NON-CONSUMER INDIVIDUAL CHAPTER 7 DEBTORS GET a PASS: NO RHYME OR REASON FOR BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005'S DISPARATE TREATMENT

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I. INTRODUCTION

Four years after its passage, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)[1] remains a matter of great debate and interest. The ink was barely dry when amendments to BAPCPA started being proposed, and increased filings triggered by the current state of the economy will likely keep bankruptcy reform under the spotlight for some time to come.[2]

The changes to individual consumer Chapter 7 cases under BAPCPA have been written on widely. However, very little has been written on how BAPCPA impacts the individual non-consumer Chapter 7 debtor. Congress left this area of the Bankruptcy Code largely untouched by BAPCPA and the failure of Congress to reform the treatment of non-consumer individual Chapter 7 debtors has resulted in two systems for individual Chapter 7 debtors.

This article focuses on one very important substantive problem with the Code[3] as amended by BAPCPA: the disparate treatment of consumer and non-consumer Chapter 7 debtors. BAPCPA expanded the divide between the two systems for individual Chapter 7 debtors, by essentially creating two separate standards for dismissal. Through new means testing provisions and inclusion of bad faith as a basis for dismissal for abuse, which apply only to individual consumer debtors, BAPCPA holds the bar much higher for consumer debtors vis a vis their nonconsumer counterparts.[4]

There is no rational basis for the disparate treatment. Abuse of the bankruptcy process, whether by a consumer or non-consumer Chapter 7 debtor, is still abuse. Indeed, as noted by the bankruptcy court in a decision regarding the distinctions between the treatment of consumer and non-consumer debtors under former § 707(b) and § 707(a):

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[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[2] *See, e.g.*, Richard B. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 Fla. L. Rev. 1, 62 (2008) ("The debate over consumer bankruptcy reform will certainly continue.").

[3] 11 U.S.C. § 101 *et seq.* (2000 & Supp. V 2006). Unless otherwise noted, all references to Bankruptcy Code, Code or section are to title 11 of the United States Code, including amendments made by BAPCPA as are codified in Supplement V to the 2000 edition of the U.S. Code (January 2, 2006).

[4] It is ironic that non-consumer Chapter 7 debtors are not subject to these rigid ability to pay tests via the means test or across the board subject to dismissal for bad faith; this category of debtors would seem on the whole much more likely to be in a better position financially than the typical consumer Chapter 7 debtor, as well as in a better position educationally, and, due to other socio-economic attributes, to have an actual ability to honor some of its obligations

> No logical reason appears evident if § 707(b) is truly designed to deal with "abuse" of chapter 7 in terms of the debtors seeking a chapter 7 discharge when they have the ability to repay their debts, as to why such dismissal for "abuse" defined in those terms should not apply to all individual debtors seeking chapter 7 relief.[5]

A comparison of the standards and case law on dismissal of consumer and nonconsumer Chapter 7 cases shows the disparate treatment among individual Chapter 7 debtors. This article reviews the changes to individual consumer Chapter 7 cases enacted through BAPCPA. Specifically, it outlines the development of the means test and standards for finding abuse to warrant dismissal under § 707(b), and the applicability of § 707(a). These laws are also compared to the standards and case law regarding dismissal of non-consumer Chapter 7 cases under § 707(a) to establish that consumer and non-consumer debtors are in fact treated differently under the current law. With that backdrop, this article proposes a statutory reform to remedy the dichotomy in the treatment of consumer and non-consumer individual debtors in Chapter 7.

II. DISMISSAL OF CONSUMER CHAPTER 7 CASES

A. *Section 707(b)*

1. Pre-BAPCPA and Substantial Abuse

Before the passage of BAPCPA, the primary mechanism to seek Chapter 7 dismissal was found in § 707(b).[6] That section was added to the Code in 1984 through the Bankruptcy Amendments and Federal Judgeship Act of 1984[7] after a strong lobbying effort of the credit industry,[8] and remained almost unchanged until BAPCPA.[9] Section 707(b) provided for the dismissal of Chapter 7 cases if the

[5] *In re* Keniston, 85 B.R. 202, 205 (Bankr. N.H. 1988).

[6] 11 U.S.C. § 707(b) (2000), *amended by* 11 U.S.C. § 707(b) (Supp. V 2006).

[7] Pub. L. No. 98-353, § 312, 98 Stat. 333, 355 (1984). The section originally provided:

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

Id.

[8] Wayne R. Wells, Janell M. Kurtz & Robert J. Calhoun, *The Implementation of Bankruptcy Code Section 707(b): The Law and the Reality*, 39 CLEV. St. L. Rev. 15, 17 (1991).

[9] There were only two changes. First, the United States Trustee was given standing to bring such motions in 1986. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L.

debtor had primarily consumer debts and granting the debtor relief would be a substantial abuse. The key addition was the ability to dismiss consumer cases for substantial abuse.

The addition of substantial abuse to the Code developed from concern that consumers were being allowed to discharge debts too easily. Specifically, under the older version of § 707(b), consumers who could repay some debtors were able to obtain a discharge under Chapter 7 simply by being honest and surrendering nonexempt assets.[10] Substantial abuse was a tool to address this perceived problem and to limit increasing consumer filings from 1978 to 1982." Courts had considerable discretion in making determinations under the substantial abuse standard.[12] Accordingly, application of the statute varied a great deal.

Three dominant approaches to analyzing cases under the substantial abuse standard evolved: (1) the debtor's ability to pay; (2) the totality of the circumstances; and (3) an ability (based on objective statistical data) to pay without difficulty.[13] Although the approaches tend to overlap, the most common approach employed was the totality of the circumstances. The totality of the circumstances test was used by the United States Courts of Appeals for the First,[14] Fourth,[15] Sixth,[16] and Tenth[17] Circuits. The exact factors included and emphasis of each under the totality of the circumstances varies from court to court, but the common attribute is a multi-factor test that is applied to the specific circumstances of the case before the court.[18] An important distinction among the courts' approach in the pre-BAPCPA era was the weight of the ability to pay factor as part of the totality of circumstances. Some courts viewed the ability to pay as dispositive on the issue of substantial abuse.[19] Other courts viewed the ability to pay a primary factor, but required other factors to

No. 99-554, § 219, 100 Stat. 3088, 3101 (1986). Prior to that, only courts could bring such motions. Carlson, *infra* note 13, at 238. Second, in 1997 a sentence was added to protect post-petition tithing in the context of a substantial abuse analysis. Religious Liberty and Charitable Donation Protection Act of 1997, Pub. L. 105-183, 112 Stat. 517 (1998).

[10] *See* Lauren E. Tribble, Note, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE LJ. 789, 795-96 (2007).

[11] Wells, Kurtz & Calhoun, *supra* note 8, at 17 (reporting that filings doubled from 1978 to 1982 and this fueled the lobbying effort by the credit industry).

[12] Tribble, *supra* note 10, at 789 ("[T]he Bankruptcy Code gave judges discretion to decide which debtors were eligible for Chapter 7."); Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy,* 2007 U. ILL. L. REV. 9, 23 (2007).

[13] *In re* Attanasio, 180, 184-239 (Bankr. N.D. Ala. 1998) (providing a comprehensive treatment of the three major approaches to analyze substantial abuse). For an excellent shorter treatment, *see generally* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of2005,* 15 AMER. BANKR. INST. L. Rev. 223,239-48 (2007).

[14] *In re* Lamanna, 153 F.3d 1, 5 (1st Cir. 1998).

[15] *In re* Green, 934 F.2d 568, 572 (4th Cir. 1991).

[16] *In re* Krohn, 886 F.2d 123, 126-27 (6th Cir. 1989).

[17] *In re* Stewart, 175 F.3d 796, 808 (IO[01] Cir. 1999).

[18] *In re* Laine, 383 B.R. 166, 173 (Bankr. D. Kan. 2008).

[19] *In re* Kelly, 841 F.2d 908, 914-15 (9* Cir. 1988)(stating that only factor more important than the primary factor of inability to pay is "bad faith"); *In re* Koch, 109 F.3d 1285, 1288 (8th Cir. 1997)(finding that substantial ability to repay, measured by the debtor's ability to repay debts under a hypothetical Chapter 13 filing, alone is sufficient to warrant a § 707(b) dismissal).

be considered as well.[20] Still other courts considered the ability to pay to be sufficient, but recognized other factors could be relevant.[21] The result was hundreds of decisions with wide variation from court to court.

2. Post-BAPCPA and Presumption of Abuse

The inconsistent opinions interpreting "substantial abuse" and increased filings in the 1990s, led the credit industry to push for an amendment to § 707(b). Some viewed the judiciary as exercising its discretion to dismiss cases under this standard too freely.[22] Others took a more middle-of-the-road view, and characterized courts in most cases as exercising their "discretion in accord with common sense."[23] Still others viewed courts as not exercising their discretion to dismiss cases enough.[24] It seems that the final viewpoint[25] dominated the debate leading to BAPCPA. The result was the single most significant substantive change to consumer bankruptcy since enactment of the Code.[26]

BAPCPA significantly limited the discretion of the court—at least in individual consumer cases—by creating a means test that set limits on the court's ability to grant discharge. Specifically, the amendment added a presumption of abuse in Chapter 7 if, based on a set financial evaluation, it determined the individual[27]

[20] *Green*, 934 F.2d at 572-73.

[21] *In re* Lamanna, 153 F.3dl,5(lst Cir. 1998); *Krohn*, 886 F.2d at 126.

[22] *See* Carlson, *supra* note 13, at 236 ("One early court said that section 707(b) 'does not give a license to the court to adopt an ad hoc, free-wheeling approach to sift out debtors the court finds distasteful.' (citation omitted) But subsequent developments proved that this was precisely what section 707(b) would become.").

[23] Tribble, *supra* note 10, at 792.

[24] *Id.* at 799. There was a view "that bankruptcy judges were unable or unwilling to clamp down on abusive debtors." *Id.* at 799 n.82.

[25] Some have characterized this position not just as a concern about the degree of discretion a bankruptcy judge may exercise, but as a "deep mistrust of the pre-BAPCPA direction that has been exercised by the bankruptcy judiciary in its gatekeeping role under the substantial abuse dismissal regime." Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J 471 472-73 (2007).

[26] The reason for characterizing the changes in such way is that it represents a significant policy change- fi-om one favoring debtors to one the favors creditors. *See e.g.* Ronald J. Mann, *Bankruptcy Reform and the ' Sweat Box " of Credit Card Debt*, 2007 U. ILL. L. Rev. 375, 375-76 (2007)("Congress enacted amendments to the Bankruptcy Code that - - if effective - - would fundamentally change the core polices underlying the consumer bankruptcy system in this country. ... The Act radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors."); Charles J. Tabb, *A Century of Regress or Progress? A Political History of Bankruptcy Legislation in 1898 and 1989*, 15 BANKR. DEV. J. 343, 347 (1999).

27 The Code does not define individual. Courts limit the term individual to "natural persons," not corporations or other legal entities. *See* Jove Eng'g, Inc. v. I.R.S. (*In re* Jove Eng'g, Inc.), 92 F. 3d 1539, 1550-51 (11th Cir. 1996). Section 707(b) abuse provisions do not apply to corporate, partnership or other legal entity debtors. Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test* 31 S ILL U L J 463,468 (Spring 2007).

debtor with primarily consumer debts[28] has an ability to repay a portion of general unsecured debts.[29] The means test is a two-pronged test:[30] a median income test and a repayment test.[31] The calculations begin with a determination of a debtor's annualized current monthly income. [32] If the annualized current monthly income falls below the applicable median family income for the debtor's state, the debtor passes the means test.[33] In other words, he falls within a safe harbor[34] and is not required to complete the repayment test.

If the debtor's income is more than the median family income, the debtor's ability to repay a portion of the debtor's unsecured debts must be evaluated. The ability to pay is calculated based on the debtor's monthly disposable income, which is the currently monthly income, less allowed deductions.[35] If the product of debtor's monthly disposable income and sixty is greater than $10,950, then the debtor fails the means test and the presumption of abuse arises.[36] If the product is between $6,575 and $10,950, the debtor can remain in Chapter 7 provided this is less than 25% of unsecured debt.[37] And if the product is less than $6,575, the debtor can

[28] Disputes may arise regarding whether a debtor has "primarily consumer debts" because, although the Code defines "consumer debt," "primarily" is not. Consumer debt is defined as a debt incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(8)(2000). 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." *In re* Booth, 858 F.2d 1051, 1054 (5th Cir. 1988). Most courts define "primarily consumer debt" as meaning "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." *See In re* Moates, 338 B.R. 716, 717 (Bankr. N.D. Tex. 2006)(applying such a definition in the post-BAPCPA era). However, the United States Court of Appeals for the Fifth Circuit found that beyond a consideration of amount of consumer debt in relation to non-consumer debt, the number of consumer debts should be considered. *Booth*, 858 F.2d at 1051. While other courts look at the amount of consumer debt and consider number of debts in the event that the amount of consumer and non-consumer debt are equal. *In re* Bell, 65 B.R. 575, 577-78 (Bankr. E.D. Mich. 1986).

