U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D C 20530*

07-CV-015

February 15, 2008

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D C. 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Civil Procedure. As the nation's principal litigator in the Federal courts, the Department has a strong and longstanding interest in participating in the rules amendment process, and in sharing with the Committee its experiences with the Rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Committee's proposed amendments to Rules 8(c), 13(f), 15(a), and 81, and proposed Rule 62 1 The Department of Justice is sending a separate letter to the Committee that addresses the proposed "time computation" amendments.

Proposed Amendment to Rule 8(c)

The Standing Committee has proposed that "discharge in bankruptcy" be removed from the list of affirmative defenses in Rule 8(c). The draft Committee Note explains that, "[u]nder 11 USC § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt," operates as an injunction against actions "to collect, recover, or offset a discharged debt," and "[t]hese consequences cannot be waived." The Note adds that if a claimant persists in an action on a discharged claim, the "effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim "

The Department opposes this change. If, however, the change is adopted, it should be accompanied by a Committee Note to the effect that "the intent of the change is only to require that creditors plead that the debt was excepted from discharge, and not meant to imply that a determination of nondischargeability must first be obtained from a bankruptcy court."

First, the underlying premise for the change is incorrect, and omitting this affirmative defense will have unanticipated consequences, particularly if it is not accompanied with a Committee Note clarifying that the sole intent of the change is to require creditors to plead that a debt was excepted from discharge The Note should clarify that the change is not meant to suggest that determinations of dischargeability must first be obtained from a bankruptcy court. The change will cause confusion with respect to tax and other federal debts.

The proposal appears to be based, in part, on incorrect interpretations of 11 U.S.C. § 524 and related provisions – either the incorrect assumption that *all* debts are discharged by a general discharge, the incorrect assumption that dischargeability determinations are within the *exclusive* jurisdiction of bankruptcy courts, or a failure to understand that the anti-waiver clause at the end of § 524(a) is concerned with *contractual* waivers and not with future litigation in which dischargeability may be a legitimate issue and on which a litigant may and should in fact be bound by its failure to raise the defense.

The fact that judgments in violation of § 524 are "void" does not necessarily eliminate the appropriateness of the affirmative defense in Rule 8(c), and certainly cannot mean that every post-discharge judgment on every pre-petition debt is void absent a prior determination of dischargeability from the bankruptcy court Section 524, by its terms, limits the voidness to "any debt discharged under section 727, 944, 1141, 228, or 1328." Where it is not clear whether a debt is discharged, or instead is excepted from discharge, the need to raise the issue is not eliminated. The purpose of including discharge as an affirmative defense in Rule 8(c) was to recognize that whether a debt has or has not been discharged by the entry of a bankruptcy discharge is often hotly disputed on potentially numerous grounds.[1]

Section 523 generally governs what debts are discharged. It requires that creditors commence, in a short time after a bankruptcy case is filed, proceedings to preserve from discharge limited kinds of debts. Debts included in this limited category of debts that must be declared nondischargeable by a bankruptcy court during the bankruptcy case have varied over the years and currently cover only debts under § 523(a)(2), (4), or (6) and, even as to those three provisions, there is an exception for regulatory receivers such as those for the FDIC. The exceptions to discharge referenced in 523(c), *and only those exceptions*, are within the exclusive jurisdiction of bankruptcy courts to determine. If grounds for non-dischargeability listed in § 523(a)(2), (4), or (6) are not timely asserted in an adversary complaint in the bankruptcy court, a creditor cannot later assert those exceptions to discharge.

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[1] *See Mickowski v Visi-Trak Worldwide, LLC*, 415 F.3d 501, 506 (6th Cir 2005) (purpose of Rule 8(c)'s requirement to plead discharge is to give plaintiff notice of defense and a chance to argue, if he or she can, why it lacks merit).

But many other debts excepted from discharge are automatically excepted by operation of law and there is no requirement to bring any proceeding within any deadline. One category of debts not governed by § 523(c) is tax debts governed by § 523(a)(1). There are frequently disputes about whether a tax debt has been discharged -- most often (but not exclusively) with respect to whether the debtor made any willful attempt to defeat the tax within the meaning of § 523(a)(1)(C).

