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A Professional Corporation

CONSIDERING BANKRUPTCY, WHAT YOU NEED TO KNOW ABOUT REAFFIRMATION AGREEMENTS BEFORE YOU SIGN ONE

I. Introduction

A reaffirmation agreement is an agreement between a creditor and debtor, "the consideration for which, in whole or in part, is based on a debt that is dischargeable" in a case under title 11.[1] The agreement must be "made before the granting of the discharge."[2] The Bankruptcy Code does not define the term "reaffirmation agreement," but the term refers to agreements to which subsection 524(c) pertains.[3] More simply defined, "'[a] reaffirmation agreement is a postpetition agreement between an individual chapter 7 debtor and a creditor in which the debtor agrees to pay a prepetition debt to the creditor in order to retain the property subject to the creditor's security interest.'"[4]

Since its creation, § 524 of the Bankruptcy Code has allowed debtors to enter into reaffirmation agreements with creditors, but with statutory prerequisites to enforceability because "reaffirmation runs directly counter to a bankruptcy discharge."[5]

In 2018 in the District Court of Nevada, 1,057 cases obtained court approved reaffirmation agreements. 16,131 reaffirmation agreements were filed in the Ninth Circuit for the same year, and 106,678 total agreements were filed in all circuits.

A. Purpose and Legislative Intent

Sections 524(c) and (d) reflect "'the intent of Congress that the debtor be protected from his own actions undertaken during the bankruptcy proceedings unless he insists in open court that he wants to be liable on the reaffirmed debt after discharge.'"[6] These provisions "were enacted in 1978 to protect consumer debtors from the perceived problem of 'coercive and deceptive actions by creditors to secure reaffirmation of discharged debts.'"[7] The reaffirmation requirements "are intended to protect debtors from compromising their fresh start by making unwise agreements to pay dischargeable debts."[8]

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[1] 11 USC § 524(c) (2005).
[2] 11 USC § 524(c)(1) (2005).
[3] In re Ewing, 365 B.R. 347, 350 n.3 (2007).
[4] Gregory M. Duhl, *Divided Loyalties: The Attorney's Role in Bankruptcy Reaffirmations*, 84 Am. Bankr. L.J. 361, 361 n.4 (2010) (quoting Daniel A. Austion & Donald R. Lassman, REAFFIRMATION AGREEMENTS IN CONSUMER BANKRUPTCY CASES 4 (2d ed. 2010)).
[5] Lisa A. Napoli, *Reaffirmation After the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Many Questions, Some Answers*, 81 Am. Bankr.L.J. 259, 259 (2007).
[6] In re Hitt, 137 B.R. 401, 403 (1992) (quoting *Arnold v. Kyrus*, 851 F.2d 738, 741 (4th Cir. 1988)).
[7] In re Laynas, 345 B.R. 505, 514 (Bankr.E.D.Pa. 2006) (quoting 4 *Collier on Bankruptcy* ¶ 524.04, at 524-34 (15th rev. ed. 2005)).
[8] Duhl, *supra* note 4, at 362 n.8 (quoting *In re Reed*, 403 B.R. 102, 104 (Bankr.N.D.Okla. 2009)).

B. Why do Debtors and Secured Creditors Enter Reaffirmation Agreements?

"[T]he debtor may prefer to retain the property in which his creditor holds a secured interest, rather than avoid paying the creditor but lose the property to repossession or foreclosure."[9] On the other hand, "secured creditors are frequently undersecured, especially when the cost of foreclosing on a security interest is factored in, and so they would like to collect the debt directly from the debtor rather than liquidate their security interest."[10]

From a practical standpoint, secured creditors with rapidly decreasing assets, such as a car or other consumer good, may rather repossess and liquidate the asset today. A secured creditor may not want to take the chance that a debtor who did not execute a reaffirmation agreement but was current with installment payments at the time of the bankruptcy filing will later default. If that occurs, the secured creditor may repossess the asset but cannot sue the debtor for the deficiency, and the asset will most likely be worth much less at the time of repossession than at the time the secured creditor could have repossessed at the beginning of the case. This second scenario is sometimes referred to as a "ride through" in bankruptcy pre-BAPCPA.

