

1 Trustee's motion to dismiss based solely on the "totality of the
2 circumstances . . . of the debtor's financial situation." This
3 brings us to the issue at hand.

4 The United States Trustee contends that the Debtors' monthly
5 housing expense, made up primarily of the mortgage payment, is
6 unreasonably high and urges the Court to consider this an abuse
7 under the totality of circumstances of § 707(b)(3).¹ The
8 Debtors, on the other hand, argue that since the mortgage payment
9 is an unlimited allowable expense under the Means Test of
10 § 707(b)(2), the Court is precluded from considering it under the
11 totality of the circumstances test. In so doing, the United
12 States Trustee and the Debtors have taken the two sides of an
13 issue which has been the subject of discussion since the passage
14 of BAPCPA. In a nutshell, the issue is whether Congress, by
15 allowing secured claims to be included without limitation in the
16 Means Test of (b)(2), has limited the courts' discretion to
17 consider them under the totality of circumstances test of (b)(3).

18 What makes the issue so difficult is trying to discern what
19 interplay, if any, Congress contemplated as between subsection
20 (b)(2) - the Means Test - and subsection (b)(3) - totality of the
21 circumstances. A number of people anticipated during the years
22 of debate over bankruptcy reform that Congress was going to set

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24 ¹In its § 707(b)(3) challenge, the United States Trustee lumped in all housing related
25 expenses, including electricity, heating, water and sewer, phone, HOA, property taxes and
26 insurance. However, expenses such as utilities are a Means Test line item subject to a cap under
§ 707(b)(2)(A)(ii)(V), and no § 707(b)(2) challenge has been brought. The Court will focus on the
amount of the secured debt payment.

1 caps on allowable expenses for debtors as part of the structure
2 of the Means Test. Indeed, Congress imported into the Means Test
3 the "National Standards and Local Standards" issued by the
4 Internal Revenue Service "for the area in which the debtor
5 resides" 11 U.S.C. § 707(b)(2)(A)(ii)(I). Congress added
6 some expenses as allowable, subject to a "reasonable and
7 necessary" standard, and put caps on others, such as 5% on
8 overages on food and clothing, and of \$1,500 (now \$1,650) per
9 year per child for private or public education. In another
10 subpart of § 707(b)(2), Congress allowed inclusion of overages
11 for "home energy costs", again subject to a "reasonable and
12 necessary" standard.

13 In sharp contrast to the foregoing, the very next subpart,
14 § 707(b)(2)(A)(iii), provides:

15 (iii) The debtor's average monthly payments on
16 account of secured debts shall be calculated as the sum
of -

17 (I) the total of all amounts scheduled as
18 contractually due to secured creditors in each
month of the 60 months following the date of the
19 petition; and

20 (II) any additional payments to secured
21 creditors necessary for the debtor, in filing a
22 plan under Chapter 13 of this title, to maintain
possession of the debtor's primary residence,
23 motor vehicle, or other property necessary for the
support of the debtor and the debtor's dependents,
that serves as collateral for secured debts;
. . . .

24 In other words, if a debtor has a long-term secured obligation
25 (contractually due for 60 months or longer), those net amounts
26 are added onto the Means Test calculation on top of the IRS Local

1 Standards, such as for housing. Moreover, those amounts are not
2 subject to any specified cap, whether as a percentage of the IRS
3 Standards, a dollar amount, or even a "reasonable and necessary"
4 standard.

5 If the foregoing is how the Means Test of § 707(b)(2) is
6 intended to operate, a rhetorical question is why did Congress
7 back off the otherwise formulaic approach of IRS standards and
8 excess allowances subject to percentages or other caps. One
9 explanation has been proffered by Professors Culhane and White in
10 their article, "Catching Can-Pay Debtors: Is the Means Test the
11 Only Way?", 13 Am. Bankr. Inst. L. Rev. 665, 676 (2005). There,
12 they state:

13 A much bigger impact flows from the
14 decision to let debtors deduct their total
15 average monthly secured debt payments, with
16 no express requirement that the collateral be
17 necessary or the amount of the debt be
18 reasonable. The omission of those limits
19 appears intentional, for the very next
20 sentence in the Code, which allows an
21 additional deduction of cure payments, is
22 expressly limited to cure payments necessary
23 to retain possession of a few crucial assets
24 like a principal residence and motor vehicle
25 needed for the debtors and dependents. The
26 unlimited secured debt deduction bought the
support of home mortgage lenders, and when
Congress threw in limits on cramdown in
Chapter 13, got the automobile industry on
board as well. This deduction, however,
virtually assures that an extremely small
number of debtors will emerge as can-pays.

