

Cases Under §707(b)(2) and (3)
A Survey of Judicial Positions on the Means Test,
Totality of Circumstances and Bad Faith

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§707(b)(2) — Income

Unemployment Compensation

In re Baden, 396 B.R. 617 (Bankr. M.D. Pa. 2008). Chapter 13 trustee objected to confirmation of debtors' proposed plan on basis that plan failed to commit all of debtors' disposable income to plan. Specifically, trustee argued that unemployment benefits received by debtors during six months prior to filing had to be included as part of debtors' CMI. Court held that unemployment compensation payments debtors received over six-month period preceding petition date were not "benefits received under the Social Security Act," and therefore had to be included in calculating CMI.

In re Sorrell, 359 B.R. 167 (Bankr. S.D. Ohio 2007). UST moved to dismiss under Section 707(b)(2). Court held that unemployment compensation payments debtors received over six-month period preceding petition date were "benefits received under the Social Security Act," that could not be included in calculating CMI.

Veteran's Benefits

In re Hedge, 394 B.R. 463 (Bankr. S.D. Ind. 2008). Unsecured creditor objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Court held that debtor's veterans benefits had to be included in calculation of debtor's CMI as such benefits did not fall within an enumerated exception to CMI.

Retirement Distributions

In re DeThamplé, 390 B.R. 716 (Bankr. D. Kan. 2008). Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Debtor-wife received distribution from her employee retirement plan

(401K) within the six-month period preceding petition date. Court held that debtors, in calculating their CMI, had to include income realized from 401K distribution.

***In re Wayman*, 351 B.R. 808 (Bankr. E.D. Tex. 2006).** Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Debtor, as part of property settlement agreement with former spouse, obtained custody, care, and control of former spouse's individual retirement account (IRA) prior to the six-month period preceding petition date. Debtor later received early distribution from IRA during the six-month period preceding petition date. Court held that debtor, in calculating her CMI, did not have to include income realized from IRA distribution because income was actually earned when the debtor first obtained custody, care, and control over the IRA.

***In re Sanchez*, Case Nos. 06-40886 and 06-40865, 2006 WL 2038616 (Bankr. W.D. Mo., July 13, 2006).** Chapter 13 trustee objected to confirmation of debtors' proposed plans on basis that plans failed to commit all of debtors' disposable income to plans. Debtors received distributions from their employee retirement plans (401K) within the six-month period preceding petition date, but argued that the distributions were actually "earned" prior to that six-month period. Court held that debtors, in calculating their CMI, had to include income realized from 401K distributions because earnings contributed to a 401K plan are not actually "received" until withdrawn and a distribution takes place.

Contributions from Non-Filing Spouse

***In re Travis*, 353 B.R. 520 (Bankr. E.D. Mich. 2006).** UST moved to dismiss under Section 707(b)(2). Court held that only amounts regularly contributed by non-debtor spouse to debtor's household expenses had to be included in debtor's CMI.

Self-Employed Income

Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (B.A.P. 9th Cir. 2008). Chapter 13 trustee objected to confirmation of debtors' proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Specifically, Chapter 13 trustee argued that debtors improperly calculated CMI when they deducted business expenses from debtor-husband's self-employed income at Part II of Form 22C. The bankruptcy court overruled the trustee's objection, and entered an order confirming the debtors' plan. On appeal the bankruptcy appellate panel reversed, holding that a chapter 13 debtor engaged in business cannot deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI at Part II of Form 22C.

Amounts Paid Regularly for Household Expenses

In re Swanson, No. 08-81388, 2008 WL 4540181 (Bankr D. Neb. Oct. 7, 2008). The UST moved to dismiss under 11 U.S.C. Sections 707(b)(2) and (3). In his motion, the UST asserted that certain housing and support payment expenses claimed by the debtor on his means test form were either improper, or were required to be offset by the very same amounts received by the debtor's fiancé during the six month period prior to filing. Specifically, the UST asserted that because the debtor's housing payments were being made by his fiancé at the time he filed his case, those expense deductions were either improper, or, if allowable, had to be offset as payments made by his fiancé on a regular basis for the household expenses of the debtor. Similarly, the UST asserted that to the extent the support payments in question were being made to the debtor's fiancé those payments had to be included as income on Debtor's Form 22A. The bankruptcy court agreed, holding that the debtor's claimed housing and support payment expenses had to be

offset by the same amounts received from the debtor's fiancé for those expenses, and that dismissal was proper pursuant to Section 707(b)(2).

