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FILED  
MAR 13 2003  
UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re )  
JAMES ELLETT, )  
Debtor. )

Case No. 94-25454-A-13

JAMES ELLETT, )  
Plaintiff, )

Adv. No. 97-2820

vs. )  
GERALD GOLDBERG, Executive )  
Director of the Franchise Tax )  
Board, )  
Defendant. )

ENTERED ON DOCKET  
MAR 13 2003  
UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

MEMORANDUM DECISION

Defendant Gerald Goldberg, the executive director of the Franchise Tax Board ("FTB"), moves for an order dismissing this adversary proceeding pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) as incorporated by Fed. R. Bankr. P. 7012, on the ground that the U.S. Supreme Court's recent opinion in Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743,

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1 122 S.Ct. 1864 (2002), undermines the Ninth Circuit's  
2 determination that plaintiff James Ellett's chapter 13 discharge  
3 binds the FTB even though the FTB did not file a proof of claim  
4 or otherwise voluntarily appear in Mr. Ellett's bankruptcy case.  
5 See Goldberg v. Ellett (In re Ellett), 254 F.3d 1135, 1139 (9<sup>th</sup>  
6 Cir. 2001), *cert. denied*, 70 USLW 3514 (February 19, 2002). See  
7 also In re Collins, 173 F.3d 924, 938-31 (4<sup>th</sup> Cir. 1999); Texas  
8 v. Walker, 142 F.3d 813, 821-23 (5<sup>th</sup> Cir. 1998); New York v.  
9 Irving Trust Co., 288 U.S. 329, 333 (1933); Hoffman v. Conn.  
10 Dep't. of Income Maint., 492 U.S. 96 (1989).

11 Mr. Goldberg asserts that the FTB's sovereign immunity, as  
12 guaranteed by the Eleventh Amendment of the U.S. Constitution,  
13 prevents the discharge of the tax debt owed by Mr. Ellett to the  
14 FTB. If this tax debt was not discharged by Mr. Ellett's chapter  
15 13 discharge, then the statutory discharge injunction of 11  
16 U.S.C. § 524(a) does not apply and Mr. Goldberg cannot be  
17 prospectively enjoined pursuant to Ex Parte Young, 209 U.S. 123  
18 (1908), from collecting the taxes on behalf of the FTB.

19 In other words, this court is being asked to declare, in the  
20 face of a contrary decision from the Ninth Circuit in this case,  
21 that the Bankruptcy Code's provision for the discharge of a debt  
22 owed to a state is unconstitutional because it is accomplished by  
23 the exercise of judicial power against a state that does not  
24 consent to exercise of that power.

25 I

26 James Ellett filed a chapter 13 bankruptcy on July 11, 1994.  
27 Mr. Ellett owed the FTB approximately \$18,000 for California  
28 personal income taxes for the years 1980 through 1990. These

1 taxes were scheduled as unsecured obligations. The FTB did not  
2 file a proof of claim.

3 After Mr. Ellett completed his chapter 13 plan the court  
4 granted his discharge pursuant to 11 U.S.C. § 1328. Despite the  
5 entry of that discharge, Gerald Goldberg, as executive director  
6 of the FTB, caused the FTB to issue a demand on Mr. Ellett for  
7 payment of California personal income taxes for the calendar  
8 years 1981, 1983, 1984, 1985 and 1990.

9 Mr. Ellett responded by filing this adversary proceeding.  
10 He asks that Mr. Goldberg be enjoined from collecting these taxes  
11 on the ground that his liability for them has been discharged in  
12 bankruptcy.

13 Mr. Goldberg immediately moved to dismiss the adversary  
14 proceeding. The court denied his motion, prompting an appeal to  
15 the Bankruptcy Appellate Panel. See Goldberg v. Ellett (In re  
16 Goldberg), 229 B.R. 202 (Bankr. E.D. Cal. 1999).

17 The Bankruptcy Appellate Panel affirmed the denial of the  
18 motion to dismiss the adversary proceeding. See Goldberg v.  
19 Ellett (In re Goldberg), 243 B.R. 741 (B.A.P. 9<sup>th</sup> Cir. 1999). A  
20 further appeal to the Ninth Circuit was also rejected. Goldberg  
21 v. Ellett (In re Goldberg), 254 F.3d 1135, 1139 (9<sup>th</sup> Cir. 2001).  
22 The Supreme Court denied defendant's petition for certiorari.

