

# What We Know

## ARTICLES & INSIGHTS

### ABOUT THE AUTHOR



[Landon Van Winkle](#) is an associate within the firm's [Consumer Financial Services Compliance & Litigation](#) practice group where he assists clients with pre-suit negotiations and litigation in matters involving consumer financial services litigation and compliance and bankruptcy. His areas of practice are Consumer Financial Services Litigation & Compliance, Commercial Creditor Bankruptcy, and Commercial Litigation.

## Reaffirmation: 7 Things Every Creditor's Attorney Should Know

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Filing a reaffirmation agreement in a chapter 7 bankruptcy proceeding is a commonplace occurrence for many attorneys. However, the reaffirmation process is fraught with nuances and traps for the unwary attorney. Absent appropriate planning, these nuances may transform an otherwise standard-fee representation into an unpleasantly expensive lesson for both attorney and creditor alike.

### 1. THE PROCESS IS TIME-SENSITIVE

Chapter 7 debtors must file a statement of intention within 30 days of the petition date or the date of the 341 meeting, whichever is earlier.<sup>[1]</sup> They must perform their stated intention within 30 days of the first date set for the 341 meeting,<sup>[2]</sup> or within 45 days if the creditor has a purchase money security interest in the collateral.<sup>[3]</sup> Reaffirmation agreements must be filed with the Court within 60 days of the first date set for the 341 meeting.<sup>[4]</sup> This deadline may be extended, but reaffirmation agreements must be filed before entering the debtor's discharge.<sup>[5]</sup>

### 2. SOME REAFFIRMATION AGREEMENTS REQUIRE COURT APPROVAL.

If an attorney in the reaffirmation process represents the debtor, the agreement is automatically effective upon filing with the court, provided the attorney has submitted the declaration or affidavit stating that the agreement was voluntary, the debtor was advised of the legal consequences of reaffirmation and default under such an agreement, and the agreement does not impose an undue hardship.<sup>[6]</sup> If the debtor is *pro se*, the court must approve the agreement unless the agreement concerns a consumer debt secured by real property.<sup>[7]</sup>

### 3. BEWARE THE RESCISSION TRAP.

The debtor may rescind a reaffirmation agreement by giving notice of rescission to the creditor before entering the debtor's discharge or within 60 days after the agreement is filed, whichever occurs later.<sup>[8]</sup> Consider the case of a bank with a purchase money security interest in the debtor's vehicle and an unsecured claim arising from a credit card. The bank requires the debtor to reaffirm both debts to keep the vehicle and sends

the debtor separate agreements proposing to reaffirm both debts according to their respective contractual terms. The debtor signs both, and they are timely filed. The bank appears to have won the battle. Still, it will lose the war because once the debtor rescinds the agreement as to the credit card, the bank will have no legal basis to repossess the vehicle unless and until the debtor defaults under the reaffirmed vehicle loan. On the other hand, if the debts are addressed in a single agreement, the debtor cannot rescind the agreement without risking losing the vehicle. However, this strategy should be avoided when one of the debts is secured by real property, lest the creditor inadvertently waives the anti-modification protections afforded to mortgage lenders in chapter 11 or 13.<sup>[9]</sup>

#### **4. CREDIT UNIONS ARE SPECIAL.**

Where the debtor is *pro se* or the debtor's attorney has not submitted a declaration or affidavit that the reaffirmation agreement does not impose an undue hardship on the debtor, the reaffirmation agreement is not effective unless and until the court approves it.<sup>[10]</sup> The court must find that the agreement is in the best interests of the debtor and that it does not present an "undue hardship." An undue hardship is presumed if the debtor's monthly income less her monthly payments leaves insufficient cash to make the payments called for by the reaffirmation agreement.<sup>[11]</sup> This presumption may be rebutted if the debtor submits a written statement identifying additional sources of funds (such as gifts or contributions from family members) that may be used to cover any shortfall.<sup>[12]</sup> However, if the reaffirmation agreement is with a credit union, no presumption of undue hardship arises at all.<sup>[13]</sup>

#### **5. KNOW HOW COURTS IN YOUR CIRCUIT TREAT ASSUMED UNEXPIRED LEASES OF PERSONAL PROPERTY.**

There is a split among lower courts regarding whether an unexpired lease for personal property (most commonly a debtor's vehicle) that is assumed pursuant to § 365(p) is automatically excepted from discharge, or whether it must also be reaffirmed under § 524(c).<sup>[14]</sup> If there is any uncertainty, it may be safest to file a reaffirmation agreement to cover the assumed lease, or even a motion seeking clarification from the court, as this nominal upfront cost can save your client thousands of dollars in avoiding a fight over whether it violated the discharge injunction if the debtor ever breaches the lease post-discharge and the creditor sues to enforce the obligation. The old adage that an ounce of prevention is worth a pound of cure rings true here.

