



U.S. Department of Justice


*Office of the United States Trustee
Southern and Western Districts of Texas*

March 26, 2008

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MEMORANDUM

TO: ALL CHAPTER 7 TRUSTEES
Houston, Galveston, Laredo and Victoria Divisions
Southern District of Texas

FROM: 
Diane G. Livingstone
Assistant United States Trustee
Houston, Texas

SUBJECT: Reminder - Trustee Review and Referral of Cases for Abuse Under §707(b)

As I am sure recall from Chapter 7 Trustee Training in September 2005 and December 2006, we advised you that you had a significant and important role to play in ensuring the integrity of the bankruptcy system and assisting in the application of the Bankruptcy Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37 (“BAPCPA”)¹. While we have all struggled to use our limited resources over the last two and a half years efficiently, your continued, and even increased (for a few trustees), assistance in the review and referral of cases for abuse under §707(b) is critical to ensuring the integrity of the bankruptcy system.

In addition, one element of your Trustee Performance Review (the “Performance Review”) is Trustee Duty No. 13 - “Investigation of and Response to Bankruptcy Fraud and Abuse” in which our office evaluates you to determine the extent to which you have referred potentially abusive cases, including 707(b) matters, to our office. In order for you to adequately perform this duty and safeguard the system, you need to review and refer appropriate cases to our office. This is not a change from your pre-BAPCAP Performance Review.

Based on our experience since the implementation of BAPCPA, once you establish a routine, the review and cross-checking of relevant documents in each case can be sufficiently performed, on average, in less than five minutes.

¹ BAPCAP became effective as to cases filed on or after October 17, 2005.

Therefore, to the extent that you are not already doing so:

I. All Cases

A. Veteran's Declaration

In those few cases where the debtor declares on Form B22A (the "Means Test"), Line 1A, that he or she is a disabled veteran and does not have to complete Means Test, you should ask appropriate questions of the debtor at the 341 meeting, such as:

- Are you a disabled veteran? (30% or more disability; or discharge or release from active duty was for disability incurred or aggravated in line of duty).
- Did your indebtedness occur primarily during a period in which you were on active duty or while you were performing a homeland defense activity?
- Where were you on active duty (or on homeland defense) and when?
- What documents do you have to support Request documentation to support this declaration?

Based upon the debtor's responses, if an issue arises whether the exception applies, refer the matter to our office immediately, along with copies of all documents you have received (that are not already on file) concerning the Veteran's Declaration.

B. Declaration of Non-Consumer Debt

In the relatively small number of cases where the debtor declares on Line 1B that his/her debts are not primarily consumer debts, and therefore does not have to complete the Means Test, to the extent the debtor has not already identified consumer/non-consumer debts in the schedules, make appropriate inquiry at the 341 meeting, such as:

- How did you make the "primarily non-consumer debt" calculation?
- Which debts are non-consumer debts?
- Regarding credit card charges, under what circumstances were the charges made and what documentation do you have to support the non-consumer nature of the debt?

Based on the debtor's responses, if you believe that the debtor has primarily consumer debts and should complete the Means Test, refer the matter to our office immediately, along with copies of all documents you have received that are not available on CM/ECF.

C. Below Median Income Cases

You should cross-check data concerning income and household size by reviewing and comparing:

- Pay advices received by the debtor within 60 days prior to the petition date
- Most recent pay advice (provided to the trustee at 341 meeting),
- Tax returns (provided to the trustee seven days prior to 341 meeting),
- Account statements covering the petition date (you may see direct or other deposits from employers or other sources),
- Statement of Financial Affairs, Questions 1 and 2, and Schedule I.
- Means Test Part II.

Where you see material discrepancies (i.e., discrepancies that lead you to believe the debtor may be at or above median income) ask appropriate clarifying questions at the 341 meeting.

After asking clarifying questions, if material unexplained discrepancies lead you to believe that the debtor may be **at or above median income**, refer the matter to our office immediately, along with copies of all documents that are not available on CM/ECF, that caused you to come to this conclusion.

