

Concurrent Session

Fitting a Square Peg into a Round Hole: Deciding Which Case a Consumer Debtor Files

Barry A. Chatz | Arnstein & Lehr; Chicago

Hon. Jacqueline P. Cox | U.S. Bankruptcy Court (N.D. Ill.); Chicago

Monica Villarejos Kindt | Assistant U.S. Trustee; Cincinnati

John C. Lange | Gold Lange & Majoros, PC
Southfield, Mich.

**Fitting A Square Peg Into A Round Hole - Deciding
Which Case A Consumer Debtor Files**

**(Fact patterns and analysis in deciding which chapter a consumer
debtor should file under § 707(b)(3) issues)**

Panelists:

**Honorable Jacqueline P. Cox
United States Bankruptcy Court for the North District of Illinois
Chicago, Illinois**

**Monica V. Kindt, Esq.
Assistant United States Trustee
Cincinnati, Ohio**

**Barry A. Chatz, Esq.
Arnstein & Lehr
Chicago, Illinois**

**John C. Lange, Esq.
Gold Lange & Majoros, P.C.
Southfield, Michigan**

Facts

Joe Debtor
45 years old
2 children, 14 and 17
Married to Nancy

Joe earns \$70,000/year
Nancy earns \$104,796/year

Both children attend a private religion based school.

Joe tried to avoid filing bankruptcy. They tried to sell the house, but it is “under water” and the mortgage companies would not agree to a short sale.

Three years ago Joe lost his \$120,000 per year job. He was unemployed for the full three year period. They were unable to maintain their lifestyle through income alone. They cashed in some 401(k) and college savings accounts, and Joe took a loan against his 401(k).

Joe also incurred a lot of credit card debt trying to maintain his household.

Nancy does not believe that she needs to file bankruptcy and does not want to join Joe in his case. Joe has decided to file a Chapter 7.

Assets

House: FMV \$250,000
1st mortgage \$260,000, \$2,300/month
2nd mortgage \$100,000, \$800/month

House is owned jointly.
Joe and Nancy are jointly liable on the notes.

Cars:

Joe leases a Ford Flex for \$325/month. There are 6 months remaining on the lease. Nancy is purchasing a Land Rover. Payments are \$815/month. It is worth \$15,000. She owes \$8,000. Nancy also leases a Ford Focus for \$199/month that their son drives. Since they spent the college savings money, their son will need reliable transportation because he is going to live at home next year and commute to college.

Joe's Other Debts

Credit cards \$75,000.
Student Loans \$ 20,000 are in deferment.
Medical Bills \$5,000.
Owes his father \$20,000.

Note that Joe paid his father \$8,000 three months ago.

Joe is paying \$200/month on 401(k) loans which will be paid off in 12 months.

Joe pays child support \$433/month. The obligation is current and the obligation will end in 36 months.

Nancy's Debts

Credit Cards \$5,000.

Minimum monthly credit card payment is \$100, but Nancy regularly pays \$200/month.

Student Loans \$10,000, she pays \$200/month.

Joint Debt

IRS \$4,800 - 2008 tax year

Joe files a Chapter 7 and the United States Trustee files a Motion to Dismiss under 11 U.S.C. §707(b)(3). See the attached Schedules I and J.

Questions

1. What are the issues regarding the 401(k) loan repayments and contributions?
2. Is it important that they were unable to sell the house at a short sale?
3. What if it is possible to rent a similar house in the same neighborhood for \$2,000 per month?
4. Should the court consider that, if they let the house get foreclosed upon and the second mortgage company pursued them for a deficiency balance, it would have forced Nancy to also file for bankruptcy? Is it an important factor that if they surrendered the house the unsecured deficiency balance owing to the second mortgage would get added to the total pool of unsecured debts?
5. Are the food and clothing expenses excessive?
6. Should the nondischargeable income taxes be amortized over thirty six months or sixty months rather than twelve months?
7. Is it an issue that the spouse's car payment is relatively high?
8. Is the line item for payment of the son's vehicle reasonable?

