UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

In re PATSY PARKER BARKER,	)	Case No. 06-60835-LYN
	)	
Debtor.	)	
	)	

MEMORANDUM and ORDER

This matter comes before the court on a motion by the United States trustee under 11 U.S.C. § 707(b) to dismiss this case as an abuse of the provisions of chapter 7 of the Bankruptcy Code. Patsy Parker Barker ("the Debtor") opposes the motion.

For the reasons stated below, the Court concludes that it would not be an abuse of the provisions of chapter 7 for the Debtor to continue under this chapter. The motion will be denied.

I. Jurisdiction

This court has jurisdiction over this matter. 28 U.S.C. §§ 1334(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). Accordingly, this court may render a final order. This memorandum shall constitute the Court's findings of fact and conclusions of law as directed by Fed.R.Civ.P. 52 which is made applicable in this contested matter by Fed. R. Bankr. P. 9014(c) and 7052.

II. Facts

On June 9, 2006, the Debtor filed a chapter 7 petition. The Debtor scheduled real

property ("the Real Property") valued at $96,000.00.[1] She does not live in the Real Property. She rents it to her daughter.[2] The Real Property secures two debts, one in the amount of $80,770.00 and one in the amount of $13,731.00,[3] a total of $94,501.00. She scheduled priority unsecured claims in the amount of $500.00 and general unsecured claims in the amount of $21,598.00.[4]

The Debtor has been gainfully employed by the same employer since 1972. She scheduled monthly gross income from her employment in the amount of $3,628.00[5]. She also scheduled $650.00 in monthly income from the rental of the Real Property and $300.00 per month in household contributions from her fiancé. She scheduled monthly payroll deductions in the amount of $1,293.00, including a $143.00 monthly deduction for a contribution to her 401(k) retirement account. She scheduled net monthly income in the amount of $3,285.00.[6] The Debtor lives in a household of five persons including her fiancé, her fiancé's adult daughter, and the daughter's two children. The parties agree that the Debtor's monthly income is below that of a family of five in Virginia.[7] The Debtor scheduled monthly expenses in the amount of $3,316.00.[8] On November 7, 2006, the United States trustee filed a motion to dismiss this case.

---

[1] See Debtors' Schedule A.

[2] See Transcript of Hearing, p. 6: l. 8-24.

[3] See Debtors' Schedule D.

[4] See Debtors' Schedules E & F.

[5] See Debtors' Original Schedule I.

[6] See Debtors' Original Schedule I.

[7] See Debtor Form B22C. Also see the motion of the United States trustee to dismiss this case, page 2, ¶ 7.

[8] See Debtors' Schedule J.

The motion is ultimately brought under the standard set forth in Section 707(b)(3)(B) which requires the court to consider the totality of the circumstances of the Debtor's financial situation.

After the United States trustee filed his motion, the Debtor filed amended schedules. The contents of those amended schedules are discussed below.

III. Discussion

A. Dismissal for Abuse Under Section 707(b).

The United States trustee brings this motion on the grounds that it would be an abuse of chapter 7 to permit the debtor to continue prosecuting this case under that chapter. A case may be dismissed for abuse. See 11 U.S.C. § 707(b) as revised by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[9]

Whether the prosecution of a chapter 7 case constitutes abuse is determined under Sections 707(b)(1), (2), (3) & (7). Section 707(b)(1)[10] provides that a court may dismiss an individual case under chapter 7 if (1) the debtor's debts are primarily consumer debts and (2) it would be an abuse of the provisions of chapter 7 of the bankruptcy code to grant relief to the debtor.

Section 707(b)(2) provides that abuse is presumed if the debtor's net income exceeds a

---

[9] Section 707(b) was revised and became effective on October 17, 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). See Pub. L. No. 109-8, 119 Stat. 23 (2005).

[10] Section 707(b) (1) provides:

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

certain threshold as determined by a rather rigid mathematical test (the "means test"). The means test was designed to determine if the debtor has the ability to pay some of his or her debts through the mechanism of a chapter 13 plan. The debtor may rebut the presumption by demonstrating that certain adjustments to expenses are warranted.

Section 707(b)(3) provides that, if the presumption in Section 707(b)(2) does not arise or is rebutted, the court shall consider "(a) whether the debtor filed the petition in good faith; or (B) [whether] the totality of the circumstances . . . of the debtor's financial condition demonstrates abuse."

Section 707(b)(7) provides that the means test found in Section 707(b)(2) does not apply to debtors whose current median income is less than or equal to the median income for families of equal size in the applicable state ("below-median income debtors")[11]. This of course implies that the means test applies only to debtors whose current income is greater than the median income for families of equal size in the applicable state ("above-median income debtors"). This distinction between these two classes of debtors, first made in Section 707(b)(7), is relevant to subsequent code provisions, including one in Chapter 13 that is, as will be seen, relevant to this inquiry.

B. Burden of Proof

Under the pre-BAPCPA law, the burden of production and the burden of persuasion in a motion to dismiss under Section 707(b) rested with the moving party. See 4 Collier on Bankruptcy, "Dismissal", ¶ 707.04[5][a], p. 707-27 (15th ed. rev.) (Citing Green v. Staples (In re

---

[11] Section 707(b)(7) provides that no judge, United States trustee, trustee or party in interest may file a motion under Section 707(b)(2) if the debtor is a below-median income debtor. It does not actually provide that the test does not apply to such a debtor, but the practical effect is the same as if it did.

