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## COMMENTS

### THE CASE AGAINST “BAD FAITH” DISMISSALS OF BANKRUPTCY PETITIONS UNDER 11 U.S.C. § 707(a)

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#### INTRODUCTION

Bankruptcy filings are on the rise yet again.<sup>1</sup> The recent economic downturn has led to many sources of financial distress, including the rise in unemployment, increase in the number of uninsured people, mortgage and foreclosure crises, and tightening of consumer credit.<sup>2</sup> Debtors facing these difficult situations may have no other option but to turn to the last resort of filing for bankruptcy to obtain a “fresh start.”<sup>3</sup>

1. See Press Release, American Bankruptcy Institute, Consumer Bankruptcy Filings Surge Past One Million During First Nine Months of 2009 (Oct. 2, 2009), available at <http://www.abiworld.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=58852> (noting that at the end of September 2009, consumer bankruptcies totaled 1,046,449 filings, the first time since 2005 that bankruptcy filings have exceeded one million during the first three quarters of the year). See generally Jon P. Nelson, *Consumer Bankruptcy and Chapter Choice: State Panel Evidence*, 17 CONTEMP. ECON. POL'Y 552 (1999) (examining the rise in bankruptcy cases from 1985 to 1996 and the impact of the bankruptcy laws on bankruptcy decisions).

2. See Hibah Yousuf, *Personal Bankruptcies Hits a 4-Year High*, CNNMONEY.COM, Oct. 2, 2009, [http://money.cnn.com/2009/10/02/news/economy/consumer\\_bankruptcy/?postversion=2009100217](http://money.cnn.com/2009/10/02/news/economy/consumer_bankruptcy/?postversion=2009100217) (noting that the unemployment rate has climbed to 9.8 percent in September 2009 and that 37.6 percent of consumers who filed for bankruptcy attributed it to job loss). See generally Thomas Evans & Paul B. Lewis, *Bankruptcy Reform and the Foreclosure Crisis*, 28 BANKING & FIN. SERVS. POL'Y REP. 1 (2009) (examining the relationship between the number of foreclosures and bankruptcy filings).

3. See Lauren E. Tribble, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 793–94 (2007) (noting that Chapter 7 bankruptcy has always been intended to give the debtor a fresh start, without which “people who never expected

Just four years ago, a startling 2,078,415 bankruptcy petitions were filed,<sup>4</sup> and in response to this thirty percent skyrocket in filings, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).<sup>5</sup> Through the BAPCPA, Congress attempted to relieve the growing concerns that the existing limitations of the Bankruptcy Code (“Code”) were insufficient to prevent debtors from filing opportunistic bankruptcy petitions despite having sufficient funds to pay at least a part of their outstanding debt.<sup>6</sup> Nevertheless, although a “mere” 617,660 petitions were filed in 2006,<sup>7</sup> the upsurge has resumed—if not accelerated—over the past few years, which may be attributable in part to the worst economic crisis the United States has suffered since the Great Depression.<sup>8</sup> As annual filings increased thirty-five percent (from 967,831 filings in 2008 to 1,306,315 filings in 2009),<sup>9</sup> the pressure on

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or intended to incur debt might be forced to spend their lives working to pay their creditors, never able to take home their own pay” (citing 151 CONG. REC. S1836 (daily ed. Mar. 1, 2005) (statement of Sen. Kennedy))).

4. Administrative Office of the United States Courts, Table F-2, U.S. Bankruptcy Courts, Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the Twelve Month Period Ending Dec. 31, 2005, [http://www.uscourts.gov/bnkrpctstats/bankrupt\\_f2table\\_dec2005.xls](http://www.uscourts.gov/bnkrpctstats/bankrupt_f2table_dec2005.xls).

5. 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 11 U.S.C.).

6. See H.R. REP. NO. 109-31, pt. 1, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92 (stating that a “factor motivating comprehensive reform is that the present bankruptcy system has loopholes and incentives that allow and—sometimes—encourage opportunistic personal filings and abuse”); President George W. Bush, Remarks at the Signing of Abuse Prevention and Consumer Protection Act (Apr. 20, 2005), *available at* [http://findarticles.com/p/articles/mi\\_m2889/is\\_16\\_41/ai\\_n13777502](http://findarticles.com/p/articles/mi_m2889/is_16_41/ai_n13777502) (“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 . . . Under the new law, Americans who have the ability to pay will be required to pay back at least a portion of their debts.”).

7. Administrative Office of the United States Courts, Table F-2, Business and Nonbusiness Bankruptcy Cases Commenced, by Chapter of the Bankruptcy Code, During the Twelve Month Period Ending Dec. 31, 2006, [http://www.uscourts.gov/bnkrpctstats/bankrupt\\_f2table\\_dec2006.xls](http://www.uscourts.gov/bnkrpctstats/bankrupt_f2table_dec2006.xls).

8. See *The 2009 Bankruptcy Judgeship Recommendations of the Judicial Conference of the United States: Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 2–3 (2009) (testimony of J. Barbara M. G. Lynn, Chair, Judicial Conference Comm. on the Administration of the Bankruptcy System) (noting the record number of petitions that continue to be filed due to the economic situation). See generally Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349 (2008) (reviewing data collected in the 2007 Consumer Bankruptcy Project to analyze the effects of the BAPCPA on the rate of bankruptcy filings and finding that the BAPCPA has not prevented “can-pay” debtors from using the bankruptcy system but instead may have discouraged debtors who are in need of relief from filing for bankruptcy).

9. See Press Release, Administrative Office of the United States Courts, Bankruptcy Filings Continue to Rise in June (Aug. 13, 2009), *available at* [http://www.uscourts.gov/Press\\_Releases/2009/BankruptcyFilingsJun2009.cfm](http://www.uscourts.gov/Press_Releases/2009/BankruptcyFilingsJun2009.cfm) (emphasizing the drastic increase in the total number of filings in all bankruptcy

judges to clear their dockets by disposing of bankruptcy cases as quickly as possible has only heightened.<sup>10</sup>

The BAPCPA's failure to slow the increase in bankruptcy filings has led judges to look elsewhere for means to alleviate their caseload.<sup>11</sup> One method in particular that judges have seized upon is dismissing petitions on the grounds of bad faith under § 707(a) of the Code.<sup>12</sup> Under § 707(a), a case may be dismissed "for cause" if the debtor fails to satisfy a technical or procedural requirement such as paying the filing fee.<sup>13</sup> Its counterpart, § 707(b), calls for a subjective inquiry into the facts and circumstances of the case to determine whether the debtor filed in bad faith ("bad faith inquiry").<sup>14</sup> Although § 707(a) remains silent as to bad faith, under the guise of judicial discretion, courts have inserted subjective factors—including the debtor's intent and financial situation—into the court's objective analysis of whether "cause" exists to justify dismissal.<sup>15</sup>

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chapter filings in the twelve month periods ending on June 30, 2008 and June 30, 2009, respectively). In the twelve month period ending on June 30, 2009, Chapter 7 filings totaled 907,603, which was a forty-seven percent increase from the previous twelve month period ending on June 30, 2008. *Id.*

10. *The 2009 Bankruptcy Judgeship Recommendations of the Judicial Conference of the United States: Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 2–3 (June 16, 2009) (testimony of J. Barbara M. G. Lynn, Chair, Judicial Conference Comm. on the Administration of the Bankruptcy System) (petitioning for immediate appointments of bankruptcy judgeships to alleviate docket pressures and ensure efficient operation of the bankruptcy system, especially in light of the record number of petitions that continue to be filed due to the economic situation).

11. *See id.* at 7 ("An overburdened court may use several strategies to temporarily alleviate the caseload burden, such as *streamlined case management procedures*, assistance from other bankruptcy courts, recalled judges, *expansion of automation programs*, or addition of more support personnel." (emphasis added) (internal footnote omitted)).

12. *E.g.*, *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 207 (3d Cir. 2000) (dismissing the debtor's Chapter 7 case because the debtor lacked good faith in filing for bankruptcy); *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991) (same).

13. 11 U.S.C. § 707(a) (2006).

14. *Id.* § 707(b).

15. *See, e.g.*, *In re O'Brien*, 328 B.R. 669, 675 (Bankr. W.D.N.Y. 2005) (applying a fourteen-factor test to make the same inquiry); *In re Griffith*, 209 B.R. 823, 827 (Bankr. N.D.N.Y. 1996) (applying a six-factor test to determine whether the filing was done in bad faith); *see also* David S. Kennedy, *Treatment of Bad Faith and Abusive Filings in Individual Bankruptcy Cases and Related Matters*, 9 J. BANKR. L. & PRAC. 391, 397–98 (2000) (categorizing the divergent definitions of bad faith created by courts under § 707(a)); 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, 66–68 (1996) (arguing that the judge-made good faith filing requirement is an abuse of judicial discretion that is unsupported by the text or purpose of the Code and has been improperly applied by a multitude of courts, many of which consider the "worthiness" of the debtor to decide whether or not to dismiss the case).

This misinterpretation frustrates the intent of Congress, which has clearly distinguished the analyses under each subsection.<sup>16</sup> The bad faith inquiry goes beyond the objective scope of § 707(a)<sup>17</sup> and is not only duplicative but also constitutes a complete disregard of the other provisions of the Code that also afford protections to creditors and trustees.<sup>18</sup> Additionally, it ignores the BAPCPA, through which Congress increased the objectivity of the Code largely to constrain judicial discretion.<sup>19</sup> In short, though courts have understandably felt the pressure to quickly dispose of cases, bad faith dismissals under § 707(a) find no support in the statutory text, purpose, or legislative history of the Code and thus debtors should not be denied access to bankruptcy relief under this flawed application of § 707(a).

Suppose a debtor who has been living a lavish lifestyle and incurring heavy credit card debt undergoes an unforeseen and very costly medical procedure but has just been laid off from work. He is left with no means to cover his expenses and no choice but to file for bankruptcy. Should the court completely deny him a “fresh start” by dismissing his bankruptcy petition because he previously engaged in abusive credit card activity?

Many courts have dismissed such bankruptcy petitions under § 707(a) on the grounds that the debtor filed in “bad faith.”<sup>20</sup> In so

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16. See Kimlinger & Wassweiler, *supra* note 15, at 90 (noting that, while the analysis under § 707(a) looks to the technical and procedural requirements of bankruptcy filings, a good faith inquiry requires a factual analysis into the presence of “any abuses of the provisions, purpose, or spirit of the bankruptcy law and into whether the debtor honestly requires the liberal protection of the Bankruptcy Code” (quoting *In re Bingham*, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987))).

17. See *id.* at 63–71 (arguing that the absence of an explicit good faith filing requirement supports the rejection of bad faith dismissals under § 707(a)); see also *infra* Part II.A (arguing that the statutory text of § 707(a) provides no support for bad faith dismissals under that subsection).

18. See *infra* Part II.B (discussing the other provisions contained in the Code that protect the integrity of the bankruptcy system). For example, § 523 exempts certain debts from discharge and § 303(i) provides damages for involuntary petitions brought in bad faith. 11 U.S.C. §§ 303(i), 523.

19. See Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J. 395, 397 (2009) (noting that Congress attempted to reduce discretion by adding a formulaic means test); see also *infra* Part III.A (arguing that courts erroneously uphold cases granting bad faith dismissals because Congress intentionally omitted bad faith as cause for dismissal and preserved the objective nature of § 707(a)).

20. E.g., *In re O'Brien*, 328 B.R. at 674 (dismissing the case under § 707(a) for bad faith after considering the totality of the circumstances of the debtor’s financial situation); *U.S. Trustee v. Lacrosse (In re Lacrosse)*, 244 B.R. 583, 588–89 (Bankr. M.D. Pa. 1999) (dismissing the debtor’s petition under § 707(a) due to his fraudulent conduct, which indicated that he lacked good faith); *In re Griffith*, 209 B.R. at 827 (dismissing the debtors’ Chapter 7 petition because the debtors were unwilling to alter their comfortable lifestyle to be able to afford to repay their creditors).

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holding, these courts have misread the Code and have inserted a factual and subjective inquiry into a subsection that is intended to ensure compliance with the technical and procedural requirements of filing for bankruptcy.<sup>21</sup> The relevant inquiry concerns only whether the debtor has met these procedural requirements and has passed the means test, an objective inquiry that looks to see whether his income exceeds the median income of his state of residence (“state median income”).<sup>22</sup> The analysis therefore turns not on the financial situation of the debtor, but on whether his case is procedurally sound.

This Comment argues that under § 707(a), bad faith should not constitute cause for dismissal. Part I provides an overview of the overarching purpose of the bankruptcy system and of § 707. It then summarizes the existing circuit split over whether § 707(a) permits courts to grant bad faith dismissals and concludes by discussing the congressional intent behind the BAPCPA. Next, Part II provides a comprehensive statutory construction analysis of § 707(a) that addresses the continued preservation of the distinct analyses under the two subsections, the alternative remedies that are provided in other sections of the Code, and the distinguishing factors between Chapter 7 cases and cases filed under Chapter 11 and 13.

Part III explains why the judicial discretion exercised by courts in broadly interpreting § 707(a) to grant bad faith dismissals is both problematic and excessive, especially in light of the BAPCPA. After analyzing the positive movement towards a less subjective inquiry and towards adopting the Ninth Circuit’s general rejection of bad faith dismissals, Part III closes by using an exemplar case to demonstrate the practical consequences of the continued misinterpretation. Part IV concludes with the recommendation that courts should no longer grant bad faith dismissals under § 707(a) and urges Congress to enact more objective standards and clearly articulate its intentions through amendments or additions to the Code in order to increase consistency among decisions in the lower courts.

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21. See *In re Griffith*, 209 B.R. at 827 (enumerating six common factors that courts have considered in determining whether the petition was filed in bad faith); Kennedy, *supra* note 15, at 395–99 (listing factors that courts commonly considered when determining whether the debtor filed in bad faith as well as decisions in which the courts have applied the “judge-made rule that bad faith constitutes cause for dismissal under section 707(a) allowing the courts to ‘weed out’ undeserving chapter 7 debtors”).

22. See *infra* notes 49–51 and accompanying text (discussing the debtor’s eligibility for Chapter 7 bankruptcy based on whether his income exceeds or falls below the state median income).

## I. BACKGROUND

The bankruptcy system serves to provide a “fresh start,” but not a head start,<sup>23</sup> for the “honest but unfortunate debtor.”<sup>24</sup> Bankruptcy is not a right, but a privilege that furnishes remedies to both creditors and debtors<sup>25</sup> and should not be used to eliminate the obligations of debtors who are capable of paying all or a portion of their debts.<sup>26</sup> Debtors, however, may attempt to file for bankruptcy in hopes of cheating their creditors from partial or even full repayment and may incur debt with the intention of purposefully discharging it by filing for bankruptcy.<sup>27</sup> The bankruptcy system seeks to eliminate such opportunistic filings because they are an abuse of the system.<sup>28</sup>

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23. See *In re Krohn*, 886 F.2d 123, 127–28 (6th Cir. 1989), *aff'g In re Krohn*, 79 B.R. 829 (Bankr. N.D. Ohio 1987) (affirming the bankruptcy court’s dismissal on the grounds that granting relief would constitute substantial abuse and that the debtor “appear[ed] to be seeking a ‘head start’ with no attempt to deal with creditors on an equitable basis” (quoting *In re Krohn*, 79 B.R. at 833)); *McLaughlin v. Jones (In re Jones)*, 114 B.R. 917, 925 (Bankr. N.D. Ohio 1990) (“The Bankruptcy Code is intended to serve those persons who, despite their best efforts, find themselves hopelessly adrift in a sea of debt. Bankruptcy protection was not intended to assist those who, despite their own misconduct, are attempting to preserve a comfortable standard of living at the expense of their creditors.”); *In re Brown*, 88 B.R. 280, 285 (Bankr. D. Haw. 1988) (emphasizing that, granting a debtor who seeks to discharge his debts while shielding his wealth defeats the purpose of bankruptcy of providing a “fresh start” and instead permits the debtor to “live like a king”).

24. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (stating that the purpose of bankruptcy is to give “the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy[] a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt”).

25. See *In re Khan*, 172 B.R. 613, 625 (Bankr. D. Minn. 1994) (noting that many sections of the Code, including §§ 522, 523, and 727 provide creditors with alternative remedies that minimizes the risk of the total loss of assets and dismissal of the petition); Tribble, *supra* note 3, at 789 (relaying that through bankruptcy, creditors are repaid at least a portion of the outstanding debt and debtors can obtain a fresh start to help them get back on their feet).

