UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Michael P. and Patricia M. Serie,

Debtors. BKY 4-89-5318

American Family Financial Services, Inc., ADV 4-90-226

Plaintiff,

v. ORDER DISAPPROVING SETTLEMENT AGREEMENT

Michael P. and Patricia M. Serie,

Defendants.

At Minneapolis, Minnesota, .

This proceeding came on for hearing on the motion of the plaintiff to approve a settlement agreement. Richard J. Harden appeared for the plaintiff. Based on the motion and the file in this case, I make the following:

MEMORANDUM ORDER

The defendants filed a petition under chapter 7 of the Bankruptcy Code on November 1, 1989. The plaintiff was listed on the debtors' schedules as an unsecured creditor; it was on the mailing matrix, and received notice of the filing of the case and of the appropriate deadlines. No complaints objecting to the debtors' discharge or to determine the dischargeability of a debt was filed by the plaintiff or by anyone else. As a result, the debtors were discharged on February 5, 1990. On June 27, 1990, the plaintiff filed its complaint to revoke the debtors' discharge. Revocation of discharge is governed by Section 727(d) which provides:

> On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--
>
> (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
>
> (2) the debtor acquired property

> that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or
>
> (3) the debtor committed an act specified in subsection (a)(6) of this section.

11 U.S.C. 727(d).

The plaintiff's complaint alleges that the debtors' obtained their discharge through fraud by scheduling the plaintiff as an unsecured creditor rather than a secured creditor and by failing to schedule its collateral. The plaintiff also alleges that the debtors knowingly and fraudulently failed to report the acquisition or entitlement of the bank's collateral or to deliver it to the trustee. Although no trial has been held on the complaint, on its face, the factual allegations do not seem to state a claim under either Section 727(d)(1) or (2). The complaint alleges that the debtors converted the bank's collateral which clearly states grounds for an exception to discharge under Section 523(a)(6). However, the time for filing such a complaint has long since expired. The plaintiff has now entered into an agreement(FN1) with the defendants in which the parties agree to a settlement of the complaint to revoke discharge whereby the defendants would pay the plaintiff $3,500.00, with interest at 10% per annum, payable in monthly payments of $75.00 each.

Bankruptcy Rule 7041 and Local Rule 116(c) deal with the subject of objections to discharge and the policy of those rules apply equally to complaints requesting revocation of discharge. Objections to discharge and complaints to revoke discharge are in the nature of class actions. The relief sought would, if granted, inure to the benefit of all creditors, not just the plaintiff. Thus, it is inappropriate to allow the nominal plaintiff to obtain consideration in exchange for dismissal of its complaint. Secondly, of course, the remedy sought is so severe that abuse is to be guarded against carefully. I cannot articulate the considerations better than Judge Kishel did in similar circumstances, albeit in the context of an objection to discharge. The discussion applies equally to this proceeding.

> The substantive rule prohibiting dismissal of a private creditor-plaintiff's objection to discharge after the passage of consideration both underlines the nature of the role of a plaintiff in an objection to discharge and serves a deterrent goal. It reinforces the perception and policy that a private creditor

(FN1) The agreement itself has not been filed, but the plaintiff's motion describes the agreement in some detail.

> objecting to discharge should not, and may not

> be permitted to, prosecute the objection solely to vindicate its own interests in preserving the enforceability of its pre-petition debt. This policy is based on the fact that a creditor objecting to discharge takes on something of the role of a trustee, protecting the integrity of the bankruptcy system itself. In re Harrison, 71 Bankr. 457, 459 (Bankr. D. Minn. 1987). It also embodies a recognition of the powerful leverage that a threat of denial of discharge can bring to bear to coerce a debtor's reaffirmation of debt or other forgoing of the full benefits of bankruptcy relief. The requirement serves as a deterrent to future abuse of objections to discharge by requiring the plaintiff-creditor to fully carry out the trustee-like function which it takes on, notwithstanding the settlement of its own private debtor-creditor dispute. Requiring private-creditor plaintiffs to continue to bear the financial and time-and-effort burden of discharge litigation where consideration has passed will, in the long run, discourage creditors from bringing non-meritorious objections to discharge, and will focus the invocation of the procedure on the specific purposes for which Congress intended it.

Belview State Bank v. Johnson (In re Johnson), Slip Op. ADV 3-86-304 (Bktcy. D. Minn. Jan. 8, 1988).

This proceeding is a perfect example of the application of this rationale. For reasons not disclosed in the record, the plaintiff missed its opportunity to timely file a complaint to determine the dischargeability of its debt, a complaint which appears to have some merit, and instead, allowed a discharge to be entered and filed this complaint to revoke that discharge, a complaint which clearly has no merit. However, because the stakes are high and the debtor has chosen to proceed without an attorney, the defendant has improvidently entered into this agreement whereby the plaintiff would receive money in exchange for dismissing its complaint. Allowing such a disposition of this matter would be inappropriate and abusive and I cannot, therefore, approve it.

THEREFORE, IT IS ORDERED: The motion of the defendants to approve a settlement in this proceeding is denied.

ROBERT J. KRESSEL
CHIEF UNITED STATES BANKRUPTCY JUDGE