CATCHING CAN-PAY DEBTORS: IS THE MEANS TEST THE ONLY WAY?

MARIANNE B. CULHANE AND MICHAELA M. WHITE*

The much heralded means test now guards the gates of chapter 7. Consumer debtors deemed, under that long and detailed formula, to have $167 (for some, as little as $100) in monthly disposable income, are presumed unworthy of a chapter 7 discharge. Unless they can rebut the presumption, such "can pay" debtors[1] must convert to chapter 13 or 11, or see their cases dismissed.[2]

Since 1999, however, Congress has had reason to expect more than 95% of chapter 7 filers to pass the test.[3] The pass rate will be high for three reasons: First, and most important, the great majority of chapter 7 filers have little ability to pay. The means test recognizes that, by giving a passing grade at an early point to the 75 to 85 percent of chapter 7 filers with incomes below their state's median.[4] Second, the test's outcome is predictable, so debtors who would fail can either bypass chapter 7, or with pre-bankruptcy planning, manage to pass the test. Third, in a series of political compromises, Congress eased the means test to serve goals other than maximum repayment for unsecured creditors. Most debtors will pass the test, even without pre-bankruptcy evasive maneuvers, but that apparently is what Congress intended.

Focus on the means test, however, has distracted attention from a second, possibly more onerous barrier to chapter 7, new section 707(b)(3).[5] Debtors who pass the means test still face judicial scrutiny and dismissal for "abuse of the

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* The authors are professors of law at Creighton University School of Law.

[1] We use "can-pay" to describe debtors who fail the means test, and "can't-pay" for those who pass it.

[2] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27–29 (2005) (to be codified at 11 U.S.C. § 707(b)(2)(A)(i)).

[3] *See, e.g.*, 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 (1999) (finding that only 3.6% of sample debtors are can pays under version of means test then proposed); *see also* UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTORS, PERSONAL BANKRUPTCY: ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTOR'S ABILITY TO PAY, at 15 (June 1999) *available at* http://www.gao.gov/archive/1999/gg99103.pdf (indicating March 1999 Ernst & Young study funded by VISA USA showed only 10% of sample debtors qualify as "can pays"); Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 21 (2001) (noting that retrospective focus of means test increases probability of inappropriate inclusion of some debtors). Debtors flunked the 1999 version of the means test if they had $50 a month in disposable income, much less than the $100–167 minimums enacted in 2005.

[4] Culhane & White, *supra* note 3, at 31. *See also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(7)) (granting a full safe harbor from motions to dismiss based on the means test to below-median income debtors). Technically, debtors whose income exactly equals the relevant median are also excused. In this article, we include such debtors in the term "below median debtors."

[5] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a) (to be codified at 11 U.S.C. § 707(b)(3)).

provisions of [chapter 7]" if "the debtor filed the petition in bad faith," or "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."[6] These words are new to chapter 7s text, and not defined in the amended Code. They are not, however, without a history. Before there was a statutory means test, "bad faith" and "totality of the circumstances" were often used in substantial abuse cases under former section 707(b)[7] as labels for judge-made tests of ability to pay.[8]

Some who believe the new means test is not mean enough hope to use that history and section 707(b)(3) as authority for supplementing the means test with additional, more stringent can-pay tests. Judge Eugene Wedoff, for example, recently wrote that Congressional adoption of the means test does not bar judges from dismissing debtors for abuse based on the judge's own more restrictive tests of ability to pay.[9]

Of course, other tougher tests could bar more debtors from chapter 7, and thoughtful observers can criticize Congress' choices. Which test to use, however, is a legislative decision. Since Congress has acted, the issue is not whether other tests are preferable, but rather what test(s) did Congress intend.

This paper will respectfully disagree with Judge Wedoff, and argue that Congress intended the means test to be the only test of ability to pay under the revised Code. With the detailed statutory means test in place, "filed in bad faith" and "totality of the circumstances" no longer authorize judges to define ability to pay. Instead, these phrases must be read as limited to serious debtor misconduct.

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[6] *Id*.

[7] 11 U.S.C. § 707(b) (2000) *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a), 119 Stat. 23, 29–30 (2005) (to be codified at 11 U.S.C. § 707(b)(3)). Prior to the 2005 amendments, section 707(b) read:

> 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. There shall be a presumption in favor of granting the relief requested by the debtor . . . . 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 543(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

Id.

[8] *See* David B. Harrison, *Bankruptcy: When Does Filing of Chapter 7 Petition Constitute "Substantial Abuse" Authorizing Dismissal of the Petition Under 11 U.S.C. § 707(b)*, 122 A.L.R. FED. 141, 157–58 (2005) (examining various interpretations of "substantial abuse," including "ability to pay" as one frequently used test); Eugene W. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231, 235 (2005) (exploring four different ways courts interpreted "substantial abuse" before BAPCPA); Robert C. Furr, Bradley S. Shraiberg & Marc P. Barmat, *11 U.S.C. Section 707(b)—The U.S. Trustee's Weapon Against Chapter 7 Abuse*, NABTalk (Nat'l Ass'n. of Bankr. Trs.), Vol. 18, 2002, at 11 (surveying substantial abuse cases in each circuit).

[9] Wedoff, *supra* note 8, at 236.

Professor Elizabeth Warren states it well, commenting "[i]t is one thing for a judge to be aggressive in the interpretation of 'substantial abuse' . . . when there are no other 'can-pay' provisions. It is quite something else to look past Congress' specific instructions and add a second judge-made can-pay test."[10]

The text and structure of the amended Code strongly suggest that the highly detailed means test is to replace, not just precede, other measures of ability to repay. Standard rules of interpretation direct courts to construe statutes so that all parts have meaning, and when both general and specific provisions cover the same subject matter, to let the specific provisions control. Use of judicial can-pay tests violates both of those rules, making the means test superfluous, and allowing general phrases to govern the specific. Section 707(b) as a whole makes sense when subsection two's means test governs ability to pay and subsection three covers debtor misconduct.

The statutory context also indicates that the means test is exclusive on ability to pay. BAPCPA uses the means test formula not only in chapter 7, but also to measure chapter 13 "disposable income," the chapter 13 version of the debtor's ability to pay,[11] formerly left to judicial discretion.

The legislative history shows Congress was clearly dissatisfied with inconsistent, unpredictable outcomes under former section 707(b), where the "inherently vague" substantial abuse standard "led to disparate interpretation . . . by the bankruptcy bench."[12] Use of judicial can-pay tests, in addition to the means test, would prolong the prior decisional disarray and lead to big increases in section 707(b) litigation, imposing extra expense on all parties.

Further, ad hoc judicial tests would contravene the Congressional policy choices reflected in the means test; decisions to promote important interests such as free exercise of religion, secured consumer credit, retirement savings and broader health insurance coverage. On these points, the mostly mechanical means test overrules prior ability to pay and disposable income case law. Congress surely did not intend to let each bankruptcy judge's idiosyncratic views on whether a given debtor could "easily . . . repay his debts"[13] undo these decisions.

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[10] E-mail from Professor Elizabeth Warren, Professor of Law, Harvard University, to list-serv Bankr-UNLV (May 31, 2005, 08:09 CDT) (on file with authors).

[11] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(h) (to be codified at 11 U.S.C. § 1325(b)(2)); *see also infra* text accompanying notes 82–84. While the text of that section uses the means test to calculate disposable income only for debtors with above-median incomes, it seems unlikely that judges would impose a more stringent disposable income test on lower income debtors.

[12] H.R. REP. NO. 109-31, pt. 1, at 12 (2005); *see, eg.*, Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 492–93 (2005) (discussing pre-amendment section 707(b) citing to court decisions showing disparate application of "substantial abuse" standard); Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing*, 7 AM. BANKR. INST. L. REV. 105, 111 (1999) [hereinafter Williams, *Distrust*] (highlighting lack of definition for "substantial abuse" resulting in ambiguous court decisions).

[13] The phrase is Judge Wedoff's. Wedoff, *supra* note 8, at 236.

Of course, the "filed in bad faith" and "totality of the circumstances" standards of section 707(b)(3)[14] have roles to play, but they are limited roles. Bad-faith filing covers such debtor offenses as serial filings and pervasive non-cooperation aimed at frustrating creditors, rather than seeking a discharge. Totality of the circumstances has a broader scope, including unjustified debtor attempts to "cheat" on the means test. However, judicial tests of ability to pay are no longer a primary component.

The means test is far from perfect. It adds complexity and cost to all cases, and may deter or dismiss relatively few would-be chapter 7 debtors. That does not mean, however, that Congress intended the test to be supplemented by judicial legislating under section 707(b)(3). The means test is part of a large package of consumer bankruptcy amendments. Other provisions in that package, not just section 707(b)(3), will curb debtor misconduct formerly reached only by expansive readings of "substantial abuse." If the means test or the whole package does not meet Congressional goals, Congress, not the judiciary, must fix it.

Part I of this paper summarizes the changes to section 707(b), and discusses some Congressional decisions that increased the means test pass rate to serve other goals. Part II examines section 707(b)'s text, statutory context, legislative history and policy to show Congress intended the means test to be exclusive on ability to pay. Part III outlines the appropriately limited scope of judicial discretion under "filed in bad faith" and "totality of the circumstances."

I. THE NEW SUPER-SIZED SECTION 707(b)

Section 707(b), former home of "substantial abuse," used to be three sentences long. The revised version now covers five single-spaced pages in the black-lined version of the Code, with seven subsections. Subsection one allows dismissal of cases filed by individuals with primarily consumer debts, if the case is an "abuse" of the provisions of chapter 7.[15] "Substantial" no longer modifies "abuse," and the presumption in favor of granting chapter 7 relief to the debtor is gone.[16] Standing is broadened, so that all parties in interest, not just the judge and United States Trustee ("UST"),[17] may file motions to dismiss for abuse against above-median debtors. Safe harbors discussed below protect below-median debtors.

One important part of former section 707(b) survives unchanged, the loophole for unlimited charitable deductions. In abuse decisions under any part of 707(b), courts are still barred from even considering that the debtor "has made, or continues to make, charitable contributions" to qualified religious or charitable

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[14] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a) (to be codified at 11 U.S.C. § 707(b)(3)).

[15] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(1)) (amending the statute to strike "a substantial abuse" and inserting "an abuse").

[16] *Id*.

[17] In this article, reference to the United States Trustee or UST should be understood as including the Bankruptcy Administrator in those judicial districts where the UST program is not in effect.

organizations.[18] Thus, wealthier debtors can buy their way into chapter 7 (and heaven?) by rendering unto God money their creditors claim should be theirs.[19] Congress bowed to the Church of the Latter Day Saints and others who argued that tithing is a commandment from God, and limiting it would invade religious rights.[20] It certainly cuts a big hole in the means test.

New subsection one allows dismissal for "abuse," but does not define that term. Abuse is defined, however, in section 707(b)'s next two subsections. Subsection two sets out the means test at great length, and subsection three more tersely directs the court, in cases where the debtor passes the means test, to consider whether "the debtor filed the case in bad faith,"[21] or whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse" when ruling on dismissal.[22]

Subsection four allows awards of attorney's fees, costs, and even a civil penalty[23] to case trustees who file successful section 707(b) motions to dismiss, if debtor's counsel violates Rule 9011[24] in filing the debtor's case in chapter 7. This provision may not prove a strong incentive for case trustees to file motions to dismiss against above-median debtors. Hopefully, Rule 9011 violations by debtors' counsel will be rare. Even when they occur, orders to reimburse the trustee are discretionary with the court.[25] Barring such an award, case trustees can recoup their

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[18] *See* 11 U.S.C. § 707(b) (2000).

[19] The unlimited deduction for charitable contributions was co-sponsored by Senator Orrin Hatch of Utah. *See* Religious Liberty and Charitable Donation Act of 1998, Pub. L. No. 105-183, 112 Stat. 517, 518-19 (codified as amended at 11 U.S.C. §§ 544(b), 546, 548(a), 548(d), 707(b), 1325(b)(2)(A)). For an interesting study of the use and consequences of tithing under the Code, *see* Kenneth N. Klee, *Tithing and Bankruptcy*, 75 AM. BANKR. L.J. 157, 169 (2001) (conducting empirical study analyzing whether debtor ability to direct assets away from creditors owing to insulation of churches from donative disgorgement has changed behavior of debtors); *see also* Gloria Jean Lidell et al.., *Charitable Contributions in Bankruptcy: An Empirical Analysis*, 39 AM. BUS. L.J. 99, 100–01 (2001) (assessing policy behind act by studying instances of charitable contributions in chapter 13 bankruptcy proceedings). *See generally* Jool Nie Kang, Comment, *Tithing: A Fraudulent Transfer or a Moral Obligation?*, 18 BANKR. DEV. J. 399, 400 (2002) (noting nationally inconsistent tithing rulings related to bankruptcy petitions "left debtors confused as to whether their tithing payments would be given to the church or to creditors when they filed for bankruptcy").

[20] *See* John McMickle, *Consumer Bankruptcy Reform Roundtable*, 7 AM. BANKR. INST. L. REV. 3, 6 n.14 (1999) *citing to* Larry B. Stammer, *Religion Bill Would Prevent Seizure of Tithes in Bankruptcy Cases Finance: Clinton Likely to Sign Measure Preventing What Churches See as Raids on their Treasuries*, L.A. TIMES, March 1, 1998, at B4; *see also supra*, note 19 (listing authorities emphasizing strong religious support for tithing bill and its effect on religious rights).

[21] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 29–30 (2005) (to be codified at 11 U.S.C. § 707(b)(3)(A)).

[22] *Id*. (to be codified at 11 U.S.C. § 707(b)(3)(B)).

[23] *Id*. (to be codified at 11 U.S.C.§ 707(b)(4)). The civil penalty may be awarded to the UST as well as the case trustee. If such award remains unpaid when a debtor converts to or refiles in chapter 13, the balance must be paid through the plan. Payments are limited to the greater of $25 a month or 5% of the total amount payable to general unsecured creditors, stretched over the life of the plan. The chapter 7 trustee may collect this compensation in chapter 13 "even if such amount has been discharged in a prior case under this title." *Id*. (to be codified at 11 U.S.C. § 1326(d)).

[24] FED. R. BANKR. P. 9011.

