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Substantial Abuse Dismissal under 11 U.S.C.A. § 707(b): Evolution or Malignancy

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"Evolution" is a "process of development... of gradual progressive change... in a social and economic structure." [\[FN1\]](#) Conversely, "malignant" is defined as "having an evil influence... malevolent or malicious... dangerous." [\[FN2\]](#) This paper addresses the present state of [11 U.S.C.A. § 707\(b\)](#) [the Code provision that provides for a motion to dismiss based on "substantial abuse"]; where it started and how it is now being applied. While framed in the terms of substantial abuse under [section 707\(b\)](#), the paper will include some analysis from jurisdictions that proceed under a "bad faith" analysis as "cause" for dismissal under [11 U.S.C.A. § 707\(a\)](#) as is available in some jurisdictions but is not recognized in the Ninth Circuit.

The question presented here is whether [section 707\(b\)](#) has grown from a simple challenge to discharge in the presence of factors primarily such as "ability to pay" into a vehicle by which the credit industry may rely upon the U.S. government, funded by taxpayer dollars, to police debtors' pre-bankruptcy conduct--achieving through the Department of Justice that which the creditor could not obtain under either the exceptions to discharge set forth in [11 U.S.C.A. § 727\(a\)](#) or [11 U.S.C.A. § 523\(a\)](#).

The Civil Enforcement Initiative of the Department of Justice has tasked the Office of the United States Trustee to aggressively police the chapter 7 docket to seek out debtors who allegedly engaged in perceived wrongful debt accumulation activity prior to filing bankruptcy. Motions are being filed across the country against debtors challenging discharge under allegations more than just ability to pay--now the cause is "credit card bust out schemes" or other allegations of "loading up" prior to filing.

At least one circuit court has held that a "credit card bust out scheme" may give rise to a challenge under [11 U.S.C.A. § 707\(b\)](#), and, as creditors lack standing to pursue such motions to dismiss, the U.S. Trustee is stepping up to the plate with relish. Is this where Congress intended the Code and the Bankruptcy courts to go? Is such a path within the ambit of the statute? Congress left the term "substantial abuse" undefined, and most courts have found that it was the intent of Congress to do so, so that the courts could develop the law. Has this grant of unfettered power to evolve resulted in a cancer on the system? This is the question posed.

This paper is not intended to be an exhaustive analysis of [section 707\(b\)](#) under its historical application (denying discharge in the presence of ability to pay). However,

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*some review of those historical precedents are necessary when asking the question of whether the courts are going too far with the current developments in pursuing dismissal where debtors engaged in allegedly wrongful pre-bankruptcy conduct.*

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## I. Substantial Abuse Provision of the Bankruptcy Code

The Bankruptcy Code, in relevant part, presently provides

### § 707. Dismissal.

(b) -- 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 organization (as that term is defined in section 548(d)(4)). [\[FN3\]](#)

## II. The Civil Enforcement Initiative: War Against Terrorism, or Executive Frustration over the Failure of Congress to Pass the Bankruptcy Reform Act of 2001

While [section 707\(b\)](#) has been around for nearly 20 years, courts across the country have noticed a significant increase in the prosecution of "substantial abuse" cases by the U.S. Trustee over the last two years. Some may be surprised to learn that this increased emphasis by the government is attributed to the war on terrorism. However, a closer inspection suggests that the war on terrorism is just an excuse, and the real reason may lay more squarely on executives' frustration with Congress over the failure to get the Bankruptcy Reform Act of 2001 out of committee.

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In "A Message from the Attorney General," [\[FN4\]](#) Attorney General John Ascroft states:

On September 11, 2001, evil assaulted America. Those heinous acts of violence and the continuing threat of impending violence are an attack on America and her citizens. The fight against terrorism is now the first and overriding priority of the Department of Justice. We will devote all resources necessary to disrupt, weaken, and eliminate the infrastructure of terrorist organizations, to prevent or thwart terrorist attacks, and to bring to justice the perpetrators of terrorist acts.

...

The Department of Justice's Strategic Plan for fiscal years 2001-2006 reaffirms the Department's commitment and responsibility to protect all Americans,... enforce vigorously the laws... maintain the balance between... between strict enforcement and abiding respect for individuals.

The Plan describes how the Department will uphold the American justice tradition that battles injustice to bring protection to the weak, freedom to the restrained, liberty to the oppressed, and security to all.

The strategic plan is thus a government tool that is used to combat terrorism. Goal 7 of that plan is to "Protect the Federal Judiciary and Provide Critical Support to the Federal Justice System to Ensure it Operates Effectively." The Plan provides:

**Strategic Objective 7.4 BANKRUPTCY - - Protect the integrity and ensure the effective operation of the Nation's bankruptcy system.**

The Department, through the U.S. Trustee Program (USTP), oversees and administers the bankruptcy caseload and combats bankruptcy fraud.... critical to the integrity of the bankruptcy system and the maximum distribution of funds to creditors.

In the United States, federal bankruptcy law allows individuals... to file bankruptcy. Filing bankruptcy is a means of relief from debts owed to creditors.... Since 1996, bankruptcy filings in America have been increasing at a significant rate.... By 2000, total filings had increased to 1,203,412. This represents a 29 percent increase in the last 4 years with the greatest growth attributed to individual liquidation filings.

**Strategies to Achieve the Objective**

...

**Ensure that parties adhere to standards of the law and police for embezzlement, fraud, and other abuses.**

The USTP is vigorously combating abuse of the bankruptcy system through the use of civil enforcement remedies found in [Sections 707](#), [727](#), and [110 of the Bankruptcy Code](#). These enforcement provisions authorize the USTP to file a motion for dismissal for substantial abuse, file an objection to a debtor's bankruptcy discharge, and pursue penalties against individuals who negligently or fraudulently

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prepare bankruptcy petitions. In addition, the U.S. Trustees refer instances of possible criminal conduct to the U.S. Attorney and assist in prosecutions. The USTP develops criminal referrals and, in cooperation with other federal agencies which have the authority to investigate and prosecute criminal bankruptcy violations, helps formulate responses to address bankruptcy fraud.

...

### Key Crosscutting Programs

**National Bankruptcy Fraud Working Group.** The USTP plays a leading role in the National Bankruptcy Fraud Working Group (NBFWG), comprising members from the U.S. Attorneys' Offices, DOJ Criminal Division, FBI, IRS Criminal Investigation Division, Postal Inspection Service, U.S. Trustees' Offices and the Executive Office for U.S. Attorneys. The NBFWG coordinates a national response to bankruptcy fraud issues, facilitates pro-active national investigations, assists districts in establishing local bankruptcy fraud task forces, tracks all bankruptcy fraud referrals and convictions, and develops training programs on bankruptcy fraud. Sixty of the Program's field offices have established local bankruptcy fraud working groups led by U.S. Attorneys. In addition, the Program has undertaken projects in conjunction with the Identity Theft Subcommittee of the Attorney General's Council on White Collar Crime and joined the Internet Fraud Working Group. (Goal 7 [\[FN5\]](#))

In "The U.S. Trustee Program's Efforts to Prevent Bankruptcy Fraud and Abuse," the auditors state that the "priorities of the Civil Enforcement Initiative are to... ensure that chapter 7 is not abuse[d]." [\[FN6\]](#) Included in their definition of "abuse" are "credit card bust-outs." [\[FN7\]](#) That paper stated:

At the time of our audit, all 95 offices had submitted civil enforcement action plans to the EOUST. The five UST regions we audited identified either credit card "bust-out" schemes [ftn. 20.] or serial files as the most common problem in their region to be addressed through civil enforcement actions.

For credit card bust-outs, four of the five regional offices we audited reviewed petition that had at least \$100,000 in consumer debt and little to no assets. In these cases, the regional offices determined whether the debtors filed a bankruptcy petition in bad faith or concealed assets. Filing a petition in bad faith means the debtor made a significant amount of credit card purchases without the intent and means to repay creditors and then immediately filed bankruptcy. The regional offices or trustees requested those debtors who met the criteria for a credit card bust-out to provide additional financial information such as tax returns, bank statements, and credit card statements to assist with the review of the debtor's financial background.

[ftn. 20.] Credit card bust-outs occur when individuals declare bankruptcy after obtaining goods on credit without the intent to pay and then dispose of the goods for cash. [\[FN8\]](#)

The Audit Report then goes on to recommend goals with 60% targets for:

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- percentage of motions per [section 707](#) granted by the Bankruptcy Court, cases dismissed
- percentage of motions per [section 707](#) that resulted in conversions [\[FN9\]](#)

Thus there is a tremendous push by the Department of Justice to pursue substantial abuse cases, and quotas have been set. In "The Civil Enforcement Initiative: A Review of the First Ten Months and a Look at the Next Stage," Antonia G. Darling (AUST, E.D. Ca., Sacramento div.) and Mark A. Redmiles (EOUST), remarked that "[t]he priorities of the Civil Enforcement Initiative are... [e]nsuring that chapter 7 is not abused... chapter 7 debtors who do not comply with the law will have their cases converted or dismissed." [\[FN10\]](#) In that review, the authors discuss the "substantial abuse" initiative:

*The pending bankruptcy reform legislation reflects the concerns of Congress and the public regarding debtors who are capable of repaying at least a substantial portion of their debts, but are not doing so. In the past, most Program offices could test only a sample of the chapter 7 cases filed. However, an increasing number of offices are now reviewing all chapter 7 petitions for substantial abuse and other indicia of problems. This has resulted in more debtors converting their cases to chapter 13 and more dismissals of chapter 7 cases, either by the court or by debtors who voluntarily dismiss their cases when the U.S. Trustee scrutinizes their income and expenses.*

One case involved debtors with a monthly income of \$7,000 who scheduled \$350,000 in unsecured debt, of which \$200,000 was credit card debt and \$150,000 was owed to individuals for personal loans. Banking records showed regular withdrawals from automatic teller machines at local casinos.

In another case the debtor was a commercial airline pilot who earned \$11,500 per month, paid \$3,100 per month on her mortgage, and-just before filing bankruptcy-bought a \$50,000 Mercedes to replace her repossessed \$90,000 Mercedes. Dismissal of her case prevented the discharge of more than \$122,500 in consumer credit card debt.

In yet another case, debtor spouses filed for chapter 7 relief listing more than \$11,000 in tax debt, \$4,450 in non-priority unsecured debt, and monthly expenses of \$1,000 for recreation, \$900 for food for a family of five, and \$355 for transportation other than auto loan payments.

### **Credit Card Bustouts**

Bankruptcy filings are being monitored for possible "credit card bustout" schemes. These are cases in which an individual, acting alone or in connection with a group, acquires several credit cards simultaneously. The individual makes substantial use of the credit cards and seeks to establish a good credit record and increased credit limits in a short period of time. The bustout occurs when the individual "maxes out" on all the credit cards, getting cash advances or purchasing readily resalable merchandise. When the credit cards exceed their limit and are no longer accepted, the individual often files for bankruptcy protection. When a bustout

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is identified, the Program takes action to dismiss the case or deny the debtor's discharge.

