

# Concurrent Session

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## Circuit Splits in Consumer Cases

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**§ 1325(a) THE HANGING PARAGRAPH -  
IS NEGATIVE EQUITY A PART OF A PURCHASE  
MONEY SECURITY INTEREST (PSMI)?**

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**1. Introduction**

Immediately upon implementation of the new Bankruptcy Abuse Prevention Consumer Protection Act (BAPCPA) in October 2005, § 1325(a) became famous. The reason? The so-called “hanging paragraph”, the paragraph added after § 1325(a)(9) which carries no number or letter. Since that time, the paragraph has engendered a great deal of controversy which, in turn, has generated a great deal of litigation. This presentation will explore the development of the case law in the circuits, particularly the Sixth and Seventh Circuit, on the relationship between a purchase money security interest (PMSI), negative equity and the hanging paragraph.

**2. The Hanging Paragraph**

As set forth in § 1325(a) of the Bankruptcy Code:

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

§ 506 of the Code states that a secured claim is secure only to the value of the collateral that is the subject of the claim. Before the enactment of BAPCPA, debtors in a Chapter 13 plan

could bifurcate a secured claim when the collateral was a motor vehicle, treating the amount of the debt which corresponded to the value of the vehicle as secured and treating the amount in excess of the value as an unsecured claim. The debtor was thus able to “cramdown” the debt, forcing a secured creditor to take cash in lieu of his collateral. After negotiation, the debtor and the secured creditor usually reached an agreement as to the value of the collateral, a larger amount than the debtor wanted to pay and a smaller amount than the creditor wanted to accept. If the debtor and the secured creditor could not reach agreement on the value of the collateral, the court would determine such value. The creditor’s claim was then treated as secured to the extent of that value, and the difference was treated as an unsecured claim. In the Chapter 13 proceedings, the debtor could keep the car over the objection of the secured creditor provided that he paid the full value (as determined by the parties or court) of the collateral in monthly payments through the plan.

This Chapter 13 scheme came to a screeching halt under the hanging paragraph which eliminated the bifurcation of a secured debt: (a) if the creditor has a purchase money security interest in the subject of the claim; (b) if the debt was incurred within 910 days of the filing of the bankruptcy petition; (c) if the collateral is a motor vehicle; (d) if the motor vehicle was acquired for the personal use of the debtor. The question that has arisen under the hanging paragraph is whether the creditor has a purchase money security interest (PMSI) in that portion of the loan granted by the dealership or financing company used to pay off the debtor’s negative equity in his traded-in vehicle.

### **3. The Case Law**

As of this date, eight of the eleven circuits have addressed this issue, some of them very recently. The opinions in both the Sixth and Seventh circuits were issued in March 2010. The

other circuits that have ruled are the Second, Fourth, Fifth, Eighth, Tenth and Eleventh and all have found for the creditor, ruling that the hanging paragraph prohibits bifurcation between the PMSI and non-PMSI portions of a claim and thus, that negative equity is included in the determination of a creditors PMSI. A Ninth Circuit Bankruptcy Appellate Panel (BAP) decision, which took the opposite view and allowed bifurcation, is currently on appeal to the Ninth Circuit Court of Appeals.

### **(A) The Sixth Circuit**

#### **(1) The Bankruptcy Case**

The Hanging Paragraph has generated much litigation in the Sixth Circuit. My research turned up eight cases in the bankruptcy courts. The decisions were split almost evenly for the debtors and the creditors. *In re Jamie Allen Westfall and Angela Ann Westfall* (the “Debtors”), which originated in the courtroom of Judge Russ Kendig in Canton, Ohio, under Bankruptcy Case No. 06-60297, is the case on which the Sixth Circuit issued their recent opinion.

The Debtors filed their Chapter 13 petition on March 13, 2006. They owned two vehicles, both financed. Both creditors filed proofs of claim in the total amount of the loans on both cars. The Debtors had obtained a loan on a 2005 Chevrolet Impala on or about May 31, 2005, in the amount of \$26,189.49, plus interest at 12.29% annually. The sales contract indicated that part of the loan was used to pay \$6,757.62 for negative equity on a 2003 Chevrolet Cavalier traded in by the Debtors. WFS Financial, Inc. filed a proof of secured claim in the amount owed on the loan \$25,631.03. However, in the fourth amended plan filed July 9, 2006, the Debtors proposed to pay WFS only \$18,874.03, plus interest at 8% on the Chevrolet Impala, with the balance of the loan corresponding to the amount financed to pay off the negative equity to be treated as unsecured.

Debtors' second vehicle was a 2005 Chevrolet Silverado which they also purchased on May 31, 2005. The Debtors borrowed \$18,723.65 for the vehicle, related expenses, and approximately \$3,588.47 of negative equity on a Chevrolet Blazer they traded in. The loan was assigned to Nuvell which filed a proof of secured claim in the full amount of the loan (\$18,289.89) which included the negative equity. In their fourth amended plan, the Debtors proposed to pay Nuvell a secured value of \$14,701.89 plus interest at 7% for the Silverado, with the balance treated as unsecured.

Both creditors objected to the plan. The case was prosecuted not by the attorney for the Debtors but by the Chapter 13 Trustee, Toby Rosen. The Trustee's position was that creditors had a purchase money security interest (PMSI) in the amount paid for the vehicles, but not on the portion of the loans relating to payoff of the Debtors' negative equity in the trade-ins. She argued that the claims should be bifurcated into secured and unsecured portions, thus treating the amount of the loans used to payoff negative equity unsecured. The creditors argued they had a PMSI in the entire amount of the loans, making the hanging paragraph applicable to prevent the bifurcated treatment proposed by the Debtors in their plan.

Both the Trustee and the creditors filed extensive briefs. In his opinion issued March 30, 2007, Judge Kendis stated the issue was one of first impression for the court and he raised several issues, the first being that PMSI is not defined within the Code. In seeking to find a definition, he turned to O.R.C. § 1339, 103(B), opining that "mixed" transactions could be divisible into purchase money and nonpurchase money elements. As he noted in this opinion, "[t]his approach is particularly appealing because it puts the parties in the same position as they would have been had there been two transactions: the payoff and satisfaction of the old loan and the purchase of a new car." *In re Westfall*, 365 B.R. 755, 761 (Bkrcty. N.D.Ohio, 2007).

Judge Kendig also discussed the “dual status” rule which would bifurcate the claim into a PMSI portion and a non-PMSI portion, as well as the “transformation” rule which would result in the loss of the entire PMSI security protection in a mixed transaction, and requested further briefing on the issue. He also asked the parties to address the question of whether or not the federal courts may create a federal definition, distinct from state law, of PMSI solely for application in the hanging paragraph.

In his opinion issued September 24, 2007, Judge Kendig, relying on Supreme Court precedent, defined federal common law as “a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather to the judicial creation of a special federal rule of decision,” citing *In re Westfall*, 376 B.R. 210, 213 (Bkrcty.N.D.Ohio, 2007), which in turn cited *Mickowski v. Visi-Trak Worldwide, LLC*, 415 F.3d 501, 511 (6<sup>th</sup> Cir. 2005), and *Atherton v. Federal Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997).

After further examining the issue, the Court opined that the state law definition of PMSI was not meant to apply to bankruptcy law and that federal common law applied. He then adopted the “dual status” rule, which allowed bifurcation of the claims between PMSI and non-PMSI components; the first to be secured, the second to be unsecured. The secured claim of WFS would be \$19,018.22; the unsecured claim relating to the negative equity of the trade-in would be \$6,612.81. The secured claim of Nuvell would be \$14,778.17 with the remaining \$3,511.65 unsecured.

