Bad Faith and Bankruptcy Code § 707(a)

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Abstract: While case law questioning the validity of "bad faith" review under section 707(a) of the Code is divergent, for many courts, a debtor's bad faith conduct has always been sufficient to warrant dismissal under section 707(a). Such a review should be accomplished by considering the totality of the debtor's circumstances.

I. Introduction.

The bankruptcy laws were intended to provide a fresh start for the "honest but unfortunate debtor."[3] Nevertheless, many debtors with primarily business debts seek to use chapter 7 to wholly evade their debts. A subset of these debtors include individuals who maintain extravagant lifestyles and could easily repay all, or at least a portion of their debts, but make no effort to do so.

Section 707(a) provides a critical tool (and often, the only means) to prevent egregious misuse of chapter 7 by, among others, this subset of debtors. A small but vocal minority, however, disagrees. Fueled by a circuit split on the issue,[4] that minority argues that there is no good faith filing requirement under chapter 7, and that bad faith conduct is not "cause" to dismiss a case under section 707(a).[5] The reality, however, is that there is, and always has been, a good faith filing requirement under all operative chapters of the Bankruptcy Code.

All chapter 7 cases are subject to dismissal under section 707(a), which authorizes bankruptcy courts to dismiss chapter 7 cases "for cause." The Code does not define "cause," which normally means a sufficient reason.[6] Nothing in either the text or the legislative history of section

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1 Views expressed herein are entirely those of the author and are not purported to reflect those of the United States Department of Justice, the Executive Office for United States Trustees, or the United States Trustee for Region 9.

2 The author would like to thank United States Trustee Program intern Sean P. Murphy for his contributions to this article.

3 *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

4 *See Indus. Ins. Servs. Inc. (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991); *Huckfeldt et al. v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829 (8th Cir. 1994); *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205 (3d Cir. 2000); *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184 (9th Cir. 2000); *Piazza v. Nuterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253 (11th Cir. 2013).

5 *See, e.g., In re Lobera*, 454 B.R. 824 (Bankr. D.N.M. 2011).

6 *See In re Piazza*, 719 F.3d at 1261-1262.

707(a) indicates that Congress meant something different. Thus, section 707(a) authorizes bankruptcy courts to dismiss chapter 7 cases where they find sufficient reasons to do so.

The Bankruptcy Code as enacted in 1978 included three corresponding provisions authorizing bankruptcy courts to dismiss cases "for cause."[7] Congress used the same words in each – "for cause" – to describe the standard for dismissal. The three statutes are all structured the same way. None defines "cause," but each provides the same or substantially-similar, non-exclusive examples of cause that give bankruptcy courts flexibility to determine whether sufficient reason exists to dismiss, or in some cases convert, the case. "Cause" therefore must mean the same thing in all three provisions.

The Supreme Court has stated that a debtor's bad faith conduct is "cause" to dismiss his or her case under one of those provisions, section 1307(c).[8] All ten circuit courts to consider the issue have similarly held that bad faith is "cause" to dismiss a case under another, section 1112(b).[9] And, four of the five courts of appeals that have considered the issue have agreed that "cause" includes at least some bad faith conduct.[10] Those decisions' applications of "cause" coincide with that term's ordinary meaning – a sufficient reason.

To interpret "cause" otherwise would allow some debtors to deliberately manipulate their finances before filing for bankruptcy relief, maintain lavish lifestyles while in bankruptcy, and still discharge their debts. It is difficult to envision how anyone could believe Congress designed or sanctioned such a scheme.

7 11 U.S.C. §§ 707, 1112(b), and 1307(c) (1978).

8 *Maramma v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375 n.11 (2007).

