Reaffirmations: To Sign or Not to Sign?

1.5 Hour CLE Training

Friday, September 25, 2015
11:30 am – 1:00 pm

Presenters:
Chief Judge Mike K. Nakagawa
Judge August B. Landis
Susan L. Myers, Esq., Legal Aid Center (Moderator)

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This seminar was made possible by a generous grant from the American College of Bankruptcy and the American College of Bankruptcy Foundation.

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REAFFIRMATIONS

To Sign or Not to Sign…

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Welcome and Introduction

- Goal of seminar: Understanding of reaffirmation agreements and Nevada law so that you can advise clients and determine whether to sign agreement
- Topics covered include:
  - Reaffirmation basics
  - Nevada Law: Retail Installment Sale Contracts for Vehicles and *In Re Henderson*
  - Creditor/Credit Issues
  - Practice and Ethical Issues
    - Attorneys' Duties to Clients
    - Advice vs. signing agreement

WHAT IS REAFFIRMATION?

From the United States Courts website, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Glossary.aspx:

An agreement by a chapter 7 debtor to continue paying a dischargeable debt (such as an auto loan) after the bankruptcy, usually for the purpose of keeping collateral (*i.e.* the car) that would otherwise be subject to repossession.

Sounds simple, but:

It would be hard for anyone to deny that section 524 of the Bankruptcy Code – the statute describing the process for reaffirmation of debt – is one of the more unwieldy and cumbersome provisions applicable to consumer bankruptcy cases. Section 524 makes for painful reading.

In re Grisham, 436 B.R. 896, 906 (Bankr. N. D. Tex. 2010)

The Reaffirmation Agreement

§ 524 – Effect of Discharge

Section 524(c) sets forth the elements for an enforceable reaffirmation agreement between a debtor and creditor.

Enforceable only to extent enforceable under non-BK law, only if:

1) Agreement must have been made before debtor's discharge;
2) Debtor received disclosures described in §524(k);
3) Agreement filed with court;
4) If attorney signs, declaration of attorney that (a) fully informed and voluntary agreement of debtor, (b) agreement does not impose an undue hardship on debtor or dependent, and (c) attorney fully advised debtor of the legal effect and consequences of reaffirmation agreement and any default thereunder;
5) If debtor not represented by an attorney during course of negotiating agreement, court approves agreement as (1) not imposing an undue hardship on debtor or dependent, and (2) being in the best interest of the debtor;
6) Provision of §524(d) complied with (re court's duties at reaffirmation hearing); and
7) Debtor has not timely rescinded.

Ipso Facto (BK Default) Clauses

- **Generally not enforceable**
  - **§365(e)(1)(B)** – Can't modify or terminate an executory contract just because of provision conditioned on BK filing.
  - **§541(c)(1)(B)** – Debtor's property becomes property of estate notwithstanding agreement conditioned on BK filing.
- **BUT** a carve-out for enforcement of ipso facto clause by secured creditor where debtor does not comply with:
  - **§362(h)(1)(A)** – Automatic stay terminates if debtor does not file a timely statement of intention indicating that debtor intends to surrender or retain property, and if retaining, to either redeem or enter into reaffirmation agreement. (Added by BAPCPA)
  - **§521**
    - (a)(2)(A) and (B) – Debtor must file statement of intention within 30 days of petition (or by date of 341 meeting if earlier), and must perform intention within 30 days of first 341 date.
    - (a)(6) – Ch. 7 debtor with personal property secured by purchase money security interest shall not retain that property unless enters into reaffirmation agreement (or redeems) within 45 days of first 341 meeting. If debtor fails to act, stay terminates.

A Brief History

- Three Options Pre BAPCPA (5 Circuits incl. 9th)
  - **Redemption** – Allowed debtor to pay creditor present value of the vehicle.
  - **Reaffirmation** – Debtor agreed to accept personal liability for deficiency if later defaulted (to avoid enforcement of ipso facto clause in financing contract).
  - **"Ride-through"** – Allowed debtor to keep car as long as continued making payments, without requiring filing of reaffirmation agreement.
- BAPCPA tried to kill the ride-through
  - Must choose "Redeem" or Reaffirm" on Ch. 7 Statement of Intention if not surrendering.
  - Created a carve-out for enforcement of *ipso facto* clause enforcement where debtor does not comply with sections 362 and 521.

Ride Through – Dead or Alive?

Still kicking - "Retain and Pay" Orders

In re Moustafi, 371 B.R. 434 (Bank.D. Ariz 2007): Debtor complied with the requirements of the Bankruptcy Code by timely filing her statement of intention and timely entering into a reaffirmation agreement with the credit union that held security interest in her car. Reaffirmation agreement not approved because the Debtor's net monthly income less than her expenses and because the car worth less than what she owed on it. Despite the changes made to BK Code by BAPCPA, a debtor may still, where complied with §§521(a)(2)(A) and 362(h)(1)(A), retain a car even without a court approved reaffirmation agreement.

BUT

In re Dumont, 581 F.3d 1104 (9th Cir. 2009): Ride-through was not available to debtor who had not attempted to reaffirm debt on personal property; debtor's failure to reaffirm debt terminated automatic stay with respect to vehicle and creditor was authorized to repossess vehicle.

Undue Hardship and Best Interest

- **Undue Hardship?** Do the math.
  - Presumption of undue hardship if debtor's monthly income less debtor's monthly expenses, as shown on signed statement in support of reaffirmation agreement, is less than the scheduled payments on the reaffirmed debt.
  - Presumption can be rebutted ***in writing*** if statement identifies additional sources of income. §524(m)(1)
    - What will rebut presumption? Help from family? Reducing expenses? New job? (Updated Sch. I or J needed)?
  - Credit unions - §524(m) presumption of undue hardship does not apply; can undue hardship be found?
- **In Debtor's Best Interest?** No set criteria in code.
  - A fact specific analysis - what do judges consider?
    - *See BankBoston v. Claflin*, 249 B.R. 840, 847-848 (1st Cir. BAP 2000)
      1. Alternatives, other than reaffirmation, available so that debtor can retain property
      2. Whether secured or unsecured debt
      3. If secured, threat of repossession and amount of equity
      4. Extent to which collateral a necessity
      5. Debtor's payment history on collateral
    - What about: Payments/interest rate/term remaining; percentage of income; co-signer (not driving the vehicle); benefits to debtor (*e.g.* lower interest rate)?

Best Interest After *In Re Henderson*

- Nevada law removes the *Ipso Facto* clause from vehicle retail installment sale contracts by amendment to NRS 97.304 (Ch. 97 attached), *Enforceability of default on part of buyer*, eff. 10/1/2011:
  - Default only enforceable to extent that:
    - The buyer fails to make a payment as required by the agreement (per state form agreement, payment default if later than 30 days past the date payment required by agreement); or
    - The prospect of payment, performance or realization of collateral is significantly impaired. The burden of establishing the prospect of significant impairment is on the seller.
  - Contract forms – NRS 97.299; Division of Financial Institutions form 10/1/12
- *In re Henderson*, 492 B.R. 537 (Bankr. D. Nev. 2013) (attached)
  - Judge Markell's parting gift re reaffirmations
  - Not in debtor's best interest to reaffirm post amendment contracts
    - State law has done away with *ipso facto* clause
    - Filing bankruptcy petition is not a "significant impairment" of prospect of payment, performance, realization of collateral.

Best Interest After *In Re Henderson (cont.)*

- So, does a Nevada debtor even need to sign a reaffirmation agreement for a 10/1/2011 or later vehicle loan?
  - Belt & suspenders? Does it matter if stay lifts?
- If debtor signs, will court ever approve?
- What if:
  - Debtor not current on payments?
  - A credit union?
  - A refinance?
  - Improved terms such as lower interest rate/payment?
  - Equity in vehicle?
    - Is equity is enough to justify reaffirmation, and if so, how much? How accurate are the vehicle values – esp. when stated by lenders as exactly same as amount being reaffirmed? (compare to Sch. B). See footnotes 1-6 in *Henderson*. Will lender get that much at auction? What about costs of sale?

Rules and Forms

- **Bankruptcy Rule 4008 –** Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement
  - Includes requirement that Reaffirmation Agreement be filed within 60 days after 1st date set for 341. (Compare with 45 day requirement under §521(a)(6))
- **Forms**
  - Reaffirmation Cover Sheet - Official Form 27 (12/13)
  - Reaffirmation Agreement – National Form B240A
  - Motion for Approval of Reaffirmation Agreement – National Form B240B
  - Notes:
    - Check that creditor is using correct forms.
    - No local rule (yet) requiring attachment of security agreement but a good idea (see Bankr. D. Ariz. Local Rule 4008-1 "…If the reaffirmation agreement concerns a secured debt, the security agreement must be attached.").

Secured Debts Other than Vehicle Loans

- **Vehicle Leases**
  - Reaffirm or assume lease?
- **Other personal property**
  - Electronics, furniture
  - Jewelry
  - RVs, boats, other cars (co-signers, driven by family members)
- **Mortgages**
  - Does reaffirmation apply to debt secured by real property?
    - Termination of stay under §362(h) & §521(a)(6) applies only to personal property.
      - Reaffirmation **not** necessary to keep house
    - So why sign? Can it be in debtor's best interest to retain personal liability for large, long term debt?
    - Per disclosure in §524(k)(3)(J)9i)7: "…no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust…on your real property, like your home."
      - **Effective upon filing, even if court does not approve?**

Creditor/Credit Issues

- Credit union cross-collateralization.
- Creditors changing billing/payment methods, some even not taking payments, during BK and if not reaffirmed.
- If not reaffirmed, debt is reported as discharged – debtors who want to reaffirm so loan payments reported on credit report?
  - Refer client to Financial Guidance Center for alternatives such as lending circles and secured credit cards.
- Mortgage modifications
  - Lack of reaffirmation does not prevent debtor from applying for HAMP. *See In re Bellano*, 456 B.R. 220 (Bankr. E.D. Pa. 2011).
  - Lenders who want debtors to reopen case to reaffirm as condition of modification.

Practice and Ethical Issues

- **Statutory Background of Attorney's role**
  - Under Bankruptcy Reform Act of 1978, courts had exclusive authority to approve or disapprove reaffirmation agreements.
  - 1984 Act added attorney certification that agreement would not impose undue hardship on debtor
  - BAPCPA's addition of §524(m)(1) (presumption of undue hardship) and §524(k)(5) (attorney's certification that even if presumption of undue hardship, debtor can make payments)
- **Inherent conflict in balancing:**
  - Attorney as gatekeeper for court
    - "Need" for reaffirmation vs. goal of fresh start
  - Obligation to pursue client's objectives
    - Protect co-signer, improve credit score, keep "necessary" property, like cars.

See Gregory M. Duhl, *Divided Loyalties: The Attorney's Role in Bankruptcy Reaffirmations*, 84 Am. Bankr. L.J. 361 (Fall 2010).

Practice and Ethical Issues (cont.)

- **Client Intake**
  - Duty to advise clients about reaffirmation?
    - What if they have negative income, no equity, and want to keep the car?
    - What if they are behind on payments?
  - Can reaffirmation assistance/advice be carved out in engagement letter or is it too integral to obtaining a discharge?
    - *In re Grisham*, 436 B.R. 896, 902-903 (N.D. Tex. 2010) (attached). Advise vs. signing agreement?
- **Timely Filing of Statement of Intention**
  - Importance of compliance and indicating intent to reaffirm if keeping the vehicle
    - Calendar if not filed with initial petition.
    - Choice of intention for vehicles after *Henderson*?

Practice and Ethical Issues (cont.)

- **Attorney Signing of Reaffirmation Agreement**
  - Certification by attorney on Reaffirmation Agreement:

(1) Fully informed and voluntary agreement by debtor;
(2) not an undue hardship; and
(3) attorney fully advised debtor of legal effect and consequences of agreement and default.

    - OR, if an undue hardship, attorney's opinion that debtor can make the payments.
      - If an undue hardship, hearing will be scheduled even if signed. **Why would attorney sign on a post 10/1/2011 vehicle contract in light of *Henderson*, especially if undue hardship?**
  - Are there any situations in which attorney should sign a reaffirmation agreement?
    - If so, what precautions should be taken?
    - What if debtor can't make payments later? Liability?

- **Rescinding Reaffirmation**? What if signed without knowledge of *Henderson*?
  -60 days after filed or before discharge, whichever occurs later. §524(c)(4).

For an entertaining perspective on the problems with §524, *see* post, *Advice for Creditors on Reaffirmation Agreements* by Russell DeMott, Esq., June 3, 2011 at www.bankruptcylawnetwork.com (attached) – and his state doesn't even have *In re Henderson*.

