THIRTY-FIFTH ANNUAL SOUTHEASTERN BANKRUPTCY LAW INSTITUTE

APRIL 23-25, 2009
ATLANTA, GEORGIA

LITIGATION TOOLBOX – BREAKOUT SESSION A:
COMPLAINT TO DETERMINE DISCHARGEABILITY OF CREDIT CARD DEBT

Honorable Thomas F. Waldron & John F. Cannizzaro*

*** I wish to express my appreciation to my son John C. Cannizzaro who was instrumental in preparing some of these materials.**

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1. INTRODUCTION

A. QUO VADIS?

The ancient Latin phrase "*Quo Vadis*" asks the simple/profound question – "Where are you going" and invokes the central focus of any litigation – "what will you be trying to accomplish". In a perhaps more familiar American quote, attributed to the beloved Yogi Berra, is the following observation: *If you don't know where you are going, you will wind up somewhere else*. www.rinkworks.com/said

In the context of this presentation, this quote captures the concept that, if you do not have an overall bankruptcy litigation plan a client may well wind up with an unplanned, and often, undesirable, result. The point is that establishing, and maintaining, a focus on what a litigator intends to accomplish in the overall litigation, and in its various aspects, is central to success in such litigation.

This presentation concentrates on litigation and uses as an example - a complaint to determine the dischargeability of a credit card debt. As a result there will not be an extended discussion of the current case law involving 11 U.S.C. 523(a)(2).[1] To a great

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[1] **(a)** A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—
(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
(B) use of a statement in writing—
(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
(iv) that the debtor caused to be made or published with intent to deceive; or
(C)
(i) for purposes of subparagraph (A)—
(I) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
(II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and
(ii) for purposes of this subparagraph—
(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and
(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.
…..
(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

extent, this body of law is generally settled and familiar in all the Circuits[2] and, although BAPCPA made minor changes to the statute[3], those changes are not significant for this presentation. This is not to suggest that careful examination of the applicable provisions of the statute and the governing case law are not essential initial elements in connection with any such litigation. To the contrary, the careful consideration of the statute and related case law are constant components of any ongoing litigation efforts. Remember, whether you represent the creditor or the debtor, "*If you don't know where you are going, you will wind up somewhere else*."

B. THE ATTORNEY DEBTOR-CLIENT CONTRACT

While this may not seem to be an essential element of the litigation of an adversary proceeding, it might be worth noting, both for the ethical and the self-preservation issues, the importance of the attorney debtor-client contract concerning litigation. This is an assessment that should occur in the earliest stages of attorney client contact. For example, a debtor with 20 credit cards and a history of modest monthly income may well be the recipient of an adversary involving 11 U.S.C. 523(a)(2). The initial written contract between the debtor and counsel [11U.S.C. §526, 27, 28] should clearly provide for: no representation in adversary litigation, complete representation in adversary litigation, or some variation of representation, for example, as co-counsel with another law firm. Additionally, if there is representation in adversary litigation, it should be subject to the terms of a subsequent, separate contract covering the specific litigation.

It should also be noted that becoming counsel for the debtor in any adversary litigation presents many issues involving not only substantive and procedural bankruptcy law and rules of evidence, but also, the applicable Code of Professional Responsibility and specific local rules and/or general orders. Particularly significant for litigation are the Federal Rules of Evidence.[4] Finally, it should be recognized that getting out of such

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[2] "Thus, to establish an exception pursuant to 11 U.S.C. § 523(a)(2), Ms. Johnson must allege: '1) misrepresentation of a material fact; 2) knowledge of the falsity of the representation; 3) intent to induce reliance; 4) justifiable reliance; and 5) damages.' *In re Tsurukawa*, 287 B.R. 515, 520 (9th Cir. BAP 2002)." *Johnson v. JP Morgan Chase Bank*, 395 B.R. 442 (E.D. Calif. 2008)

[3] "In enacting the BAPCPA, Congress was attempting to address common abuses of the bankruptcy system. Congress concluded that there was a pervasive abuse of the bankruptcy system by debtors who incur debt before bankruptcy with the intention of having their debt discharged. *See* HOUSE REPORT at 15 (referring to the "abusive practices by consumer debtors who ... knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief"). This Congressional intent is made evident by the changes that the BAPCPA made to section 523(a)(2)(C)(i)(I) to make the rules regarding debt for eve-of-bankruptcy spending more stringent. This provision made a debt incurred for "luxury goods" non-dischargeable if over $550 and incurred within ninety days of filing for bankruptcy as opposed to the previous rule, which made a debt for "luxury goods" non-dischargeable if over $1,225 of debt was incurred within sixty days of bankruptcy. 11 U.S.C.A. § 523, Historical and Statutory Notes. It appears that Congress enacted section 526(a)(4) as a means of combating such abuse" *Hersh V. U.S. ex rel. Mukasky*, _F3d_, 2008 WL 5255905 (5th Cir. 2008)

[4] Rule 101. Scope These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in Rule 1101. [See also, Bankruptcy Evidence Manual, Hon. Barry Russell.]

representation is considerably more complicated than getting into such representation. Local legal culture may actually prevent withdrawing from such representation, with, or without, compensation for such representation in the litigation.[5]

Although the balance of this presentation will provide greater detail, litigation divides itself conveniently into segments: pre-filing considerations, including drafting and initial pleadings, post-filing considerations, including amendments and initial written discovery, pre-trial considerations, including depositions and other discovery, final trial preparation, including documents and witnesses, and the trial, including post-trial considerations. Each of these divisions contains its own timelines, self-imposed or court-controlled, and has its own requirements, governed by statute, rule or court order. Returning to the underlying theme that litigation requires a focused plan, you should develop the specific goal(s) you trying to accomplish, overall and in a particular segment of the litigation. For example, if you represent the debtor and believe this adversary will present an issue under 523(d), you would want to raise that issue in your in initial answer, pursue it throughout your discovery, focus on it at trial and be prepared for any post-trial proceedings.[6]

C. HOW WILL THE ORDER READ WHEN YOU PREVAIL?

Although this may sound simplistic - be prepared to prevail.
If you represent the creditor with well drafted pleadings, you will want all that relief sought in those pleadings embodied in an order – that the debt is non-dischargeable, a money judgment for a specific amount as of a particular date, an amount of interest to run from a specific date, …
If you represent the debtor with well drafted pleadings, you will want all that relief embodied in an order – that the debt is non-dischargeable, that the creditor is liable for a specific amount of attorney fees as of a particular date, an amount of interest to run from a specific date, …

As part of any initial analysis, or the drafting of any initial pleading, also draft the entry you would present to the court, if you are asked to present such an order. In the draft entry you prepare, try to provide as much detail as possible. While a court might not accept such a detailed proposed entry, it should provide you with another variation of a road-map to your goal and reinforce the overall litigation plan for what you hope to accomplish in the litigation.

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[5] See *In re Egwim*, 291 B.R. 559, (N.D. Ga. 2003) (Unless counsel can meet the heavy burden persuading the court to approve withdrawal, representation of a debtor in a bankruptcy case includes representation in any adversary proceedings concerning discharge or dischargeability)

[6] In affirming the bankruptcy court's award of fees against a credit card issuer, the district court held: "To have been substantially justified in bringing this suit, FIA would have had to conduct some kind of pre-filing investigation to determine whether there was evidence to support fraud by Flowers. *See Bridgewater Credit Union v. McCarthy (In re McCarthy),* 243 B.R. 203, 209 (1st Cir. BAP 2000) ("The plaintiff must show that it reviewed its legal position before filing suit to determine if it is substantially justified."). While there "may be instances when, in view of all relevant circumstances, the creditor may demonstrate substantial justification notwithstanding its failure to take such steps before filing a § 523(a)(2) complaint," *id.* at 209 n. 6, FIA has not made such a demonstration." *In re Flowers,* 391 B.R. 178, 183 (M.D.Ala.,2008)

2. PREFILING CONSIDERATIONS

A. CREDITOR'S PERSPECTIVE

The primary element of the creditor's determination of whether to initiate an adversary is fully reviewing the statute, analyzing the case law in the applicable jurisdiction and determining whether the facts support bringing a non-dischargeability action. Although this may sound simplistic, an objective analysis can save the client time and money.

