UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re
Glen W. Smith and
Roberta A. Smith,
Debtors. No. 7-08-11823 SA

ORDER CONCERNING PROPOSED REAFFIRMATION AGREEMENT BETWEEN DEBTORS AND CHRYSLER FINANCIAL COMPANY (DOC 18)

The Court reopened this chapter 7 case sua sponte to address the late filed proposed reaffirmation agreement between Debtors Glen W. and Roberta A. Smith and Chrysler Financial Company ("Chrysler") ("Agreement") (doc 18). The Court finds and rules that the Agreement was filed too late to meet the requirements of 11 U.S.C. §524(m) and therefore cannot bind the parties.

Debtors filed their chapter 7 petition on June 6, 2008. Doc 1. The §341 first meeting of creditors was first scheduled for and took place on July 11, 2008. On Monday, September 15, 2008, at 5.00 am[1] the discharge order was entered (doc 16) and at 10.37 am the final decree closing the case was entered. Doc 17. Later that day at 2.10 pm Chrysler's counsel filed the Agreement.[2] Chrysler has not

[1] All times are Mountain Daylight Time.

[2] This Court has set its CM/ECF filing system to accept filings even after the case is closed because for the most part those filings are such that they should be accepted; for

withdrawn the filing.

The Agreement was signed by Debtors and dated by them September 3, 2008; the signature of Debtors' counsel on the agreement is dated September 10, 2008. Chrysler's counsel signed the Agreement but the line for "Date of Creditor Acceptance" is blank.[3]

Because Debtors' counsel signed Part C of the Agreement, there would be no need to review the Agreement pursuant to §524(c) and (d). However, regardless of whether Debtors were represented by counsel in the course of negotiating the Agreement, §524(m) would apply, since Chrysler is not a credit union.

A review of the Agreement and of the CM/ECF file shows

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example, motions to reopen a case, motions to release unclaimed funds, notices of appeal, and applications for writs of garnishment. The filer is notified that the case has been closed and is asked if he/she still wishes to file the document. There is no review by the Clerk's office to allow or disallow a filing before the filing takes place.

[3] At the top of the first page of the Agreement is the wording "Efiled July 10, 2008". The Court has no idea what this is supposed to mean. The Agreement was not filed, by e-filing or otherwise, on July 10, 2008. Should there ever be a hearing on the Agreement, someone on behalf of Creditor will need to explain this wording, and for that matter, why Creditor's counsel did not date his signature and whether the filer was asked, before filing the Agreement, if the filer still wished to file it. However, given the status of this matter, the Court sees no reason why there should be any such hearing.

that were the Agreement filed timely, the Court would be required to hold a hearing in order to disapprove it. The Agreement has Debtors reaffirming $8,781.86 at a 4.9% interest rate for a 2004 Chrysler Sebring. Part D of the Agreement recites that Debtors' net income is $4,000 less expenses of $3,500, leaving $500 to make the vehicle payment. Debtors' schedules I and J recite that Debtors' net income is $1,664 and their expenses are $3,406, for a monthly deficit of $1,742.

Fed. R. Bankr. P. 4008 provides in relevant part:

> The debtor's statement required under §524(k) [Part D] shall be accompanied by a statement of the total income and total expense amounts stated on schedules I and J. If there is a difference between the income and expense amounts stated on schedules I and J and the statement required under §524(k), the accompanying statement shall include an explanation of any difference.

The requirements of the rule are clear (and, it can be added, informed by common sense and experience). Part D of the Agreement transparently fails to comply with the Rule.

Section 524(m) requires that any hearing to disapprove an agreement under that subsection "shall be concluded before the entry of the debtor's discharge". The Debtors having received their discharge before the Agreement was filed, no timely hearing was possible. Given the purpose of this portion of the statute – to ensure that debtors can afford to be "back on

the hook" for an otherwise dischargeable obligation – the only conclusion can be that the Agreement is not enforceable.

The facts in this case differ from those in In re Golloday, 391 B.R. 417 (Bankr. C.D. Ill. 2008), in which debtors sought to set aside their discharges so they could file and become bound by reaffirmation agreements which had not been filed by the time the discharges were entered. But the result is the same; the reaffirmation agreements are not binding. "[Reaffirmation agreements] are strictly construed and the requirements imposed for their validity are enforced rigidly." Golloday, 391 B.R. at 421. (Citation omitted.)

The reason the Court has reopened this case to enter this order is because the Court is concerned that at some point in the future, Chrysler or perhaps an assignee of Chrysler may seek to enforce the Agreement or the underlying discharged debt and Debtors may not have counsel available (at a price they can afford[4]) to advise them that neither the Agreement

[4] The Rule 2016 statement (Disclosure of Compensation), doc 8, does not require Debtors' counsel to provide any additional services after the §341 meeting for the compensation paid. Were Debtors to contact counsel months or years after the closing of the case, to inquire about payment demands by a creditor, counsel might reasonably demand payment of several hundred dollars to reacquaint himself with the file and to advise Debtors. Nothing that the Court has said about counsel's fees or the arrangement for representation is intended to suggest any impropriety or overreaching by Debtors' counsel in this case.

nor the underlying debt is enforceable. They, or others, may be misled by the mere fact that the Agreement is on file with the Court without an accompanying order saying it was not enforceable. Certainly the wording of §524(m) makes clear that even without an explicit order, the Agreement is not enforceable, but Debtors may not be aware of or remember that fact, especially at some point in the future.[5]

