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Introduction

Section 707 of the Bankruptcy Code[1] governs when a court may dismiss a chapter 7 bankruptcy case.[2] Under section 707(a), a court may dismiss a chapter 7 case "for cause."[3] In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") and amended section 707(b) to include the so-called "means test," which provides a formula for determining whether "cause" exists to dismiss (or convert with the debtor's consent) the debtor's case.[4] Courts split as to whether this amendment to section 707(b)[5] permits a court to consider the debtor's income when deciding whether to dismiss the debtor's chapter 7 bankruptcy case under section 707(a).[6] On one hand, the minority view, relying on Congressional intent, has held that a debtor's ability to discharge debts with future income is irrelevant when determining a motion to dismiss under section 707(a).[7] On the other hand, the majority of courts have that held that courts may consider a debtor's income level and ability to

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[1] Unless otherwise indicated, all chapters and sections referenced in this article refer to chapters or sections of title II of the United States Code.
[2] 11 U.S.C. § 707(a).
[3] *See id*. at §707(a).
[4] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 102, 119 Stat. 23).
[5] *See* 11 U.S.C. § 707(b).
[6] *Compare In re Khan*, 172 B.R. 613, 620 (Bankr. Minn. 1994), *and In re Goulding,* 79 B.R. 874, 876 (Bankr. Mo. 1987), *with see also Perlin v. Hitachi Capital Am. Corp.*, 497 F.3d 364, 369-371-72, *and In re Quinn*, 490 B.R. 607, 617-18 (Bankr. N.M. 2012).
[7] *See In re Khan*, 172 B.R. at 620; *see also In re Goulding,* 79 B.R. at 876.

repay creditors when determining a motion to dismiss under section 707(a), but those factors are not dispositive.[8]

Practically, this split may not be meaningful for a high-income debtor, who will likely file under chapter 7 if such debtor can pass the means test, because the debtor's income and ability to repay will, at most, be one of many factors a court considers. Therefore, this split may not be very significant for high-income debtors.

In addition to dismissing a case, a court may convert a chapter 7 case to a chapter 11 case at any time under section 706(b).[9] The court has full discretion to determine whether to convert a debtor's chapter 7 case to a chapter 11 case because the statute does not provide a standard indicating when conversion is appropriate.[10] Courts have consistently denied a motion to convert if the movant relied on the same evidence that supported the motion to dismiss under section 707(a).[11] While exercising this discretion, however, at least one court has converted a case under section 706(b) after balancing the interests of the creditors and the debtor.[12] Accordingly, a court will likely refuse to convert a high-income debtor's chapter 7 bankruptcy case unless the movant relies on additional evidence to support conversion and only seeks to convert the case. As such, this may also encourage a high-income debtor to file under chapter 7.

This Article discusses the standard for dismissing a chapter 7 case and converting a chapter 7 case to a chapter 11 case. The Article focuses on how the courts apply these standards in cases with high-income debtors. Part I discusses the standard to dismiss a chapter 7 case under section 707(a). Part II discusses the standard for a creditor to convert a chapter 7 case to a chapter 11 case. Part III discusses the implications of each of the standards for dismissing and converting a

[8] *See In re Perlin*, 497 F.3d at 371-72; *see also In re Quinn*, 490 B.R. at 617-18.
[9] *See* 11 U.S.C. § 706(b).
[10] *See In re Quinn*, 490 B.R. at 621; *see also In re Lobera*, 454 B.R. 824, 855 (Bankr. D.N.M. 2011).
[11] *See In re Quinn*, 490 B.R. at 621; *see also In re Lobera*, 454 B.R. at 854.
[12] *See also In re Gordon*, 465 B.R. 683, 694 (Bankr. N.D. Ga. 2012).

chapter 7 case.

I. Dismissing a Chapter 7 Bankruptcy Case Under Section 707

Section 707(a) provides that a bankruptcy court may dismiss a chapter 7 bankruptcy case in the event the creditor moves to dismiss the case.[13] Under section 707(a), a court may dismiss a case after "notice and a hearing and only for cause."[14] Section 707(a) also lists three examples of "cause," including: (1) unreasonable delay by the debtor that is prejudicial to the creditor; (2) nonpayment of any fees or charges by the debtor; and (3) failure of the debtor in a voluntary case to file the required information within fifteen days.[15] The list is not exhaustive.[16] Accordingly, a bankruptcy court may dismiss a chapter 7 case "for cause" for other reasons than those listed.[17] As such, many courts have held that if the debtor acts in "bad faith," a bankruptcy court may dismiss the debtor's chapter 7 case because the debtor is unworthy of relief.[18]