9 *See C-TC 9th Ave. P'ship. v. Norton Co. (In re C-TC 9th Ave. P'ship.)*, 113 F.3d 1304, 1309-12 (2d Cir. 1997); *Solow v. PPI Enters. (U.S.) Inc. et al (In re PPI Enters. (U.S.), Inc.)*, 324 F.3d 197, 210 (3d Cir. 2003); *Rollex Corp. v. Associates Materials, Inc. (In re Superior Siding & Windows, Inc.)*, 14 F.3d 240, 242-43 (4th Cir. 1994); *Humble Place Joint Venture v. Fory (In re Humble Place Joint Venture)*, 936 F.2d 814, 917-18 (5th Cir. 1991); *Trident Assocs. Ltd. P'ship. v. Metropolitan Life Ins. Co. (In re Trident Associates Ltd. P'ship.)*, 52 F.3d 127, 130 (6th Cir. 1995); *Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.)*, 886 F.2d 859, 867 (7th Cir. 1989); *Cedar Shore Resort, Inc. v. Mueller (In re Cedar Shore Resort, Inc.)*, 235 F.3d 375, 379 (8th Cir. 2003); *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 829 (9th Cir. 1994); *The Bal Harbor Club, Inc. v. AVA Dev. Inc. (In re The Bal Harbor Club, Inc.)*, 316 F.3d 1192, 1193 n.1 (11th Cir. 2003); *Bird et al. v. Dahlstrom (In re Dahlstrom)*, 963 F.2d 382, 1992 WL 112238, at *2 (10th Cir. May 22, 1992) (unpublished table decision).

10 *In re Tamecki*, 229 F.3d at 205; *In re Huckfeldt*, 39 F.3d at 829; *In re Zick*, 931 F.2d at 1124; *In re Piazza*, 719 F.3d at 1253; *but see In re Padilla*, 222 F.3d 1184 (9th Cir. 2000).

As is the case in other chapters, bad faith under section 707(a) should be determined by an *ad hoc* inquiry into the "totality of the circumstances" surrounding the filing of the petition.[11] This approach gives bankruptcy courts the flexibility to dismiss bad faith cases where appropriate.

II. When "Sufficient Reason" Exists to Dismiss a Case, There is Cause for Dismissal Under Section 707(a).

Section 707(a) provides that "[t]he court may dismiss a case under [chapter 7] only . . . for cause, including" (1) unreasonable delay by the debtor, (2) nonpayment of fees, and (3) the debtor's failure to timely file required information.[12] The Bankruptcy Code's statutory construction provision, section 102(3), makes clear that "the word 'including' [wa]s not meant to be a limiting word."[13] Conduct other than the three examples in the statute can therefore establish "cause" for dismissal under section 707(a).

Because the Code does not define "cause," that term must be given its ordinary meaning.[14] "Cause" in this context is naturally understood as meaning "good or sufficient reason."[15] So, section 707(a) gives bankruptcy courts the discretion to dismiss cases when they find sufficient reason to do so.[16] This makes sense in light of the burdens that a bankruptcy case imposes upon creditors. Bankruptcy courts are best positioned to decide when unfairness to creditors resulting from debtor misconduct outweighs the debtor's right to proceed with the case. Neither the text nor the legislative history of section 707(a) support a different meaning.

III. Bad Faith Conduct Can be Sufficient Reason for a Bankruptcy Court to Exercise Its Discretion to Dismiss a Case Under Section 707(a).

Congress included substantially similar "dismissal for cause" provisions under all three of the primary chapters of the Bankruptcy Code when it enacted the Code in 1978. Section 707(a)

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11 *See In re Piazza*, 719 F.3d at 1271.

12 11 U.S.C. § 707(a).

13 *In re Zick*, 931 F.2d at 1126; *see also* 11 U.S.C. § 102(3) (defining "including").

14 *Ransom v. FIA Card Services, N.A., fka MBNA America Bank, N.A.*, 131 S.Ct. 716, 724 (2011).

15 Webster's Unabridged Dictionary 330 (2d ed. 2001); *see also* New Oxford American Dictionary 272 (3d ed. 2005) ("reasonable grounds for doing. . . something"); 2 Oxford English Dictionary 1000 (2d ed. 1989) ("Good, proper, or adequate ground of action").

16 *Cf. In re Sentry Park, Ltd.*, 87 B.R. 427, 430 (Bankr. W.D. Tex. 1988) ("Cause [under section 362(d)(1)] is an intentionally broad and flexible concept, made so in order to permit the courts to respond in equity to inherently fact-sensitive situations. . . .")

authorized dismissal of cases filed under chapter 7 for cause. Section 1112(b) enabled courts to dismiss cases filed under chapter 11 for cause. And, section 1307(c) allowed courts to dismiss chapter 13 cases for cause. All three dismissal provisions were structured the same way and included the same standard for dismissal – "for cause, including[.]" All three provided the same or similar, non-exhaustive examples of cause.[17]

Congress enacted all three provisions at the same time. And, it used exactly the same word, "cause," to describe the standard for dismissal. Plainly, Congress intended to give bankruptcy courts the same flexibility across the full spectrum of the Bankruptcy Code to dismiss cases. When a word is used multiple times in a statute, it should be given the same meaning each time.[18] "Cause" should therefore mean the same thing in all three of the Bankruptcy Code's corresponding dismissal statutes.

