

Reaffirmation Agreements

CONCURRENT SESSION

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Reaffirmation Agreements

Hon. Jennie D. Latta, Moderator
Richard H. Thomson
Fran Riley

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AOB27 (Official Form27)(12/09)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re _____ Case No. _____

Debtor. _____ Chapter _____

REAFFIRMATION AGREEMENT COVER SHEET

This form must be completed in its entirety and filed, with the reaffirmation agreement attached, within the time set under Rule 4008. It may be filed by any party to the reaffirmation agreement.

1. Creditor's Name: _____
2. Amount of the debt subject to this reaffirmation agreement:
\$ _____ on the date of bankruptcy \$ _____ to be paid under reaffirmation agreement
3. Annual percentage rate of interest: _____% prior to bankruptcy
_____ % under reaffirmation agreement (_____ Fixed Rate ___ Adjustable Rate)
4. Repayment terms (if fixed rate): \$ _____ per month for _____ months
5. Collateral, if any, securing the debt: Current market value: \$ _____
Description: _____
6. Does the creditor assert that the debt is nondischargeable? ___ Yes ___ No

(If yes, attach a declaration setting forth the nature of the debt and basis for the contention that the debt is nondischargeable.)

Debtor's Schedule I and J Entries

Debtor's Income and Expenses

as Stated on Reaffirmation Agreement

- | | |
|---|---|
| <p>7A. Total monthly income from \$ _____
Schedule I, line 16</p> <p>8A. Total monthly expenses \$ _____
from Schedule J, line 18</p> <p>9A. Total monthly payments on \$ _____
reaffirmed debts not listed on
Schedule J</p> | <p>7B. Monthly income from all \$ _____
sources after payroll deductions</p> <p>8B. Monthly expenses \$ _____</p> <p>9B. Total monthly payments on \$ _____
Reaffirmed debts not included in monthly expenses</p> <p>10B. Net monthly income \$ _____
(Subtract sum of lines 8B and 9B from line 7B. If total is
less than zero, put the number in the brackets.)</p> |
|---|---|

AOB27 (Official Form27)(12/09)

11. Explain with specificity any difference between the income amounts (7A and 7B):

12. Explain with specificity any difference between the expense amounts (8A and 8B):

If line 11 or 12 is completed, the undersigned debtor, and joint debtor if applicable, certifies that any explanation contained on those lines is true and correct.

Signature of Debtor (only required if line 11 or 12 is completed)

Signature of Joint Debtor (if applicable, and only required if line 11 or 12 is completed)

Other Information

Check this box if the total on line 10B is less than zero. If that number is less than zero, a presumption of undue hardship arises (unless the credit union) and you must explain with specificity the sources of funds available to the Debtor to make the monthly payments on the reaffirmed debt: _____

Was debtor represented by counsel during the course of negotiating this reaffirmation agreement?

_____ Yes _____ No

If debtor was represented by counsel during the course of negotiating this reaffirmation agreement, has counsel executed a certification (affidavit or declaration) in support of the reaffirmation agreement?

_____ Yes _____ No

FILER'S CERTIFICATION

I hereby certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this Reaffirmation Agreement Cover Sheet.

Signature

Print/Type Name & Signer's Relation to Case

AO 240 - Reaffirmation Agreement (12/11)
Debtor/Attorney Representation

- Presumption of Undue Hardship
 - No Presumption of Undue Hardship
- (Check box as directed in Part D. Debtor's Statement in Support of Reaffirmation)

UNITED STATES BANKRUPTCY COURT
Western District of Tennessee

In re _____ Case No. _____
Debtor Chapter _____

REAFFIRMATION AGREEMENT
[Indicate all documents included in this filing by checking each applicable box.]

Part A: Disclosures, Instructions, and Notice to Debtor (Pages 1-3)

Name of Creditor: _____

[Check this box if Creditor is a Credit Union as defined in § 19(b)(1)(A)(iv) of the Federal Reserve Act.

4 PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: \$ _____

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the

time of the disclosure statement: _____ %

---And/Or---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____ % If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

\$ _____ @ _____ %
\$ _____ @ _____ %
\$ _____ @ _____ %

b. If the debt is an extension of credit other than under an open end credit plan, the creditor may disclose the annual percentage rate shown in (i) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if not such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____ %

---And/Or---

(ii) The simple interest rate applicable to the amount reaffirmed as for the date this disclosure statement is given to the debtor: _____ % If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

\$ _____ @ _____ %
\$ _____ @ _____ %
\$ _____ @ _____ %

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act.

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item: Original Purchase Price or Original Amount of Loan

Optional:--At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of \$ _____ is due on _____ (date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable

---Or---

Your payment schedule will be: _____ (number) payments in the amount of \$ _____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.), unless altered later by mutual agreement in writing.

