

UNITED STATES BANKRUPTCY COURT
District of Vermont

07-BK-017

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TO: Judicial Conference's Advisory Committee on Bankruptcy Rules
Via e-mail: Rules_Comments@ao.uscourts.gov

CC: Hon. Colleen A. Brown, Chief Judge, U.S. Bankruptcy Court, District of Vermont

FROM: Thomas J. Hart

DATE: February 15, 2008

RE: Amended Bankruptcy Rule 4008: Required Cover Sheet (Official Form 27)

As an initial matter, the Court is pleased with the Committee's decision to amend Bankruptcy Rule 4008 to require the filing of a cover sheet with each reaffirmation agreement (Form 240A). This Court was in the process of implementing a similar measure by way of a local rule. However, with the Committee's change on the horizon, and after an open forum with the Vermont Bankruptcy Bar, the Court has decided to begin requiring the use of Official Form 27 with one modification. (A standing order will be issued requiring the filer of each reaffirmation agreement to also file the cover sheet as a prerequisite to having the reaffirmation agreement considered by the Court.)

In addition, to facilitate the proper completion of Official Form 27, the Court has prepared an instruction sheet for filers. It has been this Court's experience that properly completing Form 240A is an onerous hurdle for many. This, in turn, has created an added burden for Clerks' Offices throughout the country as they seek to handle the reaffirmation agreements in an efficient manner. We recognize that the implementation of Official Form 27 is a way to alleviate the concerns and issues created by the new requirements of a reaffirmation agreement. However, as the introduction of Form 240A (as well as Form 240) verified, attempts to address one issue often create others. Thus, as a prophylactic measure, we have drafted a step-by-step instruction sheet for files of Official Form 27 to aid them in providing the Court with proper and complete information. We forward this instruction sheet to you for your review and strongly urge you to consider issuing such an aid.

We are also forwarding to you a modified Official Form 27 (hereinafter, the "Form"). It is, in essence, the Committee's Form, but fine-tuned to better facilitate the filer in preparing the Form and to provide the Court with complete information to help it make its statutorily mandated determination regarding undue hardship. The following commentary explains the modifications made.

THE ENUMERATED ITEMS

TITLE: We have modified the title of the form to read: "REAFFIRMATION AGREEMENT REQUIRED COVER SHEET & CERTIFICATIONS". This modification is to make clear the mandatory nature of the cover sheet and the certifications the Court requires to make its determination whether to approve the attached reaffirmation agreement.

SUBTITLES: We have included subtitles in the Form because we believe they will make it clearer to the preparer exactly what information to insert into the Form. It has been our experience in Vermont that preparing Form 240A is daunting, especially when the filer is *pro se*, a clerk in the creditor's organization, or an attorney who does not do extensive bankruptcy work. Therefore, we have divided the Form into five sections to make it easier for the preparer to understand and complete. These sections are: (A) "General Information About Debt Being Reaffirmed under RA"; (B) "Information About Terms of RA"; (C) "Information About Debtor's Income"; (D) "Information About Debtor's Expenses"; and (E) "Comparison of Debtor's Current Income and Expenses".

ELIMINATION OF ITEM 1: First, we found the current language of Item 1 of the Form to be ambiguous. To what "amount of debt" is being referred? Is it all of a debtor's debt at the commencement of the case or only that debt which is subject to the reaffirmation agreement under consideration? Second, it is not apparent what purpose is served by providing the amount of debt as of the commencement of the case. This information does not seem necessary as the salient inquiry is the amount of debt the debtor is agreeing to reaffirm now. Thus, in our Form, we have eliminated this item.

USE OF ABBREVIATED TERM: For clarity and to save space, we have changed "reaffirmation" to "RA" (for "reaffirmation agreement") throughout the Form. See Items 3, 4, 5.

CLARIFICATION OF ANNUAL PERCENTAGE RATE: The line to be filled in for Item 5, indicating the applicable annual percentage rate, no longer is preceded by a dollar sign; instead, a percentage sign has been added at the end of it. Further, beneath this line, one indicates whether the rate is fixed or adjustable (by circling the appropriate descriptor), information which is not required to be disclosed on Official Form 27.

