

DEC 09 2011

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-11-1156-HKiMk
)
 CHRISTOPHER DOLAN OBMANN and) Bk. No. 11-12906
 REBECCA LYNN OBMANN,)
)
 Debtors.)
 _____)
)
 SAN DIEGO COUNTY CREDIT UNION;)
 THERESA HALLECK,)
)
 Appellants,)
)
 v.) **M E M O R A N D U M**¹
)
 CHRISTOPHER DOLAN OBMANN;)
 REBECCA LYNN OBMANN;)
 CHRISTOPHER R. BARCLAY,)
 Chapter 7 Trustee; UNITED)
 STATES TRUSTEE,)
)
 Appellees.)
 _____)

Argued and Submitted on October 20, 2011
at San Diego, California

Filed - December 9, 2011

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

Honorable Catherine Bauer, Bankruptcy Judge, Presiding

Appearances: William Arthur Smelko, Esq. argued for the
Appellant, San Diego County Credit Union.

Before: HOLLOWELL, KIRSCHER and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 San Diego County Credit Union (SDCCU) appeals an order of
2 the bankruptcy court that (1) disapproved a reaffirmation
3 agreement that SDCCU entered into with the debtors, (2) ordered
4 SDCCU to accept the debtors' payments, and (3) enjoined SDCCU
5 from repossessing its collateral so long as the debtors made
6 payments and otherwise fulfilled their obligations to SDCCU.

7 For the reasons given below, we AFFIRM the disapproval of
8 the reaffirmation agreement, but VACATE the portion of the
9 bankruptcy court's order that requires SDCCU to accept payments
10 and refrain from exercising its state law contractual remedies.

11 I. FACTS

12 Christopher and Rebecca Obmann (the Debtors) filed a joint
13 petition for relief under chapter 7² on January 28, 2011. On
14 their bankruptcy schedules, the Debtors listed an \$18,496.00
15 obligation to SDCCU secured by a 2004 Chevrolet Silverado
16 (Silverado). They also listed a \$7,003.00 obligation to SDCCU
17 secured by a 2004 Nissan Frontier (Nissan). According to the
18 Debtors' schedules I and J, they had a combined average monthly
19 income of \$9,126.20 and expenditures of \$9,938.00, which included
20 a \$778.00 payment on the Silverado, as well as a \$261.00 payment
21 on the Nissan.

22 Along with their schedules, the Debtors filed a Statement of
23 Intention with respect to the Silverado. On the Statement of
24 Intention form (Official Form 8), the Debtors checked the box
25

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

1 indicating that they intended to retain the Silverado, but did
2 not check either the "Redeem the property" box or the "Reaffirm
3 the debt" box. Instead, the Debtors checked a box entitled
4 "Other" and wrote "Retain and pay pursuant to contract." The
5 Debtors indicated the same intention with respect to the Nissan.

6 On February 3, 2011, the Debtors attempted to make a payment
7 on the Silverado under their loan agreement with SDCCU (the
8 Loan). At that time, the Debtors were already behind on the Loan
9 because they had failed, prepetition, to make their January
10 payment. Under the terms of the Loan, a filing of a bankruptcy
11 proceeding, as well as a failure to make any payment when due,
12 were events of default, entitling SDCCU to accelerate all payment
13 on the Loan and to exercise its state law rights against the
14 Silverado, including repossession.

15 SDCCU refused to accept the Debtors' February 3, 2011,
16 payment on the Loan. It told the Debtors it would not accept
17 payments unless there was an enforceable reaffirmation agreement
18 in place. On February 8, 2011, the Debtors and SDCCU executed an
19 agreement to reaffirm the debt secured by the Silverado (the
20 Reaffirmation).³ The Reaffirmation reaffirmed the \$13,495.58
21 remaining balance on the Silverado under the original terms of
22 the Loan. The Debtors listed the value of the Silverado as
23 \$19,875.00. They filed the executed Reaffirmation with the
24 bankruptcy court on February 14, 2011.

25 The § 341 meeting of creditors was scheduled for March 9,
26

27 ³ The Debtors filed a similar reaffirmation agreement for
28 the Nissan. The Debtors' attorney did not represent them with
respect to either of the reaffirmation agreements.

