REAFFIRMATION, REDEMPTION AND SURRENDER OF PERSONAL PROPERTY VS. "RIDE THROUGH" IN CHAPTER 7 CASES

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Section 521(a)(2) Statement of Intention

To begin at the beginning, Section 521(a)(2) defines a debtor's rights and obligations regarding secured debts upon filing a Chapter 7 bankruptcy petition. Section 521(a)(2) reads as follows:

> **(a)** The debtor shall—
> **(2)** if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
> **(A)** within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and
> **(B)** within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;
> 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);

The precise language of the statute seems to provide several options to the debtor – retention or surrender. If the debtor intends to retain the property, the debtor must specify if the property is claimed exempt, if the debtor wants to redeem the property, or if the debtor intends to

reaffirm the property. As we will review later, some courts have concluded that there is a fourth option – "ride through".

Motions to Redeem

The process for motions to redeem are described in Section 722 of the Code and Bankruptcy Rule 6008 and are permitted where a debtor wishes to retain and pay for tangible personal property intended for personal, family or household use. Section 722 reads as follows:

> An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time of redemption.

To redeem the personal property, a debtor must pay the secured creditor the amount of the "allowed secured claim" in full at the time of the redemption. Rule 6008 provides that a debtor must file a motion for Court approval, and after hearing and upon such notice as the Court directs, the Court may authorize the redemption from the lien or a sale to enforce the lien. The word "may" in the Rule suggests the Court has discretion to authorize the redemption, so even if all the requirements for redemption are met by a debtor, the Court can still refuse to approve the redemption. Notwithstanding the language in the Rule requiring a Court hearing to effectuate a redemption, a consensual redemption between a secured creditor and debtor can effectively accomplish the same goal.

The phrase "allowed secured claim" in Section 722 requires an analysis of Section 506(a)(2) of the Code. Section 506(a) reads as follows:

> **(a)**
> **(1)** An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

> **(2)** If the debtor is an individual in a case under chapter 7 or 13, such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

Section 506(a)(2) more specifically sets forth the valuation test for personal property in individual Chapter 7 and 13 cases. While Section 506(a)(1) values property in light of the purpose of the valuation and proposed disposition of the property, Section 506(a)(2) tightens up the valuation process, and thereby goes beyond the valuation standards described in *Associates v. Rash*, 117 S. Ct. 1879 (1997). Section 506(a)(2) generally requires personal property to be valued at replacement value, without deduction for costs of sale or marketing. For personal property acquired for personal, family, or household purposes, replacement value is even more specifically defined to be the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.

One question that arises in valuing personal, family or household personal property is where are the retail merchants for the personal property? Are they used car lots for vehicles, or will NADA, Kelly Blue Book, or Edmunds retail valuations suffice? However, each of the book valuation guides includes the costs of reconditioning a vehicle for a retail sale as well as marketing costs. Is it sensible for a debtor to take photographs of his or her vehicle in its poor condition and to chronicle its defects for the Court in an effort to reduce the "replacement valuation" for the purposes of redemption?

Personal property other than motor vehicles is more difficult to value. Second-hand furniture stores or flea markets may be the best valuation guide for that kind of personal property. Jewelry might be best valued at jewelry stores, although the mark-up for costs of sale or marketing of that type of personal property is high.

Where a debtor cannot obtain a consensual redemption with a secured creditor due to a dispute on valuation, Bankruptcy Rule 3012 provides that the Court may determine the value of a claim secured by a lien on property upon the motion of any party in interest and after notice and hearing to the holder of the secured claim and any other entity as the Court may direct. The burden of proof for valuation is on the moving party, so a debtor seeking redemption must provide evidence to the Court of the proper replacement value, either by market reports or

similar commercial compilations (such as NADA, for vehicles), permitted by Rule of Evidence 803(17), or by expert testimony of value. Of course, owners can always testify as to value, but their testimony may not be as persuasive as the testimony of a "retail merchant" in the business of selling a particular type of personal property.

General Requirements for Reaffirmation Agreements

A proper reaffirmation agreement must be filed with the Court prior to the debtor receiving his or her discharge, and only after the debtor received the Section 524(k) disclosures, and further upon the debtor's attorney filing a declaration or affidavit that the reaffirmation is voluntary, that there is no undue hardship, and that the attorney advised the debtor of the legal consequences of the reaffirmation agreement and any default in instances where the debtor is represented by an attorney in the negotiation of the agreement Section 524(c), which describes the requirements in detail, reads as follows:

> **(c)** An 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 any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—
> **(1)** such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;
> **(2)** the debtor received the disclosures described in subsection (k) at or before the time at which the debtor signed the agreement;
> **(3)** such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—
> **(A)** such agreement represents a fully informed and voluntary agreement by the debtor;
> **(B)** such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and
> **(C)** the attorney fully advised the debtor of the legal effect and consequences of—
> **(i)** an agreement of the kind specified in this subsection; and
> **(ii)** any default under such an agreement;
> **(4)** the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;
> **(5)** the provisions of subsection (d) of this section have been complied with; and
> **(6)**
> **(A)** in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as—

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and
(ii) in the best interest of the debtor.
(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

The reaffirmation agreement is further only effective if the debtor has not rescinded the agreement at any time prior to the discharge or within 60 days after the agreement is filed with the Court, whichever is later. Notice of the rescission must be provided to the secured creditor. In instances where the debtor is not represented by an attorney in the "negotiation" of the agreement, the Court must also follow Section 524 (d) which reads as follows:

> **(d)** In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall—
> **(1)** inform the debtor—
> **(A)** that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and
> **(B)** of the legal effect and consequences of—
> **(i)** an agreement of the kind specified in subsection (c) of this section; and
> **(ii)** a default under such an agreement; and
> **(2)** determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

Essentially, the Court is required to make certain a non-represented debtor understands the reaffirmation process and that the reaffirmation will not be an undue hardship on the debtor. Interestingly, in both Section 524 (c) and (d), there is an expectation by Congress that the reaffirmation process is a "negotiation". In this writer's experience, while some minor concessions might be negotiated with secured creditors in reaffirmations, more commonly they are quite mechanical. Creditors usually only agree to reaffirm if the debtors are current with their monthly payments on the secured loans and are meeting any other obligations (such as

insurance), and the terms of the reaffirmation are on the same terms as the secured loan as existed prior to the filing of bankruptcy. Certainly, there is an opportunity for a debtor to "play chicken" with the secured creditor and not sign the agreement unless the lender concedes on a lower interest rate or smaller total loan balance, but the creditor community seems to be relatively united in resisting any change in terms of the loan. Creditors would rather repossess the personal property and sell it at a loss than agree to modified loan terms.

The disclosures contained in Section 524 (k) are well known and have been incorporated into "form reaffirmation agreements" that are required by Courts to be used to simplify the reaffirmation process. The form agreement described in Section 524(k) contains mini-TILA provisions designed for consumer protection, but frankly are too confusing for the average consumer. The required instructions and statements in Section 524(k)(3)(J)(i) are laudable and hopefully give debtors pause before signing, but probably have too much information for debtors. To the extent debtors actually read the agreement and understand it, they certainly understand the seriousness of the reaffirmation process, and hopefully, they pause before signing.

The timing of signing reaffirmation agreements can be critical. If the agreement is signed and filed with the Court 30 days prior to discharge, the debtor can still back out of the agreement 30 days after discharge, and the creditor may have lost several remedies it may have against the debtor (such as asserting the debt should be non-dischargeable under Section 523 (a)(2), (4), or (6), because the time periods for filing a complaint under those statutory sections would have expired). A squib of a recent case, *In re Martinez*, 7-11-15027 JA, 2012 WL 3028511 (Bankr. D.N.M. July 25, 2012), illustrates that issue:

> Ms. Martinez asserts that the reaffirmation agreement was unenforceable under this Court's *Perez* decision because her counsel crossed out one of the certifications on the agreement. This Court disagrees. Counsel crossed out the certification on the Reaffirmation Agreement stating that "this agreement does not impose an undue hardship on the debtor or any dependent of the debtor." *See* Reaffirmation Agreement, p. 6—Case No. 7–11–15027— Docket No. 11. However, counsel for Ms. Martinez also checked the box on the Reaffirmation Agreement stating that "[a] presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment." *Id.* By checking the box on Part C stating that a presumption of undue hardship has been established, but in the opinion of counsel, the debtor is nevertheless able to make the payments, counsel has effectively made the undue hardship certification. *See Perez,* 2010 WL 2737187

at *4 n. 6. Thus, the Reaffirmation Agreement between NMDWFS and Ms. Martinez was enforceable at the time the parties entered into the agreement.

