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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 09-22866-C-7
)
PAUL DEWAYNE RODERICK and) DC No. PD-1
CYNTHIA LEE RODERICK,)
)
Debtor(s).)
)

Pite, Duncan, LLP, Erin L. Laney, Josephine Salmon, San Diego, California, for movant Wells Fargo Home Mortgage, Inc., as Servicing Agent for Wells Fargo Bank, N.A.

Paul Dewayne Roderick and Cynthia Lee Roderick, Marysville, California, debtors, appearing in propria persona.

KLEIN, Bankruptcy Judge:

Chapter 7 debtors acting in good faith to negotiate a reaffirmation agreement that modifies their mortgage invoke Federal Rule of Bankruptcy Procedure 4004(c)(2) to defer discharge and thereby defer expiration of the automatic stay per 11 U.S.C. § 362(c)(2)(C) until the mortgagee decides whether to allow mortgage modification. The mortgagee acknowledges it has repeatedly requested, received, and mislaid the same information from the debtors, and after four short-term discharge deferrals, wants more time. Those deferrals having proven inadequate, the motion is GRANTED and discharge deferred for six more months.

This opinion is published to highlight Rule 4004(c)(2) as a tool in a debtor's toolbox to preserve the automatic stay during mortgage modification negotiations and to call attention to the status of a mortgage modification as a form of reaffirmation that will be unenforceable as a personal liability of debtor unless it is made before the discharge is entered.

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When they filed their pro se chapter 7 case on February 20, 2009, they scheduled their Marysville, California, residence as worth \$189,000, subject to a \$231,442 debt to Wells Fargo.

Wells Fargo promptly requested, and the Rodericks supplied, their written authorization for loan modification discussions to proceed during the bankruptcy case.

Despite its awareness that the debtors intended to reaffirm the mortgage debt, and despite having told the debtors to cease making payments, Wells Fargo, acting through its servicing agent Wells Fargo Home Mortgage, Inc., moved for relief from the automatic stay on March 20, 2009, seeking permission to foreclose because the debtors had ceased making payments. It also sought attorney's fees and costs for making the motion.

At the initial hearing on April 21, 2009, counsel for Wells

1 Fargo did not know the status of loan modification discussions
2 and agreed to continue the stay relief motion to May 26, 2009.

3 At the May 26 hearing, Wells Fargo requested another
4 continuance because it had not yet decided whether it would agree
5 to a loan modification.

6 This scene repeated itself three more times, resulting in a
7 chain of continuances to July 28, 2009, then September 8, 2009,
8 then October 27, 2009.

9 As their scheduled discharge loomed, the Rodericks asked
10 that entry of the discharge be deferred in tandem with the
11 continuances so that they would not lose the benefit of the
12 automatic stay that, pursuant to § 362(c)(2)(C), otherwise would
13 expire with respect to them as of the entry of their discharge.
14 Without objection, entry of discharge was ordered deferred
15 several times on the authority, inter alia, of Rule 4004(c)(2) to
16 dates shortly after the continued stay relief hearings.

17 At the October 27 hearing, counsel for Wells Fargo asserted
18 that the loan modification process was incomplete, saying the
19 debtors had not supplied a particular item of information.

20 Mrs. Roderick instantly, and with the indignation that only
21 a pro se litigant can express convincingly, protested that the
22 putatively missing information had been given to Wells Fargo
23 several times. She brandished a sheaf of papers documenting
24 contacts with Wells Fargo and narrated her odyssey trying to deal
25 with Wells Fargo and its repeated requests for submission of
26 information previously supplied or for new information never
27 before required notwithstanding prior statements that their
28 application was complete. She noted that Wells Fargo once even

1 made her start over and submit a new application.

2 Wells Fargo did not contest Mrs. Roderick's rendition of the
3 facts and requested yet another continuance of its motion for
4 relief from stay. It could not state when Wells Fargo would make
5 a decision on the loan modification.

6 This time, the court continued the stay relief motion for
7 six months, as it was apparent that debtors acting in good faith
8 were being burdened by being dragged back to court for repeated
9 short-term continuances when no loan modification decision was in
10 sight. Nearly one year after it began the process, Wells Fargo
11 was still having difficulty determining whether it had a
12 completed loan modification application upon which it could act.

13 The court also granted the debtors' Rule 4004(c)(2) motion
14 to defer the discharge to a date certain after the six-month
15 continued date. This decision memorializes that ruling.

16 17 Jurisdiction

18 Subject-matter jurisdiction is based on 28 U.S.C. § 1334(a).
19 Stay relief is a core proceeding. 28 U.S.C. § 157(b)(2)(G). The
20 deferral of entry of discharge is likewise a core proceeding. 28
21 U.S.C. §§ 157(b)(2)(A) & (O).

22 23 Discussion

24 The issues presented implicate the reaffirmation agreement
25 provisions of the Bankruptcy Code and the terms of the discharge
26 injunction. Taken together, these inform the role for Rule
27 4004(c)(2) in the context of mortgage modifications.