## **(2) The Northern District Court of Ohio Case**

On October 24, 2008, the Federal District Court for the Northern District of Ohio affirmed the decision, citing the Sixth Circuit’s opinion in *AmeriCredit Financial Services v. Long, et al.*, 519 F.3d 288, 290 (6<sup>th</sup> Cir. 2007), which rejected the application of state law in

interpreting federal bankruptcy law. The district court opined that the Sixth Circuit’s ruling in *Long* lent support to the decision of the bankruptcy judge to utilize a federal understanding of PMSI in adopting a “dual-status” rule allowing bifurcation of claims into secured PMSI and non-PMSI portions.

**(3) The 6<sup>th</sup> Circuit Court of Appeals Case**

One of the creditors (Nuvel) appealed to the Sixth Circuit Court of Appeals which issued its decision on March 24, 2010. *In re Westfall*, ---F.3rd---, 2010 WL 1050265, (6<sup>th</sup> Cir. 2010). The Court reviewed the bankruptcy court’s order directly, and reversed and remanded to that court for further proceedings consistent with the opinion.

The Court referred to the *Long* decision which had been quoted in the district court opinion to describe the legislative purpose behind the hanging paragraph:

The hanging paragraph eliminates the cramdown occurring under § 1325(a)(5)(B) by eliminating bifurcation under § 506. Without § 506, Creditors falling within the scope of the hanging paragraph are fully secured so that when a debtor elects to retain the collateral, the debtor must propose a plan that will pay the full amount of the claim. Based upon the legislative history, there is little doubt that the “hanging-Sentence architects intended only good things for car lenders and other lienholders.

*In re Long*, *supra* at 294, (quoting Keith M. Lundin, CHAPTER 13 BANKRUPTCY, 3d ed. 451.5-1 (2000 & Supp. 2007-1).

The Sixth Circuit held that so long as the transaction meets the four criteria set forth in the hanging paragraph: (1) the creditor holds a purchase money security interest; (2) the debt was incurred within 910 days of filing; (3) the collateral consists of a motor vehicle; and (4) the debtor acquired the vehicle for his/her personal use, the creditor is protected from bifurcation of its claim into PMSI and non-PMSI portions—the latter relating to that portion of a loan used to pay off negative equity. Since the Code does not define the term “purchase money security

interest,” however, the Circuit Court held that courts must look to state law rather than federal common law for such definition, relying on *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 329 (1993), (quoting *Butner v. United States*, 440 U.S. 48 (1997)).

Since Ohio has adopted (as have most states) the Uniform Commercial Code, the Sixth Circuit began its inquiry in the UCC, which defines a “purchase-money obligation” as “an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.” O.R.C. § 1309.103(A)(2). In addition, the comments to the relevant UCC section also state that there must be a “close nexus” between the acquisition of the collateral and the secured obligation in order to fall into this definition.

The Court then focused on whether the loan used for payoff of the negative equity was either part of the price for vehicle, or “value given to enable the debtors to acquire the rights in or use of the collateral.” Holding that the negative equity which arose from the trade-in of the previous vehicle played an integral part in the purchase of the new vehicle, the Court found the necessary close nexus and—joining the other circuit courts which had ruled on the issue—decided that negative equity is part of the price of the vehicle and thus is included in the PMSI.

## **(B) The Seventh Circuit**

### **(1) The Bankruptcy Case**

In the ten or so cases decided in the Seventh Circuit’s bankruptcy courts before the Circuit Court of Appeal’s ruling in *In re Howard*, --- F3d --- , 2010 WL 68094 (7<sup>th</sup> Cir. 2010), approximately two thirds found in favor of creditors, holding that the hanging paragraph prohibited bifurcation of the debt owed on a motor vehicle into PMSI and non-PMSI portions.

Several of the bankruptcy courts in Indiana, Illinois and Wisconsin, however, took the contrary view and held that the portion of the debt attributable to negative equity was unsecured.

In *Howard*, the debtor purchased a sports-utility-vehicle for approximately \$30,000.00. As part of the transaction, the debtor traded in his old car which was then worth approximately \$15,000.00. He still owed approximately \$22,000.00 on the car leaving a deficiency balance of approximately \$8,000.00. In a single transaction, the Chevrolet dealership provided financing for the purchase price of the SUV (less the down payment of \$4,500.00) along with certain taxes and fees, and payment of the negative equity on the trade-in. When the debtor filed a Chapter 13 petition fifteen months later, the creditor filed a proof of secured claim in the full amount of the financing of \$35,000.00, which included the payoff of the negative equity.

The Bankruptcy Court for the Northern District of Illinois, Eastern Division, held that the creditor had a PMSI in the full amount of the loan and prohibited bifurcation of the claim. The Court looked to Article 9 of the Uniform Commercial Code as well as the Illinois Motor Vehicle Retail Installment Sales Act (MVRISA). Reading the two statutes together, the Court determined the “amount financed” under the MVRISA included the negative equity, that such financing enabled the debtor to purchase the new vehicle, and that there was a close nexus between the financing of the negative equity and the purchase of the new vehicle. Thus, it held that the hanging paragraph applied so as to prohibit bifurcation of the claim into a PMSI and non-PMSI.

### **(2) The Seventh Circuit Court of Appeals Case**

The case was appealed directly to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. § 158(d)(2)(A), allowing such direct appeals which involve (i) a matter of public importance; (ii) an issue requiring a resolution of conflicting law; or (iii) a decree which would

materially advance the progress of the case. In an extremely well-written opinion by Judge Posner, notable for its clarity and lack of excessive jargon, the Seventh Circuit affirmed the bankruptcy court's holding. The Circuit Court agreed that the state's MVRISA definition of "amount financed" included negative equity and that including such in the definition of "purchase money security interest . . . does no violence to the language of Article 9" of the UCC . . . and may be essential to the flourishing of the important market that consists of the sale of cars on credit."

### **C. Conclusion**

My topic at this seminar was to have been the negative equity issue in the hanging paragraph opinions which were split between the sixth and seventh circuit. Referring to the title of a movie, "A Funny Thing Happened On The Way To The Forum", an equally funny thing happened at the same time that I was researching the split between the Sixth and Seventh Circuits. The Sixth Circuit issued its opinion which erased the split. Nonetheless, it was interesting to trace the cases from the bankruptcy courts through the appeal process. This element of the BAPCPA law which has been the subject of much bankruptcy litigation throughout the country seems to be now pretty much a settled issue.



## **Dismissal for Bad Faith Under § 707(a)**

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### **I. Introduction**

907,603 Chapter 7 bankruptcy petitions were filed during the twelve month period preceding June 30, 2009, 870,266 of which were consumer cases.<sup>1</sup> Although these numbers represent a slight decrease from the high volume of cases filed in the years prior to the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”),<sup>2</sup> current economic conditions seem to be causing an increased number of debtors to turn to bankruptcy protection yet again.<sup>3</sup> Accordingly, courts and creditors alike are on the lookout for any sign of abuse. However, even more difficult than spotting the abuse, is the court’s task of determining the appropriate remedy.

Section 707(b) of the United States Bankruptcy Code (the “Code”)<sup>4</sup> allows courts to dismiss a case filed by an individual debtor whose debts are primarily consumer debts if, after notice and a hearing, the court finds that the granting of relief would be an abuse of the

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<sup>1</sup> See Bankruptcy Statistics, <http://www.uscourts.gov/bnkrpctystats/statistics.htm#june> (last visited Apr. 1, 2010).

