

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

<b>In re:</b>	)	
	)	
<b>BRICE JUAN HIGHT, SR. and</b>	)	
<b>LYNETTE LEE SMITH-HIGHT,</b>	)	<b>Case No. 02-41879</b>
	)	<b>Chapter 7</b>
<b>Debtors.</b>	)	
_____	)	

**MEMORANDUM AND ORDER OVERRULING TRUSTEE’S OBJECTION TO  
EXEMPTION AND DENYING TRUSTEE’S MOTION TO SELL  
PERSONAL PROPERTY FREE AND CLEAR OF LIENS**

This matter is before the Court on the Trustee’s Objection to Exemption<sup>1</sup> and Trustee’s Motion to Sell Personal Property Free and Clear of Liens.<sup>2</sup> The Court has jurisdiction to hear this matter,<sup>3</sup> and it is a core proceeding.<sup>4</sup> The parties have stipulated to the relevant facts, and based on those facts and applicable law, the Court overrules the Trustee’s objection to exemptions and motion to sell the property.

**I. FINDINGS OF FACT**

On July 26, 2002, Debtors filed a petition seeking relief under Chapter 13 of Bankruptcy Code. Schedule B listed six means of transportation: a 2000 Ford F-150 pickup, a 1997 Chevrolet Nova, a 1995 Harley-Davidson Sportster motorcycle, a 1998 Harley-Davidson Buell motorcycle, a 2000 Harley-Davidson Buell-Blast motorcycle, a 2000 Doolittle trailer, and a 1992 Chevrolet pickup. Schedule C,

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<sup>1</sup>Doc. 73

<sup>2</sup>Doc. 61

<sup>3</sup>28 U.S.C. § 1334 .

<sup>4</sup>28 U.S.C. §§ 157(b)(2)(B) and 157(b)(2)(N).

which sets forth which assets Debtors are claiming exempt under state law, listed the 2000 Ford F-150 pickup and the 1997 Chevrolet Nova pursuant to K.S.A. 60-2304(c). Debtors both signed a declaration wherein they certified under penalty of perjury that the information contained in their schedules was accurate.

Approximately sixteen months later, Debtors voluntarily converted their case to one under Chapter 7. Soon thereafter, the Chapter 7 Trustee filed a Motion to Sell Personal Property Free and Clear of Liens, seeking authority to sell all of Debtors' non-exempt vehicles. Debtors immediately filed an objection to the Trustee's Motion to Sell Personal Property Free and Clear of Liens, indicating their intent to amend their exemptions, and two days later filed an Amended Schedule C, claiming the 1992 Chevrolet pickup and the 1998 Harley-Davidson Buell motorcycle as exempt. The Trustee timely objected to Debtors' amended exemptions. The Trustee "does not take issue with the fact that each Debtor may have 'regularly used' more than one vehicle" at the time of filing,<sup>5</sup> and the parties have stipulated that all four vehicles were in fact used by Debtors at the time of filing.

Additional facts will be discussed below, as necessary.

## **II. STATEMENT OF ISSUES**

The issues in this case are whether Debtors should be able to exempt two different automobiles, sixteen months after originally claiming two other vehicles as exempt, and as a subset thereto, whether the Trustee has sustained his burden of proving prejudice to creditors if the amendment is allowed.

## **III. CONCLUSIONS OF LAW**

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<sup>5</sup>See Trustee's Reply Brief, Doc. No. 104 at page 1.

The Federal Rules of Bankruptcy Procedure allow a debtor to amend schedules or statements at any time before the case is closed.<sup>6</sup> Allowing unlimited amendments promotes and encourages “accurate and reliable [schedules and statements] without the necessity of digging out and conducting independent examinations to get the facts.”<sup>7</sup> But where the amendment has a bearing on the existence or disposition of potential estate assets, there are certain judicially-created exceptions to the rule allowing unlimited amendments. The controlling case law in the Tenth Circuit provides that an amendment that claims an exemption may be denied upon a showing of bad faith by the debtor or prejudice to creditors.<sup>8</sup> The bankruptcy court essentially has no discretion to disallow amended exemptions, unless the amendment has been made in bad faith or prejudices third parties.

