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Article

***241 ATTORNEYS AND THE BANKRUPTCY REFORM ACT OF 2001:
UNDERSTANDING THE
IMPOSITION OF SANCTIONS AGAINST DEBTORS' COUNSEL**

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DISCLAIMER

This article was written before the attorney sanctions provisions in the Bankruptcy Reform Act were changed from mandatory to discretionary in nature. See HR 975 Section 102, amending Section 707(b)(4)(A) and (B).

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I. INTRODUCTION

As of this writing, H.R. 333, [\[FN1\]](#) legislation that radically reforms the Bankruptcy Code, [\[FN2\]](#) is being considered in Congress. The best known and most controversial aspect of the legislation is Section 102, which creates the "means testing" mechanism to determine whether a debtor has abused the provisions of Chapter 7 of the Code. Means testing is accomplished by a radical amendment to current section 707(b), [\[FN3\]](#) implementing an elaborate measurement of income and expenses to determine if there are sufficient funds available to the debtor on a monthly basis. If there are sufficient funds, the legislation presumes that the debtor should be repaying at least a portion of existing unsecured debts, *242 whether under another chapter of the Code or outside of the bankruptcy context, rather than having those debts discharged. The penalty against the debtor who fails this test is mandatory dismissal or conversion of the case. [\[FN4\]](#)

It is not the purpose of this Article to debate the merits of the means test. Rather, this Article will focus on specific language within Section 102 of the legislation that is directed at attorneys representing individual Chapter 7 debtors. [\[FN5\]](#) Achieving the dual purpose of defining what the signature of an attorney for the debtor certifies and prescribing with some specificity the sanctions to be imposed, section 102(a)(2)(C) of the legislation provides:

[§ 707(b)](4)(A) The court shall order the counsel for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion brought under section 707(b), including reasonable attorneys' fees, if -

(i) a trustee appointed under section 586(a)(1) of title 28 or from a panel of private trustees maintained by the bankruptcy administrator brings a motion for dismissal or conversion under this subsection; and

(ii) the court -

(I) grants that motion; and

(II) finds that the action of the counsel for the debtor in filing under this chapter violated [rule 9011 of the Federal Rules of Bankruptcy Procedure](#).

(B) If the court finds that the attorney for the debtor violated [rule 9011 of the Federal Rules of Bankruptcy Procedure](#), at a minimum, the court shall order -

(i) the assessment of an appropriate civil penalty against counsel for the debtor; and

(ii) the payment of the civil penalty to the trustee, the United States trustee, or the bankruptcy administrator.

(C) In the case of a petition, pleading, or written motion, the signature of an attorney shall constitute a certification that the attorney has -

***243** (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion -

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect. [\[FN6\]](#)

It is evident from this language that Congress has not perfectly achieved its goal. The legislation will certainly give rise to interesting questions as these provisions are interpreted and applied by the courts. This Article will focus on some of those questions by interpreting the applicability and meaning of the legislation, as well as the interplay between the legislation and [Rule 9011 of the Federal Rules of Bankruptcy Procedure](#). [\[FN7\]](#) The importance of this analysis goes beyond the specifics of the legislation for it also allows insight into the conceptual approach of lawmakers in crafting remedies, including penalties arising from particularized attorney/client relationships, where abuse of the law, bankruptcy or otherwise, is perceived.

II. APPLICABILITY OF THE LEGISLATION

For the most part, determining the applicability of the legislation is not difficult, even though Congress uses rather broad language. Section 103 of the Code limits application of the four provisions to only Chapter 7 cases. [\[FN8\]](#) More specifically, the legislation likely applies only ***244** in the context of the "abusive" debtor, i.e., section 707(b), and the conduct of the attorney relating to that process.

Proposed sections 707(b)(4)(A) and (D) plainly relate to the means test. The former, by its own terms, applies only where it is the trustee who has successfully moved to convert or dismiss the case as an abuse. The latter, under which the attorney's signature certifies the correctness of the schedules, is not quite as specific, but still relates to the documents required of the debtor at the time the Chapter 7 petition is filed and concerns information that is arguably [\[FN9\]](#) pertinent to the means test itself.

At first blush, proposed section 707(b)(4)(C) appears broad, but language within it suggests a

similarly limited application. Although addressed to any "petition, pleading or written motion," which suggests breadth, this aspect of the legislation triggers a sanction if, inter alia, the suspect document is an abuse; in other words, the document must be related to Chapter 7 eligibility as set forth in section 102's amendments to section 707(b). Thus, the petition and any pleading or motion related to the means test itself are the only documents governed by the legislation's sanctions provisions. Documents not related to the means test do not evade court scrutiny; rather, they will be examined under [Rule 9011](#) without regard to the legislation.

Finally, there is proposed section 707(b)(4)(B), which requires that, upon finding a violation of [Rule 9011](#), the court must impose sanctions, including, at a minimum, the assessment of a civil penalty. As discussed in Part III, Rule 9011 is itself amended by virtue of proposed sections 707(b)(4)(C) and (D), which, like the Rule, involve the meaning of the attorney's signature on documents related to the means test. Because of the broad, and seemingly plain, language used, proposed section 707(b)(4)(B) suggests that any Rule 9011 violation by debtors' counsel, whether pertaining to the means test or some other aspect of the Chapter *245 7 case, requires a minimum sanction of a civil penalty. If the meaning of a statute is plain, then no further inquiry is permitted. [\[FN10\]](#)

However, what appears to be plain becomes ambiguous when the statutory context is taken into account. As previously stated, this language is already limited to Chapter 7 cases. Furthermore, it is buried deep within a subsection that applies only to certain debtors, that is, consumers who have allegedly abused the provisions of Chapter 7. The context of these provisions suggests that they should be applied not broadly to any violation of Rule 9011 in a Chapter 7 case, but only within the context of a motion to convert or dismiss under section 707(b).

There is authority that supports reading this generally worded provision in a more restricted fashion. Applying the maxims of ejusdem generis (general terms should be understood in context of specific ones) and noscitur a sociis (a term is known by the company it keeps), courts have applied narrow definitions to otherwise broad words, [\[FN11\]](#) phrases, [\[FN12\]](#) or subparts of various statutes, [\[FN13\]](#) recognizing that to do otherwise would create anomalous results, create broader applicability than legislatively intended, or both.

In *Eilbert v. Dennis (In re Eilbert)*, [\[FN14\]](#) for example, the debtor's husband had been killed in an automobile accident, leaving an estate of nearly \$500,000. The debtor and her husband's estate were sued for substantial damages by another party to the accident. In order to protect the debtor's assets, the debtor, then 74 years old, purchased a \$450,000 single premium variable annuity, electing to begin receiving payments just over two months later. Late that same year, judgment was entered against the debtor and her husband's estate in the state court lawsuit in the amount of \$662,502; within weeks, the debtor filed for bankruptcy protection and claimed an exemption in her interest in the annuity. The trustee and the state court plaintiff objected. [\[FN15\]](#)

In affirming the decision against the debtor, the court concerned itself with the meaning of "annuity" in the relevant statute which *246 allowed an exemption in a "payment under a pension, annuity, or similar plan or contract on account." [\[FN16\]](#) Acknowledging the broad and generic nature of the term, the court read "annuity" in conjunction with the terms surrounding it, concluding that the exemption statute intended to embrace "benefits in lieu of earnings after retirement, whether funded by the employer or purchased by the employee or the self

employed." [\[FN17\]](#) In part because of the debtor's annuity did not replace lost income and was not purchased over time as part of a long term retirement strategy, the debtor was not entitled to the exemption. [\[FN18\]](#)

Similarly, the court in *Official Committee of Tort Claimants v. Dow Corning Corp.* (In re Dow Corning Corp.), [\[FN19\]](#) determined that the power of a Chapter 11 unsecured creditors committee to "perform such other services as are in the interest of those represented" [\[FN20\]](#) did not encompass lobbying activities, despite the benefit that inured to the constituents. Rejecting the District Court's holding "that the plain meaning of subsection (c)(5) [of section 1103] was unambiguous and that the correct inquiry should be whether the lobbying activities in question are in the interest of those represented," [\[FN21\]](#) the court instead required that the "other services" must bear some relationship to the specifically enumerated powers in section 1103(c)(1) through (4).

