American Bankruptcy Institute
Southeast Bankruptcy Workshop

Consumer: Need Good Advice About Debt Relief? Ask TikTok!

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2025

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AMERICAN BANKRUPTCY INSTITUTE

Need Good Advice About Debt Relief? Ask TikTok!

Tik Tok

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The Bankruptcy Discharge

Video 1

Manifest Your Way Out!

Video 2 & 3

Just Negotiate!

Video 4

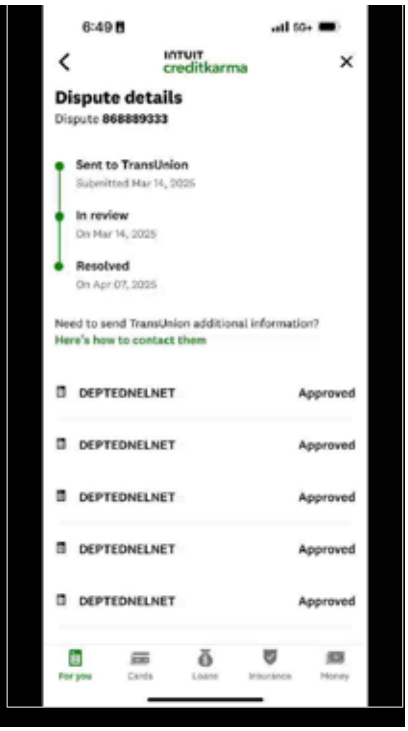
Game the system

Video 5 & 6

Get Those Student Loans Off Your Credit

Video 7 & 8

"For the Skeptics out there here is proof that you can dispute your student loans for breach of security by the DOGE team. No fancy letter is required just submit the facts that your account has been compromised. I use Credit Karma to track activity and submitted my dispute there. You'll thank me later!"



Huh?!

Video 9

Bankruptcy is Just for Protecting Assets

Video 10

It’s a write off!

Video 11

Lifestyles of the Rich and Famous?!

Video 12

Good advice

Video 13 & 14

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I. Introduction

In today's digital age, social media platforms like TikTok, Instagram, X, and Facebook have become leading sources of information for millions. According to a recent study conducted by Qualtrics on behalf of Intuit Credit Karma, forty-three percent (43%) of Americans actively seek financial advice or information online or through social media platforms, increasing to seventy-seven percent (77%) of Gen Z and sixty-one (61%) of millennials. Of those surveyed, thirty-seven percent (37%) of Gen Z and twenty five percent (25%) of millennials reported having gotten into trouble (*i.e. IRS audit*) after taking financial advice from social media/the internet. A quarter (25%) of Gen Z and twenty-three percent (23%) of millennials reported that they have been scammed by a bad actor portraying to offer financial advice or guidance on social media/online.[1]

As bankruptcy practitioners, we are increasingly seeing clients whose financial decisions are being influenced by what they've seen online. This ranges from misconceptions and misinformation, to "cheat codes" purporting to help consumers "game the system," to advice that openly encourages fraud. This article and presentation will analyze a variety of actual social media posts available on TikTok. We will explore the trends that are influencing consumers, dissect the advice being dispensed, and analyze its potential effects on our role as counselors.

II. Learning Objectives:

a. Explore common social media myths and scams that often make it more difficult for attorneys to advise their clients and set realistic expectations;

b. Analyze the intersection of credit reporting and bankruptcy; and

[1] See "Gen Z Feels Burned After Taking Financial Advice from Social Media, Credit Karma, February 18, 2025. https://www.creditkarma.com/about/commentary/gen-z-feels-burned-after-taking-financial-advice-from-social-media.

c. Discuss methods to use social media to positively influence and provide access to information in the public domain.

III. Social Media Pitfalls: Bad Advice on the Internet

A. Misinformation about Dischargeable Debts

TikTok Advice: **There are only 4 debts that are excluded from discharge.**

This video features an influencer named "Kenneth" talking about bankruptcy. He creates a straw man argument about bankruptcy by acting out a caricature of two people contemplating filing for bankruptcy. This creator uses language that makes it difficult to determine if he is truly incorrect or just outright deceptive. The primary issue with this video is its goal. The creator employs several logical fallacies, half-truths, and several outright lies to attempt to convince the viewer to hire him to help them instead of exploring bankruptcy. The creator starts the video by stating that there are types of debts that are non-dischargeable. He follows that comment by claiming that the following three things are non-dischargeable in bankruptcy:

(1) Child support payments

(2) Tax debts

(3) Student Loans

The video makes jokes about these types of debts and then proceeds to state the fourth kind of non-dischargeable debt: "Any debt that the court deems as non-dischargeable, typically debts incurred by fraud." This statement is vague and imprecise…and not worth critiquing meaningfully.

Practitioner Advice:

It is not necessarily incorrect to state that child support payments are non-dischargeable, but that does not mean the statement is not still incomplete or deceptive. 11 § U.S.C. 523(a)(5) uses the broader term "Domestic Support Obligations" as being non-dischargeable.

Stating that "tax debts" are non-dischargeable, without any limiting language such as "some" or "many" is both deceptive and false. There are tax debts that may be discharged in bankruptcy. Perhaps the most common type of tax debt that can be discharged is income tax. The limitations on what type of income tax debt is dischargeable/priority is commonly known as the "3-2-240" rule. Income taxes that become due in the three years prior to filing are priority debts under 11 U.S.C. § 507(a)(1)(A)(i). Further, 11 U.S.C. 523(a)(1)(A) incorporates them by reference, making them non-dischargeable. Meanwhile, 11 U.S.C. § 507(a)(1)(A)(i) is noticeably excluded from 11 U.S.C. § 1328. While a chapter 13 plan must provide for these priority debts, that does not mean that they cannot be discharged.

The two-year rule is found in 11 U.S.C. § 523(a)(1)(b)(ii). This rule prohibits discharge of taxes for which the return was filed within the two years prior to the filing of the bankruptcy petition. The 240-day rule is found in §507 (a)(8)(A)(ii) and incorporated as non-dischargeable by 11 U.S.C. 523(a)(1)(A). This rule makes any income tax debt a priority, non-dischargeable debt if the debt was assessed within 240 days of the filing date of the petition.

The content creator is correct that student loan debts are often non-dischargeable, but that is not always the case. If the debtor can show an "undue burden" then student loan debt may be discharged. Historically, courts have interpreted "undue burden" to render student loans virtually non-dischargeable under the *Brunner* Test. In recent years, this standard has been somewhat relaxed by Department of Education guidance and prosecutorial discretion.

B. Vague or Misleading Debt Repayment Strategies: "Manifest" Your Way Out of Debt and Focus on Investments First

TikTok Advice: **Manifest your way out of debt. Shifting your focus away from debt and towards investments will help you pay off old debt faster. Set aside income for investments first before paying any existing debt.**

There are a variety of content creators on social media who tout the concept of "manifesting." Whether it's manifesting a new job, a partner, wealth or material possessions, or even manifesting getting out of credit card debt, there are a litany of influencers who can help you "manifest" your way to a better life- as long as you click the link in their bio (and purchase the product they are selling.) Many influencers suggest that focusing on positive thoughts and energy can help eliminate debt and amass wealth.

Practitioner Advice:

Generally, our role as practitioners often comes with advising clients on lifestyle or mindset changes; good attorneys do their best to help clients help themselves. Broadly, the ideas of embracing a positive mindset and working towards financial growth can benefit most clients. However, this advice is obviously overly simplistic and likely only effective as a part of a larger concrete action plan. Related to the idea of "manifesting," influencers on social media delve into financial advice related to investments as a financial strategy. The idea that a client who is in a financial crisis should be first allotting ten percent of their monthly income to investments (rather than using that income for debt repayment) is problematic on a few levels, depending on the client's situation.

As a threshold issue, the notion that one should shift focus away from existing debts *entirely* and towards new investments is likely to lead consumers to delay or avoid creating a concrete repayment plan for existing debt. Additionally, clients would need to consider their existing interest rates and other financial priorities before deciding whether and how to invest when they have existing debts. For example, smart investing could look different depending on the nature of the client's debts. An attorney would advise a client who has $200,000 of student loan debt and

$0.00 of consumer credit card debt differently than he would advise a client who has $200,000 of consumer credit card debt.

C. Negotiations with Creditors

TikTok Advice: **Bankruptcy Courts and attorneys can be eliminated… entirely. Just negotiate with your creditors. The only creditors who get paid in bankruptcy are those in "first position," and other creditors get nothing.**

One of the primary reasons that bad financial advice on TikTok presents such a danger for the average consumer is the persuasive power of strangers on the internet. Many influencers are extremely convincing, and the majority of them have harnessed the power of confident speech, a good outfit, and an aesthetically appealing video.

