

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI
THAD COCHRAN U.S. BANKRUPTCY COURTHOUSE
703 HIGHWAY 145 NORTH
ABERDEEN, MISSISSIPPI 39730

JASON D. WOODARD
U.S. BANKRUPTCY JUDGE

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MEMORANDUM

TO: Members of the Bar
FROM: Judge Jason D. Woodard *JDW*
DATE: November 13, 2013
RE: New reaffirmation agreement policy

The purpose of this memorandum is to communicate a change in my policy and procedure with regard to reaffirmation agreements under 11 U.S.C. § 524. The changes detailed herein will take effect with regard to all reaffirmation agreements scheduled to be heard by me after January 1, 2014. These changes do not apply to cases assigned to Judge Olack.

I. PURPOSE AND GUIDELINES

The decision whether to enter into a reaffirmation agreement, and effectively waive the benefit of a discharge of certain debts, is too fundamental to the bankruptcy process to allow debtors to proceed unadvised. Accordingly, consistent with Local Rule 4002-1(b)(3), which sets forth post-petition duties required of debtors' attorneys, counsel for debtors will no longer be allowed to "opt out" of representing debtors in the reaffirmation process. Representation of debtors throughout the reaffirmation process, including negotiations with creditors and attendance at hearings, will be considered part of the fee earned in all chapter 7 cases.

This does not mean that counsel should recommend approval of all reaffirmation agreements - far from it. As a reminder, the business judgment rule is not the standard for approval of reaffirmation agreements. The test centers on whether the agreement would impose an undue hardship on the debtors. If it is clear from the schedules that the agreement would impose an undue hardship, the debtor should be advised that a hearing will be necessary and a frank discussion should be had as to the likelihood of success at that hearing. This may save the debtor and the attorney from an unfruitful day in court. If a debtor insists on moving forward with a reaffirmation not recommended by counsel, debtor's counsel may so indicate on the

agreement or § 524(c)(3) declaration. Debtor's counsel must still attend the reaffirmation hearing along with the debtor.

Reaffirmation agreements should be filled out in their entirety. Keep in mind that if a debtor has negative income, and therefore a presumption of undue hardship has arisen under § 524(m), the debtor can rebut this presumption in writing with a statement including an explanation that identifies additional sources of income that will allow the debtor to make the payments under the agreement. If debtor's counsel signs the reaffirmation agreement, and if I am satisfied that the written explanation rebuts the presumption, I will enter an order approving the agreement without a hearing. A statement that the debtor needs the collateral or that the debtor intends to attempt to reduce his or her living expenses will not generally be sufficient to rebut the presumption without a hearing.

Reaffirmation of unsecured debt will be viewed with extreme disfavor. If a particular debtor feels a moral obligation to repay the debt, as is often expressed in these hearings, remind the debtor that § 524(f) allows for voluntary repayment of the debt without the legal obligation imposed by a reaffirmation agreement.

Reaffirmation agreements to retain assets not necessary to the debtor's fresh start (e.g., ATVs, boats, electronics, etc.) when the debtor has negative monthly income are also unlikely to be approved. The same holds true when the debtors are seeking to retain more vehicles than there are drivers in the household. Agreements should be reviewed before filing to help the debtor determine if a better deal is available elsewhere (e.g., when the debtor proposes to reaffirm a debt for a vehicle at a high interest rate with significant negative equity).

Also, before filing the agreement, the schedules should be reviewed to ensure that the debt and the collateral are listed where appropriate. There have been several instances of debtors seeking to reaffirm debts in an effort to keep assets not disclosed on the schedules.

II. PROCEDURE

Beginning with all reaffirmation agreements to be heard after January 1, 2014, my chambers staff will screen the agreements when filed. As before, not all reaffirmation agreements require a hearing or court approval. If the requirements of 11 U.S.C. §§ 524(c)(1)-(3) and (m) are satisfied with regard to a particular agreement, no hearing will be necessary. If the reaffirmed debt is owed to a credit union, and debtor's counsel has signed the certification, no hearing is necessary under § 524(m)(2). If no hearing is necessary, an entry will be made on the docket to that effect.

For all those agreements that do require a hearing (usually due to the failure to satisfy § 524(c)(3)(B)), a hearing will be scheduled and both the debtor and debtor's counsel must attend the hearing and be prepared to discuss the agreement. Hearings will no longer be conducted en masse, but individually at the beginning of the docket. In Aberdeen, reaffirmation dockets will

begin at 10:00 am and the remainder of the docket will be scheduled for 10:30 am. There will be no scheduling change in Oxford, as the majority of the Oxford morning docket consists of reaffirmation hearings. The setting of a reaffirmation agreement for hearing should not be taken as an indication that approval of the agreement will be denied, only that substantial questions remain. Because the hearings will be held individually, and because I will be reviewing each reaffirmation agreement in advance of the hearing, I will only consider reaffirmation agreements that are set for hearing on that day. If the debtor has additional reaffirmation agreements scheduled for a later date, debtor's counsel may prefer to request a continuance of the first-set reaffirmation agreement to the later date.

In accordance with 11 U.S.C. § 524(c)(1), motions to approve reaffirmation agreements made after entry of the discharge will be summarily denied. Likewise, the discharge will not be vacated to permit the filing and approval of a reaffirmation agreement entered into after the discharge was entered. *See In re Clark*, 2010 WL 5348721 (Bankr. E.D.N.Y. 2010).