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*413 "MEANS TEST" OR "JUST A MEAN TEST": AN EXAMINATION OF THE REQUIREMENT THAT CONVERTED CHAPTER 7 BANKRUPTCY DEBTORS COMPLY WITH AMENDED SECTION 707(B)

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INTRODUCTION

Congress's motivation behind the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (hereinafter "BAPCPA") was that "'[t]here is something inherently unfair about denying full restitution to creditors."' [FN1] Essentially, Congress believed that many people who were filing chapter 7 bankruptcy were doing so in bad faith without first considering creditor repayment. Specifically, under BAPCPA, 11 U.S.C. section 707 of the Bankruptcy Code changed dramatically and memorialized an attempt to rectify this perceived inequity. [FN2] Section 707 did so by creating a new "means test" that debtors must complete at the time that they file a Bankruptcy case. [FN3] The purpose of the means test is "to measure the ability of ***414** Chapter 7 debtors to repay debt and then, if they have sufficient debt-paying ability, to make them repay at least some of their debt—likely through Chapter 13—in order to receive a bankruptcy discharge." [FN4] The new means test is designed to replace the subjective standard of good faith by utilizing a complex mathematical formula that produces a straightforward presumption or nonpresumption of abuse of the bankruptcy process. [FN5]

Most debtors filing bankruptcy with consumer debts must choose between filing a chapter 7 or a chapter 13 case. [FN6] Simply put, in a chapter 13 bankruptcy the debtor proposes a plan in which they offer to pay some of their debts from post-petition income, [FN7] along with a commission to the chapter 13 trustee. [FN8] In contrast, in ***415** a chapter 7 case the individual debtor is not expected to pay any monies from post-petition income. The debts, other than certain lien claims and those specifically denominated as nondischargeable, are forgiven. [FN9] The equity, if any, in the debtor's nonexempt assets [FN10] is liquidated and the proceeds are distributed to creditors. [FN11] The trustee is paid not by the debtor, but from the filing fee and a commission based on a percentage of moneys otherwise payable to creditors. [FN12] In addition to the obvious ***416** advantage to the debtor of not being required to repay debt, chapter 7 is also usually quickly administered and concluded. [FN13] This reduces the debtor's legal fees, eliminates the need to pay the trustee out of post-petition income, and overall allows the debtor to move on with their life quickly.

Before BAPCPA was passed, a debtor deciding to file chapter 7 was initially presumed to be acting in good faith. [FN14] Fueled by rising bankruptcy rates and intense lobbying from the credit business, Congress began to presume debtors were acting in bad faith and was apparently not confident that neither the bankruptcy lawyers, bankruptcy judges, nor the United States Trustee were competent to determine a debtor's sincerity, and therefore

the burden has now shifted to a presumption of bad faith if certain factors are present. [FN15] If the debtor is earning more than the state median income, and the amount of the debtor's disposable income as determined by the means test would permit a minimum payment to unsecured creditors, the debtor is presumed to be acting in bad faith in seeking chapter 7 relief. [FN16] However, regardless of whether a debtor files a chapter 13 case by choice or because they become required to do so via the means test, [FN17] it is often the case that the debtors ***417** will fall behind on their chapter 13 bankruptcy payments. If a chapter 13 debtor becomes unable to make their bankruptcy payments, the Trustee will be forced to file a Motion to Dismiss the debtor's case. In order to avoid dismissal, many debtors may seek to convert their case to a chapter 7. [FN18] The unresolved issue became the role of the means test in a case converted from chapter 13 to chapter 7. Specifically, must a debtor converting from chapter 13 to chapter 7 first demonstrate chapter 7 eligibility through the means test, or has the presumption of bad faith already been dispelled by the fact that the debtor made an attempt to repay debts via their chapter 13 filing?

In the cases examining this issue, the United States Trustees [FN19] argued that only a debtor who can meet the means test requirement for filing a chapter 7 bankruptcy case should be eligible for conversion to chapter 7 from chapter 13. [FN20] In support of ***418** this position, the Trustees have argued that the purpose of the BAPCPA was to exclude debtors from chapter 7 and force more debtors into chapter 13 repayment plans. [FN21] Advocates of BAPCPA promote the view that forcing more debtors into chapter 13 bankruptcies prevents these debtors from abusing the bankruptcy laws by discharging debts that they are capable of repaying. [FN22] They also claimed that the means test "will have the effect of lowering the costs of goods and services for all consumers by making it easier for companies and issuers of credit to collect unpaid debts rather than passing those costs on to everyone else." [FN23] In supporting the legislation, President Bush indicated that "'[t]hese common-sense reforms will make the system stronger and better so that more Americans— especially lower-income Americans—have greater access to credit."' [FN24] Proponents also believed that these reforms would "restore public confidence in the integrity of the bankruptcy system." [FN25]

Courts have not been consistent, however, regarding whether a means test is required when a debtor seeks to convert a case from chapter 13 to chapter 7. [FN26] For example, in *In re Perfetto*, the United States District Court for the District of Rhode ***419** Island (in reviewing a Rhode Island Bankruptcy Court) held that even a debtor who seeks to convert a case must file a means test calculation with the Court. [FN27] In contrast, the Bankruptcy Court for the District of New Jersey in *In re Fox*, held differently. [FN28] This paper argues that a means test should not be required for debtors who convert to chapter 7 as it does not serve any legitimate purpose for debtors who have already attempted a chapter 13 reorganization. In fact, applying the means test in conversion cases may, in some cases, actually harm creditors who prefer immediate liquidation of the debtor's assets in comparison to an extended series of small reorganization payments. [FN29]

In order to reach this conclusion, it is important to understand the history behind BAPCPA. As such, Part I of this paper will describe the previous and current bankruptcy legislation. Part II will discuss the current circuit split regarding whether conversion debtors are subject to the means test. Then, Part III of this paper will analyze the plain meaning of section 707(b) and its legislative history to argue that the means test is not required for conversion debtors. Additionally, this section will discuss other methods of preventing abuse that may be more effective in conversion cases and rebut the arguments that section 348 applies to conversion cases and that section 1307(g) requires conversion debtors to file a "means test." It will subsequently illustrate the potential creation of phantom debtors who cannot obtain relief under either chapter of the Bankruptcy Code. Part III will conclude with a discussion of how requiring the means test in conversion cases may, in some cases, harm creditors further.

I. SECTION 707 PRIOR TO BAPCPA'S ENACTMENT

The current bankruptcy system in place today is based upon the Bankruptcy Reform Act of 1978 [FN30] (referred to as the Bankruptcy Code). [FN31] Following the ***420** Bankruptcy Reform Act of 1978, bankruptcy filing rates rose dramatically. [FN32] The Bankruptcy Code was perceived by some to be too debtor friendly. [FN33] Under the 1978 Act, a chapter 7 case could be dismissed for "cause" which consisted of three enumerated but nonexclusive reasons: (1) unreasonable delay by the debtor causing prejudice to creditors; (2) failure to pay the requisite filing fees, and (3) failure to file timely schedules. [FN34] This section was then amended in 1984 to permit a bankruptcy court to dismiss a case upon finding a "substantial abuse" of the bankruptcy system. [FN35] The purpose of this amendment was to reduce perceived abuse in the bankruptcy system. [FN36]

***421** Congress amended section 707 on two other occasions prior to BAPCPA. Initially, only the court could move to dismiss a case for "substantial abuse." In 1986, section 707(b) was expanded to allow U.S. Trustees to move for dismissal in cases of "substantial abuse." [FN37] Then, in 1998, Congress again amended section 707(b) to prevent the court from considering a debtor's charitable contributions when determining whether a case was a "substantial abuse" of the bankruptcy system. [FN38] Interestingly, all of these amendments failed to define "substantial abuse."

As a result of this failure, circuit courts established different standards for what constituted "substantial abuse." The Eighth and Ninth Circuits considered a debtor's income and ability to repay his debts. If excess income was available "substantial abuse" was deemed to exist. [FN39] The Fourth Circuit established a totality of the circumstances test, which required a showing of more than a mere ability to pay. [FN40] Finally, the Sixth Circuit created a hybrid approach which considered the ability to repay alone to be enough to dismiss, but also allowed the debtor to present mitigating circumstances to rebut this presumption. [FN41] Regardless of the test applied, ***422** all courts continued to retain a presumption in favor of permitting the debtor to obtain relief under chapter 7. [FN42]

Congress instigated an examination of bankruptcy laws in 1994 by establishing the National Bankruptcy Review Commission. [FN43] The purpose of this Commission was:

> (1) to investigate and study issues and problems relating to [the Bankruptcy Code]; (2) to evaluate the advisability of proposals and current arrangements with respect to such issues and problems; (3) to prepare and submit to Congress, the Chief Justice, and the President a report ...; and (4) to solicit divergent views of all parties concerned with the operation of the bankruptcy system. [FN44]

The Commission prepared thirty-four recommendations, some of which were incorporated in BAPCPA. [FN45] Four of the commissioners vehemently opposed the Commission's recommendations due to their failure to implement a more uniform system of abuse prevention. [FN46] Two of these dissenters specifically recommended imposing a means test on chapter 7 debtors "like all other programs available in the ***423** social safety net." [FN47] Eventually these recommendations developed into the current Bankruptcy Code. [FN48]

A. Conversion

The Bankruptcy Code specifically allows cases to move from the original chapter in which the case is filed to another chapter in a process called conversion. [FN49] Section 1307 specifically allows conversion of cases from chapter 13 to chapter 7, [FN50] so long as the debtor would be a valid debtor under chapter 7 as established by section 109. [FN51] The debtor files a motion to convert pursuant to Rule 1017(f) [FN52] and ***424**

Rule 9014 [FN53] of the Federal Rules of Bankruptcy Procedure, which converts the case from one chapter to another following a notice and hearing.

Section 348 of the Code and Rule 1019 describe the effect and consequences of case conversion. Section 348(a) creates an order for relief [FN54] in the new case but retains, for most purposes, the legal effect of the original filing date, commencement of the case, and order for relief. [FN55] Thus, although the conversion has ***425** the effect of changing the underlying case strategy, the case commencement date remains constant. The effect of preserving the filing date is that the case is treated as if the original petition requested relief under the conversion chapter. [FN56] This means that the bankruptcy estate is not affected by post-petition changes and the creditor claims filed under the previous bankruptcy chapter are still filed under the converted chapter. [FN57] Subsection (b) of section 348 specifies the sections of the Code in which the reference to the "order for relief" should be treated as synonymous with the conversion order. [FN58] Subsections (c) [FN59] and (d) [FN60] relate to the notice ***426** requirements of section 342(a). [FN61] The services of the trustee or examiner are terminated under section 348(e). [FN62] Finally, "[s]ection 348(f) provides that upon conversion from Chapter 13 to Chapter 7 the property of the debtor's bankruptcy estate is limited to the property the debtor held upon filing the original Chapter 13 petition," but in the case of bad faith, the court has the "authority to include all the property held by the debtor as of the date of conversion of the case." [FN63]

***427** Rule 1019 also concerns the proceedings following conversion. Subsection 1 states that the chapter 13 "[l]ists, inventories, schedules and statements" are considered to have been filed under chapter 7. [FN64] Rule 1019(2) creates new filing time periods for "filing claims, objections to discharge, and complaints to determine dischargeability of particular debts." [FN65] Conversion does not alter a creditor's claim. [FN66] Debtors and trustees must turn over the chapter 13 records to the chapter 7 trustee under Rule 1019(4). [FN67] The clerk must further turn over every schedule filed under ***428** Rule 1019(5) to the new trustee. [FN68] The schedules filed under Rule 1019(5) consist of the debtor's unpaid debts which were incurred after the filing of the petition and before conversion of the case. [FN69] If the debtor's repayment plan has been confirmed then the debtor must also file a schedule of property, unpaid debts and executory contracts and leases that are not listed on the final report and account. [FN70] Finally, Rule 1019(6) requires proofs of claim to be filed within the time period set forth by the court. [FN71] Creditors may also request that the debtor's chapter 13 case be converted ***429** to chapter 7. Section 1307(c) allows for a party in interest [FN72] to request a hearing to convert the debtor's case to a chapter 7. [FN73] There are eleven non-exhaustive causes ***430** for conversion listed in section 1307(c). [FN74] However, "a Chapter 13 case cannot be converted unless the debtor is eligible for relief in that Chapter as prescribed in [section] 1307[(g)]." [FN75]

Debtors may not be forced into chapter 13. They must opt for that chapter willingly according to the Constitution. [FN76] Specifically, the Thirteenth Amendment states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." [FN77] Since chapter 13 requires debtors to contribute their post-petition income to their repayment plan, [FN78] Congress determined that involuntary bankruptcy petitions may be filed only in chapters 7 and 11 of the Code. [FN79]

***431** *B. History of BAPCPA*

Bankruptcy filings steadily increased from 1980 to 2003. [FN80] Proponents of the BAPCPA legislation claimed that the reform would benefit all consumers by decreasing the costs of goods and services and by mak-

ing it easier for creditors to collect debt, a savings that would be passed on to consumers. [FN81] Senator Hatch said, "[t]his bill, with its means test, will discourage such abusive filings by restricting access to chapter 7 liquidation by those with relatively high incomes. We should all stand behind a law that requires people with the ability to repay their debts to actually repay those debts." [FN82] Congress estimated that each citizen pays $400 a year for the abuse perpetrated on the bankruptcy system. [FN83]

Legislators were not the only people who believed that bankruptcy reform was needed. "Concerns about the rising tide of bankruptcy filings and the ever-increasing number of abusive filings [were] shared across the country." [FN84] In 2002, sixty-eight percent of voters thought that it was "too easy" to file for bankruptcy and sixty-one percent wanted stricter bankruptcy laws. [FN85] The number of people who ***432** desired stricter bankruptcy laws rose to sixty-four percent in 2003. [FN86] Inherent in this belief was the idea "that the then-existing Chapter 7 liquidation provisions allowed debtors to treat bankruptcy as just another 'financial planning tool and file for bankruptcy for simple convenience."' [FN87]

The consumer credit industry had lobbied Congress to eliminate these alleged abuses since the Bankruptcy Reform Act of 1978, requesting that Congress prevent debtors capable of repaying their debt from filing a chapter 7 bankruptcy case. [FN88] Congress responded with section 707(b) of the Bankruptcy Code, which allowed a judge to dismiss a case if "substantial abuse" was present. [FN89] Similar to the provisions in BAPCPA which followed later, if a chapter 7 case was dismissed for "substantial abuse," the debtor could file a chapter 13 case as an alternative. [FN90] ***433** However, Congress failed to define what constituted "substantial abuse" and, as a result, the courts had divergent ideas about what conduct warranted dismissal. [FN91] The credit industry also presented Congress with studies which concluded that between fifteen and thirty percent of chapter 7 debtors were capable of repaying a significant portion of their debt. [FN92] The purpose of these studies was to show Congress that further reform was needed to prevent abuse of the bankruptcy system.

C. Statutory Intent Behind BAPCPA

The legislative intent behind the Bankruptcy Code reform was to eliminate rampant abuse in the bankruptcy system which needed to be stopped. [FN93] The U.S. Trustee's Office reported that in 2002 it prevented the discharge of $59 million of unsecured debt in fraudulent chapter 7 bankruptcies, and this data was used by reform-minded advocates to indicate that bankruptcy abuse was an important topic. [FN94] Congress also heard testimony indicating that if the new bankruptcy reforms were adopted, the rate of repayment to creditors would increase as more debtors were shifted into a chapter 13 case, forcing them to repay their debts. [FN95]

***434** The main tool that BAPCPA developed to prevent the claimed abuse was the means test. [FN96] The means test creates a presumption of abuse for debtors who seek to liquidate their debt in a chapter 7 bankruptcy, but who appear capable of repaying at least a portion of their debt. [FN97] Prior to BAPCPA's enactment, many debtors technically were free to file a chapter 7 case even if they could repay their debt, because the presumption was "'in favor of granting the relief requested by the debtor."' [FN98] The bankruptcy system then relied on the trustees or the court to oppose the relief the debtor was seeking based upon that jurisdiction's test for abuse. [FN99]

Pursuant to section 707(b)(1), a court may dismiss or convert a chapter 7 case filed by an individual whose debts are primarily consumer debts if the court "finds that the granting of relief would be an abuse" of the bankruptcy system. [FN100] There are two Code subsections whose purpose is to determine "abuse." [FN101] First, ***435**section 707(b)(2) determines whether a presumption of abuse arises under a mathematical test, called the

means test. [FN102] In addition, a case may be found to be an "abuse" under section 707(b)(3) if "the debtor filed the petition in bad faith" [FN103] or based upon "the totality of the circumstances ... of the debtor's financial situation." [FN104] Consequently, the means test is "a formulaic screening mechanism" while section 707(b)(3) is a subjective test for abuse. [FN105]

Section 707(b)(2) is the mechanical method for finding abuse because a presumption of abuse is created "'when a debtor's disposable income exceeds fixed amounts. Pursuant to Fedederal Rule of Bankruptcy Procedure 1007(b)(4), and in order to facilitate the execution of the means test calculations, Official Form [22A] [FN106] is completed by every debtor [filing under chapter 7] and [must be] filed along with his schedules."' [FN107] The first section of Form 22A is devoted to calculating the debtor's current monthly income. [FN108]

***436** The debtor's current monthly income is then used to determine whether a presumption of abuse arises. If the debtor's currently monthly income is less than the state's median income for a household of the same size then the presumption of abuse does not arise. [FN109] If this is not the case, then the debtor must compute the expense deduction calculations as described in section 707(b)(2)(A)(ii)-(iv) [FN110] to determine his monthly disposable income. It is important to note that many of the expense deductions in the means test are completely fictitious, as they require the debtor to use a predetermined expense figure that may in fact be completely inaccurate in comparison to the debtor's actual expense. If the debtor's monthly disposable income does not exceed $100.00 per month, then the presumption of abuse does not arise. [FN111] If the debtor's monthly disposable income is greater than ***437** $166.67 per month then a presumption of abuse immediately arises. [FN112] If, however, the debtor's monthly disposable income falls between $100.00 and $166.67 per month, then one further calculation is needed. [FN113] If the debtor's current monthly income multiplied by 60 months is equal to or greater than 25% of their nonpriority secured debt, [FN114] then a presumption of abuse arises. [FN115]

***438** The presumption of abuse is not an absolute bar to filing under chapter 7, and may be rebutted as described in section 707(b)(2)(B). [FN116] To do so, the debtor must demonstrate special circumstances justifying the additional expenses or adjustment to their current monthly income for which there is no reasonable alternative. [FN117] The statute specifically names circumstances which are to be considered "special circumstances" including a serious medical condition or active military service. [FN118] If the court finds "special circumstances" then the debtor may adjust his expenses and net monthly income. [FN119] If the resulting income meets the means test requirements, the debtor will have rebutted the presumption of abuse. [FN120] If the debtor is unable to rebut the presumption of abuse, the debtor may voluntarily convert their case to chapter 13 or the case will be dismissed. [FN121]

There are also three types of safe-harbor provisions for the "means test." First, only a judge, U.S. trustee, or bankruptcy administrator may file a motion to dismiss a chapter 7 case if the debtor's income is at or below the state median family income ***439** for a household of equal or lesser size. [FN122] Second, no judge, trustee, bankruptcy administrator, or other party in interest may file a motion to dismiss if the debtor and his spouse, combined, have income at or below the state median family income for a family of equal or lesser size. [FN123] Finally, disabled veterans whose indebtedness occurred primarily during their active duty are not subject to the means test. [FN124]

II. THE CIRCUIT SPLIT AND RELEVANT CASES

Section 707(b) does not state whether a means test calculation is required when a debtor converts his case from chapter 13 to chapter 7, giving rise to a split among bankruptcy courts as to whether these debtors must file

a means test calculation. Specifically, the language of section 707(b) states:

> the court, on its own motion or on a motion by the [U.S. Trustee], trustee ..., or 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 an abuse of the provisions of this chapter. [FN125]

The Bankruptcy Court for the District of New Jersey found that a means test calculation is not required when a debtor converts his case from chapter 13 to chapter 7 because a case converted to chapter 7 is not a case "filed" under chapter 7. In contrast, the districts of Rhode Island, Oregon and Washington ruled that the term "filed" should be interpreted broadly enough to incorporate conversion cases. [FN126]

***440** *A. Minority View—Section 707(b) Does Not Require a Means Test Calculation for Cases Converted to Chapter 7*

As noted above, the District of New Jersey found that a means test requirement only applies to cases originally "filed" under chapter 7. [FN127] This court reasoned that the word "filed" clearly and explicitly rejects cases which have been originally filed in chapter 13 before being converted to chapter 7. [FN128] As a result, the means test provision does not apply to conversion cases.

