CREDITORS BEWARE!
Discharge in Bankruptcy: Affirmative Defense or Debtors' Offense?

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INTRODUCTION

Joe, an individual, is drowning in bills and decides to declare bankruptcy. He files for Chapter 7 bankruptcy.[1] The proceedings go as planned, and at the end, Joe receives a general discharge, feels he is debt free, and enjoys a sunny Friday.[2] Later that weekend, Joe gets into the luxury car he bought from a car dealership in a neighboring state eighty days before filing for bankruptcy,[3] recognizing that after the discharge his credit would drop precipitously and he would not be able to buy such a nice car.[4] While he is enjoying his Friday drive, the car dealership is working on a complaint and Joe is the defendant in the complaint. The out-of-state car dealership claims that Joe bought the luxury car for $100,000, knowing that bankruptcy was inevitable and therefore the debt for the car was exempt from the general discharge.[5] A few days later, as Joe is washing his car, he is approached by a process server. The process server hands Joe a complaint from the car dealership. Confused, Joe stumbles back to his car and flops down in the leather passenger seat. Joe sits there in awe, staring at the wood paneled dashboard,

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[1] For a brief summary of the Chapter 7 bankruptcy process refer to: *Liquidation under the Bankruptcy Code,* U.S. COURTS, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx (visited Jan. 9, 2011).

[2] In Chapter 7 bankruptcy, the discharge is granted under 11 U.S.C.S. § 727 (LexisNexis 2010).

[3] The author of this Article specifically chose this time frame to fall within the purview of 11 U.S.C.S. § 523(a)(2)(C)(i)(I) (LexisNexis 2010) (stating that "consumer debts owed to a single creditor and aggregating more than $ 600 for luxury goods…within 90 days before the order for relief…are presumed to be nondischargeable.").

[4] 15 U.S.C.S. § 1681(c) (LexisNexis 2010).

[5] Since the parties are from different states and the amount in question is greater than $75,000 the creditor can bring suit in federal court. 28 U.S.C.S. § 1332 (LexisNexis 2010).

wondering how his get out of jail free card did not get him out of this charge as well. What does Joe do next?

Prior to December 1, 2010, the Federal Rules of Civil Procedure (FRCP) under Rule 8(c)[6] required that a debtor, such as Joe, had to allege the affirmative defense of "discharge in bankruptcy" in his answer if he planned to raise that defense at trial.[7] The consequence of failing to answer would be that the creditor would win a default judgment.[8] The result would be that the affirmative defense of "discharge in bankruptcy" could not be raised because of res judicata[9] and the judgment would stand as long as the creditor alleged an exception to the general discharge.[10] The creditor could then collect as though there were no discharge, unless the debtor could get the judgment set aside.[11] Even if Joe did answer, but did not raise the affirmative defense of "discharge in bankruptcy" and there was a trial, the discharge issue could not be tried, unless the pleadings were amended.[12] What Joe does might depend on whether the complaint was filed before or after December 1, 2010.[13]

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[6] Fed. R. Civ. P. 8(c).

[7] *Id.*

[8] Fed. R. Civ. P. 55.

[9] 11 U.S.C.S. § 1738 (LexisNexis 2010).

[10] If the creditor's claim was supposed to fall under the general discharge then, according to 11 U.S.C.S. § 524 (LexisNexis 2010), the default judgment would be void.

[11] Fed. R. Civ. P. 60.

[12] Fed. R. Civ. P. 15.

[13] The scope of this Article only extends to federal courts because states have their own rules of civil procedure and this Article does not delve into whether each state's rules of civil procedure will be amended to strike "discharge in bankruptcy."

If the complaint was filed after December 1, 2010, Joe can get in the driver's seat and enjoy his car debt-free without needing to do anything until the creditor tries to collect. This debtor-friendly outcome is the result of a recent amendment to FRCP Rule 8(c) that struck the requirement of pleading the affirmative defense of "discharge in bankruptcy."[14] If there is no need to plead "discharge in bankruptcy," then there is no need to answer. This is because even if the creditor wins a default judgment the issue of "discharge in bankruptcy" will not have been decided, so res judicata will not bar litigating the issue of "discharge in bankruptcy."[15] Thus, after December 1, 2010, Joe could simply ignore the complaint with no legal consequence because "discharge in bankruptcy" will no longer be an affirmative defense that a defendant is required to plead in his answer.

Why was the affirmative defense of "discharge in bankruptcy" struck from Rule 8(c)? The FRCP rules committee claims that the impetus for striking the affirmative defense of discharge in bankruptcy is the confusion caused by the requirement of pleading the affirmative defense juxtaposed against the 1970 Bankruptcy Act[16] that developed new rules for bankruptcy procedure.[17]

In the simplest case, barring any exceptions, when a bankruptcy court enters an order of discharge, a debtor receives a general discharge.[18] That means that individual claims against the

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[14] Bankruptcy Act § 14(f) (1970) (repealed by Pub. L. No. 95-598 codified as 11 U.S.C. 524(a)); Fed R. Civ. P. 8(c) note; MARK KRAVITZ J., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 13 (2009), http://207.41.14.183/rules/Supreme%20Court%202009/Excerpt-CV.pdf.

[15] Failure to answer would lead to default judgment on the issue of liability, but Joe had no way to contest liability.

[16] Bankruptcy Act Amendments of 1970, Pub. L. No. 91-467, 84 Stat. 990 (Repealed 1978).

[17] KRAVITZ, *supra* note 14, at 13.

[18] H.R. REP. NO. 91-1502, at 2 (1970).

debtor are lumped together and discharged as a body.[19] This voids further litigation of those claims.[20] According to the Bankruptcy Code, if a creditor brings an individual claim against a debtor after a general discharge, the court would find the creditor in contempt if the creditor knew about the general discharge.[21]

However, there are some exceptions. For example, if a creditor believes a debt owed to him falls under one of the exceptions to the general discharge, the creditor can bring a separate action in a district or state court, or the creditor can ask the bankruptcy court to determine whether the claim is dischargeable.[22] The creditor can go outside the bankruptcy court to determine whether or not the creditor can prove the facts required to show that the debt falls under one of the exceptions.[23] On the assumed facts in the previous hypothetical, Joe's purchase of the car could fall under an exception to discharge. The creditor could try to prove that Joe's purchase was a false representation, the good purchased was a luxury good greater than $600, and the purchase was made within ninety day of filing for bankruptcy.[24] The dealership could probably prove all of these elements because Joe bought the car on credit and misrepresented to the credit card company that he would pay the creditor back when he actually never planned on paying back the creditor, the car is a luxury good he bought for $100,000, and Joe purchased the car eighty days before filing for bankruptcy.

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[19] *Id.*

[20] 11 U.S.C.S. § 524(a) (LexisNexis 2010).

[21] H.R. REP. NO. 91-1502, at 1-2 (1970).

[22] 11 U.S.C.S. § 523 (LexisNexis 2010).

[23] *Id.*

[24] 11 U.S.C.S. § 523(a)(2)(A)(i)(I) (LexisNexis 2010).

