

Reforming Bankruptcy Reform  
What Would a Real Bankruptcy Abuse Prevention and  
Consumer Protection Act Look Like?<sup>1</sup>

I. Means Testing

A. Background

Bankruptcy laws have long represented a back and forth between the interests of creditors and those of debtors. The 1978 Bankruptcy Code perhaps represented a high water mark for debtors and much of what Congress has done since then has been to revise that balance.

The 1978 Code contained no equivalent to the provisions of Section 707(b) as they existed prior to the passage of the 2005 Amendments. To the contrary, the legislative reports on Section 707(a)'s dismissal "for cause" provision stated:

[The section] does not contemplate . . . that the ability of the debtor to repay his debts in whole or part constitutes adequate cause for dismissal. To 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. 989, 95th Cong., 2d Sess. 94, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5880 and H. Rep. No. 595, 95th Cong., 2d Sess. 380, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6336 (Same in both reports).

In 1984, the Code was amended to provide:

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

That language, and the accompanying legislative history was almost universally taken to mean that ability to pay had now become at least some part of the decision-making analysis,

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<sup>1</sup> These materials have been prepared by the moderator, Karen Cordry. In the tradition of the ABI Great Debates, they are meant to spark debate. As such, they should not be taken to represent the views of the other panelists, the National Association of Attorneys General or any of the individual Attorneys General or their staffs – and sometimes not even those of the moderator.

## 21st Annual Winter Leadership Conference

particularly when those same 1984 amendments also added the requirement that the debtor file a statement of income and expenses, which would give the court information that would allow it to assess that issue. The case of *In re Grant*, 51 B.R. 385 (Bankr. N.D. Ohio 1985) provides an extended discussion of that history and its support for imposing some form of “ability to pay” test. In particular, the court noted that a sponsor of the bill, Congressman Mike Synar (D-OK) had supported the consumer amendments in order to eliminate abuses that he believed were destroying business confidence in extending consumer credit and were making it more difficult for honest consumers to obtain such credit. Similar themes were sounded by other supporters, including one who specifically referred to the ability of a debtor to fund a Chapter 13 plan. See discussion in *Grant*, 51 B.R. at 389-92. What Congress did not do, though, was to give the courts any specific guidance or parameters about analyzing the debtor’s finances to determine if the filing constituted “substantial abuse.” (The *Grant* court noted the absence of such guidance and indicated that it assumed rules would be forthcoming shortly, which, of course, never occurred). As a result, the cases multiplied as the courts struggled with a multitude of issues.

The case of *In re Attanasio*, 218 B.R. 180 (Bankr. N.D. Ala. 1998) may be the best single case to sum up all of the debate on this issue – as well as to illustrate the problems many, at least on the creditor side of the bar, saw with the Section 707(b) dismissal language prior to BAPCPA.

The case is approximately 65 pages long. Of that total, less than two pages are devoted to the actual debtor – one page at the beginning summing up his financial situation and one at the end with the court’s “findings” as to his situation (some of which are announced *ipse dixit* with no reference to any facts stated by the court anywhere else in its opinion).

Mr. Attanasio, according to the opinion, was a traveling salesman. In 1995, he earned more than \$83,000; in 1996, he earned more than \$66,000. In 1997, when he filed his case, the court states that his *net* monthly income was \$3,072, but omits any reference to his gross income. The opinion does not cite his age, his health, his marital status or whether he had any dependents. In light of the sympathetic approach taken by the rest of the opinion, one may reasonably assume that the court would have mentioned it if he had been near retirement, was in poor health, was married, or had dependents. The median *gross* income for a single debtor in Alabama in 2009 – twelve years later – is less than \$37,000. Thus, the debtor’s net income in 1997 was equal to the median gross income in 2009, clearly indicating that he would easily have fallen into the “above-median income” category when he filed his case.

