Reaffirmations and Related Ethics Issues

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REAFFIRMATIONS
Issues and Ethics

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I. The Basics

A. What is Reaffirmation?

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

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

If only it were that simple…

B. A Brief History – Pre and Post BAPCPA

Before the enactment of BAPCPA in 2005, five circuits, including the Ninth, allowed Debtors who wanted to keep their personal property subject to a security interest (usually cars) three options:

1. Redemption – Allowed debtor to pay creditor the present value of the vehicle shortly after filing bankruptcy.
2. Reaffirmation - Debtor agreed to accept personal liability for deficiency if later defaulted.
3. "Ride-through" – Allowed debtor to keep car as long as continued making payments, without requiring filing of reaffirmation agreement.

BAPCPA's amendments to Bankruptcy Code sections 362 and 521 restricted debtor's ability to state an intention to "ride-through"; debtors who seek to retain a vehicle after filing for Chapter 7 relief now required to state intention to reaffirm or redeem. BAPCPA

created a carve-out for enforcement by secured creditor of "ipso facto" (debtor's automatic default upon filing of bankruptcy) clauses in the contract where debtor does not comply with sections 362 and 521.

See attached article: Magdalena Reyes Bordeaux, Reaffirmation *Agreements in Chapter 7 Bankruptcy Proceedings*, LOS ANGELES LAWYER, March 2012.

C. The Details

1. Ipso Facto Clauses Generally Not Enforceable

§365 **Executory Contracts**

Section 365(e)(1)(B) provides that an executory contract cannot be terminated or modified at any time after commencement of bankruptcy case solely because of a provision in the contract that is conditioned on the commencement of a bankruptcy case.

§541 Property of the Estate

Section 541(c)(1)(B) provides that property of the debtor becomes property of the estate notwithstanding an agreement, transfer instrument or nonbankruptcy law that is conditioned on commencement of a bankruptcy case (with exception of transfer of beneficial interest in trust enforceable under nonbankruptcy law, §541(c)(1)(B)(2)).

BUT

§**362 Automatic Stay**

Section 362(h)(1)(A), a BAPCPA provision, provides that the automatic stay is terminated with respect to personal property of the estate or the debtor securing in whole or part a claim if the debtor fails to timely file a statement of intention indicating that debtor intends to surrender or retain the property, and if

retaining, either to redeem or enter into a reaffirmation agreement.

§**521 Debtor's Duties**

Section 521(a)(2)(A) provides that, within 30 days after the date of filing Chapter 7 petition (or on or before date of meeting of creditors if earlier), debtor to file statement of intention with respect to the retention or surrender of property of estate secured by scheduled debt, and if applicable specifying that such property is claimed as exempt, that debtor intends to redeem such property or reaffirm debts secured by such property.

Then, under §521(a)(2)(B), debtor must perform that intention within 30 days after the first date set for the meeting of creditors, or such additional time as court may fix, for cause, within the 30-day time period, "except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)".

Section 521(a)(6) provides that a Chapter 7 individual debtor with personal property subject to a purchase money security interest shall not retain possession of that property unless the debtor, within 45 days of the first meeting of creditors, takes either of two steps: (1) enters into a reaffirmation agreement with the creditor under §524(c) or (2) redeems the property.

2. <u>The Nitty Gritty of the Reaffirmation Agreement</u>

§524 **Effect of Discharge**

Section 524(c) sets forth the elements required to be satisfied for an enforceable reaffirmation agreement between the debtor and a creditor as follows:

(1) The agreement must be enforceable under applicable nonbankruptcy law;

(2) The agreement was made before debtor's discharge granted (§524(c)(1));

(3) Debtor received disclosures described in §524(k) before or at time debtor signed reaffirmation agreement (§524(c)(2));

(4) The agreement has been filed with the court (§524(c)(3));

(5) If debtor has an attorney, a declaration or affidavit of the attorney that states that (a) agreement represents fully informed and voluntary agreement by debtor, (b) agreement does not impose an undue hardship on debtor or dependent of debtor, and (c) attorney fully advised debtor of the legal effect and consequences of reaffirmation agreement and any default thereunder (§524(c)(3));

(6) Debtor has not rescinded the agreement prior to discharge or within 60 days after such agreement is filed with court, whichever is later, by giving notice to the creditor (§524(c)(4));

(7) The provisions of §524(d) [regarding court hearing] also have been satisfied ((§524(c)(5)); and

(8) If debtor is not represented by an attorney during course of negotiating agreement, the court approves the agreement as (1) not imposing an undue hardship on debtor or a dependent of debtor, and (2) being in the best interest of the debtor.

Criteria for finding:
(1) No Undue Hardship

It's just math:

Presumption of undue hardship if debtor's monthly income is less than debtor's monthly expenses as shown on signed statement in support of reaffirmation agreement. Presumption can be rebutted in writing if statement identifies additional sources of income. §524(m)(1)

(2) In Debtor's Best Interest

No set criteria in Code, a fact specific analysis.

What do judges consider?

High payments/term remaining

% of income

Co-signer – who is driving the vehicle

Multiple vehicles

"Benefits" to debtor such as:

Lower interest rate

Reporting to credit bureaus
Creditor not accepting payment without it

Rule 4008 - Filing of Reaffirmation Agreement; Statement in Support of Reaffirmation Agreement

(a) Filing of Reaffirmation Agreement

Shall be filed within 60 days after first date set for meeting of creditors.

