

**Dated: November 13, 2008**  
**The following is ORDERED:**



*Jennie D. Latta*

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**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re  
THOMAS POOL,  
Debtor.

Case No. 08-23770-L  
Chapter 7

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In re  
JEFFREY DAVIS,  
Debtor.

Case No. 08-24209-L  
Chapter 7

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**OPINION**

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IN THESE TWO otherwise unrelated bankruptcy cases, the Debtors have requested that the court approve reaffirmation agreements that are not accompanied by the declaration or affidavit of an attorney. Either the Debtors or their attorney, or all three, believe that court approval will render these reaffirmation agreements enforceable notwithstanding the missing declarations. In both cases, the underlying bankruptcy petitions were filed and signed by an attorney. In neither case has the attorney withdrawn from representation. The court conducted hearings in both cases on July 24,

2008, and heard from both Debtors and their attorney (the same attorney represents both Debtors). In Mr. Pool's case, the claim is made that the presumption of undue hardship does not arise. In Mr. Davis's case, it clearly does. The court took the matters under advisement. The decision in these cases was delayed because the presiding judge underwent surgery and a medical leave shortly after the hearings. The court now renders its opinion.

### FACTS

Mr. Pool seeks to reaffirm a debt secured by a manufactured home. The disclosures filed with his proposed reaffirmation agreement state that he has income of \$2,384.00 per month and expenses of \$819.06 per month, leaving \$1,564.44.<sup>1</sup> He seeks to reaffirm \$17,988.33 in debt, making payments of \$239.06 per month. In his bankruptcy schedules, Mr. Pool listed the manufactured home on Schedule A as real property. Although he does not list any leases on Schedule G, he indicates on Schedule J that his monthly rent or home mortgage payment, including "lot rented for mobile home," is \$538.00. In his testimony, Mr. Pool indicated that he does rent the land on which he lives, which costs \$280.00 per month, including property taxes.<sup>2</sup> The expenses listed on Schedule J (\$2,286.00), exceed his income listed on Schedule I (\$2,145.57), by \$140.43. Notwithstanding this, the Debtor indicates that the presumption of undue hardship does not arise.<sup>3</sup>

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<sup>1</sup> The amount of \$1,564.44 appears to be a typographical error in that \$819.06 subtracted from \$2,384.00 is \$1,564.94.

<sup>2</sup> The discrepancy between the information given in the disclosures filed with the reaffirmation agreement and that given in Schedules I and J was not explained, although Interim Bankruptcy Rule 4008 requires that the debtor provide such an explanation.

<sup>3</sup> Although the presumption of undue hardship is said to arise from the information provided in Part D, some courts have said that failure to explain any discrepancy may itself give rise to a presumption of undue hardship, or, at the very least, require the debtor to provide the required explanation. *See In re Jo*, 2007 WL 4411619 (Bankr. E.D. Va. December 14, 2007); *In re Laynas*, 345 B.R. 505, 513-15 (Bankr. E.D. Pa. 2006). It is not necessary to the court's decision in this case to determine whether the presumption does or does not arise.

Mr. Davis seeks to reaffirm a debt secured by a motor vehicle. In connection with his reaffirmation agreement, Mr. Davis discloses that he has monthly income of \$5,309.36, and monthly expenses of \$5,874.58, leaving a negative balance of \$565.22, *before* the payment on the reaffirmed debt. The reaffirmation agreement calls for 12 monthly payments of \$399.58, and one optional balloon payment of \$14,212.45 on or after April 28, 2009. The Debtor admits that the presumption of undue hardship does arise in his case. The Debtor indicates that he will reduce unnecessary spending and rely on family members to help him make his payments.

### ANALYSIS

The decision in these cases is governed by Bankruptcy Code section 524(c). That section provides:

(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 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 subsection have been complied with; and
- (6) (A) in a case concerning an individual who is 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 consumer debt secured by real property.

11 U.S.C. § 524(c).

These cases present the issue of the enforceability of a reaffirmation agreement not accompanied by the declaration or affidavit required by subsection 524(c)(3). The Debtors ask that the court “approve” their agreements notwithstanding this deficiency, presumably because they believe that court approval may be obtained *in lieu of* the required attorney declaration. They have provided no authority for this position.

