The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough

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I. INTRODUCTION

After being on the agenda of five different Congresses and a decade of political battles,[1] the revised bankruptcy legislation became law with the passage of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[2] on April 20, 2005.[3] Although the road to bankruptcy reform was long,[4] the road to put the reform into practice, so that the Bankruptcy Code[5] works in a practical fashion, is going to be much longer, and probably quite bumpy.

Prior to the passage of BAPCPA, practitioners, judges, and scholars debated the "ins and outs" of BAPCPA in countless seminars and scholarly efforts. Some praise BAPCPA,[6] and others decry it.[7] The view one has of BAPCPA is largely based on their perspective of the underlying cause of the upsurge in case filings[8] over the last decade or so.[9] Regardless of how

1. For a general discussion of the political battles over bankruptcy reform in the 1990s, see Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004), and Robert J. Landry, III, *The Policy and Forces Behind Consumer Bankruptcy Reform: A Classic Battle Over Problem Definition*, 33 U. MEM. L. REV. 509 (2003).

2. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of chapter 11 of the United States Code).

3. The bill was passed by the Senate on March 10, 2005, and the House of Representatives on April 14, 2005. WILLIAMS HOUSTON BROWN & LAWRENCE R. AHERN III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS 1 (2005).

4. For a detailed discussion of the legislative history, see Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005).

5. 11 U.S.C. §§ 101-1527 (2006). Unless otherwise noted, all references to Bankruptcy Code, Code, or section, are to title 11 of the United States Code.

6. For example, those who favor the legislation characterize it as "a substantial success in preserving the bankruptcy relief for those who need it while reducing fraud and abuse." *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act: Hearing Before the S. Comm. on the Judiciary and the Subcomm. on Administrative Oversight and the Courts*, 110th Cong. (2006), *available at* http://judiciary.senate.gov/heaings/testimony.cfm?renderforprint=1&id=2442&wit_id=5934.

7. *See* Charles J. Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 46-47 (2001) (detailing many of the mainstream media stories and editorials that strongly opposed bankruptcy reform—even the title of his article gives an indication of one point of view of bankruptcy reform).

8. *See* Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275, 284-85 (2007) (reporting yearly consumer bankruptcy filings from 1980 to 2005, nominally and by percent of the United States population). From 1995 to 2005, consumer filings have gone from 874,642 to 2,000,000. *Id.* As a percent of the U.S. population, this represents an increase from 0.33% in 1995 to 0.68% in 2005. *Id.* For more detailed information regarding bankruptcy filing numbers, see JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, 2006, at 22-24 (n.d.), *available at* http://www.uscourts.gov/library/annualreports.htm.

BAPCPA is viewed from a policy perspective, we are now in the post-BAPCPA era, and it is now that the rubber hits the road.[10]

The impact of BAPCPA on the bankruptcy system's ability to effectively address the financial distress of individual consumer debtors is unknown.[11] As in many policy areas where there is widespread reform to an existing, complex statutory scheme, the courts will have to clarify and interpret the words of the statute so that the new changes are workable. The courts have begun to work through BAPCPA and to address many of the thornier consumer issues.[12] The courts, with each decision, are interpreting

9. For an excellent example of the divergent views on the causal factors leading to the increased consumer fillings rate, see Elizabeth Warren, Jay Lawrence Westbrook & Theresa Sullivan, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings* (Working Paper, 2006), http://ssrn.com/abstract=903355 (highlighting two very different perspectives of the reason for increased filings: less stigma with more people abusing the system or more financial distress).

President George W. Bush's explanation at the signing ceremony for BAPCPA represents, in a nutshell, the view of the proponents of reform and their opinion of why the reform is necessary. President Bush stated:

> In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them. This has made credit less affordable and less accessible, especially for low-income workers who already face financial obstacles.
>
> The bill I sign today helps address this problem. Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts. . . . This practical reform will help ensure that debtors make a good-faith effort to repay as much as they can afford.

In re Richie, 353 B.R. 569, 580-81 (Bankr. E.D. Wis. 2006) (quoting Press Release, White House Press Office, President Signs Bankruptcy Abuse Prevention, Consumer Protection Act (Apr. 20, 2005)).

10. As Professor Wilson Freyermuth said regarding the bankruptcy system after BAPCPA, "We have the system we have." R. Wilson Freyermuth, *Crystas, Mud, BAPCPA, and the Structure of Bankruptcy Decisionmaking*, 71 MO. L. REV. 1069, 1078 (2006). In essence, all participants in the system must deal with the cards dealt by Congress and work through the changes.

11. *See, e.g.*, Melissa B. Jacoby, *Ripple or Revolution? The Indeterminacy of Statutory Bankruptcy Reform*, 79 AM. BANKR. L.J. 169, 170 (2005) (recognizing that the "real life impact" of bankruptcy reform is unclear). From a larger perspective, it is unknown if there will be any meaningful change from BAPCPA in the long-run. *See, e.g.*, Robert M. Lawless, *The Paradox of Consumer Credit*, 2007 U. ILL. L. REV. 347, 348 (2007) ("At the big picture level, however, it is not clear that the law changes much of anything.").

12. For an excellent treatment of the early cases after the passage of BAPCPA that address many of the thorny issues, see George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV. 297 (2006).

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and carrying out the provisions of the statute.[13] This role of the courts, as well as the role that other players in the bankruptcy system play,[14] will shape consumer bankruptcy in the post-BAPCPA era.[15]

There are scores of doctrinal changes to the Bankruptcy Code,[16] but among the more challenging areas in consumer bankruptcy has been working through the complex statutory framework of the means test.[17] The courts, debtors, creditors, trustees, Bankruptcy Administrators (BA), and U.S. Trustees (UST)[18] are incrementally working through the statutory scheme as cases present themselves.[19] The "blind legislative formula"[20] determining chapter 7 eligibility is riddled with gaps and inconsistencies.[21] Many issues are likely resolved without requiring bankruptcy courts to weigh in, but a body of case law pertaining to § 707(b) is developing.[22]

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13. In the post-BAPCPA era, there will be three kinds of decisions that have to be considered when approaching bankruptcy issues. First, there will be areas where there is no controlling authority. In this area, we will see new decisions interpreting the amendments to the Code. This is the focus of this paper. Second, some decisions will no longer be valid in light of BAPCPA. Third, some substantive decisions handed down prior to BAPCPA will still be good law and will control the outcome of some issues. *See* Brad A. Goergen, *The Post-Reform Bankruptcy Code: Is it Just a Pig in a Dress?*, THE ADVOCATE (Idaho), Jan. 2006, at 15, 15.

14. These players include, among others, the attorneys, United States Trustees, United States Bankruptcy Administrators, creditors, governmental agencies, and trustees. Each will shape the law as they work through the amendments.

15. *See* Jacoby, *supra* note 11, at 189 (recognizing the filtering effect of the day-to-day actors in the bankruptcy system).

16. Lawless, *supra* note 11, at 348 ("At the doctrinal level, the new statute changes many things. The amendments enact a new means test for consumers in chapter 7, credit counseling requirements, paperwork and filing duties, notice rules, substantive changes to priorities and payouts, and a host of other doctrinal changes.").

17. 11 U.S.C. § 707(b) (2006); *see infra* notes 36-94 and accompanying text.

18. The United States Trustee program operates in all judicial districts other than those in Alabama and North Carolina, which have the United States Bankruptcy Administrator program. Both agencies perform largely the same functions in the administration and oversight of the bankruptcy system. For a discussion of the role and function of both programs, see Dan J. Schulman, *Constitutionality of the United States Trustee/Bankruptcy Administrator Programs*, 4 J. BANKR. L. & PRAC. 319 (1995); Dan J. Schulman, *The Constitution, Interest Groups, and the Requirement of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 NEB. L. REV. 91 (1995).

19. The incremental nature of the maturation of the law will lead to a host of inconsistent decisions and will take years to resolve, if it can even ever be resolved, by the appellate courts. As one scholar has recognized, "The legislation remains, however, in its infancy and a maturation of the law will be necessary to resolve the numerous questions of statutory interpretation and legislative intent." Singer, *supra* note 12, at 411.

20. *In re* Barraza, 346 B.R. 724, 729 (Bankr. N.D. Tex. 2006).

21. The very standard itself, "abuse," is sufficiently vague and muddy. *See* Freyermuth, *supra* note 10, at 1071-72.

22. *See, e.g.*, Thomas R. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM.

With each decision, the courts shape bankruptcy policy in the post-BAPCPA era.[23] It is hoped that awareness of these decisions can guide all players to resolve disputes by consent without the necessity of the bankruptcy court.[24] It can also provide a starting point to analyze the impact of the means test in day-to-day application. This is a necessary step, as is solid empirical research,[25] before any reforms to the means test are to be seriously considered.

As the title indicates, the focus of this paper is on dismissal of individual chapter 7 cases when the detailed means test is inapplicable because a

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BANKR. L.J. 195, 195-96 (2007) (recognizing that there are a growing number of decisions in a wide array of areas under BAPCPA, but the differences in their outcomes are so varied that there is no way to have any predictability or uniformity in outcomes in individual cases).

23. It is interesting to examine how the courts shape BAPCPA because the new legislation tends to limit the discretion of judges with more rules, such as the means test. It also limits the ability of debtors to choose the most appropriate chapter of relief. Discretion and flexibility, with certain limits and statutory checks and balances, had been important in the pre-BAPCPA era to enable the Bankruptcy Code to act as a safety valve for financial distress. For a discussion of the safety valve role of consumer bankruptcy, see Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation for the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 4-5 (1999).

24. Of course, as pointed out by Professor Freyermuth, with ninety-four districts, and with bankruptcy, district, courts of appeals, bankruptcy appellate panels, and the Supreme Court, reaching a consensus on thorny issues will take a great deal of time. Freyermuth, *supra* note 10, at 1073-75. Professor Freyermuth is correct, but bankruptcy practice is very localized. Decisions by local courts, as well as accepted local norms or typical outcomes in certain cases, can have an effect of guiding the players to resolve similar disputes in the future. Additionally, the costs of appealing most bankruptcy decisions are prohibitive in routine cases and can act as an incentive to reach resolution without going through the appellate process.

The localized nature of bankruptcy practice arises in several ways. First, the promulgation of local procedural rules by bankruptcy courts around the nation leads to a localism in terms of procedures in a particular district. *See, e.g.*, Mary Josephine Newborn Wiggins, *Globalism, Parochialism and Procedure: A Critical Assessment of Local Rulemaking in Bankruptcy Court*, 46 S.C. L. REV. 1245 (1995) (recognizing the promulgation of local rules around the country). Beyond local bankruptcy rules adopted on a district-wide basis, judges often have their own rules that pertain to their court only. Rules by courts and guidelines by the U.S. Trustees, Bankruptcy Administrators, and clerks of court can add to the localized nature of bankruptcy practice. A second factor leading to localized bankruptcy practice arises from a "local legal culture," which has been evolving over time from the interested parties in the bankruptcy system: judges, clerks, trustees, and practitioners. For a general empirical analysis of this evolution, see Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801 (1994).