In *In re Fox*, the debtor filed her chapter 13 case on March 27, 2006. On May 17, 2006 her repayment plan was confirmed, committing her to remit to the trustee $410.00 each month for the next five years. [FN129] At the time that her plan was confirmed, she earned $57,000 a year. [FN130] Shortly after her plan was confirmed, she was laid off from her job. [FN131] The debtor requested that her payments be suspended, ultimately until February 1, 2007. [FN132] Five days later, "the chapter 13 Trustee filed a certification stating, '[a]s of 02/02/07 debtor(s) is $4,144 in arrears in his (her) trustee payments."' [FN133] The debtor opposed this certification stating that she was no longer receiving unemployment and would be unable to continue her trustee payments until after her new job commenced on March 5, 2007. [FN134] On February 23, 2007, the debtor filed a motion to convert to chapter 7, stating that she was unable to meet her trustee payments due to a severe decrease in her income as a result of her layoff; in fact, the debtor's income had decreased by $30,000 per year. [FN135] On February 26, 2007, the Clerk's office sent the debtor a Notice of Missing Documents and Notice of Dismissal if Documents are Not Timely Filed, as she had not filed Form 22A for the means test calculation. [FN136] Three days later, the Debtor filed a motion to determine whether a means test calculation was required for conversion cases, which the U.S. Trustee's Office opposed. [FN137]

The Debtor essentially argued that the plain language of section 707(b)(1) indicates that the means test is only applicable to cases "filed" under chapter 7 and ***441** not to cases "converted" to chapter 7. [FN138] The debtor cited to section 348(a), "which states that conversion of a case from chapter 13 to chapter 7 constitutes an 'Order for Relief' under chapter 7, but does not constitute a 'filing' of the petition under the meaning of section 707(b)(1)." [FN139] Since the means test provision was not included in this list, the debtor argued that the drafters did not intend the means test to apply to conversion cases. [FN140]

The U.S. Trustee argued that although section 707(b) did not expressly require a means test calculation for conversion cases, the term "filed" was ambiguous, and consequently the statute needed to be interpreted in light of its "history, purpose and design." [FN141] The U.S. Trustee further maintained that the "history, purpose and design" of the statute establish that the drafters intended to subject conversion cases to the "means test." [FN142] The changes in the Bankruptcy Code reflected Congress's desire to prevent abuse and change the presumption in certain cases that the debtor was in good faith. [FN143] The means test, the United States trustee ar-

gued, is necessary to meet these goals, even in conversion cases. [FN144] Citing to Rule 1007(b)(4) which requires "all individual debtors 'in' chapter 7 cases to file a Form B22A," the U.S. ***442** Trustee insisted that Congress intended the means test to apply to all debtors seeking relief under chapter 7. [FN145]

The *Fox* court rejected the U.S. Trustee's argument that the Court was bound by Rule 1007(b)(4). [FN146] It stated that the rules are not meant to override the language of the statute. [FN147] Even if the court were to find that Rule 1007(b)(4) did require a means test for conversion cases, the Rule would conflict with the plain meaning of the statute. [FN148] Allowing the Rule to supersede the statute would violate the principles of federalism, and thus, the court was required to abide by the plain meaning of section 707. [FN149] As such, the court refused to require a means test for conversion debtors. [FN150]

The court held that "[t]he fact that [section 707] provides for the dismissal or conversion to chapter 13 or 11 where the court finds abuse is an indication that the drafters were contemplating the effect of conversion specifically in this subsection." [FN151] Additionally, section 348(b) leaves out section 707(b) from the enumerated sections of the Code which treat the order of relief as synonymous with the conversion order. [FN152] By this omission, Congress must have intended conversion ***443** cases to remain distinct from cases "filed" under a chapter. [FN153] Thus, the means test provision of section 707(b) does not apply to conversion cases, and the debtor was not required to submit to the means test. [FN154]

B. Majority View—Section 707(b) Does Require a Means Test Calculation for Cases Converted to Chapter 7

Unlike the court for the District of New Jersey, the Districts of Rhode Island and Washington have held that a means test calculation is required for conversion cases. They find this holding more harmonious with Congress's intent as evidenced by the legislative history and even the title of the Act. In *In re Perfetto*, Christine Perfetto filed her chapter 13 petition on May 30, 2006. [FN155] She converted her case to a chapter 7 case on the same day that she submitted her chapter 13 schedules. [FN156] After conversion, the Court issued a Notice of Missing Documents for failure to file Official Form 22A to which the Debtor objected. [FN157] As in *In re Fox*, the debtor argued that the statute does not require debtors in conversion cases to file a means test calculation because the word "filed" does not apply to conversion cases. [FN158] The U.S. Trustee disagreed, arguing that such an interpretation would violate the purpose of BAPCPA. [FN159] In addition, the Trustee argued that if the court were to accept the view of the debtor, dishonest debtors would be able to circumvent the means test simply by filing under chapter 13 and then converting to chapter 7, even though they had enough income to repay their debts. [FN160]

The court first discussed how the "statutory language cannot be construed in a vacuum" [FN161] and thus the language requiring a means test for debtors "filing" under ***444** chapter 7 must be construed in light of the purpose and legislative history behind BAPCPA. [FN162] The court then considered section 348(a), which states that when a case is converted to a different chapter under the Bankruptcy Code it is considered to have been filed on the original petition date, not the conversion date. [FN163] The court ruled that if the converted case had the same filing date, then the case was considered to have been "filed" under chapter 7. [FN164]

The court further considered Federal Rule of Bankruptcy Procedure 1007(b)(4), which requires a debtor to file a statement of monthly income according to the "appropriate Official Form." [FN165] In addition, Federal Rule of Bankruptcy Procedure 1019(2) provides for a new time period for creditors to file claims. [FN166] The court found that this provision would only have meaning if Perfetto were required to file a means test and creditors were able to object to her chapter 7 conversion under the new filing period time. [FN167]

The court acknowledged that for some debtors, requiring a means test calculation for conversion cases would "produce an absurd result" because the means test would produce a financial picture no longer relevant to the debtor's ***445** current financial position. [FN168] However, the court reasoned that BAPCPA is full of "incongruous results" due to poor drafting. [FN169] Thus, the court should use its common sense, which would lead to the conclusion that all debtors seeking relief under chapter 7 are subject to the means test. [FN170]

The Bankruptcy Court for the District of Washington in *In re Kerr* examined *In re Fox* and *In re Perfetto*, and found the latter's reasoning more persuasive. [FN171] The court acknowledged that requiring the means test would be more time consuming for both the debtor and the courts, but stated that "BAPCPA was not designed to improve judicial efficiency." [FN172] However, the court declared that debtors who must convert legitimately would be able to pass the means test under the special circumstances exception. [FN173]

***446** III. ANALYSIS

Simply put, the Congressional intent of implementing the means test is to prevent debtors from abusing the bankruptcy system. [FN174] Specifically, if a chapter 7 debtor does not pass the means test, the chapter 7 filing is presumed to be abusive because the debtor theoretically has the financial means to repay his debts under chapter 13 (which again may be completely untrue as the figures used to calculate disposable income via the means test are based on factitious predetermined numbers). Based on this purpose, it is illogical to presume that a debtor, who must convert because of the legitimate failure of their chapter 13 plan, is abusing the provisions of chapter 7. In that case, chapter 7 becomes a necessity and the scrutiny of the means test is, therefore, not necessary. If a debtor was required to clear the means test hurdle before converting, there would be a group of debtors in limbo who would face financial crisis but could not afford to survive in chapter 13. They would not be eligible for chapter 7 relief because of the means test. This quandary would create "phantom debtors" who would be excluded from all bankruptcy protection and force them to live with a financial noose securely around their neck. Denying these good faith debtors any bankruptcy relief has never been a stated purpose of the bankruptcy reform. Although an argument can be made that allowing converting cases to avoid the means test will create a loophole for non-qualifying chapter 7 debtors (i.e., someone who fails the means test could simply file chapter 13 on day one and then convert to chapter 7 on day two), the means test does not remove the court's ability to dismiss a case for abuse. If the above scenario arises, the court will have to examine the matters on a case by case basis to determine abuse. Factors such as (i) length of time the debtor was in a chapter 13 bankruptcy; (ii) proposed chapter 13 reorganization repayment amount; and (iii) amount actually paid while in the chapter 13 bankruptcy would be useful for a judge deciding abuse.

A. The Plain Language of Section 707(b) and Legislative History Does Not Require Conversion Cases to File a Means Test

The means test of section 707(b) clearly applies to cases originally "filed" under chapter 7, but just as clearly does not apply to cases converted from chapter 13. Merriam-Webster's Collegiate Dictionary defines "file" as "to submit documents ***447** necessary to initiate a legal proceeding ... for bankruptcy," [FN175] which is consistent with Black's Law Dictionary's definition of "to commence a lawsuit." [FN176] Both definitions of "file" would and should lead a debtor to conclude that a means test is applicable only to cases originally commenced under chapter 7 and not cases which were subsequently converted to chapter 7.

The court in *In re Fox* found the language of the statute to be clear and unambiguous. It noted that "[t]he Su-

preme Court has instructed that, 'when the statute's language is plain, the sole function of the court—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."' [FN177] It is a well-understood proposition "'that Congress "says in a statute what it means and means in a statute what it says there."'" [FN178] Thus, as the language of section 707(b) did not specifically require conversion debtors to file a "means test," the courts should not impose this requirement on debtors.

The court in *In re Perfetto* held, however, that to read the statute as written would lead to an absurd result. The court cited "two exceptions to the plain meaning rule: (1) 'when literal interpretation of a statute would lead to a result that is contrary to congressional intent'; and (2) 'when literal interpretation of a statute would produce an absurd result."' [FN179] The court was reluctant to allow debtors who have not passed the means test to obtain relief under chapter 7 solely on the basis that they converted to chapter 7 rather than originally filed under chapter 7. [FN180] The court found most dispositive the fact that debtors could use conversion as a way to ***448** circumvent the means test requirement. [FN181] As this manipulation of the statute would be considered abusive, the court found that this result was incongruous with the intent of BAPCPA to prevent abuse. [FN182] Thus, the court did not rely on the plain meaning of the word "filed," but rather looked at the entire statute to determine the meaning of section 707(b). [FN183]

This argument ignores the fact that means test would produce meaningless results especially in conversion cases. The means test was created to determine if debtors could financially sustain a repayment plan. Debtors who legitimately fail their chapter 13 plans have already rebutted the presumption that they would be eligible candidates for chapter 13. Debtors who use conversion as a method of fraudulently avoiding the means test can be prevented in other ways. [FN184] As such, requiring conversion debtors to file the means test would not be productive. In fact, it would be a waste of the resources of the debtor and of the bankruptcy court.

In addition, the court in *In re Perfetto* acknowledged that to require the means test would create absurd outcomes in some conversion cases because of the time lapse between the commencement of the case and its conversion. [FN185] When considering the means test requirement in conjunction with section 348(a), debtors would be required to file a means test which relied on data which is no longer applicable. Section 348(a) requires debtors to use the filing date of their original petition as the filing date for their conversion cases. [FN186] Thus, debtors who convert to chapter 7 months or even years after their original bankruptcy filing would be using data which was no longer valid, possibly creating a presumption that they are ***449** abusing the system even when the debtor would satisfy the means test using current income. The debtors would have to rely on a finding of "special circumstances" in order to be eligible for chapter 7 relief. However, conversion as a result of changed circumstance is not an enumerated factor under "special circumstances." [FN187] Thus, eligibility for conversion would be uncertain, even after the extensive consumption of time and resources of the debtor and of the bankruptcy court.

For example, the debtor in *In re Fox* converted her petition to chapter 7 almost one year after filing her original bankruptcy petition. [FN188] The reason for her conversion was that she had established a repayment plan based upon her income at the time of filing. [FN189] However, during her repayment period, she had lost her job and, thus, had lost her ability to fund her repayment plan. [FN190] Unable to find work at her original salary, she was forced to take a severe pay cut at her new job. [FN191] Fox converted her case because repayment was no longer possible. [FN192] If the court forced her to file a means test, she would be required to use her salary at the time of the original filing date, creating an inaccurate financial picture. [FN193] Congress could not have intended to produce such incongruous results. [FN194]

***450** It is undeniable that BAPCPA was created to prevent dishonest debtors from abusing the bankruptcy system. [FN195] However, Congress has always intended bankruptcy to remain a viable option for debtors who cannot afford to repay their debts. [FN196] The Supreme Court has articulated that among the longstanding goals of the bankruptcy system was the goal to provide a "'fresh start"' for the "'honest but unfortunate debtor."' [FN197] Debtors who attempt to repay some of their debt under a chapter 13 repayment plan, but fail to do so due to circumstances over which they have no or little control, should not be denied this relief. [FN198]

B. Fraudulent Debtors Can be Caught Through Several Other Mechanisms of the Bankruptcy System

Following the means test calculation, section 707(b)(3) enumerates two different methods for determining whether the debtor is abusing the bankruptcy system. The first test is whether, according to the totality of the circumstances, the debtor should be denied the relief he seeks. The second test examines whether the debtor is acting in bad faith. These sections serve as a means for the bankruptcy court to subjectively determine whether the debtor should be allowed to file under chapter 7 if the debtor passes the objective means test.

***451** 1. Totality of the Circumstances

Under section 707(b)(3), a debtor's chapter 7 case may be dismissed based upon the "totality of the circumstances" or if the court finds that it was filed in "bad faith." [FN199] The "totality of the circumstances" test was established prior to BAPCPA's enactment, and as such, its inclusion into BAPCPA has lead courts to apply the test consistent with its pre-BAPCPA meaning. [FN200] There were three different pre-BAPCPA approaches to the totality of the circumstances test:

> (1) the *per se* rule of the Eighth and Ninth Circuits under which the debtor's ability to pay his debts, standing alone, justified dismissal; (2) the totality of the circumstances test of the Fourth Circuit which required a showing of more than an ability to pay; and (3) the hybrid approach of the Sixth Circuit which permitted the dismissal based on ability to pay alone, but also allowed the debtor to demonstrate mitigating circumstances. [FN201]

All three tests have been used following BAPCPA's enactment to find abuse. [FN202] Section 707(b)(3) states that if the presumption of abuse does not arise under the means test calculation or that presumption is rebutted, the court must still consider whether the case is an abuse of the bankruptcy system based on the additional factors of "bad faith" and "totality of the circumstances." [FN203]

***452** Several courts have held that a debtor's ability to repay his debts is a substantial factor in determining whether abuse exists under section 707(b)(3). [FN204] In *In re Pak*, the court found that the debtor's actual ability to pay, not his ability to pay according to the means test, should be considered under the totality of the circumstances test. [FN205] The court used the debtor's "actual and anticipated future income" as defined by section 1325(b)(3) and subtracted his actual expenses to determine the debtor's ability to pay. [FN206] Finding that the debtor had the ability to repay approximately $33,500 of his debts, the court found that the case was an abuse and should be dismissed or reconverted to chapter 13. [FN207]

As a conversion case has already rebutted the presumption that the debtor has the ability to succeed in chapter 13, the debtor's case should be evaluated under section 707(b)(3) and not the means test. For conversion debtors, section 707(b)(3) provides a better method for determining abuse. [FN208] The debtor's ability to pay would be considered both under section 707(b)(3) and the means test. However, the judicial discretion is

severely limited under the means test calculation as opposed to under section 707(b)(3). This does a disservice to both the bankruptcy system and the debtor in conversion cases. A bankruptcy judge could easily determine whether the debtor was converting his case in bad faith simply by evaluating his chapter 13 performance, a factor not considered by the means test calculation. Additionally, the bankruptcy judge could take into consideration other factors which have recently affected the debtor such as job loss or illness, and have affected a debtor's ability to repay his debts.

2. Bad Faith

If a bankruptcy judge concludes that the debtor is fraudulently abusing the system by using conversion as a way to avoid the means test, then the judge may be able to refuse the conversion. In *Marrama v. Citizens Bank of Massachusetts* the ***453** Supreme Court ruled that all debtors do not have an absolute right to conversion. [FN209] In this case, the debtor hid assets to prevent their liquidation by the chapter 7 trustee. [FN210] When the trustee found the assets and attempted to add the assets to the bankruptcy estate, the debtor attempted to convert his case to a chapter 13 in order to preserve the assets. [FN211] The Supreme Court ruled that conversion could be denied when the debtor is found to have converted in bad faith. [FN212]

The *Marrama* Court examined section 706(d) which states that "a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." [FN213] Finding *Marrama* ineligible for chapter 13 relief, the court denied his conversion. [FN214] The Court also ruled that a finding "that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13." [FN215] Thus, if the court found that a chapter 13 debtor was filing their conversion petition in bad faith, the court could refuse to convert their petition, thereby preventing fraud.

Marrama can be applied to cases converting from chapter 13 to chapter 7. It cannot be argued that this case is inapplicable based upon section 303, which allows for involuntary chapter 7 cases but not involuntary chapter 13 cases. *Marrama* held that conversion may be refused based upon a filing of bad faith. If the court required a means test in conversion cases, then those debtors could be prevented from converting their case based upon a finding of abuse. The finding of bad faith is the equivalent to a finding of abuse. Thus, in the case of bad faith, if the court found that refusing to convert a case from chapter 13 to chapter 7 was a violation of the Thirteenth Amendment and defied section 303, the court would similarly have to find that refusing to allow the debtor to convert based upon their failure of the means test would violate the Thirteenth Amendment and section 303.

***454** According to section 707(b)(3), after a finding that the presumption of abuse does not exist or if the debtor rebuts the presumption of abuse, the court may still dismiss a case for abuse. The court must consider the debtor's ability to repay his debts under this section. As such, the conversion debtor that has already rebutted the presumption of abuse by filing a chapter 13 case should skip the means test step because, if his case constitutes an abuse, it can be detected under section 707(b)(3).

C. Section 348 Does Not Apply to Conversion Cases

Courts ruling that a means test should be filed by conversion debtors have indicated that under section 348(a), [FN216] a case converted to a chapter is considered "filed" under that chapter. [FN217] The failure of

the drafters to include section 707 with the sections listed in section 348(b) clearly shows that Congress did not intend the means test to apply to conversion debtors. [FN218]

The *Kerr* court, however, holds that the listed sections only refer to the conversion date and are not exhaustive of those "treated as if the debtor had ***455** originally filed under the converted chapter." [FN219] This is not a correct construction of this statute.

The language of section 348(a) indicates that a conversion to a different chapter under the Bankruptcy Code does not change the date of filing, the order of relief or the commencement of the case. [FN220] It never states that conversion changes the "filing" status of the case. Rather, "the 'filing' of a case and the 'order for relief' are treated as distinct concepts" throughout the Bankruptcy Code. [FN221]

For purposes of establishing a timeline for repeat filers, courts normally hold converted cases to the filing time limits of the converted chapter. For example, in *In re Grydzuk*, the court found that the discharge in the debtor's previous case occurred in chapter 7 and thus he was ineligible to file a chapter 13 case in the four years following the discharge. [FN222] The court found that their discharge "refers to the chapter under which the discharge was actually entered, rather than the chapter under which the case was initiated." [FN223] These cases, however, cannot be applied to the issue at hand because they deal with a separate issue from the means test and thus the policy reasoning behind their decisions does not apply to the issue at hand.

Following this rule, if debtors who convert their cases from chapter 13 to chapter 7 are allowed to use their chapter 13 filing as the measuring of their time limit for subsequent bankruptcies, then the opposite must be true of chapter 7 debtors who convert their cases to chapter 13. Thus, debtors who pay back a ***456** portion of their debt would be penalized for doing so by being held to a greater time limit for subsequent filings than debtors who sought to wipe away their debt. The *Grydzuk* court, finding this result incongruous with the purposes of the bankruptcy reform, has interpreted section 348 to fix this anomaly.

No such absurd result occurs if conversion debtors are not subject to the means test. Debtors who convert their chapter 7 bankruptcy to a chapter 13 are not penalized for doing so. However, debtors who attempt to complete a chapter 13 repayment plan but are unable to do so, due to unforeseen events, are penalized because they are forced to complete a means test calculation which may not accurately show their income or their eligibility for chapter 7. Thus, these debtors would not be eligible for relief under either chapter of the Bankruptcy Code.

D. Section 1307(g) Does Not Require Conversion Debtors to File a Means Test Calculation

Section 1307(g) prevents conversion if the debtor would not be considered a debtor under the chapter to which the debtor is seeking to convert. [FN224] However, "the concept of who 'may be a debtor' in a case under chapter 7 is defined in [sections] 109(a) [FN225] and (b), [FN226] not in [section] 707." [FN227] Section 109 states that a debtor who has a domicile, property or place of business in the United States may be a debtor, with the exception of some business debtors. [FN228] In further defining section 109(b), the Senate Report stated that "[a]ll persons are eligible [for chapter 7] except certain insurance companies, and certain banking institutions." [FN229] Thus, any debtor not falling into a category of exception should be allowed to file a chapter 7 petition.

***457** Since Congress did not amend this statute to incorporate the means test articulated in section 707(b) when it amended other portions of this section, it clearly did not intend for the means test to determine who qualified as a debtor. When Congress uses words in one part of the statute but fails to use the same words in an-

other part of the statute, it is presumed that Congress purposefully did not use those words. [FN230] Because Congress did not modify section 109 when it added the means test requirement to section 707, Congress must not have intended for the means test to be a factor in determining who is an eligible debtor under chapter 7.

The language of section 707(b) explicitly supports this position. However, section 707(b) does not define what conditions someone must meet to be a debtor under this section. Rather, section 707(b) deals with dismissal, stating that the court can dismiss or convert the petition to chapter 13 "if it finds that the granting of relief would be an abuse of the provisions of this chapter" [FN231] and defines when a presumption of abuse arises as:

> [A]buse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or (II) $10,950. [FN232]

Therefore, any chapter 13 debtor who conforms to the definition of section 109—not just one who passes the means test—is eligible for conversion to chapter 7.

E. The Creation of "Phantom Debtors"

If the means test were required for conversion debtors, then the system could create phantom debtors who are eligible neither for chapter 13 nor chapter 7 relief. Debtors who convert their case from chapter 13 in good faith are converting their case because they cannot repay their debts. They cannot obtain a discharge under chapter 13, because in order to be eligible for a chapter 13 discharge they must be able to repay some amount to their unsecured creditors. [FN233] In addition, their secured ***458** creditors must receive at least the same amount of repayment as they would be entitled to under a chapter 7 bankruptcy. [FN234] However, if the debtor is unable to rebut the presumption of abuse, then the debtor would not be eligible under any of the consumer debtor bankruptcy chapters.

Obtaining a chapter 13 discharge is now more difficult than ever. [FN235] Chapter 13 repayment plans have been extended to five years for above-median debtors. [FN236] During this five year period, debtors are expected to use all of their surplus income, as calculated by Form B22C, to fund their repayment plan. This is extremely difficult, thus most repayment plans fail. [FN237] As such, it is necessary for debtors to have a method of obtaining relief after attempting a chapter 13 plan. It would be irrational to convert debtors who already failed in chapter 13 back to chapter 13 and it would be contrary to the purpose of the Bankruptcy Code to deny relief to these debtors.

