

Going for Broke: Inclusion of Social Security Benefits in a Bad Faith Bankruptcy Analysis

Joseph A. Kaczmariski*

ABSTRACT: As the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) recedes further into the rearview mirror, discretionary issues that were left to the bankruptcy courts to resolve are more divisive across jurisdictions than ever. This Note discusses one such issue—the treatment of Social Security income (“SSI”) in bad faith analyses for individual consumer debtors in chapter 7 and 13 bankruptcy relief. This Note answers the question to what extent, if any, such benefits should be included in a bad faith analysis by bankruptcy courts, assuming a debtor has otherwise satisfied the requirements for relief under the Bankruptcy Code. This Note first provides insightful historical context into bankruptcy law developments in the United States, then lays out the relevant interpretive issues from a statutory perspective, and finally examines the various solutions and positions that have thus far been adopted. This Note argues that the best of these solutions is the adoption of the majority view—that exclusion of Social Security benefits cannot rise to the standard of bad faith—by the bankruptcy courts, and the amendment of the BAPCPA.

I. INTRODUCTION.....	2366
II. HISTORICAL BACKGROUND AND STATUTORY CONTEXT	2368
A. HISTORICAL BANKRUPTCY LAW IN THE UNITED STATES.....	2369
1. The Formative Years: Early Attempts.....	2369
2. Parting Ways with the English Tradition	2371
3. Changing Tides: Foundations of Modern Bankruptcy Law	2372

* J.D. Candidate, University of Iowa College of Law, 2022; B.A., University of Minnesota-Twin Cities, 2017. I would like to thank Professor Jonathan Carlson for helping me develop this topic and for his excellent feedback throughout the editing process. I would also like to thank the outstanding *Iowa Law Review* editorial team for their insights and efforts preparing this Note for publication. This Note is dedicated to my father, Jeffrey Kaczmariski, whose parenting is responsible for many of my strengths, and who has been an unwavering source of support throughout my law school experience and life.

B.	<i>MODERN BANKRUPTCY LAW IN THE UNITED STATES: BAPCPA</i>	2373
C.	<i>THE STATUTORY STRUCTURE OF BANKRUPTCY PROCEEDINGS</i>	2377
1.	The Bankruptcy Estate.....	2377
2.	The Automatic Stay.....	2378
3.	Structure of the Bankruptcy Code.....	2379
	<i>i. The Advantages of Bankruptcy</i>	2380
	<i>ii. Means Testing for Individual Debtors</i>	2381
III.	THE INTERPRETIVE ISSUE: EVIDENCE FOR AND AGAINST CONSIDERATION OF SSI	2382
A.	<i>INTRODUCTION TO THE DISCRETIONARY ISSUE</i>	2382
B.	<i>COMMON SIGNS OF BAD FAITH IN BANKRUPTCY FILINGS</i>	2386
C.	<i>PARSING THE LANGUAGE OF THE CODE</i>	2387
1.	The Nature of the Benefits.....	2387
2.	Recent Congressional Amendments: The Coronavirus.....	2388
3.	Evidence for the Exclusion of Social Security Benefits from Creditors	2389
IV.	POTENTIAL SOLUTIONS TO THE ISSUE.....	2390
A.	<i>THE MAJORITY RULE: EXCLUSION OF SOCIAL SECURITY BENEFITS</i>	2391
1.	Bankruptcy Court Precedent.....	2391
2.	Appellate Court Precedent.....	2392
B.	<i>THE MINORITY VIEW: INCLUSION OF SOCIAL SECURITY BENEFITS</i>	2393
C.	<i>THE MIDDLE ROAD: THE “WITHOUT MORE” STANDARD</i>	2395
1.	Post-BAPCPA Evidence for Exclusion	2395
2.	Evidence for Inclusion in Some Circumstances	2396
3.	The Ideal Resolution	2396
D.	<i>THE LEGISLATIVE SOLUTION</i>	2398
V.	CONCLUSION	2399

I. INTRODUCTION

Bankruptcy goals and policies tend to be divisive. These debates generate concern over enabling the debtor who files even when they have an abundance of money and assets and somehow end up better off after the proceedings, on the one hand, and creditors who take everything from an unfortunate debtor who has nothing left to give, on the other. The bankruptcy system attempts to weigh both of these concerns: the innocent, unfortunate debtor should be

relieved of their debts and given a “fresh start,” and the creditors who are entitled to their payments ought to get as much back as possible.¹ Because of the difficulty in balancing both of these goals, though, one side often ends up better off in the end.

A bankrupt debtor’s ultimate goal is to have their debts discharged and to put an end to their creditors’ continual pursuit of their assets. Debtors can be both corporate entities and individuals, though the overwhelming majority of bankruptcy cases in the United States are for individual debtors.² For these debtors, they usually find themselves in a chapter 7 liquidation bankruptcy or in a chapter 13 repayment plan bankruptcy.³ Through the evolution of the Bankruptcy Code, certain criteria have been established for debtors to either sink or swim in the relief process.

Addressing concerns of “can-pay” debtors who abused the system, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) in 2005.⁴ This Act provided two standards by which to identify and deny relief to abusive debtors: (1) a “mechanical means test” that replaced a previous discretionary function of the bankruptcy courts;⁵ and (2) a discretionary ability to, on the back end of the proceedings, convert or dismiss a petition for relief due to a finding of bad faith.⁶ Under the second standard, a debtor may pass the mechanical test and satisfy the other requirements for relief, but the court may nonetheless refuse to grant relief.⁷ In a discretionary

1. See CHARLES J. TABB & RALPH BRUBAKER, *BANKRUPTCY LAW: PRINCIPLES, POLICIES, AND PRACTICE* 58–69 (4th ed. 2015) (illustrating the nature and purposes of bankruptcy law in the modern era); see also *Chapter 7 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> [<https://perma.cc/YA3N-RR3K>] (“One of the primary purposes of bankruptcy is to discharge certain debts to give an honest individual debtor a ‘fresh start.’”).

2. TABB & BRUBAKER, *supra* note 1, at 50 (“Approximately 2/3 of the cases are filed as straight liquidations under chapter 7 of the Bankruptcy Code, while about 32% involve individual debtor repayment efforts under chapter 13. Thus, 99% of the cases are filed under either chapter 7 or chapter 13.”).

3. *Id.*; see also *What You Need to Know About Bankruptcy*, INVESTOPEDIA (Sept. 2, 2021), <https://www.investopedia.com/articles/pf/07/bankruptcy.asp> [<https://perma.cc/8F74-L3MU>] (“In the case of individuals, as opposed to businesses, there are two common forms of bankruptcy: chapter 7 and chapter 13.”).

4. TABB & BRUBAKER, *supra* note 1, at 50; *Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)*, U.S. CTS., <https://www.uscourts.gov/data-table-report-names/bankruptcy-abuse-prevention-and-consumer-protection-act-bapcpa> [<https://perma.cc/V3HS-DAHJ>].

5. See 11 U.S.C. §§ 707(b)(2), 1307 (2018).

6. See *id.* §§ 707, 1307, 1325(b).

7. *Id.* §§ 707, 1307; *Chapter 7 - Bankruptcy Basics*, *supra* note 1 (“Unless the debtor overcomes the presumption of abuse, the case will generally be converted to chapter 13 (with the debtor’s consent) or will be dismissed.”).

analysis, courts will consider the totality of the circumstances to determine that a filing was made in bad faith.⁸

Bankruptcy courts have split on an issue of substantial importance to many consumer debtors: whether Social Security income (“SSI”) received by a debtor may be considered in an evaluation of whether “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.”⁹ In other words, a debtor may be completely forthcoming in reporting their income and cooperative throughout a bankruptcy proceeding, but nevertheless be denied relief for not *volunteering* their SSI as a form of repayment to their creditors.¹⁰ Some courts believe that inclusion of SSI when considering the totality of a debtor’s financial situation in an abuse determination is inconsistent with Congress’s treatment of SSI elsewhere in the Bankruptcy Code and the Social Security Act. Other courts believe that SSI must be considered to prevent can-pay debtors from abusing the system, and that Congress’s failure to explicitly forbid this consideration in discretionary abuse determinations gives judges freedom to dismiss or convert cases due to lack of voluntary inclusion, as was the pre-BAPCPA practice.

This Note argues that SSI should not be included in a bad faith/totality of the circumstances dismissal or conversion analysis. To help illustrate why this issue persists, in Part II this Note begins by providing historical context for the development of bankruptcy law in the United States. This Note then lays out, in Part III, the current divided interpretations courts have brought to the issue around the country. Finally, in Part IV, this Note argues that courts should adopt the majority approach, wherein the exclusion of the benefits at issue cannot constitute bad faith, and it explains why the other interpretations are flawed. This Note also proposes a long-term solution, emphasizing that legislative clarity could unify courts across the country.

II. HISTORICAL BACKGROUND AND STATUTORY CONTEXT

Bankruptcy law in the United States has a long and storied history. In order to understand the current social attitudes toward bankruptcy, a brief view of the history of bankruptcy law is necessary. Section II.A provides an overview of bankruptcy law in the United States, from the text of the Constitution to the numerous Bankruptcy Acts leading up to BAPCPA in 2005—where the majority of this Note is focused. Section II.B addresses the societal influences leading to the passage of BAPCPA, the major changes that BAPCPA introduced, and the impact that BAPCPA has had on consumer

8. See 11 U.S.C. §§ 707(b)(3), 1325(a)(3); *In re Cranmer*, 697 F.3d 1314, 1318–19 (10th Cir. 2012).

9. 11 U.S.C. § 707(b)(3)(B).

10. As this Note will discuss in Section II.C, *infra*, the Bankruptcy Code permits a debtor to exempt their SSI from their bankruptcy estate, so inclusion of these benefits is not mandatory (and, arguably, runs contrary to Congress’s intent).

bankruptcy. Section II.C details the structure of the modern Bankruptcy Code and how the relevant chapters and provisions are related.

A. HISTORICAL BANKRUPTCY LAW IN THE UNITED STATES

Before delving into the early developments in bankruptcy law in the United States, it is useful to understand why bankruptcy law exists at all. One might question what utility bankruptcy law serves. The aims of federal bankruptcy law are twofold: first, providing the debtor with a chance to start their life over instead of being shackled with unrepayable debt for the remainder of their life; and second, allowing all creditors an opportunity to salvage some return on their payments.¹¹ Without federal bankruptcy law, creditors and debtors are relegated to seeking legal relief under state law. The general rule for state law is “first in time is first in right.”¹² In other words, whichever creditor is the first to seek liquidation of a debtor’s assets will be paid first.¹³

This method functions well when a debtor only has one creditor (i.e., no competition for their assets) or when a debtor has enough assets to repay all of their creditors.¹⁴ This is rarely the case, however, and without federal bankruptcy law, the first creditor to take action will be paid in full, while those who are late to the party will be left empty-handed.¹⁵ Federal bankruptcy law, today, collects all of a debtor’s nonexempt legal and equitable assets for distribution to creditors, and binds all creditors to a collective remedy.¹⁶ This approach aims to solve both problems—after bankruptcy proceedings, a debtor can begin anew, and creditors take the nonexempt assets on a *pro rata* basis.¹⁷ The development of federal bankruptcy law was not always clear-cut, however, and it took Congress several attempts to arrive at our current system.

1. The Formative Years: Early Attempts

In the United States, bankruptcy law begins with the formative document of our system of government: the Constitution. In the Constitution, this country’s founders explicitly bestowed upon Congress the ability to “establish . . . uniform Laws on the subject of Bankruptcies . . .”¹⁸

With so obvious a focus on uniformity in bankruptcy law, it would seem intuitive that the legislature would exercise its authority immediately and begin with a long-lasting, broad-reaching bankruptcy law. The opposite, however,

11. TABB & BRUBAKER, *supra* note 1, at 63.

12. *Id.* at 64.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 65.

17. *Id.* at 64.