An enforceable reaffirmation agreement can function as an acceptable alternative to filing a complaint objecting to dischargeability of debt because it can accomplish the same result: a debt that is reaffirmed is excepted from discharge.[3] However, by entering into a reaffirmation agreement with Ms. Martinez instead of either 1) timely filing an adversary proceeding seeking a determination of non-dischargeability; or 2) obtaining entry of an order extending the time to file a complaint[4]; NMDWFS took a risk that Ms. Martinez could rescind the agreement. A debtor who enters into a reaffirmation agreement can rescind (cancel) the agreement "at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60–day period that begins on the date [the debtor's] reaffirmation agreement is filed with the court, whichever occurs later." 11 U.S.C. § 524(k) 3)(J)(i). The Complaint recites that Ms. Martinez rescinded the Reaffirmation Agreement on April 4, 2012, which is within sixty days of the date the Reaffirmation Agreement was filed with the Court. *See* Case No. 7–11–15027 JA— Docket No. 11. By rescinding the Reaffirmation Agreement, Ms. Martinez rendered the agreement unenforceable.

In re Martinez, 7-11-15027 JA, 2012 WL 3028511 (Bankr. D.N.M. July 25, 2012)

When Does the Presumption of Undue Hardship Arise?

Section 524(m)(1) establishes when the presumption of undue hardship arises, and thereby triggers a Court hearing under Section 524 (d)(1). Section 524(m) reads as follows:

(m)
(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption 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, and such hearing shall be concluded before the entry of the debtor's discharge.
(2) This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.

First, notice that the undue hardship standards do not apply if the secured creditor is a credit union. Credit unions demonstrated to Congress, in 2005, that they were trustworthy enough to not take advantage of debtors, that any reaffirmation agreement with a credit union does not receive the same scrutiny as an agreement with a national bank or national car lender. This writer's experience is that credit unions are more aggressive with consumers than other lenders regarding reaffirmations, so perhaps Congress's confidence in credit unions was misplaced.

The undue hardship presumption is basically a mathematical calculation of the debtor's monthly income and expenses, with a showing that the reaffirmed debt can be paid from existing income. If that showing is not initially made in Schedules I and J, then the debtor must rebut the presumption in writing by showing additional sources of income sufficient to pay the reaffirmed debt on a monthly basis. Interestingly, even if the Court is not satisfied that the presumption is rebutted, the Court may still approve the agreement. The Court cannot disapprove the agreement unless the court holds a hearing on the reaffirmation agreement, with notice to the debtor and creditor. The hearing must conclude prior to the issuance of the discharge.

A practice pointer: Schedule J should always include payment of any debt the debtor intends to reaffirm, and Schedules I and J should always "0" out at the end of Schedule J to show there is sufficient income to pay whatever expenses are on Schedule J. Why "0" out? Why not have extra money left over at the end of Schedule J? If there are additional funds left over, the debtor may not have issues on a reaffirmation, but could have other issues with the U.S. Trustee about why the consumer debtor is filing a Chapter 7 instead of a 13.

Two recent cases illustrate the undue hardship presumption. In *In re Caldwell*, the Court disapproved a reaffirmation agreement on a mobile home that the debtor could not afford. Finally, in *In re Minor*, the Court concluded that debtors demonstrated reduced expenses and thereby approved the reaffirmation agreement. Squibs of each case follow:

Synopsis

Background: Chapter 7 debtor sought to reaffirm debt secured by manufactured home, despite fact that her disposable income was less than amount of monthly payments that she would be required to make under reaffirmation agreement.

Holding: The Bankruptcy Court, Jeffery A. Deller, J., held that debtor failed to rebut presumption of undue hardship arising from her proposed reaffirmation of secured debt that she could not afford to pay by testifying that reaffirmation was

motivated by her desire to preserve her co-owner's interest in manufactured home that secured this debt, and that co-owner would make all monthly payments.

Not approved.

In re Caldwell, 464 B.R. 694 (Bankr. W.D. Pa. 2012)

***696**
1 Under the facts of the instant case, the presumption of undue hardship arises[2] because the Debtor's schedules indicate the Debtor's inability to make the payments required under the *Amended Reaffirmation Agreement.* For this reason, the Court conducted a hearing on the *Amended Reaffirmation Agreement* on January 20, 2012.[3]

2 At the hearing, counsel for the Debtor argued that despite the presumption, the Court should approve the *Amended Reaffirmation Agreement* because the Debtor is seeking to protect the interest of her daughter who is a co-owner of the Property and who supplies the monthly payment amount. (*See* Audio Recording of Hearing Held in Courtroom D, January 20, 2012 (10:16–10:18 AM)).

The Court does not find the Debtor's argument to be persuasive. When considering whether to approve a reaffirmation agreement the Court must consider whether the Debtor has successfully rebutted the presumption of undue hardship. *See* 11 U.S.C. § 524(m)(1). While the Debtor insists that her co-owning daughter will contribute payments, there is nothing of record to indicate that the co-owner is required to or is capable of doing so. In addition, the terms of the *Amended Reaffirmation Agreement* seek to have the Debtor affirm a payment amount of $537.27 per month over the next twenty-two (22) years. While the interest rate and payment amount seem reasonable, there was no evidence presented as to whether the Debtor (and/or her daughter) will be able to maintain a sufficient level of income over such an extended period of time to repay the reaffirmed debt.

Additionally, from the facts and circumstances presented, consideration of whether the *Amended Reaffirmation Agreement* is in the best interest of the Debtor helps to inform this Court's analysis of whether the Debtor has successfully rebutted the presumption of undue hardship. *See e.g., In re Hart,* 402 B.R. 78, 87 (Bankr. D.Del. 2009) (explaining the court's presumption analysis was “heavily influenced” by whether an agreement is in the debtor's best interest when considering a request to reaffirm consumer debt secured by real property); *In re Laynas,* 345 B.R. 505, 515 (Bankr. E.D. Pa. 2006) (When considering whether the presumption of undue hardship has been rebutted “nothing in § 524(m)(1) expressly prohibits the court from considering other factors (such as the debtor's best interest, as under § 524(c)(6)(A)).”).

Reaffirmation of the debt does not appear to provide any benefit to the Debtor.

***697**
The Debtor does not reside in the Property,[4] does not maintain any equity in the Property, and Debtor's counsel was unable to indicate what benefit, if any, the Debtor would derive in exchange for her reaffirmation of the debt. (*See* Audio Recording of Hearing Held in Courtroom D, January 20, 2012 (10:19–10:21 AM)). While the Debtor's desire to protect her co-owning daughter's interest in the Property is understandable, it does not appear to be in the Debtor's best interest. *See In re Hoffman,* 358 B.R. 839, 843–44 (Bankr. W.D. Va. 2006) (holding that reaffirming an unaffordable debt for the purpose of protecting a co-obligor was not in the debtors' best interest).

Further, just because this Court will disapprove the *Amended Reaffirmation Agreement* does not mean that the arrangement between the Debtor, her daughter, and Reliance Savings Bank must be altered in any way. Even though the Debtor's personal liability on the debt may be discharged, she maintains the absolute right to continue making payments on the debt. *See* 11 U.S.C. § 524(f). Counsel for Reliance Savings Bank acknowledged that the Debtor and her daughter are current on the mortgage and that Reliance Savings Bank would continue to accept payments from the Debtor's daughter going forward. (*See* Audio Recording of Hearing Held in Courtroom D, January 20, 2012 (10:18–10:19 AM)). So long as the Debtor and her co-signor continue to make timely payments, it appears to the Court that Reliance Savings Bank has little incentive to foreclose, and may, in fact, be prevented from doing so.[5]

In sum, because the Debtor's payment of the proposed reaffirmed debt would create negative net monthly income and reaffirmation does not appear to be in the best interest of the Debtor, the Debtor has failed to rebut the presumption of undue hardship to the satisfaction of this Court.