Despite earning close to twice the median income for Alabama in 2009 (much less whatever it was 12 years earlier), the debtor had managed to accumulate more than \$126,000 in unsecured debt. More than \$90,000 was owed to his father based on loans received from 1990 to 1997. The opinion does not address why the debtor was unable to live on his income during that period and mentions nothing about any unusual expenses incurred by the debtor. When he filed, the debtor had expenses of \$2,065 against his income of \$3,072 a month, including \$150 for telephone service and \$250 a month for entertainment. The debtor’s expenses were well above the *national* norm for expenses for a single person (a level likely to have been significantly

higher than the expense level for persons living in Alabama). The debtor was also making payment of \$280 a month on one loan and \$278 a month on delinquent taxes, amounts sufficient to satisfy those debts in eight and ten months, respectively. Absent those payments, as noted above, the debtor had more than \$1,000 a month to apply to his debts. If his expenses were also limited to the national norm, he would have close to \$1500 a month that he could pay, resulting in a 35% payment to unsecured debts in a 36 month plan and about 79% in a 60-month plan.<sup>2</sup>

Before the court considered what to do with Mr. Attanasio, though, it conducted a 60 plus page excursion through the mass of case law dealing with the “ability to pay” test, listing apparently every case the court had been able to find that had ever addressed the issue and cross-tabulating them by a variety of factors, such as the level of the debtor’s gross income, the percent of debt that could be repaid, or the types of expenses found questionable. While the length of the opinion perhaps suggests that the court or the law clerk or both had too much time on their hands, it does provide a virtual mother lode of case law for anyone examining these issues.

The court considered numerous factors that must be reviewed by a court trying to make an “ability to pay” decision. For instance, should the question be the relative amount of debt that can be paid or the absolute amount? Should there be some income level below which it is conclusively presumed that there is no abuse – or, conversely, above which a debtor should be deemed ineligible for Chapter 7 relief, absent proof of some unusual circumstances?

Should a debtor who works extra hours, or lives at home, or has an older car, be required to maintain those circumstances for a time in order to create payments for creditors if other debtors with higher expenses are allowed to continue with those expenses. What level of expenditures can be considered excessive? Should that level be set by the court’s own judgment or should it be tied to some local or national objective standard? What items are luxuries that the debtor should be required to give up until the creditors are paid? Should a debtor be allowed to save for retirement? Should he be entitled to keep his children in private schools while his creditors go unpaid? Should the only question be his future ability to pay debts – and over what period of time? Or should the court inquire into the reasons for the debt? Plainly, all of those factors are relevant to this decision. And each, as the court showed in excruciating detail, have been relied on and applied by different courts in different fashions to reach different results.

In short, despite the arguments of those who argued throughout the decade-long debate before the Bankruptcy Review Commission and Congress that “there shouldn’t be a means test,” the reality is that, at least since 1984, there has always been a “means test.” The problem is that there was not *one* means test; there were 300 or so – one for each bankruptcy judge who had to

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<sup>2</sup> The court in *Grant* found that the debtor’s ability to pay about 68% to creditors over the course of a 60-month plan would show “cause” for dismissal, especially when coupled with the lack of any showing of particular problems that caused the debtors to incur those debts. Rather, the court saw the debtors’ budget as replete with excess spending and refused to give the debtor “a ‘headstart’ in the race for conspicuous consumption.” *Grant*, 51 B.R. at 393-94, 397.

## 21st Annual Winter Leadership Conference

make his own choices among the myriad of analytical options.

While, to be sure, this allowed each judge to exercise his unfettered discretion, it meant that a “uniform law of bankruptcy,” was anything but. One judge might look at the absolute sum that could be paid. Another might require a debtor to forego even basic cable TV service, while another might not blink at a debtor who spent twice that much. Some courts looked sternly at those who would seek to avoid paying everything they could towards what they owed, so long as they were not left in dire poverty. But some debtors, like Mr. Attanasio, could wind up in the Northern District of Alabama. The court there stated:

This Court does not believe that Congress intended for 707(b) to be invoked, if doing so would reduce a low or middle income debtor to *living on the kind of harsh budget that might be required for confirmation of a Chapter 13 plan*, thereby depriving that debtor of the "clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt" envisioned by Justice Sutherland in *Local Loan*. Had Congress intended to disregard that pronouncement, it would have done so and would not have included the very specific language of the last sentence of 707(b), which requires the court to presume favorably, not that the debtor cannot pay debts, and not that the debtor is entitled to a Chapter 7 discharge of all debts, but that the debtor is entitled to be in Chapter 7, as opposed to Chapter 13. That presumption, along with the historic purpose of Chapter 7 bankruptcy, as described in *Local Loan*, *mandates that the disposable income threshold of 707(b) be more generous than the disposable income threshold of 1325(b) and that a case be dismissed from Chapter 7 only if the debtor will have a "clear field for future effort" even if the debtor is not granted a Chapter 7 discharge*. The proper question to ask under 707(b) therefore should be, can the debtor fund a Chapter 13 plan and still have a clear field of effort, not whether the debtor can fund a Chapter 13 plan. (Emphases added).

