Section 707(b) of the Bankruptcy Code: A Roadmap With a Proposed Standard for Defining Substantial Abuse

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On July 10, 1984, President Reagan signed into law the Bankruptcy Amendments and Federal Judgeship Act of 1984. This Act adds a new section to Chapter 7 of the Bankruptcy Code governing the discharge of consumer debts. The new section, 707(b), states:

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

This section is the result of a long political battle between the consumer credit industry and those favoring the discharge of consumer debts without creditor harassment. After the passage of the Bankruptcy Reform Act of 1978, the credit industry experienced a sharp increase in losses from the discharge of consumer debts. The credit industry pressured Congress to disallow discharge for consumers with sufficient income to pay their debts in the future. The Bankruptcy Code had not previously allowed a debtor's future income to determine eligibility for discharge.

3. Id. § 707(b) (Supp. II 1984).
4. Id.
6. See infra text accompanying notes 35-68.
The credit industry persuaded Congress to introduce bills that recognized a debtor's future income as an element in determining whether to discharge consumer debts. These bills met stiff resistance from consumer groups. After three years of debate, Congress deleted the "future income" language from bills under consideration and adopted section 707(b).

Section 707(b) raises a number of troubling questions. First, what did Congress mean by "primarily consumer debts"? Second, how should a bankruptcy court decide when to make "its own motion"? What happens if a "party in interest" makes a motion despite section 707(b)’s prohibition? Third, and most importantly, what is "substantial abuse," and how does the "presumption" in favor of the debtor operate? 7

7. See infra note 56.

8. In the recent case of In re Keniston, 60 Bankr. 742 (Bankr. D.N.H. 1986), a bankruptcy court raised a number of questions regarding the constitutional validity of § 707(b). While a discussion of the constitutional issues raised by § 707(b) is beyond the scope of this Note, it is nevertheless important to understand § 707(b)’s potential constitutional infirmities.

The first constitutional issue raised by the Keniston court regarding § 707(b) is that of denial of equal protection of the laws. According to the court:

[There is no rational basis for distinction between “consumer” debtors and other debtors seeking chapter 7 bankruptcy relief . . . .

The result is that a debtor having a personal injury judgment, or a debtor having debts primarily related to business activity, is entitled to Chapter 7 relief and discharge of his debts, with no questions asked as to his ability to repay, while the “consumer” debtor is required to establish that he cannot pay off his debts under some extended payment plan before he can obtain the same relief. Id. at 744-45.

Contrary to the court’s view, one can offer a rational basis for distinguishing between consumer and nonconsumer debtors. The consumer debtor voluntarily incurs debt to purchase goods for personal use. See infra text accompanying notes 73-87. In other words, the consumer debtor purposefully avails himself of the benefits of the credit system. An individual with a personal injury debt, however, does not voluntarily seek the aid of creditors to enhance his personal lifestyle. This fact alone seems sufficient to justify a difference in treatment.

But this rationale does not explain why business debtors should be treated differently from consumer debtors. The Purdue Study, however, does supply a rationale. See infra notes 156-57 and accompanying text. This study, conducted by the Krannert Graduate School of Business Administration, concluded that a substantial number of consumer debtors who filed for personal bankruptcy could have repaid their debts in full over a three-year period. See S. REP. No. 446, 97th Cong., 2d Sess. 8-10 (1982). Because consumer debtors were discharging debt that could have been repaid, Congress was justified in singling them out for special treatment.

Other constitutional questions raised by the Keniston court include the following:

(1) Does the statute deny procedural due process by constituting the judicial officer who must decide the ultimate question of the debtor’s right to bankruptcy relief as in effect “accuser” or “prosecutor” initiating the complaint against the debtor?

(2) Is the requisite “case and controversy” requirement for federal jurisdiction under Article III of the Constitution present when no other party besides the court itself has raised any issue or dispute requiring judicial determination?

(3) If this statute is construed to require the judicial officer to review all bankruptcy petitions, to determine whether some involve “substantial abuse” requir-
This Note examines these questions and proposes a standard for determining "substantial abuse." Part I provides an overview of Chapter 7 of the Bankruptcy Code. Part II discusses the legislative history of section 707(b). Part III examines the jurisdictional and procedural questions raised by the section and attempts to define what Congress meant by "primarily consumer debts" and "on [a court's] own motion." Part IV proposes a two-part standard for determining "substantial abuse." This standard suggests that courts should find "substantial abuse" whenever a debtor acts in bad faith or is able to repay 100% of his debts over the three-year period following his motion for bankruptcy.

I. AN OVERVIEW OF CHAPTER 7 BANKRUPTCY

Before examining the mechanics of section 707(b), it is important to understand the basics of Chapter 7 of the Bankruptcy Code. This Part provides a general overview of how the consumer bankruptcy provisions operate.

Chapter 7 of the Bankruptcy Code has two goals: to liquidate debtors' assets for creditors and to give debtors a fresh start. Chapter 7 provides a straightforward system for achieving these goals.

Most Chapter 7 cases are filed voluntarily by the debtor. To file, a debtor submits to the court a bankruptcy petition, a statement of financial affairs and schedule of assets and liabilities, a

60 Bankr. at 745 (emphasis in original). While these questions are provocative and interesting, it is unlikely that § 707(b) will be declared unconstitutional because of the well-established principle that federal courts should try to avoid declaring a statute unconstitutional wherever possible. *Id.*

9. The discussion in this Part draws heavily from R. AARON, BANKRUPTCY LAW FUNDAMENTALS § 1.03 (1985).

10. *Id.; see also* J.J. WHITE, BANKRUPTCY AND CREDITORS' RIGHTS 29 (1985).

11. R. AARON, supra note 9, § 1.03, at 1-9.

12. 11 U.S.C. § 521(1) (Supp. II 1984); Bankr. R. 1002, 1007(b); *see also* A. HERZOG, S. LOWE & J. ZWEBEL, HERZOG'S BANKRUPTCY FORMS AND PRACTICE, Forms 2.01, 2.25-2.26, §§ 1.03, 1.06 (7th ed. 1984).
schedule of current income and current expenditures, and an acknowledgement by the debtor that he was informed of the availability of Chapter 13 relief. The debtor also pays a sixty dollar filing fee.

Once the debtor files a petition, three important things occur. First, an automatic stay takes effect to preclude almost all actions against the debtor and his property. Second, the court appoints an interim trustee to administer the debtor's estate. Third, all listed creditors are notified and invited to a First Meeting of Creditors, usually held within thirty days of the filing, to ask questions and ensure that the debtor's assets are accurately disclosed. The creditors may also replace the interim trustee with a trustee of their election.