23 Upon returning to this court, Mr. Goldberg filed an answer  
24 which contains the following affirmative defense:

25 As its [sic] first affirmative defense, Goldberg  
26 alleges that the United States Supreme Court has  
27 granted certiorari in the case of *South Carolina State*  
28 *Ports Authority v. Federal Maritime Commission*, 243  
F.3d 165 (4<sup>th</sup> Cir. 2001, cert. granted 122 S.Ct. 297  
(2001). In that case the Court of Appeals held that  
administrative proceedings conducted before federal

1 tribunals pursuant to Article I of the U.S.  
2 Constitution, while not "suits," are, as they relate to  
3 States, nevertheless barred by the doctrine of State  
4 sovereign immunity from suit in federal court. In the  
5 event the Supreme Court decides that case in such a way  
6 as to call into question the Ninth Circuit's opinion in  
7 this case . . . Goldberg reserves his right to reassert  
8 that this Court lacks jurisdiction to bind the  
9 Franchise Tax Board to Debtor's discharge.

6 As this affirmative defense hinted he might, following the  
7 Supreme Court's decision in Federal Maritime Commission v. South  
8 Carolina State Ports Authority, 535 U.S. 743, 122 S.Ct. 1864  
9 (2002), Mr. Goldberg again moved to dismiss the adversary  
10 proceeding. His motion was argued and submitted for decision.  
11 However, on November 22, 2002, the court gave notice pursuant to  
12 28 U.S.C. § 2403(a) to the Attorney General of the United States  
13 because Mr. Goldberg is asserting that an Act of Congress  
14 affecting the public interest is unconstitutional. Consistent  
15 with this notice, the motion was restored to calendar in order to  
16 allow the United States time to intervene and to present evidence  
17 and argument.

18 The United States did not intervene. The court now rules.

19 II

20 The Ninth Circuit has held that "[w]hen an intervening  
21 Supreme Court decision undermines an existing precedent of the  
22 Ninth Circuit, and both cases are closely on point, a three judge  
23 panel of this court may reexamine our precedent to determine its  
24 continuing authority." United States v. Lancellotti, 761 F.2d  
25 1363, 1366 (9<sup>th</sup> Cir. 1985).

26 The Bankruptcy Appellate Panel has held that "we will not  
27 overrule our prior rulings unless a Ninth Circuit Court of  
28 Appeals decision, Supreme Court's decision or subsequent

1 legislation has undermined those rulings." Ball v. PAYCO General  
2 American Credits, Inc. (In re Ball), 185 B.R. 595, 597 (B.A.P.  
3 9<sup>th</sup> Cir. 1995).

4 Federal trial courts must similarly proceed very cautiously  
5 when asked to ignore circuit authority. The district court in  
6 Rodriguez v. Bowen, 678 F.Supp. 1462 (E.D. Cal. 1988), for  
7 instance, warned that "a district court should be extremely  
8 careful in concluding that circuit precedent is no longer good  
9 law."

10 Mr. Goldberg urges this court to disregard the ruling of the  
11 Ninth Circuit in this case and follow what he perceives to be a  
12 contradictory ruling by the Supreme Court in Federal Maritime  
13 Commission. Mr. Ellett, on the other hand, does not view the  
14 Supreme Court's decision as overruling the Ninth Circuit's  
15 decision in Goldberg v. Ellett. He urges this court to abide by  
16 the "law of the case" doctrine and not relitigate an issue of law  
17 already decided in this case by the appellate courts. United  
18 States ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1186  
19 (9<sup>th</sup> Cir. 2001).

20 The law of the case doctrine, however, has three exceptions.  
21 A prior decision of a legal issue will be followed unless: (1)  
22 "the evidence on a subsequent trial was substantially different,"  
23 (2) "controlling authority has since made a contrary decision of  
24 the law applicable to such issues," or (3) "the decision was  
25 clearly erroneous and would work a manifest injustice." Kimball  
26 v. Callahan, 590 F.2d 768, 771-72 (9<sup>th</sup> Cir. 1979) (citing White  
27 v. Murtha, 377 F.2d 428, 431-32 (9<sup>th</sup> Cir. 1967)).

28 Mr. Goldberg argues that the second exception requires this

1 court to revisit the Ninth Circuit's decision. He maintains that  
2 the Supreme Court's decision in Federal Maritime Commission  
3 undermines the Ninth Circuit's conclusion that the mere issuance  
4 of a discharge order does not impermissibly subject the state to  
5 a suit in violation of the Eleventh Amendment.

