ARTICLE

CHAPTER 7 BANKRUPTCY ABUSE: MEANS TESTING IS PRESUMPTIVE, BUT "TOTALITY" IS DETERMINATIVE

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I. INTRODUCTION

One of the principal goals of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005[1] was to prevent abuse of the Bankruptcy Code[2] in Chapter 7 liquidation cases. In some instances, debtors who had the actual ability to repay creditors under a plan in Chapter 13 chose, instead, to have their debts discharged in a Chapter 7 case.[3] Congress viewed this practice as abusive, and it "intended to ensure that debtors repay creditors the maximum they can afford."[4] To accomplish this

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 [hereinafter the 2005 Act]. This also is referred to as "the Act," "the new Act," or "BAPCPA" throughout the remainder of the Article.

2. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter the Bankruptcy Code] (current version at 11 U.S.C. §§ 101–1532). This also is referred to as "the Code" throughout the remainder of the Article.

3. In most Chapter 7 cases, the general unsecured creditors receive little or no distribution from a liquidation of the debtor's nonexempt property, as opposed to what creditors might receive from a debtor who is able to fund a Chapter 13 repayment plan. 11 U.S.C.A. § 1301 *et seq*. (West Supp. 2008). *See infra* Part VI.

4. H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

purpose, Congress created a presumption of abuse called the means test,[5] as well as two new grounds for dismissal of a Chapter 7 case in situations where the debtor either passed the means test or successfully rebutted the presumption generated by it. One of these alternate bases for dismissal arises when the granting of relief under Chapter 7 would be an abuse considering the "totality of the circumstances . . . of the debtor's financial situation."[6]

In interpreting "totality of the circumstances,"[7] authorities on bankruptcy law throughout the nation are divided on the following four critical issues. First, in considering the debtor's financial situation under totality, may the court take into account any relevant changes (such as in income or expenses) that occurred shortly before the bankruptcy petition was filed, as well as those occurring after the bankruptcy petition was filed? Second, in dismissing the case under totality, is the court bound by the dollar and percentage limitations that apply to the means test presumption? Third, in considering the debtor's financial situation for the purpose of finding abuse under totality, may the court take into account the debtor's nonexempt or exempt property (such as expensive luxury assets)? Fourth, inasmuch as the primary factor showing abuse under totality is the debtor's ability to repay her debts under a Chapter 13 plan, what did Congress intend in § 1325(b)(1)(B) by its reference to the debtor's "projected disposable income,"[8] a matter about which there has been great debate?

Using the language of the Bankruptcy Code, its legislative history, the U.S. Supreme Court's guidance concerning statutory interpretation, and post-Act law, this Article is the *first* to resolve all four of these pressing issues. It shows that, in considering the debtor's financial condition under totality, the court may take into account any significant changes either before or after the bankruptcy petition was filed. It also concludes that, under totality, the court is not bound by the dollar and percentage limitations that apply to the means test presumption. In addition, this Article determines that, under totality, the court may take into account the debtor's nonexempt property, but it may not consider the debtor's exempt property. Finally, for the purpose of ascertaining the debtor's ability to pay under a

5. *See infra* Part II.

6. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

7. *Id.* Hereinafter, the totality of the circumstances test will sometimes be referred to as "totality."

8. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2008).

Chapter 13 plan, this Article construes the debtor's "projected disposable income"[9] in a manner that uses current monthly income[10] and (for an above-median debtor) the applicable means test expenses[11] as a starting point, which can be adjusted for significant changes in the debtor's actual income and expenses.

Also, this Article proposes an equitable and practicable amendment to the Bankruptcy Code to resolve a problem that thwarts congressional intent concerning bankruptcy abuse in two specific situations.

II. DISMISSAL FOR ABUSE BASED ON THE MEANS TEST PRESUMPTION

Prior to the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 707(b) provided that the bankruptcy court could dismiss a case filed by an individual Chapter 7 debtor with primarily consumer debts[12] if the granting of relief was a substantial abuse of the provisions of Chapter 7.[13] The new Act made several specific changes to § 707(b) as follows. It changed the language triggering a dismissal of a case from "substantial abuse" to "abuse,"[14] thereby broadening the scope of the provision to include debtors whose conduct was abusive of Chapter 7, but whose case might not have been dismissed under the substantial abuse standard of prior law. The Act also abrogated a provision in old § 707(b) that created a presumption in favor of the debtor.[15] And it created a presumption, in new § 707(b)(2) known as the means test, that the granting of Chapter 7 relief would be an abuse of Chapter 7 if the debtor did

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9. *Id.* Section 1325(b)(2) defines "disposable income" as "current monthly income received by the debtor . . . less amounts reasonably necessary" for certain expenses. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2008). However, in § 1325(b)(1)(B), the word "projected" preceding "disposable income" is not defined. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2008).

10. "Current monthly income" is defined in § 101(10A). 11 U.S.C.A. § 101(10A) (West Supp. 2008).

11. For a debtor whose current monthly income is above the applicable state median, § 1325(b)(3) states that the "[a]mounts reasonably necessary to be expended" for purposes of calculating disposable income under § 1325(b)(2) shall be determined by using the means test expenses of § 707(b)(2)(A)–(B). 11 U.S.C.A. § 1325(b)(3) (West Supp. 2008).

12. A "consumer debt" is defined as a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C.A. § 101(8) (West Supp. 2008).

13. 11 U.S.C.A. § 707(b) (West 2004).

14. The 2005 Act, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27 (amending 11 U.S.C. § 707(b) and renumbering it § 707(b)(1)). It is important to note that § 707(b) is a dismissal provision and not a jurisdictional provision. The court's jurisdiction is derived from 28 U.S.C. § 1334 and § 157. 28 U.S.C. § 1334 (2000); 28 U.S.C. § 157 (2000); Rudd v. Laughlin, 866 F.2d 1040, 1041 (8th Cir. 1989).

15. The 2005 Act, Pub. L. No. 109-8, § 102, 119 Stat. 23, 27.

not pass the means test standards.[16] The means test is a backward-looking provision as of the moment of the filing of the bankruptcy petition, and it constitutes "the embodiment of Congress' intent 'that there be an easily applied formula for determining when the court should *presume* that a debtor is abusing the system by filing a Chapter 7 petition.'"[17]

The means test calculation begins with current monthly income, which is defined as "the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on the last day of the calendar month immediately preceding the date of the [bankruptcy petition]."[18] Next, the debtor is permitted to deduct certain expenses for the purpose of determining the debtor's monthly disposable income. Among the allowable expenses are "the total of all amounts scheduled as contractually due to secured creditors" for each of the sixty months after the date of the petition (i.e., the total divided by sixty).[19] Also deductible are "[t]he debtor's expenses for payment

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16. *Id.* at 27–29. Under old § 707(b), bankruptcy judges throughout the country adopted varying approaches to substantial abuse, thereby resulting in a lack of uniformity and thus great uncertainty as to what conduct by the debtor constituted substantial abuse. Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 678 (2005).

17. *In re* Henebury, 361 B.R. 595, 603 (Bankr. S.D. Fla. 2007) (quoting *In re* Fowler, 349 B.R. 414, 420 (Bankr. D. Del. 2006)).

18. 11 U.S.C.A. § 101(10A)(A) (West Supp. 2008). However, social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of domestic or international terrorism are excluded from current monthly income. 11 U.S.C.A. § 101(10A)(B) (West Supp. 2008); *see also* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 246–47 (2005) (providing an excellent and thorough explanation of the means test). It is important to understand that current monthly income, as defined in § 101(10A), often is not an accurate predictor of the debtor's actual current or future income. For example, suppose that shortly before or after filing a Chapter 7 petition, a debtor who was unemployed for most of the six months prior to bankruptcy obtains a high-paying job. Or, suppose that a debtor who was employed for the greater part of the six months before bankruptcy lost his job and now is unemployed. In either hypothetical, the debtor's income for the six months prior to bankruptcy does not accurately evidence the debtor's actual financial situation. These examples illustrate the ramifications of the poor manner in which Congress defined current monthly income.

19. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2008). There is a split of authority concerning the application of this provision. The majority view holds that, even if the debtor intends to surrender the collateral to the secured creditor or has surrendered it, the amounts scheduled as contractually due as of the date of the petition are deductible from current monthly income. *See, e.g.*, *In re* Kelvie, 372 B.R. 56, 64 (Bankr. D. Idaho 2007); *In re* Haar, 360 B.R. 759, 768 (Bankr. N.D. Ohio 2007); *In re* Nockerts, 357 B.R. 497, 504–05 (Bankr. E.D. Wis. 2006); *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *8 (Bankr. N.D. Ga. May 1, 2006). Other courts have held that a debtor who has surrendered the collateral or intends to surrender the collateral will be denied this deduction. *See, e.g.*, *In re* Ray, 362 B.R. 680, 685–86 (Bankr. D.S.C. 2007); *In re* Singletary, 354 B.R. 455, 473 (Bankr. S.D. Tex. 2006); *In re* Harris, 353 B.R. 304, 309–10 (Bankr. E.D. Okla. 2006). It is important to note, however, that the view adopted by the

of all priority claims . . . divided by sixty."[20] In addition, the debtor is allowed to deduct certain applicable necessary monthly expenses specified by the Internal Revenue Service (IRS) in tables based on the number of persons per family and gross monthly income.[21] These include necessary expenses under the National Standards that are uniform throughout the country (except for Alaska and Hawaii) for food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous expenses.[22] Also, the IRS provides Local Standards that allow expenses for transportation costs, and housing and utilities costs.[23] Finally, certain other actual and necessary monthly expenses specified by the IRS and/or the statute itself may be deducted, including, for example, healthcare and health insurance, childcare, life insurance, telephone services, student loans and certain educational expenses, accounting and legal fees, and reasonably necessary expenses to maintain the safety of the debtor and her family from violence.[24] Finally, all allowable expenses are subtracted from current monthly income to determine the debtor's monthly disposable income.[25]

If the debtor's monthly disposable income is less than $109.58, then the presumption does not arise. On the other hand, if the debtor's monthly disposable income is equal to or greater than $182.50, the presumption does arise. In situations in which the debtor's monthly disposable income is $109.58 or more, but less than $182.50, the presumption arises if the debtor's disposable income enables him to pay at least twenty-five percent of the nonpriority unsecured claims in the case.[26]

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majority of courts applies only to the determination of whether the presumption of abuse arises under the means test, and not to whether the case may be dismissed under § 707(b)(3)(B) (the "totality of the circumstances"). *See infra* note 60 and accompanying text. The reason for dividing the total secured debt by sixty is because § 707(b)(2) generally considers the debtor's ability to repay his debts under a five-year Chapter 13 plan (sixty months), although sometimes a three-year plan applies. *See* 11 U.S.C.A. §§ 1322(d), 1325(b)(4) (West Supp. 2008).

