



Comments on proposed bankruptcy forms 3B and 6I and 6J

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2 Attachments



image003.jpg Bankruptcy forms comments Feb 2013.pdf

I am an attorney who primarily represents low income debtors. I also supervise and sometimes staff a *pro se* assistance desk at the US Bankruptcy Court for the Northern District of Illinois. The attached comments focus on Forms 3B, 6I and 6J from the perspective of low income debtors, attorneys who represent them, and *pro se* debtors.

In addition to the specific comments and recommendations in the attached memorandum, I am also submitting the following comments regarding the Forms Modernization Project in general.

While it would be preferable if people who are currently filing *pro se* had the option to be represented by competent attorneys, either for no fee or for an affordable fee, I recognize that this will not occur during my legal career, if ever. Therefore, in recognition of the fact that there will be tens of thousands of debtors who will be filing *pro se*, I support the advisory committee's efforts to make the forms more user friendly for *pro se* debtors. Because *pro se* debtors often file bankruptcy when it is either unnecessary, premature, or actually harmful to their interests, when the complete forms packet has been finalized it should include strong language warning debtors of the consequences of imprudent filings, the complexity of bankruptcy proceedings, the advisability of obtaining legal counsel, and the possible availability of free or low cost legal services.

I am not qualified to comment on whether the proposed forms will impose costs on software developers. This is a concern to me as any costs will be passed on either to the nonprofit agencies that provide free or low cost representation to debtors, or to debtors who hire private attorneys.

I am skeptical of the alleged benefits that are supposed to ensue from making it easier to collect data from revised forms. Recent changes to bankruptcy laws have not been driven by data, but by raw political and economic power, and there is little reason to believe that this is going to change. This should be recognized when making a cost benefit analysis of the benefits to be gained from collecting more data compared to the cost of gathering it.

In addition, to the extent that *pro se* filings do increase, whether because of changes to the forms or for other reasons, the reliability of the data gathered will decrease even as the cost of gathering it increases.

Thank you for the opportunity to comment on the forms and rules.

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Memorandum:

To: Standing Committee on Rules of Practice and Procedure

From: David S. Yen

Date: February 15, 2013

Subject: Comments on several proposed forms recommended by the Advisory Committee on Bankruptcy Rules

I. Form 3B and Order on Application to Waiver Filing Fee

A. Form 3B

Form 3B, Comment 1

Question 1 of the current form 3B asks for the family size. The last sentence states "(Do not include your spouse if you are separated AND are not filing a joint petition.)"

The revised form also asks about family size in question 1, but it instructs the applicant to include a spouse in the family size in all cases.

"Your family includes you, your spouse, and any dependents listed on Schedule J, Current Expenditures of Individual Debtor(s) (Official Form 6J).

In question 1, in the right hand column, the form says "*Check all that apply*" and has three boxes to check – You, Your spouse and Your dependents.

I cannot think of any circumstance where "you" would not apply. Inclusion of a box for "you" with the implicit message that not checking this box is an option is perplexing.

This way of asking about who is in the family is also inconsistent with the "describe your household" section in proposed form 6J. In form 6J questions 1 and 3 say not to list Debtor 1 or Debtor 2.

These alternatives are also underinclusive. If the debtor is living with an adult who is neither a spouse nor a dependent, nothing in the form would elicit that information.

Recommendation

Revise question 1 to read as follows

a 1 Describe your family.

This should be consistent with the information you have or will provide on Schedule J, Your Expenses

Your family includes debtor 1, debtor 2, a spouse living with debtor 1 who is not filing bankruptcy, and any dependents listed on *Schedule J, Current Expenditures of Individual Debtor(s)*.

b There should only be two boxes in the right half of the page. Under “check all that apply” the text accompanying the boxes should read:

Spouse of debtor 1 who lives with debtor 1 but is not filing bankruptcy (do not check if debtor 1 and spouse are separated)

Your dependents _____
How many dependents?

Form 3B, Comment 2

The instruction in question 2 not to include non-cash governmental assistance is an improvement over the current form. Although the official name for food stamps is now SNAP benefits, recipients still refer to them as food stamps, so the question should not be changed to ask about SNAP benefits.

However, question 3 is problematic, especially the line that asks for the monthly dollar value of non-cash benefits. It is difficult to put a value on free health insurance, such as Medicaid. What is the value of free or reduced price meals provided at school? Debtors who reside in public housing usually pay below market rent, but often there is not an unsubsidized monthly rent for public housing. If there is a market rate but the subsidized housing unit is in poor condition, the tenant may be withholding rent because of the poor conditions. In that situation, what is the value of the housing subsidy – the difference between the market rate and what the tenant? The recommendation below eliminates these quandaries and directs the inquiry to the only relevant question, the ability of the debtor to come up with cash.

