

21

FILED

NOV 14 2016

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re: CHRISTOPHER KYLE FAGAN,
Debtor.

Case No. 15-28694-C-7

OPINION REGARDING MILITARY DEBT DISCHARGE EXCEPTION

Before: Christopher M. Klein, Bankruptcy Judge

Peter Cianchetta, Elk Grove, California, for Debtor.

Phillip A. Talbert, Acting United States Attorney; Bruce A. Emard, Assistant United States Attorney, for United States.

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

Inconspicuous exceptions to bankruptcy discharges lurking at 37 U.S.C. §§ 303a(e)(4) and 373(c) surprised the debtor who assumed that his debt to repay the unearned part of his Navy reenlistment bonus had been discharged. He urges that Bankruptcy Code § 727(b) (discharge "from all debts" not named in § 523) trumps statutes not named in Bankruptcy Code § 523, but Congress has said otherwise in a later-enacted statute. His motion for an order of contempt to enforce the discharge injunction is DENIED.

These obscure discharge exceptions, enacted in 2006 and 2008, warrant exegesis as a case of first impression. They anchor more than 60 repayment provisions scattered around Titles 10, 14, and 37 of the United States Code and have not been reviewed in reported bankruptcy decisions.

1 Facts

2 The debtor was involuntarily discharged from the Navy after
3 serving fifteen months of a six-year reenlistment.

4 The Defense Finance and Accounting Service (DFAS) billed him
5 \$5,945.09 to recoup the unearned portion (1735 days) of his
6 reenlistment bonus.

7 He filed a chapter 7 bankruptcy case on November 9, 2015,
8 scheduling a \$5,945.10 debt to DFAS, which he expected to be
9 discharged. His chapter 7 discharge was entered on February 22,
10 2016; the case closed four days later.

11 DFAS sent the debtor a bill dated March 24, 2016, noting
12 that additional charges are assessed under 31 U.S.C. § 3717 and
13 that the debt could be turned over to the Treasury for collection
14 or offset from tax refunds and other federal benefits. It was
15 followed by another DFAS bill dated May 26, 2016.

16 The Department of the Treasury billed him on August 6, 2016,
17 for \$5,975.33, with a payment coupon showing a \$7,648.42 debt.

18 The debtor filed a motion for an order of contempt in his
19 reopened case on September 14, 2016.

20 He does not interpose a fact-based defense or question the
21 amount of the debt, relying instead on the theory that Bankruptcy
22 Code § 523 controls all exceptions to the chapter 7 discharge.

23
24 Issue

25 Do 37 U.S.C. §§ 303a(e) and 373(c) operate as exceptions to
26 discharge under 11 U.S.C. § 727(b), thereby insulating the United
27 States from exposure to liability for violation of the discharge
28 injunction under 11 U.S.C. § 524(a)?

1 Jurisdiction

2 Federal subject-matter jurisdiction is founded on 28 U.S.C.
3 § 1334. Enforcing the injunction against collecting a discharged
4 debt, including determining whether such debt is discharged, is a
5 core proceeding that may be heard and determined by a bankruptcy
6 judge. 28 U.S.C. §§ 157(b)(2)(I) and (O).

7 Congress abrogated sovereign immunity for Bankruptcy Code
8 § 524 discharge injunction violations. 11 U.S.C. § 106(a)(1).

9
10 Discussion

11 Two substantially identical discharge exceptions in Title 37
12 - 37 U.S.C. § 303a(e)(4) and § 373(c) - are considered because
13 the record is ambiguous about the statutory basis for the debt.
14 They amount to two paths to the same result. The debtor still
15 has to pay the unearned portion of his Navy reenlistment bonus.

16
17 I

18 If, as implied by the invocation of § 303a(e)(4), the debtor
19 reenlisted under the authority granted by 37 U.S.C. § 308
20 ("Special pay: reenlistment bonus"), then his repayment
21 obligation is triggered by § 308(d)¹ and is restated and
22

23
24 ¹Section 308(d) provides:

25 (d) A member who does not complete the term of enlistment
26 for which a bonus was paid to the member under this section,
27 or a member who is not technically qualified in the skill
28 shall be subject to the repayment provisions of section
303a(e) of this title.

