UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: MARIA MAGDALENA PEREZ, No. 7-10-11417 JA

Debtor.

MEMORANDUM OPINION

THIS MATTER is before the Court on the Debtor's Application for Approval of Reaffirmation Agreement with DT Credit Co. LLC. *See* Docket No. 15. The Debtor, Maria Magdalene Perez, is represented by counsel, Donald Provencio, who signed Part C: Certification by Debtor's Attorney but crossed out the second certification concerning whether the agreement imposes an undue hardship on the Debtor or a dependent of the Debtor. The Court held a final hearing on June 10, 2010 to consider the reaffirmation agreement. The Debtor appeared in person and testified under oath. Counsel for the Debtor did not appear, nor did the creditor, DT Credit Co. LLC ("DT Credit" or "Creditor"). The Court took the reaffirmation agreement under advisement to determine the following: 1) whether the agreement is enforceable absent Court approval or disapproval, and, if enforceable, whether the agreement should be disapproved; 2) if the agreement is unenforceable absent Court approval, whether the Court may render the agreement enforceable by approving it; and 3) whether the Debtor may retain the collateral and pay the debt according to the pre-bankruptcy contract terms if the reaffirmation agreement is unenforceable.

After consideration of the reaffirmation agreement in light of the applicable Bankruptcy Code sections and review of relevant case law, and after determining that the Debtor was represented by counsel in the course of negotiating the agreement, the Court has determined that the reaffirmation agreement is unenforceable. A reaffirmation agreement is not enforceable

unless all of the enforceability requirements of 11 U.S.C. § 524(c) are satisfied. For a represented Debtor, court approval of the agreement is not one of those requirements; the Bankruptcy Code does not require court approval as a condition to enforceability of the agreement, nor does it permit a court to render enforceable an otherwise unenforceable agreement by approving it. The court's only role is to render unenforceable an otherwise enforceable agreement by disapproving it, and that role is limited to agreements where the creditor is not a credit union. The reaffirmation agreement before the Court is unenforceable because it fails to satisfy one of the enforceability requirements of 11 U.S.C. § 524(c) applicable to represented debtors. Debtor's counsel did not make the required no undue hardship certification under Part C of the agreement. Accordingly, the Court need not have held a hearing on the agreement. Finally, the Court has determined that, by signing a statement of intention to reaffirm the debt, timely filing the statement in her case, and thereafter timely entering into the reaffirmation agreement, the Debtor has complied with the requirements of 11 U.S.C. § 521(a)(6) and 11 U.S.C. § 362(h). Consequently, the Court concludes that the Creditor may not exercise remedies under 11 U.S.C. § 521(d) or 11 U.S.C. § 362(h).

FACTS

Debtor, Maria Magdalena Perez, filed a voluntary petition under Chapter 7 of the Bankruptcy Code on March 23, 2010. She is represented by counsel, Donald Provencio. Debtor filed the Chapter 7 Individual Debtor's Statement of Intention ("Statement of Intention") on the same date. *See* Docket No. 8. The Statement of Intention reflects that the Debtor intends to retain a 2005 Chevrolet Equinox ("Vehicle") and reaffirm the debt to Creditor secured by the Vehicle. *Id.*

On May 13, 2010, a reaffirmation agreement between DT Credit and the Debtor concerning the Vehicle was filed in the Debtor's bankruptcy case. *See* Docket No. 15. The reaffirmation agreement includes the required Reaffirmation Cover Sheet.[1] *Id.* Both the Debtor and DT Credit signed the reaffirmation agreement. The reaffirmation agreement reflects that the Debtor has agreed to reaffirm a debt in the amount of $11,471.30, that the interest rate on the reaffirmed debt is 25.917%, and that the original purchase price of the Vehicle was $13,104.29. The payments due under the reaffirmation agreement are $186.77, payable biweekly. *See* Reaffirmation Agreement, Part A. Debtor's Schedule D reflects that the Vehicle has a value of $10,775.00. *See* Docket No. 1. Debtor's Schedules I and J reflect monthly income in the amount of $1,478.00 and monthly expenses in the amount of $2,582.00, leaving a net monthly deficit of $1,104.00. *See* Docket No. 1. The Reaffirmation Cover Sheet, as well as Part D of the Agreement, reflects the Debtor presently has monthly income in the amount of $1,400 and monthly expenses including the car payment in the exact same amount. Debtor has one dependent. The meeting of creditors was held and concluded on April 23, 2010. *See* Docket entry No. 13.

Debtor's counsel executed Part C of the reaffirmation agreement, certifying that "this agreement represents a fully informed and voluntary agreement by the debtor" and that he "fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement." Counsel for the Debtor crossed out the second certification contained in Part C: that the agreement does not impose an undue hardship on the debtor or a dependent of the debtor. Counsel for the Debtor did not check the box on Part C stating that a presumption of undue

[1] Fed.R.Bankr.P. 4008(a) was amended in 2009 to require that the entity filing the reaffirmation agreement also file a reaffirmation cover sheet as prescribed by the appropriate Official Form. This Court required the use of Official Form 27, the Reaffirmation Cover Sheet, as of February 1, 2010.

hardship has been established but that, in counsel's opinion, the Debtor is able to make the payment.

At the final hearing to consider whether to disapprove the reaffirmation agreement, the Debtor testified that she is current on the payments, that the Vehicle is insured, that she needs the car to get to work, and that she can keep up with the payments. She did not know the current value of the Vehicle, but estimated that it could be worth around $10,000.00. To date, the discharge has not been granted in the Debtor's bankruptcy case.