Under BAPCPA, if a debtor does not elect to sign a reaffirmation agreement, the secured creditor may elect to repossess even if the debtor is current on his payments. Or, the secured creditor may elect not to report timely pays to the credit bureaus due to the discharge of the underlying contract, thus thwarting a debtor's attempts to use the payments to re-establish credit worthiness.

II. Statutory History

A. Pre-BAPCPA

"The 1898 Bankruptcy Act imposed no restrictions on debtors making out-of-court agreements with creditors to pay discharged debts."[11] Pursuant to the 1978 Bankruptcy Code, reaffirmation agreements were permitted if the court found one of two things. First, that such agreement was "in the best interest of the debtor" and "not imposing an undue hardship on the debtor or a dependent of the debtor."[12] Second, the court could find "that the agreement was 'entered into in good faith' and was either in settlement of dischargability litigation or made provision for redemption of property from a secured creditor."[13] The reaffirmation agreement was required to be made before discharge and the debtor could not timely rescind the agreement.[14] Additionally, the Code "required the . . . [C]ourt to hold a hearing to inform the debtor that the agreement was not required by law and to advise the debtor of the legal consequences of default."[15] Under the 1978 bankruptcy code, "the courts were the sole gatekeeper of reaffirmation agreements . . . [t]hey had exclusive authority to approve or

[9] Cox v. Zale Delaware, Inc., 239 F.3d 910, 912-13 (7th Cir. 2001).
[10] Id. at 912.
[11] Duhl, *supra* note 4, at 365.
[12] 1978 Bankruptcy Code, 11 U.S.C. §524(c)(6)(A) (1978).
[13] Napoli, *supra* note 5, at 260 (citing 524(c)(4) (1978)).
[14] 11 USC 524(c)(1), (2) (1978)
[15] Napoli, *supra* note 5, at 260 (citing 11 USC § 524(d) (1978))

disapprove reaffirmation agreements, and lawyers did not perform any sorting function . . . ."[16] "By placing the court between the debtor and the creditor, Congress incorporated substantial debtor protection into the Code."[17]

Departing from the 1978 bankruptcy code, "[c]onsumer bankruptcy attorneys have played a gatekeeping and signaling role in connection with reaffirmation agreements" since the 1984 bankruptcy code amendments.[18] Pursuant to the 1984 and 1994 amendments, no court review was required for reaffirmation agreements if the reaffirmation agreement: was made before the discharge was granted; was filed with the court; and "included a clear and conspicuous statement of the debtor's right to not reaffirm and to rescind."[19] [20] Additionally, the debtor must have been represented by an attorney in negotiating the agreement; the attorney must have certified that the agreement (i) is a fully informed and voluntary agreement of the debtor,[21] and (ii) does not impose an "undue hardship on the debtor or a dependent of the debtor",[22] and that the attorney advised the debtor of the legal consequences of the agreement and of default.[23] Additionally, under the 1984 Amendments, "a debtor [could] only rescind a reaffirmation agreement by giving notice to the creditor with which it has reaffirmed indebtedness any time prior to receiving its discharge or within sixty days after the agreement is filed with the court."[24] Additionally, court approval was required only where the debtor was not represented by counsel in the course of negotiating the agreement.[25] The 1984 amendments "provide[d] for immediate effectiveness of the agreement upon its filing with the Court" subject to §524(d).[26]

After the 1994 amendments and through the 2005 BAPCPA, "judicial involvement in the routine reaffirmation process was limited to unrepresented debtors."[27]

B. BAPCPA

BAPCPA "did not amend most of the existing statutory provisions dealing with reaffirmation."[28] However, BAPCPA added §524(m)(1) which creates a presumption that a reaffirmation agreement "is an undue hardship on the debtor" if the debtor's monthly income less monthly expenses is insufficient to make the reaffirmation agreement payments.[29] Additionally, BAPCPA added § 524(k)(5) which requires that counsel representing a debtor in a reaffirmation agreement negotiation must certify to certain facts, as discussed herein.[30] Further,

