

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Elizabeth E. Brown

In re:

SABRA JANKO,

Debtor.

Bankruptcy Case No. 16-22485 EEB

Chapter 7

**ORDER REGARDING APPLICABILITY OF SECTION 707(b)(3) TO DISABLED
VETERANS**

The United States Trustee (“UST”) moved to dismiss the Debtor’s chapter 7 case pursuant to 11 U.S.C. § 707(b)(1) and (3)(B)¹ because he alleges that the “totality of the circumstances . . . of the [Debtor’s] financial situation . . . demonstrates abuse.” The Debtor, a disabled veteran, opposes dismissal, contending that § 707(b)(2)(D) prohibits the Court from dismissing her case based on “any form of means testing,” including any consideration of her ability to pay her debts under § 707(b)(3).

When a court considers dismissal based on the “totality of the circumstances” under § 707(b)(3), its inquiry is fact-intensive. The Court has not conducted an evidentiary hearing in this case, nor have the parties stipulated to any facts. However, the UST does not dispute that the Debtor is a disabled veteran entitled to the protections of § 707(b)(2)(D)(i), so the Court must decide some threshold legal issues before considering any factual disputes. If § 707(b)(2)(D) precludes the Court from dismissing the Debtor’s case under § 707(b)(3), the Court must deny the UST’s motion regardless of the Debtor’s financial circumstances. If the Court may dismiss a disabled veteran’s chapter 7 case under § 707(b)(3), then the Court must address whether § 707(b)(2)(D) limits the factors it may consider under § 707(b)(3).

Accordingly, the Court requested the parties to brief the following issues: (1) whether a debtor-veteran described in § 707(b)(2)(D) is subject to dismissal under § 707(b)(3); (2) if § 707(b)(3) applies, can the Court consider the debtor-veteran’s ability to pay under the totality of circumstances test, including application of the IRS expense standards and availability of disposable income; and (iii) whether dismissal of any debtor’s case (veteran or non-veteran) under § 707(b)(3)(B) is proper when the only factor present in the totality of circumstances test is the debtor’s ability to pay. The first two issues are issues of first impression in this circuit.

The Court has considered the parties’ briefs on these issues and FINDS AND CONCLUDES as follows:

¹ All references in this Order to “Section” or “§” shall refer to Title 11, United States Code, unless expressly stated otherwise.

I. DISCUSSION

A. Are Disabled Veterans Subject to Dismissal under § 707(b)(3)?

Prior to 2005, a court could dismiss a consumer debtor's chapter 7 case under § 707(b) for "substantial abuse" of the provisions of chapter 7. *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796, 808 (10th Cir. 1999) ("*Stewart*"). Despite this provision, Congress perceived that consumer debtors continued to misuse the bankruptcy system by filing chapter 7 bankruptcy when they could afford to pay their debts. In its attempt to curb remaining abuse, Congress adopted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). One of BAPCPA's major reforms was the implementation of a needs-based test, known as the "means test," which identifies debtors who have the financial ability to repay a meaningful portion of their debts. Section 707(b)(2)(A)-(C) is the codification of BAPCPA's "means test." *In re Green*, 431 B.R. 187, 190-91 (Bankr. S.D. Ohio 2010) ("*Green*"). If a debtor fails the means test, then his only choice is to convert to a reorganization case, usually chapter 13, or face dismissal. The means test, with its mechanical formula, also substantially curtailed the bankruptcy court's exercise of discretion in ferreting out those debtors who were abusing the system.

In fact, BAPCPA's amendments to § 707(b)(1) changed the standard for dismissal from "substantial abuse" to simple "abuse," and, in § 707(b)(2)(A), it prescribed a mathematical formula to determine when a court must presume that abuse exists. The formula is based on a debtor's pre-bankruptcy income and certain allowed expenses. A court must presume abuse exists if the debtor's "current monthly income,"² reduced by the enumerated expenses, exceeds a statutorily prescribed income level. A debtor may rebut the presumption of abuse by demonstrating "special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." § 707(b)(2)(B). Debtors must file schedules showing their means test calculations. § 707(a)(2)(C).

However, BAPCPA did not completely eliminate the bankruptcy courts' discretion in cases that potentially involve abuse. In § 707(b)(3), BACPA preserved the courts' discretion to dismiss cases for abuse where the presumption of abuse in § 707(b)(2)(A) does not arise or is rebutted under § 707(b)(2)(B). In such a case, the court must consider whether the debtor filed her bankruptcy petition in bad faith, or whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." § 707(b)(3)(A) and (B).

