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Memo

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To: Rule 8(c) Subcommittee

From: Brent Owen

Date: January 13, 2020

Subject: Recommendation to Amend Rule 8(c) to Remove Bankruptcy Discharge as an Affirmative Defense

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Executive Summary

The Colorado Supreme Court should remove "discharge in bankruptcy" from the list of affirmative defenses in Colorado Rule of Civil Procedure 8(c). As explained herein, removing that affirmative defense:

- Aligns Colorado's Rule 8(c) with federal law, including the Bankruptcy Code's injunction against enforcement of discharged debts. 11 U.S.C. § 524.
- Preserves judicial resources by preventing a Colorado Court from adjudicating and enforcing a debt that a federal court may subsequently declare *void ab initio*.
- Eliminates a likely unconstitutional provision from Colorado's Rule 8(c).
- Removes a vestige of an earlier version of federal bankruptcy law. I found no Colorado precedent, statute, or rationale for Colorado's treatment of "discharge in bankruptcy" as an affirmative defense.

Context, "Discharge in Bankruptcy" as an Affirmative Defense in Colorado

At the September 27, 2019 meeting of the Colorado Supreme Court Committee on the Rules of Civil Procedure, Judge Berger raised the need to consider an amendment to Colorado Rule of Civil Procedure 8(c) in light of *Orange Collar v. Mowery*, 18CA1233 (Aug. 1, 2019, unpublished). In that case, a jury entered a money judgment against Andrew Mowery for his failure to pay for services provided by Orange Collar, Inc. *Id.*, ¶ 1. On appeal, Mowery argued that the district court erred by failing to "adjudicate Mowery's affirmative defense of bankruptcy discharge." *Id.*, ¶ 2. In an unpublished, unanimous opinion, a panel of the Colorado Court of Appeals held that Mowery waived his discharge defense because he failed to adequately raise it until his "post-trial motion." *Id.*, ¶ 20 (citation omitted).

The panel noted, however, that its holding contradicted decisions from federal courts:

> We acknowledge that some federal courts have held that a bankruptcy discharge is not an affirmative defense under the Bankruptcy Code and that entry of a bankruptcy discharge automatically invalidates state courts judgments subject to that discharge without any necessity for the debtor to plead an affirmative defense of bankruptcy discharge. *In re Hamilton*, 540 F.3d 367, 375 (6th Cir. 2008).

Id., ¶ 22.

The panel also reasoned: "Rule 8(c) of the Federal Rules of Civil Procedure has been amended to delete discharge in bankruptcy as an affirmative defense." *Id.* "But," the court explained, "bankruptcy discharge remains an affirmative defense under C.R.C.P. 8(c) and we are abound to apply the rules promulgated by the Colorado Supreme Court unless and until those rules are amended, or it becomes indisputably clear that federal law prohibits states from categorizing a discharge in bankruptcy as an affirmative defense." *Id.*, ¶ 23. Notably too, in that case, Mowery never "claimed that treating a discharge in bankruptcy as an

affirmative defense offends the Bankruptcy Code or that C.R.C.P. 8(c) is unconstitutional to the extent it treats discharge in bankruptcy as an affirmative defense." *Id.*, ¶ 24.

Federal law for Bankruptcy Discharge and Federal Rule of Civil Procedure 8(c)

The Bankruptcy Code prohibits a party to collect a discharged debt (except for certain debts that are not dischargeable—*e.g.*, for fraud and crime). The Code adopts the following categorical rule that "discharge in a case under this title [the Bankruptcy Code]":

> (1) voids any judgment obtained, to the extent that such a judgment is a determination of the personal liability of the debtor with respect to any debt discharged [in bankruptcy], whether or not such discharge of 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).

Consistent with this categorical rule, on December 1, 2010, the Federal Rules Committee removed "discharge in bankruptcy" from Rule 8(c)(1)'s list of affirmative defenses, explaining:

> Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent 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.

Fed. R. Civ. P. 8, Notes of Advisory Committee on 2010 amendments.