*Attanasio*, 218 B.R. 195-196.

The court noted the “uniformity” problems with the means test as it then existed, stating:

As discussed above, many courts relate 707(b) to a debtor's lack of integrity and have recognized moral justifications for many of the factors that have been developed to describe substantial abuse. Representative is the statement that, "It is morally and legally unconscionable that a person should be able to extinguish his obligations without first making a reasonable effort to fulfill them."

*In re Hudson*, 56 B.R. 415, 419 (Bankr. N.D. Ohio 1985). This Court respectfully disagrees and believes that section 707(b) was intended by Congress and its progenitors to solve economic problems and address economic issues, otherwise the Congressionally authored standard becomes so vague and subject to such a broad array and variety of interpretations, that it permits a court to define standards to apply to any case based simply on the court's sensibilities. Thus, the statutory standard can in effect be applied, depending on the sensibilities of a particular court, to virtually any case regardless of the factual circumstances involved. As a result, the statute comes perilously close to the kind of vagueness that can result in the denial of due process as well as an unequal treatment of the persons subjected to that statute. The standards created, because they are so unclearly defined, may be subject to arbitrary, capricious, and indiscriminate application. That would be unjust and certainly would result, in many instances, in the unfair and unequal treatment of persons subject to the statute. Such would then of course undermine the legitimacy of the bankruptcy applications process as well as the confidence of the participants in that process.

*Attanasio*, 218 B.R. at 236.

Based on its reading of the legislative history, and relying very heavily on general language from *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934), a case decided 64 years earlier, and that did not deal with a means test issue, the court held that the substantial abuse test required “dismissal only where the debtor has sufficient income to pay all of his or her indebtedness, without difficulty, as it becomes due.” Further, the court held that the test of abuse was not whether the debtor could make a substantial payment in Chapter 13, or whether he would be relieved of any remaining debt at the end of a Chapter 13 case, or what burden he would be under while in Chapter 13 – rather, the standard was whether the debtor, if he did not file any form of bankruptcy could pay *all* of his debts, *with interest running, without difficulty!* Thus, the Chapter 7 case would be proper even if the debtor could pay *all* of his debts within a Chapter 13 case (which would not require interest payments). Rather, one must prove that the debtor could have *easily paid all debts in full with interest* had he not filed bankruptcy. The court readily admitted that that was a standard that would only apply in a probable handful of cases.

The court supported this highly limited reading of the section by noting that Congress had rejected a specific income test in 1984, had included a presumption that Chapter 7 relief was warranted, had only referred to cases of “substantial” abuse, and had only allowed the U.S. Trustee to raise such issues, not other parties in the case. Under its standard, the court concluded that the debtor could not pay his debts in full (particularly in light of the interest accrual) and especially not without having to make some changes in his life style and that it would be

inappropriate to make him do so. And, if he could not pay all of his debts, with interest, with ease, he could not be required to pay *any* of them. The court's final "finding" (*Attanasio*, p. 240) was that "Requiring repayment by a debtor of his debts would be a burden that would place enormous strain on the debtor, and is likely to cause his family life, personal emotional health or work productivity to suffer." The opinion does not relate that "finding" to what might occur in a Chapter 13 case; rather, this appears to be based on the assumption that the debtor would have to come up with enough to pay the entire \$120,000 with interest, which would probably require him to live on bread and water for five years or so. The court does not discuss the burden on the debtor's family life if he actually stiffed his father of the \$90,000 that was owed (although one rather expects that, after eliminating the \$30,000 or so that he owed to other creditors that the debtor might resume paying his long-suffering father.)

### B. The National Bankruptcy Review Commission and Legislative Process

The case is, in short, a poster child for why creditors clamored for a means test before the National Bankruptcy Review Commission according to its report (and the author's recollection of meetings she attended). The Commission's report contains no analysis of any specific proposal or any discussion of the uniformity problems caused by the existing language and takes up (and discards) the concept within a page and a half toward the end of its introduction of consumer issues. (pages 89-91). Judge Edith Jones wrote separate views (in which Commissioner Jim Shepard concurred) that contain a relatively lengthy discussion of the issues and suggested several approaches to how such a means test might work, including looking at the amount that could be paid in Chapter 13, setting a presumptive income ceiling, and using cost of living statistics from the Bureau of Labor Statistics.