Upon the filing of the petition, the trustee begins to assemble and liquidate the debtor's property. Debtors may exempt certain household property from collection and liquidation by the trustee. Most consumer bankruptcies yield no assets for distribution to the creditors.

Before discharging a petitioner's debts, the court holds a discharge hearing to consider any reaffirmation agreements. The court will then typically grant discharge. A discharge order voids any personal judgment against the debtor and enjoins future attempts to collect discharged debt.

14. Id. § 342(b). To obtain Chapter 13 relief a debtor must be an "individual with regular income" as that term is defined by § 101(27) of the amended Bankruptcy Code. To qualify for Chapter 13 relief the debtor must owe only noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000. See J.J. White, supra note 10, at 36.
23. R. Aaron, supra note 9, § 1.03, at 1-12. The fact that most consumer bankruptcies yield no distributable assets explains why creditors are interested in preventing debtors from entering the Chapter 7 process.
25. A reaffirmation agreement is an agreement between debtor and creditor that otherwise dischargeable debts will be enforced after bankruptcy. R. Aaron, supra note 9, § 1.03, at 1-12.
In rare cases, a court will deny a debtor the relief of discharge. Discharge may be denied for fraud, concealment of property, failure to obey court orders, refusal to respond to questions concerning financial affairs, and now for "substantial abuse" of the provisions of Chapter 7. Discharge will also be denied if the debtor has filed for Chapter 7 relief within the past six years. More commonly, discharge will be granted with certain debts exempted from discharge. The most prominent exemptions are for money loaned in reliance on false financial statements, family support obligations, credit card spending sprees, drunk driving judgments, student loans, and recent tax obligations.

II. LEGISLATIVE HISTORY OF SECTION 707(b)

To understand the language of section 707(b), the section's origins must be explored. In 1978, Congress enacted the Bankruptcy Reform Act. The 1978 Act represented the first major revision of the federal bankruptcy laws since 1938, and arguably removed many disincentives to filing for personal bankruptcy.

In the eighteen-month period following the 1978 amendments, Chapter 7 bankruptcy filings increased 103%. Legislators and experts disagreed about the correlation between the new law and the surge in filings. In early 1981, two ideologi-
cally opposed groups emerged in the debate over this unprecedented increase in filings.

Members of one group, the consumer credit industry, appeared before congressional committees from 1981 to 1983. Representatives from banks, credit unions, and retailers testified to the enormous losses\(^{41}\) engendered by the increase in bankruptcy filings.\(^{42}\) The credit industry argued that their increased losses would lead to higher loan rates.\(^{43}\) Persons most in need of credit might therefore be unable to obtain it through legal channels.\(^{44}\)

To decrease bankruptcy filings, the consumer credit industry proposed that the future earnings of debtors be considered in determining eligibility for Chapter 7 relief.\(^{45}\) Consumer creditors argued that consideration of future income would comport with actual lending practices\(^{46}\) and also would encourage debtors to repay their obligations to the extent they were able to do so.\(^{47}\)

The other group was comprised of the legal aid and civil rights communities,\(^{48}\) bankruptcy judges and scholars,\(^{49}\) and many leg-
islators, the most vociferous of whom were Senators Metzenbaum and Kennedy. This group, committed to the view that the bankruptcy laws should give debtors a "fresh start," argued that the increase in filings resulted from economic recession, high interest rates, and an overextension of credit. The group raised three objections to a future income test. First, they argued that such a restriction would prejudice lower income families who, through no fault of their own, were unable to meet their financial obligations. Second, they argued that such a test would impose high administrative burdens on bankruptcy courts by forcing judges to speculate on the earning capacities of petitioners. Third, they argued that a future income test would result in perverse incentives for both debtors and creditors. Creditors, knowing that discharge is difficult, might make riskier loans. Debtors, realizing that eligibility for Chapter 7 relief depends on their future income, might quit their jobs.

49. See, e.g., id. at 202 (testimony of Judge Joe Lee, U.S. Bankruptcy Judge, Eastern District of New York); see also id. at 322-426 (testimony of Professor Philip Shuchman, Rutgers University Law School, and Professor Frank R. Kennedy, University of Michigan Law School).


51. The idea that the purpose of the bankruptcy laws is to give debtors a fresh start comes from the Supreme Court's language in Wetmore v. Markoe, 196 U.S. 68, 77 (1904): "Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes."


53. See id. Senators Metzenbaum and Kennedy pointed out that studies have shown that the vast majority of bankruptcies involve blue-collar workers who have suffered financial reversals such as unemployment, uninsured illness, or divorce. They argued that to deny these people a fresh start by requiring them to pay off their debts over a three to five year period "is not too far from involuntary servitude." Id. at 59. According to the Senators, debtors, under a future income test, would have to undergo the "lengthy, complicated, and tremendously demeaning task of demonstrating that they are too poor to meet their obligations." Id. at 49.

54. See id. at 59-62.

S. 2000 will require bankruptcy judges to make determinations that they are ill-equipped to make about debtors’ future earning capacity and future expenses. The bill would require these judges to make highly speculative judgments initially about what debtors’ anticipated living expenses are and what their future employment prospects are. It then requires the judge to determine whether a reasonable portion of their debts can be paid off in light of the financial situation hypothesized. Such a test raises more questions than it answers.

Id. at 59-60.

55. Id. at 62.
The consumer credit industry initially succeeded in including a future income test in proposed bankruptcy reform bills. In late 1981, members of the House and Senate introduced companion bills that proposed denying Chapter 7 relief to those individuals who could pay a "reasonable portion of [their] debts out of anticipated future income."\(^{56}\) From October 1981 to April 1983, Congress held extensive hearings on these bills.\(^{57}\)

As of early April 1983, the future income test was still a part of the proposed amendments.\(^{58}\) Yet when S. 445,\(^{59}\) the primary Senate reform bill containing a "future income" test, was reported by the Senate Judiciary Committee on April 26, 1983, the "future income" language had been deleted.\(^{60}\) There is no explanation in the legislative history of why the "future income" language was deleted. In place of the "future income" language appeared a new section—the precursor to section 707(b)—with language prohibiting discharge for "substantial abuse."\(^{61}\) S. 445

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In December 1981, S. 2000 was introduced in the Senate. S. 2000, 97th Cong., 1st Sess., 127 CONG. REc. 32,195 (1981). This bill was reported by the Senate Judiciary Committee in May 1982 over the strong objections of Senators Metzenbaum and Kennedy. 1982 S. REP., supra note 36, at 49-68 (minority views on S. 2000).


