Defending Motions to Dismiss under §707(b)(2) and §707(b)(3)

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A. Dismissal or Conversion Generally

In October 2005, the most thorough revision of the Bankruptcy Code since its enactment, the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") went into effect. Among its provisions are the twin dismissal provisions codified in Sections 707(b)(2) and 707(b)(3) of the Bankruptcy Code. Broadly, these provisions authorize the court to order the dismissal of a Chapter 7 case for abuse of the bankruptcy process where there is reason to believe the debtor could pay his unsecured nonpriority creditors at least some portion of what they are due under a hypothetical Chapter 13 plan and where the debtor refuses to convert his case to a Chapter 13. *In re Reinecker*, 342 B.R. 304, 308 (Bankr. W.D. Mo. 2006).

Congressional intent in amending Section 707(b) in the BAPCPA is clear: "to identify those debtors who can afford to repay all or some of their debts and to steer them into Chapter 13." *In re Turner*, 384 B.R. 537, 542 (Bankr. S.D. Ind. 2008); *see also In re Guzman*, 345 B.R. 640, 641 (Bankr. E.D. Wisc. 2006) (quoting remarks to that effect made by the President at the BAPCPA signing ceremony); *In re Hill*, 328 B.R. 490, 494 (Bankr. S.D. Tex. 2005) ("Legislative history suggests that Congress enacted § 707(b) in an effort to deny Chapter 7 relief to the dishonest or non-needy debtor"); *and see, generally*, Susan Jensen, A LEGISLATIVE HISTORY OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, 79 Am.Bankr. L.J. 485 (2005). In pursuit of this end, Congress reduced the standard necessary to have a Chapter 7 case dismissed from that of "substantial abuse" to merely "abuse." 11 U.S.C. § 707(b)(1).

The central question when a Section 707(b) dismissal is sought is whether or not the debtor is guilty of "abuse," and therefore subject to having his case dismissed if he does not agree to convert it into a Chapter 13 proceeding. The existence of abuse is determined in one of two different ways: (1) through the application of a "blind" legislative formula called the means test that purports to determine a debtor's ability to repay his creditors, and gives rise to a presumption that a debtor who fails the means test is guilty of abuse, 11 U.S.C. § 707(b)(2); and (2) through the application of a facts and circumstances-type test intended to catch those who pass the means test but who are still gaming the system. 11 U.S.C. § 707(b)(3). Each of these provisions will be considered in turn.

B. Deadlines for Seeking Dismissal or Conversion

Before addressing the substantive issues of when a case is subject to dismissal under Section 707(b), a word about deadlines is appropriate. In permitting the trustee to

ask for the dismissal of a debtors case under Section 707(b), the BAPCPA and associated court rules also imposed three fairly strict deadlines governing such requests for relief.

By statute, a trustee is required to review the materials submitted by the debtor and, within 10 days of the first meeting of creditors, "file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b)," i.e., if the debtor's schedules show he might fail the means test. 11 U.S.C. § 704(b)(1)(A). The trustee is then afforded another 30 days to decide whether this presumption of abuse actually applies, and to file either a motion to dismiss or a "statement setting forth the reasons the United States trustee ... does not consider such a motion to be appropriate." 11 U.S.C. § 704(b)(2). Finally, all other Section 707(b) motions must be filed within 60 days of the "first date set for the meeting of creditors under § 341(a)," unless before that time the trustee files a motion to extend this deadline. Fed. R. Bankr. P. 1017(e)(1).

The effect of all of this is to impose two deadlines on trustees to seek dismissal under Section 707(b)(2) for presumed abuse (10 days to file the statement and 30 days after that to either file the Motion to Dismiss or explain why he will not do so), both of which must be met, *In re Draisey*, 395 B.R. 79, 82 (8th Cir. B.A.P. 2008); *In re Ansar*, 383 B.R. 344, 346-47 (Bankr. D. Minn. 2008), and a single 60-day deadline to file a motion to dismiss under Section 707(b)(3). *In re Littman*, 370 B.R. 820, 827 n.20 (Bankr. D. Idaho 2007); *In re Depellegrini*, 365 B.R. 830, 831 (Bankr. S.D. Ohio 2007). However, a trustee's failure to meet one deadline does not preclude the trustee from seeking relief governed by a different deadline. *See, e.g., Draisey*, 395 B.R. at 82-83; *In re Fennell*, 395 B.R. 905, 906-07 (Bankr. D. S.C. 2008); *In re Perrotta*, 390 B.R. 26, 28-32 (Bankr. D. N.H. 2008); *In re Byrne*, 376 B.R. 700, 704 (Bankr. W.D. Ark. 2007) (all holding that fact trustee did not file notice within 10 days of meeting of creditors precluded seeking dismissal under Section 707(b)(2), but did not preclude seeking dismissal under a timely-filed Section 707(b)(3) motion).

The operation of these deadlines raises a number of questions, the most important of which is whether compliance with the deadlines is jurisdictional. Put another way, may a trustee pursue a motion seeking dismissal pursuant to Section 707(b) if it has been brought after the applicable deadline? According to the Seventh Court of Appeals, the answer is "yes." The case involved a Section 707(b)(2) motion, and in its reply brief to the circuit court the debtor argued (for the first time) that the trustee's motion to dismiss missed the initial 30-day deadline, that this deadline is jurisdictional and therefore it could not have been granted. *In re Ross-Tousey*, 2008 WL 4234070 at * 4 (7th Cir. Dec. 17, 2008). In rejecting this argument, the Court distinguished a recent U.S. Supreme Court decision that seemed to suggest all deadlines incorporated into a federal statute are jurisdictional, and found the real reason for imposing a deadline to file a Section 707(b)(2) motion was to protect "cash-strapped debtors from needlessly protracted or

delayed bankruptcy proceedings." *Ross-Tousey* at * 4-5 (*distinguishing Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360 (2007)). Because the deadlines are imposed for the benefit of the debtor the court found they are not jurisdictional, and the debtor therefore waived the right to complain about the trustee's tardy filings by not raising the issue in the district court. *Id.* at * 5.

