

# THE TOTALITY OF WHAT CIRCUMSTANCES? HOW COURTS DETERMINE WHETHER GRANTING BANKRUPTCY RELIEF WOULD BE AN ABUSE

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The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)<sup>1</sup> enacted the most extensive revisions of U.S. bankruptcy law since 1978. Media coverage at the time focused primarily on the introduction of the means test included at § 707(b)(2) of the Bankruptcy Code, which serves to make it more difficult for a debtor to file a Chapter 7 case.<sup>2</sup> Even debtors who survive the means test, however, may see their cases dismissed for abuse pursuant to the “totality of the circumstances test” added by BAPCPA at § 707(b)(3). This article examines cases where debtors faced dismissal motions under § 707(b)(3).

## I. STATUTORY BACKGROUND

When the Bankruptcy Code was first enacted as part of the Bankruptcy Reform Act of 1978,<sup>3</sup> § 707 provided for dismissal of a Chapter 7 case only for “cause.” The provision read, in its entirety:

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors; and
- (2) nonpayment of any fees and charges required under chapter 123 of title 28.<sup>4</sup>

The legislative history provides that the specified causes were merely illustrative rather than exhaustive, but it notes that:

The section does not contemplate, however, that the ability of the debtor to repay his debts in whole or in part constitutes adequate cause for dismissal....

The Committee has rejected that alternative in the past, and there has not been presented any convincing reason for its enactment in this bill.<sup>5</sup>

The Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA)<sup>6</sup> added another ground for dismissing a Chapter 7 case in § 707(b). This later provision reads:

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- (b) After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.<sup>7</sup>

According to the legislative history, this provision does permit a Chapter 7 case by an individual debtor whose debts are primarily consumer debts to be dismissed on the basis that the debtor had the ability to pay debts.<sup>8</sup> A dismissal, however: (1) has to be initiated by the bankruptcy judge<sup>9</sup> and not by any party in interest; (2) has to be based on a finding of “substantial abuse”; and (3) has to survive a presumption against such dismissal.

BAPCPA substantially expanded § 707(b) while continuing the previous restriction to individual debtors whose debts are primarily consumer debts. It designated the previous § 707(b) as § 707(b)(1), removed the presumption against dismissal, permitted any party in interest to seek dismissal, and lowered the standard for dismissal from “substantial abuse” to “abuse.”

BAPCPA also added the means test of § 707(b)(2), a complicated mechanical calculation designed to ferret out abusive bankruptcy petitions. The means test creates a rebuttable presumption of abuse if a debtor’s Current Monthly Income (CMI)—determined by a detailed statutory formula based on six months of history prior to the petition month—is above a specified threshold as long as that CMI, when reduced by expenses permitted by BAPCPA, exceeds another specific threshold. Debtors unable to rebut this presumption of abuse may have their cases dismissed or be required to convert to Chapter 13 and fund a Chapter 13 plan.

In addition, BAPCPA added § 707(b)(3) to the Bankruptcy Code as another way for a court to find “abuse” and dismiss a Chapter 7 case. Pursuant to § 707(b)(3):

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 presumption in [the means test] 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 (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.

Courts must thus evaluate these other considerations, namely “bad faith” and “totality of the circumstances,” in determining whether to dismiss a Chapter 7 case as an abuse. Unlike situations where the presumption of abuse arises, the burden of proof is on the moving party to establish the existence of abuse under § 707(b)(3).<sup>10</sup>

## II. FORMULATION OF TESTS FOR BAD FAITH AND TOTALITY OF THE CIRCUMSTANCES

### A. Totality of the Circumstances

Courts have struggled to articulate exactly what they are to review when they evaluate the “totality of the circumstances... of the debtor’s financial situation.” Some debtors have argued that if no presumption of abuse arises under the means test, then ability to pay creditors cannot be taken into account, alleging that Congress created the means test to be exclusive and conclusive regarding ability to pay.<sup>11</sup> The courts have rejected this argument.

In *In re Zaporski*,<sup>12</sup> for example, the court explained that § 707(b)(3)(B) instructs a court to consider the totality of the circumstances “of the debtor’s financial situation.” The court stated:

This plain language is broad enough to encompass, indeed require, consideration of those facts that are probative of a debtor’s ability to repay his or her creditors. Such facts are in this Court’s view a circumstance of that debtor’s ‘financial situation’ even where the debtor’s petition is not filed in bad faith and even where the statutory presumption of abuse has not arisen.<sup>13</sup>

Another court has pointed out that “[n]othing in the text of § 707(b)(3)(B) suggests an intent to eliminate any aspect of the debtor’s finances from consideration in determining whether a case constitutes an ‘abuse’ of Chapter 7.”<sup>14</sup> Still another court stated the proposition at its simplest: “What could be more central to the debtor’s financial situation than his income and expenses?”<sup>15</sup>

If the “totality of the circumstances” is to include the debtor’s ability to repay creditors, then the question arises as to whether a court must look at this ability as of the petition date or whether it can take subsequent developments into account. The cases appear to be unanimous that postpetition events may be considered. In *In re Henebury*,<sup>16</sup> the court explained that when determining if the granting of relief would be an abuse, it must try to determine:

if the debtor has the ability to pay a substantial portion of their unsecured claims through a Chapter 13 plan based upon the totality of the debtor’s financial circumstances. 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.<sup>17</sup>

Similarly, in *In re Pennington*,<sup>18</sup> the court stated that holding otherwise would prohibit it from considering if “a debtor incurred additional expenses post-petition (for example, he needed a new car or had additional unexpected medical expenses)” and that such “an arbitrary rule is not mandated by the language of the Code, nor does it appear to be reasonable.”<sup>19</sup> In *In re Maya*,<sup>20</sup> the court noted that the parenthetical language of the statute itself, regarding a (postpetition) attempt to reject a personal

services contract, is perhaps “the clearest signal that Congress intended courts to consider post-petition events under § 707(b)(3)(B).”<sup>21</sup>

Assuming that the “totality of circumstances” test includes consideration of a debtor’s ability to repay creditors based on postpetition actual and anticipated events, is this ability sufficient in itself for a case to be dismissed as an abuse? For many courts, such as *In re Brenneman*,<sup>22</sup> “a debtor’s ability to repay their [sic] unsecured debts has developed to become a prime, and often dispositive consideration when determining whether, under the ‘totality of the circumstances’ standard of § 707(b)(3)(B), a case should be dismissed for abuse.”<sup>23</sup> For other courts, as stated in *In re Nockerts*,<sup>24</sup> and quoted in *In re Cribbs*,<sup>25</sup> “while the ability to [fund a Chapter 13 plan] is a factor in the totality of circumstances test, and may even be the primary factor to be considered, if it is the only indicia of abuse, the case should not be dismissed under that test.”<sup>26</sup> Still other courts, such as *In re Walker*,<sup>27</sup> try to chart a middle way, explaining that, “The ‘totality of the circumstances’ approach involves an evaluation of... other... factors as exacerbating or mitigating the apparent abuse from the debtor’s ability to repay.”<sup>28</sup>

