IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
Darla J. Foxx,	)	Case No. 19-11710 (LSS)
	)	
	)	
Debtor.	)	Re: Docket Items 19 & 23

ORDER DENYING MOTION TO RECONSIDER ORDER ON REAFFIRMATION AGREEMENT

Background

On July 31, 2019, Darla J. Foxx ("Debtor"), filed a voluntary petition under chapter 7 of the United States Bankruptcy Code [D.I. 1]. In the Statement of Intention portion of the voluntary petition, Debtor stated her intention to retain the real property known as 75 Karlyn Dr. New Castle, Delaware ("Property") and "maintain monthly payments." The Property is Debtor's home. The Statement of Intention also lists two creditors as having a lien on the Property—Community Powered Federal Credit Union ("CPFCU") and Wells Fargo Home Mortgage.

On September 10, 2019, CPFCU filed a Motion to Compel Surrender of Collateral, or Alternatively, to Dismiss Bankruptcy Case [D.I. 10]. That motion was subsequently withdrawn [D.I. 16].

On September 19, 2019, CPFCU filed a reaffirmation agreement seeking to reaffirm the debt secured by the Property ("Reaffirmation Agreement"). It was executed by Debtor and CPFCU [D.I. 14]. But, as reflected on the docket, Debtor's counsel did not sign Part IV of the Reaffirmation Agreement, "Certification by Debtor's Attorney (if any)." Rather,

Debtor's counsel expressly refused to sign the attorney certification in Part IV ("Attorney Certification"), and instead signed the following statement:

> I have reviewed the reaffirmation agreement and have advised the debtor as to its consequences. I cannot certify that the reaffirmation agreement does not impose an undue hardship on the debtor or any dependent of the debtor. Therefore, I cannot sign it because it is not in the debtor's best interest. However, the debtor wishes to comply with the statutory pre-requisites of filing a reaffirmation agreement under the Code.

CPFCU filed the Reaffirmation Agreement containing this statement. The Clerk of the Court noticed the hearing on the Reaffirmation Agreement for October 24, 2019 at 2:30 p.m., which was a date and time set aside to hear consumer chapter 7 matters.

In preparation for the October 24, 2019 hearing, I reviewed all matters scheduled for that day, including the Reaffirmation Agreement. On October 22, 2019, I entered that certain Order on Reaffirmation Agreement [D.I. 14] in which I ordered that "The [Reaffirmation] agreement is not enforceable per statute. 11 U.S.C. § 524(c)(3). No hearing on the Motion is necessary." Entering the Order on Reaffirmation Agreement prior to the scheduled hearing is consistent with my Memorandum Order in the *Keith Q. Smith* bankruptcy case in which I held that if a debtor is represented by counsel in the course of negotiating a reaffirmation agreement, it is not enforceable if the Attorney Certification is not signed. [1]

The Motion to Reconsider and the Parties' Positions

On November 5, 2019, CPFCU filed its Motion to Reconsider Order on Reaffirmation Agreement [D.I. 19] ("Motion to Reconsider"). In the Motion to

[1] *In re Keith Q. Smith*, Case No. 15-10340 (July 29, 2015) (D.I. 15), attached hereto as Exhibit A. The Smith bankruptcy case also involved a credit union, but the reaffirmation agreement there dealt with a car loan.

Reconsider, CPFCU cites to various sections of the Bankruptcy Code making a hodgepodge of arguments including: (i) that under § 524(m)(2) a court cannot find a presumption of undue hardship; (ii) that under § 524(c)(6)(B) the Reaffirmation Agreement did not require an attorney declaration stating there is undue hardship or that reaffirmation is not in the best interest of the debtor; (iii) that under § 524(c)(3) because CPFCU is a credit union and the debt is a consumer debt secured by real property, there is no requirement for an attorney certification and (iv) that the Bankruptcy Code does not authorize a chapter 7 debtor to "merely retain collateral and promise to make future loan payments."[2] At argument, CPFCU was unsure which argument should prevail, but argued that its status as a credit union must provide it with a special protection in these circumstances.

