IMPACT OF *MARRAMA* ON CASE CONVERSIONS: ADDRESSING THE UNANSWERED QUESTIONS

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INTRODUCTION

Supreme Court opinions occasionally set out to decide one issue but in the process leave a path of new unanswered questions. In *Marrama v. Citizens Bank of Massachusetts*,[1] the Supreme Court's stated purpose in granting certiorari was to resolve a "procedural anomaly."[2] The glitch in procedure perceived by the Court centered on whether the Bankruptcy Code requires a debtor's chapter 7 case be converted in the face of certain dismissal or reconversion of the chapter 13 case on bad faith grounds.[3] Put another way, must a bankruptcy court be required to "go through the drill of conversion and reconversion when reconversion appears to be a foregone conclusion?"[4]

The bankruptcy court in *Marrama* concluded that the drill was unnecessary and that immediate denial of the debtor's motion to convert was warranted.[5] This action the bankruptcy court found justified because the debtor had made two significant false statements in the schedules filed with his chapter 7 petition.[6] The first statement concerned a home in Maine the debtor had transferred before filing bankruptcy to a trust he created and in which he was the sole beneficiary.[7] Although Mr. Marrama disclosed his beneficial interest in the trust, he listed its value in his schedules as zero.[8] The second statement came in response to a question on the Statement of Financial Affairs[9] in which Mr. Marrama responded that he had not

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[1] 127 S. Ct. 1105 (2007).

[2] *Id.* at 1108.

[3] *Id.* at 1107–08.

[4] Croston v. Davis (*In re* Croston), 313 B.R. 447, 454 (B.A.P. 9th Cir. 2004) (holding in pre-*Marrama* decision that chapter 7 debtors have absolute right to convert). *But see In re* Delone, No. 06-10087DWS, 2006 WL 3898390, at *4 (Bankr. E.D. Pa. May 31, 2006) (holding that debtors do not have right to convert when it is obvious that conversion is being used as "abuse of the bankruptcy process"); Finney v. Smith, 141 B.R. 94, 101–02 (Bankr. E.D. Va. 1992) (pointing to the power of bankruptcy court to deny debtor's motion for conversion if it will knowingly lead to reconversion of the case).

[5] Marrama v. Citizens Bank of Mass. (*In re* Marrama), 313 B.R. 525, 535 (B.A.P. 1st Cir. 2004) (holding that bankruptcy court's decision to deny conversion of debtor's case from chapter 7 case to chapter 13 case was warranted due to debtor's bad faith).

[6] *Id.* at 533–34.

[7] *Id.* at 534 (noting debtor admitted this transfer was made for purpose of protecting Maine property).

[8] The property interest was listed in Question 10 on Schedule B accompanying Mr. Marrama's chapter 7 petition. *See id.*

[9] *See* Question 10, Official Form 7, Statement of Financial Affairs (Oct. 2005), http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B7.pdf.

made any transfers of property during the year before filing his petition.[10] The bankruptcy court found that both statements were false; the debtor's interest in the Maine property was substantial and the transfer to the trust had occurred seven months before his petition was filed.[11]

After being advised the trustee intended to revoke the trust and recover the Maine home as estate property,[12] Mr. Marrama filed a "notice" of conversion to chapter 13. Treated by the bankruptcy court as a motion to convert, it was opposed by the trustee and an interested creditor on the basis that conversion was sought in bad faith and would result in an abuse of process.[13] The bankruptcy court denied the motion to convert, refusing to find that the debtor's misstatements were mitigated by explanations given by debtor's counsel at the conversion hearing.[14]

The bankruptcy court's decision was affirmed by the Bankruptcy Appellate Panel for the First Circuit[15] and the Court of Appeals.[16] Both courts held that the right to convert under section 706(a) is not absolute and that the bankruptcy court was justified in denying conversion based on the debtor's bad faith conduct.[17]

The Supreme Court's majority opinion in *Marrama* sided with the lower courts, but adopted a construction of section 706 not previously seen in opinions on the subject. The Court found relevant to its decision the text of both subsections 706(a)[18] and 706(d),[19] using the latter as a means to propel into the conversion

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[10] *In re Marrama*, 313 B.R. at 534.

[11] The debtor's pre-petition transfer was the basis for a subsequent denial of the debtor's discharge under section 727(a)(2)(A). *See* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 445 F.3d 518, 524 (1st Cir. 2006) (affirming bankruptcy court's decision of reasonable inference that debtor "transferred valuable assets belonging to him, less than a year before he petitioned for bankruptcy protection, with the actual intent to defraud his creditors.").

[12] *See* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 430 F.3d 474, 476 (1st Cir. 2005).

[13] *See In re Marrama*, 445 F.3d at 528 (declaring opposition to debtor's motion to convert as grounded in bad faith and abuse of process).

[14] *In re Marrama*, 313 B.R. at 529 (discussing bankruptcy court's reasoning that "there is no 'oops' defense to concealment, and that filers have an obligation to provide accurate information.").

[15] *Id.* at 535 (affirming bankruptcy court's decision to deny debtor's notice of conversion).

[16] *In re Marrama*, 430 F.3d at 476.

[17] *See id.* at 482 (affirming bankruptcy court order upon clear evidence of debtor "playing fast and loose with the bankruptcy process"); *In re Marrama*, 313 B.R. at 535 ("The bankruptcy court was correct in denying the Debtor's request for conversion because of the existence of 'extreme circumstances' constituting bad faith."); *see also In re* Salem, 465 F.3d 767, 776 (7th Cir. 2006) (comparing First Circuit stance that bankruptcy courts can deny debtor's motion to convert to chapter 13 in cases of bad faith with holdings in other circuits); Neely v. Smith (*In re* Neely), 334 B.R. 863, 871 (S.D. Tex. 2005) (finding persuasive reasoning in *In re Marrama* that bankruptcy court may take action to prevent abuse of bankruptcy process); *In re* Harris, 357 B.R. 1, 3 (Bankr. D.N.H. 2006) (reiterating that debtor's acknowledged right to convert to chapter 13 may be denied where there is evidence debtor engaged in bad faith conduct (citing *In re Marrama*, 430 F.3d at 481)). In finding that the right to convert "is absolute only in the absence of extreme circumstances," the Bankruptcy Appellate Panel referred to other evidence of bad faith in the record relating to the debtor's attempt to claim a homestead exemption on rental property owned by the debtor in Massachusetts and the debtor's failure to list his interest in an anticipated tax refund on Schedule B, Item 17, accompanying his petition. *In re Marrama*, 313 B.R. at 534.

[18] 11 U.S.C. § 706(a) (2006) ("The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.").

determination the question of "cause" under section 1307(c). The requirement in section 706(d) that a debtor may convert to another chapter only if "the debtor may be a debtor under such chapter" gave the Court occasion to conclude that there were "at least two possible reasons" why Mr. Marrama was not eligible to be a debtor in chapter 13.[20] The first and most obvious reason is that the debtor may not meet the eligibility requirements in section 109(e).[21] The far more obscure reason triggered by section 706(d), at least as reflected in decisions before *Marrama*,[22] is that eligibility for chapter 13 relief might also turn on whether "cause" exists under section 1307(c) such that dismissal or conversion of a chapter 13 case back to chapter 7 is compelled. The majority in *Marrama* concluded that the text of section 706(d) permitted this bootstrapping of section 1307(c) considerations in a conversion hearing so as to avoid duplicative proceedings.[23]

Although the Court's solution to the "procedural anomaly" finds little support in the text of section 706, it provides bankruptcy courts with a pragmatic approach to dealing with bad faith conversions consistent with their inherent and statutory authority to prevent an abuse of the bankruptcy process.[24] However, by its reliance upon section 1307(c), a statutory provision intended to apply after, not before, case conversions,the Court left behind a host of unanswered procedural questions. Even as to the substantive standard courts are to apply in determining bad faith conversions, the Court takes no clear position. Justice Alito in his dissenting opinion describes some of these unresolved issues:

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

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[19] 11 U.S.C. § 706(d) (2006) ("Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.").

[20] Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1110 (2007).

[21] 11 U.S.C. § 109(e) (2006) (providing that to be eligible as debtor under chapter 13, individual must have regular income and have debts below specified dollar amounts).

[22] The First Circuit in *Marrama* viewed the "debtor may be a debtor under such chapter" requirement in section 707(d) as simply referring to the conditions set out in section 109(e). *See In re Marrama*, 430 F.3d at 479 n.3; *see also* S. REP. NO. 95-989, at 94 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5880 ("[S]ubsection d . . . reinforces [11 U.S.C. §] 109 by prohibiting conversion to a Chapter unless the debtor is eligible to be a debtor under that Chapter.").

[23] *In re Marrama*, 127 S. Ct. at 1111 ("[A] ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of pre-petition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13.").

[24] As an alternative basis for its decision, the *Marrama* court found that section 105(a) grants to bankruptcy court's sufficient authority to order an immediate denial of a motion to convert, and that similar authority exists under the "inherent power of every federal court to sanction 'abusive litigation practices.'" *Id.* at 1112 (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980)).

> than under a liquidation, and whether the plan in some sense "cures" prior bad faith. Today's opinion renders these questions academic, and little is left to guide what a bankruptcy court must consider, or may disregard, in blocking a § 706(a) conversion.[25]

This article offers some suggested answers to these unresolved questions. Part II addresses the initial matter of whether the process for conversions under the existing Bankruptcy Rules is compatible with *Marrama*. Due process concerns related to notice and the opportunity for hearing, the limitations on the type and scope of a bad faith conversion hearing, and the assignment of burdens of proof are also discussed. Part II presents views on the standard for determining bad faith in the case conversion context.

I. NOTICE AND HEARING

A. The Bankruptcy Rules

Bankruptcy Rule 1017(f)(2)[26] provides that a debtor's motion to convert under section 706(a) shall be by motion and served as required by Rule 9013.[27] Rule 1017(f)(1) further instructs that the court is not required to treat a section 706(a) conversion motion as a contested matter under Rule 9014. Perhaps based on the pre-*Marrama* view that conversion under section 706(a) is a matter of right, or that the statutory requirements for conversion listed in section 706 are not often disputed, these rules make clear that a motion to convert under section 706(a) is not automatically a contested matter and that a hearing need not be held unless the court so directs.[28]

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[25] *Id.* at 1115 (*footnote omitted*).

[26] The *Marrama* majority opinion mistakenly refers to the applicable Bankruptcy Rule as Federal Rule of Bankruptcy Procedure 1017(c)(2). *Id.* at 1108 ("Pursuant to Federal Rule of Bankruptcy Procedure 1017(c)(2), the notice of conversion was treated as a motion to convert, to which both the trustee and the Bank filed objections.").

[27] FED. R. BANKR. P. 1017(f)(2) ("Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.").

