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11 U.S.C. § 707(b)(2)(A)(iii): Does it Mean What it Says and Say What it Means?

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ARTICLES

11 U.S.C. § 707(b)(2)(A)(iii): DOES IT MEAN WHAT IT SAYS AND SAY WHAT IT MEANS?

A. Jay Cristol[*] *& Cheryl Kaplan*[**]

I. INTRODUCTION 1

II. "PLAIN MEANING" INTERPRETATION OF 11 U.S.C. § 707(b)(2)(A)(iii) 7

III. "LEGISLATIVE INTENT" ANALYSIS 10

IV. "PLAIN MEANING" RATIONALE VS. "LEGISLATIVE INTENT" RATIONALE 12

> "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."[1]

I. INTRODUCTION

With the implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) came the implementation of

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1. *In re* Randle, No. 07C631, 2007 WL 2668727, at *5 (N.D. Ill. July 20, 2007) (quoting Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).

the means test as set forth in 11 U.S.C. § 707(b)(2). BAPCPA's "means test" is Congress's ill-conceived attempt to curb abuse in bankruptcy cases by ensuring that those who can afford to repay some portion of their unsecured debts are required to do so.[2] Prior to the advent of BAPCPA and its means test, a Chapter 7 bankruptcy case could only be dismissed if a court determined that granting relief under that chapter would constitute a "substantial abuse."[3] This pre-amendment law established a

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2.

> The Bankruptcy Reform Act of 2005 asks the very fundamental question of whether repayment is possible by an individual. It is this simple: If repayment is possible, then he or she will be channeled into chapter 13 of the Bankruptcy Code which requires people to repay a portion of their debt as a pre-condition for limited debt cancellation. . . . This bill does this by providing for a means-tested way of steering people . . . who can repay a portion of their debts, away from [C]hapter 7 bankruptcy.

151 CONG. REC. S1856 (daily ed. Mar. 1, 2005) (statement of Sen. Grassley). With all due respect, by his statement, it is evident that Senator Grassley has failed to recognize what this author, in more than two decades on the bench, has observed first-hand. Almost all consumer debtors seeking relief in the bankruptcy court are honest, decent, hardworking citizens who suffered a catastrophic financial tragedy, seldom of their own making, such as serious medical disaster and no health insurance, loss of employment, dissolution of a marriage, or some financial mistake or misfortune. The means test imposes burdensome and onerous filing requirements and provides draconian penalties for the most minor and insignificant failures to comply with even the most unimportant statutory requirements.

3. 11 U.S.C. § 707(b) (2000). Courts determined which Chapter 7 filings amounted to "substantial abuse" by determining which debtors had unreasonable and unnecessary expenses from which they could pay some of their debts. *See In re Dorwarth*, 258 B.R. 293 (Bankr. S.D. Fla. 2001) (Chapter 7 case dismissed where debtor had ability, after eliminating or reducing certain unnecessary expenses, including payment for upkeep of retired police horses, to fund a 36-month Chapter 13 plan that would pay unsecured creditors nearly 100% on their claims). In *Dorwarth*, this author cited two different pre-BAPCPA approaches used by the courts to determine what circumstances would constitute "substantial abuse" under section 707(b) of the Bankruptcy Code:

> One approach focuses on the Debtor's ability to repay debts from future income, as determined by the Debtor's ability to fund a Chapter 13 plan. *See In re Cox*, 249 B.R. 29, 31 (Bankr. N.D. Fla. 2000); *In re Dickerson*, 193 B.R. 67, 71 (Bankr. M.D. Fla. 1996) (citing cases from the Eighth and Ninth Circuit Court of Appeals). The other adopts a "totality of the circumstances" approach which essentially looks to numerous factors relevant to the Debtor's financial planning. *See In re Haddad*, 246 B.R. 27, 33 (Bankr. S.D.N.Y. 2000) (listing fifteen factors).

Dorwarth, 258 B.R. at 295. The common thread among the circuits was that if the debtor had the

"presumption in favor of granting the relief requested by the debtor."[4] However, under the new provisions of BAPCPA, the pre-amendment presumption has been replaced and dismissal is now authorized when the lesser standard of "abuse" can be demonstrated.[5] Specifically, § 707(b) limits judicial discretion[6] by providing that a court shall presume "abuse" if the debtor's current monthly income, reduced by certain allowed expenses, produces a specific amount of disposable income which could be used to repay at least a portion of his or her unsecured non-priority debts.[7]

While some have referred to the test applied under 11 U.S.C. § 707(b)(2) as the "mean" test,[8] others who have analyzed the test present it

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ability to repay even a portion of his debts out of future income, he should not be able to proceed in a Chapter 7 case. *Id.* (quoting *In re Cox*, 249 B.R. at 31).

