

**SELECTED ISSUES CONCERNING
REAFFIRMATION AGREEMENTS UNDER BAPCPA**

Lou Jones Breakfast Club

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I. WHEN WILL A REAFFIRMATION AGREEMENT REQUIRE COURT APPROVAL.

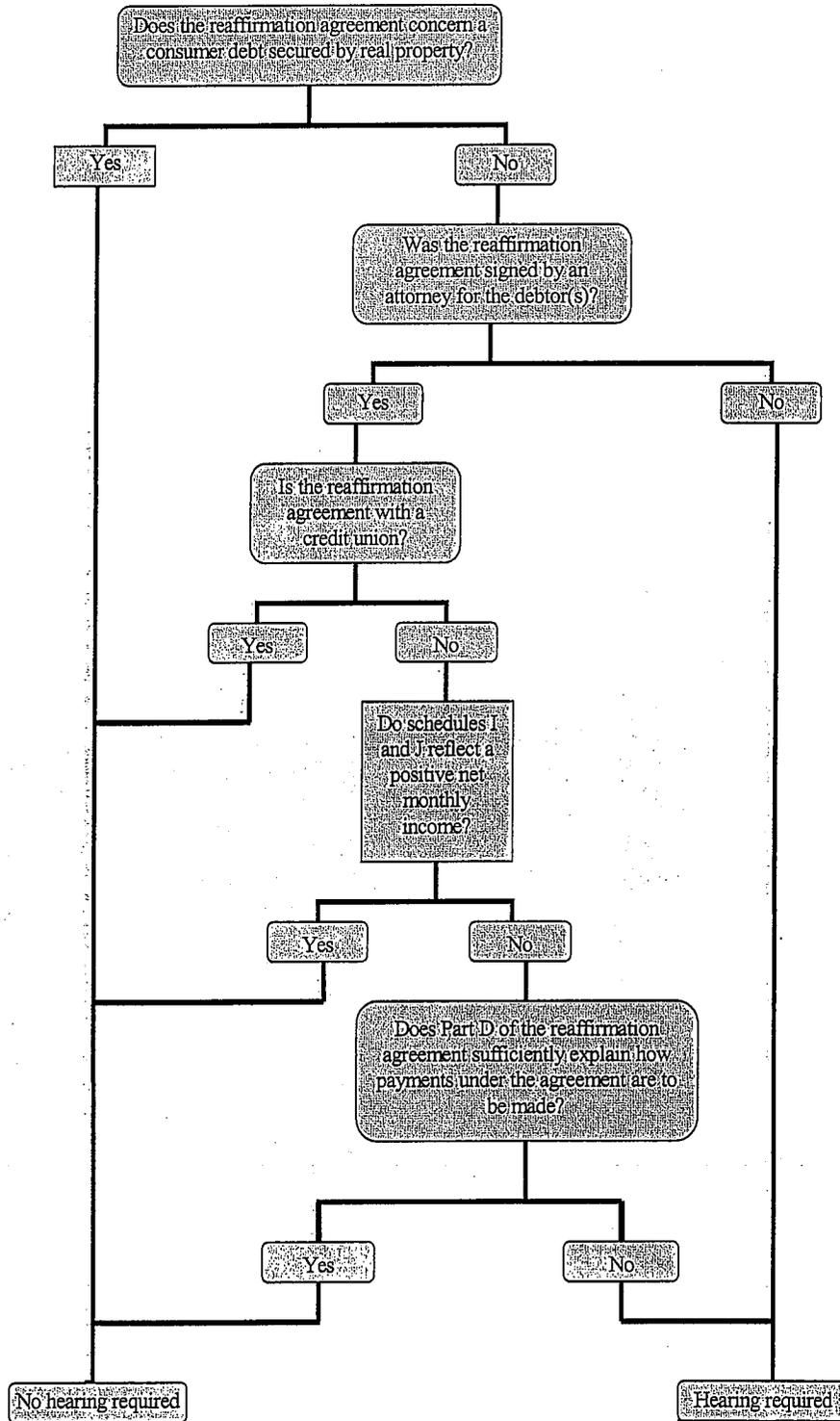
A. In In re Pham, Case No. 06-20779 (Bankr. E.D. Wis. May 31, 2006), Judge Pepper Summarizes Reaffirmation Agreement Hearing Requirements as Follows:

