Current Issues in Chapter 7 Individual Cases, or a Meander Through Chapter 7 Issues

William B. Logan, Jr., Moderator
Luper Neidenthal & Logan; Columbus, Ohio

Monica Villarejos Kindt
Office of the U.S. Trustee; Cincinnati

John W. Rose
The Rose Law Office; Cincinnati

Hon. Alan C. Stout
U.S. Bankruptcy Court (W.D. Ky.); Louisville

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Selected Case Review

Alan C. Stout, U.S. Bankruptcy Judge, Western District of Kentucky
Material Preparation Assistance by James R. Higdon, Staff Attorney for Judge Stout

CASE LAW UPDATE

Supreme Court

1. Husky Intern. Electronics, Inc. v. Ritz, 136 S.Ct. 1581 (U.S. 2016) – Before filing for bankruptcy, debtor was a director and partial owner of Chrysalis Manufacturing Corp., a circuit board manufacturer. For four years, the debtor sold and delivered electronic device components to Chrysalis. Chrysalis failed to pay Husky International Electronics, Inc. ("Husky") for some of the goods delivered. While some of that debt was outstanding, the debtor transferred a substantial amount of funds from Chrysalis to several other entities that he controlled. Husky sued the debtor in Texas state court to hold him personally liable for the company's debt. After the debtor filed for bankruptcy protection, Husky initiated an adversarial proceeding to have the debt declared non-dischargeable because Chrysalis had not received any reasonably equivalent value for the funds transferred to the debtor's other companies. The district court held the debtor personally liable for the debt under Texas law, but the debt wasn't "obtained by … actual fraud," and could be discharged in bankruptcy. The Fifth Circuit affirmed, holding that the "actual fraud" exception to a bankruptcy discharge under § 523(a)(2)(A) requires that the debtor make some kind of false representation to the creditor. Because the debtor's fraudulent transfer scheme didn't involve a misrepresentation, he wasn't barred from discharging the debt owed to Husky. The Supreme Court granted the petition for *certiorari.* The Supreme Court held that "actual fraud" includes fraudulent conveyance schemes even when those schemes don't involve a false representation. In a 7-1 decision, the Court reversed the Fifth Circuit, and resolved a circuit split on whether "actual fraud," as used in § 523(a)(2)(A), requires a false representation. The majority held it was "sensible to presume" that when Congress amended the Bankruptcy Code in 1978 and added to debts obtained by "false pretenses or false representations" an additional bankruptcy discharge exception for debts obtained by "actual fraud," it didn't intend the term "actual fraud" to "mean the same thing as the already-existing term 'false representations." Justice Clarence Thomas wrote a dissenting opinion, concluding that "actual fraud" doesn't encompass fraudulent transfer schemes.

6th Circuit Court of Appeals

2. In re Leonard, 2016 WL 1178649 (6th Cir. 2016) – When a Chapter 7 debtor filed for bankruptcy, he was delinquent on a monetary sanction owed to the Western District of North Carolina based on an underlying lawsuit. He also faced the threat of a default-judgment order in that case for his failure to timely pay the sanction. A week later, the federal court in North Carolina entered a default judgment against him on several state-law claims including fraudulent misrepresentation. In the bankruptcy case, the creditor initiated an adversary proceeding seeking damages and a determination of nondischargeability with respect to the amount owed from the fraud judgment. The bankruptcy court granted the creditor's motion for summary judgment. The debtor appealed, and both the district court and the 6th Circuit affirmed. The debtor challenged the order by the North Carolina court

imposing the sanction while he was in bankruptcy. The Circuit disagreed finding the North Carolina court's action within an exception to the automatic stay (§ 362(b)(4) stay does not impede the "continuation of an action or proceeding by a governmental unit ... to enforce [its] police and regulatory power."). The Circuit also upheld the bankruptcy court's use of issue preclusion to prevent re-litigation of the fraud issue. What is interesting is that the bankruptcy court did not use North Carolina's rules of issue preclusion, finding them incompatible with federal interests. North Carolina law does not give preclusive effect to issues determined by default. Instead, the bankruptcy court used general federal collateral estoppel principles. Under federal principles, issue preclusion prevents a party from re-litigating a matter if: (1) the precise issue was raised and actually litigated in a prior proceeding; (2) the determination of the issue was necessary to the outcome of that proceeding; (3) the prior proceeding resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in the prior proceeding. Here, the debtor challenged whether the issue was "actually litigated" in light of the default judgment. The Circuit disagreed finding this was not a true default situation, and that the debtor actually litigated this matter for over two years. He participated in extensive discovery, a mediated settlement conference, and successfully defended against a motion for pre-judgment attachment. Under these facts, the Circuit concluded that this issue had been sufficiently "actually litigated" to meet the requirement for issue preclusion. Finally, because the North Carolina fraud judgment corresponded to "actual fraud" under § 523(a)(2)(A), the bankruptcy court did not err in finding the debt nondischargeable.