---Or---

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).
2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.
3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.
4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.
5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.
6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.
7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A "lien" is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of the allowed secured claim, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor "may" do, it does not use the word "may" to give the creditor specific permission. The word "may" is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

SIGNATURE(S):

Borrower: _____ by Creditor: _____

(Print Name) (Printed) Name of Creditor

(Signature) (Address) of Creditor

Date: _____ (Signature)

Co-borrower, if also reaffirming these debts: _____ (Printed Name and Title of Individual Signing for Creditor)

(Print Name) Date of creditor acceptance: _____

(Signature) Date

Date: _____

AO 240 - Reaffirmation Agreement (12/11)
Debtor/Attorney Representation

Presumption of Undue Hardship
 No Presumption of Undue Hardship
(Check box as directed in Part D Debtor's Statement in Support of Reaffirmation)

UNITED STATES BANKRUPTCY COURT
Western District of Tennessee

In re _____ Case No. _____
Debtor _____ Chapter _____

REAFFIRMATION AGREEMENT
[Indicate all documents included in this filing by checking each applicable box.]

Part B: Reaffirmation Agreement

Name of Creditor: _____

[Check this box iff Creditor is a Credit Union as defined in § 19(b)(1)(a)(iv) of the Federal Reserve Act.

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

- Brief description of credit agreement:
- Description of any changes to the credit agreement made as part of this reaffirmation agreement.

AO 240 - Reaffirmation Agreement (12/11)
Debtor/Attorney Representation

Presumption of Undue Hardship
 No Presumption of Undue Hardship
 (Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation)

UNITED STATES BANKRUPTCY COURT
Western District of Tennessee

In re _____ Case No. _____
Debtor _____ Chapter _____

REAFFIRMATION AGREEMENT
[Indicate all documents included in this filing by checking each applicable box.]

Part C: Certification by Debtor's Attorney

Name of Creditor: _____
 [Check this box iff Creditor is a Credit Union as defined in § 19(b)(1)(p)(iv) of the Federal Reserve Act

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY)
[To be filed only if the attorney represented the debtor in negotiating the reaffirmation agreement.]

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.

[Check box, if applicable, and the creditor is not a Credit Union.] 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.

Printed Name of Debtor's Attorney: _____
Signature of Debtor's Attorney: _____
Date: _____

AO 240 - Reaffirmation Agreement (12/11)
Debtor/Attorney Representation

Presumption of Undue Hardship
 No Presumption of Undue Hardship
 (Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation)

UNITED STATES BANKRUPTCY COURT
Western District of Tennessee

In re _____ Case No. _____
Debtor Chapter _____

REAFFIRMATION AGREEMENT

(Indicate all documents included in this filing by checking each applicable box.)

Part D: Debtor's Statement in Support of Reaffirmation Agreement

Name of Creditor _____
 [Check this box if] Creditor is a Credit Union as defined in § 19(b)(1)(a)(iv) of the Federal Reserve Act
[Read and complete numbered paragraphs 1 and 2, Q&A, if the creditor is a Credit Union and the debtor is represented by an attorney, read the unnumbered paragraph below. Sign the appropriate signature line(s) and date your signature. If you complete paragraphs 1 and 2 and your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship."]

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$ _____ and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$ _____, leaving \$ _____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____
-----Or-----

[If the creditor is a Credit Union and the debtor is represented by an attorney]

I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

(Joint Debtor, if any)

Date: _____

AO 240E - Reaffirmation Agreement (12/11)

Presumption of Undue Hardship
 No Presumption of Undue Hardship
 (Check box as directed in Part D. Debtor's Statement in Support of Reaffirmation)

UNITED STATES BANKRUPTCY COURT
 Western District of Tennessee

In re Case No. Chapter Debtor

Part E: Motion for Court Approval
[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

Name of Creditor: _____

[Check this box if] Creditor is a Credit Union as defined in § 19(b)(1)(a)(iv) of the Federal Reserve Act.
[Note: Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. Note also: If you complete Part E, you must prepare and file Form 240C ALT - Order on Reaffirmation Agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (check all applicable boxes):

11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

AO 240 - Reaffirmation Agreement (12/11) Part E

11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed _____
 (Debtor)

 (Joint Debtor, if any)

Date: _____

AO 240E (Form 240E/ALT) - Reaffirmation Agreement (12/11)

Presumption of Undue Hardship
 No Presumption of Undue Hardship
 (Check box as directed in Part D. Debtor's Statement in Support of Reaffirmation)

UNITED STATES BANKRUPTCY COURT
 Western District of Tennessee

In re Case No. Chapter Debtor

Part E: Motion for Court Approval
[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

Name of Creditor: _____

[Check this box if] Creditor is a Credit Union as defined in § 19(b)(1)(a)(iv) of the Federal Reserve Act.
[Note: Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. Note also: If you complete Part E, you must prepare and file Form 240C ALT - Order on Reaffirmation Agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (check all applicable boxes):

11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re

Case No.
Chapter 7

Debtor(s).

**NOTICE OF HEARING
CONCERNING REAFFIRMATION AGREEMENT**

NOTICE IS HEREBY GIVEN THAT:

The Court has scheduled a hearing to consider the Reaffirmation Agreement, Docket No. __, filed by the debtor on (date of reaff. filing) , which shall be held on (date) , at a.m. in the United States Bankruptcy Court, 200 Jefferson Avenue, Courtroom , Memphis, Tennessee, for the following reason(s):

- The Reaffirmation Agreement Part C Certification by Debtor's Attorney (if any) is unsigned. *See* 11 U.S.C. § 524(k)(6).