[16] Duhl, *supra* note 4, at 400.
[17] BankBoston N.A. v. Nanton, 239 B.R. 419, 422 (D. Mass. 1999).
[18] Duhl, *supra* note 4, at 400.
[19] Napoli, *supra* note 5 at 260 (citing 11 U.S.C. § 524(c)(2) (1994)).
[20] Napoli, *supra* note 5 at 260 (citing 11 U.S.C. § 524(c)(1), (3), (1994)).
[21] Napoli, *supra* note 5 at 260 (citing 11 USC § 524(c)(3)(A) (1994)).
[22] Napoli, *supra* note 5 at 260 (citing 11 USC § 524(c)(3)(B) (1994)).
[23] Napoli, *supra* note 5 at 260 (citing § 524(c)(3)(C) (1994)).
[24] In re Hitt, 137 B.R. 401, 404 (1992) (quoting *In re Davis*, 106 B.R. 701, 703-04 (Bankr.S.D.Ala. 1989) (citing 11 U.S.C. § 524(c)(4) (1988))).
[25] In re Hitt, 137 B.R. at 404 (quoting *In re Davis*, 106 B.R. 701, 703-04 (Bankr.S.D.Ala. 1989) (citing 11 U.S.C. § 524(c)(6) (1988))).
[26] In re Hitt, 137 B.R. 401 at 403.
[27] Mary Ann Whipple, American Bankruptcy Institute, *Reaffirmation: The Ground Rules Have Changed*, Judicial Involvement in the Reaffirmation Process Under BAPCPA, 070614 ABI-CLE 5 (June 14-17, 2007) (publication page references unavailable).
[28] Napoli, *supra* note 5, at 260.
[29] 11 U.S.C. 524(m)(1) (2005).
[30] 11 U.S.C. 524(k)(5) (2005).

BAPCPA added §362(h), which establishes what will happen if a debtor fails to comply with §521(a).[31] Specifically, §362(h) states that:

> "[i]n a case in which a 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 . . . 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 . . . or to indicate in such statement that the debtor will either surrender such personal property or retain it . . . ; and (B) to take timely the action specified in such statement . . . ."[32]

Lastly, the BAPCPA additions of §§ 521(a)(6) and 521(d) may affect reaffirmation agreements and ride-through.[33]

III. Issues Facing Attorneys and Courts

A. The Undue Hardship Presumption

The text of § 524(m)(1) reads:

> 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 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."[34]

However, the term "undue hardship" is not defined in the Bankruptcy Code. "No law, regulation, or rule of any kind offers any guidance as to how the attorney should identify a hardship that is 'undue,' and . . . section 524 contains no provisos or safe harbors for construing 'undue hardship' in the good faith exercise of professional judgment or based on a reasonable fact inquiry."[35]

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[31] 11 U.S.C. 362(h) (2005).
[32] Id.
[33] Napoli, *supra* note 5, at 286.
[34] 11 U.S.C. §524(m)(1) (2005) (emphasis added).
[35] Duhl, *supra* note 4, at 373 n.68 (quoting Jason L. Kilborn, *Who's In Charge Here?: Putting Clients in Their Place*, 37 Ga. L. Rev. 1, 4 (2002)).

i. Accuracy of the Debtor's Statement in Support

One commentator noted that Section 524(m)(1) does not contain an accuracy requirement for the information "shown" on the Debtor's statement, nor does it provide for whether or not a court should look to sources other than the Debtor's statement when the information "shown" is in fact inaccurate.[36] The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States adopted Interim Bankruptcy Rule 4008 in an attempt to determine whether the undue hardship presumption arises.[37] Rule 4008 directed the debtor to accompany his or her statement with "'a statement of total income and expense amounts stated on schedules I and J. If there is a difference between [those] amounts . . . and the [debtor's statement] . . ., the accompanying statement shall include an explanation of any difference.'"[38]

