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09/09/2005 12:20 PM

To interim_bk_rules@ao.uscourts.gov

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Subject Interim Bankruptcy Rules

Dear Mr. McCabe,

I am a Bankruptcy Judge for the Northern District of Indiana and would like to offer some observations concerning the proposed Interim Bankruptcy Rules. Given all the hard work the Committee has gone to to prepare those rules in such an expeditious fashion, I hesitate to offer suggestions for fear of appearing too critical or unappreciative. Nonetheless, there are a couple of areas where I do not believe the Interim Rules have been sufficiently coordinated with the existing Rules or the Bankruptcy Code as it has been amended. The most significant of these are the subject of this message.

The debtor's exemptions and objections to them are the subject of Rule 4003. The Interim Rules add a new subparagraph (b)(2) to Rule 4003. After addressing an objection based upon 522(q), the second sentence of this new provision goes on to state that if an exemption is first claimed after a case has been reopened, an objection to it shall be filed before the case is closed. (I assume that this sentence was designed to refer to any objection and not just those based upon 522(q).) The first difficulty with this provision is that the Bankruptcy Rules do not appear to permit reopening a case in order to amend exemptions. Pursuant to Rule 1009(a), which has not been changed by the Interim Rules, amendments to the voluntary petition, statements, schedules and lists are to be filed "before the case is closed." Taking this rule at face value, once a case has been closed the debtor's opportunity to amend those documents, including the schedule of exemptions, comes to an end and would not be is not revived by reopening the case. To revive the opportunity the Rule would need to allow amendments "at any time" or "at any time the case is open." Consequently, there seems to be a lack of coordination between Rule 4003(b)(2) and Rule 1009(a), because the one assumes something can be done which the other does not permit. Either Rule 4003(b)(2)'s reference to post-reopening claims of exemptions needs to be deleted or Rule 1009(a) needs to be changed to permit amendments after a case has been reopened.

Assuming that Interim Rule 4003(b)(2) remains unchanged and amendments to claimed exemptions can be made after a case has been reopened, the provisions of the rule need to more clearly provide a meaningful opportunity and a readily determinable deadline for filing objections to a post-reopening claim of an exemption. As the Rule now stands, an objection may be filed "before the reopened case is closed" and nothing requires the court to keep the reopened case open for any particular amount of time. Theoretically, the case could be immediately closed -- thereby terminating the opportunity to object before creditors ever became aware that it existed -- or the case could be kept open forever -- with the result that the opportunity to object would never end. By comparison, where pre-closing claims to exemptions are concerned, Rule 4003(b)(1) gives parties in interest at least 30 days to object to the claim, with that time running from either the conclusion of 341 meeting or the date an amended schedule is filed. If the Rules are going to permit a debtor to amend a claim of exemptions after a case has been reopened, they should also give parties in interest a minimum amount of time to object to such a claim and specify a precise deadline for filing any objections.

My second area of concern has to do with the reaffirmation process and my fear that the courts may not be able to effectively carry out their responsibilities under section 524. You may recall that I previously commented upon the changes to Rule 4008 which would allow a reaffirmation agreement to be filed within the 30 days following the entry of a debtor's discharge, explaining why I felt that was unwise. I was not sufficiently persuasive and as of December 1, 2005 reaffirmation agreements need not be filed prior to discharge. Under the Rule as it will then exist, reaffirmations are to be filed within 30 days after discharge,

or even later with the court's permission. The recent amendments to the Bankruptcy Code and the Interim Rules magnify my original concerns.

Pursuant to the new 524(m) certain reaffirmation agreements are presumed to impose an undue hardship upon the debtor and the court is mandated to review those agreements. (This is in addition to the court's responsibility for holding hearings concerning reaffirmation agreements in the cases where the debtor is not represented by counsel.) The statute contemplates a hearing upon notice to both the debtor and the creditor, which is to be concluded before the discharge is entered. Interim Rule 4004(c)(1)(J) helps to implement this review by directing the court to delay the entry of discharge in these situations. I respectively submit that, in order to properly fulfill its responsibilities under both the statute and Rule 4004(c)(1), the court needs to know which cases will be the subject of reaffirmation agreements before the discharge deadline and not after. It will be impossible for the court to conclude the required hearings prior to discharge, and know which cases in which to delay the entry of discharge, if reaffirmation agreement may be filed 30 or more days after a discharge has been entered, as Rule 4008 contemplates. The only alternative which would seem allow fidelity to the duty to accomplish this review before discharge would be to defer the entry of discharge in all cases and to schedule reaffirmation hearings upon notice to the debtor and all creditors in every case. That would not only be an unworkable procedure but run afoul of the Rule 4004's goal of issuing a discharge "forthwith." These problems also exist under the current version of the Rule 4008, which contemplate a hearing within thirty days after discharge and a motion for the approval of a reaffirmation agreement being filed at or before that hearing. Nonetheless, they become more significant after December 1, 2005.

These new difficulties are in addition to the concerns I previously expressed about the proposed changes to Rule 4008. The recent amendments to the Bankruptcy Code aggravate what I thought was a bad situation. It would be much more appropriate, and procedurally convenient for all concerned, if reaffirmation agreements and the motions to approve them were filed prior to the deadline for objections to discharge. If problems arise and the reaffirmation process gets delayed, the debtor can always take advantage of the opportunity offered by Rule 4004(c)(2) and ask the court to defer the entry of discharge. This, I submit, is a much more sensible alternative than creating a procedure which places the court in a position where it cannot possibly fulfill the duties imposed upon it.

Despite my concerns, I recognize and greatly appreciate all of the hard work the committee went to prepare and disseminate the proposed Interim Rules so that we can all have a meaningful opportunity to consider and digest them prior to the October 17. I know the committee will take my suggestions to heart and seriously consider them as it continues it work. If you should have any questions concerning these comments or care to discuss them, please feel free to contact me.

Robert Grant