24 The authors observed:

25 After cutting that gaping hole in the
26 means test, Congress authorized a long list
of additional deductions. . . . Among these

1 are deductions such as starting a health
2 savings account or purchasing family health
3 insurance at the time of filing, continuing
4 to provide care for elderly or disabled
5 household members even if the debtor has no
6 legal obligation to do so, and private school
7 expenses of \$1500 per year per child. These
8 deductions advance policies far different
9 from maximum repayment of unsecured
10 creditors.

11 Congress could have made the means test
12 meaner than it is, and the pass rate lower.
13 However, Congressional decisions to serve
14 other important policies and carry support
15 for enactment led to changes which
16 substantially reduced the number of debtors
17 the means test will exclude from chapter 7.

18 Id. at 676-77.

19 While it is a side issue to the present analysis, the
20 authors go on to argue "that the means test is now the exclusive
21 ability to pay test." Id. at 678. This Court disagrees with
22 that blanket conclusion. For example, a Means Test analysis is
23 required to recognize a secured obligation contractually due at
24 the time of filing, even though a debtor has no intent to make
25 the payment because the collateral will be surrendered. In that
26 instance, the Means Test may be "passed", but still result in
dismissal under § 707(b)(3) because examination of the totality
of circumstances shows an ability to pay. See, e.g., In re Maya,
374 B.R. 750 (Bankr. S.D. Ca. 2007); In re Parada, 391 B.R. 492
(Bankr. S.D. Fl. 2008). Judge Wedoff, in his article "Judicial
Discretion to Find Abuse Under Section 707(b)(3)", 71 Missouri L.
Rev. 1035, 1047 (2006), describes the debtor who was unemployed
for some portion of the six months preceding filing, thereby

1 giving an inaccurate picture of projected disposable income.
2 Judge Wedoff argues that § 707(b)(3) should be available to
3 courts to prevent an abuse of Chapter 7 when a debtor clearly
4 could make payments going forward. See, e.g., In re Pak, 378
5 B.R. 257 (9th Cir. BAP 2007), rev'd on other ground, In re
6 Kagenveama, 541 F.3d 868 (9th Cir. 2008). This Court agrees that
7 § 707(b)(3) is available to a court faced with the factual
8 circumstances of Pak, those set out by Judge Wedoff, in Maya, and
9 likely other circumstances as well.

10 As noted earlier, during the Congressional struggles over
11 the bill, it was anticipated by some that Congress would set
12 bright line allowances for various expenses. And, as just
13 discussed, in some areas they did, while in others they set no
14 caps, such as in secured debt. Had Congress set caps across the
15 board, the present debate probably would not exist. Now,
16 however, courts are confronted with the argument that each court
17 is charged, through § 707(b)(3) with superimposing its own
18 individual judgment on what is reasonable and necessary through
19 the rubric of the totality of the circumstances test. Moreover,
20 the argument urges that the responsibility extends even to areas
21 Congress expressly addressed and declared would not give rise to
22 a presumption of abuse under § 707(b)(2).

23 As noted above, this Court is persuaded there are
24 circumstances that warrant dismissal under § 707(b)(3) although
25 a debtor may have "passed" the Means Test. The challenge
26 presented by this case is the contention that debtors should be

1 denied resort to relief under Chapter 7 because their secured
2 debt obligation for their principal residence is too high
3 compared to IRS Standards. Assuming for the moment the validity
4 of that argument asserted by the United States Trustee, debtors
5 presumably would have three options: 1) convert this case to one
6 under Chapter 13 or Chapter 11; 2) sell or walk away from their
7 primary residence and find less expensive housing (and a lender
8 who would lend for such a purchaser, since they have no equity in
9 their home); or 3) suffer dismissal and have to fend for
10 themselves against all their creditors.