18. U.S. CONST. art. I, § 8, cl. 4.

was the case. Early bankruptcy law in the United States largely followed the precedent established in England, and the first American Bankruptcy Act was not passed until 1800—lasting only three of the five years that it was intended to.¹⁹

Although the Bankruptcy Act of 1800 was short-lived, especially from a modern perspective, it set the standard as the very first American Bankruptcy Act.²⁰ This Act was very similar to its English predecessor in that “it contained no voluntary provisions”—creditors, not debtors, filed for relief.²¹ Moreover, only certain trades—traders, merchants, and brokers—were covered by the Act.²² This limited coverage meant that those who practiced other common professions, such as farmers, were left high and dry when it came to bankruptcy relief.²³ For these reasons, and because in the early days of this country it was difficult for many people to travel to federal courthouses, the Act was largely underutilized and subjected to intense scrutiny.²⁴ The Act was only initially approved for five years and was never intended to be a long-lasting piece of legislation, but it nonetheless was repealed two years early, in 1803.²⁵

After the Bankruptcy Act of 1800, Congress went on for almost 40 years without passing another bankruptcy act.²⁶ In the interim, the issues of unpaid debts and the interests of the creditors and debtors were left largely to the states to resolve.²⁷ Trends began to appear throughout the states in terms of how they would handle their debtors. For example, many states imposed a limit on the amount of debt a given debtor would have to take on before being subjected to incarceration.²⁸ In a similar vein, many states would exempt certain classes of persons from being subjected to incarceration for their debts; such classes usually included women and Revolutionary War soldiers.²⁹ Congress ultimately chose not to leave the issue of bankruptcy to the states, however, and enacted a new bankruptcy act—the Bankruptcy Act of 1841—which would respond to the criticisms of the first attempt in a very radical way.³⁰

19. Morris Weisman, *Some Chapters of Bankruptcy History: From the Bankruptcy Clause to the Act of 1898*, 22 J. NAT'L ASS'N REFS. BANKR. 99, 100 (1948).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 101.

25. *Id.* at 100.

26. *Id.* at 101.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 102.

2. Parting Ways with the English Tradition

This new bankruptcy act was revolutionary, firstly, because it did away with preferential treatment for certain professions.³¹ Under the 1841 Act, bankruptcy relief was no longer limited to only traders, merchants, and brokers, as before; every American could file.³² Additionally, if a debtor cooperated throughout the bankruptcy proceedings, their debts could be discharged even without the consent of the creditors, which was previously required.³³ Some 33,000 debtors took advantage of the Act of 1841 in the less than two years before its repeal.³⁴ Despite the short-lived nature of this Act, it solidified the crucial concepts of widespread availability of relief and discharge without creditors' consent in American bankruptcy law, which both continue to this day.

After the repeal of the 1841 Act, another 25 years would pass before Congress attempted another uniform bankruptcy act.³⁵ In 1867 Congress did pass another Act, but it suffered much the same fate as its predecessors—it was widely unpopular and failed to address the unfortunate consequences of the ease of involuntary filings.³⁶ At this time, although debtors *could* seek relief voluntarily, involuntary bankruptcy suits (i.e., suits brought by creditors instead of by debtors) were still the norm.³⁷ In fact, voluntary bankruptcy had not been established as constitutional at this time—although it was presumed legal during debate in Congress over the 1867 Act, the Supreme Court did not officially recognize voluntary bankruptcy relief as constitutional until the early 20th century.³⁸ The Act of 1867 was amended in 1874 to include a “composition requirement” possibility for debtors, which allowed debtors to pay back their debts over time with an ultimate discharge of their liabilities.³⁹ If a sufficient percentage of creditors agreed, then the composition requirement would be binding against all creditors.⁴⁰ Ultimately, the Act of 1867 lasted

31. *Id.* at 101.

32. *Id.*

33. *Id.*

34. *Id.* at 102.

35. *Id.*

36. The 1867 Act led to the liquidation of one of the most renowned and popular financiers of the Union during the Civil War while it was still “perfectly solvent” due to its creditors bringing an involuntary bankruptcy suit. *Id.*

37. See TABB & BRUBAKER, *supra* note 1, at 55–56 (explaining that the first Act to even *introduce* voluntary bankruptcy was the Act of 1841).

38. Weisman, *supra* note 19, at 102.

39. TABB & BRUBAKER, *supra* note 1, at 55. In many ways, the composition agreement of the 1874 amendment to the Act of 1867 was a predecessor to our current chapter 13 repayment option for consumer debtors. As in chapter 13, the composition agreement allowed for a debtor to retain assets that otherwise would be lost in liquidation while repaying his creditors. *Id.*

40. *Id.*

longer than its predecessors and was repealed in 1878,⁴¹ but once again creditors were left without an avenue to seek collective relief against a debtor.

3. Changing Tides: Foundations of Modern Bankruptcy Law

Congress ultimately passed another bankruptcy act in 1898, which lasted 80 years, before finally settling on the legislation that would solidify the bankruptcy system as we know it today: the Bankruptcy Reform Act of 1978 (“BRA”).⁴² The Act of 1898 can be viewed as the beginning of modern bankruptcy law in the United States; however, real modernization did not begin to take form until the introduction of different chapters in bankruptcy proceedings under the Chandler Act—an amendment to the 1898 Act—in 1938.⁴³ Forty years later, the BRA brought long-awaited clarity to bankruptcy in the United States,⁴⁴ and ultimately established the current framework under which bankruptcy law is still practiced.⁴⁵ The Act established Title 11 of the United States Code, creating a federal bankruptcy court for every federal judicial district.⁴⁶ It established for these courts original and exclusive jurisdiction under all Title 11 cases,⁴⁷ and original—but not exclusive—jurisdiction for all cases arising under or relating to Title 11.⁴⁸ The Act also solidified the various chapters under which bankruptcy relief can be sought today, including chapters 7 and 13 for consumer debtors (which this Note focuses on).⁴⁹ Further, an important administrative decision was made regarding the role of bankruptcy judges—instead of adjudicating a case and overseeing the assets of the

41. Weisman, *supra* note 19, at 103.

42. TABB & BRUBAKER, *supra* note 1, at 55–56.

43. *Id.* at 56. The Chandler Act of 1938 refined the Bankruptcy Act of 1898 in many ways. Notably, the Chandler Act segmented certain types of reorganization into separate chapters, similar to our modern bankruptcy law. Reorganizations were separated into corporate reorganizations, arrangements, real property arrangements, and wage earners’ plans. *Id.*; see also David S. Kennedy & Erno Lindner, *The Bankruptcy Amending Act of 1938 / The Legacy of the Honorable Walter Chandler*, 41 U. MEM. L. REV. 769, 777 (2011) (describing the segmentation of chapters under the Chandler Act and the emphasis placed on corporate reorganization in response to the Great Depression).

44. Brett Weiss, “Not Dead Yet:” *Bankruptcy After BAPCPA*, 40 MD. BAR J. 17, 18 (2007).

45. *Id.*; TABB & BRUBAKER, *supra* note 1, at 55–56.

46. Nathan Ravin, *Bankruptcy Reform Act of 1978*, 1980 N.J. LAW. 10, 10 (1980). Although the 1978 Act established Title 11, the various chapters within Title 11 can be traced back to the Chandler Act of 1938. The chapters under the Chandler Act were rudimentary by modern standards, but the concept of segmenting the forms of relief in bankruptcy law was adapted from this legislation. See *supra* note 43 and accompanying text.

47. *Id.* at 11.

48. *Id.* Although bankruptcy judges were given broad jurisdiction under the Act of 1978, they were not granted full Article III status through the Act. Congress chose for bankruptcy judges to remain adjuncts to federal district court judges initially, which proved to be unwise—in 1982 the Supreme Court ruled that the Act of 1978 “was unconstitutional because it gave essential Article III powers to non-Article III adjuncts.” TABB & BRUBAKER, *supra* note 1, at 56.

49. Ravin, *supra* note 46, at 11–12; Weiss, *supra* note 44, at 18.

debtors, judges' roles were refined so that they only had to rule on bankruptcy cases.⁵⁰

The Act established the U.S. Trustees to cover the administrative role.⁵¹ These trustees oversee the bankruptcy estates of debtors, which contains all of their legal and equitable nonexempt assets, in chapter 7, 11, and 13 cases.⁵² They act as an officer of the court and can motion for dismissal or conversion of cases if they suspect bad faith on the part of the debtor.⁵³ Although trustees oversee a debtor's assets, they do not represent the debtor's interests in a bankruptcy proceeding.⁵⁴ Lastly, creditors' interests are also accounted for under the 1978 Act.⁵⁵ When a debtor files bankruptcy, an automatic stay is enacted, protecting their assets from actions taken by a creditor;⁵⁶ but, creditors are afforded adequate protection for their interests in the debtor's assets.⁵⁷ The Bankruptcy Act of 1978 established the framework in which bankruptcy law is currently practiced. In 2005, however, BAPCPA fundamentally altered the system.

B. MODERN BANKRUPTCY LAW IN THE UNITED STATES: BAPCPA

With the passage of the Bankruptcy Act of 1978, the major structural framework for bankruptcy law in the United States had been established. There was a general consensus that the new system worked well for both debtors and creditors,⁵⁸ although eventually societal moods shifted. In the 1990s, the bankruptcy system came to be viewed as existing at the cost of creditors, and that debtors could attain relief far too easily.⁵⁹ The vast number of filings, increasing yearly, were largely to blame according to this view.⁶⁰ In response to this burgeoning cultural shift, congressional representatives began

50. Ravin, *supra* note 46, at 10.

51. *Id.* at 10–11.

52. *Id.*

53. *See id.* at 11 (explaining that trustees fill an administrative role for the courts); *see also* Joshua P. Searcy, *Have the BAPCPA Amendments Solved the Problems Congress Intended to Solve?: Opinions of a Newly Minted Bankruptcy Lawyer*, 57 *FED. LAW.* 48, 50 (2010) (explaining that trustees used to have the burden of showing abuse in a bad faith/totally of the circumstances analysis pre-BAPCPA).

54. Searcy, *supra* note 53, at 49.

55. *Id.*

56. Ravin, *supra* note 46, at 12.

57. *See* 11 U.S.C. § 361 (2018). Adequate protection is not defined in the Bankruptcy Code but centers around providing assurances for a secured creditor that their debt will be repaid in full while the debtor continues to possess or use the collateral. *See id.*

58. Weiss, *supra* note 44, at 18.

59. Searcy, *supra* note 53, at 50.

60. *Id.*

drafting legislation to address the issue of the can-pay debtor.⁶¹ The issue (or perceived issue) was that debtors who had the ability to repay their creditors under a chapter 13 repayment plan over three to five years were opting instead to seek chapter 7 liquidation relief to discharge all of their debts immediately.⁶² Under the structure of the 1978 Act, bankruptcy judges were allowed discretion to determine which debtors were abusing the system and were more appropriately placed into one chapter of bankruptcy over the other.⁶³ As a result of the political pressure both from the zeitgeist of the 1990s and creditors' lobbyists, Congress addressed that problem by proposing a "mechanical means test" to determine chapter 7 abusers.⁶⁴

Under this new mechanical means test, debtors who were below the median income margin for their particular state were automatically excluded from the test—they were not presumptive abusers in the eyes of the law.⁶⁵ For debtors above the median income margin, however, the circumstances were much different. Based on a calculation of the debtor's income for the previous six months, including tax-exempt revenues,⁶⁶ and subtracting certain statutorily exempt sources and secured debts, the amount of leftover cash per month is used to determine whether a debtor has enough to repay their creditors in a chapter 13 repayment plan instead of a chapter 7 liquidation and discharge plan.⁶⁷ Deductions of expenses from a debtor's income come in two forms: "(1) fixed, sliding-scale deductions based on the debtor's household size and income" such as food and clothing; and (2) unlimited, actual expense deductions such as childcare and medical care.⁶⁸ The means test has been highly criticized for its unflinchingly rigid calculations that do not account for unforeseen changes in a debtor's income in the previous six-

61. See TABB & BRUBAKER, *supra* note 1, at 68 ("Congress decided that if an individual consumer debtor has a sufficient projected future repayment capacity, such a debtor should be barred from proceeding under chapter 7 at all.").

