

ACADEMY FRIDAY TELECONFERENCE AUG. 16 2013

[Book: Vance/King Cracking The Means Test](#)

I. PRESUMPTION OF ABUSE UNDER 707(b)(2)

- **Subject to the means test § 707(b)(2)**
- **Only applies where debtor's debts are primarily consumer debts.**

II. BAD FAITH UNDER § 707(b)(3)

- **Totality of circumstances**
- **§ 707(b)(1) (presumption of abuse) is restricted to consumer debt cases:**
- **§ 707(b)(3) is subject to 707(b)(1)**

III. BAD FAITH UNDER 707(a) ("for cause")

BAD FAITH UNDER 11 U.S.C. § 707(A) SHOULD BE RESERVED FOR "EGREGIOUS" CASES.

*** In re Lobera, 454 B.R. 824 (Bankr. N.M., 2011)**

"... bad faith as grounds for "cause" under § 707(a) should apply only to egregious cases where the debtor's motives are clearly inconsistent with the established purpose of the Bankruptcy Code."

In re Blumenberg, 263 B.R. 704 (Bankr. E.D.N.Y., 2001)

"While cautioning that dismissal based on a lack of good faith could only be determined on an ad hoc basis and in only the most egregious cases entailing concealment of assets, lavish lifestyles, and the intention to avoid singular debts incurred through fraud, misconduct or gross negligence, the Sixth Circuit affirmed the bankruptcy court's bad faith dismissal on the basis of the following factors:

"(1) the debtor's manipulations which reduced the creditors in this case to one; (2) the debtor's failure to make significant lifestyle adjustments or efforts to repay; (3) the fact that the petition was filed clearly in response to the largest single creditor's obtaining a mediation award; and (4) the unfairness of the debtor's use of Chapter 7 under the facts in this case."

In re Quinn (Bankr. N.M., 2012)

" ... the Court concludes that lack of good faith on the part of a debtor, whether pre- or post-petition, or both, is a relevant consideration in determining whether to dismiss a chapter 7 case under 11 U.S.C. § 707(a) for cause, and, if sufficiently egregious, may alone be sufficient to constitute cause to dismiss ..."

In re Kealamakia (Bankr.Utah, 2013)

"This Court agrees that dismissal on the ground of bad faith should be reserved for truly egregious cases."

GOOD CASE CITES CASES ON BOTH SIDES OF ARGUMENT:

In re Mitchell, 357 B.R. 142 (Bankr.C.D.Cal., 2006)

IV. WHAT KINDS OF CONDUCT CONSTITUTE BAD FAITH?

Contains some objective factors

- Lavish lifestyle
- Used credit cards while unemployed
- Lavish vacations on eve of bankruptcy
- Lying about her employment status
- Using credit cards on eve of bankruptcy
- Intentional acts to hinder the trustee
- Making no effort to pay the debts
- Paying insiders (preferential payments)
- Multiple bankruptcies

Also the subjective factor of the debtor's intent

- Using bankruptcy to avoid one particular creditor
- Concealment of assets
- Attempting to discharge claim based on fraud
- False testimony at meeting of creditors