26. See *National Bankruptcy Review Commission Report: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 105th Cong. 3 (Nov. 13, 1997) (testimony of Rep. George Gekas, Chairman, Subcomm. on Commercial and Admin. Law) (“Historically, bankruptcy was intended as a last resort, pursued only under the most dire of situations; for instance, the loss of a job, an illness in the family, death of a spouse. Unfortunately, bankruptcy has become a way for reckless spenders to escape their debts.”).

27. See *In re Brown*, 88 B.R. 280, 284 (Bankr. D. Haw. 1988) (asserting that Congress never intended for bankruptcy to serve as “a refuge for the unscrupulous and cunning individual”); 151 CONG. REC. E737 (daily ed. Apr. 22, 2005) (statement of Rep. Tiahrt) (emphasizing debtor’s abuse of bankruptcy by using it “as a tool for fraud to cheat their way out of debt”).

28. See H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 (“The purpose of the [BAPCPA] is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”).

A. *An Overview of Bankruptcy Cases Under Chapters 7, 11, and 13 and a Debtor's Eligibility for Each Chapter*

Chapter 7 bankruptcy, otherwise known as liquidation, requires the debtor to relinquish all assets in which he has a legal or equitable interest, except for assets that may be claimed as exempt, in return for a complete discharge of all of his debts.<sup>29</sup> In this orderly, court-supervised procedure, the trustee liquidates the debtor's non-exempt assets, or in other words, reduces them to cash, and distributes the proceeds to the creditors.<sup>30</sup> Congress designed this type of bankruptcy to be available only to the "honest but unfortunate debtor," one who is truly unable to repay his debts now or in the future.<sup>31</sup>

Unlike liquidation, a Chapter 11 or 13 reorganization case allows the debtor to restructure his financial situation and keep his assets while repaying his creditors under a payment plan approved by the court.<sup>32</sup> A debtor who wishes to avoid liquidation and continue engaging in business typically files under Chapter 11 bankruptcy.<sup>33</sup> On the other hand, a case under Chapter 13 is usually filed by a debtor who has regular income but seeks a payment plan to "catch up" on overdue payments.<sup>34</sup>

In reorganization, the debtor must propose a repayment plan typically lasting three to five years under which he will repay his creditors by making regular predetermined payments to the trustee.<sup>35</sup>

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29. See 11 U.S.C. §§ 109, 726 (2006) (delineating the eligibility and property distribution requirements of Chapter 7 bankruptcy).

30. JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY BASICS 6 (3d ed. 2009), available at <http://www.uscourts.gov/bankruptcycourts/bankbasics.pdf>. The proceeds are distributed by priority and secured creditors have priority over unsecured creditors. *Id.* at 17–18.

31. See H.R. REP. NO. 55–65, at 32 (1897) (“[W]hen an honest man is hopelessly down financially, nothing is gained for the public by keeping him down, but, on the contrary, the public good will be promoted by having his assets distributed ratably as far as they will go among his creditors and letting him start anew.”).

32. H.R. REP. NO. 109–31, pt. 1, at 10–11 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 97; see DUFF, *supra* note 30, at 25–26 (detailing the factors considered in preparing a repayment plan and a timeline of events leading up to the confirmation hearing). The payment amounts are calculated based on the debtor's anticipated income over the life of the plan. *Id.* at 26.

33. See DUFF, *supra* note 30, at 31 (detailing whether personal and/or business assets are placed at risk when different types of businesses, which include corporations, sole proprietorships, and partnerships, file for bankruptcy).

34. See *id.* at 7 (noting also that Chapter 13 bankruptcy is utilized by debtors ineligible for Chapter 7 bankruptcy). Chapter 13 bankruptcy, however, is limited to debtors whose unsecured debts do not exceed \$336,900 and whose secured debts do not exceed \$1,010,650; these limits are adjusted periodically to match the changes in the consumer price index. *Id.* at 22.

35. See *id.* at 22, 30 (explaining that, for cases involving individuals, the payment plan will typically last three years if the debtor's income is less than the median

Unlike liquidation, where the debtor is required to relinquish all claims to non-exempt assets, under reorganization, the debtor must turn over all of his projected disposable income.<sup>36</sup> In return, while the plan is in effect and while the debtor continues to make timely payments, he is protected from all lawsuits, garnishments, and actions by creditors seeking recovery of the outstanding debt.<sup>37</sup> The debts covered by the plan are discharged once the payment plan is satisfied and paid in full.<sup>38</sup>

*B. Dismissal of Chapter 7 Bankruptcy Cases Under 11 U.S.C. § 707*

Under § 707 of the Code, a creditor or trustee can move to dismiss or convert a Chapter 7 bankruptcy case to a case under Chapter 11 or Chapter 13.<sup>39</sup> Section 707(a) allows a court to dismiss or convert a case “for cause” and enumerates three examples of “cause”:

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file . . . the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.<sup>40</sup>

These enumerated causes are technical and procedural in nature and are not exhaustive.<sup>41</sup>

Congress amended the Code in 1984 and added § 707(b) to apply specifically to cases filed by debtors with “primarily consumer debts.”<sup>42</sup>

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income of his state of residence, while if the debtor’s income exceeds his state’s median income, the payment plan will generally be for five years).

36. *See id.* at 25 (noting that in return for relinquishing all projected disposable income, the debtor may not be required to pay off all of his unsecured debt). Disposable income is the debtor’s income “less amounts reasonably necessary for the maintenance or support of the debtor or dependents and less charitable contributions up to 15% of the debtor’s gross income.” *Id.* at 26.

37. *See id.* at 24 (discussing the automatic stay provided under § 362).

38. *Id.* at 27. Discharge applies to some, but not all of the debtor’s debts. *Id.* For example, § 523 of the Code provides nineteen categories of debt that are excepted from discharge under Chapter 7 bankruptcy and additional debts are excepted from discharge under Chapter 13 bankruptcy. *See infra* Part II.B (discussing the other sections of the Code that prevent total discharge of a debtor’s debt).

39. 11 U.S.C. § 707(b)(1) (2006).

40. *Id.* § 707(a).

41. *See* S. REP. NO. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880 (“These causes are not exhaustive, but *merely illustrative.*” (emphasis added)).

42. H.R. REP. NO. 109-31, pt. 1, at 11–13 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 98. Under § 101(8), consumer debt is defined as debt “incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8). To meet the threshold of “primarily consumer debts,” the debts “must exceed more than half the total debt for dismissal under § 707(b).” *Id.*; *see also* Stewart v. U.S. Trustee (*In re* Stewart), 175 F.3d 796, 808 (10th Cir. 1999) (drawing the definition of “primarily” from a non-bankruptcy context to mean “more than fifty percent”).

If the court finds that granting relief under Chapter 7 would constitute “substantial abuse” of the bankruptcy system or that the debtor can, without undue hardship, repay a significant portion of his debt under a reorganization payment plan, the court may order the case to be dismissed or converted to a Chapter 11 or 13 case.<sup>43</sup> Section 707(b) was added in response to concerns that debtors would turn to bankruptcy relief to avoid satisfying their obligations despite being able to pay.<sup>44</sup>

The BAPCPA left § 707(a) completely unchanged but significantly amended § 707(b).<sup>45</sup> First, for a court to consider a motion to dismiss under § 707(b), creditors and trustees now only bear the burden of establishing that granting the debtor bankruptcy relief would be an “abuse” and not a “substantial abuse” of the bankruptcy system.<sup>46</sup> This makes it easier for creditors and trustees to move to dismiss a case and eliminates some of the leeway a debtor previously enjoyed in filing for bankruptcy.<sup>47</sup> Second, if a presumption of abuse does not arise or is rebutted, courts may grant dismissal or conversion if the creditors or trustees can establish that the debtor filed the petition in bad faith or that the totality of the circumstances of the debtor’s financial situation demonstrates abuse.<sup>48</sup>

Additionally, Congress increased the impartiality of § 707(b) by adding the means test, a two-step objective test that determines the debtor’s eligibility to file for Chapter 7 bankruptcy.<sup>49</sup> First, if the

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43. 11 U.S.C. § 707(b); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992) (holding that the essential inquiry is whether the debtor’s ability to repay his creditors with future income constitutes abuse).

44. H.R. REP. NO. 109-31, pt. 1, at 12 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 98.

45. 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 11 U.S.C.). *See generally* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665 (2005) (detailing the new provisions contained in the amended § 707(b) and the factors considered in the new analysis).

46. 11 U.S.C. § 707(b)(1).

47. The “substantial abuse” standard was implemented by the Bankruptcy Amendments and Federal Judgeship Act of 1984 but was never defined. *See* H.R. REP. NO. 109-31, pt. 1, at 12 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 98 (“The standard for dismissal—substantial abuse—is inherently vague, which has lead [sic] to its disparate interpretation and application by the bankruptcy bench. Some courts, for example, hold that a debtor’s ability to repay a significant portion of his or her debts out of future income constitutes substantial abuse and therefore is cause for dismissal; others do not.” (citations omitted)).

48. 11 U.S.C. § 707(b)(3).

49. *See* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 232–34, 237 (2005) (providing a comprehensive discussion of the means test and the new provisions contained in § 707(b)). Section 707(b)(2)(A)(i) provides, in relevant part:

debtor’s current monthly income is less than the median income of the state in which he resides, he is eligible for Chapter 7 bankruptcy.<sup>50</sup> In cases where the debtor’s income exceeds the state median income, the second prong of the means test applies, and the debtor may file for bankruptcy if his disposable income does not exceed \$166.67 per month.<sup>51</sup> If the debtor fails both prongs, a presumption of abuse arises, and the debtor is ineligible for bankruptcy relief unless he rebuts the presumption.<sup>52</sup>

To rebut the presumption of abuse, the debtor may make a showing of special circumstances that justifies any additional expenses or adjustments to his income.<sup>53</sup> Congress, however, imposed limitations on the amount allowed of these additional expenses and income adjustment.<sup>54</sup> If the presumption is successfully

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[T]he court shall presume abuse exists if the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$6,000, whichever is greater; or (II) \$10,000.

11 U.S.C. § 707(b)(2)(A)(i).

50. 11 U.S.C. § 707(b)(2)(A); see Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463, 469–70 (2007) (detailing the calculations involved to determine a debtor’s current monthly income and its comparison with the state median income for a family of the same size).

51. See 11 U.S.C. § 707(b)(2)(A) (providing a formula to determine when a debtor can properly file for bankruptcy, whereby if a debtor’s current monthly income exceeds \$166.67, his income would exceed the \$10,000 limit when multiplied by sixty, leading the court to presume abuse); Tabb & McClelland, *supra* note 50, at 470–71 (explaining the six-step computation contained in Form B22A filed by debtors that is used to determine whether a presumption of abuse arises); Wedoff, *supra* note 49, at 238–39 (explaining the applicable median income utilized to determine whether a creditor has standing to bring a motion to dismiss under § 707(b) and providing an overview of the means test). The debtor’s disposable income is his current monthly income less his necessary expenses, average monthly payments of secured debts, and expenses for payment of all priority claims. *Id.* at 240. The debtor’s monthly expenses is not the debtor’s *actual* monthly expenses, but is limited to reasonable and necessary expenses, which include food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous expenses. *Id.* at 252–54. Other expenses that may be included in the debtor’s monthly expenses are delineated in § 707(b)(2)(A)(ii). *Id.* at 264–71. Sections 707(b)(A)(2)(iii) and 707(b)(2)(A)(iv) detail the calculations performed to determine the deductions for secured and priority claims, respectively. *Id.* at 273–75.

52. 11 U.S.C. § 707(b)(2)–(3).

53. *Id.* § 707(b)(2)(B); e.g., *In re Johns*, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006) (delineating two examples of special circumstances listed in § 707(b)(2)(B) that may rebut a presumption of abuse: (1) serious medical condition and (2) a call to active duty in the Armed Forces).

54. 11 U.S.C. § 707(b)(2)(B)(iv); see Tabb & McClelland, *supra* note 50, at 498–500 (providing examples of special circumstances that could rebut the presumption of abuse but emphasizing the need to establish the circumstances that fall into this category because bankruptcy judges have been overly generous in allowing “almost anything [to] qualify, as long as the debtor can show necessity, reasonableness, and lack of a reasonable alternative” (internal footnote omitted) (citing 11 U.S.C. § 707(b)(2)(B)(i))).

rebutted or does not arise, the court will consider whether granting relief would constitute an abuse of the system by examining whether the debtor filed in bad faith or whether the totality of the circumstances of the debtor's financial situation demonstrates abuse.<sup>55</sup>

*C. Circuit Courts of Appeals Were Split Over Whether Bad Faith Dismissals Should Be Granted Under § 707(a)*

While the United States Court of Appeals for the Ninth Circuit generally has not required that the debtor file for bankruptcy in good faith, the United States Courts of Appeals for the Third, Sixth, and Eighth Circuits have imposed this good faith filing requirement. The Sixth Circuit established the implicit good faith filing requirement by broadly interpreting the language of § 707(a) and by focusing heavily on the word "including," which it believed demonstrated Congress' intent that the enumerated causes be non-exhaustive.<sup>56</sup> The Third, Sixth, and Eighth Circuits have made factual inquiries as to the existence of good faith at the time the debtor filed for bankruptcy and have considered a variety of factors in these inquiries, resulting in bad faith dismissals under § 707(a).<sup>57</sup>

The Third and Sixth Circuits have applied the broadest interpretation of § 707(a) and held that a debtor's lack of good faith alone is a sufficient justification to dismiss "egregious cases" under Chapter 7.<sup>58</sup> "Egregious cases" involve concealment or misrepresentation of assets and income, a lavish lifestyle, or an intent to avoid considerable debt through fraud, misconduct, or gross negligence by the debtor.<sup>59</sup>

In *In re Zick*,<sup>60</sup> the Sixth Circuit dismissed a Chapter 7 petition because the debtor, who incurred a court-induced mediation award

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55. 11 U.S.C. § 707(b)(3); see Tabb & McClelland, *supra* note 50, at 500–01 (discussing the court's analysis under § 707(b)(3) and listing factors courts have considered in the past in their analyses of the "totality of the circumstances" of a case).

56. See *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1126–27 (6th Cir. 1991) (placing heavy emphasis on the word "including" and stating that it was "not meant to be a limiting word").

57. See *infra* notes 58–80 and accompanying text (discussing the circuit split over whether § 707(a) permits courts to grant bad faith dismissals).

58. E.g., *In re Zick*, 931 F.2d at 1129; *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 207 (3d Cir. 2000) (quoting *In re Zick*, 931 F.2d at 1129).

59. *In re Zick*, 931 F.2d at 1129; see also *In re Sudderth*, No. 06-10660, 2007 WL 119141, at \*2 (Bankr. M.D.N.C. Jan. 9, 2007) (expanding the definition of "egregious cases" to include any abuse of the provisions, purpose, or spirit of the bankruptcy system).

60. 931 F.2d 1124 (6th Cir. 1991).

of \$600,000 a few days before filing the petition, failed to make a showing that he filed for bankruptcy in good faith.<sup>61</sup> In addition to finding that the petition was filed in response to the mediation award, the court found that the debtor’s manipulations reduced the number of creditors to one, the debtor failed to change his lifestyle or make any effort to repay his debt, and the debtor’s use of Chapter 7 bankruptcy was unfair.<sup>62</sup> The Sixth Circuit held that, as a matter of “smell,”<sup>63</sup> the debtor’s failure to present evidence as to why his petition should not have been dismissed and why he made no effort to repay his debt eliminated the need for an evidentiary hearing and warranted dismissal of the case.<sup>64</sup>

The Third Circuit has similarly granted motions to dismiss under § 707(a) upon finding that the debtor failed to meet his burden of proving that he filed the petition in good faith after the creditor alleged that he filed in bad faith.<sup>65</sup> In *In re Tamecki*,<sup>66</sup> the court held that the debtor’s assertion that he incurred the debt for subsistence purposes but intended to repay the debt was insufficient to establish that he filed in good faith.<sup>67</sup> The debtor acquired a “comparatively large consumer debt” right before filing for bankruptcy and continued to use his exempted property.<sup>68</sup> The court held that these factors sufficiently questioned the existence of good faith to justify dismissal of the case.<sup>69</sup>

The Third and Sixth Circuits have placed heavy emphasis on the role of bankruptcy courts as courts of equity that focus on what is fair

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61. *Id.* at 1125, 1129.

62. *Id.* at 1128. The court also emphasized that the debtor’s financial statements indicated that he continued to receive \$7,000 a month from his pension plan benefits, that his non-debtor spouse had additional income, and that he possessed other property worth \$90,000. *Id.*

63. *See id.* at 1127–28 (applying the “smell test” established in *Morgan Fiduciary, Ltd. v. Citizens & S. Int’l Bank*, 95 B.R. 232, 234 (S.D. Fla. 1988), which is “far from being merely a subjective olfactory whim; it is based on numerous objective factors”). In *Morgan Fiduciary*, the bankruptcy court stated that in some situations, judges will find that “a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink.” *Morgan Fiduciary*, 95 B.R. at 234.

64. *In re Zick*, 931 F.3d at 1129.

65. *E.g.*, *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 207 (3d Cir. 2000) (citing positively to the Sixth Circuit’s decision in *In re Zick*). Courts in the Second Circuit have also followed *In re Zick* by dismissing cases that lack a showing of good faith, but the Second Circuit has yet to rule on whether bad faith constitutes cause for dismissal under § 707(a). *E.g.*, *In re O’Brien*, 328 B.R. 669, 674 (Bankr. W.D.N.Y. 2005); *Blumenberg v. Yihye (In re Blumenberg)*, 263 B.R. 704, 712 (Bankr. E.D.N.Y. 2001).

66. 229 F.3d 205 (3d Cir. 2000).

67. *Id.* at 208.

68. *Id.* at 207–08.

69. *Id.*

and just,<sup>70</sup> and many other courts have applied similar reasoning to justify granting dismissal upon a finding of bad faith.<sup>71</sup> They have not only focused on preserving the integrity of the bankruptcy system but have also highlighted the importance of providing a fresh start only to the “honest but unfortunate debtor” who has “clean hands and an honorable purpose.”<sup>72</sup> Further, they have also reasoned that it was not an abuse of discretion to conclude that the debtor lacked good faith because these inquiries were carefully confined to “egregious cases.”<sup>73</sup>

On the other hand, the Eighth Circuit has upheld a narrower reading of § 707(a) and has limited bad faith dismissals to cases involving “extreme misconduct falling outside the purview of more specific Code provisions.”<sup>74</sup> In doing so, it has maintained a stronger focus on the text of the standard of dismissal under § 707(a) than the Third and Sixth Circuits.

For example, in *In re Huckfeldt*,<sup>75</sup> the Eighth Circuit found that the debtor filed the petition for Chapter 7 bankruptcy to frustrate the divorce court decree and force his ex-wife into bankruptcy.<sup>76</sup>

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70. *E.g.*, *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1126 (6th Cir. 1991) (noting that bankruptcy judges have discretion to dismiss a petition because equitable principles may be considered when interpreting and applying the Code (citing *Peterson v. Atlas Supply Corp. (In re Atlas Supply Corp.)*, 857 F.2d 1061, 1063 (5th Cir. 1988)); *In re Madeline Marie Nursing Homes*, 694 F.2d 433, 436 (6th Cir. 1982) (“As courts of equity, bankruptcy courts ‘will look through the form to the substance of any particular transaction and may contrive new remedies where those in law are inadequate. Where the Bankruptcy Act is silent, equitable principles will govern.” (quoting 1 COLLIER ON BANKRUPTCY ¶ 2.09, at 173–75 (14th ed. 1974))); *In re Jabarin*, 395 B.R. 330, 339–40 (Bankr. E.D. Pa. 2008) (applying a balancing test involving a factually intensive assessment that considers the debtor’s situation as well as the effects of dismissal on the creditors and that provides courts with the flexibility to make an “equitable determination” as to whether dismissal is proper).

71. *See, e.g.*, *Bilzerian v. SEC (In re Bilzerian)*, 276 B.R. 285, 293–95 (M.D. Fla. 2002) (adopting the holding in *In re Zick* and finding that the debtor’s motives and inability to discharge any debt constituted sufficient grounds for dismissal under § 707(a)). *But see In re Linehan*, 326 B.R. 474, 477–78 (Bankr. D. Mass. 2005) (adopting the narrower reading of § 707(a) of the Eighth Circuit to hold that bad faith dismissals should only be implemented in egregious cases because of the lack of statutory authority).

72. *McLaughlin v. Jones (In re Jones)*, 114 B.R. 917, 926 (Bankr. N.D. Ohio 1990) (citing *In re Brown*, 88 B.R. 280, 284 (Bankr. D. Haw. 1988)); *see also In re Motaharnia*, 215 B.R. 63, 68 (Bankr. C.D. Cal. 1997) (holding that bad faith may constitute cause only in egregious situations where the debtor’s motives are inconsistent with the purpose of the Code).

73. *In re Zick*, 931 F.2d at 1128–29. Some bankruptcy courts have even justified dismissals for lack of good faith by stating that they have an inherent authority to control their own docket. *In re Jones*, 114 B.R. at 926 (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)).

74. *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994) (citing *In re Khan*, 172 B.R. 613, 624–26 (Bankr. D. Minn. 1994)).

75. 39 F.3d 829 (8th Cir. 1994).

76. *Id.* at 832.

The court held that such extreme conduct made the debtor “anything but an ‘honest but unfortunate debtor,’” justifying dismissal for bad faith.<sup>77</sup> Other examples of “extreme misconduct” included using bankruptcy as a “scorched earth” tactic against a diligent creditor or as protection against litigation when the debtor was not in a state of financial distress.<sup>78</sup>

In narrowing the permissible scope of bad faith dismissals, the Eighth Circuit expressed concern that courts following the Sixth Circuit’s approach could use the good faith inquiry as a “loose cannon” to justify bad faith dismissals of debtors “whose values do not coincide precisely with those of the court.”<sup>79</sup> It argued that the “broadly-framed maxims” applied by the Third and Sixth Circuits can lead only to one possible outcome: ejection of a debtor from the protection of the bankruptcy system because he was not as “deserving” as other petitioners.<sup>80</sup> The Eighth Circuit also rejected the implicit good faith filing requirement as it was drawn from too broad of a reading of § 707(a) and remains unsupported by any provision pertaining to Chapter 7.<sup>81</sup>

Lastly, in *In re Padilla*,<sup>82</sup> the Ninth Circuit held that bad faith generally does not constitute cause for dismissal under § 707(a).<sup>83</sup> In this case, the debtor accrued almost \$100,000 of credit card debt that was related to gambling, giving rise to the trustee’s allegation that the debtor performed a “credit card bust-out” during the ten months before he filed his petition for bankruptcy.<sup>84</sup> The trustee also argued that based on his assets and financial situation, the debtor did not have the ability to repay his debt.<sup>85</sup>

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77. *Id.*

78. See *In re Khan*, 172 B.R. at 624–26 (noting that a bad faith filing exists if the debtor files for bankruptcy to hide from adjudication in another court).

79. *In re Huckfeldt*, 39 F.3d at 832 (quoting *Sinkow v. Latimer* (*In re Latimer*), 82 B.R. 354, 364 (Bankr. E.D. Pa. 1988)).

80. *In re Khan*, 172 B.R. at 620 (characterizing the debtor as a “rapacious and unworthy person who has attempted to subvert statutory remedies meant only for more ‘deserving’ and more impecunious petitioners”).

81. See *id.* at 621 (asserting that the implicit good faith filing requirement serves to better a layperson’s perception, and not a professional’s understanding, of the judicial process).

82. *Neary v. Padilla* (*In re Padilla*), 222 F.3d 1184 (9th Cir. 2000).

83. *Id.* at 1192–93.

84. See *id.* at 1187–88 (stating that a “credit card bust-out” occurs when a debtor accumulates “consumer debt in anticipation of filing for bankruptcy”); *Culhane & White*, *supra* note 45, at 698–99 (discussing that credit card “bust-outs” are commonly targeted misconduct under § 707(b)(3) but should properly be denied discharge under § 523 because § 707 defeats the protections afforded to debtors).

85. *In re Padilla*, 222 F.3d at 1187–88. Specifically, the trustee noted that the debtor’s take-home pay of \$1950 barely covered his monthly expenses of \$1830 and that his “assets consisted of his house and personal property.” *Id.* at 1187.

In denying the trustee's motion to dismiss, the court focused on two primary considerations. First, the court looked to the canons of statutory construction, which require that the more specific provisions take precedence over general provisions, regardless of the order of enactment.<sup>86</sup> Since a bad faith inquiry is provided under § 707(b), framing a § 707(a) analysis around bad faith misdirects the court from the actual focus of the inquiry: whether the debtor violated any of the technical and procedural requirements that constitute cause for dismissal.<sup>87</sup>

Second, the court distinguished cases under Chapters 11 and 13 from Chapter 7 cases and found that bad faith can *per se* constitute cause for dismissal of a Chapter 11 or 13 case,<sup>88</sup> but may not justify dismissal of a Chapter 7 case under § 707(a).<sup>89</sup> The court also noted that the debtor's debts were solely consumer debts, indicating that the case could have properly been brought under § 707(b), which addresses misconduct including credit card bust-outs.<sup>90</sup> The debtor did not falsify information or delay the administration of the proceedings and met all of the technical and procedural requirements to file for bankruptcy under Chapter 7.<sup>91</sup> As a result,

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The debtor's house had a fair market value of \$115,000 but was mortgaged for \$145,000, and the debtor claimed an exemption for most of his personal property, which was valued at \$11,745. *Id.* at 1187–88.

86. *Id.* at 1192 (citing *In re Khan*, 172 B.R. at 624). The court noted four available protections in the Code that allow creditors and trustees to object to debt discharge, including §§ 523, 727, 707(a), and 707(b). *Id.* at 1191–92.

87. *In re Padilla*, 222 F.3d at 1192 (citing *Huckfeldt v. Huckfeldt* (*In re Huckfeldt*), 39 F.3d 829, 832 (8th Cir. 1994)). *But see In re Brown*, 88 B.R. 280, 283–85 (Bankr. D. Haw. 1988) (holding that “[g]ood faith is an implicit jurisdictional requirement” that calls for an inquiry into any abuse of the purpose or provisions of the bankruptcy system and whether the debtor is an “honest but unfortunate debtor” who deserves a “fresh start” and justifying the bad faith dismissal under § 707(a) by noting that the debtor must be willing to use all resources to try to pay his creditors because the bankruptcy court “is a [c]ourt of equity and a person seeking relief under the Code must come in with clean hands, with an honorable purpose”).

88. *Id.* at 1193; see 11 U.S.C. §§ 1129, 1325 (2006) (providing that a court may confirm a reorganization repayment plan only if it is proposed in good faith). The court emphasized that unlike liquidation, the debtor-creditor relationship is maintained after the debtor files for Chapter 11 or 13 reorganization in support of allowing bad faith to be a *per se* cause for dismissal in reorganization but not in liquidation. *In re Padilla*, 222 F.3d at 1193.

89. *In re Padilla*, 222 F.3d at 1192–93.

90. *Id.* at 1193. The court discussed the purpose of § 707(b), which Congress enacted specifically as a remedy for abusive filings that allows courts “to prevent the discharge of debt owed by non-needy consumer debtors and to deal equitably when an unscrupulous consumer attempts to use the bankruptcy court as part of a scheme to take unfair advantage of his creditors.” *Id.* at 1194 (quoting *In re Motaharnia*, 215 B.R. 63, 67 (Bankr. C.D. Cal. 1997)).

91. *Id.* at 1193.

the court voided the bankruptcy court’s discharge of the debtor’s debt and held that cause did not exist to justify dismissal.<sup>92</sup>

*D. Bankruptcy Reform Through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*

In an attempt to control the rise of bankruptcy filings and eliminate opportunistic and abusive filings,<sup>93</sup> the National Bankruptcy Review Committee held numerous hearings to entertain continued discussion over the proposed means test and other suggested amendments.<sup>94</sup> Proponents highlighted four main factors to emphasize the need for bankruptcy reform.<sup>95</sup> First, the alarming increase of consumer bankruptcy filings did not appear to be a temporary event, but instead a trend that would continue if Congress failed to take action.<sup>96</sup> Second, significant losses from the discharge of debt borne by creditors were also borne by the whole economy because the creditors’ losses translated into a “tax” on every household in the nation.<sup>97</sup> Additionally, the loopholes in the Code provided numerous opportunities for abusive filings.<sup>98</sup> Lastly, a

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92. *Id.* at 1194.

93. Opportunistic filings are those in which the consumers file for Chapter 7 bankruptcy as an easy way out or for those who incur debt with the intention of discharging it in bankruptcy. *See generally* Elijah M. Alper, Note, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay Up*, 107 COLUM. L. REV. 1908 (2007) (arguing that although the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 eliminated loopholes previously exploited by “opportunistic debtors,” the law will ultimately encourage these debtors to adopt “informal bankruptcy” tactics to evade the spirit of the law).

94. *See* H.R. REP. NO. 109-31, pt. 1, at 6–14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92–101 (detailing Congress’ attempt at passing bankruptcy reform legislation, which had been ongoing for eight years); *see also* Robert J. Landry, III, *The Means Test: Finding a Safe Harbor, Passing the Means Test, or Rebutting the Presumption of Abuse May Not Be Enough*, 29 N. ILL. U. L. REV. 245, 246 (2009) (emphasizing that the bankruptcy reform debates have been ongoing for five different sessions of Congress). *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (discussing the debates and amendments, proposed and rejected, leading up to the enactment of the BAPCPA and the means test).

95. H.R. REP. NO. 109-31, pt. 1, at 3–5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90–92.

96. *See id.* at 3–4, *reprinted in* 2005 U.S.C.C.A.N. 88, 90–91 (highlighting the increase in bankruptcy filings from one million in 1998 to 1.6 million in 2004 to counter the opponents’ contentions that abusive filings were not widespread and that “most bankruptcy filings result from causes beyond debtors’ control, such as family illness, job loss or disruption, or divorce”).

97. *See id.* at 4–5, *reprinted in* 2005 U.S.C.C.A.N. 88, 91 (examining the \$18.9 billion in losses incurred by credit card companies due to consumer bankruptcy filings in 2002 and approximately \$900 million Congress anticipates credit unions will lose from consumer bankruptcy filings in 2004).

98. *See id.* at 5, *reprinted in* 2005 U.S.C.C.A.N. 88, 92 (stating that although trustees bring actions against abusive filings, the trustees have found that these filings

debtor who was able to repay a significant portion of his debt may have successfully obtained debt discharge through bankruptcy.<sup>99</sup>

As a result, the BAPCPA was enacted to provide reform measures that served “to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”<sup>100</sup> It focused on controlling the increase in bankruptcy filings by imposing additional requirements on debtors wishing to obtain bankruptcy relief and by highlighting problems—such as the lack of personal financial accountability and the absence of effective oversight to eliminate abusive filings—that needed to be remedied.<sup>101</sup> Bad faith, however, was never enumerated as a cause for dismissal under § 707(a), and the language and scope of this technical and procedural subsection remained entirely unchanged.<sup>102</sup> Thus, Congress maintained consistency with its previous statement that a “debtor’s ability to repay his debts, in whole or in part,” does not constitute “adequate cause for dismissal.”<sup>103</sup>

Many disapproved of the means test—the heart of the bankruptcy reform<sup>104</sup>—and contended that this screening mechanism eliminated too much judicial discretion.<sup>105</sup> They argued that determining a

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are more widespread than expected); *see also infra* note 267 (detailing the enforcement actions brought by U.S. Trustees).

99. H.R. REP. NO. 109-31, pt. 1, at 5 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92.

100. *Id.* at 2, *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

101. *Id.*

102. *See* Kimlinger & Wassweiler, *supra* note 15, at 64 (“Where Congress intended to impose a good faith requirement it specifically did so.”). The sole instance of an explicit good faith filing requirement in the entire legislative history of the Code was Section 74 of the Bankruptcy Act of 1933, which required judges to make a finding that the petition was filed in good faith for the case to move forward. *Id.* This provision was repealed in the Bankruptcy Act of 1938. *Id.* Despite the continued good faith inquiries by a number of courts, its absence in the Code should indicate that Congress intended to exclude grants of bad faith dismissals under § 707(a) and to limit it to § 707(b). *See id.* at 63–66.

103. *Perlin v. Hitachi Capital Am. Corp.*, 497 F.3d 364, 372 (3d Cir. 2007) (citing S. Rep. No. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880; H.R. Rep. No. 5963, at 380 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6336); *see In re Glunk*, 342 B.R. 717, 735 (Bankr. E.D. Pa. 2006) (“[D]ismissal based on a debtor’s ability to pay should be disfavored given the detailed, explicit standards for dismissal that Congress has established in § 707(b).”).

104. *See* 151 CONG. REC. S1779 (daily ed. Feb. 28, 2005) (remarks of Sen. Specter) (“The heart of this [BAPCPA] bill is a means test. It requires the bankruptcy trustee to examine the income and expenses of high income debtors and determine whether they have the ability to pay something toward their debts.”).

105. *See* Tribble, *supra* note 3, at 799–804 (2007) (arguing that in mandating judges to use a rigid means test, the BAPCPA wrongfully curtailed judicial discretion); *see also* Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy’s Social Insurance Function After BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241, 248–52 & 249 n.47 (2009) (detailing the debate leading up to the enactment of the

debtor’s eligibility to file for Chapter 7 bankruptcy based merely on a mechanized objective formula is overly strict and does not allow sufficient consideration of special circumstances.<sup>106</sup> In particular, they raised the concern that the means test risks barring an “honest but unfortunate debtor” from relief<sup>107</sup> and that its loopholes may allow an undeserving debtor to slip through the cracks and receive bankruptcy relief.<sup>108</sup> As a result, these opponents of the means test highlighted the importance of balancing the interests of the creditors and debtors in support of a system in which bankruptcy courts retain discretion to perform a factual analysis under § 707(a) and consider the specific circumstances of the debtor’s financial situation.<sup>109</sup>

## II. A STATUTORY CONSTRUCTION ANALYSIS INDICATES THAT BAD FAITH DISMISSALS SHOULD NOT BE GRANTED UNDER § 707(a)

Section 707(a) allows the court to dismiss a case after notice and hearing and only for cause, *including* unreasonable delay prejudicial to creditors, nonpayment of required fees and charges, and failure of the debtor to provide required information, including schedules and statements.<sup>110</sup> The language of § 707(a) offers no support for a good faith filing requirement in Chapter 7 cases.<sup>111</sup> Additionally, the

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BAPCPA and listing the many concerns of the National Bankruptcy Review Commission dissenters).

106. See Tribble, *supra* note 3, at 792 (emphasizing that the means test problematically limited a judge’s discretion to adjust the result based on the facts of the bankruptcy case).

107. See *id.* at 804–05 (noting that the means test fails to distinguish a “chronic overspender [from] a family forced into bankruptcy by a large and unexpected expense and the mechanized formula may prevent a needy debtor from obtaining bankruptcy relief”).

108. See Jensen, *supra* note 94, at 511 (noting that critics of the BAPCPA have characterized the means test as a “formulaic mechanism . . . [that] will not always distinguish accurately those debtors who have the capacity to repay from those that do not have that capacity” (citation omitted)); see also Michelle J. White, *Abuse or Protection? Economics of Bankruptcy Reform Under BAPCPA*, 2007 U. ILL. L. REV. 275, 275 (2007) (arguing that the BAPCPA created a ten-fold incentive for debtors to stop work six months before filings for bankruptcy in order to manipulate the means test, which generally looks at the debtor’s financial situation of the six months prior to filing for bankruptcy, and that the increased filing fees have deterred some non-opportunistic debtors from filing for bankruptcy).

109. See 144 CONG. REC. S10787 (daily ed. Sept. 23, 1998) (statements of Sen. Grassley and Sen. Durbin) (preferring a discretionary approach in the Senate bill over the mechanical approach in the House bill).

110. 11 U.S.C. § 707(a) (2006).

111. See Kimlinger & Wassweiler, *supra* note 15, at 64 (arguing that through its repeated omission in the statutory text that applies to Chapter 7 cases, Congress deliberately excluded a good faith filing requirement for Chapter 7 cases); see also Thomas F. Waldron, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 228 (2007) (suggesting that courts should look first to the plain meaning of the statute, followed by an inquiry into

existence of other Code provisions that explicitly provide that bad faith constitutes cause for dismissal for cases under other chapters<sup>112</sup> further indicates that Congress did not intend to impose a good faith filing requirement on a debtor filing for Chapter 7 bankruptcy.<sup>113</sup> Courts should confine their analyses to the provisions included and omitted in each subsection.<sup>114</sup> Allowing the cross-application of Code provisions is dangerous and defeats the separation between provisions that Congress intended to maintain.<sup>115</sup>

A. *The Allowance of Bad Faith Dismissals Finds No Support in the Statutory Text, Purpose, or Legislative History of § 707(a)*

The legislative history of § 707 indicates that Congress did not intend for bad faith to constitute cause for dismissal under § 707(a).<sup>116</sup> By adding § 707(b) in 1984, Congress established a different set of standards to address conduct that falls outside of the scope of § 707(a).<sup>117</sup> Then, through the BAPCPA of 2005, Congress placed a heavy focus on controlling petitions filed by a debtor with “primarily consumer debts” in an attempt to eliminate opportunistic

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Congressional purpose and intent, before looking to other canons of statutory interpretation).

112. Congress imposed a good faith filing requirement for cases filed under Chapter 9, and, pursuant to § 921(c), a court may dismiss a petition for Chapter 9 bankruptcy if the debtor did not file in good faith. 11 U.S.C. § 921(c). Under §§ 1129(a)(3) and 1325(a)(3), a court may deny a debtor’s reorganization payment plan upon finding that it was not filed in good faith. *Id.* §§ 1129(a)(3), 1325(a)(3).

113. See Kimlinger & Wassweiler, *supra* note 15, at 64 (asserting that had Congress intended to impose an implicit overall requirement of good faith, it would not have expressly incorporated a good faith filing requirement for some but not other chapters of bankruptcy).

114. See *In re Motaharnia*, 215 B.R. 63, 67 (Bankr. C.D. Cal. 1997) (recognizing that the two subsections of § 707 were intended to establish different standards that serve different purposes).

115. See *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994) (adopting the narrow reading of bad faith because “framing the issue in terms of bad faith may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7” and arguing the court should not punish a bad faith litigant under § 707(a), but may do so under another section).

116. H.R. REP. NO. 109-31, pt. 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88; S. REP. NO. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787; H.R. REP. NO. 95-595, at 380 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963; Pub. L. No. 109-8, 119 Stat. 27 (2005); Pub. L. No. 98-353, 98 Stat. 355 (1984); Pub. L. No. 95-598, 92 Stat. 2606 (1978). Additionally, the Code has never required a debtor to prove that the filing was done in good faith. See *In re Khan*, 172 B.R. 613, 622 & n.17 (Bankr. D. Minn. 1994) (conceding that Congress has never imposed a requirement for the debtor to prove good faith as a prerequisite to filing for bankruptcy, but still allowing the court to inquire of the debtor’s motivation to determine whether the case should proceed).

117. Pub. L. No. 98-353, 98 Stat. 355 (1984); see *In re Motaharnia*, 215 B.R. at 67 (distinguishing the broad nature of § 707(a) from the narrower purpose of § 707(b) of preventing the discharge of the debts of debtors who are not “honest but unfortunate”).

and abusive filings and added guidelines to the bad faith inquiry under § 707(b).<sup>118</sup>

On the other hand, Congress left § 707(a) unchanged, despite the widespread application of an implicit good faith filing requirement and the numerous opportunities to add bad faith as an enumerated cause for dismissal.<sup>119</sup> Standing alone, this repeated and intentional omission indicates that Congress intended to exclude bad faith dismissals from being granted under § 707(a).<sup>120</sup> The focus that Congress placed on amending the subjective inquiry under § 707(b) also suggests that its attempt to eliminate abusive and bad faith filings was heavily reliant on the factual aspects of the case, and not on the debtor’s satisfaction of the technical and procedural requirements.<sup>121</sup>

Throughout the ongoing amendments to § 707, Congress has maintained distinct purposes for each subsection and clearly distinguished the objective inquiry under § 707(a) from the subjective analysis under § 707(b).<sup>122</sup> Section 707(a) has been consistently applied to maintain the integrity of the bankruptcy system and to quickly dismiss cases that are not procedurally sound.<sup>123</sup> If the trustee or creditor moves to dismiss the case under § 707(a), the court is required to grant dismissal within ten days, absent any

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118. 11 U.S.C. § 707(b) (2006); H.R. REP. NO. 109-31, pt. 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88; *see* Bradley R. Tamm, *Substantial Abuse Dismissal Under 11 U.S.C.A. § 707(b): Evolution or Malignancy*, 13 J. BANKR. L. & PRAC. 47, 56 (2004) (stating that the amendments were primarily aimed at non-needy debtors who could reasonably repay a portion of their debts but still sought Chapter 7 relief).

119. *See supra* note 102 (detailing the legislative history of § 707).

120. *See* Kimlinger & Wassweiler, *supra* note 15, at 63–64 (reviewing the history of the requirements to be eligible to file for bankruptcy and emphasizing the lack of textual support to impose a good faith filing requirement for Chapter 7 filings). *But see* Little Creek Dev. Co. v. Commonwealth Mortgage Corp., 779 F.2d 1068, 1071 (5th Cir. 1986) (“Every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.”).

121. *See* 6 COLLIER ON BANKRUPTCY ¶ 707.03[2], at 707–20 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009) (proffering that by adding the bad faith inquiry to § 707(b), lower income debtors are no longer subject to abusive bad faith dismissal motions).

122. *See In re Sekendur*, 334 B.R. 609, 620 (Bankr. N.D. Ill. 2005) (maintaining that the technical and procedural requirements delineated in § 707(a) serve to preserve the integrity of the bankruptcy system (citing *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1192 (9th Cir. 2000)); *In re Motahamia*, 215 B.R. at 67 (differentiating the standards for dismissal Congress intended to establish under §§ 707(a) and 707(b)).

123. For a case to be procedurally sound, the debtor must provide a list of creditors, a schedule of all assets and liabilities, a statement of the debtor’s financial affairs, an itemized statement of the debtor’s monthly net income, and other documents detailing the debtor’s duties. 11 U.S.C. § 521(a); *see also* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 232 (2007) (detailing the documents that the debtor is required to provide to the trustee when filing for Chapter 7 bankruptcy pursuant to § 521).

request for additional time by the debtor.<sup>124</sup> Congress also focused on furthering the best interests of the creditors and trustees while promoting full repayment of the debts owed. Provisions including § 707(a)(1) examine whether the debtor created unreasonable delay that is prejudicial to the creditors and permits dismissal on such procedural grounds.<sup>125</sup> On the other hand, § 707(b) determines through a factual analysis whether granting relief to the debtor would constitute abuse and serves to prevent an undeserving debtor from using the bankruptcy system to take unfair advantage of his creditors.<sup>126</sup>

Section 707(a), however, does not imply that courts are limited to the three enumerated causes in § 707(a) because Congress explicitly stated that they are not exhaustive.<sup>127</sup> Nevertheless, courts' discretion in applying § 707(a) extends only to dismissal for causes that fall within its technical and procedural scope,<sup>128</sup> and courts have granted dismissals only in a limited number of cases for causes beyond those enumerated.<sup>129</sup> Bad faith remains outside of the purview of § 707(a) and therefore should not constitute cause for dismissal.<sup>130</sup>

In addition to the apparent differences in text, purpose, and scope, the difference in specificity between the two subsections calls for two

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124. See *infra* notes 205–206 (noting that motions to dismiss are addressed faster than other adversary proceedings under other sections of the Code).

125. 11 U.S.C. § 707(a)(1); see also *In re Higbee*, 58 B.R. 71, 72 (Bankr. C.D. Ill. 1986) (denying the debtor's voluntary motion to dismiss, which the debtor claimed to have filed to maximize the amount the creditors would recover, because the personal injury action the debtor initially valued at \$2,000 at the time of filing was later believed to be worth in excess of \$200,000 even though the debtor offered to settle in a way beneficial to the creditors); S. REP. NO. 95-989, at 34, 77–80 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5820, 5863–66 (maintaining that although the bankruptcy system serves to provide debtors with a fresh start, the Code provides creditors with other remedies that protect their interests and promote full or partial repayment).

126. *In re Motaharnia*, 215 B.R. at 69–72 (considering, *inter alia*, the timeliness of the motion to dismiss, whether the debts were “primarily consumer debts,” whether granting relief would be a substantial abuse of the provisions of Chapter 7, and the effect of dismissal when the debtor is unable to pay to determine whether to dismiss the debtor's case).

127. See *In re Khan*, 172 B.R. 613, 620 (Bankr. D. Minn. 1994) (explaining that under § 102(3), the words “includes” and “including” are not limiting and therefore permit the bankruptcy court to dismiss a Chapter 7 case for causes other than those enumerated under § 707(a)); *supra* note 41 and accompanying text (quoting the Senate Report issued during the Bankruptcy Reform Act of 1978).

128. See Kimlinger & Wassweiler, *supra* note 15, at 96–97 (arguing that causes for dismissal under § 707(a) must be restricted to those consistent with the technical and procedural causes enumerated in the section).

129. See *infra* note 230 and accompanying text (discussing two cases in which the court granted dismissal for causes outside of those enumerated in § 707(a)).

130. See Kimlinger & Wassweiler, *supra* note 15, at 62 (arguing that bad faith as cause for dismissal “is a legal fiction used as a vehicle to exclude unscrupulous debtors from the bankruptcy forum”).

distinct analyses. Under the canons of statutory construction, courts are required to construe provisions consistent with one another without creating superfluity, and specific provisions must take precedence over general provisions.<sup>131</sup> While the objective provisions under § 707(a) are more generally defined, § 707(b) allows the court to dismiss a case if granting relief would constitute an abuse of the bankruptcy system<sup>132</sup> or if the debtor filed in bad faith.<sup>133</sup> For cases that do not involve “primarily consumer debts,” the court’s analysis under § 707(a) should only concern the debtor’s compliance with the technical and procedural requirements and should exclude any consideration of the debtor’s financial means, which would be duplicative of the purpose of § 707(b).<sup>134</sup>

This proposed elimination of bad faith dismissals under § 707(a) raises the concern that a debtor who filed in bad faith will be granted undue bankruptcy relief because he does not have “primarily consumer debts,” which are required for a creditor or trustee to have standing to move to dismiss the case under § 707(b).<sup>135</sup> Despite these

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131. See *Basic v. United States*, 446 U.S. 398, 406 (1980) (holding that where both a specific and general statute address the same subject matter, the specific provision takes precedence, regardless of the order of enactment); *In re Khan*, 172 B.R. at 625 (“Individual creditors or the trustee can seek more particularized redress under §§ 522, 523, or 727, without the detriment of losing the centralized remedy of administration of assets that dismissal would otherwise cause.” (quoting *In re Lang*, 5 B.R. 371, 375 (Bankr. S.D.N.Y. 1980)); see also *Helvering v. Credit Alliance Corp.*, 316 U.S. 107, 112 (1942) (requiring two sections to be read as consistent and not conflicting).

132. 11 U.S.C. § 707(b); see Robert J. Landry III, *Viability of Bad-Faith Dismissals Under § 707(a)*, 27 AM. BANKR. INST. J. 1, 48 (2008) (asserting that dismissal motions based on the debtor’s bad faith should be brought under § 707(b) and be confined within those provisions).

133. 11 U.S.C. § 707(b)(3) (2006); see 6 COLLIER ON BANKRUPTCY, *supra* note 121, ¶ 707.03[2], at 707–20 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009) (explaining that Congress enacted § 707(b) to add bad faith as a consideration in determining whether to dismiss a case under § 707(b) and did not intend § 707(a) to serve that purpose).

134. See S. REP. NO. 95-989, at 94 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880 (listing the technical and procedural causes for dismissal under § 707(a) and explicitly stating that a debtor’s ability to pay debts is irrelevant to a § 707(a) inquiry); H.R. REP. NO. 95-595, at 380 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6336 (“This section authorizes the court to dismiss a liquidation case only for cause . . . [but] does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal. To permit dismissal on the ground would be to enact a *non-uniform mandatory* Chapter 13, in lieu of the remedy of bankruptcy.” (emphasis added)); see also Kimlinger & Wassweiler, *supra* note 15, at 72 (“[D]ebtor misconduct should be analyzed under the provision which specifically corresponds to that type of misconduct, and should not be analyzed under a more general provision which penalizes the debtor for ‘cause.’” (citing *In re Khan*, 172 B.R. at 624)).

135. See Kimlinger & Wassweiler, *supra* note 15, at 81–82 (discussing two cases in which the court refused to dismiss the bankruptcy petitions because the debtors were not truly needy and appeared to be capable of repaying their debts).

concerns, even if the petition is remotely meritorious, each debtor is due a hearing because in filing for Chapter 7 bankruptcy he has relinquished his property in exchange for a “fresh start.”<sup>136</sup> A successful filing indicates that the debtor has passed both the initial procedural inquiry under § 707(a) and the means test, and if the debtor acts in violation of the Code, other sections are available to protect the integrity of the bankruptcy system and provide remedies to creditors and trustees.<sup>137</sup>

*B. The Code Contains Alternative Remedies that Maintain the Integrity of the Bankruptcy System and Provide Safeguards to Creditors and Trustees*

The proposed elimination of bad faith as cause for dismissal under § 707(a) is further supported by the alternative remedies provided in the Code that also protect against abusive filings.<sup>138</sup> Sections 303(i), 305, 523, 548, 707(b), and 727 are among the sections through which creditors and trustees may raise objections to a debtor’s attempt to discharge his debt.<sup>139</sup> As noted, based on Congress’ continued omission of bad faith as an enumerated cause for dismissal under § 707(a) and the BAPCPA’s clarification and expansion of the § 707(b) bad faith inquiry,<sup>140</sup> the allowance of bad faith dismissals under § 707(a) and imposition of a good faith filing requirement are unfounded. Upholding a bad faith analysis under § 707(a) would therefore be duplicative because the analysis is already conducted under § 707(b).<sup>141</sup>

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136. See *supra* notes 23–24 and accompanying text (explaining that a “fresh start” should be afforded only to an “honest but unfortunate debtor”).

137. See *infra* Part II.B (discussing the alternative remedies contained in the Code that also protect the integrity of the bankruptcy system).

138. See *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1191–92 (9th Cir. 2000) (highlighting four provisions affording protections to creditors and trustees by allowing them to object to the discharge of debt in circumstances of fraud and misrepresentation: 11 U.S.C. §§ 523(a)(2)(A), (c)(1), intentional transfer or concealment of property with the intent of defrauding the creditor, *id.* § 727(a)(2), (c)(1), substantial abuse, *id.* § 707(b), and in the existence of “cause,” § 707(a)).

139. *E.g.*, 11 U.S.C. § 727(a)(2) (denying discharge to a debtor who has converted, transferred, or destroyed property in an attempt to avoid collections of debt by the creditors).

140. *Id.* § 707(b)(3); see also *Culhane & White, supra* note 45, at 668–71 (detailing the purpose and functions of all seven subsections of § 707(b)).

141. Additionally, courts have noted that a determination of the existence of bad faith may hinder an analysis under § 707(a) and thus reject the “bad faith” label. *In re Horan*, 304 B.R. 42, 45 n.4 (Bankr. D. Conn. 2004) (noting that the “bad faith” label impedes the § 707(a) analysis and may have led some courts to erroneously require the petitioner to sufficiently prove the existence of good faith to be eligible to file for bankruptcy, rather than impose the burden of proving the petitioner filed in bad faith on the party moving for dismissal).

Among the alternative remedies in the Code, § 727 imposes the most severe and drastic measure. If any of the nine enumerated conditions are present, the creditor or trustee may petition the court to deny discharge of all of the debtor’s debts.<sup>142</sup> These conditions prohibit the debtor from engaging in misconduct, which includes concealing property, falsifying information, knowingly making fraudulent claims or offers, and failing to satisfactorily explain any loss or deficiency of assets.<sup>143</sup>

Section 523(a) affords a less powerful remedy through which creditors can except their individual debt from discharge pursuant to the listed exceptions.<sup>144</sup> These exceptions focus on remedying “specific evils” that harm particular creditors and take precedence over providing a “fresh start” to an “honest but unfortunate debtor.”<sup>145</sup> Among the debts excepted from discharge under § 523(a) are debts for money, property, or services obtained through fraud, willful or malicious injury by the debtor to another entity, certain tax debts, debts incurred during a divorce or separation, and debts that were not discharged in a prior bankruptcy case.<sup>146</sup>

Additionally, under § 303(i), if the court dismisses an involuntary bankruptcy petition<sup>147</sup> without the consent of the petitioners or the debtor, the petitioners must pay the debtor costs or reasonable attorney’s fees.<sup>148</sup> More importantly, if the court determines that the involuntary petition was filed in bad faith, the petitioners must pay

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142. 11 U.S.C. § 727(a)(1)–(9); *e.g.*, Boroff v. Tully (*In re Tully*), 818 F.2d 106, 110–12 (1st Cir. 1987) (denying discharge because the debtor failed to include certain assets in schedules that were filed under oath).

143. 11 U.S.C. § 727(a)(1)–(9).

144. *Id.* § 523; *see infra* notes 202–204 and accompanying text (arguing that the motions to dismiss were improperly granted as the individual debts could have been discharged under § 523, which would have avoided total denial of bankruptcy relief to the debtor); *see also* Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 817, 830–31 (2005) (highlighting debts that are presumed to be nondischargeable). *But see* U.S. Trustee v. Lacrosse (*In re Lacrosse*), 244 B.R. 583, 589 (Bankr. M.D. Pa. 1999) (granting dismissal under § 707(a) on the basis of fraudulent conduct and lavish lifestyles, which are examples of misconduct covered under § 523).

145. *See* Kimlinger & Wassweiler, *supra* note 15, at 74 (noting that debtors whose conduct contradicts the policies served by § 523 will be denied a “fresh start”).

146. 11 U.S.C. § 523(a)(1)–(19).

147. Under § 303, an involuntary bankruptcy case may be “commenced only under Chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.” *Id.* § 303.

148. *Id.* § 303(i)(1)(A)–(B); *e.g.*, Higgins v. Vortex Fishing Sys., Inc., 379 F.3d 701, 706, 708 (9th Cir. 2004) (awarding attorneys’ fees and costs related to the litigation regardless of whether the petition was filed in bad faith).

punitive damages or any damages proximately caused by the filing.<sup>149</sup> Because the court may award damages for dismissals of bad faith filings under § 303(i), granting bad faith dismissals under § 707(a) is unnecessary and duplicative.<sup>150</sup>

Other sections that protect the integrity of the bankruptcy system and provide safeguards to the parties involved are §§ 305 and 548. Section 305 allows the court to dismiss or suspend a case if the interests of the creditors and debtor would be better served through either of those remedial actions.<sup>151</sup> Section 548 protects creditors and trustees by prohibiting the debtor from transferring any interests with the intent to hinder, delay, or defraud any entity to which the debtor is indebted and also limits charitable contributions to a specific percentage of the debtor's income, unless consistent with past donations.<sup>152</sup>

In light of maintaining the integrity of the bankruptcy system and Code, debtor misconduct should be analyzed under the provision that specifically addresses the misconduct.<sup>153</sup> There is a need for a stricter application of the Code to uphold the plain meaning and individual purpose of each section, and courts should limit dismissals under § 707(a) to cases involving violations of the technical and procedural requirements.

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149. *E.g.*, *Adell v. John Richards Homes Bldg. Co. (In re John Richards Homes Bldg. Co.)*, 439 F.3d 248 (6th Cir. 2006) (dismissing the involuntary Chapter 7 petition filed in bad faith and awarding punitive damages of two million dollars).

150. Under the canons of statutory construction, where Congress imposed remedies under one condition and not the other, the inclusion in one provision and exclusion in the other provision was purposeful and intentional. *See supra* Part II.A (analyzing the different purposes intended for §§ 707(a) and 707(b) and arguing against the current duplicative application of a bad faith inquiry under both provisions).

151. 11 U.S.C. § 305; *see In re Whitby*, 51 B.R. 184, 185–86 (Bankr. E.D. Mich. 1985) (denying the creditor's motion to dismiss because the interests of the debtor would not be better served by dismissal, but granting the motion to suspend the bankruptcy petition because suspension would better serve the interests of all parties involved); *see also* S. REP. NO. 95-989, at 36 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5822 (allowing courts to dismiss cases in which out-of-court arrangements are being discussed by the parties under § 305).

152. 11 U.S.C. § 548; *e.g.*, *Hayes v. Palm Seeding Partners (In re Agric. Research & Tech. Group, Inc.)*, 916 F.2d 528, 539–40 (9th Cir. 1990) (denying the debtor's motion to avoid transfers upon finding that the debtor made transfers to investors with fraudulent intent).

153. *See supra* note 131 and accompanying text (arguing that the most specific provision should be applied to address misconduct in a case).

*C. The Significant Differences Between the Statutory Text, Purpose, and Nature of Liquidation and Reorganization Should Preclude the Transfer of the Good Faith Inquiry from Reorganization Cases to Liquidation Cases*

Although the Code imposes no good faith *filing* requirement on Chapter 7 liquidation or Chapters 11 or 13 reorganization cases,<sup>154</sup> courts have created this prerequisite in liquidation cases by analogizing to reorganization cases. They have transferred the explicit requirement that debtors in reorganization propose a repayment plan in good faith to apply to debtors in liquidation.<sup>155</sup> Lack of good faith is only sufficient cause for courts to deny *confirmation* of reorganization payment plans.<sup>156</sup> The Code addresses, in two separate sections, the good faith inquiry conducted prior to the confirmation of the reorganization plan and the inquiry of whether cause exists to dismiss or convert the reorganization case.<sup>157</sup> These provisions should not be merged or transferred to permit courts to dismiss cases for bad faith under § 707(a).<sup>158</sup>

The statutory text that allows courts to grant dismissal or conversion of a case for cause under each chapter further rejects the cross-application of the provisions.<sup>159</sup> Like the enumerated causes under § 707(a), the causes for dismissal or conversion of a reorganization case are technical and procedural in nature and also include unreasonable delay by the debtor, nonpayment of fees, and

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154. The Code imposes a good faith filing requirement only for Chapter 9 bankruptcy cases. 11 U.S.C. § 921(c).

155. *See, e.g., In re Sky Group Int'l, Inc.*, 108 B.R. 86, 90 (Bankr. W.D. Pa. 1989) (citing the holding in *In re Setzer*, 47 B.R. 340 (Bankr. E.D.N.Y. 1985), in which the court dismissed a Chapter 13 petition on the ground that it was filed in bad faith, to dismiss a Chapter 7 petition filed in bad faith but without discussing the differences between Chapter 7 and 13 bankruptcy).

156. 11 U.S.C. §§ 1129, 1325. These sections both state that a court will confirm a plan if “the plan has been proposed in good faith and not by any means forbidden by law” and this good faith inquiry is left to the discretion of the bankruptcy court. *Id.*; *see also Ravenot v. Ringale (In re Ringale)*, 669 F.2d 426, 431 n.14 (7th Cir. 1982) (noting that the good faith inquiry is done on a case-by-case basis and listing factors applied in the court’s assessment).

157. For Chapter 11 bankruptcy cases, conversion and dismissal is addressed in § 1112 and confirmation of the reorganization plan is addressed in § 1129. 11 U.S.C. §§ 1112, 1129. For Chapter 13 cases, they are addressed in §§ 1307 and 1325, respectively. *Id.* §§ 1307, 1325.

158. *See Kimlinger & Wassweiler, supra* note 15, at 98 (emphasizing the importance of maintaining the integrity of each provision of the Code).

159. *See Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1193 (9th Cir. 2000) (“The Bankruptcy Code’s language and the protracted relationship between reorganization debtors and their creditors lead us to conclude that bad faith per se can properly constitute ‘cause’ for dismissal of a Chapter 11 or Chapter 13, but not of a Chapter 7 petition under § 707(a).”).

failure to provide information or attend meetings.<sup>160</sup> Dismissal or conversion is granted in reorganization unless the court finds that it would not be in the best interests of the creditors and the estate.<sup>161</sup>

The purpose and nature of reorganization further indicates that the Code's expressed inclusion of a good faith inquiry for reorganization cases and exclusion for liquidation cases were intentional.<sup>162</sup> While the debtor in liquidation surrenders his non-exempt assets in return for a "fresh start," the debtor in reorganization keeps his assets while reorganizing his debts and avoids complete liquidation of his entire estate.<sup>163</sup> Because the debtor is afforded this privilege, the interests of the creditors and the estate are heightened, justifying the requirement that the debtor propose his reorganization plan in good faith.<sup>164</sup>

The control over the debtor's property during reorganization and the post-filing relationship between the debtor and his creditors further distinguish liquidation cases from reorganization cases.<sup>165</sup> In liquidation, the debtor-creditor relationship is terminated because the debtor essentially "throws in the towel" by surrendering total control of his property to the trustee who liquidates and distributes the proceeds to the creditors.<sup>166</sup> On the other hand, the debtor-creditor relationship must be preserved in reorganization because the debtor maintains possession of his assets while formulating and

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160. Compare 11 U.S.C. § 707(a) (listing unreasonable delay by the debtor, nonpayment of fees, and failure to provide information or attend meetings as causes for dismissal), with *id.* § 1112 (containing sixteen causes for dismissal, including the causes contained in § 707(a)), and *id.* § 1307 (providing eleven causes for dismissal, including the causes contained in § 707(a)).

161. *Id.* §§ 1112(b), 1307(c); e.g., *In re Forest Hill Funeral Home & Mem'l Park*, 364 B.R. 808, 822 (Bankr. E.D. Okla. 2007) (citing *In re Muskogee Env'tl. Conservation Co.*, 236 B.R. 57, 69 (Bankr. N.D. Okla. 1999)) (finding that dismissal, rather than conversion was warranted).

162. *In re Tallman*, 397 B.R. 451, 456 (Bankr. N.D. Ind. 2008), *rev'd*, No. 1:08-CV-309-TS, 2009 WL 3245206 (N.D. Ind. Sept. 30, 2009).

163. DUFF, *supra* note 30, at 6, 22; see *NMSBPCSLDHB v. Integrated Telecom Express, Inc.* (*In re Integrated Telecom Express, Inc.*), 384 F.3d 108, 119 (3d Cir. 2004) (noting that reorganization permits debtors to avoid "the consequences of economic dismemberment and liquidation").

164. See *Kimlinger & Wassweiler*, *supra* note 15, at 65 n.18 (detailing the benefits afforded to debtors who file for reorganization bankruptcy).

165. See *Neary v. Padilla* (*In re Padilla*), 222 F.3d 1184, 1193 (9th Cir. 2000) (discussing the differences between liquidation and reorganization cases).

166. See *In re RIS Inv. Group, Inc.*, 298 B.R. 848, 852 (Bankr. S.D. Fla. 2003) (stating that "as the debtor is willing to surrender all of its assets, regardless of whether debtor's motive was grounded in good faith, the debtor is entitled to Chapter 7 protection").

proposing a payment plan to reorganize his debts and contractual relationships.<sup>167</sup>

The similarities in the scope of the provisions applying to dismissal or conversion for each chapter of bankruptcy, along with the differences in the debtor-creditor relationship and the debtor’s control over the property, therefore call into question the validity of the cross-application of the Code provisions. An analysis of the statutory construction of § 707 provides no support for bad faith dismissals of Chapter 7 petitions under §707(a).

### III. THE ALLOWANCE OF BAD FAITH DISMISSALS CONSTITUTES AN ABUSE OF JUDICIAL DISCRETION AND AN IMPROPER APPLICATION OF THE CODE

“[I]t is the duty of a Judge to apply the laws as written by Congress, rather than to substitute personal abstract concepts of justice and morality, to the cases it hears.”<sup>168</sup> Despite the amendments to the Code, courts have continued to read in a good faith filing requirement for cases under Chapter 7 and follow cases that granted bad faith dismissals while applying the Code prior to the enactment of the BAPCPA (“pre-BAPCPA”).<sup>169</sup> Congress’ repeated omission of bad faith from § 707(a) should indicate that the omission was purposeful and for good reason.<sup>170</sup> Unfortunately, there remains an excessive and unwarranted use of judicial discretion by courts that continue to grant bad faith dismissals under § 707(a).<sup>171</sup>

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167. See *In re Padilla*, 222 F.3d at 1192–93 (holding that bad faith is per se cause for dismissal of Chapter 11 and Chapter 13 bankruptcy under § 1112 and § 1325, respectively); *Marsch v. Marsch* (*In re Marsch*), 36 F.3d 825, 828–29 (9th Cir. 1994) (affirming the bankruptcy court’s for cause dismissal of the debtor’s Chapter 11 petition pursuant to § 1112(b) on the grounds of bad faith).

168. *In re Goulding*, 79 B.R. 874, 876 (Bankr. W.D. Mo. 1987).