[28] The Advisory Committee Notes describing Rule 1017(d) (subdivision (d) became subdivision (f) in 1999) provide:

> Subdivision (d) [currently (f)] is amended to provide that dismissal or conversion pursuant to §§ 706(a), 707(b), 1112(a), and 1307(b) is not automatically a contested matter under Rule 9014. Conversion or dismissal under these sections is initiated by the filing and serving of a motion as required by Rule 9013. No hearing is required on these motions unless the court directs.

FED. R. BANKR. P. 1017 advisory committee's note (1987). *See* Croston v. Davis (*In re* Croston), 313 B.R. 447, 451, 454 (B.A.P. 9th Cir. 2004) (holding that conversion was matter of right and presenting presumption that hearings not be held unless there was a court order); *In re* Oblinger, 288 B.R. 781, 783 (Bankr. N.D. Ohio 2003) (stating that, despite the necessity of court order under FED. R. BANKR. P. 1017(f)(3), conversion exercised therein is not treated as contested matter under Rule 9014).

The Bankruptcy Rules understandably take a different approach with regard to conversions from chapters 12 or 13, which "shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a)."[29] Even without *Marrama* bad faith considerations, section 706 itself requires that the debtor must be eligible to be a debtor in the chapter sought under section 109,[30] and not have previously converted the case to chapter 7.[31] In recognition that these matters could be contested, the Rules provide an opportunity for interested parties to object by requiring the debtor to seek an order of conversion upon motion.[32] But since no statutory eligibility requirements for conversion relating to debt limitations under section 109(e) or prior conversions are referenced in sections 1208(a) or 1307(a), no additional procedural steps other than the filing of a notice of conversion are warranted when a debtor converts from chapters 12 or 13 to chapter 7.[33]

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[29] FED. R. BANKR. P. 1017(f)(3). *See* 11 U.S.C. § 1208(a) (2006) ("The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable."); 11 U.S.C. § 1307(a) (2006) (using language identical to that of section 1208(a)).

[30] 11 U.S.C. § 109 (2006) (outlining what is required to "be a debtor under title 11" for chapters 7, 9, 11, 12, and 13); 11 U.S.C. § 706(d) (2006) ("Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."). *See* 6 COLLIER ON BANKRUPTCY ¶ 706.05 (Alan N. Resnick et al. eds. 15th ed. rev. 2004) (explaining section 706(d) to require that "the eligibility requirements of section 109 . . . be met before any conversion of a liquidation case may be accomplished, either by the debtor or by the court, and [that] reference must be made to section 109 for a determination of who may be a debtor under chapters 11, 12 and 13"); *see also In re* Spurlin, 350 B.R. 716, 718–19, 723 (Bankr. W.D. La. 2006) (applying subsection (d) to deny debtors' motion to convert where they could not meet eligibility requirements of section 109); *In re* Banks, 252 B.R. 399, 402 (Bankr. E.D. Mich. 2000) ("[S]ubsection (d) . . . simply serves as a restatement that § 706 cannot be used to circumvent the eligibility requirements of § 109.").

[31] *See* 6 COLLIER ON BANKRUPTCY ¶ 706.01 ("Section 706(a) provides that the debtor has a right to convert a case to a case under chapter 11, 12 or 13 at any time, as long as the case had commenced as a chapter 7 case and had not previously been converted from another chapter."); *see also Banks*, 252 B.R. at 402–03 ("Looking at both the language of [section 706(a)] and [its] legislative history" to deny debtor's motion to re-convert); *In re* Hanna, 100 B.R. 591, 593 (Bankr. M.D. Fla. 1989) ("The legislative history of § 706(a) clearly supports the interpretation that a debtor's right to convert is lost once it has been exercised.").

[32] *See* FED. R. BANKR. P. 1017(f)(2) (2006) ("Conversion . . . under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013."); FED. R. BANKR. P. 9013 (2006) ("A request for an order, except when an application is authorized by these rules, shall be by written motion . . . . The motion shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession . . . ."); *see also* Calder v. Payne (*In re* Calder), 973 F.2d 862, 867 (10th Cir. 1992) ("The rule makers certainly intended that conversion of a chapter 7 case be accomplished by entry of an order, not mere service of notice of intent to request such an order.") (*quoting In re* Dipalma, 94 B.R. 546, 549 (Bankr. N.D. Ill. 1988)); *In re* Rigales, 290 B.R. 401, 404 (Bankr. D.N.M. 2003) (applying *Calder* to hold that "the Debtor must file a motion and give notice of the proposed conversion to interested parties with opportunity for objection and hearing prior to an order for conversion"); *In re* Bistrian, 184 B.R. 678, 682 (Bankr. E.D. Pa. 1995) (holding that Rule 9013 "permits the court and the party opposing the application to prepare adequately") (*quoting* Taragon v. Eli Lilly and Co., 838 F.2d 1337, 1340 (D.C. Cir. 1988)).

[33] *See* 11 U.S.C. § 1208(a) (2006) ("The debtor may convert a case under [chapter 12] to a case under chapter 7 of this title at any time."); 11 U.S.C. § 1307(a) (2006) ("The debtor may convert a case under [chapter 13] to a case under chapter 7 of this title at any time."). The Advisory Committee Notes describing Rule 1017(d) (subdivision (d) became subdivision (f) in 1999) provide:

It had been argued in some pre-*Marrama* cases that by invoking Rule 9013 and its requirement that a motion be filed,[34] Rule 1017(f)(2) impermissibly interfered with the debtor's one-time, absolute right to convert, and that the mere filing of a notice of conversion was sufficient to effectuate conversion.[35] While courts generally rejected this argument and found no conflict between the procedure adopted by the Bankruptcy Rules and the Code,[36] strict adherence to the procedure was sometimes lacking when, for example, the debtor's filing of a notice of conversion would immediately trigger conversion.[37] The potential for *Marrama* bad faith objections lends additional support for rejection of immediate conversions which depart from the motion procedure and opportunity for hearing set out in Rule 1017(f)(2).[38]

> Conversion of a chapter 13 case to a chapter 7 case as authorized by § 1307(a) is accomplished by the filing of a notice of conversion. The notice of conversion procedure is modeled on the voluntary dismissal provision of Rule 41(a)(1) FED. R. CIV. P. Conversion occurs on the filing of the notice. No court order is required.

FED. R. BANKR. P. 1017, advisory committee's note (1987). *See In re* McFadden, 37 B.R. 520, 521 (Bankr. M.D. Penn. 1984) ("[A] request by a Debtor to convert his Chapter 13 to a Chapter 7 is effective immediately without notice to creditors by operation of law."); Perkins v. Perkins (*In re* Perkins), 36 B.R. 618, 620 (Bankr. M.D. Tenn. 1983) ("Section 1307(a) grants a *debtor* the unconditional and unwaivable right to convert a case under Chapter 13 to Chapter 7 at any time and contains no language requiring court approval of the debtor's decision to convert."); 8 COLLIER ON BANKRUPTCY ¶ 1208.01 ("The debtor's right to convert [from chapter 12] to chapter 7 is automatic and court approval need not be obtained.").

[34] FED. R. BANKR. P. 9013 ("A request for an order . . . shall be by written motion . . . ."). *See In re Calder*, 973 F.2d at 867 (discussing Rule 9013's requirement of filing motion); *In re* Washington, 235 B.R. 126, 130 (Bankr. S.D. Fla. 1998) (denying debtors' attempt to convert because they did not "[file] a motion seeking conversion pursuant to Rule 9013"). *See generally* 10 COLLIER ON BANKRUPTCY ¶ 9013.01 (discussing purpose and requirements of Rule 9013).

[35] *See, e.g.*, *In re Calder*, 973 F.2d at 866–87 (rejecting debtor's argument that filing date of motion to convert should be effective date of conversion); *In re Dipalma*, 94 B.R. at 549 (stating,"[t]he rule makers certainly intended that conversion of a chapter 7 case be accomplished by the entry of an order, not the mere service of notice of intent to request such an order").

[36] *See, e.g.*, *In re* Calder, 973 F.2d. at 867 (finding no conflict between section 706(a) and Bankruptcy Rules 1017(d) and 9013).

[37] Cabral v. Shamban (*In re* Cabral), 285 B.R. 563, 567–69 n.3 (B.A.P. 1st Cir. 2002) (noting bankruptcy court immediately converted case, terminated chapter 7 trustee, and appointed chapter 13 trustee on same date debtor filed notice of conversion); *In re* Pisczek, 269 B.R. 641, 642 (Bankr. E.D. Mich. 2001) (finding debtors' "notice of conversion" does not immediately effectuate conversion and must be treated as motion to convert); *see In re* Carrow, 315 B.R. 8, 19 (Bankr. N.D.N.Y. 2004) (announcing court will no longer sign "*ex parte* applications to convert" from chapter 7 to chapter 13 and will require compliance with motion requirement in Rule 1017(f)(2)).

[38] The following notice was added on July 10, 2007 to the "Judge's Corner" of the website for the Bankruptcy Court for the District of South Carolina, in response to the *Marrama* opinion:

> In light of the ruling of the U.S. Supreme Court in *In Re Marrama*, 127 S. Ct. 1105 (2007) that a debtor may forfeit the "absolute" right to convert a case from chapter 7 to another chapter pursuant to 11 U.S.C. § 706(a), such motions may be granted after consideration by the court or may be set for a hearing. Counsel should therefore not expect the immediate entry of an order of conversion. Motions to convert pursuant to § 706(a) should be served on the chapter 7 trustee, the debtor, and all parties in interest. If a hearing is set, 20 days notice is required pursuant to Bankruptcy Rule 2002.

B. Non-Automatic Contested Matter

The Bankruptcy Rules provide little direct guidance on how courts should address procedural questions posed by the confluence of a section 706(a) conversion motion and a section 1307(c) "for cause" objection. Nevertheless the procedural regime established by the Bankruptcy Rules for conversions is generally compatible with *Marrama* and need not be changed.

An initial question is whether the potential for section 1307(c) "for cause" matters to be heard in connection with a section 706(a) conversion motion justifies the automatic treatment of the motion as a contested matter.[39] If treated as a contested matter, Rule 9014 governs and the motion to convert would need to be served in the same manner as a summons and complaint under Rule 7004.[40] Reasonable notice and an opportunity for a hearing must be afforded to the parties against whom the conversion is sought.[41] Additionally, unless the court orders otherwise, the Part VII rules applicable in adversary proceedings as listed in Rule 9014(c) would be applicable.

Marrama tells us that bad faith objections to conversion should arise only in the exceptional case, with the "vast majority" of conversions being sought by "honest but unfortunate debtors who do possess an absolute right to convert their cases . . . ."[42] While it is too early to predict the frequency of such objections, the number of *Marrama*-style objections will likely not exceed objections historically filed based

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> [Conversions from chapter 13 to chapter 7 pursuant to section 1307(a) are unaffected by this announcement and remain effective upon the filing of a notice pursuant to Bankruptcy Rule 1017.]