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

[30] It can be characterized or broken down in other ways. For example, some characterize the means test "as consisting of three parts: current monthly income, allowable expenses, and the residual available to the debtor to service his or her debts." Bruce D. Fisher, *Means Testing Bankruptcy: Destroying the Social Safety Net in Trying Times?*, 87 MICH. B.J. 25, 28 (July 2008).

[31] *See* Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. Rev. 275, 285-86 (2007).

[32] *Id*

[33] *Id.*

[34] *See* 6 COLLIER ON BANKRUPTCY **H** 707.05[2] [b] (15th ed. Rev. 2006)(citing **1**1 U.S.C. **§** 707(b)(7)). A second safe harbor exists under the statutory scheme. If a disabled veteran's indebtedness was occurred primarily during a period during which the veteran was on active duty or performing a homeland defense activity the disabled veteran is not subject to the means test. 11 U.S.C. § 707(b)(D) (Supp. V 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 366 B.R. 164, 166 n.2 (Bankr. W.D. Ok. 2007).

[35] White, *supra* note 31, at 285-86.

[36] *Id.*

[37] *Id.*

remain in Chapter 7 regardless of amount of unsecured debt.[38] In all cases, if the presumption of abuse arises, a debtor can rebut the presumption by showing special circumstances, including serious medical condition or call to active duty in the Armed Forces.[39]

3. Post-BAPCPA and Generalized Abuse Analysis

Individual debtors with primarily consumer debts that are able to rebut the presumption of abuse, or individual debtors for whom the presumption does not arise, may still have their case dismissed under a general abuse analysis.[40] The generalized abuse analysis includes two explicit factors for courts to consider: bad faith and whether "totality of the circumstances ... of the debtor's financial situation demonstrates abuse."[41] In practice, both factors tend to arise together.[42] Accordingly, the post-BAPCPA cases in which bad faith is found generally hinge on a similar finding: The debtor that was not "unfortunate" and had the ability to pay some portion of his debts, and granting a discharge under Chapter 7 would undermine the fundamental purpose of the Chapter 7 discharge.[43] This high standard for finding bad faith is consistent with the pre-BAPCPA caselaw which tended to limit a finding of bad faith to only the most "egregious cases."[44]

The standard of "totality of the circumstances" is not new to bankruptcy jurisprudence. As explained above, courts applied this test in the context of "substantial abuse"[45] cases in the pre-BAPCPA era.[46] The factors to include in the new statutory "totality of the circumstances" test do not exclude anything associated with the debtor's financial circumstances. As such, the prior caselaw employing the "totality of the circumstances" is useful in an "abuse" analysis.

A thorny issue in the post-BAPCPA era is the role of "ability to pay" in the "totality of the circumstances" analysis. Specifically, there is some question

[38] *Id.* Note that as enacted in 2005, the dollar limits in § 707(b) were $6,000 and $10,000; however, under 11 U.S.C. § 104(b) (Supp. V 2006) these dollar limits are periodically adjusted by the Judicial Conference of the United States and published in the Federal Register to reflect changes in the Consumer Price Index.

[39] 11 U.S.C. § 707(b)(2)(B) (Supp. V 2006). The courts have generally applied a strict construction to what satisfies special circumstances. *See, e.g., In re* Johns, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006) (finding that under the debtors' own numbers the presumption of abuse arises). The court held that a "potential payback of zero percent to unsecured creditors in a Chapter 13 is not a special circumstance." The circumstances of the debtors were not of the same degree of seriousness as the examples in the statute: serious medical illness or called to duty in the Armed Forces. *Id.*

[40] 11 U.S.C. § 707(b)(3) (Supp. V 2006). *See In re* Haar, 360 B.R. 759, 760-61 (Bankr. N.D. 0hio)(2007)(recognizing that the bases for dismissal under 707(b)(2) and (b)(3) are completely independent of each other).

[41] 11 U.S.C. § 707(b)(3) (Supp. V 2006).

[42] For example, *see In re* James, 345 B.R. 664, 667 (Bankr. N.D. Iowa 2006).

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

[44] *See* Haney v. Clippard, No. 4:06CV-150, 2007 WL 781321, *3 (W.D. Ky 2007)

[45] 11 U.S.C. § 707(b) (2000).

[46] Carlson, *supra* note 13, at 296; Tabb & McClellan, *supra* note 27, at 501.

regarding whether ability to repay should be considered as part of the totality of circumstances test, and, if so, to what extent.[47] Courts have generally found that below-median-income debtors who have never completed the detailed means test calculation may have ability to pay considered as part of totality of the circumstances test.[48] The courts have been divided on this issue when the case involves an abovemedian debtor.[49] Debtors have argued that passing the means test protects them from dismissal under § 707(b)(3)[50] under the totality of circumstances when the basis is ability to pay. Most courts have rejected this position,[51] but at least one court has found that the means test is the "sole" way to consider 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.[52] Other courts have found that ability to pay will warrant dismissal under the totality of the circumstances test.[53] In sum, the role of a debtor's ability to pay in a substantial abuse analysis was inconsistent among appellate courts before BAPCPA,[54] and continues to be inconsistent now.

[47] For a discussion and summary of the debate, see *infra* notes 49-54 and accompanying text.

[48] *See In re* Pak, 343 B.R. 239 (Bankr. N.D. Cal. 2006)(stating that equal-to or below-median-income debtor may have case dismissed for abuse under Section 707(b)(3) including ability to pay as a factor); *In re* Paret, 347 B.R. 12 (Bankr. D. Del. 2006)(stating that fact debtor was below the median income does not preclude dismissal under totality of the circumstances including consideration of ability to pay).

[49] *See infra* notes 51-54 and accompanying text.

[50] *In re* dePellegrini, 365 B.R. 830, 831 (Bankr. S.D. Ohio 2007).

[51] *In re* Mestemaker, 359 B.R. 849, 853-859 (Bankr. N.D. Ohio 2007)(stating 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). *See also In re* McUne, 358 B.R. 397, 399 (Bankr. D. Or. 2006)(in a case involving a debtor in which the presumption of abuse did not arise, 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"). Judge Dale Somers wrote in a recent opinion that he has not found any cases in which courts have refused to consider dismissal of cases for abuse under Section 707(b)(3). *See e.g., In re* Schoen, No. 06-20864-7, 2007 WL 643295, at *3 (Bankr. D. Kan. 2007).

