject to section 365 as part of a bankruptcy plan pursuant to 11 U.S.C. § 1322(b)(7). Debtors filing under Chapter 7 must abide by the trustee's judgment concerning assumption or rejection.

6. A trustee must affirmatively elect to assume a contract because when a party files for bankruptcy, it creates a new legal entity which is distinct from the debtor prior to bankruptcy, who was the original party to the contract. Assumption means that the debtor will perform, and will expect the other party's performance, according to the terms of the contract. See Raymond T. Nimmer, *Executory Contracts in Bankruptcy: Protecting the Fundamental Terms of the Bargain*, 54 U. COLO. L. REV. 507, 513 (1983). Generally, a trustee must elect to assume a contract within 60 days after the order for relief or the court will consider the contract rejected. 11 U.S.C. § 365(d)(1) (1988). Once the trustee properly assumes the contract, it may assign the contract to benefit the estate on the condition that the assignee provides adequate assurance regardless of whether or not the debtor previously defaulted on the contract. 11 U.S.C. § 365(f) (1988).

7. Rejection is simply repudiation and breach of the contract. Nimmer, *supra* note 6, at 513.

8. 11 U.S.C. § 103(a) states, "[C]hapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title." 11 U.S.C. § 103(a) (1988). Consequently, the debtor to which section 365 refers may have filed under any of the appropriate chapters.

9. The drafters of the Code did not specifically define "executory contract." The legislative history states:

Though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides. A note is not usually an executory contract if the only performance that remains is repayment. Perform-

rid itself of contracts that are burdensome to the estate¹⁰ and to retain the benefits of favorable contracts as it attempts to make a "fresh start."¹¹ However, section 365 contains several exceptions to the general election rule. Section 365(c)(2)¹² provides that a trustee may not assume an executory contract to extend "financial accommodations."¹³ In con-

ance on one side of the contract would have been compiled and the contract is no longer executory.

H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 347 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6303-04. However, most courts accept Professor Vern Countryman's definition of executory contract. According to Countryman, an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). See also *In re Select-A-Seat Corp.*, 625 F.2d 290 (9th Cir. 1980) (accepting Countryman's definition); *Chattanooga Memorial Park v. Still (In re Jolly)*, 574 F.2d 349, 352 (6th Cir. 1978) (same), cert. denied, 439 U.S. 929 (1978). But see *In re Norquist*, 43 B.R. 224, 226-27 (Bankr. E.D. Wash. 1984) (suggesting that Countryman's definition does not support the purpose and spirit of the Code).

Michael Andrew has proposed a slight variation of the Countryman definition. He defines an executory contract as one that consists of two necessary elements: "(a) debtor and non-debtor each have unperformed obligations, and (b) the debtor, if it ceased further performance, would have no right to the other party's continued performance." Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845, 893 (1988).

An in-depth discussion of what constitutes an executory contract is beyond the scope of this Note. For a general overview, see Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989); Benjamin Weintraub & Alan N. Resnick, *From the Bankruptcy Courts: What is an Executory Contract? A Challenge to the Countryman Test*, 15 UCC L.J. 273 (1983).

10. Under 11 U.S.C. § 541(a), at the commencement of a bankruptcy case, "all legal and equitable interests of the debtor in property" become property of the estate. 11 U.S.C. § 541(a) (1988). But see 11 U.S.C. §§ 541(b), 541(c)(2) (listing exceptions). This broad definition of estate includes a debtor's executory contracts. The trustee's power to reject burdensome contracts parallels its power to abandon property of the estate under 11 U.S.C. § 554 (1988). See Don Fogel, *Executory Contracts and Unexpired Leases in the Bankruptcy Code*, 64 MINN. L. REV. 341, 343 (1980). See also Douglas Bordewick & Vern Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293, 303 (1983) (viewing § 365 as a limitation on § 541(a)(1) by giving the debtor the option to decide whether executory contracts and unexpired leases comprise property of the estate), cited in THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 106 n.3 (1986).

11. See *infra* Subpart II(B).

12. Section 365(c)(2) states:

(c) the trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if-

....

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

11 U.S.C. § 365(c)(2) (1988).

13. *Id.* Other types of contracts not subject to election under section 365 generally include

sistent language, section 365(e)(2)(B)¹⁴ reinforces section 365(c)(2) by excluding contracts to extend financial accommodations from subjection to the general principle that a party to a contract may not terminate the contract upon bankruptcy regardless of any ipso facto termination clause.¹⁵ When a nondebtor party proves to a court that section 365(e)(2)(B) applies to an executory contract, the party has demonstrated "cause" for relief from the automatic stay¹⁶ under section 362(d)(1),¹⁷ and the court should grant the subsequent right to terminate the contract.¹⁸ This "financial accommodations" exception to section

those which contain an uncured default, 11 U.S.C. § 365(b) (1988), those between the debtor and a party who is excused from performance under applicable law, 11 U.S.C. § 365(c)(1) (1988), or those not designated as "assumed" or "rejected" in a timely manner, 11 U.S.C. § 365(d) (1988).

14. Section 365(e) provides:

(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on -

- (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
- (B) the commencement of a case under this title; or
- (C) the appointment or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

....

- (B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

11 U.S.C. § 365(e) (1988).

15. *Id.*

16. As soon as a debtor files a bankruptcy petition, an automatic stay takes effect prohibiting, *inter alia*, the continuation of pending creditor actions, seizure of property of the estate, and any act to collect, amass, or recover repetition claims against the debtor. 11 U.S.C. § 362(a) (1988). According to the legislative history of section 362, the stay should "stop all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in U.S.C.C.A.N. 5787, 5963, 6297. For a more detailed discussion of the automatic stay, see Kathleen Thorne, *Automatic Stay: Section 362*, 3 BANK. R. DEV. J. 181 (1986).

17. Section 362(d) provides:

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

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

11 U.S.C. § 362(d) (1988).

18. See *Government National Mortgage Corp. v. Adana Mortgage Bankers, Inc.* (*In re Adana*

365 codifies the policy preventing a trustee from forcing a party to extend new credit to a debtor.¹⁹

Recently, in *Citizens and Southern National Bank v. Thomas B. Hamilton Co. (In re Thomas B. Hamilton Co.)*,²⁰ the Eleventh Circuit concluded that a credit card merchant agreement between a debtor retailer and the debtor's bank was not a financial accommodations contract.²¹ The holding in this case highlights the difficulty courts encounter when they attempt to characterize executory contracts for the purpose of section 365. Clearly, a credit card merchant agreement requires a bank to extend credit to the retailer in certain situations.²² Nevertheless, the court gave the trustee the option to assume this contract under section 365,²³ thus obligating the bank to finance a questionable debtor.

One should not fault the court for this decision. The statute does not define "financial accommodations,"²⁴ and the legislative history of section 365 does not help articulate a practical definition.²⁵ Furthermore, the cases that apply section 365 fail to characterize these mixed contracts consistently.²⁶ Consequently, it is never obvious whether or not a court will allow a trustee to assume an executory contract that has some aspects of financial accommodation. Such uncertainty is costly, not only because bankruptcy filings are increasing,²⁷ but also because it might dis-

Mortgage Bankers, Inc.) 12 B.R. 977, 987-88 (Bankr. N.D. Ga. 1980). According to the court, when section 365(c) bars assumption, there is no logical reason to maintain the stay, thereby preventing a party from terminating a nonassumable contract. *Id.* at 988 ("Termination is the inevitable final disposition of these [a]greements as allowed under section 365(e)(2).").

19. See *infra* Subpart II(B).

20. 969 F.2d 1013 (11th Cir. 1992).

21. *Id.*

22. A credit card merchant agreement embodies the complex relationship between a merchant, the merchant's bank, the credit card company, the cardholder's bank, and the cardholder. When the cardholder instigates a valid chargeback, the cardholder's bank passes liability for the amount of the chargeback to the merchant bank and then to the merchant. If the merchant cannot pay (for instance, if the merchant is bankrupt), then the merchant bank extends credit to the cardholder on behalf of the merchant. See *infra* Subpart III(A) for a complete discussion of the *Hamilton* case.

23. *Hamilton*, 969 F.2d at 1014.

24. See *supra* note 12 for text.

25. The legislative history of § 365 states only that "[c]haracterization of contracts to make a loan, or extend other debt financing or financial accommodations, is limited to the extension of cash or a line of credit and is not intended to embrace ordinary leases or contracts to provide goods or services with payments to be made over time." 124 CONG. REC. 32,396 (statement of Rep. Edwards) reprinted in 1978 U.S.C.A.N. 5787, 6436, 6447.

