

“Current Monthly Income”: Income Included in Calculation

District of Nebraska

Judge Saladino

In re Ferando BK06-81855 (March 2007): Chapter 7 debtor had to convert because the unusually high commissions earned in the six months prior to filing were not a special circumstance sufficient to rebut presumption of abuse established by §707(b)(2.) “This is not a situation where Debtor claims that there was a one-time large and unique commission...[n]or has some circumstance arisen which will cause her income to remain lower during the term of a Chapter 13 plan.” Debtor needed to demonstrate that her income would be ‘dramatically’ different post-petition.

In re Gannon BK06-41399 (March 2007): Under §707(b)(3), Trustee argued that Debtor’s \$10,000 annual bonus in the three years preceding his petition constituted abuse of Chapter 7 under the totality of the circumstances. While the annual bonus fell outside of the six month pre-filing period, its inclusion in annual income resulted in the Debtor being above median income. The Court concluded that Debtor’s Chapter 7 was an abuse under the totality of the circumstances because the bonus (while not guaranteed) had been received for the last few years, and enabled the Debtor to repay his creditors.

In re Herbert BK07-40224 (May 2007): The Trustee challenged the Chapter 7 filing under both §707(b)(2) and (b)(3.) The Debtors’ revised means test included an adjustment for reduced overtime post-petition, their actual rental payment (which was in excess of the applicable standard), a vehicle ownership deduction for wholly owned cars, 401(k) contributions, and future payments on secured debts which the Trustee disputed.

The Court held that a reduction in overtime pay post-petition was not a special circumstance which Debtors could use to lower their current monthly income; the Debtors did not prove that there was a unique opportunity to earn overtime pre-petition or that “some circumstance had arisen which would cause Debtors to be unable to continue earning overtime income during the term of a Chapter 13 plan.” Income fluctuations are a fact of life. Thus, Debtors’ filing was abusive under §707(b)(2.)

As to the income deductions, the Court resolved that: Debtors did not prove that no reasonable alternative housing existed so they were held to Local Standard housing expense; Debtors were entitled to ownership expense deduction on wholly owned vehicle; only truly mandatory 401(k) contributions may be deducted; payments on unsecured 401(k) loans cannot be deducted as secured debt payment on line 42 but can be listed as an additional expense to rebut presumption of abuse because the circumstances demonstrated that the Debtors had no reasonable alternative but to repay the loans; future secured debt payments are to be calculated by statute, and Debtors may not use past payments as deduction. With these deduction changes, Debtors’ filing was also abusive under §707(b)(3.)

Bankruptcy Courts in the Eighth Circuit

Minnesota

In re Kimberly M. Ellringer, 370 B.R. 905 (June 2007): Chapter 7 debtor was required to include in her current monthly income the amount paid on joint car debt by co-debtor (and former joint tenant of home.) Former occupant paid debtor \$600 a month for car debt and other household expenses, and moved out after the bankruptcy filing. The portion of that payment attributable to the car debt was included in debtor's CMI as support paid to the debtor; the rest of the money given to debtor was non-CMI because it was for the former occupant's share of household expenses; income received by debtor from third party other than for the support of debtor or debtor's dependents is non-CMI. The Trustee's argument that former occupant's entire income had to be considered was rejected, and the Court allowed debtor's use of household size of two to determine the relevant median income because the Census Bureau's definition required it. The IRS' definition of household is only relevant to DMI.

Arkansas

In re Robert, 366 B.R. 27 (April 2007, Western District): Court overruled Chapter 13 Trustee's objection to the post-confirmation modification of debtors' plan payments based on a significant reduction in debtors' earnings. The debtors were allowed to submit as disposable income the difference between Amended Schedules I and J. The requirement to use DMI as fixed at petition date throughout the life of the plan would lead to an absurd result, in that section 1329(a)(1), which allows modification of payments to unsecured creditors, could never occur.

Missouri

In re Ward, 359 B.R. 741 (January 2007): Greedy Chapter 13 Trustee argued that Debtor's Social Security benefits should have been considered when determining disposable income to be paid into plan. Court overruled objection to plan and reminded Trustee that statute specifically excludes Social Security benefits from CMI.

In re Sanchez, 2006 Bankr. Lexis 1381 (July 2006): Debtors' distributions from 401(k) plan in six months prior to filing must be included in CMI calculation. It is irrelevant that the money was earned and contributed to the account prior to the six month period.

Iowa

In re Pederson, 98 A.F.T.R.2nd RIA 7619 (October 2006, Northern District): Debtors needed to produce evidence that pre-petition overtime was not going to continue post-petition. Statement of Schedule I as to anticipated change in income was insufficient. CMI is a factor to be considered by the Court when determining projected disposable

income, but it will be controlling without any other evidence. Debtor should have had evidence from employer to prove post-petition reduction.