

MEANS TESTING: THE FAILED BANKRUPTCY REVOLUTION OF 2005

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INTRODUCTION

As with most human practices, American bankruptcy law is rife with myth and misconception. One of them is the idea that honest debtors are entitled to a bankruptcy discharge and a fresh start.¹ This myth was promulgated by *Local Loan Co. v. Hunt*,² where, Hesiod-like, Justice Sutherland wrote the following oft-quoted words:

[The] purpose of the [Bankruptcy] act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.³

Although *Local Loan* does not actually use the phrase "fresh start,"⁴ the case is usually cited in connection with the concept.⁵ Technically, *Local Loan* involved avoidance of a pre-petition wage assignment as security for a loan. This assignment

¹ E.g., *Marrama v. Citizens Bank of Mass.*, 127 S. Ct. 1105, 1107 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'").

² 292 U.S. 234 (1934).

³ *Id.* at 244.

⁴ It does, however, refer to debtors "starting afresh." *Id.* at 244 ("One of the primary purposes of the Bankruptcy Act is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" (quoting *Williams v. U.S. Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915))).

⁵ E.g., *Cent. Va. Cmty. College v. Katz*, 126 S. Ct. 990, 996 (2006) (citing *Local Loan* and noting Bankruptcy Code gives debtor an ultimate discharge and a new start); *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (citing *Local Loan* and stating central purpose of Bankruptcy Code is for debtors to make peace with creditors to enjoy new opportunity in life).

was valid under Illinois law, yet Justice Sutherland ruled as a matter of non-statutory bankruptcy policy, that the lien was automatically dissolved by the very fact of a bankruptcy discharge.⁶ Discharge of a debt has no such effect on other types of security interests.⁷ So *Local Loan* strongly stands for the proposition that the debtor has an inalienable ownership of his post-petition wages following a bankruptcy discharge.

The principle of *Local Loan* was ratified by Congress forty-three years later in the Bankruptcy Reform Act of 1978.⁸ The spirit of the fresh start is embodied within section 541(a), which defines the bankruptcy estate. Preliminarily, section 541(a)(1) establishes that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."⁹ Without more, it would appear that a worker's "job" is part of the bankruptcy estate, since a job is an executory contract and these routinely go into the bankruptcy estate, where section 365 of the Bankruptcy Code governs them at great length. But section 541(a)(6) goes on to specify that the bankruptcy estate includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, *except such as are earnings from services performed by an individual debtor after the commencement of the case.*"¹⁰ Here is where the concept of *Local Loan* manifests itself. Post-petition wages belong to the debtor, not to the bankruptcy estate.¹¹

So, gazing at section 541(a)(6), one might get the impression that individuals, if they file for bankruptcy, can disencumber their wages from any pre-petition debts. True, they may have to give up their non-exempt assets (if any), but, so long as they qualify for a discharge, they have a *right* to a fresh start, do they not? The "fresh start" is all about disencumbering the post-petition wage income stream from any pre-petition claim. To use a notorious example, in 1987 Dr. Denton Cooley, the innovative heart surgeon, reported income of \$9,747,599.¹² Nevertheless he filed for bankruptcy liquidation in 1988 and from his prodigious wages enjoyed a very fresh start indeed.

In spite of this example, the fresh start has not been possible for ordinary mortals since 1984.¹³ In that year, at the behest of the consumer finance industry, Congress

⁶ *Local Loan*, 292 U.S. at 242–43. See generally Matthew Frankle, *Wage Garnishments in Bankruptcy: Riddervold Revisited*, 21 CARDOZO L. REV. 927 (1999) (arguing while Illinois allowed assignment of wages earned after bankruptcy, United States Supreme Court rejected concept noting its inconsistency with purpose of Bankruptcy Act).

⁷ See *Chandler Bank of Lyons v. Ray*, 804 F.2d 577, 579 (10th Cir. 1986) (holding discharge will not preclude enforcement of valid lien).

⁸ Pub. L. No. 95-598, § 541, 92 Stat. 2549, 2558–59 (codified in 11 U.S.C. § 541(a)(6)).

⁹ 11 U.S.C. § 541(a)(1) (2006).

¹⁰ *Id.* § 541(a)(6) (emphasis added).

¹¹ Oddly, the job belongs to the trustee, even if the proceeds of the job do not. Presumably, a malicious trustee could resign the debtor from a too-lucrative job. On this peculiarity, see Louis M. Phillips & Tanya Martinez Shively, *Ruminations on Property of the Estate—Does Anyone Know Why a Debtor's Postpetition Earnings, Generated by Her Own Earning Capacity, Are Not Property of the Bankruptcy Estate?*, 58 LA. L. REV. 623, 630–39 (1998) (suggesting debtor can receive post-petition wages even if trustee could assert debtor had vested contractual right to employment that would allow trustee to exercise debtor's rights and perform debtor's obligations).

¹² *In re Cooley*, 87 B.R. 432, 436 (Bankr. S.D. Tex. 1988).

¹³ See *Green v. Staples (In re Green)*, 934 F.2d 568, 570 (4th Cir. 1991) ("Prior to 1984, debtors enjoyed a

enacted a new provision, section 707(b), which authorized dismissal of consumer bankruptcy cases for "substantial abuse."¹⁴ After 1984, courts have defined substantial abuse as the condition of having surplus income that could be used to pay creditors.¹⁵ In other words, the fresh start was denied to any consumer debtor who had even modest surplus income after expenses. At this point, or perhaps in 1986, when the United States trustee was given standing to make motions to dismiss, the untrammelled right to a fresh start essentially ended.¹⁶

What section 707(b) became was a procedure whereby the intimate details of a debtor's life were subject to scrutiny by a bankruptcy judge. If the judge did not like what he or she saw, the judge could deny the debtor a fresh start. Most dramatically, section 707(b) has become a means for extorting future wages and other forms of exempt property in exchange for access to a bankruptcy discharge. The past deeds of a debtor might also be used to dismiss a case, even though the bad conduct is not listed as grounds to deny a discharge under section 523(a) or 727(a) of the Bankruptcy Code. Even admittedly honest debtors could be barred from a fresh start, if they had net surplus wages or if a court has disapproved of their life style.¹⁷

In 2005, Congress finally passed the ironically named Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").¹⁸ Most famously, this legislation, "a side car to the existing bankruptcy vehicle,"¹⁹ vastly expands section 707(b) to provide a mechanical means test.²⁰ Consumer advocates in particular have been overwrought about the massive elongation of section 707(b) to include means testing of consumer debtors.²¹ These advocates somehow imagine that fewer

virtually unfettered right to a 'fresh start' under Chapter 7, in exchange for liquidating their nonexempt assets for the benefit of their creditors.").

¹⁴ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312(2), 98 Stat. 333, 355 (codified in 11 U.S.C. § 707 (b) (2000)). The idea can be traced back to President Herbert Hoover, sponsor of the Great Depression. See Ann Morales Olazabal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 325–26 (2003).

¹⁵ Doctor Cooley escaped this regulation since his debts were business-related, not consumer debts. See *infra* text accompanying notes 86–87.

¹⁶ See *infra* text accompanying notes 102–05.

¹⁷ See *Price v. U.S. Trustee (In re Price)*, 280 B.R. 499, 505 (B.A.P. 9th Cir. 2002) (holding debtor honest but not unfortunate); *In re West*, 324 B.R. 45, 49–50 (Bankr. S.D. Ohio 2005) (dismissing chapter 7 relief as "substantial abuse" where debtors were honest but unable to point to inability to support themselves); *In re Hill*, 328 B.R. 490, 496–97 (Bankr. S.D. Tex. 2005) (finding debtors honest but nevertheless dismissed in light of surplus income); *In re Zuehlke*, 298 B.R. 610, 615–16 (Bankr. N.D. Iowa 2003) (concluding stroke victim and schizophrenic spouse living on social security and disability insurance with no extravagant expenses were bankruptcy abusers).

¹⁸ Pub. L. No. 109-8, 119 Stat. 23 (2005) [hereinafter BAPCPA] (codified as amended in scattered sections of 11 U.S.C.). The tortured legislative history of BAPCPA is set forth in Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) ("The enactment of the BAPCPA in 2005 brought to a close a tumultuous legislative initiative . . .").

¹⁹ *In re Murray*, 350 B.R. 408, 411 (Bankr. S.D. Ohio 2006).

²⁰ Judge Jeff Bohm protests that *means test* "is a misnomer in the sense that the 'test' being conducted is not whether the debtor has means to pay, but rather whether the debtor has *no* means to pay." *In re Singletary*, 354 B.R. 455, 459 (Bankr. S.D. Tex. 2006).

²¹ See, e.g., Robert J. Landry, III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U.L. REV. 91, 92 (2006) (stating means test

consumers will be entitled to the fresh start the bankruptcy supposedly represents.²²

It is a mistake, however, to think that the 2005 amendments are anything new or revolutionary. The real revolution occurred in 1984, or perhaps 1986. If anything, the 2005 means test *encourages bankruptcy abuse*, as that term was defined in the pre-BAPCPA case law. It is *more generous* to high-income debtors than the old case law of section 707(b).²³ The mechanical test is counter-productive in its effect on bankruptcy abuse, defined as seeking a discharge in the face of surplus future wages.

Because this is so, courts have begun (though not unanimously) to ignore the means test of 2005 as too debtor-friendly. Significantly, BAPCPA invites courts to be harder on debtors than the mechanical test BAPCPA institutes. The tools for ignoring the means test are fully provided for in the BAPCPA amendments, although this requires courts to deny the preemptive quality that a highly specific mechanical test might be expected to have.

So courts have discretion to prevent the increase in bankruptcy abuse that BAPCPA invites. But they also have an excuse to find that Congress *intended* to increase abuse by overruling harsh pre-BAPCPA case law. The one thing that is *not* true about BAPCPA is that it will make chapter 7 less accessible to high-income debtors than it had previously been.

The conclusion of my study is that the means test either encourages bankruptcy abuse or has no effect. To be sure, BAPCPA adds a great amount of detail and is rife with bad draftsmanship, dumbfounding contradictions, and curious, even comical, special interest exceptions. It is hard to choke out any words of admiration for the quality of BAPCPA's draftsmanship. Judges and scholars have not hesitated to pour scorn on Congress for the details of BAPCPA.²⁴ But, insofar as the fresh start is concerned, the end result is a consumer bankruptcy law that is not much changed (in substance) compared to the days before 2005.

"places a host of challenges and problems for those seeking relief"); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 191, 193 (2005) (decrying complicated nature of amended section 707(b) means test).

²² Empirical studies disagree how prevalent such cases are in chapter 7. *Compare Bankruptcy Reform Act of 1998; Responsible Borrower Protection Act; and Consumer Lenders Borrowers and Bankruptcy Accountability Act of 1998 - Part II: Hearing on H.R. 3150, H.R. 2500, and H.R. 3146 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 25–31 (1998) (statement of Thomas S. Neubig, Ernst & Young, LLP) (claiming 15% of bankruptcies filed by above-median debtors), with Marianne B. Culhane & Michaela M. White, *Taking the New Consumer Bankruptcy Model For a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 AM. BANKR. INST. L. REV. 27, 31–34 (1999) [hereinafter Culhane & White, *Means-Testing Real Chapter 7 Debtors*] (explaining only 3.6% of chapter 7 debtors would be adversely affected by means testing as opposed to 11% as claimed in Ernst & Young study).

²³ See, e.g., *In re Hill*, 328 B.R. 490, 499 (Bankr. S.D. Tex. 2005) (dismissing pre-BAPCPA case even though it was "ambiguous" whether the debtors would flunk new means test).

²⁴ Indeed, against my intention, I am apparently unable, in this paper, to resist this temptation. See Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law*, 79 AM. BANKR. L.J. 283, 284 (2005) ("It's a behemoth of bad policy, an illiteracy of ill-conceived provisions, an underbelly of unintended consequences."); Jean Braucher, *Rash and Ride-Through Redux: The Terms for Holding on to Cars, Homes and Other Collateral Under the 2005 Act*, 13 AM. BANKR. INST. L. REV. 457, 457 n.3 (2005) ("Because it is so complex and badly drafted and makes so many dubious policy choices, experts have taken to calling it by the fanciful acronym BARF (BAnkrutcy ReForm Act).").

If BAPCPA has an impact, it is by requiring more paperwork of consumer debtors, thereby driving up the cost of going bankrupt.²⁵ Accordingly, Part I of this Article describes the new disclosures that BAPCPA imposes on individuals. Part II describes means testing prior to 2005, showing that the law was already severe in denying consumer debtors a fresh start (even as it was unbelievably generous to Dr. Cooley and other wealthy business debtors). Part III describes the mechanical test that BAPCPA now imposes. Part IV describes the effect means testing has on defining disposable income in chapter 13 cases. No chapter 13 plan can be confirmed unless *all* disposable income is paid into the plan. At least for above-median debtors, disposable income is arguably defined by reference to BAPCPA means testing (though this too is subject to great ambiguity). Means testing is basically designed to force consumer debtors out of chapter 7 liquidation and into chapter 13, where post-petition income is dedicated to paying creditors. Part IV assesses how well the chapter 7 means test actually matches with the disposable income definition in chapter 13. This part reveals that there are many discrepancies, each one of which testifies to the imprecision of a chapter 7 test that is supposed to predict the chapter 13 result. That the chapter 7 test fails to predict the chapter 13 payout represents a fundamental theoretical failure of BAPCPA means testing.²⁶ Finally, Part V speculates on the future of chapter 13 cases converted to chapter 7, given the means test.

I. DISCLOSURES

My main point is that the mechanical means test is either counterproductive or meaningless in terms of preventing bankruptcy abuse (defined as having surplus post-petition wages). If BAPCPA has any substantive effect on consumer bankruptcy, it is to increase the paperwork burden and hence the cost of filing for bankruptcy.

As originally enacted, the Bankruptcy Code only required that debtors "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, and a statement of the debtor's financial affairs"²⁷ None of these was helpful for means testing,²⁸ which initially was not provided for by the Bankruptcy Code. In 1984, Congress empowered bankruptcy courts to dismiss consumer chapter 7 cases for substantial abuse.²⁹ As this was conceived as a surfeit of net income that should be

²⁵ See Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 677–78 (2005) [hereinafter Culhane & White, *Catching Can-Pay Debtors*] ("We are frustrated that Congress imposed so much cost and administrative burden for so little benefit.").

²⁶ According to the earliest commentator on BAPCPA means testing, the very purpose of means testing in chapter 7 is "to measure the ability of Chapter 7 debtors to repay debt and then, if they have sufficient debt-paying ability, to make them repay at least some of their debt—likely through Chapter 13—in order to receive a bankruptcy discharge." Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 231 (2005).

²⁷ Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 521, 92 Stat. 2549, 2586.

²⁸ The statement of financial affairs is currently modeled in Official Form 7. See Official Form 7, Statement of Financial Affairs (Oct. 2005), http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B7.pdf.

²⁹ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, § 312(2), 98 Stat. 333,

used to pay creditors a substantial dividend in chapter 13 or perhaps in chapter 11, Congress also required more disclosures: a schedule of current income and expenditures.³⁰

BAPCPA further burdens debtors with paperwork in aid of means testing. After October 17, 2005, the debtor must perform the complicated means testing calculation required by section 707(b)(2) and disclose it as part of her section 521 filings.³¹ This entails filing Form B22A³² in chapter 7 cases and B22C³³ in chapter 13 cases. What these forms entail will be examined in due course. In large part, the law of means testing in chapter 7 and disposable income in chapter 13 is a matter of what these forms mean—though we will see that in chapter 13 a majority of courts have already ruled that Form B22C is all but irrelevant in defining disposable income.³⁴

In addition to Form B22A or B22C, debtors must now include a certificate from the lawyer or bankruptcy petition preparer who signs the bankruptcy petition stating that the lawyer or preparer delivered to the debtor the notice required in section 342(b). This is a description supplied by the clerk of the court of the alternatives to filing for chapter 7 bankruptcy. The debtor must also supply pay stubs from her employer covering the sixty days prior to the bankruptcy petition,³⁵ an itemized statement of monthly net income,³⁶ and a statement disclosing any expected increase of income

355 (codified in 11 U.S.C. § 707(b) (2000)) ("[T]he court . . . may dismiss a case filed by an individual debtor under this chapter . . . if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter.").

³⁰ See *id.* § 305, 98 Stat. at 352 (codified in 11 U.S.C. § 521(a)(1)(B)(ii)); see also *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992). In addition, after 1984, within thirty days after the bankruptcy petition, an individual debtor had to declare, with regard to property encumbered by security interests (i.e., cars), whether she would retain it as exempt, redeem it, surrender it, or pursue reaffirmation of a security agreement relative to the property in question. See 11 U.S.C. § 521(a)(2)(A) (2006). This last requirement was fraught with history. Debtors began to claim that, beyond surrender, exemption, reaffirmation, or redemption, there was another option—unilateral reinstatement of the security agreement. Circuit courts were deeply split as to whether this additional option existed. BAPCPA intervenes to prohibit this additional option. See, e.g., *In re Steinhaus*, 349 B.R. 694, 707–08 (Bankr. D. Idaho 2006) (reading additional remedy of immediate order of possession into section 521 as beyond intentions of Congress); see also generally Braucher, *supra* note 24 (discussing debtor's ability to opt for ride-through of secured debts).

³¹ See 11 U.S.C. § 707(b)(2)(C) (2006).

³² See Form B22A, Statement of Current Monthly Income and Means Test Calculation (Oct. 2006), http://www.usdoj.gov/ust/eo/bapcpa/defs/docs/samples/BK_Form_B22A_V1.pdf. Rule 1007(b)(7) of the Federal Rules of Bankruptcy Procedure requires Form B22A to be filed. FED. R. BANKR. P. 1007(b)(7). This form was created in conformance with section 1232 of BAPCPA. See BAPCPA, Pub. L. No. 109-8, § 1232, 119 Stat. 23, 202 (2005).

³³ See Form B22C, Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Oct. 2006), http://www.usdoj.gov/ust/eo/bapcpa/defs/docs/samples/BK_Form_B22A_V1.pdf. Rule 1007(b)(6) of the Federal Rules of Bankruptcy Procedure requires this form to be filed. FED. R. BANKR. P. 1007(b)(6). There is also Form B22B for individual chapter 11 cases.

³⁴ See *infra* Part IV.

³⁵ 11 U.S.C. § 521(a)(1)(B)(iv) (2006). The lack of even a single pay stub (even though every pay stub has a "year-to-date" report of wages paid included within it) can lead to a dismissal of the case. See *In re Bartholomew*, No. 05-70116-B, 2005 Bankr. LEXIS 2648, at *2–3 (Bankr. N.D.N.Y. Dec. 30, 2005).

³⁶ 11 U.S.C. § 521(a)(1)(B)(v) (2006).

expected in the twelve months following the bankruptcy.³⁷

Individual debtors are also expected to file a certificate from a credit counseling agency that the debtor has heard the sales pitch of that dubious scandal-ridden industry,³⁸ and a copy of any debt repayment plan entered into with a credit counseling agency must be supplied.³⁹ A debtor must also file a record of any interest he or she has in an education individual retirement account ("IRA") or qualified state tuition program.⁴⁰

A debtor must now supply a federal income tax return for the most recent year ending before the bankruptcy petition to the court⁴¹ and to any creditor who timely requests such copy.⁴² If the debtor fails to comply with these requirements, the court must dismiss the case unless circumstances beyond the debtor's control are to blame.⁴³ Also, if a party in interest requests it, an individual must file new tax returns (including overdue returns)⁴⁴ with the court at the same time the returns are made to the Internal Revenue Service ("IRS").⁴⁵

If the IRS does not receive any post-petition tax returns that are due, the IRS can move the court to dismiss or convert the case to some other chapter.⁴⁶ The court is obliged to grant this request if the tax return is not delivered within ninety days following the IRS's motion. All of this is required even though tax returns will provide little or no help with the means test.⁴⁷

If the United States trustee or other bankruptcy trustee requests it, the debtor must supply proof of identity—"a driver's license, passport, or other document that contains a photograph"⁴⁸

If some of these items are not supplied within forty-five days of the bankruptcy petition, "the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition."⁴⁹ This rule, however, applies only to the disclosures

³⁷ *Id.* § 521(a)(1)(B)(vi).

³⁸ *Id.* § 521(b)(1). For details on credit counseling's sad record, see generally *In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006). For analysis on what is a "certificate," see Jeffrey A. Deller & Nicholas E. Meriwether, *Putting Order to the Madness: BAPCPA and the Contours of the New Prebankruptcy Credit Counseling Requirements*, 16 J. BANKR. L. & PRAC. 101, 104–06 (2007).

³⁹ 11 U.S.C. § 521(b)(2) (2006).

⁴⁰ *Id.* § 521(c).

⁴¹ *Id.* § 521(e)(2)(A)(i).

⁴² *Id.* § 521(e)(2)(A)(ii).

⁴³ *Id.* § 521(e)(2)(B)–(C) (2006); see also *In re Ring*, 341 B.R. 387, 388 (Bankr. D. Me. 2006) (refusing to dismiss case for failure to provide tax return based on facts and not on statutory construction involving bright-line test).

⁴⁴ 11 U.S.C. § 521(f)(2) (2006).

⁴⁵ *Id.* § 521(f)(1). There is also a strange reference to an uncodified portion of BAPCPA, which requires the Administrative Office of the United States Courts to establish procedures to provide confidentiality for tax returns. Section 521(g)(2) enjoins any trustee or creditor obtaining a tax return to follow these regulations. *Id.* § 521(g)(2).

⁴⁶ *Id.* § 521(j).

⁴⁷ See Gary Neustadter, 2005: *A Consumer Bankruptcy Odyssey*, 39 CREIGHTON L. REV. 225, 305–11 (2006) (describing relationship between filing of tax returns and means test calculation as too attenuated).

⁴⁸ 11 U.S.C. § 521(h) (2006).

⁴⁹ *Id.* § 521(i)(1).

required in subparagraph (a)(1) of section 521.⁵⁰ A few of the above disclosures are required in other subsections. For example, the certificate from the credit counseling agency certifying that the debtor has suffered the sales pitch of that agency (for a fee),⁵¹ the copy of the debt repayment plan, if any,⁵² the debtor's interest in an education IRA,⁵³ and tax returns⁵⁴ are not called for in subparagraph (a)(1). Failure to file these items apparently does not automatically terminate the bankruptcy proceeding.⁵⁵

Interestingly, section 521(a)(1) nowhere requires that Form B22A or B22C be filed. Subparagraph (B)(ii) requires only a "schedule of current income and current expenditures."⁵⁶ But section 707(b)(2)(C) requires:

*As part of the schedule of current income and expenditures required under section 521, . . . a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph [707(b)(2)(A)(i), that show how each such amount is calculated.*⁵⁷

Typically, a section of the Bankruptcy Code incorporates by reference another section of the Bankruptcy Code. Section 707(b)(2)(C) is different in that it incorporates itself into section 521(a)(1)(B)(ii). Reflexive self-incorporation is one of the more Hegelian contributions to bankruptcy law instituted by BAPCPA. So presumably section 707(b)(2)(C) is *part* of section 521; but is it part of subsection (a)(1) for purposes of the automatic dismissal rule of section 521(i)(1)?⁵⁸ Given the early hostility of the courts to the notion of automatic dismissal,⁵⁹ it is possible to predict that failure to file Form B22A or B22C will not trigger automatic dismissal. In support of this notion, the new definition of "current monthly income" in section 101(10A)(A)(ii) commands the court to calculate income in cases where the debtor does *not* file Form B22A.⁶⁰

⁵⁰ One completely overlooked issue with regard to automatic dismissals for failure to file documents is the involuntary petition in bankruptcy. *See id.* § 303. What if a debtor is involuntarily placed into bankruptcy and is adjudicated as not paying debts as they fall due? *See id.* § 303(h)(1). May this debtor escape a bankruptcy she does not want by failing to file pay stubs? Section 521(i)(1) makes clear that automatic dismissal applies only in voluntary cases. *Id.* § 521(i)(1).

⁵¹ *Id.* § 521(b)(1).

⁵² *Id.* § 521(b)(2).

⁵³ *Id.* § 521(c).

⁵⁴ *Id.* § 521(e)(2)(A).

⁵⁵ *See In re Ring*, 341 B.R. 387, 389 n.4, 390 (Bankr. D. Me. 2006).

⁵⁶ 11 U.S.C. § 521(a)(1)(B)(ii) (2006).

⁵⁷ *Id.* § 707(b)(2)(C) (emphasis added).

⁵⁸ Section 521(i) has been named "one of the most confusing of the sections added by BAPCPA." *In re Parker*, 351 B.R. 790, 800 (Bankr. N.D. Ga. 2006).

⁵⁹ *In re Riddle*, 344 B.R. 702, 703 (Bankr. S.D. Fla. 2006), Judge Jay Cristol *sua sponte* reviewed the debtor's file and proclaimed it complete. He then set forth angry poetry denouncing the concept of automatic dismissal. *In re Jackson*, 348 B.R. 487, 494, 497 (Bankr. S.D. Iowa 2006), Judge Lee Jackwig announced a cessation of *sua sponte* dismissals for incomplete files on the ground that it aided debtor fraud. Judge Jackwig admitted that "automatic" was thereby made "not automatic," but felt that the entire statutory scheme commanded such a conclusion. *See id.* at 497–98.

⁶⁰ 11 U.S.C. § 101(10A)(A)(ii) (2006).

"Current monthly income" is a key concept in BAPCPA's means test.⁶¹ The invitation to fill in the gap caused by failure to file Form B22A implies that this failure cannot be grounds for automatic dismissal.

In favor of this view is the point that all debtors must comply with section 521(a), whether they are individuals or corporations or whether they are in chapter 7 or chapter 11. If section 707(b)(2)(C) has made itself part of section 521(a), then section 707(b)(2)(C) is applicable in any bankruptcy case, whether corporate or individual, whether chapter 7 or chapter 11. There is no use saying section 707(b)(2)(C) does not apply in chapter 11. Section 521(a) *does* apply, and the premise is that section 707(b)(2)(C) is within the text of section 521(a). Because this is absurd, section 521(a) is best viewed as not encompassing section 707(b)(2)(C).

But there is a contrary argument. One of the things section 521(a)(1)(B)(ii) requires is "a schedule of current income and current expenditures."⁶² Section 707(b)(2)(C) makes a statement of the debtor's current monthly income (i.e., Form B22A) part of the schedule of current income. The reference in section 707(b)(2)(C) to "schedule of current incomes and current expenditures" implies that these words from section 521(a)(1)(B)(ii) *do* encompass Form B22A. On this basis, automatic dismissal *can* follow if the debtor does not file the form.

In *In re Copeland*,⁶³ Judge Letitia Clark ruled that non-consumer individuals had to file Form B22A because section 521(a)(1)(B)(ii) required it. So not only did she rule that section 707(b)(2)(C) is part of section 521(a)(1)(B)(ii); she also ruled that section 707(b)(2)(C) applies to non-consumer debtors, even though section 707(b)(2) is a means test that applies *only* to consumers. On this view, even wage-rich business debtors who are not to be means-tested must fill out this burdensome form.⁶⁴

In *In re Beacher*,⁶⁵ Judges Marvin Isgur and Wesley W. Steen, writing in tandem, avoided the issue of whether section 707(b)(2)(C) is in or out of section 521(a) by pointing out that section 521(a)(1)(B) (which requires "a schedule of current income and current expenditures") applies only "unless a court orders otherwise."⁶⁶ These judges seized upon this discretion to issue a legislative decree stating that non-consumer debtors provisionally could dispense with Form B22A.

If a party in interest moves to dismiss in light of the above failure to file, the court must grant it within five days.⁶⁷ But this again is tied to filings required by section 521(a)(1). If the debtor has failed to file one of the 521(a)(1) documents, a debtor may nevertheless request more time, provided this request is made during the first forty-five days during which the case is still pending.⁶⁸ If a trustee is inclined, he may move the

⁶¹ See *infra* Part III.A.6.

⁶² 11 U.S.C. § 521(a)(1)(B)(ii) (2006).

⁶³ No. 06-32116-H3-7, 2006 Bankr. LEXIS 2200, at *5 (Bankr. S.D. Tex. Sept. 5, 2006).

⁶⁴ But see *In re Moates*, 338 B.R. 716, 718 (Bankr. N.D. Tex. 2006) (holding non-consumer debtors need file only Schedules I and J).

⁶⁵ No. 06-37157-H2-7-X, 2007 Bankr. LEXIS 240, at *13 (Bankr. S.D. Tex. Jan. 26, 2007).

⁶⁶ See *id.* (quoting 11 U.S.C. § 521(a)(1)(B) (2006)).

⁶⁷ 11 U.S.C. § 521(i)(2) (2006).

⁶⁸ *Id.* § 521(i)(3).

court to waive these disclosures if the debtor attempted in good faith to file and if the best interest of the creditors demands that the case continue.⁶⁹

Suppose a debtor has failed to file something required by section 521 generally but not one of the documents described in section 521(a)(1). Can a party in interest move to dismiss a chapter 7 case for the debtor's failure to file Form B22A—assuming this is not required by section 521(a)(1)? This motion must be made pursuant to section 707(a), which provides:

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

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

...

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.⁷⁰

There are some limits on this alternative theory of dismissal. First, note that only the United States trustee has standing to dismiss under section 707(a)(3). Other parties in interest must proceed only under section 707(a)(1), where a creditor must show a delay is prejudicial. In a regime where most unsecured creditors obtain a zero dividend, prejudice will perhaps be hard to show.

Furthermore, there is a cross-reference problem in section 707(a)(3). The trustee must show a failure to file information filed by paragraph (1) of section 521. In fact section 521 has eight different subparagraphs bearing the number (1). Four of these require the debtor to file documents. So one reading of the statute is that the trustee's right to a dismissal under section 707(a)(3) is broader than the automatic dismissal right in section 521(i)(1) or the right of a party in interest to move to dismiss under section 521(i)(2). Two editors of the Bankruptcy Code, however, have suggested that the cross-reference in section 707(a)(3) should be to section 521(a)(1), thereby limiting the trustee's ability to achieve a dismissal.⁷¹

⁶⁹ *Id.* § 521(i)(4).

⁷⁰ *Id.* § 707(a)(1), (3).

⁷¹ See 2006 COLLIER PORTABLE PAMPHLET § 707, at C-276 n.1 (Alan N. Resnick & Henry J. Sommer eds., Mathew Bender & Company, Inc. 2006). If these editors of the Bankruptcy Code are correct, then the trustee could not move to dismiss for failure to file a certificate attesting to credit counseling. Such a filing is required by section 521(b)(1), not section 521(a)(1). See 11 U.S.C. § 521(b)(1) (2006). Yet BAPCPA makes pre-petition credit counseling (or some valid excuse in lieu of counseling) a jurisdictional matter. See *id.* § 109(h)(1). So presumably, the trustee can move to dismiss a chapter 7 case on these jurisdictional grounds under section 307. See *id.* § 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or

The new disclosures required by BAPCPA are designed to permit the United States trustee to administer the mechanical means test of new section 707(b)(2). If the debtor flunks the test, the case must be converted to chapter 13 (where all disposable income must be paid into the plan) or dismissed.⁷²

II. MEANS TESTING PRIOR TO 2005

The thesis of this Article is that BAPCPA is not revolutionary; it arguably adds nothing to the ideas already implicit in the Bankruptcy Code prior to 2005. Or, if it adds anything, it preempts prior law and provides an expanded opportunity for abuse for high-income opportunistic debtors.

The new means testing regulation is an outgrowth of an endeavor that began in 1984, when Congress enacted section 707(b).⁷³ As it existed after 1984 and before October 17, 2005 (BAPCPA's effective date), this section provided:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.⁷⁴

As originally enacted, this section is "more impressive for what it does not contain than for what it does."⁷⁵

A. "Primarily Consumer Debts"

Section 707(b) has always applied to "an individual debtor . . . whose debts are primarily consumer debts"⁷⁶ Consumer debts are defined as "debt incurred by an

proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.").

⁷² According to BAPCPA, as an alternative to dismissal, a court may "with the debtor's consent" convert the case to chapter 13. 11 U.S.C. § 707(b)(1) (2006). Although the conversion alternative is new with BAPCPA, the legislation reflects a practice of the courts to sign orders dismissing the case *unless* the debtor voluntarily converts the case to chapter 13. *See Price v. United States (In re Price)*, 353 F.3d 1135, 1141 (9th Cir. 2003).

BAPCPA also severely limits or even eliminates the automatic stay for multiple bankruptcy filers. But an exception is made for those who file again because their chapter 7 petition was dismissed under section 707(b). *See* 11 U.S.C. § 362 (c)(3), (4) (2006).

⁷³ *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 355.

⁷⁴ *Id.*

⁷⁵ *In re Attanasio*, 218 B.R. 180, 184 (Bankr. N.D. Ala. 1998). *Attanasio* is an extraordinary resource for the definition of "substantial abuse," as it stood in 1998. I will rely on it extensively in describing pre-BAPCPA law.

⁷⁶ *See supra* text accompanying note 74; *see also* 11 U.S.C. § 707(b)(1) (2006).

individual primarily for a personal, family, or household purpose."⁷⁷ Basically, courts have interpreted the phrase "individual debtor . . . whose debts are primarily consumer debts" to mean that more than 50% of the debts must be related to domestic purposes.⁷⁸

The biggest debt an individual is likely to owe is the home mortgage. The home mortgage is usually related to home acquisition—a purchase money mortgage. Courts have held that the purchase money home mortgage is a consumer debt, thereby guaranteeing most individuals will be found to owe primarily consumer debts.⁷⁹ This is so even though legislative history is to the contrary.⁸⁰ The fact that most *discharged* unsecured debts are business debts carries no weight, where mortgage debt pushes a debtor over to the consumer side of the line.⁸¹ Nevertheless, all courts agree that the use of the proceeds of the mortgage loan is the ultimate test. If the mortgage loan finances a business investment, then the mortgage is not a consumer debt after all.⁸²

Alimony and the like are consumer debts.⁸³ Tort judgments are not.⁸⁴ Intra-family debt is not consumer debt where used for tuition, but where student loans also existed and were used for household expenses and where the intra-family loan was diverted to tuition, the intra-family debt can be considered consumer debt.⁸⁵

Certainly one of the inequities of section 707(b), then and now, is that the individuals with high incomes and *business* debts are not subject to scrutiny for bankruptcy abuse. We have already seen that the bankrupt heart swapper, Dr. Denton Cooley, who in 1988 reported income of \$9,747,599,⁸⁶ was not regulated by section 707(b), because his losses were investment-related. *He* is not expected to contribute post-petition wages to his unsecured creditors; only consumers are so burdened.⁸⁷

⁷⁷ 11 U.S.C. § 101(8) (2006).

⁷⁸ See, e.g., *Stewart v. U.S. Tr. (In re Stewart)*, 175 F.3d 796, 807–08 (10th Cir. 1999); *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988).

⁷⁹ See, e.g., *Price v. United States Tr. (In re Price)*, 353 F.3d 1135, 1139 (9th Cir. 2004); *In re Evans*, 334 B.R. 148, 151 (Bankr. D. Md. 2004). One court has refused to reduce the debt by half where a non-debtor spouse is 50% liable for the debt. *In re Hayman*, No. 03-17898, 2005 Bankr. LEXIS 135, at *3 (Bankr. S.D. Ohio Jan. 24, 2005). A nonrecourse mortgage has been counted as a consumer debt. See *In re Bryson*, No. 05-27009, Bankr. LEXIS 704, at *7 (Bankr. D. Kan. Mar. 6, 2007).

⁸⁰ See, e.g., 124 CONG. REC. H11,909 (daily ed. Sept. 28, 1978) & S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. Dennis DeConcini) ("A consumer debt does not include a debt to any extent that the debt is secured by real property."). On the basis of this, a lonely court has held that a real estate acquisition is not a consumer debt. *In re Restea*, 76 B.R. 728, 734 (Bankr. D.S.D. 1987).

⁸¹ See *Price*, 353 F.3d at 1140–41 ("Given the plain words of the statute, we cannot conclude that Congress meant 'primarily consumer debts' to refer only to those debts sought to be discharged rather than the aggregate debts listed on the bankruptcy schedules.").

⁸² *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988) (regarding mortgage loans secured by debtor's residence as non-consumer debt).

⁸³ *Stewart*, 175 F.3d at 807 (holding alimony is consumer debt when not motivated by profit); *In re Hall*, 258 B.R. 45, 50 (Bankr. M.D. Fla. 2001).

⁸⁴ *Deglin v. Keobapha (In re Keobapha)*, 279 B.R. 49, 54 (Bankr. D. Conn. 2002) ("In addition, the substantial abuse test under § 707(b) can only be used for cases where there is primarily consumer debt. In the present case, the only debt at issue is not consumer debt, but a judgment debt.").

⁸⁵ *Stewart*, 175 F.3d at 807 (categorizing student loans as "consumer debt" because money was used for dual family and personal purposes).

⁸⁶ *In re Cooley*, 87 B.R. 432, 436 (Bankr. S.D. Tex. 1988).

⁸⁷ Judge Edith Jones, whose dissenting opinion in the Bankruptcy Review Commission was an important

The inequity has led debtors to suggest that the singling out of abusive consumer debtors for chapter 7 dismissal is a violation of the equal protection clause of the Fifth Amendment of the United States Constitution. Section 707(b), however, has survived equal protection challenge. According to one court, consumer debtors consume; business debtors sometimes acquire hard assets.⁸⁸ On this basis, the discrimination has a rational basis and so is constitutional.⁸⁹

There is, however, a provision that permits dismissal of non-consumer chapter 7 cases. According to section 707(a), which BAPCPA does not amend:⁹⁰

The court may dismiss a case under this chapter 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, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.⁹¹

In section 707(a), "cause" for dismissal is not exclusively defined. Courts have split on whether cause includes bad faith filing of the bankruptcy petition.⁹² Some

influence in BAPCPA, favored extending section 707(b) to non-consumer individuals. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 1169–70 (1997) (explaining limitation of section 707(b) to consumer debt is arbitrary, unjust, and complicated). For some reason, this recommendation, in spite of its wisdom and soundness, was never followed.

⁸⁸ *See In re Copeland*, No. 06-32116-H3-7, 2006 Bankr. LEXIS 2200, at *2–5 (Bankr. S.D. Tex. Sept. 5, 2006) (noting debtor was bankrupt because she guaranteed debts of corporation).

⁸⁹ *See Stewart*, 175 F.3d at 813 ("A rational relationship exists between Congress singling out consumer debtors for dismissal for substantial abuse under § 707(b) and the government's legitimate purpose in preventing consumer abuse . . ."). A recent attempt to ground the bankruptcy discharge in some over-arching purpose holds that the bankruptcy discharge exists to encourage entrepreneurship. *See* John M. Czarnetzky, *The Individual and Failure: A Theory of the Bankruptcy Discharge*, 32 ARIZ. ST. L.J. 393, 398–99 (2000) (hypothesizing bankruptcy discharge is part of institutional framework vital to fostering entrepreneurship in the market). Of course, consumers who live beyond their means are not entrepreneurs. But if those with primarily business debts are viewed as entrepreneurs, then one could argue that awarding entrepreneurs surplus post-petition income constitutes a reduction in the cost of entrepreneurship (at the expense of creditors, of course). Non-entrepreneurs, in contrast, must pay more for their discharge, on this view. For a defense of discrimination in favor of the wealthy on the grounds that the rich pay for bankruptcy discharge as a form of insurance, see Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301, 333.

⁹⁰ It should have. The cross-reference therein to paragraph (1) of section 521 is now obsolete and should refer to section 521(a)(1). There are now four different paragraph (1)'s.

