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A Voluntary Organization Composed of Persons Interested in the Improvement of the Bankruptcy Code and Its Administration

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February 17, 2006

By Electronic Transmission

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed Amendments to Interim Bankruptcy Rules and Forms

Dear Mr. McCabe:

You may recall that the National Bankruptcy Conference[1] ("NBC") sent a letter to the Advisory Committee on Bankruptcy Rules on September 27, 2005 making certain recommendations with regard to the Interim Rules and Proposed Forms. The NBC appreciates very much the consideration given to those recommendations. As we indicated in that letter those recommendations were preliminary comments. Upon further consideration of the Rules and Forms by the full Conference at its Mid-year meeting, the NBC appreciates the opportunity to supplement that letter in various respects, to reiterate and further explain certain of the recommendations made in that letter, and to make a series of other recommendations as well.

As you know, the NBC is a voluntary, non-profit, non-partisan organization of approximately sixty judges, lawyers and law professors interested in the improvement of the Bankruptcy Code and its administration. A short description of the Conference and list of the Conferees is attached.

We are well aware of the enormous amount of work that went into producing the proposed forms and rules, as the Advisory Committee includes several of our Conferees as members, reporters and consultants. On the whole, the work product of the Rules Committee is remarkable, considering the short time frame for producing so many changes.

Interim Rule 1007(c)

Our first concern is with Interim Rule 1007(c), which deals with the prefiling counseling requirement. As now written, the rule requires that the

[1] See the attached for a description of the National Bankruptcy Conference.

certification of receipt of a briefing from an approved nonprofit budget and credit counseling agency ("certificate of briefing") be filed with the petition.[2] The counseling requirement is an entirely new requirement and many debtors, particularly those who are filing Pro Se, are failing to provide either a certification of briefing ("certificate") or to document the statutory basis for filing without the certification. A number of courts, as a result of the current requirement that the certificate be filed with the petition, have instituted a variety of non-uniform procedures, ranging from show cause orders to summary dismissals when the certificate is not filed. Under BAPCPA, a dismissal has dramatic consequences. In a second filing done to cure a technical error such as not timely filing the certificate of briefing, the debtor has only a thirty day automatic stay, which can only be extended on stringent terms. See § 362(c)(3). Unless necessary to achieve the clear mandate of the statute, a rule should not create an unnecessary trap for the unwary. In other courts, the Clerk has been informally or by Local Rule instructed to refuse to accept a Petition which fails to contain either the counseling certification or statutory basis for not filing the certificate. This is contrary to the statute and to appropriate Bankruptcy Court administration. In addition, there have been cases in which the debtor obtains the counseling briefing before the petition, as the statute requires, but cannot obtain the certificate in time to file the petition before some imminent adverse event, such as a foreclosure or repossession. The Interim Rule creates a barrier to filing for these debtors that is not required by the Code.

To resolve these issues the NBC urges the Rules Committee to promulgate a Rule which would require several things. First, the debtor would be required to file a separate form to be filed with the petition indicating either that the certificate is attached or one of the several reasons why it could not be attached. Requiring this form will call to the attention of a pro se debtor who completes it the requirement that the briefing must be obtained before the petition is filed. Second, the rule should require the Clerk to provide a Notice (to be drafted by the Administrative Office) to any pro se debtor who does not file the form or a counseling certificate that a prepetition counseling briefing is required and that the case may be dismissed if it has not been obtained. These two changes would greatly reduce, if not completely eliminate the problem of debtors who file petitions without knowing that counseling is required. With these changes in place, the Rule could be amended to allow the actual certificate to be filed, like most other initial papers, up to 15 days after the petition, which would deal with the problem of debtors who have obtained the briefing but do not yet have the certificate.

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[2] The pertinent language of 1007 as now promulgated states:

> (c) TIME LIMITS. ... The documents required by subdivision (b)(3) [*i.e.*, the certificate of briefing] shall be filed with the petition in a voluntary case. ...

