

## **REAFFIRMATION AGREEMENTS AFTER BAPCPA**

By the Honorable Nancy C. Dreher  
United States Bankruptcy Judge  
for the District of Minnesota

A. DEBTOR'S OPTIONS

An individual debtor has a statutory right to redeem secured collateral, 11 U.S.C.A. § 722, or reaffirm debts relating to such collateral, 11 U.S.C.A. § 524(c), as well as the right to surrender the collateral.

B. STATEMENT OF INTENTION

*See*, 11 U.S.C.A. § 521(a)(2), (a)(6) and (d), Official Form 8 (the statement of intention), which was amended to conform to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

1. The statement of intention must be filed within 30 days of the filing of the petition or before the date of the meeting of creditors, whichever occurs first, unless extended by the court. 11 U.S.C.A. § 521(a)(2)(A).
2. A copy of the statement must be served on the trustee and the creditors named in the statement on or before the date it is filed. Interim Rule 1007(b)(2); Fed. R. Bankr. P. 1009(b). *See*, Fed. R. Bankr. P. 1019 regarding filing of the statement of intention upon conversion of a Chapter 11, Chapter 12, or Chapter 13 case to a Chapter 7 case.
3. The debtor may amend the statement at any time before the expiration of the time period in which the stated intention must be performed pursuant to 11 U.S.C.A. § 521(a)(2)(B). Fed. R. Bankr. P. 1009(b).
4. A statement of intention is required in Chapter 7 cases only. 11 U.S.C.A. § 521(a)(2)(A).

*See*,

*In re Schlitzer*, 332 B.R. 856 (Bankr. W.D.N.Y. 2005) (the plain language of § 521(a)(2) when read in conjunction with the remedy in § 362(h)(2) for a failure to so comply applies only in Chapter 7 cases);

*In re Kasper*, 309 B.R. 82, 85 (Bankr. D.D.C. 2004) ("Section 521(2) by its terms applies only when the debtor has filed a petition under Chapter 7.").

*But see*,

§ 1307(c)(1) (Upon the request of the U.S. trustee, a Chapter 13 case may be dismissed or converted to a Chapter 7 if the Chapter 13 debtor fails to file a statement of intention.).

5. There is no longer a limitation that the debt to be reaffirmed be a consumer debt. 11 U.S.C.A. § 521(a)(2).

*See*,

*In re Root*, 2006 WL 1050687 (Bankr. N.D. Iowa 2006) (debtor's filed statement of intention did not say what debtor intended to do with farm equipment; debtor failed to comply with § 521(a)(2), which is not limited to consumer debts; automatic stay did not extend to farm equipment).

6. The time period for performance of the stated intention is shortened. It is now 30 days after the date first set for the meeting of creditors, or such additional time as the court for cause within such 30-day time frame allows. 11 U.S.C.A. § 521(a)(2)(B).
7. Nothing in § 521(a)(2)(A) or (B) alters the debtor's or the trustee's rights with respect to the property. This is old law. Under BAPCPA this statement is qualified by the phrase "except as provided in § 362(h)." 11 U.S.C.A. § 521(a)(2)(C).
8. New § 521(a)(6) now provides that an individual Chapter 7 debtor cannot retain possession of personal property "as to which the creditor has an allowed claim for the purchase price" secured in whole or in part by such property unless the debtor, not later than 45 days "after the first meeting of creditors," either enters into a reaffirmation agreement or redeems the property. If the debtor fails to do so, the automatic stay is terminated with respect to property of the debtor or of the estate, the property is no longer property of the estate, and the creditor "may take whatever action as to such property is permitted by applicable nonbankruptcy law," unless the trustee files a motion for relief to grant an extension of that period. The court must find that the property is of consequential value or benefit to the estate and must order adequate protection, and the debtor must deliver the collateral to the trustee.
9. New § 521(d) provides that if the debtor fails timely to take action specified in subsection 521(a)(6) or in paragraphs (1) and (2) of 362(h), and the creditor's security interest is not avoidable, an ipso facto clause is enforceable.

#### C. AUTOMATIC STAY

*See*, 11 U.S.C.A. § 362(h)(1) and (2).

1. New § 362(h)(1) provides that with respect to an individual debtor, the automatic stay terminates with respect to personal property of the debtor or of the estate which secures in whole or in part a claim "and such personal property shall no longer be property of the estate" if the debtor fails
  - (A) to timely file a statement of intention or to indicate that the debtor will surrender, redeem or reaffirm; and

(B) “to take timely the action specified in such statement,” unless the debtor states an intention to reaffirm the debt according to the terms of the original contract and the creditor refuses to agree to the reaffirmation of those terms.

2. New § 362(h)(2) provides that the trustee can file a motion before the expiration of the time period set forth in § 521(a)(2) seeking an order that the stay did not terminate, but the property must be of consequential value to the estate and the trustee must provide adequate protection.

D. QUESTIONS ARISING UNDER THESE NEW PROVISIONS OF § 521 AND § 362(h)

1. Do the amendments to §§ 521 and 362 eliminate the so-called fourth option?

In cases decided before enactment of the 2005 Act, courts disagreed as to whether the three alternatives set forth in old § 521(2) (now § 521(a)(2))—reaffirmation, redemption, or surrender of the collateral—were the only options available to the debtor. The circuit courts split on this question and the Eighth Circuit had not decided the issue. Several circuit courts held that the debtor must either reaffirm, redeem, or surrender the collateral.