[Rev. 11/21/2013 9:26:06 AM--2013]

TITLE 8 - COMMERCIAL INSTRUMENTS AND TRANSACTIONS

CHAPTER 97 - RETAIL INSTALLMENT SALES OF GOODS AND SERVICES

GENERAL PROVISIONS

RETAIL INSTALLMENT CONTRACTS

CONSOLIDATING PURCHASES; RETAIL CHARGE AGREEMENTS

PROVISIONS COMMON TO RETAIL INSTALLMENT CONTRACTS AND RETAIL CHARGE AGREEMENTS

CONTRACTS FOR SALE OF VEHICLES

REMEDIES, ENFORCEMENT AND PENALTIES

GENERAL PROVISIONS

NRS 97.015 Definitions. As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 97.017 to 97.145, inclusive, have the meanings ascribed to them in those sections.
(Added to NRS by 1965, 657; A 1993, 2756; 1995, 1801, 2600; 1997, 550; 2009, 1274)

NRS 97.017 "Amount financed" defined. "Amount financed" means the cash sale price of the goods or services which are the subject matter of a retail installment contract less the amount of the buyer's down payment in money or goods or both, plus the amounts, if any, included therein, if a separate identified charge is made therefor and stated in the contract, for insurance and official fees.
(Added to NRS by 1995, 1800)

NRS 97.025 "Cash sale price" defined. "Cash sale price" means the price for which the seller would have sold or furnished to the buyer, and the buyer would have bought or obtained from the seller, the goods or services which are the subject matter of a retail installment transaction, if the sale had been a sale for cash. The cash sale price may include any taxes, registration and license fees, and charges for transferring vehicle titles, delivery, installation, servicing, repairs, alterations or improvements.
(Added to NRS by 1965, 657)

NRS 97.026 "Credit" defined. "Credit" means the right granted by a seller to a buyer to defer payment of debt or to incur debt and defer its payment.
(Added to NRS by 2009, 1274)

NRS 97.031 "Finance charge" defined. "Finance charge" means the cost of credit indicated in a dollar amount. The term includes any charge payable directly or indirectly by the buyer and imposed directly or indirectly by the seller as an incident to or a condition of the extension of credit. The term does not include any charge of a type payable in a comparable cash transaction.
(Added to NRS by 1995, 1801)

NRS 97.035 "Goods" defined. "Goods" means:
1. All tangible personal property, whether movable at the time of purchase or a fixture, which is used or bought for use primarily for personal, family or household purposes; and
2. Merchandise certificates or coupons, issued by a retail seller, to be used in their face amount in lieu of cash in exchange for goods or services sold by such a seller.
(Added to NRS by 1965, 658)

NRS 97.055 "Official fees" defined. "Official fees" means fees prescribed by law for perfecting, transferring or releasing a security interest created by a retail installment transaction.
(Added to NRS by 1965, 658)

NRS 97.075 "Rate" defined. "Rate" means the percentage which, when multiplied times the unpaid balance for each month or other installment period, yields the amount of the finance charge for that month or period.
(Added to NRS by 1965, 658; A 1993, 2756; 1995, 1801)

NRS 97.085 "Retail buyer" and "buyer" defined. "Retail buyer" or "buyer" means a person who buys or hires goods from, or gives or agrees to give a security interest in goods to, or agrees to have services rendered or furnished from, a retail seller.
(Added to NRS by 1965, 658; A 1967, 1201; 1995, 2600; 1997, 651)

NRS 97.095 "Retail charge agreement" defined. "Retail charge agreement" means an agreement entered into or performed in this state prescribing the terms of retail installment transactions in which the buyer may pay, in installments, to a retail seller, the unpaid balance due in a retail installment transaction, whether or not a security interest in the goods sold is retained by the seller, and under the terms of which a finance charge is to be computed in relation to the buyer's unpaid balance from time to time.
(Added to NRS by 1965, 658; A 1967, 1201; 1993, 2756; 1995, 1801, 2600; 1997, 550)

NRS 97.105 "Retail installment contract" and "contract" defined.
1. "Retail installment contract" or "contract" means a contract, other than a retail charge agreement or an instrument reflecting a sale made pursuant thereto, entered into or performed in this state for a retail installment transaction.

2. The term includes a security agreement and a bailment contract or lease if the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of the value of the goods and if it is agreed that the bailee or lessee is bound to become or, without giving further substantial value, has the option of becoming the owner of the goods upon full compliance with the provisions of the bailment or lease.

3. The term does not include a bailment or lease of a vehicle where the lessee becomes or may become the owner of the vehicle by payment to the lessor of an amount which is substantially equal to the residual value or the unamortized capitalized cost, if the payment is not nominal.

(Added to NRS by 1965, 658; A 1979, 1264)

NRS 97.115 "Retail installment transaction" defined. "Retail installment transaction" means a transaction in which a retail buyer purchases goods or services from a retail seller pursuant to a retail installment contract or a retail charge agreement which may provide for a finance charge and under which the buyer agrees to pay the total of payments in one or more installments.

(Added to NRS by 1965, 658; A 1993, 2756; 1995, 1801; 2009, 1274)

NRS 97.125 "Retail seller" and "seller" defined.

1. "Retail seller" or "seller" means:

(a) A person engaged in the business of selling or leasing goods or services to retail buyers or a licensee, franchisee, assignee or corporate affiliate or subsidiary of such a person;

(b) A person, other than a financial institution, who enters into agreements prescribing the terms for the extension of credit pursuant to which the person may, with the buyer's consent, purchase or acquire one or more obligations of the buyer to a retail seller if the purchase, lease, loan or other obligation to be paid in accordance with the agreement is evidenced by a sales slip or memorandum; or

(c) A person, other than a financial institution, who regularly extends, whether in connection with sales or leases of goods or services, credit which is payable by agreement in more than four installments or for which the payment of a finance charge may be required.

2. As used in this section, "financial institution" means:

(a) A bank, credit union, savings institution or trust company organized under, or supervised pursuant to, the laws of the United States or of any state, or any affiliate or subsidiary thereof; or

(b) A person licensed pursuant to chapter 675 of NRS.

(Added to NRS by 1965, 658; A 1967, 1201; 1995, 1802, 2601; 1997, 550; 2009, 1274)

NRS 97.135 "Services" defined. "Services" means work, labor or services of any kind when purchased primarily for personal, family or household use and not for commercial or business use whether or not furnished in connection with the delivery, installation, servicing, repair or improvement of goods, and includes repairs, alterations or improvements upon or in connection with real property, but does not include services for which the price charged is required by law to be determined or approved by or to be filed, subject to approval or disapproval, with the United States or any state, or any department, division, agency, officer or official of either as in the case of transportation services.

(Added to NRS by 1965, 659)

NRS 97.145 "Total of payments" defined. "Total of payments" means the amount financed plus the finance charge.

(Added to NRS by 1965, 659; A 1993, 2756; 1995, 1802)

RETAIL INSTALLMENT CONTRACTS

NRS 97.165 Contract contained in single document; date, signatures and size of type; fee for cancellation.

1. Every retail installment contract must be contained in a single document which must contain the entire agreement of the parties, including any promissory notes or other evidences of indebtedness between the parties relating to the transaction, except as otherwise provided in NRS 97.205 and 97.235, but:

(a) If the buyer's obligation to pay the total of payments is represented by a promissory note secured by a chattel mortgage or other security agreement, the promissory note may be a separate instrument if the mortgage or security agreement recites the amount and terms of payment of that note and the promissory note recites that it is secured by a mortgage or security agreement.

(b) In a transaction involving the repair, alteration or improvement upon or in connection with real property, the contract may be secured by a mortgage or deed of trust on the real property contained in a separate document. Retail sales transactions for home improvements which are financed or insured by the Federal Housing Administration are not subject to the provisions of this chapter.

2. The contract must be dated, signed by the retail buyer and completed as to all essential provisions, except as otherwise provided in NRS 97.205, 97.215 and 97.235. The printed or typed portion of the contract, other than instructions for completion, must be in a size equal to at least 8-point type.

3. Any fee charged to the retail buyer for his or her cancellation of a retail installment contract within 72 hours after its execution is prohibited unless notice of the fee is clearly set forth in the printed or typed portion of the contract.

(Added to NRS by 1965, 659; A 1987, 369; 1995, 1802)

NRS 97.175 Seller to provide certain creditor disclosures to buyer.

1. Before any credit is extended, the retail seller shall provide to the retail buyer any disclosures required to be made by a creditor pursuant to 15 U.S.C. § 1638.

2. Until the seller provides the required disclosures pursuant to subsection 1, the buyer is obligated to pay only the cash sales price.

3. Any acknowledgment by the buyer of delivery of a copy of the contract must be in a size equal to at least 10-point bold type and, if contained in the contract, must appear directly above the buyer's signature.

(Added to NRS by 1965, 659; A 2009, 1274)

NRS 97.185 Contents of contract.

1. A retail installment contract must contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer and a description or identification of the goods sold or to be sold, or services furnished or rendered or to be furnished or rendered. The contract also must contain the following items, which must be set forth substantially in the sequence appearing below:

(a) The cash sale price of each item of goods or services.

(b) The amount of the buyer's down payment, identifying the amounts paid in money and allowed for goods traded in.

(c) The difference between paragraphs (a) and (b).

(d) The aggregate amount, if any, included for insurance, specifying the type or types of insurance and the terms of coverage.

(e) The aggregate amount of official fees.

(f) The amount financed, which is the sum of paragraphs (c), (d) and (e).

(g) The amount of the finance charge.

(h) The amount of the total of payments owed by the buyer to the seller, which is the sum of paragraphs (f) and (g).

(i) The number of installments required to pay the total of payments, the amount of each installment, and the date for payment of the installments. If the final payment substantially exceeds the other scheduled installments, it must be set forth separately.

2. Additional items may be included in the contract to explain the calculations involved in determining the amount to be paid by the buyer.

(Added to NRS by 1965, 659; A 1993, 2756; 1995, 1802)

NRS 97.195 Amount of finance charge and any other fee, expense or charge. The amount of the finance charge in any retail installment contract and of any other fee, expense or charge may be any amount agreed upon by the parties.

(Added to NRS by 1965, 660; A 1981, 1592; 1984, 5; 1993, 2757; 1995, 1803)

NRS 97.205 Contracts negotiated and entered into by mail or telephone based on seller's catalog or printed solicitation; preparation and delivery of memorandum.

1. Retail installment contracts negotiated and entered into by mail or telephone without solicitation in the personal presence of the buyer and based upon a catalog of the seller, or other printed solicitation of business may be made as provided in this section. Such contracts when completed by the buyer need not contain the items required by NRS 97.185.

2. If such catalog or other printed solicitation clearly sets forth the cash sale prices and other terms of sales to be made through such medium, when the contract is received from the retail buyer, the seller shall prepare a written memorandum containing all of the information required by NRS 97.185 to be included in a retail installment contract. The seller shall deliver to the buyer a copy of such memorandum prior to the due date of the first installment payable under the contract.

3. If the catalog or other printed solicitation does not set forth all of the other terms of sales in addition to the cash sale prices, such memorandum shall be delivered to the buyer prior to or at the time of delivery of the goods or services.

(Added to NRS by 1965, 660)

NRS 97.215 Blank spaces in contracts. The seller shall not obtain the signature of the buyer to any contract when it contains blank spaces of items which are essential provisions of the transaction except as provided in NRS 97.205 and 97.235, and except that if delivery of the goods is not made at the time of the execution of the contract, the identifying numbers or marks of the goods or similar information and the due date of the first installment may be inserted by the seller in the seller's counterpart of the contract after it has been signed by the buyer.

(Added to NRS by 1965, 660)

NRS 97.225 Prepayment of unpaid total of payments; refund.

1. Notwithstanding the provisions of any retail installment contract to the contrary, if the rights of the buyer have not been terminated or forfeited under the terms of the contract, the buyer may prepay in full the unpaid total of payments thereof at any time before its final due date and, if the buyer does so, and if the contract is not in default under any term or condition of the contract more than 2 months, the buyer is entitled to a refund of the unearned portion of the finance charge for the prepayment. The amount of the refund must be computed by applying the agreed rate of the finance charge to the unpaid total of payments. Any greater amount of the finance charge which may have been precomputed and included in the balance due must be refunded.

2. This section does not preclude the imposition of any penalty for prepayment to which the parties may agree when the contract is executed.

(Added to NRS by 1965, 661; A 1983, 975; 1985, 1259; 1993, 2757; 1995, 1803)

CONSOLIDATING PURCHASES; RETAIL CHARGE AGREEMENTS

NRS 97.235 Consolidated contracts; memoranda.

1. If retail installment purchases are made by a buyer from a seller, the subsequent retail installment purchases may, by agreement of the parties, be consolidated with a prior retail installment contract. The finance charge for the consolidated contract must not, however, exceed the aggregate of the finance charge for:

(a) The original contract and any extension thereof by virtue of the consolidation; and

(b) The subsequent installment purchase or purchases.

2. In the event of such a consolidation, in lieu of the buyer's executing a retail installment contract respecting each subsequent purchase, it is sufficient if the seller prepares a written memorandum of each subsequent purchase, in which case the provisions of NRS 97.165, 97.175 and 97.185 do not apply. Unless previously furnished in writing to the buyer by the seller, by sales slip, memorandum or otherwise, the memorandum must set forth with respect to each subsequent purchase the items set forth in paragraphs (a) to (f), inclusive, of subsection 1 of NRS 97.185, and in addition:

(a) The unpaid balance of the previous contract or contracts;

(b) The consolidated unpaid balance;

(c) The amount of the finance charge;

(d) The consolidated total of payments; and

(e) The revised installments applicable to the consolidated total of payments, if any, in accordance with NRS 97.185.

➥ The seller shall deliver to the buyer a copy of the memorandum before the due date of the first installment of the consolidated contract.

3. When a subsequent purchase is made, the entire amount of all payments made previous thereto must be applied toward the payment of the previous time sale price or time sale prices. Each payment thereafter received must be allocated to all of the various time sale prices in the same ratio as the original cash sale prices of the various purchases bear to one another. However, the amount of any initial or down payment on the subsequent purchase must be allocated in its entirety to that purchase.

