

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT

BANKRUPTCY JUDGE

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September 13, 1988

William Pfeiffer, Esq.
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Aberdeen, South Dakota 57401

Terry L. Sutton, Esq.
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Watertown, South Dakota 57201

Re: Charles and Jeanette Schomaker
Chapter 7 87-10040

Dear Counsel:

The Court has considered the record in this contested matter and renders the following decision.

From admissions in the pleadings and information gleaned from the Court file the facts are as follows. The Debtors filed their Chapter 7 Petition January 29, 1987. The case has not been closed. The original Schedule 3-4 listed personal property with an estimated value of \$805.00 as exempt from creditors. After this Schedule was prepared the Debtors discovered the chapter 7 Trustee was receiving ASCS checks made payable to the Debtors.

On March 6, 1987 the Schomakers filed their "First Amendment to Schedule 3-4" claiming \$3,195.00 in these ASCS payments as exempt, for a total personal property exemption of \$4,000.00. See SDCL 43-45-4. This amendment was served on Peter Buttaro, Chapter 7 Trustee, the United States Trustee, and the ASCS. No objection was filed.

On June 16, 1987 an order discharging the Debtors was entered. On July 8, 1987 the Clerk of Courts office served notice to interested parties that contrary to its earlier no assets notice, property subsequently appeared from which a dividend might be payable. On November 5 of the same year the Debtors tiled another "First Amendment to Schedule 8-4" specifically listing two ABCS checks in the amounts of \$607.92 and \$1,597.29 as exempt property. The Certificate of Service reveals that William Pfeiffer, chapter 7 Trustee, the United States Trustee, and the Debtors were served

with the amendment. Again, no objection was filed.

On March 25, 1988 the Debtors filed the motion at bar, entitled "Motion for Leave to Amend Schedules and Turn-over." By this motion the Debtors pray for an order granting leave to amend the Debtors' Schedule B-4 to claim the sum of \$3,395.00 as exempt, and for an order compelling the Chapter 7 Trustee to turnover proceeds from ASCS farm program and P1K certificates in this amount. The Schomakers allege that Attorney Pfeiffer holds such proceeds in an amount exceeding \$10,000.00. Mr. Pfeiffer, who has been court approved as the standing trustee's counsel, admits receipt of the ASCS proceeds, but denies their value exceeds \$10,000.00. His response also denies that the amendments were timely.

A hearing on the motion was held in June of this year. Although no evidence was heard, the parties offered oral argument. It was attorney Sutton's position that the amendment was timely under Rule 1009, that all "interested parties" had been served, and that the trustee waived his right to object under Rule 4003~ Attorney Pfeiffer contended that Rule 1009 did not refer to the scheduled exempt property. Rather, he maintained that Code Section 522 governs the attempted amendment to claim additional exemptions, and that the amendment was untimely under this section.

The trustee is correct that Section 522 governs claimed exemptions. However, the provision contains no language limiting the time period in which an amendment may be proposed. Rather, this period is determined by Rule 1009 (a) which provides:

A voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or chapter 13 Statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, statement of financial affairs, statement of executory contracts, or chapter 13 statement to be amended and the clerk shall give notice of the amendment to entities designated by the court. (Emphasis added).

It is clear that the word "schedule" refers to documents required by Rule 1007. It is equally clear that a claim of exemptions is included in those Rule 1007 documents. See Rule 4003(a); In re Lindberg, 735 F.2d 1087, 1090-91 (8th Cir. 1984), cert. denied, 469 U.S. 1073 (1984). Also, Section 522(1) requires the debtor to file a "list" of property claimed exempt. Rule 1009 therefore includes amendments to claimed exemptions.

Case law has carried out the intent of Rule 1009, holding that the Bankruptcy Court generally is without discretion to deny the

debtor's motion to amend schedules to add exempt property. In re Williamson, 804 F.2d 1355 (5th Cir. 1986); Lucius v. McLemore, 741 F.2d 125 (6th Cir. 1984); Tignor v. Parkinson, 729 F.2d 977 (4th Cir. 1984). See 8 Collier on Bankruptcy para. 4003.03(2) (1988). See also Redmond v. Tuttle, 698 F.2d 414 (10th Cir. 1983) ; In re Doan, 672 F.2d 831 (11th Cir. 1982) (both cases interpreting Federal Rule of Bankruptcy procedure 110, superceded without material change by Rule 1009).

Although some courts have carved exceptions to the general rule in instances of bad faith, concealed property, or prejudice to creditors, Williamson; Lucius; Tignor In re Roberts, 81 8.1k. 354 (Bkrtcy. W.D. Pa. 1987), in this case there are no allegations or proof regarding these exceptions. The Court has uncovered case law handed down prior to the enactment of the current Bankruptcy Rules which places an earlier time restriction on amendments. However, these cases are overruled by the present provisions. 8 collier on Bankruptcy para. 4003.03(2) (1988).

From the foregoing it has been established that the Debtors' proposed amendment is timely, as it was filed prior to the closing of the case. The court does not go further in this opinion and rules that the claimed additional exemptions are allowed. Rule 4003(b) allows the trustee or any creditor to file objections to the amendment within thirty days after its filing. Rule 1009 requires the debtor to give notice of the amendment to the trustee and "any entity affected thereby." Local Rule 208 requires the debtor to serve the amendment to the claimed exemptions on all parties in interest.

As noted above, the Debtors' certificate of Service reveals that only the Chapter 7 Trustee, united States Trustee and the Debtors were served with the latest amendment. The thirty day period in which to object has run only as to these noticed parties, and only they are time-barred from being heard. See In re Brandstaetter, 767 F.2d 324 (7th Cir. 1985); In re Dents, 757 F.2d 777 (6th Cir. 1985);¹ 8 Collier on Bankruptcy para. 4003.04[3] (1988). The Debtors must therefore serve their amendment upon those parties entitled to service under the above rules so that they are allowed to challenge the claimed additional exemption. Not until any objection is denied, or the thirty day period has passed without objection shall the amendment become effective. See § 522(e).

Because of the lack of proper notice the request for turnover

¹ Dembs and Brandstaetter also stand for the proposition that ordinarily objections filed after entry of a discharge order are untimely. Even if the Court construed the trustee's unwillingness to pay the claimed exempt proceeds as a post-discharge objection, the Court would still need not determine if this objection was barred under the facts of this case. This Court has already held that the trustee waived his right to object by failing to do so within the period allowed by Rule 4003(b). Further, the debtor has not raised this argument.

is also denied. This request is further denied for the reason it was not brought as an adversarial action. See Rule 7001(1). In any event, it is not expected that a formal turnover procedure will be necessary after the order carrying out this decision is entered.

This matter constitutes a core proceeding under 28 U.S.C. Section 157(b). This letter decision shall serve as findings of fact and conclusions of law in this case. Should the Debtors' attorney have any additional findings or conclusions he may propose them. He shall also submit an appropriate order.

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk