

I. CONSUMER CASES – SECTION 707(b), SCHEDULE I AND J AND THE MEANS TEST

- A. Section 707(b)(2). The Means Test. What is the U.S. Trustee doing?
 - a. Under Section 704(b)(1)(A) we have 10 days from the Section 341 meeting to file a statement as to whether the case is presumed to be abusive under the Means Test.
 - b. This deadline cannot be extended.
 - c. CM/ECF system allows us three choices.
 - i. Statement of presumed abuse.
 - ii. Statement that insufficient information has been provided to make determination.
 - iii. Take no action. Presumption does not arise.
 - d. Why are we asking for information so quickly? Have deadline and want to information to make the best decision we can.
 - e. After the 10 day statement is filed, we have 30 days to file a motion to dismiss or file a “statement setting forth the reasons the United States trustee . . . does not consider such a motion to be appropriate (a “Declination Statement.”). Section 704(b)(2).
 - i. Deadline cannot be extended.
 - f. If we file a 10 day statement we will ask for an interview of the debtor.
 - i. Voluntary.
 - ii. Very helpful to us in making determination as to whether to file a motion to dismiss or not.
- B. Section 707(b)(3). Dismissal based on the totality of the circumstances.
 - a. Deadline is the same as the dischargeability objection deadline. Can be extended.
 - b. Can be filed even if no Section 707(b)(2) Means Test motion is filed.
- C. Common Schedule I Issues
 - a. Line 2 – Bonuses
 - i. *McDow v. Meade (In re Meade)*, 420 B.R. 291, 305-07 (Bankr. W.D. Va. 2009) (Judge Stone) (permitting annual bonus received during the 6-month CMI period to be prorated over 12 months for the purpose of the means test).
 - ii. Could also include on Line 8h.
 - b. Lines 5b and 5c – Retirement plans
 - i. Voluntary or involuntary?
 - ii. Involuntary payments are mostly in the public sector.
 - iii. Matters on the Means Test.
 - c. Line 8e – Social Security
 - i. Doesn’t count on the Means Test.
 - ii. Still have to show it.
 - d. Line 11 – Contributions to the Household

- i. One of the most factually complicated issues.
- ii. Review carefully with your client.
 - 1. Flat dollar amount contributed?
 - 2. Paying one or more bills?
 - 3. Actual separate finances?

D. Common Schedule J Issues

- a. Line 2 – Dependents
 - i. Should match the household size number on the Means Test or be clear why it does not.
- b. Line 6c – Telephone, cell phone, etc.
 - i. Whose phone(s) is the debtor paying for?
- c. Line 21
 - i. Covers a lot of ground
 - 1. Make sure explanations are sufficient.
 - 2. Make sure they are not duplicated.

E. General Schedule I and J Matters

- i. Any of the items should match the Means Test
 - 1. Health insurance amount
 - 2. Charitable deductions
 - 3. Medical and dental expenses
- ii. Watch double counting
 - 1. Health insurance
 - 2. Charitable deduction from pay
 - 3. Child or spousal support

F. Common Means Test Issues

- a. For Means Test to apply, debt must be “primarily consumer debt.” Section 707(b)(1).
 - i. “Consumer debt” means “debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8).
 - ii. “Primarily” is probably talking about relative amount of debt, although the cases leave open the idea of looking at the number of creditors of each type. *See Matter of Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988).
 - iii. When is a debt consumer or non-consumer? Starting points for research.
 - 1. *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996) (divorce settlement “not incurred with a profit motive or in connection with a business transaction” is a consumer debt.).
 - 2. *What are “primarily consumer debts,” under 11 U.S.C.A. § 707(b), authorizing dismissal of chapter 7 Bankruptcy case if granting relief would be substantial abuse of chapter’s provision*, 101 A.L.R. Fed 117 (1991).

- iv. Secured debt counts. *See Harris v. Margretten & Co., Inc. (In re Harris)*, 203 B.R. 46, 50 (Bankr. E.D. Va. 1994).
 - v. If it is a close case.
 - 1. Indicate on the Schedules whether the debt is consumer or non-consumer.
 - 2. We may ask you for your breakdown of consumer v. non-consumer debt.
- b. Particular issues
- i. Taxes
 - 1. Income taxes are usually found to be non-consumer. *See IRS v. Westberry (In re Westberry)*, 215 F.3d 589, 591 (6th Cir. 2000) (federal income taxes not consumer debt. Among other things, tax debt is incurred for public purpose not “personal, family, or household purpose.” Co-debtor stay case.).
 - 2. *In re Stovall*, 209 B.R. 849, 854 (Bankr. E.D. Va. 1997) (personal property tax on a personal vehicle is not a consumer debt – tax debt is not “incurred” by debtors, it is involuntarily imposed by government. Co-debtor stay case.).
 - ii. Student Loans. Split in authority.
 - 1. *In re Ferreira*, 549 B.R. 232, 239 (Bankr. E.D. Cal. 2016) (“[I]n order to show a student loan was incurred with a profit motive, the debtor must demonstrate a tangible benefit to an existing business, or show some requirement for advancement or greater compensation in a current job or organization.”)
 - 2. *Palmer v. Laying*, 559 B.R. 746, 755 (D. Colo. 2016) (largely rejecting the tangible benefit and advancement components set out in *Ferreira*. “The important question is whether [debtor’s] education can be properly characterized as a business investment in himself.”).
- c. Number of persons in debtor’s household
- i. Threshold issue given the current median incomes. Current median incomes (as of April 1, 2019).
 - 1. One person - \$61,864.
 - 2. Two people - \$77,904.
 - 3. Three people - \$91,781.
 - 4. Four people - \$105,261.
 - 5. Can find this on the U.S. Trustee website for any particular date - <https://www.justice.gov/ust/means-testing>.
 - ii. *Leave it to Beaver* household or *Modern Family* household?
 - iii. Household is not defined in the Bankruptcy Code.
 - iv. *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012) (2-1 decision), *cert. denied*, 568 U.S. 1087 (2013).
 - 1. Technically a Chapter 13 Means Test case.

2. Requires the determination of fractional members of a household.
- v. Strange situations – think about them.
- d. Part 2, Line 3 – “Marital Adjustment”
 - i. Section 101(10A) defines “current monthly income” to include “any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor’s dependents”
- e. Part 2, Line 10 – housing expense
 - i. Not just that the debtor spends more than the established amount for housing. *See In re Greer*, 2011 WL 10676936 at *6 (Bankr. E.D. Cal. 2011).
- f. Part 2, Line 16 – Taxes
 - i. Per the instructions this is net of refunds.
 - ii. “[I]f you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.”
- g. Part 2, Line 22 – Additional health care expenses
 - i. Additional.
 - ii. This is the amount that is greater than the standard amount on Line 7.
- h. Part 2, Line 23 – Optional Phone service.
 - i. Not just the amount the debtor pays for phone service.
 - ii. Only “to the extent necessary for your health and welfare or that of your dependents or for the production of income.”
- i. Part 2, Line 25 – Health Savings Accounts
 - i. Only Health Savings Accounts
 - ii. Not Flexible Spending Accounts or other arrangement.
- j. Part 2, Line 29 – Education Expenses for Dependents under 18
 - i. Currently capped at \$170.83 per child.
 - ii. Must give case trustee documentation of actual expenses.
 - iii. Must explain why amount is reasonable and necessary and not included in other parts of the Means Test.
- k. Part 2, Line 30 – Additional food and clothing expense.
 - i. Cannot be more than 5% of the food and clothing allowances.
 - ii. Must show that the additional amount is reasonable and necessary.
- l. Part 2, Line 31 – Charitable contributions.
 - i. Must be consistent with prior giving. *See In re Hallstrom*, 2002 WL 1784500 at *4 (Bankr. M.D.N.C. 2002).
 - ii. Must be able to establish contributions are actually made. *See In re Linn*, 2005 WL 1307692 at *4 (Bankr. M.D.N.C. 2005).
- m. Part 2, Special circumstances
 - i. Section 707(b)(2)(B)(ii)
 - ii. Allows the debtor to rebut the presumption
 - iii. Procedural requirements
 1. Set out in the Statute.

