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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	ID-04-1423-KSB
)		
7	STAN C. MONCUR; MARILYN)	Bk. No.	98-03213
	MONCUR,)		
8)	Adv. No.	99-06010
	Debtors.)		
9)		
10	_____)		
)		
11	STAN C. MONCUR; MARILYN)		
	MONCUR,)		
12)		
	Appellants,)		
13	v.)	OPINION	
)		
14	AGRICREDIT ACCEPTANCE CO.;)		
	FORREST HYMAS, Chapter 12)		
15	Trustee,)		
)		
16	Appellees.)		
17	_____)		

Argued and Submitted on March 23, 2005
by Telephone and Video Conference

Filed - June 6, 2005

Appeal from the United States Bankruptcy Court
for the District of Idaho

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Before: KLEIN, SMITH, and BRANDT, Bankruptcy Judges.

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1 KLEIN, Bankruptcy Judge:

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3 The debtors appeal the renewal of a money judgment that was
4 excepted from discharge under 11 U.S.C. §§ 523(a)(2) and (6) in
5 the first of their two bankruptcy cases. They argue that the
6 debt lost its nondischargeable status when the judgment creditor
7 did not file another nondischargeability action in their second
8 bankruptcy case. We agree with the bankruptcy court that the
9 doctrines of claim and issue preclusion obviated the need for
10 repetitive nondischargeability actions and that the chapter 7
11 discharge order could not provide otherwise. AFFIRMED.

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FACTS

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Appellants, Stan and Marilyn Moncur, were debtors in a chapter 12 bankruptcy case from September 1998 until March 2000, and then again in a chapter 7 case from September 2001 until March 2002, in which they received a chapter 7 discharge.

In the chapter 12 case, the appellants stipulated to a money judgment, excepted from discharge under §§ 523(a)(2) and (6), in favor of appellee, Agricredit Acceptance Company ("Agricredit"). The judgment became final.

In the second bankruptcy, the court used a local form of discharge order that deviated from Official Form 18 ("The debtor is granted a discharge under [11 U.S.C. § 727]") by adding:

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following: ... (b) unless heretofore and hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under [11 U.S.C. § 523(a)](2), (4), (6), & (15)...

1 2. Whether language in the chapter 7 discharge order entered in
2 the second bankruptcy necessitated a second adversary
3 proceeding not otherwise required by the Bankruptcy Code.
4

5 STANDARD OF REVIEW

6 We review rulings regarding the availability of res judicata
7 doctrines, including claim and issue preclusion, de novo as mixed
8 questions of law and fact in which legal questions predominate.
9 Robi v. Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988);
10 Alary Corp. v. Sims (In re Assoc. Vintage Group, Inc.), 283 B.R.
11 549, 554 (9th Cir. BAP 2002).
12

13 DISCUSSION

14 I

15
16 The first issue logically follows upon our decision in
17 Paine, in which we explained and held that 11 U.S.C. § 523(b) is
18 a limited statutory modification of the common law preclusion
19 rules regarding the effect of a valid and final judgment.
20

21 A

22 Section 523(b) indirectly acknowledges that, except for the
23 several exceptions stated therein, the general rule is that if a
24 particular debt is determined to be nondischargeable in a valid
25 and final judgment by a court with jurisdiction and from which
26 there was an opportunity to appeal, then the debt is always
27 nondischargeable on the basis determined in the judgment. Paine,
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1 283 B.R. at 37-38. In other words: once nondischargeable, always
2 nondischargeable.¹

3 The procedural posture of Paine was that the debtors in a
4 2001 chapter 7 case filed an adversary proceeding to establish
5 that a judgment debt that had been excepted from discharge in
6 their 1995 chapter 7 case was discharged in the second case. The
7 court excepted the debt from discharge in the second case in
8 reliance on 11 U.S.C. § 523(a)(10), which section does not refer
9 to nondischargeable debts. On appeal, we declined to reach the
10 debatable § 523(a)(10) question because it was plain that claim-
11 and issue-preclusion (which were raised but not decided in the
12 bankruptcy court) dictated the result. Id. at 36-37.

