



MEANS TESTING

Presented by

Office of the

United States Trustee



Preliminary Thoughts...

- Forms taken directly from statutes

- Make sure you are using proper/latest version of forms

http://www.uscourts.gov/bkforms/bankruptcy_for_ms.html

- Beware of “default” settings in software



Timing of Filing...

- File with the Petition.
- “Part of” schedule of current income and current expenditures so...
- If not filed within 45 days of petition date – case may be automatically dismissed.
- May be dismissed sooner on UST Motion.
- Failure to file likely to cause continuance of 341.



Cross-Check Financial Data

- Trustees and OUST will be cross-checking data.
- Cross Checking MTF with...
 - Documents to the Trustee
 - Most recently filed tax return (transmit to trustee 7 days before 341)
 - Account statements covering petition date (bring to 341)
 - Evidence of “certain expenses” (bring to 341)
Evidence of “special circumstances” (bring to 341)



Cross-Checking - continued

File with the Court

- “60 Day” Pay stubs (unless local rule or order provides otherwise)
- Schedules and SOFA
- Statement of Intent
- All materials filed by debtor
- Debt repayment plan prepared in credit counseling session

Standing to File §707(b) Motions

	Debtor's income and, if applicable, spouse's income combined at or <u>below</u> the applicable Median	Debtor's income at or below the applicable median <u>but</u> Debtor's and non-filing spouse's income combined above the applicable Median	Debtor's income and, if applicable, spouse's income combined <u>above</u> the applicable median
Means Testing Presumption of Abuse; §707(b)(2)	No one has standing; <u>See</u> §707(b)(7)(A).	Only Judges, U.S. Trustees, and Bankruptcy Administrators have standing; <u>See</u> §707(b)(6).	All parties in interest have standing
General grounds of abuse: totality of circumstances and/or bad faith; §707(b)(3)	Only Judges, U.S. Trustees, and Bankruptcy Administrators have standing; <u>See</u> §707(b)(6).		



UST “Presumed Abuse” Procedures

- Review Documents.
- Inquiry letter to request additional documents.
- Question Debtor at 341.
- 10 Day Statements (from conclusion of 341)
 - Most cases – no 10 day statement will be filed
 - If statement filed (4 options)
 - “Presumption Arises” (debtor checked this box and we agree)
 - “Presumption Arises” (despite what debtor said)
 - “No Presumption Arises” (despite what debtor said)
 - “Don’t have enough info yet”

“Presumed Abuse” Procedures - continued

- If “Presumed Abuse”, UST has 30 days to file 707(b)(2) Motion or a Declination statement.

- If Declined, Trustee, Court or Party in Interest can still bring.

- All parties retain full 60 days to bring (b)(3)
 - “totality of circumstances”
 - “bad faith”



Safe Harbors?

(From Presumption of Abuse)

- Below Median Income.
- Primarily Non-Consumer Debt.
- Disabled Veteran and incurred debt on Active Duty/Homeland Defense.



Below Median Income

- Presumption never applies. If debtor's household income (including non-filing spouse – if any) is below median for (a) state in which he lives and (b) size of family.
- Majority of cases will be below median.
- If Below Median, only first part of Means Test Form need be completed.



Primarily Consumer Debt

- Only fill out Means Test if debts are primarily consumer debts. (Still must complete B22B or B22C in chapter 11 or 13 even if not primarily consumer debt.)
- Consumer debt is incurred primarily for personal, family, or household purpose. 11 U.S.C. §101(8)



Primarily Consumer Debt - continued

- Primary residence mortgage = consumer debt.
- Most tax debt (even income tax) = non-consumer debt.
- Be consistent with representation on petition.
- Be prepared to provide documentation of non-consumer debt.



Veteran's Declaration

Line 1

- Must be both:
 - (a) disabled (30% or more disability; See 38 U.S.C. §3741(1)) or discharge/release from active duty was for a disability incurred or aggravated in line of duty; and
 - (b) indebtedness occurred primarily during a period while on active duty/homeland defense.