Reaffirmation shall be accompanied by a cover sheet as prescribed by appropriate Official Form,

Court may at any time and in its discretion, enlarge time to file a reaffirmation agreement.

Conflict with Bankruptcy Code?

(b) Statement in Support of Reaffirmation Agreement

Statement required under §524(k)(6)(A) shall include statement of total income and expenses stated on schedules I and J, and if a difference between statement as of time of reaffirmation, statement shall include explanation of difference.

Reaffirmation Agreement Forms

•B27 (Official Form 27) (12/13) – Reaffirmation Cover Sheet

•National Form B240A (4/10) – Reaffirmation Agreement

•National Form B240B (12/09) - Motion for Approval of Reaffirmation Agreement

Incomplete agreements/missing information - what do judges require?

3. Creditor's Role in Reaffirmation Agreement

Can a creditor simply not provide debtor with a reaffirmation agreement and then enforce ipso facto clause (debtor has not timely filed a reaffirmation agreement)? See *In re Quintero*, 2006 Bankr. LEXIS 906, at 909-10 (Bankr. N.D. Cal. May 2006) (debtor prohibited from repossessing car where did not provide debtor with disclosure statement at appropriate time under §524(k)).

4. Can Secured Creditor Enforce Ipso Facto Clause if Court Denies Reaffirmation?

Section 521(d) – Creditors' argument that can repossess if reaffirmation denied rejected in Oregon (*In re Bower,* 2007 Bankr. LEXIS 2580, 2588 (Bankr. D. Or. July 27, 2006), N.D. California (*In re Quintero*), and Arizona (*In re Moustafi*, 371 B.R. 434 (Bank.D. Ariz 2007)).

But other reasons for denial, *e.g.* debtor did not appear at hearing, could leave debtor open to enforcement of ipso facto clause.

If creditor cannot enforce ipso facto clause as long as debtor filed statement of intention and followed through with agreement, why would courts approve reaffirmation agreements? Are reaffirmation agreements ever in a debtor's best interest?

II. Selected Legal Issues

A. Riding Through – Dead or Alive?

"Retain and Pay" Orders

In re Moustafi, 371 B.R. 434 (Bank.D. Ariz 2007):

> The Debtor complied with the requirements of the Bankruptcy Code by timely filing her statement of intention and timely entering into a reaffirmation agreement with the credit union that holds a security interest in her car. That reaffirmation agreement will not, however, be approved because the Debtor's net monthly income is less than her expenses and because the car is worth less than what she owes on it. Despite the changes made to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), a debtor may still, under certain limited circumstances, retain a car even without a court approved reaffirmation agreement. This is such a case.

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

B. Reaffirmation of Debts Other than Vehicles – Can/Should it be Done?

1. Vehicle Leases

   Reaffirm or assume lease?

2. Other Personal Property

   Electronics, Furniture (e.g. Best Buy and R.C. Willey)

   RVs, Boats

3. Mortgages

Does reaffirmation apply to debt secured by real property?

§521(a)(6) applies to debt secured by personal property

§524(c)(6)(B) and (d)(2) – agreement based on consumer debt not secured by real estate.

Can it be in a debtor's best interest to take personal liability for long term, large debt?

C. Reopening Cases to Reaffirm Debt

1. Why would a debtor want to do this?

2. Is it too late?

Remember §524(c)(1) - enforceable reaffirmation agreement requires that agreement was made before debtor's discharge granted.

So, can debtor have discharge vacated?

See *In Re McNeal*, Case No. 13-32395 (Bankr.N.D.Ohio, October 2, 2013) (Order Denying Motion to Vacate Discharge).

3. The Mortgage Conundrum

When lenders insist on a reaffirmation for a modification or refinance:

Pre-discharge

Post-discharge

D. Credit Unions

Undue hardship – subsection (m) of §524 (re presumption of undue hardship) does not apply where creditor is a credit union.

Does that mean judge does not consider debtor's net monthly income?

E. District-Specific Issues/Procedures

Arizona – No hearing on request to reaffirm mortgage; form order denying reaffirmation of mortgages attached.

Nevada - NRS 97.304 (gutting ipso facto default provisions in vehicle retail installment sales contracts entered into beginning 10/1/2011) and unpublished Markell Opinion, *In Re Henderson*, 12-23691 (attached), that not in best interest to reaffirm.

Northern District of California - Order Disapproving Reaffirmation Agreement where debtor indicated willingness to enter into reaffirmation agreement (attached).

III. Ethical and Practice Issues

A. Client Intake

Duty to advise clients about reaffirmation?

What if they have negative income, no equity, and want to keep the car?

What if reaffirming isn't in client's best interest?

What if they are behind on payments?

Can reaffirmation assistance/advice be carved out or is it too integral to obtaining a discharge?

B. Timely Filing of Statement of Intention

Importance of compliance and indicating intent to reaffirm if keeping the vehicle; make sure calendared if not filed with initial petition.

C. Attorney Signing of Reaffirmation Agreement

Certification by attorney on Reaffirmation Agreement:

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

OR, if an undue hardship, attorney's opinion that debtor can make the payments.

Are there any situations in which attorney should sign a reaffirmation agreement?