In a recent case the bankruptcy court denied discharge, based on the U.S. Trustee's investigation and ensuing complaint, of more than \$617,000 of credit card debt listed by the debtor. Credit card records for just one major credit card company revealed that in a one-month period the debtor shopped at a different Costco Wholesale Store almost every day, incurring more than \$62,000 in debt. Additional investigation indicated that the debtor had purchased consumer goods for resale. The U.S. Trustee's complaint to deny the debtor's discharge was based on the debtor's false oaths, inability to explain the disposition of estate property, and failure to keep records. [\[FN11\]](#)

Additionally, in "How to keep your clients *and you* from becoming enforcement targets," [\[FN12\]](#) AUST Mark A. Neal (D. Md., Baltimore) correctly comments: "One of the most commonly utilized civil enforcement sections of the Bankruptcy Code is [11 U.S.C.A. § 707\(b\)](#).... What constitutes "substantial abuse" is not defined by the Bankruptcy Code but, rather, has been left to the courts to sort out." He goes on to mention that "[e]ven if the case was filed in good faith, recent bankruptcy court cases indicate that cases resulting only from a debtor's over extension of credit likely will be found to be a substantial abuse." As the courts in his district recognize motions to dismiss for "bad faith" under [section 707\(a\)](#) [rejected in the Ninth Circuit in *In re Padilla* [\[FN13\]](#)], Mr. Neal comments that "[section 707\(a\)](#) serves as safety net for abuse cases that might not otherwise fall squarely within the ambit of the other civil enforcement sections of the [Bankruptcy Code. Section 707\(a\)](#) provides that the bankruptcy court may dismiss a case for cause." His observation holds for cases brought under the "substantial abuse" rubric as suggested by the *Padilla* case.

Most recently, the U.S. Trustee released its annual report for FY 2002, where it disclosed that, in FY 2002, it filed approximately 2,750 "substantial abuse motions," of which approximately 1,400 were granted by the court or resulted in a conversion to chapter 13 (approximately 50%). The report also states that the U.S. Trustee initiated informal investigations in more than 3,800 cases that did not result in formal motions or litigation. The Report concludes that the U.S. Trustee "successfully pursued over 5,000 debtors through investigations and formal actions, and prevented the immediate discharge in chapter 7 of more than \$59 million of general unsecured debt." [\[FN14\]](#)

The push is on-whether it is the fight against terrorism or the frustration of certain quarters over the failure of Congress to pass the Bankruptcy Reform Act of 2001-for the U.S. Trustee to vigorously pursue dismissals under [section 707\(b\)](#) for substantial abuse; not merely the garden variety "substantial abuse" historically experienced (where debtor has the ability to repay), but the new "substantial abuse" (incurring consumer debt beyond the ability to repay in "bust-out" schemes.) However, for all the rhetoric, it still remains a mystery as to what "substantial abuse" is. Is it like pornography, you know it when you see it? For if it is, it will depend upon who sees it.

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### III. Legislative History of [Section 707\(b\)](#)

Under the Bankruptcy Act of 1896, it was well settled law that:

[I]f the bankruptcy, however solvent, or however impure its motive may have been, or whatever may have been the actuating purpose, saw fit to surrender its assets into the custody and jurisdiction of the court for the benefit of its creditors, the creditors as a matter of law have no cause for complaint. [\[FN15\]](#)

"Good faith," although a consideration in reorganization proceedings under the prior Act, generally was not a consideration in a liquidation proceeding. [\[FN16\]](#) However, times have changed, and the law has evolved. [Section 707\(b\)](#) became law in 1984 as a part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Before final passage in 1984, the proposed amendments contained a "future income threshold test" and a consumer counseling system that were removed from the final version of the bill. Requirements for a mechanical future income threshold test were deleted from earlier drafts of the proposed [section 707\(b\)](#) and replaced with the undefined term "substantial abuse." [\[FN17\]](#) As originally enacted, [section 707\(b\)](#) provided:

After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. [\[FN18\]](#)

Although the term "substantial abuse" is not defined in the Act, legislative history indicates that the amendments to the Code were aimed primarily at stemming the use of chapter 7 relief by non-needy debtors. [\[FN19\]](#)

The amendments were aimed specifically at debtors who could repay a reasonable portion of their debts. The consumer credit amendments, of which [11 U.S.C.A. § 707\(b\)](#) is a part, were the result of congressional concern that credit costs were being driven upward by the easy access and ready availability of chapter 7 discharge to individuals seeking to rid themselves of debt even though they had an ability to pay. In addition to statements on record from individual congressmen, the 1983 Senate Committee Report on S. 445, explained the purpose of the substantial abuse provision:

This provision represents a balancing of two interests. It preserves the fundamental concept embodied in our bankruptcy laws that debtors who cannot meet debts as they come due should be able to relinquish non-exempt property in exchange for a fresh start. At the same time, however, it upholds creditors' interests in obtaining repayment where such repayment would not be a burden.... However, if a debtor can meet his debts without difficulty as they come due, use of chapter 7 would represent a substantial abuse. [\[FN20\]](#)

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Senator Hatch put this in other words on the Senate floor, referring to it as "another important provision in title III [which] prevents abuse of the code.... As I mentioned earlier, title III contains more than 30 amendments to ensure that a 'fresh start' does not become a 'head start.'" [\[FN21\]](#)

Thus it would appear that Congress rejected a mechanical "threshold test" because it did not want to limit [§ 707\(b\)](#) to the "ability to pay" factor, but rather preferred a broader test by which to analyze "substantial abuse" cases. The Eighth Circuit, after an analysis of the legislative history of earlier attempts to modify the Code, and the amendments that enacted 707(b), stated: "We believe that in deleting the mandatory future income threshold formula, Congress simply replaced a rigid test with a flexible "substantial abuse" standard that does not foreclose the courts from considering, inter alia, the debtor's ability to pay his debts out of his future income." [\[FN22\]](#)

One district court stated that "[t]his provision was enacted to correct an imbalance in Bankruptcy Code policy which had allowed one side of the equation, a debtor's right to a fresh start, to outweigh the other side of the equation, the presumption, which protects creditors rights, that a debtor will make his best effort to meet his obligation before turning to chapter 7 relief." [\[FN23\]](#)

The legislative history of [section 707\(b\)](#) thus exclusively deals with the question of "need" for a discharge based upon ability to pay. Nowhere in the legislative history is there any indication that Congress intended the section to be a vehicle that the court (and later the U.S. Trustee) would be able to invoke to challenge the debtors' right to a discharge for pre-bankruptcy conduct.

#### **IV. Summary of Controlling Law by Jurisdiction**

NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS  
CHAPTER 13 ATTORNEYS FEES & FUNCTIONS SURVEY  
March 2003

**The Survey:** As it did previously in 1993 and 1999, in March 2003, NACBA surveyed a geographic sample of its members, requesting data about attorneys fees normally allowed in their area, the method of paying those fees, and the duties of the attorneys in Chapter 13 cases. Fee limits are either imposed by local guidelines or by practice and are sometimes referred to as "no look" fees because no time records are required.

**Duties:** The survey requested information about who is responsible for performing basic tasks in a Chapter 13 case. New this year are questions about Electronic Case Filing (ECF) -- Is ECF operational? If so, is it mandatory? and who is responsible for preserving original signature documents? The last column, the "Attorneys Function Score," is meant to be a rough estimate

of the degree of attorney involvement in a case during its pendency. Each of the tasks is assigned a weight of 20 points. If the attorney shares the task, the score of 10 is generally assigned for that task. Therefore, if the attorney is primarily responsible for 4 of the 5 tasks, the score is 80. ECF counts only if it is mandatory. This score is not intended to actually evaluate the amount of time required by each task in each of the geographic areas. However, it will give a hint of the work assumed by debtors' attorneys in relation to the fees awarded.

**Abbreviations:** A = Attorney; APS = adequate protection payments on secured claims; C = Court; T = Trustee; TR = Time records must justify both the additional fees requested as well as the original "no look" fee.

**Cost of Living Adjustment:** "No look" fees for consumer cases are adjusted by the Cost of Living Index data produced by ACCRA, formerly the American Chamber of Commerce Researchers Association. ACCRA is the industry standard used by human resource departments to compare living expenses for employees. This index uses 100 as the average current cost of living for the nation. The ACCRA Cost of Living Index compares living expenses among geographic areas. A higher than average cost of living is indicated by a number exceeding 100. ACCRA data from 4th quarter 2002 or immediately prior quarters in 2002 was used. The Consumer Price Index was not used because it measures the increase in living expenses over time for individual areas; it does not compare different areas. By adjusting for the ACCRA cost of living, the attorneys fees can more appropriately be compared.

REGION	SOURCE	PRIMARY TASK RESPONSIBILITY	ECF	Reqd?	DRG	Sup?	ATTYS FEE LIMIT	METHOD OF PAYMENT	ADDITIONAL	AVG TIME days	ACCRA	Adjusted Avg	Attys
		Calc pmts + prep-ph 341 claims	Y/N				Consumer	Formula	Any/A	Plt -> Clnt	Cost/Living	Active Fees per	Function
								Fees	Fees	Cont -> 1st Pmt	1100 = eqpt	Case/Living	Score
Northern Dist/ Eastern Dist/ Alabamian	T Semmes	A C A A	A N	.	.	1500	1500	No	1st-admin expense	180	98.2	1500 ->	60
										30		1527	
Northern Dist/ Western Dist/ Alabama (Birmingham)	C Burns	A C A A	A N	.	.	1500	1500	No	1st-admin expense	60	97.6	1800 ->	60
										30		1527	
Arizona (Phoenix)	NewDeWitt	A A B C	A Y	A	A	2750	2750	OK	1st-admin expense	180	95.1	2750 ->	80
										50		2892	
Arkansas (Hot Springs) (Pina Bluff)	K Hewner K Cuz	A C T A	A Y	A	A	2500 + 50	1050-1500 + 50	OK	1st-9500; then 10% of plan pmts	95-100	95.1	1550 ->	60
										30		1630	
Northern Dist/ California (Oakland)	M Bronsky S Elkington	A C A A T A	A N	.	.	4000	2500	2000-B 1000-C	Prorate wkcs; claims	60	139.6	2500 ->	50
										30		1791	
Northern Dist/ California (Santa Rosa)	E Lober	A T A B T A	A N	.	.	-	-	OK	1st-9500; then 9200/mo	45	.	-	50
										45			
Northern Dist/ California (San Jose & San Francisco)	H Hennessy	A T A A	A N	.	.	2500-4550	1400-3350	500	1st-9500; then plan pmt subject to APS	60	168.1	2379 ->	60
										30		1413	

V.

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## The Elements of [Section 707\(b\)](#)

"In applying [§ 707\(b\)](#) the Court must determine three elements: 1. That the debtor is an individual; 2. That the case involves primarily consumer debts; and 3. That relief under chapter 7 would be a "substantial abuse" of the provisions of chapter 7. All of these factors must be evaluated with a presumption in favor of granting the relief requested by a debtor." [\[FN24\]](#) Each of these elements is addressed as follows:

### A. Filed by an individual debtor

While not defined in the code, "individual" generally refers to a natural person and not an entity. [\[FN25\]](#)

### B. Whose debts are primarily consumer debts

#### 1. "Primarily"

The Ninth Circuit early on stated that "'primarily' means 'for the most part.' Webster's Ninth New Collegiate Dictionary 934 (1984). Thus, when 'the most part'--i.e., more than half--of the dollar amount owed is consumer debt, the statutory threshold is passed." [\[FN26\]](#) No other court has disputed or disagreed with this definition for the term "primarily" in the context of [§ 707\(b\)](#).

