ADDENDUM TO AGENDA MATERIALS
FOR THE MEETING OF THE
ADVISORY COMMITTEE
ON BANKRUPTY RULES

Phoenix, Arizona
March 29-30, 2012

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 29 - 30, 2012
Phoenix, Arizona

Agenda Addendum

A4. Report by the Subcommittee on Consumer Issues.

(A) Professor Gibson's memo of March 13, 2012, on the subcommittee's recommendation concerning Judge Frank's comment on the published amendments to Rule 3007(a).

A5. Joint Report by the Subcommittees on Consumer Issues and Forms.

(A) Professor Gibson's memo of March 15, 2012, on the subcommittees' recommendation concerning comments on the proposed amendment to Official Form 6C in response to *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

A6. Report by the Chapter 13 Form Plan Drafting Group.

Professor McKenzie's memo of March 12, 2012, on amendments to the Bankruptcy Rules in connection with the Drafting Group's work on a national form chapter 13 plan.

A7. Report by the Subcommittee on Forms.

(A)(2) Judge Perris' report on the goals and guiding principles of the redesign of the Official Forms for individuals.

A8. Report by the Subcommittee on Business Issues.

(A) Professor McKenzie's memo of March 15, 2012, on the subcommittee's recommendation concerning suggestions to amend the Bankruptcy Rules in response in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

A9. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Professor Gibson's memo of March 23, 2012, concerning the subcommittee's recommendation on publication of the proposed revision of the Part VIII rules.

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TAB A4(A)

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: PROPOSED AMENDMENT TO RULE 3007(a)

DATE: MARCH 13, 2012

Among the rule amendments published for public comment last August was an amendment of Rule 3007(a), which addresses the time and manner of serving objections to claims. The Committee proposed the amendments to this provision in response to two suggestions submitted on behalf of the Bankruptcy Judges Advisory Group. The first suggestion (09-BK-H), from Judge Margaret D. McGarity, proposed that Rule 3007(a) be amended to permit the use of a negative notice procedure for objections to claims. The second suggestion (09-BK-N), from Judge Michael E. Romero, sought clarification of the proper method of serving objections to claims.

To accomplish these goals, the published draft of amended Rule 3007(a) no longer requires notice of a claim objection to be provided at least 30 days before "the hearing" on the objection. Instead, it requires notice of the objection to be provided at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing." It also specifies how and on whom an objecting party must serve the objection and notice of objection.

Two comments were submitted in response to the publication of the proposed amendment. Bankruptcy Judge Eric Frank (E.D. Pa.) questioned whether a negative notice procedure is generally appropriate for an objection to a claim since, under Rule 3001(f), a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank

suggested that in many situations a claim should not be disallowed by default and without a hearing. Raymond P. Bell, Jr., submitted a comment agreeing with Judge Frank. Although Mr. Bell's comment was submitted after the comment period had expired, it was considered in the Subcommittee's deliberations.

The Proposed Amendment

The amendment and its accompanying Committee Note, as published, read as follows:

Rule 3007. Objections to Claim

(a) ~~OBJECTIONS TO CLAIMS~~TIME AND MANNER OF SERVICE. An objection to the allowance of a claim and a notice of objection that conforms substantially to the appropriate Official Form shall be ~~in writing and~~ filed~~.~~ and served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing. The objection and notice shall be served as follows:

(1) on the claimant by first-class mail to the person most recently designated by the claimant on its original or amended proof of claim as the person to receive notices, at the address so indicated; and

(A) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or

(B) if the objection is to a claim or an insured depository institution, according to Rule 7004(h); and

(2) on the debtor or debtor in possession and the trustee by first-class mail or other permitted means.

~~A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.~~

COMMITTEE NOTE

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take.

Judge Frank's Comment

Judge Frank based his comment on the tension that he perceives between the proposed amendment and Rule 3001(f). That provision states that "A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." In his view, this rule was intended to facilitate the filing and allowance of claims by creditors—including those who live far away from the bankruptcy court or are not represented by counsel—by shifting the burden of production of evidence to the objector. Because of Rule 3001(f), he does not believe that in most situations a claim can be disallowed without a hearing, particularly if the objection is not accompanied by any evidence that the claim is invalid.

Judge Frank suggested that, "at a minimum," the Committee Note be revised to "state unequivocally that although local rules may impose the obligation on a claimant to respond to [an objection to the] proof of claim, there may [be] matters in which a proof of claim is valid and allowable notwithstanding the failure to file a response to claims objection or request a hearing . . . ." He said that the Committee Note should indicate that, with regard to those matters, the court has a duty to determine whether Rule 3001(f) requires allowance of the claim, even if the claimant does not respond or request a hearing.

Finally, Judge Frank observed that "the claims allowance process involves a very delicate balancing of interests." Because of the usual situation of limited resources, he said that both debtors and creditors may be tempted to take advantage of the possibility that the other side will not respond to questionable claims or objections because the cost of doing so is likely to exceed any expected benefit. He therefore urged the Committee "to tread carefully when modifying the existing rules governing claims allowance."

The Subcommittee's Recommendation

During its March 9, 2012, conference call, the Subcommittee discussed Judge Frank's comment and the reasons for the Committee's proposal to amend Rule 3007(a). In the end, the Subcommittee concluded that the proposed amendment should be withdrawn for the time being so that it can be considered along with the package of rule amendments that are being considered in connection with the drafting of a national chapter 13 form plan. As is discussed at agenda item 6, the Chapter 13 Plan Form Working Group is currently considering possible rule amendments that would permit the amount and priority status of certain types of claims to be determined in a chapter 13 plan, as well as by motion or claim objection. The Subcommittee concluded that the method of service on the claimant should be the same regardless of the

method used for seeking the determination of the amount or priority status of such claims. Rather than proceed with the published amendment of Rule 3007(a), which generally allows service by mail on the person designated on the proof of claim, **the Subcommittee recommends that further action on the amendment be postponed until a unified approach to the service of claim objections and claim determinations through plans can be proposed.** Before bringing an amendment of Rule 3007(a) back to the Committee, the Subcommittee will also give further consideration to the appropriateness of a negative notice procedure for claim objections.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEES ON CONSUMER ISSUES AND ON FORMS

RE: COMMENTS ON PROPOSED AMENDMENT OF SCHEDULE C IN RESPONSE TO *SCHWAB v. REILLY*

DATE: MARCH 15, 2012

A preliminary draft of an amendment to Official Form 6C (Schedule C – Property Claimed as Exempt) was published for comment last August. The proposed amendment was intended to reflect the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010). It would provide a new option permitting the debtor to state the value of the claimed exemption as the "full fair market value of the exempted property."

In *Schwab* the Court held that a debtor's claim of an exemption in the same amount as the value specified for the exempted property does not constitute a claim for the entire value of the property if the actual property value is more than the value specified. Rather, it is a claim of exemption limited to the specific value stated. Thus, if the debtor "accurately describes an asset subject to an exempt interest and . . . declares the 'value of [the] claimed exemption' as a dollar amount within the range the Code allows," the trustee has no duty to object to the exemption within the time limit specified by Rule 4003(b). 130 S. Ct. at 2662. On the facts of the case before it, the Court held that the debtor's Schedule C revealed a valid exemption claim, limited in amount, to which the trustee had no duty to object. As a result, the trustee was not barred from later contending that the property was worth more than the specific exemption amount claimed and seeking to sell the property to collect that excess value for the estate.

At the end of the majority opinion, the Court explained how a debtor can indicate the intent to exempt "the full market value of the asset or the asset itself" in a manner that puts the trustee on notice of the scope of the claimed exemption. The Court stated that the debtor can list as the exempt value of the asset on Schedule C "'full fair market value (FMV)' or '100% of FMV.'" Then, the Court explained, "[i]f the trustee fails to object, or if the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset." 130 S. Ct. at 2668.

In considering the impact of *Schwab* on Schedule C, the Committee noted that the current form does not indicate the right of a debtor to exercise the option described by the Supreme Court of exempting the full fair market value of an asset. Schedule C requires four pieces of information for each exemption claimed: description of property, law providing each exemption, value of claimed exemption, and current value of property without deducting exemption. Members of the Committee expressed concern that only knowledgeable debtors (or more likely, debtors represented by knowledgeable lawyers) would understand that "value of claimed exemption" could be stated as something other than a specific dollar amount.

After discussing the matter at both the September 2010 and April 2011 meetings, the Committee voted to propose an amendment to Schedule C that would change the column for value of claimed exemption in the following manner. Two options for that column would be provided: one that says "Exemption limited to $_____" and the other that says "Full fair market value of the exempted property." The debtor would be instructed to "Check one box only for each claimed exemption." The columns would also be rearranged so that the current market value of the property would follow the description of the property. In *Schwab* the Court stated

that the property's market value provides useful information but is not essential for determining the validity of a claimed exemption.

Seven written comments were submitted in response to the publication of the proposed amendment. In addition, the National Association of Bankruptcy Trustees ("NABT") expressed its views about the amendment by means of a telephonic hearing. The comments and testimony are summarized below, followed by a discussion of the Subcommittees' recommendation.

Comments and Testimony on the Published Amendment

11-BK-004. L. Jed Berliner, Esq. Because a debtor can only exempt his or her equity in property, the form should say "100% of equity" rather than "full fair market value." The form should also require the debtor to state any amount of the "wild card" exemption (§ 522(d)(5)) being used, even when 100% of equity is being claimed as exempt.

11-BK-005. Walter Oney, Esq. A debtor should have to state an exemption amount, even when exempting full fair market value, so that a trustee can determine whether the debtor is attempting to exceed a capped exemption amount. The form should change the fourth column to read "Current Value of Debtor(s)' Interest," and a fifth column should be added for the debtor to indicate if 100% of that value is being claimed as exempt. Also the form should be clarified to indicate that "full fair market value of the exempted property" refers to the value of the debtor's equity in the property and not the value of the property itself.

11-BK-007. Judge Patricia Williams (Bankr. E.D. Wash.). The form will impose an unnecessary burden on trustees and should not be adopted. Pro se debtors will not understand the difference between the two options, and some will check both boxes or neither, despite the instructions. The amended form will encourage the use of the FMV option and require trustees,

who are already underpaid in no-asset cases, to quickly and thoroughly review and compare the debtor's schedules and determine the validity of the asserted valuations.

11-BK-009. Grant F. Shipley, Esq. Rather than providing the option of claiming "full fair market value of the exempted property," the form should allow the debtor to claim "ALL" or "100%" as exempt. Because exemptions apply to the value of the property as of the date of the petition, a claim of full fair market value allows the estate to claim any increase in value that occurs postpetition—even for property that is entitled to an uncapped exemption amount.

11-BK-011. Raymond J. Obuchowski, Esq. (NABT). Schedule C should not include a "full fair market value" option. Most exemptions are statutorily defined in dollar amounts, and thus they can only be claimed in dollar terms. Courts are divided on whether it is proper to claim 100% FMV when invoking an exemption that is limited in dollar amount. The proposed amendment to Schedule C would encourage this type of exemption claim and lead to a "plethora of objections." It would increase the gamesmanship that already occurs with the valuation of property and the claiming of exemptions. While Schedule C should not be amended as proposed, it should be amended to provide in one place the information necessary for assessing claimed exemptions. In addition to the information currently requested, the form should require the debtor to state the value of the portion of the property the debtor owns, the total amount of liens on the property, the net value to the estate, and in a joint case the identity of the debtor claiming the exemption.

11-BK-013. Henry J. Sommer, Esq. (National Association of Consumer Bankruptcy Attorneys). NACBA strongly supports adoption of the proposed amendment to Schedule C. The debtor needs to know promptly whether property claimed exempt is exempt and thus is available for the debtor's use, sale, or other disposition. The *Schwab* Court provided a

straightforward way for the debtor to alert the trustee and other parties to the intention to claim the debtor's entire interest in an item of property as exempt—by listing the exempt value as full fair market value or 100% of FMV. If a trustee needs more time to determine the value of the property in order to know whether to object to the claimed exemption, the trustee can either adjourn the meeting of creditors to a later date (since the deadline for objecting runs from the conclusion of that meeting) or seek an extension of the objection deadline. There is no reason to allow the trustee to delay making a determination of whether any value in the property will be claimed for the estate. The trustees' professed fear of an avalanche of objections is unfounded. Many bankruptcy courts agreed with the position taken by the Third Circuit in *Schwab* (which was overturned by the Supreme Court) without encountering problems. The current Schedule C presents a trap for the unwary, which would be eliminated by the proposed amendment's inclusion of the option of claiming a "full fair market value" exemption.

11-BK-014. Henry E. Hildebrand, III, Esq. (National Association of Chapter 13 Trustees). NACTT adopts and endorses the comment submitted by Mr. Obuchowski on behalf of NABT. The additions to Schedule C proposed by NABT would also assist chapter 13 trustees in performing a "best interest of creditors" analysis under § 1325(a)(4).

Testimony at February 10, 2012 Telephonic Hearing – Two witnesses appeared on behalf of NABT. They were Neil Gordon, president, and Raymond Obuchowski, chair of the association's rules committee. They expanded on the written comments that Mr. Obuchowski submitted.

Chapter 7 panel trustees are paid only $60 for a no-asset case and nothing for an *in forma pauperis* case. They therefore cannot afford to engage in wasteful and unnecessary disputes over exemptions. Although *Schwab* rejected in-kind exemptions, debtors are continuing to claim

100% FMV exemptions even for exemptions that are capped by a dollar amount. This is abusive. The proposed amended form would bring back the in-kind exemption and make it even easier to claim by just having to check a box. If the Committee does not pursue the amendments to Schedule C that NABT proposed, the form should be left as it is. When a debtor needs finality regarding the status of property claimed as exempt, the debtor can move to compel the trustee to abandon the property.