11 Considering the first option, the Court acknowledges that
12 one of the purported goals of the Means Test and BAPCPA was to
13 move more debtors to Chapter 13 in the expectation of generating
14 a return to unsecured creditors that would not be available in a
15 Chapter 7. That said, in determining whether dismissal is
16 warranted if a debtor does not consent to conversion to Chapter
17 13, or Chapter 11, it seems appropriate to examine whether a
18 return might be generated in either of those Chapters that would
19 not exist in a Chapter 7. In doing so, however, the Means Test
20 of § 707(b)(2) is very much involved. Under 11 U.S.C. § 1325,
21 governing confirmation of a Chapter 13 plan, subpart (b)(3)
22 provides in relevant part: "Amounts reasonably necessary to
23 be expended . . . shall be determined in accordance with
24 subparagraphs (A) and (B) of section 707(b)(2)"
25 If § 707(b)(2) contains no limit on secured debt for a principal
26 residence, then by importation of § 707(b)(2) into § 1325 the

1 same condition obtains. Moreover, the same occurs in a
2 Chapter 11 for individual debtors pursuant to § 1129(a)(15)(B)
3 (by importing § 1325(b)(2)). Because § 707(b)(2) applies in both
4 Chapter 13 and Chapter 11, and because § 707(b)(2) has no cap on
5 secured debt obligations for a primary residence there is no
6 greater ability to pay in a Chapter 13 or 11 than in a Chapter 7.

7 The third option largely speaks for itself. Congress has
8 closed the door to bankruptcy relief under 11 U.S.C. § 109 for
9 certain classes of debtors. In Chapter 7, it provided for
10 dismissal for an absence of good faith (not at issue in this
11 case), as well as under § 707(b)(2), and the totality of
12 circumstances under § 707(b)(3). In § 109 it has declared that
13 debtors are ineligible for relief in Chapter 13 if they have too
14 much secured or unsecured debt. But nowhere in Chapter 7 has
15 Congress said that consumer debtors are ineligible for relief if
16 they have too much secured debt for their principal residence.
17 Section 707(b)(2) appears to declare to the contrary.

18 Which leaves us with the second option. With all the
19 foregoing in mind, the United States Trustee's motion asks the
20 Court to conclude that Congress intended the Court to force
21 debtors to sell or walk away from their primary residences when
22 the expenses of hanging onto the property are higher in some
23 measure than the IRS Standards. Moreover, because there is no
24 presumption of abuse under § 707(b)(2), it would be up to each
25 individual court, in the first instance, to decide when that
26 measure has been reached.

1 This Court must be candid and acknowledge that the United
2 States Trustee's argument has appeal on multiple levels. This
3 Court was one of those that expected Congress to set some caps,
4 including on home mortgage expenses, in part because there is an
5 appearance issue of the efficacy of bankruptcy when individuals
6 who are known in their community to have obtained relief continue
7 to live in the same nice home or drive the same nice car simply
8 because there is no equity in either for a trustee to realize for
9 the benefit of creditors. (Of course, it is not at all clear how
10 often that might really happen, and this Court suspects much more
11 often the house or car has been lost to the lenders by
12 foreclosure or repossession.)

13 On another level there is the spectre of the individual
14 debtor trying to hang on to the proverbial "McMansion". In the
15 minds of many, including this Court, there is a point at which
16 allowing an individual debtor relief from unsecured debt while
17 sinking most income into maintaining the debt service on such a
18 property seems egregious.

19 On yet another level, judges generally prefer to be vested
20 with discretion, rather than having to mechanically apply one
21 formula or another.

22 If this Court were writing on a blank slate, or were a
23 member of Congress working on the legislation, the foregoing
24 issues would be firmly in mind. At the same time, the Court
25 is aware that there may have been many other policy concerns
26 that resulted in compromises or rearranged priorities. To the

1 extent Congress' decision to not put some cap on secured debt
2 under § 707(b)(2) was based on some policy concerns, as Culhane
3 and White have stated, 13 Am. Bankr. Inst. L. Rev 665, 676
4 (2005), it would be wholly inconsistent for Congress to address
5 that policy concern in § 707(b)(2) with one hand, and yank it
6 right back with the other under § 707(b)(3). Nor should a court
7 arrogate the legislative authority to do what Congress did not,
8 even when doing so would serve ends the court might view as
9 salutary.

10 Another point that should not be overlooked is the
11 continuing priority that secured debt enjoys throughout the
12 Bankruptcy Code. Indeed, such protection was expanded as to
13 certain vehicles in Chapter 13 under the so-called "hanging
14 paragraph" which follows § 1325(a)(9). Further, it is well
15 understood that a debtor in Chapter 13 cannot modify the
16 rights of a creditor "secured only by a security interest in
17 real property that is the debtor's principal residence".
18 11 U.S.C. § 1322(b)(2).

19 In a similar vein, it would seem quite ironic if Congress
20 went through all it did to establish the assertedly more
21 objective Means Test in place of individual discretion, only to
22 turn around in § 707(b)(3) and hand the same discretion right
23 back. Yet some courts seem to have taken just that position.