Green), 934 F.2d 568 (4th Cir. 1991)). Collier concluded that the burden was heighten because the former Code provided that "the court should give the benefit of any doubt to the debtor." Collier, supra. That language, however, has been removed from the Code. While no longer heightened, the burden remains on the United States trustee to meet the burden of going forward and to meet the burden of persuasion by a preponderance of the evidence.

C. Section 707(b)(3)(B)

The parties agree that the Debtor's debts are primarily consumer debts, so we turn to the issue of abuse. Because the Debtor is a below-median income debtor Section 707(b)(2) does not apply. The issue then becomes whether abuse exists under Section 707(b)(3), that is, whether the debtor has acted in bad faith or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse. The United States trustee does not assert that the petition was filed in bad faith, so it remains to be determined whether the totality of the circumstances of the debtor's financial situation demonstrates abuse.

In order to determine whether abuse exists, it is necessary to consider four legal issues. First, does the test in Section 707(b)(3)(B) include a consideration of a debtor's ability to pay some or all of his or her unsecured debt by funding a chapter 13 plan? Second, what other financial factors should be considered under Section 707(b)(3)(B)? Third, should any non-financial factors be considered when determining abuse under Section 707(b)(3)(B)? Fourth, how should the court measure a below-median income debtor's ability to fund a chapter 13 plan?

1. The Debtor's Ability to Fund a Chapter 13 Plan.

The first issue is whether the court should consider a below-median income debtor's ability to pay some or all of his or her unsecured debt by funding a chapter 13 plan when

applying the test in Section 707(b)(3)(B). Guidance is provided by both judicial and non-judicial authority.

At least two non-judicial authorities have concluded that Section 707(b)(3)(B) does not provide a separate ability-to-pay test for below-median income debtors.

> It seems clear that the 'bright line test' of section 707(b)(7) means that no chapter 7 case should be dismissed based on the debtor's ability to pay if the debtor has an income below the safe harbor threshold. As the House Report stated:
>
> > The Act's second safe harbor only pertains to a motion under section 707(b)(2), that is, a motion to dismiss based on a debtor's ability to repay. It does not allow a judge, United States trustee, bankruptcy administrator or party in interest to file such motion if the income of the debtor . . . and the debtor's spouse is less than certain monetary thresholds.
>
> The median income threshold adopted by Congress for means testing recognizes that families with income below that threshold do not have the ability to pay significant amount to their creditors while maintaining a reasonable living standard. *Courts should not attempt to evade this Congressional intent by using some alternative means test to find "abuse"on the part of debtors whose incomes are below the applicable median income threshold.*

6 Collier on Bankruptcy, "Dismissal / Conversion Under Chapter 11 or 13", ¶ 707.05[2][b] (15th Ed. Rev.) (Emphasis added.).

This Court is not persuaded by the argument in Collier. Collier bases its conclusion on legislative history that focuses on Section 707(b)(2), not Section 707(b)(3). Furthermore, as noted, the safe harbor provided by Section 707(b)(7) only applies to the means test in Section 707(b)(2). It does not apply to section 707(b)(3). Consequently below-median income debtors must face the strictures of Section 707(b)(3), which included a separate test based on the totality of the circumstances of the debtor's financial situation. Congress did not intend to grant below-median income debtors a safe harbor from Section 707(b)(3)(B) just because it did so for Section 707(b)(2). Congress knew how to eliminate an ability-to-pay test from Section 707(b)(3)(B) for

below-median income debtors, had that been its intent. Furthermore, to exclude the debtor's ability to fund a chapter 13 plan from such consideration would render the Section 707(b)(3)(B) without effect.

In their article published immediately after the BAPCPA became effective, Professors Culhane and White wrote that " . . . Congress intended the means test [in Section 707(b)(2)] to be the only test of ability to pay under the revised Code" and "[t]he test and structure of the amended Code strongly suggest that the highly detailed means test is to replace, not just precede, other measures of ability to repay."[12] They base the conclusion on (1) the detailed nature of Section 707(b)(2); and (2) the canon of construction that requires courts to give meaning to all parts of a statue.

Professors Culhane and White argue that the detailed nature of Section 707(b)(2) indicates that Congress intended it to be the only ability-to-pay test. They concluded that Congress intended to prevent courts from invoking discretion in considering motions to dismiss for abuse. But, just because Congress clearly intended to limit judicial discretion in one paragraph does not mean that it intended to remove it from another. Generally, it is not necessarily proper to interpret the *meaning* of one rule of law based on a *judicial restriction* in another rule. More particularly, Congress could logically have intended that one test [Section 707(b)(2)] be applied without discretion, and a different test [Section 707(b)(3)(B)] be applied with discretion.