INTERIM RULE 1007(c).

Official Forms

As we stated in our letter of September 27 we do not believe the Official Forms should decide legal issues or require parties to subscribe to a particular view on such issues. We recognize that it is not always easy to draft a neutral form, but whenever possible the forms should achieve this goal. The following changes are suggested to make the forms neutral on important substantive issues.

Form 22C

Form 22C which calculates disposable income for chapter 13, in our view, takes positions on certain issues that are not necessarily correct. It does not provide an opportunity for debtors to deduct in the calculation of their Current Monthly Income certain categories of expense that they believe they have the right to deduct in that calculation, such as the Internal Revenue Service "Other Necessary Expenses" we discussed in our first letter to the Committee and discuss again below. It also does not allow debtors to adjust their income for amounts that may be within the definition of "current monthly income" but are arguably not "current monthly income received by the debtor" as described in section 1325(b). Examples of such expenses might include a grandparent of the debtor's child paying certain expenses of that child that might be deemed household expenses (e.g. private school tuition, or purchasing expensive clothes or toys) directly. While such payments might fall within the definition of current monthly income, a debtor could argue that because the debtor does not receive the money, and cannot access the funds, it is not disposable income available for chapter 13 plan payments within the meaning of section 1325(b).

We believe the form could solve this problem by adding a space at the end of the form C (before the final calculation of disposable income) for "any other deductions and adjustments to which the debtor claims to be entitled under the statute," probably requesting a description and statutory citation for each item listed. This suggestion would make the form neutral with regard to whether such interpretations of the statute are appropriate with regard to the calculation of Current Monthly Income. Just as with any other item on the form, if any party entitled to object to confirmation under section 1325(b) believes a deduction or adjustment is not appropriate that party may challenge the deduction by objecting to confirmation of the plan.

"Other Necessary Expenses"

Our third concern is one that we mentioned in our letter to the Rules Committee dated September 27, 2005. At its recent meeting the NBC reviewed carefully those recommendations and would like to reassert and further explain the positions taken in that letter.

The forms appear to take a position that debtors cannot deduct IRS Other Necessary Expenses for purposes of the means test unless they fit in the descriptions listed on the forms. Those categories do not allow other expenses that the debtor may argue are in the categories of being necessary for the production of income or welfare of the debtor's family, such as household help for an elderly person who cannot feed or bathe herself, burglar alarm fees

in a high crime neighborhood, or unreimbursed employee business expenses not otherwise specified in the form, like travel expenses or uniforms (which are covered by the form only if paid through involuntary deductions from wages.) (Although the forms allow business expenses for self-employed debtors, they do not allow employees' business expenses). Allowing the debtor to deduct those expenses on the form, if that is the debtor's legal position, does not decide the issue. Any party may challenge such a deduction, but it does permit the debtor to assert his or her legal position. Not allowing the deduction may compel debtors either to disregard the instructions on the form (at the peril of being accused of malfeasance) or to check a box stating that the debtor should be presumed abusive according to the form. Even though the form now includes better language that prevents the checkbox from becoming a formal admission of a presumption of abuse, it is still no small thing to compel someone to state that they are presumptively "abusing" the Bankruptcy Code when they do not believe that is true. Moreover, the mere fact that the form takes a particular position on the issue of "Other Necessary Expenses" could be viewed by courts as a statement from the Rules Committee that this is the only legitimate position.

Section 707(b) Safe Harbor Calculation

Similarly, the form compels a debtor to combine the debtor's income with that of a nondebtor spouse, even though that spouse does not have current monthly income as defined by the Code, to give a total current monthly income figure for determination of whether the section 707(b)(7) safe harbor applies. It would have been simple enough to let the debtor assert a position regarding whether the spouses' incomes should be combined. In fact, the Committee took exactly that approach in drafting form 22C, with respect to the calculation of the commitment period, which raised an almost identical issue based on identical statutory wording. If the United States Trustee disagrees with that position, s/he has the opportunity to state a position within ten days after the creditors' meeting, to notify all creditors of that different position, and to bring a motion alleging abuse. This should be no different than if the United States Trustee disagrees with some other number or calculation provided by the debtor and is precisely the purpose of section 704(b)(1). However, requiring the debtor (and hence the notice to creditors) to state that the safe harbor does not apply despite the debtor's belief to the contrary may give creditors an excuse to file unwarranted motions under section 707(b) and perhaps use that statement as a defense against sanctions for such motions. The forms should not put the debtor in that position.