By contrast to the NBRC's report, which was received by Congress on October 20, 1997, and in the time-honored tradition of reports by blue-ribbon panels, dropped out of sight with nary a ripple of the water, a bill introduced in the House a month *prior* to the report, (H.R. 2500), with 185 sponsors (including a number of Democrats) contained a robust form of a means test from day one. S. 1301, was introduced the day after the report was filed, by Senator Charles Grassley (R-IA) and Richard Durbin (D-IL). Although the debate lasted for eight years, those bills (particularly H.R. 2500) bore a striking resemblance to the legislation that finally passed, at least in its broad outlines – an outline in sharp contrast to the approach taken by the NBRC majority.<sup>3</sup>

They did, indeed, attempt to address the uniformity problems that the *Attanasio* court perceptively put its finger on. Many courts, in considering the means test language, plainly are not overly happy with the language and react by suggesting that Congress decided to impose an arbitrary set of standards and demanded that courts apply them rigidly with no discretion whatsoever. A number of cases support their view that Congress intended a rigid, mechanical standard by citing to a statement by *dissenters* from the pending legislation. See, e.g., *In re*

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<sup>3</sup> Indeed, the contrast and the timing was so striking that one might say the report was not only DOA, it had expired before it ever left the scene of the accident.

*Randle*, 358 B.R. 360 (N.D. Ill. 2006) (“To the extent it is discernable, Congress' intent in enacting the Means Test was to create a "mechanical" formula for presuming abuse of Chapter 7. See Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H.R.Rep. No. 109-31, Pt. 1, p. 553, 109th Cong., 1st Sess. (2005) (“[T]he formula remains inflexible and divorced from the debtor's actual circumstances.”) (dissenting views).”). If one traces back numerous other cases as they cite to earlier cases, most end up with that one single phrase by those opposing the bill – who are not usually the ones whose views of a bill are deemed dispositive.

There is little if anything else they cite that suggests that Congress wished to outlaw any consideration of good faith as it applied to the application of the means test. Section 707(b)(3), in particular, picks up that concept in its emphasis on the “totality of the circumstances” and virtually all courts have agreed that the courts may consider the reality of economic factors that have not been taken into account under the basic means test. Judge Wedoff’s article, has been very influential in that respect. See Wedoff, Hon. Eugene R., “*Means Testing in the New § 707(b)*,” 79 Am Bankr. L. Rev. 231, 236 (2005). In Chapter 13, Section 1325(a)(3)’s good faith requirement might be readily seen as serving the same purpose, but for reasons that are less than clear to the author, many, if not most, courts view that provisions as wholly unavailing.

### C. The Results

In any case, what those who rail at the means test do not address – and what is part of what this panel will consider – is how one *should* deal with the problem of uniformity raised by *Attanasio*. All of the questions that the court raised there are valid – and the decision on many are policy questions, not necessarily issues that can or should be left to each court’s individual views on those matters. *Should* a debtor be required to have no more than a poverty level income to obtain a Chapter 7 discharge? *Is* it fair to allow a debtor to buy and deduct from his income the payments for any car he chooses, or should there be a limit set? And, if so, how should that limit be decided?<sup>4</sup> What income *should* be counted to assess the debtor’s ability to pay and are they types of payments we should exclude for policy considerations, even though they clearly make the debtor more able to satisfy his obligations? If Congress merely removed the presumption in favor of Chapter 7 relief, and changed “substantial abuse” to “abuse,” would courts have a much better idea of how to answer those questions?

And, more to the point, would the answers have any degree of uniformity from court to court, or even judge to judge? Since uniformity, as the States have been informed in the context of sovereign immunity, is of constitutional significance and somehow so immensely important

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<sup>4</sup> Is it gauged by the proverbial “length of the Chancellor’s foot?” Or, in these cases, the cost of the bankruptcy judge’s own car? Some would say nay, although the author has seen fit to use that comparison in conducting creditor’s examinations – e.g., “I make X and I drive a five-year old Hyundai, why are you driving a brand new Mercedes when you claim you have no income?”

## 21st Annual Winter Leadership Conference

that it distinguished bankruptcy from every other Article I power held by Congress, it does not seem unreasonable for some degree of uniformity to be imposed on the most fundamental question of what type of bankruptcy relief a debtor may be entitled to.

It seems reasonably clear that the point of the test was to provide some standards for how these decisions were to be made. And, the courts surely should know that, absent such standards, they were operating under a form of judicial anarchy. Indeed, courts often did note that problem, asking how were they to know whether they should object to a particular form or amount of spending by a debtor. A proper means test, as we will discuss in this session, surely should attempt to resolve at least the more common and recurring problems.