37 U.S.C. § 308(d).

1 implemented at § 303a(e).²

2 If he reenlisted under the authority of 37 U.S.C. § 331
3 ("General bonus authority for enlisted members"), then his
4 repayment obligation is triggered by § 331(g)³ and is restated
5 and implemented at § 373(a).⁴

6
7 ²Section 303a(e) (1) (A) :

8 (e) (1) (A) Except as provided in paragraphs (2) and (3)
9 [sole survivorship and combat-related exceptions], a member
10 of the uniformed services who receives a bonus or similar
11 benefit and whose receipt of the bonus or similar benefit is
12 subject to the condition that the member continue to satisfy
13 certain eligibility requirements shall repay to the United
14 States an amount equal to the unearned portion of the bonus
15 or similar benefit if the member fails to satisfy the
16 eligibility requirements and may not receive any unpaid
17 amounts of the bonus or similar benefit after the member
18 fails to satisfy the requirements, unless the Secretary
19 concerned determines that the imposition of the repayment
20 requirement and termination of the payment of unpaid amounts
21 of the bonus or similar benefit with regard to the member
22 would be contrary to a personnel policy or management
23 objective, would be against equity and good conscience, or
24 would be contrary to the best interests of the United
25 States.

26 37 U.S.C. § 303a(e) (1) (A) .

27 ³Section 331(g) provides:

28 (g) Repayment. A person or member who receives a bonus
under this section and who fails to complete the period of
service, or meet the conditions of service, for which the
bonus is paid, as specified in the written agreement under
subsection (d), shall be subject to the repayment provisions
of section 373 of this title.

37 U.S.C. § 331(g) .

⁴Section 373(a) provides:

(a) Repayment and termination. Except as provided in
subsection (b) [sole survivorship, combat-related, and
discretionary exceptions], a member of the uniformed
services who is paid a bonus, incentive pay, or similar
benefit, the receipt of which is contingent upon the

1 Sections 303a and 373 collectively are cross-referenced by,
2 and anchor, more than 60 separate uniformed services pay
3 provisions that entail repayment obligations.

4
5 II

6 The discharge exceptions at § 303a(e)(4) and § 373(c) are
7 identical.⁵

8 Each excepts repayment debts under §§ 303a and 373(a) from
9 any discharge order entered in a bankruptcy case within five
10 years after the trigger date of the debt. Specifically, they
11 provide "discharge in bankruptcy under title 11 does not
12 discharge a person from such debt if the discharge order is
13 entered less than five years after" termination of the service or
14 the agreement on which the debt is based.⁶

15
16 member's satisfaction of certain service or eligibility
17 requirements, shall repay to the United States any unearned
18 portion of the bonus, incentive pay, or similar benefit if
19 the member fails to satisfy any such service or eligibility
20 requirement, and the member may not receive any unpaid
amounts of the bonus, incentive pay, or similar benefit
after the members fails to satisfy such service or
eligibility requirement.

21 37 U.S.C. § 373(a).

22 ⁵The only difference is that one uses the word "subsection"
23 where the other uses "section."

24 ⁶Sections 303a(e)(4) and 373(c) each provide:

25 An obligation to repay the United States under this
26 subsection is, for all purposes, a debt owed the United
27 States. A discharge in bankruptcy under title 11 does not
discharge a person from such debt if the discharge order is
entered less than five years after -

28 (A) the date of the termination of the agreement or
contract on which the debt is based; or

(B) in the absence of such an agreement or contract,

1 A

2 Section 302a(e) was added to § 303a in 2006. Act of Jan. 6,
3 2006, Pub. L. 109-163, § 687, 119 Stat. 3326, 3336.

4 The bankruptcy discharge exception, initially enacted as
5 § 303a(e)(3), was redesignated § 303a(e)(4) in 2009. Act of Oct.
6 28, 2009, Pub. L. 111-84, § 617(a), 123 Stat. 2190, 2354.