25. *See, e.g.*, Katherine Porter, *The Potential and Peril of BAPCPA for Empirical Research*, 71 MO. L. REV. 963 (2006) (recognizing a whole host of policy areas that intersect with the bankruptcy system and the importance of empirical research on the relationship between those areas and consumer bankruptcy).

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debtor falls within a safe harbor,[26] the debtor passes the means test,[27] or the debtor is able to rebut the presumption of abuse.[28] The focus is not on presumption of abuse cases and a detailed analysis of the mechanics of the means test. The reason for this focus is twofold. First, the detailed means test is not applicable to most debtors since most fall within the safe harbor of having too low of an income.[29] As such, the presumption of abuse never will arise. The avenue for review of these cases is under generalized abuse.[30] Second, debtors who must complete the means test, the above-median-income debtors, are those where the possibility of abuse is more likely to exist, rather than the below-median-income debtors. The above-median-income debtors naturally have more money and assets than most debtors. They, therefore, likely have more of an ability and reason to use the means testing calculations in a way that avoids the appearance of abuse, or at least rebuts the presumption of abuse. It is in these cases where abuse, if any, is likely to occur. As such, the focus of this paper is primarily on situations where the debtor has moved beyond the means test and overcome any resulting presumptions, so that the case is analyzed for abuse under section 707(b)(1) and 707(b)(3)[31] or for possible dismissal for cause under section 707(a).[32] In such situations, the safe harbor, passage of the means test, or rebutting the presumption of abuse may not be enough for the debtor to get the relief they seek.

Prior to directly addressing that area, a brief overview of the means test and presumption of abuse is necessary. The framework leading to application of the means test is required to fully understand the "ins and outs" of the generalized abuse analysis. Following that overview, which includes a discussion of several of the thornier issues in the application of the means test, is a discussion of dismissal of cases for abuse under the bad faith and/or totality of the circumstances standards. A brief discussion of opportunities for possible dismissal under § 707(a)[33] for individual debtors with primarily business debts or consumer debtors in which § 707(b)[34] analysis is not useful will follow. Finally, the paper concludes with some observations and areas that need further research.

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26. *See infra* notes 51-60 and accompanying text.

27. *See infra* notes 64-68 and accompanying text.

28. Even if abuse is presumed, a debtor can rebut the presumption. 11 U.S.C. § 707(b)(2)(B) (2006); *see infra* notes 85-94 and accompanying text.

29. *See* Jerry D. Truitt, *The State of Bankruptcy 18 Months After BAPCPA*, AM. BANKR. INST. J., Dec.-Jan. 2007, at 52, 52 (recognizing that ninety-four percent of cases filed were by debtors below the applicable state's median income).

30. *See* discussion *infra* Part III.

31. 11 U.S.C. § 707(b)(1), (3) (2006).

32. 11 U.S.C. § 707(a) (2006).

33. 11 U.S.C. § 707(a) (2006).

34. 11 U.S.C. § 707(b)(1), (3) (2006).

II. OVERVIEW OF THE MEANS TEST AND THE PRESUMPTION OF ABUSE

The means test is a complex statutory scheme that applies a presumption of abuse in chapter 7 cases if it is determined that the debtor could repay a portion of their general unsecured debts.[35] The presumption of abuse is determined by the debtor's ability to repay a portion of their general unsecured debts.[36] If the presumption arises, the debtor cannot obtain relief under chapter 7 without showing special circumstances exist.[37]

Prior to considering the application of the means test, an analysis of the threshold requirements and safe harbor provisions is necessary. If the threshold requirements are met, an analysis of the safe harbor provisions is then required. If the threshold requirements are met and no safe harbor provisions apply, then a substantive means test analysis applies. Then, even if the presumption of abuse does not arise or is rebutted, dismissal for abuse, the focus of this paper, or possibly dismissal for cause should be considered.

A. THRESHOLD REQUIREMENTS

Section 707(b)(1) provides that a chapter 7 case filed by an individual debtor whose debts are primarily consumer debts shall be dismissed if the court determines that the filing constitutes an abuse.[38] It is important to recognize two threshold requirements before analyzing whether a case is subject to dismissal for abuse: (1) individual debtor (2) whose debts are "pri-

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35. *In re* Haar, 360 B.R. 759, 761 (Bankr. N.D. Ohio 2007) ("[T]he function of [the means test] is to determine whether a debtor has the means available to repay his or her obligations.").

36. *Id.* ("The actual mechanics of the test are highly detailed and rigid, . . . [y]et, the overall concept of the test is simple; if a debtor's income exceeds his or her necessary expenses by certain predetermined thresholds, a presumption that the debtor is abusing the bankruptcy process will arise.").

37. Essentially, the means test is a methodology to determine if a chapter 7 debtor can fund a plan under chapter 13 and, if so, to dismiss the case or convert the case to chapter 13. *See, e.g.*, Richard L. Wiener, Susan Block-Lieb, Karen Gross & Corinne Baron-Donovan, *Unwrapping Assumptions: Applying Social Analytic Jurisprudence to Consumer Bankruptcy Education Requirements and Policy*, 79 AM. BANKR. L.J. 453, 458 (2005) ("BAPCPA seeks to curb access . . . to chapter 7 . . . by imposing an income-based test intended to insure that only those individual debtors who could not repay their unsecured debt through a repayment plan are entitled to access chapter 7."). For a detailed explanation of the mechanics of the means test, see Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005), and Robert J. Landry, III & Nancy H. Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 107-12 (2006).

38. 11 U.S.C. § 707(b)(1) (2006).

marily consumer debts."[39] Note, as discussed below in part IV, if the threshold requirements of the means test are not met so that § 707(b) is inapplicable, debtors may be subject to dismissal on the grounds enumerated in § 707(a), including "cause."[40]

1. *Individual Debtor*

First, the debtor must be an individual; however, "individual" is not defined in the Bankruptcy Code.[41] Undefined words in the Bankruptcy Code are given their plain meaning, unless such a meaning would lead to "a result demonstrably at odds with the intention of its drafters."[42] Applying this standard to the term "individual," courts generally limit the term to "natural persons," not corporations or other legal entities.[43] As such, the § 707(b) dismissal for abuse does not apply to corporate, partnership, or other legal-entity debtors.[44]

2. *Primarily Consumer Debts*

Second, if an individual debtor's debts are not primarily consumer, the debtor is not subject to the means test and, in fact, does not need to file Official Form B22A,[45] which contains the means test calculation.[46] Disputes may arise regarding whether a debtor has "primarily consumer debts." This is because "consumer debt" is defined in the Code,[47] whereas "primarily" is not.

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39. *Id.*

40. *See In re* Sudderth, No. 06-10660, 2007 WL 119141, at *1-*2 (Bankr. M.D.N.C. Jan. 9, 2007).

41. *In re* JAC Family Found., 356 B.R. 554, 555 (Bankr. N.D. Ga. 2006).

42. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-42 (1989) (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)).

43. *See* Jove Eng'g, Inc. v. IRS *(In re* Jove Eng'g, Inc.), 92 F.3d 1539, 1550-51 (11th Cir. 1996).

44. Charles J. Tabb & Jillian K. McClelland, *Living With the Means Test*, 31 S. ILL. U. L.J. 463, 468 (2007).

45. INTERIM FED. R. BANKR. P. 1007(b)(4) (2006).

46. Although it appears that interim rule 1007(b)(4) does not require Form 22A to be filed in this instance, several courts have reached different conclusions when addressing this issue. For the divergent views on this issue, see *In re Beacher*, 358 B.R. 917, 919-21 (Bankr. S.D. Tex. 2007) (finding that Form B22A is not required unless the debtor has primarily consumer debts), *In re Copeland*, No. 06032116-H3-7, 2006 WL 2578877, at *2 (Bankr. S.D. Tex. Sept. 5, 2006) (addressing the *In re Moates* case and finding that § 521(a)(1)(b)(v) requires a statement of current monthly income and is not limited to individuals with primarily consumer debts; the court concluded that individual chapter 7 debtors with primarily business debts were required to file Official Form B22A), and *In re Moates*, 338 B.R. 716 (Bankr. N.D. Tex. 2006).

47. 11 U.S.C. § 101(8) (2006).

Section 101(8) defines "consumer debt" as a "debt incurred by an individual primarily for a personal, family, or household purpose."[48] The test used by most courts in examining whether a particular debt is a consumer debt is "whether it was incurred with an eye for profit."[49] This test is derived from jurisprudence regarding the definition of consumer debt in the Truth in Lending Act,[50] since the definition of consumer debt in the Code is derived from consumer protection law.[51]

Most courts define "primarily consumer debt" as "more than 50% of the amount of debt is consumer debt, without regard to whether more than 50% of the number of debts is consumer debt."[52] However, the Fifth Circuit found that beyond a consideration of the amount of consumer debt in relation to nonconsumer debt, the number of consumer debts should be considered.[53] Other courts look at the amount of consumer debt and consider the number of debts in the event that the amount of consumer and nonconsumer debt are equal.[54]

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48. *Id.*

49. *In re* Booth, 858 F.2d 1051, 1054 (5th Cir. 1988); *see also In re* Bell, 65 B.R. 575, 577 (Bankr. E.D. Mich. 1986); *In re* Almendinger, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

50. *In re Booth*, 858 F.2d at 1054-55.

51. "[The] definition [of consumer debt] is adapted from the definition used in various consumer protection laws." S. REP. No. 95-989, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5808.

52. *In re* Beacher, 358 B.R. 917, 920 (Bankr. S.D. Tex. 2007) (applying such a definition in the post-BAPCPA era). For similar holdings prior to BAPCPA, which would still be applicable, see *Stewart v. U.S. Tr. (In re Stewart)*, 175 F.3d 796, 808 (10th Cir. 1999), where in a substantial abuse case, which has the same language as in the current Code section, the court applied a plain meaning of the word "primarily," defining it as "meaning consumer debt exceeding fifty percent of the total debt," *Zolg v. Kelly*, 841 F.2d 908, 913 (9th Cir. 1988) ("'Primarily' means 'for the most part.'" Thus, when 'the most part'—i.e., more than half—of the dollar amount owed is consumer debt, the statutory threshold is passed."), and *In re Price*, 353 F.3d 1135, 1139 (9th Cir. 2004) (noting that over half the debt was consumer debt, satisfying the primarily consumer debt requirement).

53. *In re Booth*, 858 F.2d at 1055.