Other Sources of Income

In re Royal, 397 B.R. 88 (Bankr. N.D. III. Nov. 7, 2008), Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Among other things, the trustee argued that the debtor's "earned income tax credit" should be considered income for the purposes of CMI on the debtor's Form 22A. The bankruptcy court agreed, ruling that because earned income tax credits were not specifically excluded from the plain language of Section 101(10A), Congress intended it to be included in the calculation of CMI.

§707(b)(2) — Household Size

In re Ellringer, 370 B.R. 905 (Bankr. D. Minn. 2007). UST moved to dismiss case under Section 707(b)(2). Court denied motion, ruling that Section 707(b)(7) precluded the filing of a motion based on a presumption of abuse. In doing so, the Court found that the term "household," for the purposes of Section 707(b)(7), includes the debtor and all other people living in the debtor's living quarters, whether related to the debtor or not. In making this determination, the Court utilized the Census Bureau's definition of household and rejected the Internal Revenue Service's position, which references dependents listed on a taxpayer's latest income tax return. Specifically, the Court found that because Section 101(39A)(A) utilizes the Census Bureau's definition of "household" in defining "median family income" it was appropriate to use that same definition in defining "household" for the purposes of Section 707(b)(7).

***In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007).** UST moved to dismiss case under Section 707(b)(2). Court held that debtors' daughter and her dependants — each of whom were dependent upon the debtors for their support, were unable to contribute any of their income to the debtors after paying their expenses, showed no evidence that their living arrangement was intended to be temporary, and showed no evidence that they failed to function as an economic unit with the debtors — were part of debtors' household. In making this determination, the Court rejected both the Census Bureau's definition, and the Internal Revenue Service's position regarding what constitutes a household.

§707(b)(2) - Expenses Housing and Utility

***In re Sullivan*, 370 B.R. 314 (Bankr. D. Mont. 2007).** UST moved to dismiss case under Section 707(b)(2). Court held that replacement costs for broken furnace and deck that posed safety threat to debtors and their family were allowable adjustments to local standard deduction for household expenses and utilities, but that other claimed adjustments — such as replacement of a fence, finishing a bathroom, and resurfacing a driveway — were not.

***In re Turner*, 376 B.R. 370 (Bankr. D. N.H. 2007).** UST moved to dismiss case under Section 707(b)(2). The debtors successfully rebutted the presumption of abuse. However, in its ruling, the Court noted that the local standard deduction for household expenses and utilities takes into account amounts necessary for maintenance and repair such as pest control expenses.

Vehicle Expenses — Line 22A

***In re Martinez*, 391 B.R. 424 (Bankr. E.D. Wis. 2008).** UST moved to dismiss case under Section 707(b)(2). At the time the case was filed the debtors owned 2 six- year-old-plus vehicles, each of which was encumbered. The debtor's claimed an additional operating expense for each vehicle in the amount of \$200.00, or in the alternative, a pro-rated operating expense

for each vehicle of less than \$200.00 (i.e., 200/60 months) based on when the debtors might extinguish all encumbrances on the vehicles under a hypothetical Chapter 13 plan. The Court held that the debtors were not entitled to claim the additional \$200.00 vehicle operating expense because each vehicle was encumbered on the petition date, and indicated that any attempt to pro-rate the additional \$200.00 vehicle operating expense would be speculative, and hence, inappropriate.

In re Slusher, 359 B.R. 290 (Bankr. D. Nev. 2007). Chapter 13 trustee objected to confirmation of plan because debtor, among other things, deducted the IRS Local Standard for vehicle ownership for a vehicle owned free and clear of liens. The bankruptcy court ruled that while the debtor was not entitled to claim an ownership expense for the unencumbered vehicle, he was entitled to claim an additional \$200.00 operating expense for the vehicle because it was more than six years old. **Vehicle Ownership Expenses — Lines 23/24 Representative Cases**
Allowing Ownership Expense

Neary v. Ross-Tousey (In re Ross-Tousey), 549 F. 3d 1148 (7th Cir. 2008). UST moved to dismiss case under Section 707(b)(2). The UST challenged the debtors' attempt to deduct the IRS Local Standard for vehicle ownership for a vehicle they owned outright. The bankruptcy court denied the UST's motion. The district court reversed and held that debtors must have an "actual" expense for vehicle ownership before the expense can be "applicable" to the debtor and thus allowable on the means test. On appeal the 7th Circuit reversed, agreeing with the bankruptcy court that the plain language of the statute supports the allowance of a monthly ownership expense and that "applicable expense" cannot mean the same as "actual expense."

