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Regarding
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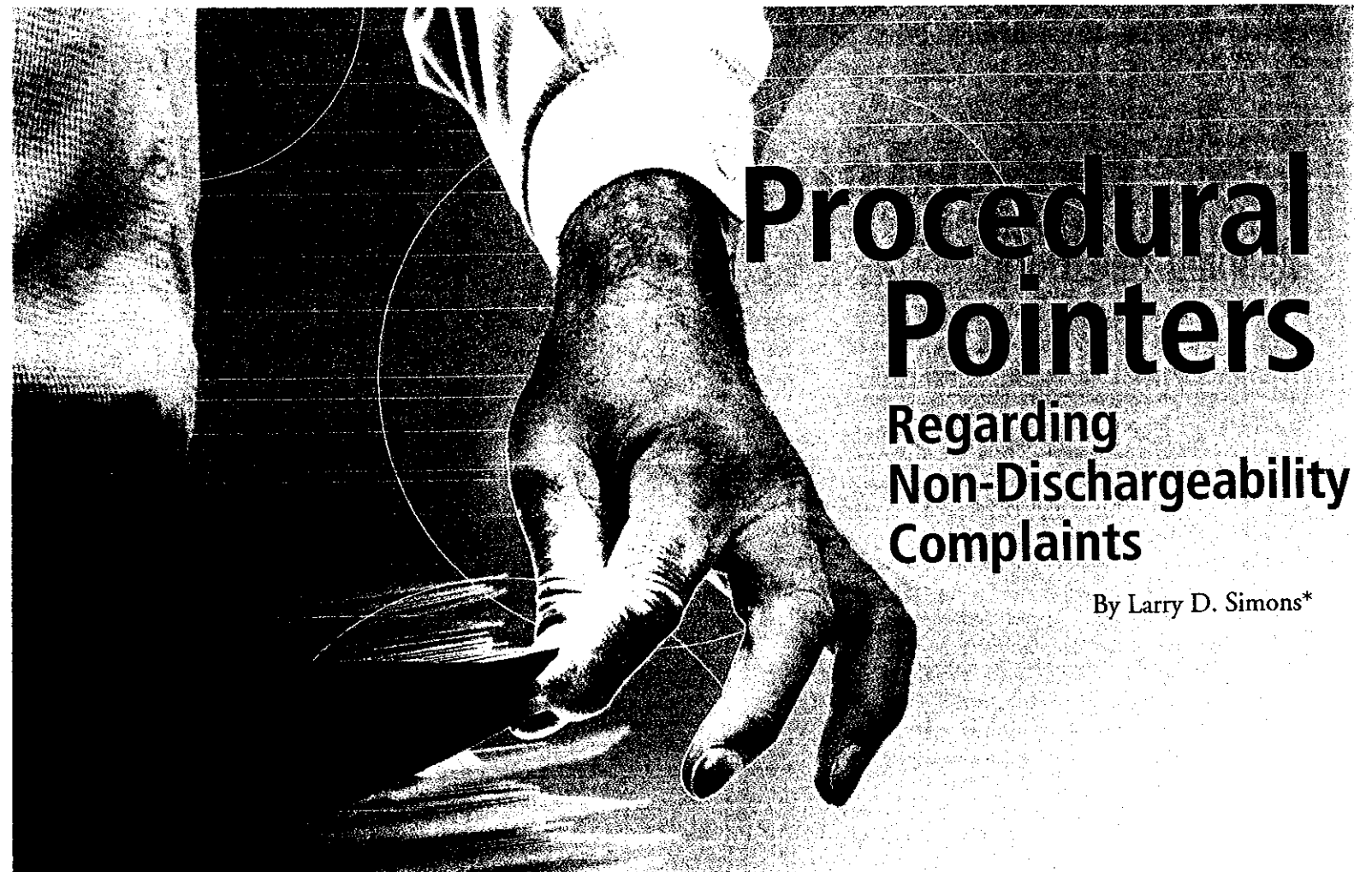
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Procedural Pointers

Regarding Non-Dischargeability Complaints

By Larry D. Simons*

Introduction

Debtors usually file for bankruptcy protection to either reorganize or to liquidate their outstanding debt through what is commonly known as a “fresh start.” “The principal purpose of the Bankruptcy Code is to grant a “fresh start” to the “honest but unfortunate debtor.”¹ This “fresh start” is ensured by a debtor obtaining a discharge after filing for bankruptcy protection. Individuals are entitled to a discharge in Chapter 7,² Chapter 13,³ or Chapter 11 proceedings,⁴ but corporations can only receive a discharge under Chapter 11.⁵