I

The ability of debtors to request deferral of discharge is a procedural corollary to the provision in Bankruptcy Code § 524(c) that reaffirmations are not enforceable against debtors unless made before the discharge is entered. By statute, no agreement for which the consideration is "in part" based on a dischargeable debt is enforceable if the agreement is made after the granting of a discharge. 11 U.S.C. § 524(c)(1).¹ This necessitates a rule of procedure to defer a discharge in order to facilitate ongoing negotiations of reaffirmation agreements.

Without a way to defer discharge, reaffirmation agreements that are actually in debtors' best interests could become impossible. Similarly, creditors are better off having reaffirmed debt obligations that they will be able to enforce after bankruptcy. Thus, Rule 4004(c)(2) authorizes debtors, but only debtors (in light of negotiating imbalances), to ask that their discharges be deferred. Fed. R. Bankr. P. 4004(c)(2).²

¹Bankruptcy Code § 524(c)(1) provides:

(c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to the extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

11 U.S.C. § 524(c)(1) (emphasis added).

²Rule 4004(c)(2) provides:

(2) Notwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a

1 When Rule 4004(c)(2) was promulgated in 1983, the Advisory
2 Committee on Bankruptcy Rules explained that its purpose was to
3 accommodate problems presented by the requirement in Bankruptcy
4 Code § 524(c)(1) that an enforceable reaffirmation agreement must
5 have been made before the discharge:

6 The last sentence of subdivision (c) takes cognizance
7 of § 524(c) of the Code which authorizes a debtor to enter
8 into enforceable reaffirmation agreements only prior to
9 entry of the order of discharge. Immediate entry of that
10 order after expiration of the time fixed for filing
11 complaints objecting to discharge may render it more
12 difficult for a debtor to settle pending litigation to
13 determine the dischargeability of a debt and execute a
14 reaffirmation agreement as part of the settlement.

15 Fed. R. Bankr. P. 4004(c), advisory committee note.³

16 It is also significant that an incidental consequence of
17 Rule 4004(c)(2) discharge deferral is that the automatic stay,
18 which otherwise expires upon entry of discharge, continues to
19 protect the debtor. 11 U.S.C. § 362(c)(2)(C).⁴

20 discharge for 30 days and, on motion within that [period],
21 the court may defer entry of the order to a date certain.

22 Fed. R. Bankr. P. 4004(c)(2).

23 ³Rule 4004(c)(2) was originally the final sentence of a Rule
24 4004(c) without subdivisions. Although relocated, the text of
25 the original final sentence has not been changed.

26 ⁴The relevant language of the automatic stay statute is:

27 (2) the stay of any other act under subsection (a) of
28 this section [i.e., acts against the debtor and the debtor's
property] continues until the earliest of –

(C) if the case is a case under chapter 7 of this title
concerning an individual or a case under chapter 9, 11, 12,
or 13 of this title, the time a discharge is granted or
denied;

11 U.S.C. § 362(c)(2)(C).

1 II

2 Two fundamental bankruptcy doctrines influence the analysis
3 of the concept that mortgage modifications constitute
4 reaffirmation agreements to the extent they implicate the
5 personal liability of debtors: first, the discharge terminates
6 the debtor's personal liability except as otherwise provided in
7 the Bankruptcy Code; and, second, liens that attached to property
8 before bankruptcy remain attached to the property after
9 bankruptcy unless they are specifically avoided during the
10 bankruptcy case.

11
12 A

13 A reaffirmation agreement is an agreement between a creditor
14 and debtor, "the consideration for which, in whole or in part, is
15 based on a debt that is dischargeable" in a case under title 11.
16 11 U.S.C. § 524(c)(1). In order to be enforceable, a
17 reaffirmation agreement must be "made" before the discharge is
18 entered. Id.

19 One must also focus on what is being reaffirmed. The view
20 is through the prism of the two main facets of the terms of the
21 discharge as prescribed by Bankruptcy Code § 524(a)(1).

22 First, discharge "voids any judgment" at any time obtained
23 "to the extent that such judgment is a determination of the
24 personal liability of the debtor" with respect to a discharged
25 debt. 11 U.S.C. § 524(a)(1). Second, discharge "operates as an
26 injunction" against any act to collect, recover, or offset any
27 discharged debt "as a personal liability of the debtor." 11
28 U.S.C. § 524(a)(2). Hence, the heart of the discharge is the

1 "personal liability of the debtor."⁵

2 Accordingly, a post-discharge transaction in any way
3 connected with prepetition debt is vulnerable to attack as
4 unenforceable as to personal liability. The problem is that the
5 phrase "consideration for which, ... in part, is based on a debt
6 that is dischargeable" in the definition of a reaffirmation
7 agreement leads to a question of fact, the determination of which
8 is subject to the vagaries of litigation. 11 U.S.C. § 524(c).

