UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA

03-BK-002

ROBERT E. GRANT, JUDGE

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October 23, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Offices of the U.S. Courts
Thurgood Marshall Federal Building
Washington, D.C. 20544

Re: Proposed Amendment to Bankruptcy Rule 4008

Dear Mr. McCabe:

I was pleased to see that the committee proposes to amend Rule 4008 of the Federal Rules of Bankruptcy Procedure so that it includes a deadline by which reaffirmation agreements must be filed. Unfortunately, I think the committee has chosen an inappropriate deadline. Rather than thirty days after the entry of an order granting a discharge or confirming a chapter 11 plan, a much better choice would be to require reaffirmation agreements to be filed before either of those two events. The longer deadline the committee proposes risks creating confusion, as well as additional and otherwise unnecessary litigation.

Using the date of discharge as the deadline for filing reaffirmation agreements establishes a readily discernable and easily enforceable bright-line standard. It is also consistent with § 524(c)(1) of the Bankruptcy Code when it requires such agreements to be "made before the granting of the discharge." Allowing an additional thirty days beyond that date to file the agreement seems to dilute the statutory requirement and, by doing so, lays the groundwork for otherwise unnecessary litigation. I can easily imagine a set of circumstances arising after a default under a reaffirmation agreement filed during the thirty days following the entry of discharge, where the defaulting party defends based upon the proposition that the agreement was not made prior to the discharge but was really made shortly thereafter and is, therefore, unenforceable. I can also see controversies, and eventually published opinions, over how much of a reaffirmation agreement must be decided upon, and what terms can be left open, and still permit the agreement to be made before the discharge is granted. The courts already face these issues in civil litigation involving questions of contract formation. There is no reason to import them into the reaffirmation process.

I realize that debtors and creditors are not always able to complete the reaffirmation process, or to prepare and execute the documents needed to memorialize their understanding, prior to the entry of discharge. Nonetheless, the existing rules already provide a solution to this problem through Rule 4004(c)(2), which allows the court to defer the entry of discharge at the debtor's request. Indeed, I

always understood that one of the primary reasons for this particular provision was to give debtors and creditors additional time to complete the reaffirmation process.

The opportunity which Rule 4004 provides for deferring discharge also eliminates the need for the proposed change in Rule 4008 to allow the court to extend the time for filing reaffirmation agreements. The committee note to this portion of the proposed rule indicates that it contemplates the court having broad discretion to permit the late filing of reaffirmation agreements. This, I submit, creates fertile ground for breeding otherwise unnecessary litigation. Of course, no one really cares whether or not a reaffirmation agreement is enforceable until someone has defaulted in the performance of their obligations under it. I can easily imagine scenarios in which reaffirmation agreements are not filed until someone becomes interested in enforcing them. Of course, under those circumstances, the party in default would certainly like to have the opportunity to persuade the court that, in the proper exercise of its discretion, it should not permit the untimely filing – thereby rendering the agreement unenforceable. To make matters worse, this will often be taking place years after the bankruptcy case has been closed. Consequently, an issue which otherwise could quite rightly have been left to the state court – the enforcement of the reaffirmation agreement itself – will end up spawning satellite litigation in the bankruptcy court over a completely preliminary question – whether the belated filing of the reaffirmation agreement should be permitted.

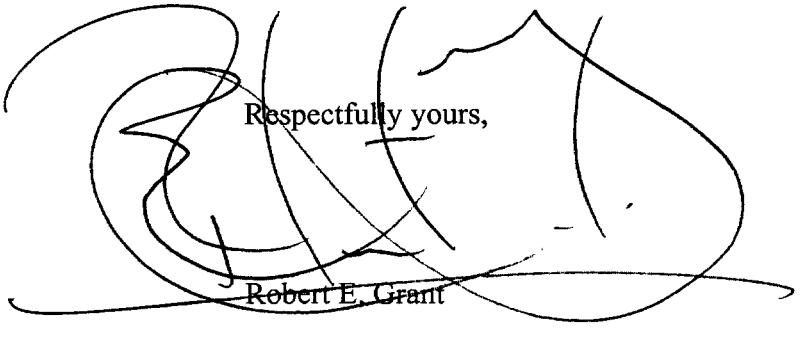
It is in everyone's best interest for debtors and creditors to know precisely where they stand with one another at the conclusion of the bankruptcy. The proposed amendment to Rule 4008 does not facilitate this. Instead, by allowing reaffirmation agreements to be filed after – sometimes well after – the discharge has been entered, the proposed amendment leaves the relationship unsettled. Ambiguity is reduced when everyone can look to clearly discernable and readily identifiable rules to guide their conduct. Such rules also reduce the possibilities for litigation. I realize that it is not always possible to design procedural rules in ways that eliminate ambiguity or the possibility of litigation over their requirements. Nonetheless, this is not one of those situations. The deadline for filing reaffirmation agreements is one which readily lends itself to clearly identifiable, unambiguous deadlines. Indeed, Congress has already established such a deadline for the making of the agreement. The courts should reinforce that decision by creating an equally firm and identifiable deadline for the filing of the agreement.

I hope that the committee will reconsider its proposed amendment to Bankruptcy Rule 4008. I would suggest something along the following lines:

> A reaffirmation agreement shall be filed prior to the entry of an order granting a discharge. In the event additional time may be needed to file the agreement, the entry of discharge may be deferred in accordance with Rule 4004(c)(2).

Thank you for your consideration.

Respectfully yours,



Robert E. Grant

REG/JF