Issues, Trends and Ethical Problems in Chapter 7 Cases under BAPCPA

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Proposed Changes in the Means Test Forms

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This paper sets out changes to the means test forms that were approved, in substance, at the meeting of the Advisory Committee on Bankruptcy Rules, held March 29-30. These proposed changes may be altered for style, and are subject to further review by the standing rules committee and the Judicial Conference of the United States. In addition to the changes discussed here, there are several changes required to comply with the triennial cost-of-living adjustment mandated by § 104 of the Bankruptcy Code. The changes are discussed here in the order they appear in Form 22C (and, where applicable, the corresponding change in Form 22A), followed by a change affecting only Form 22A.

1. Form 22C, Line 3 (Form 22A, Line 4)

Income from self-employment.

The Committee has proposed an addition to the instructions for reporting income from the operation of a business, profession, or farm, to deal with situations in which debtors operate more than one such entity. The addition states: "If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment."

2. Form 22C, Lines 7 and 9 (Form 22A, Lines 8 and 10)

Treatment of support payments as current monthly income.

The definition of current monthly income ("CMI") in § 101(10A) has two parts. The first part, (10A)(A), is general, defining CMI as "average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable." The second part, (10A)(B) contains specific inclusions and exclusions from CMI, beginning with the provision that CMI "includes any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents." Some support payments—alimony and separate maintenance payments—are within the general (10A)(A) definition (income received by the debtor) and so should not be limited by the provision of (10A)(B) that includes only regular payments of household expenses. *See* 26 U.S.C. § 71(a) (alimony and separate maintenance are "gross income" for tax purposes). Child support, however, is not considered income to the recipient. *See* 26 U.S.C. § 71(c) (excluding child support payments from the scope of § 71(a)); *Preston v. Commissioner,* 209 F.3d 1281, 1284 (11th Cir. 2000) (child support payments do not constitute income to the recipient spouse and cannot be deducted from the income of the paying spouse). Thus, child support payments are properly included in CMI only to the extent regularly paid for the household expenses of the debtor's dependents under (10A)(B).

To deal properly with this distinction, the Committee has proposed that Line 7 of Form 22C would be modified to include the average of all alimony and separate maintenance payments received by the debtor in the six calendar months before filing, regardless of whether they were paid on a regular basis or were for household expenses. Child support payments, however, would continue to be subject to the (10A)(B) limitations.

3. Form 22C, Lines 13 and 19 (Form 22A, Line 17)

Marital adjustment.

The Committee has proposed additions to the instructions dealing with the situation of married debtors filing separately from their spouses. In these situations, the Code (and hence the forms) require that for some purposes, all of the income of the non-filing spouse be counted, but that for other purposes, only part of the income of the non-filing spouse—the income regularly used to pay household expenses of the debtor or the debtor's dependents ("debtor expenses")—is counted. The forms deal with this situation by requiring a disclosure of all of the non-filing spouse's income, but then providing for an adjustment—deducting the income not used to pay debtor expenses. To clarify the purpose for this adjustment the Committee determined that the should specify the purposes to which the non-filing spouse put any income not used to pay the debtor's household expenses. To accomplish this, the Committee has proposed the following content for Form 22A, Line 17:

17	**Marital adjustment.** If you checked the box at Line 2.c, enter on Line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero.

a.		$
b.		$
c.		$

Total and enter on Line 17.

Similar changes are proposed in Form 22C, Lines 13 and 19, but since Line 13 presents an optional adjustment (used only if the debtor contends that the full income of a non-filing spouse should not be used for calculating the applicable commitment period), the instruction is somewhat more complex:

> If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does not require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If any of the conditions for entering this adjustment do not apply, enter zero.

4. Headings for Form 22C, Part IV (Form 22A, Part V)

Accuracy of headings.

The problem addressed here is that the existing headings are inaccurate in limiting to "§ 707(b)(2)" the deductions from current monthly income included in the sections that they introduce. One of the included deductions—the one for charitable contributions—is not set out in § 707(b)(2) but rather is found in §1325(b)(3) (for Form 22C) and § 707(b)(1) (for Form 22A).

To avoid this inaccuracy, the Committee has proposed that the headings be changed as follows: the heading for Part V of Form 22A and Part IV of Form 22C should be "CALCULATION OF DEDUCTIONS FROM CURRENT MONTHLY INCOME," the heading for Subpart B should be "Additional Living Expense Deductions," and the heading for Subpart D should be "Total Deductions from Current Monthly Income."

5. Form 22, Lines 24 and 44 (Form 22A, Lines 19 and 39)

References to the content of the National Standards for living expenses.

In order to conform more closely to the language used in the Internal Revenue Manual, the Committee has proposed changing the "clothing" reference in the instruction for applying the National Standards to "apparel and services," changing the "household supplies" reference to "housekeeping supplies," and the "food and apparel" reference to "food and clothing (apparel and services)."

6. Form 22C, Lines 24, 25A, and 25B (Form 22A, Lines 19, 20A, and 20B)

Use of the debtor's "household" instead of "family" size in instructions for determining applicable deductions.

In order to determine the proper National and Local Standard deductions for living expenses, a debtor must specify the number of persons for whom the deductions are applicable. The current forms refer to this number as the debtor's "family size," apparently because there are references to "family" in the Internal Revenue Manual and because § 707(b)(6) and (7) compare the debtor's income to the "median family income" reported by the Census Bureau. However, in making this comparison, § 707(b)(6) and (7) themselves use the number of persons in the debtor's "household," and the Bureau of Labor Statistics, which provides the basis for the IRS's National and Local Standard living expense deductions, measures expenses by household size.[1] Accordingly, the Committee has proposed that "family size" be changed to "household size" in the lines for National and Local Standard deductions.

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[1] "Household" size is not expressly specified by the Internal Revenue Manual, but the manual's expense deductions are based on the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey (see Internal Revenue Manual § 5.15.1.7(3)) and the BLS Survey expressly reports its data based on "household" size, defining "household" in detail. *See* Bureau of Labor Statistics, Consumer Expenditures in 2004 (Report 992) at 7, defining "consumer unit" as "Members of a household consisting of (a) occupants related by blood, marriage, adoption, or

7. Form 22C, Line 24 (Form 22A, Line 19)

Determination of "gross monthly income" in the application of the IRS National Standards.

Comments received by the Committee suggested that the means test form should instruct debtor how to determine the "gross monthly income" used to determine the proper National Standard deduction or to require debtors to disclose the gross monthly income that they actually used. Because there is no clear indication in the Code as to how gross monthly income should be determined, the Committee decided not to include a definition, and because of concerns that it would confuse debtors, the Committee decided not to require disclosure of the amount of gross monthly income used for calculating the National Standard deduction.[2] However, the Committee concluded that the source used by the debtor to determine gross monthly income should be disclosed, through a checklist setting out the most likely sources.

8. Form 22C, Line 31 (Form 22A, Line 26)

IRS "Other Necessary Expense" allowance for employment expenses.

To correspond more closely to the language contained in the Internal Revenue Manual, the Committee has proposed that the phrase "payroll deductions" be changed to "deductions for employment", and "mandatory" be changed to "involuntary."

9. Form 22C, Lines 32, 34-37, 40-44 (Form 222A, Line 27, 29-32, 35-39)

Consistent use of the word "total average" on the means test forms.

The current forms are inconsistent in the use of the words "total average" to describe debtors' expenses. Wherever there may be multiple expenditures within a expense given category, the Committee determined that the instruction should direct debtors to total these expendi-

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some other legal arrangement; (b) a single person living alone or sharing a household with others, but who is financially independent; or (c) two or more persons living together who share responsibility for at least 2 out of 3 major types of expenses—food, housing, and other expenses. Students living in university-sponsored housing also are included in the sample as separate consumer units."

[2] There is no clear basis for determining what "monthly gross income" should be used in applying the National Standard expense deductions. The Internal Revenue Manual sets out a lengthy definition of "income" for purposes of determining a taxpayer's ability to repay debt. Manual § 5.15.1.11(2) (set out in the Appendix to this memorandum). This definition varies in some respects from the definition of current monthly income set out in § 101(10A) of the Code. For example, the IRS definition calls for an annual (rather than six-month) averaging of interest and dividend income, it expressly includes social security benefits, and it includes all child support received, regardless of its regularity. The monthly income calculated in Schedule I presents yet a third possible statement of "monthly gross income." A debtor could reasonably employ any of these possibilities in choosing the applicable National Standard expense allowance.

tures. Wherever the amount of the expenditure may vary from month to month, the Committee determined that the instruction should direct debtors to average the monthly expenditures. Accordingly, the Committee has proposed that the words "total" or "average" be added to several of the instructions for expense deductions.

10. Form 22C, Line 33 (Form 22A, Line 28)

IRS "Other Necessary Expense" for court ordered payments.

The category of court-ordered payments, as defined in the Internal Revenue Manual, encompasses payments ordered by an administrative agency as well as a court. The Committee has proposed that the instructions be expanded to include agency-ordered payments.

11. Form 22C, Line 36 (Form 22A, Line 31)

IRS "Other Necessary Expense" allowance for health care.

The Internal Revenue Manual limits health care expenses to those "required for the health and welfare of the family," but that the current instruction for Line 36 fails to include this limitation. The Committee has proposed that the instructions be amended to include the limitation to "required" expenses.

12. Form 22C, Line 39 (Form 22A. Line 34)

Statutory deduction for health insurance, disability insurance, and health savings account expenses.

Comments received by the Committed noted that the forms' instructions currently limit the debtor's deduction for health insurance, disability insurance, and health savings account expenses to amounts actually expended, but that § 707(b)(2)(A)(ii)(I), which provides for the deduction, does not expressly contain this limitation. Whether a limitation to actual expenses is implied depends on resolution of a statutory ambiguity. Here is the relevant language:

> *The debtor's monthly expenses* shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and *the debtor's actual monthly expenses* for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides . . . . *Such expenses* shall include reasonably necessary health insurance, disability insurance, and health savings account expenses

The antecedent for "such expenses" in the sentence allowing the insurance/health savings deduction could be either "the debtor's monthly expenses," which are not limited to actual expenses, or "the debtor's actual monthly expenses" in the IRS "Other Necessary Expense" categories. The Committee determined that the former is a reasonable interpretation. That interpretation is also consistent with §1329(a)(4), which allows a Chapter 13 plan to be modified to allow a debtor who had not purchased health insurance to modify a plan for purposes of doing so.

Accordingly, the Committee has proposed that Line 39 be amended to allow the debtor to deduct "reasonably necessary" expenditures, without limitation to amounts actually expended. However, the Committee also concluded that the debtor should be required to state actual expenditures when actual expenditures differ from the amounts claim as reasonably necessary, without using the actual number as part of the means test computation.

13. Form 22C, Line 41 (Form 22A, Line 36)

Expense deduction for protection against family violence.

The present instruction for the expense deduction for protection against family violence, provided for in §707(b)(2)(A)(ii)(I)), does not include the statutory limitation to "reasonably necessary expenses." The Committee has proposed that the instruction be amended to refer to "reasonably necessary expenses" that the debtor incurs for protection against family violence.

14. Form 22C, Line 42 (Form 22A, Line 37)

Home energy costs.

Consistent with the language of § 707(b)(2)(A)(ii)(V), the Committee has proposed that the instructions be changed to require debtors to provide documentation only of the amount of their actual expenses and to permit debtors to "demonstrate" rather than "document" the reasonable and necessary character of those expenses.

15. Form 22C, Line 43 (Form 22A, Line 38)

Educational expenses for dependent children.

To be more consistent with the language of § 707(b)(2)(A)(ii)(IV), the Committee has proposed two changes: first, that the instruction be changed to refer to expenses "for attendance at . . . school" rather than the costs of "providing education," and second, that the instructions require the debtor only to "demonstrate" that additional expenses are reasonable and necessary rather than provide "documentation" of reasonableness and necessity.

16. Form 22C, Line 44 (Form 22A, Line 39)

Additional food and clothing expense.

Consistent with the language of § 707(b)(2)(A)(ii)(I), the Committee has proposed that the instruction require the debtor only to "demonstrate" that additional expenses are reasonable and necessary rather than provide "documentation" of reasonableness and necessity.

17. Form 22C, Line 45 (no change in Form 22A)

Issue No. 24, pp. 22-23: charitable contributions, comments 06-BK-009 and 06-BK-019.

The Religious Liberty and Charitable Donation Clarification Act of 2006 amended § 1325(b) to allow above-median income debtors the same charitable donation deduction that

had previously been accorded only to below-median income debtors (capped at 15% of gross income). To accommodate this change in the law, the Committee has proposed that the instruction for deducting charitable contributions in Chapter 13 read as follows:

> Enter the amount reasonably necessary for you to expend on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2). **Do not include any amount in excess of 15% of your gross monthly income.**

18. Form 22C, Line 47 (Form 22A, Line 42)

Future payments on secured claims.

Two distinct issues are addressed here. First, in order to be consistent with the language of § 707(b)(2)(A)(iii)(I), the Committee has proposed that instruction refer to amounts "scheduled as" contractually due. Second, to allow a challenge to double deductions of taxes and interest already allowed under the Local Standard for housing, the Committee has proposed that the debtor be required to state, by way of a check box, whether the debtor is including escrow payments for taxes and insurance in the secured debt deduction.

19. Form 22C, Line 49 (Form 22A, Line 45)

Expenses of Chapter 13 attorney fees.

The Committee rejected comments suggesting that anticipated attorney fees for Chapter 13 representation could be deducted as priority claims. However, to avoid confusion on this issue, the Committee has proposed an addition to the instructions for priority claim deductions, stating expressly that these should include only past due obligations.

20. Form 22C, Line 54 (no corresponding change in Form 22A)

Exclusion of support income from disposable income.

Pursuant to § 1325(b)(3), certain child support payments, foster care payments, and disability payments for a dependent child are not to be included in calculating the disposable income required to be paid to unsecured creditors. Such payments would properly be included in Line 7 of Form 22C, and the instruction for excluding these items in Line 54 now makes reference to payments "included in Line 7." However, it is possible that a debtor might include such payments in another line of Part I of the form. To deal with that situation, the Committee has proposed that the instruction be amended to state that the debtor should not report support income "reported in Part I" rather than "included in Line 7."

21. Form 22C, Line 55 (no corresponding change in Form 22A)

Qualified retirement deductions.

Section 541(b)(7) provides a deduction from disposable income in Chapter 13 for certain retirement plan deductions. To track the statutory language more closely, the Committee has

proposed that the instruction for this deduction be amended to read as follows: "Enter the monthly total of (a) all amounts withheld by your employer as wages or received by your employer as contributions for qualified retirement plans, as specified in § 541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in § 362(b)(19)."

22. Form 22C, New Line 57 (no corresponding change in Form 22A)

Issue No. 29, pp. 25-26: deduction for expenses arising from special circumstances, comments 06-BK-009 and 06-BK-019.

In providing for use of the means test in calculating disposable income for above-median income debtors, § 1325(b)(3) provides for the use not only of § 707(b)(2)(A), the means test deductions, but also § 707(b)(2)(B), the provision allowing a debtor to rebut a presumption of abuse by showing, among other things, expenses arising from special circumstances. Form 22C currently has no provision allowing a debtor to deduct such expenses from disposable income. To address this issue, the Committee has proposed that Form 22C be amended to add a new Line 57 allowing the debtor to include any expenses arising from special circumstances as described in § 707(b)(2)(B).

23. Form 22A, Line 1

Non-consumer debtors.

The Committee concluded that two changes should be made to address the issue of debtors who claim that their debts are not primarily consumer debts, and so are not subject to any of the "abuse" provisions of § 707(b). First, the Committee has proposed that Rule 1007(b)(4) be amended by deleting the words "with primarily consumer debts." This change would require all individual debtors to complete at least the first part of a means test form. Second, the Committee has proposed that Part I of Form 22A be amended with an expanded title—"Exclusions for Disabled Veterans and Non-Consumer Debtors," that the existing exclusion for veterans be renumbered as Line 1A, and that a new Line 1B be added with a check box allowing debtors to declare that their debts are not primarily consumer debts. As with covered veterans, this declaration would result in the debtor not being required to complete the remainder of the form.