The few bankruptcy courts that have addressed the issue in the context of a below-median income debtor have concluded that it is proper to construct and apply a second ability-to-

---

[12] Marianne B. Culhane and Michaela M. White, Catching Can-Pay Debtors: is the Means Test the Only Way?. 13 Am. Bankr. Inst. L. Rev. 665, 666 (2005).

pay test when considering the totality of the circumstances of the debtor' financial situation under Section 707(b)(3)(B). In In re Pak , 343 B.R. 239 (Bankr. N.D.Cal. 2006), the Court considered the case of a debtor whose current monthly income, as defined under Section 101(10A)[13], was almost non-existent because he had been unemployed for most of the six months pre-petition. The Court first considered the argument that a specific provision in a statute concerning a rule of law (in this case, Section 707(b)(2)) takes precedent over a general provision concerning the same rule of law (in this case, Section 702(b)(3)), but reasoned that the canon did not apply because Section 707(b)(2) does not apply to below-median income debtors.

The Court also found it instructive that Congress used the term "totality of the circumstance" in Section 707(b)(3)(B). The Court reasoned Congress must have intended that Courts employ an ability to pay test under Section 707(b)(3)(B) because pre-BAPCPA judicial opinions that incorporated a totality-of-the-circumstances test always considered the debtor's ability to pay test in the analysis. The Court concluded to do otherwise under the BAPCPA

---

[13] Section 101(10A) provides:

(10A) The term "current monthly income"--

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism

would be counterintuitive. This Court is not convinced by this reasoning. First, a totality-of-the-circumstances test is not the same as a totality-of-the-circumstances-of-the-debtor's-financial-circumstances test. The former test, without more, includes all circumstances, even those that are non-financial. The second test only considers financial circumstances. The addition of the phrase "of the debtor's financial situation" is significant.

The Court in Pak also rejected the debtor's argument (and that of Professors Culhane and White) that one of the purposes of the BAPCPA was to eliminate or greatly reduce judicial discretion and that to impose an ability-to-pay test under Section 707(b)(3) would subvert that purpose. The court countered that not all discretion has been eliminated and that some discretion is necessary with respect to below-income debtors.

In In re Paret, 347 B.R. 12 (Bankr. Del. 2006) and In re Pennington, 348 B.R. 647 (Bankr. Del. 2006), the Court found the language of Section 707(b)(3)(B) clearly and plainly compels a total examination of the debtor's financial circumstances, an examination that necessarily includes the debtor's ability to pay. The Court also concluded that Section 707(b)(3)(B) was no less specific than Section 707(b)(2). In In re Richie, 353 B.R. 569 (Bankr. E.D. Wis. 2006) the Court adopted the holdings in Pak, Paret, and Pennington.

This Court agrees that Section 707(b)(3)(B) requires bankruptcy courts to conduct an inquiry into the debtor's total financial circumstances including his or her ability to fund a chapter 13 plan. Specifically, this Court agrees with the Court in Paret when it wrote that Section 707(b)(3) is no less specific than Section 707(b)(2) and that it is, therefore, not controlled by Section 707(b)(2).

More importantly, as noted by Judge Wedoff in his law review article, the fact that "bad

faith" and the "totality of financial circumstances" are listed in the disjunctive is very strong evidence that Congress intended that bad faith and a debtor's ability to pay constitute independent grounds for relief. See Eugene W. Wedoff, Means Testing in the New 707(b), 79 Am. Bankr. L.J. 231 (2005). A bankruptcy court may dismiss a case if it finds that the debtor filed the petition in bad faith, *or* that the totality of the circumstances of the debtor's financial situation demonstrates abuse. Each of the two considerations is potentially sufficient for a finding of abuse. The debtor's financial situation must, therefore, have some separate implication in the context of abuse apart from considerations of bad faith for all debtors and considerations of the means test in Section 707(b)(2) for above-median debtors. This Court concludes the debtor's ability to fund a chapter 13 plan is properly considered under Section 707(b)(3)(B).

2. Financial Factors Other than the Debtor's Ability to fund a Chapter 13 Plan.

The test in Section 707(b)(3)(B) is not limited to an examination of the Debtor's ability to fund a chapter 13 plan. The Court must consider the debtor's entire financial situation. A debtor's financial situation may be divided into three parts: (1) the debtor's assets; (2) claims against the debtor's assets[14]; and (3) the debtor's future income and expenses. Issues concerning assets and claims in the context of abuse will generally take the form of undisclosed assets and unscheduled claims. But issues of non-disclosure are more properly considered as inquiries into bad faith under Section 707(b)(3)(A). The same may be said for matters concerning unscheduled claims. In contrast, whether a debtor's future income is greater than his or her future reasonable expenses will rarely be relevant to considerations of bad faith. Section

[14] Unsecured claims are properly included as claims against a debtor's assets.

707(b)(3)(B) necessarily requires an examination of a debtor's ability to fund a chapter 13 plan.

Why, then, does Section 707(b)(3)(B) not instruct courts to consider the debtor's ability to fund a chapter 13 plan? Because there are other financial factors that may negate a finding of abuse even if a debtor can afford to fund a chapter 13 plan.

There are at least two scenarios in which a debtor's other financial circumstances would be relevant to a consideration of abuse under Section 707(b)(3)(B). First, the ability to fund a chapter 13 plan must be considered in light of the financial consequences of allowing a debtor to remain in chapter 7, that is, whether creditors will receive more in chapter 7 than they would in chapter 13. Section 707(b)(3)(B) requires courts to examine the liquidation value of the debtors non-exempt assets, the amount of claims against the debtor and the debtor's assets and the cost of prosecuting a case under chapter 13. It would not be an abuse for a debtor to prosecute a case under chapter 7 if the unsecured creditors would receive as much as or more than they would in through a chapter 13 plan.

