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

February 8, 2007

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By Electronic Transmission

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

Re: Proposed Amendments to Bankruptcy Rules

Dear Mr. McCabe:

The National Bankruptcy Conference[1] has studied the proposed amendments to the Federal Rules of Bankruptcy Procedure, which were published for comment on August 15, 2006. We are well aware of the enormous amount of work that went into producing the proposed Rules and Official Forms, as the Advisory Committee has included several of our Conferees as members, reporters and consultants. As a whole, we believe that the work product of the Rules Committee is remarkable, especially considering the short time frame for producing so many changes. Although the Conference believes that the amendments will provide needed improvements to practice and procedure in the bankruptcy court, we submit these comments in the hopes of drawing the Committee's attention to areas of potential problems and further improvements in the proposed amendments.

I. Rules Relating to the Patient Care Ombudsman: 2007.2, 2015.1, and 6011

Rule 2007.2 provides that in a case in which the debtor is a health care business, a patient care ombudsman is to be appointed unless the court on motion of the US Trustee or a party in interest filed within 20 days after the commencement of the case (or another time fixed by the court) determines that such appointment is unnecessary. It is, accordingly, important that parties be made aware promptly that a health care case has been filed so that they can, if they choose, make a timely motion. For this reason, we recommended that Rule 1021 require that if the petition states or the court later determines that the debtor is a health care business, the party filing the case (the debtor in a voluntary filing or the petitioning creditor(s) in an involuntary filing) give notice to the parties listed in Rule 1021(b) within a specified time after the date of the filing of the petition or the court determination,

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

whichever is earlier, that the debtor is a health care business and that section 333 of the Bankruptcy Code and Rules 1021 and 2007.2 apply.

Rule 2015.1 requires that notice be given to, among others, "all patients." There may well be situations where notice to certain patients (such as in psychiatric or acute care facilities) could be injurious to the patient's well-being. For this reason, it is recommended that the requirement of notice to all patients be qualified by the words "unless the court orders otherwise." This will give the court discretion in appropriate circumstances to provide for alternative notice (such as to the guardian or family member of such patient).

Rule 6011 deals with the notice to be given where the trustee proposes to dispose of patient records. Subsection (b) of the Rule provides that a notice regarding claiming or disposing of records shall "direct" that a patient's family member or other representative who receives such notice inform the patient. The use of the word "direct" is susceptible of unintended consequences including contempt citations or civil liability where the family member fails to comply with such direction. The substitution of the word "request" for "direct" is more appropriate, especially because section 351(1)(B) (which Rule 6011 implements) requires only an "attempt to notify directly each patient" by mailing such notice to the "patient, or a family member or contact person for that patient, and to the appropriate insurance carrier ... ."

A second suggested change to this Rule would correct an inconsistency between the notice in the statute (quoted immediately above) and that contained in the Rule. Specifically, while the statute calls for service on the carrier and the patient or a family member, the Rule requires service on the carrier, the patient and the family member.

Finally, subparagraph (c) of the Rule provides that unless the court orders the trustee to file under seal proof of compliance with the notice regarding disposal of records, such proof of compliance shall be maintained by the trustee for "a reasonable time". In order to avoid uncertainty as to how long the trustee's obligation continues (or the need for the trustee to seek an order from the court clarifying the matter), we suggest that the Rule provide that "the trustee shall not file, but shall maintain for one year from the date of the notice or for such other period as the court orders, the proof of compliance."

II. Rules Relating to Notice to Foreign Creditors: § 1514(c) and Official Forms 9E and 9F

Section 1514(c) of the Code, added by BAPCPA, deals with notices of commencement of a case given to foreign creditors. It requires that such notices (1) indicate the deadline and place for filing proofs of claim, (2) state whether secured creditors are required to file proofs of claim, and (3) give any additional information that would otherwise be required. In general the Rules Advisory Committee has effectively modified the forms for notice of case commencement—the several versions of Official Form 9—to implement section 1514(c). In one respect, however, the Conference believes that an improvement can be made.

Official Forms 9E and 9F provide notice of the commencement of a chapter 11 case in which the court has not yet set a bar date. Accordingly, the front of the forms correctly states: "Deadline to File a Proof of Claim: Notice of deadline will be sent at a later time." The general instructions for "Claims," set out on the back of the forms, also correctly inform creditors of the general rules regarding the need to file proofs of claim. Then, however, these forms make the following statement:

> **Filing Deadline for a Foreign Creditor**: The deadlines for filing claims set forth on the front of this notice apply to all creditors. If this notice has been mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.

Because, as noted above, the front of the form does not set out a filing deadline, this last instruction could be confusing to foreign creditors. The Conference suggests that this part of the instruction be changed to the following:

> **Filing Deadline for a Foreign Creditor**: The deadline for filing claims will be set in a later court order and will apply to all creditors unless the order provides otherwise. If notice of the order setting the deadline is mailed to a creditor at a foreign address, the creditor may file a motion requesting the court to extend the deadline.

