

## Reaffirmation under BAPCPA<sup>1</sup>

by Susan V. Kelley

### Part D and Rule 4008

With respect to completing Part D, Bankruptcy Rule 4008 states that Part D shall be accompanied by a statement of the total income and total expense amounts stated on schedules I and J, and if there is a discrepancy between those schedules and the income and expenses stated on Part D, the debtor must include an explanation.<sup>2</sup>

If the debtor was represented by an attorney during the negotiation of the reaffirmation agreement, and is reaffirming a debt owed to a credit union as defined in § 19(b)(1)(A)(iv) of the Federal Reserve Act, then the income and expense information is not required. Instead, the debtor completes the second portion of Part D, which provides:

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.

The court uses Part D to determine whether a presumption of undue hardship exists so that a hearing is needed under new § 524(m). The hearing is not required if the creditor is a credit union and the debtor is represented by an attorney.

### Part C Attorney's Certification

Under § 524(k)(5), the certification by the debtor's attorney has been changed significantly by the BAPCPA, and some attorneys have refused to sign the new certifications.<sup>3</sup> The certification is Part C of the reaffirmation agreement form. The first part of Part C is not different than the certifications made by debtors' attorneys pre-BAPCPA. In Part C, the attorney must certify 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 debtor's dependents and (3) the attorney fully advised the debtor of the legal effects and consequences of the agreement. However, if a presumption of undue hardship is shown in Part D, i.e., the debtor's expenses and the amount of the reaffirmed debt exceed the debtor's income, the attorney is required to certify that in the attorney's opinion, the debtor can make the payments.<sup>4</sup> This certification is not required if the creditor is a credit union.<sup>5</sup>

### Presumption of Undue Hardship

The 2005 Act added § 524(m). This section states that until 60 days after an agreement is filed with the court, it is presumed that the agreement is an undue hardship on the

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<sup>1</sup> Excerpt from Ginsberg & Martin on Bankruptcy, Fifth Edition to be published June 2008

<sup>2</sup> See *In re Chang Yeon Jo*, 2007 Bankr. LEXIS 4278 (Bankr. E.D. Va. Dec. 14, 2007); *In re Duenez*, 2007 Bankr. LEXIS 2960 (Bankr. W.D. Tex. July 14, 2007); *In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006); but see *In re Wilson*, 363 B.R. 220 (Bankr. D.N.M. 2007) (suggesting that Part D numbers are the only relevant ones for making the undue hardship inquiry).

<sup>3</sup> See *In re Smith*, 2007 Bankr. LEXIS 3021 (Bankr. S.D. Ohio July 18, 2007); *In re Carvajal*, 365 B.R. 631 (Bankr. E.D. Va. 2007) (court indicated counsel were expected to sign agreements when they had represented the debtor in the case).

<sup>4</sup> See *In re Vaupel*, 2007 Bankr. LEXIS 2937 (Bankr. N.D. Iowa Aug. 28, 2007) (Counsel who sign a reaffirmation agreement assume a difficult burden); *In re Vargas*, 257 B.R. 157, 164 (Bankr. D.N.J. 2001) (Attorneys have a duty to make reasonable financial inquiries before they can certify that reaffirmation agreements will not cause undue burden to their clients).

<sup>5</sup> See *In re Isom*, 2007 Bankr. LEXIS 2437 (Bankr. E.D. Va. July 17, 2007) (before approving agreement, court required counsel to sign certification in case in which creditor was credit union).

debtor if the debtor's monthly income less the debtor's monthly expenses is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court and may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make agreed payments.<sup>6</sup> If the presumption is not rebutted, the court may disapprove the agreement.<sup>7</sup> No agreement can be disapproved without notice to the debtor and creditor, and a hearing to be concluded before the debtor's discharge.<sup>8</sup> Section 524(m)(2) excuses reaffirmation of debts with credit unions from the undue hardship limitations of § 524(m)(1). However, the bankruptcy court can disapprove agreements with credit unions on grounds other than undue hardship.<sup>9</sup>

### **Reaffirmation Procedure**

The 2005 Act changed the procedure for the approval of reaffirmation agreements.

First, a reaffirmation of a consumer debt not secured by real estate is brought before the court for approval by motion when the debtor is not represented by counsel.<sup>10</sup> The motion must be made by the debtor, and Form B240 contains the form of motion for the debtor to make. Second, in a case where the debtor is represented by counsel, and there is a presumption of undue hardship shown by Part D, the court is required to review the agreement, and if the court may disapprove the agreement, must hold a hearing on notice to the debtor and creditor.<sup>11</sup> If the creditor is a credit union, no such hearing is required.