Second, the Court must consider the dividend that unsecured creditors would receive if the debtor converted to chapter 13. If the dividend would be de minimis or small, then it cannot be said that it would be abusive to permit the debtor to remain in chapter 7.

3. Non-Financial Factors

The third issue for consideration is whether non-financial factors should be considered under Section 707(b)(3)(B). Prior to the enactment of the BAPCPA, a chapter 7 case could be dismissed if it would constitute a substantial abuse of the provisions of chapter 7 to allow it to proceed. In the Fourth Circuit, the movant was required to demonstrate something more than the debtor had the ability to fund a chapter 13 plan. See Green v. Staples (In re Green), 934 F.2d

568 (4th Cir. 1991). It was necessary to show the existence of some other factor, such as failure to disclose assets, the purchase of luxury items, the taking of cash advances or the absence of a financial trauma in the debtor's recent past.

One Court in the Seventh Circuit recently examined Section 707(b)(3)(B) in light of the rule in Green and concluded that the movant must still demonstrate some factor in addition to the debtor's ability to fund a chapter 13 plan. See In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wisc. 2006)[15].

> The "totality of circumstances" test has its roots in pre-BAPCPA law. Although the Seventh Circuit Court of Appeals had not weighed in on the issue, a District Court in this Circuit analyzed the case law in In re Ontiveros, 198 B.R. 284 (C.D.Ill.1996). The court explained that in ruling on "substantial abuse" motions under the prior version of § 707(b), the circuit courts devised three main approaches: (1) the *per se* rule of the Eighth and Ninth Circuits under which the debtor's ability to pay his debts, standing alone, justified dismissal; (2) the totality of the circumstances test of the Fourth Circuit which required a showing of more than an ability to pay; and (3) the hybrid approach of the Sixth Circuit which permitted the dismissal based on ability to pay alone, but also allowed the debtor to demonstrate mitigating circumstances. Id. at 287.
>
> The means test of § 707(b)(2) appears to be a codification of the *per se* rule, with its presumption of abuse for debtors who have the ability to pay based on application of the means test formula. The Fourth Circuit's "totality of the circumstances" test was adopted by name in BAPCPA § 707(b)(3)(B), suggesting that *something other* than an ability to pay is required to succeed on a Motion to Dismiss under this section. Further, as illustrated in *Ontiveros,* examining the "totality" of the circumstances suggests considering more than one factor (i.e., ability to pay).

In re Nockerts, 357 B.R. at 505-506.

While a court may, and should, seek guidance from pre-revision authority when considering revised statutes,[16] it should also deviate from this tenet when the statutory revisions

---

15 Nockerts concerns an above-median income debtor. The distinction is not relevant to this inquiry.

16 See, e.g., In re Pfeifer, 2007 WL 926387 ("Because Congress retained the phrase "totality of the circumstances" in the BAPCPA, the Court concludes that it may look to pre-BAPCPA case law to construe the meaning of the phrase under § 707(b)(3).")

render the reasoning in prior authority inapplicable. This Court concludes that the conclusion in Green prohibiting dismissal under Section 707(b) when no factors are present other than a debtor's ability to pay, is not applicable under the BAPCPA.

The Court in Nockerts did not examine Green in light of the language in Section 707(b)(3). The Green Court based its ruling on three considerations. First, the Court considered a *per se* rule that was based dismissal solely on the existence of disposable income, by looking at the Congressional history.

> The ambiguity of the statutory language is no doubt a reflection of Congress's inability to agree on a definition of substantial abuse which would encompass these countervailing considerations in all situations. Nevertheless, in unsuccessfully attempting to carve out such a definition, Congress considered and rejected the use of a threshold future income or ability to repay test (known as "mandatory Chapter 13") as a qualification for Chapter 7 relief for consumer debtors. [Footnote omitted.] *In re Deaton,* 65 B.R. 663, 665 (Bankr.S.D.Ohio 1968).

Green, 934 F.2d at 571. Given the extensive revision of Section 707(b), any reliance on prior legislative history is misplaced.

Second, the Court in Green looked to the language in pre-BAPCPA Section 707(b) providing that "[t]here shall be a presumption in favor of granting relief requested by the debtor." The Court in Green rejected a *per se* rule because it would "render this presumption [in favor of granting the relief requested by the debtor] toothless." Green at 573. This presumption, however, was removed from the code by the BAPCPA. Accordingly, it no longer provides a basis for requiring something more a debtor's ability to pay.

Finally, the Fourth Circuit considered the Bankruptcy Code and Rules as a whole and

section 109[17] of the Bankruptcy Code in particular.