The Supreme Court has already indicated that a debtor's bad faith is "cause" to dismiss a chapter 13 bankruptcy case and interpreted "cause" to include bad faith in *Marrama*.[19] The Court observed that "[b]ankruptcy courts. . . routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words 'for cause.'"[20] It explained that the debtor who engages in bad faith conduct "is not a member of the class of honest but unfortunate debtors that the bankruptcy laws were enacted to protect."[21]

So too with dismissal of chapter 11 cases under section 1112(b). While the Supreme Court has not had occasion to interpret that provision, all circuit courts to have done so have held that bad faith constitutes cause to dismiss a bankruptcy case.[22]

Even before *Marrama*, three of the four circuit courts that considered the issue affirmed the dismissal of bad faith cases for cause under section 707(a) – and a fourth agreed last year.[23]

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17 *Compare* 11 U.S.C. §§ 707, 1112(b), 1307(c) (1978).

18 *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears"); *see also Sullivan v. Stroop*, 496 U.S. 478, 484 (citations omitted) ("identical words used in different parts of the same act are intended to have the same meaning").

19 549 U.S. at 375 n.11(discussing11 U.S.C. § 1307(c)).

20 *Id*. at 373.

21 *Id*. at 374 (quotations and citation omitted).

22 *See* note 9 *supra*.

23 *See* note 10 *supra*.

The Third and Sixth circuits expressly held that cause includes bad faith.[24] Focusing on the Bankruptcy Code's fundamental purpose to grant a "fresh start" to the "honest debtor," the Sixth Circuit concluded that a debtor who is not needy or who appeared to be seeking a "head start" instead of dealing with creditors on an equitable basis is not entitled to chapter 7 relief.[25] The Third Circuit agreed, ruling that "[a]lthough the Code does not define good faith, courts in this circuit have uniformly held that at the very least, good faith requires a showing of honest intention."[26]

The Eighth Circuit agrees with the Third and Sixth circuits in substance if not semantics. Although it declined to find that bad faith is always cause for dismissal under section 707(a), the Eighth Circuit affirmed the bankruptcy court's dismissal of a chapter 7 case based on the debtor's bad faith conduct, explaining that while the cause and bad faith inquiries were different, the same factors that established bad faith also constituted cause for dismissal.[27] Defining "cause" to include bad faith conduct, as the Third, Sixth, and Eighth circuits did, is consistent with the word's dictionary meaning. [28]

Notwithstanding this substantial support for the proposition that bad faith conduct constitutes sufficient reason to dismiss a case under section 707(a) for "cause," some contend that "cause" means something different in section 707(a) because chapter 7 debtors do not need to proceed in good faith. The Ninth Circuit adopted this view in *Padilla*,[29] presuming that the inclusion of provisions in chapters 11 and 13, requiring plans to be proposed in good faith to be confirmed, implied a good faith filing requirement in those chapters that is lacking in chapter 7.[30] But the obvious reason that chapter 7 has no provision similar to sections 1129(a)(3) and 1325(a)(3) is

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24 *In re Zick*, 931 F.2d at 1127; *In re Tamecki*, 229 F.3d at 207.

25 *Zick*, 931 F.2d at 1128.

26 *Tamecki*, 229 F.3d at 207 (internal citation and quotations omitted).

27 *In re Huckfeldt*, 39 F.3d at 832-33.

28 The facts and ultimate holding of *Huckfeldt* underscore that the Eighth Circuit's concern with the term "bad faith" was more about semantics than substance when compared to *Zick* and *Tamecki*. The debtor in *Huckfeldt* filed his petition "to frustrate [his] divorce decree and to push his ex-wife into bankruptcy" – conduct the Eighth Circuit found to be "unworthy of bankruptcy protection." *Id*.

29 *In re Padilla*, 222 F.3d at 1184.