DISCUSSION

I. Whether the Reaffirmation Agreement is Enforceable Absent Court Approval and Whether the Court Can Render it Enforceable by Approving It.

A reaffirmation agreement allows a debtor to reaffirm a debt, the unsecured portion of which would otherwise be dischargeable in bankruptcy, provided certain requirements are met. 11 U.S.C. § 524(c). Reaffirmation agreements are enforceable only if all applicable requirements of 11 U.S.C. § 524(c) are satisfied. Section 524(c) provides that "An agreement . . . is enforceable only to the extent enforceable under applicable nonbankruptcy law . . . *only* if—" and then enumerates six requirements in subsections (1) through (6). 11 U.S.C. § 524(c) (emphasis added). One of the requirements for an enforceable reaffirmation agreement, § 524(c)(3),[2] applies only to debtors represented by counsel in the course of negotiating the agreement, and two of those requirements, § 524(c)(5) and (6),[3] apply only to debtors who are not represented by counsel in the course of negotiating the agreement.

[2] Section 524(c)(3) is satisfied if the reaffirmation agreement is accompanied by an affidavit or declaration by the attorney that represented the debtor during the course of negotiating the reaffirmation agreement that includes the three certifications set forth in that section. Those certifications are contained in Part C of the Official Form.
[3] The requirements of an enforceable reaffirmation agreement applicable to unrepresented debtors include § 524(c)(5), which requires compliance with subsection (d), and § 524(c)(6). Subsection (d) requires the court to inform the debtor of the following: 1) that the debtor is not required to enter into a reaffirmation agreement; 2) the legal effect and consequences of entering into a reaffirmation agreement; and 3) the legal effect and consequences of a default under a reaffirmation agreement. 11 U.S.C. § 524(d)(1)(A) and (B). Subsection (d) also requires the

A. The Role of Counsel for An Individual Chapter 7 Debtor in a Consumer Case

Because the requirements for an enforceable reaffirmation agreement differ depending on whether the Debtor was represented by an attorney in the course of negotiating the agreement, the Court must first determine whether the Debtor was so represented before determining whether the reaffirmation agreement is enforceable and the Court's role with respect to approval or disapproval of the agreement. The Reaffirmation Agreement Cover Sheet for the reaffirmation agreement before the Court does not specify whether the Debtor was represented by counsel during the course of negotiating the Agreement. Part C of the agreement, entitled "Certification by Debtor's Attorney (if Any)," is executed by Debtor's counsel. The Court will presume that the Debtor was represented by counsel during the course of negotiating the agreement.[4]

Exclusion of such representation by bankruptcy counsel for a chapter 7 individual debtor in a consumer case would be an impermissible limitation on counsel's representation of the debtor. "[T]he decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process-so critical, that assistance with the decision must be counted among the necessary services that make up competent representation of a Chapter 7 debtor." *In re Minardi*,

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Court to determine whether the agreement complies with subsection (c)(6) provided the debt at issue is a consumer debt not secured in whole or in part by the debtor's real property. 11 U.S.C. § 524(d)(2). Subsection (c)(6) provides that a reaffirmation agreement entered into by an unrepresented debtor may be approved by the Court upon a finding that the agreement does not impose an "undue hardship on the debtor or a dependent of the debtor" and is "in the best interest of the debtor." 11 U.S.C. § 524(c)(6)(A). Subsection (c)(6)(B) mirrors the language of subsection (d), excluding consumer debts secured by real property. *Compare* 11 U.S.C. § 524(d)(2)(" . . . if the consideration or such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.") *with* 11 U.S.C. § 524(c)(6)(B)("Subparagraph (a) shall not apply to the extent that such debt is a consumer debt secured by real property.").

[4] Representing the debtor during the course of negotiating a reaffirmation agreement should at a minimum include counseling the debtor in regard to 11 U.S.C. § 521(a)(2), advising the debtor with respect to the matters described in 11 U.S.C. § 524(c)(3)(a) and (C), working with the debtor to complete the reaffirmation agreement, and assisting the debtor with respect to any negotiations with the creditor. If such negotiations take place, counsel should exercise professional judgment regarding the form of such assistance, which for example could take the form of direct negotiations by counsel with the creditor or counseling the debtor with respect to the debtor's negotiations with the creditor. Counsel should exercise professional judgment on whether to appear with the debtor at a reaffirmation hearing. The Court ordinarily does not expect counsel to so appear.

399 B.R. 841, 848 (Bankr. N.D. Okla. 2009). The decision to reaffirm an otherwise dischargeable debt affects the debtor's fresh start and ordinarily is one of the most important decisions to be made by an individual debtor in a chapter 7 consumer case. Debtor's counsel plays a critical role in protecting the interests of the debtor in making this important decision. Attorneys appearing before this Court typically are bound by the New Mexico Rules of Professional Conduct. Rule 16-101.C provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." For the reasons set forth above and in *Minardi*, exclusion by Debtor's bankruptcy counsel in representing the Debtor in this case in the course of negotiating a reaffirmation agreement would not be a reasonable limitation on the scope of services. *See Minardi*, 399 B.R. at 848-56.[5]

B. The Enforceability of a Reaffirmation Agreement for a Represented Debtor and the Role of the Court

The four requirements for an enforceable reaffirmation agreement applicable to debtors represented by counsel in the course of negotiating the agreement are:

> (1) such agreement was made before the granting of the discharge under section 717, 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

[5] *See also Hale v. United States Trustee*, 509 F.3d 1139, 1149 (9th Cir. 2007) (agreeing with bankruptcy court's determination that bankruptcy counsel may not exclude from representation of the debtor "critical and necessary services"); *In re Johnson*, 291 B.R. 462, 469 (Bankr. D. Minn 2003) (attorneys representing individual debtors in chapter7 cases may not "unbundle the core package of ordinary legal representation reasonably anticipated in every case"); *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008) (counsel for an individual chapter 7 debtor in a consumer case may not exclude from the scope of representation certain essential services; debtor's counsel "must advise and assist their clients in complying with their responsibilities assigned by Section 521 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead to reaffirm or to redeem secured debts."); *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001) (stating that counsel who accepts an engagement to represent a debtor in a bankruptcy case must be prepared to "assist that debtor through the normal, ordinary and fundamental aspects of the process" which includes counseling the debtor with regard to reaffirmation of debts).

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 an 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[.]

11 U.S.C. § 524(c).

Because the Debtor was represented by counsel in the course of negotiating the reaffirmation agreement, 11 U.S.C. § 524(c) does not require court approval as a condition to enforceability of the agreement. Court approval is not one of the four requirements for enforceability.

The reaffirmation agreement satisfies enforceability requirements (1), (2) and (4): the Debtor and Creditor entered into the reaffirmation agreement before the granting of the Debtor's discharge; the reaffirmation agreement contains the required disclosures; and, as of the date of the final hearing on the reaffirmation agreement, the Debtor had not received a discharge and had not rescinded the reaffirmation agreement.

Enforceability requirement (3) has not been satisfied because counsel did not certify that reaffirmation of the debt will not impose an undue hardship on the debtor or her dependents. If a debtor is represented by counsel in the course of negotiating the agreement, 11 U.S.C. § 524(c) is not satisfied if counsel does not make all the certifications set forth in § 524(c)(3), including the no undue hardship certification set forth in § 524(c)(3)(B). In this case, the Debtor's counsel signed Part D of the Agreement and certified that the agreement represents a fully informed and voluntary agreement by the Debtor and that he fully advised the Debtor of the legal effect and

consequences of the agreement and any default under the agreement, but crossed out the certification that the Agreement does not impose an undue hardship on the Debtor or a dependent of the Debtor.[6] *See* Docket No. 15. The reaffirmation agreement therefore does not meet all the applicable requirements under 11 U.S.C. § 524(c) for an enforceable reaffirmation agreement; consequently, the reaffirmation agreement is unenforceable.[7]

1. Disapproval of the Reaffirmation Agreement - Presumption of Undue Hardship Under 11 U.S.C. § 524(m)

If, as here, a debtor is represented by counsel in the course of negotiating a reaffirmation agreement, the Bankruptcy Code does not permit a court to render enforceable an otherwise unenforceable agreement by approving it. The Code only contemplates the court rendering unenforceable an otherwise enforceable agreement by disapproving it. "In cases where the debtor has counsel, Congress has not authorized the bankruptcy court to substitute its judgment in place of that of debtor's counsel in order to render a reaffirmation agreement enforceable." *Isom,* 2007 WL 2110318 at *2.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made several changes to 11 U.S.C. § 524, including the addition of a new subsection, 11 U.S.C.

[6] Counsel can also make the no undue hardship certification by checking the box on Part C stating that a presumption of undue hardship has been established but that, in counsel's opinion, the Debtor is able to make the payments. Here, counsel did not check the box. Subsection 524(m) provides: "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 ... is less than the scheduled payments on the reaffirmed debt." Whether reaffirmation of the debt is an undue hardship thus depends on whether the debtor can afford to make the payments. By checking the box, counsel certifies that counsel has determined there is a presumption of undue hardship but the presumption has been rebutted to the satisfaction of counsel. As discussed below, when the presumption of undue hardship arises, the Court may hold a hearing pursuant to Subsection 524(m) to consider whether to render unenforceable an otherwise enforceable reaffirmation agreement, unless the creditor is a credit union or the debt is a consumer debt secured in whole or in part by real property of the debtor. At the hearing, the Court determines whether the presumption has been rebutted, even if counsel has determined that the debtor is able to make the payments.

[7] *See, e.g. Minardi,* 399 B.R at 846 (stating that a reaffirmation agreement that fails to fully comply with the strict requirements for reaffirmation , including the certifications by counsel required under 523(c)(3), is void and unenforceable); *In re Isom,* 2007 WL 2110318 at *3 (Bankr.E.D.Va. 2007)("The failure of Debtor's counsel to endorse Part C of the Reaffirmation Agreement, in and of itself, renders the agreement unenforceable.").