Debtor responds to the Motion to Reconsider attempting to divine the arguments that CPFCU advanced. Debtor argues that: (i) the Bankruptcy Code appears to favor ride-through treatment for consumer debts in real property because the discharge injunction of § 524(a)(2) does not apply to creditors who retain a security interest in the principal residence of the debtor; (ii) "bankruptcy courts, including this Court, have historically refused to reaffirm mortgage debt due to the lack of a perceived benefit to the debtor absent

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[2] Motion to Reconsider 6. CPFCU further explains in the Motion to Reconsider:

> By filing a reaffirmation agreement that does not contain the requisite Debtor Certification, Debtor has attempted to evade the three statutory options, i.e. redemption, surrender or reaffirmation, given to a Chapter 7 debtor with respect to property collateralizing repayment of a perfected lien. What the Debtor in this case has done, is, in effect, a back-door attempt to circumvent the well-established ruling of the U.S. Supreme Court in *Dewnsnup v. Timm*, 502 U.S. 410 (1992). The Supreme Court, in *Dewsnup*, put a stop to lien-stripping in Chapter 7 cases, finding that, so long as an allowed claim is secured by a lien- even one worth less than the full amount of the claim- a debtor could not strip down the lien. Instead, the lien would survive the bankruptcy and the lender could foreclose it even after the Chapter 7 debtor received a discharge of his or her debts.

Id. at 7.

a loan modification or other significant change to the terms of the mortgage in exchange for the reaffirmation agreement (i.e. reduction in principal, interest rate, loan term and/or monthly payments);" and no such concessions were made here; (iii) as such, Ms. Foxx can "stay and pay;" (iv) the Reaffirmation Agreement does not meet the requirements of section 524(c)(3) because Ms. Foxx was represented and counsel did not sign the Attorney Certification; and (v) CPFCU's *Dewnsup* argument is not relevant as CPFCU is retaining its lien against the Property in all events.

I held argument on December 5, 2019. At that time, I stated to counsel that I was inclined to deny the Motion to Reconsider, but I wanted to review the filings again. Having reviewed the filings, my mind has not changed.

Standard

CPFCU brings the Motion for Reconsideration under Federal Rule of Civil Procedure 59(e) made applicable by Federal Rule of Bankruptcy Procedure 9023. Specifically, CPFCU contends that "reconsideration should be granted on the third prong of the standard: the need to correct a clear error of law or fact or to prevent manifest injustice."[3]

[3] Motion for Reconsideration 2.

Discussion

Section 524 is a byzantine section of the Bankruptcy Code which can be difficult to decipher. But, the basic principles enunciated in that section lead to the result in this case. In order for a reaffirmation agreement to be enforceable it must meet the following requirements:

1. the agreement must be enforceable under non-bankruptcy law (introduction to § 524(c));
2. the agreement must be made before the granting of the discharge under, as relevant here, § 727 (§ 524(c)(1));
3. the debtor must have received the disclosures described in subsection (k) at or before the time the debtor signed the agreement (§ 524(c)(2));
4. the agreement has been filed with the court (§ 524(c)(3));[4]
5. the debtor must not have rescinded the agreement any time prior to discharge or within sixty days after the agreement is filed with the court, whichever occurs later (§ 524(c)(4));
6. the provisions of subsection (d) (which requires that the debtor appear for a discharge hearing in certain circumstances) must be complied with (§ 524(c)(5)); and
7. ***if the debtor was represented by an attorney during the course of negotiating the reaffirmation agreement***, the reaffirmation agreement is accompanied by the attorney's declaration or affidavit stating that: (i) the agreement represents a fully informed and voluntary agreement; (ii) the agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and (3) the attorney has fully advised the debtor of the legal effect and consequences of the agreement and any default on such agreement (§ 524(c)(3))

-OR-

if the debtor was not represented by an attorney during the course of negotiating the agreement and the agreement is a consumer debt secured by personal property, the court approves such agreement as: (i) not imposing an undue hardship on the debtor or a dependent of a debtor; and (ii) in the best interest of the debtor. (§ 524(c)(6)).

[4] The requirement in subsection (3)(c) that the agreement be filed would have been better in a standalone subsection.

Here, Ms. Foxx was represented by counsel. Counsel did not sign the Attorney Declaration making the statements required by § 524(c)(3). The Reaffirmation Agreement is therefore not enforceable. I do not see any clear error of law or manifest injustice to reconsider my previous Order.

At argument, counsel stated that the reason CPFCU filed the Motion for Reconsideration was because it was not sure that I was aware when entering my original Order that CPFCU was a credit union and, as such, certain rules are not applicable to it. Counsel argued that because CPFCU is a credit union the requirement of § 524(c)(3)) that the Attorney Declaration accompany a reaffirmation agreement is inapplicable. Counsel pointed to the words "if applicable" in § 524(c)(3) to support her contention.