Broader still is *In re Hages*, [\[FN22\]](#) in which the court was not dealing with a straightforward delineation of items as in *Eilbert and Dow Corning*, but with the interplay of general subsections within a particular section. After the debtor in *Hages* filed a petition for relief under Chapter 7 of the Code, the appointed trustee discovered through investigation that the debtor's residence had value in excess of the homestead exemption, and so the trustee retained a real estate agent to sell the home. The debtor then converted her case to one under Chapter *247 13 and the Chapter 7 trustee subsequently sought approval of her fees. [\[FN23\]](#) Among the issues in *Hages* was the application of section 326(c)'s limitation on compensation where more than one person serves as trustee in the case, specifically whether the Chapter 7 and Chapter 13 trustees serving in *Hages's* bankruptcy were to be treated as a single, composite trustee for fee purposes. [\[FN24\]](#)

In objecting to the fee application, the U.S. trustee argued that the language "more than one person serves as trustee in the case" was plain and required that the fees payable to the Chapter 13 trustee must be counted toward the maximum amount allowed the Chapter 7 trustee under section 326(a). [\[FN25\]](#) The court disagreed, looking to the language of section 326 as a whole. Because § 326(a) refers to "a case under chapter 7 or 11," while section 326(b) concerns "a case under chapter 12 or 13," the general reference to "the case" in section 326(c) must be limited to meaning "the case 'under chapter 7' (or chapter 11, 12 or 13), consistent with the type of case previously referred to in section 326(a) and (b)." [\[FN26\]](#) Therefore, the limitation of section 326 is applicable only where "more than one person serves as trustee in a case under a single chapter of the Bankruptcy Code." [\[FN27\]](#)

In keeping with these principles, the civil penalty required "[i]f the court finds that the attorney for the debtor violated rule 9011" should be interpreted in light of the provisions that surround it. The unamended language section 103(b) of the Code limits application of this language to only Chapter 7 cases. More specifically, this language would be a part of section 707(b), rather than standing alone within its own section of the Code. The two succeeding provisions define an attorney's certification on documents relating to the debtor's eligibility for Chapter 7 under the means test. Immediately preceding this language is the provision that sets forth the specific sanction to be imposed if there is a violation of Rule 9011 and the trustee is the party who successfully moves to convert or dismiss. Also in section 102 of the legislation is a sanctions provision directed at creditors, which is expressly related to *248 motions to convert or dismiss under section 707(b). [\[FN28\]](#) In sum, the most salient feature of section 102 of the legislation is

compliance with the means testing requirements and the penalties for failing to do so. Understanding this is key to determining what the phrase "the attorney for the debtor violated rule 9011" means, [\[FN29\]](#) and leads to the conclusion that only violations occurring in conjunction with the means test are sanctionable under proposed section 707(b)(4)(B).

III. REQUIRED SANCTIONS

Two provisions of the legislation address the specific sanctions that must [\[FN30\]](#) be imposed against individual Chapter 7 debtors' attorneys. The first is quite specific and drastically limits court discretion. It requires counsel for the debtor to reimburse the trustee's costs, including attorneys' fees, incurred in prosecuting a section 707(b) motion where the motion is granted and "the action of the counsel for the debtor violated" Rule 9011. The second goes to Rule 9011 violations generally, requiring at a minimum the assessment of a civil penalty payable to the trustee, United States trustee or bankruptcy administrator. [\[FN31\]](#)

***249** A. PAYMENT OF TRUSTEE EXPENSES

The provision requiring payment of the trustee's expenses is worthy of note because substantively it is not so much a sanction as it is a fee shifting provision, except that (1) the fee shifts only if the trustee prevails [\[FN32\]](#) and (2) the payor is not the losing party, but his lawyer. Requiring the courts to disregard other types of sanctions, regardless of their propriety, [\[FN33\]](#) proposed section 707(b)(4)(A) represents a significant departure from the primary goal of sanctions under Rule 9011, which is to deter improper litigation conduct. [\[FN34\]](#)

It is also extraordinarily punitive because counsel is liable for all the trustee's costs in successfully prosecuting the motion if the court finds a Rule 9011 violation. Perhaps this makes sense in a straightforward case in which the debtor's income and expenses simply do not comport with the requirements of the means test. But section 102 of the legislation is littered with words and phrases that are not amenable to easy interpretation, and judicial clarification will be required. For example, to rebut the presumption of abuse, the debtor may demonstrate "special circumstances" that warrant a deviation from the income and expense mandates of the means test, but Congress provides no indication as to what those circumstances might be. [\[FN35\]](#) There is no way for counsel to know before the fact how the courts will treat this phrase, yet counsel may be liable to the trustee if his interpretation proves unpersuasive.

A question not readily answerable concerns the frequency with which trustees will actually pursue section 707(b) motions. The ***250** legislation permits, but does not require, the trustee to so move. Section 102(c) of the legislation charges the U.S. Trustee [\[FN36\]](#) with the responsibility of reviewing Chapter 7 debtors' documents, after which it must file either a motion to dismiss or a statement indicating why such a motion is not appropriate. [\[FN37\]](#) Although the U.S. Trustee certainly has oversight of the appointed Chapter 7 trustees, [\[FN38\]](#) it is not clear whether there is any authority to delegate that duty to the trustees themselves. Particularly in the initial development of the case law after the legislation becomes effective, [\[FN39\]](#) when the thorny questions surrounding the means test will require judicial clarification, trustees may be hesitant to expend resources in pursuit of abusive debtors because the ability to recover their

expenses will be uncertain. [\[FN40\]](#)

Debtors' counsel may take some comfort in the express limitation of this provision. Although standing to move for a section 707(b) dismissal is expanded to include creditors and the trustee appointed in the case, [\[FN41\]](#) the reimbursement of litigation expenses provision applies only to those motions filed by the trustee, [\[FN42\]](#) and the civil assessment required under proposed section 707(b)(4)(B) may be paid only to the trustee, U.S. Trustee or bankruptcy administrator. Consequently, creditors must move to convert or dismiss with the understanding that ***251** they will likely bear their own expenses. [\[FN43\]](#) The court may order payment of a prevailing creditor's expenses, including attorney fees, under a traditional Rule 9011 analysis in addition to the civil penalty that is required, but that decision will rest within the sound discretion of the court.

B. ASSESSMENT OF A CIVIL PENALTY

The second, more general, sanction required is the assessment of a civil penalty, payable to the trustee, U.S. Trustee or bankruptcy administrator if counsel violates Rule 9011. The legislation states that the court shall order this penalty "at a minimum;" further sanctions apparently remain within the discretion of the court. Presumably, courts will be free to rely on established case law under Rule 9011 in this regard. They may, however, act with greater hesitation since any other sanction must be in addition to the civil penalty.

Of greater interest is the assessment of the civil penalty where the trustee is the successful section 707(b) movant. As discussed above, the legislation specifically sets forth the required sanction-counsel must reimburse the trustee's expenses in prosecuting the motion, creating what appears to be an exclusive remedy. Yet, because the assessment of the civil penalty is the minimum, rather than the only, sanction for general Rule 9011 violations, that provision seems to allow both the penalty and the payment of the trustee's expenses. Three interpretations could result.

The first is precisely what has just been suggested, that the legislation contemplates payment of the trustee's expenses in addition to the required civil penalty. This allows the compulsory language of both proposed sections 707(b)(4)(A) and (B) to be given effect. The result, though, is the harshest of the three interpretations, for counsel must be twice sanctioned for the same violation. On the other hand, there may be cases in which the court believes payment of the trustee's expenses is an insufficient sanction in light of the severity of counsel's ***252** conduct. In its present form, Rule 9011 permits a court to impose sanctions that exceed the amount of the opposing party's expenses if necessary to deter further unreasonable conduct. [\[FN44\]](#) The same result is achieved if proposed sections 707(b)(4)(A) and (B) are both applied to counsel's conduct.

The second possibility interprets the expense shifting provision as the exclusive sanction, awardable where the trustee is the successful section 707(b) movant and there is a violation of Rule 9011. Applying the same reasoning and doctrines of statutory construction set out above, [\[FN45\]](#) the seemingly general language of the civil penalty provision would be limited in light of the more specific language that surrounds it, restricting application to Rule 9011 violations other

than those that occur within the trustee's motion to convert or dismiss.

Finally, and perhaps most harmonious of the three, the court could simply conclude that the appropriate civil penalty to be assessed is the amount of the trustee's expenses incurred in prosecuting the section 707(b) motion. This interpretation is possible because the legislation permits the civil penalty to be paid to the trustee and nothing in the legislation appears to preclude this approach. Both provisions are given effect by this approach and it also serves to ameliorate the concerns that could lead courts to reject the first interpretation. There would be no double sanction against counsel and, should the court believe that requiring payment of the trustee's expenses, over which the court has no discretion, exceeds that which the circumstances require, it can at least decide not to compound that result.

In terms of the sanctions required, both generally and specifically for the trustee, the legislation represents a significant departure from the goal of Rule 9011 sanctions, which involves a balance between deterring improper behavior and preserving zealous advocacy. [\[FN46\]](#) By significantly restricting court discretion in determining the appropriate sanction, Congress seems to tacitly acknowledge the unreasonableness of the standards it seeks to impose on debtors' counsel under the legislation.

***253 C. Due Process Requirements under Rule 9011**

The foregoing discusses the sanctions the court is required to impose as if they were automatic in nature. Rule 9011 however, sets forth specific procedures that must be followed before sanctions may be imposed because an individual is entitled to receive notice and an opportunity to be heard before sanctions may be imposed. [\[FN47\]](#) The legislation is silent with respect to Rule 9011's procedural safeguards; thus, it must be presumed that they remain in full force.

