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**CHAPTER 7 DISMISSALS
for
Totality of Circumstances Abuse**

**The Honorable H. Christopher Mott
United States Bankruptcy Judge**

This article prepared by:
Sarah Dougharty McHaney
Law Clerk
The Honorable H. Christopher Mott
903 San Jacinto Blvd., Ste. 326
Austin, Texas 78701
sarah_mchaney@txwb.uscourts.gov
512-916-5800

With the assistance of:

Emily Franco
Summer Intern 2011
The Honorable H. Christopher Mott

Spencer Hamilton
Fall Intern 2011
The Honorable H. Christopher Mott

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I.

INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) substantially expanded §707(b) to make it more difficult for debtors with primarily consumer debt to file Chapter 7 cases. BAPCPA added the “means test” of §707(b)(2), which creates a rebuttable presumption of abuse if a debtor’s current monthly income—reduced by certain allowed expenses—is above a certain mathematical threshold.

Although a failed means test creates a presumption of abuse, it is not the only way to prove abuse. BAPCPA’s addition of §707(b)(3) provides a separate ground for dismissal, even if a debtor passes the means test—the totality of the circumstances. In determining whether a Chapter 7 case should be dismissed, §707(b)(3) states:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph [the means test] does not arise or is rebutted, the court shall consider—

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

(B) the **totality of the circumstances** (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor’s financial situation demonstrates abuse (emphasis added).

This article discusses in general how certain courts have determined whether granting Chapter 7 bankruptcy relief would be an abuse under a “totality of circumstances” test. Next, this article sets forth recent Texas bankruptcy court decisions that have dealt with abuse under the totality of circumstances standard of §707(b)(3)(B), including case-specific facts. Lastly, this article provides four scenarios and requests audience participation (and hopefully a rousing discussion) in determining which facts may either help or hurt a debtor defending a §707(b)(3)(B) dismissal motion.

II.

FACTORS FOR EVALUATING TOTALITY OF CIRCUMSTANCES ABUSE

A. General Factors

Courts must evaluate the “totality of the circumstances” of the debtor’s “financial situation” to determine whether to dismiss a Chapter 7 case as an abuse. The burden of proof is on the moving party to prove that the totality of the circumstances establishes the existence of abuse. *See e.g., In re Dumas*, 419 B.R. 704, 707-08 (Bankr. E.D. Tex. 2009).

The courts have struggled to define what to specifically consider when evaluating the totality of the circumstances under §707(b)(3)(B). In *In re Zaporski*, the court noted that §707(b)(3)(B) requires the court to consider the totality of the circumstances “of the debtor’s financial situation.” 366 B.R. 758, 770-71 (Bankr. E.D. Mich. 2007). The *Zaporski* court held that evidence of a debtor’s ability to pay must be considered, even when the petition was not in bad faith and the statutory presumption of abuse had not arisen. *Id.* at 771. Another court explained that the text of §707(b)(3)(B) did not indicate intent to remove any aspect of the debtor’s finances in the evaluation process. *In re Schoen*, 2007 WL 643295 (Bankr. D. Kan. 2007). In addition, the debtor’s income and expenses must be considered because they are fundamental to the debtor’s financial situation. *In re Pak*, 343 B.R. 239, 241 (Bankr. N.D. Cal. 2006).

The debtor’s ability to pay creditors is a very significant factor for courts to take into account, and to this end, courts also consider post-petition events. *In re Cortez*, 457 F.3d 448 (5th Cir. 2006) (holding that bankruptcy courts can and should consider post-petition events when determining whether to dismiss a case for substantial abuse under § 707(b) pre-BAPCPA); *In re Henebury*, 361 B.R. 595 (Bankr. S.D. Fla. 2007). The consideration of post-petition changes to the debtor’s financial situation is necessary to accurately evaluate actual or anticipated ability to pay. Many courts have held that this ability to repay creditors based on post-petition events is enough to dismiss a case for abuse. For example, in *In re Brenneman*, the debtor’s ability to repay unsecured debts was a dispositive consideration for dismissal under the totality of the circumstances standard. 397 B.R. 866 (Bankr. N.D. Ohio 2008).

Courts have developed the following list of factors to consider in determining whether a debtor’s financial situation demonstrates an abuse:

1. Whether the debtor could pay a substantial portion of their debts from future income in a hypothetical Chapter 13 case;
2. Whether the bankruptcy petition was filed due to sudden illness, calamity, disability or unemployment;
3. Whether the debtor incurred cash advances and made consumer purchases far in excess of their ability to repay;

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