54. *In re* Bell, 65 B.R. 575, 577-78 (Bankr. E.D. Mich. 1986). The court articulated the test as follows:

> The Court concludes that it is appropriate in defining the phrase "primarily consumer debt" to give more weight to the portion of total debt that is consumer debt and less weight to the portion of the total number of debts that are consumer debts. Thus, where the total amount of the consumer debt is substantially less than the total amount of non-consumer debt, the debts cannot be considered primarily consumer debts, even if there is a greater number of consumer debts. On the other hand, when the amount of the consumer debt is substantially greater than the amount of the non-consumer debt, the debts must be considered primarily consumer debts even if there is a greater number of non-consumer debts. Finally, when the consumer debt and the non-consumer

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B. SAFE HARBOR PROVISIONS

If the threshold requirements are satisfied, it is necessary to consider the safe harbor provisions in § 707(b).[55] The Code provides two specific safe harbors from the full application of the means test and the possibility of a presumption of abuse for individual debtors with primarily consumer debts: (1) debtors with income below the median household income in their state, and (2) disabled veterans in very limited circumstances.[56] Even if a debtor satisfies a safe harbor provision so that the means test and resulting presumption are not applicable, as discussed in part III, the debtor may be subject to dismissal for abuse under § 707(b)(1)[57] and § 707(b)(3),[58] or possibly even under § 707(a).[59]

1. Current Monthly Income Below Median State Income

When the product of a debtor's current monthly income (CMI)[60] and twelve exceeds the applicable state median household income, the debtor is subject to the means test.[61] Conversely, when the product of a debtor's CMI and twelve is below the applicable state median household income, the debtor is not subject to the means test or the possibly resulting presumption of abuse.[62] In such instances, the debtor falls within a "safe harbor" from application of the mechanics of the detailed means test.[63]

It is important to recognize that the accuracy of the CMI figure in situations where the CMI is just below the median household income in the state is very important. Calculation of CMI is supposed to be based on a debtor's household income for the full six months of pay in the calculation; however, obtaining this data may be difficult, and the result may be the

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> debts are approximately equal, the Court should consider the relative numbers of consumer and non-consumer debts.

Id. at 577-78.

55. 11 U.S.C. § 707(b)(2)(D), (b)(7) (2006).

56. *Id.*

57. Dismissal is proper if granting relief would be an abuse of the provisions of chapter 7.

58. Dismissal is proper if the petition was filed in bad faith or the circumstances surrounding the debtor's financial situation indicate abuse.

59. Dismissal is proper for prejudicial delays, failure to pay fees, or failure to furnish required information.

60. 11 U.S.C. § 101(10A) (2006) (stating that current monthly income is the debtor's average monthly income for the six calendar months prior to the filing of the bankruptcy case).

61. 11 U.S.C. § 707(b)(2)(A) (2006).

62. 11 U.S.C. § 707(b)(7) (2006).

63. *See* 6 COLLIER ON BANKRUPTCY ¶ 707.05[2][b] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (citing 11 U.S.C. § 707(b)(7) (2006)).

usage of pay information outside of the prior six months or a failure to include nondebtor spouse income. Using incorrect or incomplete data distorts the accuracy of CMI.[64] In some instances, the safe harbor may not actually be applicable to debtors that, on the face of the petition, appear to be below-median-income debtors. Therefore, those debtors should be subject to application of the means test.[65] Furthermore, even if the debtors pass the means test on its face, if the calculation of CMI was materially incorrect, that *may* be a relevant factor, in the context of a particular case, to an analysis under § 707(b)(1) and (3).

2. *Disabled Veterans*

Disabled veterans may also fall within a *very limited* "safe harbor" from application of the means test. If the disabled veteran's indebtedness occurred primarily during a period when the veteran was on active duty or performing a homeland defense activity, the disabled veteran is not subject to the means test.[66] Official Form 22A has a box for debtors to certify that they fall within this exception.

This initially appears to provide real relief to disabled veterans, however, upon closer review, it does not.[67] The veteran must have been "disabled,"[68] on "active duty,"[69] or "performing a homeland defense activity"[70] at the time the debtor incurred the debt. Each of these terms has a specific statutory definition, and when each is read together, the actual relief available to veterans appears limited.[71] With that said, it is unclear exactly who will challenge this or verify the accuracy of such a certification.[72]

64. It may be necessary to review the pay advices and/or tax documents, which can help assess the accuracy of CMI. Practitioners should be prepared to show how the calculation was arrived at.

65. The old aphorism of "garbage in, garbage out" can be applied to the means test results when the initial CMI figures used are incorrect.

66. 11 U.S.C. § 707(b)(D)(i)-(ii) (2006). In such instances, the veteran debtor does not need to complete the detailed means test calculations of Official Form 22A. *See* INTERIM FED. R. BANKR. P. 1007(b)(4) (2006); *see also In re* Galyon, 336 B.R. 164, 166 (Bankr. W.D. Okla. 2007).

67. David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 292-94 (2007) (explaining the inherent problems and limitations of this purported protection to veterans).

68. 38 U.S.C. § 3741(1) (2006).

69. 38 U.S.C. § 101(21) (2006).

70. 32 U.S.C. § 901(1) (2006).

71. The conjunctive nature of the statutory requirement will make it difficult for the exclusion, particularly the requirement that the debt actually be incurred while the disabled veteran was on active duty or performing a homeland defense activity.

72. The U.S. BAPCPA Trustee training manual expects trustees to verify the veteran status. *See* David W. Allard & Katherine R. Catanese, Presentation at the ABI Central

C. MEANS TEST GENERALLY

If the threshold requirements are satisfied and the safe harbor provisions do not apply, the debtor must complete the detailed means test.[73] A detailed examination of the mechanics of the means test is beyond the scope of this paper;[74] however, a review of several of the thornier issues is provided below in part II. What follows is a cursory overview of the process.

The means test is really a two-step test: (1) a median income test, and (2) a repayment test.[75] The median income test is one of the safe harbors set forth above in part II.B. If the debtor's CMI times twelve (Annualized Current Monthly Income, or ACMI) is equal to or below a state's applicable median family income, the debtor passes the means test.[76] The debtor is in a safe harbor and is not subject to the detailed means test and the possibly resulting presumption of abuse.

However, debtors with ACMI above the median income must calculate their ability to repay a portion of their unsecured debts based on their CMI, less allowed deductions, which constitutes the repayment test.[77] If a debtor's monthly disposable income (MDI), less CMI allowable expenses, multiplied by sixty, is greater than $10,000, then the debtor fails the means test and must file chapter 13.[78] If the product of the MDI and sixty is be-

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States Bankruptcy Workshop: Advanced Means Testing Issues: What Can Be Done to Make the Process More Efficient and Easier to Use? (July 15-18, 2006) (transcript available at www.abiworld.org).

73. 11 U.S.C. § 707(b)(2)(A)(i)-(iv) (2006).

74. The means test essentially determines if a chapter 7 debtor can fund a plan under chapter 13. For a detailed explanation of the mechanics of the means test, along with application of the test to hypothetical debtors, see Robert J. Landry, III & Nancy H. Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91, 107-12 (2006). Landry and Mardis provide the following summary of the means test:

> If a debtor can pay $100 a month and has $24,000 in unsecured debt, the bankruptcy filing will be presumed an abuse of Chapter 7. Over a 60-month period this will fund a repayment plan with $6000, which is 25% of the unsecured general debt. Then, on the high end, if the debtor has $166.66 a month to pay and has at least $39,998.40 in general unsecured debt, it will also be presumed to be an abuse of Chapter 7. Over a 60-month period this will fund a repayment plan with $9999.60, which is 25% of the unsecured general debt.

Landry & Mardis, *supra* note 37, at 109-10. If the case is presumed an abuse and the debtor does not rebut the presumption, the case will be dismissed, unless the debtor voluntarily converts the case to one under chapter 11 or chapter 13. *Id.* at 108. For other detailed treatments of the means test, see Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005).

75. *See* White, *supra* note 8, at 285-86.

76. *Id.*

77. *Id.*

78. *Id.*

tween $6000 and $10,000, the debtor can remain in chapter 7, provided that the above result is less than twenty-five percent of their unsecured debt.[79] Further, if the product of MDI and sixty is less than $6000, the debtor can remain in chapter 7 regardless of the amount of their unsecured debt.[80]

Additionally, it is important to recognize that the substantive calculations of the means test are riddled with problems, in part due to the fact that CMI is based on historic income information[81] and because allowable expenses include actual and Internal Revenue Service standards for expenses.[82] Therefore, an accurate assessment of the debtor's financial situation is not always reached.[83] Instead, what results is often an inaccurate assessment of a debtor's ability to repay a portion of his debts.[84] Sometimes the results can work in favor of higher-income debtors seeking chapter 7 relief.[85] The inherent problems in the substantive means testing calculations bolster the need to carefully review the accuracy of CMI in close cases in which the debtor's ACMI puts him or her just under the abuse threshold.

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79. *Id.*

80. *Id.*

81. CMI is actually the debtor's six month average income. 11 U.S.C. § 101(10A) (2006).

82. 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2006). For a concise discussion of the expenses, see Eugene Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31, 49-52 (2007).

83. The expenses are a combination of actual and presumed deductions calculated based on Internal Revenue Service living expenses standards and, as such, may not be the actual expenses a debtor incurs. This fact, coupled with the definition of CMI, shows that passing the means test does not necessarily provide an accurate picture of a debtor's financial condition. In such instances, dismissal under the "totality of the financial circumstances" standard may be applicable. 11 U.S.C. § 707(b)(3)(A) (2006); *see, e.g.*, *In re* Paret, 347 B.R. 12 (Bankr. D. Del. 2006) ("As is manifest in section 707, a safe harbor upon entry into which neither one's motives nor fitness for chapter 7 relief are questioned is hardly one Congress sought to dredge. When no presumption of abuse arises under paragraph (b)(2), the Court concludes that the Code mandates consideration of a debtor's ability to pay his creditors within the test articulated in paragraph (b)(3).").

84. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, 71 MO. L. REV. 1035, 1047-49 (2006) (recognizing that both current monthly income under the means test and allowable deductions under the means test may very well provide an inaccurate assessment of the debtor's financial condition).

85. Judge Wedoff provides an excellent hypothetical example of a CEO who loses his job shortly before filing and how the means test calculation likely would result in no presumption of abuse, i.e., passing the means test. However, if the actual financial situation was examined, the debtor may very well be able to repay a significant portion of their unsecured debts. *See id.* at 1035-37, 1051.

