

## **Real Estate Reaffirmation Agreements and Credit Reporting**

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### **I. Attorney Certification and Court Approval of Reaffirmation Agreements, Generally.**

Section 524(m)(1) created a presumption that a reaffirmation agreement imposes an “undue hardship” when the debtor’s monthly expenses minus the debtor’s monthly income does not leave the debtor enough money to make the payments on the reaffirmed debt, and requires the court to review such presumption, whether or not the debtor is represented by an attorney in negotiating the agreement.

Under section 524(k)(5), the attorney representing the debtor in negotiating a reaffirmation agreement is required to certify not only that the agreement does not impose an “undue hardship on the debtor or a dependent of the debtor,” but, if the presumption of undue hardship arises, that the debtor can make the “required payment” under the agreement.

Debtor’s counsel is the sole gatekeeper of reaffirmations of debt secured by real estate. Court approval of a reaffirmation agreement for debts secured by real property is not required, regardless of whether the debtor is represented by counsel “during the course of negotiating [the] agreement.” 11 U.S.C. § 524(c)(6)(B); 11 U.S.C. § 524(k)(3)(J)(i)7.

*See, e.g., In re Law*, 421 B.R. 735, 738 (Bankr. W.D. Pa. 2010) (“That precisely describes the [consumer debt secured by real property] involved here, so the Court must conclude that the Reaffirmation Agreement is enforceable despite the fact that the Court might not believe it to be in the best interest of the Debtor.”).

### **II. Things to Consider When Entering Into a Reaffirmation Agreement.**

- Theory. (1) Does the reaffirmation agreement “impose an undue hardship on the debtor or a dependent of the debtor”? 11 U.S.C. § 524(k)(5)(A).  
(2) If the reaffirmation creates a presumption of “undue hardship,” can the debtor still make the payment under the reaffirmation agreement? 11 U.S.C. § 524(k)(5)(B).
- Reality. (1) What is the risk of default, deficiency, and resulting continued personal liability? (Debtor’s positive or negative disposable income, interest rate, total amount of payments, equity in collateral, and whether the debtor is current on payments may all be relevant.)

- (2) Does the debtor want to protect a co-signor?
- (3) Is the creditor offering more favorable terms?
- (4) Is the debtor overly optimistic about income and expenses?
- (5) Does the creditor have a legitimate claim for nondischargeability?
- (6) Can (should?) the debtor try to rehabilitate his credit score?

### **III. Creditors' Reporting – or Not – of Mortgage Payments to Credit Agencies.**

No Affirmative Duty to Report.

*In re Bates*, 517 B.R. 395 (Bankr. D.N.H. 2014). Residential mortgagee's actions, in declining to report to credit reporting agencies the payments that debtors made pursuant to post-discharge loan modification agreement because payments were purely voluntary and debtors had not reaffirmed their debt did not violate discharge injunction. Mortgagee, while stating the reasons for its conduct in response to inquiry from debtors, did not attempt to pressure debtors into signing reaffirmation agreement, and when debtors later ceased their voluntary payments, made no attempt to collect from debtors personally, but simply foreclosed on its mortgage.

Without Reaffirmation Debtor Must Proceed on Secured Creditor's Terms.

*In re Manning*, 505 B.R. 383 (Bankr. D.N.H. 2014). The chapter 7 debtor brought an adversary proceeding against the secured creditor, alleging that the creditor was liable for violating the discharge injunction. The debtor and mortgage lender had entered into a reaffirmation agreement prior to the debtor's discharge, however it was not filed with the court. Nevertheless, the debtor had continued to make payments on the mortgage because he thought the debt had been reaffirmed.

After the debtor attempted to refinance the loan, he learned that the creditor had not reported his post-discharge mortgage payments to the credit reporting agencies. The debtor retained counsel in order to get his post-discharge payments reported on his credit report. The creditor informed debtor's counsel that the creditor would only report the post-discharge payments to the credit reporting agencies if the mortgage debt were reaffirmed, and that mortgage debt could not be reaffirmed until the debtor paid off all amounts "due" under the mortgage. The creditor requested that the debtor sign a second reaffirmation agreement (also unenforceable), to replace the unenforceable first agreement. Based on the creditor's statements, the debtor moved to reopen his bankruptcy so he could reaffirm the mortgage. The debtor then made an additional mortgage payment of \$2,462. The creditor executed the new reaffirmation agreement, but it was never placed on the court's docket for approval.