Under the law prior to December 1, 2010, Joe's failure to answer and consequent failure to raise the affirmative defense of "discharge in bankruptcy" would end the matter. The out-of-state car dealership would be entitled to a default judgment and could collect from Joe. Under the new rules, Joe's failure to answer does not have as serious a consequence. Joe can still raise the defense of "discharge in bankruptcy" in response to a collection attempt. Joe could then move the bankruptcy court to hold the out-of-state car dealership in contempt for violating the discharge and require the out-of-state car dealership to litigate the discharge issue in bankruptcy court. For forty years, the affirmative defense and the Bankruptcy Code coexisted, but in 2010 the FRCP Rules Committee amendment to strike the affirmative defense ended the coexistence. In the end, the Committee decided there could be only one rule and the Bankruptcy Code prevailed over the affirmative defense.[25]

The Rules Committee struck the affirmative defense because the Committee felt the existence of "discharge in bankruptcy" under Rule 8(c) might lead to confusion.[26] Specifically, the Committee thought the language of 11 U.S.C. § 524, which voids all judgments against a discharged debt, was contradictory to Rule 8(c)'s requirement of pleading the affirmative defense of "discharge in bankruptcy" or waiving the ability to plead "discharge in bankruptcy" after a default judgment.[27] However, as with so many areas of the law, clearing up one possible problem by making a "small change" could lead to inefficiencies and unintended consequences. This Article will discuss the possible unintended consequences of the change to Rule 8(c) and possible solutions to those unintended consequences.

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[25] KRAVITZ, *supra* note 14, at 13.

[26] *Id.*

[27] *Id.*

Striking the affirmative defense of bankruptcy is an overbroad solution to the confusion of two seemingly contradictory rules and should be narrowed either by the rules committee, the creditors, or the judiciary. Part I explores the function of the affirmative defenses under FRCP Rule 8(c). Part I then lays out the history of the affirmative defense of discharge in bankruptcy, from the common law rule, to its addition to the FRCP and its role in the amended Bankruptcy Acts, and then later the Bankruptcy Code.

Part II explains the connection between the possible legal issues implicated because of this rule change. Specifically this part describes the two main Bankruptcy Code sections at issue in this Article—11 U.S.C. § 524, the general discharge section, and 11 U.S.C. § 523, exceptions to discharge—and how the affirmative defense helped shape these provisions. Part II also explains the concurrent jurisdiction that can arise post-discharge in bankruptcy.

Part III looks at the Rules Committee's debate to strike "discharge in bankruptcy" from the affirmative defenses in the FRCP. Part III first looks at why the Rules Committee struck "discharge in bankruptcy" from the FRCP. Part III then analyzes the Department of Justice's concern for striking "discharge in bankruptcy."

Part IV proposes possible solutions to remedy the negative consequences of striking "discharge in bankruptcy" from the affirmative defenses. The solutions could come from the Rules Committee, the creditors, or the judiciary. All of the solutions would clear up the unintended consequences that are likely to result from striking "discharge in bankruptcy" from the affirmative defenses.

Part I: Background

A. Affirmative Defenses under Rule 8(c) of the Federal Rules of Civil Procedure

An affirmative defense is a legal claim "which avers that even if the petition is true, the plaintiff cannot prevail because there are *additional facts* which permit the defendant to avoid legal responsibility."[28] In 1937, the Federal Rules of Civil Procedure were adopted and the requirement to plead an affirmative defense was included.[29] The defense of "discharge in bankruptcy" was included as an affirmative defense at the inception of the FRCP.[30]

The FRCP requires pleading the affirmative defense in certain cases or the defense will be waived.[31] The Eleventh Circuit, in *American First Federal*,[32] held that the difference between a claim and an affirmative defense is that a claim is a reason why the plaintiff should not succeed, while an affirmative defense attacks the legal right to bring the action.[33] If the plaintiff has notice of the affirmative defense, it gives him or her an opportunity to argue why the defense is not

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[28] World Enter., Inc. v. Midcoast Aviation Servs., Inc., 713 S.W.2d 606, 608 (Mo. Ct. App. 1986) (holding that since the court had the whole contract, the provision in question did not have to be plead as an affirmative defense); 61A AM. JUR. 2D *Pleading* § 288 (2010).

[29] In re Gurrola, 328 B.R. 158, 166 (B.A.P. 9th Cir. 2005) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when the claim should have been or was discharged under 11 U.S.C. § 524(a)(1)).

[30] *Id.*

[31] Loney v. Milodragovich, Dale & Dye, P.C., 905 P.2d 158, 161-62 (Mont. 1995) (holding that if the affirmative defense of discharge in bankruptcy is not raised, it will be waived).

[32] Am. First Fed., Inc. v. Lake Forest Park, Inc., 198 F.3d 1259 (11th Cir. 1999).

[33] *Id.* at 1265 (holding that the defendant's assertion was not an affirmative defense but instead it was a counterclaim and as such the defendant was required to exhaust the administrative remedies in 12 U.S.C.S. § 1821(d), but the defendant did not, so the court did not have jurisdiction).

applicable in the current case.[34] Often, factual development is key to determine the applicability and validity of certain defenses.[35]

It is sometimes difficult to determine whether or not a claim is an affirmative defense. Though the FRCP enumerates certain defenses[36] such as "discharge in bankruptcy," Rule 8(c) states that, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including [the enumerated defenses]…."[37] The use of the words "any avoidance or affirmative defense" leaves open the possibility of many avoidances or affirmative defenses and the enumerated defenses are only examples of federally accepted affirmative defenses or avoidances.[38] The phrase "any avoidance or affirmative defense" is a residuary clause.[39] A defense that is not enumerated but "shares the common characteristic of a bar to the right of recovery even if the general complaint were more or less admitted to" falls under the residuary clause of Rule 8(c).[40]

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[34] Mickowski v. Visi-Trak Worldwide, LLC, 415 F.3d 501, 506 (6th Cir. 2005) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971)); 61A AM. JUR. 2d *Pleading* § 288 (2010).

[35] Daniel B. Tukel, *The Best Defense or a Good Offense? Are the Damages Caps in 42 U.S.C. § 1981A Waivable Affirmative Defenses?*, 24 LAB. LAW. 303, 304 (2009).

[36] Before December 1, 2010, Fed. R. Civ. P. 8(c) specifically required that a party in response to a pleading state: "accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver."

[37] Fed. R. Civ. P. 8(c).

[38] *See* Hadar v. Concordia Yacht Builders, Inc., 886 F. Supp. 1082, 1089 (S.D.N.Y. 1995) (holding that a defense is not necessarily affirmative just because it negates a prima facie element of the plaintiff's case).

[39] Jones v. Bock, 549 U.S. 199, 211 (2007) (stating that "Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response."); Jakobsen v. Mass. Port Auth., 520 F.2d 810, 813 (1st Cir. 1975) (stating that "certain specified defenses and any other matter constituting an avoidance or affirmative defense" must be pleaded affirmatively.").

[40] Jakobsen v. Mass. Port Auth., 520 F.2d 810, 813 (1st Cir. 1975).