Although these deadlines may not necessarily be jurisdictional, they still exist, and so the question becomes how they will be enforced. Courts have a particular problem calculating the date of the 10 and 30-day deadlines governing Section 707(b)(2) motions, a difficulty caused by the use of the term "first meeting of creditors." Some courts take a strict textual view, and hold that if the Section 341 meeting is postponed, the trustee's notice deadline is nevertheless calculated from the date it began, which is the "first" meeting of creditors. *In re Close*, 384 B.R. 856, 866-871 (D. Kan. 2008); *In re Clark*, 393 B.R. 578, 582-83 (Bankr. E.D. Tenn. 2008). Other courts note that under prior bankruptcy law the phrase "first meeting of creditors" had a technical meaning, distinct from other kinds of meetings that might occur (such as a "special meeting" or the "final meeting"), and because the first meeting did not necessarily conclude after a single session, the trustee's deadlines run from the conclusion of the 341 meeting, regardless of how many times it is continued. *In re Molitor*, 395 B.R. 197, 201-04 (Bankr. S.D. Ga. 2008); *In re Cadwallder*, 2007 WL 1864154 at * 11-13 (Bankr. S.D. Tex. 2007). In defense of this position, courts note that a continuance of 341 meetings is usually attributable to the fact the debtor did not provide the trustee with necessary paperwork, and therefore it is unfair to allow the debtor to take advantage of his own failure to act, *In re Granger*, 2008 WL 5157843 at * 3 (Bankr. D. N.M. Sept. 22, 2008), and because calculating the deadline from the first meeting allows debtors to manipulate the proceeding to cause the deadline to pass before the trustee has the information necessary to file a sufficiently detailed statement about presumed abuse. *Molitor*, 395 B.R. at 204.[1]

Finally (and reasonably enough), courts also require a measure of specificity in the notice and motions to dismiss. For example, the 10-day notice that is a prerequisite to a Section 707(b)(2) motion to dismiss must be unequivocal; trustees are not allowed to file "placeholder" notices saying he "cannot make a determination as to whether the debtor's

[1] It will be interesting to see whether and how courts mesh these considerations with *Ross-Toucey*'s conclusion that the purpose of these deadlines is to protect debtors from protracted determinations of whether they ought to be in Chapter 7 at all. The author believes that if the deadlines are not jurisdictional because they are intended to protect debtors from protracted proceedings they cannot afford (the threat of which will drive up the costs of representation across the board), a *per se* rule calculating deadlines from the last 341 meeting is contrary to this goal, but the obvious solution (to look at the facts and circumstances and assign blame for the delay to the debtor or the trustee) means the deadlines will vary from case to case, a resolution that is inadequate because it provides no certainty.

case is presumed abusive." *In re Robertson*, 370 B.R. 804, 907-11 (Bankr. D. Minn. 2007) (trustee claimed to be unable to determine whether debtors were guilty of substantial abuse because "debtor has not filed or transmitted all of the required means testing documents"). Similarly, it is not sufficient to merely state that a motion is brought pursuant to Section 707(b), without also explaining why dismissal is appropriate, and a motion to dismiss that fails to make such an argument will be found to be untimely, even if the document was filed within the time allowed. *See, e.g., Ansar*, 383 B.R. at 349-50 (motion to dismiss, which mentioned Section 707(b)(3) only in the caption and the prayer, and which cited no authority addressing this section, did not properly present the matter to the court, even though it had been filed within the 60 days allowed); *accord, Robertson*, 370 B.R. at 811 n. 11.

C. Dismissal or Conversion Based on the Presumption of Abuse Created by Section 707(b)(2)

1. Means Test Generally

Most commonly, the trustee will seek to dismiss a debtor's case by asserting that the application of the means test shows the debtor should be presumed to be abusing the bankruptcy system. "The 'means test' consists of a statutory formula for determining whether the debtor's income in excess of his expenses is sufficient to permit him to pay a specified amount or percentage of his nonpriority unsecured debts during the five year period in a Chapter 13 bankruptcy proceeding." *In re Oliver*, 350 B.R. 294, 299 (Bankr. W.D. Tex. 2006). This is determined through the application of a formula that purports to determine the amount of hypothetical disposable income available to a Chapter 7 debtor, *In re Hice*, 376 B.R. 771, 773 (Bankr. D.S.C. 2007), which in turn allows the Court to determine whether the debtor should be presumed to be abusing the bankruptcy system. *In re Ragle*, 395 B.R. 387, 390 (E.D. Ky. 2008).

2. Presumption of Abuse Generally

The broad outlines of how the means test required by Section 707(b)(2) of the Bankruptcy Code works are reasonably clear. Generally, it requires above-median income debtors, 11 U.S.C. § 707(b)(7), with primarily consumer debts, 11 U.S.C. § 707(b)(2)(C),[2] to subtract his expenses from his current monthly income, and then multiply that number by 60. 11 U.S.C. § 707(b)(2)(A)(I). If the resulting number is

[2] The characterization of the debtor's debts as "consumer" debts is rarely disputed, but requires more than 50% of the value of the debtor's debts to be consumer in nature, not 50% of the number of debts. *In re Hlavin*, 394 B.R. 441, 447-48 (S.D. Ohio 2008); *In re Beacher*, 358 B.R. 917, 920-21 (Bankr. S.D. Tex. 2007).

greater either: (1a) 25% of the debtor's unsecured, nonpriority claims; or (1b) $6,000; or (2) $10,000, the court is to presume the debtor is abusing the bankruptcy system and should generally dismiss the debtor's case. 11 U.S.C. § 707(b)(2)(A)(I); *In re Kogler*, 368 B.R. 785, 786 (Bankr. W.D. Wisc. 2007).