The court is to consider reaffirmations at the discharge hearing.<sup>12</sup> Although Rule 4008 allows this hearing to be held within 30 days after the discharge, § 524(m)(1) states that the court's disapproval of a reaffirmation agreement based on undue hardship must be based on a hearing concluded prior to the entry of the debtor's discharge.<sup>13</sup>

If the court schedules a hearing on approval of the reaffirmation agreement, either because the debtor was not represented by counsel during the negotiation of the agreement and the agreement does not involve real estate, or because a presumption of undue hardship is not rebutted to the satisfaction of the court, the debtor must attend the hearing or the agreement cannot be approved.<sup>14</sup> At the hearing, the court is to advise the debtor that reaffirmations are not required and to ensure that the debtor has been fully informed concerning the effect of reaffirmation and of default on the reaffirmed debt.<sup>15</sup> If

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<sup>6</sup> The debtor should explain any discrepancy with the income and expenses shown on Schedule I and J. F.R.B.P. 4008. *See also In re Stevens*, 365 B.R. 610 (Bankr. E.D. Va. 2007); *In re Husain*, 364 B.R. 211 (Bankr. E.D. Va. 2007) (debtors failed to rebut undue hardship by stating that they needed the vehicles); *In re Laynas*, 345 B.R. 505 (Bankr. E.D. Pa. 2006).

<sup>7</sup> *See In re Duenez*, 2007 Bankr. LEXIS 2960 (Bankr. N.D. Tex. July 17, 2007).

<sup>8</sup> *See In re Parker*, 372 B.R. 835 (Bankr. W.D. Tex. 2007) (discussing confusion of requirements that undue hardship denial must be at hearing before discharge and Rule allowing hearing after discharge).

<sup>9</sup> *See In re Rios*, 2007 Bankr. LEXIS 2847 (Bankr. W.D. Tex. Aug. 20, 2007) (nonrecourse home equity loan reaffirmation was disapproved).

<sup>10</sup> F.R.B.P. 4008. *See, e.g., In re Moustafi*, 371 B.R. 434 (Bankr. D. Ariz. 2007).

<sup>11</sup> *See In re Parker*, 372 B.R. 835 (Bankr. W.D. Tex. 2007).

<sup>12</sup> 11 U.S.C. § 524 (d). This hearing is optional unless court approval of the reaffirmation agreement is required.

<sup>13</sup> *See In re Parker*, 372 B.R. 835 (Bankr. W.D. Tex. 2007).

<sup>14</sup> *In re Rennels*, 37 B.R. 81 (Bankr. W.D. Ky. 1984). If a pro se debtor wants to reaffirm any debts not secured by real estate, attendance at the discharge hearing is mandatory. Failure to attend should invalidate the reaffirmation. *See* 11 U.S.C. § 524(c)(6), 524(d)(2).

<sup>15</sup> 11 U.S.C. § 524(d)(1).

the court approves the reaffirmation agreement, an order is entered granting the debtor's motion to approve the agreement.<sup>16</sup>

Under § 524(m), if the presumption of undue hardship is not rebutted to the satisfaction of the court, the court may disapprove a reaffirmation agreement at the hearing. The court may disapprove the reaffirmation agreement even when it is accompanied by an attorney declaration.<sup>17</sup>

### **Timing Requirements for an Effective Reaffirmation**

To be enforceable, the reaffirmation agreement must be entered into prior to discharge, not necessarily filed with the court prior to discharge.<sup>18</sup> However, after the debtor is discharged, it is too late for a creditor to obtain an enforceable reaffirmation. Efforts to pressure a debtor into entering into a reaffirmation agreement post-discharge -- including efforts to pressure a debtor into "setting aside" the discharge (even assuming such a thing were ever legally possible) -- have been held "clear, clean, and obvious violations" of the discharge injunction.<sup>19</sup> This is true even if the debtor wants to reaffirm. The debtor's desire to reaffirm certain dischargeable debts is not grounds for reopening the case<sup>20</sup> or revoking the discharge.<sup>21</sup> Most courts are unwilling to "vacate" the discharge to allow a debtor to enter into reaffirmations under the auspices of § 105.<sup>22</sup> Even if such a procedure was allowed, a creditor whose debt is reaffirmed after the discharge has been granted and then vacated might well have problems enforcing the reaffirmation should the debtor have a change of heart and stop paying off the reaffirmed debt.

