

Chap 7..13

Bankruptcy Blotter



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Summer 2009

THE PRUDENT PRACTITIONER

Reaffirmation Agreements

By Rosemary E. Williams*

The first question that elusive individual, the “reasonable” person, might ask a Chapter 7 debtor who reaffirms personal liability on an otherwise dischargeable debt is “why?” The central objective of a case under Chapter 7 is to obtain a discharge covering as much debt as possible under the facts of the case. Even though Congress has repeatedly constricted the scope of the Chapter 7 discharge, it still is *the* objective. Why else would anyone put up with the intrusive, confrontational nature of a consumer bankruptcy case, turn over so much personally identifiable information, and go through a public

* Rosemary E. Williams is a member of the California and Texas Bars. She is the author of *Bankruptcy Practice Handbook and Electronic Case Management and Filing in Bankruptcy Court* (both from Thomson Reuters/West)

From the Editor

With the advent of version 8.0, we now have the ability to mark up PDF documents before filing them with the court. Plan 13 customers (across more and more districts) have the ability to edit the full text of their chapter 13 plans. What next?

The most noticeable change in version 9 will be changes to the Case Explorer window which will make it easier to obtain contact information and other data without having to dig into the Case, or Creditor, Information windows. This will be accompanied by many more contact fields for your clients as well as other parties involved in the case. We also hope to soon offer a “Setup Wizard” for new and existing customers to set commonly used defaults. Full text editing of local forms is also in the works.

We are planning on the version 9 CD for September. If you have comments on how we can improve the program, please send them to West.Chap7dotdot13@thomsonreuters.com.

Your Chap 7..13 Project Team

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grilling about how much is spent for food? In the context, the only reason a debtor would reaffirm personal liability on a dischargeable debt is to gain a financial benefit that would be lost without the reaffirmation. That financial benefit is a continuation of some sort of prepetition credit, whether it be renewal of a credit line or continuation of currency on a vehicle loan.

From the creditor's viewpoint, the prospect is much less intimidating. The creditor, in effect, wants the consumer debtor to waive the benefit of the discharge of the creditor's claim, and to get that, will make some sort of concession, even if that is nothing more than leaving an existing loan in place. The creditor will receive a higher recovery than would otherwise be available, while the debtor will receive the benefit of renewed credit. When the debt is a vehicle or home loan, the concession generally is restricted to not carrying out a forced sale of the collateral. Otherwise, concessions can and have included some questionable benefits, such as permitting the debtor to pay a reduced price for the 65 inch high-definition color television set with surround-sound rather than repossess it and recover almost nothing on a resale.

Caution: It is worthwhile to review the default provisions of the original loan agreement. If the debtor is current on the payment obligations, maintains any required insurance, and is not in default under the terms of the loan agreement, the debtor is in a stronger position to negotiate better terms than those in the original agreement (depending of course on the law of the situs state, whether self-help recovery of the collateral is possible, and how willing state courts are to allow a forced sale for a technical default.

Given the mutuality of financial incentives, it may seem strange—on the face of it—that relatively few reaffirmation agreements are submitted and judicially approved. This may be in part because judicial ap-

proval is not required for one commonly reaffirmed obligation—a home mortgage.¹ But this is not enough by itself to explain the scarcity of reaffirmation approvals. Some consideration must be given to a post-discharge limiting factor of continuing financial stress. Debtors who file bankruptcy as a consequence of chronic illness, lost jobs, and other financial losses created by the present economic turmoil may not be able to afford credit. But there is no doubt that one factor is the overly complex and confusing reaffirmation process itself.

The contents and procedural requirements for reaffirmation agreements are laid out in five non-sequential Code provisions: Code § 524(c) and (d), and latterly (k), (l) and (m) added by the 2005 amendments.² The 2005 provisions add a series of disclosure requirements,³ none of which are particularly onerous, or meaningful, and then describe what is necessary to make the agreement binding on the parties after the discharge. In case creditors have any problems with the required disclosures, Congress enacted protection from liability for creditors who make some sort of good faith attempt to comply. Code § 524(l)(1) permits a creditor to accept payments from a debtor before and after the filing of a reaffirmation agreement. Further, if the creditor believes in good faith that a reaffirmation agreement is “effective,” the creditor may accept payments from a debtor under an otherwise invalid agreement.⁴ Finally, the disclosure requirements “shall be satisfied” if the required disclosures are given in good faith.⁵ As a consequence of all this exculpatory language protecting creditors, any problems arising from a defective reaffirmation agreement are to be borne by the debtor. This may set aside the old rule that ambiguities in an agreement are to be resolved against the drafter.