The *Walker* court provided an eight-point list of the other factors that it would consider in determining whether a debtor’s financial situation demonstrated an abuse:

- (1) whether the bankruptcy filing was precipitated by an unseen catastrophic event, such as a sudden illness or unemployment;
- (2) whether the debtor is eligible for chapter 13 relief;
- (3) whether there are non-bankruptcy remedies available to the debtor;
- (4) whether the debtor can obtain relief through private negotiations;
- (5) whether the debtor’s proposed budget is excessive or unreasonable;
- (6) whether the debtor has a stable source of future income;
- (7) whether the debtors could provide a meaningful distribution in a chapter 13 case; and
- (8) whether the debtors’ expenses could be reduced significantly without depriving them and their dependents of necessities.<sup>29</sup>

Few other courts have been willing to give such a list of factors that would be considered in evaluating the “totality of the circumstances.” One exception is found in *In re Siegenberg*,<sup>30</sup> where the court said it would use the factors set forth in *In re Price* for determining “substantial abuse” under the “totality of the circumstances” test<sup>31</sup> of pre-BAPCPA law, namely:

- (1) whether there is a likelihood of future income to fund debtor’s chapter 11, 12, or 13 plan;
- (2) whether the petition was filed as a consequence of illness, disability, unemployment, or other calamity;
- (3) whether the schedules suggest debtor obtained cash advances and consumer goods without the ability to repay;

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- (4) whether debtor's proposed family budget is excessive or extravagant;
- (5) whether debtor's papers misrepresent his or her financial condition; and
- (6) whether debtor engaged in eve of bankruptcy purchases.<sup>32</sup>

### **B. Bad Faith**

In addition to the "totality of the circumstances... of the debtor's financial situation" under § 707(b)(3)(B), the statute also provides in § 707(b)(3)(A) that a court is to consider whether the debtor filed the petition in "bad faith" when determining if a case should be dismissed for abuse. "These two grounds for dismissal are read in the disjunctive, so that a finding by a court that either of these grounds exist will warrant dismissing a debtor's bankruptcy case" for abuse.<sup>33</sup>

In *In re Mitchell*,<sup>34</sup> the court gave the following list of factors that it would consider in determining whether a petition is filed in bad faith:

- (1) whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims;
- (2) whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or some other calamity;
- (3) whether the schedules suggest the debtor obtained cash advancements and consumer goods on credit exceeding his or her ability to repay them;
- (4) whether the debtor's proposed family budget is excessive or extravagant;
- (5) whether the debtor's statement of income and expenses is misrepresentative of the debtor's financial condition;
- (6) whether the debtor has engaged in eve-of-bankruptcy purchases;
- (7) whether the debtor has a history of bankruptcy petition filings and case dismissals;
- (8) whether the debtor intended to invoke the automatic stay for improper purposes, such as for the sole objective of defeating state court litigation; and
- (9) whether egregious behavior is present.<sup>35</sup>

Most other courts do not give any list of factors. According to *In re Harter*,<sup>36</sup> a determination of abuse for bad faith "must be undertaken on an *ad hoc* basis."<sup>37</sup> *Harter* goes on to say, however, that dismissal for bad faith "should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence."<sup>38</sup>

The courts are clearly reluctant to identify specific lists of factors to test for determining abuse based on either bad faith or the totality of the circumstances of the

debtor's financial situation. What is striking is that, other than ability to pay and related factors (stability of future income, reasonableness of future expenses, eligibility for Chapter 13, size of hypothetical Chapter 13 dividend), the factors considered for the two tests are substantially similar. Was the bankruptcy the result of the calamity/catastrophe of illness or unemployment? Has the debtor been spending excessively? Did the debtor incur debts without a reasonable ability to repay them? Did the debtor act badly on the eve of bankruptcy? Has the debtor made misrepresentations? The answers to these questions, along with the separate consideration of the debtor's ability to repay debt, usually determine whether a case is dismissed as an abuse, irrespective of which prong of § 707(b)(3) the court invokes to support its decision.

### III. EVALUATION OF SPECIFIC FACTORS IN DETERMINING ABILITY TO PAY

#### A. Income

Courts evaluate a number of situations as significant when considering the specific debtors that are the subject of motions to dismiss. This is especially true when a court tries to determine if the debtor has an ability to pay creditors. Not surprisingly, the first key area is the income of the debtor.

Some courts simply find that debtors' "high level of income, alone, makes this Court skeptical of their need for Chapter 7 bankruptcy relief" since "there exists a large degree of incongruity between a high level of income and an inability to repay, at least a percentage, of one's debts."<sup>39</sup> Put another way, "Under any measure, a debtor, having a stable annual salary of almost \$100,000.00, will be hard pressed to establish that they [sic] do not have the ability to pay some of their unsecured debt, such as through funding a Chapter 13 plan of reorganization."<sup>40</sup> On the other hand, debtors with a combined gross income of almost \$141,000 annually and net annual take home pay of \$104,724 have been found, because of their actual financial situation and a lack of additional evidence by the moving party, not to illustrate abuse warranting dismissal.<sup>41</sup>

Courts scrutinize allegations as to debtors' actual income with particular care. For example, courts have looked at income tax refunds as a source of income for a debtor, even though not available on a monthly basis, "so long as there is the realistic prospect of similar refunds in the future."<sup>42</sup> Courts have been willing to find abuse based on bad faith where a debtor fails to provide the income of her nonfiling spouse on Schedule I.<sup>43</sup> On the other hand, courts have noted instability in income and postpetition decreases in monthly income as the basis for not finding abuse.<sup>44</sup>

In *In re Richie*,<sup>45</sup> the court expressed particular hostility to a debtor's assertion that her income was insufficient to enable her to pay creditors. The debtor had asserted that her financial circumstances had changed in the four months since she had filed her Chapter 7 petition because she had been fired from her job, and her only source of income was unemployment compensation. The court, however, found that lack of income did not end the inquiry because the debtor appeared to be unemployed by choice. According to the court:

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[Where] Congress intended that BAPCPA require debtors to make a good-faith effort to repay their debts, this Court concludes that a debtor who lacks the ability to pay because she has not engaged in a broad employment search, does not wish to work outside her chosen field, does not wish to work within her chosen field outside of southeastern Wisconsin, and takes this position at the expense of her creditors, abuses the provisions of Chapter 7 by seeking an immediate discharge.<sup>46</sup>

