LOOKING FORWARD WHILE LOOKING BACK: USING DEBTORS' POST-PETITION FINANCIAL CHANGES TO FIND BANKRUPTCY ABUSE AFTER BAPCPA

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INTRODUCTION

On the day the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) became effective in October of that year, the nation's courts were forced to begin the process of answering a lengthy list of legal questions created by the new legislation.[1] Then, in July 2006, the Fifth Circuit Court of Appeals caught the attention of consumer bankruptcy law practitioners nationwide with its decision in *In re Cortez*.[2] The Fifth Circuit's decision in *Cortez* added another important question to this list.

At issue in *Cortez* was the pre-BAPCPA version of 11 U.S.C. § 707(b), a provision that allowed a bankruptcy court to dismiss a Chapter 7 petition for bankruptcy relief if the granting of the relief would have constituted a "substantial abuse" of the nation's bankruptcy laws.[3] The court of appeals was faced with deciding whether a court passing judgment on a motion to dismiss under § 707(b) could consider a post-petition change in the debtor's financial circumstances in deciding whether to grant the motion to dismiss, or whether the court could only consider the financial condition of the debtor as it existed on the day the debtor's petition for bankruptcy relief was filed. The Fifth Circuit, like the district court before it, held that post-petition changes in the debtor's financial circumstances could be considered under § 707(b), a reversal of the bankruptcy court's ruling on the issue.[4]

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1. For an overview of the major decisions interpreting the BAPCPA's provisions in 2005 and 2006, see George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 82 N.D. L. REV. 297 (2006).

2. 457 F.3d 448 (5th Cir. 2006). One commentator referred to *Cortez* as "a case of first impression in the nation." John Council, *Employment Status Change Nixes Chapter 7 Bankruptcy*, TEX. LAW., July 31, 2006, at 1.

3. *See* 11 U.S.C. § 707(b) (2000), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 27-32 (to be codified at 11 U.S.C. § 707(b)). The Fifth Circuit was forced to apply pre-BAPCPA law because the petition for bankruptcy relief at issue in *Cortez* was filed on April 8, 2004; only those petitions filed on or after October 17, 2005 are subject to the changes made by the BAPCPA. *See Cortez*, 457 F.3d at 450.

4. *See Cortez*, 457 F.3d at 450.

In so doing, the court expressly declined to discuss the effect that applying post-BAPCPA law would have had on its holding.[5] The Fifth Circuit's decision, coupled with the considerable changes made to § 707(b) by the BAPCPA,[6] has thus created another issue for courts interpreting the new text of the Bankruptcy Code to consider.

The question of whether a debtor's post-petition financial changes can be considered under § 707(b) is an important one that must be resolved properly. Although a debtor will rarely benefit from a post-petition increase in income, such as existed in *Cortez*, this scenario has already arisen again in connection with at least two different Chapter 7 cases.[7] Even more important, however, is the potential impact that considering Chapter 7 debtors' post-petition financial changes will have in other situations, such as when debtors desire to reduce their expenses in troubled financial times. Fear of jeopardizing their bankruptcy petition may force these debtors to abstain from making small, sensible reductions in their monthly expenses until after their petition for bankruptcy relief is granted.[8]

Despite the importance of resolving this point of law, the bankruptcy courts that have been tasked with deciding whether to consider post-petition events in connection with all or part of the new § 707(b) have reached different conclusions, and even some of those courts in agreement on certain results have reached their conclusions in different ways. The current bankruptcy literature, meanwhile, also fails to resolve the issue. Although the new § 707(b) has been the subject of some scholarly attention, the journal articles that have been written about the section do not discuss whether post-petition events should be considered under the provision.[9] As

5. *See id.* at 458 n.11 ("In so holding, we do not opine on the effects of the amendments to § 707(b) under the 2005 Act.").

6. *See infra* Part III.

7. *See In re* Henebury, 361 B.R. 595 (Bankr. S.D. Fla. 2007) (considering a petition for bankruptcy relief filed by husband and wife, each of whom secured higher-paying employment after filing); *In re* Pak, 343 B.R. 239 (Bankr. N.D. Cal. 2006) (considering a petition for bankruptcy relief by another debtor who secured employment after filing the petition).

8. *See infra* notes 137-38 and accompanying text.

9. *See* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223 (2007); 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); John A. E. Pottow, *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying To Bridge the Wedoff/Culhane & White Divide*, 71 MO. L. REV. 1053 (2006); Eugene R. Wedoff, *Judicial Discretion To Find Abuse Under Section 707(b)(3)*,

a result, the law on this point is quite unsettled and awaiting comprehensive assessment.

This Note explores the issue of whether a court applying post-BAPCPA law can consider a post-petition change in a debtor's financial circumstances while ruling on a motion to deny Chapter 7 bankruptcy relief under § 707(b). Part I provides a background discussion of Chapter 7 bankruptcy relief, including a discussion of the evolution of § 707(b) from its initial version, adopted in 1984, to the version that applied in *Cortez*. Part II details the facts that gave rise to the *Cortez* decision, as well as the legal arguments made on both sides of the case. Part III introduces the relevant changes the BAPCPA made to § 707(b). Part IV then analyzes whether a debtor's post-petition financial changes can be considered in each of the three ways post-BAPCPA courts can find abuse under the new § 707(b). It concludes that post-petition changes cannot be considered in performing § 707(b)'s "means test" calculations, but that they can be considered to rebut the presumption of abuse that can arise under the means test. It also concludes that courts can consider post-petition changes to determine whether a Chapter 7 petition was filed in good faith to the extent such changes provide evidence of the debtor's intent in filing the petition. Finally, it concludes that Chapter 7 debtors' post-petition financial changes should be considered under § 707(b)'s "totality of the circumstances" test. Part V then argues in favor of amending § 707(b) once again to make a number of changes, including the insertion of a de minimis rule in two parts of the provision.

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71 MO. L. REV. 1035 (2006) [hereinafter Wedoff, *Judicial Discretion*]; Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231 (2005) [hereinafter Wedoff, *Means Testing*]. The only literature discussing post-petition events in connection with § 707(b) consists of either short works that collect cases decided under the BAPCPA without providing significant commentary, accounts of the *Cortez* case, or a pair of short features on the matter. For an example of a well-written secondary account of the *Cortez* case, see Council, *supra* note 2. The two short features on the *Cortez* case were both published in the *American Bankruptcy Institute Journal*, a newsletter-style publication of the American Bankruptcy Institute. *See* Justin H. Dion, *Timing Is Everything ... or Is It?:* Cortez *Challenges the "Snapshot" Approach to Analyzing Abuse Pursuant to § 707(b)*, AM. BANKR. INST. J., Oct. 2006, at 1; Rafael I. Pardo, *Analyzing Chapter 7 Abuse Dismissal Motions Post-BAPCPA: A Reply on* Cortez, AM. BANKR. INST. J., Dec.-Jan. 2007, at 16. Each piece recounts the facts of the *Cortez* case and speculates briefly about the importance of the decision on post-BAPCPA cases, but the length of both features—neither is longer than four pages—leaves a need for a more comprehensive analysis.

I. CHAPTER 7 BANKRUPTCY RELIEF AND § 707(B)

A. Chapter 7 Bankruptcy Relief

A debtor who receives Chapter 7 bankruptcy relief is given an immediate and unconditional discharge of personal liability for certain debts in exchange for surrendering all of his or her assets, except certain basic assets exempted by statute, to a bankruptcy trustee for liquidation and distribution to the debtor's creditors.[10] This unconditional discharge given to a consumer debtor in Chapter 7 relief is quite different from the conditional discharge given to a consumer debtor who pursues Chapter 13 bankruptcy relief. The latter requires a debtor to commit to repay some or all of his debts in exchange for retaining all his current assets, both those exempted under Chapter 7 and those not exempted, and receiving a broader discharge of debt than is available under Chapter 7.[11]

B. Section 707(b)

Congress passed the Bankruptcy Code in 1978.[12] Under the initial version of the Bankruptcy Code, a debtor seeking Chapter 7 relief could have his petition dismissed only for "cause."[13] Section 707 was amended in 1984, however, to permit the bankruptcy court hearing a petition for relief to dismiss the case if the granting of Chapter 7 relief to the debtor would constitute a "substantial abuse" of the Bankruptcy Code.[14] The adoption of this "substantial abuse" provision, which gave birth to § 707(b), was made for the same reasons that prompted Congress to adopt the BAPCPA more than twenty years later: it was added to the Code "as part of a package of consumer credit amendments designed to reduce perceived abuses"

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10. *See generally* H.R. REP. NO. 109-31, pt. 1, at 10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 97 (providing background on Chapter 7 bankruptcy relief).

11. *See id.* (contrasting the relief provided to individual debtors under Chapter 7 with the relief provided under Chapter 13).

12. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended in scattered section at 11 U.S.C. (2000)).

13. *See id.* § 707, 92 Stat. at 2606 (codified as amended at 11 U.S.C. § 707 (2000)).

14. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 312, 98 Stat. 333, 335 (codified as amended at 11 U.S.C. § 707(b) (2000)).

by debtors seeking Chapter 7 relief.[15] It was adopted in response "to concerns that some debtors who could easily pay their creditors might resort to [C]hapter 7 to avoid their obligations."[16]

In the years between its creation in 1984 and its overhaul in 2005, § 707(b) was amended twice. The first amendment, made in 1986, expanded the scope of § 707(b) to allow United States trustees to move for dismissal on the grounds of "substantial abuse"; previously, only the court could move for dismissal on this ground.[17] The second amendment, made in 1998, added the following language at the end of § 707(b):

> In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).[18]

With the addition of this wording, the whole of § 707(b) amounted to 139 words.[19] Despite the section's increased length, however,

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15. *See* H.R. REP. NO. 109-31, at 11-12 (quoting 6 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶ 707.LH[2], at 707-30 (15th ed. rev. 2002)).

16. *Id.* at 12 (quoting 6 KING ET AL., *supra* note 15, ¶ 707.04).

17. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219, 100 Stat. 3088, 3101 (codified as amended at 11 U.S.C. § 707(b) (2000)). After the Act was adopted, creditors and other parties in interest still were not allowed to file motions under § 707(b). Furthermore, § 707(b) still did not *require* bankruptcy judges and U.S. trustees to file motions under this section, even if they believed granting Chapter 7 bankruptcy relief would constitute a "substantial abuse." *See id.*

18. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 4(b), 112 Stat. 517, 518 (codified at 11 U.S.C. § 707(b) (2000)). This language later played an important role in the *Cortez* case. *See infra* notes 44-45 and 58 and accompanying text.

19. After the 1998 amendment, the section read:

> After notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, but 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. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or

it still left undefined—as it had since 1984—what constituted "substantial abuse." Also missing was any guidance as to what test the courts should have applied to determine whether substantial abuse existed; the courts were told only that there was a presumption against finding "substantial abuse."

As a result of this ambiguity, the handful of circuit courts that were called on to decide whether "substantial abuse" would have arisen in the granting of a particular Chapter 7 discharge applied different tests to decide this issue. Two circuits held that a debtor's ability to pay his debts, standing by itself, was enough to establish substantial abuse.[20] Other circuits applied a "totality of the circumstances" test, holding that the debtor's ability to repay his debts was the primary factor to be considered under such a test, but still only one of several factors.[21] Two other circuits applied a hybrid test, adopting the totality of the circumstances approach, but stating that even under this test a debtor's ability to repay his debts alone may still be enough, in some instances, to dismiss a case under § 707(b).[22] Eventually, the list of circuits adopting the hybrid version of the totality of the circumstances approach grew. The Fifth Circuit, after surveying this landscape of decisions and noting that both the bankruptcy and district courts chose to embrace the hybrid version of the test, also embraced this standard.[23]

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organization (as that term is defined in section 548(d)(4)).

11 U.S.C. § 707(b) (2000).

20. *See In re* Walton, 866 F.2d 981, 983-84 (8th Cir. 1989) (holding that the ability of the debtor to fund a hypothetical Chapter 13 plan alone can be sufficient reason to dismiss a Chapter 7 case under § 707(b)); Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 914-15 (9th Cir. 1988) (stating that "a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse").

21. *See* Stewart v. U.S. Trustee (*In re* Stewart), 175 F.3d 796, 809 (10th Cir. 1999); Kornfield v. Schwartz (*In re* Kornfield), 164 F.3d 778, 784 (2d Cir. 1999); Green v. Staples (*In re* Green), 934 F.2d 568, 572-73 (4th Cir. 1991).

22. *See* First USA v. Lamanna (*In re* Lamanna), 153 F.3d 1, 2 (1st Cir. 1998) ("We adopt the 'totality of the circumstances' test as the measure of 'substantial abuse' under § 707(b) of the Bankruptcy Code. In doing so, we join the Fourth, Sixth, Eighth and Ninth Circuits in holding that a consumer debtor's ability to repay his debts out of future disposable income is not per se 'substantial abuse' mandating dismissal. At the same time, we do not require a court to look beyond the debtor's ability to repay if that factor warrants the result."); *In re* Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (adopting the totality of the circumstances approach, finding that one factor to be considered is the debtor's ability to repay his debts out of future earnings, and saying "[t]hat factor alone may be sufficient to warrant dismissal").

23. *See In re* Cortez, 457 F.3d 448, 456 & n.7 (5th Cir. 2006) ("The Cortezes do not dispute that this standard applies or ask us to adopt a different test for determining substantial

II. A CASE OF FIRST IMPRESSION: *IN RE CORTEZ*

A. Facts of the Case

On April 8, 2004, Carlos Cortez and his wife, Suzanne, filed a joint petition for Chapter 7 bankruptcy relief.[24] In addition to their petition for relief, the Cortezes filed both the required Schedule I and Schedule J forms, which asked for a disclosure of current monthly income and current monthly expenses, respectively. The Cortezes listed a secured debt of $176,000 on their homestead and unsecured debts amounting to $85,719, a figure that consisted mostly of credit card debt.[25] The Cortezes also listed their net monthly income as $4,147 and their total monthly expenses as $5,320 per month.[26] At the time the petition was filed and the schedules completed, Carlos Cortez was unemployed and Suzanne Cortez worked as a nurse, thus all the monthly income listed on Schedule I was attributable to Suzanne Cortez.[27] In response to an instruction on the bottom of the Schedule I form that was in effect at the time and told debtors to "[d]escribe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document," the Cortezes wrote that Carlos Cortez "believes he will be employed this month, but he has not started working yet."[28]

Four days after filing their petition for bankruptcy relief, Carlos Cortez was offered a position as the Human Resource Director for Aramark Healthcare Management Services.[29] He accepted the position and began working for Aramark on April 26, 2004, earning an annual salary of $95,000, making his net income $5,896 per month.[30] He was also eligible for a company car and a $5,000 signing

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abuse. Accordingly, for purposes of this appeal, we will assume, without deciding, that this is the correct standard.").

24. *Id.* at 450.
25. *Id.*
26. *Id.*
27. *Id.* at 450-51.
28. *Id.* at 451.
29. *Id.*
30. *Id.*

bonus after sixty days of employment.[31] After Carlos began working for Aramark, Suzanne reduced the hours she worked as a nurse each month, making her new net income about $750 a month.[32]

Between Carlos's new job and Suzanne's reduced hours, the Cortezes' net income totaled $6,646 each month, a figure that exceeded their expenses by $1,325 per month.[33] The Cortezes provided documents to the U.S. trustee assigned to their case reflecting this change in Carlos's employment status and testified to this effect at the mandatory meeting with their creditors on May 10, 2004.[34] After learning of this change, the U.S. trustee filed a motion to dismiss the Cortezes' petition under § 707(b) on July 9, 2004, claiming that, as a result of Carlos's new job, the Cortezes "appear to have the means to repay a substantial portion of their debts through a Chapter 13 plan," and that it would be a substantial abuse to grant the Cortezes a Chapter 7 discharge.[35] The Cortezes filed their response to the motion on July 28, 2004, contending that because Carlos was unemployed at the time they filed their petition for Chapter 7 relief, and because it was inappropriate for the court to consider post-petition events under § 707(b), the court should not consider Carlos's new job while passing judgment on the trustee's motion to dismiss.[36]

B. The Bankruptcy Court's Opinion

Judge Dennis Michael Lynn denied the trustee's motion, holding that a post-petition change in a debtor's financial circumstances could not be considered under § 707(b) unless the change was "clearly in prospect" at the time the debtor's petition for Chapter 7 was filed.[37] Judge Lynn began the explanation of his holding by citing the statutory presumption that existed in § 707(b) in favor of

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *In re* Cortez, 335 B.R. 351, 358 (Bankr. N.D. Tex. 2004) (withdrawn at the request of the court).

granting Chapter 7 relief and against finding substantial abuse.[38] Then, relying on *In re Pier*,[39] Judge Lynn interpreted the phrase "granting of relief" in § 707(b) as referring to an "order for relief," which occurs at the commencement of a Chapter 7 case under 11 U.S.C. § 301.[40] As a result, Judge Lynn reasoned, "the court's analysis must focus on whether the order for relief granted on the Petition Date by operation of *section 301* was proper, not whether substantial abuse would occur if the court were to grant that same relief for the first time today."[41]

Judge Lynn's opinion supported this conclusion by arguing that it was not only consistent with the language of § 301 and § 707(b), but was also consistent with what he called "the general bankruptcy policy of using the date of filing as a line in the sand to determine a party's rights in the case."[42] The opinion went on to say that this position is "reinforced by Congress's very specific instructions when post-petition events are to be considered" and cited a list of Bankruptcy Code sections in which Congress explicitly stated that post-petition events are relevant to the matter at issue.[43] Judge Lynn

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38. *See id.* at 353-54. Judge Lynn cited to a "leading treatise" for the idea that "the presumption is an indication that in deciding the issue, the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present." *Id.* at 353 & n.7 (citing 6 KING ET AL., *supra* note 15, ¶ 707.04[5][a]).

39. 310 B.R. 347, 355 (Bankr. N.D. Ohio 2004).

40. *Cortez*, 335 B.R. at 354.

41. *Id.* Judge Lynn went on to say:

> If the court were deciding, *on the Petition Date*, whether granting the relief requested by Debtors would constitute a substantial abuse, the court would of course look to the circumstances as they existed at that moment in time. Circumstances changed subsequent to the order for relief should, as a general rule, make no difference simply because the court has the benefit of hindsight.