⁹¹ 11 U.S.C. § 707(a) (2006).

⁹² *See* 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, 62 (1996) ("Despite the fact the text of the Code does not require chapter 7 debtors to file bankruptcy in good faith, courts have conjured a good faith in filing requirement under the auspices of § 707(a) . . .").

courts think so, citing a motive to evade obligations to an ex-spouse⁹³ or a single creditor⁹⁴ as justifying dismissal, or evading enforcement of an anti-competition covenant in state legislation.⁹⁵ Other courts hold bad faith is *not* cause to dismiss a chapter 7 proceeding, even if it *is* cause to dismiss cases in chapters 11 or 13.⁹⁶

In any event, it is far from clear that the presence of surplus wages is cause to dismiss a chapter 7 petition where the debtor owes mostly non-consumer debtors.⁹⁷ In *Sherman v. SEC (In re Sherman)*,⁹⁸ the Ninth Circuit reversed a district court decision dismissing a chapter 7 case under section 707(a) because the debtor sought to sustain a lifestyle funded by bilking investors in a Ponzi scheme. The *Sherman* court conceded that "cause" exceeds the confines of section 707(a), but an asserted cause could not be something specifically addressed by other Bankruptcy Code sections. Since the movant could not cite a reason for dismissal that was not addressed by other Code sections, dismissal was inappropriate. A stylish life specifically did not suffice as cause to dismiss.⁹⁹ As one appellate court put it, with regard to a non-consumer debtor earning \$454,000 a year:

The result reached here may understandably offend some on the ground that this debtor, given his income and lifestyle, is a member of a class of people who are undeserving of the privileges and benefits of the Bankruptcy Code. [sic] *i.e.* the class of people who can pay their debts, but choose instead to spend their substantial incomes on what most would consider luxuries. Importantly, however, § 707(a) does not embody this sentiment. Any dissatisfaction with this result should therefore be addressed to Congress for it is that body, and not the courts, that has the power to alter the result reached here.¹⁰⁰

In 2005, Congress responded to this challenge by perpetuating the discrimination in favor of business debtors, for whom high life is no impediment to the fresh start.

⁹³ *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994).

⁹⁴ *Keeper*, 329 B.R. 693, 696–97 (Bankr. W.D. Mo. 2005).

⁹⁵ *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991).

⁹⁶ *E.g.*, *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1191 (9th Cir. 2000); *see also* *Shangraw v. Etcheverry (In re Etcheverry)*, 242 B.R. 503, 506 (Bankr. D. Colo. 1999). The *Padilla* court defended bad faith as "cause" under sections 1112(b) and 1307(c), because, in those proceedings, the debtor has an ongoing relation with the creditors. *See In re Padilla*, 222 F.3d at 1192–93.

⁹⁷ *See In re Mottilla*, 306 B.R. 782, 787 (Bankr. M.D. Pa. 2004) (discussing how disposable income can be considered, but only if debtor has dishonestly reported inflated expenses).

⁹⁸ 441 F.3d 794, 819 (9th Cir. 2006).

⁹⁹ *Accord Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994) (indicating dismissal "for cause" under section 707(a) cannot be founded solely on the ability to pay); *Novak v. Wagnitz (In re Wagnitz)*, No. 03C516, 2004 U.S. Dist. LEXIS 5010, at *30 (N.D. Ill. Mar. 29, 2004); *In re Wiedner*, 344 B.R. 321, 326 (Bankr. M.D. Pa. 2005); *In re Goulding*, 79 B.R. 874, 876 (Bankr. W.D. Mo. 1987) (citing legislative history and noting "it is difficult to contemplate how Congress could more emphatically have stated that the debtor's [ability to repay his debts] is not 'cause'" under section 707(a)).

¹⁰⁰ *McDow v. Smith*, 295 B.R. 69, 82–83 (E.D. Va. 2003) (footnotes omitted).

B. Standing

Former section 707(b) was restrictive on standing. As originally enacted in 1984, only the court on its own motion, "but not at the request or suggestion of any party in interest," could dismiss a chapter 7 debtor.¹⁰¹ In 1986, the United States trustee was given standing to make this motion.¹⁰² This probably should be considered the exact point in which the doctrine of the fresh start came to an end.

Prior to 2005, neither a chapter 7 trustee appointed for the case nor a creditor could make this motion.¹⁰³ The chapter 7 trustee is not to be confused with the United States trustee. The chapter 7 trustee is elected by the creditors at the first creditor's meeting and has the duty to liquidate assets, object to claims, etc.¹⁰⁴ The United States trustee is a member of the executive branch under the U.S. Department of Justice ("Justice Department" or "United States Trustee"), charged with the duty of representing the public in any given bankruptcy case.¹⁰⁵

As originally enacted, section 707(b) stated that a court could dismiss a chapter 7 case *sua sponte*, but "not at the request or suggestion of any party in interest"¹⁰⁶ When standing expanded to include the United States trustee, these words were retained, leading debtors to claim that a trustee's motion to dismiss must be denied where "tainted" by the suggestion of a creditor that the chapter 7 case be dismissed. Courts have ruled, however, that the motion of the United States trustee is not tainted, where parties in interest whispered encouragement in his ear. Rather, taint is prohibited only with regard to *sua sponte* actions by the court.¹⁰⁷

¹⁰¹ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. No. 98-355, § 312, 98 Stat. 333, 355.

¹⁰² See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219, 100 Stat. 3088, 3101. The United States trustee must make this motion within sixty days after the first creditors' meeting. FED. R. BANKR. P. 1017(e)(1). Motions under section 707(a), however, are not subject to this limitation. See *In re Weeks*, 306 B.R. 587, 589 (Bankr. E.D. Mich. 2004) (denying section 707(b) motion on merits). If the United States trustee loses the motion, the debtor may be entitled to attorney's fees and costs under the Equal Access to Justice Act. See 28 U.S.C. § 2412 (2000); *In re Terrill*, No. 05-87180-BJH-7, 2006 Bankr. LEXIS 1890, at *2-3 (Bankr. N.D. Tex. July 27, 2006).

¹⁰³ Creditors could, however, move to convert a chapter 7 case to chapter 11, but such motions were unsuccessful. One court ruled that, since a consumer debtor would have to commit wages to a chapter 11 plan, forcing a debtor into chapter 11 was inappropriate. *In re Lenartz*, 263 B.R. 331, 335 (Bankr. D. Idaho 2001). This same court also ruled that where the debtor was ineligible for chapter 13, a dismissal under section 707(b) for substantial abuse was warranted because chapter 11 was a viable option for the debtor. *Id.* at 342. Another court ruled that section 706(a) motions by creditors could not be based on substantial abuse of chapter 7, as that would deprive meaning to the United States trustee's unique standing to seek dismissals under section 707(b). *In re Ryan*, 267 B.R. 635, 638 (Bankr. N.D. Iowa 2001).

¹⁰⁴ 11 U.S.C. §§ 702(b), 704(a) (2006). Prior to the first creditors' meeting there is an interim trustee. *Id.* § 702(a).

¹⁰⁵ See generally Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91 (1995) (discussing uniformity of United States Trustee throughout federal judicial districts).

¹⁰⁶ Bankruptcy Amendments and Federal Judgeship Act § 312, 98 Stat. at 355.

¹⁰⁷ See *Stewart v. U.S. Tr. (In re Stewart)*, 175 F.3d 796, 804 (10th Cir. 1999) ("[T]he court could dismiss a petition *sua sponte*, but arguably not at the request or suggestion of a party in interest."); *U.S. Tr. v. Clark (In re Clark)* 927 F.2d 793, 797 (4th Cir. 1991); *In re Praleikus*, 248 B.R. 140, 143-44 (Bankr. W.D. Mo. 2000).

C. "Substantial Abuse"

Former section 707(b) required a finding that the bankruptcy petition constitutes a "substantial abuse" of chapter 7. BAPCPA, however, strikes the word "substantial" from newly numbered section 707(b)(1).¹⁰⁸ Today even modest abuse, however blushing and demure, warrants dismissal. It is far from clear, however, whether this amendment will make any difference, as courts, prior to 2005, were quite willing to boot the humble as well as the egregious debtor from chapter 7.

In defining the phrase "substantial abuse," all courts agreed that a debtor's ability to repay debts out of post-petition wages was the principal factor justifying dismissal of a chapter 7 case.¹⁰⁹ These holdings ignore a vigorous 1984 legislative history against dismissing cases because post-petition surplus income existed.¹¹⁰

Some courts thought that surplus income, without more, was enough to justify a dismissal.¹¹¹ "Fresh start, not a head start" has been an inspirational slogan.¹¹² Others have put the matter somewhat differently: the ability to fund a chapter 13 plan is the primary factor for substantial abuse of chapter 7,¹¹³ though courts also denied that eligibility for chapter 13 is required for a section 707(b) dismissal;¹¹⁴ for those exceeding the debt limit for chapter 13 jurisdiction,¹¹⁵ chapter 11 is an alternative.¹¹⁶ Chapter 11, prior to BAPCPA, had no rule requiring the dedication of surplus

¹⁰⁸ See 11 U.S.C. § 707(b)(1) (2006). According to the legislative history of the 2000 bill: "Dismissal under 707(b) is also authorized when there is 'abuse.' It is intended that by changing the standard for dismissal from 'substantial abuse' to 'abuse,' stronger controls will be available . . . to limit the abusive use of chapter 7 based on a wide range of circumstances." 146 CONG. REC. 26,468 (2000) (emphasis added).

¹⁰⁹ See, e.g., *U.S. Tr. v. Harshaw (In re Harshaw)*, 345 B.R. 518, 521–23 (Bankr. W.D. Pa. 2006).

¹¹⁰ See *In re Walton*, 866 F.2d 981, 987 (8th Cir. 1989) (McMillian, J., dissenting) ("[T]he express intent of Congress with the enactment of § 707(b) was not to impose a future income test.").

¹¹¹ See *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 438 (6th Cir. 2004); *U.S. Tr. v. Harris*, 960 F.2d 74, 75–76 (8th Cir. 1992); *In re Walton*, 866 F.2d at 985; *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913–14 (9th Cir. 1988).

¹¹² *Accord In re Krohn*, 886 F.2d 123, 128–29 (6th Cir. 1989); *In re Ontiveros*, 198 B.R. 284, 290 (C.D. Ill. 1996) (citing *In re Pilgrim*, 135 B.R. 314, 317 (C.D. Ill. 1992) (quoting Senator Orrin Hatch)); *In re Glenn*, 345 B.R. 831, 835 (Bankr. N.D. Ohio 2006); *In re Beitzel*, 333 B.R. 84, 88 (Bankr. M.D.N.C. 2005); *In re Godios*, 333 B.R. 644, 647 (Bankr. W.D.N.Y. 2005); *In re Laman*, 221 B.R. 379, 382 (Bankr. N.D. Tex. 1998) (citing *In re Krohn*, 886 F.2d at 127–28).

¹¹³ See *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1289 (8th Cir. 1997); *In re Jones*, 335 B.R. 203, 208 (Bankr. M.D. Fla. 2005).

¹¹⁴ See *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *In re Krohn*, 886 F.2d at 127.

¹¹⁵ Section 109(e) requires a chapter 13 debtor to have "regular income" and non-contingent unsecured debts of less than \$307,675 and non-contingent secured debts of \$922,975. 11 U.S.C. § 109(e) (2006). These unrounded numbers are subject to automatic adjustment for inflation under section 104 of the Code.

¹¹⁶ See *Scheinberg v. U. S. Tr. (In re Scheinberg)*, 134 B.R. 426, 429–30 (D. Kan. 1992); *In re Lenartz*, 263 B.R. 331, 342 (Bankr. D. Idaho 2001) ("[W]hile they cannot be compelled to do so, if Debtors genuinely desire bankruptcy relief, they could explore a voluntary conversion and offering a repayment plan under Chapter 11."); *In re Mastromarino*, 197 B.R. 171, 177–78 n.10 (Bankr. D. Me. 1996). Some courts have disagreed and have refused to dismiss *unless* the debtor is eligible for chapter 13. See *In re Williams*, 155 B.R. 773, 774–75 (Bankr. D. Idaho 1993) ("[W]here chapter 13 is unavailable and relief under chapter 11 would not be a meaningful alternative, the dismissal of a chapter 7 case under section 707(b) is inappropriate."); *In re Mastroeni*, 56 B.R. 456, 459–60 (Bankr. S.D.N.Y. 1985).

disposable income, but it did have the absolute priority rule, which barred distributions to the individual debtor if a class of unsecured creditors voted against the plan.¹¹⁷ Thus, individual debtors would have to win creditor support with sufficient payments in order to retain title to a house with valuable equity. BAPCPA, however, now repeals the absolute priority rule for individual debtors.¹¹⁸ Oddly, it does not require, as chapter 13 does, that all disposable income be dedicated to the plan.¹¹⁹

Under the banner "totality of the circumstances"—words borrowed by BAPCPA for section 707(b)(3)(B)—the Court of Appeals for the Fourth Circuit, in *Green v. Staples (In re Green)*,¹²⁰ found surplus income alone insufficient for dismissal. The *Green* court added an array of other considerations that must supplement this fact, such as (1) the debtor's health,¹²¹ (2) the debtor's pre-petition conduct in borrowing and spending on luxury items, (3) the excessiveness of the debtor's family budget, (4) the accuracy of net income, and (5) the good faith of the debtor in filing for bankruptcy in the first place.¹²² An even more diffuse list of factors was sponsored in the Sixth Circuit, which mentioned (1) the "need"¹²³ of a debtor for a discharge, (2) the debtor's honesty, candor, eve-of-bankruptcy behavior, (3) catastrophic events,¹²⁴ (4) stable source of income, (5) eligibility for chapter 13, (6) the existence of state remedies to ease the debtor's burden, and (7) the ability of the debtor to lower expenses to fund

¹¹⁷ See 11 U.S.C. § 1129(b)(2)(B)(ii) (2000) (instituting absolute priority rule and stating junior holders may not receive property under plan for reorganization on account of junior claim or interest). BAPCPA now requires individual debtors to contribute disposable income to the plan. *Id.* § 1129(a)(15).

¹¹⁸ *Id.* § 1123(b)(2)(B)(ii).

¹¹⁹ Section 1123(a)(8) of the Code, new with BAPCPA, only requires an individual debtor to provide for "the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor . . . as is necessary for the execution of the plan." *Id.* § 1123(a)(8).

¹²⁰ 934 F.2d 568, 572 (4th Cir. 1991).

¹²¹ *Cf. In re Beitzel*, 333 B.R. 84, 90–91 (Bankr. M.D.N.C. 2005) (noting debtor's responsibility for health of family members influenced debtors decision to file chapter 7).

¹²² See *Green*, 934 F.2d at 572; see also *Stewart v. U.S. Tr. (In re Stewart)*, 175 F.3d 796, 809–10 (10th Cir. 1999); *Kornfield v. Schwartz (In re Kornfield)*, 164 F.3d 778, 787 (2d Cir. 1999); *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 4–5 (1st Cir. 1998); *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146, 149–50 (4th Cir. 1996).

¹²³ *In re Krohn*, 886 F.2d 123, 126–27 (6th Cir. 1989). There, the court stated:

Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings. That factor alone may be sufficient to warrant dismissal. For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Other facts relevant to need include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

Id. (citations omitted).

¹²⁴ *Cf. In re Mastromarino*, 197 B.R. 171, 180 (Bankr. D. Me. 1996) (being hoodwinked by yacht repairman does not constitute "calamity").

repayment of creditors.¹²⁵ Under these cases:

[A] chapter 7 case may be dismissed even without evidence of culpable behavior of a debtor who does not need chapter 7 relief. Such lack of need will be evidenced by financial resources which should be adequate to avoid bankruptcy if a debtor were either more prudent in his lifestyle or more disciplined in his financial choices.¹²⁶

Taxonomists have placed the Eighth and Ninth Circuits at the anti-debtor extreme and the Fourth Circuit at the pro-debtor extreme, with the Sixth Circuit in the middle.¹²⁷ One study, however, concludes that, rhetoric aside, courts look only to whether surplus disposable income exists; if it does, they dismiss the case.¹²⁸

Even modest ability to pay unsecured creditors with post-petition wages has justified a dismissal. One court dismissed a chapter 7 case because a hypothetical 14% dividend was foreseen in chapter 13.¹²⁹ Yet a 16% dividend was held insufficient to justify dismissal.¹³⁰ It was reversible error not to dismiss where 56% payment was possible over a three-year period.¹³¹ On the other hand, it was in the discretion of a court to find no abuse in light of a 53% possible payout (even though the debtor had scheduled secured debt payments on a horse trailer and a large truck to haul lazy Dobbin about).¹³² These cases have judged "substantial abuse" based on the percentage

¹²⁵ See *Behlke v. Eisen (In re Eisen)*, 358 F.3d 429, 436–38 (6th Cir. 2004); *In re Krohn*, 886 F.2d at 126–27; *In re Hill*, 328 B.R. 490, 496 (Bankr. S.D. Tex. 2005) (stating "the 'honesty'-prong is backwards looking and the 'need'-prong is forward looking").

¹²⁶ *In re Goddard*, 323 B.R. 231, 234 (Bankr. S.D. Ohio 2005).

¹²⁷ See *In re Harshaw*, 345 B.R. 518, 523 (Bankr. W.D. Pa. 2006) ("The difference between the approach of the Sixth Circuit and that of the Fourth Circuit, however, is that a finding that a debtor is not in need of a Chapter 7 discharge, by itself, may be sufficient to warrant a dismissal The Sixth Circuit approach thus represents a much more limited version of the 'totality of the circumstances' approach.").

¹²⁸ See Carl Felsenfeld, *Denial of Discharge for Substantial Abuse, Refining—Not Changing—Bankruptcy Law*, 67 FORDHAM L. REV. 1369, 1391 (1999). According to this study, 139 reported cases existed as of 1999, 107 resulted in dismissal because of surplus income, and "[a] review of other circumstances may or may not be a part of the analysis." *Id.* at 1392–93. Six cases were dismissed based solely on surplus income, and "[o]nly seven cases find that, although there was enough surplus income to make a meaningful payment to creditors, the Chapter 7 case should not be dismissed because a review of the 'totality of the circumstances' . . . failed to uncover some equitable abuse of the Code." *Id.* at 1393. But see *In re Smith*, 354 B.R. 787, 790–92 (Bankr. W.D. Va. 2006) (showing in spite of surplus disposable income, lack of aggravating factor led to court's denial of motion to dismiss).

¹²⁹ *Behlke*, 358 F.3d at 436–37; see also *In re Mastromarino*, 197 B.R. at 176 (stating Ninth Circuit "can be read to mandate dismissal given sufficient ability to pay [The Sixth Circuit] permits but does not require that result.").

¹³⁰ *In re Drillman*, No. 03-10814, 2004 Bankr. LEXIS 369, at *4–5, *17–33 (Bankr. S.D.N.Y. Apr. 2, 2004).

¹³¹ See generally *U.S. Tr. v. Harris (In re Harris)*, 960 F.2d 74 (8th Cir. 1992) ("The district court correctly rejected the bankruptcy court's holding that dismissal for substantial abuse under § 707(b) requires the moving party to show 'egregious behavior' by the debtor.").

¹³² See *McDow v. Fulcher (In re Fulcher)*, No. 306-CV-0040, 2006 U.S. Dist. LEXIS 74564 (W.D. Va. Oct. 16, 2006); see also *Harris v. U.S. Tr. (In re Harris)*, 279 B.R. 254, 262 (B.A.P. 9th Cir. 2002) (stating 2.5% payout is not substantial abuse); *In re Vansickel*, 309 B.R. 189, 193 (Bankr. E.D. Va. 2004) (noting 6.5% payout is not abuse, but when pension contribution added in, debtor could have paid 16.6%); *In re O'Neill*, 301 B.R.

payout. This implies that, where two debtors have the same surplus income, the one who most abused his credit cards is more likely to be the one who is entitled to chapter 7 relief.¹³³ BAPCPA amends this bias in part, though a shadow of it lingers.¹³⁴ Then as now this shows the perversity of means testing—it rewards the grasshopper and punishes the frugal-but-unfortunate ant.

Other courts, however, defined "ability to pay" as ability to pay *in full* over the standard three-year term of a chapter 13 plan.¹³⁵ At least one other court required a 70% payout of non-priority creditors.¹³⁶

Some courts took up the lash of the slave driver in demanding hard work from would-be chapter 7 debtors. Some went so far as to hold a past penchant for overtime against a debtor, in effect condemning the debtor to future overtime in order to pay creditors in a chapter 13 plan.¹³⁷ Quitting high-paying jobs and taking lower pay has been held a substantial abuse (in light of high credit card debt used for buying luxuries).¹³⁸ One court demanded that minor children be put to work in order to benefit the creditors.¹³⁹

In their search for surplus net income, pre-BAPCPA courts attacked expenses claimed by debtors on Schedule J, required to be filed under section 521(a)(1)(B)(ii).¹⁴⁰

898, 901 (Bankr. D.N.M. 2003) (holding no abuse in spite of 36% payout); *In re Balaja*, 190 B.R. 335, 336 (Bankr. N.D. Ill. 1996) (declaring debtors could pay 60% over thirty-six month period, or almost 100% over sixty-month period, in chapter 13); *In re Butts*, 148 B.R. 878, 881 (Bankr. N.D. Ind. 1992) (holding no dismissal where debtors could pay 42% of their unsecured debts over thirty-six month period, or 75% in sixty months, in chapter 13); *In re Beles*, 135 B.R. 286, 287 (Bankr. S.D. Ohio 1991) (noting debtors could pay 35% of unsecured debt over three years). Courts disagree on whether one might ignore intra-family debt for the purpose of these payouts. *Compare In re Weber*, 208 B.R. 575, 577 (Bankr. M.D. Fla. 1997) (ignoring loan from family), with *In re Attanasio*, 218 B.R. 180, 183 n.2 (Bankr. N.D. Ala. 1998) (stating such debts must be counted, absent evidence of fraud).

¹³³ See Olazabal & Foti, *supra* note 14, at 341 n.136 (hypothesizing situation wherein debtor with higher percentage of debt owed would likely be discharged for substantial abuse).

¹³⁴ See *infra* Part III.B.1.

¹³⁵ See *In re Zaleta*, 211 B.R. 178, 181 (Bankr. M.D. Pa. 1997); *In re Edwards*, 50 B.R. 933, 937 (Bankr. S.D.N.Y. 1985). But see *In re Gomes*, 220 B.R. 84, 88 (B.A.P. 9th Cir. 1998) (upholding dismissal based on 43% payout in hypothetical chapter 13 case).

¹³⁶ *In re Messenger*, 178 B.R. 145, 149 (Bankr. N.D. Ohio 1995).

¹³⁷ See *In re Reeves*, 327 B.R. 436, 443 (Bankr. W.D. Mo. 2005); *In re Harger*, 267 B.R. 848, 850, 852 (Bankr. N.D. Iowa 2001); *In re Carlton*, 211 B.R. 468, 480 (Bankr. W.D.N.Y. 1997) (holding substantial abuse where debtor contended that "at 45-years-old he can no longer work the overtime that he previously did to maintain a higher level of income"); *In re Stallman*, 198 B.R. 491, 497 (Bankr. W.D. Mich. 1996); *In re Dubberke*, 119 B.R. 677, 680 (Bankr. S.D. Iowa 1990) (concluding single mother abused system by quitting her second job in order to stay home with her son); *In re Helmick*, 117 B.R. 187, 190 (Bankr. W.D. Pa. 1990). But see *Com. Credit Corp. v. Killough (In re Killough)*, 900 F.2d 61, 65–66 (5th Cir. 1990) (determining overtime should not be included in "disposable income" for chapter 13 purposes); *McDow v. Fulcher*, 2006 U.S. Dist. LEXIS 74564, at *10; *In re Attanasio*, 218 B.R. at 215; *In re Hampton*, 147 B.R. 130, 131 (Bankr. E.D. Ky. 1992).

¹³⁸ See *In re Manske*, 315 B.R. 838, 842 (Bankr. E.D. Wis. 2004) ("The biggest sticking point in this case involves the circumstances under which these debtors voluntarily decided to leave their high-paying jobs in Wisconsin and move to Tennessee The debtors' self-imposed termination of employment, sudden move to Tennessee, and the timing of a series of events starting in September of 2003 and continuing over a short period of time are extremely suspect.").

¹³⁹ See *In re Carlton*, 211 B.R. at 481.

¹⁴⁰ See Schedule J—Current Expenditures of Individual Debtor(s),

Extravagant or unnecessary school tuition was not allowed.¹⁴¹ A car for the daughter,¹⁴² cell phones,¹⁴³ high cable and internet bills,¹⁴⁴ high mortgage payments,¹⁴⁵ maid service,¹⁴⁶ life insurance (where an adult daughter was the beneficiary),¹⁴⁷ mortgage payments on behalf of mother,¹⁴⁸ a car¹⁴⁹ or college¹⁵⁰ for an adult child, an expensive car for the debtor,¹⁵¹ the desire to reaffirm a security agreement regarding a luxury camping vehicle,¹⁵² lawn care in excess of \$29 per month,¹⁵³ recreational boating expenses,¹⁵⁴ and country club dues¹⁵⁵ were cause to find substantial abuse. Ice skating¹⁵⁶ and tennis lessons¹⁵⁷ for children were not justifiable. Monthly student loan payments could not be too high, on the assumption that the lender will agree to a longer amortization and a lower monthly payment.¹⁵⁸ Excessive pet food and veterinary expenses for aged pets¹⁵⁹ and time share rentals are out.¹⁶⁰ Spending more than \$15 a day on food¹⁶¹ or \$28.33 for a family of six¹⁶² is a gluttonous waste.¹⁶³ The need to

<http://www.uscourts.gov/bkforms/official/b6j.pdf>.

¹⁴¹ *Kornfield v. Schwartz (In re Kornfield)*, 164 F.3d 778, 784 (2d Cir. 1999); *In re Hand*, 323 B.R. 14, 19 (Bankr. D.N.H. 2005); *U.S. Tr. v. Welch (In re Welch)*, 344 B.R. 50, 55 (Bankr. W.D. Pa. 2005). In tuition cases, the debtor has the burden to prove necessity. *See Watson v. Boyajian (In re Watson)*, 309 B.R. 652, 664 (B.A.P. 1st Cir. 2004).

¹⁴² *Shaw v. U.S. Bankr. Adm'r*, 310 B.R. 538, 541 (M.D.N.C. 2004).

¹⁴³ *Id.*

¹⁴⁴ *In re Hill*, 328 B.R. 490, 497 (Bankr. S.D. Tex. 2005); *In re Cohen*, 246 B.R. 658, 669 (Bankr. D. Colo. 2000) (stating no HBO, HBO-2 allowed).

¹⁴⁵ *Shaw*, 310 B.R. at 541; *In re Jones*, 335 B.R. 203, 210 (Bankr. M.D. Fla. 2005); *In re Welch*, 344 B.R. at 55; *In re Music*, 310 B.R. 359, 362 (Bankr. N.D. Ohio 2004); *In re Mooney*, 313 B.R. 709, 714–15 (Bankr. N.D. Ohio 2004).

¹⁴⁶ *In re Haddad*, 246 B.R. 27, 35 (Bankr. S.D.N.Y. 2000) (finding education credentials of debtor did not justify maid service); *In re Summer*, 255 B.R. 555, 563 (Bankr. S.D. Ohio 2000).

¹⁴⁷ *In re McReynolds*, 253 B.R. 54, 63 (Bankr. S.D. Iowa 2000); *see also In re Heffernan*, 242 B.R. 812, 817 (Bankr. D. Conn. 1999) (holding life insurance with cash value trade-in inappropriate for deduction from disposable income).

¹⁴⁸ *In re Miller*, 302 B.R. 495, 502 (Bankr. M.D. Pa. 2003) ("Thus, while paying off such debt is certainly a moral obligation of the Debtors, it is not one that Section 707(b) recognizes.").

¹⁴⁹ *In re Welch*, 344 B.R. at 55.

¹⁵⁰ *In re Shaw*, 311 B.R. 180, 184 (Bankr. M.D.N.C. 2003), *aff'd*, 310 B.R. 538 (M.D.N.C. 2004) ("While supporting a daughter in college is an admirable goal, debtors propose to do so at the expense of their creditors."); *In re Staub*, 256 B.R. 567, 571 (Bankr. M.D. Pa. 2000).

¹⁵¹ *In re Butler*, 277 B.R. 917, 922 (Bankr. N.D. Iowa 2002).

¹⁵² *Nelson v. Siouxland Fed. Credit Union (In re Nelson)*, 223 B.R. 349, 351 (B.A.P. 8th Cir. 1998).

¹⁵³ *In re Wood*, 92 B.R. 264, 266 (Bankr. S.D. Ohio 1988).

¹⁵⁴ *In re Engskow*, 247 B.R. 314, 317 (Bankr. M.D. Fla. 2000).

¹⁵⁵ *In re Walsh*, 287 B.R. 154, 157 (Bankr. E.D.N.C. 2002).

¹⁵⁶ *In re Stout*, 336 B.R. 138, 143 (Bankr. N.D. Iowa 2006).

¹⁵⁷ *In re Rathbun*, 309 B.R. 901, 904–07 (Bankr. N.D. Tex. 2004).

¹⁵⁸ *See In re Lenartz*, 263 B.R. 331, 337 (Bankr. D. Idaho 2001).

¹⁵⁹ *In re Miller*, 335 B.R. 335, 344 (Bankr. E.D. Pa. 2005); *In re Cohen*, 246 B.R. 658, 669 (Bankr. D. Colo. 2000) (allowing \$100 monthly maximum for pet care).

¹⁶⁰ *In re Hand*, 323 B.R. 14, 19 (Bankr. D.N.H. 2005).

¹⁶¹ *In re Ontiveros*, 198 B.R. 284, 291 (C.D. Ill. 1996).

¹⁶² *Kornfield v. Schwartz*, 214 B.R. 705, 710–11 (W.D.N.Y. 1997).

¹⁶³ *Contra In re Messenger*, 178 B.R. 145, 147 (Bankr. N.D. Ohio 1995) (holding no substantial abuse where debtor and spouse budgeted \$26.66 per month for food). For a taxonomy of cases on expenses such as food, clothing, housing, transportation, home maintenance, utilities, telephone, recreation, cable TV and laundry, *see In*

repay parents for a loan is not permitted.¹⁶⁴ One court dismissed debtors because they took "for granted a sizable home which they are able to maintain, reliable transportation, the ability to give substantial gifts and help their daughter through school, and health and dental care. Many chapter 13 debtors are not so fortunate and still manage to pay disposable income to their creditors."¹⁶⁵

A debtor with low expenses because he lived with his parents was notoriously considered an abuser, where he did not anticipate a change of living situation.¹⁶⁶ This condemned the debtor to his parent's basement for the duration of the chapter 13 plan, so that the creditors could reap the benefits of parental inconvenience.¹⁶⁷ Similarly, debtors with old cars which would soon need replacement were abusers if they spent money on new car debt, instead of paying creditors.¹⁶⁸ On the other hand, one court (from a tobacco state) found no bankruptcy abuse where the debtor spent \$200 a month on cigarettes for himself and his children.¹⁶⁹ In this exercise, a court is authorized to use its own value judgment as to what expense is an extravagance.¹⁷⁰ Accordingly, it is very easy to find contradictions in the case law. According to one commentator:

One court affirmed dismissal for substantial abuse partially because debtors spent more than \$75 per month for clothes for a family of four. But another found that expenses of \$200 per month for clothing for a family of four were reasonably necessary. One judge ruled that a couple should spend no money for recreation. But another decision by the very same bankruptcy court held that substantial abuse was not indicated where a couple spent \$125 a month on recreation. In many cases, any amount of money spent on cable television is deemed excessive. A few courts, however, find money for cable television is reasonable. One court indicated that \$50 per month would be a reasonable amount to spend to hire someone to clean the debtor's home, but another found substantial abuse where the debtor's family

re Attanasio, 218 B.R. 180, 201-07 (Bankr. N.D. Ala. 1998).

¹⁶⁴ *In re Praleikus*, 248 B.R. 140, 142 (Bankr. W.D. Mo. 2000).

¹⁶⁵ *In re Beckel*, 268 B.R. 179, 184-85 (Bankr. N.D. Iowa 2001).

¹⁶⁶ See *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 5 (1st Cir. 1998); see also *In re Matias*, 203 B.R. 490, 492 n.1 (Bankr. S.D. Fla. 1996); *In re Andrus*, 94 B.R. 76, 77 (Bankr. W.D. Pa. 1988); *In re Brady*, 95 B.R. 1004, 1004 (Bankr. W.D. Mo. 1987).

¹⁶⁷ Similarly, courts have found that any attempt of a debtor to improve his housing situation near the time of bankruptcy is an abuse. See *In re Buntin*, 161 B.R. 466, 468 (Bankr. W.D. Mo. 1993) ("I find that Chapter 7 relief is not intended to allow debtors to 'upgrade their current low standard of housing,' at the expense of their creditors.") (citation omitted); *In re Ploegert*, 93 B.R. 641, 643 (Bankr. N.D. Ind. 1988) (noting substantial abuse indicated where debtor moved into larger apartment after filing bankruptcy so that his expenses were increased each month by \$300).

¹⁶⁸ *In re Attanasio*, 218 B.R. at 197 & n.17 (gathering cases describing new car debt as substantial abuse).

¹⁶⁹ *Waites v. Braley*, 110 B.R. 211, 216 (E.D. Va. 1990). *Contra In re Buntin*, 161 B.R. at 468 (holding substantial abuse where debtors would spend \$262 each month on tobacco products for family of two). In comparison, under BAPCPA the presence of \$160 per month in net income is *per se* evidence of bankruptcy abuse, if the debtor is above the median in income. See 11 U.S.C. § 707(b)(2)(A)(i)(II) (2006).

¹⁷⁰ See *Voelkel v. Naylor (In re Voelkel)*, 322 B.R. 138, 146 (B.A.P. 9th Cir. 2005).

of five spent seventy-five dollars on household supplies each month.¹⁷¹

Courts disagreed on 401(k) contributions. Some courts insist on a complete ban on 401(k) contributions.¹⁷² Others suggest that contributions for a person near retirement or minimal contributions are acceptable.¹⁷³ Typically, ERISA contributions—even repayment of loans from the ERISA plan—have not been viewed as valid expenses,¹⁷⁴ though contrary instances can be found.¹⁷⁵ Oddly, once wages hit the 401(k) account, they cannot be reached by creditors.¹⁷⁶ Nevertheless, the intent to deposit funds in the 401(k) plan has been held evidence of abuse, for purposes of section 707(b).¹⁷⁷ The heavy hand of the AARP, however, is readily visible throughout BAPCPA, so it is unclear whether this bias against pension contributions by insolvent consumers can be sustained. Nevertheless, as we shall see, BAPCPA invites dismissal on the "totality of the circumstances."¹⁷⁸ This invitation suggests that *all* of the case law of prior section 707(b) is at the disposal of bankruptcy judges anxious to defeat a congressional intent to increase bankruptcy abuse.¹⁷⁹

In individual cases, courts have considered the *joint* income of debtors and their non-debtor spouses in their search for surplus income.¹⁸⁰ This does not sit well with the

¹⁷¹ Harriet Thomas Ivy, Note, *Means Testing Under the Bankruptcy Reform Act of 1999: A Flawed Means to a Questionable End*, 17 BANKR. DEV. J. 221, 241–42 (2000) (citations omitted).

¹⁷² See *In re Hand*, 323 B.R. 14, 18 (Bankr. D.N.H. 2005); *In re Leung*, 311 B.R. 626, 631 (Bankr. S.D. Fla. 2004).

¹⁷³ See *In re Hill*, 328 B.R. 490, 499 (Bankr. S.D. Tex. 2005); *In re Drillman*, No. 03-10814, 2004 Bankr. LEXIS 369, at *26 (Bankr. S.D.N.Y. Apr. 2, 2004) (holding continuing contribution to 401(k) reasonable because debtor was close to retirement age and facing decline in disposable income); *In re King*, 308 B.R. 522, 532–33 (Bankr. D. Kan. 2004) (determining repayment reasonable because house needed repair and 401(k) account likely source of funds); see also *New York City Employees' Ret. Sys. v. Sapir (In re Taylor)*, 243 F.3d 124, 129 (2d Cir. 2001) (finding in chapter 13, 401(k) contributions not per se included in disposable income).

¹⁷⁴ See *Hebbring v. U.S. Tr.*, 463 F.3d 902, 908 (9th Cir. 2006) (indicating, in pre-BAPCPA case, debtor could not deduct 401(k) payments or repayments of loan from 401(k) plan, based on totality of circumstances); *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 435–36 (6th Cir. 2004) (stating debtor's voluntary 401(k) contributions should be included in disposable income); *In re Jones*, 335 B.R. 203, 209 (Bankr. M.D. Fla. 2005); *In re Fauntleroy*, 311 B.R. 730, 737 (Bankr. E.D.N.C. 2004); *In re Porter*, No. 02-70904, 2002 Bankr. LEXIS 1025, at *3–4 (Bankr. C.D. Ill. May 28, 2002) (disallowing repayment of loan); *In re Mills*, 246 B.R. 395, 402–03 (Bankr. S.D. Cal. 2000); *In re Rubio*, 249 B.R. 689, 697 (Bankr. N.D. Tex. 2000).

¹⁷⁵ See *In re Vansickel*, 309 B.R. 189, 210 (Bankr. E.D. Va. 2004) (permitting loan repayments to be excluded from disposable income while mandating voluntary contributions to 401(k) plan be included); *In re Aiello*, 284 B.R. 756, 762, 765 (Bankr. E.D.N.Y. 2002) (noting \$300 monthly contribution would have been allowed but for debtor increasing pension contributions just before bankruptcy); *In re Scobee*, 269 B.R. 678, 681 (Bankr. W.D. Mo. 2001) (providing 3% contribution acceptable).

¹⁷⁶ See 11 U.S.C. § 541(c) (2006).

¹⁷⁷ *Taylor v. United States (In re Taylor)*, 212 F.3d 395, 396–97 (8th Cir. 2000).

¹⁷⁸ 11 U.S.C. § 707(b)(3)(B) (2006).

¹⁷⁹ See *infra* Part III.C.

¹⁸⁰ See *In re Keeper*, 329 B.R. 693, 694 (Bankr. W.D. Mo. 2005); *In re Bicsak*, 207 B.R. 657, 658, 662 (Bankr. W.D. Mo. 1997) (indicating child support received by debtor's partner from her ex-husband for support of two children had to be added to debtor's income); *In re Stewart*, 201 B.R. 996, 1007 (Bankr. N.D. Okla. 1996) ("And he can afford to pay what he owes, to them and to all his other creditors—if not all at once, then certainly over time, within the near and foreseeable future, entirely from his own earnings if need be, but certainly with the

premise that non-debtor spouses are typically not liable for the debts of their life mates. Probably a better approach is for the courts to consider the extent to which the non-debtor spouse's income actually covers the expense of the debtor.¹⁸¹

Apart from surplus income, assets could be considered. One court cited the possibility that valueless stock options and modest real estate equity might increase in the future as grounds to dismiss a case.¹⁸² This, of course, overlooks the nature of valuation as a weighted average of upside and downside market changes. If a valuation is a true weighted average, there is no reason to believe that values will ever appreciate, when adjusted for inflation.