26. See *infra* Part III for examples of executory contracts that courts have examined.

27. Between 1980 and 1990, the number of bankruptcies filed increased by more than 100%. See Lester Brickman & Jonathan Klein, *The Use of Advance Fee Attorney Retainer Agreements in Bankruptcy: Another Special Law for Lawyers?*, 43 S.C. L. REV. 1037, 1060 n.102 (1992).

courage the use of voluntary credit transactions which form a basis of our economy.²⁸

This Note contends that Congress should amend section 365 of the Code to mandate bifurcation of executory contracts that contain some financial accommodations provisions. Specifically, Congress should allow a trustee to elect to assume or reject the contract *without* the financial accommodation provisions. Then, if a trustee chooses to assume a contract that requires financing, the debtor must secure this credit from an outside source or make a new agreement with the original contract party. This bifurcation proposal not only upholds the dual purposes of section 365—to protect both the debtor and the party advancing money—but also creates certainty for the parties by providing a straightforward method of handling executory contracts included in a debtor's estate.²⁹

Part II of this Note describes the legislative history of section 365 and states Congress' reasons for enacting it. Part III traces the courts' seemingly anomalous treatment of executory contracts that have some aspects of financial accommodation. Part IV outlines the bifurcation proposal and demonstrates that it is viable and consistent with Code policy, other Code provisions, and related judicial opinions concerning partial assumption and bifurcation.

II. LEGISLATIVE HISTORY

A. Section 365 and Its Predecessor

Congress enacted section 365 as part of the Bankruptcy Reform Act of 1978.³⁰ Section 365 replaced section 70(b) of the Bankruptcy Act of

28. See Nimmer, *supra* note 6, at 514. Nimmer posits that the legal system should promote voluntary credit transactions. According to Nimmer, parties consider the risk of bankruptcy and the potential application of section 365 when they negotiate contracts. *Id.* Carrying this premise to its logical conclusion, if section 365 is ambiguous and might be applied to the detriment of a party extending some aspect of financial accommodations, the party will be less willing to contract voluntarily.

29. See *infra* Part IV.

30. The enactment of the Code in 1978 was the culmination of an extensive legislative process. Congress formerly initiated Code drafting in 1970 when it created the Commission on Bankruptcy Laws of the United States to examine and recommend changes to the revised version of Bankruptcy Act of 1898. See Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468 (1971). After three years of investigation, the Commission submitted a two-part report to Congress on July 30, 1973. The first part discussed general findings and recommendations. The second part represented a draft of a bill designed to implement the recommendations of part one. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, Parts I & II, H.R. DOC. NO. 137, 93d Congress, 1st

1898.³¹ Section 70(b) substantially codified the case law prior to 1938³² by giving the trustee the right to assume or reject an executory contract, including an unexpired lease.³³ The trustee had to make this election within a prescribed time limit.³⁴ Congress also added section 70(b) to fix a time for trustee election and to solve the problem of liability assump-

Sess. (1973) [hereinafter COMMISSION REPORT]. Along with a proposal from the National Conference of Bankruptcy Judges, the Commission Report was presented to the 93rd Congress as H.R. 10792 and S. 4026.

In 1975, the draft and judges' proposal were reintroduced to the 94th Congress as H.R. 31 and H.R. 32 and S.235 and S.236 respectively. After the 95th Congress defeated a consensus bill on the House floor, Congress again revised the bill and reintroduced it to the House as H.R. 8200, 95th Cong., 1st Sess. (1977), and to the Senate as S. 2266, 95th Cong., 1st Sess. (1977). After hearings in the Senate, both Houses produced reports. S. REP. NO. 95-989, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787 [hereinafter S. REP.]; H.R. REP. NO. 95-595, 95th Cong., 1st Sess. (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 [hereinafter H. REP.]. The two bills differed slightly from each other, but Congress passed a compromise bill extracting elements from each. Instead of a conference commission report concerning the act that was passed, the legislative leaders read nearly identical statements into the Congressional Record to explain the differences between the two bills and the Code as enacted. 124 CONG. REC. 32,392 (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436 [hereinafter Statement of Rep. Edwards]; 124 CONG. REC. 33,992, *reprinted in* 1978 U.S.C.C.A.N. 6505 [hereinafter Statement of Sen. DeConcini]. For a complete discussion of the legislative history of the Code, see Kenneth N. Klee, *Legislative History of the New Bankruptcy Code*, 28 DEPAUL L. REV. 941 (1979).

31. Congress enacted section 70(b) in the Chandler Act of 1938. Act of June 22, 1938, ch. 575, § 70(b), 52 Stat. 840, 880 (repealed 1978).

32. Early case law tied a trustee's right to reject an executory contract with his ability to abandon burdensome property of the estate. A trustee could opt to assume or reject an executory contract depending on its potential profit to the estate. See 2 COLLIER ON BANKRUPTCY, ¶ 365.01[a] (Lawrence P. King ed., 15th ed. 1993). See also *Central Trust Co. of Illinois v. Chicago Auditorium Ass'n.*, 240 U.S. 581 (1916), *cited in* COLLIER, *supra*, ¶ 365.01[1], at 365-10.3 n.2.

33. Unlike current section 365(a), see *supra* note 4, which gives the trustee the right to assume an executory contract or an unexpired lease, section 70(b) referred to executory contracts including unexpired leases. However, courts have not considered this change of language to be significant. See Robert L. Rubin, Comment, *Legislative and Judicial Confusion Concerning Executory Contracts in Bankruptcy*, 89 DICK. L. REV. 1029, 1037 n.47 (1985).

34. Section 70(b) provided:

B. Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however*, That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time, whether or not a trustee has been appointed or has qualified, shall be deemed to be rejected. A trustee shall file, within sixty days after adjudication, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee: *Provided, however*, That the court may for cause shown extend or reduce such period of time. Unless a lease of real property shall expressly otherwise provide, a rejection of such lease or of any covenant therein by the trustee of the lessor shall not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either

tion by requiring complete performance from debtors who assume executory contracts.³⁵ Section 70(b) did not contain any statutory language comparable to that found in section 365(c)(2) making contracts involving financing unassumable.³⁶ Consequently, under section 70(b), a debtor could theoretically force a nondebtor party to continue to extend financial accommodations in accordance with an assumed executory contract.³⁷ However, a party could avoid this situation by including a clause in the original contract providing that bankruptcy either terminates the contract or gives the other party the option to terminate. Under section 70(b), such ipso facto termination clauses were enforceable.³⁸

Similar to both early common law and section 70(b), the dominant purpose of section 365 is to allow a trustee the discretion to examine the debtor's executory agreements, assume those that benefit the estate, and reject those that do not.³⁹ However, in developing the 1978 Code provision dealing with executory contracts, the drafters did not focus solely on the debtor's election rights as a means of facilitating a debtor's rehabilitation opportunities.⁴⁰ Exhibiting concern for the parties contracting with the debtor, the drafters offered direct, instead of indirect,⁴¹ protection to parties extending financing to the debtor.⁴² Congress reversed the section 70(b) policy upholding termination clauses when it enacted section 365(e)⁴³ which broadly rejects all optional or ipso facto termination

party shall terminate the lease or give the other party an election to terminate the same shall be enforceable.

11 U.S.C. § 110(b) (repealed 1978).

35. See COLLIER, *supra* note 32, ¶ 365.01[2]. See also *Burger King Corp. v. Rovine Corp. (In re Rovine)*, 6 B.R. 661, 666 (Bankr. W.D. Tenn. 1980) (stating that both § 70(b) and § 365 were intended to solve the problem of assumption of liabilities).

36. See *supra* note 34 for the text of § 70(b). This Note focuses on § 365(c)(2) with the assumption that § 365(e)(2)(B) simply corresponds to the language of the previous subsection.

37. See 4 COLLIER ON BANKRUPTCY, ¶ 70.43[9], at 536 (14th ed. 1975).

38. Under an ambiguous portion of § 70(b), an express, as opposed to a general, covenant that assignment resulting from bankruptcy shall terminate the lease was enforceable. See *supra* note 34 for text of § 70(b). Although the provision only mentioned leases specifically, it most likely applied to executory contracts as well. See COLLIER, *supra* note 37, ¶ 70.43[8].

39. See *Silk Plants, Etc. Franchise Systems, Inc. v. Register (In re Register)*, 95 B.R. 73, 74 (Bankr. M.D. Tenn. 1989); *In re G-N Partners*, 48 B.R. 462, 465 (Bankr. D. Minn. 1985); *Rovine*, 6 B.R. at 666.