In addressing this issue, courts have chosen either a broad or a narrow approach to a determination of whether the undue hardship presumption arises.[39] In *In re Laynas*, although on its face the debtor's statement did not create an undue hardship presumption, and therefore an ability to pay the reaffirmed debt, the debtor failed to comply with Interim Rule 4008.[40] There, upon reviewing the debtor's schedules I and J, the Court discovered a discrepancy between the income and expenses as reported on the debtor's statement and those on the debtor's schedule.[41] The Court acknowledged that a literal reading of §524(m)(1) would not give rise to the presumption of undue hardship, but that a "broader scope of review" of the debtor's statement was necessary to effectuate congressional intent that the statement was accurate and properly completed.[42] Specifically, the Court stated that its "power to evaluate the accuracy of the financial disclosures made by a debtor as part of a reaffirmation package is . . . supported by the history and purpose of 11 U.S.C. § 524."[43]

Alternatively, in *In re Wilson*[44], the court chose a narrow approach to determine whether the undue hardship presumption arose. There, the debtor's statement showed a surplus monthly income in an amount sufficient to make the payments required by the reaffirmation agreement, but the debtor's schedules I and J differed and showed a deficit.[45] There, the Court held that the presumption is determined solely on the numbers in the statutorily mandated portion of the debtor's §524(k)(6)(A) statement and that the numbers from schedules I and J were "irrelevant."[46] Accordingly, no presumption of undue hardship arose.[47]

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[36] Napoli, *supra* note 5, at 266.
[37] Id. at 266.
[38] Id. (quoting FED. R. BANKR. P. (Interim) 4008 (proposed August 22, 2005)).
[39] *See* Napoli, supra note 5 4, at 267-70.
[40] 345 B.R. 505, 513 Bankr.L. Rep. p 80729 (Bankr.E.D.Pa. 2006).
[41] Id. at 513.
[42] Id. at 513-14.
[43] Id. at 514.
[44] 363 B.R. 220 (Bankr.D.N.M. 2007).
[45] Id. at 222.
[46] Id. at 224.
[47] Id. at 225.

Clearly, the accuracy of a debtor's statement of support is an issue facing courts today.

ii. Court Review of Undue Hardship Presumption

As stated above, §524(m) requires that a presumption of undue hardship "shall be reviewed by the court."[48] However, "BAPCPA does not . . . provide any guidance as to how courts should go about conducting such mandated review."[49]

One commentator observed the procedures courts are following in reviewing reaffirmation agreements, noting that there are "five different procedural scenarios of bankruptcy court involvement in reaching enforceable reaffirmation agreements."[50] These five scenarios are that a reaffirmation agreement is enforceable: (1) as filed without any court involvement; (2) only if both a hearing and court approval have occurred; (3) only if a hearing has occurred; (4) only if a hearing has occurred and the court has not timely disapproved the agreement; or (5) unless the court timely disapproves the agreement after notice and a hearing.[51]

Additionally, some courts have held that BAPCPA "precludes the rejection of a properly completed attorney-certified reaffirmation agreement" where there is no presumption of undue hardship.[52] For example, in *In re Morton*, the court held that it did not have authority to disapprove an attorney-certified reaffirmation agreement solely because the court believes it is not in the debtor's best interest.[53]

Therefore, the manner in which and procedures to follow in reviewing reaffirmation agreements is unclear.

B. Attorney's Certification

In order to be complete, a reaffirmation agreement must include a Certification by the Debtor's Attorney (if any) which states that:

> "(1) [the] agreement represents a fully informed and voluntary agreement by the debtor; (2) [the] agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) [the attorney] fully advised the debtor of the legal effect and consequences of [the] agreement and any default under [the] agreement."[54]

Additionally, if a presumption of undue hardship arises, "such certification shall state that in the opinion of the attorney, the debtor is able to make the payment."[55] Therefore, post-BAPCPA, "the attorney is the court's gatekeeper for two questions: (1) [d]oes the reaffirmation agreement 'impose an undue hardship on the debtor or a dependent of the debtor'? (2) [i]f the reaffirmation

[48] 11 U.S.C. § 524(m) (2005).
[49] Napoli, *supra* note 5, at 270.
[50] Whipple, *supra* note 29.
[51] Id.
[52] Duhl, *supra* note 4, at 368.
[53] 410 B.R. 556, 562 (B.A.P. 6th Cir. 2009).
[54] 11 U.S.C. 524(k)(5)(A) (2005).
[55] 11 U.S.C. 524(k)(5)(B) (2005).