One final aspect of BAPCPA is critical in this case. In § 707(b)(2)(D), BAPCPA created a "safe-harbor" from means testing for certain veterans. In pertinent part, the exception states that "[s]ubparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing – (i) if the debtor is a disabled veteran . . . and the

² The Code defines "current monthly income" in § 101(10A) as the monthly average of all income a debtor received in the six months prior to filing bankruptcy.

indebtedness occurred primarily during a period during which he or she was (I) on active duty . . . ; or (II) performing a homeland defense activity.”³ § 707(b)(2)(D)(i).

The Debtor argues that the language of § 707(b)(2)(D), particularly its reference to “any form of means testing,” means a court may never dismiss a disabled veteran’s bankruptcy case based on her financial circumstances. The Debtor argues that, because a debtor’s ability to pay her debts is a primary consideration in the § 707(b)(3)(B) “totality of circumstances” analysis, § 707(b)(3)(B) is another type of “means test” that the Court may not use to dismiss her case.

The Court has considered the Debtor’s well-stated arguments, but it disagrees with her conclusion. The Court acknowledges that, because it references § 707(b)(2)(A)-(C) and “any form” of means testing in the same phrase, the statutory language of § 707(b)(2)(D) is ambiguous. *In re Rowell*, 536 B.R. 245, 249 (Bank. E.D. Wis. 2015) (“*Rowell*”). To interpret ambiguous statutory language, a court may consider “the statutory structure, relevant legislative history, congressional purposes expressed in the pertinent act, and general principles of law applicable to the circumstances of the statute.” *Id.* (quoting *In re Knudsen*, 389 B.R. 643, 653 (N.D. Iowa 2008)); *United States v. Handley*, 678 F.3d 1185, 1189 (10th Cir. 2012).

The statutory structure of § 707(b) and the legislative history of BAPCPA strongly indicate that Congress intended to exempt qualified veterans only from the structured, objective, mathematical “means test” of § 707(b)(2)(A)-(C). The courts’ analyses in *Green* and *Rowell*, the only two reported cases to address whether the safe-harbor of § 707(b)(2)(D) prevents dismissal under § 707(b)(3), are thoughtful and well-reasoned and this Court adopts that reasoning here.⁴

As did the courts in *Green* and *Rowell*, the Court first finds it extremely persuasive that Congress placed the exception for certain veterans within the means-testing section, § 707(b)(2), rather than as a stand-alone provision, and that Congress did not repeat the language of the exception in § 707(b)(3). *See Green*, 431 B.R. at 190; *Rowell*, 536 B.R. at 249. Also, for the reasons set forth by the Court in *Green*, the Court agrees “means testing,” as used in § 707(b)(2)(D), is a term of art that refers to the statutory formula set forth in § 707(b)(2) and it does not refer to the “totality of circumstances” test under § 707(b)(3)(B). *Green*, 431 B.R. at 192,

Finally, BAPCPA’s legislative history supports the Court’s conclusion. The House Judiciary Committee’s section-by-section summary and analysis of BAPCPA’s provisions contains an extensive and detailed description of the mathematical test of § 707(b)(2)(A), the conditions under which a debtor may rebut the presumption of abuse under § 707(b)(2)(B), and the implementing schedules that § 707(b)(2)(C) describes. H.R. Rep. No. 109-31, pt. 1, at 48-50 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 119-121. Throughout this discussion, the report

³ BAPCPA also included servicemenbers on or recently returned from active duty in the § 707(b)(2)(D) exception. In the National Guard and Reservists Debt Relief Act of 2008, Congress broadened the exception to include members of the Armed Forces reserves or National Guard who are called to active duty or who perform homeland defense activities. § 707(b)(2)(D); *Green*, 431 B.R. at 188.

⁴ The Debtor argues that *Green* and *Rowell* are inapposite because the debtors in both cases were reservists that § 707(b)(2)(D) did not originally include. However, this distinction does not alter the analysis of the statutory structure or the meaning of phrase term “means test.”

refers to the provisions of § 707(b)(2) as “needs-based reforms” based on a “needs-based test.” *Id.* Immediately thereafter, the report says that, “[a]n exception to *the* needs-based test applies with respect to a debtor who is a disabled veteran whose indebtedness occurred primarily during a period when the individual was on active duty . . . or performing a homeland defense activity.” (emphasis added). *Id.* at 50, 2005 U.S.C.C.A.N. at 121. Clearly “the” needs-based test to which the legislative history refers is the means test formula in § 707(b)(2). The summary and analysis section of the House Report contains no reference to an exemption for veterans from dismissal under § 707(b)(3).⁵

The Debtor cites *In re Love*, 461 B.R. 29 (Bankr. N.D. Ill. 2011), in support of her arguments. The court in *Love* required a debtor’s former attorneys to disgorge fees she paid them for a chapter 13 case because the attorneys failed to recognize that the debtor, who was on active duty, would have been exempt from “means testing” under § 707(d)(2)(D). 461 B.R. at 30. This case did not address the question now before this Court and it contains no analysis of the meaning of the phrase “means testing” in § 707(b)(2)(D) nor its relationship to § 707(b)(3). The *Love* case does not inform the Court’s decision one way or the other.