58. S. REP. No. 65, 98th Cong., 1st Sess. 4-7 (1983).


60. S. REP. No. 65, 98th Cong., 1st Sess. 4-7 (1983).

61. S. 445, supra note 59.
passed the Senate the following day, but was not submitted to the House for consideration.

Instead, a similar bill was introduced in the House a year later. This bill, H.R. 5174—without a future income test—contained the precise language found in the final version of section 707(b). H.R. 5174 passed the House on March 21, 1984, the Senate on June 19, 1984, and became law on July 10, 1984 as the Bankruptcy Amendments and Federal Judgeship Act of 1984.

Section 707(b) is one of a group of provisions in the 1984 Act designed to make the discharge of debts in bankruptcy more difficult. Chapter 7 now requires debtors to submit a schedule of current income and expenditures, court clerks to apprise debtors of the availability of Chapter 13 relief, and courts to prohibit discharge of debts incurred to finance eve-of-bankruptcy purchases. The 1984 Act also prevents discharge of debts incurred as the result of drunk driving. It is important to understand that Congress enacted section 707(b) as part of this reform package.

III. Jurisdictional and Procedural Questions

The first step in analyzing the mechanics of section 707(b) is to determine when the section applies. A debtor invokes section 707(b)'s jurisdiction only if his debts are "primarily consumer debts." Once it has been determined that section 707(b) applies, the court, "on its own motion," may inquire into potential abuse.

65. See id. at H1840-41 (H.R. 5174, § 212).
66. Id. at H1854.
67. Id. at S7625 (daily ed. June 19, 1984).
70. Id. § 342(b).
71. Id. § 523(a)(2)(C).
72. Id. § 523(a)(9).
A. The Jurisdictional Prerequisite: "Primarily Consumer Debts"

Section 707(b) applies only to debtors with "primarily consumer debts." A court may not dismiss a petition for "substantial abuse"—or even consider the issue of "substantial abuse"—if the debts that the debtor seeks to discharge are not "primarily consumer debts." To determine section 707(b)'s jurisdictional scope, the terms "consumer debts" and "primarily" must be defined.

1. "Consumer debts"—Section 101(7) of the Bankruptcy Code defines consumer debt as "debt incurred by an individual primarily for a personal, family, or household purpose." While a loan for the purchase of an automobile for personal use would be an obvious example of consumer debt, a personal judgment for medical malpractice is an example of nonconsumer debt.

There has been no consensus on what factors should be determinative in deciding whether consumer debt exists. One court has argued that the presence of a "profit motive" should be the critical factor. In In re Almendinger, the court held that credit card debts incurred by a stockbroker in an attempt to recoup personal stock market losses were not consumer debts because a "profit motive" was present.

In Almendinger, the debtor stockbroker listed $119,486.00 in unsecured credit card debts. At the section 707(b) discharge hearing, the debtor testified to significant investment losses that he attempted to offset with cash advances from his numerous credit cards.

On these facts, the court found that the debtor's obligations were not "primarily consumer debts." Tracing the legislative history of section 101(7), the court noted that the definition of consumer debt comes from the use of that term in various consumer protection laws. The court then stated that consumer protection case law suggests that the presence of a "profit motive" precludes a transaction from being one for "consumer" credit. Because the transaction in Almendinger involved a profit motive, it was not a consumer debt.

73. Id. § 101(7) (1982).
74. Id.
75. 56 Bankr. 97 (Bankr. N.D. Ohio 1985).
76. Id. at 99.
77. Id.
78. Id.
The court's reasoning in this case is supported by strong policy considerations. By reading narrowly the definition of "consumer debts," the court prevents the speculating debtor—here a stockbroker chasing market losses—from characterizing his debts as "consumer debts" and thereby triggering section 707(b)'s jurisdiction. The court in effect blocks the speculating debtor from taking advantage of section 707(b)'s presumption favoring discharge.

Aside from being "personal," consumer debt must be voluntarily "incurred" "primarily" to achieve that personal purpose. In re White,\textsuperscript{79} holding that automobile accident liability is not consumer debt, illustrates the significance of these definitional terms. In that case, White, a nineteen-year-old boy, incurred a $375,000 debt as the result of an automobile accident.\textsuperscript{80} White filed for discharge of this debt under Chapter 7. The judgment creditor—the accident victim and plaintiff in the case—argued that to grant relief would constitute substantial abuse of the Code. In her attempt to invoke section 707(b),\textsuperscript{81} the judgment creditor further argued that because White was using his car for personal purposes when the accident occurred, his liability for negligent operation of the vehicle constituted a "consumer debt."

In rejecting these arguments, the court engaged in a four-step analysis explaining why personal injury debts are not "consumer debts" under section 101(7). According to the court, the key words in the definition are "incurred," "primarily," and "purpose."\textsuperscript{82} First, to "incur" an obligation is "to bring it down on oneself."\textsuperscript{83} Implicit in the court's argument is the notion that the word "incur" implies \textit{voluntary action}. Second, "primarily" refers to the requirement that incurrence of the debt was fundamental to a personal purpose.\textsuperscript{84} Third, "purpose" means having an aim or objective.\textsuperscript{85} Thus, a consumer debt must have been acquired principally to achieve a personal aim or objective.\textsuperscript{86} Because personal injury debts are not acquired to achieve a per-

\begin{thebibliography}{86}
  \bibitem{79} 49 Bankr. 869 (Bankr. W.D.N.C. 1985).
  \bibitem{80} Id. at 871.
  \bibitem{81} For a discussion of the propriety of the judgment creditor's attempt to invoke § 707(b), see \textit{infra} text accompanying notes 104-12.
  \bibitem{82} 49 Bankr. at 872.
  \bibitem{83} Id.
  \bibitem{84} Id.
  \bibitem{85} Id.
  \bibitem{86} Id.
\end{thebibliography}
sonal purpose, they are not "consumer debts" as that term is defined in section 101(7).87

2. "Primarily" consumer debts—Another problem raised by the phrase "primarily consumer debts" is the determination of whether a debtor with many outstanding obligations has "primarily" consumer debts. One court has held that a debtor has "primarily" consumer debts when consumer debts exceed non-consumer debts in both dollar and numerical amount. In re Bryant88 involved a debtor with substantial personal and business debts. Bryant's consumer debts—which comprised twelve of his sixteen obligations—totalled $46,844.97, while his nonconsumer debts totalled only $40,248.89 On these facts, the court held that the debts were "primarily" consumer debts.89

B. A Procedural Problem: "On [the Court's] Own Motion"

Section 707(b) states that a court, "on its own motion," may dismiss a debtor's filing on grounds of substantial abuse. This language raises two questions. First, how are courts supposed to spot potential abuse at the petition stage? Second, how should courts handle motions by parties in interest?

