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Harmonizing Conversion and the Means Test in Bankruptcy

*Garrett Pratt, Daniel Graves & Michelle Arnopol Cecil**

ABSTRACT

Determining whether the means test applies in cases converted from Chapter 13 to Chapter 7 has divided courts across the United States and has even caused bankruptcy judges within the same district court to disagree. In the nearly 15 years since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), a majority of courts have held that the means test applies in converted cases. However, a considerable minority view has emerged, which virtually all scholarship on the issue has adopted. Although both the majority and minority views cause interpretive problems, this article argues that the means test should apply in cases converted from Chapter 13 to Chapter 7. This view promotes a better reading of § 707(b) and the Bankruptcy Code in general and prevents debtors from manipulating the bankruptcy system by filing under Chapter 13 and then converting to Chapter 7 to avoid the means test. Additionally, this article also provides language that Congress should adopt in amending the Bankruptcy Code to codify the view that the means test applies in converted cases.

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I. INTRODUCTION

The Bankruptcy Code¹ provides a fresh start to honest debtors who find themselves unable to pay their debts because of unfortunate circumstances.² Yet, bankruptcy cases are replete with debtors behaving badly. Some debtors lie to the court about their assets and liabilities,³ while others file multiple bankruptcy cases to postpone inevitable foreclosure sales.⁴ While the Bankruptcy Code discourages some bad debtor behavior,⁵ it is often left to the bankruptcy courts to determine whether other debtor behavior is within the bounds of the Bankruptcy Code or, instead, constitutes an abuse of the bankruptcy process. This article explores one such issue: the conversion of a case from Chapter 13 to Chapter 7.

One of the first strategic decisions that an individual filing for bankruptcy must make is whether to file for bankruptcy protection under Chapter 7⁶ or Chapter 13⁷ of the Bankruptcy Code.⁸ Under Chapter 7, a debtor receives an unconditional discharge of his or her personal liability for most debts by turning over nonexempt assets to a bankruptcy trustee, who liquidates those assets and distributes the proceeds to creditors.⁹ Conversely, in Chapter 13, a debtor's discharge is conditioned upon repaying a portion of his or her debts over three to five years.¹⁰ Chapter 13 allows debtors to retain nonexempt assets.¹¹

Since the enactment of the Bankruptcy Act of 1978,¹² some members of Congress have been concerned that individual debtors with sufficient disposable income to repay at least some of their unsecured debts choose to file under Chapter 7 to receive a quick discharge even though they have some ability to repay those debts under Chapter 13.¹³ It is widely believed that credit card companies and banks

1. 11 U.S.C. §§ 101–1532 (2012).

2. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (the Bankruptcy Code provides debtors a fresh start by establishing “a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.’” (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). *Grogan* also states that a fresh start is an opportunity limited only to honest but unfortunate debtors. *Id.* (citing *Hunt*, 292 U.S. at 244).

3. *United States v. Edwards*, 595 F.3d 1004, 1009 (9th Cir. 2010) (debtor failed to disclose \$3 million criminal restitution judgment against him and failed to disclose over \$40,000 in nonexempt assets).

4. *Casse v. Key Bank Nat'l Ass'n (In re Casse)*, 198 F.3d 327, 329 (2d Cir. 1999).

5. If debtors behave badly during the course of their bankruptcy cases, the court may determine that some or all of their debts are non-dischargeable. *See, e.g.*, 11 U.S.C. §§ 523(a)(2), (a)(5), 727(a) (2012). Debtors may also be subject to criminal prosecution for their misconduct in bankruptcy. 18 U.S.C. § 157 (2012).

6. *See* 11 U.S.C. §§ 701–784 (2012).

7. *See* 11 U.S.C. §§ 1301–1330 (2012).

8. Individual debtors may also file under Chapter 11 or Chapter 12. Generally, most individuals do not file under Chapter 11 because of its expense unless they are ineligible for Chapters 7 and 13 because their secured or unsecured debt exceed certain statutory thresholds and they are trying to avoid liquidating their non-exempt assets. *See* 11 U.S.C. § 109(e) (Westlaw through Pub. L. No. 116-8); *see generally* 11 U.S.C. §§ 1101–1174 (2012). An individual must be a family farmer or family fisherman to file under Chapter 12. 11 U.S.C. § 109(f).

9. H.R. REP. NO. 109-31(I), at 10 (2005); 11 U.S.C. § 727(b) (2012).

10. 11 U.S.C. § 1325(b)(4) (Westlaw through Pub. L. No. 116-8).

11. *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015) (“A wholly voluntary alternative to Chapter 7, Chapter 13 allows a debtor to retain his property if he proposes, and gains court confirmation of, a plan to repay his debts over a three- to five-year period.” (citing 11 U.S.C. §§ 1306(b), 1322, 1327(b)).

12. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

13. *See infra* notes 30–42 and accompanying text.

heavily lobbied Congress to include more stringent anti-abuse provisions in the Bankruptcy Code, forcing can-pay debtors to file for Chapter 13 rather than Chapter 7.¹⁴ After a decade of lobbying,¹⁵ their efforts paid off; President George W. Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) into law in 2005.¹⁶

The heart of BAPCPA is Bankruptcy Code § 707(b)(2), colloquially known as “the means test.”¹⁷ The goal of the means test is to determine if a debtor’s Chapter 7 case is an abuse of the Bankruptcy Code.¹⁸ The means test itself is a multi-step determination that begins with a calculation of a debtor’s monthly disposable income. The means test raises a rebuttable presumption that a debtor’s Chapter 7 case is an abuse of the bankruptcy process if his or her disposable income exceeds a certain requisite threshold.¹⁹

While the means test is complex,²⁰ its application is straightforward in cases originally filed under Chapter 7. However, courts disagree on whether the means test applies in cases where the debtor originally filed under Chapter 13 and subsequently converts to Chapter 7.²¹ Bankruptcy judges within the same district have disagreed with one another across the United States.²² In the nearly 15 years since BAPCPA’s enactment, a majority of courts addressing the issue have determined that the means test applies in converted cases.²³ However, a considerable number of courts have held the means test is not applicable in cases converted from Chapter 13 to Chapter 7.²⁴ Courts adopting both views have recognized that adopting either

14. Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 380 (2007).

15. *Id.* at 383.

16. Associated Press, *Bush Signs Tougher Bankruptcy Bill into Law*, NBC NEWS (Apr. 20, 2005, 4:58 PM), http://www.nbcnews.com/id/7575010/ns/business-personal_finance/t/bush-signs-tougher-bankruptcy-bill-law/#.XLU_i-hKhPY.

17. ELIZABETH WARREN ET AL., *THE LAW OF DEBTORS AND CREDITORS* 253 (7th ed. 2014).

18. *See generally* 11 U.S.C. § 707(b)(2) (Westlaw through Pub. L. No. 116-8).

19. *See generally id.*

20. WARREN ET AL., *supra* note 17, at 257.

21. *See infra* notes 126–298 and accompanying text.

22. *Compare In re St. Jean*, 515 B.R. 864, 865 (Bankr. M.D. Fla. 2012) (means test applies), *with In re Thoenke*, 2014 WL 443890, at *1 (Bankr. M.D. Fla. Feb. 4, 2014) (means test does not apply); *compare In re Hayes*, 2015 WL 236275, at *5 (Bankr. S.D. Tex. Jan. 16, 2015) (means test applies), *with In re Pate*, 2012 WL 6737814, at *3 (Bankr. S.D. Tex. Dec. 28, 2012) (means test does not apply); *compare In re Reece*, 498 B.R. 72, 74 (Bankr. W.D. Va. 2013) (means test applies), *with In re Dudley*, 405 B.R. 790, 801 (Bankr. W.D. Va. 2009) (means test does not apply).

23. *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1336 (11th Cir. 2017); *Justice v. Advanced Control Solutions, Inc.*, 2008 WL 4368668, at *5 (W.D. Ark. Sep. 22, 2008), *aff’d*, 639 F.3d 838, 840–41 (8th Cir. 2011) (not an abuse of discretion to order conversion of case back to Chapter 13 after debtor failed to rebut the presumption of abuse under § 707(b)); *In re Chapman*, 447 B.R. 250, 250 (B.A.P. 8th Cir. 2011); *In re Burgher*, 539 B.R. 868, 877 (Bankr. D. Colo. 2015); *In re Hayes*, 2015 WL 236275, at *5; *In re Croft*, 539 B.R. 122, 132 (Bankr. W.D. Tex. 2015); *In re Summerville*, 515 B.R. 651, 652 (Bankr. M.D. Fla. 2014); *In re Davis*, 489 B.R. 478, 479 (Bankr. S.D. Ga. 2013); *In re Reece*, 498 B.R. at 74; *In re St. Jean*, 515 B.R. at 865; *In re Lassiter*, 2011 WL 2039363, at *1 (Bankr. E.D. Va. May 24, 2011); *In re Willis*, 408 B.R. 803, 804 (Bankr. W.D. Mo. 2009); *In re Peretto*, 361 B.R. 27, 28 (Bankr. D.R.I. 2007); *In re Kellett*, 379 B.R. 332, 339 (Bankr. D. Or. 2007); *In re Kerr*, 2007 WL 21192921, at *4 (Bankr. W.D. Wash. July 18, 2007).

24. *In re Thoenke*, 2014 WL 443890, at *1; *In re Pate*, 2012 WL 6737814, at *4; *In re Layton*, 480 B.R. 392, 393–94 (Bankr. M.D. Fla. 2012); *In re Dudley*, 405 B.R. at 801; *In re Guarin*, 2009 WL 4500476, at *1 (Bankr. D. Mass. Dec. 3, 2009); *In re Miller*, 381 B.R. 736, 741 (Bankr. W.D. Ark. 2008); *In re Ryder*, 2008 WL 3845246, at *1 (Bankr. N.D. Cal. Aug. 18, 2008); *In re Fox*, 370 B.R. 639, 648 (Bankr. D.N.J. 2007).

view inevitably creates contradictions between provisions of the Bankruptcy Code itself or with the Federal Rules of Bankruptcy Procedure.²⁵ Indeed, the first court of appeals to consider the issue acknowledged that both views are “defensible positions.”²⁶ Unlike the courts, however, academic scholarship on the issue nearly uniformly argues that the means test should not apply in converted cases.²⁷ If the means test does not apply in converted cases, debtors could avoid the means test by filing their bankruptcy cases under Chapter 13 and immediately converting to Chapter 7, even though they have sufficient income to repay at least some of their debts. For example, one court holding that the means test did not apply in a converted case allowed debtors with \$2,000 of monthly disposable income to quickly convert from Chapter 13 to Chapter 7 and avoid the means test.²⁸ The court’s holding permitted the debtors to avoid the repayment of nearly \$120,000 of debt that they would have been required to repay in a Chapter 13 proceeding.²⁹

To avoid outcomes like the one described above, this article argues that the means test should apply in converted cases. While imperfect, this position promotes a better reading of § 707(b) and avoids creating a loophole by which debtors with sufficient disposable income can avoid the means test by initially filing under Chapter 13 and then immediately converting to Chapter 7. This article proposes an amendment to the Bankruptcy Code to resolve this issue by statute.

Part II briefly summarizes the legislative history of § 707(b), as well as the mechanics of the means test. It also explores the Bankruptcy Code’s provisions detailing the effect of conversion on a debtor’s case. Part III summarizes the most prominent cases on both sides of this vexing issue, focusing on the policy justifications for both positions. Finally, Part IV argues that the means test should apply in converted cases and provides statutory language that Congress should use to amend the Bankruptcy Code to codify this position. This article concludes that congressional adoption of this statutory amendment will bring the Bankruptcy Code one step closer to achieving its goals of providing honest debtors a fresh start after bankruptcy, while preventing other debtors from behaving badly by abusing the bankruptcy process.

II. STATUTORY FRAMEWORK

This section outlines § 707(b)’s legislative history and describes the mechanics of the means test. It then discusses the effect of conversion on a debtor’s case and analyzes Congress’s intent in providing for conversion from Chapter 13 to Chapter 7.

25. *In re Layton*, 480 B.R. at 393–94 (“Both positions cite anomalies within the Bankruptcy Code and the accompanying Rules that would occur if the opposite view were to prevail. Unfortunately, these anomalies are not exclusive to a particular view and are readily existent regardless of the position the Court takes.”).

26. *Pollitzer*, 860 F.3d at 1338.

27. G. Eric Brunstad Jr., *The Inapplicability of “Means Testing” to Cases Converted to Chapter 7*, 24-NOV AM. BANKR. INST. J. 1, 58 (2005); Kathleen Murphy & Justin H. Dion, “Means Test” or “Just a Mean Test”: An Examination of the Requirement that Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(b)”, 16 AM. BANKR. INST. L. REV. 413, 419 (2008).

28. *Dudley*, 405 B.R. at 792, 801.

29. *Id.*

A. Legislative History of § 707(b)

Under the 1978 Bankruptcy Act, a court could dismiss a Chapter 7 case “for cause.”³⁰ Cause included a debtor’s unreasonable delay in paying creditors or non-payment of statutory fees or charges.³¹ In 1984, Congress expanded a court’s authority to dismiss Chapter 7 cases by also allowing a finding of substantial abuse.³² Codified in § 707(b) of the Bankruptcy Code, Congress added the substantial abuse requirement to ensure that debtors holding primarily consumer debt did not abuse the use of Chapter 7.³³ Congress intended to respond “to concerns that some debtors who could easily pay their creditors might resort to [C]hapter 7 to avoid their obligations.”³⁴ Then, in 1986, Congress again expanded § 707(b) to allow the United States Trustee to move for dismissal for substantial abuse.³⁵

Over the years, credit card companies and banks—dissatisfied with the Code’s attempts to curb debtor abuse—heavily lobbied Congress to enact even tougher anti-abuse provisions.³⁶ Ultimately, in 2005, Congress comprehensively overhauled the bankruptcy system by enacting BAPCPA.³⁷ BAPCPA’s supporters argued that bankruptcy claims had skyrocketed since Congress’s last major overhaul of the Bankruptcy Code in 1978.³⁸ They praised BAPCPA, arguing that it would reduce debtor abuse of the system.³⁹ Congress drafted BAPCPA specifically to prevent debtors who are able to repay their creditors, at least in part, from using Chapter 7.⁴⁰

30. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2606 (1978); *see also* H.R. REP. NO. 109-31(I), at 11 (2005).