4. 11 U.S.C. § 707(b) (2000 & Supp. 2004).

5. *Id.* § 707(b)(1) (2005). Congress was apparently unhappy with how courts were determining which cases were a "substantial abuse" and therefore created a strict formula for determining abuse, to wit, the means test. The means test eliminates from the Bankruptcy Code the former presumption of Chapter 7 availability in favor of the debtor. *See id.* Some believe that § 707(b)(2) effectively replaces uncertainty and diversity of holdings in the case law determining "substantial abuse." Karen A. Giannelli et al., *Step-by-Step Procedure in a Chapter 7 Case, in* COMM. LAW & PRACTICE COURSE HANDBOOK SERIES 216-17 (2006). This author disagrees and believes there exists sufficient precedent set forth in the pre-BAPCPA case law to guide courts, and inform debtors, in the determination of what "substantial abuse" is. *See, e.g., In re* Dorwarth, 258 B.R. at 295. *But see* H.R. REP. NO. 109-31 pt. 1, at 12 (2005) (noting that the law is responsive to concerns that the "substantial abuse" standard for dismissal was "inherently vague" and had led to "disparate interpretation and application by the bankruptcy bench.").

6. In *In re Hartwick*, the Minnesota court concluded that Congress essentially locked the courts out of any discretionary decision on how to apply the means test—taking away all equitable discretion to help make the Code work effectively:

> [C]oncepts of fairness involve equitable principles and judicial discretion. Congress had neither of these in mind in enacting the means test in 11 U.S.C. § 707(b). The means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt. Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process.

352 B.R. 867, 870 (Bankr. D. Minn. 2006), *aff'd in part, rev'd in part* 373 B.R. 645 (D. Minn 2007).

7. 11 U.S.C. § 707(b)(2)(A)(i) (2005). However, the means test presumption is not applicable to debtors whose income is at or below the highest applicable state median family income. *Id.* § 707(b)(7)(A)(i).

8. *United States Trustee Program: "Watch Dog or Attack Dog?" Hearing Before the*

as "an objective, formulaic determination aimed at measuring a consumer debtor's ability to repay at least some portion of his or her general unsecured debt over time."[9] Consumer debtors who file for bankruptcy relief under either Chapter 7 or Chapter 13 must now file what are referred to generically as the "means test forms." Although the means test forms differ depending on the chapter under which a debtor files, the forms contain required current monthly income calculations and a schedule of deductions allowed under § 707(b)(2).[10] The first step in the means test analysis is to compute an income variable designated as current monthly income (CMI),[11] and compare it to state median income figures.[12] If a debtor or joint debtors fall below the applicable state median family income, then no presumption of abuse arises; the debtors "fail" the means test and are permitted to file under Chapter 7, providing them a safe harbor free from dismissal for "abuse."[13]

Subcomm. on Administrative and Commercial Law of the H. Comm. on the Judiciary, 110th Cong. 4 (2007) [hereinafter *Watch Dog*] (testimony of A. Jay Cristol, Chief Judge Emeritus, U.S. Bankruptcy Court, S. Dist. of Fla.). *See also In re* Barraza, 346 B.R. 724, 729 (Bankr. N.D. Tex. 2006) ("The means test does not distinguish those who have tried hard from those who have hardly tried. It is a blind legislative formula . . . .").

9. George H. Singer, *The Year in Review: Case Law Developments Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 29 CAL. BANKR. J. 37, 88 (2007); *see generally* Mark A. Neal & Sandra Manocchio, *Means Testing: The Heart of BAPCPA*, 40 MD. B.J. 26 (2007).

10. "Means test forms" may be obtained from the web site of the Administrative Office of the U.S. Courts, *available at* http://www.uscourts.gov/bkforms/index.html (last visited Feb. 18, 2008).

11. "Ironically, there is nothing very current about CMI." Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 673 (2005). A debtor's CMI is defined as the average monthly gross income received by a debtor (and the debtor's spouse in a joint case) in the six month period preceding the bankruptcy filing. 11 U.S.C. § 101(10A) (2005). Almost any source of income is included in the calculation of a debtor's CMI, without regard to whether the income is taxable; but, Social Security benefits and other narrow categories of income, including payments to victims of terrorism, war crimes, and crimes against humanity are excluded from CMI. *Id.* Although the CMI may not accurately reflect the actual income of a debtor or debtors, "it is the rock on which the means test is built." Culhane & White, *supra*, at 674.

12. The median income figures for all states can be obtained at the U.S. Trustee Program web site, *available at* http://www.usdoj.gov/ust/eo/bapcpa/20061001/meanstesting.htm (last visited Feb. 18, 2008).