40. See *infra* notes 57-60 and accompanying text for a discussion of the Code's rehabilitation purpose.

41. Ipso facto termination clauses are a means of indirect protection for creditors.

42. See 11 U.S.C. §§ 365(c)(2) and (e)(2)(B).

43. See *supra* note 14 for text.

clauses relating to the financial status of the debtor.⁴⁴ With this change, Congress effectively denied financiers their indirect method of protecting themselves against extending new credit to a debtor. However, with the assistance of outspoken lender advocates at the Senate hearings on the new bankruptcy bill,⁴⁵ Congress determined that parties extending financing in the executory contract context warrant special, specific protection.⁴⁶

In proposing the legislation that eventually resulted in section 365(c)(2), both the Senate and the House explained that their purpose for this protection was to prevent parties from having to extend new credit to a debtor under an assumed executory contract.⁴⁷ The Senate and House versions of this legislation differed somewhat, however. The Senate bill, S. 2266,⁴⁸ was slightly more inclusive than its counterpart in the House, H.R. 8200.⁴⁹ Section 365(b)(4) of S. 2266 prohibited a trustee's assumption of executory contracts requiring the other party to make a

44. According to the legislative history, Congress believed that ipso facto clauses hampered rehabilitation. Therefore, Congress invalidated them. See S. REP., *supra* note 30, at 59; H. REP., *supra* note 30, at 348.

45. Responding to the fact that under section 70(b) a trustee could assume a credit agreement, thereby forcing the lender to extend new financing, a representative of the American Bankers' Association stated, "We believe that this problem must be met by a clear amendment of section 365 to preclude the preposterous situation of a lending institution being required to make loans to a bankrupt." *Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S.2266 and H.R. 8200*, 95th Cong., 1st Sess. 576 (1977) (statement of Robert Grimmig).

46. In addition to the mere existence of § 365(c)(2) and (e)(2)(B), the legislative history accompanying section 365(e) clearly demonstrates the drafters' awareness of the nondebtor party's position: "[t]he unenforceability of ipso facto or bankruptcy clauses proposed under this section will require courts to be sensitive to the rights of the nondebtor party to executory contracts and unexpired leases." S. REP., *supra* note 30, at 59; H. REP., *supra* note 30, at 348.

47. The Senate Reports states:

The purpose of this subsection is to make it clear that a party to a transaction which is based upon the financial strength of a debtor should not be required to extend new credit to the debtor whether in the form of loans, lease financing or the purchase or discount of notes.

S. REP., *supra* note 30, at 59. The House Report similarly reads:

The purpose of this subsection, at least in part, is to prevent the trustee from requiring the new advances of money or other property. The section permits the trustee to continue to use and pay for property already advanced, but it is not designed to permit the trustee to demand new loans or additional transfers of property.

H. REP., *supra* note 30, at 348. Although the House Report comments that preventing new advances is only part of the subsection's purpose, it does not mention any other objectives. See also *In re Farrell*, 79 B.R. 300, 304 (Bankr. S.D. Ohio 1987) (echoing the purposes proclaimed by Congress).

48. See *supra* note 30.

49. See *supra* note 30

loan, deliver equipment, or issue a security to the debtor.⁵⁰ Although Section 365(c) of H.R. 8200 did refer to contracts extending debt financing and financial accommodations, it did not cite contracts that provide for equipment delivery.⁵¹ In the compromise bill that was eventually enacted,⁵² Congress adopted the House version of section 365(c).⁵³

By approving the narrower House bill at the expense of the Senate equivalent, Congress illustrated its intent that section 365 should only apply to select types of executory contracts.⁵⁴ However, the final language of the statute and the few statements of the legislative leaders that accompany the Code make it difficult to determine which contracts the provision covers. Courts have difficulty interpreting the terms of section 365, especially the term "financial accommodations." Attempting to define this ambiguous term, which appears nowhere else in the Code, the legislative leaders merely stated that contracts to extend financial accommodations are those involving extensions of cash or credit.⁵⁵

B. Overview of the Bankruptcy Code

Courts have held that in order to give more substance to the term "financial accommodations," the judiciary should construe the term in light of the Code's two broad legislative purposes.⁵⁶ The first purpose is

50. Section 365(b)(4) of S. 2266 provides: "Notwithstanding anything to the contrary contained in this section, the trustee may not assume an executory contract to make a loan or deliver equipment to or to issue a security of the debtor." Note that this provision does not contain the term "financial accommodations." S. 2266 § 365(b)(4), 75th Cong., 1st Sess. (1977).

51. Section 365(c)(2) of H.R. 8200 was an amendment to the original bill. The language of the amendment is identical to current § 365(c)(2). Cf. H.R. 8200, 95th Cong., 1st Sess. (1977).

52. See *supra* note 1.

53. See Statement of Rep. Edwards, *supra* note 30, at 32,396; Statement of Sen. DeConcini, *supra* note 30, at 33,995-96. Congress eliminated contracts to deliver equipment from the provision. Professor Nimmer asserts that this exclusion is illogical:

To the extent that a distinction between pure credit contracts and credit sales contracts is intended, it represents an anomalous discontinuity in the protection of the nonbankrupt party. The creditor in both types of contracts is faced with a significant change in the debtor's circumstances that affects fundamental aspects of the original bargain.

Nimmer, *supra* note 6, at 534.

54. According to the leaders' statements, section 365 is "not intended to embrace ordinary leases or contracts to provide goods or services with payments to be made over time." Statement of Rep. Edwards, *supra* note 30, at 32,396; Statement of Sen. DeConcini, *supra* note 30, at 33,396.

55. Statement of Rep. Edwards, *supra* note 30, at 32,396; Statement of Sen. DeConcini, *supra* note 30, at 3396. The premier treatise on bankruptcy adds that the term should be "strictly construed." See COLLIER, *supra* note 32, ¶ 365.05[1], 365-46.

It is worthwhile to note that the extensive 1984 amendments to the Code did not in any way alter § 365(c)(2) or (e)(2)(B).

56. See *Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 105 (2d Cir. 1982) (proposing that

debtor-oriented. The essence of bankruptcy law is to release a debtor from the burdens of indebtedness and to provide the debtor with a "fresh start."⁵⁷ This policy is evident in early case law,⁵⁸ in the legislative history of the 1978 Code,⁵⁹ and in the individual Code provisions themselves.⁶⁰ In general, section 365 embodies this fresh start policy by allowing the trustee to reject those contracts that are burdensome and might hinder the debtor's rehabilitation. The section also allows the trustee to assume beneficial contracts that will assist the debtor's recovery from bankruptcy. More specifically, section 365(c)(2) promotes fresh starts by strictly limiting the types of contracts that are unassumable. Courts uphold a fresh start policy by interpreting financial accommodations narrowly and permitting the trustee to assume agreements with some financing.

Of course, the Code protects creditors as well as debtors.⁶¹ The second, equally important purpose of the Code is to provide fair treatment to creditors.⁶² Like the fresh start policy, this goal pervades both case

section 365 must be construed in the context of the broad purposes of the Code); *Northeast Bank of Lewiston and Auburn v. Lyon* (*In re Lyon*), 8 B.R. 152, 154 (Bankr. D. Maine 1981) ("The Code's provisions are to be construed, when reasonably possible, in harmony with the purpose so as to effectuate the general purpose and policy."). These purposes are especially relevant because this Note asserts that a bifurcation scheme reflects the Code objectives more fully than the current section. See *infra* Part IV.

57. See generally *Grogan v. Garner*, 498 U.S. 279 (1991); *General Motors Acceptance Corp. v. McDonald* (*In re McDonald*), 129 B.R. 279, 282 (Bankr. M.D. Fla. 1991); *In re Campbell*, 124 B.R. 462, 464 (Bankr. W.D. Pa. 1991); *In re Epstein*, 39 B.R. 938, 941 (Bankr. D.N.M. 1984).

58. See generally *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 514 (1938) (stating that goal is to relieve debtor from oppressive indebtedness and to permit the debtor to start afresh), *rehearing denied*, 305 U.S. 668 (1938); *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (stating that goal of the Code is to provide debtors with "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt").

59. See 123 CONG. REC. 35, 452 (statement of Rep. Drinan). Representative Drinan remarked, "First we want to give a fresh start to the debtor; in all the writings on bankruptcy, this is the essence of bankruptcy. Let this poor individual discharge his debts. Ever since the mid-1800s, we do not put him in jail for debts he cannot pay. Give him a fresh start." *Id.*

60. See, e.g., 11 U.S.C. § 522(d) (1988) (providing exemptions from the bankruptcy estate for various items including the homestead, household goods, jewelry, and others); 11 U.S.C. § 525 (1988) (prohibiting employment discrimination based on bankrupt status); 11 U.S.C. § 541(a)(6) (1988) (excluding a debtor's post-petition wages from the estate so that the debtor may use them in rehabilitation).

61. See 123 CONG. REC. 35,452 (statement of Rep. Drinan) ("This is a very balanced bill. There are some things that help debtors in this bill . . . there are many things for creditors too.").