7 The text of § 303a(e)(4) has not been amended since 2006.
8

9 B

10 Section 373(c) was enacted in 2008 and plainly was cloned
11 from § 303a(e). Act of Jan. 28, 2008, Pub. L. 110-181, § 661,
12 122 Stat. 3, 163.

13 The text of § 373(c) has not been amended since 2008.
14

15 III

16 The debtor served only fifteen months of a sixty-month
17 reenlistment for which he had received a reenlistment bonus of
18 about \$7,500.00. DFAS calculated that the unearned portion of
19 the bonus was \$5,945.09. That sum is owed to the United States
20 by virtue of the statutes described above.

21 The chapter 7 case was filed with the expectation that the
22 debt to the United States would be discharged. This motion for
23 an order of contempt brings § 303a(e)(4) and § 373(c) into play.
24
25

26 the date of the termination of the service on which the debt
27 is based.

28 37 U.S.C. §§ 303a(e)(4) & 373(c) (§ 373(c): "section" vice
"subsection").

1 A

2 This is a situation in which the parties rely on what the
3 debtor contends are conflicting statutes.

4 The 1978 Bankruptcy Code used mandatory terms in § 727(b)
5 naming the Bankruptcy Code § 523 nondischargeability provisions
6 as the sole source of exceptions to discharge:

7 § 727(b) Except as provided in section 523 of this title, a
8 discharge under subsection (a) of this section discharges
9 the debtor from all debts that arose before the date of the
10 order for relief under this chapter, and any liability on a
11 claim that is determined under section 502 of this title as
12 if such claim had arisen before the commencement of the
13 case, whether or not a proof of claim based on any such debt
14 or liability is filed under section 501 of this title, and
15 whether or not a claim based on any such debt or liability
16 is allowed under section 502 of this title.

17 11 U.S.C. § 727(b).

18 Read literally, the only exceptions to the § 727 discharge
19 are those stated in § 523. The debtor relies on that language.

20 In 2006 and 2008, Congress used unambiguous terms referring
21 to title 11 at two places in title 37 to create exceptions to
22 discharge without mentioning Bankruptcy Code §§ 727(b) or 523: "A
23 discharge in bankruptcy under title 11 does not discharge a
24 person from such debt..." 37 U.S.C. §§ 303a(e)(4) & 373(c).

25 The usual canon of statutory construction where statutes
26 conflict is to give effect to each and to construe a later
27 statute as implicitly amending an earlier, more general statute.
28 Smith v. Robinson, 468 U.S. 992, 1024 (1984); Acosta v. Gonzales,
439 F.3d 550, 555 (9th Cir. 2006).

Where a conflict is irreconcilable, the more recent statute
governs. Watt v. Alaska, 451 U.S. 259, 268 (1981).

Here, the debtor is relying on a 1978 statute as a defense
against conflicting statutes enacted in 2006 and 2008.

1 The 2006 and 2008 statutes are more specific than the 1978
2 statute. If they do not surmount Bankruptcy Code § 727(b), then
3 they would have no effect. It would, however, be absurd to
4 construe them as having no effect in the face of an earlier, more
5 general statute. Congress must have meant for those two statutes
6 to mean something. That something is an implicit amendment to
7 the earlier statute adding an extra "except" clause to Bankruptcy
8 Code § 727(b).

9 It follows that § 303a(e)(4) and § 373(c), in order to be
10 given any effect at all, must be construed as creating exceptions
11 to bankruptcy discharge regardless of the seemingly-comprehensive
12 language of Bankruptcy Code § 727(b).

13 To be sure, Congress invites confusion when it strews
14 bankruptcy-related statutes around other titles of the U.S. Code
15 without a cross-reference in the Bankruptcy Code. It may even
16 offend internal legislative procedural rules to circumvent the
17 congressional committees responsible for bankruptcy legislation
18 to sneak bankruptcy provisions into other legislation, but those
19 are internal housekeeping matters for Congress.

