

monthly expenses of \$2,188, leaving only \$10 to make the required payments. She states, however, that she can afford to make the payments because her mother, who is also obligated on the debt, will make up the difference.

The Debtor is represented by an attorney in this case, but the attorney declined to make the certifications that 11 U.S.C. § 524(c)(3) requires. This is significant because it raises the issue of whether the agreement is unenforceable or whether it may be reviewed by the court.

In a case when a debtor is represented by an attorney during the course of negotiating the reaffirmation agreement and the attorney makes the requisite certifications set forth in § 524(c)(3), the agreement is enforceable and there is no necessity for court review unless a presumption of undue hardship arises under § 524(m)(1).²

If a debtor is not represented by an attorney during the course of negotiating a reaffirmation agreement, the court must approve the agreement as “(i) not imposing an undue hardship on the debtor . . . [and] (ii) in the best interest of the debtor.” 11 U.S.C. § 524(c)(6)(A).

²Section 524(m)(1) provides that “Until 60 days after an agreement of the kind specified in subsection (c) is filed with the court (or such additional period as the court, after notice and a hearing and for cause, orders before the expiration of such period), it shall be presumed that such agreement is an undue hardship on the debtor if the debtor's monthly income less the debtor's monthly expenses as shown on the debtor's completed and signed statement in support of such agreement required under subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This presumption shall be reviewed by the court. The presumption may be rebutted in writing by the debtor if the statement includes an explanation that identifies additional sources of funds to make the payments as agreed upon under the terms of such agreement. If the presumption is not rebutted to the satisfaction of the court, the court may disapprove such agreement. No agreement shall be disapproved without notice and a hearing to the debtor and creditor, and such hearing shall be concluded before the entry of the debtor's discharge.” Section 524(m)(2) provides that a reaffirmation agreement with a credit union is excepted from this provision.

It is clear from the hearing that the debtor's lawyer represented the Debtor in connection with negotiation of the reaffirmation agreement but declined to provide the required certification for reasons that, properly, she did not disclose, given her duty of maintaining the confidences of her client and the protections of the attorney-client privilege. In this regard, the Court is satisfied that the Debtor's lawyer properly fulfilled her professional responsibilities to represent the Debtor in all aspects of this case, including counseling with regard to the proposed reaffirmation agreement.³ Thus, this is not a case in which a debtor's lawyer attempts to exclude reaffirmation matters, a category absolutely fundamental to chapter 7 representation, from the scope of the bankruptcy representation.⁴ To the extent an attorney engages in such a practice, she does so at her peril.

The question here is whether the Debtor is "unrepresented" for purposes of § 524 in view of the fact that her lawyer represented her at least with regard to advising her about the agreement, continues to represent her in the case, but refused to provide the required certification. If the court deems the debtor unrepresented, the court may review the reaffirmation agreement. § 524(c)(6). If the court does not consider the debtor unrepresented, a debtor with a lawyer could never enter into an enforceable reaffirmation agreement since it is neither signed by the attorney nor approved by the court.

The Court concludes that, based on the interests of the debtor and creditors, there must be a mechanism that permits a debtor to obtain court review when her attorney has declined to sign a reaffirmation agreement. A lawyer's certification necessarily cannot be the only way for

³See *In re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003).

⁴*Id.*

a debtor with a lawyer to enter into an enforceable reaffirmation agreement. To this end, the Court rejects the view that a court lacks authority to review a reaffirmation agreement when the debtor is represented by counsel but counsel has not executed a certification.⁵ If a court has authority under § 524(m) to review a reaffirmation agreement because a debtor's expenses exceed income even when an attorney has made the necessary certification, it is absurd to conclude that the court lacks the same authority when the attorney has *not* signed the certification.

In the final analysis, it is the client, not the lawyer, who makes the decision about reaffirmation. So a debtor must have the opportunity to seek to enter into an enforceable reaffirmation agreement notwithstanding her lawyer's decision not to sign the certification based on the lawyer's professional judgment that it is not in her best interest or for other valid reasons. And the debtor's lawyer, who ordinarily has a duty to represent a consumer debtor in all aspects of a bankruptcy case, need not seek to withdraw from representation in the case (in which her services may still be required with regard to other matters) so that the debtor can become unrepresented so that she can pursue an enforceable reaffirmation agreement. Indeed, the lawyer's professional responsibilities actually require the lawyer to represent the debtor in connection with reaffirmation matters even if she ultimately declines to sign the certification.

So withdrawal, even partial withdrawal, is problematic when a lawyer's professional responsibilities require her to represent the client in the case to achieve an objective that the client has a right to seek but the lawyer recommends against it. Requiring a lawyer to withdraw before permitting the debtor to seek the court's approval for a reaffirmation agreement makes

⁵*See, e.g., In re Isom*, 2007 WL 2110318 (Bankr. E.D. Va. 2007).

no sense. Thus, the Court concludes that, if a lawyer fulfills her professional duty to represent the debtor with regard to reaffirmation but concludes that she cannot make the required certification, the lawyer's client may seek the Court's approval of the reaffirmation agreement in the same manner she could if she did not have a lawyer. In effect, the lawyer withdraws from further representation of the client with regard to the required certification but still represents the debtor in the case. Because the lawyer's duty is to assist her client in achieving lawful objectives and because the lawyer continues to represent the debtor in the case, the lawyer's duty when she cannot make the required certification is to assist the debtor in bringing the proposed reaffirmation before the Court for resolution and to appear at the hearing to present (but not necessarily advocate) the position of the client.

The Court, therefore, will proceed to determine whether to approve the proposed reaffirmation agreement pursuant to 11 U.S.C.A. § 524(c)(6). Given the debtor's financial circumstances (particularly the fact that she cannot afford to make the payments on her own) and the substantial amount by which the debt secured by the subject vehicle exceeds its value, the Court cannot conclude that the reaffirmation agreement is in the best interests of the debtor.

The Court understands that the Debtor wants to protect her mother who is also obligated on this debt. The Court points out that a debtor may voluntarily repay any debt. 11 U.S.C. § 524(f). Thus, the debtor may voluntarily continue to make payments and DaimlerChrysler may continue to accept them and apply them to the debt.

It is, therefore, **ORDERED and ADJUDGED** that approval of the Reaffirmation Agreement be, and it hereby is, **DENIED**. Notwithstanding such denial, the Debtor may voluntarily make payments on the debt, DaimlerChrysler may accept such payments, and

DaimlerChrysler may contact the Debtor from time to time as appropriate with regard to matters concerning its collateral and the debt other than enforcement or collection of it as a personal liability of the Debtor.

END OF ORDER

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