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

[53] *In re* Henebury, 361 B.R. 595, 607 (Bankr. S.D .Fla. 2007) (holding that "[e]ither ability to pay or bad conduct in connection with the bankruptcy will warrant dismissal for abuse under § 707(b)(3)"). In dicta 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 so. *See e.g. In re* McGillis, 370 B.R. 720, 746 n.30 (Bankr. W.D. Mich. 2007).

[54] The United States Court of Appeals for the Fourth Circuit determined that "solvency alone is not a sufficient basis for finding that the debtor has in fact substantially abused the provisions of Chapter 7." *In re* Green, 934 F.2d 568, 572 (4th Cir. 1991). In contrast, the United States Court of Appeals for the Ninth Circuit held that ability to pay debts alone justifies dismissal for substantial abuse. *In re* Kelly, 841 F.2d 908, 914 (9th Cir. 1988). Further complicating the issue, in the middle between the Fourth and Ninth are the First, Sixth and Eighth Circuits that have ruled that ability to pay can be sufficient to dismiss a case under the substantial abuse standard. *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 courts are not required to look beyond the ability to repay if that warrants dismissal in a particular case); *In re* Krohn, 886 F.2d 123, 126-27 (6th Cir. 1989)(requiring a comprehensive review of circumstances including situations "where disposable income permits liquidation of his consumer debts with relative ease"); United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992)("[A]bility to fund a Chapter 13 plan can be sufficient reason to dismiss a Chapter 7 petition under § 707(b).").

B. *Section 707(a)*

1. Pre-BAPCPA

Section 707(a)[55] creates another method for the courts, a party in interest, the United States Trustee or the Bankruptcy Administrator to seek dismissal of a Chapter 7 case.[56] Specifically, that section provides for the dismissal of a case based on (1) unreasonable delay which prejudices creditors;[57] (2) failure to pay required charges or fees;[58] and (3) failure of a voluntary debtor to file schedules and other documents required by § 521.[59] However, it is well settled that the grounds for dismissal extend beyond those specifically enumerated.[60] Without a express statutory definition of cause, courts have struggled to define the term. A particular issue that is still unsettled, is whether bad faith constitutes cause under § 707(a).[61]

Prior to BAPCPA, there was a split among the courts,[62] as well as scholars,[63] regarding this issue. The United States Court of Appeals for the Third and Sixth Circuits found that bad faith can serve as a basis for dismissal of a case under § 707(a).[64] Some courts looked to the specific grounds for dismissal in § 707(a) and, if

[55]11U.S.C. § 707(a) (2000).

[56] David S. Kennedy, *Treatment of Bad Faith and Abusive Filings in Individual Bankruptcy Cases and Related Matters,* 9 J. BANKR. L & PRAC. 391, 389 (May/June 2000).

[57] 11 U.S.C. § 707(a)(1) (2000).

58 11 U.S.C. § 707(a)(2) (2000).

59 11 U.S.C. § 707(a)(3) (2000). Subsection (a)(3) was not in the original enactment of § 707(a), just subsections (1) and (2). *See, e.g.,* Laura A. Pawloski, Note, *The Debtor Trap: The Ironies of Section 707(a),* 7 BANKR. DEV. J. 175, 181 (1990) (discussing the original version that contained just two express grounds for "cause"). Subsection (a)(3) was added in 1986 by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986. Pub. L. No. 99-554, § 219, 100 Stat. 3088, 3101 (1986). As recognized by Professor Carlson, § 707(a)(3) references § 521(1), but that subsection does not exist because BAPCPA modified the numbering of § 521, so that the correct cross-reference should be § 521(a)(1). Carlson, *supra* note 13, at n.90 (citing 11 U.S.C. § 521). This is just a minor example of one of the many drafting errors in the Code as amended by BAPCPA.

[60] *See In re* Huckfeldt, 39 F.3d 829, 831 (8th Cir. 1994); *In re Crooks,* 148 B.R. 867, 873 (Bankr. N.D. 111. 1993). *See* a/so.Pawloski, *supra* note 59, at 181. This interpretation is supported by the congressional history leading up to the enactment of BAPCPA. *See* S. Rep No. 989, 95[h] Cong, 2d Sess 94 (July 14, 1978) ("This section authorizes the court to dismiss a liquidation case only for cause, such as a unreasonable delay by the debtor that is prejudicial to creditors or nonpayment of any fees and charges . . . . These causes are non exhaustive, but merely illustrative."). *See also* 11 U.S.C. § 102(3)(2000)(stating "'includes' and 'including' are not limiting").

[61] *See* BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE, § 28A:60 (West, WESTLAW through December 2007).

[62] *See* Carlson, *supra* note 13, at 236.

[63] For a detailed analysis of the arguments against a good faith filing requirement in Chapter 7, see Katie Thein Kimlinger & William P. Wassweiler, *The Good Faith Fable of 11 U.S.C.* § *707(a): How Bankruptcy Courts Have Invented a Good Faith Filing Requirement for Chapter 7 Debtors* 13 BANKR DEV. J. 61 (1996).

[64] *See. e g., In re* Tamecki, 229 F.3d 205, 207 (3d Cir. 2000); *In re Zick,* 931 F.2d at 1127 (finding that bad faith can provide cause for a § 707(a) dismissal). *See also 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 thè petition); *In re Smith,* 229 B.R. 895, 897 (Bankr. S.D. Ga. 1997) (finding that lack of good faith constituted "cause" for

the enumerated grounds were not satisfied, "they w[ould] consider whether a case ha[d] been filed in good faith."[65] Other courts framed the issue of good faith as an implicit jurisdictional prerequisite for filing a petition for relief under chapter 7.[66] Regardless of how the issue was formulated, however, these courts narrowly construed the application of bad faith under § 707(a) by reserving it for egregious type of conduct.[67]

The United States Courts of Appeals for the Eighth and Ninth Circuits took the opposite position and held that bad faith does not in and of itself constitute cause under § 707(a).[68] Most of these courts relied on basic statutory construction and reasoned that because Chapter 7 did not specifically require good faith—as Chapters 11[69] and 13 do—bad faith could not serve as a basis for cause under § 707(a).[70] The Eighth Circuit recognized that some conduct constituting cause could fall within the

dismissal of Chapter 7 case); *In re* Griff let/?, 209 B.R. 823, 831 (Bankr. N.D.N.Y. 1996) (finding that dismissal warranted under Section 707(a) because the debtors' case was not filed in good faith); *In re* Sky Group Int'l, Inc., 108 B.R. 86, 90 (Bankr. W.D. Pa. 1989) (finding that bad faith can result in dismissal under Section).