31. § 707, 92 Stat. at 2606.

32. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 335 (1984). The 1984 amendment did not define what constituted substantial abuse, but provided that there was a “presumption in favor of granting the relief requested by the debtor.” *Id.*

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

34. *Id.* at 12 (quoting 6 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY § 707.04 (15th ed. rev. 2002)).

35. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088, 3101 (1986).

36. Mann, *supra* note 14.

37. Pub. L. No. 109-8, 119 Stat. 23 (2005).

38. *See, e.g.*, 151 CONG. REC. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (“We all know how bankruptcy claims have skyrocketed since the last major bankruptcy reform bill in 1978.”); 151 CONG. REC. S1813 (daily ed. Mar. 1, 2005) (statement of Sen. Frist) (“Personal bankruptcies are skyrocketing . . .”); 151 CONG. REC. S1834 (daily ed. Mar. 1, 2005) (statement of Sen. Akaka) (stating that 287,570 consumers filed for bankruptcy in 1980, while approximately 1.2 million consumers filed for bankruptcy in just the first nine months of 2004); 151 CONG. REC. E704 (daily ed. Apr. 14, 2005) (statement of Rep. Moore) (“Bankruptcy filings have increased by 70[%] over the last decade, and last year alone Americans filed over 1.6 million consumer bankruptcy petitions”).

39. H.R. REP. NO. 109-31(I), at 2.

40. *See, e.g.*, 151 CONG. REC. S2459 (daily ed. Mar. 10, 2005) (statement of Sen. Hatch) (“We all know about the abuses of the system . . . The legislation . . . will put a stop to abusive practices . . . [and] reduce the number of fraudulent and abusive filings.”); 151 CONG. REC. S1813–14 (daily ed. Mar. 1, 2005) (statement of Sen. Frist) (“[W]ealthy debtors are walking away from debts that they have the ability to repay. . . Opportunistic debtors who have the means to repay use the law to evade personal responsibility. . . [T]he FBI estimates that at least 10 percent of all filings involve fraud of some type.”); 151 CONG. REC. E704 (daily ed. Apr. 14, 2005) (statement of Rep. Moore) (“[The bill] is a serious, good faith effort to reform our bankruptcy laws and reduce the worst abuses in the consumer bankruptcy system.”); 151 CONG. REC. E737 (daily ed. Apr. 14, 2005) (statement of Rep. Tiahrt) (“The bill . . . [will] make it more difficult for those who use bankruptcy as a tool for fraud to cheat their way out of debt . . . [N]umerous studies have shown many bankruptcy debtors are able to repay a significant portion of

BAPCPA reduced the abuse standard from “substantial abuse” to “abuse” and expanded the list of parties that could file a motion for dismissal under § 707(b) to include the Chapter 7 trustee, the bankruptcy administrator, and any party in interest.⁴¹ Congress also enacted § 707(b)(2), which codified the means test.⁴² The mechanics of the means test and the legislative history of § 707(b) are discussed below.

B. The Mechanics of the Means Test

Congress intended that the means test—the heart of BAPCPA’s consumer bankruptcy reform measures—ensure that “debtors repay creditors the maximum they can afford.”⁴³ Included within the general abuse provisions of Chapter 7,⁴⁴ which collectively allow a court to dismiss a case if it determines that granting relief to the debtor would be an abuse of the bankruptcy system.⁴⁵ The means test employs a mechanical series of calculations to determine whether a debtor⁴⁶ has the ability to repay his or her unsecured creditors, at least partially.⁴⁷

If after applying the means test the debtor has sufficient income to repay unsecured creditors, a nearly irrebuttable presumption arises that allowing the debtor to receive a Chapter 7 discharge would constitute abuse.⁴⁸ The debtor may rebut the presumption only by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the armed forces, to the extent such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.⁴⁹ The court may then either dismiss the case or, with the debtor’s consent, convert it to a Chapter 11 or Chapter 13 case.⁵⁰ The complex mechanics of the means test are outlined below.

their debts.”). *See also* H.R. REP. NO. 109-31(I), at 2 (“[BAPCPA] includes provisions intended to deter serial and abusive bankruptcy filings”).

41. 11 U.S.C. § 707(b)(1) (Westlaw through Pub. L. No. 116-8).

42. 11 U.S.C. § 707(b)(2).

43. H.R. REP. NO. 109-31(I), at 2.

44. *See generally* 11 U.S.C. § 707.

45. *See, e.g.*, 11 U.S.C. §§ 707(a), (b)(1).

46. These abuse provisions, including the means test, apply only to individual debtors with primarily consumer debts. 11 U.S.C. § 707(b)(1) (“The court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.”). Consumer debts are defined as those “incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8) (2012).

47. *See generally* 11 U.S.C. § 707(b)(2).

48. 11 U.S.C. § 707(b)(2)(A)(i) (“In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court *shall presume* abuse exists if the debtor’s current monthly income” meets the requirements of the means test.) (emphasis added). A presumption of abuse under the means test can be rebutted only under narrowly defined “special circumstances.” 11 U.S.C. § 707(b)(2)(B).

49. 11 U.S.C. § 707(b)(2)(B)(i).

50. 11 U.S.C. § 707(b)(1). Broadly speaking, Chapter 11 allows certain debtors, most commonly businesses, to restructure their debts. *See generally* 11 U.S.C. §§ 1101–1174 (2012). Chapter 13 allows certain debtors to enter into a repayment schedule of three to five years, requiring the debtor to repay a portion of his or her debts before receiving a discharge of most remaining obligations. *See generally* 11 U.S.C. §§ 1301–1330 (2012). Section 1328(a) provides a complete list of non-dischargeable debts under Chapter 13. 11 U.S.C. §§ 1328(a)(1)–(4) (2012).

i. Calculating Current Monthly Income

An individual Chapter 7 debtor⁵¹ completes Form 122A-1⁵² to determine whether his or her “current monthly income” is above or below the median income in the debtor’s state of residence.⁵³ The debtor’s current monthly income is the debtor’s total income, including non-taxable income, received from virtually any source⁵⁴ during the six months immediately preceding the petition date, divided by six.⁵⁵ The court then takes the debtor’s current monthly income, adds the current monthly income of the debtor’s non-filing spouse,⁵⁶ and multiplies the total by 12 to determine the debtor’s yearly income.⁵⁷ If the debtor’s yearly income is equal to or less than the median yearly family income in the debtor’s state of residence for a family of the same size, the presumption of abuse does not arise.⁵⁸ However, if the debtor’s yearly income is above the median, the means test requires the debtor to complete Form 122A-2⁵⁹ to determine whether the presumption of abuse arises. Form 122A-2 requires the debtor to compare his or her monthly income to his or her total allowed monthly expenses.⁶⁰

ii. Calculating Total Allowed Monthly Expenses

The next step under the means test for an above-median income debtor is to calculate whether the debtor will have enough money over the next five years to repay his or her non-priority, unsecured creditors a certain minimum amount of money.⁶¹ Under the means test, a debtor is deemed to be able to repay his or her creditors the difference between the debtor’s current monthly income and his or her

51. Some debtors do not have to file Form 122A-1. See 11 U.S.C. § 707(b)(2)(D) (listing certain disabled veterans, active duty military, or reservists).

52. *Means Testing*, UNITED STATES DEPT. OF JUSTICE/UNITED STATES TRUSTEE PROGRAM, <https://www.justice.gov/ust/means-testing> (last visited Mar. 5, 2019) [hereinafter *Means Testing*].

53. 11 U.S.C. § 707(b)(7).

54. The only sources of income excluded from this calculation are benefits received under the Social Security Act and certain payments to victims of war crimes, crimes against humanity, or terrorism. 11 U.S.C. §§ 101(10A)–(B) (2012).

55. 11 U.S.C. § 101(10A). If a debtor does not file the schedule of current income required by 11 U.S.C. § 521(a)(1)(B)(ii), the last date of the six-month income calculation window instead becomes the date the court determines the debtor’s current income. 11 U.S.C. § 101(10A)(A)(ii).

56. Debtors do not have to include a non-filing spouse’s income if they file an affidavit certifying that they and their spouse are legally separated or are otherwise living apart, and they provide an estimate of any amount of cash received from their spouse that is part of their current monthly income. 11 U.S.C. §§ 707(b)(7)(B)(i)–(iii).

57. 11 U.S.C. § 707(b)(7)(A).

58. *Id.* (“No judge, United States trustee . . . , trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor . . . and the debtor’s spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than” the median family income of the applicable State for a household of the same size.). For a list of state-by-state median family incomes effective for bankruptcy cases filed on or after November 1, 2018, see CENSUS BUREAU MEDIAN FAMILY INCOME BY FAMILY SIZE, https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/median_income_table.htm (last visited Mar. 5, 2019).

59. U.S. BANKRUPTCY COURT, INSTRUCTIONS BANKRUPTCY FORMS FOR INDIVIDUALS (2019), https://www.uscourts.gov/sites/default/files/instructions_individuals.pdf.

60. 11 U.S.C. § 707(b)(2)(A)(ii).

61. 11 U.S.C. § 707(b)(2)(A)(i).

“total allowed monthly expenses.”⁶² There are five categories of allowed monthly expenses, as outlined in detail below.

The first set of allowed expenses cover some of a debtor’s basic necessities. Using the Internal Revenue Service’s (“the Service”) National Standards,⁶³ the court calculates a set dollar amount for food, housekeeping supplies, apparel, personal care products and services, and miscellaneous expenses based on the debtor’s household size.⁶⁴ The court must use the Service-specified amounts regardless of whether the debtor’s actual expenses in these categories are higher or lower than the Service’s National Standards.⁶⁵ The court must also allow for any of the Service’s Other Necessary Expenses that the Service has issued for the debtor’s geographic area of residence, but these expenses are limited to the debtor’s actual monthly outlays.⁶⁶ Finally, the court must include the debtor’s reasonably necessary expenses for health insurance, disability insurance, health savings accounts, and certain family safety expenses.⁶⁷

The second set of allowed monthly expenses is governed by a series of Local Standards that the Service issues, covering the debtor’s costs for housing, utilities, and transportation.⁶⁸ The Service establishes housing amounts by county within each state, which include the debtor’s mortgage or rent payments, property taxes, insurance, maintenance, repairs, and utilities.⁶⁹ The transportation amounts include vehicle loans or lease payments as well as operating expenses, including gas and insurance.⁷⁰ The Service breaks out operating expense amounts by region with certain major metropolitan areas afforded higher expenses,⁷¹ while the ownership expense amounts are the same throughout the country.⁷² Courts have been hopelessly

62. 11 U.S.C. §§ 707(b)(2)(A)(i)–(iv).

63. 11 U.S.C. § 707(b)(2)(A)(ii)(I). IRS NATIONAL STANDARDS FOR ALLOWABLE LIVING EXPENSES, U.S. DEP’T OF JUSTICE, https://www.justice.gov/ust/eo/bapcpa/20181101/bci_data/national_expense_standards.htm [hereinafter NATIONAL EXPENSE STANDARDS]. These standards are adjusted periodically and vary according to family size. *Id.*

64. NATIONAL EXPENSE STANDARDS, *supra* note 63. The court also may allow an additional expense amount for food and clothing, up to five percent of the applicable National Standard, if the debtor’s actual expenses in that category exceed the National Standard and the debtor can prove those expenses are reasonable and necessary. 11 U.S.C. § 707(b)(2)(A)(ii)(V) (“In addition, if it is demonstrated that it is reasonable and necessary, the debtor’s monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.”).

65. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (“The debtor’s monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the National Standards.”).

66. *Id.* (“The debtor’s monthly expenses shall be . . . the debtor’s actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides.”).

67. *Id.*

68. *Id.*; *Census Bureau, IRS Data, and Administrative Expenses Multipliers*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/ust/means-testing/20181101> (last visited Mar. 19, 2019).

69. *Means Testing*, *supra* note 52. These allowed expenses do not include any payments by the debtor on account of a secured debt; these payments are covered elsewhere in the Bankruptcy Code. *See* 11 U.S.C. § 707(b)(2)(A)(iii). This distinction is important because, while these Local Standards payments are capped at the amounts determined by the Service, payments on account of secured debts are capped at the debtor’s actual payment amounts, meaning a debtor who makes mortgage payments secured by a house in excess of the Service’s Local Standards is able to deduct from income the full payment amount, while a debtor who makes rental payments in excess of the Service’s Local Standards is limited to the Service’s number.

70. *Means Testing*, *supra* note 52.