3. In re Gandy, --- Fed.Appx. ----, 2016 WL 1381882 (6th Cir. 2016) – A debtor filed for Chapter 13 and, with his schedules, filed his Statement of Financial Affairs and "Means Test." After confirmation, the debtor failed to make payments. While a motion to dismiss was pending by the Chapter 13 Trustee, the debtor converted to Chapter 7. After conversion, the debtor filed a new Means Test. A creditor filed an adversary proceeding for a determination that the debtor should be denied a discharge based upon §§ 727(a)(2), (3), and (4). The bankruptcy court found that the debtor had made material false oaths with fraudulent intent in his Chapter 13 Means Test, his Chapter 7 Means Test, his Original Chapter 13 Schedule I, and his Statement of Financial Affairs, which warranted denial of discharge under 11 U.S.C. § 727(a)(4)(A). Accordingly, the bankruptcy court denied the debtor's discharge pursuant to § 727(a)(4)(A). The debtor appeal and the district court affirmed. On appeal to the Circuit, the 6th Circuit also affirmed. In order to deny a debtor a discharge, a creditor must prove five elements by a preponderance of the evidence: 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. The debtor argued that the false oaths were simply mistakes, and that he lacked the intent required under § 727. The bankruptcy court found the debtor's testimony at trial attributing his errors to a mere oversight not convincing. The Circuit found no compelling ground to overturn this factual finding. Finally, the debtor also argued the misinformation was not material. The Circuit held a false oath is material if it bears a relationship to the debtor's business transactions. Here, the incorrect financial information in the schedules and the Means Test were material and

detrimental to his creditors.

4. Eifler v. Wilson & Muir Bank & Trust Co., 588 Fed.Appx. 473 (6th Cir. 2014) – After the debtor filed for Chapter 7, a creditor filed an adversary proceeding seeking to deny the debtor's discharge under §727(a)(2), and (4). Specifically, the creditor alleged that the debtor had made numerous transfers to shield assets from his creditors. These transfers included his home equity loan proceeds to his wife, his tax refunds to his wife, prepaid private tuition for his children, and gifts to his in-laws. The creditor also asserted the debtor failed to disclose several assets in his schedules, including several bank accounts. The bankruptcy court agreed with the creditor, finding that the debtor failed to list several banking accounts, and that he transferred funds to shield them from creditors. The debtor argued he lacked the requisite intent to deny his discharge because he relied upon the "advice of counsel." The bankruptcy court rejected this defense, finding the debtor had acted with requisite fraudulent intent, of kind required to deny him a discharge on "false oath" theory. On appeal, the district court affirmed, finding the "defense of counsel" defense inapplicable. The debtor knew he was failing to list bank accounts, and knew that by transferring his assets, he was removing them from the reach of his creditors. On appeal, the Sixth Circuit also affirmed the bankruptcy court. The Circuit held that the bankruptcy court was correct in finding that the debtor omitted several material facts from his schedules. Moreover, the bankruptcy court was not incorrect in inferring fraudulent intent due to the number of transfers. The Circuit also rejected the "advice of counsel" defense, finding that the debtor did not fully disclose all the pertinent facts to his attorney, thus, he could not rely upon that attorney's advice. Additionally, any advice relied upon had become stale by intervening events. "A client, and especially a financially literate, well-educated businessman like [the debtor], cannot reasonably rely on advice after the pertinent facts have changed significantly."