The problem emerges where a conceptually pure means test structure meets the reality of interest politics. What happened was much akin to the passage from the majestic simplicity of the opening language of Section 61 of the Internal Revenue Code – “Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items” and listing 15 types of income, to the resulting thousands of pages of statutes that flesh out what is income and what will be excluded therefrom. By now, the Internal Revenue Code has become a horribly bent, gnarled and interlaced structure where the provisions of one section readily undercut the goals of another. Much the same is true of the means test.

It started as covering all income. The first crack was probably the exclusion of benefits to “war crime” and terrorist survivors – a conceptually improper provision since such funds were income, no matter how deserving the recipient – but the numbers of such debtors were surely minuscule. Section 101(10A)(B). But, that opened the floodgates – then came the exclusion of Social Security income. *Id.* Such payments are obviously income, and, even if exempt, would normally have been taken into account in a Chapter 13 case prior to BAPCPA to determine what the debtor could afford to pay. *See Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1289 (8th Cir. 1997) (“courts since 1984 have continued to hold that revenues received from exempt sources during the life of a Chapter 13 plan are ‘income,’ the disposable portion of which must be paid to unsecured creditors if the plan is to be confirmed). But, now, all of a sudden, a person who had just less than the state median income in other income, but also \$15,000 a year in Social Security benefits, remained a below-median income debtor, while his neighbor across the way with just slightly higher income not derived from social security would be subject to increased scrutiny.

Perhaps the most illogical provision is Section 1325(b)(2) – which defines “disposable income for a debtor as *not* including child support payments to the extent necessary to support the child, while simultaneously allowing for the deduction of those very same child support expenses! (Section 1325(b)(2)(A)(i)). This was apparently intended to try to meet criticism by womens’ groups of the bill, even though the criticism was generally directed at *other* portions of the bill that they asserted would be harmful to women and children. Perhaps they specifically demanded this provision despite its patently inequitable approach and perhaps Congress saw it as a needed change to obtain passage, but it is distinctly odd nonetheless. The result of the process

has left the means test oddly distorted.

And that implies that the means test as written reflects Congress' intentions, but it seems clear that the drafting had a number of problematic aspects and/or did not anticipate situations that rapidly arose in the cases being filed. The panel will be asked to look at some global issues and a few typical scenarios and discuss 1) what they think the statute as written actually requires, 2) what did Congress *intend* for the statute to require, and 3) what would be a good policy if we were starting again to address these issues?. And, as an overall discussion, we will consider whether the means test, for better or for worse, is serving the purpose envisioned by the creditors who pushed hard for its adoption.

### **Global Issues**

1. Was the creation of a specific means test intended to ensure that more attention was directed to ability to pay issues? Or was it intended as an attempt to change the way courts exercised their discretion when they did review those issues? (The judge in *Attanasio* noted that only a relatively small fraction of courts had ever issued an opinion on a Section 707(b) motion.) In other words, was Congress concerned about what judges did when they did review the issue? Or, was it merely concerned that they were not looking at the issue enough? The result may speak to the degree of discretion it intended to leave with courts. Was the answer different for Chapters 7 and 13?

2. What is the overall goal of such a test? To create a "quick and dirty" screening mechanism for Chapter 7? A valid tool to decide the vast majority of cases correctly with only a small corrective role for Section 707(b)(3)? Something in between?

3. Depending on the goal, can the same test be reasonably used in both Chapter 7 and Chapter 13? If it can be used in Chapter 13, does it make sense to only apply it to above-median income debtors?

### **Scenarios:**

1. The "No Payment" scenario

a. Debtor has car(s) with no current financing or lease payment. Debtor wishes to deduct the "ownership" expense set out in the IRS standards? Allowed or not? Is or should the result be different in Chapter 13?

b. Debtor has car payment that is less/more than the maximum in the standard. How much does he deduct? Is the result different in Chapter 13?

Applicable language: Section 707(b)(A)(ii)(I) – "The debtor's monthly expenses shall be the debtor's *applicable* monthly expense amounts specified under the

## 21st Annual Winter Leadership Conference

National Standards and Local Standards, and the debtor's actual monthly expenses for [other categories.]" Car ownership expenses fall under a Local Standard.

Section 1325(b)(3) – “Amounts reasonably necessary to be expended . . . shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) [for above-median income debtors.]