9 Nor can one rely upon traditional structuring strategies to
10 elude reaffirmation status. Designating a post-discharge
11 transaction as a new loan, refinancing, or novation, will not
12 necessarily eliminate the question whether it nevertheless is an
13 unenforceable reaffirmation agreement as to personal liability.
14 Estoppel may be difficult to rely upon. Loan Star Sec. & Video,
15 Inc. v. Gurrola (In re Gurrola), 328 B.R. 158, 168-76 (9th Cir.
16 BAP 2005). Ultimately, whether consideration is "in part" based
17 on a dischargeable debt will be a question of fact that could be
18 raised in defense of an action on the debt and, as bankruptcy

19
20 ⁵The terms of the discharge are fixed by statute:

21 (a) A discharge in a case under this title –

22 (1) voids any judgment at any time obtained, to the
23 extent that such judgment is a determination of the personal
24 liability of the debtor with respect to any debt discharged
25 under section 727, 944, 1141, 1228, or 1328 of this title,
26 whether or not discharge of such debt is waived;

27 (2) operates as an injunction against the commencement or
28 continuation of an action, the employment of process, or an
act, to collect, recover or offset any such debt as a
personal liability of the debtor, whether or not discharge
of such debt is waived; and

(3) [community property injunction terms omitted].

11 U.S.C. § 524(a) (emphasis supplied).

1 courts have jurisdiction to enforce discharges, determined by a
2 bankruptcy judge in a reopened bankruptcy case. The outcome of
3 any fact-specific inquiry in litigation is inherently uncertain.

4 Although any debt may be reaffirmed, most reaffirmations
5 involve secured debts. Since liens ordinarily survive bankruptcy
6 regardless of reaffirmation, the reaffirmation of a secured debt
7 has the main effect of preserving the debtor's personal liability
8 for the debt. Thus, the most common use of reaffirmations is to
9 prevent "recourse" debt from becoming "nonrecourse" debt.

10 Negotiations focused on revising the terms of the obligation
11 to be reaffirmed are common. Indeed, Congress in § 524(c) twice
12 used the phrase "negotiating an agreement under this subsection"
13 in a context connoting its expectation that negotiations will
14 occur. 11 U.S.C. §§ 524(c)(3) & (6). Such negotiated
15 modifications may include capitalizing or adding missed payments
16 to the end of the loan payment schedule or substantially reducing
17 principal and interest.

18 Wells Fargo Bank, N.A., as a case in point, systematically
19 agrees to reaffirmations that write down automobile loans to the
20 value of the subject vehicle and reduces the interest rate.⁶

23 ⁶As an illustration, Wells Fargo agrees in reaffirmations to
24 write down automobile loans to the value of the vehicle and
25 reduce interest. For example, both of the Wells Fargo
26 reaffirmations on this court's January 6, 2010, calendar modified
27 loan terms in favor of debtors. On one, principal was reduced
28 from \$7,585.60 to \$3,348.75 and interest was reduced from 15.99%
to 8%. On the other, interest was reduced from 9.25% to 8%. In
re Morfin, Bankr. E.D. Cal. No. 09-40038-C-7; In re Sheridan,
Bankr. E.D. Cal. No. 09-37894-C-7.

1 B

2 A mortgage modification appears to be a reaffirmation
3 agreement to the extent that it affects a debtor's personal
4 liability. There is no sound basis to distinguish mortgage
5 modifications from other negotiated reaffirmation agreements.

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9 Although mortgages take a number of forms in the various
10 states, all involve a personal obligation to pay money backed by
11 some form of charge against, or interest in, real estate to
12 secure payment of the debt. Unless the debt is "nonrecourse"
13 either by contract or by statute so that the creditor may enforce
14 the obligation only against the collateral, the obligor remains
15 personally liable.

16 In general, two categories of mortgage – the lien of the
17 mortgage in favor of the lienor-mortgagee and the note and deed
18 of trust in which title is conveyed to a trustee for the duration
19 of the life of the obligation – predominate.

20 Upon completion of the terms of the contractual debt
21 obligation (typically payment), either the mortgagee must release
22 the lien or the trustee under the deed of trust must reconvey
23 title. All such forms of security are within the definition of
24 "lien" under the Bankruptcy Code. 11 U.S.C. § 101(37).⁷

25
26 ⁷The Bankruptcy Code definition of "lien" is:

27 (37) The term "lien" means charge against or interest in
28 property to secure payment of a debt or performance of an
obligation.

The personal liability of the debtor for a mortgage-type debt depends upon the contract and upon nonbankruptcy law. In an express "nonrecourse" debt scenario, the contract provides that the creditor's sole recourse will be against the collateral. De facto "nonrecourse" debt results in a functional sense when nonbankruptcy (typically, state law) enforcement mechanisms or prohibitions insulate obligors from personal liability in a manner that operates to render certain categories of mortgage debt into nonrecourse debt, regardless of the contractual terms.

As to the latter category – the functional effect of state law enforcement mechanisms and limitations – myriad variations among the states make it difficult to generalize about whether any particular mortgage-type obligation is or is not nonrecourse debt in a functional sense.

2

California law controls this case. What matters for present purposes is that, at least as a matter of theory, the debtors in this case could be exposed to personal liability on their residential mortgage. Hence, reaffirmation is not chimerical.

To be sure, the great majority of mortgages on California owner-occupied residences are, in the functional de facto sense, "nonrecourse" for either of two reasons. First, California permits the foreclosing creditor to elect a simplified and expedited nonjudicial foreclosure, following which there can be no deficiency judgment. Cal. Code Civ. Proc. § 580d; 4 B.E.