1. The petition stage: a procedure for initially spotting potential abuse—Section 707(b) requires the court to make an independent inquiry into the existence of substantial abuse. Congress, by forbidding creditors to challenge Chapter 7 filings on grounds of substantial abuse, seemed confident in relying upon the courts' powers of instinct and inference to weed out potential abusers. Congress did not, however, prescribe a particular procedure for initially spotting potential abuse in bankruptcy petitions.

87. The court adds a persuasive textual interpretation to bolster its argument that personal injury debts are not the type with which Congress intended to deal. The court states that the legislative history surrounding § 707(b) reflects a concern with abuse of consumer credit. The court then notes that the 1984 Act changed the Code to make liability for drunk driving per se nondischargeable (11 U.S.C. § 523(a)(9) (Supp. II 1984)). Congress's simultaneous silence regarding personal injury indicates an intent not to have those debts encompassed by § 707(b) or by the Code in general. 49 Bankr. at 875.


89. Id. at 26.

90. "The Debtor's consumer debts outweigh his non-consumer debts by more than seven thousand dollars. . . . Similarly, with regard to number, at least twelve of the Debtor's fifteen or sixteen obligations are consumer debts, and in this respect, also, his case is one involving primarily consumer debts." Id.
Judge Abram of the Southern District of New York, in *In re Edwards*,\(^\text{91}\) suggests a useful procedure for handling section 707(b) cases. First, the court should closely review each bankruptcy petition that it is assigned. Such review takes little time\(^\text{92}\) and provides a "comparison framework for [debtors'] debt, income and expense data."\(^\text{93}\) From this framework, Judge Abram suggests, "[c]ertain petitions simply leap out as unusual."\(^\text{94}\) In these cases, the court should issue an order to show cause why the petition should not be dismissed.\(^\text{95}\) To obtain additional information, the court can either hold an evidentiary hearing or ask the debtor to supply the court with written affidavits to explain why the petition in question should not be dismissed.\(^\text{96}\) Judge Abram suggests that the debtor decide whether to testify or submit information in writing. Because written affidavits speed up the fact-finding process, courts should probably en-

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92. Id. at 941.
93. Id.
94. Id. Judge Abram provides an example:

[S]hortly after Code § 707(b) became effective, the court reviewed a Chapter 7 petition that appeared to present an abuse. Only a single debt of several thousand dollars for a student loan was listed and the stated income and expenses of the debtor revealed no apparent reason why the debt could not be paid in full in a matter of less than a year. An order to show cause issued for dismissal under Code § 707(b). That petition was dismissed on the nonappearance of the debtor. \(^\text{Id.}\)

95. An example of an order to show cause is presented in *In re Edwards*:

"... It appearing that Code § 707(b), as amended, authorizes the bankruptcy court, 'on its own motion and not at the request or suggestion of a party in interest' to dismiss, after notice and a hearing a case filed by an individual whose debts are primarily consumer debts if the court finds that the granting of relief would be a 'substantial abuse' of Chapter 7, and

"It appearing that Code § 101(7) defines 'consumer debt' as a debt incurred by an individual primarily for personal, family, or household purpose, and . . .

"It further appearing that the Debtors have scheduled as their only debts obligations of approximately $10,500 for consumer purchases and obligations of approximately $3,000 on student loans, and

"It further appearing in their schedule of current income and expenditures that the Debtors have an annual gross income of $60,000 and a combined monthly take-home pay of $2,550 and have no dependents, and

"It further appearing that the Debtors' estimated monthly expenditures total $2,366, including $250 for recreation, and

"It further appearing that a budget surplus of $184 per month exists and that the Debtors have otherwise made no showing of why they are unable to make periodic payments on their debts, it is therefore

"ORDERED that the Debtors . . . show cause before the undersigned . . . why an order should not be entered dismissing their Chapter 7 petition on the grounds that the granting of relief would be a substantial abuse of the provisions of Chapter 7 . . . ."

\(^\text{Id.}\) at 935.
96. Id.
courage debtors to submit information in this form. Because the "notice and hearing" language in section 707(b) refers only to the hearing in which the court ultimately decides the substantial abuse issue, and not to any intermediate evidentiary hearings, this procedure would not violate the statutory prescription.

Under this procedure, the court assumes the burden of procuring additional information from the debtor. This task seems required by the statutory presumption in section 707(b) in favor of granting the debtor the relief that he requests. Such an approach to section 707(b) cases provides a fair, uniform, and efficient system, and also appears to comport with congressional intent for the operation of this section.

2. Motions by "parties in interest"—The statutory lan-

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Federal Rule of Evidence 301 governs presumptions and states that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption." Thus, the court satisfies its prescribed burden by initiating an inquiry into potential abuse.

98. The court is satisfied that the initiation of an inquiry by way of its own motion and subsequent receipt from a debtor of a written response to the points noted by the court, in addition to any testimony the debtor wishes to give, would satisfactorily enable the court to render a fair and prompt decision.


99. See id. ("This is the procedure that the court perceives Congress envisioned for it to employ under Code § 707(b)."); see also S. 445, supra note 59. S. 445, a bill passed by the Senate but not considered by the House, contained the following section: Prior to dismissing any Chapter 7 case for substantial abuse, the court shall set forth, in writing within twenty days of the permanent designation of relief made by the debtor . . . its reasons for finding that substantial abuse would occur; and the court shall, at the same time, advise the debtor of his right to respond in writing and/or to request and secure a hearing on the court's findings. The court shall establish, by rule, time limits for the debtor's response and for the court's written findings in response thereto. No creditor or representative of a creditor may participate in judicial proceedings relating to substantial abuse except upon the request of the court.

Id. § 203(a).

The above-cited language did not make it into the final version of § 707(b), but the reason for this is unclear. Unlike the overt hostility to the future income language contained in the original version of S. 445, there seems to have been no opposition to this suggested procedural subsection. Although Congress considered this procedural language and never enacted it, there does not seem to be any particular policy reason behind Congress's deletion.