### **B. Housing**

On the expense side of a debtor's ability to pay creditors, the greatest single expense is usually the cost of housing. Not surprisingly, a number of cases have based their decisions on that circumstance. In *In re Talley*,<sup>47</sup> for example, a debtor lived in a mobile home on 38.5 acres of real property subject to two mortgages paid by the debtor. There was minimal or no equity in the property, the mortgage payments equaled 67% of the debtor's budgeted expenses and over 80% of his net income, and the payments were over three times higher than the IRS standard for housing in his county of residence. The court found that even though the debtor had proposed a fairly minimal budget for all items except housing, his retention of the real estate would come at the expense of his unsecured creditors, and the case was an abuse under the totality of the circumstances.<sup>48</sup>

Similar findings have occurred where the debtor's housing expense was over 5.7 times the local housing standard,<sup>49</sup> where the debtors were spending over \$3,500 per month in home mortgages,<sup>50</sup> where the debtor was spending \$2,646 per month for mortgages, utilities, and maintenance,<sup>51</sup> where the debtors were spending \$2,200 per month for housing expenses while the IRS standard for the county was \$1,292,<sup>52</sup> and where the debtors were spending more than \$4,000 per month for mortgages, utilities, and maintenance on a \$430,000 house (which the court said "can only be categorized as a luxury item").<sup>53</sup> The court in *In re Carney*,<sup>54</sup> in making a finding of abuse, expressly stated that debtors who paid \$3,534 in mortgages and utilities for a house with no equity (72% of their stated net monthly income) had the alternative of "surrendering their over-mortgaged residence and obtaining more affordable housing."<sup>55</sup>

Or do they? Eight months after issuing the *Carney* decision, the very same bankruptcy court again considered a motion to dismiss because of the totality of debtors' financial circumstances based upon housing expenses. In *In re Seeburger*,<sup>56</sup> the debtors had monthly housing expenses (mortgage, property tax, and homeowners' association dues) of \$2,049, and a motion to dismiss argued that the debtors had an ability to pay creditors since they could reduce these expenses. In denying the motion and finding no abuse, the court stated that the argument "does not address the reality of how these Debtors are to go about effectively reducing their housing expense at this time without generating more unsecured debt arising from a probable mortgage debt deficiency."<sup>57</sup> The court noted that there was no evidence that the mortgage holder would accept a short sale or deed-in-lieu of foreclosure, and thus the argument for dismissal was, in essence, that the debtors "should stop paying and default on their secured debt obligation... in order to make funds available to pay their unsecured creditors instead." Because "in almost every case, alternative housing of some sort that is less expensive

is likely to be found... the court does not find consideration of less expensive alternatives particularly relevant.”<sup>58</sup>

On the other hand, in *In re Felske*,<sup>59</sup> the court expressly refused to consider the possibility that debtors paying housing expenses (mortgage, utilities, and maintenance) of \$3,500 per month would incur a mortgage deficiency claim if they sold their house. The court stated:

[E]ven if this ultimately proves to be true, accepting this argument sets a bad precedent. Not only does it reward the Debtors for an improvident decision—purchasing a home which, even in the best of circumstances, consumed an inordinate amount of the Debtors’ financial resources—it would be unfair to those debtors who were more prudent with respect to their financial decisions. As such, this Court will not be held hostage to the argument that the potentiality of a deficiency from a debtor’s sale of collateral should militate against a dismissal under § 707(b)(3)(B).<sup>60</sup>

The court in *In re Jensen*<sup>61</sup> gives a thoughtful response to the position that deficiency claims are not be considered in evaluating whether a bankruptcy case is an abuse. While rejecting, like all other courts, the argument that if no presumption of abuse arises under the means test then ability to pay creditors cannot be taken into account in evaluating the totality of the circumstances, the court stated that it still needed to respect the policies implicit in the means test:

Congress has specified that for purposes of determining the presumption of abuse, a debtor’s monthly payments on account of secured debt shall not be considered. Considering such payments under the § 707(b)(3)(B) totality of the circumstances test would render the language in § 707(b)(2) disallowing consideration of those payments superfluous, void, and insignificant.<sup>62</sup>

Thus for debtors who did not have other indicia of abuse, the *Jensen* court would not find abuse based solely on a hypothetical ability to pay arising after a hypothetical default upon secured debt. The court stated that it “certainly shares the discomfort other courts have felt at the prospect of permitting debtors to retain luxury goods in defiance of their unsecured creditors.”<sup>63</sup> Nonetheless, it emphasized that determining whether to permit Chapter 7 debtors to continue to pay secured debts was “a zero-sum game, in which either secured creditors or unsecured creditors will emerge the winners.”<sup>64</sup> The court concluded that “Congress has conferred an advantage on secured creditors.”<sup>65</sup>

The difference between the *Jensen* approach and those cases that base a finding of abuse on excessive housing expenses is perhaps most clearly illustrated in *In re Kaminski*.<sup>66</sup> The debtors’ mortgage expense in *Kaminski* was \$1,856.12, more than twice the IRS allowance. In rejecting this expense, the court stated:

In essence, what the Debtors are asking is that they be permitted to use the bankruptcy process so that they can continue to honor an admittedly bad bargain *while presumably seeking to discharge other obligations of the same nature*. Such an approach is not acceptable. Bankruptcy is meant to afford an honest

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debtor a fresh-start, whereby the debtor is freed from preexisting financial burdens, and is not meant to be used as a means by which a debtor can perpetuate bad financial decisions.<sup>67</sup>

What the *Jensen* court presumably would say, in response, is that the secured mortgage obligation is not of the same nature as the unsecured claims and that the policy underlying § 707(b) calls for favoring it.