11 U.S.C. § 101(37).

1 WITKIN, SUMMARY OF CALIFORNIA LAW: SECURITY TRANSACTIONS IN REAL PROPERTY
2 § 199 (10th ed. 2005) (hereafter "WITKIN").

3 Nonjudicial foreclosure is normally preferred over the more
4 protracted and expensive judicial procedure for obtaining a
5 judgment of foreclosure and a deficiency judgment premised on
6 personal liability. Cal. Code Civ. Proc. §§ 725a-730.5; WITKIN
7 §§ 139-43 & 178-81. The economics of the transaction costs
8 discourage creditors from pursuing judicial foreclosure unless a
9 deep pocket lurks in the background. Nevertheless, since any
10 California mortgagee can choose between judicial and nonjudicial
11 foreclosure, it is not apodictic that the structure of the
12 foreclosure system perfectly insulates California owner-occupants
13 from personal liability on account of their mortgage debts.

14 Next, California insulates owner-occupants of residences
15 with fewer than four units by prohibiting deficiency judgments in
16 judicial foreclosures with respect to purchase money obligations.
17 Cal. Code Civ. Proc. § 580b. That protection is also imperfect
18 as the statute limits it to financing "to secure repayment of a
19 loan which was in fact used to pay all or part of the purchase
20 price" of the owner-occupied dwelling. Id. (emphasis supplied).
21 California courts construe § 580b as narrowly limited to the
22 "standard purchase money transaction." Compare Roseleaf Corp. v.
23 Chierighino, 59 Cal. 2d 35, 41 (1963) (Traynor, J.), with Brown
24 v. Jensen, 41 Cal. 2d 193, 198 (1953); WITKIN §§ 182-89.

25 Since the refinancings and home equity lines of credit that
26 have been popular in recent years are not necessarily "standard
27 purchase money transactions," the insulation of § 580(b) is
28 spottier than one might otherwise assume. By refinancing, many

1 California owner-occupants may have lost their statutory
2 insulation from deficiency judgments. See WITKIN §§ 182-83.

3 Junior mortgages, which are also eligible for mortgage
4 modification, may also entail personal liability for California
5 debtors when the lien of the junior mortgage is eliminated as a
6 consequence of foreclosure by a senior lienor. The so-called
7 "sold-out junior" may sue on the debt, particularly if the junior
8 financing transaction was not part of a standard purchase money
9 transaction. Roseleaf Corp., 59 Cal. 2d at 39-40; WITKIN § 205.

10 In this instance, the subject debt appears to be refinanced
11 debt. Thus, the debtors' stated desire to affirm their mortgage
12 debt to Wells Fargo potentially has legal and practical
13 significance that dovetails back to the effect of the discharge.

14
15 3

16 The Bankruptcy Code makes no relevant distinction between
17 debt secured by real property and debt secured by other than real
18 property. In the eyes of the bankruptcy discharge, a mortgage
19 lien is no different than any other lien.

20 As with liens generally, the lien of a mortgage survives the
21 discharge as a charge against the subject real property (or
22 interest in real property) to secure a debt, unless there is an
23 order specifically altering or eliminating the lien. The
24 debtor's personal liability on the debt, however, terminates upon
25 the entry of the discharge unless there is an enforceable
26 reaffirmation agreement. If there is not an enforceable
27 reaffirmation, then only the lien may be enforced after entry of
28 the discharge, which lien the creditor can agree to release for

less than (but probably not more than) the amount of the debt.

Therein lies the relevance of the reaffirmation agreement provision of Bankruptcy Code § 524(c) to mortgage modification in relation to the timing of the discharge. A mortgage modified before the discharge preserves the personal liability of the debtor. A mortgage modified after the discharge is entered can only modify the terms under which the lien will be released.

4

The conclusion that mortgage modifications are reaffirmations for purposes of assessing post-discharge personal liability is not undermined by the provision in Bankruptcy Code § 524(c)(6)(B) that the court is not required to approve a reaffirmation of consumer debt secured by real property as being in the debtor's best interest and as not imposing an undue hardship, which otherwise is required whenever the debtor was not represented by counsel during the negotiation of the reaffirmation agreement. 11 U.S.C. § 524(c)(6)(B). That provision applies only to the sixth essential element of an enforceable reaffirmation and, in particular, does not excuse compliance with the first essential element that the agreement be "made" before the discharge.

