UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE	)	
	)	
CHRISTOPHER MICHAEL LYONS	)	**Case No. 08-20588-TLM**
TANYA NICOLE LYONS,	)	**Chapter 7**
	)	
Debtors.	)	
	)	
_____	)	

SUMMARY ORDER AND NOTICE OF HEARING

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Though it has now been over three years since the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA"), the instant case presents a recurring problem – compliance with the provisions of amended § 524 that govern the submission and approval of reaffirmation agreements.[1] On the basis of the record here, a reaffirmation agreement submitted by chapter 7 debtors Christopher and Tanya Lyons ("Debtors") cannot be approved, and the matter must be set for hearing.

[1] Much of this opinion echoes what the Court said in *In re Gosselin*, Case No. 06-20028-TLM at Doc. No. 17 (Summary Order and Notice of Hearing, June 15, 2006). Though not "published," that ruling was disseminated to the members of the Commercial Law and Bankruptcy Section of the Idaho State Bar through the Section's "list-serve" process. The Court's experience with reaffirmations in the intervening two years, including that presented in the instant case, indicates a need to reiterate some of the discussion and authorities on the subject.

A. Overview

A reaffirmation agreement must meet several requirements in order to be effective. *See* §§ 524(c)(1) - 524(c)(6). BAPCPA added a new § 524(c)(2), that requires debtors receive the lengthy, detailed notices and disclosures described in § 524(k) at the time of or prior to signing the agreement. Procedural Form B240 (the "Form") has been revised to assist debtors, their counsel, and creditors in meeting the requirements imposed by BAPCPA.

In general, BAPCPA anticipates that many, probably most, reaffirmation agreements will become effective without any Court review or approval. *See* § 524(c)(1)-(5); *see also* § 524(k)(3)(J)(i) (requiring a disclosure that states: "If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.").[2]

However, even where counsel assists a debtor in deciding to reaffirm a debt, there is a potential for Court review. Section 524(m)(1) provides:

> (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

[2] If the debtor was not represented by counsel during the course of negotiating a reaffirmation agreement, a court hearing is required. *See* § 524(c)(6), § 524(d). The present case concerns debtors who were represented by an attorney in connection with the reaffirmation agreement, and these *pro se* provisions are not implicated.

> 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.

Section 524(m)(1).[3]

What this means, simply stated, is that where the debtor's actual post-bankruptcy income and expenses do not yield enough positive net income to allow payment of the reaffirmed debt amount, there is a presumption of undue hardship. The existence of that presumption requires Court review. If the Court agrees that the presumption is rebutted in the manner required by § 524, the agreement may be approved. If not so rebutted, a hearing is required because disapproval of the agreement cannot occur without notice and a hearing.[4]

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[3] Section 524(m)(2) provides, however, that subsection (m) does not apply to reaffirmation agreements where the creditor is a credit union as defined by § 19(b)(1)(A)(iv) of the Federal Reserve Act.

[4] The phrase "notice and a hearing" used in § 524(m)(1) does not mandate an actual hearing. *See* § 102(1) (authorizing action without an actual hearing if notice and an opportunity to request a hearing is provided and no hearing is timely requested). However, given the nature of the issues presented in reaffirmations, the undersigned Judge regularly sets actual hearings, requiring debtors and their counsel to appear. It does so because, if defects in the reaffirmation agreement are not cured by supplementation, the Court must hear further explanation from debtors and their counsel in order to decide if the presumption of undue hardship can be rebutted.

B. Problems with the reaffirmation

The common problems still seen with reaffirmations post-BAPCPA tend to fall into three categories. Unfortunately, each is exemplified by the instant case.

1. The existence, and accurate calculation, of the presumption of undue hardship.

The statement of debtor's income and expenses referred to in § 524(m) as "required under § 524(k)(6)(A)" must be in the following form:

> Part D: Debtor's Statement in Support of Reaffirmation Agreement.
>
> 1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $ XXX, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $ XXX, leaving $ XXXX to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: XXX.
>
> 2. I received a copy of the Reaffirmation Disclosure Statement in part A and a completed and signed reaffirmation agreement.

See § 524(k)(6)(A).

Part D of the Form mirrors the Code language, substituting blanks for completion where "XXX" appears in the statute's text, and adding an instruction after the last "XXX" in paragraph 1 that states: "(Use an additional page if needed for a full explanation.)"

In the present case, Debtors agreed to reaffirm a $668.26 debt owed to Les Schwab Tire Centers of Idaho, Inc. ("Les Schwab"). Doc. No. 17 at Part A. The debt is secured by four tires purchased in April, 2008, some five months prior to the filing of Debtors' petition.[5] The reaffirmed debt will carry interest at 12%, a reduction of a pre-bankruptcy contract rate of 18%, and is payable in monthly instalments of $75.00. *Id.*

Thus, the amount of actual, post-bankruptcy positive net income that must be shown on part D to prevent the presumption from arising is $75.00 or more.