WHEREFORE, this ***30th*** day of ***January, 2012,*** for the reasons stated above, **IT IS HEREBY ORDERED THAT** the *Amended Reaffirmation Agreement* between the Debtor and Reliance Savings Bank, filed in the above-captioned case **NOT APPROVED.**

In re Caldwell, 464 B.R. 694, 696-97 (Bankr. W.D. Pa. 2012)

STATEMENT OF THE CASE

Debtor seeks to reaffirm a debt secured by a 2007 Chevrolet Silverado Z71. Debtor's Reaffirmation Agreement shows the presumption of undue hardship arises under 11 U.S.C. § 524(c)(6)(A). Debtor asserts he has reduced his living expenses and can afford to make the payments under the reaffirmation agreement. The Court finds that Debtor has successfully rebutted the presumption of undue hardship and now approves reaffirmation.

In re Minor, BR 12-00416, 2012 WL 4482575 (Bankr. N.D. Iowa Sept. 26, 2012)

The Bankruptcy Code requires a hearing and court approval if the debtor's monthly expenditures will exceed his monthly income after the reaffirmation. 11 U.S.C. § 542(m)(1). A presumption of undue hardship exists when the debtor's monthly expenses exceed his monthly income. *Id.* The debtor may rebut this presumption, in writing, by identifying additional sources of income available to make the reaffirmed payments. *Id.* "Bankruptcy courts have a duty to review reaffirmation agreements for undue hardship, even when the debtor's attorney confirms that the debtor is capable of paying the reaffirmed debt." *Bartz,* 2011 WL 671991, at *3 (citing *In re Miller,* No. 07–00581, 2007 WL 2413012, at *1 (Bankr. N.D. Iowa 2007)); *see In re Melendez,* 224 B.R. 252, 260 (Bankr. D.Mass. 1998). "The debtor cannot overcome the presumption of undue hardship merely by showing that he needs [an item]." *Bartz,* 2011 WL 671991, at *3 (citing *In re Stevens,* 365 B.R. 610, 612 (Bankr. E.D. Va. 2007)).

Several courts have rejected reaffirmation agreements when the reaffirmed debt would generate a negative monthly net income. *See id.; see also In re Payton,* 338 B.R. 899, 904 (Bankr. D.N.M. 2006); *In re Husain,* 364 B.R. 211, 217 (Bankr. E.D. Va. 2007). "When reaffirming a debt, the Court considers the terms of the reaffirmation agreement, the necessity of the goods sought to be retained, the repossession risk if the debtor does not reaffirm the debt, the goods' replacement value compared to the debt, and whether the collateral is a necessity." *Vosburg,* 2012 WL 1098523, at *3 (citing *Bartz,* 2011 WL 671991, at *3); *Miller,* 2007 WL 2413012, at * 1. This Court has previously stated: "The appropriate financial inquiry ascertains whether the debtors' expenses exceeded their income and whether the reaffirmed debt is secured by a necessary item." *Miller,* 2007 WL 2413012, at *1 (citing *In re Vargas,* 257 B.R. 157, 166 (Bankr. D.N.H. 2001)).

ANALYSIS

At the hearing, the Court asked Debtor's counsel to distinguish this case from *Bartz.* In *Bartz,* this Court denied reaffirmation of a debt secured by a 2009 Chevrolet Silverado when the presumption of undue hardship arose. 2011 WL 671991, at * 1. The debtor in *Bartz* would have had a monthly deficit of $321.86 after reaffirmation. *Id.* Debtor's attorney pointed out several differences between Debtor's case and the facts of *Bartz,* including the age of the truck at the time of filing the reaffirmation agreements, and whether debtor "upgraded" to a newer truck shortly before bankruptcy. Here, debtor's attorney points out debtor's truck September 26, 20 was older, not recently upgraded, and provided a much smaller amount to finance. The Court agrees with Debtor and finds that these facts sufficiently differentiate this case from *Bartz.* The Court finds the Debtor has shown the truck is a necessary item.

The Court also finds Debtor has shown that he can make the payments with the adjustments he has made to his lifestyle. Taken as a whole, the circumstances

> provide sufficient justification for the Court to find Debtor has successfully rebutted the presumption of undue hardship.
>
> In re Minor, BR 12-00416, 2012 WL 4482575 (Bankr. N.D. Iowa Sept. 26, 2012)

Should Debtor's Counsel Sign The Reaffirmation Agreement?

As noted earlier, if there is no attorney representing the debtor negotiating the agreement, the Court is required to hold a hearing under Section 524(d) and determine that the agreement does not impose an undue hardship on the debtor and is in the best interest of the debtor under Section 524(c)(6). Section 524(c)(3) delineates the obligations of an attorney who represents a debtor in the negotiation of a reaffirmation agreement. The attorney must sign a declaration or affidavit demonstrating that the agreement represents a fully informed and voluntary agreement by the debtor, that the agreement does not impose an undue hardship on the debtor or a dependent of the debtor (debtor can afford the car, but his or her children might not eat?), and that the attorney advised the debtor of the legal effect and consequences of the agreement and a default under the agreement.

Some attorneys are reluctant to sign the declaration or affidavit on reaffirmation agreements because it can impose liability on the attorney from an unhappy debtor after the conclusion of the bankruptcy case. There is a perception that every debtor would throw his or her attorney under the bus if the debtor became unhappy with the reaffirmation after the expiration of the rescission period. Someone must be to blame if the debtor is later unhappy, right? Yet other attorneys routinely do not sign on to reaffirmation agreements because they are philosophically opposed to reaffirmation generally.

Courts will take the attorney's signature on a reaffirmation agreement seriously – using Rule 9011 as a guide for the attorney's performance in his or her obligations under Section 524(c). One recent case is *In re Gomez*, a squib from which follows:

> Related to this subsection, the debtors also argue that without the disclosure ***330** of a monthly payment, it would have been difficult for the Court to determine whether there was a presumption of an undue hardship as defined by the code. Hence, the debtors argue that the Court should have held a hearing to determine whether the reaffirmation should have been approved. *See* 11 U.S.C. § 524(k)(3)(J)(i)(6). However, the Court believes that the attorney certification stating that the agreement does not impose an undue hardship resolves that issue. Without an undue hardship, court review is not required and may not even be allowed. There is no provision in the code that permits a court to scrutinize a

reaffirmation agreement when the debtors are represented by counsel and there is not a presumption of undue hardship. *Bay Federal Credit Union v. Ong (In re Ong),* 461 B.R. 559, 563 (9th Cir. BAP 2011). Without an undue hardship, the reaffirmation agreement is effective upon filing if the other provisions of § 524(c) are met. *Id.* at 562 (holding that once the requirements of § 524(c) are met, the agreement is effective and enforceable upon filing, unless there is a presumption of undue hardship).

Based on the above findings, the Court concludes as a matter of law that the reaffirmation agreement that is the subject of the debtors' adversary proceeding complies with the statutory requirements of § 524(c) and (k) and the Court denies any relief under this claim.

Deceptive Reaffirmation Agreement

6 The debtors' second argument is that the reaffirmation agreement was deceptive as to Martha Gomez because she was being asked to reaffirm "an unsecured loan." As stated earlier, the reaffirmation agreement that was filed with the Court was the official form promulgated by the Administrative Office of the United States Courts. This particular form includes all of the required provisions under § 524(c) and (k), including the required certification by the debtors' counsel that (A) such agreement represents a fully informed and voluntary agreement by the debtor; (B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and (C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

11 U.S.C. § 524(c)(3). This certification by the debtors' counsel negates the debtors' argument that the reaffirmation agreement was deceptive as to Martha Gomez. Neither debtor was under an obligation to enter into the voluntary reaffirmation agreement and, according to their counsel's certification, they were advised of the legal effect of the reaffirmation agreement. Even though the deed to the subject property reflected only Marcelo Gomez as the Grantee, Martha Gomez was obligated on the debt that is the subject of the reaffirmation agreement and chose to reaffirm that obligation.[4]

***331**

Marcelo Gomez testified that he and Martha Gomez entered into the reaffirmation agreement because they wanted to keep the real property, which was their home. There was no allegation that Martha Gomez was coerced into signing the reaffirmation agreement or that the debtors' counsel acted improperly with regard to the reaffirmation agreement. *See In re Ong,* 461 B.R. at 563 (stating that the only time a court should concern itself with an attorney-certified reaffirmation agreement when there is no presumption of undue hardship is when there has been a Rule 9011 violation by the attorney). Accordingly, the Court finds that because Martha Gomez was represented by counsel when she entered into the

agreement, the debtors' argument that the reaffirmation agreement was deceptive as to Martha Gomez fails and the Court denies any relief under this claim.

