THE STIPULATION OF NONDISCHARGEABILITY AS A COST-CUTTING MEASURE

"They Misrepresented the Facts, Then Declared Bankruptcy Owing Me $2,000. What Should I Do?"

Suppose you have a good fraud case against a debtor in bankruptcy but the nondischargeable amount of his unsecured debt to you is only around $2,000. What should you do?

One option would be to simply close your file and let the debtor get his discharge. Most creditors, however, find fraud sufficiently repugnant to dislike this option.

A second option would be to seek a reaffirmation of at least the nondischargeable portion of the debt from your debtor. But since your extension of credit is unsecured, although obtained through fraud, you will have no recourse against your debtor should he rescind the reaffirmation after the deadline for filing a fraud suit has run. Since the deadline for filing a nondischargeability complaint is 60 days from the date set for the First Meeting, and the rescission period on a reaffirmation is any time prior to discharge or within 60 days after filing of the Reaffirmation Agreement with the court, whichever occurs *later*, the debtor can rescind with impunity. After all, he has already defrauded you once in regard to the same obligation.

A third option would be to file a suit for nondischargeability within the 60 days granted to do so after the first meeting. This is not ordinarily a good choice, however, simply because of the expense of so proceeding. Attorneys ordinarily handle such adversary proceedings on an hourly basis, and fraud suits are as expensive as any other litigation. In addition, they are more difficult for the plaintiff to win because it must establish fraud by a clear and convincing standard of proof rather than a mere preponderance of the evidence. Absent a quick settlement by way of an agreed judgment, the creditor will usually end up spending more money than the case is worth. Remember, we are talking about a claim of around $2,000.

Well, what else is a creditor to do? The answer is an inexpensive option in use around the country and referred to variously as a "Stipulation of Nondischargeability" or "Waiver of Discharge." When using this option, the creditor and its counsel persuade the debtor and its counsel to sign a paper bearing the caption of the bankruptcy proceeding and titled "Stipulation of Nondischargeability" or "Waiver of Discharge."

This statement simply recites that the debtor stipulates to the fact that a stated amount of the creditor's claim is nondischargeable under 11 U.S.C. Section 523. The stipulation does not require court approval when filed and, if ever challenged, should withstand attack as an effective waiver of discharge under 11 U.S.C. Section 727(a)(10). After all, the Code does not require a debtor to take a discharge of all debts.

The stipulation of nondischargeability, once filed with the Court, spares the debtor and the creditor the expenses of litigating whether the claim is nondischargeable, and should be relatively easy to obtain when the facts in support of nondischargeability are clear and convincing. The stipulation is not subject to rescission, as is a reaffirmation. If the creditor has already filed an adversary proceeding to determine nondischargeability, however, it should obtain an Agreed Judgment as to the amount nondischargeable rather than simply a stipulation. The reason for this is that a creditor can then go ahead and execute upon the judgment without having to go back to the courthouse when the debtor fails to pay.

A stipulation of nondischargeability is not in itself a judgment. If the creditor does not already have a judgment in state court prior to the bankruptcy, it will be unable to execute upon the mere stipulation. The stipulation simply allows the creditor to go ahead and obtain a judgment for the amount of the stipulation despite the debtor's bankruptcy.

In conclusion, the stipulation of nondischargeability has proved itself an economic way to deal with nondischargeable claims for relatively small amounts.