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Reaffirmation Under BAPCPA: Did Ride-Through Survive?

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The amendments to the debtor's duties and to the requirements for enforceable reaffirmation agreements made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[1] included an addition of § 521(a)(6) to the Bankruptcy Code. That new section provides:

> in a case under chapter 7 of this title in which the debtor is an individual, [the debtor shall] not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either--
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> (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
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> (B) redeems such property from the security interest pursuant to section 722.[2]

Section 521(a)(2), as amended by BAPCPA, provides that the individual Chapter 7 debtor, within 30 days of the filing of the petition or the meeting of creditors, whichever is earlier in time, must file the statement of intention to either reaffirm, redeem or surrender secured property, and within 30 days of the first date set for the meeting of creditors, that debtor must perform the stated intention as to such property.[3] The new § 521(a)(6) further provides that if the individual Chapter 7 debtor does not reaffirm, redeem or surrender secured personal property within 45 days "after the first meeting of creditors," the automatic stay under § 362(a) is "terminated with respect to the personal property of the estate or of the debtor," and "such property shall no longer be property of the estate."[4] Moreover, "the creditor may take whatever action as to such [personal] property as is permitted by applicable nonbankruptcy law," unless upon the case trustee's timely motion the court determines "that such property is of consequential value or benefit to the estate" and orders appropriate adequate protection to the secured creditor and turnover of the personal property by the debtor to the trustee.[5] As we shall see in some decisions, this specific language of § 521(a)(6), referring to "applicable nonbankruptcy law," is significant.

BAPCPA's addition of § 362(h) to the Code provides that the automatic stay is terminated in an individual debtor's case "with respect to personal property of the estate or of the debtor securing in whole or in part a claim," and " such personal property shall no longer be property of the estate" if that debtor fails to comply with the requirements of § 521(a)(2).[6] Section 362(h)(2) has the same savings clause found in § 521(a)(6), which might extend the automatic stay upon the case trustee's timely motion showing that the property "is of consequential value or benefit to the estate" and assuming that the debtor turns over the personal property to the trustee with adequate protection provided to the secured creditor.[7]

These new provisions point to a conclusion that the former "fourth option" or "ride-through" is no longer permitted; however, as a recent bankruptcy court decision points out, that conclusion does not necessarily mean that a secured creditor of personal property gets to repossess its collateral.[8] The collateral involved in reaffirmation efforts is typically the debtor's automobile, although other personal property may be the subject of reaffirmation. However, the reaffirmation provisions do not apply to real property.[9]

A North Carolina bankruptcy court in **In re Donald,**[10] concluded that "ride-through" was no longer available under the amended Bankruptcy Code, but noted that the reality appeared to be that debtors might continue to make payments on secured personal property debts without reaffirming and that creditors might continue to accept those payments:

It also is worth acknowledging that, ultimately, whether or not the "ride-through" option survives the new statutory hurdles may not make much of a difference to many debtors and creditors because in this circuit, and also in those that do not recognize the "fourth option," debtors continue to submit payments when due and creditors continue to accept them. Creditors frequently acquiesce in ride-through because chapter 7 debtors "usually become[ ] better able to afford paying secured debts, and this gain in creditworthiness may more than offset the creditor's loss of recourse against the debtor personally after discharge."[11]

Moreover, even though the debtor has neither reaffirmed, redeemed nor surrendered the personal property collateral in conformity with § 521(a)(6), the secured creditor may be entitled only to an order granting relief from the automatic stay. That was the holding of **In re Steinhaus,**[12] in which the court specifically found that it did not have the authority to order the debtor to turn over the collateral to the secured creditor. The only statutory bankruptcy remedy was relief from the automatic stay, as mandated by the amended statute, and granting any additional remedy would be beyond that congressionally chosen relief. The **Steinhaus** court also noted that the applicable state law would control the creditor's rights, as well as what constitutes a default; thus, the bankruptcy court declined to decide those state-law issues. This same result, a combination of the language in BAPCPA's amendments to the Bankruptcy Code and applicable state law, has been reached in other bankruptcy courts, such as **In re Rowe.**[13]

There are several decisions, such as **In re Stillwell,**[14] **In re Laynas,**[15] and **In re Payton,**[16] where the courts questioned the debtor's ability to make the payments under a proposed reaffirmation and ultimately refused to approve the proposed reaffirmation, yet those courts declined to rule on the secured creditor's ability to foreclose or repossess. **In re Quinero,**[17] the court both denied approval of a reaffirmation agreement and refused to allow foreclosure, reasoning that § 521(a)(6) only provides for stay relief upon the debtor's failure to act on reaffirmation or redemption within 45 days of the first meeting of creditors. In that case, the creditor failed to provide the debtor with the disclosures required by § 524(k), but the debtor was willing to enter into a reaffirmation.