One such influencer, who wears what appears to be an expensive suit, explains that people only file for bankruptcy because they do not know how to restructure debt on their own. He makes the bold claim that if people only knew how to restructure their debts, then "bankruptcy courts and attorneys would go out of business…literally". The evidence he proceeds to offer in defense of this proposition is a gross misrepresentation of bankruptcy's priority structure. The video also assumes that there is money to pay a creditor. What if there is no money left? How can someone restructure their debt and pay someone without capital? The "big boss" image that the speaker in the video portrays is simply an attempt to appeal to the viewer's ego. It is intended to make the viewer feel like bankruptcy is only for stupid people who aren't smart enough to manage debts on their own. And how does he propose that you become smart enough to handle these debts without bankruptcy? By following his account and, potentially, paying him money.

Practitioner Advice:

The threat of bankruptcy is often used to negotiate with creditors and is a powerful tool in a bankruptcy petitioner's arsenal. On a superficial level, the idea that a debtor can negotiate with his creditors prior to or instead of filing bankruptcy is sound; many of us devote a large amount of our practice to helping clients in financial workouts or restructuring outside of bankruptcy. Creditor negotiations can be highly effective and practical; many clients are able to lead those negotiations themselves with advice of counsel. Critically, however, the danger in taking advice from social media is that this particular influencer is omitting some key pieces of the puzzle. For example, 11 U.S.C. §507 creates a priority structure for unsecured debts. Secured creditors can be given a variety of different treatments in Chapter 11 or 13 plans. A full analysis of the debtor's options for treatment of certain creditors, and analysis of the potential outcomes in a bankruptcy case can allow a practitioner to drive creditor negotiations pre-bankruptcy towards the best result for the client.

There are a number of other considerations that go into advising clients related creditor negotiations; one obvious consideration is the creditor's willingness to work with the debtor. Social media selling the idea that a debtor who is in default has the option to just negotiate with creditors rather than file for bankruptcy creates unrealistic and oversimplistic expectations that could potentially lead a debtor awry (without the advice of counsel.)

D. Game the System: Various Methods to Purportedly Remove Bankruptcy From Your Credit Report

***TikTok Advice*: You can have your bankruptcy deleted from your credit report. If you dispute your prior bankruptcy, the credit bureaus cannot verify it.**

A masked creator on TikTok claims you can have your bankruptcy deleted from your credit report. Another video features a presenter advising viewers to place a security freeze on their credit reports and opt out of LexisNexis, then dispute their bankruptcy so the credit bureaus cannot verify

it. Another influencer advises calling the *county clerk's* office to request a certification that there is no bankruptcy on your record.

Practitioner Advice:

While it's true that 15 U.S.C. § 1681c(a)(1) limits how long a bankruptcy can be reported (typically 10 years from the date of discharge or dismissal), this does not mean you can force its removal before that time if the report is accurate. For Chapter 13 bankruptcies, credit bureaus may remove them after seven years, but that is due to internal industry policy—not statutory requirement. Attempting to dispute or remove a bankruptcy that you know is accurate amounts to fraud. Under 15 U.S.C. § 1679c, consumers have the right to dispute **inaccurate** information only—not valid public records.

The idea in the LexisNexis dispute video is to exploit a gap in verification procedures; however, if you did in fact file bankruptcy and are pretending otherwise, you're committing fraud. Consumer protection laws do not shield fraudulent conduct, and this advice encourages people to make false statements to federally regulated agencies.

All three of these videos have one thing in common: they are advising people to send fraudulent disputes to credit Reporting Agencies (CRA). Yes, there are tricks that can be used to fraudulently induce the CRAs to remove things from your report. These types of disputes generally do not have direct consequences for the offender. The CRAs rarely report or pursue people who file fraudulent disputes unless it is a defense for the bureau in on-going litigation. The true victim is the system itself.

It has become common for Debtors to demand that their attorneys assist them in removing the bankruptcy indicator from the Debtor's credit report because they "heard that everyone should be doing it." Every bankruptcy attorney should familiarize themselves with the Fair Credit

Reporting Act ("FCRA") and the Credit Repair Organizations Act ("CROA"). The FCRA was designed to dispute inaccurate or misleading information. It may not be used to attempt to fraudulently induce a creditor into removing accurate information. Any attorney who knowingly attempts to assist a client with removing accurate information using these methods is assisting in illegal activity.

CROA prohibits "bars companies offering credit repair services from demanding advance payment, requires that credit repair contracts be in writing, and gives consumers certain contract cancellation rights."[2] One very simple way to help clients who have fallen prey to these scams is to simply fight fire with fire. Tell your client to google "CROA" and ask if the person who gave them this advice asked them for money. Of course, social media credit repaid scam artists ALWAYS ask for money. That is a clear violation of CROA that any client can understand. Once a client understands that they are being scammed, it is infinitely easier to convince them that they cannot and should not send fraudulent disputes. Instead, debtors should focus on rebuilding credit the right way.

These inane, constant, and fraudulent disputes have caused serious damage to the credit system. CRAs are overloaded with frivolous disputes, making it more difficult to identify and fix legitimate disputes. CRAs have also begun to use these disputes as a defense when they fail to properly re-investigate legitimate disputes. The CRA argument sounds something like this: "we reasonably thought this was a frivolous dispute because we get SO MANY and we have to do our best to weed out fraudulent ones". Courts have begun to show sympathy to this argument, sometimes causing legitimate victims to be unable to recover damages as a result.

CROA Amendments and Bankruptcy Advertising

[2] https://www.ftc.gov/legal-library/browse/statutes/credit-repair-organizations-act.

Bi-partisan legislation has been introduced to attempt to resolve this issue. The Ending Scam Credit Repair Act (ESCRA) seeks to prohibit the system from being jammed up with duplicative disputes. While this will help the system generally, it could also lead to more data furnishers and CRAs using the "apparent frivolous dispute" defense. As it is currently written, CROA can be interpreted to prohibit bankruptcy attorneys from advertising that they will assist clients with credit reporting errors post-discharge. Even if they do not intend on charging up-front fees for this assistance. CRAs have sued bankruptcy attorneys under the theory that they were violating CROA by advertising post-discharge credit assistance. The theory is that the offer of free post-discharge assistance is an attempt to induce payment for bankruptcy services. This twisted argument has had a chilling effect on bankruptcy advertising. That void has been filled by social media influencers who claim that bankruptcy will destroy your credit forever. If ESCRA is passed, bankruptcy attorneys will be able to fight back. The door will be open for bankruptcy attorneys to advertise the truth about post-bankruptcy credit.

Some bankruptcy attorneys are pushed into attempting burdensome reaffirmations for the sole purpose of "rebuilding credit". Clients will complain because they have heard over and over that they must reaffirm a debt in order to rebuild credit. This is simply not true. The United States Bankruptcy Court for the Southern District of California has concluded that ". . . reaffirming the debt cannot be said to affirmatively help debtors rebuild their credit since the benefit is minimal at best and offset by more severe damage to the credit score if the debtors default."[3]

Credit Reporting and Student Loans

Many influencers on social media claim to have successfully removed their student loans from their credit report. While the credit bureaus may occasionally suppress or delete reporting—

[3] In re Anzaldo, 612 B.R. 205, 218 (Bankr. S.D. Cal. 2020)

especially in response to disputes—this does not erase the debt itself. The Department of Education retains full collection authority. Under 20 U.S.C. § 1095(a), the Secretary of Education or a guaranty agency can garnish up to fifteen percent (15%) of your disposable income without a court judgment. They may also intercept your federal tax refunds. So, while the loan may be temporarily "invisible" on your credit report, it still very much exists and can be aggressively collected.

E. Fraudulent Tax Strategies

***TikTok Advice*: Just Write it Off!**

In this video, a very popular influencer encourages you to "write off" a private chef for your family as a "business expense." This particular video has over **1.5 million views.**

Practitioner Advice:

It goes without saying- do not commit fraud! Some business expenses are legitimately tax deductible. Practitioners can advise clients on what those legitimate business expenses are and direct them to a CPA for additional assistance. However, the idea that you can funnel personal expenses, like family dinners (and the cost of the private chef who prepares those dinners) through your business and claim a tax deduction is inviting misconduct and encouraging tax fraud.

Taking tax advice from a non-CPA can be risky and invite major consequences. The litany of influencers styling themselves as "tax experts" present a real danger for the average consumer, especially those younger generations seeking financial and tax advice on social media as they may be more impressionable, have less background knowledge regarding tax strategies, and may not be inclined to file taxes with the help of a licensed CPA (given the expense and given that a number of online tax preparation services offer a "do it yourself" option.)