If so, what precautions should be taken?

What if debtor can't make payments later?

D. Answering Questions/Reviewing Reaffirmation Agreement Even if Not Signing

Once again, can reaffirmation assistance/advice be carved out or is it too integral to obtaining a discharge?

E. Pro Bono Services

Programs available to assist persons proceeding without an attorney regarding reaffirmation agreements in:

District of Nevada: Bankruptcy Facilitator, Legal Aid Center of Southern Nevada
District of Arizona: Self Help Centers staffed by volunteer attorneys, run by Bankruptcy Section of State Bar
Central District of California: Bankruptcy Pro Bono Program reaffirmation clinics operated by Public Counsel's Debtor Assistance Program in conjunction with Los Angeles County Bar.

practice | tips

BY MAGDALENA REYES BORDEAUX

Reaffirmation Agreements in Chapter 7 Bankruptcy Proceedings

A DEBTOR WHO FILES FOR CHAPTER 7 bankruptcy relief must state an intention to retain or surrender personal property—usually a car. After the passage of the Bankruptcy Abuse Prevention Consumer Protection Act (BAPCPA) in 2005, the options available to the debtor wanting to keep a car were greatly restricted.[1]

Prior to the passage of BAPCPA, five circuits—including the Ninth—allowed debtors who wanted to keep their cars to carry out this intention by selecting from three options:[2]

1) A redemption agreement, which allowed the debtor to pay the creditor the present value of the vehicle soon after filing bankruptcy.[3]

2) A reaffirmation agreement, which imposed personal liability on the debtor if the debtor later defaulted on the car loan.[4]

3) The "ride-through" option,[5] which allowed a debtor to continue making payments on the vehicle without requiring a reaffirmation agreement to be filed with the bankruptcy court.[6]

The other circuits rejected the ride-through option and only recognized a debtor's right to indicate an intention to redeem or reaffirm.[7]

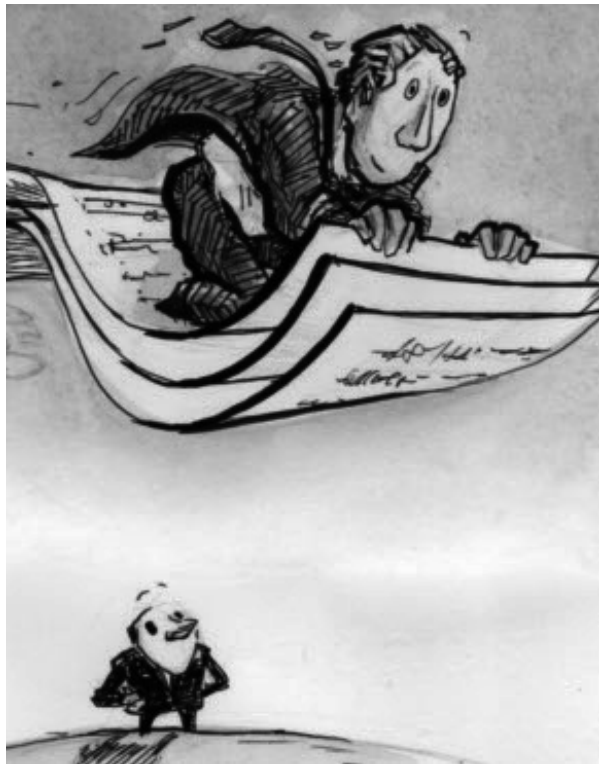
In the five circuits that permitted it, the ride-through option was extremely popular, because debtors could retain their vehicles without having to assume personal liability for the car loans.[8] The ride-through option also prevented creditors from impinging on a debtor's right to a fresh start because it did not impose personal liability on the debtor for the car loan. When a debtor selected the ride-through option a creditor still retained the right to repossess the vehicle if the debtor later defaulted on the loan.[9]

After BAPCPA, key provisions in Bankruptcy Code Sections 362 and 521 restricted a debtor's ability to state a ride-through intention when filing for Chapter 7 bankruptcy relief.[10] A debtor who seeks to retain a vehicle after filing for Chapter 7 relief is now required to state a permissible intention—which after BAPCPA is either an intention to reaffirm or redeem.[11]

Failure of a debtor to indicate a permissible intention may allow a creditor to exercise nonbankruptcy options, such as to invoke an ipso facto clause,[12] a contract provision that permits a creditor to declare the contract in default by virtue of the other party's insolvency or bankruptcy.[13] However, courts have held that a creditor is not permitted to exercise an ipso facto clause when a debtor complies with the newly adopted BAPCPA provisions under Sections 362 and 521 in the reaffirmation agreement process.[14] As such, even if a bankruptcy judge denies a reaffirmation agreement, a creditor is not permitted to exercise an ipso facto clause unless the creditor demonstrates that the debtor failed to comply with Sections 362 and 521.

Debtor Compliance

When a debtor files for bankruptcy, the automatic stay is triggered and prevents a creditor from repossessing a vehicle without permission from the court.[15] Generally, ipso facto clauses in installment contracts are unenforceable as a matter of law.[16] The bankruptcy code has afforded the debtor protections upon filing for bankruptcy pursuant to Bankruptcy Code Sections 365(e)(1)(B)[17] and 541(c)(1)(B),[18] which generally restrict or render unenforceable ipso facto clauses.