There are two ways to interpret Congress's deletion. First, one could argue that the fact that Congress considered the section and did not enact it is prima facie evidence that congressional intent was against such a procedural scheme. On the other hand, one could argue that the absence of explicit hostility to the procedural scheme suggests a nonsubstantive (i.e., administrative) reason for deletion of the language. If one accepts the latter interpretation as more logical than the former, then the procedural scheme outlined supra in the text accompanying notes 91-97 arguably comports with congressional intent.
guage prohibiting motions by interested parties raises two questions. First, who is a party in interest? Second, how should courts respond to motions or other suggestions by interested parties?

The most obvious examples of parties in interest are creditors. Creditors lose their money upon the discharge of a debtor's obligations and thus have an interest in demonstrating substantial abuse. For this reason, courts are typically most hostile towards motions from creditors of a consumer debtor. In In re Christian, for example, a creditor bank brought a motion requesting the court to hold a hearing to determine whether an individual debtor's petition should be dismissed for substantial abuse. The court rejected the motion, stating: "[I]f this creditor were permitted to dismiss a Chapter 7 proceeding . . . the floodgates could open every time there is an adversary proceeding concerning the dischargeability of a debt or the granting of a discharge."

Other types of parties may also qualify as parties in interest. For example, the court in In re Christian was also forced to decide whether a United States Trustee is an "interested party" for purposes of section 707(b). Holding in the affirmative, the court pointed out that the United States Trustee is often called upon to protect the estate against the debtor or vice versa, making the Trustee an interested party.

A more troubling question is what courts should do when interested parties "suggest" potential abuse—either by making a motion in disregard of section 707(b), or by hinting in a less direct fashion that discharge is inappropriate. Although the statutory language prohibits such motions, it does not preclude a court, after rejecting the motion, from inquiring into the possibility of substantial abuse. There are several possible responses

101. Id. at 120.
102. A United States Trustee is not the same thing as a Chapter 7 or 13 trustee. According to Professor White: "The United States Trustee establishes and supervises a panel of private trustees for Chapter 7 cases, and appoints or serves as a Chapter 13 standing trustee. The U.S. trustee also appoints Chapter 11 trustees, creditor's committees and examiners, and conducts investigations to ensure that participants in bankruptcy cases are not avoiding the requirements of the Code." J.J. Whitt, supra note 10, at 51; see 28 U.S.C. §§ 581-589 (1982).
103. It is clear that the trustee is a party in interest who is looking for that which will preserve the estate as against the debtor in some situations, in favor of the debtor in other situations. The role may change. The trustee is not guilty of a conflict, but is a party in interest.

In re Christian, 51 Bankr. at 119 (emphasis in original).
to such motions.

One possible response is to prevent the court from looking into substantial abuse and to require discharge of the debtor's obligations. Such a prophylactic rule provides a strong disincentive to creditors to bring motions of this type. Because creditors are aware of the statutory prohibition, a strong deterrent is appropriate. This rule would also comport with the congressional intent to keep the bankruptcy process inexpensive and free of creditor harassment. The problem with this rigid approach, however, is that it often could result in the discharge of debts in petitions that should be dismissed. Because this approach would mandate an automatic discharge of debts upon the filing of a creditor motion, regardless of whether such discharge would constitute substantial abuse, it could often lead to anomalous results. Such an approach might also encourage creditors to resort to surreptitious means to call the court's attention to potential abuse.

Another possible response would allow motions by interested parties despite the statutory prohibition against them. Under this approach, courts would recognize the motions and examine more closely the petitions in question. Such an approach maxi-

104. In fact, this approach was endorsed by Senator Metzenbaum when the 1984 Act was passed. See 130 Cong. Rec. S7624 (daily ed. June 19, 1984) ("If a creditor asks a court to dismiss a case claiming that there has been substantial abuse of [the bankruptcy laws by the debtor,] the court would not be allowed . . . to do so.") (statement of Sen. Metzenbaum); see also In re Jones, 60 Bankr. 96, 98 (Bankr. W.D. Ky. 1986) (holding a motion by a creditor's attorney as "initiated at the suggestion of a party in interest and hence, precluded from consideration by that very provision it seeks to invoke").

105. See 130 Cong. Rec. S7624-25 (daily ed. June 19, 1984) ("Only a bankruptcy court, acting on its own initiative, could dismiss a case involving substantial abuse. This will preclude creditors from making bankruptcy too expensive for the debtor by filing harassing motions alleging substantial abuse.") (statement of Sen. Metzenbaum).

106. The court in In re Hudson, 56 Bankr. 415, 420 (Bankr. N.D. Ohio 1985), modified in part, 64 Bankr. 73 (Bankr. N.D. Ohio 1986), states:

While it appears that the provisions of Section 707(b) should be given their ordinary and plain meaning, to do so is to present the Court with a practical difficulty in the event a party-in-interest should bring a case to the Court's attention. On one hand, the Court may not act pursuant to Section 707(b) if a case has been brought to its attention by a party-in-interest. On the other hand, the Court cannot ignore information which has been brought before it, regardless of how the information was obtained. If a rule were devised, whereby a Court could not act pursuant to Section 707(b) if a case was called to the Court's attention by a party-in-interest, such a rule would have a deterrent effect on the parties who would otherwise make this information available. However, it would also have the effect of preventing the Court from acting in cases where an abuse of Title 11 Chapter 7 is most likely to be occurring.

107. One can envision ingenious creditors placing anonymous phone calls to law clerks or slipping notes under chambers' doors in the dead of night advising the court to check John Doe's file for substantial abuse.
mizes the court’s opportunity for spotting abuse, particularly if a court has many petitions and the creditors act in good faith. At least one court has endorsed this approach, arguing that “Congress has authorized the Courts to challenge cases in which abuse is suspected.” The court held that unless a party in interest repeatedly or intentionally violates the limits of section 707(b), it would not refuse to hear such motions. Such an approach, however, flagrantly violates the proscriptive language of section 707(b). Because creditors would have nothing to lose by filing motions under such a rule, the rule would encourage harassment, and should therefore be rejected.

An ideal response to creditor motions would both deter such motions and still permit the court to dismiss a petition for substantial abuse. Therefore, a court, after rejecting a creditor’s motion, should inquire into substantial abuse at its own discretion, but assess costs—including attorney’s fees—against the movant. The court’s discretion can be guided by its initial judgment under Judge Abram’s procedure for initially spotting abuse, and the penalty of attorney’s fees finds support in a closely related section of the Bankruptcy Code. This interme-


This Court cannot sanction flagrant violations of the restrictions which limit parties-in-interest from suggesting the review of a case for dismissal under Section 707(b). However, this Court also cannot sanction abuse of Chapter 7, particularly when Congress has authorized the Courts to challenge cases in which abuse is suspected. If given the choice as to which of these violations should be overlooked, this Court believes that public policy and equity require that it be the former.