1 2011. Also on March 9, 2011, the bankruptcy court held a hearing
2 on whether to approve the Reaffirmation (the Reaffirmation
3 Hearing). At the Reaffirmation Hearing, the bankruptcy court
4 expressed its concern that SDCCU, by refusing to accept payments,
5 was purposely forcing debtors into defaulting on their loans
6 until the court approved a reaffirmation agreement. It continued
7 the hearing to March 30, 2011, and entered an order requiring the
8 president and CEO of SDCCU, Teresa Halleck (the CEO), to appear:⁴

9 to explain its policies and procedures⁵ regarding
10 bankruptcy, since it appears that either the Credit
11 Union fundamentally misunderstands the purpose and
12 extent of the automatic stay and/or that it is
13 purposely forcing debtors into defaulting on their car
14 loans under some misconception that this Court will
15 then be forced to approve reaffirmation agreements that
16 are not advisable (especially in view of the forced
17 defaults)

17 ⁴ On March 18, 2011, SDCCU filed an objection and an
18 emergency ex-parte motion to modify the order to appear and
19 excuse the CEO from appearing. The declaration from SDCCU,
20 attached to its motion, explained its policies, as well as the
21 Debtors' history on the Loan, including the fact that the Debtors
22 were not current on their payments prior to filing bankruptcy.
23 On March 25, 2011, the bankruptcy court denied SDCCU's ex-parte
24 motion. SDCCU and the CEO timely appealed. (BAP Nos. 11-1155,
25 11-1158). The BAP subsequently dismissed those appeals as moot
26 on June 9, 2011, because the CEO appeared and testified at the
27 hearing.

24 ⁵ However, the bankruptcy court was aware of the reasons for
25 SDCCU's policy because it had previously ordered SDCCU to appear
26 in other cases to explain why SDCCU refused customers' payments
27 prior to approval of a reaffirmation agreement. SDCCU's
28 Assistant Vice President of Legal Services previously appeared
before the bankruptcy court to testify about SDCCU's
reaffirmation policy.

1 The Debtors appeared at the continued hearing but did not
2 testify. The CEO appeared and testified that SDCCU did not
3 accept customer payments unless there was an enforceable
4 agreement between the parties, otherwise she believed that SDCCU
5 risked having to return any payments made if there was not a
6 court-approved reaffirmation in effect. The CEO further
7 testified that SDCCU believed that a failure to obtain an
8 enforceable reaffirmation would compromise SDCCU's future ability
9 to exercise its state law remedies.

10 The bankruptcy court disapproved the Reaffirmation as not in
11 the Debtors' best interest because, despite reaffirming the debt,
12 they would still be exposed to potential repossession of the
13 Silverado due to payment defaults, which the bankruptcy court
14 apparently believed were solely the result of SDCCU's refusal to
15 accept the Debtors' postpetition payments. On March 31, 2011,
16 the bankruptcy court entered an order disapproving the
17 Reaffirmation (Reaffirmation Order).⁶

18 In its Reaffirmation Order, the bankruptcy court found that
19 the Reaffirmation posed an undue hardship on the Debtors and was
20 not in their best interest. Additionally, the Reaffirmation
21 Order stated that "SDCCU shall accept any and all payments that
22 Debtors are past due and shall have no right to repossess the
23

24 ⁶ An identical order was entered denying reaffirmation on
25 the Nissan. SDCCU did not appeal that order. However, at least
26 one similar order that required SDCCU to be bound by the terms of
27 the original agreement with the debtor as long as the debtor made
28 payments, was entered by the bankruptcy court in a different case
and was appealed by SDCCU. That appeal became moot when the
collateral was surrendered, and was subsequently dismissed.

1 subject vehicle so long as Debtors make their payments, keep the
2 vehicle insured, and otherwise fulfill their obligations to
3 SDCCU." SDCCU timely appealed.

4 II. JURISDICTION

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 § 157(b)(2)(O). We have jurisdiction under 28 U.S.C. § 158.