[25] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707 (b)(4)(B)). The American Bar Association lobbied successfully to change "shall" to "may" in this

costs only if there are cash assets in the estate,[26] and asset cases are not usually the cases they want to dismiss.[27]

Subsection five allows awards of attorney fees and costs (but no civil penalty) against a creditor (but not a UST or case trustee), in favor of a debtor who successfully defends the creditor's motion to dismiss, if the creditor violates Rule 9011,[28] or his attorney does so and the debtor proves the motion was made "solely . . . [to] coerce the debtor into waiving a right guaranteed to the debtor under this title."[29] Creditors were denied standing under former section 707(b) due to fears that, as interested parties, they would abuse the motions to coerce reaffirmations or other concessions.[30] Debtors in bankruptcy are vulnerable to such tactics because they often lack resources to pay additional legal fees to defend creditor motions.[31] Now that creditors have standing against above-median debtors, this section offers some slight disincentive to such creditor abuse. Small business creditors with

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provision. *See* Catherine E. Vance & Corinne Cooper, *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law*, 79 AM. BANKR L.J. 283, 288 n.19 (2005) (stating change was result of "intense lobbying" by the American Bar Association).

[26] *See* Samuel K. Crocker & Robert H. Waldschmidt, *Impact of the 2005 Bankruptcy Amendments on Chapter 7 Trustees*, 79 AM. BANKR. L.J. 333, 369 (2005) (suggesting drafters forgot to modify 11 U.S.C. § 326 to enable case trustees to be reimbursed for costs of motion to dismiss in no asset cases). *See generally* 11 U.S.C. § 326 (2000); Richard C. Friedman, *A Trustee's Guide to Selected Legal Issues in Chapter 7 Final Reports*, AM. BANKR. INST. J., Feb. 1999, at 14. (discussing 11 U.S.C. § 326 trustee's fee request).

[27] *See* Furr, *supra* note 8, at 19 (arguing objection to discharge is preferable to section 707(b) dismissal in asset cases, so chapter 7 trustee can administer assets for benefit of creditors). *See generally* 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, 204 (2005) (discussing section 707(b) trustees' incentives to litigate under section).

[28] FED. R. BANKR. P. 9011.

[29] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(5)). Query whether the provision may have teeth by analogy to the Supreme Court's holding in *FCC v. NextWave Personal Comm. Inc.*, 537 U.S. 293, 301–02 (2003), which read "solely because" in 11 U.S.C. § 525 to require proof only that the debtor's failure to pay a dischargeable debt was the "proximate cause" of the creditor's action, "whatever the [creditor's] ultimate motive in pulling the trigger may be." *Id*. There, the Court said mixed motives are not necessarily a defense. *Id*.

[30] *See* Bradley R. Tamm, *Substantial Abuse Under 11 U.S.C.A. § 707(b): Evolution or Malignancy?*, 13 J. BANKR. & PRAC. 47, 60–61, (2004) (discussing creditors and standing under former section 707(b)); *see also* Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of "Substantial Abuse"*, 60 AM. BANKR. L.J. 33, 54 n.232 (1986) ("although creditors do not have standing to petition the court for a chapter 7 dismissal, it is arguable that a decision not to dismiss is appealable even by creditors."); Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 AM. BANKR. L.J. 653, 688 n.122 (1999) (analyzing creditors and standing under former section 707(b)).

[31] *See* Gary L. Klein, *Means Tested Bankruptcy, What Would It Mean?*, 28 U. MEM. L. REV. 711, 731–32 n.84 (1998) ("Creditor motions under 11 U.S.C. §109 have been common") (citing *In re* Arena, 81 B.R. 851, 852 (Bankr. E.D. Pa. 1988) ("[B]ased upon 11 U.S.C. § 109(g)(1), the moving party bears the burden of showing that the debtor either (1) willfully failed to abide by an order of the court or (2) willfully failed to appear before the court in proper prosecution of the case."); *see also* Bankers Trust Co. v. Nordbrock (*In re* Nordbrock), 772 F.2d 397, 400 (8th Cir. 1985) (awarding debtor attorney's fees for creditor's frivolous appeal).

claims under $1000, however, are granted immunity from this protective provision.[32]

Subsections six and seven are important safe-harbors for below-median debtors. Only the court and UST may file motions to dismiss under any part of section 707(b) if the debtor's (in a joint case, both debtors' combined) means test income is below-median.[33] No one, not even the court or UST, may move to dismiss under the means test if the income of the debtor (plus that of the debtor's spouse, whether or not it is a joint case) is below-median.[34] Thus, lower income debtors need not fear means test motions, and creditors and case trustees cannot file general abuse motions against them either.

A. The Means Test: Original Idea and as Enacted

Now that we have explored section 707(b)'s overall plan, let us go back to its central component, the means test. The basic idea of the means test is to identify a group of higher-income debtors for special scrutiny, allow them standardized

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[32] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §102(a)(2) (to be codified at 11 U.S.C. § 707(b)(5)(B)) ("A small business that has a claim of an aggregate amount less than $1,000 shall not be subject to subparagraph (A)(ii)(I)"); *id*. (to be codified at 11 U.S.C. § 707(b)(5)(C)) (defining "small business" as unincorporated business, partnership, corporation, association or organization that, as of date of filing, has fewer than 25 full-time employees and is engaged in commercial or business activity); *id*. (to be codified at 11 U.S.C. §§ 707(b)(6) & 707(b)(7)) (declaring only judge, U.S. trustee or bankruptcy administrator may file motion under section 707(b) on behalf of debtors with certain below-median incomes).

[33] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §102(a)(2) (to be codified at 11 U.S.C. § 707(b)(6)). New section 707(b)(6) provides:

> Only the judge or United States trustee (or bankruptcy administrator, if any) may file a motion under section 707(b), if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief, when multiplied by 12, is equal to or less than—
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> (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
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> (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
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> (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

Id. Technically, debtors whose incomes are exactly equal to the applicable median also enjoy these safe harbors. *Id*. In this article, we will use the convention "below median" to describe debtors with incomes equal to or below the applicable median.

[34] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §102(a)(2) (to be codified at 11 U.S.C. § 707(b)(7)) (stating judge, trustee or bankruptcy administrator may not file motion to dismiss, premised on debtor abuse, if debtor's income is equal to or below applicable state income medians). If the debtor and non-filing spouse are separated, the spouse's income need not be aggregated. *See id*. For unmarried debtors, the thresholds are the same. *Id*. For married debtors, however, it is harder to qualify for the full means test safe-harbor than for the limited section 707(b)(6) safe-harbor. *Id*.

deductions, and then see if enough disposable income remains to fund a workable chapter 13 plan. If it does, then boot the debtor out of chapter 7 or let him convert to chapter 13. Focusing on the higher-income group is efficient, since that group is most likely to have substantial repayment capacity, and using standard deductions with some leeway for special circumstances seems fair in principle.

The means test as enacted after nine years of discussion generally follows this model. Section 707(b)(2)'s means test computes an income variable designated current monthly income ("CMI"), compares it to state median income figures, and gives all below-median debtors a passing grade at that early point. They qualify for the full means test safe harbor, and only the court and UST have standing to move to dismiss for abuse on the non-means test grounds of section 707(b)(3).[35]

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.[36] If it does, the debtor may rebut it by showing special circumstances. However, even here, judicial discretion is limited to expense increases or income reductions that bring the debtor's income below the $100 to $167 per month abuse thresholds.[37] Each step is more complex than at first appears, and at many points

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[35] *See supra* notes 33 and 34 and accompanying text.

[36] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 §102(a)(2) (to be codified at 11 U.S.C. § 707(b)(2)) (stating court shall presume abuse if certain requirements under means test are met). The means test is imposed on all chapter 7 consumer filers, and the official forms require debtors to check a box indicating whether the means test presumption of abuse arises in their case. *See id*. If so, some party in interest will likely move to dismiss on that basis, unless the debtor makes a strong showing of "special circumstances." *Id*. In fact, within 10 days after the meeting of creditors, the UST is required to file a statement disclosing whether the presumption has arisen. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(c) (to be codified at 11 U.S.C. § 704(b)). If it has, the UST must promptly notify all creditors. *See id*. Within 30 days after the meeting, the UST must file either a motion to dismiss or a written statement explaining why the UST chose not to seek dismissal. *Id*.

[37] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a)(2) (to be codified at 11 U.S.C. § 707(b)(2)(B)). 11 U.S.C. § 707(b)(2)(B) provides:

> (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 justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.
> (ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—
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> > (I) documentation for such expense or adjustment to income; and
> > (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.
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> (iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.
> (iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current

along the way, Congress made choices which reduce the test's severity and thus increase the pass rate. Some of these choices are for administrative convenience, while others serve policies and constituencies competing with the interests of unsecured creditors. We will not do a thorough analysis of the means test here; that has been done well by others.[38] Our purpose here is to examine how the means test lost its teeth.

B. Current Monthly Income

The first step is to compute the debtor's current monthly income.[39] Ironically, there is nothing very current about CMI. Instead, Congress chose to average the debtor's income[40] in the six months prior to bankruptcy.[41] If the debtor's income changes much, the timing of the filing—a month or two sooner or later—can lead to a CMI figure considerably greater or less than actual or projected income at time of filing.[42] However, Congress presumably chose averaging to avoid the even greater distortions that could occur if only one month's income was used.

> monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—
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> > (I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or
> > (II) $10,000.

Id.

[38] *See supra* note 3. *See generally* Jean Braucher, *Means Testing Consumer Bankruptcy: The Problem of Means*, 7 FORDHAM J. CORP. & FIN. L. 407 (2001) (examining current proposed means testing); James T. Hubler, *The End Justifies the Means: The Legal, Social, and Economic Justifications for Means Testing under the Bankruptcy Reform Act of 2001*, 52 AM. U. L. REV. 309 (2002) (addressing bankruptcy eligibility aspects of Reform Act); Wedoff, *supra* note 8 (analyzing means testing under Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

[39] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(2)(A)(i)).

[40] And in a joint case, the income of both debtors. *See id*. (to be codified at 11 U.S.C. § 707 (b)(2)(A)(ii)(I)).

[41] *Id*. (to be codified at 11 U.S.C. § 101(10A) (A)). CMI includes amounts paid by anyone other than the debtor on a regular basis for the household expenses of the debtor or dependents. *See id*. (to be codified at 11 U.S.C. § 101(10A)(B)).

[42] For example, consider the plight of a debtor who will file chapter 7 after losing a job, and possibly much more, due to Hurricane Katrina. Unless the debtor waits at least six months to file, calculation of CMI will include one or more months of salary the debtor no longer earns. However, such a debacle might well qualify as special circumstances and rebut the presumption of abuse if it arose. *See generally* David W. Allard, *Means Testing, Dismissal and Conversion under the New Law*, AM. BANKR. INST. J., July-Aug. 2005, at 8 (analyzing abuse under Reform Act); Richard M. Hynes, *Optimal Bankruptcy in a Non-Optimal World*, 44 B.C. L.REV. 1 (2002) (discussing how consumer bankruptcy insures individuals against misfortunes); Ann Morales Olazábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 335 (2003) (assessing "sudden illness, calamity, disability or unemployment" under Bankruptcy Code).

CMI expressly excludes benefits under the Social Security Act,[43] so CMI will understate actual income for many debtors. This was a deliberate policy choice, and one consistent with the general thrust of the amendments to protect retirement benefits at the expense of creditors. For many reasons, CMI may not reflect actual income, but it is the rock on which the means test is built.

C. Median Income Test

The next step is to choose the relevant median income figure; the dollar figure that determines whether the debtor passes the test at this early point and qualifies for safe harbors as a below-median debtor. The median to use depends on the debtor's state of residence or domicile[44] and household size. The higher the median, the more below-median debtors there will be. Debtors could possibly manipulate outcomes by reducing income, moving to a higher-median state, or increasing household size.[45]

However, the great majority of chapter 7 filers will be below-median without any such shenanigans, and Congress was so informed early on. Well-publicized empirical studies in 1998–99, audited by the General Accounting Office at the request of the chief sponsor of the legislation, Senator Charles Grassley, indicated that only 17% to 25% of then-current chapter 7 filers were above-median.[46] Since that time, additional tinkering with medians has further reduced the above-median group.[47] More recent studies estimate that only 6% to 15% of filers are above-

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[43] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 101 (10A)(B)). CMI also excludes payments to victims of war crimes, and crimes against humanity, as well as victims of domestic or international terrorism. *Id*.

[44] *See id*. (to be codified at 11 U.S.C. § 707(b)(6)–(7) (referring to median income of "applicable states)). It is not entirely clear which state's median income figure the debtor must use. The term is not defined by BAPCPA.

[45] *See infra*, Part 3 (discussing whether such manipulations constitute abuses under new section 707(b)(3)).

[46] UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTORS, PERSONAL BANKRUPTCY: ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTOR'S ABILITY TO PAY 15 (June 1999) *available at* http://www.gao.gov/archive/1999/gg99103 (denoting all studies using 100% of national median found percentage of above-median debtors to fall within this range). *See also* Culhane & White, *supra* note 3, at 37 (attributing difference in results of 1998 Ernst & Young study finding 47% of debtors above-median to fact it set cut at 75% rather than 100% of national median).

[47] While the Census Bureau's actual income medians often decline for families of more than three persons, Congress adjusted medians for use in the means test to increase Census Bureau medians for four persons by $6300 for each additional household member in excess of four. The percentage of above-median debtors was further reduced by decisions to use the higher "one-earner" median rather than that for "households of one person," and state rather than national medians. Use of "household size" rather than "family size" for choice of median may also allow a debtor to qualify for a higher median. *See generally, Summary: Major Effects of the Consumer Bankruptcy Provisions of Amended S. 1301*, AM. BANKR. INST. J., June 1998, at 6 (indicating Census Bureau's use of "household" may allow for those unrelated to debtor, but who happen to be living in the house, to be counted as household members).

median.[48] All these studies were done before the means test took effect, so the sample debtors had no reason to try evasive measures to stay below the median.

