25-103

United States Court of Appeals

for the

Second Circuit

IN RE: LAURA CHARLENE GOEBEL,

Debtor,

LAURA CHARLENE GOEBEL, DEBTOR,

Plaintiff-Appellee,

– v. –

UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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2. When the IRS filed its own complaint in district court, did Ms. Goebel's supplemental complaint cure any lack of ripeness?

3. Given five decades of consistent legislation and precedent determining the IRS' rights under bankruptcy laws, can Ms. Goebel seek a determination of non-dischargeability notwithstanding the Declaratory Judgment Act's preclusion of declaratory judgments "with respect to Federal taxes"?

COUNTER-STATEMENT OF CASE

This interlocutory appeal arises from denial of the IRS' Fed. R. Civ. P. 12(b)(1) motion to dismiss on jurisdictional grounds. Therefore, every averment in Ms. Goebel's complaint is assumed to be true – on this appeal, her tax debts are presumed dischargeable and she did not attempt to evade or defeat taxes. She is an "honest debtor."

The facts before this Court are, therefore, quite limited, and may be summarized as follows.

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[1] "IRS" is used throughout to refer to United States of America Department of the Treasury Internal Revenue Service, defendant-appellant.

[2] "Ms. Goebel" is used throughout to refer to Laura Charlene Goebel, debtor-plaintiff-appellee.

On September 2, 2022, Ms. Goebel filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York. SA1-47. She had no assets available for distribution to creditors and total debts of $623,331.31, of which the tax debts relevant to this appeal totaled $512,545.17 and related to tax years 2008-2018. SA8; SA18.

The IRS had assessed taxes with respect to those years, entered into installment payment agreements with respect to certain of those years, and from time to time noticed Ms. Goebel with respect to liens and levies on her property with respect to those years. SA58 ¶ 6(c), SA59 ¶ 6(e) (referring to installment agreements); SA76-104. Ms. Goebel made what payments she could and made an offer of settlement that was rejected by the IRS. SA112 ¶ 5; SA77–78; SA81; SA88.

The tax debts are so old that they are subject to the Bankruptcy Code's general discharge unless Ms. Goebel "willfully attempted in any manner to evade or defeat" the tax debts under section 523(a)(1)(C) of the Bankruptcy Code. 11 U.S.C. § 523(a)(1)(C). Unless otherwise indicated, each reference to a section is to a section of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, and to the correlative section in Title 11, U.S.C. As noted above, for purposes of this appeal Ms. Goebel is deemed not to have willfully attempted to evade or defeat her tax debts.

Ms. Goebel put the IRS to its proof by filing, on October 23, 2022, a

complaint in the bankruptcy court under Rule 7001(f) of the Federal Rules of Bankruptcy Procedure[3] to determine the dischargeability of her old tax debts. A18-A31. On December 7, 2022, the bankruptcy court entered a discharge order. SA124.

On March 14, 2023, the IRS filed its own complaint in the United States District Court for the Eastern District of New York. SA127-136; SA137–142. The IRS' district court action is before U.S. District Judge Dora L. Irizarry.

On April 21, 2023, the IRS moved in bankruptcy court to dismiss Ms. Goebel's complaint for lack of jurisdiction under Bankruptcy Rule 7012(b)(1) and Fed. R. Civ. P. 12(b)(1) incorporated therein. SA48. The IRS contended that that Ms. Goebel's bankruptcy court complaint could not be ripe until the IRS filed its district court complaint and therefore, the IRS argued, the IRS' district court complaint was filed first and the district court had jurisdiction under the first to file rule. SA68-69. The IRS also contended that the Declaratory Judgment Act, 28 U.S.C. § 2201(a), barred the bankruptcy court from adjudicating the dischargeability of tax claims. SA62-65.

On March 13, 2024, the bankruptcy court denied the IRS' motion to dismiss. A227-266; A207-209. In light of the IRS' district court complaint, the bankruptcy court ruled that Ms. Goebel could cure any ripeness issue by filing a

[3] Hereinafter, the "Bankruptcy Rules."

supplemental complaint under Fed R. Civ. P. 15(d).[4] A209; A264. The bankruptcy court ruled that the Declaratory Judgment Act did not preclude the bankruptcy court from adjudicating whether the old tax debts are discharged. A252, A264.

The IRS moved the district court for leave to appeal the bankruptcy court's interlocutory order under 28 U.S.C. § 158(a)(3). A210–216. The motion for leave to appeal was before U.S. District Judge Irizarry, who certified the motion directly to this Court. A221–226. Ms. Goebel and the IRS agreed to adjourn proceedings before Judge Irizarry on the IRS' district court complaint until the resolution of this appeal.

STANDARD OF REVIEW

In this appeal of an interlocutory order, the bankruptcy court's denial of the IRS' motion to dismiss Ms. Goebel's complaint is subject to *de novo* review.

JURISDICTION

Under 28 U.S.C. §§ 1334(a) & (b), the United States District Court for the Eastern District of New York has original and exclusive jurisdiction over all cases under the Bankruptcy Code and original but not exclusive jurisdiction over all civil proceedings arising under the Bankruptcy Code or arising in or related to cases under the Bankruptcy Code. This grant of jurisdiction includes jurisdiction over

[4] Hereinafter "Rule 15(d)." Bankruptcy Rule 7015 provides that Rule 15 applies to adversary proceedings.

dischargeability proceedings.

The United States District Court of the Eastern District of New York has referred all such cases and proceedings to the United States Bankruptcy Court for the Eastern District of New York pursuant to 28 U.S.C. § 157(a).

The bankruptcy court has jurisdiction to adjudicate the dischargeability of the old tax debts as a "core matter" under 28 U.S.C. § 157(b)(2)(I).

This Court took jurisdiction over this interlocutory appeal upon certification of the three issues restated above pursuant to 28 U.S.C. §§ 158(a)(3) & (d)(2)(A).

SUMMARY OF ARGUMENT

This appeal raises the fundamental issue of whether a debtor who has been pursued by the IRS prior to bankruptcy can, within her bankruptcy case, obtain a ruling on whether her tax debts are discharged so that she can emerge with a "fresh start" —"a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement" of her old tax debts. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

The Bankruptcy Code and Bankruptcy Rules authorized Ms. Goebel to seek such a ruling in bankruptcy court against the IRS and abrogated the IRS' sovereign immunity to allow her to do so. This authority, and the bankruptcy court's traditional "*in rem*" jurisdiction over Ms. Goebel's estate, made Ms. Goebel's

complaint ripe when filed.

When the IRS filed its later complaint in district court, Ms. Goebel's supplemental complaint, to the extent it was necessary, related back to her original complaint to preserve the superior jurisdiction over discharge that Congress gave the bankruptcy court.

Finally, the Declaratory Judgment Act does not shield the IRS from a bankruptcy court's determination that tax claims are dischargeable under the Bankruptcy Code. No court has ever held that it does. The IRS' argument for such a shield contradicts the Bankruptcy Code's abrogation of sovereign immunity and numerous Supreme Court precedent holding that such abrogation renders the IRS subject to bankruptcy court orders determining its rights under the Bankruptcy Code.

The IRS argues that the IRS, and only the IRS, may seek a ruling on dischargeability at a time and in a court of its choosing – an argument which, if accepted, would establish a precedent allowing the IRS to resume pre-bankruptcy collection efforts after the case is over and the debtor has lost access to counsel – contrary to the expressed intent of Congress codified in three successive statutes including the current Bankruptcy Code.[5] The IRS' argument destroys the discharge

[5] *See* S. Rep. No. 91-1173, at 2 (1970) (Addendum, ADD-32). This Report explains the purpose of the 1970 amendments to the Bankruptcy Act of 1898, which were, as discussed below, re-enacted in the current version of the Bankruptcy Code.

as it relates to taxes, and has been repeatedly rejected by Congress, most recently in the Bankruptcy Code.

In sum: Ms. Goebel did exactly what the Bankruptcy Code and the Bankruptcy Rules authorize her to do in accordance with manifest Congressional intent: she sought an expedited determination of the dischargeability of her tax claims in bankruptcy court. Neither Article III of the Constitution, nor the Declaratory Judgment Act, precluded her from doing so.

ARGUMENT

I. Ms. Goebel's Complaint Was Ripe When Filed.

a. The Plain Language of the Bankruptcy Rules, Bankruptcy Code and Title 28 Made Ms. Goebel's Complaint Justiciable.

The Bankruptcy Rules, the Bankruptcy Code and Title 28[6] all provided Ms. Goebel with authority, power and jurisdiction to bring her complaint in bankruptcy court against the IRS in October of 2022. In particular:

- Bankruptcy Rule 4007(a) & (b) authorize Ms. Goebel to bring her dischargeability complaint under section 523(a)(1) "at any time."
- Section 106(a)(1) of the Bankruptcy Code allows Ms. Goebel to sue the IRS to determine dischargeability by abrogating the IRS' sovereign immunity under section 523(a)(1).

[6] 28 U.S.C. §§ 101 *et seq.*

- 28 U.S.C. § 157(b)(1) & (b)(2)(I) provide that the dischargeability of the old tax debts is a "core proceeding" which the statute specifically authorizes the bankruptcy court to hear and determine.

The IRS argues that Ms. Goebel's October complaint was brought before her November discharge—but there is no requirement in the Bankruptcy Code or Bankruptcy Rules that a debtor wait for a general discharge before bringing a proceeding to determine the dischargeability of particular claims.

The statute shows a general discharge cannot be a jurisdictional pre-requisite. Section 523(c) and Bankruptcy Rule 4007(c) provide that creditors with allegedly non-dischargeable claims for fraud or breach of fiduciary duty under section 523(a)(2), (4) or (6) must bring dischargeability proceedings within 60 days of the first date set for a meeting of creditors in a chapter 7 case—always before a general discharge has been granted. Fed. R. Bankr. P. 4004(a) (objections to general discharge due 60 days after the date fixed for the first meeting of creditors) & Fed. R. Bankr. P. 4004(c) (general discharge granted only after expiration of time to file objections). Requiring a general discharge as a jurisdictional condition would disrupt all such proceedings, and that has never been the law.

Section 507(a)(8) provides further evidence that that a general discharge cannot be a jurisdictional pre-requisite. Section 507(a)(8) determines what tax claims are entitled to priority. Tax claims entitled to priority are among the

tax claims that are excepted from discharge. 11 U.S.C. § 523(a)(1)(A); *see also Young v. United States*, 535 U.S. 43, 46–47 (2002). Every chapter 11, chapter 12 or chapter 13 plan must provide for full payment of all priority (and thus usually non-dischargeable[7]) tax claims.[8] 11 U.S.C. §§ 1129(a)(9)(C), 1222(a)(2) & 1322(a)(2). Thus there is no way to confirm a chapter 11, chapter 12 or chapter 13 plan without obtaining, *prior to discharge*, a determination of the tax claims entitled to priority and excepted from discharge.

The IRS' argument that Bankruptcy Rule 4007 cannot create standing and cannot create ripeness is misplaced – the argument is contrary to the statute and the facts.

The statute provides standing: Ms. Goebel is the beneficiary of a general discharge and therefore has standing to litigate the scope of that discharge. Congress acknowledged Ms. Goebel's standing by abrogating the IRS' immunity in discharge proceedings. Section 106(a)(1)'s abrogation of the IRS' immunity with respect to section 523(a) has meaning only if Ms. Goebel can be a plaintiff, and the IRS can be a defendant, under section 523(a). The IRS' argument would write the abrogation of immunity with respect to section 523(a) out of the statute.

The IRS' ripeness argument flies in the face of section 505(a)(1) which

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[7] Some priority tax claims are dischargeable in chapter 13 under 11 U.S.C. § 1328(a).

[8] Of course, the taxing authority can agree to less than payment in full.

provides bankruptcy courts the power to determine the "amount or legality" of any tax "whether or not previously assessed." Just as proceedings to determine "the amount or legality" of yet-to-be assessed tax claims are ripe under section 505, proceedings to determine dischargeability of yet-to-be-excepted tax claims are ripe under section 523(a)(1).

The IRS attempts to distinguish section 523(a)(1) proceedings as "establishing a defense" (and therefore, the IRS argues, unripe) from section 505 proceedings as establishing "the amount or legality of a tax" (and therefore, the IRS argues, ripe) – but the IRS' argument dissolves before the language of section 505 and Supreme Court precedent. Determining the "legality" of an unassessed tax under section 505 involves nothing more than determining whether the debtor has a defense to the unassessed tax under the Internal Revenue Code. The Supreme Court has for almost 90 years sustained the justiciability of lawsuits initiated in federal court to establish a federal defense to a claim under federal law. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126, 127 n.7 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)).

In sum: the plain language of the Bankruptcy Code and the Bankruptcy Rules authorized Ms. Goebel to bring her complaint when she did (in October 2022), and where she did (in bankruptcy court).

b. Congress Wrote the Bankruptcy Code to Make Ms. Goebel's Complaint Justiciable When Filed.

The legislative history of the Bankruptcy Reform Act of 1978 shows that Congress wrote the Bankruptcy Code (section 106 and section 523), amended Title 28 (28 U.S.C. § 1334(b)) and endorsed Bankruptcy Rule 4007 to authorize Ms. Goebel to bring her complaint when she did, and where she did.

Debtors such as Ms. Goebel have had the right, the power and the jurisdiction to bring discharge proceedings against the IRS for over 54 years, ever since Congress enacted section 17c of the Bankruptcy Act of 1898 in 1970, re-enacted section 17c in the Bankruptcy Reform Act of 1978, and reinforced section 17c in the Bankruptcy Reform Act of 1994.

The 1970 amendments provided jurisdiction to determine dischargeability,[9] authorized the bankrupt to seek (and the bankruptcy court to grant) a determination of dischargeability,[10] and provided for the injunction and supersession of dischargeability proceedings in other courts.[11]

As the Supreme Court recognized in *United States v. Nordic Village,*

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[9] 11 U.S.C. § 11(a)(12) (1976) (Addendum, ADD-1).

[10] 11 U.S.C. § 35(c)(1) & (3) (1976) (Addendum, ADD-5); Bankruptcy Rule 409(a)(1) (former) (Addendum, ADD-20–21).

[11] 11 U.S.C. § 35(c)(4) (1976) (Addendum, ADD-5). *See* 1A COLLIER ON BANKRUPTCY ¶ 17.14[10] (14th ed. 1978), available from the New York Law Institute (Addendum, ADD-38).

Inc., 503 U.S. 30, 36 (1992) – and as the legislative history of the Bankruptcy Code of 1978 shows – the Bankruptcy Code re-enacted the 1970 amendments.

The substantive provisions of section 17c of the Bankruptcy Act of 1898 were incorporated in Bankruptcy Code section 523. The jurisdiction provisions of section 17c were subsumed in the general grant of jurisdiction under 28 U.S.C. § 1334(b). S. Rep. No. 95-989, at 77 (1978) ("S. Rep. 989") (28 U.S.C. § 1334(b) made specific grant of jurisdiction over dischargeability unnecessary) (Addendum, ADD-35); H.R. Rep. No. 95-595, at 363 (1977) ("H.R. Rep. 595") (Addendum, ADD-27). All Senate and House Reports relating to the Bankruptcy Code endorsed a bankruptcy rule authorizing the debtor to seek dischargeability of debts at any time: "The Rules of Bankruptcy Procedure will specify, as they do today, who may request determination of dischargeability . . . and when such a request may be made." S. Rep. 989 at 77; H.R. Rep. 595 at 363; *see also* S. Rep. No. 95-1106, at 9 (1978) (stating intention of S. 2266 is to retain substance of section 17c of the Bankruptcy Act, under which a debtor had the ability to seek dischargeability of a tax claim in bankruptcy court) (Addendum, ADD-30).[12]

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[12] The Bankruptcy Rule at the time of the legislation was Bankruptcy Rule 409(a)(2). "Under former Rule 409(a)(2), the court was given fairly wide latitude in setting a deadline for the filing of dischargeability complaints, which could be as early as the first date set for the meeting of creditors in some cases or as late as 90 days thereafter." 9A COLLIER ON BANKRUPTCY ¶ 4007.RH[1] (16th ed. 2025) (LEXIS).

Congress cemented the debtor's right to seek discharge of tax claims in bankruptcy court, and indeed cemented the superiority of bankruptcy court jurisdiction, in the final debates over sovereign immunity. Congress rejected Senate Bill 2266, which provided ***no*** statutory abrogation of sovereign immunity, in favor of the House Amendment, which enacted section 106(c)[13] abrogating sovereign immunity under all sections of the Bankruptcy Code of 1978.

Joint Explanatory Statements in the Congressional Record explained the purpose of the House Amendment:

> Under the House Amendment, as under present law, an individual debtor can also file a complaint to determine dischargeability. Consequently, where the tax authority does not file a claim or a request that the bankruptcy court determine dischargeability of a specific tax liability, the debtor could file such a request on his own behalf, so that the bankruptcy court would then determine both the validity of the claim against assets in the estate and also the personal liability of the debtor for any nondischargeable tax.