- * If the Debtor is not represented by counsel, and the reaffirmation agreement relates to a debt that is *secured by real property*-**no court approval necessary, no hearing necessary.**
- * If the Debtor is not represented by counsel, and the reaffirmation agreement relates to a debt that is *not secured by real property*-**court approval necessary, and court must hold a hearing.**
- * If the Debtor has an attorney, and the income-minus-expenses calculation in Part D yield enough money left over to pay the reaffirmation payment-**no court approval necessary, no hearing necessary.**
- * If the Debtor has an attorney, and the income-minus-expenses calculations in Part D *do not* yield enough money left over to pay the reaffirmation agreement, *but the debt is owed to a credit union*-**no court approval necessary, no hearing necessary.**
- * If the Debtor has an attorney, and the income-minus-expenses calculations in Part D *do not* yield enough money left over to pay the reaffirmation payment, *but the debt is secured by real property*-**no court approval necessary, no hearing necessary.**
- * If the Debtor has an attorney, the income-minus-expenses calculations in Part D *do not* yield enough money left over to pay the reaffirmation payment, and the debt is not owed to a credit union or secured by real property-**court approval is required, and a hearing may be necessary, depending on whether the Debtor has satisfactorily rebutted the presumption of undue hardship in writing.**

*Many thanks to Jennifer Herzog for the research that she provided for the preparation of this outline.

1. Note that if the reaffirmation agreement relates to a debt secured by real property, no hearing is required regardless of whether or not the Debtor is represented by an attorney.
 - a. § 524(m) suggests that a reaffirmation hearing would be required for a reaffirmation agreement on real estate **if the Debtor is represented by a lawyer** and there is a presumption of undue hardship, even though no such hearing would be required if the Debtor were unrepresented. This, however, "would work a somewhat puzzling and illogical result." Pham at p.7.
 2. Query: If no court approval is required for reaffirmation agreements on real estate, is there any concern about undue hardship? Is there any need to complete Part C of the reaffirmation agreement (certification of Debtor's attorney) or Part D (Debtor's statement in support of reaffirmation agreement?)
- B. Alternative Analysis of Reaffirmation Agreement Hearing Requirements with Statutory References and Flow Chart.
1. Does the reaffirmation agreement concern consumer debt secured by real property?
 - a. Yes: No hearing is required.
 1. See 11 U.S.C. § 524(c)(6)(B), and In re Pham, Case No. 06-20779 (Bankr. E.D. Wis., May 31, 2006).
 - b. No: Go to Question 2.
 2. Was the reaffirmation agreement signed by an attorney for the Debtor?
 - a. Yes: Go to Question 3.
 - b. No: Hearing required.
 1. See 11 U.S.C. § 524(c)(6).
 3. Is the reaffirmation agreement with a credit union?
 - a. Yes: No hearing required.
 1. See 11 U.S.C. § 524(m)(2).

- b. No: Go to Question 4.
4. Do Schedules I and J reflect a positive net monthly income?
- a. Yes: No hearing required.
 - 1. See 11 U.S.C. § 524(m).
 - b. No: Go to Question 5.
5. Does Part D of the reaffirmation agreement sufficiently explain how payments under the agreement are to be made?
- a. Yes: No hearing required.
 - 1. See 11 U.S.C. § 524(m)(1) and 11 U.S.C. § 524(k)(6)(A).
 - b. No: Hearing required.
 - 1. See 11 U.S.C. § 524(m)(1) and 11 U.S.C. § 524(k)(6)(A).