The Subcommittees' Recommendation

The Subcommittees discussed the comments and testimony regarding the proposed amendment to Schedule C during their joint conference call of February 17, 2012, and the Consumer Subcommittee engaged in further discussions during its March 9 conference call. Members debated the merits of the proposed amendment to Schedule C and the concerns that had been raised by commentators. While the conclusion was not unanimous, **the Subcommittees recommend that the published amendment be withdrawn and that any revision of Schedule C be addressed by the Forms Modernization Project.** The Subcommittees also explored possible rule amendments that would require trustees to make prompt decisions on abandonment of property, but they concluded that the amendments under consideration were inconsistent with either § 554 of the Code or the *Schwab* decision.

The Subcommittees' recommendation to withdraw the published amendment is based on a couple of factors. First, debtors are incorporating into existing Schedule C the language suggested by the Supreme Court in *Schwab*. The need to amend the form in response to that decision therefore appears to be less compelling than the Committee initially thought. Second, courts are divided on whether it is always improper for a debtor to claim an exemption of full fair market value when the exemption in question is capped at a specific dollar amount. The

consensus of the Subcommittees was that any amendment of Schedule C should await further development of the case law. The recommendation to withdraw the published amendment is therefore intended to maintain the status quo and should not be read as signaling the Committee's rejection of the permissibility of claiming as exempt the full fair market value of property.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: CHAPTER 13 FORM PLAN WORKING GROUP

RE: AMENDMENTS TO BANKRUPTCY RULES IN CONNECTION WITH NATIONAL CHAPTER 13 FORM PLAN PROJECT

DATE: MARCH 12, 2012

The working group tasked with developing a national chapter 13 form plan has concluded that the project will require amendments to the Bankruptcy Rules. This memorandum discusses how the working group reached that conclusion, what rules the working group has identified as the ones most likely to need amending, and when the working group anticipates that draft rule amendments will be ready for consideration by the Advisory Committee.

Background

Because various form plans are used in chapter 13 cases in courts around the country, the working group decided at the outset of its efforts to gather information on bankruptcy courts' experiences with those plans. Accordingly, the Chair of the Advisory Committee wrote to the chief judge of the bankruptcy court in each judicial district.[1] Among other questions posed in that letter, the Chair asked whether, if the district used a form plan, there were particular

[1] The request for information comprised the following questions:

1. Is there any report, instruction sheet, or other document explaining your model plans? If so, could you send us a copy or tell us where to find it?
2. Are there any provisions of your plans that you think are particularly helpful or problematic? If so, could you point them out to us?
3. Are there particular plan provisions that you think would either be essential to any plan or that ought to be included as options? We are interested in any suggestions you have for the full wording of the particular provisions, rather than just identification of the topic?
4. Are there any rule revisions that you think would improve chapter 13 procedures, particularly those that relate to the chapter 13 plan confirmation process or the impact of a confirmed chapter 13 plan?

provisions that were helpful or problematic, and whether there were rule revisions that could improve chapter 13 procedures. In particular, the Chair sought information about possible rule amendments that relate to the chapter 13 plan confirmation process or the impact of a confirmed chapter 13 plan. The working group received responses from 31 districts.

The responses expressed support for the project of crafting a national chapter 13 form plan. Based on their experiences with their own form plans, however, the bankruptcy judges and chapter 13 trustees who responded to the Chair's request for information identified a number of areas of chapter 13 practice that called for possible rule amendments. Principal areas of concern brought to the working group's attention included the requirements for filing proofs of claim, the treatment of claims in a plan, and the force and effect of a plan.

Rule Changes Contemplated by the Working Group

As the working group makes progress towards a draft form plan, its experience has confirmed the importance of potential rule revisions in the areas pointed out by the responses to the Chair's request. The following rules have been the focus of the working group's attention.

1. Rule 3002

Rule 3002 governs the filing of a proof of claim or interest. Two aspects of the rule have garnered attention. First, the working group has endorsed the suggestion, which the Consumer Subcommittee has prepared for consideration by the Advisory Committee, to require secured creditors to file proofs of claim. Currently, Rule 3002(a) requires only unsecured creditors to do so, and the omission has created confusion about whether secured creditors must file proofs of claim in order to participate in the chapter 13 process and receive distributions from a plan. An amendment clarifying that a proof of claim must be filed in order for a secured creditor to have an allowed secured claim would remove that confusion.

Second, the working group contemplates aligning the period for filing proofs of claim with the required time frame for confirmation hearings in chapter 13 cases. A common complaint in chapter 13 practice is that the current claims bar date under Rule 3002(c), which is 90 days after the meeting of creditors under Code § 341, is ill timed. Because § 1324(b) generally requires a confirmation hearing in a chapter 13 case to occur within 20 to 45 days after the § 341 meeting, under the current rule a claim can be filed after a confirmation hearing and nevertheless be considered timely. This anomaly adds uncertainty and inefficiency to the process of confirming a chapter 13 plan. The working group is considering a rule amendment to ensure that essentially all claims (with the principal exception of claims filed by governmental creditors) are filed before a confirmation hearing.

2. Rule 3012

Rule 3012 deals with the valuation of secured claims. In keeping with the goal of making the confirmation hearing a more effective part of the chapter 13 process, the working group would like to clarify that certain actions may be taken as part of confirming a chapter 13 plan. The working group anticipates proposing an amendment to Rule 3012 to provide explicitly that a plan may determine the amount of an allowed secured claim and the amount of an unsecured claim entitled to priority. Any objection to the valuation of a secured or priority claim would be resolved at the confirmation hearing. Rule 3012 currently provides that valuation of secured claims requires a motion after notice and a hearing. The working group intends to include provisions to ensure that appropriate notice is given to a creditor when valuation is undertaken in a chapter 13 plan.

3. Rule 3015

Rule 3015 governs the filing and modification of a chapter 13 plan, and objections to plan confirmation and modification. The working group anticipates significant amendments to this rule. First, an amended rule should require the use of the official form plan. Second, the rule should also require that any deviations from the official form—that is, "special" provisions not otherwise provided for in the form plan—must be clearly designated. By assuring that non-standard provisions are salient, this requirement will ease review of chapter 13 plans by creditors, counsel, and courts. Third, to further the goal of resolving as many disputes as possible at a confirmation hearing, the rule should be amended to require, as a default, that objections to plan confirmation be filed within a defined period in advance of a confirmation hearing. Fourth, an amendment should also clarify that the provisions of a confirmed plan govern over anything to the contrary in a proof of claim—a point of dispute in chapter 13 practice. Fifth, the working group anticipates proposing amendments to Rule 3015 to ensure appropriate notice in advance of a confirmation hearing or a proposed plan modification.

4. Rule 4003

Rule 4003 governs the treatment of property claimed to be exempt. The working group anticipates an amendment to the rule to clarify that the avoidance of a lien on exempt property under § 522(f) may be provided for in a chapter 13 plan. As with the valuation of secured claims, the working group intends to propose appropriate notice provisions in the amended rule.

5. Rule 7001

Rule 7001 currently requires that any "proceeding to determine the validity, priority, or extent of a lien or other interest in property" must be brought as an adversary proceeding. The working group would clarify that the avoidance of a lien on exempt property under § 522(f) and

the valuation of a secured claim pursuant to amended Rule 3012 may be pursued through a chapter 13 plan.

6. Rule 9009

One issue that came to light during the working group's deliberations is the treatment of official forms generally. Rule 9009 currently states that forms may be "used with alterations as may be appropriate" and "may be combined and their contents rearranged to permit economies in their use." These portions of the current rule have been the source of concern in the past and may pose an especially difficult problem with a form chapter 13 plan. As discussed above, one goal of a form plan is to ensure that counsel, courts, and creditors are able to review the terms of a chapter 13 plan with ease. If the terms of a form plan are not standard or do not appear in their usual place, that goal will be frustrated. It is particularly important that any form chapter 13 plan cannot be "alter[ed]" or "rearranged" in light of the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010), which held that a confirmed chapter 13 plan is binding under principles of res judicata even when it contains procedurally improper provisions. Accordingly, the working group anticipates amending Rule 9009 to limit the ability of litigants to modify official forms.

The Timing of Proposed Amendments

Although the working group has made substantial progress toward drafting these rule amendments, it has decided not to propose specific language at this time. The working group's initial goal was to propose draft language for the Advisory Committee's consideration at the March meeting, with the purpose of seeking approval from the Standing Committee for publication of the rule amendments in 2012. Because the process for amending forms takes two years while the process for amending rules takes three years, this schedule would have allowed

an additional year to draft a plan and have its accompanying rule changes come into effect at the same time as the form.

Two considerations persuaded the working group not to pursue a request for publication this year. First, the process of drafting language for the rules discussed in this memorandum has revealed the importance of seeking input from each subcommittee whose area of expertise may be affected by proposed rule changes. The working group is sensitive to the reality that a rule amendment designed to facilitate the use of a form chapter 13 plan may have an effect outside chapter 13 cases. Taking additional time before going forward with publication of proposed rule amendments will allow additional consultation with appropriate subcommittees of the Advisory Committee. Second, the working group would like to use the additional time to solicit the input of a broad cross-section of interested parties. One potential approach for doing so would be modeled on the process used in the Forms Modernization Project—that is, seeking the views of lawyers (for debtors and creditors), trustees, and judges in workshop-style sessions.

For these reasons, the working group has decided to wait before bringing forward specific rule amendment language for the Advisory Committee's consideration. The working group will proceed with the aim of seeking publication of proposed rule amendments in 2013.

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Bankruptcy Official Forms Modernization

I. The Goals of the Redesign Effort

Clarify the forms and instructions to improve the collection of necessary information

Increase the completeness and accuracy of responses

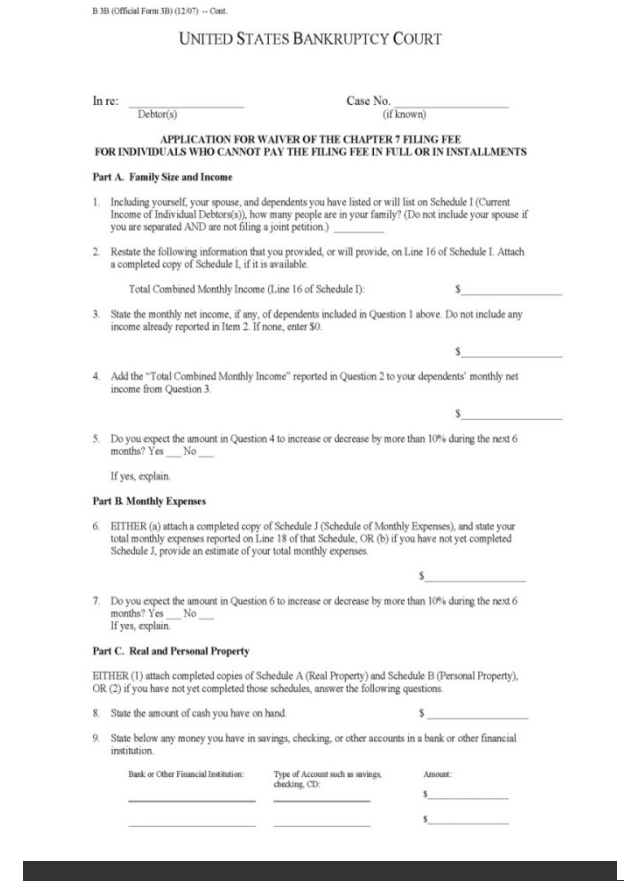
Reduce errors

Create separate form packages for individual and non-individual debtors

Streamline the look and feel of the forms, making them inviting and easier to read

Here's an example of how the new forms are easier to read and look more inviting. For bigger versions of the forms in this example, see the next two pages:

Before — Application for



B 3B (Official Form 3B) (12/07) -- Cont.

UNITED STATES BANKRUPTCY COURT

In re: _____ Debtor(s) Case No. _____ (if known)

APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE FOR INDIVIDUALS WHO CANNOT PAY THE FILING FEE IN FULL OR IN INSTALLMENTS

Part A. Family Size and Income

1. Including yourself, your spouse, and dependents you have listed or will list on Schedule I (Current Income of Individual Debtors(s)), how many people are in your family? (Do not include your spouse if you are separated AND are not filing a joint petition.) _____

2. Restate the following information that you provided, or will provide, on Line 16 of Schedule I. Attach a completed copy of Schedule I, if it is available.

Total Combined Monthly Income (Line 16 of Schedule I): $_____

3. State the monthly net income, if any, of dependents included in Question 1 above. Do not include any income already reported in Item 2. If none, enter $0.

$_____

4. Add the "Total Combined Monthly Income" reported in Question 2 to your dependents' monthly net income from Question 3.

$_____

5. Do you expect the amount in Question 4 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___

If yes, explain.

Part B. Monthly Expenses

6. EITHER (a) attach a completed copy of Schedule J (Schedule of Monthly Expenses), and state your total monthly expenses reported on Line 18 of that Schedule, OR (b) if you have not yet completed Schedule J, provide an estimate of your total monthly expenses.