In addition, debts are not discharged if a creditor is not given notice of the bankruptcy case in time to file a claim. 11 U.S.C. § 523(a)(3). Disputes can arise on whether a creditor was provided with due notice. In a case where a creditor was not provided with notice, the creditor may be unaware of the bankruptcy and therefore cannot be expected to assert an exception to discharge in a complaint. In that context, it is particularly appropriate to place on the debtor the burden of raising the issue as an affirmative defense (and then proving that notice was given). A debtor who responds to a post-discharge complaint on a debt that may well be excepted from discharge, fails to raise discharge as a defense, and suffers a judgment, should not be permitted years later to insist that the judgment is void.[2]

The Ninth Circuit Bankruptcy Appellate Panel has ruled that Rule 8(c)'s inclusion of discharge as an affirmative defense was invalidated, not by the 1978 Code, but by the 1970 amendment to § 14f of the "old" Bankruptcy Act of 1898, which made judgments for discharged debts "void." *In re Gurrola*, 328 B.R. 158, 170 (9th Cir BAP 2005) Some legislative history to the 1970 amendment to old Act § 14f, quoted in *Gurrola*, suggests that at least some in Congress believed the amendment would enable debtors to ignore post-discharge lawsuits on discharged debts and then collaterally attack default judgments. Even if *Gurrola* is correct in its reading of amended § 14f, it appears that, whatever may have been the situation between 1970 and 1978, the 1978 Code plainly envisioned that non-bankruptcy courts would have concurrent jurisdiction

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[2] The phrase "judgment at any time obtained," in § 524, is similar to one in § 14f of the "old" Bankruptcy Act of 1898, which voided "any judgment theretofore or thereafter obtained in any other court." But it is not clear from this language that it covers *all* judgments in suits *begun* after discharge. To the contrary, the language in the old Act referred only to debts "not excepted from discharge" – similar to the way that § 524 refers only to "any debt discharged under" the various discharge provisions. Thus, § 524 begs the question as to whether a particular debt was discharged, at least where the ground for an exception is one other than in § 523(a)(2), (4), or (6) The phrase "at any time obtained" in § 524, and the similar one referring to post-discharge judgments in old § 14f, are nevertheless appropriate because the general discharge lifts the stay, which could result in a creditor resuming a pre-petition suit, which could then result in a post-discharge judgment, based on an answer filed pre-petition that of course would not have raised discharge affirmatively Alternatively, if the void language is also deemed to refer to judgments based on post-discharge complaints, it is logically limited only to those debts for which there is no colorable exception to discharge.

to determine whether at least certain types of debts were or were not discharged in a prior bankruptcy. This is confirmed by § 523(c)'s inclusion of only limited discharge exceptions under the requirement that a creditor obtain a ruling during the bankruptcy case and from the bankruptcy court.

Gurrola suggests that Congress in 1970 was concerned that some creditors would rely on Rule 8(c) deliberately to bring lawsuits on discharged debts, hope the debtor would default, and then argue the debt was revived. This concern is not realistic, at least under the modern Code. Courts can sanction creditors for willful violations of the discharge injunction, and we believe that is sufficient to deter deliberate efforts by creditors to use Rule 8(c) inappropriately.[3] Also, default judgments present a special situation that is easily remedied without change to Rule 8(c). The debtor can invoke Rule 60(b) and demonstrate that the judgment is truly "void" – *i.e.*, that there was no colorable exception to discharge requiring litigation in good faith, or can seek relief in the bankruptcy court to enforce the discharge injunction.

The non-exclusive jurisdiction of bankruptcy courts over dischargeability issues is confirmed by 28 U.S.C. § 1334(b), which states that district courts sitting in bankruptcy (and the bankruptcy courts as units thereof) have "original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11." Language almost identical to this was first enacted in 1978 as 28 U.S.C. § 1471(b) and later revised slightly in the 1984 bankruptcy amendments as part of dealing with the fallout of the Supreme Court's decision in *Northern Pipeline Construction Co v Marathon Pipe Line Co.*, 458 U.S. 50 (1982), limiting the authority of Article I judges. The 1978 legislative history explains that "the phrase 'arising under title 11'" refers to "any matter under which a claim is made under a provision of title 11." S Rep. 95-989, at 154 (1978), *reprinted in* 1978 U.S.C.C.A.N., at 5787, 5940. A dischargeability proceeding is thus the quintessential example of a civil proceeding "arising under title 11" since the cause of action is created by section 523. Accordingly, the enactment of explicitly "not exclusive" jurisdiction over dischargeability actions in 1978 as modified slightly in 1984 undermines the reliance by the *Gurrola* court on the 1970 amendment to old Act § 14f to arrive at the proposition that discharge is no longer a proper affirmative defense to an action on a debt outside the bankruptcy forum.

