

REAFFIRMATION AGREEMENTS & THE 45 DAY DEADLINE

When you filed your chapter 7 case, you also filed a **Statement of Intention** for your property that disclosed how you will deal with your debts that are secured by consensual liens (home mortgages, car loans, etc.). **You must redeem or reaffirm this debt with the court within 45 days of your meeting of creditors; if you fail to do so, the automatic stay is terminated and your creditors are entitled to repossess ANY items secured by the lien. We will not conduct any work on this without your instructions.**

Statement of Intention & Background Information on Secured Debts

The debts on the statement of intention are called "**secured debts**" or "**secured transactions**," and the property you pledge for the lien is called "**collateral**". A **secured debt** or **secured transaction** involves 2 obligations:

- 1) First, you sign a "promissory note" or some other written promise to repay the lender for borrowed money, which creates "**in personam**" or **personal liability**;
- 2) Second, you give the lender a lien (a property right) to secure repayment of the promissory note, which is called "**in rem**" **liability**. If you fail to make payments pursuant to the promissory note, the lien gives the lender a legal right to repossess and sell the collateral without going to court. After the collateral is sold, all excess proceeds belong to you. If the sale proceeds do not satisfy the amount due to the lender, you are responsible for the deficiency under your promissory note.

When you receive a bankruptcy discharge, your "**in personam**" **liability** for the debt is discharged. The lender's lien, "**in rem**" **liability**, is not affected by the discharge and continues on the collateral. If you stop making payments on the debt, the creditor can enforce its lien by repossessing and selling the collateral. Because "**in personam**" liability is discharged, you are not responsible for any deficiency from the sale of repossessed collateral. Therefore, unless you continue making payments after a bankruptcy is filed, the lender can only rely on sale proceeds from collateral to make a recovery.

Surrender of Property Secured by a Lien

The collateral may be **surrendered** to the lender, who will sell it and apply the proceeds to the debt. You are not obligated to pay for any deficiency that may exist after surrender and sale. Surrendering collateral is a good choice if you will have difficulty making continued payments to the lender or if you can get by without the property.

Reaffirming Secured Debts

Reaffirming a secured debt involves agreeing to pay the full amount of the debt after you receive your bankruptcy discharge. If you choose this option, you are undoing the effect of the bankruptcy discharge and you revive your "**in personam**" **liability** on this debt as if the bankruptcy never happened.

After receiving a copy of the Statement of Intention, the lender will normally prepare a proposed reaffirmation agreement and send it to our office. To properly reaffirm a debt you and the lender must:

- Sign a formal reaffirmation agreement which sets forth the terms of your agreement:

- File the agreement with the Bankruptcy Court before your discharge is entered;
- Your attorney is also required to sign a certification stating that your agreement to reaffirm will not place an undue financial hardship on you.

NO PRESUMPTION OF UNDUH HARDSHIP: If your monthly income is greater than your expenses on Schedules I and J, a presumption of undue hardship will not arise and the court will approve the agreement.

PRESUMPTION OF UNDUH HARDSHIP: If your monthly income is less than your expenses, on Schedules I and J, a presumption of undue hardship has arisen under § 524(m)(1) and you will need to obtain court approval of the agreement.

If a presumption of undue hardship exists, you can “explain” to the court how you will adjust your income and expenses so you can afford to make the loan payment. Normally people will look to reducing their expenses or will find overtime or a second job to earn “extra” income to make the payment. If there is not a logical way for you to make the payment we cannot sign the certification which provides that despite the undue hardship you should be able to make the payment on the loan you are reaffirming. If there is an undue hardship and you cannot adjust your income and expenses but still wish to reaffirm the debt the Court must then hold a hearing to consider approval of the reaffirmation agreement. You will have to appear to explain why the agreement will not unduly burden you financially. If the Judge is satisfied, the agreement will be entered. If the Judge thinks the agreement is a financial burden, the agreement will not be entered. **There is an additional charge for this assistance of \$400.00; we rarely if ever have a client that goes to this extreme!**

Retain and Pay

Some secured lenders will continue to accept your monthly payments and allow you to keep the collateral even if you haven't indicated intent to reaffirm your debt. This is known as the **Retain and Pay** option, which is an informal option not explicitly recognized by the Bankruptcy Code, but not specifically forbidden by it either.

Reaffirmation vs. Retain and Pay as an Option for Vehicle Loans

Retain & pay is an attractive option for secured loans if the lender will accept it. However, you must be comfortable with assuming a lot of risk.

The risk you must assume with Retain and Pay is a lack of certainty or predictability. Some car lenders like FMCC, GMAC & Daimler Chrysler state they will repossess vehicles unless you timely reaffirm the debt. Other lenders typically feel that it is better to receive monthly payments under the informal "retain and pay" option rather than lose money by selling repossessed vehicles at auction prices. Others have made no statements regarding the topic. You may think the lender has decided to continue to accept your payments under the "retain and pay" option only to wake up one morning and find your vehicle gone. **Make sure you carefully discuss these options with us before making any decisions.**

Reaffirmation vs. Retain and Pay With Regard to Real Estate Mortgages and Equity Loans

Choosing to reaffirm a mortgage may be a safe option, but it creates a personal risk for any deficiency that may exist if you later default on the loan and the mortgage is foreclosed.

Further, there may be no downside if, instead of choosing to reaffirm a mortgage, you choose to retain and pay.

As a result, the best choice for mortgages on the Statement of Intention may be the retain and pay option. This option will: 1) likely allow you to keep making payments as long as you are not in default; 2) likely prohibit the lender from starting the foreclosure process; and 3) eliminate personal responsibility for deficiencies from a foreclosure sale that may result from a default on loan payments after the bankruptcy case is closed.

Retain & Pay option: Post Bankruptcy Payments & Statements

Some secured creditors will refuse to send you additional payment statements / books after you file a chapter 7 case unless you reaffirm your debt. If you select the retain and pay option, and wish to prevent a payment default, make a copy of your most recent mortgage and car loan statements so you can make post-bankruptcy payments even if the lender stops sending you payment statements. **If you wish to avoid a post bankruptcy repossession, it is your responsibility to make all the post bankruptcy payments in a timely manner. Even if you make the post bankruptcy payments in a timely manner, there is a risk that the creditor may repossess the collateral for the simple failure to reaffirm.** Also, be advised that most creditors will stop reporting your payments (even though they are being made) to the credit reporting agencies. Accordingly, you will not receive "credit" for making your loan payment unless you reaffirm.

Please let us know if you have any questions.