4. A retail installment contract may be contained in more than one document, if one such document is an original document signed by the retail buyer, stated to be applicable to purchases of goods or services to be made by the retail buyer from time to time. In that case the document, together with the sales slip, account book or other written statement relating to each purchase must set forth all of the information required by NRS 97.185 and constitutes the retail installment contract for each purchase. On each succeeding purchase pursuant to the original document, the sales slip, account book or other written statement may at the option of the seller constitute the memorandum required by this section.

(Added to NRS by 1965, 661; A 1993, 2757; 1995, 1803)

NRS 97.245 Retail charge agreements: Finance charge; contents of monthly statements; notice of change in terms.

1. The amount of the finance charge in any retail charge agreement may be any amount, and the agreement may provide for the imposition of any fee, expense or charge, agreed upon by the parties.

2. At or before the time a retail charge agreement is made the seller shall advise the buyer in writing, on the application form or otherwise, or orally, that the finance charge will be computed on the outstanding balance for each month, which need not be a calendar month, or other regular period agreed upon, the schedule or rate by which the finance charge will be computed, and that the buyer may at any time pay the total unpaid balance. If the information is given orally, the seller shall, upon approval of the buyer's credit, deliver or mail to the buyer and the buyer's address a memorandum setting forth the information.

3. The seller or holder of a retail charge agreement shall promptly supply the buyer with a statement as of the end of each monthly period, which need not be a calendar month, or other regular period agreed upon, in which there is any unpaid balance thereunder. The statement must set forth the following:

(a) The unpaid balance under the retail charge agreement at the beginning and end of the period;

(b) Unless otherwise furnished by the seller to the buyer by sales slip, memorandum or otherwise, a description or identification of the goods or services purchased during the period, the cash sale price and the date of each purchase;

(c) The payments made by the buyer to the seller and any other credits to the buyer during the period; and

(d) The amount, if any, of any finance charge, fee, expense or charge for the period.

4. If a change is to be made in the terms of a retail charge agreement previously disclosed to the buyer, the seller shall mail or deliver to the buyer a written disclosure of the proposed change not less than 15 days before the effective date of the change. No notice is required if the change involves:

(a) Charges for late payment, documentary evidence or exceeding an agreed limit;

(b) A reduction of any component of a finance or other charge;

(c) Suspension of future credit or termination of an account or plan; or

(d) The result of an agreement involving a court proceeding or of the consumer's default or delinquency, unless an increase is made in the periodic rate or other finance charge.

(Added to NRS by 1965, 662; A 1981, 1593; 1984, 5; 1993, 2758; 1995, 1804)

NRS 97.253 Rights of retail seller; action to determine liability for unauthorized negotiable instrument used to make payment.

1. A retail seller shall be deemed to be a payee with respect to any payment made on an account of a buyer by a check or other negotiable instrument.

2. Upon the posting of a payment to an account of a buyer, a retail seller has changed his or her position in reliance thereon if the payment was made by a check or other negotiable instrument.

3. A payment made on an account of a buyer by a check or other negotiable instrument is received by the retail seller in good faith if the retail seller did not have actual knowledge that the check or other negotiable instrument was forged, altered or unauthorized when it was posted to the account.

4. An action or proceeding brought to determine liability for an allegedly forged, altered or unauthorized check or other negotiable instrument used to make payment on an account of a buyer must be determined pursuant to the provisions of chapter 104 of NRS.

(Added to NRS by 1995, 1801)

PROVISIONS COMMON TO RETAIL INSTALLMENT CONTRACTS AND RETAIL CHARGE AGREEMENTS

NRS 97.265 Insurance. If the cost of any insurance is included in the retail installment contract or retail charge agreement:

1. The contract or agreement must state the nature, purpose, term and amount of the insurance, and in connection with the sale of a motor vehicle, the contract must state that the insurance coverage ordered under the terms of the contract does not include "bodily injury liability," "public liability," and "property damage liability" coverage, where such coverage is in fact not included.
2. The contract or agreement must state whether the insurance is to be procured by the buyer or the seller.
3. The amount included for such insurance must not exceed the premiums chargeable in accordance with the rate fixed for such insurance by the insurer, except where the amount is less than $1.
4. If the insurance is to be procured by the seller or holder, the seller or holder shall, within 45 days after delivery of the goods or furnishing of the services under the contract, deliver, mail or cause to be mailed to the buyer, at the buyer's address as specified in the contract, a notice thereof or a copy of the policy or policies of insurance or a certificate or certificates of the insurance so procured.
5. If any goods included in the down payment are insured, and the insurance policy or rights thereunder are assigned to the seller, the amount realized on the assignment must be refunded to the buyer or credited on the next payment due under the contract or agreement.
6. If the contract or agreement requires the buyer to procure and furnish insurance acceptable to the seller and the buyer fails so to provide or such insurance as procured by the buyer is cancelled or expires, the seller may procure the insurance in such form as the seller may deem necessary, and the cost thereof together with a finance charge may be added to the unpaid total of payments.

(Added to NRS by 1965, 663; A 1993, 2759; 1995, 1805)

NRS 97.275 Invalidity of provisions of contract or agreement; waiver of provisions of chapter ineffective.

1. No provision of a retail installment contract or retail charge agreement shall be valid by which the buyer agrees not to assert against the seller or against an assignee a claim or defense arising out of the sale.
2. No act or agreement of the retail buyer before or at the time of the making of a retail installment contract, retail charge agreement or purchases thereunder shall constitute a valid waiver of any of the provisions of this chapter or of any remedies granted to the buyer by law.

(Added to NRS by 1965, 663)

NRS 97.285 Provisions of chapter governing retail installment transactions exclusive. Except as otherwise provided by specific statute, the provisions of this chapter governing retail installment transactions are exclusive, and the provisions of any other statute do not apply to retail installment transactions governed by this chapter. If there is a conflict between the provisions of this chapter and any other statute, the provisions of this chapter control.

(Added to NRS by 1965, 663; A 1981, 1593; 1993, 2760; 1995, 1806; 2001, 490)

CONTRACTS FOR SALE OF VEHICLES

NRS 97.297 "Vehicle" defined. For the purposes of NRS 97.299 and 97.301, "vehicle" has the meaning ascribed to it in NRS 482.135.

(Added to NRS by 1987, 1479)

NRS 97.299 Forms for contracts and applications for credit: Adoption of regulations prescribing forms; contents; acceptance; translation into Spanish; amendment of forms.

1. The Commissioner of Financial Institutions shall prescribe, by regulation, forms for the application for credit and contracts to be used in the sale of vehicles if:
   (a) The sale involves the taking of a security interest to secure all or a part of the purchase price of the vehicle;
   (b) The application for credit is made to or through the seller of the vehicle;
   (c) The seller is a dealer; and
   (d) The sale is not a commercial transaction.
2. The forms prescribed pursuant to subsection 1 must meet the requirements of NRS 97.165, must be accepted and acted upon by any lender to whom the application for credit is made and, in addition to the information required in NRS 97.185 and required to be disclosed in such a transaction by federal law, must:
   (a) Identify and itemize the items embodied in the cash sale price, including the amount charged for a contract to service the vehicle after it is purchased.
   (b) In specifying the amount of the buyer's down payment, identify the amounts paid in money and allowed for property given in trade and the amount of any manufacturer's rebate applied to the down payment.
   (c) Contain a description of any property given in trade as part of the down payment.
   (d) Contain a description of the method for calculating the unearned portion of the finance charge upon prepayment in full of the unpaid total of payments as prescribed in NRS 97.225.

(e) Contain a provision that default on the part of the buyer is only enforceable to the extent that:
(1) The buyer fails to make a payment as required by the agreement; or
(2) The prospect of payment, performance or realization of collateral is significantly impaired. The burden of establishing the prospect of significant impairment is on the seller.
(f) Include the following notice in at least 10-point bold type:

NOTICE TO BUYER

Do not sign this agreement before you read it or if it contains any blank spaces. You are entitled to a completed copy of this agreement. If you pay the amount due before the scheduled date of maturity of the indebtedness and you are not in default in the terms of the contract for more than 2 months, you are entitled to a refund of the unearned portion of the finance charge. If you fail to perform your obligations under this agreement, the vehicle may be repossessed and you may be liable for the unpaid indebtedness evidenced by this agreement.

3. The Commissioner shall arrange for or otherwise cause the translation into Spanish of the forms prescribed pursuant to subsection 1.
4. If a change in state or federal law requires the Commissioner to amend the forms prescribed pursuant to subsection 1, the Commissioner need not comply with the provisions of chapter 233B of NRS when making those amendments.
5. As used in this section:
(a) "Commercial transaction" means any sale of a vehicle to a buyer who purchases the vehicle solely or primarily for commercial use or resale.
(b) "Dealer" has the meaning ascribed to it in NRS 482.020.
(Added to NRS by 1987, 1479; A 1989, 458; 1993, 2760; 1995, 1806; 2003, 1906; 2009, 1275; 2011, 1029)

NRS 97.301 Forms for contracts and application for credit: When use is mandatory. When a vehicle is sold in this state under the circumstances described in subsection 1 of NRS 97.299, the seller and any lender to whom the application for credit is made shall use the forms prescribed pursuant to that section.
(Added to NRS by 1987, 1479; A 1989, 459)

NRS 97.304 Enforceability of default on part of buyer. Notwithstanding the provisions of any contract to the contrary, default on the part of the buyer is only enforceable to the extent that:
1. The buyer fails to make a payment as required by the agreement; or
2. The prospect of payment, performance or realization of collateral is significantly impaired. The burden of establishing the prospect of significant impairment is on the seller.
(Added to NRS by 2011, 1029)

REMEDIES, ENFORCEMENT AND PENALTIES

NRS 97.305 Violation bar to recovery. A seller who enters into a contract or retail charge agreement which does not comply with the provisions of this chapter or who violates any provision of this chapter, and a lender who violates NRS 97.301, except as a result of an accidental or bona fide error is barred from the recovery of any finance charge, official fees, or any charge for delinquency or collection under or in connection with the related retail installment contract or purchase under a retail charge agreement; but the seller or lender may nevertheless recover from the buyer an amount equal to the cash price of the goods or services and the cost to the seller or lender of any insurance included in the transaction.
(Added to NRS by 1965, 661; A 1987, 1480; 1993, 2761; 1995, 1807)

NRS 97.315 Injunction to prevent violation. The Attorney General or the district attorney may bring an action in the name of the state against any person to restrain and prevent any violation of this chapter.
(Added to NRS by 1965, 664)

NRS 97.325 Assurance of discontinuance. In the enforcement of this chapter, the Attorney General may accept an assurance of discontinuance of any act or practice deemed in violation of this chapter, from any person engaging in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the district court of the county in which the alleged violator resides or has his or her principal place of business. No such assurance may be accepted after the commencement of any action by a district attorney under NRS 97.315 without the consent of the district attorney.
(Added to NRS by 1965, 664)

NRS 97.335 Civil penalties. Any person who violates any order or injunction issued pursuant to this chapter shall forfeit and pay a civil penalty of not more than $1,000. For the purposes of this section the district court issuing any injunction shall retain jurisdiction, the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for the recovery of civil penalties.
(Added to NRS by 1965, 664)

492 B.R. 537
United States Bankruptcy Court,
D. Nevada.

In re Kevin Wayne HENDERSON and Rosa Isela Henderson, Debtors.
In re Douglas Allen Kennedy and Jennifer Joy Kennedy, Debtors.
In re Janice P. Green, a/k/a Jan Green, Debtor.
In re Beatriz A. Perez–Urrea, a/k/a Beatriz Perez, Debtor.
In re Edgar A. Greene, Debtor.

Nos. BK–S–12–23691–BAM, BK–S–12–23954–BAM, BK–S–12–24017–BAM, BK–S–13–10960–BAM, BK–S–13–11417–BAM. | May 22, 2013.

Synopsis
Background: In separate Chapter 7 cases, debtors sought court approval of reaffirmation agreements that they had negotiated, without aid of counsel, with motor vehicle lenders.

Holdings: The Bankruptcy Court, Bruce A. Markell, J., held that:

[1] under Nevada law, as predicted by bankruptcy judge in that state, mere filing of Chapter 7 petitions by debtors who had entered into prepetition contracts to finance their purchase of motor vehicles did not "significantly impair" motor vehicle lenders' prospects of payment, performance, or realization on their collateral, such that ipso fact clauses in finance agreements were unenforceable, and

[2] bankruptcy court could not approve, as being in "best interest" of Chapter 7 debtors, their proposed agreements for reaffirmation of debtors' obligations on motor vehicle loans on which they were current in their payments, and upon which amounts owed were in excess of vehicles' values.

Agreements disapproved.

West Headnotes (8)

[1] **Bankruptcy**
Reaffirmation

Reaffirmation agreements are enforceable only if approved in accordance with Bankruptcy Code requirements. 11 U.S.C.A. § 524(c).

Cases that cite this headnote

[2] **Bankruptcy**
Grounds for approval or rejection

Whether proposed reaffirmation agreement that debtor negotiated without aid of counsel is in debtor's "best interest," as required for bankruptcy court to approve it, requires a fact-specific analysis. 11 U.S.C.A. § 524(c)(6)(A).

Cases that cite this headnote

[3] **Bankruptcy**
Grounds for approval or rejection

Financial best interest of debtor ordinarily requires disapproval of agreement for reaffirmation of unsecured debt. 11 U.S.C.A. § 524(c)(6)(A).

Cases that cite this headnote

[4] **Bankruptcy**
Motor vehicle transactions

Creditors' right to repossess motor vehicles securing Chapter 7 debtors' obligations to them was controlled by nonbankruptcy law.