169. See, e.g., *In re Privada, Inc.*, No. 07-10940 FRM, 2008 WL 4692372, at \*5 (Bankr. W.D. Tex. Oct. 22, 2008) (relying on *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986), to support the proposition that bad faith can be a cause for dismissal of a Chapter 7 case under § 707(a) on the reasoning that “every bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution and confirmation of bankruptcy proceedings”).

170. See *Landry*, *supra* note 132, at 48 (agreeing with commentators who maintain that the inclusion of bad faith as grounds for dismissal under § 707(b) defeats the imposition of a good faith filing requirement under § 707(a)); see also *Kimlinger & Wassweiler*, *supra* note 15, at 63–64 (“Where Congress intended to impose a good faith requirement it specifically did so.”).

171. See, e.g., *Sec. Am., Inc. v. Tallman* (*In re Tallman*), No. 1:08-CV-309-TS, 2009 WL 3245206, at \*7 (N.D. Ind. Sept. 30, 2009) (following the majority of federal courts, which have recognized that bad faith constitutes cause for dismissal under § 707(a), and applying the “totality of the circumstances” analysis to determine whether the debtor acted in bad faith), *rev’g* 397 B.R. 451, 455 (Bankr. N.D. Ind.

A. *Despite the Enactment of the BAPCPA, Courts Have Continued to Improperly Follow Cases that Misinterpreted § 707(a) and Granted Bad Faith Dismissals*

It should first be noted that even prior to the enactment of the BAPCPA, the allowance of bad faith dismissals under § 707(a) was improper. In *In re Zick*, the Sixth Circuit held that the addition of § 707(b) in 1984 was instructive as to the purpose and function of § 707(a) and correctly held that § 707(b) served as an additional restraint on the debtor's ability to receive bankruptcy relief.<sup>172</sup> The court, however, went beyond looking to the addition of § 707(b) as mere instruction of the scope of § 707(a) and erroneously held that, like § 707(b), § 707(a) also afforded bankruptcy courts leeway to deal equitably with abusive debtors.<sup>173</sup>

In granting dismissals for a debtor's lack of good faith, the Sixth Circuit relied heavily on the importance of maintaining the purpose of the bankruptcy system to afford relief to the "honest but unfortunate debtor."<sup>174</sup> Although bankruptcy courts are courts of equity, they do not serve to create or amend the Code to ensure the most equitable outcome but instead exist to interpret and enforce its provisions within the confines of the Code's purpose and language.<sup>175</sup> Further, as discussed above, dismissals for bad faith under § 707(a) constitute a total disregard of statutory construction<sup>176</sup> and improperly broaden the scope of the section by placing undue emphasis on the

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2008) (detailing the different perceptions of what bad faith is in the context of a petition for liquidation relief).

172. *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1128 (6th Cir. 1991) (citing *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989)).

173. *Id.* at 1129; see Kimlinger & Wassweiler, *supra* note 15, at 88 (arguing that courts craft the implicit good faith filing requirement to "weed out" unsuitable debtors and that dismissing cases under § 707(a) imposes a harsher penalty for debtors engaging in misconduct than warranted under the Code).

174. See *In re Zick*, 931 F.2d at 1128–29 (adopting the conclusions of previous cases that, although not explicitly stated in the Code, good faith is an inherent requirement for receiving bankruptcy relief).

175. See *Phar-Mor, Inc., v. Gen. Elec. Capital Corp. (In re Phar-Mor, Inc.)* 166 B.R. 57, 61 (W.D. Pa. 1994) ("This section of the Code authorizes a court to use its equity powers to fashion such orders as are necessary to further the substantive provisions of the [Code] . . . . However, while the grant of authority is broad, a court may not create substantive rights in favor of a debtor that are in addition to the rights bestowed by the Code if such rights do not also exist outside of bankruptcy law." (internal citations and quotation marks omitted)). *But see* *Gen. Motors Acceptance Corp. v. Rose (In re Rose)*, 21 B.R. 272, 276 (Bankr. D.N.J. 1982) ("Bankruptcy matters are . . . inherently proceedings in equity and must foster equitable results." (citation omitted)); *supra* note 56 (noting bankruptcy courts' heavy reliance on equitable principles to support bad faith dismissals).

176. See *supra* Part II (providing a comprehensive analysis of the statutory construction of § 707).

word “including.”<sup>177</sup> Bad faith dismissals also ignore the longstanding congressional intent that § 707(a) “does not contemplate . . . that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal.”<sup>178</sup> In addition to the debtor’s ability to pay, other considerations, such as misconduct and improper motive, should not be included in a court’s analysis under § 707(a) because they fall outside of its purview.<sup>179</sup>

Despite the enactment of the BAPCPA, courts have continued to read in an implicit good faith filing requirement and grant bad faith dismissals under § 707(a).<sup>180</sup> These courts have applied a number of multifactor, subjective tests—including the Sixth Circuit’s smell test<sup>181</sup>—to determine whether the filing was made in bad faith under a § 707(a) analysis.<sup>182</sup> They appear to have given little weight to the

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177. See *In re Zick*, 931 F.2d at 1126–27 (rationalizing that the word “including” is not a limiting word and that § 707(a) is a “general” provision that allows bad faith dismissals).

178. *Id.* at 1127 n.3. Congress stated that “[t]o permit dismissal on that ground would be to enact a non-uniform mandatory chapter 13, in lieu of the remedy of bankruptcy.” S. REP. NO. 95-989, at 94 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5880; H.R. REP. NO. 95-595, at 380 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6336; see also *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (noting that the “[a]bility to pay is the primary inquiry under § 707(b),” not § 707(a)); *In re Motaharnia*, 215 B.R. 63, 68 (Bankr. C.D. Cal. 1997) (stating that Congress never intended for courts to consider a debtor’s ability to pay part or all of its debts when considering “cause” under § 707(a)); *In re Goulding*, 79 B.R. 874, 876 (Bankr. W.D. Mo. 1987) (“It is difficult to contemplate how Congress could more emphatically have stated that the debtor’s net worth or future prospects is not ‘cause’ as the word is used in Section 707 for dismissal.”).

179. See *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1193 (9th Cir. 2000) (maintaining that debtors are entitled to Chapter 7 protection as long as they are willing to surrender all of their assets, regardless of whether their motives in filing were in good faith); *Kimlinger & Wassweiler*, *supra* note 15, at 78–79 (arguing that some courts have adopted an overly expansive definition of bad faith and merely require a finding of the debtor’s ability to repay the debt, while others have required misconduct, improper motive, or dishonesty in addition to the ability to repay the debt for a finding of bad faith).

180. *E.g., In re Marino*, 388 B.R. 679, 683–84 (Bankr. E.D.N.C. 2008) (dismissing the debtor’s Chapter 7 case for lack of good faith based on the lack of sudden financial disaster, the debtor’s knowledge that attorney’s fees were accruing and that the law firm expected payment from her equitable distribution recovery, and debtor’s unwillingness to repay the attorney’s fees exceeding \$250,000 because she allegedly did not want to withdraw funds from her IRA, despite the law firm’s offer to settle the claim for \$20,000).

181. See *supra* note 63 and accompanying text (describing the smell test).

182. See *In re Parker*, No. 08-04126-8-ATS, 2009 WL 249884, at \*2 (Bankr. E.D.N.C. Feb. 3, 2009) (maintaining that the lack of good faith can constitute cause for dismissal under § 707(a) and applying a totality of circumstances analysis to determine whether to dismiss the case under § 707(a)). In *In re Parker*, the bankruptcy court used a fourteen-factor test applied in cases decided prior to the BAPCPA that focuses on the intent of the debtor and on promoting equity in the bankruptcy system. *Id.* at \*2. Compare *In re Griffith*, 209 B.R. 823, 827 (Bankr. N.D.N.Y. 1996) (applying a six-factor test to determine whether the filing was done in

amendments of § 707(b) and have opined that courts maintain discretion to consider the debtor's monthly income and expenses along with other factors to determine the existence of good faith.<sup>183</sup> The continued broad reading of § 707(a) is an abuse of judicial discretion, especially in light of the BAPCPA and the addition of the means test, through which Congress provided further clarification regarding its intent to limit judicial discretion.<sup>184</sup>

A prime example of a case where a court misapplied § 707(a) is *In re Lombardo*.<sup>185</sup> The debtor sought bankruptcy relief to discharge her debts, which primarily consisted of attorney's fees incurred during a contentious divorce proceeding.<sup>186</sup> The debtor retained a law firm pursuant to a Marital Retainer Agreement but exhausted the initial retainer, ending the law firm's obligation to provide any additional legal services.<sup>187</sup> The law firm agreed to take a security interest in property in lieu of immediate payment<sup>188</sup> and also agreed to waive a portion of the outstanding debt, reduce the monthly installments, and continue performing legal services despite the debtor's repeated late payments and even nonpayment of fees.<sup>189</sup>

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bad faith), *with In re O'Brien*, 328 B.R. 669, 675 (Bankr. W.D.N.Y. 2005) (applying a fourteen-factor test to make the same inquiry).

183. See *Perlin v. Hitachi Capital Am. Corp. (In re Perlin)*, 497 F.3d 364, 367 (3d Cir. 2007) (rejecting the bankruptcy court's reasoning that because a presumption of abuse arises when the debtor with primarily consumer debts petitions for bankruptcy with sufficient income to repay his debt, a consideration of the debtor's income and expenses should not exist in the court's determination of whether to grant dismissal under § 707(a)); see also *In re Parker*, 2009 WL 249884, at \*1-2 (disregarding the amendments by applying a totality of the circumstances approach in an analysis under § 707(a) despite the fact that the debtor's income exceeds the state median income, allowing for a presumption of abuse, and erroneously applying the substantial abuse standard of the pre-BAPCPA Code, as opposed to the standard of mere abuse under the amended Code to dismiss the case under § 707(b)).

184. See A. Jay Cristol & Cheryl Kaplan, *11 U.S.C. § 707(b)(2)(a)(iii): Does It Mean What It Says And Say What It Means?*, 19 U. FLA. J.L. & PUB. POL'Y 1, 2 (2008) (arguing that the amended § 707(b) limits judicial discretion by instituting an objective calculation to determine whether the debtor has sufficient disposable income to repay at least a portion of his unsecured non-priority debts); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 473 (2007) (noting that the means test "sought to divest bankruptcy judges of their gatekeeping discretion" but that the BAPCPA has blurred the judicial and administrative functions of the bankruptcy court).

185. 370 B.R. 506 (Bankr. E.D.N.Y. 2007).

186. *Id.* at 507-08. The attorney's fees constituted eighty-seven percent of the debtor's total debt. *Id.* at 507. The debtor also wanted to discharge seven other general unsecured claims consisting of credit card debt totaling \$8,409.63. *Id.*

187. *Id.* at 508.

188. *Id.* at 509. The debtor persuaded the law firm to continue representing her in the divorce proceeding. *Id.* at 508-09. It was unlikely that the debtor would have been able to retain new counsel willing to charge a rate comparable to the law firm's \$250 hourly rate. *Id.* at 508.

189. *Id.* at 509. The law firm waived \$9,584.09 and reduced the monthly installments from \$400 to \$300. *Id.* Additionally, after offering the debtor a reduced

The law firm moved to dismiss the bankruptcy case under § 707(a) on the grounds that the debtor filed the petition in bad faith to thwart its attempts at recovery, that the debtor was able to repay the outstanding debt, and that granting relief would be unfair in light of the law firm’s offer to substantially reduce the outstanding debt.<sup>190</sup> Relying heavily on pre-BAPCPA cases and giving little weight to the BAPCPA,<sup>191</sup> the court performed a bad faith inquiry by applying multifactor tests and found that the debtor’s conduct met several factors that suggested that the filing was made in bad faith.<sup>192</sup> Although the law firm failed to establish cause justifying dismissal, the court still granted dismissal under § 707(a) on the grounds that the debtor filed the bankruptcy petition solely to thwart the law firm’s attempts to recover the unpaid attorney’s fees.<sup>193</sup>

Another case where a court abused its discretion in applying § 707(a) was *In re Marino*,<sup>194</sup> a case factually similar to *In re Lombardo*. In *In re Marino*, the debtor filed for bankruptcy relief to discharge the attorney’s fees incurred during a marital and equitable distribution, as well as her credit card debt, a personal loan, accounting fees, and a student loan.<sup>195</sup> Unlike the debtor in *In re Lombardo*, the debtor in *In re Marino* had already paid off roughly half of the outstanding legal fees and had more consumer debt and less income.<sup>196</sup> After applying a multifactor test,<sup>197</sup> the court determined that the debtor did not file in good faith and dismissed the case.<sup>198</sup> It found that the debtor filed for bankruptcy to frustrate the law firm’s attempts to recover the outstanding debt and that granting relief would be unfair because the

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fee of \$20,000 and notifying the debtor that it would be applying to the state court to perfect her security interest in a portion of her ex-husband’s 401(k) plan, the debtor offered to pay a mere \$10,000 to satisfy the outstanding legal fees. *Id.* at 509–10. Before the law firm filed the application, the debtor filed for bankruptcy relief under Chapter 7. *Id.* at 510.

190. *Id.* at 507–08. The law firm offered a reduced fee of \$20,000 to satisfy the outstanding debt, forgiving \$36,479.95. *Id.* at 510.

191. *See id.* at 511 (making no reference to the BAPCPA and citing cases applying the pre-BAPCPA Code).

192. *See id.* at 512 (applying the six-factor test utilized in *In re Griffith*, 209 B.R. 823 (Bankr. N.D.N.Y. 1996), and the fourteen factor test applied in *In re O’Brien*, 328 B.R. 669 (Bankr. W.D.N.Y. 2005)).

193. *Id.* at 512. The debtor obtained \$30,400 of her ex-husband’s 401(k), which is exempt from creditors under § 522, which the court asserted that she would use for her own personal benefit instead of repaying her creditors. *Id.* at 513. Additionally, the law firm decided not to “abandon the [d]ebtor during [her] hour of need,” despite the reduction of debt and the debtor’s occasional late and even nonpayment of fees. *Id.* at 512.

194. 388 B.R. 679 (Bankr. E.D.N.C. 2008).

195. *Id.* at 681.

196. *Id.* at 683.

197. *Id.* at 682.

198. *Id.* at 684.

law firm ensured that the debtor received \$250,000 in IRA accounts, which are protected in bankruptcy proceedings.<sup>199</sup>

Although both courts found that the debtors were not “honest but unfortunate debtors” worthy of bankruptcy relief, dismissal under § 707(a) was improper in both cases. The debtors may have filed for bankruptcy to frustrate the law firms’ attempts to recover the outstanding legal fees, but this finding is insufficient to justify dismissal under § 707(a), even though under the laws of equity, the law firms were entitled to recovery.<sup>200</sup> In *In re Lombardo*, the law firm did not have standing to move for dismissal under § 707(b) because the debtor’s income fell below the median income level.<sup>201</sup> The court, however, should not have conveniently turned to its counterpart, § 707(a), to grant dismissal because cause did not exist to justify dismissal. Instead, in both cases, the creditors could have moved to deny discharge of the attorney’s fees under § 523.<sup>202</sup> The debtor’s student loans in *In re Marino* could also have been excepted from discharge under § 523.<sup>203</sup> Both debtors should not have been denied bankruptcy relief under § 707(a) as it appears that they met all of the technical and procedural requirements of a Chapter 7 bankruptcy filing.<sup>204</sup>

The continued broad reading of § 707(a) is an abuse of the Code provisions because it permits creditors to take the shortest and cheapest way to recover outstanding debt.<sup>205</sup> Unlike most proceedings, motions to dismiss do not require a filing fee and are heard within a short period of time, which may explain creditors’

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199. *Id.* at 683.

200. *See supra* note 173 and accompanying text (arguing that courts have improperly read in a good faith filing requirement for Chapter 7 bankruptcy cases to eliminate debtors who may have filed in bad faith).

201. *See Landry, supra* note 132, at 49 (referring to the debtor’s Official Form 22A, which detailed the debtor’s financial situation and indicated that she was a consumer debtor whose income fell below the median income of her state of residence).

202. 11 U.S.C. § 523(a)(19)(B)(iii) (2006) (excepting attorney’s fees from discharge); *see supra* notes 144–146 and accompanying text (discussing the application of § 523).

203. 11 U.S.C. § 523(a)(8) (excepting any educational loan unless it would impose an undue hardship on the debtor and the debtor’s dependents).

