Creditor brings AP post discharge--or May I?  
  
Shannon McDuffie

On Sat, Nov 27, 2010 at 7:17 AM, Daniel Press <[pressdm@gmail.com](mailto: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](mailto:money1238@aol.com) <[money1238@aol.com](mailto: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](mailto:rtraversa@gmail.com)>  
> To: [bk@nacba.org](mailto: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  
> Arjont Group  | Philadelphia, PA

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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](mailto: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  
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