Joint Explanatory Statements on Compromise Bill, 124 Cong. Rec. H 11110 (Sept. 8, 1978) (Addendum, ADD-10); Joint Explanatory Statements on Compromise Bill, 124 Cong. Rec. S 17427 (Oct. 6, 1978) (Addendum, ADD-17). The Joint Explanatory Statements conclude:

> In essence, under the House Amendment, the bankruptcy judge will have authority to determine which court will determine the

[13] Later amended and restated in 1994 as current sections 106(a)(1)–(5), 11 U.S.C. § 106(a)(1)–(5), as discussed below.

> merits of the tax claim both as to claims against the estate and claims against the debtor concerning his personal liability for nondischargeable taxes.

124 Cong. Rec. H 11111 (Addendum, ADD-10–11); 124 Cong. Rec. S 17428 (Addendum, ADD-17).

The Joint Explanatory Statements were identical statements made on the floor of the House and Senate immediately before the final votes on the Bankruptcy Code of 1978, and are therefore the most authoritative statements of Congressional intent with respect to the interpretation and enforcement of the statute.

The abrogation of the IRS' sovereign immunity shows that Congress, in enacting the Bankruptcy Code, rejected the IRS' argument that Ms. Goebel's complaint was not "ripe":

> [The section] codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim.

Joint Explanatory Statements, 124 Cong. Rec. H 11091 (Addendum, ADD-9); 124 Cong. Rec. S 17407 (Addendum, ADD-15).

In *Gwilliam,* the IRS had argued that court lacked jurisdiction for want of an "existing controversy" because the IRS had not filed a proof of claim or otherwise appeared in the bankruptcy case. The Ninth Circuit would have none of

it:

> Such refusal and non-action by IRS is apparently an attempt to avoid the Bankruptcy Court's determination of the Bankrupt's federal tax liability and indebtedness and the ultimate discharge in bankruptcy of a bankrupt's eligible tax indebtedness, and we believe is directly opposed to [the statute] and the policy flowing therefrom to allow a bankrupt to start over and enhance the individual's chances of financially rehabilitating himself by eliminating his old tax debts.

Gwilliam v. United States (*In re Gwilliam*), 519 F.2d 407, 409 (9th Cir. 1975). The Ninth Circuit's holding is particularly relevant to this case, given Congress' intent to "codify" its opinions.

Therefore, the IRS is wrong when it asserts that section 17c of the Bankruptcy Act of 1898 was a "short-lived" expansion of bankruptcy court power which (the IRS erroneously asserts) was "repealed" by the Bankruptcy Code. The statute is to the contrary, the rule is to the contrary, and the legislative history is to the contrary.

c. Neither Section 523 nor Bankruptcy Rule 4007 Violates Article III's Requirement of a Case or Controversy

The Bankruptcy Code authorized Ms. Goebel to seek a determination of dischargeability, Bankruptcy Rule 4007(a) & (b) provide that Ms. Goebel could do so at any time, and the legislative history of the Bankruptcy Code shows that Congress wrote the statute (and endorsed the rule) to achieve those ends.

Nothing in Article III makes a proceeding under the rule non-justiciable

for lack of standing or ripeness. Bankruptcy is and always been an "*in rem*" proceeding. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). Once a federal court takes jurisdiction over the "*res"* it has jurisdiction to determine rights in the "*res*."

The discharge is itself part of the "*res*" over which the bankruptcy court has *in rem* jurisdiction. *Hood*, 541 U.S. at 447. Ms. Goebel's commencement of her bankruptcy case satisfied Article III requirements of a case and controversy over her discharge and the right to initiate litigation over the scope of her discharge.

Ms. Goebel initiated proceedings to determine the dischargeability of her old tax debts to make her discharge meaningful. *Carter Day Indus., Inc. v. Env't Prot. Agency* (*In re Combustion Equip. Assocs., Inc.*), 838 F.2d 35, 37 (2d Cir. 1988) (the Bankruptcy Code can accelerate a party's right to litigate by allowing a bankruptcy judge to estimate contingent liabilities).

Even on an "*in personam*" basis, the IRS' efforts to collect from Ms. Goebel would support jurisdiction under Article III. If the old tax debts are discharged, Ms. Goebel owes the IRS nothing; if the old tax debts are not discharged, Ms. Goebel owes the IRS more than $500,000. The old tax debts are therefore a contingent liability. The Supreme Court has held that a contingent liability is sufficient to establish injury in fact and establish ripeness for federal jurisdiction. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 241 (1937)

("Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . ."). This is true when the dispute is "definite and concrete," touches "legal relations of parties having adverse legal interests" and "admit[s] of specific relief through a decree of a conclusive character" based on facts that have already occurred. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. at 127 (quoting *Aetna Life Ins. Co.*, 300 U.S. at 240–41).

The threat of IRS enforcement was sufficient injury to justify Ms. Goebel's proceeding to determine dischargeability, *see Thompson v. United States* (*In re Thompson*), 666 B.R. 1, 13 (Bankr. E.D.N.Y. 2024) (denying IRS' motion to dismiss for lack of subject matter jurisdiction because of debtor's "concern about the future collectability of a debt is an authentic, legitimate, and substantive ground to bring a dischargeability action"). Delay in a determination of dischargeability is itself "injury in fact." *Cf. In re Sisk*, 962 F.3d 1133, 1142–43 (9th Cir. 2020) (reversing orders that had imposed a minimum duration for chapter 13 plans and delayed discharge for debtors who paid all amounts under their chapter 13 plans prior to the minimum duration).

The dischargeability of old tax debts comprising 80% of Ms. Goebel's liabilities was therefore justiciable from the moment she filed her bankruptcy

petition. *Educ. Credit Mgmt. Corp. v. Coleman* (*In re Coleman*), 560 F.3d 1000, 1005 (9th Cir. 2009). Her "purpose in filing" was to seek the discharge of her old tax debts which the IRS had tried to enforce. This presented a "substantial controversy" that was "certainly 'definite and concrete, not hypothetical or abstract'" over "a specific and defined debt. *Id.* (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)) (sustaining complaint to determine dischargeability of student loan before general discharge).[14]

Finally, the IRS' argument that Ms. Goebel's complaint was unusual and unfairly pre-emptive is contradicted by a myriad of reported cases showing that debtors routinely initiate proceedings to determine whether debts are dischargeable under section 523(a): *Colsen v. United States* (*In re Colsen*), 446 F.3d 836 (8th Cir.

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[14] *Coleman* addressed the dischargeability of a student loan in chapter 13. Chapter 13 debtors earn a general discharge only after they complete payments under their chapter 13 plans and a discharge of student loans only after they show "substantial hardship." Some circuits allow a debtor to show that paying their student loans would be an "undue hardship" before earning the general discharge (*see In re Coleman*, 560 F.3d 1000 (9th Cir. 2009); *Cassim v. Educ. Credit Mgmt.* (*In re Cassim*), 594 F.3d 432, 440 (6th Cir. 2010)), others want the showing proximate to completion of the plan (*see Ekenasi v. Educ. Res. Inst.* (*In re Ekenasi*), 325 F.3d 541, 547 (4th Cir. 2003); *Bender v. Educ. Credit Mgmt. Corp.* (*In re Bender*), 368 F.3d 846, 847 (8th Cir. 2004)), but none has held that a discharge is a jurisdictional requirement. *Ekenasi*, 325 F.3d at 547, *Bender*, 368 F.3d at 847. Ms. Goebel's dischargeability complaint is *stronger* – more ripe – than any of the complaints debated in chapter 13 cases: as a chapter 7 debtor, Ms. Goebel was entitled to a general discharge immediately, did not have to show financial hardship to obtain a discharge of her old tax debts, and had received notices of levies and liens in respect of old tax debts.

2006) (dischargeability of tax debts); *La. Dep't of Revenue v. Lewis* (*In re Lewis*), 199 F.3d 249 (5th Cir. 2000) (taxes under § 523(a)(1)). *See also Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (whether restitution debts are dischargeable under 11 U.S.C. § 1328(a)); *Burks v. Louisiana* (*In re Burks*), 244 F.3d 1245 (11th Cir. 2001) (whether debts for a stipend are not a student loan and hence qualify for discharge); *Harrell v. Sharp* (*In re Harrell*), 754 F.2d 902 (11th Cir. 1985) (whether debt is not for alimony or support and hence qualifies for discharge). The IRS' quest to preclude debtor-initiated dischargeability proceedings is not only unsupported by statute and contradicted by legislative history, it would up-end decades of established bankruptcy practice in violation of Supreme Court adjuration: "We, however, 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Cohen v. de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Davenport v. Pa. Dept. of Public Welfare*, 495 U.S. 552, 563 (1990)).

The few lower court decisions cited by the IRS provide no basis for a contrary result. None of those decisions address Congress' manifest intent in three successive statutes, including the current Bankruptcy Code, that authorize debtor-initiated discharge proceedings – perhaps because in the cited cases the IRS was

either unopposed[15] or represented it had no intent to prosecute or reason to investigate the dischargeability of its claims.[16] In no cited case did the IRS do what it did here: file its own complaint in district court shortly after receiving notice of Ms. Goebel's bankruptcy court complaint.

II. Ms. Goebel's Supplemental Complaint Cured Any Issue With Respect to Ripeness under Rule 15(d)

The bankruptcy court ruled that any issue as to ripeness could be cured after the IRS filed its own district court complaint by Ms. Goebel filing a supplemental complaint under Bankruptcy Rule 7015, which incorporates Rule 15(d). In appealing this ruling, the IRS has constructed an argument that would

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[15] *Namai v. United States* (*In re Namai*), Adv. No. 23-ap-00044, 2023 WL 5422627, at *1 (Bankr. D. Md. Aug. 21, 2023) (dischargeability complaint dismissed when debtor failed to appear).

[16] *Mlincek v. United States* (*In re Mlincek*), 350 B.R. 764, 769–70 (Bankr. N.D. Ohio 2006) (dismissing on prudential grounds given IRS' statement it had no intent to assert nondischargeable claims); *Sheehan v. United States* (*In re Sheehan*), Adv. No. 09-1351, 2010 WL 4499326, at *6 (Bankr. N.D. Ohio Oct. 29, 2010) (same); *IRS v. Wallace* (*In re Wallace*), No. 23-cv-1331, 2023 WL 7360835, at *8–9 (C.D. Ill. Nov. 7, 2023) (district court vacated for lack of ripeness but remanded to allow debtor to file supplemental complaint under Rule 15(d) given the IRS' post-complaint declaration of its intent to collect the tax debts); *Hinton v. United States*, Adv. No. 09 A 621, 2011 WL 1838724, at *1 (N.D. Ill. May 12, 2011) (IRS represented it had no facts justifying exception to discharge, no present intent to investigate and that it would abate the tax upon debtor's discharge); *Erikson v. U.S. Dep't of Treasury* (*In re Erikson*), Adv. No. 12-05546, 2013 WL 2035875, at *1 (Bankr. E.D. Mich. May 10, 2013) (IRS stated no present intent to assert non-dischargeable claims, no present reason warranting an investigation into debtors' conduct and an intention to suspend or abate tax assessments which made nondischargeability "remote").

prevent any debtor from ever filing a dischargeability complaint. The IRS argues that its pre-bankruptcy collection efforts did not make Ms. Goebel's original complaint ripe, that only the IRS' post-bankruptcy complaint creates ripeness and that Ms. Goebel's supplemental complaint never relates back to make her prior complaint ripe – an argument that should be rejected for the "catch-22" that it is.[17]

The Supreme Court has suggested that a supplemental complaint avoids dismissal when the plaintiff satisfies a pre-suit statutory requirement while the case is pending, *Mathews v. Diaz*, 426 U.S. 67, 75 (1976), and six circuits have held that a supplemental complaint under Rule 15(d) can be used to cure a jurisdictional defect.[18] This Court has never held to the contrary, *see Saleh v. Sulka Trading Ltd.*, 957 F.3d 348, 354 (2d Cir. 2020) ("[W]e have never squarely addressed whether events occurring after the filing of a complaint may cure a jurisdictional defect that existed at the time of initial filing. That question has divided our sister circuits."), and has suggested in *dicta* that it would follow the majority view. *Fund Liquidation Holdings LLC v. Bank of Am. Corp.*, 991 F.3d 370, 390–92 (2d Cir. 2021)

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[17] See *Williams v. Reed*, 604 U.S. ___, 145 S. Ct. 465, 468, 470 (2025); *Berni v. Barilla S.p.A.*, 964 F.3d 141, 148 (2d Cir. 2020).

[18] *Scahill v. District of Columbia*, 909 F.3d 1177, 1184 (D.C. Cir. 2018); *United States ex rel. Gadbois v. Pharmerica Corp.*, 809 F.3d 1, 6 n.2 (1st Cir. 2015); *Northstar Fin. Advisors v. Schwab Invs.*, 779 F.3d 1036, 1044 (9th Cir. 2015); *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 347 (4th Cir. 2014); *Prasco, LLC v. Medicis Pharm Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008); *Wilson v. Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir. 1988).

("[N]umerous courts have made clear that, in certain instances, subject-matter jurisdiction can even be obtained after a case's initiation and given retroactive effect through procedural rules.").

None of the opinions cited by the IRS involve a proceeding remotely similar to the proceedings in this case.

The opinions cited by the IRS involve standing (the injury asserted was too attenuated[19]), an injunction against future acts that might never happen,[20] a suit to protest government denial of an application the plaintiff had not yet filed,[21] a declaratory judgment against preliminary government action that had no force and effect,[22] or post-complaint actions to create diversity jurisdiction. Each of the cited opinions involved a fact critical to the jurisdiction of the court or the injury to the plaintiff. None of the opinions has any bearing on this case.

The bankruptcy court at all times had jurisdiction under 28 U.S.C. § 157(a) & (b)(2) and 28 U.S.C. § 1334(b). Ms. Goebel at all times had standing to determine the scope of her discharge under section 523. No future action was required to determine whether or not Ms. Goebel's tax debts were dischargeable –

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[19] *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1050–52 (2d Cir. 1976) (en banc).

[20] *Park v. Forest Serv. of U.S.*, 205 F.3d 1034 (8th Cir. 2000).

[21] *Kleinknecht v. Ritter*, No. 21-2041, 2023 WL 380536, at *3 n.2 (2d Cir. Jan. 25, 2023).

[22] *Trump v. New York*, 592 U.S. 125 (2020).

Ms. Goebel was not asking the IRS to do or not do anything, and no act was required of Ms. Goebel herself at the time she filed her complaint. All facts relating to dischargeability had already happened.

The law shows that the supplemental complaint should relate back. Congress abrogated the IRS' sovereign immunity in dischargeability proceedings under section 523, provided jurisdiction under 28 U.S.C. § 1334(b) for dischargeability proceedings, endorsed Bankruptcy Rule 4007(a) & (b) authorizing the debtor to seek a dischargeability ruling at any time, and gave the bankruptcy court the power to enjoin competing dischargeability proceedings under section 524(a)(2).

Indeed, the law provides superior jurisdiction to the bankruptcy court on discharge issues brought in other courts. A dischargeability proceeding can be removed from another court under 28 U.S.C. § 1452, *see* 1 COLLIER ON BANKRUPTCY ¶ 3.07 (16th ed. 2025) (LEXIS), the court can enforce the discharge injunction of section 524(a)(2) against creditors that bring collection actions in other courts, *see* 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][a] (16th ed. 2025) (LEXIS), and a state court judgement on a discharged debt can be declared void under section 524(a). *Id.* ¶ 524.02[1]. Given section 524(a)(2), there cannot be a first-to-file rule in dischargeability litigation – especially where, as here, the bankruptcy case is not closed.

Thus Ms. Goebel's supplemental complaint, to the extent it was necessary, served merely to retain the superior jurisdiction in the bankruptcy court that the Bankruptcy Code provides and that Congress explicitly intended the bankruptcy court to have: "[T]he bankruptcy judge will have authority to determine which court will determine the merits of the tax claim both as to claims against the estate and claims against the debtor concerning his personal liability for non-dischargeable taxes." Joint Explanatory Statements, 124 Cong. Rec. H 11111 (Sept. 28, 1978) (Addendum, ADD-11); 124 Cong. Rec. S 17428 (Oct. 6, 1978) (Addendum, ADD-17).[23]

III. The Declaratory Judgment Act Does Not Bar Ms. Goebel's Action to Determine the Dischargeability of Stale Tax Claims.