62. *Id.*

63. See *id.* at 56 (explaining that bankruptcy judges had wide discretion over bankruptcy matters after the Act of 1978); see also Searcy, *supra* note 53, at 50 (referencing the new "shall dismiss" language of BAPCPA and explaining that the new language largely removes the discretion that bankruptcy judges used to have under the 1978 Act).

64. 11 U.S.C. § 707(b) (2018). Although the means test was codified in BAPCPA in 2005, this was not the first time that it was proposed. In 1994, Congress created a National Bankruptcy Review Commission that filed a report in 1997 with recommendations. The consumer credit lobby pushed hard for the introduction of "needs-based" bankruptcy during this period, but the Commission ultimately rejected the idea. TABB & BRUBAKER, *supra* note 1, at 57.

65. Matthew M. Benson, *Chapter 7 Is Alive and Well Despite the "Means Test,"* 97 ILL. BAR J. 470, 471 (2009).

66. 11 U.S.C. § 707(b).

67. *Id.*

68. Mark A. Neal & Sandra Manocchio, *Means Testing: The Heart of BAPCPA*, 40 MD. BAR J. 26, 28 (2007).

month period.⁶⁹ If a debtor suddenly loses their job, for example, two weeks after filing for bankruptcy, and has to settle for a new job that pays half of their previous wages, the mechanical means test cannot account for these changes. Despite the criticism, “Congress [has] described the new means test[] . . . as ‘the heart of [BAPCPA’s] consumer bankruptcy reforms.’”⁷⁰

Besides the means test, BAPCPA introduced other new changes into the world of consumer bankruptcy law. Many of the changes resulted in more complexity, financial burden, and time-consuming hurdles for debtors to contend with. For debtors, BAPCPA introduced a new requirement to submit pay stubs for the 60 days leading up to their bankruptcy filing, as well as tax returns—if a debtor fails to produce the documents, “the case is subject to automatic dismissal.”⁷¹ Additionally, filing successive petitions for bankruptcy relief can result in the removal of the automatic stay that protects a debtor’s assets from collection actions by creditors.⁷² Debtors also must comply with new credit counseling requirements in order to be eligible for relief; these counseling sessions are usually around an hour in length, and the payment for them must be made by the debtor.⁷³ There are also new “Debtor’s Duties” disclosure provisions that debtors must read in order to obtain relief.⁷⁴

BAPCPA also modified the available exemptions for debtors in bankruptcy law. At state law, debtors can exempt certain assets and property from the clutches of creditors. Some of the more common exemptions include homestead exemptions and limits on the amount that creditors can garnish from a debtor’s wages and bank accounts.⁷⁵ “Under BAPCPA, a debtor who has moved from one state to another within two years of filing . . . the bankruptcy case must use the exemption laws from the place of the debtor’s domicile . . . before the filing.”⁷⁶ BAPCPA further expanded the number of nondischargeable

69. Searcy, *supra* note 53, at 52; *but see* Benson, *supra* note 65, at 471 (explaining that although there is undoubtedly some portion of chapter 13 debtors who are converted from chapter 7, we do not know the exact amount—and only 26 percent of all chapter 13 debtors are above-median-income debtors).

70. Neal & Manocchio, *supra* note 68, at 27.

71. Weiss, *supra* note 44, at 19 (emphasis omitted).

72. *Id.*

73. *Id.*; *see also* Chapter 7 - Bankruptcy Basics, *supra* note 1 (“[N]o individual may be a debtor under chapter 7 or any chapter of the Bankruptcy Code unless he or she has, within 180 days before filing, received credit counseling from an approved credit counseling agency either in an individual or group briefing.”) (citing 11 U.S.C. §§ 109, 111 (2018)).

74. *See* Searcy, *supra* note 53, at 50 (referencing the new requirements for debtors to achieve the discharge of all of their dischargeable debts under 11 U.S.C. § 521).

75. *See* Robert DeMarco, *History of Bankruptcy – Part 11*, AM. BANKR. INST. (July 11, 2013), <https://www.abi.org/feed-item/history-of-bankruptcy—part-11> [<https://perma.cc/V8L8-H53E>]; *see* TABB & BRUBAKER, *supra* note 1, at 33–35 (describing the definition of what garnishment is and how creditors are limited in pursuing this remedy).

76. DeMarco, *supra* note 75 (citation omitted). “BAPCPA also, implemented a ‘cap’ on homestead exemptions”—if, within three years of filing bankruptcy, a debtor added more than

student loans.⁷⁷ For counsel as well as the parties in interest, BAPCPA has changed the way that bankruptcy is practiced.⁷⁸ In the post-BAPCPA world, counsel is restricted from advising debtors to take on more debt in anticipation of bankruptcy to affect the means test.⁷⁹ Additionally, “[v]oluminous” disclosures must be made by counsel to their client within three business days of counsel’s first offer to provide assistance,⁸⁰ and a written contract between counsel and client must be executed within five business days of counsel’s first offer to provide assistance.⁸¹ Before BAPCPA, general practitioners could handle simple bankruptcy filings.⁸² Now, the increase in paperwork and complexity, coupled with the harsh penalties for failing to make deadlines, has had a chilling effect; only bankruptcy law specialists can now provide counsel.⁸³ BAPCPA’s efficacy remains subject to debate. The aim of BAPCPA was to reduce abusive filings in the bankruptcy courts, but whether that goal was achieved is unclear.⁸⁴ The perception of BAPCPA was that it was very creditor-friendly, and as a result, before BAPCPA took effect the amount of consumer bankruptcy filings skyrocketed.⁸⁵ Predictably, immediately after the passage of BAPCPA, consumer bankruptcy filings plummeted.⁸⁶ After the dust settled, however, the number of filings steadily climbed as BAPCPA became settled law, and by 2010 the number of filings was exactly the same as in 2005, before the law was passed.⁸⁷ Moreover, over the last 35 years the number of bankruptcy filings has *tripled*, and the increase is almost entirely in consumer

\$125,000 in value to their homestead, the amount in excess of \$125,000 is not subject to exemption. *Id.* The cap also applies in situations where a debtor has purchased a new home in a state other than the one in which they file bankruptcy. *Id.*

77. *Id.* Under BAPCPA, the nature of a given student loan lender is no longer relevant—for-profit lenders are included under the umbrella of protection. Traditionally, only governmental lenders fell under the protection from ability to discharge. Student loans are among the most difficult to seek discharge for; courts only discharge student loan debts for evidence of “undue hardship.” *Id.*; *Chapter 7 - Bankruptcy Basics*, *supra* note 1 (“The debtor may rebut a presumption of abuse only by a showing of special circumstances that justify additional expenses . . .”).

78. Maddy Tekka, *Bankruptcy: Changes in the Law Under BAPCPA*, FINDLAW (Jan. 13, 2021), <https://www.findlaw.com/bankruptcy/chapter-7/checklist-of-key-changes.html> [<https://perma.cc/3XSF-WBXA>].

79. Weiss, *supra* note 44, at 20.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*; see also *Chapter 7 - Bankruptcy Basics*, *supra* note 1 (“Because a chapter 7 discharge is subject to many exceptions, debtors should consult competent legal counsel before filing to discuss the scope of the discharge.”).

84. See TABB & BRUBAKER, *supra* note 1, at 49–53 (comparing the goals of BAPCPA with data that shows the number of bankruptcy filings both as a result of the Act and over a larger timeframe).

85. *Id.* at 50.

86. *Id.*

87. *Id.* at 50–51.

filings.⁸⁸ In light of this data, BAPCPA may have only been a temporary solution for a deeper problem.⁸⁹

C. THE STATUTORY STRUCTURE OF BANKRUPTCY PROCEEDINGS

As has been established, the BRA created the modern bankruptcy structure in the United States, and BAPCPA amended that structure to address perceived issues of debtor abuse but did not fundamentally alter it.⁹⁰ This Section illustrates what happens when an individual consumer debtor files for bankruptcy and outlines the relevant chapters and provisions of the Bankruptcy Code.

1. The Bankruptcy Estate

Bankruptcy relief exists for individual consumer debtors who are insolvent and are seeking a fresh start. At the instant that an individual debtor files a petition for relief, an order for relief is granted which creates the bankruptcy estate.⁹¹ The bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case,” with some exceptions.⁹² This definition is intentionally very broad—*all* of the debtor’s interests in property are subsumed into the bankruptcy estate. The estate is a legal fiction, an entity that exists during the bankruptcy proceedings and terminates when the final order for relief is granted or the case is dismissed.⁹³ The purpose of the estate is to collect as much of the debtor’s property as possible for repayment to creditors—creditors in bankruptcy proceedings may only be repaid from the assets in a debtor’s bankruptcy estate.

From a creditor’s perspective, then, it is most advantageous to include as much property as possible in the bankruptcy estate, because that will result in a larger repayment of what they are owed by the debtor. From a debtor’s perspective, the opposite is true; they would like to keep as much property out of the estate as possible—not necessarily to frustrate their creditors, but to emerge from the bankruptcy proceedings in the best position possible. Although the earlier language of the Code might seem like *all* of a debtor’s property is included in the estate, there are two methods by which a debtor’s

88. *Id.* at 52–53.

89. *Id.* at 51. Tabb “suggests that changing the bankruptcy law to make it harder for consumer debtors—as Congress did in 2005—may be a fools’ errand Thus, if Congress really wants to slow or even reverse the increase in bankruptcy filings, the real target should be the underlying cause—credit card debt—and not the bankruptcy law itself.” *Id.*

90. *See supra* Sections II.A, II.B.

91. 11 U.S.C. §§ 301(b), 541(a) (2018).

92. *Id.* § 541(a)(1).

93. *Id.* § 362(c)(1).

property may not enter the estate after all: exclusions,⁹⁴ which operate as an effective mandatory ban on property entering the estate; and exemptions,⁹⁵ which are permissive in nature and allow a debtor to choose to keep property out of the estate. The topic of this Note, SSI, is not a mandatory exclusion from a debtor's bankruptcy estate but may be exempted by a debtor if they so choose.⁹⁶

2. The Automatic Stay

The automatic stay is, at bottom, a shield that protects the property in the bankruptcy estate from attempts to collect by a debtor's creditors. It forbids actions by a creditor against a debtor, against the property of the debtor, and against the property of the bankruptcy estate.⁹⁷ It also protects against creditors attempting to secure their debt by perfecting a lien on collateral and protects against creditors who already have secured their debts by collecting on the collateral.⁹⁸ This provides peace of mind to both debtors and creditors, as well as channels creditors' claims into bankruptcy proceedings.

For debtors, the automatic stay provides protection against collection attempts by creditors for the duration of the bankruptcy proceedings. Since a bankrupt debtor usually has far fewer assets than they do debts, creditors understand that they compete against each other for a debtor's scarce assets. Without the automatic stay, creditors would fight for a debtor's assets like

94. *See id.* §§ 541(b), (c)(2).

95. *See id.* § 522.

96. *Compare id.* §§ 541(b), (c)(2) (failing to exclude SSI from the estate), *with id.* § 522(d)(10)(A) (allowing exemption of "[t]he debtor's right to receive . . . a social security benefit" from the estate).

97. *Id.* § 362(a).