13. Mark Jickling, *Bankruptcy Reform: The Means Test*, CRS Report for Congress, Order Code RS22058, at 4 (2005). Under § 707(b)(3), the safe harbor does not protect a debtor if a court or the U.S. Trustee move to dismiss for abuse on non-means test grounds. 11 U.S.C. § 707(b)(3) (2005).

If a debtor's CMI is above-median, the debtor must next calculate allowable deductions from CMI.[14] If an above-median income debtor has no disposable income remaining after deducting allowed expenses, the debtor's case will not be presumed to be an abuse of the provisions of Chapter 7.[15] If, on the other hand, the debtor has disposable income remaining, the debtor must satisfy a mathematical test found in 11 U.S.C. § 707(b)(2)(A)(i) designed to determine the total amount of disposable income the debtor will produce over the next sixty months which could be devoted to a repayment plan under Chapter 13, should the debtor choose to convert rather than have the case dismissed for abuse.[16]

Naturally, the more expenses a debtor is allowed to deduct from CMI, the better the chances are of remaining in a Chapter 7 case.[17] However, in the two years since the enactment of BAPCPA, courts are no closer to agreeing on the appropriate deductions available to debtors. While some courts adhere to the plain language of the statutes, others, struggling to achieve Congress's perceived goals of BAPCPA, are ignoring the plain language and opting to inject legislative history and congressional intent into their interpretation of the means test provisions to try to make the test "work better."[18] This Article focuses on the diverging opinions emerging specifically from the application of 11 U.S.C. § 707(b)(2)(A)(iii), and discusses how some courts, urged by the United States Trustee (UST), are

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14. The categories of allowable expenses which may reduce a debtor's CMI are contained in 11 U.S.C. § 707(b)(2)(A)(ii)-(iv) (2005). The Congressional Committee Notes on Subpart 5C of Means Test—Deductions for Debt Payment indicate that Subpart C of the forms deals with the means test's deductions from CMI for payment of secured and priority debt, as well as a deduction for administrative fees that would be incurred if the debtor paid debts through a Chapter 13 plan. Advisory Committee Note to Official Forms 22A, 22B, & 22C, ¶ C(3) (2005-2008). In accord with § 707(b)(2)(A)(iii), the deduction for secured debt is divided into two entry lines—one for payments that are contractually due during the sixty months following the bankruptcy filing, the other for amounts needed to retain necessary collateral securing debts in default. 11 U.S.C. § 707(b)(2)(A)(iii)(I)-(II) (2005). In each situation, the instructions for the entry lines require dividing the total payment amount by sixty, as the statute directs. *Id.*

15. Neal & Manocchio, *supra* note 9, at 28.

16. *Id.* § 707(b)(2)(A)(I). If, after deduction of all allowable expenses from a debtor's CMI, the debtor has less than $100 per month in monthly net income (i.e., less than $6,000 to fund a sixty month plan), the filing is not presumed abusive. *Id.* If the debtor has between $101 and $166 per month, the case will be presumed abusive if that sum, when multiplied by sixty [months], will pay 25% or more of the debtor's non-priority unsecured debts. *Id.* § 707(b)(2)(A)(i)(I).

17. *See supra* note 13.

18. *See* Neil P. Olack, *Symposium, Consumer Bankruptcy Panel: Selected Hot BAPCPA Topics*, 23 EMORY BANKR. DEV. J. 517, 522 (2007) (comments by the Honorable Neil P. Olack regarding those judges who "think they can determine what Congress meant and deviate from the plain meaning and try to find a rational resolution of whatever the issue is.").

cheating the means test and denying debtors the full benefits of the plain meaning of the statute. This Article concludes by suggesting the UST exercise the discretion given to it by BAPCPA[19] to decline to file motions to dismiss or convert and that the courts follow suit by adhering strictly to the language of the statute.

Section 707(b)(2)(A)(iii)(I) provides that the debtor is entitled to deduct from CMI "the total of all amounts scheduled as contractually due to secured creditors."[20] Simply stated, this provision allows a debtor to deduct from CMI payments the amount the debtor is legally obliged to make under a contract. Although the language of the statute appears to be "plain"[21] and simple, courts have disagreed over whether the statute allows a debtor to deduct from CMI secured debt for property the debtor intends to surrender, and in some cases actually does surrender. Some courts allow a debtor to include among the means test's secured debt expenses the debts on property the debtor intends to surrender.[22] Other courts conclude just the

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19. "BAPCPA vests in the [UST] the responsibility to review each presumptively abusive case and the discretion to determine whether a motion to dismiss for presumed abuse is appropriate." Neal & Manocchio, *supra* note 9, at 28-29. Under 11 U.S.C. § 704(b)(1)(A), if a case is identified as presumptively abusive, the UST must file a statement of presumed abuse within ten days after the conclusion of the first meeting of creditors. Within thirty days after filing a statement of presumed abuse, the UST must "file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the [UST] . . . does not consider such a motion to be appropriate." 11 U.S.C. § 704(b)(2) (2005).