After asking clarifying questions, if you believe that the debtor is still **below median income**, you do not need to refer the case to our office for abuse under §707(b). However, if material discrepancies suggest the need for additional review by our office for other types of civil or criminal enforcement action, you should refer the matter to our office as soon as possible, along with copies of all documents, that are not available on CM/ECF, that caused you to come to this conclusion.

Anytime you determine that the debtor should have, but did not complete the entire Means Test, let our office know immediately. You may continue the 341 meeting in appropriate cases, until the debtor provides the relevant and necessary information.

II. Above Median Income Cases

If the debtor checks the box “Presumption Arises,” send our office all documents that you receive prior to (i.e., tax return) or at the 341 meeting (e.g., additional expenses with respect to Lines 37 and 38, a current pay statement, bank statement(s), trustee questionnaire, that are not available on CM/ECF. Our office will conduct a complete review of this case to determine whether a motion to dismiss for abuse is appropriate.

If the debtor does not check the box “Presumption Arises,” but the debtor has above median income, you should cross-check data concerning income and household size in the same way that you reviewed the information in Below Median Income Cases. With regard to expense amounts, particular line items in Part VI. Subpart B of the Means Test, specifically require debtors to provide documentation to trustees or require additional inquiry by trustees regarding the reasonableness and necessity of the expense.

If the debtor claims expenses for Line 37 Home Energy Costs, the debtor must give you documentation to support their actual expenses and demonstrate that the additional amount claimed in excess of the allowance specified by IRS local standards for Housing and Utilities is reasonable and necessary.

If the debtor claims expenses for Line 38 - Education Expenses for Dependent Children less than 18, the debtor must give you documentation of their actual expenses and **explain** why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards - such as for Food and Clothing.

If the debtor claims expenses for Line 39 - Additional food and clothing expense, the amount cannot be more than 5% of the combined allowance for food and clothing (apparel and services) and the debtor must show that the additional amount is reasonable and necessary.

If, based on the information on the Means Test and other required documents, (1) you cannot determine the accuracy of the income or expenses, and there is a likelihood that a discrepancy in the income or expenses might lead to a level of disposable income that would trigger the presumption of abuse, or (2) the debtor did not provide enough of the required documents for you to conduct a reasonable cross-check of the information, you may continue the 341 meeting to obtain additional information or take other appropriate action. You should advise our office as soon as possible of your concerns, but not later than the end of your panel day regarding ALL cases that you have continued for these reasons or have concerns about.

If you have a case involving alleged “special circumstances” or pre-BAPCPA “substantial abuse” facts, let our office know about the case and your concerns as soon as possible, but again, no later than the end of your panel day for that meeting. Provide us with all of the financial and

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special circumstances information the debtor provided to you that is not otherwise available on CM/ECF. Such referrals could be based upon bad faith - 707(b)(3)(A) and totality of the circumstances - 707(b)(3)(B). Much of the §707(b) litigation is based on “bad faith” or “totality of the circumstances,” rather than on the presumption of abuse and ability to repay based on the monthly disposable income as calculated in the Means Test.

Even if the debtor “passes” the Means Test, Our office still needs, and expects, you to make §707(b)(3) or §727 referrals. In addition, you must refer cases with suspected conduct of credit care bust-outs, attorney misconduct, concealment of assets, and any other conduct that warrants civil or criminal enforcement action by our office.

Attached is a graphic which may assist in your review.

Documents:

1. If you cannot provide us with documents prior to the §341 meetings for the cases in question, please send all documents in the cases to be referred to our office immediately after the 341 meeting, as we only has 10 days from the conclusion of the §341 meeting to file our statement concerning the presumption (the “10 day statement”).
2. Documents should be sent to the attention of the UST attorney assigned to supervise the administration of your cases.

We appreciate your assistance on these matters. We will be providing refresher training on how to efficiently and effectively review and cross-check the relevant documents in the coming months. Please let us know if you or your staff have any questions about this.

Attachment

cc: Chapter 13 Trustees

