

JUN 29 2011

ORDERED PUBLISHED

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No. NC-10-1192-HBaJu
7	REGGIE ONG,)	Bk. No. 09-57224
8	Debtor.)	
9	_____)	
10	BAY FEDERAL CREDIT UNION,)	
11	Appellant,)	
12	v.)	O P I N I O N
13	REGGIE ONG,)	
14	Appellee.)	
15	_____)	

Argued and Submitted on May 11, 2011
at San Francisco, California

Filed - June 29, 2011

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

Appearances: _____
 Spencer P. Scheer of Scheer Law Group, LLP, argued
 for the Appellant.
 Emily M. Kaplan on brief for appellee.

Before: HOLLOWELL, BARRECA¹, and JURY, Bankruptcy Judges.

¹ The Hon. Marc L. Barreca, Bankruptcy Judge for the Western
 (continued...)

1 HOLLOWELL, Bankruptcy Judge:
2

3 Creditor Bay Federal Credit Union (BFCU) appeals an order of
4 the bankruptcy court disapproving a reaffirmation agreement that
5 BFCU entered into with the debtor. The debtor was represented by
6 an attorney during the negotiation of the reaffirmation agreement
7 and the agreement complied with all relevant statutory
8 requirements of § 524,² including the attorney's certification
9 that the agreement represented a fully informed and voluntary
10 agreement, did not pose an undue hardship on the debtor or his
11 dependents, and that the debtor was advised of the agreement's
12 legal effect and consequences.

13 Because the Bankruptcy Code does not provide for independent
14 court review of a reaffirmation agreement between a represented
15 debtor and a credit union, we REVERSE.

16 **I. FACTS**

17 On August 27, 2009, Reggie Ong (the Debtor), represented by
18 an attorney, filed a chapter 7 bankruptcy petition. On August
19 28, 2009, the Debtor signed and filed a statement of intention,
20 pursuant to § 521(a)(2)(A), stating that he intended to retain a
21 2007 GMC truck (Truck) and reaffirm the debt securing it.

22 The bankruptcy court set November 24, 2009, as the last day
23

24 ¹(...continued)
25 District of Washington, sitting by designation.

26 ² Unless otherwise indicated, all chapter and section
27 references in the text are to the Bankruptcy Code, 11 U.S.C.
28 §§ 101-1532. All "Rule" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

1 to object to the Debtor's discharge. On November 18, 2009, the
2 Debtor filed a reaffirmation agreement with the bankruptcy court,
3 reaffirming the debt to BFCU on the Truck with monthly payments
4 of \$675.41, for a total of \$19,193.76 (the Agreement).

5 In addition to setting out the amount of the debt to be
6 reaffirmed, the monthly payment, interest rate, and collateral
7 securing the debt, the Agreement contained numerous disclosures
8 about the purpose and effect of the Agreement, as required by
9 § 524(k). The Agreement was on an Official Form 240A and
10 contained a certification signed by the Debtor's attorney that
11 (1) the Debtor was fully informed and advised of the legal effect
12 and consequences of the Agreement and any default under the
13 Agreement; (2) the Debtor chose to enter into the Agreement
14 voluntarily; and, (3) the Agreement did not pose an undue
15 hardship on the Debtor or his dependents. The Debtor certified
16 that he believed the Agreement was in his financial interest and
17 that he could afford to make the payments under the Agreement.
18 Additionally, the Agreement contained a checked box certifying
19 that BFCU is a credit union as defined in § 19(b)(1)(A)(iv) of
20 the Federal Reserve Act.

21 On March 23, 2010, the bankruptcy court issued an order,
22 pursuant to § 524(d), setting the Agreement for hearing. It
23 stated that "[w]hile the Court recognizes that no presumption of
24 undue hardship arises since Creditor is a credit union, the
25 Agreement may, nonetheless, not be in Debtor's best interest"
26 because (1) the Debtor may not be able to afford to make the
27 payments under the Agreement based on the information contained
28

1 in the Debtor's bankruptcy schedules;³ (2) the debt to BFCU may
2 be undersecured; (3) the Agreement may reaffirm an unsecured
3 debt; and (4) BFCU may not have made concessions to the Debtor.

4 The hearing was held on May 11, 2010. During the short
5 hearing, the bankruptcy court noted that:

6 the debtors [sic] can barely afford the vehicle. Per
7 [bankruptcy schedule] I and J they only have \$18.61
8 leeway. The creditor has allowed a ride through. They
9 may change their position. I can't control that. Are
you willing, [BFCU], to make a commitment for this
case, for this debtor, that you'll let them keep the
car?

10 BFCU: Yes, Your Honor, we are. The Debtor has made 42
11 monthly payments and has never been late.

12 . . .

13 BANKRUPTCY COURT: Yeah. Okay. So that's your answer.
And the Court disapproves the reaff.

14 Hr'g Tr. (May 11, 2010) at 3:4-17.

15 The following day, the bankruptcy court entered a minute
16 order denying approval of the Agreement. A final order was
17 entered on July 12, 2010. BFCU timely appealed.⁴

18 II. JURISDICTION

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
20 § 157(b) (2) (O). We have jurisdiction under 28 U.S.C. § 158.