D. SELECTED PRESUMED ABUSE DECISIONS—§ 707(B)(2)

1. *Reductions of "Current Monthly Income"—401K Loans—§ 707(b)(2)(A)(ii)(I)*

Under § 707(b), a debtor's "current monthly income" is reduced by certain expenses; this is the net "current monthly income" used for determining whether the debtor must repay unsecured creditors. The expenses that the debtor deducts from "current monthly income" are those in existence on the filing date, and include typical living expenses. Specifically, § 707(b)(2)(A)(ii)(I) provides that debtors may deduct from current monthly income "the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides."[86]

Recently, an issue arose as to whether 401(k) loan repayments are "Other Necessary Expenses" under § 707(b)(2)(A)(ii)(I), so that such repayments could be deducted in determining the debtor's net "current monthly income." The bankruptcy court in the case of *In re Barraza*[87] found that such expenses are not included as other necessary expenses if the only consequence of defaulting on such loans is treating the loans as a taxable distribution. The court reasoned that the loans may be required under the 401(k) plan but, relying on the *Internal Revenue Service Manual*, found that repayment of 401(k) loans is not included as a deduction.[88] The court recognized the inconsistent treatment of the repayment of 401(k) loans in a chapter 7 means test analysis with how those repayments are treated under chapter 13.[89] In chapter 13, those repayments are permitted under § 1322(f) and do not constitute disposable income under § 1325.[90]

2. *Reductions of "Current Monthly Income" —Payments for Collateral Intended To Be Surrendered—§ 707(b)(2)(A)(iii)*

As discussed above, a debtor's "current monthly income" is reduced by certain expenses, and it is the net "current monthly income" that is used for determining whether the debtor can repay unsecured creditors. Section 707(b)(2)(A)(iii) provides for a deduction of the average monthly payments for priority and secured debts. Under § 707(b)(2)(A)(iii), "average monthly payments" for secured debt is calculated as follows:

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86. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).
87. *In re* Barraza, 346 B.R. 724 (Bankr. N.D. Tex. 2006).
88. *Id.* at 730.
89. *Id.* at 731.
90. *Id.*

> The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—(I) the total of all amounts *scheduled as contractually due* to secured creditors in each month of the 60 months following the date of the petition; and (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60.[91]

In an early post-BAPCPA case, *In re Walker*,[92] the court was presented with the question of how to interpret the statutory language of § 707(b)(2)(A)(iii), pertaining to the deduction of "average monthly payments" for secured debts from "current monthly income," when the debtor surrenders the collateral after filing the petition. By surrendering the collateral, the debtor will not be making the secured payments postpetition. The U.S. Trustee argued that courts should take this fact into account and not permit the deduction of secured payments from "current monthly income" in this context. The court agreed with the debtors' position and applied the plain meaning of the statutory language.[93] Since the secured payment amounts are "scheduled as contractually due" as of the filing date, the debtor can make the deduction even if the secured debts are not reaffirmed.[94] The court recognized that this interpretation leads to an inaccurate picture of the debtors' postpetition financial condition, but concluded that this result is "not a sufficient basis upon which to conclude that the plain language of the statute produces an absurd result."[95] Other courts have reached similar conclusions.[96]

As in many areas of bankruptcy law, bankruptcy courts reach different conclusions. This issue is no different; several courts have reached different

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91. 11 U.S.C. § 707(b)(2)(A)(iii) (2006) (emphasis added).

92. *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *1 (Bankr. N.D. Ga. May 1, 2006).

93. *Id.* at *3.

94. *Id.* at *4.

95. *Id.* at *6.

96. *See In re* Haar, 360 B.R. 759 (Bankr. N.D. Ohio 2007); *In re* Sorrell, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re* Zak, 361 B.R. 481 (Bankr. N.D. Ohio 2007); *In re* Randle, 358 B.R. 360 (Bankr. N.D. Ill. 2006); *In re* Nockerts, 357 B.R. 497 (Bankr. E.D. Wis. 2006); *In re* Simmons, 357 B.R. 480 (Bankr. N.D. Ohio 2006); *In re* Singletary, 354 B.R. 455, 468 (Bankr. S.D. Tex. 2006); *In re* Hartwick, 352 B.R. 867 (Bankr. D. Minn. 2006), *aff'd in part*, *rev'd in part*, 373 B.R. 645 (D. Minn. 2007).

conclusions than the one reached in *Walker*.[97] In interpreting § 707(b)(2)(A)(iii) in the context of confirmation of a chapter 13 plan for an above-median-income debtor, Judge Sawyer did not allow the deduction of secured payments for collateral that will be surrendered. In *In re Love*,[98] Judge Sawyer interpreted "scheduled," in § 707(b)(2)(A)(iii)(I), as forward looking. That interpretation, coupled with the forward-looking approach of "projected disposable income" in § 1325(b)(1)(B), led the court to conclude that deducting payments for collateral that will be surrendered violates the plain language of the statute and that an interpretation otherwise would lead to an illogical result.[99] The interpretation by the court in *Love* recognizes the "logical inconsistencies in its [§ 707(b)] application to real life situations."[100]

3. *Rebutting the Presumption of Abuse—§ 707(b)(2)(B)*

If a presumption of abuse arises under the means test, a debtor can rebut the presumption by showing special circumstances, including a serious medical condition or a call to active duty in the armed forces.[101] In *In re*

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97. *See In re* Skaggs, 349 B.R. 594, 599-600 (Bankr. E.D. Mo. 2006); *In re* Harris, 353 B.R. 304 (Bankr. E.D. Okla. 2006).
98. *In re* Love, 350 B.R. 611 (Bankr. M.D. Ala. 2006).
99. *Id.* at 615.
100. *Id.*
101. Section 707(b)(2)(B)(i) provides:

> [D]emonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.
>
> (ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—
>
> (I) documentation for such expense or adjustment to income; and
>
> (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.
>
> (iii) the debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.
>
> (iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—
>
> (I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or

Johns,[102] the bankruptcy court was presented with a case in which the debtors failed the means test. Under the chapter 7 means test, the debtors had over $29,000 in disposable income, clearly exceeding the $10,000 required for escaping a presumption of abuse under § 707(b)(2).[103] The issue was whether the debtors had special circumstances to rebut the presumption. The burden is on the debtors to rebut the presumption.[104] The debtors argued that if the case was in chapter 13, there would be no return to unsecured creditors.[105] The reason for the different outcome is that child support, included as income in the means test analysis, would not be income in a chapter 13 case, and the debtors would be allowed to include 401K contributions and loan payments as deductions in chapter 13.[106] The debtors also asserted that in a chapter 13 case they would need to include payments for a vehicle and a home mortgage, neither of which applied to the debtors as they owned a vehicle and a home without debt.[107]

The court rejected the debtors' position. The court reasoned that regardless of what is included or deducted, under the debtors' own numbers, the presumption of abuse arose.[108] The debtors' circumstances were examined under the requirements of chapter 7, and the court noted that it did not need to consider the potential return under chapter 13.[109] The court held that a "potential payback of zero percent to unsecured creditors in a Chapter 13 is not a special circumstance."[110] The circumstances of the debtors in *In re Johns* are not of the same degree of seriousness as the examples in the statute—a serious medical illness or a call to duty in the armed forces.[111]

III. DISMISSALS FOR ABUSE UNDER § 707(B)(1) AND § 707(B)(3)

Even if an individual debtor with primarily consumer debts is able to rebut the presumption of abuse or the presumption does not arise, a debtor's case may still be subject to dismissal for abuse. Many scholars predicted that most debtors would not be subject to the means test presumption of abuse because their median income would be below the state median income. It was expected that dismissal of chapter 7 cases would hinge largely

(II) $10,000.

11 U.S.C. § 707(b)(2)(B)(i) (2006).

102. *In re* Johns, 342 B.R. 626 (Bankr. E.D. Okla. 2006).

103. *Id.* at 628.

104. *Id.* at 629.

105. *Id*. at 628-29.

106. *Id.*

107. *Id.*

108. *In re Johns*, 342 B.R. at 629.

109. *Id.*

110. *Id.*

111. *Id.*

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on the dismissal provisions in § 707(b)(3)(A) and (B), which require the courts, in a general abuse analysis, to consider whether the filing was made in bad faith or if "the totality of the circumstances . . . of the debtor's financial situation demonstrates an abuse."[112] Early evidence suggests the prediction was true. Early issues for courts to address have been the parameters of dismissal under these new statutory provisions of § 707(b)(1) and (3).

A. BAD FAITH—§ 707(B)(3)(A)

There are only a few published "bad faith" cases in the post-BAPCPA era.[113] In these cases, the courts tend to apply the bad faith standard along with a consideration of a totality of the circumstances standard.[114] This makes sense since bad faith was part of the pre-BAPCPA totality of circumstances test,[115] and, as a practical matter in most cases, a consideration

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112. 11 U.S.C. § 707(b)(3)(A)-(B) (2006); *see also In re* Haar, 360 B.R. 759 (Bankr. N.D. Ohio 2007) (recognizing that the bases for dismissal under § 707(b)(2) and (b)(3) are completely independent of each other); *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *8 (Bankr. N.D. Ga. May 1, 2006) ("In cases in which the presumption of abuse does not arise or is rebutted, the U.S. Trustee may pursue dismissal of a debtor's case under section 707(b)(3), which provides that the court may consider whether the 'totality of the circumstances . . . of the debtor's financial situation demonstrates abuse.'" (quoting 11 U.S.C. § 707(b)(3) (2000))).

113. There appear to be four published decisions that specifically address bad faith under § 707(b)(3)(A). *See In re* Oot, 368 B.R. 662 (Bankr. N.D. Ohio 2007); *In re* Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006); *In re* Haney, No. 06-40350, 2006 WL 3020961, at *1 (Bankr. W.D. Ky. Oct. 19, 2006), *aff'd sub nom.* Haney v. Clippard, No. 4:06CV-150, 2007 WL 781321, at *1 (W.D. Ky. Mar. 9, 2007); *In re* James, 345 B.R. 664 (Bankr. N.D. Iowa 2006). In *In re Haney*, the bankruptcy court considered the nondebtor spouse's income in the analysis. *In re Haney*, 2006 WL 3020961, at *2. The court found that the nondebtor spouse's income (and his significant financial resources), coupled with the debtor's conscious disregard of her financial limitations, was bad faith under the totality of the circumstances. *Id.* The district court affirmed the bankruptcy court in total. Haney v. Clippard, No. 4:06CV-150, 2007 WL 781321, at *1 (W.D. Ky. Mar. 9, 2007).

114. *See, e.g.*, *In re* James, 345 B.R. 664, 667 (Bankr. N.D. Iowa 2006).

115. The "totality of the circumstances" standard was created by courts as a construct for determining "substantial abuse" under the prior version of § 707(b). Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, AM. BANKR. INST. J., Apr. 2006, at 49, 52. Many courts employed this construct in determining substantial abuse. Tabb & McClelland, *supra* note 44, at 501; *see also* Green v. Staples (*In re* Green), 934 F.2d 568, 572 (4th Cir. 1991) (recognizing that whether the petition was filed in good faith was a factor); *In re* Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (recognizing a debtor's good faith and candor as a factor). One of the factors considered was whether the petition was filed in good faith. Tabb & McClelland, *supra* note 44, at 501. The pre-BAPCPA case law employing this construct should be useful in analyzing cases for abuse under the new § 707(b). *See In re* Oot, 368 B.R. 662 (Bankr. N.D. Ohio 2007) (recognizing the usefulness of prior case law to interpret bad faith in the post-BAPCPA era); Wedoff, *supra*, at 52. However, some scholars have questioned the extent of the applicability of pre-BAPCPA case law in interpreting the totality of the circumstances test. Tabb & McClelland, *supra* note 44, at 501-02.

of the totality of circumstances, rather than a single factor or circumstance, would be needed to reach a conclusion of bad faith.[116] Additionally, it would seem that most motions to dismiss for bad faith would also be considered under the totality of the circumstances,[117] but not necessarily vice versa.[118] To date, it appears that there is only one reported decision in which the dismissal was based solely on bad faith and not on bad faith coupled with the totality of the circumstances test.[119]

The reported cases have one thing in common. Each case is a clear example of a debtor who was not "unfortunate" and who had the ability to pay some portion of his debts. It is also an example of where granting a discharge under chapter 7 would undermine the fundamental purpose of the chapter 7 discharge.[120] The early post-BAPCPA jurisprudence on this issue seems to be setting a high standard for establishing bad faith. This is consistent with most pre-BAPCPA case law, which limited bad faith to only "egregious cases."[121]