71. *Id.*

72. *Id.*

split over whether a debtor is entitled to the full expense amounts determined by the Service for each local standard category if the debtor's actual monthly expenses are lower.⁷³ In 2011, however, the Supreme Court decided *Ransom v. FIA Card Services*, holding that if a debtor's actual expense in the vehicle ownership cost category was zero, the debtor was not entitled to any deduction for that category.⁷⁴

The third set of expenses that a debtor includes in his or her total allowed monthly expenses are four items that the court may include at its discretion.⁷⁵ First, the court may include the debtor's actual monthly expenses for the care and support of certain household and family members if the amounts are reasonable and necessary, the beneficiary of the expenses is unable to pay for those expenses, and the expenses are for a continuation of care already being provided prior to the filing of the debtor's bankruptcy petition.⁷⁶ Providing care for an aging parent is one example of this expense.⁷⁷ Second, if the debtor would otherwise be eligible under Chapter 13, the court may include the actual administrative expenses that the debtor would incur under a hypothetical Chapter 13 plan, including up to 10% of the debtor's projected Chapter 13 plan payments.⁷⁸ Third, the court may include, at its discretion, the debtor's actual monthly expenses for elementary or secondary school tuition costs for the debtor's dependent children under the age of 18, up to \$2,050 per child,⁷⁹ if the debtor documents the expenses, explains why they are reasonable and necessary, and shows that they are not already covered by the Service's National Standards, Local Standards, or Other Necessary Expenses.⁸⁰ Finally, the court may include an additional allowance for housing and utilities above the amount set forth in the Service's Local Standards, up to the debtor's actual expenses, if the debtor documents those expenses and shows that they are reasonable and necessary.⁸¹

The fourth set of relevant expenditures relates to the debtor's secured debts. The court calculates the total amount of all payments contractually owed to the

73. See, e.g., *In re Canales*, 377 B.R. 658, 662 (Bankr. C.D. Cal. 2007) (citing 18 cases holding that debtors do not get the expense amount if they have no expense whatsoever in the category, and seventeen cases reaching the opposite result).

74. *Ransom v. FIA Card Services*, N.A., 562 U.S. 61, 80 (2011) (“[W]e hold that the Local Standard expense amount for transportation ‘Ownership Costs’ is not ‘applicable’ to a debtor who will not incur any such costs during his bankruptcy plan.”).

75. 11 U.S.C. §§ 707(b)(2)(A)(ii)(II)–(V) (Westlaw through Pub. L. No. 116-8) (all noting “the debtor’s monthly expenses *may* include” these amounts) (emphasis added).

76. 11 U.S.C. § 707(b)(2)(A)(ii)(II) (“[T]he debtor’s monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor’s immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.”).

77. *Id.*

78. 11 U.S.C. § 707(b)(2)(A)(ii)(III). Presumably, this provision exists because if a debtor is eligible for Chapter 13 and is kicked out of Chapter 7 due to a presumption of abuse under the means test, the debtor would incur these administrative expenses under the subsequent Chapter 13 repayment plan, ultimately reducing the amount the debtor would be able to pay to his or her creditors. Because the point of these calculations is to determine how much the debtor can repay his or her creditors, it therefore makes sense to include these expenses in the calculation of the debtor’s total allowed expenses.

79. This amount is indexed for inflation. See 11 U.S.C. § 104(a) (2012).

80. 11 U.S.C. § 707(b)(2)(A)(ii)(IV).

81. 11 U.S.C. § 707(b)(2)(A)(ii)(V).

debtor's secured creditors over the next 60 months.⁸² Next, the court adds to that amount any additional payments that the debtor would have to pay to his or her secured creditors under a Chapter 13 plan in order to retain possession of his or her primary residence, motor vehicle, or other property needed to support the debtor and his or her dependents, but only if those items also serve as collateral for the related secured debt.⁸³ The court then divides the total amount by 60 for the amount added to the debtor's total allowed monthly expenses for secured debt.⁸⁴

The final set of allowed expenses concerns any priority unsecured claims that the debtor must pay.⁸⁵ Bankruptcy Code § 507 governs priority unsecured claims, which include domestic support obligations,⁸⁶ certain taxes,⁸⁷ and claims against the debtor for death or personal injury resulting from drunk driving or boating.⁸⁸ The court divides the total of priority claims by 60 to determine the amount to add to the debtor's total allowed monthly expenses for this final category.⁸⁹

iii. Comparing the Repayment Amount with the Threshold Amount

After calculating the debtor's total allowed monthly expenses, the court subtracts those expenses from the debtor's current monthly income and multiplies the resulting number by 60, giving the amount of money the debtor is deemed able to repay to his or her general unsecured creditors (the "repayment amount") over a typical five-year Chapter 13 plan.⁹⁰ Then, the court compares the repayment amount to a statutorily-prescribed threshold amount in deciding whether the debtor's bankruptcy petition constitutes substantial abuse.⁹¹

To determine the threshold amount, the court adds all of the debtor's non-priority unsecured claims and divides that amount by four (the "unsecured remainder"),⁹² If the unsecured remainder is less than or equal to \$8,175, the debtor's threshold amount is \$8,175. If the unsecured remainder is greater than \$8,175 and

82. 11 U.S.C. § 707(b)(2)(A)(iii)(I). Note that this is not duplicative of the mortgage amounts allowed under the IRS's Local Standards earlier in the Bankruptcy Code; instead, if the mortgage is secured by the home, the expense is allowed here rather than under the National Standards language. *See Means Testing*, *supra* note 52.

83. 11 U.S.C. § 707(b)(2)(A)(iii)(II).

84. 11 U.S.C. § 707(b)(2)(A)(iii). The amount is divided by 60 because most payment plans in a Chapter 13 bankruptcy span 60 months, and the court is attempting to establish how much the debtor could pay to creditors. 11 U.S.C. § 707(b)(2)(A)(i).

85. 11 U.S.C. § 707(b)(2)(A)(iv). Because priority unsecured claims are first in line for repayment from the debtor after secured creditors are repaid, it is appropriate to include these payments in the debtor's total allowed monthly expenses to determine how much the debtor will be able to pay his remaining, non-priority, unsecured creditors under § 707(b)(2)(A). *See* 11 U.S.C. § 726(a)(1) (2012). Common priority claims are administrative expenses, unsecured claims tax obligations, and domestic support obligations. WARREN ET AL., *supra* note 17, at 230–33.

86. 11 U.S.C. § 507(a)(1) (Westlaw through Pub. L. No. 116-8).

87. 11 U.S.C. § 507(a)(8).

88. 11 U.S.C. § 507(a)(10). For a more in-depth discussion of priority claims, *see* WARREN ET AL., *supra* note 17, at 230–33.

89. 11 U.S.C. § 707(b)(2)(A)(iv).

90. 11 U.S.C. § 707(b)(2)(A)(i) (The repayment amount equals "the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60.").

91. *Id.*

92. 11 U.S.C. § 707(b)(2)(A)(i)(I) (The unsecured remainder equals "25 percent of the debtor's nonpriority unsecured claims in the case.").

less than or equal to \$13,650, the debtor's threshold amount equals the unsecured remainder. If the unsecured remainder is greater than \$13,650, the debtor's threshold amount is \$13,650.⁹³ The threshold amount establishes the minimum amount the Bankruptcy Code would require a debtor to repay his or her general unsecured creditors in a theoretical Chapter 13 case.⁹⁴ Finally, the court compares the debtor's repayment amount to the threshold amount.⁹⁵ If the repayment amount is less than the threshold amount, the means test does not create an automatic presumption of abuse.⁹⁶ If, however, the debtor's repayment amount is equal to or greater than the threshold amount, the means test raises the presumption of abuse.⁹⁷

C. Voluntary Conversion by a Debtor

In contrast to the complexity of the means test, the statutory provisions governing a debtor's voluntary conversion from one bankruptcy chapter to another are relatively straightforward.⁹⁸ Except for Chapter 9, which applies only to municipalities and other governmental debtors,⁹⁹ every chapter of the Bankruptcy Code under which debtors can seek relief contains a mechanism for at least some debtors to convert their cases to another chapter.¹⁰⁰

i. Statutory Requirements for Conversion

For purposes of this article, the relevant provision is § 1307(a), which provides that a "debtor may convert a case under this chapter to a case under [C]hapter 7 of this title at any time."¹⁰¹ A Chapter 13 debtor cannot convert to Chapter 7, however, unless he or she is eligible to be a debtor under Chapter 7.¹⁰² To be an eligible Chapter 7 debtor, the debtor must either reside in the United States or have a

93. 11 U.S.C. § 707(b)(2)(A)(i) (The threshold amount equals "the lesser of (I) [the unsecured remainder] or \$8,175, whichever is greater; or (II) \$13,650.") (Westlaw through Pub. L. No. 116-8).

94. *Id.*

95. *Id.* ("[T]he court shall presume abuse exists if the debtor's [repayment amount] is not less than the lesser of" the debtor's threshold amount.)

96. *See id.* Note that this does not mean the debtor cannot be kicked out of Chapter 7 for abuse; it means only that the means test does not give rise to an *automatic* presumption of abuse. *See, e.g.*, 11 U.S.C. § 707(b)(3) (providing other factors that a court may consider when determining whether the granting of relief under the bankruptcy code would be an abuse of the code when the means test either does not give rise to a presumption of abuse or is rebutted).

97. 11 U.S.C. § 707(b)(2)(A)(i) ("[T]he court *shall* presume abuse exists . . .") (emphasis added). The debtor may rebut the presumption by establishing special circumstances, including a medical illness or call to military active duty. *See* 11 U.S.C. § 707(b)(2)(B)(i).

98. *See* 2 NORTON BANKR. L. & PRAC. 3d § 39:1 (stating "Voluntary conversion of bankruptcy cases among the operative chapters of the Code (Chapters 7, 11, 12, and 13) is generally simple.")

99. *See* 11 U.S.C. § 109(c) (Westlaw through Pub. L. No. 116-8) (defining which entities may be a debtor under Chapter 9).

100. *See* 11 U.S.C. § 706(a) (2012) (providing conversion from Chapter 7 to Chapters 11, 12, or 13 unless the debtor has already converted from one of those chapters to Chapter 7); 11 U.S.C. § 1112(a) (2012) (authorizing conversion from Chapter 11 to Chapter 7 unless either the debtor is not a debtor in possession, the debtor's bankruptcy is involuntary, or the case was previously converted to Chapter 11 and the debtor did not request that conversion); 11 U.S.C. § 1208(a) (2012) (allowing conversion from Chapter 12 to Chapter 7 at any time); 11 U.S.C. § 1307(a) (2012) (permitting conversion from Chapter 13 to Chapter 7 at any time).

101. 11 U.S.C. § 1307(a).

102. 11 U.S.C. § 1307(g) ("[A] case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.")

domicile, a place of business, or some property in the United States¹⁰³ and must not be a disqualifying person.¹⁰⁴ While an original Chapter 7 debtor can be a number of entities,¹⁰⁵ because a Chapter 13 debtor must be an individual person rather than a corporation or other non-person entity,¹⁰⁶ any debtor attempting to convert from Chapter 13 to Chapter 7 also will necessarily be an individual.

The actual procedures that a debtor must follow to convert a case voluntarily are equally simple. To convert his or her case from Chapter 13 to Chapter 7, the debtor files a notice of conversion pursuant to § 1307(a).¹⁰⁷ No court order is required to effectuate the conversion, and the court clerk must deliver notice of the conversion to the United States Trustee.¹⁰⁸

ii. Interpreting Legislative Intent of Conversion Under §§ 706 & 1307

While the qualifications and procedure for conversion from Chapter 13 to Chapter 7 are straightforward, the consequences of conversion are far less clear. In unpacking the consequences of conversion, Congress's intent in enacting § 1307(a) would be instructive. Unfortunately, Congress rarely discusses its policy justifications behind allowing a debtor to convert from one chapter to another.

The House explained its intent for allowing debtors to convert from Chapter 7 to Chapter 13 when it first considered adding § 706 to the Bankruptcy Code.¹⁰⁹ "Subsection (a) of [§ 706] gives the debtor one absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. . . . The policy of the provision is that the debtor should always be given the opportunity to repay his debts."¹¹⁰ However, the House provided no explanations of its intent for allowing conversions unfettered from Chapter 13 to Chapter 7 when discussing § 1307.¹¹¹

Similarly, the 1978 Senate Report provided no express explanations regarding its intent in enacting § 1307; however, the report noted that the problems propelling a debtor into bankruptcy often do not go away after the debtor files under Chapter 13, inevitably leading to the ultimate dismissal or conversion of some cases even after the debtor has made some payments under his or her bankruptcy plan.¹¹² The 1978 Senate Report suggests that Congress intended to allow voluntary conversions

103. 11 U.S.C. § 109(a) (Westlaw through Pub. L. No. 116-8) ("[O]nly a person that resides or has a domicile, place of business, or property in the United States . . . may be a debtor under this title.").

104. See 11 U.S.C. § 109(b) (listing railroads, foreign and domestic insurance companies, and banks among the types of persons that cannot be debtors under Chapter 7).

105. *Id.* (only denying Chapter 7 status to railroads, domestic insurance companies, domestic banks, savings and loan associations, building and loan associations, homestead associations, and various other financial institutions, and certain foreign insurance companies and financial institutions). See also 11 U.S.C. § 109(a) (noting that municipalities may be debtors under Title 11).

106. 11 U.S.C. § 109(e) ("Only an individual . . . may be a debtor under Chapter 13 of this title.").

107. FED. R. BANKR. P. 1017(f)(3) ("A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a).").

108. *Id.*

109. H.R. REP. NO. 95-595, at 380 (1977).

110. *Id.*

111. *Id.* at 428. Subsequent revisions to the Bankruptcy Code have yielded no further discussion of the policy behind conversion. See, e.g., H.R. REP. NO. 98-882 (1984) (Conf. Rep.); H.R. REP. NO. 109-31(I), at 297-98 (2005).