For what it's worth- H&R Block quickly took to TikTok to post in the comments on this video, saying *"For anyone in the comments: don't do this."*

F. Few and Far Between: The Good Side of Social Media

Not all TikTok content is harmful. There are some helpful and accurate videos and resources out there. Specifically, there is a creator who discusses Wells Fargo's internal policy of freezing deposit accounts when a bankruptcy is filed and the total combined balance exceeds $5,000. In a recent real-world case, a debtor had three adult daughters with separate Wells Fargo accounts, and he was listed as a joint owner on each—despite not using the accounts. When he filed bankruptcy, all three accounts were frozen. In Georgia, O.C.G.A. § 7-1-812(a) provides that funds in joint accounts belong to each party in proportion to their individual contributions, unless clear and convincing evidence proves otherwise. Using that statute, the accounts were ultimately unfrozen—but it took nearly 30 days. In this case, the TikTok content served as a useful warning to both debtors and practitioners.

IV. Conclusion

There are a variety of strategies practitioners can employ when counseling clients who have taken advice from social media. A few parting suggestions for weaning clients away from dangerous online advice would include:

- **Identify Online Influences**: During initial consultations, ask clients about any financial advice they have followed recently, particularly from social media. This can help identify potential issues early.
- **Provide Reality Checks**: Educate clients on the risks of following unverified online advice, including the long-term consequences that are often glossed over by influencers.
- **Collaborate with Trustees**: Communicate proactively with trustees to explain any unusual financial moves that were influenced by social media, minimizing delays or misunderstandings.
- **Client Education Materials**: Develop or provide educational resources that debunk

common social media financial myths, helping clients better understand the realities of debt and bankruptcy.

• **Monitor Credit Repair Attempts**: If clients have tried credit repair schemes, review the documentation to ensure it will not adversely affect the bankruptcy process. Address any misleading disputes with appropriate disclosures.

APPENDIX A:

Case Law: ***In re Anzaldo***

APPENDIX B:

Proposed Legislation

612 B.R. 205
United States Bankruptcy Court, S.D. California.

IN RE: Beatriz ANZALDO, Debtor,

BANKRUPTCY NO: 19-00882-MM7
|
Signed January 7, 2020
|
DATE: October 24, 2019, TIME: 3:00 p.m., CRTRM: 1

Synopsis

Background: After Bankruptcy Court ordered car lender to show cause, as it appeared lender might have pressured Chapter 7 debtor to reaffirm debt, proceedings revealed other issues about the reaffirmation agreement.

Holdings: Upon reviewing reaffirmation agreement, the Bankruptcy Court, Margaret M. Mann, J., held that:

[1] attorney's certification for reaffirmation agreement was improper and understated debtor's ability to make car loan payment;

[2] attorney violated Rule 9011 by filing improper certification for reaffirmation agreement;

[3] striking attorney's improper certification was warranted;

[4] attorney's violation of Rule 9011 by filing improper certification for reaffirmation agreement did not warrant further sanctions beyond striking certification;

[5] reaffirmation agreement was unenforceable as a result of attorney's invalid certification of the agreement; and

[6] reaffirmation agreement was not in debtor's "best interest" and thus could not be approved.

Ordered accordingly.

West Headnotes (17)

[1] Bankruptcy Reaffirmation

For a reaffirmation agreement to be immediately enforceable, it must be signed before the discharge is entered, include the disclosures of debtors' monthly income and expenses, including the reaffirmed debt, be certified by the debtor's attorney, and be enforceable under state law. 11 U.S.C.A. § 524.

[2] Bankruptcy Reaffirmation

Requirements of bankruptcy statute must be strictly complied with in order for reaffirmation agreement to be enforceable. 11 U.S.C.A. § 524.

[3] **Bankruptcy** Reaffirmation

If a reaffirmation agreement does not comply with requirements of bankruptcy statute, it is void and unenforceable without any involvement of the court. 11 U.S.C.A. § 524.

[4] **Bankruptcy** Judicial hearing and approval

Bankruptcy court's review of reaffirmation agreement is necessary in three circumstances: (1) if the certification is not proper, (2) if a presumption of undue hardship arises, or (3) if the debtors are unrepresented. 11 U.S.C.A. § 524.

3 Cases that cite this headnote

[5] **Bankruptcy** Judicial hearing and approval

Where debtors are unrepresented, the bankruptcy court must hold a hearing under to ensure the debtor is informed of the legal consequences and voluntary nature of reaffirming a debt. 11 U.S.C.A. § 524.

[6] **Bankruptcy** Judicial hearing and approval

When reviewing a reaffirmation agreement, the bankruptcy court must determine whether the agreement is in the debtor's best interest and not an undue hardship, regardless of whether an undue hardship presumption arises. 11 U.S.C.A. § 524.

4 Cases that cite this headnote

[7] **Bankruptcy** Judicial hearing and approval

Bankruptcy court's review of reaffirmation agreement is required if disclosures reflect a presumption of undue hardship arises because debtor's budget is negative, even if attorney certifies the agreement; disapproval of the agreement is mandated unless the debtor can rebut the presumption by identifying additional sources of funds to make the payments. 11 U.S.C.A. § 524.

[8] **Bankruptcy** Judicial hearing and approval

When the creditor of a reaffirmed debt is a credit union, there is no presumption of undue hardship, and consideration of the debtor's best interest is not permitted. 11 U.S.C.A. § 524.

3 Cases that cite this headnote

[9] **Bankruptcy** Judicial hearing and approval

Even if no presumption of undue hardship technically arises when reviewing reaffirmation agreement, other information in the record can authorize the bankruptcy court to review whether the debtor can afford the payment. 11 U.S.C.A. § 524.

1 Case that cites this headnote

[10] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Judicial hearing and approval

Although the common avenue to evaluating attorney's certification of reaffirmation agreement is Rule 9011, invoking that rule is not necessary to invalidate a flawed certification. 11 U.S.C.A. § 524; Fed. R. Bankr. P. 9011.

[11] **Bankruptcy** Grounds for approval or rejection

Attorney's certification for reaffirmation agreement was improper and understated Chapter 7 debtor's ability to make car loan payment, where debtor was misinformed by her attorney about the legal effect and consequences of reaffirming her debt, as counsel mistakenly assumed the agreement was necessary to protect her car from repossession and to improve her credit score, and misinformed debtor as to the risk of a deficiency judgment, and debtor's budget information was unreasonable, giving rise to a presumption of undue hardship. 11 U.S.C.A. § 524.

1 Case that cites this headnote

[12] **Bankruptcy** Judicial hearing and approval

Attorney certification requirement for reaffirmation agreements is strictly construed as necessary to protect debtors from compromising their fresh start by making unwise agreements to repay debts. 11 U.S.C.A. § 524.

[13] **Bankruptcy** Judicial hearing and approval

Striking attorney's improper certification was warranted, which was not based on an objective assessment of debtor's ability to repay the reaffirmed debt and misinformed debtor about numerous aspects of the reaffirmation decision. 11 U.S.C.A. § 524.

[14] **Bankruptcy** Frivolity or bad faith; sanctions

Attorney violated Rule 9011 by filing improper certification for reaffirmation agreement, which was not based on an objective assessment of debtor's ability to repay the reaffirmed debt and misinformed debtor about numerous aspects of the reaffirmation decision. 11 U.S.C.A. § 524; Fed. R. Bankr. P. 9011.

[15] **Bankruptcy** Frivolity or bad faith; sanctions

Bankruptcy Judicial hearing and approval

Attorney's violation of Rule 9011 by filing improper certification for reaffirmation agreement, which was not based on an objective assessment of debtor's ability to repay the reaffirmed debt and misinformed debtor about numerous aspects of the reaffirmation decision, did not warrant further sanctions beyond striking certification; non-monetary sanctions sufficed to deter future conduct since the problem was informational. 11 U.S.C.A. § 524; Fed. R. Bankr. P. 9011.

[16] **Bankruptcy** Reaffirmation

Reaffirmation agreement was unenforceable as a result of attorney's invalid certification of the agreement, which was not based on an objective assessment of debtor's ability to repay the reaffirmed debt and misinformed debtor about numerous aspects of the reaffirmation decision. 11 U.S.C.A. § 524.

[17] **Bankruptcy** Grounds for approval or rejection

Reaffirmation agreement that was improperly certified by attorney, as it was not based on an objective assessment of debtor's ability to repay the reaffirmed debt and misinformed debtor about numerous aspects of the reaffirmation decision, was not in Chapter 7 debtor's "best interest" and thus could not be approved. 11 U.S.C.A. § 524.