[65] Turner v. United States of America *(In re* Turner), 195 B.R. 476, 493 (Bankr. N.D. Ala. 1996). *See also In re* Tanguay, 206 B.R. 575, 577 (Bankr. M.D. Fla. 1997) (finding that example of cause is a debtor's lack of good faith in filing the Chapter 7 case); *In re* Zick, 931 F.2d 1124 (6th Cir. 1991) (finding that lack of good faith of Chapter 7 debtor is a valid basis to dismiss a case for "cause"); *In re* Ripley & Hill, P.A., 176 B.R. 596, 598 (Bankr. M.D. Fla. 1994); *In re* Markizer, 66 B.R. 1014 (Bankr. S.D. Fla. 1986)(Chapter 7 case); *In re* Campbell, 124 B.R. 462 (Bankr. W.D. Pa. 1991)(Chapter 7 case).

[66] *In re* Creazzo, 172 B.R. 657, 658 (Bankr. M.D. Fla. 1994); *In re* Doss, 133 B.R. 108 (Bankr. N.D. Ohio 1991).

[67] As the United States Court of Appeals for the Third Circuit recently reiterated:

> First, we noted that a finding of lack of good faith "should not [be] lightly inferred]." 229 F.3d at 208. Second, we cautioned that dismissal should be "confined carefully" and utilized only in "egregious cases that entail concealed or misrepresented assets and/or sources of income, lavish lifestyles, and intention to avoid a large single debt based upon conduct akin to fraud, misconduct or gross negligence." *Id.* (quoting *In re Zick*, 931 F.2d 1124, 1129 (6th Cir. 1991)); see also 229 F.3d at 209 ("j Bankruptcy and district courts have reserved bad faith dismissal for the truly egregious case, often involving individuals with substantial means who have flaunted their wealth, have continued their lavish lifestyles, and are engaging in creative, elaborate schemes to conceal their assets and cheat their creditors or to otherwise inflict harm on third parties.") (Rendell, J., dissenting).

Perlin v. Hitachi Capital America Corp., 497 F.3d 364, 373 (3d Cir. 2007).

[68] *See, e.g., In re* Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994)(stating that while some conduct giving rise to dismissal under § 707(a) can be characterized as bad faith, the issue is properly whether the petition should be dismissed "for cause"); *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)."); *In re* Etcheverry, 242 B.R. 503, 506 (D. Colo. 1999) (finding 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) (finding that good faith requirement cannot be read into section).

[69] Chapter 11 does not require good faith in filing, but confirmation of a plan requires that the plan be proposed in good faith. *See* Ali M.M. Mojdehi and Janet Dean Gertz, *The Implicit "Good Faith" Requirement in Chapter II Liquidations: A Rule in Search of a Rationale?,* 14 AMER BANKR. INST. L. Rev. 143,144 (Spring 2006).

[70] *In re* Mitchell, 357 B.R. 142, 154, 154 n.l 1 (C.D. Cal. 2006).

characterization of bad faith.[71] Nevertheless, the court concluded that in light of the fact that Congress defined dismissal under § 707(a) for cause, that the standard for dismissal was cause, not bad faith.[72]

The scholarship prior to BAPCPA has closely tracked the two views that have developed by the circuit courts.[73] However, one particular argument is worth mentioning here. Scholars advocating against the expansion of cause to include bad faith, suggest that § 707(a) is limited to mere technical or procedural violations of the Code and Rule[74] and that expanding cause to include bad faith is inconsistent with the statutory examples.[73] It is true that the current version of § 707(a) focuses primarily on technical rule compliance. Nevertheless, these basic requirements of a debtor to not cause unreasonable delays that prejudice creditors, to pay fees and charges and to file basic documents that provide the financial disclosure are core obligations that permit the bankruptcy process to work. Other less technical factors, including bad faith, also interfere with the proper functioning of the bankruptcy system and their inclusion would not interfere with the current operation of the statutory scheme.

2. Post-BAPCPA

The pre-BAPCPA decisions that applied a good faith requirement in consumer Chapter 7 cases via § 707(a) are now codified in § 707(b)(3)(A).[76] Most courts interpret these amendments to § 707(b) as ending 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.[77] Accordingly, the pre-BAPCPA cases that found that there was no good faith filing requirement are superseded by BAPCPA, at least to the extent that they pertain to consumer cases.[78]

[71] *Huckfeldt*, 39 F.3d at 832.

[72] *Id.*

[73] *See supra* note 63.

[74] Kimligner and Wassweiler, *supra* note 63, at 97-98.

[15] *Id.*

[76] *In re* Oot, 368 B.R. 662, 666 (Bankr. N.D. Ohio 2007).

[77] *See e.g.*, Collier ON Bankruptcy, *supra* note 34, at **1** 707.03[2], *See also* David L. Buchbinder, *Implicit Good Faith Requirement in Chapter 7 Cases* 18(2) BaNKR. STATEGIST 1 (December 2000)(predicting that bad faith analysis under § 707(a) may become "superfluous" if means testing legislation is passed). This is consistent with a basic tenant of statutory construction: the specific provision regarding dismissal for bad faith for consumer debtors in § 707(b) would take precedence over the general provision for dismissal under § 707(a). As such, reliance on the more specific provisions in § 707(b) is required for dismissal motions based on bad faith be brought under and limited to the parameters set forth in § 707(b). *See, e.g.*, Tabb & McClelland, *supra* note 27, at 501 ("Notably, this change means that dismissal motion based on bad faith now is subject to all the procedural constraints in § 707(b)."); *see generally* Kimligner & Wassweiler, *supra* note 63, at 71-73.

[78] *See, e.g., In re* U.S. Voting Machines, Inc., No. C 05-01281 JF, 2007 WL 4287526, at *3 n.5 (N.D. Cal. 2007) . Some commentators have characterized the inclusion of the provision "filed in bad faith" in § 707(b) as ratifying pre-BAPCPA "cases holding that bad faith is not cause for dismissal under" § 707(a). *See* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only*

A particularly important limitation of this interpretation of BAPCPA, however, is that only the U.S. Trustee or courts have standing to bring bad faith motions against below median income debtors.[79] The rationale for this limitation offered by some commentators is to "afford protection to lower income debtors against abusive bad faith dismissal motions by creditors which they might not be able to defend due to a lack of financial resources."[80] The specific standing restriction in § 707(b)(3), and clear statutory language, bolsters the argument that bad faith dismissal for consumer cases should be confined to § 707(b).