Cases that cite this headnote

[5] **Bankruptcy**
Motor vehicle transactions

Contracts between Chapter 7 debtors and motor vehicle lenders, in conjunction with state law, determined whether debtors had defaulted on automobile loans, such that lenders had right to repossess vehicles.

Cases that cite this headnote

[6] **Bankruptcy**
Motor vehicle transactions
Bankruptcy
"Ipso facto" clauses
Secured Transactions
Default of debtor
Secured Transactions
Possession by secured party

Unless mere fact of Chapter 7 debtors having filed for bankruptcy itself amounted to "significant impairment" of motor vehicle lenders' prospect of payment, performance, or realization on their collateral, ipso facto clauses in car loan agreements were rendered unenforceable by Nevada statute which provided that, notwithstanding any contrary provision in parties' contract, debtors' default was unenforceable, and did not authorize motor vehicle lenders to repossess their collateral, unless it consisted of payment default or significantly impaired prospect of payment, performance, or realization on collateral. West's NRSA 97.304.

Cases that cite this headnote

[7] **Bankruptcy**
Motor vehicle transactions
Bankruptcy
"Ipso facto" clauses
Secured Transactions
Default of debtor
Secured Transactions
Possession by secured party

Under Nevada law, as predicted by bankruptcy judge in that state, mere filing of Chapter 7 petitions by debtors who had entered into prepetition contracts to finance their purchase of motor vehicles did not "significantly impair" motor vehicle lenders' prospects of payment, performance, or realization on their collateral, such that ipso facto clauses in finance agreements were unenforceable, and would not authorize motor vehicle lenders to repossess vehicles as long as debtors were current in their payments, in event that debtors did not enter into proposed reaffirmation agreements. 11 U.S.C.A. § 524(c); West's NRSA 97.304.

Cases that cite this headnote

[8] **Bankruptcy**
Judicial hearing and approval

Bankruptcy court could not approve, as being in "best interest" of Chapter 7 debtors, their proposed agreements for reaffirmation of debtors' obligations on motor vehicle loans on which they were current in their payments, and upon which amounts owed were in excess of vehicles' values, where ipso facto clauses in debtors' agreements with motor vehicle lenders were unenforceable under state law and would not enable lenders to repossess vehicles, and where, as result of entering into reaffirmation agreements, debtors would remain personally liable for unsecured portion of motor vehicle debts, which would otherwise be discharged in bankruptcy. 11 U.S.C.A. § 524(c)(6)(A); West's NRSA 97.304.

Cases that cite this headnote

Attorneys and Law Firms

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OPINION DISAPPROVING REAFFIRMATION AGREEMENTS

BRUCE A. MARKELL, Bankruptcy Judge.

I. INTRODUCTION

These cases each present a common factual scenario: debtors who wish to reaffirm a car loan that exceeds the value of the car that serves as collateral. The debtors each wish to reaffirm the loan because a car is, among other things, essential to keeping their employment. Even though all debtors are current on their payments, they fear repossession because their purchase contracts make a bankruptcy filing an event of default that allows repossession.

Controlling Nevada law, however, has recently changed to preclude repossession unless the default significantly impairs the prospect of payment, performance, or realization of the lender's collateral. The question thus resolves itself into whether the simple act of filing bankruptcy, without ***539** more, constitutes such an impairment. This court says no.

Without such an impairment, a lender cannot repossess simply because of a bankruptcy filing. This is critical, because one of the two requirements for approval of a reaffirmation agreement is that the reaffirmation agreement be in the debtor's best interests. If it is not—and without the specter of legal repossession it cannot be—then the agreement cannot be approved. Accordingly, in each of theses cases the court will deny approval of the reaffirmation agreement.

II. FACTS

A. *In re Henderson*

The Hendersons purchased their 2012 Chevy Suburban on June 6, 2012. (12–23691, Dkt. No. 1 at 22.) On December 17, 2012, they filed their Chapter 7 bankruptcy petition. (*Id.* at 1.) They scheduled a secured claim in favor of U.S. Bank for $57,724, listed the vehicle as collateral, and asserted the vehicle's value at $57,164. Their schedules thus showed an unsecured deficiency of $560. (*Id.* at 22.)

Their proposed reaffirmation agreement—filed about three months after their petition—stated the following: (i) total amount to be paid: $53,905; (ii) monthly payment: $816; (iii) debtors' net monthly income: $3,129; and (iv) the car's market value: $54,725.[1] (12–23691, Dkt. No. 25.)

B. *In re Kennedy*

The Kennedys purchased their 2012 Buick Enclave on July 6, 2012. (12–23954, Dkt. No. 1 at 21.) On December 26, 2012, they filed their Chapter 7 bankruptcy petition. (*Id.* at 1.) They scheduled a secured claim in favor of Wells Fargo Dealer Services for $27,636, listed the Enclave as collateral, and asserted the vehicle's value at $26,990. Their schedules thus showed an unsecured deficiency of $646. (*Id.* at 21.)

Their proposed reaffirmation agreement—filed about three months after their petition—stated the following: (i) total amount to be paid: $26,596; (ii) monthly payment: $440; (iii) debtors' net monthly income: $100; and (iv) the car's market value: $36,800.[2] (12–23954, Dkt. No. 16.)

C. *In re Green*

Janice Green purchased her 2011 Ford Escape on November 1, 2011. (12–24017, Dkt. No. 1 at 17.) On December 27, 2012, she filed her Chapter 7 bankruptcy petition. (*Id.* at 1.) She scheduled a secured claim in favor of GM Financial for $24,503, listed the Escape as collateral for that loan, and scheduled the vehicle's value at $23,000. Her schedules thus showed an unsecured deficiency of $1,503. (*Id.* at 17.)

Her proposed reaffirmation agreement—filed about four months after her petition—stated each of the following: (i) total amount to be paid: $23,409; (ii) monthly payment: $530; (iii) her net monthly income: $156; and (iv) the car's market value: $22,525.[3] (12–24017, Dkt. No. 17.)

D. *In re Perez–Urrea*

Beatriz Perez–Urrea purchased her 2009 Nissan Altima in

May 2012. (13–10960, Dkt. No. 1 at 17.) On February 8, ***540** 2013, she filed her Chapter 7 bankruptcy petition. (*Id.* at 1.) She scheduled a secured claim in favor of Capital One Auto Financing for $17,500, listed the Altima as collateral, and asserted the vehicle's value to be $6,500. Her schedules thus showed an unsecured deficiency of $11,000. (*Id.* at 17.)

Her proposed reaffirmation agreement—filed about one month after her petition—stated the following: (i) total amount to be paid: $17,498; (ii) monthly payment: $410; (iii) her net monthly income: *negative* $40; and (iv) the car's market value: $14,675.[4] (13–10960, Dkt. No. 16.)

E. *In re Greene*

Edgar Greene purchased his 2012 Ford Fusion on October 20, 2011. (Reaffirmation Hr'g, April 30, 2013; *see* 13–11417, Dkt. No. 1 at 18.) On February 25, 2013, he filed his Chapter 7 bankruptcy petition. (13–11417, Dkt. No. 1.) He scheduled a secured claim in favor of Ford Motor Credit for $18,218, listed the Fusion as collateral for the loan, and asserted the vehicle's value to be $18,741, thus indicating no unsecured deficiency.[5] (*Id.* at 18.)

His proposed reaffirmation agreement—filed about one month after his petition—stated the following: (i) total amount to be paid: $17,813; (ii) monthly payment: $405; (iii) his net monthly income: $57; and (iv) the car's market value: $18,075.[6] (13–11417, Dkt. No. 19.)

III. ANALYSIS

A. The Applicable Law

[1] A reaffirmation agreement is an agreement "the consideration for which, in whole or in part, is based on a debt that is dischargeable...." 11 U.S.C. § 524(c)(1) (2012). Reaffirmation agreements are enforceable only if approved in accordance with Section 524(c)(1)–(6). The process for this approval starts with Section 521(a)(2) of the Bankruptcy Code. That section requires debtors to file a statement of intention with respect to property of the estate that secures their debts, such as an automobile serving as collateral for an auto loan. *Id.* § 521(a)(2)(A). The statement must indicate whether the debtor intends to surrender or retain the property. *Id.* The debtor must then timely perform her intention with respect to the property. *Id.* § 521(a)(2)(B). If the intention is to retain the property, the debtor must either redeem it (by paying the amount of the secured claim in full) or reaffirm the debt secured by it (by entering into such an agreement with the creditor). *Id.* §§ 521(a)(2)(A), 722. Section 521(a)(2) does not "alter the debtor's or trustee's rights with regard to such property ..., except as provided in section 362(h)." *Id.*

Section 362(h), in turn, provides that the automatic stay under Section 362(a) "is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim ..., and such personal property shall no longer be property of the estate if the debtor fails" to file a statement of intention or to perform that intention within the time limits set by Section 521(a)(2). *Id.* § 362(h)(1). *See Samson v. Western Capital Partners, LLC (In re Blixseth),* 684 F.3d 865 (9th Cir.2012).

If the debtor intends to reaffirm the debt, she must "enter into an agreement of ***541** the kind specified in section 524(c)." *Id.* Notably, the debtor is required to "enter into" the agreement to comply with Section 362(h); the statute is silent on whether the court must ultimately approve the agreement. *In re Moustafi,* 371 B.R. 434, 439 (Bankr.D.Ariz.2007).

For reaffirmation agreements, Section 524(c) lists various content and timing requirements, none of which are in dispute in any of these cases. *See* 11 U.S.C. § 524(c)(1)–(5) (2012). Paragraph (6) is relevant, however, as it provides the requirements for court approval of reaffirmation agreements for personal property negotiated without the assistance of counsel, *id.* § 524(c)(6), such as is the case with every debtor here. To approve such agreements, the court must find that the reaffirmation agreement does "not impos[e] an undue hardship on the debtor or a dependent of the debtor" *and* that the agreement is "in the best interest of the debtor." *Id.* § 524(c)(6)(A).[7]

There is a presumption of undue hardship "if the debtor's monthly income less the debtor's monthly expenses ... is less than the scheduled payments on the reaffirmed debt." *Id.* § 524(m)(1). The debtor may rebut the presumption by identifying additional sources of funds to make the payments. *Id.*

[2] [3] With respect to the second requirement that the agreement must be "in the best interest of the debtor," the Code does not specify how to determine the debtor's best interest; it is a fact-specific analysis. *See In re Kamps,* 217 B.R. 836, 847 (Bankr.C.D.Cal.1998). However, "the financial best interest of the debtor ordinarily requires the denial of a reaffirmation of an unsecured debt." *In re Carlos,* 215 B.R. 52, 62 (Bankr.C.D.Cal.1997).

To summarize, the court must disapprove a reaffirmation

agreement if it imposes an undue hardship on the debtor *or* if it is not in the debtor's best interest. Even if the court does not approve the reaffirmation agreement, however, the vehicle remains in the estate and is protected by the automatic stay so long as the reaffirmation agreement complies with Section 524(c). 11 U.S.C. § 362(h) (2012). But the stay ultimately ends, as the entry of the discharge terminates the automatic stay, 11 U.S.C. § 362(c), and replaces it with the permanent discharge injunction—which notably does not restrict secured creditors from enforcing their liens. 11 U.S.C. § 524(a). Accordingly, debtors may be rightfully concerned that their vehicles will be repossessed post-discharge because most car purchase agreements, printed on standard forms, state a default occurs if the debtor files for bankruptcy relief, or if the debtor was ever a debtor in bankruptcy. These so-called "*ipso facto* " clauses[8] are nearly universal in vehicle purchase contracts.

[4] [5] A creditor's right to repossession is controlled by nonbankruptcy law. "[T]he disposition of the debtor's assets is generally left to state law ... The parties contract, in conjunction with state law, determines when a debtor has defaulted on an automobile loan." *Dumont v. Ford Motor Credit Co. (In re Dumont),* 581 F.3d 1104, 1114–15 (9th Cir.2009), *aff'g,* ***542** 383 B.R. 481, 488–89 (9th Cir. BAP 2008). This is normally controlled by a state's adoption of Article 9 of the Uniform Commercial Code, which does not specify what actions or conditions are defaults. Rather, it allows debtors and creditors to define conditions leading to default in their security agreement. U.C.C. § 9–601, cmt. 3 ("[T]his Article leaves to the agreement of the parties the circumstances givening rise to a default.") As default is necessary to a lender's right to repossess, U.C.C. § 9–601(a), the conditions defining default are critical.

Nevada law, however, has recently changed the background laws. For vehicle sale contracts, Nevada's retail installment law now states:

> Notwithstanding the provisions of any contract to the contrary, default on the part of the buyer is only enforceable to the extent that: [1] The buyer fails to make a payment as required by the agreement; or [2] The prospect of payment, performance or realization of collateral is *significantly impaired.* The burden of establishing the prospect of significant impairment is on the seller.

NEV.REV.STAT. § 97.304 (2011) (emphasis added). This statute became effective on October 1, 2011 and applies only to purchases made after that date.

[6] This statute renders provisions such as *ipso facto* clauses unenforceable unless the fact of the bankruptcy itself amounts to a significant impairment of the prospect of payment, performance, or realization of collateral. The question here is whether the filing of a bankruptcy meets this test.