$_____

7. Do you expect the amount in Question 6 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___
If yes, explain.

Part C. Real and Personal Property

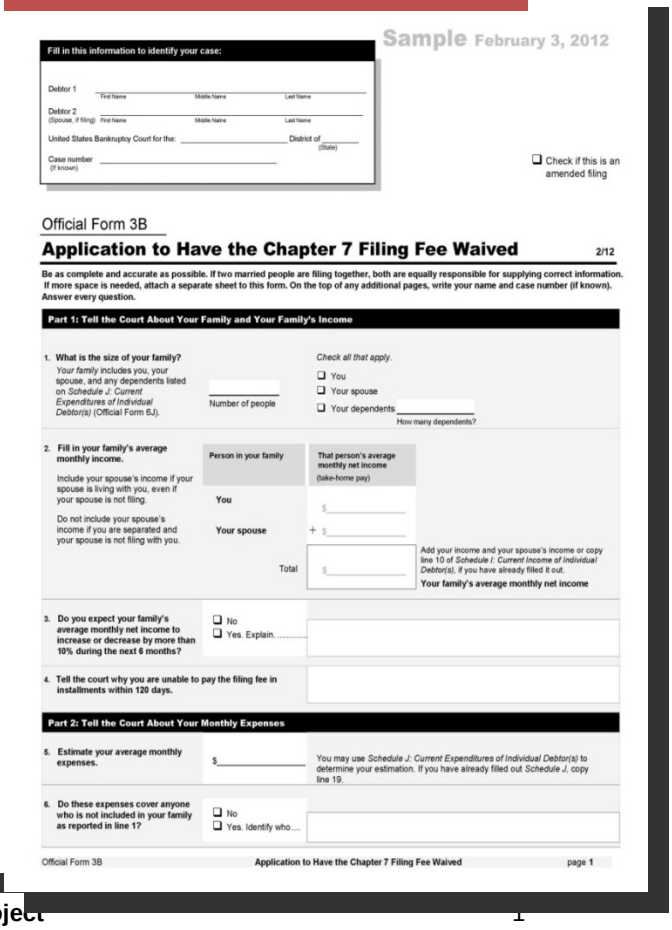
EITHER (1) attach completed copies of Schedule A (Real Property) and Schedule B (Personal Property), OR (2) if you have not yet completed those schedules, answer the following questions.

8. State the amount of cash you have on hand. $ _____

9. State below any money you have in savings, checking, or other accounts in a bank or other financial institution.

Bank or Other Financial Institution:	Type of Account such as savings, checking, CD:	Amount:
_____	_____	$_____
_____	_____	$_____

After — Application to Have Fee



Sample February 3, 2012

Fill in this information to identify your case:

Debtor 1 First Name Middle Name Last Name

Debtor 2 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (if known) _____

☐ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived 2/12

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Tell the Court About Your Family and Your Family's Income

1. **What is the size of your family?** *Your family* includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J). Number of people. *Check all that apply.* ☐ You ☐ Your spouse ☐ Your dependents _____ How many dependents?

2. **Fill in your family's average monthly income.** Include your spouse's income if your spouse is living with you, even if your spouse is not filing. Do not include your spouse's income if you are separated and your spouse is not filing with you.

Person in your family	That person's average monthly net income (take-home pay)
You	$_____
Your spouse	+ $_____
Total	$_____

Add your income and your spouse's income or copy line 10 of *Schedule I: Current Income of Individual Debtor(s)*, if you have already filled it out. **Your family's average monthly net income**

3. **Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?** ☐ No ☐ Yes. Explain. _____

4. **Tell the court why you are unable to pay the filing fee in installments within 120 days.**

Part 2: Tell the Court About Your Monthly Expenses

5. **Estimate your average monthly expenses.** $_____ You may use *Schedule J: Current Expenditures of Individual Debtor(s)* to determine your estimation. If you have already filled out *Schedule J*, copy line 19.

6. **Do these expenses cover anyone who is not included in your family as reported in line 1?** ☐ No ☐ Yes. Identify who. _____

Official Form 3B **Application to Have the Chapter 7 Filing Fee Waived** page 1

B 3B (Official Form 3B) (12/07) -- Cont.

UNITED STATES BANKRUPTCY COURT

In re: _____ Debtor(s)

Case No. _____ (if known)

APPLICATION FOR WAIVER OF THE CHAPTER 7 FILING FEE FOR INDIVIDUALS WHO CANNOT PAY THE FILING FEE IN FULL OR IN INSTALLMENTS

Part A. Family Size and Income

1. Including yourself, your spouse, and dependents you have listed or will list on Schedule I (Current Income of Individual Debtors(s)), how many people are in your family? (Do not include your spouse if you are separated AND are not filing a joint petition.) _____

2. Restate the following information that you provided, or will provide, on Line 16 of Schedule I. Attach a completed copy of Schedule I, if it is available.

   Total Combined Monthly Income (Line 16 of Schedule I): $_____

3. State the monthly net income, if any, of dependents included in Question 1 above. Do not include any income already reported in Item 2. If none, enter $0.

   $_____

4. Add the "Total Combined Monthly Income" reported in Question 2 to your dependents' monthly net income from Question 3.

   $_____

5. Do you expect the amount in Question 4 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___

   If yes, explain.

Part B. Monthly Expenses

6. EITHER (a) attach a completed copy of Schedule J (Schedule of Monthly Expenses), and state your total monthly expenses reported on Line 18 of that Schedule, OR (b) if you have not yet completed Schedule J, provide an estimate of your total monthly expenses.

   $_____

7. Do you expect the amount in Question 6 to increase or decrease by more than 10% during the next 6 months? Yes ___ No ___
   If yes, explain.

Part C. Real and Personal Property

EITHER (1) attach completed copies of Schedule A (Real Property) and Schedule B (Personal Property), OR (2) if you have not yet completed those schedules, answer the following questions.

8. State the amount of cash you have on hand. $ _____

9. State below any money you have in savings, checking, or other accounts in a bank or other financial institution.

Bank or Other Financial Institution:	Type of Account such as savings, checking, CD:	Amount:
_____	_____	$_____
_____	_____	$_____

Sample February 3, 2012

Fill in this information to identify your case:

Debtor 1 _____ (First Name / Middle Name / Last Name)

Debtor 2 (Spouse, if filing) _____ (First Name / Middle Name / Last Name)

United States Bankruptcy Court for the: _____ District of _____ (State)

Case number (If known) _____

☐ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived

2/12

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Tell the Court About Your Family and Your Family's Income

1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

_____ Number of people

Check all that apply.

☐ You
☐ Your spouse
☐ Your dependents _____ How many dependents?

2. Fill in your family's average monthly income.

Include your spouse's income if your spouse is living with you, even if your spouse is not filing.

Do not include your spouse's income if you are separated and your spouse is not filing with you.

Person in your family	That person's average monthly net income (take-home pay)
You	$_____
Your spouse	+ $_____
Total	$_____

Add your income and your spouse's income or copy line 10 of *Schedule I: Current Income of Individual Debtor(s)*, if you have already filled it out.

Your family's average monthly net income

3. Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?

☐ No
☐ Yes. Explain. .....

4. Tell the court why you are unable to pay the filing fee in installments within 120 days.

Part 2: Tell the Court About Your Monthly Expenses

5. Estimate your average monthly expenses.

$_____

You may use *Schedule J: Current Expenditures of Individual Debtor(s)* to determine your estimation. If you have already filled out *Schedule J*, copy line 19.

6. Do these expenses cover anyone who is not included in your family as reported in line 1?

☐ No
☐ Yes. Identify who ....

II. Guiding Principles Behind Redesigning the Forms for Individuals

We analyzed the original forms and surveyed users in the court to find out what problems people were having with the current forms, what information was missing, and what concepts people found confusing.

For every data element in the original forms, we identified who in the court system used the information and how they used it. We asked whether it was necessary and how the debtor would be able to supply it.

In an effort to address the deficiencies we found, we then followed these principles as we drafted the new forms:

1. **Give people a context for the process and for the questions you're asking.**
2. **Use conversational language.**
3. **Define technical terms if you must use them.**
4. **Give people information they need where they need it.**
5. **Simplify the task of giving information.**
6. **Tell people specifically what you want to know.**

On the following pages are examples of how we applied the guiding principles in the forms.

1. Give people a context for the process and for the questions you're asking.

Unlike the original forms, the new forms have accompanying instructions so people understand each form. The instruction pages are not intended to be filed.

Official Form 6I

Instructions for Schedule I: Your Income 2/12

United States Bankruptcy Court

How to fill out Schedule I

In *Schedule I: Your Income* (Official Form 6I), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a non-filing spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a non-filing spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

One easy way to calculate how much income would be per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid annually, you would simply divide your annual salary by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

$15,000 *income every quarter*
X 4 *pay periods in the year*
$60,000 *total income for the year*

Official Forms 22A–1 and 22A–2

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 2/12

How to fill out these forms

Official Forms 22A–1 and 22A –2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims set out in the Bankruptcy Code.

You must file 22A –1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A –1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, 22A – 2, *Chapter 7 Means Test Calculation*. The calculations on this form – sometimes called the *Means Test* – reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you may have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together – called a *joint case* – and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

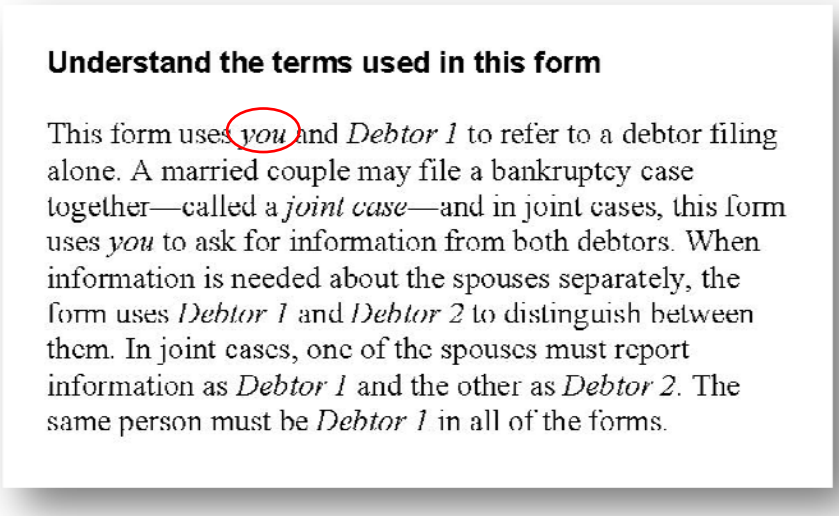
Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

2. Use conversational language.

Where possible, we made the forms easier to read by using shorter sentences, the active voice, personal pronouns, and more commonly used words.



Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Original		New language
The presumption is temporarily inapplicable.	=	**The Means Test does not apply now because of qualified military service but it could apply later.**
Part I. MILITARY AND NON-CONSUMER DEBTORS	=	**Part 2: Determine Whether Military Service Provisions Apply to You**
Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION	=	**Part 3: Calculate Your Current Monthly Income**
Part III. APPLICATION OF § 707(b)(7) EXCLUSION	=	**Part 4: Determine Whether the Means Test Applies to You**
Describe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document	=	**Do you expect an increase or decrease in your expenses within the year after you file this form?** For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

3. Define technical terms if you must use them.

Where possible, we defined technical terms in context.

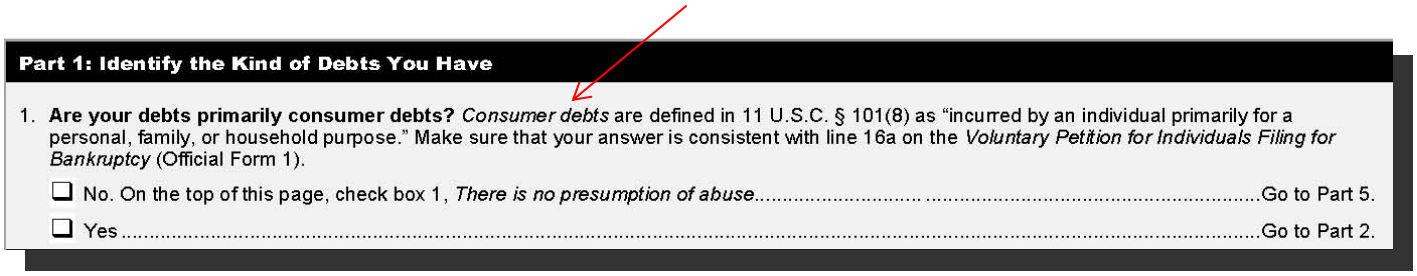
1. What is the size of your family?

Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

_____
Number of people

Check all that apply.

- ❑ You
- ❑ Your spouse
- ❑ Your dependents _____
  How many dependents?



Part 1: Identify the Kind of Debts You Have

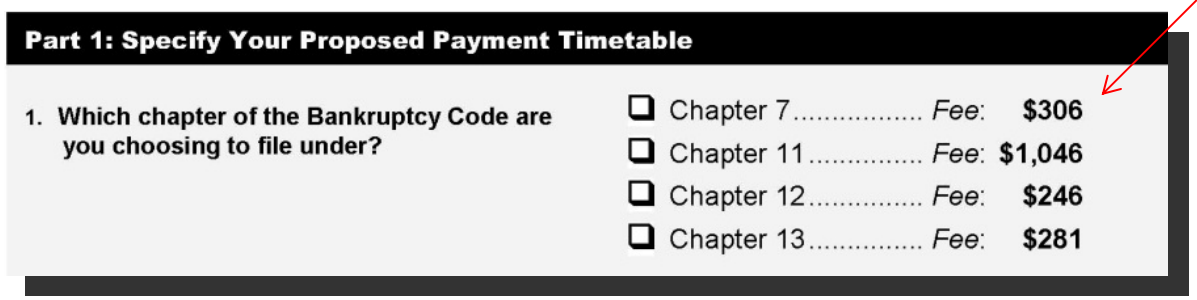
1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with line 16a on the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 1).

   ❑ No. On the top of this page, check box 1, *There is no presumption of abuse*.....Go to Part 5.

   ❑ Yes .....Go to Part 2.