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The enforceability of the terms of a reaffirmation agreement is determined by non-bankruptcy law,⁶ but the agreement doesn't get that far unless it is made in compliance with the Code's federal requirements,⁷ and filed prior to issuance of the order of discharge.⁸ Even then, the consumer debtor has the right to rescind the agreement at any time prior to the issuance of the order of discharge, or within 60 days after the reaffirmation agreement is filed, whichever date is later, by giving notice of rescission to the creditor.⁹

Assuming the contents of the reaffirmation agreement are in compliance with the Code, there are several statutory requirements for enforceability, all of which must be met for the agreement to be enforceable:¹⁰

- 1) The reaffirmation agreement has to be dated as made before the issuance of the order of discharge;¹¹
- 2) The reaffirmation agreement contains disclosures as required, and a "clear and conspicuous"¹² statement regarding the debtor's right of rescission;¹³
- 3) The agreement is filed with the court;¹⁴
- 4) The agreement is filed concurrently with one or, depending on whether the debtor is represented or pro se, two declarations or affidavits:
 - a. By the attorney who represented the debtor in the negotiations of the reaffirmation agreement (usually the debtor's case counsel, although that is not a requirement) that states:
 - i. The agreement was voluntary on the debtor's part;
 - ii. The debtor was "fully informed" about the agreement;
 - iii. The attorney has "fully advised" the debtor of the legal effect and consequences of the reaffirmation agreement and any default (presumably by the debtor) under its terms; and
 - iv. The terms of the agreement will not "impose an undue hardship on the debtor or a dependent of the debtor."
 - b. Each reaffirmation agreement must be accompanied by a Statement of Support showing the debtor's ability to make the

payments described in the agreement.¹⁵ If the statement shows insufficient funds to make the payment, a presumption of undue hardship arises, and the court must hold a hearing. The entry of the order of discharge is delayed where the presumption arises.¹⁶

- c. By the debtor, if not represented during the negotiations on the agreement providing facts by which the court can find at a hearing that the terms of the agreement do not impose an undue hardship on the debtor or a dependent of the debtor, and that the reaffirmation is in the debtor's best interest.¹⁷
- 5) Code §524(k)(7), added by the 2005 Amendments, requires that the debtor file a Motion for Court Approval and supporting Order. The Motion must state:
 - a. (i) I am not represented by an attorney in connection with this reaffirmation agreement.
 - (ii) I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement of Support of this reaffirmation agreement and because (provide any additional relevant reasons the Court should consider):
 - (iii) Therefore, I ask the court for an order approving this reaffirmation agreement.
 - b. If the court grants the debtor's motion and approves the reaffirmation agreement, the court order used to approve the agreement must state the following: "The court grants the debtor's motion and approves the reaffirmation agreement described above."
- Caution:** As of December 1, 2009, each reaffirmation agreement must be accompanied by Official Form 27, the Reaffirmation Agreement Cover Sheet, which includes information permitting the court to determine whether the proposed reaffirmation agreement raises a presumption of undue hardship. Some courts have adopted this form through local rule.
- 6) The debtor does not exercise the right of rescission, or doesn't do it timely; and
 - 7) If required by statute, a judicial hearing¹⁸ is held at which the agreement is approved.

- 8) The big exception to all this: a reaffirmation agreement with a creditor holding a debt secured by real property does not require judicial approval.¹⁹

There are reference forms for reaffirmation agreements and orders approving them. Director's Form B240A provides a reaffirmation agreement which includes on the first page a checkbox for whether the presumption of undue hardship arises. The form also sets out the (i) disclosures, instructions and notice to the debtor; (ii) reaffirmation agreement; (iii) certification for the debtor's attorney, if any; (iv) debtor's statement in support of the reaffirmation agreement, and (v) motion for court approval if necessary. Form B240B is the related order approving the reaffirmation agreement. In addition to these forms, some courts have adopted a form for reaffirmation agreements and include a sample in the local rules.