F. Allowing Conversion May Also Benefit Creditors

Creditors may find themselves in situations in which they want to convert the debtor's case from chapter 13 to chapter 7. [FN238] The situation usually occurs when the ***459** debtor has abused the provisions of chapter 13. [FN239] Some examples of such behavior are unreasonably delaying the case, failing to pay fees, delaying a presentation of the plan, defaulting on their plan or if the court refuses to confirm their plan. [FN240] Creditors may decide that a liquidation of debtors' assets and any distribution of their income would be preferable to a slow trickle of income in the future.

Section 707(b) assumes that creditors should get as much money from the debtor as the debtor can afford to

pay. [FN241] That section does not, however, provide any option for creditors who want the debtor's case converted where liquidation of the debtor's assets in chapter 7 would be a more reliable vehicle for repayment than follow-up non-bankruptcy litigation were the chapter 13 case simply dismissed. Essentially, the means test provides even less control to a creditor who has already been harmed by the failure of the debtor to repay his debts.

CONCLUSION

Keeping with the Congressional intent of the means test, it seems clear that debtors should be able to convert to chapter 7 without first having to pass the means test calculation. For many debtors, bankruptcy is the only opportunity to obtain a fresh financial start. An overwhelming number of chapter 7 debtors have recently experienced extreme life hardships (divorce, job loss, injury, foreclosure, etc.) which have acted as the catalyst to their financial downfall. The purpose of bankruptcy is to allow good, honest, hard working people a fresh start, as the alternative (being saddled with mounting debt for the rest of their life) encourages ***460** debtors to reside in a state of helplessness where they will fail to again become productive members of society. Although bankruptcy has been an accepted form of equitable relief for debtors in extreme financial trouble since the time our country was formed, [FN242] the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 changed the bankruptcy landscape. [FN243] Many believe that the statutory changes made receiving necessary bankruptcy relief unfairly more difficult (and in some cases impossible). [FN244] The means test is a prime example of this difficulty. Section 707(b) of the Code requires a means test calculation for debtors “filing” under chapter 7, [FN245] it does not explicitly require such a calculation for conversion debtors who “filed” under chapter 13. Some courts have found that the overall purpose behind the bankruptcy reform mandates that all debtors seeking relief under chapter 7, including conversion debtors, are subject to the means test provision. [FN246] This conclusion leads to an unintended and unfair result in some cases, where good, honest, hard-working debtors who fell on legitimate hard times are suddenly unable to receive any relief under chapter 7 or chapter 13. [FN247] These phantom debtors are essentially denied any relief and the opportunity to obtain a fresh start.

An interpretation of BAPCPA not requiring the means test for conversion debtors is more consistent with the legislative history. The purpose of the means test is to separate high income debtors with disposable income from other chapter 7 debtors and force them to repay at least a portion of their debt into chapter 13 ***461** repayment plans. [FN248] However, conversion debtors have already attempted to obtain relief from chapter 13. To the extent that they have acted in good faith, their failure to create an acceptable chapter 13 plan or, if one is confirmed, live within its provisions, has essentially rebutted a bad faith presumption. Consequently, the split among the courts as to the necessity of filing a means test calculation when a debtor seeks conversion from chapter 13 to chapter 7 should be resolved in favor of not requiring these debtors to file a “means test.”

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[FN1]. Stephen Labaton, *Bankruptcy Bill Set for Passage; Victory for Bush*, N.Y. TIMES, Mar. 9, 2005, at A1 (quoting Senator Orrin G. Hatch, "a Utah Republication who has fought for the measure for eight years").

[FN2]. *See In re* Schoen, No. 06-20864-7, 2007 WL 643295, at *2 (Bankr. D. Kan. Mar. 2, 2007) (stating BAPCPA "dramatically modified" section 707(b) by reducing standard for dismissal from "substantial abuse" to "abuse," and by eliminating presumption in favor of granting debtor relief); *see also In re* Hardacre, 338 B.R. 718, 720 (Bankr. N.D. Tex. 2006) (stating intent of BAPCPA was to address abuses within bankruptcy process such as "easy access to chapter 7 liquidation proceedings by consumer debtors who, if required to file under chapter 13, could afford to pay some dividend to their unsecured creditors"); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 463-64 (2007) (acknowledging one goal of BAPCPA was to restore integrity to system by preventing abuse, and main method for doing so was "means test").

[FN3]. *See* 11 U.S.C. § 707(b)(2) (2006):

> (i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and
>
> (iv), and multiplied by 60 is not less than the lesser of—
>
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or
>
> (II) $10,950

In re Pfeifer, 365 B.R. 187, 190 (Bankr. D. Mont. 2007) (stating whether "abuse" exists in given case is determined by applying objective test of section 707(b)(2), commonly referred to as "the Means Test"); *In re* Galyon, 366 B.R. 164, 166 (Bankr. W.D. Okla. 2007) (stating whether facts of debtor's case "cause the presumption of abuse to arise is determined by lengthy and complicated calculations, commonly referred to as the 'means test' or 'means test calculation.' The means test calculation must be made by the debtor by completing and filing with his schedules Official Form B22A").

[FN4]. Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005) (reflecting on comments by Senator Grassley, who stated BAPCPA's purpose was to steer individuals with the ability repay their debt away from chapter 7 bankruptcy). *See* 11 U.S.C. § 707(b)(2) (2006) (establishing calculation to determine whether there has been abuse by debtor of provisions of statute and whether to dismiss his case); *see also In re* Wilson, 356 B.R. 114, 116 (Bankr. D. Del. 2006) (discussing means test as way to prevent debtors with ability to repay their debt from not doing so).

[FN5]. *See* 11 U.S.C. § 707(b)(2) (setting forth objective calculation to determine whether there is presumption of abuse); *see also In re* Henebury, 361 B.R. 595, 603 (Bankr. S.D. Fla. 2007) (discussing creation of statutory presumption that debtors who fail means test would be abusing chapter 7 relief); David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 226 (2007) (discussing subjective nature of section 707(b) prior to BAPCPA, as "intimate details of a debtor's life were subject to scrutiny by a bankruptcy judge").

[FN6]. *See* Karen Gross, FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY SYSTEM 115-23 (1997) (discussing choices debtor must make when filing for bankruptcy); *see also* Tidewater Fin. Co. v. Williams, 498 F.3d 249, 252 (4th Cir. 2007) (reviewing different paths debtor can take when filing for bankruptcy); Jeffery A. Logan, *Troubled State of Chapter 13 Bankruptcy and Proposals for Reform*, 51 SMU L. REV. 1569, 1570 (1998) (discussing debtor's choice between filing chapter 7 and chapter 13).

[FN7]. A bankruptcy case is initiated once the debtor's petition has been filed with the bankruptcy court. 11 U.S.C. § 301(a) (2006) ("A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter."). *See* 1 COLLIER BANKRUPTCY PRACTICE GUIDE, ¶ 13.03, at 13-7 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (describing briefly petition process). *See generally* Kevin C. Driscoll, Jr., Note, *Eradicating the "Discharge By Declaration" For Student Loan Debt in Chapter 13*, 2000 U. ILL. L. REV. 1311, 1316 (2000) (discussing procedure for adversary proceeding as governed by statute). The petition must conform with Official Form 1. 1 COLLIER BANKRUPTCY PRACTICE GUIDE, ¶ 13.03, *supra* 13-7 (noting requirement of substantial conformity). *See* FED. R. BANKR. P. 1002(a) (stating, in committee note, "Official Form No. 1 may be used to seek relief voluntarily under any of the chapters. Only the original need be signed and verified, but the copies must be conformed to the original"); FED. R. BANKR. P. 9009 (stating forms may also be altered if appropriate). *See generally* Hideaki Sano, Note, *Judicial Abuse of "Process": Examining the Applicability of Section 2F1.1(b)(4)(B) of the Federal Sentencing Guidelines to Bankruptcy Fraud*, 98 MICH. L. REV. 1038, 1055 (2000) (describing general language of bankruptcy disclosure forms). Once the petition has been filed, an automatic stay is immediately instituted in the debtor's estate, preventing creditors from taking any action against the estate without the permission of the bankruptcy court. *See, e.g., In re* Steenstra, 280 B.R. 560, 566 (Bankr. D. Mass. 2002) (discussing remedies for violations of automatic stay as provided by Code); *In re* Clark, 207 B.R. 559, 564-65 (Bankr. S.D. Ohio 1997) (examining purpose of automatic stay); *see* 2 COLLIER BANKRUPTCY PRACTICE GUIDE, ¶ 38.02, at 38-8 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (describing general applicability of automatic stay). In the bankruptcy petition, the debtor must plead the amount of their indebtedness, that they are eligible to become a voluntary debtor, whether they have had a bankruptcy discharge within the last six years, the chapter under which the debtor is seeking relief and a prayer for relief. *See, e.g.*, 1 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 13.06, at 13-9 (Alan N. Resnick et al. eds., 2002) (describing information required by forms and petitions in bankruptcy proceeding); 10 NORTON BANKRUPTCY LAW AND PRACTICE 2d, § 301:3, at 3-20 (2005) (providing example of Voluntary Petition— Official Form 1). *See generally* Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 31-32 (2005) (comparing bankruptcy petition pleadings to other kinds of judicial actions).

[FN8]. 28 U.S.C. § 586(e)(2) (2006) ("Such individual shall collect such percentage fee from all payments received by such individual under plans ... for which such individual serves as standing trustee."). *See* Jeffrey R. Drobish, Note, *The Forbidden Crystal Ball: Interpreting "Projected Disposable Income" for Chapter 13 Bankruptcy Plans After BAPCPA*, 85 WASH. U. L. REV. 185, 188-91 (2007) (discussing payment plan components and trustees' role as mediators); Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 531-33 (2006) (acknowledging trustee expenses and compensation as significant portions of total chapter 13 costs).

[FN9]. *See* 11 U.S.C. § 727(a) (2006) (discussing when court will grant debtor discharge); *see also In re* Speece, 159 B.R. 314, 322 (Bankr. E.D. Cal. 1993) ("The chapter 7 discharge discharges debtors from all debts that arose before the date of the order for relief under chapter 7, except nondischargeable debts."); Nancy Hisey Kratzke, *Dischargeability Issues and Superfund Claims: The Conflict Between Environmental and Bankruptcy Policies*, 17 COLUM. J. ENVTL. L. 381, 410 n.182 (1992) (indicating certain debts which may not be forgiven, such as fraud, alimony, student loans, certain taxes, governmental fines).

[FN10]. Exempt assets are assets the debtor is allowed to take out of the bankruptcy estate in order to prevent their liquidation for the benefit of creditors. 1 COLLIER ON BANKRUPTCY ¶ 1.03[2][d][iii], at 1-47 (Alan N.

Resnick et al. eds., 15th ed. rev. 2006) (stating section 522 permits individual to do this by claiming property as exempt); *see* Melissa B. Jacoby & Diane Leenheer Zimmerman, *Foreclosing on Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1343 n.126 (2002) (providing definition for exempt property as property which, according to applicable law, "cannot be reached by unsecured creditors"); *see also* Morgan D. King & Jonathan H. Moss, *Avoiding Tax Liens on Personal Property in Bankruptcy: A Look at the Interplay Between the Bona Fide Purchaser Provisions of the Tax and Bankruptcy Code*, 31 CAL. W. L. REV. 1, 26 n.157 (1994) (providing examples of permissible exempt items such as household belongings and tools of trade). Exemptions are established by section 522 of the Bankruptcy Code. 11 U.S.C. § 522 (2006) (establishing exemptions and outlining requirements for exemption); *see In re* Wallace, 347 B.R. 626, 635 (Bankr. W.D. Mich. 2006) ("The Bankruptcy Clause of the Constitution gives Congress the exclusive power to establish what exemptions a debtor may claim in conjunction with a bankruptcy proceeding."); 1 COLLIER ON BANKRUPTCY ¶ 1.03[2][d][iii], at 1-47 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (noting section 522 allows debtor to claim exemptions so as to take property "out of the estate, revest it in the debtor and prohibit its use to pay claims owed to creditors").

[FN11]. *See In re* Farmer, 295 B.R. 322, 323 (Bankr. W.D. Wis. 2003) (indicating liquidation of debtor's nonexempt assets and distribution of proceeds to creditors as principal role of chapter 7 trustees); *see also* Drobish, *supra* note 8, at 188-91 (noting plan will typically lay out "proposed monthly payments to creditors"). *See generally* Margaret Howard, *A Bankruptcy Primer for the Family Lawyer*, 31 FAM. L.Q. 377, 382 (1997) (observing calculation of payments to creditors in chapter 7 as "fairly straightforward").

[FN12]. *See In re* McKinney, 374 B.R. 726, 730 (Bankr. N.D. Cal. 2007) (positing chapter 7 trustees fees as commission must be reasonable under BAPCPA); *In re* Borrego Springs Development Corp., 253 B.R. 271, 276 (S.D. Cal. 2000) (applying 11 U.S.C. section 326 to determine reasonable compensation awarded to trustees); *In re* Hages, 252 B.R. 789, 792 (Bankr. N.D. Cal. 2000) (discussing section 326 and its allowance for reasonable compensation under section 330 for the trustees services (citing 11 U.S.C. § 326 (2000))).

[FN13]. *See In re* McClearn, 372 B.R. 471, 473 (Bankr. W.D. Wis. 2007) ("Chapter 7 bankruptcy cases typically move very quickly, often concluding within 90 days of the first meeting of creditors."); Margaret Rosso Grossman, *Troubled Times: The Farm Debtor Under the Amended Bankruptcy Code*, 38 OKLA. L. REV. 579, 623 (1985) (noting quickness and efficiency of bankruptcy proceedings "because the various claims against the debtor are resolved in a single forum"); *cf.* Peter C. Alexander & Gary S. Gildin, *Bankruptcy Pro Bono Legal Assistance Programs: An Update*, NORTON ANN. SURV. BANKR. L., Sept. 2007, at 398-99 (describing bankruptcy proceedings generally, and rise in demand for bankruptcy counseling and representation).

[FN14]. *See* Robert M. Thompson, Comment, *Consumer Bankruptcy: Substantial Abuse and Section 707 of the Bankruptcy Code*, 55 MO. L. REV. 247, 259 (1990) (noting section 707(b) explains "[t]here shall be a presumption in favor of granting the relief requested by the debtor" (citing 11 U.S.C. § 707(b) (1988), *amended by* BAPCPA, Pub. L. No. 109-8, §§ 102(h)(1), 318(2), 119 Stat. 23, 33, 93 (2005))); *cf. In re* Fletcher, 248 B.R. 48, 50 (Bankr. D. Vt. 2000) (remarking on U.S. Trustee's burden of proof to show debtor's case should be dismissed); *In re* Snow, 185 B.R. 397, 402 (Bankr. D. Mass. 1995) (holding debtor's ability to make substantial payments could rebut presumption in his favor).

[FN15]. *See* 11 U.S.C. § 707(b) (2006) (changing presumption in favor of debtor to "presumption of abuse"); *see also* John C. Anderson, *Highlights of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 — Part I — Consumer Cases*, 33 S.U. L. REV. 1, 5 (2005) (discussing special circumstances necessary to

rebut the presumption of abuse); Christopher M. Hogan, *Will the Ride-Through Ride Again?*, 108 COLUM. L. REV. 882, 891 (2008) (suggesting "concerted efforts of certain commentators, creditors, and lawmakers to respond to the perceived abuses of Chapter 7 bankruptcy ... end [ed] the universal presumption of the honest debtor").

[FN16]. *See* 11 U.S.C. § 707(b)(2)(A)(i) (2006) (providing formula for determining if abuse exists); *see also In re* Mastromarino, 197 B.R. 171, 173 (Bankr. D. Me. 1996) ("'Bad faith' has long been recognized as a ground upon which a consumer debtor's voluntary resort to Chapter 7 relief might be thwarted."); Anderson, *supra* note 15, at 3-4 (observing first part of two-part "means" test, and "[u]nder the new bill, the debtor's income will be ... compared to his or her state's median income ... [and] if it is above the state's median income, ... the debtor is facially ineligible for Chapter 7 relief").

[FN17]. If a debtor is ineligible for relief under chapter 7 the bankruptcy court can dismiss their case. Since debtors may convert their chapter 7 case to chapter 11, 12, or 13 at any time, debtors who are facing dismissal under chapter 7 may choose to convert their case to a chapter 13 in order to remain under the protection of the Bankruptcy Code. *See* 11 U.S.C. § 706(a) (2006) (governing voluntary conversion of chapter 7 case to case under another chapter); 6 COLLIER ON BANKRUPTCY ¶ 706.02[1], at 706-2-706-3 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (noting "a debtor may wish to convert from chapter 7 to chapter 13 after a significant debt has been found nondischargeable, in order to receive the benefit of the broader discharge available under chapter 13" (citing 11 U.S.C. § 1328(a) (2006))); *see also* Schultz v. United States (*In re* Schultz), 529 F.3d 343, 347 (6th Cir. 2008) (highlighting differences between filing for chapter 7 and chapter 13).

[FN18]. *See* 11 U.S.C. § 1307(a) (2006) (affording debtors right to convert a chapter 13 case to a chapter 7 "at any time"); *see also In re* Muth, 378 B.R. 302, 302-03 (Bankr. D. Colo. 2007) (clarifying method and process of conversion from chapter 13 to chapter 7); *In re* Fox, 370 B.R. 639, 640-41 (Bankr. D.N.J. 2007) (discussing debtor who could not complete repayment plan due to severe decrease in income and was permitted to convert case to chapter 7).

[FN19]. The United States Trustees Office is the division of the Department of Justice, which oversees the Bankruptcy System. Roberta DeAngelis & Donna S. Tamanaha, *Understanding the Basics of Bankruptcy & Reorganization*, 898 PRACTISING L. INST. 223, 229 (2007); *see* 28 U.S.C. § 581 (2006) (providing Attorney General appoints one U.S. trustee for each one of twenty regions composed of Federal judicial districts); 28 U.S.C. § 583 (2006) ("Each United States trustee and assistant United States trustee, before taking office, shall take an oath to execute faithfully his duties."). The purpose of the United States Trustees Office is to "ensure[] that parties comply with applicable laws and procedures in order to promote the just, speedy and economical resolution of cases filed under the Bankruptcy Code [.]". DeAngelis & Tamanaha, *supra*, at 229. *See* 28 U.S.C. § 586(a) (2006) (describing U.S. trustee's duties and obligations); *see also In re* Miles, 330 B.R. 848, 850 (Bankr. M.D. Ga. 2004) (finding trustees' powers are not limited to those listed in section 586). As such, the United States Trustees Office may both file and oppose motions when necessary to enforce the Bankruptcy Code. DeAngelis & Tamanaha, *supra*, at 229-30; *see In re* Cadwallder, No. 06-36424, 2007 WL 1864154, at *1 (Bankr. S.D. Tex. June 28, 2007) (holding U.S. Trustee's motion to dismiss debtors chapter 7 case as an abuse of the Code was timely and may be prosecuted); *In re* Cooper, 302 B.R. 633, 637 (Bankr. N.D. Iowa 2003) (granting trustee's extension for objections to debtor's motion for summary judgment for chapter 7 discharge). Thus, in the cases at issue, the United States Trustees Office either files a motion to compel the converting debtor to file a means test with the court, or opposes the debtor's Motion to Strike Requirement to File Official Form B22A in Conversion from chapter 13 to chapter 7. *See In re* Kellett, 379 B.R. 332, 333 (Bankr. D. Or. 2007)

(denying motion to strike general requirement to file Form B22A in cases converted from chapter 13 to chapter 7); *see also In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *6 (Bankr. W.D. Wash. July 18, 2007) (affirming requirement to file Form B22A in chapter 13 case converted to chapter 7); *In re* Jackson, 348 B.R. 487, 496 n.21 (Bankr. S.D. Iowa 2006) (stating "[t]rustee may file a motion to dismiss, a motion to compel, an objection to discharge or a complaint to revoke discharge if debtor fails to comply with the debtor's duties under the applicable code sections and federal rules").

[FN20]. *See In re Kellett*, 379 B.R. at 340 (holding means test must be passed to convert from chapter 13 to chapter 7); *see also In re Kerr*, 2007 WL 2119291, at *1 (seeking enforcement of Local Interim Bankruptcy Rule requiring means test to convert from chapter 13 to chapter 7); *In re* Perfetto, 361 B.R. 27, 28 (Bankr. D.R.I. 2007) (agreeing with U.S. Trustee and stating all debtors seeking relief under chapter 7 must pass the means test and thus must file the requisite paperwork with the court).

[FN21]. *See* Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 583 (2005) (stating "a principal purpose of BAPCPA is to cause more debtors to file Chapter 13 cases, it does so solely by imposing new limits on the filing of Chapter 7 cases"); *see also* Charles J. Tabb, *Consumer Bankruptcy Filings: Trends and Indicators* 23 (U. Ill. Legal Working Paper Series, U. Ill. Law and Econ. Working Papers, Working Paper No. 67, 2006) (suggesting Congress expected BAPCPA to cause "quantum shift" from chapter 7 to chapter 13); Richard L. Wiener et al., *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 458 (2005) (stating BAPCPA was intended to limit access to bankruptcy, especially straight liquidation offered by chapter 7).

[FN22]. *See* Anderson, *supra* note 15, at 2 ("Lawmakers who formulated and advocated this legislation argued that it will prevent consumer debtors from abusing bankruptcy laws by using them to cancel debts which they can arguably afford to pay."); *see also* Robert J. Landry, III, *An Empirical Analysis of the Causes of Consumer Bankruptcy: Will Bankruptcy Reform Really Change Anything*, 3 RUTGERS BUS. L.J. 2, 48 n.175 (2006) ("Policymakers prefer Chapter 13 to Chapter 7 because it includes an acknowledgement by filers to pay as much of their debts as they can, whereas Chapter 7 filers are asking to be relieved of the burden of paying anything towards the debts they have incurred."); Tabb & McClelland, *supra* note 2, at 463 (contending prior to BAPCPA chapter 7 was being used by debtors as "just another 'financial planning tool"' (quoting Rep. Rick Boucher)) (citation omitted).