Violation of Discharge Injunction

The debtors' third argument is that Wells Fargo violated the discharge injunction under § 524(a). This argument is premised upon the reaffirmation agreement being invalid because it failed to meet the requirements of § 524(c). Based on the Court's earlier conclusion that the reaffirmation agreement complies with § 524(c) as a matter of law, the debtors' third argument is moot and the Court denies any relief under this claim.

Conclusion

For the reasons stated above, the Court concludes as a matter of law that the reaffirmation agreement between Wells Fargo and the debtors that was filed in this case on August 20, 2008, complied with the requirements of § 524(c) and is a valid reaffirmation agreement. Accordingly, the debtors' *Complaint Seeking Injunctive Relief Declaring Reaffirmation Agreement Null and Void and Seeking Damages For Violation of the Discharge Injunction* is denied.
IT IS SO ORDERED

In re Gomez, 473 B.R. 322, 329-31 (Bankr. W.D. Ark. 2012)

Certainly, there needs to be a clear process in each debtor's counsel's office for reaffirmation agreements to demonstrate that the attorney's obligations are met under Section 524(c). In a busy debtor's practice, perhaps representing hundreds of debtors each year in Chapter 7 cases, a routine in which the attorney explains reaffirmation at the initial client meeting, as well as at the signing of the petition and schedules, and finally having the attorney or a skilled paralegal review the reaffirmation pros and cons at the time of signing the agreement are essential. If the process is followed routinely, the likelihood that a client will later experience "reaffirmer's remorse" and blame the attorney is remote.

When Must the Reaffirmation Agreement be Filed?

Bankruptcy Rule 4008 sets forth the applicable time periods for filing reaffirmation agreements. Reaffirmation agreements must be filed within 60 days from the date first set for the 341(a) meeting. The Court may, at any time and within its discretion, enlarge the time to file a reaffirmation agreement. Rule 4008(a). At the time of the filing of the reaffirmation agreement, the debtor is required to file a statement under Section 524 (k)(6)(A) as well as the total income and expenses as stated on Schedules I and J. If there is a discrepancy between the

two statements of income and expenses, the debtor must provide an explanation for the difference.

Debtor's Duty to Surrender or Perform Duties in Statement of Intention

Sections 521(a)(2) and (a)(6) describe the time periods for a debtor to perform his or her obligations under a statement of intention. They read as follows:

> **(a)** The debtor shall—
>
> **(2)** if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
>
> **(A)** within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and
>
> **(B)** within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;
>
> 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);
>
> **(6)** in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—
>
> **(A)** enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
>
> **(B)** redeems such property from the security interest pursuant to section 722;
>
> * If 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 nonbankruptcy law, unless the court

> determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. (* this unnumbered paragraph appears to modify Section 524(a)(6), yet it appears after 524(a)(7) in the Code).

Notice that a debtor must perform his or her intention under the Statement of Intention within 30 days after the 341 meeting except in the instance of an individual with personal property, in which case, a debtor must not retain possession of personal property from a secured creditor for longer than 45 days after the 341 meeting, unless the debtor enters into a reaffirmation agreement or redeems the personal property. This reading of the Code follows the interpretation of a debtor's choices in Chapter 7 bankruptcy regarding secured personal property: surrender, retain by reaffirmation, or retain by redemption, an interpretation adopted by a majority of Bankruptcy Courts..

Notwithstanding this clear delineation of a debtor's choices in Section 521 of the Code, some Courts have concluded that there is a fourth option available for debtors, sometimes known as a "Ride Through". The statutory analysis for this fourth option is well described in a squib from a recent case, *In re Wilson*, from the 4th Circuit:

> In the alternative, the Debtor argues that this court should permit him to retain the Vehicle and have it "pass-through" the bankruptcy case unaffected. The option the Debtor requests, commonly known as a "back door ride-through" or "pay and drive" in bankruptcy jargon, is an issue of first impression for this court; however, not novel to sister bankruptcy courts within the Fourth Circuit. This court agrees with the holdings of *In re Chim,* 381 B.R. 191 (Bankr. D.Md. 2008) and *In re Husain,* 364 B.R. 211 (Bankr. E.D. Va. 2007) that the back door ride-through remains viable after BAPCPA for personal property.[4] The court declines to iterate their cogent discussions here. Thus, this court holds that where a debtor fully complies with the prescriptions of §§ 521(a) and 362(h), the automatic stay remains in place with respect to the ... [personal property], the ... [personal property] remains property of the estate, the debtor is not obligated to turn over possession of the ... [personal property], and the lender may not exercise remedies as a result of a default under the *ipso facto* clause under the loan agreement. *In re Chim,* 381 B.R. at 198.
>
> The Debtor in this case fully performed his duties under §§ 521(a) and 362(h). The Debtor complied with § 521(a)(2)(A) by filing his statement of intention to reaffirm the Vehicle on February 15, 2012. § 521(a)(2)(A) (requiring debtor to file statement of intention within 30 days of filing of the petition or on or before the date of the meeting of the creditors, whichever is earlier). The Debtor also met

the deadline of § 521(a)(2)(B) by entering into the Reaffirmation Agreement with CSC Logic on or around March 19, 2012. § 521(a)(2)(B) (mandating the debtor "perform his intention with respect to such property" under § 521(a)(2)(A) "within 30 days after the first day set for the meeting of creditors"). Because the Debtor timely filed a statement of intent to reaffirm the Vehicle and timely entered into the Reaffirmation Agreement, § 362(h) is not triggered.[5] § 362(h)(1) (providing that the automatic stay under § 362(a) terminates with respect to personal property if a chapter 7 debtor fails to file a timely statement of intention under § 521(a)(2)).

***3** Notably, § 521(a)(6) is inapplicable because CSC Logic is not a holder of an "allowed claim"; CSC Logic did not file a proof of claim in this no asset case and therefore cannot assert a claim for the "purchase price" of the Vehicle. § 521(a)(6) (requiring creditor to hold "an allowed claim for the purchase price" before a debtor is forced to surrender the underlying personal property); *see In re Blakeley,* 363 B.R. 225, 229 (Bankr. D. Utah 2007) (remarking that "[s]ection 521(a)(6) only applies if a creditor has an 'allowed claim' " and since the creditor did not file a proof of claim under § 501, there was no allowed claim under § 502).[6]

Consequently, the Debtor has avoided the implications of § 521(d); namely, any *ipso facto* clause contained in the loan agreement becoming operative. § 521(d) ("If the debtor fails timely to take the action specified in ... [§ 521(a)(6), § 362(h)(1), or § 362(h)(2)], with respect to property which ... a creditor holds a security interest ..., nothing in this title shall prevent or limit the operation" of an *ipso facto* clause in the underlying agreement).

CONCLUSION

At the reaffirmation hearing, the Debtor said that he is current on Vehicle payments; the automatic stay and discharge injunction will continue provided that the Debtor remains current on his payments due under the Reaffirmation Agreement. *In re Hussain,* 364 B.R. at 219 ("Once the discharge is granted, the creditors may not repossess the vehicles without violating the discharge injunction unless there is a subsequent payment or insurance default ."). CSC Logic may continue to accept payments under § 524(l)(1). *In re Stevens,* 365 B.R. 610, 612 (Bankr. E.D. Va. 2007). And because the Debtor has complied with §§ 521(a) and 362(h), CSC Logic cannot exercise the relief provisions of §§ 362(h), 521(a)(6), and 521(d). A separate order will be entered pursuant to Fed. R. Bankr. P. 9021.