Sixth Circuit BAP

5. In re Martin, 542 B.R. 199 (6th Cir. BAP 2015) – Debtor appealed bankruptcy court order granting stay relief. Creditor had sought relief to continue state court fraud litigation against the Debtor. The bankruptcy court held that because the fraud litigation involved parties who were not a party to the bankruptcy court proceeding, and a party had made a jury demand and did not consent to trial in the bankruptcy court, cause existed for relief from the stay to allow the litigation on the fraud issues to proceed in state court. The bankruptcy court held the dischargeability adversary proceeding in abeyance pending the resolution of the state court case. On appeal, the debtor argued the bankruptcy court was allowing the state court to decide the issue of dischargeability. The BAP disagreed, holding that although bankruptcy courts have exclusive jurisdiction to determine the dischargeability of debts, the fact that a bankruptcy court may give preclusive effect to the state court judgment does not mean that is deferring to the state court to determine dischargeability. The dischargeability of the debt must still be adjudicated as a matter separate from the merits of the debt itself. Here, the underlying cause of action involved state law fraud, additional parties not involved in the bankruptcy, and a jury demand. Furthermore, the state court action had proceeded at

least to some degree with discovery. The debtor did not demonstrate that the state court litigation would unfairly burden the bankruptcy estate or other creditors. In light of these considerations, the BAP affirmed the bankruptcy court.

6. In re Casciano, 2016 WL 105926 BAP 6th Cir. 2016) – Debtor and creditor engaged in a bar fight. Debtor was charged with assault and battery, which resulted in his conviction. Creditor then filed a civil action against the debtor. Before the case could proceed to trial, the debtor filed for Chapter 7. Creditor then initiated an adversary proceeding against the debtor seeking to hold this debt non-dischargeable under § 523(a)(6) for willful and malicious injury. A trial was held in the adversary, wherein the bankruptcy court heard testimony regarding the fight. The bankruptcy court held that the debtor did not act in "such a manner as to warrant the exception to discharge" under § 523(a)(6). On appeal, the BAP reversed and remanded. The Panel concluded that the debtor's action in punching the plaintiff in the face was "willful" within the meaning of § 523(a)(6). Here, the debtor intended to throw the punch. Such action evidences an intent to harm and is "willful" under the statute. The BAP also held that the bankruptcy court should have considered whether the debtor's claim of self-defense negated the existence of malice. Self-defense can constitute a justifiable excuse for a defendant's actions and negate a claim of malice under § 523(a)(6). On remand, since self-defense is an affirmative defense, the debtor bears the burden of proving the elements of self-defense.

7. In re Yonish, 2016 WL 832587 (6th Cir. BAP 2016) – Debtors moved to reopen their closed bankruptcy case in order to avoid judicial liens. No party objected to the reopening of the case. The bankruptcy court denied the motion to reopen, finding that the two year gap between the closing of the case and the filing of the motion to reopen too long. The bankruptcy court found the motion to reopen untimely and held that the debtors had exercised a "lack of diligence" in pursuing the lien avoidance motions. The bankruptcy court also found a "potential for prejudice" to the lienholders. The debtors appealed, and the BAP reversed. It is established law that avoidance of a judicial lien falls within the ambit of 'cause' under 11 U.S.C. § 350 to reopen a case, because it presents the potential for relief to the debtor. The BAP also found that the bankruptcy court erred in finding prejudice based upon the two year delay. The bankruptcy court abused its discretion by presuming prejudice on the mere fact of the delay. The bankruptcy court also denied the motion to reopen on the basis that it was untimely filed. Timeliness is not an independent basis for denying a motion to reopen. Neither 11 U.S.C. § 350(b) nor Fed. R. Bankr. P. 5010 impose a limit on the time to file a motion to reopen.

8. In re Sheidler, 2016 WL 1179268 (6th Cir. BAP 2016) – A purchase deal for a condominium went bad and the purchasers initiated an adversary proceeding against the debtors under §§ 523 (a)(2)(A) and 727(a)(4). The bankruptcy court ruled in favor of the debtors and the purchasers appealed. The BAP affirmed. To utilize § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false

representation; and (4) its reliance was the proximate cause of loss. Here, there was no evidence that the debtors' representations were false, that the debtors knew them to be false at the time they were made, or that they were made with gross recklessness as to the truth. There was also no evidence to supporting a finding of fraudulent intent. With respect to the § 727(a)(4) allegation, in order to deny a debtor's discharge under § 727(a)(4)(A), a plaintiff must establish by a preponderance of the evidence the following five elements: 1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case. Here, the bankruptcy court found no false oaths were made with connection to the bankruptcy case. If misstatements were made, they were immaterial. Finally, the statements were not made with the intent to deceive. On appeal, the BAP found these findings were not clearly erroneous.