7 III. ISSUE

8 Did the bankruptcy court err in entering the Reaffirmation
9 Order?

10 IV. STANDARDS OF REVIEW

11 We review the bankruptcy court's interpretation of the
12 Bankruptcy Code de novo. Bankr. Receivables Mgmt. v. Lopez
13 (In re Lopez), 274 B.R. 854, 859 (9th Cir. BAP 2002), aff'd,
14 345 F.3d 701 (9th Cir. 2003), cert. denied, 124 S.Ct. 2015
15 (2004); Dumont v. Ford Motor Credit Co. (In re Dumont),
16 383 B.R. 481, 484 (9th Cir. BAP 2008), aff'd, 581 F.3d 1104 (9th
17 Cir. 2009). The requisite procedure for issuing injunctions is a
18 question of law that we review de novo. Demos v. Brown
19 (In re Graves), 279 B.R. 266, 270 (9th Cir. BAP 2002).
20 Additionally, whether adequate due process was given in a
21 particular instance is a mixed question of law and fact that we
22 also review de novo. Id.

23 The bankruptcy court's factual findings are reviewed for
24 clear error. United States v. Hinkson, 585 F.3d 1247, 1262-63
25 (9th Cir. 2009) (en banc). A factual finding is clearly
26 erroneous if it is illogical, implausible, or without support in
27 inferences that can be drawn from the facts in the record. Id.
28 at 1263.

1 Therefore, the Debtors failed to comply with § 362(h)(1)(A). See
2 e.g., In re Steinhaus, 349 B.R. 694, 701 (Bankr. D. Idaho 2006).
3 SDCCU argues, therefore, that the automatic stay terminated at
4 the time the bankruptcy court held the Reaffirmation Hearing.

5 Nevertheless, SDCCU concedes that the bankruptcy court had
6 jurisdiction to review the Reaffirmation. Consequently, we need
7 not decide whether the automatic stay was, in fact, terminated at
8 the time of the Reaffirmation Hearing, or, whether a debtor may
9 amend his original intention prior to the time he must perform on
10 that intention and thereby cure any previous defect. See e.g.,
11 In re Norton, 347 B.R. 291, 296-98 (Bankr. E.D. Tenn. 2006)
12 (finding termination of automatic stay could not occur until the
13 deadline of § 521(a)(2)(B) had passed); Arizona Fed. Credit Union
14 v. DeSalvo, 2009 WL 5322428 *3 (Bankr. S.D. Ga. 2009); In re
15 Bower, 2007 WL 2163472 *2 n.2 (Bankr. D. Or. 2007) (an improper
16 statement of intention can be "cured" by a timely filed
17 reaffirmation agreement); In re Baker, 390 B.R. 524, 529 (Bankr.
18 D. Del. 2008) (same).

19 Debtors may reaffirm dischargeable debts. 11 U.S.C. § 524.
20 However, in order to protect debtors from compromising their
21 fresh start by making unwise agreements to repay such debts, the
22 Bankruptcy Code sets out various procedures and requirements for
23 approval of reaffirmation agreements. Id.; Gordon v. Hines
24 (In re Hines), 147 F.3d 1185, 1190 (9th Cir. 1998); Rogers v.
25 NationsCredit Fin. Servs. Corp., 233 B.R. 98, 107 (N.D. Cal.
26 1999). These include requiring creditors to make detailed
27 disclosures of the legal ramifications of reaffirmation.
28 11 U.S.C. § 524(k). Additionally, when, as here, the debtor is

1 not represented by an attorney, the bankruptcy court must inform
2 the debtor that reaffirmation is not required, describe the legal
3 consequences of reaffirming a debt, and decide whether
4 reaffirmation is in the debtor's best interest or poses an undue
5 hardship. 11 U.S.C. § 524(d), (c)(6).

6 Section 524(m)(1) raises a rebuttable presumption that a
7 reaffirmation agreement imposes an undue hardship on the debtor
8 when the debtor's monthly income, less the debtor's monthly
9 expenses, is less than the scheduled payments on the reaffirmed
10 debt. 11 U.S.C. § 524(m)(1). The bankruptcy court is required
11 to review all agreements, regardless of whether a debtor is
12 represented or appearing in pro se, when the presumption of undue
13 hardship exists; however, the presumption is waived when the
14 creditor of a reaffirmed debt is a credit union. 11 U.S.C.
15 § 524(m)(2).

