

**2008 ABI NORTHEAST BANKRUPTCY CONFERENCE**  
**FABLES AND FAIRY TALES...HOW THE PRACTICE HAS EVOLVED**

**POLICING THE “MEANS TEST”: SOME OBSERVATIONS AND**  
**QUESTIONS FROM A PANEL TRUSTEE**

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As a result of the Bankruptcy Abuse Prevention And Consumer Protection Act<sup>1</sup> (“BAPCPA”) enacted in 2005, debtors (more often, thankfully, their attorney) are required to prepare and file the “means test” disclosing monthly income and, when the median income for the state of residence is exceeded, their expenses. Income is based on “income received from all sources” during the six months preceding the bankruptcy filing ending on the last day of the month preceding the actual filing date. One example, therefore, would be that a debtor could file on July 31, and the current monthly income (“CMI”) would be based on income received during the six month period ending on June 30. The debtor, however, is required to file (more likely, provide to the panel trustee) “payment advices” for the 60 day period preceding the filing date, 11 U.S.C. § 521(a)(1)(B)(iv). Given the above filing hypothetical, the trustee is receiving payment advices for only one month of the six month period on which the CMI is based. The payment advices can provide some assistance in verifying the CMI, particularly if the debtor is a regular “wage earner”, however, if the “goal” was to verify the CMI, it would seem that payment advices for the **seven** month period preceding the filing date should be required in order to cover the situation where the bankruptcy case is filed on the last day of the month. Like much of BAPCPA one can only wonder where the 60 day requirement came from.

Another question is if CMI is based on “income received from all sources”, then should debtors be required to provide all bank account statements for the same seven month period as

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<sup>1</sup> Some perhaps cynical attorneys have referred to the legislation as the Bankruptcy Prevention and Consumer Abuse Act!

the payment advices to help confirm that no other income was received during the applicable time frame? Please note that I am not advocating for these changes but only posing questions about the “disconnect” in the process by which the means test is reviewed and policed.

A related question: who thought that “filing” the payment advices would be acceptable? This writer’s informal survey of bankruptcy districts throughout the country revealed that the vast majority of the Bankruptcy Court’s have standing orders requiring that the payment advices be provided to the panel trustee, rather than being filed with the Court. The fact that the panel trustee is the person designated to receive the payment advices (and federal income tax return) is also somewhat odd in that it is the U.S. Trustee that has the primary responsibility for policing the means test. From this writer’s perspective, it would certainly seem more efficient if the debtor was required to provide the tax return and the payment advices directly to the U.S. Trustee in order to allow a more meaningful review of the means test. As it currently stands, the burden is placed on the panel trustee to review the payment advices and tax return to see if they comport with the means test (to the extent possible; see above) and inform the U.S. Trustee if there appears to be a problem. This usually results in a request from the U.S. Trustee to the panel trustee for copies of the payment advices and tax returns. Thankfully, these documents can frequently be forwarded as an electronic file or scanned and emailed to the U.S. Trustee. This task, however, can take significant time for which the panel trustee is not compensated.

This writer was involved as trustee in a case in which he spent a substantial amount of time investigating the debtors’ financial circumstances and providing information to the U.S. Trustee. Ultimately the U.S. Trustee filed a 707(b) motion to dismiss the case which resulted in a motion filed by the debtors to convert the case to a Chapter 13 case. The trustee then filed a motion for an administrative expense in the Chapter 13 case. The Court held a hearing on the trustee’s motion (which was not opposed by the debtors) and denied the motion for an administrative expense. The Court stated that it has been receptive to the allowance of administrative expense claims by former Chapter 7 Trustees when the primary reason for the conversion to Chapter 13 was, for example, to preserve an asset that the trustee wanted to sell. The Court, however, apparently viewed the policing of the means test to be, primarily, a job for the U.S. Trustee and, perhaps, did not want to set a precedent for allowance of administrative expenses in future similar situations.