D. Deductions from CMI

The small group who are above-median must next calculate the deductions allowed from CMI. In this area, many deliberate policy choices were made with the effect of allowing more debtors to pass the test. For administrative convenience, and to make the test more certain and predictable, the means test treats the major IRS CFS expense categories as straight allowances, ignoring the debtor's reported actual expenses, even if they are less than the allowances. Given that the means test is a forecast of the debtor's reasonable expenses for the next five years, use of objectively determined allowances in place of actual current expenses makes sense. "Other Necessary Expenses" is the only IRS category in which the means test uses the debtor's actual expenses.[49]

Another illustration is the handling of future auto repair and replacement expenses for debtors with older cars that are paid off at time of filing. The IRS would deny any ownership allowance to delinquent taxpayers with paid-off cars. The means test, however, allows debtors with paid-off cars the full monthly IRS ownership allowance, to cover expected repairs and replacement. Congress' choice benefits debtors and the automotive industry, and is one we have advocated.[50] The

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[48] BestCase Solutions, Inc. analyzed 11,000 bankruptcies filed between June 15 and July 6, 2005, and found that 85.6% of the sample chapter 7 filers had incomes below applicable state medians. *See also* ELIZABETH WARREN & JAY L. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 161 (5th ed. 2005) (reporting only 8% of sample debtors from the 2001 Consumer Bankruptcy Project would have incomes above applicable state medians); Culhane & White, *supra* note 3, at 37–38 (indicating actual percentage of above-median debtors in study is 24.2%).

[49] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat 23, 27–28 (2005) (to be codified at 11 U.S.C. § 707 (b)(2)(A)(ii)(I–V)). The statutory argument supporting use of the IRS figures as straight allowances rather than as caps on current actual expenses is section 707(b)(2)(A)(ii)(I)'s directive that the debtor deduct from CMI the "amounts specified under the [IRS Housing and Transportation] Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses . . . by the [IRS] . . . ." (emphasis added). Congress' use of "amounts specified" for housing and transportation, and "actual expenses for Other Necessary Expenses shows Congress intended different treatment of the former, since all debtors have housing and transport expenses, from the more individualized miscellaneous expenses that some but not all debtors may incur as Other Necessary Expenses. The Official Forms for reporting means test data adopt this view. *See* Official Forms B22 A (chapter 7) lines 20A-24, and B22 C (chapter 13) lines 25A – 29 (October 2005) (at http://www.uscourts.gov/bkforms/bankruptcy_forms.html#official lines. We think the forms committee got it right. Substituting the IRS' empirically determined allowances for the debtor's often understated view of his or her actual expenses provides a more reliable basis for assessing feasibility of a hypothetical 5-year chapter 13 plan for the debtor, the purpose underlying the means test.

[50] *See* Culhane & White, *supra* note 3, at 45–46 ("The CFS Ownership Allowance, when used for a five-year forecast, must be read to cover not only current debt, but also leasing, major repairs, and in some cases, eventual replacement of aging or damaged vehicles."); *see also* Wedoff, *supra* note 8, at 257–58 (supporting idea that debtor should be able to claim ownership expense based on number of vehicles owned or leased, not number for which debtor makes payments).

impact on the means test is significant, however. When we modeled this factor in our 1999 study, that single change cut the can-pay group from 6.8% to 3.6% of the sample.[51]

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 or the amount of the debt be reasonable.[52] The omission of those limits appears intentional, for the very next sentence in the Code, which allows an additional deduction of cure payments, is expressly limited to cure payments necessary to retain possession of a few crucial assets like a principal residence and motor vehicle needed for the debtors and dependents.[53] The unlimited secured debt deduction bought the support of home mortgage lenders, and, when Congress threw in limits on cramdown in chapter 13, got the automobile industry on board as well.[54] This deduction, however, virtually assures that an extremely small number of debtors will emerge as can-pays. Of course, the unlimited deduction also seems to invite last-minute purchases for those who need more deductions from CMI to pass the means test. Congress set no time-of-acquisition limits for this purpose. It did, however, bar debtors' counsel from advising debtors to incur debt, secured or otherwise, in contemplation of bankruptcy.[55]

After cutting that gaping hole in the means test, Congress authorized a long list of additional deductions. Several are noteworthy because they approve types of expenses which judges often disallowed in "substantial abuse" cases under former section 707(b). Among these are deductions such as starting a health savings account or purchasing family health insurance at the time of filing, continuing to provide care for elderly or disabled household members even if the debtor has no

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[51] Culhane & White, *supra* note 3, at 45–46 (indicating impact of denial of "ownership allowance" on means-testing outcomes nearly doubled number of can-pays).

[52] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(2)(A)(iii)(I)) (allowing deduction from CMI of "[t]he debtor's average monthly payments on account of secured debts" including "all amounts scheduled as contractually due" in the 60 months post-filing).

[53] *Id*. (to be codified at 11 U.S.C. § 707(b)(2)(A)(iii)(II)) (allowing deduction from CMI of "additional payments . . . necessary . . . to maintain possession of debtor's primary residence, motor vehicle, or other property *necessary* for support of debtor and debtor's dependents, that serves as collateral . . . .") (emphasis added).

[54] *See* Richardo I. Kilpatrick, *Consumer Bankruptcy Reform Roundtable*, 7 AM. BANKR. INST. L.REV. 3, 12–13 (1999) (analyzing effect of sections 124 and 125 of Bankruptcy Code on cram down).

[55] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 227(a) (to be codified at 11 U.S.C. § 526(a)(4)):

> A debt relief agency shall not advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

Id.; *see also* Vance & Cooper, *supra* note 25, at 309–12 (discussing various interpretations of 11 U.S.C. § 526).

legal obligation to do so, and private school expenses of $1500 per year per child.[56] These deductions advance policies far different from maximum repayment of unsecured creditors.

Congress could have made the means test meaner than it is, and the pass rate lower. However, Congressional decisions to serve other important policies and curry support for enactment led to changes which substantially reduced the number of debtors the means test will exclude from chapter 7.

II. WHY THE MEANS TEST IS THE ONLY TEST OF ABILITY TO PAY

Some say too many debtors will pass the means test, and from that, conclude that Congress did not mean the means test to be the last word on ability to pay. They read section 707(b)(3) to authorize additional (and stricter) tests of ability to pay. As Judge Wedoff recently wrote:

> [B]ecause the general abuse provisions of § 707(b)(3) expressly apply when the means test has been rebutted, "passing" the means test does not preclude a discretionary finding of abuse by the court . . . . [I]f a debtor's overall financial circumstances would easily allow the debtor to repay debts . . . the court may find abuse.[57]

Judge Wedoff contends that the means test will be ineffective because it is too easy to pass, especially by the wealthiest, well-counseled debtors; and that judges are free to remedy the means test's under-inclusiveness by using section 707(b)(3) to impose different and more stringent judge-made measures of ability to pay.[58]

We agree, and have said so before, that the means test will not catch a lot of can-pay debtors.[59] First, there are just not that many to catch, and Congress sensibly limited the means test to above-median debtors, that small minority of chapter 7 filers who might have significant repayment capacity. However, the same Congress then loaded the test with large allowed deductions for charitable contributions and

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[56] *See supra* notes 52 to 53. The relevant deduction also covers public school expenses.

[57] Wedoff, *supra* note 8, at 236; *see* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a) (to be codified at 11 U.S.C. § 707(b)(3)) (mandating court to consider whether debtor filed petition in bad faith or totality of circumstances of debtor's financial situation demonstrates abuse).

[58] Wedoff, *supra* note 8, at 278–79; *see also* Culhane & White, *supra* note 3, at 37–38 (analyzing median income test in context of 1995 bankruptcy filings); Ed Flynn & Gordon Bermant, *Bankruptcy by the Numbers: Pre-Bankruptcy Planning Limits Means-Testing Impact*, AM. BANKR. INST. J., Feb. 2000, at 22 (asserting superiority of HUD county medians in measuring debtor's actual economic environment).

[59] *See* Culhane & White, *supra* note 3, at 31 (outlining results of Creighton Study involving means-test). *But see* UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTORS, PERSONAL BANKRUPTCY: ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTOR'S ABILITY TO PAY, 2–3, 31–33 (June 1999) *available at* http://www.gao.gov/archive/1999/gg99103.pdf (comparing and contrasting Creighton Study with other studies on debtor's ability to pay); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 188–92 (1999) (questioning assumptions of Creighton Study but recognizing its importance).

secured debt, and numerous smaller ones, making it is hard to flunk and easy to escape. Like Judge Wedoff, we are frustrated that Congress imposed so much cost and administrative burden for so little benefit.

We disagree, however, with Judge Wedoff's second point: that a judge who thinks the means test is not mean enough may "fix it" by substituting his or her own more stringent standards of ability to pay and idiosyncratic views of appropriate debts and expenses. In our view, the language of the revised Code, the interaction among its sections, its legislative history, and the need for uniformity in consumer bankruptcy law all support the view that the means test is now the exclusive ability to pay test. It may not perform as advertised, but it is the only ability to pay test Congress intended to impose.

First, there is the language of section 707(b). Subsection one allows dismissal for "abuse." Subsection two remedies one shortcoming of the former substantial abuse section, the view of some courts that ability to pay, standing alone, was not cause to dismiss.[60] Subsection two clearly overrules that view. Ability to pay now suffices for dismissal.

Subsection two does not stop there, as it could have. Instead, it addresses another problem of great concern to Congress: lack of uniformity in judicial tests of ability to pay. As the House Report on BAPCPA says, the statutory standard "substantial abuse" was "inherently vague, which has led to . . . disparate interpretation and application by the bankruptcy bench."[61] George Wallace, a principal drafter of the means test, complained that "[j]udges' values, which become important in determining how much expenses are appropriate for a debtor, vary widely . . . ."[62] "The objective standards . . . are necessary in order to produce some uniformity in the system."[63]

Professor Jack Williams, in an important article on the evolution of the means test, writes, "Wallace is asserting the classic attack on standards. As perceived by Wallace, a *standard*, like [former] section 707(b), vests too much discretion in bankruptcy judges . . . ."[64] What was needed instead was a clear rule, "an algorithm

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[60] *See, e.g.*, Green v. Staples (*In re* Green), 934 F.2d 568, 572–73 (4th Cir. 1991) (finding insolvency alone is not enough to constitute substantial abuse); *In re* Krohn, 886 F.2d 123, 127–28 (6th Cir. 1989) (adopting totality of circumstances analysis to determine whether there is substantial abuse of chapter 7); *In re* Degross, 272 B.R. 309, 313 (Bankr. M.D. Fla. 2001) (holding ability to pay is not conclusive factor in determining whether there is substantial abuse).

[61] *See* H.R. REP. NO. 109-31, pt. 1, at 12 (2005); *accord* David White, *Disorder in the Court: Section 707(b) of the Bankruptcy Code*, 1995-96 ANN. SURV. OF BANKR. L. 333, 355 (1995) (recognizing courts use different methods to define substantial abuse).

[62] *See Resolved: The Time has Come for Means Testing Consumer Bankruptcy*, AM. BANKR. INST. J., April 1998, at 46 (excerpting debate among Judge Wedoff, George Wallace and Gary Klein).

[63] *Id*.

[64] Williams, *Distrust*, *supra* note 12, at 111 (emphasis added). Professor Williams draws on the work of Professor Kathleen Sullivan. *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293–94 (1992) (discussing categorization and balancing as alternative methods of constitutional interpretation).

purposefully designed to limit judicial discretion on the issue of consumer debtor abuse."[65] Wallace designed such an algorithm and Congress has enacted it.

Professor Williams compares standards and rules as alternative tools to limit judicial discretion. Rules are "outcome-determinative," and "promote consistency, predictability, and judicial restraint in decision making."[66] Standards, on the other hand, allow broad discretion and are not outcome-determinative. Standards encourage the decision-maker to balance many factors. Standards may be fairer, and allow a decision-maker to "minimize the risk of error from the over- and under-inclusiveness endemic in a rule."[67] Standards have their own limitations, however. One is the risk of "error from bias and incompetence."[68] Another is that standards provide less notice to the rest of the community as to what is expected. Rules, by contrast, give "fair notice of what is expected of parties in interest."[69]

Congress, wisely or not, has replaced the standard of substantial abuse with a rule on ability to pay—the highly detailed and hard-edged means test—in an attempt to reduce judicial discretion. First, the means test deprives judges of discretion on what counts as income, specifically overruling cases holding Social Security payments to be disposable income, despite their exemption under federal law.[70] Next, the means test picks Census Bureau income medians, rather than relying on judicial views of how much income should subject a debtor to special scrutiny. Third, the means test adopts IRS allowances to fix exact dollar deductions in very important categories, rather than letting judges decide what is reasonable. In other categories, where the debtor's actual expenses are used, sometimes they are

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[65] Williams, *Distrust*, *supra* note 12, at 119.

[66] Williams, *Distrust*, *supra* note 12, at 119–20; *see* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 266–67 (1996) (noting rules maximize "predictability of the law" and judicial restraint); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985) (suggesting adoption of rules would be appropriate when "certainty, uniformity, stability, and security are highly valued").

[67] *See* Williams, *Distrust*, *supra* note 12, at 121; United States v. Logan, 250 F.3d 350, 368 (6th Cir. 2001) (affirming court's broad discretion in applying balancing test standard when deciding whether to admit certain evidence); Jack F. Williams, *Process and Predictions: A Return to a Fuzzy Model of a Pretrial Detention*, 79 MINN. L. REV. 325, 361 (1995) [hereinafter Williams, *Process*] (arguing standards are fairer than rules "because [standards] promote substantive justice and equality").

[68] *See* Williams, *Distrust*, *supra* note 12, at 121.

[69] *See* Williams, *Distrust*, *supra* note 12, at 120; *see* Simmons II v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995) (asserting function of Fed. R. Civ. P. 8(e)(1) is "to give fair notice of the claim asserted") (quoting 2A JAMES WM. MOORE ET AL.., MOORE'S FEDERAL PRACTICE ¶ 8.13, at 8–58 (2d ed. 1994)); Williams, *Process*, *supra* note 67, at 361 (contending rules provide fair notice of what is expected of litigants).