CONSISTENT TERMINOLOGY: Where the Form refers to Schedules I and J, we have used the language from those Schedules (i.e., "combined average monthly income from Sch. I.", see Item 6; and "average monthly expenses from Sch. J.", see Item 9).

TIMING REFERENCES: Where the Form seeks information about a debtor's monthly income and expenses "at reaffirmation," we have modified that to read the "debtor's current" monthly income and expenses. The term "**current**" has also been highlighted with bold text and the parenthetical "(after filing petition)" has been added to emphasize the information the Court is soliciting. See Items 7 and 10.

MORE SPECIFIC REQUESTS FOR INFORMATION: Where the Form seeks explanations from the preparer, the phrase "***with specificity***" has been added. See Items 8 and 11. Note, also, that the phrase is in bold and italicized text to emphasize the need for specific explanations. See id. We have also added corresponding footnotes, explaining the criterion of information needed. See id. It has been our experience in Vermont that, often, the explanations provided in Part D of Form 240A are too vague to be helpful to the Court in making its "undue hardship"/"debtor's best interest" determination. (For example, stating that one intends to tighten one's belt, while well-intentioned, does not provide the Court with satisfactory information to make its statutorily mandated determination.) We hope to avoid receiving inadequate explanations by clarifying the type of explanations that are sufficient.

COMPARISON INQUIRY: We have added a comparison section, requiring the preparer to compare the debtor's current income to his/her current expenses. See ¶ E. This is the logical conclusion of the analysis: Today, as the debtor stands before the Court asking it to approve a reaffirmation agreement, what is the debtor's financial picture (i.e., can the debtor make the monthly payments under the reaffirmation agreement?). Under paragraph E, the debtor shows the Court whether s/he has the financial ability to make those payments and if not, how, nonetheless, s/he will meet that obligation if the reaffirmation agreement is approved. Since the Court needs sufficient assurance that this is possible and that by approving the reaffirmation agreement, the debtor is not taking on an undue hardship, Item 13 allows the

debtor to explain this to the Court. (Note that, similar to Items 8 and 11, Item 13 includes the emphasized phrase “*with specificity*” and has a corresponding footnote explaining the information the Court needs.)

DISCLOSURE OF THIRD PARTY ASSISTANCE: It is our experience that, often, a third party is willing to assist the debtor in making the monthly payments under the reaffirmation agreement. Thus, Item 13 requires the disclosure of that third party. See Item 13 n.3. In the “Certifications” portion of the Form, a “third Party’s Certification” is provided. In lieu of testimony or an affidavit from this third party evidencing an ability and willingness to assist the debtor in making his/her monthly payments under the reaffirmation agreement, now the third party simply needs to execute the appropriate certification incorporated in the Form.

MISCELLANEOUS MODIFICATIONS: We have made some minor stylistic and layout changes. For example, to try to keep the Form “clean” (i.e., reduce too much text in the Form), we have moved the preamble paragraph to a footnote. We have also lined up lines with text. As discussed above, we have broken the Form into several sections.

THE CERTIFICATIONS

THIRD PARTY CERTIFICATION: As discussed above, the Third Party’s Certification we propose will provide a sufficient basis for courts to make a determination that certain reaffirmation agreements – where, for example a debtor does not show sufficient income to make monthly reaffirmation agreement payments, but has a third party willing to assist the debtor do so—will not cause an undue hardship to debtors. The certification makes clear that the third party’s assistance is voluntary and is not intended as any guarantee or promise to the creditor. The certification is made under penalty of perjury so that it can be used, in lieu of an affidavit, as an evidentiary basis upon which a court can make its “undue hardship”/“debtor’s best interest” determination. We strongly urge the Committee to consider and include this certification.

PLACEMENT AND CONTENT OF THE DEBTOR’S CERTIFICATION: We have inverted the order of the “Debtor’s Certification” and the “Filer’s Certification,” because, regardless who files the Form, the debtor will have to sign it. Therefore, it seems more pragmatic to have the “Debtor’s Certification” be the first one. Also, we have changed the language of the “Debtor’s Certification” so that the debtor certifies that all the information in the Form is true and correct, not just the explanations. Lastly, consistent with the requirement that one’s petition and schedules be signed under penalty of perjury, we believe the debtor’s certification to the truthfulness and correctness of the information in the Form be made under penalty of perjury as well. Thus, we have added the requisite language to accomplish that.