Section § 524 provides, in relevant part, that an agreement between a holder of a claim and a debtor is enforceable, only if:

> the reaffirmation agreement has been filed with the court, and, ***if applicable***, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection. . .

Counsel argues that the emphasized words "if applicable" refers to whether or not the creditor is a credit union. Counsel for Debtor argues that the emphasized words refer to whether or not the debtor is represented. I agree with counsel for Debtor.

As set forth above, § 524(c) provides requirements for a reaffirmation agreement to be enforceable. While the statute could have been better drafted, the natural reading of the words "if applicable" in subsection (3) refers to whether the debtor is represented. If the

debtor is not represented, then the declaration required in subsection (3) is not required.[5] Subsection (3) contains no exception for credit unions; nor is there an exception for credit unions in any other part of § 524(c).

As CPFCU correctly notes, § 524(m) does provide credit unions with a special exception with respect to reaffirmation agreements. Subsection (m)(2) provides that in the case of a credit union, the presumption of undue hardship found in (m)(1) does not apply. This is the only exception found in subsection (m)(2). CPFCU would have me somehow import the (m)(2) exception into subsection (c)(3) through the words "if applicable." I see no basis to do so. Subsection (m)(2) is clear on its face. It does not purport to negate the Attorney Declaration requirement found in subsection (c)(3).

Finally, CPFCU seems to suggest that notwithstanding the lack of an Attorney Declaration, it would be unfair to CPFCU to permit Debtor to remain in her house without an enforceable reaffirmation agreement and/or that Debtor's actions are a back-door attempt to strip CPFCU's lien in derogation of *Dewnsnup v. Timm*. The effect of not entering into an enforceable reaffirmation agreement is not before me today.[6] Debtor has chosen her path. The Reaffirmation Agreement is not enforceable; no legal error occurred in my original Order. Further, nothing in the Court's original Order had any effect on CPFCU's lien.

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[5] Indeed, an unrepresented debtor could not supply an Attorney Declaration so this requirement would be impossible to meet.

[6] As a point of information, I would direct CPFCU to *In re: Price*, 370 F.3d 362 (3d Cir. 2004) in which the Third Circuit discusses the concept of ride through albeit in context of personal property.

Accordingly, the Motion to Reconsider is DENIED.

Dated: July 1, 2020

Laurie Selber Silverstein
United States Bankruptcy Judge

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Case No. 15-10340 (LSS)
KEITH Q. SMITH,	)	Chapter 7
Debtor.	)	**Re: Docket No. 6**

MEMORANDUM ORDER[1]

Upon consideration of the filing of a reaffirmation agreement between Debtor and DEXSTA Federal Credit Union ("DEXSTA"), the Court hereby FINDS as follows:

Background

1. On February 18, 2015, Keith Q. Smith ("Debtor") filed a voluntary petition ("Petition" [D.I. 1]) for relief under chapter 7 of title 11 of the United States Code ("Bankruptcy Code"). The Petition includes the Chapter 7 Individual Debtor's Statement of Intention, in which Debtor indicates that he will retain a 2008 Toyota Yaris by reaffirming the associated debt. *Id.* The petition was filed by counsel for Mr. Smith.

2. On March 6, 2015, DEXSTA filed with the Court an agreement between Debtor and DEXSTA to reaffirm the automobile loan for the 2008 Toyota Yaris (the "Reaffirmation Agreement" [D.I. 6]). That day, the Clerk of the Court electronically served a Notice of Reaffirmation Hearing on counsel to Debtor, the chapter 7 Trustee, and the Office of the United States Trustee. The notice was also served by mail on Debtor and DEXSTA.

3. Part I of the Reaffirmation Agreement reflects that: (i) the amount of the loan to be reaffirmed is $7,790.70, (ii) the current market value of the vehicle is $7,650.00, and

[1] This Memorandum Order constitutes the Court's findings of fact and conclusions of law, as required by the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 7052, 9014(c). The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157, 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408, 1409. Consideration of this matter constitutes a "core proceeding" under 28 U.S.C. §§ 157(b)(2)(A) and (O).

(iii) the interest rate is 8.49%. On the first page of the Reaffirmation Agreement, Debtor checked boxes indicating that the creditor is a credit union, and that the "Presumption of Undue Hardship" applies.