The majority of debts listed by a debtor are automatically discharged unless a complaint seeking to have the debt found to be non dischargeable is filed. Some debts, however, are deemed to be automatically nondischargeable even if a complaint is not filed seeking a court order determining dischargeability. Examples of these types of debts include: support, either child or spousal;⁶ priority taxes;⁷ student loans;⁸ injury caused by operation of a motor vehicle, vessel or aircraft while intoxicated;⁹ and restitution orders.¹⁰ These examples are not an inclusive list and other types of debts that fall into this category can be found at § 523(a).

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¹ *Marrama v. Citizens Bank*, 127 S. Ct. 1105, 1107, 166 L.Ed.2d 956, 961 (2007).

² 11 U.S.C. § 727(a)(1) (“The Court shall grant the debtor a discharge unless the debtor is not an individual.”). References are to Title 11 of the United States Code unless otherwise noted.

³ § 109(e) (“Only an individual with regular income...may be a debtor under chapter 13 of this title.”)

⁴ Section 1141(d)(2) prevents an individual debtor from discharging debts that would be excepted under § 523.

⁵ § 1141(d)(1)(A) (...the confirmation of a plan discharges the debtor from any debt...”).

⁶ § 523(a)(5).
⁷ § 523(a)(7).
⁸ § 523(a)(8).
⁹ § 523(a)(9).
¹⁰ § 523(a)(13).

Other debts such as debts based upon fraud under §§ 523(a)(2), (4) or (6) will be discharged unless a creditor files a complaint seeking to hold that particular debt non dischargeable.¹¹ This article will focus on the time constraints contained in the Bankruptcy Code and Rules in filing a complaint to determine dischargeability of a debt under § 523(c) or a complaint seeking to deny a debtor's discharge under § 727. It will also discuss the procedure and standards to obtain an extension of the deadline to file such a complaint and what effect the conversion of a case has on these deadlines.

Deadline to File Dischargeability Complaints

Section 727(a)

In a Chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). In a Chapter 11 reorganization case, the complaint shall be filed no later than the first date set for the hearing on confirmation.¹² Section 727 is not applicable to Chapter 13 proceedings.¹³ The United States Supreme Court has held that the time limit in Rule 4004(a) is not jurisdictional, but rather a procedural complaint-processing rule. Therefore, a debtor who did not raise the untimeliness of a creditor's complaint until after the bankruptcy court had granted summary judgment to the creditor was precluded from arguing that the court had no jurisdiction to enter that judgment. The debtor had "forfeited" the right to raise timeliness by failing to raise it in time.¹⁴

Section 523

A complaint to determine a debt nondischargeable under any section under § 523 other than a complaint filed pursuant to § 523(c) may be filed at any time.¹⁵ Section 523(c) states in part that the debtor shall be discharged from a debt of a kind specified in §§ 523(a)(2), (4) or (6) unless the court determines the debt to be non dischargeable.

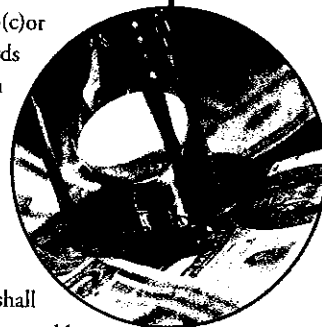
Rule 4007(c) states that a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). This applies to cases arising under Chapter 7, 11 and 13. Rule 4007(d) contains a special rule with regard to filing a complaint seeking to have a debt held nondischargeable on the basis that it was "willful or malicious injury" under § 523(a)(6). This subsection states that on motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing the time to file a complaint to determine the dischargeability of any debt under § 523(a)(6) and shall give no less than 30 days' notice of the time fixed to all creditors in the manner provided in Rule 2002.¹⁶

Extension of Deadline to File Dischargeability Complaints

Rule 4004(b) and Rule 4007(c) state that upon motion of any party in interest, after a court hearing on such a motion, the court may for cause extend the time to file a complaint objecting to the discharge of a particular debt or to deny the debtor's discharge. The motion seeking to extend the deadline must be filed prior to the original deadline to file a complaint. In those cases in which an extension of time is granted, the extension applies only to the party who sought it. Thus, when a trustee has obtained an extension of time to file a complaint objecting to discharge, a creditor who has not obtained a similar extension cannot file such a complaint.¹⁷