<sup>2</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

<sup>3</sup> Pamela C. Tsang, *The Case Against “Bad Faith” Dismissals of Bankruptcy Petitions Under 11 U.S.C. § 707(a)*, 59 AM. U. L. REV. 68, 687-88 (2010).

<sup>4</sup> 11 U.S.C. § 101 *et. seq.* (2005).

provisions of Chapter 7.<sup>5</sup> Further, where the debtor’s income is above median, abuse will be presumed.<sup>6</sup> However, even where the presumption does not arise, or where it is successfully rebutted, the court may nonetheless dismiss the case if the court finds that the debtor filed his petition in bad faith, or where the totality of the circumstances of the debtor’s financial situation demonstrates abuse.<sup>7</sup>

Although § 707(b) provides an effective method for detecting and dealing with debtor abuse, its use is limited (i) because of the limitations in section 707(b)(1) requiring the debtor to be an individual whose debts are primarily consumer debts and the possibility of conversion to a case under Chapter 11 or 13 with the debtor’s consent, and (ii) because prior to BAPCPA, only the court or the United States Trustee could bring a motion to dismiss under that provision.<sup>8</sup> Accordingly, creditors and other parties in interest were forced to turn to other provisions of the Code for relief. Section 707(a) of the Code has been a common choice for creditors, it provides:

The court may dismiss a case under [Chapter 7] only after notice and a hearing and only for cause, including –

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file . . . the information required by paragraph (1) of section 521 . . . .<sup>9</sup>

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<sup>5</sup> 11 U.S.C. § 707(b)(1) (2005).

<sup>6</sup> *See generally* 11 U.S.C. § 707(b)(2) (2005); *see also* Official Form 22A, *available at* <http://www.uscourts.gov/bankform/> (last visited Apr. 1, 2010).

<sup>7</sup> 11 U.S.C. § 707(b)(3) (2005).

<sup>8</sup> ALAN N. RESNICK & HENRY J. SOMMER, 2010 Collier Pamphlet Ed. Bankruptcy Code § 707 629 (Matthew Bender & Company, Inc. 2009) (“Section 102 [of BAPCPA] . . . amend[ed] section 707(b) of the Bankruptcy Code to permit—in addition to the court and the United States trustee—a trustee, bankruptcy administrator, or a party in interest to seek dismissal or conversion of a chapter 7 case to one under chapter 11 or 13 on consent of the debtor, under certain circumstances.”).

<sup>9</sup> 11 U.S.C. § 707(a) (2005).

The issue is complicated when creditors allege bad faith on the debtor's part as cause for a motion to dismiss under § 707(a). Legal scholars have argued that while the list of examples enumerated by Congress in § 707(a) is not exhaustive, “the three examples given are all ‘technical’ or ‘procedural,’” therefore, any other allegations of cause should have the same technical or procedural character.<sup>10</sup> In practice, many courts have interpreted “cause” under § 707(a) more liberally, allowing allegations of bad faith to serve as cause for dismissal.<sup>11</sup> However, bad faith is not a defined term in the Code, and courts have freely developed their own standards for determining bad faith.<sup>12</sup> Critics argue that this liberal approach allows judges to “decide who is worthy of bankruptcy protection and who is not,” without any statutory guidelines.<sup>13</sup> As the Eighth Circuit Court of Appeals has characterized it, “the bad faith inquiry will be ‘employed as a loose cannon which is to be pointed in the direction of a debtor whose values do not coincide precisely with those of the court.’”<sup>14</sup>

## II. The Circuit Split

The Third and Sixth Circuits have permitted a lack of good faith to serve as cause for dismissal under § 707(a), reasoning that the goals of bankruptcy are to provide debtors with a fresh start, but not a head start.<sup>15</sup> Conversely, the Eighth and Ninth Circuits have limited the inquiry to the statutory standard of “cause”, explaining that other, more specific provisions of the Code are intended to address the question of bad faith.<sup>16</sup>

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<sup>10</sup> Rebecca Ellen Bruck, *Lessons in Eliminating Statutory Vagueness: Rule 11 of the FRCP as a Model for Removing the “Good Faith” Fulcrum from Section 707(a) of the Bankruptcy Code*, 19 BANKR. DEV. J. 399, 403 (2003).

<sup>11</sup> *Id.* at 404.

<sup>12</sup> *Id.* at 406.

<sup>13</sup> *Id.* at 402.

<sup>14</sup> *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994) (internal citations omitted).

<sup>15</sup> See *In re Zick*, 931 F.2d 1124, 1128 (6th Cir. 1991) (quoting *In re Krohn*, 886 F.2d 123 (6th Cir. 1989)).

<sup>16</sup> See *In re Padilla*, 222 F.3d 1184, 1192 (9th Cir. 2000) (quoting *In re Huckfeldt*, 39 F.3d at 832).

**A. The Sixth Circuit**

In *In re Zick*, the Sixth Circuit Court of Appeals held that a debtor's lack of good faith may serve as a valid basis for dismissal by a bankruptcy court under § 707(a).<sup>17</sup> In *Zick*, the debtor signed a non-solicitation agreement with his employer.<sup>18</sup> Later, the debtor left his employment to start his own company and began soliciting clients from his former employer.<sup>19</sup> The former employer filed suit against the debtor alleging an intentional breach of contract.<sup>20</sup> Ultimately a court induced mediation award was entered in favor of the former employer in the amount of \$600,000. The debtor later filed for Chapter 7 bankruptcy protection, seeking a discharge of the mediation award.<sup>21</sup> The former employer then filed a motion to dismiss under § 707(a) based on the debtor's bad faith.<sup>22</sup> The bankruptcy court granted the motion to dismiss based on the finding that the debtor had manipulated his bankruptcy into a one creditor case, evidenced by the fact that the debtor filed his bankruptcy petition a mere 9 days after the mediation award was entered and based on the debtor's failure to make any substantial changes to his lifestyle in order to repay his obligation.<sup>23</sup>

On review the Sixth Circuit looked to the language of § 707(a) and reasoned that the word "including" was not meant to be a limiting word.<sup>24</sup> Further, the court noted that a number of bankruptcy courts had previously recognized a lack of good faith as being a valid cause for dismissal.<sup>25</sup> The court recognized that a requirement of good faith is not expressly listed in the

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<sup>17</sup> *In re Zick*, 931 F.2d at 1127.

<sup>18</sup> *Id.* at 1125.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1125-26.

<sup>21</sup> *Id.* at 1126.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1126-27 (citing generally *In re Sky Group Int'l, Inc.*, 108 B.R. 86 (Bankr. W.D. Pa. 1989); *In re Maide*, 103 B.R. 696 (Bankr. W.D. Pa. 1989); *In re Brown*, 88 B.R. 280 (Bankr. D. Hawaii 1988); *In re Bingham*, 68 B.R. 933

provisions of Chapter 7, however, the court reasoned that such a requirement is inherent in the purposes of bankruptcy relief.<sup>26</sup> Further, Congress' intent was to provide the honest debtor with a fresh start, but to deny relief to the dishonest or non-needy debtor who seeks a head start.<sup>27</sup> The court ultimately articulated the following test for when a dismissal for bad faith is appropriate:

Dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.<sup>28</sup>

Based on the foregoing “smell test,” as it has commonly become known, the Sixth Circuit found that the bankruptcy court had properly dismissed the debtor’s case based upon his lack of good faith.<sup>29</sup>

### **B. The Third Circuit**

In *In re Tamecki*, the Third Circuit adopted the Sixth Circuit’s approach from *Zick*, but took the test one step further in stating that “once a party calls into question a [debtor’s] good faith, the burden shifts to the [debtor] to prove his good faith.”<sup>30</sup> In *Tamecki*, the debtor filed for Chapter 7 bankruptcy protection seeking discharge of \$35,000 in credit card debt owed to a single creditor.<sup>31</sup> The debtor’s only asset, which he exempted, was a share in an unencumbered tenancy by the entirety held with his estranged wife.<sup>32</sup> The trustee sought dismissal under § 707(a) based upon the debtor’s lack of good faith, specifically alleging that the debtor would

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(Bankr. M.D. Pa. 1987); *In re Kragness*, 63 B.R. 459 (Bankr. D. Or. 1986); *In re Khan*, 35 B.R. 718 (Bankr. W.D. Ky. 1984)).