creates a presumption of 'undue hardship,' can the debtor still make the 'required payment' under the reaffirmation agreement?"[56]

An attorney certification does not preclude court review altogether. For example, in *In re Morton*, the court held that it could not conduct an independent review of an attorney-certified reaffirmation agreement simply because it was not in the debtor's best interest.[57] Similarly, in *In re Mendoza*, the court held that if a debtor's attorney certifies that the debtor can make the payments, although there may be an undue hardship, the court will not address the undue hardship.[58] Alternatively, despite an attorney-certification, the court may review the agreement's compliance with §524(c) and the compliance of the attorney's certification itself with Rule 9011 of the Federal Rules of Bankruptcy Procedure.[59] Even with an attorney certification, the court may review a reaffirmation agreement pursuant to § 524(m) if a presumption of undue hardship arises.[60]

i. Debtor's Ability to Pay

BAPCPA requires an attorney to certify that a debtor is able to make reaffirmation agreement payments. "Debtors may be unrealistic in assessing their ability to make payments on a reaffirmed debt. Counsel should carefully explain the options available to the debtor, determine whether the options are affordable and achievable, and make sure the debtor understands the ramifications of his or her selection."[61]

ii. Should an Attorney Make the Certification?: Potential Conflict Between Duties to the Client vs. Duties to the Court

Perhaps the most important issue facing attorneys in reaffirmation agreements today is deciding whether to make the attorney certification. One critic described the attorney certification requirement as "a disturbing example of Congressional manipulation of the delicately balanced attorney-client relationship [that] subjects debtors to their lawyers' virtually unchecked paternalistic oversight, and . . . thrusts debtors' lawyers into uncomfortable limbo between advocate and judge."[62] Elaborating on the advocate/judge position, Gregory M. Duhl discusses the lawyer's duty to the client and duty to the court in regards to reaffirmation agreements in his article, *Divided Loyalties: The Attorney's Role in Bankruptcy Reaffirmations*.[63]

a. Duty to the client

Model Rule of Professional Conduct 1.2(a) states that "[a] lawyer shall abide by a client's decisions concerning the objectives of the representation and . . . shall consult with the client as to the means by which they are to be pursued."[64] Post-BAPCPA, "[s]ection 524

[56] Duhl, *supra* note 4, at 368.
[57] In re Morton, 410 B.R. 556, 562-63 (B.A.P. 6th Cir. 2009).
[58] Mendoza, 347 B.R. at 41.
[59] Duhl, *supra* note 4, at 368 (citing *Morton*, 410 B.R. at 562; *In re Hovestadt*, 193 B.R. 382, 386 (Bankr.D. Mass. 1996)).
[60] 11 U.S.C. 524(m)(1) (2005).
[61] Duhl, *supra* note 4, at 394 n. 172 (quoting AUSTIN & LASSMAN, *supra* note 4, at 27).
[62] Kilborn, *supra* note 36, at 4.
[63] *See* Duhl, *supra* note 4.
[64] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

frustrates the client-lawyer relationship by effectively placing decision-making power in the hands of the debtor's attorney rather than the debtor."[65] Despite an attorney's possible concerns about the debtor's best interest and the potential risk of significant deficiency,[66] "[i]f the client wants to reaffirm a debt, that is the client's decision, even if doing so flies in the face of the attorney's sound legal advice[,] [a]fter all, attorneys can't *force* their clients to do anything."[67]

b. Duty to the Court

The certificates required by § 524 "are obligations to the court."[68] Federal Rule of Bankruptcy Procedure 9011 states that

> "by presenting [a paper] to the court . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,– (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; . . . (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery."[69]

A violation of Rule 9011(b) is subject to an appropriate sanction.[70]

Due to this advocate/judge position, some attorneys refuse to represent clients who want to reaffirm a debt, while others seek to dissuade a client from reaffirming a debt.[71] −Duhl discusses the problem that arises when a debtor, without an attorney's certification, seeks to reaffirm a debt. In such cases, "[t]he lawyer is, in effect, signaling to the court that he or she does not believe the court should reaffirm the debt, a signal that is in direct conflict with the lawyer's loyalty to the objectives of the client."[72]

c. Can an Attorney Represent a Debtor in a Chapter 7 but not in Connection as to a Reaffirmation Agreement?