RICHARD EWING

However, under a new BAPCPA provision, Bankruptcy Code Section 362(h)(1)(A), the automatic stay can now be terminated in a Chapter 7 bankruptcy case when a debtor fails to timely file a statement of intention pursuant to Section 521(a)(2)(A), which requires a debtor retaining a vehicle with a secured loan to indicate either an intention to redeem or reaffirm. If a debtor fails to state an intention to redeem or reaffirm, the secured creditor has the right to take whatever action is permissible under nonbankruptcy law pursuant to Section 521(a)(6).[19] Accordingly, when a secured creditor has a permissible ipso facto clause in the loan agreement, a debtor's failure to comply with Sections 362 and 521 can trigger the ipso facto clause

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and leave the debtor vulnerable to repossession of his or her vehicle.

However, debtor compliance with newly adopted Sections 362 and 521 does not require the debtor to ensure the agreement is approved by the court. Courts have consistently held that compliance under Sections 362 and 521 only requires a debtor seeking to reaffirm a car loan to: 1) file a statement of intention indicating an intent to reaffirm, 2) cooperate with the creditor in filing a reaffirmation agreement with the bankruptcy court, and 3) act upon the intention to reaffirm by attending the reaffirmation hearing set by the bankruptcy court.[20]

Some courts have allowed a debtor to cure the failure to indicate an intention to reaffirm when a debtor timely executes a reaffirmation agreement.[21] Nevertheless, a debtor's failure to comply with Sections 521 and 362 is risky and could leave the debtor vulnerable to repossession of his or her vehicle by the secured creditor.[22] After a debtor has complied with Sections 521 and 362, the final determination of whether the reaffirmation agreement is legally enforceable is governed by Bankruptcy Code Section 524(c).

Approval of Reaffirmation Agreement

Pursuant to Section 524(c), a reaffirmation agreement is unenforceable unless the agreement is approved by the bankruptcy court. Provisions under Section 524(c) grew out of concerns about the long history of coercive and deceptive actions by creditors to secure reaffirmation agreements of discharged debt.[23]

Section 524(c) provides two ways that a debtor can request approval of a reaffirmation agreement by the bankruptcy court.

First, an attorney can certify the agreement does not pose an undue hardship on the debtor or a dependent of the debtor and that he or she provided the debtor with disclosures regarding the reaffirmation agreement, including that the agreement is voluntary.[24] Alternatively, a bankruptcy judge can determine that the reaffirmation agreement does not pose an undue hardship on the debtor or a dependent of the debtor and that the agreement is in the best interest of the debtor.[25]

After debtors have complied with Sections 362 and 521, they can first attempt to have a reaffirmation agreement approved by the bankruptcy court by asking their attorneys to sign a declaration along with the reaffirmation agreement.[26] The attorney declaration must state that the attorney: 1) informed the debtor that the agreement is voluntary, 2) informed the debtor about the consequences of reaffirming a discharged debt, and 3) determined the agreement does not pose undue hardship on the debtor or a dependent of the debtor.[27] If a debtor's attorney certification is not filed with the court or one is not filed because the debtor is unrepresented, the debtor must seek approval of a reaffirmation agreement from the bankruptcy court.

When a debtor requests that a bankruptcy judge approve a reaffirmation agreement, the request is made directly at a reaffirmation hearing.[28] At a reaffirmation hearing, a bankruptcy judge has the duty to carefully examine the debtor's financial circumstances and ensure that the reaffirmation agreement: 1) does not pose an undue hardship on the debtor or a dependent of the debtor, and 2) is in the best interest of the debtor.[29] Moreover, a presumption of undue hardship arises when the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of the agreement is less than the scheduled payments on the reaffirmed debts.[30]

When Congress passed BAPCPA, new Bankruptcy Code Section 524(k) expanded consumer debtor protections in the reaffirmation agreement process by requiring creditors to provide additional disclosures to the debtor in a timely manner so as to ensure the debtor is fully aware of the consequences of entering into a contract imposing personal liability of a discharged debt.[31] Congress, however, did not seek to eliminate or restrict subsequent review and approval by a bankruptcy judge of a reaffirmation agreement.[32] More importantly, Congress did not include any language when it passed BAPCPA and amended Section 524 that an ipso facto clause would be triggered if a bankruptcy court denied a reaffirmation agreement. If Congress had wanted to give a secured creditor the right to exercise an ipso facto clause upon denial of a reaffirmation agreement, it could have done so by inserting such language in Section 524, since Congress had already amended that section when it passed BAPCPA.