30 The confirmation provisions of both chapter 11 and chapter 13 contain identical requirements that the plan be "proposed in good faith and not by any means forbidden by law." 11 U.S.C. §§ 1129(a)(3); 1325(a)(3).

that chapter 7 a debtor's assets are simply liquidated and distributed to creditors – there is no plan to confirm.

The Ninth Circuit's reading of section 707(a) in *Padilla* is an unusual one. It departs fundamentally from the dictionary meaning of "cause," which requires nothing more than a sufficient reason. Further, *Marrama* and subsequent amendments to the Bankruptcy Code in 2005 belie the Ninth Circuit's view that debtors may file under chapter 7 in bad faith.

First, *Marrama* clarified post-*Padilla* that the Bankruptcy Code requires debtors to proceed in good faith, and that lack of good faith is "cause" for dismissal.[31] There, the Court did not rely on any express statutory good faith requirement, including section 1325(a)(3), when ruling. Instead, the Court broadly concluded that a debtor who proceeded in bad faith was not within the class of honest but unfortunate debtors the bankruptcy laws were designed to protect.[32] That fundamental policy applies equally to debtors filing for relief under chapter 7,[33] and requires chapter 7 debtors to proceed in good faith or have their cases be subject to dismissal for cause.

Second, Congress clarified in 2005 that chapter 7 debtors are not exempt from a good faith requirement. The 2005 amendments to the Code added section 707(b)(3)(A), which requires a court to consider whether a chapter 7 consumer debtor filed in bad faith. That provision expressly confirmed that chapter 7 consumer debtors had to proceed in good faith.

Moreover, the Ninth Circuit's view that chapters 11 and 13 are different from chapter 7 because of the post-filing debtor-creditor relationship is also misguided. Citing a single law review article, *Padilla* accepted the article's premise that chapters 11 and 13 "permit the debtor to retain its assets and reorder its contractual obligations to its creditors. In return for these benefits, the debtor must approach its new relationship with the creditors in good faith."[34] Chapter 7, by contrast, "requires no ongoing relationship between the debtor and its creditors."[35]

But that premise was, and remains, wrong. Chapter 11, like chapter 7, explicitly permits

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31 *Marrama* held that a debtor's conversion right is conditioned upon a bankruptcy judge's finding of "good faith." However, in doing so, it also noted that a lack of "good faith" is cause for dismissal under section 1307(c). 549 U.S. at 375 n.11.

32 *Id*. at 374.

33 *See Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998).

34 222 F.3d at 1193 (citation and quotations omitted).

35 *Id*. (quotation omitted).

debtors to liquidate rather than reorganize.[36] A chapter 11 liquidation, like a chapter 7 liquidation, requires no ongoing relationship between a debtor and its creditors, thus undermining a lynchpin of the minority viewpoint's reasoning.

Proponents of the minority view occasionally also argue that there cannot be a good faith requirement in chapter 7 because the Code permits courts to convert bad faith cases to chapter 7. But that conclusion does not follow from its premise – it assumes that the "bad faith" debtor under another chapter would necessarily *benefit* from such a conversion. Bankruptcy courts, though, have the discretion to decide whether to convert or dismiss a bad faith case based upon the best interests of creditors.[37]

When a debtor has significant non-exempt property, for example, the court may find the interests of creditors will be better served by converting the case to chapter 7, thereby allowing a trustee to administer the assets, than by dismissing the case.[38] But if there are no assets to administer, courts can and often find that the creditors' best interests require dismissal. Therefore, applying the ordinary meaning of "cause" allows courts discretion to dismiss bad faith cases when there is "sufficient reason" to do so, but to administer such cases in chapter 7 when there is not. In this way, the discretion to convert a "bad faith" case to chapter 7 is not a weakness in the majority's argument, but in reality it is a strength of the Code's structure.

Proponents of the minority view also refer to the reasoning of the Ninth Circuit in holding that bad faith could not be "cause" for dismissal under section 707(a) because other provisions of the Bankruptcy Code – such as sections 362, 523, 547, 548, and 727 – can be used to address such conduct.[39] No other circuit has taken the Ninth Circuit's approach, which usurps litigants' rights under the Code to elect a particular remedy. Moreover, the approach is untenable for three rea-

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36 *See* 11 U.S.C. § 1123(b)(4) (chapter 11 plan can "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests");11 U.S.C. § 1123(a)(5)(D); 11 U.S.C. § 1129(a)(11); *see also* Vincent S.J. Buccola & Ashley C. Keller*, Credit Bidding and the Design of Bankruptcy Auctions*, 18 Geo. Mason L. Rev. 99, 99 (2010) (noting that more than half of debtors in chapter 11 cases now seek to sell substantially all assets)

37 *See* 11 U.S.C. §§ 1112(b)(1), 1307(c).