- The Reaffirmation Agreement Part D Statement in Support of Reaffirmation Agreement gives rise to a presumption of undue hardship, but the Debtor has failed to satisfactorily explain how he or she can afford to make the payments. *See* 11 U.S.C. § 524(k)(6).

If the Debtor is represented by an attorney and an amended Reaffirmation Agreement is filed at least seven days prior to the scheduled hearing, it will not be necessary for the Debtor or the Debtor's attorney to attend unless specifically notified to do so.

This notice has been provided to the Debtor and the Debtor's attorney (if any), and to the creditor named in the Reaffirmation Agreement.

**Jed G. Weintraub
CLERK OF COURT**

By: _____
Deputy Clerk

Date:

EXHIBIT

B₁₀

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re _____ Case No. _____
Debtor. Chapter _____

NOTICE OF HEARING CONCERNING REAFFIRMATION AGREEMENT

I. PLEASE TAKE NOTICE that the court has conducted an initial review of the Reaffirmation Agreement filed by the Debtor on _____ and notes the following deficiencies in the form of the Agreement.

- The Part A Disclosure Statement is incomplete. *See* 11 U.S.C. §§ 524(k)(2) and (3)
- The Part B Reaffirmation Agreement is missing one or more signatures. *See* 11 U.S.C. §§ 524(s)(6).
- The Part C Certification by Debtor's Attorney (if any) is unsigned or is incomplete. *See* U.S.C. §§ 524(k)(6).
- The Part D Statement in Support of Reaffirmation Agreement has not been completed and/or signed. *See* 11 U.S.C. §§ 524(k)(6).
- Part D Statement in Support of Reaffirmation Agreement gives rise to a presumption of undue hardship, but the Debtor has failed to explain how he or she can afford to make the payments. *See* 11 U.S.C. §§ 524(k)(6).
- If the Debtor was not represented by an attorney in connection with the reaffirmation agreement, the Part E Motion for Court Approval was not completed and/or signed. *See* 11 U.S.C. §§ 524(k)(7).
- The Part D Statement in Support of Reaffirmation was not accompanied by a statement of the total income and expenses stated on Schedules I and J and/or fails to explain any difference between the total income and expenses stated on those schedules and the Part D Statement in Support of Reaffirmation Agreement. *See* FED. R. BANKR. P. 4008(b).
- Other _____

THE COURT HAS SCHEDULED A HEARING to consider the Reaffirmation on at _____ in the United States Bankruptcy Court.

If the Debtor is represented by an attorney and an amended Reaffirmation Agreement is filed at least seven days prior to the scheduled hearing, it will not be necessary for the Debtor or the Debtor's attorney to attend unless specifically notified to do so.

If the Debtor is not represented by an attorney, the Debtor must attend. This notice has been provided to the Debtor and the Debtor's attorney (if any) and to the creditor named in the Reaffirmation Agreement.

**Jed G. Weintraub
CLERK OF COURT**

BY: _____

DATE: _____
Deputy Clerk

The court grants the debtor(s) motion under 11 U.S.C. § 524(k)(8) and approves the reaffirmation agreement described above.

The court does not disapprove the reaffirmation agreement under 11 U.S.C. § 524(m).

The court disapproves the reaffirmation agreement under 11 U.S.C. § 524(m).

The court does not approve the reaffirmation agreement.

cc: Debtor(s)
 Attorney for debtor(s)
 Creditor
 United States Trustee
 Chapter 7 Trustee

**United States Bankruptcy Court
 Western District of Tennessee**

Case No.
 Chapter

In re
 Debtor(s)

ORDER ON REAFFIRMATION AGREEMENT

The debtor(s) _____ has (have) filed a motion for approval of the reaffirmation agreement dated _____ made between the debtor(s) and _____ The court held the hearing required by 11 U.S.C. § 524(d) on notice to the debtor(s) and the creditor on _____

COURT ORDER: The court grants the debtor(s) motion under 11 U.S.C. § 524(c)(6)(A) and approves the reaffirmation agreement described above as not imposing an undue hardship on the debtor(s) or a dependent of the debtor(s) and as being in the best interest of the debtor(s).

CONSIDER THIS BEFORE YOU REAFFIRM

Do you really need it?

Answer this question honestly. You may like that new sofa, the new computer or that TV, but its time to make hard choices and you can't keep everything. Only consider reaffirming debts on things you absolutely need, like your car to go to work.

IF YES

Can you get another one for less money? IF SO, DON'T REAFFIRM!

Can you really afford it? (I MEAN REALLY!!) IF NOT, DON'T REAFFIRM!

Has the creditor offered you a "new deal," credit card or anything else to reaffirm?

WEIGH YOUR OPTIONS- LOWER INTEREST RATES AND BETTER PAYMENT TERMS MAY NOT BE THE ANSWER

You still want to reaffirm?

So you still want to keep it.
Can your creditor repossess or take the property if you don't make your payments? Make sure the creditor shows you the paper that says they can take your property. If they can't, DON'T REAFFIRM!