During the reaffirmation agreement hearing, a debtor is unable to compel a judge presiding over the reaffirmation hearing to approve a reaffirmation agreement.[33] In fact, the bankruptcy court has held that a debtor's concern over a creditor-relief provision, such as an ipso facto clause, if the court disapproves the reaffirmation agreement is not warranted, and is not sufficient to overcome a presumption of undue hardship.[34] Thus, a debtor can comply with Sections 362 and 521 and still not have an enforceable reaffirmation agreement because the bankruptcy judge has ruled, pursuant to Section 524, that the agreement poses either an undue hardship and/or is not in the best interest of the debtor. However, some creditors have tried to impose an additional obligation on debtors by advising them that if they are unable to get a reaffirmation agreement approved by the bankruptcy judge, an ipso facto clause in the contract will be triggered and leave them vulnerable to repossession of their cars.[35]

Ipso Facto Clauses

The bankruptcy code explicitly restricts the enforceability of ipso facto agreements pursuant to Bankruptcy Code Sections 362, 541(c)(1)(B), and 365(e)(B). Since the overriding purpose of a Chapter 7 bankruptcy relief is to provide the honest but unfortunate debtor with a fresh start, courts view ipso facto clauses as unenforceable as a matter of law.[36]

After BAPCPA, Congress created a carveout for secured creditors to exercise an ipso facto clause. However, the ability of a creditor to exercise the clause can only be triggered under very limited circumstances. The secured creditor's right to exercise an ipso facto clause can be further limited if a creditor refuses to provide a debtor with a reaffirmation agreement or file such an agreement with the bankruptcy court.[37] Thus, a secured creditor can lose the ability to exercise an ipso facto clause if the secured creditor thwarts a debtor's ability to carry out a debtor's intention to reaffirm pursuant to Bankruptcy Code Section 362(h)(1)(B).[38]

Bankruptcy courts have held that a creditor does not have the right to exercise an ipso facto clause when a debtor complies with Sections 362 and 521, but the bankruptcy judge denies the agreement at a reaffirmation hearing.[39] More importantly, courts have recognized that the provisions under Section 521(d), which can trigger an ipso facto clause, when working in concert with other sections of the code, can only be invoked by a debtor's failure to comply with Sections 362 and 521.[40] The bankruptcy courts have rejected the position argued by creditors that the language of Section 521(d) allows a secured creditor to exercise an ipso facto clause when a debtor has complied with Sections 362 and 521.[41]

Courts have further held that when a debtor complies with Sections 362 and 521, the debtor may retain possession of the collateral after the entry of discharge and the closure of the case without fear that the secured creditor will exercise an ipso facto provision and repossess the collateral, so long as the debtor remains current.[42] Since a secured creditor is not entitled to exercise an ipso facto clause after the bankruptcy court has denied a reaffirmation agreement, a creditor cannot thereafter repossess the vehicle without violating the automatic stay or discharge injunction when there is no payment or insurance default.[43] In fact, the bankruptcy court has found a secured creditor in violation of the discharge injunction and awarded compensatory damages along with return of the vehicle pursuant to Bankruptcy Code Section

105 after the creditor repossessed a vehicle when a debtor complied with Sections 362 and 521 and the bankruptcy judge denied the reaffirmation agreement at a reaffirmation hearing.[44]

The passage of BAPCPA brought many sweeping changes to the bankruptcy code, especially as they relate to consumer debtors filing for Chapter 7 bankruptcy. One key change was elimination of a debtor's ability to retain personal property securing a debt, such as a vehicle, without stating a permissible intention to either retain or redeem as required by Bankruptcy Code Sections 362 and 521. BAPCPA also created a limited carve-out for creditors to exercise an ipso facto clause under Bankruptcy Code Section 521 when the debtor failed to comply with Sections 362 and 521—provided the clause is permissible under applicable nonbankruptcy law.[45] Debtor compliance with Sections 362 and 521 does not require a debtor to get approval of the reaffirmation agreement. Sections 362 and 521 only require the debtor to enter the reaffirmation agreement.

When a bankruptcy court denies a reaffirmation agreement under Section 524(c) and the debtor has complied with Sections 362 and 521, bankruptcy courts have consistently held that a creditor cannot exercise an ipso facto clause. Since the approval of a reaffirmation agreement is out of the control of the debtor, courts have held that Section 521(d), which allows creditors to exercise a permissible ipso facto clause, is not triggered.

If a creditor exercises an ipso facto clause after the debtor has complied with Sections 362 and 521 in entering into a reaffirmation agreement that is denied by the judge, the creditor may be in violation of the automatic stay or discharge injunction. In such cases, the court may award compensatory and punitive damages against the secured creditor. ■

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[1] Bankruptcy Abuse Prevention Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[2] In re Dumont, 581 F. 3d 1104, 1109 (9th Cir. 2009).

[3] 11 U.S.C. §722. Since many debtors are unable to pay a vehicle's present value even if it is less than the outstanding loan, this option is often economically infeasible.

[4] 11 U.S.C. §524(c).

[5] In re Dumont, 581 F. 3d at 1108 n.3 ("Ride-through was not limited to automobile loans. However, as the name implies, ride-through was used most frequently to allow debtors to hold on to an automobile.").

[6] *Id.* at 1109.

[7] *Id.*

[8] *Id.* at 1108.

[9] *Id.*

[10] 11 U.S.C. §§362(h)(1)(a), 521(a)(2)(A), 521(a)(2)(B), 521(a)(6)(B), and 521(d). In re Perez, 2010 Bankr. LEXIS 2229, at *23 n.14 (Bankr. D. N.M. July 12, 2010).

[11] In re Dumont, 581 F. 3d at 1117.

[12] *Id.* at 1114.

[13] In re Perez, 2010 Bankr. LEXIS 2229, at 37 n.26.

[14] In re Dumont, 581 3d at 1118-19 (The court held that courts have allowed the ride-through after BAPCPA when there has been substantial compliance with §§362 and 521 by the debtor.).