### C. Vehicles

A number of cases also hold that a debtor has an ability to pay creditors based on the debtor's overspending with respect to vehicles. In *In re Brenneman*,<sup>68</sup> for example, the debtors allocated \$1,278.03 per month to service the debt on their two automobiles. The court concluded:

Such a substantial outlay for two automobiles resembles more of an expense incurred for luxury items as opposed to necessities. Put another way, the Debtors, by acknowledging that they can afford \$1,300.00 per month in vehicle payments, have gone a long way in demonstrating that they have some ability to repay their creditors.<sup>69</sup>

Similar findings have occurred where the debtor was spending \$1,800 per month to lease two vehicles,<sup>70</sup> where the debtor was spending \$833 per month on a 2003 Ford F350 Super Duty Cab Long bed (described as a large vehicle with “no remunerative purpose”),<sup>71</sup> and where the debtors were reaffirming secured debt on a “Pop-Up Camper,” a 2002 Ford Windstar, a 2005 Volvo, and a 2004 Mercedes Benz.<sup>72</sup> Again, these cases disagree with the *Jensen* approach regarding secured debt.<sup>73</sup>

In *In re Brown*,<sup>74</sup> the debtors owned three cars, the newest of which was 16 years old and the lowest mileage of which was 202,467 miles. On Schedule J they deducted \$495 per month for “anticipated” car expenses. A motion to dismiss argued that removing this expense would leave the debtors with a budget sufficient to fund a Chapter 13 plan. In allowing the motion and finding that granting Chapter 7 relief to the debtors would be an abuse, the court stated:

Claiming ‘anticipated’ expenses, no matter how much mileage a car has, runs contrary to the notion of disposable income required by the Code. There is no specific date at which the Debtors can be sure that they will need to replace one or both of their vehicles. If, several months into the plan, the Debtors need to purchase or lease a vehicle, they must file a modified plan to include this new, actual expense. The Debtors essentially are arguing that they should be allowed to save part of their disposable income each month in order to purchase a car at some later date. This is not the function of Chapter 13.<sup>75</sup>

It is not clear how, without such savings, the court imagined debtors in these financial circumstances would be able to purchase or lease a car, or why such a circumstance surely bearing on the debtors' ability to pay their creditors over a Chapter 13 plan was viewed by the court as outside of the “totality of the circumstances.”

Unless a debtor is a fisherman, spending money on a boat is an almost certain way to have a court find an ability to pay. In *In re Hoffner*,<sup>76</sup> for example, a debtor's projected expenses included \$351 per month to retain a boat. The court deemed the boat "an unnecessary luxury item" and was not persuaded by the debtor's assertion that "she uses the boat to entertain potential and existing insurance clients."<sup>77</sup> Even debtors who make an initial attempt to retain a boat but later rescind that effort are subject to being tarred as debtors living beyond their means, who would have the ability to pay their creditors, and whose case could be dismissed as an abuse.<sup>78</sup>

#### D. 401(k) Contributions and Repayments

Many courts have held that voluntary contributions to a 401(k) plan generally should not be considered reasonably necessary expenses under the totality of the circumstances analysis. In *In re Parada*,<sup>79</sup> the court stated, "Bankruptcy courts, while recognizing that saving money for retirement certainly is a prudent investment, have consistently held that debtors should not be permitted to pay themselves money at the expense of creditors."<sup>80</sup> Noting that the debtors in this case "are young and, hopefully, will have many years of gainful employment to work towards retirement,"<sup>81</sup> the court found they had an ability to pay and ordered their case dismissed.

Similarly, in *In re Burton*,<sup>82</sup> the court stated that repayment of a loan against a 401(k) plan was the equivalent of a contribution, as it was a repayment of a loan from oneself to oneself, and that it was inherently unfair to permit a debtor to fund his own retirement account while paying creditors only a fraction of their claims.<sup>83</sup> The tax consequences suffered by a debtor who does not repay a loan against a 401(k) plan did not sway the court in *In re Gonzalez*,<sup>84</sup> which stated that "a tax penalty is simply one of the inherent risks which one assumes when taking a loan against a 401(k) account."<sup>85</sup> The court refused to consider the effect of such tax penalty on the debtors' ability to pay creditors.

BAPCPA's insertion of § 1322(f) into the Bankruptcy Code, which "established that 401(k) loan repayments and voluntary contributions cannot be considered disposable income in a Chapter 13 case," did not prevent the court in *In re Bender*<sup>86</sup> from holding that "the repayment of such loans and contributions should be taken into consideration when assessing a debtor's ability to repay his debts."<sup>87</sup> In *In re Zaporski*,<sup>88</sup> the court found relevance simply in the balance in a debtor's 401(k) plan and the fact that the debtor "already has a very substantial retirement nest egg set aside."<sup>89</sup>

A few courts have rejected the argument that 401(k) plan contributions evidence an ability to repay creditors. In *In re Beckerman*,<sup>90</sup> the court found that debtors who were 55 years of age with minimal savings for retirement could have 401(k) contributions excluded in determining their ability to repay creditors.<sup>91</sup> In *In re Tucker*,<sup>92</sup> the court similarly found that a debtor in his early- to mid-50s with little accumulated retirement savings could exclude "the modest amount being paid by him as contributions and loan repayments to his 401(k) plan" in determining his ability to repay creditors.<sup>93</sup>

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### E. Other Expenses

Several courts have found an ability to pay and, correspondingly, abuse by debtors because they were using their income to pay their children's college expenses. In *In re Walker*,<sup>94</sup> the court found that the debtors:

simply reordered their priorities once their two oldest children reached college age. The Debtors have redirected their income to enable them to provide [their sons] with cell phones, spending money, book money, rent assistance, vehicles, and car insurance. . . supporting adult children at the expense of unsecured creditors is not permissible. . . The Debtors have no legal obligation to support [their sons], who are now able-bodied adults. The Debtors propose to shift the use of their income from paying their own obligations to enable their adult children to attend college full time without the burden of working to support themselves. . . Permitting a discharge in this case would be an abuse, as the Debtors are not needy."<sup>95</sup>

Similarly, in *In re Beckerman*,<sup>96</sup> the court stated:

Debtors' projected expenses are premised entirely upon their moral obligation to support their children while they pursue a college education. While the Court will not go so far as to say that the Debtors should not provide any assistance to their children while they are in college, complete subsidy of the children, to the extent of paying for all food, clothing, housing and even cell phones, including contributions towards college tuition expenses, while they themselves are driven into bankruptcy is not reasonable or necessary. . . The children are capable of bearing some measure of the costs of their own expenses.<sup>97</sup>

In *In re Brown*,<sup>98</sup> a tobacco expense drew extreme criticism as part of a granting of a motion to dismiss for abuse. In assessing a \$170 monthly expense for the purchase of tobacco products, the court, after rhetorically asking "what will be the cost to creditors of one of the Debtors developing lung cancer," stated:

it is preposterous to argue that, in light of the overwhelming scientific evidence regarding the dangers of smoking available in the year 2007, the purchase of \$170.00 per month of tobacco products is a necessary expense. The Debtors may struggle to quit their habit, but bankruptcy is not designed to coddle debtors. A fresh start comes with a price tag, both financial and psychological: lifestyles must be sacrificed and the comforts of a former life give way to a more Spartan existence. Fortunately for the Debtors, the changes they must make will have a beneficial side effect on their health."<sup>99</sup>

