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Subject Comments on Means Test Form

05-BR-018

To: Rules Committee
From: Professor Marianne B. Culhane
Professor Michaela M. White
Creighton Univ. School of Law
Date: September 26, 2005

RE: Means Test Official Forms

As consumer bankruptcy scholars, we have studied the means test for years, and collaborated on an empirical study of that formula funded by the nonpartisan American Bankruptcy Institute.^[1]

We have reviewed Form B22A (Chapter 7) (10/05) and have the following comments.

1. Part II. Current Monthly Income for § 707(b)(7) Exclusion.

The form currently requires addition of all a non-debtor spouse's average monthly income to the debtor's current monthly income, for comparison to the applicable state median income figure. The form should include both spouses' incomes only in joint cases.

Code section 707(b)(7) refers to the "current monthly income"(CMI) of the debtor and of the debtor's spouse, apparently including cases where only one spouse files a petition in bankruptcy. In joint cases, that provision is not problematic. However, the provision is ambiguous and technically impossible when only one spouse files, because a non-debtor cannot have CMI. CMI is defined in section 101(10A) as the "income...that the debtor receives (or in a joint case the debtor and the debtor's spouse receive)...." When only one spouse files, the debtor's CMI includes any amount which the non-debtor spouse pays "on a regular basis toward the household expenses of the debtor..." Section 101(10A)(B). Because a non-debtor spouse has no CMI, and the debtor's CMI includes amounts received from the non-debtor, the form should require a spouse's full income to be listed in Column B only in joint cases. This change would obviate the need for Part IV of the form, where the non-debtor spouse's income is subtracted out before the rest of the means test is applied.

2. Part V: Deductions for Other Necessary Expenses.

In boxes 24 through 31, the form permits deduction from CMI of some, but not all, of the "Other Necessary Expenses" that the Internal Revenue Service would allow. Part VII of the form provides space to list additional actual expenses "required for the health and welfare" of the

debtor and family, but those additional expenses are not deducted from CMI. They are simply informational. The form should instead deduct these additional expenses from CMI before determining if the presumption of abuse arises.

Code section 707(b)(2)(A)(ii)(I) authorizes debtors to deduct from CMI “the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service...” The IRS Revenue Manual (I.R.M.) describes three types of allowable expenses: National Standards, Local Standards and Other Expenses. “Other Expenses” are items not included in the National or Local Standards that “meet the necessary expense test—they must provide for the health and welfare of the taxpayer and/or his or family or they must be for the production of income.” I.R.M.section 5.15.10 (05-01-2004). The Code term “categories specified” should include any actual expense that meets the IRS “necessary expense test,” whether or not the particular type of expense is on the non-exclusive list of examples that the I.R.M. sets forth. All such expenses are rightfully deductible from CMI before determination of a presumption of abuse.

3. Parts III and VI. Admissions of Above-Median Income and Presumption of Abuse.

The form currently requires debtors not only to disclose CMI and total allowed deductions, but also to check boxes and admit in writing that CMI exceeds the applicable state median income and that a presumption of abuse arises. Yet a debtor may have well-founded legal arguments that one or both of these admissions is incorrect, for example, because the form does not permit deduction of all the debtor’s actual necessary expenses, as discussed above. The form may properly require disclosure of CMI and claimed expense deductions. However, the form should not require debtors to admit legal conclusions or foreclose arguments on appropriate deductions.

^[1] See Marianne B. Culhane & Michaela M. White, Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors, 7 Amer. Bankr. Inst. L.Rev. 27 (1999).

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[1] See Marianne B. Culhane & Michaela M. White, Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors, 7 Amer. Bankr. Inst. L.Rev. 27 (1999).