COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

To: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Honorable Lee H. Rosenthal, Chair**
Advisory Committee on Federal Rules of Civil Procedure

Date: **December 15, 2005 (Revised June 29, 2007)**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

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Part I of this report presents one action item, a recommendation to approve for publication a minor amendment of Civil Rule 8(c). The recommendation is for publication when this rule can be included in a package with other proposals.

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I Action Item: Rule 8(c) Amendment Recommended for Publication

The Committee recommends approval for publication of an amendment removing "discharge in bankruptcy" from the list of affirmative defenses enumerated in Rule 8(c)(1):

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 8. General Rules of Pleading

* * * * *

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- 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;

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*New material is underlined; matter to be omitted is lined through. Includes amendment to rule that will take effect on December 1, 2007.

- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

* * * * *

Committee Note

"[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. These consequences of a discharge cannot be waived. If a claimant persists in an action on a discharged claim, the effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim.

Discussion

The Style Project raised two questions about the affirmative defenses listed as examples in Rule 8(c). "Contributory negligence" has become outmoded in most states, having given way to rules that in one way or another compare the role of both plaintiff and defendant in causing the plaintiff's injuries. A determination whether to recommend revision of Rule 8(c) on this point was deferred, however, for two reasons. There is no indication that anyone doubts that, for example, comparative negligence is an affirmative defense, captured either in "contributory negligence" or in the residual provision of Rule 8(c) that includes "any other matter constituting an avoidance or affirmative defense." An amendment, further, would require a choice either to substitute a more modern phrase or to avoid any reference at all. This defense is far more often invoked than many of the other matters used as examples in Rule 8(c), making deletion questionable. Substitution, however, would require a choice among comparative negligence, comparative fault, or — and most accurately — comparative responsibility. In many jurisdictions comparison extends beyond negligence claims to claims based on "strict" liability, suggesting that "fault" might be more suitable. The comparison, moreover, commonly weighs not only relative degrees of departure from the required standard of care but also relative causal contribution, suggesting that "comparative responsibility" may be the best term. This question remains on the agenda.

"Discharge in bankruptcy," another item in the Rule 8(c) list of examples, is ripe for change. Early in the Style Project a bankruptcy judge advised that discharge in bankruptcy is no longer an "affirmative defense" as a matter of substantive bankruptcy law. For many years, 11 U.S.C. § 524(a)(1) and (2) and the predecessor statute have provided:

> (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 * * *.

Although § 524 runs on for many pages, Judge Walker, liaison from the Bankruptcy Rules Committee, affirmed that it means what it seems to say. A discharge voids any judgment obtained on the discharged debt even if the debtor defaults or appears but fails to plead the discharge. The discharge, indeed, operates as an injunction that makes it a contempt to initiate or pursue an action on the discharged claim, again whether or not the debtor fails to plead the discharge.

Section 524 has superseded the role of discharge as an affirmative defense. Rule 8(c) should be amended by deleting the reference to "discharge in bankruptcy." Publication of the proposed amendment, however, can safely await the next package of published proposals. The existing provision has survived for many years after it became irrelevant without causing any observable problem.