RULING OF THE U.S. SUPREME COURT IN *IN RE MARRAMA* (2007), http://www.scb.uscourts.gov/JudgesCorner/judgescornermain.htm.

[39] *See* 11 U.S.C. §§ 706(a), 1307(c) (2006). All conversion and dismissal matters other than those listed in Rules 1017(f)(2) and (f)(3) are treated as contested matters. FED. R. BANKR. P. 1017(f)(1).

[40] FED. R. BANKR. P. 9014(b); 10 COLLIER ON BANKRUPTCY ¶ 9014.03 (Alan N. Resnick et al. eds., 15th ed. rev. 2007) ("Once the motion commencing the contested matter has been filed, it is to be served on the party against whom relief is sought in the manner provided in Rule 7004 for the service of a commons and complaint.").

[41] FED. R. BANKR. P. 9014(a) ("In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought."); *see* Fireman's Fund Mortgage Corp. v. Hobdy (*In re* Hobdy), 130 B.R. 318, 320 (B.A.P. 9th Cir. 1991) (holding debtor's indirect challenge to secured claim by its proposed chapter 13 plan, which substantially reduced claim, failed to give reasonable notice and opportunity for hearing). *See generally* 10 COLLIER ON BANKRUPTCY ¶ 9014.04 (stating that many if not all districts have local rules that detail time limits and manner in which court hearing is requested and set).

[42] Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1111 (2007); *see* Jeffrey W. Warren & Shane G. Ramsey, *Revisiting the Inherent Equitable Powers of the Bankruptcy Court: Does* Marrama v. Citizens Bank of Massachusetts *Signal a Return to Equity?*, 26 AM. BANKR. INST. J. 22, 22 (Apr. 2007) ("This resolution was clearly an important victory for chapter 7 trustees and creditors of bankruptcy estates because it prevents the possibility of waste to the estate by the fraudulent conduct of the atypical debtor and avoids administrative waste of unnecessary proceedings before the court.").

on debt limitations in section 109(e).[43] More to the point, if the *Marrama* decision is intended to help courts avoid unnecessary procedural burdens, no rule change making all section 706(a) motions a contested matter is justified.

C. Notice and Opportunity for Hearing

The effect of treating conversion motions under the existing rules without change, however, raises some concerns probably best addressed through local rules or court order. For the vast majority of motions to convert, those unopposed or in which opposition does not assert bad faith, normal motion practice under local rules will continue to afford courts flexibility to efficiently process such requests. No hearing will be required on these motions in most cases, unless the court directs.[44]

In the rare case in which bad faith is alleged in a response, thereby effectively transforming the motion under *Marrama* into a section 1307(c)-type proceeding, and a contested matter under Rule 9014, courts should ensure by local rule or court order entered in the proceeding that appropriate due process protections are extended to the parties.[45] Section 1307(c) itself provides that the court may convert or dismiss a chapter 13 case on request of party in interest "after notice and a hearing."[46] The Bankruptcy Code defines the phrase "after notice and a hearing" to mean "such notice as is appropriate in the particular circumstances and such opportunity for a hearing as is appropriate in the particular circumstances."[47] This has been construed as a flexible concept, giving courts much latitude in determining what process is due in the circumstances.[48] At a minimum, litigants should be

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[43] *See* 11 U.S.C. § 109(e) (2006) (setting maximum limits for secured and unsecured debts for individual to be debtor under chapter 13); 2 COLLIER ON BANKRUPTCY ¶ 109.06[3] ("There has been some dispute as to whether the bankruptcy court may look beyond the debtor's schedules to determine eligibility under section 109(e).").

[44] *See* Croston v. Davis (*In re* Croston), 313 B.R. 447, 454 (B.A.P. 9th Cir. 2004) (observing that effect of not automatically treating section 706(a) motions to convert under Rule 9014 is presumption no hearing will be held unless court so orders); David S. Kennedy & Spencer Clift, III, *Current Controversies Around a Debtor's Right to Convert a Chapter 7 Case to a Case Under Chapter 11 or 13*, 12 J. OF BANKR. L. & PRAC. 3, 8 (2003) ("No notice and a hearing are required on such motions unless the court so directs."); 6 COLLIER ON BANKRUPTCY ¶ 706.07 ("[N]o hearing is required on these motions unless the court so directs.").

[45] 11 U.S.C. § 1307(c) (2006) (governing conversion of cases to and from chapter 13); FED. R. BANKR. P. 1017 (classifying procedure to convert case to another chapter as contested matter under Rule 9014); *see e.g.*, *In re* Broad Creek Edgewater, LP, 371 B.R. 752, 757 (Bankr. D.S.C. 2007) (applying *Marrama*, court held that since right to convert was no longer absolute, it was necessary to have notice, which in that case was 20 days, and hearing).

[46] 11 U.S.C. § 1307(c) (2006); *see* FED. R. BANKR. P. 1017(f)(1) (stating that Rule 9014 governs a proceeding to convert a case); FED. R. BANKR. P. 9014 (requiring when there is a contested matter that reasonable notice and opportunity for hearing "be afforded to the party against whom relief is sought").

[47] 11 U.S.C. § 102(1)(A) (2006).

[48] Tennant v. Rojas (*In re* Tennant), 318 B.R. 860, 870 (B.A.P. 9th Cir. 2004) (citing Great Pac. Money Mkt.s, Inc. v. Krueger (*In re* Krueger), 88 B.R. 238, 241 (B.A.P. 9th Cir. 1988)) ("Thus, the concept of notice and a hearing is flexible and depends on what is appropriate in the particular circumstance."); *see, e.g.*, Dinova v. Harris (*In re* Dinova), 212 B.R. 437, 443–44 (B.A.P. 2d Cir. 1997) (holding that notice requirement was not met where court gave notice prior to debtor failing to comply with procedure and then dismissed without hearing); *In re* Meints 222 B.R. 870, 872 (Bankr. D. Neb. 1998) (affirming lower court's

entitled to no less process than would be afforded on a motion to convert or dismiss under section 1307(c).[49]

In the context of an attempt to block conversion on bad faith grounds, the objecting party should be required to state, with particularity, the factual and legal basis for the objection. Akin to the requirement in Federal Rule of Civil Procedure 9(b) that fraud shall be "stated with particularity,"[50] applicable in contested matters pursuant to Bankruptcy Rules 7009 and 9014(c), a debtor should be given adequate notice before hearing of the specific allegations of bad faith.[51] If the court takes action sua sponte to prevent immediate conversion by invoking its authority under section 105(a), the court should issue an order to show cause which sufficiently apprises the debtor of the conduct believed to be an abuse of process.[52]

In defining the hearing prong of the words "after notice and a hearing," section 102(1)(B) authorizes a court to act without conducting a hearing if proper notice is given and if a timely request for a hearing is not made by a party in interest, or if there is insufficient time for a hearing before an act authorized by the court must be

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sua sponte decision to dismiss debtor's case for failure to comply with procedural requirements when debtor was given adequate notice of those requirements).

[49] The "after notice and a hearing" language is also found in section 1112(b) and section 1208(c). *See* Finney v. Smith (*In re* Finney), 992 F.2d 43, 45–46 (4th Cir. 1993) (ordering remand of bankruptcy court's *sua sponte* reconversion of chapter 11 case back to chapter 7 because, although debtor had been given ample notice and opportunity for hearing on issue of "subjective bad faith," he was not afforded opportunity for hearing on whether chapter 11 reorganization was "objectively futile."); *cf.* 11 U.S.C. §§ 1112(b)(1), 1208(c) (2006) (using "after notice and a hearing" language for chapter 11 and chapter 12 also); *In re* Bartelt, No. 03-61599, 2007 WL 2579949, at *2 (Bankr. D. Mont. Sept. 4, 2007) (rendering decision with respect to conversion of chapter 7 plan to chapter 13 plan under section 706(a) only after due notice was given and hearing was conducted).

[50] FED. R. CIV. P. 9(b). *See Pleading Securities Fraud with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1432 (1984) (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 400 (1969) ("This special pleading requirement derives from the historically disfavored status of fraud claims at common law."); Interim Bankruptcy Rules 1017(e)(1) at 9–10 (Aug. 2005), *available at* http://www.uscourts.gov/rules/BK_Interim_Rules_Clean.pdf ("A motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse.").

[51] *See* Cabral v. Shamban (*In re* Cabral), 285 B.R. 563, 578–79 (B.A.P. 1st Cir. 2002) (finding that although trustee's motion for reconversion under section 1307(c) did not use phrase "bad faith", debtor was given sufficient notice by motion's reference to misrepresentations and conflicting statements made at meeting of creditors); *In re Krueger*, 88 B.R. at 241 (recognizing that notice is not only statutory requirement under section 1307(c), but a constitutional requirement as well); Hon. Christopher M. Klein, *Bankruptcy Rules Made Easy (2001): A Guide to the Federal Rules of Civil Procedure That Apply in Bankruptcy*, 75 AM. BANKR. L.J. 35, 43 n.50 (2001) (noting that Rule 9 of the Federal Rules of Civil Procedure is expressly made applicable by Rule 7009 of Federal Rules of Bankruptcy Procedure).

[52] *See In re Tennant*, 318 B.R. at 870 (concluding that procedural due process requiring notice and opportunity to be heard applies when court invokes section 105(a) to dismiss debtor's case); Muessel v. Pappalardo (*In re* Muessel), 292 B.R. 712, 717–18 (B.A.P. 1st Cir. 2003) (finding bankruptcy court's *sua sponte* dismissal of debtor's chapter 13 case on alternate grounds not raised by trustee, without notice or meaningful opportunity to be heard, violated "fundamental rights to procedural due process and the express requirements of the Bankruptcy Code"); Fid. Nat'l Title Ins. Co. v. Franklin (*In re* Franklin), 179 B.R. 913, 927 (Bankr. E.D. Cal. 1995) (recognizing that when bankruptcy courts raise issue of remand of removed action *sua sponte*, due process ordinarily requires that parties be afforded opportunity to be heard).

done.[53] There certainly will be matters involving alleged bad faith conversions in which the court may determine, upon consideration of the written submissions, that a hearing is unnecessary or will not assist the court in deciding the matter. Bankruptcy Rule 9017 contemplates that a court may rely upon affidavits of the parties without an evidentiary hearing in ruling on a motion.[54] The parties may agree that witness testimony is unnecessary or they may fail to request an evidentiary hearing.[55] But in the highly fact-intensive proceeding which *Marrama* contemplates involving allegations of bad faith and "fraudulent conduct,"[56] live testimony would seem an essential component of the hearing process.[57] Except in the most extraordinary cases, the parties should be given an opportunity, unless they consent otherwise, to present testimony at an evidentiary hearing. If the debtor intends to offer testimony, a specific request for an evidentiary hearing should be made.[58]

D. Notice of Hearing

Bankruptcy Rule 9006(d) requires that "notice of any hearing shall be served not later than five days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court."[59] In fact, the timing of a hearing on a motion to convert or dismiss filed in a chapter 7, 11 or 12 case is controlled by another rule. Bankruptcy Rule 2002(a)(4) requires twenty days notice

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[53] 11 U.S.C. § 102(1)(B) (2000); *see* Morlan v. Universal Guar. Life Ins. Co., 298 F.3d 609, 618 (7th Cir. 2002) ("A requirement of 'notice and a hearing' really means notice and *the opportunity for* a hearing."); Grundy Nat'l Bank v. Looney (*In re* Looney), 823 F.2d 788 (4th Cir. 1987) (recognizing that section 102 does not require actual hearings in some circumstances).

