

# **PERSONAL PROPERTY REAFFIRMATION AGREEMENTS**

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The purpose of bankruptcy is to “provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Grogan v. Garner*, 498 U.S. 279, 286 (1991)(citations omitted). In other words, as is so often said, the purpose of bankruptcy is to give the debtor a “fresh start.” *Id.* at 286-287. It is no wonder, then, that so many courts look very carefully at anything which interferes with the debtor’s fresh start, the prime example being a reaffirmation agreement.

### **The purpose of a reaffirmation agreement.**

Most of the time, a Chapter 7 discharge releases the debtor from personal liability on a debt secured by personal property, even though the collateral may remain subject to the creditor’s lien.<sup>1</sup> When the debtor executes a reaffirmation agreement, the debtor remains personally liable on the debt and is bound by the terms of the instrument evidencing the debt. As one court explained this process:

Unless one of the exceptions enumerated in 11 U.S.C. § 523 applies, a Chapter 7 debtor receiving a discharge under 11 U.S.C. § 727 is relieved of all in personam liability for debt that arose before the date of the order for relief. As with every rule, exceptions exist. Section 524(c) allows a debtor to enter into a reaffirmation agreement, which is a voluntary agreement between a debtor and the holder of a claim that allows the debtor to reassume in personam liability for a debt that would otherwise be dischargeable in the bankruptcy case. A reaffirmation agreement is the only means by which a dischargeable debt may survive a Chapter 7 discharge.

*In re Minardi*, 399 B.R. 841, 845 (Bankr. N.D. Okla. 2009) (footnotes omitted). A reaffirmation agreement is a contract between the creditor and the debtor. *Pickrel v. Household Realty Corp.* (*In*

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<sup>1</sup> Reaffirmation agreements, however, are not just for Chapter 7 cases. Even in a Chapter 11, a creditor may have to meet the requirements and make the disclosures required for reaffirmation agreements. *See, In re Sandburg Financial Corp.*, 446 B.R. 793 (D.Ct.S.D.Tex. 2011), *aff’d. sub nom, In re American Rice, Inc.*, 448 Fed.Appx. 415 (5<sup>th</sup> Cir. 2011).

*re Pickerel*), 433 B.R. 679, 685 (Bankr. N.D. Ohio, 2010). Reaffirmation allows a Chapter 7 debtor who cannot immediately pay off debts secured by collateral the debtor wants to keep to continue making periodic payments and retain the property. *In re Turner*, 156 F.3d 713, 715 (7<sup>th</sup> Cir. 1998).<sup>2</sup>

It is important to remember that absent a reaffirmation agreement, any action by the creditor other than accepting payments could be found to be a violation of the discharge injunction under 11 U.S.C. §524(a)(2). If the debt has not been reaffirmed, the creditor arguably is prevented by the discharge injunction from negotiating with the debtor when there is a missed payment or the like. *See*, 11 U.S.C. §524. Since a reaffirmation agreement is a contract between the debtor and a creditor, the debtor may also be able to negotiate better terms under the reaffirmation agreement than are available in the underlying agreement. *See, In re Pendlebury*, 94 B.R. 120, 124 (Bankr.E.D.Tenn. 1988). Thus, it may be a good idea for the debtor to enter into a reaffirmation agreement even if the creditor will not repossess the collateral for failure to reaffirm the debt. Of course, since the reaffirmation agreement is voluntary for both parties<sup>3</sup>, there is also nothing to prevent the creditor from negotiating different terms as well; for instance, requesting its attorneys fees incurred in negotiating the reaffirmation agreement be paid. *Id.* However, if the creditor insists on terms different than those of the underlying agreement, it may lose the protections of 11 U.S.C.

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<sup>2</sup> Prior to BAPCPA, numerous cases had held that debtor could not ‘redeem by installments’ and that redemption required a lump sum payment at the time of redemption. This was codified by BAPCPA in the addition of the phrase ‘in full at the time of redemption’ to the end of 11 U.S.C. §722. Thus, a reaffirmation agreement is the only way the Code provides for a debtor to retain collateral and make payments over time.

<sup>3</sup> Just as a creditor cannot force a debtor to reaffirm a debt, there is nothing in the code which requires a creditor to enter into a reaffirmation agreement with the debtor and neither the debtor nor the court can force the creditor to enter into a reaffirmation agreement. *See, In re Turner*, 208 B.R. 434 (Bankr.C.D.Ill. 1997), *aff’d in part, dism’d in part*, 156 F.3d 713 (7<sup>th</sup> Cir. 1998). *See also, In re McKinstry*, 56 B.R. 191 (Bankr.D.Vt. 1986). *McKinstry* is interesting, as well, in that it holds that ‘Chapter 20’ debtors who do not reaffirm a debt on a residence cannot cure the arrears and keep the property in the Chapter 13 case. Doing so would “unilaterally impose a reaffirmation on the mortgagee in a subsequent Chapter 13 bankruptcy in order to prevent foreclosure.” *Id.* at 193.

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