§ 524(m).[8] Unlike 11 U.S.C. § 524(c)(6), which contemplates court approval of a reaffirmation agreement for a self-represented debtor if the agreement does not impose an undue hardship on the debtor or a dependent of the debtor and is in the best interest of the debtor, [9] 11 U.S.C. § 524(m) only contemplates court *disapproval* of a reaffirmation agreement. Subsection (m) provides an additional protection for the debtor if the creditor is not a credit union by providing a mechanism for the court to consider disapproving an otherwise enforceable agreement to render it unenforceable.[10] Under 11 U.S.C. § 524(m)(1), the Court reviews the reaffirmation agreement to determine whether there is a presumption of undue hardship, and, if there is, whether the debtor has rebutted the presumption in writing to the satisfaction of the court. The court may disapprove the agreement, and thereby render it unenforceable, only after notice and a hearing.[11]

For a represented debtor, counsel makes the "no undue hardship" determination in the first instance by completing Part D of the reaffirmation agreement. If counsel does not make the no undue hardship certification on Part D, there is no need for the court to review the agreement under 11 U.S.C. § 524(m) to decide whether to disapprove it, nor to hold a hearing, because the

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[8] Subsection (m) provides, in relevant part:

> Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court . . . 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.
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> 11 U.S.C. § 524(m)(1).

[9] 11 U.S.C. § 524(c)(6) does not apply "to the extent that such debt is a consumer debt secured by real property." 11 U.S.C. § 524(c)(6)(B). *See also,* 11 U.S.C. § 524(k)(3)(J)(i)(7).

[10] Credit unions are expressly excepted from the application of 11 U.S.C. § 524(m). *See* 11 U.S.C. § 524(m)(2) ("This subsection does not apply to reaffirmation agreements where the creditor is a credit union, as defined in section 19(b)(1)(A)(iv) of the Federal Reserve Act.").

[11] 11 U.S.C. § 524(m) (1)("No agreement shall be disapproved without notice and a hearing to the debtor and creditor . . ."). *See also, In re Morton,* 410 B.R. 556, 563 (6th Cir. BAP 2009)(holding that the bankruptcy court erred when it disapproved a reaffirmation agreement certified by debtor's counsel on grounds that the agreement was not in the debtor's best interest without notice and a hearing to consider whether the agreement would impose an undue hardship under § 524(m)).

agreement is unenforceable absent the court's disapproval under 11 U.S.C. § 524(m).[12] In other words, because the failure to satisfy all the enforceability requirements of 11 U.S.C. § 524(c) renders the reaffirmation unenforceable, the court need not also disapprove the agreement by conducting the undue hardship analysis found under 11 U.S.C. § 524(m). On the other hand, if counsel makes the no undue hardship certification and the agreement otherwise satisfies all applicable requirements of 11 U.S.C. § 524(c), the court conducts the undue hardship review under 11 U.S.C. § 524(m) and may hold a hearing only to consider disapproval of the agreement.

In this case, the Court need not have held a hearing on the reaffirmation agreement. Debtor's counsel did not make all the required certifications on Part D of the reaffirmation agreement; consequently, the reaffirmation agreement fails to satisfy all the requirements of 11 U.S.C. § 524(c)(3) and is, therefore, unenforceable. The Court need not have held a hearing to consider approval of the reaffirmation agreement because it would not be rendered enforceable by court approval. The Court need not have held a hearing pursuant to 11 U.S.C. § 524(m) to consider disapproval of the reaffirmation agreement because it was unenforceable without the Court's disapproval.[13]

II. Whether the Debtor Can Retain the Collateral and Pay the Debt

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), circuits were split on the issue of whether a debtor could retain and pay a pre-petition secured debt according to the contract terms without either reaffirming or redeeming

[12] *See Isom,* 2007 WL 2110318 at *3 (finding that debtor's counsel's failure to endorse Part C of the reaffirmation agreement rendered the agreement unenforceable).

[13] In the case of a self-represented debtor, because the debtor does not have counsel to make an undue hardship determination or advise the debtor concerning the agreement, the court conducts a hearing to make the undue hardship determination in the first instance and to determine whether reaffirmation of the debtor is in the debtor's best interest (unless the debt is a consumer debt secured in whole or in part by real property of the debtor), and to inform the debtor that the agreement is not required under the Bankruptcy Code and of the legal consequences of an enforceable reaffirmation agreement. *See* 11 U.S.C. §524(d).

the collateral as contemplated under then 11 U.S.C. § 521(a)(A) (2000).[14] This concept is often referred to as the so-called "fourth option" or "ride-through" option, which permits a "debtor to retain property even though [the debtor] had failed to redeem or reaffirm, provided that the debtor remained current on the payments due on a secured debt." *In re Jones*, 397 B.R. 775, 781 (S.D.W.Va. 2008)(citing *Belanger,* 962 F.2d at 347-49). Pre-BAPCPA, the Tenth Circuit determined that a Bankruptcy Court has some discretion to permit a debtor who remained current under a pre-petition contract for a secured debt to "ride-through" bankruptcy and retain the collateral without having to either reaffirm or redeem the debt. *See Lowry Fed. Credit Union v. West,* 882 F.2d 1543, 1547 (10th Cir. 1989) (stating that, while the provisions of § 521 are mandatory, "we do not believe those provisions make redemption or reaffirmation the exclusive means by which a bankruptcy court can allow a debtor to retain secured property.").