The Conference notes that the proposed **Rule 2002(p) and Official Form 9** use the phrase "foreign creditor" in headings and "creditor with a foreign address" in the body of the Rule and Form. We note that the statute appears to use both terms without any intent to refer to different kinds of creditors. We believe that the relevant statutory provisions were intended to apply to creditors whose principal address for notice is not within the United States, not to United States creditors who happen to have a foreign address. Although the Rules cannot amend the Code, we suggest that for clarity the Committee use a single term, "creditor with a foreign address," in both headings and body.

III. Rules Relating To Individual Debtors: Form 22C; Rule 1017.1 (new); 1007(b)(7) and 4004(c); 4008; 4003(b)

1. Means test determination under Form 22C.

You may recall that the Conference sent you a letter dated February 17, 2006, making certain recommendations with regard to the Interim Rules and Proposed Forms. The Conference appreciates very much the consideration that the Advisory Committee gave to those recommendations. At this time we reiterate very briefly one of the recommendations we previously made to the Committee and make four other recommendations for your consideration.

As we stated in our letters of September 27, 2005 and February 17, 2006, we do not believe the Official Forms should decide legal issues or require parties to subscribe to a particular view on such issues. We understand that although the Committee subscribes to a simi-

lar view, it is not always easy to draft a neutral form. Whenever possible, however, the Official Forms should strive to achieve this goal. We believe this could be accomplished better in Official **Form 22C** simply by inserting a line at the end of the form allowing subtraction of any adjustment to which the debtor claims entitlement, together with an explanation citing authority. This simple suggestion would make the form neutral with regard to whether such interpretations of the statute are appropriate with regard to the calculation of Current Monthly Income. Just as with any other item on the form, if any party entitled to object to confirmation under section 1325(b) believes a deduction or adjustment is not appropriate, that party may challenge the deduction by objecting to confirmation of the plan.

2. Sufficiency of the debtor's certification of exigent circumstances under Section 109(h)(3).

Nature of the problem and explanation of proposed amendments.

Section 109(h)(3) allows an individual debtor to obtain a credit counseling briefing during the 30 days after bankruptcy filing (rather than during the 180 days before filing) if the debtor submits a certification (1) that states that the debtor requested credit counseling services from an approved agency but was unable to obtain the services within five days of making the request, (2) that describes "exigent circumstances," meriting a waiver of the usual requirement that the counseling take place prepetition, and (3) that is satisfactory to the court.

The Interim Rules do not set out a procedure for testing the sufficiency of a certification filed by a debtor under section 109(h)(3). Consistent with the statutory language, Interim Rule 1007(b)(3) merely requires that the debtor file the certification. A proposed change to Rule 1007(b) would require that the debtor file a statement of compliance with the credit counseling requirements of section 109(h), using a prescribed Official Form, but the proposed Rule change also prescribes no procedure for testing the sufficiency of a section 109(h)(3) certification. Nevertheless, the form adopted to implement the proposed change, Exhibit D to Official Form 1 (Voluntary Petition) states that a section 109(h)(3) certification "must be accompanied by a motion for determination by the court."

Establishing a procedural requirement through an Official Form rather than a Rule is not good practice, but more fundamentally, requiring the debtor to move for approval of a section 109(h)(3) certification is not consistent with the statute. Section 109(h)(4), which provides for non-application of the credit counseling requirement in situations of incapacity, disability or active military service, requires that the court make a determination, after notice and hearing, that the debtor is prevented by one of those conditions from completing the counseling. No such notice and hearing requirement is provided with respect to section 109(h)(3). The statute, then, implies that the debtor's certification should be effective unless some other party calls it into question. Requiring the debtor to file a motion for approval adds unnecessary expense and burden and presents the potential for a valid certification being found ineffective simply because the debtor failed to file the required motion for approval with the certification.

To implement section 109(h)(3) appropriately, there should be a Rule setting a period in which the sufficiency of a section 109(h)(3) certification could be questioned and determined, after which the debtor could obtain credit counseling—within the 30 days required by section 109(h)(3)—with the assurance that the case would not be subject to dismissal (or other adverse action) based on the debtor's ineligibility. The deadline for challenge and ruling would accordingly need to be less than 30 days.