[FN23]. Labaton, *Bankruptcy Bill Set for Passage*, *supra* note 1, at A1.

[FN24]. Stephen Labaton, *House Passes Bankruptcy Bill; Overhaul Now Awaits President's Signature*, N.Y. TIMES, Apr. 15, 2005, at C5.

[FN25]. Todd J. Zywicki, *The Two-Income Tax Trap*, WALL ST. J., Aug. 14, 2007, at A17. *Accord* H.R. REP. NO. 109-31, pt.1, at 1 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 (documenting Congress' purpose of enacting BAPCPA which was to restore "personal responsibility and integrity in bankruptcy system"); *see* Zelotes v. Martini, 352 B.R. 17, 22 (D. Conn. 2006) (applying legislative history to analyze government interest in monitoring and reforming bankruptcy system).

[FN26]. *See In re* Kellett, 379 B.R. 332, 340 (Bankr. D. Or. 2007) (agreeing with requirement of B22A filing in converted cases but acknowledging requirement may be waived based on court order when B22A would "serve no purpose"). *Compare In re* Perfetto, 361 B.R. 27, 31 (Bankr. D.R.I. 2007) (requiring B22A forms be filed

when debtors seek to convert cases), *with In re* Fox, 370 B.R. 639, 648 (Bankr. D.N.J. 2007) (rejecting *In re Perfetto* and finding no support for conclusion that B22A forms are required in converted cases).

[FN27]. *In re Perfetto*, 361 B.R. at 28 (holding Form B22A must be filed upon conversion to chapter 7 from chapter 13); *cf. In re* Miller, 381 B.R. 736, 741 (Bankr. W.D. Ark. 2008) (acknowledging *In re Perfetto*, yet holding it "incongruous" to apply "code mandated formula" for only chapter 13 in converted case); *In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *6 (Bankr. W.D. Wash. July 18, 2007) (affirming *In re Perfetto* but noting there is no need to apply rule when case is converted from chapter 13 to chapter 7, as opposed to "filing initially under Chapter 7").

[FN28]. *In re Fox*, 370 B.R. at 644 (concluding "while the drafters provided in [section] 707(b)(1) that consensual conversion could be a consequence of the presumption of abuse under the means test," there is no indication in section "that the drafters meant to apply the means test to debtors who commence their case under another chapter and subsequently convert their case to chapter 7").

[FN29]. *See infra* Part III.F.

[FN30]. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (effective Oct. 1, 1979) (codified as amended in scattered sections of 11 U.S.C.); *see In re* Johnson, 386 B.R. 171, 175 (Bankr. W.D. Pa. 2008) (noting current Bankruptcy Code was adopted in 1978). *See generally* Brett Weiss, *"Not Dead Yet": Bankruptcy After BAPCPA*, 40 MD. B. J. 17, at 17, 18 (May/June 2007) (providing background to and explanation of BAPCPA).

[FN31]. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered sections of 11 U.S.C.); *see* Robert J. Landry, III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 95 (2006) ("The Bankruptcy Reform Act [is] commonly referred to as the Bankruptcy Code ....").

[FN32]. Tabb, *supra* note 21, at 1 (positing this fact is "common knowledge"); *see* Thomas Evans & Paul B. Lewis, *An Empirical Economic Analysis of the 2005 Bankruptcy Reforms*, 24 EMORY BANKR. DEV. J. 327, 350 (2008) (observing "the 1978 Act was causal in increasing the number of personal bankruptcies. For example, Lawrence Shepard estimates that chapter 7 bankruptcies increased by 15% and chapter 13 bankruptcies increased by 20% as a consequence of the 1978 Act" (citing Lawrence Shepard, *Personal Failures and the Bankruptcy Reform Act of 1978*, 27 J.L. & ECON. 419 (1984))); *see also* Landry & Mardis, *supra* note 31, at 99 ("From 1958 to 1978, the number of filings rose from about one hundred thousand annually to about two hundred thousand. From 1978 to 1998 the yearly filings rose from two hundred thousand to 1.4 million.") (footnotes omitted). *But see* David A. Moss & Gibbs A. Johnson, *The Rise of Consumer Bankruptcy: Evolution, Revolution, or Both?*, 73 AM. BANKR. L.J. 311, 330 (1999) (arguing "the number of filings almost certainly would have increased even in the absence of any change in law").

[FN33]. *See In re* Fulton, 52 B.R. 627, 630 (Bankr. D. Utah 1985) ("In the years immediately following enactment of the Bankruptcy Code, it was widely perceived in the consumer credit industry that Congress had gone too far in promoting the interests of debtors at the expense of their creditors."); George W. Kuney, *Hijacking Chapter 11*, 21 EMORY BANKR. DEV. J. 19, 22 (2004) (enumerating various criticisms and commendations of Code); Landry & Mardis, *supra* note 31, at 95 (noting "some argue that [the Bankruptcy Code] enhanced a policy in favor of debtors") (citation omitted).

[FN34]. *See* 11 U.S.C. § 707(a) (2006) (requiring there be notice and hearing in addition to "cause"); *see also In re* McDaniel, 350 B.R. 616, 618 (Bankr. M.D. Fla. 2006) (describing reasons listed in section 707(a) as "examples" and noting "courts may look at a number of other factors in determining whether cause for dismissal exists"); Steven G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 651-52 (2006) (describing broad and narrow interpretations of "cause" courts have used).

[FN35]. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 335; *see* First USA v. Lamanna (*In re* Lamanna), 153 F.3d 1, 3 (1st Cir. 1998) (noting Congress, by declining to either define "substantial abuse" or leave specific guidance in legislative history, created flexible standard that "enabl[es] courts to address each petition on its own merit"); Vicki W. Travis, *Of the Latest Attempted Revisions to the Bankruptcy Code: Can They Really Change Anything?*, 16 BANKR. DEV. J. 221, 228-29 (1999) ("While the amendments did not define a 'substantial abuse,' legislative history indicated that such abuse occurred when a debtor would have sufficient future income to pay at least a portion of the debt from which he was seeking relief.").

[FN36]. H.R. REP. NO. 109-31, pt. 1, at 11-12 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 98 ("This provision, codified in section 707(b) of the Bankruptcy Code, was added 'as part of a package of consumer credit amendments designed to reduce perceived abuses in the use of chapter 7.'" (quoting 6 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY, 707 LH [2], at 707-30 (15th ed. rev. 2002))); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 475 (2007) (identifying "substantial abuse dismissal" of Bankruptcy Amendments and Federal Judgeship Act of 1984 and "abuse dismissal" of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as attempts to "deny debtors with an ability to repay access to Chapter 7"); Travis, *supra* note 35, at 228 (identifying section 707(b) of Bankruptcy Amendments and Federal Judgeship Act of 1984 as most significant of amendments aimed at curtailing abuse of bankruptcy system).

[FN37]. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219(b), 100 Stat. 3088, 3101 (explaining U.S. Trustees could move for dismissal in case of substantial abuse); *see* Hebbring v. U.S. Trustee, 463 F.3d 902, 909 (9th Cir. 2006) (affirming district court's dismissal where substantial abuse was found); Price v. U.S. Trustee (*In re* Price), 353 F.3d 1135, 1141 (9th Cir. 2004) (affirming bankruptcy court decision to dismiss for substantial abuse).

[FN38]. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-83, § 4(b), 112 Stat. 517-18 (exempting court's consideration of debtor's charitable contributions in determining dismissal of case); *see* U.S. Trustee v. Cortez (*In re* Cortez), 457 F.3d 448, 455 (5th Cir. 2006) (interpreting language of section 707(b) as expressly instructing courts "not to consider whether debtor had made or currently makes charitable contributions"); *In re* Bender, 375 B.R. 25, 29 (Bankr. E.D. Mich. 2007) (holding courts are precluded from considering charitable contributions when deciding to dismiss under section 707(b)).

[FN39]. *See* U.S. Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992) (noting previous agreement with Ninth Circuit, where it was found debtor's ability to pay his debts is enough to constitute substantial abuse (citing *In re* Walton, 866 F.2d 981 (8th Cir. 1969))); *In re* Nockerts, 357 B.R. 497, 505 (Bankr. E.D. Wis. 2006) (illustrating Eighth and Ninth circuit's view that ability to pay debts is enough to justify dismissal (citing *In re* Ontiveros, 198 B.R. 284, 287 (Bankr. C.D. Ill. 1996))); *cf.* Stuart v. Koch (*In re* Koch), 109 F.3d 1285, 1288-90 (8th Cir. 1997) (holding "disposable income" must be paid to creditors and failure to do so constitutes substantial abuse).

[FN40]. Green v. Staples (*In re* Green), 934 F.2d 568, 572 (4th Cir. 1991) (enumerating five different factors to be considered in conjunction with debtor's ability to pay when determining whether abuse exists) (citations omitted). *See In re Nockerts*, 357 B.R. at 505 (acknowledging Fourth Circuit uses totality of circumstances test that requires showing of more than mere ability to pay); *In re Ontiveros*, 198 B.R. at 287 (acknowledging Fourth Circuit's interpretation of totality of circumstances test to include consideration of five factors).

[FN41]. *See In re* Krohn, 886 F.2d 123, 126-27 (6th Cir. 1989) (enumerating factors to consider under the hybrid approach with regards to debtor's ability to pay "out of future earnings", such as whether debtor has "stable source of future income" and whether there are other state remedies); *In re Nockerts*, 357 B.R. at 505 (noting hybrid approach applied by Sixth Circuit allows court to dismiss solely on ability to pay, and allows debtor to show "mitigating circumstances" (citing *In re Ontiveros*, 198 B.R. 284)); *In re Ontiveros*, 198 B.R. at 287-88 (acknowledging Sixth Circuit's approach where first court considers debtors ability to repay "out of future earnings", but also considers mitigating factors which could rebut presumption of abuse).

[FN42]. *See In re* Smith, 269 B.R. 686, 689 (Bankr. W.D. Mo. 2001) (acknowledging statutory presumption in favor of granting debtor discharge pursuant to section 707(b)); *In re Ontiveros*, 198 B.R. at 287 (holding there is rebuttable presumption to grant relief requested by debtor); Ann Morales Olazábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 343 (2003) (explaining if reform legislation were to be passed, it "would have replaced the current law's presumption in favor of the debtor with a mandatory presumption of abuse, triggered under certain conditions") (emphasis omitted).

[FN43]. *See* Donald A. Brittenham Jr., *The Pros and Cons Behind the First Circuit's Decision to Establish Bankruptcy Appellate Panels and the Growing Question of Whether the Panels Will Last*, 32 NEW ENG. L. REV. 215, 227 (1997) (indicating Bankruptcy Reform Act of 1994 as Congress's call for "broad reform" in bankruptcy); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 486 (2005) (noting creation of National Bankruptcy Review Commission spurred "consumer credit community" and was driving force behind BAPCPA); Larry E. Ribstein, *Partner Bankruptcy and the Federalization of Partnership Law*, 33 WAKE FOREST L. REV. 795, 798 (1998) (noting creation of National Bankruptcy Review Commission for purposes of reviewing changes to Bankruptcy Code).

[FN44]. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 603, 108 Stat. 4106, 4147 (1995) (enumerating duties of National Bankruptcy Review Commission).

[FN45]. *See* A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1863 (2006) ("BAPCPA's origins generally can be traced to activities of National Bankruptcy Review Commission."); Hon. James B. Haines, Jr. & Philip J. Hendel, *No Easy Answers: Small Business Bankruptcies After BAPCPA*, 47 B.C. L. REV. 71, 75 (2005) (discussing assimilation of "essential conclusion" of Commission's recommendation into BAPCPA); Jensen, *supra* note 43, at 487-88 (stating some consumer bankruptcy recommendations were integrated into BAPCPA).

[FN46]. *See* Dickerson, *supra* note 45, at 1864 (describing opposition of four members to Commission's recommendations where bankruptcy afforded easy relief); Jensen, *supra* note 43, at 488 (noting four member strong dissent from Commission's final report); *see also* Brenda Anthony, Comment, *"Substantial Abuse" Under Section 707(b) of the Bankruptcy Code: American Consumers Learn Declaring Bankruptcy May Cease to be a Way Out*, 67 U. CIN. L. REV. 535, 550-51 (1999) (highlighting nine member commission's serious division over

consumer bankruptcy recommendations in final report).

[FN47]. Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, *in* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, at 1127 (1997) [hereinafter *Additional Dissent*], ("Silence stifles debate over whether bankruptcy relief should be means-tested like all other programs available in the social safety net."); Jensen, *supra* note 43, at 489 ("With respect to means testing, two dissenting commissioners specifically addressed the issue of 'whether bankruptcy relief should be means-tested like all other programs available in the social safety net." (quoting Jones & Shepard, *Additional Dissent*, *supra*, at 1127)). *See* Dickerson, *supra* note 45, at 1865 (citing Edith H. Jones & James I. Shepard, *Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, *in* REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION, Ch. 5, at 1044 (1997)) (indicating four dissenters urged means test for bankruptcy to prevent abuse of bankruptcy relief).

[FN48]. *See* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 285 (2005) (noting almost every version of BAPCPA bill "reflected views of Commission's minority"); Jensen, *supra* note 43, at 488 (indicating some recommendations were included in BAPCPA); *see also* Dickerson, *supra* note 45, at 1865-66 (stating dissenting Commission members' views supported by Congress).

[FN49]. *See, e.g.*, 3 COLLIER ON BANKRUPTCY ¶ 348, at 348-4 (Alan N. Resnick et al. eds., 15th ed. rev 2006) ("Section 348 of the Bankrputcy Code governs the effect of conversion ...."); *see In re* Cutillo, 181 B.R. 13, 14 (Bankr. N.D.N.Y 1995) (positing conversion is based upon case-by-case consideration of what is in best interest of creditors and estates); *In re* White, 126 B.R. 542, 546 (Bankr. N.D. Ill. 1991) (highlighting conversion is not automatic, but rather product of court's discretion).

[FN50]. 11 U.S.C. § 1307(a) (2006) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable."); *see* David S. Kennedy & R. Spencer Clift, III, *Reasonable and Necessary Expenses Under 1325(b) of the Bankruptcy Code, Post Confirmation Considerations, and the Effect of Conversion and Dismissal of Chapter 13 Cases*, 32 U. MEM. L. REV. 789, 864 (2002) (noting court may convert chapter 13 case to case under chapter 7 for "cause" after notice and hearing); *see also In re* Henry, 368 B.R. 696, 699 (N.D. Ill. 2007) (observing section 1307 governs conversion and sets forth list of causes for such action).

[FN51]. *See* Toibb v. Radloff, 501 U.S. 157, 160 (1991) ("Section 109 ... defines who may be a debtor under the various chapters of the Code."); *see also* G. Eric Brunstad, Jr., *The Inapplicability of "Means Testing" to Cases Converted to Chapter 7*, 24 AM. BANKR. INST. J. 1, 59 (Nov. 2005) ("[Sections] 109(a) and (b) provide that any person who resides in or has a domicile, property or a place of business in the United States 'may be a debtor' under chapter 7 ...."). Section 109(a) states: "Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." 11 U.S.C § 109(a) (2006).

[FN52]. Rule 1017(f) states:

> (1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a) 1208(a) or (b), or 1307(a) or (b).
>
> (2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b) or 1307(b) shall be on motion filed and served as required by Rule 9013.

> (3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly transmit a copy of the notice to the United States Trustee.

FED R. BANKR. P. 1017(f). *See In re* Rigales, 290 B.R. 401, 403 (Bankr. D.N.M. 2003) (noting motion to convert under section 706(a) must follow requirements under Rule 9013); *see also* Kennedy & Clift, *supra* note 50, at 864 (noting when debtor converts from chapter 13 to chapter 7, after confirmation, debtor must file numerous schedules pursuant to Rule 1019(5)(D) and clerk transmits the schedules to U.S. trustee); Calder v. Job (*In re* Calder), 973 F.2d 862, 867 (10th Cir. 1992) (positing request for court order pursuant to Rules 1017(d) and 9013 is needed for conversion).

[FN53]. FED. R. BANKR. P. 9014; *see In re* Atamian, 368 B.R. 375, 378 (Bankr. D. Del. 2007) (holding Rule 9014 only requires opportunity for hearing and does not apply to adversary proceedings); *see also* Marrama v. Citizens Bank of Mass., No. 05-996, slip op. at 6 (U.S. Feb. 21, 2007) (Alito, J., dissenting) ("Rule 9014 (a), in turn, requires that the request be made by motion and that 'reasonable notice and opportunity for hearing ... be afforded the party against whom relief is sought."').

[FN54]. 11 U.S.C. § 348(a) (2006) (stating "[c]onversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted"). An order for relief is a judgment from the bankruptcy court which applies the debtor's discharge to "all parties in interest" whether or not they exercised their rights in the bankruptcy proceeding. *See* England v. Am. Trust Co., 267 F.2d 20, 23 (9th Cir. 1959) (holding "court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which shall be given to all parties in interest"); *In re* Wara, 116 F.2d 447, 449 (9th Cir. 1940) (noting court should make order fixing time for filing of objections to appellants discharge, and give notice to "all parties in interest"); *In re* Daugherty, 189 F. 239, 240 (Bankr. W.D. Ky. 1911) (finding "[u]pon due notice to all parties in interest the case [had been] set down for hearing upon the bankrupts' petition for a discharge"). The order for relief also incorporates the automatic stay which is in place once the bankruptcy petition is filed. *See, e.g.*, United Air Lines, Inc. v. U.S. Bank Nat'l Ass'n (*In re* United Air Lines, Inc.), 438 F.3d 720, 735 (7th Cir. 2006) (granting orders of relief from automatic stay); Widel v. Centera Bank (*In re* Widel), 107 F. App'x. 824, 825 No. 03-3240, 2004 WL 1386363 (10th Cir. June 22, 2004) ("A bankruptcy appeal becomes moot when the bankruptcy court has granted relief from an automatic stay, the debtor has failed to obtain a stay of that order pending appeal, and the creditor has conducted a foreclosure sale."); Allen v. Allen, 275 F.3d 1160, 1161 (9th Cir. 2002) (reversing order denying relief from automatic stay and remanding for further proceedings).

[FN55]. *See* 11 U.S.C. § 348(a) (2006); *see also In re* Hudson, 158 B.R. 670, 672 (Bankr. N.D. Ohio 1993) (discussing determination of petition date in conversion case); Kennedy & Clift, *supra* note 50, at 862 (reiterating petition filing date is not changed). Section 348(a) states:

> Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

11 U.S.C. § 348(a).

[FN56]. *See In re* Tucker, 133 B.R. 819, 820 (Bankr. W.D. Tex. 1991) (stating "upon conversion, a case should be treated as having been filed under the chapter to which it is converted"); 3 COLLIER ON BANKRUPTCY, ¶

348.01, at 348-4 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (explaining generally effects of conversion); *cf.* *In re* Genova, 43 B.R. 108, 110 (Bankr. D. Colo. 1984) (discussing code sections pertaining to pre-conversion chapter no longer control after conversion to new chapter).

[FN57]. *See In re Tucker*, 133 B.R. at 820 (stating after conversion code sections pertaining to converted chapter control); *cf. In re* Knapp, 137 B.R. 582, 586 (Bankr. D.N.J. 1992) (discussing in conversion from chapter 13 to chapter 7 credit card charges made after original petition but before conversion are treated as pre-petition claims); 3 COLLIER ON BANKRUPTCY, ¶ 348.01, at 348-4 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) ("When a debtor converts from chapter 13 to chapter 7, the property of the estate will consist of the property the debtor had on the date the original chapter 13 petition was filed, to the extent the property is still in the debtor's possession.").

[FN58]. *See* 11 U.S.C. § 348(b) (2006); S. REP. NO. 95-989, at 78 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5834 (explaining this subsection provides list of specific "sections in the operative chapters of the bankruptcy code in which there is a reference to 'the order for relief under this chapter.' In those sections, the reference is to be read as a reference to the conversion order if the case has been converted into the particular chapter" (quoting 11 U.S.C. § 348(b))); Kennedy & Clift, *supra* note 50, at 862 ("Section 348(a) ... specifies that conversion of the case to another Chapter constitutes a new order for relief, but the conversion does not modify the date of the filing of the petition, commencement of the case, or order for relief, subject to the exceptions articulated in § 348(b) and (c)."). Section 348(b) states:

> Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case to such chapter.

11 U.S.C. § 348(b).

[FN59]. 11 U.S.C. § 348(c) (2006) (stating "[s]ections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1208, or 1307 of this title, as if the conversion order were the order for relief"); *see In re* Kors, Inc., 22 B.R. 19, 19-20 (Bankr. D. Vt. 1982) (applying section 348(c) to conversion from chapter 11 to chapter 7); Kennedy & Clift, *supra* note 50, at 863 ("Section 348(c) requires that the same notice requirement that governs orders for relief in § 342(a) also governs conversion orders ....").

[FN60]. 11 U.S.C. § 348(d) (2006); *see In re* Toms, 229 B.R. 646, 652 (Bankr. E.D. Pa. 1999) (explaining operation of section 348(d) in conversion case); Kennedy & Clift, *supra* note 50, at 863 ("Claims arising after the order for relief is entered, but before conversion, are treated as prepetition claims pursuant to § 348(d), and the services of the trustee or examiner are terminated upon conversion of the case as prescribed by § 348(e)."). Section 348(d) states:

> A claim against the estate or the debtor that arises after the order for relief but before the conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C. § 348(d).