<sup>26</sup> *In re Zick*, 931 F.2d at 1129 (citing *In re Jones*, 114 B.R. 917 (Bankr. N.D. Ohio 1990)) (“Good faith and candor are necessary prerequisites to obtaining a fresh start.”).

<sup>27</sup> *Id.* at 1128.

<sup>28</sup> *Id.* at 1129.

<sup>29</sup> *Id.*

<sup>30</sup> *In re Tamecki*, 229 F.3d 205, 207 (3rd Cir. 2000).

<sup>31</sup> *Id.* at 206.

<sup>32</sup> *Id.*

soon be entitled to his portion of the dissolved tenancy by the entirety, which would enable him to repay his debts.<sup>33</sup> The burden then shifted to the debtor to establish that he had acted in good faith in filing his petition.<sup>34</sup> The bankruptcy court found that the debtor failed to meet his burden because he could not point to any “calamity or sudden loss” that had caused him to accrue such large consumer debts, and the debtor’s own testimony demonstrated that his pending divorce would be resolved soon and that the tenancy by the entirety would be dissolved.<sup>35</sup>

The Third Circuit affirmed the bankruptcy court’s dismissal stating that “where the trustee has called into question the debtor’s good faith, and put on evidence sufficient to impugn that good faith, the burden then shifts to the debtor to prove his good faith.”<sup>36</sup> Further, the trustee presented sufficient evidence in this case to shift the burden to the debtor, and the debtor subsequently failed to meet his burden.<sup>37</sup>

### **C. The Ninth Circuit**

The Ninth Circuit has taken a strict approach to its statutory interpretation of § 707(a), limiting dismissals under that provision to those for cause.<sup>38</sup> In *In re Padilla*, the court held that bad faith does not provide cause to dismiss a case under § 707(a).<sup>39</sup> In *Padilla*, the trustee moved to dismiss the case for bad faith under § 707(a), alleging that the debtor had engaged in a credit card bust-out related to prior gambling losses.<sup>40</sup> The bankruptcy court ultimately granted the trustee’s motion.<sup>41</sup>

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<sup>33</sup> *Id.* at 206-07.

<sup>34</sup> *Id.* at 207.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* n.2.

<sup>37</sup> *Id.* at 207.

<sup>38</sup> See generally *In re Padilla*, 222 F.3d 1184 (9th Cir. 2000).

<sup>39</sup> *Id.* at 1191.

<sup>40</sup> *Id.* at 1187-88. The term credit card bust-out describes a debtor’s accumulation of consumer debts on the eve of bankruptcy. *Id.*

<sup>41</sup> *Id.* at 1188.

On review, the Ninth Circuit rejected *Zick* and held that bad faith is not a proper grounds for dismissal under § 707(a).<sup>42</sup> The court noted that the explicit grounds listed in § 707(a) are procedural in nature and are aimed at maintaining the integrity of the bankruptcy process.<sup>43</sup> However, there are other, more specific provisions in the Code that serve to protect creditors from abusive debtors. The court identified the following: (1) under § 523, a creditor may request that a debtor be prevented from discharging a particular debt; (2) under § 727, a creditor may object to a discharge generally; and, (3) under § 707(b) a creditor may move to dismiss if the debts are primarily consumer debts and if granting relief would be a substantial abuse of the provisions of Chapter 7.<sup>44</sup>

The court went on to contrast Chapter 7 cases with Chapter 11 and Chapter 13 filings. In the former, there is no continuing relationship between the debtor and his creditors. However, the latter cases involve a post-filing relationship with creditors which the debtor must approach in good faith, evidenced by Congress' inclusion of a good faith requirement in reorganization cases.<sup>45</sup> The court concluded that based upon the "Code's language and the protracted relationship between reorganization debtors and their creditors . . . bad faith per se can properly constitute 'cause' for dismissal of a Chapter 11 or Chapter 13 petition but not of a Chapter 7 petition under § 707(a)."<sup>46</sup>

In evaluating whether the debtor's credit card bust-out constituted cause for dismissal under § 707(a), the court noted that some conduct constituting cause may look very much like bad faith. However, the inquiry must always be framed in terms of cause so that the court will be

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<sup>42</sup> *Id.* at 1191.

<sup>43</sup> *Id.* at 1192. (citing Katie Thein Kimlinger & William P. Wassweiler, *The Good Faith Fable of 11 U.S.C. § 707(a): How Bankruptcy Courts Have Invented a Good Faith Filing Requirement for Chapter 7 Debtors*, 13 BANKR. DEV. J. 61, 97 (1996)).

<sup>44</sup> *Id.* at 1191-92.

<sup>45</sup> *Id.* at 1193. *See also* 11 U.S.C. §§ 1129(a)(3) and 1325(a)(3) (2005).

<sup>46</sup> *Id.* at 1193.

guided by the fundamental principles of Chapter 7.<sup>47</sup> Here, the debtor's conduct did not violate any procedural requirements of Chapter 7, nor did the debtor fail to pay any fees or file any required documents.<sup>48</sup> Further, dismissal under § 707(a) is only proper where the debtor's misconduct is the type contemplated by a specific provision in Chapter 7.<sup>49</sup> Therefore, the debtor's credit card bust-out did not constitute cause and the bankruptcy court's dismissal of the case under § 707(a) was in error.<sup>50</sup>

#### **D. *The Eighth Circuit***

An Eighth Circuit opinion preceding *Tamecki* took the same approach.<sup>51</sup> In *In re Huckfeldt*, the court held that the § 707(a) analysis should be limited to the statutory standard of cause. Further, where the bankruptcy court elects to act under judicial power to punish a bad faith debtor, that action cannot be taken under § 707(a).<sup>52</sup> Ultimately the court found cause for dismissal in this case based upon the debtor's attempt to file his bankruptcy petition merely to frustrate an earlier divorce decree and to push his ex-wife into bankruptcy herself.<sup>53</sup> This type of misconduct, according to the court, "violate[d] the purpose and intent of the [Code]."<sup>54</sup>

#### **E. *Where does the Seventh Circuit Stand?***

The Seventh Circuit has not yet indicated where it stands on the § 707(a) split. However, a bankruptcy court in the northern district of Illinois has indicated in dicta that it would apply the approach employed by the Third and Sixth Circuits.<sup>55</sup> In *In re Collins*, the Illinois court stated that § 707(a) "permits a court to dismiss a case 'for cause'" and that "[b]ad faith can constitute

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<sup>47</sup> *Id.* at 1192-93.

<sup>48</sup> *Id.* at 1193.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1194.

<sup>51</sup> See generally *In re Huckfeldt*, 39 F.3d 829 (8th Cir. 1994).

<sup>52</sup> *Id.* at 832.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 833.