#### 2. "Consumer debts"

The Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." [\[FN27\]](#) "Debt" means "liability on a claim," [\[FN28\]](#) and "claim," in turn, is broadly defined as any "right to payment, whether or not such right is... secured, or unsecured." [\[FN29\]](#) Debts under [section 707\(b\)](#) scrutiny include all priority and general unsecured debt as well as the unsecured portion of secured obligations. Some of the special considerations included in determining "consumer debt" include:

Home Mortgage Debt: Notwithstanding statements made while the 1984 amendments were being debated on the floor of both the House and Senate that Congress did not intend mortgage debt, [\[FN30\]](#) the courts have held that mortgage debt secured by a debtor's residence is consumer debt under the Code. [\[FN31\]](#)

Student Loan Debt: Student loans are not per se consumer debts. [\[FN32\]](#)

Marital Debt: Debts owed to a former spouse are generally consumer debt. [\[FN33\]](#)

### C. Where granting relief would be a substantial abuse of chapter 7

Substantial abuse is not defined in the Code, but the history and policies underlying [§ 707\(b\)](#) give content to its meaning and purpose. That history is well set out in previous opinions. [\[FN34\]](#) Most courts that have analyzed the history have concluded

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that Congress chose neither to define "substantial abuse" in the 1984 Act nor to leave specific guidance in legislative history; Congress left a flexible standard enabling courts to address each petition on its own merit. [\[FN35\]](#) Thus the stage was set to allow the definition of "substantial abuse" as a term of art to evolve.

### **1. Factors to be considered in determining substantial abuse**

"Relevant factors for finding substantial abuse include: [\[FN36\]](#)

- (1) circumstances surrounding the bankruptcy filing (i.e., was it induced by emergency, sudden illness, disability, unemployment, etc.);
- (2) whether the debtor incurred cash advances and made consumer purchases far in excess of his or her ability to pay;
- (3) whether the debtor's budget is excessive or unreasonable;
- (4) whether the debtor's schedules and statement of income and expenses reasonably and accurately reflect his or her true financial condition;
- (5) whether the petition was filed in good faith; and
- (6) whether the debtor has the ability to repay."

### **2. Ability to pay**

Early on, it was the unanimous conclusion of bankruptcy courts that the principal factor to be considered in determining substantial abuse was the debtor's ability to repay the debts for which a discharge is sought. [\[FN37\]](#) Additionally, from the start, in finding "ability to pay," the courts have looked to the debtor's ability to fund a chapter 13 plan. [\[FN38\]](#).

In one of the earliest Circuit Court opinions, and after a review of the bankruptcy court's finding that ability to pay is the principal factor to be considered, the Ninth Circuit held that "a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse." [\[FN39\]](#) Over the years, the percentage repayment threshold got lower and lower. [\[FN40\]](#)

## **VI. Who May Move for Dismissal**

### **A. Court (sua sponte)**

The Code provides that the court may move for dismissal on its own initiative. [\[FN41\]](#)

### **B. U.S. Trustee**

The Code was amended in 1986 to add that, in addition to the court, the U.S. Trustee may so move. [\[FN42\]](#)

(Publication page references are not available for this document.)

## **C. Creditor or other party in interest**

### **1. Under present law**

Creditors or other parties in interest are prohibited from filing a motion to dismiss under [section 707\(b\)](#). However, creditors may provide information to U.S. Trustee which the U.S. Trustee then uses to bring motion. [\[FN43\]](#)

However, it remains to be seen if creditors can use the threat of 707(b) to strong-arm a reaffirmation from a debtor. In one recent case, the author received a letter from a creditor's counsel in which it was stated:

I represent Mr. Black, a creditor listed by Mr. Green in his chapter 7 case. Black requests that Mr. Green either withdraw his bankruptcy petition or reaffirm a portion of the debt owed to Black otherwise Black intends to request that the Trustee make an independent inquiry whether dismissal of the chapter 7 case for substantial abuse is appropriate and pursue a judgment against Mr. Green for damages incurred by Black and his company.

Such extortionate tactics cause pauses to reflect initially on the ethical concerns with threatened criminal prosecution to gain advantage in a civil matter, and the legislative intent behind [section 523\(d\)](#), which imposes attorney's fees against a creditor for using a non-discharge threat to "strong-arm" reaffirmation agreements. [\[FN44\]](#) While neither of these reflections is square on point with this case, they are sufficiently relevant to mention when taken in the context of the law of [section 707\(b\)](#).

Just how far a creditor can go to "request or suggest" a 707(b) motion without actually "request or suggesting" such a motion to run afoul of the precise statutory language of the section is unclear. This issue will have to be resolved in the courts, and its likelihood of occurrence is increasing as more and more attention is placed upon the provision.

### **2. Proposed law (Bankruptcy Reform Act of 2001)**

Under the amendments to the Bankruptcy Code proposed by Congress in various forms (such as the Bankruptcy Reform Act of 2001), most are familiar with the addition of "means testing," which has received the most attention in the press. What has escaped the attention of most is that the reform will open the right to move under [section 707\(b\)](#) to the "...trustee, bankruptcy administrator, or any party in interest" as well. [\[FN45\]](#)

## **D. Chapter 7 Trustee**

The panel trustee, as a party in interest, is precluded from raising the substantial abuse issue by motion. [\[FN46\]](#) However, the Joint Explanatory Statement of the Committee of Conference for the 1986 Act [\[FN47\]](#) commented that:

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The conferees anticipate that the panel trustee will work closely in conjunction with the United States Trustee to assist in the discharge of the specific authority granted under [section 707\(b\)](#). This would include bringing to the United States Trustee's attention any information or evidence of fraud or abuse which may provide the basis for dismissal of the case under [section 707\(b\)](#). The U.S. Trustee may, in his discretion, bring that information to the attention of the court. The conferees anticipate that panel trustees will frequently appear in court regarding the motions filed by the U.S. Trustee under [section 707\(b\)](#), as amended. Such appearances will be in their capacity as panel trustee and not as a representative of the U.S. Trustee. [\[FN48\]](#)

Thus the panel trustee may, and under the current U.S. Trustee guidelines must, refer matters to U.S. Trustee. [\[FN49\]](#)

## VII. Options in Lieu of Dismissal-Conversion

Courts have the discretion to allow debtors to avoid dismissal under [section 707\(b\)](#) by conversion to chapter 13. [\[FN50\]](#)

### A. Chapter 13 relief

As an alternative to dismissal of the chapter 7 case under [section 707\(b\)](#), almost all courts permit the debtor to convert to a case under chapter 13 (provided the debtor is otherwise eligible). [\[FN51\]](#)

Should the debtor elect conversion, the case is then subject to the provisions of chapter 13, including the commitment of postpetition earnings, best interests of creditors test, and the jurisdictional limitations of [11 U.S.C.A. § 109](#). However, some debtors do not qualify for chapter 13, and therefore must look to chapter 11.

### B. Debtor ineligible for chapter 13 relief

While the tests proposed by the various courts consider the ability to repay creditors in the context of funding a hypothetical chapter 13 plan, [\[FN52\]](#) few cases have specifically addressed whether the availability of chapter 13 should be a requirement for [section 707\(b\)](#) dismissal.

One chapter 7 case involving primarily consumer debts was dismissed on grounds that granting relief would be substantial abuse under [§ 707\(b\)](#), even though debtors were ineligible for chapter 13 relief (jurisdictional unsecured debt limitations exceeded). In that case, the debtors claimed a substantial unknown liability from medical malpractice actions and sale of their former residence that placed them outside the jurisdictional limitations of a chapter 13 case. The court found that they had almost \$2,000 in monthly disposable income to fund a chapter 11 plan and granted the dismissal for that reason. [\[FN53\]](#) However, in another case, the court held that the debtors' chapter 7 case could not be dismissed for substantial abuse, even though debtors would have \$1,400 per month to fund a plan, where chapter 13 was not available because debtors' unsecured debt exceeded \$100,000. Chapter 11 was not a

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meaningful alternative because debtors could not be compelled to fund a chapter 11 plan with postpetition income that was not property of the estate. [\[FN54\]](#)

In a more recent case, the Idaho court turned away from its prior holding in *Williams*, and stated:

This is one of those rare occasions on which this bankruptcy judge must respectfully disagree with a decision of his distinguished former colleague in light of the facts of this case. There is no express language in [section 707\(b\)](#) indicating that chapter 13 eligibility is a condition for dismissal for substantial abuse. While *Kelly* analyzed the facts with reference to that debtor's ability to fund a chapter 13 plan, it did not specifically address the situation where a debtor has substantial disposable income, but was ineligible for chapter 13. That significant difference in the facts, in this Court's opinion, distinguishes this case from *Kelly* or *Williams*. In addition, and unlike in those cases, here Debtors have also engaged in aggravating activities not present in *Williams*.

Instead, the Court agrees with the Sixth Circuit and other bankruptcy courts which have concluded that eligibility for chapter 13 relief is not a prerequisite for [section 707\(b\)](#) dismissal.

The anomalous result of saying those whose high unsecured indebtedness renders them ineligible for chapter 13 treatment can always avoid [§ 707\(b\)](#) dismissal, would be rewarding outrageous abusers of consumer credit, while denying to those with more moderate consumer debt the benefits of chapter 7. Indeed, such a bright-line test could be said to encourage debtors to run up unsecured debts in excess of [the eligibility limits], thereby avoiding dedication of future earnings to debt retirement under chapter 13.

[In re Krohn, 886 F.2d 123, 126 \(6th Cir.1989\).](#)

"There is no constitutional right to a bankruptcy discharge, and the 'fresh start' provided for by the Code is a creature of congressional policy." [In re Krohn, 886 F.2d 123](#), citing [U.S. v. Kras, 409 U.S. 434, 446-47, 93 S.Ct. 631, 34 L.Ed.2d 626 \(1973\)](#). See also [Scheinberg v. U.S. Trustee \(In re Scheinberg\), 134 B.R. 426, 430-31 \(D.Kan.1992\)](#) (agreeing with *Krohn* that eligibility for chapter 13 was not a prerequisite to a [section 707\(b\)](#) dismissal); [In re Makinen, 239 B.R. 532, 536, n. 1 \(Bankr. D. Minn. 1999\)](#) (eligibility for chapter 13 relief is not relevant to the [section 707\(b\)](#) analysis); [In re Uddin, 196 B.R. 19, 24 \(Bankr. S.D. N.Y. 1996\)](#) (rejecting debtor's argument that the case should not be dismissed for substantial abuse because he was unemployed and was therefore ineligible for chapter 13 relief, because he had engaged in extravagant purchases which he knew he could not repay); and [In re Nolan, 140 B.R. 797, 802 \(Bankr. D. Colo. 1992\)](#) (finding that even though debtor was ineligible for chapter 13 relief, other factors overrode the statutory presumption for the granting of chapter 7 relief).