The Committee proposed these changes in response to concerns that a failure to file Form 22A could lead to automatic dismissal of a case filed by debtors who incorrectly asserted that they did not have primarily consumer debts. Section 707(b)(2)(C) provides that debtors subject to § 707(b) (individuals with primarily consumer debts) must file a statement of current monthly income and calculations that determine whether a presumption of abuse has arisen, "[a]s part of the schedule of current income and expenditures required under section 521." The statement of current income and expenditures is required by § 521(a)(1)(B)(2), and failure to file a document required under any provision of § 521(a)(1) results in automatic dismissal 45 days after the bankruptcy filing, pursuant to § 521(i)(1), unless on motion filed within that period the court extends the deadline for no more than an additional 45 days. Requiring Form 22A in all individual Chapter 7 cases is intended to eliminate this potential for dismissal, with the understanding that the debtor will have filed the required statement, even though it would have to be amended substantially in the event that the debtor was later determined to have primarily consumer debts.

Official Form 22A (Chapter 7) (12/08)
In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:
☐ **The presumption arises.**
☐ **The presumption does not arise.**
(Check the box as directed in Parts I, III, and VI of this statement.)

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual Chapter 7 debtor, whether or not filing jointly, whose debts are primarily consumer debts. Joint debtors may complete one statement only.

Part I. EXCLUSION FOR DISABLED VETERANS

1	If you are a disabled veteran described in the Veteran's Declaration in this Part I, (1) check the box at the beginning of the Veteran's Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement. ☐ **Veteran's Declaration.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).

Part II. CALCULATION OF MONTHLY INCOME FOR § 707(b)(7) EXCLUSION

2	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 3-11.** b. ☐ Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of § 707(b)(2)(A) of the Bankruptcy Code." **Complete only Column A ("Debtor's Income") for Lines 3-11.** c. ☐ Married, not filing jointly, without the declaration of separate households set out in Line 2.b above. **Complete both Column A ("Debtor's Income") and Column B (Spouse's Income) for Lines 3-11.** d. ☐ Married, filing jointly. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A Debtor's Income**	**Column B Spouse's Income**
3	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
4	**Income from the operation of a business, profession or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the business expenses entered Line b as a deduction in Part V.** a. Gross receipts $ b. Ordinary and necessary business expenses $ c. Business income Subtract Line b from Line a	$	$
5	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part V.** a. Gross receipts $ b. Ordinary and necessary operating expenses $ c. Rent and other real property income Subtract Line b from Line a	$	$
6	**Interest, dividends and royalties.**	$	$
7	**Pension and retirement income.**	$	$
8	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.** Do not include amounts paid by the debtor's spouse if Column B is completed.	$	$

9	**Unemployment compensation.** Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below: Unemployment compensation claimed to be a benefit under the Social Security Act — Debtor $ _____ — Spouse $ _____	$	$
10	**Income from all other sources.** If necessary, list additional sources on a separate page. **Do not include** any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism. Specify source and amount. a. $ b. $ Total and enter on Line 10	$	$
11	**Subtotal of Current Monthly Income for § 707(b)(7).** Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s).	$	$
12	**Total Current Monthly Income for § 707(b)(7).** If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A.	$	

Part III. APPLICATION OF § 707(b)(7) EXCLUSION

13	**Annualized Current Monthly Income for § 707(b)(7).** Multiply the amount from Line 12 by the number 12 and enter the result.	$
14	**Applicable median family income.** Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) a. Enter debtor's state of residence: _____ b. Enter debtor's household size: _____	$
15	**Application of Section 707(b)(7).** Check the applicable box and proceed as directed. ☐ **The amount on Line 13 is less than or equal to the amount on Line 14.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII. ☐ **The amount on Line 13 is more than the amount on Line 14.** Complete the remaining parts of this statement.	

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR § 707(b)(2)

16	**Enter the amount from Line 12.**	$
17	**Marital adjustment.** If you checked the box at Line 2.c, enter the amount of the income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. If you did not check box at Line 2.c, enter zero.	$
18	**Current monthly income for § 707(b)(2).** Subtract Line 17 from Line 16 and enter the result.	$

Part V. CALCULATION OF DEDUCTIONS ALLOWED UNDER § 707(b)(2)

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

19	**National Standards: food, clothing, household supplies, personal care, and miscellaneous.** Enter "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable family size and income level. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
20A	**Local Standards: housing and utilities; non-mortgage expenses.** Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court).	$

20B	**Local Standards: housing and utilities; mortgage/rent expense.** Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. **Do not enter an amount less than zero.** a. IRS Housing and Utilities Standards; mortgage/rental expense $ b. Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42 $ c. Net mortgage/rental expense Subtract Line b from Line a.	$
21	**Local Standards: housing and utilities; adjustment.** if you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below: _____ _____ _____	$
22	**Local Standards: transportation; vehicle operation/public transportation expense.** You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8. ☐ 0 ☐ 1 ☐ 2 or more. Enter the amount from IRS Transportation Standards, Operating Costs & Public Transportation Costs for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	$
23	**Local Standards: transportation ownership/lease expense; Vehicle 1.** Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.) ☐ 1 ☐ 2 or more. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs, First Car $ b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42 $ c. Net ownership/lease expense for Vehicle 1 Subtract Line b from Line a.	$
24	**Local Standards: transportation ownership/lease expense; Vehicle 2.** Complete this Line only if you checked the "2 or more" Box in Line 23. Enter, in Line a below, the amount of the IRS Transportation Standards, Ownership Costs, Second Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. **Do not enter an amount less than zero.** a. IRS Transportation Standards, Ownership Costs, Second Car $ b. Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 42 $ c. Net ownership/lease expense for Vehicle 2 Subtract Line b from Line a.	$
25	**Other Necessary Expenses: taxes.** Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self employment taxes, social security taxes, and Medicare taxes. **Do not include real estate or sales taxes.**	
26	**Other Necessary Expenses: mandatory payroll deductions.** Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. **Do not include discretionary amounts, such as non-mandatory 401(k) contributions.**	$

27	**Other Necessary Expenses: life insurance.** Enter average monthly premiums that you actually pay for term life insurance for yourself. **Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.**	$
28	**Other Necessary Expenses: court-ordered payments.** Enter the total monthly amount that you are required to pay pursuant to court order, such as spousal or child support payments. **Do not include payments on past due support obligations included in Line 44.**	$
29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service—such as cell phones, pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. **Do not include any amount previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$
	Subpart B: Additional Expense Deductions under § 707(b) **Note: Do not include any expenses that you have listed in Lines 19-32**	
34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total: Add Lines a, b and c	$
35	**Continued contributions to the care of household or family members.** Enter the actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	$
36	**Protection against family violence.** Enter any average monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
37	**Home energy costs.** Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary**.	$
38	**Education expenses for dependent children less than 18.** Enter the average monthly expenses that you actually incur, not to exceed $125 per child, in providing elementary and secondary education for your dependent children less than 18 years of age. **You must provide your case trustee with documentation demonstrating that the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards**.	$
39	**Additional food and clothing expense.** Enter the average monthly amount by which your food and clothing expenses exceed the combined allowances for food and apparel in the IRS National Standards, not to exceed five percent of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) **You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary**.	$
40	**Continued charitable contributions.** Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. § 170(c)(1)-(2).	$
41	**Total Additional Expense Deductions under § 707(b).** Enter the total of Lines 34 through 40	$

Subpart C: Deductions for Debt Payment

42 **Future payments on secured claims.** For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment. The Average Monthly Payment is the total of all amounts contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. Mortgage debts should include payments of taxes and insurance required by the mortgage. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	60-month Average Payment
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c.

$

43 **Other payments on secured claims.** If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.

	Name of Creditor	Property Securing the Debt	1/60th of the Cure Amount
a.			$
b.			$
c.			$
			Total: Add Lines a, b and c

$

44 **Payments on priority claims.** Enter the total amount of all priority claims (including priority child support and alimony claims), divided by 60. $

45 **Chapter 13 administrative expenses.** If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.

a.	Projected average monthly Chapter 13 plan payment.	$
b.	Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)	x
c.	Average monthly administrative expense of Chapter 13 case	Total: Multiply Lines a and b

$

46 **Total Deductions for Debt Payment.** Enter the total of Lines 42 through 45. $

Subpart D: Total Deductions Allowed under § 707(b)(2)

47 **Total of all deductions allowed under § 707(b)(2).** Enter the total of Lines 33, 41, and 46. $

Part VI. DETERMINATION OF § 707(b)(2) PRESUMPTION

48	**Enter the amount from Line 18 (Current monthly income for § 707(b)(2))**	$
49	**Enter the amount from Line 47 (Total of all deductions allowed under § 707(b)(2))**	$
50	**Monthly disposable income under § 707(b)(2).** Subtract Line 49 from Line 48 and enter the result	$
51	**60-month disposable income under § 707(b)(2).** Multiply the amount in Line 50 by the number 60 and enter the result.	$

52	**Initial presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than $6,000** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI. ☐ **The amount set forth on Line 51 is more than $10,000**. Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI. ☐ **The amount on Line 51 is at least $6,000, but not more than $10,000.** Complete the remainder of Part VI (Lines 53 through 55).	
53	**Enter the amount of your total non-priority unsecured debt**	$
54	**Threshold debt payment amount.** Multiply the amount in Line 53 by the number 0.25 and enter the result.	$
55	**Secondary presumption determination.** Check the applicable box and proceed as directed. ☐ **The amount on Line 51 is less than the amount on Line 54.** Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. ☐ **The amount on Line 51 is equal to or greater than the amount on Line 54.** Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII.	

Part VII: ADDITIONAL EXPENSE CLAIMS

56 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b and c	$

Part VIII: VERIFICATION

57 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: _____ Signature: _____ (Debtor)

Date: _____ Signature: _____ (Joint Debtor, if any)

INCOME AND EXPENSE ISSUES UNDER SECTION 707(b)(2)

American Bankruptcy Institute
14th Annual Northeast Bankruptcy Conference
Northeast Consumer Forum

July 14, 2007
10:30 -11:30 a.m.

Phoebe Morse
United States Trustee
Region 1
Boston, Massachusetts

MEANS TESTING: APPLICATION OF IRS EXPENSE ALLOWANCES[1]

Under section 707(b)(1) of the Bankruptcy Code, an individual's chapter 7 case merits dismissal when the individual has primarily consumer debts, and the granting of relief would be an "abuse" of the provisions of chapter 7. See 11 U.S.C. § 707(b)(1). In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress significantly amended the Code to establish a new statutory presumption: a case is an abuse of chapter 7 if a detailed mathematical formula set out in the statute, commonly referred to as the "means test," yields more than a specified amount of monthly disposable income.[2] See 11 U.S.C. § 707(b)(2).

The means test, as embodied in Official Form 22A ("Form 22A"), is calculated in a two-step process. The first step determines whether a debtor's annualized current monthly income is above the applicable state median family income. See 11 U.S.C. §§ 707(b)(7)(A), 101(10A). Generally, if a debtor's income is above the applicable state median family income, the case will be presumed to be abusive unless under the second step of the means test, a deduction of allowed expenses brings the debtor's net monthly income to less than $167 per month. 11 U.S.C. §§ 101(10A), 707(b)(2)(A)(i).

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[1] Cases are updated through May 1, 2007.

[2] Pursuant to 11 U.S.C. §104, the dollar amounts set forth in Title 11 and applicable to the threshold amounts for determining when the presumption of abuse arises under the means test were adjusted based on the consumer price index, for cases filed on or after April 1, 2007. For cases filed between October 17, 2005 and March 31, 2007, the presumption does not arise if an above median debtor's monthly disposable income is less than $100 per month (or $6,000 over 60 months). If the debtor's monthly disposable income is equal to or exceeds $166.67 per month (or $10,000 over 60 months) the presumption of abuse arises. If an above median debtor's monthly disposable income is between $100 and $167 per month, the presumption of abuse arises if that amount, over 60 months, is sufficient to pay at least 25% of the debtor's nonpriority unsecured debt.

"Allowed expenses" are therefore a critical issue in determining whether or not a presumption of abuse arises. Generally, BAPCPA allows deductions from income in these categories: standard deductions taken regardless of actual expense (housing, transportation); deductions taken only as actual expenses (secured debt, taxes, insurance,); and additional deductions for actual expenses reflecting legislative value judgments (support of elderly family members, protection from family violence, charity). We examine four areas of controversy about allowed expenses: 1) transportation expenses; 2) treatment of secured debt expense when collateral is surrendered; 3) retirement contributions/loan repayments; and 4) in chapter 13, income tax.

I. Transportation Expenses

Transportation expenses fall within the category of expenses allowed by Congress as standardized amounts that may be deducted regardless of actual expense. These standardized amounts are taken from the "National Standards and Local Standards" issued by the Internal Revenue Service. The IRS Transportation Standards divide vehicle expenses into two categories, operating and ownership.

A. Is the IRS Standard Ownership Allowance Contingent on Existence of a Loan or Lease Obligation?

1. Statutory analysis

The Ownership Standard is designed by the IRS to account only for expenses associated with the purchase or lease of a vehicle and is based on the " five-year average of new and used

car financing data compiled by the Federal Reserve Board of Governors."[3] Form 22A, following Section 707(b)(2)(A)(i) and (ii)(I), allows a debtor to deduct from income the IRS Standard amount for ownership of a car, even if the IRS Standard is higher than the debtor's actual loan or lease payment. The IRS Ownership Standard is inserted on lines 23 and 24 of Form 22A. The debtor enters the IRS Standard amount and subtracts the amount of any loan or lease to calculate the benefit to the debtor from the IRS Standard, if any. (Secured amounts are listed and subtracted from monthly income elsewhere on Form 22A.)

2. Hardacre and McGuire– Debtor's real expenses are relevant when applying the means test

Two early cases emerged post-BAPCPA, holding that debtors must have a loan or lease payment in order to claim the IRS Local Standard for vehicle ownership. In both cases, the debtors claimed an expense allowance for the full IRS Transportation Ownership expense for a vehicle, even though they did not have a loan or lease payment obligation on the vehicle. In re Hardacre, 338 B.R. 718 (Bankr. N.D.Tex. 2006); In re McGuire, 342 B.R. 608 (Bankr. W.D. Mo. 2006).

In Hardacre, the debtor argued that debtors are not only entitled to, but are required by §707(b)(2)(A)(I), to deduct both the full IRS expense allowance and the full amount of the actual average secured debt payment. See Hardacre, 338 B.R. at 724. In McGuire, the debtors argued that because §707(b)(2)(A)(ii) provides that "the debtor's monthly expenses *shall be* the amounts *specified under* the IRS Standards," they were entitled to claim such amounts, whether or not

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[3] See Internal Revenue Manual, Part 5, (entitled Collecting Process), Chapter 8,§ 5.8.5.5.2, Treatment of Non-Business Transportation Expenses, 12-16, which may be found at the IRS website at: http://www.irs.gov/irm/part5/ch08s05.html; http://www.irs.gov/individuals/article/0,,id= 96543,00.html.

they had any such ownership expense. McGuire, 342 B.R. at 613. Hardacre held such "double-dipping" of IRS Standard allowances and actual expenses for car ownership to be impermissible. The Hardacre court found that §707(b)(2)(A)(ii)(I)'s limitation on expenses, which provides "[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts" means that debtors must reduce their deductions for car expenses under the IRS Standards by the average monthly payment for secured claims for those items. The effect is to allow debtors to deduct the greater of their actual secured debt payment or the IRS Standard expense allowance, but not both. See Hardacre, 338 B.R. at 727. McGuire follows Hardacre on "double dipping" and ownership expense issues.