9. Is it relevant that the child support will be paid off in three years?
10. Is the private school tuition excessive? Does it matter that the private school is religiously based and the total payment is less than 15% of the household income?
11. What issues are there regarding the payment of the spouse's unsecured debts?
12. What if Nancy had no unsecured debts but there was a line item that simply indicated \$400 a month for "spouse's recreation"?
13. What if the \$400 per month were simply listed as "spouse's savings"?
14. Is it relevant that this may end up being an asset case in light of the preference payments made to Joe's father?
15. Is it relevant to inquire into whether the majority of Joe's credit card charges were incurred for a household purpose, also benefitting the non-filing spouse?
16. What if the majority of Joe's credit card charges were the result of gambling losses of which the non-filing spouse was not even aware?

B61 (Official Form 61) (12/07)

In re Joe Debtor Case No. _____
 Debtor(s)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by every married debtor, whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. Do not state the name of any minor child. The average monthly income calculated on this form may differ from the current monthly income calculated on Form 22A, 22B, or 22C.

Debtor's Marital Status: Married	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP(S): Daughter Son	AGE(S): 14 17
Employment:	DEBTOR	SPOUSE
Occupation	Engineer	School Principal
Name of Employer	Ford Motor Company	Detroit Public Schools
How long employed	3 months	20 years
Address of Employer	Dearborn, MI 48126	Detroit, MI

	DEBTOR	SPOUSE
INCOME: (Estimate of average or projected monthly income at time case filed)		
1. Monthly gross wages, salary, and commissions (Prorate if not paid monthly)	\$ 5,833.00	\$ 8,733.00
2. Estimate monthly overtime	\$ 0.00	\$ 0.00
3. SUBTOTAL	\$ 5,833.00	\$ 8,733.00
4. LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	\$ 1,200.00	\$ 1,400.00
b. Insurance	\$ 200.00	\$ 0.00
c. Union dues	\$ 0.00	\$ 0.00
d. Other (Specify): <u>401(k) Loan</u>	\$ 200.00	\$ 0.00
<u>401(k) Contribution</u>	\$ 58.00	\$ 500.00
5. SUBTOTAL OF PAYROLL DEDUCTIONS	\$ 1,658.00	\$ 1,900.00
6. TOTAL NET MONTHLY TAKE HOME PAY	\$ 4,175.00	\$ 6,833.00
7. Regular income from operation of business or profession or farm (Attach detailed statement)	\$ 0.00	\$ 0.00
8. Income from real property	\$ 0.00	\$ 0.00
9. Interest and dividends	\$ 0.00	\$ 0.00
10. Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above	\$ 0.00	\$ 0.00
11. Social security or government assistance (Specify): _____	\$ 0.00	\$ 0.00
_____	\$ 0.00	\$ 0.00
12. Pension or retirement income	\$ 0.00	\$ 0.00
13. Other monthly income (Specify): _____	\$ 0.00	\$ 0.00
_____	\$ 0.00	\$ 0.00
14. SUBTOTAL OF LINES 7 THROUGH 13	\$ 0.00	\$ 0.00
15. AVERAGE MONTHLY INCOME (Add amounts shown on lines 6 and 14)	\$ 4,175.00	\$ 6,833.00
16. COMBINED AVERAGE MONTHLY INCOME: (Combine column totals from line 15)	\$ 11,008.00	

(Report also on Summary of Schedules and, if applicable, on Statistical Summary of Certain Liabilities and Related Data)

17. Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of this document:

CENTRAL STATES BANKRUPTCY WORKSHOP

B6J (Official Form 6J) (12/07)

In re Joe Debtor Debtor(s) Case No. _____

SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

Complete this schedule by estimating the average or projected monthly expenses of the debtor and the debtor's family at time case filed. Prorate any payments made bi-weekly, quarterly, semi-annually, or annually to show monthly rate. The average monthly expenses calculated on this form may differ from the deductions from income allowed on Form 22A or 22C.

Check this box if a joint petition is filed and debtor's spouse maintains a separate household. Complete a separate schedule of expenditures labeled "Spouse."