Indeed, even before the amendment, courts recognized that the modern Bankruptcy Code forbade a court from treating a "discharge in bankruptcy" as an affirmative defense. *See In re Lanford*, Case No. 01-02548, 2004 Bankr. LEXIS 2247 (Bankr. D.D.C. Sept. 1, 2004). In *Lanford*, for instance, a debtor sought to hold a creditor in contempt for violating the Bankruptcy Code's "automatic stay" requirements by prosecuting the debtor for his debt in

state Court. *Id*. at *1. The creditor defended his prosecution of the debt in state court by arguing that discharge was an affirmative defense: "a debtor must affirmatively raise the discharge as a defense, such that a judgment recovered by a creditor after entry of the discharge may not be attacked collaterally as relating to a discharged debt." *Id.* at *2.

The *Lanford* court rejected the creditor's argument, explaining that 1970 amendments to the "[former] Bankruptcy Act . . . changed the discharge from an affirmative defense (which could be waived) to a statutory injunction." *Id.* at *2-3. The court emphasized that Section 524(a)(2) "provides that discharge '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 [discharged] debt as a personal liability of the debtor,'" and thus renders a judgment in violation of that provision "a nullity." *Id.* at *4.

Helpfully, the *Lanford* court also explained that the *Rooker-Feldman* doctrine did not apply in the context of a debt discharged in bankruptcy. *Id.* at *5. *Rooker-Feldman* "generally deprives the court of subject matter jurisdiction to adjudicate a claim" that is "'inextricably intertwined' with a state court judgment." *Id.* (gathering precedent). But, the *Lanford* court correctly explained, *Rooker-Feldman* does not apply "in the face of a federal statute." *Id.* "Because the state court judgment here has been voided by § 524(a)(1), the judgment is unworthy of protection under *Rooker-Feldman*." *Id.* The *Rooker-Feldman* doctrine does not protect areas where Congress gives federal courts exclusive jurisdiction, like bankruptcy. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 n.3 (2002) (opining that "the *Rooker-Feldman* doctrine merely recognizes" Congress's choice of where to vest jurisdiction); *see also Hamilton v. Herr (In re Hamilton)*, 540 F.3d 367, 376 (6th Cir. 2008) (holding "that a state-court judgment that modifies a discharge in bankruptcy is *void ab initio*" and that the *Rooker-Feldman* doctrine does not "bar federal-court jurisdiction");

cf. Matter of Lombard, 739 F.2d 499, 503-04 (10th Cir. 1984) (avoiding applying "waiver" from C.R.C.P. 8(c) by holding that a homestead claim "is merely an instrument filed with the county" and thus not subject to waiver for failure to plead "under Colorado Rule of Civil Procedure 8(c)").

The leading bankruptcy treatise, COLLIER ON BANKRUPTCY, explains that Congress expressly amended Section 524 to remove "discharge in bankruptcy" as an affirmative defense, particularly in state court. "A primary reason for the amendments was to effectuate the discharge and make it unnecessary to assert it as an affirmative defense in a subsequent state court action." 4 COLLIER ON BANKRUPTCY P. 524.LH [1] ("Origins of Section 524 as Enacted in 1978") (Matthew Bender, 16th ed. rev.). That treatise anticipates the precise situation from *Orange Collar, Inc.*:

> In the usual case of discharge abuse or creditor harassment, suit would be brought in a local court after the granting of the discharge, and if the debtor failed to plead the discharge affirmatively, the defense was deemed waived and an enforceable judgment could be taken against him or her. Too often, the defense was in fact waived either through inadvertence, failure to be served or lack of means to obtain counsel. [The change was made] to prevent creditors from entering the arena of local courts and creating issues of waiver and default, and to restrain creditors holding such discharged debts from forcing the debtor into any other forum or proceeding.

Id.

The amendment to Federal Rule of Civil Procedure 8(c) brought the federal rule in line with controlling federal law and better reflects Congress's reasoned decision that discharge in bankruptcy should not be treated as an affirmative defense.