[54] FED. R. BANKR. P. 9017 (applying Rule 43 of the Federal Rules of Evidence); *see* Blaise v. Wolinsky (*In re* Blaise), 219 B.R. 946, 948 (B.A.P. 2d Cir. 1998) (finding that evidentiary hearing not necessary to satisfy notice and hearing requirement of section 1307(c) and that court may rely upon affidavits of the parties); Leonard L. Gumport, *The Bankruptcy Examiner*, 20 CAL. BANKR. J. 71, 103–04 (1992) (noting conflicting holdings regarding need to conduct full evidentiary hearing on motion for trustee).

[55] *See In re Cabral*, 285 B.R. at 577–78 (finding debtor did not object to trustee's facts at nonevidentiary hearing and failed to request evidentiary hearing); *In re* Blaise 219 B.R. at 949 (stating evidentiary hearing was not required because creditor's allegations were not disputed and no hearing was requested); Powers v. Am. Honda Fin. Corp., 216 B.R. 95, 97 (N.D.N.Y. 1997) (asserting parties must request evidentiary hearing).

[56] Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1111 (2007).

[57] *See In re* Harris, 357 B.R. 1, 6 (Bankr. D.N.H. 2006) (noting court's finding of bad faith was "reinforced by the Court's opportunity to observe, at length, the Debtor on the witness stand"); *see also* DeHart v. Parke (*In re* Parke), 369 B.R. 205, 207 (Bankr. M.D. Pa. 2007) (indicating second evidentiary hearing would be necessary due to lack of testimony). *But see* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 430 F.3d 474, 483 (1st Cir. 2005) (finding record was sufficient evidence to support finding of "bad faith").

[58] The debtor in *Marrama* contended on appeal that the bankruptcy court lacked a sufficient record supporting a finding of bad faith because he was not provided an evidentiary hearing. In rejecting this argument, the First Circuit observed that the debtor had failed to request an evidentiary hearing or advise the bankruptcy court about what additional evidence he sought to offer. *In re Marrama*, 430 F.3d at 483; *see also In re Cabral*, 285 B.R. at 577 (indicating importance of requesting evidentiary hearing); *Powers*, 216 B.R. at 97 ("[A] hearing is not required if a party in interest does not request one.").

[59] FED. R. BANKR. P. 9006(d).

to all parties in interest for such a motion, unless the hearing on the motion to convert or dismiss is under section 707(a)(3),[60] or under section 707(b),[61] or based on the debtor's failure to pay the filing fee.[62] A motion to convert filed by the debtor under section 706(a) is thus subject to the twenty day notice requirement.

Some courts have questioned the application of Rule 2002(a)(4) when a hearing is scheduled following an objection to a section 706(a) motion to convert.[63] Once again, this practice may have been driven by the pre-*Marrama* view that section 706(a) provides for immediate conversion. If an objection to conversion is filed raising fact-intensive bad faith issues, the parties now, more than ever, should be given at least as much notice of hearing as the rules currently afford. Although perhaps unnecessary, local rules post-*Marrama* may seek to bolster the Bankruptcy Rules by clarifying that twenty days notice is required.[64]

E. Type of Hearing

The primary focus of the conversion hearing should be on whether proven bad faith conduct sufficiently merits the "immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of

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[60] 11 U.S.C. § 707(a)(3) (2006) (permitting dismissal of chapter 7 case, on motion by U.S. trustee, for failure to timely file schedules and other information required by section 521(a)(1) (although section 521(1) was renumbered as 521(a)(1) by BAPCPA, no corresponding change was made to 707(a)(3))).

[61] 11 U.S.C. § 707(b) (2006) (permitting dismissal or conversion of chapter 7 case for "abuse").

[62] FED. R. BANKR. P. 2002(a)(4). Bankruptcy Rule 2004(a)(4) does not address the timing of motions to convert or dismiss chapter 9 or 13 cases, apparently leaving this to the discretion of the court under Rule 2002(f). *See In re* Anderson, 70 B.R. 883, 888 (Bankr. D. Utah 1987) (applying twenty day notice requirement under Bankruptcy Rule 2002(a)(7) (currently (a)(4)) to motion to convert chapter 13 case even though rule is silent with respect to such cases); *see also* 9 COLLIER ON BANKRUPTCY, ¶ 2002.02[6][d], at 2002–23 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) ("[W]hen notice and hearing are required on motions to convert or dismiss under . . . chapters [9 and 13], the court has discretion to establish an appropriate period under rule 2002(f)."). *See generally* FED. R. BANKR. P. 2002(f) (providing for court's discretion to order that notice be given in circumstances not covered by other subdivisions).

[63] *See, e.g.*, Nikoloutsos v. Nikoloutsos, 222 B.R. 297, 301 (E.D. Tex. 1998) (*rev'd on other grounds*, Nikoloutsos v. Nikoloutsos (*In re* Nikoloutsos), 199 F.3d 233 (5th Cir. 2000)) (finding, pre-*Marrama*, that because conversion under section 706(a) is matter of right and hearing is not required under Rule 9013, Rule 2002(a) was not applicable and bankruptcy court properly converted case to chapter 13 four days after motion filed); *cf. In re* Carrow 315 B.R. 8, 20 (N.D.N.Y. 2004) (electing to direct movant requesting conversion under section 706(a) to provide 20 days notice pursuant Rule 2002(a)(4) to allow United States Trustees and creditor with opportunity to raise objections). *But see In re* Spencer, 137 B.R. 506, 512–13 (N.D. Okla. 1992) (finding, pre-*Marrama*, that when read in conjunction, section 706(a), Rule 9013, and Rule 2002(a), require debtor in conversion from chapter 7 to 13 to give 20 days notice).

[64] *See, e.g.*, BANKR. E.D. MICH. R. CH. 7 CONV. (requiring debtors converting under section 706(a) provide 20 days notice); *see also* BANKR. W.D. MO. R. 1017-1(C) (stating creditors and interested parties have 20 days from date of service of notice by debtor to file objection). Section 1112, which governs conversion or dismissal of chapter 11 cases, was substantially amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). *See* Pub. L. No. 109-8, § 442, 119 Stat. 23, 115—16 (2005). A provision was added in section 1112(b)(3) setting time deadlines for a hearing on conversion. It provides that the court shall "commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph." *Id.*

equivalent relief . . . ."[65] Mindful that *Marrama* is premised on the desire to remedy this "procedural anomaly" and avoid unnecessary delay,[66] conversion should be allowed if the court is uncertain that equivalent relief (reconversion) is inevitable, or if an adequate record is lacking prior to conversion upon which to make such a decision.

Depending upon the bad faith standard applicable in such proceedings, as discussed in part III, most debtors should be allowed to proceed with conversion and given the opportunity to demonstrate that conversion is in the best interest of creditors. As *Marrama* states, the "vast majority" of debtors are those which "Congress sought to give . . . the chance to repay their debts should they acquire the means to do so."[67] The door to conversion should be shut only to those debtors whose acts of bad faith are so "shockingly egregious,"[68] generally amounting to flagrant abuse of process, that reconversion would be ordered no matter how much redemption the debtor might otherwise muster with a confirmable plan if conversion were permitted.

Marrama recognizes the authority bankruptcy courts possess, either under section 105(a) or through the court's inherent power, to control the flow of proceedings brought before it.[69] When the debtor's bad faith is so palpable based on the evidence presented that reconversion is certain, courts need not postpone the inevitable. This ability to consider evidence of bad faith as "cause" under section 1307(c) at the preconversion stage rather than at a postconversion motion to dismiss or reconvert is in part an exercise in docket control based on notions of judicial

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[65] Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1112 (2007).

[66] *Id.* at 1108. *See* Hon. James D. Walker Jr. & Amber Nickell, *2006 Eleventh Circuit Survey—Bankruptcy*, 58 MERCER L. REV. 1145, 1152 (Summer 2007) (noting that before *Marrama*, lower courts grappled with issue of whether conversion from chapter 7 to chapter 13 was absolute right); *see* William C. Heuer, Marrama v. Citizens Bank of Massachusetts*: Bad Faith Forfeits Right to Convert to Chapter 13*, 26 AM. BANKR. INST. J. 22, 65 (April 2007) (noting that *Marrama* ruling is based on both text of section 706(d) and bankruptcy court's authority to "prevent abuse of process").

[67] *In re Marrama*, 127 S. Ct. at 1111. *See In re* Young, 91 B.R. 730, 731 (E.D. La.1998) (holding that debtor was permitted to convert from chapter 7 to chapter 13); *In re* Kelly 261 B.R. 785, 789 (Bankr. M.D. Fla. 2001) (finding that debtor's acts were not egregious enough to justify denial of debtor's absolute right to convert from chapter 7 to chapter 13).

[68] *See* Condon v. Smith (*In re* Condon), 358 B.R. 317, 323 (B.A.P. 6th Cir. 2007) (observing that debtors' conduct is "almost always shockingly egregious" in reported cases in which conversion is denied); *In re* Ponzini, 277 B.R. 399, 406 (Bankr. E.D. Ark. 2002) (holding that debtor was precluded from converting from chapter 7 to chapter 13 because evidence showed that debtor acted in bad faith when debtor ignored court orders to appear in person, failed to file required pleadings, and refused to cooperate with chapter 7 trustee and other parties); *In re* Pakuris, 262 B.R. 330, 335 (Bankr. E.D. Pa. 2001) (rejecting debtor's request to convert from chapter 7 to chapter 13 based on debtor's bad faith because debtor failed to disclose her interest in equitable property distribution on her schedules and statement of financial affairs until trustee learned about asset by anonymous letter).

[69] *See In re Marrama*, 127 S. Ct. at 1112; *see also* Jeffrey W. Warren & Bush Ross, *Whatever Happened to the Inherent Equitable Powers of the Bankruptcy Court*?, 24 AM. BANKR. INST. J. 54, 54 (Apr. 2005) (concluding after consensus of circuit court opinions that "section 105(a) has been the power that allows bankruptcy courts to fashion appropriate extraordinary relief notwithstanding other provisions of the Code providing for similar relief or where the Code is silent as to such relief").

economy.[70] To the extent that objecting parties' allegations of bad faith include matters concerning the treatment of creditors under the debtor's anticipated plan or the probable inability of the debtor to propose a confirmable plan, courts may question whether judicial economy is truly served if a section 1307(c)-type hearing is held prematurely. There seems little advantage to permitting evidence on these matters if the court ultimately concludes, as it should in most cases, that a proper record cannot be developed prior to conversion.[71] Once section 1325 plan confirmation issues are introduced by an objecting a party, it no longer remains a matter of avoiding redundant hearings.