II. DOES THE "RIDE THROUGH" STILL EXIST AS A FOURTH OPTION.

A. The Ride Through Has Been Technically Eliminated.

1. The gaps in the pre-BAPCPA code that provided a justification for the "ride through" have been closed.
 - a. Previously, there were no substantive consequences to a Debtor who did not comply with § 521(a)(2), and no specific remedy to a creditor. See Lowry Federal Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989).
2. § 362(h)(1) essentially provides that if a Debtor does not timely file the Statement of Intention (30 days from petition), and timely perform the stated intention (30 days from first date set for § 341 hearing), the automatic stay is terminated, and the collateral is no longer property of the estate. In re Rowe, 342 Bankr. 341 (D. of Kan. 2006).
 - a. Note that it appears that not only is the stay automatically terminated, but the abandonment is automatic as well, unless the trustee acts affirmatively to prevent the abandonment. § 362(h)(2).
3. § 521(a)(6) likewise provides for termination of the automatic stay and removal of the collateral from the bankruptcy estate where the Debtor fails to reaffirm or redeem within 45 days of the § 341 hearing. (Note: It does not say 45 days from the first date set for the § 341 hearing.)
4. Upon termination of the stay and removal of the collateral from the estate, the creditor is permitted to pursue all non-bankruptcy remedies.
 - a. Despite the language in § 521(a)(6), which suggest the Debtor must turn over the collateral, the creditor must still return to state court.
 - b. Debtor is not automatically required to surrender collateral and the court cannot order turnover. Rowe
 1. Also, see In re Donald, 2006 Westlaw 1666734 (Bankr. E.D. N.C. 2006), where the same result was reached through a much different route.

B. The "Ride Through" as a Practical Matter May Still be Available.

1. Once the stay is terminated and property is removed from the estate, whether under § 362(h) or § 521(a)(6), creditors right to foreclose on the collateral is controlled by the security agreement and state law. Rowe
 - a. In Kansas, which has adopted the Uniform Consumer Credit Code, if the payments are current and the prospect for future performance is not "significantly impaired," a creditor will not successfully foreclose their collateral. Rowe
 - b. Query as to what the result would be under the Wisconsin Consumer Act.
2. The new provision in BAPCPA regarding validity of ipso facto clauses appears to provide little help to creditors.
 - a. § 521(d) essentially provides that if a Debtor fails to comply with either § 362(h) or § 521(a)(6), the Bankruptcy Code will not be construed as limiting any "ipso facto" clause in the underlying security agreement. Rowe and Donald
 - b. That section does not make "ipso facto" clauses sufficient to define a default under non-bankruptcy law. At least in Kansas, the prospect of payment must still be "significantly impaired." Rowe
 - c. Likewise, the court in the Donald case held that "[c]reditors still must ensure that the contract, and their efforts to enforce the terms in it, do not run afoul of any applicable state laws."

III. MISCELLANEOUS COMMENTS AND QUESTIONS.

A. Use the Proper Form; Official Form B20.

1. An agreement that does not satisfy the requirements of § 524(c) is unenforceable and cannot be fixed with a "new" agreement if the deadline has passed. In re Quintero, 2006 Westlaw 1351623 (Bankr. N.D. Cal. 2006).
2. Clearly indicate, for the court's benefit:
 - a. Creditor name and address.
 - b. Indicate if collateral is real estate, which secures a consumer debt.

- c. Indicate if creditor is a credit union.
 - d. Complete first or second section of Part C.
 - e. Complete Part D as appropriate to rebut the presumption.
 - f. Specify the amount of monthly payments going forward.
- B. Income and Expenses Listed in Part D Should be Based on Schedule I and J as Filed. In re Laynas, 2006 Westlaw 1699958 (Bankr. E.D. Penn. 2006).
1. If you are asserting adjustments to income or expenses, either file amended Schedules I and/or J, or reference adjustments in Part D where you have the opportunity to rebut the presumption.
- C. Statement of Intention must now list all secured debts, not just secured consumer debts. § 521(a)(2).
1. Failure to list a secured creditor on the Statement of Intention will cause the stay to terminate under § 362(h), the same as if no Statement of Intention were filed. In re Root, 2006 Westlaw 1050687 (Bankr. N.D. Iowa 2006).
 2. Likewise, the stay will terminate if you do not list one of the three permissible options. That is, indicating that the Debtor will retain the collateral and stay current with payments will result in the stay terminating. In re Craker, 337 B.R. 549 (Bankr. M.D. NC 2006).
- D. Is a Reaffirmation Agreement Necessary Where the Debtor has Assumed a Personal Property Lease Under § 365(p).
1. Put differently, is a lease assumption an "agreement" under § 524(c)? If so, it would appear that the lease assumption must be embodied in a reaffirmation agreement, although there is nothing in the Code or recent case law to support that this is the case.

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