> Moreover, nowhere in the Code is there a requirement that a debtor be insolvent in order to file for bankruptcy. Section 109, which the 1984 Amendments left unchanged, allows any person to be a debtor under Chapter 7 unless he comes within one of several limited exceptions, none of which apply to consumer debtors and none of which are predicated upon anticipated income. 11 U.S.C.A. § 109 (1979 & West Supp.1990). Section 109, taken together with the Senate report on Section 707(a) cited *infra,* provides a strong indication that Section 707(b) was intended to explicitly recognize the court's ability to dismiss a Chapter 7 petition for lack of good faith-- when "the total picture is abusive." *Waites v. Braley, supra,* 110 B.R. at 215 (quoting bankruptcy court Opinion and Order; *but see* 217, holding that neither bad faith nor fraud is an element required for a finding of substantial abuse).

Id. The Court's reasoning is based on legislative history coupled with an absence of statutory language requiring an ability-to-pay test. This reasoning does not hold under the BAPCPA as the old legislative history is no longer applicable and the new law clearly indicates a legislative disposition towards an examination of a debtor's ability to fund a chapter 13 plan.

Because this Court does not believe that the Fourth Circuit would reach the same holding under the BAPCPA as it did in Green, it is concluded that a debtor's ability to pay, standing alone, can form the basis for dismissal under Section 707(b)(3)(B) when considered in light of

---

[17] Section 109(b), which concerns whether a person is eligible to be a chapter 7 debtor, provides:

(b) A person may be a debtor under chapter 7 of this title only if such person is not--
(1) a railroad;
(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or
(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

the debtor's other financial circumstances.

The language of Section 707(b)(3)(B) supports this conclusion. First, the standard for dismissal has been reduced[18] from "substantial abuse" to "abuse". As a practical matter this revision of the statute does not alter the method of analysis. See In re Travis, 353 B.R. 520, 529 (Bankr. E.D.Mich. 2006) ("While the prior act refers to 'substantial abuse' and the new act refers to 'abuse', the language change is a distinction without a difference for purposes of analyzing whether granting relief to the debtor would be an abuse of the bankruptcy system.") Also see 6 Collier on Bankruptcy ¶ 707.05[1] (15th ed. rev.2006) ("The 2005 amendments also changed the standard for dismissal from 'substantial abuse' to 'abuse.' It is unclear how much impact this will have; few, if any, courts permitted a chapter 7 case to proceed because they found it to be an abuse, but not a substantial abuse, under prior law.")

Even though the change from "substantial abuse" to "abuse" has little practical effect on a court's analysis, it constitutes a signal from Congress that courts should take a closer look at a debtor's circumstances before allowing him or her to proceed in chapter 7. Given other revisions in the code, considering a debtor's ability to fund a chapter 13 plan in light of his or her other financial circumstances is a proper response to this signal.

Second, and more importantly, new Section 707(b)(3) divides the pre-BAPCPA Section 707(b) into two separate tests that are, as noted by Judge Wedoff, to be applied in the disjunctive. Section 707(b)(3)(A) allows courts to dismiss a case for bad faith by the debtor.

---

[18] The context of the statute indicates that Congress intended this change to effect a reduction in the threshold for abuse, notwithstanding the fact that in some other areas of law the removal of the word "substantial" from a standard indicates a heightening of that standard. For example, "substantial performance" is a lower level of performance than [full] performance, and "substantial consummation" in bankruptcy is a lower level of performance than "consummation".

Section 707(b)(3)(B) allows courts to dismiss the case if it finds doing so is proper based on "the totality of the circumstances *of the debtor's financial situation.*" (Emphasis added.) Section 707(b)(3) bifurcates the Green test into two separate and distinct tests. Under the BAPCPA, the court is to consider *either* the totality of the debtor's financial situation *or* the debtor's bad faith. Issues concerning a debtor's actual financial situation are not to be considered as a component of bad faith, and issue of bad faith are not to be considered when considering a debtor's actual financial situation.

Courts should still consider the factors suggested in Green, but not in conjunction with each other. In Green, the Court listed a number non-exclusive factors, in addition to a debtor's ability to pay, for consideration under its totality-of-the-circumstances test. See Green, 934 F.2d at 572. The first two factors concern whether the debtor filed the petition because of "sudden illness, calamity, disability, or unemployment" and whether the debtor made pre-petition cash advances and consumer purchases far in excess of his or her ability to repay the resulting debt. The last two factors concern whether the petition was filed in good faith and whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition. These four factors remain important under the BAPCPA, but are more properly considered under Section 707(b)(3)(A) as components of the inquiry into bad faith.[19]

The other factor in Green concerns whether the debtor's proposed family budget is

[19] The Court in Green also endorsed three other factors examined by other courts: (a) whether the debtor engaged in free-wheeling spending (See In re Grant, 51 B.R. 385, 396 (Bankr. N.D.Ohio 1985); (b) whether the debtor altered monthly obligations in statements to the court at least three times (See In re Peluso, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987)); and (c) whether the debtor chose Chapter 7 over Chapter 13 in order to voluntarily pay favored creditors (See In re Shands, 63 B.R. 121, 123 (Bankr. E.D.Mich 1985)). See Green, 934 F.2d at 573.

excessive or unreasonable. This factor and a debtor's ability to pay are properly considered under Section 707(b)(3)(B) as a component of the debtor financial situation generally, and his or her disposable income in particular.