112. S. REP. NO. 95-989, at 12 (1978).

from Chapter 13 to Chapter 7 because debtors will sometimes be unable to make all plan payments, especially if their financial situations either fail to improve or worsen after initially filing for bankruptcy.¹¹³

While inferences may need to be made to ascertain Congress's intent in enacting § 1307(a), its legislative history strongly suggests that § 1307(a) affords the debtor "an absolute right of conversion to a [Chapter 7] liquidation case. . . ."¹¹⁴ However, in 2007, the Supreme Court in *Marrama v. Citizens Bank of Massachusetts* threw this seemingly absolute right into question.¹¹⁵

In *Marrama*, the Court held that a Chapter 7 debtor forfeited his ability to convert to Chapter 13 because of his bad faith conduct when he made misleading and inaccurate statements on his schedules of assets.¹¹⁶ The Court agreed that § 706 authorizes a debtor's conversion from Chapter 7 to Chapter 13 and also noted the 1978 Senate Report described the right as being absolute.¹¹⁷ However, the Court held that considering the right to convert as absolute is an overstatement because a debtor's ability to convert is contingent on his or her qualification as a debtor under the destination chapter.¹¹⁸ Further, the Court reasoned that the right to convert is not absolute because a bankruptcy court's statutory ability to dismiss or convert a Chapter 13 proceeding for cause under § 1307(c) "is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13."¹¹⁹ The Court acknowledged that a bankruptcy court has broad authority "to take any action that is necessary or appropriate 'to prevent an abuse of process' as described in § 105(a) of the [Bankruptcy] Code" and also has "inherent power of every federal court to sanction 'abusive litigation practices.'"¹²⁰

While *Marrama* dealt with conversion from Chapter 7 to Chapter 13, similarities between both types of conversion suggest that applying the Court's logic in *Marrama* would apply equally to conversions from Chapter 13 to Chapter 7 for three reasons. First, §§ 706(a) and 1307(a) both state that a debtor "may convert" the case.¹²¹ Second, both § 706(d) and § 1307(g) prohibit a case from being converted unless the debtor may be a debtor under the destination chapter.¹²² Finally, §§ 1307(c) and 707(b)(1) authorize a court to dismiss or forcibly convert a case

113. Indeed, the rate of debtors successfully completing a Chapter 13 plan suggest most debtors' financial situations fail to improve or worsen after filing. Scott F. Norberg, *Consumer Bankruptcy's New Clothes: An Empirical Study of Discharge and Debt Collection in Chapter 13*, 7 AM. BANKR. INST. L. REV. 415, 439-40 (1999) (noting approximately one-third completion rate in empirical study); William C. Whitford, *The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy*, 68 AM. BANKR. L.J. 397, 411 (1994) (referring to 31% completion of Chapter 13 plans).

114. H.R. REP. NO. 95-595, at 428; S. REP. NO. 95-989, at 141 (section 1307's legislative history strongly "confirm[s], without qualification, the rights of a Chapter 13 debtor to convert the case to a liquidating bankruptcy case under Chapter 7 of Title 11, at any time"); see also *In re DeFrantz*, 454 B.R. 108, 113 (B.A.P. 9th Cir. 2011); but see discussion of *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007), *infra* notes 115-127 and accompanying text (discussing *Marrama*).

115. *Marrama*, 549 U.S. 365.

116. *Id.* at 371.

117. *Id.* at 372 (citing S. REP. NO. 95-989, at 94).

118. *Id.* at 372-74.

119. *Id.* at 373-74.

120. *Id.* at 375-76.

121. Compare 11 U.S.C. § 706(a) (2012), with 11 U.S.C. § 1307(a) (2012). In fact, the Court pointed out that the appellate court below focused on the statute's use of "may" instead of "shall" in its ruling. *Marrama*, 549 U.S. at 370-71.

122. Compare 11 U.S.C. § 706(d), with 11 U.S.C. § 1307(g).

under certain circumstances.¹²³ Given the similarities between §§ 706 and 1307, *Marrama*'s holding that a bankruptcy court cannot convert a Chapter 7 case dismissed due to bad faith to a Chapter 13 case should equally apply in cases converted from Chapter 13 to Chapter 7. Thus, legislative history suggests that Congress intended for Chapter 13 debtors to convert to Chapter 7 if they are unable to complete their bankruptcy plans, and the right to convert from Chapter 13 to 7 may be conditioned upon eligibility under the destination chapter and their lack of bad faith behavior.

One overarching issue that often arises with conversion is whether the provisions of the chapter under which the debtor originally filed or those of the destination chapter control the case. The Bankruptcy Code itself answers many of these questions, dictating, for example, that a conversion does not change the date of the filing of the debtor's petition or the commencement of the case.¹²⁴ Not all issues are resolved in the Bankruptcy Code, however, and courts occasionally have differed on how to resolve these unanswered questions.¹²⁵ One issue that has proven to divide the courts since BAPCPA's enactment is whether the means test applies to debtors that voluntarily convert their bankruptcy cases from Chapter 13 to Chapter 7.

III. THE DIVIDED COURTS

Since BAPCPA's enactment in 2005, at least 23 courts have addressed whether the means test applies to bankruptcy cases voluntarily converted from Chapter 13 to Chapter 7. These courts are divided, with a majority holding, for a variety of reasons that the means test applies to a converted case.¹²⁶ A robust minority of courts have held, however, that the means test does not apply.¹²⁷ The discussion below summarizes the most important cases addressing the question and outlines the main rationales that courts employ in adopting each view.

A. Courts Holding That the Means Test Applies to Converted Cases

This subsection summarizes four key opinions holding that the means test applies in converted cases: *In re Perfetto*,¹²⁸ *In re Kerr*,¹²⁹ *In re Willis*,¹³⁰ and *Pollitzer v. Gebhardt*.¹³¹ *In re Perfetto* is the first published opinion on the issue of whether the means test applies in converted cases, and *Pollitzer* is the first court of appeals opinion to address the issue.

123. Compare 11 U.S.C. § 1307(c), with 11 U.S.C. § 707(b)(1).

124. 11 U.S.C. § 348(a) (2012).

125. See, e.g., *In re Lindberg*, 735 F.2d 1087 (8th Cir. 1984) (ruling exemptions are determined as of the date of conversion), superseded by statute as stated in *In re Alexander*, 236 F.3d 431, 432 (8th Cir. 2001); *In re Ferretti*, 230 B.R. 883, 884 (Bankr. S.D. Fla. 1999), *aff'd*, 268 F.3d 1065 (11th Cir. 2001) (exemptions are determined as of the date of filing).

126. See cases cited *supra* notes 23–24.

127. See cases cited *supra* note 24.

128. 361 B.R. 27 (Bankr. D.R.I. 2007).

129. 2007 Bankr. WL 2119291 (Bankr. W.D. Wash. July 18, 2007).

130. 408 B.R. 803 (Bankr. W.D. Mo. 2009).

131. 860 F.3d 1334 (11th Cir. 2017).

i. In re Perfetto

In re Perfetto is the first published opinion on whether the means test applies in converted cases. On May 30, 2006, Christine Perfetto filed a voluntary Chapter 13 bankruptcy petition.¹³² Two weeks later, she filed Form B22C,¹³³ a statement of current monthly income and a calculation of disposable income, as well as other required schedules, revealing a monthly net cash flow loss coupled with \$13,855 in unsecured, non-priority consumer debt.¹³⁴ On the same day, Perfetto converted her case from Chapter 13 to Chapter 7, although nothing indicated any change in her circumstances.¹³⁵

Following her conversion, Perfetto failed to file Form B22A,¹³⁶ the means test form then applicable in Chapter 7 cases.¹³⁷ Consequently, the court issued a Notice of Missing Documents and ordered her to file Form B22A within 15 days.¹³⁸ Perfetto objected to the court's order, arguing that she was not required to file Form B22A because § 707(b) of the Bankruptcy Code does not apply to cases converted from Chapter 13 to Chapter 7.¹³⁹ Perfetto based this argument on a plain reading of § 707(b),¹⁴⁰ asserting that the statute's use of the word "filed" limited the court's authority to dismiss cases based on the means test only to cases originally filed under Chapter 7, not to cases filed under another chapter and then converted to Chapter 7.¹⁴¹ Perfetto argued that because she originally filed her petition under Chapter 13, not Chapter 7, the plain meaning of § 707(b) prohibited the court from dismissing her case based on the means test.¹⁴²

The United States Trustee argued, in response, that § 707(b), along with the then-interim Federal Rule of Bankruptcy Procedure 1007(b)(4),¹⁴³ required a debtor in a Chapter 7 case to file Form B22A regardless of how the debtor entered Chapter 7.¹⁴⁴ The United States Trustee argued that Perfetto's interpretation of § 707(b) conflicted with Congress's goal in enacting BAPCPA of determining whether a debtor was abusing the bankruptcy system.¹⁴⁵ Additionally, the United States Trustee argued that Perfetto's interpretation would create a loophole avoiding the scrutiny of

132. *In re Perfetto*, 361 B.R. at 28.

133. The contemporary equivalent of this form is Form 122C-1. *See Means Testing*, *supra* note 52.

134. *In re Perfetto*, 361 B.R. at 28.

135. *Id.* at 29.

136. The contemporary equivalent of this Form is Form 122A-1. *See Means Testing*, *supra* note 52.

137. *In re Perfetto*, 361 B.R. at 29.

138. *Id.*

139. *Id.* Perfetto alternatively argued that even if she was required to file Form B22A, her filing of Form B22C already established that her income was below the state's median, so filing Form B22A would serve no purpose and she should be excused from the requirement. *Id.*

140. "After notice and a hearing, the court . . . 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 an abuse of the provisions of this chapter." 11 U.S.C. § 707(b)(1) (2012) (Westlaw through Pub. L. No. 116-8) (emphasis added).

141. *In re Perfetto*, 361 B.R. at 30.

142. *Id.*

143. The current text of the rule reads, "Unless §707(b)(2)(D) applies, an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by §707(b), prepared as prescribed by the appropriate Official Form." FED. R. BANKR. P. 1007(b)(4).

144. *In re Perfetto*, 361 B.R. at 30.

145. *Id.*

the means test by allowing debtors to file under Chapter 13 and then immediately convert to Chapter 7.¹⁴⁶

In holding that the means test applies to converted cases, the court rejected Perfetto's simplistic interpretation in favor of a common sense approach, noting that the Bankruptcy Code must be read as a whole.¹⁴⁷ Specifically, the court noted that while § 707(b) on its face applies only to cases filed under Chapter 7, § 348(a) provides that conversion of a case from one chapter to another "constitutes an order for relief under the chapter to which the case is converted, but . . . does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief."¹⁴⁸ The court cited a number of cases explaining that the usual interpretation of § 348(a) is that a case converted from Chapter 13 to Chapter 7 is deemed to be filed under Chapter 7 on the date on which the original Chapter 13 petition was filed.¹⁴⁹ Finally, the court agreed with the United States Trustee that then-interim Rule 1019(2) provided a new time period for filing substantial abuse motions under § 707(b) triggered by the conversion of a case from Chapter 13 to Chapter 7, and that this new time period for converted cases would be meaningless and lead to an absurd result if debtors in cases converted from Chapter 13 to Chapter 7 did not have to comply with the means test.¹⁵⁰

Finally, the court expressed some sympathy for Perfetto's point that applying the means test to cases converted from Chapter 13 to Chapter 7 might occasionally lead to strange results, particularly if the conversion occurs months or years after the initial Chapter 13 filing.¹⁵¹ Because the means test in such a case would look to the debtor's income for the six months prior to the initial Chapter 13 filing, the analysis might not reflect the debtor's then-current financial situation at the time of conversion.¹⁵² However, this hypothetical situation was not applicable in Perfetto's situation because she converted nearly immediately after filing her initial petition; thus, the possibility of incongruous results did not exist.¹⁵³ Ultimately, the court left open the possibility of contrary holdings in the future, explaining that it would consider similar cases in the future on an individual basis.¹⁵⁴

ii. *In re Kerr*

In re Kerr was a consolidated opinion addressing whether the means test applied in two converted cases. The first debtor in this case, Stephanie Kallberg, filed a Chapter 13 petition on August 25, 2006, together with the required Form B22C.¹⁵⁵

146. *Id.*

147. *Id.* at 29–30.

148. *Id.* at 30; 11 U.S.C. § 348(a) (2012).

149. *In re Perfetto*, 361 B.R. at 30–31 (citing *Resendez v. Lindquist*, 691 F.2d 397, 399 (8th Cir. 1982)); *In re Grydzuk*, 353 B.R. 564, 568 (Bankr. N.D. Ind. 2006); *In re Sours*, 350 B.R. 261, 268 (Bankr. E.D. Va. 2006) (section 348(a) "mandates that a case which has been converted to Chapter 7 from Chapter 13 . . . is deemed to be 'filed under' Chapter 7 on the date on which the Chapter 13 was filed") (internal citations omitted); *In re Capers*, 347 B.R. 169, 171–72 (Bankr. D.S.C. 2006). *See also In re Lyons*, 162 B.R. 242, 244 (Bankr. E.D. Mo. 1993).

150. *In re Perfetto*, 361 B.R. at 31.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *In re Kerr*, 2007 WL 2119291, at *1 (Bankr. W.D. Wash. July 18, 2007). Form B22C's contemporary equivalent is Form 122C-1. *See Means Testing, supra* note 52.