[15] 11 U.S.C. §362(a)(2) provides "a petition filed… operates as a stay, applicable to all entities of the enforcement, against the debtor or against property of the estate."

[16] In re Jones, 591 F. 3d 308, 312 (4th Cir. W. Va. 2010) (citing Riggs Nat. Bank of Washington, D.C. v. Perry, 729 F. 2d 982, 984-85 (4th Cir. 1984) (explaining that [ipso facto] clauses deprive debtors of the advantages of bankruptcy proceedings by causing them to default immediately upon filing a bankruptcy petition)). 11 U.S.C. §365(e)(1)(B) generally renders unenforceable any contractual terms that purport to create a default solely based on the commencement of a bankruptcy case. In re Dumont, 581 F. 3d at 1115.

[17] In re Dumont, 581 F. 3d at 1115.

[18] *Id.* at n.18.

[19] 11 U.S.C. §521(a)(2)(6) provides:

> [I]f the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under Section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable non-bankruptcy law.

[20] 11 U.S.C. §§362(h)(1)(a), 521(a)(2)(A), 521(a)(2)(B), 521(a)(6)(B), 521(d). In re Perez, 2010 Bankr. LEXIS 2229, at *29 (Bankr. D. N.M. July 12, 2010) (The court held that §521(a)(2)(B) does not require the debtor to consummate an enforceable reaffirmation agreement, since whether the agreement is enforceable depends on factors outside the debtor's power or control, but only to do all that is within the power and control of the debtor.). *See also* In re Moustafi, 371 B.R. 434, 438 (Bankr. D. Ariz. 2007); In re Husain, 364 B.R. 211, 219 (Bankr. E.D. Va. 2007); In re Barron, 441 B.R. 131, 137 (Bankr. D. Ariz. 2010); In re Chim, 381 B.R. 191, 198 (Bankr. D. Md. 2008).

[21] In re Bower, 2007 Bankr. LEXIS 2580, at 2586 (Bankr. D. Or. July 26, 2007).

[22] In re Miller, 443 B.R. 54, 59 (Bankr. D. Del. 2011).

[23] In re Grisham, 436 B.R. 896, 900 (Bankr. N.D. Tex. 2010).

[24] 11 U.S.C. §524(c)(3).

[25] 11 U.S.C. §§524(c)(3), 524(c)(6)(A)(i), and 524(c)(6)(A)(ii).

[26] 11 U.S.C. §524 (c)(3).

[27] 11 U.S.C. §524 (c)(3). When an attorney files an affidavit with the agreement, the reaffirmation agreement is typically approved without further scrutiny from the court. Many attorneys are uncomfortable certifying that the reaffirmation agreement will not pose an undue hardship because a debtor's financial circumstances could change in an instant. A debtor who had every intention of paying a car loan when an attorney certified the agreement and later unexpectedly loses a job will not only have his or her car repossessed but will also have a creditor chasing after the debtor for any potential deficiency judgment.

[28] 11 U.S.C. §524(d).

[29] 11 U.S.C. §524(6)(A).

[30] "The presumption [of undue hardship] 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." 11 U.S.C. §524(m)(1).

[31] "[A]n 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 the extent enforceable under applicable non-bankruptcy law…[and] only if the debtor received the disclosure described in subsection (k) at or before the time at which the debtor signed the agreement." 11 U.S.C. §524(c)(2).

[32] In re Quintero, 2006 Bankr. LEXIS 906, at 908 (Bankr. N.D. Cal. May 5, 2006) (The court stated that BAPCPA includes in its title the phrase "consumer protection" and that BAPCPA's addition of 11 U.S.C. §524(k), which mandates greater disclosures about the terms of the reaffirmation agreement, is one of the primary consumer protections Congress afforded to Chapter 7 debtors that recognized a debtor's continuing need for protection from coercive and deceptive creditor actions.).

[33] In re Perez, 2010 Bankr. LEXIS 2229, at *28-29 (Bankr. D. N.M. July 12, 2010).

[34] In re Chim, 381 B.R. 191, 199 (Bankr. D. Md. 2008).

[35] At monthly reaffirmation hearings in the Los Angeles and San Fernando Valley divisions of the Central District of California, Public Counsel and pro bono attorneys counsel hundreds of pro se debtors each month before scheduled reaffirmation hearings. Every month, the most common question asked by pro se debtors is, can they repossess my car if the judge denies the agreement? Some pro se debtors report that creditors have warned them that failure to get a reaffirmation approved will result in automatic repossession of their vehicle despite their compliance with BAPCPA.

[36] In re Jones, 591 F. 3d 308, 309-10 (4th Cir. W. Va. 2010) (citing Riggs Nat. Bank of Washington, D.C. v. Perry, 729 F. 2d 982, 984-85 (4th Cir. 1984)); In re Dumont, 581 F. 3d 1104, 1108 (9th Cir. 2009).

[37] 11 U.S.C. §362(h)(1)(B) provides:

> [U]nless such statement [of intention] specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

[38] In re Quintero, 2006 Bankr. LEXIS 906, at 909-10. The court reasoned that Congress could not have intended to leave it within a secured creditor's power to thwart a Chapter 7 debtor's attempt to retain his or her car and reaffirm the debt by failing to comply with the requirement that the creditor supply the debtor with the expanded disclosure at the appropriate time and that by failing to comply with §524(k) the creditor had in effect refused to enter into an enforceable reaffirmation agreement with the debtor and was prohibited from repossessing the car.

