

SEPTEMBER 2005 MONTHLY NEAMA MEETING

Brief Synopsis of Reaffirmation Agreements Under the
Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005

Presented by:

Brian Aylward, Esq.

Smith, Levenson, Cullen & Aylward, PC

5 Essex Green Drive, Peabody, MA 01960

978-532-9494 x222

www.SmithLevensonLaw.com

Aylward@SmithLevensonLaw.com

(Fax: 978-532-9408)

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- 1) **“Reaffirmations Agreements”** under the new bankruptcy reform act of 2005 will bring some changes to reaffirmation procedures. Some of these general changes are outlined below.
- 2) What is a bankruptcy **“Discharge”**?
 - a) The Bankruptcy Code provides that all pre-petition debts of a Debtor are forever discharged under §727(a), subject to certain exceptions in §523. The discharge cancels the debtor’s obligation to pay any discharged debts. The discharge statute also contains an injunction against creditors preventing them from collecting discharged debts. The purpose of the discharge is to afford a debtor a “fresh start”.
 - b) However, the Code permits a debtor to waive the discharge in two limited circumstances:
 - i) By entering into a **“Reaffirmation Agreement”** of a pre-petition debt which fully complies with the reaffirmation requirements set forth in Sections 524(c) and (d) of the Code; or
 - ii) By making purely voluntary payments on a debt without any reaffirmation of personal liability, as permitted by §524(f).
 - iii) These Code sections are designed to insure that any reaffirmation agreements are truly voluntary. Because of the potential for abuse by creditors in coercing debtors to enter into ill-advised waivers of their discharge, reaffirmation agreements are “not favored” and the requirements are strictly enforced. “The requirements are designed to

protect the debtor from his or her own bad judgments.” Referring to Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. 1998), where over \$165,000,000.00 was returned to debtors from payments made on unlawful reaffirmation agreements resulting from creditor’s “flawed legal judgment” in adopting a policy of not filing reaffirmation agreements with bankruptcy courts.

- iv) Any type of agreement that requires a debtor to repay any portion of a discharged debt is considered a reaffirmation agreement. Disguised reaffirmation agreements are prohibited. Irrespective of any recitals in the agreement suggesting it is not a reaffirmation agreement, it is void and unenforceable unless there has been full compliance with the conditions of sections 524(c) and (d).**
- v) If an agreement relates to property only, a so-called “in rem” agreement, and imposes no personal liability on the debtor, it may not qualify as a reaffirmation agreement. Even a requirement that the debtor pay attorney fees and collection costs will impose a personal liability which will be prohibited, unless it qualifies as a reaffirmation agreement.**
- vi) A transaction that leaves a debtor believing he or she is obligated to repay a discharged debt cannot be characterized as voluntary.**

3) Timing Issues

- a) Debtor is required, within 30 days of the date the bankruptcy petition is filed to file a Statement of Intention (§521) with respect to all personal property covered by liens (whether purchase money, non-purchase money security interests or leases). If Debtor fails to do so, then after the 30 day period the severe Automatic Stay provisions under the Bankruptcy Code are “lifted” or terminated and creditors may repossess under state law.**
- b) If Debtor files such a Statement of Intention and then fails to take the action specified (redeem, reaffirm, etc) within 30 days after the §341 Meeting of Creditors, then the Automatic Stay again terminates in favor of the creditors, subject to a right of the Bankruptcy Trustee to request that property with equity remain in the bankruptcy estate.**
- c) “Purchase money security interests” are slightly different. This is the lien of a creditor on an item of personal property purchased by Debtor with the loan. Examples include a car or refrigerator. If Debtor refinances the car, the loan is no longer considered a “purchase money security interest”.**
 - i) This makes a difference because the Debtor may not retain possession of the personal property subject to a purchase money security interest unless Debtor within 45 days of filing the petition either:**