There are only two exceptions to this general rule that a presumption of abuse requires the case to be dismissed: (1) it does not apply if the debtor is a disabled veteran whose debts were incurred primary when the debtor was on duty, 11 U.S.C. § 707(b)(2)(D)[3]; or (2) if the debtor can convince the court of the existence of "special circumstances." 11 U.S.C. § 707(b)(2)(B)(I). However, because the presumption of abuse is broadly determined by subtracting expenses from income and then looking at the result, any change that either increases expenses or decreases monthly income can effectively show the debtor should not be presumed to be abusing the system. Although all considerations which affect the determination of allowable expenses or currently monthly income are outside the scope of this paper, a few common situations affecting these numbers will be addressed below, as well as the proof of special circumstances.

3. Increasing the Amount of the Debtor's Expenses or Decreasing his Current Monthly Income

a. Generally

The first possible way to change the calculation used to determine whether there is a presumption of abuse is to increase the amount of the expenses the debtor claims, which is the first component of the means test calculation. The expenses the debtor is allowed to deduct from the income that he previously earned almost always include the amounts specified in the IRS's National and Local Standards (an IRS publication purporting to determine the amount of money it costs families of various sizes to live in different parts of the country), 11 U.S.C. § 707(b)(2)(B)(ii)(I), as well as the average amount the debtor will pay out on secured debts and priority claims that are contractually scheduled as due over the next 60 months. 11 U.S.C. § 707(b)(2)(A)(iii), (iv).[4] Depending on the debtor's

[3] The author has found no reported case involving the operation of this exception. This is possibly because it is hard to imagine how a solider on active duty could incur the kinds of consumer debts that typically lead to bankruptcy.

[4] There are other specific provisions falling under the heading of "Congressional gimmies and goodies," provisions that will not affect the average debtor. *See, e.g.*, 11 U.S.C. §§ 707(b)(2)(A)(ii)(I) (amounts spent by debtor to "maintain the safety of the debtor ... from family violence"), Section 707(b)(2)(A)(iii)(II) (the "continuation" of actual expenses incurred in caring for an elderly, ill or disabled member of the debtor's immediate family who is unable to pay for their own care); Section 707(b)(2)(A)(iii)(IV) (up to $1,500 per year per child for private school tuition). For purposes of this article, I assume debtors usually cannot deduct these expenses and,

specific circumstances, the debtor also may also ask for an additional allowance in excess of certain of these expenses, on proof that they are reasonably incurred and necessary. 11 U.S.C. § 707(b)(2)(A)(ii); *see also In re Johnson*, 346 B.R. 256, 265 (Bankr. S.D. Ga. 2006) (characterizing the IRS National Standards as "both a floor and a ceiling" on expenses, subject only to the possibility of upward adjustment as set forth therein).

b. Treatment of Debts "Scheduled as Contractually Due"

One area that allows for considerable variation in the debtor's expenses is whether the court permits the debtor to deduct payments due on collateral the debtor intends to surrender. This is the case because if the debtor intends to surrender the collateral, he is being allowed a deduction from the calculation his income for an "expense" he will never incur. Of course, debtors take the position that the phrase "scheduled as contractually due" means exactly what it says, and since the statute does not require the debt actually be *paid* but rather merely that it be *due* means any debt owed may be considered in performing the means test. Not surprisingly, trustees and creditors take the opposite view, arguing that because the purpose of the means test is to give the court an accurate picture of the debtor's ability to pay his creditors, subtracting payments that will not be made from the debtor's income is misleading and improper. Not unusually, the BAPCPA provides little guidance, with courts noting that the word "scheduled" can mean different things in a bankruptcy context, and Section b(2) does not make clear which meaning is intended. *In re Ray*, 362 B.R. 680, 684 (Bankr. D. S.C. 2007).

The courts that have been presented with this question have split into three distinct camps. A solid majority of courts find for debtors, and typically do so by applying the "plain meaning" test to find the statute means what it says, and the fact the debtor lacks the intent to actually pay the secured debt does not change the fact it is "scheduled as contractually due"; the fact there is no "actual payment" requirement appears to strongly affect this analysis. *See, e.g., In re Lynch*, 395 B.R. 346, 349-50 (E.D. N.C. 2008); *In re Willette*, 395 B.R. 308, 325-26 (Bankr. D. Vt. 2008); *In re Parada*, 391 B.R. 492, 498 (Bankr. S.D. Fla. 2008); *In re Quigley*, 391 B.R. 294, 300-02 (Bankr. N.D. W.Va. 2008); *In re Anderson*, 383 B.R. 699, 707 (Bankr. S.D. Ohio 2008); *In re Graham*, 363 B.R. 844, 849 (Bankr. S.D. Ohio 2007); *In re Hartwick*, 359 B.R. 16, 20-21 (Bankr. D. N.H. 2007); *In re Castillo*, 2008 WL 454467 at * 3-5 (Bankr. S.D. Fla. Oct. 10, 2008). This approach is sometimes called the "snapshot" approach; the debtor takes a snapshot of debts due on the date the petition is filed, and that picture determines which debts are "scheduled as contractually due," *Lynch*, 395 B.R. at 348-49; *In re Longo*, 364 B.R. 161, 165 (Bankr. D. Conn. 2007), a term understood to mean something like "a debt the debtor has contractually obligated himself to pay."