In the 90 years since the Declaratory Judgment Act was first amended to exclude declaratory judgments "with respect to Federal taxes," in the 55 years since bankruptcy courts were given explicit power and jurisdiction to determine dischargeability of tax claims, and in the 47 years since the Bankruptcy Code

[23] The IRS argues that most dischargeability litigation is brought in state court (IRS Br. at 5) – this argument is both irrelevant and unsupported. *Taggart v. Lorenzen*, 587 U.S. 554, 563–64 (2019) in particular says only that a creditor has no duty to determine dischargeability of its claim in bankruptcy court before litigating in state court. *Taggart* says nothing about a debtor's right to determine dischargeability in bankruptcy court. *Taggart*'s *dicta* that dischargeability litigation is usually brought in state court (*id.* at 564) applies to cases brought by creditors (not debtors) and is supported only by authorities observing that jurisdiction is held concurrently by the bankruptcy and non-bankruptcy courts.

explicitly abrogated the IRS' sovereign immunity in dischargeability proceedings, counsel has found no opinion holding that the Declaratory Judgment Act precludes a bankruptcy court from determining dischargeability of a tax claim.

The IRS cites none.

The history and language of the Declaratory Judgment Act itself, its amendment in the same 1978 statute which enacted the Bankruptcy Code, and the subsequent Bankruptcy Reform Act of 1994, all show that the Declaratory Judgment Act does not restrict a bankruptcy court from determining that old tax debts are dischargeable under section 523:

> We cannot believe that Congress gave the bankruptcy court jurisdiction to determine the dischargeability of tax debts where the United States has not filed a proof of claim, as we have held, and then intended that the determinations should be prohibited by the Declaratory Judgment Act.

Bostwick v. United States (*In re Bostwick*), 521 F.2d 741, 747 (8th Cir. 1975), echoed in *McKenzie v. United States*, 536 F.2d 726, 728 (7th Cir. 1976), and cited by the Supreme Court in its interpretation of IRS' sovereign immunity under the Bankruptcy Code. *United States v. Nordic Village, Inc.*, 503 U.S. at 36.

There are at least five reasons why the Declaratory Judgment Act does not bar Ms. Goebel's action to determine dischargeability of her tax claims.

a. Ms. Goebel Sought a Determination of Dischargeability, not a Declaratory Judgment

Neither Ms. Goebel's original complaint, nor her supplemental complaint, sought a "declaratory judgment" against the IRS. She commenced "a proceeding to determine dischargeability of a debt" under Bankruptcy Rule 7001(f). She did ***not*** commence "a proceeding to obtain a declaratory judgment" under Bankruptcy Rule 7001(i).

The distinction between determinations and declaratory judgments is not unique to dischargeability proceedings. The distinction appears throughout the Bankruptcy Rules. The value of collateral subject to an IRS lien, or the priority of the IRS' tax claim, is determined in a contested matter under Bankruptcy Rule 3012 – not in an adversary proceeding for a declaratory judgment under Bankruptcy Rule 7001(i). Whether an IRS lien is voidable is a determined in an adversary proceeding under Bankruptcy Rule 7001(b) – not in a proceeding for a declaratory judgment under Bankruptcy Rule 7001(i). Whether an IRS tax claim should be subordinated is determined in an adversary proceeding under Bankruptcy Rule 7001(h) – not in a proceeding for a declaratory judgment under Bankruptcy Rule 7001(i).

The repeated distinction between determinations and declaratory judgments is not merely a label – it reflects decades of distinction between *in rem* determinations in a bankruptcy case and the declaratory judgment remedy developed for *in personam* cases.

b. The Declaratory Judgment Act Never Applied to *In Rem* Determinations in Bankruptcy Cases

The Declaratory Judgment Act of 1934 enacted a new (and controversial[24]) remedy under federal law; it had nothing to do with the determination of rights in bankruptcies or insolvencies. Federal courts had already determined rights in bankruptcies for 36 years under the Bankruptcy Act of 1898 without any need for a declaratory judgment.

As the Declaratory Judgment Act had nothing to do with the determination of rights in bankruptcies, the 1935 amendment precluding declaratory judgments "with respect to Federal taxes" had nothing to do with determination of the IRS' rights in a bankruptcy case in 1935 and has no bearing on a bankruptcy court's *in rem* jurisdiction over dischargeability proceedings today.

That much is clear from the Supreme Court's decision in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). In *Hood*, the Supreme Court held the Eleventh Amendment did not preclude a bankruptcy court from determining the dischargeability of student loans guaranteed by an agency of the State of

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[24] *See MedImmune v. Genentech, Inc.*, 549 U.S. at 126 ("There was a time when this Court harbored doubts about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement. [citing cases]. We dispelled those doubts, however, in *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249 (1933) . . . . The federal Declaratory Judgment Act was signed into law the following year, and we upheld its constitutionality in *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617 (1937).").

Tennessee. *Id.* at 443. The Supreme Court reasoned that the bankruptcy court was merely exercising *in rem* jurisdiction over the discharge (which it equated to property of the estate). *Id.* at 447–48. The issuance of a summons to the state to determine the scope of the discharge did not violate the Eleventh Amendment because it did not involve the exercise of jurisdiction over the state. *Id.* at 448–50.

As in *Hood*, so in this case, the determination of dischargeability under the Bankruptcy Code does not involve the exercise of personal jurisdiction over the IRS. Ms. Goebel had no need to invoke the Declaratory Judgment Act against the IRS and did not invoke the Declaratory Judgment Act against the IRS.

The IRS is arguing for greater immunity under the Declaratory Judgment Act, with respect to discharge proceedings, than the states enjoy under the Eleventh Amendment. There is no basis for such an argument.

c. The 1978 Amendment of the Declaratory Judgment Act Did Not, by Implication, Give the IRS Immunity It Never Had

The IRS argues that the Bankruptcy Reform Act of 1978 allowed declaratory judgments against the IRS under sections 505 and 1146 of the Bankruptcy Code and therefore, by implication, precluded determination of IRS rights under all other sections of the Bankruptcy Code. The text and legislative history of the statute, and its subsequent amendment in 1994, show that the IRS is wrong.

The Bankruptcy Reform Act of 1978:

- abrogated IRS immunity under ***all*** provisions of the Bankruptcy Code, intending to "codify" cases that upheld dischargeability complaints against the IRS;[25]
- enacted section 505(a)(2)(B), which granted the bankruptcy court new[26] jurisdiction to adjudicate the estate's right to a tax refund;
- enacted section 505(b), granting a bankruptcy trustee new power to force prompt IRS determination of taxes;[27] and
- amended the Declaratory Judgment Act to read "except with respect to Federal taxes other than . . . a proceeding under section 505 or 1146[28]of title 11[.]"

Section 505 authorizes the bankruptcy court to determine a debtor's liabilities, and the estate's right to refunds under, the Internal Revenue Code – not under the Bankruptcy Code. Therefore, the Declaratory Judgment Act amendment ("other than a proceeding under section 505") did nothing more than recognize the bankruptcy court's power, under section 505, to declare the IRS' rights and

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[25] See Part I, *supra*.

[26] 11 COLLIER ON BANKRUPTCY (BANKRUPTCY TAXATION) ¶ TX5.04[2][b] & n. 26 (16th ed. 2025) (LEXIS).

[27] *Id.* ¶ TX5.04[3][a].

[28] Section 1146 relates solely to state and local taxes.

obligations under the Internal Revenue Code. The amendment contains no text limiting the bankruptcy court's well-established power to determine IRS rights (without a declaratory judgment) under the Bankruptcy Code.

The IRS cannot read into the statute language that does not exist – it cannot change decades of established law through insertion of fictitious text, *United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988) ("[A] major change in the existing rules would not likely have been made without specific provision in the text of the statute [and] it is most improbable that it would have been made without even any mention in the legislative history") – especially when the IRS' fictitious text would conflict with enacted text: the Bankruptcy Code's abrogation of the IRS' sovereign immunity.

d. The Explicit Abrogation of Immunity in Discharge Proceedings Precludes the IRS from Asserting Immunity under the Declaratory Judgment Act

Under the original Bankruptcy Code of 1978, section 106(c) provided that a "governmental unit" (such as the IRS) would be bound by bankruptcy court "determination of an issue" arising under any provision of the Bankruptcy Code containing "creditor," "entity" or "governmental unit." In 1992, the Supreme Court reasoned that although section 106(c) ***would*** permit declaratory relief against the IRS, the statute did not "unambiguously" abrogate the IRS' immunity with respect to damage claims. *United States v. Nordic Village, Inc.*, 503 U.S. at 35–36. Section

113 of the Bankruptcy Reform Act of 1994[29] overruled *Nordic Village* by enacting the current section 106 of the Bankruptcy Code, which provides as follows:

- Section 106(a)(1) abrogates sovereign immunity with respect to 60 listed sections of the Bankruptcy Code, including section 523 pertaining to dischargeability determinations.
- Section 106(a)(2) provides that the bankruptcy court "may hear and determine any issue arising with respect to the application of such sections to governmental units."
- Finally, section 106(a)(3) provides that the bankruptcy court "may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure . . . ."

As explained in the legislative history to the 1994 amendment of Section 106:

> This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries ***as well as declaratory and injunctive relief.*** It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 . . . .

Section-By-Section Description of Bankruptcy Reform Act of 1994, 140 Cong. Rec. H 10766 (daily ed. Oct. 4, 1994) (emphasis added) (Addendum, ADD-19).

[29] Pub. L. No. 103-394 (1994).

Therefore, the IRS' argument – that the 1978 amendment of the Declaratory Judgment Act is somehow "more specific" or "later" legislation that should override the explicit and repeated abrogation of IRS sovereign immunity in the Bankruptcy Code – is contrary to both statutory text and legislative history.

e. The IRS' Assertion of Immunity Under the Declaratory Judgment Act Contradicts Numerous Provisions of the Bankruptcy Code

Finally, the preclusion of declaratory judgments "with respect to Federal taxes," if applied to preclude determinations of IRS rights under the Bankruptcy Code, would be both nonsensical and destructive.

The IRS argues that Ms. Goebel cannot obtain a declaratory judgment that her claims are dischargeable – but admits that Ms. Goebel could seek an injunction against post-discharge collection under section 524(a)(2)[30] and prove dischargeability in the injunction proceeding. IRS Br. at 53–54. This is exactly what the debtor did in *IRS v. Murphy*, 892 F.3d 29 (1st Cir. 2018).

The bankruptcy court can enter, against the IRS, judgments for damages under section 547 (preferences) or section 548 (fraudulent transfers), *see United States v. Miller*, 604 U.S. ___, 145 S. Ct. 839 (2025). The bankruptcy court can also enter an order compelling the IRS to turn over property under section 542.

[30] The application of section 524(a)(2) to the IRS' action in district court is not an issue before this Court in this appeal.

See United States v. Whiting Pools, 462 U.S. 198 (1983).

Given the bankruptcy court's power to *enforce* rights against the IRS under the Bankruptcy Code by injunction or damages, it would be nonsense to read the Declaratory Judgment Act as precluding *determination* of the IRS rights under the Bankruptcy Code.

It would also be destructive. Precluding "determination" of IRS rights would prevent a bankruptcy court from:

- determining either the allowed amount of an IRS secured claim under section 506 or the priority of an IRS claim under section 507(a)(8);
- determining that an IRS lien is void under section 544(a); or
- determining that an IRS claim is subordinated in a liquidation under section 724 or in a family farmer bankruptcy under section 1232.

These are all determinations of the IRS' rights under the Bankruptcy Code. None are determinations "with respect to Federal taxes." None are proceedings to obtain a declaratory judgment under Bankruptcy Rule 7001(i).

The IRS' interpretation of the Declaratory Judgment Act is not only unprecedented, it would impair if not destroy the administration of bankruptcy law.

CONCLUSION

The Bankruptcy Code and Bankruptcy Rules entitled Ms. Goebel to initiate a proceeding in bankruptcy court to determine the dischargeability of her tax debts in order to secure a meaningful discharge, which is the principal benefit and justification of her no-asset bankruptcy case. The bankruptcy court was right to deny the IRS' motion to dismiss Ms. Goebel's complaint. This Court should affirm the decision below and remand to bankruptcy court[31] where this dischargeability proceeding belongs.

[31] The district court in certifying this appeal to this Court denied the IRS' motion for leave to take an interlocutory appeal to the District Court. A221. Therefore, the district court never took jurisdiction over Ms. Goebel's adversary proceeding or bankruptcy case.

Respectfully submitted,

Dated: July 15, 2025

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CERTIFICATE OF COMPLIANCE

I, Thomas Moers Mayer, hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) and Local Rule 32.1(a) because the document contains 7,898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

Dated: July 15, 2025
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ADDENDUM

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ADD-1

Wage earner defined for purposes of chapter 13, see section 1006 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 15 section 78eee.

CHAPTER 2—COURTS OF BANKRUPTCY

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 41, 45, 502, 702, 781, 802, 886, 1002, 1069 of this title; title 15 section 78fff.

§ 11. Creation of courts of bankruptcy and tbeir jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title;

(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

(2A) Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review;

(3) Appoint, upon the application of parties in interest, receivers or the marshals to take charge of the property of bankrupts and to protect the interests of creditors after the filing of the petition and until it is dismissed or the trustee is qualified; and to authorize such receiver, upon his application, to prosecute or defend any pending suit or proceeding by or against a bankrupt or to commence and prosecute any suit or proceeding in behalf of the estate, before any judicial, legislative, or administrative tribunal in any jurisdiction, until the petition is dismissed or the trustee is qualified: *Provided, however,* That the court shall be satisfied that such appointment or authorization is necessary to preserve the estate or to prevent loss thereto;

(4) Arraign, try, and punish persons for violations of this title, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;

(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section 76 of this title;

(6) Bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy;

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property in any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this title an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;

(8) Close estates, by approving the final accounts and discharging the trustees, whenever it appears that the estates have been fully administered or, if not fully administered, that the parties in interest will not furnish the indemnity necessary for the expenses of the proceeding or take the steps necessary for the administration of the estate; and reopen estates for cause shown;

(9) Confirm or reject arrangements or plans proposed under this title, set aside confirmations of arrangements or wage-earner plans and reinstate the proceedings and cases;

(10) Consider records, findings, and orders certified to the judges by referees, and confirm, modify, or reverse such findings and orders, or return such records with instructions for further proceedings;

(11) Determine all claims of bankrupts to their exemptions;

(12) Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon;

(13) Enforce obedience by persons to all lawful orders, by fine or imprisonment or fine and imprisonment;

(14) Extradite bankrupts from their respective districts to other districts;

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: *Provided, however,* That an in-

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junction to restrain a court may be issued by the judge only;

(16) Punish persons for contempts committed before referees;

(17) Approve the appointment of trustees by creditors or appoint trustees when creditors fail so to do; and, upon complaints of creditors or upon their own motion, remove for cause receivers or trustees upon hearing after notice;

(18) Tax costs, and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this title;

(19) Transfer cases to other courts of bankruptcy;

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction;

(21) Require receivers or trustees appointed in proceedings not under this title, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this title or, where an arrangement or a plan under this title has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this title, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided, however,* That such delivery and accounting shall not be required, except in proceedings under section 205 and chapters 10 and 12 of this title, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall reexamine and determine the propriety and reasonableness of all disbursements made out of such property by such receiver, trustee, assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this title, surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive; and

(22) Exercise, withhold, or suspend the exercise of jurisdiction, having regard to the rights or convenience of local creditors and to all other relevant circumstances, where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States.

(b) Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

(July 1, 1898, ch. 541, § 2, 30 Stat. 545; Apr. 12, 1900, ch. 191, § 34, 31 Stat. 84; Feb. 5, 1903, ch. 487, § 1, 32 Stat. 797; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; June 25, 1910, ch. 412, §§ 1, 2, 36 Stat. 838, 839; May 27, 1926, ch. 406, § 2, 44 Stat. 662; June 22, 1938, ch. 575, § 1, 52 Stat. 842; July 7, 1952, ch. 579, § 2, 66 Stat. 420; Sept. 25, 1962, Pub. L. 87-681, §§ 1, 2, 76 Stat. 570; July 5, 1966, Pub. L. 89-496, § 1, 80 Stat. 270; Oct. 19, 1970, Pub. L. 91-467, § 1, 84 Stat. 990.)

AMENDMENTS

1970—Subd. (a)(12). Pub. L. 91-467 substituted "Discharge or refuse to discharge bankrupts, set aside discharges, determine the dischargeability of debts, and render judgments thereon" for "Discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases".

1966—Subd. (a)(2A). Pub. L. 89-496 added subd. (2A).

1962—Subd. (a)(1). Pub. L. 87-681, § 1, eliminated provision authorizing courts of bankruptcy to adjudge persons bankrupt who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction.

Subd. (a)(22). Pub. L. 87-681, § 2, added subd. (22).

1952—Subd. (a)(1). Act July 7, 1952, § 2(a), added "or who have been adjudged bankrupts by courts of competent jurisdiction without the United States, and have property within their jurisdictions, or in any cases transferred to them pursuant to this Act;".

Subd. (a)(7). Act July 7, 1952, § 2(b), added "and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;".

Subd. (a)(21). Act July 7, 1952, § 2(c), inserted "section 205" immediately preceding "chapters 10 and 12 of this title".