9. In re Tench, 2016 WL 2892497 (6th Cir. BAP 2016) – Credit Union filed motion to allow late filed claims in a Chapter 13 case on the grounds of excusable neglect. The debtors opposed the motion. The bankruptcy court found that the bankruptcy notice was not sent to a specific person at the Credit Union, that there had been a personnel change at the Credit Union, that the claim was filed only eight days late, and that the plan had been confirmed before the claims bar date. Based upon these considerations, the bankruptcy court allowed the late-filed claims on the basis that the creditor's delay was due to excusable neglect. On appeal, the BAP reversed. Bankruptcy Rule 3002 sets the time to file proofs of claim in chapter 13 cases and Rule 3002(c) defines a timely-filed claim by a non-governmental creditor as one filed "not later than 90 days after the first date set for the meeting of creditors." Bankruptcy Rule 9006(b)(1) provides for the allowance of late-filed claims due to "excusable neglect." However, this Rule is not applicable to deadlines set by Rule 3002(c). Fed. R. Bankr. P. 9006(b)(3). Thus, to the extent that the bankruptcy court allowed the late-filed claims under Rule 9006(b)'s excusable neglect exception, the bankruptcy court committed reversible error. The Credit Union argued instead that the bankruptcy court was using it equitable powers, and not the Rule 9006, to allow the late-filed claims. The BAP also disagreed with this argument. Section 105 authorizes courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," but it cannot override explicit mandates of other sections of the Bankruptcy Code. As such, § 105 cannot be used to expand the Code and Rules to allow late-filed claims. Finally, even though not directly argued, the BAP expressed serious doubts that equitable tolling could have save the Credit Union's late-filed claims.

Of Note

10. In re Witty, 2016 WL 47616 (Bankr. W.D. Ky. 2016) – United States Trustee ("UST") moved to dismiss Chapter 7 consumer bankruptcy case pursuant to 11 U.S.C. §§ 707(b)(1), (b)(3)(A) and (b)(3)(B). The debtor was a recently divorced single mother of two children. Following her divorce, the debtor accepted new employment in Raleigh, North Carolina which caused her to move from Bowling Green, Kentucky. She was highly educated with a annual gross income of $187,000. On Schedule I to her Petition, the debtor indicated net

monthly income of $6,275. On Schedule J to her petition, the debtor included the following expenses:$558 BMW automobile lease payment, and$1,500 for travel expenses to visit her two children in Bowling Green. At the trial on the motion to dismiss, the debtor indicated her salary was $170,767. Debtor also indicated that her leased 2014 BMW was repossessed. The bankruptcy court denied the motion to dismiss. Because the BMW had been repossessed, that monthly automobile expense would not be held against her. With respect to the travel expense, the bankruptcy court held that in order to maximize time with the children, the debtor must fly from North Carolina to Nashville, rent a car to travel to Bowling Green and incur lodging costs for her visitation. The bankruptcy court did find that the debtor had large expenses, but they were commensurate with her lifestyle and job requirements as a high wage earner. It was to the creditors' benefit that debtor continue to maintain her current position and rate of pay. As such, her expenses were in line with achieving those ends.