38 For the same reason, the United States Trustee generally does not seek dismissal of a chapter 7 case where there are significant assets to be administered.

39 *Padilla*, 222 F.3d at 1192.

sons.

First, the argument proves too much. The Ninth Circuit relied on five separate Code provisions – 11 U.S.C. §§ 362, 523, 547, 707(b), and 727 – that, in its view, provide exclusive remedies for specific types of bad faith misconduct, and therefore preclude dismissal for cause under section 707(a).[40] But the three of those provisions *not* specific to chapter 7 – sections 362, 523 and 547 – also apply to chapter 11 and chapter 13 cases.[41] So, under the Ninth Circuit's logic, bad faith likewise would not be "cause" for dismissal under sections 1112(b) and 1307(c). But the Supreme Court in *Marrama*, and each of the circuit courts described above in chapter 11 found precisely the opposite.

Second, those other Code provisions function very differently than section 707(a). They have different objectives, require different elements of proof, and, with the exception of section 707(b), provide very different remedies.[42] Section 707(b), for example, is specifically aimed at curbing consumer abuse, and applies only in cases where a debtor's debts are primarily consumer debts.[43] And, section 727 addresses only very narrow types of fraudulent conduct by the debtor. By framing section 707(a) in general terms, Congress gave bankruptcy courts flexibility to consider whether the debtor's specific misconduct justifies dismissal under the particular circumstances of a case.

In many cases, section 707(a) is the only way to prevent debtors with primarily business debts, who have no need for a fresh start, from misusing the bankruptcy system. An interpretation of section 707(a) that divests the bankruptcy court of discretion to dismiss bad faith cases may well enable those debtors to manipulate their finances prepetition, file to thwart specific creditors or for other improper purposes, yet still obtain a discharge. Surely, this was not Congress's intent.

Third, the provisions that provide other remedies for certain types of misconduct are not

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40 *Id*. (relying on sections 523, 727 and 707(b)); *see also Sherman v. S.E.C. (In re Sherman)*, 491 F.3d 948, 971-73 (9th Cir. 2007).

41 *See* 11 U.S.C. § 103(a).

42 *See, e.g.*, 11 U.S.C. §§ 707(b) (permitting dismissal where discharge of primarily consumer debts would be an abuse), 362 (providing certain exceptions to the automatic stay and authorizing relief from the automatic stay for cause), 547 (allowing trustee to avoid preferential transfers), and 727(a)(4)(A) (providing for denial of discharge for false oaths).

43 *See* 11 U.S.C. § 707(b)(1).

phrased in exclusive terms.[44] Thus, although a court may grant the remedy in the requisite circumstances, it does not have to. That makes sense because the consequences of proceeding under different statutes may be very different. Indeed, if a denial of discharge was the only available remedy for certain bad faith conduct, then bad faith debtors could still impose substantial administrative burdens on the system by filing chapter 7 petitions that courts and trustees would still have to administer. For example, some bad faith debtors do not seek a bankruptcy discharge, but instead repeatedly file cases to frustrate creditors' collection activities. It is also likely to be more costly for a creditor to bring an action seeking the denial of, or an exception to discharge than it is to move for dismissal of the case.[45]

Proponents of the minority view often contend that section 707(b) somehow prohibits bad faith dismissals under section 707(a). That simply is not plausible for two reasons. First, Congress enacted section 707(a) and the other "for cause" dismissal provisions in 1978 as part of the original Bankruptcy Code. "Cause" had a specific meaning in 1978 that was consistent across the operative chapters of the Code, and authorized courts to dismiss bad faith cases. Neither the addition in 1984 of section 707(b) – a new provision aimed at curbing abuse of chapter 7 by consumer debtors – nor the subsequent amendments to section 707(b) in 2005, withdrew that authority.