16 Even though there was no presumption of undue hardship that
17 required rebuttal by the Debtors, because they were
18 unrepresented, the bankruptcy court was required to decide
19 whether the Reaffirmation imposed an undue hardship and was in
20 their best interest. 11 U.S.C. § 524(c)(6)(A)(i),(ii); Coastal
21 Fed. Credit Union v. Hardiman, 398 B.R. 161, 178 (E.D. N.C.
22 2008); In re Smith, 2011 WL 671994 *1 (Bankr. N.D. Iowa 2011);
23 In re Huskinson, 2008 WL 2388113 *2 n.7 (Bankr. N.D. Ohio 2008).

24 To that end, the bankruptcy court found that the payments on
25 the Silverado were large and that the Debtors' expenses
26 significantly exceeded their income making it an undue hardship
27 on the Debtors. Furthermore, the bankruptcy court found it was
28 not in the Debtors' best interest to reaffirm the debt because

1 there was no assurance that SDCCU would honor a purported verbal
2 agreement to work with the Debtors to cure any default, and
3 reaffirmation would make the Debtors personally liable for any
4 deficiency balance on the Loan.

5 These findings were supported by the record. The Debtors'
6 schedules demonstrated that their expenses significantly exceeded
7 their income. The record, including the testimony provided by
8 the CEO, demonstrated that the Debtors had defaulted on the Loan,
9 and that as a result of those defaults, SDCCU was entitled to
10 enforce its rights under the Loan. Accordingly, we perceive no
11 error in the bankruptcy court's decision in disapproving the
12 Reaffirmation under § 524(c)(6)(A)(i) and (ii).

13 SDCCU contends that even though the bankruptcy court could
14 disapprove the Reaffirmation under § 524(c)(6)(A), it could not
15 enjoin SDCCU from enforcing its rights under the Loan. SDCCU
16 particularly assigns error to the bankruptcy court's issuance of
17 an injunction without an adversary proceeding.

18 SDCCU contends that the issuance of injunctive relief and
19 declaratory relief may only result from an adversary proceeding.
20 Rule 7001, 7065. SDCCU relies on case authority where a
21 bankruptcy court was asked to grant injunctive relief. We agree
22 that in those situations, the request must procedurally be made
23 through an adversary proceeding. However, SDCCU's premise that
24 an adversary proceeding is always required before an injunction
25 can be issued by a bankruptcy court is belied by the plain

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1 language of § 105(a)⁷, which allows the bankruptcy court to act
2 sua sponte to issue any order that is necessary to carry out the
3 provisions of the Bankruptcy Code. 11 U.S.C. § 105(a).

4 Therefore, “[i]njunctive relief is available in bankruptcy
5 court in two ways: pursuant to the court’s discretionary and
6 inherent equitable power under section 105(a) ‘to issue any
7 order, process, or judgment that is necessary or appropriate to
8 carry out the provisions of this title,’ or under the auspices of
9 Bankruptcy Rule 7065.” Rinard v. Positive Invest., Inc.
10 (In re Rinard), 451 B.R. 12, 22 (Bankr. C.D. Cal. 2011); Eisen v.
11 Golden (In re Eisen), 2006 WL 6810928 (9th Cir. BAP 2006)
12 (unpublished).

13 The bankruptcy court did not cite to § 105(a) as the basis
14 of its authority, but we presume that it relied on its equitable
15 powers when it required SDCCU to accept payments and to suspend
16 its state law contractual rights to the Silverado. While
17 § 105(a) permits the bankruptcy court to impose injunctions,
18 there are limitations on that power. In re Graves, 279 B.R. 266
19 at 274. First, when acting in a matter that ordinarily requires
20 an adversary proceeding, the bankruptcy court must assure that

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22 ⁷ Section 105(a) provides that:

23 [t]he court may issue any order, process, or judgment
24 that is necessary or appropriate to carry out the
25 provisions of this title. No provision of this title
26 providing for the raising of an issue by a party in
27 interest shall be construed to preclude the court from,
28 sua sponte, taking any action or making any
determination necessary or appropriate to enforce or
implement court orders or rules, or to prevent an abuse
of process.