Under Rule 9011, sanctions may be imposed on motion of a party in interest or the court's own initiative. If requested by a party in interest, a separate motion that specifically describes the offending conduct must be served on the party that presented it. The motion may not be filed with the court unless the document under suspicion is not withdrawn or corrected within 21 days. [\[FN48\]](#) Sanctions on the court's own initiative require an order to show cause that, like a party's motion, describes the specific conduct for which sanctions are under consideration. [\[FN49\]](#) Proper notice was described by *Simmerman v. Corino*:

The precise form of procedural protection required will, of course, vary with the circumstances of the case. With regard to the notice component, however, we have held that the mere existence of the rule does not satisfy the requirement. The party sought to be sanctioned is entitled to particularized notice including, at a minimum, 1) the fact that Rule 11 sanctions are under consideration, 2) the reasons why sanctions are under consideration, and 3) the form of sanctions under consideration. Only with this information can a party respond to the court's concerns in an intelligent manner. [\[FN50\]](#)

Due process also entails an opportunity to be heard in response to a request that sanctions be imposed. Like notice, "the form of counsel's opportunity to respond will vary with the circumstances." [\[FN51\]](#) The necessity of the opportunity as it pertains to sanctions against attorneys ***254** was well articulated by the court in *Fellheimer, Eichen & Braverman v. Charter*

Technologies:

Sanctions are not to be assessed without full and fair consideration by the court. They often entail a fine which may have more than a token effect upon an attorney's resources. More importantly, they act as a symbolic statement about the quality and integrity of an attorney's work - a statement which may have tangible effect[s] upon the attorney's career. [\[FN52\]](#)

The legislation does require sanctions upon a finding of a Rule 9011 violation, but does not obviate the need for separate notice and an opportunity to be heard to determine whether the violation has in fact occurred. Rule 9011 is not rendered wholly inapplicable, because the legislation conflicts only insofar as it redefines the attorney's certification within the limited context of a section 707(b) dispute. The Rule's remaining provisions, including those addressing due process concerns, survive intact and must be complied with before sanctions may be awarded under either of proposed sections 707(b)(4)(A) or (B). To conclude otherwise raises issues that could render the legislation constitutionally infirm, a result doubtlessly unintended by Congress.

IV. DEFINING A VIOLATION OF RULE 9011

The most challenging aspect in interpreting the legislation will involve defining just what constitutes a violation of Rule 9011. The two sanctions provisions of the legislation refer generally to findings that counsel violated the Rule. The two remaining provisions, proposed sections 707(b)(4)(C) and (D), amend the Rule itself by changing the attorney certification provisions; to the extent the legislation and the Rule conflict, the former must prevail. [\[FN53\]](#) Because they employ markedly *255 different language, each of the two violations provisions of the legislation will be discussed in turn.

A. PROPOSED SECTION 707(b)(4)(C)

Proposed section 707(b)(4)(C) of the legislation provides:

(C) In the case of a petition, pleading, or written motion, the signature of an attorney shall constitute a certification that the attorney has -

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion -

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

This language is simultaneously similar to and different from Rule 9011, which in pertinent part states:

(b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause

unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a ***256** nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. [\[FN54\]](#)

Both proposed section 707(b)(4)(C) and Rule 9011 require a prefiling investigation, but the character of that inquiry is not quite the same. Each also requires that the subject document have factual and legal support. The Rule is broader; both refer to a "petition, pleading or written motion," but the Rule additionally applies to "any other paper." Most important, the legislation is not directed at inappropriate conduct, as is the Rule. Instead, its focus is on compliance with the means test, attempting to impose strict liability upon counsel where abuse, as defined in the legislation, is found.

1. Petition, Pleading or Written Motion

Note that the language of proposed section 707(b)(4)(C) is directed at "a petition, pleading, or written motion." The petition part makes sense because section 707(b), both currently and as amended by the legislation, concerns itself with debtors who are making inappropriate use of the provisions of Chapter 7. Because the attorney's signature certifies under proposed section 707(b)(4)(C) that the pleading or written motion is not an abuse, it follows that each such document must bear some relationship to the means test. In other words, the reference to "abuse" limits application of the certification requirement of proposed section 707(b)(4)(C). The difficulty here is ascertaining exactly what pleadings or written motions will subject counsel to liability under the legislation.

***257** Courts construing statutes should do so in a way that gives every word some operative effect. [\[FN55\]](#) Thus, because Congress included both "pleading" and "written motion" in the legislation, it must be presumed that each bears a meaning that differs from the other. To be sure, attorneys commonly use the term "pleading" to refer to any document filed in a case, including motions. Such a generic interpretation of "pleading" is not permitted under the legislation, for doing so would deprive "motion" of operative effect, rendering it superfluous.

For clarification, we look to the rules. [Rule 7\(a\) of the Federal Rules of Civil Procedure](#) instructs that pleadings are complaints, answers, replies to counterclaims, answers to cross-claims, third party complaints, and third party answers. [\[FN56\]](#) Courts have been unwilling to approach [Rule 7\(a\)](#) with liberality. [\[FN57\]](#) Both in bankruptcy and federal civil litigation generally, the courts construe other documents as pleadings only in exceptional circumstances. [\[FN58\]](#)

This limited construction of a pleading applies in bankruptcy whenever an adversary proceeding is commenced, [\[FN59\]](#) or, pursuant to Rule 9014, in a contested matter if the court so

directs. [\[FN60\]](#) Conversion or dismissal under section 707(b) is governed by Rule 1017(e), which, unlike adversary proceedings or Rule 9014 contested matters, seems to make no allowance for the filing of any pleadings. [\[FN61\]](#) If courts are *258 hesitant to expand the application of [Rule 7\(a\)](#)'s construction of "pleading" within an adversary proceeding or nonbankruptcy litigation, surely they would not import that term into Rule 1017(e) when there is no textual authority to do so.

Like a pleading, the definition of "motion" is not without limitation; it is a request for an order. Because of Rule 1017(e), motions are certainly going to be filed in section 707(b) disputes, but it is difficult to imagine when the debtor will be the movant. In practice, the trustee, a creditor, or some other entity will file a motion to dismiss or convert under section 707(b), and the debtor will file a response. A strict reading of the legislation removes the response from the certification requirement of proposed section 707(b)(4)(C). Thus, neither "pleading" nor "written motion" appears to have any operative effect.

If anything saves proposed section 707(b)(4)(C), it must be the mere possibility that some pleading or written motion could be filed by the debtor within the context of a section 707(b) dispute. The debtor could, for example, request that the court determine whether a particular debt is entitled to priority, the answer to which could alter the income and expense ratio under the means test. Such scenarios are difficult to imagine and not likely to arise, but the prospect that the debtor might file a pleading or written motion bearing on a finding of abuse allows proposed section 707(b)(4)(C) to be construed in a way that each of its terms is given operative effect.

Critics could easily charge that the use of "pleading or written motion," especially the former, is the result of simple carelessness on the part of Congress. The true aim of this section is to impose strict liability on counsel, requiring sanctions against any attorney who incorrectly determines that his client is eligible for Chapter 7 relief under the means test. This aim is evident from the requirement that any petition, pleading or written motion be certified by counsel as "not an abuse." But in its zeal to curb what it perceives to be rampant abuse of the Chapter 7 discharge, Congress seems to have simply incorporated wholesale the language of Rule 9011 without considering the very unique application *259 of the legislation. Speaking in terms of a petition, pleading or written motion within the context of Rule 9011 makes sense, because the Rule is intended to cover all papers presented to the court. Inclusion of "pleading or written motion" in the legislation seems to have less to do with sensible policy than with Congressional caprice.

2. Nature of Prefiling Investigation

Under Rule 9011, attorneys and pro se litigants must conduct an inquiry that is reasonable under the circumstances. Courts take a variety of factors into consideration, including

(1) the time available to the signer for investigation; (2) the extent of the attorney's reliance upon his client for the factual support for the document; (3) the feasibility of the pre-filing investigation; (4) whether the signing attorney accepted the case from another member of the bar or forwarding attorney; (5) the complexity of the factual and legal issues; and (6) the extent to which development of the factual circumstances underlying the claim requires discovery. [\[FN62\]](#)

In a peculiar departure from established principles, the legislation requires counsel to conduct "a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion." Interpretive difficulty is immediately apparent. The "gave rise to" language suggests causation, i.e., the circumstances that led to the debtor's financial distress and the consequent determination that bankruptcy relief was in order.