Proposed amendments.

a. Adopt a new **Rule 1017.1**, as follows:

> **Rule 1017.1 Determination of the Sufficiency of Debtor's Certification of Exigent Circumstance.**
>
> A certification of exigent circumstances filed by an individual debtor under § 109(h)(3) may be determined to be insufficient only upon order of the court entered within 21 days after the filing of the certification. The court may enter such an order, accompanied by a specification of the reasons for finding the certification insufficient, with such notice to the debtor as the court finds appropriate, or without notice. A party in interest may seek entry of such an order by motion, with notice to the debtor, filed so as to allow a determination by the court within 21 days after the filing of the certification.

b. Strike the bracketed language in numbered paragraph 3 of Exhibit D to Official Form 1 that advises the debtor that the § 109(h)(3) certification "must be accompanied by a motion for determination by the court."

c. Strike the first sentence of the paragraph following numbered paragraph 3 of Exhibit D to Official Form 1 and replace it with the following: "The court may determine that your certification of exigent circumstances is insufficient. If so, the court will issue an order to that effect within 21 days after the date that you file the certification."

3. Deadline for filing a statement of completion of a personal financial management course.

Nature of the problem and explanation of proposed amendments.

Section 727(a)(11) provides that the failure of a debtor to complete an instructional course concerning personal financial management is a ground for withholding discharge, and section 1328(g) provides that the court shall not grant a discharge unless the debtor has completed such a course. Interim Rule 1007(b)(7) enforces these provisions by requiring an individual debtor in a chapter 7 or chapter 13 case to "file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form," and Interim Rule 1007(c) provides:

> The statement required by subdivision (b)(7) shall be filed by the debtor within 45 days after the first date set for the meeting of creditors under § 341 of the Code in a chapter 7

> case, and no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge under § 1328(b) in a chapter 13 case. [A]ny extension of time for the filing of the ... statement ... may be granted only on motion for cause shown ... ."

The impact of these Rule provisions on a debtor who has in fact completed the required personal financial management course can be a withholding of discharge, simply because the debtor failed to file a statement of completion within the specified time. *See In re Hassett*, 341 B.R. 832, 834 (Bankr. E.D. Va. 2006) (declining to award a discharge to a debtor who filed an untimely statement of completion without a motion showing cause to extend the filing deadline). Moreover, if the debtor's case is closed without a discharge because of a failure to file the statement of completion, the debtors currently would be required to pay a reopening fee equal to the original filing fee, under the Bankruptcy Court Miscellaneous Fee Schedule adopted by the Judicial Conference.

Sections 727(a)(11) and 1328(g) do not require the filing of a statement of completion by the debtor, and such filings are not necessary to enforce the discharge limitations. Agencies providing financial management instructional courses must be approved by the United States trustee or bankruptcy administrator, under section 111. The Executive Office for United States Trustees requires that these agencies "[h]ave sufficient computer capabilities to issue certificates of completion of an instructional course in conformance with the directives established by the EOUST." Application Procedures and Criteria for Approval of Nonprofit Budget and Credit Counseling Agencies and Approval of Providers of a Personal Financial Management Instructional Course by United States Trustees, 71 Fed. Reg. 38076, 38083 (July 5, 2006) (to be codified at 28 C.F.R. Part 58). The United States trustees or bankruptcy administrators thus can have access to a computer-generated list of debtors who have completed the required course, and they can move to withhold discharge where a debtor has failed to complete the course. Requiring such a motion to enforce the debtor education requirements would avoid withholding of discharge unnecessarily from debtors who had actually completed educational courses and would encourage compliance by debtors who had not done so.

However, if the requirement for a debtor's filing of a statement of completion is retained, any filing deadline should merely be cautionary, triggering a warning from the clerk's office that the case may be closed without discharge. At any time before case closing, the debtor should be allowed to file the statement and obtain a discharge. After case closing, for at least some reasonable period of time, the debtor should be allowed to reopen the case, file the certificate, and obtain a discharge without an additional filing fee (Recognizing that the Judicial Conference recently determined that a reopening fee should be charged in this situation, and that the Rules Advisory Committee may be reluctant to suggest a revision of this policy via a rule amendment, the NBC will also make this suggestion directly to the Judicial Conference.)

*Proposed amendments to **Rule 1007(b)**.*

First Alternative

a. Delete both Rule 1007(b)(7) and the sentence referring to subdivision (b)(7) in Rule 1007(c).

b. Delete Official Form 23 (the statement of completion form).

c. Amend Rule 4004(c)(11) to state "a motion to withhold discharge under § 727(a)(11) is pending;".

d. Amend Rule 4004(c) to add a new subdivision (4), stating "In a chapter 13 case, the court shall not grant a discharge if a motion to withhold discharge under § 1328(g) is pending.".

e. Amend Rule 4004(c) to add a new subdivision (5) stating: "A case may be reopened without payment of an additional filing fee for the purpose of obtaining a discharge withheld under §§ 727(a)(11) or 1328(g).".

