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## CONSUMER BANKRUPTCY

### Protecting Your Client from Creditors Who Ignore the Discharge

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While I prepare some future columns on tips for handling the new bankruptcy laws, I will review a fundamental bankruptcy issue: the discharge and protecting your clients from creditors who may abuse it.

The general objective in filing a consumer bankruptcy is to obtain a discharge which will free the debtor from personal liability. The concept of providing the debtor with a fresh new financial start is contained throughout the legislative history of the Bankruptcy Code. The new laws going into effect in October 2005 will not change that. In order to ensure that the slate is wiped clean of the problems of pre-petition debt, the Bankruptcy Code contains provisions to protect the debtor after discharge from creditors who ignore its protections.

What happens when a creditor ignores the discharge and continues to harass a debtor for a pre-petition debt that was discharged? Most abuses can be quickly stopped with a simple letter or phone call. Some recalcitrant creditors will nevertheless ignore the discharge as well as subsequent warnings from debtors' counsel, and engage in outrageous conduct, requiring court intervention to finally

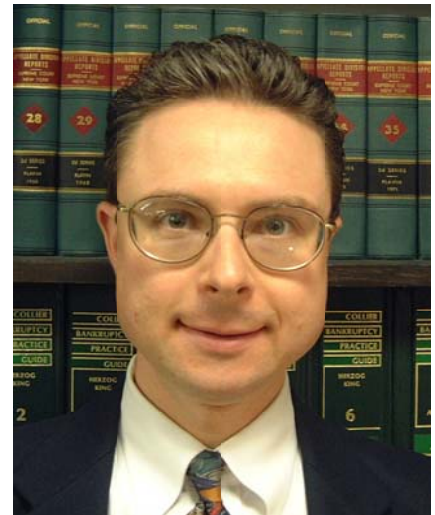
protect the debtor.

When your bankruptcy client's discharge rights are being violated, it is wise to take some type of protective action. In this column, I will briefly discuss the discharge and what steps a debtor's attorney can take against creditors who ignore it.

**The Bankruptcy Discharge.** Bankruptcy Code section 524 (a) (2) provides that a discharge operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt or claim as a personal liability of the Debtor.

The Code very broadly defines "claim" to include any right to payment or right to an equitable remedy if such remedy gives rise to a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured. [Code sec. 101 (5)].

**Post Petition Collection Suits.** Although the C.P.L.R. provides that a bankruptcy discharge is an affirmative defense which must be pleaded, this is an antiquated



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argument which has been rendered unnecessary and superseded by Bankruptcy Code sec. 524. About thirty years ago, the legislature, intending to fully effectuate the discharge provisions of the new Bankruptcy Code, decided to make the discharge less subject to abuse by harassing creditors.

The discharge automatically voids any judgment at any time obtained to the extent such judgment is a determination of the personal liability of the debtor on a discharged debt. Thus, should a creditor institute suit in a state court after the discharge, and obtain a judgment against the debtor, the judgment is rendered null and void ab initio, even if no affirmative defense was interposed. The purpose of these provisions is to make it absolutely unnecessary for the debtor to do anything at all in the state court

action.

**The Uninformed Collection Attorney.** Often a creditor will send its file to a collection attorney to commence litigation. However, the creditor does not notify the collection attorney of the bankruptcy, and the collection then commences a suit or obtains a default judgment in an existing suit. If you suspect an uninformed attorney has commenced litigation or taken a judgment, then contacting the other attorney and advising him or her of the bankruptcy should be sufficient to resolve the problem. If a judgment was already obtained, it is the other attorney's responsibility to vacate it by preparing a stipulation vacating judgment and then filing them in the court.

**The Bureaucratic Creditor.** Frequently a large credit card company or bank has so many departments, some of which are in different states, that news of the bankruptcy filing does not reach all channels. Thus, it is not uncommon for a debtor to continue to receive collection letters and collection calls long after the petition is filed. It is usually simple to put a quick stop to this kind of activity by merely informing the creditor that a bankruptcy was filed and by providing the creditor with the filing information.

**The Ignorant Collection Attorney.** Some attorneys simply do not have sufficient knowledge of the Bankruptcy Code and the effects of filing for bankruptcy. They may be unaware of the effects of the automatic stay and discharge. Usually, telephoning these attorneys and diplomatically advising them of the provisions of the bankruptcy Code is sufficient to educate them that their litigation actions are improper.

**Remember That Some Debts are Non-Dischargeable.** Some debts are excepted from discharge regardless of whether a

creditor seeks a determination of dischargeability. These debts include, among others, most taxes and obligations to governmental entities, maintenance and support, student loans, and debts for certain condominium or co-op expenses. Accordingly, the order of discharge will not bar these types of creditors.

**Extreme Discharge Violations.** There are always some creditors or attorneys who will remain ignorant, stubborn, thick-headed and arrogant, and who will disregard your repeated letters that they are violating the very sanctity of the bankruptcy process by continuing to litigate in violation of the order of discharge. At this point, it may be necessary to haul them into bankruptcy court. Should a creditor violate the provisions of the discharge order, the creditor will also have violated the bankruptcy court injunction against collection efforts. The creditor will thus be subject to citation for contempt in the bankruptcy court upon application of the debtor.

When creditors receive a copy of the order of discharge, they are put on notice that they violate the injunction provisions at their own risk. Such violation is an invitation to contempt proceedings. Violation of the order of discharge is considered contempt of court.

The bankruptcy court has the inherent power to punish for contemptuous conduct. [Code sec. 105 (a) and Rule 9020 (b)]. It is often best to litigate such matters in the bankruptcy court as this forum is most familiar with bankruptcy law and not sympathetic to creditors who choose to ignore it. Case law is replete with references that violations of the discharge injunction are not to be taken lightly and will not be tolerated.

**The Contempt Motion.** A regular motion brought in the bankruptcy court against the creditor

is sufficient to seek contempt. If the debtor's bankruptcy case was closed, it will also be necessary to seek re-opening of the case pursuant to Code sec. 350 (b). If it is necessary to immediately seek an injunction to stop a creditor from executing on a judgment, an order to show cause can be brought.

**Sanctions, Punitive Awards and Attorneys Fees.** Bankruptcy case law provides that a debtor may collect costs, reasonable attorneys fees, sanctions, punitive damages, and compensatory damages against creditors and their attorneys who violate the order of discharge.

Courts have held that a collection attorney has a continuing obligation to review and reevaluate his pleadings upon discovery that they may be without merit or in violation of the law. Thus, it is imperative to put the other attorney on notice by certified mail that he is violating the Bankruptcy Code to establish his duty of inquiry.

There are many cases where sanctions and punitive damages have been awarded in the thousands of dollars against creditors and their attorneys for violating the order of discharge.

Therefore, if you are a collection attorney, take heed of the power of the discharge. If you are a debtor's attorney, you can rely on the bankruptcy forum to protect your client's rights against creditors who ignore your client's discharge rights.

*Editor's Note (revised 2008):*  
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