

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
JOHN A. GOSSELIN)	Case No. 06-20028-TLM
)	
Debtor.)	SUMMARY ORDER AND
)	NOTICE OF HEARING
)	

The chapter 7 debtor in the above case, John Gosselin (“Debtor”), and creditor Les Schwab Tire Center (“Les Schwab”), entered into a reaffirmation agreement. *See* Doc. No. 14 (the “Reaffirmation”).

Since this case was filed on March 3, 2006, well after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, (“BAPCPA”), Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005), the provisions of amended § 524 govern the Reaffirmation. A specific – and unfortunately common – problem is presented by the Reaffirmation under the BAPCPA changes.

According to § 524(c), a reaffirmation agreement must meet several requirements in order to be effective. *See* §§ 524(c)(1) - 524(c)(6). BAPCPA added a new § 524(c)(2), that requires debtors receive the lengthy, detailed notices and disclosures described in § 524(k) at or prior to signing the agreement. Fortunately, Procedural Form B240 (the “Form”) has been revised to assist

debtors and creditors in meeting the requirements of the BAPCPA-amended Code and disclosure requirements. In this case, Debtor and Les Schwab used the Form.

However, mere use of the Form does not necessarily negate Court review.

Section 524(m)(1), which was also added by BAPCPA, provides:

(m)(1) Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. 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.

Section 524(m)(1).¹

The referenced statement of debtor's income and expenses is required, by

§ 524(k)(6)(A), to be in the following form:

Part D: Debtor's Statement in Support of Reaffirmation Agreement.

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments

¹ Section 524(m)(2) provides that subsection (m) does not apply to reaffirmation agreements where the creditor is a credit union as defined by § 19(b)(1)(A)(iv) of the Federal Reserve Act.

on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$XXX, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$XXX, leaving \$XXXX to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does 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. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: XXX.

2. I received a copy of the Reaffirmation Disclosure Statement in part A and a completed and signed reaffirmation agreement.

See § 524(k)(6)(A). Part D of the Form mirrors this Code language.

In the present case, Debtor agreed to reaffirm a \$386.00 debt owed Les Schwab. Doc. No. 14 at Part A. The debt is secured by used tires and batteries, carries interest at 18%, and is payable in monthly instalments of \$50.00. *Id.*²

Debtor's Part D disclosed \$1,522.00 as his monthly income, and \$1,976.00 as his monthly expenses "leaving \$0 to make the required payments on this reaffirmed debt." *Id.* at Part D (figure inserted by Debtor).³ Therefore, as the Code and Form language expressly provides, a presumption of undue hardship is

² The signed Reaffirmation asserts that the tires are worth \$568.80 and the batteries are worth \$143.90. Debtor's schedules alleged a \$100.00 value for the tires and batteries combined. *See* Doc. No. 1 at schedule B.

³ The income shown in the reaffirmation is consistent with that shown in Debtor's schedules. *See* Doc. No. 1 at schedule I. The expenses on schedule J were \$2,076.00 but that schedule listed a \$100.00 per month obligation to Les Schwab. The \$1,976.00 in expenses used on the Reaffirmation appears to be the schedule J figure of \$2,076.00 minus the \$100.00.

created.⁴

Debtor's counsel was required to make a declaration (also called a certification) under § 524(k)(5). Because there was a presumption of undue hardship, § 524(k)(5)(B)'s certification, rather than that of § 524(k)(5)(A), was required here. This certification, found now in Part C of the Form in a check-the-box format but in language consistent with that mandated by § 524(k)(5)(B), states:

[If applicable and the creditor is not a Credit Union] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Here, Debtor's counsel checked the box, thus making the necessary certification.

Section 524(m) requires the Court's review of all reaffirmations where a presumption of undue hardship arises. The Court can approve the reaffirmation if the presumption is adequately rebutted in writing.

Debtor inserted the following underlined language, to rebut the presumption, in Part D of the Reaffirmation:

I understand that if my income less my monthly expenses does not

⁴ If a debtor is represented by counsel (thus making § 524(c)(6) and § 524(d) inapplicable) and if the correctly completed Form B240 agreement shows no presumption of undue hardship, the agreement would be effective upon filing. See § 524(k)(3)(J)(i) (noting the required disclosure that "If you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court."). Here, the presumption of undue hardship in the Reaffirmation led to the Court's review and, then, to this Order and Notice of Hearing

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. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: I still have merchandise and would like to keep them and would like to keep my account.

Doc. No. 14 at Part D.

