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Subject Comments on Proposed Amendments to Fed. R. Bankr. P. 4002 and 5005.

04-BK-003

I write to comment on several of the proposed changes in Federal Rules of Bankruptcy Procedure 4002 and 5005.

Rule 4002

First, the Advisory Committee is to be commended for its rejection of most of the United States Trustee Program's suggestions for required documents at §341 meetings. Requiring debtors to bring, and even to spend time and money to obtain, the numerous documents listed in that proposal would have been extremely onerous and would have caused very significant costs, delays and hardships.

However, the acceptance of some of these suggestions, perhaps due to a feeling that "we have to give them something," would produce the same results, albeit to a much lesser degree. It also opens the door to further changes based on the marked change in philosophy it embodies. That change is the abandonment of the presumption that debtors tell the truth in their sworn schedules. This is the same presumption that applies in many other government programs, including the tax system, where taxpayers are not required to provide "evidence" supporting the statements they make in their returns. While there are many anecdotes about mistakes on documents filed, I am unaware of any studies or other evidence showing that they are due to widespread intentional concealment of income or assets, much less that undisclosed income or assets would be of a magnitude to be material in a large number of cases. Indeed, in my experience, debtors are at least as likely to innocently omit monthly expenses as they are to omit income. In other words, the Committee appears to acting on sparse anecdotal evidence at best in changing a very basic philosophy of the bankruptcy system.

Aside from the philosophical issue, there are also very real issues of costs and burdens that would be added to a system that is already straining under a record number of cases. If debtors are to produce additional documents at the §341 meeting, trustees will presumably be required to read them, perhaps question the debtor about them, and, probably, report on them. This will take additional trustee time, ultimately requiring more trustee meeting space to accommodate longer meetings. Trustees, of course, can be expected to demand greater fees to do this work and such fees are invariably passed on the debtors in chapter 7 filing fees. (In chapter 13, they are more likely to be paid by unsecured creditors, who will receive a smaller percentage payout if trustee fees increase.) Any increase in fees produces a decrease in access to the bankruptcy court, since some low income people who can barely afford current fees will be unable to pay increased fees. (This problem might be solved in part by allowing in forma pauperis bankruptcy filings, but that has yet to be enacted.)

Additional costs will also come in the increased need for debtors to file schedules and statements separately from the bankruptcy petition. Although the rules permit these documents to be filed within 15 days after the petition, most practitioners, trustees, and probably clerks

find it preferable to have all the documents filed with petition. (In some districts, the failure to file the schedules and statements with the petition triggers a notice mailed out by the clerk.) Attorneys will be very reluctant to file the schedules with the petition because they will almost never be able to know whether the bank balances listed in the schedules will match the amounts that will be shown for the petition date on the next bank statement the debtor receives. There is no way to know which checks have cleared or of any electronic deposits on that date; even if the attorney and the debtor electronically access the debtor's account over the Internet, transactions for the day on which the account is accessed typically are not shown. Unfortunately, debtors' attorneys must more than ever guard their clients against the game of U.S. Trustee "gotcha" in which an uncleared check would become an "undisclosed asset" putting the debtor at risk of not only losing property but also an accusation of not disclosing all assets. There have been reports from around the country of trustees being under increased pressure from United States trustees to have a higher percentage of asset cases and to administer cases with assets as small as a few hundred dollars or even less. The promulgation of this rule would be likely to reinforce this disturbing trend, which is contrary to the legislative intent of the Code. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 93 (1977).

The only way to prevent this problem is to wait until a later date when the final balance for the petition date can be known and inserted on the schedules. This will often cause the debtor to have to make a separate trip to the attorney's office when a bank statement is received or to access the client's account electronically after the petition date. (The statement may come too late to be mailed and, indeed, the timing may require a request for an extension of time to file the schedules.) Many debtors do not have Internet access to their accounts and few attorneys will want to obtain a client's password to access the account out of the client's presence. Any extra trip to the attorney's office can mean lost wages for many debtors.

While the costs of requiring debtors to produce tax returns or W-2 forms in their possession are not as great, it must be recognized that these forms often do not even reflect the debtor's current economic situation. In most cases, the information in these forms about the debtor's income will be many months old and thus largely irrelevant to a section 707(b) analysis, which is primarily based on the debtor's current income and expenses. There are also serious privacy issues. Tax returns may, for example, reveal medical expenses of a debtor who prefers they be kept confidential. They may reveal confidential information about a nondebtor spouse or child of the debtor who never chose to subject herself to such disclosure. There should be a heavy burden to justify routinely examining documents that may contain such private information. Like bank statements, these documents can be requested from the debtor in a particular case in which they might actually be relevant to a possible issue in the case, but there is no reason for the wholesale disregard of privacy rights and the expenditure of the time and resources that would be required by a rule compelling the debtor to produce them and the trustee to review them in every case.

Is there any evidence that the cumulative costs of these proposals would not greatly outweigh the benefits that would flow from them? I am not aware of any. Certainly, anecdotal evidence of occasional serious abuses (which have been discovered without this change in the rules) cannot meet the burden of showing that the benefits of this proposed change outweigh the costs. In most areas, the government is very conscious of reducing the paperwork burdens on businesses and citizens that cannot be

amply justified by their benefits. Bankruptcy debtors, who already have had more than their share of misfortunes, should not be treated as a disfavored class to whom these standards do not apply.

Rule 5005

I also have concerns about the proposed amendment to Rule 5005 which would permit courts to require electronic filing of all documents. While I am sensitive to the Judiciary's desire to cut costs and aware that electronic filing will help in that effort, I hope we never come to a point where we will allow cost savings to detract from the courts' mission to provide justice for all.

There is no doubt in my mind that, on the whole, electronic filing is of great benefit not only to the courts but to almost all practitioners who use it. However, requiring every attorney appearing in a bankruptcy court to file all documents electronically would have unfortunate side effects that impede access to justice.

For example, at the Consumer Bankruptcy Assistance Project, a pro bono bankruptcy program where I work, a significant percentage of our volunteers are attorneys who do not ordinarily practice bankruptcy law. Some of them are attorneys just starting their practices and others are in corporate counsel offices or government agencies. Typically, such attorneys might handle two or three bankruptcy cases a year and some handle no other cases in any court. We are greatly concerned that if these attorneys are required to invest the time, and perhaps money, necessary to participate in the electronic filing program they will choose to go to other pro bono agencies with which we compete for their time and which do not impose such requirements We could lose many of the volunteers who make it possible for us to fulfill our mission and, for the first time, be put in the difficult position of having to turn needy clients away.

Similarly, the general practitioner in a small town, or even a large city, who does not regularly handle bankruptcy cases may decide to turn away a client needing his or her services rather than go through the process of becoming able to file electronically. A creditor coming to his or her attorney for representation in a bankruptcy case may have to go to a different attorney because the creditor's usual attorney faces this new barrier to participating in bankruptcy cases. While this may be to the advantage of lawyers who specialize in bankruptcy, I do not think that it is healthy for the system to take steps in the direction of limiting bankruptcy practice to a closed club of specialists. It could be a particular problem for people living in remote areas who do not have a wide range of attorneys to choose from (even though electronic filing is in some ways the most beneficial to attorneys in such areas.)

There will undoubtedly come a time when all court filings are electronic and these concerns become outdated, but we have not yet reached that point. Therefore, I strongly urge the Committee to modify the proposal to state that no court can require electronic filing by attorneys or other participants in the system who participate in fewer than ten cases a year and that such persons are entitled to a waiver of the electronic filing requirement. I believe some local rules have such provisions and am not aware of any problems that have resulted from them.

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