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[3] *See, e g , In re Zilog, Inc.*, 450 F 3d 996, 1007 (9th Cir. 2006); *In re Pratt*, 462 F.3d 14, 17 (1st Cir. 2006); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 445 (1st Cir 2000); *Matter of Rosteck*, 899 F.2d 694, 698 (7th Cir. 1990); *but see Pertuso v Ford Motor Credit Co* , 233 F 3d 417, 423 (6th Cir. 2000) (holding that there is no private damages action under § 524) In *Walls v Wells Fargo Bank, N A* , 276 F.3d 502, 507 (9th Cir. 2002), the Ninth Circuit indicated its agreement with the reasoning of *Pertuso* with respect to the existence of a statutory action, but held that courts could nevertheless use the compensatory civil contempt remedy.

Insofar as section 524(a)'s "void" language is limited to *discharged* debts and section 523 does not vest exclusive jurisdiction to determine dischargeability in bankruptcy courts, it is clear that a non-bankruptcy court's judgment on a post-discharge complaint for a debt that was at least arguably excepted from discharge must be accorded *res judicata* effect.[4] If the discharge defense is, however, removed from the list of affirmative defenses in Rule 8(c), the Committee Note should explain that the deletion is only meant to shift the burden of pleading nondischargeability to a plaintiff/creditor. It should not leave open any possible inference of enabling a debtor to ignore a post-discharge action on a debt completely, at least where a creditor's claim of nondischargeability is plausible. The current proposal seems to reflect the view that debtors may ignore post-discharge actions, and the inclusion of its proposed Note with the removal of discharge from Rule 8(c), would therefore create significant problems

The invalidation of waivers in final clause of § 524(a), which first appeared in the 1978 Code, also does not justify eliminating a discharge as an affirmative defense under Rule 8(c). The phrase "whether or not discharge of such debt is waived" is intended to address contractual waivers, and not the failure of a debtor to plead discharge in a future lawsuit, reflecting that the traditional definition of "waiver" is a voluntary relinquishment of a known right.[5] The House and Senate reports explain that the provision operates as an injunction against the collection of a discharged debt "whether or not the debtor has waived discharge of the debt involved," and that "[t]he change is consonant with the new policy forbidding binding reaffirmation agreements . . . and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it."[6] The phrase operated to void pre-bankruptcy agreements that debts will be nondischargeable, and also bolsters the procedural requirements for reaffirmation agreements.

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[4] If the court is a state court, the judgment must be accorded full faith and credit (and many state courts have their own rules regarding affirmative defenses that include bankruptcy discharge). *See* U.S. Const., Art. IV, Sec. 1. Only in those instances where there is no colorable exception to discharge (*i.e.*, where the creditor had notice of the bankruptcy and the debt is of a kind that is necessarily discharged unless a timely § 523(c) action was brought in a bankruptcy case) is there any basis to claim that a judgment on a pre-petition debt in an action commenced post-discharge is invariably "void."

[5] *See Black's Law Dictionary* 1611 (8th ed 2004). The failure to plead a defense is *treated* as or *deemed* to be a "waiver," but a procedural default is different from a true "voluntary relinquishment" of a "legal right or advantage."

[6] H.R. Rep No. 95-595 at 365-66 (1977); S Rep. No. 95-989 at 80 (1978), *reprinted in* 1978 U S.C.C.A.N., at 5787, 5866 The reports explain that "[t]he language 'whether or not discharge of such debt is waived' is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section. It is directed at waiver of discharge of a particular debt, not waiver of discharge in toto as permitted under section 727(a)(9) " *Ibid.*

See § 523(c), (d). There is no indication that Congress was referring to anything other than express waivers, or that it meant to alter the longstanding practice of requiring a debtor to plead discharge in defense to a judicial action to collect a debt that might in fact not be discharged.[7]

The Code should not be read "to effect a major change in pre-Code practice" unless the change is the subject of "at least some discussion in the legislative history." *Dewsnup v. Timm*, 502 U S. 410, 419 (1992). It is settled law that bankruptcy and non-bankruptcy courts have concurrent jurisdiction to determine whether specific exceptions to discharge apply to a particular debt. There is no reason for this concurrent jurisdiction to be viewed as altered by the enactment of the 1978 Code or the 1970 amendment to § 14f of the old Act. To the contrary, the fact that § 523(c) is limited to contentions governed by § 523(a)(2), (4), or (6), coupled with the language of 28 U.S.C. § 1334(b) discussed above, suggests that Congress intended there to be concurrent jurisdiction in all other circumstances.