20. *Id.* § 707(b)(2)(A)(iii)(I). The amounts to be deducted are not the actual monthly payments due under the relevant contracts but rather the "average" monthly payments "calculated as the sum of . . . the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition." *Id.* The statute also provides as follows:

> (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under [C]hapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60.

11 U.S.C. § 707(b)(2)(A)(iii)(II).

21. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (stating that the plain meaning of the statute controls unless the literal application of the statute produces "'a result demonstrably at odds with the intentions of its drafters.'") (citation omitted).

22. *See, e.g.*, *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006); *In re* Randle, 358 B.R. 360 (Bankr. N.D. Ill. 2006), *aff'd.* No. 07C631, 2007 WL 2668727 (N.D. Ill. 2007); *In re* Hartwick, 359 B.R. 16 (Bankr. D.N.H. 2007); *In re* Longo, 364 B.R. 161 (Bankr. D. Conn. 2007); *In re* Mundy, 363 B.R. 407 (Bankr. M.D. Pa. 2007); *In re* Kelvie, 372 B.R. 56 (Bankr. D. Idaho 2007); *In re* Benedetti, 372 B.R. 90 (Bankr. S.D. Fla. 2007).

opposite.[23]

II. "PLAIN MEANING" INTERPRETATION OF 11 U.S.C. § 707(b)(2)(A)(iii)

A court's starting point in construing a statute "is the existing statutory text."[24] "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd–is to enforce it according to its terms.'"[25] "As long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."[26] "A statute is not ambiguous . . . merely because it is susceptible to varying interpretations."[27] "'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used and the broader context of the statute as a whole.'"[28]

The earliest case to assess the plain meaning of 11 U.S.C. § 707(b)(2)(A)(iii) is *In re Walker.*[29] In *Walker*, Chapter 7 debtors included in their means test calculations a deduction for the average monthly payments on property they intended to surrender at the time of filing.[30] The UST filed a motion to dismiss, arguing the debtors should not be allowed to deduct from CMI an expense that they have no intention of paying in the future.[31] The *Walker* court disagreed with the UST and allowed the deduction. It applied the "plain meaning" rule in interpreting the statute

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23. *See, e.g., In re* Skaggs, 349 B.R. 594 (Bankr. E.D. Mo. 2006); *In re* Harris, 353 B.R. 304 (Bankr. E.D. Okla. 2006); *In re* Love, 350 B.R. 611 (Bankr. M.D. Ala. 2006); *In re* Crittendon, No. 06-10322C-13G, 2006 WL 2547102 (Bankr. M.D.N.C. Sept. 1, 2006) (noting the application of § 707(b)(2) is different in a Chapter 13 case than in a Chapter 7 case); *In re* Ray, 362 B.R. 680 (Bankr. D.S.C. 2007).

24. Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004).

25. *Id.* (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)). "When no specific definition for a term is given in the statute itself, [courts should] look to the ordinary common sense meaning of the words." "'Absent clearly expressed legislative intent to the contrary, the language is regarded as conclusive.'" Watson v. Ray, 192 F.3d 1153, 1156 (8th Cir. 1999) (citations omitted).

26. *In re* Am. Steel Prod., Inc., 197 F.3d 1354, 1356 (11th Cir. 1999) (quoting United States v. Ron Pair Enter., Inc., 489 U.S. 235, 240 (1989)).

27. *In re* Wilkins, 370 B.R. 815, 819 (Bankr. C.D. Cal. 2007).

28. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

29. No. 05-15010, 2006 WL 1314125 (N.D. Ga. May 1, 2006).

30. *Id.* at *5-6.

31. *Id.* at *2, *6.

and determined that the common meaning of the words "scheduled as contractually due" is "those payments that the debtor will be required to make on certain dates in the future under the contract."[32] The court stated that "nothing the debtor does or does not do changes the fact that the scheduled payments remain contractually due."[33] Significantly, the *Walker* court held that the date of the filing of the petition is the applicable date on which to determine all allowances as the statute requires a determination of "how many payments are owed under the contract for each secured debt at the time of filing."[34] Because the Walkers were contractually obligated to make payments on the date they filed their bankruptcy petition, the deduction from CMI was allowed.