The debtor likewise may have an interest in seeking to rebut evidence of bad faith at the conversion hearing by demonstrating that conversion and the debtor's proposed plan, if presented by that time,[72] are in the best interest of creditors.[73] Even a debtor who has exhibited a lack of good faith occasionally "surprises everyone and winds up confirming and performing a chapter 13 plan that pays creditors more than they would receive in chapter 7 and leaves everyone better off."[74] Evidence of this kind, however, whether offered by the debtor or objecting

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[70] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citing Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)) (finding federal courts have inherent authority to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); Eriline Co. v. Johnson, 440 F.3d 648, 654 (4th Cir. 2006) ("[A] district court has an important interest in keeping its docket from becoming clogged with dormant cases and in ensuring that a party does not use the court as an instrument of fraud or deceit."); *cf.* United States v. Hudson, 11 U.S. 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.").

[71] *In re* Oblinger, 288 B.R. 781, 786–87 (Bankr. N.D. Ohio 2003) (finding that issues of good faith, best interests of creditors, best efforts of debtor and feasibility "should be addressed in the context of a complete record developed in a confirmation hearing on a proposed Chapter 13 plan actually noticed to and evaluated by creditors and the Chapter 13 trustee, not in the context of a hearing on the propriety of conversion in the first instance"); *see In re* Gibbons, 280 B.R. 833, 836 (Bankr. N.D. Ohio 2002) (explaining debtors will have to propose repayment plan "in their Chapter 13" and then plan will be evaluated by chapter 13 trustee and creditors for several reasons including debtors' "good faith or lack thereof." Following this, court will then consider objections from interested parties when debtors "ask that their plan be confirmed.").

[72] The debtor is not required to file a plan with a motion to convert. FED. R. BANKR. P. 3015(a). If a case is converted to chapter 13, a plan must be filed no later than 15 days after the date of conversion. FED. R. BANKR. P. 3015(b); *see In re* Lorenz, 368 B.R. 476, 478 n.3 (Bankr. E.D. Va. 2007) (involving debtor who "moved for and was granted an extension of time in which to file his plan" which was "therefore timely filed"); *In re* Maurice, 167 B.R. 114, 123 (Bankr. N.D. Ill. 1994) (confirming "[u]nder Rule 3015(b), if the plan is not filed with the debtor's petition, it shall be filed within fifteen days thereafter, and such time shall not be further extended except for cause shown and on notice as the Court may direct.").

[73] *See, e.g.*, *In re* 10 Bears at Chiloquin, Inc., No. 06-62079-fra7, 2007 Bankr. LEXIS 1997, at *6, 8 (Bankr. D. Or. June 6, 2007) (applying *Marrama* in case in which debtor sought to convert to chapter 11 and finding "demonstration that past faults were innocent and curable and that a plan can be confirmed to the ultimate benefit of creditors and the estate is an affirmative defense to a claim that the case should be converted or dismissed"); *see also In re* Michalek, No. CIV-90-1212S, 1991 U.S. LEXIS 15343, at *18–19 (W.D.N.Y Oct. 22, 1991) (explaining bankruptcy courts do not always have to "make an explicit 'best interest' finding when converting a Chapter 11 case" and "it is not unprecedented for a court to find cause and yet refuse to dismiss or convert."); *cf.* Rollex Corp. v. Assoc. Materials, Inc. (*In re* Superior Siding & Window, Inc.), 14 F.3d 240, 243 (4th Cir. 1994) (stating "court must consider the interests of *all* of the creditors") (*emphasis in original*).

[74] Croston v. Davis (*In re* Croston), 313 B.R. 447, 454 (B.A.P. 9th Cir. 2004). *See In re* Thebeau, 3 B.R. 537, 539 (Bankr. Ark. 1980) (involving situation where, under chapter 13 plan, creditors would be paid

parties, in most instances, should be allowed in a *Marrama* bad faith conversion hearing only if the objecting parties have overcome the preliminary evidentiary threshold of proving egregious bad faith conduct,[75] or if the court is satisfied in a sua sponte proceeding that the debtor has exhibited such conduct.

Simply put, while *Marrama* clarifies that a court may collapse a hearing on conversion with a hearing on whether "cause" exists under section 1307(c), it does not compel this result. The equitable nature of the court's inherent and statutory authority to look beyond section 706 as a means to control proceedings before it should mean that in most cases, "for cause" matters shall be deferred until a postconversion motion under section 1307(c) is filed. Evidence of the debtor's bad faith remains relevant in the converted case and can be addressed under section 1307(c) as well as under section 1325 in relation to the good faith plan confirmation requirements.[76]

F. Burden of Proof

In concluding that a debtor's right to convert may be constrained not only by the eligibility requirements of section 109(e) but also those that indirectly apply through the application of section 1307(c), the *Marrama* court did not address how the burden of proof should be assigned as between the parties in a contested conversion hearing. Should the debtor have to prove that conversion is in good faith or should the objecting party be compelled to prove a bad faith debtor is not worthy of conversion?

Courts have generally held that a party seeking dismissal or conversion of a chapter 13 case for "cause" under section 1307(c) has the burden of showing the debtor's lack of good faith.[77] In *In re Love*, [78] the Internal Revenue Service argued on a section 1307(c) dismissal motion that the debtor "tax protestor" had the burden of proving good faith, relying on decisions which had addressed the burden of proof

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statutory fee in excess of what would be received in no-asset chapter 7 proceeding); Gen. Fin. Co. of Va. v. Powell (*In re* Powell), 2 B.R. 314, 315 (Bankr. E.D. Va. 1980) (describing plan where unsecured creditors would receive more under chapter 13 plan than under chapter 7 liquidation).

[75] *See* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1112, 1112 (2007) (refusing to define "bad faith," but noting that debtor's conduct must be atypical).

[76] *See* Mason v. Young (*In re* Young), 237 F.3d 1168, 1174 (10th Cir. 2001) ("The provisions of 11 U.S.C. § 1325 ensure that a Chapter 13 plan arising out of a conversion from Chapter 7 will be properly scrutinized by the bankruptcy court before the plan is confirmed, mitigating the danger of abuse."); *see also* Handeen v. LeMaire (*In re* LeMaire), 898 F.2d 1346, 1352 (8th Cir. 1990) ("While pre-filing conduct is not determinative of the good faith issue, it is nevertheless relevant."); Ohio v. Doersam (*In re* Doersam), 849 F.2d 237 (6th Cir. 1988) (acknowledging that totality of debtor's conduct, before and after submitting plan, should be considered when evaluating good faith).

[77] *See, e.g., In re* Love, 957 F.2d 1350, 1355 (7th Cir. 1992) (stating that burden of showing good faith is not on debtor because unlike section 1325(a)(3), section 1307(c) "does not specifically require that a debtor file a petition in good faith"); Alt v. United States (*In re* Alt), 305 F.3d 413, 420 (6th Cir. 2002) (noting that party seeking dismissal has burden to show debtor's lack of good faith); Sullivan v. Solimini (*In re* Sullivan), 326 B.R. 204, 211 (B.A.P. 1st Cir. 2005) ("[U]nder § 1307(c), the objecting creditor has the burden of proof, while under § 1325(a)(3), it is the debtor's burden.").

[78] 957 F.2d at 1355–56.

in the context of whether a chapter 13 plan was submitted in good faith under section 1325(a).[79] Noting that courts were not in agreement even as to whether the debtor bears the burden of proof in the section 1325(a) plan confirmation setting, the Seventh Circuit found that the differences in the wording and function of the two statutes convincingly establish that the debtor should not have to prove the "absence of cause," thus placing the burden to prove cause on the party seeking dismissal or conversion in a section 1307(c) proceeding.[80]

This was the approach taken by the Sixth Circuit BAP in the prescient opinion in *In re Condon*, [81] decided while *Marrama* was pending in the Supreme Court, in which the panel held that the section 1307(c) good faith standard should apply to a debtor's motion to convert.[82] Consistent with the panel's view that bankruptcy courts should exercise the same "reluctance" in denying a motion to convert to chapter 13 as they would in dismissing a case under section 1307(c), the *Condon* court held that the party opposing conversion under section 706(a) has the burden of proving a lack of good faith.[83]

Although section 1307(c) is expressly drafted to apply only to existing chapter 13 cases, there is no reason to treat the provision differently in the assignment of proof burdens when, as *Marrama* directs, it is considered in the context of a contested matter involving a section 706(a) conversion motion. Therefore at a hearing on a motion to convert, the debtor has the initial burden to show eligibility for conversion based on the section 706 requirements (at least in the pre-*Marrama* sense), that the debtor has not previously converted the case to chapter 7, and that the debtor is eligible to be a debtor under the chapter sought in accordance with section 109.[84] Apart from the occasional dispute over whether the debtor has regular

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[79] *Id.*; *see* Hardin v. Caldwell (*In re* Caldwell), 895 F.2d 1123, 1126 (6th Cir. 1990) (stating that burden of proving good faith is on party seeking discharge under chapter 13); Chinichian v. Campolongo (*In re* Chinichian), 784 F.2d 1440, 1443–44 (9th Cir.1986) ("For a court to confirm a plan, each of the requirements of section 1325 must be present and the *debtor has the burden* of proving that each element has been met," including good faith) (*emphasis added*); *In re* McKissie, 103 B.R. 189, 191 (Bankr. N.D. Ill. 1989) (indicating that burden of proof regarding good faith is on debtor and that "'[t]he good faith requirement is one of the central, perhaps the most important confirmation finding to be made by the court in any Chapter 13 case.'" (citing *In re* Rimgale, 669 F.2d 426, 431 n.14 (7th Cir. 1982))).

[80] *Love*, 957 F.2d at 1355 (citing *In re* Klein, 100 B.R. 1004, 1008 (N.D. Ill.1989)) (providing that "dismissal for cause cannot mean that a debtor must show an absence of cause; it can only mean that the party moving for dismissal must demonstrate cause" and concluding that statute clearly requires movant to show cause for conversion or dismissal).

[81] 358 B.R. 317 (B.A.P. 6th Cir. 2007).

[82] *Id.* at 325 (affirming bankruptcy court's denial of debtor's motion to convert due to debtor's bad faith).

[83] *Id.* at 326 (holding that burden of proving lack of good faith in context of section 706(a) is on party opposing conversion).