Marital Filing Status

Line 2

■ 4 Options

Unmarried

Married (but separated not filing jointly)

- Requires representation of legal separation or that separation was not to beat MT.

Married – Not Filing Jointly

Married – Filing Jointly

- If legally separated filing joint petition – UST will treat as one household for expense purposes.



Six Months Historical Figures

- Looks back 6 months (ending with last day of the month before month of filing).
- Won't necessarily match Schedule I.
- Should not rely exclusively on Debtor's representations – review documents yourself.
- Should not always extrapolate from 60 day pay stubs – may review full 6 months income documentation.



Income

Line 3

- Gross Wages, Etc.
 - Includes pay/shift differentials
 - Regardless of whether taxable
 - Use figures before deductions for 401(k), flex plan, charitable, etc.



Business Income

Lines 4 - 5

- UST position is ordinary and necessary business/operating expenses does not include non-cash expenses such as depreciation.
- Must be “necessary” and “ordinary” in the sense of not being unreasonable.
- Line c should never be a negative number.



Interest, Dividends, Royalties

Line 6

- No *de minimis* exception.
- Includes dividends automatically reinvested as well as cash dividends.



Pensions and Retirement Income

Line 7

- Includes annuities, state/local government retirement, 401(k) or IRA payments.
- Does not include SSA payments.



Regular Amounts Paid for Household Expenses

Line 8

- Includes amounts paid monthly, quarterly, annually, etc.
- Regardless of written agreement understanding with contributor.
- Includes payments from roommate, partner, parents, relative regardless of whether or not living with debtor.



Regular Amounts Paid for Household Expenses

Line 8 - continued

- Includes payments made directly to creditors on behalf of debtor (rent, car payments, insurance, tuition, etc.).
- Does not include payments from non-filing spouse whose income is already included in Column B.



Unemployment Compensation

Line 9

- Program's position is unemployment compensation is included in calculation.
- Debtor may contend otherwise but needs to disclose amount regardless.



“Catch All” Income

Line 10

- Includes gambling winnings, cash gifts, (not otherwise regular contributions) litigation proceeds, trust income, etc.
- Includes veteran’s disability and other non-SSI disability payments.
- Does not include SSA benefits (retirement, survivors, disability, SSI).
- Does not include tax refunds.
- Does not include loan proceeds.



“Current Monthly” Income

Lines 11 - 13

- Defined in Section 101(10A).
- Includes all income from all sources, without respect to whether taxable, obtained within 6 months before filing.



Applicable Median Family Income

Line 14

- State of residence at filing.
- If married but have two different households, use median figures for where most members of household reside.
- If no majority in either state, use state of spouse with highest income.
- See <http://www.usdoj.gov/ust/>



Applicable Median Family Income

Line 14 - continued

- “Household size” generally includes the debtor, spouse (but not if box 2b checked) and any dependents as defined by IRS. This application takes into consideration both the census bureau’s family income figures and the IRS national expense standards.
 - There may be reasonable exceptions.

- “Dependent” is “qualifying child” or “qualifying relative”. See IRS Publication 501 (Exemptions, Standard Deduction and Filing Information).



Application of 707(b)(7)

Lines 15

- If below median income, check “presumption does not arise”.
- Sign verification – You Are Done!
- Vast majority of filers will be below median income
 - Presumption can never be against them
 - May still be subject to (b)(3) motion by UST or court action



Application of 707(b)(7)

Lines 15 - continued

- If above median income fill out balance of form
 - Presumption may still not arise

- If data shows “above”, you should amend MT Form to provide “expense” data.



Calculation of CMI for 707(b)(2)

Lines 16 -18

- General Rule is all income of non-debtor spouse is included in calculation.
- However, some expenses of non-debtor spouse may be “adjusted” or “backed out.”
- Should not “back out” amounts if they are claimed as expenses elsewhere on the form.