98. *Id.* § 362(a)(4)–(6). The concept of a "secured debt" is very important in debtor-creditor relationships. When a creditor makes a loan to a debtor, they may "secure" the repayment of the loan with an agreement that if the debtor defaults on repayment, they may seize a piece of the debtor's property (i.e., the collateral) as repayment of the debt. Julia Kagan, Julius Mansa & Marcus Reeves, *Security Interest*, INVESTOPEDIA (Apr. 7, 2021), <https://www.investopedia.com/terms/s/security-interest.asp> [<https://perma.cc/957F-DZE6>]. When the value of the collateral is worth more than the value of the debt, the creditor is over-secured. *See* George G. Triantis, *Secured Debt Under Conditions of Imperfect Information*, 21 J. LEGAL STUD. 225, 236 (1992). When the value of the collateral is worth less than the value of the debt, the creditor is under-secured. *See id.* Not all debts are secured; a common form of unsecured lending is credit card debt. Christina Majaski, Khadija Khartit & Kirsten Rohrs Schmitt, *Unsecured vs. Secured Debts: What's the Difference?*, INVESTOPEDIA (Feb. 17, 2021), <https://www.investopedia.com/ask/answers/110614/what-difference-between-secured-and-unsecured-debts.asp> [<https://perma.cc/W48A-NWW5>]. Unsecured creditors tend to compensate for the risk of their lack of collateralization by charging higher interest rates on their loans; but, in bankruptcy proceedings, the secured creditors are entitled to the value of the agreed-to collateral, and the unsecured creditors may only collect on any remaining property after the secured creditors have been repaid. *See* 11 U.S.C § 507.

sharks drawn to blood in the water.⁹⁹ With it, secured creditors are assured adequate protection of their interests in the debtor's property, so there is no need to fight each other for the assets; moreover, if creditors do attempt to circumvent the stay and collect on a debtor's property, the collections may be avoided by the bankruptcy court.¹⁰⁰ Without the fear of collection attempts, debtors are less likely to attempt to conceal or transfer away their property. Thus, the stay benefits both debtors and creditors in bankruptcy proceedings.

3. Structure of the Bankruptcy Code

The Bankruptcy Reform Act created the structure of the modern Bankruptcy Code, codifying the various chapters in Title 11 of the United States Code.¹⁰¹ Within Title 11, chapters 1, 3, and 5 establish general rules on definitions, case administration, and bankruptcy estates that are applicable to *all* bankruptcy filings.¹⁰² Beyond this, the chapters contain provisions that are unique to a certain kind of bankruptcy filing. For example, chapter 9 delineates provisions for a municipal bankruptcy, and chapter 11 contains provisions unique to business entity reorganization bankruptcies. This Note deals with individual consumer bankruptcies, which are governed largely by chapters 7 (for liquidation) and 13 (for long-term repayment plans).

Somewhat intuitively, the two chapters of individual consumer bankruptcy—7 and 13—are intrinsically connected. In a chapter 7 bankruptcy, the debtor will have all of their nonexempt assets gathered into their bankruptcy estate, sold for cash, and that cash will be used to repay their creditors.¹⁰³ At the closing of the proceedings, the debtor's debts will be discharged and they may start life anew.¹⁰⁴ The general trend is for debtors to seek relief under chapter 7 first, then follow with chapter 13 relief if liquidation is not available.¹⁰⁵ If chapter 13 relief is granted instead, the debtor will be subjected to a repayment plan whereby their calculated projected disposable income ("PDI") is used to repay their creditors for three to five years following

99. One such example, outside of bankruptcy proceedings, is the dreaded "repo man" that comes to repossess a debtor's vehicle on behalf of a purchase money secured lender. In practice, repo men descend upon unsuspecting debtors' vehicles in the dead of night so as not to trigger the "breach of the peace" provision of the U.C.C. See U.C.C. § 9-609(b)(2) (AM L. INST. & UNIF. L. COMM'N 2012). The debtor wakes up with their primary method of transportation to and from work, to the grocery store, and for every other purpose, gone.

100. See 11 U.S.C. §§ 361, 547.

101. See *supra* note 46 and accompanying text.

102. The provisions are numbered according to which chapter they correspond to. Thus, section 541 identifies a provision in chapter 5, while section 707 comes from chapter 7, and section 101 delineates the definitions in chapter 1.

103. 11 U.S.C. § 726.

104. *Id.* § 727.

105. But a debtor may convert their chapter 7 case into a chapter 13 case if they so desire. *Id.* § 706(a).

the close of proceedings, and only after the close of the repayment is a discharge of debt granted.¹⁰⁶

i. The Advantages of Bankruptcy

The consequences to a debtor who is found to be abusive, either under a bad faith analysis or for failing the mechanical means test of chapter 7, will be dismissal of the case or conversion to another form of relief.¹⁰⁷ For the bankrupt debtor, dismissal of the case would be disastrous, and is generally avoided at all costs for several reasons. It is important to understand exactly what a liquidation bankruptcy proceeding accomplishes. At a high level, this form of relief collects a debtor's nonexempt assets for the benefit of creditors and keeps these assets in a legal bankruptcy estate until the close of the proceedings.¹⁰⁸ Those assets are then sold for cash, and that cash is distributed to creditors on a *pro rata* basis based on what they were owed by the debtor.¹⁰⁹ After the close of the proceedings, the debtor is discharged of their liabilities and is able to start life anew.¹¹⁰ Without the existence of bankruptcy proceedings, a debtor's only remedies are those available to them through applicable non-bankruptcy law—generally, state law. At state law, available remedies are typically not as friendly to debtors due to the “first in time is first in right” pursuit of their assets and the discharge of debts that comes through bankruptcy proceedings.¹¹¹ Sometimes exemptions exist for certain types of property that creditors are not permitted to pursue,¹¹² but as a general matter a debtor would be much better off seeking relief through federal bankruptcy proceedings than at state law.

106. *Id.* §§ 1326–28.

107. *Id.* §§ 707(b)(3), 1325(a)(3). Alternative forms of relief are those found under other chapters of Title 11. For example, an individual debtor whose case is converted from chapter 7 can convert to a chapter 13 case, or a chapter 11 if they are wealthy enough.

108. *Id.* § 541.

109. TABB & BRUBAKER, *supra* note 1, at 58; *see also Chapter 7 - Bankruptcy Basics*, *supra* note 1 (“[T]he bankruptcy trustee gathers and sells the debtor’s nonexempt assets and uses the proceeds of such assets to pay holders of claims (creditors) in accordance with the provisions of the Bankruptcy Code.”).

110. TABB & BRUBAKER, *supra* note 1, at 58; *see also Chapter 7 - Bankruptcy Basics*, *supra* note 1 (“Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases.”). *But see Discharge in Bankruptcy - Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics> [<https://perma.cc/ZR6R-5WDT>] (“Not all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. . . . There are 19 categories of debt excepted from discharge under chapters 7, 11, and 12. A more limited list of exceptions applies to cases under chapter 13.”).

111. TABB & BRUBAKER, *supra* note 1, at 64; 11 U.S.C. § 727.

112. Cara O’Neill, *The Homestead Exemption in Bankruptcy*, NOLO (Mar. 14, 2019), <https://www.nolo.com/legal-encyclopedia/homestead-exemption-bankruptcy.html> [<https://perma.cc/QR8Y-W7PK>].

ii. Means Testing for Individual Debtors

Structurally, when an individual consumer debtor files for relief under chapter 7, if they have an income below the average of the state median where they reside, they will be presumed to be unabusive and will not be subjected to the means test post-BAPCPA.¹¹³ If, however, the debtor has an income that is above the median level in the state in which they reside, then they will have to go through the “means test” to determine if they pass muster as an abusive or non-abusive debtor—in other words, if they can afford to pay their creditors enough to warrant a repayment plan.¹¹⁴ Congress has shown a strong preference for allowing debtors to convert their cases out of liquidation relief, from chapter 7 to chapter 11, 12, or 13 “at any time,” unless their case had been previously converted from one of those chapters.¹¹⁵ For the purposes of this Note, chapters 11 and 12 will be ignored—they focus on corporate or high-income debtor reorganization and family farmers, respectively.¹¹⁶

If a debtor is seeking relief under chapter 13, either due to conversion from chapter 7 or out of preference to retain their assets and exit the proceedings with a higher credit rating, courts will calculate PDI in order to create a payment plan with which to repay unsecured creditors over the three to five years post-proceedings.¹¹⁷ In calculating PDI, courts calculate a disposable income from the debtor’s *current* income and project the amount over a period of time that would satisfy the unsecured creditor’s claims.¹¹⁸ In calculating a debtor’s PDI with which to repay creditors in chapter 13, courts use the *same* current monthly income (“CMI”) calculation that is used to ferret out abusers in chapter 7.¹¹⁹ Repayment plans need not satisfy every penny that creditors are owed; so long as the entire PDI is used to repay creditors, the court must confirm the plan.¹²⁰

113. See 11 U.S.C. § 707(b)(3).

114. See *id.* § 707(b); see also *Chapter 7 - Bankruptcy Basics*, *supra* note 1 (“If the debtor’s ‘current monthly income’ (1) is more than the state median, the Bankruptcy Code requires application of a ‘means test’ to determine whether the chapter 7 filing is presumptively abusive.”).

115. 11 U.S.C. § 706(a).

116. TABB & BRUBAKER, *supra* note 1, at 50; see also *Chapter 11 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [<https://perma.cc/6YCG-LKLF>] (providing a brief overview of chapter 11 reorganization bankruptcies), and *Chapter 12 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-12-bankruptcy-basics> [<https://perma.cc/Eg8J-F36Q>] (providing a brief overview of chapter 12 family farmer bankruptcies).

117. 11 U.S.C. § 1325(b)(2).

118. *Id.* § 1325(b)(4).

119. *Id.* § 1325(b)(2).

120. *Id.* §§ 1325(a), 1325(b)(1)(B); see also *Chapter 13 – Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics> [<https://perma.cc/W5QQ-CXDX>] (“While a variety of objections may be made, the most frequent [is] . . . that the debtor’s plan does not commit all of the debtor’s projected disposable income for the three or five year applicable commitment period.”).

This language seemingly leaves little ambiguity, but courts struggle with parsing the broad language of the bad faith and totality of the circumstances standards for dismissal or conversion with the unambiguous language of what the Code permits debtors to retain. However, so long as the criteria for a repayment plan are satisfied, a court must confirm the plan. Moreover, “the plan [must be] proposed in good faith and not by any means forbidden by law.”¹²¹ Of course, another way of saying that a plan must be proposed in good faith is to say that it must not be proposed in bad faith. Similar language is found in confirmation of relief under chapter 7, but the Code states that “the court shall consider . . . whether the debtor filed the petition in bad faith; or . . . [if] the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.”¹²² Courts have held that the bad faith inquiry in chapter 7 is to be treated much the same as it is in chapter 13.¹²³ This creates a problem of statutory interpretation: The scope of the totality of the circumstances inquiry is not defined, and courts are left to decide for themselves whether they are to consider an even broader source of income than is defined in Section 101(10A) of the Code.¹²⁴

III. THE INTERPRETIVE ISSUE: EVIDENCE FOR AND AGAINST CONSIDERATION OF SSI

This Part introduces the issue of how courts ought to treat the inclusion of Social Security income (“SSI”) in a bad faith analysis. This Part begins with an introduction to the discretionary issue at hand by providing a broad overview of the considerations in deciding whether a debtor has acted in bad faith and will broadly lay out the consequences of such a finding. Next, this Part will explore other common examples of bad faith in bankruptcy filings by individual consumer debtors. Finally, this Part will conclude with an analysis of the relationship between a chapter 7 liquidation bankruptcy and a chapter 13 repayment bankruptcy before explaining how courts have handled the issue and introducing a preferred solution.

A. INTRODUCTION TO THE DISCRETIONARY ISSUE

Bad faith is a term used throughout the Bankruptcy Code—including in chapters 7 and 13, the primary chapters at issue in individual consumer bankruptcy.¹²⁵ The term comes up throughout the law generally, but in the bankruptcy context it alludes to a debtor filing a claim for relief in an attempt

121. 11 U.S.C. § 1325(a)(3).

122. *Id.* § 707(b)(3).

123. *In re Thompson*, 439 B.R. 140, 143 (B.A.P. 8th Cir. 2010).

124. 11 U.S.C. § 101(10A).