Other courts have followed the *Walker* court's lead.[35] Although these cases vary slightly in their reasoning, they all conclude that the term "scheduled as contractually due" includes payments that will not be made post-petition on surrendered property. Moreover, the plain meaning of the term "does not lead to an absurd result."[36] Whether the word "scheduled" is given its "dictionary meaning of 'to plan for a certain date' or . . . intended to reflect debts listed in [the debtors'] '[s]chedules[,]'" the qualifying words "'contractually due' make[] the differing definitions of 'scheduled' insignificant."[37] As long as a debtor is obligated under contract to make regular monthly payments on secured debt, those payments are

32. *Id.* at *9.

33. *Id.* at *13. The *Walker* court explained that surrender did not eliminate the debtors' contractual obligations; "[a]t the earliest, it may be eliminated by the entry of the discharge." *Id.* at *12.

34. 2006 WL 1314125 at *11. As the *Kelvie* court stated,

> an approach to the issue focusing on post-petition events defeats the function of the means test as an objective, formulaic analysis at the time of the filing of the petition. The means test in Chapter 7 calls for a snapshot, not a movie. Tying the analysis to events occurring after bankruptcy . . . is inconsistent with the language and overall structure of the means test.

In re Kelvie, 372 B.R. 56, 62 (Bankr. D. Idaho 2007) (distinguishing itself from the court in *In re* Singletary, 354 B.R. 455 (Bankr. S.D. Tex. 2006) which was constrained in its opinion by pre-BAPCPA precedent set under *In re* Cortez, 457 F.3d 448 (5th Cir. 2006), in which the Fifth Circuit held that post-petition factors determine whether a debtor is entitled to deduction for collateral the debtor intends to surrender). *Accord In re* Benedetti, 372 B.R. 90 (Bankr. S.D. Fla. 2007) (instead of looking at how the debtor's finances progress over time, the means test takes a snapshot of the debtor's finances on the petition date).

35. *See supra* text accompanying note 22.

36. *In re* Wilkens, 370 B.R. 815, 819 (Bankr. C.D. Cal. 2007).

37. *Id.*

"'contractually due' from the debtor on the petition date."[38] A statement of intention to surrender secured property does not alter the "legal obligation to make the payments as it existed on the petition date."[39]

The *Walker* court's reasoning and plain meaning interpretation of the statute accomplish the broader goals of the means test—fairly applying a straightforward formulaic equation to all debtors equally. The plain meaning interpretation emphasizes the fact that the means test does not impose limits on the deduction of secured debt payments.[40] There is also "no express requirement that the collateral be necessary or the amount of the debt be reasonable";[41] and, there is no limitation on the time of acquisition of the secured property.[42] Moreover, there is no conditional language in § 707(b)(2)(A)(iii) which requires that a debtor must intend to continue to pay the contractually due amounts to claim the expense, and a debtor's intent to surrender collateral does not alter the contractual obligations.[43]

This section of BAPCPA specifically addresses secured debt payments, not general expenses, and "contains no limitations on the secured debt deduction, other than that the projected expenses" must actually exist at the time of filing.[44]

> If Congress intended to limit secured debt payments contractually due from debtors on the petition date to those where actual future payments will be made in Form B22C calculations, it knew how to

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38. *Id.*

39. *Id.*

40. *See* Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 201, 224 (2005). The deduction for secured claims is not limited to those debts which would be paid in a hypothetical Chapter 13 case. *Id.* "The unlimited secured debt deduction bought the support of home mortgage lenders, and, when Congress threw in limits on cramdown in [C]hapter 13, got the automobile industry on board as well." Culhane & White, *supra* note 11, at 676 (citing Richardo I. Kilpatrick, *Consumer Bankruptcy Reform Roundtable,* 7 AM. BANKR. INST. L. REV. 3, 12-13 (1999)).

41. Culhane & White, *supra* note 11, at 676. The omission of these limits appears intentional as the next sentence following allows an additional deduction of cure payments, expressly limited to those cure payments that are necessary to retain possession of a few crucial assets (i.e., principal residence and motor vehicle needed for the debtors and dependents). *Id.*

42. *Id.* The unlimited deduction appears "to invite last-minute purchases for those who need more deductions from CMI to pass [(or more appropriately, "fail")] the means test." *Id.*

43. *See In re* Randle, No. 07C631, 2007 WL 2668727, at *5-6 (N.D. Ill. July 20, 2007).

44. *See* Charles J. Tabb & Jillian K. McClelland, *Living With the Means Test,* 31 S. ILL. U. L.J. 463, 492 (2007) (the secured debt deduction rewards the debtor who has larger amounts of secured debt).