204. Neither opinion makes any mention of either debtor’s failure to meet any of the technical or procedural requirements of a Chapter 7 petition. *See In re Marino*, 388 B.R. 679 at 684; *In re Lombardo*, 370 B.R. 506, 514 (Bankr. E.D.N.Y. 2007). After the petition in *In re Lombardo* was dismissed, the parties resolved the dispute through settlement, upon which the court vacated the dismissal of the case. *See Landry, supra* note 132, at 49 (citing the bankruptcy court order granting the motion to vacate and noting that the BAPCPA may not have completely eliminated bad faith dismissals of consumer bankruptcy cases).

205. *See Kimlinger & Wassweiler, supra* note 15, at 72–73 (noting that motions to dismiss may be heard within ten days of service while several months could pass before adversary proceedings are heard).

general preference for filing them.<sup>206</sup> Congress intended to *reduce* judicial discretion rather than afford courts more leeway and discretion in interpreting the Code to relieve increasing docket pressures.<sup>207</sup> As such, cases in which the court conducted factual inquiries and granted bad faith dismissals under § 707(a) should no longer be upheld.

*B. All Courts Should Properly Apply § 707(a) by No Longer Granting Bad Faith Dismissals Under that Subsection*

The Ninth Circuit in *In re Padilla*<sup>208</sup> rejected the implicit good faith filing requirement and the bad faith dismissal under § 707(a),<sup>209</sup> but only a limited number of courts outside of the Ninth Circuit have adopted this approach.<sup>210</sup> These courts have found that, of the three lines of cases,<sup>211</sup> the Ninth Circuit’s reasoning and rejection of the implicit good faith filing requirement was most persuasive.<sup>212</sup> They focused on the differences in the applicable statutory text, the post-filing debtor-creditor relationship, and the purpose or outcome of

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206. See *id.* at 72 (“One can logically assume that the proliferation of motions to dismiss under § 707(a) is due to the timeliness and cost effectiveness of motion practice versus adversary proceedings.”).

207. See Culhane & White, *supra* note 45, at 679–80, 683 (noting that the means test has constricted the discretion that judges are permitted to use in applying the different provisions of § 707(b)). But see *In re Privada, Inc.*, No. 07-10940 FRM, 2008 WL 4692372, at \*6 (Bankr. W.D. Tex. Oct. 22, 2008) (“There is no indication that Congress intended . . . to restrict a bankruptcy court’s discretion in deciding motions to dismiss under § 707(a).”). The court further asserted that “[t]he legislative history to the 2005 Act does not indicate that the modifications to § 707(b) imply anything about the dismissal of bankruptcy cases under § 707(a).” *Id.*

208. 222 F.3d 1184 (9th Cir. 2000).

209. *Id.* at 1191.

210. E.g., *In re Farkas*, 343 B.R. 336, 339 (Bankr. S.D. Fla. 2006). But see *McDow v. Dudley (In re Dudley)*, 405 B.R. 790, 800 (Bankr. W.D. Va. 2009) (holding that lack of good faith is sufficient cause for dismissal of a case under § 707(a)); *In re Lombardo*, 370 B.R. 506, 511 (Bankr. E.D.N.Y. 2007) (looking to other cases in the Second Circuit to determine that the lack of good faith is a sufficient cause for dismissal under § 707(a)). The Fourth Circuit, however, has suggested in dictum that bad faith should only be a consideration under § 707(b). *In re Green*, 934 F.2d 568, 571 (4th Cir. 1991).

211. As one court explained:

The first line of cases states that there is no [good faith filing requirement] for filing a chapter 7 petition. The second line of cases holds that [d]ismissal based on lack of good faith must be undertaken on an *ad hoc* basis . . . . The third line of cases holds that, although certain actions of a debtor constituting cause may also be characterized as bad faith, framing the issue in such terms [bad faith] may tend to misdirect the inquiry away from the fundamental principles and purposes of Chapter 7.

*In re RIS Inv. Group, Inc.*, 298 B.R. 848, 851 (Bankr. S.D. Fla. 2003) (internal quotation marks and citations omitted).

212. E.g., *In re Farkas*, 343 B.R. at 340; *In re RIS Inv. Group, Inc.*, 298 B.R. at 851.

liquidation and reorganization cases that the Ninth Circuit highlighted in *In re Padilla*.<sup>213</sup>

Unfortunately, though some courts have explicitly stated that they agree with the Ninth Circuit's holding, many of them have fallen short of upholding its narrow application of § 707(a). In *In re Linehan*,<sup>214</sup> the court appointed a guardian for the debtor who suffered from mental illnesses and other severe medical conditions for the general administration of the case.<sup>215</sup> Because the debtor either refused or was unable to appear at depositions, the creditors moved to dismiss the case under § 707(a) on the ground that the debtor's conduct in the bankruptcy proceedings was a deliberate attempt to frustrate their collection efforts.<sup>216</sup> The court found that the creditor's allegation of "bad faith" did not rise to the level of "egregious conduct"—the broader standard applied by the Sixth Circuit.<sup>217</sup> Although the court denied the motion to dismiss the case under § 707(a) upon finding complete satisfaction of the technical and procedural requirements,<sup>218</sup> the court should not have applied the Sixth Circuit's standard and instead should have followed the Ninth Circuit's narrow application of § 707(a) and refrained from any bad faith inquiry.

Some courts have granted bad faith dismissals under § 707(a) but have narrowed the scope of what constitutes bad faith under the subsection.<sup>219</sup> For example, although past courts have granted bad faith dismissals upon finding that the debtor filed for bankruptcy in an attempt to thwart the creditors' collection efforts, courts have recently rejected such findings as an insufficient showing of bad faith to justify dismissal of a case.<sup>220</sup>

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213. *In re RIS Inv. Group, Inc.*, 298 B.R. at 852 (citing *In re Padilla*, 222 F.3d at 1193).

214. 326 B.R. 474 (Bankr. D. Mass. 2005).

215. *Id.* at 476 (noting that the debtor had "severe coronary artery disease with multiple bypass surgery & stent placements, along with angiography/angioplasty . . . [which were] further complicated by poorly controlled diabetes, peripheral neuropathy and severe depression").

216. *Id.* at 482.

217. *Id.* at 483.

218. *Id.*

219. See, e.g., *In re Tallman*, 397 B.R. 451, 454–55 (Bankr. N.D. Ind. 2008), *rev'd*, No. 1:08-CV-309-TS, 2009 WL 3245206 (N.D. Ind. Sept. 30, 2009) (emphasizing the importance of looking to the cumulative effect of all of the relevant factors in a bad faith inquiry and comparing such an analysis to a determination of whether a work of art is a masterpiece to support the proposition that a bad faith inquiry should not be a "mechanical recitation of factors").

220. Compare *In re Kane & Kane*, 406 B.R. 163, 170 (Bankr. S.D. Fla. 2009) (denying the creditor's motion to dismiss despite finding that the debtor filed for bankruptcy in an attempt to thwart the creditor's collection efforts), with *In re Stump*, 280 B.R. 208, 214 & nn.1–2 (Bankr. S.D. Ohio 2002) (granting dismissal of a case

Courts have also interpreted the Code more strictly by applying provisions only in cases in which the relevant conduct is present.<sup>221</sup> If, for example, the debtor has satisfied all of the technical and procedural requirements but is guilty of conduct that excepts a debt from discharge under § 523, the court’s proper response should be to not only deny discharge of that specific debt but also deny the petition for dismissal under § 707(a). Even if the creditor or trustee makes a strong showing that the filing was made in bad faith, the petition should not be dismissed under § 707 unless the debtor’s debt consists of “primarily consumer debts,” in which case the creditor or trustee would have standing to move for dismissal under § 707(b).

In rejecting bad faith dismissals under § 707(a), courts in the Ninth Circuit have noted that if bad faith *did* constitute cause for dismissal under § 707(a), § 707(b) would be unnecessary.<sup>222</sup> It would also be excessive and redundant if § 707(a) provided an exhaustive list of all causes that justified dismissal because other technical and procedural requirements are provided in other sections of the Code.<sup>223</sup> More importantly, it would create opportunities for a debtor to find loopholes and exceptions to bypass § 707(a). The non-exhaustive enumeration sufficiently establishes the scope of the provision.<sup>224</sup>

For example, in *In re Tiner*,<sup>225</sup> the court granted dismissal for a non-enumerated cause that fell within the scope of § 707(a).<sup>226</sup> The court held that although dismissal is explicitly warranted under § 707(a) (3)

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upon finding that the debtor filed for bankruptcy to thwart the creditor’s collection efforts), and *In re Collins*, 250 B.R. 645, 654–55 (Bankr. N.D. Ill. 2000) (dismissing the petition because the debtor filed for bankruptcy to frustrate his only creditor’s efforts at recovery and was unwilling to change his lifestyle to pay his debt).

221. See, e.g., *In re Tallman*, 397 B.R. at 459–60 (“Including conduct redressed by other portions of the Bankruptcy Code as part of the bad faith dismissal analysis distorts the structure Congress designed when it evaluated and created solutions to particular problems.”); see also *supra* Part II.B (emphasizing the importance of applying the provision that applies specifically to the misconduct present).

222. See *In re Tiner*, No. 08-42070 TM, 2008 WL 2705103, at \*2–3 (Bankr. N.D. Cal. July 1, 2008) (citing *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1191–92 (9th Cir. 2000)) (stating that the causes enumerated in § 707(a) are “illustrative and not exhaustive”).

223. See *Kimlinger & Wassweiler*, *supra* note 15, at 97 (noting that the enumerated causes are representative of the technical and procedural violations of the Code but that courts should refrain from applying § 707(a) not only to misconduct beyond its scope but also to misconduct more specifically addressed in other sections). Providing a more complete list of causes for dismissal may also be dangerous because any omission may be construed as an intentional omission, potentially allowing for the creation of loopholes to preclude dismissal in certain situations.

224. See *In re Padilla*, 222 F.3d at 1191 (defining “including” to mean “not limiting” and citing *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829 (8th Cir. 1994), to emphasize the non-exclusivity of the enumerated causes for dismissal).

225. No. 08-42070 TM, 2008 WL 2705103 (Bankr. N.D. Cal. July 1, 2008).

226. *Id.* at \*6.

if the debtor failed to meet § 521(a)(1),<sup>227</sup> the debtor's failure to satisfy its counterpart, § 521(b)(1), which required him to file a credit counseling certificate, also constituted cause for dismissal.<sup>228</sup> Because the three enumerated causes are "illustrative and not exhaustive," the court properly applied § 707(a) to grant dismissal because the requirement under § 521(b)(1) was also technical and procedural in nature.<sup>229</sup>

Other cases have also been dismissed for causes beyond the scope of those enumerated in § 707(a). For example, courts have dismissed cases on the basis of protecting public health, safety, and well-being of the community.<sup>230</sup> Courts have recognized, however, that extraordinary circumstances typically must be present to warrant dismissal under § 707(a) beyond the scope of those enumerated.<sup>231</sup>

*C. Some Courts Have Reverted to Applying the Totality of the Circumstances Analysis, Hampering the Movement that Bankruptcy Courts Have Made Towards a Proper Application of § 707(a)*

Courts continue to exhibit reluctance towards eliminating the bad faith inquiry from a § 707(a) analysis, especially in cases without "primarily consumer debts" in which § 707(b) is inapplicable.<sup>232</sup> What is particularly concerning is that although some bankruptcy courts have held that bad faith does not constitute cause for dismissal under § 707(a) or have at least narrowed their bad faith inquiry, district courts have reversed their decisions and have reverted to applying a

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227. *Id.* at \*3, \*6. Under § 521(a)(1), the debtor must file, *inter alia*, a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of financial affairs. 11 U.S.C. § 521(a)(1) (2006).

228. *In re Tiner*, 2008 WL 2705103, at \*2-3.

229. *Id.* at \*3.

230. See *Ohio ex rel. Celebrezze v. Commercial Oil Serv., Inc.* (*In re Commercial Oil Serv., Inc.*), 58 B.R. 311, 318 (Bankr. N.D. Ohio 1986) (dismissing the case for cause under § 707(a) for economical and expeditious removal of hazardous wastes to restore community safety and health); see also *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 507 (1986) (granting dismissal under § 707(a) and holding that a trustee may not abandon property that was responsible for an environmental hazard because the trustee is responsible for bringing the property to a state that is in compliance with state and federal regulations, which are designed to protect the health and safety of the general public from identified hazards).

231. See *In re RIS Inv. Group, Inc.*, 298 B.R. 848, 854 (Bankr. S.D. Fla. 2003) (finding that without factors including "a severe threat to public health, an abuse of the legal process, or some comparable extraordinary circumstances, a voluntary [c]hapter 7 business case should not be dismissed pursuant to [§ 707(a)]").

232. See, e.g., *In re Lombardo*, 370 B.R. 506 (Bankr. E.D.N.Y. 2007) (dismissing the bankruptcy petition under § 707(a) after conducting a bad faith inquiry for equitable reasons despite the fact that the debtor's debt did not consist of "primarily consumer debts").

totality of the circumstances analysis to grant bad faith dismissals.<sup>233</sup> In continuing this longstanding misapplication, these district courts have relied heavily on precedent and have continued to ignore, *inter alia*, congressional intent, legislative history, and the canons of statutory construction.<sup>234</sup>

This problem is exemplified in *In re Tallman*,<sup>235</sup> in which the bankruptcy court denied the creditor’s motion to dismiss under § 707(a) because its “overall impression” indicated that the debtor was “ready, willing, and able” to satisfy the responsibilities of filing for Chapter 7 bankruptcy.<sup>236</sup> Less than a year later, a district court reversed the bankruptcy court’s decision, stating that the bankruptcy court should have conducted a bad faith inquiry that considered the “totality of the circumstances.”<sup>237</sup>

Although the bankruptcy court focused the § 707(a) analysis on the debtor’s honesty of purpose and on preserving the integrity of the bankruptcy system,<sup>238</sup> it narrowed the bad faith inquiry in a number of ways. First, the court noted that applying only multifactor tests is not particularly helpful because they risk diverting the court’s

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233. See, e.g., Sec. Am., Inc. v. Tallman (*In re Tallman*), No. 1:08-CV-309-TS, 2009 WL 3245206, at \*8 (N.D. Ind. Sept. 30, 2009), *rev’g* 397 B.R. 451 (Bankr. N.D. Ind. 2008) (reversing the bankruptcy court’s holding on the grounds that it failed to apply the totality of the circumstances analysis and disregarded facts and circumstances relevant to a bad faith analysis under § 707(a)); *In re Pedigo*, 296 B.R. 485, 488–90 (Bankr. S.D. Ind. 2003), *rev’d*, United States v. Pedigo, 329 B.R. 47 (S.D. Ind. 2005) (upholding the principals of statutory construction and emphasizing the importance of maintaining a clear distinction between the objectives of each subsection in rejecting bad faith as cause for dismissal under § 707(a)).

234. See, e.g., *Pedigo*, 329 B.R. at 48–51, *rev’g In re Pedigo*, 296 B.R. 485 (Bankr. S.D. Ind. 2003) (rejecting the Ninth Circuit’s narrow reading of § 707(a) and citing a long string of cases that have upheld bad faith as a cause for dismissal). The district court also stated that the Eighth and Ninth Circuits have not held that “the debtor’s motives in filing his Chapter 7 petition are irrelevant to the § 707(a) inquiry.” *Id.* at 49. However, while distinguishing Chapter 7 cases from cases under Chapter 11 or 13, the Ninth Circuit stated in *In re Padilla* that Chapter 7 bankruptcy “requires no ongoing relationship between the debtor and its creditors’ and should be available to any debtor willing to surrender all of its nonexempt assets, ‘regardless of whether the debtor’s motive in seeking such a remedy was grounded in good faith.’” *Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1192–93 (9th Cir. 2000) (emphasis added) (citing *Kimlinger & Wassweiler*, *supra* note 15, at 65). Although the Seventh Circuit had not addressed what constituted cause under § 707(a), the court justified its decision on the grounds that the Seventh Circuit has ruled that bad faith constitutes cause for dismissal of Chapter 13 cases under § 1307(c), a “parallel provision of § 707(a).” *Pedigo*, 329 B.R. at 49–50.

235. 397 B.R. 451 (Bankr. N.D. Ind. 2008), *rev’d*, No. 1:08-CV-309-TS, 2009 WL 3245206 (N.D. Ind. Sept. 30, 2009).

236. *Id.* at 461. The creditor was limited to bringing a motion to dismiss pursuant to § 707(a) because the debtor’s debt were not “primarily consumer debts.” *Id.* at 453 n.1.