*See, e.g.,*

*In re Burr*, 160 F.3d 843 (1st Cir. 1998) (debtor must elect to reaffirm or redeem and then perform within 45 days);

*Matter of Johnson*, 89 F.3d 249 (5th Cir. 1996) (debtor could not retain property unless debtor redeemed or reaffirmed);

*Matter of Edwards*, 901 F.2d 1383 (7th Cir. 1990) (debtor must reaffirm or redeem even though debtor continues to perform all contractual obligations).

Other circuits recognized a fourth option for debtors who were not in default on the secured debt by permitting the debtor to retain the collateral while maintaining payments.

*See, e.g.,*

*In re Price*, 370 F.3d 362 (3d Cir. 2004) (allowing the debtor to retain collateral if current; this best comports with the “fresh start” policy of the Code);

*In re Lopez*, 345 F.3d 701 (9th Cir. 2003), *cert. denied*, 541 U.S. 987, 124 S. Ct. 2015, 158 L. Ed. 2d 491 (2004) (debtor may retain personal property if debtor remains current);

*In re Boodrow*, 126 F.3d 43 (2d Cir. 1997) (options listed in § 521(2)(A) were not intended to be exclusive, but only intended to give notice of intent);

*In re Belanger*, 962 F.2d 345 (4th Cir. 1992) (§ 521(2) is a notice provision only and options stated are not exclusive);

*Lowry Federal Credit Union v. West*, 882 F.2d 1543 (10th Cir. 1989) (nothing in Bankruptcy Code requires redeem or reaffirm to be debtor’s exclusive course).

Post-BAPCPA bankruptcy courts have consistently held that the amendments to § 521 and § 362 eliminated the so-called “fourth” option if the creditor objects.

*See, e.g.,*

*In re Moustafi*, 2007 WL 1592965 (Bankr. D. Ariz. 2007) (there is no more fourth option);

*In Re Parker*, 363 B.R. 621 (Bankr. M.D. Fla. 2007) (debtor “must” elect to surrender, redeem or reaffirm);

*In re Blakely*, 363 B.R. 225 (Bankr. D. Utah 2007) (together these four subsections have been interpreted to eliminate the possibility of a debtor “riding through” a bankruptcy case without obtaining approval of a reaffirmation agreement);

*In re McFall*, 356 B.R. 674 (Bankr. N.D. Ohio 2006) (debtor’s indication on statement of intention that he intended to “retain” collateral did not comply with § 362(h)(1); debtor did not have the option to retain and pay without reaffirmation or redemption);

*In re Ruona*, 353 B.R. 688 (Bankr. D.N.M. 2006) (debtor must either redeem or reaffirm or the stay terminates);

*In re Steinhaus*, 349 B.R. 694 (Bankr. D. Idaho 2006) (no longer option to “retain-and-pay” or “ride through”);

*In re Anderson*, 348 B.R. 652 (Bankr. D. Del. 2006) (BAPCPA overruled *In re Price*, 370 F.3d 362 (3d. Cir. 2004) making a fourth option no longer available);

*In re Norton*, 347 B.R. 291 (Bankr. E.D. Tenn. 2006) (so-called “fourth” or “ride through” option, to extent previously available to debtors, cannot be invoked by post-BAPCPA debtors);

*In re Boring*, 346 B.R. 178 (Bankr. N.D. W. Va. 2006) (the 2005 Act eliminated the “drive and pay option”; this is manifest from a reading of § 521(a)(2) and the addition of § 362(h));

*In re Donald*, 343 B.R. 524, 535 (Bankr. E.D.N.C. 2006) (§ 521(a)(6) and 521(d), when read with § 521(a)(2)(C) and § 362(h)(1) and (2), eliminated the so-called fourth option);

*In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006) (“[T]he ‘fourth option’ which would otherwise still be allowed because of the continued use of the ‘if applicable’ phrase in Section 521(a)(2)(A) is prohibited by Section 362(h)(1)(A).”);

*In re Craker*, 337 B.R. 549 (Bankr. M.D.N.C. 2006) (there is no fourth option).

2. Is § 521(a)(6) applicable if a creditor has not filed a proof of claim?

*See, e.g.,*

*In re Blakeley*, 363 B.R. 225 (Bankr. D. Utah 2007) (§ 521(a)(6) requires creditor to hold an allowed claim, not just a claim; a claim is allowed under § 502 only after a proof of claim is filed; the credit union had not filed a claim; § 521(a)(6) was inapplicable);

*In re Hinson*, 352 B.R. 48 (Bankr. E.D.N.C. 2006) (for § 521(a)(6) to apply, creditor must file a claim);

*In re Anderson*, 348 B.R. 652 (Bankr. D. Del. 2006) (no; the statute requires an “allowed claim”);

*In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006) (term “allowed claim” interpreted literally).

*But see,*

*In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006) (literal interpretation of “allowed claim” would produce a result at odds with congressional intent).

3. Is § 521(a)(6) applicable if the creditor does not have a claim “for the purchase price”?

*See, e.g.,*

*In re Blakely*, 363 B.R. 225, 228 (Bankr. D. Utah 2007) (§ 521(a)(6) only applies where the allowable claim is for the full purchase price, not where the creditor has a partially paid off PMSI; “While instances where a creditor would hold a claim for the purchase price of property are rare, it does occur in situations of abuse when a debtor, knowing full well that they are about to file bankruptcy, will take advantage of ‘no down payment’ offers to purchase vehicles or other property.”);

*In re Hinson*, 352 B.R. 48 (Bankr. E.D.N.C. 2006) (§ 521(a)(6) not applicable since balance was less than full purchase price);

*In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006) (for § 521(a)(6) to apply, creditor must have an “allowed claim,” and that claim must be for the full purchase price; therefore provision does not apply in a no asset Chapter 7 case).