4. In Part II of the Reaffirmation Agreement, Debtor checked the "Yes" box with respect to both question A ("Were you represented by an attorney during the course of negotiating this agreement?") and question B ("Is the creditor a credit union?"). Debtor also filled out section C of Part II, even though this section is to be filled out only if the debtor responds "no" to either question A or B.

5. Debtor signed his Certification in Part III of the Reaffirmation Agreement, and DEXSTA signed the agreement as well.

6. Part IV of the Reaffirmation Agreement, "Certification by Debtor's Attorney (if any)" (the "Attorney Certification") was not signed by counsel. The certification required in Part IV is as follows:

> I hereby certify that (i) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.
>
> ☐ A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

7. A hearing on the Reaffirmation Agreement was held on April 2, 2015. At that hearing, the Court took argument, but counsel asked for permission to submit case law in support of their respective positions. Accordingly, the hearing was continued to April 16, 2015. During the interim period, the parties both submitted that certain Memorandum Order in *David C. Smith and Carol L. Wells-Smith,* Case No. 13-12036 (BLS) (D.I. 21) ("Wells-Smith Order"). At the April 16 hearing, the Court took further argument and additional cases were presented to the Court. The Court took the matter under advisement.

The Parties' Positions

8. DEXSTA makes three arguments with respect to the Reaffirmation Agreement. First, DEXSTA argues that because it is a credit union and Debtor is represented by counsel,[2] the Reaffirmation Agreement becomes effective upon filing and the Court is not authorized to hold a hearing on the Reaffirmation Agreement. Second, DEXSTA argues that if a debtor is represented by counsel and his attorney does not sign the Attorney Certification, the reaffirmation agreement does not meet the requirements of section 524(c) and thus the debtor does not have the protections of section 521(a) and 362(h).[3] In that event, DEXSTA argues that it can repossess the car even if Debtor is current on his payments. Alternatively, DEXSTA argues that to the extent this Court is authorized to hold a hearing, the Reaffirmation Agreement is reasonable on its face, and should be approved.

9. Debtor first requested that the Court not approve the Reaffirmation Agreement. Debtor's counsel next stated, however, that because in this case Debtor checked the "yes" box in Part II A, she would concede that Debtor was represented by counsel, the Reaffirmation Agreement could be "effective" upon filing and no hearing

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[2] To support its position that Debtor was represented by counsel during the course of negotiating the reaffirmation agreement, DEXSTA cites to *In re Harvey*, 452 B.R.179 (Bankr. W.D. Va 2010), which holds that a debtor's counsel cannot exclude legal services related to reaffirmation agreements from its general representation of a consumer debtor. Other courts take different approaches to this question. *See e.g. In re Riggs*, 2006 WL 2990218 (Bank. W. D. Mo. Oct. 12, 2006) (if counsel does not sign the Attorney Certification, court has no way of knowing whether debtor was represented by an attorney during the course of negotiating the agreement; accordingly, the court must conduct a hearing); *In re Berni*, 2013 WL 160217 (Bankr. D. Alaska Jan. 14, 2013) (because Attorney Certification was not endorsed, court treats the agreement as having been filed *pro se*); *In re Donald*, 343 B.R. 524, 527 (Bankr. E.D.N.C. 2006) ("The court finds that although the debtors have been ably represented by their attorney in connection with the issues presented to the court in connection with their reaffirmation agreement, the debtors were not represented by their attorney during the course of the negotiation of the reaffirmation agreement with [creditor]."); *In re Mendoza*, 347 B.R. 34 n.13 (Bankr. W.D. Tex. 2006) (lack of signature is equivalent to debtor being unrepresented). Because the Court finds that the Reaffirmation Agreement is not enforceable regardless of whether Debtor is represented by counsel, the Court need not resolve this issue.

[3] All references herein to sections are sections of the Bankruptcy Code.

would be required.[4] At the same time, counsel sought to preserve for future cases the issue of whether the representation of a debtor, generally, means, *ipso facto*, that the debtor was represented by counsel "during the course of negotiating" a reaffirmation agreement.