Hildebrand v. Kimbro (In re Kimbro), 389 B.R. 518 (B.A.P. 6th Cir. 2008), *appeal pending* Case No. 08-5871 (6th Cir. Aug. 24, 2008). Chapter 13 trustee objected to confirmation of plan because debtors deducted the IRS Local Standard for vehicle ownership for vehicle owned free and clear of liens. The bankruptcy court overruled the trustee's objection and entered an order confirming the debtors' plan. On appeal the BAP affirmed, holding that above-median debtors were entitled to deduct an applicable monthly vehicle ownership expense for a vehicle that was not encumbered by a loan or lease payment.

Representative Cases Denying Ownership Expense

Babin v. Wilson (In re Wilson), 383 B.R. 729 (B.A.P. 8th Cir. 2008). Chapter 13 trustee objected to confirmation of plan because debtors deducted the IRS Local Standard for vehicle ownership for vehicle owned free and clear of liens. The bankruptcy court overruled the trustee's objection and entered an order confirming the debtors' chapter 13 plan. On appeal the bankruptcy appellate panel reversed, holding that debtors without vehicle loan or lease payments are not permitted to claim the vehicle ownership expense because such expenses are not applicable under Section 707(b)(2)(A)(ii)(1).

Ransom v. MBNA America Bank, N.A. (In re Ransom), 380 B.R. 799 (B.A.P. 9th Cir. 2007). Unsecured creditor objected to confirmation of plan because debtor deducted the IRS Local Standard for vehicle ownership for vehicle owned free and clear of liens. The bankruptcy court sustained the creditor's objection and entered an order denying confirmation of the debtor's chapter 13 plan. The bankruptcy appellate panel affirmed, ruling that the language of Section 707(b)(2)(A)(ii)(I), the common meaning of

"applicable," and the overall scheme of the Bankruptcy Code each reveal that vehicle ownership expenses only apply if a debtor actually has vehicle financing costs.

Tate v. Lentz, et al. (In re Tate), Case No. 08-32, 2008 WL 4489761 (S.D. Miss. Sept. 29, 2008), *appeal pending* Case No. 08-60953 (5th Cir. Oct. 6, 2008). UST moved to dismiss case under Section 707(b)(2). The UST challenged the debtors' attempt to deduct the IRS Local Standard for vehicle ownership for two vehicles they owned outright. The bankruptcy court granted the UST's motion. The district court affirmed ruling that the debtors could not claim vehicle ownership expense amounts on vehicles for which they have no vehicle ownership expenses.

Payroll Taxes — Line 25

In re Hale, Case No. 07-32744, 2007 WL 2990760 (Bankr. N.D. Ohio Oct. 10, 2007). UST moved to dismiss case under Section 707(b)(2). The UST challenged, among other things, the debtors' claimed expense deduction for payroll taxes. The bankruptcy court granted the motion, ruling that the debtors' claimed expense deduction for payroll taxes was overstated. In doing so, the court noted that the debtors were only entitled to deduct their actual tax liability, not necessarily the amounts withheld from their pay which was overstated due to over-withholding.

Court Ordered Payments — Line 28

In re Casey, 356 B.R. 519 (Bankr. E.D. Wash. 2006). Chapter 13 trustee objected to confirmation of plan because debtor, among other things, failed to properly amortize court ordered support payments that were due to expire on the 24th month of his plan. The bankruptcy court sustained the objection, ruling that the debtor was required to

amortize court ordered payments over a 60 month period per Section 707(b)(2)(A)(iv) of the Code.

Telecommunications — Line 32

In re Stimac, 366 B.R. 889 (Bankr. E.D. Wis. 2007). Chapter 13 trustee objected to confirmation of debtors' proposed plan on basis that plan failed to commit all of debtors' disposable income to plan. Court held that debtors were entitled to claim cellular telephone expenses necessary for their or their dependents health and welfare, or for the production of income; but that debtor's claimed land line expense could not be deducted as an expense since it was subsumed within the IRS Local Standard for housing and utilities.