There is at least one red herring that should be removed from the discussion. At some point, courts began to argue that the full standard “ownership expense” should be allowed even where there was no note or lease payment because “everyone has ownership expenses” even if they don't have such payments. While not the first such case, one of the more extended versions of this analysis is set out in *In re Kimbro (Hildebrand v. Kimbro (In re Kimbro)*, 389 B.R. 518, /// (6th Cir. BAP 2008)

This argument ignores the economic realities of vehicle ownership. The expenses of vehicle ownership are the fixed expenses that an owner incurs that naturally arise from ownership regardless of the vehicle's operation. By that definition, neither debt payments or lease payments are ownership expenses. Lease payments are not ownership expenses because by definition the debtor has no ownership. Debt payments are not ownership expenses because they are more naturally related to the necessities of financing the purchase. The expenses relating to vehicle ownership are the expenses for depreciation, insurance, licensing fees and taxes, each of which is a consequence of ownership and is incurred without regard to vehicle use. Ultimately, every vehicle owner incurs ownership expenses, and that is so regardless of debt or lease payments.

That analysis has two glaring problems. First, it attempts to redefine to its own liking what is a deductible “ownership expense” under the IRS standards. The IRS states that “The transportation standards consist of nationwide figures for monthly loan or lease payments referred to as ownership costs, and additional amounts for monthly operating costs. The operating costs include maintenance, repairs, insurance, fuel, registrations, licenses, inspections, parking and tolls.” <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html>.

Thus, while the court might like to create its own idea of what an “ownership” allowance should cover, the IRS standard is perfectly clear – it does cover lease payments and debt payments and it makes no reference to depreciation costs. And, equally importantly, it states that the *operating* expense allowance covers the other points mentioned above such as insurance, and licensing fees. (Taxes are not covered, presumably because there are other provisions allowing deductions for taxes.). In short, the professed shortcoming of not allowing the debtor to deduct costs that accrue even in the absence of a lease payment simply do not exist since those costs are

covered under a different allowance that the debtor unquestionably may deduct. Notwithstanding its patent inaccuracy, this objection has been copied by a number of courts, including the Seventh Circuit, in *In re Ross-Tousey*, 549 F.3d 1148, 1159-60 (7th Cir. 2009).

The depreciation “cost” is a red herring for another reason (not least of which is that a disposable income analysis has never previously been thought to include a paper “expense” that is not actually being paid. It is really a stand-in for concerns about whether a debtor who is driving an ancient, fully-paid for car will be able to continue to rely on that vehicle in the future. But, to the extent that is the concern, depreciation is irrelevant since for a car that old depreciation, whether on the basis of IRS standards, or junk yard payments would already likely have long since become *de minimis*. Rather, what the courts really are arguing about is whether a debtor should be able to start saving for a new vehicle while still owing substantial funds to others, and, more specifically, whether that was what Congress wrote or intended to write?

- Queries:
- i. What’s the most logical reading of the section?
  - ii. Did Congress actually intend for debtors to be able to start saving?
  - iii. If it did, does it make sense to allow such a deduction in Chapter 7, as opposed to allowing it to be a basis for modifying a plan in Chapter 13?
  - iv. What would be a logical provision that accommodates the concern about debtors with “clunkers,” versus cars that are still relatively new? Should there be a standard? After 6 years? 8 years? Or should this be a discretionary “good faith” analysis?

2. The “Surrender” scenario:

This raises much the same issues, but here the debtor has no payment because he has or intends to schedule an asset on which payments were due as of the filing date, but which he will no longer need to pay after the surrender. *See* Section 707(b)(2)(A)(iii)(I)

The debtor’s average monthly payments on account of secured debts shall be calculated as the sum of –

- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition . . .

- Queries:
- I. Again, what’s the most logical reading of that? (Among other issues, is a payment on a “secured claim,” when the security has been surrendered?
  - ii. If the language is read to allow the deduction of that expense, is that what Congress intended?
  - iii. Should there be a distinction between Chapter 7 and Chapter 13 as to such claims?
  - iv. Does “good faith” come into play in either chapter?

## 21st Annual Winter Leadership Conference

- v. Is there any rationale for allowing such deductions?
- vi. Should we just incorporate the IRS Manual with the degree of discretion that it allows?

### 3. The “Necessity” Scenario

The debtor proposes to deduct secured debt payments for expensive toys, such as a Harley-Davidson “hog,” or a motor boat, or an RV. The trustee objects, arguing that such payment are not reasonably necessary for the support of the debtor. If a payment is for debt on a secured asset, is there any “necessity” requirement?