Debtors' Part D disclosed $2,797.00 as their combined monthly income, and $3,344.00 as their combined monthly expenses "leaving ($547.00) to make the required payments on this reaffirmed debt." *Id.* at Part D (figures inserted by Debtors). Thus, on these figures, a presumption of undue hardship is created because Debtors have no funds with which to make the $75.00 monthly payment to Les Schwab on the reaffirmed debt.

Debtors and their counsel here erred in a regularly seen fashion. They included on Part D of the Form precisely what was estimated and projected on their schedules I and J, without any adjustment or correction to account for the

[5] Debtors' schedule D asserts that Les Schwab's claim, estimated at $732.00, is fully unsecured. *See* Doc. No. 1. Debtors, consistent with that position, did not list Les Schwab on their § 521 Statement of Intention which addresses how they propose to deal with secured creditors. *Id.* Given these assertions, it is odd that Debtors' schedule J projected post-bankruptcy instalment payments of $75.00 per month to Les Schwab, *id.*, or that they reaffirmed at all. It appears Debtors concede Les Schwab's debt is secured by the tires.

information Part D actually requires.

Debtors' income as shown on schedule I was $2,797.00 and their expenses as shown on schedule J were $3,344.00. As mentioned at note 5 above, these schedule J expenses include an instalment payment of $75.00 to Les Schwab. By reflexively using the schedule J figures in part D of the reaffirmation agreement, Debtors ignored the language of the Form in two ways. First, they used dated projections when the form specifically asks for current income and "*actual current* monthly expenses including monthly payments *on post-bankruptcy debt* and *other* reaffirmation agreements." (Emphasis added). Second, they included in the claimed expenses the proposed payments on the subject reaffirmed debt.

Section 524(k)(6)(A), and the Form, when correctly completed, force a disclosure of the amount of net income actually available to debtors post-bankruptcy. This net amount then can be easily evaluated to see if debtors can cover the proposed reaffirmation at issue with their real net income (*i.e.*, "leaving $XXX to make the required payments on *this* reaffirmed debt").

Assuming Debtors' actual post-filing income remained at $2,797.00, and assuming their pre-filing schedule of expenses was as "accurate" in post-bankruptcy reality as it was in pre-bankruptcy projection,[6] then part D expenses

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[6] That Debtors' actual post-bankruptcy expenses are – to the dollar – precisely what they estimated on schedule J is perhaps not impossible, but is improbable. If debtors are concerned that their reaffirmation agreements' specification of income and expenses impeaches their sworn (continued...)

should have been $3,269.00 (*i.e.*, $3,344.00 from schedule J less $75.00, the amount of the reaffirmation payment at issue that was included in that schedule). This would have resulted in a negative net income on part D of ($472.00).

However, though the Form was erroneously completed, a presumption of undue hardship exists under either calculation.

2. Counsel's declaration

Debtor's counsel was required to make a declaration (also called a certification) under § 524(k)(5). Because there was a presumption of undue hardship, the form of certification under § 524(k)(5)(B), rather than that of § 524(k)(5)(A), was required.[7]

Both of the required certifications are captured in Part C of the Form. The § 524(k)(5)(A) general certification is first set out, and then, in language

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[6](...continued)
projections at the commencement of the case, they are free to explain the situation in their attachments to the reaffirmation agreement.

[7] Section 524(k)(5) requires:

> (A) The following certification:
> Part C: Certification by Debtor's Attorney (If Any).
> I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.
> Signature of Debtor's Attorney: Date:.
>
> (B) If a presumption of undue hardship has been established with respect to such agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment.

consistent with that mandated by § 524(k)(5)(B), there is a certification for use when a presumption of undue hardship exists, which requires counsel to check the box stating:

> ☐ *[If applicable and the creditor is not a Credit Union]* 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.

Here, Debtors' counsel failed to check the box. Thus, he failed to make the necessary certification.[8]

With a presumption established on part D of the Form, and without an appropriate § 524(k)(5)(B) certification by counsel on Part C, there could be no approval by this Court.

3. The "justification" or "rebuttal"

Section 524(m)(1) requires the Court's review of all reaffirmations where a presumption of undue hardship arises. After review, the Court can approve the reaffirmation if the presumption is adequately rebutted in writing.

Here, Debtors' reaffirmation agreement with Les Schwab inserted the following underlined language, in Part D, to rebut the presumption:

> I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is

[8] In another recent case, debtors' counsel checked the box and signed the certification, but struck out the last sentence (to wit: "In my opinion, however, the debtor is able to make the required payment.") and initialed that modification. The resulting certification did not comply with the Code's requirements, and that approach is *not* acceptable.

> presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: Debtors must reaffirm in order to have safe tires which will permit them to drive to and from work. [signed] Harold B. Smith, atty., 10-23-08.

Doc. No. 17 at Part D. Though authored by Debtors' counsel, Debtors signed this Part D, and the Court therefore treats the assertions as Debtors' own.