Calculation of CMI for 707(b)(2)

Lines 16 -18 - continued

- “Adjust” for expenses which do not contribute to debtor’s household’s “bottom line” which may include:
 - prior domestic support obligations of non-debtor spouse
 - student loan payments for non-debtor spouse
 - withholding taxes for non-debtor spouse
 - debt payments on which only non-debtor spouse is liable (but may be considered a “contribution” on line 8).
 - 401k contributions/loan repayments by non-debtor spouse



Expenses

- Generally, UST position is: expenses for CMI should be the estimated expenses a debtor will incur “going forward”.
- Still may be based on historical (six month pre-petition average) figures, if appropriate.



Expenses

National Standards – Food, Clothing, etc.

Line 19

- Very inclusive but not exhaustive.
 - School lunches
 - \$110 per month “wildcard” for first person and \$28 each every person thereafter
 - Meals at home and away

- What if expenses are higher for food/clothing? See Line 39.



Local Standard-Housing and Utilities (non-mortgage)

Line 20A

- Based on county (for multiple county households – see previous discussion)
- Includes maintenance and repair, HOA dues, and condo fees.



Local Standard-Housing and Utilities (non-mortgage)

Line 20A - continued

- Utilities includes gas, electricity, water, fuel oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning and basic telephone and long distance service.
- What if expenses are higher for home energy?
See Line 37.



Local Standards; Housing and Utilities (mortgage/rent)

Line 20B

- County specific.
- Includes principal, interest, homeowner's/renter's insurance and local property taxes, rent.
- Line 20B(b) should match Line 42 for house payments (if 60 months or beyond).



Local Standards; Housing and Utilities (mortgage/rent)

Line 20B - continued

- Debtors receive benefit of higher of IRS standard or actual mortgage costs.
 - However, beware of §707(b)(3)
- IRS standard is both the “floor and ceiling” for rent expense.
- No “double dipping” – don’t get both IRS standard and actual cost.
- UST position is: don’t list mortgage payment for house being surrendered but do list amount of IRS standard.

Local Standards; Housing and Utilities (mortgage/rent)

Line 20B - continued

- Only entitled to one mortgage/rent payment per household
 - even if maintaining two separate households
 - no vacation homes (but payment allowed on Line 42)

- UST position is: debtors generally don't get this allowance if no mortgage/rent payment obligation
 - Living with relative long period of time
 - Military/employer paid housing (but may be entitled to deduct non-mortgage portion on line 20A if paid by debtor).



Housing Adjustment

Line 21

- If you contend that the division of the housing standard between Line 20a and 20b doesn't accurately reflect the IRS housing allowance to which you are entitled, state why and state amount.
- Exception – not rule.



Local Standards; Transportation (Operating)

Line 22

- Same venue rules apply as with housing.
- Get an “operating” expense even without vehicle (but limited to “zero” vehicles).
- Get operating costs corresponding to number of vehicles not to exceed two.

Local Standards; Transportation (Operating)

Line 22

- Applies if vehicle owned outright, leased, purchasing or if paying operating expenses.
- Includes gas, oil, tires, etc.
- Applies to any licensable “street ready” vehicle.
- Debtors without a vehicle loan or lease payment, but who operate vehicles older than 6 model years and/or with 75,000 or more miles, will be allowed an additional \$200 vehicle operating expense per vehicle for up to two eligible vehicles.
 - See In re McGuire, 2006 WL 1527146 (Bankr. W.D.Mo. June 1, 2006)

Local Standards; Transportation (Ownership)

Line 23 and 24

- National standards.
- “Stackable” so currently \$471 for first vehicle, \$332 for second vehicle. No more than two.
- UST position is: don't claim ownership expense on vehicle with no purchase or lease payment obligation. See In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006); In re McGuire, 2006 WL 1527146 (Bankr. W.D.Mo. June 1, 2006).
 - Paid off vehicle
 - Borrowed vehicle
 - Surrendered vehicle
- See In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006); In re McGuire, 2006 WL 1527146 (Bankr. W.D.Mo. June 1, 2006).
 - Both cases follow UST position that ownership expense is not allowed if debtor owns vehicle free and clear.