[FN61]. 11 U.S.C. § 342(a) (2006) (stating "[t]here shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title"); *see* Massa v. Addona (*In re* Massa), 187 F.3d 292, 296 (2d Cir. 1999) (recognizing creditor must receive notice once conversion occurs);

Kennedy & Clift, *supra* note 50, at 863 (noting notice requirement in section 342(a) applies to conversion orders).

[FN62]. 11 U.S.C. § 348(e) (2006) (stating "[c]onversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before such conversion"); *see* Cable v. Ivy Tech State Coll., 200 F.3d 467, 474 (7th Cir. 1999) (determining trustee does not have ability to act on estate's behalf after conversion); Kennedy & Clift, *supra* note 50, at 863 (stating trustee's position is ended upon conversion of case).

[FN63]. Kennedy & Clift, *supra* note 50, at 863. *See* 11 U.S.C. § 348(f) (2006):

> (1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> (A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
>
> (B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapter 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan; and
>
> (C) with respect to cases converted from chapter 13—
>
> (i) the claim of any creditor holding security as of the date of the petition shall continue to be secured by that security unless the full amount of such claim determined under applicable nonbankruptcy law has been paid in full as of the date of conversion, notwithstanding any valuation or determination of the amount of an allowed secured claim made for the purposes of the case under chapter 13; and
>
> (ii) unless a prebankruptcy default has been fully cured under the plan at the time of conversion, in any proceeding under this title or otherwise, the default shall have the effect given under applicable nonbankruptcy law.
>
> (2) If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion

see also In re Carrow, 315 B.R. 8, 18 (Bankr. N.D.N.Y. 2004) (affirming if debtor in bad faith converts case under chapter 13 her property in case consists of property as of conversion date).

[FN64]. FED. R. BANKR. P. 1019(1). Rule 1019(1) states:

> (A) Lists, inventories, schedules and statements of financial affairs theretofore filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of the entry of the order directing that the case continue under chapter 7.
>
> (B) If a statement of intention is required, it shall be filed within 30 days after entry of the order of conversion or before the first date set for the meeting of creditors, which ever is earlier. The court may grant an extension of time for cause only on written motion filed, or oral request made during a hearing, before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

FED. R. BANKR. P. 1019(1). *See In re* Beshirs, 236 B.R. 42, 47 (Bankr. D. Kan. 1999) (discussing after conversion, statement filed in chapter 13 case is considered filed in chapter 7 case); Kennedy & Clift, *supra* note 50, at 863 (noting claims filed before conversion are considered filed in chapter 7 case).

[FN65]. Kennedy & Clift, *supra* note 50, at 863. *See* FED. R. BANKR. P. 1019(2):

> A new time period for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence pursuant to Rules 3002, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, of 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, a complaint objecting to discharge, or a dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

Massa v. Addona (*In re* Massa), 187 F.3d 292, 298 (2d. Cir. 1999) (indicating "upon conversion ... creditors are afforded additional time periods for filing claims").

[FN66]. FED. R. BANKR. P. 1019(3) (stating "[a]ll claims actually filed by a creditor before conversion of the case are deemed filed in a chapter 7 case"); *see In re* Benjamin Coal Co., 978 F.2d 823, 827 (3d Cir. 1992) (finding converted case is considered filed in chapter 7 case and does not need new filing); Kennedy & Clift, *supra* note 50, at 863 (observing all claims filed before conversion by creditor are considered filed in converted case).

[FN67]. FED. R. BANKR. P. 1019(4); *see In re* Simmons, 286 B.R. 426, 430 (Bankr. D. Kan. 2002) (explaining Rule 1019(4) requires chapter 13 trustees to turn over records to chapter 7 trustees); *In re* Brown, 234 B.R. 907 (Bankr. W.D. Mo. 1999) (holding burden is on debtors to turn over all records to trustee when case is converted to chapter 7); *In re* Great Am. Pyramid Joint Venture, 144 B.R. 780, 794 (Bankr. W.D. Tenn. 1992) (requiring debtors turn over records to chapter 7 trustee under Rule 1019(4)). Rule 1019(4) states:

> After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee.

FED. R. BANKR. P. 1019(4).

[FN68]. FED. R. BANKR. P. 1019(5)(D) (stating "[t]he clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to Rule 1019(5)"); *see In re* Winom Tool & Die, Inc., 173 B.R. 613, 619 (Bankr. E.D. Mich. 1994) (recognizing Rule 1019(5) established certain filing requirements including transmissions to United States trustee); Kennedy & Clift, *supra* note 50, at 864 (explaining bankruptcy clerk must transmit copies of every schedule filed pursuant to Rule 1019(5) to United States trustee).

[FN69]. FED. R. BANKR. P. 1019(5)(B); *see In re Great Am. Pyramid Joint Venture*, 144 B.R. at 794 (explaining trustee's final report includes schedule of all unpaid debts after commencement of case); Kennedy & Clift, *supra* note 50, at 864 (stating debtor's schedule under Rule 1019(5)(B)(i) includes all unpaid debts incurred between filing of petition and conversion, and trustee's final report must be filed within 30 days of conversion). Rule 1019(5)(B) states:

> Unless the court directs otherwise, if a chapter 13 case is converted to chapter 7,
>
> (i) the debtor, not later than 15 days after conversion of the case, shall file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and
>
> (ii) the trustee, not later than 30 days after conversion of the case, shall file and transmit to the United States

trustee a final report and account.

FED. R. BANKR. P. 1019(5)(B).

[FN70]. FED. R. BANKR. P. 1019(5)(C); *see In re* Hamlin Terrace Health Care Ctr., 211 B.R. 997, 1002 (Bankr. M.D. Fla. 1996) (explaining debtor must file schedule of all properties acquired between commencement of chapter 11 case and order or confirmation, schedule of debt incurred following confirmation but before entry of order of conversion, and schedule of all executory contracts entered between filing and conversion); Kennedy & Clift, *supra* note 50, at 864 (noting in cases of conversion after confirmation of prior plan, debtor "must file a schedule of unpaid debts since the filing of the Chapter 13 case incurred after confirmation but before conversion[,] a schedule of executory contracts entered or assumed after filing of the petition and prior to the conversion[,] and a list of property acquired after the filing of the petition until conversion"). Rule 1019(5)(C) states:

> Unless the court orders otherwise, if a chapter 11, chapter 12, or chapter 13 case is converted to chapter 7 after confirmation of a plan, the debtor shall file:
>
> (i) a schedule of property not listed in the final report and account acquired after the filing of the petition but before conversion, except if the case is converted from chapter 13 to chapter 7 and § 348(f)(2) does not apply;
>
> (ii) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before the conversion; and
>
> (iii) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the petition bit before conversion.

FED. R. BANKR. P. 1019(5)(C).

[FN71]. FED. R. BANKR. P. 1019(6). *See In re* Pro Set, Inc., 193 B.R. 812, 816 (Bankr. N.D. Tex. 1996) (stating Rule 1019(6) requires all entities on schedule of debts to submit proof of claim); Patricia L. Barsalou, *Chapter 11 Administrative Expense Claims Post-Conversion—When Do You Need an Order for Payment?*, 12 AM. BANKR. INST. J. 30, 37 (Feb. 1994) ("Rule 1019(6) has been interpreted as requiring a proof of claim before post-petition pre-conversion claimants may recover on such claims."). Rule 1019(6) states:

> A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or a time fixed by the court. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within the later of a time fixed by the court or 180 days after the date of the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)-(d) and 3002. Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d).

FED. R. BANKR. P. 1019(6). Creditors establish their claims by filing a "proof of claim" with the bankruptcy court. *See* 11 U.S.C. § 501(a) (2006) (allowing creditor or indenture trustee may file proof of claim); *In re* Hogan, 346 B.R. 715, 719 (Bankr. N.D. Tex. 2006) (stating proof of claim filing is one "springboard upon which claim evaluation hinges"); Mark Glover, Note, *Timely Filing in Chapter 13 Bankruptcy Cases: Does Rule 3002(c)'s Deadline Apply to Secured Creditors?*, 87 B.U. L. REV. 1231, 1233 (2007) (providing creditors who want to receive payment distributions may file proof of claim). In order to receive any payment from the bankruptcy estate, the claim must be filed and accepted by the court. FED. R. BANKR. P. 3021 (allowing for distri-

bution only to claims that have been "allowed"); *see* State of Ohio Dep't of Taxation v. Swallen's, Inc. (*In re* Swallen, Inc.), 269 B.R. 634, 637 (B.A.P. 6th Cir. 2001) (explaining after plan is confirmed, payment is allowed "to creditors whose claims have been allowed"); Glover, *supra*, at 1233 (explaining claim must be allowed in order to receive plan payments). Acceptance is presumed unless the debtor or the trustee objects to the creditor's proof of claim. 11 U.S.C. § 502(a) (2006) (providing all claims of interest are deemed allowed unless objected to); *see In re* Goldstein, 114 B.R. 430, 432-33 (Bankr. E.D. Pa. 1990) (providing claim must be allowed unless objected to); Glover, *supra*, at 1233 (stating claim is presumed allowed unless objected to by debtor or trustee).

[FN72]. A party in interest is anyone who has a financial stake in the debtor's estate. *In re* El Comandante Mgmt. Co., 359 B.R. 410, 417 (Bankr. D.P.R. 2006) (explaining anyone with financial stake or significant legal stake in outcome of debtor's estate is party at interest); 7 COLLIER ON BANKRUPTCY, ¶ 1109, at 1109-1 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (noting "general theory behind the section is that anyone holding a direct financial stake in the outcome of the case should have an opportunity (either directly or through an appropriate representative) to participate in the adjudication of any issue that may ultimately shape the disposition of his or her interest"); *cf.* 11 U.S.C. § 1109(b) (2006) (providing right of parties of interest to appear and be heard and providing non-exhaustive list of potential parties of interest "including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee").

[FN73]. Section 1307(c) states:

> Except as provided in subsection (e) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause ....

11 U.S.C. § 1307(c) (2006). *See In re* Henry, 368 B.R. 696, 699 (N.D. Ill. 2007) (noting section 1307(c) governs rights of trustee to move for conversion or dismissal of chapter 13 case in best interests of creditor); *In re* Henson, 289 B.R. 741, 752 (Bankr. N.D. Cal. 2003) (holding section 1307(c) provides creditor with right to request dismissal or conversion of case based on best interests of creditor).

[FN74]. 11 U.S.C. § 1307(c)(1)-(11) (2006) (listing situations when court may convert case to chapter 7 or dismiss case for cause); *see In re Henry*, 368 B.R. at 699 (recognizing section 1307 "sets forth a non-exhaustive list of causes" for dismissal or conversion); *In re* Muscatello, 1:06-CV-453 (LEK), 2006 U.S. Dist. LEXIS 86486, at *9-10 (N.D.N.Y. Nov. 29, 2006) (interpreting section 1307(c) as "non-exhaustive list of instances where a bankruptcy can be converted to a Chapter 7 proceeding or dismissed" (citing *In re* Pearson, 354 B.R. 558, 561 (Bankr. D. Mass. 2006))).

[FN75]. Kennedy & Clift, *supra* note 50, at 865. *See* 11 U.S.C. § 1307(g) (2006) ("Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."); Marrama v. Citizens Bank of Mass., 127 S. Ct. 1105, 1110 (2007) (holding conversion was conditioned on debtor's ability to qualify as debtor under such chapter to which conversion is sought).

[FN76]. *See* Brunstad, *supra* note 51, at 60 (explaining "Chapter 13 cases are strictly voluntary"); *see also In re* Wincek, 202 B.R. 161, 169 (Bankr. M.D. Fla. 1996) (upholding well-established principle "debtor's decision to seek Chapter 13 relief is willing and voluntary"); *In re* Noonan, 17 B.R. 793, 799 (Bankr. S.D.N.Y. 1982) (explaining Congress sought to prevent "involuntary servitude by prohibiting involuntary chapter 13 cases").

[FN77]. U.S. CONST. amend. XIII, § 1.

[FN78]. 11 U.S.C. § 1306(a)(2) (2006). Section 1306(a)(2) states:

> (a) Property of the estate includes, in addition to the property specified in section 541 of this title— ...
> (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

See In re Tworek, 107 B.R. 666, 668 (Bankr. D. Neb. 1989) ("'There is no provision in Chapter 11 comparable to 11 U.S.C § 1306 which expands the definition of estate property to include virtually all property acquired by a Chapter 13 debtor after commencement of the case but before conversion."' (quoting *In re* Myrvold, 44 B.R. 202, 204 (Bankr. D. Minn. 1984))); Robert J. Keach, *Dead Man Filing Redux: Is the New Individual Chapter Eleven Unconstitutional?*, 13 AM. BANKR. INST. L. REV. 483, 488 (2005) (highlighting chapter 13 provisions require debtors to contribute post-petition earnings to plan). In addition, section 1322 requires the repayment plan to "provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan ...." 11 U.S.C. § 1322(a)(1) (2006).

[FN79]. 11 U.S.C. § 303(a) (2006) ("An involuntary case may be commenced only under chapter 7 or chapter 11 of this title ...."). *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 35 (1995) [hereinafter *History of the Bankruptcy Laws*] (highlighting Congress' rejection of compulsory chapter 13); *see also* Michael A. Fagone, *Involuntary Individual Chapter 11 Post-BAPCPA as a Collection Device?*, 15 AM. BANKR. INST. J. 28, 28 (Dec. 2006 — Jan. 2007) ("An individual cannot be the subject of an involuntary chapter 13 case.").

[FN80]. *See* Landry, *supra* note 31, at 99 (quoting data from various editions of the Annual Report, Admin. Office of the United States Courts, *available at* http://www.uscourts.gov/library/annualreports.htm (last visited Oct. 16, 2008)); *cf.* David A. Lander, *"It 'is' the Best of Times, It 'is' the Worst of Times": A Short Essay on Consumer Bankruptcy After the Revolution*, 78 AM. BANKR. L.J. 201, 202 (2004) (documenting rise in consumer debt over same time period); *see also In re* Cole, 347 B.R. 70, 76 (Bankr. E.D. Tenn. 2006) (noting increase in bankruptcy filings over last few years).

[FN81]. 151 CONG. REC. S14296, S14297 (daily ed. Dec. 21, 2005) (statement of Sen. Allard) (stating "law will save approximately $3 billion a year for consumers through lower interest rates and better products and services"); *see* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376 (2007) (noting BAPCPA "radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors"); *see also* Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 NW. U. L. REV. 1463, 1464 (2005) (noting "[a]nnual filings rose from 250,000 in 1979 to over 1.5 million last year").

[FN82]. 151 CONG. REC. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch).

[FN83]. 151 CONG. REC. S1834, S1844, (daily ed. Mar. 1, 2005) (statement of Sen. Hatch) (noting for many families, this is equivalent to mortgage or rent payment).

[FN84]. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003: Hearing on H.R. 975 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 108th CONG. 74 (Mar. 4, 2003) (statement of Lucile P. Beckwith, President & CEO Palmetto Trust Federal Credit Union). *See* Mann, *supra* note 81, at 377 ("The catchphrase in the legislative history was 'bankruptcy of convenience."') (citation

omitted); Zywicki, *supra* note 81, at 1526 (suggesting cause of "consumer bankruptcy crisis is not an increase in consumer financial vulnerability but rather an increase in consumers' *propensity* to respond to financial problems by filing bankruptcy and discharging their debts instead of reining in spending or tapping accumulated wealth").

[FN85]. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003: Hearing on H.R. 975 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 108th CONG. 77 (Mar. 4, 2003) (written testimony of Lucile P. Beckwith, President & CEO Palmetto Trust Federal Credit Union) (pointing out November 2002 nationwide survey found sixty eight percent of voters agreed it is "too easy" to file for bankruptcy); *see* Elizabeth Warren, *The Bankruptcy Crisis*, 73 IND. L.J. 1079, 1079 (1998) (asserting alleged crisis caused by one million families filing for bankruptcy proved it is too easy to file for bankruptcy); Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2027 (2003) (discussing Congress' call for tougher bankruptcy laws).

[FN86]. *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003: Hearing on H.R. 975 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 108th CONG. 74 (Mar. 4, 2003) (statement of Lucile P. Beckwith, President & CEO Palmetto Trust Federal Credit Union) ("A January 2003 nationwide survey found that 64 percent of the public feels strongly that it should be made more difficult to declare bankruptcy."); *see* Charles J. Tabb, *Bankruptcy Law and Society: Lessons from the Globalization of Consumer Bankruptcy*, 30 LAW & SOC. INQUIRY 763, 774 (2005) (acknowledging reformers call for stricter bankruptcy laws, placing blame for "bankruptcy explosion" on debtors).

[FN87]. Tabb & McClelland, *supra* note 2, at 463 (reporting sentiments of Rep. Rick Boucher (quoting Press Release, U.S. House of Representatives Committee on the Judiciary, Committee Approves Senate-Passed Bankruptcy Reform Legislation Without Amendment (Mar. 16, 2005) (*available at* http:// judiciary.house.gov/newscenter.aspx?A=467)). *See* Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1305 (2006) (quoting Rep. George W. Gekas, who stated "'[b]ankruptcy has become a way for reckless spenders to escape their debts"'); Katherine A. Jeter-Boldt, *Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement: In re* Gee, Note, 71 MO. L. REV. 1101, 1105 (2006) (discussing abuse of bankruptcy laws and how people with financial problems should choose solution other than filing for bankruptcy).

[FN88]. *See* Tabb & McClelland, *supra* note 2, at 465 (discussing how consumer credit industry wanted to exclude can-pay debtors from chapter 7); Harriet Thomas Ivy, Comment, *Means Testing Under the Bankruptcy Reform Act of 1999: A Flawed Means to a Questionable End*, 17 BANKR. DEV. J. 221, 222 (2000) (proposing solution to large number of bankruptcy filings is means testing); Brian Wildermuth, Note, *In Re Lee: Tithing as Grounds for Dismissal Under Section 707(b) of the Bankruptcy Code*, 26 U. TOL. L. REV. 725, 728 (1995) (explaining *In re* Busbin, 95 B.R. 240, 243 (Bankr. N.D. Ga. 1989), which held "purpose of section 707(b) was to provide for the dismissal of a debtor's case if he had the ability to repay his debts with disposable income").

[FN89]. *See* Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 5 J.L. & COM. 1, 75 (1984) (stating chapter 7 case can be dismissed "on the grounds of 'substantial abuse"'); Tabb & McClelland, *supra* note 2, at 465 (indicating Congress "added" section 707(b) so courts could dismiss cases that substantially abused chapter 7 (citing 11 U.S.C. § 707(b) (1984))); J. Kaz Espy, Comment, *Chapter 7 Bankruptcy and Section 707(b): Should the Subjective "Substantial Abuse" Standard Be Replaced by an Objective "Means-testing" Formula?*, 56 MERCER L. REV. 1385, 1409 (2005)

(discussing courts' discretion to determine what is substantial abuse in order to dismiss case under section 707(b)).

[FN90]. *See* Tabb & McClelland, *supra* note 2, at 465-66 (stating if chapter 7 case was dismissed, "debtor was left with the option to forego bankruptcy relief altogether or proceed voluntarily under chapter 13" (citing 11 U.S.C. § 706(a), (d) (2000))); *see also* Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 677-78 (2005) (discussing how chapter 13 was provided by Congress as alternative to chapter 7 (citing Fidelity & Cas. Co. of N.Y. v. Warren (*In re* Warren), 89 B.R. 87, 95 (B.A.P. 9th Cir. 1988))); Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 665 (2005) (mentioning unless debtors can rebut presumption of being "unworthy of a chapter 7 discharge", then "such 'can-pay' debtors must convert to chapter 13 or 11, or see their cases dismissed").

[FN91]. *See* Price v. U.S. Trustee (*In re* Price), 280 B.R. 499, 505 (B.A.P. 9th Cir. 2002) ("Congress left to the courts the task of interpreting 'substantial abuse.'"'); *In re* Attanasio, 218 B.R. 180, 184 (Bankr. N.D. Ala. 1998) (explaining lack of "guidance" regarding factors defining substantial abuse due to failure to define term); Tabb & McClelland, *supra* note 2, at 465 (noting conflicting legislative history resulting from Congress' failure to define "substantial abuse" (citing *In re Price*, 280 B.R. at 505)).

[FN92]. Tabb & McClelland, *supra* note 2, at 466 (citing CREDIT RESEARCH CTR., CONSUMER BANKRUPTCY STUDY (Krannert Graduate School of Management, Purdue University 1982)). *But cf.* Marrianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 56, 61 (1999) (finding only 3.55% of debtors capable of payment); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 15 (2001) (stating it is not "fair to assume that most debtors can repay a significant portion of their debts").

[FN93]. *See* Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 100 (2007) (stating "courts are justified in taking Congress at its word, that it intended to prevent abuse and to protect consumers, as stated in the name of the legislation"); Jensen, *supra* note 43, at 488-89 (discussing various recommendations of commission to reform law and prevent abuse); Tabb & McClelland, *supra* note 2, at 463 (indicating Bankruptcy Code reflects concern of debtors taking advantage of "a forgiving bankruptcy regime").

[FN94]. *See, e.g.*, 151 CONG. REC. S1813, S1842-43 (daily ed. Mar. 1, 2005) (statement of Sen. Hatch) (supporting Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 as means of preventing abuse of bankruptcy system).

[FN95]. *Bankruptcy Revision: Before the H. Comm. on the Judiciary*, 109th CONG. ___ (2005) (statement of Kenneth Beine, President & CEO of Shoreline Credit Union) (supporting "needs-based bankruptcy" to achieve public policy goal of filing chapter 13 instead of erasing debts); 151 CONG. REC. S1813, S1842 (daily ed. Mar. 1, 2005) (statement of Sen. Hatch) (explaining reform would compel those with available funds to enter chapter 13 reorganization and repayment plan); S. REP. NO. 106-49, at 3 (1999) (illustrating reform "will steer individuals with repayment ability to Chapter 13").