The Trustee claims that Debtors’ prior statements under oath, in their original Schedule C, that they regularly used a Ford F-150 pickup and a 1997 Chevrolet Nova, equitably estop them from now claiming that they also regularly used the 1992 Chevrolet pickup and the 1998 Harley-Davidson Buell motorcycle listed in Schedule B. In addition, the Trustee claims that Debtors should be barred from altering their exemptions at this time because of the prejudice that would result to unsecured creditors if the amendment was allowed.

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<sup>6</sup>Fed. R. Bankr. P. 1009(a).

<sup>7</sup>*In re Grogan*, 300 B.R. 804, 807 n.8 (Bankr. D. Utah 2003) (quoting *In re Mascolo*, 505 F.2d 274, 278 (1<sup>st</sup> Cir. 1974)).

<sup>8</sup>*Calder v. Job (In re Calder)*, 973 F.2d 862, 867 (10<sup>th</sup> Cir. 1992) (holding even though schedules may be amended as a matter of course, an amendment may be denied if there is bad faith by the debtor or prejudice to creditors).

Pursuant to Kansas law, and subject to certain qualifications not at issue in this case, Debtors are each entitled to claim “one means of conveyance regularly used for the transportation of the person” as exempt property in this bankruptcy proceeding.<sup>9</sup> It is well-settled that in cases converted from Chapter 13 to Chapter 7, the facts as they exist on the date of filing are the facts pertinent to determine exemptions.<sup>10</sup> “In determining whether a debtor is entitled to claim an exemption, ‘the exemption laws are to be construed liberally in favor of exemption.’”<sup>11</sup> “Once a debtor claims an exemption, the objecting party, here the Trustee, bears the burden of proving the exemption is not properly claimed.”<sup>12</sup> That burden must be met by a preponderance of the evidence.<sup>13</sup>

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<sup>9</sup>K.S.A. 60-2304(c). *See also In re Lampe*, 331 F.3d 750, 754 (10<sup>th</sup> Cir. 2003) (noting that Kansas has opted out of the federal exemptions and that Kansas exemption laws apply to bankruptcy proceedings in Kansas).

<sup>10</sup>*In re Marcus*, 1 F.3d 1050, 1051 (10<sup>th</sup> Cir. 1993); *In re Currie*, 34 B.R. 745, 748 (D. Kan. 1983). *See also* 11 U.S.C. § 348(f)(1) (relevant date determining property of Chapter 7 estate after conversion from Chapter 13 is original filing date). *Cf. Campbell v. Bonney (In re Campbell)*, \_\_\_ B.R. \_\_\_ (10<sup>th</sup> Cir. B.A.P., August 27, 2004) (holding law applicable on petition date, not conversion date, applies to determine whether Chapter 12 relief available).

<sup>11</sup>*In re Lampe*, 331 F.3d at 754 (quoting *In re Ginther*, 282 B.R. 16, 19 (Bankr. D. Kan. 2002)).

<sup>12</sup>Fed. R. Bankr. Proc. 4003; *In re Lampe*, 331 F.3d at 754; *In re Robinson*, 295 B.R. 147, 152 (10<sup>th</sup> Cir. B.A.P. 2003).

<sup>13</sup>*Cf., In re Serafini*, 938 F.2d 1156, 1167 and n.2 (10<sup>th</sup> Cir. 1991) (holding no good reason exists to apply different standard between § 523 objections to discharge of a debt [requiring “preponderance of evidence” standard] versus § 727(a)(2) objections to discharge). *But see In re Grogan*, 300 B.R. 804, 808 (Bankr. D. Utah 2003) (holding that Tenth Circuit case law provides that an amendment that claims an exemption may be denied “upon a clear and convincing showing of bad faith by the debtor or prejudice to creditors.”)