1 Case that cites this headnote

Attorneys and Law Firms

***208** Andrew J. Miller, San Diego, CA, for Debtor.

MEMORANDUM DECISION

MARGARET M. MANN, CHIEF JUDGE, United States Bankruptcy Court

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") erected a structure of safeguards for debtors in bankruptcy who reaffirm certain debts, thereby waiving their discharge as to those debts. For personal property secured loans, including primarily car loans, this structure requires debtors to first indicate an intent to reaffirm the debt at the outset of the case, and then sign a reaffirmation agreement with the lender. This agreement must include a certification from counsel that the decision to reaffirm the debt was informed, voluntary, and did not impose an undue hardship. If these safeguards are properly met, court review is limited, and the agreement becomes enforceable 60 days after it is filed.

But if the debtors are not represented by an attorney when negotiating the agreement, the court must step in and review the agreement and discuss the consequences with the debtors. Court review is also required, regardless of whether the debtors are represented, if the agreement reflects budgeted income less than the debtors' expenses including the reaffirmed debt. Where the court becomes concerned about the validity of the counsel's certification as factually sound, the court is also obliged to review the reaffirmation decision.

In this case, the court's concerns arose when the reaffirmation agreement reflected a slight budget surplus resulting from significantly understated expenses. The agreement also concealed the car loan deficiency reflected in the schedules creating a risk of further financial distress for Anzaldo if she were to default after the bankruptcy. The court scheduled a hearing and questioned counsel about these problems, which were conceded. But counsel could not explain why he certified the agreement as in Anzaldo's best interest under the circumstances. Instead, he admitted that he certified the agreement to protect the car from repossession and to help Chapter 7 Debtor Beatriz Anzaldo rebuild her credit.

The court issued an order to show cause ("OSC") to Anzaldo's car lender, Wells Fargo Bank, N.A. ("WF"), because it appeared WF may have been pressuring Anzaldo to reaffirm the debt. While those concerns have been assuaged, the proceedings revealed that counsel here, and other attorneys who appear in this court, are misinformed about how their clients' credit scores are impacted by reaffirmation agreements, which affects how they discharge their responsibilities in counseling reaffirmation decisions. The court will strike counsel's certification because it was admittedly misinformed. Alternatively, the court will disapprove the agreement.

This opinion is published to attempt to assist consumer bankruptcy attorneys in advising their clients about the complex reaffirmation process. Despite the questions which remain unanswered despite the testimony presented by WF about the credit reporting industry, some guidance may be provided by the record in this case.

I. Factual Background

A. Anzaldo's Finances and Reaffirmation Decision.

Anzaldo's income is well below the median for this district, despite her stable employment. ***209** She continues to work as a custodian at the University of California San Diego, as she has for the past 13 years, commuting more than 40 miles to work each day. Her attempts to manage her finances under a frugal, but unrealistic, budget led to unpaid debts and the need to file bankruptcy. In both her schedules and her reaffirmation agreement, Anzaldo reports a below median monthly income of $2,247.03, with expenses of $2,232.14 (including the $436.86 per month payment to WF), or less than half the national standard. This yields a budget surplus of merely $14.89 to cover unexpected expenses or contingencies. A comparison of Anzaldo's expenses with the applicable standards follows:

	Debtor's Sch. J Expenses	National and Local Standards
Food & Housekeeping Supplies	$200	$369[1]
Apparel & Services	$25	$89
Personal Care Products & Services	$25	$38
Miscellaneous[2]	$202.28	$151
Healthcare Expenses[3]	$50	$52
Utilities/Housing Expenses (not including mortgage/rent)[4]	$235	$502
Mortgage/Rent	$858	$1,751
Transportation Operating Costs[5]	$200	$261
Total	$1,795.28	$3,213

[**Editor's Note**: The preceding image contains the reference for footnote[1,2,3,4,5]].

Anzaldo owes WF $13,837.02 secured by her 2014 Honda CR-V. The car is her most valuable asset and the car loan is her largest debt. The car is over-encumbered. It was valued at $11,000 in Anzaldo's schedules, although the reaffirmation agreement values the car at $15,125, an increase of over a third. This delta resulted from different valuation measures. WF ***210** used retail value and Anzaldo used blue book value. The testimony was undisputed that Anzaldo's value was a more accurate prediction of what would be achieved if she defaulted and the car was sold after repossession. Her other debts, which total approximately $12,000, are for consumer goods, internet service, or basic living expenses incurred as an apparent result of her inability to afford expenses on her budget.

Like most debtors in this district, the lack of reliable public transportation means having a car is critical to Anzaldo's livelihood. *See Pamela Foohey et al., Driven to Bankruptcy*, 55 Wake Forest L. Rev. (forthcoming 2020) (manuscript at 2) (on file with authors) ("Household financial distress can threaten automobile ownership and, with it, the day-to-day life stability and upward mobility that car ownership brings.") (citing AnnaMaria Andriotis, Ken Brown & Shane Shifflett, *Families Go Deep in Debt to Stay in the Middle Class*, Wall St. J. (Aug. 1, 2019), https//www.wsj.com/articles/families-go-deep-in-debt-to-stay-in-the-

middle-class-11564673734) (identifying auto loans as a main component of economic risk as American families go deeper into debt to maintain middle class lifestyles). Living 40 miles from work, Anzaldo needs her car. She intends to pay her debt and reaffirmed it by signing the reaffirmation agreement.

Her counsel for an unexplained reason signed the schedules and the disclosures in the reaffirmation agreement with the understated budget. In fact, he certified that her income and expenses were enough to make the monthly payment and that it would not impose an undue hardship in the agreement. He also certified that Anzaldo was fully informed of the legal effect and consequences of reaffirmation, when he admitted based on the testimony at the OSC hearing that neither he nor his client understood the ramifications of reaffirmation on her credit score.

B. Procedural History

The court's concerns about Anzaldo's budget led it to schedule a hearing for April 25, 2019. Only counsel appeared since Anzaldo did not want to miss work. Counsel volunteered that he had discussed the deficiency with his client, but it was her only car. He continued:

> Wells Fargo, without the reaffirmation, won't report the payments on her credit report and won't help her rebuild her credit.
>
> They - without the reaffirmation agreement, they deem it as discharged. And if you tell them that it just passes through, they can't repo. But so in that sense, I mean, she's asking to help her credit. It's - you know, according to Wells Fargo, it's not upside down. On our schedules, it was upside down by three grand or so. She's able to make the payments. She wants to go forward with the reaffirmation agreement.

Anzaldo thus had two objectives in reaffirming the debt; to protect her car from repossession and to rebuild her credit score. The court requested evidence from counsel as to what he understood to be WF's credit reporting practices and issued the OSC. WF responded to the OSC averring it does not repossess a debtor's car if the payments are current, regardless of ***211** whether the debt is reaffirmed.[6] It also explained its credit reporting practices are standard in the industry and not coercing or harassing.

WF's response raised other issues about the reaffirmation that the court noted in a tentative ruling. WF then supplemented its response with a declaration from its Vice President in Operations Risk/Control, Amanda Gilroy, who did not appear to testify. WF also submitted a declaration from a consumer credit reporting expert, Dean Binder, who has been employed by both Equifax Credit Information Services and by the Fair Isaac Corporation, who compiles and provides “FICO” credit scores, widely used in the consumer credit and lending environment.

The court questioned Gilroy, Binder, and Alisa A. Giventel at the OSC hearing on October 24, 2019. Giventel was identified as an expert on the Fair Credit Reporting Act (“FCRA”). It also questioned counsel who was ordered to attend the hearing. After the hearing, since the experts could not answer the court's questions, WF was directed to supplement the record with testimony from Joe Ibarra, a bankruptcy manager with WF, which it filed. The matter was then taken under submission.

C. Impact of Credit Reporting Practices on Anzaldo's Reaffirmation Decision

The industry standard, which WF follows, is not to report payments after bankruptcy unless the debt is "reaffirmed". The testimony about when a debt should be categorized as "reaffirmed" is murky at best, however.The CRAs then prepare credit reports with the data and calculate consumer credit scores.

All furnishers, including WF, who access credit reports must report data consistent with the Credit Data Industry Association's (“CDIA's”) Credit Reporting Resource Guide (“CRRG”). The CDIA is a trade association comprised of representatives who are primarily Experian, Equifax, Transamerica, Transunion, and Novus. The CDIA publishes the CRRG to advise furnishers how to

provide accurate information through the CDIA's electronic reporting system referred to as "Metro 2." As the CRRG is designed to assist furnishers in electronic reporting through the Metro 2 system, it is often referred to as the "Metro 2 Guidelines." These guidelines are generated by the industry for its purposes and not in response to any regulatory requirement.