4. Give people information they need where they need it.

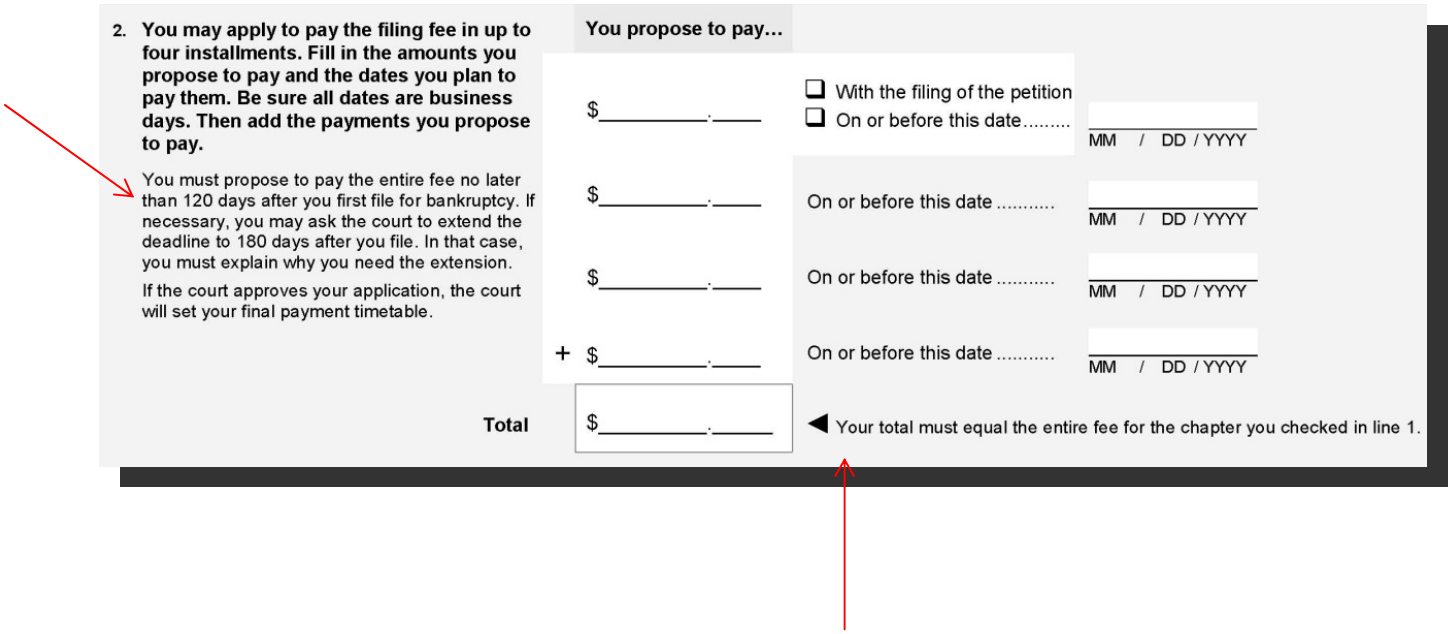
We included information that people would need at the question level so that they could more accurately answer questions, even if they did not read the separate instructions.



Part 1: Specify Your Proposed Payment Timetable

1. **Which chapter of the Bankruptcy Code are you choosing to file under?**

- ☐ Chapter 7 ..... *Fee*: **$306**
- ☐ Chapter 11 ..... *Fee*: **$1,046**
- ☐ Chapter 12 ..... *Fee*: **$246**
- ☐ Chapter 13 ..... *Fee*: **$281**



2. **You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.**

You must propose to pay the entire fee no later than 120 days after you first file for bankruptcy. If necessary, you may ask the court to extend the deadline to 180 days after you file. In that case, you must explain why you need the extension.

If the court approves your application, the court will set your final payment timetable.

	You propose to pay…	
	$_____.____	☐ With the filing of the petition ☐ On or before this date ..... MM / DD / YYYY
	$_____.____	On or before this date ..... MM / DD / YYYY
	$_____.____	On or before this date ..... MM / DD / YYYY
+	$_____.____	On or before this date ..... MM / DD / YYYY
Total	$_____.____	◀ Your total must equal the entire fee for the chapter you checked in line 1.

5. Simplify the task of giving information.

The forms use format (alignment and placement of elements) to structure answers and checkboxes to simplify the task of responding.

Before

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP(S):	AGE(S):
Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

After

Part 1: Describe Employment

1. **Fill in your employment information.**

If you have more than one job, attach a separate page with information about additional employers.

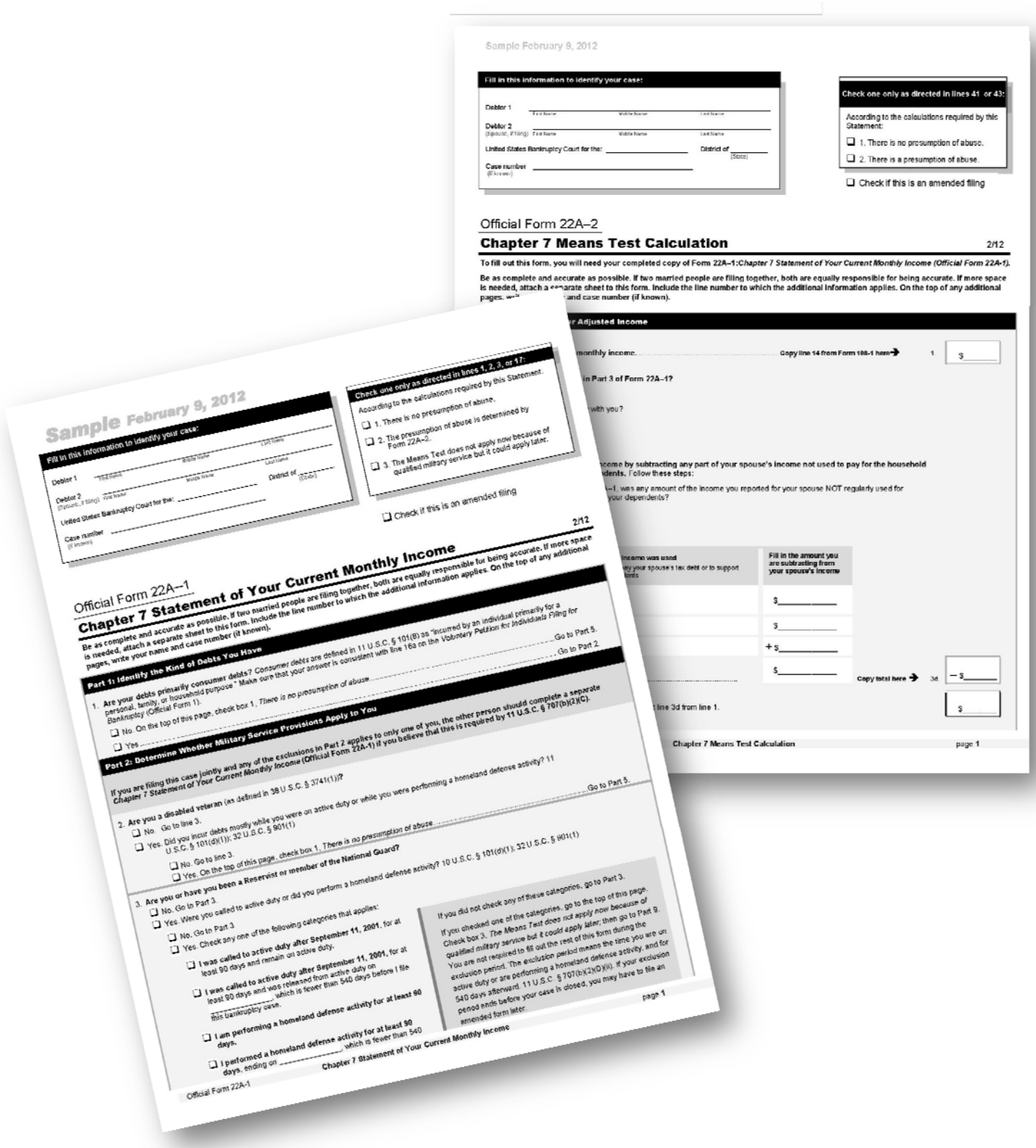
Include employment information about a non-filing spouse unless you are separated.

Include part-time, seasonal, or self-employed work.

Occupation should include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	❑ Employed ❑ Not employed	❑ Employed ❑ Not employed
Occupation	_____	_____
Employer's name	_____	_____
Employer's address	_____ Number Street _____ _____ _____ City State ZIP Code	_____ Number Street _____ _____ _____ City State ZIP Code
How long employed there	_____	_____

The forms reduce people's burden by having them fill in only what applies to them. For example, the *Statement of Current Monthly Income* is now separate from the *Means Test Calculation*. Debtors only fill out the *Means Test Calculation* if it is necessary.



6. Tell people specifically what you want to know.

The forms use cues, checkboxes, and examples to elicit specific responses to questions.

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form 6A)*, attach a copy to this application and go to Part 4.

9. How much cash do you have?

Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_____

10. Bank accounts and other deposits of money?

Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	_____	$_____
Savings account:	_____	$_____
Other financial accounts:	_____	$_____
Other financial accounts:	_____	$_____

Part 4: Answer These Additional Questions

16. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

- ❑ No
- ❑ Yes. **Whom did you pay?**
  - ❑ An attorney
  - ❑ A bankruptcy petition preparer, paralegal, or typing service
  - ❑ Someone else _____

How much did you pay?

$_____

18. Has anyone paid someone on your behalf for services for this case?

- ❑ No
- ❑ Yes. **Who was paid on your behalf?**
  - ❑ An attorney
  - ❑ A bankruptcy petition preparer, paralegal, or typing service
  - ❑ Someone else _____

Who paid?

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else _____

How much did someone else pay?

$_____

III. Summary of Substantive Changes in Draft Forms

Many of the changes are changes in wording, not substance, and have been so indicated below. Those changes that are a matter of wording, or self-explanatory changes designed to increase accuracy, are not highlighted in the draft Committee Note. The more significant non-substantive changes are included on the list so that Committee members can review them to determine whether we should add anything to the draft Committee Note.

Form B3A Application for Individuals to Pay Filing Fee in Installments

1. Additional case identifying information (form header)

The proposed form provides a separate box containing fields for the main case identifying information, including separate fields for debtor and joint debtor, a field identifying the court in which the petition is filed and a checkbox, allowing the filer to report whether the application is an amended filing.

2. Instructions embedded in the form (See, e.g. line 2)

The proposed form provides much more explanation within the form. It also omits references that to the Federal Rules of Bankruptcy Procedure. (See, e.g. current line 1)

3. Proposed Payment Time Table (line 2)

The proposed form provides the total fee amount associated with filing Chapters 7, 11, 12, and 13, information not provided on the current form. The proposed form requires debtors to total proposed payments and confirm they are equal to the entire fee appropriate to the chapter under which debtors indicated they filed.

4. Declaration of Bankruptcy Petition Preparer (omitted from form)

The declaration of the bankruptcy petition preparer is omitted from the proposed form in its entirety. Instead, Application Instructions direct debtors to ensure a preparer fills out the Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer Form (Official Form 19). We identified this change in the draft Committee Note for B3B and for the sake of consistency we should do the same for B3A.

Order

The substance of the order remains unchanged. The tone of the order is more conversational and the same identifying information box at the top of the application is provided at the top of the order.

Form B3B Application to Have the Chapter 7 Filing Fee Waived

1. Additional case identifying information (form header)

The proposed form provides a separate box containing fields for the main case

identifying information, including separate fields for debtor and joint debtor, a field identifying the court in which the petition is filed and a checkbox, allowing the filer to report whether the application is an amended filing.

2. Family Size and Income (line 2)

Income of dependants is no longer requested in the proposed form (current line 3). Instead, the proposed form directs debtor to calculate her family's average monthly net income according to her and her spouse's income only. This should be added to the Committee Note.

3. Monthly Expenses (lines 6 and 7)

The proposed form provides a field for debtors to identify people who are not also family members on whose behalf debtors incur expenses and the amount of those expenses. (Line 6) The proposed form also provides a field for debtors to identify others contributing toward payment of monthly expenses. (line 7) This should be added to the Committee Note.

4. Additional Information (line 18)

The proposed form provides a field for debtors to report if someone has paid for services associated with the bankruptcy case on their behalf and, if so, what relationship that person has to debtors, what type of service provider received payment, and the amount paid. While this information is solicited on the current form in an open-ended question format, the proposed form asks for this information by using several closed-ended questions, resulting in debtor providing more specific information. (Current line 16)

Order

The substance of the order remains unchanged. The tone of the order is more conversational and the same identifying information box at the top of the application is provided at the top of the order.

Form B6I Schedule I: Your Income

1. Marital Status (omitted)

The revised form does not ask for marital status, and moves the information about dependents from Schedule I to Schedule J. (lines 1 and 2) Not asking directly about marital status does not seem to matter because the debtor has to list the income of either Debtor 2 (in a joint filing) or a non-filing spouse. It would be good to mention the shift of the listing of dependents from Schedule I to Schedule J in the Committee Note.

2. Payroll Reductions (line 5)

In payroll deductions, the revised form includes additional categories of deductions, including contributions to retirement plans and required the payments of retirement fund loans.

3. Other income (line 8)

The form explains what type of information needs to be provided about income from rental property or operating a business, profession, or farm. (Line 8a) Old Schedule I (line 7) simply said "Attach detailed statement."

The form asks for family support payments that the debtor, a non-filing spouse, or a dependent regularly receives. (line 8c) The old Schedule I asked only for support payments "payable to the debtor for the debtor's use or that of dependents listed above." (line 10)

In lines 8d, 8e, and 8f, the form separates out lines for unemployment compensation, social security, and other government assistance (rather than lumping them together).