Absent a local rule or practice to the contrary, there is no need outlined in the Code for a court appearance by counsel or the debtor at the reaffirmation hearing if (i) the debtor was represented by counsel during the negotiations on the reaffirmation agreement, (ii) the attorney signs the certification in Part C²⁰ and opines that there is no presumption of undue hardship, and (iii) the debtor's certification in Part D does not raise a presumption of undue hardship. Absent any of these factors, the attorney should attend the reaffirmation hearing,²¹ and if the presumption of undue hardship arises, must attend.²² This is because the Part C certification is both a certification under 11 U.S.C.A. § 524(k)(5)(A) in all cases, and an opinion under 11 U.S.C.A. § 524(k)(5)(B) in cases where the presumption of undue hardship arises. If the attorney represented the debtor during negotiations but for whatever reason cannot sign the Part C certification, the attorney should review a recent decision by the Bankruptcy Court for the Northern District of Georgia in which the court held that it could determine whether to approve the reaffirmation agreement filed without Part C because "In the final analysis, it is the client, not the lawyer, who makes the decision about reaffirmation. So a debtor must have the opportunity to seek to enter into an enforceable reaffirmation agreement notwithstanding her lawyer's decision not to sign the certification based on the lawyer's professional judgment that it is not in her best interest or for other valid reasons."²³ Thus if the presumption of undue hardship arises, or if the

attorney cannot complete and sign all of Part C, the attorney should attend the reaffirmation hearing.

None of this sounds complicated, but it gets messed up an astonishing number of times. One common way to have this go haywire is that the reaffirmation agreement is not filed with the court prior to the date of issuance of the discharge. Debtors and creditors desperate to get a late reaffirmation agreement approved have even tried revocation of the order of discharge for fraud under 11 U.S.C.A. § 727(d).²⁴

How does this fiasco occur? Generally because creditors, and especially collection agencies, think that their job is done when the debtor agrees to reaffirm.²⁵ A form reaffirmation agreement is placed in the mail via a round tuit, is sent to an unrepresented debtor who hasn't a clue what to do with it, or is sent to an attorney and has terms so egregious that the attorney has no time to negotiate reasonable terms prior to the discharge, and therefore refuses to sign the affidavit so as to leave it up to the court to try to find no undue hardship.²⁶ This even though the Code mentions "negotiations" twice.

Another route to disaster is taken when the creditor doesn't follow up in sufficient time before the order of discharge to discover a problem or a time lapse, or guide the debtor through the necessary steps—until a day or two before, or worse, after, receiving notice that the discharge order has been issued, at which the debtor gets a call or a letter stating that the television or vehicle is going to be repossessed because no reaffirmation agreement was approved.

The Code places on the debtor the obligation to aver in a declaration or affidavit to the necessary facts, but does not describe or define whose burden it is to get this done. Creditors rarely send an unrepresented debtor the necessary declaration or affidavit to get the required factual averment. However, where the debtor is represented, it is difficult to see how the creditor can be expected to do this since the facts of a specific case can vary. But the unrepresented debtor doesn't know how or what to do; the creditor doesn't either or just doesn't feel any responsibility for doing it. Whatever the cause, the court clerk ends up with a scared debtor trying to get a hearing on an emergency basis to somehow get the reaffirmation agreement approved after the order of discharge has been issued.

So what does a Prudent Practitioner do?

- 1) Tell the debtor, with written confirmation, a bit about the purpose of and procedure for reaffirmation.
- 2) The experienced attorney will be able to identify which debts are likely to be the subject of reaffirmation. After all, the statement of intent requires that these be identified. Discuss each of these debts specifically with the debtor to obtain a clear understanding of what can and cannot be done with regard to surrender or reaffirmation.
- 3) Follow up preparation of the statement of intent with letters sent to the creditor or collection agency stating the date of the expected discharge, and stating in clear and conspicuous words and numbers the last date by which a reaffirmation agreement should be sent in sufficient time for it to be reviewed and filed timely. Send a copy of this letter to the debtor.
- 4) If the creditor is being mindless, or is known to demand overreaching terms, state in the letter that if the proposed terms are not reasonable, the attorney will neither represent the debtor nor sign an affidavit or declaration that reaffirmation is not an undue hardship.²⁷
- 5) If an affidavit or declaration is to be signed by the attorney, it must contain *facts* supporting the conclusion of no undue hardship—and remember where the debtor has a family member that reaffirmation cannot be an undue hardship on the dependent either.
- 6) Include appropriate compensation for negotiating and presenting a reaffirmation agreement, or include a provision that the representation does not include reaffirmation unless a later, separate agreement is reached.
- 7) If the Prudent Practitioner is dealing with an unrepresented debtor, include a cover letter with the reaffirmation agreement describing the procedure, telling the debtor what he or she must do, and setting out an explicit timetable.
- 8) Send a follow-up communication no later than 7 working days before the discharge date.