1. Rent or home mortgage payment (include lot rented for mobile home)		\$ <u>3,100.00</u>
a. Are real estate taxes included?	Yes <u>X</u> No _____	
b. Is property insurance included?	Yes <u>X</u> No _____	
2. Utilities:		\$ _____
a. Electricity and heating fuel		\$ <u>300.00</u>
b. Water and sewer		\$ <u>100.00</u>
c. Telephone		\$ <u>100.00</u>
d. Other <u>Cable and Internet</u>		\$ <u>120.00</u>
3. Home maintenance (repairs and upkeep)		\$ <u>100.00</u>
4. Food		\$ <u>1,200.00</u>
5. Clothing		\$ <u>400.00</u>
6. Laundry and dry cleaning		\$ <u>100.00</u>
7. Medical and dental expenses		\$ <u>200.00</u>
8. Transportation (not including car payments)		\$ <u>400.00</u>
9. Recreation, clubs and entertainment, newspapers, magazines, etc.		\$ <u>250.00</u>
10. Charitable contributions		\$ <u>0.00</u>
11. Insurance (not deducted from wages or included in home mortgage payments)		\$ _____
a. Homeowner's or renter's		\$ <u>0.00</u>
b. Life		\$ <u>200.00</u>
c. Health		\$ <u>0.00</u>
d. Auto		\$ <u>300.00</u>
e. Other _____		\$ <u>0.00</u>
12. Taxes (not deducted from wages or included in home mortgage payments)		\$ _____
(Specify) <u>Nondischargeable income tax</u>		\$ <u>400.00</u>
13. Installment payments: (In chapter 11, 12, and 13 cases, do not list payments to be included in the plan)		\$ _____
a. Auto		\$ <u>325.00</u>
b. Other <u>Spouse's car</u>		\$ <u>815.00</u>
c. Other <u>Spouse's second car, son drives it</u>		\$ <u>199.00</u>
14. Alimony, maintenance, and support paid to others		\$ <u>433.00</u>
15. Payments for support of additional dependents not living at your home		\$ <u>0.00</u>
16. Regular expenses from operation of business, profession, or farm (attach detailed statement)		\$ <u>0.00</u>
17. Other <u>See Detailed Expense Attachment</u>		\$ <u>1,966.00</u>

18. AVERAGE MONTHLY EXPENSES (Total lines 1-17. Report also on Summary of Schedules and, if applicable, on the Statistical Summary of Certain Liabilities and Related Data.) \$ 11,008.00

19. Describe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document:

20. STATEMENT OF MONTHLY NET INCOME		
a. Average monthly income from Line 15 of Schedule I		\$ <u>11,008.00</u>
b. Average monthly expenses from Line 18 above		\$ <u>11,008.00</u>
c. Monthly net income (a. minus b.)		\$ <u>0.00</u>

B6J (Official Form 6J) (12/07)

In re Joe Debtor

Case No. _____

Debtor(s)

SCHEDULE J - CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)
Detailed Expense Attachment

Other Expenditures:

Spouse's unsecured debts	\$	400.00
Private school tuition	\$	1,266.00
Haircare	\$	100.00
Gifts	\$	100.00
Emergencies	\$	100.00
Total Other Expenditures	\$	1,966.00

THE TOTALITY OF § 707(b)(3) CIRCUMSTANCES

BARRY A. CHATZ, KEVIN H. MORSE AND MARC S. ZASLAVSKY¹

CALIFORNIA:

- In re Mitchell, 357 B.R. 142 (Bankr. C.D.Cal. 2006)

In a case of first impression for the Central District of California, the Bankruptcy Court found that the debtor filed her bankruptcy petition in bad faith and dismissed the debtor's chapter 7 case as abuse under 11 U.S.C. § 707(b)(3)(A). The debtor had testified that she was unemployed for the two year preceding the filing. In alleging bad faith, the U.S. Trustee put forth evidence that the debtor had charged, in that two year period, approximately \$30,000 on credit cards for dining out, clothes, beauty treatments and electronics. Moreover, the U.S. Trustee also presented an affidavit of an analyst that the debtor, during her period of unemployment, created a false sense of financial solvency by claiming on her credit card applications that she had annual income of \$80,000. The Bankruptcy Court dismissed the case and found sufficient cause to under 11 U.S.C. § 349 to impose a 180-day bar against refiling another Chapter 7 petition.