- a. Itemize additional expenses and adjustments to income.
 - b. Provide supporting documentation.
 - c. Provide “detailed explanation” of the special circumstances.
2. Starting point for research – *In re Parulan*, 387 B.R. 168 (Bankr. E.D. Va. 2008) (Judge Mitchell). Discusses procedural requirements at length.
- iv. Substantive requirements
 1. Are your circumstances “special”?
 2. Statute says “serious medical condition” or being called to active duty in the Armed Forces.
 3. Starting point for research – *In re Burdett*, 2013 WL 865575 (Bankr. E.D. Va. 2013) (Judge Kenney). Discussing the “narrow view” and the “broad view” used by courts in analyzing what is a “special circumstance.”
 4. Western District Cases.
 - a. *Robbins v. Alther (In re Alther)*, 537 B.R. 262, 267 (Bankr. W.D. Va. 2015) (Judge Connelly). Special circumstances must be “unusual, yet necessary.”
 - b. *Robbins v. Ervin (In re Ervin)*, 2016 WL 721043 (Bankr. W.D. Va. 2016) (Judge Black). Discusses the procedural requirements and analyzes four categories of expenses. “[The Court] takes a middle road [on the issue of what is a special circumstance] . . . special circumstances should be addressed on a case-by-case basis . . . circumstances must be of a more severe nature than ordinary job changes or income fluctuations.” *Id.* at *12 (quotation omitted).

II. VALUATION ISSUES

- A. Make sure you are accurately disclosing values of property on schedules.
- B. Consequences for the attorney
 - a. Section 707(b)(4)(C) and (D).
 - b. (C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—
 - c. (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
 - d. (ii) determined that the petition, pleading, or written motion—
 - e. (I) is well grounded in fact; and
 - f. (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

- g. (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.
- h. “Inasmuch as Rule 9011 and the § 707(b)(4)(C) standard is to be a reasonable one, it must be tested objectively. Accordingly, it seems to this Court that the answers to at least the following questions are germane to a Rule 9011 and § 707(b)(4)(C) analysis: (1) did the attorney impress upon the debtor the critical importance of accuracy in the preparation of documents to be presented to the Court; (2) did the attorney seek from the debtor, and then review, whatever documents were within the debtor's possession, custody or control in order to verify the information provided by the debtor; (3) did the attorney employ such external verification tools as were available and not time or cost prohibitive (e.g., on-line real estate title compilations, on-line lien search, tax “scripts”); (4) was any of the information provided by the debtor and then set forth in the debtor's court filings internally inconsistent—that is, was there anything which should have obviously alerted the attorney that the information provided by the debtor could not be accurate; and (5) did the attorney act promptly to correct any information presented to the Court which turned out, notwithstanding the attorney's best efforts, to be inaccurate. These questions can be further simplified and reduced to one question, their common denominator: Did the attorney do his or her level best to get it right? More cannot, and should not, be asked of any attorney. And when an attorney appears to have provided less, an inquiry under Rule 9011 and § 707(b)(4)(C) is proper.” *In re Withrow*, 391 B.R. 217, 227–28 (Bankr. D. Mass. 2008), *aff'd*, 405 B.R. 505 (B.A.P. 1st Cir. 2009).
- i. A motion for review of fees under Section 329 is another possible consequence.

C. Consequences for the debtor

- a. Denial of discharge
 - i. *Robinson v. Worley*, 849 F.3d 577 (4th Cir. 2017) (upholding denial of discharge for false oaths in case where debtor had undervalued an interest in an LLC).
 - ii. Debtor was sophisticated financial professional. “Mere difference of opinion regarding the valuation of an illiquid asset” is not sufficient. Marginal differences are not sufficient, but debtor’s undervaluing was “anything but marginal.” *Robinson*, 849 F.3d at 586–87 (citations omitted).
 - iii. *In re Farouki*, 133 B.R. 769, 782 (Bankr. E.D. Va. 1991), *subsequently aff'd sub nom. Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244 (4th Cir. 1994) (Debtor denied discharge for, among other reasons, under valuing property on schedules).
 - iv. Debtor valued certain furniture at \$60,000 on a financial statement dated January 31, 1986. He filed bankruptcy on February 5, 1987. Debtor valued the furniture on the schedules at \$2,086.
- b. Estoppel outside of bankruptcy