Form B6J Schedule J: Your Expenses

1. Dependents (lines 1 and 2)

Information about dependents moved from Schedule I, and clarifies that it includes all dependents of joint filers, including dependents who do not live with debtor or spouse. (This is discussed in the draft Note, but it is highlighted here for consideration.)

2. Others who live in household (line 3)

Includes information about others who live in the household. (This is discussed in the draft Note, but it is highlighted here for consideration.)

3. Expenses of joint debtors living separately (instructions)

The instructions tells joint debtors who live separately to file a separate Schedule J for each debtor. Under the old Schedule J, the form instructed separated joint debtors to complete "a separate schedule of expenditures labeled 'spouse.'" It was unclear whether the schedule of expenditures was a Schedule J.

4. Rental or home ownership expenses (line 4)

The revised form elicits more precise information about housing costs, and clarifies that mortgage payments include only first mortgage payments. The revised form includes separate lines for expenses for real estate taxes, insurance (including renter's insurance), home maintenance and repair, and HOA or condominium dues. (Lines 4a - 4d) The form adds separate line for additional mortgage payments such as home equity loans. (line 5)

5. Utilities (line 6)

Allows more precision regarding utilities, and includes line for telephone, cell phone, internet, satellite and cable services. (line 6c)

6. Childcare, children's education costs (line 8)

Adds a line item for childcare and children's education costs.

7. Personal care products and services (line 10)

Adds a line item for personal care products and services.

8. Installment or lease payments (line 17)

Breaks out installment or lease payments and specifically provides lines for payments on multiple vehicles and student loans. (Lines 17a - 17c)

9. Other real property expenses (line 20)

Adds line items for real property expenses that are not included in expenses for the home - mortgages on other real property, property taxes, insurance, maintenance and repair, HOA and condominium dues.

Form 22A-1 Chapter 7 Statement of Your Current Monthly Income

As observed in the draft note current form 22A is now broken into two forms. Debtors compute whether their current monthly income is above the applicable median income on form 22A-1. Only those debtors with above-median income are required to complete form 22A-2 which contains the Means Test Calculation. Most chapter 7 debtors will not need to file 22A-2 because they are below the applicable median income.

1, Kind of Debts (line 1)

The form no longer includes a separate Declaration of non-consumer debts (former line 1B). This is subsumed in the general declaration under penalty of perjury in Part 5.

2. Disabled Veteran (line 2)

The form no longer includes a separate Declaration of Disabled Veteran (former line 1A). This is subsumed in the general declaration under penalty of perjury in Part 5.

3. Reservists and National Guard Members (line 3)

The form no longer includes a separate Declaration of Reservists and National Guard Members (former line 1C). This is subsumed in the general declaration under penalty of perjury in Part 5.

4. Alimony and Maintenance Payments (line 6)

These are now a separate item. The current form includes those items in "Income from all other sources" on line 10. This also impacts line 13, "income from all other sources not listed above" in that "alimony and maintenance payments" are no longer included.

Form 22A-2 Chapter 7 Means Test Calculation

1. Number of Exemptions (line 5)

This line is new and asks the debtor to expressly state the number of people used in determining deductions from income. Previously the debtor was instructed in line 19A to use the number of exemptions on their federal tax return, plus the number of any additional dependents whom they support. Thus, the number of exemptions was subsumed in lines 19A - 20B.

2. Housing and Utilities - Insurance and operating expenses (line 8)

Previously this was called "non-mortgage expenses." (Line 20A)

3. Housing and utilities - Mortgage or rent expenses (line 20B)

On line 9B we now ask for information by creditor. Previously we asked for a total without any creditor breakdown (current line 20B).

4. Vehicle ownership or lease expense (line 13)

I'm a bit concerned about why we used different language regarding the exclusion of lease expenses for vehicle 1 (line 13b - "Do not include installment payments for leased vehicles") and vehicle 2 (line 13e - "Do not include costs for leased vehicles"). Unless there is a reason for the difference these should probably be the same.

5. Continuing charitable contributions (line 31)

We have changed the statutory reference from 26 U.S.C. § 170(c)(1)-(2) to § 548(d)(3) and (4) and have added a reference to religious as well as charitable organizations. I believe that these are changes in form rather than substance since § 548(d)(3) and (4) refer to 26 U.S.C. § 170(c) and refer to both charitable and religious organizations.

6. Priority claims (line 35)

The proposed form asks about "past due" amounts. The current form asks about amounts "for which [debtor was] liable at the time of" bankruptcy (line 44). Again, I believe that these are changes in form rather than substance.

7. Find out whether there is a presumption of abuse (line 40)

The current form (line 52, first two boxes) direct the debtor complete the verification in Part VIII. The proposed form does not expressly require the debtor to complete a verification. It simply directs debtor to Part 5 which is signed under penalty of perjury. Again, I believe that these are changes in form rather than substance.

Form 22B Chapter 11 Statement of Your Current Monthly Income

1. Instruction on Form

The current form says, "Joint debtors may complete one statement only." This is omitted from the draft form. No change in substance is intended.

2. Marital status (line 1)

The current form only has three possible categories. It directs married debtors who do not file jointly with their spouse not to complete the spouse column. (Line 1.b.) The draft form adds, "Married and your spouse is NOT filing with you: You and your spouse are: □ Living in the same household and not legally separated. Fill out both Columns A and B, lines 2-10."

However, this proposed change is mistaken; the current chapter 11 form is correct in its treatment of the income of a non-filing spouse. The income of a non-filing spouse is included in the chapter 7 and 13 forms only because of special provisions in those chapters that require it. The calculation of a debtor's income under 1325(b), made applicable to chapter 11 by 1129(a)(15), does not require the current monthly income of a non-filing spouse to be included. The new form has been changed to reflect this and is included in these materials.

3. Change Carried Over from the B22A-1. Alimony and Maintenance Payments (line 3)

These are now a separate item. The current form includes those items in "Income from all other sources" on line 9.

Form 22C-1 Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

As observed in the draft note current form 22c is now broken into two forms. Debtors compute whether their current monthly income is above the applicable median income on form 22C-1. Only those debtors with above-median income are required to complete form 22C-2 which contains the Disposable Income Calculation. Many chapter 13 debtors will not need to file 22C-2 because they are below the applicable median income.

1. Alimony and Maintenance Payments (line 3)

These are now a separate item. The current form includes those items in "Income from all other sources" on line 9.

2. Amounts regularly paid for household expenses (line 4)

We have deleted the instruction on the current form (line 7), "Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B." This could be added to the draft instructions.

3. Net business income (line 3)

We have deleted the instruction on the current form (line 3) regarding what to do if the debtor has more than one business. That instruction says, "If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero." This could be added to the draft instructions.

Form 22C-2 Calculation of Your Disposable Income

1. Number of Exemptions (line 1)

This line is new and asks the debtor to expressly state the number of people used in determining deductions from income. Previously this was subsumed in the instructions on line 24A.

2. Housing and Utilities - Insurance and operating expenses (line 4)

Previously this was called "non-mortgage expenses." (Line 25A). In addition, on line 24 we refer to certain costs that "are included in your non-mortgage housing and utilities." This is not intended to be a change in substance.

3. Housing and utilities - Mortgage or rent expenses (line 5)

On line 5b we now ask for information by creditor. Previously we asked for a total without any creditor breakdown (current line 25B). Also, we do not ask whether the mortgage payment includes taxes and insurance on line 5b or on line 29a. On the existing form we get that information on line 47 because we ask that question as to all debt payments. This is not intended to be a change in substance.

4. Vehicle ownership or lease expense (line 13)

The title is "vehicle ownership or lease expense." Line 9b says "Average monthly payment for all debts secured by [the vehicle]. Do not include costs for leased vehicles." The current form (lines 28 and 29) do not include the instruction, "Do not include costs for leased vehicles." This is not intended to be a change in substance.

5. Additional home energy costs (line 24)

See note 3 above re the terminology.

6. Education for Dependent Children Younger than 18 (line 25)

The maximum deletes the cents, the current form (line 43) does not.

7. Continuing charitable contributions (line 27)

We have changed the statutory reference from 26 U.S.C. § 170(c)(1)-(2) to § 548(d)(3)

and (4) and have added a reference to religious as well as charitable organizations. I believe that these are changes in form rather than substance since § 548(d)(3) and (4) refer to 26 U.S.C. § 170(c) and refer to both charitable and religious organizations.

8. Priority claims (line 31)

The proposed form asks about "past due" amounts. The current form asks about amounts "for which [debtor was] liable at the time of" bankruptcy (line 49). This is not intended to be a change in substance.

9. Secured debt payment deductions (line 29)

Line 29a regarding mortgages does not ask whether the payment includes taxes or insurance; the current form (line 47) does. Lines 29b and 29c ask about "[l]oans on your first two vehicles." If this is intended to include current lease payments the use of the term "loans" may be confusing. The problem exists with the current form (line 47) because it asks about "secured debts."

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TAB A8(A)

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: RULEMAKING RESPONSES TO *STERN V. MARSHALL*

DATE: MARCH 15, 2012

The Rules Committee has received a number of suggestions to amend the Bankruptcy Rules in response to *Stern v. Marshall*. 131 S. Ct. 2594 (2011). Each suggestion addresses the possibility that *Stern* has destabilized the previous meaning of core and non-core proceedings in bankruptcy. Before *Stern*, a proceeding was treated by the Bankruptcy Rules as either core or non-core and, if core, the bankruptcy judge was empowered to hear and finally determine it. After *Stern*, courts have confronted the argument that some proceedings may be deemed core—as provided by 28 U.S.C. § 157(b)—and nevertheless fall beyond a bankruptcy judge's power to enter final judgment. The mischief these suggestions seek to avoid is that a party might allege (or agree) that a proceeding is "core" as a statutory matter but later assert that the proceeding is not "core" as a constitutional matter. Each suggestion attempts to address this problem by altering portions of the Bankruptcy Rules that rely on the core/non-core distinction.

The suggestions adopt different approaches to the issue. The first suggestion (11-BK-I), from Judge Eric P. Kimball (Bankr. S.D. Fla.), would require the parties in an adversary proceeding to state whether each consents to entry of final rulings by a bankruptcy judge, without regard to whether a proceeding is alleged to be core or non-core. This suggestion essentially adheres to the current approach of the Bankruptcy Rules—that parties affirmatively consent to the exercise of final adjudicatory power by a bankruptcy judge in circumstances

where that power is otherwise limited by Article III—but seeks to remove the ambiguity *Stern* has generated about the terms "core" and "non-core." The second suggestion (11-BK-K), jointly submitted by Judges A. Benjamin Goldgar, Carol A Doyle, and Bruce W. Black (Bankr. N.D. Ill.), would instead flip the default rule and require a party to demand entry of final rulings by a district judge. Failure to make a timely demand would waive or forfeit a party's right to final judgment in an Article III forum.

In addition to these suggestions, a third suggestion (11-BK-L), submitted by Arthur J. Gonzalez (Bankr. S.D.N.Y.), informs the Advisory Committee of a *Stern*-related revision to the standing order referring cases and proceedings to the bankruptcy court that was recently adopted by the District Court for the Southern District of New York.

The Subcommittee discussed these suggestions during its December 20, 2011, and March 8, 2012, conference calls. Members of the Subcommittee were initially inclined to delay any proposed rulemaking in order to await further developments in the case law after *Stern*. After further deliberation, however, the Subcommittee concluded that certain portions of the Bankruptcy Rules have been rendered ambiguous by *Stern*, and that this ambiguity has already generated a sufficient risk of confusion to justify prompt rulemaking. The Subcommittee therefore proposes rule amendments for the Advisory Committee's consideration.

The Subcommittee endorses the approach taken by Judge Kimball's suggestion—that is, amendments targeted at the ambiguity created by the use of "core" and "non-core" in the Bankruptcy Rules. The Subcommittee favors this approach because it accomplishes the goal of clarifying the rules with the least disruption to the current system of bankruptcy adjudication. Unlike Judge Kimball's suggestion, however, the Subcommittee's proposal would not retain the terms core and non-core in the amended rules. The Subcommittee would also amend Rules 9027

and 9033 in addition to Rules 7008 and 7012 as suggested by Judge Kimball. Accordingly, the Subcommittee recommends that (i) Rules 7008, 7012, 9027, and 9033 be amended as set forth at the end of this memorandum, and (ii) the Advisory Committee take no further action on the suggestion by Judges Goldgar, Doyle, and Black.

The Suggestions

1. Judge Kimball's suggestion

Judge Kimball suggests amending Rules 7008 and 7012, which make reference to whether a proceeding is core or non-core. Rule 7008 of the Bankruptcy Rules provides that Rule 8 of the Federal Rules of Civil Procedure, which governs pleading in civil actions, applies in adversary proceedings. In addition, Rule 7008 requires a pleading to "contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge." Similarly, Rule 7012 provides that Rule 12(b)-(i) of the Civil Rules, governing pre-answer motions, applies in adversary proceedings. Rule 7012 requires any responsive pleading to contain an admission or denial of an allegation that a proceeding is core or non-core and, only if the proceeding is non-core, a statement as to whether the party does or does not consent to entry of final rulings by the bankruptcy judge. The rule also provides that final orders or judgments shall not be entered in non-core proceedings without "the express consent of the parties."

Judge Kimball's suggestion would amend these rules to require a party to state whether or not it consents to entry of final orders or judgment by the bankruptcy court, regardless of whether the proceeding is alleged to be core or non-core. His suggestion would also make clear that, if all parties do not consent to entry of final rulings, and the bankruptcy judge concludes

that it may not enter final rulings without that consent, the bankruptcy judge must submit proposed findings of fact and conclusions of law in accordance with § 157(c) and Rule 9033. If amended pursuant to Judge Kimball's suggestion, Rule 7008(a) would read as follows:

Rule 7008. General Rules of Pleading

(a) Applicability of Rule 8 F.R.Civ.P.