62. See, e.g., *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (holding that the primary objective of the Bankruptcy Act of 1898 is to minimize the injury to creditors arising from bankruptcy); *In re The Harwald Company*, 497 F.2d 443, 444 (7th Cir. 1974) (same); *In re Sanchez*, 20 B.R. 431, 433 (Bankr. W.D. Tex. 1982) (maintaining that the Code is intended to pro-

law⁶³ and the Code.⁶⁴ Often the two purposes offset each other. Although the Code encourages a debtor's fresh start, such rehabilitation should not occur to the complete detriment of creditors.⁶⁵ Clearly, section 365(c)(2) directly accomplishes the creditor protection goal by proscribing assumption of financing contracts, thereby preventing a trustee from compelling a creditor to offer new credit to a potentially unreliable party. While the fresh start policy requires courts to interpret financial accommodations narrowly, the term must be loosely construed to protect creditors, so that fewer agreements are assumable.

As demonstrated, neither the legislative history of section 365 nor that of the Code as a whole reveals a clear, undisputed and operative interpretation of financial accommodations contracts.

III. JUDICIAL INTERPRETATION

Few courts have analyzed executory contracts under section

vide fair treatment to the creditor and debtor). Although the first two cases cited refer to the 1898 Act and not the 1978 Code, the above cases demonstrate that the underlying purposes of the two acts are consistent.

63. See *supra* note 62.

64. See, e.g., 11 U.S.C. § 361 (1988) (explaining the adequate protection requirement found in sections 362, 363, and 364); 11 U.S.C. § 365(b)(1) (1988) (requiring a debtor to cure defaults in executory contracts and provide adequate assurance before assumption); 11 U.S.C. § 366(b) (1988) (requiring a debtor to provide adequate assurance to utility resuming service); 11 U.S.C. § 507 (1988) (defining priorities among creditors); 11 U.S.C. § 1325 (1988) (permitting Chapter 13 plan confirmation only when plan passes both the "best interests" and "disposable income" tests).

In addition, the judiciary supports the goal of protecting creditors in its interpretation of certain Code provisions. For example, courts refuse to expand the reading of 11 U.S.C. § 525(b), which prohibits private employment discrimination based solely on bankruptcy status, to encompass credit discrimination based on past debtor status. In other words, courts will not apply section 525 to order a party to extend credit to a previous debtor even if the refusal is based solely on the debtor's past bankruptcy and if the party seeking credit offers money upfront. See *Rose v. Connecticut Housing Finance Authority (In re Rose)*, 23 B.R. 662, 666 (Bankr. D. Conn. 1982) ("[S]ection 525 does not prohibit private discrimination, nor relieve debtors from requirements applicable to all. 'Section 525 does not prohibit private consideration of other factors such as future financial responsibility or ability, and does not prohibit imposition of requirements . . . if applied nondiscriminatorily.'") (quoting *Henry v. Heyison*, 4 B.R. 437, 442 (E.D. Pa. 1980)). But see *Douglas G. Bishkoff, Private Parties and Bankruptcy-Based Discrimination*, 62 IND. L.J. 159 (1986) (advocating a reading of section 525 that prevents private parties from considering bankruptcy when extending credit).

65. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (suggesting that the Act limits the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor."). See also *Nimmer, supra* note 6, at 509-10. Professor Nimmer suggests that "[e]xcessive and too readily available discharge might weaken the general social norm that honestly incurred liabilities should be voluntarily repaid." Nimmer, *supra* note 6, at 509-10.

365(c)(2).⁶⁶ In these few cases, courts repeatedly express their confusion about what constitutes a contract for financial accommodations and how to treat contracts with multiple purposes that include providing financial accommodations.⁶⁷ Of course, straightforward situations do exist. For example, a letter of credit or loan commitment is certainly the type of contract to which section 365(c)(2) applies.⁶⁸ Conversely, a pre-petition pledge of capital made with no expectation of future repayment is definitely not a contract for financial accommodations.⁶⁹ Unfortunately, the majority of disputed contracts exhibit some aspects of financing, but were not established solely for that purpose. The courts' uncertainty as to how to deal with these mixed contracts manifests itself in inconsistent treatment of similar contracts.⁷⁰ By comparing the courts' past examinations of executory contracts with the credit card merchant agreement at issue in *In re Hamilton*,⁷¹ one may conclude that the Eleventh Circuit could have easily and logically characterized the contract either way by employing the sound rationale developed by previous courts.⁷²

66. See *Gill v. Easebe Enterprises, Inc. (In re Easebe Enterprises)*, 900 F.2d 1417, 1419 (9th Cir. 1990) ("[T]here is scant judicial authority on the application of section 365(c)(2)."). As of March 1993, there are approximately 30 cases on the issue.

67. See *In re Cole Brothers, Inc.*, 137 B.R. 647, 651 (Bankr. W.D. Mich. 1992) ("The Bankruptcy Code supplies no further guidance as to what constitutes a contract for financial accommodation and no express answer is given as to what a court should do when only part of the agreement provides for financial accommodations."); *Airlines Reporting Corp. v. Wills Travel Service, Inc. (In re Wills Travel Service, Inc.)*, 72 B.R. 380, 382 (Bankr. M.D. Fla. 1987) ("[T]he legislative history and the remarks are ambiguous. . . ."), *vacated, rehearing granted*, 87 B.R. 690 (Bankr. M.D. Fla. 1988); *Clayton J. Dean v. Postle (In re Postle)*, 48 B.R. 721, 725 (Bankr. D. Ar. 1985) ("The Code provides instruction on what to do if a provision is construed to be a financial accommodation, not whether the transaction constitutes such accommodation in the first instance.").

68. See *Farmer v. Crocker Nat'l Bank (In re Swift Air Lines, Inc.)*, 30 B.R. 490, 496 (Bankr. App. 1983) (holding that a letter of credit is an executory contract for financial accommodations); *In re New Town Mall*, 17 B.R. 326, 327-28 (Bankr. D.S.D. 1982) (holding that a loan commitment is a contract for financial accommodations). Both courts rely on the distinct language in the legislative history: "Under this provision, contracts such as loan commitments and letters of credit are non-signable and may not be assumed by the trustee." H. REP., *supra* note 30, at 348; S. REP., *supra* note 30, at 59. See *New Town Mall*, 17 B.R. at 328; *Farmer*, 30 B.R. at 496.

69. See *Lowin v. Dayton Sec. Assoc. (In re Securities Group)*, 124 B.R. 875, 901 (Bankr. M.D. Fla. 1991) (holding that pledge of capital contribution is not the type of contract contemplated by section 365).

70. Compare *In re Skylark Travel Inc.*, 120 B.R. 352 (Bankr. S.D.N.Y. 1990) (holding that agreement between debtor travel agency and national clearinghouse for airline tickets was not financial accommodations contract) with *In re Lockspur, Inc.*, 82 B.R. 37 (Bankr. E.D. La. 1987) (holding that the exact same type of contract was a financial accommodations contract).

71. 969 F.2d 1013 (11th Cir. 1992).

72. See *infra* parts III.B, III.C.

A. In re Hamilton

In *In re Hamilton*,⁷³ the Eleventh Circuit determined that a credit card merchant agreement between a Chapter 11 retail debtor and a merchant bank was not a contract to extend financial accommodations.⁷⁴ The agreement between Thomas Hamilton Company, Inc.⁷⁵ and Citizens and Southern National Bank⁷⁶ typifies the complex arrangements between most merchants who are dependent on credit card transactions, financial institutions, and credit card holders.⁷⁷ Under this conventional credit card merchant agreement, the merchant bank purchased sales drafts generated by the retailer's credit card transactions at a stipulated percentage of the total credit card sales.⁷⁸ Meanwhile, the credit card company⁷⁹ transferred the transactional data to banks issuing the credit card used in the sales.⁸⁰ These card-issuing banks pay the merchant bank and bill the cardholder.⁸¹ For the purposes of this discussion, the crucial aspect of the agreement lies in the chargeback procedure. When a cardholder discovers a valid billing error on a statement,⁸² the cardholder is not obligated to pay the card-issuing bank. However, by the time the cardholder discovers the error,⁸³ the card-issuing bank has already transmitted funds to the merchant bank. Therefore, the card-issuing bank has the right to initiate a "chargeback" against the merchant bank that then pays the chargeback and usually passes the liability on to the retailer.⁸⁴

73. 969 F.2d 1013 (11th Cir. 1992).

74. In reaching this conclusion, the Eleventh Circuit affirmed the findings of the bankruptcy court and district court below. *Id.*

75. Thomas B. Hamilton Company, Inc. (Hamilton) buys and sells sterling silver products at the retail level. *Id.* at 1014.

