

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

Matthew E. Murray
and Rhonda B. Murray,
Debtors.

No. 7 - 03-18543 - SR

MEMORANDUM ON SECTION 707(b) APPLICABILITY

This matter came before the Court for a preliminary hearing on a Motion to Dismiss under 11 U.S.C. § 707(b) or in the Alternative to Convert the Case to Chapter 13, filed by the United States Trustee ("UST")(doc. 9). UST appears through its attorney Leonard K. Martinez-Metzgar. Debtors appeared through their attorney William H. Ivry. The parties agreed to submit a stipulation of facts from which the Court could determine whether the Debtors' debts are "primarily consumer debts" as required for Section 707(b)¹ to apply. The parties submitted the Stipulation of Facts (doc. 24), and the Court has reviewed the applicable law, and is ready to rule. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

¹ Section 707(b) provides, in relevant part:
After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

In Stewart v. United States Trustee (In re Stewart), 175

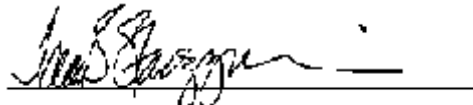
F.3d 796, the Tenth Circuit Court of Appeals stated the test:

The Bankruptcy Code does not define "primarily," and only a few of our sister circuits have defined "primarily" under § 707(b). Noting the word "primarily" is not an ambiguous or difficult word to understand, and is defined in Webster's Dictionary as "for the most part," the Ninth Circuit determined it to mean consumer debt must exceed more than half the total debt for dismissal under § 707(b). See In re Kelly, 841 F.2d [908] at 913, 916 [(9th Cir. 1988)]. In a non-bankruptcy context, we similarly defined "primarily" as meaning more than fifty percent. Bohn v. Park City Group, Inc., 94 F.3d 1457, 1461 (10th Cir.1996) (recognizing the Department of Labor, as a "good rule of thumb," defines "primary duty" to mean the major part, or over fifty percent, of the employee's time). Finding no cases to the contrary, we therefore define "primarily" in the context of § 707(b) as meaning consumer debt exceeding fifty percent of the total debt.

(Footnote omitted.)

The Stipulation of Facts, page 3, summarizes Debtors' debts as \$204,058.64 "consumer" and \$196,439.17 "non-consumer." Therefore, under Stewart the Debtors' debts are primarily consumer debts such that the UST's motion will not be dismissed.

The Court will set a status conference/pretrial conference to schedule discovery and trial of this matter.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on February 16, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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