The Court does not consider that this opinion violates the case or controversy requirement of the United States Constitution by being an advisory opinion. Compare, e.g., Unified School District No. 259, Sedgwick County, Kansas v. Disability Rights Center of Kansas, 491 F.3d 1143, 1147 (10th Cir. 2007) (concerning the Article III requirement that federal courts may only decide actual ongoing cases or controversies, "the crucial question is whether granting a present determination of the issues offered ... will have some effect in the real world." Citation and internal punctuation omitted.) and United States of America v. Burlington Northern Railroad Company, 200 F.3d 679, 699 (10th Cir. 2000) ("It is fundamental that federal courts do not render advisory

[5] Consistent with this policy, this Court, when it has reviewed an agreement pursuant to §524(m) and not disapproved it, makes a CM/ECF docket entry reciting that the review has taken place and that the agreement in not disapproved.

opinions and that they are limited to deciding issues in actual cases and controversies." Citation and internal punctual omitted.). Debtors and their counsel, by signing the Agreement and returning it to Chrysler's counsel, and Chrysler, by signing the Agreement (through its counsel) and filing it, have by those actions sought a review of the Agreement and a ruling pursuant to §524(m). By its wording, §524(m) requires the Court to review a presumption of undue hardship in any reaffirmation agreement with a creditor which is not a credit union. The review must take place even though both debtors and the creditor seek approval of the agreement. Thus the parties need to be told, and are entitled to be told, whether the filed reaffirmation agreement is binding or not.

Nor does the Court consider that by issuing this opinion it is being improperly proactive; for example, the Bankruptcy Court for the District of New Mexico in October 2005, in anticipation of the provisions of what is now §521(i)(1), enacted Clerk's office procedures to provide early notice to debtors of filing deficiencies and to provide for the prompt entry of written orders dismissing cases for the failure to correct §521(i) deficiencies, regardless of whether there was a request for the entry of such an order pursuant to §521(i)(2). The reason for this proactive approach was to

ensure that a debtor did not mistakenly believe that she or he had received a discharge, or fail to understand that the case had been dismissed, only to be confronted with the disruption of a collection action months or years later.[6]

In this case, the Court is concerned that the mere presence of the reaffirmation agreement on the CM/ECF file, without a statement of its non-effectiveness, could be used by

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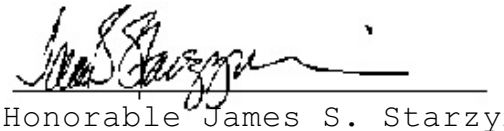
[6] It was for this reason as well that the Court issued the opinion in In re Francisco, 386 B.R. 854 (Bankr. D. N.M.) (holding that the 180-day period to obtain the budget and credit counseling required by §109(h) did not include the day of the filing of the petition), reversed 390 B.R. 700 (10th Cir. B.A.P. 2008) (holding that the moment of filing of the petition is the deadline for obtaining the counseling). Given the developing market for discharged (not distressed) debt and subsequent collection actions thereon, see, e.g., Robert Berner and Brian Grow, Prisoners of Debt, Business Week, November 1, 2007 ("Prisoners of Debt"), available at http://www.businessweek.com/bwdaily/duflash/content/oct2007/db20071031_039775.htm (describing market for billions of dollars of discharged debt and methods used to collect on that debt), it is useful to have both a clear CM/ECF record and a definitive interpretation of the law so that everyone knows if a discharge order is effective. Unfortunately, the brave new world of, among other things, massive data mining of bankruptcy court records (enabled and encouraged, albeit appropriately, by the Administrative Office's PACER Service System), data analysis programs that can be created by any number of savvy fourteen-year-olds, an appetite for risk by investors with large amounts of capital, and the usual human avarice and greed, permits the easy exploitation of unsophisticated debtors. Thus a holder of a claim perhaps only apparently discharged might be able to attempt with impunity to collect on the claim. This is today's reality.

Chrysler inadvertently[7], or a potential successor in interest to Chrysler, intentionally or inadvertently, or a credit reporting agency, to improperly treat the debt as reaffirmed or as not discharged. See In re Rathavongsa, Case No. 98-00576-5-ATS (Bankr. E.D.N.C., December 18, 2003) (creditor continued to report discharged debt as outstanding in order to pressure debtor to pay the debt).[8]

IT IS THEREFORE DECLARED AND ORDERED that the proposed reaffirmation agreement between Debtors Glen W. and Roberta A. Smith and Chrysler Financial Company (doc 18) was filed too late to meet the requirements of 11 U.S.C. §524(m) and therefore cannot bind the parties.



Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: November 21, 2008

[7] The Court is not suggesting that counsel for Chrysler has acted unethically or illegally in any way.

[8] The Rathavongsa case, cited in Prisoners of Debt, is unpublished but the details are set out in In re Jones, 367 B.R. 564, 570 n. 3 (Bankr. E.D. Va. 2007).

copies to:

Glen W. Smith
1934 Western Hills Dr
Rio Rancho, NM 87124

Roberta A. Smith
1934 Western Hills Dr
Rio Rancho, NM 87124

William R Brummett
113 6th St NW Ste E
Albuquerque, NM 87102-3103

Yvette Gonzales
Trustee
PO Box 1037
Placitas, NM 87043-1037

United States Trustee
PO Box 608
Albuquerque, NM 87103-0608

James E Shively
2999 N 44th St Ste 500
Phoenix, AZ 85018-7252