The text of § 524(c), as set out in the margin, specifies five essential elements for an enforceable reaffirmation agreement that always apply and a sixth that applies only when the debtor was not represented by counsel in connection with

1 reaffirming, except for consumer debt secured by real property.⁸

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4 ⁸Bankruptcy Code § 524(c) provides:

5 (c) An agreement between a holder of a claim and the
6 debtor, the consideration for which, in whole or in part, is
7 based on a debt that is dischargeable in a case under this
8 title is enforceable only to any extent enforceable under
applicable nonbankruptcy law, whether or not discharge of
such debt is waived, only if –

9 (1) such agreement was made before the granting of the
discharge under section 727, 1141, 1228, or 1328 of this
title;

10 (2) the debtor received the disclosures described in
subsection (k) at or before the time at which the debtor
11 signed the agreement;

12 (3) such agreement has been filed with the court and,
if applicable, accompanied by a declaration or an affidavit
13 of the attorney that represented the debtor during the
course of negotiating an agreement under this subsection,
14 which states that

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

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

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

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

19 (ii) any default under such an agreement;

20 (4) the debtor has not rescinded such agreement at any
time prior to discharge or within sixty days after such
agreement is filed with the court, whichever occurs later,
21 by giving notice of rescission to the holder of such claim;

22 (5) the provisions of subsection (d) of this section
have been complied with; and

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

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

26 (ii) in the best interest of the debtor.

27 (B) Subsection (A) shall not apply to the extent that
such debt is a consumer debt secured by real property.

28 11 U.S.C. § 524(c).

1 Under the plain language of the statute, the provision of
2 § 524(c)(6)(B) that excuses compliance with § 524(c)(6)(A) does
3 not excuse compliance with the other five essential elements of
4 an enforceable reaffirmation agreement.

5 Moreover, the 2005 Amendments to the Bankruptcy Code gave
6 the court additional power to disapprove a reaffirmation
7 agreement (except on debt to credit unions), if the debtor's
8 surplus income over expenses is not sufficient to make scheduled
9 payments on the reaffirmed debt. 11 U.S.C. § 524(m). Nothing
10 suggests that § 524(m) does not also apply to mortgages.

11 Since nothing in § 524(c) suggests that a reaffirmation
12 agreement made after entry of a discharge is enforceable against
13 the debtor as a personal liability if the requirement of
14 § 524(c)(1) is not satisfied, it follows that the rules of
15 procedure designed to facilitate the negotiation of reaffirmation
16 agreements apply to mortgage modification situations.

17 18 III

19 This brings the analysis back to the details of Rule
20 4004(c)(2):

21 Notwithstanding Rule 4004(c)(1), on motion of the debtor,
22 the court may defer the entry of an order granting a
23 discharge for 30 days and, on motion within that [period],
the court may defer entry of the order to a date certain.
24 Fed. R. Bankr. P. 4004(b)(2).

25 Rule 4004(c)(2) limits the sweep of the affirmative command
26 of Rule 4004(c)(1) that the court shall "forthwith" grant the
27 discharge upon completion of the basic prerequisites for
28 discharge. If the discharge is deferred, then, as noted above,

1 there is the incidental consequence of extending the duration of
2 the debtor's enjoyment of the protection of the automatic stay.
3 11 U.S.C. § 362(c)(2)(C).

4
5 A

6 One technical problem in Rule 4004(c)(2) merits discussion.
7 A word essential to making sense of the rule is omitted. No
8 confusion results, however, as the context of the rule is such
9 that the omitted word can only be the word "period."

10 Specifically, the text of Rule 4004(c)(2), promulgated in
11 1983 as the last sentence of Rule 4004(c), omits the word
12 "period" from the following: "defer the entry of an order
13 granting a discharge for 30 days and, on motion within that
14 [period], the court may ..." Fed. R. Bankr. P. 4004(c)(2). The
15 word "period" needs to be inserted because the phrase "on motion
16 within that, the court may" is nonsense.

17 From context, the omitted word can only be the antecedent to
18 which "within that" points. As the drafting conventions of the
19 rules prefer "period" over "time," the omitted word must be
20 "period." This solution to the omission is so far beyond doubt
21 that the Collier treatise and Collier publication of the text of
22 the rules go so far as to insert the missing word "period" as if
23 the rule had been corrected.

24 Nor does there appear to have been a reported controversy
25 regarding the omission.

26 To the extent a judicial ruling is needed to fill in the
27 gap, this court now holds that the missing word after "within
28 that" in Rule 4004(c)(2) is "period." Thus, Rule 4004(c)(2)

1 permits the debtor to make a motion to defer entry of discharge
2 for 30 days and, on motion within that period, the court may
3 defer discharge to a date certain.

4
5 B

6 Timing and mechanics are considerations. Rule 4004(c)(2)
7 contemplates an initial 30-day deferral of discharge that may be
8 further extended to a date certain on motion nominally to be made
9 "within the 30 day period" of the initial deferral.

10
11 1

12 The first mechanical question is whether the rule creates a
13 straightjacket in which no initial order may defer a discharge
14 for more or less than 30 days, even if it is known that several
15 months will be needed to resolve the matter.

16 If it is known at the outset that more than a 30-day
17 deferral will be needed, then it would be an excessive formalism
18 to require two motions under Rule 4004(c)(2) and would be
19 inconsistent with the obligation to construe the rules to secure
20 just, speedy, and inexpensive determination of every case and
21 proceeding. Fed. R. Bankr. P. 1001. It follows that a court has
22 discretion in an initial motion for deferral to leapfrog the
23 initial 30-day extension and defer discharge to a date certain.