*But see,*

*In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006) (true, literally read, only a creditor with an allowed claim for the full purchase price is entitled to assert this limitation on the automatic stay; however, to enforce this language literally would deprive the vast majority of creditors in no asset cases of its benefit).

4. What action must the debtor take to prevent termination of the automatic stay under § 362(h)(1)?

*See, e.g.,*

*In re Parker*, 363 B.R. 621 (Bankr. M.D. Fla. 2007) (“To timely perform their stated intent to redeem the motor vehicle securing a creditor’s claim and to prevent the automatic stay from terminating as to this vehicle based on their nonperformance, Chapter 7 debtors had to do more than simply negotiate with potential lenders about redemption financing during the applicable 45-day period, without either communicating with the creditor or filing a redemption motion with the court.”);

*In re Blakely*, 363 B.R. 225 (Bankr. D. Utah 2007) (all debtor has to do to avoid a termination of the automatic stay is to timely file a statement of intention stating an intent to surrender, reaffirm or redeem and then to take timely action to perform by entering into a reaffirmation agreement);

*In re McFall*, 356 B.R. 674 (Bankr. N.D. Ohio 2006) (automatic stay terminated where statement merely indicated debtor’s intention to keep the vehicle, but did not say whether the vehicle would be redeemed or the debt reaffirmed; creditor could repossess without violating the stay);

*In re Norton*, 347 B.R. 291 (Bankr. E.D. Tenn. 2006) (debtors could not file a statement of intention electing the ride-through option);

*In re Boring*, 346 B.R. 178 (Bankr. N.D. Va. 2006) (debtor’s statement of intention recited debtor sought to retain collateral, but did not specify whether collateral would be redeemed or debt reaffirmed; statement did not comply with § 521(a)(2); relief from stay appropriate under § 362(h));

*In re Craker*, 337 B.R. 549 (Bankr. M.D.N.C. 2006) (relief from stay granted because debtor did not strictly comply with § 362(h)(1)(A) by stating that she would either reaffirm or redeem).

5. What happens when the creditor balks?

Courts have held that the § 362(h)(1) does not apply if the debtor’s statement of intention specifies his or her intention to reaffirm the debt on the original terms and the creditor refuses to agree to the reaffirmation.

*See, e.g.,*

*In re Hinson*, 352 B.R. 48 (Bankr. E.D.N.C. 2006) (stay did not terminate where debtor agreed to reaffirm under same terms set forth in the original agreement, but creditor refused to allow reaffirmation unless debtor paid attorney’s fees).

6. If the stay terminates, what happens?

*See, e.g.,*

*In re Ruona*, 353 B.R. 688 (Bankr. D.N.M. 2006) (stay terminates, but creditor limited to state law remedies);

*In re Steinhaus*, 349 B.R. 694 (Bankr. D. Idaho 2006) (creditor entitled to order confirming stay terminated but not order for turnover);  
*In re Rowe*, 342 B.R. 341 (Bankr. D. Kan. 2006) (stay terminates; the creditor is not entitled to an order of turnover, but must use state law remedies).

7. Is a creditor entitled to a comfort order that the stay is terminated under § 362(h)?

*See, e.g.,*

*In re Kasrai*, 2007 WL 2188170, \*2 (Bankr. E.D. Va. 2007) (creditor argued motion was based on § 362(c)(1), not § 362(h); § 362(c)(1) provides that “the stay of an act against property of the estate under § 362(a) continues until such property is no longer property of the estate”; comfort order denied. “Just because property may no longer be property of the estate, it may very well continue to be protected by the automatic stay until such time as the case is closed or dismissed or the debtor has received a discharge.”);

*In re Grossi*, 365 B.R. 608 (Bankr. E.D. Va. 2007) (§ 362(j) applies only if stay terminated under § 362(c)(3));

*In re Hill*, 364 B.R. 826 (Bankr. M.D. Fla. 2007) (no; § 326(j) does not apply because movant asserted termination under § 362(h), not § 362(c));

*In re Conley*, 358 B.R. 337 (Bankr. N.D. Ohio 2006) (no; § 362(j) applies only where the stay has terminated under § 362(c)(3) and not where it has done so under § 362(h));

*In re Dienberg*, 348 B.R. 482, 487 (Bankr. N.D. Ind. 2006) (no; holding that “the comfort orders authorized by § 362(j) are limited to situations where the automatic stay has terminated by reason of the operation of the provisions of § 362(c) and are not authorized where the stay is alleged to have terminated by operation of § 362(h)”);

*In re Steinhaus*, 349 B.R. 694 (Bankr. D. Idaho 2006) (undecided; “This Court does not enter its order today by reason of § 362(j) and will save that discussion for another day.”);

*In re Espey*, 347 B.R. 785, 788 (Bankr. M.D. Fla. 2006) (yes; “Once the property is no longer property of the estate, as is the case when the stay terminates pursuant to § 362(h), a party in interest may move the Court [ex parte] for an order confirming that the stay is terminated under § 362(j).”);

*In re Craker*, 337 B.R. 549 (Bankr. M.D.N.C. 2006) (maybe; creditor filed a motion to confirm that stay terminated and court granted the motion).

8. What happens if the debtor timely files a statement of intention and enters into a reaffirmation agreement but the court declines to approve it? The back door ride through?

Several courts have held that a debtor can keep the collateral and continue to pay if the debtor is current and timely files a statement indicating an intention to

reaffirm and timely enters into a reaffirmation agreement even if the court denies approval. The reasoning is that § 521(a)(6), § 521(d) and § 362(h) require nothing more of the debtor and § 521(a)(2)(C) preserves the debtor's rights to the collateral. The automatic stay remains in place because the debtor has filed a valid statement of intention and performed on that intention by signing a reaffirmation agreement.

