Comments of the National Association of Consumer Bankruptcy Attorneys on Proposed Amendments to Official Forms
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Attached are Comments of the National Association of Consumer Bankruptcy Attorneys on Proposed Amendments to Bankruptcy Official Forms 6 and 22C.

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Henry J. Sommer
7118 McCallum St.
Philadelphia, PA 19119
Phone: 215-242-8639
Fax: 215-242-2075

COMMENTS OF THE NATIONAL ASSOCIATION OF BANKRUPTCY ATTORNEYS ON PROPOSED AMENDMENTS TO OFFICIAL FORM 6 SCHEDULE C AND OFFICIAL FORM 22C

Official Form 6 Schedule C

The National Association of Consumer Bankruptcy Attorneys (NACBA) strongly supports the adoption of proposed Official Form 6 Schedule C. Adoption of this form will effectuate the purposes of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 4003, clarify the rights of all parties, and permit the prompt administration of bankruptcy cases.

The purpose of the exemption provisions of the Code, of course, is to assist in the debtor's prompt fresh start.[1] To that end, the Code specifies property that can be claimed as exempt, whether it is the "*property listed* in paragraph (2) or, in the alternative, paragraph (3) of [section 522(b)]". 11 U.S.C. § 522(b)(1). "The debtor shall file a list of *property* the debtor claims as exempt under subsection (b). . . .Unless a party in interest objects, the *property* claimed on such list is exempt." 11 U.S.C. § 522(l).

Rule 4003 effectuates these provisions by setting a deadline for objections to exemptions, which section 522(l) obviously contemplates. The purpose of this deadline is to provide an early determination of whether the property claimed as exempt is exempt. Without such an early determination, in a chapter 7 case the debtor would have no way of knowing what property claimed as exempt the debtor was free to use, sell, or otherwise dispose of. If there are other assets not claimed as exempt that will be administered by the trustee, this situation could go on for many months, or even years. In a chapter 11, 12, or 13 case, the determination is critical to

[1] Rule 4004, providing for prompt entry of a chapter 7 discharge serves the same purpose.

the operation of the best interests of creditors test for plan confirmation.

The Supreme Court considered these issues in *Schwab v. Reilly*. In response to the dissent's claim that the Court's opinion would not permit the prompt determination of exemptions and would leave a debtor in limbo, the Court disagreed, and set forth a straightforward way for the debtor to alert the trustee and other parties to the debtor's intention to claim the debtor's entire interest in an item of property as exempt (which the Court found that the debtor in *Schwab* had not done):

> Where, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as "full fair market value (FMV)" or "100% of FMV." Such a declaration will encourage the trustee to object promptly to the exemption if he wishes to challenge it and preserve for the estate any value in the asset beyond relevant statutory limits. If 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. If the trustee objects and the objection is sustained, the debtor will be required either to forfeit the portion of the exemption that exceeds the statutory allowance, or to revise other exemptions or arrangements with her creditors to permit the exemption. See Fed. Rule Bkrtcy. Proc. 1009(a). Either result will facilitate the expeditious and final disposition of assets, and thus enable the debtor (and the debtor's creditors) to achieve a fresh start free of the finality and clouded-title concerns Reilly describes. See Brief for Respondent 57-59 (arguing that "[u]nder [Schwab's] interpretation of Rule 4003(b), a debtor would never have the certainty of knowing whether or not he or she may keep her exempted property until the case had ended"); id., at 66.

Thus, a debtor who claimed "100% of FMV" as exempt would avoid the problems created by the ambiguities the Court found in Ms. Reilly's Schedule C. The trustee and any other party who disagreed with the debtor's claim that the value of the property was within the exemption limits would then have an opportunity to object and the court could determine the value of the property. If the trustee needed time to investigate the value in a particular case, the trustee could either adjourn the meeting of creditors to a later date, which would prevent the time period from running, because the time period runs from the conclusion of the meeting, or seek an extension of the exemption objection deadline from the court under Rule 4003(b)(1).

Despite this seemingly simple procedure explained by the Supreme Court, some trustees continue to argue that they do not need to object to an exemption, even if the debtor clearly expresses the intention to exempt the debtor's entire interest in a particular property. Others argue that debtors and their counsel are somehow committing an abuse by doing exactly what the Supreme Court directed them to do! Their assertions are in part based on the current form, which directs the debtor to list the amount of the exemption applied to the property and does not explicitly give the debtor the option to simply assert that the debtor intends to claim the debtor's entire interest in the property as exempt. Amazingly, despite the Supreme Court's opinion, some courts have questioned the debtor's right to claim the entire item of property as exempt using the language dictated by the Court.

The trustees opposing the form amendment desire a system where they can sit back and decline to object to exemptions, and then later attempt to sell the debtor's property. But such a system flies in the face of bankruptcy's purposes of a prompt fresh start. If a trustee can later come and claim that the debtor's home is not fully exempt and should be liquidated, should the debtor continue to make mortgage payments? If the trustee might later claim the right to sell the debtor's car, should the debtor pay for repairs? If the debtor owns stocks, or inventory in a business, can the debtor sell those items after the exemption deadline has run?