11. In re St. George, 2016 WL 2603367 (Bankr. N.D. Ohio 2016) – UST brought adversary to deny the debtor's discharge under various subdivisions of § 727(a). The UST alleged the debtor's discharge must be denied under § 727(a)(3) because the debtor concealed, destroyed, or failed to keep or preserve recorded information from which the debtor's financial condition or business transactions might be ascertained. Additionally, the UST alleged that the debtor's discharge must be denied under § 727(a)(5) because the debtor has not adequately explained the loss of assets or deficiency of assets to meet the debtor's liabilities. With respect to the § 727(a)(3) count, the court found that the debtor intertwined his financial information with his solely owned corporation. Most importantly, the debtor paid nearly all of his personal and business expenses from the corporation's checking account. The UST presented sufficient evidence to identify information that was not adequately kept or preserved by the debtor. The debtor's supplementation and later disclosures were "piecemeal, disorganized and incomplete." The UST easily met his burden of showing how this missing information "might" enable the debtor's financial condition to be ascertained. The debtor's financial condition was inextricably intertwined with those of his companies. This debtor was not simply an employee, nor was he one shareholder of a larger business entity. He was the sole shareholder and nearly all of his personal expenses were paid from corporation's coffers. The documents sought by the UST were all directly relevant to the financial condition or business transactions of the corporation, and, therefore, might enable a more full understanding of the debtor's financial condition. The bankruptcy court also found that the debtor failed to adequately explain the dissipation of his assets. The debtor has failed to adequately account for $ 181,000 in income that the corporation reported on its 2014 tax return. The debtor has also failed to adequately account for the disposition of $137,000 in hard assets held by the corporation.

12. In re Chapter 13 Plan Administration in the Brownsville, Corpus Christi and McAllen Divisions, 2016 WL 2772099 (Bankr. S.D. Tex. 2016) – In a truly unusual case, the bankruptcy court found that the Chapter 13 trustee had been administering Chapter 13 Plans in a manner "inconsistent" with the standard Southern District of Texas Chapter 13 plans. For years, based upon a previous judge's interpretation, debtors were required to file a motion to modify in the event an increase in mortgage payment caused the plan to not timely

pay out. If the debtor failed to file a motion to modify, the trustee would file a motion to dismiss. If there was no objection filed by the debtor, the trustee would increase the amount of the mortgage payment to reflect the new increased mortgage payment; however, the debtor's overall payment to the plan did not increase unless the court signed an order modifying the plan. The bankruptcy court found this practice violated the express provisions of the confirmed plan which required debtors' payments to be automatically increased or decreased by the amount of the increase or decrease in the mortgage payments. The bankruptcy court ordered the Chapter 13 trustee to refund any overpayments caused by the deviation to the debtor, first from funds on hand, then from recovered funds from creditors, and finally if not fully repaid from the trustee herself. In cases where the debtor underpaid, the trustee was to file a "mortgage payment change notice," which would implement tan increase in plan payments on a prospective basis. The trustee was also to provide notice that she had failed to comply with the plan, and giving parties a set number of days within which they could file a claim against the Chapter 13 trustee. The bankruptcy court pointed out that the whole system failed, from the Chapter 13 trustee, to the UST, to the court itself.

Notes on 11 U.S.C. § 707(b)

11 U.S.C. § 707 governs the dismissal or conversion of a case filed under Chapter 7. The 2005 Act ("BAPCPA") significantly changed the provisions of former § 707(b), which is applicable to individual debtors with mostly consumer debt. Prior to BAPCPA, a presumption existed in favor of granting the relief (discharge of debt) requested by the debtor. This presumption could only be overcome if the court determined that there was "substantial abuse". Section 707(b)(1) eliminated the presumption language entirely and deleted the word "substantial" before abuse. The Court may now dismiss a case on its own motion or the motion of the Trustee if it find that a consumer debtor's filing constitutes an "abuse."

BAPCPA also introduced the so-called "means test" in § 707(b)(2). The means test is a rigid mathematical formula that, in part, uses the debtor's past income and IRS standard allowable expenses to determine the debtor's supposed disposable income. If the calculated disposable income is over a certain amount, the debtor's Chapter 7 filing is presumed to be an abuse. This presumption can only be rebutted by a showing of special circumstances, such as a serious medical condition or active duty in the military.

If a debtor passes the means test or is able to show special circumstances, there is further statutory language that can prevent him from being eligible for a Chapter 7 discharge. In § 707(b)(3), the Court is empowered to find abuse where the debtor filed the petition in bad faith or "the totality of the circumstances…demonstrates abuse."

In light of all of these changes to § 707(b), it has been argued that BAPCPA created a presumption *against* the relief available in a Chapter 7 case.