After BAPCPA, many courts within jurisdictions that permitted "ride-through" prior to the enactment of BAPCPA continue to permit debtors to ride-through bankruptcy, albeit in an indirect form.[15] The new language in the Code after BAPCPA clearly eliminates the "fourth

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[14] *Compare In re Price*, 370 F.3d 362 (3d Cir.2004) (permitting ride-through), *Capital Communications Fed. Credit Union v. Boodrow (In re Boodrow)*, 126 F.3d 43 (2d Cir.1997)(same), and *Home Owners Funding Corp. of Am. v. Belanger (In re Belanger),*962 F.2d 345 (4th Cir. 1992)(same) *with Bank of Boston v. Burr (In re Burr),* 160 F.3d 843 (1st Cir. 1998)(rejecting ride-through as an alternative "fourth option" to redemption, reaffirmation, or surrender), *Johnson v. Sun Fin. Co. (In re Johnson),* 89 F.3d 249, 252 (5th Cir. 1996)(same), *Taylor v. AGE Fed. Credit Union (In re Taylor)*, 3 F.3d 1512 (11th Cir.1993) (same), and *In re Edwards*, 901 F.2d 1383 (7th Cir.1990) (same).

[15] *See, e.g., Coastal Fed. Credit Union v. Hardiman*, 398 B.R. 161, 182-183 (E.D.N.C. 2008)("entering into" a reaffirmation agreement does not require the debtor to enter into an enforceable agreement); *In re Chim*, 381 B.R. 191, 198 (Bankr. D. Md. 2008)(holding that creditor could not exercise its remedies where the debtor timely complies with the requirements of § 521 and § 362(h) even if the court declines to approve the reaffirmation agreement); *In re Baker,* 390 B.R. 524, 530 (Bankr.D.Del. 2008)("ride-through" permitted where debtor filed a statement of intention (though the statement did not indicate an intent to reaffirm) and timely entered into a reaffirmation agreement); *In re Moustafi,* 371 B.R. 434, 439 (Bankr.D.Ariz. 2007)(holding that because the debtor complied with the requirements of § 521, creditor could not repossess the vehicle as long as the debtor remained current on payments and insurance obligations); *In re Blakeley,* 363 B.R. 225, 231-232 (Bankr.D.Utah 2007)(concluding that "[b]ecause the Debtor has fully complied with the requirements under § 521(a)(2), § 521(a)(6), § 521(d), and §362(h), the remedies contained in each of the subsections are not triggered."). *See also, Jones,* 397 B.R. at 788 (referring to debtor's retention of personal property after debtor has complied to the maximum extent with § 521 and § 362(h) as a "backdoor ride through.").

option" as it previously existed.[16] To determine whether a debtor can retain the collateral and pay the debt according to the pre-petition contract, the Court must analyze four subsections of the Code added by BAPCPA: 11 U.S.C. § 521(a)(2), 11 U.S.C. § 521(a)(6), 11 U.S.C. § 521(d) and 11 U.S.C. § 362(h). Section 521(a)(2) specifies duties a debtor must satisfy if a debtor wishes to reaffirm a debt. Sections 362(h) and 521(a)(6) provide for stay relief in favor of the creditor if the debtor wishing to reaffirm a debt does not satisfy certain requirements specified in those sections. Section 521(d) provides that an *ipso facto* clause is enforceable if a debtor wishing to reaffirm a debt does not satisfy certain requirements under §§ 362(h) and 521(a)(6). The Court will examine each section in turn.

11 U.S.C. §§521(a)(2)

Section 521 is entitled "Debtor's duties," and provides, in relevant part:

> If an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—
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> (A) Within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement his intention with respect to the retention or surrender of such property, and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;
> (B) Within 30 days after the first date set for the meeting of creditors under 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

[16] *See In re Rowe,* 342 B.R. 341, 351 (Bankr.D.Kan. 2006)(concluding "that Congress, by amended §§ 521 and 362 intended to and was successful in eliminating the 'fourth option,' under which a Chapter 7 individual debtor having possession of personal property subject to a purchase money lien by performing all obligations under the security agreement and note could retain the property and be protected by the stay without either redemption of the property or reaffirmation of the secured debt."); *Blakeley,* 363 B.R. at 227 (stating that "BAPCPA appears to have eliminated simple retention and 'ride through' as an option for debtors."); *In re Steinhaus,* 349 B.R. 694, 703 (Bankr. D. Idaho 2006)(finding that § 521(a)(6) gives individual chapter 7 debtors only two options to retain personal property subject to a security interest: redemption or reaffirmation, and does not, therefore, allow the debtor to "retain and pay"); *In re Norton,* 347 B.R. 291, 299 (Bankr.E.D.Tenn. 2006) (stating that "BAPCPA extinguished the 'ride-through' option, by which some courts allowed debtors to keep their secured property without reaffirming or redeeming, as long as they made their regular contract payments.")(citation omitted).

(C) Nothing in subparagraphs (a) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)[.]

11 U.S.C. § 521(a)(2).

Under this Code section, an individual debtor electing to retain property and reaffirm a debt secured by the property is required to do two things: 1) file a statement of intention within a specified time stating the debtor's intention to reaffirm the debt secured by the property; and 2) perform that intention with respect to the property within a specified time. *Id.*

The Debtor satisfied the first requirement by timely filing a completed, executed Statement of Intention substantially in the form of Official Form 8 in which the Debtor checked the box for "Property will be Retained" and the box for "If retaining the property, I intend to Reaffirm the debt."[17] The Statement of Intention was filed concurrently with the filing of the Debtor's petition which is a date before the date of the meeting of the creditors held April 23, 2010, and earlier than 30 days after the date the petition was filed on March 23, 2010.