<sup>55</sup> See generally *In re Collins*, 250 B.R. 645 (Bankr. N.D. Ill. 2000).

cause for dismissal under § 707(a).”<sup>56</sup> In *Collins*, the debtor filed for bankruptcy in anticipation of a judgment being entered against him in a pending civil litigation.<sup>57</sup> In evaluating bad faith, the Illinois court considered the totality of the circumstances, with the most important factor being the debtor’s ability to pay his debts.<sup>58</sup> Here, the debtor did have an ability to repay his debts, either from the \$2.3 million in life insurance and pension funds or from his future income. However, the debtor openly admitted to the court that if he were denied bankruptcy protection, he would cease working in order to curtail his income and avoid paying his creditors.<sup>59</sup> The court considered other factors such as the debtor’s intent to frustrate one particular creditor, and his refusal to make changes to his lavish lifestyle.<sup>60</sup> With regard to the later, the court found that the debtor was spending tens of thousands of dollars each year on vacationing, and often times the debtor paid for family members to accompany him on these vacations.<sup>61</sup> The court stated that “creditors should not have to bear the burden of the debtor’s open-handedness.”<sup>62</sup> The court ultimately found that it “would be an affront to equity and good conscience to allow the debtor to manipulate the system,” and that the evidence overwhelmingly demonstrated the debtor’s bad faith.<sup>63</sup>

The lone bankruptcy court decision on the issue siding with the Sixth Circuit position on section 707(a) dismissals was based upon the most egregious facts imaginable and, of course, has no precedential value as dicta in a lower court decision. Since we could locate no other decisions

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<sup>56</sup> *Id.* at 653.

<sup>57</sup> *Id.* at 651. The Debtor was a member agent of Lloyds of London (“Lloyds”), the British insurance market. Due to substantial underwriting losses suffered by the debtor during his time as an agent, Lloyds proposed a settlement whereby the debtor, and other agents who had experienced losses, would pay certain premiums to a reinsurance company that would assume all the liabilities. Additionally, the agents would receive a reduced amount as reimbursement for their losses. However, the debtor never made any premium payments and subsequently Lloyds brought suit against him in English court. *Id.* at 650.

<sup>58</sup> *Id.* at 654.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 654-55.

<sup>61</sup> *Id.* at 653.

<sup>62</sup> *Id.* at 655.

<sup>63</sup> *Id.*

on the issue at any level in the Seventh Circuit, it is possible to speculate that substantive, section 707(a) dismissals are not commonly being utilized in the Seventh Circuit, and that, if they were, such motions would not be viewed favorably.

### III. Conclusion

Critics of the Sixth Circuit's approach have argued that "[a]lthough bankruptcy courts are courts of equity, they do not serve to create or amend the Code to ensure the most equitable outcome but instead exist to interpret and enforce its provisions within the confines of the Code's purpose and language."<sup>64</sup> Further, where the statutory language is clear, as it is in § 707(a), courts should not misconstrue that language in an effort to protect the integrity of the bankruptcy process.<sup>65</sup> When courts engage in a subjective determination of what the particular debtor was "thinking, planning, scheming, or orchestrating," it leads to inconsistent results and prevents debtors and other parties in interest from reasonably predicting an outcome of the proceeding.<sup>66</sup>

The Eighth and Ninth Circuits' approach is not without criticism either. While the test employs the statutory standard of cause, subjective elements remain.<sup>67</sup> Some of the same factors utilized in the bad faith inquiry are present in the context of cause, including a debtor's manipulation of his case to frustrate a single creditor.<sup>68</sup>

One scholar has proposed a change to § 707(a) which would address the current inconsistency on the issue. Replacing the "for cause" language with the phrase "for an unreasonable violation of bankruptcy procedure" would make clear that the § 707(a) inquiry is a limited one which does not encompass the subjective test of good faith.<sup>69</sup> It is argued that this

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<sup>64</sup> Tsang, *supra* note 3, at 714.

<sup>65</sup> *Id.* at 728.

<sup>66</sup> Bruck, *supra* note 10, at 402 & 406.

<sup>67</sup> *Id.* at 414 ("for cause" will continue to face divergent levels of narrow and broad interpretation").

<sup>68</sup> See *Huckfeldt*, 39 F.3d at 832.

<sup>69</sup> Bruck, *supra* note 10, at 424-425.

language would bring more consistency and predictability back into the bankruptcy process, while still leaving the court with a sufficient level of flexibility on the issue.<sup>70</sup>

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<sup>70</sup> *Id.* at 425. The author explains in more detail that:

[T]he use of the word ‘unreasonable’ allows judges to maintain flexible control over the outcome, but places boundaries on what will constitute grounds for dismissal. No longer will the court have to consider what the debtor was thinking or ‘scheming,’ rather the sole inquiry will be ‘what has the debtor done?’ By changing the language slightly, a quantifiable action becomes the determinative factor. *Id.*