In re Wilson, 1:12-BK-00172, 2012 WL 2411918 (Bankr. N.D.W. Va. June 26, 2012)

The 4th Circuit appears to allow a "Ride Through" even after BAPCPA's passage in limited circumstances, such as undue hardship, where the debtor has attempted to perform as he

is required to do, but did not receive cooperation from the secured lender. Other Circuits, such as the 3rd and 9th, are not inclined to permit a "Ride Through" since BAPCPA was enacted. Several other decisions, such as *In re Dumont*, 581 F.3d 1104, 1114 (9th Cir. 2009) and *In re Mollison*, 463 B.R. 169, 179 (Bankr. D. Mass. 2012), describe the history and analysis opposing the availability of the "Ride Through" options for debtors. Squibs from *In re Mollison* follow:

> Section 362(h)(1)(A) requires that a debtor "indicate 'either' surrender 'or' retention; if he chooses the latter, he must indicate 'either' redemption, reaffirmation, 'or' assumption. 'Either' means '[t]he one or the other.'.... [T]he 'either ... or' disjunction has always meant that *one of the listed alternatives must be satisfied*." *Dumont v. Ford Motor Credit Co. (In re Dumont),* 581 F.3d 1104, 1114 (9th Cir. 2009) (emphasis supplied) (quoting Am. Heritage Dictionary of the English Language 572 (4th ed. 2000)).[9] Thus, for purposes of the Filing Requirement, a debtor's failure to choose one of the "approved" options (surrender, redeem, or reaffirm) has the same effect as if the debtor failed to file the Statement of Intent at all.[10]
>
> In re Mollison, 463 B.R. 169, 179 (Bankr. D. Mass. 2012)
>
> Footnote #10:
>
> Prior to the BAPCPA amendments, the First Circuit Court of Appeals had interpreted § 521(a)(2)(A) as requiring that a debtor elect to surrender, reaffirm, or redeem property securing a consumer debt, *see Bank of Boston v. Burr (In re Burr),* 160 F.3d 843, 849 (1st Cir. 1998), and that interpretation is now further buttressed by the specificity found in the new § 362(h)(1)(A). Even in those circuits where a "fourth" option of retaining and making payments on secured debts under § 521(a)(2)(A) had been sanctioned, several courts have now recognized that § 362(h)(1)(A) does not allow such a "ride through." *See, e.g., In re Dumont,* 581 F.3d at 1113–14 (noting that the BAPCPA amendments are "inconsistent" with prior 9th Circuit law, which had allowed debtors to retain personal property and continue to make payments and holding that § 362(h) now requires debtors, in the statement of intention, to " 'indicate in such statement that' he will do one of four things: surrender, redeem, reaffirm, or assume an unexpired lease' "); *In re Miller,* 443 B.R. 54, 58 (Bankr. D.Del. 2011) ("New section 362(h) thus changed the pre-BAPCPA analysis because the debtor must now indicate whether she will surrender, reaffirm, redeem, or assume an unexpired lease, *and then perform accordingly.* Consequently, the pre-BAPCPA 'ride through' option available to debtors in the Third Circuit has been narrowed."); *but see In re Baker,* 390 B.R. 524 (Bankr. D.Del. 2008), *aff'd Ford Motor Credit Co. v. Baker (In re Baker),* 400 B.R. 136 (D. Del. 2009) (Third Circuit Court of Appeals' decision in *Price v. Delaware State Police Fed. Credit Union (In re Price),* 370 F.3d 362, 372 (3d Cir. 2004), which held "that the enumeration of three options for treatment of secured property under former section 521(2)—i.e., surrender, redemption or reaffirmation—did not preclude the

> debtor from exercising a so-called 'fourth option'—i.e., retaining the property while remaining current on payments" was not affected by changes in BAPCPA and remained controlling law.).
>
> In re Mollison, 463 B.R. 169, 179 N.10 (Bankr. D. Mass. 2012)

In short, the "Ride Through" analysis requires a debtor to perform in accordance with Section 521 by filing the Statement of Intention and to timely choose one of the intentions and timely perform the intention. If the debtor performs, then the automatic stay does not terminate with respect to the personal property as set forth in Section 362(h), which reads as follows:

> **(h)**
> **(1)** In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—
>
> **(A)** to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and
>
> **(B)** to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement 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.

In addition, if a debtor has performed his or her intention as required by Section 521, then the ipso facto default clauses in many security agreements is not enforceable pursuant to Section 521(d) which reads:

> **(d)** If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the

> insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

However, as noted in *In re Mollison*, courts that disagree with the "Ride Through" option see a debtor's failure to either surrender, reaffirm, or redeem as set forth in Section 362(h)(1)(A) as the equivalent of failing to satisfy a debtor's obligations under the Statement of Intention. Interestingly, the Code language describing the reaffirmation process as a "negotiation" suggests that creditors do not need to cooperate with debtors, notwithstanding a debtor's desire to reaffirm and retain collateral. Negotiations sometimes fail.

Stay Violations from A Creditor's Failure to Accept Surrender

What happens if a debtor chooses the option to surrender his or her personal property and the secured creditor refuses to take possession of the surrendered property and dispose of it? "Surrender" in this bankruptcy context is generally understood to mean that a debtor must make the collateral available to the secured creditor. A secured creditor is not obligated to take possession of the personal property. *In re White*, 487 F. 3d 199 (4th Cir. 2007). A common example is a motor vehicle with little value – a debtor surrenders it in a Chapter 7 bankruptcy, but the secured creditor does not repossess the vehicle, leaving the debtor with a junk vehicle and no way to dispose of it, since junkyards are unwilling to accept a vehicle on which there is a lien.

In the case of *In re Pratt*, 462 F.3d 14 (1st Cir. 2006), the First Circuit Court of Appeals held that a secured creditor's refusal to accept a surrender, and to also demand payment for the collateral, constituted "objective coercion" and thereby a violation of the discharge injunction under Section 524. The same conduct by a secured creditor should accordingly constitute an automatic stay violation. However, most Chapter 7 cases are "no asset" cases which are open only 3 – 4 months, and getting the attention of and performance from a secured creditor during that short time span makes it less likely that a debtor will prosecute a stay violation case against the creditor than a later discharge injunction violation case, after the initial closure of the Chapter 7 case. A copy of the *In re Pratt* decision is included with these materials.

Secured Creditor Options if Collateral is Not Surrendered

Where a debtor fails to perform his or her intentions regarding personal property as set forth in the Statement of Intention (and assuming the debtor is not in a jurisdiction permitting the

"Ride Through" option), the automatic stay is lifted pursuant to Section 362(h)(1). A Motion for Relief from Stay is unnecessary as the relief is automatic.

In instances where a debtor initially chooses to reaffirm, signs an agreement to reaffirm and later timely rescinds the reaffirmation agreement (thereby surrendering the personal property), and where a secured creditor accepts payments from a debtor, the creditor is permitted to retain the payments and does not violate the discharge injunction, pursuant to Section 524(l), which reads:

> **(l)** Notwithstanding any other provision of this title, the following shall apply:
> **(1)** A creditor may accept payments from a debtor before and after the filing of an agreement of the kind specified in subsection (c) with the court.
> **(2)** A creditor may accept payments from a debtor under such agreement that the creditor believes in good faith to be effective.
> **(3)** The requirements of subsections (c)(2) and (k) shall be satisfied if disclosures required under those subsections are given in good faith.

Section 524(d) also permits a secured creditor to use its ipso facto default clause to assert a default by the bankruptcy filing, and take possession of its collateral. But what happens if a debtor is hiding the collateral or failing to cooperate with the secured creditor in returning the collateral? Section 727(a)(2) is a remedy available to the secured creditor, assuming there is a timely complaint filed. The secured creditor may want to obtain a court order requiring the debtor to turn over the personal property first, however. A debtor's failure to obey the Court's turnover order could subject the debtor to losing his or her discharge under Section 727(a)(6). A debtor's violation of Section 727(a)(6) can subject the debtor to having his or her discharge revoked under Section 727((d)(3) and (e) if a complaint is filed by the creditor before the later of one year after the discharge was granted or the case is closed.