- In re Pak, 343 B.R. 239 (Bankr. N.D.Cal. 2006)

Under the "totality of the circumstances" provision in 11 U.S.C. § 707(b)(3), the Bankruptcy Court held the debtor's Chapter 7 case to be abusive even though the debtor could pay only a 19% dividend to creditors through a 36-month Chapter 13 plan. The Bankruptcy Court looked at three "considerations" in finding a 19% dividend sufficient for abuse. The first consideration was that Congress lowered the standard from "substantial abuse" to "abuse." Second, that while 19% is a relatively low dividend, that percentage will allow him to make \$33,497.28 in plan payments over a 36-month plan period. Finally, the Bankruptcy Court agreed with the U.S. Trustee that the debtor's claimed expenses were excessive for a Chapter 7 debtor.

DELAWARE:

- In re Pennington, 348 B.R. 647 (Bankr. Del. 2006)

The U.S. Trustee moved to dismiss the Chapter 7 case of a below-median debtor based on the debtor's postpetition financial situation and excessive expense reductions. The debtor's Schedule I reflected only \$91.00 in monthly net income available to pay creditors. However, the U.S. Trustee presented evidence that the debtor's schedules failed to account for \$430 deducted each month from his paycheck and deposited into a savings account and that the debtor

¹ Barry A. Chatz is a partner and chair of the Bankruptcy, Creditors' Rights & Restructuring practice group at Arnstein & Lehr LLP. Kevin H. Morse and Marc S. Zaslavsky are associates in the Bankruptcy, Creditors' Rights & Restructuring practice group of Arnstein & Lehr LLP.

surrendered his original car and obtained a car with payments \$200 less than on his schedules. With these adjustments, the debtor could repay 42% of his unsecured debt in a three-year plan or 69% of his unsecured debt through a five-year plan. Since this amount was above the “means test” 25% threshold, the Bankruptcy Court concluded it was an abuse to grant Chapter 7 relief to the debtor.

FLORIDA:

- In re Henebury, 361 B.R. 595 (Bankr. S.D.Fla. 2007)

The U.S. Trustee moved to dismiss the joint Chapter 7 case filed by husband and wife debtors as abuse of provisions of that chapter based on debtors' ability to pay their creditors out of their monthly disposable income. The debtors scheduled as exempt a \$295,000 residence in which they were no longer residing in or paying the mortgage. Additionally, the debtors were also paying \$1,550/month in rent for an apartment and reaffirmed a secured debt of \$15,000 in a Disney timeshare. Further, in deciding whether to dismiss, the Bankruptcy Court found it appropriate and equitable to include as funds available for payment of creditors the debtor-wife's income from teaching job which she started just four days after debtors filed their petition. Once the debtors' superfluous expenses were removed and the wife's postpetition income included, the Bankruptcy Court found that the debtors would be able to repay 100% of their unsecured debt in less than 33 month. As such, the Bankruptcy Court dismissed the joint Chapter 7 case as abuse of Chapter 7.

- In re Reese, 402 B.R. 43 (Bankr. M.D.Fla. 2008)

The Bankruptcy Court did not find abuse under 11 U.S.C. § 707(b)(3) despite the debtor, with \$30,000 annual income, incurring average *monthly* credit card expenses of \$40,000, monthly car payments of \$5,000 for two high-end sport utility vehicles and monthly entertainment expenses of more than \$5,000. In denying the U.S. Trustee's motion to dismiss, the Bankruptcy Court found that the core inquiry under the totality of the circumstances was whether the debtor's financial situation indicates she has the ability to pay a substantial portion of her unsecured debt. Since the debtor had average annual income of only \$30,000 and over \$300,000 in unsecured debt, the Bankruptcy Court found that she could not repay her debts in Chapter 13 and, therefore, the U.S. Trustee did not establish that relief would be an abuse.