## Means Test Allowance for Surrendered Property - Chapter 7

### Whether the payment on a secured asset to be surrendered can be an expense in the means test.

THIS WAY (majority view)	THAT WAY (minority view)
<p>You can expense for payment on the means test for a surrendered asset.</p> <p><i>In re Rudler</i>, 576 F.3d 37 (1<sup>st</sup> Cir, 2009). The plain language of the Bankruptcy Code allows debtors to deduct payments due on a secured debt notwithstanding the debtor's intention to surrender the collateral. In calculating monthly income under the "means test" for identifying an abusive Chapter 7 petition, debtors can deduct, as "amounts scheduled as contractually due to secured creditors," payments due on secured debt notwithstanding debtor's intention to surrender the collateral. When petition is filed and means test calculation performed, debtor will not yet have given up any secured property identified for surrender, so that debtor will then still have "contractually due" payments that are "scheduled" to be paid.</p> <p><i>Fokkena v. Hartwick</i>, 373 BR 645 (D. Minn. 2007). The United States District Court for the District of Minnesota concludes that the plain language of 11 U.S.C.S. 707(b)(2)(A)(iii) dictates that a debtor must be permitted to deduct secured payments on property, even if that debtor intends to surrender that property post-petition.</p> <p><i>In re Randle</i>, 2007 WL 2668727 (N.D. Ill. July 20, 2007). The Bankruptcy Court determined, after interpreting the statute, that §707(b)(2)(A)(iii) permits Randle to deduct her actual mortgage payments from her CMI, even though she stated her intention to surrender her home to the mortgage company when she filed a Chapter 7 bankruptcy petition. In reaching this decision, the Bankruptcy Court based its decision first on the plain language of § 707(b)(2)(A)(iii), which says that the debtor "shall" deduct the amounts "scheduled as contractually due in each month of the 60 months following the date of the petition."</p> <p><i>In re Kogler</i>, 368 B.R. 785 (Bankr. W.D. Wis. 2007). Considering the debtor's post-petition intentions, hopes, or dreams seems to defeat the purpose of the mechanical computations of the means test. While permitting the debtors to deduct expenses for surrendered assets appears inconsistent with their actual ability to repay creditors, such a result is certainly not inconsistent with the congressional purpose of creating a mechanical test by which all debtors are judged as of the date they file for bankruptcy. The best interpretation of § 707(b)(2) is to regard it as requiring a "snapshot" of the debtors' finances at the time of filing.</p> <p><i>In re Goble</i>, 401 B.R. 261 (Bankr. S.D. Ohio 2009). The court found the debtor did not violate § 707(b)(2) because she was entitled to deduct, on her means test, her mortgage and arrearage payments on her residence, even though she had given up the residence. However given her ability to pay a significant dividend to her unsecured creditors in a Chapter 13 case, however, the court concluded that abuse did exist based under the totality-of-the-circumstances standard set forth in § 707(b)(3).</p> <p><i>In re Nockerts</i>, 357 B.R. 497 (Bankr. E.D. WI 2006);  <i>In re Vecera, Slip Copy</i>, 2010 WL 935028 (Bkrcty.S.D.Ind., 2010);  <i>In re Cutler</i>, 2009 WL 2044378 (Bkrcty.S.D.Ind.,2009);  <i>In re Wright</i>, 364 B.R. 640 (Bankr. N.D. Ohio 2007);  <i>In re Brandenburg</i>, 2007 WL 145 9402 (Bankr. E.D. Wis. May 17, 2007);  <i>In re Zak</i>, 361 BR 481 (Bankr. N.D. Ohio 2007);  <i>In re Sorrell</i>, 359 B.R. 167 (Bankr. S.D. Ohio 2007) ;  <i>In re Phillips</i>, 417 B.R. 30 (Bankr. S.D. Ohio 2007);  <i>In re Simmons</i>, 357 B.R. 480 (Bankr. N.D. Ohio 2006) ;  <i>In re Haar</i>, 360 B.R. 759 (Bankr. N.D. Ohio 2007)</p>	<p>You cannot expense the payment on the means test for a surrendered asset.</p> <p><i>In re Skaggs</i>, 349 B.R. 594 (Bankr. E.D. Mo. 2006). Debtors were not entitled to deduct vehicle operation expense for more than one vehicle, given that they intended to surrender second vehicle.</p> <p><i>In re Burden</i>, 380 B.R. 194 (Bankr. W.D. Mo. 2007). Debtors could not deduct the payments that they were contractually obligated to make, but would not in fact be making, on residence and motor vehicle, in performing "means test" calculation.</p> <p><i>In re Leary</i>, 2008 WL 1782636 (Bankr. S.D. Tex. 2008). Because the Court is required to interpret "amounts scheduled as contractually due to secured creditors" in the context of whether a presumption of abuse arises, and if abuse is defined in terms of whether a debtor is able postpetition to pay creditors, the Court cannot allow a deduction for a debt that debtors will not pay because of abandonment, surrender, and discharge.</p> <p><i>In re Naut</i>, 2008 WL 191297 (Bankr. E.D. Pa. 2008). Scheduled as contractually due," as used in that section, in conjunction with other sections of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. Such construction results in the clear result that debts must be included on a debtor's Schedule J to be deducted from income through the means test</p> <p><i>In re Ray</i>, 362 B.R. 680 (Bankr. S.C. 2007). In applying means test to determine whether above-median debtors' Chapter 7 case was subject to being dismissed as abusive, debtors who indicated in their statement of intention their intent to surrender collateral were not entitled to take expense deductions for payments on secured debts</p> <p><i>In re Masur</i>, 2007 WL 3231725 (Bankr. D.S.D. Oct. 30, 2007);  <i>In re Harris</i>, 353 B.R. 304 (Bankr. E.D. OK 2006);  <i>In re Singletary</i>, 354 B.R. 455 (Bankr. S.D. Tex. 2006).</p>

# CENTRAL STATES BANKRUPTCY WORKSHOP

## Means Test Allowance for Surrendered Property – Chapter 13

### Whether the payment on a secured asset to be surrendered can be an expense on the means test.

THIS WAY (minority view)	THAT WAY (majority view)
<p>You can expense for payment on the means test for a surrendered asset.</p> <p><i>In re Tonti, 406 B.R. 265 (Bankr. M.D. Pa. 2009)</i> In performing "means test" calculation, debtor was entitled to deduct, as "amounts scheduled as contractually due to secured creditors," the payments that he was contractually obligated to make on petition date on debts secured by collateral that he intended to surrender, and it did not matter whether this calculation was performed in Chapter 7 case, for purpose of determining whether bankruptcy petition was presumptively abusive, or by above-median-income Chapter 13 petitioners like debtor, for purpose of calculating the "projected disposable income" available for payment of unsecured claims.</p> <p><i>In re Marshall, 407 B.R. 1 (Bankr. D. Mass. 2009)</i> Above-median-income Chapter 13 debtors, in performing "means test" calculation to determine "projected disposable income" available for payment of unsecured claims, were entitled to deduct, as "amounts scheduled as contractually due to secured creditors," the payments that they were contractually obligated to make on petition date to junior mortgagee whose lien was wholly unsupported by any equity in mortgaged property over and above amount of senior mortgage debt; it did not matter that debtors, on same date they filed their amended plan, also filed motion to "strip off" junior mortgage lien and proposed to treat junior mortgagee as unsecured creditor in plan.</p> <p><i>In re Thomas, 395 B.R. 914 (B.A.P. 6<sup>th</sup> Cir. 2008)</i> A debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as the debtor's continuing contractual obligations remain unextinguished on the date of the bankruptcy filing.</p> <p><i>In re Anderson, 383 B.R. 699 (Bankr. S.D. Ohio 2008)</i> Contractually incurred secured debt scheduled on Schedule D relating to collateral being surrendered under a Chapter 13 plan may be deducted in the means test in calculating disposable income. The court in <i>Anderson</i> found that the intention to surrender, either in a proposed Chapter 13 plan or a Chapter 7 statement of intention, does not change that such debts are contractually due at filing.</p> <p><i>In re Willette, 395 B.R. 308 (Bankr. D. Vt. 2008)</i> In determining whether an obligation is "scheduled as contractually due," within the meaning of the section of the Bankruptcy Code providing that a Chapter 13 debtor calculating his or her disposable income may subtract from current monthly income the total of all amounts scheduled as contractually due to secured creditors, it makes no difference whether the debtor has actually been paying the obligation or intends to keep paying it, nor does it make a difference whether the debtor intends to surrender the collateral securing the obligation.</p>	<p>You cannot expense the payment on the means test for a surrendered asset.</p> <p><i>In re Turner, 574 F.3d 349 (7<sup>th</sup> Cir. 2009) reversing 384 B.R. 537 (Bankr. S.D. Ind. 2008)</i> Although bankruptcy judges could not engage in speculation about the future income or expenses of the Chapter 13 debtor, there was no speculation in the instant case since all that was at issue was a fixed debt that would disappear before the Chapter 13 plan was approved. The deduction of mortgage expense from the Chapter 13 debtor's disposable income was not intended to enrich the debtor at the expense of his unsecured creditors. It was intended to adjust the respective rights of a secured creditor, the mortgagee, and the unsecured creditors. The deduction is not allowed from the means test for a secured debt on a house that was to be surrendered.</p> <p><i>In re Smith 418 B.R. 359 (9<sup>th</sup> Cir.BAP Wash. 2009)</i> The above-median income debtors contended that the fixed formula for determining reasonably necessary expenses permitted the debtors to deduct payments that they were contractually obligated to make as of the date of their bankruptcy petition, even though they intended to surrender the collateral. The bankruptcy appellate panel held that the debtors were precluded from claiming expenses for the houses and vehicle which they intended to surrender in calculating their projected disposable income, since the expenses were not reasonably necessary for the debtors' maintenance and support. The two-part analysis of 11 U.S.C. 1325(b)(2) and (3) first required a determination of whether an expense was reasonably necessary and, if not, then there was no need to determine the amount of the expense. In the debtors' case, the debtors' election to surrender the houses and the vehicle conclusively established that the items were not necessary for the debtors' maintenance and support, and thus the fixed formula for determining the amount of expenses for such items did not apply in determining the debtors' projected disposable income.</p> <p><i>In re Kalata, 2008 WL 552856 (Bankr. E.D.Wis. Feb 27, 2008)</i> The majority has generally found that in chapter 7 cases, amounts "scheduled as contractually due" in section 707(b)(2)(A)(iii)(I) refers to the amounts due as "provided for by" the underlying contract, and that the means test calculations are intended to represent a "snapshot" as of the petition date, examined without regard to the debtor's future intentions. The term "contractually due" ... does not carry the same meaning in a chapter 13 case as in a chapter 7 case. The chapter 13 plan constitutes a new agreement between the debtor and each secured creditor. A debtor's obligations under the plan are substituted for his or her obligations under the original contract with each secured creditor. Nevertheless, I am satisfied that "projected disposable income" is distinguishable from "disposable income," and "to be expended" is distinguishable from "contractually due." Chapter 13 continues to be forward looking in the statutory sense, as it must be, because in real life it will continue for up to five years after the date of filing</p>