Too much exempt property has been held an abuse.¹⁸³ This holding punishes a debtor for exercising a right expressly provided for in section 522(b) of the Bankruptcy Code. On the other hand, post-petition wages cannot be reached by creditors either, and section 707(b) is routinely used to force debtors to share this "exemption." It was no great stretch from here to insist that debtors also liquidate pre-petition exempt property. Indeed, section 707(b) could be viewed as the power of a bankruptcy court to extort

help of his current wife, whose own considerable earnings can support them while Stewart pays his just debts."); *In re Duncan*, 201 B.R. 889, 895 (Bankr. W.D. Pa. 1996); *In re Dempton*, 182 B.R. 38, 40 (Bankr. W.D. Mo. 1995) (concluding \$700 in child support received by non-debtor spouse had to be added to debtor's income); *In re Wilkinson*, 168 B.R. 626, 628 (Bankr. N.D. Ohio 1994) ("This Court finds that Debtor has the ability to pay the debt to Fidelity Guaranteed Mortgage in twenty (20) months if her husband contributes to the payments."); *In re Smith*, 157 B.R. 348, 350-51 (Bankr. N.D. Ohio 1993); *In re Bacco*, 160 B.R. 283, 286 (Bankr. W.D. Pa. 1993) (noting \$880 in monthly worker's compensation received by debtor's unemployed, non-debtor spouse); *In re Gyurci*, 95 B.R. 639, 644 (Bankr. D. Minn. 1989); *In re Bryant*, 47 B.R. 21, 24 (Bankr. W.D.N.C. 1984).

¹⁸¹ See *In re Rysso*, 321 B.R. 522, 526 (Bankr. D. Minn. 2005); *In re Falke*, 284 B.R. 133, 139 (Bankr. D. Or. 2002) (stating debtor could not allocate all expenses to self where spouse had income); *In re Attanasio*, 218 B.R. 180, 234-35 (Bankr. N.D. Ala. 1998) (explaining non-debtor spouse's share should never exceed 50%). *But see In re Reeves*, 327 B.R. 436, 442, 445 (Bankr. W.D. Mo. 2005) (rejecting this approach, but claiming it made no difference on facts of case). Judge Cohen raises a difficult ethical question: if a debtor with a working spouse is coerced into chapter 13, is not the spouse condemned to continuing her perhaps unpleasant job so that the debtor's spouse can benefit? *In re Attanasio*, 218 B.R. at 198.

¹⁸² *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 436 (6th Cir. 2004).

¹⁸³ *Accord Kornfield v. Schwartz*, 214 B.R. 705, 712 (W.D.N.Y. 1997), *aff'd*, 164 F.3d 778 (2d Cir. 1999) (acknowledging debtors had \$390,000 in retirement funds); *In re Heller*, 160 B.R. 655, 656 (D. Kan. 1993) (considering exempt property valued at \$8,573, including \$6,323 accumulated in pension plan); *In re Snyder*, 332 B.R. 641, 644 (Bankr. M.D. Fla. 2005) (discussing exempt house); *In re Mitman*, No. 00-12995, 2001 Bankr. LEXIS 865, at *6 (Bankr. S.D. Ohio Feb. 28, 2001) (deciding ERISA account too large); *In re Dorwarth*, 258 B.R. 293, 294, 296 (Bankr. S.D. Fla. 2001) (reporting \$279,000 in retirement account while total debts were only \$66,000); *In re Carlton*, 211 B.R. 468, 478-80 (Bankr. W.D.N.Y. 1997), *aff'd*, 214 B.R. 705 (W.D.N.Y. 1997), *aff'd*, 164 F.3d 778 (2d Cir. 1999) (observing debtors had \$10,000 in retirement funds); *In re Duncan*, 201 B.R. at 897-98 (remarking debtor had between \$25,000 and \$131,000 in exempt equity in residence owned by him and his non-debtor spouse); *In re Fitzgerald*, 155 B.R. 711, 712 (Bankr. W.D. Tex. 1993) (recognizing debtor accumulated over \$30,000 in retirement funds); *In re Wray*, 136 B.R. 122, 125 (Bankr. W.D. Pa. 1992) (providing debtors "claimed as exempt virtually all of their assets which could be liquidated to make at least partial distribution to those creditors"); *In re Stratton*, 136 B.R. 804, 805-06 (Bankr. C.D. Ill. 1991) (contemplating \$28,000 in retirement account); *In re Palmer*, 117 B.R. 443, 445 (Bankr. N.D. Iowa 1990) (realizing homestead valued at \$58,000, retirement account of \$19,000, and only \$35,018 in unsecured debts); *In re Higginbotham*, 111 B.R. 955, 965 (Bankr. N.D. Okla. 1990) (assessing exempt "superfluous vehicles and expensive toys"); *In re Helmick*, 117 B.R. 187, 190-91 (Bankr. W.D. Pa. 1990) (evaluating exempt Kawasaki Jet Ski); *In re Gyurci*, 95 B.R. at 640 (noting \$57,000 of equity in homestead); *In re Bryant*, 47 B.R. at 24 (finding exempt equity in home that could have been used to pay creditors).

anything whatsoever from debtors as the price of admission to chapter 7.

Bad deeds separate and apart from surplus income have warranted dismissal. Hiding assets and desiring to prevent an ex-wife from recovering justified a dismissal.¹⁸⁴ So did pre-petition credit card bingeing,¹⁸⁵ incurring debt that could never be repaid,¹⁸⁶ inaccurate reporting,¹⁸⁷ using non-exempt assets to buy exempt assets,¹⁸⁸ refusing to sell an engagement ring,¹⁸⁹ living beyond one's means via credit cards,¹⁹⁰ amending Schedule J to show increased expenses,¹⁹¹ the "brazen" purchase of two new

¹⁸⁴ *Kestell v. Kestell* (*In re Kestell*), 99 F.3d 146, 147 (4th Cir. 1996); *In re Traub*, 140 B.R. 286, 291 (Bankr. D.N.M. 1992); *In re Palmer*, 117 B.R. at 448; *In re Shands*, 63 B.R. 121, 124 (Bankr. E.D. Mich. 1985). Judge Cohen protests such cases on the ground that the ex-spouse's claims are non-dischargeable under sections 523(a)(5) and (15). *In re Attanasio*, 218 B.R. at 223. Why, then, deprive the debtor of a discharge of other creditors?

¹⁸⁵ *Wilson v. U.S. Tr.* (*In re Wilson*), 125 B.R. 742, 743 (W.D. Mich. 1990); *In re Uddin*, 196 B.R. 19, 21 (Bankr. S.D.N.Y. 1996) (demonstrating debtor had \$170,418 in consumer debts, misrepresented his income on unsolicited credit card applications during unemployment, then purchased \$60,000 in jewelry, clothes, airline tickets, toys, radios, televisions, perfume and cosmetics, and \$60,000 on gambling trips to Atlantic City); *In re Bacco*, 160 B.R. at 288 (indicating during three years preceding bankruptcy, debtor bought \$95,000 in guns which he contends were stolen just before bankruptcy); *In re Andrus*, 94 B.R. 76, 77 (Bankr. W.D. Pa. 1988) (noting eleven televisions, eight VCR's, and one stereo given away as gifts); *In re Newsom*, 69 B.R. 801, 805 (Bankr. D.N.D. 1987) (discussing "consumer spending spree").

¹⁸⁶ *In re Braithwaite*, 192 B.R. 882, 884 (Bankr. N.D. Ohio 1996); *In re Gavita*, 177 B.R. 43, 47 (Bankr. W.D. Pa. 1994) (acknowledging debtors knew "when the debts were incurred that they could not or would not pay them or they chose to ignore the obvious"); *In re Bacco*, 160 B.R. at 288–89; *In re Nolan*, 140 B.R. 797, 803 (Bankr. D. Col. 1992) (reporting debtor continued to incur consumer debt after suffering \$50,000 judgment against him); *In re Gyurci*, 95 B.R. at 644 (explaining debtor showed "complete disregard for an eventual ability to repay"); *In re Peluso*, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987) (indicating debtor "voluntarily incurred consumer debts beyond his ability to pay them"). A notable case is *In re Wolniewicz*, 224 B.R. 302, 303 (Bankr. W.D.N.Y. 1998) (noting debtors' annual interest on debt to fifty-nine credit card companies exceeded their annual income).

Against this criterion, Judge Cohen points out that such debts were incurred under false pretences and therefore are not dischargeable under section 523(a)(2). *In re Attanasio*, 218 B.R. at 218–19. In light of this, there is no reason also to dismiss the chapter 7 case in order to defeat the discharge. Judge Cohen remarks:

If there was no intent to repay, upon proof of those facts, the debtor may not receive a discharge of those debts. But if no non-dischargeability complaint is filed, then why should a court presume that there was fraud and consequently abuse? Dismissal of a debtor's case under 707(b) then for the reason that the debtor has incurred debts without the ability to repay them becomes a de facto 523(a)(2)(A) judgment without evidence of actual fraud or intent or the usual due process safeguards attendant to an adversary proceeding.

Id. at 219 n.56.

¹⁸⁷ *U.S. Tr. v. Harrelson*, 323 B.R. 176, 179 (W.D. Va. 2005) (holding debtors' schedules and statement of income did not reasonably and accurately reflect true financial position); *In re Meyn*, 330 B.R. 286, 291 (Bankr. M.D. Fla. 2005) (inferring debtor's failure to accurately report true financial condition was not inadvertent); *In re Luikart*, 319 B.R. 1, 4 (Bankr. M.D. Fla. 2003). For a BAPCPA case, see generally *Haney v. Clippard*, No. 4:06CV-150, 2007 U.S. Dist. LEXIS 17295, at *1 (W.D. Ky. Mar. 9, 2007).

¹⁸⁸ *In re Lenartz*, 263 B.R. 331, 340 (Bankr. D. Idaho 2001).

¹⁸⁹ *In re Gotham*, 327 B.R. 65, 77 n.12 (Bankr. D. Mass. 2005) (noting sale would have funded 2% repayment of unsecured debt).

¹⁹⁰ *In re Uddin*, 196 B.R. at 21.

¹⁹¹ *In re Pier*, 310 B.R. 347, 351 (Bankr. N.D. Ohio 2004).

automobiles on the eve of bankruptcy,¹⁹² arranging a nonrecoverable preference for a relative,¹⁹³ leaving select creditors off the schedule in order to prefer them with post-petition wages after the discharge,¹⁹⁴ enrolling in college courses solely to defer the day on which student loan payments must be made,¹⁹⁵ and failing to negotiate debts down before filing for bankruptcy.¹⁹⁶ One early court said that section 707(b) "does not give a license to the court to adopt an ad hoc, free-wheeling approach to sift out debtors the court finds distasteful."¹⁹⁷ But subsequent developments proved that this was precisely what section 707(b) would become.

D. Pro-Debtor Presumption

Former section 707(b) provided, "There shall be a presumption in favor of granting the relief requested by the debtor."¹⁹⁸ BAPCPA has eliminated these words. A leading case importuned bankruptcy courts to pay attention to it.¹⁹⁹ Indeed, where the debtor survives dismissal, it is usually mentioned.²⁰⁰ Nevertheless, one gets the impression from pre-2005 case law that courts were quick to dismiss cases if surplus net income was discovered, notwithstanding this preemption.²⁰¹ Nevertheless, at least one appellate panel has reversed a *sua sponte* dismissal where the court did not expressly address this

¹⁹² *In re McLaughlin*, 305 B.R. 505, 509 (Bankr. W.D. Mo. 2004); *see also In re Logan*, No. 02-39177-SAF-7, 2003 Bankr. LEXIS 600, at *15 (Bankr. N.D. Tex. June 17, 2003) (noting truck was purchased with funds that could have gone to creditors); *In re Rodriguez*, 228 B.R. 601, 604–05 (Bankr. W.D. Va. 1999) (indicating debt incurred by purchase of new truck could have gone to creditors).

¹⁹³ *In re Evans*, 334 B.R. 148, 152 (Bankr. D. Md. 2004).

¹⁹⁴ *In re Attanasio*, 218 B.R. 180, 223–24 (Bankr. N.D. Ala. 1998); *In re Gavita*, 177 B.R. 43, 48 (Bankr. W.D. Pa. 1994) (demonstrating debtors did not list one credit card on their schedules so that they could keep the account open and continue to use it); *In re Bryant*, 47 B.R. 21, 23–24 (Bankr. W.D.N.C. 1984) (finding seven or eight credit cards omitted for the apparent purpose of continuing to incur consumer credit following bankruptcy).

¹⁹⁵ *In re Lenartz*, 263 B.R. 331, 339 (Bankr. D. Idaho 2001).

¹⁹⁶ *In re Fitzgerald*, 155 B.R. 711, 716–17 (Bankr. W.D. Tex. 1993) (stating "evidence that chapter 7 was the debtor's first solution to their financial problems coupled with evidence that other solutions were available but not tried . . ." debtors had not "exhausted all the available routes for repaying their debts"); *In re Veenhuis*, 143 B.R. 887, 889 (Bankr. D. Minn. 1992) (noting no sincere effort to repay his debt). *But see In re McCormack*, 159 B.R. 491, 495–96 (Bankr. N.D. Ohio 1993) (acknowledging substantial abuse even though credit counselor told them their debts were too large to be adjusted through negotiations with creditors and debtors presented documented evidence that they had attempted to negotiate with creditors prior to filing bankruptcy); *cf. In re Attanasio*, 218 B.R. at 226 (remarking failure to negotiate should not be a factor justifying dismissal).

¹⁹⁷ *In re Edwards*, 50 B.R. 933, 937 n.3 (Bankr. S.D.N.Y. 1985).

¹⁹⁸ 11 U.S.C. § 707(b) (2000).

¹⁹⁹ *See Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991) (pointing out, pre-BAPCPA, the statutory presumption in favor of granting discharge).

²⁰⁰ *See McDow v. Fenster*, No. 7-05-CV-00592, 2006 U.S. Dist. LEXIS 10707, at *5 (W.D. Va. Mar. 17, 2006); *In re Ray*, 325 B.R. 193, 196 (Bankr. E.D. Mich. 2005) (noting former section 707(b) placed burden of proof on trustee to show substantial abuse); *In re Gotham*, 327 B.R. 65, 68–69 (Bankr. D. Mass. 2005) (discussing application of former section 707(b) in instant case); *In re Boyer*, 321 B.R. 457, 460–61 (Bankr. N.D. Ohio 2004); *In re Vansickel*, 309 B.R. 189, 213 (Bankr. E.D. Va. 2004); *In re Marcoux*, 301 B.R. 381, 384 (Bankr. D. Conn. 2003).

²⁰¹ *See In re Walton*, 866 F.2d 981, 987 (8th Cir. 1989) (holding words meant nothing if surplus post-petition income existed).

presumption.²⁰²

BAPCPA repeals this presumption. The words of Judge Benjamin Cohen in *In re Attanasio*²⁰³ thereby become ironic:

This Court does not believe that Congress intended for 707(b) to be invoked, if doing so would reduce a low or middle income debtor to living on the kind of harsh budget that might be required for confirmation of a Chapter 13 plan, thereby depriving that debtor of the "clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" envisioned by Justice Sutherland in *Local Loan*.^[204] Had Congress intended to disregard that pronouncement, it would have done so and would not have included the very specific language of the last sentence of 707(b), which requires the court to presume *favorably*, not that the debtor cannot pay debts, and not that the debtor is entitled to a Chapter 7 discharge of all debts, but that the debtor is entitled to be in Chapter 7, as opposed to Chapter 13. That presumption, along with the historic purpose of Chapter 7 bankruptcy, as described in *Local Loan*, mandates that the disposable income threshold of 707(b) be more generous than the disposable income threshold of 1325(b) and that a case be dismissed from Chapter 7 only if the debtor will have a "clear field for future effort" even if the debtor is not granted a Chapter 7 discharge. The proper question to ask under 707(b) therefore should be, can the debtor fund a Chapter 13 plan and still have a clear field of effort, not whether the debtor can fund a Chapter 13 plan.²⁰⁵

Now that Congress has taken up Judge Cohen's invitation, it is time to recognize that the myth of *Local Loan* has been laid to rest.

E. Charitable Contributions

Whatever bankruptcy abuse was prior to 2005, the all-powerful televangelist movement persuaded Congress in 1998 to append this clause to section 707(b):

In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any

²⁰² Voelkel v. Naylor (*In re Voelkel*), 322 B.R. 138, 149 (B.A.P. 9th Cir. 2005) ("[T]he court's discretion is bounded by the [section 707(b)] presumption, which must be applied expressly.").

²⁰³ 218 B.R. 180 (Bankr. N.D. Ala. 1998).

²⁰⁴ 292 U.S. 234, 244 (1934).

²⁰⁵ *In re Attanasio*, 218 B.R. at 195–96.

qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).²⁰⁶

Section 548(d)(3) defines "charitable contribution" to mean whatever it means under section 170(c) of the Internal Revenue Code.²⁰⁷ The Internal Revenue Code in turn defines "charitable contribution" to mean a gift to a United States governmental entity for exclusively public purposes²⁰⁸ or a gift to any corporation, trust, community chest, fund, or foundation organized under United States or local law and operated "exclusively for religious, charitable, scientific, literary, or educational purposes or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals"²⁰⁹

This provision has not been amended and perhaps provides a loophole in means testing, to which we will soon turn. Harder it may be for a camel to pass through the eye of a needle than for a rich man goes to heaven, but it is positively easy for a bankrupt prankster to defeat means testing by upping his monthly contribution to the televangelist *du jour*. It is a bankruptcy abuse for a debtor to support his aging mother²¹⁰ but debtors are invited to overlard the fat-already wallet of Jerry Falwell with fraudulent conveyances.²¹¹

This last observation must be tempered with the observation that section 707(b) protects a debtor for contributions he *has made* or *continues* to make. *New* contributions proposed going forward can apparently be considered an abuse.²¹² The debtor will have to establish a history of contributions before taking shelter under this clause.

III. MEANS TESTING AND BAPCPA

BAPCPA does not expressly make high income debtors ineligible for chapter 7 liquidation. Chapter 7 eligibility as such is governed section 109(b) of the Bankruptcy Code, which BAPCPA leaves unchanged, insofar as individuals are concerned.²¹³

²⁰⁶ Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 4(b), 112 Stat. 517, 518 (codified as amended in 11 U.S.C. § 707(b) (2000)).

²⁰⁷ 11 U.S.C. § 548(d)(3) (2006).

²⁰⁸ I.R.C. § 170(c)(1) (West Supp. 2006).

²⁰⁹ *Id.* § 501(c)(3).

²¹⁰ See *U.S. Tr. v. Miller (In re Miller)*, 302 B.R. 495, 502 (Bankr. M.D. Pa. 2003) ("Thus, while paying off such debt is certainly a moral obligation of the Debtors, it is not one that Section 707(b) recognizes.").

²¹¹ For a defense of the televangelists, see Todd J. Zywicki, *Rewrite the Bankruptcy Laws, Not the Scriptures: Protecting a Bankruptcy Debtor's Right to Tithe*, 1998 WIS. L. REV. 1223, 1247. Oddly, Professor Zywicki is a great proponent of means testing when religion is not involved. See Judge Edith H. Jones & Todd J. Zywicki, *It's Time For Means Testing*, 1999 BYU L. REV. 177, 183.

²¹² See *In re Hill*, 328 B.R. 490, 499 (Bankr. S.D. Tex. 2005) (holding payments to retirement account in post-petition bankruptcy indicates substantial abuse pursuant to section 707(b) of Bankruptcy Code); *In re Smihula*, 234 B.R. 240, 242-43 (Bankr. D.R.I. 1999) (asserting post-petition charitable contributions may be considered abuse under section 707(b) of Bankruptcy Code).

²¹³ Of course, section 109(h) adds the irksome credit counseling requirement, but this is an eligibility matter for chapter 7 and chapter 13 cases alike. See 11 U.S.C. § 109(h)(1) (2006) (requiring debtors to obtain credit

Nothing bars the bankruptcy petition by an above-median debtor.

What section 707(b) did, prior to 2005, and what it still does, is to provide the vehicle for dismissing validly commenced chapter 7 cases for abuse. BAPCPA does, however, make various, mostly procedural, changes in the law. It is, of course, my thesis that the *substantive* effect of means testing is either nil or supportive of increased abuse by high income debtors.

A. Standing

Before 2005, only the United States trustee or the court *sua sponte* could dismiss a consumer chapter 7 case. BAPCPA's new version of section 707(b)(1) has opened standing to any party in interest.²¹⁴ But new subparagraphs (6) and (7) proceed to restrict and perhaps eliminate standing in certain cases involving below-median debtors.²¹⁵ So universal standing exists only in the case of an above-median debtor. Before we examine the means test *per se*, it will serve us well to consider the standing question in below-median cases. The rules pertaining to these cases have already proved perplexing.

1. United States Trustees

According to section 707(b)(6), only a judge,²¹⁶ the United States trustee or bankruptcy administrator²¹⁷ may move to dismiss if the debtor's current monthly

counseling 180 days prior to filing bankruptcy petition).

²¹⁴ *Id.* § 707(b)(1) ("After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest . . .").

²¹⁵ *See id.* § 707(b)(6)–(b)(7) (limiting ability to dismiss case under section 707(b) to judge or United States trustee when debtor's monthly income is below median income of applicable state).

²¹⁶ One court notes that judges do not file motions with themselves. Judges don't file motions. *See In re Paret*, 347 B.R. 12, 14 n.4 (Bankr. D. Del. 2006). Rather, they issue orders to show cause why a *sua sponte* order should not be issued. *See, e.g., Scott v. U.S. Tr. (In re Doser)*, 412 F.3d 1056, 1060 (9th Cir. 2004) (discussing issuance of *sua sponte* order to show cause why debtor should not be found in violation of section 110 of Bankruptcy Code).

²¹⁷ Prior to BAPCPA, bankruptcy administrators appeared in the codified version of the Bankruptcy Code only once—in former section 1112(b). *See* 11 U.S.C. § 1112(b) (2000). Thanks to BAPCPA, references to bankruptcy administrators abound. *See generally* BAPCPA, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.). Bankruptcy administrators exist only in North Carolina and Alabama, pending the decision of the judges of those districts to participate in the United States Trusteeship program. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 302(d)(3), 100 Stat. 3088, 3119–23. The existence of bankruptcy administrators was to terminate on October 1, 1992, but Congress extended this deadline first to October 1, 2002. *See* Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 317(a)(1), 104 Stat. 5104, 5115. In 2000, the deadline was entirely omitted. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501(1), 114 Stat. 2410, 2421–22. As a result, bankruptcy administrators still roam the hills of North Carolina and Alabama. *See* FED. R. BANKR. P. 9035. Oddly, BAPCPA eliminates bankruptcy administrators from section 1112(b) but freely alludes to them in numerous bankruptcy provisions. Meanwhile, an uncodified statute provides, "A bankruptcy administrator may raise and appear and be heard on any issue in any case under title 11, United States Code, but may not file a plan pursuant to section 1121(c) of such title." *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act § 317(a)(1), 104 Stat. at 5115–16. This uncodified law closely resembles section

income (times twelve) is below the relevant median family income of the state. This is a continuation of old section 707(b)'s standing rule, which was (after 1984) limited to *sua sponte* court action and (after 1986)²¹⁸ motions by the United States trustee for consumer bankruptcy abuse.²¹⁹

With regard to the United States trustee or bankruptcy administrator, BAPCPA requires their prompt attendance to section 707(b) motions. According to section 704(b)(1)(A), these officials, within ten days of the first creditors' meeting, must file a report on whether the debtor's bankruptcy petition constitutes an abuse. The bankruptcy court must then send this report to all of the creditors.²²⁰ In addition, the United States trustee must, within thirty days after filing the above statement, either move to dismiss a case involving an above-median debtor or explain why this is not being done.²²¹

As to these new burdens, anyone reading the advance sheets will have noticed the extreme increase of section 707(b) cases after 2001. It has been suggested that this increase stemmed from the Justice Department's frustration with Congress's inability to pass a bankruptcy reform act during the early years of the decade and the affirmative decision to use existing section 707(b) to police the bankruptcy courts.²²² New section 704(b)(1) can therefore be read to commit future Justice Departments to this policy of increased vigilance.

307 of the Code, pertaining to the power of United States trustees. See 11 U.S.C. § 307 (2006).

In *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1528 (9th Cir. 1994), the United States trustee sought a fee in a chapter 11 case. The debtor resisted on the grounds that the United States Trusteeship is unconstitutional, since this institution does not exist in Alabama and North Carolina. The United States Constitution, it seems, requires a *uniform* national bankruptcy law. U.S. CONST. art. I, § 8. The Ninth Circuit permitted the fee but took the trouble to advise those two states that their bankruptcy administrator program was unconstitutional. *St. Angelo*, 38 F.3d at 1531–32. Congress, however, has chosen to ignore the studied advice of the Ninth Circuit and has perpetuated this unconstitutional regime. See Dan J. Shulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91, 127–28 (1995).

²¹⁸ Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act § 219(b), 100 Stat. at 3100–01.

²¹⁹ BAPCPA also requires the United States trustee or bankruptcy administrator to review the debtor's submissions and file a statement with the court as to whether the debtor is a presumed abuser. 11 U.S.C. § 704(b)(1)(A) (2006). The court must send this report to all creditors within five days of receiving the report. *Id.* § 704(b)(1)(B). There follows a very dense provision in section 704(b)(2), which I read as requiring the trustee to do nothing if her report of section 704(b)(1)(A) reveals the debtor to be a non-abuser. See *id.* § 704(b)(2). If, however, the debtor is an abuser, the trustee must, within thirty days following her report, either "file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons . . . [the] motion is inappropriate." *Id.* Oddly, the statement is required only if the trustee determines the debtor is an above-median debtor. *Id.* § 704(b)(2)(A)–(B). Apparently, if the debtor is an abuser but below the median, the United States trustee has discretion not to file a motion or a report.

²²⁰ 11 U.S.C. § 704(b)(1)(B) (2006).

²²¹ See *In re Close*, 353 B.R. 915, 918 (Bankr. D. Kan. 2006) (dismissing United States trustee's motion where trustee filed within ten days of a *rescheduled* creditors' meeting).

²²² See Bradley R. Tamm, *Substantial Abuse Dismissal under 11 U.S.C.A. § 707(b): Evolution or Malignancy*, 13 J. BANKR. L. & PRAC. 47, 50 (2004). In 2002, the United States trustee's office filed 2,750 substantial abuse motions, about half of which were granted. *Id.* at 55; cf. ADMIN. OFFICE OF THE U.S. CTS., PERSONAL BANKRUPTCY FILINGS CONTINUE TO RISE IN FISCAL YEAR 2003, at 1 (2003), available at <http://www.txnb.uscourts.gov/release/FY03BK.pdf> (asserting 1,547,669 bankruptcies filed in 2002).

2. Partial Immunity

Section 707(b)(6) provides consumer debtors with a partial immunity in the sense that it bars parties in interest (other than the judge or the United States trustee) from moving to dismiss.²²³ The immunity applies to *any* "motion under section 707(b)." Certain crime victims, however, may still move to dismiss a chapter 7 case under section 707(c).²²⁴

In joint cases, the income of both spouses taken together must fall below the median to justify partial immunity. But even where one spouse is bankrupt and the other not, the impact of the non-debtor's income, as we shall see, influences the determination of the debtor's current monthly income.²²⁵

3. Total Immunity

BAPCPA provides an even more stringent standing rule if the current monthly income (times twelve) of the debtor *and* her spouse is below the median. In such cases, "[n]o judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest" may move to dismiss.²²⁶ But this near-total²²⁷ immunity rule applies only to a motion under section 707(b)(2).

This cross-reference is the central mystery of BAPCPA means testing. Section 707(b)(2) describes the presumption of bad faith for debtors with too much surplus net income. In fact, motions to dismiss are filed under section 707(b)(1), not section 707(b)(2). What is this cross-reference struggling to say?

One possibility is that the cross-reference is a mistake. The reference should have been to section 707(b)(1). If this is true, then consumer debtors who qualify for section 707(b)(7) total immunity indeed are *per se* eligible for chapter 7, provided they do the paperwork required by sections 521 and 707(a).

A second possibility is that the cross-reference is an unartful way of saying that qualifying below-median debtors are not subject to the means test of section 707(b)(2). Thus, Form B22A excuses debtors from filling out the expense portion of the form if

²²³ Two usually astute commentators write as if the means test applies only to above-median debtors. See Culhane & White, *Catching Can-Pay Debtors*, *supra* note 25, at 672 ("Only the small group of above-median debtors must proceed to the more detailed parts of the means test, computation of allowed deductions and then comparison of remaining income to the abuse threshold, to see if the presumption of abuse arises."). But this is definitely not so for those debtors who qualify for the partial immunity but not for the total immunity; the United States trustee can and even must move to dismiss.

²²⁴ See *infra* note 227 & Part III.A.5.

²²⁵ See *infra* Part III.A.6.a.

²²⁶ 11 U.S.C. § 707(b)(7)(A) (2006) This strange rule requires the aggregation of the "current monthly income of the debtor, including a veteran . . . and the debtor's spouse . . ." *Id.* It is highly unclear what this phrase "including a veteran" is supposed to mean.

²²⁷ Once again, crime victims can move to dismiss under section 707(c). *Id.* § 707(c). With this in mind, I shall nevertheless refer to section 707(b)(7)'s largesse as a "total immunity."

debtors qualify for the (b)(7) immunity.²²⁸ Nevertheless, the United States trustee, bankruptcy administrator or the court *sua sponte* can move to dismiss. In this regard, as we shall see, a suggestive new subparagraph invites the court to dismiss cases for all the reasons cases were dismissed prior to 2005. According to section 707(b)(3):

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) does not arise^[229] or is rebutted, the court shall consider—

- (A) whether the debtor filed the petition in bad faith; or
- (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.²³⁰

Putting section 707(b)(3) together with the reference to subparagraph (2) in the total immunity section of section 707(b)(7), one interpretation of total immunity is that the United States trustee can bring a motion under section 707(b)(1) against (b)(7) debtors, but it cannot cite the presumption of subparagraph (2)'s means test in pursuit of this goal.²³¹

So what grounds can be cited? First, section 707(b)(3)(A) mentions "whether the debtor filed the petition in bad faith."²³² We have seen that, prior to 2005, courts dismissed consumer cases where commencement was considered revenge against a particular creditor, especially an ex-spouse.²³³ Section 707(b)(3)(A) guarantees that those authorities remain good law.

More interestingly, the motion is invited to address whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."²³⁴ This phraseology seems directly borrowed from *Green v. Staples (In re Green)*,²³⁵ which held that the presence of surplus net income was *not* enough to justify dismissal. Rather, the standard required the addition of some bad fact related to (1) the debtor's health, (2) the debtor's pre-petition conduct in borrowing and spending on luxury items, (3) the excessiveness of the debtor's family budget, (4) the accuracy of net income, and (5) the good faith of the debtor in filing for bankruptcy in the first place.

This raises the issue of whether a debtor qualified for total immunity under section

²²⁸ Form B22A, *supra* note 32, Line 13.

²²⁹ This is another mis-reference. There is no subparagraph (a)(i) to "such paragraph"—i.e., paragraph (1). Presumably Congress meant to refer subparagraph (a)(i) to paragraph (2). For literalists, no harm is done, since the nonexistent presumption of subparagraph (1)(A)(i) never arises, as it does not exist. The statute works perfectly well with the bad cross-reference.

²³⁰ 11 U.S.C. § 707(b)(3) (2006).

²³¹ See *In re Singletary*, 354 B.R. 455, 460 (Bankr. S.D. Tex. 2006).

²³² 11 U.S.C. § 707(b)(3)(A) (2006).

²³³ See *supra* text accompanying note 93.

²³⁴ 11 U.S.C. § 707(b)(3)(B) (2006).

²³⁵ 934 F.2d 568, 572 (4th Cir. 1991).

707(b)(7) can be booted from chapter 7 (plus a bad fact per the *Green* test) for having surplus income which could fund a chapter 13 plan. Keep in mind, however, that the premise, for the moment, is that the reference in section 707(b)(7) to subparagraph (2) does not disempower the United States trustee entirely, but simply repeals the presumption of abuse that subparagraph (2) imposes. On this assumption, the trustee is not entitled to rely on this presumption.

To be concrete, we will discover that any debtor with \$160 in net monthly income is *per se* an abuser of chapter 7. Any debtor with net income below \$100 per month passes the means test.²³⁶ Suppose a debtor who qualifies for total immunity has \$99 in net monthly income according to the official means test, but, according to Schedules I and J, actually has a greater net income. Has this debtor abused the Bankruptcy Code by filing in chapter 7?

Surely, under our premise that the cross-reference in section 707(b)(7) to subparagraph (2) means *something*, a United States trustee cannot refer to the presumption of abuse. But "totality of the circumstances" used to mean surplus income *plus* a bad fact. Accordingly, what "totality of the circumstances" means is that the United States trustee can still boot the qualifying debtor for surplus income; it's just that there is no presumption and also some additional bad fact must be shown.

Alternatively, it could mean that, in the totality of the circumstances, net income cannot be considered at all. This would accord with what President Bush declared when he signed this provision into law:

In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them. This has made credit less affordable and less accessible, especially for low-income workers who already face financial obstacles.

The bill I sign today helps address this problem. Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts. *Those who fall behind their state's median income will not be required to pay back their debts.* This practical reform will help ensure that debtors make a good-faith effort to repay as much as they can afford.²³⁷

At this early stage, a few courts have taken the position that total immunity under section 707(b)(7) means no immunity at all.²³⁸ That is, a United States trustee can move to dismiss a qualifying debtor with any sort of net income. The trustee may want the

²³⁶ See *infra* text accompanying notes 315–17.

²³⁷ Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005), <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html> (emphasis added) [hereinafter Press Release, *President Signs BAPCPA*].

²³⁸ See *In re Richie*, 353 B.R. 569, 574–81 (Bankr. E.D. Wis. 2006); see also *In re Pak*, 343 B.R. 239, 246 (Bankr. N.D. Cal. 2006); *In re Paret*, 347 B.R. 12, 16 (Bankr. D. Del. 2006); *In re Pennington*, 348 B.R. 647, 649–50 (Bankr. D. Del. 2006).

aid of the mandatory presumption of subparagraph (2), but the court still has discretion to dismiss for net income alone. On this view, the import of means testing is to make dismissal mandatory where there is no total immunity and the debtor flunks the BAPCPA means test. Beyond this, the court has discretion to boot any debtor it perceives to be a bankruptcy abuser.

To summarize, the total immunity provision, section 707(b)(7), has an ambiguous cross-reference to section 707(b)(2). Courts will have to choose between one of the following interpretations of this total immunity:

(a) The cross-reference was a scrivener's error. It should have been a reference to (b)(1). Qualifying debtors can never be booted from chapter 7 under section 707(b). Any dismissal would have to be justified under section 707(a) (where high living and ability to pay cannot be considered, according to some courts),²³⁹ or section 707(c) (which pertains only to crime victims).²⁴⁰

(b) The cross-reference means that a United States trustee can still move to dismiss a qualifying debtor, in spite of section 707(b)(7), but the trustee will have to show either bad faith in the commencement of the case or abuse under the totality of the circumstances, which is defined as surplus net income plus some other bad fact.

4. The Qualifications for Partial and Total Immunity

Partial immunity under section 707(b)(6) means that only the United States trustee, bankruptcy administrator or the court *sua sponte* can bring a motion to dismiss under section 707(b). Total immunity may mean nothing or it may indeed be a near-total immunity, depending on the meaning of the cross-reference in section 707(b)(7).

Assuming that total immunity means something, there is a different qualification for partial as opposed to total immunity. In the case of partial immunity, the debtor must show that *her own* current monthly income (times 12) is below the yearly median for the state. Or, in a joint case,²⁴¹ the married couple must show that *their* joint income is below the median. So where a debtor's non-debtor spouse has a high income but the debtor is below the median, the debtor qualifies for partial immunity but not total immunity.

To warrant total immunity (whatever that may mean) a debtor will have to show that "current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and a debtor's spouse combined"²⁴² (times twelve) is less

²³⁹ See *supra* text accompanying notes 97–100.

²⁴⁰ See *infra* text accompanying notes Part III.A.5.

²⁴¹ Section 302(a) permits a voluntary petition by an individual debtor and spouse. 11 U.S.C. § 302(a) (2006).

²⁴² *Id.* § 707(b)(7)(A). The reference to veterans is a complete mystery. Would any court have ruled against the total immunity *because* the debtor is a veteran?

than the median. The difference in these standards raises some interpretive questions.

Can an unmarried individual ever qualify for total immunity? One could, I suppose, argue that section 707(b)(7)(A) requires that there be a spouse. But this seems unreasonable. If there is no spouse, then the spouse and her income should count as a zero. So any unmarried debtor qualifying for section 707(b)(6)'s partial immunity also automatically qualifies for total immunity under section 707(b)(7).

But if this is so, Congress has created yet another marriage tax. If a single person lives in sin with a high income non-debtor lover, whether gay or straight, that person is able to qualify for the total immunity. Wedding bells, however, would constitute a bankruptcy abuse, for which the debtor is booted from chapter 7.

BAPCPA also promotes legal separation and the breakup families. Congress has provided that, for debtors trying for the full immunity, "current monthly income of the debtor's spouse shall not be considered" if the couple is legally separated *or* living apart "other than for the purpose of evading subparagraph (A)."²⁴³

"[S]eparated under applicable nonbankruptcy law" implies a judicial declaration that a married couple is separated.²⁴⁴ There is no requirement that separated married couples live apart. So it is open for a strategic debtor to obtain legal separation, live with his spouse and apply for the total immunity. Since those merely living apart must not be doing so "for the purpose of evading subparagraph (A),"²⁴⁵ the implication is that married couples *can* legally separate and live together (or apart) for the sole purpose of gaming the system. Of course, this judgment assumes that the total immunity means something, rather than nothing.

Where the debtor is not legally separated but is living apart from the spouse, the debtor must swear under penalty of perjury that the debtor is separated or living apart for purposes other than evading subparagraph (A).²⁴⁶ In addition, the debtor must give the "best estimate of the aggregate [] amount of cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income."²⁴⁷ This is included, in any case, as part of the definition of current monthly income. According to section 101(10A)(B), income "includes any amount paid by any entity other than the debtor"²⁴⁸ BAPCPA therefore discourages marriage *and* encourages married couples to separate or live apart.

In joint cases, the two debtor spouses are expressly given partial immunity under section 707(b)(6)—only the judge or the United States trustee or bankruptcy administrator may initiate a motion under section 707(b). To qualify they must together be below the median. But if they qualify for the partial immunity, do they not also automatically qualify for the total immunity? While section 707(b)(6) mentions joint cases, section 707(b)(7) does not. It refers only to the debtor and the debtor's spouse. Nevertheless, in a joint case, if both together are under the median, each spouse

²⁴³ *Id.* § 707(b)(7)(B)(i)(I)–(b)(7)(B)(i)(II).

²⁴⁴ *See, e.g.*, N.Y. DOM. REL. LAW § 200 (McKinney 2003) (listing grounds for separation).

²⁴⁵ 11 U.S.C. § 707(b)(7)(B)(i)(II) (2006).

²⁴⁶ *Id.*

²⁴⁷ *Id.* § 707(b)(7)(B)(ii)(II).

²⁴⁸ *Id.* § 101(10A)(B).

presumably can *individually* claim the total immunity, which they would then enjoy jointly.

5. Crime Victim Standing

Overriding the partial and even the (perhaps) total immunity of below-median debtors is section 707(c)(2), which invites victims of violent or drug-trafficking crime to move to dismiss a case "[e]xcept as provided in paragraph (3)"²⁴⁹ The partial immunity accorded the below-median debtors is immunity for a motion to dismiss "under section 707(b)."²⁵⁰ The total immunity may or may not refer to motions under section 707(b). Neither of these bars motions by crime victims under section 707(c). Therefore, the immunities of below-median debtors can never be complete, as dismissals under subparagraph (c) are always possible.