Id. at 354-55.

42. *Id.* at 355. Judge Lynn's opinion specifically referenced the automatic stay under § 362 that arises on the petition date, the fact that § 522 determines a debtor's right to exemptions as of the petition date, the fact that secured claims are determined as of the petition date pursuant to § 506, the fact that the avoidability of certain transfers under § 547 and § 548 is dependent on the timing of these transfers in relation to the petition date, the fact that a creditor's security interest could be avoided under § 544 if the security interest is not perfected as of the petition date, and the fact that post-petition events could be considered under § 109(e) only to the extent they shed light on the amount of secured and unsecured debt actually owed by the debtor at the time the debtor filed his bankruptcy petition. *Id.* at 355-56.

43. *Id.* at 356. The opinion pointed out that § 541(a)(5) sets forth clear distinctions as to which types of property acquired by the debtor after filing a bankruptcy petition are considered property of the debtor's estate for bankruptcy purposes, that § 1207 and § 1306 provide for inclusion of post-petition income in the estate, and that other sections have

reasoned that if Congress intended post-petition events to be considered under § 707(b), then similar language would have been included in its text.[44] The opinion pointed out that some might read the 1998 addition to § 707(b) relating to charitable contributions as proof Congress intended the courts to consider post-petition events.[45] The opinion, however, construed the "or continues to make" language in the 1998 amendment as "an instruction not to consider a particular category of expenses which may appear on a debtor's schedules, not as evidence that Congress intended the court to generally consider post-petition events in the *section 707(b)* analysis."[46]

Finally, the bankruptcy court's opinion discussed the policy implications of its decision. The opinion argued that this holding provides "certainty to debtors and creditors and will allow attorneys to give clients accurate advice regarding the applicability of *section 707(b)* to a case."[47] It said that holding otherwise would mean a debtor's eligibility for relief would remain in question until the deadline for filing a motion to dismiss under § 707(b) passes, a date that is typically about three months after the petition for relief is filed.[48] This position, the court said, would have the undesirable effect of discouraging a debtor who is unemployed at the petition date from seeking employment out of fear that getting a job would jeopardize his bankruptcy petition.[49]

The opinion also rejected the related policy argument, made by the U.S. trustee, that not considering post-petition circumstances for the purpose of § 707(b) would "foster future abuse by unemployed debtors who, anticipating that they will secure permanent employment, will forego seeking or accepting employment until after filing for bankruptcy."[50] The court concluded that this concern was not unjustified, but reasoned that its holding provided "protection against the potential for such abuse in the future" because

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similar, clear standards for when post-petition events should be considered by the court. *Id.*

44. *Id.*

45. For the language of the 1998 amendment, see *supra* text accompanying note 18.

46. *Cortez*, 335 B.R. at 356 n.8.

47. *Id.* at 357.

48. *Id.* at 357 & n.10.

49. *Id.* at 357.

50. *Id.* at 356.

events clearly in prospect at the time of filing could be considered under § 707(b).[51]

C. The Appeal

On March 9, 2005, the district court reversed the bankruptcy court, distinguishing the case from *Pier* and concluding that the wording of the 1998 amendment to § 707(b) made clear that post-petition events should be considered while hearing a motion to dismiss under the section.[52] The Cortezes appealed this decision to the Fifth Circuit.

The Fifth Circuit issued its opinion on July 20, 2006.[53] Siding with the district court in overruling the bankruptcy court, the Fifth Circuit's opinion contained five arguments in favor of considering post-petition changes under § 707(b). First and foremost, the court took issue with the bankruptcy court's determination that the phrase "granting of relief" in § 707(b) meant the order for relief that takes place at the beginning of the case.[54] In reaching this conclusion, the court found that the words "would be" that follow "granting of relief" in the text of § 707(b) indicated that the subsection only applies to an event that will take place in the future, namely the discharge of a petitioner's debts under Chapter 7 that ends a bankruptcy case, not an event that took place in the past, namely the order for relief that was granted at the beginning of the case.[55] The court further supported this conclusion by showing it was consistent with the Federal Rules of Bankruptcy Procedure, which delay granting a Chapter 7 discharge while a motion to dismiss under § 707(b) is pending,[56] and with implicit holdings by other

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51. *Id.* The court's opinion defined "clearly in prospect" quite narrowly, however. It determined Carlos's job was not clearly in prospect on the date of filing, despite the notation on the Cortezes' Schedule I form that Carlos expected to be employed soon. *See id.* at 356-57. The court went on to say that employment would have been clearly in prospect if Carlos had verbally accepted an offer of employment before the filing date, or even received a letter offering the position prior to the petition date. *Id.* at 356.

52. Neary v. Cortez (*In re* Cortez), 2005 U.S. Dist. LEXIS 39778, at **6-7 (N.D. Tex. Mar. 9, 2005).

53. *In re* Cortez, 457 F.3d 448, 448 (5th Cir. 2006).

54. *See id.* at 454-55 & n.6.

55. *Id.* at 455.

56. *Id.*

circuits.[57] The court then finished its explanation of this conclusion by citing to a passage in *Collier on Bankruptcy*, which stated: "In determining whether a substantial abuse exists, there is a presumption in favor of granting the relief sought by the debtor, i.e., a *discharge*."[58]

The second argument raised by the court was that the "or continues to make" wording of the 1998 amendment exempting charitable contributions shows congressional intent to allow courts to focus on subsequent developments that occur after the petition date under § 707(b), except to what charities the debtor is presently contributing.[59]

The third argument raised by the court in favor of considering the post-petition change in the Cortezes' income originated in the decisions of other circuits tasked with determining how to decide whether substantial abuse was present in the § 707(b) context. The court noted that the other circuits that had applied the hybrid totality of the circumstances test it chose to apply in this case[60] had placed an "emphasis on the debtor's ability to repay debts under a Chapter 13 plan."[61] The court then detailed how post-petition financial changes would be handled under a Chapter 13 plan, pointing out that in a Chapter 13 proceeding debtors are obligated to amend their schedules–the same ones that would have been originally filed in connection with a Chapter 7 case–to include subsequent income, even if that income was not known or anticipated at the time the petition for Chapter 13 relief was filed.[62] In fact, the court noted, even if a Chapter 13 plan is confirmed as initially proposed, the plan can be modified later based on a change in the debtor's income.[63] Based on these principles, the court concluded that, because it was required to look to whether a debtor

57. *See Cortez*, 457 F.3d at 455 (citing First USA v. Lamanna (*In re* Lamanna), 153 F.3d 1, 3 (1st Cir. 1998); U.S. Trustee v. Harris (*In re* Harris), 960 F.2d 74, 75 (8th Cir. 1992)).

58. *Id.* (emphasis added) (quoting 6 KING ET AL., *supra* note 15, ¶ 707.04[5][a]). This passage was clearly quoted to demonstrate that respected scholarly materials consider the words "granting of relief" to refer to the discharge of debt that occurs at the end of a Chapter 7 case, not the order for relief that occurs at the beginning of such a case.

59. *Id.*

60. *See supra* notes 22-23 and accompanying text.

61. *Cortez*, 457 F.3d at 456 n.7.

62. *Id.* at 457.

63. *Id.* at 457-58 (citing Arnold v. Weast (*In re* Arnold), 869 F.2d 240, 241 (4th Cir. 1989)).

would be eligible for Chapter 13 relief under the totality of the circumstances test in this case, and because post-petition events are considered in a Chapter 13 proceeding, then post-petition events had to be considered here as well, "up until the point at which the [Chapter 7] discharge is entered."[64]

The court's next argument took issue with the view that the Bankruptcy Code generally makes the date a Chapter 7 petition is filed the critical date for determining the debtor's rights.[65] Although it acknowledged that this is the date used to fix a number of rights in Chapter 7 cases, such as the automatic stay and entitlements to exemptions, the court rejected this argument because of the number of sections under which post-petition circumstances can be considered in a Chapter 7 proceeding.[66]

Fifth and finally, the court rejected the argument, not raised in the bankruptcy court opinion, that post-petition earnings cannot be considered for the purposes of a motion to dismiss under § 707(b) because they do not constitute property of the debtor's estate for purposes of a Chapter 7 hearing under § 541(a)(6) of the Bankruptcy Code.[67] The court concluded that "the ability to exclude post-petition income for purposes of a Chapter 7 estate is an independent issue from whether debtors have the ability to repay their debts," and that "[t]he latter issue is the pertinent inquiry for determining substantial abuse under § 707(b)."[68] The court thus joined the other circuits that have considered whether exempt property should be considered for the purposes of a substantial abuse determination in holding that it is appropriate to do so.[69]

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64. *Id.* at 458.

65. *Id.* at 458 n.10.

66. *Id.*

67. *Id.* at 458. "Property of the estate" in this context means property that belongs to the bankruptcy estate. The U.S. trustee typically seizes and sells the property of the estate when a debtor is given Chapter 7 relief; the proceeds are then used to pay the claims of a debtor's creditors. *See* The U.S. Trustee's Role in Consumer Bankruptcy Cases, http://www.usdoj.gov/ust/eo/public_affairs/factsheet/docs/fs05.htm (last visited Sept. 23, 2007).

