

# For defense of nondischargeability for fraud or false representation

**Carl Gustafson, Esq.**  
California and Utah bars

A creditor that files an nondischargeability action under Sec. 523 (a)(2) does so at its own peril. Sec. 523(d) grants attorneys fees to the debtor's attorney where the debt was:

1.1. consumer, and;

2.2. discharged;

And where the complaint alleging nondischargeability was:

3.3. not legally and factually substantially justified, and;

4.4. devoid of special circumstances.

Once the first two prongs are met, the burden shifts to the plaintiff for prongs 3-4.

This scenario can lead to a very strange situation in which the matter is decided on a legal grounds, but the attorneys fees are decided on factual grounds where no trial occurred. The examination of the facts is not to determine the debtor-defendant's liability, but to determine the soundness of the evidence upon which the plaintiff brought its case.

Special circumstances are equitable in nature and the cases granting it are limited.

Sometimes this is going to be apparent from the outset. For instance, a complaint that is time-barred will have a really tough time showing it has a basis in law, the creditor who did no investigation or a loan file with very obvious red flags [cite] are likely not to be substantially based. In other cases, you may engage in a long defense without access to the basis of the plaintiff's belief, thus the defense without a

substantial retainer is riskier.

Note that this fee provision covers only fees incurred for nondischargeability actions brought under Sec. 523(a)(2) and no other type of dischargeability. Intentional acts, embezzlement, etc. are not covered. Thus, in a suit brought under several subsections of Sec. 523, you can:

1. Win on the (a)(2) but if the debt is held non-dischargeable under a different section you will be ineligible for fees under Sec. 523(d)
2. Win a discharge of the debt but be awarded only the portion of your fees incurred in defending the (a)(2) cause of action.  
Query: how to establish that portion of the work?

## **Get fees for getting fees**

Time spent seeking and collecting fee awards is compensable. *Spain v. Mountanos*, 690 F.2d 742, 747 (9th Cir. 1982); *Carnes v. Zamani*, 491 F.3d 990, 996 (9th Cir. 2007); *In re Dayton*, 306 B.R. 322 (Bankr. N.D. Cal. 2004).

## **Get fees for collecting on a fees award**

Now you have a fees award, but the judgment debtor doesn't want to pay it. You can add your time in collecting on the fees award according to CA law. Cal. Code Civ. Pro. §685.040 et seq. State law governs. FRCP 69(a)(1).

I have been awarded fees on two very different 523(d) motions, both of which have had all sorts of twists and turns. I plan on sharing some of those to enable a bigger picture insight into how to avoid the pitfalls and uncertainties in this fee shifting provision inasmuch as possible.

Carl R. Gustafson  
Attorney & Counselor at Law  
Lincoln Law, LLP  
1525 Contra Costa Blvd.  
Pleasant Hill, CA 94523  
(800) 722-6578