More broadly, if a debt falls within any discharge exception other than the paragraphs listed in § 523(c) over which bankruptcy courts have exclusive jurisdiction, the bankruptcy court's jurisdiction over dischargeability disputes is not exclusive and creditors or debtors may raise issues of dischargeability at any time and in any court in which a creditor has brought suit.[8] As the Committee Note to Bankruptcy Rule 4007(b) states, "[j]urisdiction over this issue [of dischargeability] on these debts is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum." Rule 4007(b) was adopted after the enactment of the 1978 Code.

The Advisory Committee's proposal also may generate much unnecessary litigation because the elimination of the discharge language will prompt more bankruptcy debtors to allege,

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[7] *Gurrola* reads the just-quoted House and Senate reports as support for precluding a "waiver" by the failure to plead discharge. This is an unreasonable reading of language referring to "whether the debtor has waived," adding that the provision is consistent with restrictions on reaffirmation agreements, and then adding that the clause is targeted at waivers of discharge of "particular" debts in contrast to a full discharge waiver. A full discharge waiver requires an explicit statement of waiver. By analogy, the reports contemplate precluding limited express waivers (unless reaffirmation procedure is followed).

[8] *See Whitehouse v. LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002) ("at their option, creditors seeking a nondischargeability determination need not submit to the jurisdiction of the bankruptcy court, but instead may invoke the jurisdiction of any appropriate nonbankruptcy forum either before or after the bankruptcy proceeding has been closed.") (emphasis added); *Accord In re Doerge*, 181 B.R. 358, 364 n.9 (Bankr. S D Ill 1995) (citing *In re Canganelli*, 132 B.R 369, 385 n 3 (Bankr. N.D Ind. 1991)); *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F.Supp. 468, 481 (D.D.C. 1997); *In re Massa*, 217 B.R. 412, 421 (Bankr W D N Y. 1998), *aff'd*, 187 F 3d 292 (2d Cir. 1999).

and some courts likely to assume (just as the Committee apparently has) that suits to obtain judgment on pre-petition debts are invariably violations of the discharge injunction in § 524, whenever the debt is ultimately determined to have been discharged. In fact, as long as there is a good faith claim that a debt was not discharged, a suit for a judgment, as a predicate to any effort to collect the debt, should not be viewed as a violation of § 524.[9]

Special problems will arise with respect to tax debts. The United States frequently files a suit in two counts, one of which will be to set aside a fraudulent transfer from a taxpayer to a relative, and the other of which will be to seek a personal judgment against the taxpayer, using the fact of the fraudulent transfer as a primary premise for the contention that the taxpayer made a willful attempt to defeat payment of the tax within the meaning of § 523(a)(1)(C), so that the debt has not been discharged in the taxpayer's bankruptcy case. The debtor will frequently rush into bankruptcy court and file a motion to reopen the bankruptcy case to file a complaint to determine dischargeability. A dispute will then ensue over whether the bankruptcy court or district court should proceed first. If the bankruptcy court refuses to yield to the prior jurisdiction of the district court (as has happened on occasion), or if the district court thinks that the matter is more appropriate for a bankruptcy court, the government is then placed in a situation where it can lose on dischargeability in bankruptcy court and be collaterally estopped against the fraudulent transferee whereas, if it wins dischargeability, the fraudulent transferee will not be bound by the bankruptcy court's judgment, since the transferee cannot be made a party in the bankruptcy court proceeding on dischargeability. Thus, in order to recover fraudulently transferred assets, the United States may have to win at two trials the issue of whether the debtor fraudulently transferred the subject assets Based on such concerns, we have generally been successful in persuading bankruptcy courts to "stand down" and allow a district court action to proceed rather than attempt to enjoin it and proceed first. In those disputes, the ability to point to Rule 8(c) has been crucial to our ability to convince both courts that it is appropriate for the district court to handle the dischargeability issue as a defense to the count seeking judgment personally against the taxpayer/debtor.