Although furnishers must be compliant to participate in the Metro 2 system, they retain discretion on how to interpret and follow the guidelines. The system is not static since the Metro 2 Guidelines are updated annually. The CDIA is expected to publish revisions to these guidelines in the next year to address "practical complexities faced by furnishers in the bankruptcy context." The upcoming revisions are intended to prevent the need for edits to loan level data in the bankruptcy context, but how that will be accomplished is unknown at this time. Changes to the Metro 2 system could render some aspects of this decision obsolete.

***212** The Metro 2 system currently records four bankruptcy events for an account such as a car loan: 1) the filing of the bankruptcy; 2) the period after the bankruptcy and when it is resolved; 3) reaffirmation of a debt or lease assumption; and 4) the entry of a discharge. Information on these events is either furnished by the lenders or obtained from public records.

The industry standard, which WF follows, is not to report payments after bankruptcy unless the debt is "reaffirmed," the testimony about when a debt should be categorized as "reaffirmed" is murky at best. WF's communications with Anzaldo's counsel suggested that WF would not furnish payment information if the court denied approval of the agreement. But neither of WF's experts could provide a knowledgeable response to the court's questions about whether the agreement had to be enforceable before the payments are reported. The only specific evidence provided by WF in response to the court's question whether a determination of enforceability of a reaffirmation was germane was from Ibarra, who averred:

> For auto accounts of Chapter 7 debtors who agree to reaffirm their debts, Wells Fargo does not furnish the reaffirmation consumer information indicator until after the period to rescind the reaffirmation agreement has expired.

This testimony suggests that WF considers a debt to be reaffirmed after the rescission period expires 60 days after it is signed and filed under 11 U.S.C. § 524(c)(4)[7], regardless of whether the agreement is later disapproved or rendered unenforceable. Anzaldo signed, filed, and never rescinded the reaffirmation agreement. Since more than 60 days has elapsed, then WF may already be reporting the payments Anzaldo has been making since this bankruptcy was filed. Further clarification for the benefit of the consumer bankruptcy community is in order.

But even if WF is continuing to report Anzaldo's payments to the CRA's as she hoped, this will not necessarily rebuild her Anzaldo's credit score. Binder's opinion is to the contrary. He avers in his declaration:

> The reporting of positive payment history on an account that has a discharged in bankruptcy indicator would not be beneficial for a consumer from a scoring perspective.

He explained this is because:

> An account included in bankruptcy is considered a major derogatory by FICO. As such, any positive payment history would not be evaluated by the scoring model.

Binder concluded that the impact of entering into the reaffirmation agreement on a debtor's credit score is "none if very low." Binder also noted that entering into a reaffirmation agreement and having payments reported could also backfire because reporting newer negative late payment information would lower the consumer's credit score. In short, Binder's view is that the negative impact of missed payments outweighs the benefit of any positive payments. Binder declined to hypothesize about what would happen if furnishers reported payments to the CRA if the debt was not reaffirmed.

Neither Anzaldo nor counsel were aware of this testimony about the impact of reaffirmation on Anzaldo's credit score when she decided to reaffirm the debt. For this reason, counsel admitted at the OSC hearing he would have given different advice based on information he learned in these proceedings. Counsel would now advise his ***213** clients of WF's policy not to repossess the car if a debtor is current on the payments, and of WF's reporting practices. Knowing about the repossession policy, counsel conceded that Anzaldo's only reason to reaffirm the debt was to improve her credit score, which is of dubious value.

II. The Court Has Authority to Examine Anzaldo's Reaffirmation Agreement

WF contends this court lacks authority to review its reaffirmation agreement with Anzaldo for two reasons; first, because her attorney filed a § 524(c)(3) certification that was timely and technically proper so that the agreement became enforceable 60 days after it was filed with the court. Second, no presumption of undue hardship arose under § 524(m)(1) because her budget was positive. WF relies on *Bay Fed. Credit Union v. Ong (In re Ong)*, 461 B.R. 559, 562 (9th Cir. BAP 2011) (reaffirmation agreement where budget was positive became immediately enforceable after expiration of the rescission period for debtors represented by counsel provided the certification complies with § 524(c) and the presumption of undue hardship is not applicable since the lender was a credit union). Anzaldo's case involves different facts, and requires a different outcome, however.

A. The Limits to Immediate Enforceability

[1] [2] [3] For a reaffirmation agreement to be immediately enforceable under § 524(c), it must be signed before the discharge is entered, include the disclosures of debtors' monthly income and expenses under § 524(k)(6)(a), including the reaffirmed debt; be certified by the debtor's attorney, and be enforceable under state law. *Salyersville Nat'l Bank v. Bailey (In re Bailey)*, 664 F.3d 1026, 1031 (6th Cir. 2011) (interpreting § 524(c)). The requirements of § 524(c) "must be strictly complied with in order for a reaffirmation agreement to be enforceable." *In re McHale*, 593 B.R. 670, 675 (Bankr. M.D. Fla. 2018); *Mejia v. Partners for Payment Relief LLC (In re Mejia)*, 559 B.R. 431, 439 (Bankr. D. Md. 2016). If the agreement does not comply with § 524(c), it is void and unenforceable without any involvement of the court. *Venture Bank v. Lapides*, 800 F.3d 442, 446 (8th Cir. 2015) (reaffirmation agreement that was never filed with the court is void and not enforceable).

Although all the boxes necessary for enforceability of Anzaldo's reaffirmation agreement were checked, a superficial review is not appropriate here.

B. Roles of Attorneys and Courts Regarding Reaffirmation Agreements

Both the oversight authority of the court and the role of debtors' attorneys in the reaffirmation process were emphasized in the BAPCA. *In re Laynas*, 345 B.R. 505, 516 (Bankr. E.D. Pa. 2006) (noting court review authority expanded under BAPCPA with the enactment of § 524(m) and Fed. R. Bankr. P. 4008). The attorneys' role remains paramount, however. *In re Minardi*, 399 B.R. 841, 847 (Bankr. N.D. Okla. 2009) ("[W]hether an attorney represented a debtor during the course of negotiating a reaffirmation agreement is of critical importance in determining when and if the agreement becomes effective, and whether the Court has any remaining obligations under § 524(d) with respect to the agreement after it is filed.") (emphasis in original). *In re Miller*, 575 B.R. 87, 90 n.4 (Bankr. E.D. Pa. 2017) (proper certification "removes all judicial review of a debtor's reaffirmation agreement").

[4] [5] [6] Court review is necessary in three circumstances: if the certification is not proper, if a presumption of undue ***214** hardship arises, or if the debtors are unrepresented. Where debtors are unrepresented, the court must hold a hearing under §§ 524(c)(6) and (d) to ensure the debtor is informed of the legal consequences and voluntary nature of reaffirming a debt. The court must determine whether the reaffirmation agreement is in the debtor's best interest and not an undue hardship, regardless of whether an undue hardship presumption arises under §§ 524(c)(6)(A)(i) and (ii). *San Diego Cty. Credit Union v. Obmann (In re Obmann)*, No. CC-11-1156-HKiMk, 2011 WL 7145760, at *4, 2011 Bankr. LEXIS 5298, at *10-11 (9th Cir. BAP Dec. 9, 2011), cited in *Ong*, 461 B.R. at 563.

[7] [8] [9] Second, court review is also required if the § 524(k) (6) (A) disclosures reflect a presumption of undue hardship arises under § 524(m) because the debtors' budget is negative, even if the attorney certifies the agreement. Disapproval is mandated unless the debtor can rebut the presumption by identifying "additional sources of funds to make the payments." § 524(m)(1). If the lienholder is a credit union as in *Ong*, 461 B.R. at 562-63, the presumption does not apply, and consideration

of the debtor's best interest is not permitted. *Ong*, 461 B.R. at 562-63. Even if no presumption of undue hardship technically arises, other information in the record can authorize the court to review whether the debtor can afford the car payment as required by § 524(m). *In re Griffin*, 563 B.R. 171, 173 (Bankr. M.D.N.C. 2017) (court reviewed agreement even though the reaffirmation agreement reflected expenses exactly equal to monthly income); *In re Carrington*, 509 B.R. 337, 341 (Bankr. E.D. Wash. 2014) (presumption of undue hardship arose under § 524(m)(1) where schedules showed a negative monthly income and the reaffirmation agreement did not); *In re Caldwell*, 464 B.R. 694, 695 (Bankr. W.D. Pa. 2012) (presumption of undue hardship arose under § 524(m)(1) because the reaffirmed payment was not listed on the debtor's schedules and the positive monthly income on the schedules was insufficient to make the payment on the reaffirmed debt); *In re Payton*, 338 B.R. 899, 903 (Bankr. D.N.M. 2006) (court need not "rely only on the income and expense figures set out in part D of a reaffirmation agreement"); *Laynas*, 345 B.R. at 511 (the court should not "woodenly" review the reaffirmation agreement budget because "sometimes looks deceive").