The reaffirmation agreement proposed by Mr. Pool presents one issue not present with respect to the agreement proposed by Mr. Davis. Mr. Pool’s agreement purportedly concerns a consumer debt secured by real estate. No one has suggested that the mobile home that secures the debt underlying Mr. Pool’s agreement is not real estate, but certainly there are instances in which a mobile home is not considered to be real estate. *See Roberts v. Green Tree Fin. Corp. (In re Cassady)*, 197 B.R. 846, 849 (Bankr. E.D. Tenn. 1996) (mobile home not affixed to real estate is a “motor vehicle” under Tennessee law). The record does not contain facts from which the court can draw any conclusion on this issue. Fortunately, however, it is not necessary to the questions that are before the court. Whether or not the reaffirmation agreement concerns a consumer debt secured by real estate is an issue only when the debtor is not represented by an attorney during the course of negotiating the reaffirmation agreement. Thus, although one of these cases may involve real

estate and the other clearly does not, both raise essentially the same question or questions: (1) when is a bankruptcy debtor represented by counsel; (2) what is the effect of an attorney's refusal to provide the declaration or affidavit required by section 524(c)(3); and (3) can this effect be overcome by obtaining court approval of the agreement?

*1. When is a bankruptcy debtor represented by counsel during the course of negotiating a reaffirmation agreement?*

It is not clear in these cases that the Debtors *actually* take the position that they were unrepresented by counsel during the course of negotiating their reaffirmation agreements. As stated previously, both petitions were signed by the same attorney, that attorney has not requested to be permitted to withdraw from these representations, and that attorney spoke on behalf of each of the Debtors at the hearings to consider approval of their reaffirmation agreements. Indeed, at the beginning of Mr. Pool's hearing, the attorney announced, "I'm his counsel." Neither Debtor suggested that his agreement with his attorney did not include representation during the course of negotiating a reaffirmation agreement and neither produced a written contract to that effect.

Although it is not clear that they do, the Debtors in these cases may take the position that their attorney's refusal to sign a declaration or affidavit in support of their reaffirmation agreements renders them unrepresented by counsel. This would be an extremely odd result, however. In a bankruptcy case, the fact of representation is a matter of public record. Once a bankruptcy petition is filed, the court and the public may determine the fact of representation and the identity of counsel by consulting court records. An attorney cannot be released from representation without court approval. L.B.R. 2090-1(f). *See also, In re Carvajal*, 365 B.R. 631 (Bankr. E.D. Va. 2007).

These cases do not raise the question of whether an appearance in the main bankruptcy case

is tantamount to an agreement to represent the debtor in any related adversary proceeding. Although that question is not presented for decision, I have generally taken the view that the agreement to represent a debtor in a bankruptcy case does *not* entail an agreement to represent the debtor in a related adversary proceeding. I have taken the position that if the debtor is a defendant in an adversary proceeding, he is not represented by counsel until counsel makes an appearance on his behalf by filing a responsive pleading.

Instead, these cases suggest the question whether an attorney may “carve out” certain activities during the course of representing a client in a bankruptcy case that are not within the scope of his or her representation. Although this question is likewise not squarely before the court, at a minimum, I believe that such “carve outs” must be the subject of a written agreement entered into *before* the filing of the bankruptcy petition. I would go further and say that the carve out of representation during the course of negotiating a reaffirmation agreement would be disfavored as the decision to enter into a reaffirmation agreement goes to the very heart of one of the most important benefits of the filing of a bankruptcy case – the debtor’s fresh start.

The court concludes that in these cases, the Debtors have not squarely presented the question of whether they were represented by counsel during the course of the negotiation of their reaffirmation agreements. All of the facts in these cases tend to indicate that they were represented, and the court will treat them as represented by counsel for the purposes of considering the remaining questions raised by them.