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if they do, they usually are not subject to being meaningfully increased post-petition.

A minority of courts have reached a contrary conclusion, but in so doing they also claim to focus on the supposed purpose of the means test, which they generally identify as determining the debtor's true ability to pay. According to these courts, this purpose would be frustrated if the debtor is allowed to subtract payments he will not make because it reduces his current monthly income to account for "phantom" expenses. *In re Burden*, 380 B.R. 194, 198-203 (Bankr. W.D. Mo. 2007); *Ray*, 362 B.R. at 685; *In re Harris*, 353 B.R. 304, 307-09 (Bankr. E.D. Okla. 2006); *In re Skaggs*, 349 B.R. 594, 598-99 (Bankr. E.D. Mo. 2006). Under this line of cases, the courts believe *they* are interpreting the plain language of the statute correctly by considering the context in which the phrase "scheduled as contractually due" is used, *Ray*, 362 B.R. at 685, and the minority courts understand this phrase to mean something like "scheduled in the debtor's bankruptcy to be repaid by the debtor."

Still others split the baby, holding it is proper to consider the fact the debtor intends to surrender the collateral securing a debt in applying the means test, but if the property has not actually been surrendered as of the date of the motion to dismiss (and therefore the payments are still due under the contract) the deduction for those payments would be allowed. *In re Nockerts*, 357 B.R. 497, 504-05 (Bankr. E.D. Wisc. 2006); *In re Singletary*, 354 B.R. 455, 467-70, 473 (Bankr. S.D. Tex. 2006). In essence, this third line of cases holds the determination of whether a given debt is "scheduled as contractually due" until at least the hearing on the motion to dismiss, recognizing the debtor's post-petition acts can affect the answer, *Ray*, 362 B.R. at 684, and therefore conceptually lean towards the line of cases that do not allow the deduction of payments on surrendered property when calculating a debtor's current monthly income, if only because such a deduction could be denied by the court at least some of the time.[5] However, these cases suffer perhaps the most serious handicap; while they represent a logical attempt to understand the meaning of a confusing portion of the means test and appear to have reached a reasonable conclusion, their approach is unsupported by the language of the statute. *In re Kelvie*, 372 B.R. 56, 62 n. 13 (Bankr. D. Idaho 2007) ("The means test in chapter 7 calls for a snapshot, not a movie. Tying the analysis to events occurring after bankruptcy but before the date the UST's motion is filed ... is inconsistent with the language and the overall structure of the means test); *see also Kogler*, 368 B.R. at 791.

[5] Although it has been pointed out this could lead to gamesmanship, with the debtor reaffirming a debt before the motion to dismiss is heard (thereby leaving the debt "on the books" and allowing the deduction of the payments when calculating current monthly income), but later rescinding the reaffirmation agreement. *In re Haar*, 360 B.R. 759, 767 (Bankr. N.D. Ohio 2007).

c. Reasonably and Necessary Expenses

Another matter that can affect the debtor's expense calculations are the provisions of Section 707(b)(2)(A)(ii) which specify the debtor is allowed to make deductions for certain expenses (such as health and disability insurance) if they are "reasonably necessary," and Form B22C lists some other categories of such expenses, such as taxes, life insurance, court-ordered payments, education for children with handicaps or disabilities, etc. *In re Ransom*, 380 B.R. 799, 803 n. 9 (9th Cir. B.A.P. 2007). Certain additional deductions above the norm (such as for food and clothing) may also be allowed if the court deems that they are "reasonable and necessary." Although the standard used to make this determination are not even internally consistent within sections of the BAPCPA, *In re Meek*, 370 B.R. 294, 309 (Bankr. D. Idaho 2007) ("The modifiers are not consistently used, though some are redundantly used. For example, these expenses must be ... 'reasonable,' 'necessary,' or 'reasonably necessary.'"), they generally allow courts to determine whether a particular expense claimed by a debtor is reasonably necessary for some reason. *In re Austin*, 372 B.R. 668, 681 n.7 (Bankr. D. Vt. 2007). The degree of discretion vested in the courts is subject to some dispute, *see, e.g., In re Ceasar*, 364 B.R. 257, 261 (Bankr. W.D. La. 2007) (citing and discussing cases), but it is not plenary in a way that allows a court to "gut" the means test by finding expenses it would not otherwise allow to be permissibly deducted from the debtor's current monthly income. *In re Styles*, 2008 WL 5054599 at * 2 (Bankr. W.D. Va. Nov. 21, 2008).

4. Proof of Special Circumstances

a. Generally

Alternatively, a debtor can also show that his case should not be dismissed even though the presumption of abuse arises because of the existence of so-called "special circumstances," which justify allowing the debtor to pursue a Chapter 7 bankruptcy because his special situation shows that even though abuse may be presumed no abuse is actually occurring. A special circumstances claim turns on the question of what makes a circumstances sufficiently "special" to justify a departure from the mechanistic means test created by Section b(2), a fact-specific determination. *In re Templeton*, 365 B.R. 213, 216 (Bankr. W.D. Okla. 2007) (the fact an outcome is "unfair" does not make it "special"). Rather, circumstances are "special" when they are "uncommon, unusual, exceptional, distinct [or] peculiar ..." *In re Martin*, 2007 WL 2043720 at * 3 (Bankr. C.D. Ill. July 16, 2007). Congress, ever helpful, has provided two examples of what it considered sufficiently "special": "a serious medical condition" or "a call or order to active duty in the Armed Forces ..." 11 U.S.C. § 707(b)(2)(B). Outside of these two examples, what authority there is on the issue is (once again) mixed.