*See, e.g.,*

*In re Moustafi*, 2007 WL 1592965 (Bankr. D. Ariz. 2007) (the debtor's act of entering into a reaffirmation agreement with creditor satisfies the performance requirement of § 521(a); ergo § 521(a)(6) and (d) do not apply and § 362(h) has been satisfied);

*In re Stevens*, 365 B.R. 610 (Bankr. E.D. Va. 2007) (if the debtor is current, has timely filed a statement of intention and has timely reaffirmed, § 521(a)(2)(6) and (d) do not kick in);

*In re Husain*, 364 B.R. 211 (Bankr. E.D. Va. 2007) (§ 521(a) performance requirements should not be read as a mandate for debtors to entirely consummate their stated intentions);

*In re Blakely*, 363 B.R. 225 (Bankr. D. Utah 2007) (reaffirmation agreement disapproved, but “[b]ecause this Debtor has fully complied with the requirements under § 521(a)(2), § 521(a)(6), § 521(d) and § 362(h), the remedies contained in each of the subsections are not triggered. The Debtor is not compelled to surrender possession of the property, the stay is not terminated as to the property, and the Bankruptcy Code continues to prevent and limit the operation of the contract's *ipso facto* clauses.”);

*In re Riggs*, 2006 WL 2990218 (Bankr. W.D. Mo. 2006) (court declined to approve reaffirmation agreement on undue hardship ground; finds debtor has fully performed duties under § 521; § 521(d) validating ipso facto clause therefore not implicated);

*In re Quintero*, 2006 WL 1351623 (Bankr. N.D. Cal. 2006) (court disapproved reaffirmation agreement due to failure to provide required disclosures; § 521(a)(6) only requires debtor to enter into reaffirmation agreement; automatic stay remains in effect and creditor may not repossess collateral);

*In re Hinson*, 352 B.R. 48 (Bankr. E.D.N.C. 2006) (debtor merely needs to file the statement of intention and sign the reaffirmation agreement; the agreement need not be approved by the court);

*In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006) (debtor is required to actually reaffirm obligation or redeem vehicle under enforceable arrangement in order to avoid termination of automatic stay and applicability of ipso facto clause; may be able to obtain statutory benefits if reaffirmation agreement unenforceable due to creditor's failure to supply required disclosures).

E. REAFFIRMATION AGREEMENTS

*See*, 11 U.S.C.A. §§ 524(c), (d), (k), (l), and (m); Interim Rule 4004(c)(1)(J), Fed. R. Bankr. P. 4004(c)(2) and 4008; Form B240.

1. A reaffirmation agreement is enforceable only if:
  - (a) It is enforceable under applicable nonbankruptcy law. 11 U.S.C.A. § 524(c).
  - (b) It was made before the granting of the discharge. 11 U.S.C.A. § 524(c)(1).
  - (c) The debtor receives the disclosures set forth in § 524(k). 11 U.S.C.A. § 524(c)(2).
  - (d) The reaffirmation agreement is filed with the court and, “if applicable,” is accompanied by an affidavit or declaration of the attorney who represented the debtor during the course of negotiating the agreement. The declaration or affidavit must state that the agreement represents a fully informed and voluntary agreement by the debtor, that the agreement does not impose an undue hardship on the debtor or any of the debtor’s dependents, and that the attorney fully advised the debtor of the legal effect and consequences of the reaffirmation agreement and any default under that agreement. 11 U.S.C.A. § 524(c)(3).
  - (e) The debtor has not rescinded the reaffirmation agreement prior to the discharge or within 60 days after the agreement is filed with the court, whichever is later, by giving the creditor notice of rescission. 11 U.S.C.A. § 524(c)(4).
  - (f) The provisions of 11 U.S.C.A. § 524(d) have been complied with. 11 U.S.C.A. § 524(c)(5).

Section 524(d) provides that in the case of an individual debtor who wishes to reaffirm a debt and was not represented by an attorney during the course of negotiating the reaffirmation agreement, a hearing is mandatory. At the hearing, the court is required to inform the debtor, who must appear in person, (1) that reaffirmation is not required by law or by any agreement not made in accordance with the above requirements, and (2) of the legal effect and consequences of reaffirmation and default. *See* 11 U.S.C.A. § 524(d)(1). The court must also determine whether the agreement meets the requirements of § 524(c)(6) unless the debt being reaffirmed is secured by real property. 11 U.S.C.A. § 524(d).

(g) Section 524(a)(6) provides that, in a case of an individual debtor who was not represented by an attorney during the course of negotiating the agreement, the court has approved it as (1) not imposing an undue hardship on the debtor or a dependent of the debtor, and (2) in the best interest of the debtor. 11 U.S.C.A. § 524(c)(6).

2. New § 524(k) dictates the form and content of disclosures that must be given to the debtor and the form and content of the reaffirmation agreement that must be completed.

(a) Part A of the reaffirmation agreement must contain detailed disclosures regarding the amount reaffirmed, the fees and costs accrued as of the date of the disclosure statement, interest rates and how they are calculated, and at the election of the creditor, a statement of the repayment schedule.

If the debt is secured, the disclosure must contain a description of the property to which the creditor's lien attaches and the original purchase price of the collateral (if the security interest is not a purchase money interest, the disclosure must contain the amount of the original loan). The disclosure must also include considerable cautionary language explaining, inter alia, that the debtor has the right to consult an attorney, that the reaffirmation agreement must be filed with the court before it becomes effective, and that the debtor has the right to rescind the reaffirmation within 60 days of its filing. Disclosures must be made before the reaffirmation is signed by the debtor.