76. Citizens & Southern National Bank (C & S) is an Atlanta-based bank. *Id.*

77. *Id.* at 1017.

78. *Id.* at 1014-15. More specifically, Hamilton would transmit the customers' credit card information to an electronic network system at the bank. Within three days of the transaction, Hamilton would release the sales drafts for purchase by C & S. The bank could pay Hamilton for the drafts by crediting or making adjustments to a commercial account that Hamilton maintained at the bank or by promptly sending Hamilton a check. Hamilton chose to receive credit to its account. *Id.*

79. In this case, the credit card companies were Mastercard and Visa. *Id.* at 1014.

80. At the same time that Hamilton released the sales drafts for purchase, information was transmitted to Mastercard and Visa. *Id.* at 1015.

81. The card-issuing banks pay via a settlement process devised by Mastercard and Visa. *Id.*

82. Billing errors usually occur when the cardholder is charged for goods or services the cardholder did not receive or accept. *Id.* The card-issuing bank investigates the cardholder's claim to evaluate whether it is valid. *Id.* at 1016.

83. The cardholder has up to 60 days to notify the bank of an error, and then the bank has 90 days to investigate. *Id.* at 1015-16.

84. Under the terms of the agreement, Hamilton is liable for chargebacks when: 1) the cus-

The retailer may reimburse the merchant bank in several ways: the bank may deduct the amount from commercial accounts held for the retailer; the retailer may pay promptly on demand; or the bank may draw on a reserve account established for this purpose, if one exists.⁸⁵ When the merchant bank pays the chargeback, it is actually extending credit on behalf of the merchant.⁸⁶ Under the agreement,⁸⁷ if the merchant is unable to repay the bank because of financial difficulty, the bank bears the loss.

Although the court in *In re Hamilton* admitted that the merchant bank was in fact extending credit to the debtor when valid chargebacks occurred,⁸⁸ it rejected the bank's section 365 financial accommodations argument and allowed the trustee to assume the contract.⁸⁹ Explicitly adopting a narrow reading of section 365(c)(2),⁹⁰ the court analyzed the "true legal nature"⁹¹ of the contract. Because the primary purpose—and true legal nature—of the credit card merchant agreement was not to provide financing but to establish a business relationship that would permit retail credit card transactions, the court held that the agreement did not qualify as a financial accommodations contract.⁹² Essentially, the court held that incidental credit provisions within a contract will not render it unassumable.

The court delineated several policy arguments to support its decision. First, obstructing the trustee's ability to assume such a contract would

tomers returns or does not receive merchandise; 2) the sales transaction exceeds the dollar limitation of the card; 3) the sales draft was drawn without authority; 4) the sales draft is illegible; 5) the cardholder disputes the sale, quality, or delivery of the merchandise and the retailer cannot resolve the dispute; 6) the sales draft is drawn in breach of an agreement; 7) extending the credit violated the law; or 8) the card is invalid, expired, or listed on a restricted list. *Id.* at 1016-17.

85. *Id.* at 1017. C & S never established a reserve fund. *Id.* Moreover, reserve funds may not always cover the extended credit sufficiently.

86. *See supra* note 22.

87. *Hamilton*, 969 F.2d at 1019 (holding a merchant bank liable for chargebacks it could not recover from merchant).

88. *Id.* at 1020.

89. *Id.* at 1021. After C & S learned that Hamilton filed a bankruptcy petition, it asked Hamilton to complete a new credit application. As part of the application process, it subjected Hamilton to a credit review. Based on the poor results of the review, C & S wished to terminate the existing credit card merchant agreement. It filed a motion with the bankruptcy court for relief from the automatic stay so that it could terminate the executory contract to extend financial accommodations pursuant to section 365(e)(2)(B). *Id.* at 1017-18.

90. *Id.* at 1019-20.

91. *Id.* at 1020 (quoting *In re Wills Travel Service, Inc.*, 72 B.R. 380, 382 (Bankr. M.D. Fla. 1987)).

92. *Id.*

make a retail debtor's rehabilitation virtually impossible.⁹³ Second, it noted that other Code provisions protect the bank. For example, section 365(a) requires the bankruptcy court's approval for assumption. Accordingly, the court in *In re Hamilton* would not authorize assumption if performance of an agreement would place the nondebtor party at an unreasonable risk.⁹⁴ Finally, the court stressed that section 365(b)⁹⁵ requires the debtor to cure any defaults, such as failure to reimburse the bank for chargebacks, before assuming the contract.⁹⁶

Nevertheless, it is significant that, in the end, the court doubted some aspects of its conclusions. The court conceded that its holding actually increased the bank's financial risk,⁹⁷ and more importantly, it noted that not every circumstance involving the type of credit card merchant agreement that was at issue in this case would merit identical treatment.⁹⁸ This admission supports the premise that courts are uncertain when faced with executory contracts. Accordingly, one can never confidently predict the outcome of a case.

B. Other Contracts that Are Not Financial Accommodations

When other courts reject financial accommodation descriptions, they emphasize many of the same contractual characteristics that the *Hamilton* court found significant. First, like the Eleventh Circuit, courts frequently evaluate whether credit provisions in executory contracts are incidental or fundamental to the purpose of the entire contract. For example, in *In re Cole Brothers, Inc.*⁹⁹ the court determined that a trustee

93. *Id.* at 1021.

94. *Id.* However, it seems more likely that if the contract did in fact place an unreasonable risk upon the nondebtor, the court, from the onset, should have declared it unassumable as a financial accommodations contract.

95. Section 365(b)(1) states:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee-

(A) cures, or provides adequate assurance that the trustee will promptly cure such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1) (1988).

96. *Hamilton*, 969 F.2d at 1021.

97. *Id.*

98. *Id.*

99. 137 B.R. 647 (Bankr. W.D. Mich. 1992).

could assume a series of dealer agreements that required John Deere to provide retail financing to qualified customers of the debtor John Deere dealer.¹⁰⁰ Although individually the contracts would have been considered agreements to extend financial accommodations, as a unit, they formed the basis of a broader business relationship.¹⁰¹ Together, the purpose of the agreements was to create a dealership, not to provide financing.¹⁰² Therefore, section 365(c)(2) did not bar the trustee from assumption. Similarly, in *Braniff, Inc. v. GPA Group PLC (In re Braniff)*,¹⁰³ the court succinctly asserted that a lease commitment, partial assignment, and purchase agreement relating to an aircraft transaction did not comprise a contract to extend financial accommodations because the financing aspects of the contracts were incidental to the objective of the unified arrangement.¹⁰⁴ The philosophy behind this rationale is best summarized by the oft-cited theory: to bar every contract in which the debtor owed money would "allow the exception to swallow the rule."¹⁰⁵

In addition to conducting an incidental purpose analysis, many courts consider whether the disputed executory contract is "ordinary." If the contract resembles the majority of contracts that deal with similar goods or services, the court is more likely to endorse assumption.¹⁰⁶ In *In re Farrell*,¹⁰⁷ the court held that an ordinary van lease was not a contract to extend financial accommodations.¹⁰⁸ Similarly, in *In re United Press In-*

100. *Id.* at 649, 652.

101. *Id.* at 650-51. This conclusion is problematic. The court noted, "The statute does not state whether the debtor is barred from assuming a contract where only a part of the agreement is for financial accommodation." *Id.* at 652. The court recognized that several individual agreements constituted financial accommodation contracts. *Id.* at 650. However, the court, on its own, decided to consider the agreements as a whole. *Id.* at 651.

102. *Id.* at 651.

103. 118 B.R. 819, 845 (Bankr. M.D. Fla. 1990).

104. *Id.* at 845. The *Braniff* court addressed this issue in only two sentences of the opinion. The court indicated that the financing was incidental, and that fact alone made it assumable. *Id.* The purpose of the contract was to enable the debtor to obtain possession of 26 aircrafts. *Id.* at 829.

105. *Hamilton*, 969 F.2d at 1019 (quoting *In re The Travel Shoppe*, 88 B.R. 466, 470 (Bankr. N.D. Ga. 1988)); *In re Farrell*, 79 B.R. 300, 304 (Bankr. S.D. Ohio 1987); *In re United Press Int'l.*, 55 B.R. 63, 66 (Bankr. D.D.C. 1985).

106. At the onset, one should note that this is an extremely nebulous inquiry.

107. 79 B.R. 300 (Bankr. S.D. Ohio 1987).