[70] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 32 (2005) (to be codified at 11 U.S.C. § 101(10A)) (defining "current monthly income"). For cases holding that exempt income must be considered available for repayment of creditors in bankruptcy, *see* Stuart v. Koch (*In re* Koch), 109 F.3d 1285, 1290 (8th Cir. 1997) (determining worker's compensation benefits are to be included in "disposable income" if debtor seeks chapter 13 relief); *In re* Shields, 322 B.R. 894, 900 (Bankr. M.D. Fla. 2005) (finding Social Security benefits are not excluded from "disposable income"); *In re* Zuehlke, 298 B.R. 610, 614 (Bankr. N.D. Iowa 2003) (requiring debtors' exempt disability income to be included as disposable income in their chapter 13 plan); *In re* Hagel, 171 B.R. 686, 687 (Bankr. D. Mont. 1994) (holding exempt social security disability income may be considered as disposable income).

limited by "reasonable" or "necessary," as with cure payments, and sometimes not, as with secured debt pure and simple.[71] Fourth, the means test includes special deductions not on the IRS CFS list, deductions which clearly overrule prior case law disallowing such expenses as care for disabled and elderly household members,[72] and some private school expenses.[73] Finally, the means test sets specific dollar amounts as triggers for the presumption of abuse, in place of various court-developed tests. Congress adopted rules, not discretionary standards, to govern ability to pay. Those rules are uniform and predictable, as Congress intended. They communicate to debtors and other parties in interest what is expected. Whether they are strict enough is a legislative decision.

To say that judges are free under section 707(b)(3) to substitute their own can-pay standards for Congress' means test would render the means test superfluous. Yet the canons of statutory construction require just the opposite, and direct courts to construe the provisions within a statute to be consistent with each other, and to give meaning to all parts.[74] The general abuse section has a role, but as we show in Part III, it is a limited one that does not replace the means test's many detailed rules with alternate tests of ability to pay. Section 707(b)(3)'s "bad faith" and "totality of the circumstances" standards must give way to the more specific means test algorithm. "[I]t is a commonplace of statutory construction that the specific governs the general . . . ."[75]

It was necessary for judges to give content to the former vague standard of substantial abuse. Its words gave few clues on how to measure ability to pay. The situation is much different now that Congress has enacted precise rules. As the Supreme Court wrote in *Lamie v. United States Trustee*, "[t]here is a basic

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[71] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(2)(A)(iii)).

[72] *See, e.g.*, *In re* Beharry, 264 B.R. 398, 404 (Bankr. W.D. Pa. 2001) (unwilling to include expenses for debtor's second wife's minor child in budget); *In re* Cox, 249 B.R. 29, 32 (Bankr. N.D. Fla. 2000) (finding it unreasonable for debtor to be feeding his fiancé and her family, instead of using money to pay his creditors); *In re* Haddad, 246 B.R. 27, 32 (Bankr. S.D.N.Y. 2000) (disallowing expenses for family members whom debtor was not legally obligated to support).

[73] *See, e.g.*, *In re* Watson, 403 F.3d 1, 8 (1st Cir. 2005) (affirming decision that debtors' parochial school tuition is not reasonably necessary expense); *In re* Walsh, 287 B.R. 154, 157 (Bankr. E.D.N.C. 2002) (disallowing private school expenses); Univest-Coppel Village, Ltd. v. Nelson, 204 B.R. 497, 500 (Bankr. E.D. Tex. 1996) (refusing to include private high school tuition as reasonably necessary expense).

[74] Helvering v. Credit Alliance Corp., 316 U.S. 107, 112 (1942) (stating two sections of Act should be construed as being consistent with each other); *see also* Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41, 48 (1895) (articulating history of interpreting provisions of legislation as consistently as possible); United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co., Inc., 5 F.3d 39, 43 (3d Cir. 1993) (supporting decision by interpreting two provisions within statute as consistent with each other).

[75] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992); *see also* Coady v. Vaughn, 251 F.3d 480, 484 (3d Cir. 2001) (reinforcing statutory principle that specific provision of statute governs general provision); Edmond v. United States, 520 U.S. 651, 657 (1997) (reiterating principle that where specific provision conflicts with general provision, specific provision governs).

difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[76]

Further evidence that the means test displaces judicial discretion on ability to pay is found in the amendments to chapter 13. Clearly, a major aim of the means test is to push can-pay debtors into repayment plans under chapter 13. As Senator Grassley, a principal sponsor of BAPCPA put it, "If repayment is possible, then [the debtor] will be channeled into chapter 13 . . . . This bill does this by providing for a means tested way of steering people . . . ."[77]

Chapter 7 ability to pay tests have been linked to chapter 13's required payment levels since 1984, when section 707(b)'s substantial abuse and section 1325(b)'s disposable income standards were added to the Code.[78] The latter was intended to end the wide disparity among the courts on minimum repayment to unsecured creditors. Prior to 1984, some courts routinely approved zero-percent plans, while others required 70% or more, under the rubric of "good faith."[79] As Professor Braucher has so convincingly shown, however, the loose "all disposable income" standard failed to overcome local legal culture. There was no uniformity under that standard.[80]

For the same problem, Congress administered the same remedy, replacing a standard with the means test rule. Once above-median income debtors enter chapter 13, whether it was their first choice or only option after flunking the means test, BAPCPA still requires them to pay all their disposable income into the plan—and for a longer time than is required of lower-income debtors. However, BAPCPA also replaces the bankruptcy judges' former discretion to decide how much

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[76] 540 U.S. 526, 538 (2004) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)); *see also* Iselin v. United States, 270 U.S. 245, 251 (1926) (rejecting defendant's argument as modification of statute, not filling statutory gap).

[77] 151 CONG. REC. S1856 (daily ed. January 4, 2005) (statement of Senator Charles Grassley) (addressing debtors' repayment ability); *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a)(2), 119 Stat. 23, 27 (2005) (amending Code relating to conversion of chapter 11 filing to chapter 13 filing for repayment purposes); Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 829 (2005) (discussing Act's push toward repayment plans under chapter 13).

[78] 11 U.S.C. § 707(b) (2000) (codifying dismissal of filings which would be substantial abuse of title 11 provisions); 11 U.S.C. §1325(b) (2000) (requiring repayment plan to include all disposable income received by debtor within three years of beginning of repayment period); *see also* John B. Butler, III, *A Chapter 13 Trustee Looks at Section 1325(b) of the Bankruptcy Code*, 63 AM. BANKR. L.J. 401 (1989) (analyzing disposable income test under Bankruptcy Reform Act of 1984).

[79] *See* Marianne B. Culhane, *In re* Estus*: Payments to Unsecured Creditors under Chapter 13*, 16 CREIGHTON L.REV. 841, 846–48 (1983) (noting role of good faith in arriving at variety of repayment rates); s*ee also* Barnes v. Whelan, 689 F.2d 193, 198–200 (D.C. Cir. 1982) (ruling 1978 Code sets no minimum payment other than best interests of creditors liquidation amount test); *In re* Raburn, 4 B.R. 624, 626 (Bankr. M.D. Ga. 1980) (holding good faith requires 70% repayment of unsecured claims).

[80] *See* Braucher, *Lawyers and Consumer Bankruptcy*, *supra* note 54, at 532–37 (showing variety of repayment percentages); *see also In re* Greer 60 B.R. 547, 555–56 (Bankr. C.D. Cal. 1986) (concluding variable percentage rates of repayment are acceptable under good faith test); *cf. In re* Jones, 55 B.R. 462, 466 (Bankr. D. Minn. 1985) (asserting it is court's duty to determine percentage of disposable income to be included in repayment plan).

disposable income an above-median debtor has. New section 1325(b)(2)[81] requires that "disposable income" be calculated starting with chapter 7 CMI,[82] and, for above-median debtors, deductions for living expenses are those allowed in the means test of section 707(b)(2).[83] No more may judges calculate a debtor's disposable income using their "own subjective preferences to determine the debtor's allowed living expenses."[84]

Chapter 13 trustees recognized early on that this redefinition of disposable income meant some high-income debtors would pay less than they would have under the variant judicial tests and local legal culture that previously measured the chapter 13 disposable income. The chapter 13 trustees repeatedly made their concerns known to Congress, asking that CMI less deductions be a minimum, not the maximum, but no changes were made.[85] As in *Lamie*, "[t]his alert, followed by the Legislature's nonresponse, should support a presumption of legislative awareness and intention."[86]

Thus, even if judge-made ability-to-pay tests were used to push debtors identified as "can-pays" into chapter 13, those with higher incomes would not have to pay more into the plan than the means test mandates. Some chapter 13 trustees have reportedly been considering use of chapter 13's good faith requirement to sidestep this and require higher payments.[87] One leading chapter 13 trustee sees that approach as "fraught with judicial (and trustee) legislating."[88] We think that the very specific language of section 1325(b)(2) displaces any such use of chapter 13 "good faith," even assuming that phrase had any relevance to minimum payments after the 1984 amendments. Once again, Congress demonstrated a determination to replace judicial discretion under general standards with precise rules-based calculations. One can understand why bankruptcy judges would chafe at such restrictions, but that does not mean that Congress did not mean what it said.

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[81] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(h) (to be codified at 11 U.S.C. § 1325(b)(2)).

[82] *Id*. § 101, 156–57 (to be codified at 11 U.S.C. § 101(10A)).

[83] *Id*. § 102(h) (to be codified at 11 U.S.C. § 1325(b)(3)).

[84] Todd Zywicki, *Bankrupt Criticisms*, National Review Online at 2 (Mar. 15, 2005), *at* http://www.nationalreview.com/comment/zywicki200503150744.asp; Harriet Thomas Ivy, *Means Testing Under the Bankruptcy Reform Act of 1999: A Flawed Means to a Questionable End*, 17 BANKR. DEV. J. 221, 240 (2000) (detailing how courts previously calculated a debtor's disposable income). *See generally* Kenneth N. Klee, *Restructuring Individual Debts*, 71 AM. BANKR. L.J. 431 (1997) (illustrating the financial fairness standard to which many, but not all judges subscribe).

[85] E-mail from Henry E. Hildebrand, III, chapter 13 Trustee, to list-serve Bankr-UNLV (May 31, 2005, 08:09:00 CST) (on file with authors).

[86] Lamie v. U.S. Trustee, 540 U.S. 526, 541 (2004); *see also* Sommer, *supra* note 27, at 192 (questioning whether "courts that have been instructed to strictly follow the plain language of the statute will adhere to that rule in interpreting the new provisions . . . ."); Gordon Bermant, *Bankruptcy Reform: Finding the Best Gross Income Test*, AM. BANKR. INST. J., July-Aug. 1999, at 18 (explaining the fair and practical rationale behind the policy of making high-income debtors subject to income testing).

[87] E-mail from Henry E. Hildebrand, III, chapter 13 Trustee, to list-serve Bankr-UNLV (May 31, 2005, 08:09:00 CST) (on file with authors).

[88] *Id*.

III. GENERAL ABUSE UNDER SECTION 707(b)(3)

In part II of this paper, we argued that section 707(b)(2)'s means test determines ability to pay for chapter 7 debtors, and that those who find that test too harsh or too lenient must ask Congress to revisit it, rather than judges to rewrite it. However, debtors who pass the means test may still face dismissal under section 707(b)(3), which directs the court to 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 circumstances demonstrates abuse.[89]

In Part III, we raise some questions and suggest a few answers on the post-BAPCPA meaning of these terms. While both have a history in chapter 7 case law, for several reasons their reach and impact will be different after BAPCPA. First, a new opportunity for debtor misbehavior has opened, cheating on the means test, which should be cognizable under one or both of these terms. Second, judicial discretion to assess ability to pay is greatly circumscribed by the means test, leaving that issue little or no part to play under section 707(b)(3) general abuse. Third, bad faith and totality of the circumstances may no longer reach conduct for which BAPCPA provides new, more specific remedies. If section 707(b)(3) does overlap other remedies, consideration should be given to whether creditors would be better served, and abusive debtors more appropriately punished, by sanctions other than dismissal. And finally, since the means test is not BAPCPA's only provision

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[89] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102(a)(1), 119 Stat. 23, 27 (2005) (to be codified at 11 U.S.C. § 707(b)(3)) ("[T]he court shall consider whether the debtor filed the petition in bad faith . . . ."). An initial surprise is that these standards are found in section 707's subsection (b), rather than in subsection (a). This location makes both standards applicable only to debtors with primarily consumer debts and means creditors and case trustees have standing to seek dismissal only of above-median debtors. *Id*. (to be codified at 11 U.S.C. § 707(b)(6)) ("Only the judge or United States trustee (or bankruptcy administrator, if any) may file a motion under section 707(b) . . . ."). This removes most charitable contributions from consideration. *See* 11 U.S.C. § 707(b)(1) (2000) (as amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102(a)(1)) ("[T]he court may not take into consideration whether a debtor has made, or continues to make, charitable contributions . . . .").

Much prior "bad faith" litigation arose under subsection (a), where all parties in interest may seek dismissal for cause, such as the debtor's unreasonable delay or nonpayment of fees. Creditors sought to sidestep the standing limits of former subsection 707(b) by asserting that bad faith was an additional, though unlisted, cause under subsection (a). Placement of the express "filed in bad faith" standard in subsection (b) ratifies cases holding that bad faith is not cause for dismissal under subsection (a). *See, e.g.*, Neary v. Padilla (*In re* Padilla), 222 F.3d 1184, 1191 (9th Cir. 2000) ("[B]ad faith as a general proposition does not provide a 'cause' to dismiss a chapter 7 petition under § 707(a)."); Shangraw v. Etcheverry (*In re* Etcheverry), 242 B.R. 503, 506 (D. Colo. 1999) ("Congress did not incorporate a good faith requirement when a bankruptcy court rules on motions to dismiss under 11 U.S.C. § 707(a)."); *In re* Pedigo, 296 B.R. 485, 489–90 (Bankr. S.D. Ind. 2003) ("[S]ection 707(a) authorizes dismissal for the debtor's failure to comply with bankruptcy procedures and is not conditioned on that debtor's motive for filing . . . ."); *In re* Landes, 195 B.R. 855, 856 (Bankr. E.D. Pa. 1996) (holding bad faith is not cause for dismissal under section 707(a)).

intended to discourage chapter 7 filings, there should be far fewer cases in which credible section 707(b) motions can be filed.[90]

A. The Pre-BAPCPA Meaning of These Terms

"Filed in bad faith" and "totality of the circumstances" are new to the text of the Code, and neither is defined by BAPCPA. Both terms, however, were frequently and sometimes interchangeably used in cases under former section 707, before ability to pay was measured by the means test. Bad faith was used both under section 707(a) as "cause" for dismissal, as well as under former subsection 707(b) in substantial abuse cases, where it sometimes stood alone but often was considered in addition to judicial tests of ability to pay.[91]

When bad faith stood alone,[92] the test was well described in one much cited case[93] as requiring proof of "extreme misconduct falling outside the purview of more specific Code provisions, such as using bankruptcy as a 'scorched earth' tactic against a diligent creditor, or using bankruptcy as a refuge from another court's jurisdiction."[94] In *Kahn*, the court described bad faith as "manifested dishonesty" aimed at the court, attempts to gain bankruptcy benefits such as the automatic stay, "while intentionally and fraudulently [acting] to avoid . . . the detriments," that is, evading debtor duties to file truthful schedules, cooperate with the trustee, and

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[90] *See, e.g., infra* note 97 and accompanying text.