20. 11 U.S.C.A. § 707(b)(2)(A)(iv) (West Supp. 2008).

21. 11 U.S.C.A. § 707(b)(2)(A)(ii) (West Supp. 2008).

22. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (West Supp. 2008); *see also* Wedoff, *supra* note 18, at 253–55 & nn.50 & 56 (discussing the IRS's National Standards for expenses and the applicable tables, and also referring with specificity to the IRS's Financial Analysis Handbook in the Internal Revenue Manual and the applicable website, as well as the website for the IRS tables).

23. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (West Supp. 2008); *see also* Wedoff, *supra* note 18, at 255–61.

24. 11 U.S.C.A. § 707(b)(2)(A)(ii) (West Supp. 2008); *see also* Wedoff, *supra* note 18, at 261–72.

25. 11 U.S.C.A. § 707(b)(2)(A)(i) (West Supp. 2008).

26. *Id.*

Notwithstanding these means test dollar and percentage thresholds, no judge, the trustee in the case, U.S. Trustee or bankruptcy administrator, or any other party in interest may file a motion to dismiss based on the means test presumption if the current monthly income of the debtor and the debtor's spouse combined (with one exception), as of the date of the order for relief, is equal to or less than the applicable state median.[27]

It is important to note that even when the means test presumption of abuse arises, it is merely a rebuttable presumption. More specifically, the debtor may rebut the presumption by demonstrating special circumstances justifying either additional expenses or changes in current monthly income "for which there is no reasonable alternative."[28] The Code gives two nonexclusive examples of what might constitute special circumstances resulting in additional expenses or adjustments of current monthly income: the debtor's call to active duty in the Armed Forces or a serious medical condition.[29]

Therefore, this Article emphasizes that the means test is merely a presumption of abuse based on a snapshot at the moment of the filing of the bankruptcy petition, and it is not necessarily indicative of the debtor's actual financial condition. As stated by the court in *In re Hartwick*, "The means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt."[30] More specifically, Bankruptcy Judge Eugene Wedoff has characterized "the proper role of the means test in Chapter 7" as being "simply a mechanism for generating a presumption; it does not result in any final determination."[31] On the other hand, even if the debtor passes or

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27. 11 U.S.C.A. § 707(b)(7) (West Supp. 2008).

28. 11 U.S.C.A. § 707(b)(2)(B)(i) (West Supp. 2008).

29. *Id*. A 2005 Harvard University study found that "medical problems contribute to about half of all bankruptcies." David U. Himmelstein, Elizabeth Warren, Deborah Thorne & Steffie Woolhandler, *Market Watch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFF.: POL'Y J. HEALTH SPHERE, W5-63, W5-70 (Feb. 2, 2005), *available at* http://content.healthaffairs.org/cgi/reprintframed/hlthaff.w5.63v1.

30. *In re* Hartwick, 352 B.R. 867, 870 (Bankr. D. Minn. 2006).

31. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 MO. L. REV. 1035, 1037 (2006). *Contra* John A. E. Pottow, *The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying to Bridge the Wedoff/Culhane & White Divide*, 71 MO. L. REV. 1053, 1057–58 (2006) (stating that "the means test, despite its label, is not a presumption" even though "Congress has explicitly called it that" (title capitalization omitted)). *But see* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

successfully rebuts the means test, the case may be dismissed under the totality of the circumstances, which is determinative.[32]

III. DISMISSAL FOR ABUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES MAY BE BASED ON PRE-PETITION AND POST-PETITION CHANGES IN THE DEBTOR'S FINANCIAL CONDITION

Section 707(b)(3)(B) states:

> In considering under paragraph (1)[33] whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the [means test] presumption . . . does not arise or is rebutted, the court shall consider . . . (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.[34]

Unlike the means test, totality is forward-looking because it considers the debtor's post-petition financial condition, including changes before and after the bankruptcy petition was filed.[35] Therefore, for the purpose of dismissal under totality, it is important to utilize the debtor's actual income and expenses, and

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32. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

33. 11 U.S.C.A. § 707(b)(1) states that "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.A. § 707(b)(1) (West Supp. 2008).

34. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

35. The overwhelming majority of courts have held that, under totality, the court may consider post-petition changes in the debtor's financial condition. *See, e.g.*, *In re* dePellegrini, 365 B.R. 830, 832 n.1 (Bankr. S.D. Ohio 2007); *In re* Henebury, 361 B.R. 595, 607 (Bankr. S.D. Fla. 2007); *In re* Richie, 353 B.R. 569, 576–77 (Bankr. E.D. Wis. 2006); *In re* Pennington, 348 B.R. 647, 651–52 (Bankr. D. Del. 2006); Justin H. Rucki, Note, *Looking Forward While Looking Back: Using Debtors' Post-Petition Financial Changes to Find Bankruptcy Abuse After BAPCPA*, 49 WM. & MARY L. REV. 335, 364–68 (2007). In another article authored by Bankruptcy Judge Eugene R. Wedoff, the introduction presents a hypothetical in which a temporarily unemployed corporate CEO maintains his lavish lifestyle by spending his savings and taking on large amounts of debt. He subsequently finds a new job paying even more than his previous employment, and, in order to avoid repaying his additional debt, he files a Chapter 7 bankruptcy petition. He has no assets that the trustee can liquidate because of a sizeable state homestead exemption, depletion of his bank accounts, and encumbrances on all of his vehicles. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under § 707(b)(3)*, 25 AM. BANKR. INST. J. 1, 1 (2006). It is interesting to note that Judge Wedoff was careful to craft his hypothetical in such a way that the debtor obtained the new high-paying job shortly before bankruptcy, rather than shortly after bankruptcy. Perhaps he was implying that if the new employment had been obtained after filing the bankruptcy petition, it would not constitute abuse unless the debtor knew in advance that he would be obtaining the new high-paying job. Under this approach, abuse is viewed as of the date of the bankruptcy petition, and thus it would seem to disagree with this Article's assertion that totality includes consideration of post-petition changes in the debtor's income or expenses.

not the means test income and expenses, which often are not an accurate reflection of the debtor's financial condition because the means test is based on current monthly income and certain expenses that might no longer exist.

A. Plain Language

The unambiguous language of the statute expressly provides that it is the "granting of relief" that would be abusive of Chapter 7.[36] The granting of relief refers to a discharge under Chapter 7, not the filing of the bankruptcy petition.[37] Also, it is significant that dismissal under totality does not include the word "petition,"[38] in contrast with dismissal under § 707(b)(3)(A) for the debtor's having "filed the petition in bad faith."[39]

Inasmuch as the granting of the Chapter 7 discharge constitutes the abuse for which the case may be dismissed under totality, the court should consider all significant changes relating to the debtor's financial situation, pre-petition or post-petition, up until the time of the hearing on the motion to dismiss under the totality of the circumstances. Similarly, the court in *In re Mestemaker* reasoned, "[T]he plain language of § 707(b)(3), read in conjunction with § 707(b)(1) and (2), is clear and compels a conclusion that a court must consider a debtor's actual debt-paying ability in ruling on a motion to dismiss based on abuse where the presumption does not arise or is rebutted."[40]

This approach is consistent with the U.S. Supreme Court's well-established canon of statutory interpretation: "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms."[41]

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36. 11 U.S.C.A. § 707(b)(1), (3)(B) (West Supp. 2008).

37. *See In re* Cortez, 457 F.3d 448, 454–55 (5th Cir. 2006); 6 COLLIER ON BANKRUPTCY ¶ 707.04[5][a], at 707-35 (Allan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008). Section 727(a) is the provision under which the court grants a debtor a Chapter 7 discharge. 11 U.S.C. § 727(a) (2006).

38. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

39. 11 U.S.C.A. § 707(b)(3)(A) (West Supp. 2008).

40. *In re* Mestemaker, 359 B.R. 849, 855 (Bankr. N.D. Ohio 2007). For this Article's discussion of the debtor's ability to pay under totality, see *infra* Part III.C.

41. Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted)).

B. Legislative History

Although the language of § 707(b)(1) and (3) unambiguously allows the court to take into account post-petition changes in the debtor's income and expenses under totality, this Article, for the purpose of thoroughness, also will examine the legislative history. The legislative history accompanying the 2005 Act did not contain a conference committee report (because no conference committee existed) or a Senate Judiciary Committee Report, and the House Judiciary Committee Report for the most part simply repeats the language of the 2005 Act.[42] The 2005 Act was the culmination of several unsuccessful attempts by Congress over a number of years to enact legislation intended to deter abusive bankruptcy filings. One of these bills was the Bankruptcy Reform Act of 2000,[43] which was explained by portions of the 1999 Senate Judiciary Committee Report that were inserted into the Congressional Record by Senator Grassley, who sponsored and was the principal author of both the unsuccessful 2000 Act, as well as the 2005 Act (a fact of great significance).[44]

In referring to the 1999 Senate Judiciary Committee Report, it is important to understand that the 2000 Conference Committee Report merely tracked the language of the statute with very little explanation, and that the changes to § 707(b)(3)(B) from the unenacted 2000 Act to the 2005 Act are *de minimis* and do not change its meaning. More specifically, the only changes made to the 2000 Act's version of § 707(b)(3)(B) are: (1) substituting "does not arise" for "does not apply" and (2) substituting "or is rebutted" for "or has been rebutted," before the language "the court shall consider."[45] Therefore, inasmuch as committee reports usually are recognized as constituting the

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42. Hon. Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 217 & n.105 (2007).

43. Hereinafter, the Bankruptcy Reform Act of 2000 will sometimes be referred to as "the 2000 Act."

44. 146 CONG. REC. 26,462 (2000). The 1999 Senate Judiciary Committee Report originally accompanied the unenacted Bankruptcy Reform Act of 1999. During the Senate's debate on the Bankruptcy Reform Act of 2000 Conference Report, Senator Grassley inserted portions of the 1999 Senate Judiciary Committee Report into the Congressional Record to provide an explanation of the 2000 Conference Report. The text of these insertions appears in the Congressional Record as seven-point font, rather than the standard eight-point font, indicating that they were contained in a document inserted into the Congressional Record by Senator Grassley. LAWS AND RULES FOR PUBLICATION OF THE CONGRESSIONAL RECORD, *available at* http://www.gpoaccess.gov/crecord/laws-rules.pdf.

