



NABT's Rules Comments

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11-BK-011

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1 Attachment



Rules Comments 121911 1632.pdf

The National Association of Bankruptcy Trustees (NABT) submits its comments on the proposed Bankruptcy Procedure Rules and Forms Amendments as to Action Item 20, Official Form 6C – (Schedule C – Property Claimed as Exempt) in the Statement/Comments as attached.

NABT believes that Official Form 6C should not be amended or modified for the inclusion of a “Full fair market value of the exempted property” checkbox.

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## Comments of the National Association of Bankruptcy Trustees regarding the Proposed Amendments to the Federal Rules of Bankruptcy Procedure as published for Public Comment in August 2011.

The National Association of Bankruptcy Trustees (“NABT”) is an organization primarily comprised of individuals that serve as Trustees in Chapter 7 bankruptcy cases. NABT, on behalf of Chapter 7 Trustees, has a core purpose in promoting fair and just administration of bankruptcy estates and the bankruptcy laws in conjunction with the administration of such estates.

The Rules Committee of NABT has undertaken a review and analysis of the proposed amendments published for public comment and hereby submits its comments for consideration by the Advisory Committee on Bankruptcy Rules as specifically addressed to Action Item 20. Official Form 6C (Schedule C – Property Claimed as Exempt).

Action Item 20 calls for the amendment or modification of Schedule C to provide the option of declaring as exempt the full fair market value of property, and a rearrangement in the order of the columns within the form. NABT has significant concerns regarding the inclusion of a “full fair market value of the property” checkbox which stem from both legal and practical perspectives. While the underlying premise found in the Advisory Committee’s note is that the US Supreme Court decision of *Schwab v. Reilly*, 130 S. Ct. 2652, 2668 (2010) **suggests** such a declaration of exemption is inappropriate, NABT believes that is not the case.

*Schwab*, as some commentators have noted, held that Rules can’t trump a statute. That is, of course, a truism. The point here is most statutes which establish the underlying basis of a bankruptcy exemption, whether federal bankruptcy law (§522(d)) or by incorporation of state laws (§522(b)) are generally dollar defined or driven, unless specifically stated otherwise. No Rule, or form, can trump a statute’s terms. Valid exemptions, which are established in dollar terms, can only be claimed in dollar terms.

Examples of this line of thinking are found in the case of *In re Stoney*, 445 B.R. 543 (Bankr. E.D. Va. 2011) which held the 100% FMV type of exemption claim, similar to the proposed “full fair market value,” was unacceptable under its state law exemptions. However, some Courts have determined otherwise as noted in the case of *In re Massey*, 455 B.R. 17 (Bankr. C.D. Ma 2011), or crafted alternative treatment, *In re Salazar*, 449 B.R. 890 (Bankr. N.D. Tex. 2011). The proposed modification of Schedule C would create the potential for a plethora of objections, whether by Chapter 7 trustees or by creditors. The modification is only a paucity of assistance to both the bankruptcy judiciary and case administration. Even if the potential for objections is disregarded, the proposed modification of Schedule C may still fail since the majority of the Court in *Schwab* noted:

[I]t is far from obvious that the Code would “entitle” Reilly to clear title in the equipment even if she claimed as exempt a “full” or “100%” interest in it (which she did not). Of course, it is likely that a trustee who fails to object to such a claim would have little incentive to do anything but pass title in the asset to the debtor. But that does not establish the statutory entitlement Reilly claims.

*130 S. Ct. at 2668, footnote 21.*

In instances such as the cases above, the trustee is still required to object, but then the burden is on the debtor to go forward and establish a plausible basis for claiming the exemption in that manner and that it was within the statutory limit allowed. If debtor satisfies the burden, the trustee would have the burden of proving the claimed exemption exceeded the statutory limit. This can only increase the burden on both the judiciary and the Chapter 7 trustee without any substantive benefit to any of the parties.

Federal and many state exemptions are in the nature of four (4) types, 1) dollar driven – item specific, car, household goods; 2) true in kind, health aids; 3) “reasonable and necessary for support” alimony, and portions of the personal injury exemption; and, 4) the wildcard. At some level the wildcard is dollar driven, but because it can be spread across several assets, and because of the reduction in the amount available when used through the “pour over” the wildcard exemption deserves separate treatment.

Today, there is gamesmanship, primarily involving real estate and interests in business entities. (See *In re Winchell*, 2010 Bankr. LEXIS 4883 (Bankr. E.D.W.A.) – Bankruptcy Judge Patricia Williams<sup>1</sup>; and, *In re Wiczek*, 452 B.R. 762 ( Bankr. D.Minn, 2011). Artificially low values or unknown values are often reported, and the apparent equity appears to be below statutory values. Inherently when this form of conduct occurs and a 100% exemption is claimed, a game of “gotcha” with bankruptcy trustees occurs. In giving an overview of the process, the U.S. Supreme Court certainly would not have sought to encourage or promote this kind of a misuse of the process. No Rule or Form should encourage gamesmanship of this type.

It is NABT’s position that Schedule C should not be amended or modified for the inclusion of “Full fair market value of the exempted property” checkbox and that it should be removed. NABT has been active as part of the Judicial Conference’s Advisory Committee on Bankruptcy Rules and the Bankruptcy Official Forms Modernization Project. In conjunction with the Forms Modernization effort, NABT noted a common theme which was complete and consolidated information. The current Schedule C – Property claimed as exempt form (Official Form 6C) results in providing only a minimal amount of information. While it does set forth a description of the property, the statutory basis and the amount of the claimed exemption, it fails to provide critical information as to the net value available for administration, and fails to provide without cross-referencing both liens against such property and property not claimed

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<sup>1</sup> Comment 11-BK-007, in which Bankruptcy Judge Williams noting the effect of a designated FMV checkbox and the practical burdens it would create in her comment opposing the proposed amendment.

as exempt. It is NABT's position that this could be easily remedied by the inclusion of a few additional columns, which would clearly set forth what properties and values are subject to administration.

An example of such modification might be as follows:

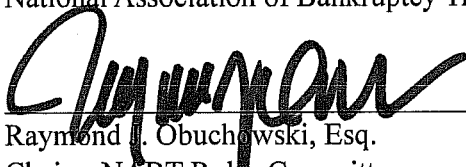
Property Description from Schedule A	Full market value of the property	Current value of the portion you own	Liens against the full market value	Amount you claim as exempt	Specific laws that allow exemption	Net value to the Estate	Claimant (H or W)
2008 Toyota Tacoma	\$20,000.00	\$20,000.00	\$12,000.00	\$3,450.00	11 USC 522(d)(2)	\$4,550.00	H
1995 Chevy Truck	\$3,000.00	\$1,500.00	\$ -	\$ -	N/A	\$1,500.00	W

A modified form as suggested above would allow for quick verification, in summary fashion of the property, the exemption and if there is an administrable asset, which would benefit Debtors, their counsel, as well as the Judiciary and Chapter 7 Trustees. Further, reference to the Debtor's intent as to reaffirmation or surrender would be of additional assistance in promoting prompt administration.

As previously noted, NABT believes that Official Form 6C should not be amended or modified for the inclusion of a "Full fair market value of the exempted property" checkbox.



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December 16, 2011