To a large extent, however, the reason why a debtor files for bankruptcy is irrelevant, especially in consumer cases. Neither current law nor even the means test is all that concerned with the particular misfortune that has befallen any given debtor, [\[FN63\]](#) and eligibility does not *260 turn on normative value judgments. [\[FN64\]](#) There are exceptions in both the Code [\[FN65\]](#) and the legislation, [\[FN66\]](#) but as a general rule the prepetition circumstances that compelled the debtor to seek bankruptcy relief bear little on whether the debtor is eligible for such relief under the Code. [\[FN67\]](#)

If the debtor is seeking bankruptcy protection with inappropriate motives, the circumstances that gave rise to the petition may become relevant. It is entirely appropriate to examine whether the debtor's bad faith or improper conduct, rather than financial distress, have resulted in the filing of a bankruptcy petition. [\[FN68\]](#) But these cases are already proscribed by Rule 9011's requirement that a paper not be presented for an improper purpose, such as harassment, unnecessary delay, or increased costs to other parties and the courts. [\[FN69\]](#)

The language Congress has chosen with respect to the prefiling investigation serves little useful purpose. Courts must resolve the distinction between the legislation's required "investigation" and the "inquiry" called for under Rule 9011, although there is little meaningful definitional difference. [\[FN70\]](#) The focus of the inquiry or investigation differs, however, with Rule 9011 requiring a general inquiry that is reasonable under the circumstances, while the legislation looks to the reason for the bankruptcy. The legislation is arguably more narrow. The argument could be made that the petition, pleading or written motion is factually and legally warranted based on an investigation that satisfies the legislation's "gave rise to" language, but which would fail under "reasonable under the circumstances" test of Rule 9011. There is *261 something disingenuous about such an argument, though, because it amounts to counsel stating that he knows why the debtor is filing for bankruptcy, and so has satisfied his investigation requirement, even though he knows little else. Unwilling to allow culpable attorneys to avoid sanctions on this basis, the courts will likely continue to require the type of inquiry that would satisfy the Rule 9011 standard.

3. Well Grounded in Fact

This aspect of the legislation should not give rise to great difficulty. As just discussed, the prefiling investigation required under the legislation could, but probably will not, lead to some different standard as to the factual basis supporting the petition, pleading or written motion. Instead of, or perhaps in addition to, the investigation into the reason for the bankruptcy, the courts will likely continue to examine whether counsel's factual inquiry was reasonable under the circumstances. Unless the reason for the petition, pleading, or written motion itself is suspect, the legislation's investigation requirement is inadequate to find the requisite factual support.

The legislation also reverts to previously used Rule 9011 language, i.e., "well grounded in fact," while Rule 9011 as amended in 1997 requires that factual contentions have evidentiary support. In *Hedges v. Yonkers Racing Corp.*, [FN71] the Second Circuit interpreted a parallel amendment to Rule 11 [FN72] in a way that essentially described the amendment as one more of degree than of kind. Discussing the specific issue of whether an attorney may rely on the objectively reasonable representations of the client, the *Hedges* court discussed the permissibility of such reliance under the "well grounded in fact" standard and stated that, as amended, Rule 11 makes this "even clearer." [FN73] Stated another way, the amendment enhances the objective nature of the prefiling inquiry. [FN74] In a subsequent case, the Second Circuit clarified that the amendment constrains the court in the *262 imposition of sanctions, which would not be permitted unless the factual contention is "utterly lacking in support." [FN75]

Despite the different treatment of factual allegations under the legislation and Rule 9011, it is doubtful that there will be any significant practical effect. Except in cases involving very close calls, the distinction between the two is slight. Moreover, many of the facts that support the bankruptcy petition will need to be filed with the court, including detailed statements of net monthly income, payment advices, tax returns, and other information that bears on means test eligibility. Thus, much of the factual support will be provided along with the petition, or shortly thereafter.

Interestingly, the language disparity is probably a mistake. The push to reform the Code began in late 1997, just prior to the time the amendment to Rule 9011 became effective. [FN76] Although it has yet to be enacted into law and various amendments have been made over the last four years, the change in the factual support standard in Rule 9011 was quite likely overlooked.

4. Warranted by Existing Law or a Good Faith Argument for the Extension, Modification, or Reversal of Existing Law

a. Existing Law

The petition, pleading, or written motion must be "warranted by existing law," a phrase over which little controversy is likely to arise. Although linked to the distinct prefiling investigation into the circumstances giving rise to the filing, this requirement tracks Rule 9011 word for word. The standards of Rule 9011 may be fully applied here, but to wholly uncharted bankruptcy territory.

Making this aspect of the legislation interesting is the fact that the seemingly rigid and formulaic means test is littered with language that leaves plenty of room for legal disputes. An obvious example is the provision that allows a debtor to rebut the presumption of abuse "by demonstrating special circumstances that justify" deviation from the means test calculations if there is no "reasonable alternative." [FN77] It will be up to the courts to set the parameters of both "special circumstances" *263 and "reasonable alternative," and it is fair to say this will be done on a case by case basis.

Section 102 of the legislation is replete with other language that invites litigation. Many

allowable expenses are qualified by "actual," "reasonable," and/or "necessary." [FN78] Current monthly income is measured from a mysterious "date of determination," [FN79] and includes amounts paid by some other entity on a "regular" basis to the "household expenses" of the debtor or his dependents. [FN80] Where the presumption of abuse under the means test either does not arise or has been rebutted, the court may still find abuse if the petition was filed "in bad faith," or where "the totality of the circumstances ... of the debtor's financial situation demonstrate abuse." [FN81] Case law interpreting similar language elsewhere in the Code will provide some guidance, [FN82] but not certainty. There is no way of knowing how the courts will treat these and other *264 unclear terms within the specific context of the means test. As the case law develops in this area, some guidelines will emerge. In the meantime, it is fair to conclude that whether an argument is warranted by existing law will depend largely on the reasonableness of counsel's interpretation of the legislation's language.

b. Good Faith Argument for the Extension, Modification, or Reversal of Existing Law

As with the requirement of factual support, this aspect of the legislation tracks that of Rule 9011 prior to the 1997 amendment in requiring that the argument be made in good faith. As amended, Rule 9011 looks to whether the argument is frivolous, representing a move toward greater objectivity. The legislation arguably creates a more lenient standard, not quite reviving the "empty head, pure heart" defense that the Rule has sought to eliminate, [FN83] but perhaps allowing some measure of the attorney's subjective belief.

In application, a more lenient standard based on subjective good faith is not likely. Like the factual distinction, the difference here is one of degree rather than kind, and the two can easily become blurred. Prior to being amended, courts examined objective good faith by looking, in part, at whether the argument was frivolous; [FN84] post-amendment, determining whether an argument is not frivolous seems to involve at least some measure of good faith. [FN85] Of course, objective good faith is premised on the "reasonable under the circumstances" inquiry mandated by Rule 9011, which differs from the pre-filing investigation under the legislation. Both, however, require reasonableness, and it is fair to conclude that courts will view a "good faith argument for the extension, modification, or reversal of existing law" in a manner that differs little, if at all, from existing precedent.

*265 5. "Not An Abuse"

An attorney's signature on his client's bankruptcy petition constitutes a certification that there is no abuse. A cursory reading of this language suggests that if abuse is found, debtor's counsel is liable; in other words, the attorney faces strict liability based on nothing more than having landed on the losing side of a legal argument. However, both a careful reading of the language and the long standing and well accepted principles under Rule 9011 jurisprudence allow a different conclusion.

Neither Rule 9011 nor Rule 11 has been interpreted to penalize an unsuccessful litigant, or his attorney, for the lack of success alone. [FN86] Even the probability of losing is not enough. As the court in *Taylor v. United States* stated, although "sanctions are clearly appropriate whenever

a reasonable inquiry has or would have indicated that the legal or factual basis of the claim is untenable, when such inquiry merely reveals a likelihood of losing, a lawyer does not violate Rule 11 by maintaining the claim." [\[FN87\]](#) Indeed, courts have been mindful to avoid using the wisdom of hindsight, testing the signor's conduct by examining what was reasonable for counsel to believe at the time the document was presented. [\[FN88\]](#) Zealous advocacy should not be unduly chilled, and there should be a healthy respect for the resultant contribution to the continued evolution of the law. [\[FN89\]](#) All doubt should be resolved in favor of the signor. [\[FN90\]](#)

A careful review of the language of proposed section 707(b)(4)(C) suggests Congressional acknowledgement of these Rule 9011 concepts because an interpretation that requires strict liability in any case in which the court determines that abuse is present reveals an inherent conflict - a good faith argument for the extension, modification, or reversal of existing law, i.e., section 707(b) as amended by the legislation, carries with it an implication that without the change being advanced, the client's position is not warranted by existing law, i.e., the debtor's case is presumed to be an abuse. Because statutory conflicts *266 should be harmonized wherever possible, it is possible to conclude that proposed section 707(b)(4)(C) does not require an after the fact analysis, with sanctions imposed against counsel every time a case is determined to be abusive. Instead, the inquiry is more characteristic of that currently conducted under Rule 9011, with the inquiry focusing temporally at counsel's signing of the petition. That is, if the facts and the law (or a good faith argument for a change thereof) support counsel's reasonable conclusion at the time the petition is signed that the case is not an abuse, no sanctions will be imposed irrespective of some later determination that counsel was in error.

This conclusion resolves what would otherwise be an irreconcilable conflict and allows the provision to be read in a manner consistent with the settled purpose and limitations of Rule 9011 sanctions. It also makes sense based on the legislation itself. Had Congress truly wanted strict liability in any case in which abuse is found, even after disputed issues are judicially resolved, it need not have bothered with the extensive language concerning whether the case is well grounded in fact or law, nor would it have allowed an argument for a change in the law; indeed, this language would be rendered superfluous.