6 III

7 This court will not disregard the Ninth Circuit's ruling in  
8 Goldberg v. Ellett because Federal Maritime Commission does not  
9 clearly undermine it.

10 The Ninth Circuit concluded that Mr. Ellett's bankruptcy  
11 discharge is binding on the FTB even though it did not file a  
12 proof of claim or otherwise participate in Mr. Ellett's chapter  
13 13 case. Goldberg v. Ellett, 254 F.3d at 1139-41. However,  
14 following In re Mitchell, 209 F.3d 1111 (9<sup>th</sup> Cir. 2000), the  
15 Ninth Circuit also concluded that the discharge could not be  
16 enforced directly against the FTB or the State of California.  
17 Instead, Mr. Ellett was limited to enforcing the discharge  
18 against Mr. Goldberg, the state tax official seeking to collect  
19 the allegedly discharged taxes on behalf of the FTB. Mr. Ellett  
20 may seek prospective injunctive and declaratory relief under the  
21 Ex Parte Young doctrine against Mr. Goldberg.

22 In Federal Maritime Commission the Supreme Court held that a  
23 state's sovereign immunity precluded the Federal Maritime  
24 Commission from adjudicating a private party's complaint that a  
25 state-run port had violated the Shipping Act of 1984. In  
26 reaching this conclusion, the Supreme Court found that the  
27 similarities between administrative proceedings before the  
28 commission and civil litigation were overwhelming.

1 For instance, a commission proceeding is adversary in  
2 nature, parties are permitted to conduct discovery, and oral and  
3 documentary evidence is presented at a hearing presided over by  
4 an administrative law judge cloaked with judicial immunity. The  
5 Supreme Court noted that a proceeding before the commission  
6 "walks, talks and squawks very much like a lawsuit." 122 S.Ct.  
7 at 1873.

8 The "preeminent purpose of state sovereign immunity is to  
9 accord States the dignity that is consistent with their status as  
10 sovereign entities." Id. at 1874. This purpose led the Supreme  
11 Court to hold that

12 state sovereign immunity bars the FMC from adjudicating  
13 complaints filed by a private party against a  
14 nonconsenting State. Simply put, if the Framers  
15 thought it an impermissible affront to a State's  
16 dignity to be required to answer the complaints of  
17 private parties in federal courts, we cannot imagine  
18 that they would have found it acceptable to compel the  
19 state to do exactly the same thing before the  
20 administrative tribunal of an agency, such as the FMC.

21 Id. at 1873.

22 Federal Maritime Commission does not call into question the  
23 continued viability of the Ninth Circuit's decision in Goldberg  
24 v. Ellett, nor the decisions of the Fourth and Fifth Circuits in  
25 Texas v. Walker or In re Collins.

26 The key distinction between these cases and Federal Maritime  
27 Commission is that a bankruptcy debtor does not bring a suit  
28 against the state in order to obtain a discharge. To discharge a  
debt, the debtor merely identifies the creditor owed the debt in  
the bankruptcy schedules. Once notified of the filing of the  
petition, the creditor decides whether to file a proof of claim  
and participate in the bankruptcy case.

1 At the conclusion of a chapter 13 bankruptcy case, including  
2 Mr. Ellett's, the court issues a discharge order. That order  
3 declares that "the debtor is discharged from all debts provided  
4 for by the plan or disallowed under 11 U.S.C. § 502." See Order  
5 Discharging Debtor entered on April 19, 1997, Case No. 94-25454.  
6 Prior to entry of the discharge order, the court embarks on no  
7 inquiry as to which creditors are compelled to appear. Nor does  
8 the court make any determination that a particular debt is  
9 included within or excluded from the scope of the discharge. In  
10 effect, the court decrees, somewhat tautologically, that  
11 dischargeable debts have been discharged.

12 Because the discharge order does not determine whether a  
13 particular debt has been discharged, with exceptions not relevant  
14 in the chapter 13 context, a creditor, as well as the debtor, is  
15 free to contest in bankruptcy or nonbankruptcy court the  
16 applicability and scope of the bankruptcy discharge to its claim.  
17 28 U.S.C. § 1334(b).<sup>1</sup> Cf. Fidelity National Title Insurance Co.  
18 v. Franklin (In re Franklin), 179 B.R. 913 (Bankr. E.D. Cal.  
19 1995).