[39] *See supra* note 20.

[40] In re Dumont, 581 F. 3d at 1117; In re Chim, 381 B.R. at 197.

[41] In re Hardiman, 398 B.R. 161, 187 (E.D. N.C. 2008) (The court held that since the debtor had already complied with §§362 and 521, the remaining language stating, "[n]othing in this title shall prevent or limit the operation of an [an ipso facto clause]" does not apply.); In re Perez, 2010 Bankr. LEXIS 2229, at 40. The same analysis should be applied when reading the language used later in §521(d).

[42] *Id.* at 44. In re Bower, 2007 Bankr. LEXIS 2580, 2588 (Bankr. D. Or. July 26, 2007) (Because the debtor complied with §521(a)(6), the debtor could retain the vehicle after disapproval of a reaffirmation agreement so long as the debtor stayed current on payments and insurance.). *See also* In re Quintero, 2006 Bankr. LEXIS 906 at 909; In re Moustafi, 371 B.R. 434, 440 (Bankr. D. Ariz. 2007).

[43] In re Barron, 441 B.R. 131, 137 (Bankr. D. Ariz. 2010).

[44] In re Baker, 390 B.R. 524, 531-32 (Bankr. D. Ariz. 2008).

[45] In re Dumont F. 3d 1104 at 1115.

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re: LONG NGUYEN, Debtor(s).	Case No. 13-53374 SLJ Chapter 7 Date: September 11, 2013 Time: 4:00 p.m. Ctrm: 3099

ORDER DISAPPROVING REAFFIRMATION AGREEMENT

This matter having been duly noticed and called for hearing at the above-referenced date and time, for reasons stated on the record, good cause appearing, the reaffirmation agreement between Debtor and Toyota Motor Credit Corporation ("Creditor") is DISAPPROVED.

Nevertheless, Debtor here indicated a willingness to enter into a reaffirmation agreement with Creditor, and this case is thus distinguishable from *In re Dumont*, 581 F.3d 1004 (9th Cir. 2009), where the debtor expressly elected not to reaffirm the debt and simply indicated an intent to retain the collateral while making monthly payments.[1] If the Creditor chooses to repossess the collateral despite Debtor's willingness to enter the reaffirmation agreement and his timely performance of the payment obligations on the underlying debt, Debtor may ask the court for injunctive or other relief.

IT IS SO ORDERED.

*** * * END OF ORDER * * ***

[1] In 2005, Congress amended 11 U.S.C. §§ 521(a)(2) and (6), as well as § 362(h), to provide that the automatic stay is lifted if an individual chapter 7 debtor does not indicate an intention to surrender or redeem collateral or reaffirm the debt. Chapter 7 individual debtors cannot simply opt to "pay and drive." *Dumont*, 581 F.3d at 1104.

UNITED STATES BANKRUPTCY COURT
For The Northern District Of California

COURT SERVICE LIST

Electronically mailed to ECF registered participants.

Honorable Bruce A. Markell
United States Bankruptcy Judge

Entered on Docket
May 22, 2013

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re: KEVIN WAYNE HENDERSON and ROSA ISELA HENDERSON, Debtors.	BK-S-12-23691-BAM Chapter 7 Date: April 23, 2013 Time: 8:30 a.m.
In re: DOUGLAS ALLEN KENNEDY and JENNIFER JOY KENNEDY, Debtors.	BK-S-12-23954-BAM Chapter 7 Date: April 23, 2013 Time: 8:30 a.m.
In re: JANICE P. GREEN, a/k/a JAN GREEN, Debtor.	BK-S-12-24017-BAM Chapter 7 Date: April 23, 2013 Time: 8:30 a.m.
In re: BEATRIZ A. PEREZ-URREA, a/k/a BEATRIZ PEREZ, Debtor.	BK-S-13-10960-BAM Chapter 7 Date: April 23, 2013 Time: 8:30 a.m.
In re: EDGAR A. GREENE, Debtor.	BK-S-13-11417-BAM Chapter 7 Date: April 30, 2013 Time: 8:30 a.m.

OPINION DISAPPROVING REAFFIRMATION AGREEMENTS

I. INTRODUCTION

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

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

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

II. FACTS

A. *In re Henderson*

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

Their proposed reaffirmation agreement—filed about three months after their petition—stated the following: (i) total amount to be paid: $53,905; (ii) monthly payment: $816;

(iii) debtors' net monthly income: $3,129; and (iv) the car's market value: $54,725.[1] (12-23691, Dkt. No. 25.)

B. *In re Kennedy*

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

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

C. *In re Green*

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

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

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

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

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

D. In re Perez-Urrea

Beatriz Perez-Urrea purchased her 2009 Nissan Altima in May 2012. (13-10960, Dkt. No. 1 at 17.) On February 8, 2013, she filed her Chapter 7 bankruptcy petition. (*Id.* at 1.) She scheduled a secured claim in favor of Capital One Auto Financing for $17,500, listed the Altima as collateral, and asserted the vehicle's value to be $6,500. Her schedules thus showed an unsecured deficiency of $11,000. (*Id.* at 17.)