462 F.3d 14
United States Court of Appeals,
First Circuit.

In **re** Carlton Dana **PRATT** and
Christine Ann **Pratt**, Debtors.
Carlton Dana **Pratt**, Appellant,
v.
General Motors Acceptance Corporation, Appellee.

No. 05-2453. | Heard March 7, 2006. | Decided Sept. 1, 2006.

Synopsis

Background: Chapter 7 debtors brought action against creditor whose claim was secured by interest in debtors' motor vehicle, alleging that creditor violated the discharge order issued by the Bankruptcy Court by refusing to either release its secured lien or repossess the vehicle. The United States Bankruptcy Court, James B. Haines, Jr., J., 324 B.R. 1, entered judgment in favor of creditor. Debtors appealed. The United States District Court for the District of Maine, Gene Carter, Senior District Judge, 2005 WL 1961341, affirmed. Debtors again appealed.

Holdings: The Court of Appeals, Cyr, Senior Circuit Judge, held that:

[1] debtors' surrender of vehicle did not require that creditor repossess the vehicle, and

[2] creditor violated discharge injunction by expressly refusing to release the lien on the vehicle.

Reversed and remanded.

West Headnotes (13)

[1] Bankruptcy
Conclusions of Law; De Novo Review
Bankruptcy
Clear Error

Following an intermediate appeal to the district court, the Court of Appeals directly reviews the bankruptcy court decision, conducting de novo review of its legal conclusions, and clear error review of its findings of fact.

1 Cases that cite this headnote

[2] Bankruptcy
Enforcement of Injunction or Stay
Bankruptcy
Damages and Attorney Fees

A bankruptcy court is authorized to enforce a discharge injunction and order damages for the debtor for a violation of the injunction if the merits so require. 11 U.S.C.A. § 524.

11 Cases that cite this headnote

[3] Bankruptcy
Effect as to Securities and Liens

Although the unsecured portion of a secured creditor's claim may be discharged in a Chapter 7 or 13 case, its lien in the collateral normally survives the bankruptcy proceeding and the discharge, and is enforceable in accordance with state law. 11 U.S.C.A. § 524.

3 Cases that cite this headnote

[4] Bankruptcy
Redemption
Bankruptcy
Reaffirmation

Where a Chapter 7 debtor wishes to retain the secured collateral, he may either reaffirm his agreement to repay the prepetition debt under renegotiated terms acceptable to the secured creditor, or redeem the collateral by paying its current fair market value to the secured creditor. 11 U.S.C.A. § 521(a)(2).

3 Cases that cite this headnote

[5] Bankruptcy
Protection Against Discrimination or Collection Efforts in General; "Fresh Start."

Bankruptcy
Reaffirmation

Due to the importance of the Bankruptcy Code's fresh start policy, reaffirmation agreements are subjected to very stringent controls to ensure that debtors are neither coerced nor harassed by secured creditors into reassuming debts which would otherwise be entitled to discharge. 11 U.S.C.A. § 521(a)(2).

2 Cases that cite this headnote

[6] **Bankruptcy**
Secured Claims

Where the debtor decides not to reaffirm a secured debt, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: surrender the collateral. 11 U.S.C.A. § 521(a)(2).

2 Cases that cite this headnote

[7] **Bankruptcy**
Secured Claims

In the context of a bankruptcy proceeding, "surrender" by the debtor of secured collateral means that the debtor agrees to make the collateral available to the secured creditor, not that the debtor physically transfers the collateral to creditor. 11 U.S.C.A. § 521(a)(2).

8 Cases that cite this headnote

[8] **Bankruptcy**
Secured Claims

Chapter 7 debtors' surrender of motor vehicle did not require that secured creditor repossess the vehicle if it deemed such repossession cost ineffective. 11 U.S.C.A. § 521(a)(2).

5 Cases that cite this headnote

[9] **Bankruptcy**
Discharge as Injunction

Bankruptcy
Proceedings, Acts, or Persons Affected

In assessing violations of the automatic stay and the discharge injunction, the core issue is whether the creditor acted in such a way as to coerce or harass the debtor improperly. 11 U.S.C.A. § 524.

20 Cases that cite this headnote

[10] **Bankruptcy**
Discharge as Injunction

In determining whether a violation of the discharge injunction has occurred, the line between forceful negotiation and improper coercion is not always easy to delineate, and each case must be assessed in the context of its particular facts. 11 U.S.C.A. §§ 521(a)(2), 524.

3 Cases that cite this headnote

[11] **Bankruptcy**
Lien Enforcement

Creditor whose claim was secured by interest in Chapter 7 debtors' motor vehicle violated discharge injunction by expressly refusing to release the lien on the vehicle after debtors surrendered it, unless debtors paid claim in full, precluding the debtors from being able to junk the vehicle, where creditor also refused to repossess the vehicle because it was not cost effective to do so. 11 U.S.C.A. §§ 521(a)(2), 524.

16 Cases that cite this headnote

[12] **Bankruptcy**
Application of State or Federal Law in General

State law governs in a bankruptcy proceeding unless some federal interest requires a different result.

[13] **Bankruptcy**
Protection Against Discrimination or Collection Efforts in General; "Fresh Start."

Bankruptcy
Discharge as Injunction

Even legitimate state-law rights exercised in a coercive manner may impinge upon the

important federal interest served by the discharge injunction, which is to ensure that debtors receive a fresh start and are not unfairly coerced into repaying discharged prepetition debts. 11 U.S.C.A. § 524.

6 Cases that cite this headnote

Attorneys and Law Firms

***15** James F. Molleur, for appellant.

F. Bruce Sleeper, with whom Jensen, Baird, Gardner & Henry, was on brief for appellee.

Before LIPEZ, Circuit Judge, CYR, Senior Circuit Judge, and HOWARD, Circuit Judge.

Opinion

CYR, Senior Circuit Judge.

Carlton and Christine **Pratt**, chapter 7 debtors, appeal the district court judgment which affirmed a bankruptcy court ruling that General Motors Acceptance Corporation (GMAC) did not violate the chapter 7 discharge injunction by declining to discharge its lien on the debtors' automobile until they paid the remaining balance due on their prepetition car loan. We now reverse and remand for further proceedings.

I

BACKGROUND

In 1994, Carlton **Pratt** bought a new Chevrolet Cavalier and financed the purchase through GMAC, which acquired a lien on the vehicle. Four years later, the ***16** **Pratts** filed a chapter 13 petition, and estimated the current value of the vehicle at $4900. The bankruptcy court allowed the GMAC proof of secured claim for the outstanding loan balance (including interest) at $3,291.35, and GMAC subsequently received $1,083.62 in distributions during the course of the chapter 13 proceeding.

In 1999, the **Pratts** converted their chapter 13 case to chapter 7, by which time the balance due on the GMAC secured claim approximated $2620. Pursuant to Bankruptcy Code § 521(a)(2)(A), the **Pratts** gave notice that they intended to "surrender" the vehicle, *viz.*, by ceding possession in lieu of reaffirming their prepetition loan obligation to GMAC. The bankruptcy court granted the GMAC motion for relief from the automatic stay in order to allow GMAC to realize on its lien. GMAC notified the **Pratts** in writing of their right to cure the default. After concluding that the expense of repossession would outstrip the value of its secured claim, GMAC followed its customary practice of writing off the remaining loan balance. The **Pratts** retained possession of the vehicle. The bankruptcy court granted the **Pratts** a chapter 7 discharge, which released them from their outstanding personal indebtedness for the balance due on the GMAC car loan.

By September 1999, the **Pratts** realized that the Cavalier was inoperable, hence essentially worthless, and that they would have to dispose of it. Before they could "junk" the car, however, salvage dealers were required by Maine law to obtain a release of the GMAC lien. During the next few months, the **Pratts** repeatedly contacted GMAC and requested that it either repossess the car or release the lien. GMAC refused to release its lien unless and until the outstanding loan balance was paid in full.