The Debtor also argues that she is outside the reach § 707(b)(3) because it only applies when “the presumption of abuse does not arise or is rebutted,” and she is completely exempt from any presumption of abuse. In other words, the Debtor argues that § 707(b)(3) only applies when a court performs the § 707(b)(2) calculations and the debtor “passes” the means test. She argues that it does not apply where the Court never performs the test in the first place because of § 707(b)(2)(D)’s safe harbor for veterans. While this is a clever argument, the Court rejects it. Section 707(b)(3) retains the Court’s discretion to analyze abuse in all cases, regardless of whether the debtor “passed” the means test or it did not apply.

For all of the above reasons, the Court concludes that § 707(b)(2)(D) exempts the Debtor only from the mathematical “means test” set forth in § 707(b)(2). It does not bar the Court from considering the UST’s motion to dismiss based on a “totality of circumstances” under § 707(b)(3)(B).

B. Can the Court Consider the Debtor’s Ability to Pay Under the Totality of Circumstances Test?

The current version of § 707(b)(3)(B) allows a court to dismiss a chapter 7 case if “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.” BAPCPA specifically incorporated the “totality of the circumstances” test that many courts had utilized pre-BAPCPA in determining whether a debtor’s filing constituted a “substantial abuse”

⁵ In support of her argument, the Debtor cites to the transcript of a House Judiciary Committee debate on a proposed, but ultimately unsuccessful, amendment regarding the claims of pay-day lenders in veterans’ bankruptcy cases. Representative Cannon spoke against the proposed pay-day lender amendment and said, “[BAPCPA] specifies that the absolute safe harbor from all types of dismissal motions under section 707(b) applies to a veteran.” H.R. Rep. No. 109-31, part 1 at 381. Given the language Congress actually adopted in § 707(d)(2)(D), as well as summary and analysis of that section quoted above, the Court is persuaded that Representative Cannon misspoke or was misinformed about the breadth of the disabled veterans’ safe-harbor or that he was describing a version of the proposed legislation different from the one Congress ultimately enacted. The Court also notes that, in response to Representative Cannon’s comment, Representative Conyers said, “I took out the military exemption.” *Id.* at 382.

of chapter 7. See *Stewart*, 175 F.3d at 809 (adopting totality of circumstances test). It also changed the standard for dismissal from “substantial abuse” to “abuse.” *In re Jaramillo*, 526 B.R. 410 (Bankr. D. N.M. 2015). Courts generally agree that pre-BAPCPA cases using the “totality of the circumstances” test remain applicable to the analysis of “abuse” under § 707(b)(3) and that courts may properly consider the debtor’s ability to pay as part of that analysis. *Id.* at 410-11 (citing *Witcher v. Early (In re Witcher)*, 702 F.3d 619, 622 (11th Cir. 2012)). See also *In re Robinson*, 560 B.R. 352, 357 (Bankr. D. Colo. 2016) (recognizing that BAPCPA adopted an objective means test in § 707(b)(2) but preserved a subjective analysis of abuse, including *Stewart* factors, in § 707(b)(3)).

In *Stewart*, the Tenth Circuit listed several factors to guide a court’s analysis in determining substantial abuse under pre-BAPCPA § 707(b): (1) the debtor’s ability to pay; (2) whether the debtor enjoys a stable source of future income; (3) whether the debtor is eligible for adjustment of debt in chapter 13; (4) whether state remedies exist to ease the financial predicament; (5) the degree of relief obtainable through private negotiation; (6) sudden illness calamity, disability, or unemployment; (7) whether the debtor’s expenses are excessive or unreasonable and/or can be significantly reduced without depriving the debtor of adequate food, clothing, shelter, and other necessities; (8) the accuracy of the statements and schedules; (9) the existence of excessive cash advances or consumer purchases; (10) the debtor’s good faith.⁶ 175 F.3d. at 809. While these factors are instructive, they do not preclude a court from considering other factors. Nor are they to be used to erect a *per se* formula. Instead the court must separately analyze the particular facts of each case on a case-by-case basis. *Id.*