The core elements of a credit card usage non-dischargeability action brought pursuant to 11 USC § 523(a)(2)(A) are-

i. debtor procuring money, property, services or an extension of credit;

ii. through a false representation, false pretense or actual fraud*

(*debts for luxury goods or services owing to a single creditor incurred within 90 days of filing aggregating more than $550.00 or cash advances exceeding $825.00 incurred under an open end credit plan within 70 days of filing are presumed non-dischargeable under 11 USC § 523(a)(2)(A). However, the presumption only applies to the burden of going forward with the evidence. The presumption does not shift the ultimate burden of proof, which remains upon the party seeking the non-dischargeability finding.)[7]

The Courts have taken a varied approach as to whether the three bases for non-dischargeability (false representation, false pretense or actual fraud) require the Plaintiff to establish the elements of fraud or if fraud is simply one of three different

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[7] *In re Welch, 208 BR 107, Dist Ct SD NY 1997; In re Brumbaugh, 383 BR 907 Bk Ct ND Oh 2007 (*As a basic evidentiary matter, the party asserting a claim carries the burden of proof. 29 AM. JUR. 2D Evidence § 158 (2006). A creditor, thus, seeking to hold a debt nondischargeable for fraud under § 523(a)(2)(A) is charged with establishing the existence of those elements necessary to establish a claim thereunder. *Grogan v. Garner,* 498 U.S. 279, 287-88, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). This burden is comprised of two components: (1) the "burden of persuasion" which is the necessity of establishing a fact and which generally remains fixed upon the movant for the duration of the action; and (2) the "burden of production" which is the necessity of making a prima facie showing and which may shift throughout the course of the action. *Virginia v. Black,* 538 U.S. 343, 395, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

Under this evidentiary framework, an action brought under § 523(a)(2) will proceed as follows: If a creditor is able to present a prima facie case on all of the § 523(a)(2)(A) elements of fraud, the burden of production will shift to the debtor to establish a defense to the creditor's claim. If the debtor is unable to establish a viable defense, the creditor will prevail on its action. *Gore v. Kressner (In re Kressner),* 206 B.R. 303, 309 (Bankr.D.N.Y.1997). If, however, a viable defense is forthcoming, it remains the creditor's overall burden to persuade the trier-of-fact, by at least a preponderance of the evidence, as to the sufficiency of its claim.

While the statutory presumption of fraud set forth in § 523(a)(2)(C) alters this evidentiary framework, it does so only as it concerns the creditor's initial burden of production. FED.R. EVID. 301.[FN3] If applicable, § 523(a)(2)(C) will shift the burden of production to the debtor, but the overall burden of persuasion will still remain upon the creditor. *J.C. Penney Co. v. Leaird (In re Leaird),* 106 B.R. 177, 179 (Bankr.W.D.Wis.1989).

bases for non-dischargeabilty.[8] The U.S. Supreme Court shed some light on this debate in the case of *Field v. Mans*,[9] where the Court found that a finding of non-dischargeability under 523(a) requires some reliance albeit *justifiable* reliance and not *reasonable* reliance. As such, the Court has lent credence to those Courts finding that 523(a)(2)(A) retains the common law fraud requirements.

Having determined the base requirements for non-dischargeability, the creditor's pre-filing analysis should necessarily include a determination of whether they can establish the common law requirements for fraud, false representation or false pretense. Most courts require:

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements:
>
> (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth;

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[8] *fn 7, In re Welch, supra "*One of the threshold questions that has induced different judicial responses is whether a party proceeding under *section 523(a)(2)(A)* must establish the five elements of fraud, namely that (1) the debtor made representations (2) which she knew at the time were false (3) that were made with the intent to deceive (4) that were relied upon (5) in sustaining damages that were the proximate result of the representations, *In re Carrier, 181 B.R. 742, 746 (Bankr. S.D.N.Y. 1995)*; *see AT&T Universal Card Services Corp. v. Akdogan, 204 B.R. 90, 95 (Bankr. E.D.N.Y. 1997)*, or whether "fraud" is merely one of three independent bases for discharge pursuant to *section 523(a)(2)(A)* and thus has a meaning broader than its traditional definition and does not include "reliance" or "representation." *See In re Leventhal, 194 B.R. at 28*. As stated *In re Shanahan, 151 B.R. 44, 46 (Bankr. W.D.N.Y. 1993)*,

> some fraudulent acts -- some tricks, deceptive devices or artifices -- do not involve "reliance" upon a "representation." Some artifices or pretenses or devices are frauds even if there is no real "represention" (but merely an action or impetus) and no real "reliance" (but merely an anticipated response or consequence).

Courts that have adopted the latter approach cite the disjunctive language in the section -- "false pretenses, a false representation, or actual fraud," *11 U.S.C. § 523(a)(2)(A)* -- as evidencing a statutory distinction among the three. *Leventhal, 194 B.R. at 26*. Our Court of Appeals has yet to address the issue.

The disparate readings of *section 523(a)(2)(A)* have resulted in varying analytical approaches to the dischargeability of credit card debt. Courts that have required proof of the five elements of fraud, have, as a general matter, adopted an "implied representation" approach which holds that each time a debtor uses a credit card the debtor impliedly represents that he or she has the intention and ability to pay the issuer for the charges incurred. *See, e.g., In re Carrier, 181 B.R. at 747*; *In re Sharp, 144 B.R. 372, 374 (Bankr. S.D. Ohio 1992)*. Further, the creditor's extension of credit constitutes both actual reliance and damages. Thus, in most credit card cases, as in this one, the creditor easily demonstrates the elements of representation, actual reliance, and damage. *Carrier, 181 B.R. at 747*. Consequently, the creditor need only establish the second and third elements of fraud -- that the debtor knew that the representation was false and that the representation was made with the intent to deceive.

Courts adopting the alternative reading have held that, insofar as misrepresentation is a traditional element of fraud and because Congress chose to construct "false representation" and "actual fraud" as different, independent bases for nondischargeability, "actual fraud" under *section 523(a)(2)(A)* must necessarily mean something other than "traditional fraud." *See Leventhal, 194 B.R. at 28*; *Shanahan, 151 B.R. at 46*. These courts, noting that the three bases for a finding of nondischargeability all focus on the conduct of the debtor and the debtor's state of mind, have looked to the "totality of the circumstances" and considered twelve or more factors in determining whether the defendant was guilty of false pretense, false representation, or fraud in obtaining credit."

[9] *Field v Mans, 516 US 59, 1995 ("*Following our established practice of finding Congress's meaning in the generally shared common law when common-law terms are used without further specification, we hold that § 523(a)(2)(A) requires justifiable, but not reasonable, reliance" *Id at p 73*

(2) the debtor intended to deceive the creditor;

(3) the creditor justifiably relied on the false representation; and

(4) its reliance was the proximate cause of loss.[10]

Some courts find that the mere usage of a credit card constitutes an implied representation of intent to pay upon which the creditor may rely.[11] Some Courts find that such an implied representation incorrectly shifts the burden to the debtor and makes them a guarantor of every debt they cannot pay.[12] Many courts however find that credit card usage constitutes an implied intent to pay but does not constitute an implied "ability to pay." That element (intent to deceive) must be established by the creditor through circumstantial evidence.[13]

Consequently, a creditor seeking to have a credit card debt deemed non-dischargeable pursuant to 523(a)(2)(A) should be prepared to establish by a preponderance of the evidence, the elements set forth in the statute through the above delineated so called "badges of fraud".

B. DEBTOR'S PERSPECTIVE

Most of the Debtor's pre-filing considerations involve analyses prior to filing the case. *11 USC § 526(a)* provides that:

> "A debt relief agency shall not-
> (2) make any statement, or counsel or advise any assisted person …to make a statement… that is untrue or misleading, or that upon exercise of reasonable care, should have been known by such agency to be untrue or misleading."