13 We have, in more complex circumstances, applied Paine and
14 held that claim preclusion may prevent §§ 523(a)(2) and (6)
15 relitigation in a second chapter 7 case of a judgment debt
16 entered in a prior bankruptcy. Bankr. Recovery Network v. Garcia
17 (In re Garcia), 313 B.R. 307, 310 (9th Cir. BAP 2004).

18 In this instance, unlike Paine and Garcia, nobody filed an
19 adversary proceeding in the second bankruptcy. Rather, after the
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21 ¹ Section 523(b) provides:

22 (b) Notwithstanding subsection (a) of this section, a
23 debt that was excepted from discharge under subsection
24 (a)(1), (a)(3), or (a)(8) of this section, under section
25 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under
26 section 439A of the Higher Education Act of 1965, or under
27 section 733(g) of the Public Health Service Act in a prior
28 case concerning the debtor under this title, or under the
Bankruptcy Act, is dischargeable in a case under this title
unless, by the terms of subsection (a) of this section, such
debt is not dischargeable in the case under this title.

11 U.S.C. § 523(b).

1 second case closed, the debtors raised the discharge issue in an
2 effort to block renewal of the money judgment.

3 The appellants argue that the creditors were required to
4 refresh their nondischargeable status with a timely adversary
5 proceeding in the second bankruptcy in order to preserve the
6 claim- and issue-preclusive effects of the valid and final
7 nondischargeable money judgment entered in the first bankruptcy
8 case. We are not persuaded and see this as a straightforward
9 preclusion situation in which claim and issue preclusion overlap,
10 the precise question having been litigated and decided.

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12 1

13 A foundational requirement for preclusion is that there must
14 be a judgment by a court that has both jurisdiction of the
15 subject matter and jurisdiction over the person. RESTATEMENT
16 (SECOND) OF JUDGMENTS § 1 ("RESTATEMENT (SECOND)").²

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20 ² That section provides:

21 § 1. Requisites of a Valid Judgment

22 A court has authority to render judgment in an action when
23 the court has jurisdiction of the subject matter of the
24 action, as stated in § 11, and

25 (1) The party against whom judgment is to be rendered has
26 submitted to the jurisdiction of the court, or

27 (2) Adequate notice has been afforded the party, as stated
28 in § 2, and the court has territorial jurisdiction of the
action, as stated in §§ 4 to 9.

RESTATEMENT (SECOND) OF JUDGMENTS § 1.

1 a

2 The subject-matter jurisdiction aspect of the valid judgment
3 foundation has two facets, the first of which is that the court
4 must have jurisdiction over the specific subject matter.³

5 As relevant here, a bankruptcy court has subject-matter
6 jurisdiction to resolve § 523 dischargeability questions in cases
7 pending before it, and, for §§ 523(a)(2), (4), (6), and (15),
8 such jurisdiction is exclusive. Compare 28 U.S.C. § 1334(b),
9 with 11 U.S.C. § 523(c); Fid. Nat'l Title Ins. Co. v. Franklin
10 (In re Franklin), 179 B.R. 913, 920-23 (Bankr. E.D. Cal. 1995).

11 The second facet of the subject-matter jurisdiction
12 foundation for a valid judgment is that the issue must be
13 justiciable. This concept subsumes such doctrines as ripeness,
14 standing, mootness, and advisory opinions that are all regarded
15 as jurisdictional in nature. See 13 CHARLES ALAN WRIGHT ET AL.,
16 FEDERAL PRACTICE & PROCEDURE § 3529 (2d ed. 1984 & Supp. 2004).

17 The doctrines regarding ripeness and advisory opinions
18 underlie the reasoning of decisions holding that no court, not
19 even a bankruptcy court, can adjudicate the dischargeability of a
20 debt of a person who is not yet a debtor in a bankruptcy case.
21 Hansbrough v. Birdsell (In re Hercules Enters., Inc.), 387 F.3d
22 1024, 1029 (9th Cir. 2004); Citizens' Bank & Trust Co. v. Case
23 (In re Case), 937 F.2d 1014, 1025 (5th Cir. 1991). Such a

24
25 ³ The general requirement is:

26 A judgment may properly be rendered against a party
27 only if the court has authority to adjudicate the type of
controversy involved in the action.

