

CONSUMER BANKRUPTCY

Do bankruptcy laws encourage debtors to smoke?

Some interesting butt budget and means test issues

By Craig D. Robins

Although staunchly opposed to smoking, I'm continually intrigued by the amount of money some of my consumer bankruptcy clients spend to maintain their unhealthy tobacco habit. In looking at this one particular expense, I've made the bizarre observation that some smokers, because of their cigarette expense, will actually find it easier to file Chapter 7 than non-smokers.

Let me explain. In order to seek Chapter 7 relief, which enables a consumer to eliminate almost all consumer debts, the consumer has to essentially pass two tests - the "means test," which is a series of calculations involving both real and artificial expenses, designed to weed out those debtors who appear to have sufficient disposable income to make some kind of payment to creditors over a period of time.

The other test, sometimes referred to as the "disposable income" test, involves the debtor's actual budget. If the debtor has a significant amount of disposable income after subtracting actual expenses from income, then it would be considered an abuse for the debtor to obtain a Chapter 7 discharge.

Let's suppose a consumer with a substantial income passes the means test. That, in and by itself, does not mean that they qualify for a Chapter 7 filing. They must also demonstrate that they spend all of their disposable income on reasonable expenses.

Disposable income is that income which remains after satisfying all reasonable and necessary living expenses, like rent or mortgage, food, utilities, car expense, clothing, insurance, etc.

It is primarily the role of the U.S. Trustee to review all bankruptcy petitions to ensure that they are filed in good faith and do not constitute an abuse of the bankruptcy laws. The U.S. Trustee always has one eye on the bottom line of a debtor's budget - Schedule "J" - to see if there is additional disposable income.

It is not uncommon for the U.S. Trustee to bring a motion to dismiss a bankruptcy case pursuant to Bankruptcy Code section 707(b), alleging that a consumer debtor

has available disposable income to make a substantial repayment of their unsecured debt over the course of a Chapter 13 plan, and that the existing bankruptcy filing, if permitted to go forward, would result in a "substantial abuse" of the provisions of the bankruptcy code.

If a consumer has several hundred dollars in disposable income each month, then it is virtually inevitable that the U.S.

Trustee will seek to have the case dismissed or converted to one under Chapter 13. Inexperienced attorneys, and consumers who file without attorneys, often make this mistake - I've seen it happen many times.

Smoking has become an incredibly expensive habit. With cigarette packs now costing about 10 bucks each, a pack-a-day smoker is facing a monthly expense of \$300. The two pack-a-day habit costs \$600 a month. Imagine if both husband and wife smoked! Can these monthly expenses be considered excessive and therefore an unreasonable budget expense?

An interesting notion is that a non-smoker, who has \$500 of actual disposable income each month, cannot file for Chapter 7. However, a smoker with identical expenses, except with the addition of a smoking habit that costs \$500 a month, can demonstrate that they have no extra income to devote to creditors, and the U.S. Trustee, at least in this district, will not blink an eye at that person or their tobacco expense. In this case, the smoker will have no disposable income and would have no difficulty seeking Chapter 7 relief.

It almost doesn't seem fair in this instance that the smoker will be able to obtain Chapter 7 relief, but the non-smoker would be compelled to file a Chapter 13 payment plan bankruptcy and end up paying tens of thousands of dollars to his or her creditors over a period of three to five years.

It's wild, but if a non-smoker who had a disposable income of several hundred dollars a month, and was therefore unable to



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file for Chapter 7 relief, suddenly took up smoking, then they would then qualify. Even a heavy smoker will fare better than a light smoker, as far as reducing disposable income. As a zealous non-smoker, this doesn't seem right to me, yet that's how the law in this jurisdiction treats smoking in bankruptcy. Payments that would have gone to creditors have literally gone up in smoke.

This raises an interesting ethical, moral and legal question. Can a bankruptcy attorney advise a client that if they took up smoking, or went from a pack a day to two packs a day, the client could then qualify for a discharge whereas they would not have before?

Obviously, good faith is an implicit and significant aspect of any bankruptcy case and there is a presumption that the debtor will set forth his expenses accurately, without deliberately inflating them or artificially including expenses for the sole purpose of manipulating the bankruptcy to avoid paying creditors.

Although I addressed an interesting scenario about how some smokers would find it easier to file for Chapter 7, I must note that most smokers would probably find it more difficult. This is because cigarette expense is not a valid means test deduction.

Smokers who do not have any disposable income may actually find it more difficult to qualify under the means test because the means test will artificially show that the debtor has extra money, when in fact the money is actually being spent for tobacco. In such situations, the smoker could be compelled to file for Chapter 13 relief even though the funds would not be available, putting an incredible strain on the debtor because there would be insufficient money in the budget to pay creditors even though the means test would mandate such payment.

Not all jurisdictions are as lenient with smokers as ours appears to be here in the Eastern District of New York. In other

jurisdictions, there have been a few instances where the U.S. Trustee took a much different position.

In a Virginia case from 2005, the U.S. Trustee brought a 707(b) motion to dismiss, arguing that a debtor's budget was excessive, and highlighting a number of expenses including \$186 per month for cigarettes. Although there was a full trial on the motion, the judge commented on how the U.S. Trustee failed to present any evidence to support its position that the cigarette expense was unreasonable.

The judge stated: "While the Court is reluctant to endorse even by implication the proposition that it is appropriate for a bankruptcy debtor to spend \$186 a month on cigarettes to the prejudice of his creditors... the Court has found few published decisions explicitly discussing the issue of a debtor's budgeted expense for cigarettes in the context of a section 707(b) substantial abuse motion. Based on those published decisions, it appears that the weight of the authority is favorable to the debtor." *In re: Gromada* (No. 05-75683, W.D.V. 2005).

It appears that most reported cases that refer to cigarette spending lump this expense with other "discretionary" expenditures that the U.S. Trustee challenged in the proceeding. The reasonable conclusion is that the U.S. Trustee will probably be unlikely to object to cigarette expenses as long as all other expenses appear to be reasonable and necessary. So if your client needs to claim a smoking expense, make sure all other budget items are within reason.

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