108. *Id.* at 304. While the lease did offer the lessee the option of purchasing the van at the end of the lease period, the lessee had to pay the fair market value of the vehicle, not nominal consideration. Therefore, the court concluded that it was a true lease, not a lease intended as a security. *Id.* at 303. The lessor was under no duty to provide advances of cash or new property. Therefore, this was not a financial accommodation. *Id.* at 304.

ternational, Inc.,¹⁰⁹ the court deemed a nonresidential real estate lease, which required the lessor to prepare the premises for occupancy,¹¹⁰ as ordinary and therefore assumable.¹¹¹ Finally, in *In re Peaches Records and Tapes*,¹¹² the court concluded that a lease based on a percentage of the debtor retailer's gross sales did not constitute a financial accommodations contract because gross sales percentage is a customary method for establishing rent.¹¹³ If the *Hamilton* court had undertaken a similar inquiry into typicality, its findings would have supported its holding. The credit card merchant agreement typified arrangements for credit card services.¹¹⁴ Under this approach, therefore, it is not a contract to extend financial accommodations.

The type of executory contract that has been the subject of most litigation under section 365(c)(2) is the arrangement between debtor travel agencies and national airline ticket clearinghouses.¹¹⁵ Under a normal agreement, the clearinghouse supplies the travel agency with blank airline tickets and airline identification plates that bear the airline's name. When the agency sells the tickets for cash,¹¹⁶ it deposits the proceeds into a special bank account from which the clearinghouse draws funds to cover what it has paid to the airline for the tickets, less the agency's commission.¹¹⁷ These contracts are analogous to some aspects of credit card merchant agreements. In both instances, the main thrust of the agreement is to facilitate the use of goods and services, not to provide financing. In addition, the nondebtors extend credit in a similar fashion. In both cases, the nondebtor, a merchant bank or clearinghouse, pays a

109. 55 B.R. 63 (Bankr. D.D.C. 1985).

110. The preparation involved erecting partitions and installing electricity and water pipes. *Id.* at 64. The mere fact that the lessor bore the burden of preparing the building did not make the lease financial accommodation. *Id.* at 65-66. The debtor here received no fiscal benefit, only property suitable for occupation. *Id.* at 66.

111. *Id.* at 67. This case differs from *Dean v. Postle Enterprises, Inc.* (*In re Postle Enterprises, Inc.*), 48 B.R. 721 (Bankr. D. Ariz. 1985). In that case, the court held that a lease which bound the lessor to provide \$150,000 in construction allowances to the debtor was a financial accommodations contract partially because it did not represent a typical lease. See *infra* notes 152-53 and accompanying text.

112. 51 B.R. 583 (Bankr. 9th Cir. 1985).

113. *Id.* at 590.

114. *Hamilton*, 969 F.2d at 1017.

115. The issue has been litigated at least seven times. See *infra* notes 120-32 and accompanying text.

116. There are separate arrangements for credit sales.

117. See, e.g., *In re Skylark*, 120 B.R. 352, 352-54 (Bankr. S.D.N.Y. 1990). These agreements are referred to as "ARC" agreements ("Agency Reporting Agreements"). *Id.*

third party, a cardholder bank or airline company, on behalf of the debtor. The nondebtor only suffers financially when the debtor cannot reimburse according to the respective agreement.¹¹⁸

The majority of courts considering these airline agreements have held that they are not contracts to extend financial accommodations.¹¹⁹ In *Airlines Reporting Corp. v. Wills Travel Service, Inc. (In re Wills Travel Service)*,¹²⁰ the first case that examined these agreements, the bankruptcy court declared that the contract was not a financial accommodations agreement simply because the clearinghouse never intended to extend credit to the debtor.¹²¹

Building on the *Wills* rationale, the bankruptcy court in *Karsh Travel, Inc. v. Airlines Reporting Corp. (In re Karsh Travel, Inc.)*¹²² asserted that section 365(c)(2) did not bar assumption of the agreement because it was a contract to provide ordinary goods in the form of airline tickets.¹²³ Furthermore, from a policy standpoint, finding that the agreement was not assumable would place the clearinghouses in control of travel agency bankruptcies.¹²⁴ However, Congress had intended bankruptcy courts to control such bankruptcies.¹²⁵

Later, in *In re The Travel Shoppe, Inc.*,¹²⁶ the bankruptcy court adopted a strict construction of "financial accommodations" along with the *Wills* conclusions.¹²⁷ The bankruptcy courts in *In re Ambassador*

118. Clearinghouses suffer when the agency is late in crediting funds or when the draft drawn on the special account is dishonored. *See id.* at 354.

119. Six out of seven courts proclaim that these contracts are assumable. *See infra* notes 120-32 and accompanying text.

120. 72 B.R. 380 (Bankr. M.D. Fla. 1987). Although the court eventually vacated this decision, later courts consider its analysis because the vacation resulted from the need to correct technicalities. *See In re Ambassador Travel, Inc.*, 98 B.R. 1018, 1020 (Bankr. S.D. Fla. 1989).

121. 72 B.R. at 383. The court contrasts the credit extension in the instant case with that in *In re Postle*. *See infra* notes 152-53 and accompanying text. While in *Postle*, the agreement expressly dictated that a nondebtor landlord had to expend \$150,000 in construction allowances to the debtor, in this case, the agreement contemplated no such allowance. 72 B.R. at 383. However, regardless of whether the clearinghouse intended to extend credit, it had to do so when the debtor provided insufficient funds to cover the cost of the issued ticket. The involuntary nature of this type of credit extension might make it even more injurious to the nondebtor simply because the nondebtor did not plan for such financing.

122. 87 B.R. 110 (Bankr. N.D. Cal. 1988).

123. *Id.* at 111.

124. *Id.*

125. *Id.*

126. 88 B.R. 466 (Bankr. N.D. Ga. 1988).

127. *Id.* at 470.

*Travel, Inc.*¹²⁸ and *In re Charrington Worldwide Enterprises, Inc.*¹²⁹ inquired into the true legal nature of the agreements and determined that financing was only an incidental purpose of the agreements.¹³⁰ Based on precedent, the *In re Skylark, Inc.*¹³¹ bankruptcy court allowed assumption of a clearinghouse agreement on the condition that the debtor agency post a bond in accordance with the agreement.¹³²

Most of the arguments advanced by the courts in the airline clearinghouse context apply to credit card merchant agreements as well. Like clearinghouses, merchant banks do not intend to extend credit for the merchant.¹³³ Moreover, just as airline tickets are ordinary goods, arranging for credit card transactions is an ordinary service.¹³⁴ Thus, the primary purpose of each contract is to provide for these services or goods, not to extend financing.¹³⁵

However, presuming that credit card merchant agreements, like airline clearinghouse agreements, should be assumable is not an airtight line of reasoning. Notably, one court has held that clearinghouse agreements are financial accommodations contracts, illustrating that the issue is not completely resolved. In *In re Lockspur, Inc.*,¹³⁶ the bankruptcy court barred assumption of the airline agreement pursuant to section 365(c)(2).¹³⁷ The court based its decision on the agency's poor financial condition and the agency's inability to post a security bond.¹³⁸ More importantly, different circumstances surrounding credit card agreements further strain any comparison to airline agreements. As alluded to in *Lockspur*, airline agreements require a party to post a bond, effectively

128. 98 B.R. 1018 (Bankr. S.D. Fla. 1989).

129. 110 B.R. 973 (Bankr. M.D. Fla. 1990).

130. *Charrington*, 110 B.R. at 975; *Ambassador*, 98 B.R. at 1020-21. In *Ambassador*, the court determined that the underlying purpose of the agreement was to provide goods—airline tickets. *Ambassador*, 98 B.R. at 1021. The *Charrington* court found that the purpose of the agreement was to facilitate the sale of airline tickets and that any extension of credit was only incidental. *Charrington*, 110 B.R. at 975.

131. 120 B.R. 352 (Bankr. S.D.N.Y. 1990).

132. *Id.* at 355. The agreement originally required the agency to maintain a bond. *Id.* at 353. Therefore, the court was merely requiring the debtor to comply with the agreement before assumption would be allowed.

133. See *supra* note 92 and accompanying text.

134. See *Hamilton*, 969 F.2d at 1017.

135. See *supra* note 92 and accompanying text.

136. 82 B.R. 37 (Bankr. E.D. La. 1987).

137. *Id.* at 40.

138. *Id.* at 39.

reducing the clearinghouse's risk.¹³⁹ No similar feature protects parties to credit card merchant agreements.¹⁴⁰ Thus, the assumption of a credit card merchant agreement is potentially more financially damaging than assumption of clearinghouse agreements.¹⁴¹

C. *Financial Accommodations Contracts*

Courts have developed many common theories in sustaining various contracts as financial accommodations. Unfortunately, these rationales easily apply to the credit card merchant agreement, which the *In re Hamilton* court deemed assumable. For instance, several courts have defined financial accommodation as "an obligation to pay money on the obligation of another."¹⁴² In *In re Adana Mortgage Bankers*,¹⁴³ Judge Norton¹⁴⁴ asserted that an agreement under which the Government National Mortgage Association (GNMA) guaranteed mortgage-backed securities issued by the debtor mortgage banker was a financial accommodations contract because GNMA was responsible for continued payment of the debtor's liabilities to the security holders in the event that the debtor failed to pay.¹⁴⁵

139. *Skylark*, 120 B.R. at 355; *Charrington*, 110 B.R. at 976; *Ambassador*, 98 B.R. at 1021; *Travel Shoppe*, 88 B.R. at 470; *Lockspur*, 82 B.R. at 39.