[91] *See, e.g.*, Tamecki v. Frank (*In re* Tamecki), 229 F. 3d 205, 208 (3d Cir. 2000) ("[A]bility to repay is not in and of itself sufficient proof of bad faith, both the reasonableness of his accrual of the debt and the timing of his filing . . . were sufficiently questionable to warrant good faith scrutiny."); Indus. Ins. Servs., Inc. v. Zick (*In re* Zick), 931 F.2d 1124, 1126–27 (6th Cir. 1991) ("A lack of good faith . . . has been recognized in a number of bankruptcy cases as a valid cause of dismissal under § 707(a)"); *In re* Collins, 250 B.R. 645, 666 (Bankr. N.D. Ill. 2000) (holding there is good faith filing requirement under section 707(a).); *In re* Spagnolia, 199 B.R. 362, 365 (Bankr. W.D. Ky. 1995) (basing section 707(a) dismissal on totality of the circumstances, with bad faith as one factor).

[92] Under former section 707(b), creditors and case trustees did not have standing to seek dismissal for substantial abuse, where ability to pay was either the sole relevant factor or a most important one. However, all parties had (and still have) standing under section 707(a) to seek dismissal for "cause." When creditors used that route, some courts held ability to pay could not be raised there against consumer debtors, as creditors lacked standing on that issue. *See, e.g., In re* Green, 934 F.2d 568, 571 (4th Cir. 1991) ("Congress considered and rejected the use of a threshold future income or ability to repay test . . . as a qualification for Chapter 7 relief for consumer debtors."); Deglin v. Keobapha (*In re* Keobapha), 279 B.R. 49, 53 (Bankr. D. Conn. 2002) ("[A] debtor's ability to pay in the future is not a factor a court should consider in a motion to dismiss pursuant to § 707(a)."); *In re* Motaharnia, 215 B.R. 63, 72 (Bankr. C.D. Cal. 1997) ("[I]f . . . the debtor is unable to meet a meaningful part of his financial obligations, the court must consider other relevant indicia of the debtor's honesty and good faith . . . .") Thus, the pre-BAPCPA section 707(a) bad faith cases may be the best guides for defining bad faith under new section 707(b)(3), since ability to pay is now confined to 707(b)(2)'s means test.

[93] *In re* Khan, 172 B.R. 613 (Bankr. D. Minn. 1994) *cited with approval in In re* Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994); *see* 6 COLLIER ON BANKRUPTCY, ¶ 707.03(2), at 707–12 (Lawrence P. King ed., 15th ed., rev. 1996) (explaining holding in *In re* Huckfeldt, 39 F.3d 829).

[94] *In re Huckfeldt*, 39 F.3d at 832.

surrender non-exempt assets.[95] Under that decision, isolated instances are not enough; instead, there must be "systemic and deliberate misstatements or omissions on . . . schedules, knowingly false testimony at a meeting of creditors or court hearing; and intentional acts to hinder the trustee . . . . [A] permeating animus . . . ."[96] The Eighth Circuit agreed that bad faith should be narrowly defined and limited to truly egregious conduct, so that it would not be "employed as a loose cannon [against] a debtor whose values do not coincide precisely with those of the court."[97]

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[95] *In re Khan*, 172 B.R. at 625 (indicating that bankruptcy court should look at debtor's "manifested attitude toward the integrity of the bankruptcy process"); *see also In re* Mottilla, 306 B.R. 782, 788 (Bankr. M.D. Pa. 2004) (holding debtor is presumed to have filed for bankruptcy in good faith, but presumption can be challenged by a party in interest); *In re* Campbell 124 B.R. 462, 465 (Bankr. W.D. Pa. 1991) (holding although debtor was technically in compliance with Bankruptcy Code, he was attempting to "overutilize" bankruptcy to detriment of his creditors, undermining overall purpose of Bankruptcy Code); *In re* Brown, 88 B.R. 280, 283–84 (Bankr. Haw. 1988) (noting courts have emphasized that purpose of bankruptcy law is to give "a fresh start" to honest debtor, not "the unscrupulous and cunning individual").

[96] *In re Kahn*, 172 B.R. at 625 n.23 (providing examples indicating a "manifest dishonesty" on behalf of debtor to bankruptcy court); *see In re Mottilla*, 306 B.R. at 788 (outlining factors bankruptcy court considers when analyzing whether petitioner is honest and deserving of relief, such as timing of bankruptcy filing and increase in credit card debt before filing); *In re Keobapha*, 279 B.R. at 52 (listing factors to determine whether debtor acted in bad faith when filing petition, such as filing case in response to judgment or pending litigation or failure of debtor to try to repay his debts); *In re* Stewart, 175 F.3d 796, 809–10 (10th Cir. 1999) (indicating that court must consider numerous factors to see if "substantial abuse" has occurred).

[97] *See In re Huckfeldt*, 39 F.3d at 832, *citing with approval In re* Latimer, 82 B.R. 354, 364 (Bankr. E.D. Pa. 1988)). *Huckfeldt* illustrates one context in which creditors frequently allege bad faith under section 707(a): a bankruptcy following a divorce. In *Huckfeldt*, the Eighth Circuit affirmed dismissal where the bankruptcy court found debtor-surgeon acted in bad faith by manipulating income and filing chapter 7 with intent to frustrate a divorce decree and force his ex-wife into her own bankruptcy. *In re Huckfeldt*, 39 F.3d at 832. *See* In *re* Linehan, No. 05-10233-JNF, 2005 Bankr. LEXIS 1201, at 12 (Bankr. D. Mass. June 23, 2005) (quoting *In re Latimer*, 82 B.R. at 364); *In re* Original IFPC S'holders, Inc., 317 B.R. 738, 750 (Bankr. N.D. Ill. 2004) (indicating that analysis in *Huckfeldt* was focused on whether debtor had "legitimate reorganizational objective within the scope of the Bankruptcy Code").

However, debtors seeking escape from divorce obligations will not find chapter 7 nearly as inviting under BAPCPA's extensive amendments favoring domestic relations creditors. Property settlement obligations are now automatically excepted from discharge in chapter 7; the creditor spouse no longer needs to file an adversary and prevail on the former balancing and ability to pay tests. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 215, 119 Stat. 23, 54 (2005) (to be codified at 11 U.S.C. § 523(a)(15)); *id*. (to be codified at 11 U.S.C. § 523(c)). Support claims, now called domestic support obligations, get first priority. *Id*. § 212 (to be codified at 11 U.S.C. § 507(a)(1)). Further, new exceptions to the stay increase the leverage of support claimants by allowing them to start or continue civil proceedings to withhold support from the debtor's income, intercept tax refunds, and suspend drivers' and professional licenses. *Id*. § 214 (to be codified at 11 U.S.C. § 362(b)(2)). They may proceed against exempt property without regard to state law. *Id*. § 216 (to be codified at 11 U.S.C. § 522(c)(1)). Finally, trustees are required to notify the creditor spouse of the progress of the case, the location of the debtor and of the services of state child support agencies. *Id*. § 219 (to be codified at 11 U.S.C. § 704(a)(10)). *See generally* MICHAELA WHITE, MARIANNE CULHANE & NATHALIE MARTIN, WHEN WORLDS COLLIDE: BANKRUPTCY AND ITS IMPACT ON DOMESTIC RELATIONS AND FAMILY LAW 25–30 (3d ed. ABI 2005); Crocker & Waldschmidt, *supra* note 26, at 334–37 (addressing amendments and changes to section 704 and implications on spouses); William Houston Brown, *Taking Exception to a Debtor's Discharge: The 2005 Bankruptcy Amendments Make It Easier*, 79 Am. Bankr. L.J. 419, 436 (referring to amendments of new Bankruptcy Code in which debtor is required to notify spouse of debtor's discharge, last known address, and information about debts that are excepted from discharge or reaffirmed).

Totality of the circumstances was the more pro-debtor of two tests of substantial abuse under former 707(b)(2).[98] The other, tougher test was the *per se* rule that if a judge found a debtor could pay enough unsecured debt in chapter 13, that alone showed substantial abuse.[99] The totality test, in contrast, held apparent ability to pay standing alone not sufficient proof of substantial abuse. The court was to weigh many other factors as well, including why the debtor had so much debt (true calamity or consistent overspending), efforts if any to repay, debts reaffirmed, eligibility for chapters 11 and 13, and interestingly, the debtor's good or bad faith, his honesty or lack thereof in dealing with creditors and the court.[100] Nevertheless, ability to repay, measured by variant judicial standards in those pre-means-test days, was a very important factor.[101]

Bad faith and totality of the circumstances made their way from case law into the text of the Code by political compromise. When bankruptcy reform proposals were debated in the late 1990's, the House and Senate each approved a different method of detecting ability to pay. The House bill contained a formulaic rule-type means test denying judicial discretion, which evolved into revised section 707(b)(2).[102] The Senate bill, on the other hand, set standards to let judges decide,

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[98] *See, e.g.*, *In re* Lamana, 153 F.3d 1, 4 (1st Cir. 1998) (rejecting per se rule mandating dismissal for "substantial abuse" when debtor can repay debt out of future income and adopting "totality of the circumstances test" because it "demands a comprehensive review" both of debtor's current and future financial situation); *In re* Carlton, 211 B.R. 468, 477–78 (Bankr. W.D.N.Y. 1997) (holding that ability to pay is not sufficient to prove substantial abuse); *In re* Green, 934 F.2d 568, 572 (4th Cir. 1991) (indicating that "totality of the circumstances" approach involves evaluation of several factors, as well as "the relation of the debtor's future income to his necessary expenses," which allows court to determine whether debtor is attempting to abuse bankruptcy process); *In re* Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (noting that based on legislative history Congress meant to deny chapter 7 relief to "the dishonest or non-needy debtor" and that courts should adopt "totality of the circumstances" approach in order to determine whether debtor should be afforded relief).

[99] *See In re* Koch, 109 F.3d 1285, 1288 (8th Cir. 1997) (noting substantial ability to pay creditors would warrant dismissal of petition); *In re* Walton, 866 F.2d 981, 984 (8th Cir. 1989) (commenting that ability to repay substantial amount of pre-petition debt, standing alone, is sufficient basis for dismissal under substantial abuse provision of section 707(b)); *In re* Kelly, 841 F.2d 908, 914–15 (9th Cir. 1988) (adopting rule that if debtor has ability to pay his debts, that will justify section 707(b) dismissal).

[100] *See, e.g.*, *In re* Mutty, No. 04-10634, 2004 WL 2647705, at 4-5 (Bankr. D. Vt. Nov. 19, 2004) (observing that good faith in debtor's actions was critical factor to consider in determining "totality of the circumstances"); *In re Carlton*, 211 B.R. at 478 (setting forth long and nonexclusive list of 15 factors, in which good faith in filing and good faith and candor in schedules were 2 of the 15); *In re Green*, 934 F.2d at 572 (stating that debtor's good faith in filing is factor in "totality of the circumstances" test); *In re Krohn*, 886 F.2d at 126 (pointing out that court should determine if debtor is honest by looking at whether debtor has acted with "good faith and candor in filing schedules and other documents").

[101] *See In re Koch*, 109 F.3d at 1288 (setting forth that court analyzes ability of debtor to repay when considering if debtor is attempting to abuse the process); *In re* Farrell, 150 B.R. 116, 120 (Bankr. D. N.J. 1992) (adopting *Green* test that while solvency was an important factor for determining whether debtor was abusing system, it was not the only factor to consider); *In re Green*, 934 F.2d at 572–73 (stating that ability of debtor to repay would indicate whether he or she is attempting to abuse bankruptcy process).

[102] *See* H.R. 3150, 105th Cong. § 101 (1998) (providing conditions where debtors are ineligible for chapter 7 relief); Jensen, *supra* note 12, at 504–05 (discussing means test under House bill); Richard L. Stehl, *The*

case by case, who in the totality of circumstances could and should repay in chapter 13, and who else merited dismissal for bad faith.[103] Rather than choose just one of these inconsistent tools, Congress put both in BAPCPA.

B. Bad Faith and Totality of the Circumstances after the Means Test: Some Examples

Now that Congress has granted the means test primacy on ability to pay, the boundaries of bad faith and the totality test have to some extent been reset. Perhaps it makes little difference which standard is applied to particular debtor conduct, since both carry the same sanction of dismissal. However, the two tests have differed in the past, and we think they will carry different meanings into the future. Bad faith should require a strong showing of debtor dishonesty. The totality test, on the other hand, should encompass debtor actions before or during the case which, though honestly disclosed, not illegal or necessarily dishonest, are nonetheless manifestly unreasonable under the debtor's circumstances.

1. Cheating the Means Test

One new area for abuse is cheating on the means test, and a debtor could transgress either standard here. If the debtor's reported means-test calculations are rife with intentional misrepresentations and omissions, the case may have been filed in bad faith.[104] Even if the debtor fills out the forms truthfully, but passes the test

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Failings of the Credit Counseling and Debtor Education Requirements of the Proposed Consumer Bankruptcy Reform Legislation of 1998, 7 AM. BANKR. INST. L. REV. 133, 135 n.10 (1999):

> [D]ebtors would be ineligible for chapter 7 relief where the debtor's household income is above the national median for a household of the same size and income . . . [and after] deduction of certain expenses . . . is [still] greater than fifty dollars per month and sufficient to pay twenty percent of general unsecured claims over a five year period.