**A. Debtors are not estopped from claiming they regularly use the 1992 Chevrolet pickup and the 1998 Harley-Davidson Buell motorcycle based on the Trustee's argument that otherwise, Debtors will have *de facto* committed perjury.**

The Trustee's first argument was that Debtors could only exempt the automobile they each "primarily" used, under K.S.A. 60-2304(c), and that by definition, that had to be the automobile that they attempted to exempt in their initial schedules. Relying on the assumption that the statute required "primary" use, he argued that Debtors should be estopped from changing their exemptions to now claim different vehicles, because to do so would in effect be perjurious.

In response, Debtors argued that the term "regularly used" in the Kansas exemption statute does not preclude the possibility that a debtor could, over some period of time, regularly use more than one vehicle. Since they now claim that at the time they filed their bankruptcy petition, they regularly used all four of the vehicles, it is not inconsistent for them to now exempt two other automobiles that were also "regularly used" on the date of filing.

The Trustee, in his final reply, now appears to have essentially abandoned the argument that Debtors cannot prove entitlement, as a matter of law, to exempt the two new vehicles, admitting K.S.A. 60-2304(c) only requires "regular use," not primary use. Out of an abundance of caution, however, the Court will nevertheless address this issue.

Like the parties, the Court was unable to locate any decision that interpret the use of the term "regularly used" as it relates to exempt automobiles under K.S.A. 60-2304(c). Had the Kansas Legislature used a term such "exclusively used" or "primarily used," K.S.A. 60-2304(c) would clearly prohibit a debtor from claiming that more than one vehicle would qualify as exempt. However, the term "regularly used" seems to imply a less restrictive requirement, one which would allow more than one vehicle to qualify for

the exemption. Because the exemption laws are to be viewed liberally in favor of debtors,<sup>14</sup> the Court must thus find that any ambiguity as to whether a debtor may “regularly use” more than one vehicle must be resolved in favor of debtors. Therefore, if Debtors regularly used all four vehicles at issue in this matter, which the Trustee does not now dispute, then Debtors could have chosen any two of these four vehicles as exempt under K.S.A. 60-2304(c) at the time of filing.<sup>15</sup>

Based upon the Court’s determination that the term “regularly used” could apply to more than one vehicle for each individual debtor, the Court finds that Debtors’ original schedules stating that they regularly used the 2000 Ford F-150 pickup and the 1997 Chevrolet Nova are not necessarily inconsistent with the inclusion of two other vehicles in their amended Schedule C. Because there is no factual issue, as a result of the Trustee’s admission that he “does not take issue with the fact that each Debtor may have ‘regularly used’”<sup>16</sup> more than one vehicle, the Court finds that, absent prejudice to creditors, Debtors may amend their Schedule C to exempt two different vehicles also regularly used by them on the date of filing.

**B. The Trustee has not sustained his burden of proving that the late amendment of Schedule C prejudices creditors.**

The second reason the Trustee articulates for sustaining his objection to Debtors’ amended exemptions is that allowing the late amendment will prejudice unsecured creditors. The Trustee first argues that unsecured creditors in this case were expecting a distribution from Debtors’ Chapter 13 estate based

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<sup>14</sup>*In re Lampe*, 331 F.3d at 754.

<sup>15</sup>Although all four vehicles may have met the qualifications for an exemption under K.S.A. 60-2304(c), Debtors were still required to chose one vehicle each as Kansas law clearly limits a debtor to exempting “one means of conveyance.”