The court in Hardacre also found that the existence of a loan or lease payment is a prerequisite to allowance of the IRS Ownership Expense. The Local Standards "only provide for a deduction for automobiles that are subject to lease or purchase," and "do not permit a debtor to claim an ownership deduction for a vehicle owned free and clear by a debtor." Hardacre, 338 B.R. at 728. Similarly, the McGuire court held that, in order to be allowed, the IRS expenses must be "applicable," and that the IRS expense is only "applicable" if the debtor "is actually incurring the expense." McGuire, 342 B.R. at 613.

3. Cases After Hardacre and McGuire

Many courts considering the issue have generally followed the Hardacre/McGuire reasoning, holding that, following the IRS application of the Local Standards, debtors may only claim the IRS Local Standard for vehicle ownership on Form 22A if they have a loan or lease payment obligation. Other courts have declined to follow this rationale, holding that the Internal

Revenue Service's application of the Local and National Standards, including the Standard for vehicle ownership, do not apply in bankruptcy cases.

a) ***Cases following the Hardacre/McGuire "real expenses are relevant" approach***

In re Slusher, 359 B.R. 290 (Bankr. D.Nev. 2007). The court ruled that the debtor was not entitled to claim an ownership expense because he owned his car free and clear of encumbrances, reasoning that the manner in which the IRS applies the Local Standards governs because it incorporated into the Bankruptcy Code an existing, administrative system that the IRS long had in place. Further, the court held that the qualifying term "applicable" in § 707(b)(2) does not mean that the debtor is to cross-match his location and status against the IRS standards, as the debtor claimed, and that the standards should instead be interpreted in the same manner as the IRS. (Chapter 13 case)

In re Devilliers, 358 B.R. 849 (Bankr. E.D.La. 2007). As in Slusher, the court held that the word "applicable" in § 707(b)(2) means that only the types of expenses allowed by the IRS and applicable to the specific debtor in question are deducted. The court rejected "rigid" applications of § 707(b)(2) that allow the IRS standard expenses for every debtor regardless of need, and instead found that unnecessary expenses should not be included in the calculation of disposable income simply because that expense might be both necessary and available for some other debtor. The court noted that the ownership deduction is not the equivalent of an allowance for depreciation or an invitation for a debtor to save for the ultimate replacement of an existing vehicle." (Chapter 13 case)

In re Barraza, 346 B.R. 724 (Bankr. N.D. Tex. 2006). In a chapter 7 case before the Hardacre judge, a debtor without a car payment argued that he was not "double-dipping" - taking

both the ownership expense and the secured debt - and should be allowed to take the ownership expense on that basis. The court rejected that argument, holding that the language of the statute itself controls and thus the Local Standards apply.

In re Oliver, 350 B.R. 294 (Bankr.W.D.Tex. 2006). In a chapter 7 case, the debtor opposed a motion to dismiss under 707(b)(2) and (b)(3), claiming that special circumstances rebutted the presumption of abuse. The court concluded, after analyzing the various factors raised by debtor, that the presumption of abuse still arose. Following Hardacre and McGuire, and relying on IRS Financial Analysis Handbook, the court agreed with the United States Trustee that debtor may not claim car ownership expense if debtor makes no loan or lease payment.

In re Carlin, 348 B.R. 795 (Bankr. D.Or. 2006). Following Hardacre and McGuire, and relying on IRS Financial Analysis Handbook, the court held that debtor may not claim a car ownership expense if debtor makes no loan or lease payment. (Chapter 13 case)

In re Wiggs, 2006 WL 2246432 (Bankr.N.D.Ill. 2006)(not reported in B.R.) The court held that when debtors own a vehicle free and clear, an ownership expense for the vehicle is not allowed, but did not look to Internal Revenue Service Manual for guidance. Instead, the court reviewed the statute, and to the extent necessary the legislative history and comments to the official forms. In finding the statute unambiguous, the court determined under §707(b)(2)(A)(ii)(I) that "applicable" modifies "amounts specified" to limit expenses to those that apply. Therefore, debtors are not allowed to include the standard ownership expense for transportation ownership when they do not have a payment on a vehicle." (Chapter 13 case)

In re Demonica, 345 B.R. 895 (Bankr.N.D.Ill. 2006). The Trustee objected to confirmation of debtor's plan where the debtor took expense deductions relating to a motor

vehicle. The debtor was not liable on the motor vehicle, claimed he made car payments "in wife's name,"and deducted these payments as an "Other Expense"on line 59 of Form 22A. The court found McGuire persuasive, to prohibit an ownership deduction if debtor does not own or lease a vehicle. However, because the debtor incurred a monthly expense for ownership, the court indicated that it would allow an ownership expense. At the same time, the court sustained an objection to the ownership expense when claimed as an "Other Expense" on line 59. In re Demonica, 345 B.R. at 905. (Chapter 13 case)

In re Harris, 353 B.R. 304 (Bankr. E.D.Okla. 2006)(following McGuire). In a chapter 7 case, the court found the reasoning in McGuire persuasive, distinguishing Demonica, *supra*, because the debtor in that case was actually making ownership payments. The Harris debtors were not making payments on their vehicles and thus could not take an ownership expense on them.

b) Cases rejecting Hardacre/McGuire and following "imaginary expenses" approach

In re Fowler, 349 B.R. 414 (Bankr.D.Del. 2006)(chapter 7 case subsequently converted to chapter 13). The United States Trustee moved to dismiss the debtor's case based on the presumption of abuse that arose because the debtor deducted a vehicle ownership expense for a vehicle owned free and clear. The court reasoned that, because the IRS treats the Local Standards as "caps," rather than "fixed allowances," as the Bankruptcy Code does, Congress did not intend to apply the IRS Manual to §707(b)(2). Id., at 418. Based on "plain reading of statute" the court held that the debtor was entitled to take IRS Transportation ownership expense Standard even without a payment obligation. The court relied, in part, on Demonica, supra

(reliance appears incorrect as Demonica debtor was actually making acquisition payments on vehicle, and court allowed as a "projected" expense only).

In re Watson, 2007 WL 1086582 (Bankr. D.Md. 2007). Following Fowler, the court held that Local Standards referenced by § 707(b)(2)(A)(ii)(I) do not include the guidance set forth in the Internal Revenue Manual ("IRM") for tax collection, because BAPCPA allows deductions for the full amount of secured debt on a vehicle while the IRM allows the lesser of secured debt and the Ownership Standard.

In re Hartwick, 2006 WL 2938700 (Bankr. D.Minn. 2006)(appeal pending). In a chapter 7 case. The court held that the debtor is entitled to a deduction for vehicle ownership even without a loan or lease payment obligation. The court reasoned that "[t]he means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt. Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process." Id., at 870.

In re Farrar-Johnson, 353 B.R. 224 (Bankr.N.D. Ill. 2006). In a housing expense case, the debtors claimed a deduction for the Local Standards for housing/utilities, even though they had no actual house payment because they lived in military housing. The court allowed the expense deduction, noting that § 707(b)(2)(A)(ii)(I) asks for "applicable" expenses, while other portions of § 707(b)(2) allow "actual" expenses, and this distinction means that "applicable" expenses need not be actual. Id. at 230-31. The court expressly rejected Hardacre and McGuire because the court believed those cases (1) confuse "actual" and "applicable" expenses, and (2)

improperly use the IRS Manual as a guide to application of the Local Standards, since the Code only directs courts to apply the "amounts specified" by the IRS, and not the Internal Revenue Manual. Id. (Chapter 13 case)

In re Haley, 354 B.R. 340 (Bankr. D.N.H. 2006). Vehicle ownership expenses for a second car owned free and clear were allowed. The court followed Fowler and Farrar-Johnson and allowed the expense, rejecting Hardacre, et al. The court stated that "[u]nder section 707(b)(2)(A)(ii)(I), what makes an ownership expense 'applicable' is not whether the debtor is required to make a car payment or whether the deduction would be allowed by the IRS. Rather, whether an expense is 'applicable' depends on the number of vehicles owned or leased ...." Id., at 343. (Chapter 13 case)

In re Prince, 2006 WL 3501281 (Bankr. M.D.N.C. Nov. 20, 2006). In a chapter 7 case, the court allowed ownership expenses for a vehicle owned free and clear because "[t]he relevant language of § 707(b)(2)(A)(ii)(I), in specifying the methodology for determining a debtor's expenses under that provision refers only to the 'National Standards' and the 'Local Standards' and does not refer to the rules and practices specified throughout The Internal Revenue Manual."

In re Zak, 2007 WL 143065 (Bankr. N.D.Ohio Jan. 12, 2007). In a chapter 7 case the debtors owned their vehicles free and clear of liens. Citing Fowler, *supra,* he court allowed the ownership expense deduction because the IRS applies the Local Standards as "caps" but the Code does not cap the expenditure, meaning the Code allows the Standard expense as the "actual deduction to which the Debtor is entitled." Id. at *6.

In re Grunert, 353 B.R. 591 (Bankr.E.D.Wis. 2006). In allowing deductions for vehicle ownership for two vehicles owned free and clear, the court held that the analysis "boils down to

the meaning of the phrase 'applicable ... amounts specified under the Local Standards....'" Id. at 592. Noting a split in judicial opinions over whether "applicable" means "applicable to the particular debtor" or "the region where the debtor lives and the number of vehicles owned," the court agreed with the latter, and allowed the expense. Id. at 592, 594. (Chapter 13 case)

In re Sawdy, 2007 WL 582535 (Bankr. E.D. Wis. Feb. 20, 2007). In an opinion discussing most other cases addressing the issue, the court held that the debtors were entitled to deduct ownership expenses on cars they owned free and clear because "Congress used the word "applicable" instead of the word "actual" in referring to the expenses enumerated in the National and Local Standards" and because "Congress appears to have considered importing the language from the Internal Revenue Manual and the Financial Collections Analysis into § 707(b)(2)(A)(ii)(I), but chose not to do so." Id. at *15. (Chapter 13 case)

B. Is Allowance of Additional $200 Operating Expense for Older/High Mileage Vehicles Consistent with the IRS Local Standards?

1. IRS Standard

Where there is no loan or lease payment obligation on a vehicle and the vehicle is over six years old or has reported mileage of 75,000 or more miles, an additional operating expense of $200 may be allowable. See Internal Revenue Manual ("IRM"), Part 5, Chapter 8, Section 5, at § 5.8.5.5.2, which may be found at the IRS website: http://www.irs.gov/irm/part5/ch08s05.html.

The vehicle must meet all requirements for the additional operating expense in order for the expense to be allowed: (1) there must be no loan or lease payment; (2) the vehicle must have 75,000 or more miles and/or be 6 or more model years in age (currently model year 2002 or

older); and (3) the debtor must actually own the vehicle and pay operating expenses with respect to the vehicle. In McGuire, *supra*, the court also held that the $200 additional operating expense was "consistent with IRS Local Standards...." and that such additional allowance was "allowed for debtors with cars more than six years old, or having more than75,000 miles." McGuire, 342 B.R. at 613-14.

a) Cases following McGuire, incorporating IRM allowance of $200 additional operating expense

In re Slusher,359 B.R. 290 (Bankr. D. Nev. 2007).

In re Oliver, 350 B.R. 294 (W.D.Tex. 2006).

In re Carlin, 348 B.R. 795 (Bankr.D.Or. 2006).

In re Barraza, 346 B.R. 724 (Bankr. N.D.Tex. 2006).

b) Cases rejecting McGuire, noting that § 707(b)(2) does not include IRM allowance of additional $200 operating expense

In re Johnson, 2006 WL 2883243 (Bankr. M.D. N.C. 2006) Noting McGuire and other courts have approved the $200 additional operating expense, the Johnson court held that §707(b)(2)(A)(ii)(I) refers only to the use of the tables in the IRS Local and National Standards in determining "applicable" deductions for transportation costs and does not refer to or include the IRS Manual. Thus, the $200 allowance is prohibited. In re Johnson, 2006 WL 2883243 at *3.

II. Surrender of Collateral

A. Analysis - Is the fact the debtor will not incur an expense relevant for means testing purposes?

Section 707(b)(2)(A)(iii) provides: "[t]he debtor's average monthly payments on account of secured debts shall be calculated as the sum of ...(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition." Section 521(a)(2)(A) requires a debtor to file a statement of intention within 30 days of the earlier of the petition date and the date of the meeting of creditors. Section 521(a)(2)(B) then requires that the debtor perform that expressed intention within 30 days after filing the statement of intention.

Three lines of cases have emerged post-BAPCPA on the issue of whether debtors who state an intent to surrender secured property may deduct amounts "contractually due" to secured creditors "on account of" such property in each of the sixty months following the petition date. One line of cases, characterized by In re Ray, 2007 WL 690131 (Bankr. D.S.C. Feb 28, 2007), holds that debtors who have stated their intention to surrender collateral securing a debt are not entitled to deduct future "average monthly payments" from their current monthly income. Another line of cases holds that payments to secured creditors should be excluded from the means test for property already surrendered as of the hearing date. See In re Singletary, 354 B.R. 455 (Bankr. S.D. Tex. 2006). Finally a line of cases, starting with In re Walker, 2006 WL 1314125 (Bankr. N.D.Ga. 2006), holds that debtors are entitled to claim secured payments on the means test form, even though they intend to surrender the property.

1. Future Payments for Surrendered Property May Not be Deducted

In re Ray, 2007 WL 690131 (Bankr. D.S.C. Feb 28, 2007). Chapter 7 debtors stated their intention to surrender a motorcycle and a camper but deducted the average monthly payments for them on line 42 of their means test. Reasoning that the meaning of statutory language depends on context, the court concluded that the phrases "average monthly payments on account of secured debts" and "in each of the 60 months following the date of the petition" are "best construed as contemplating a forward-looking calculation." Id. at *5. Thus, the debtors were not entitled to deduct these average monthly payments from their current monthly income.

In re Skaggs, 349 B.R. 594 (Bankr.E.D.Mo. 2006). The debtors stated their intention to surrender a mobile home and a car. On their Form 22A, they took an expense allowance for the average monthly payments on the secured claims for both, despite the fact that surrendering this property meant that they would not have any amounts due to secured creditors on account of this property following the petition date. The court held that surrender eliminated the debtors' eligibility to claim secured debt payments on the means test, reasoning that the use of the phrase "scheduled as" in the Bankruptcy Code refers not to the common dictionary meaning of the word, but to whether a debt is identified on the debtors' schedules. The court found that it is the debtors' schedules and statement of affairs which form the basis from which the court determines whether a debt is "scheduled as contractually due." Thus, since the property scheduled was being surrendered by debtors post-petition, expense deductions for payments on the mobile home and the car were disallowed.

In re Harris, 353 B.R. 304 (Bankr.E.D.Okla. 2006). The United States Trustee filed a motion to dismiss for presumed abuse under § 707(b)(2), on the ground that debtors may not deduct IRS Local Standard for ownership of a vehicle without a loan or lease payment, and that monthly payments for secured debt cannot be included in the means test calculation when a debtor intends to surrender the collateral. The court agreed with the United States Trustee on both grounds for dismissal. On the surrender issue, the court followed Skaggs, holding that Walker, *infra*, was incorrectly decided. Id. at 309.

2. If Collateral is Actually Surrendered, Future Payments for Surrendered Property May Not be Deducted

In re Singletary, 354 B.R. 455 (Bankr. S.D.Tex. 2006). The Singletary court found that post-petition events should be considered under the test for presumption of abuse. In a modification of the approach utilized in Ray and relying on In re Cortez, 457 F.3d 448 (5th Cir. 2006), the court found that property must actually be surrendered to disallow the expense for the property. Because Cortez requires a court to "consider post-petition events in deciding whether to dismiss a case for substantial abuse under § 707(b)," the Singletary court determined it could not examine the means test strictly as of the filing date. The court then found that the date the motion to dismiss is filed is the relevant date for assessing whether the collateral has in fact been surrendered, holding that the fact that the debtor had filed a notice of intent to surrender or indicated an intent to surrender on the bankruptcy schedules was an insufficient basis to disallow the secured debt expense in calculating disposable income. (But see In re Hartwick, 359 B.R. 16 (Bankr. D.N.H. 2007), holding that post-petition events cannot be considered in evaluating the means test and may only be considered in a 707(b)(3) case.)