1 the defendant is afforded the procedural protection of due
2 process. Id. at 272. Second, the remedy must conform to the
3 objectives of the Bankruptcy Code. Id.; Beck v. Fort James Corp.
4 (In re Crown Vantage, Inc.), 421 F.3d 963, 975 (9th Cir. 2005).

5 Due process requires a notice and an opportunity to be
6 heard. Tennant v. Rojas (In re Tennant), 318 B.R. 860, 870 (9th
7 Cir. BAP 2004). "Notice and an opportunity to be heard" is a
8 flexible concept that depends on what is appropriate in the
9 particular circumstance. Id. At a minimum, however, notice must
10 be "reasonably calculated, under all of the circumstances, to
11 apprise interested parties of the pendency of the action and
12 afford them an opportunity to present their objections." Mullane
13 v. Central Hanover Bank & Trust, Co., 339 U.S. 306, 314 (1956).

14 Here, SDCCU was provided notice of the bankruptcy court's concern
15 that SDCCU misunderstood "the purpose and extent of the automatic
16 stay and/or that it is purposely forcing debtors into defaulting
17 on their car loans under some misconception that this Court will
18 then be forced to approve reaffirmation agreements that are not
19 advisable (especially in view of the forced defaults)." SDCCU
20 was given the opportunity to be heard with respect to that
21 concern when the CEO testified about SDCCU's policies and
22 procedures.⁸ Accordingly, SDCCU was afforded the requisite due
23

24
25 ⁸ The record demonstrated that the bankruptcy court had
26 ordered SDCCU to appear before it in the past to discuss its
27 policies and position regarding its non-acceptance of payments
28 before a reaffirmation becomes enforceable. Therefore, SDCCU was
aware of the bankruptcy court's concerns. Moreover, the
bankruptcy court had entered orders similar to the Reaffirmation
Order in at least two prior cases involving SDCCU.

1 process prior to the entry of the bankruptcy court's
2 Reaffirmation Order.

3 Nevertheless, the bankruptcy court acted outside the limits
4 of its § 105(a) authority because it imposed a remedy that was
5 not contemplated by the Bankruptcy Code. Bankruptcy courts have
6 "broad authority" under § 105(a) to take action necessary to
7 prevent an abuse of process. Marrama v. Citizens Bank of Mass.,
8 549 U.S. 365, 375 (2007). Indeed, that power has been used to
9 craft various remedies for a range of conduct. See In re Kmart
10 Corp. 359 F.3d 866, 871 (7th Cir. 2004) (compiling cases).
11 Nevertheless, § 105(a) does not allow "free-floating discretion
12 in accordance with the court's personal views of justice and
13 fairness" (Id. at 871) or amount to "a roving commission to do
14 equity." Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325
15 F.3d 1168, 1174 (9th Cir. 2003). A bankruptcy court may only
16 exercise its equitable power as a means to fulfil some specific
17 provision within the Bankruptcy Code. Marrama v. Citizens Bank
18 of Mass., 549 U.S. at 382 (citing N.W. Bank Worthington v.
19 Ahlers, 485 U.S. 197, 206 (1988)). Its authority may be invoked
20 "only if, and to the extent that, the equitable remedy dispensed
21 by the court is necessary to preserve an identifiable right
22 conferred elsewhere in the Bankruptcy Code." Jamo v. Katahdin
23 Fed. Credit Union (In re Jamo), 283 F.3d 392, 403 (1st Cir. 2002)
24 (internal citations omitted).

25 The bankruptcy court did not identify any Bankruptcy Code
26 section to support its conclusion that SDCCU had to accept
27 payments that were tendered by a debtor. The bankruptcy court's
28 statements on this issue included:

1 "[I]f I don't approve a reaffirmation where the people
2 have been trying to make the payments, you're going to
3 go pick up the car unless they pay it off? . . . it's
not compliant with federal bankruptcy law."