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or noncore and, ~~if non-core~~ without regard to whether the proceeding is alleged to be core or non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

Rule 12 would read as follows:

Rule 7012. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

* * * * *

(b) Applicability of Rule 12(b)-(i) F.R.Civ.P.

Rule 12(b)-(i) F.R.Civ.P. applies in adversary proceedings. A responsive pleading shall admit or deny an allegation that the proceeding is core or non-core. ~~If the response is that the proceeding is non-core~~ Without regard to whether the proceeding is alleged to be core or non-core, ~~it~~ the responsive pleading shall

include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings and in other proceedings where the bankruptcy court has determined that the bankruptcy court may not enter final orders or judgments absent consent of the parties, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties. In non-core proceedings and in proceedings where the bankruptcy court has determined that the bankruptcy court may not enter final orders or judgments absent consent of the parties, and in which not all necessary parties have consented, the bankruptcy court shall submit proposed findings of fact and conclusions of law to the district court consistent with 28 U.S.C. § 157(c) and Rule 9033.

As Judge Kimball explains in commentary accompanying his suggestion, these changes are meant to clarify three issues after *Stern*. First, his suggested amendments would capture proceedings defined as "core" in 28 U.S.C. § 157(b) but that lie beyond the power of a bankruptcy judge to enter final orders and judgments after *Stern*. Parties would be required to state whether or not they consent to entry of final rulings by a bankruptcy judge in those proceedings. Second, Judge Kimball intends these changes to apply to the treatment of personal injury or wrongful death tort claims under 28 U.S.C. § 157(b)(5). Although § 157(b)(5) states that those claims "shall be tried" in the district court, the Supreme Court concluded that a party may consent (by waiver or forfeiture) to their resolution by a bankruptcy judge. *See Stern*, 131 S. Ct. at 2606-07 (2011) ("[W]e agree with Vickie that § 157(b)(5) is not jurisdictional, and that Pierce consented to the Bankruptcy Court's resolution of his defamation claim."). His proposed revisions are intended to be broad enough to address consent to final rulings by bankruptcy

courts on personal injury or wrongful death tort claims. Third, the suggested changes would explicitly provide for the filing of proposed findings of fact and conclusions of law in any proceeding in which the bankruptcy judge is not empowered to enter final orders or judgment, regardless of the proceeding's denomination as core or non-core. Currently, Rule 9033(a) provides that bankruptcy courts shall file proposed findings of fact and conclusions of law in "*non-core proceedings* heard pursuant to 28 U.S.C. § 157(c)(1)" (emphasis added). The rule does not explicitly contemplate the filing of proposed findings of fact and conclusions of law in matters defined as core that cannot, consistent with *Stern*, be subject to the entry of final rulings by the bankruptcy court. Judge Kimball's suggested amendment to Rule 7012(b) would explicitly require a bankruptcy judge to treat any proceeding in which the judge may not enter final rulings as a proceeding under § 157(c)(1) and Rule 9033.

2. The Goldgar, Doyle, and Black Suggestion

Like Judge Kimball, Judges Goldgar, Doyle, and Black seek to address potential ambiguities in the treatment of core and non-core proceedings after *Stern*. They seek to do so, however, by creating a "negative notice" form of consent to full adjudication in bankruptcy court. Under their suggestion, parties would need to demand judgment by the district court in any proceeding in which the bankruptcy judge is not empowered, absent consent, to enter final rulings. In addition to amending Rules 7008 and 9033, this suggestion would extensively revise Rule 9027 to require a demand for final judgment in the district court at the time a proceeding is removed under 28 U.S.C. § 1452 on the basis of bankruptcy jurisdiction.

This suggestion would reduce the scope of Rule 7008 and add a new Rule 7008.1. In Rule 7008, it would delete the required allegations regarding core and non-core jurisdiction in a pleading. Rule 7008(a) would thus read:

Rule 7008. General Rules of Pleading

(a) Applicability of Rule 8 F.R.Civ.P.

Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. ~~In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or noncore and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.~~

The treatment of adjudication by a bankruptcy court or district court would be addressed instead in new Rule 7008.1:

Rule 7008.1 Right to Judgment by the District Court

(a) Right Preserved.

In any adversary proceeding filed in the bankruptcy court, the right to judgment by the district court established by Article III of the Constitution is preserved to the parties.

(b) Demand.

To demand judgment by the District Court on any claim in an adversary proceeding—

(1) a plaintiff, or a defendant filing a counterclaim, must state the demand in the allegation of jurisdiction required by Rule 7008 in the initial pleading asserting the claim; and

(2) any answering party must state the demand in the initial answer to the pleading asserting the claim.

Any pleading that includes a demand for judgment by the district court must note the demand in the caption.

(c) Waiver; withdrawal.

A party waives judgment by the district court unless a demand is made as specified in paragraph (b). A demand by a plaintiff or defendant filing a counterclaim may be withdrawn only if the other parties consent.

(d) Objection to a demand.

Any party may, by motion, object to a demand for judgment by the district court on any claim on the ground

(1) that the claim is not one as to which there is a right to judgment by the district court under Article III of the Constitution, or

(2) that the election was not made as specified in paragraph (b).

The bankruptcy court may also raise an objection independently. The bankruptcy court may determine, after notice and hearing, that the demand is not effective.

Rule 9027(a) and (e) would be amended to read:

Rule 9027. Removal

(a) Notice of removal

(1) Where filed; form and content

A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove~~, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings~~.

* * * * *

(4) To demand judgment by the district court on any claim sought to be removed, the notice must state the demand in the text and in the heading. The party filing the notice waives judgment by the district court unless the demand is made. The party filing the notice may withdraw a demand only with the consent of all other parties to the removed claim or cause of action.

* * * * *

(e) Procedure after removal

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge may issue all necessary orders and process to bring before it all proper parties whether

served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) ~~Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.~~ To demand judgment by the district court on any claim or cause of action sought to be removed, any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, must file a demand for such judgment. The demand must be signed pursuant to Rule 9011 and must be filed not later than 14 days after the filing of the

notice of removal. Any party who files a demand pursuant to this paragraph must mail a copy to every other party to the removed claim or cause of action. A party waives judgment by the district court unless such a demand is made.

(4) Objection to a demand.

Any party to the removed claim or cause of action may, by motion, object to a demand for judgment by the district court on any claim on the ground that the claim is not one as to which there is a right to judgment by the district court under Article III of the Constitution, or that the demand was not made as this rule requires. The bankruptcy court may also raise an objection independently. The bankruptcy court may determine, after notice and hearing, that the demand is not effective.

Finally, the suggestion would amend the first sentence of Rule 9033(a) to delete the word "non-core" and change the word "shall" to "must." As revised, the rule would read:

Rule 9033. Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings

(a) Service.

In ~~non-core~~ proceedings heard pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy judge ~~shall~~ must file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

3. The Southern District of New York's Amended Standing Order of Reference

Judge Gonzalez's suggestion alerts the Advisory Committee to the Southern District of New York's amended Standing Order of Reference. When Article III bars entry of a final order or judgment by a bankruptcy judge, the amended order provides explicitly that (i) the bankruptcy judge shall submit proposed findings of fact and conclusions of law, and (ii) the district court may treat any order of a bankruptcy judge as proposed findings of fact and conclusions of law if the district court determines that the bankruptcy judge could not have entered a final order in keeping with Article III.[1] The amended standing order is intended to address proceedings deemed core as a statutory matter that cannot be treated as core as a constitutional matter under *Stern*. Although Judge Gonzalez recognizes that proceedings of this kind might simply be considered non-core and treated accordingly, he explains that the amended order is meant to "close the gap" if a court were to find that there is no authority for a bankruptcy judge to issue proposed findings of fact and conclusions of law in *Stern*-barred proceedings. The amended standing order was adopted by the district court on January 31. The District of Delaware adopted an identically worded amended standing order on February 29.

[1] The full standing order reads:

> Pursuant to 28 U.S.C. Section 157(a) any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 are referred to the bankruptcy judges for this district.
>
> If a bankruptcy judge or district judge determines that entry of a final order or judgment by a bankruptcy judge would not be consistent with Article III of the United States Constitution in a particular proceeding referred under this order and determined to be a core matter, the bankruptcy judge shall, unless otherwise ordered by the district court, hear the proceeding and submit proposed findings of fact and conclusions of law to the district court. The district court may treat any order of the bankruptcy court as proposed findings of fact and conclusions of law in the event the district court concludes that the bankruptcy judge could not have entered a final order or judgment consistent with Article III of the United States Constitution.

Discussion

These suggestions presented two basic questions for the Subcommittee. The first was whether any changes to the Bankruptcy Rules in response to *Stern* should be made at this time. The second was whether, if responsive rulemaking is now appropriate, it should take the form of the more limited approach offered by Judge Kimball or the more comprehensive approach suggested by Judges Goldgar, Doyle, and Black.

1. Is There a Need for Responsive Rulemaking Now?

a. Reasons to Delay Rulemaking

The Bankruptcy Rules and the Judicial Code contemplate a binary division between core and non-core proceedings—core proceedings may be fully adjudicated by a bankruptcy judge, while non-core proceedings may not be fully adjudicated without the consent of the parties.[2] But *Stern* could be read as creating a third category of proceeding—core as a statutory matter but beyond the power of a bankruptcy judge to adjudicate fully as a constitutional matter. Amending the Bankruptcy Rules in response to *Stern* could be justified based on that reading of the case.

Nevertheless, most courts have applied *Stern* cautiously to avoid conflicting interpretations of the meaning of core proceedings. For example, some litigants have made the argument that if a proceeding is considered core under § 157(b) but is beyond the power of a bankruptcy judge to enter final rulings under *Stern*, then the bankruptcy judge is also not

[2] *See, e.g.*, Fed. R. Bankr. P. 7008 advisory committee's note:

> Proceedings before a bankruptcy judge are either core or non-core. 28 U.S.C. § 157. A bankruptcy judge may enter a final order or judgment in a core proceeding. In a non-core proceeding, absent consent of the parties, the bankruptcy judge may not enter a final order or judgment but may only submit proposed findings of fact and conclusions of law to the district judge who will enter the final order or judgment. 28 U.S.C. § 157(c)(1).

empowered to file proposed findings of fact and conclusions of law. Section 157(c) and the Bankruptcy Rules, the argument goes, contemplate the filing of proposed findings of fact and conclusions of law only when a proceeding is non-core. At the time of the Subcommittee's initial discussion of these suggestions, only one court had found that contention persuasive. *See In re Blixseth*, 2011 WL 3274042, at *10-12 (Bankr. D. Mont. Aug. 1, 2011). Every other court had rejected it. *See, e.g., In re El-Atari*, 2011 WL 5828013, at *4-5 (E.D. Va. Nov. 18, 2011); *In re Mortgage Store, Inc.*, 2011 WL 5056990, at *5-6 (D. Hawaii Oct. 5, 2011); *In re Canopy Fin., Inc.*, 2011 WL 3911082, at *4-5 (N.D. Ill. Sept. 1, 2011). With the exception of *Blixseth*, the bankruptcy and district courts appeared content to treat a proceeding that cannot be fully adjudicated by a bankruptcy judge without consent as "non-core" regardless of its denomination in the Judicial Code. That is in keeping with how the Supreme Court described its approach in *Stern*—"the removal of counterclaims such as [the estate's] from core bankruptcy jurisdiction" and not the creation of a third category of proceedings.[3] 131 S. Ct. at 2620.

b. Reasons for Prompt Rulemaking

The Seventh Circuit's decision in *In re Ortiz*, 665 F.3d 906 (7th Cir. 2011), however, indicated to the Subcommittee that there was sufficient cause for concern to justify a rulemaking response. In *Ortiz*, two groups of debtors launched class action adversary complaints against a

[3] The Supreme Court's judgment in *Stern* itself would make little sense if a bankruptcy judge lacked the power to file proposed findings of fact and conclusions of law when a proceeding described as "core" in § 157(b) could not be fully adjudicated by the bankruptcy judge in keeping with Article III. The bankruptcy judge in *Stern* believed the estate's counterclaim was a core proceeding and entered an order purporting to be a final judgment; the district court disagreed and treated the ruling as proposed findings of fact and conclusions of law. The Supreme Court did not suggest that the district court's treatment was improper.

health care provider, Aurora.[4] Aurora had filed proofs of claim in thousands of bankruptcy cases in Wisconsin, and the debtors alleged that the proofs of claim improperly disclosed confidential medical information in violation of Wisconsin law. The bankruptcy court concluded that the class actions were core proceedings and, on the merits, entered summary judgment in favor of the defendant. When the debtors appealed, all parties joined in a motion to certify direct appeals to the Seventh Circuit. *Stern* was decided after the court of appeals took the direct appeals, which prompted the court to order supplemental briefing on *Stern*'s impact on appellate jurisdiction in the cases. Although the Seventh Circuit agreed that the debtors' claims were core proceedings under 28 U.S.C. § 157(b)(2)(C), the court ultimately read *Stern* to bar the bankruptcy court from entering final judgments on the debtors' state law claims. Without a final judgment below, the court dismissed the direct appeals for want of appellate jurisdiction.

The decision in *Ortiz* warrants attention, not so much for its square holding but for some of the language in the opinion. Particularly noteworthy is its discussion of the question whether the bankruptcy judge's decision could be considered an interlocutory order from which a discretionary direct appeal could be permitted under 28 U.S.C. § 158(a)(3) and (d).[5] The court observed:

> For the bankruptcy judge's orders to function as proposed findings of fact or conclusions of law under 28 U.S.C. § 157(c)(1), we would have to hold that the debtors' complaints were "not a core proceeding" but are "otherwise related to a

[4] One class action was filed originally in bankruptcy court, but the other was filed in state court and removed to bankruptcy court by Aurora.