Moreover, Congress demonstrates in proposed section 707(b)(4)(D) that it is adept at brevity in requiring that the attorney certify, after an inquiry, to the correctness of the schedules. [\[FN91\]](#) Strict liability for a finding of abuse could easily have been achieved in a similar manner in proposed section 707(b)(4)(C) by simply providing that counsel certify that the case is not an abuse. Because Congress did not so limit itself, and because all the section's language must be given operative effect without conflict, one can properly conclude that the attorney's liability where abuse is found is not nearly so broad as the legislation at first blush appears.

***267 B. PROPOSED SECTION 707(b)(4)(D)**

This provision is also directed at the signature of counsel, requiring that:

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

This language does resolve a minor judicial conflict. Not all courts are convinced that Rule 9011 can be used to sanction attorneys with respect to the schedules because Rule 9011(a) [\[FN92\]](#) expressly removes schedules from the signature requirement as it pertains to counsel. [\[FN93\]](#) Even if inapplicable, however, the courts are naturally unwilling to allow a culpable attorney to escape liability by simply claiming that the Rule does not apply, and sanctions may be imposed under other sources, such as section 105 [\[FN94\]](#) or the court's inherent authority. [\[FN95\]](#)

The standard for imposing sanctions does differ, however. Rule 9011 looks to objective reasonableness while other sources of sanctions typically require bad faith. [\[FN96\]](#) In expressly applying a certification requirement with respect to the schedules, proposed section *268 707(b)(4)(D) apparently swings the pendulum in the opposite direction, holding counsel accountable if the information in the schedules is incorrect, seemingly without regard to the reason for the error, whether it be mere inadvertence or outright fraud.

The courts must set the parameters of three important terms within proposed section 707(b)(4)(D), none of which is directly qualified by reasonableness or any other adjective. First, they must determine the scope of the inquiry that is required. It must also be determined when the information in the schedules is actually incorrect, and when an attorney may be said to have knowledge of that incorrectness.

1. Extent of the Inquiry

An issue that will undoubtedly arise is the extent of inquiry required. Rule 9011 requires an inquiry that is "reasonable under the circumstances," and, as discussed in Part III.A.2. above, the legislation requires counsel to perform a "reasonable investigation into the circumstances that gave rise" to the subject document. But with proposed section 707(b)(4)(D), the inquiry is not qualified by reasonableness; its omission could prove troublesome.

It is an oft cited principle that where Congress includes a particular word in one provision, but omits it from a similar provision, the omission is intentional and should be given effect. [\[FN97\]](#) One could argue that by using "investigation" in one part of the legislation and "inquiry" in the other, Congress intended that the two have different meanings and, therefore, the courts may impute a reasonableness requirement into the inquiry. [\[FN98\]](#) The two terms, however, differ little as a substantive matter, [\[FN99\]](#) diluting the strength of such an argument. Moreover, the lack of a reasonableness requirement in the legislation must still be squared with its inclusion in Rule 9011, which requires an inquiry that is reasonable under the circumstances. Thus, separating a bare inquiry from a reasonable one is a necessary task.

It is possible that the use of the word inquiry, without more, requires counsel to conduct an exhaustive investigation of the debtor's *269 assets, liabilities, and every other bit of information disclosed in the schedules. This would include acquisition of bank statements, appraisal of household goods, title checks, and a host of other activities that would be far too costly for most, if not all, consumer debtor practices to afford. As a practical matter, it is highly unlikely that the courts would give the legislation such an onerous effect. To do so would be to impose a level of

exactitude that the nature of the schedules itself renders impossible. [\[FN100\]](#)

Moreover, courts have long recognized that attorneys may be dependent upon the information supplied by the client, and that independent corroboration of the information might not be possible. The client may be in a better position to conduct an inquiry, [\[FN101\]](#) or simply disorganized. [\[FN102\]](#) Pertinent information may be unavailable for any number of reasons. Moreover, not all clients are fully candid with their attorneys, and the courts have demonstrated some reluctance in sanctioning attorneys who have been misled or deceived by their clients. [\[FN103\]](#) The court in *In re Alderson*, [\[FN104\]](#) for example, declined to impose sanctions against the debtor's attorney because the debtor's "inadequate and unconventional" bookkeeping methods allowed him "to conceal his true financial condition and hamper his attorney's ability to verify the accuracy of the information" the debtor did provide. [\[FN105\]](#) Interpreting the inquiry that the legislation requires of counsel as encompassing verification under such difficult, if not impossible, circumstances is draconian, for it imposes a virtually insurmountable task.

Although "inquiry," as used in proposed section 707(b)(4)(D) must mean something less than a search for exactitude, it is equally improbable that a bare inquiry would be sufficient to satisfy the *270 legislation's inquiry requirement. Section 523(a)(2) of the Code [\[FN106\]](#) presents an analogous situation. Subparagraph (B) provides that a debt obtained by the debtor's use of a material false statement in a written financial statement, on which the creditor reasonably relied, is nondischargeable. Subparagraph (A) renders nondischargeable debts incurred through the debtor's misrepresentation, false pretenses, or actual fraud, without reference to reliance.

The disparity was resolved in *Field v. Mans*, [\[FN107\]](#) in which the Supreme Court held that the inclusion of "reasonable" in section 523(a)(2)(B), but not section 523(a)(2)(A), meant that the latter required something different, which the Court determined to be the more lenient standard of justifiable reliance. [\[FN108\]](#)

Of course, the context of *Field v. Mans* differs from that with which this Article deals because the *Field v. Mans* Court relied heavily on common law tort doctrines, but this distinction does not detract from the usefulness of the case in the present context. Because the *Field v. Mans* Court rejected the argument that the absence of a specific standard meant that only actual reliance was required, [\[FN109\]](#) courts dealing with attorneys under the legislation can require more than a bare inquiry and the attorney's subjective position within it. A bare inquiry is at odds with Congressional intent because the legislation plainly attempts to impose greater liability on debtors' counsel than that which currently may be imposed. Moreover, courts would no doubt be constrained to permit such liberality on the part of counsel because it would represent an abdication of the courts' desire and authority to control attorney conduct before them.

The level of inquiry required, then, may be gleaned in part from *Field v. Mans*, in which the Court stated:

[I]t is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own. [\[FN110\]](#)

*271 To continue the analogy between the reasoning of *Field v. Mans* and the language of the

legislation, then, an "inquiry," which need not be "reasonable" or "reasonable under the circumstances," is required when information given by the client appears incorrect on its face or serves as a warning of an inaccuracy. Although this interpretation lessens the inquiry requirement under Rule 9011, which is arguably inconsistent with what Congress wants to do, the case law supports this reading of the actual language employed in the legislation itself.

If we take this reasoning one step further, the ironic conclusion is that the standard departs little, if at all, from that currently required, save for the clarification that, under Rule 9011, counsel is accountable for information in the schedules. *Field v. Mans* discusses justifiable reliance from the standpoint of "one of [the person's] own knowledge and intelligence," which, here, would be debtors' counsel generally. Thus, something very close to reasonableness emerges. The analysis would not be one that is purely subjective; instead, the courts would examine counsel's conduct in light of that of a knowledgeable and intelligent attorney who represents Chapter 7 debtors.

2. Knowledge

Congress has declined to indicate whether actual knowledge is required or, conversely, whether counsel is liable for what should have been known. But this issue is not a significant one. As used in the legislation, "knowledge" is not fully unqualified; it is tied to the inquiry. Once the courts set out the inquiry that is required, counsel will be accountable for errors of which he should have been aware under that standard.

3. Incorrect

That the attorney certifies that the information in the debtor's schedules is correct is perhaps the most interesting aspect of proposed section 707(b)(4)(D)'s language because of Rule 1009(a), which allows a debtor to amend the schedules as a matter of course throughout the bankruptcy case. [\[FN111\]](#) The debtor's right to amend the schedules is *272 virtually unqualified, unless bad faith or prejudice has been shown. [\[FN112\]](#) Correlatively, the debtor is under a duty to amend the schedules once he becomes aware that the information provided needs to be changed or supplemented. [\[FN113\]](#)

Counsel's obligation here is twofold. There is a duty to the client, of course, but also as an officer of the court. [\[FN114\]](#) The legislation suggests that, in fulfilling this two-pronged duty pertaining to amendments, counsel may expose himself to sanctions because the very filing of the amendment implies that the schedules were not fully accurate as originally filed. The question, then, is whether counsel may be sanctioned based on the initially incorrect information, irrespective of the amendment, or whether the amendment relieves counsel from violation of the certification requirement.

In both *In re Ace Finance Co.* [\[FN115\]](#) and *In re Ball*, [\[FN116\]](#) the courts state that an amendment to the schedules relates back to the originals. *In re Lagniappe Inn of Nashville, Ltd.* [\[FN117\]](#) reached a similar conclusion with respect to incorrect information in the petition. Under these decisions, there is room to argue that counsel is not liable for the original inaccuracy;

because the amendment relates back to the original, there is no incorrect information for which counsel can be held accountable. Although there are cases disagreeing with the proposition that an amendment to the schedules relates back to the original, the difference seems to rest on the substantive difference in the effect. That is, the amendment will not relate back if doing so would diminish some other substantive duty of the debtor or right of another party in interest. [\[FN118\]](#)

***273** With respect to the legislation, relation back makes sense so long as there is no bad faith or prejudice resulting from the amendment. [\[FN119\]](#) A contrary conclusion results in a triumph of form over substance, which the law generally disfavors. Relation back also reconciles the legislation with Rule 1009's liberal allowance of amendments, and counsel's duties that arise thereunder. Furthermore, because the legislation conflicts with Rule 9011 only insofar as the certification is concerned, it must be presumed that the remainder of that Rule remains in full force, including Rule 9011(c)(1)(A), the safe harbor. Thus, an amendment that corrects information in the schedules would be roughly equivalent to the correction of a document pursuant to the safe harbor provision.