Discussion

I. *Existing Case law in this Court*

10. The arguments raised by DEXSTA do not appear to have been addressed in previous decisions of this Court. Nonetheless, prior case law from this Court is instructive, and the Court will review two previous decisions that are relevant to this matter.

a) *David C. Smith and Carol L. Wells-Smith, Case No. 13-12036 (BLS) (D.I. 21)*

11. In *Wells-Smith*, Chief Judge Shannon addressed the level of review dictated by section 524(c)(6) with respect to reaffirmation agreements when: (i) the debtor is not represented by an attorney in connection with the negotiation of the agreement and (ii) the agreement is with a credit union. First, the court held that it may not review the agreement to determine whether it poses an undue hardship pursuant to section 524(c)(6)(i) because section 524(m)(2) provides that the presumption of undue hardship does not apply when the creditor is a credit union. Wells-Smith Order ¶4.[5] Second, the court held that notwithstanding its inability to review the agreement under section 524(c)(6)(i), it is required to review a reaffirmation agreement under section 524(c)(6)(ii) to determine if it is in the debtor's best interest. The court, thus, held that in order for a reaffirmation agreement with a credit union to be enforceable when the debtor is unrepresented, the agreement must first

[4] In response to questions from the Court at the April 16, 2015 hearing, Debtor's counsel stated that she forwarded the agreement to Debtor and advised Debtor what a reaffirmation agreement was, but she did not attempt to negotiate terms with DEXSTA.[4]

[5] The Court believes an interesting question exists as to whether the Court may review an agreement with a credit union to ensure, under § 524(c)(6)(i), that it does not impose an undue hardship on the debtor or a dependent of the debtor. "Undue hardship" is not defined in the Bankruptcy Code, and while § 524(m)(1) establishes a statutory, rebuttable presumption of undue hardship in certain circumstances, it is not clear to this Court that a finding could not be made under § 524(c)(6)(i) in the absence of a presumption. This issue was not raised in this case, and will not be decided herein. *Compare In re Laynas*, 345 B.R. 505, 515 (observing that the scope of the court's review under § 524(m)(1) is "not obvious from the text of the statute" and questioning whether court can consider factors other than whether presumption has been rebutted).

be subject to court scrutiny. In explaining its rationale, the court quoted from *In re Cooper*, 2012 WL 566070, at *5 (Bankr. D. Kan Feb. 21, 2012) as follows:

> When no attorney is present to advise and negotiate the best terms possible on behalf of a debtor, § 524(c)(6) requires the Court step in and essentially perform the role of counsel to ensure that the debtor is fully educated about the effect and consequences of a reaffirmation agreement, and that the debtor's best interest is being protected. And the responsibility exists to unrepresented debtors regardless the identity of the creditor; in other words, regardless if the creditor is a credit union.

b) *In re Baker, 390 B.R. 524 (Bankr. D. Del. 2008)*

12. *In re Baker*, 390 B.R. 524 (Bankr. D. Del. 2008) *aff'd Ford Motor Credit Co. v. Baker (In re Baker)*, 400 B.R. 136 (D.Del.2009) presented an issue that has divided the courts–whether the so-called "ride through" option exists after the passage of BAPCPA.[6] Answering that question in the affirmative, Judge Sontchi ruled that, notwithstanding the court's refusal to approve a reaffirmation agreement, absent a "valid default" under a loan agreement, a creditor has no right under state law to repossess a vehicle when a debtor timely meets its obligations under section 521(a)(6) (enters into a reaffirmation agreement with a creditor) and section 362(h) (files its statement of intention). *Baker*, 390 BR at 531.[7]

13. It is against this backdrop that the Court determines the appropriate review of the Reaffirmation Agreement in the matter *sub judice*.

II. *Analysis*

14. Discharge of personal liability on prepetition debts is the cornerstone of the "fresh start" promise of chapter 7. *In re Cooper,* 2012 WL 566070, at * 2. Accordingly, absent compliance with the statutory protections found in section 524, reaffirmation agreements are unenforceable. 11 U.S.C. § 524(c). As relevant here, section 524 provides:

> (c) A [reaffirmation] agreement . . . is enforceable . . . only if—
>
> (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the

[6] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") (Pub. L. 109-8, 119 Stat. 23, enacted April 20, 2005).

[7] In a subsequent case, the Court characterized *Baker* as a case in which the debtor "substantially complied with sections 521(a)(2) and 362(h)." *In re Miller*, 443 B.R. 54, 58 (Bankr. D. Del. 2011).

attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such agreement;

* * *

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

11 U.S.C. §524(c)(3), (6).

A. If Debtor was Represented by Counsel During the Course of Negotiating the Reaffirmation Agreement, it is not Enforceable Because the Attorney Certification was not Executed.