[5] Section 158(d)(2)(A) permits a court of appeals to exercise jurisdiction over appeals described in the first sentence of § 158(a). Section 158(a)'s first sentence, in turn, includes appeals from "final judgments, orders, and decrees" of bankruptcy courts and "with leave of the court, from other interlocutory orders and decrees; and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title."

> case under title 11." *Id.* As we just concluded, the debtors' claims qualify as core proceedings and therefore do not fit under § 157(c)(1).

This language could be read to find that there is a no-man's land in the adjudication of *Stern*-barred claims. In other words, a bankruptcy court's decision in a proceeding deemed core as a statutory matter could not be treated as a final judgment if doing so would violate Article III under *Stern*, but it also could not be treated as proposed findings of fact and conclusions of law, because § 157(c)(1) speaks of the submission of proposed findings of fact and conclusions of law in "a proceeding that is not a core proceeding."

It is not at all clear that this was the court of appeals's intended meaning. First, the opinion goes on to state that "[t]he direct appeal provision in 28 U.S.C. § 158(d)(2)(A) also does not authorize us to review on direct appeal a bankruptcy judge's proposed findings of fact and conclusions of law." If so, then it was irrelevant whether or not the bankruptcy judge's decision could be treated as proposed findings of fact and conclusions of law. A direct appeal could not be permitted either way, and the court's discussion of § 157(c)(1) was arguably dicta. Second, the odd posture of the case—a direct appeal from a bankruptcy judge's decision, with debtors opposing the bankruptcy judge's exercise of power and the defendant creditor supporting it—should give pause before overreading *Ortiz*. Third, since *Ortiz*, the decision already has been cited in six opinions available on Westlaw, but none of those decisions reads the case as prohibiting a bankruptcy judge from entering proposed findings of fact and conclusions of law in *Stern*-barred proceedings. Indeed, the District Court for the District of Montana cites *Ortiz* approvingly while explicitly rejecting the reasoning of the only bankruptcy court decision to take that view of § 157(c)(1). *See Blixseth v. Brown*, 2012 WL 691598 at *7-8 (D. Mont., March 5, 2012) (finding that "*Stern* does not bar the Bankruptcy Court from issuing proposed findings of fact and conclusions of law" and disapproving of *In re Blixseth*, 2011 WL 3274042 (Bankr. D.

Mont. Aug. 1, 2011)). In doing so, the Montana district court did not suggest that the Seventh Circuit's decision had supported the bankruptcy court's reasoning.

c. Other Considerations

The Subcommittee weighed two other considerations in deciding whether rulemaking was necessary. The first was Judge Gonzalez's suggestion. On the one hand, if every district adopted a similar standing order, perhaps no rulemaking response by the Advisory Committee would be necessary. That two influential districts have approved a *Stern*-related amendment to their standing order of reference could encourage other districts to do so. The standing order would serve to answer the ambiguity in the treatment of core and non-core proceedings after *Stern*. On the other hand, the felt necessity to amend standing orders of reference strongly suggests that there is sufficient concern about a possible gap in the treatment of core and non-core proceedings to warrant responsive rulemaking. Rather than await piecemeal attempts to fill that gap in each judicial district, a more uniform response would be preferable.

Second, the ambiguity in the terms core and non-core places pressure on the treatment of consent in bankruptcy litigation. If a litigant agrees that a proceeding is core and later asserts that the allegation related to the statutory definition of the term and not its constitutional significance, a court is then presented with the question whether the litigant consented to final adjudication. After *Stern*, some courts have accepted objections to final adjudication by a bankruptcy judge that would otherwise appear to be untimely. *See In re Development Specialists, Inc.*, 2011 WL 5244463, at *11-13 (S.D.N.Y. Nov. 2, 2011) (finding no consent even though the objecting parties had previously admitted the bankruptcy court's jurisdiction and had requested that the bankruptcy court enter judgment in their favor). Other courts have been much less receptive to untimely objections to a bankruptcy judge's authority to enter final rulings. *See,*

e.g., *Mercury Companies, Inc. v. FNF Sec. Acquisition, Inc.*, 2011 WL 5127613 (D. Colo. Oct. 31, 2011) (rejecting defendants' objection to the authority of the bankruptcy court to enter final rulings in a fraudulent conveyance action when the defendants had litigated, without objection, before the bankruptcy judge for nineteen months). The Subcommittee believes that removing ambiguity from the rules with respect to the treatment of core and non-core proceedings would also serve to clarify the issue of consent.

2. What Is the Appropriate Form of Rulemaking?

Moving to the question of the appropriate form of rulemaking, the Subcommittee preferred the more limited approach of Judge Kimball's suggestion. That approach has the virtue of creating the least disturbance in the current Bankruptcy Rules. The Subcommittee also believed, however, that it would make sense to include all the rules touching on the bankruptcy court's authority to enter final adjudications—Rules 7008, 7012, 9027, and 9033. The Subcommittee considered as an alternative a strictly minimalist approach that would make no amendment other than to Rule 9033, which treats proposed findings of fact and conclusions of law. That rule could be amended to state that any proceeding in which the bankruptcy judge does not have constitutional authority to enter final rulings is treated as a non-core proceeding. The Subcommittee concluded that it would be better to amend the rules wherever the terms core and non-core are used, because those terms are likely to generate confusion even if Rule 9033 is clarified.

The Subcommittee found value in the more comprehensive approach offered in the joint suggestion of Judges Goldgar, Doyle, and Black. It would likely decrease the risk of disputes over party consent by requiring a demand for final adjudication in the district court. A party

failing to make such a demand would be found to consent, by waiver or forfeiture, to final adjudication in the bankruptcy court. This "negative notice" form of consent would reduce gamesmanship by parties seeking to challenge the authority of a bankruptcy judge as a late-inning litigation tactic. The *Development Specialists* case is a cautionary example of this potential under the current rules. The objecting litigants had agreed that the bankruptcy court had "jurisdiction" and later sought entry of judgment by the bankruptcy court in their favor. The district court nevertheless found that their statements did not amount to clear, affirmative consent to final adjudication in the bankruptcy court. 2011 WL 5244463, at *11-13.

On the other hand, moving towards a negative notice form of consent to final adjudication in the bankruptcy court would be a significant departure from the consent provisions currently in the rules. The Advisory Committee designed the consent structure of the rules to require affirmative consent. *See* Rule 7008 advisory committee's note ("Failure to include the statement of consent does not constitute consent. Only express consent in the pleadings or otherwise is effective to authorize entry of a final order or judgment by the bankruptcy judge in a non-core proceeding."). Arguably, affirmative consent better protects the rights of litigants, recognized in *Stern*, to have their disputes finally adjudicated in an Article III forum.

Finally, the Subcommittee took into consideration the Fifth Circuit's recent decision in an important post-*Stern* appeal that was pending at the time of the Advisory Committee's fall meeting. In August, the court of appeals ordered supplemental briefing on the question whether Article III is violated when a magistrate judge enters final judgment on a state law claim. *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.* --- F.3d ---, 2012 WL 688520 at *1 (5th Cir., March 05, 2012). Although not a bankruptcy case, *Technical Automation Services Corp.* is

significant, because the parties had consented to final adjudication by the magistrate. A decision by the Fifth Circuit to the effect that *Stern* makes consent irrelevant when determining a non-Article III judge's power would have had an impact in bankruptcy as well.

In its decision, the Fifth Circuit instead reaffirmed the ability of parties to consent to final adjudication by a non-Article III judge. The court's reasoning rests on prior circuit precedent upholding the constitutionality of the Federal Magistrate's Act, which permits a magistrate to enter final judgments in civil cases with the parties' consent. Because *Stern* did not "unequivocally" overturn that prior precedent, the court of appeals adhered to its pre-*Stern* view of the role of consent. *Tech. Automation Servs. Corp*., 2012 WL 688520 at *5. The court did not engage, however, in a detailed first-principles discussion of the place of consent in non-Article III adjudication. Nor did the court indicate how it would resolve the consent issue in a case involving a bankruptcy judge. Rather, the court took note of *Stern*'s description of its holding as narrow, and declined to extend that holding to the case. Nevertheless, the Fifth Circuit's opinion offers a rebuttal to those who believe that *Stern* undermined the place of litigant consent in bankruptcy adjudication.

3. The Subcommittee's Preferred Form of Rulemaking

In light of these developments, the Subcommittee operated on the following principles. First, the consent of litigants remains a valid basis for a bankruptcy judge to hear and finally determine a proceeding that would otherwise lie beyond the judge's adjudicatory power in light of Article III. Second, there is sufficient concern about the treatment of those proceedings deemed core as a statutory matter, but over which bankruptcy judges cannot exercise final adjudicatory power after *Stern*, that some form of clarifying rulemaking is appropriate. Third,

amendments to the Bankruptcy Rules that could achieve the desired clarity with the least disruption should be favored.

The Subcommittee would excise the terms core and non-core from the amended rules. Instead, the amended rules should simply require a statement as to whether a litigant does or does not consent to entry of final orders or judgments by the bankruptcy judge. If all litigants do not consent, the bankruptcy court would be required to decide whether it may nevertheless finally adjudicate the proceeding. The amended rules would also clarify that a bankruptcy court may issue proposed findings of fact and conclusions of law in any proceeding in which the bankruptcy court has determined that it may not enter final orders or judgments without consent of the parties, and all necessary parties have not consented.

RULE 7008. GENERAL RULES OF PLEADING

(a) APPLICABILITY OF RULE 8 F.R. CIV. P.

Rule 8 F.R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement ~~that the proceeding is core or noncore and, if non-core~~ that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

COMMITTEE NOTE

Subdivision (a) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. The amended rule therefore calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. Rule 7012(b) has been amended to require a similar statement in a responsive pleading.

RULE 7012. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON THE PLEADINGS

* * * * *

(b) APPLICABILITY OF RULE 12(B)-(I) F.R.CIV.P.

Rule 12(b)-(i) F.R. Civ. P. applies in adversary proceedings. A responsive pleading ~~shall admit or deny an allegation that the proceeding is core or non-core. If the response is that the proceeding is non-core it~~ shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. In ~~non-core~~ proceedings in which the bankruptcy court has determined that it may not enter final orders or judgments without the consent of all the parties, the bankruptcy court shall issue proposed findings of fact and conclusions of law pursuant to Rule 9033~~, final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties~~.

COMMITTEE NOTE

Subdivision (b) is amended to remove the requirement that the pleader state whether the proceeding is core or non-core and to require in all proceedings that the pleader state whether the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. The amended rule therefore calls for the pleader to make a statement regarding consent, whether or not a proceeding is termed non-core. This amendment complements the requirements of amended Rule 7008(a). If the bankruptcy court determines that it may not enter final orders or judgment without the parties' consent, and all parties have not consented, then Rule 9033 applies. Under those circumstances, the bankruptcy court must issue proposed findings of fact and conclusions of law.

RULE 9027. REMOVAL

(a) NOTICE OF REMOVAL

(1) *Where filed; form and content*

A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action ~~the proceeding is core or non-core and, if non-core~~, ~~that~~ the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

* * * * *

(e) PROCEDURE AFTER REMOVAL

* * * * *

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement ~~admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state~~ that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 14 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

COMMITTEE NOTE

Subdivisions (a)(1) and (e)(3) are amended to delete the requirement for a statement that the proceeding is core or non-core and to require in all removed actions a statement that the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. The amended rule therefore calls for a statement regarding consent at the time of removal, whether or not a proceeding is termed non-core.

The party filing the notice of removal must include a statement regarding consent in the notice, and the other parties who have filed pleadings must respond in a separate statement filed within 14 days after removal. If a party to the removed claim or cause of action has not filed a pleading prior to removal, however, there is no need to file a separate statement under subdivision (e)(3), because a statement regarding consent must be included in a responsive pleading filed pursuant to Rule 7012(b).

RULE 9033. REVIEW OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ~~IN NON-CORE PROCEEDINGS~~

(a) SERVICE.

~~In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1)~~In a proceeding in which the bankruptcy court has determined that it may not enter final orders or judgments without consent of the parties, and all necessary parties have not consented, the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a bankruptcy judge must issue proposed findings of fact and conclusions of law whenever the bankruptcy judge may not enter final orders or judgment without the consent of the parties, and the parties have not consented. To avoid ambiguity, the amendment removes the former language limiting this provision to non-core proceedings. Some proceedings may satisfy the statutory definition of core proceedings, 28 U.S.C. § 157(b)(2), but remain beyond the constitutional power of a bankruptcy judge to adjudicate finally without the consent of the litigants. A bankruptcy judge must issue proposed findings of fact and conclusions of law in those proceedings.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: PART VIII RULES—PROPOSED RULES 8001 and 8010; 8013-8027; and 8007

DATE: MARCH 23, 2012

At the fall 2011 meeting, the Advisory Committee tentatively approved for publication the first half of the proposed Part VIII revised rules with two exceptions. The Subcommittee was asked to give further thought to Rules 8001 and 8010 and to report back on proposed changes at the spring 2012 meeting. The Committee asked the Subcommittee to revise the definition of "transmit" in Rule 8001 to incorporate an exception to the presumption of electronic transmission for pro se individuals. With respect to Rule 8010, the Committee requested the Subcommittee to resolve issues about the procedure for preparing and filing a transcript when a court records testimony electronically without a court reporter present.