20 The statutes enacting § 303a(e)(4) and § 373(c) are valid
21 acts of Congress passed by the House of Representatives and the
22 Senate and presented to, and signed by, the President. For
23 better or worse, the Bankruptcy Power entitles Congress to do
24 what it likes with entitlements in bankruptcy. U.S. Const. art.
25 I, § 8; Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 21 (2000).

26

27

B

28

The exceptions to discharge in § 303a(e)(4) and § 373(c) are

1 not absolute.

2 By their terms, those statutes permit discharge in
3 bankruptcy of unearned military bonus and incentive payments if
4 the discharge is entered more than five years after termination
5 of the agreement on which the debt is based or, if no such
6 agreement, termination of service. 37 U.S.C. §§ 303a(e)(4)
7 & 373(c).

8

9

1

10 The debtor's chapter 7 discharge would have been effective
11 to discharge his debt if he had waited to file a bankruptcy case
12 for nearly five years, instead of six months, after leaving the
13 Navy. His chapter 7 discharge was entered February 22, 2016. To
14 be sure, there are ways to defer the entry of discharge in
15 chapter 7 cases, but those deferrals are ordinarily measured in
16 months, not years. Fed. R. Bankr. P. 4004(c).

17

18

2

19 While § 303a(e)(4) and § 373(c) purport to apply to all
20 bankruptcy discharges, the operation of the five-year rule in
21 those sections leaves open the possibility of discharging
22 § 303a(e)(4) and § 373(c) debt in chapter 11, 12, and 13 cases.

23 Chapter 13 plans commonly provide for payments over a period
24 of five years. 11 U.S.C. § 1325(b)(4).

25 Discharge is not "entered" until after completion of all
26 payments under the plan. 11 U.S.C. § 1328(a).

27 Thus, a discharge entered after completing a sixty-month
28 payment plan in a chapter 13 case filed after a § 303a(e)(4) or

1 § 373(c) debt arises would qualify for discharge under the five-
2 year rule in those sections.

3

4

C

5 It is also noted that § 303a(e)(1) and § 373(b)(1) each
6 permit the Secretary concerned to determine that the imposition
7 of the repayment requirement "would be contrary to a personnel
8 policy or management objective, would be against equity and good
9 conscience, or would be contrary to the best interests of the
10 United States." 37 U.S.C. §§ 303a(e)(1) & 373(b)(1). This
11 language confers constrained discretion and suggests that
12 defenses focused on those grounds could be asserted.

13 Regulations are authorized to describe circumstances in
14 which an exception to repayment may be granted. 37 U.S.C.
15 §§ 303a(e)(1) & 373(b)(1).

16 Such regulations should address the statutory standards for
17 excusing payment: personnel policy or management objective;
18 equity and good conscience; and best interests of the United
19 States. Cf. In re [Redacted] [sic], 2008 Westlaw 10707636
20 (D.O.H.A.C.A.B. 2008) (DoD Claims Appeals Bd. disclaiming
21 jurisdiction and citing § 303a(e)(1)); Vol. 7A, DoD Fin. Mgmt.
22 Reg. - Military pay Policy & Procedures, DoD 7000.14R, 090501-
23 090504 (Recoupment).

24 An interesting question that can be left to another day is
25 whether a bankruptcy court could review (presumably after
26 exhaustion of administrative remedies) whether repayment would,
27 for example, be "against equity and good conscience" within the
28 meaning of 37 U.S.C. §§ 303a(e)(1) & 373(b)(1).

1 The debtor has identified no facts that might suggest that
2 one of these statutory exceptions ought to apply in his case.

3
4 IV

5 The procedure applicable to this dispute also deserves
6 review because of a confusing Ninth Circuit decision.

7
8 A

9 The question of the discharge status of the unearned portion
10 of a military reenlistment bonus can arise in three distinct,
11 albeit overlapping, contexts.

12 First, during the case, it could be the subject of an
13 objection to claim under Rule 3007. Fed. R. Bankr. P. 3007;
14 Ryan v. Defense Fin. & Accounting Serv. (In Ryan), 2016 Westlaw
15 402201 at *1 (Bankr. E.D.N.C 2016).