[84] *In re* Broad Creek Edgewater, LP, 371 B.R. 752, 757 (Bankr. D.S.C. 2007) (debtor has initial burden of proving eligibility for relief under section 109 and that "conversion is to achieve a purpose permitted under the proposed Chapter"); *In re* George Love Farming, LC, 366 B.R. 170, 179 (Bankr. D. Utah 2007) ("[A] debtor seeking to convert a case from chapter 7 has an initial burden to show that . . . the debtor is otherwise eligible to be a debtor under the new chapter (in this case, chapter 11).").

income[85] or the debt limits in section 109(e) have been exceeded,[86] the debtor will typically satisfy the burden of proving these preliminary eligibility requirements without difficulty. The burden should then shift to the party opposing conversion to show based on *Marrama* that bad faith conduct has caused the debtor to forfeit the absolute right to convert.[87] Depending upon the proffered evidence of bad faith conduct and the timing of the hearing, the burden may shift back to the debtor to demonstrate that conversion is warranted and in good faith. If this includes argument and evidence that conversion is in the best interest of creditors despite proven bad faith, the court may exercise discretion, as discussed earlier, to allow conversion and defer ruling on such matters until plan confirmation or a section 1307(c) motion is filed.

With burdens of proof and presumptions often confusingly intertwined in legal opinions,[88] one final matter worth briefly addressing is whether any parties are entitled to a presumption of good or bad faith. In seeking dismissal under section 1307(c) in *In re Love*,[89] the Internal Revenue Service argued that the debtor's "egregious" pre-petition conduct in dodging his tax obligations as a tax protestor created a presumption that the debtor lacked good faith.[90] The Seventh Circuit found that a presumption which gives undue consideration to specific pre-petition conduct is incompatible with the totality of the circumstances test for determining good faith and would impose an unfair disadvantage on the debtor:

> If we were to create a presumption when a debtor's debt arose from egregious prepetition conduct, then a debtor with egregious prepetition conduct would be foreclosed from bankruptcy unless

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[85] An "individual with regular income" is defined as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." 11 U.S.C. § 101(30) (2006).

[86] It was noted in *Marrama* that the debtor had filed another chapter 13 case after certiorari was granted and that this subsequent case was dismissed on section 109(e) grounds. Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1110, n.7 (2007) (citing Marrama v. Citizens Bank of Mass. (*In re* Marrama), 345 B.R. 458, 463–64, 464 n.10 (Bankr. D. Mass. 2006)). Although considerable time was devoted to this issue at oral argument in the context of whether the case before the Supreme Court was moot, the *Marrama* court ultimately did not address whether Mr. Marrama had exceeded the debt limits. *See id.*

[87] *In re* Broad Creek Edgewater, LP, 371 B.R. 752, 757 (Bankr. D.S.C. 2007) (finding that burden of proof shifts to objecting parties to show that debtor is not eligible for conversion based on bad faith considerations set out in *Marrama*); *George Love Farming, LC*, 366 B.R. at 179 (applying *Marrama* to find parties objecting to debtor's motion to convert to chapter 11 had burden of showing conversion was in bad faith); *In re* Shar, 253 B.R. 621, 628 (Bankr. D.N.J. 1999) (stating creditor had burden of proving debtor's bad faith by preponderance of evidence).

[88] *See, e.g.*, *In re* Charles, 334 B.R. 207, 215–16 (Bankr. S.D. Tex. 2005) (applying statutory presumption of bad faith under section 362(c)(3) in considering motions to extend automatic stay); *Shar*, 253 B.R. at 628–29 (noting "[g]enerally, there is a presumption that debtors file petitions for reorganization in good faith," but recognizing courts may find bad faith is cause to grant relief under section 362(d)(1), and ultimately dismissal for lack of good faith lies in courts' discretion); *In re* Thacker, 6 B.R. 861, 865 (Bankr. W.D. Va. 1980) ("Courts should never presume a lack of good faith. The law universally presumes that man acts upright and honest. Like fraud, which is never presumed . . . neither is a lack of good faith presumed.").

[89] 957 F.2d at 1352.

[90] *Id.* at 1355.

> the debtor could come forward with evidence that her later activities demonstrate good faith. Some debtors with sincere intentions in filing for Chapter 13 relief might have difficulty meeting this burden. Accordingly, such a presumption has the possibility of unjustifiably foreclosing certain debtors from Chapter 13 relief.[91]

Arguments advocating such presumptions in *Marrama* conversion hearings should be rejected for the reasons set forth in *Love*. Moreover there is a textual basis for reaching the same result. By adding through the BAPCPA amendments a presumption that a case is filed not in good faith in sections 362(c)(3) and (c)(4),[92] Congress has indicated circumstances under which a bad faith filing may be presumed. No similar language expressly creating a presumption is found in either section 706(a) or 1307(c). Moreover, in expanding the "for cause" factors in section 1112(b)(4) for dismissal of a chapter 11 case as part of the BAPCPA amendments, Congress also chose not to include a presumption relating to bad faith.[93] The absence of any such presumption in these sections suggests that Congress did not intend, through its silence, to impose such a shifting of the burden of proof.[94]

II. STANDARD FOR DETERMINING BAD FAITH

In undertaking to resolve simply whether the Bankruptcy Code compels a court to convert a chapter 7 case when reconversion is a foregone conclusion, *Marrama* had "no occasion . . . to articulate with precision" the standard for determining what bad faith conduct it takes for a debtor to forfeit the absolute right to convert from chapter 7.[95] Still the Court was careful to describe the bankruptcy court's authority to block conversion in terms of an "appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor."[96] The Court also made clear that this authority to deny conversion should be exercised only in "extraordinary cases."[97] On this point, the Court embraced the distinction noted by the Seventh Circuit in *Love* between the standard for good faith in proposing a chapter 13 plan under section

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[91] *Id.*

[92] *See* 11 U.S.C. § 362(c)(3), (4) (2006).

[93] *See* 11 U.S.C. § 1112(b)(4) (2006).

[94] *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) (construing Congress's silence to mean exclusion when at-issue language is included elsewhere); Keene Corp. v. United States, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (*citation omitted*); Russello v. United States, 464 U.S. 16, 23 (1983) (noting Congress's silence means intent to exclude when Congress specifically includes disputed statute in following section).

[95] Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1112 n.11 (2007).

[96] *Id.* at 1111.

[97] *Id.* at 1112 n.11.

1325(a)(3) and in dismissing a case under section 1307(c); a more stringent standard for lack of good faith is compelled under section 1307(c) in light of the dire consequences of case dismissal.[98]

Finally, the Court's reliance on section 105(a) and reference to the "inherent power" of federal courts suggests that the conduct to be prevented by denying conversion will involve an "abuse of process" or "abusive litigation practices."[99] This is consistent with pre-*Marrama* decisions which found the right to convert could be denied in "extreme circumstances."[100]

The logical place courts may look for standards to determine bad faith will be in the case law that has developed under section 1307(c). This was the approach often taken by courts which had concluded before *Marrama* that a debtor's right to convert was not absolute.[101] While these standards provide an appropriate starting

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[98] *Id.* (citing *In re* Love, 957 F.2d 1350, 1356 (7th Cir. 1992)) ("Because dismissal is harsh . . . the bankruptcy court should be more reluctant to dismiss a petition . . . for lack of good faith than to reject a plan for lack of good faith under Section 1325(a)."). The addition of section 1325(a)(7) by BAPCPA lends further support for the view that a more stringent test should be applied under section 1307(c), since courts are now given authority under section 1325(a)(7) to take the less drastic step of denying confirmation of a chapter 13 plan if the petition is not filed in good faith, rather than dismissing the case. *See* 11 U.S.C. § 1325(a)(7) (2006) ("[T]he court shall confirm a plan if the action of the debtor in filing the petition was in good faith."); *In re* Hall, 346 B.R. 420, 426 (Bankr. W.D. Ky. 2006) ("[T]he insertion of §1325(a)(7) is meant to provide courts with an alternative to the harsh dismissal called for under §1307(c) if the Court finds that a petition was not filed in good faith."); 8 COLLIER ON BANKRUPTCY, ¶ 1325.07A, at 1325–50 (Alan N. Resnick et al eds., 15th ed. rev. 2006) ("By providing a specific remedy in section 1325(a)(7) for bad faith filing of the petition, Congress has presumably indicated that denial of confirmation, rather than dismissal, is the appropriate way to prevent such conduct.").

[99] *In re Marrama*, 127 S. Ct. at 1112. *See* Jeffrey W. Warren & Shane G. Ramsey, *Revisiting the Inherent Equitable Powers of the Bankruptcy Court: Does* Marrama v. Citizens Bank of Massachusetts *Signal a Return to Equity?*, 26 AM. BANKR. INST. J. 22, 22 (2007) (discussing that under Supreme Court's reasoning in *Marrama*, "bankruptcy judges have 'broad authority' to take any action that is necessary or appropriate to prevent an abuse of process under §105(a) of the Code and have the inherent power to punish abusive litigation practices"); Kenneth N. Klee & Matthew C. Heyn, *Developments in Lender Liability: Four Causes of Action, a Theory of Damages, and a Defense*, SM014 A.L.I.-A.B.A. 231, 240 n.39 (2007) (stating that under *Marrama*, Supreme Court held that every federal court has inherent power to sanction "abusive litigation practices").

[100] *See* Copper v. Copper (*In re* Copper), 426 F.3d 810, 814, 817 (6th Cir. 2005) (holding "common sense dictates that the bankruptcy court should have authority to police the integrity of its proceedings"); *see* Pepper v. Liton, 308 U.S. 295, 304 (1939) (citing Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934)) (stating "courts of bankruptcy are essentially courts of equity and their proceedings inherently proceedings in equity"); *In re* Spencer, 137 B.R. 506, 512 (Bankr. N.D. Okl. 1992) ("In the presence of extreme circumstances, debtor's right to convert can be conditioned or denied as necessary to prevent injustice to other parties and imposition on the Court.").

[101] *See, e.g.*, Marrama v. Citizens Bank of Mass. (*In re* Marrama), 430 F.3d 474, 479 (1st Cir. 2005) ("Subsection 706(a) contains no intimation that the debtor should be accorded protection against his own willful misconduct, such as an intentional abuse of the bankruptcy process."); Alt v. United States (*In re* Alt), 305 F.3d 413, 418–19 (6th Cir. 2002) (citing Banks v. Vandiver (*In re* Banks), 267 F.3d 875, 876 (8th Cir. 2001)) (asserting that bankruptcy court has power to dismiss chapter 13 petition upon finding that debtor did not bring it in good faith); Leavitt v. Soto (*In re* Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999) (citing Eisen v. Curry (*In re* Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (*per curiam*)) ("Bad faith, as cause for the dismissal of a Chapter 13 petition with prejudice, involves the application of the 'totality of circumstances' test."); Kestell v. Kestell (*In re* Kestell), 99 F.3d 146, 148 (4th Cir. 1996) (citing *Love*, 957 F.2d 1350) ("Reasons constituting 'cause' for dismissal include enumerated ones . . . as well as judicially construed ones

point, *Marrama* demands an approach more focused on factors relevant to determining bad faith of an atypical debtor at the preconversion stage.