Section 707(b)(2)(A)(iii) states:

The debtor’s average monthly payments on account of secured debts shall be calculated as the sum of –

- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition, and
- (II) any additional payments to secured creditors necessary for the debtor, in filing a plan . . . , to maintain possession of the debtor’s primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor’s dependents that serves as collateral for secured debt.”

- Queries:
- i. Can the “necessary for the support of the debtor language be read into (I) as well as (II)?
  - ii. Did Congress intend to allow payments for *any* secured debt, no matter how unnecessary? (As opposed to requiring a debtor to surrender unneeded toys?)
  - iii. Is there a rationale for a provision that would extend that far? Or is there some other provision that might strike some middle ground?
  - iv. Does “good faith” play any role in Chapter 13?

### **Is the Test Doing Its Job:**

On a global basis, how well does the means test satisfy any of the possible objectives, including reducing abusive filings in Chapter 7 that should be moved to Chapter 13, and ensuring that adequate amounts are paid in Chapter 13?

Are creditors satisfied with the overall result? \

Are creditors basing their satisfaction on demonstrated results in terms of higher Chapter

13 filings or payment percentages? Are those difference holding up over time? Or is this a case where creditors instinctively believe that harsher measures provide better results when the opposite often turns out to be true?

Can debtors live with the test?

Is there some overall different approach that would do better? Is there some median point between simply sending courts back to exercise total discretion but with added “marching orders” to make sure “debtors pay” and mind-numbing detail?

How can one balance objective criteria with flexibility to deal with a multitude of situations? Is the IRS – standards plus discretion – approach the way to go?

## 21st Annual Winter Leadership Conference

### II. Credit Counseling/Information Production/Automatic Dismissal

#### A. Credit Counseling

Include “summary” from article.

What is the reaction of the three panelists as to credit counseling and/or debtor education?

Is it worthwhile? Does it appear to provide demonstrable results?

The problem of what to do about counseling requirements for debtors faced with an imminent foreclosure problem (even though, to be sure, it will usually be of their own making) remains a stubborn issue.

Are there changes that could be made to deal with that problem? How do you ensure that debtors get in and get counseling at a time when it’s useful – as it seems it may be?

Could there be a conditional bankruptcy filing until the counseling is done that doesn’t count as “one strike” on the serial filing rules?

Since the debtor can just obtain counseling and refile immediately before the foreclosure can start up again, does the “dismissal” accomplish anything or merely burden the system?

#### B. Information Production

Section 521(a)(1) provides that the debtor shall file, *inter alia*, (iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition.” Section 521(i)(1) provides that “if an individual debtor . . . fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day of the filing of the petition.” Leaving aside the question of whether the information to be provided refers to payment for days worked within the 60 day period, or for when payment was earned for such work, or when the “payment advice” (a term nowhere else used in employment jurisprudence to the author’s knowledge), there are other issues with this provision. First, although there are several other matters within 521(a)(1), the “payment advice” seems to be the only one that causes significant problems. That may well be because of the confusion about exactly which pay stubs are needed, but other questions abound.

1. Is this information actually useful in most instances? How often do the pay stubs not line up with the information listed on the schedules?

2. What is an “automatic” dismissal? What did Congress intend that the court should do? Did it have in mind the problems about a dismissal that is not formally entered?”
3. Does an automatic dismissal it make sense in general? Why an “automatic dismissal” as opposed to the provision in 521(e)(2)(B) which provides that the court “shall dismiss the case unless the debtor demonstrates that the failure to [provide required tax returns] is due to circumstances beyond the control of the debtor?” Are pay stubs more important than tax returns? Or is this just a relic of the fact that a tax group wrote the tax provision and a creditor group wrote the pay stub provision?
4. Conversely, what about the problem with debtors that may use a failure to comply as a back-door way out of denial of a motion to dismiss a Chapter 7 case. Was that in Congress’ mind? Would it disagree that the debtor should be barred from using the provision in that way?
5. What about trustees that bring “gotcha” motions; i.e., waiting until the 46th day and moving to dismiss for failures that could easily be cured? Should this be allowed, why do they do that?
6. What changes should be made? Change the nature of the dismissal process? Make it mandatory, but only after “notice and a hearing?” Allow the trustee to move to waive the provision at any time to keep the case in Chapter 7? What else?