An early case that analyzed bad faith under § 707(b)(3)(A), which was actually brought under bad faith and the "totality of the circumstances," was

116. Since pre-BAPCPA cases employed good faith as part of the totality of circumstances analysis, it seems natural that bad faith and totality of the circumstances would be considered in the post-BAPCPA world. Even if a motion alleged only bad faith, implicit into that inquiry would be the facts and circumstances of the case that rise to the level of bad faith in the aggregate. In effect, a bad faith analysis will be a totality of the circumstances analysis. *See, e.g.*, *In re* Mitchell, 357 B.R. 142, 153-55 & n.11 (Bankr. C.D. Cal. 2006). In a pure bad faith case brought only under § 707(b)(3)(A), Judge Robles considered a host of factors to determine if bad faith existed. *Id.* Judge Robles expressly recognized possible confusion of this type of analysis with the new "totality of the circumstances" and avoided characterizing the bad faith test employed under § 707(b)(3)(A) as a "totality of circumstances test." *Id.* As the Sixth Circuit has recognized, the "smell test" will determine what is "bad faith." *In re* Zick, 931 F.2d 1124, 1129 (6th Cir. 1991). Bad faith is an "amorphous notion, largely defined by factual inquiry." *In re* Charfoos, 979 F.2d 390, 393 (6th Cir. 1992). There is no exhaustive list of "factors that could be relevant in analyzing a particular debtor's good faith." *Id.*

It is possible that a particular fact or circumstance could arise, in and of itself, to constitute bad faith, but the more likely scenario would be a host of cumulative factors leading to a finding of bad faith. To date, most cases that consider bad faith seem to do so in the context of both bad faith and the totality of circumstances, with the analysis overlapping the two. *See, e.g.*, *In re* James, 345 B.R. 664 (Bankr. N.D. Iowa 2006).

117. Judge Speer recognized that the facts in a case before him satisfied a finding of bad faith, but also, along with other facts, supported dismissal under the totality of the circumstances. *In re* Oot, 368 B.R. 662 (Bankr. N.D. Ohio 2007).

118. *See, e.g.*, *In re* Love, 350 B.R. 611 (Bankr. M.D. Ala. 2006).

119. *In re* Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006).

120. *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (recognizing that the purpose of bankruptcy discharge is to provide a fresh start to honest but unfortunate debtors who lack the ability to pay debts as they come due).

121. *See In re* Haney, No. 06-40350, 2006 WL 3020961, at *1 (Bankr. W.D. Ky. Oct. 19, 2006).

In re James.[122] The debtor had only $24,000 in unsecured debt and, over the four months prior to the filing, received employment bonuses totaling nearly $14,000. The debtor also was entitled to a federal income tax return.[123] The debtor did not use these monies to reduce the unsecured debt but rather spent the money on a host of unnecessary expenditures, including gifts, a new kennel and shock collar for his dog, a new gun, a bowling ball and bag, hunting boots, a snow blower, a new washer and dryer, and a trip to a professional football game.[124] During this spending spree prior to bankruptcy, the debtor was looking for a lawyer to represent him in a bankruptcy.[125]

During the spending spree, the debtor did not incur new debt, but the court found the conduct "recklessly wasteful."[126] Particularly important to the court was the fact that the spending was done with the intent to file bankruptcy and that the debtor did not attempt to reduce his unsecured debts.[127] In this context, the court found that discharging the debt would constitute bad faith under § 707(b)(3)(A).[128] It is worth noting that the court recognized that the debtor probably could benefit from the relief based on his schedules and certain ongoing medical expenses, but the "bad faith"

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122. *In re* James, 345 B.R. 664, 667 (Bankr. N.D. Iowa 2006).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 668.
127. *Id.* The debtor asserted that frivolous spending and immature behavior should not be the standard for bad faith dismissal. The court rejected those arguments. As the court wrote in its opinion,

> James defends the motion by admitting that what he did was immature and that many, but not all, of the expenditures were frivolous. But, he argues, *frivolous spending cannot be the standard for bad faith*, because if it were, many improvident debtors would be denied protection in bankruptcy. James asserts that bad faith connotes a calculated, intentional design to harm creditors, not merely lavish spending on the eve of bankruptcy.
>
> I disagree. To be sure, many debtors spend unwisely as they descend financially into insolvency. But that does not mean each is doing so with an eye toward discharging his unpaid debts. Moreover, *James's spending did not lack the element of calculation*. He testified that as opposed to paying any of his debts, he chose to enjoy the bonus money as a reward. *He chose this use of the money at a time when he was contemplating bankruptcy*.

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

128. *Id.* In reaching the holding of bad faith, Judge Edmonds expressly considered the totality of the circumstances. *Id.* at 667. The motion by the U.S. Trustee was under both bad faith (§ 707(b)(3)(A)) and the "totality of the circumstances" (§ 707(b)(3)(B)). *Id.*

exhibited by the debtor precluded him from obtaining relief under chapter 7.[129]

In re James is also useful because it provides a few simple definitions of important terms in the post-BAPCPA era: abuse and bad faith. Judge William Edmonds defined "abuse" under § 707(b)(1) as follows: "I consider an abuse to be a misuse of the bankruptcy provisions, to use them wrongly or improperly."[130] Judge Edmonds defined "bad faith" as follows: "I consider that bad faith has taken place when a debtor files a bankruptcy petition with motives that lack honesty of purpose or fair dealing."[131] Particular definitions of abuse and good faith will vary slightly from circuit to circuit as each will have its own case law defining abuse in the context of pre-BAPCPA substantial abuse cases and prior case law in chapters 11 and 13 and possibly in chapter 7[132] that define good faith. Nevertheless, the *James* decision's definitions are good starting points.

A more recent case, *In re Oot*,[133] which as with *In re James*[134] was grounded in both bad faith and the totality of the circumstances tests, exemplifies the kind of facts that have risen to a level of bad faith in the post-BAPCPA world.[135] The debtors reaffirmed over half a million dollars in secured debt for luxury items, such as a very expensive home, a Mercedes, a Volvo, and a camper, in addition to incurring significant credit card debt prior to the bankruptcy, while contributing significant monies to their retirement accounts. Furthermore, their annual income was nearly double the median income in the state, and the debtors were relatively young.[136] There was no catastrophic or unforeseen event that led to the filing and no mitigating or excessive expenses.[137] In addition to demonstrating a lack of candor in formulating their payment schedules,[138] the debtors had the ability to

129. *Id.*
130. *Id.* at 667.
131. *Id.*
132. Prior to BAPCPA, a lack of good faith as a basis for dismissal of chapter 7 cases pursuant to § 707(a) was not universally accepted by the courts. This was based on the fact that chapter 7 did not expressly include a good faith requirement, as did chapters 11 and 13. *See, e.g.*, Padilla v. Frazer (*In re* Padilla), 214 B.R. 496, 500 (B.A.P. 9th Cir. 1997), *aff'd sub nom.* Neary v. Padilla (*In re* Padilla), 222 F.3d 1184 (9th Cir. 2000). In *Padilla v. Frazer*, the bankruptcy court found bad faith and dismissed a chapter 7 case for incurring credit card debt in a short time frame, insider transactions, and selling personal property for gambling. *Id.* at 497-500. However, the Bankruptcy Appellate Panel for the Ninth Circuit reversed, finding that § 707(a) could not be used to dismiss a case based on these facts. *Id.*
133. 368 B.R. 662 (Bankr. N.D. Ohio 2007).
134. 345 B.R. 664 (Bankr. N.D. Iowa 2006).
135. *In re* Oot, 368 B.R. 662 (Bankr. N.D. Ohio 2007).
136. *Id.* at 667.
137. *Id.* at 668.
138. *Id.*

"make a meaningful dent in their unsecured debt."[139] Under these facts, the court found the case was an abuse under the bad faith standard of § 707(b)(3)(A) or the totality of circumstances test of § 707(b)(3)(B).[140]

Similarly egregious facts existed in the only pure bad faith published decision, *In re Mitchell*.[141] In this case, the court relied on jurisprudence from "substantial abuse" cases, as well as the criteria for bad faith under chapters 11 and 13, to analyze whether bad faith existed under the new § 707(b)(3)(A).[142] The criteria involved a host of factors to determine if the debtor's intent in filing the case was consistent with the goals of chapter 7: providing a fresh start and maximizing return to creditors.[143] The court noted that there is no single criterion that is dispositive, since "all of the facts in a case must be evaluated."[144]

In *In re Mitchell*, the court found that the following facts rose to a level that warranted a finding of bad faith: significant spending months prior to bankruptcy on consumer goods, even after speaking to a bankruptcy lawyer;[145] spending in great excess of income; no showing of mitigating circumstances; significant bank deposits within six months of filing with no explanation by the debtor; evidence of creating a "false sense of financial solvency by lying" to a creditor; and spending nearly three times her monthly budget.[146] Based on these facts, the court found that the petition was filed in bad faith.[147] Beyond merely dismissing the case, the court dis-

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139. *Id.* at 668-69.

140. *Id.* at 670.

141. 357 B.R. 142 (Bankr. C.D. Cal. 2006).

142. *Id.* at 153-54.

143. *Id.* at 154-55.

144. *Id.* at 155. Furthermore, the court found that neither malice nor fraudulent intent is required. *Id.*

145. The nature and magnitude of the spending leading up to bankruptcy seem to have influenced the court. The court found:

> Regardless, as the UST has demonstrated, the Debtor spent a total of $15,386.32 on "dining out," "women's fashions and accessories," "electronics and personal property," and "beauty treatments and related products" during the year 2005. Moreover, in the first four months of 2006 (leading up to her bankruptcy filing in May 2006), the Debtor spent $13,531.52 on these same types of items. This amounts to an *increase* from $1,282.19 average monthly spending on non-essential consumer goods during 2005 to $3007.00 per month in the four months prior to the Debtor's bankruptcy filing in May 2006.

Id.

146. *In re* Mitchell, 357 B.R. 142, 156-57 (Bankr. C.D. Cal. 2006).

147. *Id.* at 157 ("[T]he debtor has filed her petition in bad faith. The debtor is seeking more than a 'fresh start.' She is seeking an impermissible 'head start' at the expense of her creditors." (citing *In re* Vangen, 334 B.R. 241, 245 (Bankr. W.D. Wis. 2005))).

missed the case with a 180-day bar against filing another chapter 7 petition.[148]

B. TOTALITY OF THE CIRCUMSTANCES—§ 707(B)(3)(B)

1. Generally

Inclusion of the language, "[the] totality of the circumstances . . . of the debtor's financial situation demonstrates abuse,"[149] provides a mechanism to dismiss both above- and below-median-income debtors.[150] This standard of "totality of the circumstances" is not new to bankruptcy jurisprudence as courts applied this test in the context of "substantial abuse" cases in the pre-BAPCPA era.[151] The exact parameters of the standard have varied among the courts[152] with most courts considering a host of factors, including among others, good faith and the debtor's ability to repay debt.[153]

The new Code provision for bad faith modifies the case law considering bad faith as part of the "totality of the circumstances" analysis so that bad faith may now be abuse in and of itself.[154] As such, the pre-BAPCPA case law regarding bad faith as part of the substantial abuse analysis may not apply under the new statutory "totality of the circumstances" analysis.[155] However, the general principles and indicia of bad faith would still be applicable.

