

## Must A Debtor Who Converts From Chapter 13 To Chapter 7 “Retake” The Means Test?

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A debtor who files his petition under chapter 7 must show whether the relief he seeks would be an abuse of that chapter’s provisions by completing the so-called “means test.” 11 U.S.C. §707(b)(1). He accomplishes this by completing official form 22A, statement of current monthly income, pursuant to Interim Fed. R. Bankr. P. 1007(b)(4).

In a parallelism, a chapter 13 petitioner must show his disposable income by completing official form 22C, which, under certain circumstances, draws on the means test for permissible expenses, *see* 11 U.S.C. §1325(b)(3). But must a debtor who files an initial petition under chapter 13 (along with the requisite chapter 13 statement of current monthly income, official form 22C), and subsequently converts his case to one under chapter 7, pursuant to 11 U.S.C. §1307(a), show that his case is not abusive by subjecting his case to the means test by filing an official form 22A? Not surprisingly, two recent decisions arrived at opposite conclusions.

### Yes

In what it thought was an issue of first impression nationally, the U.S. Bankruptcy Court for the District of Rhode Island concluded that a converting debtor (from chapter 13 to chapter 7) must complete official form 22A so as to enable a review for abuse by use of the chapter 7 means test. *In re Perfetto*, 361 B.R. 27, 31 (Bankr. D. R.I. 2007).

The debtor argued that she need not file an official form 22A, subjecting herself to the means test, because the Code required such only in “a case *filed* by an individual debtor under this chapter.” *Id.* at 28, 30 (*quoting* 11 U.S.C. §707(b)(1)) (emphasis added). According to her, *conversion* to chapter 7 is distinguishable by the wording of the statute from *filing* under chapter 7. *Id.* at 28. Furthermore, as a practical matter, argued this debtor, her official form 22C showed her income to be below the median for the state; thus, an official form 22A would provide no new useful information. *Id.* at 29.

The U.S. Trustee argued, relying on the phrase overlapping that quoted by the debtor, that she must file official form 22A because she is an “individual debtor under this chapter whose debts are primarily consumer debts”, regardless of how she arrived at chapter 7 (either filing or converting). *Id.* at 28, 30. Furthermore, argued the U.S. Trustee, sidestepping the means test by the device of filing under chapter 13 then “perfunctorily converting to chapter 7” would conflict with the legislative goal of testing chapter 7 filings for abuse. *Id.*

In its analysis, the court found no ambiguity in 11 U.S.C. §707(b), *id.* at 29 (“[A] look at the statute makes it clear that §707 (b) is not at all ambiguous.”); nevertheless, it rejected

a “literalist” approach, hewing instead to a “common sense” approach, as consistent with congressional intent. *Id.* at 29-30. This approach required a consideration of context and the statute as a whole, seeking consistency. *Id.*

The court harmonized its construction of 11 U.S.C. §707(b) with 11 U.S.C. §348(a) and determined that the statutory language which related a conversion back to the date of the original petition also effectively changed the chapter under which a debtor filed to that to which he converted, with all of its new or different requirements. *Id.* at 30-31. Examining extra-statutory authority, the court found its construction accordant with Interim Fed. R. Bankr. P. 1007(b)(4), requiring the debtor to file a statement of current monthly income on the appropriate form, and with Interim Fed. R. Bankr. P. 1019(2), which resets the calendar, so to speak, for a motion under 11 U.S.C. §§707(b)(1) or (c)(2). *Id.* at 31. Because such a motion for a determination of abuse must rely on a review of the debtor’s finances, it was apparent to the court that Congress intended that a converting debtor complete official form 22A. *Id.*

## No

A very similar case came before the U.S. Bankruptcy Court for the District of New Jersey, which determined quite the opposite from the *Perfetto* court. *In re Fox*, No. 06-12410 (GMB), 2007 Bankr. LEXIS 1865, at \*\* 25-26 (Bankr. D.N.J. June 1, 2007) (“This court holds that the debtor, having converted her case from one under chapter 13 to one under chapter 7, is not subject to the means test under the plain language of §707(b)(1) and is, thus, not required to file a Form B22A under *Rule 1007(b)(4)*.”)<sup>1</sup>

The debtor’s argument was similar if not identical to that offered by the debtor in *Perfetto*. She argued that the language of 11 U.S.C. §707(b)(1) imposed the means test on a *filer* under, rather than a converter to, chapter 7. *In re Fox*, 2007 Bankr. LEXIS 1865, at \*\* 4-5. She further argued that while 11 U.S.C. §348(a) provides that conversion to chapter 7 constitutes “an order for relief”, it does not constitute a filing under chapter 7. *Id.* Lastly, she argued that if Congress had intended to apply the means test to a case converted to chapter 7, it would have drafted the statute explicitly to do so. *Id.*

The U.S. Trustee, relying on *Perfetto*, argued that the plain meaning of the statutory language applied means test to all chapter 7 individual debtors “whose debts are primarily consumer debts,” whether they filed under chapter 7 or converted thereto. *In re Fox*, 2007 Bankr. LEXIS 1865, at \*5. According to the U.S. Trustee, it was not the intent of Congress to afford debtors the right to discharge their debts regardless of their ability to pay. *Id.* at \*6. Rather, BAPCPA purposefully shifted the presumption for discharge to one of abuse, and requires every chapter 7 debtor to be subjected to the means test. *Id.* at \*6. Such intent is supported by the language of 11 U.S.C. §707(b)(2)(C), requiring a debtor to file a statement of current monthly income, and Interim Fed. R. Bankr. P. 1007(b)(4), requiring a debtor “in a chapter 7 case” to file a statement of current monthly income on the appropriate form. *Id.* Additional support lay in 11 U.S.C. §342(d), which