When the creditor failed to report the debtor's payments, the debtor sued the creditor alleging a violation of the discharge injunction. The *Manning* court concluded the secured creditor did not violate the discharge injunction, finding the creditor's actions fell within the exception to the discharge injunction that allowed the creditor to take steps in the ordinary course of business to ensure that the mortgage was current.

#### **IV. The Reaffirmation Proposal.**

A creditor may send a postpetition letter to a debtor proposing a reaffirmation agreement without violating the automatic stay. However, the creditor's communication regarding reaffirmation must not be threatening or coercive. *Matter of Duke*, 79 F.3d 43 (7<sup>th</sup> Cir. 1996).

Example. *In re Estrada*, 439 B.R. 227 (Bankr. S.D. Fla. 2010). Mortgagee's letter proposing reaffirmation agreement with chapter 7 debtor violated the automatic stay by including impermissible threats:

*Please be advised that National City Mortgage will suspend all credit bureau reporting if the debt is not reaffirmed prior to a discharge.*

The creditor specifically threatened a negative consequence, namely suspending the reporting of mortgage payments to the creditor bureaus, if the debtor did not agree to reaffirm the debt. The letter particularly appeared coercive since the debtor was never in default on the mortgage and was current under the loan when she filed bankruptcy case.

Nevertheless, the debtor's motion for contempt was denied because the creditor revised its language for use in future reaffirmation solicitations:

*There may be benefits to your client(s) resulting from entering into a Reaffirmation Agreement with PNC Mortgage. PNC Mortgage normally suspends credit bureau reporting during the pendency of a bankruptcy and after discharge. However, if a borrower has entered into a Reaffirmation Agreement, PNC Mortgage will continue credit reporting of the borrower's payments thereunder. Accordingly, if your client(s) reaffirms, the subsequent payment history will be reflected on you client's credit report.*

*Note: The Reaffirmation Agreement must be filed with the court prior to a discharge.*

In denying the motion for contempt, the *Estrada* court also noted that the creditor never had the obligation to continue reporting payments after discharge.

## V. Alternatives to Reaffirmation of Real Estate.

Ride-Through. Additionally, at least in jurisdictions where courts protected ride-through prior to BAPCPA, debtors still have the option of riding through on consumer debts secured by real property.

Sections 362(h) and 521(a)(6), the provisions added by BAPCPA that terminate the stay as to an interest in property if the debtor does not comply with § 521(a)(2) or 521(a)(6) – by not timely filing a statement of intention and performing that intention under § 521(a)(2), or by not entering into a reaffirmation agreement or redeeming the property within the statutory period under § 521(a)(6) – apply only to personal property. *See* 11 U.S.C. §§ 362(h), 521(a)(2), (a)(6). Additionally, the Code also seems to contemplate ride-through on consumer debts in real property because it states that the discharge injunction under § 524(a)(2) does not apply to a “creditor [who] retains a security interest in real property that is the principal residence of the debtor.” 11 U.S.C. § 524(j)(1).

If the debtor is current on a mortgage or deed of trust, and the jurisdiction permits ride-through, ride-through is usually a better alternative than reaffirmation, unless the debtor can negotiate more favorable terms in the reaffirmation agreement. With reaffirmation, the debtor’s personal liability on the real estate debt survives bankruptcy, potentially subjecting the debtor to a deficiency if she defaults. Ride-through allows the debtor to stay in her residence as long as she can keep current on the payments, and still discharge the underlying debt in bankruptcy.

Chapter 13. If the debtor is delinquent on a real estate debt, chapter 13 may be a better option than chapter 7. Attorneys can use the threat of surrender to force a compromise with the creditor, the debtor can cure late payments over the length of the plan, and, if the debtor cannot make the payments under the plan, the debtor can still discharge the real estate debt upon a conversion from chapter 13 to chapter 7.