24
25 2

26 The second mechanical question is whether Rule 4004(c)(2)
27 permits the fourth extension that is now being ordered. In other
28 words, may there may be multiple successive extensions to a date

1 certain? The pertinent language of Rule 4004(c)(2) is: "on
2 motion within that [period], the court may defer entry of the
3 order to a date certain." Fed. R. Bankr. P. 4004(c)(2).
4 Although the sense of the language is singular, conventional
5 statutory analysis answers the question in the affirmative as
6 permitting multiple successive extensions.

7 The rules of construction prescribed by Bankruptcy Code
8 § 102 are expressly incorporated into the rules by Rule 9001.
9 Fed. R. Bankr. P. 9001 ("the rules of construction in § 102 of
10 the Code govern their use in these rules"). Bankruptcy Code
11 § 102(7) provides that "the singular includes the plural." 11
12 U.S.C. § 102(7). Accordingly, multiple successive extensions to
13 dates certain are permitted by Rule 4004(c)(2). Hence, the
14 subsequent extension in this instance is authorized by the rule.

15
16 3

17 An additional question is whether a motion for deferral to a
18 date certain, which Rule 4004(c)(2) says is obtained "by motion
19 made within that [period]," actually must be made before the
20 prior deferral period has expired. The "motion-made-within-that-
21 period" deadline in Rule 4004(c)(2) turns out to be not so rigid
22 as first meets the eye once it is recognized that the time may be
23 retroactively enlarged under Rule 9006(b)(1) upon a showing of
24 excusable neglect. Fed. R. Bankr. P. 9006(b)(1).

25 Rule 9006(b) permits the time for any act "required or
26 allowed to be done at or within a specified period by these
27 rules" to be enlarged unless Rules 9006(b)(2) or (3) either
28 prohibit or limit enlargement. Fed. R. Bankr. P. 9006(b)(1).

1 An enlargement under Rule 9006(b)(1) may be retroactive upon
2 a showing of "excusable neglect." Fed. R. Bankr. P. 9006(b)(1);
3 Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507
4 U.S. 380, 388-95 (1993).

5 Retroactive enlargements for making Rule 4004(c)(2) motions
6 are permitted because, notwithstanding the rule's apparent
7 internal time limit, Rule 4004(c)(2) is not designated in Rules
8 9006(b)(2) or (3) as a rule for which enlargements are either not
9 permitted or are limited. Fed. R. Bankr. P. 9006(b)(2) (no
10 enlargements) & 9006(b)(3) (enlargements limited). Where
11 internal time limits in various rules are inflexible, Rule 9006
12 is specific about enforcing them. Pioneer Inv. Servs. Co., 507
13 at U.S. 389 n.4. Since Rule 4004(c)(2) is not named in either
14 Rule 9006(b)(2) or (b)(3), it follows that enlargement is
15 permitted and may be retroactive upon a showing of excusable
16 neglect. Id.; Fed. R. Bankr. P. 9006(b)(1).

17 As the initial deferral motion does not have a designated
18 deadline, the first Rule 4004(c)(2) motion is timely if it is
19 made before the discharge is entered.

20
21 C

22 Although no reported decision appears to have considered the
23 effect of Rule 9006 on the question of retroactive enlargement
24 before a discharge is actually entered, decisions construing Rule
25 4004(c)(2) reveal important features about the landscape.

Bankruptcy courts have divided on the question whether the discharge can or should be vacated so that an otherwise unenforceable, post-discharge reaffirmation agreement can become enforceable. Compare, e.g., In re Edwards, 236 B.R. 124, 126-27 (Bankr. D.N.H. 1999) (permissible to vacate discharge), with, e.g., Rigal v. Fleet Mortgage Corp. (In re Rigal), 254 B.R. 145, 148 (Bankr. S.D. Tex. 2000) (impermissible to vacate discharge).

The debate heretofore has touched on Federal Rule of Civil Procedure 60(b), as incorporated by Rule 9024, and has not focused on the role of retroactive enlargements upon a showing of excusable neglect. Fed. R. Civ. P. 60(b), incorporated by Fed. R. Bankr. P. 9024; & Fed. R. Bankr. P. 9006(b). As no discharge has been entered in this case, the issue is left to another day.

The teaching of the second group of cases is that caution is needed when a court acts so as to increase the "gap" between the deadline to object to discharge and the entry of discharge.

The puzzle is how one goes about challenging a discharge when the crucial facts warranting denial or revocation of discharge are discovered during the interval between the deadline to object to discharge fixed by Rule 4004(b), which time is not subject to retroactive extension, and the actual entry of discharge that can then be revoked for fraud not known "until after" the granting of such discharge. Compare Fed. R. Bankr. P. 4004(b) & 9006(b) (3) (no retroactive extension), with 11 U.S.C. §§ 727(d), 1228(d), & 1328(e); Morse v. Perotta (In re Perotta),

1 406 B.R. 1, 10-13 (Bankr. D.N.H. 2009) (collecting cases).

2 This "gap" conundrum reflects an imperfect coordination
3 between the rules and the statute that has existed since 1983
4 whenever the entry of the order of discharge is not instantaneous
5 upon expiration of the deadline to object to discharge. The gap
6 would be adjustable if Rule 4004(b) had a procedure for extending
7 the deadline to object to discharge less rigid than an insistence
8 that the motion be filed before the deadline has expired. Fed.
9 R. Bankr. P. 4004(b).