### III. Serial Filing/Automatic Stay Issues

The bills that were considered over the eight-year saga of passage of the BAPCPA had many provisions that referred to placing bars on “serial filings.” In fact, though, none of the bills generally barred serial *filings*, rather, they barred serial *discharges*, which are very different things. A debtor may, for better or worse, be able to obtain many benefits from a bankruptcy filing, whether or not a discharge ever results. The extended payment period allowed in a Chapter 13 case under the protection of the automatic stay is one such benefit – a debtor may well be able to pay off his debts in a 60-month case. If so, it is irrelevant whether he also obtains a “discharge” at the end of that time.

Another factor that is (thankfully) not very well known is the fact that a debtor may avoid liens on his property in a case that does not – and never could - result in a discharge of the debtor. Even if the creditors retain their debts, the removal of the liens owed to those creditors obviously gives the debtor a great ability to work mischief by creating liens in favor of other parties that bar the initial creditors, on a practical basis, from being able to collect their debts. *See, e.g., In re Allen*, 217 Bankr. 945 (Bankr. M.D. Fla. 1998).

## 21st Annual Winter Leadership Conference

Section 1328(f) provides that the debtor may not receive a discharge if he  
has received a discharge –

- (1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, pr
- (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.

The debate is whether the time periods relate to a) a discharge being entered within the relevant period – i.e., if the case was in Chapters 7, 11, or 12, was the discharge entered within the last four years or if in Chapter 13, the last two years, or b) discharge obtained at any time with respect to a case filed within those time periods. The latter reading, particularly with respect to Chapter 13 cases, would make the section very largely (*albeit* not completely) irrelevant, since discharges in Chapter 13 normally are only entered after 36 or more months of payments.<sup>5</sup> It does, though, follow the grammatical rule of the “last antecedent.” The former reading, which perhaps makes more sense in terms of Congress’ purpose in limiting serial filings, must imply that there should be commas around the “in a case filed under chapter X” language.

1. Is there any indication as to which reading Congress intended?
2. Is there a logical or policy basis to pick one reading over the other?
3. Or, should there be such limits as this in any event, if the goal is to get people in Chapter 13 and have them pay their creditors?

Much the same problem arises in connection with the refiling provisions in serial cases in connection with the application of the automatic stay. Section 362(c)(3) and (4) deal with cases filed by debtors who had, respectively, one and two cases dismissed in the prior year. Section 362(c)(4) is relatively straightforward. It clearly indicates that the automatic stay does not go into effect at all for such debtors unless they request its imposition within 30 days after the petition is filed. Section 362(c)(3)(A) is considerably murkier. It provides that “the stay . . . with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.”

A quick reader would likely assume a symmetry between the two provisions – if there has been one case, then there is a stay for 30 days as to all property involved in the case to allow the party to ask for a longer time. If there have been two cases, there is no stay and only 30 days to

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<sup>5</sup> Hardship discharges are the exception, but it is unclear why Congress would want to only affect such debtors.

ask for one. More discriminating readers, including most courts, have held, to the contrary, that Section 362(c)(3) is far narrower than Section 362(c)(4) and only applies to “the debtor” *and* the debtor’s property. (They generally do not explain why, if they are using a literal reading of Section 362(c)(3), they extend the stay coverage beyond the debtor to his property (but not property of the estate) when the debtor’s property is not mentioned.) Judge Wedoff, though, in *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009) explained why the narrow reading was wrong and the two sections were essentially parallel.

1. Is Judge Wedoff’s the correct reading?
2. Is that what Congress intended?
3. Is Section 362(c) as currently written a good set of policy prescriptions?
  - a) Should estate property be covered under Section 362(c)(3).
  - b) Does it make sense to limit a debtor’s ability in 362(c)(4) to obtain the stay to only the first 30 days?
  - c) Is the requirement for cases being dismissed within the past year two stringent? It is difficult, except with the most negligent of debtors to necessarily have two cases filed, processed, and dismissed in time to have yet a third case filed within the same year? That time period seems relatively easy to circumvent and there are no provisions for dealing with more drawn out schemes of avoidance.
  - d) Does the court retain sufficient additional discretion to enter *in rem* orders to protect against those schemes? Section 362(d)(4) in particular refers to a “scheme to delay, hinder, AND defraud creditors.” In light of that “and” which makes the language quite restrictive, are courts still able to fashion effective orders?
  - e) In general, are the provisions appropriate? Useful? Too lax? Too harsh?