1938—Subd. (a)(21). Act June 22, 1938, added subd. (a)(21).

Subd. (a), opening paragraph and (1), (3), (4), (7) to (10), (13), (15), (17), (18), (20), formerly first paragraph and clauses thereof, amended by act June 22, 1938.

Subds. (a)(2), (5), (6), (11), (12), (14), (16), (19), formerly clauses of the first paragraph, and subd. (b), formerly the last paragraph, reenacted without change by act June 22, 1938.

EFFECTIVE DATE OF 1970 AMENDMENT

Section 10 of Pub. L. 91-467 provided that: "The provisions of this amendatory Act [amending this section and sections 32, 33, 35, 66 and 94 of this title] shall take effect on and after sixty days from the date of its approval [Oct. 19, 1970] and shall govern proceedings in all cases filed after such date."

EFFECTIVE DATE OF 1966 AMENDMENT

Section 6 of Pub. L. 89-496 provided that: "This Act [adding subd. (a)(2A) of this section and amending sections 35(a)(1) and 104(a)(4) of this title] shall take

effect on the ninetieth day after the date of its enactment [July 5, 1966]."

EFFECTIVE DATE OF 1952 AMENDMENT

Amendment by act July 7, 1952 effective 3 months after July 7, 1952, see section 57 of act July 7, 1952, set out as a note under section 1 of this title.

EFFECTIVE DATE AND CONSTRUCTION OF 1938 AMENDMENT

Effective date and construction of act June 22, 1938, known as the Chandler Act, see sections 6 and 7 of act June 22, 1938, set out as notes under section 1 of this title.

SEPARABILITY OF PROVISIONS

Section 4 of Pub. L. 89-496 provided that: "If any provision of this Act, or any amendment made by it [adding subd. (a)(2A) of this section and amending sections 35(a)(1) and 104(a)(4) of this title], or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions of this Act, or other amendments made by it, or applications thereof which can be given effect without the invalid provision or application."

SAVINGS CLAUSE; PENDING PROCEEDINGS

Section 5 of Pub. L. 89-496 provided that:

"(a) Nothing in this Act, or in the amendments made by it [adding subd. (a)(2A) of this section and amending sections 35(a)(1) and 104(a)(4) of this title], shall operate to release or extinguish any penalty, forfeiture, or liability incurred under the Bankruptcy Act [this title] before the effective date of this Act [see Effective Date of 1966 Amendment note under this section].

"(b) The amendments made by this Act [adding subd. (a)(2A) of this section and amending sections 35(a)(1) and 104(a)(4) of this title] shall govern proceedings so far as applicable in cases pending when it takes effect."

CROSS REFERENCES

Jurisdiction and powers of bankruptcy courts in corporate reorganization, railroad reorganization, and arrangement proceedings, see sections 205, 511 to 517, 521, 711 to 716, and 811 to 816 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 76 of this title.

CHAPTER 3—BANKRUPTS

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 41, 45, 502, 702, 781, 802, 886, 1002, 1069 of this title; title 15 section 78fff.

§ 21. Acts of bankruptcy

(a) Acts of bankruptcy by a person shall consist of his having (1) concealed, removed, or permitted to be concealed or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them, or made or suffered a transfer of any of his property, fraudulent under the provisions of section 107 or 110 of this title; or (2) made or suffered a preferential transfer, as defined in subdivision (a) of section 96 of this title; or (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or distraint and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; or (4) made a general assignment for the benefit of his creditors; or (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; or (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt.

(b) A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time with respect to the third act of bankruptcy shall expire four months after the date the lien through legal proceedings or distraint was obtained and, with respect to the first or fourth act of bankruptcy, such time shall not expire until four months after the date when the transfer or assignment became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein, and such time with respect to the second act of bankruptcy shall not expire until four months after the date when the transfer became perfected as prescribed in subdivision (a) of section 96 of this title. For the purposes of this section, it is sufficient if intent to hinder, delay or defraud under the first act of bankruptcy, where such intent is an element of such act, or if insolvency under the second act of bankruptcy, exists either at the time when the transfer was made or at the time when it became perfected, as hereinabove provided.

(c) It shall be a complete defense to any proceedings under the first act of bankruptcy to allege and prove that the party proceeded against was not insolvent as defined in this title at the time of the filing of the petition against him. If solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed. In such proceedings the burden of proving solvency shall be on the alleged bankrupt.

(d) Whenever a person against whom a petition has been filed alleging the commission of the second, third, or fifth act of bankruptcy takes issue with and denies the allegation of his insolvency or his inability to pay his debts as they mature, he shall appear in court on the hearing, and prior thereto if ordered by the court, with his books, papers, and accounts, and submit to an examination and give testimony as to all matters tending to establish solvency or insolvency or ability or inability to pay his

CROSS REFERENCES

Adjudications, see section 41 of this title.
Arrangements, see section 701 et seq. of this title.
Concealment of assets; false oaths and claims; bribing, see section 152 of Title 18, Crimes and Criminal Procedure.
Debts not affected by discharge, see section 35 of this title.
Definitions of "Adjudication", "Bankrupt", "Creditor", and "Discharge", see section 1 of this title.
Duty of bankrupt to answer questions generally, see sections 25 and 44 of this title.
Duty of bankrupt to comply with lawful orders, see section 25 of this title.
Jurisdiction of referee to grant discharge, see section 66 of this title.
Meeting of creditors, see section 91 of this title.
Notices to creditors for filing objections to discharge, see section 94 of this title.
Refusal to obey lawful orders or to appear and testify, as contempt, see section 69 of this title.
Release of directors and stockholders from liability by discharge of corporation, see section 22 of this title.
Revocation of discharges, see section 33 of this title.
Trustee's duty to oppose discharges when advisable to do so, see section 75 of this title.
Wage earners' plans, see section 1001 et seq. of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Discharge in bankruptcy as affirmative defense, see rule 8, Title 28, Appendix, Judiciary and Judicial Procedure.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 35 of this title.

§ 33. Discharges, when revoked

The court may revoke a discharge upon the application of a creditor, the trustee, the United States attorney, or any other party in interest, who has not been guilty of laches, filed at any time within one year after a discharge has been granted, if it shall appear (1) that the discharge was obtained through the fraud of the bankrupt, that the knowledge of the fraud has come to the applicant since the discharge was granted, and that the facts did not warrant the discharge; or (2) that the bankrupt, before or after discharge, received or became entitled to receive property of any kind which is or which became a part of the bankrupt estate and that he knowingly and fraudulently failed to report or to deliver such property to the trustee; or (3) that the bankrupt during the pendency of the proceeding refused to obey any lawful order of, or to answer any material question approved by, the court. The application to revoke for such refusal may be filed at any time during the pendency of the proceeding or within one year after the discharge was granted, whichever period is longer.

(July 1, 1898, ch. 541, § 15, 30 Stat. 550; June 22, 1938, ch. 575, § 1, 52 Stat. 851; Oct. 19, 1970, Pub. L. 91-467, § 4, 84 Stat. 991.)

AMENDMENTS

1970—Pub. L. 91-467 designated as cl. (1) the existing enumeration of parties who can apply for the revocation of the discharge and added cls. (2) and (3).

1938—Act June 22, 1938, substituted "court" for "judge" and deleted "upon a trial" after "revoke it".

EFFECTIVE DATE OF 1970 AMENDMENT

Effective date of amendment by Pub. L. 91-467, see section 10 of Pub. L. 91-467, set out as a note under section 11 of this title.

EFFECTIVE DATE AND CONSTRUCTION OF 1938 AMENDMENT

Effective date and construction of act June 22, 1938, known as the Chandler Act, see sections 6 and 7 of act June 22, 1938, set out as notes under section 1 of this title.

CROSS REFERENCES

Discharges, when granted, see section 32 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Relief from order procured by fraud, see rule 60, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 34. Co-debtors, guarantors or sureties for bankrupts

The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

(July 1, 1898, ch. 541, § 16, 30 Stat. 550.)

CROSS REFERENCES

Action to proceed against bankrupt to save rights against sureties, see section 29 of this title.
Bankruptcy of partnerships and partners, see section 23 of this title.
Effect of discharge of corporations on liability of officers and stockholders, see section 22 of this title.

FEDERAL RULES OF CIVIL PROCEDURE

Discharge in bankruptcy as affirmative defense, see rule 8, Title 28, Appendix, Judiciary and Judicial Procedure.

§ 35. Dischargeability of debts

(a) Debts not affected by discharge

A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as

(1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: *Provided, however,* That a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made by the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to

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him under this title: *And provided further*, That a discharge in bankruptcy shall not release or affect any tax lien;

(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another;

(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy;

(4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity;

(5) are for wages and commissions to the extent they are entitled to priority under subdivision (a) of section 104 of this title;

(6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment;

(7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or

(8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

(b) Proceedings for debts dischargeable

The failure of a bankrupt or debtor to obtain a discharge in a prior proceeding under this title for any of the following reasons shall not bar the release by discharge in a subsequent proceeding under the title of debts that were dischargeable under subdivision (a) of this section in the prior proceeding: (1) discharge was denied in the prior proceeding solely under clause (5) or clause (8) of subdivision (c) of section 32 of this title; (2) the prior proceeding was dismissed without prejudice for failure to pay filing fees or to secure costs. If a bankrupt or debtor fails to obtain a discharge in a proceeding under this title by reason of a waiver filed pursuant to section 32(a) of this title or by reason of a denial on any ground under section 32(c) of this title other than clause (5) or clause (8) thereof, the debts provable in such proceeding shall not be released by a discharge granted in any subsequent proceeding under this title. A debt not released by a discharge in a proceeding under this title by reason of clause (3) of subdivision (a) of this section may nevertheless be dischargeable in a subsequent bankruptcy proceeding.

(c) Procedure

(1) The bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt.

(2) A creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision (a) of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision (b) of section 32 of this title and, unless an application is timely filed, the debt shall be discharged. Notwithstanding the preceding sentence, no application need be filed for a debt excepted by clause (8) if a right to trial by jury exists and any party to a pending action on such debt has timely demanded a trial by jury or if either the bankrupt or a creditor submits a signed statement of an intention to do so.

(3) After hearing upon notice, the court shall determine the dischargeability of any debt for which an application for such determination has been filed, shall make such orders as are necessary to protect or effectuate a determination that any debt is dischargeable and, if any debt is determined to be nondischargeable, shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof. A creditor who files such application does not submit himself to the jurisdiction of the court for any purposes other than those specified in this subdivision.

(4) The provisions of this subdivision shall apply whether or not an action on a debt is then pending in another court and any party may be enjoined from instituting or continuing such action prior to or during the pendency of a proceeding to determine its dischargeability under this subdivision.

(5) Nothing in this subdivision shall be deemed to affect the right of any party, upon timely demand, to a trial by jury where such right exists.

(6) If a bankruptcy case is reopened for the purpose of obtaining the orders and judgments authorized by this subdivision, no additional filing fee shall be required.

(July 1, 1898, ch. 541, § 17, 30 Stat. 550; Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798; Mar. 2, 1917, ch. 153, 39 Stat. 999; Jan. 7, 1922, ch. 22, 42 Stat. 354; June 22, 1938, ch. 575, § 1, 52 Stat. 851; July 12, 1960, Pub. L. 86-621, § 2, 74 Stat. 409; July 5, 1966, Pub. L. 89-496, § 2, 80 Stat. 270; Oct. 19, 1970, Pub. L. 91-467, §§ 5-7, 84 Stat. 992.)

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1970—Subd. (a)(2). Pub. L. 91-467, § 5, substituted "malicious conversion of the property of another" for "malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation" in the list of liabilities.

Subd. (a)(5). Pub. L. 91-467, § 5, substituted "are for wages and commissions to the extent they are entitled to priority under subdivision (a) of section 104 of this title;" for "are for wages which have been earned within three months before the date of commencement of the proceedings in bankruptcy due to workmen, servants, clerks, or traveling or city salesmen, on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; or".

Subd. (a)(6). Pub. L. 91-467, § 5, substituted a semicolon for a period at the end of cl. (6).

Subd. (a)(7). Pub. L. 91-467, § 6, added subd. (a)(7).

Subd. (a)(8). Pub. L. 91-467, § 6, added subd. (a)(8).

Subds. (b), (c). Pub. L. 91-467, § 7, added subds. (b), (c).

1966—Subd. (a)(1). Pub. L. 89-496 made dischargeable in bankruptcy debts for taxes which became le-

gally due and owing more than three years preceding bankruptcy, provided certain exceptions to such a discharge for failure to make returns, omissions from returns, false or fraudulent returns, and nonpayment of taxes collected or withheld from others, and provided that discharge shall not bar any remedies available against the exemption of the bankrupt allowed by law or affect tax liens.

1960—Pub. L. 86-621 inserted the prohibition against discharge in bankruptcy from debts which are liabilities for obtaining money or property on credit or obtaining an extension or a renewal of credit by furnishing false financial statements in clause (2).

1938—Opening clause. Act June 22, 1938, inserted "whether allowable in full or in part" after "provable debts".

Clause (1). Act June 22, 1938, substituted "or any State" for "the State" and deleted "in which he resides" after "municipality".

Clause (2). Act June 22, 1938, inserted "money or" before "property".

Clauses (3), (4), and (6) reenacted without change by act June 22, 1938.

Clause (5) amended generally by act June 22, 1938, which among other changes inserted "on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt" after "traveling or city salesmen".

EFFECTIVE DATE OF 1970 AMENDMENT

Effective date of amendment by Pub. L. 91-467, see section 10 of Pub. L. 91-467, set out as a note under section 11 of this title.

EFFECTIVE DATE AND CONSTRUCTION OF 1938 AMENDMENT

Effective date and construction of act June 22, 1938, known as the Chandler Act, see sections 6 and 7 of act June 22, 1938, set out as notes under section 1 of this title.

CROSS REFERENCES

Debts which may be proved, see section 103 of this title.

Discharge, when granted, see section 32 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 32, 94, 771, 876, 1060, 1061 of this title; title 26 section 7430.

CHAPTER 4—COURTS AND PROCEDURE THEREIN

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 41, 45, 502, 702, 781, 802, 886, 1002, 1069 of this title; title 15 section 78fff.

§ 41. Process; pleadings; and adjudications

(a) Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpena, shall be made upon the person therein named as defendant. Upon the filing of a voluntary petition in behalf of a partnership by less than all of the general partners, service thereof, with a writ of subpena, shall be made upon the general partner or partners not parties to the filing of such petition. Such service shall be returnable within ten days, unless the court shall, for cause shown, fix a longer time, and shall be made at least five days prior to the return day, and in other respects shall be made in the same manner that service of summons is had upon the commencement of a civil action in the courts of the United States; but in case personal service cannot be made within the time allowed, then notice shall be given by publication in the same manner as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the court shall otherwise direct, the order shall be published only once and the return day shall be five days after such publication.

(b) The bankrupt and, in the case of a petition against a partnership, any general partner or, in the case of a petition in behalf of a partnership, any general partner not joining therein, may appear and plead to the petition within five days after the return day or within such further time as the court may allow.

(c) Petitions for both voluntary and involuntary bankruptcy shall be verified under oath.

(d) If a party entitled to appear and plead shall appear, within the time limited, and controvert the facts alleged in the petition, the court shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury except in cases where a jury trial is given by this title, and make the adjudication or dismiss the petition.

(e) If on the last day within which pleadings may be filed none is filed, the court shall on the next day, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

(f) The filing of a voluntary petition under chapters 1 to 7 of this title, other than a petition filed in behalf of a partnership by less than all of the partners, shall operate as an adjudication with the same force and effect as a decree of adjudication.

(July 1, 1898, ch. 541, § 18, 30 Stat. 551; Feb. 5, 1903, ch. 487, § 6, 32 Stat. 798; June 22, 1938, ch. 575, § 1, 52 Stat. 851; July 7, 1952, ch. 579, § 7, 66 Stat. 423; June 23, 1959, Pub. L. 86-64, § 2, 73 Stat. 109; Sept. 21, 1959, Pub. L. 86-293, 73 Stat. 571.)

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1959—Subd. (c). Pub. L. 86-293 substituted "Petitions for both voluntary and involuntary bankruptcy" for the words "All pleadings setting up matters of fact".

Subd. (f). Pub. L. 86-64, § 2(b), redesignated former subd. (g) as (f), and substituted provisions requiring the filing of a voluntary petition under chapters 1 to 7 of this title, other than a petition filed in behalf of a partnership by less than all of the partners, to operate as an adjudication, for provisions which required a judge to hear the petition and to make the adjudication or dismiss the petition, and eliminated provisions which required the clerk to refer the case to a referee if at the time of the filing of the petition the judge is absent from the district or division in which the petition was filed. Former subd. (f), which related to refer-

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House concurred in Senate Amendment with an amendment.
Congressional Record-House, September 28, 1978.