Family Care — Line 35

In re Hicks, 370 B.R. 919 (Bankr. E.D. Mo. 2007). UST moved to dismiss case under Section 707(b)(2). The UST challenged, among other things, the debtor's claimed expense deduction for support of his healthy 21 year old son. The bankruptcy court granted the motion, ruling that the debtor's claimed expense deduction was improper because debtor's son was not an elderly, chronically ill, or disabled person in need of support as required under Section 707(b)(2)(A)(ii)(11) of the Code.

Payments on Secured Claims — Line 42 — Surrendered Collateral

Morse v. Rudler, et al. (In re Rudler), 388 B.R. 433 (B.A.P. 1st Cir. 2008), *appeal pending* Case No. 08-9007 (1st Cir. Jul. 16, 2008). UST moved to dismiss two cases under Section 707(b)(2). The UST's motions challenged the debtors' claimed secured debt repayment expenses for a vehicle and homes they intended to surrender. The bankruptcy court ruled that the debtors were entitled to claim the expenses. The bankruptcy appellate panel consolidated both

matters on appeal and affirmed, holding that the debtors could claim the expenses notwithstanding their intent to surrender.

***Randle v. Neary (In re Randle)*, Case No. 07-631, 2007 WL 2668727 (N.D. Ill. July 20, 2007).** UST moved to dismiss case under Section 707(b)(2). The UST's motion challenged the debtor's claimed secured debt repayment expense for a home she intended to surrender. The bankruptcy court ruled that the debtor was entitled to claim the expense. The district court affirmed, holding that the debtor could claim the expense notwithstanding her intent to surrender. The district court concluded that the debtor's mortgage payments "were still contractually due . . . even if [she] had not been paying [the] monthly mortgage payments," and that her filing of a Statement of Intent to surrender was "not an actual surrender."

***In re Ray*, 362 B.R. 680 (Bankr. D. S.C. 2007).** UST moved to dismiss case under Section 707(b)(2). The UST's motion challenged the debtors' claimed secured debt repayment expense for vehicles they intended to surrender. The bankruptcy court ruled that the debtors were not entitled to claim the expense, noting that in considering the phrase "amounts scheduled as contractually due" Congress contemplated a forward looking calculation requiring consideration of events contemplated in the debtors' Statement of Intent.

Payments on Secured Claims — Line 42 — 401K Loans

***Eisen v. Thompson (In re Thompson)*, 370 B.R. 762 (N.D. Ohio 2007).** UST moved to dismiss case under Section 707(b)(2). The UST's motion challenged the debtor's claimed secured debt repayment expense for a retirement plan loan repayment. The bankruptcy court ruled that the debtor was entitled to claim the expense. The district court

reversed, holding that the debtor could not claim the expense because the loan payments in question were not associated with a debt.

Statement of Presumed Abuse under §704(b)

In re Draisey, 395 B.R. 79 (B.A.P. 8th Cir. 2008). UST filed a motion to dismiss pursuant to Section 707(b)(3) within the 60 day deadline established under Fed. R. Bankr. P. 1017. Debtor challenged the motion arguing that the UST was required to file a statement indicating either a presumed abuse or a lack of a presumed abuse within the 10 day deadline established under Section 704(b). The bankruptcy court denied the UST's motion, ruling that the UST's filing of a statement indicating either a presumed abuse or a lack of a presumed abuse within the 10 day deadline established under Section 704(b) constituted a prerequisite to the filing of a motion to dismiss pursuant to Section 707(b)(3). The bankruptcy appellate panel reversed, holding that under the plain language of Section 704(B), the filing of a statement under Section 704(b) is not a condition precedent to filing a motion to dismiss under Section 707(b)(3).

In re Molitor, 395 B.R. 197 (Bankr. S.D. Ga. 2008). Debtors' Section 341 meeting of creditors was continued, and not concluded until 28 days after its originally scheduled date. UST filed a statement of presumed abuse within 10 days after that date, and a motion to dismiss pursuant to Sections 707(b)(2) and (3) within 30 days thereafter. Debtors challenged the (b)(2) portion of the motion, arguing that the statement of presumed abuse was filed after the 10 day deadline established under Section 704(b). The bankruptcy court denied the Debtor's objection to the motion, ruling that the 10 day deadline established under Section 704(b) runs 10 days after the date on which the debtor's 341 meeting of creditors concludes.