FILER’S CERTIFICATION: Reflective of the explanation provided above, the filer (whether the debtor, the debtor’s attorney, or some representative of the creditor) should make his/her certification under penalty of perjury. Thus, we have added the appropriate language to the certification to accomplish this. We also believe, and have had a practice in effect since the effective date of BAPCPA, that it is important to have someone certify that the reaffirmation is in strict compliance with § 524 of the Bankruptcy Code. Indeed, one of the very reasons to have a cover sheet filed with a reaffirmation agreement is to provide sufficient assurance to the Court that the agreement conforms to the Code, thereby eliminating the requirement that the Clerk’s Office staff perform the time-consuming process of verifying conformance. Therefore, in addition to certifying that the attached agreement is a true and correct copy of the subject reaffirmation agreement, the filer also certifies that it is in strict compliance with § 524.

I, or a member of my staff, am happy to discuss these comments, the attached alternative cover sheet Form, and the instruction sheet with members of the Committee. Thank you for your consideration.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

**INSTRUCTION SHEET TO
OFFICIAL FORM 27,
REAFFIRMATION AGREEMENT
COVER SHEET & CERTIFICATIONS**

**SUPPLEMENT TO
STANDING ORDER # 08-1
(A/K/A VT. LB FORM P-4)**

In conjunction with Standing Order # 08-01, this instruction sheet is provided to assist the filer(s) in successfully completing Official Form 27, the cover sheet that must be filed with each reaffirmation agreement filed in this District. Use of this instruction sheet is optional, but strongly encouraged to help reduce the necessity of debtors (and possibly others) from having to appear at evidentiary hearings as a prerequisite for obtaining approval of a reaffirmation agreement. These instructions explain how to fill out each item, check box, and certification of Official Form 27.

Enumerated Items:

Item 1 – “Amount of debt as of commencement of case.” Fill in the dollar figure reported in Schedule D of the Debtor’s petition for the Creditor’s claim that the Debtor now seeks to reaffirm.

Item 2 – “Describe collateral, if any, securing debt.” Where there is collateral securing the debt the Debtor seeks to reaffirm, explain the asset against which the Creditor has a claim and for which the Debtor seeks to reaffirm his/her debt obligation. For example, if a Debtor has pledged his/her car as the collateral to secure the Creditor’s loan, one should provide its make, model, year, VIN, and overall condition. Similar identifying information should be provided for other collateral so that the Court can easily identify the asset in the Debtor’s petition and assess its value.

Item 3 – “Amount of debt being affirmed.” This should be the dollar figure reported on the first page of Form 240A the reaffirmation agreement disclosure statement. This “amount of debt” includes all fees and costs (if any) that have accrued as of the date of the reaffirmation agreement.

Item 4 – “Repayment term of reaffirmation.” This is the estimated number of months the Debtor will need to make payments to pay the full amount due under the reaffirmation agreement. This may be longer than the original term (or length) of the original loan. The term of the reaffirmation agreement should be found on page 3 of Form 240A

Item 5 – Monthly payment under reaffirmation.” This is the monthly loan payment due to the Creditor under this reaffirmation agreement, and should be found on page 3 of Form 240A. Note that this amount may not be the same amount that the Debtor had been paying the Creditor in the past.

Item 6 – Annual percentage rate under reaffirmation.” This is the rate of interest the Creditor is charging the Debtor for making the loan; it is a percentage figure. The percentage rate on the loan may be fixed or variable. “Annual Percentage Rate” information begins on page 2 of Form 240A and continues onto page 3 of the Form. Note that this interest rate may not be the same as what the Creditor was charging the Debtor under the original terms of the loan.

Item 7 – “Debtor’s monthly income at reaffirmation.” Provide the Debtor’s most current income information; it may be more or less than the Debtor’s monthly income when s/he filed this bankruptcy case. This figure is calculated by adding together the Debtor’s take-home pay and all other income received. It must be the same dollar figure the Debtor reports in Part D of Form 240A, “Debtor’s Statement in Support of Reaffirmation Agreement.”

Item 8 – “Income from Schedule I, line 16.” Refer to line 16 of the Debtor’s Schedule I (filed with the bankruptcy petition) and insert the dollar amount found on that line here.