Suggested Technical Changes

As a result of our consideration of the Forms and Rules the NBC is pleased also to make the following recommendations regarding more "technical" changes to the Rules and Forms.

1. *Interim Rule 1007(c)*

The Interim Rule deletes an "or" that is in current National Rule 1007(c). The deletion appears to be a mistake, however. The "or" is needed in order for the sentence to make

sense. A document filed within 15 days after the petition cannot be filed "with" the petition, so the sentence without the "or" seems nonsensical.

2. *Form B22C Line 17*

The Instruction in Line 17 is incorrect and should be revised to instruct all debtors to complete Part III of the form so that current monthly income is calculated for all chapter 13 debtors.

3. *Section 101(10A) and (B)*

Section 101(10A) and (B) calls for income the debtor receives. . ., derived during the 6-month period, and it includes amounts "paid by any entity other than the debtor ... on a regular basis for the household expenses of the debtor or the debtor's dependents." The wording of the forms refers to amounts "contributed" to household expenses. This wording departs from the language of the statute with potentially legally significant consequences. The NBC recommends that the Committee change the instruction reflecting income and payment of household expenses as part of the CMI (Lines 1, 7, 13, and 19 of the Chapter 13 Form; Lines 2, 8 and 17 of the Chapter 7 Form; and Lines 1 and 7 of the Chapter 11 Form) to reflect more closely the statutory language by adding the following language.

> (1) The income instructions should be changed to refer to "average monthly income that you received, derived during the six calendar months prior to filing" and to direct averaging of the total the amount "derived during the six months."
>
> (2) The phrase "regular contributions to the household expenses of the debtor or the debtor's dependents" should be changed to "payments made on a regular basis for the household expenses of the debtor or the debtor's dependents."
>
> (3) The word "contributions" where it appears separately in these instructions with respect to household expenses should be changed to "payments."

4. The instruction language for calculating CMI in Line 1 of the Chapter 11 and Chapter 13 forms and Line 2 of the Chapter 7 Form should be changed to track the statutory language more closely.

The instruction language in Line 1 should be revised to reflect the language of the statute. Section 101(10A), where CMI is defined, adds an additional limitation on income "received;" however, the statute says that CMI means "the average monthly income from all sources that the debtor receives ... derived during the six month period ending [the end of the last complete month before the filing]. 11 U.S.C. § 101(10A)(A) (emphasis added). The use of the word "derived" can be important for debtors who, for example, may receive a bonus or a commission check or tax refund within the 6 month window, but the monies received are derived from an earlier part of the year outside the 6 month window. Form B22C, as written, does not

permit the debtor to make this distinction, potentially skewing all the rest of the numbers throughout the form.

The instruction should be modified as follows to track the language of the statute:

> "All figures must reflect average monthly income derived during for the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing."

5. Line 35: The Form may mislead debtors into believing that "pre-school" expenses are not deductible; however, the IRS permits "preschool" expenses to be deducted. The deduction for child care expenses should be changed to track the statutory language more closely.

This line is part of Pt. IV, the section in which a debtor calculates deductions allowed under § 707(b)(2). This particular line instructs a debtor to enter amounts actually expended for childcare, then specifically cautions the debtor not to include payments made for "children's education." The instruction varies from what the IRS actually permits in terms of childcare – expenses for pre-school. The instruction as now written misleads debtors into thinking that pre-school expenses are not deductible as childcare because pre-school is "education." The instruction should be deleted.