Are you way behind on your payments? If you do not have a real chance to catch up, you will default later and lose your property anyway. DON'T REAFFIRM!

When you owe a lot of money and the creditor is offering to give you new credit or keep your account in good standing, be careful and think: **ARE THERE CHEAPER WAYS TO GET CREDIT?**

BEFORE YOU SIGN...

**IF NO,
GIVE IT BACK!**

- If you decide to reaffirm, you must sign the reaffirmation agreement before you get a discharge.
- Do you understand the agreement? Amount you owe? Payment terms?
- Are all agreed terms in the document?
- If you don't have an attorney, the bankruptcy court must approve the agreement before it is binding and a creditor can enforce it.
- If you change your mind you can cancel the agreement anytime before your discharge or 60 days after the agreement is filed with the court, whichever comes later. Just tell the creditor (in writing is best), and the agreement is cancelled. This is your right to rescind the agreement.

FLA. BAR
BUSINESS
LAW
SECTION

11 U.S.C. § 524. Effect of discharge (Excerpts)

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if--

- (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
- (2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;
- (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that--
 - (A) such agreement represents a fully informed and voluntary agreement by the debtor;
 - (B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and
 - (C) the attorney fully advised the debtor of the legal effect and consequences of--
 - (i) an agreement of the kind specified in this subsection; and
 - (ii) any default under such an agreement;
- (4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;
- (5) the provisions of subsection (d) of this section have been complied with; and
- (6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as--
 - (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
 - (ii) in the best interest of the debtor.
- (B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall--

- (1) inform the debtor--
 - (A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

- (B) of the legal effect and consequences of--
- (i) an agreement of the kind specified in subsection (c) of this section; and
 - (ii) a default under such an agreement; and
- (2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.
- (e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.
- (f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.
- (k)(1) The disclosures required under subsection (c)(2) shall consist of the disclosure statement described in paragraph (3), completed as required in that paragraph, together with the agreement specified in subsection (c), statement, declaration, motion and order described, respectively, in paragraphs (4) through (8), and shall be the only disclosures required in connection with entering into such agreement.
- (2) Disclosures made under paragraph (1) shall be made clearly and conspicuously and in writing. The terms “Amount Reaffirmed” and “Annual Percentage Rate” shall be disclosed more conspicuously than other terms, data or information provided in connection with this disclosure, except that the phrases “Before agreeing to reaffirm a debt, review these important disclosures” and “Summary of Reaffirmation Agreement” may be equally conspicuous. Disclosures may be made in a different order and may use terminology different from that set forth in paragraphs (2) through (8), except that the terms “Amount Reaffirmed” and “Annual Percentage Rate” must be used where indicated.
- (3) The disclosure statement required under this paragraph shall consist of the following:
- (A) The statement: “Part A: Before agreeing to reaffirm a debt, review these important disclosures.”;
 - (B) Under the heading “Summary of Reaffirmation Agreement”, the statement: “This Summary is made pursuant to the requirements of the Bankruptcy Code”;
 - (C) The “Amount Reaffirmed”, using that term, which shall be--
 - (i) the total amount of debt that the debtor agrees to reaffirm by entering into an agreement of the kind specified in subsection (c), and
 - (ii) the total of any fees and costs accrued as of the date of the disclosure statement, related to such total amount.
 - (D) In conjunction with the disclosure of the “Amount Reaffirmed”, the statements--
 - (i) “The amount of debt you have agreed to reaffirm”; and
 - (ii) “Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your “credit agreement.”.

(E) The “Annual Percentage Rate”, using that term, which shall be disclosed as--

(i) if, at the time the petition is filed, the debt is an extension of credit under an open end credit plan, as the terms “credit” and “open end credit plan” are defined in section 103 of the Truth in Lending Act, then--

(I) the annual percentage rate determined under paragraphs (5) and (6) of section 127(b) of the Truth in Lending Act, as applicable, as disclosed to the debtor in the most recent periodic statement prior to entering into an agreement of the kind specified in subsection (c) or, if no such periodic statement has been given to the debtor during the prior 6 months, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of each such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under subclause (I) and the simple interest rate under subclause (II); or

(ii) if, at the time the petition is filed, the debt is an extension of credit other than under an open end credit plan, as the terms “credit” and “open end credit plan” are defined in section 103 of the Truth in Lending Act, then--

(I) the annual percentage rate under section 128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to the entering into an agreement of the kind specified in subsection (c) with respect to the debt, or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed at the time the disclosure statement is given to the debtor, or to the extent this annual percentage rate is not readily available or not applicable, then

(II) the simple interest rate applicable to the amount reaffirmed as of the date the disclosure statement is given to the debtor, or if different simple interest rates apply to different balances, the simple interest rate applicable to each such balance, identifying the amount of such balance included in the amount reaffirmed, or

(III) if the entity making the disclosure elects, to disclose the annual percentage rate under (I) and the simple interest rate under (II).

(F) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act, by stating “The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.”

(G) If the debt is secured by a security interest which has not been waived in whole or in part or determined to be void by a final order of the court at the time of the disclosure, by disclosing that a security interest or lien in goods or property is asserted over some or all of the debts the debtor is reaffirming and listing the items and their original purchase price that are subject to the asserted security interest, or if not a purchase-money security interest then listing by items or types and the original amount of the loan.