In re Close, 384 B.R. 856 (D. Kan. 2008). Debtors' Section 341 meeting of creditors was continued, and not concluded until 28 days after its originally scheduled

date. UST filed a statement of presumed abuse within 10 days after that date, and a motion to dismiss pursuant to Sections 707(b)(2) and (3) within 30 days thereafter. Debtors challenged the (b)(2) portion of the motion, arguing that the statement of presumed abuse was filed after the 10 day deadline established under Section 704(b). The bankruptcy court entered an order denying the (b)(2) portion of the motion. The district court affirmed, ruling that the 10 day deadline established under Section 704(b) runs 10 days after the originally scheduled date for a debtor's 341 meeting of creditors notwithstanding whether the 341 meeting has been continued.

§707(b)(3)(A) — Bad Faith

In re Oot, 368 B.R. 662 (Bankr. N.D. Ohio 2007). Bad faith found in debtor's lack of candor in filing schedules, funding of retirement plans prepetition and attempts to reaffirm luxury items after filing.

In re O'Brien, 373 B.R. 503 (Bankr. N.D. Ohio 2007). Dismissal justified under bad faith and totality of circumstances for debtors who purchased new home and vehicle within three months of filing, falsely characterized their unsecured debt as being "in collections," and listed their income on recent credit applications as being double what they listed on Form 22A.

In re Felske, 385 B.R. 649 (Bankr. N.D. Ohio 2008). Debtors attempt to reaffirm new, expensive house at expense of other creditors found to be abusive.

In re Haney, Case No. 06-40350, 2006 WL 3020961 (Bankr. W.D. Ky. Oct, 19, 2006), **affd.**, Case No. 06-150, 2007 WL 781321 (W.D. Ky. March 9, 2007). Case dismissed under bad faith and totality of circumstances where wife incurred substantial credit card debt shortly

before filing and then did not list non-filing spouse's income despite the fact that the couple shared income and expenses.

In re James, 345 B.R. 664 (Bankr. N.D. Iowa 2006). Use of bonuses received shortly before filing to purchase luxury items rather than paying down debt constitutes bad faith.

In re Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006). Incurring substantial credit card debt shortly before filing without a meaningful ability to repay debt constitutes bad faith.

§707(b)(3)(B) — Totality of Circumstances

Ability to Repay

In re Haar, 360 B.R. 759 (Bankr. N.D. Ohio 2007). Ability to pay may be exclusive factor in (b)(3) analysis.

In re dePellegrini, 365 B.R. 830, (Bankr. S.D. Ohio 2007). Mere fact that debtor "passed" the means test is no defense against (b)(3) motion.

In re Richie, 353 B.R. 569 (Bankr. E.D. Wis. 2006). Removal of "substantial" from statute demonstrates Congressional intent to make it easier to dismiss cases; debtor who was voluntarily unemployed had ability to repay debt.

Standards for Dismissal

In re Mestemaker, 359 B.R. 849 (Bankr. N.D. Ohio 2007). Debtors \$300 per month excess income over expenses exceeded "abuse threshold" under (b)(2) and was sufficient to indicate abuse under totality of circumstances.

In re Croskey, Case No. 06-33437, 2007 WL 1302571 (Bankr. N.D. Ohio May 1, 2007). 401(k) contributions and loan repayments are not permissible deductions when

determining a debtor's section 707(b)(3) ability to pay; case dismissed where, after the 401(k) allocations were excluded, the debtors could pay 100% of unsecured creditors in a 60-month plan.

***In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006), appeal pending Case No. 07-cv-178-ER (E.D. Pa. Dec. 26, 2006).** Court looked to debtor's ability to repay over applicable chapter 13 commitment period in determining case was abusive.

***In re Campbell*, Case No. 06-01656, 2007 WL 1376226 (Bankr. N.D. Iowa May 7, 2007).** Totality of circumstances demonstrated abuse where debtors had over \$500,000 in 401(k) accounts, gross annual income of over \$100,000, unsecured debt primarily consisted of "careless" credit card usage and debtors had ability to repay over 25% of their unsecured debt in 60 months.

***In re Pennington*, 348 B.R. 647 (Bankr. D. Del. 2006).** Where net monthly income is sufficient to repay 25% of unsecured debt within five years, filing is abusive under totality of the circumstances test.