

The ABC's of 11 U.S.C. § 707(b)'s.
Motions to Dismiss Case for Abuse and Common Issues¹
The 23rd Annual White-Williams Bankruptcy Institute
Friday, March 29, 2019

by

Tiiara N. A. Patton, Trial Attorney
Cathy Lowman, Bankruptcy Auditor

Pursuant to 11 U.S.C. § 707(b) a court may dismiss a bankruptcy case for substantial abuse based upon the debtor's future income and expenses, Section 707(b) only applies when a debtor's debts are "primarily consumer debts." The central question when a section 707(b) dismissal is sought is whether or not the specific facts of a debtor's case is "abusive," and therefore subject to having their case dismissed. The existence of abuse is determined in one of two different ways: (1) through the application of a legislative formula called the means test (Form B122A-2) (the "Means Test") that is used to determine a debtor's ability to repay their creditors, and gives rise to a presumption that a debtor's case is abusive (11 U.S.C. § 707(b)(2));² and/or (2) through the application of a facts and circumstances-type test intended to evaluate the debtor's financial situation (11 U.S.C. § 707(b)(3)). Therefore, it is critically important that debtors, along with their retained professional, review the information included on their bankruptcy documents to ensure the information is truthful and accurate. And, a debtor should promptly respond to information requests from the Department of Justice, Office of the United States Trustee (the "Office of the United States Trustee") timely and fully. Oftentimes, a debtor's response to requests from the United States Trustee will eliminate or narrow the matters that give rise to a motion to dismiss for abuse pursuant to 11 U.S.C. § 707(b).

Below is a list of common errors that appear on documents filed in a debtor's case and, may provide a basis for a motion to dismiss for abuse pursuant to 11 U.S.C. § 707(b):

Means Test (11 U.S.C. § 707(b)(2))

- a. *Miscalculation of "current monthly income" (11 U.S.C. § 101(10A))* – Means Test, Line 1 – the exclusion of a debtor's part-time employment, bonuses and/or a nonfiling spouse's income, and failure to provide documentation to substantiate the information included on the Means Test.
 - (i.) *Self – Employed Debtor* – a debtor's inability to produce documentation to substantiate the information included on the Means Test.
- b. *Marital Adjustment* – Means Test, Line 3 – permits a debtor to deduct some of the nonfiling spouse's expenses, which reduces a debtor's disposable income.

¹ All views expressed in this article are those of the author, and do **not** necessarily represent the views of the United States Department of Justice, Office of the United States Trustee.

² 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.

However, a debtor is only permitted to exclude any of the nonfiling spouse's income that is not contributed to the household expenses.

- c. *Taxes* – Means Test, Line 16 – the overstatement of a debtor's tax expense when the facts provide that the debtor has received a substantial tax refund, and appear to continue to withhold at the same level that generated the large tax refund.
- d. *Involuntary Deductions* – Means Test, Line 17 – the inclusion of a debtor's monthly 401(k) contributions and/or loan repayments. Also, there appears to be some confusion on the issue of what constitutes voluntary versus involuntary deductions.
- e. *Additional health care expenses* – Means Test, Line 22 – debtors misunderstand how additional health care expense on the Means Test correlates with the amount listed on their schedules, the Internal Revenue Service standard health care allowance, and the health spending account deduction.

Totality of Circumstances/Bad Faith (11 U.S.C. § 707(b)(3))

- f. *Monthly Income* – Schedule I: Your Income – the exclusion of a debtor's part-time employment, bonuses and/or a nonfiling spouse's income, and failure to provide documentation to substantiate the information included on the Means Test.
 - (i.) *Self – Employed Debtor* – a debtor's inability to produce documentation to substantiate the information included their schedules.
- b. *Payroll Deductions* – Schedule I: Your Income, Line 5 – the lumping and failure to itemize a debtor's payroll deductions on Line 5a, which masks a debtor's voluntary contribution to a retirement plan or the repayment of retirement fund loans.
- c. *Expenses* – Schedule J: Your Expenses – a failure to substantiate certain expenses identified by the debtor.

The foregoing is not an exhaustive list of errors that the Office of the United States Trustee encounters when reviewing a debtor's bankruptcy dockets. However, they are common issues that may provide a basis for the Office of the United States Trustee to seek dismissal of a debtors case pursuant to 11 U.S.C. § 707(b). If your client's case is identified by the Office of the United States Trustee as a case that may be abusive, please contact the bankruptcy auditor trial attorney assigned to your case and respond to any information requests timely and often.