A number of cases look at a debtor's cumulative expenses and conclude that the case is an abuse as debtors would have an ability to pay because "[t]he family has engaged in no effort to moderate spending or to tighten the family belt."<sup>100</sup> Thus, in *In re Wolf*,<sup>101</sup> the court noted "a food budget of \$1800, cable television \$125, transportation cost \$600, and recreation \$300."<sup>102</sup> In *In re Carney*,<sup>103</sup> it was "\$170 a month for cable TV, \$220 a month for telephones, \$100 a month for clothing and \$400 for recreation"

that the court found to be “individually and collectively unreasonable.”<sup>104</sup> In *In re Gonzalez*,<sup>105</sup> the court found it unnecessary for a family with two small children to allocate \$900 per month for food and \$230.55 per month for telephones.<sup>106</sup>

Recreation expenses often come in for particular criticism. For example, in *In re Zuccarell*,<sup>107</sup> the court stated that:

[G]iven its discretionary character, a debtor should offer a viable reason why... an expense [for recreation] is reasonably necessary. But in this particular matter, the Debtor, beyond vague statements, was unable to offer any viable reason why, to the detriment of his unsecured creditors, he needed to allocate \$250.00 per month toward recreation.<sup>108</sup>

One expense is statutorily excluded from the determination of abuse. The last sentence of § 707(b)(1) of the Bankruptcy Code provides, “In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions... to any qualified religious or charitable entity or organization.”<sup>109</sup>

Even this provision may not be as far-reaching as may first appear. In *In re Bender*,<sup>110</sup> the court held that the statute includes only postpetition contributions that the debtor had also made prepetition and not increases in contributions voluntarily added into a debtor’s budget postpetition. The court noted:

To conclude otherwise invites Chapter 7 debtors to propose a dramatic increase in charitable giving post-bankruptcy in an effort to consciously avoid qualifying as a Chapter 13 debtor...[N]othing in the statute can be construed to permit a debtor to suddenly become substantially more charitable after filing for bankruptcy, especially when it is the increased charitable contributions that deprive the debtor of the income which could fund a hypothetical Chapter 13 plan.<sup>111</sup>

## F. Hypothetical Chapter 13

As noted above, many courts frame the issue of a debtor’s ability to pay as requiring inquiry into a debtor’s ability to pay a substantial portion of unsecured claims through a Chapter 13 plan. Not all debtors are eligible for Chapter 13, however, as there are limits on the amount of debts that may be owed by a Chapter 13 debtor, currently \$336,900 in noncontingent, liquidated, unsecured debts and \$1,010,650 in noncontingent, liquidated, secured debts.<sup>112</sup> Therefore, some courts, when determining abuse, find significant whether a debtor is eligible to be a Chapter 13 debtor.

In *In re Harter*, for example, in concluding there was no abuse by the debtor, the court found that the debtor was not eligible for Chapter 13 and that while “[h]e could file a Chapter 11... the cost of these proceedings together with his family income and expenses make it unlikely that anything could be achieved beyond payment of his priority tax debt.”<sup>113</sup> Similarly in *In re Maya*,<sup>114</sup> the court “wrestled” with the debtors’ ineligibility for Chapter 13 and the fact that “Chapter 11 cases are more expensive, and the administrative costs would reduce the funds to be distributed to creditors.” The

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court nevertheless concluded that “the amount of monthly disposable income available to debtors is sufficient to make a meaningful distribution to unsecured creditors even if greater administrative expense is also incurred”<sup>115</sup> and therefore found abuse.

On the other hand, in *In re Wolf*,<sup>116</sup> the court stated that:

[The court] views eligibility for relief under another chapter as having either no or very minimal relevance to the proper framework for analyzing dismissal. There is no constitutional right to bankruptcy relief. The issue is whether a debtor should receive a chapter 7 ‘fresh start’. Where abuse is present the case should be dismissed without regard to the availability of relief under some other chapter.”<sup>117</sup>

There is also the question of what constitutes the payment of a “substantial” portion of unsecured claims in Chapter 13. One court stated “that a debtor’s ability to repay 25% or more of his or her unsecured non-priority debts in a Chapter 13 plan is persuasive evidence that allowing the debtor to proceed under Chapter 7 would constitute an abuse”<sup>118</sup> Another court found that a potential Chapter 13 dividend of less than 11% to unsecured creditors would not “be a significant repayment to unsecured creditors such that granting Debtors a discharge in this case would be an abuse of the provisions of Chapter 7.”<sup>119</sup>

A third court took a more nuanced approach in a situation where a debtor could pay only a 19% dividend to creditors through a Chapter 13 plan. The court noted that, prior to BAPCPA, it generally used a 33 1/3% “rule of thumb” in determining motions to dismiss for “substantial abuse.” The court focused on the removal of the word “substantial” from § 707(b) and the fact that, while 19% is a relatively small percentage payment, the gross amount that would go to creditors would be the relatively large amount of \$33,497.28. These findings led the court to conclude that the case was an abuse.<sup>120</sup>

On the other hand, in *In re Brenneman*,<sup>121</sup> the court stated that it would “disregard that any Chapter 13 plan proposed by the Debtors may not, given their substantial unsecured debt, result in a high-percentage distribution to unsecured creditors.”<sup>122</sup>

### G. Nondischargeable Debt

A particularly vexing situation arises when a debtor owes student loans that are nondischargeable in any bankruptcy chapter pursuant to § 523(a)(8) of the Bankruptcy Code. The problem for a debtor in Chapter 13 is that, although nondischargeable, student loans are not accorded any priority status. Thus a Chapter 13 plan ordinarily must pay all nonpriority unsecured claims at the same dividend rate, which typically is much less than the interest accruing on the student loans, meaning that, at the end of the Chapter 13 plan period, the debtor would owe more on the student loan than was owed on the petition date.

Debtors who would face this situation have argued that it is improper to conclude that their cases are an abuse because they have an ability to pay creditors. In *In re Kaminski*,<sup>123</sup> the court emphatically rejected such argument. The court stated that such reasoning “goes against the core principle of bankruptcy that similarly situated creditors are entitled to an equal distribution of estate assets.”<sup>124</sup> The court added that to

hold otherwise would be to advantage debtors who owe nondischargeable debts arising from a debtor's wrongful conduct such as fraud, embezzlement, and larceny.<sup>125</sup>

An even more extreme example of this kind of situation is found in *In re Wadsworth*.<sup>126</sup> There, the debtor, who was divorced, argued that he did not have an ability to pay because he was obligated to pay \$1,956 per month on two mortgages encumbering his residence, now worth less than the total of the mortgages. In response to an argument that such payment was excessive, the debtor explained that his ex-wife was also an obligor on the mortgages and that, under his divorce decree, he was required to indemnify her to the extent she was required to make payments on the mortgages (an indemnification obligation that would be nondischargeable under § 523(a)(15) of the Bankruptcy Code). Thus he could not truly reduce his costs by moving to lower priced housing because that would make his ex-wife liable for the resulting mortgage deficiency claim and trigger his indemnification liability. The court rejected this argument out of hand, stating that “it would seem quite odd to allow a debtor to use what Congress looked upon with disfavor—*i.e.* the nondischargeability of certain categories of debts—as bearing favorably for the debtor in a ‘totality of the circumstances’ analysis under § 707(b)(3)(B).”<sup>127</sup> The court found the case to be an abuse, although it did not explain what it realistically expected the debtor to do to remedy his financial situation.

