

1 plan, so allowing them to go forward in a Chapter 7 would result
2 in an abuse under the Bankruptcy Code, as amended.

3 This Court has subject matter jurisdiction pursuant to
4 28 U.S.C. § 1334 and General Order No. 312-D of the United States
5 District Court for the Southern District of California. This is
6 a core proceeding under 28 U.S.C. § 157(b)(2)(A), (O).

7
8 Discussion

9 Section 707(b)(1) provides in relevant part:

10 After notice and a hearing, the court
11 . . . may dismiss a case filed by an
12 individual debtor under this chapter whose
13 debts are primarily consumer debts . . . if
14 it finds that the granting of relief would be
15 an abuse of the provisions of this chapter.

16 Section 707 then sets out a statutory scheme which provides for a
17 calculation that either results in a presumption of abuse, or
18 not. If the presumption arises, it is almost irrebutable, and
19 requires dismissal unless the debtor agrees to conversion to
20 chapter 11 or 13. If the presumption does not arise, the filing
21 may still be subject to dismissal under § 707(b)(3) under a
22 "totality of the circumstances" analysis.

23 In conducting the § 707(b)(2) analysis, certain listed
24 expenses are subtracted from the debtor's "current monthly
25 income" (which is a defined phrase) to yield a net number. That
26 number is then matched against a formula to ascertain whether the
presumption of abuse arises. As might be imagined, the higher
the amount of expenses deducted, the lower the net number and the

1 greater the likelihood that the presumption of abuse will not
2 arise. Conversely, the lower the amount of expenses that can be
3 deducted, the higher the net number will be and the greater the
4 likelihood the presumption of abuse will arise.

5 For purposes of the present case, and many cases like it,
6 § 707(b)(2)(A)(iii) provides in pertinent part:

7 The debtor's average monthly payments on
8 account of secured debts shall be calculated
9 as the sum of -

10 (I) the total of all amounts
11 scheduled as contractually due to
12 secured creditors in each month of the
13 60 months following the date of the
14 petition

15 Courts that have wrestled with similar motions have focused on
16 the phrase "scheduled as contractually due" while grappling with
17 whether to allow a debtor to deduct contractually due payments
18 when the debtor intends to surrender the collateral and not make
19 any further payments. They have debated the meaning of the word
20 "scheduled", apparently in an effort to pick a date post-petition
21 at which to measure what secured debts remain "contractually
22 due". Certainly, it seems to strain credulity that a debtor
23 ought to be able to deduct expenses he or she has no intent to
24 pay, and especially when a debtor has filed a formal Statement
25 of Intention under 11 U.S.C. § 521 expressing the intent to
26 surrender that property.

Notwithstanding that notion, the Court is persuaded that for
purposes of the "means test" analysis of § 707(b)(2) the
appropriate measuring point in time is the petition date. See

1 In re Walker, 2006 WL 1314125 (Bankr. N.D. Ga. 2006); In re
2 Littman, 2007 WL 1957175 (Bankr. D.ID 2007); In re Wilkins, 2007
3 WL 1933591 (Bankr. C.D. Cal. 2007); In re Haar, 360 B.R. 759
4 (Bankr. N.D. OH 2007); In re Kelvie, 2007 WL 1987383 (Bankr. D.
5 ID. 2007); In re Benedetti, 2007 WL 2083576 (Bankr. S.D. Fla.
6 2007). First, the Court is persuaded the statutory scheme of the
7 "means test" is intended to be a mechanical or formulaic
8 calculation, as illustrated by using historical income
9 information and government agency median allowances. It has to
10 be as of a point in time, which almost always is the petition
11 date. One case, In re Singletary, 354 B.R. 455 (Bankr. S.D. TX
12 2007), says the measuring date should be the date of filing the
13 motion to dismiss. Why not the date the motion is actually
14 heard, or the date the schedules are actually filed, or the date
15 by which the intent to surrender must be performed as required
16 under § 521(a)(2)? Each of those is a floating variable date,
17 while eligibility under the Bankruptcy Code for many things is
18 measured as of the petition date. No good reason has been
19 proffered for holding otherwise, except for the obvious argument
20 that secured property usually won't have been surrendered by that
21 date.