There are two approaches to this question. First, in *In re Minardi*, an Oklahoma court "mirror[ed] the Model Rule in allowing limits on the scope of representation where 'reasonable' and where the client gives 'informed consent.'"[73] There, the debtor was not represented by an attorney as to the reaffirmation agreement, as was such counsel's practice.[74] "[Condemning counsel's practice[,]"[75] the Court stated that "[c]ounsel that are unwilling to undertake and follow through on such duties should not accept employment in a Chapter 7 case, or if currently

[65] Lauren Sylvester, *Bankruptcy Attorneys' Responsibility to Clients in Reaffirmation Agreements*, 20 No. 2 Prof. Law 22,22 (2010).
[66] Duhl, *supra* note 4, at 381.
[67] Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Code*, 79 AM. BANKR. L.J. 283, 291 (2005).
[68] Duhl, *supra* note 4, at 373.
[69] FED. R. BANKR.P. 9011(b).
[70] FED. R. BANKR.P. 9011(c).
[71] Duhl, *supra* note 4, at 376.
[72] Duhl, *supra* note 4, at 377.
[73] 399 B.R. 841, 851 (Bankr. N.D.Okla. 2009).
[74] Id. at 844.
[75] Duhl, *supra* note 4, at 380.

employed, should withdraw from all further representation of the debtor."[76] The Court took this position because the obligation to help client's decide whether to surrender, reaffirm, or redeem secured debts is "one of an attorney's primary and essential responsibilities, particularly after the passage of [BAPCPA], which made the decision more difficult and more complicated."[77] Additionally, "the responsibility for advising a debtor about the reaffirmation process and evaluating the effect of each agreement [is laid] at the feet of debtors' counsel."[78]

Alternatively, in *In re Goodman*, the court "endorsed de facto partial withdrawal as a potential solution."[79] There, the court did not believe a lawyer refusing to certify a reaffirmation agreement should withdraw, but that such lawyer should even help the client prepare the proposed agreement.[80] The court "found that it might be consistent with the lawyer's professional responsibilities for the attorney to help the client 'achieve an objective that the client has a right to seek but the lawyer recommends against.'"[81]

As discussed by Lauren Sylvester, the *Goodman* approach has three implications.[82] First, how should a court treat the reaffirmation agreement of a debtor who is unrepresented as to the agreement, but was represented in the bankruptcy case?[83] Second, the *Goodman* court's partial withdrawal approach still had the attorney appear for the debtor at the reaffirmation hearing. [84] Sylvester discussed the implication of this "blur[ring] the lines of representation" by having a lawyer be present but not necessarily advocate.[85] Finally, the *Goodman* approach implicates the duty of confidentiality.[86] Although the *Goodman* attorney did not violate the duty of confidentiality by failing to disclose her reasons for not signing the certification,[87] it has been suggested that "an attorney should seek permission to disclose the reasons for lack of certification, and, if the client refuses, the attorney must withdraw."[88]

This issue also implicates competent representation, as the *Minardi* court stated that "the decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process- so critical, that assistance with the decision must be counted among the necessary services that make up competent representation of a Chapter 7 debtor."[89]

Clearly, when it comes to attorney certification requirements and professional conduct in reaffirmation agreements, "'[t]here are no guideposts . . . .And the statute is stubbornly obtuse.'"[90]