20 For instance, after a chapter 13 case has been concluded a  
21 former spouse can assert in state court that a debt owed to him  
22 or her is a support obligation and therefore was excepted from a  
23 chapter 13 discharge. See 11 U.S.C. §§ 523(a)(5) and 1328(a)(1).

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25 <sup>1</sup> Section 1334(b) provides: "Notwithstanding any Act of  
26 Congress that confers exclusive jurisdiction on a court or courts  
27 other than the district courts, the district courts shall have  
28 original but not exclusive jurisdiction of all civil proceedings  
... related to cases under title 11." The jurisdiction of the  
district court is referred to the bankruptcy court by 28 U.S.C. §  
157(a) and a general order of the District Court.



1 The same post-discharge determination can be made with reference  
2 to student loans, restitution obligations, and debts for death or  
3 personal injury caused by the debtor's operation of a motor  
4 vehicle while intoxicated. See 11 U.S.C. §§ 523(a)(8) & (a)(9)  
5 and 1328(a)(2) & (a)(3).

6 This case does not involve a category of debt excepted by  
7 section 1328(a)(1)-(3) from the chapter 13 discharge. Rather,  
8 there is a dispute as to whether the FTB was given notice of the  
9 case in time to file a proof of claim.<sup>2</sup>

10 The chapter 13 discharge is limited to debts "provided for  
11 by the plan." 11 U.S.C. § 1328(a).<sup>3</sup> In order to provide for a  
12 debt, the chapter 13 plan must make provision for the claim and  
13 the holder of the claim must receive notice of the filing of the  
14 bankruptcy petition in time to participate by filing a timely  
15 proof of claim. See Fed. R. Bankr. P. 3002.

16 In other words, if a debtor fails to tell a creditor about  
17 the bankruptcy case and thereby deprives the creditor of the  
18 opportunity to file a proof of claim, the debtor will not  
19 discharge that claim even if the plan makes provision for its

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21 <sup>2</sup> In the chapter 13 context, the failure to file a timely  
22 proof of claim prevents the claim holder from participating in  
23 the case. See In re Osborne, 76 F.3d 306 (9<sup>th</sup> Cir. 1996); In re  
24 Edelman, 237 B.R. 146, 153 (B.A.P. 9<sup>th</sup> Cir. 1999); Ledlin v.  
United States (In re Tomlan), 907 F.2d 114 (9<sup>th</sup> Cir. 1989);  
Zidell, Inc. v. Forsch (In re Coastal Alaska), 920 F.2d 1428,  
1432-33 (9<sup>th</sup> Cir. 1990).

25 <sup>3</sup> Section 1328(a) provides: "As soon as practicable after  
26 completion by the debtor of all payments under the plan, unless  
27 the court approves a written waiver of discharge executed by the  
28 debtor after the order for relief under this chapter, the court  
shall grant the debtor a discharge of all debts provided for by  
the plan or disallowed under section 502 of this title. . . ."

1 payment. See e.g., Southtrust Bank of Ala. v. Gamble (In re  
2 Gamble), 85 B.R. 150, 152 (Bankr. N.D. Ala. 1988); In re Cash, 51  
3 B.R. 927, 929 (Bankr. N.D. Ala. 1985); Leber v. Illinois Dep't of  
4 Revenue (In re Leber), 134 B.R. 911 (Bankr. N.D. Ill. 1991).

5 Conceivably, then, the FTB could commence an action in a  
6 nonbankruptcy tribunal to collect its claim. In any such action,  
7 Mr. Ellett could assert his bankruptcy discharge as a defense.  
8 If raised as a defense, the tribunal could then determine whether  
9 the FTB had been given sufficient notice of the petition in time  
10 to file a proof of claim. Cf. In re Franklin, 179 B.R. at 924.  
11 If the FTB was not given sufficient notice, the tribunal could  
12 conclude that the debt had not been discharged.<sup>4</sup>

13 Such post-discharge litigation is possible because, just as  
14 the discharge order did not determine whether a particular debt  
15 was a support obligation, a student loan, a restitution  
16 obligation, or a liability for death or personal injury caused  
17 while operating a vehicle while intoxicated, it did not determine  
18 that the FTB's claim for taxes was provided for in the plan.

