

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

05-BR-020

September 27, 2005

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INTERNATIONAL, INC.

Re: **Proposed Interim Rules and Forms**

Honorable Thomas S. Zilly
Chair, Advisory Committee on Bankruptcy Rules of the
Judicial Conference of the United States
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Dear Judge Zilly:

The National Bankruptcy Conference appreciates the opportunity to comment on the newly issued Official Bankruptcy Forms and the suggested Interim Rules. As you know, the NBC is a voluntary, non-profit, non-partisan organization of approximately 60 judges, lawyers, and law professors interested in the improvement of the Bankruptcy Code and its administration. A short description of the Conference and a list of its Conferees is attached.

We are well aware of the enormous amount of work that went into producing the proposed forms and rules, as the Advisory Committee includes several of our Conferees as members, reporters, and consultants. On the whole, the work product of the Rules Committee is remarkable, considering the short time frame for producing so many changes. At this time, we can provide only preliminary comments, and we expect to submit further, more detailed comments before the March Advisory Committee meeting.

Our principal concern is that some of the Official Forms will force parties (primarily debtors) to make statements, under penalties of perjury, regarding significant issues of law with which they do not agree and which could even be considered admissions in a later legal proceeding. Such statements are seemingly compelled by certain parts of the Official Forms which take a position on the interpretation of section 707(b). While the forms arguably also take some positions with which a creditor may not agree, creditors are not required to submit or sign the forms and are free to challenge any statement made on the forms.

We do not believe it is appropriate for the Official Forms or the Interim Rules to decide legal issues, much less require parties to subscribe to a particular view on such issues. We are confident that there are ways to avoid such problems by drafting forms that leave parties free to assert any legitimate position.

For example, the forms appear to take a position that debtors cannot deduct IRS Other Necessary Expenses for purposes of the means test unless they fit in the categories listed on the form. Those categories do not allow other

expenses that the debtor may argue are necessary for the production of income or welfare of the debtor's family, such as high automobile operating expenses due to a lengthy commute and increased gas prices. (While the forms allow business expenses for self-employed debtors, they do not allow employees' business expenses.) Allowing the debtor to deduct those expenses on the form, if that is the debtor's legal position, does not decide the issue. Any party may challenge such a deduction or any other deduction, but it does permit the debtor to assert his or her legal position. Not allowing the deduction may compel debtors either to disregard the instructions on the form (at the peril of being accused of malfeasance) or to check a box stating that the debtor should be presumed abusive. Nor is the debtor permitted to list special circumstances that demonstrate that the chapter 7 case is not abusive. It is no small thing to compel someone to state that they are presumptively "abusing" the Bankruptcy Code when they do not believe that is true. In chapter 13 cases, the calculation may require the debtor to state that his or her disposable income is higher than the debtor believes it is under the means test formula.

Similarly, the form compels a debtor to combine the debtor's income with that of a nondebtor spouse, even though that spouse does not have current monthly income as defined by the Code, to give a total current monthly income figure for determination of whether the section 707(b)(7) safe harbor applies. It would have been simple enough to let the debtor assert a position regarding whether the spouses' incomes should be combined. If the United States trustee disagrees with that position, s/he has the opportunity to state a position within 10 days after the creditors meeting and to bring a motion alleging abuse. However, requiring the debtor to state that the safe harbor does not apply despite the debtor's belief to the contrary may give creditors an excuse to file unwarranted motions and perhaps use that statement as a defense against sanctions for such motions. The forms should not put the debtor in that position.

Moreover, we believe the various versions of Official Form 22 – the current monthly income/means test/disposable income test form – all make a fundamental assumption that we believe will be a significant contested question of statutory construction: the forms mandate that any amount deducted under 707(b)(2)(A)(iii) or (iv) must be subtracted or netted against an expense deduction allowed by an IRS standard under 707(b)(2)(A)(ii) whereas the statute is open to the opposite conclusion. This is a crucial point on which we do not believe the Official Form or Rules should take a position.

We will have additional comments on the interim rules and forms in the months to come. However, we think it is important to raise the issues set forth above at this time. In particular, we believe our comments regarding the means test calculation forms are significant, and accordingly we respectfully suggest that the various versions of Official Form 22 be reconsidered and revised before the October 17, 2005 effective date of the amendments to section 707(b).

Once again, please convey to the members of the Rules Committee our complements and thanks for their extraordinary effort and product, and feel free to contact us if you have any questions regarding the comments above. Questions regarding this letter should be directed to David Lander, Esq., Chair of the Individual Debtor Committee of the National Bankruptcy Conference. He may be reached at 314-552-6067.

Sincerely,



Donald S. Bernstein
Chair

Cc: Jeffrey W. Morris
Peter G. McCabe
John K. Rabiej
James H. Wannamaker III
Hon. Eugene R. Wedoff
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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 Harvard University, the University of Chicago, the University of Texas, UCLA, the University of North Carolina and other major law schools, as well as 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 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. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

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 deliberations of the Conference.

Technical and Advisory Services to Congress. The NBC views itself as having a single client — The Congress of the United States. Accordingly, to facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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bcc

Subject National Bankruptcy Conference Preliminary Comments on
Interim Rules and Forms

Dear Judge Zilly:

On behalf of the National Bankruptcy Conference, I am forwarding the attached letter providing some preliminary comments on the Interim Rules and new official forms. We are very appreciative of the excellent work the Rules Committee has done and we believe the promulgation of the proposed rules and forms in such a brief time frame is a substantial accomplishment. We did, however, want to bring to the Committee's attention one or two significant issues before the effective date of the amendments in the hope that the Rules Committee might consider addressing these issues.

Please feel free to contact me about the attached letter or about any other matter.

Sincerely,

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Chair, National Bankruptcy Conference
212-450-4092



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