The only factors that should be considered under Section 707(b)(3)(B) are the debtor's actual financial circumstances. All other factors are more properly considered only if there are allegations of bad faith. If the debtor's financial circumstances are not accurately reflected in the debtor's schedules, statement of financial affairs and other pleadings, the court should make all necessary adjustments to these documents before determining whether a debtor has the ability to fund a chapter 13 plan.

4. Measuring the Below-Median Income Debtor's Ability to Fund a Chapter 13 Plan.

Having concluded that below-median income debtor's ability to fund a chapter 13 plan is a component of the inquiry under Section 707(b)(3)(B), it is necessary to determine how the debtor's ability to fund a chapter 13 plan is to be measured. The proper measure is the minimum amount that the debtor would be required to pay if he or she had filed a petition under chapter 13. Under chapter 13, a below-median income debtor must pay all of his projected disposable income to the trustee for a minimum of three years. 11 U.S.C. § 1325(b)(1)(B). Disposable income is defined as monthly income received by the debtor less amounts reasonably necessary to be expended for the maintenance or support of the debtor and his or her dependents. 11 U.S.C. § 1325(b)(2). The majority of courts that have considered the issue have determined that Schedules I and J may be used for below- median income debtors under the BAPCPA to determine "projected disposable income." See, e.g., In re Dew, 344 B.R. 655 (Bankr.N.D.Ala.2006); In re Schanuth, 342 B.R. 601 (Bankr.W.D.Mo.2006) (using current

monthly income less debtor's expenses on Schedule J); and In re Kibbe, 342 B.R. 411 (Bankr.D.N.H.2006). This is the same measure that was used under the pre-BAPCPA bankruptcy code. Consequently, it is proper to determine the reasonable level of expenses using pre-BAPCPA law.

D. Abuse in this Case.

We now examine whether abuse exists in this case under Section 707(b)(3)(B). The inquiry focuses on the totality of the circumstances of the Debtor's financial situation beginning with the Debtor's ability to fund a chapter 13 plan.

Gross and Net Monthly Income. In her amended schedules, the Debtor scheduled monthly gross income from her employment in the amount of $3,628.00. She added $800.00 in contributions from her fiancé and $650.00 from her daughter as rent on the Real Property. Her total scheduled *gross income is $5,078.00*. After deducting $1,293.00 in payroll deductions, she scheduled her *net income as $3,785.00*. The $1,293.00 in payroll deductions include a $143.00 monthly deduction for a contribution to her 401(k) retirement account and a $97.00 payment toward the repayment of a loan from her 401(k) account.

The Debtor scheduled her total expenses as $3,929.00. She scheduled, as expenses, her monthly payments on the Real Property at $648.00 on the first mortgage and $279.00 on the second mortgage. She also scheduled, as expenses, payments made by her fiancé for his monthly car payment ($387.00)[20], his monthly car insurance ($72.00)[21], his share of the monthly telephone bill ($35.00), and monthly payments that he makes toward his medical bills

---

[20] See Debtor's Amended Schedule J. And Transcript of hearing, p 59.

[21] Calculated by taking the difference between the vehicle insurance amount on the original schedule J ($65.00) and the vehicle insurance on the amended schedule J ($122.00).

($150.00)[22]. These four expenses total $654.00. The Debtor's schedule's indicate a *net monthly income of negative $144.00.*

The United States trustee summarizes his calculations of the Debtor's net income in his Exhibit 6. He begins with the Debtor's Amended Schedules I and J, makes adjustments, and concludes that the Debtor could afford to pay a chapter 13 trustee $945.00 per month. The adjustments include the elimination of the income and expenses related to the Real Property, the disallowance of the Debtor's fiancé's expenses, and the elimination of the deductions for the Debtor's 401(k) payroll deduction and 401(k) loan repayment.

Rental of the Real Property. As noted, the Debtor scheduled both of her monthly mortgage payments on the Real Property, totaling $927.00, as expenses and scheduled $650.00, the approximate amount of the first deed of trust which is paid by her daughter who lives in the Real Property, as income. The United States trustee argues that either the Debtor's daughter should pay the full amount of both mortgages, or the Debtor should surrender the property to the secured creditors. If either event were to occur, the Debtor would lose $650.00 in income, but would rid herself of $927.00 in monthly expenses.

The argument of the United States trustee that the Debtor should not be supplementing her daughter's rental has much to recommend it. In this case, however, the debtor moved into the apartment to reduce her monthly housing expense by approximately $182.00[23] and to be closer to her place of employment. The irony is that the Debtor's attempt to reduce her financial

---

[22] Transcript of hearing, p 59.

[23] If she continued to reside in the Real Property, the debtor would be paying $927.00 per month. She now pays $460.00 in rent and continues to pay the second mortgage in the amount of $279.00, for a total of $739.00. Her monthly housing has been reduced by the difference ($182.00 = $927.00 - $739.00).

burden may increase the possibility of a finding of abuse based on the totality of the circumstances of her financial situation. This fact notwithstanding, the adjustments urged by the United States trustee are allowed for purposes of calculating the Debtor's disposable income in chapter 13. They will, however, be revisited below as part of her total financial circumstances.