- ii) Reaffirms the debt; or
 - iii) Redeems or pays off the debt.
 - iv) If the Debtor fails to act, the Automatic Stay is terminated and the creditor may take action under non-bankruptcy law, that is state law, to repossess the collateral.
 - v) The bankruptcy trustee within 45 days of the filing of the petition may file his or her own motion that the property is of consequential value (has value above the lien amount) to the estate and that it should be turned over to the trustee, basically to sell.
- d) So, Debtor has less time to deal with purchase money security interests
- 4) The Reaffirmation process requires a pro se Debtor or Debtor's attorney and the Creditor to obtain, draft, complete, sign and file forms with the Court under certain deadlines. This is no easy task. Completing a reaffirmation requires diligence and cooperation. Debtor is motivated to keep certain property and to avoid serial bankruptcy filings which are penalized much more severely under the new 2005 provisions. Creditors seek more money through a reaffirmation than can usually be obtained from a Chapter 13 distribution. Creditors also seek to avoid the expenses and hassles of repossession.
- 5) **Creditor Disclosure Statement** under §524(k)(1)-(3);
- a) This section requires extensive disclosures by the Creditor. Section §524(k) spells out in detail the disclosures that must be made including the essential language and forms before a debt may be reaffirmed.
 - b) Disclosures must be made before the reaffirmation is signed by the Debtor. §524(c)(2)
 - c) Creditors' disclosure requirements are satisfied if "given in good faith." §524(l)(3)
 - d) The disclosures may be in a form created by the Creditor or Debtor attorney but which must be reviewed by the Creditor.
 - e) The disclosures must be accompanied by a proposed Reaffirmation Agreement, the Statement, a Declaration, a Motion and a proposed Order to be signed by the Court. §524(k)(1)
- 6) Debtor **Reaffirmation Statement in support of the Reaffirmation Agreement:**

- a) Debtor must submit a statement in support of the reaffirmation agreement attesting to his or her ability to make the payments on the reaffirmed debt and identifying current income and monthly expenses. §524(k)(6)(A).
- b) If the statement of income and expenses differs from Schedules I and J on the bankruptcy petition the Debtor will have to explain the difference. (Proposed Rule 4008).
- c) Debtor must:
 - i) Sign the Agreement;
 - ii) State the amount of monthly take home pay and other income received, along with current monthly income and expenses (including post bankruptcy obligations and other debts which were reaffirmed) and the amount available to meet the payments on the debt being reaffirmed.
 - iii) Debtor must affirm that entering into the re-affirmation agreement does not impose and “undue hardship”; and
 - iv) That Debtor has the ability to make the payments required, or
 - v) If a presumption of undue hardship arises under this section, the Debtor must state how he or she intends to make the payments.
- 7) In general, Reaffirmation Agreements will:
 - a) Outline detailed rights of the debtor;
 - b) Specify the amount of the debt being reaffirmed;
 - c) Specify additional charges or costs imposed upon the debtor;
 - d) Specify the annual percentage rate;
 - e) Specify the simple interest rate applicable to the amount reaffirmed, if elected by the creditor;
 - f) Contain a statement of the repayment schedule with APR and usual loan disclosures;
 - g) Describe debtor’s repayment obligations with some specificity;
 - h) Set forth the right to consult an attorney;