In re Nockerts, 357 B.R. 497 (Bankr. E.D.Wis. 2006). The debtors testified at the § 341 meeting, that they were not reaffirming the mortgage on their homestead, were not making the monthly payment on the mortgage, and intended to surrender the homestead to the secured creditors. Considering Singletary favorably, the court held that as long as the debtor has not surrendered the collateral as of the petition date, future payments on secured debt could be deducted from income even if, post-petition, the debtors intend to surrender the collateral.

3. Debtors May Deduct Secured Payments on Surrendered Property.

In re Walker, 2006 WL 1314125 (Bankr. N.D.Ga. 2006). The debtors stated their intention to surrender their home and one vehicle. On their Form 22A, they took an expense allowance for the average payments due on secured claims for the surrendered home and surrendered vehicle, despite the fact that surrendering this property meant that they would not have any amounts due to secured creditors on account of this property in the 60 months following the petition date. The court held that debtors may deduct secured debt payments on Line 42 of Form 22A, even though they have committed to surrender the property. Id. at *8. The court stated that the plain language of §707(b)(2)(A)(iii) allows debtors to deduct secured debt payments that are "scheduled as contractually due" at the time of filing, and the debtor is not required to reaffirm the obligation as a prerequisite to taking the deduction. The court reasoned that its interpretation gives meaning to the word "scheduled" which implies "the possibility that the payments may not be made as required under the contract, either because the debtor will surrender the collateral or because the payments might be modified." Id. at *4. The Walker court further found that, if Congress had wished to limit the deduction to payments on collateral

the debtor intended to reaffirm, it would have done so. The court concluded that its approach gave meaning to the words "as contractually due" because the surrender of collateral does not alter the fact that the payments are contractually due. Id.

In re Hartwick, 2006 WL 2938700 (Bankr. D.Minn. 2006) (appeal pending). Following Walker, the court permitted the debtor to deduct her actual monthly mortgage payment on a home she intended to surrender. The court reasoned that, even though the debtor would not actually make the payments going forward as a result of the surrender, the payments were nevertheless allowed because courts lack discretion to alter the provisions of the means test: "[t]he means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt. Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process." Id., at *2. *Note* – this approach may provide for more judicial discretion because it shifts the analysis to §707(b)(3), which does not incorporate objective expense standards or limits; see In re Hartwick, 359 B.R. 16 (Bankr. D.N.H. 2007).

In re Randle, 358 B.R. 360 (Bankr. N.D.Ill. 2006) (appeal pending). The court denied the United States Trustee's motion to dismiss because the "plain language" of § 707(b)(2)(A)(iii) requires the debtor to deduct the amount due under her contracts for secured debt regardless of whether she intends to redeem, reaffirm or surrender the property. Further, the court noted that the purpose of the means test was to create a "mechanical" formula for presuming abuse, and so individualized information should not be considered.

In re Simmons, 357 B.R.480 (Bankr. N.D.Ohio 2006). The debtor deducted secured debt payments on his Form 22A for property that was being surrendered. The court held that the debtor's stated intention to surrender his residence did not preclude him from deducting the secured debt payments on Line 42 of Form 22A. The court reasoned that the filing of a petition in bankruptcy does not eliminate a debtor's liability for debts due as of the date of filing and a debtor will remain liable on such debts until, generally, such time as a discharge is granted. Accordingly, the court held that Congress' use of the phrase "scheduled as contractually due" means that a debtor may deduct from his current monthly income the total of all payments that are, as of the time of filing, due in each of the 60 months following the petition date on any secured debt that is rightfully listed on Schedule D regardless of whether debtor will remain liable on such debt in the future.

In re Sorrell, 359 B.R. 167 (Bankr. S.D.Ohio Jan. 26, 2007). The debtors claimed a deduction for the secured debt on a vehicle they intended to surrender, and the court ruled that the debtors were entitled to deduct the secured dept payments. The court ruled that the phrase "scheduled as" in § 707(b)(2)(A)(iii)(I) do[es] not refer to the bankruptcy schedules. The court cited to Nockerts, *supra*, for the proposition that the term "scheduled" may or may not refer to the bankruptcy schedules because some parts of the Code use that term to mean only the bankruptcy schedules, while § 521(k)(3)(H)(ii) uses it to mean a repayment schedule. The court reasoned that § 707(b)(2)(A)(iii) has more in common with sections of the Code that use the term "scheduled" to refer to a repayment plan, and therefore held that the term has that meaning in § 707(b)(2)(A)(iii)(I) as well. Accordingly, because the vehicle payments were "scheduled" as contractually due as of the petition date, they were allowed.

III. Retirement Contributions/Loan Repayments

Section 707(b)(2)(A)(ii)(I) allows as monthly expenses the "categories specified as other necessary expenses issued by the Internal Revenue Service" for the area in which the debtor resides as in effect on the date of the order for relief.

A. Analysis

Generally, deductions for 401(k) loan repayments are not allowed in chapter 7 cases because such deductions are expressly limited to debtors in chapter 13. See 11 U.S.C. §1322(f) (excluding 401(k) loan repayments from "disposable income"). However, the Internal Revenue Manual includes categories for "involuntary deductions" if the deduction is a requirement for the debtor's job. See http://www.irs.gov/irm/part5/ch15s01.html#d0e178408. Courts have thus addressed whether chapter 7 debtors may deduct 401(k) loan repayments as "mandatory payroll deductions," as special circumstances, and as secured debt payments.

1. **In re Otero**, 2007 WL -- (Bankr. W.D. Tex. April 26, 2006). Otero is the first district court decision addressing 401(k) loan repayments for chapter 7 debtors. In reversing the bankruptcy court, the district court held that 401(k) loan repayments are neither debt not secured debt payments under the means test. The district court examined the meaning of "secured debt" under the Bankruptcy Code and, agreeing with the overwhelming majority of pre-BAPCPA courts that considered the issue, concluded that the obligation to make 401(k) loan repayments did not constitute "debt." The district court rejected the debtors' argument that BAPCPA changed the definition of "secured debt" vis-a-vis 401(k) loans, and reversed the bankruptcy court's summary determination that 401(k) loan repayments constitute "special circumstances."

2. 401(k) Loans as Secured Debt Payments

In re Thompson, 350 B.R. 770 (Bankr. N.D. Ohio 2006)(appeal pending). The debtor claimed 401(k) loan repayments as a secured debt on Line 42 of Form 22A. Although the loan documents do not grant the 401(k) plans a right of recourse against the debtor in the event of default, the court held that the 401(k) loan repayment is a payment to a secured creditor on secured debt under §707(b)(2)(A)(iii) and, alternatively, a special circumstance under §707(b)(2)(B). But see In re Otero, *supra*, a Texas district court case discussing Thompson and reaching the opposite conclusion ("Thompson appears to be the only decision in which a court has concluded that repayments of a loan from a debtor's retirement plan are payments on account of a "secured debt . . .").

3. 401(k) loan repayments as Mandatory Payroll Deductions

In re Barazza, 346 B.R. 724 (Bankr.N.D.Tex. 2006). Among other things, the debtor deducted $915 per month from current income, Line 26 of Form 22A (Other Expenses: mandatory payroll deductions), to account for loan repayments on two loans from 401(k) plans. Repayment of the loans was not a condition of debtor's employment. The debtor argued that he would be allowed to deduct the 401(k) loan payments in a chapter 13 case, resulting in zero dollar plan for unsecured creditors and an absurd result. The court held that 401(k) loan repayment is not an Other Necessary Expense, even if automatically withdrawn from debtor's paycheck, if the only consequence to debtor is a taxable event. In *dicta*, the court described involuntary payroll deductions to include work uniforms, union dues, and work shoes.

In re Lenton, 358 B.R. 651 (Bankr. E.D.Pa. 2006) (appeal pending). The debtor was paying 401(k) loans through bi-weekly payroll deductions and he claimed the loan payments as a Mandatory Payroll Deduction at Line 26 of Form 22A. The loan documentation stated that the monthly repayments were mandatory until the loan was repaid or, if the debtor was terminated from his job or was otherwise in a position where payroll deductions could not be made, he was required to continue making payments or be in default. In the event of default, the balance of the loans would be treated as a distribution from his account, subject to tax consequences. The court disallowed the expense observing that "mandatory retirement contributions" "implies a situation where participation in a retirement plan is a condition of the job, *i.e.*, the original contributions are a deduction that an employer would take from *all* employees." Id. At 657; (emphasis original).

3. 401(k) Loans as a Special Circumstance

In re Johns, 342 B.R. 626 (Bankr. E.D. Okla. 2006). The debtors asserted that their 401(k) repayments were a special circumstance sufficient to rebut the presumption of abuse, alleging, among other things that if they were in a chapter 13 case, the distribution to general unsecured creditors would be zero because: (1) the monthly child support payment included in their current monthly income in a chapter 7 would not be included as income in a chapter 13; and (2) they would be allowed to deduct their 401(k) loan payments and 401(k) contributions in a chapter 13. The court held that a potential payback of zero percent to unsecured creditors in a chapter 13 is not a special circumstance contemplated under §707(b)(2)(B). Id. at 629.

In re Lenton, (citation and facts *supra*). Although he court held that 401(k) loan repayments could not be taken as Mandatory Payroll Deductions, it also held that such payments are a special circumstance sufficient to rebut the presumption of abuse. The court found it compelling that the debtor incurred the loans more than a year before filing his bankruptcy and used the loans to pay down his credit card debt, thereby reducing the unsecured debt that would otherwise be paid in a chapter 13 case. Further, the court found the fact that the debtor cannot stop making the payroll deductions as long as he is employed, and must quit or take leave of absence to stop the payments, to be sufficient to constitute special circumstances for which there is no reasonable alternative.

IV. Income Taxes Under the Means Test

The majority of cases post-BAPCPA hold that the allowable amount of the debtor's tax liability to be deducted on Line 25 of Official Form 22A (Line 30 of Official Form 22C) is the debtor's *actual tax liability*, and not the *amount withheld* from the debtor's paycheck.

In re Balcerowski, 353 B.R. 581 (Bankr. E.D. Wis. 2006). The debtor had a negative disposable monthly income figure from Form B22C. This figure was calculated by subtracting the amount withheld from the debtor's wages, rather than the amount of income taxes the debtor would end up actually owing based on the applicable tax tables. The court, relying on the IRS Manual, held that the correct amount of disposable income is determined by subtracting the debtor's actual tax expense from the debtor's Schedule I income. The same court later questioned its holding in this case, at least to the extent it relied on the IRS Manual. See In re

Sawdy, 2007 WL 58235 at n.4.

In re Lawson, 2007 WL 184733 (Bankr.D.Utah Jan. 25, 2007). The debtor and the Chapter 13 Trustee disagreed on the correct amount to be included on the debtors' means test form for taxes (Line 30). The Chapter 13 Trustee argued that it should reflect the amount of the debtors' actual future tax liability. Debtors argued that it should be the amount *withheld* from Mr. Lawson's paycheck, even though that amount may be over-withholding. The court concluded that the amount that should be entered on Line 30 is the *actual tax liability* for the six month period before the petition date, and not the *amount withheld* on the debtors' paychecks.

In re Risher, 344 B.R. 833 (Bankr. W.D.Ky. 2006). Chapter 13 Trustee objected to provisions in debtors' plan that purported to exclude future tax refunds from distribution to unsecured creditors. The court noted that tax refunds are amounts overwithheld and therefore constitute additional income. Accordingly, Line 30 should reflect the taxes actually paid, and not the amount withheld. Id., at 837. The court ordered turnover of refund amounts annually.

In re Johnson, 346 B.R. 256 (Bankr. S.D.Ga. 2006). Tax amount to be entered on Line 30 of Official Form B22C is the *actual* tax liability, and not amount withheld. Id. at 269.

In re Riggs, 359 B.R. 649 (Bankr. E.D. Ky 2007). Chapter 13 Trustee sought and the court allowed an adjustment of a debtor's monthly payment to reflect actual taxes paid rather than amount withheld.

In re Raybon, 2007 WL 841372 (Bankr. D.S.C. Jan. 23 2007). The court held that the plain reading of the statute requires that tax refunds are income for the purpose of § 1325(b)(1).

BAPCPA ISSUES:

§521 EXTENDED DEBTOR DUTIES AND *IN FORMA PAUPERIS* WAIVER UNDER 28 U.S.C. § 1930(f)(1)

February, 2007

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SECTION 521(a) & (e): ADDITIONAL DEBTOR DUTIES AND CONSEQUENCES FOR FAILURE TO COMPLY

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA") amended the debtor's duties under 11 U.S.C. §521 to, inter alia, require debtors to file and/or produce documents, including a Statement of Intention, payment advices and federal income tax returns. Courts have taken differing approaches with implementation of these provisions and the effect when debtors fail to comply.

A. Payment Advices Under 11 U.S.C. §521(a)(1)(iv)

Section 521(a)(1)(iv) requires that payment advices be filed.[1] If the debtor fails to file the payment advices, or other documents required by Section 521(a)(1) "the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition." 11 U.S.C. §521(i)(1). The court may extend the time within which a debtor may file payment advices or other §521(a)(1) documents for up to an additional 45 days if the debtor files the request "within 45 days after the filing of the petition," and if the court finds "justification" therefor. 11 U.S.C. §521(i)(3). A trustee may move during the first 45 days of the case for the case not to be dismissed if the debtor attempted in good faith to file the information required under § 521(a)(1) and the interests of creditors would best be served by administering the estate. *Query*: what if the debtor has not attempted to file the information required by § 521(a)(1)?

1. Automatic Dismissal on 46th Day

Early cases addressing §521(a)(1)(iv) and §521(i) found that the statute is unambiguous and requires strict application by the court. For example, in In re Fawson, 338 B.R. 505 (Bankr.D.Utah 2006), the court held that a case is automatically dismissed on the 46th day if a debtor fails to file the appropriate payment advices or obtain an extension. In re Fawson, 338 B.R. at 510. The court rejected the debtors' argument that a motion to extend the time to file the

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[1] The other categories of documents required by §521(a)(1) include a list of creditors, schedule of assets and liabilities, schedule of current income and current expenditures including statement of current monthly income, statement of financial affairs, statement of the amount of monthly net income, and statement disclosing any reasonably anticipated increase in income or expenditures over the 12 month period following the filing date. 11 U.S.C. §521(a)(1)(A)(B)(i)-(vi) & §707(b)(2)(C).

payment advices could be filed after the expiration of the first 45 day period "where the failure to act was the result of excusable neglect," pursuant to Fed. R. Bankr. P. 1007 and 9006(b).

Other courts have also found no judicial discretion to extend the deadlines for debtors who seek an extension after the 45 day period has expired. See In re Calhoun, 2007 WL 117725 (Bankr. E.D. Mo. 2007) (dismissal is automatic and court lacks authority to extend time for filing documents required by §521(a)(1) past 45 days when the debtor failed to seek an extension); In re Williams, 339 B.R. 794 (Bankr. M.D. Fla. 2006) (same); In re Ott, 343 B.R. 264 (Bankr. D. Colo. 2006) (same); In re Cloud, 2006 WL 3438600 (Bankr. N.D.Okla. 2006). See also In re Lovato, 343 B.R. 268, 269 (Bankr. D.N.M. 2006)(finding automatic dismissal where debtor failed to provide payment advices to the trustee and did not ask timely for an extension, stating that "[h]ad [BAPCPA]... left the Court with any discretion, the Court would deny the Chapter 7 Trustee's motion with leave to allow the Debtor to submit the required payment advices.").

2. Dismissal Not "Automatic;" Requires Entry of an Order

In In re Parker, 351 B.R. 790 (Bankr. N.D.Ga. 2006), the court found that "automatic" dismissal means simply that no notice or hearing need be held, but that the court has discretion to excuse the requirement for the filing of pay advices before or after the 45 day time period. Id. at 801. The debtor had scheduled assets of $1.8 million and liabilities in excess of $3.9 million. After the Chapter 7 Trustee took action to sell the debtor's houseboat, the debtor moved to dismiss his case claiming, inter alia, that the case was automatically dismissed after 45 days because he failed to file payment advices or comply with the credit counseling certificate requirements of §109(h). The court found that dismissal under § 521 is not a "ministerial act," and that the court must review the docket and enter an order of dismissal. Id. Further, the court found that it could excuse the filing requirements in a case at any time under appropriate circumstances, before or after the 45-day period, pursuant to 11 U.S.C. §521(a)(1)(B). Id.