#### **6. RESIST THE TEMPTATION TO STICK TO THE FORM.**

The Administrative Office of the United States Courts has created a form reaffirmation agreement that includes the disclosures required by statute, as well as a fillable reaffirmation agreement that endeavors to cover a wide variety of reaffirmed obligations.<sup>[15]</sup> This form reaffirmation agreement may work very well for a vanilla reaffirmation, particularly where the debtor is not in default, but for a more complicated agreement (or one where an arrearage must be addressed), consider appending a separate written reaffirmation agreement to the form—there is no requirement that the reaffirmation agreement portion of the form is used (Exhibit B of the form)—the form of

the reaffirmation agreement itself may be “a separate agreement you and your creditor agree on.”<sup>[16]</sup> Reaffirmation agreements are often loan modifications in substance, containing interest rate changes, waivers of fees or charges, payment holidays, stair-stepped payments or interest rates, and other provisions that the debtor and creditor agree to. Trying to cram customized terms into a preprinted form is not only maddening but raises the risk that the debtor (or the court) will misinterpret the terms of the reaffirmed agreement. In order to ensure that the debtor is clear on his obligations under the reaffirmed debt, consider appending a formal loan modification agreement to the form reaffirmation agreement.

## **7. CHECK THE LOCAL RULES.**

Many courts have specific requirements for reaffirmation agreements set forth in the local rules. Some require documents evidencing a creditor’s perfected and non-avoidable security interest to be included with the filed reaffirmation agreement <sup>[17]</sup>. Some will not consider the reaffirmation agreement unless it is filed with both the official form and the Cover Sheet for Reaffirmation Agreements (Official Form 427).<sup>[18]</sup> At least one bankruptcy court goes the opposite direction, providing that the cover sheet required by Rule 4008(a) of the Federal Rules of Bankruptcy Procedure is not required if the creditor is a credit union.<sup>[19]</sup>

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<sup>[1]</sup> 11 U.S.C. § 521(a)(2)(A).

<sup>[2]</sup> 11 U.S.C. § 521(a)(2)(B).

<sup>[3]</sup> 11 U.S.C. § 521(a)(6).

<sup>[4]</sup> Fed. R. Bankr. P. 4008(a).

<sup>[5]</sup> *Id.*; 11 U.S.C. § 524(c)(1).

<sup>[6]</sup> 11 U.S.C. § 524(c)(3).

<sup>[7]</sup> 11 U.S.C. § 524(c)(6)(A)-(B).

<sup>[8]</sup> 11 U.S.C. § 524(c)(4).

<sup>[9]</sup> *See* 11 U.S.C. §§ 1123(b)(5) and 1322(b)(2).

[\[10\]](#) 11 U.S.C. § 524(c)(6), (d), and (m)(1).

[\[11\]](#) 11 U.S.C. § 524(m)(1).

[\[12\]](#) *Id.*

[\[13\]](#) 11 U.S.C. § 524(m)(2).

[\[14\]](#) *See, e.g., Bobka v. Toyota Motor Credit Corp.*, 968 F.3d 946, 951 (9th Cir. 2020) (“No court of appeals has yet considered whether lease assumptions under section 365(p) require reaffirmation under section 524(c), and bankruptcy courts have reached differing conclusions.”) (collecting cases). The Ninth Circuit ultimately held that the debtor’s obligations under a lease assumed pursuant to § 365(p) are excepted from discharge, notwithstanding the failure of the debtor or creditor to file a reaffirmation agreement covering the obligation.

[\[15\]](#) Form B 2400A/B ALT, available at <https://www.uscourts.gov/forms/bankruptcy-forms/reaffirmation-agreement-0>.

[\[16\]](#) 11 U.S.C. § 524(k)(3)(j)(i).

[\[17\]](#) Local Bankruptcy Rule 4008-1(c) (Bankr. M.D.N.C.) (version current as of May 12, 2020); Local Bankruptcy Rule 4008-1 (Bankr. D.N.M.) (version current as of April 1, 2019).

[\[18\]](#) Local Bankruptcy Rule 4008-1(b) (Bankr. D. Colo.) (version current as of December 1, 2018).

[\[19\]](#) Local Bankruptcy Rule 4008-1(a) (Bankr. D.S.D.) (“[N]otwithstanding Fed. R. Bankr. P. 4008(a), a reaffirmation agreement cover sheet (Official Form 427) need not be filed if the reaffirmation agreement is with a credit union . . . .”) (version current as of February 19, 2020).

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#### CONTACT US

919.250.2000  
mail@smithdebnamlaw.com

#### RALEIGH OFFICE

The Landmark Center  
4601 Six Forks Road, Suite 400  
Raleigh, NC 27609

Phone: 919.250.2000  
Fax: 919.250.2100

#### CHARLESTON OFFICE

171 Church Street  
Suite 120C  
Charleston, SC 29401

Phone: 843.714.2530  
Fax: 843.714.2541