<sup>16</sup>Trustee’s Reply Brief, Doc. No. 104.

upon their original exemption choices, and that allowing Debtors, after conversion to Chapter 7, to now change the exemptions will result in no distribution to unsecured creditors. Unfortunately, there are no facts before the Court to sustain that argument. The parties agreed that, in lieu of an evidentiary hearing, they could stipulate to all relevant facts. A Stipulation of Facts was filed,<sup>17</sup> but it contains no reference, whatsoever, to whether unsecured creditors could have expected to receive a dividend in the Chapter 13 proceeding.

The Court will assume, for the sake of discussion, that it should take judicial notice<sup>18</sup> of the content of the schedules and Chapter 13 plan in this case, and will nevertheless consider this argument. In his initial brief in support of his objection to Debtors' exemptions, the Trustee claimed that unsecured creditors were expecting a distribution based upon the liquidation value of the two cars that were not originally exempted, but retained by Debtors. Debtors argue, conversely, that unsecured creditors were not expecting a distribution after confirmation of their Chapter 13 petition, that is because there was no equity in those cars, as Debtors had pledged them as collateral to Gold Bank in connection with loans made to Sportsman Bar and Deli, LLC, a company owned by Debtors.

A review of the docket entries in this case, including the Chapter 13 plan, does not reveal that unsecured creditors would, in fact, have received any distribution. The Trustee apparently realized that fact, as in his reply brief, he candidly admits that "it is difficult to tell if unsecured creditors thought they

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<sup>17</sup>Doc. No. 101.

<sup>18</sup>Fed. R. Evidence 201(e) provides that a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. Accordingly, if the Court was inclined to rule against the Debtors, it would allow Debtors an opportunity to be heard to request a hearing on the evidence judicially noticed.

would receive a distribution due to the Code’s liquidation analysis test.” Because the Trustee bears the burden of proving Debtors’ exemptions are improper,<sup>19</sup> and he has essentially admitted that he has not done so in regard to this issue, the Court must overrule the objection that allowing the late amendment will prejudice unsecured creditors.

Finally, the Trustee also argues that the State of Kansas likely would have received a distribution from the Chapter 13 plan, because it holds an unsecured priority claim, but now will receive no dividends from the Chapter 7 Trustee if the amended exemptions survive. The distribution the State would have received if Debtors had not converted to Chapter 7, however, was from earnings Debtors paid into the plan, not from the sale of the relevant automobiles. In other words, the Kansas Department of Revenue was not affected in any way by Debtors’ choice of exempt automobiles at the time the case was filed, because their expected distribution was not, in any way, linked to Debtors’ exemptions. In addition, the State is further not prejudiced by the conversion, because its claims entitled to priority under § 507(a)(8) are not discharged in Chapter 7 proceedings.<sup>20</sup> For that reason, this creditor can pursue collection both against Debtors, as well as against Debtors’ property outside of bankruptcy.

#### **IV. CONCLUSION**

The Court overrules the Trustee’s objection to Debtors’ amended exemptions and denies his Motion for Authority to Sell as it relates to the newly exempted 1992 Chevrolet pickup and 1998 Harley-Davidson Buell motorcycle. The Kansas Legislature did not limit which regularly used automobile could

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<sup>19</sup>See *In re Lampe*, 331 F.3d at 754 (holding “Once a debtor claims an exemption, the objecting party bears the burden of proving the exemption is not properly claimed.”).

<sup>20</sup>11 U.S.C. § 523(a)(1).

be exempted, other than to place a dollar limit on each vehicle. The Court also finds that the Trustee has not met his burden of demonstrating that unsecured creditors will be prejudiced by allowing the late exemptions.

**IT IS, THEREFORE, BY THIS COURT ORDERED** that the Trustee's Objection to Exemption (Doc. 73) is overruled.

**IT IS FURTHER ORDERED** that the Trustee's Motion for Authority to Sell Personal Property Free and Clear of Liens (Doc. 61) is denied as it relates to the 1992 Chevrolet pickup and 1998 Harley-Davidson Buell motorcycle.

**IT IS SO ORDERED** this \_\_\_\_\_ day of September, 2004.

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