The court in In re Spencer, 2006 WL 3820702 (Bankr. D.Col. 2006), also held that dismissal for failure to comply with § 521 is not "automatic" on the 46th day, but requires the court to enter an order dismissing the case. The court noted that there is no directive in the statute that the court "shall enter an order confirming that the case was dismissed effective on the 46th day" and that reading the statute as requiring dismissal effective without a court order would

lead to "absurd results." Id. at *2. Among other things, the court noted that there may be factual disputes relating to the debtor's failure to comply that must be resolved by the court and that automatic dismissal may lead to confusion regarding the status of the case in the time between the 46th day and the date of entry of the dismissal order. Id., at *2-*4. The court also asked for briefing on the issue of whether the effective date for dismissal is the 46th day following the petition or the date of the order of dismissal. Id. at *4.

In In re Riddle, 344 B.R. 702 (Bankr. S.D.Fla. 2006), the bankruptcy court reviewed the debtors' compliance with § 521 *sua sponte*. Although the court concluded that debtors' case was not subject to automatic dismissal because debtors complied with the requirements of § 521, the court, in a poem, expressed its frustration with the automatic dismissal provisions, suggesting that a requirement of a court order would eliminate uncertainty in the statute.

B. Statement of Intent Under 11 U.S.C.§521 (a)(2) & (a)(6)

Section §521(a)(2)[2] of the Bankruptcy Code requires debtors to file a Statement of Intent with respect to secured estate property. 11 U.S.C. §362(h), a new provision added by the BAPCPA, terminates the automatic stay and removes personal property from the estate if a debtor fails to adhere to Section 521(a)(2). 11 U.S.C. §521(a)(6), another new provision under BAPCPA, provides that a chapter 7 debtor is not entitled to retain possession of secured personal property without either reaffirming the debt or redeeming the collateral within 45 days after the § 341(a) meeting of creditors.

Thus, with respect to any debt secured by personal property which will not be surrendered, BAPCPA requires that the chapter 7 debtor: (1) file a statement of intention declaring an intent within 30 days of the filing of the petition, 11 U.S.C. § 521(a)(2)(A); and (2) perform the stated intention within 30[3] days of the first date set for the meeting of creditors under section 341(a) 11 U.S.C. § 521(a)(2)(A). If the debtor fails to fulfill these requirements the

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[2] Prior to the enactment of BAPCPA, this provision was numbered as § 521(2).

[3] Under 11 U.S.C. § 521(a)(6) the post-BAPCPA Debtor may have 45 days to perform the intent after the first meeting of creditors.

debtor will lose the benefit of the automatic stay and risks having the personal property removed from the bankruptcy estate, 11 U.S.C. § 362(h).

Prior to the effective date of BAPCPA, a majority of courts considering the issue ruled that a debtor who was current on his installment payments and not otherwise in default could choose to: (1) surrender the collateral, (2) redeem the collateral, (3) reaffirm the debt or (4) continue in possession of the collateral if he continued to meet his obligations under the loan agreement (the "4th Option" or "Ride Through"). Thus, in most jurisdictions the secured creditor could not foreclose or repossess that collateral securing the debtor's indebtedness as long as the debtor remained current post-petition, without regard to whether the debtor reaffirmed the debt or redeemed the collateral. See In re Boodrow, 126 F.3d 43 (2d Cir. 1997); In re Price, 370 F.3d 362 (3d Cir. 2004); In re Parker, 139 F.3d 668 (9th Cir. 1998); In re West, 882 F.2d 1543 (10th Cir. 1989); In re Belanger, 962 F.2d 345 (4th Cir. 1992); but see In re Burr, 160 F.3d 843 (1st Cir. 1998); In re Taylor, 3 F.3d 1512 (11th Cir. 1993); Matter of Edwards, 901 F.2d 1383 (7th Cir. 1990).

Section 521(a)(2)(B) [pre-BAPCPA §521(2)(B)] was amended to reduce to 30 days the period in which the debtor must perform his or her stated intention and to start the 30-day period from the "first date set for the meeting of creditors under section 341(a)." Section 521(a)(2)(c) [pre-BAPCPA §521(2)(c)] was amended to include the language "except as provided in section 362(h)."[4]

Section 362(h) is specifically stated as an exception to §521(a)(2)(c), and those two provisions are construed together. In re Donald, 343 B.R. 524, 534 (Bankr. E.D.N.C. 2006) citing 3 Collier on Bankruptcy ¶ 362.10A at 362-120). When the two subsections are read together, the "fourth option" on property securing an individual's debt is eliminated. See, e.g., In re Boring, 346 B.R. 178, 180 (Bankr. N.D.W.Va. 2006); In re Rowe, 342 B.R. 341, 346-347

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[4]Section 362(h)(1)(A) specifically terminates the automatic stay "if the debtor fails within the applicable time set by §521(a)(2) ... (A) to file timely any statement of intention required under §521(a)(2)...or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, [or] enter into an agreement of the kind specified in section 524(c)[reaffirmation agreement] ...."

(Bankr. D.Kan. 2006); In re Craker, 337 B.R. 549, 551 (Bankr. M.D.N.C. 2006); In re Steinhaus, 2006 WL 2529631 (Bankr. D.Idaho 2006); In re Anderson, 348 B.R. 652 (Bankr. D.Del. 2006).

What the BAPCPA amendments do not appear to govern is the right of secured creditors to foreclose on the property. Courts considering this issue have determined that the terms of the pre-BAPCPA contract, including the underlying state law, determine the right of the secured creditor with respect to collateral possessed by a debtor who does not comply with the provisions of 11 U.S.C. § 521(a). In re Steinhaus, 2006 WL 2529631 at ** 8-9; In re Rowe, 342 B.R. at 351; In re Anderson, 348 B.R. at 658-659.

In Rowe, for example, the court concluded that the debtor's failure to comply with the Statement of Intent requirement of § 521 did not entitle the creditor to foreclose, because under Kansas law the creditor's collateral was not "significantly impaired" where the Debtor was current and expressed an intent to remain current. Rowe, 342 B.R. at 351-352. Conversely, in Anderson, the Court upheld the creditor's repossession of the collateral because under Delaware law the *ipso facto* clause in the underlying contract constitutes a default authorizing repossession. In re Anderson, 348 B.R. at 659-60.

Accordingly, §§ 521(a)(2), 521(a)(6) and 362(h) only govern whether the creditor's collateral remains subject to the automatic stay and within the bankruptcy estate. The terms of the pre-BAPCPA contract, including governing state law, determine the rights of the secured creditor with respect to collateral possessed by a debtor who does not comply with the relevant provisions of 11 U.S.C. § 521(a).

C. Income Tax Returns Under 11 U.S.C. §521(e)

11 U.S.C. §521(e)(2) provides that a debtor shall provide a copy of his or her most recent federal income tax return (or a transcript of such return) to the chapter 7 trustee within seven days before the date first set for the § 341 meeting of creditors. Unlike 11 U.S.C.§521(i), which addresses documents required under § 521(e)(2), there is no provision for automatic dismissal of a debtor's case upon failure to provide the returns. Instead, if the debtor fails to comply with §521(e)(2), the court shall dismiss the case unless the debtor demonstrates that failure to comply is "due to circumstances beyond the control of the debtor." 11 U.S.C. §521(e)(2)(B).

1. No Automatic Dismissal

In In re Ring, 341 B.R. 387(Bankr. D. Me. 2006), the court addressed debtors who were not required to file federal income tax returns for many years because their only income was Social Security benefits. The debtors sought an advisory-type ruling from the court that they did not violate 11 U.S.C. § 521(e)(2) by not filing tax returns. The court found that while §521(i) mandates automatic dismissal if certain filings are not made under § 521(a), there is no automatic dismissal if tax returns are not filed. In re Ring, 341 B.R. at 389. Rather, any dismissal for failure to provide tax returns would require a motion to dismiss with notice and opportunity for a hearing. Id. at 390.

2. Hard Copies vs. Computer Printouts

In In re Houston, 2006 Bankr. Lexis 364 (Bankr. E.D.Va 2006), the court addressed the requirement of 11 U.S.C. §521(e) and what constitutes a "copy" of a tax return when the debtor electronically files her tax return. The debtor provided to the case trustee a computer print-out summarizing the data from her electronically-filed return, and the trustee took the position that the document did not satisfy the requirement for a "copy of the federal tax return." Id., at *2. The court would not rule based on the record before it that a computer generated summary of data electronically submitted to the IRS constitutes a "copy" of the return, and found that the "better practice," if the return preparation software provides such capability, is to submit a hard-copy printout of the traditional paper form populated with the data transmitted to the IRS. Id. at *7. Alternatively, the court admonished counsel to advise clients who e-file their returns to obtain IRS transcripts. Id. Under the facts of the case, the court found that the debtor substantially complied with the statutory requirement, or if not, that her noncompliance was due to circumstances beyond her control.

3. Timing of Submission of Tax Returns

In In re Duffus, 339 B.R. 746 (Bankr. D. Ore. 2006), the court denied a motion to dismiss filed by the case trustee where debtors provided their tax return four days before the § 341 meeting. The trustee, while moving for dismissal, stated that "he [does] not advocate for dismissal" and stated that he had "identified possible assets for distribution." In re Duffus, 339 B.R. at 747. Debtors' counsel had possession of the returns in time sufficient to have provided

them to the trustee. The court stated that trustees should exercise "prosecutorial discretion" in determining whether to seek dismissal in such cases. Id. Because dismissal would be contrary to the interests of the estate, the motion to dismiss was denied.

Similarly, in In re Grasso, 341 B.R. 821 (Bankr. D.N.H. 2006), the debtor did not submit tax returns to the trustee until three days before the first meeting of creditors and the case trustee moved for dismissal. The trustee stated his belief that dismissal was required under §521(e)(2)(B) unless the court found that the debtor's failure to comply was "due to circumstances beyond the control of the debtor." In re Grasso, 341 B.R. at 822. While the court agreed that it must dismiss unless the debtor establishes that his failure to comply is excused by circumstances beyond the debtor's control, the court followed Duffus, explaining that trustees have discretion whether or not to file motions to dismiss relative to tax returns, and that such dismissal is not automatic. Id., at 824-25.

The court in In re Norton, 347 B.R. 291 (Bankr. E.D. Tenn. 2006), disagreed with both Grasso and Duffus, as being contrary to the wording of §521(e)(2). In Norton, the chapter 7 trustee filed a motion to allow the debtor an extension to, inter alia, submit her 2005 tax returns to the trustee. The court found that unless the debtor could show cause establishing that her failure to comply was beyond her control, the court was required to dismiss debtor's case for failure to comply with § 521(e)(2). The court noted that the statute states that debtors "shall" provide their most recent tax return to the trustee "no later than" one week prior to the first date set for the first meeting of creditors, and if the debtor does not do so, the court "shall" dismiss the case "unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." Id. at 301. The court found that '[t]here is simply nothing within §521(e)(2) to allow the Trustee to request an extension on the Debtor's behalf, and in any event, the Trustee has not provided the court with any reasons behind her request to demonstrate that the Debtor's failure to comply was due to circumstances beyond the Debtor's control. Id at 301-302.

MISCELLANEOUS: *IN FORMA PAUPERIS* WAIVER UNDER 28 U.S.C. §1930(f)(1)

In addition to amending the eligibility requirements of § 521, BAPCPA amended title 28 of the United States Code to include a new two-pronged test at § 1930(f)(1) to determine whether

a chapter 7 debtor is eligible to waive the bankruptcy case filing fee. Section 1930(f)(1) provides:

> Under the procedures prescribed by the Judicial Conference of the United States, the district court or the bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line [sic] ... applicable to a family of the size involved and is unable to pay that fee in installments.

Accordingly, § 1930(f)(1) provides for waiver of the filing fee in chapter 7 cases where the debtor earns 150% below the poverty line and the debtor cannot pay the fee in full or in installments.

A. Ability to Pay Fee in Full or Installments

In In re Spisak, 2007 WL 96398 (Bankr. D. Vt. 2007), the court identified several factors that courts have applied to determine, based on the totality of the circumstances, whether a debtor is able to pay the filing fee in installments. These factors include (1) whether expenses exceed income; (2) whether there are any discrepancies between the debtor's application and schedules; (3) whether the debtor has any collateral sources of income from family or friends to pay the filing fee; (4) whether the debtor listed unreasonable expenses that could be directed to pay the filing fee; (5) whether the debtor agreed to pay a portion of the attorney's fees after the filing of the case; and (6) whether the debtor has any exempt property that could be used to pay the filing fee. Id. at *3; In re Machia, 2007 WL 188633 (Bankr. D. Vt. 2007)(explaining factors in Spisak). In addition, the court in Spisak noted that the amount of debt being discharged, the debtor's historical allocation of net disposable income, and whether the debtor's current or anticipated expenses are the result of extraordinary circumstances are additional factors that should be considered. Spisak, 2007 WL 96398 at *4. The court applied the above factors in holding that the debtor had not met his burden of proving that he cannot pay the filing fee. Principally, the court found that the debtor failed to provide sufficient evidence to sustain his burden of proving that he could not afford to pay the filing fee in installments. See id., at *7.

See also In re Robinson, 2006 WL 3498296 (Bankr. S.D.Ga. 2006) (analyzing scope of factors required for fee waiver in ruling on multiple debtors' applications).

In In re Machia, 2007 WL 188633 (Bankr. D.Vt. 2007), the same court held that, although the debtor has historically received a tax refund of between $400 and $500 per year, that fact could not be considered in the totality of the circumstances analysis in determining whether a fee waiver is appropriate. Id., 2007 WL 188633 at *4. The court held that it was not able to conclude with certainty that the debtor would receive a tax refund the following year, and so it could not consider a potential refund in evaluating the factors enumerated in Spisak. Id.

In In re Johnson, 2006 WL 2883143 (Bankr. M.D.Tenn. 2006), the chapter 7 trustee objected to the debtor's application for a fee waiver on the sole ground that the debtor paid her attorney $600 prior to filing her bankruptcy. The court overruled the trustee's objection, holding that "a debtor is not disqualified for a waiver of the filing fee solely because the debtor paid (or promised to pay) a bankruptcy attorney, bankruptcy petition preparer, or debt relief agency in connection with the filing." Id. at *1.

In In re Burr, 344 B.R. 234 (Bankr. W.D.N.Y. 2006), the court denied the debtor's application for a fee waiver, even though the debtor had no income or assets that could be liquidated to pay the fee. The debtor, who had been a student until she filed for chapter 7 bankruptcy, was being supported by her boyfriend and her father. The court noted " this court cannot force either the father or the boyfriend of the debtor to pay the required filing fee for bankruptcy relief. Where these parties provide so accurately for the care of the debtor and her child, however, the court may reasonably expect the debtor to find the necessary financial support for the same filing fee that other debtors are compelled to pay." Id. at 237.

In In re Lineberry, 344 B.R. 487 (Bankr. W.D.Va. 2006), the court denied the debtor's application for a fee waiver on the ground that the debtor-husband failed to explain how he had spent a $3,400 tax refund or why such amount could not be used to pay the fee, and the debtor-wife testified that she intended to purchase a school ring totaling $489 for their son.

The court in In re Hairston, 2006 WL 221344 (Bankr. D.Dist.Col. 2006) denied debtor's application for a fee waiver, on the ground that, although her income was below 150% of the

poverty level, she nevertheless had $247 per month in disposable income. The court stated it "must presume that a debtor saving $247 every month can pay her filing fee in installments." Id., at *1.