Id.

109.

[T]his Court must conclude that unless a party or their counsel flagrantly, intentionally, or repeatedly violate the limitations under 11 U.S.C. Section 707(b), the Court will not necessarily be precluded from dismissing a case pursuant to 11 U.S.C. Section 707(b), despite the fact that a party-in-interest brought to light information which subjects a case to scrutiny under that section.

Id.

110. Assessment of costs in this situation is supported by other sections of the Bankruptcy Code that call for assessment of costs against creditors who act in bad faith. See, e.g., 11 U.S.C. § 303(i) (1982) (awarding either damages proximately caused by bad faith filing or punitive damages).

111. See supra text accompanying notes 91-99.


If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney’s fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.
diate approach protects creditors by not foreclosing inquiry and protects debtors by providing a deterrent to harassing motions.

IV. A PROPOSED STANDARD FOR DETERMINING SUBSTANTIAL ABUSE

Perhaps the most important and controversial question arising from the language of section 707(b) concerns the definition of "substantial abuse." If an individual debtor has "primarily consumer debts," a court "on its own motion" may dismiss a debtor's petition for Chapter 7 relief if granting discharge would constitute "substantial abuse" of the Bankruptcy Code. This Part argues that courts should find substantial abuse if the debtor acts in bad faith or is able to repay 100% of his debts within three years after his motion for bankruptcy.

A. Bad Faith

That bad faith on the part of a debtor should preclude discharge finds support in the origins and purposes of the Bankruptcy Code. The bankruptcy courts have their foundation in the Courts of Equity where the "clean hands" doctrine strictly applies. To receive equity, a debtor must act equitably himself. Thus, when debtors file petitions in bad faith under Chapters 7, 11, or 13, courts will often deny relief to protect the integrity of the bankruptcy courts. Judge Ordin, a California bankruptcy judge, has argued that a debtor's good faith is a prerequisite to relief. Courts have denied relief for (1) successive

114. See In re Bryant, 47 Bankr. 21, 26 (Bankr. W.D.N.C. 1984) ("To receive equity, one must do equity.").
115. See Ordin, supra note 113, at 1796.
116. Jurisdictional integrity of the bankruptcy court, articulated in terms of good faith, is often expressed as a threshold test to ensure that the legal status and economic condition of the debtor are within the jurisdictional grant, contemplation, and purpose of [the Code].

Accordingly, the bankruptcy court is said to have the inherent discretionary power to prevent the continuation of a proceeding where the court perceives an intent to abuse the purpose of the Code.

The good faith inquiry will often focus on conduct of a debtor in the context of candor, frankness, sincerity, and willingness to do equity, which are said to be
filings;\textsuperscript{117} (2) failure to supply financial data;\textsuperscript{118} (3) lack of compliance with court orders;\textsuperscript{119} (4) protection of preferences;\textsuperscript{120} (5) fraudulent transfers;\textsuperscript{121} (6) concealment of assets;\textsuperscript{122} (7) filing for ulterior motives such as delay,\textsuperscript{123} avoidance of contractual obligations,\textsuperscript{124} or reclamation of assets;\textsuperscript{125} (8) failure to list truthfully all obligations and monthly expenses;\textsuperscript{126} and (9) for seeking to maintain an exorbitant lifestyle at creditors' expense.\textsuperscript{127} Therefore, when a debtor exhibits bad faith in filing a Chapter 7 petition, the court should deny discharge under section 707(b) on the theory that discharging a bad-faith petition would amount to "substantial abuse" of the Code.

\textbf{B. The 100%/Three Years Test}

This section argues that courts should also look to a debtor's future income to determine whether granting discharge constitutes "substantial abuse" of the Code. After establishing the arguments in favor of examining future income, this section suggests that whenever a debtor can repay 100\% of his debts over the three-year period after filing, the debtor's petition for discharge should be dismissed for "substantial abuse" of the Code.

\begin{itemize}
\item \textsuperscript{117} the indicia of good faith. In contrast, manipulative use of the letter of the statute for an ulterior motive or purpose is interdicted.
\item \textsuperscript{118} Id. at 1796-97 (citations omitted).
\item \textsuperscript{119} Id. at 1798-99.
\item \textsuperscript{120} Id. at 1799-1800.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 1800-01.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id. at 1808-11.
\item \textsuperscript{125} Id. at 1804-08.
\item \textsuperscript{126} Id. at 1802-03.
\item \textsuperscript{127} \textsuperscript{In re Bryant, 47 Bankr. 21 (Bankr. W.D.N.C. 1984).}
\item \textsuperscript{128} \textsuperscript{[I]t was not the design of the Bankruptcy laws to allow the Debtor to lead the life of Riley while his creditors suffer on his behalf." Id. at 26; see also In re Grant, 51 Bankr. 385, 394 (Bankr. N.D. Ohio 1985) (denial of Chapter 7 relief for couple who have "at no point in their recent history . . . displayed a sincere resolve to tighten their belts").}
\item \textsuperscript{129} The court in \textsuperscript{In re Bryant, 47 Bankr. at 26, rejected a debtor's petition for Chapter 7 relief, stating:}
\item \textsuperscript{[I]n light of the Debtor's . . . fraudulent and misleading omissions in his petition; his attempts to pad his expenses statement in order to misrepresent his financial position; and the relatively exorbitant lifestyle which he seeks to maintain while taking shelter from his creditors under the Bankruptcy provisions, the Court concludes that to allow this petition would be a substantial abuse of the provisions of Chapter 7.}
\end{itemize}
1. **Policy arguments supporting a future income standard**—Courts have been interpreting section 707(b) to mandate an examination of debtors' future income.\textsuperscript{128} This section examines the arguments for and against considering "future income" and suggests that future income be considered as part of a substantial abuse determination.

