

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES
FROM: JEFF MORRIS, REPORTER
RE: CONSUMER RULES
DATE: JULY 24, 2005

The most extensive changes that the 2005 bankruptcy reform legislation brought to the Bankruptcy Code were those involving consumer bankruptcy cases. Most importantly, the amendments place limitations on debtor eligibility for relief generally (debtor must obtain credit counseling prior to commencement of the case in nearly all instances) and for chapter 7 relief specifically (means test). Other significant changes include the contraction of the “super discharge” in chapter 13 cases, additional limits on the entry of a discharge for individual debtors (they must complete a financial management course as a condition to the entry of the discharge order), expanded debtor duties to provide information and documents, and a myriad of other amendments. A number of these amendments require changes in or additions to the Official Forms, and those matters will be addressed by the Forms Subcommittee materials.

The Consumer Subcommittee recommends the adoption of the attached rules with the exception of the items on which the Subcommittee could not reach consensus and that are presented to the Advisory Committee for its consideration. Those rules will be identified specifically below. As with each package of proposed amendments and additions to the rules, some of the amendments are purely technical, others conform the rules to the Code as amended, and some are more substantial.

Rule 1006 governs the payment of filing fees. The 2005 legislation amends 28 U.S.C.

§ 1930 to provide for fee waivers in bankruptcy cases. Rule 1006 is amended to implement that statutory change, and the amendments to the rule are both merely technical (subdivision (a)) and substantial. The more substantial amendment is that the rule shifts to the Official Form some of the requirements for installment payments (Subdivision (b)) and fee waiver requests (subdivision (c)), and that installment payments can be made even if the debtor has already made some payments to an attorney or other person in connection with the case (subdivision (b)(3)).

Rule 1007 sets out much of the information and documentation that a debtor must provide. The bankruptcy reform legislation includes several new obligations for debtors including a statement of current monthly income, evidence of education retirement accounts, and statements or certificates regarding the completion of credit counseling and financial management programs, among other things. The rule is therefore amended to include these additional items among the things that a debtor must file in a case. Although the amendments to the rule are somewhat lengthy, they are essentially just amendments that are intended to make the rule conform to the new provisions in the Code. **Please note that the two sentences on lines 60-62 of this rule were combined into a single sentence in the Consumer Subcommittee's proposal. In splitting the sentences, a discussion in the Style Subcommittee raised the question whether there is any need for an involuntary debtor to file a certificate that he or she has completed credit counseling. Section 109(h)(1), as amended in 2005, provides that "an individual may not be a debtor under this title unless such individual has, during the 180 day period preceding the date of filing of the petition BY such individual..." (emphasis added). So, the argument is that this requirement does not apply as an eligibility limitation, and the reference in § 521(b) is to a certificate "under § 109(h)" which does not exist in an**

involuntary case. It may be that Congress did not see credit counseling as necessary here because the creditors have acted rather than the debtor. Congress also probably would not want the absence of credit counseling to operate to prevent the initiation of an involuntary case.

Rule 1009 contains a technical amendment correcting a cross reference that must be changed to reflect the 2005 amendments to § 521 of the Code.

Rule 1017 is amended to account for the expanded standing given under the 2005 amendment to creditors to bring motions under § 707(b) of the Code. Subdivision (e) is amended to require that motions brought under § 707(b)(1) and (3) of the Code state the grounds for the motion with particularity. Motions brought under the means test are self explanatory in that they will simply assert that the debtor is not eligible because he or she does not meet the test. The grounds for dismissal under the other subsection of § 707(b) are not as specific, so the rule requires a movant to plead the matter in a way that will effectively inform the debtor of the nature of the alleged abuse.

Rule 1019 governs the conversion of a case to chapter 7, and the rule is amended to address the increased likelihood under the 2005 amendments to the Code that a case will be converted initially from chapter 7 to chapter 13 and then back to chapter 7. The restriction on the super discharge under chapter 13 contained in the 2005 amendments also created a need to revise subdivision (2) of the rule to create a new deadline for filing a complaint to determine the dischargeability of debts under § 523(a)(6).