B. Vacating Orders Granting Filing Fee Waivers

In In re Kauffman, 2006 WL 3017316 (Bankr. D.Vt. 2006) the court held that it may vacate and order granting a waiver of the filing fee based on developments in the administration of the case that subsequently demonstrate that a waiver was not warranted. In Kauffman, the court granted the debtor's application for a fee waiver. Subsequently, however, and after the debtor converted her case to a case under chapter 13, the chapter 7 trustee moved for reconsideration on the ground that the debtor was able to pay the filing fee. Among other things, the trustee noted that the debtor owned her home free and clear of liens and could have obtained a home equity loan or other loan against the property, and that the debtor was entitled to a property tax rebate in the amount of $1,415 as of the petition date.

The court held that courts may revoke an order granting a fee waiver if the following four factors are met: (1) the debtor has notice that the fee waiver may be revoked if facts or circumstances are discovered that demonstrate the waiver was unwarranted; (2) such facts or circumstances are properly brought before the court; (3) the debtor is given notice of the alleged change in eligibility and an opportunity to be heard; and (4) the court concludes that the debtor does not qualify for the waiver under the two-pronged test of § 1930(f)(1). Kauffman, 2006 WL 3017316 at *2. After applying these factors, the court held that the fee waiver was not warranted, and revoked the order.

In addition, although the debtor had subsequently converted to chapter 13, the court ordered the debtor to pay the chapter 7 filing fee because she was on notice at the time she filed her chapter 7 petition that the filing fee would be reinstated if circumstances later warranted, and the chapter 7 trustee would not be paid for administering the case unless a chapter 7 filing fee was paid. Id. at *3.

LEXSEE 409 F.3D 480

IN RE CARL J. HANNIGAN, Debtor, CARL J. HANNIGAN, Appellant, v. ROBERT R. WHITE, Appellee.

No. 04-2234

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

409 F.3d 480; 2005 U.S. App. LEXIS 10050; Bankr. L. Rep. (CCH) P80,293

June 2, 2005, Decided

SUBSEQUENT HISTORY: Motion dismissed by *In re Hannigan, 2005 Bankr. LEXIS 2438 (Bankr. D. Mass., June 24, 2005)*

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Patti B. Saris, U.S. District Judge. *Hannigan v. White, 2004 U.S. Dist. LEXIS 28802 (D. Mass., Aug. 3, 2004)*

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant Chapter 7 debtor claimed a homestead exemption pursuant to Mass. Gen. Laws ch. 188, § 1A (2004). He later sought to amend his filing under Fed. R. Bankr. P. 1009(a), to increase the value of the exemption to the full amount allowed under state law. He appealed after the bankruptcy court denied his request. The debtor sought further review after the United States District Court for the District of Massachusetts affirmed the decision.

OVERVIEW: The debtor claimed his home, which consisted of a 1.36-acre house parcel and an adjoining, 33-acre undeveloped parcel, as an exemption under Mass. Gen. Laws ch. 188, § 1A (2004). At the time of his original filing, he declared only the value of the house parcel. The debtor later sought to amend his filing to increase the value of the property to the statutory maximum. The bankruptcy court denied the amendment, finding that the debtor had acted in bad faith in deliberately excluding the undeveloped parcel and undervaluing the property in his original exemption filing. The court found no error. The bankruptcy court had discretion to deny the amendment request. The debtor failed to show that the bankruptcy court committed clear error in inferring that he had intentionally undervalued his property or in refusing to permit the amendment as a sanction for his bad faith conduct. The bankruptcy court was entitled to insist that the debtor exercise the utmost good faith. The evidence showed that the debtor knew that he was supposed to declare the value of both parcels and that he had originally, deliberately excluded the value of the undeveloped parcel from the declared value of his home.

OUTCOME: The court affirmed the bankruptcy court's order denying the requested amendment.

COUNSEL: Thomas M. Bovenzi with whom James M. Donovan and Bovenzi & Donovan were on brief for appellant.

Robert White with whom Levy & White was on brief for appellee.

JUDGES: Before Boudin, Chief Judge, Campbell, Senior Circuit Judge, and Howard, Circuit Judge.

OPINION BY: CAMPBELL

OPINION:

[*481] **CAMPBELL, Senior Circuit Judge.** Carl J. Hannigan (the "Debtor") filed a voluntary Chapter 7 petition at the age of 69. On Schedule A - Real Property - he listed his ownership interest in a single-family dwelling at 106 Haynes Road, Townsend, Massachusetts, indicating that the market value of the property was $ 135,000. On Schedule C - Property Claimed as Exempt - he claimed a Massachusetts homestead exemption under *Mass. Gen. Laws ch. 188, § 1A* n1 for the same real estate in the amount of $ 135,000.

n1 *Mass. Gen. Laws ch. 188, § 1A (2004)* provides in pertinent part:

> The real property . . . of persons sixty-two years of age or older . . . shall be protected against attachment, seizure or execution of judgment to the extent of $ 300,000; provided, however, that such person has filed an elderly . . . declaration of homestead protection as provided in section two; and, provided further, that such person occupies or intends to occupy such real property . . . as his principal residence.

[**2]

In the course of the bankruptcy proceedings, the Debtor filed a motion to amend his homestead exemption from $ 135,000, as previously claimed in respect to that property in his Chapter 7 petition, to "the value of the property to the extent of $ 300,000.00," the full amount allowed under *Mass. Gen. Laws ch. 188, § 1A*. The bankruptcy court denied the motion on the ground that the Debtor had intentionally undervalued his property, which consisted of a 1.36-acre house parcel ("House Parcel") and an adjoining, 33-acre parcel ("Back Parcel"), and that doing so in this case "amounted to bad faith." The district court affirmed, see Hannigan v. White, No. 03-40232 (D. Mass. Aug. 3, 2004), and this appeal followed.

Rule 1009(a) of the Federal Rules of Bankruptcy Procedure permits a debtor to amend a schedule "as a matter of course at any time before the case is closed." However, a bankruptcy court has discretion to deny the amendment of exemptions where the amendment would prejudice creditors or where the debtor has acted in bad faith or concealed assets. See, e.g., [*482] *Kaelin v. Bassett (In re Kaelin), 308 F.3d 885, 888 (8th Cir. 2002)*; [**3] *Doan v. Hudgins (In re Doan), 672 F.2d 831, 833 (11th Cir. 1982)*; *Snyder v. Rockland Trust Co. (In re Snyder), 279 B.R. 1, 5 (B.A.P. 1st Cir. 2002)*. Courts have held that it is permissible to deny an amendment where the debtors had intentionally undervalued their home in bad faith. See, e.g., *Bauer v. Iannacone (In re Bauer), 298 B.R. 353, 357 (B.A.P. 8th Cir. 2003)*; *In re Rolland, 317 B.R. 402, 415-16 (Bankr. C.D. Cal. 2004)*.

The Debtor challenges the bankruptcy court's finding that he intentionally and in bad faith undervalued his property. In passing on the Debtor's appeal, we give no actual deference to the district court's review of the bankruptcy court's decision, although we of course may consider it for its persuasive value. *HSBC Bank USA v. Branch (In re Bank of New England Corp.), 364 F.3d 355, 361 (1st Cir. 2004)*. Instead, we directly review the decision of the bankruptcy court, examining its legal conclusions de novo and its factual findings for clear error. Id. The question of a debtor's intent is a question of fact reviewed under the clearly erroneous standard. [**4] See *Smith v. Grondin (In re Grondin), 232 B.R. 274, 277 (B.A.P. 1st Cir. 1999)*.

The bankruptcy court relied on the following facts to support the inference that "the Debtor's intentional undervaluing of the Property in this case amounts to bad faith":

> The *Section 341* meeting [of the creditors] was suspended by the Trustee for the specific purpose of the Debtor's providing the Trustee with an accurate appraisal of the Property. This suspension occurred after [the Debtor's only creditor] questioned the Debtor about whether the values he listed on Schedule A and Schedule C included both the House Parcel and the Back Parcel, or just the House Parcel. Thus, the Debtor should have been aware of exactly what information the Trustee was seeking and, in fact, the Debtor testified on cross-examination that he knew as he left the *Section 341* meeting that the Trustee wanted to know the value of both the House Parcel and the Back Parcel. Accordingly, the Debtor and his counsel cannot credibly assert that they did not know that they were supposed to provide an appraisal for the entire Property.
>
> Nevertheless, the assessment provided by the Town of Townsend and [**5] submitted by Debtor's counsel only included the House Parcel. This submission appears even more deceitful on the part of the Debtor given that the assessment indicates that it is for "106 Haynes Road," a description which, when used by the Town of Townsend, meant only the House Parcel but when used by the Debtor on his schedules was intended to encompass the entire 34.36 acre property. The Debtor testified that he knew [] that the information provided to the Trustee was not what she had requested and yet did nothing to fix the problem or even bring it to the Trustee's attention. Therefore, the Court concludes that the Debtor intentionally undervalued the Property in documentation submitted to the Trustee.

A finding is "clearly erroneous" even if there is evidence to support it when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City, 470 U.S. 564, 573, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)*. Our review of the record fails to convince us that the bankruptcy court's finding that the Debtor's intentional undervaluing of the property amounts to bad faith was clearly erroneous.

[*483] The Debtor argues [**6] that the undervaluing of the property cannot constitute bad faith as a matter of law because the undervaluing was not "material," i.e., "the purported act of bad faith [lacked] some logical connection with the consequential facts." According to the Debtor, the amount of the homestead exemption under *Mass. Gen. Laws ch. 188, § 1A* "automatically increases to the statutory maximum as the property appreciates over time." This shows, the Debtor contends, that the undervaluation, which was well below the statutory maximum, must have been innocent and unintentional since it served no purpose beneficial to himself.

While it may well be true, under Massachusetts law, that a homeowner can claim the value of the property, which may increase with time, to the extent of the statutory maximum, federal bankruptcy law nonetheless requires a debtor to state the true value of his property at the time he files his petition. See *Grogan v. Garner, 498 U.S. 279, 287, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991)* (noting that the opportunity for a "fresh start" under the Bankruptcy Code is for the "honest but unfortunate debtor"). A bankruptcy court is entitled to insist [**7] upon filings and representations made in utmost good faith.

The circumstances here strongly suggested some attempt, even if quite misguided, at continued, deliberate exclusion of the value of the Back Parcel from the overall valuation of the Debtor's real estate. The Debtor may have feared that the Back Parcel was not entitled to the homestead exemption or that its value would bring the property's total value above the $ 300,000 limit. n2 He may have simply misunderstood where his better interests lay. That falsification was not actually in his interest was certainly a relevant fact in determining his likely intention, but so also were the facts that the Debtor plainly knew what information was wanted, knew that what he provided was not that information (and was misleading on its face as to the land included), and kept from those involved the information they desired. n3 This is not to say that mere carelessness or oversight would be sufficient to show bad faith or concealment. But bad faith may encompass intentional misconduct that, in retrospect, was not in the actor's best interest. For example, in In re Bauer, the bankruptcy appellate panel held that the bankruptcy court did [**8] not err in finding bad faith and denying the debtors' amended claim of exemption where the debtors had substantially undervalued their home in the schedules to reflect no equity. *298 B.R. at 357*. The court noted the "irony" -- "if the Debtors had accurately disclosed the true value of their home from the outset, they may have [*484] been entitled to exempt their equity in it." Id. Instead, the "bad faith" undervaluation "cost the Debtors the equity in their home." Id. See also Hannigan v. White, No. 03-40232 (D. Mass. Aug. 3, 2004) (the district court's extended and thoughtful analysis of the circumstances here).

n2 We note that one of the subsequent appraisals of the House Parcel and the Back Parcel would result in a total value of $ 865,000, well in excess of the $ 300,000 exemption. The other two appraisals indicated a total value below the exemption.

n3 The Debtor has not cited any case indicating that an intentional undervaluing of property must be of a "material" nature, i.e., must necessarily work to the Debtor's actual advantage, before a court can deny an amendment. Two of the cases cited by the Debtor for the proposition do not address the issue of so-called materiality. See *In re Doan, 672 F.2d at 833-34* (debtor's action did not show intentional or fraudulent concealment); *Kobaly v. Slone (In re Kobaly), 142 B.R. 743, 749 (Bankr. W.D. Pa. 1992)* (evidence was not sufficient to support inference that debtor attempted to conceal asset). The third case, *Peoples Bank v. Colburn (In re Colburn), 145 B.R. 851 (Bankr. E.D. Va. 1992)*, involves the denial of a general discharge of a Chapter 7 debtor's debt, and not the denial of an amendment of exemptions pursuant to *Fed. R. Bankr. P. 1009(a)*.

[**9]

On this record, we cannot say the bankruptcy court committed clear error in inferring, in all the circumstances, that the Debtor had intentionally undervalued the property, and in refusing to permit him to amend his claimed homestead exemption as a sanction for what the court concluded "amounted to bad faith." n4

n4 The appellee did not file an appeal from the bankruptcy court or the district court's orders. Hence we do not consider his arguments that the homestead exemption does not apply to pre-

existing debts under *Mass. Gen. Laws ch. 188, § 1A* or that he has a consensual lien.

Affirmed.

ROBERT LOUIS MARRAMA, PETITIONER v. CITIZENS BANK OF MASSACHUSETTS ET AL.

No. 05-996

SUPREME COURT OF THE UNITED STATES

127 S. Ct. 1105; 166 L. Ed. 2d 956; 2007 U.S. LEXIS 2651; 75 U.S.L.W. 4113; Bankr. L. Rep. (CCH) P80,850; 47 Bankr. Ct. Dec. 221; 20 Fla. L. Weekly Fed. S 93

November 6, 2006, Argued
February 21, 2007, Decided

NOTICE: [***1]

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT. *Marrama v. Citizens Bank (In re Marrama), 430 F.3d 474, 2005 U.S. App. LEXIS 23512 (1st Cir., 2005)*

DISPOSITION: 430 F.3d 474, affirmed.

Case in Brief **($)**

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner bankruptcy debtor filed a voluntary petition under Chapter 7 and made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. The debtor filed a notice of conversion to Chapter 13 which was denied. On appeal, the U.S. Court of Appeals for the First Circuit rejected the debtor's argument that *11 U.S.C.S. § 706(a)* gave him an absolute right to convert to Chapter 13. Certiorari was granted.

OVERVIEW: In verified schedules attached to his bankruptcy petition, the debtor made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. He later claimed that the misstatements were made in error, but the bankruptcy court rejected his argument. The Court held that the text of *11 U.S.C.S. § 706(d)* provided adequate authority for the denial of the debtor's motion to convert his Chapter 7 case to Chapter 13. Nothing in the text of either *11 U.S.C.S. § 706* or *11 U.S.C.S. § 1307(c)* (or the legislative history of either provision) limited the authority of the bankruptcy court to take appropriate action in response to fraudulent conduct by the debtor. The broad authority granted to the bankruptcy judge to take any action that was necessary or appropriate to prevent an abuse of process described in *11 U.S.C.S. § 105(a)*, was adequate to authorize an immediate denial of a motion to convert filed under *11 U.S.C.S. § 706*.

OUTCOME: The judgment was affirmed.

SYLLABUS: In filing his petition under Chapter 7 of the Bankruptcy Code, petitioner Marrama misrepresented the value of his Maine property and that he had not transferred it during the preceding year. Respondent DeGiacomo, the trustee of Marrama's estate, stated his intention to recover the Maine property as an estate asset. Thereafter, Marrama sought to convert the proceeding to Chapter 13, but the trustee and respondent bank, Marrama's principal creditor, objected, contending that the request to convert was made in bad faith and would constitute an abuse of the bankruptcy process. The Bankruptcy Judge denied Marrama's request, finding bad faith. [***2] Affirming, the First Circuit's Bankruptcy Appellate Panel rejected Marrama's argument that he had an absolute right to convert under *§ 706(a) of the Bankruptcy Code*, which provides that a Chapter 7 debtor "may convert a case" so long as it has not been converted previously, and that a waiver of the right to convert is unenforceable. The First Circuit also rejected that argument, emphasizing, *inter alia,* that a bankruptcy court has the authority to dismiss a Chapter 13 petition based on a debtor's bad faith, and that a first-time motion to convert a Chapter 7 case to Chapter 13 should not be treated differently from the filing of a Chapter 13 petition in the first instance.