(H) At the election of the creditor, a statement of the repayment schedule using 1 or a combination of the following--

(i) by making the statement: “Your first payment in the amount of \$ ___ is due on ___ but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.”, and stating the amount of the first payment and the due date of that payment in the places provided;

(ii) by making the statement: “Your payment schedule will be:”, and describing the repayment schedule with the number, amount, and due dates or period of payments scheduled to repay the debts reaffirmed to the extent then known by the disclosing party; or

(iii) by describing the debtor's repayment obligations with reasonable specificity to the extent then known by the disclosing party.

(I) The following statement: “Note: When this disclosure refers to what a creditor ‘may’ do, it does not use the word ‘may’ to give the creditor specific permission. The word ‘may’ is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.”

(J)(i) The following additional statements:

“Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

“1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

“2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

“3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

“4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

“5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

“6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

“7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

“Your right to rescind (cancel) your reaffirmation agreement. You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

“What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

“Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

“What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ‘lien’ is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the property securing the lien if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you must make a single payment to the creditor equal to the amount of the allowed secured claim, as agreed by the parties or determined by the court.”.

(ii) In the case of a reaffirmation under subsection (m)(2), numbered paragraph 6 in the disclosures required by clause (i) of this subparagraph shall read as follows:

“6. If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.”.

(4) The form of such agreement required under this paragraph shall consist of the following:

“Part B: Reaffirmation Agreement. I (we) agree to reaffirm the debts arising under the credit agreement described below.

“Brief description of credit agreement:

“Description of any changes to the credit agreement made as part of this reaffirmation agreement:

“Signature: Date:

“Borrower:

“Co-borrower, if also reaffirming these debts:

“Accepted by creditor:

“Date of creditor acceptance:”.

(5) The declaration shall consist of the following:

(A) The following certification:

“Part C: Certification by Debtor's Attorney (If Any).

“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:”.

(B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that, in the opinion of the attorney, the debtor is able to make the payment.

(C) In the case of a reaffirmation agreement under subsection (m)(2), subparagraph (B) is not applicable.

(6)(A) The statement in support of such agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

“Part D: Debtor’s Statement in Support of Reaffirmation Agreement.

“1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$____, leaving \$____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ____.

“2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.”.

(B) Where the debtor is represented by an attorney and is reaffirming a debt owed to a creditor defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act, the statement of support of the reaffirmation agreement, which the debtor shall sign and date prior to filing with the court, shall consist of the following:

“I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.”.

(7) The motion that may be used if approval of such agreement by the court is required in order for it to be effective, shall be signed and dated by the movant and shall consist of the following:

“Part E: Motion for Court Approval (To be completed only if the debtor is not represented by an attorney.). I (we), the debtor(s), affirm the following to be true and correct:

“I am not represented by an attorney in connection with this reaffirmation agreement.

“I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

“Therefore, I ask the court for an order approving this reaffirmation agreement.”

(8) The court order, which may be used to approve such agreement, shall consist of the following:

“Court Order: The court grants the debtor’s motion and approves the reaffirmation agreement described above.”.

(I) Notwithstanding any other provision of this title the following shall apply:

(1) A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.

(2) A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.

(3) The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), 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 required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This 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 such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.

(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

2008, and heard from both Debtors and their attorney (the same attorney represents both Debtors). In Mr. Pool's case, the claim is made that the presumption of undue hardship does not arise. In Mr. Davis's case, it clearly does. The court took the matters under advisement. The decision in these cases was delayed because the presiding judge underwent surgery and a medical leave shortly after the hearings. The court now renders its opinion.

FACTS

Mr. Pool seeks to reaffirm a debt secured by a manufactured home. The disclosures filed with his proposed reaffirmation agreement state that he has income of \$2,384.00 per month and expenses of \$819.06 per month, leaving \$1,564.44.¹ He seeks to reaffirm \$17,988.33 in debt, making payments of \$239.06 per month. In his bankruptcy schedules, Mr. Pool listed the manufactured home on Schedule A as real property. Although he does not list any leases on Schedule G, he indicates on Schedule J that his monthly rent or home mortgage payment, including "lot rented for mobile home," is \$538.00. In his testimony, Mr. Pool indicated that he does rent the land on which he lives, which costs \$280.00 per month, including property taxes.² The expenses listed on Schedule J (\$2,286.00), exceed his income listed on Schedule I (\$2,145.57), by \$140.43. Notwithstanding this, the Debtor indicates that the presumption of undue hardship does not arise.³

¹ The amount of \$1,564.44 appears to be a typographical error in that \$819.06 subtracted from \$2,384.00 is \$1,564.94.

² The discrepancy between the information given in the disclosures filed with the reaffirmation agreement and that given in Schedules I and J was not explained, although Interim Bankruptcy Rule 4008 requires that the debtor provide such an explanation.