The Instruction should read:

> "Enter the average monthly amount that you actually expend on child care (baby-sitting, day care, nursery and preschool). Do not include other educational expenses."

6. Change the instruction for deductions of special telecommunication expenses to make the listed items only examples of the types of expenses allowed.

The instruction is unnecessarily limiting. It lists as permissible expenses certain kinds of telecommunications items. In so doing, it excludes other services (and also limits the form over time, as technology changes). The instruction is easily modified by the insertion of the phrase "for services such as" immediately following the words "expenses that you actually pay."

Substitute the following language:

> "Enter the average monthly amount that you actually pay for telecommunications services other than your basic home telephone service – such as cell phones, pagers, call waiting, caller I.D., special long distance, or internet service – to the extent necessary for the production of income or your health and welfare or that of your dependents. Do not include any amount previously deducted."

7. Line 39, Line 42, and Line 48 - The instructions are narrower than the statute actually allows.

The instruction regarding health insurance and similar costs is narrower than the statutory language (Section 707(b)(2)(A)(ii)(I) from which it is derived. The statute actually permits monies expended, not only for the debtor, but also for the debtor's spouse, whether or not he or she is a dependent or a co-debtor. The Committee recommends the following instruction be substituted.

> "List the average monthly amounts that you actually pay for reasonably necessary health insurance, disability insurance, and health savings account expenses for yourself, your spouse, or your dependents."

Similarly, Section 707(b)(2)(A)(V) is worded differently than the forms, with potential substantive ramifications. The first sentence of line 42 should be changed to read: "Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for housing and utilities, that you actually spend for home energy costs. "

Line 48 also contains a faulty instruction. As written, it states that if a secured debt from Line 47 is "in default," then the debtor "may deduct 1/60th of the amount you must pay the creditor as a result of the default (the 'cure amount') in order to maintain possession of the property." The statutory language from which this instruction is drawn is not so limited. Section 707(b)(2)(A)(iii)(II) permits, in addition to scheduled payments as contractually due, "any additional payments to secured creditors necessary for the debtor, in filing a [chapter 13] plan, to maintain possession of [the property in question]." 11 U.S.C. § 707(b)(2)(A)(iii)(II). This language is broad enough to encompass a broad variety of charges debtors are likely to be called on to pay the lender, such as additional attorney's fees incurred in filing a proof of claim. Many of these charges may not necessarily be "as a result of a default" by the debtor.

Substitute the following language:

> If any of the debts listed [in the relevant secured debt line] are secured by property that is necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in [the relevant secured debt line], in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page.

Once again, please convey to the members of the Rules Committee our compliments and thanks for their extraordinary effort and product, and feel free to contact us if

you have any questions regarding the comments above. Questions regarding the letter should be directed to.

Please feel free to contact David Lander, Chair of the NBC's Individual Debtor Committee, at 314-552-6067, NBC Chair Donald S. Bernstein at (212) 450-4092, or me, at (212) 735-2800, should you have any additional questions regarding this matter.

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

Attachment

cc: Prof. Jeffrey Morris

National Bankruptcy Conference

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formalized in the 1940s, at the request of Congress, from a nucleus of the nation's leading bankruptcy scholars, who gathered informally in the 1930s to assist Congress in the drafting of the Chandler Act of 1938, the first comprehensive revision of U.S. bankruptcy law since the Bankruptcy Act of 1898. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment in 1978 of the Bankruptcy Code, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC) whose 1997 report led to the legislation that overhauled our bankruptcy laws in 2005. The NBC has been active as a resource to Congress on every major piece of bankruptcy legislation since 1978.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 55 active members are leading bankruptcy scholars from major law schools, current and former judges from nine different judicial districts, and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC also includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort and tax related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members—who represent a broad spectrum of political and economic perspectives—based on their knowledge and experience as practitioners, judges and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the Conference's deliberations. The Conference also provides advisory services to policy makers on technical matters relating to bankruptcy law and practice.