To satisfy the second requirement, the Debtor must do all that is within her power and control to except the debt from discharge under 11 U.S.C. 524(c).[18] A statute should be construed if possible to avoid an absurd result.[19] The language of §521(a)(2)(B) "the debtor shall

[17] If the Debtor had instead checked the box entitled "other," and written "retain and pay" in the space provided next to that box, the Debtor would not have complied with the express requirements of 11 U.S.C. § 521(a) and §362(h)(1)(A). *See, Steinhaus,* 349 B.R. at 703 (finding that § 521 leaves a debtor who wants to retain personal property secured by a debt with *only* two options: redemption or reaffirmation).

[18] *See, e.g., Hardiman*, 398 B.R. 161 at182-183 ("entering into" a reaffirmation agreement does not require the debtor to enter into an enforceable agreement); *Chim*, 381 B.R. at 198 (holding that creditor could not exercise its remedies where the debtor timely complies with the requirements of § 521 and § 362(h) even if the court declines to approve the reaffirmation agreement); *Baker,* 390 B.R. at 530 ("ride-through" permitted where debtor filed a statement of intention (though the statement did not indicate an intent to reaffirm) and timely entered into a reaffirmation agreement); *Moustafi,* 371 B.R. at 439 (holding that because the debtor complied with the requirements of § 521, creditor could not repossess the vehicle as long as the debtor remained current on payments and insurance obligations); *Blakeley,* 363 B.R. at 231-232 (concluding that "[b]ecause the Debtor has fully complied with the requirements under § 521(a)(2), § 521(a)(6), § 521(d), and §362(h), the remedies contained in each of the subsections are not triggered.").

[19] *See, e.g., United States v. Granderson*, 511 U.S. 39, 47 n.5, 114 S.Ct. 1259, 127 L.Ed.2d 611 (1994) (dismissing an interpretation said to lead to an absurd result); *Dewsnup v. Timm*, 502 U.S. 410, 427, 112 S.Ct. 773, 116 L.Ed.2d

perform his intention [to reaffirm the debt]," is a "duty" in every chapter 7 case of a debtor wishing to reaffirm a debt. It would not make sense to construe this language to impose a "duty" on every chapter 7 debtor wishing to reaffirm a debt to render a performance that is outside the power or control of a debtor. Section §521(a)(2)(B) does not require the debtor to consummate an enforceable reaffirmation agreement, since whether the agreement is enforceable depends on factors outside the debtor's power or control, only do all that is within the power and control of a debtor.

To perform the intention to reaffirm the debt, a debtor who is represented by counsel must (i) being willing to enter into a reaffirmation agreement with the creditor on the original contract terms, (ii) cooperate with the creditor in executing a reaffirmation agreement on the original contract terms, or on other terms if mutually acceptable to the debtor and creditor; and (iii) appear at any hearing on disapproval of the reaffirmation agreement, and at the hearing honestly respond to questions and not ask that the agreement be disapproved.

It is not within any represented debtor's power or control to compel counsel to make the certifications required under 11 U.S.C. §524(c)(3) or to compel the Court not to disapprove the agreement at a hearing held under 11 U.S.C. §524(m). Thus, to perform the intention to reaffirm the debt, a represented debtor is not required to obtain counsel's certifications under 11 U.S.C. § 524(c)(3) or to prevent entry of an order following a hearing held pursuant to 11 U.S.C. §524(m) disapproving the agreement. Here, the Debtor satisfied the second requirement by entering into the reaffirmation agreement with DT Credit on May 13, 2010, a date within forty-five days of the first date set for the meeting of creditors on April 23, 2010, filing the reaffirmation agreement in

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903 (1992) (Justice Scalia, dissenting) ("[i]f possible, we should avoid construing the statute in a way that produces such absurd results").

order to seek Court approval of the reaffirmation agreement, and appearing at the hearing on the reaffirmation agreement.

> 11 U.S.C. § 521(a)(6)
>
> Section 521(a)(6) provides, in relevant part:
>
> In a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—
>
> (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
> (B) redeems such property from the security interest pursuant to section 722[.]
>
> If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law . . .[20]
>
> 11 U.S.C. § 521(a)(6).

Section 521(a)(6) by its express terms applies only if an individual chapter 7 debtor wishes to retain possession of personal property as to which (i) "a creditor has an allowed claim" (ii) "for the purchase price" of the property; and (iii) the debt is "secured in whole or in part by an interest in such personal property." If those three conditions exist, and the debtor intends to retain the collateral and reaffirm the debt instead of surrendering or redeeming the collateral, the debtor must, not later than 45 days after the meeting of creditors under section 341(a),[21] enter into a reaffirmation agreement with the creditor with respect to the claim secured by such property.

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[20] This provision, though it clearly references subsection (a)(6), is codified following subsection (a)(7).

[21] 11.U.S.C §521(a)(6) does not expressly provide whether the debtor, to satisfy that section, must enter into a reaffirmation agreement within 45 days after the first date set for the meeting of creditors, or within 45 days after the conclusion of the meeting of creditors. Section 341(a) refers to a meeting of creditors, not to a first meeting of creditors. The Bankruptcy Rules, unlike 11.U.S.C §521(a)(6), specify whether a deadline runs from the first date set for the meeting of creditors, or within 45 days after the conclusion of the meeting of creditors