The Department believes that it is appropriate to maintain discharge as an affirmative defense and thus to consider it waived if it is not raised, particularly given that some creditors will not have been given notice of the bankruptcy. It is still likely that courts would allow a debtor to reopen a judgment under Rule 60(b) to claim discharge if the debtor could show some reason for not having raised it, and at least in situations where there has been a default judgment

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[9] *See In re Massa*, 217 B.R. 412, 421 (Bankr W D.N.Y 1998) (because creditor could raise § 523(a)(3) dischargeability issue in collection suit, "until such a determination was made, further proceedings to collect the Addonas Claim and have the issue of dischargeability determined pursuant to Section 523(a)(3)(B) were not in violation of Section 524(a) or the Discharge Order"), *aff'd*, 187 F.3d 292 (2d Cir. 1999)

due to the failure of the debtor to appear. But those issues are best left to judicial discretion under Rule 60(b).[10]

Although there are a couple of exceptions (the Ninth Circuit BAP being one), most courts have not seen any reason to question the rule that discharge in bankruptcy is an affirmative defense – a rule not just of *federal* procedure but also one applicable in most states – and have enforced the rule appropriately without any grossly inequitable results.[11] And, those courts that

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[10] For example, it would be one thing to permit a debtor to reopen a judgment on a debt if the creditor had been notified of the bankruptcy and the debt is of a kind that was clearly discharged (*e g.*, the kind of debt that requires a creditor's adversary complaint under § 523(c) to survive discharge). It would be quite another thing to hold that even where a creditor's complaint mentions the bankruptcy and alleges that the debt was not discharged (as Tax Division complaints often do), and where the debt is not covered by § 523(c), a debtor served with process may ignore the suit, suffer a default judgment, and then file a dischargeability complaint in the bankruptcy court or even a Rule 60(b) motion in the district court and claim a right to litigate the issue of dischargeability with no excuse for not having timely answered the complaint.

[11] On the side enforcing Rule 8(c) are *Bauers v. Board of Regents of University of Wisconsin*, 33 Fed. Appx. 812, 817 (7th Cir. 2002) (because Chapter 7 debtor-employee did not raise her discharge in bankruptcy as an affirmative defense to her employer's counterclaim, debtor was deemed to have waived the defense); *In re Kahl*, 240 B.R. 524, 530 (Bankr E.D. Pa. 1999) ("undue hardship" exception to general nondischargeability of student loan is not self-effectuating; rather, it is up to the debtor either to bring an adversary proceeding to determine whether student loan debt is dischargeable, or to plead and prove dischargeability of debt as affirmative defense in action brought by creditor in state court); *In re Sunbrite Cleaners, Inc* , 284 B.R 336, 342 (N.D N.Y. 2002) (affirming bankruptcy court's refusal to consider creditor's post-confirmation assertion of nondischargeability due to lapse of jurisdiction, holding that issue could be raised by debtor as a defense in post-bankruptcy litigation, whether before a federal district or state court); *Allender v. Fields*, 800 N.E.2d 584, 585 (Ind. App. 2003) (reversing state court order granting post-judgment relief to debtor who failed to plead discharge as affirmative defense required by Indiana trial rule and where claim was arguably not discharged due to failing to list creditor on bankruptcy schedule). *See also Sparks v Booth*, 232 S.W.3d 853, 870 (Tex. App. Dallas 2007); *Systrends, Inc. v. Group 8760, LLC*, 959 So.2d 1052, 1064 (Ala. 2006); *McWherter v. Fischer*, 126 P.3d 330, 331 (Colo. App. 2005).

A case reaching the view that the failure to plead discharge is irrelevant is *Standifer v State*, 3 P.3d 925, 927-28 (Alaska 2000). The court held that a default judgment obtained after service by publication was void due to lack of subject matter jurisdiction in view of § 524(a), even though there could have been a good faith dispute on the issue of dischargeability in the state court. It reversed a ruling that the debtor could not reopen the default to litigate the issue of

have undermined the rule have, in our view, done so unnecessarily to avoid inequitable results that could readily have been avoided without undermining the rule – for example by using Rule 60(b) to vacate default judgments.

