

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

**In re:
CAROL FERRI,**

Debtor.

Case No. 08-12399

**POINTS AND AUTHORITIES REGARDING DEBTOR'S
MOTION TO WAIVE DISCHARGE**

Carol Ferri, Debtor, states the following in support of her request for discharge:

1. Creditor offers the case of *In re Asbury*, 423 B.R. 525 (BAP 8th Cir. 2010) in support of its argument that the Bankruptcy Court can take a creditor's interest into account when determining whether it is appropriate to allow a debtor to waive his/her discharge. Debtor disputes that this was the sole reason which led the BAP to deny the waiver. The BAP in *Asbury* actually upheld the bankruptcy court on the basis that, "It held two hearings, at the conclusion of which it determined that the debtor did not fully appreciate the rights he purported to give up and, as a result, the waiver could not be approved." *Id.* at 529.
2. In *Asbury*, the BAP did uphold the bankruptcy court's evaluation of an objecting creditor's interests; however, this analysis led to the dissent filed by Chief Judge Kressel. Judge Kressel believed the majority "expanded 11 U.S.C. §727(a)(10) beyond its intended meaning." *Id.* Judge Kressel based his interpretation of Section 727(a)(10) on the fact that "the statute does not include the language 'after notice and a hearing.'" *Id.* at 530. Judge Kressel took the omission of that language to mean that "Congress did not intend that creditors or parties in interest, other than the debtor, have a role in the court's determination of whether or not to approve the waiver." *Id.* Finally, Judge Kressel does explain the more reasoned role of the court as being

“limited to assuring that the statutory requirement that the waiver be executed after the order for relief is met and the waiver is a true one, i.e., that the debtor has knowingly executed the waiver.” *Id.*

3. The role as interpreted by Judge Kressel is in line and consistent with all other bankruptcy authority. Namely, there are three requirements which must be met in order for a court to decide that the waiver is effective under the code: It must be (1) in writing; (2) executed by the debtor after the order for relief; and (3) approved by the court. *In re Levinson*, 58 B.R. 831, 836-37 (Bankr.N.D.Ill. 1986); *Cheripka v. Republic Ins. Co.*, 122 B.R. 33, 34 (Bankr.W.D.Penn. 1990)(separates the post-petition timing element so as to create four requirements); and *In re Eliscu*, 163 B.R. 335 (Bankr.N.D.Ill. 1994).
4. Neither the Bankruptcy Code nor Rules require that a creditor’s interest be taken into account when determining whether to approve a debtor’s waiver of discharge pursuant to 11 U.S.C. §727(a)(10). In this case, the creditor will still be able to get its proverbial “pound of flesh” in that it will be able to pursue collection of the debt through other means provided by state law. Other creditors will be provided the opportunity as well. There is no prejudice to the creditor if the bankruptcy court accepts this waiver.

For reasons stated above, Debtor respectfully requests that the Court conduct a hearing to approve the Debtor’s written waiver of discharge.

Respectfully Submitted,

/s/Electronically filed
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CERTIFICATE OF SERVICE

I hereby certify that this pleading was electronically filed and provided to the following persons by electronic submission this 15th day of August 2011:

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