(b) Part B contains the language the reaffirmation agreement must contain.

(c) Part C, "Certification by Debtor's Attorney (*If Any*)," must state that:

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

"Signature of Debtor's Attorney: Date:"

If the information contained in Part D triggers a presumption of undue hardship, "such certification shall state that, in the opinion of the attorney, the debtor is able to make the payment." However,

if the reaffirmation agreement is with a federal credit union, the attorney does not need to include this language.

- (d) Part D of the reaffirmation agreement is the Debtor's Statement in Support of Reaffirmation Agreement. It tends to be misunderstood by debtors who are not represented by counsel. The debtor must aver that the debtor believes that the reaffirmation agreement will not impose an undue hardship on the debtor or the debtor's dependents, that the debtor can afford to make the payments on the reaffirmed debt because the debtor's monthly income (take home pay plus any other income received) is larger than the actual current monthly expenses, including monthly payments on post-bankruptcy debt and other reaffirmation agreements, and by what amount. The statement must acknowledge that, if income does not exceed expenses by enough to make the payment on this reaffirmed debt, the agreement is presumed to be an undue hardship and must be reviewed by the court. In the statement the debtor is given an opportunity to state how the debtor will actually be able to make the payment and overcome the presumption. The debtor must also acknowledge that the debtor has received the required disclosures and completed and signed the reaffirmation agreement. "Where the debtor is represented by an attorney" and the debt is owed to a credit union, the Debtor's Statement in Support of the Reaffirmation Agreement is shorter and there is no need to show income and expense figures.
- (e) Part E contains the form of motion the debtor must use "if approval of such agreement by the court is required in order to be effective" and is to be completed "only if the debtor is not represented by an attorney." In the motion the debtor states that the debtor is not represented by an attorney in connection with the reaffirmation agreement but believes that the reaffirmation agreement is in the debtor's best interest. There is an opportunity in the motion to explain.

Subsection (k) also provides the form of order that is to be used to approve the agreement.

11 U.S.C.A. § 524(k).

- 3. For the period extending through 60 days after the agreement is filed, a reaffirmation agreement "shall be presumed" to create an undue hardship if the Debtor's Statement in Support shows that the debtor's monthly expenses, plus reaffirmed debt, exceed monthly income. The presumption "shall be reviewed by the court." The presumption may be rebutted "in writing" by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of the reaffirmation

agreement. “If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement,” but it cannot do so without notice and a hearing to the debtor and the creditor, and the hearing must be concluded before the entry of the debtor’s discharge. 11 U.S.C.A. § 524(m)(1).

Subsection m(1) “does not apply” with respect to reaffirmation agreements with federal credit unions. 11 U.S.C.A. § 524(m)(2).

4. New interim Fed. R. Bankr. P. 4004(c)(1)(J) was inserted in the Interim Rules to implement new § 524(m). It provides that the court shall not grant a discharge where a presumption that a reaffirmation agreement is an undue hardship has arisen. Fed. R. Bankr. P. 4004(2) also allows the debtor to request that the entry of the order for discharge be deferred for 30 days, and may move within that 30 days for an order deferring discharge to a definite time. Fed. R. Bankr. P. 4004(c)(2). In part, this rule is designed to allow the debtor time to negotiate with a creditor who may be seeking a reaffirmation agreement, which must be entered into before the discharge is entered, or to settle a claim that the entire discharge should be denied.
5. Fed. R. Bankr. P. 4008 provides that on not less than ten days notice to the debtor and the trustee and not more than 30 days following the entry of an order granting or denying a discharge or confirming a plan in an individual Chapter 11 case, the court may hold the hearing provided for in § 524(d) and that a motion by the debtor for approval of a reaffirmation agreement must be filed before or at the discharge hearing. The drafters added language to Rule 4008 on an interim basis to facilitate the court’s determinations regarding approval of reaffirmations. The amendments provide that the debtor must attach Schedules I and J to Part D, and if there is a difference between the two, “the accompanying statement shall include an explanation of any difference.”
6. Finally, BAPCPA added 11 U.S.C.A. § 524(l) to address the question of whether a creditor may accept payments from the debtor pending reaffirmation. The new section provides that the creditor may receive payments before or after the reaffirmation agreement is filed if the creditor believes in good faith that the agreement is effective. It further provides that the requirements of § 524(c)(2) and (k) are satisfied if the disclosures have been given in good faith. 11 U.S.C.A. § 524(l).

#### F. QUESTIONS ARISING WITH RESPECT TO REAFFIRMATION AGREEMENTS

1. What happens when the debtor wants to reaffirm but the creditor does not?

*See, e.g.,*

*Matter of Turner*, 156 F.3d 713 (7th Cir. 1998) (“Implicit in the statute’s repeated reference to an ‘agreement’—the word is used no less than eighteen times in section 524(c)—is the requirement that the creditor as well as the debtor consent to the reaffirmation.”).