The crime victim, however, will have to show a criminal conviction *and* that dismissal "is in the best interest of the victim."²⁵¹ It will not be necessary, however, for the victim to be a *creditor* of the debtor, though it is hard to imagine how the dismissal of the case helps the victim unless the victim is a creditor. Even so, the criminal debtor can defend herself by showing "by a preponderance of the evidence" that a chapter 7 case is "necessary to satisfy a claim for a domestic support obligation."²⁵² For example, a domestic support claimant is entitled to a high priority under section 507(a)(1). If this claim could be paid in chapter 7 but not outside it, then the criminal debtor can resist the dismissal. Outside bankruptcy, the domestic support claimant may have no priority compared to the crime victim.²⁵³

So, if Congress punishes marriage under the partial and total immunity criteria, here we see Congress promoting family values by allowing deadbeat dads to stay in chapter 7 at the expense of the victims of their violent or drug-induced crimes.

Why crime victims should have standing to move for dismissal is questionable in light of section 523(a)(6) since claims "for willful and malicious injury by the debtor to another entity or to the property of another entity" are never dischargeable.²⁵⁴ One answer might be that drug trafficking harms may not be malicious (though typically they will be willful). Another answer is that, even if the crime is malicious and willful, the automatic stay still applies to prevent the victim from enforcing a tort judgment during the pendency of the case. Therefore, early dismissal would be in the interest of the victim because it frees the victim from the stay.

6. Current Monthly Income

In order to determine whether debtors qualify for the partial or total immunities, a

²⁴⁹ *Id.* § 707(c)(2).

²⁵⁰ *Id.* § 707(b)(6).

²⁵¹ *See id.* § 707(c)(2).

²⁵² *Id.* § 707(c)(3).

²⁵³ Some states, however, do provide such a priority. *See, e.g.*, N.Y. C.P.L.R. 5234(b) (McKinney Supp. 2007).

²⁵⁴ 11 U.S.C. § 523 (a)(6) (2006).

court must determine "current monthly income," multiply it by twelve,²⁵⁵ and compare it to the median family income of the state wherein the debtor resides. In a joint case, the two combined current monthly incomes must be considered. "Current monthly income" is a *historic* look at what happened in the six months prior to the bankruptcy petition. The assumption is that "what's past is prologue, what's to come is yours and my discharge."²⁵⁶ Critics have complained that this new concept is rather like that of the Holy Roman Empire: It is "neither current (as it deals with the income the debtor receives in the six months *prior* to the month in which he filed for bankruptcy) nor monthly (as it is an average of six months) nor income (as the debtor may no longer be receiving it)."²⁵⁷

BAPCPA sets forth a new definition of this term, and it serves as a key concept for chapter 7 means testing and chapter 13 disposable income. Under section 101(10A), the term is defined as average monthly income from all sources, whether taxable or not.²⁵⁸ According to section 101(10A)(A), current monthly income

means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii) . .

²⁵⁹

To find this average, we are to take a six month period stretching backward²⁶⁰ from the last day of the month preceding the bankruptcy petition.²⁶¹ But this rule applies only if the debtor has filed a schedule of current income under section 521(a)(1)(B)(ii). Interestingly, section 521(a)(1)(B)(ii) requires only a "schedule of current income and current expenditures."²⁶² There is no requirement of a *monthly* schedule here. But, as we have seen, section 707(b)(2)(C) requires "[a]s part of the schedule of current income and expenditures required under section 521, . . . a statement of the debtor's

²⁵⁵ The presence of this multiplicand has already had jurisprudential consequences for the interpretation of some new chapter 13 provisions. See *infra* text accompanying notes 567–72.

²⁵⁶ WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

²⁵⁷ *In re Balcerowski*, 353 B.R. 582, 589 (Bankr. E.D. Wis. 2006); see also Voltaire, *Essai sur l'histoire generale et sur les moeurs et l'esprit des nations* ch. 70 (1756) (declaring Holy Roman Empire as "ni saint, ni romain, ni empire").

²⁵⁸ Those debtors who are paid weekly must calculate their gross income by 4.3 times the weekly paycheck, except for February. *In re Welch*, 347 B.R. 247, 249 n.2 (Bankr. W.D. Mich. 2006).

²⁵⁹ 11 U.S.C. § 101(10A)(A) (2006).

²⁶⁰ As Judge William Sawyer has remarked, "One may readily see that the term 'current monthly income' is something of a misnomer in that it is historical data and not a projection of the amount of income that the debtor may expect to receive in the future." *In re Love*, 350 B.R. 611, 613 (Bankr. M.D. Ala. 2006).

²⁶¹ See 11 U.S.C. § 101(10A)(A)(i) (2006).

²⁶² *Id.* § 521 (a)(1)(B)(ii).

current monthly income, and the calculations that determine whether a presumption arises under subparagraph [707(b)(2)](A)(i), that show how each such amount is calculated."²⁶³

Oddly, if the debtor has not made this filing, the court is authorized by section 101(10A)(A)(ii) to calculate six months back from the "date on which current income is determined" ²⁶⁴ Earlier, we suggested that a debtor's failure to file Form B22A is perhaps not grounds to dismiss the case, because Form B22A is not required by section 521(a)(1)—a predicate that both section 521(i)(2) and (arguably) section 707(a)(3) dismissals require.²⁶⁵ The fact that the court does not *need* this form to accomplish means testing is further evidence on this inability to dismiss the debtor for not filing Form B22A. On the other hand, according to section 521(i)(A), if it is agreed section 707(b)(2)(C) is "under" section 521(a)(1) (in spite of no cross-reference there), the debtor's bankruptcy case is automatically dismissed after forty-five days. One of the things section 521(a)(1)(B)(ii) requires is "a schedule of current income and current expenditures," and this plausibly includes Form B22A under section 707(b)(3)(C). If the above reasoning follows, there will be little need for the court to establish the six month reach-back period.²⁶⁶

In any case, if the debtor survives dismissal for failing to file Form B22A, the test for current monthly income in section 101(10A)(A)(ii) implicates post-petition income of a debtor, when a court is called to fill in the gaps because the debtor has not filed Form B22A.²⁶⁷ Form B22A itself entails pre-petition income only.

a. Non-Debtor Spousal Income

In addition to this six-month test, "current monthly income" must also include "any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)" ²⁶⁸ So where a married debtor files without the spouse, some sort of calculation must be made with regard to the spouse's contribution to the household. This raises enormous allocational difficulties. For example, if the debtor has no children and the spouse contributes exactly 50% of the household expenses, are these contributions income for the debtor? Or is the spouse merely contributing toward his own 50% responsibility of the household? If there is one child and the non-debtor

²⁶³ 11 U.S.C. § 707(b)(2)(C) (2006) (emphasis added); *see also supra* text accompanying notes 57–61.

²⁶⁴ *Id.* § 101 (10A)(A)(ii).

²⁶⁵ *See supra* text accompanying notes 58–72.

²⁶⁶ Wedoff, *supra* note 26, at 248 ("However, the alternate six-month period will only rarely be applicable. If the debtor does not file schedules required by § 521(a)(1)(B)(ii), it is likely that the case will be dismissed for cause under § 707(a)(3), making it unnecessary to pursue dismissal under any of the provisions of § 707(b).").

²⁶⁷ *See In re Clemons*, No. 05-85163, 2006 Bankr. LEXIS 1366, at *12 (Bankr. N.D. Ga. June 1, 2006) ("If the statement of 'current income' is missing, the court determines 'current monthly income' for the six-month period ending on the date of the determination, thereby necessarily taking into account a debtor's post-petition income.").

²⁶⁸ 11 U.S.C. § 101(10A)(B) (2006).

spouse contributes all of the child's tuition expenses, has the debtor received income? And, with a bow to 1960's feminism, what if the non-debtor spouse is a homemaker; should not his uncompensated labor toward maintenance of the household be counted as outside income to the debtor?²⁶⁹ If so, BAPCPA punishes the stay-at-home parent by counting the monetary value of the homemaker's contribution as income. These are problems that will tie the courts in knots for years to come.²⁷⁰ Fortunately for debtors, at least one court has ruled that it is the chapter 13 trustee's burden to show that the non-debtor spouse actually covers household expenses.²⁷¹ Perhaps this holding will leach its way into chapter 7.

The way Form B22A adjudicates spousal income is that a married debtor filing without the spouse is required to disclose all spousal income.²⁷² Then a "marital adjustment" is invited. The debtor is to subtract from income "the amount . . . that was NOT regularly contributed to the household expenses of the debtor or the debtor's dependents."²⁷³ This procedure invites double-dipping by a debtor who claims expenses against his own income and also who claims that the spouse does *not*, as a factual matter, contribute to the debtor's expenses. In *In re Travis*,²⁷⁴ the debtor claimed a household of five and the associated automatic deductions for food, utilities and clothing.²⁷⁵ His non-debtor spouse was included in the household of five. The debtor then claimed that basically none of the spouse's income contributed to his expenses. If correct, the debtor successfully beat the means test. As Judge Marci McIvor asks:

A determination of the amount paid by a non-filing spouse on a regular basis for household expenses is necessarily fact specific and subject to interpretation. For example, if the non-filing spouse has substantial income and chooses to spend that income on an expensive home, or a vacation home, or a luxury vehicle that is driven by the debtor and the non-filing spouse, are payments on those items "household expenses" of the debtor?²⁷⁶

In *Travis*, the non-debtor spouse confessed that she spent \$520 a month on expenses the debtor claimed against his income. To this extent, Judge McIvor disallowed the

²⁶⁹ See generally Symposium, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U. L. REV. 943 (2000).

²⁷⁰ Some courts mechanically allocate expenses according to an apportionment of income. See, e.g., *In re McNichols*, 249 B.R. 160, 172 (Bankr. N.D. Ill. 2000). Others reject any mechanical test. See, e.g., *In re Pattison*, No. 05-17994, 2006 WL 2086585, at *1 (Bankr. S.D. Ohio July 6, 2006) (noting non-debtor spouse paid virtually all household expenses).

²⁷¹ *In re Quarterman*, 342 B.R. 647, 652 (Bankr. M.D. Fla. 2006).

²⁷² Form B22A, *supra* note 32, Line 1.

²⁷³ *Id.* Line 17.

²⁷⁴ 353 B.R. 520, 522–23 (Bankr. E.D. Mich. 2006).

²⁷⁵ See *infra* Part III.B.2.

²⁷⁶ *In re Travis*, 353 B.R. at 526. Judge McIvor suggests that such non-debtor behavior proves that the *debtor* is committing bankruptcy abuse. See *id.* at 531. But in *Travis*, the non-debtor spouse spent her money on supporting her mother, her daughter and her daughter's children, which Judge McIvor found not abusive. *Id.* at 530–31.

exclusion and insisted that \$520 be added back into "current monthly income."²⁷⁷ She also rejected the United States trustee's claim that, because the spouse was included in the household of five, the debtor could not claim that the spouse made no contributions to expenses. This leaves open the possibility that a debtor could cover all expenses with his income while the non-debtor spouse simply banked all of her income or spent it on sensuous luxury.²⁷⁸

b. Child Support

Child support must apparently be included in a debtor's current monthly income. As evidence, BAPCPA's new definition of disposable income in chapter 13 specifically excludes "child support payments, foster care payments, or disability payments for a dependent child"²⁷⁹ The implication is that, if excluded from current monthly income for the purposes of chapter 13, child support and the like must be included in chapter 7's means test.²⁸⁰ The United States Trustee's office apparently agrees and includes it as an item on Form B22A.²⁸¹

c. Exclusions

Whatever spousal income must be added, there are exclusions. Social security payments need not be added;²⁸² here we perhaps see the fine hand of the AARP at work. Part of the social security system, then, is BAPCPA's invitation of old folks, time's doting chronicle, to commit bankruptcy abuse.

Unemployment compensation is a state-provided benefit. Yet, under the Social Security Act, grants are provided to the states if states choose to offer unemployment benefits, provided the state complies with federal mandates.²⁸³ Do the indirect subsidies authorized by the Social Security Act make state unemployment benefits excludible under the definition of "current monthly income"? Judge Thomas Waldron, in *In re Sorrell*,²⁸⁴ found these benefits excludible. His major point is a "knew how to" argument. In several sections of BAPCPA, Congress knew how to invoke limited portions of the Social Security Act.²⁸⁵ But in defining "current monthly income,"

²⁷⁷ See *id.* at 527–28.

²⁷⁸ Even though the debtor gets a clothing deduction in the means test, a spouse's choice to buy *extra* clothing for herself and her spouse did not interfere with the debtor's deduction for clothing. See *id.* at 527.

²⁷⁹ 11 U.S.C. § 1325(b)(2) (2006).

²⁸⁰ Wedoff, *supra* note 26, at 245 (contrasting treatment of contributions to household expenses as "disposable income" under chapter 7 and chapter 13).

²⁸¹ Form B22A, *supra* note 32, Line 8 (requiring information regarding "regular contributions to the household expenses of the debtor or the debtor's dependents, including child support").

²⁸² 11 U.S.C. § 101(10A)(B) (2006). This provision overrules cases like *In re Shields*, 322 B.R. 894, 898 (Bankr. M.D. Fla. 2005) (characterizing "social security benefits, disability benefits, and retirement benefits" as income though acknowledging "such benefits are exempt from the claims of the debtor's creditors").

²⁸³ 42 U.S.C.A. §§ 1101–05, 1321 (West 2002).

²⁸⁴ No. 06-31720, 2007 Bankr. LEXIS 161, at *32–43 (Bankr. S.D. Ohio Jan. 26, 2007).

²⁸⁵ E.g., 11 U.S.C. §§ 362(b)(2)(D)–(F), 704(c)(1)(A)(i) (2006).

section 101(10A) excludes "benefits received under the Social Security Act."²⁸⁶ Congress must have intended, Judge Waldron concluded, that *indirect* benefits stemming from the Social Security Act were not to be included as currently monthly income under section 101(10A).²⁸⁷

Also to be excluded are "payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism or domestic terrorism"²⁸⁸ So, the scant consolation to the victims of man's inhumanity to man is an invitation to commit acts which, if performed by a non-victim, would constitute a bankruptcy abuse. Two wrongs (one monumental, the other petty) make a right, according to Congress. Exclusions such as these imply that a debtor's *real* income may be higher than his BAPCPA income.²⁸⁹ Meanwhile, exempt income (such as worker's compensation payments in states like South Dakota,²⁹⁰ or disabled veteran benefits²⁹¹) is not excluded; the expectation is that these must be used to fund chapter 13 plans.

d. Irregular Income

As many have noticed, the six-month test gives rise to anomalies with regard to seasonal workers. For example, a teacher who is not paid in the summer may find that a bankruptcy petition filed in December is in good faith;²⁹² the same petition filed in March is in bad faith.²⁹³ For such workers, there is a seasonal aspect to bankruptcy abuse. High income workers who have been fired and who could easily find new employment may find that, by taking an unpaid leave, they can qualify for chapter 7 bankruptcy, where they can walk away from their credit card debts.²⁹⁴ Depending on

²⁸⁶ *Id.* § 101(10A)(B).

²⁸⁷ *In re Sorrell*, 2007 Bankr. LEXIS 161, at *36–38.

²⁸⁸ 11 U.S.C. § 101(10A)(B) (2006).

²⁸⁹ *See In re Casey*, 356 B.R. 519, 521 (Bankr. E.D. Wash. 2006) (explaining prior to BAPCPA, debtor "would have been considered to receive significantly greater income than after the enactment of BAPCPA"). It has been suggested that employer contributions to ERISA pension funds are not current monthly income because the debtor does not "receive" them. *See* Tedra Hobson, *The Bankruptcy Abuse Creation Act?: Curing Unintended Consequences of Bankruptcy Reform*, 40 GA. L. REV. 1245, 1257 (2006). This suggestion overlooks the fact that the debtor "receives" the beneficial interest in these dollars, even though a pension fund trustee has legal title. *See id.*

²⁹⁰ *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1289–90 (8th Cir. 1997) (reasoning "chapter 13 contains no language suggesting exempt post-petition revenues are not chapter 13 'income'"); *In re Georgiu*, 344 B.R. 47, 49 (Bankr. M.D. Pa. 2005) (including disability benefits as part of income to determine whether there is abuse by debtor).

²⁹¹ *In re Shields*, 322 B.R. 894, 898 (Bankr. M.D. Fla. 2005) (considering social security benefits, disability benefits, and retirement benefits in disposable income analysis to decide whether debtor was able to repay his debts).

²⁹² *In re Beasley*, 342 B.R. 280, 284–85 (Bankr. C.D. Ill. 2006).

²⁹³ Neustadter, *supra* note 47, at 278 (pointing out pre-petition planning to avoid means test may constitute abuse); Wedoff, *supra* note 26, at 249 (noting arbitrariness of six-month averaging in light of debtors whose incomes vary from season to season).

²⁹⁴ *See In re Pak*, 343 B.R. 239, 241 (Bankr. N.D. Cal. 2006) (stating debtor not subjected to means test because debtor was unemployed for most of the six months preceding bankruptcy).

whether they qualify for the total immunity and what that immunity means, such tricky debtors, however, can still be dismissed under section 707(b)(3)(B), which permits dismissal if "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."²⁹⁵ Thus, in *In re Quintana*,²⁹⁶ a striking worker could show a very low current monthly income and could still be invited out of chapter 7.²⁹⁷ Arguably, had the debtor qualified for the total immunity of section 707(b)(7), the debtor would have survived this motion. But, again, this depends on what this near-total immunity means.

Another difficulty with "current monthly income" is that "income from all sources"²⁹⁸ is not a defined term. So it presumably includes proceeds from the sale of assets. Judge Wedoff gives the example of a debtor who sells her home within six months of bankruptcy.²⁹⁹ This sale might even constitute a capital loss. The sale would in general fund chapter 7 dividends for unsecured creditors. Perhaps it would fund a very high bankruptcy dividend indeed. Nevertheless, it must be included in income, thus raising the average for purposes of the sixty-month calculation and making a chapter 7 proceeding an abuse.³⁰⁰ On the other hand, a debtor who sells the house *seven* months before the bankruptcy and then blows the proceeds on a luxury vacation is fully eligible for chapter 7, if the lower income allows the debtor to meet the means test. Similarly, a debtor may have received a bonus in the prior six months, but no adjustment is appropriate even though bonuses are, by definition, not mandatory.³⁰¹

7. Median Family Income

The immunities discussed require that the debtor individually or in combination with a spouse fall below the "median family income." This term is defined in Bankruptcy Code section 101(39A) as the number calculated by the Bureau of the Census.³⁰² If the data is stale, section 101(39A)(B) requires inflation adjustments per the Consumer Price Index for All Urban Consumers, produced by the U.S. Department of Labor. The various state medians are easily retrievable on the internet.³⁰³

²⁹⁵ 11 U.S.C. § 707(b)(3)(B) (2006).

²⁹⁶ No. 4:05-bk-08497-JMM, 2006 Bankr. LEXIS 1973, at *6-7 (Bankr. D. Ariz. May 3, 2006).

²⁹⁷ Cf. *U.S. Tr. v. Cortez (In re Cortez)*, 457 F.3d 448, 455 (5th Cir. 2006) (concluding courts can consider post-petition employment as grounds to dismiss under second 707(b) in pre-BAPCPA case).

²⁹⁸ 11 U.S.C. § 101(10A)(A) (2006).

²⁹⁹ Wedoff, *supra* note 26, at 251 (using an example reflecting "the situation of a debtor who earns \$5,000 per month, realizes a \$120,000 gain on a sale in January, and files a Chapter 7 case in July").

³⁰⁰ On the other side of the coin, money withdrawn from a tax-deferred retirement account (although being taxed for the first time) is *not* income received within six months of bankruptcy. See *In re Wayman*, 351 B.R. 808, 811 (Bankr. E.D. Tex. 2006) (noting IRA distribution is not component of current monthly income).

³⁰¹ See *In re Oliver*, 350 B.R. 294, 300 (Bankr. W.D. Tex. 2006) (refusing to adjust debtors income based on prospective bonuses).

³⁰² 11 U.S.C. § 101(39A) (2006) ("The term 'median family income' means for any year [] the median family income both calculated and reported by the Bureau of the Census in the then most recent year . . .").

³⁰³ State medians can be retrieved by going to the United States Trustee's Website, available at <http://www.usdoj.gov/ust/index.htm>, and clicking on the link "Means Testing Information" under the heading "Bankruptcy Reform."

If the debtor lives in a household of one, the relevant comparison is the median for a household of one. If the household has two, three or four persons, the relevant median is for households with the same *or fewer* individuals. For example, if a debtor has a household of four and if the median income is \$55,000 for a household of four, \$60,000 for a household of three and \$65,000 for a household of two, the debtor is entitled to assert the highest number of \$65,000. Also, where the household exceeds four, the debtor may enhance the median by \$525 per month (\$6,300 per annum) for every household member in excess of four.

What is a household? This is an undefined term, and an opportunity for the courts to recognize (or refuse to recognize) the changing nature of American families. That the definition of "household" is expansive is hinted at in new section 541(e). That section regulates the concept of children, which is used in new sections 541(b)(5) and (6). These latter two provisions exempt from the bankruptcy estate funds in an education individual retirement account more than a year before bankruptcy. This exemption only applies on behalf of a "child, stepchild, grandchild, or stepgrandchild of the debtor," or funds used to buy a tuition credit under a qualified state tuition program.³⁰⁴ Section 541(e) further elaborates that children who live in "the debtor's household" and who are "foster" children shall be deemed "a child of such individual by blood."³⁰⁵ What this definition implies is that non-blood relatives can be part of a household. Therefore, the definition of "household" must be expansive (since section 541(e) undertakes to contract it).³⁰⁶

"Household" is the term needed to determine whether debtors are above or below the state median income. Oddly, the definition of expenses is not geared to households. Rather the debtor's expenses are deemed to be with regard to "the debtor, dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent."³⁰⁷ As a result, whether the debtor is above or below the median uses the expansive "household" definition; but should the debtor be above the median and therefore subject to the means test, she will not be able to deduct "household" expenses—only the expenses of the debtor and dependents of the debtor.³⁰⁸

Further complicating the analysis is the fact that sections 707(b)(6) and (7) refer to "median *family* income" for *households* of various sizes. Yet the census data reports only *household* incomes. According to the U.S. Census Bureau definition, a household is "all the people who occupy a housing unit" and defines householder as "the person (or one of the people) in whose name the housing unit is owned or rented (maintained)"³⁰⁹ A family, however, is "a group of two or more people . . . related by birth,

³⁰⁴ *Id.* § 541(b)(5)(A), (b)(6)(A).

³⁰⁵ *Id.* § 541(e).

³⁰⁶ *Contra In re Napier*, No. 06-02464-JW, 2006 Bankr. LEXIS 2248, at *3–4 (Bankr. D.S.C. Sept. 18, 2006) (rejecting definition of "household" as exceeding domain of "dependents").

³⁰⁷ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006); *see also In re Jewell*, No. 06-53976, 2007 Bankr. LEXIS 811, at *15–17 (Bankr. S.D. Ohio Mar. 16, 2007) (holding non-dependent adult son could not be counted in household).

³⁰⁸ What is a dependent? This will be addressed in the context of deductible expenses, where the definition is most critical. *See infra* Part III.B.2.a.ii.

³⁰⁹ U.S. Census Bureau, Current Population Survey (CPS)—Definitions and Explanations (Jan. 20, 2004),

marriage, or adoption and residing together; . . ."³¹⁰ As Professor Gary Neustadter concludes, "Families are therefore a subset of all households."³¹¹ The opposite is also true; households can be a subset of a family, where jointly filing spouses live apart.³¹²

So, to summarize, BAPCPA is most confusing on comparing current monthly income to the "median family income" for a "household." The former number seems to be a subset of the latter number. The good news is that the ambiguity perhaps does not matter. Since the United States trustee typically is the moving party in all section 707(b) controversies, the achievement of partial immunity is probably not important. In addition, the total immunity in section 707(b)(7) may be meaningless, depending on how the cross-reference to section 707(b)(2) is interpreted.

B. The Means Test

1. The Sixty-Month Test for Gross Income

BAPCPA establishes a sixty-month means test for above-median debtors.³¹³ In comparison, the test establishing the immunity of the below-median debtors is only a twelve-month test.³¹⁴ Both tests, however, turn on multiplying "current monthly income," which is an average income for the preceding six months.

The sixty-month means test applies only to historic gross income. This amount is reduced by hypothetical expenses, in a manner to be described. The result I will refer to as *net income*. Significantly, a debtor is *not* required to prove sixty months of expenses but can use snapshot pictures of those expenses at the time of the bankruptcy petition.

The test to be applied is a kind of minimum-maximum test.³¹⁵ In order to avoid the connotation of bankruptcy abuse, the multiplicand (net monthly income times sixty) must be *less* than \$10,000³¹⁶ or the *maximum* of two criteria: 25% or \$6,000. So, for example, suppose a debtor has net income of \$40 per month. Multiplying by sixty produces \$2,400. This is less than \$10,000 and less than \$6,000. Our debtor is not a bankruptcy abuser under the means test, although it apparently is open for the United States trustee to claim otherwise under section 707(b)(3).³¹⁷

<http://www.census.gov/population/www/cps/cpsdef.html>. This has been referred to as the "heads on beds" test for households. See *In re Jewell*, 2007 Bankr. LEXIS 811, at *15–17.

³¹⁰ U.S. Census Bureau, *supra* note 308.

³¹¹ Neustadter, *supra* note 47, at 282.

³¹² See *In re Graham*, No. 06-54764, 2007 Bankr. LEXIS 720, at *7–17 (Bankr. S.D. Ohio Mar. 6, 2007) (holding husband and wife could separately take household expense deduction).

³¹³ 11 U.S.C. § 707(b)(2)(A)(i) (2006).

³¹⁴ *Id.* § 707(b)(6)–(7).

³¹⁵ The test, according to Professor Neustadter, "scales new heights of obscurity . . ." Neustadter, *supra* note 47, at 284.

³¹⁶ Any dollar amount to be found in section 707(b) is subject to increase according to the rules of Bankruptcy Code section 104(b). This provision provides for automatic adjustments every three years to reflect the Consumer Price Index for All Urban Consumers, published by the U.S. Department of Labor. See 11 U.S.C. § 104(b)(1)(A) (2006).

³¹⁷ See *infra* Part III.C.

Suppose the debtor's net income is \$110 per month. Now the multiplicand is \$6,600 per month. This is less than \$10,000 but more than \$6,000. Our debtor must now show that unsecured claims against her exceed \$26,600. In other words, the more bad debts such a debtor has, the more "good faith" she has—a counter-intuitive result.³¹⁸

Congress may have counteracted the bad incentive of section 707(b)(2)(A)(i)(I) by prohibiting lawyers from advising more debt as a way of beating the means test. New section 526(a)(4) prohibits "advis[ing] an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title"³¹⁹ This conclusion follows only if lawyers are "debt relief agencies" as that term is defined in section 101(12A).³²⁰ At least one court has ruled that lawyers are *not* within the definition.³²¹ Another court concludes they are *in* the definition, but the provision is an unconstitutional abridgement of free speech.³²² Either way, lawyers would be free to advise a debtor to rack up more debt in order to game the system. If neither premise is true, lawyers are obliged to withhold such good advice from their clients.

Finally, suppose net income is \$167.77 a month. Since the multiplicand exceeds \$10,000, such a debtor is disqualified from a chapter 7 proceeding.

What is the significance of the number 60? Presumably, this is related to the duration of a chapter 13 plan for households above the median.³²³ The mandatory five-year term³²⁴ is a BAPCPA innovation, and the chapter 7 test is premised on chapter 13 being the principal alternative if chapter 7 is impossible. Yet only above-median debtors are required to maintain a Stalinist five-year plan. Below-median debtors can write three-year plans. The number 60 bears no relation to below-median debtors.

The sixty-month test, however, turns on a *monthly* test, which in turn depends on a twelve-month average. One might suspect that the number 60 could have largely been dispensed with, but this is not so. Means testing boils down to this: if net current monthly income exceeds \$167.77, the debtor's chapter 7 case will always be

³¹⁸ Wedoff, *supra* note 26, at 242 (noting debtor under chapter 7 has incentive to find ways to maximize allowable deductions in order to minimize current monthly income).

³¹⁹ 11 U.S.C. § 526(a)(4) (2006).

³²⁰ See *Olsen v. Gonzales*, 350 B.R. 906, 911 (D. Ore. 2006) (holding attorneys are debt relief agencies); see also Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295, 1309 (2006) (highlighting uncertainty about whether the term "debt relief agency" includes lawyers); Neustadter, *supra* note 47, at 312–14 (noting consumer bankruptcy attorneys are now debt relief agencies); Vance & Cooper, *supra* note 24, at 289 (listing duties of attorney who falls under category of "debt relief agency").

³²¹ *In re Attorneys-at-Law*, 332 B.R. 66, 69 (Bankr. S.D. Ga. 2005) (concluding Congress did not intend to include attorneys under definition of "debt relief agency").

³²² *Zelotes v. Martini*, 352 B.R. 17, 23, 25 (D. Conn. 2006); *Hersh v. United States*, 347 B.R. 19, 22, 25 (N.D. Tex. 2006) (employing plain meaning rule to conclude that "debt relief agency" includes attorneys, but holding such provision facially unconstitutional as applied to attorneys).

³²³ 11 U.S.C. § 1325(b)(4)(A)(ii) (2006) (limiting applicable commitment period to no less than 5 years); *In re McPherson*, 350 B.R. 38, 45–46 (Bankr. W.D. Va. 2006) ("The objective of the Means Test in Section 707(b) . . . is to roughly estimate whether a debtor has sufficient disposable income to fund a chapter 13 plan, that is, to estimate the amount of residual income that the debtor has each month . . .").

³²⁴ In 100% payout plans, the term may be less than five years. 11 U.S.C. § 1325(b)(4)(B) (2006) (conditioning payout in less than five years if "plan provides for payment in full of all allowed unsecured claims . . .").

dismissed.³²⁵ If it is under \$100, the case will not be dismissed on the mechanical means test alone (though it still could be dismissed for other indicia of bad faith, including, perhaps, surplus net income).³²⁶ Only if monthly income is between \$100 and \$167.77 does the multiplicand of 60 really become relevant. For such net monthly incomes, the debtor will have to satisfy the following inequality:

$$CMI < u/240$$

where $100 < CMI < 166.67$ is net current monthly income and u is the total amount of unsecured claims against the debtor. The denominator 240 is the product of 4×60 . The 4 represents the 25% requirement of section 707(b)(2)(A)(i)(I);³²⁷ that is, by multiplying both the numerator and denominator by 4, $.25u$ becomes u , and 60 becomes 240. The 60 in the denominator product comes from the sixty multiplicand of section 707(b)(2)(A)(i), and so 60 cannot entirely be eliminated from the calculation. It is relevant whenever $100 < CMI < 166.67$.³²⁸

A related observation based on the above inequality is that \$167.77 for net current monthly income is the only relevant test where unsecured claims against the debtor exceed \$40,264.80. One hundred dollars is the only relevant test where unsecured debts are less than \$24,000.24. The multiplicand of 60 is relevant only where unsecured debt falls between these two numbers.

2. Expenses

The means test concerns *net* income, so expenses are all-important. Whereas "current monthly income" is based on a historic weighted average, expenses are not necessarily based on history.

a. IRS Standards

According to section 707(b)(2)(A)(ii), monthly expenses are "the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides"³²⁹ These National and Local Standards can be found in the

³²⁵ In the landmark pre-BAPCPA case of *In re Attanasio*, 218 B.R. 180, 239–41 (Bankr. N.D. Ala. 1998), Judge Benjamin Cohen found no abuse where something resembling current monthly income of \$1,460 was available to pay creditors.

³²⁶ See 11 U.S.C. § 707(b)(3) (2006).

³²⁷ See *id.* § 707(b)(2)(A)(i)(I) ("Twenty-five percent of the debtor's non-priority unsecured claims in the case, or \$6,000, whichever is greater . . .").

³²⁸ For example, in *In re Praliekus*, 248 B.R. 140, 145 (Bankr. W.D. Mo. 2000), the debtor's current monthly income was \$154. Her debt was about \$13,894. *Id.* at 144. Therefore, $u/240 = 132.89 < 154$, so the debtor would be an abuser under BAPCPA (as she was prior to BAPCPA).

³²⁹ See 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

Internal Revenue Service Financial Analysis Handbook, which itself is part of the Internal Revenue Service's Internal Revenue Manual ("Manual").³³⁰ Their purpose is to aid IRS tax collectors in assessing how much tax can be extracted from delinquent taxpayers.³³¹

i. National Standards

National standards cover food, clothing, household supplies, personal care and miscellaneous. Totals are given by household, presumably, though this is not entirely clear. The allowable amounts also vary according to gross income of the debtor. On Form B22A, this is an easy amount to fill in.³³² For instance, a two-person household with a gross income of \$5,834 or more is entitled to deduct \$1,306. The same household with a gross income of \$578 is entitled to deduct \$578. The poor are expected to sacrifice more than the rich, in terms of producing disposable income for the benefit of creditors.³³³

We have seen, however, that a debtor's true income may not equate with the debtor's BAPCPA income, as the definition of "current monthly income" excludes certain sources such as social security or payments in settlement of war crimes.³³⁴ Where a debtor has high real income and low BAPCPA income, may the debtor assert the low income and take the food-clothing allowance that accords with the higher *real* income? Courts so far have answered no. If the debtor asserts low BAPCPA income, the debtor is stuck with the lower food-clothing allowance associated with this artificially low amount.³³⁵

If the debtor shows that it is necessary, she can have an additional 5% of the food and clothing categories as specified by the National Standards of the Internal Revenue

³³⁰ See H.R. REP. NO. 109-31, at 13–14 (2005) ("[T]he debtor's monthly expenses . . . must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook as Necessary Expenses under the National and Local Standards categories . . ."). This handbook can be retrieved on the IRS website. See generally IRS, INTERNAL REVENUE MANUAL, PART V—FINANCIAL ANALYSIS HANDBOOK § 5.15.1.1–.36, available at <http://www.irs.gov/irm/part5/ch15s01.html> (last visited Feb. 7, 2006) [hereinafter IRM]. It can also be retrieved from LEXIS under the source "Internal Revenue Manual (IRM)." *Id.*, available at <http://lexis.com> (follow "Legal" hyperlink; search "Internal Revenue Manual" under "Find a Source" hyperlink; search "financial analysis handbook").

³³¹ See IRM § 5.15.1.35, available at <http://www.irs.gov/irm/part5/ch15s01.html> (follow link "Making the Collection Decision"). Prior to BAPCPA, the IRS guidelines were informally used to determine expenses in connection with chapter 13's requirement that all disposable income must be dedicated to the plan. See *In re Beckel*, 268 B.R. 179, 184 (Bankr. N.D. Iowa 2001). But see *In re DeGross*, 272 B.R. 309, 314 (Bankr. M.D. Fla. 2001) (declining to use IRS standards for section 707(b) dismissal).

³³² See Form B22A, *supra* note 32, Line 19. At least one court has ruled that Form B22C, which contains an identical line to Form B22A line 19, is "entitled to considerable deference." *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256, 266 (Bankr. S.D. Ga. 2006).

³³³ Populists protest this phenomenon. Professor Tabb asks, "Do wealthier people have to eat more?" Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?* 18 BANKR. DEV. J. 1, 29 (2001). Of course they do not. They simply require a better grade of claret.

³³⁴ See *supra* text accompanying notes Part III.A.6.c.

³³⁵ See *In re Casey*, 356 B.R. 519, 524 (Bankr. E.D. Wash. 2006) ("Debtors may not 'mix and match' forms.").

Service.³³⁶ The 5% number is directly retrievable as provided in the IRS National Standards. For a family of two, food and clothing are designated to cost \$1,000 out of the total \$1,306 allocable if the household's gross income exceeds \$5,834, and 5% yields an additional \$50 deduction. This claim of necessity, however, must be documented, as Form B22A warns.³³⁷ Meanwhile, the fact that an extra amount is allowed for documented clothing expense suggests that extra deductions for other expenses, such as gasoline, are not permitted.³³⁸

National standards do not refer to households or to families but rather to "one person" or "two persons."³³⁹ There is an extra allowance for persons more than four. It appears that some debtors will fall through the cracks. In *In re Barraza*,³⁴⁰ the debtor paid the mortgage for his divorced spouse and their children; he lived with a friend with three children, towards which he contributed \$400 per month. The debtor received no credit for this \$400, yet, if the two households had been considered consolidated, the debtor could have had an additional \$816 a month in National Standard deductions.³⁴¹

The stipulation of the National Standards is the governing criterion even if the actual expenses of the debtor are different.³⁴² "It doesn't matter if the debtor feels those amounts are unreasonably low, or if the trustee feels those amounts are unreasonably high—those are the amounts the debtor is allowed to deduct from her current monthly income to determine her 'disposable monthly income.'"³⁴³ Of course, dismissal under the totality of the circumstances is still permitted, giving the United States trustee a second chance to criticize the debtor for taking the full B22A deduction.

ii. Dependents

Household expenses will vary according to the number of people in the household. Accordingly, it is relevant that section 707(b)(2)(A)(ii)(I) refers to the expenses "for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent."³⁴⁴ In *In re Napier*,³⁴⁵ debtors sought to

³³⁶ See 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

³³⁷ See Form B22A, *supra* note 32, Line 39.

³³⁸ See *In re Tranmer*, 355 B.R. 234, 241 (Bankr. D. Mont. 2006) (denying extra deduction for long commute to work). Some jurisdictions will permit an extra gas allowance for a long commute. See *In re Oliver*, 350 B.R. 294, 302 (Bankr. W.D. Tex. 2006) ("The Court finds that the Debtor's actual gasoline expense is a necessary expense. The National local expenses are only guidelines . . .").

³³⁹ See IRS, NATIONAL STANDARDS FOR ALLOWABLE LIVING EXPENSES (Feb. 1, 2006), <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html> [hereinafter IRS, NATIONAL STANDARDS].

³⁴⁰ 346 B.R. 724, 727–28, 733–34 (Bankr. N.D. Tex. 2006).

³⁴¹ This is based on \$204 per extra "person" on the National Standards entry for additional persons, times four for the number of persons in the friend's household. See IRS, NATIONAL STANDARDS, <http://www.irs.gov/businesses/small/article/0,,id=104627,00.html> (allowing \$204 per person above four-person total allowance of \$1,203 for gross monthly salary between \$4,167 and \$5,833).

³⁴² See *In re Demonica*, 345 B.R. 895, 902 (Bankr. N.D. Ill. 2006) (acknowledging debtor not obligated on the mortgage agreement but could still claim the deduction).

³⁴³ *In re Fuller*, 346 B.R. 472, 484 (Bankr. S.D. Ill. 2006) (addressing chapter 13 case and subsequent plan).