The very first, and most critical, problem is that the proffered rebuttal of the presumption of undue hardship misses the point.

Neither the Code nor the Form asks for a statement of motivation or an explanation regarding why debtors wish to reaffirm. There is a clear assumption throughout § 524 that debtors will consult with their counsel, and that their counsel will explain to them the pros and cons of reaffirmation, explore all other alternatives, and if reaffirmation is still desired, explain all the consequences of such an agreement.[9] One can reasonably assume that, if an agreement is filed, the debtors have reasons for wanting to reaffirm.

An explanation of the sort used here fails to address the relevant question of "how [debtors] can afford to make the payments." This is the question the Form

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[9] *In re DeSantis*, 395 B.R. 162 (Bankr. M.D. Fla. 2008), discusses the duties of consumer debtors' counsel, including assisting debtors in regard to deciding whether to surrender collateral, redeem, or reaffirm. It characterizes such obligations as "one of a debtor's attorney's primary and essential responsibilities, particularly after passage of [BAPCPA], which made the decision more difficult and more complicated." *Id.* at 169. *See also id.* at 168 (citing, *inter alia*, *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001), and at 170 (citing *Hale v. U.S. Trustee*, 509 F.3d 1139 (9th Cir. 2007)).

actually asks:

> However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____.

Indeed, the answer to that question is mandated by the express requirements of § 524(m)(1), which explains that "The presumption may be rebutted in writing by the debtor if the statement [required under § 524(k)(6)(A)] includes *an explanation that identifies additional sources of funds to make the payments* as agreed upon under the terms of such agreement." (Emphasis added).

The Code and the Form obviously require a *financial* explanation. The question presented is how debtors will be able to make the payment, not whether the debtors have a reason for reaffirming or why they are motivated to make the payment. It is unclear how Debtors or their counsel think the presumption of undue hardship – a presumption driven by budget data indicating no financial ability to make the called for payment given a significant monthly negative net income – was adequately rebutted by the inserted comment since the comment says nothing about how Debtors "can afford to make the payments."

C. The result

Under BAPCPA, when the Court encounters a reaffirmation agreement that contains, as here, (a) a defect in the certification of counsel, or (b) a presumption of undue hardship that is not adequately rebutted, the matter must be set for

hearing. The Court cannot approve the reaffirmation agreement on this record, but neither can it disapprove the agreement without a hearing because § 524(m) states "no agreement may be disapproved without notice and a hearing to the debtor and the creditor[.]"

Such hearings on reaffirmations certainly impose a burden on debtors, who must take time away from work and other obligations to appear. It may also impose another cost on debtors, that of fees for their attorney to appear for the hearing. The latter is a cost which, depending on the parties' fee relationship and agreement, may not be covered by previously paid fees.[10] However, both such costs are clearly avoidable. BAPCPA's structure exposes attorney-represented debtors to those costs only in cases where a presumption of undue hardship arises and that presumption is not adequately addressed and overcome in the reaffirmation agreement as signed and filed.

In the present case, the Court cannot approve the reaffirmation agreement on the theory that the statutory presumption of undue hardship was rebutted. Counsel's inserted language, which Debtors endorsed, is inadequate. Nor could the Court approve the reaffirmation without Counsel's required declaration.

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[10] This Court has made it clear in hearings over the past three years that, where the defects in the reaffirmation agreements leading to such hearings are shown to have been the result of counsel's errors, counsel will not be allowed to collect fees or expenses related to those hearings. However, whether these Debtors should have to pay additional, post-bankruptcy attorneys' fees to deal with the hearing set herein is an issue not presently before the Court, and need not be addressed at this time.

Since disapproval cannot occur without notice and hearing, Debtors, their counsel, and the creditor, Les Schwab, are hereby notified that the question of approval of the reaffirmation agreement, Doc. No. 17, is set for hearing before the Court on its video calendar, **Monday, November 24, 2008, at 9:00 a.m. PST / 10:00 a.m. MST.** Parties shall appear in either the courtroom in the Federal Building and Courthouse, 205 N. 4th St., Coeur d'Alene, Idaho, or in the courtroom of this Court in the James A. McClure Federal Bldg. and U.S. Courthouse, 550 W. Fort St., Boise, Idaho, at the appropriate time.

IT IS SO ORDERED.

DATED: November 18, 2008

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

A "notice of entry" of this Summary Order and Notice of Hearing has been served on Registered Participants as reflected by the Notice of Electronic Filing. A copy of the Summary Order and Notice of Hearing has also been provided to non-registered participants by first class mail addressed to:

Christopher and Tanya Lyons
1008 E St Elias Ct
Post Falls, ID 83854

Les Schwab Tire Centers of Idaho, Inc.
Credit Department
P.O. Box 667
Prineville, OR 97754

Case No. 08-20588-TLM

Dated: November 18, 2008

/s/
Suzanne Hickok
Law Clerk to Chief Judge Myers