24 In grappling with these issues, multiple courts have looked
25 to pre-BAPCPA case law for guidance in understanding the totality
26 of the circumstances under § 707(b)(3). In re Stewart, 383 B.R.

1 429, 432 (Bankr. N.D. Ohio 2008). Indeed, this Court did so in
2 In re Maya, 374 B.R. 750, 754 (Bankr. S.D. CA 2007). That does
3 not necessarily mean, however, that the facets or breadth of
4 today's § 707(b)(3)'s totality of the circumstances is identical
5 to the test that had evolved under the old § 707(b). That is the
6 crux of the issue in this discussion. If Congress determines
7 that there should be no cap on secured debt obligations on a
8 debtor's primary residence for purposes of the Means Test, and
9 therefore no presumption of abuse arises under § 707(b)(2), can
10 Congress properly be understood to intend that that same primary
11 residence secured obligation can, by itself, be the basis for a
12 finding of abuse under § 707(b)(3)?

13 Based on the record as before this Court, and the
14 corresponding analysis set out above, the Court concludes that
15 Congress did not intend that consumers would be denied access to
16 Chapter 7 solely because of the amount of their mortgage payment
17 on their principal residence.

18 Notwithstanding that conclusion, this Court has also
19 examined pre-BAPCPA decisions concerning the totality of
20 circumstances test as it was understood under the former
21 § 707(b). In the Ninth Circuit the factors to be considered in
22 evaluating the totality of the circumstances under former section
23 707(b) included:

24 (1) Whether the debtor has a likelihood of
25 sufficient future income to fund a Chapter 11, 12,
26 or 13 plan which would pay a substantial portion
of the unsecured claims;

1 (2) Whether the debtor's petition was filed
2 as a consequence of illness, disability,
unemployment, or some other calamity;

3 (3) Whether the schedules suggest the debtor
4 obtained cash advancements and consumer goods
5 on credit exceeding his or her ability to
6 repay them;

7 (4) Whether the debtor's proposed family
8 budget is excessive or extravagant;

9 (5) Whether the debtor's statement of income
10 and expenses is misrepresentative of the
debtor's financial condition; and

11 (6) Whether the debtor has engaged in eve-of-
bankruptcy purchases.

12 In re Price, 353 F.3d 1135, 1139-40 (9th Cir. 2004).

13 One of the foremost factors to be considered under the
14 totality of circumstances is "whether the debtor has a likelihood
15 of sufficient future income to fund a Chapter 11, 12, or 13
16 plan which would pay a substantial portion of the unsecured
17 claims" Price, 353 F.3d at 1139. Standing alone, this
18 might seem to indicate that a court should consider all of a
19 debtor's income and expenses anew under the "totality of
20 circumstances" test. However, as already discussed, the Means
21 Test also finds its way into the confirmation analysis in both
22 Chapters 13 and 11 as provided in §§ 1325, 1129. Under each
23 section, in order to overcome an objection to confirmation,
24 an individual must pay all claims in full or commit all of the
25 debtor's "projected disposable income." In order to determine
26 "projected disposable income," both sections 1325 and 1129
incorporate § 707(b)(2). That is, as noted above, under

1 § 707(b)(2) a debtor is entitled to claim as an expense all
2 actual monthly housing mortgage payments without the limitation
3 of reasonableness. Thus it follows that when determining
4 "whether the debtor has a likelihood of sufficient future income
5 to fund a Chapter 11, 12, or 13 plan which would pay a
6 substantial portion of the unsecured claims . . ." the court may
7 not consider in that analysis the reasonableness of payments on a
8 mortgage.

9 The only other Price factor theoretically in play in the
10 present case is whether the "proposed family budget is excessive
11 or extravagant". Of course, the United States Trustee's focus is
12 on the part of the budget that involves the primary residence
13 expenses the bulk of which is the mortgage payment. So, in at
14 least one sense, we are back to the core issue of whether that
15 can be considered under the new § 707(b)(3) given the policy
16 decisions Congress made in § 707(b)(2). Assuming that the size
17 of the mortgage payment can be considered notwithstanding
18 § 707(b)(2), the Court is comfortable in concluding that the
19 mortgage payment in this case is neither sufficiently excessive
20 nor extravagant as to warrant dismissal on a totality of the
21 circumstances basis under § 707(b)(3).

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CONCLUSION

For the foregoing reasons, the motion to dismiss brought by the United States Trustee under 11 U.S.C. § 707(b)(3) is denied.

IT IS SO ORDERED.

DATED: DEC -8 2008



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court