[10] The third review requirement is for the court to "determine the bona fides" of an attorney's § 524(c) (3) certification. Although the common avenue to evaluating the certification is Fed. R. Bankr. P. 9011[8], invoking that rule is not necessary to invalidate a flawed certification. *Miller*, 575 B.R. at 89 n.2; *In re Izzo*, 197 B.R. 11, 12 (Bankr. D.R.I. 1996) (improper reaffirmation declared void without expressly relying on Rule 9011.) Many cases apply Rule 9011 instead. *In re Vargas*, 257 B.R. 157, 160 (Bankr. D.N.J. 2001) (attorney required to disgorge fees under Rule 9011); *In re Melendez*, 235 B.R. 173, 196-97 (Bankr. D. Mass. 1999) (Rule 9011 permitted the attorney certification to be reviewed); *In re Bruzzese*, 214 B.R. 444, 450-51 (Bankr. E.D.N.Y. 1997); *In re Hovestadt*, 193 B.R. 382, 383 (Bankr. D. Mass. 1996) (a pre-BAPCPA case in which the court held it had "an independent obligation to review reaffirmation agreements to ensure that all the elements of section 524(c) are fully satisfied," including whether the attorney violated Rule 9011 in executing the applicable certification);

***215** The court's review authority was triggered in this case because Anzaldo was misinformed by her attorney about the legal effect and consequences of reaffirming her debt, and because her budget information was unreasonable giving rise to a presumption of undue hardship.

III. The Attorney Certification Was Misinformed and Understated Anzaldo's Ability to Make the Payment under the Car Loan

A. The Reaffirmation Agreement and Schedules Stated an Unrealistic Budget

[11] Anzaldo's vulnerable financial condition creates a significant risk of default on the reaffirmed debt that counsel never explained. While Anzaldo has a steady job, her annual income is 25% below the California median family income for her family size. She has no non-exempt assets and her only significant asset, other than her state pension, is her over-encumbered car at issue here. Her net positive income is only the result of expenses which fall well below the median average and appear to be unsustainable given her bankruptcy filing.

Neither Anzaldo, nor her attorney, explained how she can keep her monthly expenses $1,417.72 below the median average, beyond a vague reference to Anzaldo having roommates. Her low rent may be unsustainable. If her expenses were listed at the median average, her monthly income would be a negative $596.97, and she would not be able to afford the reaffirmed payment. *See* 4 *Collier on Bankruptcy* ¶ 524.04 (16th ed. 2019) (Internal Revenue Service standards can be used to "assess whether debtors have ... inadequately budgeted for food and other necessities").[9]

Other evidence in the record reflects that Anzaldo struggles to cover her living expenses. Although she was current on her car payments at the various hearings in this case, the nature of the unpaid debts she scheduled indicate she had to resort to credit cards for other purchases and living expenses such as cable and phone bills. There is no evidence Anzaldo spends money on luxury items or is profligate. Because Anzaldo will not be able to seek another discharge for eight years under § 727(a) (8), her access to bankruptcy relief will be limited.

Because this unrealistic budget leaves Anzaldo at risk of default in making her car payments, despite her best intentions, the court finds a presumption of undue hardship arose under § 524(m). Since this presumption was not rebutted by Anzaldo's counsel, the agreement cannot be approved.

B. Anzaldo was Misinformed that Reaffirmation was Necessary to Protect the Car from Repossession

Counsel certified the reaffirmation agreement was in Anzaldo's best interest mistakenly assuming this was necessary to protect her car from repossession. He admitted his error after WF responded to the OSC and he learned Anzaldo did not have to reaffirm the debt to manage the repossession risk. This policy is not unusual. As a matter of economics, many lenders, including WF, will not repossess debtors' cars unless they default on the ***216** payments.[10]

[12] Counsel's certification here erroneously stated that Anzaldo was "fully advised ... of the legal effect and consequences" of reaffirming her debt as required by § 524(c)(3), when he later admitted that his advice was flawed. As such, the certification must be treated as void for failing to strictly comply with the requirements of § 524(c)(3). *Ong*, 461 B.R. at 563-64 (attorney certifications can be disregarded "when close scrutiny compels the conclusion that the elements set forth in § 524(c) are either lacking altogether, insufficient or void as having been filed in violation of Rule 9011"). The certification requirement is strictly construed as necessary to protect debtors from compromising their fresh start by making unwise agreements to repay debts. *Gordon v. Hines (In re Hines)*, 147 F.3d 1185, 1190 (9th Cir. 1998). Counsel's certification does not meet this exacting standard.

C. Anzaldo was Misinformed that Reaffirmation was Necessary to Improve her Credit Score

Anzaldo's primary reason to reaffirm the car, once she learned that reaffirmation was not necessary to protect her car from repossession, was to improve her credit score. This decision was also misinformed. WF's expert opined that reporting the payments after bankruptcy does not have much of a positive impact on her credit score and the negative impact of missing a payment is exacerbated. It may also be that Anzaldo's payments have been and will continue to be reported by WF to the CRAs since she has not rescinded the agreement, and approval by the court is not apparently a factor as to whether payments will be reported.

This misunderstanding is significant. After hearing the testimony, counsel in fact admitted he would give different advice to his clients in the future. Again, strictly construed, the certification is invalid for this additional reason.

D. Anzaldo Was Misinformed of the Risk of a Deficiency Judgment

Anzaldo's counsel also failed to give due consideration to the detriment of waiving her discharge in reaffirming the car loan in explaining his decision to the court. That reaffirmation is a detriment has been recognized by the Ninth Circuit. *McClellan Fed. Credit Union v. Parker (In re Parker)*, 139 F.3d 668, 671 (9th Cir. 1998) (only car lenders and not debtors benefit from reaffirmation agreement because debtors are required to pay any deficiency as an unsecured debt upon default by waiving their discharge).

The court cannot find counsel fully advised Anzaldo of the consequences of a default as required by § 524(c)(3)(c)(ii). The risk of a deficiency judgment here is significant because Anzaldo's schedules reflect her car is encumbered by a debt greater than its value. Counsel testified the schedules employed the blue book liquidation value measure as that was more realistic in his experience. WF used the retail value measure that was over $4,000 greater than the blue book value, even though that was a less accurate prediction of the potential deficiency judgment if Anzaldo missed the payments. But counsel attorney never

explained why he signed schedules with a significant deficiency, and then certified a reaffirmation agreement that eliminated the deficiency using what he knew to be an improper value after repossession. He also never explained how this known risk was considered in his advice to his client, which left her uninformed ***217** about the risk. The attorney certification is improper for this final reason.

IV. The Attorney Certification Did Not Satisfy the Requirements of Rule 9011

[13] **[14]** Striking counsel's certification is justified without resort to Rule 9011. *Miller*, 575 B.R. at 89 n.2; *Izzo*, 197 B.R. at 12. Even if the court were to invoke Rule 9011 to evaluate counsel's certification which is the more common approach, *supra*, the court would order the same relief. Rule 9011(c) expressly authorizes "non-monetary directives" to address violations of Rule 9011 (b) as necessary to deter future conduct. *Counsel v. Cardinale (In re DeVille)*, 361 F.3d 539, 551-555 (9th Cir. 2004) (affirming $23,597 monetary penalty to deter future conduct to the court rather than the opposing party).

[15] Counsel here did not consider the range of circumstances here for Anzaldo, who was misinformed by counsel about numerous aspects of the reaffirmation decision. Even though counsel cannot be faulted for being unaware of the credit reporting practices of the industry which remain elusively opaque here, counsel's certification was also not based on an objective assessment of Anzaldo's ability to repay the reaffirmed debt. Although a Rule 9011 (b) violation occurred, non-monetary sanctions suffice to deter future conduct since the problem was informational, and no further sanctions need be issued.[11]

V. The Reaffirmation Agreement is Unenforceable

When the certification in a reaffirmation agreement is absent or improper, the effect on its enforceability is not well settled. One court has concluded court approval is then required. *In re Cockrell*, 496 B.R. 596, 598 (Bankr. W.D. Ark. 2013) (reaffirmation which debtor's attorney did not certify could not be approved because it was not in debtor's best interest as there was no distinction between instances where the debtor's counsel refused to sign the certification and instances where the debtor was not represented by counsel in negotiating the agreement).

[16] **[17]** Other courts conclude that the agreement becomes unenforceable, and court review is not required. *In re Barron*, 441 B.R. 131, 134 (Bankr. D. Ariz. 2010) (treating attorney who did not sign the certification precluded court review because the agreement was rendered immediately unenforceable); *In re Harvey*, 452 B.R. 179, 182 (Bankr. W.D. Va. 2010); (*In re Isom*, No. 07-31469-KRH, 2007 WL 2110318, at *4, 2007 Bankr. LEXIS 2437, at *13 (Bankr. E.D. Va. July 17, 2007)). This court agrees that the effect of an invalid certification means it is unenforceable consistent with the statutory analysis of *Ong*, 461 B.R. at 563. Alternatively, the court would not approve the agreement as not in debtor's best interest under Cockrell.