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UNIFORM LAW ON BANKRUPTCIES

Mr. EDWARDS of California. Mr. Speaker, I ask unanimous consent to take from the Speaker's desk the bill (H.R. 8200) to establish a uniform law on the subject of bankruptcies, with a Senate amendment thereto, and concur in the Senate amendment with an amendment.

The Clerk read the title of the bill.

The Clerk read the Senate amendment.

Mr. EDWARDS of California (during the reading). Mr. Speaker, I ask unanimous consent to dispense with further reading of the Senate amendment.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

The Clerk read the House amendment to the Senate amendment, as follows:

H.R. 8200

In lieu of the matter inserted by the Senate amendment, insert:

TITLE I—ENACTMENT OF TITLE 11 OF THE UNITED STATES CODE

SEC. 101. The law relating to bankruptcy is codified and enacted as title 11 of the United States Code, entitled "Bankruptcy", and may be cited as 11 U.S.C. § , as follows:

TITLE 11—BANKRUPTCY

Chapter
1. General Provisions.
3. Case Administration.
5. Creditors, the Debtor, and the Estate.
7. Liquidation.
9. Adjustment of Debts of a Municipality.
11. Reorganization.
13. Adjustment of Debts of an Individual With Regular Income
15. United States Trustees.

CHAPTER 1—GENERAL PROVISIONS

Sec.
101. Definitions.
102. Rules of construction.
103. Applicability of chapters.
104. Adjustment of dollar amounts.
105. Power of court.
106. Waiver of sovereign immunity.
107. Public access to papers.
108. Extension of time.
109. Who may be a debtor.

§ 101. Definitions

In this title—

(1) "accountant" means accountant authorized under applicable law to practice public accounting, and includes professional accounting association, corporation, or partnership, if so authorized;

(2) "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or all or substantially all of the property of the debtor under a lease or operating agreement;

(3) "attorney" means attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law;

(4) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(5) "commodity broker" means futures commission merchant, foreign futures commission merchant, clearing organization, leverage transaction merchant, or commodity options dealer, as defined in section 761 of this title, with respect to which there is a customer, as defined in section 761(9) of this title;

(6) "community claim" means claim that arose before the commencement of the case concerning the debtor for which property of the kind specified in section 541(a)(2) of this title is liable, whether or not there is any such property at the time of commencement of the case;

(7) "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose;

(8) "corporation"—

(A) includes—

(i) association having a power or privilege that a private corporation, but not an individual or a partnership, possesses;

(ii) partnership association organized under a law that makes only the capital subscribed responsible for the debts of such

Section 102 specifies various rules of construction but is not exclusive. Other rules of construction that are not set out in title 11 are nevertheless intended to be followed in construing the bankruptcy code. For example, the phrase "on request of a party in interest" or a similar phrase, is used in connection with an action that the court may take in various sections of the Code. The phrase is intended to restrict the court from acting sua sponte. Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question, but the court will not be permitted to act on its own.

Although "property" is not construed in this section, it is used consistently throughout the code in its broadest sense, including cash, all interests in property, such as liens, and every kind of consideration including promises to act or forbear to act as in section 548(d).

Section 102(1) expands on a rule of construction contained in H.R. 8200 as passed by the House and in the Senate amendment. The phrase "after notice and a hearing", or a similar phrase, is intended to be construed according to the particular proceeding to mean after such notice as is appropriate in the particular circumstances, and such opportunity, if any, for a hearing as is appropriate in the particular circumstances. If a provision of title II authorizes an act be taken "after notice and a hearing" this means that if appropriate notice is given and no party to whom such notice is sent timely requests a hearing, then the act sought to be taken may be taken without an actual hearing.

In very limited emergency circumstances, there will be insufficient time for a hearing to be commenced before an action must be taken. The action sought to be taken may be taken if authorized by the court at an ex parte hearing of which a record is made in open court. A full hearing after the fact will be available in such an instance.

In some circumstances, such as under section 1128, the bill requires a hearing and the court may act only after a hearing is held. In those circumstances the judge will receive evidence before ruling. In other circumstances, the court may take action "after notice and a hearing," if no party in interest requests a hearing. In that event a court order authorizing the action to be taken is not necessary as the ultimate action taken by the court implies such an authorization.

Section 102(8) is new. It contains a rule of construction indicating that a definition contained in a section in title 11 that refers to another section of title 11 does not, for the purposes of such reference, take the meaning of a term used in the other section. For example, section 522(a)(2) defines "value" for the purposes of section 522. Section 548(d)(2) defines "value" for purposes of section 548. When section 548 is incorporated by reference in section 522, this rule of construction makes clear that the

definiton of "value" in section 548 governs its meaning in section 522 notwithstanding a different definition of "value" in section 522(a)(2).

Section 104 represents a compromise between the House bill and the Senate amendment with respect to the adjustment of dollar amounts in title 11. The House amendment authorizes the Judicial Conference of the United States to transmit a recommendation for the uniform percentage of adjustment for each dollar amount in title 11 and in 28 U.S.C. 1930 to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year thereafter. The requirement in the House bill that each such recommendation be based only on any change in the cost-of-living increase during the period immediately preceding the recommendation is deleted.

Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title 11 applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106 (a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

Section 109(b) of the House amendment adopts a provision contained in H.R. 8200 as passed by the House. Railroad liquidations will occur under chapter 11, not chapter 7.

Section 109(c) contains a provision

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under the House amendment, file a claim against the estate for a prepetition tax liability and may also file a request that the bankruptcy court hear arguments and decide the merits of an individual debtor's personal liability for the balance of any nondischargeable tax liability not satisfied from assets of the estate. Bankruptcy terminology refers to the latter type of request as a creditor's complaint to determine the dischargeability of a debt. Where such a complaint is filed, the bankruptcy court will have personal jurisdiction over an individual debtor, and the debtor himself would have no access to the Tax Court, or to any other court, to determine his personal liability for nondischargeable taxes.

If a tax authority decides not to file a claim for taxes which would typically occur where there are few, if any, assets in the estate, normally the tax authority would also not request the bankruptcy court to rule on the debtor's personal liability for a nondischargeable tax. Under the House amendment, the tax authority would then have to follow normal procedures in order to collect a nondischargeable tax. For example, in the case of nondischargeable Federal income taxes, the Internal Revenue Service would be required to issue a deficiency notice to an individual debtor, and the debtor could then file a petition in the Tax Court—or a refund suit in a district court—as the forum in which to litigate his personal liability for a nondischargeable tax.

Under the House amendment, as under present law, an individual debtor can also file a complaint to determine dischargeability. Consequently, where the tax authority does not file a claim or a request that the bankruptcy court determine dischargeability of a specific tax liability, the debtor could file such a request on his own behalf, so that the bankruptcy court would then determine both the validity of the claim against assets in the estate and also the personal liability of the debtor for any nondischargeable tax.

Where a proceeding is pending in the Tax Court at the commencement of the bankruptcy case, the commencement of the bankruptcy case automatically stays further action in the Tax Court case unless and until the stay is lifted by the bankruptcy court. The Senate amendment repealed a provision of the Internal Revenue case barring a debtor from filing a petition in the Tax Court after commencement of a bankruptcy case

(sec. 6871(b) of the code). See section 321 of the Senate bill. As indicated earlier, the equivalent of the code amendment is embodied in section 362 (a)(8) of the House amendment, which automatically stays commencement or continuation of any proceeding in the Tax Court until the stay is lifted or the case is terminated. The stay will permit sufficient time for the bankruptcy trustee to determine if he desires to join the Tax Court proceeding on behalf of the estate. Where the trustee chooses to join the Tax Court proceeding, it is expected that he will seek permission to intervene in the Tax Court case and then request that the stay on the Tax Court proceeding be lifted. In such a case, the merits of the tax liability will be determined by the Tax Court, and its decision will bind both the individual debtor as to any taxes which are nondischargeable and the trustee as to the tax claim against the estate.

Where the trustee does not want to intervene in the Tax Court, but an individual debtor wants to have the Tax Court determine the amount of his personal liability for nondischargeable taxes, the debtor can request the bankruptcy court to lift the automatic stay on existing Tax Court proceedings. If the stay is lifted and the Tax Court reaches its decision before the bankruptcy court's decision on the tax claim against the estate, the decision of the Tax Court would bind the bankruptcy court under principles of res judicata because the decision of the Tax Court affected the personal liability of the debtor. If the trustee does not wish to subject the estate to the decision of the Tax Court if the latter court decides the issues before the bankruptcy court rules, the trustee could resist the lifting of the stay on the existing Tax Court proceeding. If the Internal Revenue Service had issued a deficiency notice to the debtor before the bankruptcy case began, but as of the filing of the bankruptcy petition the 90-day period for filing in the Tax Court was still running, the debtor would be automatically stayed from filing a petition in the Tax Court. If either the debtor or the Internal Revenue Service then files a complaint to determine dischargeability in the bankruptcy court, the decision of the bankruptcy court would bind both the debtor and the Internal Revenue Service.

The bankruptcy judge could, however, lift the stay on the debtor to allow him to petition the Tax Court, while reserving the right to rule on the tax authority's claim agains assets of the estate. The bankruptcy court could also, upon request by the trustee, authorize the trustee to intervene in the Tax Court for purposes of having the estate also governed by the decision of the Tax Court.

In essence, under the House amend-

ment, the bankruptcy judge will have authority to determine which court will determine the merits of the tax claim both as to claims against the estate and claims against the debtor concerning his personal liability for nondischargeable taxes. Thus, if the Internal Revenue Service, or a State or local tax authority, files a petition to determine dischargeability, the bankruptcy judge can either rule on the merits of the claim and continue the stay on any pending Tax Court proceeding or lift the stay on the Tax Court and hold the dischargeability complaint in abeyance. If he rules on the merits of the complaint before the decision of the Tax Court is reached, the bankruptcy court's decision would bind the debtor as to nondischargeable taxes and the Tax Court would be governed by that decision under principles of res judicata. If the bankruptcy judge does not rule on the merits of the complaint before the decision of the Tax Court is reached, the bankruptcy court will be bound by the decision of the Tax Court as it affects the amount of any claim against the debtor's estate.

If the Internal Revenue Service does not file a complaint to determine dischargeability and the automatic stay on a pending Tax Court proceeding is not lifted, the bankruptcy court could determine the merits of any tax claim against the estate. That decision will not bind the debtor personally because he would not have been personally before the bankruptcy court unless the debtor himself asks the bankruptcy court to rule on his personal liability. In any such situation where no party filed a dischargeability petition, the debtor would have access to the Tax Court to determine his personal liability for a nondischargeable tax debt. While the Tax Court in such a situation could take into account the ruling of the bankruptcy court on claims against the estate in deciding the debtor's personal liability, the bankruptcy court's ruling would not bind the Tax Court under principles of res judicata, because the debtor, in that situation, would not have been personally before the bankruptcy court.

If neither the debtor nor the Internal Revenue Service files a claim against the estate or a request to rule on the debtor's personal liability, any pending tax court proceeding would be stayed until the closing of the bankruptcy case, at which time the stay on the tax court would cease and the tax court case could continue for purposes of deciding the merits of the debtor's personal liability for nondischargeable taxes.

Audit of trustee's returns: Under both bills, the bankruptcy court could determine the amount of any administrative period taxes. The Senate amendment, however, provided for an expedited audit procedure, which was mandatory in some cases. The House amendment (sec. 505(b)), adopts the provision of the House bill allowing the trustee discretion in all cases whether to ask the Internal Revenue Service, or State or local tax authority for a prompt audit of his returns on behalf of the estate. The House amendment, however, adopts the provision of the Senate bill permitting a prompt audit only on the basis of tax returns filed by the trustee for completed taxable periods. Procedures for a prompt audit set forth in the Senate bill are also adopted in modified form.

Under the procedure, before the case can be closed, the trustee may request a tax audit by the local, State or Federal tax authority of all tax returns filed by the trustee. The taxing authority would have to notify the trustee and the bankrupty court within 60 days whether it accepts returns or desires to audit the returns more fully. If an audit is conducted, the taxing authority would have to notify the trustee of tax deficiency within 180 days after the original and it request, subject to extensions of time if the bankruptcy court approves. If the trustee does not agree with the results of the audit, the trustee could ask the bankruptcy court to resolve the dispute. Once the trustee's tax liability for administration period taxes has thus been determined, the legal effect in a case under chapter 7 or 11 would be to discharge the trustee and any predecessor of the trustee, and also the debtor, from any further liability for these taxes.

The prompt audit procedure would not be available with respect to any tax liability as to which any return required to be filed on behalf of the estate is not filed with the proper tax authority. The House amendment also specifies that a discharge of the trustee or the debtor which would otherwise occur will not be granted, or will be void if the return filed on behalf of the estate reflects fraud or material representation of facts.

For purposes of the above prompt audit procedures, it is intended that the tax authority with which the request for audit is to be filed is, as to Federal taxes, the office of the District Director in the district where the bankruptcy case is pending.

Under the House amendment, if the trustee does not request a prompt audit, the debtor would not be discharged from possible transferee liability if any assets are returned to the debtor.

Assessment after decision: As indicated above, the commencement of a

Uniform Law on Bankruptcies . . . . . Document 59
Senate concurred in House amendment with an amendment. Congressional Record-Senate, October 5, 1978. (reported on October 6, 1978).

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DOCUMENT 59

Senate

(Proceedings of the Senate Continued From the Record of October 5, 1978)

UNIFORM LAW ON BANKRUPTCIES

Mr. ROBERT C. BYRD. Mr. President, I ask the Chair to lay before the Senate a message from the House of Representatives on H.R. 8200.

The PRESIDING OFFICER laid be-

fore the Senate the amendment of the House of Representatives to H.R. 8200, an act to establish a uniform law on the subject of bankruptcies.

(The amendment of the House is printed in the RECORD of September 28, 1978, beginning at page H11047.

Mr. DECONCINI. Mr. President, I ask unanimous consent that Bob Feidler and Harry Dixon of the staff of the Subcommittee on Judicial Machinery be accorded the privilege of the floor during the consideration of the message from the House on H.R. 8200.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DECONCINI. Mr. President, it is with great pleasure that I support the House amendment to H.R. 8200. Several weeks ago the Senate passed its version of the bankruptcy reform bill which differed significantly from the House version. Since that time the Senate has appointed conferees but the House has rejected the request for conference for parlimentary reasons. Instead, the House has passed an amendment to the Senate amendment. The provisions of the House amendment were arrived at in negotiations between the House and Senate managers of the legislation. I concur in the House amendment and am prepared to accept it with several amendments I shall propose.

Both Houses should take pride in the final compromise product. It represents give and take by both sides and the result should be workable and satisfactory to all reasonable parties. The Senate prevailed in the concept that the new courts will not have article III judges. While the new judges will not have life tenure they will be elevated to a status far above that of the present day referee. The new courts will be adjuncts of the district courts and should provide a respected and highly qualified judicial forum for the handling of bankruptcy cases.

The Senate also generally prevailed in its position that private trustee as opposed to public trustees should continue to play the predominant role in estate administration. However, we did agree that there have been occasions of trustee mishandling of cases and that it would be worth a trial experiment to test the theory and workings of a public trustee. To that end, we accepted the concept of pilot U.S. trustee programs that will be placed in several judicial districts.

In the area of exemptions, it was agreed that a Federal exemption standard will be codified but that the States could at any time reject them in which case the State exemption laws would continue to prevail.

In the business reorganization chapter the Senate succeeded in obtaining special protection for the large cases having great public interest. There will be automatically appointed an examiner in those cases, but not a trustee as in the Senate passed bill. I am convinced that debtor and creditor interests, as well as the public interest, will be preserved and enhanced by these provisions. I want to at this point thank the members and staff of the Security and Exchange Commission for their fine assistance in formulating these public interest provisions.

The Houses were in substantial agreement initially on the handling of chapter 13, so-called wage earner cases. This chapter will be broadened to include small business debtors. Debtors under this chapter will be able to voluntarily pay off their debts while being under the protection of the court. This allows for greater payouts to creditors than would probably occur if the debtor took straight bankruptcy, and it preserves the debtors self-esteem by permitting him to pay his debts using his best efforts without incurring undue hardship.

New subchapters relating to non-SIPC stockbroker and commodity broker liquidations fill a void in present law and will allow future cases in this area to be handled in a fair and orderly fashion.

Other sections of the bill update and revise present law taking into consideration the vast changes necessitated by the adoption of the uniform commercial code, the boom in credit and credit prac-

are not among the claims defined by this paragraph and amounts owed by private companies to the holders of industrial development revenue bonds are not to be included among the assets of the municipality that would be affected by the plan.

Section 101(6) defines "community claim" as provided by the Senate amendment in order to indicate that a community claim exists whether or not there is community property in the estate as of the commencement of the case.

Section 101(7) of the House amendment contains a definition of consumer debt identical to the definition in the House bill and Senate amendment. A consumer debt does not include a debt to any extent the debt is secured by real property.