237. *In re Tallman*, 2009 WL 3245206, at \*8.

238. *In re Tallman*, 397 B.R. at 453–54 (“Yet, one man’s trash can be another man’s treasure and bad faith, like beauty, is often in the eye of the beholder.”).

attention from the true purpose of the inquiry—whether or not cause exists to justify dismissal—to determining whether specific factors are present.<sup>239</sup> Second, the court found inapplicable the creditor’s allegations that the debtor intended to use the bankruptcy process to discharge his largest debt, filed for bankruptcy in response to an arbitration award, and had the ability to pay a substantial portion of his debts.<sup>240</sup> These were all factors that courts previously accepted in support of a finding of bad faith.<sup>241</sup>

Additionally, the bankruptcy court gave no weight to the creditor’s argument that the timing of the filing was an abuse of the system by explaining that bankruptcy is often a debtor’s last resort that usually is not a consideration until no alternatives remain.<sup>242</sup> Creditors can easily allege that the debtor filed for bankruptcy in bad faith and in response to their efforts to collect the outstanding debt.<sup>243</sup> To avoid such allegations and the risk of dismissal, the debtor would be left to wait until the creditor has stopped taking action to file for bankruptcy.<sup>244</sup>

In light of the bankruptcy court’s analysis, it is puzzling to see the district court revert to the totality of the circumstances analysis and grant dismissal for bad faith under § 707(a). The district court concluded that the bankruptcy court failed to consider evidence including the debtor’s income and expenses, resulting in an unfair application of the totality of the circumstances analysis.<sup>245</sup> In light of

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239. See *id.* at 454 (asserting that factor analyses are helpful only to a certain point, are more formulaic, and may not properly assess the circumstances surrounding each debtor’s unique situation as certain factors may draw a heavier focus than others); see also *In re Kane & Kane*, 406 B.R. 163, 167 (Bankr. S.D. Fla. 2009) (recognizing that many factors applied by courts to determine whether the debtor acted in bad faith have little to no weight in cases under Chapter 7). The court also stated that in applying the multifactor analyses, courts are “tallying the pluses and minuses” to determine the existence of bad faith, which they have yet to define or even articulate. *In re Tallman*, 397 B.R. at 454.

240. *In re Tallman*, 397 B.R. at 457–58. To all of the creditor’s arguments, the court responded, “This is true, but, so what?” *Id.*

241. See, e.g., *Perlin v. Hitachi Capital Am. Corp.* (*In re Perlin*), 497 F.3d 364, 372 (3d Cir. 2007) (holding that although a debtor’s inability to repay the debts alone is inadequate cause for dismissal, the court retains discretion to consider the debtor’s financial situation in a good faith analysis under § 707(a)); *In re O’Brien*, 328 B.R. 669, 675 (Bankr. W.D.N.Y. 2005) (applying a totality of the circumstances under § 707(a) and, in its bad faith inquiry, considering a list of fourteen factors, which include whether the debtor petitioned for bankruptcy in response to a judgment pending litigation and whether the debtor’s use of bankruptcy protection causes “unconscionable detriment” to the creditors).

242. See *In re Tallman*, 397 B.R. at 457–58.

243. *Id.* at 458 n.5.

244. *Id.*

245. See *Sec. Am., Inc. v. Tallman* (*In re Tallman*), No. 1:08-CV-309-TS, 2009 WL 3245206, at \*6–8 (N.D. Ind. Sept. 30, 2009) (arguing that the bankruptcy court should have considered the evidence regarding the debtor’s ability to pay under the

the objective provision applied to justify dismissal, the court’s focus on reaching the most equitable outcome is understandable but troublesome because such a broad reading may create a slippery slope that would allow good faith and other principles of equity to be read into other objective provisions of the Code.

However, in *In re Sherman*,<sup>246</sup> the Ninth Circuit reversed the district court and upheld the bankruptcy court’s decision to deny the creditor’s motion to dismiss under § 707(a).<sup>247</sup> In this case, the debtor, an attorney, represented a number of companies involved in a securities fraud action pursuant to a contingency fee agreement; the companies agreed to periodically pay the debtor advances against the contingency fee during the litigation.<sup>248</sup> After settling the suits, the Receiver of the companies filed a motion seeking an order to require the debtor to disgorge the funds that he received and retained, but had not earned, through representing the companies.<sup>249</sup> Four days before the hearing, the debtor filed for bankruptcy protection,<sup>250</sup> and the SEC subsequently filed a motion to dismiss.<sup>251</sup>

In holding that the bankruptcy court did not err in denying the motion to dismiss, the court did not focus the § 707(a) inquiry on the existence of bad faith but narrowed it to determine whether there was cause for dismissal.<sup>252</sup> As in *In re Padilla*, it found that other sections of the Code addressed each type of misconduct that the petitioner alleged and concluded that there was no cause to justify dismissal of the bankruptcy petition.<sup>253</sup> If none of the Code provisions

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totality of the circumstances and merely stating that “a majority of federal courts has determined that bad faith constitutes cause under § 707(a) and can justify dismissal”).

246. 491 F.3d 948 (9th Cir. 2007).

247. *Id.* at 956.

248. *Id.* at 954. Any money the debtor received that was in excess of his contingency fees was considered an interest-free loan. *Id.* A year before these proceedings, the debtor was also found in civil contempt for violating a court’s freeze order by withdrawing funds from the companies’ litigation trust account and was ordered to disgorge the funds withdrawn. *Id.*

249. *Id.* at 954–55. The Receiver settled the suits under the contingency fee agreement for \$750,000, entitling the debtor to \$300,000 in fees. *Id.* The district court granted the motion for disgorgement and ordered the debtor to pay \$581,313.43—the difference between the \$881,313.43 in advances the debtor collected and the actual fees the debtor earned for his representation. *Id.* at 955.

250. *Id.* at 954.

251. *Id.* at 955.

252. *Id.* at 970.

253. *Id.* at 974. The creditor alleged that the debtors:

(1) “used the bankruptcy as a refuge from the district court’s jurisdiction, and to thwart [the creditor’s]” attempts at recovering the debt, (2) engaged in a “scorched earth” tactic against the creditor, and (3) “deliberately exaggerated their liabilities and expenses . . . to create the . . . impression that they were in dire . . . need of bankruptcy relief.”

addressed the type of misconduct alleged, the court would have considered whether the case could have been completely dismissed under the circumstances asserted.<sup>254</sup>

Although the Ninth Circuit denied the motion to dismiss under § 707(a), the creditor was not left unprotected or without remedy. The creditor simply sought to enforce its judgment under the wrong Code provision and failed to allege any debt-specific misconduct.<sup>255</sup> On remand, the court held that the debt was nondischargeable under § 523.<sup>256</sup> Though the creditor and the court were frustrated with the debtor's behavior before and during the bankruptcy proceedings, courts must carefully apply the Code and should neither read in provisions to achieve the most equitable remedy nor turn to the quickest and easiest remedy.<sup>257</sup>

In sum, despite the increase in bankruptcy filings and the weakened but recovering economy, each debtor, including those who file remotely meritorious petitions, should receive a full hearing, and courts should not grant dismissals under § 707(a) at the petition stage unless the petition is procedurally unsound.<sup>258</sup> By filing for

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*Id.* at 970. The court found that § 362, which recognizes that it is not always appropriate to allow debtors to take advantage of the automatic stay and allows a party in interest to challenge the imposition of the automatic stay, addressed the first alleged misconduct. *Id.* at 971. Next, § 547(b) addresses the "scorched earth" tactic and was enacted to prevent a debtor from favoring certain creditors by making pre-petition transfers. *Id.* at 972–73. Section 727 addresses the last alleged misconduct and denies a debtor discharge if he misrepresented his liabilities and expenses to worsen the appearance of his situation. *Id.* at 973.

254. See *id.* at 970 (explaining the two-part inquiry established in *In re Padilla*, 222 F.3d 1184 (9th Cir. 2000)).

255. *Id.* at 975. The court stated that the creditor was protected under § 362(b)(4) and that the debtor was not subject to the automatic stay generally afforded to debtors in bankruptcy. *Id.* Additionally, the court found that the creditor could have avoided some of the debtor's pre-petition transfers under § 547 and could have prevented discharge under § 727 due to the debtor's misrepresentations. *Id.*

256. See *SEC v. Sherman*, 406 B.R. 883, 887 (C.D. Cal. 2009) (noting that the Ninth Circuit properly ordered the debtor "to make restitution of funds he obtained that were derived from a violation of federal securities laws, and that [§ 523(a)(19)] is available to the [creditor] for such violations"). Section 523(a)(19) excepts discharge for debts incurred in violation of any federal or state securities laws or through fraud, deceit, or manipulation in connection with the purchase or sale of any security within a specified time period. 11 U.S.C. § 523(a)(19) (2006). The court emphasized the importance of maintaining the creditor's ability to enforce the federal securities laws. *Sherman*, 406 B.R. at 887.

257. See *In re Sherman*, 491 F.3d at 975 ("*Padilla* does not, however, permit a free-floating concept of cause for dismissal to substitute for careful application of the bankruptcy scheme Congress devised, including the multitude of remedies for abusive behavior or behavior harmful to the public interest.>").

258. See *In re Tallman*, 397 B.R. 451, 457 & n.4 (Bankr. N.D. Ind. 2008), *rev'd*, No. 1:08-CV-309-TS, 2009 WL 3245206 (N.D. Ind. Sept. 30, 2009) (noting that the debt was too large for the debtor to be eligible for relief under Chapter 13).

Chapter 7 bankruptcy, the debtor has effectively thrown himself at the mercy of the bankruptcy court by relinquishing all claims to his property.<sup>259</sup> Creditors and trustees have many other provisions to turn to under which they can move the court to deny discharge if the debtor has engaged in misconduct.<sup>260</sup> Courts should take the final step and no longer recognize bad faith as a cause justifying dismissal of a Chapter 7 bankruptcy petition under § 707(a).

#### CONCLUSION

Despite the projected 1.45 to 1.5 million bankruptcy filings expected by the end of 2009,<sup>261</sup> courts should not read in “bad faith” as cause for dismissal under § 707(a). Although it is impossible to deny the existence of the increasing docket pressures that have resulted from the upsurge in bankruptcy petitions<sup>262</sup> and the concomitant shortage of bankruptcy judgeships,<sup>263</sup> those considerations cannot override the text, structure, or legislative purpose of the Code. Perhaps to some, the debtor who incurred significant credit card debt from living a lavish lifestyle but recently underwent a costly medical procedure and lost his job deserves no relief and should be left to pay off his debt through his own means. But under the cases described above, it is possible that an “honest but unfortunate debtor” could be denied bankruptcy relief due to a cursory analysis of his overall financial situation that only considers the presence of certain factors to support a finding of bad faith.

The sole concern of the court reviewing a motion to dismiss under § 707(a) should be the debtor’s satisfaction of the technical and procedural requirements that fall within the objective scope of the

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259. See *In re Kane & Kane*, 406 B.R. 163, 170 (Bankr. S.D. Fla. 2009) (emphasizing the consequences of denying a debtor access to bankruptcy relief); see also *supra* Part I.A (providing an overview of Chapter 7 bankruptcy); *supra* Part II.C (highlighting the differences between liquidation and reorganization, warranting different treatment for each type of bankruptcy).

260. See *supra* Part II.B (detailing some of the other Code provisions that creditors and trustees may turn to in order to petition the court to deny the debtor discharge of his debt).

261. Posting of Bob Lawless to Credit Slips, <http://www.creditslips.org/creditslips/2009/04/my-entry.html> (April 2, 2009, 5:25 PM). The rate of filings has almost returned to the level before the BAPCPA became effective. *Id.*

262. *Downturn Pushes More Toward Bankruptcy*, AACER, 2007, <http://aacer.com/> (follow “Press” tab and scroll to article).

263. Press Release, Administrative Office of the U.S. Courts, Congress Is Urged to Add Bankruptcy Judgeships in the Face of Near-Record Case Levels (June 16, 2009), [http://www.uscourts.gov/Press\\_Releases/2009/BankruptcyJudgeships\\_0616.cfm](http://www.uscourts.gov/Press_Releases/2009/BankruptcyJudgeships_0616.cfm); Press Release, Administrative Office of the U.S. Courts, Bankruptcy Filings Continue to Increase, Records Broken for Total Filings and Non-Business Filings (May 15, 2003), [http://www.uscourts.gov/Press\\_Releases/303bk.pdf](http://www.uscourts.gov/Press_Releases/303bk.pdf).

section.<sup>264</sup> Regardless of the apparent ineffectiveness of the BAPCPA in reducing the number of bankruptcy filings, Congress has maintained the objective nature of § 707(a) by repeatedly and intentionally omitting bad faith from the section.<sup>265</sup> Although bankruptcy courts are courts of equity, they should abide by the provisions of the Code and should not decide a case based on what they subjectively conclude to be fair and just.<sup>266</sup> Not only do other provisions of the Code afford protections to the bankruptcy system, but trustees will also bring enforcement actions to combat fraudulent and abusive filings.<sup>267</sup> Courts need not and should not misconstrue § 707(a) in order to protect the integrity of the bankruptcy system, and a filing done in bad faith should not automatically preclude a debtor from qualifying for bankruptcy relief.

What remains is the need for consistency among court decisions concerning bad faith dismissals.<sup>268</sup> This calls for clarification from the Supreme Court, or failing that, further amendments of the Code and the addition of more objective standards to clarify congressional

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264. See *supra* notes 41, 121, 128 and accompanying text (arguing that the application of § 707(a) should be limited to technical and procedural violations of the Code).

265. See *supra* note 102 and accompanying text; see *supra* Part II.A (emphasizing that Congress' repeated and intentional omission of bad faith from § 707(a) should preclude any bad faith inquiry and should limit the court's inquiry to the existence of violations of the enumerated technical and procedural causes for dismissal or violations within the objective scope of the section).

266. See *supra* note 175 and accompanying text (arguing that the function of the bankruptcy court, despite being a court of equity, is to interpret the Code and accurately apply its provisions without incorporating equitable considerations in the analysis).

267. See generally U.S. DEPARTMENT OF JUSTICE, UNITED STATES TRUSTEE PROGRAM ANNUAL REPORT (2008), available at [http://www.usdoj.gov/ust/eo/public\\_affairs/annualreport/docs/ar2008.pdf](http://www.usdoj.gov/ust/eo/public_affairs/annualreport/docs/ar2008.pdf) (detailing the investigations and actions brought by the United States Trustees against creditors, debtors, attorneys, and others involved in the bankruptcy process to prevent unwarranted discharge of debt and abusive conduct). U.S. Trustees file motions to dismiss under § 707(b) if the debtor fails to rebut the presumption of abuse through a showing of special circumstances, and in the 2008 fiscal year, these filings prevented \$374,854,825 from being discharged. *Id.* at 12. They may also file complaints to deny discharge under § 727 if the debtor has engaged in improper conduct such as concealing assets or destroying property to hinder a creditor from recovery. *Id.* at 11.

268. Another troubling fact is that the misinterpretation of § 707(a) is also contained in digests and sources that lawyers turn to for guidance for application of the laws. See, e.g., 9A AM. JUR. 2D *Bankruptcy* § 1170 (2009) (stating that "[t]he application of equitable principles in determining whether good cause for dismissal exists is not precluded" and citing pre-BAPCPA cases upholding the implicit good faith filing requirement as support); 4 NORTON BANKRUPTCY LAW AND PRACTICE 3D § 79.4 (William L. Norton, Jr., 2009) (listing factors that courts considered in determining whether cause existed for dismissal, which included "whether the debtor is acting in good faith"). The inaccuracies contained in these sources may be a contributing factor to the continued misapplication of the Code and improper dismissals of Chapter 7 cases. See *id.*

intent, particularly with regard to the application of § 707(a).<sup>269</sup> Congress should set forth a clear distinction between the objective analysis under § 707(a) and subjective analysis under § 707(b). Although the discharge of debts through Chapter 7 bankruptcy should be limited to the “honest but unfortunate debtor,” § 707(a) should be strictly interpreted, and bad faith should not be considered an appropriate cause for dismissal.

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269. See generally Jean Braucher, *A Fresh Start for Personal Bankruptcy Reform: The Need for Simplification and a Single Portal*, 55 AM. U. L. REV. 1295 (2006) (emphasizing the need for Congress to simplify the bankruptcy system and eliminate the burdens imposed on the debtors and stating that BAPCPA failed in achieving its goal of abuse prevention or consumer protection).