VI. Conclusion

The court is sympathetic to the heavy burden imposed on debtors' counsel by BAPCPA in certifying a reaffirmation agreement for a car that their financially struggling clients desperately need for transportation. This responsibility is further encumbered by the lack of reliable information about the practices of both the CRAs and the car lenders about when a debtor is deemed to reaffirm the debt. The industry policy may be to report payments to the CRAs only if the debt is reaffirmed, but whether determination is merely a ***218** temporal one, or whether court approval also affects the reporting decision is unclear. Reaffirming the debt cannot be said to affirmatively help debtors rebuild their credit since the benefit is minimal at best and offset by more severe damage to the credit score if the debtors default. Clarification from the industry or a regulatory authority body on when a debt is deemed "reaffirmed" and how "in rem" liability is treated by the system[12] would be of great value to the consumers of this nation.

Despite the difficulties in representing debtors in reaffirmation agreements, consumer attorneys must still discharge their obligations to their clients adequately. Counsel is duty bound to decline to sign the certification where this is not warranted and to reflect realistic budget information in the schedules and reaffirmation agreement. In this event, the agreement will become unenforceable without a hearing, but the clients will still be protected against repossession risk in those courts that follow

Moustafi, 371 B.R. at 438 until controlling authority determines whether ride through remains a reaffirmation option after BAPCPA.

Because of counsel's misapprehension of the effect of reaffirmation and understatement of her budget, court review was required in this case. Because the certification is stricken, and the presumption of undue hardship not rebutted, the reaffirmation agreement Anzaldo signed is unenforceable but she may retain her car if she stays current on the payments. Her discharge may then be entered.

WHEREFORE:

Based on the findings of fact and conclusions of law in this Memorandum Decision:

1. The OSC against WF is discharged;

2. The certification does not satisfy the strict requirements of § 524(c)(6) as Anzaldo was not fully informed of the consequences of the agreement.

3. The certification is stricken under Rule 9011 rendering the agreement unenforceable, but no monetary sanctions are awarded;

4. The presumption of undue hardship having not been rebutted, the reaffirmation agreement is not approved and is unenforceable on this alternative ground.

IT IS SO ORDERED.

All Citations

612 B.R. 205

Footnotes

1 The expense guidelines list these separately as Food and Housekeeping Supplies, respectively $334 and $35 for the applicable time period. *IRS National Standard for Allowable Living Expenses*, https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/national_expense_standards.htm (last visited Jan. 6, 2020).

2 Debtor did not list any miscellaneous expenses on her Sch. J; however, the court includes here the other costs listed on her Sch. J: car and renters insurance ($142.28 and $10 respectively) and entertainment ($50).

3 *IRS National Standards for Out-of-Pocket Health Care*, https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/national_oop_healthcare.htm (last visited Jan. 6, 2020).

4 *Bankruptcy Allowable Living Expenses*, https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/housing_charts/irs_housing_charts_CA.htm (last visited Jan. 6, 2020).

5 *IRS Local Transportation Expense Standards - West Consensus Region*, https://www.justice.gov/ust/eo/bapcpa/20181101 /bci_data/IRS_Trans_Exp_Stds_WE.htm (last visited Jan. 6, 2020).

6 WF's policy not to repossess Anzaldo's car if she is current on her payments regardless of whether she reaffirms the debt renders moot any analysis of 11 U.S.C. §§ 362(h)(1) and 521(d) and the viability *In re Moustafi*, 371 B.R. 434, 438 (Bankr. D. Ariz. 2007) (debtor who, like here, timely indicated an intention to reaffirm the debt and signed and filed a reaffirmation agreement could retain her car free of the risk of repossession so long as she keeps current on the payments). This practice could change if controlling law eliminates the ride through option or if WF changes its policy.

7 All statutory citations are to Title 11 of the United States Code unless otherwise stated.

8 All citations are to Fed. R. Bankr. P. unless otherwise stated.

9 The Internal Revenue Service national and local expense standards are published by the United States Census Bureau on a website maintained by the United States Trustee's Program which is updated each year pursuant to § 101(39A)(B). *See Means Testing*, Mps://www.justice.gov/ust/means-testing/20181101 (last updated Nov. 20, 2019). These standards are used to calculate means test eligibility for Chapter 7 bankruptcy and to determine a taxpayer's ability to pay a delinquent tax liability. *Id.*

10 *Foohey*, et al., *supra* (manuscript at 4).

11 Since the court did not notice an order to show cause regarding monetary sanctions, this outcome is appropriate on due process grounds as well.

12 The industry interprets a debt that is discharged in bankruptcy as one in which no payments are purportedly contractually "owed and collectable." This interpretation does not consider the *in rem* liability that remains on non-recourse debts post-discharge. *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 2154, 115 L.Ed.2d 66 (1991) (a discharged debt is still a claim that may be restructured in a Chapter 13 plan because the mortgage holder retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property). While this failure could conceivably result in the reporting being inaccurate under the FCRA, 15 U.S.C. § 1681s-2, and the California Credit Reporting Agencies Act ("CCRAA"), Cal. Civ. Code § 1785.25(a), no such claims are implicated in this decision, and there is no controlling law expressly on point.

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.....
(Original Signature of Member)

119TH CONGRESS
1ST SESSION

H. R. _____

To amend the Credit Repair Organizations Act to add additional protections against harmful practices within the credit repair organization industry, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Ms. MCBRIDE introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Credit Repair Organizations Act to add additional protections against harmful practices within the credit repair organization industry, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ending Scam Credit Repair Act" or the "ESCRA Act".

SEC. 2. CREDIT REPAIR ORGANIZATION DEFINITION.

Section 403(3) of the Credit Repair Organizations Act (15 U.S.C. 1679a(3))—

(1) in subparagraph (A), by inserting "(not including anything received in return for representing a consumer in preparation for or during litigation)" after "consideration"; and

(2) in subparagraph (B)—

(A) by inserting "an entity or individual that is, in good faith and not for the purpose of evading this title" after "include";

(B) in clause (ii), by striking "or";

(C) in clause (iii), by striking the period and inserting "; or"; and

(D) by adding at the end the following:

"(iv) any attorney that provides legal services rendered or to be rendered to a consumer in contemplation of or in connection with a case filed, or to be filed within 12 months, under title 11 or title 15, United States Code, by an attorney within the same law firm.".

SEC. 3. PROHIBITED PRACTICES.

(a) UNTRUE OR MISLEADING STATEMENTS.—

(1) IN GENERAL.—Section 404(a)(1) of the Credit Repair Organizations Act (15 U.S.C. 1679b(a)(1)) is amended—

(A) by inserting "knowingly" before "make any statement, or";

(B) in subparagraph (A), by striking "or"; and

(C) by adding at the end the following:

"(C) the Bureau of Consumer Financial Protection directly or through an online portal established to receive complaints, disputes, or reports of fraud;

"(D) the Federal Trade Commission directly or through an online portal established to receive complaints, disputes, or reports of fraud; or

"(E) any Federal, State, local, or Tribal law enforcement agency, directly or through an online portal established to receive complaints, disputes, or reports of fraud;".

(2) FINDING.—The Congress finds that it is already unlawful to make materially false, fictitious, or fraudulent statements or representations to the Bureau of Consumer Financial Protection.

(b) ADDITIONAL PROHIBITED PRACTICES.—Section 404 of the Credit Repair Organizations Act (15 U.S.C. 1679b) is amended—

(1) in subsection (a)(2)—

(A) in subparagraph (B)(ii), by inserting "or" after "credit;"; and

(B) by adding at the end the following:

"(C) the Bureau of Consumer Financial Protection or the Federal Trade Commission;";

(2) by amending subsection (b) to read as follows:

"(b) PAYMENT IN ADVANCE.—

"(1) IN GENERAL.—No credit repair organization may request or receive payment of any fee or consideration from a consumer for services represented to remove derogatory or inaccurate information from, or improve, such consumer's credit history, credit record, or credit rating, or services related to such a representation, until the credit repair organization has provided such consumer with documentation in the form of a consumer report, issued not less than 6 months after such service, from a consumer reporting agency that demonstrates that such representation has been achieved.

"(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to alter the permissible purposes of furnishing a consumer report described in section 604 of the Fair Credit Reporting Act."; and

(3) by adding at the end the following:

"(c) JAMMING.—A credit repair organization may not submit multiple disputes described in section 611 of the Fair Credit Reporting Act of the same information unless all of the following are true:

"(1) The consumer reporting agency or data furnisher has had the time permitted under the Fair Credit Reporting Act to conduct a reasonable investigation on the prior dispute.