MEANS TEST

***In re Sorrell*, 369 B.R. 167 (Bankr.S.D.Ohio 2007) – Judge Waldron**

In one of the first cases after the enactment of BAPCPA to review §§ 707(b)(2) and (3), Judge Waldron addressed the United States Trustee's motion to dismiss the debtors' Chapter 7 case pursuant to both subsections noted above. The United States Trustee asserted that the debtors erred in their calculation of the means test by: 1.) excluding unemployment compensation in the current monthly income and 2.) including payments contractually due on a secured motor vehicle loan, along with the vehicle's operating expenses, on a motor vehicle that they indicated their intention to surrender. Had the debtors completed the means test in the manner that the United States Trustee considered correct, debtors would not have passed the means test and a presumption of abuse would have existed. The United States Trustee further asserted that even if the presumption of abuse had not existed, the debtors would have had the ability to pay, by reviewing the totality of the circumstances in light of the proposed surrender of their motor vehicle.

Judge Waldron, after a very detailed examination of the statute language in the 2005 Act, determined that unemployment compensation is to be excluded in the calculation of current monthly income as defined in § 101(10A).

Judge Waldron also determined that even if debtors filed a Statement of Intent to surrender a secured motor vehicle, it is correct for the debtors to include payments contractually due in calculating the debtors' average monthly payments under § 707(b)(2)(A)(iii)(I). He also

determined that it was correct to deduct the local standard operating expense for that vehicle under § 707(b)(2)(A)(ii)(I).

The court concluded that there was no presumption of abuse pursuant to § 707(b)(2) , but that a review of debtors' ability to pay under § 707(b)(3) was required as part of the totality of the circumstances of the debtors financial situation. After a review of debtors' actual income and expenses set forth in their Schedules I and J, it was determined that no abuse was found.

SPECIAL CIRCUMSTANCES

***In re Maura*, 491 B.R. 493 (Bankr.E.D.Mich 2013)**

Above median income debtors filed a Chapter 7, even though their means test (means test amended four times) indicated a presumption of abuse. The United States Trustee filed a motion to dismiss pursuant to both §§ 707(b)(2) and (3). Debtors argued that their special circumstances should rebut the presumption of abuse as permitted by § 707(b)(2)(B). Debtors, a family of five, had reported annual gross income of $138,528.00, but listed $900.00 per month for private education, various 401k loan payments, as well as 401k asset contributions and a student loan repayment of 205.00 per month.

11 U.S.C. § 707(b)(2)(B) permits a debtor to rebut the presumption of abuse by showing special circumstances. The phrase special circumstances are not defined in the Bankruptcy code. It does list serious medical circumstances and a call or order to active duty in the armed forces, to the extent that such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

As the Court noted, the special circumstances exception does not permit every unfortunate circumstance to rebut the presumption of abuse. It should only include those circumstances that are unforeseeable or beyond the control of the debtor. The special circumstance exception must be strictly construed to allow only those situations that are truly unavoidable. Student loan payments, private school expenses and 401k/403b contributions and loan payments do not qualify as special circumstances.

BAD FAITH AND TOTALITY OF THE CIRCUMSTANCES

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

This case presents the issue of above median income debtors where the presumption of abuse did not arise because the expenses permitted under § 707(b)(2)(A) were greater than the debtors' C.M.I. (i.e. the debtors passed the means test). The United States Trustee filed a motion to dismiss pursuant to § 707(b)(3) because the debtors' Schedules I and J showed an excess income of $299.45. The Trustee argued that the excess income was actually $457.88 per month. This was due to the debtors' deducting $158.43 per month on Schedule J for three 401k loans.

The court noted that before BAPCPA, a case could be dismissed for substantial abuse under § 707 (b) based on the totality of the circumstances. The Court found that pre-BAPCPA case law remains relevant even though BAPCPA clearly lowered the standard for dismissal from "substantial abuse" to "abuse." See *In re Krohn*, 86 F.2d 123 (6th Cir. 1989).

In this case, the United States Trustee did not allege bad faith. Rather, the argument was that the debtors' had the ability to repay a portion of their debts in a Chapter 13 plan. The factors the Court considered were:

1. ability to repay a good percentage of the debt from future income
2. stability of income stream
3. eligibility to file a Chapter 13
4. ability to belt tighten debtors' expenses without depriving them of their basic needs of shelter, food, etc.

The Court concluded that debtors could repay between 10% and 15% of their debt based upon their current schedules. As a result, the Court upheld the United States Trustee's motion to dismiss or convert.