10 The "gap" problem is not unique to Rule 4004(c)(2) and has
11 gradually been expanding since 1983 in proportion to the erection
12 of various barriers to entry of discharge. In addition to Rule
13 4004(c)(2), discharge is also deferred in a manner that does not
14 affect the deadline for objecting to discharge for eight other
15 reasons set forth in the margin.⁹

16 ⁹In addition to Rule 4004(c)(2), discharge is deferred:

- 17 ● for so long as there is pending a motion to dismiss the
- 18 case under § 707, Fed. R. Bankr. P. 4004(c)(1)(D);
- 19 ● for so long as there is pending a motion to extend the
- 20 time for filing a motion to dismiss the case under Rule
- 21 1017(e), Fed. R. Bankr. P. 4004(c)(1)(F);
- 22 ● until the debtor pays the case filing fee, Fed. R. Bankr.
- 23 P. 4004(c)(1)(G);
- 24 ● until the debtor files a statement of completion of a
- 25 course in personal financial management, Fed. R. Bankr. P.
- 26 4004(c)(1)(H);
- 27 ● while a motion is pending to defer or postpone discharge
- 28 per § 727(a)(12), Fed. R. Bankr. P. 4004(c)(1)(I);
- so long as there exists a presumption that a
- reaffirmation agreement is an undue hardship under § 524(m),
- Fed. R. Bankr. P. 4004(c)(1)(J);
- while there is pending a motion to delay discharge on the
- basis the debtor has not filed all tax documents required by
- § 521(f), Fed. R. Bankr. P. 4004(c)(1)(K); or
- until 30 days after a debtor is required to file a
- statement under Rule 1007(b)(8) has filed the statement,

1 Courts are divided on how to deal with the gap when a basis
2 to challenge the discharge is discovered after the Rule 4004(b)
3 deadline for objecting to discharge and before the entry of
4 discharge that starts the time in which to seek to have the
5 discharge revoked. Literalists would give debtors a free pass
6 that enables them to retain discharges obtained by fraud. E.g.,
7 Zedan v. Habash (In re Habash), 529 F.3d 398, 405-06 (7th Cir.
8 2008) (dictum). Courts that apply a more flexible approach so as
9 to thwart illegitimate discharges reason that the rules of
10 procedure must give way to the statute. E.g., Citibank v. Emery
11 (In re Emery), 132 F.3d 892, 895-96 (2d Cir. 1998); Ross v.
12 Mitchell (In re Dietz), 914 F.2d 161, 164 (9th Cir. 1990). A
13 third approach builds on Bankruptcy Code § 105 and the Supreme
14 Court's decision in Marrama v. Citizens Bank, 549 U.S. 365
15 (2007), to permit objections to discharge to be filed after the
16 Rule 4004(b) deadline but before the discharge is entered,
17 reasoning that abuse of process otherwise would result.
18 Perrotta, 406 B.R. at 16-17.

19 The "gap" will be manageable in this instance because the
20 law of the Ninth Circuit gives a bankruptcy court discretion, in
21 the name of complying with the spirit of the Federal Rules of
22 Bankruptcy Procedure, to indulge in the legal fiction of
23 "deeming" a discharge to have been entered immediately upon
24 expiration of the Rule 4004(b) deadline in which to object to
25 discharge even though it actually is deferred. Sherman v. SEC
26 (In re Sherman), 491 F.3d 948, 966-67 (9th Cir. 2007), explaining

27
28 Fed. R. Bankr. P. 4004(c) (3).

1 Dietz, 914 F.2d at 164. Thus, if a dysfunction arises because of
2 the "gap" that is being extended, this court has discretionary
3 tools to deal with the situation.

4
5 IV

6 Having concluded that Rule 4004(c)(2) is eligible to be
7 employed during the pendency of loan modification negotiations,
8 the question becomes whether it is appropriate to do so in this
9 instance and to do so for a substantial period of time.

10
11 A

12 The threshold prerequisite to an exercise of discretion to
13 defer discharge under Rule 4004(c)(2) is that the debtors must be
14 acting in good faith.

15 As noted at the outset, the court is persuaded that these
16 debtors are acting in good faith. They say they are setting
17 aside funds to pay the mortgage. The \$42,000 difference between
18 the amount of the debt and the presumed value of the residence
19 suggests that an agreed mortgage modification is a realistic
20 expectation. Nothing in the record suggests that they are
21 enjoying a free ride during the pendency of the automatic stay.

22
23 B

24 The Wells Fargo position is typical of what the court has
25 been hearing in other cases with regularity. Institutional
26 mortgage lenders have been coming before this court seeking
27 relief from the automatic stay to foreclose on a chapter 7
28 debtor's home on grounds there is no equity in the property

1 despite on-going modification negotiations and that payments are
2 in arrears, even though the mortgage creditor may have counseled
3 the debtors to stop making payments. These lenders often
4 acknowledge, as here, that the debtor's sometimes-multiple
5 requests for consensual modification of the mortgage have been
6 "lost" or "mislaidd." If not "lost," they say, as here, that
7 action will be "delayed" for many months because they are busy.