21
22
23 ³ The Debtor's Schedule I lists his monthly income at
24 \$2,419.61. His Schedule J monthly expenses are listed as
25 \$2,401.00, which includes the \$676.00 payment on the vehicle,
leaving a monthly net income of \$18.61.

26 ⁴ BFCU filed its notice of appeal on May 26, 2010, within 14
27 days of the entry of the minute order denying the Agreement. On
28 July 8, 2010, the BAP issued an order requesting the bankruptcy
court enter a formal order, which it did on July 12. BFCU's
appeal is timely under Rule 8002(a).

1 **III. ISSUES**

2 Does the bankruptcy court have authority to review a
3 reaffirmation agreement between a debtor and a creditor, in this
4 case a credit union, when the debtor was represented by counsel
5 and the agreement complied with the disclosures, certifications,
6 and requirements of § 524?

7 **IV. STANDARDS OF REVIEW**

8 The bankruptcy court's findings of fact are reviewed for
9 clear error and its conclusions of law are reviewed de novo.
10 Bankr. Receivables Mgmt. v. Lopez (In re Lopez), 274 B.R. 854,
11 859 (9th Cir. BAP 2002), aff'd, 345 F.3d 701 (9th Cir. 2003),
12 cert. denied, 541 U.S. 987 (2004); Dumont v. Ford Motor Credit
13 Co. (In re Dumont), 383 B.R. 481, 484 (9th Cir. BAP 2008), aff'd,
14 581 F.3d 1104 (9th Cir. 2009).

15 **V. DISCUSSION**

16 Debtors may reaffirm dischargeable debts. 11 U.S.C. § 524.
17 However, in order to protect debtors from compromising their
18 fresh start by making unwise agreements to repay such debts, the
19 Bankruptcy Code sets out various procedures and requirements for
20 reaffirmation agreements. Id.; Gordon v. Hines (In re Hines),
21 147 F.3d 1185, 1190 (9th Cir. 1998); Rogers v. NationsCredit Fin.
22 Servs. Corp., 233 B.R. 98, 107 (N.D. Cal. 1999). These include
23 disclosures relating to the legal ramifications of
24 reaffirmations. 11 U.S.C. § 524(k).

25 Additionally, if a debtor is not represented by an attorney,
26 the bankruptcy court must inform the debtor that reaffirmation is
27 not required, describe the legal consequences of reaffirming a
28

1 debt, and decide whether reaffirmation is in the debtor's best
2 interest or poses an undue hardship. 11 U.S.C. § 524(d), (c)(6).

3 When, as here, a debtor is represented by an attorney, the
4 requirements for a reaffirmation agreement are:

- 5 (1) it is made before the granting of a discharge;
- 6 (2) the debtor received the disclosures described in
7 § 524(k) before signing the agreement;
- 8 (3) it is filed with the court and contains an attorney
9 certification or declaration that states:
10 the agreement represents a fully informed and
11 voluntary agreement by the debtor,
12 the agreement does not impose an undue hardship on
13 the debtor or his dependents,
14 the attorney advised the debtor of the legal
15 effect and consequences of the agreement and any
16 default under such agreement; and
- 17 (4) the debtor has not rescinded the agreement within 60
18 days of filing or prior to discharge, whichever is
19 later.

20 11 U.S.C. § 524(c). Once these requirements are met, the
21 agreement becomes effective and enforceable upon filing, unless
22 there is a presumption of undue hardship. Id.; 11 U.S.C.
23 § 524(k)(3)(J)(i).

24 Section 524(m)(1) raises a rebuttable presumption, for 60
25 days after an agreement is filed (Presumption Period), that a
26 reaffirmation agreement imposes an undue hardship on the debtor
27 when the debtor's monthly income, less the debtor's monthly
28 expenses, is less than the scheduled payments on the reaffirmed
debt. 11 U.S.C. § 524(m)(1). The bankruptcy court is required
to review agreements when the presumption of undue hardship
exists, and the bankruptcy court may disapprove a reaffirmation
agreement, after notice and a hearing, if it is not satisfied

1 that the presumption has been adequately rebutted. Id.
2 Congress, however, provided that when the creditor of a
3 reaffirmed debt is a credit union, there is no presumption of
4 undue hardship. 11 U.S.C. § 524(m) (2).

5 In this case, the Debtor was represented by an attorney
6 during negotiations with BFCU to reaffirm the debt and, because
7 the Agreement was with a credit union, no presumption of undue
8 hardship existed. As a result, the bankruptcy court could not
9 deny approval of the reaffirmation agreement on grounds that the
10 presumption of undue hardship had not been rebutted. In re
11 Kernodle, 2010 WL 1995410, at *1 (Bankr. D.N.M. 2010); Ford Motor
12 Credit Co. LLC v. Morton (In re Morton), 410 B.R. 556, 562 (6th
13 Cir. BAP 2009); Gregory M. Duhl, Divided Loyalties: The
14 Attorney's Role in Bankruptcy Reaffirmations, 84 AM. BANKR. L.J.
15 361, 368 (2010).