> do so, as reflected, for example, by the inclusion of the terms "actual monthly expenses" and "actual expenses" elsewhere within section 707(b)(2)(A)(ii)(I) and (II).[45]

Thus, it appears from the plain language of the statute that Congress eased the means test to serve goals other than just the maximum repayment for unsecured creditors; it sought "to create a 'mechanical' formula for presuming abuse of Chapter 7."[46]

III. "LEGISLATIVE INTENT" ANALYSIS

Notwithstanding the plain language of 11 U.S.C. § 707(b)(2)(A)(iii), some bankruptcy courts attempt to derive the intent of Congress from the scant legislative history and impose additional obligations not statutorily required. These courts are urged on by the UST to conduct individualized inquiries into each debtor's intent and individual circumstances—which is precisely at odds with Congress's purpose of creating a mechanical means test.[47]

For instance, in *In re Skaggs*, the UST filed a motion to dismiss.[48] The UST argued that if the debtor does not intend to make installment payments on his secured debt, he should not be permitted to take the deduction under § 707(b)(2)(A)(iii).[49] The UST reasoned that such interpretation accomplished the goal of BAPCPA to repay as much debt as is possible.[50] The *Skaggs* court agreed with the UST and found the debtor's Statement of Intention, coupled with his pre-petition decision to cease payments and use of his mobile home and post-petition failure to object to the lift of the stay against it, presumptively precluded that secured debt from being an "applicable" expense.[51] The *Skaggs* court focused on the language "scheduled as contractually due," and concluded that the Bankruptcy Code was not referring to the common dictionary meaning for the word "schedule" but rather whether the debt was identified on debtor's

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45. *In re* Oliver, No. 06-30076RLD13, 2006 WL 2086691 at *3 (Bankr. D. Or. June 29, 2006).
46. *In re* Randle, 358 B.R. 360, 363 (N.D. Ill. 2006).
47. *See In re* Hartwick, 359 B.R 16, 21 (Bankr. D. N.H. 2007).
48. *In re* Skaggs, 349 B.R. 594, 595 (Bankr. E.D. Mo. 2006).
49. *See generally id.*
50. *Id.* at 595-98.
51. *Id.* at 598.

bankruptcy schedules.[52] Using this definition of "scheduled," the court opined that, if the debtor's schedules and statements show that the debtor will not be making the payment on a secured debt in each of the sixty months following the date of the petition, the secured payment may not be appropriately deducted on the means test.[53]

The problem with this position is that it requires revising the means test calculus to take post-petition events into account, to look forward at what is to come.[54] This holding also assumes Congress had only one goal behind implementing BAPCPA, that is, having debtors who can pay do so. That is not the case, however. Congress, in enacting the means test, also set forth a mechanical procedure for identifying abuse through a very specific formula to calculate a debtor's income and expenses.[55] A mechanical, standardized means test reduces a court's discretion in deciding whether to dismiss a case for abuse.[56] Thus, although BAPCPA was intended to weed out those debtors who could repay a portion of their debts, the means test was also enacted to create a uniform and mechanical method for determining a certain level of "abuse," without regard to an individual's actual circumstances.[57] The UST, and the courts, cannot and should not

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52. *Id.* at 599-600.

53. *In re Skaggs*, 349 B.R. at 600.

> To focus on the single term "contractually due" without due consideration of the import of the term "scheduled" and the phrase "in each of the 60 months following the date of the petition" will miss the actual meaning and the intent of § 707(b)(2). A primary intent of Congress in the passage of BAPCPA was to ensure that those debtors who can pay their debts do so.

Id.

54. *See* Tabb & McClelland, *supra* note 44, at 493; *see also In re* Kogler, 368 B.R. 785, 791 (Bankr. W.D. Wis. 2007) ("The best interpretation of § 707(b)(2) is to regard it as requiring a 'snapshot' of the debtors' finances at the time of filing."); *In re* Kelvie, 372 B.R. 56, 62 (Bankr. D. Idaho 2007); *see generally* Benedetti, 372 B.R. at 90 (Bankr. S.D. Fla. 2007).

55. *In re* Randle, No. 07C631, 2007 WL 2668727, at *9 (N.D. Ill. July 20, 2007) (citing *In re Mundy*, 363 B.R. 407, 413 (Bankr. M.D. Pa. 2007)).

56. *Id.*

57. *In re* Wilkins, 370 B.R. 815, 819-20 (Bankr. C.D. Cal. 2007).