b. Examples of Special Circumstances

In deciding whether special circumstances exist, some courts look at the examples of special circumstances enumerated in the statute — the occurrence of a serious medical condition or a call to active duty with the military — and find special circumstances involve circumstances beyond the debtor's reasonable control, *In re Haman*, 366 B.R. 307, 313 (Bankr. D. Del. 2007), and place the burden squarely on the debtor to show there are no reasonable alternatives available to them. *Compare In re Lenton*, 358 B.R. 651, 661-62 (Bankr. E.D. Pa. 2006) (obligation to repay 401(k) loan was a special circumstance; only means debtor had to avoid withdrawal of loan repayment from his paycheck was to repay the loan in full, which he could not do, or quit his job, which was financially irresponsible and would not benefit his creditors) *with In re Tranmer*, 355 B.R. 234, 250-51 (Bankr. D. Mont. 2006) (desire to keep their current jobs and not to move from their home did not make extra commuting cost a special circumstance; decision was voluntary and debtors made no showing that other alternatives like car-pooling were unavailable). Evidence that a debt cannot be deferred or discharged through bankruptcy (most commonly student loans) may constitute a special circumstance, even though the debtors did control whether or not they took student loans in the first place, *Templeton*, 365 B.R. at 216-17; *accord, In re Delbecq*, 368 B.R. 754, 756-60 (Bankr. S.D. Ind. 2007); *In re Haman*, 366 B.R. 307, 314-18 (Bankr. D. Del. 2007), although this is not necessarily or automatically the case. *In re Champagne*, 389 B.R. 191, 200 (Bankr. D. Kan. 2008) (fact students loans cannot be discharged or deferred does not *per se* mean the debtor is the victim of a special circumstance). Something which shows the debtor is not trying to negatively affect the interests of his creditors also does not hurt. *See, e.g., In re Cribbs*, 387 B.R. 324, 330-31 (Bankr. S.D. Ga. 2008) (loan from retirement account was given to company which debtors believed would be able to settled debts without bankruptcy, which it proved unable to do).

c. Increase in Expenses or Decrease in Income

Debtors commonly seek to argue that either a decrease in their income or an increase in their expenses that is not adequately or accurately accounted for by the means test qualifies as special circumstances, with mixed results.

Beginning with reductions in income, most courts are at least theoretically willing to consider whether a reduction in the debtor's income occurring after the six months immediately prior to filing constitutes a special circumstance, although whether such a claim is successful is a different matter. Most commonly, debtors argue that their income in the six months before they filed (i.e., the income used to calculate the debtor's current monthly income for purposes of determining whether the presumption of abuse arises) is

unnaturally high, and courts are willing to entertain such arguments, *In re Tamez*, 2007 WL 2329805 at * 5 (Bankr. W.D. Tex. Aug. 13, 2007) (finding change in debtor's job to be a special circumstance, even though primary effect of the changes was to decrease the debtor's income), at least where the reduction has occurred. *See, e.g., In re Perkins*, 393 B.R. 770, 773-74 (Bankr. M.D. Fla. 2008) (deferring Section 707(b)(2) motion to dismiss until after debtor stops receiving $8,000 per month in alimony payments; cessation of payments might constitute a special circumstance); *In re Schley*, 2008 WL 3895562 at * 3 n. 2 (Bankr. E.D. Wisc. Aug. 22, 2008) (abstractly recognizing that periodic income coupled with increase in expenses while income is low might constitute a special circumstance).[6] However, it is clear that any decrease in the debtor's income is not *ipso facto* a "special circumstance" justifying relief from Section 707(b)(2), especially if the decrease is attributable to common events or if the decrease is income that was never guaranteed to the debtor in the first place. *See, e.g., In re Parulan*, 387 B.R. 168, 172-73 (Bankr. E.D. Va. 2008) (reduction in overtime). Special circumstances affecting the debtor's income can also arise in other kinds of cases, such as where the debtor is forced into retirement for reasons outside of the debtor's control. *See, e.g., In re Heath*, 371 B.R. 806, 809-12 (Bankr. E.D. Mich. 2007) (case filed as Chapter 13 but converted to Chapter 7 when debtor was forced into early retirement for medical reasons and had her income cut in half; court found existence of special circumstances).

On the other side of the coin, courts are also willing to consider the argument that some unique characteristic of the debtor's expenses is a special circumstance that justifies refusing to dismiss the case of a debtor who otherwise fails the means test. Usually, the debtor argues that he has been forced to bear increased expenses not reflected in the means test, with mixed results. *Compare In re Martin*, 371 B.R. 347, 354-55 (Bankr. C.D. Ill. 2007) (increase in expenses attributable to birth of child post-petition qualified as a special circumstance) *and In re Batzkiel*, 349 B.R. 581, 586-87 (Bankr. N.D. Iowa 2006) (finding fact debtors had to commute long distance through area with many deer constituted a special circumstance justifying allowance of higher gasoline and insurance expenses) *with In re Brandon*, 2008 WL 5235354 at * 2 (Bankr. C.D. Ill. Dec. 16, 2008) (increase in gas prices is insufficiently extraordinary to constitute a special circumstance). Other debtors try to argue they are subject to certain unique circumstances due to their situation that merit special consideration, whether or not they result in a post-petition increase in expenses. *See, e.g., In re Shinkle*, 382 B.R. 85, 89 (Bankr. E.D. Ky. 2008)

[6] A caution: although a similar calculation is performed in deciding whether to approve a proposed Chapter 13 plan, there is authority that the fact that only expenses are determined with reference to Section 707(b)(2) means that a reduction in income cannot be considered, even though it may properly be considered in determining the existence of special circumstances in a Chapter 7 case. *In re Riding*, 377 B.R. 239, 241 n. 3 (Bankr. W.D. Mo. 2007) (*citing* 11 U.S.C. § 1325(b)(3)).

