04-CV-E



**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF CALIFORNIA**
**UNITED STATES COURTHOUSE**
**SUITE 3-200**
**501 "I" STREET**
**SACRAMENTO, CALIFORNIA 95814-7303**

**CHAMBERS OF**
**JUDGE CHRISTOPHER M. KLEIN**

**916-930-4510**

March 30, 2004

Hon. Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, Texas 77002-2698

Re: Amending Federal Rule of Civil Procedure 8(c)

Dear Judge Rosenthal:

I have two suggestions regarding Federal Rule of Civil Procedure 8(c) that relate to the project of the Advisory Committee on the Federal Rules of Civil Procedure to restyle the rules. First, the reference to "discharge in bankruptcy" should be deleted from the list of affirmative defenses to conform to statutory changes in the status of bankruptcy discharges. Second, "claim preclusion" and "issue preclusion" should be inserted to conform with the modern nomenclature of the principles of res judicata.

1. "Discharge in Bankruptcy" is No Longer an Affirmative Defense.

While "discharge in bankruptcy" was an affirmative defense before 1970, the treatment of the discharge as an affirmative defense was effectively outlawed in 1970 with the enactment of Public Law 91-467, amending former Bankruptcy Act § 14.

That 1970 statute transformed "discharge in bankruptcy" from an affirmative defense that was waived if not timely pled into an absolute defense that remains viable notwithstanding failure to plead it.

The 1970 amendment read, in pertinent part:

> An order of discharge shall -
>
> (1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following: ...
>
> (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

Bankruptcy Act of 1898 § 14f, added by Act of Oct. 19, 1970, Pub. L. 91-467, § 3, 84 Stat. 991.

The House committee report on the 1970 bill, S. 4247, explained:

> As stated in the report on this measure by the Senate Judiciary Committee, the major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. Often the debtor in fact does not appear because of such misplaced reliance, or an inability to retain an attorney due to lack of funds, or because he was not properly served. As a result a default judgment is taken against him and his wages or property may again be subjected to garnishment or levy. All this results because the discharge is an affirmative defense.

H. Rep. No. 91-1502, at 1-2 (1970).

The bill's floor leader in the House of Representatives, Congressman (later-Circuit Judge) Charles Wiggins, elaborated:

> S. 4247 would close some of the loopholes in current law by which creditors can unfairly harass a bankrupt, especially the "little guy" who is the subject of the typical "consumer" or nonbusiness bankruptcy.
>
> ...

> When suit on a discharged debt is filed in a State court, the bankrupt must file an answer, pleading his discharge as an affirmative defense; otherwise judgment will go to the creditor by default. Many bankrupts do not realize the consequences of ignoring the State court proceeding. Others who do have great difficulty obtaining counsel because, having just gone through bankruptcy, they have no resources with which to pay an attorney's fee. This situation has been very embarrassing to members of the bar who, having represented the bankrupt in the bankrupt proceedings, cannot continue to represent him in a series of State court proceedings without prospect of a reasonable fee. ...

116 Cong. Rec. 9549 (1970) (statement of Rep. Wiggins).

The absolute nature of the defense was carried over into the present Bankruptcy Code as 11 U.S.C. § 524(a)(1)-(2):

> (a) A discharge in a case under this title -
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived;

11 U.S.C. § 524(a)(1).

In other words, § 524(a)(1) provides that a post-discharge judgment is "void" - which I take to mean void ab initio - and that waiver cannot save such a judgment.

Continued reference to "discharge in bankruptcy" as an affirmative defense in Rule 8(c) fosters the misimpression that it is still an affirmative defense. Moreover, misunderstandings do persist, as I have encountered nonspecialist lawyers and judges who continue to think it is an affirmative defense and who point to Rule 8(c) in support of that position.

2. Modern Res Judicata Nomenclature.

It would also be appropriate to insert "claim preclusion" and "issue preclusion" in the list at Rule 8(c) so as to conform with modern developments in the principles of res judicata that are reflected in the *Restatement (2d) of Judgments*. E.g., Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984).

Professor Cooper's lucid explanation of these developments in the *Federal Practice & Procedure* treatise notes that the older res judicata nomenclature has persisted due to "ingrained professional habits." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4402, at 7 (2002).

Updating the nomenclature to include "issue preclusion" and "claim preclusion" would promote the use of the modern terms and the more precise analysis that ensues from their use.

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I would be pleased to provide further explanations to any member of the committee.

Sincerely,

Christopher M. Klein

cc: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
Washington, DC 20544