28 RESTATEMENT (SECOND) OF JUDGMENTS § 11.

1 judgment would not be a valid judgment for purposes of preclusion
2 with respect to dischargeability.

3 Thus, for example, the bankruptcy court in Hansbrough was
4 entitled to make a binding monetary sanctions award against the
5 debtor's principal but could not make a binding determination
6 that the sanctions award necessarily would be excepted from
7 discharge under § 523 if that individual were to file a
8 bankruptcy case in the future. Hansbrough, 387 F.3d at 1029.

9 Before bankruptcy, then, the most a court can do with
10 respect to dischargeability is to determine issues properly
11 before it that may be elements of § 523(a) dischargeability
12 claims. Grogan v. Garner, 498 U.S. 279, 284 (1991); Hansbrough,
13 387 F.3d at 1029. To be sure, as in Grogan, the issue determined
14 may be all but dispositive of the discharge exception issue.

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16 b

17 The personal jurisdiction aspect of the valid judgment
18 foundation is easily satisfied with respect to a debtor in a
19 pending bankruptcy case. The debtor either submitted to
20 jurisdiction of the bankruptcy court by filing a voluntary
21 bankruptcy or was subjected to jurisdiction when being
22 adjudicated an involuntary debtor. RESTATEMENT (SECOND) § 1(1).

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24 2

25 Another foundational requirement for preclusion is that, in
26 addition to being a valid judgment, it must also be final.⁴

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28 ⁴ This requirement is:

(continued...)

1 In this instance, for example, the judgment entered during
2 the first bankruptcy case was duly entered on docket and was
3 exposed to the possibility of appeal. There was nothing left for
4 the parties to litigate.

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7 It is apparent that the judgment in question was a "valid
8 and final" judgment for purposes of preclusion. The bankruptcy
9 court had exclusive subject-matter jurisdiction over the issues
10 under §§ 523(a)(2) and (6). Those issues were ripe and, hence,
11 justiciable because the defendants in the adversary proceeding
12 were debtors in that bankruptcy case. For the same reason, the
13 bankruptcy court also had personal jurisdiction. It follows that
14 the judgment entered in the debtors' first bankruptcy case was
15 entitled to have both claim- and issue-preclusive effect.

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17 B

18 Having established general eligibility of the first
19 bankruptcy court's judgment for preclusive effect, the question
20 regarding the second bankruptcy case becomes whether the
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22 ⁴(...continued)

23 § 13. Requirement of Finality.

24 The rules of res judicata are applicable only when a final
25 judgment is rendered. However, for purposes of issue
26 preclusion (as distinguished from merger and bar), "final
27 judgment" includes any prior adjudication of an issue that
is determined to be sufficiently firm to be accorded
conclusive effect.

28 RESTATEMENT (SECOND) OF JUDGMENTS § 13.

1 requirement in § 523(c) (1) that "the court" resolve
2 dischargeability issues under §§ 523(a) (2), (4), (6), and (15)
3 refers only to the second bankruptcy court.⁵ In other words,
4 under the debtors' theory, these so-called § 523(c) (1)
5 dischargeability issues would have to be relitigated in each
6 consecutive bankruptcy in which a discharge is available.

7 Paine and Garcia, by applying preclusion doctrines,
8 implicitly resolved that question in the negative. We now hold
9 that the term "the court" in § 523(c) (1) means a bankruptcy court
10 with subject-matter and personal jurisdiction over a debtor in a
11 bankruptcy case pending before it.

12 It is axiomatic that §§ 523(b) and (c) (1) must be construed
13 so as to be in harmony. The gravamen of § 523(b) is premised on
14 the general rule once a debt is nondischargeable under any theory
15 not enumerated as an exception in § 523(b), it is always
16 nondischargeable.