15. DEXSTA argues that when a debtor is represented by counsel during the course of negotiating a reaffirmation agreement with a credit union and counsel does not sign the Attorney Certification, the agreement is effective and the Court has no role in the disposition of the agreement. DEXSTA is partially correct. While the Court agrees that in such circumstances the Court has no role in approving or disapproving the agreement, the agreement is not effective; it is unenforceable.

16. The seminal case on this position appears to be *In re Isom*, No. 07-31469 KRH, 2007 WL 2110318, at *1 (Bankr. E.D. Va. July 17, 2007). In *Isom*, a debtor executed

a reaffirmation agreement with a credit union after having received the proper disclosures. While the debtor properly executed her certification, the debtor's counsel chose not to execute the Attorney Certification stating that "it was not her practice to make any such certification . . . [and that] any such determination was best left to the Court." *Id.* at *2. Further, debtor's counsel wrote on the Attorney Certification: "No endorsement-hearing required." *Id.* The court rejected this argument, finding that in order for a reaffirmation agreement to be enforceable, strict compliance with §524 is required, including an attorney certification when an attorney has represented the debtor in the course of negotiating the reaffirmation agreement. *Id.* at *2. The *Isom* court held that if the attorney representing the debtor fails to sign the Attorney Certification, the reaffirmation process ends. *Id.* at *5. *See also In re Barron*, 441 B.R. 131 (Bankr. D. Ariz. 2010) (when a debtor is represented by counsel, and counsel fails to sign the Attorney Certification, the court has no jurisdiction to review a reaffirmation agreement); *In re Harvey*, 452 B.R. 179, 187 (Bankr. W.D. Va. 2010) (if the attorney is unwilling to sign a certification of counsel with respect to a reaffirmation agreement, the Bankruptcy Code does not then authorize the bankruptcy court to "expand its authority by taking over and making the call when counsel is unwilling to do so"); *In re Minardi*, 399 B.R. 841, 849 (Bankr. N.D. Okla. 2009) (when an attorney is unable to endorse Attorney Certification, the agreement will not be enforceable); *In re Hart*, 402 B.R. 78, 84 (Bankr. D. Del. 2009) (*dicta*) (if debtor is represented by attorney during negotiation of agreement, Attorney Certification must be filed in order for agreement to be enforceable).

17. In so holding, the *Isom* court noted the gate keeper role counsel plays in the reaffirmation process:

> Cognizant of the very serious consequences that reaffirmation could have, Congress, *through BAPCPA and its additions to § 524*, sought to impose meaningful hurdles into the reaffirmation process. Even with all the new disclosures in place, Congress was unwilling to leave the decision to reaffirm dischargeable debt solely to the discretion of the debtor. Congress wanted to interject the informed judgment of debtor's counsel into the process. Obviously, Congress did not envision that counsel would rubber stamp a client's wishes. Rather, it was counsel's considered reluctance to approve onerous and ill-advised reaffirmation agreements that Congress hoped to achieve.

In re Isom, at *4 (emphasis in the original). *See also In re Cooper*, 2012 WL 566070 at *2 ("One protection the Code afforded debtors is the requirement that their attorney, if represented during the negotiation of the reaffirmation agreement, must sign [the Attorney Certification].").

18. Unlike the unrepresented debtor, there is no need for the Court to step in and perform the critical role of counsel in educating a debtor regarding the consequences of reaffirming a debt under section 524 when debtor has counsel. If counsel believes the reaffirmation agreement is ill-advised, counsel should not sign the Attorney Certification.[8] Counsel's decision not to sign the reaffirmation agreement "ends the process;" the agreement is unenforceable.[9]

19. As applied here, it is not clear whether Mr. Smith was represented by counsel during the negotiation of the Reaffirmation Agreement given that the agreement is internally inconsistent and given the discussion in court. Assuming that Mr. Smith was represented by counsel during the course of negotiating the reaffirmation agreement, counsel did not sign the Attorney Certification, accordingly, the Reaffirmation Agreement is not enforceable and no hearing was necessary.[10]

B. If Debtor was not Represented by Counsel During the Course of Negotiating the Reaffirmation Agreement, the Court finds that it is not in Debtor's Best Interest to Approve the Reaffirmation Agreement.

20. If Debtor was not represented by counsel during the course of negotiating the Reaffirmation Agreement, the Court must review the agreement to determine if it is in his

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[8] The Court does not comment on the wisdom of Congress requiring the Attorney Certification, but agrees with the *Isom* court that counsel should never sign an Attorney Certification against his/her better judgment. *Isom,* at *5.

