

Postscript to *Sommersdorf's Progeny*: Can a Wrong Credit Report Trigger a Debtor Claim under the Code?

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In the June 2007 issue of the *ABI Journal*, I analyzed recent cases considering whether a creditor's non-updating of a credit report post-petition or post-discharge could violate the Code. Two additional cases have been decided after submitting the article for publication.

In May 2007, the Southern District of New York entered its opinion in *In re Torres* on the defendant/creditor's motion for judgment on the pleadings and to dismiss the complaint. --- B.R. ---, 2007 WL 1300955 (Bankr. S.D.N.Y. 2007). In *Torres*, the creditor relied on *Irby* and *Bruno*, arguing there was no duty under the Code to revise its reporting of the pre-petition debt and that the reporting of the debt was not inaccurate. The case has the "typical" fact pattern I discussed in the *ABI Journal* article, with one exception. The *Torres* court notes numerous times the allegation made by the debtors that they requested the creditor revise the way the debt was reported, *i.e.*, to show the debt discharged in bankruptcy, and the creditor refused. This clearly troubled the court, which held that "in the context of a motion to dismiss, [this allegation could] reasonably infer an improper purpose . . . to pressure the plaintiffs to pay their debts . . ." *Id.* at *8.

Why the creditor refused to update the credit information is not factually developed because the opinion was on a motion for judgment on the pleadings. Perhaps the consumer disputed the report directly with the creditor, but there was no procedure in place to directly address that dispute because under the Fair Credit Reporting Act, the creditor's duty to investigate and respond to disputes is triggered by notice from the credit-reporting agency (CRA), not the consumer. If this was indeed the case, then the caution to creditors is that while you may not have a duty under the FCRA to respond to the consumer directly, beware that in the context of a discharged debtor, the lack of response could be interpreted as an attempt to coerce collection of a discharged debt.

On June 20, 2007, the Northern District of West Virginia, in *In re Puller*, entered its opinion on the creditor's summary judgment motion, filed before the close of discovery. 2007 WL 1811209 (Bankr. N.D. W.Va. 2007). Before the court was the creditor's unrefuted affidavit that it requested the CRAs to delete the debtor's tradeline post-petition and post-discharge. Despite this, the debtor contended that the tradeline still appeared on a CBCInnovis report (alleged to be a new CRA) one year later. The creditor requested deletion of the tradeline again after the adversary complaint was filed.

The court narrowed the issue to whether "the failing to timely update information previously supplied to credit reporting agencies after receiving notice that the debtor had filed bankruptcy, could constitute a violation of the discharge injunction." *Id.* at *4. Because discovery had not closed, the court treated the motion as one to dismiss and held that "the debtor has stated a cause

of action for a violation of the discharge injunction, and the debtor is entitled to conduct discovery related to that cause of action before fully responding to . . . [the motion].” *Id.* at *7.

The opinion reiterates those before it in holding that not updating credit information post-discharge can constitute a violation of the Code only if there is some evidence to show that the creditor’s action (or inaction) was intended to coerce the debtor to pay a discharged debt.