

BAPCPA Three Years Later: Through the Looking Glass— How Is It Down the Rabbit Hole?

1. Reaffirmation

(a) A new rule 4008, requiring the use of a reaffirmation cover sheet, is expected go into effect on December 1, 2009, but the cover sheet (attached) can be used now if desired.

(b) Entering into a reaffirmation agreement will prevent automatic termination of the automatic stay under § 521(a)(6) even if the agreement is disapproved by the court. *In re Newman*, 2008 WL 1944231 (Bankr.D.D.C., May 1, 2008); *In re Donald*, 343 B.R. 524, 541 (Bankr.E.D.N.C.2006). If the debtor is willing to reaffirm on the original terms, the failure of the creditor to prepare a reaffirmation agreement does not trigger automatic relief from the stay. *In re Schwass*, 378 B.R. 859 (Bankr. S.D. Cal. 2007).

(c) Courts refuse to approve reaffirmation agreements as to real property if the “ride-through” option is available. *In re Caraballo*, 2008 WL 1924908 (Bankr. D.Conn., April 29, 2008).

(d) Discharge cannot be vacated to revive an reaffirmation agreement entered into after discharge. *In re Carrillo*, 2007 WL 2916328 (Bankr. D. Utah July 25, 2007) (collecting authorities). In order to effectuate § 524(m), a “reaffirmation agreement must be filed before the entry of the debtor's discharge, or it cannot be approved” *In re Parker*, 372 B.R. 835, 836 (Bankr.W.D.Tex.2007). *But see In re Merritt*, 366 B.R. 637 (Bankr.W.D.Tex.2007) (fact that creditor did not sign agreement until after debtor received her discharge did not affect its validity).

(e) If the attorney's certification or the Part D information regarding presumption of abuse are not completed, a reaffirmation agreement is not effective. *In re Dawson*, 2008 WL 687105 (Bankr. E.D.Va., March 10, 2008).

(f) If Part D states that no presumption of undue hardship arises, but the agreement itself indicates the that there is a presumption, the agreement will be ineffective in the absence of the attorney's declaration of the debtor's ability to pay. *In re Rivas*, 2008 WL 597893 (Bankr. E.D.Va., March 3, 2008).

(g) Reaffirmation agreements must comply with the requirement of Bankruptcy Rule 4008 to explain differences between Part D and Schedules I and J. *In re Laynas*, 345 B.R. 505, 513-15 (Bankr.E.D.Pa.2006) (finding undue hardship in the absence of explanation); *In re Jo*, 2007 WL 4411619 (Bankr. E.D.Va., December 14, 2007) (requiring resubmission of agreement with explanation).

(h) If a debtor's attorney fails to certify a reaffirmation agreement as not imposing an undue hardship, the court can do nothing to validate the agreement. *In re Isom*, 2007 WL 2110318 (Bankr. E.D.Va. July 17, 2007). *But see In re Goines*, 2007 WL 2410592 (Bankr. M.D.N.C., August 21, 2007) (holding that if a debtor's attorney

chooses not to certify that the reaffirmation, § 524(a)(6) requires the Court to hold a hearing to determine if the reaffirmation agreement is in the debtor's best interests).

(i) "Bankruptcy courts have an independent obligation to review reaffirmation agreements, even where they are accompanied by an attorney declaration under § 524(c)(3). *In re Melendez*, 224 B.R. 252, 260 (Bankr.D.Mass.1998). Finding no reasonable basis for reaffirming is grounds to disapprove a reaffirmation agreement. *In re Vargas*, 257 B.R. 157, 166 (Bankr.D.N.H.2001)." *In re Miller*, 2007 WL 2413012 (Bankr. N.D.Iowa, August 20, 2007).

2. Discharge and dischargeability.

(a) Breach of contract, without tortious conduct, cannot be the basis for liability under § 523(a)(6). *In re Salvino*, 373 B.R. 578 (Bankr. N.D.Ill. 2007), *aff'd sub nom. Wish Acquisition, LLC v. Salvino*, 2008 WL 182241 (N.D.Ill., January 18, 2008). *But see In re Fayad*, 2008 WL 160647, at *6 (Bankr. D.Mass. January 15, 2008) (finding nondischargeability under § 523(a)(6) for willful breach of a contract to make payments on a student loan).

(b) The Bankruptcy Rules Committee is proposing (for comment this winter) a change to Rule 7001 (on the scope of adversary proceedings) that would add a new subsection (b): "An objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f), is commenced by motion and is governed by Rule 9014." The proposed change is explained in the following Committee Note: "Subdivision (b) . . . direct[s] that objections to discharge under § 727(a)(8) and (a)(9) and § 1328(f) be commenced by motion rather than by complaint. Objections to discharge on these grounds typically present issues more easily resolved than other objections to discharge, so there is less need for the more extensive procedures applicable to adversary proceedings. In appropriate cases, the court can order that all of the provisions of Part VII of the rules apply to these matters under Rule 9014(c)."

3. Means Testing

(a) New Chapter 7 and 13 means test forms went into effect on January 1, 2008, incorporating changes required by new IRS collection standards as well as amendments intended to more accurately track applicable statutory and regulatory language. A copy of the Chapter 7 form (Official Form 22A) and a revised committee note is attached.