2. Does the reaffirmation agreement need to be filed before the discharge? And what does “made” mean?

*See, e.g.,*

*In re Parker*, 2007 WL 2154241 (Bankr. W.D. Tex. 2007) (Judge Leif M. Clark) (debtor checked the “no presumption” box but, because it was in the same ink as creditor used to sign the agreement, court inquired anyway; numbers shown in Part D clearly showed a presumed undue hardship; to reconcile the requirement of filing the agreement under § 524(c)(3) and the obligation of the court not to approve reaffirmation agreements that represent an undue hardship under § 524(m) court implied a deadline for filing valid BAPCPA reaffirmation agreements; to be valid they must now be filed prior to the entry of debtor’s discharge; Rule 4008 is inconsistent with the statute and is ignored);

*In re Merritt*, 366 B.R. 637 (Bankr. W.D. Tex. 2007) (Judge Leif M. Clark) (pre-BAPCPA case; given the sequence of events, this reaffirmation agreement was made when it was signed by the debtor and prior to the entry of discharge even though it was not countersigned by GMAC until much later; under pre-BAPCPA law it did not need to be filed prior to the discharge to be valid; in noting a possible difference under BAPCPA, the case foreshadows his later decision in *Parker*);

*In re Suber*, 2007 WL 2325229 (Bankr. D.N.J. 2007) (case cannot be reopened if no evidence that parties reached agreement on reaffirming the debt prior to discharge order);

*In re Cottrill*, 2007 WL 1760927 (Bankr. N.D. W. Va. 2007) (court refused to approve a reaffirmation agreement made and filed after the grant of a discharge; debtors cannot waive the protections of § 524(c) because they exist to protect debtors from the folly of their ways; Congress intentionally required that the reaffirmation agreement be made before the discharge is granted; Rule 60(b)(6) motion is not available to vacate the discharge order even if the debtor desired to enter into the agreement; § 105 is also unavailable; in fact, court has no subject matter jurisdiction).

3. Must debtor’s counsel participate in the reaffirmation process? If so, to what extent?

*See, e.g.,*

POST-BAPCPA CASES:<sup>1</sup>

*In re Smith*, 17 CBN 1059<sup>2</sup> (Case No. 07-10900, 7/18/07) (Bankr. S.D. Ohio 2007) (attorney had specifically unbundled representation in connection with reaffirmation agreements from other representation in connection with the bankruptcy; she refused to sign Part C even though court sent a deficiency notice; she counseled with her clients and offered to appear at the reaffirmation hearing if requested, but refused to “sign off” on Part C; the court ruled that it would not force debtor’s counsel to endorse the agreement: “The court believes that in representing a bankruptcy debtor, it is the obligation of counsel to inform the client about the legal effect and consequences of a reaffirmation agreement or any default under the agreement, and that obligation cannot be contracted away. Counsel should not, however, be placed in the position of attesting that a debtor will not suffer an undue hardship if he or she enters into the reaffirmation agreement and that debtor will be able to make payments on the reaffirmed debt, for that could conceivably expose counsel to liability.”);

*In re Isom*, 2007 WL 2110318, \*2 (Bankr. E.D. Va. 2007) (counsel struck through Part C and wrote “no endorsement–hearing required”; under BAPCPA, if debtor has an attorney of record, then the attorney must sign the certification or the agreement is unenforceable; “[i]n cases where the debtor has counsel, Congress has not authorized the bankruptcy court to substitute its judgment [for] that of debtor’s counsel”; following *Carvajal*,

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<sup>1</sup>The issue raised in these post-BAPCPA cases has not yet been addressed in Minnesota. To date the Judges have allowed attorneys to elect not to represent the consumer debtor in connection with the reaffirmation process. The attorney simply does not sign the certification (Part C) or contest a presumption of undue hardship. This failure triggers a court hearing at which the debtor is required to appear. Other courts deal with the issue differently. Some follow the current Minnesota practice, (*see, e.g.*, United States Bankruptcy Court, Eastern District of Michigan, Revised Notice Regarding Reaffirmation Agreements, June 27, 2007), some require the attorney to appear at the hearing, some require counsel to be available to take a phone call, and some have established pro bono projects which pre-screen pro se debtors before the reaffirmation hearing. The question before our Judges now is whether the current practice should continue or be changed, and if so, how.

In Minnesota withdrawal without court approval is not an option. See Local Rule 9010-3(e)(2)-Withdrawal. “An attorney in a bankruptcy case whose employment was subject to approval by the court, an attorney for any party in an adversary proceeding, or an attorney for a debtor in a chapter 7 or 13 case who wishes to withdraw without a substitution of attorney shall make a motion for leave to withdraw.”

<sup>2</sup>Westlaw citation currently unavailable.

withdrawal is not an option: “Cognizant of the very serious consequences that reaffirmation could have, Congress, *through BAPCPA and its additions to § 524*, sought to impose meaningful hurdles into the reaffirmation process. Even with all the new disclosures in place, Congress was unwilling to leave the decision to reaffirm dischargeable debt solely to the discretion of the debtor. Congress wanted to interject the informed judgment of debtor’s counsel into the process. Obviously, Congress did not envision that counsel would merely rubber stamp a client’s wishes. Rather it was counsel’s considered reluctance to approve *onerous and ill-advised* reaffirmation agreements that Congress hoped to achieve.”);

*In re Carvajal*, 365 B.R. 631 (Bankr. E.D. Va. 2007) (counsel denied withdrawal: “[O]nce [counsel] makes an appearance in a bankruptcy case, he has made an appearance for all matters in that bankruptcy case and must appear with respect to them unless otherwise excused by the court. Reaffirmation agreements are an integral part of chapter 7 representation of debtors. By accepting a chapter 7 case, counsel is accepting all aspects of the case including counseling with respect to reaffirmation agreements, negotiations with creditors with respect to reaffirmation agreements, and representing debtors in court with respect to reaffirmation agreements. This is not to say that counsel is not to be paid for these services. It is expected that counsel will be paid for all services he renders.... If there are difficulties with the attorney-client relationship, including non-payment of fees, counsel may seek leave to withdraw.”);

*In re Cain*, 2007 WL 1558616 (Bankr. W.D. Tex. 2007) (if counsel permits the debtor to file a reaffirmation agreement that checks the box indicating no presumption of undue hardship, but debtor has not filled out Part D at all, there is a technical violation of Fed. R. Bankr. P. 9011; “the court deems it sufficient that, by this order, counsel is warned of the violation and is appropriately admonished. The court is confident that counsel will see to it that future reaffirmation agreements filed with this court will be properly completed.”).