While the Bankruptcy Code does not limit or prevent the operation of *ipso facto* provisions that place the debtor in default for filing for bankruptcy, 11 U.S.C. § 521(d) (2012), the Code's non-rejection of such provisions does not override state laws that regulate them. *In re Dumont,* 383 B.R. at 488–89 ("Where otherwise enforceable, ipso facto default provisions may now be used by creditors to repossess, ... [but s]ome state consumer protection statutes prevent a creditor from repossessing when there is no payment default. These ... statutes have the potential to make [Section 521(d)] meaningless if repossession is barred by state law when a debtor's payments are current.").

The court thus asks whether NEV. REV. STAT. § 97.304 has such potential, and to do so must look to the statute's origins. Those are in the Uniform Consumer Credit Code ("UCCC"). Although Nevada has not adopted the UCCC in its entirety, NEV. REV. STAT. § 97.304 was adapted from § 5.109 of the UCCC, which reads:

> An agreement of the parties to a consumer credit transaction with respect to default on the part of the consumer is enforceable only to the extent that: (1) the consumer fails to make a payment as required by agreement; or (2) the prospect of payment, performance or realization of collateral is *significantly impaired;* the burden of establishing the prospect of significant impairment is on the seller.

UNIFORM CONSUMER CREDIT CODE § 5.109 (1974) (emphasis added). The UCCC was completed in 1968 and amended in 1974. *Consumer Credit Code Summary,* UNIFORM LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Consumer% 20Credit% 20Code (last visited May 22, 2013). It was designed to be a "balanced consumer protection law, providing comprehensive regulation of consumer credit."

Id. As to UCCC § 5.109, "[c]onfining default to these scenarios is designed to prevent abuse of the consumer by the creditor." ***543** *Johnson Cnty. Auto Credit, Inc. v. Green,* 83 P.3d 152, 158, 277 Kan. 148, 155 (2004). At least ten states have adopted some version of UCCC § 5.109.[9]

Understanding NEV.REV.STAT. § 97.304 requires understanding what constitutes a significant impairment—more precisely, whether merely filing a bankruptcy petition is a significant impairment under the statute. If so, then *ipso facto* provisions are enforceable and an auto lender may repossess a vehicle even if the debtor is current on the payments. If not, repossession is impermissible if the debtor is current on payments and the only asserted grounds for significant impairment is the bankruptcy filing itself.

[7] The Nevada Supreme Court has not interpreted "significant impairment" under NEV.REV.STAT. § 97.304, but other courts addressing this precise issue under UCCC § 5.109 (and its state corollaries) have all agreed that filing a bankruptcy petition is *not* a significant impairment. *In re Koufos,* 2010 WL 4638408 at *2 (Bankr.D.Mass.2010); *In re Visnicky,* 401 B.R. 61, 66–67 (Bankr.D.R.I.2009); *In re Schmidt,* 397 B.R. 481, 485 (Bankr.W.D.Mo.2008); *In re Riggs,* 2006 WL 2990218 at *3 (Bankr.W.D.Mo.2006); *In re Steinhaus,* 349 B.R. 694, 710–11 (Bankr.D.Idaho 2006); *In re Rowe,* 342 B.R. 341, 351 (Bankr.D.Kan.2006); *Hall v. Ford Motor Credit Co. LLC,* 254 P.3d 526, 533, 292 Kan. 176, 185–86 (2011); *see In re Timmons,* 2012 WL 4435522 at *6 (Bankr.D.Kan.2012).[10]

Creditors will have a difficult time establishing that a bankruptcy filing is a significant impairment because "the bankruptcy case usually results in the discharge of debts which the debtor would otherwise be obligated to service." *In re Riggs,* 2006 WL 2990218 at *3 (citing *In re Rowe,* 342 B.R. at 350). This court believes the Nevada Supreme Court would agree that the mere filing of a bankruptcy petition is not a significant impairment under NEV.REV.STAT. § 97.304, especially in light of debtors' expected increase in available funds post-discharge.

[8] In light of the unenforceability of *ipso facto* clauses in auto sales contracts under NEV.REV.STAT. § 97.304, the next issue is whether approving a reaffirmation agreement that reaffirms an auto purchase debt incurred after October 1, 2011 can be in a debtor's best interest under Section 524(c)(6)(A)(ii). The answer is no. Without reaffirmation, the unsecured portion of a claim would be discharged and the debtor could maintain possession and use of the vehicle so long as she keeps current on payments, or otherwise does not default in a way that "substantially impairs" a lender's collateral, such as by letting any required insurance lapse. An approved reaffirmation agreement would not improve the debtor's ability to possess or use the vehicle, nor would it alter the scope of events that constitute default. Yet, it would exclude the entire amount of the creditor's claim (the secured and unsecured portions) from discharge. In short, ***544** if approved, the debtor would face the same risk of repossession yet would also retain personal liability for the unsecured portion of the debt. Approving a reaffirmation agreement in this context is certainly not in a debtor's best interest. 11 U.S.C. § 524(c)(6)(A)(ii) (2012); *In re Carlos,* 215 B.R. at 62; *see In re Moustafi,* 371 B.R. at 438.

An objection exists that this result is contrary to Congress' efforts to eliminate "ride through" in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), *In re Dumont,* 581 F.3d at 1109–10. Pre–BAPCPA, debtors could "ride-through," or "pay and drive," without entering into a reaffirmation agreement and still enjoy the protection of the automatic stay. *Id.; see McClellan Fed. Credit Union v. Parker (In re Parker),* 139 F.3d 668 (9th Cir.1998). BAPCPA requires debtors to enter into a reaffirmation agreement or suffer the termination of the automatic stay as to the relevant property. 11 U.S.C. § 362(h) (2012).

After October 1, 2011, however, Nevada creditors can only repossess on a payment or other similar default (after moving for relief from stay or after entry of the discharge). Violation of an *ipso facto* clause is insufficient to justify repossession, as the debtor's status as one who filed for bankruptcy relief does not affect collection or substantially impair collateral. In these situations, there can be no deficiency judgment because the bankruptcy discharge includes the unsecured portion of the related claim. *See Americredit Fin. Servs. v. Penrod (In re Penrod),* 392 B.R. 835, 839–40 (9th Cir. BAP 2008), *aff'd,* 611 F.3d 1158 (9th Cir.2010); *In re Anderson,* 348 B.R. 652, 661 (Bankr.D.Del.2006).

One consequence of this change in law is that if the creditor legally repossesses the vehicle, the creditor's recovery is limited to the value of the vehicle at the time of repossession, just as was the case with "ride through." Justifying the approval of a reaffirmation agreement in this context would be quite difficult if not impossible. *See id.* at 1114 ("If ride-through existed, any lawyer who advised his client to make a reaffirmation offer on the original contract terms would be guilty of malpractice, and any bankruptcy judge who approved such a reaffirmation from a pro se litigant would be seriously

derelict in his duties. For why would one ever choose reaffirmation on such terms and thus incur the risk of personal liability when one could safely achieve the same ends by ride-through?").

B. Application of Law to Facts

In the five bankruptcy cases at issue, the debtors entered into reaffirmation agreements of the kind specified in Section 524(c), and thus their vehicles remain in their respective bankruptcy estates and enjoy the protection of the automatic stay, at least until they receive their discharges. 11 U.S.C. § 362(h) (2012); *In re Moustafi,* 371 B.R. at 439. The remaining issue is whether the reaffirmation agreements should be approved under Section 524(c)(6)—a necessary inquiry because the debtors here all negotiated their reaffirmation agreements without the assistance of counsel. *Id.* § 524(c)(6).

The debtors all purchased their vehicles after October 1, 2011. NEV.REV.STAT. § 97.304 thus applies. Accordingly, any defaults due to *ipso facto* clauses in their purchase agreements cannot serve as a basis for repossession—the mere status of filing bankruptcy does not substantially impair the lenders' collection or collateral. NEV.REV.STAT. § 97.304 (2011); *In re Schmidt,* 397 B.R. at 485. Also, all debtors are current with their car payments and not otherwise in default under their purchase agreements.

***545** Were the court to approve the reaffirmation agreements, each debtor would become personally liable for the unsecured portions of their respective lender's claim. If the court does not approve, then each debtor would not become liable for any deficiency, as such claim would be discharged. Yet in either case, so long as they maintain their payments and do not endanger the collateral, they can maintain possession and use of their vehicles. In short, there is no upside for the debtors in the reaffirmation agreements. There is only the downside of excluding unsecured debt from discharge. Consequently, the reaffirmation agreements are not in the debtors' best interest.[11] 11 U.S.C. § 524(c)(6)(A)(ii); *In re Carlos,* 215 B.R. at 62.

IV. CONCLUSION

The court disapproves the five reaffirmation agreements at issue because they are not in the best interest of the debtors. The court will issue separate orders disapproving each reaffirmation agreement.

All Citations

492 B.R. 537, 69 Collier Bankr.Cas.2d 1398

Footnotes

1 The vehicle's asserted value in the reaffirmation agreement is $2,439 *less* than in the schedules.

2 The vehicle's asserted value in the reaffirmation agreement is $9,810 *more* than in the schedules.

3 The vehicle's asserted value in the reaffirmation agreement is $475 *less* than in the schedules.

4 The vehicle's asserted value in the reaffirmation agreement is $8,175 *more* than in the schedules.

5 This seems dubious. The high Blue Book value for such vehicles was around $17,000.

6 The vehicle's asserted value in the reaffirmation agreement is $666 *less* than in the schedules.

7 The strict requirements for reaffirmation in the Code and Bankruptcy Rules " 'grew out of a long history of coercive and deceptive actions by creditors to secure reaffirmation of discharged debt.' " *In re Grisham,* 436 B.R. 896, 900 (Bankr.N.D.Tex.2010) (quoting 4 COLLIER ON BANKRUPTCY ¶ 524.04 (16th ed. 2009)).

8 "*Ipso facto* " is Latin for "by the fact itself," so *ipso facto* clauses turn the simple filing of a bankruptcy—the simple "fact itself" of filing a bankruptcy—into a default.

9 *See* IDAHO CODE ANN. § 28–45–107 (2012); KAN. STAT. ANN.. § 16a–5–109 (2012); ME. REV. STAT.. tit. 9–A, §

5–109 (2012); MASS. GEN. LAWS ch. 255B, § 20B(a) (2012); MO.REV.STAT. § 408.552 (2012); NEB.REV.STAT. § 45–1,105(5) (2012); N.C. GEN.STAT. § 53–180(c) (2012); R.I. GEN. LAWS § 6–51–3 (2011); S.C.CODE ANN. § 37–5–109 (2012).

10 In an interesting contrast, Maine's version of UCCC § 5.109 adds a subsection specifying that "without limitation ... commencement of any proceeding under any bankruptcy or insolvency laws by or against debtors" constitutes a significant impairment, strongly implying that the Maine legislature interpreted UCCC § 5.109 as drafted to not comprehend filing for bankruptcy as a significant impairment. ME. REV. STAT. tit. 9–A, § 5–109(3)(A) (2012).

11 The court also notes that one of the debtors, Ms. Perez–Urrea, indicated on her proposed reaffirmation agreement that her net monthly income is *negative* $40 after deducting the monthly payment on the reaffirmed debt. This raises a presumption of undue hardship. 11 U.S.C. § 524(m)(1) (2012). In her papers and at the reaffirmation hearing, Ms. Perez–Urrea stated that she was in the process of reducing her expenses for dry cleaning and laundry. These reductions are insufficient to rebut the presumption, however. The court thus disapproves her reaffirmation agreement on the independent grounds that it imposes an undue hardship on her. *Id.* § 524(c)(6)(A)(i).

End of Document

436 B.R. 896
United States Bankruptcy Court,
N.D. Texas,
Dallas Division.

In re William V. GRISHAM, Jr., Debtor.

No. 10–32524–SGJ–7. | Sept. 7, 2010.

Synopsis
Background: Creditor and Chapter 7 debtor sought approval of proposed reaffirmation agreement pertaining to a pickup truck. Hearing was held.

[Holding:] In a memorandum opinion supported by the district's sitting bankruptcy judges, the Bankruptcy Court, Stacey G.C. Jernigan, J., held that the presumption of undue hardship was not overcome in this case.

Reaffirmation agreement disapproved.

West Headnotes (24)

[1] **Bankruptcy**
Reaffirmation

Any reaffirmation agreement that does not meet the strict requirements set forth in the Bankruptcy Code and rules is unenforceable. 11 U.S.C.A. § 524(c, d, m); Fed.Rules Bankr.Proc.Rules 4004(c)(1, 2), 4008, 11 U.S.C.A.

Cases that cite this headnote

[2] **Bankruptcy**
Reaffirmation

Provisions of the Bankruptcy Code and rules governing reaffirmation agreements grew out of a long history of coercive and deceptive actions by creditors to secure reaffirmation of discharged debt. 11 U.S.C.A. § 524(c, d, m); Fed.Rules Bankr.Proc.Rules 4004(c)(1, 2), 4008, 11 U.S.C.A.

5 Cases that cite this headnote

[3] **Bankruptcy**
Reaffirmation

In considering any reaffirmation agreement, the bankruptcy court must first determine whether the agreement was timely made, that is, whether it was made before the granting of the discharge. 11 U.S.C.A. § 524(c)(1).

1 Cases that cite this headnote

[4] **Bankruptcy**
Hearing, Determination, and Order; Discretion
Bankruptcy
Reaffirmation

Parties who have not executed a reaffirmation agreement at the time that a discharge order is due to be entered are not without a solution: the debtor may file a motion asking the court to defer entry of an order granting a discharge for 30 days and, upon later motion, the court may defer entry of the order to a still-later date certain. 11 U.S.C.A. § 524(c)(1); Fed.Rules Bankr.Proc.Rule 4004(c)(2), 11 U.S.C.A.

