

11 U.S.C. § 707(b)
Converted cases
Means test
Official Form 22A
Abuse

Torrie Ray Kellett, Case No. 06-30047-rld7
Steven Douglas Corbin, Case No. 07-31645-tmb7

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Chapter 13 debtors converted their respective cases to chapter 7, then filed motions ("Motions") seeking a determination that § 707(b) did not apply in converted cases to require debtors to file an Official Form 22A "Statement of Current Monthly Income and Means Test Calculation (Chapter 7)."

The court, utilizing a "holistic" approach to statutory construction, denied the Motions. Section 707(b) applies both in cases commenced in and cases converted to chapter 7. Thus, as a general rule, an Official Form 22A must be filed in converted cases to facilitate the statutory review for abuse. However, the court recognized that whether filing an Official Form 22A in a converted case may be waived is to be determined on a case by case basis, to be determined, on a motion filed and properly served by the debtor, on the facts of the specific case.

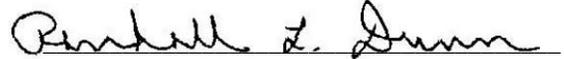
In these cases, the US Trustee performed its abuse investigation in response to the filing of the Motions such that no further purpose would be served by the debtors now filing an Official Form 22A. Accordingly, in the cases before the court, the requirement that each debtor file an Official Form 22A was waived.

P07-14(17)

December 03, 2007

Clerk, U.S. Bankruptcy Court

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
TORRIE RAY KELLETT,) No. 06-30047-rld7
)
Debtor.)
_____)
In Re:) Bankruptcy Case
STEVEN DOUGLAS CORBIN,) No. 07-31645-tmb7
)
Debtor.)
_____)

These cases both were filed initially as chapter 13¹ cases but have been converted on the debtors' (collectively, "Debtors") respective motions to chapter 7. The cases are before me on the Debtors' Motions to Strike Requirement to File Official Form B22A in Conversion from Chapter

¹ Unless otherwise indicated, all chapter, section and rule references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated as of October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23.

1 chapter 7 the same day. The § 341(a) meeting in Kellett's chapter 7 case
2 was held on August 2, 2007. The chapter 7 trustee filed a "no asset"
3 report, or report of no distribution on August 7, 2007. The UST did not
4 file a statement of presumed abuse within the ten (10) days following the
5 § 341(a) meeting, as allowed under § 704(b). Kellett cooperated with the
6 UST in providing documents requested by the UST in order to evaluate
7 Kellett's 2006 income and the current earnings of Kellett and his non-
8 filing spouse. The deadlines in Kellett's chapter 7 case for filing a
9 complaint to object to discharge and for filing a motion to dismiss
10 pursuant to § 707(b) expired on October 1, 2007. No party in interest
11 filed such a complaint or motion.

12 In re Corbin, Case No. 07-31645-tmb7:

13 Steve Douglas Corbin ("Corbin") filed a voluntary chapter 13
14 petition in the bankruptcy court for the District of Oregon on April 27,
15 2007. Corbin did not confirm a plan in chapter 13. Corbin moved to
16 convert his case to chapter 7 on June 25, 2007. Again, the court ordered
17 the case converted to chapter 7 on the same day. The § 341(a) meeting in
18 Corbin's chapter 7 case was held on August 2, 2007. The UST's attorney
19 attended the § 341(a) meeting and asked Corbin questions regarding his
20 circumstances. The chapter 7 trustee filed a "no asset" report, or
21 report of no distribution on August 7, 2007. On August 13, 2007, the UST
22 filed a statement pursuant to § 704(b)(1)(A) that Corbin's chapter 7 case
23 should be presumed to be an abuse under § 707(b). Corbin cooperated with
24 the UST in providing documents requested by the UST in order to evaluate
25 Corbin's child support modification, certain bank transactions, bonuses
26 and other compensation received by Corbin within the period of six months

1 preceding his bankruptcy filing, and information regarding Corbin's
2 current earnings. On September 11, 2007, the UST issued a statement
3 indicating that a motion to dismiss under § 707(b) was not appropriate in
4 light of Corbin's financial circumstances. The deadlines in Corbin's
5 chapter 7 case for filing a complaint to object to discharge and for
6 filing a motion to dismiss pursuant to § 707(b) expired on October 1,
7 2007. No party in interest filed such a complaint or motion.

8 Jurisdiction

9 I have jurisdiction to consider and rule on the Motions as
10 "core" matters under 28 U.S.C. §§ 1334 and 157(b)(2)(O).

11 Discussion

12 These cases were filed after the BAPCPA effective date.
13 Accordingly, the Debtors are subject to the "means test" provisions of
14 the Bankruptcy Code, as amended. Under § 521(a)(1)(B)(v), chapter 7
15 debtors are required to file a statement of their "monthly net income,
16 itemized to show how the amount is calculated." This requirement is
17 refined in two provisions of FRBP 1007(b). FRBP 1007(b)(1)(B) requires a
18 debtor, except in chapter 9 cases, to file "a schedule of current income
19 and expenditures"--the familiar pre-BAPCPA Schedules I and J. FRBP
20 1007(b)(4) further requires, with an exception for disabled veterans,
21 that,

22 an individual debtor in a chapter 7 case with
23 primarily consumer debts shall file a statement of
24 current monthly income prepared as prescribed by the
25 appropriate Official Form, and, if the debtor has
26 current monthly income greater than the applicable
median family income for the applicable state and
household size, the calculations in accordance with
§ 707(b), prepared as prescribed by the appropriate
Official Form.

1 The required Official Form in chapter 7 cases is Form B22A (Official Form
2 No. 22A).

3 FRBP 1007(b)(6) requires chapter 13 debtors to file a statement
4 of current monthly income with "a calculation of disposable income in
5 accordance with § 1325(b)(3), prepared as prescribed by the appropriate
6 Official Form." The required Official Form in chapter 13 cases is Form
7 B22C (Official Form No. 22C).

8 Form B22A and Form B22C differ in a number of respects. For
9 example,

10 joint debtors may complete a single Form B22C, but
11 each joint debtor must complete a separate Form B22A;
12 spousal income is treated differently in Form B22A and
13 B22C; disabled veterans are permitted an exclusion in
14 Form B22A, but not in Form B22C; Chapter 13 debtors
15 may deduct administrative costs of the Chapter 13 case
16 in Form B22C, Part IV, Line 33, but may not [deduct
17 chapter 7 administrative costs] in Form B22A, Part V
18 (see Line 28); and a debtor whose income is equal to
the median income is treated differently for purposes
of Section 1325(b)(4) in Form B22C, Part II, Line 17
(debtor with income equal to [or greater than] median
must propose five-year plan) than a debtor with the
same income for purposes of Section 707(b)(7) in Form
B22A, Part III, Line 15 (presumption of abuse does not
apply to debtor whose income is equal to the median
income).

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

20 Each of the Debtors filed a Form B22C in his chapter 13 case.

21
22 1. Arguments as to why § 707(b) does not apply in converted cases

23 The Debtors argue that they are not required to file Forms B22A
24 in their converted cases because they are not subject to a further "means
25 test" under § 707(b). Specifically, they rely on the language of
26 § 707(b)(1), which states that "the court, on its own motion or on a

1 motion by the [UST], trustee..., or any party in interest, may dismiss a
2 case filed by an individual debtor under this chapter whose debts are
3 primarily consumer debts...if it finds that the granting of relief would
4 be an abuse of this chapter...." (emphasis added). They point out that
5 their cases were converted to, but not filed in chapter 7. Thus, the
6 "means test" provisions of § 707(b) are not triggered, and any
7 requirement(s) of the FRBPs or local bankruptcy rules that the Debtors
8 file Forms B22A in their converted cases are precluded as inconsistent
9 with the provisions of the Bankruptcy Code itself.

10 The Debtors rely substantially on the bankruptcy court's
11 decision in In re Fox, 370 B.R. 639 (Bankr. D.N.J. 2007), where the same
12 legal issues were raised. In Fox, the bankruptcy court began its
13 analysis with a review of statutory language, focusing on §§ 707(b),
14 348(a) and (b), and 342(d). Noting that "[t]he Supreme Court has
15 instructed that, 'when the statute's language is plain, the sole function
16 of the court--at least where the disposition required by the text is not
17 absurd--is to enforce it according to its terms'" (citing Lamie v. U.S.
18 Trustee, 540 U.S. 526, 533 (2004)), the bankruptcy court in Fox found
19 nothing ambiguous in Congress's use of the phrase "filed...under this
20 chapter" in § 707(b)(1) and determined that § 707(b) did not apply to
21 cases converted from another chapter. Id. at 642-43. The Fox court
22 found particularly compelling that, although the remedies in a chapter 7
23 case found to be an abuse specifically encompass dismissal or conversion
24 to chapter 13 or 11, reflecting that the drafters had conversions in
25 mind, § 707(b) only references cases filed under chapter 7, when the
26 simple addition of the words "or converted to" chapter 7 would have

1 covered converted cases. Id. at 643, 646.

2 The Fox court found additional support for its interpretation
3 of the language of § 707(b) in §§ 348(a) and (b). Section 348(a)
4 provides that conversion of a bankruptcy case from one chapter to another
5 "does not effect a change in the date of the filing of the petition, the
6 commencement of the case, or the order for relief." Section 348(b)
7 provides that "unless the court orders otherwise," the "order for relief
8 under this chapter" in a converted case means "the conversion of such
9 case to such chapter." In effect, § 348(a) provides that conversion does
10 not commence a new bankruptcy case, but § 348(b) provides that a
11 conversion generally effects an "order for relief" in the new chapter.
12 If Congress had intended § 707(b) to apply to cases converted to chapter
13 7, another way to make that intention clear would have been to reference
14 the entry of "an order for relief" rather than filing under chapter 7.
15 Id. at 646.

16 In addition, as noted by the Fox court, § 342(d) provides that,
17 "[i]n a case under chapter 7 of this title in which the debtor is an
18 individual and in which the presumption of abuse arises under section
19 707(b), the clerk shall give written notice to all creditors not later
20 than 10 days after the date of the filing of the petition that the
21 presumption of abuse has arisen." (emphasis added). Unless a case is
22 converted immediately from another chapter to chapter 7, such a notice
23 will hardly ever be sent within ten days after the filing date in a
24 converted case. Id. at 645.

25 Beyond the statutory interpretation arguments stated in Fox,
26 other provisions of the Bankruptcy Code appear to differentiate the

1 conversion of a bankruptcy case from its filing. For example, § 1307(a)
2 provides that a debtor may convert a case from chapter 13 to chapter 7 at
3 any time, with the limitation under § 1307(g) that the debtor be eligible
4 for relief under chapter 7. In chapter 11, § 1112(a) provides that a
5 debtor may convert a chapter 11 case to chapter 7 unless:

- 6 (1) the debtor is not a debtor in possession;
- 7 (2) the case originally was commenced as an
involuntary case under this chapter; or
- 8 (3) the case was converted to a case under this
chapter other than on the debtor's request.

9 Consistent with § 1307(g), § 1112(f) limits the right of conversion to
10 chapter 11 debtors who are eligible for relief in chapter 7. See G.E.
11 Brunstad, Jr., "The Inapplicability of 'Means Testing' to Cases Converted
12 to Chapter 7," 9 Am. Bankr. Inst. J. 1 (Nov. 2005).

14 2. Arguments as to why § 707(b) does apply in converted cases

15 In opposition to the Motions, the UST argues that the Debtors'
16 narrow interpretation of the term "filed" under chapter 7 in § 707(b) is
17 flawed. The UST's statutory construction argument relies upon the
18 importance of interpreting statutory language in context. In
19 interpreting statutes, courts must "consider not only the bare meaning of
20 the critical word or phrase, but also its placement and purpose" in the
21 Bankruptcy Code. Holloway v. United States, 526 U.S. 1, 6 (1999).

22 [S]tatutory language cannot be construed in a vacuum.
23 It is a fundamental canon of statutory construction
24 that the words of a statute must be read in their
context and with a view to their place in the overall
statutory scheme.

25 Davis v. Michigan Dept. of Treas., 489 U.S. 803, 809 (1989) (citing
26 United States v. Morton, 467 U.S. 822, 828 (1984)).

1 At the outset, the UST argues that throughout the Bankruptcy
2 Code, provisions addressing the dismissal of a case refer to "a case
3 under this chapter" without differentiating converted cases. See
4 §§ 707(a), 930(a), 1112(b), 1208(b) and (c), and 1307(b) and (c). The
5 addition of the intervening words "by an individual debtor" with the
6 further addition of the phrase "whose debts are primarily consumer debts"
7 in § 707(b) arguably just limits the debtors to whom a finding of "abuse"
8 could apply.

9 The UST also argues that the Debtors simply interpret "filed"
10 too narrowly. The bankruptcy court in In re Kerr agreed with the UST's
11 position:

12 Webster's Dictionary defines "filed" as "to put or
13 keep (e.g., papers) in useful order" or "to enter
14 (e.g., a legal document) on public official record."
15 Webster's II New Riverside University Dictionary 477
16 (1988). Here, in the simplest sense, the debtors'
17 cases were entered on the Court's docket under Chapter
18 13 by the filing of petitions in bankruptcy. The
19 cases are now entered on the Court's docket under
Chapter 7 as a result of the debtors' filing motions
for conversion. While the cases were filed under
Chapter 13, they are now filed under Chapter 7. If
Congress meant to limit the application of the means
test to debtors who initially or originally filed a
petition under Chapter 7, that would have been simple
to articulate.

20 In re Kerr, 2007 WL 2119291 at *3. See In re Ybarra, 359 B.R. 702, 705
21 (Bankr. S.D. Ill. 2007). In a decision exploring the effect of a
22 conversion in a prior case on the debtor's eligibility for discharge in a
23 current case, the bankruptcy court noted in Ybarra:

24 While "filing" may denote the act of delivering a
25 document to the court clerk to begin litigation, it
26 applies as well to the delivery of documents for
placement in the record throughout the course of
litigation. Therefore, use of the term "filed" in

1 § 1328(f) does not, alone, signify that the act of
2 filing a bankruptcy petition or beginning a case is
3 necessarily implicit in the phrase "case filed under."
(emphasis in original).

4 Id.

5 The Kerr court also disagreed with the Fox court's
6 interpretation of § 348.

7 As this Court reads Section 348,...the clear intent of
8 the section is to retain the original filing date as
9 the date of the "filing of the petition,"
"commencement of the case" or "order for relief"
10 except in the circumstances provided for in
11 subsections (b) and (c), where these terms are instead
12 deemed to refer to the conversion date. Because
13 Section 707(b) is not mentioned in either subsection
14 (b) or (c) of Section 348, it follows that the
15 original filing date is retained upon conversion, but
16 the case is otherwise treated as if the debtor had
17 originally filed under the converted chapter.

18 2007 WL 2119291 at *3.

19 Section 348(c) provides that § 342 applies in converted cases
20 "as if the conversion order were the order for relief." Nothing in the
21 language of § 348, however, makes clear how the clerk is supposed to send
22 the notice of presumed abuse in a converted case pursuant to § 342(d)
23 "not later than 10 days after the date of the filing of the petition."
24 As noted above, the Fox court emphasized the inconsistency (often,
25 impossibility) of applying that time limitation to notices in a converted
26 case as support for its interpretation that § 707(b) simply does not
apply in cases converted to chapter 7. I tend to agree with the Kerr
court that it more likely represents merely "sloppy drafting." Id.²

² When the § 341(a) meeting notice is sent by the clerk in a
(continued...)

1 The UST generally argues that when the language of § 707(b) is
2 analyzed in the overall context of the BAPCPA amendments to the
3 Bankruptcy Code, Congress did not intend to limit examination of chapter
4 7 cases for "abuse" solely to cases filed originally in chapter 7.
5 Converted cases are subject to scrutiny for "abuse" as well. However,
6 the abuse analysis is limited to apply solely to cases filed by
7 individual debtors, whose debts are primarily consumer debts. The relief
8 sought is a chapter 7 discharge, and the relief is the same, whether the
9 case was filed originally in chapter 7 or was converted to chapter 7.
10 From the UST's perspective, it does not make sense to be able to assert
11 abuse with respect to a case initiated by a chapter 7 petition, while
12 being denied that right in a converted case.

13 Interpreting § 707(b) as not applying in converted cases itself
14 opens the door to abuses. A debtor seeking to avoid the chapter 7 "means
15 test" and § 707(b) "abuse" scrutiny could file a petition in chapter 13
16 and then turn around and convert the case to chapter 7. The bankruptcy
17 court faced just such a situation in In re Perfetto, 361 B.R. 27 (Bankr.
18 D.R.I. 2007). In Perfetto, the debtor filed a petition in chapter 13 on
19 May 30, 2006. Two weeks later, "with no evidence or suggestion of a
20 change of circumstances," she converted her case to chapter 7. Id. at
21 28-29. When the bankruptcy court issued a notice and order requiring the

23 ²(...continued)
24 chapter 7 case, whether it originally was filed under chapter 7 or was
25 converted to chapter 7, if the debtor has not yet filed a Form B22A, the
26 clerk notes "insufficient information available" to determine if a
presumption of abuse applies, with the possibility that the notice may be
updated later if more information becomes available.

1 debtor to file Form B22A within 15 days, she objected, arguing that
2 filing Form B22A only was required under § 707(b) in cases filed
3 originally under chapter 7 and that it would be a useless act for her to
4 file Form B22A because the Form B22C filed while her case was in chapter
5 13 established that her income was below the state median. Id. Relying
6 on decisions interpreting §§ 348(a) and 1328(f)(1) to hold that "filed
7 under" refers to the chapter to which a case has been converted, the
8 bankruptcy court in Perfetto interpreted § 707(b), "reading BAPCPA in its
9 entirety regarding means testing," as requiring the debtor to file the
10 Form B22A in her converted chapter 7 case. Id. at 30.

11 As further support for its position, the UST argues that the
12 phrase "may dismiss a case filed by an individual debtor under this
13 chapter whose debts are primarily consumer debts" in § 707(b) is not new
14 to the Bankruptcy Code under BAPCPA, and there are pre-BAPCPA decisions
15 in which the prior "substantial abuse" analysis was applied in converted
16 cases under § 707(b), including a decision from this district. See,
17 e.g., In re Morris, 153 B.R. 559, 563-65 (Bankr. D. Or. 1993)
18 (substantial abuse analysis applied in a case converted to chapter 7 from
19 chapter 13); In re Traub, 140 B.R. 286, 291 (Bankr. D.N. Mex. 1992)
20 (substantial abuse analysis applied in a case converted to chapter 7 from
21 chapter 11). However, the argument that the "filed...under this chapter"
22 language in § 707(b) does not apply to converted cases apparently was not
23 raised in either Morris or Traub. Consequently, their relevance as
24 authorities is limited.

25 The UST also asserts that § 704(b)(1) expressly requires the
26 UST to determine whether the § 707(b) presumption of abuse arises "with

1 respect to a debtor who is an individual in a case under this chapter
2 [7]," without differentiating between cases originally filed in chapter 7
3 and converted to chapter 7. In light of that requirement, the UST argues
4 that "[t]his statutory scheme only makes sense if every individual
5 Chapter 7 debtor is a potential abuser subject to the strictures of
6 Section 707(b)(2)." (emphasis in original).