Given Debtors' financial situation and the offensive manner in which they have incurred much of their debt, allowing Debtors to escape dismissal under [section 707\(b\)](#) for substantial abuse is a result this Court cannot accept. That Debtors do not

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currently qualify for chapter 13 relief not a sufficient reason to avoid the conclusion that Debtors' petition must be dismissed for substantial abuse of the provisions of chapter 7. [11 U.S.C.A. § 707\(b\)](#). And, while they cannot be compelled to do so, if Debtors genuinely desire bankruptcy relief, they could explore a voluntary conversion and offering a repayment plan under chapter 11. [11 U.S.C.A. § 1307\(d\)](#). [\[FN55\]](#)

However, chapter 11 cases are problematic. As noted by one court:

Unlike chapter 13, there is no requirement for chapter 11 debtors to pay future wages or earnings to fund a plan of reorganization. [Toibb, 501 U.S. at 166, 111 S.Ct. 2197](#); see [11 U.S.C.A. § 1322\(a\)\(1\)](#). Individual chapter 11 debtors cannot be compelled to finance a plan with wages. *Lenartz*, 263 B.R. at 335. This court in *Graham* was concerned that, in the circumstances of the case, a § 706(b) conversion might amount to an order for the individual debtor to work for his prepetition creditors and would thus be, in essence, a mandatory chapter 13 proceeding which is prohibited by the Code. 21 B.R. at 238; see also [Toibb, 501 U.S. at 166, 111 S.Ct. 2197](#) (concern about involuntary servitude not relevant in chapter 11). [\[FN56\]](#)

Thus what little case law there is to suggest that ineligibility for chapter 13 relief prevents a substantial abuse dismissal under [§ 707\(b\)](#), has been substantially eroded; particularly where the debtor's case presents with other indicia egregious or wrongful conduct. However, if the debtor is to be denied a discharge under [section 707\(b\)](#), and is ineligible for relief under chapter 13, and cannot afford to fund or otherwise maintain a chapter 11 plan, the net result is a denial of discharge, akin to a [section 727](#) dismissal, without establishing any of the statutory grounds for barring such discharge. [\[FN57\]](#)

### VIII. Scope of "Substantial Abuse" Beyond "Ability to Pay"

Until recently, most of the case law which dealt with [section 707\(b\)](#) addressed dismissal in the context where the debtor presented with an ability to repay all or some portion of his/her debt by application of some surplus or excess income. However, due in large part to the emphasis placed on this issue by the Civil Enforcement Initiative, the U.S. Trustee is now prosecuting dismissal motions in large numbers based not on ability to pay, but on a perception that the debtors incurred debts with the intention of discharging those debts in bankruptcy. The Department of Justice, as mentioned above, classifies this kind of conduct as substantial abuse.

As one court has articulated:

Prior to 1984, [§ 707](#) consisted solely of the provisions now contained in [§ 707\(a\)](#). The 1984 amendment renumbered the section and added [§ 707\(b\)](#). Although the legislative history does not specify why [section 707\(b\)](#) was enacted as a separate subsection rather than as an additional category to the original [§ 707](#), it appears that this was done because [§ 707\(b\)](#) was meant to establish different standards for dismissal than those now included in [§ 707\(a\)](#). [section 707\(a\)](#) is quite broad in that it permits dismissal for cause; however, as indicated by the

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enumerated factors in [§ 707\(a\)\(1\)-\(3\)](#), that provision is geared toward maintaining the integrity of the bankruptcy process. In contrast, [§ 707\(b\)](#) was created to provide the court with a tool to prevent the discharge of debt owed by non- needy consumer debtors and to deal equitably when an unscrupulous consumer attempts to use the bankruptcy court as part of a scheme to take unfair advantage of his creditors. *In re Green*, 934 F.2d 568, 570 (4th Cir. 1991). The motions presently before this Court were brought under both [§ 707\(a\)](#) and [§ 707\(b\)](#), and must therefore be analyzed under the provisions of each of those sub-sections. [\[FN58\]](#)

Thus "substantial abuse" is not limited to situations in which the debtor has the ability to repay all or a portion of the debt, but extends to other situations as well.

#### A. Beyond "ability to pay" -- "bad faith" substantial abuse

"Substantial abuse" is an undefined label that courts have struggled to define. To make the situation even more complicated, there is confusion over whether to charge pre-petition wrongful conduct as "substantial abuse," "bad faith," "lack of good faith," or some other type of generalized conduct. This situation has come up, and continues to come up, in actions brought by the U.S. Trustee for dismissals under both subsections (a) and (b) of [section 707](#). In the case of *In re Padilla*, the Ninth Circuit took on a motion by the U.S. Trustee for a dismissal under [section 707\(a\)](#) alleging "bad faith" by way of a "credit card bust-out" scheme. [\[FN59\]](#) In that case, the Ninth Circuit looked at "bad faith:"

Whether bad faith can provide "cause" for dismissing a chapter 7 bankruptcy petition pursuant to [§ 707\(a\)](#) is a matter of first impression for this court. The Sixth Circuit and a host of bankruptcy courts that have considered the issue have found bad faith to be a ground for dismissal under [§ 707\(a\)](#). See, e.g., *Zick*, 931 F.2d at 1127 (bad faith can provide cause for a [§ 707\(a\)](#) dismissal); *In re Lacrosse*, 244 B.R. 583, 587 (Bankr.M.D. Pa. 1999) (a chapter 7 petition may be dismissed under [§ 707\(a\)](#) for lack of good faith in filing the petition); *In re Smith*, 229 B.R. 895, 897 (Bankr. S.D. Ga. 1997) (debtor's lack of good faith in filing bankruptcy petition will constitute "cause" for dismissal of chapter 7 case); *In re Griffieth*, 209 B.R. 823, 831 (Bankr. N.D. N.Y. 1996) (holding dismissal was justified under [§ 707\(a\)](#) because the debtors' case was not filed in good faith); *In re Sky Group Int'l, Inc.*, 108 B.R. 86, 90 (Bankr. W.D. Pa. 1989) (a showing of bad faith can result in dismissal under [§ 707\(a\)](#)). Taking a different view, the Eighth Circuit and several bankruptcy courts have found bad faith as such to be an improper basis for a [§ 707\(a\)](#) dismissal. See, e.g., *Huckfeldt*, 39 F.3d at 832 (stating that while some conduct giving rise to dismissal under [§ 707\(a\)](#) can be characterized as bad faith, the issue is properly whether the petition should be dismissed "for cause"); *In re Etcheverry*, 242 B.R. 503, 506 (D. Colo. 1999) (holding that because there is no explicit "good faith" requirement in chapter 7, bad faith cannot constitute "cause" for dismissal under [§ 707\(a\)](#)); *In re Landes*, 195 B.R. 855, 855 (Bankr. E.D. Pa. 1996) (holding that a good

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faith filing requirement cannot be read into [§ 707\(a\)](#), embracing [In re Latimer, 82 B.R. 354 \(Bankr. E.D. Pa. 1988\)](#), and tacitly overruling [In re Marks, 174 B.R. 37 \(1994\)](#)). As is discussed below, we agree with the Eighth Circuit that bad faith as a general proposition does not provide "cause" to dismiss a chapter 7 petition under [§ 707\(a\)](#). [FN60]

After a well-reasoned analysis of the Code and the specific provisions of both subsections 707(a) and (b), and after looking to the alternative remedies for parties under [Sections 523](#) and [727](#), the court held that "bad faith" is not in the context of [§ 707\(a\)](#), but more properly found in the context of [§ 707\(b\)](#), under the rubric of "substantial abuse." [FN61] It appears that the U.S. Trustee program has come on board with the Ninth Circuit's *Padilla* holding, as nothing in any of the papers relating to the Civil Enforcement Initiative speak to pursuing "bad faith" dismissals under [section 707\(a\)](#). The entire thrust is to classify its actions under the "substantial abuse" standard of [section 707\(b\)](#).

#### **B. Conduct not including acts articulated in [11 U.S.C.A. § 727](#)**

A motion to dismiss under [section 707\(b\)](#) is a contested matter that does not require an adversary proceeding. As such, the grant of a motion to dismiss is generally not an adjudication of ineligibility for discharge with prejudice as would be the case in a denial of discharge under [section 727](#). [Section 727](#) permits "a creditor, the bankruptcy trustee, or the United States trustee [to] object to a chapter 7 discharge generally, on the grounds that the debtor, with the intent to defraud a creditor, intentionally transferred or concealed property." [FN62] However, at least one court has noted that, in some circumstances, the U.S. Trustee may achieve the same result by moving to dismiss under [section 707\(b\)](#):

A dismissal of a chapter 7 consumer debtor's petition pursuant to [11 U.S.C.A. § 707\(b\)](#), when the debtor is ineligible for chapter 13 relief and where chapter 11 is not a meaningful alternative, would not be consistent with the legislative intent to encourage repayment in those instances where a debtor has sufficient income to repay creditors fully or partially. Indeed, a dismissal in such circumstances would be tantamount to a denial of a discharge under [11 U.S.C.A. § 727](#), without establishing any of the statutory grounds for barring such discharge. Manifestly, the drafters of [11 U.S.C.A. § 707\(b\)](#) failed to take into account the fact that if repayment is the desired goal under this section there should be no limitations placed on the eligibility of debtors for relief under chapter 13. This oversight, in addition to the omission of specific standards to be applied in determining what constitutes a substantial abuse of the provisions of chapter 7, highlights the inherent weakness in the efficacy of the statute. [FN63]

One court has noted that:

Code [§ § 523](#) and [727](#) carefully tailor the remedy to the nature of the perceived abuse. Thus, certain matters are deemed sufficient to warrant denying a debtor a discharge altogether. Yet others are thought to warrant only the denial of the

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discharge of a particular debt. Code [§ 707\(b\)](#) should not be used to dismiss a case when the evidence is not quite strong enough to warrant denying a discharge under the Code [§ 727](#) or a way of overcoming a creditor's failure to object to the dischargeability in a timely fashion as required by Code [§ 523](#). Code [§ 707\(b\)](#) does not give a license to the court to adopt an ad hoc, free-wheeling approach to sift out debtors the court finds distasteful. [FN64]

Thus a tension exists between the liberality of the loose language presented in [section 707\(b\)](#) and the specific call of [section 727\(a\)](#). That tension is heightened by the rigorous law that has developed as to the burdens and protections in the adversary process that have not fully developed, or have developed loosely, in the context of motions practice under [section 707\(b\)](#).

### C. [Section 707\(b\)](#) as a substitute for [section 523\(a\)](#) nondischargeability actions

Where the U.S. Trustee moves to dismiss a debtor's case for perceived abuse of the bankruptcy system as relates to the accumulation of prepetition debts and not in relation to any abuse by ability to pay, the government is acting for the benefit of individual creditors (in large part, credit card lenders), at taxpayer expense. If the "abuse" is the incurring of debt without the ability or intention to repay, the cause is one that is dealt with more properly in the context of a complaint to determine nondischargeability under [section 523\(a\)](#). However, only creditors may bring a complaint under [section 523\(a\)](#), and therefore the trustee and U.S. Trustee lack standing. [FN65]

[Former] Chief Judge Geraldine Mund of the Bankruptcy Court for the Central District of California looked at the abuse of credit in the context of a motion to dismiss for substantial abuse under [§ 707\(b\)](#) and related the motion to individual claims under [section 523\(a\)\(2\)](#). In her decision, she noted:

The substantial abuse to the system that is being prevented in cases involving credit-card abuse must be that [§ 523\(a\)\(2\)](#) is not an effective remedy given the facts of the case. This is not meant as a bright-line test, but rather a case-by-case analysis as to when a motion might be granted. The issues to be considered by the court are as follows: (1) whether the overwhelming percentage of the debtor's unsecured debt is due to credit cards; (2) whether the debtor has used so many credit cards that it would multiply the workload of the court to adjudicate each [§ 523\(a\)\(2\)](#) action separately; (3) whether there is no economic incentive to individual creditors to bring an action under [§ 523\(a\)\(2\)](#) to have their debt declared non-dischargeable [FN16]; (4) whether the credit-card debt was obtained for luxury goods, high lifestyle or other improper purposes; and (5) whether the debtor has failed to make an honest effort to repay these obligations before filing bankruptcy. *If the court finds that these facts are proven, then grounds exist to dismiss the case under [§ 707\(b\)](#) even if the debtors lack the ability to make present or future payments.*

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FN16. For example, whether the amounts owed on each credit card are relatively small or the creditors would have little hope of collection on a judgment during the coming 10 years. [\[FN66\]](#)

The foregoing *Motaharnia* factors are perhaps the most succinct guidance on how courts can find "substantial abuse" in the context of prepetition credit card usage, but it does little to advance the question as to whether the courts must apply the same rigorous case law of [section 523\(a\)\(2\) \(fraud\)](#) to a finding substantial abuse.