All affirmatives defenses, both enumerated and those that fall under the residuary clause, must be plead in the answer to a complaint.[41] If a debtor does not plead the affirmative defense it is waived.[42] In the typical case, if the affirmative defense is not raised in a timely manner, during litigation, it cannot be raised after a final judgment.[43] If a debtor, on the other hand, does not respond to a creditor's complaint, the creditor can file an "affidavit or otherwise" showing default.[44] Once the clerk files the default, a court will likely grant a default judgment.[45]

If the debtor does not give notice of the affirmative defense, then "failure to affirmatively plead a defense set forth in Rule 8(c) generally results in a waiver of that defense."[46] If the debtor disputes the judgment, the debtor cannot dispute it on grounds of "discharge in bankruptcy."[47] "Under the doctrine of claim preclusion,[48] a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been

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[41] Arizona v. California, 530 U.S. 392, 393 (2000) (holding in part that the affirmative defense of res judicata is lost if not timely raised); Std. Waste Sys. v. Mid-Continent Cas. Co., 612 F.3d 394, 398 (5th Cir. 2010) (holding that failure to plead an affirmative defense results in waiver unless the plaintiff is not unfairly surprised or prejudiced).

[42] Arizona v. California, 530 U.S. 392, 393 (2000); Dole v. Williams Enter., Inc., 876 F.2d 186, 189 (D.C. Cir. 1989) (holding that the defendant had to plead "greater hazard" as an affirmative defense, but even if it did all the elements of "greater hazard" were not present) (stating that "[a] party's failure to plead an affirmative defense does not merely put him at a strategic disadvantage vis-à-vis the claim; rather, it generally results in the waiver of that defense and its *exclusion from the case*.") (internal quotes omitted).

[43] Arizona v. California, 530 U.S. 392, 393 (2000).

[44] Fed. R. Civ. P. 55(a); N.Y. Life Ins. Co. v. Brown, 84 F.3d 137, 141 (5th Cir. La. 1996) (holding that the defendant did not receive actual notice, so the default was void).

[45] Fed. R. Civ. P. 55(b).

[46] Loney v. Milodragovich, Dale & Dye, P.C., 905 P.2d 158, 161-62 (Mont. 1995) (holding that if the affirmative defense of discharge in bankruptcy is not raised it will be waived).

[47] H.R. REP. NO. 91-1502 at 2 (1970).

[48] Claim preclusion is also known as res judicata. *See* BLACK'S LAW DICTIONARY 283 (9th ed. 2010).

raised in that action."[49] Thus, when discharge in bankruptcy was an affirmative defense, a debtor's default would preclude a later claim that the debt was discharged.[50]

B. History of "Discharge in Bankruptcy" and its use as an Affirmative Defense

Discharge in bankruptcy was a remnant of English law.[51] The history of the Bankruptcy Act was fraught with amendments throughout the 1800s. The first Bankruptcy Act was adopted in 1800.[52] The 1800 Bankruptcy Act was a device that only creditors could use to collect the debtor's assets, after which his debts would be discharged.[53] Once the debts were discharged the Act provided the debtor with a defense to re-litigation.[54] The Act provided for a discharge certificate that "shall be…sufficient evidence, *prima facie*, of the party's being a bankrupt within the meaning of this act…and a verdict shall thereupon pass for the defendant…."[55] The New York Supreme Court considered the discharge certificate an affirmative defense that if not raised would be lost.[56]

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[49] Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998) (holding that "claim preclusion by reason of prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b)") (internal quotes and brackets are omitted) (citing Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981)) (footnote added).

[50] *See* Loney v. Milodragovich, Dale & Dye, P.C., 905 P.2d 158, 161-62 (Mont. 1995) (holding that if the affirmative defense of discharge in bankruptcy is not raised it will be waived).

[51] Charles J. Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 326 (1991).

[52] Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[53] Tabb, *supra* note 51, at 345.

[54] *See* Bankruptcy Act of 1800, ch. 19, § 34, 2 Stat. 19, 31 (repealed 1803); Benjamin Margulis, Note, *The Bankruptcy Hegemon: Section 524(a) and its Effect on State and Federal Comity*, 31 CARDOZO L. REV. 905, 909 n.34 & 36 (2010).

[55] *See* Bankruptcy Act of 1800, ch. 19, § 34, 2 Stat. 19, 31 (repealed 1803); Benjamin Margulis, Note, *The Bankruptcy Hegemon: Section 524(a) and its Effect on State and Federal Comity*, 31 CARDOZO L. REV. 905, 909 n.34 & 36 (2010).

[56] *See* Mech.'s Bank v. Hazard, 9 Johns. 392, 392 (N.Y. Sup. Ct. 1812) (holding that defense must be plead if the debt has been satisfied); Margulis, *supra* note 54, at 909 n.34 & 36.

Then in 1841, the Bankruptcy Act[57] was amended to be a little more debtor-friendly.[58] The Act allowed debtors to voluntarily file for bankruptcy as long as the creditors agreed to the bankruptcy.[59] The 1841 Act also included an affirmative defense provision.[60] Creditors were so unhappy with the liberalization of the Act that it was repealed eighteen months later.[61] The Bankruptcy Act was again amended in 1867[62] in the aftermath of the Civil War.[63] The new provisions were again liberalized with the goal of rehabilitating the debtor.[64] The affirmative defense was included in this Act as well.[65]

A decision from the period, *Dimock v. Revere Copper Co. of Boston*[66] was decided shortly after the 1867 Bankruptcy Act was enacted, and dealt with the affirmative defense of "discharge in bankruptcy." In that case, the debtor received a discharge in bankruptcy five days before a judgment was entered against the debtor in a state court action pertaining to the same debt that

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[57] Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); Margulis, *supra* note 54, at 909 n.34 & 36.

[58] *See* Tabb, *supra* note 51, at 349.

[59] *Id.*

[60] Bankruptcy Act of 1841, ch. 9, §4, 5 Stat. 440, 444 (repealed 1843) (stating that "discharge…shall, in all courts of justice, be deemed a full and complete discharge of all debts…and shall be and may be pleaded as a full and complete bar to all suits brought in any court…."); Margulis, *supra* note 54, at 909 n.34.

[61] Robert P. Watson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 BANK. DEV. J. 77, 94 (2003).

[62] Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878).

[63] Watson, *supra* note 61, at 94.

[64] *Id.*

[65] Bankruptcy Act of 1867, ch. 176, § 34, 14 Stat. 517, 533 (repealed 1878) (stating that "a discharge duly granted…[is] a full and complete bar to all suits brought on any such debts…and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge…."); Dimock v. Revere Copper Co. of Boston, MA, 117 U.S. 559, 560 (1886); Margulis, *supra* note 54, at 909 n.34.

[66] 117 U.S. 559 (1886).

was discharged.[67] When the creditor tried to collect on the judgment, the debtor raised the defense of discharge in bankruptcy.[68] The Court determined that because the debtor had ample opportunity, five days, to raise the affirmative defense of "discharge in bankruptcy" the judgment against the debtor in the state court would stand.[69]

Creditors again complained and the Act was repealed eleven years later.[70] Then, the Bankruptcy Act of 1898[71] was enacted and it required the debtor prove all claims, and if a claim was not provable, then it would not be discharged.[72] This Act allowed for a general discharge of debt.[73] The 1898 Act also removed the consent of creditors as a requirement before the bankruptcy proceeding could begin.[74] This Act made it easier for the debtor to receive a discharge of debts, which made it harder for creditors to collect debts owed to them.[75]

The 1898 Act was very pro-debtor.[76] So pro-debtor, in fact, that sometimes creditors sought to take advantage of unwitting debtors and filed complaints in different courts against the same

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[67] *Id.* at 560.

[68] *Id.*

[69] *Id.* at 565-66.

[70] Watson, *supra* note 61, at 94.