16 Second, during or after the case, it can be raised in an
17 adversary proceeding to determine the dischargeability of a debt.
18 Fed. R. Bankr. P. 7001(6); Ryan, 2016 Westlaw 402201 at *1.

19 Third, after entry of discharge, it can, as occurred in this
20 case, form the essential predicate of a Rule 9020 motion for an
21 order of contempt to enforce the discharge injunction. 11 U.S.C.
22 § 524(a); Fed. R. Bankr. P. 9020; Barrientos v. Wells Fargo Bank,
23 N.A., 633 F.3d 1186, 1189-91 (9th Cir. 2011).

24
25 B

26 The debtor here raised the matter after entry of discharge
27 as a motion for an order of contempt pursuant to Rule 9020

1 governed by Rule 9014.⁷ This was consistent with the Barrientos
2 decision. Barrientos, 633 F.3d at 1189, construing Walls v.
3 Wells Fargo Bank, N.A., 276 F.3d 502, 506-07 (9th Cir. 2002).

4 It should be noted, however, that a dictum in the Ninth
5 Circuit's Barrientos decision seems to widen its split with the
6 First Circuit on procedure for enforcing the § 524(a) discharge
7 injunction. Compare Barrientos, 633 F.3d at 1190, with Bessette
8 v. Avco Fin. Servs., Inc., 230 F.3d 439, 443-45 (1st Cir. 2000).
9 Barrientos neither noted nor discussed Bessette.

10 The First Circuit in Bessette held that enforcement of the
11 § 524 discharge injunction as a § 105 contempt matter need not be
12 in the court that entered the discharge and permitted enforcement
13 to be raised in a civil action that included class action
14 allegations. Bessette, 230 F.3d at 446; 11 U.S.C. § 105. It
15 remanded the civil action to district court to consider whether
16 it would handle contempt-of-discharge enforcement proceeding or
17 refer the matter (including the class certification question) to
18 the bankruptcy court that had entered the discharge. Id.

19 The Ninth Circuit in Barrientos affirmed the bankruptcy
20 court's dismissal of a one-count adversary proceeding seeking an
21 injunction, a fine, declaratory relief, and attorney's fees on
22 account of alleged violation of the § 524 discharge injunction.
23 It construed its precedent in Walls that there is no private
24

25 ⁷Rule 9020 provides:

26 Rule 9020. Contempt Proceedings. Rule 9014 governs a
27 motion for an order of contempt made by the United States
28 trustee or a party in interest.

Fed. R. Bankr. P. 9020.

1 cause of action for violation of the § 524 discharge injunction
2 and that contempt under § 105 is the sole remedy, as also
3 (splitting with Bessette) requiring that the contempt be
4 determined by the court that issued the discharge order.⁸
5 Barrientos, 633 F.3d at 1188-89.⁹

6 Having clarified the law of the circuit that Walls limits
7 discharge injunction enforcement to contempt proceedings under
8 § 105 that must be decided by the court whose order is to be
9 enforced, the Barrientos court gratuitously muddied the waters.
10 In a dictum based on a dubious reading of the rules of procedure,
11 it appeared to say that a contempt issue never may be presented
12 in an adversary proceeding and that a party may complain of a
13 § 524 discharge injunction violation only by way of motion under
14 Rule 9020 as a contested matter governed by Rule 9014.¹⁰

15
16 ⁸The adversary proceeding was filed in the court that issued
17 the discharge. In re Adolfo Barrientos, No. 3:06-bk-01685.

18 ⁹The Eleventh Circuit agrees with the Ninth Circuit that a
19 contempt action must be pursued in the bankruptcy court that
20 entered the discharge. Alderwoods Grp., Inc. v. Garcia, 682 F.3d
21 958, 970-71 (11th Cir. 2012) (chapter 11) ("A debtor who believes
22 that the discharge injunction has been violated may file a
23 contempt action with the bankruptcy court that entered the
24 discharge injunction, not with another court.").