Cases that cite this headnote

[5] **Bankruptcy**
Reaffirmation

After the court has entered a discharge order, any reaffirmation agreement subsequently "made" will not be enforceable. 11 U.S.C.A. §

524(c)(1).

4 Cases that cite this headnote

[6] **Bankruptcy**
Grounds
Bankruptcy
Application, hearing, and determination

It is generally not appropriate for the bankruptcy court to "set aside" a discharge order for the sole purpose of considering a reaffirmation agreement, and then thereafter re-enter a discharge order. 11 U.S.C.A. § 524(c)(1); Fed.Rules Bankr.Proc.Rule 4004(c)(1), 11 U.S.C.A.

1 Cases that cite this headnote

[7] **Bankruptcy**
Reaffirmation

In considering any reaffirmation agreement, after determining whether the agreement was timely made, the bankruptcy court must consider whether it was timely "filed." 11 U.S.C.A. § 524(c)(1); Fed.Rules Bankr.Proc.Rule 4008(a), 11 U.S.C.A.

1 Cases that cite this headnote

[8] **Bankruptcy**
Reaffirmation

If a debtor and creditor do not "file" a reaffirmation agreement within 60 days after the first date set for the meeting of creditors, the parties are not without a solution, as the bankruptcy court may enlarge the time to file such an agreement. Fed.Rules Bankr.Proc.Rule 4008(a), 11 U.S.C.A.

Cases that cite this headnote

[9] **Bankruptcy**
Reaffirmation

Debtor or creditor may, at any time, file a motion to enlarge the time to file a reaffirmation agreement. Fed.Rules Bankr.Proc.Rule 4008(a), 11 U.S.C.A.

Cases that cite this headnote

[10] **Bankruptcy**
Reaffirmation

Bankruptcy court has the power to enlarge the time to file a reaffirmation agreement without a motion even being made. Fed.Rules Bankr.Proc.Rule 4008(a), 11 U.S.C.A.

Cases that cite this headnote

[11] **Bankruptcy**
Hearing, Determination, and Order; Discretion

Bankruptcy court shall not grant a discharge whenever a motion to enlarge the time to file a reaffirmation agreement is pending. Fed.Rules Bankr.Proc.Rules 4004(c)(1)(J), 4008(a), 11 U.S.C.A.

Cases that cite this headnote

[12] **Bankruptcy**
Judicial hearing and approval

Bankruptcy court generally must set a hearing on a proposed reaffirmation agreement when the debtor was not represented by an attorney during the course of negotiating the reaffirmation

agreement. 11 U.S.C.A. § 524(c)(6)(A).

3 Cases that cite this headnote

[13] **Bankruptcy**
Grounds for approval or rejection
Bankruptcy
Judicial hearing and approval

When the debtor was not represented by an attorney during the course of negotiating a reaffirmation agreement, the reaffirmation agreement will not be enforceable unless the court approves it as not imposing an "undue hardship" on the debtor or his dependents and as being in the debtor's best interest. 11 U.S.C.A. § 524(c)(6)(A).

8 Cases that cite this headnote

[14] **Bankruptcy**
Attorneys

It should be considered a basic part of an attorney's representation of a Chapter 7 debtor that the attorney advise his client as to something as fundamental and significant as a reaffirmation agreement and assist the client in negotiation of the same.

1 Cases that cite this headnote

[15] **Bankruptcy**
Judicial hearing and approval

Bankruptcy court generally must set a hearing on a proposed reaffirmation agreement when the presumption of undue hardship is triggered. 11 U.S.C.A. § 524(m).

1 Cases that cite this headnote

[16] **Bankruptcy**
Judicial hearing and approval

If debtor's monthly net income is negative, or less than the monthly payment for the proposed reaffirmed debt, then the so-called "presumption of undue hardship" is triggered with respect to the proposed reaffirmation agreement. 11 U.S.C.A. § 524(m); Official Bankruptcy Form 27, 11 U.S.C.A.

Cases that cite this headnote

[17] **Bankruptcy**
Attorneys
Bankruptcy
Judicial hearing and approval

If debtor's monthly net income is negative, or less than the monthly payment for the proposed reaffirmed debt, such that the so-called "presumption of undue hardship" is triggered, debtor's attorney does not have the discretion to check the "No Presumption of Undue Hardship" box on Official Form 27, even if the math is "barely" negative or even if the attorney has heard a solid explanation from the debtor regarding the ability to make the payment on the reaffirmed debt; the discretion is the court's, not the attorney's. 11 U.S.C.A. § 524(m); Official Bankruptcy Form 27, 11 U.S.C.A.

Cases that cite this headnote

[18] **Bankruptcy**
Judicial hearing and approval

Bankruptcy court has a statutory obligation to review reaffirmation agreements where a presumption of undue hardship has been triggered. 11 U.S.C.A. § 524(m)(1).

1 Cases that cite this headnote

[19] **Bankruptcy**
Judicial hearing and approval

Bankruptcy court needs to engage in its statutory review of a reaffirmation agreement within 60 days of when the reaffirmation agreement is filed because the presumption expires after 60 days, unless the court, within the 60 days, extends that time frame, with notice and a hearing and for cause. 11 U.S.C.A. § 524(m)(1).

Cases that cite this headnote

[20] **Bankruptcy**
Judicial hearing and approval

Although, in theory, the bankruptcy court could be satisfied that a debtor seeking approval of a reaffirmation agreement has rebutted with a good written explanation the presumption of undue hardship and not set a hearing, so that the presumption would expire after 60 days after the filing of the agreement and, presumably, the agreement would be enforceable, in reality the court is rarely satisfied with the written explanation of the debtor, so the court must hold a hearing on notice in order to decide whether to disapprove the agreement. 11 U.S.C.A. § 524(m)(1).

Cases that cite this headnote

[21] **Bankruptcy**
Judicial hearing and approval

When proposed reaffirmation agreement is with a creditor that is a credit union, the undue hardship presumption that normally is triggered if the debtor's monthly net income is negative or less than the monthly payment for the proposed reaffirmed debt is irrelevant. 11 U.S.C.A. § 524(m)(2).

Cases that cite this headnote

[22] **Bankruptcy**
Grounds for approval or rejection

If a debtor is seeking to reaffirm debt on his homestead, only the "undue hardship" analysis is necessary, but not the "best interests of debtor" analysis. 11 U.S.C.A. § 524(c)(6)(B).

Cases that cite this headnote

[23] **Bankruptcy**
Judicial hearing and approval

Chapter 7 debtor, who sought approval of reaffirmation agreement involving $17,690.59 debt owed on pickup truck, failed to overcome presumption, which arose because his monthly income was less than his monthly expenses, that reaffirmation agreement would be an undue hardship; debtor had no equity in the truck, interest rate applicable to the secured debt was quite steep, 17.5%, debtor had 71 more months of payments on the vehicle, debtor's only current source of income was government assistance, a major portion of which would soon expire, debtor was burdened with several large obligations that would likely survive his bankruptcy discharge, there was no compelling testimony to justify debtor's purchase of the vehicle less than two months before he filed his bankruptcy petition, and, while the monthly payments of $401.80 on the vehicle were not terribly hefty, for this debtor, in his current situation, the reaffirmation agreement was unduly burdensome. 11 U.S.C.A. § 524(m).

1 Cases that cite this headnote

[24] **Bankruptcy**
Protection Against Discrimination or Collection Efforts in General; "Fresh Start."

"Fresh start" is the overriding purpose of a

Chapter 7 bankruptcy case.

Cases that cite this headnote

Attorneys and Law Firms

***899** Lawrence Herrera, Law Office of Lawrence Herrera, Dallas, TX, for Debtor.

MEMORANDUM OPINION IN SUPPORT OF ORDER DENYING APPROVAL OF REAFFIRMATION AGREEMENT

STACEY G.C. JERNIGAN, Bankruptcy Judge.

On August 11, 2010, the court held a hearing to consider a Reaffirmation Agreement entered into between Capital One Auto Finance ("Capital") and William V. Grisham, Jr. (the "Debtor"), which was filed in the above-referenced Chapter 7 bankruptcy case on July 6, 2010. The court ruled that the agreement should be disapproved, pursuant to Section 524(m)(1) of the Bankruptcy Code. The court issued an Order Denying Approval of the Reaffirmation Agreement on August 27, 2010 (the "Order"). Because the judges in this district are observing an increasingly large number of reaffirmation agreements being pursued in recent times, and since many of these agreements have procedural deficiencies or are otherwise lacking in a basis for approval, the court issues this Memorandum Opinion explaining its analytical process in evaluating the Reaffirmation Agreement in the case at bar. The court hopes this exercise will be helpful to the entire consumer bankruptcy bar in the future.[1]

I. The Specifics Regarding the Reaffirmation Agreement Before the Court.[2]

The Reaffirmation Agreement before the court pertains to a 2007 Dodge Truck (Nitro–V6 Utility 4D SLT 2WD). The ***900** vehicle is valued at $16,225, according to the Reaffirmation Agreement. The debt that the Debtor proposes to reaffirm is $17,690.59. Thus, from the outset, this court was concerned that the Debtor wished to reaffirm debt on personal property in which there is no equity. The annual percentage rate of interest that applied to the secured vehicle loan was 17.5%. This is obviously quite steep. The monthly payments are $401.80 per month. In the abstract, this monthly payment is not terribly hefty. But the Debtor has 71 more months of these $401.80 per month payments, before the vehicle will be paid off (the Debtor purchased the vehicle less than two months before he filed his bankruptcy case—which explains why there are so many more months left before the vehicle is paid off). Moreover, the Debtor describes himself as "retired/unemployed." The Debtor's only source of income is $1,928 per month of social security income and $1,698 per month of unemployment benefits—the latter of which will soon expire. The Debtor owns no real property and testified that he currently resides rent-free at a relative's home. In addition to his vehicle loan, the Debtor has $29,000 of priority IRS debt, and $75,000 of alimony owed to one of his ex-wives. The Debtor has $170,000 of unsecured debt (and close to $100,000 of this relates to student loan indebtedness). According to the Debtor's Schedules I and J(as well as the cover sheet on his Reaffirmation Agreement), the Debtor's monthly net income, after deducting his living expenses, is a negative $1,091.

II. The Strict Requirements Generally for Reaffirmation Agreements.

[1] [2] Section 524(c), (d), and (m), and Bankruptcy Rules 4004(c)(1)(J), (K) and (c)(2), and 4008, are the Bankruptcy Code sections and Rules germane to reaffirmation agreements. Any reaffirmation agreement that does not meet the strict requirements of these provisions is unenforceable. These provisions "grew out of a long history of coercive and deceptive actions by creditors to secure reaffirmation of discharged debt." 4 Collier on Bankruptcy ¶ 524.04, pp. 524–40 (16th ed. 2009).

III. Was the Reaffirmation Agreement Timely "Made"?

[3] In considering any reaffirmation agreement, the bankruptcy court, first, must consult Bankruptcy Code Section 524(c)(1), which provides that a reaffirmation agreement is only "enforceable" if "such agreement was ***made*** before the granting of the discharge." *See* 11 U.S.C. § 524(c)(1) (2010) (emphasis added). Here, the Reaffirmation Agreement was executed by the Debtor on June 9, 2010, and it was executed by Capital on June 25, 2010. Thus, the agreement was "made" as of June 25, 2010. Here, the Debtor had not received a discharge as of the time that the agreement was "made." So, initially, there is no bar as to the enforceability of the agreement

under Section 524(c)(1)—as it was timely "made."

[4] [5] [6] The court notes that, oftentimes, a debtor and creditor do not execute a reaffirmation agreement prior to the time for entry of a discharge order. A discharge order is typically issued by the clerk's office promptly after the expiration of the time fixed for filing objections to the debtor's discharge (unless one of certain types of motions is pending—most notably, a motion to extend time to object to discharge). *See* Fed. R. Bankr.P. 4004(c)(1). ***It is noteworthy that parties who have not executed a reaffirmation agreement at the time that a discharge order is due to be entered are not without a solution.*** Pursuant to Bankruptcy Rule 4004(c)(2), a debtor may file a motion asking the court ***901** to "defer the entry of an order granting a discharge for 30 days and, on a motion within that [subsequent 30–day] period, the court may defer entry of the order to a [still-later] date certain." *See* Fed. R. Bankr.P. 4004(c)(2). ***It is critical that debtors file a motion to defer entry of a discharge order when they are having delays in finalizing a reaffirmation agreement.*** Pursuant to Bankruptcy Rule 4004(c)(1), the court ***shall*** "forthwith grant [a] discharge" in a chapter 7 case after the time has expired for parties to object to the debtor's discharge. *See* Fed. R. Bankr.P. 4004(c)(1). After the court has entered a discharge order, any reaffirmation agreement subsequently "made" will not be enforceable. Moreover, it is generally not appropriate for the bankruptcy court to "set aside" a discharge order for the sole purpose of considering a reaffirmation agreement, and then thereafter, re-enter a discharge order. *See generally In re Shires,* No. 07–20156, 2008 WL 2405039, at *2 (Bankr.N.D. Tex. June 9, 2008) and *In re Cox,* No. 07–20374, 2008 WL 2405039, at *2 (Bankr.N.D. Tex. June 9, 2008) (consolidated Memorandum Opinion of Judge Robert L. Jones, Amarillo Division); *Winters Nat'l Bank & Trust Co. v. McQuality (In re McQuality),* 5 B.R. 302, 303 (Bankr.S.D.Ohio 1980) (a bankruptcy court should not vacate a discharge order that has already been entered so that a reaffirmation agreement can be entered into before a discharge is granted).