> It is a mechanical test that requires the debtor to assume as expenses certain IRS standards, rather than using the actual expenses of the debtor in these categories. Congress could not have meant the means test to present an accurate, realistic picture of a debtor's income and expenses or it would have chosen a different vehicle to conduct the test. If the language which formulates the means test must be strictly followed in doing the form B22A calculations in all other regards, than the language of § 707(b)(2)(A)(iii) should be similarly strictly followed.

elevate one legislative purpose—having debtors who can pay do so—above another—the standardized application of the means test, especially when that is not supported by the plain language of the statute.[58]

IV. "PLAIN MEANING" RATIONALE VS. "LEGISLATIVE INTENT" RATIONALE

One advantage to the plain meaning interpretation of the statute is that "it creates a zone of certainty."[59] "[I]t means what it says" and it is safe for all—judges, attorneys, creditors, and debtors—to rely on it.[60] Adherence to the plain language rationale avoids the possibility that a court will import "unsuspected qualifications or implications into the text, even if these qualifications or implications were probably intended by the legislature."[61] The emphasis on the plain meaning of the text, rather than on the legislative intent, ensures the law is applied equally and with certainty to the public as a whole and that all have fair notice of the prerequisites of the law.[62]

While a court's fidelity to legislative intent has certain advantages, namely, advancing democracy by furthering the intentions of the elected representatives of the people,[63] it is also fraught with problems. It gives "priority not to the apparent meaning of the text, but to the meaning it was intended to have."[64] However, as in the case of BAPCPA, there is scant legislative history from which to draw proper inferences on what Congress

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Id.

58. *Randle*, 2007 WL 2668727, at *9.

59. *See* Ruth Sullivan, *The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation*, Legal Drafting, University of Ottawa, http://aix1.uottawa.ca/~resulliv/legdr/pmr.html (last visited Feb. 18, 2008).

60. *Id.*

61. *Id.*; *see, e.g.*, *In re* Skaggs, 349 B.R. 594, 598-99 (Bankr. E.D. Mo. 2006) (rejecting the *Walker* court's dictionary definition of the word "scheduled" to conclude that payments that are "scheduled as contractually due" are those payments that the debtor will be required to make on certain dates in the future, the *Skaggs* court found that the debtor's schedules and statements form the basis from which the court should determine whether a debt is "scheduled as contractually due" despite the fact no such requirement exists in the plain text of the statute).

62. *See* Sullivan, *supra* note 59.

63. *See id.* at 4-5 ("[F]or law to be legitimate it must be democratic, and for law to be democratic it must be made by the elected representatives of the people. . . . Judges do not make law; they only apply it. Being impartial and unbiased, they use their legal interpretation skills to discover and give effect to the intention of the legislature.").

64. *Id.*

intended.[65] Moreover, where there may be "errors" in the text, adherence to legislative intent in an effort to correct the errors and bring the text in line with the meaning actually intended by the legislature is inappropriate. Such judicial interpretation, to cure a perceived legislative oversight, is essentially "a form of amendment and an impermissible encroachment on the legislative sphere."[66] The BAPCPA was intended to lock the courts out of any discretionary decision on how to apply the means test—taking away all equitable discretion to help make the Code work effectively.[67]

Courts which inject legislative history into a statute as plainly written as 11 U.S.C. § 707(b)(2)(A)(iii), a statute that is neither ambiguous nor absurd in its plain meaning, cheat debtors out of the benefit of proceeding under Chapter 7 when they are truly worthy of relief.[68] In addition to the onerous and burdensome requirements imposed by the plain language of BAPCPA,[69] the arbitrary nature and extent of interpreting the law in light of legislative text and history further hinders a debtor's ability to obtain a "fresh start" in bankruptcy. Such interpretation, fostered by the UST's policy arguments, makes no exceptions for the honest but unfortunate debtor. For example, if a debtor's income, averaged over the last six months, is too high to "fail" the means test when, in fact, the debtor lost his or her job and his or her income is zero, no legislative intent is expressed to make an exception. If an expense element on the "means" test

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65. Legislative text and legislative intention are incomplete sources of law. *Id.*

66. *Id.* at 17.

67. *Supra* text accompanying note 6.

68. *See supra* text accompanying note 2. The result: "honest people become homeless. Families are broken up. The victims lose their jobs because they have no car to drive to work." *Watch Dog*, *supra* note 8, at 4; *see also infra* note 72.

69. As it is written,

> [d]ebtors must obtain all "payment advices" for the 60 days before the bankruptcy is filed; they must obtain a tax return or transcript for the most recent year before the petition is filed . . . they must provide bank statements to the trustee and evidence [of] other current income; they must attend a pre-petition credit counseling briefing, no matter how hopeless their situation and regardless of whether their problems were caused by imprudent credit decisions or unavoidable financial catastrophes; attorneys must complete numerous additional forms, including a six-page means test form that requires arcane calculations about which there are many different legal interpretations. According to the [UST] program, attorneys must also provide clients with pages and pages of so called "disclosures," many of which are either irrelevant to the client's case or inaccurate, which then requires much additional time spent explaining why they are irrelevant or inaccurate.