68. *Cortez*, 457 F.3d at 458.

69. *Id.* (citing Taylor v. United States (*In re* Taylor), 212 F.3d 395, 397 (8th Cir. 2000)); Kornfield v. Schwartz (*In re* Kornfield), 164 F.3d 778, 784 (2d Cir. 1999)).

III. BAPCPA AND THE NEW § 707(b)

A. Congressional Intent Behind the BAPCPA

In early 2005, years of effort on the part of Congress and the consumer credit lobby resulted in the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[70] The bill's stated purpose was "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."[71] The legislative history accompanying the BAPCPA makes clear that Congress thought that fairness to creditors was drastically lacking in the existing version of the Bankruptcy Code, and, as a result, Congress sought to make it significantly harder for consumers to get bankruptcy relief, all in the name of curbing bankruptcy abuse.[72] To do this, the BAPCPA overhauled much of the Bankruptcy Code, and the "heart of the bill's consumer bankruptcy reforms" was incorporated into § 707(b).[73]

B. The New § 707(b)

Section 102 of the BAPCPA made major changes to § 707(b), expanding the section from 139 words to 2,349 words.[74] Despite its newfound length, however, the section still fails to expressly answer the question that was at issue in *Cortez*: whether courts should consider a debtor's post-petition financial changes when hearing a motion to dismiss the debtor's petition for Chapter 7 relief under §

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70. *See* H.R. REP. NO. 109-31, pt. 1, at 6-10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 92-96 (discussing recent attempts to change the nation's bankruptcy laws).

71. *Id.* at 2.

72. To support this assertion, the House Report accompanying the BAPCPA cited statistics showing there had been a surge in consumer bankruptcy filings in recent years and concluded that these filings were "part of a generally consistent upward trend." *Id.* at 3. The report also cited evidence that a significant number of debtors granted Chapter 7 relief had the ability to repay their debts. *See id.* at 5 & n.18.

73. *Id.* at 2 ("The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford."). This means test is contained in the new § 707(b).

74. *See* 11 U.S.C.A. § 707(b) (West 2006).

707(b).[75] But much of the rewritten section's text does shed new light on the issue, and thus makes a new analysis of the question necessary.

The first notable change is that a court is no longer required to find "substantial abuse" in order to dismiss a Chapter 7 proceeding under § 707(b); it now need only find "abuse."[76] Another change that affects the entire section was also accomplished by a removal of wording: the presumption in favor of granting a Chapter 7 petition for debt relief is no longer present in the section.[77]

In its place, however, Congress created a presumption of abuse that arises if the debtor's "current monthly income," after subtracting for certain specified monthly expenses and multiplying by sixty, is either (1) equal to or greater than the lesser of 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or (2) $10,000, unless special circumstances exist that rebut the presumption of abuse.[78] According to the Bankruptcy Code, current monthly income:

> [M]eans the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's

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75. As noted by the opinions in the Cortez matter, the absence of such language is not typical. The Bankruptcy Code generally states whether post-petition changes should or should not be considered in any given section where the issue could be in doubt. *See supra* notes 42-44, 65-66 and accompanying text.

76. *See* § 707(b)(1). This change may be more symbolic than substantive, however. One bankruptcy treatise, in commenting on this change, says: "It is unclear how much impact this will have; few, if any, courts permitted a [C]hapter 7 case to proceed because they found it to be an abuse, but not a substantial abuse, under prior law." 6 ALAN N. RESNICK & HENRY J. SOMER, COLLIER ON BANKRUPTCY ¶ 707.05[1] (15th. ed. rev. 2006). As an aside, this section also now gives the courts a choice between dismissing a Chapter 7 case or, with the debtor's permission, converting it to a Chapter 11 or 13 case. *See* § 707(b)(1).

77. *See* § 707(b)(1).

78. *See id.* § 707(b)(2)(A)(i)-(D)(ii). If the calculations required under the means test give rise to a presumption of abuse that is not rebutted, then the debtor's Chapter 7 petition must be dismissed or converted to a Chapter 11 or 13 case. Not much guidance is given to the courts to determine what sort of special circumstances are sufficient to rebut the presumption. All that the text of § 707(b) says is that the presumption of abuse that arises under the means test "may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." *Id.* § 707(b)(2)(B)(i). Even after considering these special circumstances, however, the presumption of abuse can still only be rebutted if the debtor "passes" the means test after taking account of these new figures. *Id.* § 707(b)(2)(B)(iv).

> spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—
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> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and
>
> (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.[79]

Should this presumption of abuse either be rebutted or otherwise not apply, however, the new § 707(b) gives further clarification to the courts about how they should look for "abuse."[80] Courts should consider either "whether the debtor filed the petition in bad faith" or whether "the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse."[81] Also notable, given the disagreement between the bankruptcy court and the Fifth Circuit over the meaning of "granting of relief" in *Cortez*,[82] is the fact that the BAPCPA retained the "granting of relief" wording in the same part of § 707(b) as it appeared before,[83] but inserted the phrase

79. *See* 11 U.S.C.A § 101(10A) (West 2006).
80. *See* § 707(b)(3).
81. *Id.* § 707(b)(3)(A)-(B).
82. *See supra* notes 54-58 and accompanying text.
83. *See* § 707(b)(1).

"order for relief" in three other parts of the section.[84] Finally, the disputed language of the 1998 amendment to the section exempting charitable contributions was also retained in § 707(b)(1).[85]

IV. CONSIDERING POST-PETITION EVENTS UNDER THE NEW § 707(b)

A. Post-Petition Changes Irrelevant Under Means Test

The question of whether a post-petition change in the financial circumstances of a debtor seeking Chapter 7 relief should be considered under the "means test" contained in the new § 707(b) has already created a disagreement among the courts that have considered the issue.[86] Given the complexity of the section's new wording, this is not surprising. Still, this dispute is easily resolved after taking a closer look at the text of § 707(b)(2), the portion of the section containing the means test.

Although § 707(b)(2) may be quite complex, this complexity yields a statute that provides a clear formula for determining whether a presumption of abuse should arise, and this formula has only two variables: the debtor's "current monthly income" and the debtor's "monthly expenses."[87] If income a debtor receives does not fall

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84. *See id.* § 707(b)(2)(A)(ii)(I), 707(b)(6), 707(b)(7)(A). The phrase "granting of relief" was also inserted in 11 U.S.C.A. § 707(b)(2)(A)(i), 707(b)(3). The fact that Congress distinguished between the phrases "order for relief" and "granting of relief" in the text of the new section clearly affirms the conclusion of the Fifth Circuit in the Cortez matter that the phrase "granting of relief" does not refer to the "order for relief." *See supra* notes 54-58 and accompanying text.

85. *See* § 707(b)(1).

86. This dispute has arisen over the question of how to handle the expenses associated with repayment of secured claims that are listed on the debtor's schedules at the time of the bankruptcy filing when the debtor expresses an intention to abandon the collateral securing the debt. The courts have handled this factual scenario in one of three ways. *See infra* Part IV.A.2. A number of bankruptcy courts also have been called on to decide if the language of the means test in § 707(b) allows for consideration of a debtor's post-petition financial changes in connection with Chapter 13 cases since the section is cross-referenced in a provision governing Chapter 13 cases. *See, e.g.*, *In re* Love, 350 B.R. 611 (Bankr. M.D. Ala. 2006). Because this analysis is primarily dependent on the wording of sections that only govern Chapter 13 cases, however—and is of no real value in determining whether *this part* of § 707(b) should consider post-petition changes in a debtor's financial affairs because the clear and plain wording of the means test precludes consideration of factors other than income and expenses—these cases need not be evaluated here. An analogy to Chapter 13 cases is useful when evaluating the totality of the circumstances test, though. *See infra* Part IV.D.

87. *See supra* notes 78-79 and accompanying text.

within the definition of "current monthly income," no mechanism exists for including it in this section's means test. The same is true for any expense the debtor incurs; only those expenses that fall within the definition of "debtor's monthly expenses" can be considered in the formula that triggers a presumption of abuse.[88]

Therefore, the required analysis to determine whether debtors' post-petition financial changes can be considered under the means test is really a two-part inquiry: the courts must inquire into whether one or both of the definitions given to "current monthly income" and "debtor's monthly expenses" are broad enough to encompass a post-petition change in the respective category.

1. Post-Petition Changes Not Used To Calculate "Current Monthly Income"

Congress set forth a detailed explanation of "current monthly income," given above.[89] Income from any and all sources falls within this definition, including income that is not considered taxable income by the Internal Revenue Service. As broad as this definition of the "income" part of "current monthly income" is, though, it is reined in significantly by the "current monthly" part of "current monthly income": to qualify, the income must have been derived during the previous six-month period "ending on the last day of the calendar month immediately preceding the date of the commencement of the case," as long as the debtor files the schedule of current income required by § 521(a)(1)(B)(ii) of the Bankruptcy Code.[90]

The wording is clear: for the purposes of the means test, Congress only intended current monthly income to include the average monthly income earned by the debtor in the six full calendar months *before* the commencement of the bankruptcy case. Thus, if a debtor has an average monthly income of $950 in the months January through June, but on July 3 gets a new job paying $2,000 a month,

88. *See infra* note 93 and accompanying text.