Colorado Precedent and "Discharge in Bankruptcy"

No Colorado precedent provides a compelling rationale (or any rationale) for Colorado to retain "discharge in bankruptcy" as an affirmative defense. At most, like the panel in *Orange Collar, Inc.*, recent decisions from the Colorado Court of Appeals treat "discharge in

bankruptcy" as an affirmative defense that must be plead or waived merely because it appears in Rule 8(c). *See McWherter v. Fischer*, 126 P.3d 330, 331 (Colo. App. 2005) ("If the defense of discharge in bankruptcy is not raised, it is waived." (citations omitted)). Yet, I found no recent Colorado precedent articulating a particular rationale for that treatment. In fact, consistent with the analysis above tracking the changes to federal bankruptcy law, the Colorado precedent analyzing discharge in bankruptcy as an affirmative defense all predates Congress's 1970 amendment to the former Bankruptcy Act and adoption of the Bankruptcy Code in 1978. *Accord Finance Corp. v. King*, 150 Colo. 13, 14-15 (1962) (applying discharge in bankruptcy as an affirmative defense where debtor raised it in his initial pleadings). It follows that Colorado likely only retains "discharge in bankruptcy" as an affirmative defense because it was an affirmative defense in the 1970s, prior to passage of the Bankruptcy Code. Given the confusion, constitutional concerns, and conflict with federal law (detailed above), the Colorado Supreme Court should remove "discharge in bankruptcy" as an affirmative defense.

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TO: Civil Rules Committee

FROM: Bradley A. Levin

DATE: January 23, 2020

RE: Notice of Related Cases

At the November 22, 2019 meeting, the Committee, upon the subcommittee's[1] recommendation, decided that a related case doctrine should be included in the statewide rules. The subcommittee was asked to formulate a proposed rule incorporating the doctrine. Accordingly, the subcommittee submits the following:

A. The subcommittee recommends that Rule 121, Section 1-8 be amended by adding to the end of the section the sentence that presently appears in Section 1-9, as follows:

SECTION 1-8 CONSOLIDATION

> A party seeking consolidation shall file a motion to consolidate in each case sought to be consolidated. The motion shall be determined by the court in the case first filed in accordance with Practice Standard § 1-15. If consolidation is ordered, all subsequent filings shall be in the case first filed and all previous filings related to the consolidated cases placed together under that case number, unless otherwise ordered by the court. *Consolidation of matters pending in other districts shall be determined in accordance with C.R.C.P. 42.1*

B. The subcommittee further recommends that Section 1-9 be changed to read:

SECTION 1-9. ~~MULTI-DISTRICT LITIGATION~~ RELATED CASES

> ~~Consolidation of matters pending in other districts shall be determined in accordance with C.R.C.P. 42.1.~~
>
> 1. A party to a case shall file a notice identifying all related cases pending in any state or federal court or terminated within the previous 12 months.
>
> 2. Related cases are civil, criminal, or other proceedings that involve one or more of the same parties and have common questions of law and fact.

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[1] The subcommittee includes, in addition to myself, David DeMuro, Lisa Hamilton-Feldman, and John Lebsack.

3. A party shall file the required notice at the time of its first appearance or the filing of its first pleading, motion, or other document addressed to the court.

4. A party shall promptly file a supplemental notice of any change in the information required under this rule.

C. The subcommittee also recommends that language regarding a notice of related cases be included in the proposed Case Management Order, and referenced in Rule 16. One possibility is to amend subsection (b)(5) as follows:

(5) Pending Motions *and Notices*. The proposed order shall list all pending motions that have been filed and are unresolved. The court may decide any unresolved motion at the case management conference. *The proposed order shall also state whether any notices of related cases, pursuant to Rule 121, Section 1-9, have been filed.*

Alternatively, a new subsection could be added following subsection (b)(17):

(18) *Notices of Related Cases.* *The proposed order shall state whether any notices of related cases, pursuant to Rule 121, Section 1-9, have been filed.*

The subcommittee believes that these rule changes and additions are for notice purposes only, and that any actions to be taken following such notice should be left to the parties and the court.