8 The utility of deferring discharge pursuant to Rule
9 4004(c)(2) is to preserve the status quo during the period it
10 takes for the creditor to equilibrate the asymmetry between its
11 urgent stay relief motion filed at the outset of the case and the
12 same creditor's seemingly lackadaisical approach to considering
13 whether to agree to modify the mortgage.

14 There is, of course, every reason to expect Wells Fargo will
15 negotiate in good faith consistent with the requirement of
16 California law that every contract is subject to an implied
17 covenant, or duty, of good faith and fair dealing. E.g., Waller
18 v. Truck Ins. Exch., Inc., 11 Cal.4th 1, 35-36 (1995).

19 As Wells Fargo requests that its long-continued stay relief
20 motion be further continued and agrees that a further deferral of
21 discharge under Rule 4004(c)(2) is also appropriate, it is not
22 necessary to decide whether its motion should be denied on the
23 basis of inequitable conduct in the filing of an unnecessary
24 stay¹⁰ relief motion and lack of clean hands when filing a motion

25
26 ¹⁰There is no merit to the common assertion by mortgage
27 creditors that stay relief is needed before negotiating with
28 debtors. The conspicuous absence in thirty years of Bankruptcy
Code jurisprudence of reported decisions taking creditors to task
for participating in voluntary reaffirmation discussions

1 premised on nonpayment promptly after telling the debtors to
2 suspend payment. Rather, the only remaining question is for how
3 long to continue the stay relief motion and to defer discharge.

4 The appropriate period for further deferral is that which
5 will facilitate efforts between the debtors and Wells Fargo to
6 reach a consensual and mutually beneficial resolution. Such a
7 result, if it can be achieved, would give effect to the
8 fundamental bankruptcy policy of a fresh start for these debtors
9 and of payment on satisfactory terms to the creditor. If the
10 parties are ultimately not successful, the usual bankruptcy and
11 state law remedies will thereafter be available to the parties.

12
13 C

14 The Rule 4004(c)(2) discharge deferral has limits. It
15 cannot be used to run roughshod over security interests
16 generally. Nor can it be used as a device for indefinite delay
17 of the inevitable. Neither circumstance would comport with the
18 requirement that Rule 4004(c)(2) be invoked in good faith.

19 Moreover, discharge deferral as a strategy for dealing with
20 creditors is vulnerable to the criticism that chapter 7
21 liquidation is not designed as a long-term procedure for

22 _____
23 demonstrates the lack of merit in such a position. Stay relief
24 motions made on that pretext are vulnerable to fee shifting in
25 favor of the debtor following compliance with the safe-harbor
26 provisions of Rule 9011. Fed. R. Bankr. P. 9011(c)(1)(A). Nor
27 is the phenomenon of unnecessary stay relief motions harmless –
28 mortgage creditors often file in this court stay relief motions
in no-asset chapter 7 cases in which the stay likely will expire
soon after the motion can be heard and then add about \$1500 to
the debt for the cost of the motion; this smacks of an
illegitimate private bankruptcy penalty.

1 adjusting creditors' rights. That task ordinarily is left to
2 plans under chapters 11 and 13.

3 But the case of mortgages on individual debtors' principal
4 residences is different. Chapters 11 and 13 are inadequate for
5 dealing with mortgages on principal residences because such
6 obligations may not be modified by a chapter 11 or 13 plan. 11
7 U.S.C. §§ 1123(b)(5) & 1322(b)(2). In contrast, chapters 11 and
8 13 are adequate to restructure any other mortgage.

9 Especially in a state that, like California, has a rapid
10 nonjudicial foreclosure procedure that bypasses the local courts,
11 a debtor is left with little process-based leverage other than
12 the automatic stay and the ability to attempt to negotiate a
13 consensual reaffirmation.

14 As already explained, reaffirmations have long served to
15 provide a method for adjusting creditor rights by consent,
16 especially in chapter 7 cases. Moreover, it is common for
17 reaffirmations to reduce principal and interest or otherwise to
18 adjust payment terms. By enabling the automatic stay to remain
19 in effect by way of deferring discharge under Rule 4004(c)(2) for
20 debtors acting in good faith to negotiate reaffirmations, debtors
21 at least have some leverage to deal with a creditor.

22 The duration of the exercise of that leverage depends upon
23 the state of the negotiations. When, as with mortgage
24 modifications, a creditor holds itself out as willing to
25 negotiate, the appropriate period for discharge deferral is for
26 the duration of the negotiation process. Once there is no
27 prospect of further negotiation, it would no longer be
28 appropriate to continue to defer discharge.

1 ***

2 Federal Rule of Bankruptcy Procedure 4004(c)(2) permits
3 debtors acting in good faith to request discharge deferral while
4 attempting to renegotiate mortgages in which they would reaffirm
5 their personal liability. Multiple extensions may be warranted
6 when, as here, the creditor is proceeding at a glacial pace.

7 An appropriate order will issue.

8 Dated: March 8, 2010.

9
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UNITED STATES BANKRUPTCY JUDGE
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