89. *See supra* text accompanying note 79.

90. *See supra* text accompanying note 79. If the schedule of current income is not filed, however, the door appears to be opened to allowing in post-petition financial changes. Section 101(10A)(ii) gives the bankruptcy court the right to determine the date on which current monthly income is determined if a debtor fails to file a timely schedule of current income. *See* 11 U.S.C.A. § 101(10A)(ii) (West 2006).

and on July 5 files a petition for Chapter 7 bankruptcy relief, the debtor's current monthly income, for the purposes of the means test, remains $950. The same result obviously also applies to income from a new job taken even later, after the commencement of the bankruptcy case. The simple fact of the matter is that no other provision exists that trumps this definition of current monthly income; the definition is drafted in such a mechanical manner that neither equitable principles nor judicial construction can modify it.[91]

2. Post-Petition Changes Not Used To Calculate "Debtor's Monthly Expenses"

The phrase "debtor's monthly expenses" is defined in § 707(b)(2)(A)(ii)(I)-(iv).[92] Although clause (iv) does not provide any insight into the question of whether Congress intended for a post-petition change in a debtor's monthly expenses to be considered under the means test, clauses (ii) and (iii) are dispositive on the issue. Clause (ii)(I) provides, in relevant part:

> The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, *as in effect on the date of the order for relief*, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent.[93]

The key wording in this clause is the phrase "as in effect on the date of the order for relief." As discussed above, Congress clearly distinguished the order for relief, which occurs upon the filing of a

91. The view that the means test was drafted this way was explicitly expressed by the court in *In re* Hartwick, 352 B.R. 867, 870 (Bankr. D. Minn. 2006) ("[C]oncepts of fairness involve equitable principles and judicial discretion. Congress had neither of these in mind in enacting the means test in 11 U.S.C. § 707(b).... Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process.").

92. *See* 11 U.S.C.A. § 707(b)(2)(A)(ii)(I)-(iv) (West 2006).

93. *Id.* § 707(b)(2)(A)(ii)(I) (emphasis added).

Chapter 7 petition, from the granting of relief, which occurs at the end of a Chapter 7 case, in the text of the new § 707(b).[94]

The question that then arises is: what did Congress intend this wording to modify? A careful reading of the clause suggests that Congress intended this phrase to mean that, for the purposes of the means test, two things should be considered to remain the same as they were on the date of the order for relief: first, *the debtor's applicable monthly expense amounts* under the National and Local Standards established by the Internal Revenue Service,[95] and, second, *the debtor's actual monthly expenses* that would fall into the categories specified as "Other Necessary Expenses" by the IRS. That is, the clause freezes the debtor's expenses as they were on the date of the order for relief; it does not, as a careless reading of the clause might infer, freeze the National and Local Standards and categories listed as other necessary expenses that were in place on that date.[96]

Section 707(b)(2)(A)(iii) also gives proof of Congress's intention to ignore post-petition changes in a debtor's expenses in the means test. The clause provides, in relevant part: "The debtor's average monthly payments on account of secured debts shall be calculated as the sum of ... 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* ... divided by 60."[97] To date, the vast majority of cases that have included a discussion of whether to consider a debtor's post-petition financial changes under this part of the new § 707(b) have involved an interpretation of this clause.

Nearly all of the decisions that have interpreted this language have properly held it to mean that Congress intended a debtor's expenses under the means test to include the average monthly amount that must be repaid over the next sixty months on *all secured debts that are due on the day a Chapter 7 petition for*

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94. *See supra* notes 83-84 and accompanying text.

95. These are standards used by IRS collection agents when collecting delinquent taxes from individual taxpayers.

96. This was the conclusion reached by the court in *In re Littman*, 370 B.R. 820 (Bankr. D. Idaho 2007). The *Littman* court was faced with a debtor who was ordered to begin making monthly child support payments. Because the child support order was entered after the debtor filed a petition for Chapter 7 relief, the court held that the child support payments could not be added into the debtor's expenses for the purposes of the means test.

97. § 707(b)(2)(A)(iii) (emphasis added). This petition is the petition for relief that launches a Chapter 7 case.

relief is filed.[98] Of these opinions, perhaps the best statutory construction argument is provided by the *Walker* court, which conducted a detailed examination of the issue. The *Walker* court began its analysis by reasoning:

> The Court concludes that the plain language of the statute permits a reduction from CMI for payments on secured debts that have not been reaffirmed. Congress' choice of the phrase, "scheduled as contractually due," suggests that, in determining which payments should be averaged for the deduction, the Court should determine how many payments are owed under the contract for each secured debt at the time of filing. This interpretation gives meaning to the word "scheduled," which implies the possibility that the payments may not be made as required under the contract, either because the debtor will surrender the collateral or because the payments might be modified and paid through a Chapter 13 plan. If the intent were to permit only those payments that would actually be made in the post-petition period, Congress could have specified that the payments to be deducted are only those payments to be made on secured debts that the debtor intends to reaffirm.[99]

The *Walker* court also reasoned that the use of the phrase "contractually due" indicates an intent on the part of Congress to permit a deduction for all secured debts, regardless of whether the debt is reaffirmed or the collateral is surrendered, because "the surrender of the collateral does not change the fact that the payments are 'contractually due.' When a debtor files the bankruptcy petition, the debtor is contractually due for payments on the outstanding secured debts for the length of the contract."[100]

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98. *See, e.g.*, *In re* Kelvie, 372 B.R. 56 (Bankr. D. Idaho 2007); *In re* Hoerlein, 2007 Bankr. LEXIS 1043 (Bankr. S.D. Ohio Apr. 3, 2007); *In re* Kogler, 368 B.R. 785 (Bankr. W.D. Wis. 2007); *In re* Galyon, 366 B.R. 164 (Bankr. W.D. Okla. 2007); *In re* Longo, 364 B.R. 161 (Bankr. D. Conn. 2007); *In re* Mundy, 363 B.R. 407 (Bankr. M.D. Pa. 2007); *In re* Haar, 360 B.R. 759 (Bankr. N.D. Ohio 2007); *In re* Sorrell, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re* Nockerts, 357 B.R. 497 (Bankr. E.D. Wis. 2006); *In re* Simmons, 357 B.R. 480 (Bankr. N.D. Ohio 2006); *In re* Hartwick, 352 B.R. 867 (Bankr. D. Minn. 2006); *In re* Randle, 353 B.R. 360 (Bankr. N.D. Ill. 2006); *In re* Walker, 2006 Bankr. LEXIS 845 (Bankr. N.D. Ga. May 1, 2006).

99. *Walker*, 2006 Bankr. LEXIS 845, at **10-11.

100. *Id.* at *12.

Though the vast majority of courts have reached the same conclusion as the *Walker* court, unanimity does not exist on this issue. In fact, two other lines of authority exist on the issue of whether and when to consider a post-petition surrender of collateral securing a debt. The first of these two minority views was expressed by the Bankruptcy Court for the Southern District of Texas in *In re Singletary*.[101] The *Singletary* court, considering the same question as the *Walker* court, opened the door for considering the post-petition surrender of collateral securing a debt. The court did this by holding that the debt secured by the collateral should be eliminated from a debtor's means test expenses if the surrender is made before the motion to dismiss based on § 707(b) is filed.[102] The court reached this conclusion, in large part apparently, because it believed it was required to follow the Fifth Circuit's opinion in *Cortez*, despite the fact that *Cortez* did not interpret the language at issue here.[103] The court did not justify its conclusion by considering the text of the clause at issue, as in *Walker*, or by considering the debtor's argument that because the means test clearly does not consider post-petition changes in a debtor's income it then should not consider post-petition changes in expenses.[104] Instead the court based its holding on a poorly reasoned inference based upon the amount of time given to the U.S. trustee to file a motion to dismiss based on the presumption of abuse under the means test.[105] The court inferred that, because the U.S. trustee is given a certain number of days to file a motion to dismiss a debtor's Chapter 7 petition based on the presumption of abuse triggered by failing the means test, Congress must have intended the courts to consider all changes in all expenses, including secured debts, up until the last day the motion to dismiss can be filed.[106] Using this reasoning, for expenses to be frozen as they stand on the day the petition for relief is filed, Congress would have had to require a U.S. trustee to somehow be assigned a Chapter 7 case, read over the debtor's

101. 354 B.R. 455, 473-74 (Bankr. S.D. Tex. 2006).

102. *Id.* at 458.

103. *See id.* at 473 ("The Fifth Circuit's recent decision in *Cortez* requires this Court to consider post-petition events in any motion brought under § 707(b).").

104. *See id.* at 464.

105. *See id.* at 465-66 & n.10.

106. *See id.* at 465-66.

schedules, make the appropriate calculations, determine whether the presumption of abuse is triggered, and file a motion to dismiss the petition, all on *the same day* the petition is filed.