The bankruptcy court allowed the **Pratts**' motion to reopen their chapter 7 case to permit them to file the instant adversary proceeding against GMAC, which alleges that GMAC's refusal either to repossess the vehicle or to release the lien, absent full payment of the discharged loan balance, violated the chapter 7 discharge injunction prescribed by Bankruptcy Code § 524(a)(2). *Cf., e.g., Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 21 (1st Cir.2002) ("Even after the termination of a bankruptcy case, a discharged debtor who wishes to redeem property pursuant to section 722, but who believes that the terms proposed by the lienholder are unfair, can ask the bankruptcy court to reopen the bankruptcy case and adjudicate the matter.").

In due course, the court entered judgment for GMAC. *In **re Pratt***, 324 B.R. 1 (Bankr.D.Me.2005). The court held that (i) GMAC's *in rem* right under Maine law to enforce its lien against the vehicle survived intact the chapter 7 discharge of the **Pratts**' unsecured personal liability on the loan; (ii) by Maine statute, a secured creditor has an unqualified right to refuse to release its lien until the loan balance is paid in full; (iii) the GMAC refusal to release its lien did not coerce the **Pratts** to repay their discharged personal liability on the car loan, but simply invoked its legitimate *in rem* remedies as

accorded under Maine law; and (iv) the situation was no more coercive than had GMAC offered the **Pratts** a reaffirmation agreement whereby they could consent to repay both the secured and unsecured portions of the loan indebtedness. *See id.* at 8-9. Following an unsuccessful intermediate appeal to the district court, the **Pratts** initiated the instant appeal.

II

DISCUSSION

A. *The Putative Violation of the Chapter 7 Discharge Injunction*

The **Pratts** reiterate on appeal that GMAC violated the chapter 7 discharge ***17** injunction because its refusal either to repossess the vehicle or to release its lien effectively coerced them to repay the discharged personal liability on their car loan. They insist that the GMAC decision effectively negated their right to "surrender" the vehicle pursuant to Bankruptcy Code § 524(a)(2).

[1] Following an intermediate appeal to the district court, we directly review the bankruptcy court decision, conducting *de novo* review of its legal conclusions, and clear error review of its findings of fact. *See In re New Seabury Co. Ltd. P'ship,* 450 F.3d 24, 33 (1st Cir.2006).

[2] "A [bankruptcy] discharge ... operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2); *Fleet Mortgage Group, Inc. v. Kaneb,* 196 F.3d 265, 267 n. 4 (1st Cir.1999). "[A] bankruptcy court is authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages for the appellant in this case if the merits so require." *Bessette v. Avco Fin. Servs., Inc.,* 230 F.3d 439, 445 (1st Cir.2000). [1]

[3] Although the unsecured portion of a secured creditor's claim may be discharged in a chapter 7 or 13 case, its lien in the collateral normally survives the bankruptcy proceeding and the discharge, and is enforceable in accordance with state law. *See In re Valente,* 360 F.3d 256, 259 n. 1 (1st Cir.2004); *Arruda,* 310 F.3d at 21. The Bankruptcy Code nonetheless contains several provisions which contemplate lien avoidance and/or modification. For example, Bankruptcy Code § 521(a)(2) prescribes several remedies for the debtor who desires to be freed from a prepetition lien:

> [I]f an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate-
>
> (A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
>
> (B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and
>
> (C) 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).

11 U.S.C. § 521(a)(2).

[4] **[5]** **[6]** Subsection 521(a)(2) thus contemplates three distinct debtor prerogatives: ***18** reaffirmation, redemption, or surrender. *See Bank of Boston v. Burr (In re Burr),* 160 F.3d 843, 847-48 (1st Cir.1998) (holding that reaffirmation, redemption, or surrender are the exclusive debtor remedies contemplated by § 521(a)(2)). Where the debtor wishes to retain the collateral, he may either "reaffirm" his agreement to repay the prepetition debt under renegotiated terms acceptable to the secured creditor, or "redeem" the collateral by paying its current fair market value to the secured creditor. Due to the importance of the Code's "fresh start" policy, however, reaffirmation agreements are subjected to very stringent controls to ensure that debtors are neither coerced nor harassed by secured creditors into reassuming debts which would otherwise be entitled to discharge. *See In re Jamo,* 283 F.3d 392, 398 (1st Cir.2002); *Whitehouse v. LaRoche,* 277 F.3d 568, 574 (1st Cir.2002). [2] Likewise, the Code contains provisions which fix the amount at which the debtor will be entitled to redeem the collateral unilaterally,

which in some circumstances may not reflect its current fair market value at redemption. *See, e.g.*, 11 U.S.C. § 348(f)(1) (requiring that, when a case is converted to chapter 7 from chapter 13, property be valuated at the same amount as its determined value during the chapter 13 case). [3] Where the debtor decides not to reaffirm, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: "surrender" the collateral. The **Pratts** elected the latter option.

[7] **[8]** Subsection 521(a)(2) does not, however, define the term "surrender." Since Congress did not use the term "deliver," however, one reasonably may assume that "surrender" does not necessarily contemplate that the debtor physically have transferred the collateral to the secured creditor. *See, e.g.*, *In re Cornejo*, 342 B.R. 834, 836-37 (Bankr.M.D.Fla.2005). [4] Thus, the most sensible connotation ***19** of "surrender" in the present context is that the debtor agreed to make the collateral *available* to the secured creditor-*viz.*, to cede his possessory rights in the collateral-within 30 days of the filing of the notice of intention to surrender possession of the collateral. Similarly, nothing in subsection 521(a)(2) remotely suggests that the secured creditor is *required* to accept possession of the vehicle at the end of the 30-day period, as such a reading would be at odds with well-established law that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary. Thus, we agree with the GMAC contention that the **Pratts**' surrender did not require that it repossess the vehicle if GMAC deemed such repossession cost ineffective.

[9] **[10]** The more difficult question is whether the "surrender" provision required that GMAC release its lien. In assessing violations of the automatic stay and the discharge injunction, the core issue is whether the creditor acted in such a way as to "coerce" or "harass" the debtor improperly. *See In re Diamond*, 346 F.3d 224, 227 (1st Cir.2003); *Jamo*, 283 F.3d at 399. Although the fact that the **Pratts** (and not GMAC) initiated all the inquiries about releasing the lien might preclude a finding that GMAC "harassed" the **Pratts**, that does not foreclose the possibility that GMAC's refusal was objectively and improperly "coercive" in the circumstances. However, the line between forceful negotiation and improper coercion is not always easy to delineate, and each case must therefore be assessed in the context of its particular facts. *See id.*

[11] The particular record facts material to our assessment of objective coercion are: (i) the **Pratts** timely filed a § 521(a)(2) notice of their intention to surrender the vehicle; (ii) they did nothing to prevent GMAC from repossessing the vehicle; (iii) the value of the inoperable vehicle had plummeted to such an extent that it needed to be towed to a junkyard, which declined to accept it absent a valid lien release; (iv) GMAC determined-presumably based upon the precipitous drop in the vehicle's worth-that it was not cost effective to repossess and resell the vehicle; and (v) according to state law, the vehicle could not be junked unless GMAC released its lien.

[12] **[13]** Although GMAC did not create all these circumstances, and we find no record evidence that it acted in bad faith, in these circumstances its actions were objectively coercive. Maine law unqualifiedly entitled GMAC to refuse to release its lien unless and until the outstanding loan balance was paid, *see* 11 Me.Rev.Stat. Ann. tit. 11, §§ 9-1620 to-1624, but state law governs in a bankruptcy proceeding "unless some federal interest requires a different result." *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136, (1979); *In re LAN Tamers*, 329 F.3d 204, 213-14 (1st Cir.), *cert. denied*, 540 U.S. 1047, 124 S.Ct. 808, 157 L.Ed.2d 695 (2003). Thus, even legitimate state-law rights exercised in a coercive manner might impinge upon the important federal interest served by the discharge injunction, which is to ensure that debtors receive a "fresh start" and are not unfairly coerced into repaying discharged prepetition debts.