Local Standards; Transportation (Ownership)

Line 23 and 24

- Beware of software “defaults”
 - Should be consistent with Schedules D and G and Line 42

- If purchasing vehicle – get higher of IRS standard amount or payment as calculated on Line 42, not both
 - See In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006); In re McGuire, 2006 WL 1527146 (Bankr. W.D.Mo. June 1, 2006).

 - But beware of §707(b)(3) claim

- If leasing vehicle get IRS standard amount regardless of whether payments are actually higher or lower.

- Ownership allowance not applicable to items designed without engine (e.g. campers, 5th wheels or trailers)



Taxes

Line 25

- Gather data from pay stubs and tax returns but watch for over or under withholding – should be based on actual obligation if significantly different from withholding.
- Includes FICA, SS, Medicare, state, local taxes.
- Does not include non-debtor spouse's taxes (should be “backed out” on Line 17).



Mandatory Payroll Deductions

Line 26

- Includes mandatory retirement, union dues, uniform costs, etc.
- Does not include voluntary 401(k) loan payments or contributions, United Way or other charitable contributions, elective insurance, etc.



Life Insurance

Line 27

- Term life only – not investment or cash value insurance.
- Should match Schedule J.
- Life insurance for non-debtor spouse/children does not qualify.



Court Ordered Payments

Line 28

- Includes normal, ongoing amounts for child support/alimony, restitution, etc.
- Does not include arrearages or judgment amounts. Those go on Line 44.
- Does not include purely voluntary amounts for which there is no legal obligation
 - Payments to support another's dependents.



Education for Employment or for Physically or Mentally Challenged Child

Line 29

- Employment education expenses must be as condition for employment
 - think CLE not lifetime learning/enrichment

- Expenses for challenged children
 - must be “health and welfare”
 - Not otherwise provided by public school system
 - Don't “double dip” with Line 30 and/or 38.



Childcare

Line 30

- Actual expenses only.
- Includes babysitting, nursery school, daycare, preschool, etc.
- Must be “necessary for health and welfare” so premium daycare may not be allowable. May not be applicable if one or both debtors are “stay at home parents”.
- Should be consistent with Schedule J.



Health Care

Line 31

- Should be consistent with Schedule J.
- Payments for health insurance or health savings accounts do not go on this line – see Line 34(a).
- Generally does not include elective/cosmetic surgery
 - Must be necessary for “health and welfare”



Health Care

Line 31 - continued

- No “double dipping” with health savings accounts or flex spending accounts Line 34. Should be net of reimbursements.

- Includes actual unreimbursed out of the pocket expenses
 - deductibles
 - drugs
 - therapy
 - co-pays, etc.



Telecommunications

Line 32

- Does not include basic phone/long distance (included on Line 20A).
- Might include cell phone, pagers, internet, etc.
- “Necessary for health and welfare” or production of income.
- UST position is cable/satellite TV is not a generally allowed expense but may be if “necessary for health/welfare or production of income” and is documented.
- Don't “double dip” with business expenses on Line 4.



Health Insurance, Disability, Health Savings Accounts

Line 34

- Actual expenses for self, spouse and dependents.
- Should match Schedule J and pay stub.



Continued Contributions to Care of Household or Family Members

Line 35

- Must satisfy ALL of the following:
 - “continued” (must have historical basis)
 - actual expenses (not anticipated)
 - “reasonable and necessary” (not elective)
 - for elderly, chronically ill or disabled person
 - either living with the debtor or member of immediate family (parent, grandparent, sibling, children, grandchildren)
 - such person must be unable to pay such expenses.

- Expect to provide proof.



Protection Against Family Violence

Line 36

- Ongoing expenses related to real threat.
- Legal costs related to restraining orders may qualify.
- Home security system costs in every case will not qualify.
- Nature of expense but not amount will be kept confidential by court.