Held: Marrama forfeited his right to proceed under Chapter 13. The broad description of the right to convert as "absolute" in Senate and House Committee Reports fails to give full effect to the express limitation of *§*

706(d), which provides 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." That text expressly conditioned Marrama's right to convert on his ability to qualify as a Chapter 13 "debtor." Marrama does not [***3] qualify as such a debtor under *§ 1307(c)*, which provides that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding "for cause." Bankruptcy courts routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words "for cause," and a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of bad faith is tantamount to a ruling that the individual does not qualify as a Chapter 13 debtor. Congress gave "'honest but unfortunate debtors'" *Grogan v. Garner, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755*, the chance to repay their debts should they acquire the means to do so, and *§ 706(a)* protects a debtor from being forced to waive that right. However, a provision protecting a borrower from waiver is not a shield against forfeiture. Neither *§ 706* nor *§ 1307(c)* limits a court's authority to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, bankruptcy judges' broad authority to take necessary or appropriate action "to prevent an abuse of process" described [***4] in Code *§ 105(a)* is adequate to authorize an immediate denial of a *§ 706* motion to convert in lieu of a conversion order that merely postpones the allowance of equivalent relief and may give a debtor an opportunity to take action prejudicial to creditors. Pp. 5-10.

430 F.3d 474, affirmed.

COUNSEL: David G. Baker argued the cause for petitioner.
G. Eric Brunstad, Jr. argued the cause for respondents.
Lisa S. Blatt argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and THOMAS, JJ., joined.

OPINION BY: STEVENS

OPINION:

[*1107] [**961] JUSTICE STEVENS delivered the opinion of the Court.

The principal purpose of the Bankruptcy Code is to grant a "'fresh start'" to the "'honest but unfortunate debtor.'" *Grogan v. Garner, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)*. Both Chapter 7 and Chapter 13 of the Code permit an insolvent individual to discharge certain [**962] unpaid debts toward that end. Chapter 7 authorizes a discharge of prepetition debts following the liquidation of the debtor's assets by a bankruptcy trustee, who then distributes the proceeds to creditors. Chapter 13 authorizes an individual with regular income to obtain a discharge after the successful completion of a payment [***5] plan approved by the bankruptcy court. Under Chapter 7 the debtor's non-exempt assets are controlled by the bankruptcy trustee; under Chapter 13 the debtor retains possession of his property. A proceeding that is commenced under Chapter 7 may be converted to a Chapter 13 proceeding and vice versa. *11 U.S.C. §§ 706(a), 1307(a)* and *(c)*.

An issue that has arisen with disturbing frequency is whether a debtor who acts in bad faith prior to, or in the course of, filing a Chapter 13 petition by, for example, fraudulently concealing significant assets, thereby forfeits his right to obtain Chapter 13 relief. The issue may arise at the outset of a Chapter 13 case in response to a motion by creditors or by the United States trustee either to dismiss the case or to convert it to Chapter 7, see *§ 1307(c)*. It also may arise in a Chapter 7 case when a debtor files a motion under *§ 706(a)* to convert to Chapter 13. In the former context, despite the absence of any statutory provision specifically addressing the issue, the federal courts are virtually unanimous that prepetition bad-faith conduct may cause a forfeiture of any right to proceed with a Chapter 13 case. n1 In the [***6] [*1108] latter context, however, some courts have suggested that even a bad-faith debtor has an absolute right to convert at least one Chapter 7 proceeding into a Chapter 13 case even though the case will thereafter be dismissed or immediately returned to Chapter 7. n2 We granted certiorari to decide whether the Code mandates that procedural anomaly. *547 U.S. , 126 S. Ct. 2859, 165 L. Ed. 2d 894 (2006)*.

n1 See, *e.g., In re Alt, 305 F.3d 413, 418-419 (CA6 2002)*; *In re Leavitt, 171 F.3d 1219, 1224 (CA9 1999)*; *In re Kestell, 99 F.3d 146, 148 (CA4 1996)*; *In re Molitor, 76 F.3d 218, 220 (CA8 1996)*; *In re Gier, 986 F.2d 1326, 1329-1330 (CA10 1993)*; *In re Love, 957 F.2d 1350, 1354 (CA7 1992)*; *In re Sullivan, 326 B. R. 204, 211 (Bkrtcy. App. Panel CA1 2005)*.

n2 See, *e.g., In re Martin, 880 F.2d 857, 859 (CA5 1989)*; *In re Croston, 313 B. R. 447 (Bkrtcy. App. Panel CA9 2004)*; *In re Miller, 303 B. R. 471 (Bkrtcy. App. Panel CA10 2003)*.

[***7]

I

On March 11, 2003, petitioner, Robert Marrama, filed a voluntary petition under Chapter 7, thereby creating an estate consisting of all his property "wherever located and by whomever held." *11 U.S.C. § 541(a)*. Respondent Mark DeGiacomo is the trustee of that estate. Respondent Citizens Bank of Massachusetts (hereinafter Bank) is the principal creditor.

In verified schedules attached to his petition, Marrama made a number of statements about his principal asset, a house in Maine, that were misleading or inaccurate. For instance, while he disclosed that he was the sole beneficiary of the trust that owned the property, he listed its value as zero. He also denied that he had transferred any property other than in the ordinary course of business during the year preceding the filing of his petition. Neither statement was true. In fact, the Maine property had substantial value, and Marrama had transferred it into the newly created trust for no consideration seven months prior to filing his Chapter 13 [**963] petition. Marrama later admitted that the purpose of the transfer was to protect the property from his creditors.

After Marrama's examination at the meeting of creditors, [***8] see *11 U.S.C. § 341*, the trustee advised Marrama's counsel that he intended to recover the Maine property as an asset of the estate. Thereafter, Marrama filed a "Verified Notice of Conversion to Chapter 13." Pursuant to *Federal Rule of Bankruptcy Procedure 1017(c)(2)*, the notice of conversion was treated as a motion to convert, to which both the trustee and the Bank filed objections. Relying primarily on Marrama's attempt to conceal the Maine property from his creditors, n3 the trustee contended that the request to convert was made in bad faith and would constitute an abuse of the bankruptcy process. The Bank opposed the conversion on similar grounds.

n3 The trustee also noted that in his original verified schedules Marrama had claimed a property in Gloucester, Mass., as a homestead exemption, see *11 U.S.C. § 522(b)(2)*; *Mass. Gen. Laws, ch. 188, § 1* (West 2005), but testified at the meeting of creditors that he did not reside at the property and was receiving rental income from it, App. 71a-72a. Moreover, when asked at the meeting whether anyone owed him any money, Marrama responded "No," *id.*, at 50a, and in response to a similar question on Schedule B to his petition, which specifically requested a description of any "tax refunds," Marrama indicated that he had "none." Supp. App. 6. In fact, Marrama had filed an amended tax return in July 2002 in which he claimed the right to a refund, and shortly before the hearing on the motion to convert, the Internal Revenue Service informed the trustee that Marrama was entitled to a refund of $ 8,745.86, App. 30a-31a.

[***9]

At the hearing on the conversion issue, Marrama explained through counsel that his misstatements about the Maine property were attributable to "scrivener's error," that he had originally filed under Chapter 7 rather than Chapter 13 because he was then unemployed, and that he had recently become employed and was therefore eligible [*1109] to proceed under Chapter 13. n4 The Bankruptcy Judge rejected these arguments, ruling that there is no "Oops" defense to the concealment of assets and that the facts established a "bad faith" case. App. 34a-35a. The judge denied the request for conversion.

n4 The parties dispute the accuracy of this representation. The trustee's brief notes that Schedule I to Marrama's original petition indicates that he had been employed by a flooring company at the time the case was filed. See Brief for Respondent Mark G. DeGiacomo 10, n. 7 (citing Supp. App. 18, 30). Marrama's counsel stated during oral argument, however, that the income listed in Schedule I represented an estimate based on employment that had not yet begun. Tr. of Oral Arg. 24. Since the sufficiency of the evidence of bad faith is not at issue, we may assume that Marrama did have more income available when he sought to convert than when he commenced the Chapter 7 case.

[***10]

Marrama's principal argument on appeal to the Bankruptcy Appellate Panel for the First Circuit n5 was that he had an absolute right to convert his case from Chapter 7 to Chapter 13 under the plain language of *§ 706(a)* of the Code. The panel affirmed the decision of the Bankruptcy Court. It construed *§ 706(a)*, when read in connection with other provisions of the Code and the Bankruptcy Rules, as creating a right to convert a case from Chapter 7 to Chapter 13 that "is absolute only in the absence of extreme [**964] circumstances." *In re Marrama, 313 B. R. 525, 531 (2004)*. In concluding that the record disclosed such circumstances, the panel relied on Marrama's failure to describe the transfer of the Maine residence into the revocable trust, his attempt to obtain a homestead exemption on rental property in Massachusetts, and his nondisclosure of an anticipated tax refund.

n5 The judicial council of any circuit is authorized by statute to establish a bankruptcy appellate panel service, comprising bankruptcy judges, to hear appeals from the bankruptcy courts with the consent of the parties. See *28 U.S.C. § 158(b)*; *Connecticut Nat. Bank v. Germain, 503 U.S. 249, 252, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)*. The First Circuit has established this service.

[***11]

On appeal from the panel, the Court of Appeals for the First Circuit also rejected the argument that *§ 706(a)* gives a Chapter 7 debtor an absolute right to convert to Chapter 13. In addition to emphasizing that the statute uses the word "may" rather than "shall," the court added:

> "In construing *subsection 706(a)*, it is important to bear in mind that the bankruptcy court has unquestioned authority to dismiss a chapter 13 petition -- as distinguished from converting the case to chapter 13 -- based upon a showing of 'bad faith' on the part of the debtor. We can discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under *subsection 706(a)* differently from the filing of a chapter 13 petition in the first instance." *In re Marrama, 430 F.3d 474, 479 (2005)* (citations omitted).

While other Courts of Appeals and bankruptcy appellate panels have refused to recognize any "bad faith" exception to the conversion right created by *§ 706(a)*, see n. 2, *supra*, we conclude that the courts in this case correctly held that Marrama forfeited his right to proceed under [***12] Chapter 13.

II

The two provisions of the Bankruptcy Code most relevant to our resolution of the issue are *subsections (a)* and *(d) of 11 U.S.C. § 706*, which provide:

> "(a) The debtor may convert a case under this chapter to a case under chapter [*1110] 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
>
> "(d) 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."

Petitioner contends that *subsection (a)* creates an unqualified right of conversion. He seeks support from language in both the House and Senate Committee Reports on the provision. The Senate Report stated:

> "*Subsection (a)* of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then the debtor does not have that right. The policy of the [***13] provision is that the debtor should always be given the opportunity to repay his debts, and a waiver of the right to convert a case is unenforceable." S. Rep. No. 95-989, p. 94 (1978); see also H. R. Rep. No. 95-595, p. 380 (1977) (using nearly identical language).

The Committee Reports' reference to an "absolute right" of conversion is more equivocal than petitioner suggests. [**965] Assuming that the described debtor's "opportunity to repay his debts" is a short-hand reference to a right to proceed under Chapter 13, the statement that he should "always" have that right is inconsistent with the earlier recognition that it is only a one-time right that does not survive a previous conversion to, or filing under, Chapter 13. More importantly, the broad description of the right as "absolute" fails to give full effect to the express limitation in *subsection (d)*. The words "unless the debtor may be a debtor under such chapter" expressly conditioned Marrama's right to convert on his ability to qualify as a "debtor" under Chapter 13.

There are at least two possible reasons why Marrama may not qualify as such a debtor, one arising under *§ 109(e)* of the Code, and the other turning on the construction [***14] of the word "cause" in *§ 1307(c)*. The former provision imposes a limit on the amount of indebtedness that an individual may have in order to qualify for Chapter 13 relief. n6 More pertinently, n7 the latter provision, *§ 1307(c)*, provides that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding "for cause" and includes a nonexclusive list of 10 causes justifying that [*1111] relief. n8 None of the specified causes mentions prepetition bad-faith conduct (although *subparagraph 10* does iden-

tify one form of Chapter 7 error -- which is necessarily prepetition [**966] conduct -- that would justify dismissal of a Chapter 13 case). n9 Bankruptcy courts nevertheless routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words "for cause." See n. 1, *supra*. In practical effect, a ruling 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. That individual, in other words, is not a member of the class [***15] of "'honest but unfortunate debtors'" that the bankruptcy laws were enacted to protect. See *Grogan v. Garner, 498 U.S., at 287, 111 S. Ct. 654, 112 L. Ed. 2d 755*. The text of *§ 706(d)* therefore provides adequate authority for the denial of his motion to convert.

n6 *Subsection (e) of 11 U.S.C. § 109* provides:

"Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $ 250,000 and noncontingent, liquidated, secured debts of less than $ 750,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $ 250,000 and noncontingent, liquidated, secured debts of less than $ 750,000 may be a debtor under chapter 13 of this title."

These dollar limits are subject to adjustment for inflation every three years. See *§ 104(b)*.

n7 Marrama initiated a new Chapter 13 case the day after we granted certiorari in the present case. The new case was dismissed on the grounds that, under *§ 109(e)*, he was ineligible to be a Chapter 13 debtor. See *In re Marrama, 345 B. R. 458, 463-464, and n. 10 (Bkrtcy. Ct. Mass. 2006)*. As the Bankruptcy Judge made no such determination on the record before us in this case, and as it is not necessary to our decision that such a determination be made, we do not consider whether Marrama fails to meet the *§ 109(e)* debt limit.

[***16]

n8 Title II U.S.C. *§ 1307(c)* provides, in relevant part:

"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, including --

"(1) unreasonable delay by the debtor that is prejudicial to creditors;

"(2) nonpayment of any fees and charges required under chapter 123 of title 28;

"(3) failure to file a plan timely under *section 1321* of this title;

"(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of *section 521*."

Section 521(2), which has since been amended and redesignated as *§ 521(a)(2)*, see 119 Stat. 38, imposes a duty on a debtor in a Chapter 7 proceeding to file within a certain time period a statement of intent with respect to the retention or surrender of property being used to secure debts. See *11 U.S.C. A. § 521(a)(2), (2004 ed. and Supp. 2006)*.

N9 Indeed, because *§ 521(2)* by its terms applies only to Chapter 7 debtors, at least one prominent treatise has assumed that this subsection could only apply to a debtor who has converted a case from Chapter 7 to Chapter 13. See 8 *Collier on Bankruptcy P1307.04[9]* (15th ed. rev. 2006).

[***17]

The class of honest but unfortunate debtors who do possess an absolute right to convert their cases from Chapter 7 to Chapter 13 includes the vast majority of the hundreds of thousands of individuals who file Chapter 7 petitions each year. n10 Congress sought to give these individuals the chance to repay their debts should they acquire the means to do so. Moreover, as the Court of Appeals observed, the reference in *§ 706(a)* to the unenforceability of a waiver of the right to convert functions "as a consumer protection provision against adhesion contracts, whereby a debtor's creditors might be precluded from attempting to prescribe a waiver of the debtor's right to convert to chapter 13 as a non-negotiable condition of its contractual agreements." *430 F.3d at 479*.

n10 We are advised by the Administrative Office of the United States Courts that 833,148 Chapter 7 cases were filed in fiscal year 2006. Memorandum from Steven R. Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (Dec. 13, 2006) (available in Clerk of Court's case file).

[***18]

A statutory provision protecting a borrower from waiver is not a shield against forfeiture. Nothing in the text of either *§ 706* or *§ 1307(c)* (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. n11 On the contrary, [*1112] the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process" described in *§ 105(a)* of the Code, n12 is surely adequate to authorize an immediate denial of a motion [**967] to convert filed under *§ 706* in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors. n13

n11 We have no occasion here to articulate with precision what conduct qualifies as "bad faith" sufficient to permit a bankruptcy judge to dismiss a Chapter 13 case or to deny conversion from Chapter 7. It suffices to emphasize that the debtor's conduct must, in fact, be atypical. Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 plan is an express statutory ground for denying plan confirmation. *11 U.S.C. § 1325(a)(3)*; see *In re Love, 957 F.2d at 1356* ("Because dismissal is harsh . . . the bankruptcy court should be more reluctant to dismiss a petition . . . for lack of good faith than to reject a plan for lack of good faith under *Section 1325(a)*").