[71] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (codified at 11 U.S.C. § 362(f)) (repealed 1978).

[72] Michael G. Williamson & Stephanie C. Lieb, *The Outer Limits of Dischargeability - When Is a Claim a Claim in Bankruptcy?*, 83 FLA. B.J. 29, 29 (2009).

[73] *See* First Nat'l Bank v. Roddenberry, 701 F.2d 927, 929 (11th Cir. 1983).

[74] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (holding that once a debtor receives a discharge the creditor cannot enforce a wage assignment).

[75] *See* Tabb, *supra* note 51, at 365-66 (citing Henry Newton, *The United States Bankruptcy Law of 1898*, 9 Yale, L.J. 287, 290 (1900)).

[76] *See id.*

debtor on the same debt in an effort to get repaid.[77] Often, the debtor, because he had his discharge, would not respond to the complaint because he thought the issue was resolved.[78] The creditor would then win a default judgment against the debtor because the creditor's complaint went unanswered and consequently the affirmative defense of "discharge in bankruptcy" was waived.[79] Because of the requirement to raise "discharge in bankruptcy" as an affirmative defense, the debtor could not re-litigate the judgment later because the default judgment waived the use of the affirmative defense.[80]

Congress sought to eradicate this practice of creditors taking advantage of unsuspecting debtors, and in 1970 added provisions to the Bankruptcy Act[81] to bar creditors from bringing actions against debtors after a general discharge.[82] One of the goals of the Act was to consolidate all bankruptcy proceedings into one court.[83] If all the bankruptcy discharge proceedings were held in a bankruptcy court, the court would gain the expertise needed to effectively handle all bankruptcy discharge cases.[84] The 1970 amendment also put creditors on notice that if a creditor re-litigated a discharged debt, the judgment would be void.[85] This

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[77] In re Meadows, 428 B.R. 894, 904 (Bankr. N.D. Ga. 2010) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when a creditor does not allege a legitimate exception to the general discharge).

[78] *Id.*

[79] *Id.*

[80] In re Boardway, 248 F. 364, 365 (D.N.Y. 1918) (holding that a debtor must plead "discharge in bankruptcy or it will be waived.").

[81] Bankruptcy Act Amendments of 1970, Pub. L. No. 91-467, 84 Stat. 990 (repealed 1978).

[82] H.R. REP. NO. 91-1502, at 7 (1970).

[83] *Id.* at 8.

[84] *Id.*

[85] Bankruptcy Act Amendments of 1970, Pub. L. No. 91-467, 84 Stat. 990, 991 (repealed by Pub. L. No. 95-598).

provision kept the creditors in check, in most circumstances, but creditors were still allowed to litigate a particular debt in another court when it might be an exception to the general discharge.[86]

In 1978, the Bankruptcy Code[87] supplanted the Bankruptcy Act and was codified into its current form.[88] The 1978 amendments were also very pro-debtor.[89] Between 1983 and 2003, the number of consumer-bankruptcy cases filed rose from 286,000 to 1.6 million.[90] Creditors portrayed debtors to the public as wealthy people who shirked their moral responsibilities and sought relief from Congress.[91] In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[92] ("BAPCPA") to make it easier for creditors to collect against debtors who took advantage of the bankruptcy system.[93]

The credit industry provided Congress with assistance to pass BAPCPA.[94] The purpose of the bill was "to improve bankruptcy law and practice by restoring personal responsibility and

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[86] Bankruptcy Act Amendments of 1970, Pub. L. No. 91-467, 84 Stat. 990, 991 (repealed by Pub. L. No. 95-598) (explaining that it will not hold null and void debts excepted from discharge); Local Loan Co. v. Hunt, 292 U.S. 234, 241 (1934) (referring to the bankruptcy court handling a proceeding for a determination that a specific debt not be discharged, the court said, "It doesn't now follow, however, that the court was bound to exercise its authority. And it probably would not and should not have done so except under unusual circumstance…."

[87] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92. Stat. 2549 (codified at 11 U.S.C. §§ 101-1330).

[88] 11 U.S.C.S. § 524 (LexisNexis 2010).

[89] Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553, 569-70 (2010).

[90] *Id.* at 571.

[91] *Id.* at 574.

[92] Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

[93] Sousa, *supra* note 89, at 579-83.

[94] Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091, 1117-25 (2004) (explaining how the news media affects legislation and in this case how the news media focused on the power of the credit industry to affect the passing of bankruptcy legislation).

integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."[95] The bill was designed to help debtors by requiring them to become more fiscally sound.[96] It also includes more enhanced consumer protection from abusive creditors.[97] The Act provides sweeping changes to the Bankruptcy Code to ensure that the debtor *really* is honest.[98]

Thus, the history of bankruptcy in America shows that the legislature continuously oscillates between pro-debtor and pro-creditor legislation. In the early 1800s bankruptcy was very pro-creditor.[99] The laws were continuously amended throughout the 1800s to give the debtor more rights, and then repealed shortly afterwards because of complaints by the credit industry. In 1898, the amendments gave the debtor a true advantage by allowing them to obtain a discharge in bankruptcy without consent of creditors.[100] Finally, in 1978 Congress enacted the Bankruptcy Code to truly give the debtor a fresh start without the possibility of future litigation on discharged debt.[101] Twenty-seven years later, in 2005, Congress determined again that the 1978

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[95] H.R. REP. NO. 109-31, pt. 1, at 2 (2005); *see* Allen Mattison, Note, *Can the New Bankruptcy Law Benefit Debtors, Too? Interpreting the 2005 Bankruptcy Act to Clean Up the Credit-Counseling Industry and Save Debtors from Chronic Poverty*, 13 GEO. J. POVERTY LAW & POL'Y 513, 515 (2006) (explaining how the anti-consumer law could be interpreted to actually aid debtors).

[96] Bankruptcy Abuse and Consumer Protection Act of April 20, 2005, Pub. L. No. 109-8, 119 Stat. 23, 37 (stating that a person is not a debtor "unless such individual has, during the 180-day period preceding the date of filing…received from an approved nonprofit budget and credit counseling agency…[a] briefing…that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.").

[97] *Id.* at 42-75. Title II of the Act is entitled "Enhanced Consumer Protection."

[98] *Id.* at 75-103 (emphasis added); *see* 151 CONG. REC. H1993, 2048 (daily ed. Apr. 14, 2005) (statement of Rep. Sensenbrenner) (stating that "[t]his bill helps stop fraudulent, abusive, and opportunistic bankruptcy claims by closing various loopholes and incentives that have produced steadily cascading claims."); *see also Lundquist Consulting Reports 475,000 Filings During BAPCPA's First Year*, CONSUMER BANKRUPTCY NEWS, Nov. 23, 2006 (stating that 475,000 "is only about one-third of the annual filings prior to BAPCPA amendments, [but] Lundquist pointed out that filings have increased during every calendar quarter under the new law.").

[99] *See* Tabb, *supra* note 51, at 345.

[100] *See* Tabb, *supra* note 51, at 365-66.

[101] *See* Sousa, *supra* note 89, at 569-70.