Furthermore, from a practical standpoint, the use of § 707(a) dismissal for bad faith against a consumer debtor would only arise, if at all, in one context: a creditor filing such a motion against a below-median income consumer debtor. In such instances the creditor would not have standing under § 707(b)(3) and dismissal could only be sought under § 707(a).[81] Congress has provided for a consideration of bad faith for consumer debtors in chapter 7 in all other instances under § 707(b), so there is no need to resort to § 707(a) dismissal for bad faith. For above-median consumer debtors, creditors have standing to bring such a motion under § 707(b)(3), and, therefore, would not need to resort to § 707(a). The Bankruptcy Administrator, U.S. Trustee, and courts would not need to resort to § 707(a) dismissal for bad faith, as those parties can raise the issue for both above and below-median income consumer debtors under § 707(b)(3).[82] Congress carefully dealt with bad faith for consumer debtors and to permit an alternate avenue for bad faith in consumer cases under § 707(a) would appear to be inconsistent with the framework established in § 707(b), particularly the statutory standing restrictions.[83] Nevertheless, it can be argued that the enumeration of items in § 707(a) does not necessarily exclude non-express items, such at bad faith, which were included in § 707(b) for different reasons.[84]

To date there appears to be one reported post-BAPCPA decision, *In re Lombardo*,[85] in which a creditor filed a motion to dismiss under § 707(a) for bad faith, in which the debtor was a below-the median income consumer debtor.[86] This is the single instance in which the creditor would not have standing to bring a motion

Way?, 13 Am. BANKR. Inst. L. REV. 665, 683 n.89 (2005). That would seem to be the case under basic tenets of statutory construction, as applied to consumer cases, but not necessarily to non-consumer cases.

[79] *Id.*

[80] Collier on Bankruptcy, *supra* note 34, at ¶ 707.03 [2].

[81] Some commentators characterize the pre-use of 707(a) in this way as a way of sidestepping the requirements of § 707(b). *See* Culhane & White, *supra* note 78, at 683 n.89.

[82] Theoretically if the time limitations of 707(b) have passed, and a discharge not entered, a motion to dismiss for bad faith, or other grounds, could be brought by any party because there are no time limits on motions to dismiss under § 707(a).

[83] One can certainly argue that there is nothing to indicate that Congress intended to override the historic power that many bankruptcy courts has employed to define and remedy a bad faith filing. *See, e.g., In re* Ferguson, 376 B.R. 109 (Bankr. E.D. Pa. 2007)(recognizing this general principle in a different context). Congress chose to leave § 707(a) unchanged, leaving the issue ripe for debate.

[84] *See e.g., In re* Mu'Min, 374 B.R. 149, 169 n.36 (Bankr. E.D. Pa. 2007)(discussing this statutory principle in relation to § 707(a), (b)).

[85] 370 B.R. 506 (E.D.N.Y. 2007).

[86] *See* Docket No. 1, Official Form 1 and Official Form 22A, *In re* Lombardo, Chapter 7, Case No: 806- 73127-47, U.S. Bankruptcy Court, Eastern District of New York.

to dismiss for abuse motion under § 707(b). The court granted the motion and dismissed the case under § 707(a), employing a bad faith analysis that included a consideration of the totality of the circumstances test (including ability to pay as a factor among many) as used by courts prior to BAPCPA.[87] The court applied the very limited use of bad faith dismissal under § 707(a) to those cases with egregious conduct.*[8] It does not appear that the standing issue, in relation to § 707(b)(3), was addressed in the court's opinion, and based on a review of the pleadings, was never raised by a party.[89] Since the published opinion, the parties reached a settlement resolving the dispute between the movant and the debtor and the court entered an order vacating the dismissal on those grounds.[90] The debtor has now received a discharge.[91] Even though the decision has been vacated, it shows that the issue of bad faith dismissal of consumer debtors under § 707(a) may not be quite over. Certainly at some point, the courts will have the opportunity to directly address the issue.

III. DISMISSAL OF NON-CONSUMER INDIVIDUAL CHAPTER 7 CASES

In cases that do not involve an individual debtor[92] with primarily consumer debts,[93] however, the provisions of § 707(b), including dismissal for bad faith, are not directly applicable.[94] Accordingly, in these non-consumer cases, it would seem that the pre-BAPCPA cases recognizing dismissal for a lack of good faith under § 707(a) would still be applicable. Jurisdictions that recognized a good faith filing and jurisdictions that did not will both continue to rely on their interpretations of § 707(a) to determine whether a bad faith basis for dismissal exists. In short, as to nonconsumer debtors, the issue of a good faith filing requirement is still unresolved and outcomes will vary from circuit to circuit.

Post-BAPCA there is one reported appellate court decision pertaining to bad faith under § 707(a). Specifically, in *Perlin* v. *Hitachi Capital America Corp.*,[95] the United States Court of Appeals for the Third Circuit expressly recognized its

[87] *Lombardo*, 370 B.R. at 511-15.

[88] *Id.* at 510-11.

[89] It is worth noting that at the evidentiary hearing on the motion it does not appear that the debtor offered any evidence to contest the motion, so the court accepted the movant's testimony as true and, applying the very high standard for a finding of bad faith, made such a finding.

[90] Docket No. 29, Order Granting Motion to Vacate the Court's Memorandum Decision and Order Dated June 29, 2007, *In re* Lombardo, Chapter 7, Case No: 806-73127-47, U.S. Bankruptcy Court, Eastern District of New York.

[91] Docket No. 32, Notice of Discharge, *In re* Lombardo, Chapter 7, Case No: 806-73127-47, U.S. Bankruptcy Court, Eastern District of New York.

[92] *See supra* note 27 and accompanying text.

[93] *See supra* note 28 and accompanying text.

[94] *See e.g.. In re* Sudderth, No. 06-10660, 2007 WL 119141, at *1 (Bankr. M.D.N.C January 9 2007)

[95] 497 F.3d 364 (3d Cir. 2007).

pre-BAPCPA precedent[96] permitting bad faith dismissal under § 707(a). The Third Circuit was not presented with any questions regarding the viability of bad faith dismissal under § 707(a) in the post-BAPCPA era. The narrow issue addressed was whether income and expenses of a debtor could be considered in the context of a § 707(a) motion to dismiss for bad faith in the post-BAPCA era.[97] The bankruptcy court did not consider income and expenses in its bad faith analysis and under the facts of the case did not find bad faith. The Third Circuit found that the means test and modifications to § 707(b) did not imply any limitation on the discretion to decide § 707(a) motions to dismiss.[98] Although the Third Circuit affirmed the bankruptcy court finding of no bad faith, the Third Circuit went on to expressly find that a debtor's income and expenses, coupled with other factors, were relevant to a good faith analysis under § 707(a).[99] The facts of the case just did not rise to such a finding.