A. "For Cause" under section 1307(c)

Courts have uniformly held that bad faith under section 1307(c) should be determined based on the "totality of the circumstances."[102] Often described as a flexible standard not easily defined,[103] courts nevertheless apply a variety of factors on a case by case basis in assessing the totality of the circumstances. Emphasizing that the primary focus of the test is "fundamental fairness", the Seventh Circuit in *Love* provided the following "nonexhaustive list" of factors a bankruptcy court may consider in discerning whether a chapter 13 petition has been filed in good faith:

> (i) the nature of the debt, including the question of whether the debt would be nondischargeable in a chapter 7 proceeding;[104]
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> (ii) the timing of the petition;
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> (iii) how the debt arose;
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> (iv) the debtor's motive in filing the petition;
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> (v) how the debtor's actions affected creditors;

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such as bad faith."); Molitor v. Eidson (*In re* Molitor), 76 F.3d 218, 220 (8th Cir. 1996) (citing *In re Eisen*, 14 F.3d at 470 (9th Cir. 1994) (*per curiam*)) ("[A] chapter 13 petition filed in bad faith may be dismissed or converted 'for cause' . . . ."); Gier v. Farmers State Bank of Lucas, Kan. (*In re* Gier), 986 F.2d 1326, 1330 (10th Cir. 1993) (upholding District Court's finding of bad faith based on chapter 13 petitioner's motivation not to pay his creditors rather than his inability to pay.); *Love*, 957 F.2d at 1354 (citing *In re* Smith, 848 F.2d 813, 816 (7th Cir. 1988) ("Chapter 13 does not explicitly contain a good faith requirement for the filing of a petition. Nevertheless, section 1307(c) of the Bankruptcy Code does state that Chapter 13 petitions may be dismissed 'for cause.' This court has indicated that lack of good faith is sufficient cause for dismissal under Chapter 13.").

[102] *See, e.g.*, *In re Marrama*, 430 F.3d at 482 (adopting totality of circumstances test); *In re Alt*, 305 F.3d at 419 (determining the Sixth Circuit adopts totality of circumstances test in determining good faith); *In re* Lilley, 91 F.3d 491, 496 (3d Cir. 1996) ("We therefore join the Seventh, Ninth and Tenth Circuits in holding that the good faith of Chapter 13 filings must be assessed on a case-by-case basis in light of the totality of the circumstances."); *In re Gier*, 986 F.2d at 1330 (affirming District Court's finding of bad faith after evaluating "all the circumstances of the case").

[103] *See In re Love*, 957 F.2d at 1355 (stating that "good faith is a term incapable of precise definition."); *In re* Bryant, 323 BR 635, 641 (Bankr. E.D. Pa. 2005) (citing *In re* Basham, 167 B.R. 903, 908 (Bankr. W.D. Mo. 1994)) (adopting "a flexible approach that encompasses the totality of circumstances presented in each case"); *In re* Williams, 231 B.R. 280, 281 (Bankr. S.D. Ohio 1999) (adopting "flexible standard" to determine good faith through totality of circumstances test).

[104] *See Lilley*, 91 F.3d at 496 (instructing bankruptcy courts to consider factors adopted by Seventh Circuit in *In re Love* to determine good faith under section 1307(c), except factor concerning whether debts would be nondischargeable in chapter 7).

> (vi) the debtor's treatment of creditors both before and after the petition was filed; and
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> (vii) whether the debtor has been forthcoming with the bankruptcy court and the creditors.[105]

Marrama's pragmatic approach permitting bankruptcy courts at a conversion hearing to fast-forward ahead and consider section 1307(c) raises questions about whether some of the "for cause" factors under existing standards should be applicable. After all, the grounds for dismissal or conversion expressly listed in section 1307(c), as well as court crafted "for cause" considerations, all address whether an eligible debtor should remain in a chapter 13 case, not whether the debtor has the right to become a debtor in chapter 13. The significance of this distinction is that some of the factors typically considered by courts on a section 1307(c) motion to dismiss are not ripe for consideration at the preconversion stage and should not be considered.

For example, consideration of the type of debt sought to be discharged and whether it may be nondischargeable in chapter 7 case may be premature if the court does not have the opportunity at preconversion to review the proposed treatment of claims under the debtor's chapter 13 plan. Moreover, changes made by BAPCPA to the discharge provisions in chapter 13, eliminating the "superdischarge" for certain debts, have rendered this factor largely irrelevant.[106]

Similarly, a court's assessment of the debtor's treatment of creditors after the case is filed may be of paramount concern when deciding if a debtor's existing chapter 13 case should be dismissed or converted to chapter 7, but generally will be

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[105] *See Love*, 957 F.2d at 1357 ("Keeping in mind that the focus of the inquiry is fundamental fairness, the following nonexhaustive list exemplifies some of the factors that are relevant when determining if a chapter 13 petition was filed in good faith . . . ."); *see also In re Leavitt*, 171 F.3d at 1224 (finding that bankruptcy court should consider following factors in determining bad faith under section 1307(c): "(1) whether the debtor 'misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner'; 'the debtor's history of filings and dismissals'; (3) whether 'the debtor only intended to defeat state court litigation'; and (4) whether egregious behavior is present.") (*citations omitted*); *In re* Starling, 359 B.R. 901, 917 (Bankr. N.D. Ill. 2007) (adopting Seventh Circuit's holding in *Love* by evaluating a list of factors to determine good faith including "whether the debtor has been forthcoming with the bankruptcy court and the creditors")

[106] *See* 11 U.S.C. § 1328(a)(2) (2006). The following debts are now nondischargeable in chapter 13 cases: withheld taxes described in section 507(a)(8)(C); unfiled or late filed taxes, as provided under section 523(a)(1)(B); fraudulently filed taxes, as provided under section 523(a)(1)(C); debts incurred by fraud, as provided under section 523(a)(2) and (a)(4); and unscheduled debts, as provided under section 523(a)(3). In addition, section 1328(a)(4) creates a new type of chapter 13 nondischargeability for an award of restitution or damages in a civil action against the debtor, based on willful or malicious injury by the debtor that caused personal injury or death of an individual. *Cf.* Eugene R. Wedoff, *Major Consumer Bankruptcy effects of BAPCA*, 2007 U. ILL. L. REV. 31, 62 (2007) ("[W]here § 523(a)(6) provides that 'willful and malicious' injury gives rise to nondischargeable debts in chapter 7 and 11 cases, revised § 1328(a)(4) excepts debts arising from willful or malicious injury, potentially creating a more limited discharge in chapter 13 than in chapter 7.").

less probative of a debtor's bad faith at the preconversion phase when the debtor has not even submitted a plan. Decisions which previously denied conversion based solely on the bankruptcy court's speculation that the debtor is incapable of submitting a feasible plan and that conversion would be an "exercise in futility," without any findings of bad faith, are effectively overruled by *Marrama*.[107]

Of the factors addressed by courts under section 1307(c), clearly the most relevant to the conversion determination is the debtor's candor with the court during the chapter 7 case. Evidence that the debtor has not accurately prepared schedules and financial statements filed with the court, or provided false testimony at the meeting of creditors or Rule 2004 examination,[108] should weigh heavily in the court's determination of whether the right to convert has been forfeited. However, material misstatements and other attempts to "mislead the bankruptcy court or manipulate the bankruptcy process,"[109] rather than mistake or excusable neglect, should be the focus of such an inquiry.[110]

B. Pre-petition and Post-petition Conduct

Courts generally consider both pre-petition[111] and post-petition conduct of the debtor in deciding whether to dismiss or convert a chapter 13 case under section

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[107] *See, e.g.*, *In re* Porter, 276 B.R. 32, 39 (Bankr. D. Mass. 2002) (acknowledging that misrepresentations in debtor's schedules and tenuous nature of plan, coupled with debtor's filing of conversion motion to escape pending adversary proceedings, were circumstances sufficiently extreme to warrant denial); *In re* Tardiff, 145 B.R. 357, 360 (Bankr. D. Me. 1992) (holding conversion should not be permitted where debtor cannot demonstrate good faith); *In re* Safley, 132 B.R. 397, 400 (Bankr. E.D. Ark. 1991) (denying conversion as "meaningless" due to previous discharge of debtor's debts); *In re* Lilley, 29 B.R. 442, 443 (B.A.P. 1st Cir. 1983) (affirming bankruptcy court's denial of conversion based on finding that debtor's income was insufficient to fund plan).

[108] *See, e.g.*, Alt v. United States (*In re* Alt), 305 F.3d 413, 420 (6th Cir. 2002) (finding bad faith in context of section 1307(c) motion to dismiss based largely on debtor's recalcitrance at deposition); *In re* Rohl, 298 B.R. 95, 104 (Bankr. E.D. Mich. 2003) (relating creditor's complaint that debtor should not be entitled to right to covert "because, *inter alia*, the Debtor failed to forthrightly and accurately disclose assets").

[109] *See* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 430 F.3d 474, 482 (1st Cir. 2005), (citing Sullivan v. Solimini (*In re* Sullivan), 326 B.R. 204, 212 (B.A.P. 1st Cir. 2005)); *In re Rohl*, 298 B.R. at 104 (denying Debtor's right to convert because Debtor failed to disclose assets, presumably as attempt to mislead court).

[110] *See In re* Odette, 347 B.R. 60, 65 (Bankr. E.D. Mich. 2006) (refusing to deny debtor's motion to convert because debtor's failure to accurately describe nature of certain debts was not material and did not involve abuse of bankruptcy process); *see also* Condon v. Smith (*In re* Condon), 358 B.R. 317, 328–29 (B.A.P. 6th Cir. 2007) (reversing bankruptcy court's denial of conversion in part based on lack of finding that debtor's omissions and misstatements in schedules were intended to mislead court); *In re* Perez, 345 B.R. 137, 141 (Bankr. D. Del. 2006) (finding that debtor's conversion from chapter 13 to 7 not in bad faith for purposes of section 348(f) despite evidence debtors were "dilatory in filing their Schedules, responding to motions, and making payments to the chapter 13 trustee," noting that such behavior is "not unusual for persons in financial distress" and did not amount to abuse of bankruptcy process).