This analysis is completely inconsistent with other provisions of the Bankruptcy Code that freeze circumstances as they exist on the petition date, yet still allow for motions based on these circumstances to be filed much later.[107] Moreover, the clear wording of the clause in question in *Singletary* indicates that Congress did not intend the means test to consider post-petition changes to the secured debt of a debtor in a Chapter 7 case, as illustrated by the court in *Walker*.[108] Finally, it seems illogical that Congress would intend for the means test to ignore post-petition changes in income, yet consider post-petition changes in expenses—or just one category of expenses—without clearly articulating that it wishes this to be the case.[109] As discussed previously, Congress clearly chose to ignore changes in a debtor's post-petition income in the means test.[110] Congress did not clearly state it intended to treat post-petition expense changes differently in the text of § 707(b), and nothing in the legislative history accompanying the BAPCPA indicates that Congress had this intent either; thus, the only rational conclusion one can reach is that Congress did not intend post-petition changes in a Chapter 7 debtor's expenses to be considered in the means test, just as it did not intend such changes in a debtor's income to be considered.

As noted above, there is a second line of authority holding that a post-petition surrender of collateral securing a debt, or decision not to reaffirm the debt, can be considered for the purposes of the means

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107. For example, it is settled law that the filing of a petition for bankruptcy relief imposes a freeze on all efforts by a debtor's creditors to collect on those debts that arose before the petition date, but not those that arose after the petition date, under the "automatic stay" provision found in § 362 of the Code. *See* 11 U.S.C.A. § 362 (West 2006). Yet § 362(e) allows creditors to make a motion to end the stay with respect to specific assets throughout the life of the case. *See id.* § 362(e).

108. *See supra* notes 98-100 and accompanying text.

109. The debtors in *Singletary* made an almost identical argument. *See supra* text accompanying note 103. Common sense dictates that Congress would not intend to ignore a post-petition change in the debtor's monthly expenses for the essentials of life under the means test, yet consider a change in another set of expenses—those pertaining to repayment of secured debts—under the very same means test, all the while ignoring post-petition changes in income under the means test.

110. *See supra* Part IV.A.1.

test. Unlike the *Singletary* court, however, courts subscribing to this second minority view hold that the U.S. trustee does not need to wait to see if the collateral is actually surrendered before removing the expenses associated with the secured debt from the debtor's means test calculations; these courts hold that simply declaring an intent to surrender the collateral or not reaffirm the debt is enough to require recalculation of the debtor's monthly expenses under the means test.[111] The courts that embrace this view defend their position by either arguing that this holding is "in keeping with the overall purpose of establishing a formula that will give rise to a meaningful presumption of abuse"[112] or arguing that the use of the word "scheduled" in the phrase "scheduled as contractually due" means the act of being placed on the debtor's bankruptcy schedules, and since these schedules must be amended to stay current, the debt cannot be "scheduled as contractually due" if the debtor does not intend to reaffirm it.[113]

These arguments, although creative, ultimately fail for the same reasons as the *Singletary* court's argument. The plain meaning of § 707(b)(2)(A)(iii) clearly does not allow for the post-petition surrender of collateral securing a debt to be considered under the means test. Concluding otherwise, meanwhile, would be inconsistent with all of the remaining clauses of the means test—those which form the basis of both the debtor's income and expenses. Not a single court has held that these other clauses allow for consideration of a debtor's post-petition changes; thus, uniformity requires the same result for this clause.

3. Ignoring Post-Petition Changes in the Means Test Calculations Makes Good Sense

The idea that the means test should not consider a debtor's post-petition financial changes likely seems inequitable to many sensible people. After all, why should a debtor be able to get a job paying $250,000 a year the day after filing a petition for Chapter 7 relief and have his new earnings be immune from the means test? Anyone

111. *See In re* Ray, 362 B.R. 680 (Bankr. D. S.C. 2007); *In re* Harris, 353 B.R. 304 (Bankr. E.D. Okla. 2006); *In re* Skaggs, 349 B.R. 594 (Bankr. E.D. Mo. 2006).

112. *Ray*, 362 B.R. at 685.

113. *See Harris*, 353 B.R. at 307-10; *Skaggs*, 349 B.R. at 598-600.

concluding this result to be inequitable would be correct; this is inherently inequitable.[114]

Congress, though, did not intend for the means test to be the provision in § 707(b) that considers equitable principles. Congress's inclusion of language allowing courts to consider "the totality of the circumstances" if the means test does not result in a presumption of abuse or if the presumption is rebutted reveals the means test for what it really is: just a formulaic screening mechanism used to generate a presumption.[115]

The means test, far from being the final determinant of whether Chapter 7 relief should be granted in most truly deserving cases, is designed only to discourage filings by bankruptcy lawyers whose clients clearly have the ability to repay their debts. Any argument from equity should not be made in the application of this mechanical screening mechanism—it should be made in an attempt to rebut the presumption of abuse created by it, or under the totality of the circumstances test contained in § 707(b)(3)(B).[116]

B. Post-Petition Changes Relevant To Rebut the Presumption of Abuse Created by the Means Test

As mentioned above, a debtor who fails the means test in § 707(b) will be subject to a presumption that his petition for Chapter 7 bankruptcy relief is abusive, and this presumption "may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for

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114. This belief was also expressed by the court in *Hartwick*. *See In re* Hartwick, 352 B.R. 867, 869-70 (Bankr. D. Minn. 2006).

115. *See* 11 U.S.C.A. § 707(b)(3)(B) (West 2006). Wedoff views the means test in the same manner; he considers the means test to be "simply a mechanism for generating a presumption" that "does not result in any final determination." Wedoff, *Judicial Discretion*, *supra* note 9, at 1037.

116. The *Walker* court implicitly made the argument, by referencing the totality of the circumstances test, that Congress adopted the totality of the circumstances test as a sort of equitable safety net should a potentially abusive petition for relief survive the means test. Because the U.S. trustee in the case failed to make a motion under the totality of the circumstances test, and only moved under the means test, the court did not opine further on the matter. *See In re* Walker, 2006 Bankr. LEXIS 845, at *25 & n.4 (Bankr. N.D. Ga. May 1, 2006).

which there is no reasonable alternative."[117] It is possible that Congress did not intend these "special circumstances" to include a debtor's post-petition financial changes. Congress could have simply included this provision to allow a debtor who has, for some valid reason, higher expenses than would be allowed under the IRS National and Local Standards used to compute the "debtor's monthly expenses" portion of the means test to escape the presumption of abuse.[118]

Alternatively, Congress may have intended this provision to help out someone who lost their job a month before filing their bankruptcy petition. Because such a person's "current monthly income" would be an average of his previous six months of earnings, it would be skewed higher than his actual monthly income at the time the petition is filed and, thus, could result in an unjustified dismissal of his petition for relief if this special circumstance—the loss of his job—was not considered to rebut the presumption of abuse that arises under the means test.

But limiting consideration of a debtor's "special circumstances" to those that arise prior to the filing of the Chapter 7 petition for relief would be illogical and unfair, and, unlike in the means test, fairness clearly matters in this provision. In fact, the only purpose for this provision is to ensure fairness to debtors. Whereas the means test presents a formulaic and mechanical test that eschews equitable arguments, the only possible reason Congress could have included this "special circumstances" provision is to provide an escape hatch to debtors who might unfairly fail the means test.

Once this provision is viewed in this manner, it becomes clear why courts must allow post-petition changes to be considered under it. Preventing a debtor from raising the fact that, for example, his deteriorating health requires greater expenditures for medical care than were required at the time his petition for bankruptcy relief was filed hardly seems to serve the interests of fairness. Nor would it be fair for a court to ignore the fact that a debtor first acquired a completely new expense—such as child support payments—after filing his petition for Chapter 7 relief.[119] Nor would it be fair to

117. *See supra* note 78 and accompanying text.

118. *See supra* notes 92-96 and accompanying text.

119. *See In re* Littman, 370 B.R. 820 (Bankr. D. Idaho 2007) (holding that a debtor who was ordered to make monthly child support payments after filing his Chapter 7 petition for relief

ignore any post-petition decrease in a debtor's income. Nothing in the text of the BAPCPA or the legislative history accompanying the legislation, meanwhile, runs counter to this conclusion.[120]

C. Post-Petition Changes Relevant To Determine Whether Petition Filed in Bad Faith

In the event that the presumption of abuse does not arise under the means test or is rebutted, § 707(b)(3)(A) requires courts to consider whether the debtor filed his petition for relief "in bad faith" or if the "totality of the circumstances" indicates that the granting of bankruptcy relief would be an abuse of the Bankruptcy Code.[121] The Bankruptcy Code does not define "bad faith," but one post-BAPCPA bankruptcy court has already held that post-petition actions by a debtor can be considered when conducting an inquiry into the debtor's good faith under § 707(b). The court's analysis in this decision, *In re Oot*,[122] shows that post-BAPCPA courts can and will look to pre-BAPCPA law to define "bad faith" in this context.[123]

An argument can easily be made from pre-BAPCPA case law that post-petition financial changes can be considered when determining a debtor's intent in filing a petition for Chapter 7 relief.[124] Prior to the enactment of the BAPCPA, the courts routinely read a good faith requirement into § 707(a), but the standards for a finding of bad faith were varied and numerous.[125]

It has been suggested elsewhere that manipulation of income or expenses for the purposes of passing the means test now creates another opportunity to find dishonesty on the part of debtors.[126] But there is a possibility that this dishonesty may not show itself unless

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could not include this expense in his means test calculations because the order was entered post-petition, but he could have the court consider the payments as special circumstances to rebut the presumption of abuse).

