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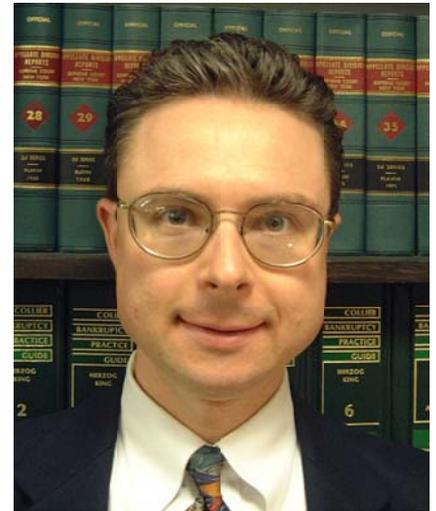
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## CONSUMER BANKRUPTCY

# A Primer on Adversary Proceedings

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**Adversary Proceedings.** Even what appears to be the simplest Chapter 7 consumer bankruptcy filing may result in an adversary proceeding which is basically a federal lawsuit brought within a pending bankruptcy proceeding. The Bankruptcy Rules provide that certain contested matters in bankruptcy proceedings must be litigated in this way. Bankruptcy Rule 7001 sets forth ten such matters. They include objections to discharge; determination of the validity, priority, or extent of a lien or interest in property of the estate; actions to recover property of the estate; and proceedings to sell property in which the debtor is only a part owner. Bankruptcy Rule 7001 *et. seq.*, sets forth all of the rules applicable to adversary proceedings.

**Proceedings to Determine The Dischargeability of a Debt.** These are by far the most common adversary proceedings that the consumer

bankruptcy practitioner may encounter. With the proliferation of consumers seeking to discharge credit card debt through bankruptcy, many credit card companies, banks and other lenders are actively reviewing petitions and credit usage histories to determine if the debtor obtained the debt by way of any fraudulent or improper means. Under code section 523, a creditor can contest the dischargeability of a particular debt that was incurred through false pretenses, fraud, use of false financial statements, embezzlement, or larceny.

**Contesting the Entire Discharge.** Bankruptcy code section 727 allows an interested party to contest the entire discharge for intentional concealment, transfer or destruction of property; unjustified failure to keep books and records; dishonesty in connection with the bankruptcy code; or failure to explain loss of assets. If a trustee requests a debtor to provide documents at the meeting of creditors

and the debtor is uncooperative, the trustee will bring an adversary proceeding under this section.

**Federal Rules Govern.** Virtually all of the Federal Rules of Civil Procedure regarding litigation apply to adversary proceedings. These rules are especially tailored to bankruptcy proceedings by Bankruptcy Rules 9001 *et. seq.* Leave your C.P.L.R. at home and get a copy of the Federal Rules. Sometimes the general practitioner is at a slight disadvantage because of an unfamiliarity with Federal law.

**How Adversary Proceedings Are Commenced.** The creditor or trustee will draft a complaint, setting forth the facts and allegations which the plaintiff believes justify the granting of relief against the debtor, and stating the

relief requested. All adversary proceedings must be filed electronically through the court's E.C.F. system. The court will also assign an adversary proceeding case number to the matter, which is different from the original bankruptcy case number. All adversary proceeding documents filed with the court must contain the full adversary proceeding caption, both case number and adversary proceeding case number, the type of chapter, and the name of the judge. The debtor can be referred to as either "debtor" or "defendant."

**Service.** Most adversary proceedings are served pursuant to Bankruptcy Rule 7004(b) by first class mail upon both the debtor and his or her attorney, although service can be completed by other means as well. Service must also be made within 10 days of the summons date. Bankruptcy Rule 7004(f).

**Be Aware of the Bar Date.** In Chapter 7 proceedings, the court sets a statute of limitations for creditors to file objections to discharge. The bar date is 60 days from the date set for the first scheduled meeting of creditors. Bankruptcy Rules 4004 and 4007. Adjournment of the meeting of creditors does not affect the bar date. Failure to timely file a dischargeability adversary proceeding by the bar date will forever bar the creditor from objecting to discharge.

**The Answer.** The answer must be served within 30 days from the date the summons is signed by the clerk of the court. The answer is no different than a typical answer you may be accustomed to, but it must be signed by the attorney. The answer must be filed with the court electronically through the court's ECF system, together with an affidavit of service.

**Extending Time To Answer.** If needed, most creditors' attorneys will cooperate by extending you time to answer by at least two to four weeks. Although court rules require that any extension of time be memorialized by a stipulation which is filed with the court, it is nevertheless common practice to

merely confirm such extensions by way of informal letter. Stipulations, however, are always more desirable. Since most adversary proceedings are settled, consider stipulating with your adversary to indefinitely extend the debtor's time to answer, pending good faith efforts to negotiate a settlement, but further stating that the plaintiff can demand an answer at any time upon several weeks written notice.

**Discovery And Trial.** If you do not settle your case, you can expect to get involved in depositions and other discovery and disclosure. The court will also require several pre-trial conferences in order to schedule discovery and provide the court with the status of the case. All judges have chambers rules requiring the parties to submit several joint pre-trial statements at various stages of the case. All of this can be somewhat burdensome and time consuming. The amount of work involved encourages all parties to settle. The trial itself is a formal hearing in which the Federal Rules of Evidence apply. Some judges may vigorously encourage the parties to work out a settlement prior to the start of any trial.

**Legal Fees.** Representing the debtor in an adversary proceeding is usually additional, unanticipated work that is not provided for in the initial retainer agreement. Retainer agreements should state this with particularity. Defense of an adversary proceeding is usually done either on an hourly basis or a lump sum basis. The fees for negotiating a settlement can range from \$750.00 to \$1,000.00 or more, depending on the issues and amount of work involved. Zealously defending the debtor with a full adversary proceeding up through trial can often result in very substantial legal fees as the time involved can easily be twenty hours or more. For this reason, most matters are settled. It is also unfortunate that a debtor who has a good defense may be unable to fully assert it because of the expense of litigation.

**Practical Tips.** If your consumer debtor client is served with an adversary proceeding, immediately consult with the client to discuss it. Consider the high cost of defending a proceeding and review settlement options. Almost all creditors challenging dischargeability are amenable to settlement, often agreeing to payment plans over extended periods of time. The sooner an adversary proceeding is settled, the less procedural work is involved, such as continuously seeking adjournments of pre-trial conferences.

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*Editor's Note (revised 2008): Craig D. Robins, Esq., a regular columnist, is a bankruptcy attorney who has represented thousands of consumer and business clients during the past twenty years. He has offices in Medford, Commack, Woodbury and Valley Stream. (516) 496-0800. He can be reached at CraigR@CraigRobinsLaw.com. Please visit his Bankruptcy Website: CraigRobinsLaw.com.*