Bankruptcy Code changes were too debtor friendly and changed the Code to make it more pro-creditor.[102] The question arises: Could striking "discharge in bankruptcy" as an affirmative defense help debtors regain some of the rights they lost after BAPCPA and act as the impetus for an oscillation back in the debtor's favor?[103]

Part II: Statutes and Legal Issues

A. Effect of Bankruptcy Discharge and Exceptions to Discharge

In 1978, Congress struck the Bankruptcy Amendments and enacted the Bankruptcy Code (the Code).[104] Based on the Code, when a bankruptcy court determines that a debt falls under 11 U.S.C. § 524[105] (§524) there is a permanent injunction on collection of the debt.[106] The injunction even applies to creditors who did not know they were subject to it.[107] "The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts."[108] Under §524, a discharge in bankruptcy voids any judgment relating to a debt that has been discharged "whether or not

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[102] *See* Mattison, *supra* note 95, at 515.

[103] *See* EDWARD H. COOPER, MINUTES: CIVIL RULES ADVISORY COMMITTEE, APRIL 20-21 21, 24 (2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV04-2009-min.pdf (stating that "[i]t is not at all clear that discharge should be made an affirmative defense to afford another tool to creditors, given the policies enacted in § 524.").

[104] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330).

[105] 11 U.S.C.S. § 524 (LexisNexis 2010).

[106] In re Mann, 58 B.R. 953, 956 (Bankr. W.D. Va. 1986).

[107] Watson, *supra* note 61, at 84.

[108] S. REP. NO. 95-989, at 8 (1978) (stating that this Act "has been expanded over a comparable provision in Bankruptcy Act § 14f to cover any act to collect…and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.").

discharge of such debt is waived."[109] The discharge also acts as an injunction against collection of the debt that is a personal liability of the debtor "whether or not the discharge of such debt is waived."[110] Finally, §524(a) states in part that the discharge acts as an injunction against collection of a debt from property of the debtor acquired after commencement of the bankruptcy proceeding that is an allowable community claim not excepted from discharge "whether or not discharge of the debt…is waived."[111] The statute acts as an injunction, barring the enforcement of later actions to collect debt.[112] §524 contains strong and repeated provisions to ensure that the debtor is protected against future litigation.

The exceptions to §524 are contained in 11 U.S.C. § 523 ("§523").[113] §523 contains nineteen exceptions to discharge.[114] The exceptions bar "discharge from 'any debt…for money, property, services or…credit, to the extent obtained by…false pretenses, a false representation, or actual fraud.'"[115] If a debtor has committed actual fraud, the debtor cannot discharge the debt received by fraud because the Bankruptcy Code only gives a fresh start to the "honest but unfortunate

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[109] 11 U.S.C.S. § 524(a)(1) (LexisNexis 2010); In re Gurrola, 328 B.R. 158, 164 (B.A.P. 9th Cir. 2005) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when the claim should have or was discharged under 11 U.S.C. § 524(a)(1)); s*ee* S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N., 5787, 5866; *see also* Letter from Jeffrey S. Bucholtz, Acting Assistant Attorney General, to Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure 5 (Feb. 15, 2008), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CV%20Comments%202007/07-CV-015.pdf (explaining that the phrase "whether or not discharge of such debt is waived" was supposed to "prevent waiver of discharge of a particular debt, not waiver of discharge in toto as permitted under section 727(a)(9).") (quoting H.R. REP. NO. 95-595, at 365-66 (1977));.

[110] 11 U.S.C.S. § 524(a)(2) (LexisNexis 2010).

[111] 11 U.S.C.S. § 524(a)(3) (LexisNexis 2010).

[112] In re Mann, 58 B.R. 953, 956 (Bankr. W.D. Va. 1986).

[113] 11 U.S.C.S. § 523 (LexisNexis 2010).

[114] *Id.*

[115] Cohen v. De La Cruz, 523 U.S. 213, 221 (1998) (quoting 11 U.S.C. § 523(a)(2)(A) (1984)).

debtor."[116] Congress designed the Code so that "the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start."[117] Together §524 and §523 allow debtors to receive a fresh start on debts when the debtor deserves a fresh start. The problem is that a judgment for a claim excepted under §523 is not void, whereas a judgment based on a claim that falls under the general discharge of §524 is void, so crafty creditors could bypass §524 by claiming an exception under §523.[118] These crafty creditors led to the 1970 Bankruptcy Amendments and now they have helped cause the Rules Committee to find the need to strike "discharge in bankruptcy" from the affirmative defenses.

B. Jurisdictional Issues

The Bankruptcy Code grants the bankruptcy court original jurisdiction in general discharge cases.[119] After the general discharge, the bankruptcy court retains jurisdiction, but that jurisdiction is not exclusive. [120] In other words, when a debtor voluntarily files for bankruptcy and receives a general discharge the creditor can still bring a suit in federal or state court, depending on which court has jurisdiction, if the creditor believes that the debt is excepted from discharge.[121] The Court can then determine whether or not a particular debt is excepted from the

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[116] Grogan v. Garner, 498 U.S. 279, 286-87 (1991) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)).

[117] Grogan v. Garner, 498 U.S. 279, 287 (1991).

[118] *See* In re Meadows, 428 B.R. 894, 909 (Bankr. N.D. Ga. 2010) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when a creditor does not allege a legitimate exception to the general discharge).

[119] 28 U.S.C.S. § 1334 (LexisNexis 2010).

[120] 28 U.S.C.S. § 1334(c)(1) (LexisNexis 2010) (stating that "nothing in this section prevents a [bankruptcy] court in the interest of justice, or in the interest of comity with State courts or respect for state law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11."); In re Mystic Tank Lines Corp., 544 F.3d 524, 528 (3d Cir. 2008).

[121] 28 U.S.C.S. § 1334(c)(1) (LexisNexis 2010); In re Mystic Tank Lines Corp., 544 F.3d 524, 528 (3d Cir. 2008).

general discharge.[122]

The bankruptcy courts are often considered pro-debtor, and therefore debtors would prefer to have litigation arising under bankruptcy decided in the bankruptcy courts whereas creditors would rather have litigation decided elsewhere.[123] Before December 1, 2010, if a debtor did not respond to a creditors' complaint asserting an action on a debt that was arguably discharged in bankruptcy, the creditor would receive a default judgment that would in essence except the debt from discharge by virtue of the debtor's failure to raise the affirmative defense of "discharge in bankruptcy."[124] This led to a resolution of the entire matter and could not be re-litigated in bankruptcy courts because "bankruptcy courts are prohibited from re-litigating these matters if the [other courts] have already resolved them."[125] Since the affirmative defense of "discharge in bankruptcy" was not raised in the initial suit the effect is that it is waived.[126] Since the

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[122] *See* 11 U.S.C.S. § 523 (LexisNexis 2010); *but see* In re Hamilton, 540 F.3d 367, 374 (6th Cir. 2008) (explaining that in cases where a state or federal court interprets a bankruptcy discharge and due to an inaccurate interpretation, modifies the discharge, the state court's modification "is a legal nullity and void ab initio." (quoting In re Pavelich, 229 B.R. 777, 783-84 (9th Cir. B.A.P. 1999)) (holding that if a debt was discharged in a bankruptcy court then the state court's ruling on the debt will not modify the bankruptcy court's discharge).

[123] Arlene E. Mirsky et al., *The Interface Between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623, 644 (1991) (explaining the differing goals of bankruptcy and environmental laws and the intersection of the different laws and how debtors often want to litigate in bankruptcy court); Robert K. Rasmussen & Randall S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357, 1371-73 (2000) (explaining that corporations try to shop for the most prodebtor venue); Carrie G. Fishman, *Partial Repudiation and the Survivability of Labor Arbitration Arguments in the Context of Bankruptcy*, 1 BANK. DEV. J. 177, 205 (1984).