In our view, the particular confluence of the above-mentioned circumstances renders the GMAC refusal to release its lien objectively coercive. First, GMAC announced that it did not intend to repossess the "surrendered" vehicle because it was of insufficient value, then expressly conditioned its release of the lien upon the **Pratts**' agreement to repay the loan balance in full. Whatever the *bona fides* of the state-law basis for the GMAC statement, ***20** its pronouncement effectively amounted to a demand for a "reaffirmation," which obviously never purported to comply with the stringent "anti-coercion" requirements of Bankruptcy Code § 524(c). *See supra note* 2. Moreover, as the **Pratts** could not junk the vehicle without a release of the GMAC lien, *see* Me.Rev.Stat. Ann. tit. 29-A, § 664-A(4), they were confronted with the grim prospect of retaining indefinite possession of a worthless vehicle unless they paid the GMAC loan balance, together with all the attendant costs of possessing, maintaining, insuring, and/or garaging the vehicle. Therefore, the GMAC refusal had the *practical effect* of eliminating the **Pratts**' "surrender" option under § 521(a)(2). This court previously has noted that the "surrender" option is an important safety-valve, inasmuch as a debtor ultimately cannot be coerced into a reaffirmation

where he retains the option to surrender the collateral to the secured creditor. *See, e.g., In re Burr,* 160 F.3d at 848 (noting that debtors cannot be compelled to reaffirm, since "they can always surrender the property and be discharged of the underlying debt"); *see also Jamo,* 283 F.3d at 400 (same).

We do not suggest that a secured creditor invariably would be in violation of the discharge injunction were it to insist upon its *in rem* rights under state law. However, GMAC identifies no compelling reason for doing so in this instance, relying instead upon its bare right of refusal under state law. Since this motor vehicle was essentially worthless, and vehicles rarely (if ever) appreciate in value over time, there was no reasonable prospect that the automobile would generate future sale proceeds (to which the GMAC lien automatically would have attached, *see* Me.Rev.Stat. Ann. tit. 11, § 9-1315(1)). GMAC determined that repossession was not feasible. The **Pratts** maintained, and the bankruptcy court found, that the vehicle had no significant value. Thus, the legitimate *raison d'etre* for the GMAC lien no longer obtained, and the federal bankruptcy-law interest in according debtors a fresh start, free from objectively coercive reaffirmation demands, must be accorded supremacy. *Cf. In re Groth,* 269 B.R. 766, 767-68 (Bankr.S.D.Ohio 2001) ("[A] debtor in a chapter 7 case, as part of his fresh economic start, should be permitted to surrender [worthless] collateral he does not intend to keep. If the secured creditor determines that its collateral is worth less than the cost of taking it into its possession, the creditor must waive the effect of its lien so that the debtor is able to dispose of the collateral."). [5]

Although the bankruptcy court aptly noted that this precise situation is likely to arise infrequently (if ever) in future cases, the "coerciveness" involved in each case must be assessed on its particular facts. We can only conclude that the GMAC refusal to release its valueless lien so that the vehicle could be junked-though presumably not made in bad faith-was "coercive" in its effect, and thus willfully violated the discharge injunction. The **Pratts** are therefore entitled to establish and recover their compensatory damages, together with other appropriate relief under Bankruptcy Code § 105(a).

B. ***The Burden of Proof***

The bankruptcy court opined that the **Pratts** needed to prove a GMAC violation simply by a preponderance of the evidence, rather than by clear and convincing evidence, ***21** citing our decision in *Fleet Mortgage Group, Inc. v. Kaneb,* 196 F.3d 265 (1st Cir.1999). ***Pratt***, 324 B.R. at 5. As the bankruptcy court ultimately found no violation under either standard, however, it did not resolve the issue. *Id.* Since the bankruptcy court decision on the liability issue must be reversed, the burden of proof issue is before us on appeal.

Kaneb did not speak to the question whether a bankruptcy debtor must prove an alleged violation of the automatic stay (or by analogy, of the discharge injunction) by the heightened evidentiary standard of clear and convincing evidence, which is normally required to establish civil contempt outside of the bankruptcy context. Rather, *Kaneb* involved a related but distinct issue: namely, *what* facts must a debtor adduce to prove a violation. We rejected the proposition that a stay violation could not be actionable (*viz.*, "willful") if the creditor had made a good faith mistake, and we held that "the standard for a willful violation of the automatic stay under § 362(h) is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation." *Kaneb,* 196 F.3d at 265. By contrast, the distinction presently at issue-between preponderance of the evidence and clear and convincing evidence-entails the *quantum* of proof; *viz.*, how much of this factual evidence of knowledge and general intent-the debtor must adduce to survive a "sufficiency of the evidence" challenge. *See Lamphere v. Brown Univ.,* 798 F.2d 532, 536 (1st Cir.1986) (defining "clear and convincing" as more than a preponderance but less than beyond a reasonable doubt).

Given the present record, we need not now address or determine the quantum-of-evidence issue. *Compare, e.g., In re Dunn,* 324 B.R. 175, 179 (D.Mass.2005) (holding that § 105 contempt action triggers "clear and convincing" standard); *In re Parker,* 334 B.R. 529, 538 (Bankr.D.Mass.2005) (same); *In re Feldmeier,* 335 B.R. 807, 811-12 (Bankr.D.Or.2005) (same), *with In re Silberkraus,* 253 B.R. 890, 913-14 (Bankr.C.D.Cal.2000) (holding that § 105 contains no evidence of a "clear and convincing" requirement), *aff'd,* 336 F.3d 864 (9th Cir.2003). Whichever the appropriate evidentiary standard, GMAC has not suggested-nor could it plausibly do so on these record facts-that it did not know of the existence of the **Pratts**' chapter 7 discharge, or that it did not intend to communicate to the **Pratts** its refusal to release its lien in the automobile so that it could be junked. Given the clarity of the present record as to both the "notice" and "general intent" elements, therefore, we conclude that the **Pratts** adduced sufficient evidence that GMAC's violation of the discharge injunction was "willful."

C. ***Damages***

Finally, the parties are in agreement that the bankruptcy court was to determine the issue as to whether GMAC violated the discharge injunction prior to determining damages. As the damages issue remains extant for factual determination, we remand to the bankruptcy court for that purpose.

The judgment of the district court affirming the bankruptcy court decision is hereby reversed, and the case is remanded to the bankruptcy court for the determination of damages. SO ORDERED.

Parallel Citations

56 Collier Bankr.Cas.2d 1016, Bankr. L. Rep. P 80,698

Footnotes

1 Section 105(a) provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

2 Subsection 524(c) requires that reaffirmation agreements

> (i) be executed before the [general] discharge has been granted;
> (ii) be in consideration for a dischargeable debt, whether or not the debtor waived discharge of the debt;
> (iii) include clear and conspicuous statements that the debtor may rescind the reaffirmation agreement at any time prior to the granting of the general discharge, or within sixty days after the execution of the reaffirmation agreement, whichever occurs later, and that reaffirmation is neither required by the Bankruptcy Code nor by nonbankruptcy law;
> (iv) be filed with the bankruptcy court; and
> (v) be accompanied by an affidavit of the debtor's attorney attesting that the debtor was fully advised of the legal consequences of the reaffirmation agreement, that the debtor executed the reaffirmation agreement knowingly and voluntarily, and that the reaffirmation agreement would not cause the debtor "undue [*e.g.*, financial] hardship."

11 U.S.C. § 524(c); *see Jamo*, 283 F.3d at 399.

3 Although we need not address the issue, the district court noted that, even though the **Pratts**' vehicle had become essentially inoperable and worthless by 1999, subsection 348(f)(1) permanently fixed its redemption value at $2620.73-its assessed value during their chapter 13 case-thus making § 521(a)(2) redemption economically infeasible for the **Pratts**.

4 Some courts interpret subsection 521(a)(2) to require that the debtor surrender possession of the collateral to the trustee, and not to the secured creditor. *See In* ***re*** *Claflin*, 249 B.R. 840, 848 n. 6 (BAP 1st Cir.2000). *But cf. Jamo*, 283 F.3d at 397 ("The debtor may, of course, surrender the collateral to the secured creditor."). In this case, we need not address the issue, as the record contains no evidence that the **Pratts** concealed the vehicle from estate representatives, nor that the latter had any interest in administering the property. Consequently, we assume, *arguendo*, that there has been an abandonment.

5 GMAC could have arranged for adequate protection of its interests: for example, by entering into a contractual agreement with the **Pratts** that it would release the lien in return for their promise to arrange to have the vehicle junked.