17 As noted above, § 523(c) (1) provides for exclusive federal
18 subject-matter jurisdiction in bankruptcy court over the four
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⁵ Section 523(c) (1) provides:

Except as provided in subsection (a) (3) (B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

28 11 U.S.C. § 523(c) (1).

1 discharge-exception grounds - §§ 523(a)(2), (4), (6) and (15)⁶ -
2 designated therein. Specifically, the operative language "unless
3 the court determines such debt to be excepted from discharge,"
4 which was carried forward from a 1970 amendment to the prior
5 Bankruptcy Act, is understood to deprive nonbankruptcy courts of
6 jurisdiction. Compare 28 U.S.C. § 1334(b), with id. § 523(c)(1)
7 (Bankruptcy Code), and with Act of Oct. 19, 1970, Pub. L. 91-467,
8 84 Stat. 992-93, amending Bankruptcy Act § 17, codified at 11
9 U.S.C. § 35(c) (1976) (repealed 1979); Grogan, 498 U.S. at 284
10 n.10; Brown v. Felsen, 442 U.S. 127, 136-37 & n.7 (1979);
11 Franklin, 179 B.R. at 920-23 (detailing analysis).

12 The history of the enactment of the original exclusive
13 jurisdiction provision in 1970 and the manner in which it was
14 carried forward into the Bankruptcy Code indicate that the
15 reference to "the court" in § 523(c)(1) contemplates a bankruptcy
16 court before which a bankruptcy case involving the debtor is
17 pending at the time the decision is rendered. Franklin, 179 B.R.
18 at 920-23.

19 Section 523(c)(1) does not, however, necessarily mean that a
20 separate determination must be made each time the debtor is the
21 subject of a bankruptcy case in which a discharge is permitted.
22 Nothing in § 523(c)(1) purports to trump or vary the terms of the
23 general issue and claim preclusion provisions of § 523(b).

24 It follows that § 523(c)(1) allocates subject-matter
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27 ⁶ Actions under § 523(a)(15) are deleted from § 523(c)(1)
28 as of the effective date of the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, § 215, 119 Stat.
23 (2005) (amending 11 U.S.C. § 523(c)(1)).

1 jurisdiction in a manner that ordinarily thwarts application of
2 preclusion doctrines to a judgment to the extent it purports to
3 establish the dischargeability of such a debt. Brown, 442 U.S.
4 at 136 & 138-39.

5 Although the exclusive-jurisdiction dischargeability problem
6 is an example of a situation in which the doctrines of claim and
7 issue preclusion overlap, either analysis leads to the same
8 result that further illustrates why the result in the instance of
9 a prior bankruptcy court with jurisdiction is different.

10 First, as explained above, a "valid and final" judgment
11 regarding dischargeability cannot be rendered with respect to one
12 who is not yet a debtor and, in the instance of the four
13 exclusive-jurisdiction dischargeability issues, only a bankruptcy
14 court could do so and then only regarding a debtor in a case
15 before it. Hansbrough, 387 F.3d at 1029.

16 Second, even if one were to ignore the "valid and final"
17 judgment requirement, there are other hurdles to clear before
18 imposing preclusion.

19 Treated as a matter of claim preclusion, even though the
20 discharge question may arise out of the common nucleus of
21 operative facts that ordinarily would implicate the general rule
22 concerning splitting claims and application of the concepts of
23 merger and bar,⁷ an exception to the general rule concerning

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25 ⁷ The basic rule is:

26 § 24. Dimensions of "Claim" for Purposes of Merger or Bar -
27 General Rule Concerning "Splitting"

- 28 (1) When a valid and final judgment rendered in an action
extinguishes the plaintiff's claim pursuant to the rules of
(continued...)

1 splitting applies when the prior court suffers from a
2 jurisdictional constraint. RESTATEMENT (SECOND) § 26(1)(c).⁸ Thus,
3 the lack of jurisdiction ordinarily blocks imposition of claim
4 preclusion. Here, however, the unusual circumstance of the
5 existence of all facets of jurisdiction in the bankruptcy court

7 ⁷(...continued)

8 merger or bar (see §§ 18,19), the claim extinguished
9 includes all rights of the plaintiff to remedies against the
10 defendant with respect to all or any part of the
11 transaction, or series of connected transactions, out of
12 which the action arose.