140. In *Hamilton*, the bank could have established a reserve fund to protect itself from the merchant's inability to pay a chargeback. 968 F.2d at 1017. If the credit card merchant agreement required a reserve fund, it might be analogous.

141. *But see Hamilton*, 969 F.2d at 1019 n.10. According to the *Hamilton* court, a clearinghouse is at a greater risk than a merchant bank. While a clearinghouse must seek recourse against a travel agent whenever the agent does not pay for issued tickets, the merchant bank only seeks recourse in the case of valid chargebacks. *Id.* However, the court does not offer evidence that agents' failing to pay for issued tickets occurs more frequently than valid chargebacks. Nor does the court compare the financial impact on the creditors.

142. *See Edwards Mobile Home Sales, Inc. v. Ohio Casualty Ins. Co.*, 119 B.R. 857, 859 (Bankr. M.D. Fla. 1990); *Wegner Farms Co. v. Merchants Bonding Co. (In re Wegner Farms)*, 49 B.R. 440, 444 (Bankr. N.D. Iowa 1985); *Government Nat'l. Mortgage Corp. v. Adana Mortgage Bankers, (In re Adana Mortgage Bankers)*, 12 B.R. 977, 987 (Bankr. N.D. Ga. 1980).

143. 12 B.R. 977 (Bankr. N.D. Ga. 1990).

144. Norton is a renowned bankruptcy judge who served from 1971-1985 and is now editor in chief of an annual survey on bankruptcy.

145. *Adana*, 12 B.R. at 986-87. In addition, Norton emphasized that the government guarantee is essential to the issuer's business because it enables the issuer to obtain credit from securities purchasers. According to Norton, a contract that is necessary to create a market for securities should not be assumable. *Id.* at 987. It is difficult to reconcile this principle with the *Karsh* rationale, which states that by making such an essential contract nonassumable, a court in essence places control of bankruptcy in the hands of the GNMA, not in bankruptcy court where it belongs. *See supra* notes 116-25.

Similarly, in *In re Wegner Farms*,¹⁴⁶ the bankruptcy court held that a debtor grain dealer could not assume a surety bond it had obtained for the benefit of persons buying or selling its grain because the contract obligated the bond issuer to assume any liabilities the debtor did not pay.¹⁴⁷ In making its characterization, the *Wegner* court particularly noted that the contract was intimately connected to the debtor's financial status, as evidenced by the issuer's requirement that the debtor supply financial statements and the fact that the issuer was uncomfortable with the debtor's poor business performance.¹⁴⁸ Applying this reasoning to a credit card merchant agreement, a court could deduce that the contract is a financial accommodation because it obligates the merchant bank to pay the cardholder bank for valid chargebacks when the retailer is unable to uphold its obligation to do so.¹⁴⁹ Moreover, like the surety bond in *Wegner*, the credit card merchant agreement depends largely on the retailer's financial integrity as determined by the bank through its examination of financial statements.¹⁵⁰

In addition to considering a nondebtor party's obligation to pay on behalf of the debtor under an executory contract to extend financial accommodations, courts often assess a nondebtor's contractual duty to provide monetary allowances to the debtor.¹⁵¹ For example, in *In re Postle*,¹⁵² the court held that an unexpired lease was a contract to extend financial accommodations because it required the landlord to finance \$150,000 in improvements made by the debtor tenant.¹⁵³ Similarly, in *In re Placid Oil Co.*,¹⁵⁴ the court stated in dictum¹⁵⁵ that a retroactive pre-

146. 49 B.R. 440 (Bankr. N.D. Iowa 1985).

147. *Id.* at 444.

148. *Id.* For a more in-depth discussion of this case, see Steven J. Wadyka, *Executory Contracts and Unexpired Leases: Section 365*, 3 BANK. DEV. J. 217, 243-44 (1986).

149. *See supra* note 87.

150. *See supra* note 89 and accompanying text.

151. *See* *Advanced Professional Home Health Care, Inc. v. Blue Cross and Blue Shield of Michigan (In re Advanced Professional Home Health Care, Inc.)*, 82 B.R. 837, 843-44 (Bankr. E.D. Mich. 1988) (finding financial accommodations where government advanced money to health care provider); *In re Placid Oil, Co.*, 72 B.R. 135 (Bankr. N.D. Tex. 1987) (finding financial accommodations where insurance paid claims first, then sought reimbursement from debtor); *Dean v. Postle Enterprises, Inc. (In re Postle Enterprises, Inc.)*, 48 B.R. 721 (Bankr. D. Ariz. 1985). For a discussion of the *Postle* case, *see infra* notes 152-53.

152. 48 B.R. 721 (Bankr. D. Ariz. 1985).

153. *Id.* at 725. Initially, the court determined that sections 365(c)(2) and (e)(2)(B) apply to leases as well as other executory contracts. *Id.* at 724-25. For a more in-depth discussion of this case, *see* Wadyka, *supra* note 148, at 242-43.

154. 72 B.R. 135 (Bankr. N.D. Tex. 1987).

mium agreement was a financial accommodations contract because the nondebtor insurance underwriters had paid the debtor's claimants before receiving the debtor's premium payments.¹⁵⁶ Basically, the nondebtor insurance company had advanced the debtor the amount of the valid claims against the debtor.¹⁵⁷ In *In re Advanced Professional Home Health Care, Inc.*,¹⁵⁸ the court barred assumption of an agreement between a health care provider and the Department of Health and Human Services because the agreement necessitated the government agency's supplying the provider with working capital to be recouped at a later date.¹⁵⁹

Utilizing these precedents, a court could describe a credit card merchant agreement as a contract to extend financial accommodations. By reimbursing the cardholder bank for valid chargebacks on behalf of the debtor, the merchant bank provides the debtor with a financial allowance. By advancing these funds to the debtor, the merchant bank resembles a landlord who finances a tenant's improvements, an insurance company that prepays a debtor's claims, and the Department of Health and Human Services when it forwards payment for future performed services.

In conclusion, the cases that evaluate executory contracts under section 365(c)(2) demonstrate that courts are unable to effectively define "financial accommodations." The fact that the credit card merchant agreement, which the Eleventh Circuit recently evaluated, might logically fall under either characterization exemplifies this premise. Consequently, it is virtually impossible to predict how a court will characterize an executory contract with financing aspects.

155. Because the court found that the agreement was not an executory contract, the discussion concerning the financial accommodations characterization is dictum. *Id.* at 138.

156. *Id.* at 139. The debtor offered demand notes as premium payments. It was after the insurance company satisfied the debtor's claimants that the debtor paid premiums based on the actual amount of the claims. *Id.*

157. *In re Placid Oil Co.* raises an interesting peripheral issue. According to the court, section 365(c)(2) protects not only the unwilling lender under an executory contract, but also all claimants against the debtor's estate. *Id.* Consequently, a lender's consent to proceed with an executory contract to extend financial accommodations does not render the contract assumable. See, e.g., *Transamerica Commercial Finance Corp. v. Citibank (In re Sun Runner Marine, Inc.)*, 945 F.2d 1089, 1092 (9th Cir. 1991) (holding that an agreement under which the lender provided financing for a retail dealer who purchased the debtor's boats was an unassumable contract to extend financial accommodations despite the lender's consent to proceed).

158. 82 B.R. 837 (Bankr. E.D. Mich. 1988).

159. *Id.* at 844.

IV. PROPOSAL

As evidenced by the judicial opinions recounted above, the law on executory contracts and section 365 is riddled with uncertainty. This confused state of affairs benefits neither the debtor nor the creditor. The lack of clear legislative or judicial authority fosters paralyzing debate between parties to an executory contract. More importantly, forcing courts to make all or nothing characterizations often denies the debtor the benefit of executory contracts that should rightly be part of the estate or compels the creditor to finance a party according to terms established under vastly different economic circumstances. In order to abolish this uncertainty and the ensuing debate, as well as to serve the best interests of both the debtor and creditor, Congress should amend the Code to provide for bifurcation of executory contracts with financing provisions. Under such a scheme, the court would bifurcate the financing and nonfinancing provisions of an executory contract. The trustee may then elect to assume any executory contract without the severed financial accommodations. If a contract were to demand financing, the trustee would need to secure it from an outside source or renegotiate terms with the original nondebtor.