7 8 3. Evaluating the conflicting arguments

9 Legitimate points are made on both sides of this argument.
10 However, interpreting the language of § 707(b) "holistically," see United
11 Savings Assn. v. Timbers of Inwood Forest, 484 U.S. 365, 371 (1988), I
12 ultimately am persuaded that the phrase "case filed by an individual
13 debtor under this chapter" does not make appropriate sense viewed in
14 isolation and must be interpreted to encompass cases converted to chapter
15 7 from other chapters as well as cases filed originally in chapter 7. In
16 light of use of the phrase "case under this chapter" without referring
17 specifically to converted cases in other provisions of the Bankruptcy
18 Code dealing with dismissal, I find that it is not dispositive that
19 § 707(b) does not specifically reference converted cases. Providing for
20 dismissal as a remedy to deal with abuse in individual consumer chapter 7
21 cases was meant to encompass findings of abuse in cases converted to, as
22 well as initially filed in, chapter 7.

23 My holding in this regard is consistent with the Supreme
24 Court's decision in Marrama v. Citizens Bank of Massachusetts, 127 S.Ct.
25 1105 (2007), in which the Supreme Court broadly interpreted the authority
26 of bankruptcy courts "to prevent an abuse of process" under § 105(a) to

1 deny a "bad faith" debtor the right to convert his case from chapter 7 to
2 chapter 13 pursuant to § 706(a). If it is appropriate to thwart a
3 conversion from chapter 7 to another chapter of the Bankruptcy Code by an
4 abusive debtor in spite of the clear language of § 706(a) generally
5 allowing such conversions, it seems perversely inappropriate to deny
6 abuse analysis of a debtor's chapter 7 case based upon the mere fact that
7 it was converted to, rather than originally filed in chapter 7.

8 In making this determination, I am not blind to the fact that
9 § 707(b) and its implementing rules, applied indiscriminately in
10 converted cases, could lead to some unfortunate and incongruous results.
11 For example, what happens if a debtor makes a good faith effort to
12 succeed in chapter 13 but (as happens in many chapter 13 cases) cannot
13 complete the obligations of a confirmed plan? If the case converts to
14 chapter 7, the debtor faces "abuse" scrutiny under § 707(b). If the case
15 is dismissed as an "abuse," the debtor may be left with no realistic
16 remedy in bankruptcy. Or, if the case is reconverted to chapter 13,
17 there is at least the possibility that the debtor could begin cycling
18 through a perpetual "do loop" of failures in chapter 13, followed by
19 brief tenures in chapter 7, followed by further reconversions to chapter
20 13. The UST argues that in the good faith exercise of discretion in
21 bringing § 707(b) motions to dismiss, such scenarios will not occur. I
22 hope and expect that is the case.

23 In addition, since § 348(a) provides that conversion "does not
24 effect a change in the date of the filing of the petition, the
25 commencement of the case, or the order for relief," the Form B22A in a
26 converted case is prepared based on the debtor's income averaged over the

1 six months preceding the month during which the debtor's original
2 bankruptcy petition was filed. Since a chapter 13 case could convert at
3 any time before completion of the plan, at least some conversions can be
4 contemplated during the last month of the applicable commitment period,
5 which may be in the 60th month after the filing date. It is questionable
6 how meaningful an analysis based on "current monthly income" can be,
7 considering income information that may be more than five years old.

8 However, if a filed Form B22A raises a presumption of abuse,
9 § 707(b)(2)(B) allows debtors to rebut the presumption with a showing of
10 "special," i.e., changed circumstances. In addition, in appropriate
11 circumstances, I find that the requirement to file a Form B22A in a
12 converted case can be waived. See, e.g., In re Edwards, 367 B.R. 921
13 (Bankr. S.D. Ga. 2007).

14 In FRBP 1007(b)(1), the requirement to file a schedule of
15 current income and expenditures can be eliminated, if "the court orders
16 otherwise." The provision for such an order is not included in FRBP
17 1007(b)(4), which encompasses Form B22A. However, the definition of
18 "current monthly income" in § 101(10A) contemplates that at least in some
19 cases, "the schedule of current income required by section
20 521(a)(1)(B)(ii)" will not be filed.³

21
22 ³ Section 101(10A) provides that:

23 The term 'current monthly income'--

24 (A) means the average monthly income from all sources
25 that the debtor receives (or in a joint case the debtor
26 and the debtor's spouse receive) without regard to
 whether such income is taxable income, derived during
 the 6-month period ending on-

(continued...)