³ Although the presumption of undue hardship is said to arise from the information provided in Part D, some courts have said that failure to explain any discrepancy may itself give rise to a presumption of undue hardship, or, at the very least, require the debtor to provide the required explanation. See *In re Jo*, 2007 WL 4411619 (Bankr. E.D. Va. December 14, 2007); *In re Layman*, 345 B.R. 305, 513-15 (Bankr. E.D. Pa. 2006). It is not necessary to the court's decision in this case to determine whether the presumption does or does not arise.



Dated: November 13, 2008
The following is ORDERED:

Jennie D. Latta
Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
THOMAS POOL,
Debtor.

Case No. 08-23770-L
Chapter 7

In re
JEFFREY DAVIS,
Debtor.

Case No. 08-24209-L
Chapter 7

OPINION

IN THESE TWO otherwise unrelated bankruptcy cases, the Debtors have requested that the court approve reaffirmation agreements that are not accompanied by the declaration or affidavit of an attorney. Either the Debtors or their attorney, or all three, believe that court approval will render these reaffirmation agreements enforceable notwithstanding the missing declarations. In both cases, the underlying bankruptcy petitions were filed and signed by an attorney. In neither case has the attorney withdrawn from representation. The court conducted hearings in both cases on July 24,

Mr. Davis seeks to reaffirm a debt secured by a motor vehicle. In connection with his reaffirmation agreement, Mr. Davis discloses that he has monthly income of \$5,309.36, and monthly expenses of \$5,874.58, leaving a negative balance of \$565.22, *before* the payment on the reaffirmed debt. The reaffirmation agreement calls for 12 monthly payments of \$399.58, and one optional balloon payment of \$14,212.45 on or after April 28, 2009. The Debtor admits that the presumption of undue hardship does arise in his case. The Debtor indicates that he will reduce unnecessary spending and rely on family members to help him make his payments.

ANALYSIS

The decision in these cases is governed by Bankruptcy Code section 524(c). That section provides:

- (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—
 - (1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
 - (2) the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;
 - (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that
 - (A) such agreement represents a fully informed and voluntary agreement by the debtor;
 - (B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and
 - (C) the attorney fully advised the debtor of the legal effect and consequences of—
 - (i) an agreement of the kind specified in this subsection; and
 - (ii) any default under such agreement;
 - (4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this subsection have been complied with; and

(6) (A) in a case concerning an individual who is not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

- (i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
- (ii) in the best interest of the debtor

(B) Subparagraph (A) shall not apply to the extent that such debt is consumer debt secured by real property

11 U.S.C. § 524(c).

These cases present the issue of the enforceability of a reaffirmation agreement not accompanied by the declaration or affidavit required by subsection 524(c)(3). The Debtors ask that the court “approve” their agreements notwithstanding this deficiency, presumably because they believe that court approval may be obtained *in lieu of* the required attorney declaration. They have provided no authority for this position.

The reaffirmation agreement proposed by Mr. Pool presents one issue not present with respect to the agreement proposed by Mr. Davis. Mr. Pool’s agreement purportedly concerns a consumer debt secured by real estate. No one has suggested that the mobile home that secures the debt underlying Mr. Pool’s agreement is not real estate, but certainly there are instances in which a mobile home is not considered to be real estate. See *Roberts v. Green Tree Fin. Corp. (In re Cassidy)*, 197 B.R. 846, 849 (Bankr. E.D. Tenn. 1996) (mobile home not affixed to real estate is a “motor vehicle” under Tennessee law). The record does not contain facts from which the court can draw any conclusion on this issue. Fortunately, however, it is not necessary to the questions that are before the court. Whether or not the reaffirmation agreement concerns a consumer debt secured by real estate is an issue only when the debtor is not represented by an attorney during the course of negotiating the reaffirmation agreement. Thus, although one of these cases may involve real

estate and the other clearly does not, both raise essentially the same question or questions: (1) when is a bankruptcy debtor represented by counsel; (2) what is the effect of an attorney's refusal to provide the declaration or affidavit required by section 524(c)(3); and (3) can this effect be overcome by obtaining court approval of the agreement?

1. *When is a bankruptcy debtor represented by counsel during the course of negotiating a reaffirmation agreement?*

It is not clear in these cases that the Debtors *actually* take the position that they were unrepresented by counsel during the course of negotiating their reaffirmation agreements. As stated previously, both petitions were signed by the same attorney, that attorney has not requested to be permitted to withdraw from these representations, and that attorney spoke on behalf of each of the Debtors at the hearings to consider approval of their reaffirmation agreements. Indeed, at the beginning of Mr. Pool's hearing, the attorney announced, "I'm his counsel." Neither Debtor suggested that his agreement with his attorney did not include representation during the course of negotiating a reaffirmation agreement and neither produced a written contract to that effect.

Although it is not clear that they do, the Debtors in these cases may take the position that their attorney's refusal to sign a declaration or affidavit in support of their reaffirmation agreements renders them unrepresented by counsel. This would be an extremely odd result, however. In a bankruptcy case, the fact of representation is a matter of public record. Once a bankruptcy petition is filed, the court and the public may determine the fact of representation and the identity of counsel by consulting court records. An attorney cannot be released from representation without court approval. L.B.R. 2090-1(f). See also, *In re Carvajal*, 365 B.R. 631 (Bankr. E.D. Va. 2007).