[FN96]. *See* 11 U.S.C. § 707(b)(2) (2006) ("In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter," court presumes there is abuse "if the debtor's current

monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or (II) $10,950."); Tabb & McClelland, *supra* note 2, at 463-64 (acknowledging means test meant to prevent abuse); *see also In re* Lindstrom, 381 B.R. 303, 304 (Bankr. D. Colo. 2007) (explaining abuse is presumed if means test not met).

[FN97]. *See* Tabb & McClelland, *supra* note 2, at 464 ("The main restorative vehicle was the 'means test,' which in [section] 707(b)(2) creates a presumption of 'abuse' that dictates dismissal or conversion of a chapter 7 case for ... 'can-pay' consumer debtors."); *see also In re* Talley, 389 B.R. 741, 743 (Bankr. W.D. Wash. 2008) ("Under 11 U.S.C. § 707(b)(2) a presumption of abuse arises where an ability to pay threshold is exceeded under a means test formula."); *In re* Mestemaker, 359 B.R. 849, 854 (Bankr. N.D. Ohio 2007) (stating "'the court shall presume abuse exists' if the financial calculations set forth in that subsection show current monthly income ... reduced only by" permitted expenses (quoting 11 U.S.C. § 707(b)(2)(A)(i) (2006))).

[FN98]. Carlson, *supra* note 5, at 234 (quoting Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 355). *See In re* Wolf, No. 07-06119-DD, 2008 Bankr. LEXIS 1598, at *13 (Bankr. D.S.C. May 16, 2008) (expostulating after Congress passed 2005 amendments "[t]he presumption in favor of the debtor [was] gone"); *In re* Springirth, No. 07-1437-AJM-7, 2008 Bankr. LEXIS 846, at *7 (Bankr. S.D. Ind. Feb. 29, 2008) ("BAPCPA substantially changed § 707(b) in that it removed the presumption in favor of the debtor ....").

[FN99]. *See In re* Miller, 381 B.R. 736, 741 (Bankr. W.D. Ark. 2008) (stating "[t]he test for abuse under § 707(b) [can be] based on a presumption as defined in § 707(b)(2), or on either bad faith or the totality of the circumstances of the debtor's financial situation as recognized in § 707(b)(3)"). *Compare In re* Fox, 370 B.R. 639, 643 (Bankr. D.N.J. 2007) ("Section 707(b) is plain in its mandate that a debtor's filing in Chapter 7 be subject to the means test computations."), *with In re Mestemaker*, 359 B.R. at 854 (explaining "[i]n determining whether granting relief would be an abuse of the provisions of Chapter 7 in a case in which the presumption 'does not arise or is rebutted,' a court is required to consider whether 'the totality of circumstances ... of the debtor's financial situation demonstrates abuse"' (quoting 11 U.S.C. § 707(b)(3)(B) (2006))).

[FN100]. 11 U.S.C. § 707(b)(1) (2006). *See, e.g., In re* Witek, 383 B.R. 323, 326 (Bankr. N.D. Ohio 2007) ("Under § 707(b)(1), it is provided that where the filing of a Chapter 7 case is found to be an abuse, the Court may dismiss the bankruptcy case filed by individual debtor whose debts are primarily consumer debts."); *In re* Hayes, 376 B.R. 55, 58 (Bankr. D. Mass. 2007) (noting where debt is primarily consumer related court may dismiss bankruptcy case upon finding of abuse if relief were to be granted).

[FN101]. *In re Talley*, 389 B.R. at 743 (explaining under section 707(b) there are two alternative standards for determining whether abuse exists); *In re* Osborne, 383 B.R. 423, 426 (Bankr. N.D. Ohio 2008) (stating two alternative standards exist to determine abuse: using means test formula or examining particular circumstances); *In re Hayes*, 376 B.R. at 58 ("'Abuse' ... may be determined pursuant to either § 707(b)(2) or § 707(b)(3).").

[FN102]. 11 U.S.C. § 707(b)(2)(A) (2006); *see, e.g., In re* Gonzalez, 388 B.R. 292, 299 (Bankr. S.D. Tex. 2008) (positing means test "generally requires debtors to calculate an average net income based on a statutory formula"); *In re Hayes*, 376 B.R. at 58 (stating mathematical test to determine whether presumption of abuse exists is called "means test").

[FN103]. 11 U.S.C. § 707(b)(3)(A) (2006) (providing court shall consider whether debtor filed petition in bad

faith in deciding abuse). *See* Anderson, *supra* note 15, at 5 (indicating bankruptcy cases may be dismissed for abuse in cases of bad faith); *see also* Justin H. Rucki, Note, *Looking Forward While Looking Back: Using Debtors' Post-Petition Financial Changes To Find Bankruptcy Abuse After BAPCPA*, 49 WM. & MARY L. REV. 335, 352 (2007) (positing courts should consider whether debtor filed petition in bad faith when looking for abuse).

[FN104]. 11 U.S.C. § 707(b)(3)(B) (2006) (indicating court shall consider totality of circumstances of "debtor's financial situation" in determining abuse). *See* Anderson, *supra* note 15, at 5 (indicating bankruptcy case can be dismissed for abuse, based on totality of circumstances); *see also* Rucki, *supra* note 103, at 352 (explaining bankruptcy case can be dismissed for bad faith, but also in cases where totality of circumstances of debtor's financial situation demonstrates abuse).

[FN105]. Rucki, *supra* note 103, at 361 (noting means test is "just a formulaic screening mechanism used to generate a presumption"). *See* Wedoff, *supra* note 4, at 231 (noting "the means test operates in the new § 707(b) by creating an apparently strict formula for presuming sufficient debt-paying ability"). *See generally* 11 U.S.C. § 707(b)(3) (2006) (allowing court to consider totality of circumstances or bad faith).

[FN106]. Official Form 22A provides a convenient method to complete the calculations outlined in 11 U.S.C. § 707(b)(2) (2006). *See, e.g.*, *In re* Binninger, No. 07-00203, 2007 WL 3091584, at *2 (Bankr. N.D. Iowa Oct. 19, 2007) ("The Means Test, through a required series of calculations on Form 22A, is designed to determine whether debtors have sufficient disposable income to fund a Chapter 13 plan." (citing *In re* Singletary, 354 B.R. 455, 459 (Bankr. S.D. Texas 2006))); *In re* Hayes, 376 B.R. 55, 57 (Bankr. D. Mass. 2007) (explaining debtors filed "Chapter 7 Statement of Current Monthly Income and Means-Test Calculation" which is Form 22A).

[FN107]. *In re Hayes*, 376 B.R. at 58 (quoting *In re Singletary*, 354 B.R. at 460-61). *See* 11 U.S.C. § 521(a)(1)(B) (2006) (indicating debtor shall file schedule of assets, liabilities, current income, expenditures, statement of financial affairs); *see also* Bucci v. La Rocca, 33 A.2d 878, 879 (Atlantic County Ct. 1943) (referring to bankrupt party's duties in preparing schedules).

[FN108]. 11 U.S.C. § 707(b)(2)(A)(i) (2006) (enumerating calculations for debtor's current monthly income); *see In re Hayes*, 376 B.R. at 58 n.6:

> "Current Monthly Income" is a defined term and refers to:
>
> (A) ... the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—
>
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and
>
> (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes [certain enumerated payments].

(quoting 11 U.S.C. § 101(10A) (2006)); *see also* Wedoff, *supra* note 4, at 232, 243-44 (noting means test assumes current monthly income is total income debtor has available for living expenses and payment of all debt).

[FN109]. 11 U.S.C. § 707(b)(7) (2006) (stating no party may file motion for abuse of system if debtor's current

monthly income is less than state median); *see, e.g., In re Hayes*, 376 B.R. at 58 (discussing if current monthly income is below state income median for household of that size, presumption of abuse does not arise); *In re Singletary*, 354 B.R. at 460 (noting first test of section 707(b) is to determine "whether the debtor's annualized [current monthly income] is lower than the state median income for a household of the same size"). On another note and as another example of drafting ambiguities, there is currently much debate and confusion over the term household size. *Compare In re* Law, No. 07-40863, 2008 WL 1867971, at *4 (Bankr. D. Kan. Apr. 24, 2008) (determining nothing in section 707(b)(2) authorizes debtor to claim his non-dependent son, just because he was living in house during filing); *and In re* Jewell, 365 B.R. 796, 800-01 (Bankr. S.D. Ohio 2007) (holding Bankruptcy Code does not define household and will not accept definition provided by neither debtors nor trustees), *with In re* Plumb, 373 B.R. 429, 438 (Bankr. W.D.N.C. 2007) (interpreting section 707(b) and Form B22C as giving "family size" and "household size" separate meanings).

[FN110]. 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2006).

[FN111]. 11 U.S.C. § 707(b)(2)(A)(i) (stating presumption of abuse is rebutted if debtor's income after expenses is less then $6,000 over 60 months); *see In re* Guerrerio, 383 B.R. 841, 844 (Bankr. D. Mass. 2008) (noting U.S. Trustee's argument if debtor's monthly net income is less than $109.58 per month, then filing is not presumed abusive); *In re Hayes*, 376 B.R. at 58 (noting U.S. Trustee's argument there is no presumption of abuse if per monthly disposable income of debtor is less than $100); *see also In re* Haar, 360 B.R. 759, 762 (Bankr. N.D. Ohio 2007) (suggesting if debtor has ability to pay more then $6,000 over 60 months then presumption of abuse will arise if "such amount will pay at least 25% of the debtor's nonpriority, unsecured claims"). Section 707(b)(2)(A)(i) states:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—
>
> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,575, whichever is greater; or
>
> (II) $10,950.

11 U.S.C. 707(b)(2)(A)(i).

[FN112]. 11 U.S.C. § 707(b)(2)(A)(iv) (2006) (rendering presumption of abuse is not rebutted if debtor's income after expenses is more than $10,000 over 60 months); *see In re Guerrerio*, 383 B.R. at 844 (holding if debtor has monthly net income of more than $109.58 and less than $182.50, filing is presumed abusive "if that sum, when multiplied by 60 months will pay 25% or more of the debtor's non-priority unsecured debts" (quoting UST's Motion to Dismiss at p.2, ¶ 4)); *In re* Hayes, 376 B.R. 55, 58 (Bankr. D. Mass. 2007) (observing U.S. Trustee's argument that if debtor's monthly disposable income exceeds $166.67 per month or $10,000 over the span of 60 months, presumption of abuse arises); *see also In re Haar*, 360 B.R. at 762 (discussing presumption of abuse will arise if debtor has ability to pay $166.67 per month for 60 months "and such amount will pay at least 25% of the debtor's nonpriority, unsecured claims").

[FN113]. 11 U.S.C. § 707(b)(2)(A)(i) (noting additional calculations); *see In re Guerrerio*, 383 B.R. at 844 (discussing if debtor's monthly income is more than $109.58, but less than $182.50, case will be presumed abusive upon further calculations); *In re Hayes*, 376 B.R. at 58-59 (finding if debtor's monthly disposable income is between $100 and $166.67 per month, presumption of abuse arises upon further inquiry); *see also In re Haar*, 360 B.R. at 762 (holding presumption of abuse may arise if debtor's monthly income is between $100 and $166.67 per month).

[FN114]. Secured debt occurs when the creditor holds a lien on the debtor's property while the debt remains outstanding. *See* Naqvi v. Fisher, 192 B.R. 591, 596 (D.N.H. 1995) (holding lien created by agreement is security interest); *In re* Ford, 52 B.R. 553, 555 (Bankr. W.D. Ky. 1985) (discussing security interest is clearly defined as interest in lien created by agreement); *see also In re* Cox, 179 B.R. 495, 499 (Bankr. N.D. Tex. 1995) (noting security interest means "interest in personal property or fixtures which secures payment or performance of an obligation"). The Bankruptcy Code establishes the order in which claims are to be paid out of the bankruptcy estate. 11 U.S.C. § 507 (2006) (outlining specific order for payment of claims); *see In re* Chalk Line Mfg., Inc., 181 B.R. 605, 607-09 (Bankr. N.D. Ala. 1995) (discussing generally existence of hierarchy of claims under section 507); *see also In re* Doug Allen Pontiac Porsche-Audi, 47 B.R. 11, 13 (Bankr. D.S.C. 1984) ("11 U.S.C. [section] 507(d) in its statutory language and as interpreted by the courts does not grant a subrogee the higher priority accorded to a 11 U.S.C. [section] 507(a)(5) creditor."). All claims of a higher priority status must be satisfied before lower priority claims receive any payment from the estate. 11 U.S.C. § 507 (2006) (establishing sequential order of claim priority); *see In re* Albion Heath Servs., 339 B.R. 171, 174 (Bankr. W.D. Mich. 2006) ("However, equality of distribution is not the only policy, for the Bankruptcy Code also reflects the Orwellian notion that some creditors are 'more equal than others.'"); *see also* Crafts Precision Indus., Inc. v. U.S. Healthcare, Inc. (*In re* Craft Precision Indus., Inc.), 244 B.R. 178, 179-80 (B.A.P. 1st Cir. 2000) (declining, in this pre-BAPCPA case, to hold in favor of Crafts, which argued that certain payments under section 507(a)(4) would have priority over claims which did not technically qualify as priority claim under section 507(a)(3)).

[FN115]. 11 U.S.C. § 707(b)(2)(A)(i) (2006) (stating presumption of abuse is rebutted if debtor's income after expenses is less than 25% of debtor's nonpriority unsecured claims); *see In re Guerrerio*, 383 B.R. at 844 (noting U.S. Trustee's argument where if debtor's monthly income "multiplied by 60 months will pay 25% or more of debtor's non-priority unsecured debts", presumption of abuse will arise (quoting UST's Motion to Dismiss at p.2, ¶ 4)); *In re Hayes*, 376 B.R. at 58-59 (noting U.S. Trustee's argument of presumption of abuse will arise if debtor's monthly income is sufficient to pay at least 25% of debtor's nonpriority secured debt); *see also In re Haar*, 360 B.R. at 762 (finding presumption of abuse will arise if debtor's monthly income will pay at least 25% of the debtor's nonpriority unsecured claims).

[FN116]. 11 U.S.C. § 707(b)(2)(B) (2006) (noting special circumstances may rebut presumption of abuse); *see In re* Delbecq, 368 B.R. 754, 761-62 (Bankr. S.D. Ind. 2007) (holding debtor's student loan payments were special circumstances allowing debtor to rebut presumption of abuse); *In re* Haman, 366 B.R. 307, 318 (Bankr. D. Del. 2007) (holding debtor's demonstrating student loan obligations constituted special circumstances allowing her to rebut presumption of abuse).

[FN117]. 11 U.S.C. § 707(b)(2)(B)(i) (2006). *See generally In re* Pageau, 383 B.R. 221, 225-26 (Bankr. D.N.H. 2008) (discussing procedural and substantive requirements for establishing special circumstances); *In re Haman*, 366 B.R. at 312 (explaining procedural requirements for establishing special circumstances).

[FN118]. 11 U.S.C. § 707(b)(2)(B)(i) (noting "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces" qualifies as special condition). *Cf. In re* Turner, 376 B.R. 370, 378 (Bankr. D.N.H. 2007) (stressing medical conditions and active military service are not exclusive qualifiers for special circumstances); *In re* Knight, 370 B.R. 429, 437 (Bankr. N.D. Ga. 2007) (reporting serious medical conditions and calls to active military service are not exhaustive list of special circumstances).

[FN119]. 11 U.S.C. § 707(b)(2)(B)(i) (noting special circumstances can rebut presumption of abuse "to the extent that such special circumstances justify additional expenses or adjustments of current monthly income for

which there is no reasonable alternative"); *see In re* Littman, 370 B.R. 820, 830 (Bankr. D. Idaho 2007) (holding debtor may adjust net monthly incomes for child support payments as child support payments here constituted special circumstances); *In re* Templeton, 365 B.R. 213, 217 (Bankr. W.D. Okla. 2007) (allowing debtors to adjust their net monthly incomes to account for student loan payments because in this situation student loan payments were special circumstances).

[FN120]. 11 U.S.C. § 707(b)(2)(B)(iv) (2006) (noting specific numeric requirements); *see In re* Martin, 371 B.R. 347, 557-58 (Bankr. C.D. Ill. 2007) (holding debtors may deduct student loans from their monthly income as special circumstances and if debtor's monthly income drops below statutory threshold debtor may rebut presumption of abuse); *In re Haman*, 366 B.R. at 318 (providing debtors can rebut presumption of abuse by showing special circumstances).

[FN121]. *See* 11 U.S.C. § 707(b)(1) (2006) (noting conversion may occur if granting relief would abuse provisions of the chapter); *see also In re* Close, 384 B.R. 856, 860 (D. Kan. 2008) (explaining debtor has option to convert to chapter 13 or have his case dismissed if he is unable to rebut presumption of abuse); *In re* Hayes, 376 B.R. 55, 59 (Bankr. D. Mass. 2007) (clarifying debtor may either convert voluntarily to chapter 13 or court may dismiss chapter 7 proceedings if presumption of abuse is not rebutted).

[FN122]. 11 U.S.C. § 707(b)(6) (2006); *see In re* Smale, 390 B.R. 111, 118 (Bankr. D. Del. 2008) (acknowledging first safe harbor to means test identified by Congress to avoid "draconian effects"); *see also In re* Longo, 364 B.R. 161, 164 n.4 (Bankr. D. Conn. 2007) (noting safe harbor found in section 707(b)(6) applies to section 707(b)(3)).

[FN123]. 11 U.S.C. § 707(b)(7) (2006); *see In re Smale*, 390 B.R. at 118 (acknowledging second safe harbor to means test identified by Congress also to avoid "draconian effects"); *see also In re* Pampas, 369 B.R. 290, 293 (Bankr. M.D. La. 2007) (remarking when applying means test "[t]he first step ... is to determine whether the debtor qualifies for section 707(b)(7)' s 'safe harbor' protection").

[FN124]. 11 U.S.C. § 707(b)(2)(D) (2006); *see In re Smale*, 390 B.R. at 118 ("[T]he bill includes a safe harbor ... for a disabled veteran whose indebtedness occurred primarily during a period when the individual was on active duty ...."); *In re* Batzkiel, 349 B.R. 581, 584 (Bankr. N.D. Iowa 2006) (noting "[d]isabled veterans are also excepted from the [m]eans [t]est" so long as indebtedness occurred primarily during period when on active duty (citing 11 U.S.C. § 707(b)(2)(D) (2006))).

[FN125]. 11 U.S.C. 707(b)(1) (2006).

[FN126]. *See In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *3 (Bankr. W.D. Wash. July 18, 2007) ("If Congress meant to limit the application of the means test to debtors who initially or originally filed a petition under Chapter 7, that would have been simple to articulate."); *In re* Perfetto, 361 B.R. 27, 31 (Bankr. D.R.I. 2007) (stating there should not be narrow reading of "filed under" and "upon conversion to Chapter 7 the Debtor is required to complete and file the Form B22A"); Carlson, *supra* note 5, at 315 (noting *In re Donovan* applied pre-BAPCPA section 707(b) yet allowed conversion because debtor was found to be in good faith (citing *In re* Donovan, No. 6:04-bk-01564-ABB, 2006 Bankr. LEXIS 3728 (Bankr. M.D. Fla. Nov. 8, 2006))). *See generally In re Donovan*, 2006 Bankr. LEXIS 3728 (finding converted case eligible for chapter 7 relief).

[FN127]. *In re* Fox, 370 B.R. 639, 648 (Bankr. D.N.J. 2007) (holding debtor who converted her case to one under chapter 7 is not subject to means test because she did not file under chapter 7).

[FN128]. *Id*. at 648 (stating "the language is plain that [section] 707(b)(1) was intended to apply to cases 'filed' under chapter 7").

[FN129]. *Id*. at 640.

[FN130]. *Id*.

[FN131]. *Id*.

[FN132]. *Id*.

[FN133]. *In re* Fox, 370 B.R. 639, 640 (Bankr. D.N.J. 2007).

[FN134]. *Id*. at 641.

[FN135]. *Id*.

[FN136]. *Id*.

[FN137]. *Id*.

[FN138]. *Id*. (arguing case did not fall under section 707 where case was filed under chapter 13 and subsequently converted to chapter 7); *see* 11 U.S.C. § 707(b)(1) (2006) (stating "the court ... may dismiss a case *filed* by an individual debtor under this chapter whose debts are primarily consumer debts") (emphasis added); Carlson, *supra*, note 5, at 314 (suggesting plain meaning of section 707(b)(1) creates "huge loophole" in application of means test in cases that have been converted to chapter 7 but filed initially under different chapter).

[FN139]. *In re* Fox, 370 B.R. 639, 641 (Bankr. D.N.J. 2007) (interpreting section 348(a) as only allowing for order of relief under chapter 7, not constituting filing of petition under that chapter). *See* 11 U.S.C. § 348(a) (2006) (codifying conversion of case from one chapter to another provides for order of relief under latter but "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief"); *see also* Carlson, *supra* note 5, at 315-16 (arguing section 348(a) does not state conversion from chapter 13 to chapter 7 should change case's original filing status; it merely states conversion order is "an order of relief" under chapter 7).

[FN140]. *In re Fox*, 370 B.R. at 641; *see* Cohen v. De La Cruz (*In re* Cohen), 106 F.3d 52, 57 (3d Cir. 1997) (deducing legislative intent by recognizing identical terms within Act have same meaning). *But see In re* Kellett, 379 B.R. 332, 340 (Bankr. D. Or. 2007) (accepting debtor's argument that when applicable, requirement for debtors to perform means test calculation could be waived when case was converted to chapter 7).

[FN141]. *In re Fox*, 370 B.R. at 641.

[FN142]. *In re Fox*, 370 B.R. at 641-42. *See In re* Perfetto, 361 B.R. 27, 30 (Bankr. D.R.I. 2007) (requiring debtor to implement means test upon conversion of her case). *But see In re* Ryder, No. 07-40192 EDJ, 2008 WL 3845246, at *1 (Bankr. N.D. Cal. Aug. 18, 2008) (concluding debtor need not file means test form in conversion case).