An order extending time with which to file a complaint objecting to discharge may only be granted "for cause." "Bankruptcy Rule 4004(b)[and 4007(c)] state that the deadline for filing complaints objecting to discharge may be extended only for cause, but does not elaborate as to what might constitute cause."¹⁸ "The most common type of cause is the need to conduct additional discovery, generally under Rule 2004."¹⁹ Most motions to extend time, if supported by reasonable cause, should be granted.²⁰

As "cause" is not defined, the determination as to whether cause has been established is left up to the court's discretion.²¹ Factors that a court should consider include (1) whether the creditor had sufficient notice of the deadline and information to file an objection, (2) the complexity of the case, (3) whether the creditor exercised diligence, (4) whether the debtor refused in bad faith to cooperate with the creditor, and (5) the possibility that proceedings pending in another forum will result in collateral estoppel of the relevant issues.²²



¹¹ § 523(c).

¹² Federal Rule of Bankruptcy Procedure 4004(a). References are to the Federal Rules of Bankruptcy Procedure unless otherwise noted.

¹³ § 103(b).

¹⁴ *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004); 9 *Collier on Bankruptcy*, ¶ 4004.02 (15th Ed. Rev. 2007) (hereafter "*Colliers*").

¹⁵ Rule 4007(b). For examples of these types of debts, see footnotes 6-10.

¹⁶ Rule 4007(d).

¹⁷ 9 *Collier's*, ¶ 4004.03 [1]; *DRMC v. McCord* (In re McCord), 184 B.R. 522 (Bankr. E.D. Mich. 1995); *In re Gallagher*, 70 B.R. 288 (Bankr. S.D. Tex. 1987)

¹⁸ 9 *Collier's*, ¶ 4004.03[2]

¹⁹ 4 *Collier Bankruptcy Practice Guide*, ¶ 75.09 at 75-20 (2007).

²⁰ *Id.* at 75-21.

²¹ *In re Farhid*, 171 B.R. 94, 96 (N.D. Cal. 1994).

²² *In re Nowinski*, 291 B.R. 302, 305-306 (Bankr. S.D.N.Y. 2003).



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If a party has sufficient notice and information to file an objection in time, no extension is appropriate, especially if the party seeking the extension has made no attempts at discovery during all or most of the time available to it.²³

Conversion of Case

A 1987 amendment to Rule 1019 resolved a split in the case law as to whether the time limits in Rules 4004 and 4007 are revived when a case is converted from Chapter 11, Chapter 12 or Chapter 13 to Chapter 7. Unless the case has been previously converted from a chapter 7 case in which the time limit of Rule 4004 and 4007 had already expired, a new time period for objecting to discharge commences with the conversion to Chapter 7.²⁴ When a case is converted from one chapter to another, there is a new meeting of creditors that must be held. At least one court has held that creditors receive a new sixty-day period in which to file their complaints after the meeting of creditors in the new chapter.²⁵ An exception to this approach involves cases that have previously been converted from Chapter 7 to chapter 11, 12, or 13, after the expiration of the deadline for complaints, and are thereafter reconverted to Chapter 7. In those cases, the time limits in the original Chapter 7 case apply in the reconverted Chapter 7 case, so no new time period commences. This prevents creditors from having two Chapter 7 opportunities to assert the same complaints.²⁶

Conclusion

As the deadline to file dischargeability complaints usually occurs within the first ninety (90) days of filing a petition, creditors or trustees must act quickly in filing their complaint or seeking to extend the complaint deadline. Failure to take affirmative action can result in an otherwise non dischargeable debt being discharged or the debtor receiving their discharge despite conduct which could have lead to denial of their discharge. It is therefore imperative that the creditor (or trustee) undertake the necessary due diligence which allows the creditor to make a determination as to whether or not to file a dischargeability complaint upon immediately learning of the bankruptcy filing. ■

²³ Santana Olmo v. Quinones Rivera, (In re Quinones Rivera), 184 B.R. 178 (D.P.R. 1995).

²⁴ Rule 1019(2).

²⁵ In re Goralnick, 81 B.R. 570 (9th Cir. BAP 1987).

²⁶ Collier's, ¶ 1019.04; In re DiPalma, 94 B.R. 546 (Bankr. N.D. Ill. 1988).

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