#### PRE-BAPCPA CASES:

*In re Vargas*, 257 B.R. 157, 163 (Bankr. D.N.J. 2001) (“attorneys may not wish to undertake the reaffirmation process because they would be taking on roles akin to in loco parentis. If this is the case, then attorneys are not obligated to take on the duties of independently assessing their clients’ financial status. If attorneys decline to sign the declarations, the corresponding reaffirmation agreements must be reviewed by the court.”);

*In re Melendez*, 235 B.R. 173, 203 (Bankr. D. Mass. 1999) (in order to comply with Bankruptcy Rule 9011, the debtor’s attorney must at a minimum conduct a reasonable inquiry to ensure that the circumstances support the

factual allegations set forth in the § 524(c)(3) declaration and that the information provided to the debtor is sufficient; review the debtor's financial circumstances, review the security agreement, question and independently consider the value of the collateral; evaluate the risk of replevy by the creditor, discuss relevant financial disclosures with the debtor, and ensure that the agreement was entered into voluntarily and without creditor misrepresentations or coercion, the debtor understands the effect and consequences of the agreement and the consequences of default, the debtor is informed as to his or her options with respect to the collateral under the Bankruptcy Code, and further, advise the debtor as to alternative sources of credit);

*In re Bruzzese*, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997) (bankruptcy court, acting sua sponte, reopened case to determine whether the consumer debtor was properly informed by debtor's attorney regarding the consequences of reaffirmation; reaffirmation agreement annulled because court rejected arguments that, since the debtors were represented by counsel and the reaffirmation agreement was not rescinded within 60 days, the court had no authority to annul the agreement; court also found that debtor's attorney violated Bankruptcy Rule 9011 by failing to investigate and explain the relevant facts to the debtor; court recognized that it has "an inherent responsibility to see that, in fact, attorneys are doing what they are supposed to ...," but also acknowledged that "[h]ow a judge should police reaffirmation agreements is unclear");

*In re Reidenbach*, 59 B.R. 248 (Bankr. N.D. Ohio 1986) (it was the attorney's obligation to become familiar with the terms of the reaffirmation agreement in order to determine whether or not the debtor should sign the agreement).

4. May the court review a reaffirmation agreement if the debtor's counsel has signed Part C?

*See, e.g.,*

*In re Isom*, 2007 WL 2110318 (Bankr. E.D. Va. 2007) (in cases where the debtor has an attorney of record, the debtor's counsel must sign Part C; the court is not authorized to substitute its judgment in place of that of debtor's counsel);

*In re Stevens*, 365 B.R. 610 (Bankr. E.D. Va. 2007) (court may disapprove reaffirmation even if debtor's attorney executes Part C of agreement where Part D shows an inability to pay);

*In re Calabrese*, 353 B.R. 925 (Bankr. M.D. Fla. 2006) (it does not make any difference whether Part D reflects that debtors cannot make the payments; if counsel signs Part C, there is no need for a hearing; Congress did not intend judges to review agreements of debtor represented by counsel);

*In re Mendoza*, 347 B.R. 34 (Bankr. W.D. Tex. 2006) (court must review if counsel has signed but not checked the box certifying debtor's ability to make payments; no review if counsel has signed both part C and certified reaffirmation agreement does not constitute undue hardship);

*In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006) (if presumption of undue hardship arises, court may review and decide whether to approve agreement regardless whether counsel signed off);

*In re Blake*, 2006 WL 3334399 (Bankr. M.D. Fla. 2006) (no; the court does not need to hold a hearing and will not review; Congress did not intend for court to review agreements signed by counsel for debtor);

*In re Melendez*, 224 B.R. 252 (Bankr. D. Mass. 1998) (pre-BAPCPA) (bankruptcy court has an independent duty to review reaffirmations even though they contain the attorney's certification).

5. May the court review a reaffirmation agreement if there is no presumption of hardship based on part D, but negative income is shown on Schedules I and J with no explanation of discrepancy? Does it make any difference if counsel is involved?

*See, e.g.,*

*In re Wilson*, 363 B.R. 220 (Bankr. D.N.M. 2007) (if Part D does not indicate an undue hardship, there is no presumption of undue hardship and no need for a hearing where debtor is represented by counsel who has filed Part C; however, if debtor is unrepresented, the court may consider the information in Schedules I and J at the reaffirmation hearing);

*In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006) (court has power to evaluate accuracy of debtor's financial disclosures even if debtor is represented; Rule 4008 suggests this result).

6. What happens when Part D is left blank? Does that impact the enforceability of the agreement if the attorney signed Part C and the "no undue hardship" box is checked?