120. *See* H.R. REP. NO. 109-31, pt. 1, (2005), *reprinted in* 2005 U.S.C.C.A.N. 88.

121. *See* 11 U.S.C.A. § 707(b)(3)(A)-(B) (West 2006).

122. 368 B.R. 662 (Bankr. N.D. Ohio 2007).

123. *See id.* at 665-70.

124. Other dishonest post-petition behavior, however, continues to be punishable under § 727. *See* 11 U.S.C.A. § 727 (West 2006).

125. *See In re* Zick, 931 F.2d 1124, 1127 (6th Cir. 1991) ("The facts required to mandate dismissal based upon a lack of good faith are as varied as the number of cases." (quoting *In re* Bingham, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987))).

126. *See* Culhane & White, *supra* note 9, at 687-90.

post-petition financial changes can be considered. For instance, if an unemployed debtor files for Chapter 7 relief knowing that he may soon be employed at a significant salary, a court should inquire into the debtor's intentions in filing the petition. The court must determine whether the debtor simply decided to seek relief out of a desire to make an opportunistic filing that would allow him to set aside considerable debt before his new job would foreclose this opportunity. To conduct this inquiry, however, the post-petition increase in income must be considered.

D. Post-Petition Changes Relevant Under the Totality of the Circumstances Test

Although the phrase "totality of the circumstances" may seem to directly answer the question of whether any post-petition changes to a Chapter 7 debtor's income or expenses should be considered under § 707(b)(3)(B), it actually does not. This is because the provision does not state whether courts should consider the totality of the circumstances as they exist on the petition date or as they exist on the day of the hearing of the motion to dismiss under § 707(b).[127] That is not to say, however, that this test does not indirectly answer the question.

As noted by the Fifth Circuit in *Cortez*, most of the handful of circuit court decisions that considered a motion filed under the pre-BAPCPA version of § 707(b) applied the totality of circumstances test.[128] These courts typically considered the same factors in each decision, such as the debtor's ability to pay his debts in a hypothetical Chapter 13 proceeding.[129]

Because so few decisions used the phrase "totality of the circumstances" in this context before Congress passed the BAPCPA, and because those opinions that did tended to repeatedly consider the same factors, courts can infer that Congress adopted the factors

127. *See* 11 U.S.C.A. § 707(b)(3)(B) (West 2006). This provision states that if the presumption of abuse does not arise under the means test or is rebutted, then the court shall consider whether "the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse." *Id.*

128. *See supra* notes 60-64 and accompanying text.

129. *See supra* notes 60-61 and accompanying text.

considered by the circuits that applied this test.[130] This would be especially true of a factor considered by all or nearly all of the circuits applying this test. If Congress wished to exclude a factor, it could have expressly done so, just as it made sure to expressly include a factor—the rejection of a personal services contract—in the text of § 707(b)(3)(B).[131]

One factor that would receive priority consideration under this line of reasoning is the measurement of a debtor's ability to repay his debts in a hypothetical Chapter 13 proceeding. This presumption of priority consideration is further enhanced by the emphasis Congress placed on measuring debtors' ability to repay their debts in both the legislative history accompanying the BAPCPA and the structure of the remainder of § 707(b), particularly the means test.[132]

Nearly all of the courts that have considered whether a Chapter 13 debtor's post-petition financial changes should be considered under the post-BAPCPA version of Chapter 13 have concluded that these changes should be considered to determine a debtor's fitness for Chapter 13 relief.[133] Thus, the same analysis used by the Fifth Circuit in the *Cortez* case should be applied in post-BAPCPA cases considering motions to dismiss Chapter 7 petitions under the totality of the circumstances test.[134] Because courts are required to look to whether a debtor would be eligible for Chapter 13 relief under the totality of the circumstances test, and because post-petition events are considered in a Chapter 13 proceeding, then post-petition events must be considered here as well, up until the last possible moment: the point at which the motion to dismiss the debtor's petition under the § 707(b)(3)(B) totality of the circumstances test is decided. Seizing primarily on this reasoning, every

130. Wedoff makes essentially the same argument. *See* Wedoff, *Judicial Discretion*, *supra* note 9, at 1042 (stating the totality of the circumstances test codified in § 707(b)(3)(B) necessarily includes consideration of a debtor's disposable income through a Chapter 13 proceeding, because this is a factor "on which the relevant case law had particularly focused").

131. *See* § 707(b)(3)(B).

132. *See supra* Part III.

133. *See, e.g.*, Baxter v. Johnson (*In re* Johnson), 346 B.R. 256 (Bankr. S.D. Ga. 2006); *In re* Demonica, 345 B.R. 895 (Bankr. N.D. Ill. 2006); *In re* Renicker, 342 B.R. 304 (Bankr. W.D. Mo. 2006). *But see In re* Oliver, No. 06-30076-rld13, 2006 Bankr. LEXIS 1607 (Bankr. D. Or. June 29, 2006). This is also in accord with the weight of pre-BAPCPA authority considering this issue, as noted by the court in *Cortez*. *See supra* notes 60-63 and accompanying text.

134. *See supra* notes 60-64 and accompanying text.

court that has been faced with the question of whether to consider a debtor's post-petition financial changes under the totality of the circumstances test has held that it is appropriate to consider such changes.[135] Because none of these decisions appear to have considered all possible arguments for and against considering a debtor's post-petition financial changes under the totality of the circumstances test, however, this Note will also examine the other factors that are relevant to this question.

There is a second relevant factor that was applied under pre-BAPCPA § 707(b) cases applying the totality of the circumstances test: the totality of the circumstances test is equitable in nature.[136] Thus, unlike in the calculation of the means test, equitable considerations can and should be considered by a court applying this provision. Application of this analysis shows that in most, but not all, cases, it proves equitable to consider a Chapter 7 debtor's post-petition financial changes.

Most observers would agree it is fair and just to consider an increase in monthly income that a debtor begins to receive after filing his bankruptcy petition but before the deadline to file a motion under § 707(b) passes. After all, why should a debtor, like the one in *Cortez*, be able to get hired at a new job with an annual salary of approximately $100,000 four days after filing his petition for relief, and the bankruptcy court be forced to consider this debtor's monthly income to be zero if he was previously unemployed? Alternatively, imagine a downtrodden debtor files a Chapter 7 petition. Then, imagine that this debtor, two days later, has a stress-induced heart attack, resulting in an increase in future medical care expenses for ongoing treatment. Surely it would be inequitable for a bankruptcy court to be barred from considering these increased expenses.[137]

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135. *See, e.g.*, *In re* DePellegrini, 365 B.R. 830 (Bankr. S.D. Ohio 2007); *In re* Henebury, 361 B.R. 595 (Bankr. S.D. Fla. 2007); *In re* Lenton, 358 B.R. 651 (Bankr. E.D. Pa. 2006); *In re* Richie, 353 B.R. 569, 576 (Bankr. E.D. Wis. 2006); *In re* Pennington, 348 B.R. 647, 650 (Bankr. Del. 2006); *In re* Pak, 343 B.R. 239, 246 (Bankr. N.D. Cal. 2006).

136. *See* Kornfield v. Schwartz (*In re* Kornfield), 164 F.3d 778, 784 (4th Cir. 1991) ("A totality of circumstances inquiry is equitable in nature and the existence of an asset, even if exempt from creditors, is relevant to a debtor's ability to pay his or her debts.").

137. The court in *Pennington* made a similar argument. *See In re* Pennington, 348 B.R. 647, 651 (Bankr. D. Del. 2006) ("A ruling that the Court may only consider the Debtor's financial situation at the time of filing would cut both ways. If a debtor incurred additional expenses

But, considering a decrease in a Chapter 7 debtor's expenses is a different matter, particularly if the debtor's expenses were already reasonable.[138] Consider a Chapter 7 debtor who desires to take sensible measures to reduce his monthly expenses after filing his petition for relief, such as switching his children from a private school to a public school, canceling a gym membership, or making similar attempts to reduce monthly expenses. If reductions in post-petition expenses are considered under the totality of the circumstances, then debtors will likely feel compelled to avoid making these sensible reductions until after their Chapter 7 discharge is granted. This result, effectively compelling debtors in dire financial straits to avoid reducing their monthly expenses for months, hardly seems to make sense.[139]

Because it is equitable to consider a debtor's post-petition financial changes in most cases, however, and because the courts are unlikely to conclude that the totality of the circumstances test allows for consideration of both post-petition changes in a debtor's income and an increase in the debtor's expenses, but not a reduction in the debtor's expenses, without clear direction from Congress to this effect, any court that would analyze the question of whether to consider post-petition changes under this test would likely conclude it is equitable to consider all such changes.

There are also other arguments in support of ignoring a debtor's post-petition financial changes under the totality of the circumstances test. For instance, it could be argued that because Congress chose to ignore post-petition events under the means test—when it could have chosen to consider such changes—then the courts should infer that Congress did not intend post-petition events to be

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post-petition (for example, he needed a new car or had additional unexpected medical expenses), the Court would not be able to consider it.").