These cases do not raise the question of whether an appearance in the main bankruptcy case

is tantamount to an agreement to represent the debtor in any related adversary proceeding. Although that question is not presented for decision, I have generally taken the view that the agreement to represent a debtor in a bankruptcy case does *not* entail an agreement to represent the debtor in a related adversary proceeding. I have taken the position that if the debtor is a defendant in an adversary proceeding, he is not represented by counsel until counsel makes an appearance on his behalf by filing a responsive pleading.

Instead, these cases suggest the question whether an attorney may "carve out" certain activities during the course of representing a client in a bankruptcy case that are not within the scope of his or her representation. Although this question is likewise not squarely before the court, at a minimum, I believe that such "carve outs" must be the subject of a written agreement entered into *before* the filing of the bankruptcy petition. I would go further and say that the carve out of representation during the course of negotiating a reaffirmation agreement would be disfavored as the decision to enter into a reaffirmation agreement goes to the very heart of one of the most important benefits of the filing of a bankruptcy case -- the debtor's fresh start.

The court concludes that in these cases, the Debtors have not squarely presented the question of whether they were represented by counsel during the course of the negotiation of their reaffirmation agreements. All of the facts in these cases tend to indicate that they were represented, and the court will treat them as represented by counsel for the purposes of considering the remaining questions raised by them.

2. *What is the effect of an attorney's failure or refusal to provide the declaration or affidavit required by section 524(c)(3)?*

The effect of not obtaining an attorney's declaration or affidavit, if applicable, is clearly

"I understand that if my income less my monthly expenses do not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court." 11 U.S.C. § 524(k)(6)(A). The form of the statement goes further, however, permitting the debtor to list facts tending to demonstrate that notwithstanding his income and expenses, he will be able to make the monthly payments.

The form of declaration required of an attorney exactly tracks the language of subsection 524(c)(3), but adds one additional requirement: if a presumption of undue hardship arises, the attorney is asked to make the further statement that in her opinion, the debtor is able to make the required payment. 11 U.S.C. § 524(k)(5)(A). Thus, under BAPCPA, the attorney is not being asked to make a certification different from that required before BAPCPA – prior to the amendments of BAPCPA, the attorney was required to opine that the agreement did not pose an undue hardship for the debtor or a dependent of the debtor – rather, the facts upon which the attorney has relied to determine that the agreement will not impose an undue hardship are to be made clear. The refusal of an attorney to provide the required declaration or affidavit under BAPCPA can only be understood as the expression of the opinion of the attorney that the proposed agreement *does in fact* impose an undue hardship upon the debtor. If the debtor's attorney chooses not to give the required declaration or affidavit, it would be unreasonable and inappropriate for a bankruptcy judge to override this decision. The attorney should be in a better position than the court in the first instance to determine the personal and financial affairs of the debtor.

In sum, the effect of the failure or refusal of debtor's counsel to provide the declaration or affidavit required by section 524(c)(3) is that the reaffirmation agreement is not enforceable.

3. *May a reaffirmation agreement that is not enforceable under Section 524(c) be made*

spelled out. Section 524(c) provides that an agreement is enforceable *only if* the requirements set forth in the following six subsections are met. *In re Graham*, 297 B.R. 695, 698 (Bankr. E.D. Tenn. 2003). The effect of not providing the declaration or affidavit of the attorney who represented the debtor during the course of negotiating a reaffirmation agreement is that the agreement is not enforceable. *In re Isom*, 2007 WL 2110318 (Bankr. E.D. Va. 2007). *Accord In re Rhoads*, 2008 WL 597893, slip op. at *1 (Bankr. E.D. Va. March 3, 2008); *see also In re Husain*, 634 B.R. 211, 215 (Bankr. E.D. Va. 2007) ("Strict compliance with the provisions of § 524 of the Bankruptcy Code has always been a prerequisite to enforce a reaffirmation agreement.").

The declaration or affidavit required by counsel is not new. It is required by subsection 524(c)(3), a subsection that was not amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA). It contains three parts: a certification that (1) the agreement represents a fully informed and voluntary agreement by the debtor; (2) the agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and (3) that the attorney fully advised the debtor of the legal effects and consequences of the agreement and any default under the agreement. 11 U.S.C. § 524(c)(3). Before the amendments of BAPCPA, the attorney for the debtor was required to opine that a proposed reaffirmation agreement did not impose an undue hardship upon the debtor. *Graham*, 297 B.R. at 698.

What is new under BAPCPA are the forms of disclosure, declaration, and statement set forth in subsection 524(k). The form of statement required of the debtor in support of the reaffirmation agreement requires the debtor to list his monthly income and current actual monthly expenses. This requirement makes clear the ability or inability of a debtor to make the payments required by the reaffirmation agreements he proposes to enter into. The debtor is required to make the statement,

enforceable by court approval?

Because the Debtors in this case do not argue that they were unrepresented by counsel during the course of negotiating their reaffirmation agreements, their request for court approval of the reaffirmation agreements is better understood as a request that the court somehow render an unenforceable agreement enforceable. The Bankruptcy Code makes no provision for court approval *in lieu of* an attorney's declaration or affidavit, however. See *Ison*, 2007 WL 2110318, *2.