³⁴⁴ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

expand their deductible expenses in a chapter 13 case, but Judge John Waites ruled that the household, for purposes of choosing the National Standards, was defined by the number of *dependents* in the household, not the number of *persons* in the household. The debtors could therefore not claim more expenses due to the presence of boarders in the house.³⁴⁶ "To the extent that Official Form B22C indicates that Debtors may include the boarders in the means test calculation, it must yield to the plain language of § 707(b)(2), which only allows Debtors to include dependents."³⁴⁷

The provision for the National Standards is one of many which invoke the concept of "dependents."³⁴⁸ As with "family" and "household," "dependent" is an undefined term. But section 707(b)(2)(A)(ii)(I) contains a clue. The spouse of a debtor is includable in the household for the purposes of expanding the National Standard deduction if the case is a joint case and "the spouse is not otherwise a dependent."³⁴⁹ This particular wrinkle suggests that Congress had in mind the Internal Revenue Code definition of dependent.³⁵⁰ At least where a married couple files a joint return, the spouse cannot be a dependent for tax deduction purposes.³⁵¹

The Internal Revenue Code defines two types of dependents: qualifying children and qualifying relative.³⁵² Qualifying child means an individual who (i) bears a relationship to the taxpayer, (ii) has the same abode for more than half the year, (iii) is less than 19, 24 (if a student),³⁵³ or any age (if disabled),³⁵⁴ and (iv) has not provided more than half his own support.³⁵⁵ "Bears a relationship" means being the child, sub-child, sibling, step-sibling, descendent of a sibling or step-sibling.³⁵⁶ A hierarchy exists as to who may claim the child, where multiple taxpayers compete for the deduction.³⁵⁷

A qualifying relative is one who (i) bears a relationship with the taxpayer,³⁵⁸ (ii) has less gross income than the exemption amount,³⁵⁹ (iii) receives from the taxpayer over half of the individual's support,³⁶⁰ and (iv) is not a qualifying child.³⁶¹ "Bears a

³⁴⁵ No. 06-02464-JW, 2006 Bankr. LEXIS 2248, at *3 (Bankr. D.S.C. Sept. 18, 2006).

³⁴⁶ *Id.* at *4 ("While the debtor's acts are admirable, debtors should not be allowed to voluntarily put the needs of these non-dependents above their obligation . . . to their unsecured creditors . . .").

³⁴⁷ *Id.*

³⁴⁸ See 11 U.S.C. §§ 101(10A)(B), 523(a)(2)(C)(ii)(II), 524(c)(3)(B), 1114(a), 1325(b)(2)(A)(i), 1329(a)(4) (2006).

³⁴⁹ *Id.* § 707(b)(2)(A)(ii)(I); see also *id.* § 522(a) ("In this section—(1) 'dependent' includes spouse, whether or not actually dependent . . .").

³⁵⁰ See I.R.C. § 152(a) (West Supp. 2006) (qualifying "dependent" for purposes of deductions for personal exemptions).

³⁵¹ *Id.* § 152(b)(2) ("An individual shall not be treated as a dependent of a taxpayer . . . if such individual has made a joint return with the individual's spouse . . . for the taxable year . . .").

³⁵² *Id.* § 152(a).

³⁵³ *Id.* § 152(c)(3)(A)(ii).

³⁵⁴ *Id.* § 152(c)(3)(B).

³⁵⁵ *Id.* § 152(c)(1).

³⁵⁶ *Id.* § 152(c)(2).

³⁵⁷ *Id.* § 152(c)(4).

³⁵⁸ *Id.* § 152(d)(1)(A).

³⁵⁹ *Id.* § 152(d)(1)(B) (referring to method of calculation in I.R.C. § 151(d)). The exemption amount is currently \$3,300. *Id.* § 151(d).

³⁶⁰ *Id.* § 152(d)(1)(C).

relationship" means a child, sub-child, sibling, step-sibling, ancestor, step-parent, niece or nephew, close in-law, or any individual living in the household with the taxpayer.³⁶² Particularly this last point contradicts Judge Waite's holding in *In re Napier*,³⁶³ if the excluded boarders had virtually no gross income and are supported by the debtor.

Pre-BAPCPA case law has addressed the concept of dependent. Offspring at college,³⁶⁴ adult children and the grandchildren,³⁶⁵ mothers,³⁶⁶ fathers in nursing homes,³⁶⁷ and stepchildren³⁶⁸ have qualified as dependents, whose expenses may be deducted. Stepchildren,³⁶⁹ grandchildren,³⁷⁰ mother,³⁷¹ fiancé and children,³⁷² girlfriend and her dependents,³⁷³ illegitimate children living with the debtor,³⁷⁴ and step-children have been disallowed. In *United States Trustee v. Meler (In re Meler)*,³⁷⁵ the court emphasized that if the debtor was not *legally obligated* to support the dependent-apparent, then the debtor could not deduct any expenses for their upkeep—a harsh conclusion that would certainly exclude aged grandparents and maiden aunts, for example.

iii. Local Standards

Local standards cover housing and transportation. They are not actually in the Manual but are available on the IRS and the United States Trustee's websites.³⁷⁶ To my

³⁶¹ *Id.* § 152(d)(1)(D).

³⁶² *Id.* § 152(d)(2).

³⁶³ No. 06-02464-JW, 2006 Bankr. LEXIS 2248, at *4 (Bankr. D.S.C. Sept. 18, 2006).

³⁶⁴ *In re Smith*, 269 B.R. 686, 689–90 (Bankr. W.D. Mo. 2001).

³⁶⁵ *In re Tefertiller*, 104 B.R. 513, 515 n.1 (Bankr. N.D. Ga. 1989) (citing *In re Wegner*, 91 B.R. 854, 859 (Bankr. D. Minn. 1998)).

³⁶⁶ *In re Bauer*, 309 B.R. 47, 51 (Bankr. D. Idaho 2004) (finding in chapter 13 case); *In re Tracy*, 66 B.R. 63, 67 (Bankr. D. Md. 1986).

³⁶⁷ *In re Vansickel*, 309 B.R. 189, 199 (Bankr. E.D. Va. 2004).

³⁶⁸ See, e.g., *In re Dempton*, 182 B.R. 38, 41 (Bankr. W.D. Mo. 1995).

³⁶⁹ *Shulz v. Gano (In re Gano)*, No. 99-14363, 00-5036, 2001 Bankr. LEXIS 2167, at *10–13 (Bankr. D. Kan. Jan. 17, 2001); see also *In re Beharry*, 264 B.R. 398, 404 (Bankr. W.D. Pa. 2001); *In re Davidoff*, 185 B.R. 631, 635–36 (Bankr. S.D. Fla. 1995) (dismissing expenses claimed where debtor's wife received child support payments).

³⁷⁰ *In re Richmond*, 144 B.R. 539, 542 (Bankr. W.D. Okla. 1992).

³⁷¹ *In re Cox*, 249 B.R. 29, 32 (Bankr. N.D. Fla. 2000).

³⁷² *Id.*

³⁷³ *U.S. Tr. v. Meler (In re Meler)*, 295 B.R. 625, 631 (D. Ariz. 2003); *In re Mastromarino*, 197 B.R. 171, 178 (Bankr. D. Me. 1996) ("This is not a moral judgment, but a legal one. Mastromarino has *no* obligation to support them. But he is legally obligated to his creditors. To grant such voluntary expenditures priority over existing legal obligations would be to permit Mastromarino unilaterally to subordinate his creditors to his personal lifestyle choices.").

³⁷⁴ *In re Meler*, 295 B.R. at 630–31.

³⁷⁵ *Id.* at 630–31.

³⁷⁶ See U.S. TR. PROGRAM, MEANS TESTING: CENSUS BUREAU, IRS DATA AND ADMINISTRATIVE EXPENSES (2006), <http://www.usdoj.gov/ust/ea/bapcpa/20061001/meanstesting.htm> [hereinafter U.S. TR. PROGRAM, *MEANS TESTING*] (supplying Local Standards for "Local Housing and Utilities Expense Standards" and "Local Transportation Expense Standards"); see also IRS, COLLECTION FINANCIAL STANDARDS (2006), <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (explaining "Collection Financial Standards are used to help determine a taxpayer's ability to pay a delinquent tax liability").

knowledge, this is the first time the United States Code defers to the fluctuating content of internet websites.³⁷⁷

(a) *Housing*

Form B22A first bids the debtor to record non-mortgage expenses.³⁷⁸ This is easily retrieved from the United States Trustee website. The Local Standards have two entries, one for "non-mortgage." These are listed by county. In Manhattan (New York County), for example, the amount listed is \$632. Form B22A refers to these expenses as "utilities."³⁷⁹

Form B22A then requires an entry for mortgage/rent expenses.³⁸⁰ This too is broken out in the Local Standards. Yet section 707(b)(2)(A)(ii)(I) also states that, "[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payment for debts."³⁸¹ This overrides the Local Standards with regard to mortgages and car loans. Separately, however, the debtor is permitted average monthly payments to all secured creditors, under section 707(b)(2)(A)(iii)(I). Accordingly, Form B22A requires that mortgage payments be subtracted from the Local Standard amount.³⁸² Numbers below zero are abolished for this purpose. The actual deduction permitted is the difference (if any) between the Local Standard amount and the actual mortgage payments.

It has been suggested that the reference to the Local Standards, together with a deduction for mortgage payments under section 707(b)(2)(A)(iii)(I), constitutes a bias against renters in favor of home owners.³⁸³ Indeed, worse than that, if a debtor has low mortgage payments and no rent expenses, Form B22A permits a deduction based in the absence of actual expenditure.³⁸⁴ Some courts, however, take the view that if there are absolutely *no* expenses, then the housing deduction is not "applicable" to the debtor and cannot be claimed. According to section 707(b)(2)(A)(ii)(I), the debtor is entitled

³⁷⁷ Judge Bruce Markell cautions that it is the IRS website, not the United States Trustee website, that counts. *In re Slusher*, No. BK-S-06-10435-BAM, 2007 Bankr. LEXIS 127, at *3 (Bankr. D. Nev. Jan. 17, 2007). This is so in spite of a disclaimer on the IRS website that "IRS Allowable Expenses are intended for use in calculating repayment of delinquent taxes. Expense information for use in bankruptcy calculations can be found on the website for the U.S. Trustee Program." See IRS, ALLOWABLE LIVING EXPENSES FOR TRANSPORTATION (2006), <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html> (alteration in original) (citing U.S. TR. PROGRAM, *MEANS TESTING*, *supra* note 376).

³⁷⁸ Form B22A, *supra* note 32, Line 20A.

³⁷⁹ *Id.*

³⁸⁰ *Id.* Line 20B.

³⁸¹ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

³⁸² Form B22A, *supra* note 32, Line 20B(b); see also *In re Hardacre*, 338 B.R. 718, 726 (Bankr. N.D. Tex. 2006) (upholding this interpretation).

³⁸³ Neustadter, *supra* note 47, at 287–94 ("This Act introduces sub silentio a distinction between mortgage payments and rent into judicial decisions about abuse and in so doing effectively prefers debtors who own homes to debtors who lease housing."). In *In re Starkey*, No. BK06-81473-TJM, 2007 Bankr. LEXIS 155, at *3 (Bankr. D. Neb. Jan. 25, 2007), a debtor's rent far exceeded the Local Standard for housing. The debtor was not permitted to deduct the surplus, even though this would have been allowed if it had been mortgage debt. *Id.* at *5–7.

³⁸⁴ See *In re Farrar-Johnson*, 353 B.R. 224, 226–27 (Bankr. N.D. Ill. 2006) (permitting deduction under Form B22C to debtors living free in military housing).

to "*applicable* monthly expense amounts specified under the . . . Local Standards" ³⁸⁵ This interpretation will be discussed in connection with transportation expense, as debtors more commonly own cars outright, compared to housing. ³⁸⁶

An enhancement is permitted to housing and utilities expense, but only with regard to "actual expenses for home energy costs" ³⁸⁷ The debtor must also show that the additional amount is "reasonable and necessary." This gives an opening for the court to rule that debtors must adjust their thermostats on behalf of their creditors.

If energy costs are to be enhanced, the debtor must know what percentage of non-mortgage expenses are allocable to energy and what part to other expenses. Form B22A gives no help on this allocation question. ³⁸⁸ Judge Wedoff, however, draws from the Bureau of Labor Statistics (which the IRS uses to devise its National and Local Standards) to suggest that 24% is an appropriate allocation. ³⁸⁹

(b) Transportation

The Local Standards permit a debtor to own two cars. ³⁹⁰ This is so even if the debtor is a single person with no family. So, for singles, it is possible to maintain a regular car and perhaps a motorcycle (assuming that a motorcycle qualifies as a "car"). ³⁹¹

There are two types of transportation expenses. The first is "Operating Costs & Public Transportation Costs." ³⁹² The Local Standards organize this category by region. Within a region, high-expense urban areas are singled out for favored treatment. For the Northeast Census Region, New York is designated to include counties in New Jersey, Connecticut and even Pennsylvania, as well as designated counties in New York. Not all New York counties are listed, however. For example, in Manhattan, allowed transportation expenses are as follows:

³⁸⁵ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006) (emphasis added).

³⁸⁶ In *In re Zak*, No. 06-41241, 2007 Bankr. LEXIS 88, at *8-17 (Bankr. N.D. Ohio Jan. 12, 2007), Judge Kay Woods allowed the full mortgage deduction even though the mortgage lender had obtained a pre-bankruptcy judgment of foreclosure. The United States trustee argued that the mortgage agreement "merged" with the contract, so there was no longer any secured debt due and owing under a contract. *Id.* In defense of this ruling, it can be pointed out that if the mortgage lender were to accept tender of an installment, the contract would be reinstated and the lender would be estopped from foreclosing. Given this possibility, the judgment of foreclosure does not mean the mortgage agreement is completely dead. It may also be noted that some courts believe the anti-ride-through legislation directed at cars implies that ride-through exists as to real estate. See Chadwick M. Werner, *Still Applicable: An Examination of BAPCPA's Perplexing Response to the Ride-Through Debate*, 16 J. BANKR. L. & PRAC. 49, 68 (2007).

³⁸⁷ 11 U.S.C. § 707(b)(2)(i)(V) (2006). In *In re Simmons*, 357 B.R. 480, 486-87 (Bankr. N.D. Ohio 2006), Judge Marilyn Shea-Stonum allowed extra utility expense even though the debtor intended to surrender the house to mortgagees.

³⁸⁸ See Form B22A, *supra* note 32, Line 37.

³⁸⁹ Wedoff, *supra* note 26, at 270-71.

³⁹⁰ Form B22A, *supra* note 32, Line 22.

³⁹¹ See *In re Casey*, 356 B.R. 519, 526 (Bankr. E.D. Wash. 2007) (holding motorcycle is a "car").

³⁹² Form B22A, *supra* note 32, Line 22.

<u>No Car</u>	<u>One Car</u>	<u>Two Cars</u>
\$313	\$402	\$484 ³⁹³

A resident of, say, Chautauqua County (a rural location) must use the generic regional figure and so does less well:

<u>No Car</u>	<u>One Car</u>	<u>Two Cars</u>
\$238	\$311	\$393

This Local Standard arguably benefits persons who, like me, walk to work and own no car. In my case, a deduction of \$313 per month substantially exceeds the amount I spend on subway trips and taxis.

Separately, the Local Standards permit a deduction for ownership and lease expenses. Here there is no regional variation. All debtors are allocated \$471 for the first car and \$332 for the second car.³⁹⁴ As with home mortgages, the Local Standard for cars is overridden by the admonition in section 707(b)(2)(A)(ii)(I) that, "[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payment for debts."³⁹⁵ Accordingly, a deduction must be made for scheduled payments on car loans.³⁹⁶ Again, the negative numbers are abolished for this purpose. As with home mortgages, the debtor will be able to reclaim the full monthly payment on cars under section 707(a)(iii), covering payments on secured debts. The net result is that car renters are disfavored. If their actual rental payments exceed the Local Standard, they are not permitted the deduction. But car owners with secured car loans are permitted the deduction.

So debtors are entitled to fixed deductions for two cars, but they must deduct actual payments on secured debt with regard to the cars. May a debtor allocate the cheap car payments to the \$471 and the high car payments to \$332, thereby maximizing total deductions net of secured creditor payments? In *In re Casey*,³⁹⁷ Judge Patricia Williams ruled that the more expensive car must be allocated to the \$471 figure; the cheaper car must be allocated to the \$332 figure.³⁹⁸ But in *In re Carlton*,³⁹⁹ Judge Mary Gorman found no such restriction on debtor discretion in the statute and permitted an allocation favorable to the debtor.

Perhaps the most important issue for transportation expense is whether a debtor

³⁹³ In a joint case, the two debtors with two cars cannot both claim this higher amount but rather must take the lesser combined two-car deduction. *In re Lara*, 347 B.R. 198, 202–03 (Bankr. N.D. Tex. 2006).

³⁹⁴ Form B22A, *supra* note 32, Lines 23–24 (listing first and second car).

³⁹⁵ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

³⁹⁶ One court states that a debtor is entitled to the *higher* of the Local Standard or the *actual* ownership expense, and that "[a]ll of the courts agree" *In re Hartwick*, 352 B.R. 867, 868 (Bankr. D. Minn. 2006). This mis-describes the statute. All debt payments must be eliminated from the National Standards. Then actual debt service must be added back in. In fact, *actual* debt service governs, when the debtor owes a secured loan.

³⁹⁷ 356 B.R. 519, 526 (Bankr. E.D. Wash. 2007).

³⁹⁸ For this purpose, motorcycles were deemed to be cars. *Id.*

³⁹⁹ No. 06-71322, 2007 Bankr. LEXIS 545, at *20–22 (Bankr. C.D. Ill. Feb. 28, 2007) (determining debtor's allowable deductions in chapter 13).

who owes no secured car debt may nevertheless have the deduction allowed for ownership expense.⁴⁰⁰ Two commentators predict that this one issue alone will have a huge impact on debtors' ability to survive a means test challenge.⁴⁰¹ The Manual describes the Local Standards as a cap on *actual* expenses. But section 707(b)(2)(A)(ii)(I) states that "monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards" ⁴⁰² No reference to actual expenses is permitted by the statute, and so both these notions seem unrelated to *actual* expenditures.⁴⁰³ "Thus, even hypothetical taxpayers living in a Garden of Eden, with cost-free satisfaction of all their basic needs, would still be allowed a deduction from income in the total amount set out in the [IRS Manual]."⁴⁰⁴ The form supplied by the United States Trustee's office agrees and provides a deduction regardless of actual expenses.⁴⁰⁵ Several courts concur that, even if the debtor owes no car payments, she may still have the full deduction for car ownership.⁴⁰⁶

Other courts disagree. They point out that section 707(b)(2)(A)(ii)(I) states that the debtor's monthly expenses shall be "the debtor's *applicable* monthly expense amounts specified under the . . . Local Standards" ⁴⁰⁷ Since the debtor owes nothing on cars absolutely owned, the Local Standards are not "applicable."⁴⁰⁸ Such a holding transgresses Form B22A, which seems to permit the full Local Standard deduction

⁴⁰⁰ Wedoff, *supra* note 26, at 255–56. Judge Wedoff does not explain where consumer debt comes from in such an environment.

⁴⁰¹ Culhane & White, *Catching Can-Pay Debtors*, *supra* note 25, at 676; *see also In re Ragle*, No. 06-30208, 2007 Bankr. LEXIS 874, at *10–15 (Bankr. E.D. Ky. Mar. 23, 2007); *In re Singletary*, 354 B.R. 455, 466–67 (Bankr. S.D. Tex. 2006) (exclusion of truck payments was outcome-determinative).

⁴⁰² 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006); *In re Singletary*, 354 B.R. at 466–67.

⁴⁰³ *See In re Grunert*, 353 B.R. 591, 594 (Bankr. E.D. Wis. 2006) (stating in chapter 13 case "Local Standard deductions for vehicle ownership as fixed allowances rather than caps on actual expenses is supported by the plain meaning of the statute . . . the legislative history, and carefully reasoned case law").

⁴⁰⁴ Wedoff, *supra* note 26, at 255.

⁴⁰⁵ *See* Form B22A, *supra* note 32, Line 22 ("You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.").

⁴⁰⁶ *See In re Ragle*, 2007 Bankr. LEXIS 874, at *10–11; *In re Enright*, No. 06-10747, 2007 Bankr. LEXIS 812, at *22–23 (Bankr. M.D.N.C. Mar. 6, 2007); *In re Zak*, No. 06-41241, 2007 Bankr. LEXIS 88, at *21 (Bankr. N.D. Ohio Jan. 12, 2007); *In re Wilson*, No. 06-10834, 2006 Bankr. LEXIS 3368, at *22 (Bankr. D. Del. Dec. 11, 2006); *In re Haley*, 354 B.R. 340, 343–44 (Bankr. D.N.H. 2006); *In re Fowler*, 349 B.R. 414, 419 (Bankr. D. Del. 2006).

⁴⁰⁷ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006) (emphasis added).

⁴⁰⁸ *Accord In re Slusher*, No. BK-S-06-10435-BAM, 2007 Bankr. LEXIS 127, at *52–54 (Bankr. D. Nev. Jan. 17, 2007); *In re Harris*, 353 B.R. 304, 308–10 (Bankr. E.D. Okla. 2006); *In re Carlin*, 348 B.R. 795, 798 (Bankr. D. Ore. 2006); *In re Oliver*, 350 B.R. 294, 301 (Bankr. W.D. Tex. 2006); *In re Wiggs*, No. 06B70203, 2006 Bankr. LEXIS 1547, at *9 (Bankr. N.D. Ill. Aug. 4, 2006); *In re Barraza*, 346 B.R. 724, 728–29 (Bankr. N.D. Tex. 2006); *cf.* IRM § 5.15.1.7 ("If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense."). *But see In re Johnson*, 346 B.R. 256, 266 (Bankr. S.D. Ga. 2006) (Local Standards comprise a floor below which a debtor may not fall). *In re Demonica*, 345 B.R. 895, 904–05 (Bankr. N.D. Ill. 2006), Judge Manuel Barbosa permitted the Local Standard ownership expense where the non-debtor spouse owed the car debt, but the debtor used the car. He also agreed that the deduction cannot be claimed where the debtor owned the car outright. *Id.*

when actual payments on the car are zero.⁴⁰⁹

In *In re Slusher*,⁴¹⁰ Judge Bruce Markell asked the question whether Congress intended to defer to the IRS's pre-discretion criteria for car expense, or whether Congress intended to defer to IRS criteria in the context of the discretion the IRS typically uses. He viewed the latter as more likely and so disallowed car ownership expense where the debtor owned the car outright. But this is open to a counter-point. If the debtor had owed a tiny amount per month on his car—say \$50 per month—would not that IRS expense be "applicable" to the debtor, allowing for a deduction of \$471? But if that is so, why should a zero payment cancel the deduction, when a \$50 payment does not? Since it clearly intended a fixed deduction in the \$50 case, Congress showed no concern for the *actual* expense of the debtor, even if the expense is zero.

Furthermore, the holding in cases like *Slusher* is open to strategic abuse. Suppose the debtor grants a friend an unperfected security interest on a car for \$60, amortized at one dollar per month. Now the IRS standard is "applicable" and the debtor can deduct the full \$471, making chapter 7 a more likely option. The fact that the unperfected security interest can be avoided in the chapter 7 case does not seem to affect the applicability of the IRS Local Standards.

One good policy reason to give the debtor the allowance is that, where the debtor owns the car free and clear it is probably old, about to fall apart, and in need of replacement. The means testing formula is, after all, supposed to be a test going forward as to whether a chapter 13 plan would yield substantial dividends for the unsecured creditors. If, however, the debtor is likely to need a new car in the next five years, the entire Local Standard amount gives a better picture of the future.

In compensation for these older vehicles, some courts note that the IRM allows an extra \$200 operating expense when a car has more than 75,000 miles on it and permits the enhancement.⁴¹¹ Form B22A, however, does not alert debtors to this allowance.⁴¹²

⁴⁰⁹ See Form B22A, *supra* note 32, Lines 23(c), 24(c) (requiring information on "[n]et ownership/lease expense for Vehicle"). Judge Mark Vaughn explains away the statutory word "applicable" as follows:

Under section 707(b)(2)(A)(ii)(I) what makes an ownership expense "applicable" is not whether the debtor is required to make a car payment or whether the deduction would be allowed by the IRS. Rather, whether an expense is "applicable" depends on the number of vehicles owned or leased by the debtor. Further, in section 707(b)(2)(A)(ii)(I), the term "applicable" modifies the phrase "monthly expense amounts specified under the National Standards and Local Standards." With the exception of the ownership expense, all other Local Standards vary depending on where the debtor resides. Thus, where a debtor resides dictates which Local Standards are "applicable." Section 707(b)(2)(A)(ii)(I) incorporates the IRS's figures, but not the IRS's publications and procedures.

In re Haley, 354 B.R. 340, 343–44 (Bankr. D.N.H. 2006)

⁴¹⁰ 2007 Bankr. LEXIS 127, at *45.

⁴¹¹ See IRM § 5.8.5.5.2; see also *In re Slusher*, 2007 Bankr. LEXIS 127, at *55; *In re Oliver*, 350 B.R. at 301; *In re McGuire*, 342 B.R. 608, 613–14 (Bankr. W.D. Mo. 2006).

⁴¹² See Form B22A, *supra* note 32, Line 22.

iv. Other Necessary Expenses

In addition to the National and Local Standards, which are set amounts the debtor cannot vary, the debtor is also entitled to deduct "Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides" ⁴¹³ Judge Wedoff has found three places in the Internal Revenue Manual that list Other Necessary Expenses. ⁴¹⁴ According to the first list, there are (1) accounting and legal fees, (2) charitable contributions, ⁴¹⁵ (3) child care, (4) court-ordered payments (such as alimony and child support), (5) dependent care, (6) health care, (7) involuntary wage deductions (such as for union dues or uniforms), ⁴¹⁶ (8) life insurance, (9) secured debts, (10) unsecured debts, (11) current taxes, ⁴¹⁷ (12) optional telephones and telephone services (such as cell phones and pagers), ⁴¹⁸ (13) student loans, (14) internet service, and (15) repayment of loans made for payment of federal taxes. ⁴¹⁹ Another portion of the Manual adds (16) education, (17) disability insurance, and (18) professional association dues. ⁴²⁰ A third list gives further definition of some of the categories already set forth. ⁴²¹

Form B22A includes several lines for "Other Necessary Expenses," ⁴²² but gives scanty hints with regard to the rich array of categories. With regard to Other Necessary Expenses, the debtor must confirm under oath that call waiting, caller identification and internet services are "necessary for the health and welfare of you and your dependents." ⁴²³ Of course, it can be argued that a loss of "call waiting" is *per se* a loss

⁴¹³ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

⁴¹⁴ Wedoff, *supra* note 26, at 261–62.

⁴¹⁵ See *id.* Courts have rejected the idea that *voluntary* tithing is a Necessary Expense. See *In re Tranmer*, 355 B.R. 234, 252–53 (Bankr. D. Mont. 2006); *In re Diagostino*, 347 B.R. 116, 119 (Bankr. N.D.N.Y. 2006). The IRS Manual requires a charitable contribution to be a condition of employment: "Example: a minister is required to tithe according to his employment contract." IRM § 5.15.1.10.

⁴¹⁶ See *infra* text accompanying notes 428–31.

⁴¹⁷ This would include income tax withholding. Over-withholding, however, is not allowed. See *In re Lawson*, No. 06-22766, 2007 Bankr. LEXIS 174, at *11–15 (Bankr. D. Utah Jan. 25, 2007); *In re Johnson*, 346 B.R. 256, 269 (Bankr. S.D. Ga. 2006); see also *In re Risher*, 344 B.R. 833, 837 (Bankr. W.D. Ky. 2006). A difficulty arises when a debtor files for bankruptcy in February and is over-withholding; how can the debtor know what may happen for the balance of the year that might increase the debtor's taxes? In *In re Balcerowski*, 353 B.R. 581, 582 (Bankr. E.D. Wis. 2006) (discussing tax refunds in chapter 13), Judge Pamela Pepper ruled that the debtor may not over-withhold and must simply use the best estimate available at the time the form is filled out.

⁴¹⁸ Dial-up internet is not allowed, where the debtor also claims an expense for high speed internet access. *In re Lara*, 347 B.R. 198, 203–04 (Bankr. N.D. Tex. 2006). Thus, expense is limited to "the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case." 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006). Therefore, cell phones for a non-dependent adult child (even if chronically ill) are not permitted. See *In re Haley*, 354 B.R. 340, 344–45 (Bankr. D.N.H. 2006). Meanwhile, there is redundancy between this item and the Local Standards for housing and utilities (which includes telephone bills). In *In re Carlton*, No. 06-71322, 2007 Bankr. LEXIS 545, at *22–23 (Bankr. C.D. Ill. Feb. 28, 2007), Judge Mary Gorman allowed the debtor the full telecommunications deduction nevertheless.

⁴¹⁹ IRM § 5.15.1.10 (3).

⁴²⁰ Wedoff, *supra* note 26, at 260–61 (interpreting section 5.19.1.4.3.5 of the IRM).

⁴²¹ See IRM Exhibit 5.19.1-12.

⁴²² Form B22A, *supra* note 32, Lines 24–31.

⁴²³ *Id.* Line 31; see also *In re Napier*, No. 06-02464-JW, 2006 Bankr. LEXIS 2248, at *4–5 (Bankr. D.S.C.

of "welfare," so perhaps a debtor can hazard an oath on such a proposition.

These Other Necessary Expenses exclude expenses for housing and transportation, which are fully provided for elsewhere.⁴²⁴ Yet they also include optional telephone services even though housing expenses include non-mortgage expenses, which is conceived of as the cost of "utilities."⁴²⁵ At least one court has permitted cell phone expense as an "Other Necessary Expense" *in addition* to the non-mortgage utility expense as part of housing.⁴²⁶

To the extent Other Necessary Expenses cover the payment of debts, it must be remembered that section 707(b)(2)(A)(ii)(I) provides: "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts."⁴²⁷ For this reason, one court has ruled that, even though payments of ERISA loans through wage withholding are "mandatory," ERISA loans are not debts; they can never be an "Other Necessary Expense."⁴²⁸ But this overlooks another portion of BAPCPA. New section 362(b)(19) holds that the automatic stay does not prevent wage withholding in favor of the ERISA plan. Yet new section 362(b)(19) also goes on to say, "nothing in this paragraph may be construed to provide that any loan made under [ERISA] . . . constitutes a claim or a debt under this title."⁴²⁹ So presumably an ERISA loan repayment *can* be an expense under section 707(b)(2)(A)(ii)(I), provided it is a *mandatory* wage deduction.

In *In re Barraza*,⁴³⁰ Judge Russell Nelms held that the ERISA loan repayments from wages are *not* mandatory.

Both plans provide that the loans must be repaid via payroll deductions. . . . However, the requirement to repay the 401(k) loans is not a job requirement in the sense that union dues, uniforms, and work shoes are. The consequence of a debtor's failure to comply with the requirement to pay union dues, wear a particular uniform, or wear certain shoes is, in all likelihood, loss of employment. By contrast, the consequences of the debtor defaulting on his 401(k) loans is that the loans are treated as taxable distributions. Consequently, the plan loan repayments do not qualify as "involuntary deductions" under the Internal Revenue Manual.⁴³¹

Judge Nelms's conclusion can certainly be challenged. Nothing in the Manual makes the

Sept. 18, 2006) (reducing debtor to \$175 per month from \$330 and stating \$90 internet justified by nature of debtor's employment).

⁴²⁴ See *In re Demonica*, 345 B.R. 895, 903 (Bankr. N.D. Ill. 2006); *In re Lara*, 347 B.R. 198, 204 (Bankr. N.D. Tex. 2006).

⁴²⁵ See *supra* text accompanying notes 378–79.

⁴²⁶ See *In re Stimac*, No. 06-25377-svk, 2007 Bankr. LEXIS 997, at *6 (Bankr. E.D. Wis. Mar. 29, 2007).

⁴²⁷ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

⁴²⁸ *In re Thompson*, 350 B.R. 770, 776–77 (Bankr. N.D. Ohio 2006).

⁴²⁹ 11 U.S.C. § 362(b)(19) (2006).

⁴³⁰ 346 B.R. 724, 730 (Bankr. N.D. Tex. 2006).

⁴³¹ *Id.*

mandatoriness of the withholding be the *sine qua non* of continued employment. If ERISA withholding constitutes an *assignment of wages*, then indeed it is mandatory, in the sense that the ERISA plan has a fiduciary duty to enforce the assignment mechanism. For this reason, Judge Nelms's conclusion should be rejected as based on an unnecessary predicate of job retention.

v. Health and Disability Insurance

The lack of social health care programs was certainly in the air in 2005, and so Congress has permitted deductions for "reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or dependents of the debtor."⁴³² Form B22A does not limit these amounts to "reasonably necessary" insurance but simply asks straight out what the debtor pays on average per month for these items.⁴³³

Amounts contributed to health savings accounts are deductible from federal income tax.⁴³⁴ This deduction was added or at least refined⁴³⁵ by the Medicare legislation in 2003.⁴³⁶ It is part of a neo-conservative solution to rising health costs. The premise is that Americans (with insurance) are over-insured and so they visit the doctor too often. The scheme is to get American taxpayers to buy "high deductible health plans"⁴³⁷ in exchange for which the taxpayer may establish a tax-deferred savings account to cover the increased personal medical expense that results.

These new health savings accounts are not to be confused with annual use-it-or-lose-it flexible spending accounts that are part of a cafeteria plan offered by employers.⁴³⁸ Because nothing is "saved" in these plans, Congress could not have meant to include these contributions within the scope of section 707(b)(2)(A)(ii)(I).

vi. Family Violence

BAPCPA permits a debtor to deduct whatever is spent to protect the debtor from family violence, "as identified under section 309 of the Family Violence Prevention

⁴³² 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006). This amendment was the work of Senator Ted Kennedy. See Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 383.

⁴³³ Form B22A, *supra* note 32, Line 34.

⁴³⁴ See I.R.C. § 223 (West Supp. 2006).

⁴³⁵ The concept began as a pilot program promulgated in the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

⁴³⁶ Medicare Prescription, Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, § 1201, 117 Stat. 2066, 2469. See generally Timothy S. Jost & Mark A. Hall, *The Role of State Regulation in Consumer-Driven Health Care*, 31 AM. J. L. & MED. 395, 395 (2005); Edward J. Larson & Marc Dettman, *The Impact of HSAs on Health Care Reform: Preliminary Results After One Year*, 40 WAKE FOREST L. REV. 1087, 1097-1100 (2005).

⁴³⁷ This is a term of art in the legislation. See *Health Savings Accounts (HSAs)*, INSTITUTIONAL REV. BOARD. NOTICE 2004-2, Jan. 12, 2004, at 269.

⁴³⁸ See Regina T. Jefferson, *Medical Savings Accounts: Windfalls for the Healthy, Wealthy and Wise*, 48 CATH. U. L. REV. 685, 704 (1999) (distinguishing health savings accounts from flexible spending accounts).

and Services Act, or other applicable law."⁴³⁹ The court is enjoined to keep this last amount confidential.⁴⁴⁰ Section 309 of this Act, redesignated as section 320 in 2003, defines "family violence" as:

[A]ny act or threatened act of violence, including any forceful detention of an individual, which—

- (A) results or threatens to result in physical injury; and
- (B) is committed by a person against another individual (including an elderly person) to whom such person is or was related by blood or marriage or otherwise legally related or with whom such person is or was lawfully residing.⁴⁴¹

The last clause is broad enough to cover expenses to guard against any former roommate as well as against family members. It does not, however, cover stalking unless preceded by cohabitation.

What expenses may be deducted in the name of warding off family violence? Judge Wedoff thinks the expense of keeping a watchdog might qualify;⁴⁴² but before deducting the expenses of Poopsie, the family's pet poodle, the debtor will presumably have to document a violent threat from a relative or roommate.

vii. The Chronically Ill

The debtor may add actual expenses for "the continuation of actual expenses paid by the debtor that are reasonable and necessary" for the care of an elderly, chronically ill, or disabled household member or member of the immediate family who is unable to pay such expense.⁴⁴³ The word "continuation" is problematic, suggesting the care for the infirm relative somehow precedes the chapter 7 case in some way;⁴⁴⁴ though, as Judge Wedoff points out, it is still possible for a debtor to introduce purely prospective care as a "special circumstance" to rebut the appearance of bankruptcy abuse, pursuant to Section 707(b)(2)(B)(i).⁴⁴⁵ Where the aged relative is entitled to welfare payments, the phrase "reasonable and necessary" could justify a court in declaring it an abuse if

⁴³⁹ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

⁴⁴⁰ See *id.* Judge Wedoff speculates: "The requirement that the court keep the expenses confidential probably refers to the detail of the expenses involved rather than to the amount claimed, and might require closing the courtroom to spectators in the event of a § 707(b) motion challenging the reasonableness of the expenses claimed for preventing family violence." Wedoff, *supra* note 26, at 265–66.

⁴⁴¹ 42 U.S.C.A. § 10421(1) (West 2003); cf. Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, § 415(5), 117 Stat. 800, 830.

⁴⁴² See Wedoff, *supra* note 26, at 265.

⁴⁴³ 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2006).

⁴⁴⁴ Tabb, *supra* note 333, at 29 ("Why should a debtor who is *already* caring for a disabled relative be allowed a deduction while a debtor who needs to *start* doing so after filing bankruptcy is not?").

⁴⁴⁵ Wedoff, *supra* note 26, at 266 ("An anticipated need to provide support payments in the future would only be relevant as a 'special circumstance' to rebut a presumption of abuse."). Section 707(b)(2)(B)(ii) puts the burden on the debtor to itemize, document, and explain under oath any adjustment of income or added expense. 11 U.S.C. § 707(b)(2)(B)(ii) (2006).

the debtor's aged relative fails to seek such relief.

The infirm recipient of debtor charity must either be a member of the household or a member of the debtor's immediate family, which "includes" siblings, parents, etc., but does not specifically mention step-children out of the household or parents-in-law. Presumably the non-exclusive nature of this definition is broad enough to include these more extended relations. Aged servants and loyal retainers out of the household are not deductible. Hopefully, these sad figures have followed Adam's advice in *As You Like It*:

The thrifty hire I saved under your father,
Which I did store to be my foster-nurse
When service should in my old limbs lie lame
And unregarded age in corners thrown⁴⁴⁶

viii. Chapter 13 Expenses

A seemingly curious item is that a debtor eligible for chapter 13 (yet nevertheless in chapter 7) may include the "actual" administrative expense of administering a chapter 13 plan.⁴⁴⁷ By "actual," Congress means the *hypothetical* expenses the debtor would have borne in his judicial district had she filed in chapter 13 instead of chapter 7. The requirement makes sense in that the sixty-month test ultimately aims to see if, in the sixty months following the bankruptcy test, the debtor could generate substantial payments to the unsecured nonpriority creditors. Since a chapter 13 proceeding is a likely mode for achieving these payments, the debtor is permitted to deduct the chapter 13 administrative expense, even though the debtor may qualify for chapter 7, where no such expense will be borne.

Debtors may not in fact be eligible for chapter 13. For instance, too much debt may eliminate such an option.⁴⁴⁸ In such a case, no chapter 13 expense can be deducted, since section 707(a)(2)(A)(ii)(III) requires a debtor to be "eligible for chapter 13." Such a debtor might be eligible for chapter 11,⁴⁴⁹ but there is no provision for any deduction of hypothetical chapter 11 expenses. Although chapter 11 expenses would be a priority claim under section 507(a)(2), they would be claims against the bankruptcy estate, not against the debtor and so not eligible for deduction under the priority concept in section 707(b)(2)(A)(iv).

The chapter 13 fee is set by the attorney general. It may not exceed 10% of plan disbursements through the standing chapter 13 trustee. But chapter 13 is embroiled in a controversy as to whether such things as mortgage payments must be made through the trustee, or whether these payments can be made "outside the plan."⁴⁵⁰ Since the debtor

⁴⁴⁶ WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 3.

⁴⁴⁷ See 11 U.S.C. § 707(b)(2)(A)(ii)(III) (2006).

⁴⁴⁸ See 11 U.S.C. § 109(e) (2006). Currently, these amounts are \$307,675 for unsecured debts and \$922,975 for secured debts.

⁴⁴⁹ Chapter 11 cases generate quarterly fees to the United States trustee. See 28 U.S.C.A. § 1930 (a)(6) (2006).