45. *Compare* S. 3186, 106th Cong. § 102 (2000), *with* 11 U.S.C.A. § 707(b)(3) (West Supp. 2008).

most reliable and authoritative form of legislative history,[46] "the history of proposed legislation related to the eventual enactment of BAPCPA [the Bankruptcy Abuse Prevention and Consumer Protection Act] can provide a principled basis for decisions interpreting BAPCPA."[47] Thus, the 1999 Senate Judiciary Committee Report is especially helpful in ascertaining Congress's intent because the 2000 Conference Committee Report failed to provide meaningful explanation of the proposed legislation.

In this regard, the U.S. Supreme Court has provided guidance concerning the use of committee reports, and also concerning the use of legislative history of prior unenacted bills. In *Garcia v. United States*, the Court stated:

> In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.[48]

In *United States v. Enmons*, the Court reasoned, "Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand . . . simply because the interpretation was given two years earlier."[49] In applying *Enmons*, the U.S. Court of Appeals for the D.C. Circuit concluded that a House subcommittee report that accompanied a previously unenacted bill was "wholly relevant to an understanding of the statute" where "the 'operative language' of the earlier bill was 'substantially carried forward' into the subsequent statute."[50]

Consequently, the 1999 Senate Judiciary Committee Report accompanying the 2000 Act is an authoritative source that provides clear insight into Congress's intent concerning dismissal under the totality of the circumstances. It states that "in addition to the means test," a debtor's case may be dismissed for either bad faith or where the granting of relief would be abusive under

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46. *See* Garcia v. United States, 469 U.S. 70, 76 (1984); *see also infra* note 48 and accompanying text.

47. Waldron & Berman, *supra* note 42, at 217.

48. *Garcia*, 469 U.S. at 76 (internal citations omitted); *see also* Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).

49. United States v. Enmons, 410 U.S. 396, 405 n.14 (1973).

50. Bolden v. Blue Cross & Blue Shield Ass'n (Appeal of Bolden), 848 F.2d 201, 209 n.4 (D.C. Cir. 1988); *see also* Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n, 801 F.2d 1120, 1127 n.1 (9th Cir. 1986).

the totality of the circumstances.[51] This same paragraph in the Report continues with an explanation that Congress intended to adopt the holding in *In re Lamanna* and similar cases, which was that the debtor's ability to pay out of future income is the primary factor in determining whether substantial abuse exists under totality.[52] The paragraph expressly states that Congress intended to reject the holding in *In re Green* and similar cases, which (according to an earlier paragraph on the previous page of the Report) Congress construed "as a justification for either ignoring ability to pay completely, or doing so in effect."[53] The Report also states that "[c]ases which have decided that a debtor's ability to pay should not be considered when determining abuse, or can be outweighed if the debtor is otherwise acting in good faith, are intended to be overruled."[54]

Furthermore, the Report states the following: "[S]ince the standard for dismissal is revised to require 'abuse' rather than 'substantial abuse', the courts are clearly given *additional discretion* to control abusive use of chapter 7 when that is appropriate."[55] Therefore, although Congress restricted the courts' discretion for purposes of the means test only, this language in the legislative history is strong evidence that Congress intended to expand the courts' discretion in determining the debtor's ability to pay under totality, thus allowing the courts to take into consideration any significant pre-petition and post-petition changes in the debtor's financial

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51. 146 CONG. REC. 26,465 (2000).

52. *Id.*; *see* First USA v. Lamanna (*In re* Lamanna), 153 F.3d 1, 5 (1st Cir. 1998) ("[I]n assessing the totality of a debtor's circumstances, courts should regard the debtor's ability to repay out of future disposable income as the primary, but not necessarily conclusive, factor of 'substantial abuse.'"); *see also* Price v. U.S. Tr. (*In re* Price), 353 F.3d 1135, 1140 (9th Cir. 2004) ("The primary factor defining substantial abuse is the debtor's ability to pay his debts as determined by the ability to fund a Chapter 13 plan."); Stewart v. U.S. Tr. (*In re* Stewart), 175 F.3d 796, 809 (10th Cir. 1999) (concluding "ability to pay is a primary factor in determining whether 'substantial abuse' occurred" but also considering other factors); *In re* Krohn, 886 F.2d 123, 126 (6th Cir. 1989) (stating that a debtor's ability to repay his debts in a Chapter 13 plan "alone may be sufficient to warrant dismissal" under the totality of the circumstances); *In re* Walton, 866 F.2d 981, 983–85 (8th Cir. 1989) (finding "substantial abuse" where a debtor acted in good faith but had the ability to pay a significant portion of his debts in a Chapter 13 plan); Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 914 (9th Cir. 1988) ("[T]he debtor's ability to pay his debts when due, as determined by his ability to fund a chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse.").

53. 146 CONG. REC. 26,464–65 (2000); *see also In re* Green, 934 F.2d 568, 572–73 (4th Cir. 1991) (appearing to require a finding of bad faith for dismissal based on the totality of the circumstances under pre-Act law).

54. 146 CONG. REC. 26,468 (2000).

55. 146 CONG. REC. 26,465 (2000) (emphasis added).

condition, instead of being limited to the income and expenses stated on the means test form.[56]

C. The Debtor's Ability to Pay

The debtor's ability to pay under a Chapter 13 plan is the most important factor for dismissal under the totality of the circumstances.[57] More specifically, ability to pay should be determined by the debtor's actual disposable income, based on such factors as significant increased income or decreased expenses, either before or after the filing of the bankruptcy petition. As stated in *In re Mestemaker*:

> The plain meaning of the phrase "debtor's financial situation" must include a debtor's actual income and expenses, since such information is the starting point for any analysis of an individual's financial situation. There is no provision in § 707(b) stating that the means test is the only method through which a court may determine whether there is abuse based on a debtor's ability to pay. Rather, the plain language of § 707(b)(3), read in conjunction with § 707(b)(1) and (2), is clear and compels a conclusion that a court must consider a debtor's actual debt-paying ability in ruling on a motion to dismiss based on abuse where the presumption does not arise or is rebutted.[58]

For example, the debtor's increased income as a result of obtaining a new high-paying job shortly after the filing of a Chapter 7 petition would be an important factor for dismissal under totality.[59] Similarly, significant decreased expenses as a result of the debtor's post-petition surrender of collateral securing large debt, such as an expensive residence or vehicle, also would be an important factor for dismissal under totality.[60]

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56. Official Form B22A, Oct. 2005, *available at* http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B22A101105.pdf.

57. *See In re* Burden, 380 B.R. 194, 199 (Bankr. W.D. Mo. 2007) (citing *In re Walton*, 866 F.2d at 984–85); *In re* Burge, 377 B.R. 573, 576–77 (Bankr. N.D. Ohio 2007) (citing *In re Krohn*, 886 F.2d at 126); *In re* Pfeifer, 365 B.R. 187, 192 (Bankr. D. Mont. 2007) (citing *In re Price*, 353 F.3d at 1140). *Contra* Culhane & White, *supra* note 16, at 667 (arguing erroneously that the means test alone governs ability to pay).

58. *In re* Mestemaker, 359 B.R. 849, 854–55 (Bankr. N.D. Ohio 2007).

59. As explained earlier, because of the way "current monthly income" is defined, it sometimes is not an accurate predictor of a debtor's actual monthly income. *See supra* note 18; *see also* 11 U.S.C.A. § 101(10A) (West Supp. 2008) (defining "current monthly income").

60. Under totality, the court should take into account the debtor's post-petition surrender of collateral for the purpose of determining the debtor's ability to pay, which usually will be enhanced because of a significant increase in actual disposable income caused by a substantial decrease in secured debt payments. It is important to distinguish the court's consideration of the debtor's financial condition under totality from the

The case law is replete with compelling examples of situations in which the debtor's financial circumstances changed significantly post-petition, thereby enabling the debtor to repay his debts under a Chapter 13 plan. For example, in *In re Henebury*, the debtors, husband and wife, were not subject to the means test because they had negative monthly disposable income as a result of certain allowed deductions from current monthly income, most prominently mortgage payments on the former family residence at which they no longer resided.[61] The court found that the debtors had stopped making payments on their former home and effectively had surrendered the property, thus significantly reducing the debtors' monthly expenses.[62] Furthermore, Mrs. Henebury, who had been unemployed prior to bankruptcy, obtained new employment earning approximately $39,000 per year four days after the filing of the bankruptcy petition.[63]

The court held that, under the totality of the circumstances, granting the debtors Chapter 7 relief would be abusive because they had the ability to pay their creditors a sizeable part of their unsecured debt in a Chapter 13 plan.[64] More specifically, the court reasoned: "If a Chapter 13 plan is to be feasible it must be based on the debtor's actual or anticipated ability to pay and therefore consideration of post-petition changes in the financial circumstances of the debtor is appropriate."[65]

In another pertinent case in which the court found abuse under totality, *In re Pak*, the debtor was unemployed for the majority of the six months prior to bankruptcy and was not subject to the means test because his current monthly income was below the state median income.[66] A few days before filing his Chapter 7 petition, the debtor, who was single and had no dependents, obtained employment at an annual salary exceeding $100,000.[67] The court concluded that the debtor's Chapter 7 case

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mechanical means test calculation of disposable (but not necessarily actual) income, which allows a deduction for the secured debt payments on the surrendered collateral merely because they were "scheduled as contractually due" at the moment of bankruptcy for the purpose of the means test presumption of abuse. *See* 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2008); *supra* note 19; *see also In re Haar*, 373 B.R. 493, 499 (Bankr. N.D. Ohio 2007) (stating that the means test and totality "serve entirely different functions").

61. *In re* Henebury, 361 B.R. 595, 597–99 (Bankr. S.D. Fla. 2007).

62. *Id.* at 614.

63. *Id.* at 598–99.

64. *Id.* at 614.

65. *Id.* at 611.

66. *In re* Pak, 343 B.R. 239, 241 (Bankr. N.D. Cal. 2006).