Despite the cases supporting the relation back principle regarding amended schedules, and because of the potential harshness involved if the information originally provided in the schedules is incorrect, perhaps the best approach for attorneys is to comply to the letter with the standards under Rule 9011. Of the disputable terms in proposed section 707(b)(4)(D), the required inquiry will likely be emphasized. It is doubtful that the legislation can or would be interpreted to require an inquiry that is more exacting than the "reasonable under the circumstances" standard under Rule 9011. If done properly, counsel will know all that he can or should know with respect to inaccuracies, thereby avoiding the pitfalls involved in the analysis of when sanctions may be imposed for originally supplying incorrect information.

V. CONCLUSION

While not pretending to be dispositive of the myriad issues that could arise under the legislation, nor of the larger policy implications of the specific provisions discussed herein, the purpose here has been to give meaning to the language Congress has chosen and to understand its inherently problematic nature. It is certainly preferable that thoughtful ***274** consideration be given to this or any other legislation that adopts a framework of penalties arising from particularized attorney/client relationships as part of the legislative process. Otherwise, such provisions will be the law, and giving them meaningful effect becomes a necessary task, despite the fact that they are neither well constructed as a statutory matter, nor wise as a matter of policy.

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[FN1]. Bankruptcy Abuse Prevention and Consumer Protection Act of 2001, H.R. 333, 107th Cong. (2001) (hereinafter, "the legislation").

[FN2]. [11 U.S.C. § 101](#), et seq. (hereinafter, "the Code")

[FN3]. Id. § 707(b). This subsection currently provides:

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

Id.

[FN4]. This is, admittedly, an overly simplified statement of the means test.

[FN5]. For the sake of brevity, all references to attorneys include only this limited group affected by the legislation, unless otherwise noted.

[FN6]. Because the pertinent section of the legislation is extremely long, the four provisions discussed herein will be referred to as "proposed section 707(b)(4)(A)," "proposed section 707(b)(4)(B)," "proposed section 707(b)(4)(A)," proposed section 707(b)(4)(C)" and "proposed section 707(b)(4)(D)," respectively. References to "section 707(b)," without further qualification, mean the current text of that section of the Code.

[FN7]. [Fed. R. Bankr. P. 9011](#) (hereinafter "[Rule 9011](#)" or "the Rule").

[FN8]. [11 U.S.C. § 103\(b\)](#) ("Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.").

[FN9]. One could argue that some of the information in the schedules has little to do with the means test. Because the means test involves a comparison of the debtor's income, after deducting allowable expenses and taking account of secured and priority indebtedness, with unsecured debt, schedules D, E, F, I and J are relevant. On the other hand, information found in the remaining schedules, such as property in which the debtor has an interest, appears to be irrelevant. This enhances the position of the legislation's critics because, in some cases, the liquidation of the debtor's property could yield a greater and more immediate payment to unsecured creditors than they would receive if the case were converted or dismissed.

[FN10]. [United States v. Ron Pair Industries, 489 U.S. 235, 241 \(1989\)](#) (where statutory language is plain, sole function of courts is to enforce it according to its terms).

[FN11]. In re [Nam, 254 B.R. 834 \(E.D. Pa. 2000\)](#).

[FN12]. Official Comm. of Tort Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 1998 U.S. App. LEXIS 7123 (6th Cir. April 6, 1998).

[FN13]. In re [Hages, 252 B.R. 789 \(Bankr. N.D. Cal. 2000\)](#).

[FN14]. [162 F.3d 523 \(8th Cir. 1998\)](#).

[FN15]. [Id. at 525](#).

[FN16]. [Id. at 527](#).

[FN17]. [Id.](#)

[FN18]. [Id.](#) The court also rejected the debtor's contention that she was entitled to the exemption by virtue of its "on account of age" language, stating that, under the debtor's reasoning "no debtor past retirement age would have any assets subject to execution, could live in a million-dollar home, have a substantial stream of income, virtually live off his creditors, and yet be judgment proof." [Id. at 526](#). See *infra* notes 19-21 and accompanying text.

[FN19]. 1998 U.S. App. LEXIS 7123 (6th Cir. April 6, 1998).

[FN20]. [11 U.S.C. § 1103\(c\)\(5\)](#).

[FN21]. Official Committee of Tort Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 1998 U.S. App. LEXIS 7123, *7.

[FN22]. [252 B.R. 789 \(Bankr. N.D. Cal. 2000\)](#).

[FN23]. [Id. at 791](#).

[FN24]. Section 326(c) provides: "If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be." [11 U.S.C. § 326\(c\)](#).

[FN25]. The court noted that the parties assumed the court had no power to reduce the Chapter 13 Trustee's compensation, but it did not decide this issue. [252 B.R. at 791](#).

[FN26]. [252 B.R. at 796](#).

[FN27]. [Id. at 799](#).

[FN28]. Section 102(a)(2)(C) of the legislation provides:

[§ 707(b)](5)(A) Except as provided in subparagraph (B) and subject to paragraph (6), the court may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion brought by a party in interest (other than a trustee, United States trustee, or bankruptcy administrator) under this subsection if -

- (i) the court does not grant the motion; and
- (ii) the court finds that -

(I) the position of the party that brought the motion violated [rule 9011 of the Federal Rules of Bankruptcy Procedure](#); or

(II) the party brought the motion solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

Although by its language this section actually applies to any party other than the trustee, U.S. Trustee and bankruptcy administrator, its practical effect will be borne by creditors. The reference in the provision to "subparagraph (B)" is the exception for motions filed by certain small business; "paragraph (6)" is the safe harbor provision regarding the means test.

[FN29]. [Gutierrez v. Ada, 528 U.S. 250 \(2000\)](#). Although not a bankruptcy case, the analysis in Gutierrez is remarkably analogous to the legislation.

[FN30]. Both provisions are mandatory, as they both state that the court "shall" order the sanctions.

[FN31]. The Congressional assumption that a financial penalty is most appropriate in all cases warrants comment. Although commonly ordered, there are many instances in which other sanctions, such as a reprimand, may be better suited to the particular circumstances. In *Household Credit Servs. v. Drago* (In re [Dragoo](#)), [219 B.R. 460 \(Bankr. N.D. Tex. 1998\)](#), the

court suspended two attorneys from practicing in the Bankruptcy Court for the Northern District of Texas for a period of four years and imposed conditions to be met prior to readmittance. The attorneys, husband and wife law partners, had repeatedly filed nondischargeability complaints based on fraud without making inquiry and without proper service. The court determined suspension from practice to be most appropriate because, inter alia, the husband had suffered depression, which in part caused the problems that led to sanctions, and the wife steadfastly refused to accept responsibility for the inappropriate filings.

Even in cases involving less egregious conduct, a nonmonetary sanction, ranging from "a warm friendly discussion on the record, a hard-nosed reprimand in open court, [or] compulsory legal education," [Thomas v. Capital Sec. Serv., Inc.](#), 836 F.2d 866, 878 (5th Cir. 1988), may be appropriate.

For a thorough discussion of varied approaches to sanctions, see Georgene Vairo, [Rule 11 and the Profession](#), 67 [FORDHAM L. REV.](#) 589 (1998) for a discussion of cases imposing nonmonetary sanctions under [Rule 11 of the Federal Rules of Civil Procedure](#).

[\[FN32\]](#). Presumably, if the trustee's conduct violates [Rule 9011](#), the court may order payment of the debtor's expenses or some other sanction.

[\[FN33\]](#). See supra note 31.

[\[FN34\]](#). In re [KTMA Acquisition Corp.](#), 153 B.R. 238, 248 (Bankr. D. Minn. 1993).

[\[FN35\]](#). For a more complete discussion of the components of the legislation that will require judicial clarification, see Part III.A.4.a.

[\[FN36\]](#). The legislation refers to both the U.S. Trustee and the bankruptcy administrator. For convenience, both are referred to as "U.S. Trustee" unless otherwise noted.

[\[FN37\]](#). The manner in which Congress charges the United States Trustee with the duty to review debtors' documents demonstrates, in this author's opinion, the limited extent to which Congress understands the law it is seeking to so dramatically amend. The legislation imposes this responsibility by amending [11 U.S.C. § 704](#), which sets forth the duties of the trustee appointed in a Chapter 7 case. The duties of the United States Trustee are found at [28 U.S.C. § 586](#). The bankruptcy administrator is not governed directly by statute, but through § 302(d)(3)(i) of the Bankruptcy Judges, United States Trustee and Family Farmer Bankruptcy Act of [1986, P.L. No. 99-554](#). Standing of the bankruptcy administrator to appear and be heard in bankruptcy cases derives from § 317(b) of the Federal Courts Study Committee Implementation Act of 1990. At a minimum, it seems Congress is somewhat confused about the basic distinction between the trustee, on the one hand, and the United States Trustee or bankruptcy administrator on the other.

