WRITTEN DECISION - FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re:	)	BANKRUPTCY NO: 19-00882-MM7
	)	
	)	CHAPTER: 7
	)	
BEATRIZ ANZALDO,	)	MEMORANDUM DECISION
	)	
	)	DATE: October 24, 2019
Debtor,	)	TIME: 3:00 p.m.
	)	CRTRM: 1
	)	
	)	JUDGE: Margaret M. Mann
	)	

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. 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

[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).

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

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 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

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[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).

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 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

WF, along with most car lenders, are "furnishers" of data to credit reporting agencies ("CRAs"). Although common parlance is that WF "reports" this data to the CRAs, the technical verb for the provision of data to CRAs is to "furnish." The CRAs then prepare credit reports with the data and calculate consumer credit scores.

All furnishers, including WF, who access credit reports must reporting 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

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[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.

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.

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

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

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 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 (B.A.P. 9th Cir. 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

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.

D. 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").

Court review is necessary in three circumstances: if the certification is not proper, if a presumption of undue 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 Bankr. LEXIS 5298, at *10-11 (B.A.P. 9th Cir. Dec. 9, 2011), cited in *Ong*, 461 B.R. at 563.

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*, 261 B.R. at 562-63, the presumption does not apply, and consideration of the debtor's best interest is not permitted. *Ong*, 261 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").

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

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

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);

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

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]

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[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*, *https*://www.justice.gov/ust/means-testing/20181101 (last updated Nov. 20, 2019). These

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 payments.[10]

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

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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).

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 about the risk. The attorney certification is improper for this final reason.

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

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- 535 (9th Cir. 2004) (affirming $23,597 monetary penalty to deter future conduct to the court rather than the opposing party).

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

[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.

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).

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 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 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.

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[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 (1991) (a discharged debt is still a claim that may be restructured in a Chapter 13 plan because the

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;

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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.

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.

Dated: January 7, 2020

MARGARET M. MANN, CHIEF JUDGE
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In re Beatriz Anzaldo
Bankruptcy Case No. 19-00882-MM7

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Beatriz Anzaldo
1770 East Palomar, #2211
Chula Vista, CA 91913

Andrew J. Miller
964 Fifth Avenue, Suite 400
San Diego, CA 92101

Mary Kate Sullivan
Donald H. Cram
Alisa A. Givental
Bernard J. Kornberg
Severson & Werson
One Embarcadero Center, Suite 2600
San Francisco, CA 94111

U. S. Trustee
Office of the U.S. Trustee
880 Front Street, Suite 3230
San Diego, CA 92101

Christopher R. Barclay
P. O. Box 2819
La Mesa, CA 91943-2819

Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on January 7, 2020.

Michele McConnell

Michele McConnell, Judicial Assistant

Notice Recipients

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Recipients of Notice of Electronic Filing:

tr	Christopher R. Barclay	admin@crb7trustee.com
aty	Andrew J. Miller	ajm@engelandmiller.com
aty	Austin P. Nagel	melissa@apnagellaw.com
aty	Donald H. Cram, III	dhc@severson.com

TOTAL: 4

Recipients submitted to the BNC (Bankruptcy Noticing Center):

db	Beatriz Anzaldo	1770 E. Palomar, #2211	Chula Vista, CA 91913		
cr	PRA Receivables Management, LLC	PO Box 41021	Norfolk, VA 23541		
cr	Wells Fargo Auto	Bankruptcy Dept	po box 130000	Raleigh, NC 27605	
cr	Wells Fargo Bank, N.A., dba Wells Fargo Auto	c/o Law Offices of Austin P. Nagel	111 Deerwood Rd. Suite 305	San Ramon, CA 94583	

TOTAL: 4