ILLINOIS:

- Costello v. Bodenstein, 01-CV-9696, 2002 WL 1821663 (N.D.Ill. Aug. 7, 2002)

The District Court upheld the Bankruptcy Court's decision to dismiss the Debtors' bankruptcy case under *pre-BAPCPA* 11 U.S.C. § 707(b). The husband and wife debtors filed schedules that showed two (2) recently purchased brand new Ford Expeditions, \$40,000 in credit card charges and net income of \$626.00 per month. The United States Trustee objected that “if the Debtors did not drive high end SUVs, they would be able to repay unsecured creditors under Chapter 13

of the Bankruptcy Code.” In arriving at its decision, the district court found that, because the Seventh Circuit has not defined “totality of the circumstances,” the Bankruptcy Court appropriately (under pre-BAPCPA law) applied a multi-factor test giving the most weight to the debtors’ ability to repay their debts.

- In re Deutscher, 419 B.R. 42 (Bankr. N.D.Ill. 2009)

The Bankruptcy Court used a multi-factor test to grant the U.S. Trustee’s motion to dismiss a husband and wife’s bankruptcy case despite the 14 month gap between debtors’ purchase of a 42-foot yacht and their Chapter 7 filing. While the gap made it difficult to characterize the purchase of the yacht as on the “eve of bankruptcy,” the luxury nature of the purchase, when combined with the purchase of a second boat and sport utility vehicle that the debtors bought in the months thereafter, occurred at time when debtor-husband was unemployed and debtors were likely insolvent. The monthly payments on these luxury items consumed nearly one-third (1/3) of debtors’ net monthly income. The Court found that these facts, along with the debtors’ intent to reaffirm these debts and evidence that debtors may have been less than forthcoming with respect to their true financial situation, warranted dismissal of the Chapter 7 case as abusive under 11 U.S.C § 707(b)(3)(A).

- In re Bacardi, 09-B-25757, 2010 WL 54760 (Bankr. N.D.Ill. January 6, 2010)

The Bankruptcy Court granted a motion of the U.S. Trustee, under 11 U.S.C. § 707(b)(3), and provided the debtors 14 days to convert their case to Chapter 11 or the case would be dismissed. At the time of filing, the husband and wife debtors jointly earned more than \$216,000 annually before taxes and owned three (3) properties. The 3 properties consisted of their current residence, valued at \$790,000; their old residence, valued at \$500,000; and a condominium in Florida, valued at \$400,000. The U.S. Trustee moved to dismiss the case under § 707(b)(3)(B) based on the “totality of the circumstances” including the debtors’ intent to keep all 3 properties which would leave no recovery for unsecured creditors. The Bankruptcy Court relied solely on the debtors’ ability to repay unsecured creditors with a reduction in expenses in finding an abuse of Chapter 7 under 11 U.S.C. § 707(b)(3).

- In re Lorenca, 422 B.R. 665 (Bankr. N.D.Ill. 2010)

The U.S. Trustee moved to dismiss debtors’ Chapter 7 case as abusive under 11 U.S.C. § 707(b)(3) based upon totality of the circumstances of their financial situation. In particular, the U.S. Trustee objected to the amount of money that debtors were devoting to the retention of a \$493,000 home and another undersecured residential “investment property” rather than for use in the payment of unsecured claims. The Bankruptcy Court held that debtors, who were renting out the “investment property” for \$482 per month less than what they were paying, could not retain this old home at unsecured creditors’ expense in hopes that the real estate market would bounce back. The Bankruptcy Court concluded that the mere fact that debtors’ monthly expenses on their new home was more than double the monthly housing expense of \$2,103 allowed under Internal Revenue Service guidelines did not, but for their ability to make payments on unsecured

claims by surrendering their old home, warrant dismissal of their Chapter 7 case as abusive. Following the decision in In re Bacardi (citation above), the Bankruptcy Court provided the debtors with six (6) weeks to divest themselves of the “investment property,” convert to Chapter 13, and file a feasible plan or the case would be dismissed.