In a chapter 7 case, the first requirement for 11 U.S.C. § 521(a)(6) to apply is satisfied only if the creditor timely files a proof of claim.[22] Whether the second requirement has been satisfied for 11 U.S.C. § 521(a)(6) to apply depends on whether the creditor's claim is an allowed claim for the purchase price of the property. 11 U.S.C. § 521(a)(6). Some courts give the phrase its ordinary meaning, which is that the claim must be for the original purchase price of the collateral.[23] Other courts construe "claim for the purchase price" to refer to a purchase money security interest in the collateral.[24] However, it is not necessary for the Court to determine whether the second requirement has been satisfied for 11 U.S.C. § 521(a)(6) to apply, because the first requirement has not been satisfied: DT Credit has not filed a proof of claim. Further, even if DT Credit had filed a proof of claim and the claim were equal to the original purchase price, the Debtor has satisfied the requirements of 11 U.S.C. § 521(a)(6). She entered into a reaffirmation agreement with DT Credit with respect to its claim secured by the Vehicle on May 13, 2010, well prior to the deadline specified in 11 U.S.C. § 521(a)(6).[25]

11 U.S.C. § 521(d) and 11 U.S.C. § 362(h)

[22] Section 502 governs allowance of claims. In a chapter 7 case, for a creditor to have an allowed claim the creditor must timely file a proof of claim. Upon timely filing a proper proof of claim, the claim is deemed allowed unless a party in interest objects to the claim. 11 U.S.C. § 502(a). A creditor has the right to file a claim regardless of whether the chapter 7 case is determined to be an asset case or no asset case, and regardless of whether a deadline has been fixed for filing claims.

[23] *See, e.g., In re Donald,* 343 B.R. 524, 536-537 (Bankr.E.D.N.C. 2006)(relying on the definition in *Black's Law Dictionary* (6th ed. rev. 1990) of the term "purchase price" to conclude that the plain meaning of the term "claim for the purchase price" means claim for the full purchase price.).

[24] *See, e.g., Steinhaus,* 349 B.R. at 706-707 (finding that the legislative history indicates an intention that §521(a)(6) should encompass purchase money security interests, and concluding that "creditors with purchase money security interests in personal property . . . qualify for the protection of § 521(a)(6) even if their claim is for less than the full purchase price.").

[25] The Debtor executed the Reaffirmation Agreement, but did not date it. *See* Docket No. 15. The creditor executed the Agreement on May 13, 2010, and the Reaffirmation Agreement was filed in the Debtor's bankruptcy case on the same date. The meeting of creditors in this case was conducted and concluded on April 23, 2010. The 45-day deadline for the Debtor to enter into the Reaffirmation Agreement expired on June 7, 2010.

Additional consequences to the Debtor of not complying with her duties if she wishes to retain the vehicle and elects not to or does not have the financial ability to redeem, can be found in 11 U.S.C. § 521(d) and 11 U.S.C. § 362(h). Section 521(d) provides, in relevant part:

> If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property . . . as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such . . . agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.
>
> 11 U.S.C. § 521(d).

Under 11 U.S.C. § 521(d), if a debtor fails to take the action specified in 11 U.S.C. § 521(a)(6) or in 11 U.S.C. § 362(h), and the creditor holds a nonvoidable lien against the property, the creditor may enforce an *ipso facto*[26] clause to the extent enforceable under nonbankruptcy law, and declare a default based on the debtor's insolvency or the commencement of debtor's bankruptcy case even if the loan is current, the vehicle is insured and the debtor is not otherwise in default.

> Section 362(h) provides:
>
> In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—
>
> (A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it, and if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

[26] An *ipso facto* clause is "[a] contract provision which permits a creditor to declare a contract in default by virtue of the other party's insolvency or bankruptcy." *Blakeley,* 363 B.R. 225 at 231 n. 8.

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

11 U.S.C. § 362(h)(1).

Thus, under 11 U.S.C. § 362(h), in order for the debtor to avoid relief from the stay and abandonment with respect to personal property without electing either to surrender or redeem such property, the debtor must: (i) timely file a statement of intention indicating an intent to reaffirm the debt; and (ii) timely take the action to reaffirm the debt (unless the debtor is willing, but the creditor refuses to agree to an agreement under the original contract terms). *Id.* Stay relief and deemed abandonment of the personal property collateral takes place by operation of law on the terms and conditions specified in 11 U.S.C. § 362(h).[27] Once stay relief is obtained under 11 U.S.C. § 362(h), a creditor is free to execute on any *ipso facto* clause contained in the pre-petition contract providing for a default upon the filing of a bankruptcy, provided such clause is otherwise enforceable under applicable state law.[28]

In this case, DT Credit is not entitled to relief under 11 U.S.C. § 521(d) or 11 U.S.C. § 362(h) because the Debtor timely performed all actions required under 11 U.S.C. § 521(a)(6) and 11 U.S.C. § 362(h). The Debtor timely filed a statement of intention required under section § 521(a)(2) with respect to the Vehicle. The Debtor also timely took the action specified in her statement of intention by cooperating with the lender to fill out the reaffirmation agreement, entering into the reaffirmation agreement on the original contract terms before receiving a discharge, timely filing the reaffirmation agreement of record, obtaining whatever certifications her counsel was willing to make pursuant to 11 U.S.C. § 524(c)(3), appearing at the hearing on