[124] In re Brady Mun. Gas Corp., 936 F.2d 212, 218 (5th Cir. 1991); s*ee* Grogan v. Garner, 498 U.S. 279, 285 n. 11 (1991) (stating that "[w]e now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to [11 U.S.C.] § 523(a).").

[125] In re Brady Mun. Gas Corp., 936 F.2d 212, 218 (5th Cir. 1991).

[126] Loney v. Milodragovich, Dale & Dye, P.C., 905 P.2d 158, 161-62 (Mont. 1995) (holding that if the affirmative defense of discharge in bankruptcy is not raised it will be waived); b*ut see* In re Gurrola 328 B.R. 158, 164 (B.A.P. 9th Cir. 2005) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when the claim should have or was discharged under 11 U.S.C. § 524(a)(1) ("The phrase 'whether or not discharge of such debt is waived' (new in 1978) similarly nullifies all putative waivers of specific debts and appears to encompass both express waivers and waivers by conduct.").

affirmative defense of "discharge in bankruptcy" is waived, the court's judgment is final under the doctrine of res judicata.[127]

Res judicata ensures finality, but should only apply after careful inquiry.[128] At least one bankruptcy court located in the Northern District of Georgia determined after careful inquiry not to apply res judicata to a default judgment.[129] Thus, even before the change to Rule 8(c), a court was not bound to follow res judicata.[130] When res judicata applied, however, it helped to ensure a final resolution to litigation and therefore increased judicial efficiency.

Part III: Affirmative Defense of "Discharge in Bankruptcy" Struck from FRCP 8(c) on December 1, 2010.

A. The Rules Committee's Reasons for Striking FRCP 8(c)

The Federal Rules of Civil Procedure have legal effect in district courts because of the Rules Enabling Act.[131] To effectively determine the rules that district courts should follow, the Judicial Conference publishes and prescribes the process for rules consideration.[132] The Judicial Conference is also given the authority to appoint a standing committee to draft rules "as may be necessary to maintain consistency and otherwise promote the interest of justice."[133] The standing committee meeting minutes are open to the public.[134]

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[127] Brown v. Felsen, 442 U.S. 127, 131 (1979).

[128] *Id.*

[129] In re Meadows, 428 B.R. 894, 904 (Bankr. N.D. Ga. 2010) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when a creditor does not allege a legitimate exception to the general discharge).

[130] *See id.*

[131] 28 U.S.C.S. § 2071 (LexisNexis 2010).

[132] 28 U.S.C.S. § 2073(a)(1) (LexisNexis 2010).

[133] 28 U.S.C.S. § 2073(b) (LexisNexis 2010).

[134] 28 U.S.C.S. § 2073(c)(1) (LexisNexis 2010).

The standing committee recently decided to strike the affirmative defense of "discharge in bankruptcy."[135] Striking this provision was discussed as early as 2007.[136] The Department of Justice ("DOJ") was opposed to the idea, and the decision to strike "discharge in bankruptcy" was delayed until the committee and the DOJ could come to a consensus or clear understanding of the issue.[137] In the end, there was no consensus.[138] According to a memorandum from the Advisory Committee on Federal Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure (SCRPP), the reasons for the change are twofold:

> First, every court that has considered the impact of 11 U.S.C. § 524(a) on Rule 8(c) has concluded that discharge in bankruptcy can no longer be characterized as an affirmative defense. Second, courts that have looked only to Rule 8(c) without considering the statute have concluded - not surprisingly - that discharge is an affirmative defense.[139]

The memorandum also says that "[t]his confusion shows that there is no point in further delay. It is time to decide whether to make the change."[140]

The memorandum persuaded the Rules Committee and the Supreme Court to agree with the Advisory Committee and accept striking "discharge in bankruptcy" from FRCP 8(c).[141]

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[135] KRAVITZ, *supra* note 14, at 13.

[136] MARK KRAVITZ J., CIVIL RULES ADVISORY COMMITTEE NOVEMBER 17-18, 2008 10 (2008), http://207.41.14.192/rulesDev/Minutes/CV11-2008-min.pdf.

[137] *Id.* at 10. The meeting notes state that:

> The Department of Justice responded with a lengthy statement of reasons why the change should not be made. Bankruptcy judges and the Report for the Bankruptcy Rules Committee responded that the reasons advanced by the Department were simply wrong…Consultations will continue in hopes of reaching agreement, or at least an explanation of the problem in terms that can be understood by those who are not experts in bankruptcy law.

[138] *See* LEE H. ROSENTHAL J., COMMITTEE ON RULES OF PRACTICE AND PROCEDURE JUNE 1-2, 2009 15-16 (2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2009-min.pdf (stating that "the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8.").

[139] KRAVITZ, *supra* note 14, at 13.

[140] *Id.*

Striking "discharge in bankruptcy" from the affirmative defenses took effect on December 1, 2010.[142] In a note following FRCP 8, the reason stated for the 2010 amendment is:

> **Subdivision (c)(1).** "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are exempt from discharge. The issue whether a claim was exempt from discharge may be determined either in the court that entered the discharge or– in most instances– in another court with jurisdiction over the creditor's claim.[143]

Now that the rule has taken effect, only time will tell if the confusion that the committee thought they cleared up could lead to consequences that would cause the current confusion to pale in comparison.[144]

B. The DOJ's Concerns about Striking "Discharge in Bankruptcy"

The memorandum from the Advisory Committee on FRCP to the SCRPP advocated against changing the rule because the confusion caused seems to outweigh the purpose of the affirmative defense.[145] The purpose of the affirmative defense is to quickly end litigation when a creditor has not received notice of the general discharge, and to put the creditor on notice of the

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[141] Fed. R. Civ. P. 8 amend. note.

[142] *Id.*

[143] Fed. R. Civ. P. 8 note.

[144] *See* Bucholtz, *supra* note 109, at 9 (stating that "[a]s the Committee essentially acknowledges, present Rule 8(c) does not appear to have caused any substantial problems. But, in the Department's judgment, eliminating the reference to discharge will cause problems.").

[145] Memorandum from Honorable Laura Taylor Swain for Honorable Lee H. Rosenthal, *Report of the Advisory Committee on Bankruptcy Rules* 9 (May 11, 2009), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/BK05-2009.pdf.

defenses the debtor plans on using.[146] The affirmative defense serves an important use because, according to the DOJ,[147] creditors do not always know whether their particular debt was discharged.[148] A creditor can unknowingly bring a claim on a discharged debt against a debtor who has received a general discharge and not be subject to sanctions under §524.[149] To hold a creditor in contempt, the creditor must have willfully brought the action against a debtor after a general discharge under §524(a) knowing the debt was discharged and that the creditor's debt did not fall under an exception.[150]

The Eleventh Circuit uses a two-pronged test to determine if a creditor willfully violated §524: "(1) [the creditor] knew that the [discharge] was invoked and (2) intended the actions which violated the [discharge]."[151] In the DOJ's hypothetical, the creditor would not be held in contempt because he did not have notice.[152] The DOJ also explains that the affirmative defense is used by debtors against creditors in proceedings to determine whether or not debts should have been excepted from discharge because the debt falls under a §523 exception.[153]

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[146] World Enter., Inc. v. Midcoast Aviation Servs., Inc., 713 S.W.2d 606, 608 (Mo. Ct. App. 1986) (holding that since the court had the whole contract, the provision in question did not have to be plead as an affirmative defense); 61A AM. JUR. 2D *Pleading* § 288 (2010).