Her Chapter 13 plan proposed \$670 monthly payments over a 60-month period, but she was unable to confirm a plan or make the required monthly plan payments.¹⁵⁶ As a result, approximately six months later, she converted her case to Chapter 7.¹⁵⁷

The second set of debtors, Michael and Dawna Kerr, filed their Chapter 13 petition on July 17, 2006.¹⁵⁸ Their Form B22C showed a monthly disposable income of \$5,977.06, and their confirmed Chapter 13 plan required \$5,500 in monthly payments.¹⁵⁹ For reasons described by the court simply as economic problems, the Kerrs were unable to make these payments for very long, and they converted their case to Chapter 7 approximately eight months after filing.¹⁶⁰

The court noted that each case presented three issues: (1) whether the means test applies to cases converted from Chapter 13 to Chapter 7; (2) if so, whether the Bankruptcy Code and Rules required such debtors to file Form B22A¹⁶¹; and (3), if so, whether Form B22A should reference income and expenses as they existed on the original petition date or on the conversion date.¹⁶²

As in *Perfetto*, the debtors in *Kerr* argued that the plain language of § 707(b), allowing the court to dismiss for abuse “a case filed by an individual debtor under this chapter,”¹⁶³ indicated that the means test applied only to cases initially filed under Chapter 7.¹⁶⁴ The United States Trustee, meanwhile, argued that “under this chapter” only modified “case,” not “filed,” so the means test applied to any case under Chapter 7.¹⁶⁵

In agreeing with the United States Trustee, the court noted that, prior to BAPCPA, courts universally applied § 707(b) to cases converted from Chapter 13 to Chapter 7, and BAPCPA did not change the interpretation of the phrase “filed by an individual debtor under this chapter.”¹⁶⁶ The court also stated that the word “filed” was not limited to the initial filing of a case, but included other actions to enter a legal document on an official public record, such as a docket.¹⁶⁷ Under this meaning of “filed,” the court explained that a case converted from Chapter 13 to Chapter 7 is filed in the sense it is entered on the court’s docket under Chapter 7 when the debtor filed a motion to convert.¹⁶⁸

The court’s analysis also noted that, as the court did in *Perfetto*, § 348(a) retained the original filing date for converted cases but otherwise treated converted cases as if a debtor had originally filed his or her case under the new chapter.¹⁶⁹ The

156. *In re Kerr*, 2007 WL 2119291, at *1. Kerr could not get a plan confirmed because, as a real estate agent earning her income primarily based on commissions, she could not make regular plan payments or confirm a plan. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Form B22A’s contemporary equivalent is Form 122A-1. *See Means Testing, supra* note 52.

162. *Id.*

163. 11 U.S.C. § 707(b)(1) (Westlaw through Pub. L. No. 116-8).

164. *In re Kerr*, 2007 WL 2119291, at *2.

165. *Id.* at *2.

166. *Id.* at *3; 11 U.S.C. § 707(b)(2). *See, e.g., In re Morris*, 153 B.R. 559, 563–65 (Bankr. D. Or. 1993) (case converted from Chapter 13 to Chapter 7 dismissed under Section 707(b)); *In re Traub*, 140 B.R. 286, 291 (Bankr. D.N.M. 1992) (dismissal under § 707(b) of a case converted from Chapter 11 to Chapter 7).

167. *In re Kerr*, 2007 WL 2119291, at *3.

168. *Id.*

169. *Id.*

court also pointed out that § 521(a)(1)(B)(ii) and Rule 1007(b) require a debtor to file a schedule of current income and expenditures as of the time of conversion.¹⁷⁰

Finally, the *Kerr* court addressed one inconsistency that caused a court in another case to hold that the means test did not apply to converted cases.¹⁷¹ The *Kerr* court observed that § 342(d) required the clerk to give notice to creditors within ten days after the filing of the petition if a presumption of abuse has arisen, but § 348(c) says that § 342 applies to a converted case as if the conversion order is the order for relief, not the date of the filing of the petition.¹⁷² The court noted the absence of guidance detailing how the clerk should comply with his or her duty in a converted case to give notice that the presumption of abuse has arisen because the petition date might be far more than ten days separated from the date of the conversion order.¹⁷³ While acknowledging that the other court regarded this as proof that the means test was not applicable to converted cases, the *Kerr* court decided that this was merely sloppy drafting.¹⁷⁴

After holding the means test applied to converted cases, the court also held that debtors in such cases are required to file Form B22A.¹⁷⁵ In addressing the issue of whether such debtors should include in Form B22A their income and expenses as of the initial date of filing or the later date of conversion, the court noted that both §§ 707(b)(2)(C) and 521 require debtors to disclose their “current monthly income,” which § 101(10A) defines as a debtor’s average monthly income for the six-month period preceding “the date of the commencement of the case.”¹⁷⁶ Because § 348(a) does not change the date of the commencement of the case when a case is converted, the court determined that a debtor’s current monthly income is based on the date that the initial petition is filed.¹⁷⁷

Regarding expenses, the court acknowledged that while neither “monthly expenses” nor “current expenditures” is defined in the Bankruptcy Code or Rules, § 707(b) refers to “Other Necessary Expenses . . . as in effect on the date of the order for relief.”¹⁷⁸ Again noting that § 348(a) preserves the original date of the order for relief, the court ruled that the debtors’ expenses were based on the date of filing of the petition, especially because reviewing the debtors’ income and expenses from different time periods would be illogical.¹⁷⁹ The court noted that this framework might not accurately reveal the debtor’s financial situation as of the date of conversion if conversion happened long after the initial petition filing date, but noted that this risk would depend on when conversion occurred in a given case.¹⁸⁰ The court seemed to leave open the possibility that it might rule otherwise under different factual circumstances.¹⁸¹

170. *Id.* at *4.

171. *Id.*; *In re Fox*, 370 B.R. 639, 645 (Bankr. D.N.J. 2007); *see also infra* notes 241–265 and accompanying text.

172. *In re Kerr*, 2007 WL 2119291, at *4.

173. *Id.*

174. *Id.*; *In re Fox*, 370 B.R. at 645.

175. *In re Kerr*, 2007 WL 2119291, at *4.

176. *Id.*

177. *Id.*

178. *Id.* at *5; 11 U.S.C. § 707(b)(2)(A)(ii)(I) (Westlaw through Pub. L. No. 116-8).

179. *In re Kerr*, 2007 WL 2119291, at *5.

180. *Id.*

181. *Id.*

Finally, the court addressed the debtor's contention that if the means test applies to converted cases, filing Form B22A is unnecessary because it would merely repeat the information contained in the already-filed Form B22C.¹⁸² The court rejected this argument, noting the differences between the two forms, such as the treatment of spousal income, the availability of certain disabled veteran exclusions, and the deduction of certain administrative costs.¹⁸³ Thus, the court required the debtors to file Form B22A upon conversion.¹⁸⁴ Similarly, the court dismissed the debtors' argument that applying the means test to converted cases would lead to debtors being harassed by creditors moving for dismissal under the abuse provisions of § 707(b).¹⁸⁵ The court pointed out that § 707(b) gives rise only to a presumption of abuse, which can be rebutted by a debtor's showing of changed financial circumstances between the petition filing date and the conversion date.¹⁸⁶

iii. In re Willis

The first Missouri court to face the issue of whether the means test applies in a case converted from Chapter 13 to Chapter 7 is *In re Willis*. In *Willis*, the debtor, Jason Willis, filed a voluntary Chapter 13 bankruptcy petition on May 9, 2008.¹⁸⁷ Willis then moved to convert the case to Chapter 7 on September 5, 2008 and concurrently filed Form B22A, although he argued that filing it was unnecessary.¹⁸⁸ The United States Trustee moved to dismiss the case for abuse under the means test, noting that the presumption of abuse in this particular case would arise if the debtor had more than \$182.50 in monthly disposable income and if, at the time he filed, Willis had \$2,627.86 in monthly disposable income.¹⁸⁹

At the hearing on the motion to dismiss, the United States Trustee conceded that Willis's circumstances had changed, and that he only had \$474.55 of monthly disposable income by the time he converted his case.¹⁹⁰ Willis argued that his income and that of his non-filing spouse had severely declined and would continue to drop in upcoming months, and that he had \$250 of monthly child care expenses that the United States Trustee would not consider in the means test calculation because he could not provide sufficient documentation.¹⁹¹

Similar to the above cases, Willis argued that the plain language of § 707(b) precluded application of the means test to converted cases.¹⁹² The United States Trustee argued that other provisions of the Bankruptcy Code make it clear that converted cases are deemed to have been filed under Chapter 7.¹⁹³

182. *Id.*

183. *Id.*

184. *Id.* at *6.

185. *Id.*

186. *Id.*

187. 408 B.R. 803, 805 (Bankr. W.D. Mo. 2009).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 806.

193. *Id.* The court makes no mention of which other provisions the United States Trustee referenced.

The court noted that a fairly-even split had developed on this issue among bankruptcy courts, citing *In re Ryder*¹⁹⁴ and *In re Fox*,¹⁹⁵ holding that the means test does not apply to converted cases, and *Kellett*,¹⁹⁶ *Kerr*, and *Perfetto* reaching the opposite conclusion.¹⁹⁷ The court noted that all five courts based their rulings on the plain language of the statute and on advancing the policy goals of the Bankruptcy Code.¹⁹⁸

The court raised and dismissed the three principal reasons the *Ryder* and *Fox* courts relied on in determining that the means test did not apply in converted cases.¹⁹⁹ First, the court rejected the rationale that because § 707(b) does not explicitly refer to converted cases, then the means test does not apply.²⁰⁰ The court rejected this rationale because a “broader, contextual interpretation” of the Bankruptcy Code strongly suggests that § 707(b) applies in converted cases.²⁰¹ The court also noted that § 1328(f)²⁰² references cases “filed under Chapter 7” and has been interpreted nearly unanimously to apply to converted cases.²⁰³ The court found particularly persuasive the “apparently unanimous agreement among courts that, for purposes of [§] 1328(f), the phrase ‘filed under Chapter 7’ encompasses cases converted under Chapter 13 to Chapter 7.”²⁰⁴ Given the substantial phraseology between §§ 707(b) and 1328(f), the court applied the statutory canon, “Identical words used in different parts of the same statute generally are presumed to have the same meaning.”²⁰⁵ The court then agreed with the *Kerr* court that “filed” means more than just filing the initial petition and also includes other actions that put a case on a court’s docket.²⁰⁶

Second, the *Willis* court determined that when examined in conjunction with § 348(a), § 348(b) does not limit when conversion is treated as the order for relief under the destination chapter, but rather only limits when conversion changes the *date* of the filing of the petition, the commencement of the case, or the order for relief.²⁰⁷ The court found further support for its argument in an Eighth Circuit case dealing with the timing for determining what property is included in the debtor’s estate. In that case, the Eighth Circuit held that under § 348(a), “when there is a

194. *In re Ryder*, 2008 WL 3845246 (Bankr. N.D. Cal. Aug. 18, 2008).

195. See *infra* notes 241–265 and accompanying text.

196. 379 B.R. 332 (Bankr. Or. 2007).

197. *In re Willis*, 408 B.R. at 806.

198. *Id.*

199. *Id.* at 806–07.

200. *Id.* at 809.

201. *Id.*

202. Section 1328(f) addresses the time limitations for when a discharge may be obtained under Chapter 13, similar to § 707(b). 11 U.S.C. § 1328(f) (2012) (“Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—(1) in a case filed under chapter 7, 11, or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or (2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.”).

203. *In re Willis*, 408 B.R. at 809–10.

204. *Id.* at 809 (citing *In re Resendez*, 691 F.2d 397, 399 (8th Cir. 1982)); see also *In re Knighton*, 355 B.R. 922, 925–26 (Bankr. M.D. Ga. 2006); *In re Grydzuk*, 353 B.R. 564, 569 (Bankr. N.D. Ind. 2006); *In re Sours*, 350 B.R. 261, 267–68 (Bankr. E.D. Va. 2006); *In re Capers*, 347 B.R. 169, 172–73 (Bankr. D.S.C. 2006).

205. *In re Willis*, 408 B.R. at 809.

206. *Id.* at 808–09.

207. *Id.* at 809.

conversion, the debtors are deemed to have *filed* a Chapter 7 case at the time the Chapter 13 case was filed.”²⁰⁸

Finally, the court rejected the rationale that applying the means test to converted cases may lead to absurd results because the calculation of the debtor’s current monthly income is made as of the date of filing the petition; the argument goes that this could potentially lead to cases in which this calculation is no longer representative of the debtor’s then-current income and would ultimately force a debtor back into Chapter 13 or force the dismissal of his or her case.²⁰⁹ The court, in rejecting the absurd results argument, explained that a debtor can circumvent the problem by following the steps in § 707(b)(2)(B)²¹⁰ to establish special circumstances justifying an adjustment to the calculation of his or her income and expenses.²¹¹ The court also noted that the United States Trustee can exercise discretion under § 704(b)(2)²¹² and elect not to pursue dismissal in light of a debtor’s changed circumstances.²¹³

Ultimately, the court held that the means test applied to Willis’s case and the presumption of abuse applied.²¹⁴ The court noted that Willis had at least \$400 of disposable monthly income and failed to produce sufficient documentation to allow Willis’s claimed \$250 monthly childcare expense, putting him over the abuse presumption threshold of \$182.50.²¹⁵ Because Willis failed to prove any special circumstances meriting rebuttal of the presumption of abuse, the court granted the United States Trustee’s motion to dismiss.²¹⁶

iv. Pollitzer v. Gebhardt

Debtor Stratton Pollitzer filed a voluntary Chapter 13 bankruptcy petition in March 2011.²¹⁷ Two years later, Pollitzer converted his case to Chapter 7.²¹⁸ The United States Trustee argued that the debtor had substantial disposable income and could pay a significant amount to his unsecured creditors.²¹⁹ Pollitzer responded that the means test does not apply in converted cases.²²⁰

Pollitzer based his argument on the plain language of § 707(b). Namely, he argued that § 707(b) applies only to cases originally filed “under this chapter”—

208. *Id.* at 809–10 (quoting *Resendez v. Lindquist*, 691 F.2d 397, 399 (8th Cir. 1982)) (emphasis in original).

