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Subject NACBA Comments

Attached are the comments of the National Association of Consumer Bankruptcy Attorneys (NACBA) in response to the proposed amendments to Bankruptcy Rules 4002 and 5005(a). These comments are also being submitted on this date by facsimile. Thank you.

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Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendments to Bankruptcy Rules 4002 and 5005(a)

Dear Mr. McCabe:

The National Association of Consumer Bankruptcy Attorneys (NACBA) submits these comments in response to the proposed amendments to Bankruptcy Rules 4002 and 5005(a).

INTEREST OF NACBA

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 1,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. NACBA is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The NACBA membership has a vital interest in the proposed rule amendments. NACBA members primarily represent individual low- and moderate-income wage-earners. NACBA members are concerned that the proposed amendments will make it more difficult for these debtors and their families to obtain bankruptcy relief in an effective, speedy, and inexpensive manner.

COMMENTS TO PROPOSED AMENDMENTS TO RULE 4002

A. General Comments

Proposed Rule 4002(b)(2) begins with the phrase: "Unless the trustee, the United States trustee, or the bankruptcy administrator instructs otherwise." If this phrase was intended to mean that the trustee may waive the proposed rule requirements by advising the debtor before the § 341 meeting that the debtor need not comply with some or all of the requirements in proposed Rule 4002(b)(2), NACBA suggests that the language be revised to avoid any ambiguity. For example, the Rule might state: "Unless the trustee, the United States trustee, or the bankruptcy administrator informs the debtor that compliance with this subsection is not required, ..."

The problem is that some trustees may interpret this phrase as giving them authority to routinely require additional documents in all or substantially all cases. NACBA is concerned that some trustees may subvert the apparent intent of this language by suggesting that it allows the kind of blanket requests for documents that had originally been proposed by the EOUST as an amendment to this Rule. Individual trustees should not be permitted to use any potential ambiguity in this language to claim authority to effectively implement proposed rule changes that were appropriately rejected by the Advisory Committee.

In addition, the Committee Notes indicate that the debtor is not required to "create documents or obtain documents from third parties", but only to produce documents in the debtor's possession. NACBA supports this statement and believes it should be incorporated into the rule itself.

B. Bank Statements

Proposed Rule 4002(b)(2)(C) requires a debtor to bring to the meeting of creditors bank statements for the "time period that includes the date of filing of the petition." The problem with this amendment is that it will almost certainly result in the majority of consumer cases being filed without schedules as skeletal petitions.

Debtors in most cases will not have bank statements covering the petition date when the petition is filed. They will not be able to obtain verification of the exact amount of funds in checking accounts on the petition date before the petition is filed because there may be checks which have not been presented or honored until after the petition date. These may be checks the debtor has sent prepetition to cover ordinary, ongoing debts such as mortgage payments and utility bills.

NACBA members and their clients will therefore have no choice but to delay the filing of the schedules to ensure that Schedules B and C list the exact amount of funds in these accounts. They will delay filing schedules in this manner to avoid any suggestion that their schedules are inaccurate, even if the variance in account balances would be insignificant. The proposed amendment will also make it more difficult for debtors to avoid the "no-win situation" described in *In re Dybalski*, 316 B.R. 312 (Bankr.S.D.Ind. 2004), in which debtors were compelled to turn over funds to the trustee representing the amount of certain checks which had been written but had not cleared before the petition date. In the case of a debtor whose mortgage payment check has not cleared by the petition date and the funds are deemed property of the estate, the *Dybalski* court noted that the trustee could recover the funds as a post-petition transfer from either the mortgage lender or the debtor. In either case, though, the debtor will owe the mortgage payment, perhaps $500-$1000 or more, which the debtor may not easily afford.

The practical effect of this rule change will be to drive up the costs of bankruptcy representation. Debtor's counsel will need be obtain account balance information for the petition date before completing and filing the client's remaining schedules. This will require debtor's counsel to analyze the statements to determine the account balance on the petition date because this information is not readily provided on the standard checking account statement. There will also be additional costs imposed on debtor's counsel (and the bankruptcy clerk's office) in staggering the filing of the petition and schedules, or alternatively in filing motions to amend the schedules once the account balance information is obtained. NACBA is concerned that the additional compliance requirements associated with this proposed rule will make it more difficult for financially-strapped debtors to find and afford representation in bankruptcy matters. Competent counsel will have no alternative but to increase their fees to cover the additional costs and expenses of compliance.

C. Tax Returns

Proposed Rule 4002(b)(2)(B) requires a debtor to bring to the meeting of creditors "the debtor's most recently filed income tax return, including any attachments." NACBA is concerned that the proposed rule would require debtors to produce documents containing some of the most sensitive information about themselves despite the lack of any substantial privacy protections. The information and documents that would be submitted under this proposed rule and subsection 4002(b)(2)(C)(financial statements) contain private personal information, such as Social Security numbers, names of children and dependents, bank account numbers, income and other tax information, dates of birth, market value of real property and other assets, alimony and support payments, and listings of expenses, purchases, medical treatment, and other personal spending habits. These documents include unique personal identifiers and information that is particularly susceptible to abuse. This information, if used improperly in an identity theft or predatory lending scheme, can plague debtors for years and prevent them from obtaining a fresh start.[1]

[1] A recent survey sponsored by the Federal Trade Commission suggests that incidents of identity theft are on the rise in the United States. The survey reveals that 12.7% of Americans have been victimized by some form of identity theft in the last five years, and that the total cost of this crime is estimated at $50 billion per year. Victims of identity

Some debtors will have extensive documents and attachments as part of their tax returns or as statements from financial institutions. Unless the current scheduling of meetings of creditors is changed in many districts, it is not realistic to expect that trustees will be able to review these documents during the meeting. Trustees will therefore be compelled to take copies of the documents back to their office for review at a later time.