Item 9 – “Explain any difference in the amounts set out on lines 7 and 8.” The Court requires a specific explanation of the difference between the Debtor’s income on the date the petition was filed and the Debtor’s current income. So, if the Debtor’s monthly income is currently more than what it was on the date the bankruptcy case was filed, the Debtor must identify in this blank all new sources of income and the monthly amounts received from each source. Conversely, if the Debtor’s monthly income is now less than what it was when the Debtor filed bankruptcy, the Debtor must explain the reason for this reduction and specify the amount of the monthly reduction.

Item 10 – “Debtor’s monthly expenses at reaffirmation (without this reaffirmed debt).” The Debtor must report here all his/her current monthly expenses except the monthly payment s/he contemplates making under this reaffirmation agreement. It is the same dollar figure s/he reports in Part D of Form 240A “Debtor’s Statement in Support of Reaffirmation Agreement,” as his/her “actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements,” if any.

Item 11 – Current expenditures from Schedule J, line 18.” Refer to Line 18 of the Debtor’s Schedule J (filed with the bankruptcy petition) and insert the dollar amount found on that line here.

Item 12 – “Explain any difference in the amounts set out on lines 10 and 11.” The Court requires a specific explanation of the difference between the Debtor’s expenses on the date the petition was filed and the Debtor’s current expenses. At a minimum, the Debtor must identify those categories of expenses that have changed, explaining the reason(s) for the change(s), and stating the amount of the change(s) in each category of expenses. For example, it is *not sufficient* to state, “I have reduced my discretionary spending by \$100.” Rather, a sufficient explanation would be, “I have reduced my discretionary spending by decreasing entertainment expenses by \$60, dry cleaning expenses by \$15, and gift expenses by \$35.”

Check Boxes:

Check the **first box** if the dollar figure in Item 10 is more than the dollar figure in Item 7. This signals that the Debtor’s current expenses are greater than the Debtor’s current income and triggers what the Bankruptcy Code calls a presumption of “undue hardship” in connection with this reaffirmation agreement. Therefore, the Court must review the facts and figures that give rise to this “hardship” and decide whether to approve the reaffirmation agreement. See 11 U.S.C. § 524(m).

Note: A Debtor may provide a written statement to the Court explaining how s/he can afford to make the reaffirmation payments, even though s/he appears to have insufficient income to make the payment. If the Debtor chooses not to provide this statement, or if the statement is insufficient, the Debtor will be required to appear at a hearing in order to obtain Court approval of the reaffirmation agreement. If the written statement identifies a third party as an additional source of funds for making those payments, then either the third party must testify or file an affidavit or certification under penalty of perjury indicating the third party’s:

- relationship to the debtor;
- ability and willingness to assist the debtor;
- assistance is voluntary and is not a guarantee or promise of payment to the Creditor; and
- understanding that his/her assistance may be a basis for the Court's approval of the reaffirmation agreement.

Check the **second box** if the Debtor was not represented by an attorney in negotiating the reaffirmation agreement. In this District, if an attorney charges a Debtor a flat fee for representation in a Chapter 7 case, negotiating reaffirmation agreements is a service covered by the fee and the attorney cannot charge an additional fee to assist the Debtor with any reaffirmation agreement. See Vt. LBR 2016-1(f)(2)(A). Therefore, a Debtor should only check this box if s/he is not represented by an attorney in the bankruptcy case.

Certifications:

“Filer’s Certification” – In this District, the “Filer’s Certification” has been modified to include language that the reaffirmation agreement meets the requirements set out in 11 U.S.C. § 524. Thus, the filer must certify that the agreement attached to Official Form 27 is a true and correct copy of the reaffirmation agreement under consideration and that the reaffirmation agreement meets the requirements set out in § 524. The party filing the reaffirmation agreement and the cover sheet (whether the Creditor, Debtor or another party) must complete and sign this certification. A cover sheet without an executed “Filer’s Certification” shall be considered deficient and will not be processed by the Court.

“Debtor’s Certification” – The Debtor must execute the “Debtor’s Certification.” A cover sheet without an executed “Debtor’s Certification” shall be considered deficient and will not be processed by the Court.

Questions

Any questions about this instruction sheet, or the deficiency procedure, should be directed to Kathleen Ford, Chief Deputy Clerk, at (802) 776-2003; however, neither she nor anyone in the Clerk's Office is permitted to give legal advice.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF

In re Debtor.