25 ¹⁰Here is the transition from holding to dictum:

26 We therefore rule that Walls is sufficient to dispose of the
27 present case. However, even in the absence of Walls, it
28 appears that the Bankruptcy Rules require that an action for
contempt arising out of the violation of an order issued in
a bankruptcy case must be brought by motion in the
bankruptcy case.

Barrientos, 633 F.3d at 1189.

The more-accurate statement is that the Bankruptcy Rules
permit an action for contempt arising out of the violation of an

1 This doubled the width of the existing split with the First
2 Circuit. Walls and Besette already disagreed on whether another
3 court could entertain a § 105 contempt-of-discharge matter. The
4 Barrientos dictum that Rule 9020 "mandates" party-initiated
5 contempt be a Rule 9014 contested matter implies that it can
6 never be included in an adversary proceeding. This conflicts
7 with Besette where contempt-of-discharge was allowed to be a
8 count in a civil action. Besette, 230 F.3d at 445-47.

9 A closer look at Barrientos, however, suggests that the
10 conflict with the First Circuit is less than meets the eye. The
11 split is real, of course, regarding which judicial officer has
12 authority over § 524 discharge injunction enforcement. But the
13 procedural split can be bridged by the overlapping structure of
14 the Bankruptcy Rules regarding contested matters and adversary
15 proceedings. The history of Rule 9020 indicates that the rule
16 permits, but does not require, bankruptcy contempt issues to be
17 presented in Rule 9014 contested matters.

18
19 C

20 The statements in the Barrientos dictum about the procedural
21 differences between Rule 9014 "contested matters" and Rule 7001
22 adversary proceedings are inaccurate. The problem is that they
23 create the misimpression that contested matters and adversary
24 proceedings are mutually exclusive – they are not.

25
26
27
28 order issued in a bankruptcy case to be brought by motion in the
bankruptcy case.

2 The essential characteristic of Rule 9014 contested matters
3 is streamlined procedure that permits litigation within a matter
4 of weeks without sacrificing too much due process.

5 The hallmark of the contested matter rules is the power of
6 the court to tailor the rules to fit the situation. A pared-down
7 set of the adversary proceeding rules that excludes most of the
8 pleading and scheduling rules presumptively applies.¹¹ But those
9 are a minimum, and the bankruptcy court has the flexibility to
10 direct that any or all of the other adversary proceeding rules
11 apply in any particular situation.¹²

12 In contrast, Rule 7001 adversary proceedings, which are
13 essentially conventional civil actions under the Federal Rules of
14

15 ¹¹Rule 9014(c) provides, in relevant part:

16 (c) Application of Part VII rules. Except as otherwise
17 provided in this rule, and unless the court directs
18 otherwise, the following rules shall apply: 7009, 7017,
19 7021, 7025, 7026, 7028-7037, 7041, 7052, 7054-7056, 7064,
20 7069, and 7071. The following subdivision of Fed. R. Civ.
21 P. 26, as incorporated by Rule 7026, shall not apply in a
22 contested matter unless the court directs otherwise:
26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures
regarding expert testimony) and 26(a)(3) (additional pre-
trial disclosure), and 26(f) (mandatory meeting before
scheduling conference/discovery plan).

23 Fed. R. Bankr. P. 9014(c) (first two sentences).

24 ¹²The relevant part of Rule 9014(c) provides:

25 The court may at any stage in a particular matter direct
26 that one or more of the other rules in Part VII shall apply.
27 The court shall give the parties notice of any order issued
28 under this paragraph to afford them a reasonable opportunity
to comply with the procedures prescribed by the order.

Fed. R. Bankr. P. 9014(c) (last two sentences).

1 Civil Procedure, entail the more formal and time-consuming
2 process of complaint, answer, counterclaim, cross-claim, third-
3 party complaint, dilatory motions, scheduling orders, and
4 pretrials that do not ordinarily apply in contested matters.

5 The Barrientos decision placed emphasis on the fact that
6 § 524 discharge injunction enforcement matters are not listed in
7 Rule 7001 as requiring an adversary proceeding and that Rule 9020
8 specifies that Rule 9014 "governs" a motion for an order of
9 contempt made by the United States trustee or a party in
10 interest, from which the court of appeals concluded that the rule
11 "mandates" a contested matter and forbids treating such a matter
12 in an adversary proceeding. Barrientos, 633 F.3d at 1190. The
13 conclusion does not follow from the premise.