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

E. In re Greene

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

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

III. ANALYSIS

A. The Applicable Law

A reaffirmation agreement is an agreement "the consideration for which, in whole or in

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

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

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

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

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

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

For reaffirmation agreements, Section 524(c) lists various content and timing requirements, none of which are in dispute in any of these cases. *See* 11 U.S.C. § 524(c)(1)–(5) (2012). Paragraph (6) is relevant, however, as it provides the requirements for court approval of reaffirmation agreements for personal property negotiated without the assistance of counsel, *id.* § 524(c)(6), such as is the case with every debtor here. To approve such agreements, the court

must find that the reaffirmation agreement does "not impos[e] an undue hardship on the debtor or a dependent of the debtor" *and* that the agreement is "in the best interest of the debtor." *Id.* § 524(c)(6)(A).[7]

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

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

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

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

called "*ipso facto*" clauses[8] are nearly universal in vehicle purchase contracts.

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

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

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

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

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

While the Bankruptcy Code does not limit or prevent the operation of *ipso facto* provisions that place the debtor in default for filing for bankruptcy, 11 U.S.C. § 521(d) (2012), the Code's

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

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

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

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

UNIFORM CONSUMER CREDIT CODE § 5.109 (1974) (emphasis added). The UCCC was completed in 1968 and amended in 1974. *Consumer Credit Code Summary*, UNIFORM LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Consumer%20Credit%20Code (last visited May 22, 2013). It was designed to be a "balanced consumer protection law, providing comprehensive regulation of consumer credit." *Id*. As to UCCC § 5.109, "[c]onfining default to these scenarios is designed to prevent abuse of the consumer by the creditor." *Johnson Cnty. Auto Credit, Inc. v. Green*, 83 P.3d 152, 158, 277 Kan. 148, 155 (2004). At least ten states have adopted some version of UCCC § 5.109.[9]

Understanding NEV. REV. STAT. § 97.304 requires understanding what constitutes a

[9] *See* IDAHO CODE ANN. § 28-45-107 (2012); KAN. STAT. ANN. § 16a-5-109 (2012); ME. REV. STAT. tit. 9-A, § 5-109 (2012); MASS. GEN. LAWS ch. 255B, § 20B(a) (2012); MO. REV. STAT. § 408.552 (2012); NEB. REV. STAT. § 45-1, 105(5) (2012); N.C. GEN. STAT. § 53-180(c) (2012); R.I. GEN. LAWS § 6-51-3 (2011); S.C. CODE ANN. § 37-5-109 (2012).

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

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

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

In light of the unenforceability of *ipso facto* clauses in auto sales contracts under NEV. REV. STAT. § 97.304, the next issue is whether approving a reaffirmation agreement that reaffirms an

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

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

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

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

652, 661 (Bankr. D. Del. 2006).

One consequence of this change in law is that if the creditor legally repossesses the vehicle, the creditor's recovery is limited to the value of the vehicle at the time of repossession, just as was the case with "ride through." Justifying the approval of a reaffirmation agreement in this context would be quite difficult if not impossible. *See id.* at 1114 ("If ride-through existed, any lawyer who advised his client to make a reaffirmation offer on the original contract terms would be guilty of malpractice, and any bankruptcy judge who approved such a reaffirmation from a pro se litigant would be seriously derelict in his duties. For why would one ever choose reaffirmation on such terms and thus incur the risk of personal liability when one could safely achieve the same ends by ride-through?").

B. Application of Law to Facts

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

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

Were the court to approve the reaffirmation agreements, each debtor would become personally liable for the unsecured portions of their respective lender's claim. If the court does not

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

IV. CONCLUSION

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

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

FORM eorpssc

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:

DEBTOR NAME
DEBTOR ADDRESS
PHOENIX, AZ 85003
SSAN: xxx−xx−XXXX
EIN:

Debtor(s)

Case No.: 2:13−bk−00000−SSC

Chapter: 7

ORDER

The court has been requested to approve a reaffirmation agreement with **(Name of Secured Creditor)** involving a consumer debt secured by a mortgage, deed of trust, or other lien instrument on real estate. The United States Bankruptcy Code does not require the court to approve such agreements. 11 U.S.C. § 524; McClelland Fed. Credit Union v. Parker (In re Parker), 139 F.3d 668 (9th Cir. 1998). Debtors are not required to sign a reaffirmation agreement in order to retain their real property.

The Debtors need only comply with the original terms of their loan, such as the interest rate, the monthly payments, or the term of the loan. If the Debtors are current, but miss a future payment, the creditors may pursue their rights and remedies under applicable state law, including pursuing foreclosure remedies. Under Arizona law, the creditor's lien on real estate is not extinguished by the filing of a bankruptcy petition, but Debtors have no residual liability to the creditor once they obtain their bankruptcy discharge.

The Debtors, however, must also be aware that if there is equity in the real estate owned by them, the bankruptcy trustee may request a sale of the real estate. If the Trustee wishes to sell the property, the Trustee will file a motion with the Court, and the Debtors will have an opportunity to be heard on the matter.

As a result of this analysis, the Court has not approved the Reaffirmation Agreement with **(Name of Secured Creditor)**, and no hearing be held regarding it.

ORDERED ACCORDINGLY.

SIGNED AND DATED ABOVE.