INDIANA:

- In re Cutler, 08-B-15568, 2009 WL 2044378 (Bankr. S.D.Ind. July 9, 2009)

The U.S. Trustee moved for dismissal of the debtors’ bankruptcy case, under 11 U.S.C. § 707(b)(3), based on the “totality of the circumstances” with due consideration given to the Debtor’s post-petition financial circumstances. The Bankruptcy Court noted that a debtor’s ability to pay is the most relevant, but not the only factor, to be considered under the test. The Bankruptcy Court went on to discuss the debtors’ serious history of financial difficulty, in which the married couple went from high paying jobs and large retirement accounts, to bouncing between low paying jobs and unemployment compensation. However, the debtors financial picture brightened post-petition, with one of the debtors landing a \$125,000 per year job, and the Bankruptcy Court noted that this post-petition improvement should be a factor considered in the totality of the circumstances. Nonetheless, the Bankruptcy Court found the U.S. Trustee’s argument unpersuasive, under the “totality of the circumstances,” where the debtors had passed the means test and made significant efforts to shed their debt and alter their standard of living, such as selling their 5 bedroom house and instead renting a home.

KANSAS:

- In re Vogeler, 393 B.R. 240 (Bankr. D.Kan. 2008)

Debtor filed for Chapter 7 relief on March 27, 2007 with debts totaling approximately \$47,000. One month after filing for relief, the debtor, who was unemployed at the time of filing, won \$130,000 from the Kansas Lottery and received net proceeds of \$90,692.89. Despite the Chapter 7 Trustee and U.S. Trustee’s admonition at the § 341(a) hearing not to spend the lottery proceeds, the debtor spent most of his winnings on new vehicles and various, non-emergency personal expenses. The U.S. Trustee moved to dismiss the debtor’s Chapter 7 case, under 11 U.S.C. § 707(b)(3), as abusive based on the totality of the circumstances. In granting the U.S. Trustee’s motion, the Court chose to apply the 10th Circuit’s pre-BAPCPA list of factors to analyze the totality of the circumstances. The non-exhaustive list included (1) whether the debtor enjoys a stable income; (2) whether the debtor is eligible for Chapter 13 relief; (3) whether the debtor suffered a sudden calamity precipitating the bankruptcy filing; (4) whether the debtor made pre-petition purchases far in excess of his ability to repay; (5) whether the debtor’s expenses are excessive; (6) whether the debtor’s schedules are accurate; and (7) whether the debtor has demonstrated good faith.

MICHIGAN:

- In re Zaporski, 366 B.R. 758 (Bankr. E.D.Mich. 2007)

In moving to dismiss the debtor's Chapter 7 case under 11 U.S.C. § 707(b)(3), the U.S. Trustee relied both on statutory presumption of abuse, which would have been triggered if the debtor had not taken vehicle deductions for cars he owned outright without monthly payments, and on the "totality of circumstances" test. The Bankruptcy Court found an abuse under the totality of the circumstances, despite finding that the debtor was entitled to deduct the vehicle ownership expenses. The record demonstrated the debtor was single with no dependents, had a substantial 401(k) plan, substantial pension plan upon retirement and stable employment of more than 26 years, which provided him with a salary of more than double the median income for a family of one in Michigan. As such, the Court dismissed the case as abusive under chapter 7 because it was the debtor's lifestyle choices that led to the filing of bankruptcy and his ability to repay creditors over a 60-month chapter 13 plan.

NEW MEXICO:

- In re Ruel, 418 B.R. 389 (Bankr. D.N.M. 2009)

The U.S. Trustee moved to dismiss the voluntary joint Chapter 7 case as "abusive," based on the totality of circumstances of debtors' financial situation. The husband, who had recently retired from career military service, was earning \$2,500/month in retirement pay and \$4,200/month from postpetition, private sector employment. Together, with his wife's postpetition employment, the debtors gross income was \$7,600/month. The debtors monthly mortgage payments were \$1,700 with credit card debt of over \$100,000 and interest rates of nearly 30%. Based on these postpetition increases, and even taking into account the debtors' postpetition purchase of a new sports utility vehicle, the U.S. Trustee determined that a 60-month chapter 13 plan would pay a 73% dividend to creditors. As such, the Court found the debtors' financial problems were solely the result of living beyond their means for years and the Court would dismiss the case under 11 U.S.C. § 707(b)(3) if it was not timely converted to chapter 13.