NOTES

1. 11 U.S.C.A. § 524(c)(6)(B). The presumption of hardship does not apply to reaffirmation agreements where the creditor is a credit union. See 11 U.S.C.A. § 524(m)(2).
2. See, in general, 1 Bankruptcy Practice Handbook § 5:81 (2d ed.) regarding dealing with postpetition abuse by creditors of the reaffirmation process.
3. 11 U.S.C.A. § 524(k). In case someone doesn't get it, there are forms described in the Code. See 11 U.S.C.A. §§ 524(k)(7) for the motion and 524(k)(8) for the order. See 11 U.S.C.A. § 524(k)(6)(A) for the debtor's declaration or affidavit in support of the reaffirmation, and see 11 U.S.C.A. § 524(k)(5) for the certification of counsel. Also see Director's Forms B240A and B. If a creditor doesn't want to read the statutory requirements, or the forms, or who otherwise doesn't comply with the statutory requirements, it can defend any claims of invalidity by demonstrating some sort of "good faith" effort to comply. 11 U.S.C.A. § 524(l)(3).
4. 11 U.S.C.A. § 524(l)(2).
5. 11 U.S.C.A. § 524(l)(3).
6. 11 U.S.C.A. § 524(c).
7. A reaffirmation agreement is enforceable "only if" the requirements of Code § 524(c) are met.
8. 11 U.S.C.A. § 524(c)(1).
9. 11 U.S.C.A. § 524(c)(4).
10. *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439 (C.A.1 (R.I.), 2000). The forum may be limited to the bankruptcy court which issued the order of discharge. See *Cox v. Zale Delaware, Inc.*, 239 F.3d 910 (C.A.7.Ill., 2001).
11. 11 U.S.C.A. § 524(c)(1). See Fed R Bankr Pro 4008(a): "A reaffirmation agreement shall be filed no later than 60 days after the first date set for the meeting of creditors," a time which can be extended by the court. In re Merritt, 366 B.R. 637 (Bankr.W.D.Tex. San Antonio Div., 2007) holding that, so long as it can be shown that reaffirmation agreement was made prior to discharge, there is no statutory requirement that the agreement also be filed prior to discharge in order to be effective – but a timely filing is prudent nonetheless.
12. The standard for clear and conspicuous is low. See In re Bassett, 285 F.3d 882 (C.A.9 2002) holding that the "right to rescind" language is clear and conspicuous if it is "so written that a reasonable person against whom it is to operate ought to have noticed it," and approving a right-to-rescind provision in a reaffirmation agreement even though the provision appeared in lower-case type in a paragraph that contained other information to the effect that the debtor's exercise of the right of rescission would constitute a default, and placed next to another paragraph printed in upper-case letters. The Court cautioned that a contract term in all caps can be inconspicuous "if it is hidden on the back of a contract in small type, if it appears in hard-to-read type, or if it is buried deep within a long paragraph in capitals." See Bankruptcy Practice Form 4008-1 from the Bankruptcy Court for the Middle District of Pennsylvania at http://www.uslawcenter.com/usmiddle/BPF4008_1.pdf, which uses underlining for the clear and conspicuous requirement.
13. 11 U.S.C.A. § 524(c)(2) referring to Code § 524(k).
14. 11 U.S.C.A. § 524(c)(3). The agreement need only be "made" before issuance of the discharge; however, courts like to have the approval hearing before the discharge is issued, so best to get the hearing, if one is needed, over before that date rather than risk subsequent disputes about the effectiveness and enforceability of the agreement.