"(2) The consumer reporting agency or data furnisher has returned the results of its investigation to the consumer with respect to such dispute, unless there are material changes to the information submitted with the dispute.

"(3) The credit repair organization includes with the resubmitted dispute a specific description of what information is inaccurate.".

SEC. 4. DISCLOSURES.

Section 405 of the Credit Repair Organizations Act (15 U.S.C. 1679c) is amended—

(1) in subsection (a)—

(A) by striking "due to fraud." and inserting "due to fraud. Credit repair organizations do not provide any services that you cannot do yourself for free.";

(B) by striking "regulates" and inserting "and the Bureau of Consumer Financial Protection regulate"; and

(C) by inserting "The Bureau of Consumer Financial Protection 1700 G St. NW, Washington, DC, 20552 Tel: 855–411–2372 TTY/TTD: 855–729–2372" after "20580"; and

(2) in subsection (c)—

(A) in paragraph (1), by striking the period at the end and inserting "and any recordings of telephone communications with the consumer."; and

(B) in paragraph (2)—

(i) by striking "2" in the heading and inserting "5";

(ii) by inserting "and any telephone recordings with the consumer" after "consumer's statement";

(iii) by striking "2" and inserting "5"; and

(iv) by striking "statement is signed by the consumer" and inserting "statement or the telephone recordings are created".

SEC. 5. CONSUMER CONTRACT REQUIRED.

(a) IN GENERAL.—Section 407(c) of the Credit Repair Organizations Act (15 U.S.C. 1679e(c)) is amended by adding at the end the following:

"(3) copies of all communications sent on behalf of the consumer, at the time the communication is sent.".

(b) TECHNICAL AMENDMENT.—Section 407(c) of the Credit Repair Organizations Act (15 U.S.C. 1679e(c)) is amended—

(1) by striking "at the time the contract or the other document is signed.";

(2) in paragraph (1), by striking "; and" inserting ", at the time the contract or the other document is signed;"; and

(3) in paragraph (2), by adding at the end "at the time the contract or the other document is signed; and".

SEC. 6. NONCOMPLIANCE.

Section 408 of the Credit Repair Organizations Act (15 U.S.C. 1679f) is amended by adding at the end following:

"(d) LEGAL SERVICES WITHIN CREDIT REPAIR ORGANIZATIONS.—A credit repair organization shall be subject to this title regardless of whether the organization is, or employs, an attorney who also provides legal services to a consumer, except if such attorney is an attorney described in section 403(3)(B)(iv).

"(e) CREDIT REPAIR ORGANIZATIONS WITHOUT A STATE LICENSE.—On or after January 1, 2026, no person may act as a credit repair organization unless such person is licensed by a State.".

SEC. 7. CREDIT REPAIR ORGANIZATION COMMUNICATIONS WITH FURNISHERS OF INFORMATION.

(a) IN GENERAL.—The Credit Repair Organizations Act (15 U.S.C. 1679 et seq.) is amended by inserting after section 408 the following new section:

"§ 408A. Credit repair organization communications with furnishers of information

"Disputes submitted to a person who furnishes information to a consumer reporting agency by or on behalf of a credit repair organization shall meet the following requirements:

"(1) If sent by mail, the dispute shall be transmitted by first class mail and list on the envelope the—

"(A) name of the credit repair organization; and

"(B) State license number of the credit repair organization, if applicable.

"(2) The dispute shall list the—

"(A) name of the credit repair organization;

"(B) State license number of the credit repair organization, if applicable; and

"(C) name of the consumer on whose behalf the dispute is submitted.

"(3) In the case of any additional communication after an initial dispute, the additional communication shall clearly and conspicuously identify any material changes to the information provided in the initial written dispute and include the information described in paragraphs (1) and (2).

"(4) In the case where a credit repair organization sells or otherwise provides an online or paper blank dispute form to be completed and filed by the consumer, such form must contain the—

"(A) name and address of such credit repair organization; and

"(B) State license number of such credit repair organization, if applicable.

"(5) In the case where the person responds to a dispute submitted by a credit repair organization seeking clarifying information, verifying if the customer has actually engaged with the credit repair organization, or denying the accuracy of the underlying claim, the credit repair organization shall respond in writing within 15 business days.

"(6) In the case where the credit repair organization is an attorney, the attorney shall certify that any communication is consistent with any information or documentation provided by the consumer, confirmed based upon methods or means proven to be historically reliable and accurate.

"(7) A credit repair organization, when sending a dispute, shall disclose the fact that it is a credit repair organization by placing the following disclosure on the dispute letter: 'This communication was submitted or prepared on behalf of the consumer by a credit repair organization, as defined in section 403 of the Credit Repair Organizations Act (15 U.S.C. 1679a).' ".

(b) CLERICAL AMENDMENT.—The table of contents for the Credit Repair Organizations Act is amended by inserting after the item relating to section 408 the following:

"408A. Credit repair organization communications with furnishers of information.".

SEC. 8. CIVIL LIABILITY.

Section 409(a)(1) of the Credit Repair Organizations Act (15 U.S.C. 1679g(a)(1)) is amended—

(1) by striking "ACTUAL DAMAGES" and inserting "DAMAGES";

(2) in subparagraph (A), by striking "or";

(3) in subparagraph (B), by striking the period at the end and inserting "; or"; and

(4) by adding at the end the following:

"(C) the amount of $500 in damages for each violation of this title.".

Faculty

Charles M. Clapp is the founder of CMC Law LLC in Atlanta, where he specializes in chapter 7 and chapter 13 bankruptcy for consumers and small businesses. His practice is devoted to helping individuals and families navigate bankruptcy, foreclosure, creditor harassment, repossession and asset-protection. Mr. Clapp's career began as a trial lawyer, protecting the rights of indigent clients. In 2008, he concentrated his practice on consumer bankruptcy, where he worked as lead attorney for one of Atlanta's largest consumer bankruptcy firms. Mr. Clapp is a frequent lecturer on the bankruptcy law circuit, actively attends bankruptcy seminars, and has trained many lawyers in consumer bankruptcy. He is also an experienced civil litigator; he was the lead counsel in hundreds of lawsuits in Georgia state and federal courts, representing both plaintiffs and defendants. He also was the lead attorney in several cases of first impression in the Northern District of Georgia. Mr. Clapp received his undergraduate degree from the University of Missouri in 2002 and his J.D. from Florida Coastal School of Law in 2005.

Jeremy Harn is an associate attorney with the Law Offices of John T. Orcutt and manages the firm's Raleigh, N.C. office. His practice focuses on consumer bankruptcy and consumer litigation, with particular emphasis on claims under the Fair Credit Reporting Act. Over the course of his career, Mr. Harn has filed more than 1,500 consumer bankruptcy petitions under chapters 7 and 13. He is a board member of the Eastern Bankruptcy Institute and was recognized in *Business North Carolina*'s 2024 Legal Elite. He also was a participant in the National Conference of Bankruptcy Judges' NextGen program in 2024. Mr. Harn is a frequent speaker at continuing legal education programs, including the NCBA's Annual Bankruptcy Institute and the NACBA Member's Only Workshop, where he has presented on issues such as equity in consumer cases, mortgage litigation, ethics, and the intersection of social media and financial decision-making. He is admitted to practice in the U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina and is a member of the North Carolina Bar Association, the National Association of Consumer Bankruptcy Attorneys, and the National Association of Consumer Advocates. Mr. Harn received his B.A. with distinction in political science in 2012 from the University of North Carolina at Asheville, and his J.D. *cum laude* in 2016 from Campbell University School of Law.

Lydia C. Stoney is an attorney with Hendren, Redwine & Malone, PLLC in Raleigh, N.C. She focuses her practice on chapter 7 and 11 bankruptcy cases for both individuals and businesses. Ms. Stoney has experience with liens and commercial disputes, and she assists clients experiencing insolvency with workouts and settlements. She is admitted to practice in all state and federal courts in North Carolina. Prior to joining the firm, Ms. Stoney clerked for Hon. Judge Pamela W. McAfee at the U.S. Bankruptcy Court for the Eastern District of North Carolina. She is a member of the Carolinas Chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC), ABI, the North Carolina Bar Association, the Wake County Bar Association and the Order of the Barristers. Prior to becoming an attorney, she was an educator, and she still devotes time to students through volunteer work. Ms. Stoney received her J.D. *cum laude* from Campbell University School of Law, where she was a member of the *Campbell Law Review* and the National Mock Trial Team. She won multiple national trial advocacy championships and received national awards and accolades for her oral advocacy skills.