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[76] Id. at 851.
[77] Minardi, 399 B.R. at 850.
[78] Id. at 848.
[79] Sylvester, *supra* note 67, at 23.
[80] Duhl, *supra* note 4, at 379.
[81] Duhl, *supra* note 4, at 378 (quoting *In re Goodman*, 2009 WL 936910, *2 (Bankr.N.D.Ga. Apr. 6, 2009)).
[82] *See* Sylvester, *supra* note 67, at 24.
[83] Id.
[84] Id. (citing *Goodman*, 2009 WL 936910 at *1-2).
[85] Sylvester, *supra* note 67, at 24.
[86] Id.
[87] Id. (citing *Goodman*, 2009 WL 936910 at *1).
[88] Sylvester, *supra* note 67, at 24 (citing CORINNE COOPER, ATTORNEY LIABILITY IN BANKRUPTCY 114, 115-16 (Corinne Cooper & Catherine E. Vance eds., ABA Publishing 1956) (2006)).
[89] In re Minardi, 399 B.R. 841, 848 (Bkrtcy.N.D.Okla. 2009).
[90] Sylvester, *supra* note 67, at 24 (quoting *In re Mendoza*, 347 B.R. 34, 39 (Bankr.W.D.Tex. 2006)).

C. Ride-through

"[T]he trustee may abandon property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[91] Section 521 requires a debtor to file "a statement of his intention with respect to the retention or surrender of [secured] property," and perform his intention with respect to such property "within 30 days after the first date set for the meeting of creditors under section 341(a)."[92] Accordingly, if such abandonment occurs, the debtor has three options, pursuant to statute, with regard to the collateral: "(i) surrender the property to the secured creditor, (ii) retain and redeem the property under section 722 by paying the secured creditor the full amount of the secured claim, . . . or (iii) retain the property and sign a reaffirmation agreement."[93] A fourth option, judicially-created, is to "retain the collateral and continue making loan payments in accordance with the original terms of the loan documents without a reaffirmation agreement."[94] This option is known as ride-through.[95] This option is "not protected in the U.S. Courts of Appeals for the First, Fifth, Seventh, and Ninth Circuits, and the question is open in the Sixth and Eighth Circuits."[96]

The BAPCPA amendments to Section 521(a)(2)(B) and additions of Section 521(a)(6) and Section 362(h) "attempt to halt the 'ride-through' option, and its language suggests that the debtor may not keep secured property without either reaffirming or redeeming the debt."[97] However, ride-through survived BAPCPA in two ways, according to Lisa Napoli: first, by means of a reaffirmation agreement that is not approved, and second, by default.[98]

An example of the first way is the case *In re Blakely*.[99] There, the debtor timely filed her statement of intent and timely entered into the reaffirmation agreement with the secured creditor of her vehicle.[100] The court did not find the reaffirmation agreement to be in the debtor's best interest, but because the debtor had complied with §§ 521(a)(2) and (6), § 521(d), and 362(h), the debtor did not have to surrender possession of the vehicle.[101]

In a similar case, *In re Moustafi*, the Court held that a debtor's vehicle reaffirmation agreement was not in the debtor's best interest, because her expenses exceeded her income.[102] There, the debtor complied with §§ 521(a)(2) and 362(h)(1) by filing her Statement of Intention and executing and filing the reaffirmation agreement.[103] Despite disapproving the reaffirmation agreement, the Court allowed the debtor to ride through on the debt because of her compliance, and the creditor could not enforce the ipso facto clause in the credit agreement.[104]

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[91] 11 U.S.C. 554(a) (2005).
[92] 11 U.S.C. § 521(a)(2)(A), (B) (2005).
[93] Scott B. Erlich, *The Fourth Option of Section 512(2)(A) - - Reaffirmation Agreements and the Chapter 7 Consumer Debtor*, 53 Mercer L. Rev. 613, 615 (2002).
[94] Id.
[95] This option has "been labeled 'ride-through' and 'pay and drive' (because debtors used this option to keep their cars and continue to make payments on their car loans." Coastal Fed. Credit Union v. Hardiman, 398 B.R. 161, 171 (E.D.N.C. 2008).
[96] Duhl, *supra* note 4, at 385 n.129.
[97] James L. Burns, Jr., *Navigating the "Ride-Through" – Is the Road Still Open?*, 070614 ABI-CLE 5 (2007) (page references not available).
[98] *See* Napoli, *supra* note 5, at 285-292.
[99] 363 B.R. 225 (Bankr.D. Utah 2007).
[100] Napoli, *supra* note 5, at 287 (citing *Blakeley*, 363 B.R. at 226-227).
[101] Napoli, *supra* note 5, at 287-88 (citing and quoting Blakeley, 363 B.R. at 231-32).
[102] 371 B.R. 434, 438 (Bankr.D. Az. 2007).
[103] Id. at 438-39.
[104] Id. (In many parts of the country, this is known as a *Moustafi* Order)