#### **D. Presumption in favor of granting debtor a discharge**

[Section 707\(b\)](#) provides an explicit presumption in favor of granting the debtor a discharge. [\[FN67\]](#) This express presumption acts as a reminder of the policy favoring granting bankruptcy relief. [\[FN68\]](#) As the court in *Motaharnia* stated:

In other words, 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.*, citing 6 Collier ¶ 707.04[5][a]. *Kelly* enunciated the standard in the context of due process concerns about a bankruptcy court's ability to sua sponte bring a motion to dismiss under [§ 707\(b\)](#). Therefore, *Kelly* did not explicitly discuss the relationship between the presumption and the substantial abuse standard. [\[FN69\]](#)

In practice, the presumption is rebutted depending upon the theory which the U.S. Trustee is pursuing the dismissal; ability to pay or otherwise. As the *Motaharnia* court stated:

When the debtor has the ability to repay debts, the presumption is rebutted and a dismissal under [§ 707\(b\)](#) is appropriate. *Walton*, 866 F.2d at 985; *Ontiveros*, 198 B.R. at 290. If the debtor does not have the ability to repay, the presence of other factors indicating dishonesty or lack of need will overcome the presumption. [Carlton, 211 B.R. 468, 477-478; Krohn, 886 F.2d at 128.](#) However, the factors must clearly demonstrate a substantial abuse in order to overcome the presumption in favor of the debtor. *Kelly*, 841 F.2d at 917. [\[FN70\]](#)

Thus the presumption that favors the grant of a discharge may be overcome by a clear showing (but not "clear and convincing evidence") that the debtor has the ability to repay all or a substantial portion of his debts or other factors indicating dishonesty or lack of need.

#### **E. Application of case law--is substantial abuse fraud?**

It has been suggested that 707(b) was intentionally worded broadly so as not to restrict the court to the standards of fraud under [§ 523\(a\)\(2\)](#) when dismissing cases where the debtor is honest, but not in need (ability to pay). [\[FN71\]](#) But this leaves open the question where the dismissal is sought under the theory of unworthy prepetition conduct, such as is presented by a "bust-out" case.

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### 1. Intent not to repay and actual fraud

This anomaly has been noted in at least one case. In *Attanasio*, the court stated:

Congress has amply provided for punishment for a debtor who incurs debts with the intention of not repaying them. Those debts are nondischargeable under [section 523\(a\)\(2\)\(A\)](#). Similarly, [section 523\(a\)\(2\)\(C\)](#) requires a court to presume that consumer debts over \$1,000 that were incurred for the purchase of "luxury goods or services" within 60 days of bankruptcy, and cash advances over \$1,000, that were obtained within 60 days of bankruptcy as an extension of consumer credit under an open end credit plan, are nondischargeable. This Court does not believe that in enacting [section 707\(b\)](#), Congress intended to duplicate the same remedies provided to creditors in [section 523](#), especially considering that [section 523\(a\)\(2\)\(C\)](#) was added to the Bankruptcy Code at the same time as [section 707\(b\)](#) and by the same legislation.

While a debtor's accumulation of consumer debt beyond an ability to repay may not be responsible, such an accumulation is not illegal and is not necessarily fraudulent, unless accompanied by the requisite intent. [\[FN56\]](#) Why then should the bankruptcy court prosecute the credit card company's non-dischargeability case by way of 707(b)? If the credit card debt was incurred without the intent to repay, as evidenced by the debtor's complete inability to pay, then the debt, upon proof of those facts, may be adjudged non-dischargeable. However, in the absence of proof, the debt is dischargeable. [Section 707\(b\)](#) should not circumvent non-dischargeability sections with concomitant bypassing of procedural safeguards required for the prosecution and proof of the elements essential for a judgment of non-dischargeability.

FN56. Because a creditor sends a debtor a credit card statement of account every month, can the creditor then be said to know the status of the debtor's account at all times? Have the charges on the card been made by the debtor (at least within the credit limits established by the creditor) with the express knowledge and consent, or at least ratification, of the creditor? If so, then how can using the card within the limits set by the company with the company's express knowledge and consent be properly called an "abuse" in a 707(b) review. If there was no intent to repay, upon proof of those facts, the debtor may not receive a discharge of those debts. But if no non-dischargeability complaint is filed, then why should a court presume that there was fraud and consequently abuse? Dismissal of a debtor's case under 707(b) then for the reason that the debtor has incurred debts without the ability to repay them becomes a de facto 523(a)(2)(A) judgment without evidence of actual fraud or intent or the usual due process safeguards attendant to an adversary proceeding.

In this Court's opinion, substantial abuse, therefore, cannot be found simply in the magnitude of credit card debt, or other consumer credit, owed by a debtor. [Section 523](#) provides remedies and, consequently, precludes adverse consequences for non-fraudulent credit card use, no matter how lavish. Congress did not say that a case should be dismissed if it represents a substantial abuse of

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consumer credit, but said rather that the case should be dismissed if it represents a substantial abuse of chapter 7. [\[FN72\]](#)

The *Attanasio* case brings to light a very important question in situations where the motion to dismiss is premised upon some kind of credit abuse prior to bankruptcy. This case suggests that it would be appropriate to require that the U.S. Trustee prove a case of nondischargeability, applying the same standards as a creditor pursuing an action under [11 U.S.C.A. § 523\(a\)\(2\)](#). To do otherwise, renders [§ 523](#) and the requirement to prove fraud a nullity.

## 2. The moral obligation to repay

The court in *Attanasio* also addressed the court's role in enforcing a person's moral obligation to repay debts:

*The idea that 707(b) is designed in part to enforce a person's moral obligation to pay debts requires the conclusion that 707(b) was not only created to prevent fraudulent conduct, but was also created to prevent conduct that is not fraudulent, but is merely violative of a generally accepted moral norm of society. This Court does not agree that "[i]t is morally and legally unconscionable that a person should be able to extinguish his obligations without first making a reasonable effort to fulfill them." [In re Scheinberg, 134 B.R. 426, 429 \(D.Kan.1992\)](#). Some people simply do not have the means, whether physical, mental, emotional or financial, to do so.*

The impetus behind 707(b) is purely economic, not moral. Moral norms are represented elsewhere in the Bankruptcy Code. Some in favor of debtors, and some not so. For example, the concept of granting a discharge in bankruptcy and a fresh start in life, which is directly opposite to the idea of debt repayment, is arguably the most important moral norm represented in chapter 7 of the Code. See [Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 \(1934\)](#). On the other hand, the concepts in [sections 523](#) and [727](#) certainly invoke a court's moral perspective, and those in [18 U.S.C.A. §§ 151-155](#), which define and provide for the punishment of bankruptcy invoke the strong moral norms of our reviewing society. A court need not construe [section 707\(b\)](#) to impose upon debtors higher moral standards than those already required. [\[FN73\]](#)

This situation reminds this author of a refrain learned from his professor in law school: "Morality belongs to God, the Law belongs to the courts. Got a moral problem? See a priest. Got a legal problem? See a lawyer." The line between morality and the law is often a murky one, but the courts should struggle to separate law from its views on morality.

## 3. Creditor complicity in the harm

The court in *Attanasio* also addressed the general assumption that the debtor is at fault; what few have had the courage to ask in recent years is what culpability rests at the feet of the creditors:

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The concept that 707(b) was intended to force debtors to pay their debts appears to be based partly on the belief that debtors are primarily responsible for what has been referred to as a "consumer credit crisis." Contrary to that belief, is the position that consumer creditors, including credit card providers, may bear some responsibility. As recognized by the Court of Appeals for the Eleventh Circuit in [First National Bank of Mobile v. Roddenberry](#), 701 F.2d 927, 932 (11th Cir. 1983), Circuit Judge James C. Hill wrote:

The element of risk is inherent in the issuance of bank credit cards. Our "credit-card economy" encourages widespread voluntary risk-taking on the part of those issuing cards. Once credit cards are issued (if not fraudulently obtained), the bank has agreed to trust the cardholder and to extend credit, and once credit is extended, the bank must decide when and if credit will be revoked. It is not the function of courts to determine when a bank ought to revoke credit. It also is of little consequence that the bank can show that the terms and conditions said to apply to use of the card have been violated. The mere breach of credit conditions is of minimum probative value on the issue of fraud because banks often encourage or willingly suffer credit extensions beyond contractual credit limits. Indeed, banks have a definite interest in permitting charges beyond established credit limits because of the high finance charges typical in such transactions. [In re Talbot](#), 16 B.R. 50, 52 (Bkrcty. M.D. La. 1981). Banks are willing to risk non-payment of debts because that risk is factored into the finance charges. Because the risk is voluntary and calculated, section 17a(2) should not be construed to afford additional protection for those who unwisely permit or encourage debtors to exceed their credit limits. Id.

*If a creditor, after reviewing a debtor's monthly charges, does not heed plain indications of over-extension, then is there not blame to share if the creditor continues to lend money to the debtor and the debtor does not pay?* [\[FN74\]](#)

Prior to 1984, there was no "substantial abuse" dismissal provision, and, prior to 1984, most people did not yet have much in the way of credit cards or other signature-only access to credit. Credit card proliferation has spawned a corresponding increase in debt, which has driven more and more rhetoric that the hapless debtor is the source of the evil. This author agrees with the court in *Attanasio* that the creditors have assumed the risk and have already been compensated by their factored charges. This author goes even further to suggest that the present situation is like an attempt to shoot a dog to rid him of his fleas. While the U.S. Trustee is persecuting debtors for their stupidity, who is looking at the creditors who extended credit?

## IX. Burden of Proof on Motion for Substantial Abuse

The statutory presumption favoring the debtor's discharge has been held to mean something more than a rule about the burden of proof. [\[FN75\]](#) In that case, the court went on to say that:

In the context in which the court and the U.S. Trustee are given the special responsibility to note and raise the [§ 707\(b\)](#) issue, it makes sense to remind the

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trier of fact that, first, even though the court may be in the anomalous position of also being the movant, a case is presumed not to be an abuse of chapter 7 unless and until the question is both raised and decided adversely to the debtor and, second, that "*substantial abuse*" should only be found by a preponderance of the evidence.

[\[FN76\]](#)

### A. Initial burden on movant

Consistent with the general rules of motion practice, the burden of proof (i.e., the burden of going forward as well as the burden of persuasion) rests on the movant; which in [§ 707\(b\)](#) cases is either the U.S. Trustee or the court. [\[FN77\]](#)

### B. Once prima facie case is made, does burden shift to debtor?

The Federal Rules of Evidence provide that:

[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast. [\[FN78\]](#)

Here, the presumption is that which favors the debtor's discharge, which may only be overcome by the U.S. Trustee coming forward with evidence of abuse substantial enough to overcome that presumption. However, one commentator has observed that it is difficult to predict how [FRE 301](#) will play out in [§ 707\(b\)](#) litigation. [\[FN79\]](#)

Dealing with federal regulations, it has been held that a rebuttable presumption prevails "until the party disputing the presumed fact offers substantial countervailing evidence." [\[FN80\]](#) It has also been held that, in domicile cases, the opponent has "the ultimate burden of persuasion... to prove by 'competent proof' and by a 'preponderance of the evidence'" that domicile had not continued. [\[FN81\]](#) In other cases, however, it has been held that the opponent of the presumed fact "has no more than the limited duty of producing evidence to balance, not to outweigh" the presumption. [\[FN82\]](#). In all three instances, [FRE Rule 301](#) was cited.