In what otherwise is a “no asset” case, the request for payment advices and tax return means more tasks for the panel trustee to perform for the (since 1994) \$60 “no asset” fee<sup>2</sup>. In a case that might otherwise be an “asset case”, however, the panel trustee may be “shooting himself or herself in the foot”. By making the U.S. Trustee aware of potential cause for a Section 707(b)(2) Motion To Dismiss, the panel trustee probably needs to await a determination by the U.S. Trustee whether such a motion will be filed or not. It is this writer’s understanding that the Bankruptcy Court will consider such a motion to dismiss to be “jurisdictional”; as a result, even if the panel trustee would likely recover assets or money for distribution to creditors, the motion to dismiss would have priority. Given the relatively quick time frame for prosecuting such a motion, it is unlikely that substantial time would be spent on liquidating or recovering assets, but in the “right” case, the dismissal of the case could conceivably result in the panel trustee returning money or assets to the party from whom they were recovered.

At the time these materials were due, I was in the process of gathering information about how payment advices (and tax return) were “handled” throughout the country. The information was incomplete but I hope to be able to provide a handout at the conference.

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<sup>2</sup> One trustee who will remain nameless described this compensation as a “tip”, apparently indicating the frustration that panel trustees have experienced with the increased requirements resulting from BAPCPA without any increase in compensation either for “no asset” cases or in the trustee compensation formula set forth in 11 U.S.C. §326. At the time these materials were prepared, legislation was pending to increase the \$60 “no asset” fee to \$100.

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**PANEL TRUSTEE PET PEEVES (A SAMPLING)**

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1. Failure to receive “payment advices” for the two month period preceding the “Petition Date” (§521(a)(1)(B)(iv)) and the most recently filed federal tax return (or transcript) (§521(e)(2)(A)(i)) at least 7 days prior to Meeting Of Creditors.  
Ramifications? Dismissal? Meeting not held? Other?
2. Stale information in the bankruptcy documents due to failure to update prior to filing.
3. Incomplete and/or inaccurate Schedules and Statement Of Financial Affairs: a few examples:
  - a. Voluntary Petition: Alias names, maiden name, d/b/a names, not listed; street address of debtor listed as P.O. Box.
  - b. Schedules: Schedule A, nature of Debtor's interest in property listed as “fee simple” not helpful; perhaps sole owner, joint owner, Tenants By The Entirety, Tenant In Common.
  - c. Schedule B: bank account name and type of account, e.g., checking, savings, Certificate of Deposit, money market account, etc. would be helpful.
  - d. Statement Of Financial Affairs: failure to list foreclosure actions and divorces in response to question #4 (“Suits and administrative proceedings, ...”).
  - e. Statement Of Financial Affairs: failure to list the payments which the debtor made to debtor’s bankruptcy attorney and when.

4. Showing up late for Meeting Of Creditors, **particularly** for 9 A.M. meetings.
5. Failure to prepare the Debtor for the Meeting Of Creditors, e.g., not having picture I.D. and proof of social security number available; advising the Debtor to speak loudly enough to have the recorder pick up the responses; if documents are requested by the Trustee, how that is to be handled; etc.
6. Delay in providing documents and information requested from the Debtor prompting the filing of motion(s) to extend the Discharge Deadline and/or motions to compel the production of the documents, ultimately resulting in a “no asset” determination and the resulting \$60 “compensation” after spending numerous hours of time chasing the information down.
7. Related to #4: substantial delay in obtaining documents which counsel should have already obtained from the Debtor as part of the “reasonable investigation” requirement into the Debtor's financial circumstances (§707(b)(4)(C)).
8. Related to #5, filling motions to extend Discharge deadlines and/or exemption deadlines while awaiting the documents and then determining it is a “no asset” case.
9. Failure to provide the “imaged check” pages when copies of bank statements are requested.
10. Inaccurate or incomplete listing of recipients of potentially “preferential” payments on the Statement Of Financial Affairs.
11. Counsel who do not prepare their clients that there is non exempt equity in an asset that may require its surrender or settlement.
12. Liquidating assets and/or recovering money for creditors only to find out that few creditors filed claims and, as a result, a “surplus” is returned to the debtor.