67. *Id.*

was abusive under the totality of the circumstances because the debtor had the ability to repay a substantial portion of his unsecured debts in a Chapter 13 plan.[68] Significantly, it ruled that "in connection with this hypothetical chapter 13 plan, the Debtor's 'projected disposable income' should take into account any post-filing change in circumstances, such as increased or decreased income."[69]

These two cases highlight the necessity of considering both pre-petition and post-petition changes in the debtor's financial situation to determine whether there is abuse of Chapter 7 under the totality of the circumstances. More specifically, the key factor is the debtor's ability to repay her debts under a Chapter 13 plan based on her actual disposable income, which might depend on events occurring before or after the filing of the bankruptcy petition, either of which could alter the debtor's financial situation. It is important to remember that the abuse for which the case may be dismissed under totality is the granting of a Chapter 7 discharge, not the filing of the bankruptcy petition.[70] In other words, the abuse prevented in *Henebury* and *Pak* was not the filing of the Chapter 7 petition, but rather the granting of a Chapter 7 discharge after the debtors had obtained new employment providing them with the ability to repay their debts, irrespective of whether the job was obtained before or after the filing of the bankruptcy petition.

Another good example is the case of *In re Haar*, in which the debtors passed the means test primarily because, even though they had surrendered their residence and no longer had secured debt payments on two mortgages of $2,242.60 per month, they were allowed the means test expenses for the mortgage payments that were scheduled as contractually due on the date of the petition.[71] The debtors chose, instead, to rent at a rate of $888.00 per month, thereby also saving $250.00 per month in real estate taxes.[72]

After examining the debtors' budget, the court found that the debtors had at least $1,200 per month of disposable income, which was expected to continue indefinitely.[73] Therefore, the debtors would have $72,000 available over a sixty-month period

68. *Id.* at 246–47.
69. *Id.*
70. *See supra* notes 36–37.
71. *In re* Haar, 373 B.R. 493, 496, 498 (Bankr. N.D. Ohio 2007).
72. *Id.* at 496.
73. *Id.* at 500.

of a hypothetical Chapter 13 plan, thus enabling them to pay 100% of their unsecured indebtedness.[74]

The court held that, under totality, it may consider the additional income made available by the debtors' post-petition surrender of their residence. It emphasized that the methods for presuming abuse under the means test and for determining abuse under totality are very different: "The 'means test' of § 707(b)(2) is a strict mechanical test, while § 707(b)(3)'s approach [totality] is grounded in equity."[75] The court stated that "§ 707(b)(3), itself, makes it clear that a court is not to construe this provision as having any direct linkage with the 'means test' of § 707(b)(2)."[76] Furthermore, the court held that, under totality, "the Debtors have the ability to repay their unsecured creditors, thereby making the granting of relief in this case an abuse of the bankruptcy process."[77]

D. Debtor's Duty to Disclose Anticipated Post-Petition Changes in Financial Condition

The Code requires the debtor to file "a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition."[78] This new debtor's duty was added in the amendments contained in the 2005 Act,[79] and it is consistent with the court's mandatory responsibility under § 707(b)(3) to consider "the totality of the circumstances . . . of the debtor's financial situation."[80] It is also consistent with the information required of the debtor on Schedule I at line 17 and Schedule J at line 19, which is to describe any increase or decrease in income or expenditures "reasonably anticipated to occur within the year following the filing of this document."[81]

Thus, the statute as well as the Official Forms appear to provide additional support for the assertion that Congress

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74. *Id.*

75. *Id.* at 501 (citing *In re* Peoples, 345 B.R. 840, 843 (Bankr. N.D. Ohio 2006); *In re* Hartwick, 352 B.R. 867, 870 (Bankr. D. Minn. 2006)).

76. *Id.*

77. *Id.* at 503.

78. 11 U.S.C. § 521(a)(1)(B)(vi) (2006). It appears that a technical amendment would be appropriate also to include any reasonably anticipated decrease in income or expenditures during this twelve-month period. *See* 4 COLLIER, *supra* note 37, ¶ 521.09D, at 521-48.

79. The 2005 Act, Pub. L. No. 109-8, § 315(b)(1), 119 Stat. 23, 90.

80. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

81. Official Form 6I, Oct. 2006, *reprinted in* 11 U.S.C. app. at 458 (2006); Official Form 6J, Oct. 2006, *reprinted in* 11 U.S.C. app. at 459 (2006).

intended § 707(b)(3)(B) to be forward-looking and to take into account any significant post-petition changes in the debtor's financial situation.

E. Totality and Bad Faith Are Independent Grounds for Dismissal Under § 707(b)(3)

Section 707(b)(3) states: "In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the [means test] presumption . . . does not arise or is rebutted, the court shall consider—(A) whether the debtor filed the petition in bad faith; *or* (B) the totality of the circumstances . . . ."[82]

Under pre-Act law, bad faith was included as one of several factors to be considered under the totality of the circumstances when a motion was made to dismiss the debtor's case for substantial abuse. However, under the new Act, "substantial abuse" was changed to "abuse," and bad faith and the totality of the circumstances were made separate bases for dismissal in § 707(b)(3)(A) and (B), respectively.[83] As stated clearly in *In re Henebury*, "[T]he debtor's total financial situation as a measure of ability to pay, and bad faith are separate and sufficient grounds for dismissal. Either ability to pay *or* bad conduct in connection with the bankruptcy will warrant dismissal for abuse under § 707(b)(3)."[84]

This interpretation is consistent with cases decided by the U.S. Supreme Court that provide direction concerning statutory construction. For example, the Court has stated: "Statutes must be interpreted, if possible, to give each word some operative effect."[85] Similarly, the Court has reiterated its "longstanding canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous."[86] Therefore, the interpretation of § 707(b)(3) that best follows the Supreme Court's directives is

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82. 11 U.S.C.A. § 707(b)(3)(A), (B) (West Supp. 2008) (emphasis added).

83. *See id.*; *see also In re* Henebury, 361 B.R. 595, 607 (Bankr. S.D. Fla. 2007).

84. *In re Henebury*, 361 B.R. at 607; *see also* Pottow, *supra* note 31, at 1065; Wedoff, *supra* note 18, at 236. *But see* Culhane & White, *supra* note 16, at 699–700 (arguing erroneously that "[t]otality of the circumstances and filed in bad faith should be reserved for serious debtor misconduct that is not adequately addressed by other more specific remedies in the Code").

85. Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 209 (1997) (citing United States v. Menasche, 348 U.S. 528, 538–39 (1955)); *see also* Moskal v. United States, 498 U.S. 103, 109–10 (1990) ("[A] court should give effect, if possible, to every clause and word of a statute.") (internal quotations omitted).

86. Beck v. Prupis, 529 U.S. 494, 506 (2000).

that the debtor's bad faith is no longer a factor to be considered for dismissal under totality,[87] but rather is an independent ground for dismissal under § 707(b)(3)(A). Congress clearly intended for the totality of the debtor's financial circumstances to mean something different than the debtor's bad faith because § 707(b)(2)(A) and (B) are worded in the disjunctive.[88] Moreover, the legislative history shows that Congress expressly rejected the holding in *In re Green*, which appears to have required a finding of bad faith for dismissal under the totality of the circumstances.[89]

In dismissing a case for bad faith under § 707(b)(3)(A), the court focuses on the debtor's conduct rather than the debtor's ability to repay creditors. More specifically, a § 707(b)(3)(A) dismissal occurs because the debtor filed her petition in bad faith, while a § 707(b)(3)(B) dismissal occurs because the totality of the debtor's financial circumstances demonstrates abuse in light of the debtor's ability to repay creditors. Hence, dismissal under § 707(b)(3)(A) is backward-looking for the debtor's acts already performed in bad faith, while dismissal under § 707(b)(3)(B) is forward-looking based on the debtor's ability to repay creditors under a Chapter 13 plan.

For example, the court in *In re Mitchell* dismissed the case under § 707(b)(3)(A) for the debtor's bad faith filing of her Chapter 7 petition because, in the seven months before bankruptcy, the debtor loaded up on more than $39,000 of nonessential, nonpriority unsecured debt, which constituted 63.2% of her total nonpriority unsecured debts.[90] These debts arose from charges against at least five credit card accounts that the debtor had opened during this period for purchases such as beauty treatments and related products, electronics and personal property, women's fashions and accessories, pet pampering, and dining out.[91] It is noteworthy that prior to filing her bankruptcy petition in May 2006, the debtor had zero earnings during 2003, 2005, and 2006, and only $11,000 during the four years prior to bankruptcy.[92] Based on these facts, the court held that granting

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87. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

88. *See* Wedoff, *supra* note 18, at 236 (asserting that bad faith under § 707(b)(3)(A) is not limited to a debtor's dishonesty, such as an intentional and material misstatement or omission in the schedules, but instead is interpreted much more broadly).

89. *See In re* Green, 934 F.2d 568, 572–73 (4th Cir. 1991); 146 CONG. REC. 26,465 (2000); *see also supra* notes 51–54 and accompanying text (discussing the legislative history of § 707(b)(3)).

90. *In re* Mitchell, 357 B.R. 142, 147 (Bankr. C.D. Cal. 2006).

91. *Id.* at 146–47.

92. *Id.* at 146.

the debtor Chapter 7 relief would be abusive because she had filed her bankruptcy petition in bad faith.[93]

Other examples of the debtor's bad faith conduct that might result in a dismissal under § 707(b)(3)(A) are: transferring property shortly before bankruptcy to friends or relatives for little or no consideration; filing the Chapter 7 petition solely to avoid one large judgment entered against the debtor shortly before bankruptcy; filing a Chapter 7 petition to discharge a sizeable accumulation of debts while unemployed prior to bankruptcy and with actual knowledge that the debtor would begin a new high-paying job shortly after the filing of the petition; and misstating or omitting material facts in the debtor's schedules. These types of bad faith acts by the debtor ostensibly differ in nature from cause for dismissal based on the totality of the debtor's financial circumstances, including any significant post-petition changes relating to the debtor's ability to repay creditors.