Second Alternative

a. Strike the sentences referring to subdivision (b)(7) in Rule 1007(c).

b. Amend Rule 5009 by placing "(a)" before the current language of the Rule and adding the following new paragraph to the end of the Rule:

> (b) If an individual debtor in a chapter 7 case has not filed the statement required by subdivision (b)(7) before the 45th day after the first date set for the meeting of creditors under § 341, the court shall forthwith notify the debtor that the case may be closed without entry of discharge. If a debtor in a chapter 13 case has not filed the statement required by subdivision (b)(7) before making the last payment required by the plan, the chapter 13 trustee shall forthwith notify the debtor that the case may be closed without entry of discharge.

c. Amend Rule 4004(c) to add a new subdivision (4) stating: "Within [60] days after the entry of an order closing a case, the case may be reopened without payment of an additional filing fee for the purpose of obtaining a discharge withheld under §§ 727(a)(11) or 1328(g).".

4. Official form for reaffirmation agreements.

Nature of the problem and explanation of proposed amendments.

Section 524(k)(6) requires a debtor to complete a new Part D in any reaffirmation agreement, stating whether his or her income, less expenses, is sufficient to pay the proposed reaffirmed debt. If not, a presumption of undue hardship arises that can be rebutted by the debtor's statement as to how payment of the reaffirmed debt is affordable, but if not rebutted to

the satisfaction of the court, the presumption can lead to disapproval of the reaffirmation under section 524(m). Interim Rule 4008 additionally requires the debtor to explain any differences between the income and expenses reported in Part D and those reported in Schedules I and J.

Debtors have had substantial difficulty in understanding and complying with the requirements of section 524(k)(6) and Rule 4008. An official form that provided clear instructions and spaces for the necessary computations and statements could assist both debtors in completing reaffirmation agreements and courts in reviewing them for presumptions of undue hardship.

Proposed amendments to ***Official Form for Reaffirmation Agreements.***

Adopt a new official form for reaffirmation agreements, including the following Part D:

Part D: Debtor's Statement in Support of Reaffirmation Agreement.

1. I believe that this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt based on the following information:

A. My monthly income (take home pay plus any other income received) is $_____.

☐ This is the same income amount shown on my Schedule I.

☐ The income amount shown on my Schedule I is $ _____.
My income is now different because:

_____

B. My monthly expenses (including monthly payments on post-bankruptcy debt and other reaffirmation agreements) is $_____.

☐ This is the same expense amount shown on my Schedule J (less any payments listed in Schedule J for this reaffirmed debt).

☐ The expense amount shown on my Schedule J (less any payments listed in Schedule J for this reaffirmed debt) is $_____.
My expenses are now different because:

_____

C. My monthly income (shown on Line A), less my monthly expenses (shown on Line B) leaves $_____ to make the required payments on this reaffirmed debt.

D. The monthly payment on the reaffirmed debt is $_____.

☐ This is less than the amount available for payments shown on Line C, and so can be paid without undue hardship.

☐ This is more than the amount available for payments shown on Line C. I understand that this reaffirmation agreement is presumed to be an undue hardship and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here:

_____

_____

5. Objections to Exemptions.

Nature of the problem and explanation of proposed amendments

Proposed Rule 4003(b)(1) extends the normal period for exemption objections from 30 to 60 days following the conclusion of the creditors' meeting under section 341. This extension would delay discharge and case closing in many cases when the 341 meeting is continued. It would also leave a debtor's property in limbo, with potential restrictions on use or transfer, for much longer in every routine case. A party normally can examine the exemptions claimed well before the 341 meeting and can always ask for an extension of time in the rare non-routine case. Trustees can and regularly do hold the section 341 meeting open for reasonable time if there are exemption issues, which prevents the objection time period from running. We are not aware of any cases in which the automatic extension to 60 days would have made a difference. Indeed, it is extremely unusual for any parties other than trustees to object to exemptions. The primary effect of this Rule change would be simply to delay the prompt administration of cases.

Also, Rule 4003(b)(2)—which grants an extended time for objection in situations of a fraudulently asserted exemption claim—does not clearly provide for the debtor to receive notice of the objection if the exemption was asserted by another on the debtor's behalf.

*Proposed amendments to **Rule 4003(b)**.*

a. Delete the extension of the 30-day deadline in Rule 4003(b)(1).

b. Strike the last sentence of proposed Rule 4003(b)(2) and replace it with the following: "The trustee shall deliver or mail the objection to the debtor and the debtor's attorney, and, if the debtor did not file the list, to the person filing the list and to that person's attorney."

Once again, please convey to the members of the Rules Committee our compliments and thanks for their extraordinary effort and product, and please feel free to contact me at (212) 735-2800 or the Conference Chair Donald S. Bernstein at (212) 450-4092, should you have any additional questions regarding this matter.

Very truly yours,

/s/ Richard Levin

Richard Levin
Vice-Chair

cc: Prof. Jeffrey Morris

National Bankruptcy Conference

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

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

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

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