#### IV. EVALUATION OF SPECIFIC FACTORS IN DETERMINING ABUSE WITHOUT REFERENCE TO ABILITY TO PAY

##### A. Lavish and Extravagant Lifestyle

As noted above, many courts determining whether a case is an abuse consider issues besides a debtor's ability to pay, and they frame these issues similarly whether acting under the “bad faith” prong of § 707(a)(3)(A) or the “totality of the circumstances” prong of § 707(a)(3)(B). Chief among these issues is whether the debtor has spent extravagantly and lived a lavish lifestyle.

In *In re Mitchell*,<sup>128</sup> for example, the court found bad faith through its focus on the fact that the debtor, though unemployed, spent almost \$29,000 in the 16 months before she filed bankruptcy on “dining out,” “women's fashions and accessories,” electronics and personal property,” and “beauty treatments and related products.”<sup>129</sup> In *In re Zaporski*,<sup>130</sup> the court found relevant to its decision to dismiss the case the fact that the debtor filed bankruptcy “because of excessive spending on entertainment and personal lifestyle choices.”<sup>131</sup> In *In re Siegenberg*,<sup>132</sup> dismissal came because of significant evidence that the debtor used her credit cards for tens of thousands of dollars in personal expenditures, the purchase of consumer goods and services, and to obtain unexplained cash advances.<sup>133</sup> In *In re Oot*,<sup>134</sup> the court found an abuse because the debtors filed their bankruptcy case “intent on maintaining a lifestyle they could no longer afford.”<sup>135</sup> In *In re Bender*,<sup>136</sup> the court found that the debtors not only had not tightened their belts but had “added to their expenses while in bankruptcy. Debtors borrowed \$3,000.00 from a friend and committed to repaying the loan at the rate of \$200.00 per month. Rather than cutting food expenses, Debtors eat many of their

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meals in restaurants. [One debtor] takes out payday loans in an effort to ‘make ends meet’.”<sup>137</sup> All of these cases were found to be abuses.

Some courts view the issue in terms of why the debtor filed bankruptcy and, in particular, whether it arose from illness, unemployment, or other calamity. In finding an abuse in *In re Campbell*,<sup>138</sup> the court simply stated that the “[d]ebtors did not file this case because of any unforeseen or catastrophic event. [One debtor] testified that they got to the point of careless spending that snowballed on them. These are not the types of ‘needy’ debtors for which a Chapter 7 discharge is meant.”<sup>139</sup> On the other hand, in *In re Newman*,<sup>140</sup> the court found there to be no abuse even though the debtor had a household income with her nonfiling spouse of over \$150,000 per year and mortgage payments of over \$4,400 per month because the debtor had filed bankruptcy due to a job loss, most of the mortgage expense was being covered by the nonfiling spouse, and the debtor’s other expenses were not excessive.<sup>141</sup>

Especially problematic for debtors is debt incurred without a belief that it could be repaid. In *In re Jensen*,<sup>142</sup> the court explained:

[P]urchases that cause the debtor to become insolvent generally give rise to a determination of abuse, regardless of the length of time that elapses between the purchase and the bankruptcy filing. The Bankruptcy Code is intended to afford relief to the ‘honest but unfortunate debtor’, not to the debtor who makes purchases that she knows she cannot afford.<sup>143</sup>

An especially egregious example occurred in *In re Mitchell*,<sup>144</sup> where the court found that the debtor increased her monthly credit card spending after she contacted a bankruptcy law firm.<sup>145</sup>

On the other hand, in *In re Baum*,<sup>146</sup> the debtor had substantial credit card debt from prepetition gambling losses. The court found, however, that the debtor’s state of mind was such that she honestly (although mistakenly) believed she would pay that credit card debt when she incurred it. The court further found that the debtor subsequently changed her lifestyle, ceasing gambling three months prior to the petition date, and then explored possibilities for paying her debt, and it denied a motion to dismiss. While the debtor “was clearly living beyond her means.... if this alone were sufficient to indicate such dishonesty with one’s creditors as to warrant a dismissal for abuse, a staggering number of Chapter 7 cases would have to be dismissed as abusive.”<sup>147</sup>

### **B. Omissions and Misstatements**

Omissions and misstatements in a debtor’s statements and schedules will often lead to a finding of abuse. A court will conclude that the debtor has acted to disguise, rather than disclose, a debtor’s financial condition.

In *In re Hickman*,<sup>148</sup> the court found that the debtor failed to disclose information about an active LLC that had a bank account with numerous financial transactions of the debtor, a refinancing of real estate that paid down a mortgage, a gift of a car to his daughter five months prior to bankruptcy, and several other things. The court found that, while “the omissions and misstatement of the Debtor, when taken alone, do not

misrepresent the Debtor's financial condition... when taken as a whole, they do present a false picture of the Debtor's finances. The Debtor's lack of disclosure indicates an indifference for the truth."<sup>149</sup> In *In re Wolf*,<sup>150</sup> the debtor failed to disclose receipt of funds for fuel cost reimbursement, receivable collections, and sale of a motorcycle. The court found the debtor "has not been forthcoming with information necessary to the administration of his case."<sup>151</sup> In *In re Sullivan*,<sup>152</sup> the debtors intentionally omitted all their medical debt from their schedules of creditors.<sup>153</sup> Finally, in *In re Ashraf*,<sup>154</sup> the debtors failed to disclose additional income, a stock transfer, and certain debt for which one debtor was personally liable.<sup>155</sup> Each of these cases was found to be an abuse.

A particular source of contradiction to statements in a debtor's schedules can come from a reaffirmation agreement. In a reaffirmation agreement, a debtor must show an ability to repay the debt that is being reaffirmed. Consequently, the figures in a reaffirmation agreement may, unlike a debtor's other statements and schedules, show monthly income in excess of monthly expenses and lead a court to conclude a debtor has an ability to repay creditors.

