

06 - BK - 054

MEMORANDUM

TO: Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure

FROM: Judge Dennis Montali

SUBJECT: Suggested Amendments to Fed. R. Bankr. P. 1019(2)

I write to propose amendments to Bankruptcy Rule 1019 to close a loophole that may exist when debtors claim improper exemptions in unsuccessful Chapter 11, 12 or 13 cases, rendering those exemptions immune from attack when the cases are converted to Chapter 7.

I recognize that my suggested amendments are not a result of any provisions in BAPCPA, and that the numerous rule revisions presently out for public comment are necessitated by BAPCPA rather than bankruptcy practice generally. Nevertheless, I hope the Bankruptcy Rules Committee will consider this suggestion either in the present round of rule making or in the near future.

The suggestion I have simply resets the time for trustees or other parties in interest to object to a debtor's claim of exemptions when a case is converted to Chapter 7. Presently Rule 1019(2) starts new time periods for various actions that may be taken following conversion of a case to Chapter 7. These actions include motions to dismiss, filing proofs of claim, filing complaints to determine dischargeability of a debt and to object to a debtor's discharge. Noticeably the rule does not reset the time to object to exemptions. The new time periods are not reset if the Chapter 7 case has been converted from one of the other chapters after earlier having been in Chapter 7 and the deadlines having expired.

My proposed amendments would simply add "an objection to a claim of exemption," in the opening and ending parts of subparagraph 2, and insert "4003" in the middle. Thus, subparagraph 2 (with the currently proposed amendments included) would read as follows (my inserts underlined):

(2) *New Filing Periods.* A new time period for filing a motion under § 707(b) or (c), a claim, an objection to a claim of exemption, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under Rules 1017, 3002, 4003, 4004, or 4007, but a new time period shall not commence if a Chapter 7 case has been converted to a Chapter 11, 12 or 13 case and thereafter reconverted to a Chapter 7 case and the

time for filing a motion under § 707(b) or (c), a claim, an objection to a claim of exemption, a complaint objecting to discharge....

I make this suggestion because I believe there is too much risk that an individual debtor in Chapter 11, particularly if there is no active creditors committee participation and no plan filed early, or in Chapter 12 or 13, where perhaps an unrealistic full-pay plan may be proposed, may assert a spurious claim of objection that might understandably be overlooked in the short time available to do so. This may occur because in the former instance, no party in interest is likely to come forward until a plan is proposed, and in the latter case, a Chapter 12 or 13 trustee has no real incentive to object to an exemption if a plan has been proposed to pay creditors in full.

In the event the Chapter 11, 12 or 13 aborts after the last day to object to the exemption (30 days from the conclusion of the meeting of creditors in accordance with Rule 4003(b)), creditors will be without a remedy and an unworthy debtor will potentially get away with an improper exemption. This possibility can be eliminated quite easily.

This outcome was recognized as the inevitable consequence of the way the rules work in Smith v. Kennedy, 235 F.3d 472 (9th Cir. 2000). The decision is completely consistent with the language of Rule 1019(2) but invites an unsound result as a matter of bankruptcy policy.

I urge the Rules Committee to correct this discrepancy by having debtors being subjected to the same reexamination of their exemptions in a converted Chapter 7 as there is presently a thorough reexamination of their entitlement to a discharge of their debts.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
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Tel. 415-268-2320

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