125. TABB & BRUBAKER, *supra* note 1, at 50.

to impermissibly take advantage of the system.¹²⁶ There are several telltale signs of bad faith. These signs will be elaborated upon later in this Section.¹²⁷ Although BAPCPA initially limits the bad faith analysis, it is within a court's discretion to ultimately dismiss or convert a case on bad faith grounds after the mechanical analysis is complete. This decision has consequences: If a court is going to either force a debtor into a different form of relief or, more seriously, bar them from bankruptcy relief entirely, then the debtor at issue ought to have done something serious enough to warrant the result.

Generally, debtors prefer to have their assets liquidated in chapter 7 bankruptcy instead of having future earnings subjected to a chapter 13 repayment plan.¹²⁸ In chapter 7, more of a debtor's assets will be subjected to liquidation to satisfy obligations to creditors, but the proceedings end with a discharge of a debtor's liabilities.¹²⁹ Put another way, debtors will lose more of their property up-front, but after the proceedings end, they will be able to start their lives anew. In chapter 13, however, a repayment plan is created for the three to five years following the close of proceedings, and a debtor's future earnings will be used to satisfy their obligations to creditors.¹³⁰ Generally, chapter 13 relief allows debtors to retain more of their property (because it is not being liquidated) and has the additional benefit of debtors retaining higher credit scores, allowing them to more easily take on credit in the future.¹³¹ Still, debtors tend to prefer liquidation of their assets and the immediate discharge of their liabilities, rather than wait three to five years for the discharge.¹³²

126. *Bad faith*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bad%20faith> [<http://perma.cc/MR6X-5VNV>]; see Hamilton v. Lanning, 560 U.S. 505, 522 (2010) (explaining that the delay in timing of a petition can appear to be bad faith).

127. See *infra* Section III.B.

128. Lyle Daly, *Personal Bankruptcy Statistics for 2020*, ASCENT (Mar. 24, 2020), <https://www.fool.com/the-ascent/research/personal-bankruptcy-statistics> [<https://perma.cc/7AT3-VUF7>]; TABB & BRUBAKER, *supra* note 1, at 50.

129. See 11 U.S.C. § 727; TABB & BRUBAKER, *supra* note 1, at 50. *But see* Kristin Turner & Rohan Pavuluri, *What Is Chapter 7 Bankruptcy & Should I File?*, UPSOLVE (Dec. 12, 2021), <https://upsolve.org/learn/should-i-file-for-chapter-7-bankruptcy> [<https://perma.cc/H5X3-659Z>] (“In 95% of Chapter 7 bankruptcy cases, people are able to keep all of their property.”).

130. 11 U.S.C. § 1325(b)(4)(A).

131. TABB & BRUBAKER, *supra* note 1, at 97–98; see also *Chapter 13 – Bankruptcy Basics*, *supra* note 120 (“If the debtor wants to keep the collateral securing a particular claim, the plan must provide that the holder of the secured claim receive at least the value of the collateral.”).

132. See *Discharge in Bankruptcy - Bankruptcy Basics*, *supra* note 110 (“Although a chapter 13 debtor generally receives a discharge only after completing all payments required by the court-approved . . . repayment plan, there are some limited circumstances under which the debtor may request the court to grant a ‘hardship discharge’ even though the debtor has failed to complete plan payments. Such a discharge is available only to a debtor whose failure to complete plan payments is due to circumstances beyond the debtor’s control.”).

Creditors, on the other hand, tend to prefer chapter 13 relief to chapter 7 liquidation because they will recover more of the amount that they are owed. In chapter 7 liquidation, many creditors end up with only pennies on the dollar for the amount owed to them; they can recover more from a long-term payment plan.¹³³ This tension between the creditors and debtors was, under the 1978 Act, largely left to the bankruptcy courts to resolve.¹³⁴ Creditors, however, felt that debtors were allowed access to chapter 7 liquidation relief from sympathetic courts more often than they should have been and subsequently lobbied Congress to ameliorate their concerns.

It is at this point that a caveat must be introduced. For those creditors whose debts are secured by property that is greater than or equal to the value of the debt that is owed them, this issue of potential losses does not arise. Those creditors will collect the collateral (or its fair market value) that is owed them by the debtor, or receive adequate assurance in their investments, and be on their merry way;¹³⁵ the creditors whose debts are either not fully secured by the property collateralized in their lending agreements or whose debts are completely unsecured by property are the ones that must fight over a debtor's (often scarce) assets.¹³⁶

For those creditors, it is most advantageous to have the maximum number of assets possible at their disposal, or to be repaid with future earnings so that they recover the maximum amount possible from a bankrupt debtor. Addressing this concern from unsecured creditors, and in response to the zeitgeist of animus toward the can-pay debtor, Congress enacted the mechanical means test in BAPCPA.¹³⁷

The mechanical means test is never applied to the majority of bankruptcy filers—these filers are presumptive non-abusers because their income levels are below the median in the state they reside.¹³⁸ However, for those debtors that *are* above the median income level, they are subjected to the mechanical means test of chapter 7.¹³⁹ The mechanical formulation is included within the

133. *Baud v. Carroll*, 634 F.3d 327, 341 (6th Cir. 2011); *In re Welsh*, 440 B.R. 836, 848 (Bankr. W.D. Mont. 2010).

134. *See In re Riggs*, 495 B.R. 704, 722–24 (Bankr. W.D. Va. 2013); *Hamilton v. Lanning*, 560 U.S. 505, 512 (2010); TABB & BRUBAKER, *supra* note 1, at 68; *see also infra* Section IV.B (explaining pre-BAPCPA practice).

135. 11 U.S.C. § 1326(a)(1)(C); *see also* TABB & BRUBAKER, *supra* note 1, at 339–44 (explaining the concept of adequate assurance).

136. *Baud*, 634 F.3d at 341; *In re Welsh*, 440 B.R. at 848; *see also Chapter 13 – Bankruptcy Basics*, *supra* note 120 (“The plan need not pay unsecured claims in full as long it provides that the debtor will pay all projected ‘disposable income’ over an ‘applicable commitment period,’ and as long as unsecured creditors receive at least as much under the plan as they would receive if the debtor’s assets were liquidated under chapter 7.”) (citing 11 U.S.C. § 1325).

137. TABB & BRUBAKER, *supra* note 1, at 50.

138. 11 U.S.C. § 707(b)(7).

139. *See id.*

Code itself in Section 707(b), and reflects—at a basic level—a debtor’s income from the six months leading up to bankruptcy, less certain allowable deductions.¹⁴⁰ The definition of income for this calculation of the Code is *broad*, encompassing forms of income that are not subject to the income tax.¹⁴¹ There are, however, some forms of income that Congress has specifically enumerated that are excluded by the debtor in this calculation; these can be found in section 101(10A)(B)(ii).¹⁴² The first and foremost of the excluded sources of income are “benefits received under the Social Security Act.”¹⁴³ Although the statutory language appears clear on its face, courts are divided on how to interpret this exclusion in a discretionary bad faith analysis.

Under one view of the text, because Congress has excluded Social Security from the calculation of CMI, Social Security benefits ought to be totally excluded from a bad faith analysis in which a debtor would be subjected to either conversion of their case to a chapter 13 repayment plan or total dismissal. Because Congress specifically excluded these benefits from inclusion in CMI, this view argues that it seems only natural that they are also excluded from consideration from a bad faith discretionary dismissal or conversion for a debtor who has otherwise satisfied the mechanical means test.

On the other end of the spectrum, it is not entirely clear that Congress intended that the exclusion of Social Security benefits would not be subject to scrutiny where a bankrupt debtor acts in bad faith. Perhaps, from a policy standpoint, it would be better to include those benefits so that debtors who are able to repay their creditors are compelled to do so. Bad faith, however, requires more than a policy analysis. In order for a debtor seeking relief to have acted in bad faith, an element of deceptive intent on their part must be present.¹⁴⁴ One such example of bad faith would be for a debtor to purposefully skew their deductions or income reporting on their calculation of CMI in order to skate by the mechanical means test.¹⁴⁵ Still, it seems difficult to conceive of situations in which a bankrupt debtor’s conduct rises to the standard of bad faith simply for excluding a source of income that Congress intended to be excluded in their CMI.

140. *Id.* § 707(b).

141. *Id.* § 101(10A); *see also* 26 U.S.C. § 61 (defining gross income under the Tax Code).

142. 11 U.S.C. § 101(10A)(B)(ii).

143. *Id.* § 101(10A)(B)(ii)(I).

144. *Bad faith*, *supra* note 126; *see* Hamilton v. Lanning, 560 U.S. 505, 522 (2010) (explaining that delays in timing of petitions can appear to be bad faith).

145. *See Dismissals of Bankruptcies Filed in Bad Faith: What’s the Standard*, AM. BANKR. INST. (Dec. 1, 2004) [hereinafter *Dismissals of Bankruptcies Filed in Bad Faith*], <https://www.abi.org/abi-journal/dismissals-of-bankruptcies-filed-in-bad-faith-whats-the-standard> [<https://perma.cc/AG9R-B2AK>]. *See generally* Jane VanLare & Matthew Smith, *Defining “Bad Faith” Is Hard to Do: Objective and Subjective Criteria for Dismissing a Bankruptcy Petition*, 10 PRATT’S J. BANKR. L. 601 (2014) (listing specific behaviors that compel courts to find bad faith).

Moreover, although this tension arose following the enactment of BAPCPA, Congress has not returned to the statutory text to resolve the issue. As will be discussed later in this Note, a potential resolution would be for Congress to revisit the Bankruptcy Code and explicitly resolve the controversy by amending Section 707 to specify permissible and impermissible conduct subject to the bad faith scrutiny. As bankruptcy law is not at the forefront of the current political conversation,¹⁴⁶ and 15 years have passed without commentary from Congress, it seems unlikely that legislative resolutions will be forthcoming. Instead, courts themselves have addressed the issue in a multitude of ways. Although courts often come to separate conclusions on how to address a debtor's exclusion of Social Security benefits, they often work from common understandings of what constitutes bad faith.

B. COMMON SIGNS OF BAD FAITH IN BANKRUPTCY FILINGS

The bad faith standard is difficult to codify due to its multifaceted nature. It is for this reason that the determination of bad faith has been left to the bankruptcy courts as a matter of discretion; there are, however, some common examples of bad faith filings for bankruptcy relief.¹⁴⁷ Some of the most common examples are underreporting income in a chapter 7 filing, intentionally withholding nonexempt assets to avoid chapter 13 relief, intentionally taking in less income in the months leading up to filing bankruptcy, and taking on additional secured debts in preparation of bankruptcy.¹⁴⁸ Additional considerations that will weigh in favor of a finding of bad faith include previous, frequent bankruptcy petitions and a showing that the debtor filed solely to benefit from the creation of the automatic stay barring creditors, secured and unsecured, from collecting payment from a debtor's assets.¹⁴⁹

Although the examples cited provide insights, the courts have provided additional context to what the analysis of bad faith in bankruptcy entails. The Eighth Circuit has articulated that bad faith "require[s] a pattern of concealment, evasion, and direct violations of the Code or court order which

146. Compare TABB & BRUBAKER, *supra* note 1, at 50, with Daly, *supra* note 128 (noting that although bankruptcy was a hotly contested issue because of the rise in cases in 2005, cases have declined and the policy has subsequently fallen out of the political discussion).

147. See 11 U.S.C. §§ 707(b)(3), 1325(a)(3).

148. See *In re Riggs*, 495 B.R. 704, 719 (Bankr. W.D. Va. 2013) (explaining that the debtor took on an additional \$60,000 of secured debts before bankruptcy); *Dismissals of Bankruptcies Filed in Bad Faith*, *supra* note 145. See generally VanLare & Smith, *supra* note 145 (explaining bankruptcy court bad faith standards across jurisdictions).