(rejecting the debtors' claim that they should be entitled to a higher than usual housing allowance because one of the debtor's government job required her to live in a certain county).

d. Necessity for Debtor to Maintain Two Households

Finally, some debtors go so far as to argue that their circumstances are so unique that they should be permitted to bear to costs of maintaining two separate households, at much increased expense. Courts facing such an argument have applied a somewhat flexible approach, one grounded in the facts of the case. For example, where the evidence showed the debtor was unable to find a job where he lived and took a job in a different state, this was found to be a special circumstance justifying allowing the debtor to claim the expenses of operating two households. *Graham*, 363 B.R. at 849-51. Legal separation of parties to a joint bankruptcy case is a special circumstance that justifies the additional expenses incurred in keeping two households. *In re Crego*, 387 B.R. 225, 228-29 (E.D. Wisc. 2008); *In re Armstrong*, 2007 WL 1544591 at * 3-4 (Bankr. N.D. Ohio May 24, 2007). Finally, bankruptcy courts have proved unwilling to use the means test as a vehicle for breaking up families, finding that evidence showing the debtor had a good job in another state justified maintenance of two separate households, where moving to his state of employment would cause the stay-at-home spouse to lose custody of children whose residence was fixed in another state. *Graham*, 363 B.R. at 847. In any case, the question of what can constitute a special circumstance is necessarily so fact-specific it is impossible to enumerate all of the different rulings on this point.

D. Operation and Effect of the Test for Abuse Created by Section 707(b)(3)

Finally, even if the debtor is not presumed to be abusing the bankruptcy system under Section 707(b)(2), his Chapter 7 case may still be dismissed is the court finds it is abusive under Section 707(b)(3). *In re Pak*, 343 B.R. 239, 341 (Bankr. N.D. Cal. 2006). "[T]his provision allows a court to conduct a subjective, case-by-case, analysis of a debtor's financial situation." *In re Felske*, 385 B.R. 649, 654 (Bankr. N.D. Ohio 2008). Because a motion to dismiss made under Section b(3) is relatively less common than a motion made under Section b(2) (or, when they are made, they are not decided because the court determines that there is an unrebutted presumption of abuse under Section b(2)), there are relatively fewer cases discussing the operation of Section b(3) on its merits.

1. The Structure of Section 707(b)(3)

As is the case under Section b(2), the central question to be answer in a motion to dismiss brought under Section b(3) is whether the debtor is guilty of abuse of the bankruptcy system, but unlike a motion brought under Section b(2), a Section b(3)

motion does not enjoy any presumption of abuse. 11 U.S.C. § 707(b)(3). Although the term "abuse" is nowhere defined in the Bankruptcy Code, courts appear to give the word its common meaning, *see, e.g., In re James*, 345 B.R. 664, 667 (Bankr. N.D. Iowa 2006) ("I consider an abuse to be a misuse of the bankruptcy provisions, to use them wrongly or improperly"), and find abuse is occurring "when a debtor is attempting to use the provisions of the Code to get a 'head start' rather than a 'fresh start.'" *In re Lipford*, 397 B.R. 320, 326 (Bankr. M.D. N.C. 2008).

Under Section b(3), there are two statutory grounds that support a finding of abuse: (1) if the debtor has filed his petition in "bad faith," 11 U.S.C. § 707(b)(3)(A); or (2) when, under the totality of the circumstances, the court believes the "debtor's financial situation demonstrates abuse." 11 U.S.C. § 707(b)(3)(B). In either case, it is the trustee's burden to prove that dismissal is appropriate, by a preponderance of the evidence. *In re Seeburger*, 392 B.R. 735, 740 (Bankr. N.D. Ohio 2008) (Section 707(b)(3)(A)); *In re Walker*, 381 B.R. 620, 623 (Bankr. M.D. Pa. 2008) (Section 707(b)(3)(B)); *In re Beckerman*, 381 B.R. 841, 844 (Bankr. E.D. Mich. 2008) (Section 707(b)(3)(B)); *In re Burto*, 379 B.R. 732, 735 (Bankr. N.D. Ohio 2007) (Section 707(b)(3)(A)).

2. Dismissal for a Bad Faith Filing

The first basis for a determination that a debtor's petition should be dismissed under Section b(3) is if the court finds it was filed in "bad faith." 11 U.S.C. § 707(b)(3)(A).[7] Unfortunately (or, given the state of the BAPCPA, perhaps fortunately), the phrase "bad faith" is not defined in the Bankruptcy Code, and so courts have had to develop their own tests to determine if the circumstances show the existence of bad faith.