[***19]

n12 Title II U.S.C. *§ 105(a)* provides:

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

n13 Both the Chapter 7 trustee and the United States as *amicus curiae* argue in their briefs that in the interval between the allowance of a motion to convert under *§ 706(a)* and the subsequent granting of a motion to dismiss under *§ 1307(c)*, the fact that the debtor would have possession of the property formerly under the control of the trustee would create an opportunity for the debtor to take actions that would impair the rights of creditors. Whether or not that risk is significant, under our understanding of the Code, the debtor's prior misconduct may provide a sufficient justification for a denial of his motion to convert.

[***20]

Indeed, as the Solicitor General has argued in his brief *amicus curiae,* even if *§ 105(a)* had not been enacted, the inherent power of every federal court to sanction "abusive litigation practices," see *Roadway Express, Inc. v. Piper, 447 U.S. 752, 765, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)*, might well provide an adequate justification for a prompt, rather than a delayed, ruling on an unmeritorious attempt to qualify as a debtor under Chapter 13.

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

DISSENT BY: ALITO

DISSENT:

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Under the clear terms of the Bankruptcy Code, a debtor who initially files a petition under Chapter 7 has the right to convert the case to another chapter under which the case is eligible to proceed. The Court, however, holds that a debtor's conversion right is conditioned upon a bankruptcy judge's finding of "good faith." Because the imposition of this condition is inconsistent with the Bankruptcy Code, I respectfully dissent.

I

The Bankruptcy Code unambiguously provides that a debtor who has filed a bankruptcy petition under Chapter 7 has a broad right [***21] to convert the case to another chapter. Title 11 *§ 706(a)* states:

> "[A] debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title."

[*1113] The Code restricts a Chapter 7 debtor's conversion right in two -- and only two -- ways. First, *§ 706(a)* makes clear that the right to convert is available only once: A debtor may convert so long as "the case has not been converted [to Chapter 7] under *section 1112, 1208*, or *1307* of this title." Second, *§ 706(d)* provides that a debtor wishing to convert to another chapter must meet the conditions that are needed in order to "be a debtor under such chapter." Nothing in *§ 706(a)* or any other provision of the Code suggests that a bankruptcy judge has the discretion to override a debtor's exercise of the *§ 706(a)* conversion right on a ground not set out [**968] in the Code. Thus, a straightforward reading of the Code suggests that a Chapter 7 debtor has the right to convert the debtor's case to Chapter 13 (or another chapter) provided that the two express statutory conditions contained in *§ 706* are satisfied. [***22]

This reading of the Code is buttressed by the contrast between the terms of *§ 706* and the language employed in other Code provisions that give bankruptcy judges the discretion to deny conversion requests. As noted, *§ 706(a)* says that a Chapter 7 debtor "may convert" the debtor's case to another chapter. Chapters 11, 12, and 13 contain similar provisions stating that debtors under those chapters "may convert" their cases to other chapters. See *§§ 1112(a), 1208(a)*, and *1307(a)* (2000 ed. and Supp IV). Chapters 11, 12, and 13 also contain separate provisions governing conversion requests by other parties in interest. For example, the applicable provision in Chapter 11 provides:

> "On request of a party in interest and after notice and a hearing, *the court may convert* a case under this chapter to a case under chapter 11 of this title at any time." *§ 706(b)* (emphasis added).

See also *§§ 1112(b), 1208(b), (d)*, and *1307(c)*.

In these sections, parties in interest are not given a right to convert. Rather, parties in interest are authorized to request conversion. And the authority to convert, after notice and a hearing, is expressly left to the discretion of the bankruptcy [***23] court, which "may convert" the case if the general standard of "cause" is found to have been met. If the Code had been meant to give a bankruptcy court similar authority when a Chapter 7 debtor wishes to convert, the Code would have used language similar to that in *§§ 1112(b), 1208(b), (d)*, and *1307(c)*. Congress knew how to limit conversion authority in this way, and it did not do so in *§ 706(a)*.

In Chapter 7, Congress did directly address the consequences of the sort of conduct complained of in this case. In *§ 727(a)(3)*, Congress specified that a debtor may be denied a discharge of debts if "the debtor has concealed . . . records, and papers, from which the debtor's financial condition or business transactions might be ascertained." The Code further provides that discharge may be denied if the debtor has "made a false oath or account" or "presented or used a false claim." *§ 727(a)(4)*. In addition to blocking discharge, Congress could easily have deemed such conduct sufficient to bar conversion to another chapter, but Congress did not do so.

Instead of taking that approach, Congress included in the statutory scheme several express means to redress a debtor's bad faith. First, [***24] if a bankruptcy court finds that there is "cause," the court may convert or reconvert a Chapter 11 or Chapter 13 restructuring to a Chapter 7 liquidation. *§§ 1112(b), 1307(c)*. Second, a Chapter 13 debtor must propose a repayment plan to satisfy the debtor's creditors -- a plan that is subject to court approval [*1114] and must be proposed in good faith. *§§ 1325(a)(3), (4)*; accord, *§ 1328(b)(2)*. Third, a debtor's asset schedules are filed under penalty of perjury. *28 U.S.C. § 1746*; *Fed. Rule Bkrtcy. Proc. 1008*. Fourth, a Chapter 13 case is overseen by a trustee who is empowered to investigate the debtor's financial affairs, to furnish information regarding the bankruptcy estate to parties in interest, and to oppose discharge if necessary. *11 U.S.C. §§ 704(4), (6)* and *(9)*. [**969] See also *§ 1302(b)* (defining the powers of a Chapter 13 trustee in part by reference to the powers of a Chapter 7 trustee). These measures, as opposed to the "good faith" requirement crafted by the Court, represent the Code's strategy for dealing with debtors who engage in the type of abusive tactics that the Court's opinion targets. n1

> n1 And as noted above, *11 U.S.C. § 727(a)(4)* also addresses such conduct, making it a bar to discharge, but not to conversion.

[***25]

In sum, the Code expressly gives a debtor who initially files under Chapter 7 the right to convert the case to another chapter so long as the debtor satisfies the requirements of the destination chapter. By contrast, the Code pointedly does not give the bankruptcy courts the authority to deny conversion based on a finding of "bad

faith." There is no justification for disregarding the Code's scheme.

II

In reaching the conclusion that a bankruptcy judge may override a Chapter 7 debtor's conversion right based on a finding of "bad faith," the Court reasons as follows. Under *§ 706(d)*, a Chapter 7 debtor may not convert to another chapter "unless the debtor may be a debtor under such chapter." Under *§ 1307(c)*, a Chapter 13 proceeding may be dismissed or converted to Chapter 7 "for cause." One such "cause" recognized by bankruptcy courts is "bad faith." Therefore, a Chapter 7 debtor who has proceeded in "bad faith" and wishes to convert his or her case to Chapter 13 is not eligible to "be a debtor" under Chapter 13 because the debtor's case would be subject to dismissal or reconversion to Chapter 7 pursuant to *§ 1307(c)*. I cannot agree with this strained reading of the Code.

The requirements [***26] that must be met in order to "be a debtor" under Chapter 13 are set forth in *11 U.S.C. A. § 109* (main ed. and Supp. 2006), which is appropriately titled "Who may be a debtor." The two requirements that are specific to Chapter 13 appear in *subsection (e)*. First, Chapter 13 is restricted to individuals, with or without their spouses, with regular income. Second, a debtor may not proceed under Chapter 13 if specified debt limits are exceeded. n2

> n2 "Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $ 307,675 and noncontingent, liquidated, secured debts of less than $ 922,975, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $ 307,675 and noncontingent, liquidated, secured debts of less than $ 922,975 may be a debtor under chapter 13 of this title." *§ 109(e)* (Supp. 2006) (footnote omitted).

[***27]

As the Court of Appeals below correctly understood, *§ 706(d)*'s requirement that a debtor may convert only if "the debtor may be a debtor under such chapter" obviously refers to the chapter-specific requirements of *§ 109*. *In re Marrama, 430 F.3d 474, 479, n. 3 (CA1 2005)*.

Rather than reading *§§ 109(e)* and *706(d)* together, the Court puts *§ 109(e)* aside and treats *§ 706(d)* as a separate [*1115] repository of additional requirements (namely, the absence of the grounds for dismissal or reconversion under *§ 1307(c)*) that a Chapter 7 debtor must satisfy *before* conversion to Chapter 13. But *§ 1307(c)* plainly does not set out requirements that an individual must meet in order to "be a debtor" under Chapter 13. Instead, [**970] *§ 1307(c)* sets out the standard ("cause") that a bankruptcy court must apply in deciding whether, in its discretion, an already filed Chapter 13 case should be dismissed or converted to Chapter 7. Thus, the Court's holding in this case finds no support in the terms of the Bankruptcy Code.

In holding that a bankruptcy judge may deny conversion based on "bad faith," the Court of Appeals appears to have been influenced by the belief that following the literal [***28] terms of the Code would be pointless. *Id., at 479-481*. Specifically, the Court of Appeals observed that if a debtor who wishes to convert from Chapter 7 to Chapter 13 has exhibited such "bad faith" that the bankruptcy court would immediately convert the case back to Chapter 7 under *§ 1307(c)*, then no purpose would be served by requiring the parties and the court to go through the process of conversion and prompt reconversion. *Id., at 481*.

It is by no means clear, however, that conversion under *§ 706(a)* followed by a reconversion proceeding under *§ 1307(c)* would be an empty exercise. The immediate practical effect of following the statutory scheme is compliance with *Bankruptcy Rule 1017(f)*, which applies *Bankruptcy Rule 9014* to the reconversion. *Fed. Rule Bkrtcy. Proc. 1017(e)(1). 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." The Court's decision circumvents this process and forecloses the right that a Chapter 13 debtor would otherwise possess to file a Chapter 13 repayment and reorganization plan, *11 U.S.C. § 1321*, [***29] which must be filed in good faith and which must demonstrate that creditors will receive no less than they would under an immediate Chapter 7 liquidation, *§§ 1325(a)(3)* and *(4)*; accord, *§ 1328(b)(2)*. While the plan must be filed no later than 15 days after filing the petition or conversion, the debtor may file the plan at the time of conversion, *i.e.*, before the reconversion hearing. *Fed. Rule Bkrtcy. Proc. 3015(b)*.

Moreover, it is not clear whether, in converting a case "for cause" under *§ 1307(c)*, a bankruptcy court must consider the debtor's plan (if already filed) and, if the plan must be considered, whether the court must take into account whether the plan was filed in good faith, whether it honestly discloses the debtor's assets, whether it demonstrates that creditors would in fact fare better under the plan than under a liquidation, and whether the

plan in some sense "cures" prior bad faith. Today's opinion renders these questions academic, and little is left to guide what a bankruptcy court must consider, or may disregard, in blocking a *§ 706(a)* conversion. n3

n3 Indeed, the only procedural guidance for such a situation is *Federal Rule of Bankruptcy Procedure 1017(f)(2)*, which requires the filing of a motion to convert by the debtor and service thereof.

[***30]

The Court notes that the Bankruptcy Code is intended to give a "' "fresh start"' " to the "' "honest but unfortunate debtor."' " *Ante,* at 1, 9 (quoting *Grogan v. Garner, 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)).* But compliance with the statutory scheme -- conversion to Chapter 13 followed by notice and a hearing on the question of reconversion -- [*1116] would at least provide some structure to the process of identifying those debtors [**971] whose "'bad faith'" meets the Court's standard for consignment to liquidation, *i.e.,* "'bad faith'" conduct that is "atypical" and "extraordinary." *Ante*, at 10, n. 11.

III

Finally, the Court notes two alternative bases for its holding. First, the Court points to *11 U.S.C. § 105(a)*, which governs a bankruptcy court's general powers. n4 Second, the Court suggests that even without a textual basis, a bankruptcy court's inherent power may empower it to deny a *§ 706(a)* conversion request for bad faith. Obviously, however, neither of these sources of authority authorizes a bankruptcy court to contravene the Code. On the contrary, a bankruptcy court's general and equitable powers "must and can only be exercised within [***31] the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988)*; accord, *SEC v. United States Realty & Improvement Co., 310 U.S. 434, 455, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940)* ("A bankruptcy court . . . is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act").

n4 "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *§ 105(a).*

Ultimately, *§ 105(a)* and a bankruptcy court's inherent powers may have a role to play in a case such as this. The problem the Court identifies is a real one. A debtor who is convinced that he or she can successfully conceal assets [***32] has a significant incentive to pursue Chapter 7 liquidation in lieu of a Chapter 13 restructuring. If successful, the debtor preserves wealth; if unsuccessful, the debtor can convert to Chapter 13 and land largely where the debtor would have been if he or she had fully disclosed all assets and proceeded in Chapter 13 in the first instance.

Bankruptcy courts have used their statutory and equitable authority to craft various remedies for a range of bad faith conduct: requiring accountings or reporting of assets n5; enjoining debtors from alienating estate property n6; penalizing counsel n7; assessing costs and fees n8; or holding the debtor [**972] in contempt n9 . But [*1117] whatever steps a bankruptcy court may take pursuant to *§ 105(a)* or its general equitable powers, a bankruptcy court cannot contravene the provisions of the Code.

n5 See, *e.g., In re All Denominational New Church, 268 B. R. 536 (Bkrtcy. App. Panel CA8 2001)* (affirming dismissal for failure to comply with required monthly reporting); *In re Martin's Aquarium, Inc., 225 B. R. 868, 880 (Bkrtcy. Ct. E. D. Pa. 1998)* ("[A] debtor may, in an appropriate case, be required to produce an accounting, and . . . a bankruptcy court does indeed have the power to so order [this equitable remedy]").

[***33]

n6 See, *e.g., In re Bartmann, 320 B. R. 725, 732-733 (Bkrtcy. Ct. N. D. Okla. 2004)*; *In re Newport Creamery, Inc., 293 B. R. 293 (Bkrtcy. Ct. R. I. 2003)*; *In re Peklo, 201 B. R. 331 (Bkrtcy Ct. Conn. 1996).*

n7 See, *e.g., In re Everly, 346 B. R. 791, 797 (Bkrtcy. App. Panel CA8 2006)* (bankruptcy court's *§ 105* powers include authority to sanction counsel); *In re Brooks-Hamilton, 329 B. R. 270 (Bkrtcy. App. Panel CA9 2005)* (upholding sanction and suspension of debtor's counsel); *In re Washington, 297 B. R. 662 (Bkrtcy. Ct. S. D. Fla. 2003).*

n8 See, *e.g., In re Deville, 280 B. R. 483 (Bkrtcy. App. Panel CA9 2002)*; *In re Johnson,*

336 B. R. 568, 573 (Bkrtcy. Ct. S. D. Fla. 2006); *In re Couch-Russell*, No. 00-02226, 2003 W L 25273863 (Bkrtcy. Ct. Idaho 2003); *In re Gorshtein, 285 B. R. 118 (Bkrtcy. Ct. S. D. N. Y. 2002)*.

n9 See, *e.g.*, *In re Sekendur, 334 B. R. 609 (Bkrtcy. Ct. N. D. Ill. 2005)* (imposing contempt sanction for serial and vexatious bankruptcy filing); *In re Tolbert, 258 B. R. 387 (Bkrtcy. Ct. W. D. Mo. 2001)* (same); *In re Swanson, 207 B. R. 76 (Bkrtcy. Ct. N. J. 1997)* (imposing civil contempt under *§ 105* for failure to vacate property).

[***34]

Because the provisions of the Code rule out the procedure that was followed in this case by the bankruptcy court, I would reverse the judgment of the Court of Appeals.