

13W REAFFIRMATION REVIEW PROCESS

A. SUBSTANCE (Note: the two analyses required by §524(c) and (d) and by §524(m) are entirely independent of each other, so that there may be a review of and/or hearing on a reaffirmation agreement on either or both grounds.)

1. §524(c) and (d) - self represented debtors

Judge must conduct a hearing on a reaffirmation agmt

if debtor is pro se (including if a lawyer represents the debtor but does not sign off on the reaffirmation agreement)

but not if the reaffirmation is for a "consumer debt secured by real property" (e.g., a home mortgage, a home equity line of credit [assuming there is such a thing anymore], a mortgage on an empty lot, etc.)

2. §524(m) - undue hardship cases

Judge must review a reaffirmation agreement (and then will let staff know if a hearing is necessary)

whether or not the debtor is pro se or the debtor's lawyer signs off on the reaffirmation agreement, and

whether or not the debt is a "consumer debt secured by real property",

if undue hardship is indicated,

but not if the creditor is a credit union.

B. FORM

For any reaffirmation agreement:

The form of the reaffirmation agreement needs to be on the latest official form,

Signed by debtor(s) and the creditor,

Showing the collateral, principal balance, interest rate, monthly payment (and how many months of payments).

For a 524(m) review (that is, when the creditor is not a credit union):

The "undue hardship" boxes must be on the top of the first page and one of them must be checked;

Agreement must comply with Rule 4008, which requires also showing the schedule I and J budget numbers if different from the budget numbers set out in Part D and an explanation of why the Schedule I and J numbers differ from Part D budget numbers; and

If Part D shows that the debtor cannot "afford" the payment (that is, if the income figure minus the expenses figure without the payment at issue leaves a number which does not equal or exceed the payment at issue), there is a presumption of undue hardship. E.g., income of \$4,000 less \$3,700 (excluding the monthly \$500 car payment) = \$300, which is less than the \$500 car payment; or, \$4,000 net income minus total expenses of \$4,200 (which figure includes the monthly car payment) = <\$200>. If there is a presumption of undue hardship, the debtor must explain how the debtor will be able to afford the payment. An explanation that someone else who can afford the payment is making the payment may be sufficient; an explanation that the debtor will prioritize this payment or the debtor has learned to reduce expenses will likely not be sufficient.

Note: even if the form is deficient, if the deal is particularly advantageous for the debtor (for example, a significant reduction in the principal balance and in the interest rate), the reaffirmation agreement will likely be approved.

If there is any doubt, the reaff should be forwarded to the judge for a review.

13W REAFFIRMATION HEARING CHECKLIST

Prelims:

DAR, CD
ID JSS, debtor (speaking for marital community?),
creditor
ID collateral, debt and interest rate, lender
collateral condition
rescission right (in writing, to address in agreement,
within 60 days)

Pro se - 524(c) and (d):

explain and make decision in best interest of and for
debtor and any dependent (JSS makes the decision)
deficiency, BR, deficiency: checking account, savings
account, lien on house, garnish wages
can pay voluntarily and creditor can let debtor have
collateral voluntarily - incentive for each side and
maybe state court action if you keep paying and keep
the collateral insured and they take it away anyway
still want to do this?

Undue hardship - 524(m):

Part D vs. Sched I and J
Rule 4008
where did the numbers come from?
Boxes on front page

Decision:

"Fault"
will send order to debtor and creditor
creditor won't be surprised