[FN143]. *In re Fox*, 370 B.R. at 642.

[FN144]. *See In re Fox*, 370 B.R. at 641-42; Irving A. Breitowitz, *New Developments in Consumer Bankruptcy: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 60 AM. BANKR. L.J. 33, 33-34 (1986) (exploring problems in defining what constitutes "substantial abuse" in chapter 7 cases); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005"*, 79 AM. BANKR. L.J. 191, 193-94 (2005) (describing issues in representing clients where bright line test determines whether party is "abusing" chapter 7 relief).

[FN145]. *In re* Fox, 370 B.R. 639, 642 (Bankr. D.N.J. 2007) (discussing section 707(b)(2)(C)'s requirement that debtor "shall include a statement of the debtor's current monthly income, and the calculations ... demonstrate [] Congress' intent for all debtors in chapter 7—including those debtors who convert their chapter 13 case to one under chapter 7—to satisfy the means test requirements under § 707(b)") (internal citations omitted). *See* INTERIM FED. R. BANKR. P. 1007(b)(4) (requiring individual debtors in chapter 7 cases to file statement of current monthly income, including calculation required by section 707(b) if their income exceeds median family income for applicable state and household size). The Federal Rules of Bankruptcy Procedure are proposed by the United States Supreme Court and then must be approved by Congress. 28 U.S.C. § 2075 (2006).

[FN146]. *In re Fox*, 370 B.R. at 646.

[FN147]. *Id; see In re* Kellett, 379 B.R. 332, 336 (D. Or. 2007) ("[S]tatutory language cannot be construed in a vacuum." (quoting Davis v. Mich. Dep't. of Treas., 489 U.S. 803, 809 (1984))); *see also In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *5 (Bankr. W.D. Wash. July 18, 2007) (requiring debtor to file form pursuant to Interim Rule 1007(b)(4)).

[FN148]. *In re Fox*, 370 B.R. at 645 (noting less narrow language of 1007(b)(4) conflicts with unambiguous language of section 707(b)); *see In re* Ries, 377 B.R. 777, 785 (Bankr. D.N.H. 2007) (finding language of section 707(b) to be unambiguous); *In re Perfetto*, 361 B.R. 27, 29-30 (Bankr. D.R.I. 2007) (noting section 707(b) is not ambiguous).

[FN149]. *In re Fox*, 370 B.R. at 645; *see* United States v. Larionoff, 431 U.S. 864, 873 (1977) (finding regulations must be consistent with related statute in order to be valid); Pacific Gas and Elec. Co. v. United States, 664 F.2d 1133, 1136 (9th Cir. 1981) (holding regulations that conflict with statutes are null); Furlow v. United States, 55 F. Supp. 2d 360, 364 (D. Md. 1999) ("It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations.").

[FN150]. *In re Fox*, 370 B.R. at 646 (finding Congress only intended for originally filed chapter 7 cases to be subject to means test).

[FN151]. *In re* Fox, 370 B.R. 639, 643 (Bankr. D.N.J. 2007) (emphasis omitted).

[FN152]. *In re Fox*, 370 B.R. at 645-46 (noting unlike other sections of Bankruptcy Code, Congress failed to include any indication means test should apply to all chapter 7 cases in this section); *see* 11 U.S.C. § 348(b) (2006) (failing to include section 707(b) as order of relief under this chapter). *See generally* Russello v. United States, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."' (quoting United States v. Wong Kim Bo, 472 F. 2d 720, 722 (5th Cir. 1972))).

[FN153]. *In re Fox*, 370 B.R. at 645-46 (holding words of statute are interpreted to only apply to originally filed chapter 7 cases and not to converted chapter 7 cases); *see In re* Kellett, 379 B.R. 332, 336 (D. Or. 2007) (noting Bankruptcy Code in several areas differentiates between cases converted to chapter 7 and those originally filed as chapter 7 cases); *cf. In re* Perfetto, 361 B.R. 27, 30 (Bankr. D.R.I. 2007) (finding chapter 13 cases converted to chapter 7 to fall under same category as originally filed chapter 7 cases).

[FN154]. *In re Fox*, 379 B.R. at 645-46 ("[N]owhere in the section is there an indication that the drafters meant to apply the means test to debtors who commence their case under another chapter and subsequently convert their case to chapter 7."); *see* Brunstad, *supra* note 51, at 58 (stating "a case converted from chapter 11 or 13 to chapter 7 is not a case 'filed under' chapter 7. Instead, it is a case filed under chapter 11 or 13 and 'converted' to a case under chapter 7. Accordingly, the provisions of [section] 707(b)(1) do not apply in the converted chapter 7 case"). *But see In re Kellett*, 379 B.R. at 340 (holding section 707(b) applies in cases converted to chapter 7 and debtors in such converted cases are generally required to file Form B22A).

[FN155]. *In re* Perfetto, 361 B.R. 27, 28 (Bankr. D.R.I. 2007).

[FN156]. *Id*. at 29.

[FN157]. *Id*.

[FN158]. *Id*. at 30.

[FN159]. *Id*.

[FN160]. *Id*.

[FN161]. *In re* Perfetto, 361 B.R. 27, 30 (Bankr. D.R.I. 2007) ("'[I]t is necessary to consider all relevant sections of the statute, because 'statutory language cannot be construed in a vacuum.'" (quoting *In re* Sours, 350 B.R. 261, 266 (Bankr. E.D. Va. 2006))) (internal citations omitted). *See* United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear ...."); Kelly v. Robinson, 479 U.S. 36, 43 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 217, 221 (1986))).

[FN162]. *In re Perfetto*, 361 B.R. at 30 (recognizing disingenuous filing is unintended result that runs contrary to "public policy and congressional intent" (quoting *In re Sours*, 350 B.R. at 266)); *see, e.g., In re* Morgan, 374 B.R. 353, 360 (Bankr. S.D. Fla. 2007) (looking to legislative history and Congressional intent to interpret statute); *In re* Lenton, 358 B.R. 651, 664 (Bankr. E.D. Pa. 2006) (positing courts use language of statute and legislative history to determine debtor's ability to pay).

[FN163]. *In re Perfetto*, 361 B.R. at 30-31 (quoting 11 U.S.C. § 348(a) (2000)); *see In re* Ybarra, 359 B.R. 702, 706 (Bankr. S.D. Ill. 2007) (determining conversion does not effect change in petition date); Sean P. Gates, *Conversion of the Postconfirmation Chapter 11 Case: Selected Problems, Needed Reform, and Proposed Amendments*, 6 J. BANKR. L. & PRAC. 219, 220 (1997) (finding with some exceptions, conversion does not alter petition filing date).

[FN164]. *In re Perfetto*, 361 B.R. at 30 (quoting 11 U.S.C. § 348(a) (2000)).

[FN165]. *In re Perfetto*, 361 B.R. at 31. *See* FED. R. BANKR. P. 1007(b)(4) (requiring detailed information of debtor's monthly income); *In re* Moates, 338 B.R. 716, 717 (Bankr. N.D. Tex. 2006) (stating 1007(b) requires individual debtor to file current monthly income and allowable deductions).

[FN166]. *In re Perfetto*, 361 B.R. at 31 (quoting FED. R. BANKR. P. 1019(2)); *see In re* Hines, No. 07-50587, 2008 WL 2783351, at *2 (Bankr. M.D.N.C. July 15, 2008) (holding Rule 1019(2) permits new time period for filing complaints although it does not permit new time period for objections to exemptions); *In re* Pendergrass, 376 B.R. 473, 476 n.3 (Bankr. E.D. Pa. 2007) (indicating new time period shall commence when case converts under chapters 11, 12 or 13 to chapter 7, except when case originated under chapter 7 (citing FED. R. BANKR. P. 1019(2))).

[FN167]. *In re* Perfetto, 361 B.R. 27, 31 (Bankr. D.R.I. 2007) ("Under BAPCPA, the starting point for determining whether substantial abuse exists is the Chapter 7 means test ... so that a review of the Debtor's financial condition could be conducted within the renewed filing period for motions under 707(b)."); *see* Resendez v. Lindquist, 691 F.2d 397, 399 (8th Cir. 1982) (positing unfairness for unsecured creditors when certain debts owed under chapter 13 becomes exempt upon successful conversion to chapter 7 (citing *In re* Bradley Jenison, BR. No. 80-05061 (Bankr. N.D. May 8, 1981))); *see also In re* Capers, 347 B.R. 169, 172 (Bankr. D.S.C. 2006) (stating new filing period is consistent with Congressional intent to lengthen time between debtor's discharges).

[FN168]. *In re Perfetto*, 361 B.R. at 31 (denying debtor's discharge because "'a converted case relates back to the initial filing date for all purposes"' (quoting *In re* Sours, 350 B.R. 261, 268-69 (Bankr. E.D. Va. 2006))). For example, see *In re* Fox, 370 B.R. 639, 640-41, 648 (Bankr. D.N.J. 2007), where absurd results occurred. The debtor's means test presented her income as much higher than it was at the time of conversion because the means test used her income for the six months prior to her commencement of her chapter 13 case. *Id*. at 640-41. In addition, the means test did not take into account her reason for converting her case, which was the fact her income dramatically diminished when she was laid off from her job. *Id*. at 641. *But see In re* Ryder, No. 07-40192 EDJ, 2008 WL 3845246, at *1-2 (Bankr. N.D. Cal. Aug. 18, 2008) (suggesting reason for conversion is irrelevant because courts always hold authority to dismiss chapter 13 cases "not filed in good faith").

[FN169]. *In re Perfetto*, 361 B.R. at 31. *See In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *4 (Bankr. W.D. Wash. July 18, 2007) (noting inconsistent language in section 342(d) was "merely sloppy drafting"); *In re* Hardacre, 338 B.R. 718, 725-26 (Bankr. N.D. Tex. 2006) (remarking section 707(b)'s language and meaning is "anything but plain," "superfluous," "broad," and "circular").

[FN170]. *In re Perfetto*, 361 B.R. at 31 (acknowledging necessity of considering "totality of the circumstances in each case"); *see* Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 218 n.111 (2007) (observing how *Perfetto* court did not consider legislative history because "'[a]nyone not in a sound sleep would know that is the last thing the 109th Congress would have intended"' (quoting *In re Perfetto*, 361 B.R. at 30 n.6)); *cf. In re* Kellett, 379 B.R. 332, 340 (Bankr. D. Or. 2007) (noting requirement to file Form B22A is sometimes waivable).

[FN171]. *In re Kerr*, 2007 WL 2119291, at *2-4 (analyzing *In re Fox's* broad reading of section 707(b) as consistent with other pertinent statutes and rules).

[FN172]. *In re Kerr*, 2007 WL 2119291, at *6. *See In re* Perfetto, 361 B.R. 27, 31 (Bankr. D.R.I. 2007)

(discussing court's ad hoc approach to deal with anomalies resulting from BAPCPA which were never addressed by its drafters); *In re* Binion, No. 05-69633, 2006 WL 2668464, at *4 (Bankr. N.D. Ohio Sept. 15, 2006) (describing use of court's inherent power to ease unnecessary burden imposed by BAPCPA revision).

[FN173]. *In re Kerr*, 2007 WL 2119291, at *6 ("A debtor who files bankruptcy in good faith under Chapter 13, then subsequently suffers financial setback that forces conversion to Chapter 7, should have no difficulty rebutting the presumption of abuse if the debtor's circumstances have legitimately worsened."); *see In re* Kellett, 379 B.R. 332, 339-40 (Bankr. D. Or. 2007) (stating debtors who had to convert from chapter 13 to chapter 7 could overcome presumption of abuse by demonstrating special circumstances); *In re* Delbecq, 368 B.R. 754, 757 (Bankr. S.D. Ind. 2007) (acknowledging debtor can show special circumstances in order to rise above means test).

[FN174]. *See, e.g., In re* Fox, 370 B.R. 639, 646-48 (Bankr. D.N.J. 2007) (determining whether debtor is subject to abuse test through means test calculation and discussing congressional intent); *In re* Schoen, No. 06-20864-7, 2007 WL 643295, at *1 (Bankr. D. Kan. Mar. 2, 2007) (stating means test calculation determines abuse); *In re* Perfetto, 361 B.R. 27, 28 (Bankr. D.R.I. 2007) (finding debtor must file means test calculation to determine if presumption of abuse exists); *see* Tabb & McClelland, *supra* note 2, at 464 (stating means test was devised to prevent abuse of chapter 7).

[FN175]. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 467 (11th ed. 2003). It should be noted that the court in *In re Kerr* used the definition "'to put or keep (e.g., papers) in useful order"' and "'to enter (e.g. a legal document) on public official record"' in their analysis. *See In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *3 (Bankr. W.D. Wash. July 18, 2007) (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 477 (1988)).

[FN176]. BLACK'S LAW DICTIONARY 660 (Bryan A. Garner ed., 8th ed. 2004) (providing one definition of "file" is to commence lawsuit).

[FN177]. *In re* Fox, 370 B.R. 639, 642 (Bankr. D.N.J. 2007) (quoting Lamie v. U.S. Trustee, 540 U.S. 526, 533 (2004)).

[FN178]. *In re Fox*, 370 B.R. at 642 (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000)). *See* Old Colony R.R. Co. v. Comm'r, 284 U.S. 552, 560 (1932) ("The legislature must be presumed to use words in their known and ordinary signification." (quoting Levy's Lessee v. McCartee, 31 U.S. 102, 110 (1832))); Escondito Mut. Water Co. v. La Jolla Indians, 466 U.S. 765, 772 (1984) (observing "Congress expresses its purpose through the ordinary meaning of the words it uses").

[FN179]. *In re* Perfetto, 361 B.R. 27, 29 (Bankr. D.R.I. 2007) (noting two exceptions to plain meaning rule (citing *In re* Sours, 350 B.R. 261, 266 (Bankr. E.D. Va. 2006))). *See* United States v. Ron Pair Enter., Inc., 489 U.S. 235, 242 (1989) (indicating plain meaning rule should be followed except in cases where meaning would be contrary to meaning intended by drafters); Comm'r v. Brown, 380 U.S. 563, 571 (1965) (recognizing courts can interpret statutes contrary to plainly stated language, but only in exceptional situations where following plain meaning would lead to absurd results) (citations omitted).

[FN180]. *In re Perfetto*, 361 B.R. at 31 (concluding debtors must satisfy means test upon conversion to chapter 7 in order to obtain relief); *see In re* Kellett, 379 B.R. 332, 340 (Bankr. D. Or. 2007) (finding debtors converting to chapter 7 are generally required to satisfy means test after conversion, but holding this requirement can be

waived in appropriate cases); *In re Kerr*, 2007 WL 2119291, at *3 (agreeing debtor must satisfy means test subsequent to conversion).

[FN181]. *In re Perfetto*, 361 B.R. at 31 (finding not requiring satisfaction of means test upon conversion would lead debtors to use conversion to circumvent means test); *see In re* Coleman, 382 B.R. 759, 762 (Bankr. W.D. Ark. 2008) (stating purpose of means test "is to determine whether the granting of relief under chapter 7 would be considered an abuse of the provisions of that chapter"); Wedoff, *supra*, note 4, at 234 (discussing idea that requiring satisfaction of means test is way for debtor to "avoid dismissal").

[FN182]. *In re Perfetto*, 361 B.R. at 31; *see In re* Capers, 347 B.R. 169, 172 (Bankr. D.S.C. 2006) (positing Congress could not have intended to provide converting debtors with loophole for abuse); *see also In re Sours*, 350 B.R. at 269 (finding literal interpretation of certain statutory language would lead to absurd result, contrary to congressional intent).

[FN183]. *In re Perfetto*, 361 B.R. at 30 (stating to read section 707(b) sensibly, section 348(a) must also be looked at); *see In re* Ybarra, 359 B.R. 702, 706 (Bankr. S.D. Ill. 2007) (stating "it is necessary to examine the meaning of the section within the context of the statutory scheme"); *In re* Grydzuk, 353 B.R. 564, 568 (Bankr. N.D. Ind. 2006) (placing section of statute in context of section 348(a) to deduce meaning).

[FN184]. *See* Copper v. Copper (*In re* Copper), 426 F.3d 810, 817 (6th Cir. 2005) (agreeing with previous case law that chapter 13 petitions can be dismissed for lack of good faith); *In re* Burrell, 186 B.R. 230, 234 (Bankr. E.D. Tenn. 1995) (dismissing chapter 13 complaint for having been filed in bad faith); *infra* Part III.B.

[FN185]. *In re* Perfetto, 361 B.R. 27, 31 (Bankr. D.R.I. 2007); *see In re Kellett*, 379 B.R. at 339 (questioning relevance of income information more than five years old). *But see In re* Fox, 370 B.R. 639, 647-48 (Bankr. D.N.J. 2007) (rejecting idea from *In re Perfetto* that anomalies can be overcome by courts on ad-hoc basis based on totality of circumstances).

[FN186]. 11 U.S.C. § 348(a) (2006) (recognizing conversion of case "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief"); *see In re Ybarra*, 359 B.R. at 709 (holding filing date of debtors' original petition for chapter 13 was filing date for conversion case to chapter 7); *see also* Carlson, *supra*, note 5, at 316 (discussing filing date in conversion cases).

[FN187]. 11 U.S.C. § 707(b)(2)(B)(i) (2006) ("In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces ...."). *See In re* Witek, 383 B.R. 323, 329 (Bankr. N.D. Ohio 2007) (explaining, to be valid, alleged "special circumstances" must contain qualities of listed statutorily recognized examples); *In re* Vaccariello, 375 B.R. 809, 813 (Bankr. N.D. Ohio 2007) (determining 11 U.S.C. section 707(b)(2)(B)(i) contains only two listed "special circumstances" although circumstances are not exclusive).

[FN188]. *In re Fox*, 370 B.R. at 640-41.

[FN189]. *Id*. at 640.

[FN190]. *Id*.

[FN191]. *In re* Fox, 370 B.R. 639, 641 (Bankr. D.N.J. 2007).

[FN192]. *Id*. at 640-41.

[FN193]. *See id*. at 647 (illustrating, in *In re Perfetto*, "conversion to chapter 7 would not present an accurate picture of the debtor's current and relevant financial circumstances" because debtor "convert[ed] to chapter 7 months after filing a petition under chapter 13"); *see also In re* Perfetto, 361 B.R. 27, 30 (Bankr. D.R.I. 2007) (noting most courts have held "[the filing date of] 'a converted case relates back to the initial filing date for all purposes"' under 11 U.S.C. section 348(a) and under section 348(a), case that has been converted from chapter 13 to chapter 7 "is deemed to be 'filed under' Chapter 7 on the date on which the Chapter 13 was filed") (citation omitted); Mary Pat Gallagher, *Means Test Held Not to Apply to Converted Ch. 7 Bankruptcies*, 188 N.J.L.J. 869, 869 (2007) (noting Judge Burns in *In re Fox* stated "requiring the means test would lead to the absurd result that Fox would have to look back at her income for the six months before she filed her Chapter 13 petition, despite the change in her circumstances since then").

[FN194]. *See* Brunstad, *supra* note 51, at 58 (noting "[i]f Congress had intended the conversion of a case to constitute the 'filing' of a new case, it would have said so" but, because Congress failed to state such, it "did not intend the conversion to constitute a new filing"); *see also In re Fox*, 370 B.R. at 643 (stating drafters of BAPCPA did not state it wanted means test to be applied to "cases converted to chapter 7"); *In re Perfetto*, 361 B.R. at 30 & n.6 (mentioning AUST's argument that Congress did not intend to "create a procedural charade wherein debtors could evade the means test by filing a Chapter 13 petition, then immediately converting the case to Chapter 7, and avoiding scrutiny under Section 707(b)").

[FN195]. *See* 151 CONG. REC. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (advocating bill "with its means test, will discourage such abusive filings" and "acts to stop abuse"); *see also In re Perfetto*, 361 B.R. at 29 (explaining BAPCPA amended 11 U.S.C. section 707(b) "to include a Chapter 7 means test to determine whether the filing would 'be an abuse of the provisions of chapter 7"'); Tabb & McClelland, *supra* note 2, at 463-64 ("The stated goal of the 2005 Amendments to the Bankruptcy Code was to restore integrity to the system by preventing 'abuse."' (citing H.R. REP. NO. 109-31, pt.1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89)).

[FN196]. *See Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 41 WEEKLY COMP. PRES. DOC. 641-42 (Apr. 20, 2005) (advocating if system is made fairer, then "more Americans can get access to affordable credit"); *see also* 151 CONG. REC. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (stressing everyone "should stand behind a law that requires people with the ability to repay their debts to actually repay those debts"); Tabb & McClelland, *supra* note 2, at 464 (noting means test would "dictate[] dismissal or conversion of a chapter 7 case for ... 'can-pay' consumer debtors" because of "presumption of abuse").

[FN197]. Marrama v. Citizens Bank of Mass., 127 S. Ct. 1105, 1107 (quoting Grogan v. Garner, 498 U.S. 279 (1991)). *See generally* Tedra Hobson, Note, *The Bankruptcy Abuse* Creation *Act?: Curing Unintended Consequences of Bankruptcy Reform*, 40 GA. L. REV. 1245, 1271 (2006) ("'One of the primary purposes of the Bankruptcy Act is to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."'" (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)); Waldron & Berman, *supra* note 170, 206 (2007) (stating "'[t]he principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor"') (citation omitted).

[FN198]. *See In re* Lightsey, 374 B.R. 377, 381-82 (Bankr. S.D. Ga. 2007) (stating debtors will be excused from payment when circumstances are beyond their control or "unforeseeable"); *In re* Freund, 271 B.R. 907, 910 (Bankr. S.D. Fla. 2001) (holding debtors were entitled to bankruptcy protection because circumstances which made payment impossible were unforeseeable); *In re* Falotico, 231 B.R. 35, 42 (Bankr. D.N.J. 1999) (recognizing bankruptcy law protects debtors from financial situations "beyond their control").