In order to make such a representation, counsel needs to determine the credit card usage before filing. This may entail reviewing the credit card statements for a period of months. Counsel may need to procure credit reports. Essentially, counsel should know before the case is filed if there is a likelihood that a creditor may bring an action. Although the creditor bears the ultimate burden of proof, the burden of proceeding with

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[10] *In re Rembert, 141 F.3d 277, 6th Cir 1998*

[11] *In re Mercer, 246 F3d 391, 5th Cir 2001* - We agree with the Ninth Circuit that each card-use forms a unilateral contract: the holder "*promises* to repay the debt ... and the ... issuer *performs* by reimbursing the merchant who ... accepted the ... card in payment". *Anastas v. American Sav. Bank (In re Anastas), 94 F.3d 1280, 1285 (9th Cir. 1996)*

[12] *In re Han, 2005 Bankr.Lexis 755, Bk Ct ND Ga 2005* - Plaintiff's complaint asserts that the subject debt should be deemed nondischargeable due to Defendant's representation that he would repay all amounts utilized in accordance with the terms and conditions set forth in the parties' loan agreement. The Court does not consider such an assertion to be a viable argument. "This representation is immaterial to nondischargeability and requires no discussion beyond stating the established principle that breach of a mere promise to pay on a contract, without more, does not constitute false representation, false pretenses, or actual fraud. If it were otherwise, every default by every debtor failing to pay a just debt would qualify as a false representation or actual fraud, an obviously absurd result." *Alam, 314 B.R. at 837-838*

[13] *In re Rembert, supra; In re Schartz, 221 BR 397, 6th Cir BAP 1998*

the evidence shifts to the debtor once the creditor makes a prima facie case for non-dischargeability. The debtor must then present evidence refuting the so called badges of fraud. Debtor's counsel should know whether those "badges" exist prior to filing.

Most courts rely upon a non-exclusive list of factors to determine whether a debtor had the subjective intent to defraud. The factors, enunciated in *In re Daugherty,*[14] are:

> (1) the length of time between the charges made and the filing of bankruptcy;
> (2) whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made;
> (3) the number of charges made;
> (4) the amount of the charges;
> (5) the financial condition of the debtor at the time the charges are made;
> (6) whether the charges were above the credit limit of the account;
> (7) whether the debtor made multiple charges on the same day;
> (8) whether or not the debtor was employed;
> (9) the debtor's prospects for employment;
> (10) financial sophistication of the debtor;
> (11) whether there was a sudden change in the debtor's buying habits; and
> (12) whether the purchases were made for luxuries or necessities.

The Debtor has several factors in their favor when defending a credit card non - dischargeability action.

(1) strong presumption in favor of dischargeability;
(2) timing of filing the petition in bankruptcy;
(3) creditor has the burden of proof to establish the elements for non-dischargeability;
(4) the debtor knows the reasons why they made the charges.

Use all of these to your advantage. Remind the court of the presumption in favor of dischargeability and that the party seeking to have a debt deemed non-dischargeable carries the burden. Argue the standard by which the creditor must establish the elements on the non-dischargeabililty claim. Be prepared to cite to the court existing precedent, particularly if you are in a jurisdiction where credit card usage is not presumed to be an implied promise to pay or implied ability to pay.

If the creditor is using 523(a)(2)(C) as the presumption for non-dischargeability, note that the presumption only relates to proceeding with the evidence. The ultimate burden of proof still remains with the creditor. Establish that the charges were not for luxury goods or services. In order to justifiably argue that charges were not for luxury goods, determine with the debtor how these charges were reasonably necessary for the

[14] *In re Dougherty, 84 B.R. 653 (9th Cir. B.A.P. 1988)*

support or maintenance of the debtor or debtor's dependents. These are determinations that should be made before bankruptcy is filed.

3. PLEADINGS

Plaintiff must craft pleadings which present all of the essential elements of the non-dischargeability complaint. The purpose is two-fold:

1. give the Defendant the facts upon which Plaintiff relies to hold the debt non-dischargeable;
2. in the event the Defendant does not answer the complaint, provide facts sufficient to permit the Court to grant a Motion for Default.

Defendant in their Answer should set out their defenses including the factual basis for refuting the non-dischargeability of the debt in question. Quite often, the Plaintiff in a credit card non-dischargeability action has only the documentary evidence that gives rise to the appearance of non-dischargeability. The Debtor/Defendant holds the factual reasons for the incurrence of debt. Drafting the answer in such a fashion that puts the Plaintiff on notice that the suit will not only be defended, but that facts exist that render the complaint suspect, may result in the matter being either dismissed or settled.

The Defendant also has the remedies of 11 USC § 523(d). The statute provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except the court shall not award such costs and fees if special circumstances would make the award unjust.

The court shall award the defendant their attorney fees if:

1. the debt is discharged; and,
2. the creditor's position is not substantially justified.

The creditor can avoid having to pay the defendant's attorney fees and costs, even if the debts are deemed dischargeable and their position deemed not substantially justified, if they can establish that special circumstances make the award unjust.

A. FORM COMPLAINT

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

In re:
Honest B Unfortunate

Case No. 09-50001
Chapter 7
Judge C. Kathryn Preston

Chase Bank USA, N.A.
14 Penn Plaza, Suite 1300
New York, NY 10122,
Plaintiff,
vs.

Honest B Unfortunate
103 Plum Street
Marysville, OH 43040-8675,
Defendant.

ADV. NO.

COMPLAINT OBJECTING TO DISCHARGEABILITY OF INDEBTEDNESS
(11 U.S.C. §523)

NOW COMES Plaintiff, by and through its attorney of record, John Smith, to allege and complain as follows:

I. PARTIES AND JURISDICTION

1. Plaintiff is a foreign corporation licensed to do business in the State of Ohio with all fees and licenses paid, and otherwise is entitled to bring this action.

2. Defendant filed a Chapter 7 bankruptcy petition on 01/30/2008.

3. Jurisdiction is vested in this proceeding pursuant to 28 U.S.C. § 157, 28 U.S.C. §1334, and 11 U.S.C. §523; this proceeding is a core matter.

4. Plaintiff is a creditor in this bankruptcy proceeding and is the original party in interest

having extended a line of credit, which is the subject matter of this proceeding.

II. CAUSE OF ACTION

5. Plaintiff re-alleges and incorporates by reference the allegations set forth in paragraphs 1 through 4, above.

6. Defendant had a charge account with Chase Bank USA, N.A., Account No. XXXXXXXXXXXX1234.

7. Defendant incurred charges and cash advances on this account totaling $3,536.88, including interest, as of 01/30/2008, the date the bankruptcy petition was filed.

8. Between 08/21/2007 and 10/23/2007 Defendant accumulated $3,141.00 in retail charges.

9. Defendant's debt is a “consumer debt”, as defined by 11 U.S.C.§ 101(8).

10. By obtaining and/or accepting an extension of credit from Plaintiff and incurring charges on their account, Defendant represented an intention to repay the amounts charged.

11. Plaintiff reasonably relied on the representations made by Defendant.

12. Defendant incurred the debts when they had no ability or objective intent to repay them.

13. Defendant obtained credit extended from the Plaintiff by false pretenses, false representations and/or actual fraud.

14. As a result of Defendant's conduct, Plaintiff has suffered damages in the amount of $3,141.00.

15. Pursuant to 11 USC § 523(a)(2), Defendant should not be granted a discharge of this debt to the Plaintiff in the amount of $3,141.00.

III. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant the following relief:

1. A monetary judgment against Defendant in the amount of $3,141.00, plus accrued interest at the contractual rate from and after 01/30/2008, plus additional interest at the contractual rate, which will continue to accrue until the date of judgment herein;

2. An order determining that such debt is non-dischargeable under 11 USC § 523(a)(2);

3. An order awarding Plaintiff its attorneys' fees and costs incurred herein; and

4. An order awarding Plaintiff such additional relief as this Court deems just and equitable.

DATED: April 7, 2008

_/s/ John Smith_____
John Smith
Attorney for Plaintiff
SMITH & SMITH
123 Deep Pocket Street, Suite 1
Columbus OH 43215
614-464-1111 / 614-464-0220 (Fax)
Jsmith@Yahoo.com

B. FORM ANSWER

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

In re:
Honest B Unfortunate

Case No. 09-50001
Chapter 7
Judge C. Kathryn Preston

Chase Bank USA, N.A.
14 Penn Plaza, Suite 1300
New York, NY 10122,
Plaintiff,
vs.

Honest B Unfortunate
103 Plum Street
Marysville, OH 43040-8675,
Defendant.

ADV. NO.