149. 11 U.S.C. § 362; see also *Chapter 13 – Bankruptcy Basics*, *supra* note 120 ("An individual cannot file under chapter 13 . . . if, during the preceding 180 days, a prior bankruptcy petition was dismissed . . ."). See generally TABB & BRUBAKER, *supra* note 1, at 189–215 (explaining the concept of the automatic stay and its role in bankruptcy law).

clearly establishes an improper motive.”¹⁵⁰ Other courts have distinguished that the attempt of a debtor to frustrate his creditors by itself does not constitute bad faith, so long as he still honestly seeks rehabilitation.¹⁵¹ Still, “[b]ad faith must be shown by clear and convincing evidence based on the totality of the circumstances” and “must encompass intentional misconduct.”¹⁵²

All of these examples have a common underlying factor—there is an element of a debtor’s intentional deceptiveness to take advantage of the bankruptcy court system.¹⁵³ But how can it be that a debtor exhibits bad faith when they exclude forms of income that Congress specifically intended for them to exclude?¹⁵⁴

C. PARSING THE LANGUAGE OF THE CODE

Bankruptcy courts continue to struggle with parsing the permissible exemption of SSI from a debtor’s bankruptcy estate and its exclusion from the CMI and PDI calculations with the totality of the circumstances inquiry in considering whether to dismiss or convert a bankruptcy filing. This Section highlights the difficulties in reconciling the statutory language.

1. The Nature of the Benefits

One interpretive issue that arises relating to the inclusion of SSI in individual consumer debtors’ repayment abilities pertains to the *nature* of SSI relative to a debtor’s interest in them. Bankruptcy is intended to gather all of a debtor’s nonexempt assets into the bankruptcy estate and then either liquidate them and use the proceeds to repay creditors or allow the debtor to retain them so as to better repay creditors in installments for the three to five years following bankruptcy proceedings.¹⁵⁵ How much of a debtor’s property is subject to the estate is a question of law. Whether assets are included in the estate but then excluded from repayment—or simply never enter the estate and are therefore not subject to repayment—is an interpretive matter.

Property of the bankruptcy estate is defined in Section 541 of the Bankruptcy Code and includes “all legal or equitable interests of the debtor in property as of the commencement of the case.”¹⁵⁶ Although the language is incredibly broad, there are some exclusions listed in the provision. While

150. *In re Kerr*, 908 F.2d 400, 404 (8th Cir. 1990).

151. *In re Kowalski*, No. 18-09130, 2018 WL 6841355, at *1 (Bankr. N.D. Ill. Nov. 30, 2018).

152. *In re Younoszai*, 478 B.R. 841, 844 (Bankr. W.D. Ky. 2012).

153. *See id.*; *Hamilton v. Lanning*, 560 U.S. 505, 521–24 (2010); *In re Kerr*, 908 F.2d at 404; *In re Kowalski*, 2018 WL 6841355, at *1.

154. *See infra* Part IV.

155. *See* TABB & BRUBAKER, *supra* note 1, at 58–69; *see also* Chapter 13 – Bankruptcy Basics, *supra* note 120 (“Under this chapter, debtors propose a repayment plan to make installments to creditors over three to five years.”).

156. 11 U.S.C. § 541(a)(1) (2018).

educational individual retirement accounts and employee retirement accounts are not subject to the bankruptcy estate,¹⁵⁷ nothing explicit in the language of section 541 excludes SSI from the bankruptcy estate. There are several permissible exemptions from the bankruptcy estate, though, that are not found in section 541.

Contained in section 522 of the Bankruptcy Code are other exemptions of debtor property to the bankruptcy estate. The language, admittedly, can be difficult to follow. Section 522(b) creates exemptions from the bankruptcy estate “[n]otwithstanding section 541.”¹⁵⁸ In essence, section 541 defines what property is included and excluded from the bankruptcy estate, and section 522 allows debtors to—of their own volition—exempt certain property from the estate that would otherwise be included.¹⁵⁹ Most of the permissible exemptions are listed in section 522(b), but not all.¹⁶⁰ Congress included additional exemptions in 522(d), which provides for “property [that] may be exempted under subsection (b)(2)” and allows for an exemption for “a social security benefit, unemployment compensation, or a local public assistance benefit.”¹⁶¹

Courts recognize SSI as being a legitimate exemption from the bankruptcy estate¹⁶² in addition to being excluded from consideration from the definition of CMI in section 101(10A)(B)(ii)(I). The crux of the issue is that SSI is not *necessarily* excluded from property of the bankruptcy estate. It is not automatically excluded from the estate under section 541, but rather is permitted to be exempted by the debtor under section 522. Because the Code does not mandate removal of SSI from the property of the estate, but does remove it from the calculation of a debtor’s income in the post-BAPCPA means test, tension exists regarding the extent to which SSI should be considered in a bad faith dismissal or conversion analysis.

2. Recent Congressional Amendments: The Coronavirus

Congress has—perhaps inadvertently—made the issue of statutory interpretation even more difficult in light of the current coronavirus pandemic. The fundamental disagreement on interpretation is whether, despite the exclusion of SSI from CMI in the Code, exclusion of those benefits might

157. *Id.* §§ 541(b)(5), (7).

158. *Id.* § 522(b)(1) (“Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in . . . paragraph (2) . . . of this subsection.”).

159. *Id.* § 522(b).

160. Social Security Benefits are not listed as a permissible exemption under Section 522(b). *See id.*

161. *Id.* §§ 522(d), 522(d)(10)(A).

162. SOCIAL SECURITY LAW AND PRACTICE § 34:17 (Thomson Reuters 2022); 11 U.S.C. §§ 541, 522(d)(10)(A).

nonetheless rise to the level of bad faith.¹⁶³ The argument for inclusion of those benefits—recognized by a minority of courts—in a bad faith analysis is that, even though Congress excluded Social Security benefits from inclusion in CMI in section 101(10A), there is no explicit exclusion from them anywhere in Section 707(b)(3) or in section 1325.¹⁶⁴

In response to the coronavirus pandemic, Congress amended Section 101(10A)(B)(ii) of the Bankruptcy Code to exclude from CMI “[p]ayments made under Federal law relating to the national emergency declared by the President . . . with respect to the coronavirus disease 2019 (COVID-19).”¹⁶⁵ In amending the Code, Congress also explicitly barred from consideration in a chapter 13 repayment plan those payments in light of the coronavirus disease, in addition to other specific forms of payment.¹⁶⁶ The other payments excluded from a chapter 13 repayment plan—“child support payments, foster care payments, or disability payments for a dependent child”—do not also appear as exclusions in the computation of CMI.¹⁶⁷ This further muddies the issue of how to interpret the exclusions from CMI under Section 101(10A)(B)(ii)—if those exclusions were not meant to be considered in computing PDI in the first instance, because PDI “means current monthly income received by the debtor,”¹⁶⁸ then there would be no need for Congress to exclude them in both Sections 1325(b)(2) and 101(10A)(B)(ii).

If the amendment to Section 1325(b)(2) was made as a redundancy to leave no question as to congressional intent in whether payments received in light of the coronavirus were to be included in PDI and, subsequently, in a bad faith inquiry, Congress could *also* have included not only Social Security benefits, but every other exclusion from Section 101(10A)(B)(ii) so as to resolve the controversy at issue in this Note. The decision not to do so strengthens the argument that Congress intends that Social Security benefits may be included in a bad faith analysis.

3. Evidence for the Exclusion of Social Security Benefits from Creditors

On the other hand, courts have held that Social Security benefits ought to be excluded from a bad faith analysis because of evidence that Congress did not want these payments subjected to payments to creditors. The most glaring evidence for this interpretation is in the definition of CMI in Section 101(10A)(B)(ii)(I), wherein the Code defines CMI as “exclud[ing] benefits

163. *Id.* § 101(10A)(B)(ii)(I).

164. *In re Calhoun*, 396 B.R. 270, 276 (Bankr. D.S.C. 2008).

165. *Id.* § 101(10A)(B)(ii)(V).

166. *Id.* § 1325(b)(2).

167. *Compare id.* § 1325(b)(2) (listing “child support payments, foster care payments, [and] disability payments for a dependent child”), *with id.* § 101(10A)(B)(ii) (not listing those payments).

168. *Id.* § 1325(b)(2).

received under the Social Security Act.”¹⁶⁹ This CMI is used not only to determine if a debtor is abusive under chapter 7 in liquidation, but also to project future disposable income in chapter 13 in determining whether a debtor has sufficient assets to repay creditors in the future.¹⁷⁰ Since the mechanical calculation in determining abusive debtors excludes Social Security benefits from income, it cannot be abusive for debtors to act in a manner that the Code allows.

The Bankruptcy Code is not the only source of law that supports this point of view. The Social Security Act, too, appears to have a clear intent of keeping those benefits out of the hands of creditors. That Act, in relevant part, states:

The right of any person to any future payment under this subchapter shall not be transferrable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, *or to the operation of any bankruptcy or insolvency law.*¹⁷¹

The “shall not” language of the provision leaves no discretion up to the bankruptcy courts.¹⁷²

This language, combined with the exclusion from the Bankruptcy Code’s definition of CMI, appears to establish a strong congressional intent against subjecting Social Security payments to inclusion in repayment plans, or liquidation.

IV. POTENTIAL SOLUTIONS TO THE ISSUE

This Part of the Note addresses the solutions and ways in which bankruptcy courts to this point have attempted to parse the statutory language and address the issue. Section IV.A will first introduce the majority view, that Social Security benefits are not subject to a bad faith analysis because of a congressional intent to exclude them from such an inquiry. Section IV.B will then introduce the minority view, that Social Security benefits are subject to a bad faith inquiry because of the plain language of the bad faith statutory provisions and the absence of explicit language as to the scope of the totality of the circumstances inquiry contained in those provisions. Section IV.C will introduce a modified view, that the exclusion of Social Security benefits without other evidence of bad faith does not rise to the standard of bad faith.

169. *Id.* § 101(10A)(B)(ii)(I).

170. *Id.* §§ 101(10A), 707(b)(2), 1325(b)(2).

171. 42 U.S.C. § 407(a) (emphasis added).

172. *Id.* It is astounding that more bankruptcy courts have not considered the explicit language of the Social Security Act when ruling on SSI inclusion cases. Most of the cases on SSI inclusion focus only on Bankruptcy Code provisions and precedents, while language from the Social Security Act is given short shrift.

Finally, Section IV.D will briefly address a potential legislative solution to the issue.

A. *THE MAJORITY RULE: EXCLUSION OF SOCIAL SECURITY BENEFITS*

The issues that have arisen from deciding the proper role of Social Security benefits in a bad faith analysis have confounded the bankruptcy courts since BAPCPA. Although the Supreme Court did address how changes to a debtor's income after the calculation of PDI could be included in a chapter 13 repayment plan in *Hamilton v. Lanning*,¹⁷³ the Court did not address whether exclusions from CMI could be subjected to a bad faith analysis. It appears unlikely that the Court will offer further guidance on this issue in the near future, and Congress is similarly unlikely to provide clarity.¹⁷⁴ Thus, the interpretive issues have been relegated to the lower bankruptcy courts. One potential solution would be for courts to uniformly adopt the current majority view—that Congress has sufficiently moved away from the prior discretionary practice such that Social Security benefits can never be considered in a bad faith analysis for dismissal or conversion.

1. Bankruptcy Court Precedent

Bankruptcy courts have largely espoused the view that SSI should not be included in a bad faith analysis. In *In re Welsh*, the court balanced the conflicting views that arose as a response to *Lanning*.¹⁷⁵ The trustee in *Welsh* objected to confirmation of a chapter 13 plan because the debtor excluded their Social Security benefits and argued that the *Lanning* court allowed for such inclusion based on changes in the debtor's income.¹⁷⁶ The trustee argued that the "actual" income produced from SSI warranted inclusion, even though PDI excluded it.¹⁷⁷

The court, however, was unpersuaded by this language, referencing the definition of CMI in the Bankruptcy Code and the previously mentioned language in the Social Security Act.¹⁷⁸ The court further noted that *Lanning* allowed for modifications in "unusual" cases, and that the SSI received by the debtor had remained constant throughout bankruptcy proceedings.¹⁷⁹

173. *Hamilton v. Lanning*, 560 U.S. 505, 524 (2010).