Case No.: Chapter

REAFFIRMATION AGREEMENT ("RA") REQUIRED COVER SHEET & CERTIFICATIONS*

Debtor's Name: Debtor's Address: Creditor's Name: Creditor's Address:

A. GENERAL INFORMATION ABOUT DEBT BEING REAFFIRMED UNDER RA (THE "RA DEBT")

1. Amount of RA debt Debtor agrees to reaffirm: \$
2. Describe collateral, if any, securing the RA debt:

B. INFORMATION ABOUT TERMS OF RA

3. Monthly payment on RA debt, as shown on attached RA: \$
4. Estimated Repayment term for the RA debt (# of months of RA): months
5. Annual percentage rate due on RA debt, as shown on RA: %
Circle one: (Fixed Rate/Adjustable Rate)

C. INFORMATION ABOUT DEBTOR'S INCOME

6. Debtor's combined average monthly income from Sch. I., line 16: \$
7. Debtor's current total monthly income (after filing petition): \$

8. Explain with specificity any difference between the amounts set forth in Items 6 and 7.

D. INFORMATION ABOUT DEBTOR'S EXPENSES

9. Debtor's average monthly expenses from Sch. J., line 18: \$
10. Debtor's current monthly expenses (after filing petition):
minus Item 3:
minus other RA payment (if any)
minus other RA payment (if any)

Net current monthly expenses: \$

* Note. This Cover Sheet must be completed in its entirety and filed within the time set under Bankruptcy Rule 4008 It may be filed by any party to the Reaffirmation Agreement (RA) and the RA must be attached to this Cover Sheet

1 If the Debtor's monthly income is currently more than it was on the date the bankruptcy case was filed, indicate all new source(s) of income and the monthly amount received from each source. If the Debtor's monthly income is currently less than it was on the date the bankruptcy case was filed, explain the reason for and the amount of the monthly reduction

11. Explain *with specificity* any difference between the amount in Item 9 and the net amount in Item 10.²

E. COMPARISON OF DEBTOR'S CURRENT INCOME AND EXPENSES

12. Subtract the net figure in Item 10 from amount in Item 7: \$ _____

13. If the figure in Item 12 is less than the figure in Item 3, explain *with specificity* the sources of funds available to the Debtor to make the monthly RA payments.³

- Check the box to the left if the amount in Item 10 exceeds the amount in Item 7. (*A presumption of undue hardship arises where the Debtor's net current monthly expenses minus the monthly RA payment is more than the Debtor's current monthly income.*)
- Check the box to the left if the Debtor was not represented by counsel during the course of negotiating this RA. (*In that event, a hearing is required for the Court to determine whether to approve the RA.*)

-CERTIFICATIONS -

DEBTOR'S CERTIFICATION

I hereby certify under penalty of perjury that all the information provided in this Cover Sheet is true and correct.

Dated: _____

Signature (Debtor)

Dated: _____

Signature (Joint Debtor, if any)

FILER'S CERTIFICATION

I, _____, (Debtor/Debtor's Attorney/Creditor's representative), hereby certify under penalty of perjury that the attached agreement is a true and correct copy of the Reaffirmation Agreement between the parties identified in this Cover Sheet and that the Reaffirmation Agreement is in compliance with the requirements of 11 U.S.C. § 524.

Dated: _____

Signature

Print Name

² At a minimum, identify those categories of expenses that have changed, explaining the reason(s) for the change(s), and stating the amount of the change(s) in each category of expenses

³ If the source of funds is a third party, then on this Cover Sheet the third party (a) must be identified and (b) must certify to the Court his/her ability and willingness to provide the Debtor with these funds. See the "Third Party's Certification" block at the end of the "Certifications" section

THIRD PARTY'S CERTIFICATION

My name is _____. My relationship to the Debtor is _____. By signing below, I hereby certify under penalty of perjury that I am able and willing to provide financial assistance to the Debtor in making his/her monthly payments of the debt being reaffirmed. This assistance is voluntary on my part. I am not making any guarantee or promise to the Creditor. I understand that my agreement to provide this assistance to the Debtor may be the basis for the Court's approval of the attached Reaffirmation Agreement.

Dated: _____

Signature

Print Name