NEW YORK:

- In re Colgate, 370 B.R. 50 (Bankr. E.D.N.Y. 2007)

The Bankruptcy Court held that while the pre-BAPCPA standard for dismissing a Chapter 7 case was "substantially abusive", and the 2005 Amendments lowered the standard to just "abusive," the Court would apply the same pre-BAPCPA two-part test in deciding whether to dismiss the case as abusive, based on totality of circumstances, in a case in which no presumption of abuse arose or was rebutted. The Second Circuit's two-part test first considered the debtor's ability to pay and then weighed other mitigating or aggravating factors. The Bankruptcy Court focused on the debtor's ability to make a 39% distribution to unsecured creditors under a hypothetical

Chapter 13 plan, the purchase of a new computer, furniture and electronics on the “eve of bankruptcy,” and the significant increase in the debtor’s credit card purchases in the months leading up to the petition date. As such, the Bankruptcy Court found the debtor’s case warranted dismissal, unless the debtor converted the case to Chapter 13 within twenty days.

OHIO:

- In re Wright, 364 B.R. 640 (Bankr. N.D. Ohio 2007)

The U.S. Trustee moved to dismiss the debtor’s case as abusive under 11 U.S.C. § 707(b)(3). The U.S. Trustee’s motion did not make any allegations questioning the debtor’s honesty. Rather, the U.S. Trustee argued that the debtor lacked the need for Chapter 7 relief since he intended to surrender his house and car which would give him the ability to repay his creditors. Thus, according to the U.S. Trustee, the debtor can repay his creditors out of his future earnings. However, the Bankruptcy Court’s review of the debtor’s financial situation did not lead to a finding of abuse under the totality of the circumstances. The Bankruptcy Court applied the Sixth Circuit’s standard that a finding of abuse may “be predicated upon either a lack of honesty or want of need.” In this case, the U.S. Trustee did not question the debtor’s honesty and the Bankruptcy Court found the debtor’s postpetition decline in income expedient in denying the U.S. Trustee’s motion.

WISCONSIN:

- In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wis. 2006)

The U.S. Trustee’s motion to dismiss the case relied on debtors’ § 341(a) testimony that the debtors were not reaffirming the mortgage debts on their house, were not making mortgage payments and intended to surrender their house despite taking an expense deduction, for means test purposes, for payments on the house. On the basis that the debtors would otherwise be able to pay unsecured creditors, the U.S. Trustee moved to dismiss the case under 11 U.S.C. § 707(b)(3)(B) because the “totality of the circumstances” of the debtors’ financial situation demonstrated abuse. The Bankruptcy Court continued the case for additional evidence of abuse and held that the U.S. Trustee would have to demonstrate more than the debtors’ ability to repay debts as reliance solely on the ability to repay would render the means test “surplusage.”

- In re Brandenburg, 07-B-20244, 2007 WL 1459402 (Bankr. E.D. Wis. May 15, 2007)

The U.S. Trustee filed a motion to dismiss the debtor’s case as an abuse of Chapter 7 on the theory that, *inter alia*, the totality of the circumstances of Debtor’s financial situation under §707(b)(3) demonstrated abuse. The debtor included deductions for his mortgage payments in Form B22A despite the sale of his condominium, at a foreclosure sale in accordance with Minnesota law, two days prior to the bankruptcy filing. The U.S. Trustee argued that the mortgage was extinguished upon the sale, and therefore the mortgage payments were no longer

contractually due and the Court agreed. *Id.* at 3. In holding that the foreclosure sale extinguished the mortgage, the court found that there is no “payment scheduled as contractually due”, and therefore the debtor could not deduct the monthly mortgage payments for the condominium on Line 42 Form B22A. This brought the Debtor’s threshold income above the median level, once again raising the presumption of abuse, and denying the U.S. Trustee’s ability to move for dismissal under 11 U.S.C. § 707(b)(3). However, since the debtor did not rebut this presumption, the Court stated it would dismiss the case under 11 U.S.C. § 707(b)(2), unless the debtor moved to convert to Chapter 13 within 30 days.