ANSWER TO PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY OF INDEBTEDNESS

NOW comes Honest B Unfortunate, by and through counsel, and hereby responds to Plaintiff's Complaint as follows:

1. The Defendant admits the allegations contained in paragraphs 1, 2, 3, 5 and 9.
2. The Defendant admits that Plaintiff is a creditor, however, denies the balance of allegations contained in paragraph 4 of Plaintiff's complaint.
3. The Defendant admits or denies the allegations re-averred in paragraph 5 of Plaintiff's complaint as previously admitted or denied heretofore as to the specific paragraph.

4. The Defendant admits that she had a charge account as alleged in paragraph 6, however, the terms and conditions of the account are unknown as the Plaintiff has failed to attach an executed copy of the contract which Plaintiff alleges gives rise to this cause of action.

5. The Defendant denies the allegations contained in paragraph 7 of the Plaintiff's Complaint.

6. The Defendant admits having incurred charges of $3,141.00 prior to October 23, 2007, many of which were for food and fuel; however Defendant represents that at all times when those charges were incurred she had the intent to repay but was prohibited from doing so because of medical problems that ultimately required her to file for bankruptcy.

7. The Defendant denies the balance of allegations contained in Plaintiff's Complaint.

8. The Defendant represents that the medical problems that delayed her return to work until mid-December 2007 were the ultimate reason for her filing bankruptcy and not an intent to deceive or defraud this creditor or any other creditor.

9. The Defendant answers further by stating that the creditor's allegations of non-dischargeability are not substantially justified.

WHEREFORE, the Defendant demands that Plaintiff's Complaint be dismissed at Plaintiff's cost, that she be granted her costs and attorney fees as mandated by 11 USC § 523(d) and that the Court grant Defendant such further relief as the Court deems just and proper in the premises to grant.

/s/ John F. Cannizzaro
John F. Cannizzaro #0005096
Attorney for Defendant
CANNIZZARO, FRASER, BRIDGES,
JILLISKY & STRENG
302 S. Main St.
Marysville, OH 43040
Phone: 937-644-9125
Fax: 937-644-0754
Email: jsheets@cfbjlaw.com

Certificate of Service

I hereby certify that a true copy of the foregoing ANSWER TO PLAINTIFF'S COMPLAINT TO DETERMINE DISCHARGEABILITY OF INDEBTEDNESS was served by ECF service upon John Smith, Attorney for Plaintiff, SMITH & SMITH, 123 Deep Pocket Street, Suite 1, Columbus OH 43215; U. S. Trustee's Office, 170 N. High St., Ste. 200, Columbus, Ohio 43215; and by regular U.S. Mail upon Honest B Unfortunate, 103 Plum Street, Marysville, OH 43040-8675.

/s/ John F. Cannizzaro
John F. Cannizzaro
Attorney at Law

C. DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

In re:
Honest B Unfortunate

Case No. 09-50001
Chapter 7
Judge C. Kathryn Preston

Chase Bank USA, N.A.
14 Penn Plaza, Suite 1300
New York, NY 10122,
Plaintiff,
vs.

Honest B Unfortunate
103 Plum Street
Marysville, OH 43040-8675,
Defendant.
ADV. NO.

REQUEST FOR PRODUCTION OF DOCUMENTS

Now comes Honest B Unfortunate, Defendant herein, by and through counsel, and pursuant to the provisions of Rule 7034 the Federal Rules of Bankruptcy Procedure and hereby demands that Plaintiff, Chase Bank produce and permit Defendant to inspect and copy all documents requested herein. The Defendant states that each document requested herein constitutes evidence or contains matters that may be relevant to the pending cause of action. The Defendant demands that the inspection and copying of the documents take place at the office of John F. Cannizzaro, Cannizzaro, Fraser, Bridges & Jillisky, 302 South Main Street, Marysville, Ohio 43040, during regular business hours of 8:30 A.M. to 5:30 P.M., Monday through Friday, within thirty (30) days after service, however, no later than July 18, 2008, which date is consistent with the procedures delineated by the Federal Rules of Bankruptcy Procedure.

Request for production:

1. Produce all documents which the Plaintiff intends to introduce at the trial of this case.

2. Produce a complete accounting of the credit card account which is the subject of this case from its inception through the date that the cardholder filed for relief pursuant to the bankruptcy code.

3. Produce copies of all statements, communications, letters, dunning notices and collection communications forwarded by the Plaintiff or an agent of the Plaintiff to the Defendant.

4. Produce an executed copy of the original agreement creating the account which forms the basis for Plaintiff's complaint.

/s/ John F. Cannizzaro
John F. Cannizzaro #0005096
CANNIZZARO, FRASER, BRIDGES
JILLISKY & STRENG
302 South Main Street
Marysville, OH 43040
937-644-9125 (Phone No.)
937-644-0754 (Fax No.)
jsheets@cfbjlaw.com (Email)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Request for Production of Documents was mailed by regular U.S. Mail this 18th day of June, 2008 to the Attorney for the Plaintiff:

John Smith
Attorney for Plaintiff
SMITH & SMITH
123 Deep Pocket Street, Suite 1
Columbus OH 43215

/s/ John F. Cannizzaro
John F. Cannizzaro

D. PLAINTIFF'S INTERROGATORIES AND DEMAND FOR PRODUCTION

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT COLUMBUS

In re:
Honest B Unfortunate — Case No. 09-50001
Chapter 7
Judge C. Kathryn Preston

Chase Bank USA, N.A.
14 Penn Plaza, Suite 1300
New York, NY 10122,
Plaintiff,
vs.

Honest B Unfortunate
103 Plum Street
Marysville, OH 43040-8675,
Defendant.

ADV. NO.

PLAINTIFF'S FIRST SET OF INTERROGATORIES
AND DEMAND FOR PRODUCTION OF DOCUMENTS

In accordance with the Federal Rules of Civil Procedure, you are to fully answer, in writing under oath, each of the following Interrogatories, and return the completed set of original Interrogatories along with the answers to the undersigned attorney within thirty (30) days from the date these Interrogatories were served upon you. You are to answer in the spaces provided, inserting additional pages where necessary. You are also to verify of certify your answers under penalty of perjury in the location provided after the last Request for Production. These Interrogatories are continuing in nature until the time of trial and any and all amendments to the answers provided are to be delivered to the undersigned attorney as soon as the information is either directly or indirectly available to you. Any information not supplied will be objected to at trial.

Interrogatory #1

Please state your age, educational background, and your employment history, including a brief summary of your particular responsibilities on each position held for the last five years.

Interrogatory #2

Please list the addresses of any residence you have maintained during the last five years prior to filing bankruptcy.

Interrogatory #3

Please identify all credit card accounts in your name or on which you were a signor within the year prior to filing bankruptcy.

Interrogatory #4

From those credit cards identified in response to Interrogatory #3, please identify each credit card to which you made any charges, including any and all retail charges, cash advances, balance transfers or convenience checks, in the 12 months preceding filing bankruptcy.

Interrogatory #5

Please identify from those credit cards listed in the preceding Interrogatories each credit card to which you made any payments within the twelve months preceding filing bankruptcy, including the source of the funds used to make those payments.

Interrogatory #6

Were any charges, including convenience checks, cash advances, balance transfers, or any other charges on any credit cards identified in any of the preceding Interrogatories incurred in or as a result of any activity related to gambling? If so, please identify the date and amount of these charges and the credit card they were charged to.

Interrogatory #7

Identify each expert or other individuals retained by you or your attorneys whom you expect to cal as witnesses at trial and as to each, provide all information discoverable set forth in FRCP 26(b)(4)(A)(i).

Interrogatory #8

To the extent no identified in your answers to the preceding Interrogatories, please identify all individuals you intend to call as witnesses at trial and provide a brief summary of the extent of the testimony of each such individual.

Interrogatory #9

Please provide the date on which you first consulted an attorney or other individual with expertise in bankruptcy matters and the name of the individual consulted.

Interrogatory #10

Please identify the event or events which you believe did or may have directly contributed to your decision to file for bankruptcy protection.