- i) State the need to file the reaffirmation with the court before it becomes effective;
 - j) State the right of Debtor to rescind the reaffirmation within 60 days of the filing of the reaffirmation agreement with the court.
- 8) If Debtor is represented by an attorney, the attorney must sign a Certification Statement:
- a) That Debtor was fully informed of the consequences of signing the agreement and;
 - b) That the reaffirmation was voluntary; and
 - c) That the attorney has explained the effect of the reaffirmation, such as the possibility of repossession; and
 - d) That the agreement does not impose undue hardship; and
 - e) That if the presumption of hardship applies, then in the opinion of the attorney, the Debtor has the ability to make the payments.
- 9) Payments Received by Creditors Under Presumed Reaffirmation Agreements are treated differently.
- a) A creditor may receive payments before or after the reaffirmation agreement is filed if Creditor and Debtor believe in “good faith” that the agreement is effective. This is intended to absolve the Creditor from errors made if the Affirmation Agreement is technically non compliant with the rules at the time payments are received from Debtor. Otherwise, the payments would be a violation of the automatic stay provisions of the bankruptcy code exposing the creditor to penalties.
 - b) “Good faith” is established if the disclosure requirements of Section 524(k) are satisfied.
 - c) Creditors’ disclosure requirements are satisfied if “given in good faith.”
- 10) Debtor’s “Statement in Support” Is Required under Section 524(k)(6)
- a) A debtor must file a statement in support of the reaffirmation agreement and
 - b) The debtor’s attorney must certify that the agreement does not impose an undue hardship upon the debtor.
 - c) Presumption of “Undue Hardship” under Section 524(m)

- i) For a 60 day period after the Reaffirmation Agreement is filed, the reaffirmation agreement itself is “presumed” to create an “undue hardship” on a Debtor IF the §523(a)(6) statement shows that the Debtor’s expenses, plus the new reaffirmation payment, exceed the Debtor’s monthly income as outlines in his or her disclosures.
- ii) This “presumption” may be rebutted or disproved if the Debtor can identify additional sources of funds to pay the payments, perhaps from family members.
- iii) The court must review the “presumption” apparently while the presumption is in effect. If debtor fails to rebut the presumption in writing to the court’s satisfaction, the court may “disapprove” the agreement. The Court may still disallow reaffirmation agreements after hearings before the discharge.
- iv) Specifically,
 - (1) A reaffirmation agreement is presumed to impose a hardship upon a debtor if:
 - (2) The debtor’s expenses including the payments on the reaffirmed debts are greater than the debtor’s income.
 - (3) If such presumption exists, the debtor’s attorney must affirm that in the attorney’s opinion, the debtor can make the payments.
 - (4) All reaffirmation agreements where the payment of which creates a presumption of undue hardship must be reviewed by the court
 - (a) except for debts reaffirmed with a credit union.
- v) The court must review all reaffirmations proposed by a pro se debtor.
- d) Although reaffirmation agreements must be executed prior to the entry of a discharge, there is no deadline for filing the reaffirmation agreement
 - i) It cannot be enforced until the 60 day period has passed. §524(k)
 - ii) Under new § 524(l), creditors are allowed to receive payments both prior to the filing of a reaffirmation agreement and under agreements “which the creditor believes in good faith to be effective.”

11) Can you send bills to the Debtor after reaffirmation?

a) Yes.

12) If there is no reaffirmation and Debtor wishes to pay his mortgage payment, can the creditor send monthly “bills” to the Debtor?

a) Yes

b) Section 524(a)(2) prevents Creditors from collecting or recovering a debt that has been discharged. Technically, if a mortgage is not “reaffirmed” then the personal liability of the debtor is discharged and the creditor hold only a “lien” on the property. Of course, Debtor must pay the lien or risk losing the property to foreclosure, or repossession for personal property. Section 524(j) allows lien holders to seek or obtain periodic payments from Debtors “in lieu of pursuit of in rem relief to enforce the lien” as long as the bill or demand is in the ordinary course of business between the creditor and the debtor.

13) A word on “Redemptions”

a) The Court may allow a claim by a creditor that a debt is “secured” by an asset. Section 722. A debtor may “redeem” or payoff property secured by a lien or other security interest.

b) The old law valued the collateral as the value of the collateral if it were repossessed and sold by the creditor, minus sale costs.

c) The new law pegs the value as the “replacement” value as of the date of filing without deduction sale costs. This is more akin to the price a retail merchant would charge say for a used refrigerator in a store, as opposed to how much a bank could get for it when they sold it to a used refrigerator store, minus their repossession and sale costs.

d) Redemption of property may no longer be paid out over time but rather must be paid lump sum at the time of the redemption.