19 In issuing Mr. Ellett's chapter 13 discharge, then, this  
20 court did not subject FTB to a suit in federal court in violation  
21 of the Eleventh Amendment. In the words of the Fifth Circuit,  
22 the FTB was not "hauled into federal court against its will."  
23 Texas v. Walker, 142 F.3d at 822. Rather, this court gave Mr.

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25 <sup>4</sup> Had Mr. Ellett commenced an action in this court  
26 against the FTB in order to determine whether its claim had been  
27 discharged, in the absence of a waiver of the state's sovereign  
28 immunity, the Eleventh Amendment would have precluded this court  
from entertaining the suit. See In re Mitchell, 209 F.3d 1111  
(9<sup>th</sup> Cir. 2000).

1 Ellett a potential defense to any attempt by the FTB to collect a  
2 pre-petition claim after the entry of a discharge.

3 At the argument of the motion to dismiss, the Attorney  
4 General acknowledged that the Constitution vests the federal  
5 government with the power to enact uniform bankruptcy laws. U.S.  
6 Const., art. I, § 8, cl.17. He further asserted that if Congress  
7 had authorized the Postmaster General to issue a bankruptcy  
8 discharge, there would be no Eleventh Amendment issue because the  
9 discharge would not be issued in the context of a judicial  
10 proceeding.

11 This seems to be a tacit, if not express, acknowledgment  
12 that it is within the constitutional grasp of Congress to provide  
13 for a bankruptcy discharge of debts owed to states. What is  
14 giving the Attorney General heartburn is the issuance of the  
15 discharge by a federal court.

16 However, as noted above, the FTB was not compelled to  
17 participate in a judicial proceeding and the end product of it,  
18 the discharge, was not a judgment against the FTB. Rather, the  
19 discharge invested the debtor with a defense to any action the  
20 FTB (or any other creditor) might bring against him. "An  
21 assertion of the discharge defense is not equivalent to seeking  
22 affirmative relief." Texas v. Walker, 142 F.3d at 820.

23 Nor does Federal Maritime Commission call into question the  
24 holding in In re Collins, relied on by the Ninth Circuit in  
25 Goldberg v. Ellett, that the ability to grant a discharge of debt  
26 which is valid against a state is crucial to the integrity of the  
27 bankruptcy system.

28 "The power of bankruptcy courts to discharge debt is

1 fundamental to our bankruptcy system. If a state could  
2 assert Eleventh Amendment immunity to avoid the effect  
3 of a discharge order, the bankruptcy system would be  
4 seriously undermined . . . This purpose can be  
5 fulfilled today only if the bankruptcy courts retain  
6 the power to discharge debts, including debts owed to  
7 states, consistent with federal supremacy power with  
8 respect to bankruptcy."

9 In re Collins, 173 F.3d 924, 930 (4<sup>th</sup> Cir. 1999). Cf. Hood v.  
10 Tennessee Student Assistance Corp., 319 F.3d 755 (6<sup>th</sup> Cir. 2003)  
11 (In holding that 11 U.S.C. § 106(a) is constitutional, the court  
12 held: "This conclusion in no way undermines the dignity of the  
13 state as a separate sovereign. This is not an instance in which  
14 Congress has enabled private parties to 'haul' states into court  
15 against their will . . . Unlike a traditional lawsuit, in which  
16 the state is forced to defend itself against an accusation of  
17 wrongdoing, the bankruptcy process is, shortly speaking, an  
18 adjudication of interests claimed in a res.' If the state wishes  
19 to assert its interest in the res, it may do so." [Internal  
20 citations omitted.]

#### 21 IV

22 The motion to dismiss this adversary proceeding will be  
23 denied. The Ninth Circuit previously determined in this case  
24 that Mr. Ellett's bankruptcy discharge order was binding on the  
25 FTB and that its issuance did not impinge upon the State of  
26 California's sovereign immunity. For the reasons explained  
27 above, the court concludes that this determination is unaffected  
28 by the intervening Supreme Court decision in Federal Maritime  
Commission. Therefore, Mr. Ellett may continue with his effort  
pursuant to Ex Parte Young to prospectively enjoin Mr. Goldberg  
from collecting any taxes that may have been discharged in the

1 chapter 13 case.

2 A separate order will be issued.

3 Dated: *13 March 2003*

4 By the Court

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Michael S. McManus, Chief Judge  
7 United States Bankruptcy Court

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