

**NATIONAL BANKRUPTCY CONFERENCE**  
*A Voluntary Organization Composed of Persons Interested in the  
Improvement of the Bankruptcy Code and Its Administration*

September 27, 2005

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Re: **Proposed Interim Rules and Forms**

Honorable Thomas S. Zilly  
Chair, Advisory Committee on Bankruptcy Rules of the  
Judicial Conference of the United States  
United States Courthouse  
700 Stewart Street, Suite 15229  
Seattle, WA 98101

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Dear Judge Zilly:

The National Bankruptcy Conference appreciates the opportunity to comment on the newly issued Official Bankruptcy Forms and the suggested Interim Rules. As you know, the NBC is a voluntary, non-profit, non-partisan organization of approximately 60 judges, lawyers, and law professors interested in the improvement of the Bankruptcy Code and its administration. A short description of the Conference and a list of its 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. At this time, we can provide only preliminary comments, and we expect to submit further, more detailed comments before the March Advisory Committee meeting.

Our principal concern is that some of the Official Forms will force parties (primarily debtors) to make statements, under penalties of perjury, regarding significant issues of law with which they do not agree and which could even be considered admissions in a later legal proceeding. Such statements are seemingly compelled by certain parts of the Official Forms which take a position on the interpretation of section 707(b). While the forms arguably also take some positions with which a creditor may not agree, creditors are not required to submit or sign the forms and are free to challenge any statement made on the forms.

We do not believe it is appropriate for the Official Forms or the Interim Rules to decide legal issues, much less require parties to subscribe to a particular view on such issues. We are confident that there are ways to avoid such problems by drafting forms that leave parties free to assert any legitimate position.

For example, 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 categories listed on the form. Those categories do not allow other

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expenses that the debtor may argue are necessary for the production of income or welfare of the debtor's family, such as high automobile operating expenses due to a lengthy commute and increased gas prices. (While 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 or any other 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. Nor is the debtor permitted to list special circumstances that demonstrate that the chapter 7 case is not abusive. It is no small thing to compel someone to state that they are presumptively "abusing" the Bankruptcy Code when they do not believe that is true. In chapter 13 cases, the calculation may require the debtor to state that his or her disposable income is higher than the debtor believes it is under the means test formula.

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. If the United States trustee disagrees with that position, s/he has the opportunity to state a position within 10 days after the creditors meeting and to bring a motion alleging abuse. However, requiring the debtor 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 and perhaps use that statement as a defense against sanctions for such motions. The forms should not put the debtor in that position.

Moreover, we believe the various versions of Official Form 22 – the current monthly income/means test/disposable income test form – all make a fundamental assumption that we believe will be a significant contested question of statutory construction: the forms mandate that any amount deducted under 707(b)(2)(A)(iii) or (iv) must be subtracted or netted against an expense deduction allowed by an IRS standard under 707(b)(2)(A)(ii) whereas the statute is open to the opposite conclusion. This is a crucial point on which we do not believe the Official Form or Rules should take a position.

We will have additional comments on the interim rules and forms in the months to come. However, we think it is important to raise the issues set forth above at this time. In particular, we believe our comments regarding the means test calculation forms are significant, and accordingly we respectfully suggest that the various versions of Official Form 22 be reconsidered and revised before the October 17, 2005 effective date of the amendments to section 707(b).

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 this letter should be directed to David Lander, Esq., Chair of the Individual Debtor Committee of the National Bankruptcy Conference. He may be reached at 314-552-6067.

Sincerely,



Donald S. Bernstein  
Chair

Cc: Jeffrey W. Morris  
Peter G. McCabe  
John K. Rabiej  
James H. Wannamaker III  
Hon. Eugene R. Wedoff  
Alan N. Resnick  
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