In *Stewart*, the Tenth Circuit recognized that the ability to pay is a primary factor in determining abuse, but that “other relevant or contributing factors, such as unique hardship, *must* also be examined before dismissing a chapter 7 petition.” *Id.* (emphasis added). The Debtor argues, however, that the Court may not consider her ability to pay in its § 707(b)(3)(B) analysis, because that would be tantamount to a means test, from which she is exempt. For the reasons set forth above, the Court rejects this argument. The means test that the Court may not apply to the Debtor is the mathematical formula set forth in § 707(b)(2)(A)-(C). By granting certain veterans a safe-harbor from the means test, Congress indicated its intent to relieve those veterans from the strictures of the prescribed income and expense standards. It did not intend to exempt them from a subjective analysis of abuse under § 707(b)(3). Such an exemption would allow wealthy veterans, such as those in *Rowell*, to abuse the bankruptcy system in precisely the manner that led Congress to enact BAPCPA in the first place. The Court’s consideration of the Debtor’s ability to pay, along with other appropriate factors, under § 707(b)(3)(B), is not a “means test” as that term is used in the Bankruptcy Code. *Green*, 431 B.R. at 192 (concluding that “means testing” has never described the analysis of a debtor’s ability to pay under the totality of the circumstances test either prior to or following BAPCPA). Thus, this Court may consider the Debtor’s ability to pay her debts, along with other relevant factors, to determine whether, under the totality of the circumstances, her case is an abuse of chapter 7.

The parties disagree whether the Court may consider the IRS expense standards as part of its evaluation of the totality of the circumstances of the Debtor’s financial situation. The Debtor

⁶ Since lack of good faith is now a separate ground for dismissal under § 707(b)(3)(A), the Court will no longer include it in its analysis of the “totality of the circumstances” under § 707(b)(3)(B).

contends that, if the Court does so, it is engaging in prohibited “means testing.” The UST asserts that the Court may consider the IRS expense standards as relevant to the seventh *Stewart* factor: the reasonableness of the Debtor’s expenses. Certainly, the Court is not required to use the IRS expense standards as it would when performing a means test evaluation under § 707(b)(2). Nothing in § 707(b)(3)(B) compels it to do so. However, the Court may consider the IRS standards as “some” evidence bearing on the reasonableness of the Debtor’s expenses. Frankly, the Court expects to give little if any weight to the IRS standards in its totality of circumstances evaluation. It must make a subjective analysis of the Debtor’s actual financial situation and whether allowing her case to remain in chapter 7 comports with the purposes of the Bankruptcy Code.

The parties did not take a position on the Court’s consideration of “disposable income,” so the Court need not address it here at any length. The Court notes, however, that “disposable income” is a defined term applicable only in chapter 13. It is therefore not strictly relevant to the § 707(b)(3)(B) analysis, except insofar as it is encompassed in the Court’s analysis of the Debtor’s actual income and expenses in connection with the *Stewart* factors.

C. Is Dismissal Under § 707(b)(3)(B) Proper Based Only On the Debtor’s Ability to Pay?

Stewart directs that, in making an assessment of the totality of the circumstances of the Debtor’s financial situation, the Court must consider factors other than the Debtor’s ability to pay. The Court intends to do so. For the reasons set forth above, the fact that the ability to pay is a primary factor in the totality of circumstances analysis does not convert that analysis to a “means test,” and the Court may give substantial weight to that factor without running afoul of § 707(b)(2)(D). The Tenth Circuit has not ruled on the propriety of dismissal under § 707(b)(3) based *solely* on a debtor’s ability to pay and other courts that have considered it have come to different conclusions. Compare *In re Hoffman*, 413 B.R. 191, 195 (Bankr. M.D. Pa. 2008) (ruling that court may dismiss under § 707(b)(3) based solely on ability to pay) with *In re Nockerts*, 357 B.R. 497, 505-06 (Bankr. E.D. Wis. 2006) (interpreting § 707(b)(3) test as requiring proof of more than the ability to pay).

In this case, however, the UST has stated that he intends to rely on factors in addition to the Debtor’s ability to pay in presenting his case for dismissal under § 707(b)(3). Accordingly, the Court need not decide this issue, at least at this point in the case.

II. CONCLUSION

For the foregoing reasons, the Court concludes that it may properly consider the totality of the circumstances of the Debtor’s financial situation, including her ability to pay her debts, to determine whether it should dismiss her chapter 7 case under § 707(b)(3). To preclude consideration of a disabled veteran’s ability to pay under § 707(b)(3) would strip the Court of its discretion to dismiss the case of a party who is truly abusing the bankruptcy system. In BAPCPA, Congress did not evidence an intent to extend the protections of § 707(b)(2)(D) that far. To analyze the totality of the circumstances under § 707(b)(3)(B), the Court must conduct an evidentiary hearing. Accordingly, the Court hereby