There are two principal arguments against applying a "future income" standard under section 707(b). First, a narrow reading of the legislative history militates against the consideration of "future income." Because Congress considered the future income language and chose not to adopt it, principles of statutory interpretation suggest that courts should not consider such a standard.\textsuperscript{129} In fact, at least one senator has explicitly stated that this interpretation is the proper one to be accorded section 707(b).\textsuperscript{130} Second, as Senators Kennedy and Metzenbaum stressed during Senate hearings, a future income test might degrade the debtor by forcing him to prove that he is too poor to enter a repayment plan,\textsuperscript{131} impose high administrative burdens on bankruptcy courts,\textsuperscript{132} and create perverse incentives for both debtors and creditors.\textsuperscript{133}

These arguments, however, can each be effectively countered by arguments supporting the use of a future income standard. First, the fact that "future income" language existed in early bills and was later deleted does not conclusively establish that Congress intended courts to disregard a debtor's future income when deciding whether substantial abuse has occurred. There is no explanation of why the future income language was deleted.

\textsuperscript{128} See In re Grant, 51 Bankr. 385, 391 (Bankr. N.D. Ohio 1985) ("It follows from the floor debates [of H.R. 1800] that due attention must be paid to the future income potential of the debtor to determine to what extent debts may be repaid."); In re Edwards, 50 Bankr. 933, 937 n.3 (Bankr. S.D.N.Y. 1985) ("Both the legislative background to adoption of Code § 707(b) and the creditor protections against bankruptcy abuse long found in other sections of the Bankruptcy Code have caused the Court to determine that the debtor's future ability to pay is the proper focus of Code § 707(b)."); see also In re Bell, 56 Bankr. 637, 641 (Bankr. E.D. Mich. 1986) (ability to repay is "primary if not exclusive, factor").

\textsuperscript{129} Such a rejection "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).

\textsuperscript{130} "I cannot tell how pleased I am that both the House and Senate have agreed to the total elimination of the future income language. Under H.R. 5174, the availability of bankruptcy relief would not be limited by a future earnings standard." 130 Cong. Rec. S7624 (daily ed. June 19, 1984) (statement of Sen. Metzenbaum).


\textsuperscript{132} Id. at 50.

\textsuperscript{133} Id. at 62.
When interpreting a code section in the absence of an explicit congressional statement of purpose, one must look to the circumstances and context of the provision's passage to shed light on its meaning.

Section 707(b) was enacted as part of a series of provisions designed to make it more difficult for debtors to discharge their debts. The tone of the 1984 amendments indicates a strict congressional attitude toward debtors. The 1984 Act contains a number of pro-creditor amendments that reflect the credit industry's attempts to force debtors into mandatory Chapter 13. As a result of the 1984 amendments, not only must bankruptcy clerks and debtors' attorneys inform petitioners that they may proceed under either Chapter 7 or 13, but also, debtors must acknowledge that they are aware of each form of relief available under the Code. Other pro-creditor 1984 amendments include the nondischargeability of debts for luxury goods or services created by eve-of-bankruptcy purchases and the prohibition against discharge of drunk driving judgments. These amendments are all pro-creditor in tone, and it is logical to interpret section 707(b), enacted as part of the same reform package, as reflecting the same pro-creditor tone.

More specifically, the 1984 amendment requiring each debtor to submit a schedule of current income and expenditures indicates that Congress must have intended the courts to use the earning potential of the debtor as a yardstick to measure substantial abuse under section 707(b). Otherwise, the current income requirement would have no purpose. Congress could not have required debtors to file current income statements and intended that courts not consider such information.

135. Id. at 364-66.
137. See R. Aaron, supra note 9, § 13.01[2].
138. Id.
140. Id. § 523(a)(9).
141. Id. § 521(1).
142. The amendment to section 521 requiring filing a statement of current income and expenditures compliments [sic] the amendment to section 707. It is from this statement that the court may deem whether the debtor will have sufficient income to repay a meaningful part of the debts. If that is the situation, the court may then find that use of chapter 7 would constitute a substantial abuse of its provisions.

4 Collier on Bankruptcy ¶ 707.02, at 707-7 to -8 (15th ed. 1986).
Second, as Judge Abram points out in In re Edwards,\(^{143}\) prior to the adoption of section 707(b), courts, trustees, and creditors enjoyed a variety of specific weapons designed to combat specific forms of abuse.\(^{144}\) Section 523 provides a laundry list of debts that cannot be discharged.\(^{145}\) Section 727 prevents discharge of debts that are connected with fraudulent transactions.\(^{146}\) Section 362(b)(1) prevents a debtor from obtaining relief from the effects of criminal conduct.\(^{147}\) Each of these sections is narrowly tailored to prevent a specific form of abuse. The fact that other bankruptcy sections are narrowly tailored to deal with specific abuses makes it likely that section 707(b) is likewise designed to prevent a particular type of abuse.

Congress, before passing section 707(b), heard voluminous testimony regarding the ability of many debtors to repay substantial portions of their debts from future income.\(^{148}\) The logical inference from the fact that Congress heard such testimony and then enacted section 707(b) is that the section must have been designed, in part, to combat this newly perceived problem. Indeed, it is difficult to determine a different congressional intent behind section 707(b) other than to prevent the discharge of debts when the debtor's future income is sufficient to repay those debts. Because Code provisions were already in place to

\(^{143}\) 50 Bankr. 933 (Bankr. S.D.N.Y. 1985).

\(^{144}\) Id. at 937 n.3.

\(^{145}\) Id.

\(^{146}\) Code § 523 specifies types of debts which may not be discharged. Three of the exceptions require creditor action to preserve; if the creditor fails to act promptly these types of debts are discharged. The balance of the exceptions do not require affirmative creditor action and are automatic. The three requiring creditor action are Code § 523(a)(2) (the fraud or false pretense or false financial statement exception), § 523(a)(4) (the fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny exception) and § 524(a)(6) (the willful and malicious injury to another or another's property exception).

\(^{147}\) Id.

\(^{148}\) Id.

\(^{149}\) Code § 727 provides a number of grounds on which objection may be made to the debtor's discharge generally. If one of the specified grounds is proven the debtor receives no discharge at all. Most of the grounds relate to conduct in connection with the bankruptcy case itself, such as knowingly and fraudulently making a false oath in connection with the case (Code § 727(a)(4)), failing to obey a lawful order (Code § 727(a)(6)), destroying, falsifying or failing without justification to keep books and records from which the debtor's financial affairs might be ascertained (Code § 727(a)(3)).
curb bad faith on the debtor's part, section 707(b) must have been designed to cure a specific form of bad faith, namely discharge of debts when future income would have been sufficient to repay the obligations.

Finally, and perhaps most importantly, there are strong policy considerations that support the use of future income in the "substantial abuse" determination. The language of section 707(b) is probably best understood when viewed as the result of political compromise. Congress was divided on the issue of future income. This section reflects that division. Section 707(b) is vaguely worded, procedurally bizarre, and of very little guidance to the courts. Because the text of the section itself is not clear and because the legislative history is inconclusive, policy considerations must be examined to make sense of section 707(b).