138. Nearly all expenses that are allowed to be deducted from current monthly income must be "reasonable" under the means test. *See* 11 U.S.C.A. § 707(b)(2)(A)(ii)(I)-(V) (West 2006). The only exception is for secured debts, which are not dischargeable in a Chapter 7 proceeding. *See id.*

139. This argument borrows from Judge Lynn's observation in the *Cortez* case that some debtors may delay looking for employment until after their bankruptcy case is decided if post-petition events are considered under § 707(b). *See supra* notes 48-49 and accompanying text. Whereas the hypothetical provided by Judge Lynn smells of bad faith on the part of the debtor, though, the same can hardly be said of debtors who simply try to cut back on their monthly spending.

considered under the totality of the circumstances test either.[140] This argument would likely fail if tried in court, however, because it assumes Congress simply adopted the phrase "totality of the circumstances" without knowing what factors the courts that had used this phrase in the past considered under "totality of the circumstances," or at least failed to realize the result of applying these factors to a scenario involving post-petition changes to a debtor's financial situation.[141] The courts are unlikely to embrace this assumption. For this same reason, the courts are also unlikely to embrace any policy argument that post-petition changes should not be considered for efficiency reasons.[142]

Embracing the view that a Chapter 7 debtor's post-petition financial changes should be considered under the totality of the circumstances test also is consistent with Congress's goals in adopting the BAPCPA, because doing so will tend to make it harder for most Chapter 7 debtors to obtain relief. Both the overall theme of the changes to § 707(b), particularly the removal of the presumption in favor of granting a debtor relief from § 707(b)(1),[143] and the legislative history accompanying the BAPCPA clearly show that Congress intended to make it harder to obtain Chapter 7 relief.[144]

V. A PROPOSAL

The primary purpose of this Note is to provide debtors, creditors, lawyers, and the courts with guidance when they are faced with interpreting whether a debtor's post-petition changes can be

140. This is a twist on the argument made by Professors Culhane and White in their article, cited above, that was published shortly after the BAPCPA was adopted. *See* Culhane & White, *supra* note 9, at 666-67, 677-82. Professors Culhane and White argue that Congress's intent in adopting the means test was to make it the only test in § 707(b) that would consider a debtor's ability to pay off debts. *Id.* The courts have since unanimously rejected this interpretation, however, so this argument is not considered further in its original form within this Note.

141. As discussed above, this Note asserts that Congress understood what it meant to statutorily adopt the "totality of the circumstances" test. *See supra* notes 129-30 and accompanying text.

142. As one practitioner has observed in commenting on the *Cortez* decision, requiring courts to consider a debtor's post-petition financial changes may impose a significant investigatory burden on U.S. trustees. *See* Dion, *supra* note 9, at 47-48.

143. *See supra* text accompanying note 77.

144. *See supra* Part III.A.

considered under the new § 707(b). In this Part, however, this Note goes beyond merely interpreting the existing statute; it sets forth a pair of recommendations to change the existing law.[145]

A. Expressly State When Courts Should Consider Post-Petition Changes in § 707(b)

The current text of § 707(b) has clearly produced confusion in the bankruptcy bar and among the U.S. trustees tasked with seeking dismissal of cases under the section.[146] If these highly respected members of the legal community are at times unsure whether post-petition events can be considered under the various parts of the section, then the confusion on the part of the counsel for indigent, consumer Chapter 7 debtors surely must be just as great or worse.

The debtors represented by these counsel deserve greater clarity. This clarity, moreover, can easily be supplied by amending § 707(b) to clearly and unequivocally state when a debtor's post-petition financial changes should and should not be considered in the various parts of the section. By doing this, § 707(b) will be brought in line with the host of other Bankruptcy Code sections that clearly articulate whether post-petition events are relevant therein.[147] Making this change will also prevent the need to litigate this question at the expense of indigent Chapter 7 debtors.

B. Insert a De Minimis Exception

As noted above, considering post-petition changes in a Chapter 7 debtor's financial circumstances under the totality of the circum-

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145. The changes made by the BAPCPA have been widely criticized by bankruptcy practitioners, and even many of the nation's bankruptcy judges, because many in both groups feel they were shut out of the drafting process by Congress in order to cater to the consumer credit lobby. *See, e.g.*, Jack B. Schmetterer et al., *BAPCPA: What Do We Know and When Did We Know It?*, 4 DEPAUL BUS. & COM. L.J. 597, 597, 600 (saying "the bankruptcy community, the bench and the bar, were effectively shut out of this particular bankruptcy bill" and that BAPCPA "is badly drafted, shabbily drafted, carelessly drafted"). This criticism, as well as the recent political changes in Congress, makes another package of revisions to the Bankruptcy Code possible in the next several years. As a result, the statutory changes recommended by this Note are particularly timely.

146. *See supra* Part IV.

147. *See supra* notes 42-43, 65-66 and accompanying text.

stances test makes sense in most cases.[148] From a policy standpoint, it is wise to evaluate post-petition changes in a debtor's income; this ensures that debtors whose income may have significantly improved after the filing of their petition are not able to walk away from debts unnecessarily, and also insures that struggling debtors who see decreases in their income will be more likely to receive bankruptcy relief.[149] Public policy also dictates that the courts should consider post-petition increases in a debtor's monthly expenses. It would be inherently unfair to dismiss a petition for Chapter 7 relief without considering additional financial hardships the debtor has incurred since filing his petition.[150]

Given the drawbacks to considering some post-petition reductions in a debtor's expenses discussed above, however, the same cannot be said of considering this type of post-petition change. Considering reductions in a debtor's expenses will likely force debtors to refrain from making sensible decisions to control their spending until after their petitions for relief have been granted.[151]

To avoid these problems, Congress should amend the totality of the circumstances test and bad faith provision in § 707(b)(3) to include a de minimis exception. This amendment should prevent judicial consideration, for the purposes of the totality of the circumstances test, of post-petition decreases in a debtor's monthly expenses to the extent these decreases do not exceed 10 percent of the debtor's monthly expenses allowed under either the means test or the total monthly expenses allowed to rebut a presumption of abuse if special circumstances exist, whichever is greater.[152] It should also make clear that aggregate reductions in monthly expenses of 10 percent or less after the filing of the petition should not be considered for the purposes of a bad faith finding.

This proposal has a basis in both pre- and post-BAPCPA law. The Schedule I form in effect prior to the BAPCPA—the form debtors used to detail their current income—asked debtors to "[d]escribe any increase or decrease of more than 10% in any of the above categories

148. *See supra* notes 136-38 and accompanying text.

149. *See supra* text accompanying note 136.

150. *See supra* note 136 and accompanying text.

151. *See supra* notes 137-38 and accompanying text.

152. Of course, the expenses allowed to rebut the presumption of abuse by showing special circumstances would always be the greater of the two, should special circumstances exist.

anticipated to occur within the year following the filing of this document."[153] This instruction implies that changes of less than 10 percent should be ignored. So, while a 10 percent threshold may seem arbitrary to some, it is not the first time such a threshold would be used in connection with § 707(b). Moreover, other provisions of the current Bankruptcy Code also recognize de minimis exceptions.[154] Considering changes in monthly expenses that exceed this 10 percent de minimis threshold, however, will ensure that debtors who may have been living too comfortably—that is, those who have plenty of unnecessary expenses they can reduce—will not escape an abuse inquiry.

CONCLUSION

The issue of whether a Chapter 7 debtor's post-petition financial changes can be considered by a court hearing a motion to dismiss the debtor's petition for relief under § 707(b) is unlikely to be settled anytime soon. The first bankruptcy courts faced with this question have given inconsistent answers to it, and those that have given the same answer have taken different analytical paths in reaching their conclusions. These courts have also failed to consider all possible arguments for and against considering post-petition changes, and no appellate courts have had the opportunity to clarify the situation.

This Note can be used to help debtors, creditors, practitioners, and, ultimately, the courts resolve this complicated issue. This Note concludes that the courts cannot consider post-petition financial changes under the means test provisions of § 707(b), but it concludes that the courts should consider such changes to rebut the presumption of abuse created by the means test, to determine whether a debtor filed a petition for relief in bad faith under § 707(b)(3)(A) and

153. Official Form B6I, Dec. 2003, *available at* http://www.uscourts.gov/bkforms/official/b6i.pdf. The current Schedule I form, like the current Schedule J form that is used to detail a debtor's expenses, has done away with this 10 percent threshold. Both forms now instruct debtors to "[d]escribe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document." Official Form B6I, Oct. 2006, *available at* http://www.uscourts.gov/rules/BK_Forms_06_Official/Form_6I_1006_revised.pdf; Official Form B6J, Oct. 2006, *available at* http://www.uscourts.gov/rules/BK_Forms_06_Official/Form_6J_1006.pdf.

154. *See, e.g.*, 11 U.S.C.A. § 547(c)(9) (West 2006) (prohibiting parties from recovering transfers of less than $5,000 in a preference action).

to administer the totality of the circumstances test in § 707(b)(3)(B). This Note also recommends that Congress intervene to expressly adopt these results in the text of § 707(b), but modify them so that debtors can exempt some post-petition reductions in expenses from judicial consideration for the purposes of a good faith inquiry or the totality of the circumstances test. Applying existing law properly, coupled with the addition of these recommendations, will ensure that post-petition changes are always considered in a fair and efficient manner by the courts.

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