Creditor brings AP post discharge--or May I?

Shannon McDuffie

On Sat, Nov 27, 2010 at 7:17 AM, Daniel Press <pressdm@gmail.com> wrote:

The creditor does not need to bring an AP.  A creditor contending it a
has a student loan or any other non-dischargeable claim can simply sue
in non-Bk court, and the debtor can then assert discharge as a
defense.  The state court can then rule, unless the debtor removes the
case to bk court.  The creditor has the burden of proof of
non-dischargeability.

The creditor bears the risk that this approach would be a discharge
violation, so it's safer approach would be to file an AP complaint to
determine dischargeability.

On 11/27/10, money1238@aol.com <money1238@aol.com> wrote:
> Are you saying that the creditor must bring an AP to determine that a
> student loan is not dischargeable before attempting to collect?
>
>
> If, as in your circumstance, the debt is questionably subject to the

> 23(a)(8) then the burden would be on the creditor to bring an AP to

> etermine that the debt is not otherwise dischargeable.
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> -----Original Message-----
> From: Roger Traversa <rtraversa@gmail.com>
> To: bk@nacba.org
> Sent: Fri, Nov 26, 2010 2:15 pm
> Subject: [NACBA-BK] Re: When a student loan isn't really a student laon
>
>
> On most educational debts the assumption is that the debt is a student

> oan, based on the McDonnell Douglas v. Green burden shifting scheme,

> nd section 523(a)(8) is self executing.
> If, as in your circumstance, the debt is questionably subject to the

> 23(a)(8) then the burden would be on the creditor to bring an AP to

> etermine that the debt is not otherwise dischargeable.
> I'm not aware of any cases where there has been an AP to determine

> ischargeability based on obviously noneducational debt. I would

> magine the repercussions to the attorney bringing and losing such a

> laim would be significant.
> Roger Traversa
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> hich are specifically included and made part of this message.
>
> On Fri, Nov 26, 2010 at 12:07 AM, Guy Conti <gconti@contilegal.com> wrote:
>  To the Firm:
>  I am well aware of 523(a)(8).  I know that a debtor must bring an adversary
>  proceeding in order to have a loan described by 523(a)(8) discharged under
>  undue hardship.
>  However, who has the burden to prove a loan is, in fact, a loan under
>  523(a)(8)?  What if I lend someone $1,000.00 and claim it is a qualified
>  education loan?  What stops credit cards from simply making that claim and
>  forcing a debtor to file an adversary proceeding to prove dischargeability
>  on normal credit card purchases?
>  I know the last sentence question may sound silly but I think the overall
>  question is quite important:  assuming the debtor must file an AP to
>  determine dischrgeability of a loan under 523(a)(8), what if the debtor
>  simply says the loan is not such a loan and the creditor says it is?
>  If a debtor brings an action for violation of the discharge injunction and
>  the creditor's defense is 523(a)(8), who has the burden of proof on whether
>  the loan is a 523(a)(8) loan?
>  Thanks!
>  Guy T. Conti
>  Attorney at Law
>