[\[FN38\]](#). See *id.*

[\[FN39\]](#). The legislation would become effective 180 days after enactment.

[\[FN40\]](#). Another factor that may influence the vigor with which trustees will pursue Chapter 7 debtors for abuse is the extent to which their own practice includes representation of consumer debtors.

[\[FN41\]](#). Current law allows § 707(b) dismissal only on motion of the U.S. Trustee or on the court's own initiative. [11 U.S.C. § 707\(b\)](#).

[\[FN42\]](#). [Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1 \(2000\)](#) (use of "trustee" in [11 U.S.C. § 506\(c\)](#) means only the trustee, not other parties in interest, may surcharge collateral of secured creditors).

[\[FN43\]](#). Creditors must also be cognizant of proposed [§ 707\(b\)\(5\)](#). Creditors who unsuccessfully move to dismiss or convert may be liable to the debtor for his reasonable costs in contesting the motion, including reasonable attorneys' fees. In addition to losing on the merits of the motion, the court must find that the creditor either violated Rule 9011 or brought the motion solely for the purpose of coercing the debtor into waiving a right guaranteed under the Code. See *supra* note 28 for the text of this proposed provision.

Note that, unlike the provisions relating to debtors' counsel, this provision is not aimed directly at the creditor's attorney, nor are the sanctions mandatory.

[\[FN44\]](#). In re [Kilgore, 253 B.R. 179, 192 \(Bankr. D.S.C. 2000\)](#).

[\[FN45\]](#). See *supra*, notes 11-29 and accompanying text.

[\[FN46\]](#). *Halverson v. Funaro* (In re [Funaro, 263 B.R. 892, 901 \(8th Cir. B.A.P. 2001\)](#) ("Sanctions for litigation abuse are intended as a balance between responsible conduct by the litigants and 'creative and ardent representation.'") (citing J. Scott Humphrey, [Sanctions Against the Creditor's Attorney in Non-reorganization Bankruptcy Proceedings, 6 BANKR. DEV. J. 481, 482 \(1989\)](#)).

[\[FN47\]](#). *Karsch v. LaBarge* (In re [Clark, 223 F.3d 859, 864 \(8th Cir. 2000\)](#)).

[\[FN48\]. Fed. R. Bankr. P. 9011\(c\)\(1\)\(A\).](#)

[\[FN49\]. Fed. R. Bankr. P. 9011\(c\)\(1\)\(B\).](#)

[\[FN50\]. *Simmerman v. Corino*, 27 F.3d 58, 64 \(3d Cir. 1994\)](#) (citations omitted).

[\[FN51\].](#) Id.

[\[FN52\]. *Fellheimer, Eichen & Braverman v. Charter Technologies*, 57 F.3d 1215, 1227 \(3d Cir. 1995\).](#)

[\[FN53\].](#) See, e.g., *American Law Center PC v. Stanley* (In re [Jastrem](#)), [253 F.3d 438 \(9th Cir. 2001\)](#). That court stated:

[A] Bankruptcy Rule cannot create an exception to the Bankruptcy Code. The Supreme Court is authorized under [28 U.S.C. § 2075](#) to prescribe rules of bankruptcy procedure, but the rulemaking power under [§ 2075](#) is limited in the same way as the rulemaking power under the Rules Enabling Act, [§ 2072\(b\)](#). Both sections provide, "Such rules shall not abridge, enlarge, or modify any substantive right." We have interpreted [§ 2075](#) to mean that "any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code. Id. at 441-42 (citations omitted).

[\[FN54\]. Fed. R. Bankr. P. 9011\(b\).](#)

[\[FN55\]. *Haines v. Regina C. Dixon Trust* \(In re \[Haines\]\(#\)\), 178 B.R. 471, 474 \(Bankr. W.D. Mo. 1995\)](#) (quoting [United States v. Nordic Village, Inc.](#), [503 U.S. 30 \(1992\)](#)).

[\[FN56\]. Fed. R. Civ. P. 7\(a\).](#)

[\[FN57\].](#) See, e.g., [Phinney v. Paulshock](#), [181 F.R.D. 185, 206 \(D.N.H. 1998\)](#) (motion for sanctions is not a pleading and may not be stricken pursuant to Rule 12(f)); In re [Harwell](#), [80 B.R. 901 \(Bankr. W.D. Tenn. 1987\)](#) (motion for summary judgment is not a pleading for purposes of amendment of complaint as a matter of course).

[\[FN58\]. *Carter v. American Bus Lines, Inc.*, 22 F.R.D. 323 \(D. Neb. 1958\)](#) (court concluded it had power to allow amendment of motion to dismiss, which was previously overruled, to include an additional and newly discovered ground that would have been waived).

[\[FN59\]. Fed. R. Bankr. P. 7007.](#)

[\[FN60\]. Fed. R. Bankr. P. 9014.](#)

[\[FN61\]. Fed. R. Bankr. P. 1017\(e\)](#), which provides:

The court may dismiss an individual debtor's case for substantial abuse under [§ 707\(b\)](#) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under [§ 341\(a\)](#), unless, on request filed by the United States trustee before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under [§ 341\(a\)](#). The notice shall set forth all matters to be considered by the court at the hearing.

[\[FN62\]. In re Kilgore, 253 B.R. 179 n.10 \(Bankr. D.S.C. 2000\)](#) (quoting [Childs v. State Farm Mut. Auto. Ins. Co., 29 F.3d 1018, 1026 \(5th Cir. 1994\)](#)).

[\[FN63\].](#) Indeed, the means test itself arguably creates the incentive to behave irresponsibly with respect to one's financial affairs in order to become eligible for Chapter 7 relief. For example [§ 102\(f\)](#) of the legislation allows the victim of a crime of violence or a drug trafficking to move for [§ 707\(b\)](#) dismissal. The court is not permitted to grant such a motion if the debtor proves the bankruptcy is necessary to satisfy a claim for a domestic support obligation. Here, an incentive is created to allow alimony or child support to fall into arrears to generate the necessity of a Chapter 7 petition.

[\[FN64\].](#) See generally Lynn M. LoPucki, Reforming Consumer Bankruptcy Law: Four Proposal: [Common Sense Consumer Bankruptcy, 71 AM. BANKR. L.J. 461 \(1997\)](#).

[\[FN65\].](#) See, e.g., [11 U.S.C. § 109\(g\)](#) which renders an individual ineligible for bankruptcy relief if, within the preceding 180 days, a case was dismissed based on the debtor's failure to abide by court orders or to properly prosecute the case, or the court granted the debtor's request to dismiss the case following the filing of a motion for relief from the automatic stay. Such prior conduct suggests an inappropriate use of the bankruptcy process.

[\[FN66\].](#) Abuse under the legislation encompasses not just the means test but also dismissal or conversion if the petition was filed in bad faith or the totality of the debtor's financial

circumstances demonstrates abuse.

[FN67]. See [11 U.S.C. § 109](#).

[FN68]. See, e.g., In re [Collins](#), [250 B.R. 645 \(Bankr. N.D. Ill. 2000\)](#) for a thorough and interesting discussion of bankruptcy petitions filed for an improper purpose.

[FN69]. [Fed. R. Bankr. P. 9011\(b\)\(1\)](#).

[FN70]. The terms often overlap. Webster's defines "investigate" as "to observe or study by close examination and systematic inquiry; to make a systematic examination; to conduct an official inquiry." WEBSTER'S DICTIONARY 624 (9th Collegiate Ed. 1988). An "inquiry" is "a request for information" or "a systematic investigation often of a matter of public interest." Id. at 636.

[FN71]. [48 F.3d 1320 \(2d Cir. 1995\)](#).

[FN72]. [Fed. R. Civ. P. 11](#).

[FN73]. [Hedges v. Yonkers Racing Corp.](#), [48 F.3d at 1329](#).

[FN74]. Theodore C. Hirt, Article: [A Second Look at Amended Rule 11](#), [48 AM. U.L. REV. 1007, 1014 \(1999\)](#).

[FN75]. [O'Brien v. Alexander](#), [101 F.3d 1479, 1489 \(2d Cir. 1996\)](#).

[FN76]. The amendment to [Rule 9011](#) became effective December 1, 1997.

[FN77]. See § 102(a)(2)(C) of the legislation (proposed [§ 707\(b\)\(2\)\(B\)\(i\)](#)).

[FN78]. Id. (proposed [§ 707\(b\)\(2\)\(A\)](#)).

[FN79]. Under § 102(b) of the House version, which amends [11 U.S.C. § 101\(10\)](#), "current monthly income:"

(A) means the average monthly income from all sources which the debtor, or in a joint case,

the debtor and the debtor's spouse, receive without regard to whether the income is taxable income, derived during the 6-month period preceding the date of determination; and

(B) includes any amount paid by any entity other than the debtor (or, in a joint case, the debtor and the debtor's spouse), on a regular basis to the household expenses of the debtor or the debtor's dependents (and, in a joint case, the debtor's spouse if not otherwise a dependent, but excludes benefits received under the Social Security Act and payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes.