Id.; Williams, *Distrust*, *supra* note 12, at 117–19 (explaining three-part means test introduced by House to assess debtor's substantial repayment capacity to steer them from chapter 7 to chapter 13).

[103] *See* S. 1301, 105th Cong. § 102 (1998) (listing guidelines court must consider in determining whether debtor abused relief under chapter 7); *see also* Jensen, *supra* note 12, at 515 n.159 (commenting Clinton Administration preferred discretionary approach of Senate bill over "rigid and arbitrary approach" in House bill); Vicki W. Travis, *Of the Latest Attempted Revisions to the Bankruptcy Code: Can They Really Change Anything?*, 16 BANKR. DEV. J. 221, 253 (1999) (arguing Senate bill was less stringent than House bill by requiring debtors who could repay 20 percent or more of secured debts to convert from chapter 7 to chapter 13); Williams, *Distrust*, *supra* note 12, at 114–17 (explaining means test under Senate bill).

[104] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23, 29–30 (2005) (to be codified at 11 U.S.C. § 707(b)) (providing when presumption of abuse does not arise or is rebutted, court shall consider "(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse") *See generally* Allard, *supra* note 42, at 68 (acknowledging uncertainty surrounding what is meant by "bad faith" in amendment to section 707(b) of Bankruptcy Code); Jennifer A. Brewer, *Bankruptcy & Entertainment Law: The Controversial Rejection of Recording Contracts*, 11 AM. BANKR. INST. L. REV. 581, 602–03 (2003) (analyzing amendments to section 707(b) of Bankruptcy Code as "providing that a chapter 7 bankruptcy case

only due to unreasonable evasive maneuvers that pushed income down or deductions up, the case might be abusive under the totality test. Creditors and case trustees now have standing to seek dismissal of above-median debtors,[105] so those groups could help police compliance with the test.

Let us consider a few of the possibilities. With respect to income, a debtor's CMI might be "artificially low," if the petition was strategically timed to capture the off-months for a debtor who is seasonally employed, such as a construction worker,[106] or to exclude a sizeable annual bonus. And because CMI is strictly backward looking, it would fail to capture income from a new job the debtor starts just before or soon after filing. Medians could be manipulated as well, for a debtor could move to a state with higher medians or increase household size. Loading up on secured debt in contemplation of bankruptcy could also be abuse, allowing an above median to debtor to pass by increasing deductions from CMI.[107]

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could be dismissed merely upon a showing that the debtor could repay at least a specified portion of his/her debts or that the debtor filed the chapter 7 petition in bad faith"); Vance & Cooper, *supra* note 25, at 317 n.103 ("If the means test provision does not arise or has been rebutted, 707(b)(3) requires that the court consider whether the debtor filed the petition in bad faith or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse."); Wedoff, *supra* note 8, at 236 (asserting amendments to section 707(b) of Bankruptcy Code indicate "bad conduct by the debtor in connection with the bankruptcy is a ground for 707(b) relief independent of financial circumstances indicating that the debtor could repay debt"). Of course, denial of discharge may be a more appropriate remedy. 11 U.S.C. § 727(a) (2000) (enumerating circumstances where court shall not grant debtor discharge).

[105] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(1)) (amending section 707(b) to permit a "trustee . . . or" any party in interest to seek dismissal of a chapter 7 case); *Allard*, *supra* note 42, at 8 ("Generally, U.S. Trustees (USTs), trustees, bankruptcy administrators (if any) and any party in interest may file a motion to dismiss a consumer debtor's case under § 707(b)"); Kilpatrick, *supra* note 77, at 818 (noting BAPCPA permits party-in-interest to suggest dismissal of case); ALAN N. RESNICK & HENRY J. SOMMER, THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 WITH ANALYSIS 1 (2005) (explaining under 2005 amendments "[c]reditors and trustees are permitted to bring abuse motions for debtors above state median income as defined in" section 707(b)); Wedoff, *supra* note 8, at 237 ("[N]ew 707(b)(1) generally allows any party in interest, including case trustees and creditors—not just a U.S. trustee or the court—to bring a motion seeking dismissal of a Chapter 7 case for abuse.").

[106] *See* Wedoff, *supra* note 8, at 249–51 (providing examples of debtors whose income varies in regular pattern and who file just before or just after his or her season of lower income, and thus has artificially high or low CMI respectively); Robert B. Chapman, *The Bankruptcy of Haig-Simons? The Inequity of Equity and the Definition of Income in Consumer Bankruptcy Cases*, 10 AM. BANKR. INST. L. REV. 765, 786 (2002) ("Whether a motion to dismiss may or must be filed turns on a comparison of 'current monthly income' (CMI), with respect to which 'income' is also undefined, to median family income as determined by the Census Bureau.").

It is not always easy to assign particular conduct to one of section 707(b)(3)'s categories. Judge Wedoff sees timing of income issues as attackable under either bad faith or totality of the circumstances. Wedoff, *supra* note 8, at 251. Some UST Program training materials on BAPCPA list means-test planning as bad faith while putting such obvious misdeeds as use of a false Social Security number to obtain credit or, in a bankruptcy petition, to avoid serial filing sanctions, as "totality of the circumstances." *See, e.g.*, U.S. DEPT. OF JUSTICE, CIVIL ENFORCEMENT: BAD FAITH AND TOTALITY OF THE CIRCUMSTANCES 7-8, in Trustee Training Seminar on BAPCPA (materials for UST Region 13 training in Omaha NE, on September 9, 2005, on file with authors) [hereinafter CIVIL ENFORCEMENT].

[107] Remember that all secured debt may be deducted from CMI to determine if the means-test presumption of abuse arises. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(2)(A)(iii)) (permitting reduction of CMI by secured debt); *see also* Allard,

We agree with some of this, but think the timing of the petition should not be grounds for dismissal under section 707(b)(3). In the petition timing situation, the debtor is taking an action—filing a petition—that is necessary in every chapter 7 proceeding, an action which Congress knew would be taken, and for which Congress has provided specific timing rules in relation to ability to pay. Those rules should be dispositive. Congress could easily have chosen a longer period, say a year, over which to average income, but it did not. It could have included a reach-forward provision, like the 180-day period in section 541(a)(5),[108] to capture future income increases, but again, it did not. Further, Congress expressly provided for reducing CMI when the formula results in a number that is higher than actual or projected income at time of filing, when that results in the debtor failing the means test. In such cases, the debtor may rebut a presumption of abuse by proof of "special circumstances."[109] Congress' failure to provide an equivalent way to *increase* CMI when CMI is less than actual or projected income may indicate that no such adjustment is to be allowed.

However, suppose that the debtor takes some eve-of-bankruptcy action intended to reduce CMI, an action that is in no way required for filing the case. The debtor might take an unpaid leave of absence, quit a job, or refuse overtime the formerly welcomed.[110] None of these actions is specifically provided for in the means test, and each might be abuse under the totality test, depending on the debtor's motive and the act's materiality. Dismissal should not be ordered if the debtor had a legitimate economic, family or health reason for the change in behavior, or if the income reduction did not change the outcome of the means test and thus was immaterial. On the other hand, if the act was done primarily to pass the means test, and enabled a debtor to pass when he otherwise would have failed, dismissal may be appropriate.

This standard could be used for other apparent attempts to manipulate the means test, such as big-ticket purchases on secured credit shortly before filing. Of course, one could argue that eve-of-bankruptcy secured debt is not abusive if the

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supra note 42, at 71 (indicating CMI may be reduced by debtor's average monthly payments on account of secured debts. Unsecured debt, on the other hand, is relevant only if CMI less all deductions is less than $10,000 but greater than $ 6000. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(2)(A)(i)) (providing presumption of abuse arises if debtor's CMI less all deductions is "(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or (II) $10,000").

[108] 11 U.S.C. § 541(a)(5) (2000) (including in property of the estate interests in some types of property acquired by debtor within 180 days after filing of petition).

[109] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(2)(B)).

[110] *See, e.g., In re* Manske, 315 B.R. 838, 843 (Bankr. E.D. Wis. 2004) (finding substantial abuse where debtors reaffirmed lease for vehicle which required "hefty monthly payments" after both quit their jobs before either obtained new employment); *In re* Blum, 255 B.R. 9, 15 (Bankr. S.D. Ohio 2000) (finding substantial abuse where debtor voluntarily quit her job before filing, because there was "no indication that [debtor] would not return to work"); *In re* Helmick, 117 B.R. 187, 189–90 (Bankr. W.D. Pa. 1990) (dismissing case as substantial abuse where debtor wife quit job and debtor husband refused overtime, demonstrating clear, "calculated attempt to reduce income on the eve of bankruptcy.").

debtor expects and is able to repay it, since Congress could have, but did not, put time-of-acquisition limits on secured debt deductions in the means test. Despite this, we think that the court could question last-minute purchases under totality of the circumstances. If the purchase is material to the outcome, and the debtor's motivation was to pass the test rather than to serve some legitimate economic, family or health need, abuse might be found.

Suppose that 30 days before filing a chapter 7 petition, the debtor traded in a 4-year-old low mileage car in good repair, on which he owed only $4000. He replaced it with a new car on which he owes $40,000, or ten times as much secured car debt as before. The debtor did not lie to the seller, expects to reaffirm the debt and should be able to make the payments. However, but for that purchase, he would have failed the means test. It looks bad for the debtor, but before we dismiss his case, BAPCPA says look at the totality of the circumstances. If that new car is a spiffy little convertible bought to serve a teenage daughter's sense of style;[111] that is not our idea of a legitimate family purpose. On the other hand, if the new vehicle is a van with a wheel-chair lift and other accommodations for a newly disabled debtor or dependent, allowing him to stay in a job he would otherwise have to quit and to drive to needed medical treatment on his own, the purchase suddenly looks justifiable. Even though it was eve-of-bankruptcy and material to the means test, we would not dismiss the latter case.

2. Exemption Claims

Judge Wedoff suggests mere retention of exempt property, even if purchased long before bankruptcy, may evidence abuse. "[W]here a debtor owns a valuable car free of liens and is allowed by applicable exemption law to retain the car in Chapter 7 . . . dismissal could still be obtained under the totality of the circumstances standard . . . ."[112]

Here we must respectfully disagree. First, while some pre-BAPCPA cases included the value of exempt property when determining ability to pay,[113] the new means test completely excludes exemptions from the formula. Further, exemptions are legislative decisions, and here the legislature decided that the debtor may rightfully keep such assets from unsecured creditors, to insure some minimum standard of living for the debtor and dependents.[114] Congress has frequently been

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[111] *See, e.g.*, *In re* Watkins, 216 B.R. 394, 395 (Bankr. W.D. Tex. 1997) (dismissing case for substantial abuse where debtors bought $25,000 van 15 days before filing).

[112] *See* Wedoff, *supra* note 8, at 258.

[113] *E.g.*, Taylor v. United States (*In re* Taylor), 212 F.3d 395, 396 (8th Cir. 2000) (finding even if creditors could not reach ERISA plan, those funds should be treated as disposable income when determining ability to pay under former section 707(b)(2)). BABCPA expressly excludes such funds from disposable income in chapter 13. *See supra* text accompanying note 11.

[114] CHARLES J. TABB, THE LAW OF BANKRUPTCY 640–41 (Foundation Press 1997); *see also In re* Koch, 109 F.3d 1285, 1290 (8th Cir. 1997) (stating that exemptions ensure "that even if [a debtor's] creditors levy

asked, but since 1978 has refused, to require debtors in bankruptcy to use a uniform federal list of exemptions.[115] Failing that, there have been constant calls to cap state law exemptions in bankruptcy, particularly the notorious unlimited homestead exemptions of Texas, Florida and a few other states. The long pre-enactment debate over BAPCPA included discussion of both options.[116] In the end, all Congress did was cap homestead exemptions at $125,000 in a few narrow situations, limit some debtors to the exemptions of their former domicile after an interstate move, and expand some retirement fund exemptions.[117]

Thus, judges, trustees and creditors are not free to undercut these Congressional decisions by arguing that it is abuse for the debtor to use an exemption which Congress expressly left in place. Cases disallowing exemptions or denying discharge for "too much" eve of bankruptcy conversion of non-exempt into exempt property may still be good law,[118] but merely owning and choosing to retain long-held exempt property is not abuse under BAPCPA. The remedy is with state legislatures or Congress, but not dismissal under section 707(b)(3).

3. Rejection of Personal Service Contracts: Congress Dips into Sports and Entertainment Law

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on all of his nonexempt property, the debtor will not be left destitute and a public charge"); *In re* Bailey, 176 F. 990, 993 (D. Utah 1910) (formulating age-old rule of public policy "the superiority of right of a debtor to the exempt property over that of his creditors to the payment of their debts").

[115] The 1978 Code includes a list of federal bankruptcy exemptions in section 522(d), but a long series of political compromises has allowed debtors to choose other exemption sets, and allowed states to opt out of the section 522(d) exemptions for their residents. *See* 11 U.S.C. § 522(b)(1) (as amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) (allowing debtors to choose either the federal bankruptcy exemptions of § 522(d) or exemptions under state, local and other federal law); *see also* 11 U.S.C. § 522(b)(2) (as amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) (authorizing state opt-out legislation).

[116] For an excellent discussion of exemption policy and legislative history of that topic under BAPCPA, *see* Margaret Howard, *Exemptions Under the 2005 Bankruptcy Amendments: A Tale of Opportunity Lost*, 79 AM. BANKR. L.J. 397, 398–401 (2005); *see also* Jensen, *supra* note 12, at 488, 511, 517, 525, 532, 537–38 (detailing years of debate on homestead amendments); *cf.* FLA. CONST. art. X, § 4 (stating exemption from forced sale under process of any court).