***In re Hess*, Case No. 07-31689 (Bankr.N.D.Ohio Oct. 15, 2007)**

In this case, an above median income debtor (household of one) filed Chapter 7. There was substantial negative equity in her personal residence and a motor home, both she intended to surrender. Her general, unsecured, non-priority debt was $22,515.00. Debtor had been employed at the same job for 17 years, so her income was steady. Debtor's Schedules I and J reflected disposable income of approximately $97.00.

The United States Trustee objected to several expenses on Schedule J. The debtor had a $174.00 per month expense listed for her repayment of a 401k loan, $100.00 per month to repay her parents and $300.00 per month to support her adult son, not living at home. The United States Trustee argued that adjusting those expenses would leave the debtor with $477.00 excess monthly income.

The United States Trustee filed a motion to dismiss pursuant to § 707(b)(3). Assuming excess income of $477.00 , the Chapter 13 payment would have been $400.00. The anticipated

percentage of payback to unsecured claims universe would have been approximately 14%. The court found the percentage to be sufficient and upheld the United States Trustee's motion. The court also noted the strong possibility that the debtor's mortgage company would not file a timely proof of claim there by potentially increasing the percentage paid to unsecured claims.

***In re Shubert*, Case No. 07-11511 (Bankr.S.D.Ohio Mar. 4, 2008)**

In this case, above median income debtors (family of four) filed a Chapter 7 Bankruptcy with a gross yearly income of $102,122.00. Schedule I reflected an income of $6,472.93. Schedule J reflected expenses of $6,461.81. They owned one parcel of real estate (their primary residence) with two mortgages. The two payments totaled $2,265.00. There was no equity.

Debtors indicated an intent to surrender a majority of their secured debt, one boat and two motor vehicles. They also eliminated a $250.00 per month tithe due to their reduction in income. Their belt tightening steps were commendable and the court noted same.

The United States Trustee filed a motion to dismiss pursuant to § 707(b)(3) because the debtors had steady jobs with substantial yearly gross income well above the median income levels for a family of four. Their attempts to reduce their expenses was evident, but in addition to their monthly income they received a substantial annual tax refund, approximately $11,424.00 in the year preceding the filing of the petition. The estimate for the upcoming tax year was $6,000.00

The court ruled in favor of the United States Trustee's motion to dismiss, noting that the debtors could fund a 15% Chapter 13 plan by either adjusting their tax withholding or using their annual refunds directly, as well as their plan to reduce their overall expenses.

***In re Watley*, Case No. 09-12930 (Bankr.S.D.Ohio Nov. 6, 2009)**

Debtor (family of six) filed a Chapter 7 listing gross yearly income of $108,252.00. Her Schedules I and J reflected a net monthly negative income of -$625.00 Debtor's Statement of Intent indicated that she wanted to surrender her real estate. Combined mortgages were in excess of $2,000.00 per month. Debtor listed on Schedule J her expectation to pay $2,000.00 per month for rent. This amount is 1.72 times the amount the IRS allows for housing, which is $1,166.00. She also listed $500.00 per month for electricity and heat. Schedule J listed $592.00 per month for an auto lease that was being surrendered. She noted an expense of $250.00 per month for assistance to two college aged children. This expense was not listed on Schedule J.

The court noted that if the housing expense was reduced to 1.5 times the IRS housing allowance combined with the $592 per month realized by the surrender of the auto lease, debtor could pay $218.00 monthly into a Chapter 13 plan. This would result in a Chapter 13 plan which paid 30% to unsecured creditors.

The court granted the United States Trustee's motion to dismiss or convert. Judge Aug noted the following factors: Both debtor and non-debtor spouse have steady jobs with sizeable income. There was no unforeseen or catastrophic event that led to the bankruptcy filing. Debtor could reduce her expenses and was eligible for Chapter 13 relief.

***In re Dupuy*, Case No. 10-10160 (Bankr.S.D.Ohio July 14, 2010)**

Debtor was retired and received various retirement benefits of $4,994.00 per month. Non-debtor spouse was a self-employed consultant with an income of $0.00 according to Schedule I. They owned a home valued at $400,000.00. There were two mortgages that totaled $2,248.00 per month. The IRS housing allowance for a household of 2 was $969.00 The debtor intended to reaffirm both mortgages. Also listed on Schedule J were a cable expense of $275.00 and a cell phone expense of $285.00

The United States Trustee filed a motion to dismiss pursuant to §§ 707(b)(3)(a) and (b)(3)(B). The court granted the United States Trustee's motion (for both bad faith and totality of the circumstances) citing debtor's refusal to do any meaningful belt tightening, no catastrophic event led to the filing of the bankruptcy, and the debtor's steady retirement income.