The Fiancé's Contribution. The United States trustee argues that the Debtor's fiancé should pay his own expenses. He reduces the Debtor's expenses by three of the four scheduled payments that her fiancé makes each month: his monthly car payment ($387.00), his share of the monthly telephone bill ($35.00), and payments that he makes toward his medical bills ($150.00).[24] The problem with this adjustment is that it is made without making a corresponding adjustment to the amount that her fiancé contributes to the household expenses.

Originally, the Debtor's scheduled income included a $300.00 contribution from her fiancé. At the first meeting of creditors she stated that he contributed $800.00 per month. Both statements are accurate. The $800.00 represents her fiancé's total net monthly income. It does not include any deductions for payments that he makes toward his own expenses. The $300.00 represents the approximate amount that he contributes toward the community expenses after he pays his monthly car payment ($387.00)[25], his monthly car insurance ($72.00)[26], his share of the monthly telephone bill ($35.00), and payments that he makes toward his medical bills ($150.00)[27]. These four expenses total $654.00.

---

[24] The United States trustee does not make an adjustment for his $72.00 monthly car insurance payment.

[25] <u>See</u> Debtor's Amended Schedule J and Transcript of hearing, p 59.

[26] Calculated by taking the difference between the vehicle insurance amount on the original schedule J ($65.00) and the vehicle insurance on the amended schedule J ($122.00).

[27] Transcript of hearing, p 59.

The United States trustee adjusts three of the Debtor's fiance's expenses to $00.00, but retains the entire amount of his net monthly income of $800.00 as income attributable to the Debtor. How can the Debtor's fiancé pay his car payment, cell phone bill, and medical bill if he gives all of his income to the Debtor? The answer is that he cannot. The analysis in Exhibit 6 is flawed in that it retains the income contributed by the fiancé, but not the expenses incurred by him. The three expenses must be added back into the Debtor's expenses if the entire $800.00 is to be treated as her income. Retaining the $800.00 in income on Schedule I and allowing the $572.00 in expenses on Schedule J results in a reduction of $572.00 per month from the United States trustee's calculation of net monthly income.

Contributions to the 401(k) account. Second, the United States trustee argues that the Debtor's monthly contribution to her 401(k) account in the amount of $143.00 would not be allowed in calculating her disposable income under chapter 13. Under the BAPCPA, the 401(k) account deductions are not part of the Debtor's income and must be excluded from the calculation of the amount that could be used fund a chapter 13 plan.

> Not all sources of income need be committed to a Chapter 13 plan.
> . . .
> Debtors are . . . permitted to shelter certain contributions to employee benefit plans (EBPs). "[*A*] *ny amount*" that is either "withheld by" or "received by" a debtor's employer for qualifying EBPs, deferred compensation plans, tax-deferred annuities, or state-law-regulated health insurance plans "shall not constitute disposable income, as defined in section 1325(b)(2)." 11 U.S.C. § 541(b)(7)(A) & (B) (emphasis added).
> Among the qualifying programs are any "employee benefit plan[s] ... subject to Title I of the Employee Retirement Income Security Act of 1974" ("ERISA"). *See* 11 U.S.C. § 541(b)(7)(A)(i)(I) & (B)(i)(I). This includes EBPs subject to 26 U.S.C. § 401(k) ("401(k) plans"). *See* 29 U.S.C. §§ 1002(3) (defining "employee benefit plan"), 1003(a) (defining ERISA's coverage). So long as a debtor's contributions are within the limits legally permitted by the EBP, "any amount" of this contribution is exempted from disposable income.
> . . .
> . . . Sections 541(b)(7) and 1322(f) both plainly state that these contributions "shall not

> constitute disposable income." Congress has placed retirement contributions outside the purview of a Chapter 13 plan.

In re Johnson, 346 B.R. 256, 263-264 (Bankr. S.D.Ga. 2006). Also see In re Barraza, 346 B.R. 724, 732 (Bankr. N.D. Tex. 2006) and In re Devilliers, 358 B.R. 849, 864-865 (Bankr.E.D. La. 2007).

The $143.00 is not properly included in the debtor's income for purposes of calculating the amount that the debtor could pay into a chapter 13 plan. That amount must be deducted from the United States trustee's calculation of disposable income.

Repayment of the 401(k) loan. Third, the United States trustee argues that the amount ($97.00) that is deducted from the debtor's paycheck for repayment a loan from her 401(k) account must be included in disposable income. In addition to sheltering EBP contributions, the BAPCPA also protects repayments of loans from EBPs, including loans from 401(k) plans. Section 1322(f) provides that "[A] plan may not materially alter the terms of a loan described in section 362(b)(19) [i.e., a loan from a qualifying employee benefit plans or retirement savings accounts], and any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."

In this case the Debtor testified that the loan will be repaid in full very soon.[28] Consequently, the United States trustee's adjustment is proper.

Net Disposable Income. If we reduce the net amount of $945.00 calculated by the United States trustee by $143.00 for the contribution to the 401(k) and $572.00 for the expenses incurred by the Debtor's fiancé, we are left with disposable income in the amount of $230.00 per month. During the pendency of a thirty-six month chapter 13 plan, the Debtor could pay the

---

[28] Transcript of hearing, page 18, line l6 to page 19, line 11.

chapter 13 trustee a total of $8,280.00. Of this amount the chapter 13 trustee would be paid approximately 10% or $828.00 and the Debtor's attorney would be paid approximately $2,500.00. Priority and general unsecured creditors would receive $4,952.00 (= $8,280.00 - [$828.00 + $2,500.00]).