IV. Was the Reaffirmation Agreement Timely "Filed"?

[7] In considering any reaffirmation agreement, the bankruptcy court, next, must consider whether it was timely "filed." Pursuant to Bankruptcy Rule 4008(a), "A reaffirmation agreement shall be ***filed*** no later than 60 days after the first date set for the meeting of creditors." *See* Fed. R. Bankr.P. 4008(a) (emphasis added). Here, the Reaffirmation Agreement was filed on July 6, 2010. The first date set for the meeting of creditors in the case was May 18, 2010. Thus, the Reaffirmation Agreement was timely filed within 60 days after May 18, 2010.

[8] [9] [10] Similar to what the court mentioned above, oftentimes, a debtor and creditor do not "file" a reaffirmation agreement within 60 days after the first date set for the meeting of creditors. In such situations, the parties are (again) not without a solution. Pursuant to Bankruptcy Rule 4008(a), "[t]he court may, at any time and in its discretion, enlarge the time to ***file*** a reaffirmation agreement." *Id.* (emphasis added). Thus, a debtor or creditor may, at any time, file a motion to enlarge the time to file a reaffirmation agreement. Technically, the court has the power to enlarge the time to ***file*** a reaffirmation agreement without a motion even being made.

[11] Note that, pursuant to Bankruptcy Rule 4004(c)(1)(J), a court shall ***not*** grant a discharge whenever a motion to enlarge the time to file a reaffirmation agreement is pending under Rule 4008(a). *See* Fed. R. Bankr.P. 4004(c)(1)(J). Thus, in a perfect world, a "red flag" is raised in a bankruptcy clerk's office, whenever a motion to enlarge time to file a reaffirmation agreement is filed in a bankruptcy case, to halt the entry of a discharge order. It is important that the discharge order be halted, since the court may be required to hold a hearing on the reaffirmation agreement before a discharge is granted (as explained in Part VI below).

V. Did the Reaffirmation Agreement Require a Hearing, and Why?

The court, as mentioned, set a hearing on the Reaffirmation Agreement in the above-referenced case. While this particular ***902** Reaffirmation Agreement required a hearing, the court is not always required to set a hearing on a reaffirmation agreement. There seems to be some confusion regarding this point. When is a hearing required? There are at least a couple of situations in which the bankruptcy court will typically need to set a hearing on a reaffirmation agreement.

A. The Unrepresented Debtor.

[12] [13] First, the most obvious situation in which there is a need for a court hearing is when the debtor "was not represented by an attorney during the course of negotiating" the reaffirmation agreement. *See* 11 U.S.C. § 524(c)(6)(A) (2010). In such situations, the reaffirmation agreement will not be enforceable unless the court approves it as not imposing an "undue hardship" on the debtor or his dependents ***and*** as being in the debtor's "best interest."

The court notes, anecdotally, that it is dismayed that sometimes reaffirmation agreements are filed in this court without a declaration or affidavit of a debtor's counsel, even though the debtor has not proceeded *pro se* in the case. In other words, sometimes debtors who hired and paid for attorneys to represent them in their chapter 7 cases nevertheless do not have assistance from their counsel in negotiating reaffirmation agreements. Therefore, the court is required to set the reaffirmation agreements for hearing, so that the court can: (a) make the findings required by Section 524(c)(6) that the reaffirmation agreements are in the best interests of the debtors and do not impose an undue hardship; (b) inform the debtors of the information set forth in Section 524(d) (*i.e.*, the legal effect and consequences of a reaffirmation agreement); and (c) determine whether the court should approve the reaffirmation agreements. The reaffirmation agreements will not be enforceable otherwise, in light of debtors' counsel not signing them and making certain declarations. Many times, if a debtor's counsel had only signed a reaffirmation agreement—specifically, signed the declaration described in Section 524(c)—the court would not have been required to hold a hearing, and the debtor would not have been required to go to the trouble of traveling downtown to the courthouse to attend such hearing. Indeed, it would add quite a large burden to the bankruptcy system if the court were always required to hold a hearing each and every time a reaffirmation agreement is filed with the court.

[14] The court believes that this type of attorney-behavior is unacceptable. ***It should be considered a basic part of chapter 7 debtor-representation that an attorney advise his client as to something as fundamental and significant as a reaffirmation agreement and assist him in negotiation of the same.*** The court has heard some attorneys state that "they do not feel comfortable signing a reaffirmation agreement if they do not believe it is in the client's best interest." As a trusted advisor, one would hope that most of the time, an attorney could impress upon his client not to do something that is not in the client's best interest (so, "reaction number one "is" try harder" to persuade the client).[3] But the court further notes that the form reaffirmation agreement technically does not seem to require a certification by the attorney of the agreement being in the best interest of the debtor, *per se.* It only contains a ***903** certification that the reaffirmation agreement represents "a fully informed and voluntary agreement by the debtor;" does not impose an "undue hardship" (or alternatively, there is a box to check if it does present a presumption of an undue hardship); and that the debtor's attorney has "fully advised the debtor of the legal effect and consequences" of the agreement and any default thereunder. This court sees plenty of attorneys sign reaffirmation agreements and (if the presumption of undue hardship is triggered) show up with their clients in court and, basically, explain the situation to the court—and maybe even explain that the attorney did not personally believe the reaffirmation agreement was in the client's best interest—but the attorney is nevertheless in court to assist the client since the client wants to reaffirm. This latter approach is certainly the more ethical and honorable course of action for a debtor's attorney.

B. The Presumption of Undue Hardship is Triggered.

[15] The second situation in which there is a need for a hearing on a reaffirmation agreement is when the presumption of undue hardship is triggered. This is why the court set a hearing in the case at bar.

[16] There is a section in the form reaffirmation agreement (Section II of Official Form 27) for a debtor to list all of his monthly income and then all of his monthly expenses, including all reaffirmed debt except the debt subject to the reaffirmation agreement. The difference between income and these expenses will be considered the debtor's monthly net income. If this number is negative, or less than the monthly payment for the proposed reaffirmed debt, then the so-called "presumption of undue hardship" is triggered, and there is a box on the reaffirmation agreement form that should be checked (at the top of the first page of the reaffirmation agreement, reading "Presumption of Undue Hardship"). If the number is positive, then the box that reads "No Presumption of Undue Hardship" should be checked. This is fairly simple math. *See* 11 U.S.C. § 524(m) (2010) (where this simple-math concept is codified, specifically that "... it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement ... is less than the scheduled payment on the reaffirmed debt ...").

In the case at bar, there was "negative math" and the attorney involved correctly checked the box on page one of the Reaffirmation Agreement for "Presumption of Undue Hardship." So the court set the Reaffirmation Agreement for hearing. But this court is extremely perplexed as to why ***very*** frequently attorneys check the wrong box or do not check a box at all. In other words, there will be negative math, but nevertheless the "***No*** Presumption of Undue Hardship" box is checked. Or, somehow, folks "forget" to check either one of the boxes.

[17] The court has heard some attorneys say that if the math is "barely" negative, or if they have heard solid explanations from their clients regarding the ability to make the payment on the reaffirmed debt (*i.e.*, "a relative is now living with the debtor and is going to help"), then they believe they have the ***discretion*** to check the "***No*** Presumption of Undue Hardship" box. Wrong. The ***discretion is the court's,*** not the attorney's. If there is negative math, then the "Presumption of Undue Hardship" box must be checked. There are places on the reaffirmation agreement form in which a ***904** lawyer/debtor may explain "sources of funds available to the Debtor to make the monthly payments on the reaffirmed debt" (page 2 of the reaffirmation agreement), and that is where an explanation may be given to the court to explain such things as a new part-time job, a salary increase after filing the debtor's initial schedules, help from a relative, or other circumstances that the debtor believes overcome the presumption of undue hardship. ***The court observes that debtors and their attorneys are typically very lean with their explanations on the reaffirmation agreements.*** If attorneys would be more thorough (and perhaps even attach documentary proof), the court might be inclined to rule that the presumption of undue hardship has been overcome in many situations, even without a hearing/live testimony.[4]

C. Irregularities with Box–Checking or the "Math" on a Reaffirmation Agreement.

As described above, the court is generally going to set a hearing if: (1) there is an unrepresented debtor, or (2) a presumption of undue hardship is triggered. However, a simple audit in the bankruptcy clerk's office of reaffirmation agreements for the existence of: (1) an attorney's signature, or (2) the "Presumption of Undue Hardship" box being checked may no longer be adequate, it seems to this court. To further clarify, ***because the court has recently observed frequent inaccuracies in checking the correct box for presumption of hardship, the court is looking more carefully at reaffirmation agreements.*** Usually, the court is going to scrutinize the math and set a reaffirmation agreement for a hearing when the math is "negative" ***regardless*** of whether the debtor/attorney has checked the correct box indicating there is a presumption of undue hardship. Or, the court may set the reaffirmation agreement for hearing when the math is positive ***now,*** but was negative at the time the debtor filed his Schedules I and J (often, miraculously, the debtor has much more income and far fewer expenses, say 80 days after he filed his case and filed his Schedules I and J; sometimes there is a good explanation, and sometimes there is not). In this regard, the court urges debtors and their counsel to be candid. Be careful. The incorrect box-checking is very disturbing and happens all-too-frequently.[5] *See In re Melendez,* 224 B.R. 252, 261 (Bankr.D.Mass.1998) (attorney declaration is subject to Rule 11 "reasonable inquiry under the circumstances" requirement).

VI. Timing for a Hearing on a Reaffirmation Agreement.

Section 524(m)(1) and Bankruptcy Rule 4004(c)(1)(K) should be consulted to understand the timing concerns that underlie setting a hearing on a reaffirmation agreement where the undue hardship presumption has been triggered (such as in the case at bar).

Section 524(m)(1) provides that any hearing in which the court is going to consider approval/disapproval of a reaffirmation agreement, where the undue hardship presumption has been triggered, "shall be concluded before the entry of the debtor's discharge." *See* ***905** 11 U.S.C. § 524(m)(1) (2010). But the timing issues are slightly more complicated than simply holding the hearing before the discharge order is potentially entered.

Section 524(m)(1) contemplates that whenever the math is negative (*i.e,* whenever the debtor's monthly income less the debtor's monthly expenses is less than the scheduled payments on the reaffirmed debt), there shall be a presumption of undue hardship. But there is actually a finite time frame for this presumption to remain in effect. ***The presumption remains in effect for 60 days after the agreement is filed "(or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period).***" *Id.* Additionally, Section 524(m)(1) requires that the presumption "shall be reviewed by the court." Moreover, the debtor may attempt in the reaffirmation agreement to rebut the presumption with a written statement explaining additional sources of funds, but if "the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement." *Id.* Section 524(m)(1) finally goes on to add that "[n]o agreement shall be disapproved without notice and a hearing to the debtor and creditor." *Id.*

[18] [19] [20] Read all together, these provisions mean: (a) the court has a statutory obligation to review reaffirmation agreements where a presumption of undue hardship has been triggered; (b) the court needs to engage in its statutory review within 60 days of when the reaffirmation agreement is filed because the presumption expires after 60 days (unless the court, within the 60 days, extends that time frame, with notice and a hearing and for cause); and (c) in theory, the court could be satisfied that the debtor

has rebutted with a good written explanation the presumption of undue hardship and not set a hearing (and the presumption would expire after 60 days after the filing of the agreement and, presumably, the agreement would be enforceable). In reality, the court is rarely satisfied with the written explanation of the debtor, so the court must hold a hearing on notice in order to decide whether to disapprove the agreement—and, again, the hearing on possible disapproval shall be held before the discharge.

[21] [22] Once again alluding to a perfect world, a "red flag" should go up in a bankruptcy clerk's office, whenever a presumption of undue hardship is triggered. *See* Fed. R. Bankr.P. 4004(c)(1)(K) (describing how the court shall not grant a discharge when "a presumption has arisen under § 524(m) that a reaffirmation agreement is an undue hardship"). Once again, the court stresses the importance of checking the correct box. If the correct box is checked showing a presumption of undue hardship, then the red flag can go up signaling the clerk's office to stop the discharge temporarily in order to give the court time to review the presumption. But if the wrong box is checked, there is not necessarily the signal to the clerk that a discharge needs to be halted to enable the court to review the presumption of undue hardship. The system does not work as smoothly as it should when parties do not honestly check the correct box. ***The court may or may not ultimately conduct the statutory review that Congress requires it to engage in when parties do not check the correct box and this, no doubt, calls into question the enforceability of the reaffirmation agreements.***[6]

***906 VII. Grounds for Disapproving the Reaffirmation Agreement in the Case at Bar.**

Returning to the case at bar, the proper procedures were all correctly followed. The agreement was "made" timely. It was "filed" timely. The attorney candidly and correctly checked the "presumption of undue hardship" box because of the negative math. Thus, the red flag went up in the clerk's office, halting the entry of a discharge, pursuant to Bankruptcy Rule 4004(c)(1)(K), so that the court could timely undertake its statutorily required review of the reaffirmation agreement. The court set a hearing and concluded the hearing before a discharge order had been entered.