174. *See supra* notes 165–67 and accompanying text. Congress had an opportunity to address the issue of whether failure to include Social Security benefits ought to be grounds for bad faith when it amended the Bankruptcy Code to exclude payments relating to Coronavirus relief from sections 101(10A) and 1325; that it failed to address the issue of Social Security benefits now, as the issue becomes more distant from BAPCPA, indicates that it may never provide insight.

175. *In re Welsh*, 440 B.R. 836, 845–47 (Bankr. D. Mont. 2010).

176. *Id.* at 845.

177. *Id.*

178. *Id.* at 844–45.

179. *Id.* at 847.

Several other bankruptcy courts and appellate courts have adopted the same reasoning as these cases, although none of them reference the exclusion of Social Security benefits from the bankruptcy estate under Section 522(d)(10).¹⁸⁰

2. Appellate Court Precedent

Although, for the most part, treatment of this issue varies according to the bankruptcy jurisdiction in which the case is brought, there are some instances of appellate courts providing insight into the issue on review of bankruptcy court decisions. In *Baud v. Carroll*, the Sixth Circuit held that Social Security benefits “should not be included in the calculation of projected disposable income” for a chapter 13 debtor’s repayment plan.¹⁸¹ That court, relying heavily on the holding in *Lanning*, concluded that “the discretion *Lanning* affords does not permit bankruptcy courts to alter BAPCPA’s formula for calculating disposable income” as defined in Section 101(10A) of the Code.¹⁸² The *Baud* court also pointed out that the inclusion of Social Security benefits in calculating PDI was common pre-BAPCPA, but that in defining CMI to exclude Social Security benefits and in adopting the usage of CMI to calculate PDI, Congress intended to depart from the previous practice.¹⁸³

The Tenth Circuit reached a similar holding for comparable reasons in *In re Cranmer*. In *Cranmer* the court held that, even though the debtor would receive a substantial amount of income in Social Security benefits, all of that amount was exempted from inclusion in PDI because it was similarly exempted from CMI in Section 101(10A)(B)(ii)(I).¹⁸⁴ The *Cranmer* court went a step further, though, in including the language of the Social Security Act in its analysis.¹⁸⁵ That language, the court held, “operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate.”¹⁸⁶

180. See, e.g., *In re Boisjoli*, 591 B.R. 468, 470–72 (Bankr. D. Colo. 2018); *In re Ragos*, 700 F.3d 220, 223–26 (5th Cir. 2012); *Mihal*, No. 13-54435, 2015 WL 2265790, at *1–3 (Bankr. E.D. Mich. May 6, 2015); *In re Litt*, No. 11-62637, 2012 WL 392887, at *3–4 (Bankr. N.D. Ohio Feb. 6, 2012).

181. *Baud v. Carroll*, 634 F.3d 327, 345 (6th Cir. 2011).

182. *Id.*; 11 U.S.C. § 101(10A) (2018).

183. *Baud*, 634 F.3d at 347.

184. *In re Cranmer*, 697 F.3d 1314, 1317–18 (10th Cir. 2012).

185. *Id.* at 1318; see *supra* note 171 and accompanying text.

186. *Cranmer*, 697 F.3d at 1318 (quoting *In re Carpenter*, 614 F.3d 930, 936–37 (8th Cir. 2010)); see also *id.* at 1319 (“When a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes SSI, that exclusion cannot constitute a lack of good faith.”).

B. THE MINORITY VIEW: INCLUSION OF SOCIAL SECURITY BENEFITS

Despite the stance that a majority of bankruptcy courts adopt, a minority of courts still take the pre-BAPCPA approach that Social Security benefits are includable in a bad faith analysis, despite being excluded from the calculation of CMI and PDI. These courts adopt the view that the statutory absence of exemption of Social Security benefits from a bad faith inquiry warrants their inclusion. Because the “totality of the circumstances” framework for a finding of bad faith allows for a very broad consideration of the debtor’s financial circumstances,¹⁸⁷ this group of courts has held that they may consider a debtor’s “actual” income, not only the income provided for in the calculation of CMI.¹⁸⁸ Advocates of this viewpoint do not deny that BAPCPA evinced a congressional intent to move away from the once-common practice of including SSI in a bad faith analysis, they merely hold that Congress did not completely eliminate their ability to consider SSI in a bad faith inquiry in every instance.

The chief consideration in a bad faith analysis in bankruptcy is the debtor’s ability to pay their creditors.¹⁸⁹ Statutorily, Section 707(b)(3)(B) delineates “the totality of the circumstances . . . of the debtor’s financial situation.”¹⁹⁰ Arguably, “the debtor’s financial situation” to be considered is the *actual* financial situation of the debtor in the proceedings, not only those sources of income defined in CMI.¹⁹¹ Additionally, even though definition of CMI exempts Social Security benefits from inclusion, “[m]ost of the courts that have considered this issue . . . have held that exempt income must be taken into account in determining the debtor’s disposable income.”¹⁹² These courts look to the language of Section 1325(b) and “not[e] that there is nothing in

187. 11 U.S.C. § 707(b)(3)(B); *In re Rodgers*, 430 B.R. 910, 913–14 (Bankr. M.D. Fla. 2010); see also Cara O’Neill, *What Does it Mean to File for Bankruptcy in Bad Faith?*, ALLLAW (2022), <https://www.alllaw.com/articles/nolo/bankruptcy/bad-faith-filing-bankruptcy-cases.html> [<https://perma.cc/5ZN8-Q682>] (“Any knowing misrepresentation or omission of information on the petition can be bad faith, as well as any other attempt [sic] take advantage of the bankruptcy system.”) (emphasis added).

188. *In re Rodgers*, 430 B.R. at 914.

189. *In re Calhoun*, 396 B.R. 270, 274–75 (Bankr. D.S.C. 2008) (“[T]he debtor’s ability to repay is the *primary* factor to be considered.” (citing *Green v. Staples*, 934 F.2d 568, 572 (4th Cir. 1991))).

190. 11 U.S.C. § 707(b)(3)(B) (emphasis added).

191. *In re Calhoun*, 396 B.R. at 275–76. Arguably, the notion that the debtor’s income to be considered is the debtor’s actual income during the bankruptcy proceedings stems from the Supreme Court’s holding in *Hamilton v. Lanning*. That Court allowed for a debtor’s income to be adjusted downward in a chapter 13 filing due to a change in their income that *was* included under the Bankruptcy Code, but the notion that a debtor should pay what they can afford can be similarly applied to income sources to adjust their payments upward, as well. *Hamilton v. Lanning*, 560 U.S. 505, 519 (2010).

192. *In re Rodgers*, 430 B.R. at 913.

the definition of the term that limits income to that which is non-exempt.”¹⁹³ This interpretation clashes sharply with the majority view in that Section 1325(b)(2) *does* define disposable income as “current monthly income received by the debtor.”¹⁹⁴ Although that language does not explicitly “limit[] income to that which is non-exempt,”¹⁹⁵ it does require a reference to the definition of CMI, which specifically exempts Social Security benefits.¹⁹⁶

The minority view places great emphasis on the failure to explicitly exempt Social Security benefits from a bad faith analysis in the Bankruptcy Code.¹⁹⁷ Although courts that adopt this view acknowledge the exclusion of Social Security benefits from CMI for purposes of chapter 7 relief and from PDI for the purposes of chapter 13 relief, those courts nonetheless hold that “Congress clearly knew how to exclude benefits under the Social Security Act from consideration but did not do so in connection with the § 707(b)(3)(B) totality of the circumstances test.”¹⁹⁸

The minority view further holds that, although Social Security benefits are excluded from CMI and PDI, those provisions only establish whether a presumption of abuse arises from the mechanical means test—the totality of the circumstances inquiry must take into consideration those factors beyond the merely mechanical.¹⁹⁹ In some of these cases, the courts appear to take the approach that this Note argues for—that, by itself, exclusion of Social Security benefits ought not be indicative of action in bad faith. Instead, where other evidence leads to a finding of action in bad faith, such exclusion should be considered as an additional factor.²⁰⁰

193. *Id.*

194. 11 U.S.C. § 1325(b)(2).

195. *In re Rodgers*, 430 B.R. at 913.

196. 11 U.S.C. § 101(10A)(B)(ii)(I).

197. *In re Calhoun*, 396 B.R. 270, 276 (Bankr. D.S.C. 2008).

198. *Id.* The view adopted in *Calhoun*—that Social Security benefits ought to be considered in a “totality of the circumstances” inquiry, despite having been excluded from the definitions of CMI and PDI in chapters 7 and 13, respectively, was subsequently adopted by the 4th Circuit on appeal in *Calhoun v. U.S. Trustee*. 650 F.3d 338, 342–43 (4th Cir. 2011). This holding creates the circuit split on this issue.

199. *In re Riggs*, 495 B.R. 704, 716 (Bankr. W.D. Va. 2013).

200. *Id.* at 719. In *Riggs*, the debtors took on an additional \$60,000 of secured debts in anticipation of bankruptcy. *Id.* These additional expenditures demonstrate not only extremely poor judgment on the part of the debtors in their financial wellbeing, but also indicate that the debtors were attempting to “game the system” so as to pass the mechanical means test and still live comfortably with their SSI receipts after the discharge of their debts—leaving their creditors even more short-handed. *Id.* at 723.

C. THE MIDDLE ROAD: THE “WITHOUT MORE” STANDARD

Some courts on both sides of the interpretive issue have supported some semblance of a “without more” standard.²⁰¹ This view articulates that the exclusion of Social Security benefits from income repayable to creditors does not, by itself, rise to the level of bad faith—but with additional evidence, can be a consideration.²⁰² That courts on both sides of the interpretive issue can employ this standard is an indication of its merits. This view is, at its core, an attempt to parse the Code’s language and legislative intent into a workable standard. On the one hand, there is ample evidence that Congress intended for Social Security payments to become more difficult to attain by a debtor’s creditors.²⁰³ Amendments to the Code post-BAPCPA can be interpreted as a response to the pre-BAPCPA practice of including SSI in a debtor’s actual income in a bad faith analysis. However, Congress did not explicitly address this issue textually, as it could have done. Moreover, the minority view is correct in articulating that the mechanical means test that excludes Social Security benefits is merely to establish a presumption of abuse.²⁰⁴ Additional evidence of abuse must be considered under a totality of the circumstances or bad faith inquiry.

1. Post-BAPCPA Evidence for Exclusion

To categorically include Social Security benefits in a bad faith analysis and to hold that, by itself, the exclusion of such benefits is enough to dismiss or convert a case would be in direct contravention to much of the Bankruptcy Code and the Social Security Act.²⁰⁵ The Social Security Act articulates that present and future payments received under the Act are not subject to any bankruptcy or insolvency law.²⁰⁶ Moreover, section 522(d)(10)(A) of the Bankruptcy Code exempts SSI receipts from inclusion in the bankruptcy estate of individual debtors.²⁰⁷

The additional exclusion from SSI in the calculation of CMI and PDI in chapters 7 and 13 evinces a clear congressional intent that such benefits are not ordinarily to be subjected to the claims of creditors.²⁰⁸ To hold that the mere exclusion of such benefits, without additional evidence of bad faith, is sufficient to dismiss or convert a case is to effectively nullify the great body of

201. Compare *In re Thompson*, 439 B.R. 140, 142–43 (B.A.P. 8th Cir. 2010), with *In re Riggs*, 495 B.R. at 716.

202. *In re Thompson*, 439 B.R. at 143.

203. See 11 U.S.C. §§ 101(10A)(B), 1325(b)(2), 522(d)(10)(A) (2018).

204. See *id.* § 707(b).

205. See *id.* §§ 101(10A)(B)(ii)(I), 1325(b)(2), 522(d)(10)(A); see also 42 U.S.C. § 407.

206. See *supra* note 171 and accompanying text.

207. See 11 U.S.C. § 522(d)(10)(A).

208. See *id.* §§ 101(10A)(B)(ii)(I), 707(b)(2), 1325(b)(2).

statutory law and undeniable legislative intent to at least shift away from the previous practice and would necessarily result in all individual debtors including SSI receipts for fear of dismissal or conversion of their cases.²⁰⁹ This contravenes well-established principles of statutory interpretation and common sense.