IV. UNDER TOTALITY, THE MEANS TEST DOLLAR AND PERCENTAGE LIMITATIONS DO NOT APPLY

In dismissing a case for abuse under the totality of the debtor's financial circumstances, the court is not bound by the means test dollar and percentage limitations.[94] Recall that, for purposes of the means test presumption only, if the debtor's monthly disposable income is less than $109.58, then the presumption does not arise. On the other hand, if the debtor's monthly disposable income is equal to or greater than $182.50, the presumption does arise. In situations in which the debtor's monthly disposable income is $109.58 or more, but less than $182.50, the presumption arises if the debtor's disposable income enables him to pay at least twenty-five percent of the nonpriority unsecured claims in the case.[95]

However, if the debtor passes or rebuts the means test, the court is required to consider whether there is abuse under the totality of the circumstances,[96] with the most important factor being the debtor's ability to pay. In this regard, the legislative history clearly states: "In dealing with ability to pay cases which are abusive, the [means test] presumption of abuse . . . *will not be*

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93. *Id.* at 158.
94. *See* 11 U.S.C.A. § 707(b)(2)(A)(i) (West Supp. 2008).
95. *See id.*
96. 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

relevant."[97] Rather, when dismissing under totality, "the courts are clearly given additional discretion to control abusive use of chapter 7 when that is appropriate."[98]

Inasmuch as the means test dollar and percentage limitations were intended to reduce the court's discretion only for the purpose of the means test presumption, the legislative history quoted above is irrefutably instructive concerning the court's additional discretion when dismissing under totality. Because the means test presumption of abuse is not relevant under totality, and because Congress intended to grant the court additional discretion under totality, it would be illogical to apply the means test dollar and percentage limitations to totality and thereby reduce the court's discretion. In agreement, the leading treatise on bankruptcy suggests that "[i]t is doubtful that courts will create any bright line rules under this standard, by which its very nature is an open-ended and discretionary inquiry."[99]

Moreover, had Congress intended to apply the means test dollar and percentage limitations to totality, it certainly would have included language to that effect in § 707(b)(3)(B). More specifically, it would have added at the end of § 707(b)(3)(B): "under the means test standards of paragraph (b)(2)," or "based on the dollar and percentage limitations in paragraph (b)(2)." However, it chose not to incorporate these limitations.

It also must be remembered that the means test merely creates a presumption of abuse based on a mechanical calculation at the moment of bankruptcy. On the other hand, a finding of abuse under the totality of the circumstances is determinative, taking into account the debtor's ability to pay in light of a number of factors, such as the stability of the debtor's job, his age and health, and "whether [his] expenses can be reduced significantly without depriving [him] of adequate food, clothing, shelter and other necessities."[100] Thus, applying the means test

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97. 146 CONG. REC. 26,468 (2000) (emphasis added).

98. 146 CONG. REC. 26,465 (2000).

99. 6 COLLIER, *supra* note 37, ¶ 707.05[3][b], at 707-53–54.

100. In a pre-Act case, the Sixth Circuit gave an often-quoted list of nonexclusive factors to consider under totality. *See In re* Behlke, 358 F.3d 429, 437 (6th Cir. 2004) (citing *In re* Krohn, 886 F.2d 123, 126–28 (6th Cir. 1989) ("In addition to evaluating ability to pay debts out of future income, other factors to be taken into account to determine if debtors are 'needy' include whether debtors enjoy a stable source of income, whether debtors' expenses can be reduced significantly without depriving them of adequate food, clothing, shelter and other necessities and whether debtors' financial situation is the result of an unforeseen catastrophic event."). Courts applying the text of the 2005 Act have continued to examine such factors under totality. *See, e.g.*, *In re* Burton, 379 B.R. 732, 737 (Bankr. N.D. Ohio 2007) ("Having considered the totality of the circumstances in this case, including: the Debtor's relative age, general health, above-

dollar and percentage limitations would effectively preclude consideration of the various criteria that courts consistently have considered under the totality of the circumstances.

This issue has been the subject of varying interpretations. For example, in *In re Mestemaker*, the court dismissed the debtors' case under totality without applying the means test limitations, but it commented that the means test "abuse threshold" is a helpful guideline in determining what Congress intended to constitute abuse.[101] On the other hand, Judge Wedoff offers a bright line approach that applies the means test dollar and percentage limitations to dismissal under totality as follows:

> The abuse threshold set out in section 707(b)(2)(A)(i) is irrebuttable. Section 707(b)(2)(B) only allows a debtor to rebut the means test's calculation of disposable income in an amount above the abuse threshold; it does not allow any argument that the threshold itself is too low. . . . Since the abuse threshold cannot be challenged through the means test, there is a clear policy judgment that the threshold fixes the level at which debt-paying ability becomes abusive of Chapter 7. When judges are required to make determinations of abuse under section 707(b)(3), they should accordingly use the means test threshold: if a debtor's actual disposable income, as determined by the court, falls below that threshold, there should be no finding of abuse based on debt-paying ability; if disposable income meets or exceeds the threshold, abuse should be found.[102]

The fallacy of this approach is that the means test is merely a presumption of abuse while totality is determinative under an independent standard. It is vividly clear that the legislative history reveals Congress's intent that the means test presumption of abuse is irrelevant to a dismissal under totality, where the court is accorded greater discretion.[103]

Therefore, for all of these reasons, this Article concludes that Congress intended that the means test dollar and percentage limitations do not apply to a determination of abuse under the totality of the circumstances.

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median salary, job stability, and his 401(k) plan, the Debtor has the ability to pay a meaningful amount of his consumer debt with relative ease from future income.").

101. *In re* Mestemaker, 359 B.R. 849, 858 (Bankr. N.D. Ohio 2007).

102. Wedoff, *supra* note 31, at 1046–47; *see also In re* Pennington, 348 B.R. 647, 651–52 (Bankr. D. Del. 2006) (finding that debtor had the ability to repay 42% of his unsecured debts over three years and 69% over five years, and holding that granting a Chapter 7 discharge would be abusive because the debtor could repay significantly more than the 25% means test threshold).

103. *See* 146 CONG. REC. 26,465, 26,468 (2000).

V. UNDER TOTALITY, THE COURT MAY CONSIDER THE DEBTOR'S NONEXEMPT PROPERTY, BUT IT MAY NOT CONSIDER EXEMPT PROPERTY

Consistent with the purpose of dismissal for abuse under the totality of the debtor's financial circumstances, the court may consider the existence of nonexempt assets of great monetary value in addition to the debtor's actual disposable income. For example, suppose the debtor owns nonexempt property consisting of a $500,000 vacation home and a $70,000 speedboat. If the debtor has substantial equity in the properties, then the issue is moot under totality because the U.S. Trustee will not object to the debtor's discharge since the Chapter 7 trustee in the case will take possession of the assets, liquidate them, and distribute the proceeds to creditors. This example is a case where the bankruptcy process is working as it was designed.

However, if the assets are fully or almost fully encumbered and the debtor wants to retain them while continuing to pay the secured debts under reaffirmation agreements,[104] then it is very possible that the debtor will pass the means test due to the sizeable amount of secured debts "scheduled as contractually due."[105] In these circumstances, it is highly appropriate for the court, under totality, to take into account the debtor's extravagant lifestyle and luxury assets in determining whether granting a Chapter 7 discharge would be an abuse of Chapter 7. In other words, if the debtor surrendered the properties to the secured creditors, the debtor no longer would have to make the monthly secured debt payments, thereby enabling her to repay a significant amount and percentage of her debts under a Chapter 13 plan.

On the other hand, under totality, the court may not consider the debtor's exempt property.[106] In the 1978 Bankruptcy Reform Act, Congress expressly provided for debtors' exemptions in § 522,[107] thereby implementing a policy in favor of allowing

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104. *See* 11 U.S.C. § 524(c) (2006) (providing the requirements for a reaffirmation agreement).

105. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2008). For an explanation of "scheduled as contractually due," see *supra* note 19 and accompanying text.

106. *Accord* Culhane & White, *supra* note 16, at 690–91. *Contra* Pottow, *supra* note 31, at 1064; Wedoff, *supra* note 31, at 1050–51. In a pre-Act case, the Second Circuit Court of Appeals reached a contrary conclusion. *See In re* Kornfield, 164 F.3d 778, 784 (2d Cir. 1999) ("A totality of circumstances inquiry is equitable in nature and the existence of an asset, even if exempt from creditors, is relevant to a debtor's ability to pay his or her debts.").

107. The Bankruptcy Code, Pub. L. No. 95-598, § 522, 92 Stat. 2549, 2586 (codified as amended at 11 U.S.C.A. § 522 (West Supp. 2008)).

debtors, under the Bankruptcy Code or under applicable state law (or federal nonbankruptcy law), to shield property that Congress or the state legislatures deemed to be unreachable by creditors in general.[108] This is in accord with the primary goal of bankruptcy law, which is to give the honest debtor a fresh start.

According to *Collier*, "A fundamental component of an individual debtor's fresh start in bankruptcy is the debtor's ability to set aside certain property as exempt from the claims of creditors. Exemption of property, together with the discharge of claims, lets the debtor maintain an appropriate standard of living as he or she goes forward after the bankruptcy case."[109]

The legislative history of § 727(a)(2) provides a good analogy. This subsection provides a ground for denial of a Chapter 7 discharge because the debtor has transferred property "with intent to hinder, delay, or defraud a creditor."[110] A frequently litigated issue under § 727(a)(2) is whether the debtor's conversion of nonexempt property to exempt property shortly before bankruptcy was permissible, or was a basis for dismissal under § 727(a)(2). The legislative history concerning this issue clearly states: "As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law."[111]

Case law has construed this legislative history to mean that "the conversion of non-exempt to exempt property for the purpose of placing the property out of the reach of creditors, without more [i.e., conduct evidencing indicia of fraud], will not deprive the debtor of the exemption to which he otherwise would be entitled."[112] Logic dictates that if the policy in favor of allowing the debtor to make full use of his exemptions will not prevent the granting of Chapter 7 relief under § 727(a)(2), then analogously that same policy should not allow the debtor's ownership of

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108. *See* 11 U.S.C.A. § 522(b) (West Supp. 2008) (creating federal exemptions under (d), and allowing, alternatively, state or local law exemptions, or other federal nonbankruptcy law exemptions, under (b)(3)(A)). However, exempt property is subject to debts for domestic support obligations; tax liens, notice of which is properly filed; and liens that are not void under 11 U.S.C. § 506(d), or liens that are not avoided under 11 U.S.C. §§ 522(f) or (g), 544, 545, 547, 548, 549, or 724(a). 11 U.S.C.A. § 522(c) (West Supp. 2008).

109. 4 COLLIER, *supra* note 37, ¶ 522.01, at 522-15.

110. 11 U.S.C. § 727(a)(2) (2006).

111. S. REP. NO. 95-989, at 76 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5862; H.R. REP. NO. 95-595, at 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317.

112. *In re* Carey, 938 F.2d 1073, 1076 (10th Cir. 1991) (quoting Norwest Bank Neb., N.A. v. Tveten, 848 F.2d 871, 873–74 (8th Cir. 1988)).

exempt property to be deemed an abuse that would be cause for dismissal under the totality of the circumstances. More specifically, if converting nonexempt property to exempt property shortly before bankruptcy "without more" is permissible, then, *a fortiori*, merely owning exempt property at the time of the filing of a Chapter 7 petition should not be considered abusive under the congressional policy in favor of allowing the debtor's exemptions. In both instances, the issue at hand is the granting or denial of relief under Chapter 7; and in both instances, the policy in favor of treating the debtor's exemptions as sacrosanct should be applied as Congress intended. Therefore, the court may not consider the debtor's exempt property under totality, thereby encroaching on the debtor's fresh start.