The Senate's corollary definition is substantially the same, except it adds the following at the end of paragraph (A): "[the date of determination] shall be the date which is the last day of the calendar month immediately preceding the date of the bankruptcy filing. If the debtor is providing the debtor's current monthly income at the time of the filing and otherwise the date of determination shall be such date on which the debtor's current monthly income is determined by the court for the purposes of this Act."

These conflicting provisions will be reconciled in conference, so a uniform definition of current monthly income will emerge, but even the Senate's more defined version is in need of clarification.

[\[FN80\]](#). Id.

[\[FN81\]](#). Section 102(a)(2)(C) of the legislation (proposed [§ 707\(b\)\(3\)](#)).

[\[FN82\]](#). For example, a "regular" contribution to the debtor's household expenses may be examined in light of the case law interpreting "regular income" for chapter 13 eligibility purposes. See, e.g., In re [Crowder, 179 B.R. 571, 573 \(Bankr. E.D. Ark. 1995\)](#) ("regular income" requires an income stream that is substantially reliable and certain in amount, and should be reasonably predictable and dependable). Similarly, the discussions of bad faith and the totality of the circumstances demonstrating abuse under current [§ 707](#) jurisprudence may be useful. See, e.g., In re [Collins, 250 B.R. 645 \(Bankr. N.D. Ill. 2000\)](#) (debtor's bad faith constituted cause for dismissal under [11 U.S.C. § 707\(a\)](#)); In re [May, 261 B.R. 770, 773 \(Bankr. M.D. Fla. 2001\)](#) (listing factors considered by courts in finding substantial abuse under [11 U.S.C. § 707\(b\)](#) using totality of the circumstances test).

[\[FN83\]](#). In re [KTMA Acquisitions Corp., 153 B.R. 238, 248 \(Bankr. D. Minn. 1993\)](#).

[\[FN84\]](#). See, e.g., [Stephens v. Lawyers Mut. Liability Ins. Co., 789 F.2d 1056, 1060 \(4th Cir. 1986\)](#).

[\[FN85\]](#). See, e.g., In re [Collins, 250 B.R. 645, 665 \(Bankr. N.D. Ill. 2000\)](#) (a position not warranted by existing law or a good faith argument for a change in the law is objectively frivolous) (emphasis added).

[FN86]. [Capital Factors v. General Plastics Corp. \(In re General Plastics Corp.\), 184 B.R. 996, 1003 \(Bankr. S.D. Fla. 1995\)](#) ("Rule 9011 sanctions are not meant to deter or punish aggressive but reasoned advocacy, even though the pleader is ultimately found wrong.")

[FN87]. [Taylor v. United States, 151 F.R.D. 389 \(D. Kan. 1993\)](#).

[FN88]. See, e.g., [Glatter v. Mroz \(In re Mroz\), 65 F. 3d 1567, 1572-73 \(11th Cir. 1995\)](#).

[FN89]. [Dubrowsky v. Estate of Perl binder \(In re Dubrowsky\), 244 B.R. 560, 579 \(E.D.N.Y. 2000\)](#).

[FN90]. Id.

[FN91]. See *infra*, Part III.B. One could argue that different language was used because the character of the certification is not the same. Proposed [§ 707\(b\)\(4\)\(C\)](#) looks to debtor eligibility for Chapter 7, including compliance with the means test and good faith, while proposed [§ 707\(b\)\(4\)\(D\)](#) puts the attorney on the hook for misinformation provided by the debtor and included in the schedules. But some degree of legal analysis is also required in preparing schedules, including valuation of property, determination of the debtor's interest in property, or the propriety and amount of a given exemption. Thus, there is room to argue that language requiring factual and legal support could have been included in proposed [§ 707\(b\)\(4\)\(D\)](#); Congress simply chose not to do so.

[FN92]. [Fed. R. Bankr. P. 9011\(a\)](#) provides:

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

[FN93]. In [United States Trustee v. Bresset \(In re Bresset\), 246 B.R. 784 \(Bankr. M.D. Pa. 2000\)](#), the court stated that a "plain reading [of Rule 9011] appears to exclude the bankruptcy schedules and statement of affairs from its provisions. The court also declined to consider Rule 9011 as a basis of sanctions because service was not proper under [Rule 9011\(c\)\(1\)\(A\)](#). In [In re Kelley, 255 B.R. 783 \(Bankr. N.D. Ala. 2000\)](#), on the other hand, the court determined that by "signing the petition and presenting the entire bankruptcy package to the Court, the attorney subjects himself to the limits, scope, and bounds of Rule 9011. *Id.* at 786. Oddly enough, even after determining that [Rule 9011](#) encompassed attorney conduct in advocating improperly

completed schedules, the court nonetheless concluded that § 105 was the appropriate basis for sanctions. [Id. at 787.](#)

[\[FN94\]. In re Kelley, 255 B.R. at 787.](#)

[\[FN95\]. United States Trustee v. Bresset \(In re Bresset\), 246 B.R. at 795; In re Brantley, 84 B.R. 508, 510 \(Bankr. S.D. Ohio 1988\).](#)

[\[FN96\]. Glatter v. Mroz \(In re Mroz\), 65 F.3d 1567, 1575 \(11th Cir. 1995\) \(citing Chambers v. NASCO, Inc., 501 U.S. 32 \(1991\)\).](#)

[\[FN97\]. Field v. Mans, 516 U.S. 59, 67 \(1995\).](#)

[\[FN98\]. In re Kelley, 255 B.R. at 786](#) ("Congress proposes to expand [Rule 9011](#) in the Bankruptcy Reform Act of 2000 to include a requirement that all documents, including schedules, be submitted only after the debtor or the debtor's attorney has made a reasonable inquiry to verify the information contained in such documents.") (emphasis added).

[\[FN99\].](#) See supra note 70.

[\[FN100\].](#) For example, Schedule B requires disclosure of the debtor's cash on hand and the balance of any checking accounts held. These are in such a constant state of change that it would be difficult, to say the least, to arrive at the "correct" amount as of the moment the petition is filed. Even expert appraisals could be incorrect; an appraisal necessarily involves estimation, not exactitude.

[\[FN101\]. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 549 \(1991\).](#)

[\[FN102\]. Taylor v. United States, 151 F.R.D. 389, 394 \(D. Kan. 1993\)](#) (attorney's ability to investigate may be limited by client's failure to keep important records and other data in an organized manner).

[\[FN103\]. In re Kilgore, 253 B.R. 179, 188 \(Bankr. D.S.C. 2000\).](#)

[\[FN104\]. 114 B.R. 672 \(Bankr. D.S.D. 1990\).](#)

[\[FN105\]. Id. at 677.](#)

[\[FN106\]. 11 U.S.C. § 523\(a\)\(2\).](#)

[\[FN107\]. 516 U.S. 59 \(1995\).](#)

[\[FN108\]. Id. at 74.](#)

[\[FN109\]. Id. at 68.](#)

[\[FN110\]. Id. at 71.](#)

[\[FN111\]. Fed. R. Bankr. P. 1009\(a\).](#) That rule reads:

A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

Id.

[\[FN112\]. In re Arnold, 252 B.R. 778 \(9th Cir. B.A.P. 2000\).](#)

[\[FN113\]. In re Kloubec, 247 B.R. 246, 256 \(Bankr. N.D. Iowa 2000\)](#) (debtor's failure to promptly amend bankruptcy schedules is considered a reckless indifference to the truth which is equivalent of fraud).

[\[FN114\]. In re Shebel, 54 B.R. 199, 203 \(Bankr. D. Vt. 1985\)](#)

[\[FN115\]. 64 B.R. 688](#)

[\[FN116\]. 1996 Bankr. LEXIS 1192](#)

[\[FN117\]. 50 B.R. 47 \(Bankr. M.D. Tenn. 1985\).](#)

[FN118]. See e.g., In re [Ford](#), 87 B.R. 641, 644 (nondischargeability under [11 U.S.C. § 523\(a\)\(3\)](#) for failure to omit a creditor, which omission results in prejudice to creditor, cannot be defeated by allowing amendment to relate back); In re [Shebel](#), 54 B.R. 199 (Bankr. D. Vt. 1985) (in context of objection to discharge under [11 U.S.C. § 727](#), amendment to schedules cannot expunge falsity of an oath); Joseph v. Hewitt (In re [Castro](#)), 158 B.R. 180, 184 (Bankr. C.D. Cal. 1993) (schedules filed after commencement of case do not relate back to filing of petition to defeat trustee's interest in property under [11 U.S.C. § 544](#)). See also In re [Clinton](#), 166 B.R. 195 (Bankr. N.D. Ga. 1994) (suggesting amendment to petition to add spouse as a debtor not permissible because of inherent problems of retroactive effective date with respect to surrounding important substantive provisions of Code, including the automatic stay and creation of the bankruptcy estate).

[FN119]. See [Unroe v. United States](#), 119 B.R. 626 (S.D. Ind. 1990) (in context of amended proof of claim, court states that whether relation back applies involves balancing of equities).

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