209. *Id.* at 810.

210. “In any proceeding brought under [§ 707(b)], the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.” 11 U.S.C. § 707(b)(2)(B)(i) (Westlaw through Pub. L. No. 116-8).

211. *In re Willis*, 408 B.R. at 810.

212. “The United States trustee . . . shall . . . either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate.” 11 U.S.C. § 704(b)(2) (2012).

213. *In re Willis*, 408 B.R. at 810.

214. *Id.*

215. *Id.*

216. *Id.* at 811.

217. *Gebhardt v. Pollitzer*, 860 F.3d 1334, 1337 (11th Cir. 2017).

218. *Id.*

219. *Id.*

220. *Id.*

meaning cases only originally filed as Chapter 7 petitions.²²¹ Conversely, the United States Trustee argued that “under this chapter” modifies the immediately adjacent phrase—“an individual debtor”—and because Pollitzer was a Chapter 7 individual debtor, § 707(b) applies.²²²

The Eleventh Circuit affirmed a bankruptcy court’s decision to grant the United States Trustee’s motion to dismiss a converted debtor’s bankruptcy case for abuse because the debtor failed the means test.²²³ “Because there are unmistakable indications in the [Bankruptcy] Code that Congress intended § 707(b) to apply to converted cases,” the Eleventh Circuit rejected Pollitzer’s textual argument.²²⁴ The court first reasoned that the textual evolution of § 707 strongly suggested that the means test applied in a converted case.²²⁵ While bankruptcy courts always had the option to dismiss petitions “for cause,” Congress added § 707(b) in 1984 to permit dismissal of a Chapter 7 case for petitions that courts found “substantially abusive” because most courts were unlikely to dismiss cases for cause where a Chapter 7 debtor had substantial income to pay creditors.²²⁶ Twenty years later, Congress found debtors were still filing Chapter 7 cases when they ostensibly had disposable income available to pay creditors; as a result, in 2005 Congress lowered § 707(b)’s substantially abusive standard to merely abuse.²²⁷ According to the Eleventh Circuit, § 707(b)’s evolution strongly suggested that Congress “intended the current version of § 707(b) to be a potent tool for bankruptcy courts to expeditiously dismiss Chapter 7 petitions filed by debtors with income sufficient to pay their creditors.”²²⁸

The court also determined that Pollitzer’s position would dilute § 707(b)’s potency because it would allow a debtor to file under Chapter 13 and then immediately convert to Chapter 7 because of the debtor’s automatic right to convert a Chapter 13 case, thereby sidestepping the means test.²²⁹ The court was similarly unconvinced of Pollitzer’s argument that § 105(a) constituted a sufficient deterrent to prevent abuse because a debtor could be found to have abused the bankruptcy system by converting the case immediately after filing.²³⁰ This argument was inconsistent with Congress’s initial adoption of § 707(b) because it became concerned that bankruptcy courts were effectively abdicating their job of dismissing abusive Chapter 7 bankruptcy petitions.²³¹

The court held that Congress excluded converted cases “from the reach of other sections of the Bankruptcy Code, but not from § 707(b).”²³² According to the court, Congress’s exclusions are presumed to be intentional.²³³ Congress’s intent to include converted cases in § 707(b) is also reinforced by the fact that Congress

221. *Id.*

222. *Id.* at 1338.

223. *Id.* at 1336–37.

224. *Id.* at 1338–39.

225. *Id.*

226. *Id.* at 1338; Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 335 (1984).

227. *In re Gebhardt*, 860 F.3d at 1338–39.

228. *Id.* at 1339.

229. *Id.*

230. *Id.*

231. *Id.* at 1338.

232. *Id.* at 1340 (citing as examples 11 U.S.C. §§ 1208(b), 1307(b)).

233. *Id.*

expressly exempted disabled veterans or those recently released from active duty from the means test.²³⁴

Finally, the Eleventh Circuit considered it persuasive that Congress left Rule 1019(2)(A) untouched when it passed BAPCPA.²³⁵ This rule sets a new time period for filing a § 707(b) motion to dismiss in a case converted from Chapter 13 to Chapter 7.²³⁶ Because Rule 1019(2)(A) was unchanged by BAPCPA and there was no clear indication Congress intended to modify the application of this rule, the court held that converted cases were subject to the means test.²³⁷

As the above summary of cases demonstrates, courts adopting the view that the means test applies in converted cases uniformly believed that, when a case is converted to another chapter, it is deemed filed under the destination chapter. As a result, each court found that treating the case as filed under Chapter 7 required it to apply the means test to determine whether the filing constituted abuse of the bankruptcy system. Additionally, these courts found it more important to prevent the potential abuse of the bankruptcy system by debtors filing under Chapter 13 and then immediately converting to Chapter 7 than to worry about how to calculate the debtor's disposable income possibly years after their initial bankruptcy filing. By contrast, the cases summarized below find that the means test does not apply in converted cases, based largely on administrative concerns over the logistics of calculating income and expenses under the means test.

B. Courts Holding That the Means Test Does Not Apply in Converted Cases

This subsection summarizes the first published opinions to hold that the means test does not apply in converted cases: *In re Fox*.²³⁸ It then summarizes two key opinions adopting this view: *In re Layton*²³⁹ and *In re Dudley*.²⁴⁰

i. In re Fox

In *Fox*, the debtor, Sharon Fox, filed a Chapter 13 petition and quickly fell behind on her plan payments because she was laid off from her job.²⁴¹ She then voluntarily converted her case to Chapter 7 approximately three months after filing for bankruptcy.²⁴² The bankruptcy clerk's office notified Fox that if she did not file Forms 122A and 122B²⁴³ the court would dismiss her case.²⁴⁴ Fox filed a motion for the court to determine that the means test did not apply in cases converted to Chapter 7, which the United States Trustee opposed.²⁴⁵

234. *Id.*; 11 U.S.C. § 707(b)(2)(D) (Westlaw through Pub. L. No. 116-8).

235. *In re Gebhardt*, 860 F.3d at 1340; FED. R. BANKR. P. 1019(2)(A).

236. *In re Gebhardt*, 860 F.3d at 1340.

237. *Id.*

238. 370 B.R. 639 (Bankr. D.N.J. 2007).

239. 480 B.R. 392 (Bankr. M.D. Fla. 2012).

240. 405 B.R. 790 (Bankr. W.D. Va. 2009).

241. *In re Fox*, 370 B.R. at 640–41.

242. *Id.*

243. The contemporary equivalents of these forms are Form 122A-1 and Form 122A-2. See *Means Testing*, *supra* note 52.

244. *In re Fox*, 370 B.R. at 640–41.

245. *Id.* at 641.

The court held that Congress plainly intended to limit the reach of the means test to case originally commenced under Chapter 7, therefore excluding converted cases.²⁴⁶ Thus, the means test did not apply.²⁴⁷ In its analysis, the court first determined that § 707(b)(1)'s language, authorizing a court to dismiss a case "filed by an individual debtor under this chapter" if the presumption of abuse arises, clearly and explicitly refers to cases filed under Chapter 7.²⁴⁸ Section 707, the court concluded, "is plain in its mandate that a debtor 'filing' in [C]hapter 7 be subject to the means test computations."²⁴⁹ The court rejected the United States Trustee's assertion that "filed," as used in § 707(b)(1), should be read to include converted cases because §§ 707 and 342 repeatedly use the word "filed" and every other use of "filed" in those sections suggests application to converted cases.²⁵⁰ Section 707's silence regarding converted cases implies § 707(b)(2) only requires debtors who originally filed a bankruptcy case under Chapter 7 to complete the means test.²⁵¹ As further evidence of Congress's intent to exclude converted cases from means test, the court noted that because § 707(b)(1) provides for dismissal or conversion to Chapter 11 or Chapter 13 if the court determines that the debtor was unable to rebut the presumption of abuse, "the drafters were contemplating the effect of conversion" and, therefore, did not intend for the means test to apply to converted cases.²⁵²

Additionally, the court reasoned that the lack of reference to § 707(b) in § 348(b), defining the sections of the Bankruptcy Code where "order for relief" refers to the conversion of a case, suggested that Congress did not intend for the means test to apply in converted cases.²⁵³ The court also declined to find then-interim Rule 1007(b)(4)'s "in a [C]hapter 7 case" language, requiring a debtor to file a statement of current monthly income and then complete the means test if her income is above the applicable median family income, relevant to Fox.²⁵⁴ Reasoning that rules cannot "abridge, enlarge[,] or modify, any substantive right," the court refused to "contradict and supercede [*sic*] the unambiguous words of" § 707(b).²⁵⁵ Because the court found § 707(b)(1)'s language unambiguous, it declined to consider Congress's intent in enacting BAPCPA.²⁵⁶

The court rejected the United States Trustee's reliance on the *Perfetto*²⁵⁷ decision on two grounds.²⁵⁸ First, it determined that the *Perfetto* court's reliance on § 348(a) language providing that conversion renders a case deemed filed under the destination chapter was irrelevant because conversion did not change the petition

246. *Id.* at 643.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* at 645–46.

251. *Id.*

252. *Id.* at 643 ("The fact that the section provides for the dismissal or conversion to chapter 13 or 11 where the court finds abuse is an indication that the drafters were contemplating the effect of conversion specifically in this subsection. If the drafters intended for cases converted to chapter 7 to be subject to this new requirement, they did not say so in the clear language of the section. Moreover, it would also seem counterintuitive to read the section to apply to those cases converted from chapter 13 where the section provides for conversion to chapter 13 as a possible consequence of a finding of 'abuse.'") (emphasis in original).

253. *Id.* at 643–44.

254. *Id.* at 644–45.

255. *Id.* at 645.

256. *Id.* at 646.

257. See *supra* notes 132–154 and accompany text.

258. *In re Fox*, 370 B.R. at 647.

date, the commencement of the case, or the order for relief.²⁵⁹ Second, the court rejected the *Perfetto* court's conclusion that Congress intended that converted debtors complete the means test "so that a review of the [d]ebtor's financial condition could be conducted within the renewed filing period for motions under [§] 707(b)" as then-interim Rule 1019(2) required.²⁶⁰ The court refused to give this conclusion weight because it would give interpretive precedent to a rule contradicting § 707(b)'s plain meaning.²⁶¹

Finally, the court rejected the United States Trustee's argument that refusing to apply the means test in a converted case creates a loophole.²⁶² The court cited other sections of the Bankruptcy Code, including §§ 1307(c) and 105(a), and the Supreme Court's decision in *Marrama v. Citizens Bank*²⁶³ for the proposition that the court has ample authority to dismiss cases filed in bad faith.²⁶⁴ Ultimately, the court held that the means test did not apply.²⁶⁵

ii. *In re Layton*

In *In re Layton*, the debtor, Ronda Layton, initially filed a Chapter 13 petition but converted her case to Chapter 7 when she lost her job nearly two years after filing her case.²⁶⁶ Layton became re-employed after converting her case and began earning enough monthly disposable income to cause her to fail the means test.²⁶⁷ The United States Trustee filed a motion to dismiss her case under § 707(b)(1).²⁶⁸

The court made the initial determination that § 707(b)(1) was not plainly ambiguous.²⁶⁹ Thus, it refused to look further into whether Congress's intent in enacting BAPCPA was to require an individual debtor to have filed a Chapter 7 petition for the means test to apply.²⁷⁰ The court then raised and dismissed the rationales of courts adopting the majority view.²⁷¹

First, the court rejected interpreting § 707(b)(1)'s "filed" as modifying "debtor," because doing so would render superfluous the section's use of the phrase "under this chapter."²⁷² Doing so, according to the court, would create "a strange irony . . . that . . . presupposes the drafters took great care and precision in drafting the language of § 707(b), but simultaneously ignores the bulk of the superfluous language left in the wrath."²⁷³

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 648.

263. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); see also *supra* notes 115–20 and accompanying text (discussing *Marrama*).

264. *In re Fox*, 370 B.R. at 648.

265. *Id.*

266. 480 B.R. 392, 394 (Bankr. M.D. Fla. 2012).

267. *Id.*

268. *Id.*

269. *Id.* ("The section does not appear to be ambiguous on its face. A plain and rational interpretation suggests that an individual debtor must have voluntarily filed his or her original petition under chapter 7 in order for § 707(b) to apply.")

270. *Id.*

271. *Id.* at 393–97.

272. *Id.* at 395 (citing *Justice v. Advanced Control Solutions, Inc.*, 2008 WL 4368668 (W.D. Ark. Sep. 22, 2008), *aff'd*, 639 F.3d 838 (8th Cir. 2011)).