This conclusion is reinforced by the fact that Congress originally incorporated state exemptions into the Bankruptcy Code, and in the 2005 Act it again addressed the debtor's exemptions under state or local law (or federal nonbankruptcy law) and also amended § 522 to place certain limitations on the debtor's exemption of a homestead under state law.[113] Had Congress intended for the debtor's exempt property to be a factor for dismissal under the totality of the circumstances, it certainly would have included language to that effect in the amendments to § 522 or in the new § 707(b)(3)(B), as it did concerning the rejection of a personal services contract.[114]

VI. THE DEBTOR'S ABILITY TO PAY UNDER A CHAPTER 13 PLAN

A. *Projected Disposable Income Is Forward-Looking*

Inasmuch as the debtor's ability to pay under a Chapter 13 plan is the most important factor for dismissal under the totality of the circumstances,[115] this Article will construe the relevant

113. 11 U.S.C.A. § 522(b)(3)(A), (p), (q) (West Supp. 2008). The Act also added a new federal exemption for retirement funds to the extent that they are exempt from taxation under certain sections of the Internal Revenue Code. 11 U.S.C.A. § 522(d)(12) (West Supp. 2008).

114. *See* 11 U.S.C.A. § 707(b)(3)(B) (West Supp. 2008).

115. *See supra* note 52 and accompanying text. Post-Act courts continue to consider the debtor's ability to pay in a Chapter 13 plan the most important factor to consider under totality. *See, e.g.*, *In re* O'Brien, 373 B.R. 503, 506 (Bankr. N.D. Ohio 2007) ("This Court has observed, as have others, that § 707(b)(3) is best understood as a codification of pre-BAPCPA case law. Under pre-BAPCPA law, a debtor's ability to pay was a primary consideration in any § 707(b) analysis.") (footnote omitted) (citing *In re* Krohn, 886 F.2d 123, 126–27 (6th Cir. 1989)); *see also In re* Haynes, No. 1-07-bk-00959 RNO, 2008 WL 205223, at *4 (Bankr. M.D. Pa. Jan. 15, 2008) ("A significant number of cases under BAPCPA have held that the primary consideration under the totality [of] circumstances test is whether the Debtor has the ability to repay a substantial portion of his unsecured

language in § 1325(b)(1), which reads in part:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's *projected disposable income* to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.[116]

For purposes of § 1325(b), the 2005 Act has defined "disposable income" as meaning "current monthly income received by the debtor" minus expenses that are "reasonably necessary."[117] More specifically, if the debtor's current monthly income is greater than the applicable state median income, the amount of "reasonably necessary" expenses is determined under the means test standards of § 707(b)(2)(A) and (B).[118] On the other hand, if the debtor's current monthly income is equal to or less than the applicable state median, then the amount of expenses that are "reasonably necessary" is determined by the court.[119]

The difficulty in interpreting "all of the debtor's projected disposable income to be received in the applicable commitment period" is that Congress did not define the word "projected."[120] There are three lines of authority concerning the meaning of "projected," and the majority view is that it is forward-looking.[121] This approach is consistent with one of the primary goals of the 2005 Act, which is to shift "can-pay" debtors to a Chapter 13 repayment plan "to ensure that debtors repay creditors the

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debt through a hypothetical Chapter 13 plan.").

116. 11 U.S.C.A. § 1325(b)(1) (West Supp. 2008) (emphasis added).

117. The 2005 Act, Pub. L. No. 109-8, § 102, 119 Stat. 23, 33–34; *see also* 11 U.S.C.A. § 1325(b)(2) (West Supp. 2008).

118. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2008); 11 U.S.C.A. § 707(b)(2)(A)–(B) (West Supp. 2008). The means test expenses include "all amounts scheduled as contractually due to secured creditors" even though the collateral for such debts might have been surrendered, resulting in circumstances in which the debtor no longer is actually making the secured debt payments. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2008).

119. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2008).

120. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2008).

121. *See, e.g.*, *In re* Lanning, 380 B.R. 17, 22 (B.A.P. 10th Cir. 2007). Other courts adopting the majority approach include: *In re* Nowlin, 366 B.R. 670, 674 (Bankr. S.D. Tex. 2007), *aff'd*, No. CIV.A. H-07-2446, 2007 WL 4623043, at *1 (S.D. Tex. Dec. 28, 2007); *In re* Kibbe, 361 B.R. 302, 314 (B.A.P. 1st Cir. 2007); and *In re* Spurgeon, 378 B.R. 197, 201–02 (Bankr. E.D. Tenn. 2007). Even courts that do not consider "projected" to be a forward-looking term acknowledge that the majority of courts do consider it to be forward-looking. *See, e.g.*, *In re* Hanks, 362 B.R. 494, 498 (Bankr. D. Utah 2007).

maximum they can afford."[122] Similarly, the 2003 Merriam-Webster's Collegiate Dictionary defines "to project" as "to plan, figure, or estimate for the future (~ expenditures for the coming year)."[123] Therefore, the majority view construes "projected disposable income" as a forward-looking term that "is calculated based on a [d]ebtor's *current* projected income, not the historical average income for the six months prior to filing the petition."[124] In ascribing independent meaning to the word "projected," which modifies "disposable income," this approach uses the income and expense numbers on Form B22C[125] as a starting point only.[126] It then adjusts for substantial increases or decreases in the debtor's actual income or expenses when the disposable income figure on Form B22C "does not adequately represent the debtor's budget projected into the future."[127]

On the other hand, a minority of courts construe "projected" to mean "multiply[ing] the net 'disposable income' figure as calculated on Form B22C by the applicable commitment period. No more, no less."[128] The rationales for this approach are based on (1) the minority courts' interpretation of the plain meaning of the statute;[129] (2) the location and proximity of the 2005 Act's definition of "disposable income" to "projected disposable income;"[130] and (3) the reference in § 1129(a)(15) (one of the requirements for confirmation of a Chapter 11 plan) to the

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122. H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

123. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 993 (11th ed. 2003). Black's Law Dictionary does not define "projected." *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

124. *In re* Purdy, 373 B.R. 142, 152 (Bankr. N.D. Fla. 2007) (emphasis added) (relying on the holding of *In re* Kibbe, 361 B.R. 302 (B.A.P. 1st Cir. 2007)).

125. In Chapter 13 cases, debtors are required to complete Form B22C, which calculates disposable income in accordance with 11 U.S.C. § 1325(b)(2) and (3). Thus, the numbers on Form B22C reflect the debtor's current monthly income (based on the debtor's average income for the six months prior to bankruptcy) less reasonably necessary expenses. In many instances, current monthly income is not an accurate predictor of the debtor's actual income, and the means test expenses for an above-median debtor are not accurate predictors of the debtor's expenses during the term of the Chapter 13 plan. *See* Official Form B22C, Oct. 2005, *available at* http://www.uscourts.gov/rules/Revised_Rules_and_Forms/BK_Form_B22C_101105.pdf.

126. *In re* Jass, 340 B.R. 411, 415 (Bankr. D. Utah 2006).

127. *Id.* at 415–16.

128. *In re* Hanks, 362 B.R. 494, 499 (Bankr. D. Utah 2007); *see also In re* Kagenveama, 527 F.3d 990 (9th Cir. 2008). Hereinafter, this view will sometimes be referred to as the "multiplier view."

129. *See, e.g.*, *In re* Alexander, 344 B.R. 742, 747 (Bankr. E.D.N.C. 2006).

130. *In re* Nance, 371 B.R. 358, 364 (Bankr. S.D. Ill. 2007) ("Relying on the statute's 'plain meaning,' *Alexander* and its progeny stress the importance of the location and proximity of Congress's new definition of 'disposable income' [11 U.S.C. § 1325(b)(2)] immediately after the 'projected disposable income' provision [§ 1325(b)(1)(B)].") (citing *In Re Alexander*, 344 B.R. at 749).

definition of "disposable income" in § 1325(b)(2) as providing the definition of "projected disposable income" in Chapter 11.[131]

This Article will show that these arguments are unpersuasive and/or erroneous for the following reasons. First, this interpretation of the plain meaning of "projected disposable income," in many cases, (a) would thwart the legislative goal of shifting can-pay debtors to Chapter 13; (b) is unworkable because it accepts as conclusive an artificial definition of the debtor's income and expenses that sometimes differs greatly from the debtor's actual income and expenses; and (c) also suffers several interpretive infirmities.[132] The second and third arguments are illogical and unconvincing because, irrespective of the location and proximity of the definition of "disposable income" to "projected disposable income," and irrespective of the reference in § 1129(a)(15) to the definition of "disposable income" in § 1325(b)(2), both arguments discount the significance of the crucial fact that the word "projected" is undefined.

A third view adopted by a few courts uses the debtor's actual income and expenses on Schedules I and J, respectively, without even considering the current monthly income and the expenses on Form B22C.[133] This view is misguided because it "fails to give adequate meaning to the new definition of 'disposable income,' [a] term in section 1325(b) that now is actually defined."[134]

Therefore, the majority view is the best approach, and this Article will provide a comprehensive analysis of several compelling reasons in support. Also, in light of the fact that "the language [of § 1325(b)] is irreconcilable" because "disposable income" looks backward and "projected" looks forward,[135] this Article will illustrate how the majority view treats a debtor with the actual ability to repay his debts in situations where, because of the definition of disposable income, Form B22C calculates an inaccurate or misleading projected disposable income of zero or a negative amount. Finally, this Article will propose an amendment to § 1325(b)(3) to create an exception to the

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131. Hon. Randolph J. Haines, *Chapter 11 May Resolve Some Chapter 13 Issues*, 8 NORTON BANKR. L. ADVISER 1, 2 (2007).

132. *See infra* Part VI.B.

133. *See, e.g.*, *In re* Hardacre, 338 B.R. 718, 722 (Bankr. N.D. Tex. 2006) (Chapter 13 plan confirmation "must be based on debtor's anticipated income during the term of the plan, not merely an average of her prepetition income").

134. Brief for the United States as Amicus Curiae Supporting Reversal at 10, *In re* Kagenveama, 527 F.3d 990 (9th Cir. 2008) (No. 06-17083).