*2. What is the effect of an attorney’s failure or refusal to provide the declaration or affidavit required by section 524(c)(3)?*

The effect of not obtaining an attorney’s declaration or affidavit, if applicable, is clearly

spelled out. Section 524(c) provides that an agreement is enforceable *only if* the requirements set forth in the following six subsections are met. *In re Graham*, 297 B.R. 695, 698 (Bankr. E.D. Tenn. 2003). The effect of not providing the declaration or affidavit of the attorney who represented the debtor during the course of negotiating a reaffirmation agreement is that the agreement is not enforceable. *In re Isom*, 2007 WL 2110318 (Bankr. E.D. Va. 2007). *Accord In re Rivas*, 2008 WL 597893, slip op. at \*1 (Bankr. E.D. Va. March 3, 2008); *see also In re Husain*, 634 B.R. 211, 215 (Bankr. E.D. Va. 2007) (“Strict compliance with the provisions of § 524 of the Bankruptcy Code has always been a prerequisite to enforce a reaffirmation agreement.”).

The declaration or affidavit required by counsel is not new. It is required by subsection 524(c)(3), a subsection that was not amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (BAPCPA). It contains three parts: a certification 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 a dependent of the debtor; and (3) that the attorney fully advised the debtor of the legal effects and consequences of the agreement and any default under the agreement. 11 U.S.C. § 524(c)(3). Before the amendments of BAPCPA, the attorney for the debtor was required to opine that a proposed reaffirmation agreement did not impose an undue hardship upon the debtor. *Graham*, 297 B.R. at 698.

What is new under BAPCPA are the forms of disclosure, declaration, and statement set forth in subsection 524(k). The form of statement required of the debtor in support of the reaffirmation agreement requires the debtor to list his monthly income and current actual monthly expenses. This requirement makes clear the ability or inability of a debtor to make the payments required by the reaffirmation agreements he proposes to enter into. The debtor is required to make the statement,

“I understand that if my income less my monthly expenses do 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.” 11 U.S.C. § 524(k)(6)(A). The form of the statement goes further, however, permitting the debtor to list facts tending to demonstrate that notwithstanding his income and expenses, he will be able to make the monthly payments.

The form of declaration required of an attorney exactly tracks the language of subsection 524(c)(3), but adds one additional requirement: if a presumption of undue hardship arises, the attorney is asked to make the further statement that in her opinion, the debtor is able to make the required payment. 11 U.S.C. § 524(k)(5)(A). Thus, under BAPCPA, the attorney is not being asked to make a certification different from that required before BAPCPA – prior to the amendments of BAPCPA, the attorney was required to opine that the agreement did not pose an undue hardship for the debtor or a dependent of the debtor – rather, the facts upon which the attorney has relied to determine that the agreement will not impose an undue hardship are to be made clear. The refusal of an attorney to provide the required declaration or affidavit under BAPCPA can only be understood as the expression of the opinion of the attorney that the proposed agreement *does in fact* impose an undue hardship upon the debtor. If the debtor’s attorney chooses not to give the required declaration or affidavit, it would be unreasonable and inappropriate for a bankruptcy judge to override this decision. The attorney should be in a better position than the court in the first instance to determine the personal and financial affairs of the debtor.

In sum, the effect of the failure or refusal of debtor’s counsel to provide the declaration or affidavit required by section 524(c)(3) is that the reaffirmation agreement is not enforceable.

3. *May a reaffirmation agreement that is not enforceable under Section 524(c) be made*



*enforceable by court approval?*

Because the Debtors in this case do not argue that they were unrepresented by counsel during the course of negotiating their reaffirmation agreements, their request for court approval of the reaffirmation agreements is better understood as a request that the court somehow render an unenforceable agreement enforceable. The Bankruptcy Code makes no provision for court approval *in lieu of* an attorney's declaration or affidavit, however. *See Isom*, 2007 WL 2110318, \*2.

The Bankruptcy Code provides two instances in which a bankruptcy judge is called upon to review a reaffirmation agreement: (1) when the debtor was not represented by counsel during the course of negotiating the agreement; and (2) when the debtor was represented by counsel, and a presumption of undue hardship has arisen, but, in the opinion of debtor's counsel, the agreement does not *in fact* impose an undue hardship upon the debtor or a dependent of the debtor. The first instance of court review preceded the amendments of BAPCPA; the second was created by them.