Thereafter, a draft of Rules 8001-8012 was presented to the Standing Committee at its January 2012 meeting for preliminary review. Members of the Standing Committee discussed Rule 8001 in particular and provided some helpful feedback that the Subcommittee took into account in revising the draft of that rule. Questions were raised at the Standing Committee meeting about the use of the term "transmit," as defined in Rule 8001. Some Standing Committee members suggested that, given the importance of the emphasis on electronic transmission of documents, the presumption favoring electronic transmission should be set out in a separate provision rather than included in a definition. Whether "transmit" is the correct verb to use throughout the Part VIII rules was also debated. Additionally, some Standing Committee

members expressed concern that using "appellate court" to refer to district courts and BAPs, but not to courts of appeal, was confusing. They suggested that many users of the Part VIII rules will not consult Rule 8001 and will assume that common terms have their ordinary meaning.

Members of the Standing Committee noted that the choice of the terminology to use in reference to the sending of documents, whether electronically or in paper form, is an issue that is of relevance to all of the rules committees. In order to determine whether consistent terminology might be adopted for all the sets of rules, Judge Kravitz created an ad hoc subcommittee, to be chaired by Standing Committee member Judge Neil Gorsuch, that will include representatives from all of the rules committees. (Judge Wedoff asked Mr. Waldron to serve as this Committee's representative.) Although the subcommittee has not yet met, Andrea Kuperman and Professor Cathie Struve have compiled information on all of the terms used in the rules for the sending of documents. Suffice it to say, the list is long, and the task of arriving at uniform terminology will be challenging.

During conference calls on January 11 and February 8, 2012, the Subcommittee considered revisions to the drafts of Rules 8001 and 8010 and drafts of the second half of the Part VIII rules (Rules 8013-8027). After its careful review and revision of the drafts, **the Subcommittee voted to recommend that the Advisory Committee ask the Standing Committee to publish for comment this August the revised Part VIII rules as set forth in Appendix B to the agenda materials.** This publication schedule would mean that the new Part VIII rules would have a presumptive effective date of December 1, 2014.

This memorandum discusses the changes that the Subcommittee made to the drafts of Rules 8001 and 8010 after the fall meeting. It also highlights for each rule in the second half of the Part VIII draft significant differences from the existing Part VIII rules or from the Federal

Rules of Appellate Procedure ("FRAP"), as well as any issues that the Subcommittee thought should be called to the Committee's attention. Finally, the memorandum notes a needed correction to Rule 8007 that has been called to the reporter's attention.

Discussion of the Proposed Rules

1. *Changes to the drafts of Rules 8001 and 8010.*

Rule 8001. Scope of the Part VIII Rules; Definition of "BAP"; Method of Transmission. In response to comments at the Standing Committee meeting, the Subcommittee revised this rule to eliminate the definitions of "appellate court" and "transmit." Prior drafts of Part VIII used the term "appellate court" to mean only a district court or BAP. The proposed rules now refer to all courts by name: bankruptcy court, district court, BAP, and court of appeals. Because the term "appellate court" is no longer used, its definition in Rule 8001 was removed. Due to the repeated references to "district court or BAP," the acronym for bankruptcy appellate panel was retained, and its definition remains in this rule.

The Subcommittee changed what had been a definition of "transmit" in this rule to a provision that directly addresses the method of transmission of documents. This change responds to the concern about burying in a definition the presumption favoring filing, serving, and sending documents by electronic means. The title of this rule has also been revised to highlight the fact that it addresses the method of transmission. The presumption in favor of electronic transmission now includes an exception for pro se individuals.

The Subcommittee has retained the use of "transmit" or "transmission" throughout the proposed rules. As discussed above, the ad hoc subcommittee of the Standing Committee may eventually recommend another term or terms for use in all the sets of rules. Until that time, however, the Subcommittee favors the use of "transmit" rather than "send, "file," or another verb

because "transmit" may be applied to the several different contexts in which the Part VIII rules address the conveyance of documents and it seems more compatible than other terms with the use of electronic technology.

Rule 8010. Completion and Transmission of the Record. The Subcommittee made several changes to the draft of this rule after consulting with clerks of bankruptcy courts, the clerk of a BAP, and representatives of the Administrative Office of the U.S. Courts. They advised the Subcommittee that court reporters should be required to file documents only in a bankruptcy court and that all duties associated with preparing and filing transcripts should be carried out by reporters and transcription services, not the clerk's office.

The proposed rule now clarifies that in courts that record proceedings without a reporter present in the courtroom, the term "reporter" includes the person or service designated by the court to transcribe the recording. Unlike FRAP 11, proposed Rule 8010 does not require the reporter to file anything in an appellate court. And in a change from current bankruptcy practice, the clerk of the appellate court will no longer docket the appeal when the complete record is received. Docketing will occur upon transmission of the notice of appeal (proposed Rules 8003(d) and 8004(c)). The appellate court clerk will still provide notice to the parties of the date on which the transmission of the record was received, because under proposed Rule 8018(a) that date generally commences the briefing schedule.

2. *Highlights of proposed Rules 8013-8027.*

Rule 8013. Motions; Intervention.

- In a change from current bankruptcy practice, the proposed rule does not permit briefs to be filed in support of or in response to motions. Instead, like the practice under FRAP 27, legal arguments must be included in the motion or response.

- Proposed Rule 8013(g) permits motions for intervention in a bankruptcy appeal in a district court or BAP. The current Part VIII rules do not address intervention, and the appellate rules provide for intervention only with respect to the review of agency decisions. Someone seeking to intervene in a bankruptcy appeal must explain whether intervention was sought in the bankruptcy court and why intervention is being sought at the appellate stage.

Rule 8014. Briefs.

- The draft of subdivision (a)(6) regarding the statement of the case adopts the language of the proposed amendment of FRAP 28 that was published for comment in August 2011. In order to keep the two sets of rules parallel, the Committee will want to monitor subsequent action on the FRAP amendment to ensure that the wording of proposed Rule 8014(a)(6) remains consistent with FRAP 28(a)(6).
- In a change from existing bankruptcy practice, proposed Rule 8014(a)(7) would require appellants' and appellees' briefs to contain a summary of the argument. This requirement is consistent with FRAP 28(a)(8).
- The proposed rule departs from the requirements of FRAP 28 by not including provisions regarding references to parties and references to the record. The Subcommittee concluded that this level of detail in the bankruptcy appellate rules is unnecessary.
- Subdivision (f) adopts the provision of FRAP 28(j) regarding the submission of supplemental authorities. Unlike the FRAP provision, the proposed rule imposes a definite time limit (seven days) for any response, unless the court orders otherwise.

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

- The proposed rule is modeled on FRAP 32. The title was changed to call attention to the fact that this rule governs the length of briefs.
- Unlike FRAP 32(a)(2), subdivision (a)(2) of the proposed rule does not prescribe colors for brief covers.
- Subdivision (a)(7) decreases the length of principal and reply briefs currently permitted by Rule 8010. This change imposes the same page limit on briefs filed in a district court or BAP as applies to briefs filed in a court of appeals.
- Subdivision (a)(7)(C)(ii) refers to an Official Form for the certificate of compliance with the type-volume limitation. The Committee will need to propose a form, similar to Official Appellate Form 6, for publication in 2013 so that it can take effect at the same time as the new Part VIII rules.

Rule 8016. Cross-Appeals.

- This provision is new to Part VIII. It is modeled on FRAP 28.1

Rule 8017. Brief of an Amicus Curiae.

- The current Part VIII rules do not provide for amicus briefs. The proposed rule is modeled on FRAP 29.
- Unlike FRAP 29(a), subdivision (a) of this rule permits the court to request amicus participation.

Rule 8018. Serving and Filing Briefs; Appendices.

- The proposed rule continues the existing bankruptcy practice of allowing the appellee to file its own appendix. It differs in that respect from FRAP 30, which requires the filing of a single appendix by all parties.

- The time periods for the appellant and appellee to file their initial briefs are lengthened from the existing time limits (changed from 14 to 30 days). For the appellant the period will still be shorter than the 40-day period prescribed by FRAP 31.

Rule 8019. Oral Argument.

- Subdivision (a) alters existing Rule 8012 by (1) authorizing the court to require the parties to submit a statement about the need for oral argument and (2) permitting statements to explain why oral argument is not needed (not just why it should be allowed). The proposed rule tracks FRAP 34(a)(1).
- Subdivision (f) differs from FRAP 34(e) by giving the court discretion whether to hear the appellant's argument, or postpone argument, if the appellee fails to appear for oral argument.

[Rule 8020. Weight Accorded Bankruptcy Judge's Findings of Fact and Conclusion of Law.]

- Earlier drafts contained a proposed Rule 8020 that would have carried forward the provisions of current Rule 8013. The Subcommittee proposes the deletion of that rule.
- The Subcommittee had previously determined that there is no need to instruct district courts and BAPs on the actions they may take (affirm, modify, reverse, or remand with instructions) in ruling on bankruptcy appeals.
- The Subcommittee now suggests that the remainder of the rule—prescribing the weight to be accorded the bankruptcy court's findings of fact—be deleted. It duplicates Rule 7052, which applies in adversary proceedings and is made applicable to contested matters by Rule 9014. The appellate rules do not contain a similar rule.

- The decision not to include in revised Part VIII a rule similar to existing Rule 8013 is not intended to change existing law. It merely reflects a determination that the rule is unnecessary.
- Deletion of the earlier drafts' Rule 8020 necessitates the renumbering of the remaining proposed Part VIII rules.

Rule 8020. Frivolous Appeals and Other Misconduct.

- Subdivision (a) of the proposed rule is derived from existing Rule 8020, which in turn is modeled on FRAP 38. Note: the Committee Note should probably be revised to refer to Rule 8020, as well as FRAP 38 and 46(c).
- Subdivision (b) is derived from FRAP 46(c). It expands the FRAP provision to apply to misconduct by parties as well as by attorneys.

Rule 8021. Costs.

- FRAP 39 requires both the court of appeals and the district court to be involved in the taxing of costs. The court of appeals fixes maximum rates for producing copies of documents, and the clerk of the court of appeals prepares and certifies an itemized statement of costs for insertion in the mandate. Additional costs on appeal are taxable in the district court. The proposed rule, by contrast, is intended to continue the practice under current Rule 8014 of giving the bankruptcy clerk the responsibility for taxing the costs of appeal.
- Mr. Waldron reviewed the proposed rule and sought input from the clerk of the Ninth Circuit BAP. They agreed that the proposed rule is consistent with existing practice, which seems to work well.

- Subdivision (b) adds a provision regarding the taxing of costs against the United States. This provision, which is not included in current Rule 8014, is derived from FRAP 39(b).
- There may be an ambiguity in proposed subdivision (d) that should be corrected. It now states, "Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time." While the context probably indicates that the reference is to the bankruptcy court, it may be better to say so expressly since that is the general practice in these proposed rules.

Rule 8022. Motion for Rehearing.

- Subdivision (a)(1) retains the requirement of current Rule 8015 that in all cases parties must file a motion for rehearing within 14 days after the judgment is entered. It thus deviates from FRAP 40(a)(1), which allows 45 days for filing the motion in a civil case if the United States is a party.
- The provision in existing Rule 8015 that specifies when the time for appeal to the court of appeals begins to run is not retained because the matter is addressed by FRAP 6(b)(2).

Rule 8023. Voluntary Dismissal.

- The provision of current Rule 8001(c)(1) for dismissal by the bankruptcy court prior to the docketing of the appeal has been omitted. Under the proposed rules, appeals are docketed shortly after the notice of appeal is filed—a period likely to be especially short if the notice of appeal is transmitted electronically. The Subcommittee therefore thought it unlikely that a voluntary dismissal of the appeal would be sought after the appellant filed the notice of appeal but before the appeal had been docketed. It should be noted, however, that FRAP 42 has a provision for dismissal by the district court prior to

docketing, even though docketing under FRAP 12 also occurs upon receipt by the circuit clerk of the notice of appeal (and docket entries).

- FRAP 42(b) provides that the circuit clerk "may" dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. The proposed rule requires the clerk of the district court or BAP to dismiss under those circumstances. That requirement is consistent with current Rule 8001(c)(2).

Rule 8024. Duties of the Clerk on Disposition of Appeal.

- The only change to existing Rule 8016, other than stylistic ones, is the recognition that in some cases no original documents may have been transmitted to the appellate court.

Rule 8025. Stay of District Court or BAP Judgment.

- The proposed rule is derived from current Rule 8017. Only subdivision (c) is new. It provides for the stay of a bankruptcy court's order, judgment, or decree that is affirmed on appeal to the same extent as any stay of the appellate judgment.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There Is No Controlling Law.

- The statement in existing Rule 8018(a) that "Rule 83 F.R.Civ.P. governs the procedure for rulemaking and amending rules to govern appeals" was deleted. The Subcommittee did not think that the rule should suggest that Civil Rule 83 governs rulemaking by a circuit council, and FRAP 47, which governs local rulemaking by courts of appeals, does not apply to circuit council rulemaking for BAPs.

Rule 8027. Suspension of Rules in Part VIII.

- While the list of rules that may not be suspended is much longer than the list in current Rule 8019 and in FRAP 2, the Subcommittee concluded that compliance with the listed rules should always be required.

3. *Correction of proposed Rule 8007.*

After the Subcommittee met and agreed on its recommendation to the Advisory Committee, Professor Struve called to the reporter's attention a possible omission in the draft of Rule 8007(c). That rule, which governs stays pending appeal, was revised prior to its approval by the Committee last fall to apply to direct appeals to courts of appeals, as well as to appeals to district courts and BAPs. Most of the proposed rule reflects that change. Subdivision (c) (line 44), however, does not refer to the court of appeals. The reporter therefore suggests that subdivision (c) be revised to read: "The district court, BAP, or court of appeals may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court." This change is consistent with the existing proposed Committee Note.

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