There are three strong policy reasons for adopting a future income standard. First, it seems unfair, if not absurd, to allow discharge when a debtor has sufficient income to repay his debts. Second, because creditors look to debtors' future income when making loan decisions, it seems logical to allow courts to look to a debtor's future income when determining whether discharge would constitute a "substantial abuse" of the Code. Third, allowing courts to examine a debtor's future income encourages debtors to repay their obligations to the extent they are able to do so.

Even if a strict construction of the legislative history militates against considering future income, courts should rely on the traditional principles of equity to prevent a debtor from discharging his debts when he can afford to repay them without significant burden. Any hardships engendered by such a policy can be accommodated by the specific standard.

2. The proposed standard— After deciding to consider future income in a substantial abuse hearing, a court must promulgate a specific standard to decide how much weight to give to a debtor's future income. The "100% over three years" rule that is advocated here is suggested by Judge Abram in In re Edwards. This standard prevents the discharge of a consumer

149. See, e.g., 11 U.S.C. § 727 (1982 & Supp. II 1984); id. § 1129(a)(3) (Supp. II 1984) (allowing court to confirm a Chapter 11 plan only if the plan "has been proposed in good faith").
150. See supra text accompanying notes 35-68.
151. See supra note 46.
152. See supra note 47.
153. 50 Bankr. 933, 937 (Bankr. S.D.N.Y. 1985) ("This court has determined that it is
debtor’s obligations under Chapter 7 if the debtor can repay 100% of his debts within the three years following his filing. This rule sets a “rather high screening standard,” but can be justified on a number of grounds.

First, a per se test is easy to understand and to apply. A uniform standard applied consistently in every case promotes certainty and prevents unequal treatment among debtors.

Second, the specific “100% over three years” test is supported by the findings of the Purdue Study. This report, used by the consumer credit industry to lobby Congress for tighter restrictions on debtors, concluded that as many as 30% of all debtors could repay 100% of their debts over three years.

Third, the standard accounts for the realities of the filing process. At the time of initiating an inquiry into potential abuse, the court can only make preliminary guesses as to a debtor’s ability to repay his debts. Debtors will file additional information, usually disclosing greater expenses and lower income. Thus if the court set a lower threshold test than “100% over three years,” it might have to dismiss many of its inquiries, a procedure “unlikely to encourage greater respect for the bankruptcy system.”

Fourth, the “100% over three years” test accommodates objections to a future income standard that were voiced during the hearings on section 707(b). Senators Kennedy and Metzenbaum expressed concern that low income families and victims of unforeseen financial reversal would be prejudiced by a future in-

reasonable to conclude that a debtor whose income and reasonable expenses indicate that he could pay over three years an amount equal to 100% of the principal owed to his creditors is not suffering from sufficient economic hardship to warrant use of Chapter 7.” (footnote omitted).

154. Id. at 938.
155. Id.
158. See supra text accompanying notes 91-99.
160. Id.
161. Id.
come test. But the requirement that the debtor have sufficient income to repay 100% of his debts prevents hardship on debtors who are able to repay a substantial percentage—60% for example—but who would be unable to repay the other 40% if their petitions were dismissed. The “100% over three years” standard thus differs from the harsher standards proposed in various congressional bills in that only those debtors who meet the rather high initial threshold are subject to the penalty of dismissal.\(^\text{162}\)

The Senators also claimed that a future income test would burden the courts.\(^\text{163}\) In fact, Senator Metzenbaum believes that the 1984 Act forecloses inquiries by courts into future income and that such foreclosure benefits courts.\(^\text{164}\) These arguments, however, are outweighed by two important factors. First, because bankruptcy judges see many petitions, they can competently determine those debtors seeking to abuse the system. One judge’s experience indicates that potential abuse “leaps out” at the court.\(^\text{165}\) Second, the debtor provides the court with the raw data. Therefore the court does not actually have to speculate on the possibility of abuse. Rather, the court need only examine the information that the debtor has provided.

Finally, the statutory presumption in favor of granting the debtor the relief that he requests is accommodated by the proposed standard. When a debtor files his petition for bankruptcy under Chapter 7, courts must assume that the debtor is entitled to discharge unless evidence is discovered to rebut such an assumption. Under the proposed standard, the fact that a debtor can repay 100% of his debts over three years should serve as sufficient evidence to rebut the a priori presumption that the debtor is entitled to relief.

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162. See, e.g., S. 2000, 97th Cong., 1st Sess. § 3, 127 Cong. Rec. 32,195 (1981) (preventing a debtor from obtaining discharge under Chapter 7, when a reasonable portion of his prepetition debts could be paid out of anticipated future income). According to the drafters of S. 2000, 75% was clearly reasonable and 25% was clearly unreasonable. See 1982 S. Rep., supra note 36, at 37. Thus, S. 2000, had it been enacted, would have created a harsher standard than the one that this Note proposes.


164. The credit industry wanted us to force debtors to prove that they could not pay 50 percent of their debt over a period of 3 to 5 years in order to qualify for bankruptcy relief. I thought that was a terrible idea. It would have forced bankruptcy judges to become soothsayers and engage in the impossible task of predicting someone’s earnings and financial obligations. Bankruptcy relief would have become hostage to a judge’s guesses about how much an individual would earn, what their [sic] financial burdens would be, whether they would become sick, unemployed, and so on.


165. See supra text accompanying note 94.
CONCLUSION

Under section 707(b) of the Bankruptcy Code, a court must deny a debtor's petition for discharge if granting the petition would constitute "substantial abuse" of the Code. This Note provides a framework for interpreting section 707(b). When analyzing the section in the context of a discharge proceeding, the first question a court should ask is whether 707(b) applies. The section's jurisdictional reach extends only to those debtors who have "primarily consumer debts." If the court determines that section 707(b) applies, the second step is to comply with the section's unusual procedural scheme. The procedural scheme is strange in that the court is supposed to investigate potential abuse on its own initiative. Despite the statutory language, this Note argues that if an interested party makes a motion to alert the court to potential abuse, the court, after assessing costs against the movant, should look into the possibility of abuse at its own discretion. Finally, when determining whether granting discharge would constitute "substantial abuse" of the Code, the court should examine a debtor's future income. Under the standard proposed by this Note, if the debtor can repay 100% of his debts within three years after filing, or if he acts in bad faith, the court should deny the debtor's petition for discharge.

—David L. Balser