REQUEST FOR PRODUCTION OF DOCUMENTS

You are requested to produce any and all document requested herein and those documents referred to in your answers to the Interrogatories within thirty (30) days following the date that these requests were served upon you, no later than 4:00 pm in the law offices of John Smith for the purpose of inspection and copying or in lieu thereof, to produce those same documents or true copies of same within the same time-frame, by mail or other similarly reliable means to the offices of John Smith for purpose of inspection and copying.

All documents produced shall be set forth in the ordinary course of business and shall be labeled or otherwise specifically identified so as to correspond and be responsive to all appropriate answers to the Interrogatories and or Request for Production. The Requests for Production shall be deemed to be continuing in nature, calling for prompt production by you of all documents which come into your possession, custody or control at any time prior to the conclusion of the trial in this action, as well as all documents currently in your possession, custody or control.

Request for Production #1

Please produce any and all documents upon which the witnesses identified in your responses to the preceding Interrogatories intend to rely to lay a foundation for, establish or prove evidence at trial.

Request for Production #2

Please produce any and all documents you intend to offer as exhibits at the trial and any documents, not privileged, that you may refer to in order to refresh your recollection in advance of trial.

Request for Production #3

Please produce copies of all monthly statements from the past two years for any and all accounts identified in your answers to the preceding Interrogatories.

Request for Production #4

Please produce all bank statements and check registers for the twelve months prior to the date of filing the order for relief which are related to any accounts held by you.

Request for Production #5

Please produce copies of the two most recent federal income tax returns you have filed.

/s/ John Smith
John Smith
Attorney for Plaintiff
SMITH & SMITH
123 Deep Pocket Street, Suite 1
Columbus OH 43215
614-464-1111 / 614-464-0220 (Fax)
Jsmith@Yahoo.com

4. DISCOVERY

A. Mandatory Disclosures under Fed. R. Civ. P. 26 (Fed. R. Bankr. P. 7026)

Rules 7026 to 7037 of the Federal Rules of Bankruptcy Procedure provide that the discovery rules of the Federal Rules of Civil Procedure apply in adversary proceedings. Like any civil case governed by the Federal Rules, the parties to an adversary proceeding are required to make certain mandatory disclosures throughout the course of the litigation. Rule 26(a) provides three situations in which disclosure of information to other parties is required.

i. Rule 26(a)(1) – Mandatory Initial Disclosures

Rule 26 requires a party to disclose to all other parties in the proceeding any information which may be used at trial to support a claim or defense the party has in its possession. Several types of proceedings are exempted from the mandatory disclosures requirements of Rule 26(a)(1), however bankruptcy proceedings do not fall in to that category (see Committee Notes to the 2000 Amendments). Such disclosures must be made within 14 days of the mandatory pre-trial conference (discussed below). The following information must be disclosed:

- The names and, if known, address and telephone number of any individual likely to have discoverable information, along with the subjects of that information, which the party may use to support a claim or defense
- A copy of, or the location of, any documents, electronically stored information, or tangible matter the disclosing party may use to support a claim or defense
- A computation of damages suffered by the disclosing party, and any material supporting the calculation of those damages
- Information about any insurance which may be used to satisfy a judgment

ii. Rule 26(a)(2) – Mandatory Disclosure of Expert Testimony

Rule 26 requires parties to disclose the identity of any individual expected to give expert testimony at least 90 days before trial. In addition to such disclosures, an expert report must also be provided detailing the expert's opinion, qualifications, compensation, and the exhibits the expert may use.

iii. Rule 26(a)(3) – Mandatory Pre-trial Disclosures

Finally, every party must provide information regarding witnesses expected to be used at trial at least 30 days before the trial commences. Such disclosures should include:

- The name, address and telephone number the disclosing party expects to present at trial

- Whether the party will be testifying by deposition, and if so, a transcript of that testimony

- The evidence and exhibits the party expects to offer if the need arises

As with most discovery rules, disclosures must be made in the manner provided by Rule 26, unless a party has leave of the court or is otherwise exempted from disclosure under the Rules.

B. Mandatory Pretrial Conference under Fed. R. Civ. P. 26(f) (Fed. R. Bankr. P. 7026)

Rule 26(f) requires the parties to confer as soon as practicable to discuss discovery matters. This conference must take place at least 21 days before a schedule conference is to be held. The purpose of the conference is to allow that parties an opportunity to discuss their claims, the possibility of settlement, and any matters relating to discovery that may need resolved. The Rule also requires the attorneys of record to **(1) create a discovery plan**, and to **(2) submit to the court within 14 days a report outlining the plan**.

i. Rule 26(f)(3) – Discovery Plan

Rule 26(f)(3) states that the discovery plan should contain the following:

- What changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
- the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
- any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order;
- what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

C. Requests for Production under Fed. R. Civ. P. 34 (Fed. R. Bankr. P. 7034)

Rule 34 allows a party to request that any other party during the course of discovery the opportunity to inspect, copy, or examine any of the following items within the responding party's possession, custody, or control:

- Any documents or information stored in any medium (including electronically) which can be obtained directly, or if necessary, after translation into a reasonably useable form

- Any tangible things

The Rule also allows a party to request entry on land or other property within the responding party's possession or control for the purpose of inspecting the land or property.

Requests for production should describe each item with particularity, specify a reasonable time, place, and manner for the inspection, and the form or forms in which electronic information is to be produced. After a request has been made, the responding party has 30 days to produce the requested items. For each item requested, the responding party may permit inspection, or object.

D. Requests for Admissions under Fed. R. Civ. P. 36 (Fed. R. Bankr. P. 7036)

Rule 36 permits a party to serve on any other party a request to admit information. Unlike depositions, there is no limit to the number of admissions a party may request. After a request is made, the responding party has 30 days to answer the requests. The responding party may admit, deny, admit in part, or deny in part requests for admissions. A response must be made within 30 days, or else all requests for admissions are deemed admitted by the responding party (however, Rule 36(b) gives the court the ability to withdraw and admission).

E. Other Forms of Discovery Available Outside of the Federal Rules

In addition to those methods authorized by Federal Rules of Civil Procedure, the Bankruptcy code provides for two other means of acquiring information prior to the commencement of an adversary proceeding. **Sections 341 and 343** permit an examination of the debtor at a meeting of the creditors. **Rule 2004** gives any party in interest the ability to request the court to order an examination of the debtor or any other person to obtain information, and to compel the discovery of documents.

5. INTRODUCTION OF EVIDENCE AND PRESENTATION OF WITNESSES

A. WHAT EVIDENCE DO YOU NEED?

The initial decision is to determine what evidence is required for the proof you must establish. This requires an understanding of the substantive law and the procedural

rules required to prevail. Returning to the underlying theme that litigation requires a overall focused plan, each segment of litigation has its own specific focus and requires its own specific plan, all of which must be consistent with the overall litigation plan. Although there is a clear analytical value to examining the various evidentiary segments involved in litigation, it must be recognized that these segments are not isolated elements and each has a relationship with, and an impact on, the overall litigation. Accordingly, depending on which party you represent in a §523(a)(2) adversary you must determine what is required to establish, or defeat, the cause of action and any related relief.

Without attempting to overemphasize the word "need" in relation to evidence, it is not desirable to over-try or under-try a case. (There will be further consideration of this issue in section 9 - Trial Tactics.) Although it is always necessary to establish every element on which you bear the burden of proof and which is necessary in order for you to prevail, in general, it is not desirable to spend time or effort proving what is not in dispute, is easily proven, or is not outcome determinative. Such time and effort is better saved for the tough issues.

B. WHAT IS THE BEST WAY TO GET THAT EVIDENCE ADMITTED?

The short answer (subject to a specific Trial Tactic) is – whatever is the simplest and most secure method. This could be by an admission in a pleading, in a pretrial order, failure to object to an exhibit filed pursuant to a court order, a written stipulation, judicial notice, the oral agreement of counsel read into the record at the start of trial, etc. Bankruptcy courts have, to a great extent, through local rules, general orders, or pretrial requirements in an individual case, limited, or eliminated, many of the evidence protocols. These local rules, general orders and pretrial requirements often specify how all exhibits are to be "marked" (letters for plaintiffs [P-A, P-B, etc] numbers for defendants [D-1, D-2, etc], specific dates for filing, exchange and objections concerning all exhibits [Ex. – "file not later than 10 calendar days prior to trial and objections not later than calendar 5 days prior to trial, or all filed exhibits are deemed admitted, subject to relevancy"], etc.. The bankruptcy judge's courtroom deputy, court reporter, or other court attendant can be helpful in connection with these protocols.