- In re Roll, 400 B.R. 674 (Bankr. W.D.Wis. 2008)

The Bankruptcy Court conditionally denied the U.S. Trustee’s motion to dismiss, under 11 U.S.C. § 707(b)(3), the separate Chapter 7 petitions filed by a same sex couple living in the same household. The Bankruptcy Court held that U.S. Trustee bore the burden of proving the extent to which either debtor’s income was regularly used to pay household expenses of the other debtor or debtor’s dependent, as required for such income to be imputed to the other debtor for purposes of application on “means test.” While the debtors might have the ability to pay their debts in a hypothetical Chapter 13 case, the U.S. Trustee could not rely solely on this fact to warrant dismissal of the debtors’ Chapter 7 cases on “abuse” theory based on totality of circumstances of their financial situation. The Bankruptcy Court further found that the U.S. Trustee could not allege the same sex couple to be manipulating the bankruptcy system, as an additional factor under the “totality of the circumstances” provision, simply because they filed separate Chapter 7 petitions solely because state law does not allow them to marry.

- In re Le Roy, 08-B-26263, 2009 WL 357923 (Bankr. E.D.Wis. Feb. 12, 2009)

The U.S. Trustee moved to dismiss the Chapter 7 case based on the “totality of the circumstances” under 11 U.S.C. § 707(b)(3). The debtor made monthly payments of \$421 toward a voluntary 401(k) plan through his employer, and had monthly mortgage payments of \$600 per month for an empty lot in which the debtor intended to build a house close to his visually impaired wife’s work. The U.S. Trustee argued that the debtor had the ability to pay creditors under Chapter 13 of the Bankruptcy Code and, based on that fact alone, the Chapter 7 filing was an abuse under the totality of the circumstances test in 11 U.S.C. § 707(b)(3)(B). The Bankruptcy Court disagreed with the U.S. Trustee’s assertion and noted that while the ability to pay is a factor under the totality of the circumstances test, a case should not be dismissed if it is the only factor. The Bankruptcy Court determined that no abuse was present where the debtor had been contributing to his 401(k) for several years and the debtor had acquired the vacant lot almost two years prior to his petition.

Select 6th Circuit case law on §707(b)(3)

***In re Behlke*, 358 F.3d 429 (6th Circuit, 2004) (pre-BAPCPA case)** - Affirming Bankruptcy Court and BAP decision to include 401k contributions as “disposable income”.

***In re Pandl*, 407 B.R. 299 (S.D.Ohio, 2009)** - Debtor’s monthly contributions to employee retirement plan and their monthly payments on loan from plan regarded as income for purposes of deciding whether totality of circumstances of financial situation demonstrated that Chapter 7 filing was abusive.

***In re Phillips*, 417 B.R. 30 (S.D.Ohio 2009)** - Statutory changes brought on by BAPCPA impacted manner in which retirement funding is treated in Chapter 13, therefore motion to dismiss on basis that retirement funding could fund a Chapter 13 plan inherently flawed.

***In re Lane*, 280 F.3d 633, (6th Circuit, 2002)** - Avoidance of wholly unsecured second mortgage. See also *In re Claar*, 368 B.R. 670, (Bankr. S.D. Ohio 2007); *In re Evans*, 370 B.R. 138 (Bankr. S.D. Ohio 2007).

***In re Travis*, 353 B.R. 520, (E.D. Michigan, 2006)** - Analysis of non-filing spouse income and expenses, including whether non-filing spouse’s income enables debtor to significantly improve standard of living or funds debtor’s extravagant lifestyle.