Percentage Dividend to Unsecured Creditors. The Debtors' unsecured claims total approximately $30,150.00, representing the sum of all schedules general and priority unsecured claims ($22,098.00) and the anticipated deficiency claim that will result because the Debtor surrendered the 2003 Toyota Avalon ($8,052.00). If the Debtor is able to sustain her level of income on the date of the hearing on this matter, unsecured creditors would receive approximately 16.4% of her claims ($4,952.00 / $30,150.00).

Standard for Abuse based on Ability to Fund a Chapter 13 Plan. This Court has generally held that a debtor must demonstrate the ability to pay unsecured creditors 20% before a chapter 13 plan could be confirmed. It is consistent to require, and this court holds, that it is not abuse under Section 707(b)(3) if a debtor cannot pay his or her unsecured creditors a 20% dividend. The few courts that have considered the issue of abuse under Section 707(b)(3)(B) for below-median income debtors have reached a similar conclusion. See In re Pennington, 348 B.R. 647 (Bankr. Del. 2006) (Level of abuse is 25% of unsecured debt.) and In re Pak , 343 B.R. 239 (Bankr. N.D.Cal. 2006) (Abuse existed when below-median income debtor could pay 19% of his unsecured debt through a 36-month plan.)

Abuse in this Case. The Debtor is below the 20% threshold and so it must be concluded that it would not be abuse to permit the Debtor to prosecute her case under chapter 7. This conclusion is confirmed by a review of the Debtor's total financial situation which reveals that

even a 16% plan might not be feasible.

The Debtor's expenses are quite reasonable. Her food expense of $450.00 is so reasonable that it may be fairly predicted that she may have difficultly spending no more than this amount. The Debtor originally scheduled food for three adults and two children at $350.00 per month. At the first meeting of creditors she testified that her fiancé's daughter was eligible for, and was receiving, $387.00 in food stamps at that time. The witness for the United States trustee testified that she thought that the $350.00 was reasonable in light of the fact that the Debtor's household was receiving $387.00 in food stamps.[29] In the amended Schedule J, the Debtor listed food expense at $450.00 per month. In his Exhibit 6 the United States trustee made no adjustment to this amount, but noted as an aside that the Debtor was benefitting from $387.00 in food stamps. The Debtor however, testified that her fiance's daughter received the food stamps for only two months and that she was no longer receiving them.[30] She further testified that they were attempting to obtain public assistance in the form of both food stamps and day care for her fiance's granddaughter, but had been unsuccessful at that point.

As of the date of petition, the Debtor and her fiancé supported his daughter and two granddaughters. After that, custody of one of the granddaughters was given to the daughter's husband. The daughter, however, was expecting a child that was due on the date that this hearing was heard. The Debtor and her fiancé are supporting three adults and two children, including a new-born infant. If a member of the household was receiving $387.00 in food stamps, then $450.00 would be a reasonable amount of food expense. That would give the

---

[29] Transcript of Hearing, p 76, line 20 to page 77, line 5.

[30] Hearing at page 55, line 6 to page 56, line 17. The amount was actually $386.00.

Debtor $837.00 in food per month to support the family. But that was not the case on the date of the hearing on this matter. While the food stamps might be forthcoming in the future, the prospect is speculative.

Also, the Debtor's fiancé is paying more than $387.00 per month for his car payment. He testified that his actual car payment has been $437.00 per month.[31] Finally, the Debtor's rent is only $460.00 per month. The Debtor drives a 2000 Mercury Cougar for which she pays $250.00 per month.[32] The Court is convinced that the $230.00 month is upper limit of what the Debtor could pay in chapter 13.

Finally, the percentage payout to unsecured creditors would be decreased significantly, if the Debtor were to surrender the real property and one or both of the creditors were to be allowed a deficiency claim. The Real Property was appraised for $102,000.00 in October of 2004, but was assessed at $88,100.00 in 2005. The total of the two mortgages is $94,501.00. If the debtor surrendered the property, she would indirectly incur selling expenses, including either a 10% auction expense or a 6% broker expense. It is quite likely that the Debtor would be facing a deficiency claim, which would decrease the dividend to unsecured creditors.

III. Conclusion

The burden of proof is on the United States trustee to prove by a preponderance of the evidence that the continued prosecution of this chapter 7 case would constitute abuse. The Debtor could pay no more than, and probably much less than, $230.00 per month into a chapter 13 plan. If she could pay that amount, her unsecured creditors would receive a dividend equal to

---

[31] Transcript of Hearing, p 94.

[32] Transcript of Hearing, p 48, lines 17-19.

significantly less than 20% of their claims. It is not an abuse of the provisions of chapter 7 to permit the Debtor to prosecute her case under that chapter.

ORDER

For the above stated reasons, the motion of the United States trustee to dismiss this case for abuse is denied.

So ORDERED.

Upon entry of this Memorandum and Order the Clerk shall forward copies to the United States trustee, the chapter 7 trustee, the Debtor and David Crandell, Esq., counsel for the Debtor.

Entered on this 12th day of June, 2007.

William E. Anderson
United States Bankruptcy Judge