The second way to ride-through post-BAPCPA is by default. Essentially, the option refers to a debtor intentionally failing to state their intentions regarding a piece of property as required by 362(h). Generally, this failure is enough to negate the protection offered by the automatic stay and subject the debtor to an ipso facto clause.[105] However, Nevada offers a unique way to avoid this issue. NRS 97.304 came into effect October 1, 2011 and stated, in relevant part:

> "Notwithstanding the provisions of any contract to the contrary, default on the part of the buyer is only enforceable to the extent that: [1] The buyer fails to make a payment as required by the agreement; or [2] The prospect of payment, performance or realization of collateral is significantly impaired. The burden of establishing the prospect of significant impairment is on the seller."

This statute was applied in *In re Henderson*.[106] There, the court held that the mere filing of a Chapter 7 petition was not sufficient to significantly impair the lender's prospect of realizing collateral without something more.[107] In *Henderson*, each of the debtors bought a car after October 1, 2011.[108] In each, the only ground for default was the filing for bankruptcy.[109] The court found that was not enough to be a significant impairment in light of NRS 97.304.[110] Consequently, the debtors could retain their vehicles as long as they kept current on the payment of their vehicles.[111] Thus, this statute maintained the viability of the ride-through, at least in Nevada.[112]

In both of these scenarios, the ride-through option appears to have at least partially survived BAPCPA. In Nevada, as long as the debtor is current on their payments, creditors cannot enforce ipso facto clauses, allowing a debtor the option to ride through. In other parts of the country, the court can effectively allow ride through if the debtor complies with the substantive requirements for reaffirmation. Outside these exceptions however, ride-through is still not generally a viable option for debtors.

IV. Conclusion

Looking to the future, congressional reform is an attractive option for the questions discussed above. Duhl suggests "return[ing] the judicial function of approving reaffirmation agreements to the courts and not requir[ing] any certification from attorneys."[113] As Lisa Napoli states, "[w]hile the new requirements in §524(k) have made the required content of reaffirmation

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[105] *See generally In re Rowe*, 342 B.R. 341, 351 (Bankr. D. Kan. 2006) (The court noted that "Congress by amending §§ 521 and 362 intended to and was successful in eliminating the 'fourth option,' under which a Chapter 7 individual debtor having possession of personal property subject to a purchase money lien by performing all obligations under the security agreement and note could retain the property and be protected by the stay without either redemption of the property or reaffirmation of the secured debt.").
[106] 492 B.R. 537 (Bankr. D. Nev. 2013).
[107] Id. at 543.
[108] Id. at 539-540.
[109] Id. at 538.
[110] Id. at 543.
[111] Id. at 545 (Notably, as in Moustafi, the Court found that reaffirmation was not in the interest of the debtors. However, here despite the stay being lifted, the creditor could not proceed against the debtor due to state law.).
[112] Notably, in Nevada, a *Moustafi* order likely could still be entered. However, the real question is why it would need to be entered post-*Henderson*.
[113] Duhl, *supra* note 4, at 401.

agreements more uniform, that uniformity does not extend to the manner in which courts are managing the reaffirmation process."[114]

Until there is congressional reform on reaffirmation agreements, it is difficult to advise a debtor to sign a reaffirmation agreement. Debtor's counsel generally weigh in on the conservative side of the argument, preferring to instruct the debtor on the pro's and cons of a reaffirmation agreement but refusing to certify by signing the reaffirmation agreement, thus requiring the debtor to appear before the bankruptcy judge to make the determination as to hardship caused to the debtor by signing the reaffirmation agreement.

[114] Napoli, *supra* note 5, at 293.