22 The second step is that if the measuring date is the
23 petition date, then obligations that are "contractually due" on
24 that date are obligations to be included in the calculation of
25 expenses even though the debtor has no intent to pay them.
26 They are nevertheless "contractually due" within the meaning of

1 § 707(b)(2)(A)(iii) because simply filing a Statement of
2 Intention under § 521 does nothing to relieve a debtor legally of
3 any obligation under the terms of a promissory note on supporting
4 trust deed or title document, as a member of courts have
5 observed.

6 So, for purposes of analysis under § 707(b)(2) to determine
7 whether a presumption of abuse arises, a debtor may deduct the
8 amortized monthly payments under § 707(b)(2)(A)(iii) even though
9 the debtor intends to surrender the property because, at the time
10 of filing, those payments are still "contractually due". Any
11 other holding creates great vagaries of timing, from the date of
12 filing of the Statement of Intention (can be 30 days or more, if
13 extended, after filing, or any time within the first 30 days), to
14 the date to perform under § 521(a)(2) (possibly extended), to the
15 possible scenarios discussed in relation to the Singletary
16 decision. Many courts have agreed with this Court's conclusion,
17 and some have shared pieces of the reasoning. In addition to
18 those cases already cited for using the petition date, see also
19 In re Galyon, 366 B.R. 164 (Bankr. W.D. Okla. 2007); In re Mundy,
20 363 B.R. 407 (Bankr. M.D. Pa. 2007); In re Nockerts, 357 B.R. 497
21 (Bankr. E.D. Wisc. 2006). It is with some dismay that the Court
22 has to look past the results in cases like In re Ray, 362 B.R.
23 680 (Bankr. D.S.C. 2007); In re Skaggs, 349 B.R. 594 (Bankr. E.D.
24 Mo. 2006); In re Harris, 353 B.R. 304 (Bankr. E.D. Okla. 2006),
25 but the Court is unable to find a way to those results while

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1 keeping faith with the plain meaning and statutory structure of
2 § 707(b)(2).

3 In their "means test" analysis debtors have included the
4 mortgage payments and expenses associated with both pieces of
5 real property. They have also included the payment amount their
6 adult daughter pays on the vehicle she uses. It appears
7 uncontroverted that debtors are obligated on the promissory note
8 for the vehicle, but a question arises whether the debt is
9 secured or unsecured as to the debtors because they apparently do
10 not possess the collateral. It would seem, however, that if
11 debtors choose to claim the vehicle as an expense they must also
12 show the daughter's payments as income in some form.

13 With a reservation as to whether the one vehicle debt is
14 secured because debtors may use their "contractually due"
15 payments on secured debts that existed at the time of filing of
16 the petition in their "means test" calculation even though they
17 intend to surrender them it appears the presumption of abuse does
18 not arise. Therefore, the motion to dismiss under § 707(b)(2)
19 should be, and hereby is denied.

20
21 § 707(b)(3)

22 Section 707(b)(3) provides:

23 In considering under paragraph (1) whether
24 the granting of relief would be an abuse of the
25 provisions of this chapter in a case in which the
26 presumption in subparagraph (A)(I) of such
paragraph does not arise or is rebutted, the court
shall consider -

1 (A) whether the debtor filed the
2 petition in bad faith; or

3 (B) the totality of the
4 circumstances . . . of the debtor's
5 financial situation demonstrates abuse.

6 A central issue under § 707(b)(3)(B) is the role of a
7 debtor's ability to pay. In the pre-BAPCPA days in the
8 jurisdiction of the Ninth Circuit ability to pay was a ground
9 sufficient unto itself to support dismissal for "substantial
10 abuse". In re Kelly, 841 F.2d 908 (1988). BAPCPA lowers the
11 statutory standard to "abuse", and a number of courts that have
12 considered the role of ability to pay since BAPCPA became
13 effective agree it may support dismissal. In re Pak, 343 B.R.
14 239 (Bankr. N.D. CA 2006); In re Henebury, 361 B.R. 595 (Bankr.
15 S.D. FL 2007); In re Pennington, 348 B.R. 647 (Bankr. D. DE
16 2006); In re Mundy, 363 B.R. 407 (Bankr. M.D. PA 2007). But see
17 In re Nockerts, 357 B.R. 497 (Bankr. E.D. WI 2006) where that
18 Circuit's law pre-BAPCPA was different from Kelly. This Court
19 agrees with the reasoning in Pak, and Henebury, and concludes
20 that ability to pay may support dismissal under § 707(b)(3)(B)
21 after reviewing the totality of a debtor's financial
22 circumstances.