Three examples illustrate that bifurcation is a feasible option for dealing with executory contracts to extend financial accommodations. If the court had applied bifurcation to the credit card merchant agreement in *Hamilton*,¹⁶⁰ it would have permitted the retailer to assume the basic contract and thus continue to conduct credit card transactions on the condition that the chargeback procedure be modified to protect the bank creditor. Modifications might include the debtor's posting a performance bond or arranging for a third party to guarantee chargebacks. In essence, the court would merely have required the debtor to provide adequate assurance to the nondebtor party of an assumed financial accommodations contract, just as the debtor must provide adequate assurance to a party to a contract upon which the debtor has defaulted¹⁶¹ or to a utility providing post-petition service.¹⁶² Furthermore, bifurcation would operate similarly in the contexts of both *Postle*, in which the

160. See *supra* notes 73-98 and accompanying text.

161. See 11 U.S.C. § 365(b)(1)(C) (1988).

162. See 11 U.S.C. § 366(b) (1988). Cf. Neil P. Olack, *Executory Contracts and Unexpired Leases: Right to Adequate Protection Prior to Assumption or Rejection*, 4 BANK. DEV. J. 421 (1987). Olack argues that there should not be adequate protection *prior* to assumption or rejection because the contract is unenforceable until the trustee makes its election. However, this proposal contemplates offering adequate protection *after* the contract is assumed. *Id.*

court denied assumption,¹⁶³ and *Cole Bros.* in which the court permitted assumption.¹⁶⁴ In both cases, the debtors would reap the principal benefits of the bargain—the lease and the dealership agreement, respectively—by assuming the nonfinancing provisions of the contracts. However, due to bifurcation, the debtors would have to renegotiate financing for the construction improvements in *Postle* and the retail credit in *Cole Bros.*

Clearly, bifurcation is not a means of preserving all executory contracts to extend financial accommodations. For example, if a court severs the financing aspects of a letter of credit, there is little left for the trustee to assume. However, this result corresponds to the general legislative policy for enacting section 365.¹⁶⁵ That is, the Code should not compel unwilling creditors to finance a questionable party according to outdated contract terms. Still, as the examples above demonstrate,¹⁶⁶ bifurcation is a practical way to deal consistently¹⁶⁷ with mixed contracts that are unsuited to the current “all or nothing” approach in section 365(c)(2).¹⁶⁸

In addition to offering a viable method for handling mixed contracts, bifurcation upholds the Code’s two general policies.¹⁶⁹ First, bifurcation encourages a fresh start because the debtor receives the benefit of the contract, absent the financing provisions, during the rehabilitation process.¹⁷⁰ Second, bifurcation protects creditors by not forcing them to extend credit to an insecure party according to outdated terms. Moreover,

163. See *supra* notes 152-53 and accompanying text.

164. See *supra* notes 99-102 and accompanying text.

165. See *supra* note 47 and accompanying text.

166. See *supra* text accompanying notes 151-55.

167. The approach is consistent because mixed contracts are treated alike. Therefore, when confronted with a contract that has some financing aspects, one need not guess how the court will characterize the contract.

168. “All or nothing” refers to the fact that a court must either characterize a contract as one to extend financial accommodations or as one that does not extend financial accommodations. There is no middle ground in these decisions. Describing the current Code position as “all or nothing” does not mean that a debtor must assume a contract in its original form. The Code provides for certain limited modifications. For example, 11 U.S.C. § 365(e) eliminates ipso facto clauses and 11 U.S.C. § 365(f) bars anti-assignment clauses. 11 U.S.C. § 365(e) & (f) (1988). See also *In re Kennesaw Dairy Queen Brazier*, 28 B.R. 535, 536 (Bankr. N.D. Ga. 1983).

169. See *supra* Part II B.

170. It is significant that a debtor would seem to have more power under this bifurcation scheme than does a debtor under reaffirmation. When a debtor and nondebtor agree to reaffirm a contract pursuant to 11 U.S.C. § 554, the nondebtor can alter major terms of the original contract and give the debtor the choice to reaffirm. 11 U.S.C. § 554 (1988). Here, the nondebtor only has the benefit of removing financing provisions from the contract.

by appreciating that financial circumstances may deteriorate over time, this policy encourages voluntary contractual credit relationships.¹⁷¹ Arguably, lenders will be more willing initially to take risks in forming contracts if they understand that the law will protect them when a bankruptcy filing alters the assumptions on which the contract was based.¹⁷² In fact, bifurcation fulfills the two fundamental bankruptcy goals better than the current procedure. Currently, courts fluctuate between either bolstering the debtor's rehabilitation or accommodating the nondebtor party, depending on how a court chooses to characterize a particular contract. Under bifurcation, the court serves both parties' interests in every case.

Furthermore, bifurcation embodies the rationales that courts have expressed in the section 365 cases outlined in Part III. For instance, the bifurcation procedure recognizes the incidental nature of the financial accommodations in many contracts¹⁷³ by permitting the trustee to assume the primary, nonfinancing contractual provisions. Additionally, bifurcation acknowledges that the obligation to extend credit to or on behalf of the debtor is indeed a burdensome financial accommodation that the creditor should not be forced to carry out.¹⁷⁴

Additionally, despite apparent inconsistencies, bifurcation does not conflict with the inviolate policy prohibiting partial assumption of executory contracts. Since 1938, when Congress enacted section 70(b), courts have held that a trustee may not choose, piecemeal, which provisions it wishes to assume, and then reject the rest.¹⁷⁵ In other words, a trustee may not accept the benefits of an executory agreement without accepting the burdens as well.¹⁷⁶ However, this bifurcation proposal envisions an

171. See Nimmer, *supra* note 6, at 522-32.

172. *Id.* at 514, 538.

173. See *supra* notes 99-105 and accompanying text.

174. See *supra* notes 142-50 and accompanying text.

175. See COLLIER, *supra* note 32, ¶ 365.01[1] & n.5.

176. See, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531-32 (1984) (assuming contract *cum onere*); *Hurley v. Atchison, T. & S. F. Ry. Co.*, 213 U.S. 126 (1909) (holding that debtor must assume burdens as well as benefits); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) (same); *Vials and Sommer, Inc. v. Mahony (In re SteelShip Corp.)*, 576 F.2d 128, 132 (8th Cir. 1978) (same); *Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 175 (5th Cir. 1972) (same); *Kirby v. U.S.*, 329 F.2d 735, 737 (10th Cir. 1964) (same); *Auto Dealer Services, Inc. v. Vince Whibbs Imports, Inc. (In re Auto Dealer Services, Inc.)*, 110 B.R. 68, 70 (Bankr. M.D. Fla. 1990) (same); *Tidewater Memorial Hosp., Inc. v. Owen (In re Tidewater Memorial Hosp., Inc.)*, 106 B.R. 876, 884 (Bankr. E.D. Va. 1989) (same); *In re Maine*, 32 B.R. 452, 455 (Bankr. W.D.N.Y. 1983) (citations omitted) (same).

entirely different scenario. Unlike the partial assumption situation in which a trustee picks only the attractive provisions, under bifurcation, the court dictates which provisions are unassumable as financial accommodations. The trustee would then have the option of assuming or rejecting *all* of the nonfinancing provisions that the court finds allowable. Like the current rule prohibiting partial assumption, bifurcation would not permit potentially abusive party discretion.

Finally, the Code already provides for bifurcation in several instances. For example, when a debtor files a Chapter 7 bankruptcy petition, the court immediately divides the debtor's interests into those that are property of the estate¹⁷⁷ and those that remain the debtor's individual property.¹⁷⁸ Additionally, under section 506(a), the court bifurcates an allowed claim that has been secured by a lien on property of the estate into two claims: a secured claim to the extent of the creditor's interest in the property and an unsecured claim for the remaining portion of the allowed claim.¹⁷⁹ Similarly, under section 506(a), the court bifurcates an allowed claim that is subject to setoff under section 553 into a secured claim for the amount of setoff and an unsecured claim for the remaining portion of the allowed claim.¹⁸⁰ Accordingly, there is no apparent reason why Congress should not advocate bifurcation in this area as well.

V. CONCLUSION

By amending the Code to include the bifurcation proposal outlined in Part IV, Congress would provide courts and attorneys with a straightforward and equitable method of dealing with executory contracts to extend financial accommodations. Bifurcation would relieve courts of the uncertainty they have expressed in attempting to characterize these contracts and would serve the interests of both parties to the executory contract.

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177. 11 U.S.C. § 541(a) (1988).

178. *Id.* For example, a debtor's post-petition wages are not property of the estate. 11 U.S.C. § 541(a)(6).

179. *See* 11 U.S.C. § 506(a) (1988).

180. *Id.*