It is important to recognize that the debtor in Perlin had non-consumer debts. Whether the holding would apply to a consumer debtor is not clear. It seems that the careful statutory construction the Third Circuit applied would lead to the conclusion reached by most commentators and highlighted above—that bad faith dismissal for consumer debtors under § 707(a) is not viable post BAPCPA.

IV. The Result: Disparate Treatment OF Individual Chapter 7 Debtors

As the analysis of the current state of the law shows, the § 707(b) framework places a variety of hurdles on consumer Chapter 7 debtors: means testing, a good faith requirement and a totality of the financial circumstances analysis.[100] Nonconsumer individual Chapter 7 debtors, however, are subject to just one substantive basis for dismissal under § 707(a): cause. Cause in non-consumer cases may be interpreted in a number of ways, depending on the jurisdiction. But, even if a court does interpret § 707(a) to include a good faith requirement, it is a very high hurdle for a movant to meet, requiring much more than the showing for motions under § 707(b).

BAPCPA was purportedly designed to "ensure that debtors who had the ability to pay would actually repay their creditors."[101] The abuse standard in § 707(b) is the primary tool to achieve this purpose. In practice, the § 707(b) requirements should

96 *In re* Tamecki, 229 F.3d 205, 207 (3d Cir. 2000).

97 Perlin, 497 F.3dat369.

[98] *Id.* at 371.

[99] *Id.* at 375. The court was careful to recognize the limitation in the legislative history on relying solely on "ability to pay" as the basis for dismissal under § 707(a). *Id.* at 371-72.

[100] Certainly the other new requirements, such as credit counseling and debtor education, are important too.

[101] Evan J. Zucker, *The Applicable Commitment Period: A Debtor's Commitment to a Fixed Plan Length*, 15 AM. BANKR. INST. L. REV. 687 (2007).

reduce the number of Chapter 7 consumer-bankruptcy filings,[102] hold individual consumer debtors more accountable for their debts, and give to creditors more of what they are owed.[103] On its face, the abuse standard appears sensible through both the lens of efficiency and equity,[104] but the resulting disparate treatment between consumer and non-consumer debtors makes little sense. If abuse, including good faith and ability to pay, should be threshold hurdles for consumer Chapter 7 debtors, why not place the bar at the same level for individual non-consumer Chapter 7 debtors?[105]

An argument could be made that the purposes of providing relief to consumer and non-consumer debtors differ, and thus justify the different treatment. For example, it could be argued that providing non-consumer debtors with easier access to a discharge encourages the entrepreneurial spirit. Bankruptcy does promote "the nation's entrepreneurial spirit while addressing the omnipresent risk of financial failures."[106] However, there are many individual entrepreneurs in Chapter 13,[107]
ll,[108] and even some characterized as consumer Chapter 7 debtors,[109] that are all held to high standards of ability to pay, as well as good faith.

[102] 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 the debtor to 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 (Spring 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.").

[103] *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt,* 2007 U. ILL. L. REV. 375, 377 (2007) ("[T]he new law includes a 'means test,' designed to force consumer out of chapter 7 liquidation and into chapter 13, with the intention of limiting the ability of bankruptcy to discharge debtors while earning a substantial post discharge income.").

[104] *See* F.H. Buckley, *Book Review, The Debtor as Victim,* 87 CORNELL L. REV. 1078, 1090(2002).

[105] Professor Hirsh observed the lack of logic behind the different treatment. He wrote: "[W]hat Congress intended (and why) by restricting dismissal on grounds of abuse to cases dominated by 'consumer debts' remains unclear." Adam J. Hirsch, *Fear no the Asset Protection Trust,* 27 CARDOZO L. REV. 2685, 2708
(2006).

[106] Mike Lowry, Note, *A New Paint Job on an '85 Yugo: BAPCPA Improves Chapter 12 but will it Really Make a Difference?,* 12 DRAKE J. AGRJC. L. 231, 232 (2007).

[107] The Code permits Chapter 13 debtors to be engaged in business. 11 U.S.C. § 1302 (2000). *See also* Katherine Porter, *Phantom Farmers: Chapter 12 of the Bankruptcy Code,* 79 AMER. BANKR. L.J. 729, 739 (2005)(recognizing that many Chapter 13 debtors are entrepreneurs); Robert Lawless & Elizabeth Warren, *The Myth of the Disappearing Business Bankruptcy,* 93 Cal. L. REV. 743, 773 (2005)(estimating that entrepreneurs or small business owners represent 19.7 percent of Chapter 13 filings).

[108] Chapter 11 is usually thought of as the business chapter. This is certainly true, but individuals can and do file Chapter 11. And most of the Chapter 11 filings, individuals or entities, are made by small business debtors. *See e.g.,* Robert Lawless, *Small Business and the 2005 Bankruptcy Law: Should Mom and Apple Pie be Worried?,* 31 S. ILL. U. L.J. 585, 588-89 (2007)(recognizing that most Chapter 11 filings are small business cases).

[109] For example, a small business person will have personal and business debts combined on credit cards. The exact breakdown of business versus consumer debt may not be known or just estimated in the schedules. The filing requires a choice made by the debtor on the petition between primarily of consumer versus non-consumer debt. The choice is in many cases not that clear. Thus some debtors may very well be characterized as consumer, when they are just as easily characterized as business or non-consumer

If a Chapter 7 debtor has the ability to repay some of his or debts, or has filed the petition bad faith, regardless of the nature of the debt-consumer or non- consumer-the Code should hold the debtor to the same standard. This disparate treatment leads to fundamental unfairness and opportunities for gamesmanship, and even possible abuse of the purpose of Chapter 7 in some cases involving nonconsumer individual debtors.

For example, consider a debtor with a large tax debt and a very large income. The debtor could repay debts under an ability to pay analysis similar to the means test, but large tax debt would remove the debtor from being characterized as a consumer debtor. Therefore, under the current statutory framework the debtor would not be subject to an abuse analysis under § 707(b). The debtor may be subject to a good faith analysis under § 707(a), but that would vary from court to court. In any event, the fact the debtor could repay some debts would not in and of itself subject the debtor to dismissal under § 707(a). Thus, without more, even in such a jurisdiction employing a good faith analysis under § 707(a), the debtor could pass through Chapter 7 and receive a discharge.

V. PROPOSED STATUTORY REFORM

Section 707 should be amended to bring the standards applied to both debtors closer."[0] The bifurcated approach has led to this very unequal system for consumer and non-consumer debtors, a system that is simply unfair, without any rational basis for the distinction between the two.