Form 3B, Recommendation 2

Keep question 2 as drafted. Eliminate question 3. Revise question 6 to read as follows.

6. Estimate your average monthly expenses. If some of your expenses are paid for by non-cash government assistance such as food stamps or housing subsidies, list only the cash that your household spends on the subsidized items.

Agreement with previous comment(s).

A previous commenter(s) said that asking about previous bankruptcy cases filed by a non-filing spouse is inappropriate. I agree with that comment. This could be corrected by changing Question 20 to read. "Has debtor 1 or debtor 2 filed for bankruptcy within the last 8 years?"

B. Order on Application for Fee Waiver.

Recommendation 1

When the fee waiver is denied without a hearing, the form should have a space for the reason(s) for denial of the fee waiver.

Comment 1

The order says that if the waiver is granted, the court may order the debtor to pay the fee in the future. There is no corresponding statement that if the waiver is denied and circumstances change the debtor can ask for a waiver at that time.

Recommendation 2

Add a sentence that says that the debtor can ask the court to reconsider the denial of the fee waiver if circumstances have changed or if the reason given by the court (see recommendation 1 above) did not or no longer applies.

II. Schedule I

Schedule I, comment 1

Throughout the form column 2 refers to "Debtor 2 or non-filing spouse". This is a change from the current form, which does not require the income of a non-filing spouse if the couple is separated.

Schedule I, Recommendation 1.

The new form should be revised so that it instructs the applicant not to include income of a spouse if the couple is separated and are not filing a joint petition.

Schedule I, comment 2

The form tells the debtor to combine the income from all jobs. This will tend to obscure how the debtor arrived at the numbers included in this section.

Schedule I, recommendation 2

Income from the primary employers for debtor 1 and debtor 2 or a non filing spouse residing with debtor 1 should be listed in detail. For other employers, the form should ask only for the net income after deductions. This strikes a balance between the benefit of having complete itemization and the cost of having to file longer forms. This would also make it easier to make corrections or amendments if the income or deductions from one job was incorrect or changes.

Since the debtor has to provide pay advices for the 60 days before the case was filed, the trustee will be able to compare the pay advices to the net income of the secondary job.

The instructions should tell the debtor that paystubs from all employers will need to be provided after the case is filed.

Schedule I, Recommendation 3

This recommendation follows from recommendation 2 for Form 3B, application for waiver of the filing fee.

In Part 2, insert the word "cash" between "Monthly" and "Income" in the heading and the first sentence.

In question 8f, insert the word "cash" after "Other" and before "government".

III. Schedule J

Schedule J, Comment

This only applies to Chapter 13 cases. While I do not think that the possible benefit of having two columns outweighs the extra work and confusion that will result from this innovation, this comment is made on the assumption that the form as adopted will include two columns. I believe that the intent of the form is that the correct way to list the expense for a secured debt where the trustee is paying the secured creditor is to put the amount as

zero. Thus, if the plan provides that the trustee will pay a creditor holding a claim secured by vehicle 1, then line 17a column B would be zero. However, this may not be clear to a *pro se* debtor. Since a Chapter 13 plan will typically provide for monthly payments in a specified amount to the holder of a claim secured by a car, the *pro se* debtor may enter that payment in column B.

Schedule J, Recommendation 1

The form should include instructions that if an expense will be paid by the Chapter 13 trustee, the amount in column B should be zero, even if the plan provides for a specified payment to the creditor.

Schedule J, Recommendation 2

This recommendation follows from recommendation 2 for Form 3B, application for waiver of the filing fee and recommendation 3 for Schedule I.

The instructions should include this statement: If some of your expenses are paid for by non-cash government assistance such as food stamps or housing subsidies, list only the cash that your household spends on the subsidized items.

IV. Schedules I and J, expected changes.

Comment. Both proposed forms eliminate the 10% threshold that exists on current forms I and J. See, Schedule I, question 13 and Schedule J question 24. Unless this is meant as a perjury trap, it is hard to see why the threshold has been removed. Since the United States has a free market economy, every debtor should say that an increase or decrease is expected. Energy prices are either going to go up or down. The weather will be different. Property taxes and insurance premiums will change. Etc.,etc., and so and so forth. Most *pro se* debtors however will check the box that says "No", except perhaps for those who are very literal.

If even a few trustees and/or judges take the position that checking "no" is incorrect because of considerations such as those mentioned above, then eventually almost every attorney will include boilerplate language that changes are expected because of ... the world that we live in. No useful information will be gained as a result, although it may be an indication of how many debtors, or their attorneys, are "glass half full" people as opposed to "glass half empty".

Recommendation.

Keep the current 10% threshold.