The first instance of court review is required because the debtor has had no one to review the proposed reaffirmation agreement with her. The court is required to approve the proposed agreement as not imposing an undue hardship upon the debtor or a dependent of the debtor and as being in the best interest of the debtor, unless the debt to be reaffirmed is a consumer debt secured by real estate. 11 U.S.C. § 524(c)(6)(A) and (B). If the debtor is not represented by an attorney and the court has determined that discharge should be granted, and if the debtor desires to enter into a reaffirmation agreement, the court is directed to hold a hearing at which the debtor is present. *See* 11 U.S.C. § 524(d). The court is required to make the same disclosures that a debtor's attorney is required to make with respect to all reaffirmation agreements. 11 U.S.C. § 524(d)(1). The court is also required to form the opinion that the agreement does not pose an undue hardship and is in the

best interest of the debtor, unless the agreement is based in whole or in part on a consumer debt secured by real estate. 11 U.S.C. § 524(d)(2). In fact, this first instance of court review is the only instance in which the court is called upon actually *to approve* a reaffirmation agreement, and even then, is called upon to approve only those agreements in which the debt is not a consumer debt secured by real estate. The court is required to approve these agreements as not imposing an undue hardship because the debtor has no attorney to do this for her.

In the second instance of court review, the court is called upon to determine whether to *disapprove* a reaffirmation agreement that has been approved by debtor's counsel. Section 524(m) was added by the amendments of BAPCPA. It provides one additional layer of debtor protection for those debtors who are represented by attorneys. Under that section, if on the face of the statement by the debtor the presumption of undue hardship arises because the debtor's income is not adequate to pay her expenses *and* the payments called for by the proposed and any other reaffirmation agreements, but the debtor's attorney is satisfied with the debtor's explanation concerning how the payments will be made, the Bankruptcy Code requires the court to review the presumption.<sup>4</sup> Section 524(m) further provides:

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.

11 U.S.C. § 524(m). The court must review the proposed agreement and the explanation given by

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<sup>4</sup> Although the language of the section directs the court to review the presumption, it may be inferred from the disclosures to be made and the opinion to be rendered that the court is being directed to review all of the documents submitted by the debtor in support of the proposed reaffirmation agreement as well as the underlying bankruptcy schedules.

the debtor for how she will be able to make the required payments. If the court agrees with the opinion of counsel and is *satisfied* that notwithstanding the presumption, the proposed agreement does not *in fact* pose an undue hardship, then the court does nothing. After sixty days, the agreement becomes enforceable. If the court is *dissatisfied* with the explanation given by the debtor, the court may disapprove the agreement, but only after giving the debtor an opportunity to provide additional explanation of his ability to make the required payments.

This provision clearly was intended to further protect the debtor from entering into a reaffirmation agreement unadvisedly. It protects the debtor by requiring an additional set of eyes to review the proposed agreement when the numbers are close and there is reason to believe that the debtor may not be able to make the required payments. It also provides additional protection for the debtor's attorney, who may too easily be swayed by the debtor's explanation for how her payments are going to be made. The court provides an objective review of the proposed agreement by someone who has no personal relationship with the debtor. The court's review is not intended, however, to substitute for the disclosures and review required of the debtor's attorney, if he has one.

In sum, a reaffirmation agreement that is not enforceable because it is not accompanied by the declaration or affidavit required by section 524(c)(3) may not be rendered enforceable by court review or approval. The Bankruptcy Code does not contemplate court approval of a reaffirmation agreement submitted by a debtor who is represented by an attorney.

### **CONCLUSION**

The Bankruptcy Code makes clear that it is the debtor's attorney, if he has one, who must make the required disclosures and form the initial opinion that the proposed agreement does not impose an undue hardship upon the debtor or a dependent of the debtor. Failure of the debtor's

attorney to provide the required declaration or affidavit is tantamount to a declaration that, in the opinion of the attorney, the agreement *does in fact* impose an undue hardship upon the debtor or his dependent. The Bankruptcy Code makes no provision for court approval of a reaffirmation agreement for a debtor who is represented by an attorney. Instead, the Code provides only for disapproval of an agreement initially approved by an attorney when the presumption of undue hardship arises if the court is not satisfied with the debtor's explanation for how the payments are to be made.

For these reasons, the court declines to approve the reaffirmation agreements filed by Mr. Pool and Mr. Davis in these cases.

Separate orders will be entered in each of these cases.

cc: Debtor (both cases)  
Attorney for Debtors  
Case Trustee (both cases)  
Matrix (both cases)