## Means Test Allowance for Surrendered Property – Chapter 13

### Whether the payment on a secured asset to be surrendered can be an expense on the means test.

	<p><i>In re Spurgeon</i>, 378 B.R. 197 (Bankr. E.D. Tenn. 2007) The court also cannot ignore the purpose of the statutes. Why did Congress make the expense provisions of the Chapter 7 means test part of the disposable income test in chapter 13 cases? Congress was concerned with the deductible expenses of chapter 13 debtors with income above the family median. Congress wanted to prevent them from claiming and prevent the courts from allowing higher expense deductions than Congress thought appropriate. By keeping down deductions, Congress meant to increase disposable income and thereby increase the plan payments on general unsecured claims. The statutes will have the opposite effect if the deduction statute must be applied without regard to fact changes brought about by the chapter 13 case. That result would be absurd.</p> <p><i>In re York</i> 415 B.R. 377 (Bkrty.W.D.Wis., 2009) <i>In re Van Bodegom Smith</i>, 383 B.R. 441 (Bankr. E.D.Wis. 2008); <i>In re Hoss</i>, 392 B.R. 463 (Bankr. D. Kan. 2008); <i>In re Marcionna</i>, 2008 WL 4056187 (Bankr. N.D. Ohio Aug. 25, 2008); <i>In re Budig</i>, 2008 WL 1932097 (Bankr. N.D. Iowa, May 1, 2008); <i>In re Suess</i>, 2008 WL 1883509 (Bankr. W.D. Mo. April 28, 2008).</p>
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# CENTRAL STATES BANKRUPTCY WORKSHOP

## Chapter 13 Plan Payment Amounts

**Whether a Chapter 13 debtor's requirement to contribute all "projected disposable income to be received" is the same as "disposable income" [defined as current monthly income {defined as average of monthly income during the 6 month period preceding the filing} received by the debtor minus reasonable expenses] pursuant to Section 1325.**

THIS WAY	THAT WAY
<p>Requires contribution of projected income. Disposable income pursuant to Schedules I and J should be utilized to determine the debtor's payments. Form B22 is a starting point to be considered along with Schedules I and J for a realistic forward looking result.</p> <p><i>Hamilton v. Lanning, (In re Lanning, ) 545 F.3d 1269 (10<sup>th</sup> Cir. Kan., 2009) cert. granted 130 S. Ct. 487 (U.S. 2009).</i> The starting point for calculating a Chapter 13 debtor's "projected disposable income" is presumed to be the debtor's current monthly income. However, the court stated that the calculation is subject to a showing that there is a substantial change in circumstances. The United States Supreme Court granted certiorari on the <i>Lanning</i> issue stating that "[t]he petition for a writ of certiorari is granted limited to the following question: Whether, in calculating the debtor's 'projected disposable income' during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period."</p> <p><i>In re Baud, 415 B.R. 291 (Bankr. E.D. Mich. 2009).</i> Disposable income, as shown on Chapter 13 debtor's Form 22C, is presumptively correct calculation of debtor's projected disposable income, but such presumption may be rebutted with evidence of change in debtor's circumstances which renders the historical disposable income figure an inaccurate predictor of disposable income during pendency of debtor's plan.</p> <p><i>In re Johnson, 400 B.R. 369 (Bankr. N.D.Ill. 2009).</i> When prepetition disposable income included non reoccurring worker's compensation benefits suggesting that debtors could make higher payment, a forward-looking concept should be applied.</p> <p><i>In re Turner, 574 F.3d 349 (7<sup>th</sup> Cir. 2009) reversing 384 B.R. 537 (Bankr. S.D. Ind. 2008).</i> The court agreed with the Eighth Circuit's holding in <i>In re Frederickson (see below)</i> that while the calculation of "disposable income" in the Chapter 13 plan submitted by the debtor is a starting point for determining the debtor's projected disposable income, the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances.</p> <p><i>In re Lasowski, 575 F.3d 815. (8<sup>th</sup> Cir. 2009).</i> Calculation of debtor's projected disposable income can take into account changes in the debtor's financial circumstances that are reasonably certain to occur during the term of the proposed plan. Bankruptcy court could not ignore that debtor's payments on her 401(k) loans would decrease and then end completely.</p> <p><i>In re Nowlin, 576 F.3d 258 (5<sup>th</sup> Cir. Tex. 2009), affirming 2007 WL 4623043 (S.D. Tex. Dec. 28, 2007).</i> Projected disposable income" under 11 U.S.C.S. § 1325(b)(1) was interpreted by the appellate court to embrace a forward-looking view grounded in the present via the statutory definition of "disposable income" premised on historical data. The statutorily defined "disposable income" was the starting point -- it was presumptively correct -- from which the bankruptcy court was to project that income over the course of the plan. Under that interpretation, the statutory definition of "disposable income" was integral to the bankruptcy court's decision to confirm or reject a Chapter 13 debtor's proposed plan. Because the debtor's proposed plan did not include all of her "projected disposable income" in payments to creditors following the repayment of her 401(k) loan, which was reasonably certain to occur on or before the 24th month of her 60-month plan, the bankruptcy court properly denied confirmation under § 1325(b)(1).</p>	<p>Requires contribution of current income. The language of 1325(b)(3) is unambiguous, requiring a mechanical calculation of "projected disposable income" by using the 707(b)(2) test utilized by Form B22.</p> <p><i>In re Boyd, 414 B.R. 223 (Bankr. N.D. Ohio, 2009)</i> debtor whose income had significantly decreased from what he was earning over the six months preceding petition date, such that debtor could not afford to make the payments on unsecured debts that his prior income would have permitted, had to convert case to one under Chapter 7, or case would be dismissed.</p> <p><i>In re Kagenveama 541 F.3d 868 (9<sup>th</sup> Cir. (Ariz.), 2008; amending and superseding In re Kagenveama, 537 F.3d 990 (9<sup>th</sup> Cir. 2008);</i> The parties disputed whether "projected disposable income" meant disposable income, as defined by 11 U.S.C.S. § 1325(b)(2), projected over the applicable commitment period, as the debtor contended, or whether that phrase connoted a forward-looking concept that only used the disposable income calculation as a starting point, as the Trustee contended. Based on the plain meaning of the statute, the court held that the debtor's interpretation was correct. To give meaning to every word of 11 U.S.C.S. § 1325(b), "disposable income," as defined in § 1325(b)(2), had to be projected in order to derive "projected disposable income." The court declined to follow the line of cases holding that Form B22C created a presumptively correct definition of disposable income. The disposition required by the plain text of § 1325(b) was not absurd. The court also concluded, based on the plain language of the statute that the Trustee's interpretation of the "applicable commitment period" that mandated a temporal measurement was correct, but that the "applicable commitment period" requirement was inapplicable to the plan submitted voluntarily with no projected disposable income.</p> <p><i>In re Mancl, 381 B.R. 537 (W.D. Wis. 2008), reversing In re Mancl, 375 B.R. 514 (Bankr.W.D. Wis. 2007);</i> the bright line test of the amended 11 U.S.C.S. 1325(b) is a purely mechanical endeavor, admitting of no discretion. Section 1325(b)(2) says that "disposable income" means current monthly income "for purposes of this subsection." The term "disposable income" is used only once in the subsection, in the phrase "projected disposable income." To adopt the majority view, that the prescribed calculation of "disposable income" under 1325(b)(1)(B) is merely a starting point for determining projected disposable income, one must assume that Congress created the precise and objective current monthly income definition of 11 U.S.C.S. 101(10A), that it mandated that bankruptcy courts apply it to the 11 U.S.C.S. 1325(b) test, and that it then added the term "projected" to empower bankruptcy courts to ignore the 11 U.S.C.S. 101(10A) definition, substituting their own sense of fairness by applying the former process of analyzing and comparing Official Bankr. Schedules I, J. Given the precision and detail of the statute, such an interpretation is untenable.</p> <p><i>In re Schley, 2008 WL 3910982 (Bankr. E.D. Wis. Aug. 22, 2008);</i>  <i>In re Cruz, 2008 WL 3346583 (Bankr. E.D. Wis. Aug. 11, 2008);</i>  <i>In re Spraggins, 286 B.R. 221 (Bankr. E.D. Wis., 2008);</i>  <i>In re Farrar-Johnson, 353 B.R. 224 (Bankr. ND IL 2006).</i>  <i>In re Kaufman, Slip Copy, 2008 WL 3878005 (Bankr. D. Mont. Aug. 21, 2008)</i>  <i>In re Neclarlo, Slip Copy, 393 B.R.784 (Bankr. S.D. Fla. 2008);</i>  <i>In re Lane, Slip Copy, 2008 WL 3914097 (Bankr. D. Mass. Aug. 19, 2008);</i>  <i>In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis. 2006);</i>  <i>In re Alexander, 344 B.R. 742 (Bankr. E.D.NC. 2006).</i>  <i>In re Simms, 2008 WL 217174 (Bankr. N.D.W.Va. Jan 23, 2008) (unpublished);</i>  <i>In re Buck, Slip Copy, 2007 WL 4418145 (Bankr. E.D.Va. Dec 14, 2007);</i>  <i>In re Dalton, Slip Copy, 2007 WL 4554024 (Bankr. S.D.Miss. Dec 19, 2007);</i></p>