The lesson for creditors and debtors is clear. The time for reaffirmation is very limited. A creditor cannot obtain a reaffirmation *before* a bankruptcy petition is filed because any pre-petition waiver of a bankruptcy discharge is against public policy and unenforceable.<sup>23</sup> A creditor cannot obtain a reaffirmation *after* the discharge has been granted, because that is unenforceable.<sup>24</sup> The only time to obtain the reaffirmation is between the filing of the petition and the granting of the discharge. Seeking a reaffirmation with the debtor before the discharge is entered is not considered a violation of the automatic stay unless the creditor harasses the debtor.<sup>25</sup>

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<sup>16</sup> 11 U.S.C. § 523(k)(8).

<sup>17</sup> See, e.g., 2007 Bankr. LEXIS 2752 (Bankr. N.D. Iowa Aug. 20, 2007) (disapproving *In re Miller*, reaffirmation of motorcycle as a luxury).

<sup>18</sup> See *In re Merritt*, 366 B.R. 637, 638 (Bankr. W.D. Tex. 2007) (collecting cases). However, § 524(m)(1) creates a significant problem unless the agreement is filed prior to discharge.

<sup>19</sup> *Guardian Loan Co. of Massapequa, Inc. (In re Watkins)*, 240 B.R. 668, 678 (Bankr. E.D.N.Y. 1999).

<sup>20</sup> *In re Young*, 2007 Bankr. LEXIS 4027 (Bankr. D.S.C. Nov. 29, 2007).

<sup>21</sup> *In re Herrera*, 2007 Bankr. LEXIS 4263 (Bankr. W.D. Tex. Dec. 14, 2007).

<sup>22</sup> *In re Carrillo*, 2007 Bankr. LEXIS 2786 (Bankr. D. Utah July 25, 2007) (collecting cases); but see *In re Soloman*, 15 B.R. 105 (Bankr. E.D. Pa. 1981) (equities allowed vacation of discharge order to permit approval of reaffirmation agreement).

<sup>23</sup> 11 U.S.C. § 524(a). See *Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 651 (B.A.P. 9th Cir. 1998).

<sup>24</sup> *In re Cruz*, 254 B.R. 801 (Bankr. S.D.N.Y. 2000); *In re Bowling*, 116 B.R. 659, 664 (Bankr. S.D. Ind. 1990) *In re Noland*, 13 B.R. 766 (Bankr. D. Kan. 1981).

<sup>25</sup> See *Jamo v. Katahdin Fed. Credit Union (In re Jamo)*, 283 F.3d 392, 397 (1st Cir. 2002) (also addressing creditor's requirement that debtor reaffirm unsecured debt in order to reaffirm secured debt, and rejecting per se rule that this violates the stay); *Cox v. Zale Del., Inc.*, 239 F.3d 910, 912 (7th Cir. 2001); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000). See also *Diamond v. Premier Capital, Inc. (In re Diamond)*, 346 F.3d 224, 226 (1st Cir. 2003) (creditor violated the automatic stay by informing the debtor, during settlement negotiations in a non-dischargeability proceeding in the bankruptcy court, that the

Ordinarily, the discharge is entered automatically after the time for objecting to discharge expires, unless an objection to discharge has been filed. Since objections to discharge are fairly rare, that means that the discharge will ordinarily be granted, and the time for obtaining an enforceable reaffirmation usually expires 60 days after the date first set for the creditors' meeting.<sup>26</sup> However, the time pressure on both the debtor and creditor in the reaffirmation is eased by Bankruptcy Rule 4004(c) which allows the debtor to obtain a 30-day delay in the entry of the discharge. The debtor can move within that 30-day extension period to obtain a further delay of the discharge to a date certain, should that prove necessary.<sup>27</sup> This gives the debtor a reasonable period of time for negotiating reaffirmations. Only a debtor can obtain such an extension of the entry of the discharge; a creditor cannot move to delay the entry of the discharge for this purpose.

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creditor immediately would file a complaint with the state real estate commission to revoke the debtor's real estate license unless the debtor agreed to settle).

<sup>26</sup> F.R.B.P. 4004(a), (c). The creditors' meeting is mandated by 11 U.S.C. § 341 and is to be held from 20 to 40 days after the order for relief (i.e., a voluntary petition). *See* 11 U.S.C. §§ 301-302). Thus, creditors effectively have 80 to 100 days after a voluntary petition to obtain a reaffirmation unless the debtor extends that time.

<sup>27</sup> F.R.B.P. 4004(c)(2).