An example of this situation is found in *In re Carney*.<sup>156</sup> In this case, the debtors had shown monthly expenses in Schedule J that were more than \$500 greater than the monthly net income shown in Schedule I. The debtors, however, subsequently filed a reaffirmation agreement for a camper (which the court characterized as "a luxury vehicle that has not been shown as necessary in any way for their maintenance or support or that of their dependants").<sup>157</sup> The reaffirmation agreement stated that, after the debtors' monthly expenses, they were still left with \$700 per month with which to make the monthly payment of \$342 on the reaffirmed camper debt. The court concluded that "Debtors' own representations on the record show that they have the ability to repay a meaningful portion of their unsecured debt out of stable future income."<sup>158</sup> It found the case to be an abuse.

## V. CONCLUSION

Courts have found "abuse" leading to the dismissal of Chapter 7 cases under one of two rubrics. One is that the debtor has an ability to pay creditors, and the other is that the debtor's habits before bankruptcy or misstatements in bankruptcy make the debtor unworthy of a Chapter 7 discharge. In finding an ability to pay creditors, courts have scrutinized all aspects of a debtor's income and expenses. Some courts seem to have found high income or high expenses sufficient by themselves to conclude an ability to pay exists, while other courts have gone further and considered whether a debtor really could take the steps that would lead to an ability to pay and whether finding an ability to pay would contravene some other policy set forth in the Bankruptcy Code.

In dismissals that are not based on ability to pay creditors, courts have found debtors to be undeserving of Chapter 7 relief because of the debtor's cavalier actions before or during bankruptcy and have not found abuse where the debtor attempted to change his or her ways before filing bankruptcy. In either case, the more specific the information provided to the court about why a particular debtor truly cannot pay or really has changed, the greater the likelihood that the debtor's case will not be considered abusive.

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### NOTES

1. Pub. L. No. 109-8, 119 Stat. 23 (2005).
2. Bankruptcy Code refers to Title 11 of the U.S. Code, 11 U.S.C.A. §§ 101 to 1532.
3. Pub. L. No. 95-598.
4. Pub. L. No. 95-598, § 707.
5. House Report No. 95-595, 95th Cong., 1st Sess. 280 (1977).
6. Pub. L. No. 98-353.
7. Pub. L. No. 98-353, § 312 (amending 11 U.S.C.A. § 707 by adding new subsection (b)).
8. Senate Report No. 98-55, 98th Cong., 1st Sess. 54 (1983).
9. The Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, gave standing to the U.S. Trustee to also bring a motion to dismiss a Chapter 7 case on the grounds of substantial abuse.
10. In re Perrotta, 378 B.R. 434, 437, 58 Collier Bankr. Cas. 2d (MB) 1628, 2007 BNH 42 (Bankr. D. N.H. 2007).
11. This argument was advanced in an article by Marianne B. Culhane and Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am Bankr. Inst. L. Rev. 665 (2005).
12. In re Zaporski, 366 B.R. 758, 770-71, 57 Collier Bankr. Cas. 2d (MB) 1892 (Bankr. E.D. Mich. 2007).
13. Zaporski, 366 B.R. at 771.
14. In re Schoen, 2007 WL 643295 (Bankr. D. Kan. 2007).
15. In re Pak, 343 B.R. 239, 241 (Bankr. N.D. Cal. 2006).
16. In re Henebury, 361 B.R. 595 (Bankr. S.D. Fla. 2007).
17. Henebury, 361 B.R. at 651.
18. In re Pennington, 348 B.R. 647, Bankr. L. Rep. (CCH) P 80728 (Bankr. D. Del. 2006).
19. Pennington, 348 B.R. at 651.
20. In re Maya, 374 B.R. 750 (Bankr. S.D. Cal. 2007).
21. Maya, 374 B.R. at 754.
22. In re Brenneman, 397 B.R. 866 (Bankr. N.D. Ohio 2008).
23. Brenneman, 397 B.R. at 754. It is noteworthy that the very same judge, just 10 months earlier, had stated that “from a practicable standpoint, it would be unfair to always equate a surplus in one’s income with an ‘ability to pay’ under § 707(b)(3),” and had denied a motion to dismiss in a case where the debtors’ income exceeded their expenses by \$324.49 per month. In re Stewart, 383 B.R. 429, 434 (Bankr. N.D. Ohio 2008).
24. In re Nockerts, 357 B.R. 497, Bankr. L. Rep. (CCH) P 80871 (Bankr. E.D. Wis. 2006).
25. In re Cribbs, 387 B.R. 324 (Bankr. S.D. Ga. 2008).
26. Cribbs, 387 B.R. at 335 (citing Nockerts, 357 B.R. 497).
27. In re Walker, 383 B.R. 830 (Bankr. N.D. Ga. 2008).
28. Walker, 383 B.R. at 838.
29. Walker, 383 B.R. at 837.
30. In re Siegenberg, 2007 WL 6371956 (Bankr. C.D. Cal. 2007).
31. In re Price, 353 F.3d 1135, 51 Collier Bankr. Cas. 2d (MB) 949, Bankr. L. Rep. (CCH) P 80029 (9th Cir. 2004).
32. Price, 353 F.3d at 1139-40.
33. In re Oot, 368 B.R. 662, 665 (Bankr. N.D. Ohio 2007).
34. In re Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006).
35. Mitchell, 357 B.R. at 155.

36. In re Harter, 2008 WL 3875370 (Bankr. N.D. Cal. 2008).
37. Harter, 2008 WL 3875370.
38. Harter, 2008 WL 3875370.
39. Brenneman, 397 B.R. at 871.
40. In re Wadsworth, 383 B.R. 330, 333 (Bankr. N.D. Ohio 2007).
41. In re Graham, 363 B.R. 844 (Bankr. S.D. Ohio 2007).
42. In re Gonzalez, 378 B.R. 168, 175-76 (Bankr. N.D. Ohio 2007).
43. Haney v. Clippard, 2007 WL 781321 (W.D. Ky. 2007).
44. In re Figueroa, 376 B.R. 627 (Bankr. N.D. Ohio 2007).
45. In re Richie, 353 B.R. 569 (Bankr. E.D. Wis. 2006).
46. Richie, 353 B.R. at 581.
47. In re Talley, 389 B.R. 741 (Bankr. W.D. Wash. 2008).
48. Talley, 389 B.R. at 745.
49. In re Wolf, 390 B.R. 825 (Bankr. D. S.C. 2008).
50. In re Short, 2008 WL 2020200 (Bankr. D. Neb. 2008).
51. Wadsworth, 383 B.R. 330.
52. Gonzalez, 378 B.R. 168.
53. Oot, 368 B.R. at 667.
54. In re Carney, 2007 WL 4287855 (Bankr. N.D. Ohio 2007).
55. Carney, 2007 WL 4287855.
56. In re Seeburger, 392 B.R. 735 (Bankr. N.D. Ohio 2008).
57. Seeburger, 392 B.R. at 743.
58. Seeburger, 392 B.R. at 743-44.
59. In re Felske, 385 B.R. 649 (Bankr. N.D. Ohio 2008).
60. Felske, 385 B.R. at 658.
61. In re Jensen, 2008 WL 5746903 (Bankr. C.D. Cal. 2008).
62. Jensen, 2008 WL 5746903 (citation omitted).
63. Jensen, 2008 WL 5746903.
64. Jensen, 2008 WL 5746903.
65. Jensen, 2008 WL 5746903.
66. In re Kaminski, 387 B.R. 190 (Bankr. N.D. Ohio 2008).
67. Kaminski, 387 B.R. at 196 (emphasis added).
68. Brenneman, 397 B.R. 866.
69. Brenneman, 397 B.R. at 874 (citation omitted).
70. Short, 2008 WL 2020200.
71. Wadsworth, 383 B.R. 330.
72. Oot, 368 B.R. 662.
73. In addition to secured debt for a single-family home, *Jensen* involved secured debt for a boat and for a motor home.
74. In re Brown, 376 B.R. 601 (Bankr. S.D. Tex. 2007).
75. Brown, 376 B.R. at 610.
76. In re Hoffner, 2007 WL 4868310 (Bankr. D. N.D. 2007).
77. Hoffner, 2007 WL 4868310.
78. Felske, 385 B.R. 649. Initially trying to reaffirm secured debt for luxury items seems a sure way to predispose a court to finding a case is an abuse. In *Brenneman*, the court noted that the debtor had sought to reaffirm the secured debt on a timeshare but had changed his mind.

