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To <Rules_Comments@ao.uscourts.gov>

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08-Bk-005

Subject Proposed amendment to Bankruptcy Rule 1019

Peter G. McCabe

Secretary, Committee on the Rules

Rules_Comments@ao.uscourts.gov

Dear Mr. McCabe,

I am writing to comment on the proposed change to Bankruptcy Rule 1019. I am making these comments on behalf of myself and the National Association of Bankruptcy Trustees. My primary interest is as a Chapter 7, Panel Trustee in West Virginia. As a result of being a trustee, I joined the National Association of Bankruptcy Trustees. I serve that organization as Secretary. I have been designated as Chairman of the Strategic Legislative Committee of that organization and it is in that capacity in which I also write to you.

The primary advancement contained in the proposed rule is to clarify that a new period for objecting to exemptions exists after conversion of a case to Chapter 7. NABT welcomes and supports this clarification of the meaning of Bankruptcy Rule 4003. There has been a division in the Bankruptcy Courts over whether a new period arises after conversion from one chapter to another. In jurisdictions interpreting Rule 4003 as providing only a single opportunity to object, conversion from a chapter other than Chapter 7 to Chapter 7 usually results in the inability of the Chapter 7 trustee to make a timely objection to an improperly claimed objection. Such a situation permits an unwarranted windfall for debtors.

This problem is more acute in the conversion to Chapter 7 than in conversions to other chapters. The primary focus of a Chapter 7 trustee is on liquidating assets to make a real return to creditors. Part of calculating whether a real return is possible is analysis of how exemptions impact liquidation and distribution.

The emphasis of other chapters of the Bankruptcy Code is different. In other chapters the primary use of exemptions is to calculate where an income stream proposed in a plan results in payments over time equal to or greater than what would be received in a Chapter 7 liquidation. (The test contained in 11 U.S.C. § 1328(b)(2) is the primary example.) When an income stream is sufficient, even where incorrect exemptions were claimed, there is often an inadequate incentive to police exemptions.

Guaranteeing Chapter 7 trustee one meaningful opportunity to pursue objections after conversion will permit cases, where income streams fail to materialize and liquidation results, to be administered in the prescribed manner.

The proposed rule contains two time limitations. The first provides that if a case has previously been in Chapter 7 and thereafter converted to another chapter and has now returned to Chapter 7, a completely new period will not exist. This is a logical limitation. It encourages Chapter 7 trustees to act promptly. NABT supports this limitation.

However the second time limit proposes to limit the opportunity to object to a single year. This portion of the proposal is opposed by NABT. The limitation disregards the rationale for creating a new period in which to object. Nothing changes in the law after a year that is not true in less than a year.

Section 348 of the Bankruptcy Code defines what happens at conversion. It defines property of the estate when a conversion occurs without bad faith (the normal case) to be the property of the estate at filing, that is still in the possession or under the control of the debtor. Causing improper exemption of such property to be beyond the ability of a diligent Chapter 7 trustee to seek redress is illogical. The proposed limit is arbitrary and is opposed.

Thank you.

Sincerely,

s/ Martin P. Sheehan