4 Hr'g Tr. (March 31, 2011) at 12:2-5, 16-17.

5 and,

6 "[Y]ou are purposefully putting people in default . . .
7 And I don't think that's a good thing to do. I don't
8 think it's a good policy."

9 Id. at 12:21-22, 13:1-2.

10 Section 524(1) provides that a creditor "may accept"
11 payments from a debtor before and after the filing of a
12 reaffirmation agreement. However, a creditor does not violate
13 the Bankruptcy Code by refusing to accept payments tendered by a
14 debtor. Additionally, we did not find any other federal law
15 that may apply. For example, we reviewed provisions regarding
16 creditor/debtor relationships, including payments on debt
17 obligations, contained in the Truth In Lending Act (TILA). See
18 15 U.S.C. § 1601 et. seq. While TILA provides that a creditor
19 shall credit a payment⁹ to a consumer's account as of the date
20 of receipt, it allows the creditor to specify reasonable
21 requirements for conforming payments, which can include
22 designating certain procedures, or cut off times, for payments.
23 Id. Implementing Regulation Z, 12 C.F.R. § 226.10. We found
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26 ⁹ A "payment" presumes that the debtor delivered money in
27 performance of an obligation and that the creditor accepted it as
28 extinguishing that performance in whole or in part. 1129 Black's
Law Dictionary, 6th ed. 1990.

1 nothing within TILA that requires a creditor to accept the
2 tender.

3 We also did not find other federal banking laws that
4 include provisions regarding payment obligations between
5 creditors and debtors. Neither do we find any California law
6 that requires a creditor to accept payments tendered to it. In
7 any event, the bankruptcy court could not use its § 105 powers
8 to implement state law unless there was also a comparable
9 objective set out in the Bankruptcy Code.

10 In this case, the Debtors were in default on the Loan
11 prepetition. By requiring that SDCCU accept the Debtors'
12 payments and refrain from exercising its state law rights under
13 the Loan, the bankruptcy court ordered SDCCU to accept a cure of
14 the Debtors' default. Such authority is beyond the reach of the
15 bankruptcy court. In re Jamo, 283 F.3d at 403 (court lacked
16 power to modify proposed reaffirmation arrangement and compel
17 credit union to enter into judicially-crafted reaffirmation
18 agreement).

19 SDCCU makes a final argument that the bankruptcy court's
20 injunction effects an impermissible expansion of the discharge
21 injunction or the automatic stay that is not intended by the
22 Bankruptcy Code. It asserts that the bankruptcy court
23 "expressly [stated] that if the Debtors wanted to return the
24 vehicle at some point in the future, the Debtors could also
25 demand their payments on this 'discharged debt' back from SDCCU
26 and SDCCU would be obligated to return the payments." See
27 Appellant's Opening Brief at 20. However, neither the record
28 nor the terms of the Reaffirmation Order supports SDCCU's

1 assertion. Whether a discharged debt that is voluntarily paid
2 by a debtor must later be refunded is not at issue in this
3 appeal, and therefore, will not be addressed.¹⁰

4 **VI. CONCLUSION**

5 The bankruptcy court did not abuse its discretion in
6 denying the Reaffirmation; however, it acted beyond its
7 authority in ordering SDCCU to accept a cure of the Debtors'
8 default on the Loan and enjoining SDCCU from pursuing its state
9 law remedies. Therefore, we AFFIRM the bankruptcy court's
10 disapproval of the Reaffirmation, but VACATE the portion of the
11 Reaffirmation Order that orders SDCCU to accept the Debtors'
12 payments, and that enjoins SDCCU from repossessing the Silverado
13 so long as the Debtors make payments and otherwise fulfill their
14 obligations to SDCCU.

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21 ¹⁰ At most, the bankruptcy court referenced the possibility,
22 but never decided the issue. It stated:

23 I worked at Bank of America for 16 years, and we always
24 took payments. Always took payments. We always took
25 payments. Once in a while when somebody would say:
26 Look, I decided I'm not going to reaffirm, we gave the
27 money back. But I will tell you, we made a lot more
28 money by taking the payments than we ever lost by
giving back money.

Hr'g Tr. (March 31, 2010) at 14:21-25; 15:1-2.