The only justification the trustees can honestly claim is that it is too much trouble for them to object to exemptions, even though, through their right to adjourn the meeting of creditors, they have complete control over when the deadline for objections expires. But that justification, taken to its logical conclusion would mean that trustees would never have to object to exemptions; they could always later claim the property is worth more than the exemption amount, or was not validly exempted because it was not within the exemption description. Sooner or later, if the trustee wants to sell property, the trustee must prove that its value is above the exemption limits, and there is no reason that should not happen sooner, rather than later. Permitting trustees to disregard the exemption procedure undermines the statutory scheme, which permits the debtor to claim "property" as exempt, and provides that if no party objects the "property" is exempt. It also ignores the fact that there is a deadline for exemptions in the rules with the clear purpose of providing a prompt resolution of exemption issues.

Moreover, the trustees' professed fears of an avalanche of exemption objections are completely unfounded. In many bankruptcy courts, the position taken by the Third Circuit in *Schwab* was the law for many years and trustees lost any right to sell property or object to exemptions if they did not file a timely exemption. There is no evidence whatsoever that this created a problem of "protective" objections filed by trustees who were unsure of whether to object. Again, the trustee who is unsure about value can simply adjourn the creditors meeting to a later date to prevent the deadline from running. And there is no reason that trustees cannot perform whatever investigation they need to perform before that deadline, which they control, has run.

NACBA suspects that the trustees' real hope is to maintain a continuing trap for the unwary, such as pro se debtors like Ms. Reilly and inexperienced debtors' counsel. The current forms suggest that they be completed just as they were completed by the debtor in *Schwab*. In leading debtors and attorneys down this path, those forms undermine the ability of debtors to promptly obtain a determination that their property is fully exempt and expeditiously gain the full fresh start the statute contemplates.

These lingering issues, and unintended traps for the unwary, demonstrate the need for the proposed amendment to Schedule C.

Official Form 22C

NACBA opposes the proposed amendment to Official Form 22C. It is unnecessary, confusing, and potentially misleading.

The amendment is apparently intended to provide information to parties, trustees, and courts seeking to apply the Supreme Court's *Lanning* decision, which allows the court to consider changes in disposable income and (by dicta) expenses that are known or virtually certain. However, the language proposed goes far beyond what is necessary for this purpose, and there remains some question, in light of later case law, how changes in expenses should be considered.

With respect to income, if the change to the debtor's income has already occurred, it will be reflected in Schedule I, and there is no need to repeat the information. It will also be apparent from the evidence of current income required to be produced at the creditors meeting by Rule 4002(b)(2)(A). Similarly, Schedule J reflects the debtor's current expenses.

Beyond the date of the creditors meeting, it is unclear how long a period of time would be relevant or appropriate to consider. Even during the first year after the petition is filed, it is virtually guaranteed that other components of the means test, like the IRS standards and other expenses of the debtor will change, perhaps significantly, in ways that cannot be predicted at the beginning of the case. While we have recently enjoyed a lengthy period of low inflation, this form would be used in periods of high inflation similar to those in the past during which living expenses have increased by well over 5% per year. Requiring the debtor to list a scheduled increase in wages nine months after the petition would invite the court to compare the apples of the debtor's future income to the oranges of the debtor's current expenses. Thus, the proposed form's suggestion that future numbers can simply be inserted into the means test formula, which is otherwise unchanged, is especially troubling. The debtor's expenses could easily have increased by that time by a higher percentage than the wage increase.

Both Schedules I and J require the debtor to describe possible changes over the course of the next year, which would alert a trustee and other parties to later check whether such changes in fact have occurred, so that they might file a modification motion at such time. In addition, the trustee has the right to request statements of income and expenses each year under section 521(f)(4).

And a motion to modify the plan is the most appropriate mechanism for dealing with such postpetition changes, because in considering a motion to modify the court can take into account all changes that have occurred to income and expenses, whether they were predicted earlier or not.

Indeed, this procedure is strongly suggested by the Supreme Court's later *Ransom* decision, which supports the idea that postpetition changes in the debtor's expenses should be dealt with when they occur, through the modification process. In discussing the situation of a chapter 13 debtor whose car payments end during the plan, perhaps early in the plan period, the court did not say that this should be taken into account when the plan is confirmed. Rather it stated that modification is the appropriate remedy:

> If car payments cease during the life of the plan, just as if other financial circumstances change, an unsecured creditor may move to modify the plan to increase the amount the debtor must repay. See 11 U.S.C. § 1329(a)(1).

Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 729 (2011)

It would be premature, therefore, for the Advisory Committee to treat this issue as if it is settled, through amendment of an Official Form.

Moreover, the amendment could give rise to confusion and possible traps for the unwary debtor. It states a different standard than Schedules I and J, which speak of "reasonably anticipated" changes. Debtors and their counsel will have to speculate about whether a possible change meets one standard, both standards, or neither. It seems far better for the *Lanning* standard, as perhaps informed by *Ransom,* to be developed in case law before consumer debtors are required to apply it in every case.

And, in any event, if the form is amended along the lines proposed, the time period stated should be far shorter. For the reasons set forth above, that is the only way to fairly compare income and expenses at a given point in time. NACBA suggests that, if the form is amended, the time period should run no longer than through the anticipated date for a confirmation hearing.

For all these reasons, the proposed change to Form 22A is both unnecessary and premature. The Rules Committee should not attempt to preempt the courts' judicial development of how *Lanning* and *Ransom* should be applied, and the current rules and forms already provide sufficient information to trustees and other parties.