[117] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 322, 119 Stat. 23, 96 (2005) (to be codified at 11 U.S.C. § 522(p)) (providing caps on homestead exemption); *see also id.* § 307 (to be codified at 11 U.S.C. § 522(b)(3)(A)) (amending state law exemption for debtors after interstate moves); *id.* § 224 (to be codified at 11 U.S.C. § 522(b)(3)(C)) (expanding exemptions with respect to retirement funds); *id.* § 224 (to be codified at 11 U.S.C. § 522(n)) (requiring asset limitation on retiree with respect to retirement accounts and employee pensions). For IRA's, the million dollar limit may be raised "if the interests of justice so require." *Id.*

[118] *Compare* Hanson v. First Nat'l Bank in Brookings, 848 F.2d 866, 868 (8th Cir. 1988) (holding debtor's conversion of nonexempt property to exempt property on eve of bankruptcy will not deprive debtor of exemption to which he would be otherwise entitled) *with* Norwest Bank Nebraska, N.A. v. Tveten, 848 F.2d 871, 873–74 (8th Cir. 1988) (finding that debtor's conversion of almost all his nonexempt property into exempt form before bankruptcy was fraudulent as to creditors); *see also* Howard, *supra* note 115, at 399–400 (positing problem of drawing line between fraudulent transfers and legitimate conversion of nonexempt to exempt property).

Section 707(b)(3) gives one express example of possibly abusive debtor conduct, albeit one far removed from the ordinary consumer chapter 7 context. The statute directs the court to use of the totality of the circumstances test when "the debtor seeks to reject a personal services contract," and to examine "the financial need for such rejection."[119] Personal service contracts are those based on the debtor's personal skill, like recording or professional sports contracts. Such contracts do not become part of the estate, and cannot be assumed without the debtor's consent, in part to prevent involuntary servitude.[120]

The recording industry lobbied for limits on rejection of personal services contracts.[121] Record companies take risks, incurring substantial up-front costs to record and market new talent, and in exchange, require aspiring artists to sign contracts to make a certain number of recordings, perform exclusively for that recording company, and give the record company all reproduction rights.[122] Artists take risks as well, particularly early in their careers, when they have little bargaining power. These contracts let the record company recoup all costs by deducting them from earnings on recordings, before any royalties are paid to the artist. The minority of artists whose recordings start to sell could, if freed from these exclusive contracts, earn much more from other sources. The threat of rejection in bankruptcy gives artists added leverage if they seek to renegotiate contracts signed early in their careers when they had little bargaining power.

A few pre-BAPCPA cases disallowed rejection of such contracts, and dismissed cases for bad faith where the debtor admitted the primary reason for filing was to

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[119] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 102 (to be codified at 11 U.S.C. § 707(b)(3)(B)).

[120] *See id*. § 328 (to be codified at 11 U.S.C. § 365(c)); *see, e.g*., Delightful Music Ltd. v. Taylor (*In re* Taylor), 913 F.2d 102, 107 (3rd Cir. 1990) (stating personal services contracts differ from other executory contracts in that consent of parties is required before trustee has authority to assume contract); Cloyd v. GRP Records (*In re* Cloyd), 238 B.R. 328, 335 (Bankr. E.D. Mich. 1999) (limiting trustee's ability to enforce personal service contract as means to protect debtor against involuntary servitude); *In re* Noonan, 17 B.R. 793, 797–98 (Bankr. S.D.N.Y. 1982) (holding trustee does not take title to debtor's rights and cannot deal with contract when contract is based on debtor's personal skill).

[121] *See* David C. Norrell, *The Strong Getting Stronger: Record Labels Benefit From Proposed Changes to the Bankruptcy Code*, 19 LOY. L.A. ENT. L. REV. 445, 469 (1998) (discussing record industry's efforts to amend Bankruptcy Code); *see also* Jennifer A. Brewer, Note, *Bankruptcy & Entertainment Law: The Controversial Rejection of Recording Contracts*, 11 AM. BANKR. INST. L. REV. 581, 600–05 (2003) [hereinafter *Recording Contracts*] (discussing history of recording artists' representatives' attempts to compromise on personal services contract rejection provision for bankruptcy reform).

[122] *See Recording Contracts*, *supra* note 121, at 582–86 (discussing exclusivity as core feature of recording contracts); *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2637–39 (2003) (detailing standard recording contract as structured on business model allowing record companies to take risks and invest in unproven artists and to profit on those artists who succeed); *see also* Lisa C. Letowsky, *Broke or Exploited: The Real Reason Behind Artist Bankruptcies*, 20 CARDOZO ARTS & ENT. L.J. 625, 635 (2002) (analyzing method of advancing funds to recording artists).

reject the contract in order to sign a more profitable one.[123] In quite a few cases, however, artists were freed from exclusive recording contracts.[124]

The recording industry lobbied for stiff limits on rejection of recording contracts, but artists' unions were vigilant, and the provision finally enacted is far weaker than the flat prohibition the industry sought.[125] In fact, the provision finally enacted may miss its intended targets altogether, because it was not placed in section 365, the section on executory contracts.[126] Instead, the amendment was codified in section 707(b), which limits it to individual chapter 7 debtors whose debts are primarily consumer debts.[127] Since the costs to be recouped under recording contracts are treated as business claims in bankruptcy,[128] many recording artists may be able to show that their debts are not primarily consumer debts.

For debtors who cannot use that escape route, however, the totality test makes it clear that courts may approve rejection of such contracts, where the debtor is in real financial distress and the contract would prolong that condition.[129] The Third

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[123] *See, e.g.*, *In re* Carrere, 64 B.R. 156, 157 (Bankr. C.D. Cal. 1986) (dismissing case of actress who admitted she wanted to reject contract with one TV network in order to sign one with another paying much more); *In re* Sammons, 210 B.R. 197 (Bankr. N.D. Fla. 1997) (dismissing case of heavy-weight boxer who, rather than pursuing slower state court rescission action, admitted filing bankruptcy to reject contract with one promoter in order to sign with another).

[124] *See, e.g.*, *In re* Watkins, 210 B.R. 394 (Bankr. N.D. Ga. 1997) (denying manager's motion to dismiss artists' chapter 11 cases as filed in bad faith, because debtors did not file solely to reject contracts with managers); *In re Taylor*, 913 F.2d at 108 (finding debtor-in-possession has same power as trustee to reject any executory contract, including contract for personal services.); *In re* Noonan, 17 B.R. 793 (Bankr. S.D.N.Y. 1982) (holding debtor's exclusive recording contract with creditor could not be used as asset for creditor's benefit).

[125] *See Recording Contracts*, *supra* note 121, at 600–05 (discussing history of recording industry artists representatives' attempts to compromise on personal services contract rejection provision for bankruptcy reform.); *see* also Letowsky, *supra* note 122, at 626–27 (2002) ("Record labels argue that it is unfair for artists to reject their recording contracts by declaring bankruptcy. These concerns prompted a congressional lobbying effort by the RIAA to . . . specifically eliminate recording artists' ability to reject recording contracts in bankruptcy."); Norrell, *supra* note 121, at 446 (1999) ("[T]he concerns of record labels set in motion a congressional lobbying effort to prevent recording artists from rejecting their contracts through bankruptcy.").

[126] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 328, 119 Stat. 23, 75–76 (2005) (to be codified at 11 U.S.C. § 365).

[127] *Id*. § 302 (to be codified at 11 U.S.C. § 707(b)(3)). Under section 707(b)(3), the targets of the general abuse section are limited by 11 U.S.C. § 707(b)(1). The former subsection makes this clear by its opening words, which refer to section 707(b)(1): "In considering under paragraph (1)whether the granting of relief would be an abuse . . . ." *Id.*

[128] *See* Letowsky, *supra* note 122, at 633–35 (showing all costs are recovered before artist receives royalties.); *Recording Contracts*, *supra* note 121, at 584–85 (stating recording label recoups costs of production before royalties are paid to artist); Alison J. Winick, Note, *Can Superstars Really Sing the Blues? An Argument for the Adoption of an Undue Hardship Standard When Considering Rejection of Executory Personal Contracts in Bankruptcy*, 63 BROOK. L. REV. 409, 418 (1997) ("The advances and all amounts paid from the recording company from royalties are recoverable (recoupable) by the record company from royalties generated by sales of the artist's album").

[129] *See* All Blacks B.V. v. Gruntruck, 199 B.R. 970, 975–76 (W.D. Wa. 1996) (discussing chapter 7 case filed by grunge rock musicians); *In re* Watkins, 210 B.R. 394 (refusing to dismiss recording artists' chapter 11 cases on basis of bad faith filings); *see also Recording Contracts*, *supra* note 121, at 601 ("A bankruptcy

Circuit allowed James Taylor to reject a recording contract, since he had substantial debt, few assets, and little prospect of improvement under the contract in question.[130] The court described his "unenviable" plight:

> Mr. Taylor . . . was owed substantial amounts by Group entities, but with virtually no prospect of payment; he was contractually obliged to write and perform enough musical compositions to provide at least seven additional albums, but any revenues these efforts might generate would be retained by The Group's creditors; and he had personally guaranteed the obligations of The Group and its related entities in amounts greatly in excess of the remaining equity in his home . . . his only significant asset.[131]

Under BAPCPA's totality test, the outcome should be the same. Rejection of personal services contracts is neither illegal nor necessarily dishonest. If such a contract imposes or will prolong hardship for an honest but unfortunate debtor, rejection should be allowed.

4. Filed in Bad Faith: Some Examples

Now let us turn to the other standard for dismissal under section 707(b)(3), that "the petition was filed in bad faith."[132] As discussed above, that standard carries a requirement of pervasive dishonesty. Means test cheating via flagrant misrepresentations and omissions could suffice, as suggested above. Two other types of cases that may be filed in bad faith are the serial filings that BAPCPA presumes to be "filed not in good faith," and some particularly sophisticated "credit card bust out" cases. Since much of this misconduct can already be punished by denial of, or exception to, discharge, it is important to consider whether dismissal

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court would still have authority and discretion to allow for rejection, even if the rejection of a record contract was the primary motivation for the bankruptcy filing, if the artist's financial or economic status compelled as much.").

[130] *In re Taylor*, 913 F.2d at 107–08 (holding debtor in chapter 11 case could reject executory contracts requiring debtor to write/perform musical compositions sufficient to produce at least seven albums); *see also* Cloyd v. GRP Records (*In re* Cloyd), 238 B.R. 328 (Bankr. E.D. Mich. 1999) (allowing debtor in chapter 7 to reject executory personal service contract); *In re* Cirillo, 121 B.R. 5 (Bankr. D. N.J. 1990) (declaring contract by which entertainer/chapter 7 debtor hired personal manager was executory contract for personal services, and thus automatically rejected 60 days after petition's filing).

[131] *In re Taylor*, 913 F.2d at 105 (describing debtor's state of affairs).

[132] *Compare* L.K. Kluge v. Huckfeldt (*In re* Huckfeldt), 39 F.3d 829 (8th Cir. 1994) (dismissing chapter 7 case filed for purposes of frustrating state court divorce decree, stating court should decide whether "cause," not good or bad faith, existed for dismissal of chapter 7 case) *and* Blumenberg v. Yihye (*In re* Blumenberg), 263 B.R. 704 (Bankr. E.D.N.Y. 2001) (dismissing chapter 11 case converted to chapter 7 due to debtor's abuse of bankruptcy process by filing petition without intent to reorganize) *with In re* Padilla, 222 F.3d 1184 (9th Cir. 2000) (affirming district court order stating neither bad faith nor debtor's alleged credit card "bust-out" were cause for dismissal).

also lies, and if so, which remedy best protects the legitimate interests of creditors and debtors.

a. Serial Filings as Evidence that a Case Was Filed in Bad Faith

Serial filings are not per se abusive, and debtors whose prior case(s) ended in the grant or denial of discharge, or dismissal without either, may normally re-file.[133] However, serial filings have been used abusively, to forestall foreclosure and whipsaw creditors between state and federal forums, rather than seek discharge or reorganization.[134] Sometimes, real estate is transferred to multiple owners and then each owner successively files, as soon as an earlier case is dismissed or relief from stay is granted.[135] Section 109(g) makes some debtors ineligible to re-file for 180 days after a dismissal, but that section does not in fact prevent subsequent filings.[136] Instead, section 109(g) merely provides a statutory basis for a party to interest to move for dismissal once the next petition has been filed.[137] This posed a real

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[133] *See, e.g.*, Johnson v. Home State Bank, 501 U.S. 78, 87 (1991) (holding serial chapter 7 and chapter 13 petitions are not categorically prohibited unless they fall under certain enumerated by Congress instances); Elmwood Dev. Co. v. Gen. Elec. Pension Trust (*In re* Elmwood Dev. Co.), 964 F.2d 508, 511 (5th Cir. 1992) (concluding debtor's subsequent filing of chapter 11 was not "per se" invalid); *see also* Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 179–80 (2005) (suggesting chapter 13 debtors often need two or three tries before they get their plan confirmed); Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749, 754 (2005) (stating bankruptcy filing within 180 days of prior dismissal under section 109(g) cannot be nullity or void ab initio because threshold issue of whether debtor "may be a debtor" in subsequent case must be decided).

[134] *See, e.g.*, *In re Blumenberg*, 263 B.R. at 704 (dismissing chapter 11 case converted to chapter 7 case due to debtor's abuse of bankruptcy process by filing petition without intent to reorganize); *In re* Sar-Marco, Inc., 70 B.R. 132, 132–33 (Bankr. M.D. Fla. 1986) (dismissing chapter 11 case filed not in good faith but for purposes of delaying and frustrating creditor from proceeding with foreclosure sale and realizing on his collateral). *See generally Final Report of the Bankruptcy Foreclosure Scam Task Force*, 32 LOY. L.A. L. REV. 1063 (1999) (discussing various schemes used to delay/defraud creditors via serial filings and efforts to thwart this behavior).

[135] *See* Am. Loan Servs., Inc. v. Amey (*In re* Amey), 314 B.R. 864 (Bankr. N.D. Ga. 2004) (holding debtor's history of filing four separate chapter 13 cases in two-year period to prevent foreclosure sale warranted in rem relief from automatic stay); Friend v. Chem. Residential Mortgage Corp. (*In re* Friend), 191 B.R. 391 (Bankr. W.D. Tenn. 1996) (stating mortgagee could not record trustee's deed without specific order from court while chapter 13 case was pending, despite entry of "last opportunity" order for debtor in prior case); Napoli, *supra* note 133, at 753 (2005) (stating that by paying only bankruptcy filing fee, debtors can stop impending repossession or foreclosure sale, forcing lenders to spend considerable time and money to seek relief from automatic stay).