In order to focus on the tough substantive and procedural issues, it is helpful to avoid stumbling over certain evidence protocols. The evidence protocols consist of some variation of mark, exchange, identify and admit. The protocols for exhibits, not otherwise admitted, and which you wish to have become part of the record, and which have been marked and exchanged, must be identified and admitted. There are similar protocols in connection with approaching witnesses, handling exhibits, etc. A practice, which is generally unopposed, is to request from the court at the start of the proceeding – "May all witnesses throughout the proceeding be approached by inquiring counsel and handed exhibits, without further requests, subject only to a specific objection?" A variant is to also request from the court – "May inquiring counsel remain with a witness in order to assist in locating a specific document, page or line during a specific inquiry, without further requests, subject only to a specific objection?" Remember (subject to a specific Trial Tactic) marking, exchanging and identifying an exhibit does not get the exhibit into evidence, unless the exhibit is actually admitted. If you want the exhibit to be part of the record, you must move for its admission.

A continually developing issue is a bankruptcy judge who uses some variation of an "electronic" courtroom and requires familiarity with the use of an ELMO unit or other electronic evidence unit. Although there are on-line tutorials for the ELMO unit, again, the bankruptcy judge's court attendants or other court personnel can be very helpful in connection with these protocols.

C. WHO IS THE BEST PERSON TO GET THAT EVIDENCE ADMITTED?

The short answer (subject to a specific Trial Tactic) is - the person who can provide the evidence in the simplest and most secure method. Returning to the underlying theme that litigation requires a focused plan, the point is to have the evidence admitted and to recall that your witness pool is not necessarily limited to your client(s). They may include any witnesses opposing counsel may be required to, or will call, a neutral record-keeper, a court clerk, etc.

These concerns are obviously judgment issues; however, they require a realistic assessment of your witness. If it is difficult for him/her to testify concerning dates or numbers, look for other witnesses, or other ways, to have such evidence admitted [cross-examination of other witnesses, admissions, stipulations, judicial notice etc.]

Again, even if you have only one witness, and this witness has difficulty testifying concerning dates and numbers, look for other ways, to have such evidence admitted [cross-examination of other witnesses, admissions, stipulations, judicial notice etc.] and keep a number of comfort questions – questions the witness can comfortably answer- in reserve to help the witness regain confidence in the testimony being given.

Finally, and probably not surprisingly, if at all possible, prepare the witness. This is not a process of teaching the witness to use certain words, particularly if these are not words which would customarily come from the witness. Rather, it is a process of explaining to the witness the issues and testimony protocols so that the witness can provide the court with testimony which is relevant and credible in connection with the issues to be determined. Practice sessions are valuable, not only for attorneys, but particularly for witnesses.

D. WHAT WILL YOU DO WHEN THE EVIDENCE IS ADMITTED?

The short answer is – present it to the court in a cogent and compelling manner which permits your position to prevail in the proceeding. Although this will sound boringly repetitive, returning to the underlying theme that litigation requires a focused plan, it is counsel's responsibility to weave out of all the admissible evidence, those threads which most cogently and compellingly provide a persuasive basis for the court to conclude that your position should prevail in the proceeding.

In this connection it is important to note that legal conclusion are controlled by the court; however, the factual record is presented by counsel. Unless otherwise required, counsel can chose to present, or not present, certain documents, offer, or not offer, certain evidence, call, or not call, certain witnesses, etc. The result of the evidence presented may substantially limit the conclusions a court can reach. The point is that counsel can have a significant impact on the legal conclusions a court can reach in a particular proceeding and it is counsel, in the first instance, who provide the factual materials from which the court fashions the decision. All of this places great responsibility on counsel to

do her/his best with the evidence to assist in achieving the "just, speedy and inexpensive determination of every action and proceeding."

6. OBJECTIONS AND RESPONSES RAISED AT TRIAL

A. DOCUMENTS AND WITNESSES

Although this presentation does not consider the details of these provisions, it may be helpful to recite some fundamental evidence rules:

> Rule **102**. Purpose and Construction These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.
>
> Rule **103**. Rulings on Evidence (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and (1) Objection. - In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or (2) Offer of proof. - In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. (b) Record of offer and ruling The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.
>
> Rule **104**. Preliminary Questions (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges. (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> Rule **401**. Definition of "Relevant Evidence" "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> Rule **402**. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by

these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule **901**. Requirement of Authentication or Identification (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Rule **1001**. Definitions For purposes of this article the following definitions are applicable:(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. (2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".(4) Duplicate**.** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Rule **1002**. Requirement of Original To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

*Rule **1003**.* Admissibility of Duplicates A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

It is should be recalled that, although these Rules are important, whether the evidence comes from a document or a witness, and witnesses are certainly a significant element in bankruptcy litigation, bankruptcy court determinations seldom rest on "eye-witness" testimony; rather, bankruptcy court litigation is document intensive. This is not to suggest that lay or expert witness credibility is not significant, merely, that documents often define the parameters of trial testimony.

This leads to the important recognition that trial counsel must be familiar with the introduction and admission of documents. [See Section 5 Introduction Of Evidence And Presentation Of Witnesses] This also reinforces the earlier point that the best way to secure the admission of a document at trial is to resolve the issue prior to trial. As noted earlier, this could be through an admission in a pleading, established in a pretrial order, failure to object to a an exhibit filed pursuant to a court order, a written stipulation, judicial notice, the oral agreement of counsel read into the record at the start of trial, etc.

Although an extended discussion is beyond the scope of this presentation, an increasingly useful procedure is a Motion in Limine [See Fed. R. Evid. 103 Rulings on Evidence]. These motions can be decided as early as a pretrial conference or any time prior to the proposed admission of the document.

Among the more valuable procedures to prepare against any adverse evidence rulings at trial is to keep in mind the overall litigation plan and develop a specific plan to introduce essential evidence, whether through documents or witnesses. Such steps could include the following:

(1) be prepared, if challenged, to demonstrate the evidence is relevant,

(2) consider whether the document is an original (Rule 1002) or an admissible duplicate (Rule 1003),

(3) consider the identification based on personal knowledge (Rule 602) or expert knowledge (Rule 702) and admission requirements [requires testimony (Rule 901(1) - witness with knowledge that the document is what it is claimed to be) or self – authenticating, (Rule 902(4) – certified copies of public records)],

(4) decide if one, or more witnesses, will be required prior to seeking admission of the document [could be a witness from the opposition – (901(6) telephone conversation)],

(5) determine the evidence is not hearsay (Rule 802 - Rule 801(d)(2) admission by a party-opponent) or is subject to an exception to the hearsay Rule (Rule 803.11 business records exception) and, only if otherwise unavoidable, and with attention to all the prerequisites, a final fall-back may be the Residual Exception (Rule 807),

(6) note that evidence excluded at a particular stage of a proceeding, may, with subsequent testimony and documents, be admissible at a later stage of a proceeding, and

(6) remember, if you want the document to be part of the record the judge considers, or an appellate court reviews, before you rest, request that the evidence be admitted and receive a ruling on admission. One technique, when asked if you rest, is to request the court grant you a moment in which to gather and hand to the court attendant all the exhibits you wish to have admitted.

7. BURDENS AND PRESUMPTIONS

A. INITIAL

The debtor enjoys the benefit of having exceptions to discharge strictly construed in favor of the debtor.[15] The creditor bears the initial burden of producing evidence to establish a prima facie case under the non-dischargeability provisions of 523(a)(2)(A). Once the Plaintiff has established the requirements under 523(a)(2)(A), the burden then shifts to the Defendant to produce evidence that rebuts the evidence produced by the Plaintiff.[16]

B. SHIFTING

The burden of proof in a non-dischargeability action begins and remains with the party seeking the determination of non-dischargeability. However, the burden of going forward with the evidence shifts during the trial. The burden of producing evidence rests initially with the Plaintiff. Once the Plaintiff has made a prima facie case under 523(a)(2)(A), then the burden of producing evidence to rebut shifts to the Defendant. The Plaintiff finally has the burden of producing evidence that refutes the Defendant's proof.

