

February 27, 2012

Suggested Change to
Federal Rule of Bankruptcy Procedure 7001(1)

Under Federal Rule of Bankruptcy Procedure 7001, adversary proceedings include, in relevant part:

(1) a proceeding to recover money or property, **other than a proceeding to compel the debtor to deliver property to the trustee**, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002[.]

[Emphasis added.] The language "deliver property to the trustee" mirrors, in part, 11 U.S.C. § 542(a), which, with exceptions of no relevance here, provides that:

an entity in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall **deliver to the trustee**, and account for, **such property or the value of such property**

[Emphasis added.]

Rule 7001(1) refers only to "deliver property to the trustee," not "deliver property or the value of property to the trustee." Rule 7001(1) could be read as not requiring an adversary proceeding when a proceeding is one to compel the debtor to **deliver property** to the trustee but as literally requiring an adversary proceeding when a proceeding is one to compel the debtor to **deliver the value of property** to the trustee. See *In re Price*, 2006 WL 6589883 (Bankr. N.D. Ga. Sept. 20, 2006) (holding that an adversary proceeding is required when the debtor no longer possesses the property). But see *Jubber v. Ruiz (In re Ruiz)*, 455 B.R. 745 (10th Cir. B.A.P. 2011) (trustee

sued by way of motion for turnover when funds had been dissipated, and no issue was raised regarding the propriety of proceeding by way of motion); *In re Borowiec*, 396 B.R. 598, 601 (Bankr. W.D.N.Y. 2008) ("the exception in Bankruptcy Rule 7001(1) would apply both to a turnover proceeding and to any other request by a trustee for the recovery of property from the debtor, such as under a theory of quantum meruit."). Although I disagree with *In re Price's* interpretation of Rule 7001(1), the rule is nevertheless ambiguous, and ought to be clarified to include a proceeding to deliver the value of property to the trustee.¹

The debtor is already a party to the bankruptcy case, and is the subject of statutory commands to surrender property of the

¹ The majority of courts hold that § 542(a) authorizes the recovery of a money judgment against an entity when that entity was "in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363" but has transferred or otherwise dissipated the property. See *Bailey v. Suhar (In re Bailey)*, 380 B.R. 486, 491-93 (6th Cir. B.A.P. 2007) (the fact that a portion of the debtors' federal tax refund was no longer in the debtors' possession at the time of the turnover action did not defeat the trustee's right to recover the tax refund); *Beaman v. Vandeventer Black, LLP (In re Shearin)*, 224 F.3d 353 (4th Cir. 2000); *Boyer v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., (In re USA Diversified Prods., Inc.)*, 100 F.3d 53 (7th Cir. 1996); but see *Brown v. Pyatt (In re Pyatt)*, 486 F.3d 423, 428-30 (8th Cir. 2007) (holding that the trustee may compel turnover only from an entity with control over the property at the time of the demand for turnover). A rule amendment cannot resolve the circuit split, but a rule amendment ought to be adopted that clarifies that in those circuits that permit recovery of a monetary judgment under § 542(a) when an entity has dissipated assets that would otherwise be subject to turnover, an adversary proceeding is not required when the proceeding is against the debtor.

estate to the trustee, 11 U.S.C. § 521(a)(4), and to cooperate with the trustee, 11 U.S.C. § 521(a)(3). When the debtor has dissipated estate property, it makes no sense to require the trustee to sue by way of a burdensome adversary proceeding against the debtor to recover a monetary judgment under § 542(a).

Illustratively, assume a case in which the debtor holds \$100,000 in estate funds when the case commences but in which he has dissipated \$60,000 of the funds by the time the trustee sues for turnover under § 542(a). Assume that when the trustee files her § 542(a) motion, she is not even aware that the debtor has dissipated \$60,000 of the funds and now holds only \$40,000. It would make no sense for the trustee to be allowed by her motion only to obtain an order requiring turnover of the \$40,000 still in the debtor's possession, and, upon discovering that \$60,000 of the funds were dissipated, to be required to file a separate adversary proceeding to recover a money judgment for the \$60,000 in dissipated funds.

I suggest that Rule 7001(1) be amended to read that an adversary proceeding includes:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property **or the value of property** to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002[.]

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for the District of Columbia