Section 101(9) of the Senate amendment contained a definition of "court." The House amendment deletes the provision as unnecessary in light of the pervasive jurisdiction of a bankruptcy court under all chapters of title 11 as indicated in title II of the House amendment to H.R. 8200.

Section 101(11) defines "debt" to mean liability on a claim, as was contained in the House-passed version of H.R. 8200. The Senate amendment contained language indicating that "debt" does not include a policy loan made by a life insurance company to the debtor. That language is deleted in the House amendment as unnecessary since a life insurance company clearly has no right to have a policy loan repaid by the debtor, although such company does have a right of offset with respect to such policy loan. Clearly, then, a "debt" does not include a policy loan made by a life insurance company. Inclusion of the language contained in the Senate amendment would have required elaboration of other legal relationships not arising by a liability on a claim. Further the language would have required clarification that interest on a policy loan made by a life insurance company is a debt, and that the insurance company does have right to payment to that interest.

Section 101(14) adopts the definition of "entity" contained in the Senate-passed version of H.R. 8200. Since the Senate amendment to H.R. 8200 deleted the U.S. trustee, a corresponding definitional change is made in chapter 15 of the House amendment for U.S. trustees under the pilot program. Adoption by the House amendment of a pilot program for U.S. trustees under chapter 15 requires insertion of "United States trustee" in many sections. Several provisions in chapter 15 of the House amendment that relate to the U.S. trustee were not contained in the Senate amendment in the nature of a substitute.

Section 101(17) defines "farmer," as in the Senate amendment with an income limitation percentage of 80 percent instead of 75 percent.

Section 101(18) contains a new definition of "farming operation" derived from

present law and the definition of "farmer" in the Senate amendment. This definition gives a broad construction to the term "farming operation".

Section 101(20) contains a definition of "foreign representative". It clarifies the House bill and Senate amendment by indicating that a foreign representative must be duly selected in a foreign proceeding.

Section 101(35) defines "security" as contained in the Senate amendment. H.R. 8200 as adopted by the House excluded certain commercial notes from the definition of "security", and that exclusion is deleted.

Section 101(40) defines "transfer" as in the Senate amendment. The definition contained in H.R. 8200 as passed by the House included "setoff" in the definition of "transfer". Inclusion of "setoff" is deleted. The effect is that a "setoff" is not subject to being set aside as a preferential "transfer" but will be subject to special rules.

Section 102 specifies various rules of construction but is not exclusive. Other rules of construction that are not set out in title 11 are nevertheless intended to be followed in construing the bankruptcy code. For example, the phrase "on request of a party in interest" or a similar phrase, is used in connection with an action that the court may take in various sections of the Code. The phrase is intended to restrict the court from acting sua sponte. Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question, but the court will not be permitted to act on its own.

Although "property" is not construed in this section, it is used consistently throughout the code in its broadest sense, including cash, all interests in property, such as liens, and every kind of consideration including promises to act or forbear to act as in section 548(d).

Section 102(1) expands on a rule of construction contained in H.R. 8200 as passed by the House and in the Senate amendment. The phrase "after notice and a hearing", or a similar phrase, is intended to be construed according to the particular proceeding to mean after such notice as is appropriate in the particular circumstances, and such opportunity, if any, for a hearing as is appropriate in the particular circumstances. If a provision of title II author-

izes an act be taken "after notice and a hearing" this means that if appropriate notice is given and no party to whom such notice is sent timely requests a hearing, then the act sought to be taken may be taken without an actual hearing.

In very limited emergency circumstances, there will be insufficient time for a hearing to be commenced before an action must be taken. The action sought to be taken may be taken if authorized by the court at an ex parte hearing of which a record is made in open court. A full hearing after the fact will be available in such an instance.

In some circumstances, such as under section 1128, the bill requires a hearing and the court may act only after a hearing is held. In those circumstances the judge will receive evidence before ruling. In other circumstances, the court may take action "after notice and a hearing," if no party in interest requests a hearing. In that event a court order authorizing the action to be taken is not necessary as the ultimate action taken by the court implies such an authorization.

Section 102(8) is new. It contains a rule of construction indicating that a definition contained in a section in title II that refers to another section of title II does not, for the purposes of such reference, take the meaning of a term used in the other section. For example, section 522(a)(2) defines "value" for the purposes of section 522. Section 548 (d)(2) defines "value" for purposes of section 548. When section 548 is incorporated by reference in section 522, this rule of construction makes clear that the definition of "value" in section 548 governs its meaning in section 522 notwithstanding a different definition of "value" in section 522(a)(2).

Section 104 represents a compromise between the House bill and the Senate amendment with respect to the adjustment of dollar amounts in title 11. The House amendment authorizes the Judicial Conference of the United States to transmit a recommendation for the uniform percentage of adjustment for each dollar amount in title 11 and in 28 U.S.C. 1930 to the Congress and to the President before May 1, 1985, and before May 1 of every sixth year thereafter. The requirement in the House bill that each such recommendation be based only on any change in the cost-of-living increase during the period immediately preceding the recommendation is deleted.

Section 106(c) relating to sovereign immunity is new. The provision indicates that the use of the term "creditor," "entity," or "governmental unit" in title II applies to governmental units notwithstanding any assertion of sovereign immunity and that an order of the court binds governmental units. The provision is included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective. Section 106(c) codifies in re Gwilliam, 519 F.2d 407 (9th Cir., 1975), and in re Dolard, 519 F.2d 282 (9th Cir., 1975), permitting the bankruptcy court to determine the amount and dischargeability of tax liabilities owing by the debtor or the estate prior to or during a bankruptcy case whether or not the governmental unit to which such taxes are owed files a proof of claim. Except as provided in sections 106 (a) and (b), subsection (c) is not limited to those issues, but permits the bankruptcy court to bind governmental units on other matters as well. For example, section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit; contrary language in the House report to H.R. 8200 is thereby overruled.

Section 109(b) of the House amendment adopts a provision contained in H.R. 8200 as passed by the House. Railroad liquidations will occur under chapter 11, not chapter 7.

Section 109(c) contains a provision which tracks the Senate amendment as to when a municipality may be a debtor under chapter 11 of title II. As under the Bankruptcy Act, State law authorization and prepetition negotiation efforts are required.

Section 109(e) represents a compromise between H.R. 8200 as passed by the House and the Senate amendment relating to the dollar amounts restricting eligibility to be a debtor under chapter 13 of title II. The House amendment adheres to the limit of $100,000 placed on unsecured debts in H.R. 8200 as passed by the House. It adopts a midpoint of $350,000 as a limit on secured claims, a compromise between the level of $500,000 in H.R. 8200 as passed by the House and $200,000 as contained in the Senate amendment.

Sections 301, 302, 303, and 304, are all modified in the House amendment to adopt an idea contained in sections 301 and 303 of the Senate amendment requiring a petition commencing a case to be filed with the bankruptcy court. The exception contained in section 301 of the Senate bill relating to cases filed under chapter 9 is deleted. Chapter 9 cases will be handled by a bankruptcy court as are other title II cases.

Section 303(b)(1) is modified to make clear that unsecured claims against the debtor must be determined by taking into account liens securing property held by third parties.

Section 303(b)(3) adopts a provision contained in the Senate amendment indicating that an involuntary petition

compensation earned from the estate.

Section 505. Determinations of tax liability: Authority of bankruptcy court to rule on merits of tax claims.—The House amendment authorizes the bank-

ruptcy court to rule on the merits of any tax claim involving an unpaid tax, fine, or penalty relating to a tax, or any addition to a tax, of the debtor or the estate. This authority applies, in general, whether or not the tax, penalty, fine, or addition to tax had been previously assessed or paid. However, the bankruptcy court will not have jurisdiction to rule on the merits of any tax claim which has been previously adjudicated, in a contested proceeding, before a court of competent jurisdiction. For this purpose, a proceeding the U.S. Tax Court is to be considered "contested" if the debtor filed a petition in the Tax Court by the commencement of the case and the Internal Revenue Service had filed an answer to the petition. Therefore, if a petition and answer were filed in the Tax Court before the title II petition was filed, and if the debtor later defaults in the Tax Court, then, under res judicata principles, the bankruptcy court could not then rule on the debtor's or the estate's liability for the same taxes.

The House amendment adopts the rule of the Senate bill that the bankruptcy court can, under certain conditions, determine the amount of tax refund claim by the trustee. Under the House amendment, if the refund results from an offset or counterclaim to a claim or request for payment by the Internal Revenue Service, or other tax authority, the trustee would not first have to file an administrative claim for refund with the tax authority.

However, if the trustee requests a refund in other situations, he would first have to submit an administrative claim for the refund. Under the House amendment, if the Internal Revenue Service, or other tax authority does not rule on the refund claim within 120 days, then the bankruptcy court may rule on the merits of the refund claim.

Under the Internal Revenue Code, a suit for refund of Federal taxes cannot be filed until 6 months after a claim for refund is filed with the Internal Revenue Service (sec. 6532(a)). Because of the bankruptcy aim to close the estate as expeditiously as possible, the House amendment shortens to 120 days the period for the Internal Revenue Service to decide the refund claim.

The House amendment also adopts the substance of the Senate bill rule permitting the bankruptcy court to determine the amount of any penalty, whether punitive or pecuniary in nature, relating to taxes over which it has jurisdiction.

Jurisdiction of the tax court in bankruptcy cases: The Senate amendment provided a detailed series of rules concerning the jurisdiction of the U.S. Tax Court, or similar State or local administrative tribunal to determine personal tax liabilities of an individual debtor. The House amendment deletes these specific rules and relies on procedures to be derived from broad general powers of the bankruptcy court.

Under the House amendment, as under present law, a corporation seeking reorganization under chapter 11 is considered to be personally before the bankruptcy court for purposes of giving that court jurisdiction over the debtor's personal liability for a nondischargeable tax.

The rules are more complex where the debtor is an individual under chapter 7, 11, or 13. An individual debtor or the tax authority can, as under section 17c of the present Bankruptcy Act, file a request that the bankruptcy court determine the debtor's personal liability for the balance of any nondischargeable tax not satisfied from assets of the estate. The House amendment intends to retain these procedures and also adds a rule staying commencement or continuation of any proceeding in the Tax Court after the bankruptcy petition is filed, unless and until that stay is lifted by the bankruptcy judge under section 362(a)(8). The House amendment also stays assessment as well as collection of a prepetition claim against the debtor (sec. 362 (a)(6)). A tax authority would not, however, be stayed from issuing a deficiency notice during the bankruptcy case (sec. (b)(7)). The Senate amendment repealed the existing authority of the Internal Revenue Service to make an immediate assessment of taxes upon bankruptcy (sec. 6871(a) of the code). See section 321 of the Senate bill. As indicated, the substance of that provision, also affecting State and local taxes, is contained in section 362(a)(6) of the House amendment. The statute of limitations is tolled under the House amendment while the bankruptcy case is pending.

Where no proceeding in the Tax Court is pending at the commencement of the bankruptcy case, the tax authority can, under the House amendment, file a claim against the estate for a prepetition tax liability and may also file a request that the bankruptcy court hear arguments and decide the merits of an individual debtor's personal liability for the balance of any nondischargeable tax liability not satisfied from assets of the estate. Bankruptcy terminology refers to the latter type of request as a creditor's complaint

to determine the dischargeability of a debt. Where such a complaint is filed, the bankruptcy court will have personal jurisdiction over an individual debtor, and the debtor himself would have no access to the Tax Court, or to any other court, to determine his personal liability for nondischargeable taxes.

If a tax authority decides not to file a claim for taxes which would typically occur where there are few, if any, assets in the estate, normally the tax authority would also not request the bankruptcy court to rule on the debtor's personal liability for a nondischargeable tax. Under the House amendment, the tax authority would then have to follow normal procedures in order to collect a nondischargeable tax. For example, in the case of nondischargeable Federal income taxes, the Internal Revenue Service would be required to issue a deficiency notice to an individual debtor, and the debtor could then file a petition in the Tax Court—or a refund suit in a district court—as the forum in which to litigate his personal liability for a nondischargeable tax.

Under the House amendment, as under present law, an individual debtor can also file a complaint to determine dischargeability. Consequently, where the tax authority does not file a claim or a request that the bankruptcy court determine dischargeability of a specific tax liability, the debtor could file such a request on his own behalf, so that the bankruptcy court would then determine both the validity of the claim against assets in the estate and also the personal liability of the debtor for any nondischargeable tax.

Where a proceeding is pending in the Tax Court at the commencement of the bankruptcy case, the commencement of the bankruptcy case automatically stays further action in the Tax Court case unless and until the stay is lifted by the bankruptcy court. The Senate amendment repealed a provision of the Internal Revenue case barring a debtor from filing a petition in the Tax Court after commencement of a bankruptcy case (sec. 6871(b) of the code). See section 321 of the Senate bill. As indicated earlier, the equivalent of the code amendment is embodied in section 362 (a)(8) of the House amendment, which automatically stays commencement or continuation of any proceeding in the Tax Court until the stay is lifted or the case is terminated. The stay will permit sufficient time for the bankruptcy trustee to determine if he desires to join the Tax Court proceeding on behalf of the estate. Where the trustee chooses to join the Tax Court proceeding, it is expected that he will seek permission to intervene in the Tax Court case and then request that the stay on the Tax Court proceeding be lifted. In such a case, the merits of the tax liability will be determined by the Tax Court, and its decision will bind both the individual debtor as to any taxes which are nondischargeable and the trustee as to the tax claim against the estate.

Where the trustee does not want to intervene in the Tax Court, but an individual debtor wants to have the Tax Court determine the amount of his personal liability for nondischargeable taxes, the debtor can request the bankruptcy court to lift the automatic stay on existing Tax Court proceedings. If the stay is lifted and the Tax Court reaches its decision before the bankruptcy court's decision on the tax claim against the estate, the decision of the Tax Court would bind the bankruptcy court under principles of res judicata because the decision of the Tax Court affected the personal liability of the debtor. If the trustee does not wish to subject the estate to the decision of the Tax Court if the latter court decides the issues before the bankruptcy court rules, the trustee could resist the lifting of the stay on the existing Tax Court proceeding. If the Internal Revenue Service had issued a deficiency notice to the debtor before the bankruptcy case began, but as of the filing of the bankruptcy petition the 90-day period for filing in the Tax Court was still running, the debtor would be automatically stayed from filing a petition in the Tax Court. If either the debtor or the Internal Revenue Service

then files a complaint to determine dischargeability in the bankruptcy court, the decision of the bankruptcy court would bind both the debtor and the Internal Revenue Service.

The bankruptcy judge could, however, lift the stay on the debtor to allow him to petition the Tax Court, while reserving the right to rule on the tax authority's claim agains assets of the estate. The bankruptcy court could also, upon request by the trustee, authorize the trustee to intervene in the Tax Court for purposes of having the estate also governed by the decision of the Tax Court.

In essence, under the House amendment, the bankruptcy judge will have authority to determine which court will determine the merits of the tax claim both as to claims against the estate and claims against the debtor concerning his personal liability for nondischargeable taxes. Thus, if the Internal Revenue Service, or a State or local tax authority, files a petition to determine dischargeability, the bankruptcy judge can either rule on the merits of the claim and con-

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makes no substantive change in the law. As is customary, it was prepared and submitted to the Judiciary Committee by the Office of the Law Revision Counsel.

Concern has sometimes been expressed that mere changes in terminology and style, such as uniform use of the present tense and the active voice so far as possible, will result in changes in substance or impair the precedental value of earlier judicial decisions and other interpretations.

This fear might have some merit if this were the usual kind of amendatory legislation in which it can be inferred that a change of language is intended to change substance. In a codification law, however, the courts uphold the contrary presumption, that the law is intended to remain substantively unchanged. I might note that the committee report on this legislation contains over a dozen citations to U.S. Supreme Court decisions and other authorities affirming this principle.

I ask for a "yea" vote on H.R. 4778.

□ 2020

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. BROOKS. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore (Mr. POSHARD). The question is on the motion offered by the gentleman from Texas [Mr. BROOKS] that the House suspend the rules and pass the bill, H.R. 4778, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

BANKRUPTCY REFORM ACT OF 1994

Mr. BROOKS. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 5116) to amend title II of the United States Code, as amended.

The Clerk read as follows:

H.R. 5116

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

(a) SHORT TITLE.—This Act may be cited as the "Bankruptcy Reform Act of 1994".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

TITLE I—IMPROVED BANKRUPTCY ADMINISTRATION

SEC. 101. EXPEDITED HEARING ON AUTOMATIC STAY.

The last sentence of section 362(e) of title 11, United States Code, is amended—

(1) by striking "commenced" and inserting "concluded", and

(2) by inserting before the period at the end the following:

", unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances".

SEC. 102. JURISDICTION TO REVIEW INTERLOCUTORY ORDERS INCREASING OR REDUCING CERTAIN TIME PERIODS FOR FILING PLAN.