- i. *Neidenbach v. Amica Mutual Ins. Co.*, 96 F. Supp. 3d 925 (E.D. Mo. 2015). Debtors file chapter 13 and disclose household goods, etc. that they value at \$7,000.00. Approximately one year later, the debtors suffered a total loss of their house and garage in a fire. They made an insurance claim seeking \$262,500.00 for lost household goods and other personal property.
- ii. Debtors were denied coverage for material misrepresentations regarding submissions in their personal property claim. “[T]he Court finds there is a huge discrepancy between the amount plaintiffs claimed for lost personal property in their Proof of Loss and what they listed in their bankruptcy petition, which cannot be explained as simply a difference in methods of calculation.” Debtors denied coverage for a material misrepresentation that voided their insurance policy. *Neidenbach*, 96 F. Supp. 3d at 935.
- iii. *Titus v. Smith*, 2012 WL 8007169 (Bankr. W.D. Va. 2012) (Judge Connelly). Unlawful imprisonment and related claims. Debtor did not schedule the claim, defendant learned of bankruptcy about a year after the filing of the chapter 13 case. Debtor schedules the claim about three months after that and values it at \$0.00. Six days before the schedules were filed, debtor got offer of \$15,000. Debtor made demand of \$150,000.
- iv. Court found no estoppel, holding that the Court had not accepted the valuation, which is one of the elements of estoppel. Debtor also had chapter 13 plan on file that indicated that debtor was required to notify chapter 13 trustee of resolution of the claim.

III. SECTION 341 MEETINGS

- A. Waiving appearance at the Section 341 meeting
 - a. Debtor is required to appear in person
 - b. Under special circumstances, a debtor may appear by phone
 - i. Military service/work
 - ii. Illness
 - iii. Incarceration
 - c. Must obtain U.S. Trustee’s approval
 - d. Debtor’s counsel must make arrangements
 - e. Someone must be with the debtor
 - i. Must be authorized to administer oaths and actually administer the oath
 - ii. Must verify the debtor’s identity and social security number
 - iii. Complete the Declaration Regarding Oath and Confirmation of Identity, which will be provided by the U.S. Trustee’s Office upon approval to appear by phone
 - iv. Return completed form, with notary seal, to the Trustee
- B. Interpreters and hearing impaired debtors
 - a. Services are available

- b. Translation available in 196 languages
 - c. No cost to the debtor
 - d. Let case trustee and the U.S. Trustee know before the Section 341 meeting so we can make arrangements
 - e. Do not bring a relative or friend to provide interpretation
- C. Covering for Another Attorney
- a. Does not seem to happen much
 - b. Must have debtor consent
 - c. Notify the Trustee before the meeting
 - d. Substitute counsel should be familiar with the case and prepared to represent the debtor
 - e. Consider whether appropriate
 - i. Complicated case?
 - ii. Nervous debtor?
 - f. Consider whether you need to file an amended Rule 2016 disclosure
 - g. Not something to be repeatedly done
 - h. Can obtain continuance of Section 341 meeting
 - i. If so, be prepared to notice creditors
 - ii. If so, be prepared to agree to continue deadline to object to discharge

IV. GRAB BAG

- A. Debtor audits
- a. U.S. Trustee is required to review and investigate audits that result in a “material misstatement” finding. *See* 28 U.S.C. § 586(f)(2)(B).
 - b. *In re Kelton*, 389 B.R. 812 (Bankr. S.D. Ga. 2008), discusses what a “material misstatement” is, the consequence of that finding and related matters regarding debtor audits.
- B. Converting from Chapter 13 to Chapter 7
- a. Usually because of lost job, medical reasons or married couple separating.
 - b. Situations where presumption of abuse would have arisen based on the circumstances when Chapter 13 was filed.
 - i. Means Test issues are based on circumstances when the case was filed.
 - ii. We expect to see an amended Schedule I and J (or two Schedule Js if a couple has separated) reflecting the new circumstances.
 - iii. Debtor’s counsel can explain circumstances in the motion to convert or on the Amended Schedules.
 - c. If income is reduced under the median income due to no fault of the debtor, and there are amended schedules on file, we would expect to file a notice that the presumption arises followed by a declination statement.

C. Credit counseling for incarcerated debtors

- a. Debtor cannot do credit counseling because they do not have access (or sufficient access) to the Internet or the phone.
- b. Judge Connelly has held in an unreported case that the Court cannot waive the credit counseling requirement unless the situation falls within the categories set out in Section 109(h)(4). *See In re Haden Conrad*, United States Bankruptcy Court for the Western District of Virginia, Case No. 16-60178 (July 25, 2018).
- c. The categories in the statute are: 1) incapacity; 2) disability, and; 3) active military duty in a military combat zone. Incapacity and disability are defined in the statute to exclude a legal disability like incarceration.
- d. There is contrary authority from the Eastern District. *See In re Vollmer*, 361 B.R. 811 (Bankr. E.D. Va. 2007) (Judge Huennekens).
- e. Workaround – credit counselor breaks up the class to permit the debtor to take it over several sessions due to limitations on the time debtor is permitted to use the phone.