15. 11 U.S.C.A. § 524(k)(6)(A).
16. Fed R Bankr Pro 4004(c)(1)(K). If the parties are unable to timely file the reaffirmation agreement, Fed R Bankr Pro 4004(c)(1)(J) permits a delay in entry of the discharge during the pendency of a motion to extend the time to file the agreement.
17. Otherwise the court can only make the required findings by examining the debtor at the hearing, not something a judge wants to have to do, and leaving eventual approval somewhat up in the air.
18. 11 U.S.C.A. § 524(d).
19. This does not mean that every other requirement is waived – the reaffirmation agreement must meet the Code’s mandate, but no hearing is necessary.
20. 11 U.S.C.A. § 524(c)(3). See 11 U.S.C.A. § 524(k)(3)(J)(i) regarding inclusion of this in the reaffirmation agreement. Part C forms are included in the local rules of many courts. See, for example, Local Rules Form #11 from the Bankruptcy Court for the Middle District of Louisiana at <http://forms.lp.findlaw.com/form/court-forms/fed/cir/c5/b/lamb/lamb000009.pdf>.
21. See *In re Nelson*, 2008 WL 2961317 (Bankr.E.D.Va.,2008) ***Section 524(k)(1) requires a reaffirmation agreement to contain Part C...”. And see an even more aggressive interpretation by the same court at *In re Rodriguez*, 2008 WL 2509373 (Bankr.E.D.Va.,2008) (“where the debtor has counsel of record, counsel *must* make the required certifications in order for a reaffirmation agreement to be enforceable. This is true *regardless of whether counsel actually participated* in the process of negotiating the reaffirmation agreement”).
22. See *In re Keck*, 2008 WL 2952156 (Bankr.E.D.Va.,2008). And see *In re Buchanan*, 2008 WL 2713930 (Bankr.E.D.Va.,2008) (“court review is not required until counsel checks the box set forth in Part C”).
23. *In re Goodman*, 2009 WL 936910 (Bankr.N.D.Ga. 2009). It is noteworthy that the Court expressly approved the lawyer’s non-disclosure of the reasons for not signing the Part C certification.
24. See *In re Perryman*, 111 B.R. 227 (Bankr. E.D. Ark. 1990), where a secured creditor claimed it was fraudulently induced to enter a reaffirmation agreement, letting the deadline for objecting to discharge or dischargeability pass because of it. For fraud. Imagine how desperate the debtor has to be to do that. Sounds like a lot of pressure from the creditor, doesn’t it?
25. If there is no signatures on a written reaffirmation agreement, the debt is not reaffirmed no matter how many times, or how vehemently the debtor promises to repay the debt. *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998).
26. The courts do not apply this term with the same rigor as when the debtor is trying to obtain discharge of a student loan; otherwise, almost no reaffirmation agreement would ever be approved. For a taste of the requirements when a student loan is involved, see the leading case of *Brunner v. New York State Higher Educ. Services Corp.*, 831 F.2d 395, 396, 42 Ed. Law Rep. 535, Bankr. L. Rep. (CCH) P 72025 (2d Cir. 1987) (rejected by, *In re Healey*, 1993 WL 13000569 (Bankr. E.D. Mich. 1993)); *In re Spence*, 541 F.3d 538, Bankr. L. Rep. (CCH) P 81320 (4th Cir. 2008), cert. denied, 129 S. Ct. 1319 (2009) (applying *Brunner* and holding that the debtor failed to present proof on the second factor— namely, that “additional circumstances” existed to indicate that her financial situation was likely to persist for a significant portion of the loan repayment period, and further that the record did not show that the debtor had made a good faith effort to maximize her income, failing the third *Brunner* factor).
27. But see *In re Minardi*, 399 B.R. 841 (Bankr.N.D.Okla.,2009) holding that an attorney’s attempt to limit his services to exclude negotiation of reaffirmation agreements on behalf of a Chapter

7 debtor was an “impermissible limitation” on representation of the debtor. Further this Court held that it could not approve the reaffirmation agreement on the alternate procedure for pro se debtors, holding the opposite of the Court in note 21.

Our Most Recent Release

Chap 7..13 Version 8.1, which was released on June 9 and is available for download at <http://west.thomson.com/software/chap7-13/default.aspx>, contains several new or revised local forms, one revised official form, two new chapter 13 plans, and three revised chapter 13 plans. It also includes CM/ECF fixes for Minnesota and the Northern District of Alabama, and fixes for issues concerning the sort order for Schedule C, the print and preview buttons, and the default Windows printer.

New Editorial Features Allow More Customization of Documents

Our Version 8.0 CD, which customers received in early May, contains two new editorial tools that allow for some customization of forms. First is the new PDF-XChange Viewer, available for all chapters, which contains several editing features, such as a typewriter tool, sticky notes, text boxes, arrows and shapes, callouts, and even “rubber stamps” such as Draft and For Comment. For information on printing and/or previewing using the PDF-XChange Viewer, see Chap 7..13 Tips in this newsletter.

The second addition to our editing toolbox is the RTF editor we now have to edit the new chapter 13 plans that were added to the program in the Version 8.0 CD and the Version 8.1 web release. We currently have 67 new chapter 13 plans in RTF format in the program. The plans that are not yet in RTF format can be edited with the PDF-XChange Viewer, but the new chapter 13 plans allow you to directly edit the text of the documents with an internal word processor. Of course, these new

plans still contain all of the other features of the Plan 13 Module that customers have come to appreciate.