14

15 2

16 The primary significance of the matters that are listed at
17 Rule 7001 is that such matters are regarded as of sufficient
18 importance to require the due process and time and expense of
19 being processed as a full-blown civil action, i.e. adversary
20 proceeding, under the Federal Rules of Civil Procedure. A
21 bankruptcy judge, like a district judge, risks disapproval on
22 appeal whenever short shrift is given to those rules.

23 Rule 9014 contested matters incorporate some of those rules,
24 including discovery, consolidation, taking evidence in the same
25 manner as an adversary proceeding, making findings of fact and
26 conclusions of law, and post-judgment relief. Fed. R. Civ. P.
27 26, 28-37, 42, 43-44.1, 52, 59-60, incorporated by Fed. R. Bankr.
28 P. 7026, 7028-37, 7042, 7052, 9017, 9023-24, further incorporated

1 by Fed. R. Bankr. P. 9014(c).

2 In addition, as noted, the court may order that all of the
3 adversary proceeding rules apply in a particular contested
4 matter, making contested matter procedure potentially congruent
5 with adversary proceeding procedure. Fed. R. Bankr. P. 9014(c).
6 At that juncture, the distinction between adversary proceeding
7 and contested matter becomes a distinction without a difference.

8
9 3

10 Also significant is the applicability of the consolidation
11 rule to contested matters. Fed. R. Civ. P. 42, incorporated by
12 Fed. R. Bankr. P. 7042 & 9014(c). The bankruptcy court has the
13 discretion to apply Civil Rule 42 to consolidate a claim made in
14 a contested matter with a claim made in an adversary proceeding.

15 If a contested matter may be consolidated with a adversary
16 proceeding, then it seems nonsensical to forbid alleging a
17 contested matter issue as a count in an adversary proceeding.

18 There are, of course, practical reasons for a bankruptcy
19 court to decline to consolidate a motion for an order of contempt
20 with a claim being made in an adversary proceeding. Confusion of
21 remedies is one example. Indeed, it appears that the Barrientos
22 bankruptcy judge dismissed the one-count adversary proceeding
23 because parties were confusing adversary proceeding remedies with
24 contempt remedies. Such a ruling is within the discretion of a
25 trial judge who is trying to maintain order and promote clarity.

26
27 4

28 Coming back to Rule 9020, the Barrientos dictum suggests

1 that the rule "mandates" contested matter procedure, to the
2 exclusion of adversary proceeding procedure, for § 524 discharge
3 injunction contempt matters. The history of Rule 9020, however,
4 suggests that the more accurate description is that Rule 9020,
5 as revised in 2001, merely "authorizes" contested matter
6 procedure for § 524 discharge injunction contempt matters in an
7 effort to streamline theretofore cumbersome contempt procedures.¹³

8 What then to make of what the Ninth Circuit was deciding in
9 Barrientos? A clue is found in the decision's agreement with the

10
11 ¹³The Advisory Committee Note to the 2001 Amendment of Rule
12 9020 providing for Rule 9014 contested matter procedure explains
13 the background:

14 This rule, as amended in 1987, delayed for ten days from
15 service the effectiveness of a bankruptcy judge's order of
16 contempt and rendered the order subject to de novo review by
17 the district court. These limitations on contempt orders
18 were added to the rule in response to the Bankruptcy
19 Amendments and Federal Judgeship Act of 1984, Pub. L. 98-
20 353, 98 Stat. 333, which provides that bankruptcy judges are
21 judicial officers of the district court, but does not
22 specifically mention contempt power. See 28 U.S.C. § 151.
23 As explained in the committee note to the 1987 amendments to
24 this rule, no decisions of the courts of appeals existed
25 concerning the authority of a bankruptcy judge to punish for
26 either civil or criminal contempt under the 1984 Act and,
27 therefore, the rule as amended in 1987 "recognizes that
28 bankruptcy judges may not have the power to punish for
contempt." Committee Note to 1987 Amendments to Rule 9020.