Under section 707(b), in a chapter 7 case filed by an individual whose debts are primarily consumer debts, the court may dismiss, or with the debtor's consent, convert the case to a chapter 11 or 13 case, if the court finds that granting relief to the debtor under chapter 7 would constitute "abuse."[19] In 2005, Congress amended section 707(b) to include a "means test" to determine a debtor's eligibility to apply for chapter 7 bankruptcy.[20] Under the means test, a debtor may file for bankruptcy under chapter 7 if his disposable income does not exceed the median income in the state in which the debtor lives.[21] If the debtor's income exceeds the state

[13] 11 U.S.C. § 707(a).
[14] *See id*. at § 707(a).
[15] *See id*.
[16] *See id*.
[17] *See In re Khan*, 172 B.R. at 620.
[18] *See In re Quinn*, 490 B.R. at 618; *see also Perlin v. Hitachi Capital Am. Corp.*, 497 F.3d 364, 369-370 (3d Cir. 2007); *see also In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994).
[19] *See* 11 U.S.C. § 707(b).
[20] *See In re Perlin*, 497 F.3d at 370.
[21] *See* Pamela C. Tsang, Comment, *The Case Against "Bad Faith" Dismissals of Bankruptcy Petitions Under 11 U.S.C. §707(a)*, 59 AM. U. L. REV. 685, 694-95 (2010).

median income, the debtor must pass the means test or a presumption of abuse will arise.[22] In order to pass the means test, the debtor's "current monthly income," reduced by the expenses provided in section 707(b), must be below $100 to $166.67 per month.[23] If the debtor fails the means test, a presumption of abuse will arise.[24] The debtor may only overcome the presumption of abuse if he can establish special circumstances for his income and expenses.[25] Congress enacted the means test to ensure that those debtors who can pay their debts, or at least some of their debts, do so.[26]

Notwithstanding this Congressional intent, some debtors will pass the means test even though they have high incomes and realistically are able to pay their creditors.[27] Courts split as to whether a debtor's high income and ability to repay his creditors constitutes bad faith, thereby allowing a court to dismiss a chapter 7 bankruptcy case "for cause" pursuant to section 707(a).[28] The majority view concludes that courts are not prohibited from considering a debtor's income level and ability to repay creditors when determining bad faith under a section 707(a) motion to dismiss.[29] Conversely, the minority view has relied on Congressional intent and held that the debtor's ability to repay his debts is irrelevant when determining a motion to dismiss under section 707(a).[30]

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[22] *See id.*
[23] *See id*.
[24] *See id*.
[25] *See id*.; *see also* 11 U.S.C. § 707(B)(i) (enumerating 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).
[26] *See Ransom v. FIA Card Servs*., N.A., 562 U.S. 61, 131 S. Ct. 716, 725 (2011).
[27] *See In re Kahn*, 172 B.R at 626.
[28] *Compare In re Khan*, 172 B.R. at 620, *and In re Goulding,* 79 B.R. at 876, *with In re Perlin*, 497 F.3d at 371-72, *and In re Quinn*, 490 B.R. at 617-18.
[29] *See In re Perlin*, 497 F.3d at 371-72; *see also In re Quinn*, 490 B.R. at 617-18.
[30] *See In re Khan*, 172 B.R. at 620; *see also In re Goulding,* 79 B.R. at 876.

a. The Majority View.

Under the majority view, courts have held that Congress's amendments to section 707(b) and the enactment of the means test do not prohibit courts from considering the debtor's income level and ability to repay creditors when determining a motion to dismiss the debtor's case for bad faith under section 707(a).[31] Under the majority view, however, courts have also held that the debtor's income level and ability to repay creditors may not be the sole reasons for dismissal.[32] Instead, a bankruptcy court must consider the totality of the circumstances when determining the issue of bad faith.[33]

For example, in *In re Perlin*,[34] the court refused to dismiss debtor's chapter 7 case for cause even though the debtor earned a high income and was able to repay his creditors.[35] In *In re Perlin* the debtor earned an annual income of $370,000.[36] After filing for bankruptcy, the debtor maintained an affluent lifestyle, enjoyed the luxuries of expensive vehicles, and spent $5,000 each month on private school tuition.[37] A creditor moved to dismiss the chapter 7 case for bad faith, arguing that the debtor allegedly filed misleading schedules, artificially inflated his expenses to mask his substantial income, enjoyed a substantial income and lavish lifestyle, failed to make a good faith effort to repay his creditors, and saved over $430,000 for his retirement.[38]