Congress did not explain why it specifically codified a bad faith dismissal provision for consumer debtors in the 2005 amendments to 707(b), but it may have been to ensure that potentially abusive consumer cases were always reviewed for bad faith – something that does not routinely occur under section 707(a). Section 707(a)'s and 707(b)'s approaches to review for bad faith are different. Section 707(b)(3) obligates a court to consider the debtor's bad faith, whether or not a party affirmatively raises it.[46] In fundamental contrast, bad faith is not required to be considered under 707(a).

Although all chapter 7 cases can be dismissed for bad faith under section 707(a), the command that the courts shall consider bad faith in section 707(b)(3)(A) means that mandatory bad

44 *See* 11 U.S.C. §§ 523, 362, 547, 707(b), 727.

45 *See In re Drewek*, No. 11-42763-SWR (Bankr. E.D. Mich. July 20, 2011), slip op. at 7 (dismissing case for cause and noting that "[b]y stealing all the money from her legally incapacitated son's estate, [the debtor] left [her son's] estate financially unable to bring a nondischargeability action").

46 11 U.S.C. § 707(b)(3) (mandating that "the court shall consider").

faith review exists only in consumer cases. Congress likely instituted mandatory bad faith review in those cases because discretionary bad faith review under section 707(a) proved inadequate to prevent rampant abuse of chapter 7 by consumer debtors. The distinct natures – permissive versus mandatory – of bad faith review and dismissal under sections 707(a) and 707(b) explain why Congress included bad faith review in section 707(b)(3) even though courts already had discretion to dismiss bad faith cases under section 707(a).

Second, the Ninth Circuit's decision in *Padilla* in 2000 may also have spurred Congress to add section 707(b)(3)(A). Prior to *Padilla*, all circuits agreed that bad faith conduct could form the basis for dismissal in both consumer and non-consumer cases under section 707(a) – at least in some circumstances.[47] *Padilla*, however, held that consumer debtor cases could not be dismissed for bad faith under section 707(a) because section 707(b) specifically governed consumer debtor misconduct.[48]

An obvious implication of *Padilla*'s holding is that consumer debtor cases filed in bad faith could be dismissed only if section 707(b) authorized that relief. By adding section 707(b)(3)(A), Congress ensured that consumer debtor cases could be reviewed for bad faith under section 707(b) even if *Padilla* correctly held that such cases could not be dismissed for bad faith under section 707(a).

And, the Third Circuit in *Perlin* rejected the notion that Congress intended the 2005 amendments to section 707(b) to restrict a bankruptcy court's discretion under section 707(a).[49] It concluded that the statutory interpretation principle of negative implication does not apply because subsections 707(a) and 707(b) were not meant to go hand in hand.[50] Because the goal of the 2005 amendments was to reduce abuse by consumer debtors, it is not surprising that Congress was focused on section 707(b)'s consumer provisions rather than section 707(a).[51] But bad faith

47 *In re Tamecki*, 229 F.3d at 207; *In re Zick*, 931 F.2d at 1127; *In re Huckfeldt*, 39 F.3d at 832-33.

48 *Padilla*, 222 F.3d at 1194.

49 *Perlin v. Hitachi Capital America Corp. (In re Perlin)*, 497 F.3d 364, 369-70 (3d Cir. 2007).

50 *Id at* 369-70.

51 *See* H.R. Rep. No. 109-31, at 2 (2005) as reprinted in 2005 U.S.C.C.A.N. 88, 89; *see also In re Stewart*, 175 F.3d 796, 813 (10th Cir. 1999) (section 707(b) "was not enacted to narrow and discourage court review of abuse cases to those involving consumer debt, but to broaden and

review is, and always has been, perfectly acceptable for all chapter 7 cases under section 707(a).

IV. Bad Faith is Determined by Considering the Totality of the Circumstances.

"Cause" to dismiss a bankruptcy case simply means sufficient reason. Consistent with this, courts generally have adopted flexible tests to determine whether debtors have acted in bad faith, warranting dismissal of their bankruptcy cases. Indeed, the Supreme Court expressly declined to constrain "bad faith" within a single definition in *Marrama*.[52]

The Third, Sixth and Eleventh circuits have adopted a totality of the circumstances test for determining bad faith under section 707(a). Under this test, the bankruptcy court looks to the unique circumstances of the case before it, and considers all the facts and circumstances related to the filing of the petition.[53] Bankruptcy courts applying the "totality of the circumstances" analysis under section 707(a) routinely consider myriad factors that "help[] shed light on a debtor's intentions and help[] to determine whether the debtor is an honest but unfortunate debtor entitled to a fresh start."[54] Typically, these courts rely on the presence of several factors to establish bad faith.[55]