Section 158(a) of title 28, United States Code, is amended by striking "from" the first place it appears and all that follows through "decrees,", and inserting the following:

"(1) from final judgments, orders, and decrees;

"(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

"(3) with leave of the court, from other interlocutory orders and decrees;".

SEC. 103. EXPEDITED PROCEDURE FOR REAFFIRMATION OF DEBTS.

(a) REAFFIRMATION.—Section 524(c) of title 11, United States Code, is amended—

(1) in paragraph (2)—

(A) by inserting "(A)" after "(2)",

(B) by adding "and" at the end, and

(C) by inserting after subparagraph (A), as so designated, the following:

"(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;", and

(2) in paragraph (3)—

(A) in the matter preceding subparagraph (A) by striking "such agreement" the last place it appears,

(B) in subparagraph (A)—

(i) by inserting "such agreement" after "(A)", and

(ii) by striking "and" at the end,

(C) in subparagraph (B)—

(i) by inserting "such agreement" after "(B)", and

(ii) by adding "and" at the end, and

(3) by adding at the end the following:

"(C) the attorney fully advised the debtor of the legal effect and consequences of—

"(i) an agreement of the kind specified in this subsection; and

"(ii) any default under such an agreement;".

(b) EFFECT OF DISCHARGE.—The third sentence of section 524(d) of title 11, United States

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overwhelming liability. It is written, however, so that Johns-Manville and UNR, both of which have met and surpassed the standards imposed in this section, will be able to take advantage of the certainty it provides without having to reopen their cases.

Section 111 contains a rule of construction to make clear that the special rule being devised for the asbestos claim trust/injunction mechanism is not intended to alter any authority bankruptcy courts may already have to issue injunctions in connection with a plan or reorganization. Indeed, Johns-Manville and UNR firmly believe that the court in their cases had full authority to approve the trust/injunction mechanism. And other debtors in other industries are reportedly beginning to experiment with similar mechanisms. The Committee expresses no opinion as to how much authority a bankruptcy court may generally have under its traditional equitable powers to issue an enforceable injunction of this kind. The Committee has decided to provide explicit authority in the asbestos area because of the singular cumulative magnitude of the claims involved. How the new statutory mechanism works in the asbestos area may help the Committee judge whether the concept should be extended into other areas.

Section 112. Authority of bankruptcy judges to conduct jury trials in civil proceedings

This section would amend title 28 of the United States Code to clarify that bankruptcy judges may conduct jury trials and enter appropriate orders consistent with those trials if designated by the district court and with the express consent of all parties to the bankruptcy proceeding.

This amendment would clarify a recent Supreme Court decision and resolve conflicting opinions among the different circuits regarding this issue. The Supreme Court in conflicting opinions among the different circuits regarding this issue. The Supreme Court in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), held that in bankruptcy core proceedings, there is a constitutional right to a trial by jury.

The *Granfinanciera* court had no finding on whether bankruptcy judges could conduct civil trials, and the circuits have reached contrary opinions regarding this issue. Five circuits have held that, in the absence of enabling legislation, bankruptcy judges could not hold jury trials. See *Official Committee of Unsecured Creditors* v. *Schwartzman (In re Stansbury Poplar Place, Inc.)*, 13 F.3d 123 (4th Cir. 1993); *In re Grabill Corp.*, 967 F.2d 1153, *reh'g en banc denied*, 978 F.2d 1126 (7th Cir. 1992); *Rafoth* v. *National Union Fire Insurance Co (In re Baker & Getty Financial Services Inc.*, 954 F.2d 1169 (6th Cir. 1992); *Kaiser Steel Corp* v. *Frates (In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990); *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990). The Second Circuit has been the lone circuit to hold that bankruptcy judges have implicit authority to conduct jury trials. See *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990).

Section 113. Sovereign immunity

This section would effectively overrule two Supreme Court cases that have held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code. In enacting section 106(c), Congress intended to make provisions of title 11 that encompassed the words "creditor," "entity," or "governmental unit" applicable to the States. Congress also intended to make the States subject to a money judgment. But the Supreme Court in *Hoffman* v. *Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989), held that even if the State did not file a claim, the trustee in bankruptcy may not recover a money judgment from the State notwithstanding section 106(c). This holding had the effect of providing that preferences could not be recovered from the States. In using such a narrow construction, the Court held that use of the "trigger words" would only bind the States, and not make them subject to a money judgment. The Court did not find in the text of the statute an "unmistakenly clear" intent of Congress to waive sovereign immunity in accordance with the language promulgated in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985).

The Court applied this reasoning in *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011 (1992), in not allowing a trustee to recover a postpetition payment by a chapter 11 debtor to the Internal Revenue Service. The Court found that there was no such waiver expressly provided within the text of the statute.

This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard. Of course the entire Bankruptcy Code is applicable to governmental units where sovereign immunity is not or cannot be asserted. As suggested by the Supreme Court, section 106(a)(1) specifically lists those sections of title 11 with respect to which sovereign immunity is abrogated. This allows the assertion of bankruptcy causes of action, but specifically excludes causes of action belonging to the debtor that become property of the estate under section 541. The bankruptcy and appellate courts will have jurisdiction to apply the specified sections to any kind of governmental unit as provided in section 106(a)(2). The bankruptcy court may issue any kind of legal or equitable order, process, or judgment against a governmental unit authorized by these sections or the rules, but may not enter an award for punitive damages. Furthermore, in awarding fees or costs under the Bankruptcy Code or under the Bankruptcy Rules, the award is subject to the hourly rate limitations contained in section 2412(d)(2)(a), title 28, United States Code, and these limitations are applicable to all governmental units, not just the Federal Government. Section 106(a)(4) permits an order, process, or judgment to be enforced against a governmental unit in accordance with appropriate nonbankruptcy law. Thus, an order against a governmental unit will not be enforceable by attachment or seizure of government assets, but will be subject to collection in the same manner and subject to the same nonbankruptcy law procedures as other judgments that are enforceable against governmental units. Of course, the court retains ample authority to enforce nonmonetary orders and judgments. Nothing in this section is intended to create substantive claims for relief or causes of action not otherwise existing under title 11, the Bankruptcy Rules, or nonbankruptcy law.

Section 106(b) is clarified by allowing a compulsory counterclaim to be asserted against a governmental unit only where such unit has actually filed a proof of claim in the bankruptcy case. This has the effect of overruling contrary case law, such as *Sullivan* v. *Town & Country Nursing Home Services, Inc.*, 963 F.2d 1146 (9th Cir. 1992); *In re Gribben*, 158 B.R. 920 (S.D.N.Y. 1993); and *In re the Craftsman, Inc.*, 163 B.R. 68 (Bankr. W.D. Tex. 1994), that interpreted section 106(a) of current law.

Section 114. Service of process in bankruptcy proceedings on an insured depository institution

This section operates to amend bankruptcy rule 7004 to require that service of process to an insured depository institution be accomplished by certified mail in a contested matter or adversary proceeding. The rule that is presently in operation only requires that service be achieved by first class mail.

Section 115. Meetings of creditors and equity security holders

This section, applicable only in chapter 7 cases, requires the trustee to orally examine the debtor to ensure that he or she is informed about the effects of bankruptcy, both positive and negative. Its purpose is solely informational; it is not intended to be an interrogation to which the debtor must give any specific answers or which could be used against the debtor in some later proceeding. No separate record need be kept of the examination since it will be preserved along with the remainder of the record of the meeting, which normally is recorded on tape.

The trustee conducting the meeting of creditors is directed to orally inquire whether the debtor is aware of the consequences of bankruptcy, including protections such as those provided by the discharge and the automatic stay, as well as the fact that the bankruptcy filing will appear on the debtor's credit history. Since different creditors treat bankruptcy debtors differently, the trustee is not expected to predict whether the bankruptcy filing will make it more or less difficult for the debtor to obtain credit; some creditors may treat the debtor more favorably after bankruptcy has removed all other debts, and many creditors consider a bankruptcy filing a barrier to new credit only if it occurred in the 2 or 3 years prior to the credit application. For the same reasons, it is not expected that the trustee would predict whether a dismissal or conversion of the bankruptcy which has already been filed would improve the debtor's chances of obtaining credit.

The trustee must also verify that the debtor has knowingly signed the section of the bankruptcy petition stating the debtor's awareness of the right to file under other chapters of the Code.

Finally, the trustee must make sure the debtor is aware of the effect of reaffirming a debt. Since section 103 of the bill eliminates for most debtors the warnings and explanations concerning reaffirmation previously given by the court at the discharge hearing, it is important that trustees explain not only the procedures for reaffirmation, but also the potential risks of reaffirmation and the fact that the debtor may voluntarily choose to repay any debt to a creditor without reaffirming the debt, as provided in Bankruptcy Code section 524(f).

In view of the amount of information involved and the limits on the time available for meetings of creditors, trustees or courts may provide written information on these topics at or in advance of the meeting and the trustee may then ask questions to ensure that the debtor is aware of the information.

Section 116. Tax assessment

This section expands the tax exception to the automatic stay that is contained in 11 U.S.C. §362(b)(9). This section will lift the automatic stay as it applies to a tax audit, a demand for tax returns, assessment of an uncontested tax liability, or the making of certain assessments of tax and issuance of a notice and demand for payment for such assessment. The language of this provision is only intended to apply to sales or transfers to the debtor. It has no application to sales or transfers to third parties, such as in sales free and clear of tax liens under section 363(f).

copy of such order to the persons specified in subdivision (b) of this rule.

Rule 405. Waiver of discharge.

Any bankrupt may waive his right to discharge by a writing filed with the court.

Rule 406. Implied waiver of discharge.

If the bankrupt fails to attend and submit himself to examination at the first meeting of creditors, at any meeting specially called for his examination, or at the trial on a complaint objecting to his discharge, the court on motion shall, or on its own initiative may, set a time for hearing to determine whether the bankrupt shall be deemed to have waived his right to a discharge. Notice of the hearing shall be given the bankrupt and such other parties in interest as the court may designate.

Rule 407. Burden of proof in objecting to discharge.

At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the facts essential to his objection.

Rule 408. Notice of nondischarge.

If a waiver of discharge is filed, or if an order is entered denying or revoking a discharge or deeming the right thereto to have been waived, the court shall, within 30 days after the filing of the waiver or the entry of the order, give notice thereof to all creditors in the manner provided in Rule 203.

Rule 409. Determination of dischargeability of a debt; judgment on nondischargeable debt; jury trial.

(a) Proceeding to determine dischargeability.

(1) Persons entitled to file complaint; time for filing in ordinary case.—A bankrupt or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt. Except as provided in paragraph (2) of this subdivision, the complaint may be filed at any time, and a case may be reopened without

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the payment of an additional filing fee for the purpose of filing a complaint under this rule.

(2) *Time for filing complaint under § 17c (2) of the act; notice of time fixed.*—The court shall make an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 17c (2) of the Act. The time shall be not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors, except that if notice of no dividend is given pursuant to Rule 203 (b), the court may fix such time as early as the first date set for the first meeting of creditors. The court shall give creditors at least 30 days' notice of the time so fixed except that only 10 days' notice is required if notice of no dividend is given under Rule 203 (b). Such notice shall be given to all creditors in the manner provided in Rule 203. The court may for cause, on its own initiative or on application of any party in interest, extend the time fixed under this paragraph.

(b) *Claim and demand for judgment on nondischargeable debt.*—If his claim has not yet been reduced to judgment, the creditor shall include in a complaint or answer filed under subdivision (a) of this rule a statement of his claim and demand for judgment on the debt as provided in § 17c (3) of the Act.

(c) *Jury trial.*—Either party may demand a trial by jury of any issue triable of right by a jury by serving on the other party and filing a demand therefor in writing at any time after the filing of a complaint under this rule and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed on a pleading of the party. In his demand the party shall specify the issues which he wishes to be so tried. If he has demanded trial by jury for only some of the issues so triable of right, any other party, within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other issues so triable of right in the proceeding.

The trial of an issue for which a jury trial has been demanded shall be placed on the jury calendar of the district court when it is ready for trial unless (1) the bankruptcy judge determines after hearing on notice that the issue is not triable of right by a jury or (2) a local rule of court provides otherwise. Issues not triable of right by a jury may be tried by the bankruptcy judge, and motions and applications in the proceeding other than those necessarily incidental to and made during the course of the jury trial may be determined by the bankruptcy judge. The failure of a party to serve and file a demand in accordance with this rule constitutes a waiver by him of trial by jury. Rules 47–51 of the Federal Rules of Civil Procedure apply to a jury trial under this sudivision.

(*d*) *Applicability of rules in Part VII.*—A proceeding commenced by a complaint filed under this rule is governed by the rules in Part VII.

Part V. Courts of Bankruptcy; Officers and Personnel; Their Duties

Rule 501. Courts of bankruptcy and referees' offices.

(*a*) *Courts of bankruptcy always open.*—The court of bankruptcy shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(*b*) *Meetings and hearings; orders in chambers.*—All meetings of creditors and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a bankruptcy judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(c) *Referee's office.*—The referee's principal office with a clerical assistant in attendance shall be open during business hours on all days except Saturdays, Sundays, and the legal holidays as listed in Rule 6 (a) of the Federal Rules of Civil Procedure, but a local rule or order may provide that the referee's office shall be open for specified hours on Saturdays or particular legal holidays other than those listed in Rule 77 (c) of the Federal Rules of Civil Procedure.

Rule 502. Referees' bonds not required.

A referee shall not be required to file a bond in order to qualify.

Rule 503. Restrictions on referees.

A referee shall not engage in any transaction, directly or indirectly, with the estate and shall not act as trustee or receiver in any case under the Act. An active full-time referee shall not engage in the practice of law, and an active part-time referee shall not act as attorney for any party in any case under the Act.

Rule 504. Books, records, and reports of referees.

(a) *Records to be kept; reports to be made.*—The referee shall keep a docket for each case referred to him and shall keep a list of claims filed against the estate in each case in which it appears there will be a distribution to unsecured creditors after payment of the costs and expenses of administration. He shall keep such other books and records and make such reports as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. All papers filed with the referee, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the referee's docket. These entries shall be brief but shall show the nature

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95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 95-595

BANKRUPTCY LAW REVISION

REPORT

OF THE

COMMITTEE ON THE JUDICIARY

together with

SEPARATE, SUPPLEMENTAL, AND
SEPARATE ADDITIONAL VIEWS

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 8200]

SEPTEMBER 8, 1977.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed

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95TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 95-595

BANKRUPTCY LAW REVISION

SEPTEMBER 8, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. EDWARDS of California, from the Committee on the Judiciary, submitted the following

REPORT

together with

SEPARATE, SUPPLEMENTAL, AND SEPARATE ADDITIONAL VIEWS

[Including Cost Estimate of the Congressional Budget Office]

[To accompany H.R. 8200]

The Committee on the Judiciary, to whom was referred the bill (H.R. 8200) to establish a uniform law on the subject of Bankruptcies, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass. The committee amendment strikes out all after the enacting clause and inserts a new text, which appears in italic type in the reported bill.

The amendment is an amendment in the nature of a substitute for the bill, incorporating six substantive amendments adopted by the committee, and numerous technical, drafting, and style changes to the bill. A detailed description of the six amendments adopted during committee deliberations is incorporated into the description of the bill contained in this Report, which addresses itself to the amendments in the nature of a substitute. Briefly summarized, they are as follows:

The first amendment provides an alternative to the United States trustee in the appointment of private standing chapter 13 trustees. The amendment permits United States trustees, with the approval of the Attorney General, to employ private standing trustees or public assistant United States trustees to serve in chapter 13 cases.

The second amendment limits the consumer priority in § 507(5) of proposed title 11 to $2,400 per individual.

The third amendment changes section 303(b) of the bill to delete the repealer of section 4(e) of the Perishable Agricultural Commodities Act and replace the repealer with an amendment to section 4(e) of that Act to allow suspension of a license in the event of bankruptcy if the circumstances of the bankruptcy warrant. This changes current

the debtor the rights the trustee could have pursued if the trustee chooses not to pursue them. The debtor is given no greater rights under this provision than the trustee, and thus, the debtor's avoiding powers under proposed 11 U.S.C. 544, 545, 547, and 548, are subject to proposed 11 U.S.C. 546, as are the trustee's powers.

These subsections are cumulative. The debtor is not required to choose which he will use to gain an exemption. Instead, he may use more than one in any particular instance, just as the trustee's avoiding powers are cumulative.

Subsection (i) permits recovery by the debtor of property transferred in an avoided transfer from either the initial or subsequent transferees. It also permits preserving a transfer for the benefit of the debtor. Under either case, the debtor may exempt the property recovered or preserved.

Subsection (k) makes clear that the debtor's aliquot share of the costs and expenses recovery of property that the trustee recovers and the debtor later exempts, and any costs and expenses of avoiding a transfer by the debtor that the debtor has not already paid.