⁴⁵⁰ See David Gray Carlson, *Cars and Homes in Chapter 13 After the 2005 Amendments to the Bankruptcy*

can write what plan she pleases, it is open for the debtor to hypothesize *no* payments outside the plan, thereby inflating the deductions by 10% of mortgage and car payments.

ix. Tuition

A debtor may add \$1,500 per year per dependent child, to the extent of actual expenses to attend a private or public elementary or secondary school.⁴⁵¹ The debtor must document the expenses and explain why they are reasonable and necessary and not already accounted for in the National Standards and Local Standards referred to section 707(b)(2)(A)(ii)(II). This requirement should embroil the courts in such inquiries as whether parochial schools teaching religion is reasonable or necessary.⁴⁵² Yet courts were already embroiled in this dispute prior to BAPCPA.⁴⁵³

In *In re Cleary*,⁴⁵⁴ Judge David Duncan permitted a debtor to exceed the limit of \$1,500 per child on the grounds that tuition was an "Other Necessary Expense." He cautioned, however, that the holding was limited to the circumstance of a non-debtor spouse who was willing to work in order to pay tuition, but was not willing to work for the coarser purpose of paying her spouse's credit card debt. The extra deduction was permitted because it was not at the expense of the unsecured creditors.

x. Secured Debts

A debtor may deduct amounts needed to pay secured creditors. The expense is the amounts due under the security agreement.⁴⁵⁵ Lest the future payments be other than equal installments, the debtor must calculate the amount due over sixty months and then divide by sixty.⁴⁵⁶

With regard to this deduction, there is no limitation on the nature of the collateral. "Thus, for purposes of the means test, debt secured even by such items as luxury vehicles, pleasure boats, and vacation homes would be deductible."⁴⁵⁷ Many find the secured credit provision the single biggest opportunity for debtors to manipulate the

Code, 14 AM. BANKR. INST. L. REV. 301, 321–26 (2006).

⁴⁵¹ 11 U.S.C. § 707(b)(2)(A)(IV) (2006).

⁴⁵² Tabb, *supra* note 333, at 29 (considering bankruptcy judge's discretion in determining what expenses are reasonable and necessary).

⁴⁵³ See *supra* Part III.B.2.a.ii.

⁴⁵⁴ 357 B.R. 369, 373–74 (Bankr. D.S.C. 2006).

⁴⁵⁵ 11 U.S.C. § 707(b)(2)(A)(iii)(I) (2006).

⁴⁵⁶ See *id.*

⁴⁵⁷ See Wedoff, *supra* note 26, at 274; see also Culhane & White, *Catching Can-Pay Debtors*, *supra* note 25, at 676 ("A much bigger impact flows from the decision to let debtors deduct their total average monthly secured debt payments, with no express requirement that the collateral be necessary."); Tabb, *supra* note 333, at 42 (discussing rich debtor's ability to deduct vehicle payments from income in computing means test). A United States trustee's claim that only two cars can be deducted, since the Local Standards only permit two cars, is rejected in *In re Carlton*, No. 06-71322, 2007 Bankr. LEXIS 545, at *19–20 (Bankr. C.D. Ill. Feb. 28, 2007).

means test.⁴⁵⁸

In comparison, prior to BAPCPA, the purchase of new items on secured credit (thereby diverting too much income away from the unsecured creditors) was grounds to dismiss a chapter 7 case.⁴⁵⁹ In assessing pre-BAPCPA law, two commentators opined:

For example, if the debtor purchases a new Rolex on credit just before filing for bankruptcy protection, the debtor's disposable income going forward has to support a much higher total debt. In such circumstances, the court can and will adjust the debtor's ability to pay figure, calculating it based on the debtor's total debt *without* the additional Rolex debt.⁴⁶⁰

Ironically, this "abuse" is now directly sanctioned by BAPCPA.

Pre-BAPCPA case law, however, may still apply for "totality of the circumstances" dismissals under section 707(b)(3)(B) for debtors who pass the means test.⁴⁶¹ This depends on whether the means test of section 707(b)(2) is preemptive of prior case law or not. And, indeed, this very issue decides the question whether BAPCPA *increases* the opportunity for bankruptcy abuse, or whether it simply has no effect.

Circumstances may cast doubt on whether the debtor will in fact make all scheduled payments.⁴⁶² For example, the collateral may be subject to a pre-petition foreclosure proceeding, which might (but might not) portend loss of the house. The secured credit deduction has nevertheless been allowed under these circumstances.⁴⁶³ Or the debtor may have expressed, per section 521(a)(2)(A) of the Bankruptcy Code, her intention to surrender the collateral to the secured creditor. Courts have still allowed the deduction.⁴⁶⁴ If debtor equity in a luxury item exists, the item would likely

⁴⁵⁸ See *In re LaSota*, 351 B.R. 56, 62–63 (Bankr. W.D.N.Y. 2006) (describing lines of cases where payments on secured debt were made to secure luxury items); Culhane & White, *Catching Can-Pay Debtors*, *supra* note 25, at 676 (describing deduction of average monthly secured debt payments as "gaping hole in the means test").

⁴⁵⁹ See *Costello v. Bodenstein*, No. 01CV9696, 2002 WL 1821663, at *3 (N.D. Ill. Aug. 7, 2002).

⁴⁶⁰ Olazabal & Foti, *supra* note 14, at 339–40.

⁴⁶¹ 11 U.S.C. § 707(b)(3)(B) (2006); see also Neustadter, *supra* note 47, at 291, 296 (asserting judicial discretion allows bankruptcy judge to dismiss chapter 7 case for abuse based on totality of circumstances of debtor's financial situation, even if debtor passes means test).

⁴⁶² In *In re Sorrell*, No. 06-31720, 2007 Bankr. LEXIS 161, at *6 (Bankr. S.D. Ohio Jan. 26, 2007), the United States trustee argued that "scheduled as contractually due to sheriff creditors" refers to *bankruptcy* schedules, not to contractual schedules. Cf. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006). Judge Waldron had no trouble rejecting this claim.

⁴⁶³ See *In re Hartwick*, 352 B.R. 867, 868 (Bankr. D. Minn. 2006); see also *In re Sorrell*, 2007 Bankr. LEXIS 161, at *9.

⁴⁶⁴ See *In re Galyon*, No. 06-11985-WV, 2007 Bankr. LEXIS 969, at *17–18 (Bankr. W.D. Okla. Mar. 22, 2007); *In re Haar*, No. 06-31270, 2007 Bankr. LEXIS 544, *23–24 (Bankr. N.D. Ohio Feb. 20, 2007) (holding debtor may negotiate reaffirmation and therefore never carry out intention); *In re Hartwick*, 2007 Bankr. LEXIS 476, at *14–15; *In re Sorrell*, 2007 Bankr. LEXIS 161, at *43–55; *In re Randle*, No. 06B05929, 2006 Bankr. LEXIS 3519, at *7–8 (Bankr. N.D. Ill. Dec. 19, 2006); *In re Simmons*, 357 B.R. 480, 483–84 (Bankr. N.D. Ohio 2006); *In re Walker*, No. 05-15010-whd, 2006 Bankr. LEXIS 845, at *10–13 (Bankr. N.D. Ga. May 1, 2006). In *In re Singletary*, 354 B.R. 455, 466–67 (Bankr. S.D. Tex. 2006), Judge Jeff Bohm ruled that where the surrender

be taken from the debtor and liquidated.⁴⁶⁵ Nevertheless, section 707(b)(2)(A)(ii)(I) still seems to authorize the deduction. The debtor is absolutely entitled to "the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition"⁴⁶⁶

When the Local Standards were the issue, courts seized upon the word "applicable," in order to deny debtors deductions for expenses they did not actually bear.⁴⁶⁷ In section 707(b)(2)(A)(iii), however, the word "applicable" does not appear.

A debtor may also deduct the amounts needed to cure arrears on secured claims, but here the deduction is limited to "the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents"⁴⁶⁸ Whatever the arrears are, the debtor may prorate them by dividing the amount by sixty and deducting the remainder from current monthly income. This provision therefore replicates treatment of arrears in chapter 13 cases.⁴⁶⁹ The fact that cure is limited to these items, incidentally, suggests that the category of secured debts covered generally is unlimited.⁴⁷⁰

One controversial issue under BAPCPA is whether a debtor's expense in paying back a loan from her ERISA plan (through payroll withholding) is a properly deductible expense. As we shall see, in chapter 13 a debtor may deduct the expense of repaying the ERISA loan.⁴⁷¹ Since the point of section 707(b)(2) is to determine whether a chapter 13 plan yields a significant dividend to the unsecured creditors, it would make sense for section 707(b)(2) to be coordinated with the chapter 13 rule with respect to ERISA loans. In *In re Thompson*,⁴⁷² Judge Arthur Harris achieved this goal by ruling that repayment of the ERISA loan is repayment of a secured debt and so

had been accomplished by the time of the motion to dismiss, the secured credit deduction could not be had. But if surrender is intended but not yet carried out, the debtors may have the full secured credit deduction. This solution, besides making everything turn on the arbitrary chronological order between surrender and the motion to dismiss, overlooks the point that, just because the car has been surrendered, the secured claim is not yet extinguished. The car lender must still hold an Article 9 sale. Until then the debtor owes the money and the lender still has a security interest. Judge Bohm assumes surrender is an asset payment to which the debtor has consented pursuant to section 9-622 of the Uniform Commercial Code, but that is not necessarily the case.

⁴⁶⁵ See *In re Parker*, 351 B.R. 790, 795 (Bankr. N.D. Ga. 2006) (discussing chapter 7 trustee's proposal to sell debtor's \$180,000 fantasy houseboat).

⁴⁶⁶ 11 U.S.C. § 707(b)(2)(A)(iii)(I) (2006).

⁴⁶⁷ See *supra* text accompanying notes 384–86.

⁴⁶⁸ 11 U.S.C. § 707(b)(2)(A)(iii)(II) (2006). Judge Wedoff predicts that arrears on the teenage son's car are potentially not deductible. Wedoff, *supra* note 26, at 274–75.

⁴⁶⁹ See 1 GRANT GILMORE & DAVID GRAY CARLSON, GILMORE AND CARLSON ON SECURED LENDING: CLAIMS IN BANKRUPTCY § 9.10 (2000).

⁴⁷⁰ Culhane & White, *Catching Can-Pay Debtors*, *supra* note 25, at 676.

⁴⁷¹ See *infra* text accompanying notes 509–10. Oddly, this rule is to be found in section 541(b)(7) of the Code, where few chapter 13 practitioners would think to look. See 11 U.S.C. § 541(b)(7) (2006) ("Property of the estate does not include . . . any amount . . . withheld by an employer from the wages of employees for payment as contributions . . . to an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 . . .").

⁴⁷² 350 B.R. 770, 776 (Bankr. N.D. Ohio 2006) ("From a policy standpoint, it makes little sense that Congress would expressly exclude any amounts required to repay 401(k) loans from the definition of 'disposable income' under 11 U.S.C. § 1325, yet include such income for purpose of determining abuse under section 707(b).").

deductible under section 707(b)(2)(A)(iii)(I).

To reach this sensible result, Judge Harris points out that section 408(b)(1)(E) of ERISA does indeed require that the loan be "adequately secured."⁴⁷³ So, by definition, an ERISA loan is a secured debt. In practice, this requirement is usually satisfied by the idea that the ERISA account itself is collateral for a withdrawal from the ERISA account.⁴⁷⁴ This sounds odd at first, but what the plan's "security" consists of is the plan's right to set off payment of benefits against the loan the debtor owes. Under section 506(a)(1), a setoff right is directly equated with a security interest in collateral. So syllogistic reasoning establishes that ERISA loans are secured debts. Judge Harris reaches the same result by a different route. He rejects the idea that "secured creditors" in section 707(b)(2)(A)(iii)(I) are the same as "secured claim" under section 506(a)(1). Rather "the Court must look to the common, ordinary meaning of the term."⁴⁷⁵ In fact, a reference to section 506(a) is more helpful to the result. Common sense does not always equate set-off rights with security interests.⁴⁷⁶

A second justification can be founded on the debtor's pledge of the wage income stream to the ERISA plan as the mode of repaying the loan. In other words, the ERISA repayment mechanism constitutes the plan's security interest in the wages themselves. Such security interests are not covered by Article 9 of the Uniform Commercial Code.⁴⁷⁷ Presumably ERISA law governs them, as ERISA is held to create special federal property rights not subject to the limitations of state law.⁴⁷⁸ Yet the very case that launched the myth of the fresh start, *Local Loan Co. v. Hunt*,⁴⁷⁹ holds that wage assignments are automatically dissolved in bankruptcy. To find that the debtor has made a wage assignment to the ERISA plan requires, first, that the terms of the plan require the withholding and, second, that enactment of ERISA overrules the historically previous principle of *Local Loan*.

Complicating Judge Harris's ruling is new section 362(b)(19), which holds that the automatic stay does not prevent wage withholding in favor of the ERISA plan. Without more, this new rule coheres with the idea that the ERISA plan is a secured creditor, but new section 362(b)(19) goes on to say, "nothing in this paragraph may be construed to provide that any loan made under [ERISA] constitutes a claim or a debt under this title" ⁴⁸⁰ Yet section 707(b)(2)(A)(iii)(I) exempts payments to "secured creditors." If Judge Harris is right, then the ERISA plan is a "secured creditor" with no claim against

⁴⁷³ *In re Thompson*, 350 B.R. at 775 (citing 29 U.S.C. §§ 1106, 1108 (2000)); see 29 U.S.C.A. § 1108(b)(1)(E) (2000).

⁴⁷⁴ See *Shull v. State Mach. Co.*, 836 F.2d 306, 309 (7th Cir. 1987).

⁴⁷⁵ See *In re Thompson*, 350 B.R. at 774.

⁴⁷⁶ Grant Gilmore memorably, though erroneously, commented, "Of course a right of set-off is not a security interest and has never been confused with one: [Article 9] might as appropriately exclude fan dancing." 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.8, at 315-16 (1965).

⁴⁷⁷ U.C.C. § 9-109(d)(3), 3 U.L.A. 105-06 (2002) ("This article does not apply to . . . an assignment of a claim for wages, salary, or other compensation of an employee . . .").

⁴⁷⁸ See *Patterson v. Shumate*, 504 U.S. 753, 762 (1992) (noting ERISA self-settling trusts are valid even if state law says otherwise).

⁴⁷⁹ 292 U.S. 234, 244-45 (1934).

⁴⁸⁰ 11 U.S.C. § 362(b)(19)(B) (2006).

the debtor or the debtor's property.⁴⁸¹ Yet "creditor" is a defined term that requires the candidate for creditorship to have a "claim."⁴⁸² Judge Harris counters with the point that a bankruptcy discharge does not affect "any debt . . . owed to a pension, profit-sharing, stock bonus, or other plan established under [ERISA] under [] a loan permitted under section 408(b)(1) of [ERISA]" ⁴⁸³ If this language is read in isolation, one would have to admit that a debt owed to an ERISA plan is indeed a *debt*. Unfortunately, Congress terminates section 523(a)(18) with: "nothing in this paragraph may be construed to provide that any loan made under [ERISA] constitutes a claim or a debt under this title" ⁴⁸⁴ So BAPCPA is hopelessly contradictory on whether an ERISA debt is a debt.

It could be that Judge Harris's analysis fails because we are instructed not to regard the obligation to the ERISA plan to be a debt or a claim. If there is no debt or claim, there can be no secured creditor. Nevertheless, the ERISA loan repayment is still deductible because it is an "Other Necessary Expense" under section 707(b)(2)(A)(ii)(I).⁴⁸⁵ Ironically, Judge Harris ruled otherwise, because he thought that repayment of *any* debt must be excluded from Other Necessary Expenses.⁴⁸⁶ This once again overlooks the admonition of section 362(b)(19) and section 523(a)(18) that ERISA loan repayments are not to be considered debts.

Arguably contrary to *Thompson* is *In re Barraza*,⁴⁸⁷ where Judge Russell Nelms holds "[t]he only potential authority for deducting these payments" is mandatory withholding under "Other Necessary Expenses."⁴⁸⁸ This could be read as a rejection of the idea that the ERISA plan is a secured creditor. Furthermore, in rejecting the claim that the ERISA loan entails mandatory withholding (as "Other Necessary Expenses" requires), Judge Nelms denies that wage withholding *is* mandatory. If withholding is voluntary, not mandatory, then there has been no wage assignment, and the ERISA plan is no secured creditor. We have already encountered Judge Nelms's conclusion that the wage assignment is not mandatory. We criticized this conclusion for confusing mandatoriness with the continuation of employment.⁴⁸⁹ This certainly misconceives the inquiry, if the inquiry is whether we have before us a security interest on wages. The issue is not whether the debtor might be fired for defaulting on the ERISA loan. Rather, the issue is whether the plan constitutes a security agreement assigning wages and whether the employer has attorned itself to the plan to execute the wage assignment. As these features are both true of the ERISA plans in *Barraza*, they would appear both to be mandatory withholdings for Other Necessary Expense purposes *and* for the purpose of establishing the ERISA plan as a "secured creditor" within the meaning of section

⁴⁸¹ Claims against the debtor's property are deemed claims against the debtor. See 11 U.S.C. § 101(2) (2006).

⁴⁸² See 11 U.S.C. § 101(10) (2006) (stating creditor is an entity containing "claim against debtor").

⁴⁸³ 11 U.S.C. § 523 (a)(18)(A) (2006) (emphasis added).

⁴⁸⁴ *Id.* § 523 (a)(18).

⁴⁸⁵ See *supra* Part III.B.2.a.iv.

⁴⁸⁶ *In re Thompson*, 350 B.R. 770, 776–77 (Bankr. N.D. Ohio 2006).

⁴⁸⁷ 346 B.R. 724, 729 (Bankr. N.D. Tex. 2006).

⁴⁸⁸ *Id.* at 730.

⁴⁸⁹ See *supra* text accompanying notes 430–31.

707(b)(2)(A)(iii)(I).

xi. Priority Claims

Under section 707(b)(2)(A)(iv), a debtor may deduct payment of priority claims. Taxes will be covered by this concept, if they qualify for priority under section 507(a)(8). Section 707(b)(2)(A)(iv) specifically mentions child support and alimony. In fact, the relevant priority is new section 507(a)(1)(A), which accords priority to "domestic support obligations."⁴⁹⁰ The idea behind this deduction is to determine whether a chapter 13 case can generate a substantial dividend for unsecured *nonpriority* creditors if the debtor is booted from chapter 7.

BAPCPA newly and expansively defines this term to include *any* amount owed to a spouse or a former spouse of the debtor (presumably including business loans).⁴⁹¹ Also covered is *any* amount "owed to or recoverable by . . . a governmental unit."⁴⁹² Grammatically, these amounts are not tied to a family aspect at all, although courts may be tempted to stray from the literal meaning of the statute to link such debts to family matters. If they are not so tied, out of a literalist "plain meaning" attitude, then all sorts of spousal and government loans can be used to reduce net monthly income. Of course, the total debt must be divided by sixty in order to make the amount comparable to the monthly standard on which means testing is based.

Why did Congress make the pro rata amounts of priority claims deductions? In chapter 13, priority creditors must be paid in full over the life of the plan.⁴⁹³ This rule is an obstacle to ordinary unsecured creditors being paid in chapter 13. It therefore makes sense to make these priority claims a deduction in the means test, as these are amounts the nonpriority unsecured creditors will not get anyway.

Perhaps the most important priority expense is the cost of bankruptcy administration.⁴⁹⁴ This is partially provided for in section 707(b)(2)(A)(ii)(III), as we have seen, but this is limited to the mandatory fee due to the standing chapter 13 trustee. Another important expense is the debtor's lawyer, who, in chapter 13 cases, is an administrative claimant. This is not typically the case in chapter 7.⁴⁹⁵ In contrast, section 330(a)(4)(B) directly mentions the debtor's attorney in chapter 13 cases. And section 503(b)(2) defines as an administrative claim "compensation and reimbursement awarded under section 330(a) of this title"⁴⁹⁶

Can the debtor claim the *hypothetical* expense of an attorney in a chapter 13 case as part of means testing for chapter 7? The answer is probably no.⁴⁹⁷ According to

⁴⁹⁰ 11 U.S.C. § 507 (a)(1)(A) (2006).

⁴⁹¹ *Id.* § 101(14A)(A)(i).

⁴⁹² *See id.* § 101(14A)(A)(ii).

⁴⁹³ *Id.* § 1322(a)(2).

⁴⁹⁴ *See id.* § 507(a)(2).

⁴⁹⁵ *See* *Lamie v. U.S. Tr.*, 540 U.S. 526, 538–39 (2004).

⁴⁹⁶ 11 U.S.C. § 503(b)(2) (2006).

⁴⁹⁷ *See In re Amato*, No. 06-20612 (MBK), 2007 Bankr. LEXIS 836, at *10–11 (Bankr. D.N.J. Mar. 20, 2007) (ruling in chapter 13 case); *In re McDonald*, No. 06-31270, 2007 Bankr. LEXIS 363, at *9–11 (Bankr. D. Mont.

section 707(b)(2)(A)(iv): "The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amounts of debts entitled to priority, divided by 60."⁴⁹⁸ This language apparently requires the priority claim to *exist* at the time of the bankruptcy proceeding. The expense of the chapter 13 attorney is entirely hypothetical.

To be compared is the standing chapter 13 trustee deduction in section 707(b)(2)(A)(ii)(III):

In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.⁴⁹⁹

Here the expense is expressly hypothetical (even though the statute mentions "actual administrative expenses").

If I am right, it is unfortunate. The idea of the means test is to project the payout over the life of a chapter 13 plan. For this reason, section 707(b)(2)(A)(ii)(III) makes sense. But, because section 707(b)(2)(A)(iv) seems to exclude the hypothetical expense of the chapter 13 attorney, the means test is skewed to over-report how much will really be available in chapter 13.

Suppose a debtor owes court-ordered child support, but this obligation lapses a few months after the bankruptcy petition. May the debtor list the full amount as if this expense will continue throughout the period of a hypothetical chapter 13 plan? If the debtor relies on section 707(b)(2)(A)(iv), the answer is apparently no. The debtor must estimate the total due over time and divide by sixty. So where a debtor's child support obligation is \$600 per month, but it ends in twenty-four months, the debtor must take the total amount due (\$14,400) and divide it by sixty to obtain \$240 per month.⁵⁰⁰ If this is so, then suppose the debtor owes child support of \$600 per month for seventeen years. If we follow section 707(b)(2)(A)(iv) literally, the debtor must take the total amount due (\$122,400) and divide by sixty to obtain a deduction of \$2,040. Notice that, unlike the secured debt exemption of section 707(b)(2)(A)(iii), the debtor need *not* limit the total dividend (to be divided by sixty) to amounts due over sixty months. Indeed, the dividend is not limited at all, justifying the use of the seventeen-year figure. Thus, BAPCPA discriminates in favor of dads who walk out on their infant children, compared to dads who walk out when the child is just short of the age of majority.

Furthermore, we have already seen that *court-ordered* child support payments is an "Other Necessary Expense" within the meaning of section 707(b)(2)(A)(ii)(I). May the

Feb. 7, 2007) (ruling in chapter 13 case).

⁴⁹⁸ 11 U.S.C. § 707(b)(2)(A)(iv) (2006).

⁴⁹⁹ *Id.* § 707(b)(2)(A)(ii)(III); see *supra* Part III.B.2.a.viii (discussing chapter 13 expenses).

⁵⁰⁰ See *In re Casey*, 356 B.R. 519, 525–26 (Bankr. E.D. Wash. 2006) (examining chapter 13 case).

debtor who owes \$600 a month in court-ordered child support also deduct \$600 *in addition* to the above deduction under section 707(b)(2)(A)(iv)? Here the answer is assuredly no. According to the third sentence of section 707(b)(2)(A)(ii)(I), "[n]otwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts."⁵⁰¹ If we consider child support a "debt," it may not qualify as an "Other Necessary Expense."

3. Charitable Contributions

According to section 707(b)(1):

In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).⁵⁰²

This sentence is unamended by BAPCPA, and many assume that it threatens to undermine the means-testing regime.⁵⁰³

Suppose a debtor is close to passing the means test but faces dismissal. It is feared that the debtor could increase his contribution to Jerry Falwell in sufficient sums to meet the test. Since "the court may not take into consideration" such religious donations, the debtor enters into chapter 7 bankruptcy.⁵⁰⁴

Charitable contributions do not appear in the list of allowed expenses in section 707(b)(2)(A)(ii). Therefore, it is open for a debtor who flunks the test to show that the charitable contributions are just high enough to qualify the debtor for chapter 7. Of course, the televangelist amendment requires that the debtor "has made, or continues to make" the contributions. So presumably some sort of historical record will have to be established. If the chapter 7 proceeding is permitted, it will be up to the good conscience of the debtor whether he will live up to the representations made to the bankruptcy court, though it should be remarked that revoking discharges under section 727(d) is a possible remedy if the televangelist does not get his monthly fraudulent transfer.

There is, however, a counter-argument. Means testing is in general a mandatory presumption of abuse, if the debtor flunks the test. The means test appears within

⁵⁰¹ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

⁵⁰² *Id.* § 707(b)(1).

⁵⁰³ See Culhane & White, *Means-Testing Real Chapter 7 Debtors*, *supra* note 22, at 31 (concluding debtors can ensure chapter 7 qualification by increasing charitable contributions).

⁵⁰⁴ 11 U.S.C. § 707(b)(1) (2006). Judge Wedoff fears the charitable loophole is unlimited and points to the fact that section 1325(b) contains a 15% limit to religious contributions. The absence of any limit in section 707(b) leads him to suggest that the sky is the limit to use religious contributions to foment bankruptcy abuse. Wedoff, *supra* note 26, at 271–72.

section 707(b)(2). Gross income is defined in subsection (A)(i), and allowable expenses are defined in subsections (A)(ii)–(iv). Nowhere in subsections (A)(ii)–(iv) are charitable contributions mentioned as an allowable expense. So it is open for the bankruptcy court to conduct the test and find the debtor in bad faith, without any reference to the charitable contributions. If a court does this, it has conformed to section 707(b)(1), which orders the court *not* to take into consideration the religious contribution.⁵⁰⁵ A debtor may claim the deduction as an expense, but section 707(b)(1) bids the court not to consider this. So just as the devil may quote the scriptures to his own purposes and o'ersugar the truth to his own end, so may he cite the Bankruptcy Code to defeat televangelism in the name of preventing bankruptcy abuse.

4. Rebuttals

If the debtor flunks the sixty-month test, she is given a chance to rebut the presumption of bad faith abuse of the system. The debtor must demonstrate "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces"⁵⁰⁶ These circumstances must generate extra expenses or reduce income, which explain away the too-large multiplicand in the sixty-month test.⁵⁰⁷ The debtor is required to itemize each additional expense under oath.⁵⁰⁸

The first case to grant a rebuttal was *In re Thompson*,⁵⁰⁹ which held that repayment of an ERISA loan was payment to a secured creditor. As an alternative ground, Judge Arthur Harris ruled that the only way to halt wage withholding was for the debtor to quit or to pay back the loan. Since either of these unpleasant strategies was extraordinary, avoiding them by staying on the job and repaying by mandatory withholding was held to be an extraordinary *preventative* measure.⁵¹⁰

Because the debtors in *In re Batzkiel*⁵¹¹ kept running into deer while commuting to work, causing higher expenses in auto repair, they were permitted an extra \$577.32 a month in car maintenance expenses, which enabled them to squeak past the means test with only \$96.10 in disposable income. Only venison stood between these debtors and bankruptcy abuse.

On the other hand, a long commute causing extra gas expenses was not considered sufficiently extraordinary to justify an extra deduction for the cost of gasoline.⁵¹²

⁵⁰⁵ See *In re Diagostino*, 347 B.R. 116, 119–20 (Bankr. N.D.N.Y. 2006) (evaluating charitable contributions in context of above-median chapter 13 debtors); see also *In re Tranmer*, 355 B.R. 234, 252–53 (Bankr. D. Mont. 2006) (disallowing charitable contribution expense for above-median debtor because contribution does not fall under IRS guidelines).

⁵⁰⁶ 11 U.S.C. § 707(b)(2)(B)(i) (2006).

⁵⁰⁷ *Id.* § 707(b)(2)(B)(i).

⁵⁰⁸ *Id.* § 707(b)(2)(B)(ii)–(iii); see *In re Renicker*, 342 B.R. 304, 310 (Bankr. W.D. Mo. 2006) (denying rebuttal for want of documentation).

⁵⁰⁹ 350 B.R. 770, 773 (Bankr. N.D. Ohio 2006).

⁵¹⁰ *Id.* at 777–78.

⁵¹¹ 349 B.R. 581, 586–87 (Bankr. N.D. Iowa 2006).

⁵¹² *In re Tranmer*, 355 B.R. 234, 250–51 (Bankr. D. Mont. 2006).

Unusually high sales commissions just before bankruptcy did not suffice.⁵¹³ Nor did trying but failing to reach a credit management agreement prior to bankruptcy,⁵¹⁴ paying a high rent,⁵¹⁵ or extra housing expense so each child could have his or her own room.⁵¹⁶ Inability to fund a chapter 13 plan (in light of the need for a new vehicle) may not be considered.⁵¹⁷ Losing a high-paying job (so that the means test no longer reflects the debtor's ability to pay) is not a special circumstance.⁵¹⁸

In finding extraordinary circumstances, courts may have reference to pre-BAPCPA law. Therefore, such factors as a pregnant unmarried daughter living at home and a terminally ill puppy⁵¹⁹ may cause twice-blessed mercy to drop like the gentle rain from heaven. Likewise, an organ transplant⁵²⁰ may soften the sclerotic heart of the bankruptcy court.

5. Veterans

Means-testing does not apply if the debtor is a disabled veteran and the indebtedness in question was incurred while the debtor was on active duty or performing a homeland defense activity. The patriotic reward for those who have served their country is an invitation to commit bankruptcy abuse.⁵²¹

A disabled veteran is "a veteran who is entitled to compensation under laws administered by the Secretary for a disability rated at 30 percent or more, or [] a veteran whose discharge or release from active duty was for a disability incurred or aggravated in line of duty."⁵²² A disability rating is administered by a rating officer of the U.S. Department of Veteran Affairs, according to a lengthy regulation.⁵²³ A discharge on account of disability is also tied to 30% disability, if the veteran has less than twenty years of service. In addition to a 30% disability, the veteran must have served eight years, or the disability was the proximate result of duty, or the disability

⁵¹³ *In re Ferando*, BK06-81855, 2007 Bankr. LEXIS 607, at *3-5 (Bankr. D. Neb. Mar. 1, 2007).

⁵¹⁴ *In re Oliver*, 350 B.R. 294, 303 (Bankr. W.D. Tex. 2006).

⁵¹⁵ *In re Starkey*, No. BK06-81473-TJM, 2007 Bankr. LEXIS 155, at *6-7 (Bankr. D. Neb. Jan. 25, 2007).

⁵¹⁶ *In re Delunas*, No. 06-43133-705, 2007 Bankr. LEXIS 803, at *8 (Bankr. E.D. Mo. Mar. 6, 2007).

⁵¹⁷ *In re Oliver*, 350 B.R. at 303.

⁵¹⁸ *In re Hanks*, No. 06-22777, 2007 Bankr. LEXIS 46, at *22-23 (Bankr. D. Utah Jan. 9, 2007). This holding is in the context of a chapter 13 case, where the relevance of section 707(b)(2)(B)(i) can be questioned. *See infra* Part IV.

⁵¹⁹ *In re Olson*, No. 04-23551, 2005 Bankr. LEXIS 395, at *7-8 (Bankr. Utah. Feb. 28, 2005).

⁵²⁰ *In re Boyer*, 321 B.R. 457, 461 (Bankr. N.D. Ohio 2004).

⁵²¹ *In re Newsom*, 69 B.R. 801 (Bankr. D.N.D. 1987), Judge William A. Hill wrote:

Chapter 7 should not be counted on by military personnel as a means of escaping debt where it would not be an appropriate vehicle were they civilians. Persons in the military cannot go on a consumer spending spree and later file for Chapter 7 relief expecting a bankruptcy court to treat them any differently as a consequence of military service than it would anyone else.

Id. at 805. The veteran in *Newsom*, however, was not disabled.

⁵²² 38 U.S.C. § 3741(1) (2000).

⁵²³ Pensions, Bonuses, and Veterans' Relief, 38 C.F.R. § 4 (2006).

was incurred in time of war or was incurred after September 14, 1978.⁵²⁴

It is not enough to be a disabled veteran. It must also be the case that the "indebtedness [was] occurred primarily during a period in which he or she was [] on active duty (as defined in section 101(d)(1) of title 10 [or] performing a homeland defense activity (as defined in section 901(1) of title 32))."⁵²⁵ Active duty is defined as:

[F]ull-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.⁵²⁶

A homeland defense activity is an:

[A]ctivity undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to national security, from a threat or aggression against the United States.⁵²⁷

This provision was added as part of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005,⁵²⁸ which is better known for declaring torture to be, however temporarily, contrary to American policy.⁵²⁹ Another portion of that act makes clear that members of the National Guard⁵³⁰ who defend local sites from terrorism are engaged in "homeland defense activity" and so are invited to commit bankruptcy fraud under section 707(b)(2)(D)(ii). But members of the National Guard sent to Iraq are not eligible to be considered on active duty or engaged in homeland defense. This means that disabled National Guard members assigned to protect a critical potential target for terrorists, such as the Old MacDonald's Petting Zoo near Huntsville, Alabama,⁵³¹ have an invitation to commit bankruptcy abuse, but National Guard members disabled in Iraq are not similarly privileged.

If a disabled veteran is able to claim this immunity from means testing, the form

⁵²⁴ 10 U.S.C. § 1201(b) (2000).

⁵²⁵ 11 U.S.C. § 707(b)(2)(D) (2006).

⁵²⁶ 10 U.S.C. § 101(d)(1) (2000).

⁵²⁷ 32 U.S.C.A. § 901(1) (West Supp. 2006).

⁵²⁸ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811.

⁵²⁹ *Id.* § 1091, 118 Stat. at 2068–69.

⁵³⁰ National Guard members are considered veterans unless they served between 1955 and 1976. *See* 5 U.S.C.A. § 2108(1)(B) (West Supp. 2006). So neither President Bush nor former Vice President Dan Quayle can claim to be veterans.

⁵³¹ *See Petting Zoo and Flea Market Make Nonsense of US Target List*, MANCHESTER GUARDIAN, July 13, 2006, at 23.

designed by the Office of the United States Trustee graciously excuses the veteran of filling out the rest of the laborious form.⁵³²

6. Sanctions

BAPCPA includes an ominous provision threatening sanctions under rule 9011 of the Federal Rules of Bankruptcy Procedure if the trustee makes a motion under section 707(b) and prevails. The sanction could include the trustee's attorneys' fees and other costs.⁵³³ The court must find that the lawyer violated rule 9011.

This sounds worse than it is, however. Under rule 9011, the trustee would have to make a separate motion for sanctions and serve it on the bankruptcy lawyer before serving it on the court. The lawyer then has the opportunity to correct or withdraw the challenged "paper, claim, defense, contention, allegation or denial."⁵³⁴ If the correction is made, the trustee's motion must be denied.⁵³⁵ The court, however, on its own initiative may issue an order to show cause as to the sanction.⁵³⁶ If the lawyer has corrected the record prior to this order to show cause, the court on its own initiative may not give a monetary sanction.⁵³⁷

To be sure, section 707(b)(4)(A) indicates that the court may, on its own initiative, award the trustee attorney's fees as a sanction, but it can only do so "in accordance with the procedures described in rule 9011"⁵³⁸ The safe harbor provisions of that rule should provide major comfort to bankruptcy lawyers.⁵³⁹

Nevertheless, the attorney's signature constitutes a representation that the attorney (i) "performed a reasonable investigation into the circumstances that gave rise to the petition . . . ,"⁵⁴⁰ and (ii) has no knowledge that anything in the bankruptcy petition is incorrect.⁵⁴¹

There is also a provision suggesting that the debtor's lawyer can move for sanctions if a party in interest (other than the United States trustee) abusively moves to dismiss the bankruptcy under section 707(b).⁵⁴² The court, however, must find that the motion violates rule 9011 and was made "solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title."⁵⁴³ Once again, the safe harbor

⁵³² Form B22A, *supra* note 32, Part I.

⁵³³ See 11 U.S.C. § 707(b)(4) (2006).

⁵³⁴ FED. R. BANKR. P. 9011(c)(1).

⁵³⁵ *Id.*

⁵³⁶ FED. R. BANKR. P. 9011(c)(1)(B).

⁵³⁷ FED. R. BANKR. P. 9011(c)(2)(B).

⁵³⁸ 11 U.S.C. § 707(b)(4)(A) (2006).

⁵³⁹ The 1997 House bill was far worse for bankruptcy lawyers. Regardless of rule 9011's safe harbor provisions, the court was authorized to dun the debtor's lawyers if the bankruptcy petition was not substantially justified. See Richard E. Coulson, *Consumer Abuse of Bankruptcy: An Evolving Philosophy of Debtor Qualification for Bankruptcy Discharge*, 62 ALB. L. REV. 467, 535 (1998) (noting court may order debtor to reimburse trustee for all reasonable costs in prosecuting motion regarding petition not "substantially justified").

⁵⁴⁰ 11 U.S.C. § 707(b)(4)(C)(i) (2006).

⁵⁴¹ *Id.* § 707(b)(4)(D).

⁵⁴² See *id.* § 707(b)(5)(A).

⁵⁴³ *Id.* § 707(b)(5)(A)(ii)(II).

provisions of rule 9011 will be of great comfort to the lawyers moving to dismiss the case. In addition, since few human acts are motivated "solely" by one consideration, debtors will be unlikely to satisfy the "sole purpose" criterion. Even so, unrepresented movants seeking to dismiss are immune from counter-sanctions if the movant is a small business with a claim less than \$1,000.⁵⁴⁴

C. Means Testing In Excess of Section 707(b)(2)

According to section 707(b)(3), the court can still dismiss a case even if the income of the debtor and her spouse together fall below the state median income. Section 707(b)(3) provides:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) does not arise^[545] or is rebutted, the court shall consider—

- (A) whether the debtor filed the petition in bad faith; or
- (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.⁵⁴⁶

Suppose a debtor flunks the means test but is entitled to the total immunity of section 707(b)(7). Or suppose the debtor passes the means test by loading up on secured debt but has surplus income according to Schedules I and J. Can a court dismiss the case under section 707(b)(3) because the debtor has sufficient post-petition surplus income to pay creditors more? Judge Mary Walrath so decided in *In re Paret*.⁵⁴⁷ In this regard,

⁵⁴⁴ See *id.* § 707(b)(5)(B). A lengthy definition of "small business" is supplied in 11 U.S.C. § 707(b)(5)(C) (2006).

⁵⁴⁵ This is a mis-citation. There is no subparagraph (A)(i) to "such paragraph"—i.e., paragraph (1). Presumably Congress meant to refer to subparagraph (A)(i) to paragraph (2). For literalists, no harm is done, since the non-existent presumption of subparagraph (1)(A)(i) never arises, as it does not exist. The statute works perfectly well on this assumption.