Rule 2002 is amended to add two more notices that the 2005 amendments to the Code required as a part of the means test. The first notice is given by the clerk to creditors within the first 10

days of the case. The clerk must notify creditors whether the presumption of abuse has arisen under the means test. The second notice is one given after the § 341 meeting of creditors regarding whether the United States trustee has determined to move for dismissal under § 707(b). These are conforming amendments. **The Style Subcommittee proposed the addition of subdivision (9) to this rule as an adjunct to Rule 5008. The Consumer Subcommittee's proposal did not include this subdivision.**

Rule 3002 is amended to implement the change to § 1308 of the Code. The Consumer Subcommittee recommendation differs from the Business Subcommittee proposal, and the Advisory Committee must select from the two options, or propose another solution. The cover memo to the Business Rules Subcommittee proposals describes the two choices in greater detail. **Rule 4002** presented some of the more difficult issues for the Subcommittee. This rule sets out the debtor's duties in a case, and the 2005 amendments to the Code significantly expand those duties. The amended rule conforms to those expanded duties, and it also carries forward many of the proposed amendments to Rule 4002 that the Advisory Committee had initially recommended in June 2005 to the Standing Committee. That recommendation was withdrawn at the Standing Committee meeting to permit the Advisory Committee to reconsider the rule in light of the enactment of the reform legislation. Some of the new debtor duties set out in that proposal were included in the legislation, while others were not. The decision was made to return the proposal to the Consumer Subcommittee so that all of the changes could be made in a single amended Rule 4002. For example, the reform legislation requires debtors to file copies of some of their tax returns or tax transcripts and to provide others to the trustee and creditors. The rule is amended to conform to this provision. The rule also continues to include a requirement

taken from the previously proposed version of Rule 4002 that the debtor bring evidence of current income (not to be confused with the statutorily defined “current monthly income”) to the meeting of creditors as well as copies of bank statements among other items.

Rule 4003 is amended to conform to the addition of § 522(q) to the Code by the 2005 amendments. That section provides for the postponement of objections to exemptions if the debtor has committed certain felonies. **The Style Subcommittee changed the draft of this proposed rule from the form submitted by the Consumer Subcommittee. The change is intended to clarify that a party with standing under § 522(q) can object to a claim of exemption made during a reopened case if the exemption was first claimed in the reopened case. The change is not intended to revise the substance or purpose of the Consumer Subcommittee’s proposal. There is also alternative language for this subdivision set out in footnote 2 of the rules package.**

Rule 4004 is amended to recognize waivers of the filing fee. It is also amended to conform to the change in the Code that requires the debtor to complete a financial management course prior to receiving a discharge. The rule also is amended to delay the entry of the discharge if a presumption of undue hardship is created by a reaffirmation agreement. **Please note that the Consumer Rules Proposal includes an alternative amendment to this rule which is designed to establish a procedure for the court to fulfill its obligation to evaluate issues arising under § 522(q) of the Code as required by §§ 727(a)(12), 1141(d)(5(C), 1228(f), and 1328(h). It is set out at the end of the proposed rules amendments.**

Rule 4006 is amended to make the rule conform to the Code as amended in 2005 to inform creditors that a case was closed without the debtor receiving a discharge. Creditors are notified

under the existing rule if the discharge is denied or revoked, but the 2005 amendments to the Code create the possibility of the case being closed without the debtor receiving a discharge that was not denied or revoked. This amendment ensures that creditors are adequately notified on this matter.

Rule 4007 is amended to reflect the restriction on the chapter 13 discharge and the impact of that change on the time for filing a complaint to determine the dischargeability of a debt under § 523 (a)(6) of the Code.

Rule 4008 is amended to implement the revision of § 524 of the Code as it applies to reaffirmation agreements. That section includes a lengthy provision governing reaffirmation agreements and requires debtors to file a specific form of agreement that is intended to demonstrate whether the debtor has sufficient post-bankruptcy disposable income to make the payments called for by the reaffirmation agreement. The rule requires the debtor to provide additional information that will assist the court in determining whether the reaffirmation agreement should be approved.

Rule 5008 is new. It implements the requirement set out in § 342(d) of the Code as amended in 2005 that the clerk notify creditors that a presumption of abuse exists under § 707(b). The amendment adding Rule 2002(f)(9) works in tandem with this provision.