135. *In re* Kibbe, 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007) ("One must give way to the other, or the courts must fashion an interpretation that gives the greatest meaning to both.").

treatment of secured debts that are "scheduled as contractually due" as means test expenses that are automatically reasonable and necessary in Chapter 13 for an above-median debtor.[136] Instead, whether these secured debts are reasonable and necessary will be determined by the court.

B. Reasons that Projected Disposable Income Is Forward-Looking and Not Based on a Multiplier of Disposable Income

When interpreting a provision of a statute, courts first look to its language. Section 1325(b)(2) defines "disposable income" as current monthly income (which is the debtor's average monthly income for the six calendar months prior to bankruptcy) minus reasonably necessary expenses. Section 1325(b)(1)(B) requires the Chapter 13 plan to provide "that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan."[137] One major difference between the majority view and the multiplier approach is that, in construing the phrase "projected disposable income," the majority view attributes independent meaning to the word "projected," while the multiplier view renders "projected" superfluous. More specifically, the majority view uses disposable income as a starting point but adjusts for significant increases or decreases in the debtor's income or expenses, while the multiplier approach merely multiplies the debtor's disposable income by the number of months in the applicable commitment period.

The crux of the problem is that the debtor's current monthly income, which is based on the six months before bankruptcy, is not necessarily an accurate indicator of the debtor's actual income during the applicable commitment period; and, similarly, the means test expenses, determined at the time of filing the bankruptcy petition for an above-median debtor, are not necessarily an accurate predictor of the debtor's reasonably

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136. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2008). *See also* § 707(b)(2)(A)(iii)(I) (West Supp. 2008).

137. The applicable commitment period is five years if the current monthly income of the debtor and his spouse combined is equal to or more than the applicable state median income. The applicable commitment period is three years if the current monthly income of the debtor and his spouse is less than the applicable state median income. In either case, the applicable commitment period may be less than five years or three years, respectively, if the plan provides full payment of all allowed unsecured claims over a shorter period. 11 U.S.C.A. § 1325(b)(4) (West Supp. 2008). For purposes of including the debtor's spouse's income in current monthly income, only the amount paid by the spouse "on a regular basis for the household expenses of the debtor or the debtor's dependents" will be included. 11 U.S.C.A. § 101(10A)(B) (West Supp. 2008); *see also* 8 COLLIER, *supra* note 37, ¶ 1325.08[5][d], at 1325-68.6–68.7.

necessary expenses over the applicable commitment period. Therefore, disposable income, multiplied by the number of months of the applicable commitment period, is not necessarily an accurate predictor of the debtor's actual ability to repay his debts under a Chapter 13 plan.

For example, consider the following hypothetical case. Louie Lawyer is employed in a stable job by an established law firm. During the past several years, he has accumulated large amounts of unsecured indebtedness in his normal lifestyle. He also owes a large debt to First National Bank secured by a vacation home that is greatly overencumbered, another large debt to ABC Credit Union secured by a luxury automobile, and a debt to XYZ Mortgage Co. secured by his primary residence. Louie's attorney files a Chapter 13 petition and a plan on his behalf,[138] and three days later, Louie surrenders the vacation home and the luxury automobile to the respective secured creditors.

Because Louie is an above-median debtor in the applicable state, § 1325(b)(3) allows him the means test expenses in § 707(b)(2)(A) and (B) to determine his reasonably necessary expenses in the Chapter 13 case. These include "all amounts scheduled as contractually due to secured creditors in each of the 60 months following the date of the petition."[139] Inasmuch as Louie is no longer making the secured debt payments on the vacation home and the automobile, he has the actual ability to repay more than 50% of his unsecured debts. However, when the means test expenses, which include the *scheduled* secured debt payments on the vacation home and the automobile, are subtracted from his current monthly income, the calculation of disposable income yields a negative number. Therefore, his bankruptcy attorney asserts that Louie's projected disposable income also is negative, thus justifying his zero-percent Chapter 13 plan that proposes continued payment of the monthly home mortgage installments to XYZ Mortgage Co., and full payment of all unsecured priority claims and expenses, consisting of his bankruptcy attorney's fees, the trustee's commission, and a large tax debt. The plan proposes no payments to the general unsecured creditors.[140]

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138. Bankruptcy Rule 3015(b) requires the debtor to file a Chapter 13 plan either with the petition or within fifteen days thereafter unless the time is extended for cause shown. FED. R. BANKR. P. 3015(b).

139. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I) (West Supp. 2008).

140. Hereinafter, a Chapter 13 plan that proposes to pay the secured claims and the unsecured priority claims (if any), but nothing on general unsecured claims, will be referred to as a "zero-percent plan."

An analogous example focusing on the current monthly income component of disposable income (rather than the expense component) is the following hypothetical case. Due to a prolonged illness, Doctor Debby was unemployed for one year and earned no income. Having fully recovered, Doctor Debby obtains full-time employment in the emergency room at the Metropolitan Hospital, earning a large salary. However, during her year of unemployment, she depleted her savings, accumulated large amounts of unsecured debts on her credit cards, failed to pay an unsecured debt for taxes entitled to priority, and missed four monthly mortgage payments on her home. Fearing an imminent foreclosure, Doctor Debby consults a bankruptcy attorney, who files a Chapter 13 petition on her behalf a few days after she begins her new job. All of the required statements, schedules, and forms, as well as the Chapter 13 plan, are filed with the petition.

Because Doctor Debby earned no income for all of the six calendar months prior to bankruptcy, her current monthly income is zero, and as a below-median debtor, her reasonably necessary expenses will be determined by the court (rather than the means test) and will result in a negative monthly disposable income. Consequently, Doctor Debby's attorney, contending that she has no projected disposable income, has filed a plan that proposes to pay the monthly mortgage installments on her home; to cure the arrearages on the mortgage over twelve months; and to pay in full the unsecured priority claims and expenses, consisting of her bankruptcy attorney's fee, the trustee's commission, and the tax liability. The plan proposes no payments to the general unsecured creditors even though Doctor Debby's actual disposable income based on her new high-paying job would enable her to pay more than 50% of these claims.

Under an interpretation of "projected disposable income" that interprets "projected" as historical rather than forward-looking, both Louie Lawyer and Doctor Debbie would be granted a Chapter 13 discharge without making any payments to the general unsecured creditors because their disposable income of zero multiplied over the applicable commitment period would equal zero as well.[141] Obviously, this interpretation gives no

141. Some courts adopting this approach also misinterpret the term "applicable commitment period" and erroneously confirm Chapter 13 plans for above-median debtors who have negative projected disposable income and who propose a plan shorter than five years without paying all the unsecured creditors in full. These courts hold that if the debtor has no projected disposable income, then the applicable commitment period is irrelevant, and therefore the plan does not need to comply with § 1325(b)(4), which requires for confirmation that, for an above-median debtor, the plan's length must be five

meaning to the word "projected." As explained in *In re Jass*:

> By placing the word "projected" next to "disposable income" in § 1325(b)(1)(B), Congress modified the import of "disposable income." The significance of the word "projected" is that it requires the Court to consider both future and historical finances of a debtor in determining compliance with § 1325(b)(1)(B). . . . The only way for the word "projected" to have independent significance is if the word modifies the term "disposable income."[142]

Likewise, the U.S. Supreme Court provides guidance concerning this aspect of statutory interpretation, and it requires a court to give meaning to every word in a statute.[143] Furthermore, the Supreme Court has reasoned, "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."[144] Therefore, in the context of § 1325(b), Congress must have intended that projected disposable income have a different meaning than disposable income; otherwise, the word "projected" is superfluous.

Because of the poorly drafted definition of "disposable income," which includes both current monthly income and (for above-median debtors) the means test expenses, the most practicable definition of "projected disposable income" is one that includes the debtor's actual income and expenses during the applicable commitment period if they have changed significantly. This interpretation must be what Congress intended in the 2005 Act because it made the debtor's actual ability to pay under a Chapter 13 plan the most important factor in dismissing a case

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years unless the "plan provides for payment in full of all unsecured claims over a shorter period." 11 U.S.C.A. § 1325(b)(4)(A), (B) (West Supp. 2008); *In re* Kagenveama, 527 F.3d 990, 999 (9th Cir. 2008).

These courts misinterpret the plain language of § 1325(b)(4) and the legislative intent that the applicable commitment period constitutes "a durational requirement for the Chapter 13 plan, and not just, as the majority holds, a multiplier." *In re* Frederickson, 375 B.R. 829, 837 (B.A.P. 8th Cir. 2007) (Federman, J., dissenting) (citing H.R. REP. NO. 109-31, pt. 1, at 79 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 146).

142. *In re* Jass, 340 B.R. 411, 415–16 (Bankr. D. Utah 2006); *see also In re* Kibbe, 361 B.R. 302, 312 (B.A.P. 1st Cir. 2007) ("It would be inappropriate to give heed only to the historical perspective set forth in the term 'disposable income,' as this would effectively write the term 'projected' out of § 1325(b)."); 8 COLLIER, *supra* note 37, ¶ 1325.08[5][a], at 1325-68 ("To the extent that courts give any meaning to the word 'projected,' and courts are supposed to give meaning to every word in a statute, they may have to disregard the debtor's prior income if circumstances have changed. A number of courts have interpreted the word 'projected' to allow them to look at changes in the debtor's income from the prior six months average, while recognizing that the sources of income considered must be the same as those defined to make up current monthly income by section 101.").

143. Negonsott v. Samuels, 507 U.S. 99, 106 (1993).

144. BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) (citation omitted).

under the totality of the circumstances. Prior to the 2005 Act, "projected disposable income" was construed universally to mean the debtor's actual future income less the debtor's actual future reasonably necessary expenses. In the 2005 Act, Congress changed the two components of disposable income from actual future income and expenses to the artificial components of current monthly income and (for above-median debtors) the means test expenses, which unfortunately in many instances do not accurately represent the debtor's actual ability to pay. Therefore, interpreting "projected disposable income" in a manner that gives deference to the language of the statute means using "current monthly income" and (for above-median debtors) the means test expenses as a starting point only. However, in situations where that calculation inaccurately portrays the debtor's ability to pay because there have been significant increases or decreases in income or expenses, those changes in the debtor's financial circumstances should be considered.