[27] *See, In re Ruona,* 353 B.R. 688 (Bankr.D.N.M. 2006)(concluding that debtor's failure to make a timely election either to reaffirm or redeem debt secured by motor vehicle, but instead stated an intent to retain the vehicle and continue to make the regular monthly payments under the pre-petition contract resulted in the termination of the stay, authorizing creditor to enforce *ipso facto* clause consistent with state law).
[28] *Id.*

the reaffirmation agreement, and asking the Court to approve it. Counsel's refusal to make all certifications pursuant to 11 U.S.C. § 524(c)(3) is not an action to be taken by the Debtor, but by her counsel. Nor is this Court's disapproval of the reaffirmation agreement an action to be taken by the Debtor.[29] The Debtor, therefore, has fully complied with all of the applicable requirements under 11 U.S.C. § 521 and 11 U.S.C. § 362, so that any remedies that might otherwise be available to DT Credit under those sections do not arise, notwithstanding the fact that the reaffirmation agreement is unenforceable.[30] Because the Debtor has fully discharged her duties under 11 U.S.C. § 521(a)(6) and 11 U.S.C. § 362(h), the Bankruptcy Code provides no relief to DT Credit as a result of there not being an enforceable reaffirmation agreement. DT Credit is precluded by the automatic stay from exercising any remedies, including the immediate enforcement of any *ipso facto* clause that may exist in the underlying contract pursuant to 11 U.S.C. § 521(d) or 11 U.S.C. § 362(h).[31]

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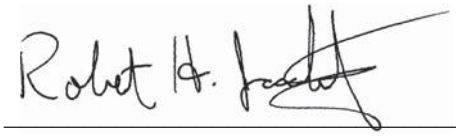
[29] *Cf. Donald,* 343 B.R. at 541 (stating that "[i]n some circumstances a reaffirmation agreement entered into by the debtor in good faith may satisfy the requirements of § 362(h), § 521(a)(6) and § 521(d) where the court disapproves the reaffirmation agreement under § 523(a)(6), especially where the debtor intends to perform under the reaffirmation agreement and where disapproval by the court is beyond the debtor's control[ ]" and noting further at n. 11 that "[t]he same result could obtain where a debtor's good faith reaffirmation agreement is unenforceable because the attorney who represented the debtor during the negotiation of the agreement declined to sign the affidavit or declaration required by § 524(c)(3).").

[30] *See Blakeley,* 363 B.R. at 232 (stating that "[c]ourt approval of the reaffirmation agreement is not a required element under § 521(a)(6) . . . . [e]ntering into the reaffirmation agreement is all that is required . . ."); *Moustafi,* 371 B.R. at 438 (stating that "[t]he consequences of § 362(h)(1) and § 521(d) . . . are only caused by a debtor's failure to timely file a statement of intention and/or to timely enter into a reaffirmation agreement, 'not by the court's disapproval of the agreement or by its determination that the agreement is unenforceable.'")(quoting *In re Husain,* 364 B.R. 211, 218-219 (Bankr.E.D.Va. 2007)).

[31] There is no evidence before the Court as to whether the pre-petition contract between the Debtor and DT Credit contains an *ipso facto* clause; without such a provision DT Credit would not be entitled to declare a default based solely on the Debtor's filing of the bankruptcy. *See, In re Dumont,* 581 F.3d 1104, 1115 (9th Cir. 2009)(acknowledging that "[w]here there is no *ipso facto* clause in the contract, [§ 521(d)] does not allow [creditor] to pencil one in. Rather, [§ 521(d)] removes the last remaining impediment under federal bankruptcy law to enforcement of an *ipso facto* clause that already exists.").

The Court is not deciding whether, post-bankruptcy, when the automatic stay terminates and is replaced by a discharge injunction, and the Vehicle is no longer property of the estate, the Bankruptcy Code or applicable state law would preclude DT Credit from enforcing an *ipso facto* clause contained in the pre-petition contract and declare the contract in default based on the debtor's bankruptcy. *Compare Rowe,* 342 B.R. at 351 (stating that the consequences of a debtor's failure to redeem or reaffirm the secured debt when the debtor remains current on payments are limited to "termination of the stay and removal of the collateral from property of the estate, with

The Court will enter an order consistent with the conclusions contained in this Memorandum Opinion.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: July 12, 2010

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creditor's remedies upon expiration of the stay being those provided by state law."); *In re Visnicky,* 401 B.R. 61 (Bankr.D.R.I. 2009)(finding that, even where debtor failed to timely take action to perform his intention to reaffirm the secured debt, creditor's remedies were nevertheless limited by applicable state law); *Baker,* 390 B.R. at 531 (noting that *ipso facto* clauses "are generally unenforceable against debtors, even after discharge," except under limited instances such as are provided under §521(d), and that, in interpreting § 521(d), "courts have noted that it provides only that *ipso facto* clauses are enforceable and that the court must still determine if, under state law, the clause creates a default that would allow repossession.")(citations omitted) *with Moustafi,* 371 B.R. at 438 and 439 (noting that, where a debtor fails to perform her stated intention, § 521(d) would permit the creditor to enforce its *ipso facto* clause so that post-discharge, the creditor would be able to repossess the vehicle because the debtor's bankruptcy filing constitutes a default under the pre-petition contract, but concluding that because the debtor complied with the requirements of § 521(a)(2), the creditor may not repossess the vehicle after the discharge is granted as long as the debtor remained current on her payment and insurance obligations.); *Chim,* 381 B.R. at 199 (stating that "where a debtor complies with the requirements of section 521(a)(2), the debtor may retain possession of the collateral after the entry of the discharge and the closure of the case without fear that the lender will exercise an *ipso facto* provision and repossess the collateral, provided that the debtor is otherwise current under the agreement.")(citation omitted); *Hardiman*, 398 B.R. at 188 (same).