[111] In its discussion of bad faith conduct, the Court in *Marrama* refers often to "pre-petition" conduct, presumably adopting the common construction of the term as referring to acts of the debtor done before filing the bankruptcy case, even in a converted case. *In re Marrama*, 430 F.3d at 482 (recording debtor's acknowledged intent to insulate transfers from creditors, as evidenced by his pre-petition transfers of valuable property); *see* 11 U.S.C. § 348(a) (2006) (providing that conversion of case under section 706(a)

1307(c).[112] While pre-petition conduct alone is rarely dispositive of the good faith issue under section 1307(c), a court's failure to consider it under the totality of circumstances test can be reversible error.[113]

The debtor in *Love* argued that the bankruptcy court gave undue weight to his pre-petition conduct as a tax protestor in finding that his petition was filed with a lack of good faith under section 1307(c).[114] The debtor contended that his pre-petition conduct, although not irrelevant, is probative of a lack of good faith only if there is a sufficient connection between the pre-petition and post-petition conduct.[115] Based on the Seventh Circuit's overriding belief that the totality of the circumstances must be a flexible standard that should not constrain a court's factual inquiry on a case-by-case basis, it found that no linkage was required.[116]

While the debtor's position in *Love* would unnecessarily tie the hands of fact finders in some cases, a slightly reformulated version of it should generally guide a court's assessment of pre-petition acts in a *Marrama* preconversion bad faith

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does not change petition date, commencement of case, or order for relief); Deborah Parker, *Environmental Claims In Bankruptcy: It's a Question Of Priorities*, 32 SAN DIEGO L. REV. 221, 279–80 (1995) (discussing courts' struggle of classifying claims as pre-petition or post-petition, and based on those findings, determining proper holding on the matter). Upon closer view, however, it appears that the majority opinion is actually referring to pre-conversion actions of the debtor, that is conduct of the debtor both before the case has been filed and for the post-petition period during the chapter 7 case prior to filing of the motion to convert. For example, the Court refers to section 1307(c)(10) as an example of a "for cause" factor relating to "pre-petition" conduct, but this subsection deals with the debtor's post-petition failure to file the statement of intention required by section 521(a)(2) during the bankruptcy case. *See* 11 U.S.C. § 1307(c)(10) (2006) (providing rule that court can convert a case to a case under chapter 7 or dismiss case for cause including failure to timely file any information required by 11 U.S.C. § 521(2)); 11 U.S.C. § 521(a)(2) (2006) (laying out filing rules to which a debtor must adhere); Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1111 (2007) (commenting that courts "routinely treat dismissal for prepetition bad-faith conduct as implicitly authorized by the words 'for cause'")

[112] *See* Copper v. Copper (*In re* Copper), 426 F.3d 810, 813 (6th Cir. 2005) (asserting that debtor must have provided his chapter 13 plan in good faith in order for it to be confirmed); *In re* Horan, 304 B.R. 42, 46 n.5 (Bankr. D. Conn. 2004) (averring that court will include pre-petition and post-petition when evaluating bad faith). *But see* Tedra Hobson, *Bankruptcy Abuse Creation Act: Curing Unintended Consequences of Bankruptcy Reform*, 40 GA. L. REV. 1245, 1269 (2006) (noting that broad good faith courts are more inclined to take into account all evidence, irrespective of whether it applies post-petition or pre-petition conduct).

[113] N.J. Lawyers' Fund for Client Prot. v. Goddard (*In re* Goddard), 212 B.R. 233, 241 (D.N.J. 1997) (remanding case with instructions for bankruptcy court to consider debtor's pre-petition disbarment and conviction for tax evasion, which court had refused to consider at hearing on motion to dismiss); *In re* Jones, 119 B.R. 996, 1003 (Bankr. N.D. Ind. 1990) ("In analyzing those factors that may bear upon a debtor's good faith or lack thereof . . . . No single consideration, standing by itself, necessarily requires a finding of good or bad faith. Instead, it is the cumulative effect of all relevant factors which leads to such a finding."); *In re* Belt, 106 B.R. 553, 569 (Bankr. N.D. Ind. 1989) ("However, a chapter 13 plan may be confirmed even in the face of egregious pre-filing conduct if other factors suggest that the plan represents the debtor's good faith effort to satisfy his creditors' claims.").

[114] *In re* Love, 957 F.2d 1350, 1357, 1359 (7th Cir. 1992) ("Love argues that the bankruptcy court put undue emphasis on Love's prepetition conduct.").

[115] *Id.* at 1359 ("Rather, Love argues that this conduct is only relevant when there is a sufficient link between the debtor's prepetition conduct and the debtor's postpetition conduct.").

[116] *Id.* ("[T]he totality of circumstances test gives the bankruptcy court the discretion . . . . We refuse to interfere with this discretion by requiring that the bankruptcy court make a specific finding that there is a sufficient link between the debtor's prepetition and postpetition conduct.").

hearing. An emphasis at such a hearing should be placed on conduct which evinces the debtor's intent to manipulate the court system, particularly acts which are done in contemplation of bankruptcy.

For example, evidence of the debtor's extravagant spending and poor financial decisions over an extended pre-petition period may help explain the debtor's reason for filing bankruptcy and may ultimately bear upon the court's consideration of plan confirmation, but alone will seldom show bad faith.[117] In most cases, such conduct without more is in keeping with an "honest but unfortunate debtor" deserving of bankruptcy relief.[118] Quite a different conclusion may be drawn, however, if this conduct is part of a scheme to take unfair advantage of the bankruptcy system by transferring assets in the period leading up to bankruptcy and then failing to disclose them when the case is filed.[119] In the context of denial of a debtor's right to convert provided under section 706(a), for pre-petition conduct to be probative of bad faith, some nexus between it and the debtor's attempt to subvert the bankruptcy process should be shown.

This connection was clearly established in *In re Harris*.[120] In a series of transactions designed to avoid claims of the primary investor in his business, the debtor foreclosed on a note he held on the business assets and dissolved the business just before filing a chapter 7 petition.[121] Within days of filing of his petition, and without court approval or notice to the trustee, the debtor then transferred the assets to a new corporation he formed so as to continue operation of the pre-petition business.[122] During the pre-petition period, the debtor also formed

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[117] *See* Jensen v. Froio (*In re* Jensen), 369 B.R. 210, 235 (Bankr. E.D. Pa. 2007) ("If improvident financial decisions were the litmus for good faith, few debtors might pass."); *In re* Elmendorf, 345 B.R. 486, 494 (Bankr. S.D.N.Y. 2006) (stating that though factually it may not be the case, "Congress likely presumed that most, if not all, individual debtors who seek bankruptcy relief do so as a result of poor financial management."); *In re* Jones, 119 B.R. 996, 1003 (Bankr. N.D. Ind. 1990) ("In analyzing those factors that may bear upon a debtor's good faith or lack thereof . . . . No single consideration, standing by itself, necessarily requires a finding of good or bad faith. Instead, it is the cumulative effect of all relevant factors which leads to such a finding.").

[118] Grogan v. Garner, 498 U.S. 279, 286–87 (1991). *See Elmendorf*, 345 B.R. at 494 (observing that Congress enacted pre-petition credit counseling requirement in section 109(h) presumably based on view that "most, if not all, individual debtors who seek bankruptcy relief do so as a result of poor financial management"); Girardier v. Webster Coll., 563 F.2d 1267, 1271 (8th Cir. 1977) (recognizing that purpose of Bankruptcy Act is to give bankrupt "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt") (*citation omitted*).

[119] *In re Jensen*, 369 B.R. at 235 (finding that for court to conclude that chapter 13 plan has been filed in bad faith under section 1325(a), "additional aggravating factors" must ordinarily be shown, such as concealment or transfer of assets, or falsification or destruction of records); *see, e.g.*, *In re* Cappuccetti, 172 B.R. 37 (Bankr. E.D. Ark. 1994) (ruling against debtor who filed inaccurate business statements with inflated expenses to avoid paying income taxes to IRS); *In re* Lichtenstein, 328 B.R. 513, 516 (Bankr. W.D. Ky. 2005) (dismissing bankruptcy petition by debtor who followed deliberate pattern of hiding and transferring his assets to evade creditors).

[120] *In re* Harris, 357 B.R. 1, 6 (Bankr. D.N.H. 2006) (noting that totality of circumstances left no doubt that debtor had exhibited bad faith).

[121] *Id.* at 4 (observing that debtor's concealment and undervaluation of assets could not have possibly been done in good faith).

[122] *Id.* at 3.

several corporations for the purpose of owning his personal residence, and often did not keep a checking or savings account in his name.[123] Once in bankruptcy, the debtor made numerous misrepresentations in his bankruptcy filing, failing to disclose transfers and undervaluing assets.[124] Denying the debtor's motion to convert to chapter 13 on bad faith grounds, the court found that the debtor's pre-petition and post-petition conduct met the "classic profile of playing fast and loose with the bankruptcy system."[125]

C. Reason for Conversion

The debtor's motivation for seeking conversion can be relevant to the *Marrama* bad faith inquiry. The timing of conversion, if on the heels of some precipitous event such as an action to deny discharge, to declare a particular debt nondischargeable, or to recover an asset, can reveal a motivation inconsistent with the desire to repay creditors. These reasons may be highly relevant, once a case has been converted, in the context of a motion to dismiss or reconvert under section 1307(c) and at a hearing on confirmation under section 1325, in determining whether the debtor's use of chapter 13 is an attempt to unfairly manipulate the system to the disadvantage of creditors.[126] However, for this factor to be relevant in a *Marrama* bad faith conversion setting, the scope of inquiry should be confined to whether the motive for conversion reflects an attempt to perpetuate a pattern of preconversion abusive conduct by a dishonest debtor.

CONCLUSION

Marrama has not dramatically changed how bankruptcy courts will handle the vast majority of motions to convert in the future. The current Bankruptcy Rules provide courts with the appropriate means to efficiently process requests for conversion. Nevertheless courts should ensure that due process protections are afforded to parties in contested conversion proceedings in which bad faith conduct

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[123] *Id.* at 6 ("The Debtor's aversion to opening bank accounts in his own name, his failure to provide financial records, and his use of corporations to own his home lengthen the shadow of bad faith that the Debtor has cast upon himself.").

[124] *Id.* at 4 (indicating that a few days post-petition, debtor formed new corporation, transferred assets to that corporation and generated at least $85,000 from assets he valued at $8,600).

[125] *Id.* at 6 (finding that debtor misled Court by intentionally undervaluing and concealing assets and that Debtor made multiple misrepresentations under oath).

[126] *See* Marrama v. Citizens Bank of Mass. (*In re* Marrama), 127 S. Ct. 1105, 1112 (2007) ("Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 plan is an express statutory ground for denying plan confirmation.") (*citations omitted*); *In re* Love, 957 F.2d 1350, 1356 (7th Cir. 1992) (holding that because dismissal is harsh, bankruptcy courts should be more reluctant to dismiss petition for lack of good faith under section 1307(c) than to reject plan for lack of good faith under section 1325(a)); *In re* George Love Farming, LC, 366 B.R. 170, 178 (Bankr. D. Utah 2007) (finding that debtor's post-petition actions may combine with pre-petition actions to create pattern of abuse exhibiting debtor's attempts to stymie creditors without desire to repay their claims).

is raised. Standards for determining bad faith should be developed which are consistent with the Supreme Court's view that a denial of conversion should be reserved for extraordinary cases involving egregious debtor misconduct relating to an abuse of the bankruptcy process.