

United States Bankruptcy Court

Central District of California
Royal Building
255 East Temple Street, Suite 1660
Los Angeles, California 90012

RECEIVED
4/16/01

Chambers of
Harry Russell
Judge

(213) 894-6091

April 4, 2001

01-BK-D

Chief Judge A. Thomas Small
U S Bankruptcy Court
P O Box Bureau 2747
Raleigh, NC 27602-2747

Dear Tom

I am writing to you, as Chairman of the Bankruptcy Rules Committee, concerning Rule 4003. In my opinion, at its inception, the Rule improperly places the burden of proof on the party objecting to the debtor's claimed exemptions.

I believe this error was due to a confusion as to the burden of proof under prior Rule 403. Under both rules 4003 and 403, the burden of proof is, and was on the objector. However, under Rule 403, the trustee prepared and filed a report indicating the allowed exemptions. Thereafter, any creditor or the "bankrupt" had 15 days after the filing of the report to object.

Since the battle over exemptions is usually fought by the trustee and the debtor, it was the debtor, not the trustee who had the burden of proof. I believe the rules committee believed they were merely continuing the prior law when in effect it was reversing the appropriate burden of proof.

Although Rule 4003 superseded Rule 403 of the Bankrupt Act, the bankrupt had a similar duty under Rule 403(a) to file full and complete schedules, including a schedule of exempt property with the trustee. See 4 Colliers on Bankruptcy, (14th Ed). Once filed, however, it was the trustee who determined which exemptions were allowed under Rule 403(b) to make a report, and it was the trustee's report not the bankrupt-debtor's claims of exemption "which [was] given the force of an adjudication." Id

As you can see from Rule 403(b), at a hearing, "The burden of proof shall be on the objector." Under Rule 403, this would almost always have been the debtor. The burden is reversed under Rule 4003 being on the creditor or the trustee rather than on the debtor.

For your convenience, the following is a copy of Rule 403:

Rule 403. Exemptions

(a) *Claim of Exemptions.* – A bankrupt shall claim his exemptions in the schedule of his property required to be filed by Rule 108.

(B) *Trustee's Report.* – The trustee shall examine the bankrupt's claim for exemptions, set apart such as are lawfully claimed, and allowable, and report to the court the items set apart, the amount or estimate value of each, and the exemptions claimed that are not allowable. The report shall be filed with the court no later than 15 days after the trustee qualifies. If the trustee reports that any exemption claimed is not allowable, he shall forthwith mail or deliver copies of the report to the bankrupt and his attorney.

(c) *Objections to Report.* -- Any creditor or the bankrupt may file objections to the report within 15 days after its filing, unless further time is granted by the court within such 15-day period. Copies of the objections so filed shall be delivered or mailed to the trustee and, if the objections are by a creditor, to the bankrupt and his attorney. After hearing upon notice the court shall determine the issues presented by the objections. The burden of proof shall be on the objector.

(d) *Procedure If No Trustee Qualified* – If no trustee has qualified, the bankruptcy judge shall file the report prescribed by subdivision (b) of this rule within 15 days after the first date set for the first meeting of creditors. If the bankrupt files objections to the report, the court shall appoint a trustee or receiver, who shall represent the estate in the hearing on the objections.

(e) *Approval of Report If No Objections.* – If no objections are filed within the time provided by this rule, the report shall be deemed approved by the court. On request, the court may, at any time and without reopening the case, enter an order approving the report.

(f) *Claim of Exemption by Person Other Than Bankrupt.* – If the bankrupt fails to claim the exemptions to which he is entitled, or if he dies before his exemptions have been set apart to him, his spouse, dependent children, or any other persons who are entitled to claim the exemptions allowable to the bankrupt may, within such time as the court may order, file a claim for his exemptions or object to the report.

As you are aware, the Supreme Court in *Raleigh v. Illinois Department of Revenue*, 120 S Ct 1951 (2000) has held that the burden of proof for tax claims is governed by non-bankruptcy substantive law. It seems to me that the burden of proof regarding entitlement to a state exemption is also a matter of substantive state law. I do not recall whether all states have opted out under Section 522(b)(1), but as stated above, I believe for federal exemptions the burden should be on the debtor.

Therefore, I suggest a bankruptcy rule which provides that the burden of proof should be governed by state law, as to state exemptions, (probably always on the debtor) and on the party claiming federal exemptions.

I would appreciate your comments on this matter.

Best regards,



BARRY RUSSELL
U.S. Bankruptcy Judge

cc Honorable Christopher M Klein
U S. Bankruptcy Judge
501 "T" Street, 6th Floor
Sacramento, CA 95814

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

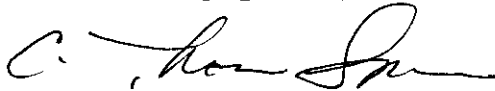
April 11, 2001

Peter G. McCabe
Secretary, Committee on Rules
of Practice and Procedure
Washington, DC 20544

Dear Peter:

Enclosed is a letter I received from Barry Russell
regarding Rule 4003 of the Federal Rules of Bankruptcy
Procedure.

Very truly yours,



A. Thomas Small

ATS:lw

Enclosure

cc: Hon. Barry Russell
Hon. Christopher M. Klein