In reaching its decision, the *Perlin* court stated that when Congress enacted the means test under section 707(b) it clearly intended to allow courts to consider the income of debtors when deciding a motion to dismiss under section 707(a).[39] In addition, the *Perlin* court reasoned that

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[31] *See In re Perlin*, 497 F.3d at 371-72; *see also In re Quinn*, 490 B.R. at 617-18.
[32] *See In re Perlin*, 497 F.3d at 371-72; *see also In re Quinn*, 490 B.R. at 617-18.
[33] *See In re Perlin*, 497 F.3d at 372; *see also In re Quinn*, 490 B.R. at 618.
[34] *See Perlin v. Hitachi Capital Am. Corp.*, 497 F.3d 364, 369-370 (3d Cir. 2007).
[35] *See id*. at 375.
[36] *See id*. at 367.
[37] *See id*. at 368.
[38] *See id*.
[39] *See In re Perlin*, 497 F.3d at 370.

Congress intended the amendments to section 707(b) to restrict the dismissal procedures for consumer filings, but the amendments did not give any indication that Congress intended to restrict the dismissal procedures under section 707(a).[40] Therefore, the *Perlin* court noted that the enactment of section 707(b) and the means test was "not meant to signal any exclusion of income-and-expense factors from a bankruptcy court's consideration of a motion to dismiss under section 707(a)."[41] Although the court held that a debtor's income level and ability to repay his creditors may be considered when deciding a motion to dismiss under section 707(a), the debtor's income level and ability to repay creditors are not dispositive and must be considered along with the other relevant factors to assess whether the debtor has acted in good faith.[42] When determining good faith, the *Perlin* court noted that it should consider "the 'honest intention' of the debtor and 'whether the debtor has abused the provisions, purpose, or spirit of bankruptcy law.'"[43] The *Perlin* court opined that good faith should be decided within the discretion of the court, on an ad-hoc basis, and that all of the facts and circumstances must be considered.[44]

After applying such standards, the *Perlin* court reasoned that there was no evidence to show that the debtor misrepresented his income, inflated his expenses, filed misleading statements or unduly interfered with the judicial process.[45] Therefore, the *Perlin* court held that the debtor's chapter 7 bankruptcy case could not be dismissed for cause under section 707(a) because the debtor's substantial income and comfortable lifestyle were insufficient to demonstrate that the debtor filed for bankruptcy in bad faith.[46]

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[40] *See id*. at 371.
[41] *Id*.
[42] *See id*.
[43] *Id*.
[44] *See id*. at 372.
[45] *See id*.
[46] *See id*. at 375.

Similarly, in *In re Quinn*, the court held that when considering whether to dismiss the debtors' chapter 7 bankruptcy case under section 707(a) a court must consider the debtors' income level and ability to repay their creditors in conjunction with the totality of the circumstances.[47] In *In re Quinn*, the debtors together earned an annual salary of over $560,000 and maintained a lavish lifestyle that included owning expensive luxury vehicles, owning a $955,000 home, and taking family vacations at resorts.[48] The United States Trustee ("UST") moved to dismiss arguing that the debtors maintained a lavish lifestyle, were able to pay their debts, and failed to make accurate disclosures in their Schedule, including failing to disclose the husband's promotion, which included eligibility for a bonus.[49] The *Quinn* court denied UST's motion to dismiss under section 707(a).[50]

In reaching its decision, the *Quinn* court enumerated six main factors that should be considered: (1) the debtor's manipulations having the effect of frustrating one particular creditor; (2) the absence of an attempt by the debtor to repay his debts; (3) the debtor's failure to make lifestyle changes; (4) the debtor's ability to repay; (5) the inflation of expenses by the debtor; and (6) the debtor's use of the Bankruptcy Code as protection from creditors.[51] The *Quinn* court noted that a court may dismiss the case under section 707(a) when the combination of these factors indicates that the debtor filed in bad faith.[52]

The *Quinn* court denied the motion to dismiss because the debtors' actions, when considered taken together, "[did] not rise to the level of egregious behavior" sufficient to dismiss the case