Watch Dog, *supra* note 8, at 4.

is higher than the actual number, the UST has the "chutzpah"[70] to ignore the statutory calculation and urges courts to use the actual number.[71]

"[T]he problems of consumer debtors are only exacerbated by the aggressive anti-consumer stance of the [UST] program."[72]

> The independent decisions of career personnel and local offices have been subordinated to central directives from a politicized central office dedicated to serving the political interests of the administration—in this case, by effectively becoming an arm of the administration's corporate backers in the financial services industry and trying to make bankruptcy as difficult and unattractive as possible.[73]

"[S]pending enormous resources [in] going after minor document defects in papers filed by consumer debtors . . . has done nothing to address the

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70. "Chutzpah" means the quality of audacity, for good or for bad. The word derives from a Hebrew word meaning "insolence," "audacity," and "impertinence." The modern English usage of the word has taken on a wider spectrum of meaning, however, having been popularized through vernacular use, film, literature, and television. *See also* LEO ROSTEN, THE JOYS OF YIDDISH 92-93 (1968) (defining "chutzpah" as "[g]all, brazen nerve, effrontery, incredible 'guts'; presumption-plus-arrogance such as no other word, and no other language, can do justice to"). Mr. Rosten provides the classic definition of "chutzpah" as follows:

> *Chutzpah* is that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.

Id. In addition to the foregoing law-themed definition, there is another legal chutzpah story that begins with a man going to a lawyer and asking:

> "How much do you charge for legal advice?"
> "A thousand dollars for three questions."
> "Wow! Isn't that kind of expensive?"
> "Yes, it is. What's your third question?"

Alex Kozinski & Eugene Volokh, *Essay: Lawsuit, Shmawsuit*, 103 YALE L.J. 463, 465 (1993) (an amusing and informative essay shedding light on the use of Yiddish in the English vernacular).

71. *See, e.g., In re Morgan*, 374 B.R. 353, 362 (Bankr. S.D. Fla. 2007) (according to the plain meaning of the statute and the carefully reasoned case law, the Local Standards deduction is a fixed allowance). *See also* Jickling, *supra* note 13.

72. *See Second Anniversary of the Enactment of the Bankruptcy Abuse Prevention and Consumers Protection Act of 2005: Are Consumers Really Being Protected Under the Act?: Hearing Before the Subcomm. on Administrative and Commercial Law of the H. Comm. on the Judiciary*, 110th Cong. 7 (2007) (testimony of Henry J. Sommer, President, Nat'l Ass'n Of Consumer Bankr. Attorneys).

73. *Id.* at 7-8.

widespread fraudulent claims and charges of mortgage companies in bankruptcy . . . ." and other creditor abuses.[74]

Bankruptcy courts should not succumb to the arbitrary policies and unfair methods employed by the UST,[75] and they should resist injecting their interpretation of legislative intent into statutes that are plainly worded.[76] Such statutes mean what they say and say what they mean. Courts should adhere to the plain meaning of 11 U.S.C. § 707(b)(2)(A)(iii) and let the chips fall where they will.

If 11 U.S.C. § 707(b)(2)(A)(iii) means what it says and says what it means, then surely the "Gander Rule" should apply. The courts and the UST are bound to enforce a fictitious calculation of income upon debtors who may not have any income whatsoever.[77] What is good for the goose is good for the gander. Fairness requires that, if the debtor is penalized by the fiction of the statute as to income, then the debtor is also entitled to any benefit the debtor may receive by the application of the fiction to the debtor's expenses. Perhaps a better means test could have been enacted, requiring use of actual income and expenses, but Congress chose fiction over fact, and it is the function of the courts to apply the statute as enacted.

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74. *Id.* at 8. Most documents filed by debtors' attorneys are not as poorly and inaccurately prepared as the unsupportable documents filed in great profusion by creditors—yet the UST spends little or no time on creditor wrongdoing. *Id.*

75.

> It appears that the [UST] sees its mission to deny people relief through bankruptcy. They file dismissal motions for minor defects, which makes things especially difficult for *pro se* debtors. The [UST] should be helping not hindering these people. Dismissal motions filed for things like credit counseling a few days early, or one or two missing pay stubs, when it is obvious that such omissions are of no significance.

Watch Dog; *supra* note 8, at 5.

76. "The decision to replace fact-based inquiry with a rigid, mechanical test in [C]hapter 7 is adequately, in fact unmistakably, evidenced. The means test requires use of CMI, a retrospective view of income, and standardized expenses." *In re* Littman, 370 B.R. 820, 829 (Bankr. D. Idaho 2007). The means test is "essentially an eligibility test, a mechanical construct designed to restrict judicial review of the debtors' financial picture when arriving at a 'presumption' of abuse. It does not contain any provision which permits a court to review the debtors' actual finances or to discount their secured debt." *In re* Kogler, 368 B.R. 785, 791 (Bankr. W.D. Wis. 2007).

77. *Supra* text accompanying note 57.