Most commonly, courts take the view that Section 707(b)(3) represents a codification of pre-BAPCPA "substantial abuse" cases, *In re Violanti*, 2008 WL 5211006 at * 2 (Bankr. N.D. Ohio Nov. 4, 2008); *Seeburger*, 392 B.R. at 739-40, albeit one using a lower "abuse" standard. *In re Gonzalez*, 378 B.R. 168, 172-73 (Bankr. N.D. Ohio 2007). Significantly, the abuse justifying dismissal of the debtor's case is abuse of the bankruptcy process as a whole, not the debtor's abuse of an individual creditor. *In re Gonyer*, 383 B.R. 316, 320-21 (Bankr. N.D. Ohio 2007) (debtor's action towards individual creditor may be dealt with under provisions of Bankruptcy Code allowing court to deny debtor discharge of certain debts, and therefore these actions should not be

[7] For some reason, almost half of the cases citing Section 707(b)(3)(A) (25 of 51, as of January 5, 2009) were issued by courts sitting in the Northern District of Ohio. One wonders why this part of the state of Ohio appears to be home to such a disproportionate number of debtors lacking in good faith.

given too much weight in deciding whether a bad faith dismissal is appropriate, except where the acts are particularly egregious).

In deciding whether a debtor is acting in bad faith, some courts analogize to similar tests used to determine whether filings under other chapters of the Bankruptcy Code are made in bad faith, on the grounds that regardless of the chapter involved the question of whether the debtor has acted in bad faith involves essentially the same determination, i.e., whether creditors will be unjustly deprived of their rights and whether the integrity of the bankruptcy system will be weakened. *See, e.g., In re Mitchell*, 357 B.R. 142, 153-54 (Bankr. C.D. Cal. 2006). This determination generally requires the court to evaluate all relevant facts and circumstances and decide whether the debtor's intention in filing for bankruptcy is inconsistent with the purpose of the Code. *Mitchell*, 357 B.R. at 154.

Because the court is supposed to consider all relevant facts and circumstances, the court in *Mitchell* enumerated a long list of factors that speak to whether a filing has been made in bad faith, including:

1. the debtor's history of filings and dismissals;
2. whether the debtor has misrepresented facts in their petition;
3. whether the debtor has unfairly manipulated the Code or otherwise acted inequitably;
4. whether the debtor actually needs bankruptcy protection;
5. whether the debtor's invocation of the automatic stay was for improper purposes, such as defeating state court litigation;
6. the debtor's actual ability to fund a Chapter 13 plan from his income;
7. whether the debtor's petition was occasioned by illness, disability, loss of employment or some other unexpected calamity;
8. the extent to which the debtor intentionally obtained cash or consumer goods in excess of his ability to repay;
9. the excessiveness of the debtor's proposed budget;
10. the presence of any eve-of-bankruptcy purchases; and
11. whether other egregious behavior is present.

Id. at 155 (citing cases).

Other courts consider similar lists of factors, as well as others. *See, e.g., Parada*, 391 B.R. at 499 (evidence did not show bad faith because it showed debtors did not make eve-of-bankruptcy purchases, file incomplete or false schedules or fail to cooperate with the trustee). Significantly, the author has been unable to find any court imposing a scienter requirement before bad faith may be found, i.e., it does not have to be shown that

the debtor acted with malice or an intent to defraud his creditors. *Mitchell*, 357 B.R. at 155.

As this lengthy list of factors suggests, determination of whether a debtor has filed in bad faith is necessarily fact driven and is perhaps best analyzed with reference to the old Texas aphorism that "pigs get fat and hogs get slaughtered." For example, evidence showing the debtor earned only $11,000 in income in the three years before filing for bankruptcy, but nevertheless had incurred debts for such "necessaries" as lingerie, beauty treatments and "pet pampering," never offered any convincing explanation as to why she could not get a job as a pilot (her profession), failed to disclose significant deposits on her schedules and lied to at least one creditor about her income all supported a finding of bad faith. *Mitchell*, 357 B.R. at 155-57. In another case, the court affirmed the bankruptcy court's determination of bad faith by noting the debtor was a doctor who earned almost $200,000 per year, her husband (also a doctor) earned about the same, she had failed to appear for creditor meetings, failed to produce necessary documents, had transferred jewelry to family members just before filing and did not give straightforward answers to Squestions about her expenses. *In re Victoria*, 389 B.R. 250, 257 (Bankr. M.D. Ala. 2008). Conversely, the fact the debts were incurred voluntarily and even foolishly does not necessarily show bad faith, *In re Baum*, 386 B.R. 649, 652-53 (Bankr. N.D. Ohio 2008) (debtor incurred debts in multi-month "spree" of internet gambling), nor does the fact the debtors repeatedly amend their schedules, so long as they have a good reason for doing so. *Seeburger*, 392 B.R. at 740-41 (need for amendments was caused by changing amounts of overtime available to employed debtor). All these factual considerations make the result of a Section 707(b)(3)(A) dismissal motion among the hardest to categorize or predict.

3. Totality of the Circumstances

The second basis for dismiss a suit under Section b(3) is if, "under the totality of the circumstances ... of the debtor's financial situation," the court believes the debtor is abusing the system. 11 U.S.C. § 707(b)(3)(B). This section is a "catch-all" provision, intended to allow courts to dismiss a Chapter 7 case any time it will result in bankruptcy abuse that Congress has not already provided for. However, it is important to note that the totality of the circumstances test itself predates the BAPCPA, and so (to the extent it has not been modified or overruled) pre-BAPCPA law on this issue may be relevant. *Walker*, 381 B.R. at 625; *In re O'Brien*, 373 B.R. 503, 506 (Bankr. N.D. Ohio 2007); *Nockerts*, 357 B.R. at 505.