[147] COOPER, *supra* note 103, at 24 (explaining that the DOJ representative was the only member of the Bankruptcy Rules Committee to dissent from the vote to delete "discharge in bankruptcy." The Standing Committee approved the deletion of "discharge in bankruptcy" by an eleven to one vote.).

[148] COOPER, *supra* note 103, at 22.

[149] In re Ryan, 100 B.R. 411, 417 (Bankr. N.D. Ill. 1989); *but see* In re Rivera, 265 B.R. 828 (Bankr. M.D. Fla. 2000).

[150] In re Hardy, 97 F.3d 1384, 1390 (11th Cir. Ga. 1996) (holding that if the creditor received notice of the discharge of a dischargeable debt and intended the action anyway the creditor will be held in contempt).

[151] *Id.* (quoting Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1555 (11th Cir. 1996)).

[152] In re Slaiby, 73 B.R. 442 (Bankr. D.N.H. 1987).

[153] COOPER, *supra* note 103, at 22.

In this scenario, if "discharge in bankruptcy" is struck from the affirmative defenses, the debtor might not have an incentive to respond to the creditor.[154] The debtor would not need to respond because if the creditor continues to pursue litigation and collection efforts, the creditor will find out after wasting a lot of time and money that the creditor cannot collect because the debt was discharged.[155] The Rules Committee claims this should not be a problem because "[a] sophisticated creditor can search for information about discharge outside a collection action, or by many means in a collection action."[156] The creditor should not have to go through this hassle to collect money that the debtor *owes* the creditor.[157]

Most debtors that creditors pursue litigation against will not have filed for bankruptcy and received a general discharge. As a result of the amendment to Rule 8(c) creditors will have to check bankruptcy filings throughout the country to determine whether the debt was discharged before every filing or face the possibility of incurring legal fees continued litigation.[158] If the creditor is required to check each debtors bankruptcy status before bringing a suit this will increase the costs to the creditor and costs to the creditors will be passed on to other debtors.[159] A debtor gets the freedom from the debt he accrued, but this does not mean he is no longer

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[154] Bucholtz, *supra* note 109, at 5 (stating that "[t]he current proposal seems to reflect the view that debtors may ignore post-discharge actions.…").

[155] *See id.*

[156] COOPER, *supra* note 103, at 23.

[157] *See* Bucholtz, *supra* note 109, at 1 (emphasis added) (asserting that when a creditor is not given notice it is "particularly appropriate to place on the debtor the burden of raising the issue as an affirmative defense.…").

[158] *See* COOPER, *supra* note 103, at 23.

[159] *See* Joseph S. Pomykala, *Wrestling with Bankruptcy The Economics – and Politics – of Reform*, THE MILKEN INSTITUTE REVIEW 47 (1999), http://www.milkeninstitute.org/publications/review/1999_12/mir4_41_wrestling.pdf (explaining in part that the debts discharged in bankruptcy are passed on by the creditor to other debtors).

responsible for responding to valid lawsuits.[160] Congress presumably put checks in place to help stop frivolous suits after a general discharge so that debtors will not be brought down by continuing litigation, but did not intend to give debtors an advantage in lawsuits related to the bankruptcy that were included under the bankruptcy suit.[161]

Part IV. Three Possible Solutions from Three Different Sources

A. The Rules Committee Can Change the Affirmative Defense to Clear up the New Confusion

Let the creator be the destroyer. The Rules Committee enacted the amendment to clear up confusion, but by eliminating "discharge in bankruptcy" the Rules Committee opened up the possibility of unintended consequences.[162] Instead of striking "discharge in bankruptcy," they could have left it in, but included a note at the end of the rule that states: "This affirmative defense is only required as an affirmative defense in lawsuits where the discharge should not have fallen under §524(a), such as an exception to discharge under §523(a)."[163]

This would allow the Committee to relieve the confusion that was the reason for striking the affirmative defense of "discharge in bankruptcy."[164] The 1970 change to the Bankruptcy Act set out to ensure that debtors were truly free from debt by imposing sanctions on creditors who

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[160] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (explaining that the point of bankruptcy is to give a fresh start to the honest debtor).

[161] *See* H.R. REP. NO. 91-1502, at 7 (1970).

[162] COOPER, *supra* note 103, at 24 (discussing how one member, after reviewing the proposed Committee Note following FRCP 8(c), asked if the confusion could be cleared up in a more simplistic way).

[163] *See* Bucholtz, *supra* note 109, at 1 (the memorandum proposes that the FRCP 8(c) include a note that states "the intent of the change is only to require the creditors plead that the debt was excepted from discharge, and not meant to imply that a determination of nondischargeability must first be obtained from a bankruptcy court.").

[164] *See* Rosenthal, *supra* note 138, at 16 (stating that "the current rule has led some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense.").

brought further litigation against a debtor when the debt was discharged.[165] After the 1970 change, debtors were confused how the affirmative defense and the amendment worked together.[166] A clarification in the FRCP by the Rules Committee when the affirmative defense should be invoked could have cleared up the confusion.

The Rules Committee did not want to include a clarification, but instead wanted to keep the affirmative defenses as simplistic as possible.[167] The DOJ asked for an addition to the committee note that the debtor should respond in some proceedings.[168] The addition was denied because even though it could add some value, "the additional advice suggested…is both unnecessary and beyond the scope of a Civil Rule Note."[169] The Rules Committee seems to suggest that the additional language is superfluous because it is a determination for a judge to make on a case-by-case basis and the possibility of a judge making that determination is not required in the note.[170]

Now that "discharge in bankruptcy" has been struck from the FRCP, it is not likely to be included again. The process for changing a rule is also both long and arduous, as exemplified by the fact that striking "discharge in bankruptcy" took over three years. There will not be any

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[165] H.R. REP. NO. 91-1502, at 7 (1970).

[166] COOPER, *supra* note 103, at 22 (stating that "[m]any bankruptcy debtors [are] unsophisticated" it also states that "[i]t was suggested that Rule 8(c) seems in tension with § 524, but § 524 has nothing to do with exceptions to discharge."); Swain, *supra* note 145, at 9 (stating that "the proposed amendment to Rule 8 was needed because it will eliminate a trap.").

[167] Memorandum from Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure to Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure 13 (May 08, 2009), http://207.41.14.183/rules/Supreme%20Court%202009/Excerpt-CV.pdf.

[168] *Id.*

[169] *Id.*

[170] *See id.*

change in the near future or any change at all until possible unintended consequences actually come to fruition.[171]

In the mean time, the change could lead to inefficiencies in the credit markets. Creditors will have to implement new procedures and spend more money ensuring that debtors have not already received a discharge. The number of debtors that have filed for bankruptcy has increased steadily over the last three years, so it seems imperative that the creditors implement some check before proceeding.[172] If the credit companies did not implement these procedures and instead went after debtors without first checking for a discharge, it is becoming more likely that they will end up in an action for contempt.[173]

B. The Creditor Could Account for Discharge in Bankruptcy in the Complaint

Without the affirmative defense of "discharge in bankruptcy," the creditor could waste a lot of time and money filing a complaint with the court, obtaining a judgment, and going after a debtor he will never recover money from because the debtor can simply raise the discharge issue in response to collection attempts. The creditor could try to take proactive steps to litigate all the issues so that other issues could not be brought up in future lawsuits.[174] Creditors could

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[171] When asked why it took thirty-nine years to address striking "discharge in bankruptcy" it was noted that it takes time to get the FRCP in tune with substantive law especially because "[s]tatutory changes are not always brought promptly to the Committee's attention." COOPER, *supra* note 103, at 23.