As seen in these decisions, courts are applying § 521(a)(6)'s language strictly, perhaps resulting in stay relief but not according creditors a possession remedy in the bankruptcy court. The effect of a secured creditor's attempt to add new contractual terms before agreeing to a proposed reaffirmation with the debtor may also have negative consequences for that creditor. In **In re Hinson,**[18] the creditor attempted to add additional terms to the reaffirmation agreement and sought foreclosure when the debtor refused to agree to those terms. Although the court agreed that reaffirmation remained a matter of contract between the parties under BAPCPA and that the creditor might ask for new contractual terms as a condition of its agreement to the reaffirmation, the court observed that "having chosen to do so here in the case of a debtor who has always been current with her payments, [the creditor] must live with the consequences if the debtor declines to reaffirm on [the creditor's new] terms but desires to continue with the original agreement."[19] This is so, according to that court, because the stay remains in effect for such a debtor and the collateral under the terms of § 362(h)(1)(B). That part of BAPCPA's amendments to the Code states that the stay does not terminate when the debtor's statement of intention "specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such tems."[20] The **Hinson** court also noted that the ipso facto clause of the parties' contract was ineffectual since the provisions of § 521(d) that could give such clauses effect had not been met. Section 521(d) provides that such clauses "placing the debtor in default... by reason of" a bankruptcy case or proceeding, or the insolvency of the debtor, are triggered "if the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h)."[21]

Another problem found by the courts with creditors seeking to enforce the debtor's choices under amended § 521(a)(6) is that the statute states that the debtor who does not timely comply with reaffirmation or redemption may not remain in possession of personal property "to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property."[22] As the court in **In re Donald**[23] recognized, in the normal no-asset Chapter 7 case, a proof of claim is never filed. In such cases, the secured creditor does not have an "allowed claim," and "the redemption/reaffirmation requirement of § 521(a)(6) is not applicable."[24]

These decisions under BAPCPA illustrate that, while "ride-through" may have technically been eliminated, in reality it may still exist, depending upon the applicable state law. Since the sole bankruptcy remedy for the debtor's failure to timely state and carry out intentions to reaffirm or redeem may be relief from the automatic stay, and if the bankruptcy court finds no authority to order surrender of the collateral to the secured creditor, the failure to reach an agreed reaffirmation, or the court's refusal to approve a proposed reaffirmation, simply puts the parties in a state court with state-law remedies. This of course means that counsel for the debtor and creditor must be familiar with applicable state law. As the **Steinhaus** court recognized,[25] the Uniform Commercial Code may control the applicable remedy, and it may not permit foreclosure/repossession for a

nonmonetary default. Moreover, if the secured creditor continues to accept payments from a debtor in the absence of an approved reaffirmation agreement, even if there had been prior monetary default, the acceptance may be construed under state law as a waiver of the default. Therefore, to the question did Congress in fact eliminate "ride-through" the answer may be no--at least unless controlling state law also says so.

Research References: Norton Bankruptcy Law and Practice (2d ed.) §§ 45:10, 51:14, 69:11
West's Key Number Digest, Bankruptcy 2852, 3022, 3034, 3415.1

Footnotes

1 Pub. L. No. 109-8, 119 Stat. 23 (2005).

2 11 U.S.C. § 521(a)(6) (2005).

3 11 U.S.C. § 521(a)(2) (2005).

4 11 U.S.C. § 521(a)(6) (2005).

5 11 U.S.C. § 521(a)(6) (2005).

6 11 U.S.C. § 362(h)(1) (2005).

7 11 U.S.C. § 362(h)(2) (2005)

8 **In re Donald,** 343 B.R. 524 (Bankr. E.D.N.C. 2006).

9 *See* **In re Bennet,** No. 06-80241, 2006 WL 1540842 (Bankr. M.D. N.C. May 26, 2006) (reaffirmation provisions do not apply to real property agreements such as mortgages). Note that § 521(a)(2) refers to "property of the estate" while § 521(a)(6) refers specifically to "personal property." Section 362(h), which is linked to § 521(a)(2), also includes the term "personal property of the estate."

10 **In re Donald**, 343 B.R. 524 (Bankr. E.D.N.C. 2006).

11 **In re Donald**, 343 B.R. at 541 (quoting Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding On to Cars, Homes and Other Collateral Under the 2005 Act,* 13 AM. BANKR. INST. L. REV. 457, 476 (2005)).

12 **In re Steinhaus**, 349 B.R. 694 (Bankr. D. Idaho 2006).

13 **In re Rowe**, 342 B.R. 341, 346-347 (Bankr. D. Kan. 2006).

[14] **In re Stillwell**, 348 B.R. 578, n. 9 (Bankr. N.D. Okla. 2006).

[15] **In re Laynas**, 345 B.R. 505, 516 (Bankr. E.D. Pa. 2006).

[16] **In re Payton**, 338 B.R. 899, 905 (Bankr. D. N.M. 2006).

[17] No. 06-40163 TK, 2006 WL 1351623 (Bankr. N.D. Cal. May 17, 2006).

[18] **In re Hinson**, 352 B.R. 48 (Bankr. E.D.N.C. 2006).

[19] **In re Hinson**, 352 B.R. at 52.

[20] 11 U.S.C. § 362(h)(1)(B) (2005).

[21] 11 U.S.C. § 521(d) (2005).

[22] 11 U.S.C. § 521(a)(6) (2005).

[23] **In re Donald**, 343 B.R. at 536-38.

[24] **In re Donald**, 343 B.R. at 536.

[25] **In re Steinhaus**, 349 B.R. at 710.