273. *Id.*

Second, the court also rejected an expansive definition of “filed.”²⁷⁴ It noted that some courts holding that the means test applies in converted cases defined “filed” as meaning entering a legal document on an official public record.²⁷⁵ Thus, those courts posited that cases would be deemed filed under Chapter 7 when they are converted.²⁷⁶ However, the court rejected this reasoning and held that if it expansively defined “filed,” doing so would render § 707(b)’s language “under this chapter” superfluous.²⁷⁷ The court also reasoned that an expansive definition of “filed” ran contrary to its ordinary meaning and use in other Bankruptcy Code provisions referring to the initial petition filing.²⁷⁸

Third, in rejecting *Perfetto*’s determination that applying § 707(b)(1)’s plain meaning was contrary to legislative intent and could lead to absurd results,²⁷⁹ the court determined, without explanation, that adopting *Perfetto*’s common sense approach would “create an unreasonably unjust result for debtors.”²⁸⁰ Although it acknowledged the *Perfetto* court’s suggestion that § 707(b) would not be applied uniformly, the court did not provide an argument against the *Perfetto* court’s determination that excluding converted cases from the means test was contrary to legislative intent or would lead to absurd results.²⁸¹

The court reasoned that any potential abuses of the means test in a converted case could be minimized by a dismissal for cause under § 707(a).²⁸² Moreover, the court argued that its authority to dismiss a case for bad faith under § 105(a) and its “inherent power to sanction abusive litigation practices” would prevent debtors from abusing the bankruptcy process.²⁸³ The court held that using a debtor’s income history for the six-month period prior to filing was potentially detrimental to debtors, and it posited that the risks inherent in that determination outweighed the possibility that debtors might use conversion to avoid application of the means test.²⁸⁴

The court also acknowledged the common-sense approach holding that the means test applies in converted cases does not address the inherent conflict its interpretation creates between §§ 707(b) and 342(d).²⁸⁵ While acknowledging that some courts have regarded this issue as “sloppy drafting,” the court determined that its plain language approach is preferable because it avoids the issue altogether.²⁸⁶

Finally, the court recognized that its approach would render Rule 1019(2) superfluous.²⁸⁷ However, the court reasoned that rendering a procedural rule meaningless was better than rendering a statutory provision, such as § 342(d),

274. *Id.* at 395–96.

275. *Id.*

276. *Id.* at 396 (explaining the interpretive consequence of the majority view’s expansive definition of “filed”).

277. *Id.*

278. *Id.* (citing 11 U.S.C. §§ 342(d), 707(b)(3), 707(b)(4), 707(c)(2), and 707(c)(3) for their use of “filed” or “filing”).

279. *Id.* at 396–97; *In re Perfetto*, 361 B.R. 27, 29–30 (Bankr. D.R.I. 2007).

280. *In re Layton*, 480 B.R. at 397.

281. *Id.*

282. *Id.*

283. *Id.* at 398; 11 U.S.C. § 105(a) (2012).

284. *In re Layton*, 480 B.R. at 398–99.

285. *Id.* at 398; 11 U.S.C. § 707(b) (Westlaw through Pub. L. No. 116-8); 11 U.S.C. § 342(d) (2012) (providing that the court “clerk shall give written notice to all creditors not later than 10 days after the date of the filing of the petition that the presumption of abuse has arisen” under § 707(b)).

286. *In re Layton*, 480 B.R. at 398; *In re Kerr*, 2007 WL 21192921, at *4 (Bankr. W.D. Wash. July 18, 2007).

287. *In re Layton*, 480 B.R. at 399.

superfluous.²⁸⁸ The court noted that both views on the applicability of the means test in converted cases rely on contradictions and inconsistencies in construing provisions of the Bankruptcy Code and its rules,²⁸⁹ but it ultimately held that Layton did not have to file Form B22A because the means test did not apply to her converted case.²⁹⁰

iii. *In re Dudley*

Less than two months after filing, the Dudleys converted their case to Chapter 7 in response to the Chapter 13 trustee's motion to dismiss or convert their case for cause because they had scheduled unreasonable expenses.²⁹¹ The United States Trustee also filed a motion to dismiss under § 707(b)(1), alleging that the presumption of abuse arose under § 707(b)(2).²⁹² The debtors argued, in response to the United States Trustee's motion to dismiss, that § 707(b) did not apply to converted cases.²⁹³

In its analysis, the court rejected an interpretation of § 707(b)(1) that construed "filed" as modifying "debtor" because applying it would render § 707(b)(1)'s phrase "under this chapter" superfluous.²⁹⁴ Therefore, citing Fourth Circuit precedent holding that "filed under" as used in Bankruptcy Code § 1328(f)(2)²⁹⁵ means "initially filed," the proper statutory interpretation was that "under this chapter" modifies "filed," and "filed" does not modify "debtor."²⁹⁶

The court also reasoned that literal application of § 707(b)(1) did not produce an absurd result because it produced "fewer conflicts within the Bankruptcy Code as a whole" than the reasoning of opposing courts.²⁹⁷ Finally, the court reasoned that the plain language interpretation was not "demonstrably at odds" with congressional intent in enacting § 707(a) because any abusive conversion could be dealt with by the United States Trustee filing a motion to dismiss for cause under § 707(a).²⁹⁸

288. *Id.* at 399–400.

289. *Id.* at 393.

290. *Id.* at 400.

291. *In re Dudley*, 405 B.R. 790, 792 (Bankr. W.D. Va. 2009).

292. *Id.*

293. *Id.*

294. *Id.* at 793–94.

295. 11 U.S.C. 1328(f)(2) (2012) ("Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge—(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.").

296. *In re Dudley*, 405 B.R. at 794–95 (citing *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 277–78 (4th Cir. 2008)). Agreeing with other courts, including *In re Fox*, the court also reasoned that the plain meaning of § 707(b)(1) required avoiding an interpretation of § 348(a) that implies a converted case should be treated "as if" it had been filed under the destination chapter. *Id.* at 796–97; *In re Fox*, 370 B.R. 639, 645–46 (Bankr. D.N.J. 2007).

297. *In re Dudley*, 405 B.R. at 798. The court noted that courts holding that the means test applies in converted cases would create conflict with 11 U.S.C. § 342(d) (requiring the clerk of the court give notice to creditors within ten days after the filing of the petition if a presumption of abuse had arisen), and would require a presumption of abuse determination on an outdated Form B22A. *Id.* at 797–98. The court acknowledged, however, that its view conflicts with § 704(b)(1)(A), requiring the United States Trustee to make an abuse determination within ten days of the first meeting of creditors. *Id.* at 797; 11 U.S.C. § 704(b)(1)(A) (2012).

298. *In re Dudley*, 405 B.R. at 798–800.

The preceding cases reveal that courts are not as concerned about debtor abuse of the bankruptcy system by filing for Chapter 13 and immediately converting to Chapter 7 as a way to circumvent the means test. Instead, these cases stress the inability of courts to apply the means test fairly when the debtor converts from Chapter 13 to Chapter 7 years after the initial bankruptcy filing. These cases point out that a calculation would require debtors to use outdated income figures in calculating their current monthly income and it would make it impossible for court clerks to timely comply with their obligations under § 342(d). These cases, however, do not account for how their view makes it impossible for the United States Trustee to comply with its duties under § 704(b)(1)(A) or how its view renders Rule 1019(2)'s new time period for filing § 707(b) motions in converted cases superfluous.

Overall, the above summaries of cases holding that the means test does or does not apply in converted cases reveals that both views create significant interpretive problems. The next section of this article outlines what courts and Congress should do to resolve this issue.

IV. A MODEST PROPOSAL FOR HARMONIZING THE BANKRUPTCY CODE'S CONFLICTING STATUTORY LANGUAGE

At least 23 courts have addressed the issue of whether the means test applies in cases converted from Chapter 13 to Chapter 7, and yet they remain hopelessly divided. A majority of courts, including the Eleventh Circuit—the only court of appeals to have considered the issue—hold that the means test applies in converted cases. In doing so, however, these courts have faced difficult interpretive problems. While a majority of the courts held that the means test must apply in converted cases to prevent debtors from abusing the bankruptcy process by filing under Chapter 13 and immediately converting to Chapter 7, they have been forced to ignore or disregard contrary statutory language. For example, § 342(d) provides that the clerk of the court must give notice to creditors within ten days after the filing of the petition if a presumption of abuse had arisen.²⁹⁹ Because conversion might occur months or years after the original filing of the petition, the clerk would not be able to discharge his or her duty properly in such cases. Some courts have simply ignored this difficult issue of statutory interpretation; others have grappled with it and ultimately dismissed the issue as a case of sloppy drafting.³⁰⁰

Conversely, courts that have held that the means test does not apply in converted cases have also faced difficulty interpretive issues. They have argued that calculating monthly disposable income for purposes of the means test months or even years after the initial Chapter 13 bankruptcy filing can lead to absurd results, yet they have struggled with how to fit this view into contrary language in the Bankruptcy Code. For example, several of the courts adopting the minority view admitted that their interpretation of the conversion issue is at odds with § 704(b) of the Bankruptcy Code, which requires the United States Trustee to give notice of the presumption of abuse to creditors within ten days of the first creditors' meeting (not within ten days of the date of filing of the petition).³⁰¹ These courts have

299. 11 U.S.C. § 342(d) (2012).

300. *In re Kerr*, 2007 WL 2119291, at *5–6 (Bankr. W.D. Wash. July 18, 2007).

301. *In re Dudley*, 405 B.R. at 797–98.

acknowledged that their reliance on § 342(d) to bolster their argument that the Bankruptcy Code contemplates no application of the means test in converted cases conflicts with the language of section 704(b). They concluded, however, that this interpretation has led to fewer statutory conflicts on the conversion issue than the majority view.

Because either approach conflicts with longstanding provisions of the Bankruptcy Code, it is imperative on Congress to act to resolve the issue. This article adopts the view that the means test should apply in cases converted from Chapter 13 to Chapter 7, providing both statutory and policy justifications for its position. This article also details how Congress should amend the Bankruptcy Code, both to adopt this position and to eliminate difficult issues of statutory interpretation that courts have been forced to grapple with since the enactment of BAPCPA nearly 15 years ago.

A. *Statutory Arguments Favoring Application of the Means Test in Converted Cases*

Until Congress amends the Bankruptcy Code to make it clear that the means test applies in converted cases, courts should adopt the view espoused by the *Per-fetto* line of cases that the means test applies in converted cases.³⁰² Two statutory reasons strongly suggest that this view is a better reading of § 707(b) and the Bankruptcy Code than the view adopted by the court in *Fox* and its progeny.

The most compelling reason for applying the means test in converted cases is that, prior to BAPCPA, courts nearly uniformly applied § 707(b)'s other provisions to converted cases. Section 707(b)(1)'s language at issue, "filed by a debtor under this chapter," existed prior to BAPCPA,³⁰³ and BAPCPA did not change this language. Case law applying § 707(b)'s other provisions in a variety of converted cases prior to BAPCPA³⁰⁴ strongly suggests that the means test should apply to converted cases. Courts interpreting § 1328(f)'s "filed under Chapter 7" language similar to that of § 707(b) have also uniformly applied it to converted cases.³⁰⁵ Moreover, courts adopting the minority view ignore both lines of case law and, as a result, create a substantial interpretive flaw in their reasoning: determining that the means test does not apply in converted cases because of § 707(b)(1)'s "filed by a debtor under this chapter" language necessarily means that all of § 707(b) does not apply to converted cases.

While no court adopting the view that the means test does not apply in converted cases has directly held that § 707(b) is inapplicable to converted cases, one scholar has suggested that it would not apply.³⁰⁶ Denying application of § 707(b) to converted cases is inconsistent with case law across the United States applying it to converted cases prior to BAPCPA.³⁰⁷ Additionally, refusing to apply the means test and § 707(b) generally to converted cases deprives the court, the United States Trustee, the trustee, and any parties in interest from filing a motion to dismiss for

302. See *supra* notes 128–237 and accompanying text.

303. See, e.g., 11 U.S.C. § 707(b) (1998).

304. See cases cited *supra* note 149.

305. See cases cited *supra* note 204.

306. Brunstad, *supra* note 27 (arguing "[T]he conclusion that means testing does not apply to cases converted from chapter 11 or 13 to chapter 7 is perfectly rational and may be constitutionally required.>").

307. See cases cited *supra* note 204.

substantial abuse.³⁰⁸ Preventing these players from raising the issue of whether the debtor's filing constitutes substantial abuse weakens the entire bankruptcy system by allowing converted debtors to avoid the investigative eyes of all parties with knowledge of the debtor's bankruptcy proceeding. Additionally, circumventing § 707(b) in converted cases takes away the means test as a potential tool that Congress intended courts to have in determining whether a debtor's case is abusive.³⁰⁹ Overall, applying § 707(b) is consistent with pre-BAPCPA case law construing "filed by a debtor under this chapter" and avoids preventing application of § 707(b) in its entirety in converted cases.

Second, the plain language of § 348(a) and case law in a variety of contexts construing it pre- and post-BAPCPA strongly suggest that a case converted to Chapter 7 is deemed filed under the destination chapter. As the *Perfetto*, *Kerr*, and *Willis* courts point out, courts adopting the view that the means test does not apply in converted cases inadequately address the body of case law finding that conversion causes a case to be deemed filed under the destination chapter.³¹⁰ Section 348(a) provides that conversion of a case "constitutes an order for relief" under the destination chapter, but otherwise does not change the petition date, the date a case is commenced, and the date of the order for relief.³¹¹ Sections 348(b) and 348(c) specify when the conversion order changes the date of the order for relief only under certain sections of the Bankruptcy Code, and § 707(b) is not among them.³¹² Otherwise, a case is deemed filed under the destination chapter. Courts adopting the view that the means test does not apply in converted cases read § 348 too expansively by arguing that the exclusion of § 707 from § 348(b) means that a case is not deemed filed under Chapter 7. Section 348(b) merely changes the date of the order for relief to the date of the conversion order. Therefore, courts holding the view that the means test applies in converted cases properly interpret § 348.

B. Policy Justifications Favoring Application of the Means Test in Converted Cases

Not only does a nuanced reading of the Bankruptcy Code support the conclusion that the means test should apply to cases converted to Chapter 7 from other chapters, but three principal policy justifications support this position as well. If the means test is part of the Bankruptcy Code, it should apply to all Chapter 7 debtors except for those that Congress expressly excluded.³¹³ Three principal reasons warrant application of the means test in converted cases.

First, refusing to apply the means test and § 707(b) in converted cases creates a loophole in the Bankruptcy Code. For example, a debtor with sufficient disposable income to repay at least a portion of his or her unsecured debt may file a Chapter

308. 11 U.S.C. § 707(b)(1) (Westlaw through Pub. L. No. 116-8).