Some advocate that § 707(b) should be expanded so that it is applicable to nonconsumer individual debtors as well as consumer debtors.[111] Others have suggested that § 707(b) be repealed and a general § 707(a) be amended.[112] However, both of these suggestions are problematic for several reasons, particularly now that § 707(b) has been amended. First, the detailed and rigid aspects of the means testing calculations will not apply as consistently in non-consumer individual cases. Therefore, the general means-testing framework and formula will not work in application to many non-consumer individual debtors.[113] Second, from a policymaking standpoint, repealing § 707(b) will likely not find much support in Congress, in light of the strong influence of the lending industry on the policy

debtors. For a discussion of the problems associated with determining the nature of a particular debtor, see Lawless & Warren, *supra* note 107, at 759-60.

[110] *See* Hirsch, *supra* note 105, at 2708-09 ("Congress should amend the Bankruptcy Code to clear up the matter, preferably by expanding the scope of the section governing dismissal unequivocally ... to include all cases without exception.").

[111] *Id* at 2709 n.108. Such a position has been advocated in regard to the prior version of § 707(b). *See* Michael D. Bruckman, Note, *The Thickening Fog of "Substantial Abuse: " Can 707(a) Help Clear the Air?*, 2 Am. BANKR. INST. L. REV. 193,202-03 (1994).

[112] Wells, Kurtz, & Calhoun, *supra* note 8, at 42-43 (advocating this view in analyzing the prior version of § 707(b)).

[113] Some would question whether it even works for consumer debtors, but that is a point to be considered another day.

process leading to the reform. Third, Congress has carefully limited the standing requirements to bring abuse motions under amended § 707(b), largely to protect consumer debtors from frivolous motions by creditors. Accordingly, mere extension of § 707(b), or repealing the section without consideration of the careful standing limitations may present problems in the legislative process. Fourth, the constitutional issues and potential constitutional challenges would be curtailed by extending application of § 707(b) to non-consumer individual debtors, but not eliminated.[114] Fifth, if § 707(b) is extended to apply only to non-consumer individual debtors, question of whether there is a general good faith filing requirement under Chapter 7 for non-individual debtors is left open.[115] Accordingly, the debate on good faith will continue with a lack of uniformity in appellate decisions throughout the country.[116]

A better solution is to expand the scope of § 707(a) by simply tracking the general abuse standard, including bad faith and a totality of the debtor's financial circumstances, from § 707(b)(1), (3).[117] Section 707(a) should be amended as follows:

> § 707. Dismissal of a case or conversion to a case under chapter 11 or 13
> (a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including-

[114] The limitation of the constitutional issue has been recognized as a benefit by applying the same standard to both consumer and non-consumer Chapter 7 debtors. *See* Bruckman, *supra* note 111 at 203

[115] *Id.*

[116] For a discussion of this debate in relation to a Chapter 11 good faith filing requirement, see generally Mojdehi and Gertz, *supra* note 69.

117 11 U.S.C. § 707(b)(1) & (3) (Supp. V 2006). Subsections (b)(1) and (3) provide:

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).
>
> 3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider-
> (A) whether the debtor filed the petition in bad faith; or
> (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse

Id.

> (1) unreasonable delay by the debtor that is prejudicial to creditors;
> (2) nonpayment of any fees or charges required under chapter 123 of title 28;
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee; and
> (4) abuse by non-consumer individual debtors of the provisions of this chapter. In making a determination whether to dismiss a case under this subsection, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)). In considering whether to dismiss a case under this subsection, the court shall consider-
> (A) whether the debtor filed the petition in bad faith;
> (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse; and
> (C) whether dismissal is in the best interest of the creditors and the estate.

A few minor technical amendments are made to § 707(a). The "and" and in subsection (a)(2) and (3) are removed. Substantively, subsection (4) is added. The language is lifted from the second half of § 707(b)(1),'[118] (b)(3)"" and other dismissal provisions in the Code.[120] The result is a standard for dismissal for non-consumer debtors that mirrors the standard for dismissal for abuse, absent any presumption that is applicable to consumer debtors. Both consumer and non-consumer debtors would

[118] 11 U.S.C. § 707(b)(1) (SuppV. 2006).

[119] 11 U.S.C. § 707(b)(3) (Supp V. 2006).

[120] For example, § 1112(b)(1) provides guidance for the court in deciding whether to dismiss or convert. It provides a "best interests of creditors and the estate" standard. 11 U.S.C. § 111 2(b)(1) (2000 & Supp. V 2006).

be subject to the dismissal for bad faith or if the totality of the circumstances indicate abuse. There would no longer be any disparate treatment.

What is missing is any kind of means testing mechanism as is applicable to consumer cases. Developing a means testing mechanism would not work in light of the differences among the non-consumer cases and consumer cases. Each case and situation will be very different so that standard ability to pay measures would not apply across the board in many cases. However, all Chapter 7 debtors would be subject to dismissal for abuse. And the finding of abuse would be subject to the discretion of the courts on a case by case basis. The only limitation placed on courts would be the requirement that they consider bad faith and totality of the debtor's financial circumstances.[121]

VI. CONCLUSION

Courts should have the express statutory ability to manage the court system and dismiss cases that have been filed in bad faith. They should also be authorized to dismiss cases in which a debtor seeks a discharge, if, under the totality of the circumstances, it would be an abuse. Like the current provisions in § 707(b), the amended statute does not dictate what is an abuse, what is bad faith or what the exact parameters of the totality of the circumstances would include. This permits courts to have discretion to analyze situations on a case-by-case basis. In the area of good faith, when courts have been given this discretion under pre-BAPCPA, they have applied it to the very limited situations of egregious cases.[122]

It is important to recognize that the amendment does not mandate dismissal when an abuse is found. The proposed statutory change does not change the basic framework or permissive nature of dismissal under § 707(a), which uses "[t]he court *may* dismiss a case."[123] There may be instances when, even in the light of an abuse, proceeding under Chapter 7 may be in the best interest of the creditors and the estate.

This amendment subjects all Chapter 7 individual debtors to the same basic rules, without any arbitrary distinction based on the nature of the debtor's debt. Adding this framework to the Code will hopefully lead to more consistent outcomes in the future and a more fair application of the individual Chapter 7 dismissal procedures in the future.

[121] This amendment applies to consumer and non-consumer individual debtors only and not to nonindividual debtors. A detailed discussion and analysis of applying a similar standard to non-individual debtors is beyond the scope of this article. For a discussion of this issue, see Mojdehi and Gertz, *supra* note 69.

[122] *See supra* note 71 and accompanying text.

[123] Section 707(a) provides: "The court *may* dismiss a case under this chapter only after notice and a hearing and only for cause, including---------- "11 U.S.C. § 707(a) (2000)(emphasis added).