[47] *See In re Quinn*, 490 B.R. at 617.
[48] *See id*. at 619.
[49] *See id*.
[50] *See id*. at 620.
[51] *See id*. at 618; *see also In re Lombardo* 370 B.R. 506, 512 (Bankr. E.D.N.Y. 2007) (considering additional factors, such as whether the debtor reduced his amount of creditors, the unfairness of the debtor's use of chapter 7, whether the debtor is paying insiders etc.).
[52] *See In re Quinn*, 490 B.R. at 620.

for cause under section 707(a).[53] In particular, the *Quinn* court found that the debtors' high income and lavish lifestyle was not indicative of bad faith because "[p]ersons who earn a lot of money are also able to spend a lot of money while living within their means."[54] In addition, the *Quinn* court noted that the debtors made some lifestyle changes, such as sending their children to public school instead of paying for private school, reducing their monthly budget, and making an effort to repay their creditors.[55] Overall, the *Quinn* court concluded that the debtors' high income and ability to repay their creditors, coupled with their other actions, did not constitute bad faith and therefore, denied the motion to dismiss under section 707(a).[56]

b. The Minority View.

Contrary to the majority view, some courts have refused to consider a debtor's income and ability to repay creditors at all when determining bad faith under section 707(a).[57] In particular, these courts have relied on Congressional intent and found that the amendments to section 707(b), including the enactment of the means test, do not permit courts to consider a debtor's income level and ability to repay debts when determining whether to dismiss a case for bad faith under section 707(a).[58]

For example, in *In re Kahn*,[59] the creditors moved to dismiss the debtors' chapter 7 bankruptcy case for "bad faith" because the debtors had "sufficient future resources to repay their dischargeable debts."[60] In *In re Kahn*, the debtor was a 40-year old physician.[61] The debtor filed a chapter 7 bankruptcy case for a debt of $67,214.38, despite her annual income of

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[53] *Id*.
[54] *Id*.
[55] *See Id*.
[56] *See id*. at 620.
[57] *See In re Khan*, 172 B.R. at 624; *see also In re Goulding,* 79 B.R. at 876.
[58] *See In re Khan*, 172 B.R. at 620; *see also In re Goulding,* 79 B.R. at 876.
[59] *See In re Khan*, 172 B.R. at 620 (the court was deciding grounds for dismissal for two separate cases, *In re Kahn* and *In re Hamblin*).
[60] *See id.* at 615.
[61] *See id.* at 616.

$138,510.[62] The creditor moved to dismiss the case under section 707(a) for bad faith.[63] In *In re Hamblin* the debtor, a factory worker with a gross monthly income of $3,027, filed a chapter 7 bankruptcy case for a debt of $20,032.[64] Subsequently, the creditor moved to dismiss the cause under section 707(a) for bad faith.[65]

Relying on Congressional intent, the *Kahn* court opined that a debtor's ability to "meet dischargeable debt obligations in whole or part from future resources is irrelevant to a motion under section 707(a)."[66] In do so, the *Kahn* court reasoned that Congress intended that section 707(b) would address the issue of debtors filing for bankruptcy when they have the resources to repay their debts.[67] Moreover, the *Kahn* court noted that the House and Senate reports explicitly stated that "the ability of the debtor to repay his debts in whole or in part" does not constitute adequate cause for dismissal.[68] Further, as a policy consideration, the *Kahn* court noted that bankruptcy courts should not be making judgmental pronouncements that debtors should be paying back debts rather than "seeking refuge in bankruptcy liquidation."[69] Ultimately, since the debtors did not commit any fraud, seek to mislead the court, or otherwise abuse the bankruptcy process, the *Kahn* court denied the motions to dismiss under section 707(a) for bad faith.[70]

Similarly, in *In re Goulding*[71] the debtor, whose income was $144,000 per year, filed a chapter 7 bankruptcy in order to discharge $378,956.45 of debt.[72] Subsequently, a creditor

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[62] *See id*. at 617.
[63] *See id*. at 620.
[64] *See id*. at 618-19.
[65] *See id*.
[66] *See id*. at 620.
[67] *See id*. at 624.
[68] *In re Kahn*, 172 B.R at 623 (quoting H.R. REP. NO. 95-595, at 380 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6336; S. REP. NO. 95-989, at 94 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5880).
[69] *See In re Kahn*, 172 B.R at 624.
[70] *See id*. at 626.
[71] *See also In re Goulding,* 79 B.R. at 874.
[72] *See id*. at 875.