In the context of [section 707\(b\)](#), the courts face a "strong presumption" in favor of granting the debtor's discharge. [\[FN83\]](#) But, as the Bankruptcy Court in Massachusetts noted, "[t]he debtor's schedules, executed under the pains and penalties of perjury, have significant evidentiary weight." [\[FN84\]](#) The court went on to say that:

While there are certainly other means of demonstrating substantial abuse, I hold that if the schedules indicate a debtor's ability to make very substantial payments on unsecured indebtedness, the movant has met the initial burden. The presumption then "vanishes entirely... and the question must be decided as any ordinary question of fact." *Bank One* at 51 n. 2; *Russell* § 301.3.

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The playing field is now even, and the debtor has the burden of producing evidence to demonstrate entitlement to relief. In so doing, all of the various factors recited by the circuit courts as quoted above should be considered. [\[FN85\]](#)

In the context then of "substantial abuse" under the theory of ability to pay, if the debtor has honestly completed his schedules, the presumption is probably illusory--as it is overcome by the schedules themselves. This is an anomaly in that it is the debtor himself who is overcoming rebutting the presumption. However, it is most likely justified under the circumstances. Contrasted with the situation where the U.S. Trustee pursues dismissal for conduct other than "ability to pay" such as in a "bust-out" situation, the movant must present evidence that the conduct rises to a sufficient level of bad faith to justify a dismissal for substantial abuse. This may be accomplished by the presentation of evidence of excessive charges in the months leading to bankruptcy. [\[FN86\]](#)

### **C. Substantial abuse must be shown by the "preponderance of the evidence"**

The standard of proof appears to be by "preponderance of the evidence" not withstanding several commentators and cases which indicate that a motion to dismiss for substantial abuse should only be granted when substantial abuse is clearly present. [\[FN87\]](#)

### **X. Evidentiary Hearings Where Facts Are in Dispute**

Where a motion to dismiss for substantial abuse presents disputed factual issues, it becomes a contested matter that requires specific findings by the court. [\[FN88\]](#)

In the context of a challenge to the reasonableness of the debtor's alleged expenses, the burden of presenting evidence that weighs on the U.S. Trustee must be overcome by admissible evidence. [\[FN89\]](#) In the *Harris* case, the U.S. Trustee challenged the reasonableness of the debtor's expenses, relying on IRS collection standards:

The UST's only evidence was the IRS standards and the schedules, but the bankruptcy court rejected the IRS standards as a measure of reasonableness. This was not error; neither the statute nor case law presently mandates use of those standards in the [§ 707\(b\)](#) analysis. Moreover, the evidentiary value of the IRS standards is questionable: the UST provided no foundation explaining how the standards were calculated, based on what data, or how current that data might be. The UST analyst's supporting declaration was merely a hearsay reiteration of information obtained from the IRS website.

Debtors' schedules, the veracity of which was unquestioned, show the level but not the reasonableness (or not) of their expenses. The only evidence regarding reasonableness was the Harris declaration. The bankruptcy court based its conclusion solely on the schedules and its subjective judgment of the Harris' lifestyle, presumably based on familiarity with the cost of living in Orange County, California. This approach is typical, see, e.g., [In re Gyurci, 95 B.R. 639, 643 \(Bankr.](#)

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[D. Minn. 1989](#)), and may be appropriate where the court raises the substantial abuse issue sua sponte, see *Kelly*, 841 F.2d at 917 (noting that the presumption does not place on the judge the burden of producing evidence). Nevertheless, the fact that an expense appears excessive on its face does not excuse the requirement that a court's findings be based on evidence. Treating the judge's familiarity with local conditions as evidence renders any findings essentially unreviewable on the facts. *While dismissal for substantial abuse is discretionary, the determination of abuse must be based on factual findings supported by admissible evidence, and not by what amounts to inappropriate judicial notice of the court's own value judgments.* [\[FN4\]](#) There was no such evidence here.

FN4. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." [FRE 201\(b\)](#). [\[FN90\]](#)

Not just reasonableness of expenses raise factual disputes; the challenge to discharge predicated on any of a number of "bad faith" claims-including massive credit card debt-are factual questions as well. [\[FN91\]](#)

## **XI. Substantial abuse under 707(b)--where is it going?**

This paper is the product of a few short weekends of work, rushed to completion while handling the caseload that typifies an active practitioner. The author is concerned that it does not fairly treat the entire subject and is not sufficiently academic in breath and scope. That being said, it is also noted that this paper reflects the frustrations of a consumer-debtor lawyer in his day-to-day battles to obtain relief for his clients. While some may differ, this author believes that the vast majority of consumer bankruptcy debtors are honest people. They can ill afford representation at even a modest level and cannot afford to withstand the assault of the government with its limitless resources. Thus, while this paper may be deficient in many respects, it is an honest look at a problem that besets the bankruptcy courts and the debtors who seek relief there.

[Section 707\(b\)](#) is a provision of law that is appropriate in spirit, but much lacking in its stated composition and inherent ambiguity. Just how do you (or the judge you are appearing before) define "substantial abuse?" It reminds one of refrain by Mr. Justice Stewart where he declined to define the term "hard core pornography," but stated: "I know it when I see it." [\[FN92\]](#)

Substantial abuse seemed pretty harmless in the first 18 years or so it was around. Starting with *Kelly* in the Ninth Circuit, holding that the ability to repay 99% of the debts in a chapter 13 case constituted abuse, the courts have progressed to find substantial abuse wherever the debtor presented the ability to repay any substantial portion of the debt in a chapter 13. Not too many practitioners have much of a problem with that. However, substantial abuse has grown to be much more than a simple fix to a simple problem; such as where a debtor is ineligible for chapter 13 (where the debtor is either unemployed or has debts in excess of the jurisdictional limits.) In such cases, the

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dismissal under [section 707\(b\)](#) is much more akin to a denial of discharge, with prejudice, under [section 727](#)-the debtor is denied bankruptcy relief in its entirety.


Then there is the problem with a [section 707\(b\)](#) dismissal for the debtor's alleged wrongful or bad faith accumulation of debt. Nowhere in the statute, or the circuit court case law, is there a requirement that the U.S. Trustee establish actual fraud, as would be required of a creditor proceeding under [section 523\(a\)\(2\)](#). Thus by mere motion practice, the U.S. Trustee may obtain what a creditor could not in a full blown adversary proceeding.

The future is always hard to call, but this one seems pretty clear: the future will rest with our judiciary. Bankruptcy judges, appellate panels, circuit courts, and perhaps the Supreme Court, will have to make up for the lack of guidance provided by Congress. The courts will have to develop a body of law that sets the boundaries, burdens, and procedures in which to establish substantial abuse in a uniform and just manner. Decisions like *Kelly* are needed to set the standards for the "bad faith" conduct dismissal as it did for the "ability to pay" situation. Hopefully, the party moving for dismissal under [section 707\(b\)](#) should not be able to obtain under that section any relief that could not be obtained under [section 523\(a\)](#) as a dismissal for abuse is a determination of non-dischargeability, and it makes little difference to the debtor that such a determination is "without prejudice" or not. Absent the protection of the bankruptcy system, the debtor remains vulnerable to the vultures at his door. However, controlling case law, which mandates that the 707(b) movant establish 523(a)(2) type fraud in a 707(b) case, does not presently exist.

This problem needs to be addressed and fixed now. Congress has shown its willingness to go along with the credit card industry in the recent past, and those changes may very well include opening [section 707\(b\)](#) to creditors as well: Once the Code changes, the flood gates will open. Credit card issuers will most likely jump at the opportunity to take advantage of the lesser standards of a motion to dismiss, and [section 523](#) actions will all but disappear.

### Research References:

[Norton Bankruptcy Law and Practice \(2d ed.\) § § 67:3, 67:5, 67:6](#); Bankruptcy Service, L. Ed. § § 37:204, 37:210, 37:211, 37:216, 37:226, 37:229, 37:275, 37:276

West's Key Number Digest, Bankruptcy  2259, 2259.1, 2261

[FN1]. Webster's New World Dict., 3rd ed. 1991.

[FN2]. Webster's New World Dict., 3rd ed. 1991.

[FN3]. [11 U.S.C.A. § 707\(b\) \(2004\)](#).

[FN4]. A prelude to the DOJ Strategic Plan 2001-2006, available on the web at <http://www.usdoj.gov/jmd/mps/strategic2001-2006/ag1.htm>.

[FN5]. Available on the web at <http://www.usdoj.gov/jmd/mps/strategic2001-2006/goal7.htm>.

[FN6]. Audit Report 03-17, March 2003, p. 27; <http://www.usdoj.gov/oig/audit/OBD/0317/final.pdf>.

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- [FN8]. [Audit Report 03-17, March 2003, p. 28; http:// www.usdoj.gov/oig/audit/OBD/0317/final.pdf.](http://www.usdoj.gov/oig/audit/OBD/0317/final.pdf)
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- [FN10]. [On the web at http://www.usdoj.gov/ust/press/articles/abi\\_092002.htm.](http://www.usdoj.gov/ust/press/articles/abi_092002.htm)
- [FN11]. [On the web at http://www.usdoj.gov/ust/press/articles/abi\\_092002.htm](http://www.usdoj.gov/ust/press/articles/abi_092002.htm) at pp. 3-4 (emphasis added).
- [FN12]. [On the web at http://www.usdoj.gov/ust/press/articles/MBJ\\_092002.htm.](http://www.usdoj.gov/ust/press/articles/MBJ_092002.htm)
- [FN13]. [In re Padilla, 222 F.3d 1184, 36 Bankr. Ct. Dec. \(CRR\) 166, 44 Collier Bankr. Cas. 2d \(MB\) 1190, Bankr. L. Rep. \(CCH\) P 78245 \(9th Cir. 2000\).](#)
- [FN14]. [On the web at http:// www.usdoj.gov/ust/press/annualreport/ar2002.pdf.](http://www.usdoj.gov/ust/press/annualreport/ar2002.pdf)
- [FN15]. [State of Alabama v. Montevallo Mining Co., 278 F. 989, 990 \(M.D. Ala. 1922\).](#)
- [FN16]. See [In re Terrace Lawn Memorial Gardens, 256 F.2d 398 \(9th Cir. 1958\).](#)
- [FN17]. [In re Walton, 866 F.2d 981, 983, 18 Bankr. Ct. Dec. \(CRR\) 1407, 20 Collier Bankr. Cas. 2d \(MB\) 533, Bankr. L. Rep. \(CCH\) P 72605 \(8th Cir. 1989\).](#)
- [FN18]. [11 U.S.C.A. § 707\(b\) \(1984\)](#), quoted in [In re Grant, 51 B.R. 385, 13 Bankr. Ct. Dec. \(CRR\) 303, 13 Collier Bankr. Cas. 2d \(MB\) 216, Bankr. L. Rep. \(CCH\) P 70656 \(Bankr. N.D. Ohio 1985\)](#). The statute was amended in 1986 to allow the motion to be filed by the U.S. Trustee as well as the court. [Pub. L. 99-554, § 219\(b\).](#)
- [FN19]. See S.Rep. No. 65, 98th Cong., 1st Sess. 3 (1983) ("the number of consumer bankruptcy cases filed each year has risen dramatically").
- [FN20]. S.Rep. No. 98-65, 98th Cong., 1st Sess. 53-54 (1983).
- [FN21]. 130 Cong.Rec.S. 8891 (June 29, 1984) as cited in [In re Keniston, 85 B.R. 202, 219, Bankr. L. Rep. \(CCH\) P 72281 \(Bankr. D. N.H. 1988\)](#) (rejected by, [In re Lamanna, 153 F.3d 1, 33 Bankr. Ct. Dec. \(CRR\) 176, 40 Collier Bankr. Cas. 2d \(MB\) 937, Bankr. L. Rep. \(CCH\) P 77791 \(1st Cir. 1998\)](#)).
- [FN22]. [In re Walton, 866 F.2d 981, 983, 18 Bankr. Ct. Dec. \(CRR\) 1407, 20 Collier Bankr. Cas. 2d \(MB\) 533, Bankr. L. Rep. \(CCH\) P 72605 \(8th Cir. 1989\)](#) citing [In re Kelly, 841 F.2d 908, 914, 17 Bankr. Ct. Dec. \(CRR\) 611, 18 Collier Bankr. Cas. 2d \(MB\) 560, Bankr. L. Rep. \(CCH\) P 72218 \(9th Cir. 1988\).](#)
- [FN23]. [In re Pilgrim, 135 B.R. 314 \(C.D. Ill. 1992\).](#)
- [FN24]. [In re Wisher, 222 B.R. 634, 636 \(Bankr. D. Colo. 1998\).](#)
- [FN25]. See [In re Midway Indus. Contractors, Inc., 178 B.R. 734, 738 \(N.D. Ill. 1995\)](#) ("Nevertheless, in those defined sections of the Code, individuals are separately distinguished from partnerships, corporations, and other artificial entities distinct from natural persons.... Absent any justification to the contrary, we find that, in accordance with the plain meaning of the word, an "individual" for purposes of [§ 362\(h\) of the Bankruptcy Code](#) does not include a corporate debtor.").
- [FN26]. [In re Kelly, 841 F.2d 908, 913, 17 Bankr. Ct. Dec. \(CRR\) 611, 18 Collier Bankr. Cas. 2d \(MB\) 560, Bankr. L. Rep. \(CCH\) P 72218 \(9th Cir. 1988\).](#)
- [FN27]. [11 U.S.C.A. § 101\(7\).](#)
- [FN28]. [11 U.S.C.A. § 101\(11\).](#)
- [FN29]. [11 U.S.C.A. § 101\(4\)\(A\).](#)
- [FN30]. See 124 Cong.Rec. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini) ("[a] consumer debt does not include a debt to any extent the debt is secured by real property"); 124 Cong.Rec. 32,393 (1978) (statement of Rep. Edwards) (same).