Subsection (l) requires the debtor to file a list of property that he claims as exempt from property of the estate. Absent an objection to the list, the property is exempted. A dependent of the debtor may file it and thus be protected if the debtor fails to file the list.

Subsection (m) requires the clerk of the bankruptcy court to give notice of any exemptions claimed under subsection (l), in order that parties in interest may have an opportunity to object to the claim.

Subsection (n) provides the rule for a joint case: each debtor is entitled to the Federal exemptions provided under this section or to the State exemptions, whichever the debtor chooses.

§ *523. Exceptions to discharge*

This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act § 17c granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1471(b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act § 17c. The Rules of Bankruptcy Procedure will specify, as they do today, who may request determinations of dischargeability, subject, of course, to proposed 11 U.S.C. 523(c), and when such a request may be made. Proposed 11 U.S.C. 350, providing for reopening of cases, provides one possible procedure for a determination of dischargeability and related issues after a case is closed.

Subsection (a) lists eight kinds of debts excepted from discharge. Taxes that are entitled to priority are excepted from discharge under paragraph (1). In addition, taxes with respect to which the debtor made a fraudulent return or willfully attempted to evade or defeat, or with respect to which a return (if required) was not filed or was not filed after the due date and after one year before the bankruptcy case are excepted from discharge. If the taxing authority's claim has

Bankruptcy Reform Act of 1978 . . . . . Document 54
Senate, 95th Congress, 2nd Session, Report No. 95-1106
(to accompany S. 2266), August 10 (legislative day, May 17), 1978.

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Calendar No. 1026

95TH CONGRESS
2d Session

SENATE

REPORT
No. 95-1106

BANKRUPTCY REFORM ACT OF 1978

AUGUST 17 (legislative day, MAY 17), 1978.—Ordered to be printed

Mr. LONG, from the Committee on Finance, submitted the following

REPORT

[To accompany S. 2266]

The Committee on Finance, to which was referred the bill (S. 2266) to establish a uniform law on the subject of bankruptcy, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. SUMMARY

S. 2266, the Bankruptcy Reform Act of 1978, was reported by the Committee on the Judiciary on July 14, 1978 (S. Rept. 95-989), and, by prior agreement, was referred to the Committee on Finance for a period not to exceed 30 days for consideration and recommendations concerning tax-related provisions of the bill. The referral specifically covers sections 346, 505, 507, 523, 728, 1146 and 1331 of the proposed new title 11 of the United States Code (contained in sec. 101 of the bill). These provisions deal with determining tax liabilities in bankruptcy, clarifying the jurisdiction of different courts to rule on these issues, and defining the priority and dischargeability of tax claims against the debtor's estate.

S. 2266 and H.R. 8200, the House-passed bill on the same subject, would modernize bankruptcy law for the first time in 40 years, in light of major changes in debtor-creditor relations during this period. The current bankruptcy system originated in 1898, and the last major revision of the Bankruptcy Act occurred in 1938.

The overall objectives of S. 2266 and H.R. 8200 are to make bankruptcy procedures more efficient, to balance more equitably the interests of different creditors, to give greater recognition to the interests of general unsecured creditors who enjoy no priority in the distribution of the assets of the debtor's estate, and to give the debtor a less encumbered "fresh start" after bankruptcy.

B. Determination of Tax Liability (sec. 505 of title 11)

S. 2266

Authority of bankruptcy court to rule on merits

This section follows present law (sec. 2a(2A)) of the Bankruptcy Act) in authorizing the bankruptcy court to rule on the merits of tax claims involving an unpaid tax of the debtor, provided that no court or administrative tribunal has previously ruled, in a contested proceeding, on the debtor's liability for the tax.

Under present bankruptcy law (sec. 17 of the Bankruptcy Act) a creditor or a debtor who is an individual can file an application with the bankruptcy court (either before or after the bankruptcy case is closed) to ask that court to rule on the extent of his personal liability after the case for nondischargeable taxes. The intention of S. 2266 is to retain the substance of this rule, although the rule does not appear in express terms in the bill (S. Rept. 95–989, pp. 153–154).

Audit of trustee's returns

S. 2266 also provides a procedure for obtaining a mandatory audit of tax returns filed by the trustee in a liquidation or reorganization case (sec. 505(c) of title II). Under the procedure, before the case can be closed, the trustee would be required to request a tax audit by the local, State or Federal tax authority of all tax returns filed by the trustee. The taxing authority would have to notify the trustee and the bankruptcy court within 60 days whether it accepts the returns or desires to audit the returns more fully. If an audit is conducted, the taxing authority would have to notify the trustee of any tax deficiency within 4 months (subject to extension of time if the bankruptcy court approves). If the trustee did not agree with the results of the audit, the trustee could ask the bankruptcy court to resolve the dispute. Once the trustee's tax liability for administration period taxes has thus been determined, the legal effect in a liquidation case under chapter 7 of title 11 would be to discharge the trustee (and any predecessor of the trustee), and also the debtor, from any further liability for these taxes.

In a reorganization case the trustee could obtain a discharge from personal liability through the prompt audit procedure, but the tax authority could still claim a deficiency against the debtor (or his successor) for additional taxes due on returns filed during the proceeding.

The prompt audit procedure would not be available with respect to any tax liability as to which any return required to be filed on behalf of the estate is not filed with the proper tax authority.

Committee Amendments

Audit of trustee's returns

The committee's amendment would modify this provision of S. 2266 by making the prompt audit mandatory only if the trustee determines that a surplus is reasonably likely to be returned to and individual debtor in either a liquidation case under chapter 7 or a reor-

Calendar No. 1182

91ST CONGRESS
2d Session

SENATE

REPORT
No. 91-1173

AMENDING THE BANKRUPTCY ACT

SEPTEMBER 16, 1970.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 4247]

The Committee on the Judiciary, to which was referred the bill (S. 4247) to amend the Bankruptcy Act, sections 2, 14, 15, 17, 38, and 58, to permit the discharge of debts in a subsequent proceeding after denial of discharge for specified reasons in an earlier proceeding, to authorize courts of bankruptcy to determine the dischargeability or nondischargeability of provable debts, and to provide additional grounds for the revocation of discharges, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to authorize the bankruptcy courts to determine dischargeability.

STATEMENT

The committee had before it a bill, S. 3523, introduced by Hon. Quentin N. Burdick on February 27, 1970.

On August 17, 1970, Senator Burdick introduced a perfected version of the bill, S. 4247.

In introducing the new bill, Senator Burdick set forth the purpose of the bill and the need for it as follows:

> Mr. President, I introduce, for appropriate reference, a bill to amend the Bankruptcy Act.

This bill is a perfected version, which has wide support, of S. 3523 which I introduced on February 27, 1970.

It is identical to H.R. 18871, a similar perfected version, which was introduced in the House of Representatives on August 10, 1970.

The purpose of the proposed legislation is to effectuate more fully the discharge in bankruptcy by rendering it less subject to abuse by harrassing 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 which, if not pleaded, is waived.

The proposed legislation is meant to correct this abuse. Under it, the matter of dischargeability of the type of debts commonly giving rise to the problem, that is, those allegedly incurred as a result of loans based upon false financial statements, will be within the exclusive jurisdiction of the bankruptcy court. The creditor asserting nondischargeability will have to file a timely application in the absence of which the debt will be deemed discharged. The bill provides that at the same time notice is given to creditors of the date by which objections to discharge must be filed, creditors are also notified of the date by which applications to determine nondischargeability of their debts must be filed. When timely filed, the matter will be heard in the bankruptcy court and final disposition made of it. The right to trial by jury as it presently exists is retained and the creditor's application does not subject him to the jurisdiction of the bankruptcy court for any other purpose.

The actual focus of the bill is to give greater effect to the discharge for those who need it most, that is, the ordinary wage earner. It is as to this type of bankrupt that the present abuse of the bankruptcy discharge occurs.

Section 4 of the bill is meant to accord greater protection to creditors by expanding the causes in section 15 of the Bankruptcy Act for which a discharge, once granted, can be revoked. Additionally, section 17b of the act will be amended to clarify existing case law regarding the status of debts during two or more bankruptcy proceedings of the same bankrupt, the earlier of which did not result in the bankrupt's obtaining a discharge.

In all, the bill, without changing the policy adopted by the Congress in determining when and as to what debts a discharge may be obtained, is all inclusive in updating the procedural aspects of the discharge to protect more fully the interests of both classes, bankrupts and creditors.

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(to accompany S. 2266), July 14 (legislative day, May 17), 1978.

DOCUMENT 52

95TH CONGRESS 2d Session } SENATE { REPORT No. 95-989

BANKRUPTCY REFORM ACT OF 1978

JULY 14 (legislative day, MAY 17), 1978.—Ordered to be printed

Mr. DECONCINI, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2266]

The Committee on the Judiciary, to which was referred the bill, S. 2266, to establish a uniform law on the subject of bankruptcies, having considered the same, reports favorably thereon and recommends that the bill in the nature of a substitute do pass. The committee amendment strikes out all after the enacting clause and inserts a new text, which appears in italic type in the reported bill.

PURPOSE OF THE BILL

The purpose of the bill is to modernize the bankruptcy law by codifying a new title 11 that will embody the substantive law of bankruptcy and to make extensive amendments to title 28, Judiciary and Judicial Procedure, that will encompass the structure of the revised bankruptcy courts.

PURPOSE OF THE AMENDMENT

The amendment in the nature of a substitute reflects, testimony received by the committee and the changes that resulted. The purpose of the revised bill remains to modernize the bankruptcy law.

INTRODUCTION

In 1970, Congress created the Commission on the Bankruptcy Laws of the United States to study and recommend changes in bankruptcy laws. The Commission became operational in June 1971, and filed its final report with Congress on July 30, 1973. Its report was in two parts. Part I contained the Commission's findings and recommendations.

fer was involuntary and the debtor did not conceal the property. If the debtor wishes to preserve his right to pursue any action under this provision, then he must intervene in any action brought by the trustee based on the same cause of action. It is not intended that the debtor be given an additional opportunity to avoid a transfer or that the transferee should have to defend the same action twice. Rather, the section is primarily designed to give the debtor the rights the trustee could have, but has not, pursued. The debtor is given no greater rights under this provision than the trustee, and thus, the debtor's avoiding powers under proposed sections 544, 545, 547, and 548, are subject to proposed 546, as are the trustee's powers.

These subsections are cumulative. The debtor is not required to choose which he will use to gain an exemption. Instead, he may use more than one in any particular instance, just as the trustee's avoiding powers are cumulative.

Subsection (h) permits recovery by the debtor of property transferred by an avoided transfer from either the initial or subsequent transferees. It also permits preserving a transfer for the benefit of the debtor. In either event, the debtor may exempt the property recovered or preserved.

Subsection (i) makes clear that the debtor may exempt property under the avoiding subsections (f) and (h) only to the extent he has exempted less property than allowed under subsection (b).

Subsection (j) makes clear that the liability of the debtor's exempt property is limited to the debtor's aliquot share of the costs and expenses recovery of property that the trustee recovers and the debtor later exempts, and any costs and expenses of avoiding a transfer by the debtor that the debtor has not already paid.

Subsection (k) requires the debtor to file a list of property that he claims as exempt from property of the estate. Absent an objection to the list, the property is exempted. A dependent of the debtor may file it and thus be protected if the debtor fails to file the list.

Subsection (l) provides the rule for a joint case.

Section 523. Exceptions to discharge

This section specifies which of the debtor's debts are not discharged in a bankruptcy case, and certain procedures for effectuating the section. The provision in Bankruptcy Act § 17c granting the bankruptcy courts jurisdiction to determine dischargeability is deleted as unnecessary, in view of the comprehensive grant of jurisdiction prescribed in proposed 28 U.S.C. 1334(b), which is adequate to cover the full jurisdiction that the bankruptcy courts have today over dischargeability and related issues under Bankruptcy Act § 17c. The Rules of Bankruptcy Procedure will specify, as they do today, who may request determinations of dischargeability, subject, of course, to proposed 11 U.S.C. 523(c), and when such a request may be made. Proposed 11 U.S.C. 350, providing for reopening of cases, provides one possible procedure for a determination of dischargeability and related issues after a case is closed.

Subsection (a) lists nine kinds of debts excepted from discharge. Taxes that are excepted from discharge are set forth in paragraph (1). These include claims against the debtor which receive priority in the second, third and sixth categories (§ 507(a)(3)(B) and (C) and (6).

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"demonstrates congressional judgment that certain problems—*e.g.*, those of financing government—override the value of giving the debtor a wholly fresh start."[44] Finding that Congress intended the personal liability for unpaid tax debts to survive bankruptcy, it found no different intention with regard to the interest on such taxes. The *Bruning* case will remain good law even in light of the 1966 amendments to § 17 making some tax debts dischargeable.[45] Where tax debts are discharged under § 17, post-petition interest and penalties will also be discharged. If the tax debt is within one of the enumerated exceptions and is not discharged, the *Bruning* case may be applied to post-petition interest and penalties making them collectible out of the debtor's after acquired property.

[10]—Proper Forum To Determine Dischargeability of Tax Claim. § 17c(1).

In 1970, § 17c was added to the Act which, together with §§ 2a(12), 14, and 38, all as amended, give to the bankruptcy court jurisdiction to determine the dischargeability of particular debts;[45a] § 17c and Bankruptcy Rule 409 contain many provisions relative to such grant of jurisdiction. In effect, the determination of whether debts are dischargeable under § 17a falls within the exclusive jurisdiction of the bankruptcy court with respect to certain types of debts, and only as a matter of concurrent jurisdiction with respect to other types of debts.

Section 17c(1) provides: "The bankrupt or any creditor may file an application with the court for the determination of the dischargeability of any debt."[45b] By virtue of the permissive grant to file the application, and by comparison with § 17c(2), it is clear that the bankruptcy court only has jurisdiction concurrent with the appropriate local court, unless the debt falls within the coverage of § 17c(2). That paragraph of subdivision c provides that applications to determine the dischargeability of debts, claimed nondischargeable because of clauses (2), (4), and (8) of § 17a, *must* be filed in the bankruptcy court within the time specified, *and, if they are not, they are deemed to*

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44 For cases applying the *Bruning* rule, see In re WNCN, Inc., 246 F. Supp. 30 (S.D.N.Y. 1965) (tax penalties remain a personal liability); In re Oxford Inv. Co. 246 F. Supp. 651 (S.D. Cal. 1965), citing Treatise.

45 *Bruning* distinguished in In re Vaughan (E.D. Ky. 1968), 292 F. Supp. 731, a Chapter XI proceeding, where prepetition taxes were fully paid, whereas in *Bruning*, the interest was on unpaid taxes.

See ¶ 17.14 and subheads [1]–[7], *supra*.

45a Pub. L. No. 91–467, 91st Cong., 2d Sess. (1970). See discussion of added § 17c, ¶ 17.28A, *infra*.

45b Bankruptcy Rule 409(a)(1) provides: "A bankrupt or any creditor may file a complaint with the court to obtain a determination of the dischargeability of any debt."

be discharged. Thus, debts falling within other clauses of § 17a may have the issue of dischargeability tried in courts other than of bankruptcy unless an application (complaint) is filed by either the creditor or bankrupt in the bankruptcy court.

The tax claim rendered nondischargeable by § 17a(1), if at all, is, therefore, one of the types for which the bankruptcy court has concurrent and not exclusive jurisdiction. The question may then be raised as to when the complaint to determine the dischargeability of the tax debt may be filed in the bankruptcy court. Clearly, under Bankruptcy Rule 409(a)(1), the bankrupt may file the complaint therein before any action has been commenced in any other forum. Once the complaint is filed, another court may not oust the bankruptcy court of its jurisdiction. And, if the action has already been instituted in another court, it will still be possible for the bankrupt to file his complaint in the bankruptcy court which could, by virtue of § 17c(4), oust the original court of its power to try the action. Section 17c(4) provides:

"The provisions of this subdivision c shall apply whether or not an action on a debt is then pending in another court and any party may be enjoined from instituting or continuing such action prior to or during the pendency of a proceeding to determine its dischargeability under this subdivision c."

It may well be that the bankrupt cannot delay too long filing his complaint in the bankruptcy court once an action has been commenced in another forum. It would seem that the bankruptcy court could refuse to enjoin continuation of the state or federal court action on the ground of laches as applied to the bankrupt's delay. There should be some reasonable period, including time and progress of the original action as part of the determining factors, during which the bankrupt (or creditor) may file the complaint, and beyond which the bankruptcy court may refuse to entertain it.

¶ 17.15. Liabilities for Certain Acts Specified in § 17a(2).

Section 17a(2) excepts from a discharge provable debts which

"(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another." [45c]

45c As amended in 1970, Pub. L. No. 91-467. To indicate the changes made by the 1970 amendment, § 17a(2) is set forth with the deleted matter in brackets and the added matter in italics:

"(2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materi-