2. Evidence for Inclusion in Some Circumstances

The language of the Bankruptcy Code raises more questions than answers. It appears irreconcilable that Social Security benefits ought not be subjected to repayments to creditors, while textually this issue remains unaddressed by the statutory bad faith provisions.²¹⁰ Given that the pre-BAPCPA practice in the bankruptcy courts was to include Social Security benefits in repayments to creditors,²¹¹ some more explicit language to the contrary would seem necessary if Congress did in fact intend for courts to ditch the practice. Moreover, it may be that Congress only intended for SSI receipts not to be included in the mechanical approach to ferret out presumptive abusers but that such receipts should be included in a bad faith/totally of the circumstances inquiry.²¹² Ultimately, though, evidence that Congress intended SSI receipts to be included in a bad faith/totally of the circumstances analysis in determining whether to deny an individual debtor bankruptcy relief is scant.

3. The Ideal Resolution

Although there are arguments in support of both the majority and minority stances, and there is a tempting compromise option in the “without more” standard, the best position in comporting with congressional intent is likely the majority view. Both the majority and minority views concede that Congress, at least in the ordinary case, intended for SSI receipts to be kept out of the hands of an individual debtor’s creditors.²¹³ The previously referenced language in the Social Security Act, as well as in Chapters 1, 5, 7, and 13 of the Bankruptcy Code illustrates that Congress intended for SSI receipts to be retained by debtors and unavailable to their creditors.²¹⁴

209. *Baud v. Carroll*, 634 F.3d 327, 347 (6th Cir. 2011).

210. *See* §§ 11 U.S.C. 707(b)(3), 1325(a)(3). Given that the rift in bankruptcy courts between including or excluding Social Security benefits has been ongoing since BAPCPA first passed in 2005, it is difficult to determine why Congress did not return to this issue in the 15-plus years since its passing. As recently as a few months ago, Congress did return to the SSI provisions of the Bankruptcy Code, but only to exclude coronavirus payments from a debtor’s income. *Id.* § 101(10A)(B)(ii)(V) (effective Mar. 27, 2020); *see supra* Section III.C.3.

211. *See In re Riggs*, 495 B.R. 704, 722–24 (Bankr. W.D. Va. 2013); *Hamilton v. Lanning*, 560 U.S. 505, 512 (2010); *TABB & BRUBAKER, supra* note 1, at 68.

212. *In re Riggs*, 495 B.R. at 722–23.

213. *See supra* notes 181–200 and accompanying text.

214. *See* 42 U.S.C. § 407(a); 11 U.S.C. §§ 101(10A)(B)(ii)(I), 541, 522(d)(10)(A), 707(b)(2)(A)(i), 1325(b)(1)(B).

If, as the minority view holds, Congress knew how to explicitly exclude SSI receipts from inclusion in a bad faith/totally of the circumstances analysis and failed to do so, this begs the question: what exactly should Congress have done to more clearly indicate the non-inclusion of SSI benefits in an individual debtor's bankruptcy estate? If bankruptcy courts take the position that a debtor's failure to include SSI in their bankruptcy estate as assets that creditors may receive as repayment by itself constitutes bad faith that results in failure to grant relief, then the language in the Social Security Act and throughout the Bankruptcy Code is merely a dead letter. Debtors will *never* exclude or exempt their SSI receipts, which the Code plainly allows them to do, if they know a bankruptcy judge will deny them relief for a perception of bad faith.

Moreover, inclusion of SSI receipts for consideration under the "without more" standard would be, in many cases, immaterial. Consider, for example, a situation in which an individual debtor's application for relief is proper in all ways except for their exemption of SSI receipts under Section 522(d)(10)(A). The debtor reports all of their income properly, does not try to hide any assets, and cooperates fully in the bankruptcy proceedings. Under the "without more" standard, this debtor would be entitled to relief in the bankruptcy courts, since other evidence of bad faith is lacking.

Now imagine an alternative scenario, in which the individual debtor attempts to conceal their assets from their creditors, fraudulently transfers assets out of their control to close friends and family for little to no consideration, preferentially pays off some creditors at the expense of others, and fails to cooperate in the bankruptcy proceedings.²¹⁵ In addition to these behaviors, the debtor also exempts their SSI receipts from the bankruptcy estate under Section 522(d)(10)(A). Although these additional behaviors may be addressed by a bankruptcy trustee, the court may be inclined to deny relief under a bad faith/totally of the circumstances analysis. In this hypothetical, the exemption of the SSI *would* be able to be considered under the "without more" standard, but it provides an immaterial addition to the bad faith analysis. In light of all of the available evidence of bad faith, the addition of the evidence of the exemption of SSI receipts adds nothing. Even in a scenario in which there is very little evidence of bad faith, there are no imaginable circumstances in which the inclusion of a debtor's exemption of their SSI receipts would tip the scales from warranting bankruptcy relief to not warranting relief. For this reason, although the "without more" standard is workable, it is unnecessary.

For the foregoing reasons, the majority approach is the most tenable option, and the one that bankruptcy courts should unanimously adopt. A debtor who calculates their CMI and PDI exactly as the Bankruptcy Code

215. These situations are contemplated and addressed in 11 U.S.C. §§ 547-48.

prescribes and exempts their SSI receipts from their bankruptcy estate exactly as the Code allows cannot be acting in bad faith.²¹⁶ For a court to circumvent the clear congressional intent evidenced in the Bankruptcy Code and in the Social Security Act through the bad faith/totality of the circumstances inquiry shows bad faith on the part of the *courts*, not of the debtors. Because the value of allowing consideration of SSI receipts in addition to other evidence of bad faith is so comparatively low, the “without more” standard should be rejected, although it is tenable. The solution most consistent with intent of Congress is to reject the pre-BAPCPA practice of including a debtor’s SSI receipts as repayments to creditors²¹⁷ and instead follow the current statutory scheme: exclude SSI benefits from calculations of CMI and PDI and allow their exemption from debtors’ bankruptcy estates.

D. THE LEGISLATIVE SOLUTION

The arguments on both sides of the issue largely stem from a lack of discernible congressional intent in the Bankruptcy Code. To be sure, while the plain language of the Code seems to suggest that Congress intended to depart from the inclusion of Social Security benefits in a bankrupt debtor’s repayable income, Congress certainly could have gone further in evincing this departure in light of the pre-BAPCPA context. There are compelling arguments as to legislative intent on both sides of the interpretive issue, and Congress has not seen fit to revisit Social Security benefits in its recent return to the Bankruptcy Code for payments relating to the coronavirus pandemic.²¹⁸ Nevertheless, despite the unlikelihood of congressional clarity on the issue, further BAPCPA amendments would be the most obvious solution.

As an initial matter, Congress should provide some clarity to the exemptions and exclusions of the Bankruptcy Code relevant to this inquiry. Section 522 presents one such area where clarification is necessary. Subsection (d) of this provision should, in its entirety, be subsumed into subsection (b)(2), as it purports to do.²¹⁹ For organizational purposes, if nothing else, this change would prevent the unnecessary meandering through the Code that attorneys and courts alike must do in order to resolve this issue. Additionally, if Congress intended to exclude Social Security benefits from the bankruptcy estate entirely, rather than only exempt them from the definition of income, then Congress should amend section 101(10A) of the Code to substitute the exclusion of benefits received under the Social Security Act with a reference to their total exclusion from the bankruptcy estate in the

216. See *In re Cranmer*, 697 F.3d 1314, 1319 (10th Cir. 2012); 11 U.S.C. § 522(d)(10)(A).

217. See *supra* note 211 and accompanying text.

218. See 11 U.S.C. §§ 101(10A)(B)(ii)(V), 1325(b)(2).

219. See *id.* §§ 522(b)(2), 522(d).

first instance.²²⁰ Finally, as a direct response to this issue, if Congress's intent was to exclude Social Security benefits—and presumably the other exclusions from CMI—from the bad faith analysis entirely, sections 707(b)(3) and 1325(a)(3) should be amended to reference section 101(10A)(B)(ii) and remove those exclusions from a bad faith/totally of the circumstances inquiry.²²¹

If Congress's intent was to allow for consideration of Social Security benefits into a bad faith analysis in every case, then the exclusion of them from CMI and PDI should be eliminated entirely by removing section 101(10A)(B)(ii)(I) wherein the exclusion for Social Security benefits is contained. Although this would include SSI receipts as income repayable to creditors in every case, this approach would simply codify the practical effect of allowing dismissal or conversion of cases solely for failing to include such receipts as income.²²²

Congress would also have to amend the Social Security Act and section 522(d)(10)(A) to remove reference to Social Security benefits from any exemption or inclusion.²²³ Whichever route Congress intends to take, the Code as written presents a substantial amount of ambiguity.

V. CONCLUSION

The inclusion of Social Security benefits in repayments to creditors in bankruptcy cases for individual debtors generates no small amount of controversy or litigation.²²⁴ In addition to the problems with interpreting what the Bankruptcy Code says—and does not say—the language of the Social Security Act and case law precedent, debtors and creditors have their livelihoods impacted by this issue. For a creditor, inclusion of Social Security benefits can have a significant impact on the debtor's CMI and PDI and would make a substantial difference in the amount of their credit that they can recover from a debtor. For a debtor, Social Security benefits might be one of the only forms of income to their name, and losing these benefits might render them destitute. Both debtors and creditors alike deserve to have clarity on the inclusion conundrum.

220. See *id.* § 101(10A)(B)(ii)(I).

221. See *id.* §§ 707(b)(3), 1325(a)(3), 101(10A)(B)(ii).

222. See *Baud v. Carroll*, 634 F.3d 327, 347 (6th Cir. 2011).

223. See 11 U.S.C. § 522(d)(10)(A).

224. See generally *e.g.*, *Hamilton v. Lanning*, 560 U.S. 505 (2010) (analyzing PDI in light of the BAPCPA amendments to the Code); *In re Cranmer*, 697 F.3d 1314 (10th Cir. 2012) (holding that excluding SSI payments from a repayment plan cannot count as bad faith); *In re Riggs*, 495 B.R. 704 (Bankr. W.D. Va. 2013) (granting a trustee's motion to dismiss under a "totality of the circumstances" analysis); *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011) (excluding Social Security benefits from PDI); *In re Calhoun*, 396 B.R. 270 (Bankr. D.S.C. 2008) (holding that a debtor's failure to volunteer SSI warrants dismissal under the totality of the circumstances analysis).

In light of the ambiguity in the relevant statutory law and Congress's unwillingness to address this issue directly, a solution should be uniformly adopted by the bankruptcy courts. Although more clarity could explicitly be introduced into the Code, the post-BAPCPA amendments to the relevant provisions indicate a strong intent by Congress to eliminate the ability of creditors to access a debtor's SSI receipts as a form of repayment.²²⁵ Although a minority of courts hold that Congress failed to fully eliminate inclusion of SSI receipts,²²⁶ and a middle road "without more" option is tenable,²²⁷ the solution most in line with congressional intent is the majority approach. The exclusion of Social Security benefits from a debtor's CMI or PDI, or the exemption of Social Security Benefits from a debtor's bankruptcy estate, cannot warrant dismissal as bad faith either in chapter 7 or chapter 13.

225. See 11 U.S.C. §§ 101(10A)(B)(ii)(I), 522(d)(10)(A), 1325(b)(2).

226. See *id.* §§ 707(b)(3), 1325(a)(3) (omitting any explicit language suggesting that Social Security benefits are to be excluded in a bad faith analysis).

227. See *In re Thompson*, 439 B.R. 140, 142 (B.A.P. 8th Cir. 2010); *In re Riggs*, 495 B.R. at 719 (showing what "more" could look like).