(b) Lines 8 and 10 were changed to provide a different treatment of alimony and maintenance. Formerly, alimony and maintenance were included in Line 8—"amounts paid by another person or entity, on a regular basis." But alimony and maintenance are always income to the recipient, whether or not regularly received. *See* 26 U.S.C. § 71(a) (listing alimony and separate maintenance as "gross income"). So alimony and separate maintenance are always CMI under § 101(10A)(A). But child support has not been changed. Child support is not "income" to the recipient. *See Preston v. Commissioner*, 209 F.3d 1281, 1284 (11th Cir. 2000). So child support is only CMI if regularly paid, under § 101(10A)(B), and so remains properly in Line 8.

(c) Line 9 deals with a statutory ambiguity: is unemployment compensation a “benefit under the Social Security Act”? See *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007) (unemployment compensation not CMI). There appears to be no contrary authority.

(d) Line 14 now uses “household” rather than “family” size to determine the applicable median income. This tracks the language of § 707(b)(7) safe harbor from means testing, which compares the debtor’s CMI “in the case of a debtor in a household of 2, 3, or 4 individuals” to “the highest median family income of the applicable State for a family of the same number or fewer individuals.” See *In re Ellringer*, 370 B.R. 905, 911 (Bankr. D. Minn. 2007) (non-related members of a debtor’s “household” must be counted in determining applicable “family” income).

(e) Line 17 now requires debtors to specify what a non-filing spouse’s income was used for other than household expenses of the debtor or the debtor’s dependents, and it gives examples of possible alternative uses.

(f) Line 19A specifies that the number of persons for the National Standard deduction should be those in the debtor’s household. However, the IRS website suggests a different test: “Generally, the total number of persons allowed for National Standards should be the same as those allowed as exemptions on the taxpayer’s most recent year income tax return.”

(g) Line 19B reflects a new, per person IRS National Standard for health care, which varies according to the age of the persons involved. It provides for a computation of the total health care allowance, again referring to household members rather than dependents.

(h) Lines 20 through 24 deal with the IRS’s Local Standards for housing and transportation. A question arises as to whether a debtor is entitled to a deduction for the cost of owning a car or home even if the debtor owns the asset free of liens. There is a split of authorities. Decisions holding that an ownership allowance should not be given with respect to property owned free and clear rely largely on the Internal Revenue Manual. See, e.g., *In re Talmadge*, 371 B.R. 96 (Bankr. M.D. Pa. 2007). Decisions in favor of an ownership allowance for property owned free and clear hold that the Internal Revenue Manual is irrelevant in light of the conflicting statutory language. See, e.g., *In re Haley*, 354 B.R. 340 (Bankr.D.N.H.2006). The issue has been addressed in a large number of cases, and the split is fairly even. For a collection of authorities, see *In re Canales*, 377 B.R. 658, 662 (Bankr. C.D. Cal. 2007).

A question has also been raised about ownership allowances for inoperable cars. See *In re Brown*, 376 B.R. 601 (Bankr. S.D. Tex. 2007) (treating the possibility as absurd); *In re Moorman*, 376 B.R. 694 (Bankr. C.D. Ill. 2007) (acknowledging the possibility and it comparing to a small second loan).

(i) Line 22B addresses the question of whether public transportation expenses can be claimed by a debtor who also claims vehicle operating expenses, allowing the public transportation expenses to be claimed, but separately categorized for possible objection.

(j) Line 31 now allows the debtor's health care expenses only to the extent that they exceed the new National Standard for health care.

(k) Line 34 now allows a debtor to claim a deduction for reasonable health insurance, disability insurance, and health savings account expenses, even if the debtor does not actually incur expenses for these items, but it requires the debtor to disclose actual expenses if lower than those claimed.

(l) Line 40 reflects the treatment of charitable donations in § 707(b)(1). Contributions must be a "continuation" of the debtor's pre-filing practice, but there is no limit on amount.

(m) Line 42 has been changed to direct the debtor to deduct "amounts scheduled as contractually due," and also requires disclosure if the debtor includes payments of taxes or insurance in these amounts. The courts are in substantial disagreement about the meaning of "amounts scheduled as contractually due." Some decisions hold that it means the amounts that would be due as a result of the information provided on the debtor's schedules. So, if the debtor proposes to surrender collateral, there will be no amounts scheduled as contractually due. *In re Skaggs*, 349 B.R. 594 (Bankr. E.D. Mo. 2006) is the leading case for this approach. The majority of courts, however, read "scheduled as contractually due" to mean "due as scheduled under the debtor's contract". This position has been adopted by the only district court opinions on the question. *Fokkena v. Hartwick*, 373 B.R. 645 (D. Minn. 2007); *Randle v. Neary (In re Randle)*, 2007 WL 2668727 (N.D. Ill. 2007). *Accord, In re Hartwick*, 359 B.R. 16 (D.N.H.2007).

(n) Line 44, dealing with priority debts, has been changed to clarify that it only includes obligations for which the debtor was liable at the time of filing, rather than future obligations.

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