Since 1987, several courts of appeals have held that
bankruptcy judges have the power to issue civil contempt
orders. [citations omitted.] To the extent that Rule 9020,
as amended in 1987, delayed the effectiveness of civil
contempt orders and required de novo review by the district
court, the rule may have been unnecessarily restrictive in
view of the judicial decisions recognizing that bankruptcy
judges have the power to hold parties in civil contempt.

Fed. R. Bankr. P. 9020, Advisory Comm. Note to 2001 Amendment.

1 Second Circuit's Kalikow decision where the bankruptcy court,
2 like the bankruptcy court in Barrientos, required a Rule 9020
3 contested matter, rather than by adversary proceeding. Solow v.
4 Kalikow (In re Kalikow), 602 F.3d 82, 93-94 (2d Cir. 2010).

5 Kalikow held that it was not error to proceed by way of
6 contested matter and rejected argument that an adversary
7 proceeding was required. Thus, whether to proceed by way of
8 contested matter or adversary proceeding is a discretionary
9 matter for the bankruptcy court that issued the discharge to
10 determine.

11 There are practical reasons why a bankruptcy judge might use
12 adversary proceeding procedure as a case management device to
13 corral a complex situation headed toward trial. Fractious
14 parties exchanging salvos in contested matter motion papers can
15 be herded towards more focused trial preparation if required to
16 employ the format of complaint and answer, as Rule 9014(c)
17 permits. This helps sharpen the focus and narrow issues for
18 trial. Likewise, other issues and parties that do necessitate an
19 adversary proceeding may overlap the contempt and warrant
20 simultaneous treatment.

21 If the bankruptcy court in Barrientos (which had issued the
22 discharge), instead of dismissing, had elected to address the
23 § 524 discharge injunction contempt in an adversary proceeding,
24 limiting relief to that which is available on a motion for
25 contempt, it seems unlikely that the Ninth Circuit would have
26 reversed for having afforded too many procedural protections.

27 It follows that the law of the Ninth Circuit after Wall and
28 Barrientos should be understood as holding that the remedy for

1 violation of the § 524 discharge injunction is limited to
2 contempt, which ordinarily is a Rule 9014 contested matter and
3 which must be decided by the court that entered the discharge.

4 Reading Barrientos in conjunction with Kalikow and Bessette
5 reveals that all three circuits agree that the choice whether to
6 permit a Rule 9020 contempt matter to be consolidated with, or
7 raised in, an adversary proceeding is up to the discretion of the
8 bankruptcy court. A bankruptc
9 y judge's decision, as in Barrientos, to dismiss an adversary
10 proceeding in favor of requiring a stand-alone Rule 9020
11 contested matter is reviewed for abuse of discretion. Likewise,
12 a decision not to dismiss an adversary proceeding that contains a
13 count alleging contempt should receive the same deferential
14 review.

15
16 ***

17 The court being persuaded that Congress validly exercised
18 its power to except certain military-related debts from discharge
19 in bankruptcy, the debt being conceded, and no matters in the
20 nature of defense having been asserted, the debtor's Motion for
21 an Order of Contempt pursuant to Federal Rule of Bankruptcy
22 Procedure 9020 is DENIED.

23 An appropriate order will issue.

24
25 Dated: November 14, 2016

26 
27 _____
28 UNITED STATES BANKRUPTCY JUDGE

Service List

This document does not constitute a certificate of service. The Office of the Clerk is directed to serve the parties listed below a separate copy of the attached Order through the BNC.

J. Michael Hopper
PO Box 73826
Davis CA 95617

Office of the U.S. Trustee
Robert T Matsui United States Courthouse
501 I Street, Room 7-500
Sacramento CA 95814

Bruce A. Emard
501 I Street, Suite 10-100
Sacramento CA 95814

Peter L. Cianchetta
8788 Elk Grove Blvd. Ste. 2A
Elk Grove CA 95624