

**POLICY REGARDING REAFFIRMATION AGREEMENTS  
WHERE THE DEBTOR HAS COUNSEL OF RECORD  
(June 9, 2010)**

Judges Starzynski and Jacobvitz will apply the following policy to reaffirmation agreements. The policy, as it relates to counsel's responsibilities outlined in items 1 and 2 below, will *be effective for reaffirmation agreements filed on and after August 1, 2010*. The reason for the delayed effective date is because the policy represents a departure from the local practice in the United States Bankruptcy Court for the District of New Mexico.

1. Required Execution of Part C of Reaffirmation Agreements. Counsel of record for the debtor will be required to sign Part C of a Reaffirmation Agreement filed with the Court. Part C is entitled Certification by Debtor's Attorney. The Court will treat counsel's signature on Part C as a representation to the Court that counsel represented the debtor during the course of negotiating the reaffirmation agreement. However, as described in paragraph 2 below, counsel need not make all of the certifications set forth in Part C; and as described in subsection 1(a) below, what is required of counsel in the representation of a debtor in the course of negotiating a reaffirmation agreement is adaptable to the circumstances.<sup>1</sup>

(a) Representing the Debtor During the Course of Negotiating the Reaffirmation Agreement. Representing the debtor during the course of negotiating the agreement should at a minimum include counselling the debtor in regard to 11 U.S.C. § 521(a)(2), 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 counselling 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 does not expect counsel to so appear.

(b) Failure by Counsel for the Debtor to Sign Part C of the Agreement-Orders to Show Cause. If counsel of record for the debtor fails to execute Part C of a Reaffirmation Agreement filed of record, the Court may issue an order to show cause why counsel should not be sanctioned for failure to discharge counsel's duties in connection with the reaffirmation agreement.

2. Certifications Set Forth in Part C of the Reaffirmation Agreement. Counsel is expected to exercise professional judgment as to which of the Part C certifications counsel will make. At a minimum counsel is expected to make the certification that "I have fully advised the debtor of the legal effect and consequences of this agreement, and any default under this agreement." Counsel may cross out or alter any of the other certifications set forth in Part C consistent with counsel's professional judgment.

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<sup>1</sup> Counseling an individual debtor client in a chapter 7 case in connection with reaffirmation of a debt is among the essential responsibilities of an attorney representing an individual chapter 7 debtor.

3. Hearings on Reaffirmation Agreements when the Debtor is Represented by Counsel During the Course of Negotiating the Reaffirmation Agreement.

- (a) Credit Union – No Hearing. If the creditor is a credit union, and counsel for the debtor executes Part C of a Reaffirmation Agreement (as required under the Court’s Policy), thereby representing that counsel represented the debtor during the course of negotiating the agreement, the Court will not hold a hearing on approval of the Reaffirmation Agreement, regardless of whether counsel has made all of the certifications set forth in 11 U.S.C. § 524(c)(3).<sup>2</sup>
- (b) Non-Credit Union.
  - (i) Counsel has Completed All Three Certifications – Possible Hearing. If the creditor is not a credit union, and counsel for the debtor executes Part C of a Reaffirmation Agreement and makes all of the certifications set forth in 11 U.S.C. § 524(c)(3), the Court will review the Agreement pursuant to 11 U.S.C. § 524(m) and hold a hearing on the Agreement if the Court determines that a hearing is appropriate.<sup>3</sup>
  - (ii) Counsel has Not Completed All Three Certifications – No Hearing. If the creditor is not a credit union, and counsel for the debtor executes Part C of a Reaffirmation Agreement, but does not make all of the certifications set forth in 11 U.S.C. § 524(c)(3), the Court will not hold a hearing on approval of the Reaffirmation Agreement. Thus, for example, if counsel does not make the certification of no undue hardship, the Court will not hold a hearing.<sup>4</sup>

4. Other Deficiencies. If the Reaffirmation Agreement is not signed by both the creditor and the debtor, or material information is omitted from any section other than Part C of the Reaffirmation Agreement, the Court may enter an order denying approval of the Reaffirmation Agreement without notice or a hearing.

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<sup>2</sup>A hearing is unnecessary for one or both of the following reasons: 1) 11 U.S.C. § 524(m), which permits the court to disapprove a reaffirmation agreement after notice and a hearing, even though the attorney has made the certification of no undue hardship, does not apply if the creditor is a creditor union; or 2) the attorney has not made all of the certifications set forth in 11 U.S.C. § 524(c)(3). See footnote 4.

<sup>3</sup> Under 11 U.S.C. § 524(m), if the creditor is not a credit union, the court reviews the reaffirmation agreement to determine whether there is presumption of undue hardship. If the presumption arises and has not been rebutted by the debtor to the satisfaction of the court, the court may disapprove a reaffirmation agreement after notice and a hearing even though the attorney has made the no undue hardship certification.

<sup>4</sup> A hearing is unnecessary because by the express terms of 11 U.S.C. § 524(c)(3) a reaffirmation agreement is not enforceable **unless** the attorney that represented the debtor during the course of negotiating the agreement makes all of the certifications set forth in that section.