⁵⁴⁶ 11 U.S.C. § 707(b)(3) (2006). In empowering the court to dismiss a chapter 7 case on the totality of the circumstances, an example is given of the rejection of executory contracts. It is possible that a person who is perfectly solvent would become insolvent if the debtor filed for bankruptcy and rejected an unfavorable executory contract. Rock stars have apparently used this tactic to break their contracts. See generally Risa Letowsky, Note, *Broke or Exploited: The Real Reason Behind Artist Bankruptcies*, 20 CARDOZO ARTS & ENT. L.J. 625 (2002) (examining rejection of recording contracts in bankruptcy). Of course, they would have to give up their vacation homes and custom built Rolls Royce automobiles to a chapter 7 trustee, but this loss might be more than compensated by the second recording label to sign them. Congress did good work in targeting this practice as an abuse. These rock stars would be perfectly solvent if they simply lived up to the word of honor and performed the contract as promised. Unfortunately, rock stars are unlikely to be subject to section 707(b), as their breach-of-contract debts are not consumer debts. It is doubtful that a breach of an executory contract will ever constitute a consumer debt, or that the amount of consumer debts will exceed the damage claim for breach of the executory contract.

⁵⁴⁷ 347 B.R. 12, 13, 16–17 (Bankr. D. Del. 2006).

Judge Walrath goes against the president, who, in signing BAPCPA into law, presumed that "[t]hose who fall behind their state's median income will not be required to pay back their debts. This practical reform will help ensure that debtors make a good-faith effort to repay as much as they can afford."⁵⁴⁸ Yet Judge Walrath is perfectly correct. It is not the case that below-median debtors are immune from the means test. It is only the case that standing to make the motion is restricted. In *Paret*, only the United States trustee had standing to move for a dismissal, thanks to section 707(b)(6). The debtor qualified for the near-total immunity of section 707(b)(7). Nevertheless, the United States trustee moved to dismiss on the "totality of the circumstances," which included whether surplus income was present.⁵⁴⁹

Contrast Judge Walrath's position with Judge William Stocks's opinion in *In re Barr*,⁵⁵⁰ where a United States trustee tried to claim that a chapter 13 plan was in bad faith because a debtor who passed the means test nevertheless had excess disposable income. Judge Stocks, citing pre-BAPCPA law, ruled that chapter 13's good faith requirement could not be used to strike down plans for not paying enough where all disposable income was given into the plan.⁵⁵¹ If this is so in chapter 13, perhaps it should also be so in chapter 7. Courts, however, have disagreed and have found that too much income is bad faith in chapter 13, even if the debtor has technically dedicated all his disposable income, as BAPCPA defines it, to the plan.⁵⁵²

Can surplus income be grounds for dismissal when the debtor has met the means test? If section 707(b)(2)'s mechanical means test implies that "totality of the circumstances" excludes considerations of surplus income, then how can we explain the very choice of the words "totality of the circumstances"? This was a phrase introduced to section 707(b) jurisprudence prior to BAPCPA by *Green v. Staples (In re Green)*.⁵⁵³ *Green* held that the presence of surplus net income was *not* enough to justify dismissal.⁵⁵⁴ Some other bad fact had to be adduced *in addition*. Since the phrase is associated in part with surplus income, it is rather hard to justify the conclusion that surplus income may not be considered as part of the "totality of circumstances," especially since BAPCPA struck the phrase "substantial abuse" from section 707(b) and substituted ordinary, quotidian abuse of a modest nature.⁵⁵⁵ In any case, a

⁵⁴⁸ Press Release, *President Signs BAPCPA*, *supra* note 237.

⁵⁴⁹ *In re Paret*, 347 B.R. at 13–14; *accord In re Schoen*, No. 06-20864-7, 2007 Bankr. LEXIS 633, *5–6 (Bankr. D. Kan. Mar. 2, 2007); *In re Mestamaker*, No. 05-76976, 2007 Bankr. LEXIS 78, at *14–22 (Bankr. N.D. Ohio Jan. 10, 2007); *In re Pak*, 343 B.R. 239, 244–45 (Bankr. N.D. Cal. 2006).

⁵⁵⁰ 341 B.R. 181, 184–85 (Bankr. M.D.N.C. 2006).

⁵⁵¹ *Id.* at 184 (citing *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968 (4th Cir. 1982)); *see also* 11 U.S.C. § 1325(a)(3) (2006) (declaring chapter 13 plans must be proposed in good faith).

⁵⁵² *See, e.g., In re Edmunds*, 350 B.R. 636, 638–39 (Bankr. D.S.C. 2006).

⁵⁵³ 934 F.2d 568, 572 (4th Cir. 1991).

⁵⁵⁴ *Id.*

⁵⁵⁵ *Accord In re Nockerts*, 357 B.R. 497, 507–08 & n.6 (Bankr. E.D. Wis. 2006) ("Given the detailed nature of the means test in § 707(b)(2), this Court holds that similar to the old totality of the circumstances test, more than an ability to pay (as shown on the debtor's Schedule I and J) must be shown to demonstrate abuse under § 707(b)(3)(B)."); *In re Simmons*, 357 B.R. 480, 488–89 (Bankr. N.D. Ohio 2006); *In re Richie*, 353 B.R. 569, 572 (Bankr. E.D. Wis. 2006).

"totality," by its nature, excludes nothing—not even surplus income.⁵⁵⁶

If the statutory means test is preemptive, then the entire enterprise of cracking down on high-income debtors is turned on its head. The statutory test invites debtors to buy luxury cars, boats and vacation homes on secured debt; payment of this secured debt is a deductible expense. If section 707(b)(3) does not permit courts to punish this sort of behavior, then bankruptcy abuse is *enhanced*, not prevented.⁵⁵⁷ Recall that BAPCPA is the bankruptcy abuse *prevention* act. Any other view of section 707(b)(3) is BAFCPA,⁵⁵⁸ not BAPCPA.

A broad interpretation of section 707(b)(3) permits courts to punish strategic manipulation of the means test. Thus, a striking worker could show a very low current monthly income and could still be invited out of chapter 7, because his future earnings were expected to be high.⁵⁵⁹ A case has been dismissed under section 707(b)(3) because the debtor had received a pay bonus and spent it on luxuries rather than paying off claims.⁵⁶⁰ As under the prior law, cases can be dismissed because a non-debtor spouse has a high income, even if the bankrupt debtor does not.⁵⁶¹ Voluntary unemployment can be punished by a (b)(3) dismissal.⁵⁶² Unlike the section 707(b)(2) test, which involves six-month historical averages, a dismissal under (b)(3) may consider post-petition developments.⁵⁶³ These cases constitute early evidence that none of the old case law under section 707(b) is preempted by BAPCPA.

Still, counter-arguments can be made. For example, disabled veterans are not subject to the statutory means test, if their indebtedness arose during active duty or protecting designated terrorist targets in the United States, such as the Old MacDonald Petting Zoo.⁵⁶⁴ Does a court have discretion to find that the presence of a disabled veteran's surplus income is an abuse of the bankruptcy process under section 707(b)(3)? Unless the means test of section 707(b)(2) is completely preemptive for everyone, it would appear that disabled veterans can be deprived of their right to commit bankruptcy abuse by unpatriotic bankruptcy courts. This imposition on disabled veterans may provide weight for the argument that the section 707(b)(2) means test is preemptive for everyone. Any other holding betrays the right of disabled veterans to commit bankruptcy abuse.

⁵⁵⁶ See DAVID GRAY CARLSON, A COMMENTARY TO HEGEL'S SCIENCE OF LOGIC 261 (2007) [hereinafter CARLSON, *HEGEL'S SCIENCE OF LOGIC*].

⁵⁵⁷ See *In re Gress*, 344 B.R. 919, 922 (Bankr. W.D. Mo. 2006) ("In enacting the means test, Congress intended to take away discretion from the courts as to higher income debtors, who were seen as abusers of the system.").

⁵⁵⁸ Bankruptcy abuse *facilitation*.

⁵⁵⁹ *In re Quintana*, No. 4:05-bk-08497-JMM, 2006 Bankr. LEXIS 1973, at *1–2, *6 (Bankr. D. Ariz. May 3, 2006) (converting case to chapter 13 because of debtor's higher future income).

⁵⁶⁰ *In re James*, 345 B.R. 664, 668 (Bankr. N.D. Iowa 2006).

⁵⁶¹ See *In re Haney*, No. 06-40350, 2006 Bankr. LEXIS 2830, at *6 (Bankr. W.D. Ky. Oct. 19, 2006).

⁵⁶² See *In re Richie*, 353 B.R. 569, 577–80 (Bankr. E.D. Wis. 2006) (utilizing student loan undue hardship precedents).

⁵⁶³ See *In re Pennington*, 348 B.R. 647, 650–51 (Bankr. D. Del. 2006) (considering post-petition developments for dismissal). The totality of the circumstances thus consists of the environment at the time of the hearing, not at the time of the bankruptcy petition. See *In re Richie*, 353 B.R. at 576; *In re Pennington*, 348 B.R. at 650–51.

⁵⁶⁴ See 11 U.S.C. § 707(b)(2)(D) (2006); see also *supra* text accompanying note 531.

In spite of such arguments, and with due respect to disabled veterans for the sacrifices they have made, the better view is that, since the mechanical test is rife with opportunity for abuse, Congress must have intended to empower judges to dismiss cases of debtors, whether they be veterans or not. Otherwise, the meaning of BAPCPA is to increase dramatically the opportunity for bankruptcy abuse.⁵⁶⁵

One potent reason for this conclusion is this: prior to BAPCPA a United States trustee could obtain a dismissal if the chapter 7 case constituted a *substantial* abuse. BAPCPA strikes the word "substantial" and permits dismissal for minor or trivial abuse. Yet any claim that the means test preempts use of surplus income under (b)(3) licenses *enormous* abuse, where debtors win a bankruptcy discharge through the purchase of yachts and luxury cars on secured credit. Surely, this is not what Congress intended.

IV. DISPOSABLE INCOME IN CHAPTER 13

Means testing takes a different form in chapter 13. Whereas, after BAPCPA, means testing yields the dismissal of a chapter 7 case (or conversion to chapter 13, at the debtor's option), chapter 13 uses the BAPCPA test to determine "disposal income," all of which must be dedicated to payment of creditors under the chapter 13 plan. That is to say, in order to obtain confirmation of a plan and ultimate discharge,⁵⁶⁶ a debtor must dedicate all "disposable income" to the execution of the plan for the requisite period. Thanks to BAPCPA, the definition of disposable income is tied to the section 707(b)(2) means test—although there is linguistic ground to dispute this conclusion.

By way of background, when chapter 13 was first enacted, debtors were only

⁵⁶⁵ Two consumer bankruptcy experts, Marianne B. Culhane and Michaela M. White, have argued, in contrast, that where a debtor passes the means test, surplus income can never be the basis of a dismissal. *Contra In re Hill*, 328 B.R. 490, 506 (Bankr. S.D. Tex. 2005) (noting pre-BAPCPA dictum). Their major point is that, if (b)(3) enables dismissal for surplus income even if the debtor passes the means test, the means test is rendered superfluous—an interpretative *faux pas*. Culhane & White, *Catching Can-Pay Debtors*, *supra* note 25, at 690 (noting examples where means test is irrelevant). Yet Culhane and White also concede that a dismissal of a debtor for gaming the means test by, say, incurring secured debt for luxury items on the eve of bankruptcy for the sole purpose of passing the means test is grounds for dismissal under section 707(b)(3)(B). But once this is conceded, cannot *anything* sanctioned by the means test be used as grounds to get rid of a debtor under the "totality of the circumstances"? For these reasons, Culhane and White are contradictory on the question whether there exists *any* immunity against (b)(3) dismissals based on the content of the (b)(2) test.

While we are at it, Culhane and White also protest the notion that debtor retention of excessive exempt property could be grounds to dismiss the chapter 7 case. *Id.* at 690–91. But isn't the whole exercise of section 707(b) designed to punish debtors for seeking to retain too much post-petition wage income, which, like exempt property, the creditors cannot get in chapter 7? Given the premise of section 707(b) in this regard, it is hard to see why a court should *not* use dismissal to coerce a debtor to surrender exemptions. See generally Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035 (2006) (arguing bankruptcy judge has duty to consider debtor's financial situation even though means test presumption is inapplicable).

⁵⁶⁶ Discharge in chapter 13 is deferred until the plan is completed. 11 U.S.C. § 1328(a) (2006). Where the plan is not completed, a bankruptcy court still has discretion to grant a discharge if the debtor has paid more than the creditors would have received in chapter 7, if modification of the plan is not feasible, and if plan default was not the debtor's fault. 11 U.S.C. § 1328(b) (2006).

required to pay every creditor what he or she would have received in chapter 7.⁵⁶⁷ Since a great many debtors had no non-exempt assets, this implied zero payment plans in chapter 13 could be routinely confirmed.⁵⁶⁸ In 1984, Congress added the further requirement that, unless every unsecured creditor and the chapter 13 trustee consented otherwise,⁵⁶⁹ debtors would have to dedicate all disposable income to the chapter 13 plan.⁵⁷⁰

Under former 1322(d), and prior to 1984, there was no required duration of a chapter 13 plan.

[P]lan payments could extend anywhere from 30 days to five years. There was no minimum length required nor any minimum amount that must be dedicated to the plan other than the requirement under § 1325(a)(4) that the plan pay unsecured creditors at least as much as they would receive in a Chapter 7 liquidation.⁵⁷¹

In those days, courts used the good faith requirement of section 1325(a)(3) to prevent the debtor from writing a plan of too short duration.⁵⁷²

In 1984, however, Congress added section 1325(b) which required (unless all creditors consented otherwise) debtors to dedicate "disposable income" to the plan for a minimum of three years (unless, of course, unsecured creditors were entirely paid in a shorter period).⁵⁷³

The definition of disposable income was relatively simple. It meant income not reasonably necessary for maintenance or support of the debtor or a dependent of the debtor.⁵⁷⁴ If the debtor ran a business, disposable income was defined as that income which was not necessary for "the continuation, preservation, and operation of such business."⁵⁷⁵ In order to adjudicate disposable income, a debtor was required to file Schedule I, showing income, and Schedule J, showing expenses. In 1998, Congress added a televangelist amendment making religious and charitable contributions the equivalent of maintenance and support of the debtor.⁵⁷⁶

⁵⁶⁷ 11 U.S.C. § 1325(a)(4), (5) (1978).

⁵⁶⁸ *E.g.*, *In re Sheets*, 26 B.R. 523, 526 (Bankr. D.N.M. 1983) (confirming zero payment plan).

⁵⁶⁹ If no creditor objects, the court must approve a plan even if not all disposable income is dedicated to the plan. *See In re Benson*, 352 B.R. 740, 742 (Bankr. E.D.N.C. 2006).

⁵⁷⁰ *See generally* James Rodenberg, Comment, *Reasonably Necessary Expenses or Life of Riley?: The Disposable Income Test and a Chapter 13 Debtor's Lifestyle*, 56 MO. L. REV. 617, 622 (1991) (recounting legislative history for chapter 13 legislation).

⁵⁷¹ *In re Davis*, 348 B.R. 449, 452 (Bankr. E.D. Mich. 2006).

⁵⁷² *See, e.g., id.*

⁵⁷³ *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356.

⁵⁷⁴ 11 U.S.C. § 1325(b)(2)(A) (1986).

⁵⁷⁵ *Id.* § 1325(b)(2)(B).

⁵⁷⁶ Since tithing still must be "reasonably necessary to be expended," courts after 1998 still found cause to question whether tithing could be subtracted from disposable income. 11 U.S.C. § 1325(b)(2) (2006); *see* Anne McLaughlin, *Tithing in a Chapter 13 Plan: The Requirement of Reasonableness Under the Religious Liberty and Charitable Donation Protection Act*, 47 B.C. L. REV. 375, 391–93 (2006) (analyzing cases where courts

Courts came to confirm very different chapter 13 plans. One version was a "pot plan." According to such a plan, the debtor had to pay a fixed amount defined by the amount of disposable income over the three-year period.⁵⁷⁷ Alternatively, courts confirmed percentage plans; the debtor would continue to pay until the unsecured creditors were paid a stipulated percentage of their claim.⁵⁷⁸ At stake was: who benefits when unsecured creditors do not file proofs of claim by the bar date? In a pot plan, the other unsecured creditors get a higher percentage when one of their fellows forgets about the proof of claim. In a percentage plan the debtor benefits because, once the filing creditors get their percentage, the debtor can stop contributing disposable income to the plan.

BAPCPA now more rigorously regulates the length of a chapter 13 plan. BAPCPA requires chapter 13 plans to run for five years, if the debtor and any spouse have incomes above the state median income. Otherwise, plans are to run for three years. Section 1322(d)(2) still permits the extension of the three-year period (now applicable to below-median debtors only). Prior to BAPCPA, many courts held that the debtor must voluntarily agree to this extension.⁵⁷⁹ In either case, lesser time is possible if the plan provides for payment in full of all creditors.⁵⁸⁰

Courts have generally rejected the premise that the three-or-five year period can be used to calculate a total payment, which can then be paid over a shorter period.⁵⁸¹ This is a blow to debtors with *no* disposable income, who hope to stay with the plan only until the administrative creditors and car lender are paid.⁵⁸² But it can be defended on

struggled to determine whether tithing could be subtracted from disposable income). BAPCPA does nothing to rescue televangelism from this dilemma. See McLaughlin, *supra*, at 397 ("Giving religious donations similar treatment would require a distinct, automatic exemption.").

⁵⁷⁷ See *In re Golek*, 308 B.R. 332, 335 (Bankr. N.D. Ill. 2004) ("[A] pot plan . . . fixes the amount a debtor must pay into the plan, leaving the question of percentage each general unsecured creditor will receive in payment until all claims are approved.").

⁵⁷⁸ See *id.* ("A percentage plan designates what percentage of its claim each general unsecured creditor will receive without stating an exact dollar amount the debtor must pay into the plan . . ."); see also Richard I. Aaron, *Hooray for Gibberish: A Glossary of Bankruptcy Slang for the Occasional Practitioner or Bewildered Judge*, 3 DEPAUL BUS. & COMM. L.J. 141, 162 (2005) (designating significance of percentage plans and how they pay creditors "a percentage of their claims").

⁵⁷⁹ See *In re Nevitt*, No. 05-77798, 2006 Bankr. LEXIS 1763, at *14 (Bankr. N.D. Ill. Aug. 18, 2006) (citing *In re Villanueva*, 274 B.R. 836, 842 (B.A.P. 9th Cir. 2002)).

⁵⁸⁰ See 11 U.S.C. § 1325(b)(4)(B) (2006).

⁵⁸¹ Accord *In re Luton*, No. 6:06-bk-70629M, 2007 Bankr. LEXIS 717, at *8 (Bankr. W.D. Ark. Mar. 8, 2007); *In re Slusher*, No. BK-S-06-10435-BAM, 2007 Bankr. LEXIS 127, at *5 (Bankr. D. Nev. Jan. 17, 2007); *In re Casey*, 356 B.R. 519, 526–27 (Bankr. E.D. Wash. 2006); *In re Girodes*, 350 B.R. 31, 34 (Bankr. M.D.N.C. 2006); *In re Davis*, 348 B.R. 449, 457 (Bankr. E.D. Mich. 2006); *In re Nevitt*, 2006 Bankr. LEXIS 1763, at *11–12; *In re Schanuth*, 342 B.R. 601, 606–08 (Bankr. W.D. Mo. 2006); see also *In re Wayman*, 351 B.R. 808, 812 (Bankr. E.D. Tex. 2006) (granting payment in full of all allowed unsecured claims over shorter period of time so long as projected disposable income requirement is imposed).

⁵⁸² *In re Girodes*, 350 B.R. at 37 ("Debtor contends that if there is no disposable income and the debtor pays priority and secured debt in a shorter period of time, the debtor should receive a discharge."); see also *In re Dew*, 344 B.R. 655, 662–63 (Bankr. N.D. Ala. 2006); *In re Schanuth*, 342 B.R. at 605. Where the debtor has negative disposable income and is nevertheless paying enough to pay the administrative expenses, the plan is not feasible within the meaning of section 1325(a)(6). However, where the debtors have social security income excludable from "current monthly income" as defined in section 101(10A)(B), and where they volunteer to contribute this

the policy ground that the minimum term permits monitoring the debtor over time and modification of the plan if the debtor's income increases over that time.⁵⁸³ A few courts, however, disagree and allow a debtor with no disposable income to end the plan early.⁵⁸⁴ On the other hand, section 1325(b) is triggered only if the trustee or a creditor objects.⁵⁸⁵ Therefore, in the absence of an objection, a court must confirm a plan of shorter duration than indicated by the applicable commitment period.⁵⁸⁶

In addition, it has been suggested that *modification* under section 1329 is not subject to these time periods.⁵⁸⁷ If so, debtors can confirm a plan with the mandatory time period and then promptly modify for the period they really prefer. According to section 1329(b)(1) of the Bankruptcy Code, only sections 1322(a) and (b), 1323(c), and 1325(a) apply to modifications. The minimum "applicable commitment period" is established in section 1325(b).⁵⁸⁸ Therefore, modification becomes a means to subvert the commitment period. It remains to be seen whether courts will permit this to happen. For example, section 1325(a)(3), which does apply to modifications, requires that a plan be in good faith. This wildcard may be enough to prevent the subversion of the commitment period. But, once again, the question arises whether it is bad faith to take advantage of opportunities created in the Bankruptcy Code itself. Use of the good faith requirement to prevent actions consistent with the statute is tantamount to legislation, a function properly allocated to Congress alone.

A. Gross Income

Disposable income for both above- and below-median debtors involves "current monthly income," a new term defined by BAPCPA. As we have seen, this involves average monthly income over the six months prior to bankruptcy.⁵⁸⁹

BAPCPA provides several income exclusions for chapter 13. To the extent chapter 13 adds these deductions from income, the chapter 7 means test does not accurately

amount to the plan, the implication can be overcome. See *In re Schanuth*, 342 B.R. at 605.

⁵⁸³ See *In re Slusher*, 2007 Bankr. LEXIS 127, at *36 ("With an ongoing obligation by the debtor to remain in bankruptcy for the plan term, interested parties can monitor the debtor and capture any increases in the debtor's income during that time.").

⁵⁸⁴ See *In re Brady*, No. 06-18922/JHW, 2007 Bankr. LEXIS 501, at *6 (Bankr. D.N.J. Feb. 13, 2007); *In re Fuger*, 347 B.R. 94, 102 (Bankr. D. Utah 2006); see also *In re Alexander*, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006) ("Because applicable commitment period is a term the statute makes relevant only with regard to the required payment of projected disposable income to unsecured creditors and not to any other plan payments or requirements, it simply does not come into play where no projected disposable income must be taken into account.") (dictum).

⁵⁸⁵ 11 U.S.C. § 1325(b)(1) (2006) ("If the trustee or the holder of an allowed unsecured claim objects . . .").

⁵⁸⁶ See *In re Jackson*, 353 B.R. 849, 852 (Bankr. E.D.N.C. 2006).

⁵⁸⁷ See *Sunahara v. Burchard* (*In re Sunahara*) 326 B.R. 768, 781–82 (B.A.P. 9th Cir. 2005); *In re Girodes*, 350 B.R. at 38 ("While pre-confirmation modifications must comply with all of the requirements of § 1322, post-confirmation modifications only require compliance with §§ 1322(a), 1322(b), 1323(c) and 1325(a).").

⁵⁸⁸ See 11 U.S.C. § 1325(b)(4) (2006). A maximum is also set in section 1322(d). See *id.* § 1322(d)(2) (noting "the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years" if certain factors are met).

⁵⁸⁹ See *supra* text accompanying notes 259–61.

foretell the chapter 13 payout. For example, section 1325(b)(2) requires deductions from this gross income amount: "child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child" ⁵⁹⁰ In chapter 7, these amounts are included within "current monthly income," for purposes of the means test. ⁵⁹¹ And, according to new section 1322(f):

A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute 'disposable income' under section 1325. ⁵⁹²

We learn in section 362(b)(19) that the automatic stay cannot prevent the

withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457 or 501(c) of the Internal Revenue Code of 1986 that is sponsored by the employer of the debtor

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title ⁵⁹³

Here we see a requirement that chapter 13 reinstate the repayment of an ERISA loan. So, it must be the case that the amounts needed to fund the reinstatement are not to be included within the concept of disposable income. ⁵⁹⁴

Although the concept nowhere appears in section 1325(b), which defines

⁵⁹⁰ 11 U.S.C. § 1325(b)(2) (2006).

⁵⁹¹ See *supra* Part III.A.6.b.

⁵⁹² 11 U.S.C. § 1322(f) (2006).

⁵⁹³ *Id.* § 362(b)(19).

⁵⁹⁴ In *In re Haley*, 354 B.R. 340, 343–44 (Bankr. D.N.H. 2006), the debtors were committed to a sixty-month plan. Yet their ERISA loan would be paid in only twenty-eight months. The United States trustee insisted that Judge Mark Vaughn borrow from the rule of section 707(b)(2)(A)(iii), pertaining to secured loan expenses. That rule requires that total payments due be divided by sixty to determine average monthly expense. Judge Vaughn refused to prorate. The debtors were permitted to deduct the full amount of the ERISA loan repayment, even though these payments would end in twenty-eight months. See *id.* at 344; accord *In re Wiggs*, No. 06B70203, 2006 Bankr. LEXIS 1547, at *3 (Bankr. N.D. Ill. Aug. 4, 2006). According to Judge Vaughn, "The Trustee and unsecured creditors are not without remedy . . . as plan modification under section 1329 would be available at or about the time that the loan obligation is satisfied." See *In re Haley*, 354 B.R. at 344.

disposable income, section 541(b)(7) provides that ERISA withholding "shall not constitute disposable income as defined in section 1325(b)(2)."⁵⁹⁵ So, once again,⁵⁹⁶ we see the phenomenon of, not incorporation by reference, but a kind of reflexive Hegelian self-incorporation of section 541(b)(7) into section 1325(a)(5).

The upshot of this is that any such amounts must be excluded from disposable income from chapter 13.⁵⁹⁷ This legislation therefore overrules cases which held that a debtor could not deduct from disposable income the amounts needed to repay such loans.⁵⁹⁸ Yet such withheld amounts would not be valid expenses for the purpose of section 707(b)(2), at least according to some courts.⁵⁹⁹ To this extent, section 707(b)(2) gives an inaccurate prediction of the chapter 13 alternative to chapter 7 liquidation.⁶⁰⁰ The means test therefore kicks out debtors from chapter 7 who may have no disposable income in chapter 13.⁶⁰¹

For some debtors, the definition of disposable income may make the plan infeasible and not confirmable.⁶⁰² Job loss tends to cause this anomaly, and, after all, job loss is typically the *reason* why a debtor needs bankruptcy relief.⁶⁰³ To bar debtors

⁵⁹⁵ *Id.* § 541(b)(7).

⁵⁹⁶ See *supra* text accompanying notes 56–58. Hegel would call this "return-into-self" (Rückkehr in sich). CARLSON, *HEGEL'S SCIENCE OF LOGIC*, *supra* note 556, at 262–63.

⁵⁹⁷ See *In re Wiggs*, 2006 Bankr. LEXIS 1547, at *3.

⁵⁹⁸ See *In re Anes*, 195 F.3d 177, 180 (3d Cir. 1999); *In re Harshbarger*, 66 F.3d 775, 777 (6th Cir. 1995).

⁵⁹⁹ See *In re Barraza*, 346 B.R. 724, 726, 731 (Bankr. N.D. Tex. 2006). But see *In re Thompson*, 350 B.R. 770, 776–77 (Bankr. N.D. Ohio 2006) (holding repayment of ERISA loans is a deductible secured debt expense). *Thompson* is discussed *supra* at notes 470–86.

⁶⁰⁰ See *In re Walker*, 05-15010-whd, 2006 Bankr. LEXIS 845, at *18 (Bankr. N.D. Ga. May 1, 2006) ("Section 707(b)'s presumption of abuse was not intended to and does not produce the most accurate prediction of debtor's actual ability to fund Chapter 13 plan.")

⁶⁰¹ See *In re Johns*, 342 B.R. 626, 627–28 (Bankr. E.D. Okla. 2006).

⁶⁰² See *In re Hanks*, 06-22777, 2007 Bankr. LEXIS 46, at *3 (Bankr. D. Utah Jan. 9, 2007); *In re Clemons*, 05-85163, 2006 Bankr. LEXIS 1366, at *1, *15–16 (Bankr. N.D. Ga. June 1, 2006).

⁶⁰³ See *In re Slusher*, BK-S-06-10435, 2007 Bankr. LEXIS 127, at *5–6, *17–19 (Bankr. D. Nev. Jan. 17, 2007) ("[T]his court holds that line 58 of Form B22C is a presumptive, but not an exclusive, basis for calculating 'projected disposable income' as used in 11 U.S.C. § 1325(b)(1)(A)."); *In re Grady*, 343 B.R. 747, 753 (Bankr. N.D. Ga. 2006); *In re Jass*, 340 B.R. 411, 417–18 (Bankr. D. Utah 2006). In *In re Hanks*, Judge Judith Boulden specifically rejected this argument and held that B22C governs disposable income:

It is not at all clear that Congress did not actually intend to keep people out of bankruptcy altogether if possible or perhaps to push them into individual chapter 11 cases, nor is it clear that a "fresh start" is still the overriding policy of the portions of the Bankruptcy Code at issue in this case. Perhaps the concept of current monthly income is an expression of Congress' intent that debtors should attempt to resolve their financial difficulties outside of bankruptcy for a period of time before filing. Indeed, this view would jibe with the new prepetition briefing requirement in § 109(h)(1) that contemplates meaningful credit counseling and the performance of budget analyses within six months of filing as well as the requirement in § 521(b)(2) that the debtor file a copy of any debt repayment plan developed during the prepetition counseling session.

2007 Bankr. LEXIS 46, *17–18 (footnote omitted). A congressional intent to push chapter 13 debtors whose incomes have fallen into chapter 11 must be discounted, as chapter 11 requires the commitment of disposable income to the plan, per the definition in section 1325(b). See 11 U.S.C. § 1129(a)(15) (2006).

from chapter 13 *because* they have lost high-paying jobs is perverse indeed.⁶⁰⁴

The opposite is also possible. Net current monthly income on Form B22C may be lower than actual net income. In such cases there is an incentive to rush into bankruptcy on the basis of the low historical average.⁶⁰⁵

According to section 1325(b)(1), a plan must provide that "all of the debtor's '*projected* disposable income' received in the 'applicable commitment period'" must be dedicated to the plan.⁶⁰⁶ Yet Form B22C asks for historic income, which may not accord with *projected* income. According to Judge Bruce Markell:

[H]istorical figures [must not be] the exclusive determinants of those finances. Otherwise, projecting static historical figures over a future period would be like attempting to ascertain the future value of a company's stock based solely on the average of its stock price over the previous six months, without taking into account currently anticipating market trends. Using just the foreclosure's static historical income average and nothing else could lead to a projection unhinged from reality.⁶⁰⁷

Because of these anomalies, and because section 1325(b)(1)(B) refers to *projected* disposable income, many courts have rejected exclusive use of the historic average and required the use of future projections based on facts not appearing on the face of Form

⁶⁰⁴ In *In re Hanks*, Judge Judith Boulden held that, in cases where Form B22C made chapter 13 plans infeasible, a court might lighten up on the disposable income requirement under the authority of section 707(b)(2)(B)(i):

[In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating] "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that [sic] justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."

2007 Bankr. LEXIS 46, at *22 (quoting 11 U.S.C. § 707(b)(2)(B)(i) (2006)). In *Hanks*, the debtor had lost a high-paying computer programming job and was reduced to reviewing bad movies for objectionable content at 20 cents a minute. Judge Boulden ruled that job degradation was not an extraordinary circumstance, but the question arises whether the debtor's submission of a plan in chapter 13 constitutes a "proceeding brought under this subsection"—that is, under section 707(b). *Id.* at *22–24. The argument in favor of Judge Boulden's reference to section 707(b)(2)(B)(i) is that, according to section 1325(b)(3), "amounts reasonably necessary to be expended under [§ 1325(b)(2)] shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)," if the debtor is above-median. *Id.* at *7 (emphasis added). Judge Boulden therefore proposes to use section 707(b)(2)(B)(i) to adjust *income*, whereas section 1325(b)(3) references section 707(b)(2) only with regard to *expenses*. In chapter 13, income is defined in section 1325(a)(2) to be "current monthly income," a term defined by section 101(10A). In section 101(10A), one finds no invitation to make adjustments of the sort extended by section 707(b)(2)(B)(i) in chapter 7 cases. Therefore, Judge Boulden overreaches by borrowing the discretion of section 707(b)(2)(B)(i) for use in chapter 13 cases.

⁶⁰⁵ See *In re Hardacre*, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006).

⁶⁰⁶ *In re Slusher*, 2007 Bankr. LEXIS 127, at *7 (emphasis added).

⁶⁰⁷ *Id.* at *16.

B22C.⁶⁰⁸ Schedule I contains this information. Form B22C has been called the "rear view mirror" approach; Schedule I, which asks the debtor to project income going forward, is the "crystal ball" approach.⁶⁰⁹ In addition, section 1325(b)(1) refers to "as of the effective date of the plan"⁶¹⁰ This also points away from "current monthly income" and toward Schedule I.⁶¹¹

Does this not make the definition of "current monthly income" irrelevant? Not quite. Form B22C must still be used to determine whether a debtor is above or below the median income.⁶¹² The definition was still relevant to define the *sources* of income, even if its concept of historic average is rejected.⁶¹³ And in *In re Jass*,⁶¹⁴ Judge William Thurman ruled that current monthly income created a presumption of projected income, unless the debtor came forward with contrary evidence.⁶¹⁵

The definition is also relevant to establish the rule that social security income must

⁶⁰⁸ Accord *In re Riggs*, No. 06-20826, 2007 Bankr. LEXIS 542, at *9 (Bankr. E.D. Ky. Feb. 27, 2007); *In re LaPlana*, No. 06:05-bk-17635-KSJ, 2007 Bankr. LEXIS 329, at *16–17 (Bankr. M.D. Fla. Feb. 9, 2007); *In re Zimmerman*, No. 06-31086, 2007 Bankr. LEXIS 410, at *18 (Bankr. N.D. Ohio Jan. 29, 2007); *In re Pak*, No. 05-49326, 2006 Bankr. LEXIS 3437, at *5–10 (Bankr. N.D. Cal. Dec. 14, 2006); *In re Edmunds*, 350 B.R. 636, 639–44, 646–47 (Bankr. D.S.C. 2006); *In re Demonica*, 345 B.R. 895, 900–01, 905 (Bankr. N.D. Ill. 2006); *In re Fuller*, 346 B.R. 472, 475 (Bankr. S.D. Ill. 2006); *In re Grady*, 343 B.R. 747, 752 (Bankr. N.D. Ga. 2006); *In re Kibbe*, 342 B.R. 411, 413–15 (Bankr. D.N.H. 2006); *In re Jass*, 340 B.R. at 415; *In re Hardacre*, 338 B.R. at 722. But see *In re Tranmer*, 355 B.R. 234, 236–52 (Bankr. D. Mont. 2006); *In re Barr*, 341 B.R. 181, 183–84 (Bankr. M.D.N.C. 2006) (finding debtor with no net income under Form B22C and positive net income under Schedule I and J could not be found in bad faith).

⁶⁰⁹ See *In re Renicker*, 342 B.R. 304, 309 (Bankr. W.D. Mo. 2006).

⁶¹⁰ 11 U.S.C. § 1325(b)(1) (2006).

⁶¹¹ See *In re Hardacre*, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (exploring the consequences of misinterpreting "current monthly income").

⁶¹² See *In re Nevitt*, No. 05-77798, 2006 Bankr. LEXIS 1763, *7 (Bankr. N.D. Ill. Aug. 18, 2006) ("The remaining portion of Form B22C is used to calculate 'projected disposable income' in accordance with § 707(b)(2)(A) and (B).").

⁶¹³ See *In re Hardacre*, 338 B.R. at 723.

⁶¹⁴ 340 B.R. at 418.

⁶¹⁵ Accord *In re Zimmerman*, No. 06-31086, 2007 Bankr. LEXIS 410, at *25 (Bankr. N.D. Ohio Jan. 29, 2007); *In re Slusher*, BK-S-06-10435, 2007 Bankr. LEXIS 127, at *22 n.15 (Bankr. D. Nev. Jan. 17, 2007); *In re Devilliers*, No. 06-10415, 2007 Bankr. LEXIS 75, at *14–19 (Bankr. E.D. La. Jan. 9, 2007). According to Judge Markell in *Slusher*:

The Court acknowledges that its result is not what every person reading Section 1325(b) might reach, considering the general view that BAPCPA sought to limit bankruptcy judges' discretion in various areas. Regardless of what this court may write, there remains a common sense argument to the effect that if Congress had meant "disposable income" to be a presumptive guide for "projected disposable income" it could have said so in explicit terms. But it didn't, and also didn't amend Section 1325(b) so that there is but one, unambiguous, canonical reading. In this vacuum, courts must puzzle over the intended differences, if any, between "projected" disposable income and "disposable income" without a modifier. This court's result, then, can perhaps best be characterized as the least flawed of all possible interpretations, each of which is in some way unsatisfactory in its own right.

be excluded from projected income, according to *In re Ward*.⁶¹⁶ This doesn't make much sense. If Schedule I rules instead of current monthly income, then *all* of current monthly income should be thrown out and social security income therefore can be considered.⁶¹⁷

Meanwhile, even if courts throw out Form B22C in favor of Schedule I, it is still the case that Form B22C is the sole means of determining whether the three- or five-year term is the applicable commitment. It is not the source for determining actual projected disposable income.⁶¹⁸

Some courts, however, have ruled that "projected" means nothing; the court can *only* consider the history-based "current monthly income."⁶¹⁹ On this assumption, debtors with social security income (excluded from current monthly income) can write plans that do not in fact dedicate all disposable income to the plan.⁶²⁰

Even if disposable income must be defined pursuant to Form B22C, there is still the possibility that post-confirmation plan *modification* can occur without any regard to section 1325(b). As stated earlier, section 1329(b) insists that, for example, section 1325(a) apply to modifications, but there is no requirement that section 1325(b) must be satisfied.⁶²¹ Therefore, it is open for courts wedded to Form B22C to chuck the form entirely if the debtor moves to modify the plan.⁶²² In fact, since the entire idea of dedicating disposable income to the plan stems from section 1325(b), there is no statutory reason why modifications could not permit a debtor meeting the minimal requirement of section 1325(a)(4)—all creditors must receive what they would have received in a hypothetical chapter 7 case—to keep much disposable income that the original plan gave to the creditors. Congress simply forgot to address the point that section 1329 modifications allow for the complete subversion, not only of the BAPCPA reforms, but of the anti-consumer reforms of 1984 that imposed the disposable income requirement of section 1325(b) in the first place.

B. Below-Median Debtors

The new definition of disposable income adopts by reference section

⁶¹⁶ No. 06-42411, 2007 Bankr. LEXIS 58, at *8–9 (Bankr. W.D. Mo. Jan. 7, 2007).

⁶¹⁷ Judge Arthur Federman also suggested that "manipulating the Code" could be grounds to deny confirmation because the chapter 13 plan was not proposed in good faith. *Id.* at *9; *cf.* 11 U.S.C. § 1325(a)(3) (2006). Other courts, however, have ruled that disposable income issues can never be re-visited under section 1325(a)(3). *See supra* text accompanying note 551.

⁶¹⁸ *In re Beasley*, 342 B.R. 280, 284 (Bankr. C.D. Ill. 2006) ("[T]he statutory formulas and Form B22C do lead to a fully-dispositive calculation of the applicable commitment period.").