[136] *See, e.g.*, *In re Friend*, 191 B.R. at 391 (recognizing that 180-day rule precluded debtor from refiling after dismissal of debtor's prior chapter 13 case); First Nat'l Bank of Rocky Mount v. Duncan (*In re* Duncan), 182 B.R. 156 (Bankr. W.D. Va. 1995) (denying creditor's motion to dismiss because voluntary dismissal of debtors' prior chapter 7 case did not affect her eligibility for relief, given lack of evidence of nexus between debtor's voluntary dismissal and creditor's motion for relief from stay in prior case).

[137] Section 109(g) is intended to bar re-filing for 180 days after either involuntary dismissal of a prior case for willful disobedience of court orders or voluntary dismissal after a creditor files a lift-stay motion. *See* 11 U.S.C. § 109(g) (2000). However, the section has been held inapplicable when the prior dismissal order did not expressly find willful disobedience, despite strong evidence that such disobedience was the basis of the

problem under the former Code because the stay arose just as automatically upon wrongful re-filings as in other cases.[138]

One way BAPCPA addresses serial filing abuse is by limiting the stay under section 362. That section, as revised, now offers only a "semi-automatic" stay,[139] and presumes some debtors' second, third or more cases, filed less than a year after prior dismissals, to be "filed not in good faith."[140] After pondering the possibility of a "faith-less" or "neutral faith" filing, we made our own leap of faith to say that "filed not in good faith" means "filed in bad faith." We were heartened in this theological quest by the revelation that the House Report on BAPCPA labels these provisions "[d]iscouraging bad faith repeat filings."[141]

In any event, if a debtor's latest case is presumed "not in good faith" under 362(c), and the presumption is not rebutted by the debtor (or the trustee with estate assets to protect), the stay as to property of the estate and/or the debtor may either

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order. *See In re* Hammonds, 139 B.R. 535, 540 (Bankr. D. Colo. 1992) ("this Court is unable to find that Judge Clark dismissed the Debtor's . . . case because of a willful failure to prosecute . . . [since] the dismissal Order is not expressly premised upon a finding of willfulness."); *In re* Marlatt, 116 B.R. 703, 707 (Bankr. D. Neb 1990) ("The debtor . . . is not prohibited from [re]filing this case . . . [because] the court did not specifically find that the debtor willfully failed to obey an order of the court."); United States v. Lawless (*In re* Lawless), 79 B.R. 850, 855 (W.D. Mo. 1987) ("In order to dismiss a bankruptcy petition with prejudice under § 109(g), there must be a specific finding by the bankruptcy court of 'willful failure' to obey a court order . . . ."). In addition, some courts hold the 180-day bar is discretionary if the prior case was voluntarily dismissed after a lift-stay motion, and require the movant to prove that the dismissal was due to the request for stay relief. *See* Home Savings of Am. v. Luna (*In re* Luna), 122 B.R. 575, 577 (B.A.P. 9th Cir. 1990) (discussing line of cases which hold section 109(g)(2) is discretionary); *In re Duncan*, 182 B.R. at 156 ("[s]ome courts have taken the position that section 109(g)(2) leaves the bankruptcy court with discretion to review the facts relevant to a given debtor and make a case-by-case determination as to whether the particular debtor qualifies to maintain a case . . . ."); Napoli, *supra* note 133, at 754–55 (2005) (indicating bankruptcy court determines if section 109(g) applies; thus court has discretion).

[138] BAPCPA does not amend section 109(g), but does add a new exception to the automatic stay for acts to enforce liens against real property where the debtor is ineligible to file under section 109(g) or filed in violation of a court order prohibiting re-filing by the debtor. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 303, 119 Stat. 23, 78 (2005) (to be codified at 11 U.S.C. § 362(b)(21)) (creating new exception from automatic stay for real estate lien enforcement if debtor was ineligible to file under section 109(g) or filed in violation of a court order entered in prior bankruptcy case).

[139] The colorful phrase is Henry Hildebrand's, at a meeting of the National Association of Consumer Bankruptcy Attorneys in Orlando, Florida, Sept. 17, 2005. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 302 (to be codified at 11 U.S.C.§ 362(c)(3)) (specifying situations in which the automatic stay will be imposed only for 30 days); *see also* Henry Hildebrand, *Impact of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on Chapter 13 Trustees*, 79 AM. BANKR. L.J. 373, 380–83 (2005) (providing more of Hildebrand's insights on changes to stay); Jacoby, *supra* note 132, at 179–180 (2005) ("[t]he statute restricts application of the automatic stay . . . . [I]f a debtor files a second case within one year of the time a prior case was pending, the automatic stay goes into effect for only thirty days.").

[140] Unless the serial filer rebuts the presumption, the stay either ends quickly or never arises. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 302 (to be codified at 11 U.S.C. § 362(c)(3)–(4)). *See also* 11 U.S.C. § 362(d)(4) (affording an in rem remedy denying a stay on specific real estate in cases filed for next two years, if court finds debtor's filing was part of scheme to delay, hinder or defraud creditors by either unconsented transfers of property or multiple filings as to real estate).

[141] S. 256, 109th Cong., § 302 (2005) (naming provision "Discouraging bad faith repeat filings"). Can you tell we teach at a Jesuit university?

not arise or soon end.[142] The case itself, however, may linger on the docket. If section 109(g) does not cover the case, dismissal for bad faith filing under section 707(b)(3) could be used for chapter 7 debtors whose debts are primarily consumer debts.

b. Fraudulent Transfers and Concealed Assets: Choice of Weapons

Where a debtor transfers property with actual intent to hinder, delay or defraud creditors, or conceals assets from the estate by knowingly filing false schedules and lying at the meeting of creditors, these dishonest acts may show that the case was "filed in bad faith" within the meaning of section 707(b)(3). However, chapter 7 debtors who commit these acts are already subject to the very specific sanction of denial of discharge under section 727.[143] Familiar canons of statutory construction hold that when conduct is apparently covered by both specific and very general provisions, that specific rule ought to govern. That principle may apply here, so that sections 727 and sometimes 523,[144] would set the sanction for conduct within their scope, rather than the much more general "filed in bad faith" standard.[145] Some pre-BAPCPA cases so hold when creditors sought dismissal for cause under section 707(a) based on fraudulent transfers and hidden assets.[146]

Even if Congress intended to make dismissal under section 707(b)(3) an additional remedy for such misconduct, it is worth considering whether dismissal is desirable when denial of discharge or exception to discharge could be obtained. Dismissal may give an abusive debtor unintended benefits and deny creditors much needed protection. First, trustees suggest that some creditors equate dismissal with discharge. When they get notice of dismissal, too many think a discharge injunction is in place, and write off the debt. The debtor thus gets a *de facto* discharge.[147] Second, dismissal, unlike a section 727 denial of discharge, allows the

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[142] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 302 (to be codified at 11 U.S.C. § 362(c)(3)(B)) (stating if debtor's case is presumed not in good faith and debtor fails to rebut presumption, stay will end). One commentator finds the new serial filing amendments to be very unclear, and suggests that creditors not rely on 11 U.S.C. § 362(c)(3) without seeking relief from stay under section 362(d). *See* Napoli, *supra* note 133, at 767 ("The deterrent factor of this provision remains questionable and secured creditors will need to think twice before relying on it to proceed with repossessions and foreclosure sales without first seeking relief from the automatic stay under § 362(d)."); *see also* Hildebrand, *supra* note 139, at 381 (explaining debtor or trustee must rebut presumption of lack of good faith to maintain stay).

[143] *See* 11 U.S.C. § 727 (a)(2) (2000) (listing grounds for denial of discharge where debtor has acted with actual intent to hinder, delay or defraud a creditor or an officer of the estate). Criminal sanctions may also apply under 18 U.S.C. § 152 (authorizing fines and /or imprisonment for debtor who knowingly and fraudulently conceals property or makes false statements).

[144] *See* 11 U.S.C. § 523(a) (as amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) (listing debts excepted from discharge).

[145] See *supra* notes 74 and 75 and accompanying text.

[146] *See In re* Khan, 172 B.R. 613, 624–25 (Bankr. D. Minn. 1994) (holding that dismissal under section 707(a) should not be based solely on acts which would be grounds for denial of or exception to discharge).

[147] *See* Furr, *supra* note 8, at 19; *see also In re* Rose, 314 B.R. 663, 687 (Bankr. E.D. Tenn. 2004) ("Failure to comply with any of these specific requirements will result in the dismissal of the case, sans the benefit of

debtor to discharge the debt in a future case. Had the debt survived due to denial of discharge, it could never be discharged in future cases under chapters 7, 11 or 12.[148] Third, if the debtor has nonexempt, hidden or fraudulently transferred assets, dismissal deprives the case trustee and unsecured creditors the benefits of a collective proceeding to recover and administer those assets.[149] The more targeted sanctions of sections 523 and 727 punish the debtor while protecting creditors.

c. Bad Faith and the Credit Card Bust Out

Another likely target of section 707(b)(3) abuse motions is debtors who appear to have planned a "credit card bust out." The United States Trustee Program, under the Justice Department's Civil Enforcement Initiative, regularly sought and sometimes won dismissal under former section 707(b)'s substantial abuse of bust out cases, which involve "debtors with substantial credit card debt, but who schedule little property, disclose no transfers and are either unemployed or underemployed."[150]

However, since the Code already provides the specific remedy of exception to discharge under section 523(a)(2) for debtors who incur debt without intent to repay, it seems unnecessary for the UST to act on the credit card companies' behalf, at taxpayer expense, to at least temporarily deny discharge via dismissal. Further, since dismissal under section 707 is a contested matter, not an adversary proceeding as is section 523, this use of section 707 bypasses important debtor protections. As one court said:

> While . . . accumulation of consumer debt beyond an ability to pay may not be responsible, [it] . . . is not illegal and is not necessarily fraudulent, unless accompanied by the requisite intent. Why then . . . prosecute the credit card company's non-dischargeability case by way of 707(b)? If the . . . debt was incurred without the intent to repay . . . then . . . upon proof . . . [the debt] may be adjudged non-

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a discharge"); *In re Khan*, 172 B.R. at 625 (suggesting bankruptcy case could benefit creditors despite debtor's acts that could be ground for denial of or exception to discharge).

[148] Once a debtor has been denied a discharge, claims from that case generally survive discharge in subsequent cases under chapters 7, 11 and 12, under sections 523(a)(10), as applied in sections 1141(d)(2) and 1228(a)(2). *See* 11 U.S.C. § 523(a)(10) (2000). *See also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 321, 119 Stat. 23, 95–96 (2005) (to be codified at 11 U.S.C. § 1141(d)(2)); *id*. § 213 (to be codified at 11 U.S.C. § 1228(a)). However, that subsection does not prevent discharge of such debts under a confirmed plan in chapter 13. *See id*. § 314 (to be codified at 11 U.S.C. § 1328(a)) (allowing discharge of claims within § 523(a)(10)).

[149] *See In re* Motaharnia, 215 B.R. 63, 72 (Bankr. C.D. Cal. 1997) (recognizing that dismissal results in all debts surviving the debtor's bankruptcy); *In re Khan*, 172 B.R. at 625 (noting if dismissal is denied, creditors have other redress under sections 522, 523 and 727); *In re* Lang, 5 B.R. 371, 375 (Bankr. S.D.N.Y. 1980) (acknowledging creditor has other remedies if dismissal is denied).

[150] *See* CIVIL ENFORCEMENT, *supra* note 106, at 7–8 (indicating UST's may now seek dismissal of these cases under "totality of the circumstances," although basing dismissal on bad faith may fit facts better in many cases).

> dischargeable. However, in the absence of such proof, the debt is dischargeable. Section 707(b) should not circumvent non-dischargeability sections [and] procedural safeguards required for . . . proof of the elements . . . of non-dischargeability.[151]

BAPCPA expands the section 523(a)(2) exception to discharge,[152] but does not grant standing under that section to the UST or case trustee. Only creditors may seek exceptions to discharge under section 523(a)(2), (4) and (6).[153] On the other hand, BAPCPA did grant standing under section 707(b) to creditors of above-median debtors. These two developments reduce the need for the UST's taxpayer-financed anti-bust out program under revised section 707(b).

Where one or two credit card issuers claim to be victims of such a scam, those creditors should use section 523, and not take the shortcut—or have the UST take it for them—of section 707(b)(3). There may, however, be appropriate cases for the UST to seek dismissal for a bust out.[154] Judge Geraldine Mund has thoughtfully pointed out that section 523 is not an effective remedy when a sophisticated debtor runs up debt using many issuers' cards. In such cases, it would "multiply the workload of the court to adjudicate each § 523 action separately,"[155] and the amount owed each issuer may be too small to justify individual non-dischargeability actions.[156] A single action by the UST under section 707(b) might be allowed in such cases, although it would be better if the evidentiary standards of section 523(a)(2) were applied.

CONCLUSION

Congress has replaced judicial discretion on ability to pay in chapter 7 abuse cases with a detailed formula. That formula almost certainly will not lead to dismissal of as many debtors as lobbyists suggested it would. However, until Congress revises it, the means test displaces judicial tests of ability to pay, and the general abuse provisions of section 707(b)(3) should not be used to undercut Congress' choice. Totality of the circumstances and filed in bad faith should be

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[151] *In re* Attanasio, 218 B.R. 180, 219 (Bankr. N.D. Ala. 1998); Tamm, *supra* note 28, at 71–72 (relying upon *In re Attanasio* to explain propriety of similar proof to establish claims under section 707(b) and section 523(a)(2); finding otherwise would leave section 523 invalid).

[152] BAPCPA extended the section 523(a)(2)(C) reach-back period for presuming non-dischargeability of cash advances and "luxury good" purchases. It also made section 523(a)(2) claims non-dischargeable in chapter 13. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 302 (to be codified at 11 U.S.C. § 1328(a)(2)).

[153] *Id*. § 215 (to be codified at 11 U.S.C. § 523(c)(1)). We have drawn on the ideas of Bradley Tamm for the following discussion. *See* Tamm, *supra* note 28, at 72 (establishing U.S. Trustees lack standing to bring section 523(a) claims).

[154] *See* Tamm, *supra* note 28, at 69 (explaining when substantial abuse can be found in bust-out situations).

[155] *In re* Motaharnia, 215 B.R. 63, 73 (Bankr. C.D. Cal. 1997).

[156] *Id*. at 73 n.16.

reserved for serious debtor misconduct that is not adequately addressed by other more specific remedies in the Code.