As the Committee essentially acknowledges, present Rule 8(c) does not appear to have caused any substantial problems. But, in the Department's judgment, eliminating the reference to discharge will cause problems. If the Committee agrees with the Department's concerns regarding the concurrent jurisdiction of bankruptcy and non-bankruptcy courts over dischargeability questions, but nevertheless concludes that a change is required to place the burden to plead nondischargeability on plaintiffs, then a Committee Note should explain the reason for the change., *i.e.*, it is simply intended to require nondischargeability to be pleaded by a creditor-plaintiff, and not intended to suggest that such a suit in a district court would be inappropriate.

Proposed Amendment to Rule 13(f)

The Standing Committee has proposed that Rule 13(f) be deleted. The Committee's reasoning is that this provision is basically redundant of Rule 15, which sets out the standards for pleading amendments. The Department supports this change. The Department agrees with the Committee's reasoning.

Proposed Amendment to Rule 15(a)

The Committee has proposed that Rule 15(a) be amended to modify when a pleading can be amended without leave of court. Under the current Rule, a party may amend its pleadings once "as a matter of course at any time before a responsive pleading is served," or, if the pleading is one to which no responsive pleading is permitted and the case has not been placed on the court's trial calendar, the party may amend the pleadings "at any time within 20 days after it is served."

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dischargeability The result in the case appears correct, but for the wrong reason. The result appears correct because, in a situation where there is no actual service, and no actual notice of service by publication, a litigant should always be able to reopen a default unless the dispute is over property that is under the *in rem* jurisdiction of the court. But grounding the decision on the notion that there is no subject matter jurisdiction causes two problems First, it means that even if the debtor had been served and appeared, the only proper result was dismissal, even if the debt was in fact excepted from discharge Second, it would mean that, even if the debtor had answered the complaint and litigated the merits of the debt for years without raising discharge and then lost, the debtor could raise the issue for the first time on appeal Once it is recognized that a state court can determine the dischargeability of a debt, there is simply no reason to allow a litigant who fails to raise the issue prior to a judgment to then raise it for the first time on appeal (or worse, perhaps, collaterally attack the judgment).

In contrast, under this proposal, a pleading to which a responsive pleading is required (such as a complaint or a cross- or counter-claim) can be amended once as a matter of course 21 days after service of a responsive pleading, or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The amended rule also would delete the current reference to a "trial calendar" because many courts do not have a central trial calendar.

The Department supports this change. The Committee seeks to address what it considers to be the anomalous treatment of a party's right to amend its pleading, one that depends on whether the opposing party has served a response (such as an answer) or has moved to dismiss. In doing so, the Committee achieves some measure of certainty, by giving the party a 21-day "window" within which to make its amendment.

Proposed Amendment to Rule 81

The Standing Committee has proposed that Rule 81 be amended to expand the definition of the term "state" to include, where appropriate, any "commonwealth" or "territory" of the United States. In brackets, the Committee also asks whether the term "possession" should be included in that definition.

The Department supports the application of the term "state" to both a commonwealth and territory. This will eliminate any uncertainty as to the status of Puerto Rico, the Virgin Islands, and Guam and the Northern Mariana Islands, all of which have district courts.

With respect to the use of the term "possession," the Committee acknowledges that its research has not shown that any "possessions" currently exist. The only possible land that could fit this definition is American Samoa. The Department notes its concern that the term "possession" might be interpreted - incorrectly - to include United States military bases overseas. We understand that the United States military's control over such bases is addressed through agreements with the foreign nations upon whose land the base is situated. The Department opposes including the term "possession" in the amended Rule.

Proposed new Civil Rule 62.1

The Standing Committee has proposed a new Rule 62.1, which would clarify the procedure under which a district court could decide a timely motion for post-judgment relief that it otherwise would lack authority to grant because of the pendency of an appeal The Appellate Rules also would be amended, through a new Rule 12.1, to provide procedures in the court of appeals to address this issue

The Department supports this proposed Rule This Rule arises out of a specific recommendation to the Standing Committee by then-Solicitor General Seth Waxman in 2000

The Department has been working with the Civil Rules Committee on the development of this proposal for several years. It should be beneficial to practitioners, who generally do not know how to address motions issues while a case is pending on appeal, and it will provide clarity to both the district courts and courts of appeal in addressing such motions

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We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Jeffrey S. Bucholtz
Acting Assistant Attorney General
Civil Division