The other factors included in the new statutory "totality of the circumstances" test, by their nature, do not exclude anything associated with the debtor's financial circumstances. As such, the prior case law employing the "totality of the circumstances" standard is useful in an "abuse" analysis. It seems that any factors associated with the debtor's financial circumstances should be considered. However, the factors evidencing the intent or motive of the debtor in filing and spending decisions would not fall within the new

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148. *Id.* at 157-58. The court relied on 11 U.S.C. § 349, which provides,

> *Unless the court, for cause, orders otherwise*, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C. § 349(a) (2006) (emphasis added).

149. 11 U.S.C. § 707(b)(3)(B) (2006).

150. The amendments to the Code make no distinction in the application of the test in § 707(b)(3)(B) among above-median- or below-median-income debtors.

151. Carlson, *supra* note 67, at 296; Tabb & McClelland, *supra* note 44, at 501.

152. *See* discussion *infra* Part III.B.2-5.

153. Tabb & McClelland, *supra* note 44, at 501.

154. *See supra* Part II.A.

155. Tabb & McClelland, *supra* note 44, at 501.

totality of the circumstances test because they would fall within an analysis of bad faith. The distinction between the two tests—bad faith and totality of circumstances—has not made much difference in practice because of the overlap of the two tests in many cases.[156] As discussed below, the more thorny issue is the role of the debtor's ability to pay in the "totality of the circumstances" analysis.

2. *Applicability of Ability to Pay*

A threshold question for courts was whether ability to repay could be considered as part of the totality of the circumstances test, and if that factor, in and of itself, could constitute an abuse.[157] The answer was relatively easy for below-median-income debtors that fell within the safe harbor of the means test. Those debtors have never completed the detailed means test calculation so there has never been an analysis of their ability to pay. As discussed below, most courts have found that falling within the safe harbor provision of § 707(b), for example, by falling below median income, does not preclude an analysis under the totality of the circumstance standard including ability to pay.[158] In such instances, judges can raise this issue, as can the U.S. Trustee or Bankruptcy Administrator, who have standing to bring such motions.[159]

The answer is not as clear with above-median-income debtors because they have passed the means test. Debtors have argued that passing the means test isolates them from dismissal through § 707(b)(3)[160] under the totality of circumstances test when the basis is ability to pay. Courts have generally rejected this position because the means test is not the sole way to analyze a case for abuse based on ability to repay.[161] At least one court has

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156. *See supra* text accompanying notes 114-17.

157. For a discussion and summary of the debate, see *infra* notes 159-63 and accompanying text.

158. *See In re* Pak, 343 B.R. 239 (Bankr. N.D. Cal. 2006) (holding that an equal-to-or below-median-income debtor may have a case dismissed for abuse under § 707(b)(3) including ability to pay as a factor); *In re* Paret, 347 B.R. 12 (Bankr. D. Del. 2006) (noting that the fact that a debtor was below the median income does not preclude dismissal under totality of the circumstances, which includes consideration of ability to pay); *In re* Schoen, No. 06-20864-7, 2007 WL 643295, at *4 (Bankr. D. Kan. Mar. 2, 2007) (finding that ability to pay is a factor to consider under totality of circumstances in a case involving a below-median-income debtor).

159. 11 U.S.C. § 707(b)(6) (2006).

160. *In re* dePellegrini, 365 B.R. 830, 833 (Bankr. S.D. Ohio 2007).

161. *In re* Mestemaker, 359 B.R. 849, 853-59 (Bankr. N.D. Ohio 2007) (recognizing that abuse can be found for above-median-income debtors that pass or rebut the means test when income is in excess of monthly expenses); *In re* dePellegrini, 365 B.R. 830, 833 (Bankr. S.D. Ohio 2007) (recognizing that passing the means test was not a defense to a § 707(b)(3) motion and that the above-median-income debtor may be subject to dismissal for

found that the means test is the "sole" way to consider a debtor's ability to repay debts and that ability to pay, by itself, is not sufficient to warrant a finding of abuse under a totality of the circumstances analysis.[162] This view runs counter to a plain reading of the statute[163] and violates the underlying policy of the amendments to § 707(b) of catching can-pay debtors because the view actually encourages abuse[164] and is contrary to the legislative history, which clearly indicates that ability to pay should be considered even when there is no presumption of abuse.[165] On the other end of the spectrum, at least one post-BAPCPA decision has ruled that ability to pay *will* warrant dismissal under the totality of the circumstances test.[166]

This raises the pre-BAPCPA debate among the appellate courts on whether ability to pay is sufficient for a finding of substantial abuse. The Fourth Circuit determined that "solvency alone *is not* a sufficient basis for a finding that the debtor has in fact substantially abused the provisions of Chapter 7."[167] In contrast, the Ninth Circuit held that ability to pay debts alone justifies dismissal for substantial abuse.[168] Further complicating the issue, in the middle, between the Fourth and Ninth Circuits, are the First,[169] Sixth,[170] and Eighth Circuits,[171] which have ruled that ability to pay *can be*

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abuse as the means test is not the sole test for determining abuse based on ability to repay); *see also In re* McUne, 358 B.R. 397, 399 (Bankr. D. Or. 2006) (finding that "§ 707(b)(3) permits a generalized review of a debtor's finances, as well as of other circumstances, where the means test may have been abused in some way, or finances may have been manipulated in order to pass the test" in a case involving a debtor against whom the presumption of abuse did not arise). Judge Dale Somers wrote in a recent opinion that he has not found any cases in which courts have refused to consider dismissal for abuse under § 707(b)(3). *See, e.g.*, *In re* Schoen, No. 06-2086407, 2007 WL 643295, at *3 (Bankr. D. Kan. Mar. 2, 2007).

162. *See In re* Nockerts, 357 B.R. 497, 507-08 (Bankr. E.D. Wis. 2006) (recognizing, in a case involving an above-median-income debtor, that the debtor's ability to pa in and of itself is not enough to warrant dismissal under the totality of the circumstances test).

163. Tabb & McClelland, *supra* note 44, at 503.

164. Carlson, *supra* note 67, at 298; *id.* at 503-04.

165. George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV. 297, 348 (2006).

166. *In re* Henebury, 361 B.R. 595, 607 (Bankr. S.D. Fla. 2007) ("Either ability to pay *or* bad conduct in connection with the bankruptcy will warrant dismissal for abuse under § 707(b)(3)."). In a footnote of a chapter 13 case, Judge Hughes reached the conclusion that ability to pay may justify dismissal under a totality of the circumstances, but not necessarily. *In re* McGillis, 370 B.R. 720, 746 n.30 (Bankr. W.D. Mich. 2007).

167. *In re* Green, 934 F.2d 568, 572 (4th Cir. 1991) (emphasis added).

168. Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 914 (9th Cir. 1988).

169. *See In re* Lamanna, 153 F.3d 1, 4-5 (1st Cir. 1998) (ruling that ability to pay does not require a finding of substantial abuse, but that courts are not required to look beyond the ability to repay if that warrants dismissal in a particular case).

170. *See, e.g.*, *In re* Krohn, 886 F.2d 123, 126-27 (6th Cir. 1989) (stating that the analysis requires a comprehensive review of circumstances including situations "where disposable income permits liquidation of [the debtor's] consumer debts with relative ease").

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sufficient to dismiss a case under the substantial abuse standard.[172] Until appellate courts weigh in on this issue in the post-BAPCPA era in light of the overall interpretation of § 707(b), bankruptcy courts will likely be able to distinguish § 707(b)(3)(B) cases from the substantial abuse cases if they wish to deviate from the pre-BAPCPA case law.

i. Below-Median Income Cases

In the case of *In re Pak*,[173] the debtor filed for bankruptcy under chapter 7 and had primarily consumer debts. The debtor's income was equal to or below median income in the state, so there was no presumption of abuse.[174] Nevertheless, the U.S. Trustee brought a motion to dismiss under § 707(b)(3) asserting that "the totality of the circumstances . . . of the debtor's financial situation" made the case an abuse.[175] The debtor, at the time of the motion, was earning over $100,000 and had no dependents.[176] The issues presented were whether the court should consider the debtor's ability to pay a significant portion of unsecured creditors under chapter 13 and if post-filing changes in income should be considered in the analysis.[177] The court answered both questions in the affirmative.

The court thoroughly considered the issue and the two divergent views that have arisen in the literature. One view, that of Judge Eugene Wedoff, analyzed the point and concluded that debtors could have their case dismissed if they have the ability to pay under either § 707(b)(2) or (3), even if they pass the means test.[178] Judge Wedoff wrote,

> Because the general abuse provisions of § 707(b)(3) expressly apply when the means test has been rebutted, "passing" the means test does not preclude a discretionary finding of abuse by the court. . . . If a debtor's overall financial circum-

171. *See* U.S. Tr. v. Harris, 960 F.2d 74, 76 (8th Cir. 1992) ("[The] ability to fund a Chapter 13 plan can be sufficient reason to dismiss a Chapter 7 petition under § 707(b)."), *aff'g* 125 B.R. 254 (D.S.D. 1991).
172. *In re* Henebury, 361 B.R. 595, 605 (Bankr. S.D. Fla. 2007).
173. *In re* Pak, 343 B.R. 239, 240 (Bankr. N.D. Cal. 2006) (mem.).
174. *Id.* at 241.
175. *Id.*
176. *Id.*
177. *Id.* at 246-47.
178. *Id.* at 242.

> stances would easily allow the debtor to repay debts . . . the court may find abuse.[179]

On the other hand, Professors Marianne Culhane and Michaela White advance a view that is opposite to Judge Wedoff's interpretation of the statute.[180] Culhane and White argue that the § 707(b)(2) means test established a "bright line" test for dismissal based on a debtor's ability to pay.[181] They argue that if "judges are free under § 707(b)(3) to substitute their own can-pay standards for Congress' means test [it] would render the means test superfluous."[182]

The bankruptcy court in *In re Pak* reasoned that actual and anticipated income should be considered in determining projected disposable income for chapter 13 plan confirmation purposes.[183] As such, it should be considered in a chapter 7 § 707(b)(3)(B) analysis.[184] The debtor had over $5000 in actual monthly income and, after deducting necessary expenses consistent with a hypothetical chapter 13, the debtor could fund a plan to repay nineteen percent of general unsecured creditors.[185] The case was dismissed.[186]

Other courts that have addressed this issue have made similar conclusions.[187] In the case of *In re Pennington*,[188] in deciding whether to dismiss the chapter 7 petition as part of the totality of the circumstances analysis, the court found that it must consider not only the debtor's financial condition as of the petition date, but also the debtor's financial condition at the

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179. *In re Pak*, 343 B.R. at 242 (quoting Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 236 n.8 (2005)). For a more recent treatment of the issue by Judge Eugene Wedoff, where he directly challenges the view espoused by some scholars that assert judges have no discretion to dismiss chapter 7 cases if the debtors can fund a plan in cases where the debtor passes the means test, see Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, 71 MO. L. REV. 1035 (2006). For scholarship on the other side of the debate, see Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 678-80 (2005). For an excellent treatment of the opposing views, see John A.E. Pottow, *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying to Bridge the Wedoff/Culhane & White Divide*, 71 MO. L. REV. 1053 (2006).