a. Consideration of the Debtor's Ability to Pay

The primary issue that has arisen in cases involving dismissals under Section b(3)(B) is whether the court may consider the debtor's income in deciding whether the totality of the circumstances suggest abuse. Some courts hold that because Section b(2) represents the mechanism for determining whether a debtor has an ability to pay, the totality of the circumstances test in Section 707(b)(3)(B) necessarily requires the court to consider factors other than the debtor's ability to pay; to hold otherwise would be to fail to give the appropriate weight to the means test codified in Section b(2), and could result in a debtor passing the means test but being dismissed for abuse based on a consideration of nothing more than his perceived ability to pay. *See, e.g., Nockerts*, 357 B.R. at 505-07. Other courts disagree, and note that when considering the "totality" of the debtor's financial situation, the debtor's ability to pay is an important consideration, albeit only one of many. *See, e.g., In re Tucker,* 389 B.R. 535, 538 (Bankr. N.D. Ohio 2008); *Felske*, 385 B.R. at 654; *In re Paret*, 347 B.R. 12, 15-17 (Bankr. D. Del. 2006). However, the abuse requirement still means the trustee seeking a Section 707(b)(3)(B) dismissal must show something more than just that the debtor has some ability to pay. *Cribbs*, 387 B.R. at 334 (basing decision on pre-BAPCPA authority).

b. Consideration of Other Circumstances as Indicative of Abuse

In addition to the debtor's income and ability to pay, courts have proven themselves willing to consider almost any other circumstances under the sun that might show a debtor is trying to get a "head start" rather than a "fresh start," and therefore that the totality of the circumstances are indicative of abuse. As is always the case when courts are asked to consider a broad range of disparate circumstances, they are quick to enumerate a list of relevant factors. One of the first courts to consider the issue came up with a five-factor list to be considered in deciding whether to grant a Section 707(b)(3) including:

1. the stability of the debtor's source of income;
2. whether the debtor is eligible for Chapter 13;
3. whether there are other remedies (such as under state law) which the debtor may use to alleviate his financial problems;
4. whether the debtor can obtain any meaningful relief through private negotiations with his creditors; and
5. whether the debtor can significantly reduce his expenses without depriving him of necessary food, shelter and clothing.

Pak, 343 B.R. at 244.

As time passed, the lists got longer and more detailed, adding to and expanding on the factors considered. *See, e.g., Beckerman*, 381 B.R. at 845 (six-factor list); *In re Walker*, 383 B.R. 830, 837 (Bankr. N.D. Ga. 2008) (eight-factor list); *Walker*, 381 B.R. at 625 (11-factor list). How helpful these checklists are is a question for the practitioner, and will probably turn on whether a court in the district has enumerated such a list and how many of the factors enumerated on a given list apply in a given case.

In addition to these commonly-enumerated circumstances, courts will look to almost any other factor they believe shed some light on whether the debtor is abuse the system under the circumstances of the case. The intentional squandering of money that could have been used to pay creditors is a circumstances courts can (and do) consider, *see, e.g., In re Vogeler*, 393 B.R. 240, 243 (Bankr. D. Kan. 2008) (debtor won lottery after filing for bankruptcy, but spent winnings on new property rather than on repaying his debts); *James*, 345 B.R. at 667-68 (debtor took two bonuses and income tax refund totaling more than 50% of the debt due and spent them on luxury items and a trip to "treat" or "reward" himself before filing for bankruptcy), as are circumstances that are indicative of the debtor's own belief about their future income. *See, e.g., Hill*, 328 B.R. at 497 (fact debtors reaffirmed debt on inoperative automobile in need of substantial repairs indicated to court that debtors believed their income situation was relatively stable). Using bankruptcy as a vehicle to reaffirm some debts to the detriment of other creditors is not looked on with favor, *O'Brien*, 373 B.R. at 506, nor are notably foolish or selfish financial decisions. *See, e.g., In re Wolf*, 390 B.R. 825, 830-31 (Bankr. D. S.C. 2008) (debtor purchased new $725,000 home with $653,000 mortgage before selling old $700,000 home with $550,000 mortgage); *In re Talley*, 389 B.R. 741, 743-46 (Bankr. W.D. Wash. 2008) (debtor wished to retain large residential tract in which he had no equity for use as a tree farm, despite fact payments consumed 80% of his income, exceeded applicable IRS allowance for housing by a factor of three and fact property could not be used for debtor's intended purpose).

c. Timing of the Totality of the Circumstances Determination

Finally, the operation of Section b(3) also raises an issue of timing: when are the "totality of the circumstances" regarding the debtor's "financial situation" to be determined, and how should a court weigh future possibilities in determining the totality of the circumstances?

The cases that have considered the first question have held that the relevant date for determination of the totality of the circumstances is as of the date of the hearing and not as of the date of the filing of the petition, *In re Pennington*, 348 B.R. 647, 651 (Bankr. D. Del. 2006) (analogizing the right of the court to consider the debtor's future income and expenses in deciding whether to confirm a Chapter 13 plan), which means

the court can and will consider changes to the debtor's financial situation that arise after the date of filing. *Vogeler*, 393 B.R. at 243; *In re Maya*, 374 B.R. 750, 754 (Bankr. S.D. Cal. 2007). The court's willingness to consider post-filing issues can cut both ways.

Some courts use the ability to consider post-petition events as a means of balancing out the perceived unfairness of allowing debtors to subtract debts contractually due but which they have no intention of paying when calculating their current monthly income. An excellent example of this is *Maya*, where the debtor's current monthly income calculations subtracted the payments due on two parcels of land surrendered post-petition, the case could be dismissed based on a finding of abuse under the totality of the circumstances, because the surrender of the property meant the debtors had more money available to pay creditors than their current monthly income calculations showed. *Maya*, 374 B.R. at 753-55. On the other hand, a post-petition change for the worse (such as a loss of a job, reduction of income, increase in necessary expenses, etc.) could theoretically be used to show that the totality of the circumstances show the debtor is not abusing the bankruptcy process, and therefore is entitled to the Chapter 7 discharge he seeks.