The proffered explanation does not address, in any fashion, “how [debtor] can afford to make the payments” as the Form requires, nor does it meet the express requirements of § 524(m).⁵ How either Debtor or counsel, or even Les Schwab for that matter, thought the presumption was adequately rebutted is unclear. How Debtor’s counsel could certify that Debtor could make the payments without undue hardship, given only the explanation in the Reaffirmation and Debtor’s schedules I and J, is equally unclear.⁶

Following the effective date of BAPCPA, and when encountering in a reaffirmation a presumption of undue hardship that is not adequately rebutted in Part D of the Form, this Court has simply caused the reaffirmation agreement to be set for hearing. It has little choice given the language of § 524(m) which states

⁵ The Code explains that “The presumption may be rebutted in writing by the debtor if *the statement [i.e. the one required under § 524(k)(6)(A)] includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement.*” § 524(m) (emphasis added).

⁶ Assertions of attorney opinion under the Part C certification would appear to be subject to Rule 9011(b)(3) (“By presenting to the court . . . other paper, an attorney . . . is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstance, . . . the allegations and other factual contentions have evidentiary support”).

“no agreement may be disapproved without notice and a hearing to the debtor and the creditor[.]”⁷ What happens next has varied.

In several instances, the presumption is adequately rebutted by information and explanation provided by the debtor and his counsel at hearing which is different from or in addition to that provided in the written agreement. The agreement is then approved.

On some occasions, however, the Court’s notice of hearing has been met by a “rescission” of the reaffirmation agreement at issue. One is left to wonder what has changed in the analysis by the debtor and his counsel about the wisdom of entering into the agreement, or the ability to make the payment without undue hardship. Nevertheless, upon rescission there simply is no further issue remaining before the Court.⁸

And, on a few occasions, the debtor and the debtor’s counsel simply fail (or refuse) to appear at the hearing, inevitably leading to a disapproval of the

⁷ There is an arguable alternative. Under § 102(a)(1)(B)(i) the phrase “after notice and a hearing” or a similar phrase can authorize an act without an actual hearing if notice is properly given and a hearing is not timely requested by a party in interest. The Court could conceivably give a notice to the debtor, his counsel and the creditor, indicate that the agreement cannot be approved due to an unrebutted or inadequately rebutted presumption of undue hardship, and advise them that in the absence of a request for a hearing within a time certain, the agreement will be disapproved. However, if one assumes that the debtor is interested in gaining approval of the reaffirmation agreement, this alternative approach places the burden on debtor’s counsel to obtain a hearing date, prepare a notice of hearing, and file and serve the same. The Court avoids that expenditure of time and effort by simply setting and noticing the hearing itself.

⁸ In such situations, the debtor’s attorney should comply with LBR 2002.2(f) in vacating the hearing.

agreement because the presumption remains insufficiently rebutted.⁹

The Court understands that having hearings on reaffirmations imposes a cost on debtors and their counsel. However, the cost is avoidable. BAPCPA's structure exposes represented debtors to those costs only in cases where a presumption of undue hardship arises and it is not adequately addressed and overcome in the reaffirmation agreement as signed and filed.

There is no way that the Court can, consistent with § 524(m), approve the Reaffirmation here on the idea that the statutory presumption of undue hardship was overcome by the wholly inadequate written explanation submitted on Part D of the Form. But disapproval cannot occur without notice and hearing. Therefore, Debtor and his counsel and the creditor, Les Schwab, are hereby notified that the question of approval of the Reaffirmation is set for hearing before the Court on its Moscow video calendar on **Monday, June 26, 2006, at 9:00 a.m. PDT / 10:00 a.m. MDT**. Parties shall appear in either the courtroom in the Federal Building and Courthouse, 220 E. 5th St., Moscow, Idaho, or in the courtroom of this Court in the James A. McClure Federal Bldg. and U.S. Courthouse, 550 W. Fort St., Boise, Idaho, at the appropriate time.

⁹ This last approach is quite odd; one would assume that the debtor would decide either to advance the reaffirmation by appearing at the hearing or providing additional written submissions, or abandon the reaffirmation by rescinding or withdrawing it. Counsel exposes himself to some risk by failing to appear, without explanation, at a scheduled court hearing. Fortunately, this sort of unprofessional behavior has proven to be quite rare.

IT IS SO ORDERED.

DATED: June 15, 2006



A handwritten signature in black ink, reading "Terry L. Myers". The signature is written in a cursive, flowing style.

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE

CERTIFICATE RE: SERVICE

A “notice of entry” of this Order and Notice of Hearing has been served on Registered Participants as reflected by the Notice of Electronic Filing. A copy of the Order and Notice of Hearing has also been provided to non-registered participants by first class mail addressed to:

Les Schwab
Bankruptcy Dept.
PO Box 667
Prineville, OR 97754-0667

John Anthony Gosselin
3122 8th St. #C
Lewiston, ID 83501-4802

Case No. 06-20028-TLM

Dated: June 15, 2006

_____/s/
Suzanne Hickok
Law Clerk to Chief Judge Myers