Additional Home Energy Costs

Line 37

- To the extent average monthly expenses exceed Line 20A.
- Unlimited but requires documentation.
- Submit documents to trustee at 341 meeting. Should include 12 months due to seasonality – to get proper monthly average.
- Must be “necessary and reasonable.”



Education Expenses for Dependent Children

Line 38

■ Requirements:

- public or private elementary or secondary education not preschool or college)
- less than 18 years old
- not to exceed \$125 per child
- “reasonable and necessary”
- requires documentation



Education Expenses

Line 38 - continued

- Don't double dip with Line 30.
- Submit documents to trustee at 341 meeting.
- Not necessarily every household/every child.
- Does not include school lunches (covered by Line 19).
- Can cover home schooling.



Additional Food and Clothing

Line 39

- Capped at additional 5% per food/clothing subcategory per household.
- Food and clothing portion of IRS standard numbers broken out on website.
- Must be actual, not anticipated.
- Exception not rule.
- Could cover special dietary/allergy restrictions.
- Requires documentation - submit documents to trustee at 341 meeting.



Charitable Contributions

Line 40

- Must be “continuing” – historically supportable.
- Should be consistent with SOFA Q.7 and tax returns.
- UST position is: subject to 15% of gross income cap of §§ 548(a)(2) and 1325(b)(2)(A).



Future Payments on Secured Claims

Line 42

- UST position is: no expense allowance if surrendering collateral.
- Does not include payments for leased property.
- Total all payments coming due in 60 months and divide by 60.
- Should track Schedule D.



Future Payments on Secured Claims

Line 42 - continued

- If variable rate loan, use loan rate/payment in effect on petition date.

- If “balloons” within 60 months, still divide all payments (including balloon) by 60.

- Include secured payments on “toys” and “luxury” items.
 - But beware of §707(b)(3).



Past Due Payments on Secured Claims

Line 43

- Must be “necessary for support of debtor and/or dependents” so don’t include “catch up” payment on toys/luxury items.
- UST position is: not allowed if surrendering collateral.



Priority Claims

Line 44

- Past due amounts only.
- Does not include ongoing payments listed on Line 28.
- Includes taxes, child support, alimony, etc.
- Student loan debts are not priority claims and are not an expense provided for on MTF.



Chapter 13 Administrative Expenses

Line 45

- Allows some costs of Chapter 13 to be factored in.
- Must be eligible for Chapter 13 to take deduction.
- Projected average monthly Chapter 13 plan payment determined by income. (One way to determine is Line 18 less expenses on Lines 19-44.)

Chapter 13 Administrative Expenses

Line 45 - continued

- Multiplier depends on district (see http://www.usdoj.gov/ust/eo/bapcpa/20070201/bci_data/ch13_exp_mult.htm)

- For cases filed on or after February 1, 2007;
 - **[NOTE: INSERT APPROPRIATE MULTIPLIER(S) FOR APPLICABLE REGION HERE]**



Determination of Presumption

Line 46 - 55

- Subtract expenses (Line 47) from income (Line 18) to arrive at monthly disposable income x 60.
- If less than \$109.58 per month (\$100/mo for cases filed before 4/1/07), presumption never arises.
- If more than \$182.50 per month (\$166.67/mo for cases filed before 4/1/07), presumption always arises.



Determination of Presumption

Line 46 - 55

- If in between \$109.58 and \$182.50 (\$100 and \$167 if filed before 4/1/07), determine if payments over 60 months will fund > 25% dividend – if so, presumption arises.
- Manipulation of unsecured Schedule F debt to “beat” the presumption may create a “bad faith” claim under 707(b)(3).



Other Expenses

Line 56

- “Wildcard” section
 - Not factored into “presumption” analysis
 - Still may be considered by Office of United States Trustee in deciding whether to bring Motion to Dismiss

- Still needs to be reasonable and necessary expense for “health and welfare” of debtor and/or dependent.

- Expect to provide documentation at 341 meeting.



Verification

Line 57

- Both debtors must sign.
- Expect to amend if it is determined that income is actually over median.