13 (2) What factual grouping constitutes a "transaction", and
14 what groupings constitute a "series", are to be determined
15 pragmatically, giving weight to such considerations as
16 whether the facts are related in time, space, origin, or
17 motivation, whether they form a convenient trial unit, and
18 whether their treatment as a unit conforms to the parties'
19 expectations or business understanding or usage.

20 The general rule of this Section is exemplified in § 25, and
21 is subject to the exceptions stated in § 26.

22 RESTATEMENT (SECOND) OF JUDGMENTS § 24.

23 ⁸ The pertinent exception is:

24 § 26. Exceptions to the General Rule Concerning Splitting

25 (1) When any of the following circumstances exists, the
26 general rule of § 24 does not apply to extinguish the claim,
27 and part or all of the claim subsists as a possible basis
28 for a second action by the plaintiff against the defendant:

...

(c) The plaintiff was unable to rely on a certain
theory of the case or to seek a certain remedy or form of
relief in the first action because of the limitations on the
subject matter jurisdiction of the courts or restrictions on
their authority to entertain multiple theories or demands
for multiple remedies or forms of relief in a single action,
and the plaintiff desires in the second action to rely on
that theory or to seek that remedy or form of relief;

RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (emphasis supplied).

1 that rendered the initial judgment makes claim preclusion
2 applicable in this instance. Garcia, 313 B.R. at 313; Paine, 283
3 B.R. at 39-40.

4 Viewing the §§ 523(a)(2) and (6) nondischargeability issues
5 through the prism of issue preclusion involves similar analysis
6 and yields a similar conclusion. The two issues are issues that
7 previously were actually litigated and decided and, being part of
8 the essence of the judgment, were essential to the decision.
9 Hence, they are eligible for issue preclusion. RESTATEMENT (SECOND)
10 § 27.⁹ Ordinarily, an exception based on jurisdictional
11 constraints defeats issue preclusion on a bankruptcy
12 dischargeability issue. RESTATEMENT (SECOND) § 28(3).¹⁰ Here,

14 ⁹ The general rule of issue preclusion is:

15 § 27. Issue Preclusion - General Rule

16 When an issue of fact or law is actually litigated and
17 determined by a valid and final judgment, and the
18 determination is essential to the judgment, the
19 determination is conclusive in a subsequent action between
20 the parties, whether on the same or a different claim.

21 Exceptions to this general rule are stated in § 28.

22 RESTATEMENT (SECOND) OF JUDGMENTS § 27.

23 ¹⁰ The pertinent exception is:

24 § 28. Exceptions to the General Rule of Issue Preclusion

25 Although an issue is actually litigated and determined by a
26 valid and final judgment, and the determination is essential
27 to the judgment, relitigation of the issue in a subsequent
28 action between the parties is not precluded in the following
circumstances:

...

(3) A new determination of the issue is warranted by
differences in the quality or extensiveness of the

(continued...)

1 however, the prior bankruptcy court had jurisdiction over the
2 issues, which were justiciable at the time that it actually and
3 necessarily decided them. Thus, this is one of those unusual
4 instances in which the garden-variety application of issue
5 preclusion is operative.

6 The consequence is that the judgment creditor is entitled to
7 assert claim and issue preclusion in the judgment renewal
8 proceeding to preclude the judgment debtors from contending that
9 their debt was discharged in the second bankruptcy case.

10
11 II

12 This brings us to the question whether the terms of the
13 discharge order in the second bankruptcy alters the otherwise
14 applicable effect of the prior judgment.

15 The question is whether the following language contained in
16 the local form discharge order, independent of the terms of the
17 Bankruptcy Code, requires a second adversary proceeding:

18 Any judgment heretofore or hereafter obtained in any court
19 other than this court is null and void as a determination of
20 the personal liability of the debtor with respect to any of
21 the following: ... (b) unless heretofore and hereafter
22 determined by order of this court to be nondischargeable,
23 debts alleged to be excepted from discharge under [11 U.S.C.
24 § 523(a)](2), (4), (6), & (15)...