It also should be noted that two other phrases in § 1325(b)(1)(B) are consistent with an interpretation of the word "projected" that is forward-looking. Section 1325(b)(1) states in part:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period . . . will be applied to make payments to unsecured creditors under the plan.[145]

The phrase "to be received in the applicable commitment period" is consistent with the majority view's forward-looking interpretation of "projected" because the verb is in the future tense. Similarly, the phrase "as of the effective date of the plan" generally refers to "the date the order of confirmation becomes final,"[146] which is a forward-looking point in time, contrasted with the date of the filing of the Chapter 13 petition, which is the date used to determine current monthly income and the means test expenses. Therefore, in situations where there has been a significant change in the debtor's actual income or expenses prior to the confirmation hearing, such changes should be considered by the court in determining whether the Chapter 13 plan includes all of the debtor's projected disposable income.

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145. 11 U.S.C.A. § 1325(b)(1)(B) (West Supp. 2008).

146. 8 COLLIER, *supra* note 37, ¶ 1325.05[2][a], at 1325-19.

"Moreover, [this approach] avoids the absurd results entailed in requiring debtors to make payments to creditors on the basis of deemed 'future' income assumptions that are known to be grossly inaccurate."[147]

Similarly, several other provisions of Chapter 13 are consistent with the majority view's forward-looking interpretation of "projected." For example, § 1306 includes in property of the bankruptcy estate the debtor's earnings from services that the debtor performs post-petition.[148] Also, one of the mandatory requirements of the Chapter 13 plan is "the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan."[149] Additionally, § 521 requires the debtor to file "a statement disclosing any reasonably anticipated increase in income or expenditures over the twelve-month period following the date of the filing of the petition."[150] Each of these provisions refers specifically to the debtor's actual future income, and the latter to the debtor's actual future expenses also.

For all of the above-stated reasons, the majority view is the correct approach because it construes "projected" to be forward-looking, and because it uses current monthly income and (for an above-median debtor) the applicable means test expenses as a starting point, but adjusts for substantial increases or decreases in the debtor's actual income or expenses.

C. Treatment Under § 1325(b)(3) of Secured Debts That Were Reaffirmed in a Converted Chapter 7 Case

Consider the following case in which the debtors reaffirmed unreasonable and unnecessary amounts of secured

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147. Brief for the United States as Amicus Curiae Supporting Reversal at 22, *In re* Kagenveama, 527 F.3d 990 (9th Cir. 2008) (No. 06-17083) (internal citation omitted).

148. 11 U.S.C.A. § 1306(a)(2) (West Supp. 2008).

149. 11 U.S.C.A. § 1322(a)(1) (West Supp. 2008); *see also In re Pak*, 378 B.R. at 268 (Klein, J., concurring) ("The chapter 13 'disposable income' objection-to-confirmation problem is a classic paradox. The emphasis in §§ 101(10A) and 1325(b) on historical income as the threshold for confirming a chapter 13 plan over an objection contradicts the basic premise embodied in §§ 1306(a) and 1322(a)(1) that chapter 13 plans are funded by future income that really exists and runs counter to the only thing that appears to be unambiguous about the 2005 consumer amendments to the Bankruptcy Code: the policy that more debtors should be diverted from chapter 7 liquidations to chapter 13 repayment plans.").

150. 11 U.S.C.A. § 521(a)(1)(B)(vi) (West Supp. 2008). This Article suggests that Congress enact a technical amendment to this provision also covering any reasonably anticipated decrease in income or expenditures.

indebtedness.[151] In the case of *In re Carney*, the debtors, husband and wife, filed a Chapter 7 case in 2007.[152] They reaffirmed $357,458 of secured debts that included two mortgages on their home that exceeded its value by $65,365, a debt of $35,896.56 secured by a 2007 leisure camper, a debt of $22,093 secured by another 2007 vehicle, and a debt of $25,000 apparently secured by a 2005 vehicle.[153] They owed unsecured nonpriority debts (almost all on credit cards) in the amount of $93,734 and had no unsecured priority debts.[154] The debtors were both employed and their income was well above the applicable state median.[155]

The debtors passed the means test because they had negative disposable income, and the U.S. Trustee moved for dismissal of the Chapter 7 case under the totality of the circumstances, contending that the debtors had the ability to pay a substantial percentage of their unsecured indebtedness.[156] However, the debtors retorted that conversion to Chapter 13 would constitute a waste of resources and time because they would file a zero-percent plan in Chapter 13, proposing no payments to the general unsecured creditors.[157] The court rejected this argument and allowed the debtors thirty days to convert to Chapter 13 or the U.S. Trustee's motion to dismiss under totality would be granted.[158] The court concluded that the debtors' reaffirmation of $357,458 of secured debts, especially the large amounts on the leisure camper and the two mortgages on the home, was unreasonable, and that the debtors could afford to repay a meaningful percentage of their unsecured indebtedness.[159] The court reasoned as follows:

> Contrary to the implication of Debtors' argument, the court does not believe that it is necessary, or even possible, in this case to decide the legal and factual issues that might arise

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151. Code § 524(c) allows a debtor and a creditor to agree voluntarily that the debtor will reaffirm a debt that is dischargeable in bankruptcy to the extent that such agreement is enforceable under applicable nonbankruptcy law. Often the parties enter into a reaffirmation agreement when the debtor desires to retain the collateral securing the debt while continuing to make the installment payments under the reaffirmation agreement. The requirements for a reaffirmation agreement are found in § 524(c). 11 U.S.C. § 524(c) (2006).

152. *In re* Carney, No. 07-31690, 2007 WL 4287855, at *1 (Bankr. N.D. Ohio Dec. 5, 2007).

153. *Id.*

154. *Id.*

155. *Id.* at *1–2.

156. *Id.* at *1, *3.

157. *Id.* at *3.

158. *Id.* at *10.

159. *Id.* at *4, *9.

> should they elect to convert to Chapter 13 in order to analyze whether it would be an abuse for them to obtain a Chapter 7 discharge. Even if Debtors are correct as to what their Form B22C would show as disposable income in a Chapter 13 case, the court does not find that fact determinative of their ability to pay out of future income for purposes of deciding whether there is abuse under § 707(b)(3).[160]

However, in *In re Doherty*, the court denied the U.S. Trustee's motion to dismiss under the totality of the circumstances in which the above-median debtor had negative disposable income, and the U.S. Trustee failed to prove abuse based on the debtor's actual financial situation.[161] One might infer that the court saw no value in having the debtor convert to Chapter 13 and thereafter file a zero-percent plan.

Therefore, the anomalous effect of utilizing the means test deductions for above-median debtors in a Chapter 13 case is that debtors who have the ability to repay their debts sometimes will not be required to repay them under a Chapter 13 plan. As stated earlier, the reason is that, by allowing the deduction "of all amounts *scheduled* as contractually due to secured creditors," the debtor's disposable income sometimes will be zero or a negative amount, thereby prompting the debtor's attorney to file a Chapter 13 plan that proposes to pay nothing to the general unsecured creditors or whatever amount that the debtor chooses to pay.

Thus, either granting the debtor a Chapter 13 discharge without making any payments to the general unsecured creditors or not dismissing the debtor's Chapter 7 case under the totality of the circumstances and granting him a Chapter 7 discharge, would fly in the face of congressional intent to shift can-pay debtors to Chapter 13.

D. A Novel Proposal

In order to achieve this result intended by Congress in situations in which the debtor reaffirms large unreasonable and/or unnecessary amounts of secured debts, this Article proposes that Congress amend § 1325(b)(3) to carve out an exception that would have the court, instead of the means test, determine what are "reasonably necessary" expenses arising from all secured debts "scheduled as contractually due" for above-

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160. *Id.* at *7.
161. *In re* Doherty, 374 B.R. 288, 291–92 (Bankr. D. Kan. 2007).

median debtors.[162] This amendment would resolve the problem of can-pay debtors receiving a Chapter 13 discharge without making any payments to the general unsecured creditors, such as what could have occurred in the *Carney* case, in addition to the related problem of some courts' reluctance to dismiss Chapter 7 cases under totality in situations in which the debtor intends to file a zero-percent plan in Chapter 13. In the *Carney* case, just as the court found the two mortgages to be unreasonable and therefore dismissed the Chapter 7 case under totality, the court in Chapter 13 could determine, under the proposed § 1325(b)(3), that the two mortgages are not "reasonably necessary expenses."[163] Therefore, the debtors possibly would have sufficient actual projected disposable income to repay a substantial percentage of their debts under a Chapter 13 plan because the court's determination that the mortgages were not reasonably necessary expenses would replace the means test allowance of payments "scheduled as contractually due."

This amendment also would cover circumstances in which the debtor has the actual ability to repay creditors because she surrendered collateral and no longer is making large secured debt payments that were "scheduled as contractually due." The effect would be to require the bankruptcy court to determine that these nonexistent expenses are, by definition, neither reasonable nor necessary, thereby sometimes averting the granting of a Chapter 13 discharge to a debtor who has made no or minimal payments to the general unsecured creditors. In this manner, the plain language of the proposed § 1325(b)(3) would achieve the result intended by Congress directly, without the necessity of using the means test expenses as a starting point and then adjusting for significant decreases in the debtor's actual reasonably necessary expenses.

Thus, an amendment requiring the bankruptcy court to determine what expenses in payment of secured debts are "reasonably necessary" would shift to Chapter 13 those debtors who have the ability to repay creditors based upon their actual, rather than artificially determined, expenses.

VII. CONCLUSION

This Article construes the means test presumption of abuse and the determination of abuse under the "totality of the

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162. 11 U.S.C.A. § 1325(b)(3) (West Supp. 2008). Under § 1325(b)(2), the court determines what expenses are reasonably necessary for below-median debtors. 11 U.S.C.A. § 1325(b)(2) (West Supp. 2008).

163. *In re Carney*, 2007 WL 4287855, at *7, *9–10.

circumstances" in a manner consistent with both the legislative history and the U.S. Supreme Court's canons of statutory interpretation, thereby resolving four important issues that have confronted bankruptcy judges and scholars since the effective date of the 2005 Act. It concludes that (1) dismissal of a Chapter 7 case for abuse under the "totality of the circumstances" may be based on pre-petition and post-petition changes in the debtor's financial condition; (2) under totality, the means test dollar and percentage limitations do not apply; (3) under totality, the court may consider the debtor's nonexempt property, but it may not consider exempt property; and (4) in § 1325(b)(1)(B), "projected disposable income" is forward-looking, and therefore the best interpretation uses current monthly income and (for an above-median debtor) the applicable means test expenses as a starting point only, and adjusts for significant increases and decreases in the debtor's actual income or expenses. Finally, this Article proposes an amendment to § 1325(b)(3) that closes a statutory loophole resulting from egregious legislative drafting and thereby effectuates the intent of Congress "to ensure that debtors repay creditors the maximum they can afford."[164]

164. H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.