309. *Gebhardt v. Pollitzer*, 860 F.3d 1334, 1339 (11th Cir. 2017).

310. *See* cases cited *supra* note 204. So, it appears to be well settled that when they do convert, debtors are deemed to have "filed under" the converted to chapter, as of the date the original petition was filed. *See also Resendez v. Lindquist*, 691 F.2d 397, 398-99 (8th Cir. 1982).

311. 11 U.S.C. § 348(a) (2012).

312. 11 U.S.C. §§ 348(b), (c) (listing §§ 342, 365(d), 727(a)(10), 727(b), 1102(a), 1110(a)(1), 1121(b), 1121(c), 1141(d), 1201(a), 1221, 1228(a), 1301(a), and 1305(a)).

313. It is noteworthy that Congress did not explicitly exclude converted debtors in its list of debtors who were excluded from the means test. *See* 11 U.S.C. § 707(b)(2)(D).

13 petition and then immediately convert to Chapter 7 to obtain a quick discharge and avoid the means test and the ire of § 707(b). Although courts adopting the view that the means test does not apply to converted cases quickly dismiss this possibility, one case adopting this view actually allowed a debtor to use the loophole in this manner. In *In re Dudley*, the court allowed debtors to convert to Chapter 7 two months after filing a Chapter 13 petition and avoid the means test even though they would have had approximately \$2,000 of disposable income each month under the means test to pay their unsecured creditors more than \$120,000 over 60 months.³¹⁴

The *Dudley* case is simply one published opinion documenting how debtors take advantage of a loophole created by the view that the means test does not apply in converted cases. While some cases holding that the means test does not apply in converted cases may have involved debtors more sympathetic than the Dudleys, including debtors who had recently lost their jobs after making plan payments for at least a year,³¹⁵ courts should not adopt a view that allows debtors to abuse the bankruptcy system. Additionally, while Congress intended for a debtor who was unsuccessful in a Chapter 13 case to be able to convert to Chapter 7 if the debtor was eligible under the destination chapter,³¹⁶ the Supreme Court made clear in *Marrama* that this is not an unfettered right. A debtor's bad faith conversion may cause him or her to forfeit the right to convert.³¹⁷ A holding that the means test applies in converted cases will prohibit debtors from exploiting the loophole, which is entirely consistent with *Marrama*.

Second, courts adopting the minority view and some scholars have theorized that if courts apply the means test to converted cases, it may create a "phantom debtor" problem.³¹⁸ Phantom debtors are theoretical debtors who initially file a Chapter 13 case and convert to Chapter 7, but fail the means test and thus cannot continue in Chapter 7.³¹⁹ Phantom debtors would be left with no ability to avail themselves of the bankruptcy system. However, courts have repeatedly held that there is no constitutional right to file for bankruptcy protection.³²⁰ There are some individuals who simply do not qualify for bankruptcy, and failing to apply provisions of the Code to remedy the problem is not an adequate solution.

Moreover, phantom debtors rarely materialize in practice. A debtor who is unable to make plan payments in a Chapter 13 but still has enough income to raise the presumption of abuse in Chapter 7 is unlikely to exist because a debtor can propose a reduction in the amount of his or her plan payments by showing a sufficient change in circumstances under § 1329(a).³²¹ In some districts, a debtor may even propose a plan payment that will pay unsecured creditors a 0% dividend.³²²

314. 405 B.R. 790, 791–92 (Bankr. W.D. Va. 2013).

315. *In re Layton*, 480 B.R. 392, 399 (Bankr. M.D. Fla. 2012).

316. S. REP. NO. 95-989, at 144 (1978).

317. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 372 (2007).

318. *In re Layton*, 480 B.R. at 399; Murphy & Dion, *supra* note 27, at 446.

319. Murphy & Dion, *supra* note 27, at 457–58.

320. *United States v. Kras*, 409 U.S. 434, 446 (1973) ("There is no constitutional right to obtain a discharge of one's debts in bankruptcy."); Thomas Kelch, *The Mythology of Waivers of Bankruptcy Privileges*, 31 IND. L. REV. 897, 900 (1998) ("Not only is there no constitutional right to file bankruptcy, but Congress need not even create a bankruptcy law.")

321. 11 U.S.C. § 1329(a) (2012).

322. A debtor may be able to propose a 0% dividend to unsecured creditors if he or she can do so in good faith. See, e.g., *In re Martin*, 464 B.R. 798, 804 (Bankr. C.D. Ill. 2012); *In re Ali*, 33 B.R. 890, 891, 898 (Bankr. D. Kan. 1983). While the calculations of a debtor's monthly disposable income for plan payments and for means test purposes are arguably different, courts should adopt the view that the means

Finally, while not perfect, the means test and § 707(b) contain several release valves that prevent absurd results from occurring. First, courts do not have to dismiss or convert case if a debtor fails to rebut the presumption of abuse.³²³ Second, under § 707(b)(1) the court, the United States Trustee, the Chapter 7 trustee, and parties in interest have discretion in deciding to bring a motion to dismiss for substantial abuse.³²⁴ Thus, courts have the statutory authority to prevent unjust results when applying the means test in converted cases, at least until Congress acts to address the issue in a more comprehensive way. The next subsection identifies the key interpretive problems that courts face in holding that the means test applies in converted cases and examines how courts can minimize their negative effects until Congress acts.

C. Interpretive Problems with Holding that the Means Test Applies in Converted Cases

Courts adopting the view that the means test applies in converted cases cause two main interpretive problems. First, determining that the means test applies in converted cases renders § 342(d) virtually impossible to enforce. Section 342(d) requires the following:

In a case under [C]hapter 7 of this title in which the debtor is an individual and in which the presumption of abuse arises under [§] 707(b), the clerk shall give written notice to all creditors not later than 10 days after the date of the filing of the petition that the presumption of abuse has arisen.

Unfortunately, some courts adopting this view raise and dismiss the discrepancy as a sloppy drafting problem.³²⁵ No court has construed how the time limit in § 342(d) should apply in converted cases. It is likely that courts adopting this view generally have not had to deal with this issue because, by holding that the means test applies in converted cases, they inevitably dismiss cases in which a debtor cannot rebut the presumption of abuse even though the clerk did not provide timely notice. Nevertheless, clerks should not be put in this untenable position until Congress amends the Bankruptcy Code. Courts should continue to apply the means test in converted cases and explicitly provide that a clerk need not timely comply with § 342(d).

The second and chief interpretive problem with applying the means test in converted cases is that debtors must use a calculation of “current monthly income” from six months prior to their original petition date, and not the date of conversion. Especially in cases where debtors convert to Chapter 7 after more than a year in Chapter 13, it seems unfair to require them to use old income figures for determining substantial abuse. However, debtors may explain the special circumstances surrounding their conversions when completing the means test.³²⁶ While adequately explaining the special circumstances and the totality of the debtor’s financial

test applies in converted cases when debtors have a clear ability to repay a portion of their unsecured debts.

323. See *In re Mravik*, 399 B.R. 202, 210 (Bankr. E.D. Wis. 2008); but see *In re Woodruff*, 416 B.R. 369, 374 (Bankr. D. Mass. 2009).

324. 11 U.S.C. § 707(b)(4) (Westlaw through Pub. L. No. 116-8).

325. *In re Kerr*, 2007 WL 2119291, at *4 (Bankr. W.D. Wash. July 18, 2007).

326. 11 U.S.C. § 707(b)(2)(B)(i).

situation is the best way for debtors to avoid being dismissed from Chapter 7, courts vary widely in what factors constitute special circumstances and create inconsistent results.³²⁷ Yet, combined with § 707(b)'s other release valves, the means test's special circumstances provision is the best tool for a court to use to avoid unfair results until Congress amends the Bankruptcy Code to address how courts should calculate a converted debtor's current monthly income in cases of conversion.

D. The Final Frontier: Congress Must Amend the Bankruptcy Code to Resolve Inconsistencies

If the means test is going to remain in the Bankruptcy Code,³²⁸ Congress should step in and amend the Bankruptcy Code to clearly indicate that the means test applies in a case converted from Chapter 13 to Chapter 7. The first step in resolving this issue would be for Congress to amend § 707(b)(1). As amended, the statute would read as follows:

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case initially filed by an individual debtor under this chapter *or a case converted by an individual debtor to this chapter* whose debts are primarily consumer debts. . . .

Adding the above language would clarify that the means test applies to cases converted by an individual debtor. In addition, this language promotes § 707(b)'s longstanding history of being a potent tool for preventing abusive filings and furthers BAPCPA's goal of ensuring that debtors who can pay a substantial portion of their debts do so in Chapter 13.³²⁹

In addition to amending § 707(b), Congress must make several conforming amendments to eliminate internal statutory conflict within the Bankruptcy Code. First, Congress should amend § 342(d) to clarify that the clerk has ten days after the conversion date to give notice to all creditors that the presumption of abuse has arisen. Thus, § 342(d) should read as follows:

(d) In a case under [C]hapter 7 of this title in which the debtor is an individual and in which the presumption of abuse arises under [§] 707(b), the clerk shall give written notice to all creditors not later than 10 days after

327. See, e.g., *In re Delbecq*, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007) (student loan debt is sufficient "special circumstance" to rebut presumption of abuse); but see *In re Maura*, 491 B.R. 493, 512 (Bankr. E.D. Mich. 2013) (student loan payments were not "special circumstance" of kind required to rebut means test presumption); *In re Champagne*, 389 B.R. 191, 200 (Bankr. D. Kan. 2008) (non-dischargeable student loan does not per se constitute "special circumstance").

328. Congress may eliminate the means test if it amends the Bankruptcy Code. The means test and BAPCPA, as a whole, have been the subject of significant criticism from courts as this article demonstrates because of the interpretive problems that it caused. Scholars have also been critical of BAPCPA and the means test because of the interpretive problems and effects on individual debtors that it caused. See WARREN ET AL., *supra* note 17, at 154; Bruce M. Price & Terry Dalton, *From Downhill to Slalom: An Empirical Analysis of the Effectiveness of BAPCPA (and Some Unintended Consequences)*, 26 YALE L. & POL'Y REV. 135 (2007) (detailing the negative consequences of BAPCPA's enactment for individual debtors).

329. *Pollitzer v. Gebhardt*, 860 F.3d 1334, 1339 (11th Cir. 2017).

the date of the filing of the petition *or in a case converted to [C]hapter 7, the date of the conversion order*, that the presumption of abuse has arisen.

This addition eliminates the statutory contradiction caused by adopting the view that the means test applies in converted cases. It also prevents the risk that a clerk would be put in the untenable position of technically violating § 342(d) in every converted case in which the debtor satisfies the means test.

Finally, to make the means test calculation fairer to debtors and to further § 707(b)'s purpose of being a potent tool for curbing abusive filings, Congress should amend § 707(b)(2)(A)(i) to provide an alternate six-month period for current monthly income calculation purposes for cases converted Chapter 7 one year after the petition date. As amended, § 707(b)(2)(A)(i) would read as follows:

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income, *or if the debtor's case is converted to [C]hapter 7 from another chapter more than one year after the petition date, a calculation of current monthly income using the six-month period immediately preceding conversion*, reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60. . . .

By providing an alternate six-month window for current monthly income, Congress would allow the means test calculation to be determined using an income figure that parallels the calculation of the means test in cases initially filed under Chapter 7. Thus, the six-month window prior to conversion in a case that was initially filed more than a year earlier, allows the debtor to utilize more recent income for the purposes of the means test. As a result, if a debtor lost his or her job or received a reduction in pay, the means test would account for that.

Limiting the new six-month period to cases converted more than a year after the original petition date would make it less likely that debtors are using conversion as a mechanism to manipulate the means test. Nevertheless, creating a second current monthly income, six-month window could potentially allow debtors to time their conversions to periods in which they have artificially low incomes. A court could prevent this from happening by employing its authority under § 707(b)(3) to consider whether a debtor's case is filed in bad faith and by looking at the totality of the debtor's financial circumstance.³³⁰ Additionally, the court could use its equitable power under § 105(a), in light of *Marrama*,³³¹ to prevent a debtor from converting to Chapter 7 or it could rely on its inherent power as a federal court to prevent abusive litigation tactics.³³²

Overall, by amending these three sections of the Bankruptcy Code, Congress can resolve the thorny issue of whether the means test applies in converted cases from another bankruptcy chapter to Chapter 7. Resolution of this issue by statute frees courts to focus their attention on other interpretive issues.

330. 11 U.S.C. § 707(b)(3).

331. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375–76 (2007).

332. 11 U.S.C. § 105(a) (2012); *Marrama*, 549 U.S. at 375–76.

V. CONCLUSION

Determining whether the means test applies in cases converted from Chapter 13 to Chapter 7 has divided courts across the United States and has even caused bankruptcy judges within the same district court to disagree.³³³ While in the nearly 15 years since BAPCPA's enactment a majority of courts have held that the means test applies in converted cases, a considerable minority view has emerged. Unfortunately, both the majority and minority views cause interpretive problems because both conflict with at least one section of the Bankruptcy Code.

By summarizing the key cases adopting both views, this article argues that the means test should apply in converted cases, and, while imperfect, courts should continue adopting the majority view until Congress amends the Bankruptcy Code. This view promotes a better reading of § 707(b) and the Bankruptcy Code in general and prevents debtors from manipulating the bankruptcy system by filing under Chapter 13 and then converting to Chapter 7 to avoid the means test. Additionally, this article lays out language that Congress should adopt in amending the Bankruptcy Code to codify the view that the means test applies in converted cases. By adopting these amendments, Congress can harmonize two central components of the bankruptcy process—conversion and the means test.

333. See cases cited *supra* note 22.