moved to dismiss the debtor's case under section 707(a) for bad faith.[73] Ultimately, the *Goulding* court denied the creditor's motion.[74] The *Goulding* court relied on Congressional intent and explained that "[i]t is difficult to contemplate how Congress could more emphatically have stated that the debtor's net worth or future prospects is not 'cause'" for dismissal under section 707(a).[75] Further, the court found that it had the duty to apply law as written by Congress and that the section 707's plain language indicated that Congress did not intend for dismissal under section 707(a) for bad faith based on the debtor's income level and ability to repay creditors.[76] After denying the creditor's motion to dismiss under section 707(a), the court noted that if the debtor committed fraud, the case would have been easier to dismiss.[77]

II. Converting A Chapter 7 Bankruptcy Case.

In addition to dismissing a case for bad faith, under section 706(b), a "court may convert a case under this chapter to a case under [c]hapter 11 of this title at any time."[78] The statute does not, however, indicate when a conversion is appropriate; therefore, the court has full discretion to determine whether to convert a debtor's case.[79] While exercising such discretion, at least one court has held that a creditor's motion convert a chapter 7 case to chapter 11 was appropriate under section 706(b).[80] However, the creditor only sought to convert the case and did not first move to dismiss the chapter 7 case under 707(a) for bad faith.[81] Alternatively, courts have denied

[73] *See id*.
[74] *See id*. at 876.
[75] *See* H.R. REP. NO. 95-595, at 380; *see also In re Goulding,* 79 B.R. at 876.
[76] *See In re Goulding,* 79 B.R. at 876.
[77] *See id*.
[78] 11 U.S.C. § 706(b).
[79] *See In re Quinn*, 490 B.R. at 621; *see also In re Lobera*, 454 B.R. 824, 855 (Bankr. D.N.M. 2011).
[80] *See also In re Gordon*, 465 B.R. 683, 694 (Bankr. N.D. Ga. 2012).
[81] *See id*.

an alternative request to convert a chapter 7 case to chapter 11 under section 706(b) where the movant relied on the same evidence that supported the dismissal motion under section 707(a).[82]

While exercising its discretion to determine whether to convert the debtor's chapter 7 case to chapter 11, the *In re Gordon*[83] court held that the creditor's motion to convert the chapter 7 case to a chapter 11 case was appropriate under section 706(b).[84] However, in *In re Gordon*, the creditor only sought to convert the chapter 7 case to a chapter 11 case and did not first move to dismiss the case under section 707(a).[85] In reaching its decision, the *Gordon* court balanced the creditors' interests, the debtor's interests, the debtor's ability to repay creditors, and the likelihood that the debtor would be able to confirm a plan to repay his creditors under chapter 11.[86] The court reasoned that converting the chapter 7 case to a chapter 11 was not only in the best interests of the creditors because it would maximize the debtor's estate, but also in the best interests of the debtor because conversion avoided litigating discharge issues.[87] The *Gordon* court also found that the debtor's monthly income demonstrated the debtor's consistent ability to repay the creditors and declined to assume that the creditor would block any reasonable plan of organization.[88] Overall, the *Gordon* court found that the conversion of the chapter 7 case to a chapter 11 case was appropriate under section 706(b).[89]

Alternatively, the *In re Quinn* court denied a creditor's motion to convert a debtor's chapter 7 case to chapter 11 because the movant relied on the same evidence in support of dismissal.[90] The *Quinn* court reasoned it was "not appropriate to compel the same end result through conversation

[82] *See In re Quinn*, 490 B.R. at 621.
[83] *See also In re Gordon*, 465 B.R. 683 (Bankr. N.D. Ga. 2012).
[84] *See id*. at 694.
[85] *See id*.
[86] *See id*. at 692-94.
[87] *See id*. at 694.
[88] *See id*. at 693.
[89] *See id*. at 694.
[90] *See In re Quinn*, 490 B.R. at 621-22.

to [c]hapter 11 when it [was] not appropriate to dismiss the [c]hapter 7 case."[91] In particular, the *Quinn* court was concerned that if it converted the debtor's case to a chapter 11 case, the debtor would not want to continue his case and voluntarily dismiss the chapter 11 case, thereby effectively granting the relief (i.e., the dismissal of the debtor's case) under section 707(a).[92]