⁶¹⁹ *See In re Kolb*, No. 06-32036, 2007 Bankr. LEXIS 993, at *27 (Bankr. S.D. Ohio Mar. 30, 2007); *In re Brady*, No. 06-18922/JHW, 2007 Bankr. LEXIS 501, at *18–19 (Bankr. D.N.J. Feb. 13, 2007); *In re Tranmer*, 355 B.R. 234, 238 (Bankr. D. Mont. 2006); *In re Girodes*, 350 B.R. 31, 36 (Bankr. M.D.N.C. 2006); *In re Alexander*, 344 B.R. 742, 748–50 (Bankr. E.D.N.C. 2006).

⁶²⁰ *See In re Rotunda*, 349 B.R. 324, 330, 332–33 (Bankr. N.D.N.Y. 2006) (adhering to Congress' exclusion of social security benefits from payment to unsecured creditors in chapter 13 context).

⁶²¹ *See supra* text accompanying notes 587–88.

⁶²² *See In re Ireland*, No. 6:06-bk-70571M, 2007 Bankr. LEXIS 996, at *17–19 (Bankr. W.D. Ark. Apr. 2, 2007).

707(b)(2)(A)'s lengthy definition of expenses for maintenance and support of the debtor.⁶²³ But the cross-reference only applies for above-median debtors.⁶²⁴ Where the debtor is below the median, section 707(b)(2)(A) governance of expenses has no bite. Rather, expenses are defined as:

- [A]mounts reasonably necessary to be expended—
- (A)(i) for the maintenance or support of the debtor or a dependent of the debtor or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
 - (ii) for charitable contributions . . . in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
- (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.⁶²⁵

So, in below-median cases, expenses are determined according to Schedule J, not Schedule B22C.⁶²⁶ According to Form B22C, a below-median debtor is not required to fill out Part IV of the Form, which sets forth the means-testing criteria.⁶²⁷ For this reason, a debtor was not permitted to claim the IRS deduction for car ownership expense (where he owned the cars outright and really had no expense), though the debtor was invited to schedule an anticipated vehicle replacement.⁶²⁸

C. Above-Median Debtors

1. The Unfairness of It All

Above-median debtors have the same definition of gross income as do their antipodean fellows, but, unlike below-median debtors, expenses are arguably to be defined by section 707(b)(2).⁶²⁹ We have seen that the section 707(b)(2) test permits

⁶²³ See 11 U.S.C. § 1325(b)(3) (2006).

⁶²⁴ See *In re Wiggs*, No. 06-70203, 2006 Bankr. LEXIS 1547 at *7, *9 (Bankr. N.D. Ill. Aug. 4, 2006) ("Thus, [below-median] family income debtors may not be allowed expenses as great as [above-median] family income debtors.").

⁶²⁵ 11 U.S.C. § 1325(b)(2) (2006).

⁶²⁶ See *In re Hanks*, 06-22777, 2007 Bankr. LEXIS 46, at *3 n.2 (Bankr. D. Utah Jan. 9, 2007) (stating above-median debtors use Form B22C); *In re Fuller*, 346 B.R. 472, 474 (Bankr. S.D. Ill. 2006). Schedule J does not reflect payment to secured creditors, so this must be subtracted to determine how much disposable income is available to *unsecured* creditors. See *In re Nevitt*, No. 05-77798, 2006 Bankr. LEXIS 1763, at *10 (Bankr. N.D. Ill. Aug. 18, 2006).

⁶²⁷ Form B22C, *supra* note 33, Part IV.

⁶²⁸ See *In re Thicklin*, 355 B.R. 856, 859 (Bankr. M.D. Ala. 2006).

⁶²⁹ See 11 U.S.C. § 1325(b)(3) (2006). For the view that above-median debtors have the right to section 707(b)(2)(A)(ii) expenses, see generally *In re Miller*, 2007 Bankr. LEXIS 201, at *1 (Bankr. N.D. Ala. Jan. 18, 2007); *In re Hanks*, 2007 Bankr. LEXIS 46, at *1; *In re Farrar-Johnson*, 353 B.R. 244 (Bankr. N.D. Ill. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); and *In re Barr*, 341 B.R. 181 (Bankr. M.D.N.C. 2006).

gross manipulation by above-median debtors, particularly by allowing such debtors to count all secured debt as a deductible expense.⁶³⁰ Below-median debtors may feel cheated that they are stuck with Schedule J, whereas above-median debtors can use the much more manipulable standard of section 707(b), but, as Judge Catharine Carruthers has pointed out, that's politics!⁶³¹ Congress has decided to provide high-income debtors with an increased opportunity to abuse the system and have left below-median debtors to the harsh regime of Schedule J (which is based on *actual* expenses).

Courts have not hesitated to vent their feelings about the unfairness of allowing debtors the shelter of the means test of section 707(b)(2). According to Judge Russell Nelms,

The means test does not distinguish those who have tried hard from those who have hardly tried. It is a blind legislative formula that attempts to direct debtors to a chapter that provides for at least some measure of repayment to unsecured creditors over a period of years.⁶³²

And Judge Susan Kelley has remarked:

While this provision of the new statute does not perform as advertised, perhaps prompting trustees, unsecured creditors and even some bankruptcy judges to long for the "good old days" of reviewing Schedules I and J and determining whether private school, high speed internet access, and a pack-a-day habit were reasonable and necessary for the debtor's maintenance and support, the mandate of new § 1325(b)(3) is clear. The court must decide the "amounts reasonably necessary to be expended" for above-median debtors based solely on § 707(b)(2)(A) and (B), i.e., Form B22C, not on excess income over expenses from Schedule J.⁶³³

Nevertheless, courts have exploited the fact that section 1325(b)(1) requires the debtor to dedicate "*projected* disposable income" to the plan.⁶³⁴ Just as the word "projected" has led courts to abandon Form B22C for Schedule I on the income side, courts have likewise abandoned Form B22C for Schedule J on the expense side.⁶³⁵ Judge Michael Kaplan, in *In re LaSota*,⁶³⁶ in particular waxed indignant that a debtor could pad his

⁶³⁰ See *supra* Part III.B.2.x.

⁶³¹ See *In re Girodes*, 350 B.R. 31, 37 (Bankr. M.D.N.C. 2006).

⁶³² *In re Barraza*, 346 B.R. 724, 729 (Bankr. N.D. Tex. 2006).

⁶³³ *In re Guzman*, 345 B.R. 640, 646 (Bankr. E.D. Wis. 2006).

⁶³⁴ See 11 U.S.C. § 1325(b)(1)(B) (2006) (Emphasis added).

⁶³⁵ See *In re Edmunds*, 350 B.R. 636, 645 (Bankr. D.S.C. 2006); *In re McPherson*, 350 B.R. 38, 47 (Bankr. W.D. Va. 2006) ("Form B22C is only a form. It carries the weight of neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure."); *In re Fuger*, 347 B.R. 94, 101 (Bankr. D. Utah 2006); *In re Renicker*, 342 B.R. 304, 308 (Bankr. W.D. Mo. 2006).

⁶³⁶ 351 B.R. 56, 60 (Bankr. W.D.N.Y. 2006) (discussing projected disposable income).

bank account because his actual expenses were less than the expenses provided in section 707(b). He insisted that the savings be dedicated to paying creditors. In *In re Love*,⁶³⁷ Judge William Sawyer noted that the test in chapter 13 is *projected* disposable income, which justified departing from Form B22C on the expense side (but not on the income side).

This Court acknowledges that its approach results in a violation of a fundamental accounting principle, that expenses should be matched with income. One may argue that it is illogical to define disposable income using income based upon historical data and expenses on projections of future expenses. The mismatching of historical income figures with future expenses violates the matching principle which underlies accrual accounting. Moreover, one may reasonably argue that it is neither logical or [sic] fair to impose this mismatch in performing the means test under § 707(b).⁶³⁸

This approach can be criticized for one-sidedness. If we are to throw out B22C expenses because they are not projections, should we not also throw out B22C income on the same grounds?

*In re Fuller*⁶³⁹ is the mirror opposite. There, Judge Pamela Pepper ruled that Form B22C is subject to override by Schedule I as to gross income, but these debtors are entitled to follow Form B22C as to expenses.⁶⁴⁰ This one-sided approach doesn't make sense. If "projected" allows the definition of "current monthly income" to be ignored, why doesn't it authorize the override of expenses as well?

Courts have disagreed over whether the above-median debtor may deduct the amount due on a secured claim where the debtor intends to surrender the collateral in question. Surrender of the collateral is an approved cram-down technique, and many debtors will avail themselves of it,⁶⁴¹ especially since BAPCPA increases the price of cramming down cars.⁶⁴² In *In re Walker*,⁶⁴³ Judge Homer Drake ruled that the debtor could have the deduction, as expenses are defined by section 707(b)(2), which authorizes a fixed deduction for transportation ownership and maintenance as a Local Standard. But other courts have disagreed on the ground, previously alluded to, that a transportation ownership deduction is not "applicable" if the debtor owns the vehicle outright.⁶⁴⁴

Judge William Anderson tried a different justification for preventing an above-

⁶³⁷ 350 B.R. 611, 613 (Bankr. M.D. Ala. 2006).

⁶³⁸ *Id.* at 614–15.

⁶³⁹ 346 B.R. 472 (Bankr. S.D. Ill. 2006).

⁶⁴⁰ *Id.* at 482–85; *accord In re Carlton*, No. 06-71322, 2007 Bankr. LEXIS 545, at *22–24 (Bankr. C.D. Ill. Feb. 28, 2007).

⁶⁴¹ See 11 U.S.C. § 1325(a)(5)(C) (2006).

⁶⁴² See generally *Carlson*, *supra* note 450.

⁶⁴³ No. 05-15010-whd, 2006 Bankr. LEXIS 845, at *10–13 (Bankr. N.D. Ga. May 1, 2006).

⁶⁴⁴ See, e.g., *In re Harris*, 353 B.R. 304, 308 (Bankr. E.D. Okla. 2006); cf. *In re McPherson*, 350 B.R. 38, 47–48 (Bankr. W.D. Va. 2006); see also *supra* text accompanying notes 400–09.

median debtor from claiming the full secured debt deduction permitted in Form B22C. In *In re McPherson*,⁶⁴⁵ the debtors had bought a computer on secured credit. The debtors valued the computer at \$100 but tried to deduct \$2,116 as the total amount due on the computer. Meanwhile, the debtors wrote a plan cramming down the secured creditor at \$100, so that the debtors sought a monthly deduction of \$67.60 (total amount owed divided by sixty) but would pay the secured creditor only \$18.20 a month.⁶⁴⁶ Judge Anderson conceded that section 707(b)(2)(A)(iii) entitled the debtors to deduct "average monthly payments on account of secured debts . . . calculated as . . . the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition . . . divided by 60."⁶⁴⁷ But, reasoned Judge Anderson, "contractually due" meant due under the chapter 13 plan, not due under the original security agreement. This is because courts analogize a chapter 13 plan to a new agreement between the parties.⁶⁴⁸ But just because a chapter 13 is *like* a contract does not mean it *is* a contract. On the contrary, it is a coercive court order usually imposed on the creditor over its opposition. The metaphor to a contract, common enough in chapter 13 cases, only expresses the idea that plans, like contracts, are *binding*. A better claim—one that Judge Anderson invokes—is the idea that, since section 1325(b)(1)(B) requires *projected* disposable income to be dedicated to the plan, the court is free to ignore Form B22C, which entails the deductions authorized by section 707(b)(2).

2. Who Receives Disposable Income?

Certainly one of the oddest moments in Form B22C is its invitation for above-median debtors to deduct the cost of the chapter 13 trustee's fee in a chapter 13 plan.⁶⁴⁹ This entry is required by the notion that section 707(b) expenses (arguably) govern above-median debtors. And section 707(b)(2)(A)(ii)(III) permits the deduction of the chapter 13 trustee's fee. Absurdly, if we follow BAPCPA literally, the deduction means that above-median debtors may *keep* disposable income to the extent of the deduction *and* pay the chapter 13 trustee out of the disposable income actually surrendered to the trustee under the plan. So, for example, if disposable income is \$500 per month (net of every other expense) and if the chapter 13 trustee's fee is 10%, the debtor's disposable income is lowered to \$450 by this deduction. The debtor gets to keep the \$50 trustee's fee. Meanwhile, the trustee must take the fee out of the \$450 actually surrendered, thereby impoverishing the unsecured creditors! To counteract this absurdity, the United States trustee, in *In re Wilber*,⁶⁵⁰ argued that the debtor should pay the \$450 (in the

⁶⁴⁵ 350 B.R. at 40–42.

⁶⁴⁶ *Id.* at 41.

⁶⁴⁷ *Id.* at 46 (quoting 11 U.S.C. § 707(b)(2)(A)(iii) (2006)).

⁶⁴⁸ See *id.* at 47 ("In other words, the plan itself has the effect of making a new agreement between the debtor and the creditor with a new obligation to be paid in the manner provided for by the terms of the plan." (quoting *In re Nicholson*, 70 B.R. 398, 400 (Bankr. D. Colo. 1987))) (emphasis added).

⁶⁴⁹ Form B22C, *supra* note 33, Line 50.

⁶⁵⁰ 344 B.R. 650, 652–53 (Bankr. D. Utah 2006).

above example) to the unsecured non-priority creditors *only*. Separately, the debtor should pay \$50 for the chapter 13 trustee's fee. In other words, the trustee sought to erase the deduction for the chapter 13 trustee's fee to be found in Form B22C, even though B22C is a straightforward literal interpretation of BAPCPA.

Ruling that the plain meaning of BAPCPA would yield an absurd result, Judge William Thurman ruled that disposable income had to be paid entirely to the non-priority unsecured creditors.⁶⁵¹ Although he never quite said so explicitly, his ruling required that the debtor pay the \$50 referred to above *in addition* to disposable income. In short, the meaning of section 1325(b)(1) is, not that the debtor must pay disposable income, but rather that the debtor must pay *more* than disposable income, because there is an inherent requirement that disposable income can *only* be paid to non-priority creditors. This move is wise, legislatively. The deduction described in section 707(b)(2)(A)(ii)(III) should not apply in chapter 13 cases, even though it makes good sense in a chapter 7 case.⁶⁵²

Form B22C also contains a deduction for payment to priority claimants.⁶⁵³ This reflects the rule of section 707(b)(2)(A)(iv). So, for example, a debtor can deduct alimony payments from income to the same effect as deducting the chapter 13 trustee's fee. To continue the numerical example above, suppose, in addition to the \$50 trustee's fee, the debtor owes \$100 a month in alimony expenses. Form B22C authorizes the \$100 deduction from the definition of disposable income.⁶⁵⁴ The debtor's income, formerly \$450, is now reduced to \$350. This means that, if BAPCPA is literally applied, the debtor gets to keep \$100 a month in income *and* write a plan that allows the ex-spouse to recover his \$100 a month from the \$350 in income payable to the plan. Once again, the unsecured non-priority creditors are impoverished. The *Wilbur* holding implies that the debtor must pay \$350 in disposable income to the plan, another \$50 separately to the chapter 13 trustee and \$100 separately for the alimony claim. The extra payments of \$150 are financed by the unwise deductions against disposable income permitted by Form B22C.

The *Wilbur* holding legislatively corrects an absurdity, but its premise cannot be limited to above-median debtors. *Wilbur* re-writes section 1325(b)(1) to require that all of the debtor's projected disposable income be applied to unsecured *non-priority* creditors. In effect, Judge Thurman adds the word "non-priority" to the statute. But if this is so for above-median debtors, is it not also the rule for below-median debtors, who are equally governed by section 1325(b)(1)? If it is, then below-median debtors must always pay all their disposable income (without deductions for the chapter 13 fee and priority creditors) *and* an additional amount to the chapter 13 trustee and any priority creditor. Such a rule would make virtually every below-median case unfeasible, unless the debtor has sources of income not reportable under the definition

⁶⁵¹ *Id.* at 564–65 (considering pre-BAPCPA law in interpreting "'unsecured creditors' in § 1325(b)(1)(b) to mean non-priority unsecured creditors only").

⁶⁵² See *supra* text accompanying notes 447–50.

⁶⁵³ Form B22C, *supra* note 33, Line 44.

⁶⁵⁴ See *id.* Line 49.

of current monthly income.

The short answer to the dilemma is that, if *Wilbur* allows for the free-form rewriting of BAPCPA, we might as well rewrite section 1325(b) as follows: in above-median cases, non-priority creditors are to get all the disposable income, but in below-median cases, both priority and non-priority creditors must *share* disposable income.

A further aspect of the absurdity is revealed in *In re Amato*,⁶⁵⁵ where the chapter 13 trustee moved to block confirmation because the plan allowed disposable income (as defined by Form B22C) to be paid to the chapter 13 trustee *and* the debtor's attorney, as well as to non-priority creditors. *Wilbur*, at least, stood for the legislative erasure of the section 707(b)(2)(A)(ii)(III) and section 707(b)(2)(A)(iv) deductions of priority claims. Judge Michael Kaplan agreed, implying that the debtor's attorney could not share in disposable income.⁶⁵⁶ Rather, the debtor would have to pay a supplement to take care of the bankruptcy lawyer, as well as the chapter 13 trustee. In other words, *Amato* goes well beyond the *Wilbur* result of erasing the deduction of sections 707(b)(2)(A)(ii)(III) 707(b)(2)(A)(iv). It requires the debtor to pay more than the debtor's *real* disposable income by allocating all disposable income to non-priority creditors only.

Had Form B22C allowed for a deduction for the debtor's attorney, *Amato* would have comprised a legislative correction in the nature of *Wilbur*. But *Amato* is more than just a correction of an absurdity. It introduces a new absurdity that not even Congress managed to think up. In justifying this extension, Judge Kaplan engages in some delicious irony. He writes: "That the Form B22C fails to make any reference to attorneys fees is an unfortunate omission and continues an apparent knowing disregard for the need to compensate attorneys representing debtors' interests."⁶⁵⁷ Of course, Form B22C only follows BAPCPA, which permits the deduction of the chapter 13 trustee's fee. What is unfortunate, then, is that the drafters of Form B22C did not choose to exceed the statute by extending a deduction to the debtor's lawyer, which Judge Kaplan could then have erased *Wilbur*-style. Judge Kaplan ends the Greek tragicomedy by blaming the Supreme Court. In *Lamie v. United States Trustee*,⁶⁵⁸ a debtor's lawyer in a chapter 7 case sought an administrative priority, even though Congress, in 1994, deleted "or to the debtor's attorney" from section 330(a)(1).⁶⁵⁹ Congress, the debtor's lawyer said, had omitted these words by accident. Judge Kaplan then quotes the following passage from *Lamie*:

Petitioner's argument stumbles on still harder ground in the face of another canon of interpretation. His interpretation of the Act—reading the word "attorney" in § 330(a)(1)(A) to refer to "debtors' attorneys" in § 330(a)(1)—would have us read an absent word into the

⁶⁵⁵ No. 06-20612 (MBK), 2007 Bankr. LEXIS 836, at *3 (Bankr. D.N.J. Mar. 20, 2007).

⁶⁵⁶ *Id.* at *10.

⁶⁵⁷ *Id.* at *11; see *In re McDonald*, No. 06-60788-13, 2007 Bankr. LEXIS 363, at *10–11 (Bankr. D. Mont. Feb. 7, 2007) (disallowing attempt to deduct debtor's attorney expense by means of Form B22C Line 50).

⁶⁵⁸ 540 U.S. 526 (2004).

⁶⁵⁹ *Id.* at 533.

statute. That is, his argument would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." With a plain, nonabsurd meaning in view, we need not proceed in this way. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."

Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill."⁶⁶⁰

So what we have is a plain-meaning case (*Lamie*) cited to justify a complete rewriting of BAPCPA to remove *one* absurdity and to create a new, quite unnecessary one.

3. Charitable Contributions

The televangelists outfoxed themselves in chapter 13. According to section 1325(b)(2)(A)(i), as originally promulgated by BAPCPA, below-median debtors can deduct their charitable contributions as part of the "maintenance or support of the debtor or of a dependent of the debtor."⁶⁶¹ But section 1325(b)(3) insists that expenses for above-median debtors are to be defined "in accordance with subparagraphs (A) and (B) of section 707(b)."⁶⁶² Yet charitable gifts are nowhere mentioned in section 707(b)(2). Rather they are mentioned in section 707(b)(1). On this basis, Judge Robert Littlefield, in *In re Diagostino*,⁶⁶³ refused to confirm a plan that included an intended \$100 a month charitable contribution. Only below-median debtors were permitted by Congress to endow their favorite televangelist with fraudulent conveyances.⁶⁶⁴

Needless to say, Congress did not intend to subordinate televangelism to the rights of creditors. Informed by *Diagostino*, Congress was obliged to add the words "other than subparagraph (A)(ii) of paragraph (2)" to section 1325(b)(3).⁶⁶⁵ The import of these words is that section 1325(b)(2) still governs above-median debtors with regard to charitable contributions. Beyond this carve-out, section 1325(b)(2) does not apply to

⁶⁶⁰ *Id.* at 538 (citations omitted).

⁶⁶¹ 11 U.S.C. § 1325 (b)(2)(A)(ii) (2006).

⁶⁶² *Id.* § 1325(b)(3).

⁶⁶³ 347 B.R. 116, 118 (Bankr. N.D.N.Y. 2006).

⁶⁶⁴ *Accord In re Meyer*, No. 13-06-11376, 2006 Bankr. LEXIS 3383, *13 (Bankr. D.N.M. Dec. 4, 2006) ("Debtors, because of their over-median income, are not entitled to claim charitable contributions as necessary expenses in calculating their disposable income for their plan."); *In re Tranmer*, 355 B.R. 234, 252 (Bankr. D. Mont. 2006).

⁶⁶⁵ See Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. No. 109-439, § 2, 120 Stat. 3285, 3285.

the expenses of above-median debtors. Only section 707(b)(2) does.

V. CONVERSION BACK TO CHAPTER 7

Notoriously, chapter 13 plans usually fail, as the Supreme Court has noticed.⁶⁶⁶ This is no surprise, since chapter 13 plans require dedication of all disposable income to the plan.⁶⁶⁷ Unless the debtor has taken care to pad expenses in proving that the plan gets all disposable income, the plan will fail at the slightest unforeseen downside event.⁶⁶⁸

Does section 707(b) apply to cases converted from chapter 13? Apparently not. According to that provision, "After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor *under this chapter* whose debts are primarily consumer debts . . ."⁶⁶⁹ The italicized language makes section 707(b)(1) depend on the debtor's filing initially in chapter 7. In a converted case, the debtor typically will have filed initially in chapter 13. Therefore, the means test does not apply in converted cases.⁶⁷⁰

Following the plain meaning of section 707(b)(1), then, we find another huge loophole in the system. The test is entirely avoided if the debtor starts in chapter 13 and then converts to chapter 7. Conversion to chapter 7 under Bankruptcy Code section 1307(a) is usually considered to be the debtor's absolute right.⁶⁷¹ At least one court,

⁶⁶⁶ See *Till v. SCS Credit Corp.*, 541 U.S. 465, 493 n.1 (2004) (Scalia, J., dissenting) (citing failure rate between 37% and 60% for chapter 13 plans); Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 440 & n.85 (1999) (noting approximately one-third completion rate in empirical study); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 411 (1994) (referring to 31% completion of chapter 13 plans).

⁶⁶⁷ 11 U.S.C. § 1325(b)(1)(B) (2006).

⁶⁶⁸ Judge Cohen thought this point mitigated against quick dismissal of chapter 7 cases, just because some disposable income was discovered:

The high failure rate of Chapter 13 cases mitigates against hasty decisions to require debtors with budgets based on bare bone living expenses to file Chapter 13 cases. And, in light of the frequent, and almost predictable failure of many Chapter 13 cases, placing emphasis on a theoretical ability to pay that stretches a debtor so thin that it leaves no extra money to meet the unplanned expenses that will inevitably and frequently arise during the course of a repayment effort, only assures the inevitable, which is why a debtor "should not be pushed to the edge of financial survival because a plan looks feasible on a cold financial statement."

In re Attanasio, 218 B.R. 180, 195 (Bankr. N.D. Ala. 1998) (footnote omitted) (quoting *In re Martin*, 107 B.R. 247, 249 (Bankr. D. Alaska 1989)).

⁶⁶⁹ 11 U.S.C. § 707(b)(1) (2006) (emphasis added).

⁶⁷⁰ I owe this point to Judge Bruce Markel.

⁶⁷¹ See 11 U.S.C. § 1307(a) (2006) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time."); see also *Laughlin v. United States*, 912 F.2d 197, 203 (8th Cir. 1990) ("At any time after confirmation, a Chapter 13 debtor has an absolute right . . . to convert to Chapter 7 . . ."); *In re Fonke*, 310 B.R. 809, 814 (Bankr. S.D. Tex. 2004) (espousing since section 1307(b) requires a debtor's request to dismiss, debtor's right to convert under section 1307(a) must be absolute); *In re Parrish*, 275 B.R. 424, 425 n.1 (Bankr.

however, suggests that the debtor's right is conditioned upon the debtor's good faith. In *In re Donovan*,⁶⁷² a debtor converted a pre-BAPCPA chapter 13 case to chapter 7. A creditor moved to dismiss under section 707(b). Judge Arthur Briskman ruled that the pre-BAPCPA version of section 707(b) applied to the converted case, and only the United States trustee had standing under the old version.⁶⁷³ Judge Briskman, however, treated the creditor's motion as an objection to conversion from chapter 13. He found the debtor was in good faith and allowed the conversion. But the fact that he thought the case was still a chapter 13 case and that he had discretion to prevent conversion gives reason to think that a United States trustee can insist that a chapter 13 case be dismissed because it was commenced in bad faith as an attempt to avoid means testing in chapter 7.⁶⁷⁴

Also to be considered is the Supreme Court's recent five-to-four holding in *Marrama v. Citizens Bank of Massachusetts*,⁶⁷⁵ where a debtor, wishing to shake a chapter 7 trustee from the scent of fraudulent conveyances, exercised his apparently absolute right to convert a chapter 7 case to chapter 13.⁶⁷⁶ The Supreme Court ruled that this right was conditioned by the requirement that the debtor be in good faith. Since section 1307 is similarly worded, it too is presumably conditioned by a silent good faith requirement.

Whether section 707(b) applies in converted cases was answered obliquely by Judge Arthur Votolato in *In re Perfetto*,⁶⁷⁷ where a United States trustee in a converted case sought to compel a debtor to file Form B22A. Since Form B22A emanates from section 707(b)(2)(C), the debtor need file the form only if section 707(b) applies in the first place. In ruling for the United States trustee, Judge Votolato relied on section 348(a), which provides:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but . . . does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.⁶⁷⁸

D.D.C. 2002).

⁶⁷² No. 6:04-bk-01564-ABB, 2006 Bankr. LEXIS 3728, at *1 (Bankr. M.D. Fla. Nov. 28, 2006).

⁶⁷³ *Id.* at *4 ("This case was commenced prior to the BAPCPA effective date and The BAPCPA amendments do not govern.").

⁶⁷⁴ *Cf. In re Vincente*, 260 B.R. 354, 361–62 (Bankr. E.D. Pa. 2001) (denying debtor's conversion to chapter 7 for lack of reason).

⁶⁷⁵ 127 S. Ct. 1105, 1107 (2007).

⁶⁷⁶ *Cf.* 11 U.S.C. § 1307(a) (2006) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307")

⁶⁷⁷ No. 06-106509, 2007 Bankr. LEXIS 194, at *11 (Bankr. D.R.I. Jan. 19, 2007) ("Under BAPCPA, the starting point for determining whether substantial abuse exists is the Chapter 7 means test, and regardless of the low esteem in which this Court holds BAPCPA in general, it was clearly the intent of the drafters that the Form B22A be required upon conversion").

⁶⁷⁸ 11 U.S.C. § 348(a) (2006); *see also In re Perfetto*, 2007 Bankr. LEXIS 194, at *8–10.

Does this provision actually say that a case filed under chapter 13 is deemed to have been filed under chapter 7 in case of a conversion? Technically it says only that the conversion order itself is an "order for relief," in analogy to an adjudication that an involuntary debtor is not paying debts as they fall due,⁶⁷⁹ or by analogy to a voluntary petition, which "constitutes an order for relief under" whatever chapter the debtor chooses to file under.⁶⁸⁰ It then indicates that the date of the conversion order is deemed to be the date of the commencement of the case. This does not exactly prove that a converting chapter 13 debtor filed under chapter 7, as section 707(b)(1) requires.

Judge Votolato, however, was able to rely on *In re Grydzuk*,⁶⁸¹ which interpreted new section 1328(f)(1). This section provides that, in chapter 13 cases, "the court shall not grant a discharge of all debts . . . if the debtor has received a discharge [] in a case filed under chapter 7, 11, or 12 . . . during the 4-year period preceding the date of the order for relief under [chapter 13]."⁶⁸² The debtors had indeed received a discharge but in a case commenced in chapter 13 and then converted to chapter 7. According to the debtors, since they had not "filed under chapter 7, 11, or 12," section 1328(f)(1) was no impediment to a discharge.⁶⁸³

In *Grydzuk*, Judge John Squires, comparing BAPCPA (invidiously) to the works of Shakespeare,⁶⁸⁴ complained that section 1328(f)(1) "presents another in a long string of incredible poorly drafted statutory provisions under the BAPCPA."⁶⁸⁵ Nevertheless, Judge Squires denied the discharge. "Thus, in a very strict and literal sense," he observed, "the debtors' prior case was 'filed' under chapter 13."⁶⁸⁶ But section 348(a) compelled him to conclude that a case "filed under" chapter 13 and converted to chapter 7 was to be deemed "filed under chapter 7."⁶⁸⁷ This holding therefore supports Judge Votolato and certainly comports with common sense, even if it pushes the meaning of section 348(a) beyond its precise grammar. It seems fair to predict that courts will find section 707(b)(1) applicable in chapter 7 cases. But as Judge Votolato

⁶⁷⁹ See 11 U.S.C. § 303(h)(1) (2006).

⁶⁸⁰ See *id.* § 301(b).

⁶⁸¹ 353 B.R. 564, 567–69 (Bankr. N.D. Ind. 2006); see also *In re Perfetto*, 2007 Bankr. LEXIS 194, at *6, *9.

⁶⁸² 11 U.S.C. § 1328(f)(1) (2006).

⁶⁸³ See *In re Grydzuk*, 353 B.R. at 565.

⁶⁸⁴ Judge Squires notes that there is an attempt to deny Shakespeare the authorship of his plays on the grounds he had no education. Unlike Shakespeare, who came forth to claim authorship, however falsely:

[N]o one has come forward to claim authorship of the newly minted provisions of the BAPCPA. This is understandable, for unlike the rapture which arises from reading the most eloquent prose and poetry ever written in the English language, no such elevated state of consciousness derives from the reading of the BAPCPA.

Id. at 566.

⁶⁸⁵ *Id.* at 567. In defense of the 109th Congress, the ambiguity in section 707(b) was promulgated in 1984, though Judge Squires is arguably right about section 1328(f)(1).

⁶⁸⁶ *Id.* at 568.

⁶⁸⁷ Accord *In re Capers*, 347 B.R. 169, 171 (Bankr. D.S.C. 2006) (opposing debtor's interpretation that the words "filed under" in section 1328(f)(1) are controlling for purposes of determining whether discharge under chapter 7—after conversion from chapter 13—would bar debtor's subsequent discharge under chapter 13).

recognizes, an absurdity arises.⁶⁸⁸ Form B22A investigates current monthly income for six months prior to the bankruptcy petition. Years may have gone by before a chapter 13 case is converted to chapter 7. Therefore, whether the debtor is a bankruptcy abuser will be governed by reports of income that are many years out of date.

Suppose, however, that the case started in chapter 7, was converted to chapter 13 because of a United States trustee's successful challenge under section 707(b), and is now back in chapter 7 because the debtor was unable to meet plan payments. May the debtor resist dismissal under section 707(b)?

One harsh answer is that, where the first of the chapter 7 cases was dismissed for failure of the debtor to meet the means test, the debtor cannot go back to chapter 7. True it may be that the debtor's circumstance has changed—a loss of wages or health expenses unforeseen at first. But section 707(b)(2)(A)(i) requires the use of "current monthly income," which is the weighted average income six months prior to the original bankruptcy petition. In converted cases, conversion

constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.⁶⁸⁹

Since neither section 101(10A) nor section 707(b) appears in the long list of exceptions to this principle, the debtor will have no power to show a lower income as the cause of chapter 13 default. On the expense side, however, there is reason to suppose that expenses might be adjusted. So far, amendments to Schedule J, at least, have been freely allowed. Presumably there is no reason why Form B22A could not be amended as well, on the expense side, to reflect post-petition developments.⁶⁹⁰ Insofar as expenses are concerned, debtors should get a second chance to beat the means test in chapter 7.

Those who beat the means test but were dismissed anyway on the "totality of the circumstances" have an interesting argument that, since the "totality of the circumstances" test of section 707(b)(3) turns on the ability to finance a chapter 13 plan, having shown that chapter 13 did not work, the debtor should now be entitled to a chapter 7 case.⁶⁹¹ At least one court, albeit not in a converted case, has ruled that inability to finance a chapter 13 case is *never* grounds to rebut the means test.⁶⁹²

Also countering this argument is the fact that the debtor had a free opportunity in chapter 13 to modify the plan for changed circumstances. Section 1329(a) gives the debtor (or others) the right to move for modification to "reduce the amount of

⁶⁸⁸ See *In re Perfetto*, No. 06-106509, 2007 Bankr. LEXIS 194, at *11 (Bankr. D.R.I. Jan. 19, 2007).

⁶⁸⁹ 11 U.S.C. § 348(a) (2006).

⁶⁹⁰ See *In re Wilson*, No. 06-10834 (BLS), 2006 Bankr. LEXIS 3368, at *1 (Bankr. D. Del. Dec. 11, 2006).

⁶⁹¹ See 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 311.1 (3d ed. 2000) (suggesting absolute right to convert may not survive dismissal based on "substantial abuse").

⁶⁹² See *In re Oliver*, 350 B.R. 294, 303 (Bankr. W.D. Tex. 2006).

payments on claims of a particular class provided for by the plan"⁶⁹³ Presumably this means a reduction of wages paid to the chapter 13 trustee (who then reduces the amounts paid to the creditors). The question arises why the debtor did not modify in light of plan defaults. If the answer is apathy or indifference, then the debtor has *not* shown that chapter 13 is infeasible; the continued feasibility suggests that either the chapter 7 case should be dismissed or, at the option of the debtor, converted back to chapter 13 yet again for modification.

CONCLUSION

The means test in BAPCPA is either counter-productive or meaningless, depending on whether courts think that the means test preempts prior case law on chapter 7 consumer debtors with surplus income.⁶⁹⁴ This is ironic, in that the very motive of the mechanical means test was frustration with the way the discretionary version of section 707(b) was administered.⁶⁹⁵

This raises the question why the consumer finance industry, which worked so hard for this particular bankruptcy reform, promulgated a regulation that either increased bankruptcy abuse or had no effect.

One reason can be discounted. This reform is not about increasing the payout creditors receive in consumer bankruptcies. It is estimated that actual recoveries via the bankruptcy process were less than \$1 billion annually in the 1990s.⁶⁹⁶ It is probably true that the number of cases shifted from chapter 7 to chapter 13 is unlikely to be great. Furthermore, once these cases reach chapter 13, a very major amount of disposable income will go to car lenders, not to credit card issuers.⁶⁹⁷ We must look elsewhere for the motive of the consumer credit industry.

Borrowing from Professor Robert Mann,⁶⁹⁸ I would like make a different suggestion.⁶⁹⁹ Recent data show that from September 2005 to September 2006 the number of bankruptcy filings fell from about 1.7 million the prior year to 1 million.⁷⁰⁰ This 2005-06 number also reports filings in anticipation of October 17, 2005—the effective date of BAPCPA.⁷⁰¹ So the decrease in filings is perhaps even more dramatic,

⁶⁹³ 11 U.S.C. § 1329(a)(1) (2006).

⁶⁹⁴ See Ivy, *supra* note 171, at 249 (predicting decisions under BAPCPA will continue to be ad hoc).

⁶⁹⁵ See Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 128–29 (1999) (suggesting "Congress [moved] to enact heightened means-testing" because bankruptcy judges are failing to "implement the intent of Congress regarding debtor abuse").

⁶⁹⁶ Culhane & White, *Means-Testing Real Chapter 7 Debtors*, *supra* note 22, at 31.

⁶⁹⁷ See Scott F. Norberg, *supra* note 666, at 462 (noting increased rights of car lenders comes right out of the pocket of unsecureds). Of course, there is assuredly an overlap between credit card issuers and car lenders; many banks are in both businesses.

⁶⁹⁸ Mann, *supra* note 432, at 401–06.

⁶⁹⁹ Something similar is suggested by Ronald J. Mann, *supra* note 432, at 399–403 ("The purpose of the means test . . . is to force borrowers into chapter 13. But the provisions of the Act that relate to chapter 13 provide strong countervailing influence.").

⁷⁰⁰ *Bankruptcy Filings Plummet*, PALM BEACH POST, Dec. 6, 2006, at 1D.

⁷⁰¹ Mann, *supra* note 432, at 397–400 (noting increase in filings in October 2005).

as the surge in bankruptcy filings in early October 2005 was dramatic.

Why did fewer people file for bankruptcy? It is surely not the case that the discrepancy can be explained by high-income "can pay" debtors who have gotten the message and are now committed to paying their debts in lieu of filing for bankruptcy. Studies estimate that only three to eleven percent of chapter 7 cases involved such debtors, prior to BAPCPA.⁷⁰² They are insufficiently numerous to account for the decline in bankruptcy filings. Nor is it likely to be the case that the financial fundamentals of the typical middle-class family have changed. The debt overhang of credit card obligation still looms very large and is undoubtedly growing.⁷⁰³ Rather, I suggest that the foul publicity that BAPCPA received has convinced consumers (wrongly) that bankruptcy is no longer an option.

Suppose this is so. Suppose that the 700,000 consumers who did not file for bankruptcy out of fear and misunderstanding pay \$500 per month in credit card carrying costs. Suppose, instead of filing for bankruptcy, these debtors make just six more interest payments than they would have, had they known that BAPCPA is basically meaningless. That means credit card issuers will have received \$2.1 billion that they otherwise would not have received.⁷⁰⁴ This financial surmise, which is by no means unrealistic, explains why the consumer credit industry invested so heavily in lobbying Congress. Although the amount of campaign contributions and lobbying fees were considerable, they were undoubtedly far to the south of the gains won by scaring the lower middle class away from bankruptcy.

If this is right, it explains the ugliness and absurdity of BAPCPA that this Article has attempted to describe. If the point is to scare the public off the bankruptcy option, ugliness and incoherence is a positive virtue. The more difficult BAPCPA is to understand, the better the result for the consumer finance industry.

But these are strictly temporary gains. Once the public discovers that bankruptcy is still a viable option for above- and below-median debtors alike, and that BAPCPA's sole impact is to increase the paperwork and hence the expense of bankruptcy, the debtors will return to the bankruptcy courts in numbers comparable to pre-BAPCPA days, simply because the financial fundamentals of the middle class have not changed a whit as a result of BAPCPA. By the time the public wises up, however, the consumer credit industry will have reaped a windfall from its campaign of fear and confusion.

⁷⁰² See Culhane & White, *Means-Testing Real Chapter 7 Debtors*, *supra* note 22, at 34 (indicating sample size of group included 3.6% and 11%).

⁷⁰³ In 2005, the total outstanding exceeded \$2 trillion. See Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided "Reform" of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1534 (2006).

⁷⁰⁴ See *Windfall for Capital One, and for Fairbank*, CARDLINE, Dec. 22, 2006, at 1 ("The slowdown in bankruptcy filings this year has been longer and more dramatic than anticipated and so contributed to favorable credit cards earnings at Capital One Financial Corp . . .").