Section 523(a)(2)(C), provides:

> (I) consumer debts owed to a single credit and aggregating more than $500 for "luxury goods or services" incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and
>
> (II) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and
>
> (ii) for purposes of this subparagraph-
>
> (I) the terms "consumer", "credit", and "open end credit plan" have the same meaning as in section 103 of the Truth in Lending Act; and
>
> (II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.

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[15] *Schweig v. Hunter* (*In re Hunter*), 780 F.2d 1577, 1579 (11th Cir.1986) Exceptions to discharge "should be strictly construed against the creditor and liberally in favor of the debtor."

[16] *In re George, 381 B.R. 911, Bkrtcy.M.D.Fla.,2007* citing *In re Tabar,* 220 B.R. 701, 704 (Bankr.M.D.Fla.1998)

523(a)(2)(C) elements, once established by the Plaintiff, carry a presumption of non-dischargeability, however, the presumption is rebuttable.[17] The burden then shifts to the Defendant to produce evidence that the debt incurred either does not qualify for the presumption or does not meet the criterion for non-dischargebililty.[18]

C. ULTIMATE

The party objecting to the dischargeability of a debt carries the burden of proof and the standard of proof is preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); Fed. R. Bankr.P. 4005 (2007).

"A plaintiff's burden of proof in a non-dischargeability action is substantial. A plaintiff must establish the traditional elements of common law fraud to prevail in a Section 523(a)(2)(A) action." SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir.1998)

If the parties move for summary judgment, the burden of proof rests with the party moving for judgment. The evidence is viewed in the light most favorable to the non-moving party. In the recent case of *In re Bachinisky*,[19] the Court reasoned as

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[17] *In re George, supra;* The presumptions are rebuttable. *Hunter,* 210 B.R. at 215-6. "Once the plaintiff has established the requirements of 11 U.S.C. § 523(a)(2)(C), the burden shifts to the defendant to rebut the presumption of fraud."

[18] *In re Meyer, 296 B.R. 849, Bkrtcy.N.D.Ala.,2003;* 11 U.S.C. § 523(a)(2)(C). According to legislative history, this subsection was enacted "to prevent 'loading up' or credit buying sprees" by those contemplating bankruptcy. *John Deere Community Credit Union v. Feddersen (In re Feddersen),* 270 B.R. 733, 736 (Bankr.N.D.Iowa 2001); *Bank One Lafayette, N.A. v. Larisey (In re Larisey),* 185 B.R. 877, 880 (Bankr.M.D.Fla.1995). While normally the burden of proving fraud under § 523(a)(2) rests with the plaintiff creditor, § 523(a)(2)(C) creates a presumption of fraud, shifting the burden to the defendant debtor to bring forth evidence rebutting the presumption. *Am. Express Travel Related Servs. Co. v. Tabar (In re Tabar),* 220 B.R. 701, 704 (Bankr.M.D.Fla.1998). A creditor will receive the benefit of this presumption only if all of the § 523(a)(2)(C) requirements are met.

> First, the debt incurred must be consumer debt. 11 U.S.C. § 101(8) defines a "consumer debt" as a "debt incurred by an individual primarily for a personal, family, or household purpose[.]" In other words, " '[i]f the credit transaction involves a profit motive, then it is not a consumer debt. …Not all consumer debts fall within the ambit of § 523(a)(2)(C). It applies only to those debts incurred for "luxury goods or services." Section 523(a)(2)(C) does not define what "luxury goods and services" are, but it defines what they are not: " 'luxury goods or services' do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor." 11 U.S.C. § 523(a)(2)(C). Considerations bearing upon whether or not an item is a luxury good include the circumstances surrounding the purchase, whether the item serves a significant family function, and whether the purchase shows financial irresponsibility. *General Motors Acceptance Corp. v. McDonald (In re McDonald),* 129 B.R. 279, 282-83 (Bankr.M.D.Fla.1991). "Purchases that are extravagant, indulgent, or nonessential under the circumstances are considered luxury goods." *Id.* at 283. Even if the subject debts were incurred for luxury goods or services, the presumption will not apply unless the debt amount owed to one creditor and attributable to such goods or services is over $1,150. *Gilmore,* 221 B.R. at 880 n. 20 (noting that the presumption of § 523(a)(2)(C) did not apply because, although the debtor owed more than the statutory threshold amount to one creditor, the portion of the debt attributable to luxury goods and services was less than the statutorily required amount). Finally, any debt which would otherwise be eligible for the § 523(a)(2)(C) presumption must have been incurred within the 60-day period before the bankruptcy filing date. 11 U.S.C. § 523(a)(2)(C).

[19] *In re Bachinsky, 393 B.R. 522, Bkrtcy.S.D.Ohio,2008*

follows:

> Under Fed.R.Civ.P. 56(c), made applicable in this adversary proceeding by Fed. R. Bankr.P. 7056, summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also* Novak v. MetroHealth Med. Ctr., 503 F.3d 572, 577 (6th Cir.2007). In reviewing a motion for summary judgment, the Court views the evidence, all facts, and any inferences drawn therefrom in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); Novak, 503 F.3d at 577; Skowronek v. Am. S.S. Co., 505 F.3d 482, 484 (6th Cir.2007) (the court "must draw all reasonable inferences in favor of the nonmoving party").
>
> > " '[A]s to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.' " Niecko v. Emro Mktg. Co., 973 F.2d 1296, 1304 (6th Cir.1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "Entry of summary judgment is appropriate 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " Novak, 503 F.3d at 577 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *see also* Ransier v. Standard Fed. Bank (In re Collins), 292 B.R. 842, 845 (Bankr.S.D.Ohio 2003).
> >
> > The filing of cross-motions does not alter the standards governing the determination of summary judgment motions. *See* Taft Broad. Co. v. United States, 929 F.2d 240, 248 (6th Cir.1991); Collins, 292 B.R. at 845. But " 'cross motions for summary judgment do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties.' " Schafer v. Rapp (In re Rapp), 375 B.R. 421, 428 (Bankr.S.D.Ohio 2007) (quoting Greer v. United States, 207 F.3d 322, 326 (6th Cir.2000)).

If there is a motion for default judgment, the mere failure to respond does not mean the Movant is entitled to judgment.

1. The court must determine "'whether the unchallenged facts constitute a legitimate cause of action;

2. The court must accept as true all of the factual allegations of the complaint, except those relating to damages and draw all reasonable inferences from the evidence offered;

3. Where the claim sounds in fraud, the court must evaluate the evidence presented to assure that the plaintiff has presented a prima facie case;

4. To satisfy the requirements of the prima facie case the plaintiff must present evidence from which a factfinder could reasonably find every element that the plaintiff must ultimately prove to prevail in the action.[20]

The Defendant's failure to respond to the Complaint does not, standing alone, entitle Fleet to judgment. At the outset, the court must determine "'whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.'" *Smith v. Household Fin. Realty Corp. of N.Y. (In re Smith), 262 B.R. 594, 597 (Bankr. E.D.N.Y. 2001)* (quoting C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2688 at 280-81, 282 (1998)). Next, the court must "[accept] as true all of the factual allegations of the complaint, except those relating to damages," and draw "all reasonable inferences from the evidence offered." *Au Bon Pain Corp. v. Artect, Inc., 653 F.2d 61, 65 (2d Cir. 1981)*. And where the claim sounds in fraud, the court must evaluate the evidence presented to assure that the plaintiff has presented a prima facie **[**7]** case. *American Express Centurion Bank v. Truong (In re Truong), 271 B.R. 738, 742 (Bankr. D. Conn. 2002)*. "To satisfy the requirements of the prima facie case the plaintiff must present evidence from which a factfinder could reasonably find every element that the plaintiff must ultimately prove to prevail in the action." *Fisher v. Vassar College, 114 F.3d 1332, 1336 (2d Cir. 1997)* (en banc), *cert. denied*, *522 U.S. 1075, 139 L. Ed. 2d 752, 118 S. Ct. 851 (1998)*.

8. SETTLEMENT

Settlement is typically based on a number of factors:

1. monetary- how much will this litigation cost;
2. evidence- what can I prove;
3. if Plaintiff prevails, how do I get paid;
4. toll it takes on the individual. No one likes to have litigation hanging over their heads.