## Chapter 13 Plan Payment Amounts

**Whether a Chapter 13 debtor's requirement to contribute all "projected disposable income to be received" is the same as "disposable income" [defined as current monthly income {defined as average of monthly income during the 6 month period preceding the filing} received by the debtor minus reasonable expenses] pursuant to Section 1325.**

*In re Frederickson*, 545 F.3d 652 (8<sup>th</sup> Cir. 2008) "Projected disposable income" was not the same as "disposable income;" the calculation on Form 22C was a starting point for determining projected disposable income, but the final calculation could take into consideration changes in the debtor's financial circumstances and the debtor's actual income and expenses as reported on Schedules I and J.

*In re DeThample*, 390 B.R. 716 (Bankr. D. Kan. 2008). The debtors were required to include a distribution the wife received from her 401(k) (essentially emptying the account) in their CMI for purposes completing Form B22C, that amount could be disregarded in determining the debtors' projected disposable income for confirmation purposes under 11 U.S.C.S. 1325(b)(1)(B) because this was a singular event that would not occur again.

*In re Petro*, 395 B.R. 369 (6<sup>th</sup> Cir. B.A.P. Tenn. 2008) The court held it was required to consider both future and historical finances of the debtors to assure that all of their projected disposable income was applied toward a Chapter 13 plan. The debtors' projected disposable income should have been calculated based on the realities of the debtors' circumstances as of confirmation and as reasonably anticipated to be during the length of the plan. It was in error for the bankruptcy court to use a mechanical application of the Form B22C and to fail to take into account the debtors' actual ability to contribute to a plan.

*In re Royal*, 397 B.R. 88 (Bankr.N.D.Ill. 2007);  
*In re Hilton*, 2008 WL 4593381 (Bankr. E.D. Wis. 2008);  
*In re Van Bodegom Smith*, 383 B.R. 441 (Bankr. E.D. Wis. 2008);  
*In re Marchionna*, 393 B.R. 512 (Bankr. N.D. Ohio 2008);  
*In re Sharp*, Slip Copy, 2008 WL 3925450 (Bankr. C.D. Ill. Aug. 21, 2008);  
*In re Grant*, 364 B.R. 656 (Bankr. E.D. Tenn. 2007);  
*In re Zimmerman*, 2007 WL 295452 (Bankr N.D. Ohio 2007);  
*In re Riggs*, 359 B.R. 649 (Bankr. E. D. Ky. 2007);  
*In re Briscoe*, 374 B.R. 1 (D.D.C. 2007);  
*In re Kibbe*, 342 B.R. 411 (Bankr. D NH 2006), aff'd 2007 WL 512753 (BAP 1st Cir. 2007);  
*In re DeThample*, 390 B.R. 716 (Bankr. D. Kan. 2008);  
*In re Lanning*, 380 B.R. 17 (10th Cir. BAP (Kan.) 2007);  
*In re Colclasure*, 383 B.R. 463 (Bankr.E.D.Ark. 2008);  
*In re Lisenko*, Slip Copy, 2008 WL 780703 (Bankr.N.D.N.Y. Mar 24, 2008);  
*In re Liverman*, 383 B.R. 604 (Bankr.D.N.J. 2008);  
*In re Linn*, Slip Copy, 2008 WL 687448 (Bankr.N.D.W.Va. Mar 10, 2008);  
*In re Wilson*, Slip Copy, 2008 WL 619196 (Bankr.M.D.N.C. Mar 03, 2008);  
*In re Louviere*, 389 B.R. 502 (Bankr.E.D.Tex. Apr. 4, 2008);  
*In re James*, 379 B.R. 903 (Bankr. D.Neb. 2007);  
*In re Briscoe*, 374 B.R. 1 (Bankr. D.Dist.Col. 2007)  
*In re Edmondson*, 363 B.R. 212 (Bankr. D.N.M. 2007);  
*In re Shusher*, 359 B.R. 290 (Bankr. D Nev 2007);  
*In re Watson*, 366 B.R. 523 (Bankr. D. Md. 2007);  
*In re LaPlana*, 363 B.R. 259 (Bankr. M.D. Fla. 2007);  
*In re: Gordon*, 360 B.R. 679 (Bankr. S.D.Cal. 2007);  
*In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006);  
*In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006).

*In re Winokur*, 364 B.R. 204 (Bankr. ED VA 2007);  
*In re Mullen*, 369 B.R. 25 (Bankr. D.Or. 2007);  
*In re Brady*, 361 B.R. 765 (Bankr. D.N.J. 2007);  
*In re Lawson*, 361 B.R. 215 (Bankr. D. Utah 2007);  
*In re Miller*, 361 B.R. 224 (Bankr. N.D. Ala. 2007);  
*In re Mitchell*, 368 B.R. 845 (Bankr. D. Neb. 2007);  
*In re Rotunda.*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006);  
*In re Barr*, 341 B.R. 181 (Bankr. MD NC 2006);  
*In re Alexander*, 344 B.R. 742 (Bankr. ED NC 2006);  
*In re Kolb*, 366 B.R. 802 (Bankr. S.D. Ohio 2007).