16 Although the bankruptcy court correctly recognized that no
17 undue hardship presumption existed, it assumed it had the
18 authority to determine if the Agreement was in the Debtor's best
19 interest because it noticed a § 524(d) hearing.⁵ The bankruptcy
20

21 ⁵ Section 524(d) provides that in an individual case when
22 the bankruptcy court has determined to grant a discharge:

23 [T]he court may hold a hearing at which the debtor
24 shall appear in person. At any such hearing, the court
25 shall inform the debtor that a discharge has been
26 granted or the reason why a discharge has not been
27 granted. If a discharge has been granted and if the
28 debtor desires to make an agreement of the kind
specified in [§ 524(c)] and was not represented by an
attorney during the course of negotiating such

(continued...)

1 court found that the Debtor's monthly income less his expenses
2 was only slightly more than the payments due under the Agreement
3 and disapproved the Agreement.⁶

4 However, § 524(d) and the "best interest" requirement is
5 limited to cases where a debtor is not represented by an attorney
6 and the debt is not a consumer debt secured by real property. 11
7 U.S.C. § 524(d), (c)(6). A bankruptcy court "may not disapprove
8 an attorney certified reaffirmation agreement solely because the
9 court believes it is not in the best interest of the debtor." In
10 re Morton, 410 B.R. at 562; In re Huskinson, 2008 WL 2388113, at
11 *2 (Bankr. N.D. Ohio 2008); In re Kernodle, 2010 WL 1995410, at
12 *2.

13 The Bankruptcy Code has no provision that permits a
14 bankruptcy court to independently scrutinize a reaffirmation
15 agreement entered into by a represented debtor when there is no
16

17 ⁵(...continued)

18 agreement, then the court shall hold a hearing at which
19 the debtor shall appear in person and at such hearing
20 the court shall

(1) inform the debtor

(A) that such an agreement is not required . . .; and

(B) of the legal effect and consequences of [the
21 agreement]; and

(2) determine whether the agreement . . . [is in the
22 debtor's best interest and does not pose an undue hardship
23 on the debtor or his dependents].

24 11 U.S.C. § 524(d) (emphasis added).

25
26 ⁶ Because the central issue in this case is the bankruptcy
27 court's right to review the Agreement, we decline to address the
28 Appellant's argument that the bankruptcy court erred in
disapproving the Agreement by improperly allowing a "ride
through."

1 presumption of undue hardship or the Presumption Period has
2 passed. See In re Morton, 410 B.R. at 562 (reaffirmation
3 agreement between represented debtor and credit union is "not
4 subject to judicial oversight"); In re Huskinson, 2008 WL
5 2388113, at *2. The only time a bankruptcy court should concern
6 itself with an attorney-certified reaffirmation agreement is in
7 the exceptional situation where there has been a Rule 9011
8 violation by the certifying attorney. In re Hovestadt, 193 B.R.
9 382, 386 (Bankr. D. Mass. 1996) (The court "cannot ignore the
10 ramifications incident to a blanket assumption that
11 reaffirmations agreements are enforceable if accompanied by an
12 attorney declaration, when close scrutiny compels the conclusion
13 that the elements set forth in § 524(c) are either lacking
14 altogether, insufficient or void as having been filed in
15 violation of Rule 9011."); In re Morton, 410 B.R. at 562. The
16 bankruptcy court here was not concerned that the certifications
17 or disclosures required under § 524(c) were improper or lacking.
18 It was only concerned that the Agreement was not in the Debtor's
19 best interest.

20 Neither does § 105 permit bankruptcy courts to make
21 independent assessments of reaffirmation agreements between
22 represented debtors and creditors. Section 105 allows the
23 bankruptcy court the authority only to "issue any order, process,
24 or judgment that is necessary or appropriate to carry out the
25 provisions of the [Bankruptcy Code]." Because § 524 does not
26 provide bankruptcy courts the authority to make a best interest
27 analysis of properly executed reaffirmation agreements by
28 represented debtors, "[t]here is no statutory authority to expand

1 the narrowly defined exceptions to the right of debtors to
2 contract freely with their creditors, either as to occasions for
3 judicial review or as to the time period provided for such
4 review.” In re Boliaux, 422 B.R. 125, 131 (Bankr. N.D. Ill.
5 2010). Thus, in cases where the debtor has an attorney and there
6 is no presumption of undue hardship, the bankruptcy court is not
7 authorized to substitute its judgment in place of a debtor’s
8 attorney. See In re Isom, 2007 WL 2110318, at *2 (Bankr. E.D.
9 Va. 2007). It may only review the reaffirmation agreement to
10 ensure that the requirements of § 524(c) are met.

11 **VI. CONCLUSION**

12 The Debtor entered into the Agreement assisted by an
13 attorney and the Agreement complied with the requirements of
14 § 524(c). No presumption of undue hardship existed. Therefore,
15 the bankruptcy court lacked the authority to independently review
16 the Agreement or to disapprove it. Accordingly, we REVERSE.