[172] *See Annual Non-Business Filings By Chapter (2007-09)*, AMERICAN BANKRUPTCY INSTITUTE, http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=60257 (last visited January 9, 2011).

[173] Bucholtz, *supra* note 109, at 6-7 (explaining that "[t]he Advisory Committee's proposal may generate much unnecessary litigation because the elimination of the discharge language will prompt bankruptcy debtors to allege…that suits to obtain judgment on pre-petition debts are invariably violations of the discharge injunction in § 524, whenever the debt is…discharged.").

[174] *See* Brown v. Felsen, 442 U.S. 127, 130 (1979) (holding that res judicata does not apply when a state court makes a determination about a debt so when the bankruptcy court reviews that debt it can expand its judgment beyond the judgment and record of the state court).

proactively plead exception from discharge in their complaint. If a creditor did this and the debtor did not respond, the creditor would win a default judgment.[175] Having pled the exception from discharge in the complaint, in theory, the issue would be closed in future litigation and therefore res judicata would prevent re-litigation of the issue.[176]

While pleading exception from discharge might be successful as a way to force the debtor to litigate "discharge in bankruptcy" in the court the creditor chooses, it is by no means a certainty guaranteed to work. A failure on the part of the debtor to respond would in substance be a waiver of the disclosure defense but courts might not apply res judicata to default judgment because of such a failure. The court might argue that the res judicata inquiry is a skeptical one.[177] Res judicata might not be allowed because it could exempt a debtor from getting his day in court.[178] If the "discharge in bankruptcy" was not given res judicata effect then it could be re-litigated in a future case. The debtor could later fight the default judgment under FRCP 60(b)[179] because the creditor would have to prove why discharge in bankruptcy does not apply.

C. Judge-Made Law of the Affirmative Defense of Discharge

Bankruptcy judges are not Article III judges,[180] so they have a shorter possible tenure in office,[181] but that is not to say that they are not able to wield great power.[182] The bankruptcy

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[175] Bucholtz, *supra* note 109, at 8 n.10.

[176] *See* Rivet v. Regions Bank of La., 522 U.S. 470, 476 (1998) (holding that "claim preclusion by reason of prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b)").

[177] Brown v. Felsen, 442 U.S. 127, 132 (1979).

[178] *See id.*

[179] Fed. R. Civ. P. 60(b).

[180] U.S. CONST. art. III (stating that judges will serve as long as they are in "good behavior").

[181] 28 U.S.C.S. § 152 (LexisNexis 2010) (stating that judges shall serve for fourteen years).

court was given exclusive jurisdiction over bankruptcy discharges so the judges could become experts in bankruptcy.[183] In *Dimock v. Revere Copper Co. of Boston*, a judge determined that the affirmative defense of "discharge in bankruptcy" was required in order to ensure the litigation was final and valid.[184]

What the creditor probably cannot accomplish with his complaint, a judge could accomplish with the power of the bench.[185] The defense of "discharge in bankruptcy" was a valid affirmative defense and was only struck based on some confusion caused by the 1970 amendment to the Bankruptcy Act.[186] Bankruptcy judges are considered experts in the area of bankruptcy, and therefore what may confuse a layman probably does not confuse a bankruptcy judge.[187] Just as the judge in *Dimock* recognized the importance of the affirmative defense, so could a bankruptcy judge today.[188]

A bankruptcy judge could still recognize "discharge in bankruptcy" as an affirmative defense by using the residuary clause of Rule 8(c).[189] As an expert in bankruptcy, a bankruptcy judge

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[182] *See* Celotex Corp. v. Edwards, 514 U.S. 300, 328 (1995) (holding that 28 U.S.C. § 1334(b) gives bankruptcy court jurisdiction over all matters arising under chapter 11 bankruptcy).

[183] H.R. REP. NO. 91-1502, at 7 (1970).

[184] Dimock v. Revere Copper Co of Boston, MA, 117 U.S. 559, 566 (1886).

[185] *See* ; Jones v. Bock, 549 U.S. 199, 211 (2007) (stating that "Rule 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response."); Jakobsen v. Mass. Port Auth., 520 F.2d 810, 813 (1st Cir. 1975) (stating that "certain specified defenses and any other matter constituting an avoidance or affirmative defense" must be pleaded affirmatively.")/

[186] KRAVITZ, *supra* note 14, at 13.

[187] COOPER, *supra* note 103, at 23 (the Committee thought that there could be abuse of creditors over debtors because "[m]any bankruptcy debtors are unsophisticated" and therefore the confusion would start with the debtors).

[188] *See* Jones v. Bock, 549 U.S. 199, 211 (2007); Jakobsen v. Mass. Port Auth., 520 F.2d 810, 813 (1st Cir. 1975).

[189] *See* Jones v. Bock, 549 U.S. 199, 211 (2007); Jakobsen v. Mass. Port Auth., 520 F.2d 810, 813 (1st Cir. 1975).

could clear up the confusion between the affirmative defense and §524.[190] Courts could engage in same kind of analysis as the Bankruptcy Court in the Northern District of Georgia engaged in when it determined that a judgment based on a claim brought under §523 was not valid and therefore under §524 the judgment was void and the affirmative defense did not apply.[191] Though the Rules Committee chose to strike "discharge in bankruptcy," bankruptcy judges could use this same logic to determine whether to use the residuary clause to apply the affirmative defense of "discharge in bankruptcy" when creditors bring valid suits under an exception to discharge.[192]

CONCLUSION

Exceptions to discharge were enumerated to ensure that creditors could litigate certain issues that are beyond the scope of the general discharge. The affirmative defense of "discharge in bankruptcy" put the debtor on notice that though a debt was discharged, a creditor still might be able to collect on the debt, so if a creditor brings a complaint the debtor should answer. After striking the discharge in bankruptcy, Joe, the debtor in the initial example, has little incentive to respond to the creditor. He can respond at his leisure or wait until collection and then can take the action to bankruptcy court if he so chooses and have that court determine whether or not Joe actually owes the debt.

The possible solutions are all theoretically possible, but in reality the solution most likely to have precedential effect is the third solution. A bankruptcy judge should have the authority to

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[190] *See* H.R. REP. NO. 91-1502, at 7 (1970).

[191] *See* In re Meadows, 428 B.R. 894, 904 (Bankr. N.D. Ga. 2010) (holding that the affirmative defense of "discharge in bankruptcy" is not waived when a creditor does not allege a legitimate exception to the general discharge).

[192] *See id.*; *see also* 11 U.S.C.S. § 523 (LexisNexis 2010).

apply res judicata based on the residuary clause of Rule 8(c) when a creditor brings a claim that is a valid exception to discharge when a debtor has shirked his responsibility by not responding to a complaint.