

Flipping Through The New Bankruptcy Forms

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For the first time in two decades, the official forms used in U.S. bankruptcy court are getting a comprehensive face-lift. The Forms Modernization Project aims to bring bankruptcy into the 21st century by making virtually all forms — from the petitions used by debtors to initiate bankruptcy cases, to creditors' proofs of claim — easier to read and comprehend, with the goal of eliciting more complete and accurate responses.

Graphically, the modernized forms have a different look and feel. The old forms were designed to cram as much information as possible into each page, with instructions often relegated inconspicuously to the end of the form. The new forms are longer, due partially to their more visually appealing layout. With instructions interspersed throughout, the new forms are not only easier on the eyes, but also easier to understand. Wherever possible, plain English in a conversational tone replaces "legalese" to minimize the potential for confusion. Many of the questions are deliberately more open-ended and request additional detail beyond what the old versions required, further contributing to the increased length of the new forms.

Practitioners who have not recently updated their bankruptcy preparation software will be in for a rude awakening when they discover the sweeping scope of the changes. Failure to use these updated forms can have dire consequences for debtors. After issuing a warning to cure the deficiency, the bankruptcy court can dismiss the bankruptcy case of a debtor who uses the old forms, although it remains to be seen how strict bankruptcy courts will be about penalizing debtors for their counsel's lapse in this regard.

Perhaps the most striking departure from the old forms is that case-opening forms are now separated into a "100 series" of forms tailored for individual debtors and a "200 series" of forms tailored for corporate and other nonindividual debtors. Before, all debtors used the same forms in a one-size-fits-all approach that caused confusion as debtors — especially individual debtors filing without the aid of an attorney — struggled to complete questions not relevant to their situation. By using specialized petitions, schedules of assets and liabilities, and statements of financial affairs, the new forms eliminate superfluous questions and allow relevant areas of inquiry to be more thoroughly explored.

Old schedules A and B, which segregated debtors' real and personal property, have merged into a single schedule A/B, which encompasses all of a debtor's assets. The order of the asset categories depends on whether or not the debtor is an individual. For example, real property — which used to be prominently featured on schedule A — still takes prime billing on the new combined schedule A/B for individual debtors, but is relegated to an inconspicuous spot halfway through the version tailored for corporate debtors. Old schedules E and F have similarly fused into a new schedule E/F, although priority unsecured claims still precede general unsecured claims. Undoubtedly, a lot of page flipping will occur at Section 341 meetings, particularly by seasoned practitioners as they familiarize themselves with the newly rearranged schedules.

The updated statement of financial affairs for corporate debtors increasingly reflects the modern business environment. For example, a new section asks whether the debtor has collected and retained personally identifiable information from its customers and, if so, whether it has a privacy policy in place with respect to that information. Given that customer data can be not only a potentially valuable asset in a Section 363 sale context but also a source of potentially significant liability in the event of a data breach, this new question shines a spotlight on an increasingly important issue.

Since financially strapped companies may be tempted to skimp on their data security, and general liability insurance coverage typically excludes liabilities of this nature, this question should provoke important discussions between debtors and their counsel, as well as close scrutiny from creditors committees and other parties in interest. The updated statement of financial affairs also includes a new section specifically targeting health care bankruptcies, to facilitate compliance with the requirements of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 relating to patient care and the protection of medical records.

The changes do not just affect debtors; creditors will notice changes as well. The retooled proof of claim form — formerly crammed into a single page — now sprawls over three more easily digested pages. The content is largely the same, with the exception of a new question for claims based on leases. Unlike most of the other new forms, the same proof of claim form can be used in cases involving both individual and corporate debtors.

However, three new specialized proof of claim attachments have been devised exclusively for the holders of claims secured by an individual debtor's principal residence: a proof of claim attachment, which requests information including a total debt calculation and loan payment history from the first date of default; a notice of mortgage payment change, which must be filed at least 21 days before any increase to the debtor's monthly mortgage payment during the plan's life span; and a notice of post-petition mortgage fees, expenses and charges, to be filed if the mortgagee seeks to recover amounts such as late charges, appraisal fees and attorneys' fees. These new attachments present potential pitfalls to residential mortgage lenders. For example, a lender who fails to file the requisite notice of a planned monthly payment hike may be out of luck, even if the debtor received notice of the change. Commercial real estate lenders, fortunately for them, are not required to utilize the new attachments.

The new forms went into effect on Dec. 1, 2015. Transition to the new forms may prove challenging in pending cases. For example, debtors with an imminent bar date may encounter a hodgepodge of old and new proofs of claim forms. Debtors making any significant amendments to their schedules or statements of financial affairs may need to provide additional information that would not have been required under the old versions. For bankruptcy practitioners accustomed to the old forms, the new forms may take some getting used to, but ultimately the new forms will benefit creditors, debtors and the attorneys advocating for them by promoting the fundamental bankruptcy principle of complete and accurate disclosure.

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