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<sup>1</sup> Another court accords in its order in *In re Edwards*, No. 06-20145, 2007 Bankr. LEXIS 1738 (Bankr. S.D. Ga. April 4, 2007); however, the debtor and the U.S. Trustee appeared to have little or no dispute.

set forth certain notice requirements regarding the presumption of abuse in 11 U.S.C. §707(b). *Id.* at \*\*6-7. The U.S. Trustee argued that the abuse provisions of 11 U.S.C. 707(b)(3) can arise only if the means test shows no presumption of abuse, or that the presumption is rebutted. *Id.* at \*7. Also, the U.S. Trustee noted that the only exception to the means test requirement was found in 11 U.S.C. §707(b)(2)(D), for disabled veterans whose indebtedness arose under certain circumstances. *Id.*

The court began by analyzing the language of 11 U.S.C. §707(b). *Id.* at \*\*7-8. Finding no ambiguity, it determined that the means test requirement clearly and explicitly applied to a chapter 7 filer only, and not to a debtor who converted to chapter 7, *id.* at \*9, especially given the repeated references throughout 11 U.S.C. §§707(b) and (c) to “filing” a case under chapter 7, *id.* at \*\*10-12, as opposed to other verbiage available to the drafters, *id.* at \*\*16-17. Furthermore, while the language of 11 U.S.C. §707(b)(1) showed that its drafters were certainly contemplating the conflux of the presumption of abuse and conversion, it pertained to consensual conversion *from* chapter 7 to another chapter, rather than *to* chapter 7 from another. *Id.* at \*12. In addition, the “order for relief” language of 11 U.S.C. §707(b)(2)(A)(ii)(I) is excluded from the list in 11 U.S.C. §348(b), which enumerates those sections that equate “order for relief” under a chapter to conversion thereunder. *Id.* \*11. Thus, a debtor’s income and expenses are determined on the filing date of her original petition, rather than the date of her conversion. *Id.*

Responding to the U.S. Trustee’s argument that Interim Fed. R. Bankr. P. 1007(b)(4) requires a converting chapter 7 debtor to file official form 22A, the court opined that rules cannot create law and cannot prevail over the unambiguous language of the statute. *Id.* at \*\*13-14. The U.S. Trustee’s 11 U.S.C. §342(d) based argument was unavailing because of, once again, the statutory language referring to “the filing of the petition” rather than any reference to conversion. *Id.* at \*\*15-16.

The court also found that the U.S. Trustee’s construction of the statute would lead to an absurd result because any income disclosure upon conversion would potentially be obsolete and irrelevant due to the passage of time between conversion and the earlier “commencement of the case” upon which current monthly income, defined in 11 U.S.C. §101(10A)(A), is based. *In re Fox*, 2007 Bankr. LEXIS 1865, at \*17.

To the U.S. Trustee’s resort to the legislative history of BAPCPA, the court responded that such was impermissible in light of the unambiguous language of the statute. *Id.* at \*\*18-19. Nevertheless, the court observed that even if it were to consider legislative history, the U.S. Trustee had shown no historical support for applying the 11 U.S.C. §707(b)(1) regime to a debtor who, pressed by a dramatic change to her financial circumstances, converted her chapter 13 case to one under chapter 7. *Id.* at \*\*19-20.

The court characterized as “specious” the U.S. Trustee’s argument that exempting a chapter 13 debtor converting to chapter 7 from the means test would create a “loophole.” *Id.* at \*\*24-25. The court was satisfied that BAPCPA’s safeguards against bad faith filers were more than adequate to provide for dismissal of a debtor who converts his case in bad faith. *Id.* at \*25.

The court explained why it declined to follow the reasoning in *Perfetto*. To that court's application of 11 U.S.C. §348(a) to the issue, the *Fox* court reiterated that 11 U.S.C. §707(b) is excluded from the list in 11 U.S.C. §348(b), which delimits the effect of 11 U.S.C. §348(a), and specifies those sections wherein "order for relief" under a chapter may be equated to conversion thereunder. *Id.* \*\*20-21. According to the court, while 11 U.S.C. §348(a) and (b) may relate back the order for relief in the converted case to that in the case before conversion, there is no reason to recast the case as one originally filed under the chapter to which it has been converted. *Id.* at \*21, n.4. To the *Perfetto* court's reasoning based on the provisions of Interim Fed. R. Bankr. P. 1019(2), the *Fox* court responded that a rule of bankruptcy could not reflect legislative intent as the *Perfetto* court would have it do. *Id.* at \*22.

The fundament of the *Fox* court's reasoning was that the plain language of 11 U.S.C. §707(b)(1) clearly and unambiguously applies itself to a case *filed* under chapter 7, and not to a case converted thereto.

## **Conclusion**

Not surprisingly, two courts presented with the same issue and very similar facts decided disparately, indeed oppositely. One court decided that a "common sense" construction of the overall statutory scheme for bankruptcy requires a debtor who converts her case from one under chapter 13 to one under chapter 7 to subject her case to the chapter 7 means test by filing official form 22A. The other court found in the plain and unambiguous language of BAPCPA no such requirement. The test of time and the crucible of appellate review will eventually resolve the differences.