[9] The Court notes that the inverse is not always true. When an attorney signs the Attorney Certification, the Court may still hold a hearing in at least two situations. *See In re Morton*, 410 B.R. 556 (6th Cir. BAP 2009) (court still retains discretion to determine whether a presumption of undue hardship exists, and whether attorney's certification complies with Rule 9011); *In re Hart*, 402 B.R. 78, 86 (Bankr. D. Del. 2009) (court must hold hearing on agreement reaffirming debt secured by real property if presumption arises even when counsel has endorsed Attorney Certification).

[10] The Court believes it preferable for the sake of the record to have an order reflecting the outcome of each reaffirmation agreement filed with the Court. Accordingly, in instances in which the Court determines that its review is not appropriate, the Court will enter an order acknowledging such.

best interest even though DEXSTA is a credit union. Wells-Smith Order, *supra.* A review of the Reaffirmation Agreement and the Schedules reflects a monthly net income of $219.82. However, as explained by DEXSTA's counsel at the hearing, after deduction of the car loan payment, monthly net income is only $70.02. The Court finds this *de minimis* amount of monthly net income is not sufficient to satisfy the Court that approval of the Reaffirmation Agreement is in the Debtor's best interest. Accordingly, the Court will decline to approve the Reaffirmation Agreement, and as such, it is not enforceable.

C. Even though the Reaffirmation Agreement is not Enforceable, Because Debtor Timely Met all of his Obligations Under Section 521, Debtor Receives the Protections of the Automatic Stay

21. DEXSTA next argues that if a debtor is represented by counsel and his attorney does not sign the Attorney Certification, the debtor does not have the protections of sections 521(a) and 362(h) of the Bankruptcy Code, and DEXSTA can repossess the car even if Debtor is current on payments. The Court respectfully disagrees.

22. As set forth above, in *Baker* this Court held that a court's decision not to approve a reaffirmation agreement has no bearing on whether a debtor is entitled to retain property while staying current on loan payments. *Baker*, 390 B.R. 530. Rather, as long as a debtor has timely performed his or her obligations under sections 521(a)(6) and 362(h), a debtor is entitled to the protections of the automatic stay, and the creditor has no right to repossess the vehicle if the debtor does not thereafter default on its loan obligations. *Id.* at 531.[11] *See also In re Hart*, 402 B.R. 78, 81 (Bankr. D. Del. 2009) (*dicta*) ("[R]egardless of whether the Court approves the reaffirmation agreement, a debtor may retain personal property securing a loan, provided that the debtor timely enters into a reaffirmation agreement.").

23. This conclusion does not change if a debtor is represented by counsel during the course of negotiating the reaffirmation agreement and counsel determines not to sign the Attorney Certification:

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[11] In *Baker*, the debtors filed a "Pro Se Reaffirmation Agreement (Without Attorney Affidavit)." Notwithstanding, counsel appeared at the hearing on the reaffirmation agreement. *Baker*, 390 B.R. 526-7.

> The consequences arising from § 521(d) of the Bankruptcy Code are triggered upon a debtor's failure to enter into the appropriate agreement, not by counsel's refusal to endorse the agreement or by the court's inability to approve the agreement. Enforceability of the reaffirmation agreement is not required.

Isom, at *4. *See also In re Barron*, 441 B.R. 131, 134 (D. Ariz. 2010) (failure of counsel to endorse reaffirmation by itself renders agreement unenforceable, but because debtors did everything required of them under sections 362(h) and 521(a), section 521(d) is inapplicable).[12]

24. As applied here, the Court finds that Debtor took all actions required under sections 362(h) and 521(a). Debtor timely filed his statement of intention and then followed through by timely executing a reaffirmation agreement; therefore, section 521(d) is inapplicable.

COURT ORDER: the Court does not approve the Reaffirmation Agreement.

Dated: July 29, 2015

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

[12] This is the nub of DEXSTA's issue. Unlike this Court, the *Harvey* court held that the "ride through" option did not survive BAPCPA such that a debtor is no longer able to retain personal property by remaining current with the obligations under the original agreement with the creditor. Under *Harvey*, absent an enforceable agreement, the creditor may repossess its collateral. It is the effect of an unenforceable reaffirmation agreement that is the real issue, not whether a debtor is represented by counsel.