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The court stated that “this change seems disingenuous considering that it only occurred after the [filing of the] Motion to Dismiss.” *Brenneman*, 397 B.R. at 873.

79. *In re Parada*, 391 B.R. 492, 59 Collier Bankr. Cas. 2d (MB) 459 (Bankr. S.D. Fla. 2008).
80. *Parada*, 391 B.R. at 503.
81. *Parada*, 391 B.R. at 503.
82. *In re Burton*, 379 B.R. 732 (Bankr. N.D. Ohio 2007).
83. *Burton*, 379 B.R. at 736.
84. *Gonzalez*, 378 B.R. 168.
85. *Gonzalez*, 378 B.R. at 174.
86. *In re Bender*, 373 B.R. 25 (Bankr. E.D. Mich. 2007).
87. *Bender*, 373 B.R. at 30.
88. *Zaporski*, 366 B.R. 758.
89. *Zaporski*, 366 B.R. at 773.
90. *In re Beckerman*, 381 B.R. 841, 59 Collier Bankr. Cas. 2d (MB) 540 (Bankr. E.D. Mich. 2008).
91. *Beckerman*, 381 B.R. at 848.
92. *In re Tucker*, 389 B.R. 535 (Bankr. N.D. Ohio 2008).
93. *Tucker*, 389 B.R. at 541.
94. *In re Walker*, 383 B.R. 830 (Bankr. N.D. Ga. 2008).
95. *Walker*, 383 B.R. at 838-39.
96. *Beckerman*, 381 B.R. 841.
97. *Beckerman*, 381 B.R. at 851.
98. *Brown*, 376 B.R. 601.
99. *Brown*, 376 B.R. at 610.
100. *Wolf*, 390 B.R. at 832.
101. *Wolf*, 390 B.R. at 832.
102. *Wolf*, 390 B.R. at 832.
103. *Carney*, 2007 WL 4287855.
104. *Carney*, 2007 WL 4287855.
105. *Gonzalez*, 378 B.R. 168.
106. *Gonzalez*, 378 B.R. at 174.
107. *In re Zuccarell*, 373 B.R. 508 (Bankr. N.D. Ohio 2007).
108. *Zuccarell*, 373 B.R. at 511-12.
109. See 11 U.S.C.A. § 707(b)(1).
110. *Bender*, 373 B.R. 25.
111. *Bender*, 373 B.R. at 29.
112. 11 U.S.C.A. § 109(e).
113. *Harter*, 2008 WL 3875370.
114. *Maya*, 374 B.R. 750.
115. *Maya*, 374 B.R. at 755.
116. *Wolf*, 390 B.R. at 834.
117. *Wolf*, 390 B.R. at 834 (citation omitted).
118. *In re Mondragon*, 2007 WL 2461616 (Bankr. D. N.M. 2007).
119. *Figuroa*, 376 B.R. at 630-31.
120. *Pak*, 343 B.R. at 246.

121. Brenneman, 397 B.R. 866.
122. Brenneman, 397 B.R. at 875.
123. Kaminski, 387 B.R. 190.
124. Kaminski, 387 B.R. at 197.
125. Kaminski, 387 B.R. at 197 (quoting *In re Reimer*, 2008 WL 495537 (Bankr. N.D. Ohio 2008)).
126. Wadsworth, 383 B.R. 330.
127. Wadsworth, 383 B.R. at 336.
128. Mitchell, 357 B.R. 142.
129. Mitchell, 357 B.R. at 146.
130. Zaporski, 366 B.R. 758.
131. Zaporski, 366 B.R. at 773.
132. Siegenberg, 2007 WL 6371956.
133. Siegenberg, 2007 WL 6371956.
134. Oot, 368 B.R. 662.
135. Oot, 368 B.R. at 670.
136. Bender, 373 B.R. 25.
137. Bender, 373 B.R. at 31.
138. *In re Campbell*, 2007 WL 1376226 (Bankr. N.D. Iowa 2007).
139. *Campbell*, 2007 WL 1376226.
140. *In re Newman*, 2008 WL 2228746 (Bankr. D. Neb. 2008).
141. *Newman*, 2008 WL 2228746.
142. *Jensen*, 2008 WL 5746903.
143. *Jensen*, 2008 WL 5746903.
144. *In re Mitchell*, 357 B.R. 142 (Bankr. C.D. Cal. 2006).
145. *Mitchell*, 357 B.R. at 155.
146. *In re Baum*, 386 B.R. 649 (Bankr. N.D. Ohio 2008).
147. *Baum*, 386 B.R. at 656.
148. *In re Hickman*, 2008 WL 2595182 (Bankr. W.D. Wash. 2008).
149. *Hickman*, 2008 WL 2595182.
150. *Wolf*, 390 B.R. 825.
151. *Wolf*, 390 B.R. at 833.
152. *In re Sullivan*, 370 B.R. 314 (Bankr. D. Mont. 2007).
153. *Sullivan*, 370 B.R. at 323.
154. *In re Ashraf*, 367 B.R. 151 (Bankr. D. Ariz. 2007).
155. *Ashraf*, 367 B.R. at 157-58.
156. *Carney*, 2007 WL 4287855.
157. *Carney*, 2007 WL 4287855.
158. *Carney*, 2007 WL 4287855.