25 The bankruptcy court held that this language from its local
26 form, which appears to have been inspired by § 14f of the

27 ¹⁰ (...continued)

28 procedures followed in the two courts or by factors relating
to the allocation of jurisdiction between them;

RESTATEMENT (SECOND) OF JUDGMENTS § 28(3) (emphasis supplied).

1 Bankruptcy Act of 1898,¹¹ did not mean quite as much as it
2 appeared to say. We agree for two independent reasons.

3 First, we defer to the bankruptcy court's construction and
4 interpretation of its own orders and local rules and forms. It
5 created the order and is entitled to opine as to what it meant.
6 E.g., Guam Sasaki Corp. v. Diana's, Inc., 881 F.2d 713, 715 (9th
7 Cir. 1989); Katz v. Pike (In re Pike), 243 B.R. 66, 69 (9th Cir.
8 BAP 1999).

9 Moreover, as a matter of law, a discharge order entered in a
10 chapter 7 case cannot change the statutory terms of the discharge
11 entered pursuant to 11 U.S.C. § 727, which are as specified at 11
12 U.S.C. § 524. Those sections do not empower the court either to
13 "provide otherwise" or to carve out exceptions other than the
14 debts that are authorized by the Bankruptcy Code to be excepted
15 from discharge.

16 Official Form 18 has been prescribed by the Judicial
17 Conference of the United States as the form suitable for a
18 chapter 7 discharge and provides, in its entirety:

19 It appearing that the debtor is entitled to a
20 discharge, IT IS ORDERED: The debtor is granted a discharge
21 under section 727 of title 11, United States Code, (the
22 Bankruptcy Code).

23 ¹¹ Bankruptcy Act § 14f began:

24 (f) An order of discharge shall -

25 (1) declare that any judgment theretofore or thereafter
26 obtained in any other court is null and void as a
27 determination of the personal liability of the bankrupt with
28 respect to any of the following: ...

Bankruptcy Act § 14f, codified at 11 U.S.C. § 32(f) (1976),
repealed 1979.

1 Official Form 18. At the bottom of the form is the notation:
2 "See the back of this order for important information."

3 The reverse side of Official Form 18 sets out a general
4 explanation of the terms of the discharge in a chapter 7 case
5 that covers essentially the same information as the language of
6 the local form. It is more detailed than the local form, is
7 couched in nuanced terms of general rules subject to exceptions,
8 and advises consultation with counsel to determine the exact
9 effect of the discharge.

10 The order of discharge is required to conform to Official
11 Form 18. Fed. R. Bankr. P. 4004(e). Moreover, Official Forms
12 are required to be "observed and used with alterations as may be
13 appropriate." Fed. R. Bankr. P. 9009.

14 For the same reason that a local rule may be invalid, it is
15 "inappropriate," hence impermissible, for a local alteration in
16 an Official Form to have the effect of varying the terms of the
17 Bankruptcy Code or Federal Rules of Bankruptcy Procedure. Fed.
18 R. Bankr. P. 9029; Steinacher v. Rojas (In re Steinacher), 283
19 B.R. 768, 772-73 (9th Cir. BAP 2002) (invalid local rule); Garner
20 v. Shier (In re Garner), 246 B.R. 617, 624 (9th Cir. BAP 2000)
21 (test for validity of local rule).

22 This case illustrates the risks that can result from well-
23 intended alterations and perhaps helps to prove the adage that no
24 good deed goes unpunished.

25 In sum, we conclude the language of the local form of the
26 discharge order did not, and could not, change the terms of the
27 Bankruptcy Code and otherwise applicable law.

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1 CONCLUSION

2 The bankruptcy court correctly granted Agricredit's motion
3 to renew its nondischargeable money judgment. The judgment
4 entered in the first bankruptcy case remained effective in the
5 second bankruptcy. The terms of the local-form discharge order
6 did not, and could not, change that result. AFFIRMED.

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