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[FN31]. [In re Kelly, 841 F.2d 908 \(9th Cir.1988\).](#)

[FN32]. See [In re Stewart, 215 B.R. 456, 39 Collier Bankr. Cas. 2d \(MB\) 184 \(B.A.P. 10th Cir. 1997\)](#), aff'd, [175 F.3d 796, Bankr. L. Rep. \(CCH\) P 77926 \(10th Cir. 1999\)](#) (the primary purpose for which the debt was incurred must be determinative ... i.e., debtor demonstrates that student loan incurred as a business investment, albeit an investment in herself or himself, much like a loan incurred for a new business.); [In re Vianese, 192 B.R. 61, 68 \(Bankr. N.D. N.Y. 1996\)](#) (holding that student loans for debtor's son's education were for "family purposes" and should be considered consumer debt); [In re Traub, 140 B.R. 286, 288 \(Bankr. D. N.M. 1992\)](#); [In re Palmer, 117 B.R. 443 \(Bankr. N.D. Iowa 1990\)](#).

[FN33]. See [In re Traub, 140 B.R. 286, 289 \(Bankr. D. N.M. 1992\)](#) (noting that "any debt to a former spouse which reflects the distribution of the net value of the community should always be classified as a consumer debt") (citing [In re Palmer, 117 B.R. 443 \(Bankr. N.D. Iowa 1990\)](#)).

[FN34]. See [In re Green, 934 F.2d 568, 570, 21 Bankr. Ct. Dec. \(CRR\) 1287, 24 Collier Bankr. Cas. 2d \(MB\) 1911, Bankr. L. Rep. \(CCH\) P 74015 \(4th Cir. 1991\)](#) (holding modified by, [In re Degross, 272 B.R. 309, 47 Collier Bankr. Cas. 2d \(MB\) 1004 \(Bankr. M.D. Fla. 2001\)](#)); [In re Krohn, 886 F.2d 123, 125-26, 19 Bankr. Ct. Dec. \(CRR\) 1388, Bankr. L. Rep. \(CCH\) P 73076 \(6th Cir. 1989\)](#) (holding modified by, [In re Degross, 272 B.R. 309, 47 Collier Bankr. Cas. 2d \(MB\) 1004 \(Bankr. M.D. Fla. 2001\)](#)); [In re Walton, 866 F.2d 981, 983, 18 Bankr. Ct. Dec. \(CRR\) 1407, 20 Collier Bankr. Cas. 2d \(MB\) 533, Bankr. L. Rep. \(CCH\) P 72605 \(8th Cir. 1989\)](#); [In re Kelly, 841 F.2d 908, 914 \(9th Cir.1988\)](#).

[FN35]. [In re Lamanna, 153 F.3d 1, 3, 33 Bankr. Ct. Dec. \(CRR\) 176, 40 Collier Bankr. Cas. 2d \(MB\) 937, Bankr. L. Rep. \(CCH\) P 77791 \(1st Cir. 1998\)](#).

[FN36]. [In re Stewart, 215 B.R. 456, 467, 39 Collier Bankr. Cas. 2d \(MB\) 184 \(B.A.P. 10th Cir. 1997\)](#), aff'd, [175 F.3d 796, Bankr. L. Rep. \(CCH\) P 77926 \(10th Cir. 1999\)](#) [paragraph restructured for clarity of presentation]; See also, e.g., [In re Green, 934 F.2d 568, 572, 21 Bankr. Ct. Dec. \(CRR\) 1287, 24 Collier Bankr. Cas. 2d \(MB\) 1911, Bankr. L. Rep. \(CCH\) P 74015 \(4th Cir. 1991\)](#) (holding modified by, [In re Degross, 272 B.R. 309, 47 Collier Bankr. Cas. 2d \(MB\) 1004 \(Bankr. M.D. Fla. 2001\)](#)). For other similar factors, see [In re Krohn, 886 F.2d 123, 126-27, 19 Bankr. Ct. Dec. \(CRR\) 1388, Bankr. L. Rep. \(CCH\) P 73076 \(6th Cir. 1989\)](#); [In re Gyurci, 95 B.R. 639, 642, 18 Bankr. Ct. Dec. \(CRR\) 1199 \(Bankr. D. Minn. 1989\)](#); [Matter of Dubberke, 119 B.R. 677, 679, 24 Collier Bankr. Cas. 2d \(MB\) 415, Bankr. L. Rep. \(CCH\) P 73647 \(Bankr. S.D. Iowa 1990\)](#).

[FN37]. See, e.g., [In re Walton, 69 B.R. 150, 154, 17 Collier Bankr. Cas. 2d \(MB\) 124 \(E.D. Mo. 1986\)](#), decision aff'd, [866 F.2d 981, 18 Bankr. Ct. Dec. \(CRR\) 1407, 20 Collier Bankr. Cas. 2d \(MB\) 533, Bankr. L. Rep. \(CCH\) P 72605 \(8th Cir. 1989\)](#); [Matter of Cord, 68 B.R. 5, 7 \(Bankr. W.D. Mo. 1986\)](#); [In re Gaukler, 63 B.R. 224, 225, 14 Bankr. Ct. Dec. \(CRR\) 998, 15 Collier Bankr. Cas. 2d \(MB\) 693 \(Bankr. D. N.D. 1986\)](#); [In re Kress, 57 B.R. 874, 878, 14 Collier Bankr. Cas. 2d \(MB\) 323 \(Bankr. D. N.D. 1985\)](#); [In re Hudson, 56 B.R. 415, 419 \(Bankr. N.D. Ohio 1985\)](#), order modified, [64 B.R. 73 \(Bankr. N.D. Ohio 1986\)](#); [In re Grant, 51 B.R. 385, 391, 13 Bankr. Ct. Dec. \(CRR\) 303, 13 Collier Bankr. Cas. 2d \(MB\) 216, Bankr. L. Rep. \(CCH\) P 70656 \(Bankr. N.D. Ohio 1985\)](#); [In re Edwards, 50 B.R. 933, 936-37, 13 Bankr. Ct. Dec. \(CRR\) 250, 13 Collier Bankr. Cas. 2d \(MB\) 255, Bankr. L. Rep. \(CCH\) P 70713 \(Bankr. S.D. N.Y. 1985\)](#); [In re White, 49 B.R. 869, 874, 13 Bankr. Ct. Dec. \(CRR\) 33, 12 Collier Bankr. Cas. 2d \(MB\) 1245, Bankr. L. Rep. \(CCH\) P 70677 \(Bankr. W.D. N.C. 1985\)](#); see also [In re Bryant, 47 B.R. 21, 24-26, 12 Bankr. Ct. Dec. \(CRR\) 565, 11 Collier Bankr. Cas. 2d \(MB\) 987, Bankr. L. Rep. \(CCH\) P 70166 \(Bankr. W.D. N.C. 1984\)](#) (dismissing petition where debtor was able to pay debts and had not truthfully reported his financial condition).

[FN38]. See, e.g., [Walton, 69 B.R. 150, 154](#); [Hudson, 56 B.R. 415, 420](#); [Grant, 51 B.R. 385, 391](#).

[FN39]. [In re Kelly, 841 F.2d 908, 916, 17 Bankr. Ct. Dec. \(CRR\) 611, 18 Collier Bankr. Cas. 2d \(MB\) 560, Bankr. L. Rep. \(CCH\) P 72218 \(9th Cir. 1988\)](#) (finding that debtors could repay 99% over 3 years).

[FN40]. See e.g. [In re Gaoiran, 113 B.R. 667, 669 \(Bankr. D. Haw. 1990\)](#) (45%); [In re Gaskins, 85 B.R. 846, 848, 17 Bankr. Ct. Dec. \(CRR\) 930 \(Bankr. C.D. Cal. 1988\)](#) (54%); [In re Gomes, 220 B.R. 84, 88 \(B.A.P. 9th Cir. 1998\)](#) (43%).

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[FN41]. [11 U.S.C.A. § 707\(b\)](#).

[FN42]. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, [Pub.L. No. 99-554](#), title II, § 219(b), 100 Stat. 3088, 3100-3101 (1986).

[FN43]. [In re Stewart](#), 215 B.R. 456, 463, 39 Collier Bankr. Cas. 2d (MB) 184 (B.A.P. 10th Cir. 1997), aff'd, 175 F.3d 796, Bankr. L. Rep. (CCH) P 77926 (10th Cir. 1999), citing [In re Clark](#), 927 F.2d 793, 797, 21 Bankr. Ct. Dec. (CRR) 725, 24 Collier Bankr. Cas. 2d (MB) 1536, Bankr. L. Rep. (CCH) P 73845 (4th Cir. 1991) (U.S. Trustee may make a motion under [§ 707\(b\)](#) on the suggestion of a creditor as statutory language bars only "the court from dismissing a debtor's chapter 7 petition 'at the request or suggestion of any party in interest'; it does not bar the trustee from making a motion at the suggestion of a creditor, or the court from considering the motion."); [In re Morris](#), 153 B.R. 559, 563, 28 Collier Bankr. Cas. 2d (MB) 1536 (Bankr. D. Or. 1993) (finding that a [§ 707\(b\)](#) action is not tainted if based on a creditor's suggestion because the US Trustee has the duty to independently investigate any allegations of substantial abuse prior to filing the motion); contra, [In re Restea](#), 76 B.R. 728, 732-33, 17 Collier Bankr. Cas. 2d (MB) 132 (Bankr. D. S.D. 1987) (refusing to consider [§ 707\(b\)](#) motion when creditor suggested US Trustee should investigate the case for abuse).