*See, e.g.,*

*In re Cain*, 2007 WL 1558616 (Bankr. W.D. Tex. 2007) (counsel admonished Part D must be completed);

7. What does it take to overcome the presumption of undue hardship?

*See, e.g.,*

*In re Blakely*, 363 B.R. 225 (Bankr. D. Utah 2007) (court suggests it is not enough that debtor needs the car to get to and from work, especially where debtor may keep the car even if the court disapproves the agreement);

*In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006) (court disapproves reaffirmation agreement because number shown on § 524(k)(6) disclosure made no sense when compared to Schedules I and J);  
*In re Payton*, 338 B.R. 899 (Bankr. D.N.M. 2006) (court would not approve agreement that leaves debtors \$314 “underwater” every month; numbers on Schedule D varied wildly from those on Schedules I and J; that debtor’s claimed need to have the car to perform his work was not controlling, especially given the fact that he would likely be able to keep the vehicle even if the court did not approve the agreement);  
*In re Quintero*, 2006 WL 1351623 (Bankr. N.D. Cal. 2006) (court refused to approve a reaffirmation agreement that did not include the required disclosures).

8. Is the court mandated to disapprove the agreement if the presumption of undue hardship arises and is not rebutted?

*See, e.g.,*

*In re Meyers*, 361 B.R. 84 (Bankr. W.D. Pa. 2007) (no, disapproval is discretionary; § 521(m)(1) uses the word “may”).

9. Can the court disapprove a reaffirmation agreement without giving notice to the creditor?

*See, e.g.,*

*In re Payton*, 338 B.R. 899 (Bankr. D.N.M. 2006) (yes; a court must give notice to the creditor under § 524(m) only if Part D reflects a deficit; here the agreement showed a surplus, although Part D bore no reality to debtor’s real financial situation; no notice required).

10. What are the consequences of a creditor’s violation of § 524(c)?

*See, e.g.,*

*Cox v. Zale Delaware, Inc.*, 239 F.3d 910 (7th Cir. 2001) (debtor had no cause of action under § 524(c) or for unjust enrichment under state law, but could seek a contempt order and ask for restitution and punitive damages; the court may order rescission of the reaffirmation agreement and monetary damages under its contempt powers);

*Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000) (no private right of action under state law, or under §§ 105(a) or 524(c) of the Bankruptcy Code, but bankruptcy court’s contempt power is available to obtain appropriate sanctions).

11. Can the creditor communicate directly with a consumer debtor concerning the reaffirmation of a debt at a time when the creditor knows that the debtor is represented by counsel?

*See, e.g.,*

*Greenwood Trust Co. v. Smith*, 212 B.R. 599 (B.A.P. 8th Cir. 1997) (since state law prohibited creditor contacting debtor if debtor represented by counsel, then creditor violated state law when creditor asked debtor to sign reaffirmation agreement).

*But see,*

*In re Holloway*, 337 B.R. 6 (Bankr. D. Mass. 2006) (creditor's letter to debtor's counsel advising that creditor holds a purchase money security interest in collateral, requesting the debtor's intentions, and enclosing a reaffirmation agreement did not violate the Fair Debt Collection Practices Act or the automatic stay).

12. Must the creditor release its lien on a vehicle it has no intention of repossessing?

*See, e.g.,*

*In re Pratt*, 462 F.3d 14, 19-20 (1st Cir. 2006) (lender's refusal to release its lien held to be objectively coercive; lender announced that it did not intend to repossess the "surrendered" vehicle because it was of insufficient value, then expressly conditioned its release of the lien upon the debtors' agreement to repay the loan balance in full; court found that the pronouncement effectively amounted to a demand for a "reaffirmation," which never purported to comply with the stringent "anti-coercion" requirements of Bankruptcy Code § 524(c)).

13. How does this relate to agreements respecting nondischargeability of particular debts?

*See, e.g.,*

*Lichtenstein v. Barbanel*, 161 Fed. Appx. 461, 466 (6th Cir. 2005) (court held that there is a difference between a reaffirmation agreement and a nondischargeability agreement and concluded that § 524(c)(2) and (c)(3) govern the requirements for reaffirmation agreements only; court observed that the debtor and the creditor had entered into a nondischargeability agreement, not a reaffirmation agreement, and further observed that "[o]nce that agreement was approved by the Bankruptcy Court, it had the same force as a court's order.... Because § 524(c), by its terms, only applies to agreements reaffirming dischargeable debts, it cannot be used here by [the debtor] to protect him from his own actions and to allow him

to render void a post-petition, court-approved waiver of discharge that satisfies all the statutory requirements of § 727(a)(10).”); *In re Martinelli*, 96 B.R. 1011, 1014 (B.A.P. 9th Cir. 1988) (observing that “Section 524(c) by its express terms only applies to debts that are dischargeable” and thus in this case “where the parties have stipulated that the debt is nondischargeable, the provisions of § 524(c) are not applicable.”).

14. Will the court reopen a bankruptcy case to allow the filing of a reaffirmation agreement?

*See, e.g.,*

*In re Suber*, 2007 WL 2325229 (Bankr. D.N.J. 2007) (cannot reopen if no evidence that agreement made prior to discharge);

*In re Lee*, 356 B.R. 177 (Bankr. N.D. W. Va. 2006) (debtors sought to reaffirm their home mortgage, but filed incorrect papers; even though the clerk notified them of the error, they failed to correct it; the court said, “[g]iving effect to a signed reaffirmation agreement when the disclosures required by § 544(k) have not been made thwarts the Congressional intent to fully inform debtors of their rights and responsibilities in executing the agreement”; request for reopening to allow debtors to file an unenforceable reaffirmation agreement denied).

#### G. THE ROLE OF THE DEPARTMENT OF JUSTICE AND THE FBI

A new provision has been added to the Bankruptcy Crimes section of title 28. It provides that the Attorney General shall designate a United States Attorney for each judicial district of the United States and an agent of the Federal Bureau of Investigation who shall have primary responsibility in carrying out enforcement activities in addressing violations of §§ 152 or 157 relating to abusive reaffirmations of debt. See 18 U.S.C.A. § 158.