180. Culhane & White, *supra* note 179, at 678-80.

181. *Id.* at 678-80.

182. *Id.* at 680.

183. *In re Pak*, 343 B.R. at 245-46.

184. *Id.*

185. *Id.*

186. *Id.* at 247.

187. For a recent case that reaches the same conclusion while carefully analyzing the issue and current case law, see *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007) ("Where the presumption . . . does not arise . . . [or is rebutted], the court must then consider a debtor's actual income and expenses in determining abuse based on ability to pay under Section 707(b)(1) and (3).").

188. *In re* Pennington, 348 B.R. 647 (Bankr. D. Del. 2006).

time the motion to dismiss was heard.[189] The debtors' current monthly income was below the median income in the state, and they had a projected disposable income of $212.71 per month, which would provide a return of 42% to unsecured creditors under a three-year plan and a 69% return under a five-year plan.[190] The Court found that the case was abusive under § 707(b)(3)(B).[191]

The bankruptcy court in the case of *In re Paret*[192] reached a similar conclusion and found,

> As is manifest in section 707, a safe harbor upon entry into which neither one's motives nor fitness for chapter 7 relief are questioned is hardly one Congress sought to dredge. When no presumption of abuse arises under paragraph (b)(2), the Court concludes that the Code mandates consideration of a debtor's ability to pay his creditors within the test articulated in paragraph (b)(3).[193]

ii. Above-Median-Income Debtors

As with most of the below-median income cases, the court in *In re McUne*[194] found that even if a debtor passes the "more or less bright line" test of the means test, the debtor is still subject to the "generalized review, including consideration of his finances."[195] The court reasoned that "[t]aken as a whole, § 707 precludes the court from permitting the debtor to liquidate under Chapter 7 when there is an ability to pay, even when other relevant factors may favor liquidation."[196] The ability to pay a portion of unsecured debt is a relevant factor in a totality of the circumstances analysis.[197] The case was heard on motion for summary judgment, so the specific facts and ability to pay were not addressed, merely the question of law was presented.[198]

In a more recent above-median-income debtor case, *In re Henebury*,[199] the court applied the totality of the debtors' financial circumstances test.[200]

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189. *Id.* at 651.
190. *Id.* at 651-52.
191. *Id.* at 652.
192. *In re* Paret, 347 B.R. 12 (Bankr. D. Del. 2006).
193. *Id.* at 15.
194. *In re* McUne, 358 B.R. 397 (Bankr. D. Or. 2006).
195. *Id.* at 399.
196. *Id.*
197. *Id.*
198. *Id.* at 398.
199. *In re* Henebury, 361 B.R. 595 (Bankr. S.D. Fla. 2007).
200. *Id.* at 614.

There were no allegations of bad faith, and dismissal was based solely on the conclusion that the debtors had the ability to repay a substantial portion of their debts upon an examination of the totality of the debtors' financial circumstances.[201] The court began its ability to pay analysis with the debtors' CMI from the means test.[202] The court added to that figure additional income from a teaching job that a codebtor began four days after filing the petition.[203] Without any adjustments to expenses, when including the debtors' additional postpetition income, the debtors could repay 100% of their $73,799.46 in unsecured debt in under forty-three months.[204] Alternatively, the court considered the information in Schedules I and J, and under that ability to pay analysis, the debtors could likewise repay 100% of their unsecured debts in an even shorter timeframe.[205]

Most cases revolve around the ability to pay factor under the totality of the circumstances test; however, cases can still be dismissed under the totality of the circumstances test even if ability to pay is not shown. For example, in the case of *In re Ashraf*,[206] the court found that the following facts constituted an abuse under the totality of the circumstances:

> The Court finds that the Debtors' failure to be forthright in their Schedules, including their decision not to include significant information, combined with the Debtors' timing to file a bankruptcy petition shortly after a judgment has been obtained by one of their creditors, reflect that based on the "totality of the circumstances" the Debtors' petition must be dismissed as an abuse of Chapter 7.[207]

The court did not make any finding of the debtors' ability to pay.[208] The court did not rule on whether the facts satisfied a finding of bad faith.[209] The court, in dicta, did state that the bad faith requirement would require "egregious behavior" in the Ninth Circuit.[210] The facts in this case constituted an abuse under the totality of the circumstances without the need to specifically find bad faith.[211]

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201. *Id.*
202. *Id.* at 612.
203. *Id.* at 613.
204. *Id.*
205. *In re* Henebury, 361 B.R. 595, 613 (Bankr. S.D. Fla. 2007).
206. *In re* Ashraf, 367 B.R. 151 (Bankr. D. Ariz. 2007).
207. *Id.* at 158.
208. *See In re Ashraf*, 367 B.R. 151.
209. *Id.* at 158.
210. *Id.* at 158 n.15.
211. *Id.* at 158.

3. *Consideration of Postpetition Events*

As reflected in the decisions above, most courts have found that postpetition events that impact the ability of a debtor to pay some or all of his debts are relevant in a totality of the circumstances analysis.[212] This rule is sensible for several reasons. First, this type of rule can help debtors or harm debtors in a totality of the circumstances analysis because under this rule *both* positive and negative events to the debtor's financial situation should be considered.[213] Second, the rule is consistent with cases that adopt a forward-looking analysis of income and expenses in the context of a chapter 13 plan.[214] Third, it provides a realistic analysis of the debtor's ability to repay and does not tie the court's hands to carry out the intent of the legislation: to catch the can-pay debtors.[215]

Notably, this consideration of postpetition events, specifically, increases or decreases in income, applies only to general abuse motions.[216] Postpetition income changes do not seem relevant for presumption of abuse motions,[217] except to the extent that decreases in income are shown by the debtor to rebut the presumption.[218]

4. *Proving Ability to Pay*

Implicitly and often explicitly, the ability to pay analysis is, in effect, a hypothetical chapter 13 analysis. As such, a debtor's projected disposable income becomes an important issue in a hypothetical chapter 13 analysis

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212. *In re* Lenton, 358 B.R. 651, 664 (Bankr. E.D. Pa. 2006) ("[T]he court must consider [a debtor's] actual and anticipated financial situation over the applicable Chapter 13 commitment period."). *See generally In re* Hare, No. 06-10924-B-7, 2007 WL 201249, at *3 (Bankr. E.D. Cal. Jan. 24, 2007) (noting that an above-median-income debtor's actual ability to pay a substantial portion of debts in light of the surrender of their residence in bankruptcy was relevant to the totality of the circumstances analysis); *In re* Richie, 353 B.R. 569 (Bankr. E.D. Wis. 2006); *In re* Pennington, 348 B.R. 647 (Bankr. D. Del. 2006); *In re* Paret, 347 B.R. 12 (Bankr. D. Del. 2006); *In re* Pak, 343 B.R. 239 (Bankr. N.D. Cal. 2006).

213. *See, e.g.*, *In re* Pennington, 348 B.R. 647, 651 (Bankr. D. Del. 2006).

214. *In re* Henebury, 361 B.R. 595, 610 (Bankr. S.D. Fla. 2007).

215. *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 677-82 (2005).

216. *See, e.g.*, Rafael I. Pardo, *Analyzing Chapter 7 Abuse Dismissal Motions Post-BAPCPA: A Reply on Cortez*, AM. BANKR. INST. J., Dec.-Jan. 2007, at 16, 87 ("Only when the presumption does not arise or when it has been rebutted does it appear that a court will have a meaningful opportunity to evaluate the effect of a postpetition increase in the debtor's income."). It seems that beyond increases to income, decreases to income should likewise be considered in § 707(b)(1) motions. *In re Pennington*, 348 B.R. at 651.

217. For an analysis indicating otherwise, see Justin H. Dion, *Timing Is Everything . . . or Is It: Cortez Challenges the "Snapshot" Approach to Analyzing Abuse Pursuant to 707(b)*, AM. BANKR. INST. J., Oct. 2006, at 1.

218. Pardo, *supra* note 216, at 87.

because, in the context of an objection to the confirmation of a chapter 13 plan, the debtor must provide "projected disposable income" under the plan to unsecured creditors.[219] Chapter 13 jurisprudence in the post-BAPCPA era indicates that projected disposable income depends on whether the debtor is below or above the median income.

For below-median-income debtors, some courts take current monthly income from Part 1 of Form B22C and, in light of the fact that these debtors do not complete the calculation of means test deductions on Official Form B22C, employ Schedule J for a calculation of expenses.[220] Other courts begin and end the inquiry with Schedules I and J.[221]

The analysis for above-median-income debtors is more complicated because above-median-income debtors have completed the detailed means test. The issue becomes whether the disposable income under § 1325(b)(2) from Form B22C is dispositive or is merely a starting point on what is "projected disposable income." Some courts have held that disposable income is not determined by Schedules I and J but rather by Form B22C using the calculation in § 707(b)(2)(A) and (B).[222] However, other courts have found that "projected disposable income" and "disposable income" are not synonymous and have rejected the mechanical application of Form B22C and look to Schedules I and J.[223] Courts that have adopted the former approach may not permit a different analysis in a § 707(b)(1) abuse analysis. However, since the inquiry is different, strong arguments can be made that the line of authority in chapter 13 confirmation is not controlling in an abuse analysis.[224]

5. *How Much Debt-Paying Ability is Abusive?*

An issue addressed by the courts is how much a debtor needs to be able to pay back in order for the filing to be considered an abuse in those cases where the debtor falls within a safe harbor, the presumption of abuse

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219. 11 U.S.C. § 1325(b)(1)(B) (2006).

220. *In re* Alexander, 344 B.R. 742, 746 (Bankr. E.D.N.C. 2006) (taking the below-median-income debtor's current monthly income reported on Part 1 of Form B22C and subtracting the total monthly expenses reported on Schedule J).

221. *E.g.*, *In re* Dew, 344 B.R. 655, 660-61 (Bankr. N.D. Ala. 2006).

222. *In re* Miller, 361 B.R. 224, 227-28 (Bankr. N.D. Ala. 2007).

223. *See In re* Edmunds, 350 B.R. 636, 644 (Bankr. D.S.C. 2006) (rejecting mechanical application of the mathematical calculation of Form B22C); *In re* Kibbe, 342 B.R. 411, 415 (Bankr. D.N.H. 2006) (noting that to give effect to the word "projected" under § 1325(b)(1)(B), the court had to find that disposable income must be determined by reference to Schedules I and J).