Similarly, the *In re Lobera*[93] court also denied a motion to convert a debtor's chapter 7 case to chapter 11 because the creditor relied on the same evidence in support of dismissal under section 707(a).[94] The *Lobera* court also reasoned that a conversion to a chapter 11 case would trap the debtor rather than provide the "fresh start" that Congress intended for a debtor who files for bankruptcy.[95] Moreover, the *Lobera* court found that "anything relevant that would further the goals of the Bankruptcy Code" should be considered and the interests of the creditors and debtors should be balanced.[96] Overall, the *Lobera* court held that conversion would not further the interest of the debtor because the "apparent reasons for the existence of a bankruptcy law available to individuals is to discharge debt and provide a fresh start."[97] The court reasoned that converting to a chapter 11 case would prohibit the debtor from reconverting to a chapter 7 case and the debtor would be "trapped in a chapter 11 proceeding."[98]

III. The Implications For Dismissing and Converting a Chapter 7 Case.

Although the majority view and the minority view have different stances on whether a debtor's income level and ability to repay creditors may be considered when determining

[91] *Id*.
[92] *See id*.
[93] *See In re Lobera*, 454 B.R. 824, 855.
[94] *See id*. at 854.
[95] *See id*. at 855.
[96] *See id.*
[97] *See id*. at 854.
[98] *See id*.

dismissal under section 707(a), either view may encourage a high-income debtor to file under chapter 7 if such debtor can pass the means test.

The minority view encourages a high-income debtor to file under chapter 7 because the courts will not consider the debtor's income level and ability to repay his creditors. The majority's view demonstrates that a high-income debtor, who has the ability to repay his creditors, may file under chapter 7 because doing so does not necessarily constitute bad faith. Importantly, under the majority view, a future court could dismiss a high-income debtor's bankruptcy case if there is other indicia of bad faith, such as manipulative behavior, absence of an attempt to repay creditors, failure to make lifestyle changes, etc.

However, if the high-income debtor avoids taking such actions, the debtor's case will not be dismissed because the debtor's income level and ability to repay his creditors cannot be the sole reasons for dismissing the case for bad faith. Interestingly, both the minority and majority view seem to be contrary to one of the primary goals of the BAPCPA, which was to ensure that debtors, who are able to pay their creditors, do pay their creditors.[99] In particular, courts seem to be reluctant to judicially adopt a requirement that debtors with the ability to repay their creditors must do so in bankruptcy.

Additionally, denying a motion to convert a debtor's case from chapter 7 to chapter 11 under section 706(b) because it is supported by the same evidence as the motion to dismiss under 707(a) may also encourage high-income debtors to file under chapter 7. In particular, a high-income debtor who can successfully overcome a motion to dismiss is less likely to have his case converted to a chapter 11 case because once a court denies the creditor's motion to dismiss under section 707(a), the creditor will need additional evidence in support of the conversion motion.

[99] *See Ransom v. FIA Card Servs*., N.A., 562 U.S. 61, 131 S. Ct. 716, 725 (2011).

However, it is unlikely that a creditor will introduce additional evidence in an alternative motion to convert because such evidence is likely relevant to the creditor's motion to dismiss. Therefore, high-income debtors that are able to successfully overcome a motion to dismiss are encouraged to file under chapter 7 because it is unlikely a creditor will be able to successfully move to convert.

Conclusion

Courts are split on whether courts may consider the debtor's income and ability to repay creditors when determining a motion to dismiss under 707(a). The majority view has held that courts may consider the debtor's income level and ability to repay creditors, but such factors may not be dispositive. On the other hand, the minority view has held that a debtor's income and ability to repay should not be considered. Regardless of which view a court adopts, a high-income debtor may be encouraged to file under chapter 7 if such debtor can pass the means test.

In addition, a court may convert a debtor's chapter 7 case to chapter 11 if the creditor only sought such conversion. In such circumstances and under section 706(b), a court will balance the creditor's interests, the debtor's interests, the debtor's ability to repay creditors, and the likelihood that the debtor can confirm a plan to repay his creditors under chapter 11. However, many courts have held that if a creditor moves to dismiss under section 707(a) and the motion is denied, the creditor may not successfully convert the chapter 7 case to chapter 11 if the motion to convert is based on the same facts as the motion to dismiss under section 707(a). It is unlikely that a creditor will provide additional support for a motion to convert because such support would be relevant to the motion to dismiss. Therefore, a high-income debtor may be encouraged to file under chapter 7 because he will have greater chances of surviving a motion to dismiss and ultimately a motion to convert.