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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 PETITION TO AMEND RULE 8(c)
11 OF THE ARIZONA RULES OF CIVIL
12 PROCEDURE

Supreme Court No. _____

**Petition to Amend Rule 8(c) of the
Arizona Rules of Civil Procedure**

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14 Pursuant to Rule 28 of the Arizona Supreme Court, the State Bar of Arizona
15 hereby petitions the Court to amend Rule 8(c) of the Arizona Rules of Civil
16 Procedure. The proposed amendment is intended to modify the current rule to
17 incorporate a recent amendment to Rule 8(c)(1) of the Federal Rules of Civil
18 Procedure. Specifically, the federal rule was amended to eliminate “discharge in
19 bankruptcy” as an affirmative defense required to be pled in an answer or be
20 waived. The change in the federal rule was made because, as a matter of law, the
21 defense of discharge in bankruptcy cannot be waived. As with the former federal
22 rule, which was modified effective December 1, 2010, this change should be made
23 to Arizona Rule 8(c) because the defense of discharge in bankruptcy is also not
24 subject to waiver by state court litigants.

25 Attached as Appendix A is a redlined version of the proposed amendment.
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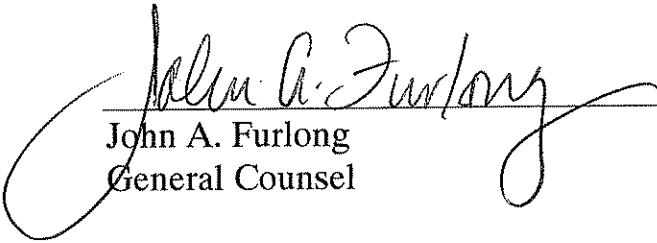
1 advisory committee's note (2010 Amendments). The advisory committee further
2 noted that there are certain categories of debt that may be excepted from discharge,
3 and stated that "whether a claim was excepted from discharge may be determined
4 either in the court that entered the discharge or—in most instances—in another
5 court with jurisdiction over the creditor's claim." *Id.* Very often, creditor claims
6 are brought in state courts. Accordingly, the confusion that would be engendered in
7 continuing to include discharge in bankruptcy among the enumerated affirmative
8 defenses is not limited to federal law.

9 In sum, the proposed amendment to Rule 8(c) would eliminate confusion and
10 recognize that "discharge in bankruptcy" is not a waivable defense. As this is likely
11 to save unnecessary litigation costs and enhance judicial efficiency, the State Bar
12 recommends the proposed amendment's adoption.

13 **Conclusion**

14 The State Bar of Arizona respectfully requests that the Court amend the Rule
15 8(c) of the Arizona Rules of Civil Procedure as shown in Appendix A.

16 RESPECTFULLY SUBMITTED this 28th day of November, 2011.

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19 
20 John A. Furlong
General Counsel

21 Electronic copy filed with the Clerk
22 of the Supreme Court of Arizona
23 this 28th day of November, 2011.

24 By: Kathleen A. Furdgen
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APPENDIX A

Proposed Rule Changes

(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by "~~strike-through~~").

Rule 8(c). Affirmative defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, ~~discharge in bankruptcy~~, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.