***In re Graham*, 363 B.R. 844 (Bankr.S.D. Ohio 2007)**

Debtors (household of four) earned in excess of $140,000.00 annually. They were clearly above median income but passed the means test. Their living situation was unique. The husband had been unemployed for six months. He obtained gainful employment in Richmond, Virginia. The debtor wife was required by a shared parenting order to remain in the Columbus, Ohio or give

up her custody of her two teenage children. They chose to set up separate households. They traveled to each other's residence on the weekends , almost weekly.

The United States Trustee filed a motion to dismiss pursuant to §§ 707(b)(2)(A) and 707 (b)(3). The Trustee's four points of contention were:

1. Debtors included their home mortgage payment on Form 22 even though their Statement of Intent indicated their desire to surrender.
2. Form 22 does not have space to list separate living expenses. The Trustee contended therefore, they could only include one set of deductions for housing and related expenses. Further the Trustee contended that if they wanted to list both household expenses they should have filed separate bankruptcies.
3. Debtor husband's desire to maintain a second mortgage vehicle, a Harley Davidson motorcycle, in addition to two other vehicles.
4. The monthly commuting expenses ($950.00) to and from each other's residences is not allowed under IRS standards.

The Court denied the United States Trustee's motion for both subsections. The Court referred to Judge Waldron's decision in *Sorrell* which found that debtors are required to include their contractual payments for mortgaged assets even if their intent is to surrender. The Court also rejected the United States Trustee's position that debtors are limited to the parameters of Official Form 22, noting that elevates form over substance. The Court added that none of the language in § 707 (b) suggests that debtors in a joint case who have separate expenses are required to select only one set of expenses for purposes of calculation under § 707 (b)(2). The fact that Official

Form 22A does not have a separate space for insertion of a second set of household expenses cannot trump the language of the statute.

Notes on 11 U.S.C. §727

The primary goal of 11 U.S.C. § 727 is to identify the circumstances in which a Chapter 7 debtor may be denied a discharge even where there is no finding of abuse under 11 U.S.C. § 707(b). The section contains several innocuous provisions – including the requirement that a debtor be an individual and identifying the time required between various filings – but also works to deny a discharge to any debtor who has committed one of the enumerated various bad acts. This section also gives the Court the power to revoke a discharge if fraud is discovered after the entry of the discharge.

A debtor can be denied a discharge under § 727 where he concealed or destroyed property with intent to hinder a creditor; where he concealed or destroyed records; where he knowingly

made a false oath or withheld information; where he fails to explain the loss of assets; or where he refuses to obey a court order. The court can revoke a discharge within one year if fraud is discovered after entry of discharge or the debtor fails to report property that came into estate (i.e. inheritance).

***In re Gandy*, Case No. 15-5831 (6th Cir. 2016)**

Debtor filed for Chapter 13 relief in February, 2011 and converted to a Chapter 7 in February, 2013. He filed both an original and amended B22c and B22a's indicating in both that he was below median income. He also filed an original and amended Schedule I's in his Chapter 13 and Chapter 7. A very determined creditor filed a motion to dismiss pursuant to § 707(b). The Court dismissed the creditor's motion because debtor claimed to be below median income. According to § 707(b)(6), only a Judge or United States Trustee may file a motion under this section in a below median case. The same creditor then filed a similar motion using §§727 (a)(4)(A)(a)(2) and (a)(3).

The Bankruptcy Court determined that the debtor made numerous false oaths in multiple filings (original and amended B22c; original and amended B22a; original and amended Schedule I's; original and amended Statement of Financial Affairs) in both the Chapter 13 and Chapter 7 filings. These multiple false oaths proved a clear example of a pattern of reckless and cavalier disregard for the truth. The five elements the court considered were:

1. Debtor made the statements under oath
2. The statements were false
3. Debtor knew they were false statements

4. Debtor made the false statements with the intent to defraud.

5. The false statements related materially to the Bankruptcy case.