> Some of the factors most readily considered by bankruptcy courts are shown below:
> (i) the debtor reduced his creditors to a single creditor shortly before the petition date;
> (ii) the debtor made no life-style adjustments or continued living a lavish lifestyle;
> (iii) the debtor filed the case in response to a judgment, pending litigation, or collection action;
> (iv) there is an intent to avoid a large, single debt;
> (v) the debtor made no efforts to repay his debts;

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encourage such review in light of the fact many bankruptcy courts were not dismissing abusive consumer petitions").

52 549 U.S. at 375, n.11.

53 *Zick*, 931 F.2d at 1127, 1129 (explaining that "[t]he facts required to mandate dismissal based upon a lack of good faith are as varied as the number of cases," and the inquiry is necessarily "ad hoc" in nature); *Perlin*, 497 F.3d at 372 (holding that "[a]n assessment of a debtor's good faith requires consideration of all the facts and circumstances surrounding the debtor's filing for bankruptcy"); *Piazza*, 719 F.3d at 1271 ("In light of its inherently discretionary nature, a totality-of-the-circumstances approach is the correct legal standard for determining bad faith under § 707(a)").

54 *In re Piazza*, 451 B.R. 608, 615 (Bankr. S.D. Fla. 2011).

55 *See In re Lichtenstein*, 328 B.R. 513, 515 (Bankr. W.D. Ky. 2005) ("where a combination of factors is present, courts have held that dismissal is warranted); *In re Perlin*, 497 F.3d at 375 (looking at ability to repay and other factors to determine whether bad faith exists).

(vi) the unfairness of the use of Chapter 7;
(vii) the debtor has sufficient resources to pay his debts;
(viii) the debtor is paying debts of insiders;
(ix) the schedules inflate expenses to disguise financial well-being;
(x) the debtor transferred assets;
(xi) the debtor is over-utilizing the protections of the Bankruptcy Code to the unconscionable detriment of creditors;
(xii) the debtor employed a deliberate and persistent pattern of evading a single major creditor;
(xiii) the debtor failed to make candid and full disclosure;
(xiv) the debtor's debts are modest in relation to his assets and income;
(xv) there are multiple bankruptcy filings or other procedural "gymnastics."[56]

Numerous other bankruptcy courts around the country have considered these, or substantially similar factors, in evaluating whether a petition should be dismissed for bad faith under section 707(a).[57]

V. Conclusion.

Despite the presence of a minority of detractors, chapter 7 cases have always been subject to dismissal for bad faith conduct under section 707(a) of the Bankruptcy Code. In the case of non-consumer debtors, section 707(a) may be the only statutory mechanism to ensure that such debtors do not receive a "head start" above and beyond the "fresh start" typically given to the "honest but unfortunate debtor."[58] When that mechanism is exercised, such debtors generally have their cases reviewed for bad faith conduct under a "totality of the circumstances" approach, whereby courts consider a litany of non-dispositive factors in determining whether dismissal is warranted. In light of these circumstances, counsel would be wise to consider such issues when counseling clients contemplating filing for protection under chapter 7 of the Bankruptcy Code – especially those clients with primarily non-consumer debts.

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56 *In re Piazza*, 451 B.R. 608, 614-15 (Bankr. S.D. Fla. 2011).

57 *See, e.g., In re Baird*, 456 B.R. 112, 116-17 (Bankr. M.D. Fla. Jan. 20, 2010); *In re McDaniel*, 363 B.R. 239, 244 (M.D. Fla. 2007); *In re Stump*, 280 B.R. 208, 214 n.2 (Bankr. S.D. Ohio 2002); *In re Parikh*, 456 B.R. 4, 20-21 (Bankr. E.D.N.Y. 2011); *In re Lombardo*, 370 B.R. 506, 512 (Bankr. E.D.N.Y. 2007); *In re Marino*, 388 B.R. 679, 682 (Bankr. E.D.N.C. 2008).

58 *See Grogan v. Garner,* 498 U.S. at 287; *In re Zick*, 931 F.2d at 1129-30.