

# Reaffirmations Under the “New Code”

Sections 524(k)-(m)

\*new code sections



# Breakdown of new provisions

- 1) Disclosure requirements
- 2) Form requirements
- 3) Certification by Debtor's attorney (if any)
- 4) Debtor's statement in support
- 5) Motion for Court approval

# Disclosure requirements

- 6 pages of text's worth of verbiage!! See 524(k)(3) – the disclosure statement required under this paragraph **shall** consist of the following...
- Note about what needs to be “clear” and “conspicuous” per 524(k)(2):
  - “Amount reaffirmed” and “Annual Percentage Rate” shall be disclosed **more conspicuously** than other terms except the phrases: “*Before agreeing to reaffirm a debt, review these important disclosures*” and “*Summary of Reaffirmation Agreement*” **may be equally conspicuous.**

## Disclosure requirements per 524(k)(3)

- Amount reaffirmed (must disclose any fees and costs accrued as of date of disclosure) 524(k)(3)(C)
- Annual percentage rate 524(k)(3)(E)- distinguishes between open end credit plans and everything else
- The collateral (if any) and it's original purchase price must be listed or if not a PMSI then the collateral and original amount of loan must be listed 524(k)(3)(G)
- Payment schedule- creditor can elect 1 or a combination of 524(k)(3)(H)(i), (ii), or (iii)

# Disclosure requirements per 524(k)(3)

- Statement regarding what a creditor “may” do, i.e. what may occur if the law permits the creditor to take action. Advising debtor, if they have questions, to consult their attorney or if pro se, the Judge will explain when hearing on reaffirmation is held.  
*524(k)(3)(I)*
- Additional statements reminding the debtor that reaffirming a debt is a serious financial decision and to make sure the decision is in their best interest. Enumerated in *524(k)(3)(J)*

## Disclosure requirements per 524(k)(3)

- Note 524 (k)(3)(J)(i)(6) – if debtor is represented by counsel in negotiation of reaff, reaff becomes effective upon filing with the Court, **unless** reaff is presumed to be an “undue hardship” (see definition @ 524(m), to be discussed later)
- Note 524(k)(3)(J)(i)(7) – if debtor is pro se, reaff not effective unless approved by Court, except no Court approval required if it is for a consumer debt secured by a lien against debtor’s real property.

## Disclosure requirements per 524(k)(3)

- Right to rescind reaffirmation agreement is **unchanged**, debtor has:
  - 1) 60 days from date reaff is filed with the Court  
OR
  - 2) before discharge Order is entered;

\*whichever occurs later

524(k)(3)(J)(7) requires this disclosure.

## Disclosure requirements per 524(k)(3)

- If creditor has a security interest or lien on property:
  - Bankruptcy discharge does not eliminate the security interest
  - Only debtor(s) personal liability on the note is discharged
  - Redemption option explained

# Form requirements per 524(k)(4)

- 524(k)(4) sets out requirements to the form of the reaffirmation agreement itself
  - sets out the material terms of the agreement (brief description of the credit agreement including any changes that are being made)
  - Code section mandates the agreement be separated into 5 distinctly labeled parts:

## Form requirements per 524(k)(4)

- “A” - the disclosures previously referred to
- “B” – the reaffirmation agreement itself
- “C” – certification by debtor’s attorney (if any)
- “D” – debtor’s statement in support of reaffirmation agreement
- “E” – motion for Court approval (only if debtor is not represented by an attorney)

## Certification by Debtor's Attorney (if any)

- First part of certification – terms mirror what was already required in reaffs under the “old code”, to wit:
  - The agreement fully informed and voluntary
  - Agreement does not impose an undue hardship on Debtor or dependants
  - That attorney has advised debtor of consequences of the reaff and the potential default on the reaff

## Certification by Debtor's Attorney (if any)

- If presumption of undue hardship has been established:
  - Certification by Debtor's attorney shall state that in the opinion of the Debtor's attorney, the Debtor is able to make the payment.
  - **NOTE**: if the reaffirmation agreement is with a **CREDIT UNION** this Certification is not required!!!!!!!

# Debtor's Statement in Support of Reaffirmation Agreement

- If debtor not represented by attorney or debt is not to a credit union:

Debtor attests that they can afford to make the payments on the reaffirmed debt because:

- their monthly net income is  $X$
- their actual current monthly expenses, including monthly payments on post-bankruptcy debt and other reaffirmation agreements is:  
 $X - (J + \text{any reaffs not contemplated in } J)$
- that they understand that if  $X - (J + \text{any reaffs not contemplated in } J)$  does not equal enough \$\$ to make the payments on the reaff, then the reaff is presumed to be an undue hardship, and must be approved by the court.

# Debtor's Statement in Support of Reaffirmation Agreement

- If debtor represented by an attorney, and reaffirming a debt to a credit union, debtor merely indicates that they believe the reaff is in their financial interest and can afford to make the payments.

# Motion for Court Approval

- Only if debtor is not represented by an attorney.  
OR
- Debtor is represented by an attorney and the undue hardship presumption applies.
- In the case of a Pro Se Debtor, the Debtor affirms the following to be true and accurate
  - They believe the reaffirmation is in their best interest based on income and expenses as disclosed in Statement of Support and because of any other additional reasons they wish to bring to the Court's attention.

# Motion for Court Approval

- In the case of a Pro Se debtor, the debtor affirms the following to be true and accurate
  - They believe the reaffirmation is in their best interest based on income and expenses as disclosed in Statement of Support and because of any other additional reasons they wish to bring to the Court's attention.
  - Ask for the Court's approval

# Motion for Court Approval

- In the case of the debtor who is represented by an attorney and the undue hardship presumption applies,
- NEW LBR 4008-1 – the debtor (not the creditor) shall file a motion for approval by the Court. Title of the motion shall be “Motion for Approval of Reaffirmation- Presumption of Undue Hardship Applies”.

# Motion for Court Approval

- Court Order, which may be used to approve the reaff, shall consist of the following:

“The Court grants the debtor’s motion and approves the reaffirmation agreement described above”

## New section 524(L)

- Creditor may accept payments from a debtor before and after the filing of a reaff
- Creditor may accept payments from a debtor under a reaff that the creditor believes in good faith to be effective;
- The requirements of (c)(2) and (k) shall be satisfied if disclosures required are given in good faith

## New section 524(m)- undue hardship presumption

- Until 60 days after a reaff is filed, it shall be presumed that such an agreement is an undue hardship on the debtor if debtors monthly income less monthly expenses on statement of support of reaff is less than the scheduled payments on the reaffirmed debt
  - The presumption shall be reviewed by the Court
  - May be rebutted in writing by the debtor with a statement identifying additional source of income to make the payments

## **New section 524(m)- undue hardship presumption**

- If presumption not rebutted, the Court may disallow the reaff
- No reaff shall be disallowed without notice and a hearing – such hearing shall be concluded before the entry of the discharge
- **THIS SUBSECTION DOES NOT APPLY TO REAFFIRMATION AGREEMENTS WITH CREDIT UNIONS!!**