[FN199]. 11 U.S.C. § 707(b)(3) (2006). *See* Perlin v. Hitachi Capital Am. Corp., 497 F.3d 364, 367 (3d Cir. 2007) (applying bad faith standard when considering dismissing debtor's case); *In re* Nockerts, 357 B.R. 497, 507-08 (Bankr. E.D. Wis. 2006) (applying totality of circumstances test when considering dismissing debtor's case).

[FN200]. *See In re* Mestemaker, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007) (reasoning since Congress "incorporated" judicially created "totality of the circumstances" test into statute, pre-BAPCPA case law is useful to determine bad faith); *In re* Mitchell, 357 B.R. 142, 153-54 (Bankr. C.D. Cal. 2006) (stating court will borrow pre-BAPCPA "'substantial abuse"' test for situations now covered by BAPCPA). *But see In re* Seeburger, No. 07-33081, 2008 WL 3414137, at *3 (Bankr. N.D. Ohio Aug. 8, 2008) ("Although pre-BAPCPA case law applying these concepts is still helpful in determining abuse under [section] 707(b)(3), under BAPCPA Congress has lowered the standard for dismissal in changing test from 'substantial abuse' to 'abuse."').

[FN201]. *In re Nockerts*, 357 B.R. at 505 (listing three main approaches devised by circuit courts (citing *In re* Ontiveros, 198 B.R. 284, 287 (C.D. Ill. 1996))). *See In re* Cribbs, 387 B.R. 324, 334 (Bankr. S.D. Ga. 2008) (describing use of three approaches circuit courts used before implementation of BAPCPA); *In re* Henebury, 361 B.R. 595, 604-06 (Bankr. S.D. Fla. 2007) (discussing pre-BAPCPA split among circuit courts).

[FN202]. *Compare In re Nockerts*, 357 B.R. at 497 ("[M]ore than an ability to pay ... must be shown to demonstrate abuse under § 707(b)(3)(B)."), *with In re Henebury*, 361 B.R. at 607 ("[T]he ability to pay, standing alone, is sufficient to warrant dismissal of a Chapter 7 case for abuse pursuant to 11 U.S.C. § 707(b)(3)(B)."), *and In re* Haar, 373 B.R. 493, 500 (Bankr. N.D. Ohio 2007) ("[T]he Court must reject the Debtors' position that, in weighing the 'totality of circumstances' under [section] 707(b)(3), the Court cannot consider solely a debtor's ability to pay.").

[FN203]. 11 U.S.C. § 707(b)(3) (2006).

[FN204]. *See In re* Simmons, 357 B.R. 480, 488-89 (Bankr. N.D. Ohio 2006) (acknowledging when determining abuse under section 707(b)(3), most courts measure ability of debtor to repay debts); *In re* Pak, 343 B.R. 239, 243-44 (Bankr. N.D. Cal. 2006) (holding court may consider ability of debtor to repay debts when analyzing "the totality of circumstances of his financial situation"); *see also In re* Lenton, 358 B.R. 651, 663 (Bankr. E.D. Pa. 2006) (inferring if debtor's ability to pay back his debt was not intended to be considered, Congress would have eliminated factor expressly).

[FN205]. *In re Pak*, 343 B.R. at 244.

[FN206]. *Id*. at 245-46 (citing 11 U.S.C. § 1325(b)(3) (2006)).

[FN207]. *Id*. at 246.

[FN208]. *See In re* Henebury, 361 B.R. 595, 603 (Bankr. S.D. Fla. 2007) (stating inquiry does not cease with

debtor's passing of means test and "discretionary finding of abuse" under section 707(b)(3) is still permissible) (citations omitted); *In re* Walker, No. 05-15010-whd, 2006 WL 1314125, at *8 (Bankr. N.D. Ga. May 1, 2006) (stating "[i]n cases in which the presumption of abuse does not arise or is rebutted, the U.S. Trustee may pursue dismissal of debtor's case under section 707(b)(3)"); *cf. In re Lenton*, 358 B.R. at 660 (positing means test only indicates whether or not debtor will avoid presumption of abuse and should not be used to determine debtor's ability to repay his debts).

[FN209]. Marrama v. Citizens Bank of Mass., 127 S. Ct. 1105, 1111-12 (2007).

[FN210]. *Id*. at 1108.

[FN211]. *Id*. at 1111-12 (noting authority of bankruptcy judge to deny conversion in light of "fraudulent conduct").

[FN212]. *Id*. (holding debtor had converted in bad faith and thus was not allowed to proceed under chapter 13); *see In re* Shankman, 382 B.R. 591, 596-97 (Bankr. E.D.N.Y. 2008) (acknowledging *Marrama* stands for proposition that conversion can be denied upon finding of bad faith); Perez v. Peake, 373 B.R. 468, 487 (S.D. Tex. 2007) (acknowledging *Marrama* Court resolved split among courts when it held conversion can be denied upon finding of bad faith).

[FN213]. *Marrama*, 127 S. Ct. at 1111-12. Section 706(d) states, "Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." 11 U.S.C. § 706(d) (2006).

[FN214]. *Marrama*, 127 S. Ct. at 1112 (affirming finding below, which found "facts established a 'bad faith' case").

[FN215]. *Id*. at 1111; *see In re* Splawn, No. 7-05-19019 MA, 2008 WL 1914253, at *3 (Bankr. D.N.M. Apr. 25, 2008) (reaffirming "debtor can forfeit his or her right to convert ... when the debtor seeks to convert in bad faith"); *In re* Piccoli, No. 06-2142, 2007 WL 2822001, at *6 (Bankr. E.D. Pa. Sept. 27, 2007) (noting bad faith conduct acts as "sufficient" basis to deny conversion).

[FN216]. 11 U.S.C. 348(a) (2006). Section 348 states:

> (a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.
>
> (b) Unless the court for cause orders otherwise, in sections 701(a), 727(a)(10), 727(b), 728(a), 728(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d)(4), 1146(a), 1146(b), 1201(a), 1221, 1228(a), 1301(a), and 1305(a) of this title, "the order for relief under this chapter" in a chapter to which a case has been converted under section 706, 1112, 1208, or 1307 of this title means the conversion of such case to such chapter.

11 U.S.C. § 348 (2006). *See In re* Morris, 155 B.R. 422, 426 (Bankr. W.D. Tex. 1993) (stating pursuant to section 348, case "converted pursuant to section 1112" which has been converted for relief is filed under date of chapter converted to (chapter 7)); *In re* Tucker, 133 B.R. 819, 820 (Bankr. W.D. Tex. 1991) (indicating upon conversion, case should be treated as having been filed under chapter to which it is converted).

[FN217]. *See* Resendez v. Lindquist, 691 F.2d 397, 399 (8th Cir. 1982) (finding "when there is conversion" of chapter 13 to chapter 7 proceeding, "debtors are deemed to have filed a Chapter 7 case at the time the Chapter 13 case was filed"); *In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *3-4 (Bankr. W.D. Wash. July 18, 2007) (concluding while original filing date is retained upon conversion, "case is otherwise treated as if the debtor had originally filed under the converted chapter"); *In re* Perfetto, 361 B.R. 27, 30-31 (Bankr. D.R.I. 2007) (stating it is "well settled" when debtors convert to another chapter, they are deemed to have filed under "converted to" chapter as of date of filing of original petition).

[FN218]. *See In re* Fox, 370 B.R. 639, 643 (Bankr. D.N.J. 2007) (interpreting from provisions of section 707(b) if "drafters intended for cases converted to" chapter 7 to be subject to new means test requirement, they did not articulate such intentions in "clear language of the section"); *see also In re* Ryder, No. 07-40192 EDJ, 2008 WL 3845246, at *1 (Bankr. N.D. Cal. Aug. 18, 2008) (upholding idea Congress meant to limit reach of means test to cases originally commenced under chapter 7, not cases filed under other chapters and then converted to chapter 7); *In re* Miller, 381 B.R. 736, 741 (Bankr. W.D. Ark. 2008) (positing "based on Congress's mandated means test" filed by individual debtors under chapter 7, section 706(b) applies to chapter 7 filings, not to "case filed under chapter 13 and later converted").

[FN219]. *In re Kerr*, 2007 WL 2119291, at *3.

[FN220]. 11 U.S.C. § 348(a) (2006) ("Conversion of a case from a case under one chapter of this title to a case under another chapter ... does not affect a change in the date of the filing of the petition, the commencement of the case, or the order for relief."); *see In re* Sadler, 935 F.2d 918, 920 (7th Cir. 1991) (stating converted case "retains all of the original filing dates"); Allen v. Phila. Elec. Co., 69 B.R. 867, 875 (Bankr. E.D. Pa. 1987) (concluding date of order for relief is same as date established upon filing of original petition since conversion does not change date of order for relief).

[FN221]. Brunstad, *supra* note 51, at 58 ("[S]everal sections of the Code establish that the conversion of a case from chapter 11 or 13 to chapter 7 does not require, and does not constitute, the 'filing' of a new case under chapter 7."). *See In re* Kellett, 379 B.R. 332, 336 (Bankr. D. Or. 2007) (stating "conversion does not commence a new bankruptcy case"); *cf. In re* Harris, No. 07-00585, 2008 WL 458730, at *1 (Bankr. D.D.C. Feb. 15, 2008) (noting although conversion constituted order for relief, it had no effect on original filing date).

[FN222]. *In re* Grydzuk, 353 B.R. 564, 569 (Bankr. N.D. Ind. 2006) (noting "debtor [beginning] a case in Chapter 7, converts to Chapter 13 and receives a discharge in the Chapter 13 case—would be precluded from obtaining a discharge in a subsequent Chapter 13 case filed four years or less from the date of the filing of the Chapter 7 case"). Congress enacted a provision in BAPCPA which prevented a debtor from filing another bankruptcy in the two years after reaching a discharge in a chapter 13 case or in the four years upon completion of a chapter 7 case. 11 U.S.C. § 1328(f)(1) (2006). *See In re* Dyer, Nos. 07-32281, 07-32595, 2007 WL 2915530, at *1 (Bankr. E.D. Tenn. Oct. 3, 2007) (holding under section 1328(f)(1) four year period applies to "date of filing of the prior case rather than the date of discharge"); *In re* Sours, 350 B.R. 261, 268 (Bankr. E.D. Va. 2006) (recognizing debtors could not file chapter 7 until four years after they received discharge from chapter 13).

[FN223]. *In re Grydzuk*, 353 B.R. at 568. *See In re Dyer*, 2007 WL 2915530, at *1 (Bankr. E.D. Tenn. Oct. 3, 2007) (holding four year period applies to date of filing of prior case rather than date of discharge); *In re Sours*, 350 B.R. at 269 (holding debtor "would have needed to wait at least four years from the date of their previous filing" to get discharge).

[FN224]. 11 U.S.C. § 1307(g) (2006) (stating "a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter"). *See In re* Garrett, No. 08-31324-KRH, 2008 WL 2206559, at *3 (Bankr. E.D. Va. May 23, 2008) (remarking there is no "absolute right" to covert case under another chapter); *In re* Kellett, 379 B.R. 332, 336 (Bankr. D. Or. 2007) (indicating debtor may convert case from one chapter to another if debtor meets limitation under section 1307(g) that qualifies it as debtor under this chapter).

[FN225]. 11 U.S.C. § 109(a) (2006).

[FN226]. 11 U.S.C. § 109(b) (2006).

[FN227]. Brunstad, *supra* note 51, at 58-59 (citing Toibb v. Radloff, 501 U.S. 157, 160 (1991)) (footnotes added). *See* Toibb v. Radloff, 501 U.S. 157, 160 (1991) (stating section 109 determines who is debtor); *In re* Estate of Whiteside, 64 B.R. 99, 100 (Bankr. E.D. Cal. 1986) (noting section 109 provides who may be debtor under Code, and sections 109(a) and (b) outline who may be debtor under chapter 7 and who fails to qualify).

[FN228]. 11 U.S.C. § 109(a) (2006) ("[O]nly a person that resides or has a domicile, a place or business, or property in the United States, or a municipality, may be a debtor under this title."); 11 U.S.C. § 109(b) (2006) (defining particular businesses that do not qualify as debtors under chapter 7, such as insurance company, savings bank, and savings and loan association); Brunstad, *supra* note 51, at 59 (explaining sections 109(a) and (b) establish who "'may be a debtor"' under chapter 7 and lists those businesses, including financial institutions and insurance companies, that do not qualify).

[FN229]. S. REP. NO. 95-989, at 54-55 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5817. *See Toibb*, 501 U.S. at 161 (observing section 109(b) expressly denies "railroads and various financial and insurance institutions" from qualifying as debtor under chapter 7); *see also In re* Peoples Bankshares, Ltd., 68 B.R. 536, 540 (Bankr. N.D. Iowa 1986) (stating "banks, savings banks, savings and loan associations, and other similar institutions" do not receive bankruptcy relief under chapter 7 because they are covered under other regulatory laws) (citations omitted).

[FN230]. *See* Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) (warning language cannot be read into statutes); FCC v. NextWave Pers. Comm'ns, Inc., 537 U.S. 293, 302 (2003) (explaining "where Congress has intended to include regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly"); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (stressing meaning intended by legislature is included in statute's language, and statute means only what its language states).

[FN231]. 11 U.S.C. § 707(b)(1) (2006).

[FN232]. 11 U.S.C. § 707(b)(2)(A)(i) (2006).

[FN233]. 11 U.S.C. § 1325(a)(4) (2006) (recognizing value on unsecured claim is "not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7"); *see* Roger M. Whelan et al., *Consumer Bankruptcy Reform: Balancing the Equities in Chapter 13*, 2 AM. BANKR. INST. L. REV. 165, 165 (1994) (indicating purpose of chapter 13 bankruptcy is to provide opportunity to debtor to "rehabilitate and reorganize by repaying their debt"); *cf.* Murphy v. O'Donnell (*In re* Murphy), 474 F.3d 143, 148 (4th Cir. 2007) (stating how much unsecured creditors should be paid).

[FN234]. *See* 11 U.S.C. § 1325(a)(4) (2006) ("[T]he court shall confirm a plan if ... the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 ...."); *In re Murphy*, 474 F.3d at 148 (stating amount must be "at least as much as they would receive in a Chapter 7 liquidation"); *see also* Wedoff, *supra* note 4, at 232-33 (stating "disposable income test" implemented by chapter 13 "can result in much larger payments to creditors than they would receive in Chapter 7").

[FN235]. *See* Anderson, *supra* note 15, at 12-13 ("Certain debts that were broadly discharged in Chapter 13 under prior bankruptcy law have now been excepted from such discharge." (citing 11 U.S.C. 1328(a) (2006))); *see also* Henry E. Hildebrand, III, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 373 (2005) ("BAPCPA imposes additional requirements on debtors and practitioners before relief will be available."); James J. White, *Abuse Prevention 2005*, 71 MO. L. REV. 863, 871-72 (2006) (highlighting recent additions and requirements for chapter 13 filings and impact it has on debtors).

[FN236]. *See* 11 U.S.C. § 1325(b) (2006) (listing "applicable commitment period" as "not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by [twelve] is not less than ..." and detailing related requirements); Feather D. Baron, *The Nondischargeability of Student Loans in Bankruptcy: How the Prevailing "Undue Hardship" Test Creates Hardship of Its Own*, 42 U.S.F. L. REV. 265, 267-69 (2007) (examining increased burden on debtors due to five-year plan); White, *supra* note 235, at 871-72 (finding extension of time as one factor in increasing difficulty for debtors filing chapter 13 under BAPCPA).

[FN237]. *See* 151 CONG. REC. S2225 (daily ed. Mar. 8, 2005) (statement of Sen. Dodd) (stating two-thirds of chapter 13 repayment plans fail); Braucher, *supra* note 87, at 1319 (reporting "most debtors do not complete their [repayment] plans"); *see also* Brunstad, *supra* note 51, at 58 (noting "the commencement of a case often gives rise to an order for relief").

[FN238]. *See, e.g., In re* Brock, 365 B.R. 201, 212 (Bankr. D. Kan 2007) (holding best interests of creditors would be better served by converting case to proceedings under chapter 7); *In re* Stoller, 351 B.R. 605, 622-23 (Bankr. N.D. Ill. 2006) (holding chapter 13 debtor's lack of candor in filing bankruptcy schedules and statement of financial affairs which were "replete with false statements, misleading information, and omissions of material facts" warranted finding of "bad faith" and converting his bankruptcy case to one under chapter 7); *see* 11 U.S.C. § 1307(c) (2006) (listing particular occurrences which may compel court to convert or dismiss debtor's case in best interests of creditor).

[FN239]. *See* 11 U.S.C. § 1307(c) (2006) (setting forth circumstances for which conversion is appropriate including those which consider abuse of chapter 13); David A. Hardy, Comment, *Conversion from Chapter 13 to Chapter 7 of the Bankruptcy Code: What Constitutes Property of the Post-Conversion Estate*, 1992 BYU L. REV. 1105, 1114 (1992) (stressing "creditors may force conversion upon a recalcitrant debtor"); *see also* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 430 F.3d 474, 477 (1st Cir. 2005), *aff'd* 127 S. Ct. 1105 (2007) (positing "bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code").

[FN240]. *See, e.g., In re* Robino, 243 B.R. 472, 486 (Bankr. N.D. Ala. 1999) (noting debtor's failure to file required reports is cause for conversion); *In re* Cloisters of Brevard, Inc., 117 B.R. 722, 723 (Bankr. M.D. Fla. 1990) (finding cause existed for converting chapter 11 case to chapter 7 because debtor disbursed estate funds

without court approval); *In re* Brauer, 80 B.R. 903, 909 (Bankr. N.D. Ill. 1987) (holding debtor's failure to file "past-due statements" was bad faith and such conduct was cause justifying bankruptcy court's dismissal of case).

[FN241]. *See* H.R. REP. NO. 109-31, pt. 1, at 2 (2005)), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89 ("The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."); *see also* 11 U.S.C. § 707(b) (2006) (outlining when courts may presume debtor abuse exists); *Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 41 WEEKLY COMP. PRES. DOC. 641-42 (Apr. 20, 2005) (observing reforms to bankruptcy law will ensure debtors make "good-faith effort to repay as much as they can afford").

[FN242]. *See* Weiss, *supra* note 30, at 18 (describing historical origins of bankruptcy protections). *See generally* Tabb, *History of the Bankruptcy Laws*, *supra* note 79, at 81 (detailing evolution of Bankruptcy Law from pre-Constitutional origins); Arnold M. Quittner, *Overview: History of the Bankruptcy Code and Prior Bankruptcy Laws*, 402 PRACTISING L. INST. 7, 23-30 (1986) (expounding on American bankruptcy law's origins in classic Roman law and subsequent development).

[FN243]. *See* Schultz v. United States, 529 F.3d 343, 347 (6th Cir. 2008) ("In 2005, the landscape for bankruptcy filings dramatically changed."); George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV. 297, 346-50 (2006) (describing mechanics of how BAPCPA and means test "fundamentally changed the landscape and dynamics of consumer bankruptcy"); *supra* notes 1-3 and accompanying text.

[FN244]. *See* James P. George, *Reimposable Discounts and Medieval Contract Penalties*, 20 LOY. CONSUMER L. REV. 50, 51 (2007) (characterizing BAPCPA as "move" by Congress to "make bankruptcy more difficult to obtain"); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2612 n.132 (2008) ("'[BAPCPA] ... takes direct aim at the ability of consumers to discharge their debts through Chapter 7 Liquidation and Chapter 13 Reorganization by making the process more difficult and more expensive ....'" (quoting Michael J. Davis, *The New Bankruptcy Code: Goodbye Consumer Chapter 7 Cases*, 17 DCBA BRIEF 16, 16 (2005))); *supra* notes 23-25 and accompanying text.

[FN245]. *See* 11 U.S.C. § 707(b)(2) (2006); *In re* Randle, 358 B.R. 360, 361 (Bankr. N.D. Ill. 2006) (describing means test calculation); *In re* Benedetti, 372 B.R. 90, 92 (Bankr. S.D. Fla. 2007) (elucidating means test "calculation").

[FN246]. *See In re* Kerr, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *4 (Bankr. W.D. Wash. July 18, 2007) (holding section 707(b) applied to cases converted from chapter 13 to chapter 7 and such debtors must file Form B22A (chapter 7 means test form)); *In re* Perfetto, 361 B.R. 27, 30-31 (Bankr. D.R.I. 2007) (holding debtor must file Form B22A (chapter 7 means test form) upon conversion from chapter 13 to chapter 7). *But see In re* Fox, 370 B.R. 639, 647-48 (Bankr. D.N.J. 2007) (declining to follow *Perfetto* court's rationale or holding).

[FN247]. *See supra* Part III.E.

[FN248]. *See* Jay Cristol & Cheryl Kaplan, *11 U.S.C. 707(B)(2)(A)(III): Does It Mean What It Says and Say What It Means?*, 19 UNIV. OF FL. J. OF LAW AND PUB. POL. 1, 4 (discussing means test calculation and analysis of debtor's current monthly income to repay debts); Evan J. Zucker, Note, *The Applicable Commitment Period: A Debtor's Commitment to a Fixed Plan Length*, 15 AM. BANKR. INST. L. REV. 687, 711 (2007)

("The cornerstone of the BAPCPA reform was the creation of the chapter 7 means test. Under this test, debtors believed to have the ability to repay a meaningful portion of their debts will be required to repay a portion of their debts through a repayment plan."); Wedoff, *supra* note 4, at 231 (stating purpose of means test is "to measure the ability of Chapter 7 debtors to repay debt and then, if they have sufficient debt-paying ability, to make them repay at least some of their debt—likely through chapter 13—in order to receive a bankruptcy discharge").
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