The Bankruptcy Code provides two instances in which a bankruptcy judge is called upon to review a reaffirmation agreement: (1) when the debtor was not represented by counsel during the course of negotiating the agreement, and (2) when the debtor was represented by counsel, and a presumption of undue hardship has arisen, but, in the opinion of debtor's counsel, the agreement does not *in fact* impose an undue hardship upon the debtor or a dependent of the debtor. The first instance of court review preceded the amendments of BAPCPA, the second was created by them.

The first instance of court review is required because the debtor has had no one to review the proposed reaffirmation agreement with her. The court is required to approve the proposed agreement as not imposing an undue hardship upon the debtor or a dependent of the debtor and as being in the best interest of the debtor, unless the debt to be reaffirmed is a consumer debt secured by real estate. 11 U.S.C. § 524(c)(6)(A) and (B). If the debtor is not represented by an attorney and the court has determined that discharge should be granted, and if the debtor desires to enter into a reaffirmation agreement, the court is directed to hold a hearing at which the debtor is present. See 11 U.S.C. § 524(d). The court is required to make the same disclosures that a debtor's attorney is required to make with respect to all reaffirmation agreements. 11 U.S.C. § 524(g)(1). The court is also required to form the opinion that the agreement does not pose an undue hardship and is in the

best interest of the debtor, unless the agreement is based in whole or in part on a consumer debt secured by real estate. 11 U.S.C. § 524(g)(2). In fact, this first instance of court review is the only instance in which the court is called upon actually *to approve* a reaffirmation agreement, and even then, is called upon to approve only those agreements in which the debt is not a consumer debt secured by real estate. The court is required to approve these agreements as not imposing an undue hardship because the debtor has no attorney to do this for her.

In the second instance of court review, the court is called upon to determine whether to *disapprove* a reaffirmation agreement that has been approved by debtor's counsel. Section 524(m) was added by the amendments of BAPCPA. It provides one additional layer of debtor protection for those debtors who are represented by attorneys. Under that section, if on the face of the statement by the debtor the presumption of undue hardship arises because the debtor's income is not adequate to pay her expenses *and* the payments called for by the proposed and any other reaffirmation agreements, but the debtor's attorney is satisfied with the debtor's explanation concerning how the payments will be made, the Bankruptcy Code requires the court to review the presumption.⁴ Section 524(m) further provides:

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 such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor and such hearing shall be concluded before the entry of the debtor's discharge.

11 U.S.C. § 524(m). The court must review the proposed agreement and the explanation given by

⁴ Although the language of the section directs the court to review the presumption, it may be inferred from the disclosures to be made and the opinion to be rendered that the court is being directed to review all of the documents submitted by the debtor in support of the proposed reaffirmation agreement as well as the underlying bankruptcy schedules.

the debtor for how she will be able to make the required payments. If the court agrees with the opinion of counsel and is *satisfied* that notwithstanding the presumption, the proposed agreement does not *in fact* pose an undue hardship, then the court does nothing. After sixty days, the agreement becomes enforceable. If the court is *dissatisfied* with the explanation given by the debtor, the court may disapprove the agreement, but only after giving the debtor an opportunity to provide additional explanation of his ability to make the required payments.

This provision clearly was intended to further protect the debtor from entering into a reaffirmation agreement unadvisedly. It protects the debtor by requiring an additional set of eyes to review the proposed agreement when the numbers are close and there is reason to believe that the debtor may not be able to make the required payments. It also provides additional protection for the debtor's attorney, who may too easily be swayed by the debtor's explanation for how her payments are going to be made. The court provides an objective review of the proposed agreement by someone who has no personal relationship with the debtor. The court's review is not intended, however, to substitute for the disclosures and review required of the debtor's attorney, if he has one.

In sum, a reaffirmation agreement that is not enforceable because it is not accompanied by the declaration or affidavit required by section 524(c)(3) may not be rendered enforceable by court review or approval. The Bankruptcy Code does not contemplate court approval of a reaffirmation agreement submitted by a debtor who is represented by an attorney.

CONCLUSION

The Bankruptcy Code makes clear that it is the debtor's attorney, if he has one, who must make the required disclosures and form the initial opinion that the proposed agreement does not impose an undue hardship upon the debtor or a dependent of the debtor. Failure of the debtor's

attorney to provide the required declaration or affidavit is tantamount to a declaration that, in the opinion of the attorney, the agreement *does in fact* impose an undue hardship upon the debtor or his dependent. The Bankruptcy Code makes no provision for court approval of a reaffirmation agreement for a debtor who is represented by an attorney. Instead, the Code provides only for disapproval of an agreement initially approved by an attorney when the presumption of undue hardship arises if the court is not satisfied with the debtor's explanation for how the payments are to be made.

For these reasons, the court declines to approve the reaffirmation agreements filed by Mr. Pool and Mr. Davis in these cases.

Separate orders will be entered in each of these cases.

cc: Debtor (both cases)
Attorney for Debtors
Case Trustee (both cases)
Matrix (both cases)