There have been numerous examples of identity theft perpetrated by employees of businesses that have access to customer or client personal information. Although panel trustees undoubtedly strive to employ honest staff, large numbers of workers in trustee offices would now have access to these sensitive records. In some districts, the standing chapter 13 trustee's offices may have over 50 employees. NACBA is concerned that the documents produced under the proposed rules could fall into the wrong hands. While the Committee Notes acknowledge that these documents include "private information that should not be disseminated," the proposed rule does not indicate what steps shall be taken to protect the information other than that it should not be disseminated to creditors and others attending the § 341 meeting.

NACBA believes the proposed rule should not be adopted without specific privacy protections included in the text of the rule itself. The proposed rule at a minimum should specify that the trustee, the United States trustee, or the bankruptcy administrator must ensure that the documents remain confidential. It should state that, except in the most exceptional cases, copies of the documents should not be made and the documents should be returned to the debtor at the conclusion of the meeting of creditors. If documents are retained by the trustee after the meeting, the rule should state that all documents must be returned to the debtor or properly shredded or destroyed immediately upon the closing of the case.

NACBA is also concerned that if the proposed rule is adopted requiring production of tax returns and financial statements by debtors in all cases, trustees will be compelled to review the documents even though most will be deemed irrelevant. As mentioned previously, since this review cannot possibly be done during the meeting of creditors in many cases without substantial changes to the scheduling of § 341 meetings, trustees will need to take the documents back to their office and review them at a later date. This review and disposition of the tax return documents (and bank account statements), whether at the § 341 meeting or at a later time, will result in substantial trustee hours each year being devoted to document review. Thus, in order to implement the proposed rule, the EOUST and panel trustees will necessarily need to divert resources from some other activity. In addition, it can be expected that trustees will demand higher fees for this additional work, increasing the cost of bankruptcy and further limiting access to the bankruptcy system for low-income debtors.

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theft spent on average 30 hours trying to resolve their problems (60 hours for cases involving credit card misuse). *See* http://www.ftc.gov/os/2003/09/synovatereport.pdf.

D. Mandatory Electronic Filing

The proposed amendment to Rule 5005 authorizes local bankruptcy courts to require all documents to be filed electronically. Despite the advantages of electronic filing for regular practitioners in the bankruptcy system, NACBA believes that this amendment to Rule 5005 should not be implemented until the Committee incorporates in the Rule clearly defined exceptions for those who cannot easily file electronically.

Many NACBA members have supported the change to electronic filing and have come to appreciate many of its benefits. As regular users of the bankruptcy system, NACBA members have devoted necessary resources to adapt to electronic filing requirements in their local courts. NACBA nevertheless believes that bankruptcy courts must remain accessible to the occasional user of the bankruptcy system. This may include, for example, practitioners who handle a few cases per year as part of a volunteer lawyer program or as a staff member of a legal aid program.

While NACBA's position is somewhat contrary to its own self-interest as an organization consisting mostly of regular users of the bankruptcy system, NACBA nevertheless believes that concerns about access to justice warrant that local courts should not be permitted to require electronic filing until such time as they have adopted appropriate exceptions.

The Committee Note for this proposed amendment indicates that courts requiring electronic filing have recognized the need to make exceptions, The Note concludes that: "Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 5005(a)(2). NACBA requests that the committee not adopt the proposed amendment until it also includes some minimum, uniform exceptions in the text of Rule 5005(a)(2). The amended Rule 5005(a)(2) should clearly articulate these minimum exceptions and note that courts may adopt by local rules additional exceptions that do not conflict with the federal rule.

CONCLUSION

Debtors sign bankruptcy schedules by making a declaration under penalty of perjury that the information provided is true and correct. The vast majority of debtors are fully aware and have been advised by their counsel that severe criminal penalties exist for the filing of false or fraudulent bankruptcy petitions and schedules. While these incentives for compliance cannot eliminate fraud completely, the current process reflects an appropriate presumption that debtors are generally honest. It also embraces a policy preference that the vast number of participants in the system should not be burdened and tarnished by the unfortunate acts of a few, especially when the costs of additional compliance are prohibitive. These same policy considerations that favor statements and filings by declaration rather than extensive document production operate in other government programs, such as submissions filed with the Internal Revenue Service.

There is no reason to assume bankruptcy debtors are more dishonest than taxpayers. NACBA respectfully requests that the Committee be mindful of these considerations in amending the current rules.

On behalf of NACBA, we thank you for this opportunity to submit comments on the proposed amendments.

Very truly yours,

Henry Sommer
President

John Rao
Director