[23] Be that as it may, the court could not find that the presumption of undue hardship had been overcome in this situation, so the Reaffirmation Agreement is disapproved. As described in Part I above, the Reaffirmation Agreement pertains to a 2007 Dodge Truck in which the Debtor has no equity. The interest rate applicable to the secured debt is 17.5%. The Debtor has 71 more months of payments on the vehicle. Moreover, the Debtor's only current source of income is government assistance—a major portion of which will soon expire. While the monthly payments on the vehicle are not eye-popping ($401.80 per month), for this Debtor, in his current situation, it is unduly burdensome. In particular, this Debtor is burdened with several obligations that will likely survive his discharge in bankruptcy (large IRS debt; large alimony; and large student loan debt). Finally, the court heard no compelling testimony to justify ***907** why the Debtor purchased his vehicle right before filing bankruptcy (sometimes this may be defensible and sometimes not).

In summary, the court will not stamp its seal of approval on the Debtor's reaffirmation of the debt. To do so would create a hardship on this Debtor and does not otherwise seem justified.

VIII. Conclusion.

It would be hard for anyone to deny that Section 524 of the Bankruptcy Code—the statute describing the process for reaffirmation of debt—is one of the most unwieldy and cumbersome provisions applicable to consumer bankruptcy cases. Section 524 makes for painful reading. In addition to the items discussed in this opinion, there are lengthy disclosures and other requirements in Section 524 that must be adhered to for a reaffirmation agreement to be enforceable. Moreover, the official form for a reaffirmation agreement has been modified numerous times over the years. Thus, on balance, it is not terribly surprising that compliance with this Code section (and the accompanying rules) is frequently woefully deficient. The court hopes that this Memorandum Opinion provides a resource in the future for those struggling with proper protocol in the area of reaffirmation agreements.

The court also hopes that the thought-process that this court shared, regarding the above-referenced Debtor (and, specifically, why the court would not approve his Reaffirmation Agreement), is useful. Bankruptcy is about "fresh starts" and new beginnings. It is about belt-tightening and shedding past bad habits. Too often, a reaffirmation agreement will reveal that someone just does not comprehend this, and wants to go forward in a manner that will impair his fresh start and perpetuate bad habits from the past.

The court realizes that this is sometimes complicated. In a context in which a debtor does not enter into a reaffirmation agreement during a chapter 7 case regarding a debt-encumbered vehicle, there are probably situations

in which a vehicle-lender will repossess the debtor's vehicle post-discharge, even when the debtor is making regular and timely contractual payments for the car post-discharge—for the simple reason that the debtor did not "reaffirm." This court has heard intellectual pontificating regarding the legal propriety of such an action by a lender. It would appear that Sections 521(a)(6) and (d), combined with Section 362(h)(1)(A) and (j), may have ended the intellectual debate about this, and may allow such a course of action (at least from a Bankruptcy Code standpoint)—except for, perhaps, in a case in which the debtor ***entered*** into a reaffirmation agreement but such agreement was nevertheless not approved by the court. *See* 11 U.S.C. § 521(a)(6), (d) (2010).[7] Thus, the court can understand why a debtor and his counsel might see the wisdom of ***entering*** into a reaffirmation agreement, even if they can envision the court may never approve it because of the negative math. Perhaps they imagine that this will help the debtor with the car lender post-discharge, if they at least tried to get the reaffirmation agreement approved with the court. Moreover, perhaps the debtor genuinely needs a car and worries that, absent an attempt at a reaffirmation agreement, he will surely lose the car post-discharge and may not be able to purchase (*i.e.*, obtain financing) for another vehicle in the near future.

[24] Again, the court is not unsympathetic and realizes this can all be very ***908** complicated. The court realizes that we are in a world where car lenders may not always act like economically rational animals. And, the court appreciates that car lenders may sometimes have their own economic pressures with which to contend. But, again, the fresh start is the overriding purpose of a chapter 7 bankruptcy case. Many reaffirmation agreements presented to the court are the farthest thing from a "fresh start" that one could ever imagine. Many times it is time to say "good riddance" to the car. And many times—maybe, just maybe—a car lender will see the wisdom of renegotiating a car loan if reaffirmation is denied.

Accordingly,

IT IS ORDERED that the Reaffirmation Agreement between the Debtor and Capital is disapproved.

All Citations

436 B.R. 896, Bankr. L. Rep. P 81,861

Footnotes

1 This Memorandum Opinion has been previously circulated to all of the sitting bankruptcy judges in the Northern District of Texas, and they have indicated their support for the analysis and admonitions set forth herein.

2 This Memorandum Opinion shall constitute the court's findings of fact and conclusions of law in support of the Order. The court has jurisdiction in this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157.

3 *See* Tex. Disciplinary Rules of Prof'l Conduct 2.01 (entitled "Advisor," this rule provides that "[i]n advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice").

4 In the case at bar, the Debtor merely indicated he would be working with an ex-wife to reduce alimony and was seeking employment.

5 *See* Tex. Disciplinary Rules of Prof'l Conduct 3.03 (entitled "Candor Toward the Tribunal," this rule provides that "(a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal ...").

6 The court would be remiss if it did not mention that there are two special exceptions that impact the general protocol for reaffirmation agreements described herein:

A. ***Special Rules for Credit Unions.*** With regard to credit unions, the undue hardship presumption is irrelevant. *See* 11 U.S.C. § 524(m)(2) (2010). This means that ***if*** an attorney is involved, and the presumption of undue hardship is technically triggered (because of negative cash flow) there is ***no need*** to set a hearing. However, again, if no attorney is involved and personal property is involved, the court will still set the reaffirmation agreement for hearing to consider the sole question of whether the reaffirmation agreement with the credit union is in the "best interest" of the debtors (again, the undue hardship presumption is irrelevant). *See In re Moustafi,* 371 B.R. 434, 438 (Bankr.D.Ariz.2007) (declining to approve a reaffirmation agreement with a credit union where it was not in the debtor's best interest). *See also In re Donald,* 343 B.R. 524, 526 (Bankr.E.D.N.C.2006) (without reference to section 524(m), the sole question before the court on approval of a reaffirmation agreement with a credit union was whether

the agreement was in the best interest of the debtors).

B. ***Special Rules for Homesteads.*** As for homesteads, it appears to be the opposite of credit unions. In other words, it appears that only the "undue hardship" analysis is necessary, but not the "best interest" analysis. *Compare* 11 U.S.C. § 524(c)(6)(B) (2010), with 11 U.S.C. § 524(m) (2010). This means that ***if*** an attorney is involved and the presumption of undue hardship is technically triggered (because of negative cash flow), there ***is*** indeed a need to set a hearing. But the sole question at the hearing should be whether the reaffirmation agreement imposes an undue hardship (again, "best interest" of the debtor is irrelevant). Some authority suggests that a hearing and court approval is never necessary in the case of a homestead. *See generally* 4 COLLIER ON BANKRUPTCY ¶ 524.04, pp. 524–41 (16th ed. 2009) (simply citing 11 U.S.C. § 524(c)(6)(B)). In this court's view, this position may overlook the more specific provisions of 11 U.S.C. § 524(m) which were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Because of the two special rules set forth above, it would appear that if a debtor is proposing to reaffirm debt on his homestead and a credit union is the creditor, then ***no hearing will ever be necessary*** whether or not an attorney represented the debtor, and whether or not the presumption of undue hardship is triggered by negative math, because, in this scenario, both the "undue hardship" and "best interests of debtor" analyses are irrelevant. *See* 11 U.S.C. § 524(c)(6)(B), (m) (2010).

7 *See also Ford Motor Credit Co. v. Baker (In re Baker),* 400 B.R. 136, 139 (D.Del.2009).

Advice for Creditors on Reaffirmation Agreements

by Russell DeMott, Charleston Bankruptcy Lawyer

June 3, 2011

Yes, you read it right. This is about giving creditors advice about reaffirmation agreements. It just might be a first here at Bankruptcy Law Network. But it's occurred to me that creditors deserve some help from time to time. So why not?

The reaffirmation provisions are hopelessly flawed

Before 2005 reaffirmation was simple. The debtor signed a relatively short form if he wanted to reaffirm a secured debt. The form had plenty of disclosures on it. It worked just fine for over two decades.

And then came the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Whoever you hired (yes, you, you did this) to monkey around with section 524 (that's the Code section dealing with the reaffirmation provisions) was just plain clueless, completely lacking the most basic understanding of consumer bankruptcy law.

Undue hardship

The crowning jewel of section 524 is the concept of "undue hardship." Under the new, 2005 rules, undue hardship is presumed to exist where the debtor's expenses exceed his income.

Let's think about that for a minute. We know the following: (1) Reaffirmation only applies to Chapter 7 bankruptcy, (2) debtors which have "disposable income" left over are, generally speaking, expected to file Chapter 13 reorganization plans so they can pay back their creditors, and, therefore, (3) it logically follows that in almost all Chapter 7 cases the debtor's expenses exceed his income. This is why the debtor is in Chapter 7 in the first place! For example, if a debtor has $5,000 of income and $4,500 of expenses, that debtor won't be in Chapter 7. He'll be in Chapter 13 because he can pay his creditors $500 a month. The bottom line here is this: *There's an undue hardship in virtually every Chapter 7 filed!*

Rebutting the presumption

This requires the debtor to show (1) that circumstances have changed since filing bankruptcy and that the "undue hardship" no longer exists, or for (2) the attorney to certify that the debtor can make the payments, along with an explanation from the debtor as to how those payments can now be made. Oh, and if the lender is a credit union, none of this matters. I guess consumers don't need as much protection against credit unions?

Two obvious problems

First, requirement one–that the debtor's circumstances have changed–just isn't realistic in the overwhelming majority of cases. How often would any debtor's income or expenses materially change in the few short weeks between filing and signing the reaffirmation agreement? Pretty much never. It's just a really dumb idea to even expect it.

Second, many lawyers–myself included–refuse to sign the certification stating: "A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment." How can I certify that this agreement does not impose an undue hardship on the debtor when the debtor's expenses exceed his income? Remember, the folks who re-wrote section 524 defined "undue hardship" as a situation where expenses exceed income. As Illinois bankruptcy lawyer Andy Miofsky explains:

> Because of this certification requirement, attorneys across the country often refuse to sign reaffirmation agreements on the basis that they are not in a position to determine whether the debtor can make the future payments, and therefore do not want to assume liability for certifying the ability to repay a debt. The act does not require an attorney sign the agreement, but if the attorney does sign, then the signature must include the certification.

So because neither of these two things happen with much frequency, reaffirmation agreements usually don't get entered. But because the debtor signed the agreement, he's done everything that's required of him, and the creditor can't repossess the collateral–almost always the debtor's car.

Perhaps the best-known case on this issue is *In re Husain*, 364 B.R. 211 (Bankr. E.D. Va. 2007). *Husain* and other cases allow "back door ride through" where the debtor attempts to reaffirm but can't because the presumption of undue hardship can't be rebutted, or where the debtor's attempt to reaffirm is otherwise frustrated. Put simply, because the debtor signed the reaffirmation, he did what the Code requires, and the creditor can't repossess the collateral.

The result of the ill-fated tinkering with section 524 is that debtors enter into reaffirmation agreements far less frequently and that courts, now being required to approve reaffirmation agreements when not "certified" by the bankruptcy lawyer, almost never approve them.

So what's a creditor to do? (I was just waiting for you to ask.)

1. Send the debtor's lawyer a letter explaining that while the bankruptcy discharge will relieve the debtor of liability on the loan, the lien remains. This calls the debtor's intention to the fact that cars aren't just given away, and that the lender will repossess the vehicle if payments are not made as required.

2. Repossess the vehicle if the debtor is more than 30 days late. Keep the debtor on a short leash.

3. Quit wasting time sending out these agreements, and quit pestering debtors and their lawyers to get them signed. Most of the time they won't get entered anyway, so why bother? And if they do and the debtor later defaults, the odds of collecting anything from the debtor–likely jobless at that point–are miniscule.

4. Reassign insolvency staff members dealing with this craziness to more productive uses –modifying loans, for example, thereby lowering losses from needless defaults and repossessions. (We all know if the car is repossessed a huge deficiency will result, and now that the debt is discharged, the creditor will take a huge loss.) If you can't use staff in this capacity, send them to the mortgage modification department, because those folks lose virtually every piece of paper they ever touch. They could really use some help.

5. Realize that any increased losses from failing to obtain to get the occasional reaffirmation agreement entered will be offset by not needlessly paying employees to waste time with this process. To quote a friend of mine: "I have one expense, and it's people." You run a business, and I don't care if you're the CEO of Ford Motor Credit or a country lawyer like I am, payroll and employee benefits are your number one expense. There's just no way that staffing up to deal with the reaffirmation madness is cost-effective.

6. Do NOT repossess a vehicle just because the debtor failed to sign a reaffirmation agreement. That's just plain stupid and almost always guarantees that you'll have a loss. (See #2 for how to deal with this situation.) Ford Motor Credit is the most notorious lender with this policy, and it's a really bad one. My guess on this one is that the guy who decided to rename the Ford Taurus the "Ford 500" got transferred over to finance and had a heavy hand in this policy. See Reaffirmation Agreements: "Let them Eat Steel" (Parts One and Two) on just what a bad idea this is. Any debtors reading this post should read these, too.

7. You've got good lobbyists, but make sure they don't hire the same folks to revise section 524 next time around. For all the money you've spent on this legislation, you really deserve better.

Postscript: For debtors wanting a detailed explanation of their rights and obligations regarding this issue, see my four-part post on reaffirmation agreements on the Charleston Bankruptcy Blog by clicking here.

(Bio) Latest Posts

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Last modified: June 3, 2011

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