[FN44]. See generally, [In re Carolan](#), 204 B.R. 980, 987 (B.A.P. 9th Cir. 1996) ([§ 523\(d\)](#) to "discourage creditors from initiating meritless actions based on [§ 523\(a\)\(2\)](#) in the hope of obtaining a settlement from an honest debtor anxious to save attorneys' fees.")

[FN45]. H.R. 333 and S. 420.

[FN46]. [In re Passis](#), 235 B.R. 562, 566 (Bankr. D. N.J. 1999).

[FN47]. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, [Pub.L. No. 99-554](#), title II, § 219(b), 100 Stat. 3088, 3100-3101 (1986).

[FN48]. [H.R. Conf. Rep. No. 99-958, at 46-47 \(1986\)](#), reprinted in 1986 U.S.C.C.A.N. 5227, 5247-48.

[FN49]. See [In re Joseph](#), 208 B.R. 55, 59-60, 37 Collier Bankr. Cas. 2d (MB) 1604 (B.A.P. 9th Cir. 1997) (holding that the United States Trustee may bring a [§ 707\(b\)](#) motion upon referral from panel trustee); see also, Vol. 2, U.S. Trustee Manual, p. 120-121, ¶ 2-3.14 "Investigation of and Response to Bankruptcy Fraud and Abuse" (... the Trustee must assist the United States Trustee in the prosecution of the motion to dismiss... [t]he United States Trustee must maintain in the trustee's performance review file a list of all... 707(b) referrals... brought by the panel trustee. [emphasis added]).

[FN50]. [In re Gomes](#), 220 B.R. 84, 88 (B.A.P. 9th Cir. 1998).

[FN51]. [In re Piontek](#), 113 B.R. 17 (Bankr. D. Or. 1990); [In re Duncan](#), 201 B.R. 889 (Bankr. W.D. Pa. 1996); [In re Pedigo](#), 296 B.R. 485 (Bankr. S.D. Ind. 2003) [commenting that [§ 707\(b\)](#) "has been most commonly used as a mechanism to force debtors who have the ability to pay their debts into a chapter 13"]; [In re Dempton](#), 182 B.R. 38 (Bankr. W.D. Mo. 1995) (dismissal granted unless converted within 10-days); [In re Lamanna](#), 210 B.R. 17 (Bankr. D. R.I. 1997) (court's "normal practice is to stay the Order of Dismissal for ten days to allow conversion to chapter 13.")

[FN52]. I.e., [In re Kelly](#), 841 F.2d 908, 914 (1988).

[FN53]. [In re Scheinberg](#), 134 B.R. 426, Bankr. L. Rep. (CCH) P 74517 (D. Kan. 1992).

[FN54]. [In re Williams](#), 155 B.R. 773 (Bankr. D. Idaho 1993).

[FN55]. [In re Lenartz](#), 263 B.R. 331, 341-342 (Bankr. D. Idaho 2001).

[FN56]. [In re Ryan](#), 267 B.R. 635, 638, 47 Collier Bankr. Cas. 2d (MB) 315 (Bankr. N.D. Iowa 2001).

[FN57]. See [In re Mastroeni](#), 56 B.R. 456, 459-460, 13 Bankr. Ct. Dec. (CRR) 1129, 13 Collier Bankr. Cas. 2d (MB) 1470, Bankr. L. Rep. (CCH) P 70894 (Bankr. S.D. N.Y. 1985).

[FN58]. [In re Motaharnia](#), 215 B.R. 63, 67 (Bankr. C.D. Cal. 1997) (emphasis added, footnotes omitted).

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[FN59]. The court defined "credit card bust-out as "a term used to describe a person's accumulation of a consumer debt in anticipation of filing for bankruptcy." [In re Padilla](#), 222 F.3d 1184, 1188, 36 Bankr. Ct. Dec. (CRR) 166, 44 Collier Bankr. Cas. 2d (MB) 1190, Bankr. L. Rep. (CCH) P 78245 (9th Cir. 2000).

[FN60]. [In re Padilla](#), 222 F.3d 1184, 1191.

[FN61]. [In re Padilla](#), 222 F.3d 1184, 1194.

[FN62]. [In re Padilla](#), 222 F.3d 1184, 1191.

[FN63]. [In re Mastroeni](#), 56 B.R. 456, 459-460, 13 Bankr. Ct. Dec. (CRR) 1129, 13 Collier Bankr. Cas. 2d (MB) 1470, Bankr. L. Rep. (CCH) P 70894 (Bankr. S.D. N.Y. 1985). See also [In re Williams](#), 155 B.R. 773 (Bankr. D. Idaho 1993); [In re Motaharnia](#), 215 B.R. 63, 72 (Bankr. C.D. Cal. 1997) ("Since the effect of dismissing these cases under § 707(b) results in a complete denial of discharge identical to that under § 349 or § 727, it should not occur without a finding that the debtor acted to the detriment of the bankruptcy system.").

[FN64]. [In re Edwards](#), 50 B.R. 933, 938, 13 Bankr. Ct. Dec. (CRR) 250, 13 Collier Bankr. Cas. 2d (MB) 255, Bankr. L. Rep. (CCH) P 70713 (Bankr. S.D. N.Y. 1985) [emphasis added].

[FN65]. 11 U.S.C.A. § 523(c)(1); see also [In re Jones](#), 206 B.R. 355 (Bankr. M.D. Pa. 1997) (trustee lacks standing to bring § 523(a)(2) action); contra [In re Muller](#), 111 B.R. 911, 22 Collier Bankr. Cas. 2d (MB) 1281 (Bankr. S.D. Cal. 1990) (allowing trustee, when acting on behalf of creditor estate, to bring § 523(a)(2) action. But, as the court noted in Schwab, there is not a lot of difference between a § 523(a)(2) action brought by a creditor, and a motion to dismiss brought by the US Trustee for substantial abuse under § 707(b), where it appears that the debtor obtained a multiplicity of debt in anticipation of obtaining a discharge in bankruptcy.).

[FN66]. [In re Motaharnia](#), 215 B.R. 63, 72-73 (Bankr. C.D. Cal. 1997) (emphasis added).

[FN67]. 11 U.S.C.A. § 707(b).

[FN68]. [In re Kelly](#), 841 F.2d. 908, 917.

[FN69]. [In re Motaharnia](#), 215 B.R. 63, 73.

[FN70]. [In re Motaharnia](#), 215 B.R. 63 (emphasis added).

[FN71]. [In re Walton](#), 866 F.2d 981, 18 Bankr. Ct. Dec. (CRR) 1407, 20 Collier Bankr. Cas. 2d (MB) 533, Bankr. L. Rep. (CCH) P 72605 (8th Cir. 1989).

[FN72]. [In re Attanasio](#), 218 B.R. 180 (Bankr. N.D. Ala. 1998).

[FN73]. [In re Attanasio](#), 218 B.R. 180, at 219 (emphasis added).

[FN74]. [In re Attanasio](#), 218 B.R. 180, at 219-220 (emphasis added).

[FN75]. [In re Harris](#), 279 B.R. 254 (B.A.P. 9th Cir. 2002), citing 6 *Collier's on Bankruptcy*, ¶ 707.04[5][a] (15th rev. ed. 2001).

[FN76]. [In re Harris](#), 279 B.R. 254, 260 (emphasis added).

[FN77]. See e.g., [In re Regan](#), 269 B.R. 693, 696 (Bankr. W.D. Mo. 2001); [In re Browne](#), 253 B.R. 854, 856-57 (Bankr. N.D. Ohio 2000) (abrogated by, [In re Behlke](#), 358 F.3d 429, 32 *Employee Benefits Cas.* (BNA) 1193, Bankr. L. Rep. (CCH) P 80050, 2004 FED App. 0053P (6th Cir. 2004)); [In re Fletcher](#), 248 B.R. 48, 51, 35 Bankr. Ct. Dec. (CRR) 291, Bankr. L. Rep. (CCH) P 78169, 2000-1 U.S. Tax Cas. (CCH) P 50462, 87 A.F.T.R.2d 2001-1849 (Bankr. D. Vt. 2000); [In re Cohen](#), 246 B.R. 658, 665, 35 Bankr. Ct. Dec. (CRR) 243 (Bankr. D. Colo. 2000); see also Hon. Barry Russell, *Bankruptcy Evidence Manual* § 301.7 (1995-96 ed.) (Trustee has the burden of proving that the chapter 7 filing should be dismissed as a "substantial abuse" under [section 707\(b\)](#)).

[FN78]. Fed. R. Evid. § 301.

**(Publication page references are not available for this document.)**

[FN79]. Hon. Barry Russell, *Bankruptcy Evidence Manual* § 301.7 (1994-95 ed.), cited in [In re Snow](#), 185 B.R. 397, 34 Collier Bankr. Cas. 2d (MB) 351, Bankr. L. Rep. (CCH) P 76613 (Bankr. D. Mass. 1995).

[FN80]. [Zelman v. Gregg](#), 16 F.3d 445, 447 (1st Cir. 1994).

[FN81]. [Bank One, Texas, N.A. v. Montle](#), 964 F.2d 48, 51 (1st Cir. 1992).

[FN82]. [N.L.R.B. v. Wright Line, a Div. of Wright Line, Inc.](#), 662 F.2d 899, 905, 108 L.R.R.M. (BNA) 2513, 92 Lab. Cas. (CCH) P 12987, 9 Fed. R. Evid. Serv. 371 (1st Cir. 1981).

[FN83]. [In re Farrell](#), 150 B.R. 116 (Bankr. D. N.J. 1992).

[FN84]. [In re Snow](#), 185 B.R. 397, 402 34 Collier Bankr. Cas. 2d (MB) 351, Bankr. L. Rep. (CCH) P 76613 (Bankr. D. Mass. 1995).

[FN85]. [In re Snow](#), 185 B.R. 397, 402-403.

[FN86]. See [In re Motaharnia](#), 215 B.R. 63, 70 (Bankr. C.D. Cal. 1997).

[FN87]. See [In re Harris](#), 279 B.R. 254, 259 (B.A.P. 9th Cir. 2002) (holding clear and convincing standard, after quoting Collier's treatise which mentions the words "clearly present."); accord [In re Marcoux](#), 301 B.R. 381, 384 (Bankr. D. Conn. 2003); [In re Hall](#), 258 B.R. 45, 50 (Bankr. M.D. Fla. 2001); [In re Watkins](#), 216 B.R. 394, 397, 39 Collier Bankr. Cas. 2d (MB) 344 (Bankr. W.D. Tex. 1997); [In re Laury-Norvell](#), 157 B.R. 14, 17, 29 Collier Bankr. Cas. 2d (MB) 758 (Bankr. N.D. Ohio 1993); [In re Summer](#), 255 B.R. 555, 563 (Bankr. S.D. Ohio 2000).

[FN88]. [In re Harris](#), 279 B.R. 254 (B.A.P. 9th Cir. 2002), citing [Fed. R. Bankr. Pro., Rules 9014, 7052](#) and [In re Hotel Hollywood](#), 95 B.R. 130, 132-34 (B.A.P. 9th Cir. 1988).

[FN89]. [In re Harris](#) 279 B.R. 254, 260 (9th Cir. BAP 2002).

[FN90]. [In re Harris](#), 279 B.R. 254, 260-261 (emphasis added).

[FN91]. [In re Harris](#), 279 B.R. 254, 260; see also [In re Hall, Bayoutree Associates, Ltd.](#), 939 F.2d 802, 804-05, Bankr. L. Rep. (CCH) P 74106 (9th Cir. 1991).

[FN92]. [Jacobellis v. State of Ohio](#), 378 U.S. 184, 196, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

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