One important thing to remember with the plan 13 editor is that it allows for only one narrative plan to be worked on at a time for the open client file. You can save multiple versions to your computer, but only one version within the computer itself.

Also, *your manual edits to the document will not flow back into Plan 13's database; they are present only in the document. Therefore, you should manually edit a narrative plan only at the conclusion of your*

workflow, that is, after you have made all other necessary modifications within the program itself and have balanced the plan.

If you modify and recalculate the plan with Plan 13 again, the Narrative Plan will be regenerated and you will need to manually modify it again and save it again.

We think you will enjoy these new features, and we hope you feel that they enable you to prepare and file your bankruptcy forms with even more efficiency and accuracy.

Chap 7..13 Tips:

Setting Printing Preferences

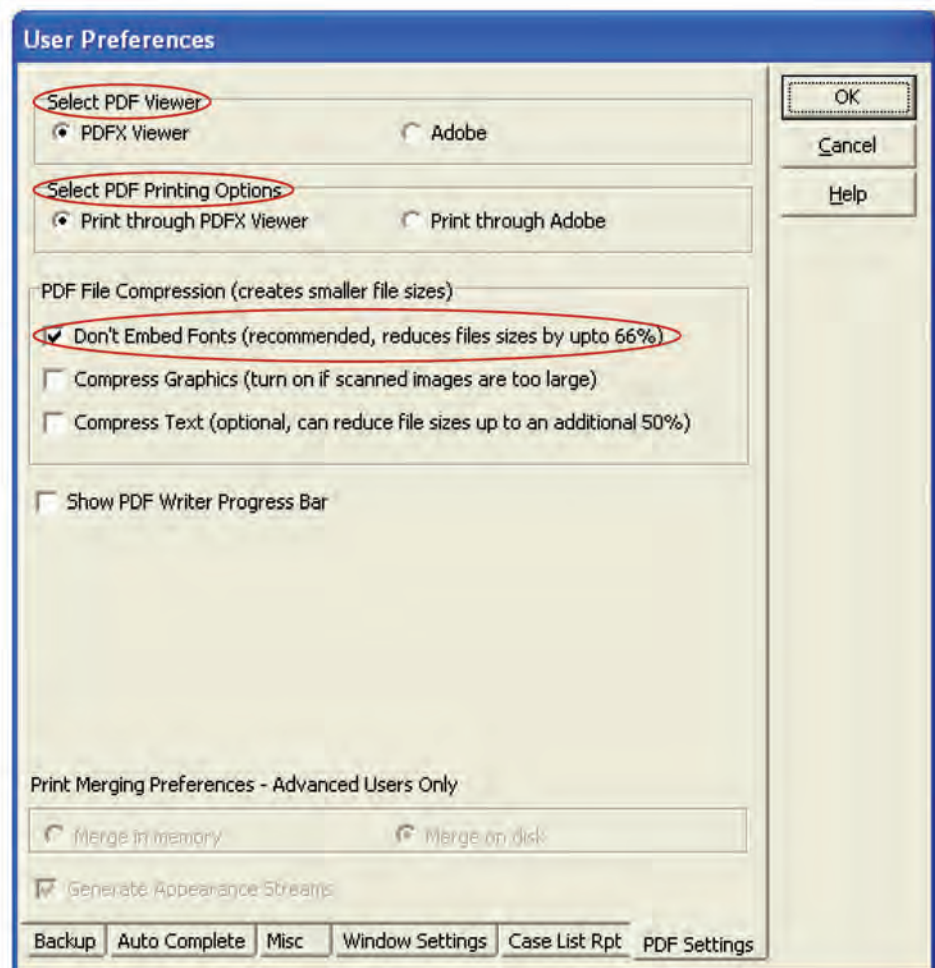
Starting with Chap 7..13 Version 8.0, you have the option of using either our PDF-XChange Viewer or Adobe to preview or print documents.

This program setting can be found under File./User Preferences/PDF Settings, at the top of the screen.

This way, if you're having problems with printing or previewing from the one (such as when you upgrade your printer, or choose a different printer), you can choose the other. Please bear in mind, however, that if you switch the pdf viewer to Adobe, you will lose the editing functionality that is available in the PDFX Viewer.

Update Reminder

You should have received version 8.0 in the mail a few months ago. Don't forget to upgrade your program to version 8.1.5. This can be done via our website (a link can also be found under the Help menu in the program): <http://west.thomson.com/software/chap7-13/default.aspx>.



Suite Solutions News

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