Settlement is generally trading an unknown potential for a certain in hand result. (A bird in the hand is worth two in the bush). However, the settlement proposed must be fair and equitable based upon a thorough understanding of the implications of the settlement. *In re Bermingham, 201 B.R. at 817, Bankr. Ill. 1996.* Before approving a settlement, the Court must be satisfied that the settlement is not occasioned solely by an inability of one party to proceed based on lack of funds alone.

One Court recently rejected the proposed settlement of a credit card non-dischargeability claim citing the following rationale:

> Settlement of complaints seeking non-dischargeability of credit card debt under 11 U.S.C. § 523(a)(2)(A) has many perils for debtors.

[20] *In re Macias, 324 B.R. 181; Bk Ct ED NY 2004*

> First, in many instances, the defendants in these cases are *pro se,* as is Ms. Riley. Moreover, by definition they are bankrupt, destitute and routinely unequipped-intellectually and financially to litigate in bankruptcy court.
>
> Second, credit card companies have the facility and access, through technology and automation, to instantly, easily, and inexpensively access a cardholder's most current and accurate credit information. They can, and often do so, when extending credit, increasing credit limits, or increasing a debtor's interest rate when the debtor makes a late payment on another creditor, mortgage, or another extension of credit. Certainly, the credit card companies can do so when sending unsolicited convenience checks or inviting a cardholder to transfer credit card balances.
>
> Third, there is, generally, on the part of the defendants (*pro se* or otherwise) a lack of understanding of the stipulation and agreement and the defendants' appreciation of the implications, or the perception of settling a complaint wherein "false pretenses, a false representation, or actual fraud" is alleged. Settlement of a section 523(a)(2)(A) complaint is implicitly, if not explicitly, an acknowledgment of the fraud claims embodied in that section of the Bankruptcy Code. It is, absent language to the contrary, an admission of misconduct in the nature of "false pretenses, a false representation, or actual fraud." As a practical matter, if not a legal question, the credit community's view and the general perception of settling a claim predicated on fraud-as here-is that fraud, deceit or some wrongful conduct, is implicitly acknowledged by the defendant, if not actually explicitly admitted.[21]

The Court went on to set out a number of factors that Courts should consider when approving a settlement:

> Incorporating the standards set forth in *Kaiser* and the review set forth in *AT & T Universal Card Service v. Bermingham (In re Bermingham)*, the relevant inquiry for this Court in approving or disapproving stipulations and consent judgments resolving non-dischargeability complaints under 11 U.S.C. § 523 is:
>
> (1) whether the Stipulations are fair and equitable considering the probability of success, for either side, in the litigation;
>
> (2) the complexity and expense of the litigation;
>
> (3) whether the debtors/defendants understand the terms of the agreement;

[21] *In re Panem, 352 B.R. 269, Bkrtcy.D.Colo., 2006*

(4) whether there is a reasonable basis for entry of the judgment on the terms agreed to by the parties;

(5) whether the debtors/defendants are aware of the right to a trial on the merits; and

(6) whether the debtors/defendants consent at the time judgment is rendered. [22]

The terms of a settlement should correctly disclose the basis for the resolution. If the settlement is strictly a cost saving measure for both sides, then the settlement agreement should properly disclose that fact and provide for dismissal of any claims that are not specifically admitted. The settlement terms should be carefully crafted to not only resolve the issue for the parties, but to address the court's function in the dispute.[23]

9. TRIAL TACTICS

A. MOST IMPORTANT

The most important trial tactic is Preparation. It would be foolishly presumptive to suggest that this presentation could reveal all the trial tactics which would provide a certain path to litigation success. Having made that observation, there is one suggested trial tactic which is most important. Disappointingly, it is no secret short-cut; rather, it is preparation, preparation, and preparation.

While there may be something to the old adage, "As an experienced lawyer you win cases, you should have lost and, as an inexperienced lawyer, you lose cases you should have won", it is suggested that an overall litigation plan and a specific trial plan, which is carefully considered, persistently prepared, and implemented in a focused fashion provides, perhaps, as much assurance as is available in litigation circumstances. It is impossible to overemphasize the significance of preparation for all aspects of any litigation. This involves a through and comfortable familiarity with the underlying legal, procedural and evidentiary factors. It requires a similar familiarity with the facts, as they will be presented both by your evidence and the anticipated evidence of opposing counsel.

Generally, with reflection, a pattern, a story will emerge, which, through often confusing and contradictory evidence, will provide a persuasive path for the court to follow in order for you to prevail. Persistent preparation will provide you with the ability to present that persuasive path to the court.

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[22] *In re Panem, supra pp 280-281*

[23] *In re Panem, supra at 278*; "The judgment, if entered, is consequential as it becomes a final decree and order of this Court. Moreover, it has the "judicial *imprimatur* " of the court. The inherent powers of this Court, embodied in 11 U.S.C. § 105(a), impose a duty on this Court to ensure that the provisions of the Code are carried out and to prevent an abuse of process."

B. MOST HELPFUL

The most helpful trial tactic is calm. Few people are born with the skills of an accomplished trial lawyer. Recognizing a person may possess certain attributes and predispositions, which can be components of an accomplished trial lawyer, it is strongly suggested that trial skills are an acquired art.

Among the significant components of an accomplished trial lawyer is calm- an ability to be able to fully assess, in a detached manner, existing or anticipated circumstances involving the pending litigation. This is not to suggest an accomplished trial lawyer cannot, or will not, demonstrate a full range of human emotions – justifiable anger, appropriate outrage, a disappointment when faced with obvious deceit, a thirst for justice, etc - rather, it is the trial lawyer's sense of calm, which permits her/him to appropriately use these emotions in the proper order and at the precise time they will be most effective. It is easy to succumb to the intensity of a trial atmosphere and lose either overall, or specific, focus during the proceeding.

A sense of calm allows an accomplished trial lawyer to: continue with the overall litigation plan and the specific trial approach and, without any visible reaction, to adjust to her/his own witness, despite intense preparation, providing a totally surprising and harmful answer to a previously reviewed question and rehabilitate that witness; to receive an unanticipated adverse evidentiary ruling and subsequently secure the admission of that same evidence; to courteously continue questioning an increasingly hostile witness until the sought testimony has been secured; to avoid jumping on an obviously harmful piece of testimony from an opposing witness, until it has been repeatedly stated in the record and adopted by the witness and then accentuating the harm at the most propitious moment in the trial; etc. This authentic sense of calm often extends a mantle of enhanced credibility to all evidence and argument submitted by such a lawyer.

C. MOST USEFUL

The most useful trial tactic is flexibility. It would be wonderful if litigation were a predictable process. It simply is not. It involves humans, and human activity, and neither are predictable. Of course, there are predictable parameters and predictable procedures involved in any litigation; however, the central figures, whether litigants, lawyers or judges, share the common characteristic of a human being that, despite their best efforts, they will not always act in a predictable, consistent manner.

A rigid approach to litigation - this is the only way in which the evidence must be presented, this is the only way to cross-examine this witness, etc.- unless there really is no other possible way, is, generally, a recipe for disaster.

The better approach is a flexible one. That is an approach in which, after having carefully considered a number of variations concerning the litigation, the trial attorney continues to recognize that adjustments may need to be made at any moment and is mentally prepared for such events. It might be wonderful if such adjustments and flexibility could be done immediately and "on your feet"; however, different attorneys have different approaches and a request for a 5 minute recess (with an awareness the request may be denied) may be better. The point is to be flexible in your approach and

be prepared to vary it in a manner still consistent with the overall litigation plan and the specific evidence issues.

10. POST-TRIAL

Although little attention can be devoted to this issue, part of trial litigation is an awareness of post-trial issues. These may include being requested by the court to submit proposed findings of fact and conclusion of law, or, if the court has entered an order, requesting a new trial (Fed. R. Bankr. P. 9023), correcting the Order (Fed. R. Bankr. P. 9024), requesting a stay (Fed. R. Bankr. P. 9062) or filing an appeal (Fed. R. Bankr. P. 8001). These filings all occur on an accelerated time line, generally 10 days, and are most appropriately considered as part of the trial process, rather than, as a time pressured decision, which had never previously been considered.