224. *See In re* Henebury, 361 B.R. 595, 612 (Bankr. S.D. Fla. 2007) (recognizing that chapter 13 cases on this point can be instructive, but are not controlling as the matter before the court is not confirmation).

has not arisen, or the presumption was rebutted. Judge Wedoff has argued in his writings that the level of debt-paying ability should be the same as the abuse threshold under the means test.[225] He argues that "[s]ince the abuse threshold cannot be challenged through the means test, there is a clear policy judgment that the threshold fixed the level at which debt-paying ability becomes abusive of Chapter 7."[226] This policy rationale is logical and is consistent with the intent of Congress in enacting the new § 707(b)—catching can-pay debtors. Those below the statutorily established threshold are not can-pay debtors.

Several courts have expressly adopted the threshold as advocated by Judge Wedoff in the means test.[227] For example, the court in *In re Mestemaker*[228] found that

> [w]hen judges are required to make determinations of abuse under § 707(b)(3), they should accordingly use the means-test threshold: If a debtor's actual disposable income, determined by the court, is below that threshold, there should be no finding of abuse based on debt-paying ability; if disposable income meets or exceeds the threshold, abuse should be found.[229]

Table 1 reflects some recent decisions and levels of debt-paying ability that constituted an abuse. The range is from the abuse threshold of the means test up to a 100% ability to repay unsecured creditors.

Table 1: Level of Debt-Paying Ability Constituting an Abuse Under § 707(b)(3)

Percentage or Threshold Amount	**Authority**
Standard in § 707(b)(2)(i)(I)-(II): 25% of nonpriority unsecured claims or $6000, whichever is greater, or $10,000	Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, 71 MO. L. REV. 1036, 1047 (2007).
Debtor's ability to fund plan and to pay $18,000 exceeded statutory threshold	*In re Mestemaker*, 359 B.R. 849, 858 (Bankr. N.D. Ohio 2007).
Pay meaningful percentage of debts (estimated 25%-40% over 60 months)	*In re dePellegrini*, 365 B.R. 830 (Bankr. S.D. Ohio 2007).
57%	*In re Freis*, No. 06-30393, 2007 WL 1577752, at *1 (Bankr. W.D. Mo. May 18, 2007).
100% over 60 months	*In re Henebury*, 361 B.R. 595 (Bankr. S.D. Fla. 2007).*
Court did not specify the percentage, but found that debtors could pay "substantial portion of unsecured debtors through a chapter 13 plan"	*In re Hare*, No. 06-10924-B-7, 2007 WL 201249, at *1 (Bankr. E.D. Cal. 2007).

*Ability to repay alone is sufficient to warrant dismissal.

225. Wedoff, *supra* note 82, at 1047.
226. *Id.*
227. *In re* Mestemaker, 359 B.R. 849, 854-55 (Bankr. N.D. Ohio 2007); *In re* Pennington, 348 B.R. 647, 651-52 (Bankr. D. Del. 2006).
228. *In re Mestemaker*, 359 B.R. at 854-55.
229. *Id.*

IV. DISMISSAL FOR CAUSE UNDER § 707(A)

If a debtor does not satisfy the threshold requirements of § 707(b)—being an individual debtor with primarily consumer debts—then the dismissal provisions of § 707(b) are not applicable.[230] In such instances, dismissal may be possible for "cause" under § 707(a). Likewise, if dismissal is not available for an individual consumer debtor under § 707(b), dismissal *may* be possible under § 707(a).[231] It seems that in the latter situation the BA would not need to resort to § 707(a), but creditors may be forced to use § 707(a) for below-median-income debtors.

Prior case law and debates about what constitutes "cause" outside of the enumerated grounds of § 707(a), specifically a lack of "good faith,"[232] would still be ripe for continued debate.[233] Amended § 707(b), by including bad faith as a ground for dismissal for abuse, has likely ended any argument that an individual debtor with primarily consumer debts is subject to dismissal under § 707(a) for cause under a lack of good faith theory.[234] However, in cases in which the debtor's debts are not primarily consumer debts, § 707(a) and lack of good faith may still be a possible avenue warranting dismissal if it was permitted in a particular jurisdiction prior to BAPCPA.[235]

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230. *See In re* Sudderth, No. 06-10660, 2007 WL 119141, at *1 (Bankr. M.D.N.C. Jan. 9, 2007).

231. *See id.* at *2 n.1.

232. *Id.* at *2 ("There is widespread debate on the subject of whether there is a good-faith filing requirement in Chapter 7 cases and whether the absence of good faith is a ground for dismissal of a Chapter 7 case.").

233. *See, e.g.*, *In re* Lombardo, 370 B.R. 506, 510-11 (Bankr. E.D.N.Y. 2007) (discussing the conflict among the appellate courts regarding whether a lack of good faith constitutes "cause" under § 707(a) in a post-BAPCPA case).

234. *See, e.g.*, 6 COLLIER ON BANKRUPTCY ¶ 707.03[2] (Allan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008). However, at least one court in the post-BAPCPA era has dismissed a debtor with primarily consumer debts under § 707(a) under a bad faith analysis that included a consideration of the totality of the circumstances test (including ability to pay as one factor among many) employed by courts prior to BAPCPA. *See In re* Lombardo, 370 B.R. 506 (Bankr. E.D.N.Y 2007).

235. Prior to BAPCPA, there was a split among the courts as to whether "bad faith" constituted cause. As to nonconsumer cases, those cases would be applicable in the post-BAPCPA era to the extent that dismissals for nonconsumer cases were based on "bad faith" under § 707(a). The Third and Sixth Circuits found that bad faith can provide cause for dismissal under § 707(a). *See, e.g.*, *In re* Tamecki, 229 F.3d 205, 207 (3d Cir. 2000); *see also* Bradley R. Tamm, *Substantial Abuse Dismissal Under 11 U.S.C.A. § 707(b): Evolution or Malignancy*, 13 J. BANKR. L. & PRAC. 6 Art. 2, pt. VIII.A (2004) (citing *In re* Zick, 931 F.2d 1124, 1127 (6th Cir. 1991) (noting that bad faith can provide cause for a § 707(a) dismissal); *In re* Lacrosse, 244 B.R. 583, 587 (Bankr. M.D. Pa. 1999) (finding that lack of good faith in filing warranted dismissal of chapter 7 petition); *In re* Smith, 229 B.R. 895, 897 (Bankr. S.D. Ga. 1997) (finding that lack of good faith constituted "cause" for dismissal of chapter 7 case); *In re* Griffieth, 209 B.R. 823, 831 (Bankr. N.D.N.Y. 1996) (finding dismissal warranted under § 707(a) because the debtors' case was not filed in good faith); *In re*

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V. CONCLUSION

The parameters of dismissal for abuse under § 707(b)(1) and (3) are still evolving. The continued use of § 707(a), particularly against consumer debtors, will eventually be fully tested in the courts by creditors. These are some of the early cases that have worked through the application of the statute to real-life situations, and as lawyers bring more issues to the courts to address, the body of case law will continue to develop.[236] It is not likely that any meaningful issues will be resolved, at least not anytime in the near future.[237] The players in the system will continue to "muddle through" to make the bankruptcy system workable.

Recognizing the posture that we are in the bankruptcy process, several points worth remembering in the area of § 707(b) in the post-BAPCPA era:

1. The means test is a "paper tiger" with little apparent impact on the type of relief afforded to a debtor because most chapter 7 debtors pass the means test. This needs to be empirically tested, but it is too close to the passage of BAPCPA to be able to obtain any data that can be tested empirically.
2. In light of this ever-apparent fact, most litigation and areas of development in the courts will arise under the general abuse standard.

Sky Group Int'l, Inc., 108 B.R. 86, 90 (Bankr. W.D. Pa. 1989) (noting that bad faith can result in dismissal under the section)). The Eighth and Ninth Circuits, as well as other courts, have taken the opposite position. *See, e.g.*, *In re* Padilla, 222 F.3d 1184, 1191 (9th Cir. 2000) ("Bad faith as a general proposition does not provide 'cause' to dismiss a Chapter 7 petition under § 707(a)."); *see also* Bradley R. Tamm, *Substantial Abuse Dismissal Under 11 U.S.C.A. § 707(b): Evolution or Malignancy*, 13 J. BANKR. L. & PRAC. 6 Art. 2, pt. VIII.A (2004) (citing *In re* Huckfeldt, 39 F.3d 839, 832 (8th Cir. 1994) (stating that while some conduct giving rise to dismissal under § 707(a) may be characterized as bad faith, the issue is properly whether the petition should be dismissed "for cause"); *In re* Etcheverry, 242 B.R. 503, 506 (D. Colo. 1999) (noting that there is an explicit "good faith" requirement in chapter 7 and therefore bad faith cannot constitute "cause" for dismissal); *In re* Landes, 195 B.R. 855, 855 (Bankr. E.D. Pa. 1996) (holding that good faith requirement cannot be read into the section)).

236. For an interesting overview of the response to the developing case law by the judiciary and the lawyers in practice since the enactment of the BAPCPA, see Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93 (2007).

237. *See, e.g.*, Thomas R. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 195-96 (2007) (recognizing that there are a growing number of decisions in a wide array of areas under BAPCPA, but the differences in their outcomes are so wide that there is no way to have any predictability or uniformity in outcomes of individual cases).

3. The analysis under the generalized abuse standard—whether applying the bad faith standard, the totality of the circumstances standard, or a combination of both—is essentially a question of whether the debtor can fund a meaningful plan, and if so, to determine whether there are any mitigating factors. Certainly there may be situations of pure bad faith where ability to pay is not a consideration, but in most cases it will be an important factor. With that said, ability to pay should not always dictate the outcome. The ability to pay in some cases may not be enough to warrant a finding of abuse. The outcomes will be driven by the facts of the case being considered. Fair outcomes require the players—particularly the UST, BA, and the courts—to be mindful of the role they play in the implementation of BAPCPA. Most of the meaningful areas of reform, if any, will come from the implementation of BAPCPA. This requires the wise exercise of discretion in interpreting and carrying out the language of the Code.
4. Even in situations where there is no basis for dismissal under § 707(b), there may be cases that warrant a challenge under § 707(a). The Code does not address all the factual situations in which the bankruptcy system is affording relief only to honest but unfortunate debtors. In those rare instances where debtors "slip" through the cracks, § 707(a) may be a tool to actually curb abusive filings within that statutory framework.

Finally, beyond the challenges for the players in the bankruptcy system, policymakers must be open to changes and improvements. The players in the system can only do so much to work with the framework provided by Congress. The Code has evolved dramatically since its creation with the Bankruptcy Act of 1978. The Code has been amended numerous times since 1978, prior to BAPCPA, with significant amendments in 1984, 1986, and 1994.[238] With each change, there are required future changes and modifications by Congress. Future changes should be based on sound empirical evidence and information from the players in the system with daily experience with the gaps and problems of the framework. Otherwise, we will be left with a system that "works," but which may not actually be improved in the long run.

This may very well be the case in the area of attacking the perceived abuses of chapter 7 with the application of BAPCPA's means test. The application of the safe harbor, the means test, and rebutting the presumption of abuse may not only be insufficient for debtors to obtain the requested

238. *See* Vicki W. Travis, *Of the Latest Attempted Revisions of the Bankruptcy Code: Can They Really Change Anything?*, 16 BANKR. DEV. J. 221, 226-32 (1999).

relief, the complex framework may not be enough to lead to any improvements in the overall bankruptcy system. Time will tell.