23 Debtors argue, at least implicitly, that they have no more
24 ability to pay under a § 707(b)(3)(B) analysis than they did
25 under § 707(b)(2) because the measuring point is still the date
26 of the petition and the debtors can still use the "contractually
due" payments in assessing their "financial situation". The

1 Court disagrees. Perhaps the clearest signal that Congress
2 intended courts to consider post-petition events under
3 § 707(b)(3)(B) is the parenthetical language in the statute
4 itself: "(B) the totality of the circumstances (including whether
5 the debtor seeks to reject a personal services contract and the
6 financial need for such rejection as sought by the debtor) of the
7 debtor's financial situation demonstrates abuse." Courts that
8 have considered post-petition events or circumstances in a
9 § 707(b)(3)(B) analysis include In re Henebury, supra; In re
10 Pennington, supra; In re Mundy, supra; In re Pak, supra.

11 Based on the foregoing, the Court finds and concludes that
12 for purposes of § 707(b)(3)(B) debtors may not rely on payments
13 and expenses for property they intend to, and do surrender post-
14 petition. In scrutinizing debtors' "financial situation", the
15 Court also finds and concludes that the payments the adult
16 daughter makes on the vehicle in her possession should not be
17 included as an expense of the debtors. Alternatively, if the
18 expense is included, then the daughter's payments for the loan,
19 operation, insurance and maintenance of the vehicle should be
20 included on the income side of the analysis.

21 The United States Trustee's Bankruptcy Analyst submitted a
22 supplemental declaration after debtors disclosed their current
23 income information and rent expenses. In it he calculated the
24 monthly disposable income available to debtors to pay creditors
25 on a monthly and five year basis. The issue for the Court under
26 the totality of circumstances test is whether allowing the

1 debtors relief under Chapter 7 would result in an abuse. Under
2 the "means test" analysis of § 707(b)(2), "[i]f the debtors have
3 monthly net income of \$166.67 or more (i.e., at least \$10,000 to
4 fund a 60-month plan), the filing is presumed abusive." In re
5 Ray, 362 B.R. 680, 681 (Bankr. D.S.C. 2007). Here, the Analyst
6 has calculated that debtors have at least \$733.72 of monthly
7 disposable income after making adjustments on the surrender of
8 the houses, associated expenses, mortgage interest and real
9 property tax deductions, and on the daughter's vehicle. That is
10 over \$44,000 over a 60 month period. The Court finds and
11 concludes that allowing debtors relief under Chapter 7 with that
12 much monthly disposable income would constitute an abuse under
13 the totality of circumstances of the debtors' financial
14 situation.

15 The Court has briefly wrestled with the fact debtors would
16 not be eligible for Chapter 13 because they exceed the debt
17 ceilings. Chapter 11 cases are more expensive, and the
18 administrative costs would reduce the funds to be distributed to
19 creditors. The Court is of the view that the funds that would
20 reach creditors is a relevant consideration in determining
21 whether an abuse would occur if the debtors were allowed to
22 continue under Chapter 7 under the totality of the circumstances
23 test. Here, while the consideration is relevant, the amount of
24 monthly disposable income available to debtors is sufficient to
25 make a meaningful distribution to unsecured creditors even if
26 greater administrative expense is also incurred. The core

1 question is whether relief under Chapter 7 would constitute an
2 abuse. The Court finds that it would.

3
4 One Final Issue

5 Debtors in their Opposition to the motion threw in a
6 paragraph that reads:

7 Finally, the UST does not dispute the
8 Debtor's right to claim the secured payments,
9 if they were to retain the properties. Thus,
10 the UST's argument admits to treating debtors
11 similarly situated in a different manner.
12 This approach would appear to violate the
13 Debtors' rights to equal protection and due
14 process.

15 In the Court's view, the argument proceeds from a false premise.
16 It presupposes that debtors who surrender property are similarly
17 situated to those that retain it. Of course they are not
18 similarly situated. Their only similarity is they are both
19 debtors. The United States Trustee has responded more
20 thoroughly. The Court rejects the argument made by debtors. The
21 United States Trustee has appeared and taken a position on the
22 merits of the matter and 28 U.S.C. § 2403 has been satisfied.

23 Conclusion

24 For all the foregoing reasons, the Court concludes that the
25 United States Trustee's Motion to Dismiss under § 707(b)(2)
26 should be and hereby is denied. The Motion to Dismiss under
§ 707(b)(3)(B), however, should be and hereby is granted.

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