

Major Consumer Bankruptcy Provisions

Area of Impact	Issue	H.R. 833 Section	S. 625 Section	Details
Chapter 7	Means testing	§102	§102	Six-month pre-petition income (with exclusion in 833) less (1) living expenses, using IRS collection standards, (2) secured debt, (3) priority debt, (4) charitable contributions, (5) (in 833 only) private school expenses. Presume abuse if resulting net monthly income is at least \$100 (833) or \$250 (625). Presumption overcome only by showing extraordinary circumstances, detailed and sworn to by debtor and attorney. Trustee (833) or UST (625) must file statement regarding presumption of abuse; court must serve on creditors. Trustee must file motion or statement in all presumption cases where income is above defined median. General standing limited by median income.
	Debtor attorney liability	§102(a)(3)	§102(a)(3)	Fees shifted to debtor attorney if bankruptcy filing is not substantially justified (625) or violation of rule 9011 (833). Debtor attorney also warrants accuracy of lists, schedules and documents.
	Domestic support priority	§139	§142	Support of obligations would be first priority, ahead of administrative expenses.
	Retention of personal property security	§119	§304	Debtor may not retain personal property secured by PMSI unless agrees within 45 days after §341 meeting to reaffirm or redeem.
Chapter 13	Secured claims: stripdown/ Adequate protection	§122, 135	§§306 (b) 309(c)	PMSIs within five years of bankruptcy not subject to stripdown (833). All secured debts within six months of bankruptcy and motor vehicle loans with five years not subject to stripdown (625). Pre-confirmation adequate protection must be paid debtor in no less than contractual payments.
	Timing of events	§605	§317	Ninety days for plan (625). Twenty days for confirmation after 341 (833).
	Length of plan	§606	§318	Five years minimum plan required for debtors with more than median income (833) or debtors who convert from chapter 7 to chapter 13 (625). Debtor who first files in chapter 13 only required to do three-year plan (625).
	Superdischarge	§§127, 807	§§314, 707	Eliminates superdischarge for §523(a)(1), (2), (3)(b), (4) and (6) (personal injury only).
	Limit on co-debtor stay	§131		Terminates the co-debtor stay 30 days from filing where the debtor did not receive consideration for claim held by creditor.
General	Successive discharge; time between filings	§137	§312	No chapter 13 discharge if any prior discharge in a case filed within five years. No chapter 7 discharge if any prior discharge in a chapter 7 case filed within eight years.
	Tax returns	§603 (b)	§315(b)	Three years of returns must be filed within 45 days of case filing (extendable once for 45 days maximum) or automatic dismissal. Creditors may inspect and copy.
General	Audits	§602	§601	Random audits of 0.4 percent of consumer filings and scheduled

				deviating from mea, conducted under GAAS by licensed or certified public accounts (833), or conducted under regulations of the Attorney General (625).
	Debtor Education	§104, 302(b)	§§104, 105(b)	Completion of education programs made a condition for discharge; pilot programs run concurrent under §109; exigency exception if services are unavailable.
	Credit Counseling	§302 (a)	§105(a)	Counseling from an approved credit counseling service made a requirement of eligibility under §109; exigency exception if services are unavailable.
	Notice to creditors	§603 (a)	§315(a)	Creditors must be served at addresses filed with the court or (833 only) at the address on the last correspondence with the debtor.
	Homestead exemptions	§§124, 147	§307	730-day residency requirement for use of state exemptions; \$250,000 homestead cap, waivable by state legislation (833) only. No cap in Senate bill at this point.
	Reaffirmations	§§108, 114	§204	Reaffirmation of unsecured debts requires court fairness hearing; waivable by represented debtor. No class actions for violation of discharge injunction (833 only).
	Limitation on luxury goods	§133	§310	Presumption that debts owed to single creditor aggregating over \$250 for luxury goods, or cash advances aggregating over \$250 within 90 days of filing are non-dischargeable (833); \$750 within 70 days (625).
	Automatic stay	§136	§311	Excepts from the stay eviction actions by lessor against debtor involving residential real property where the underlying lease has terminated.
	In rem relief from stay	§118	§303	Excepts from the stay eviction actions by lessor against debtor involving residential real property where the underlying lease has terminated.
	Debt incurred to pay non-dischargeable debts		§134	Excepts from discharge debts incurred within 70 days to pay non-dischargeable debts.
	Post-petition income of chapter 11 debtor.		§321	Provides that such income will be deemed property of the estate in individual chapter 11 cases.
	Appellate procedure	§612	N/A	Direct appeal to the courts of appeal, with intermediate appeal to BAP if all parties consent (833 only).

Bankruptcy Reform: Finding the Best Gross Income Test

The major bankruptcy reform bills offered in 1998 in the 105th Congress and in 1999 in the 106th include a test of gross income of chapter 7 files to determine if they should be permitted to remain chapter 7: a gross income means test. This test is combined with one or more other means tests (e.g., income after allowed expenses) to determine whether the use of chapter 7 by debtors with relatively high incomes is an **abuse of the Code and therefore subject to motion for conversion for dismissal under 11 U.S.C. 707(b)**. It must be noted that 707(b) is already in code and enforced, however, depending on the T-Tee. Using county and Metropolitan Statistical Area

(MSA) median incomes may be an equitable and practical alternative to using national, regional or state median income standards.

The two bills introduced in 1999, H.R. 833 and S. 625, place the means tests in different procedural and administrative contexts. The bills also differ in the standards of gross income they select as the basis for determining who may not remain chapter 7. At different times, the bills use national median incomes, regional median incomes and state median incomes as gross income standards. The bills also take different approaches to supplementing the published income medians for larger families.

Establishing a gross-income means test has an intuitive policy rationale with two parts. First, it requires high-income debtors in bankruptcy to reorganize their finances in order to repay at least some of their unsecured debt over time. Second, debtors whose incomes are so low that they would be unable to repay a meaningful amount of money in any event is excused or protected from this requirement.

Any means test uses some standard against which to compare the debtor's gross income. The standard should bear a meaningful rather than an arbitrary relationship to the debtor's income. The standard should reflect the debtor's actual economic environment and be based on readily available income data.

Rewriting a Debtor's Tax Obligation Under the Code

If a debtor does not like its tax obligations, it can ask the bankruptcy court to go back and retroactively change those tax bills. There is only one requirement for the debtor to take advantage of this extraordinary remedy provided under the Code: It must have done nothing to contest the tax bills. **Section 505** is powerful, and practitioners would be wise to include it in their arsenal when handling a bankruptcy case with significant tax claims.

Section 505(a) provides a broad grant of jurisdiction to the bankruptcy court to determine the amount of any tax due from the debtor in the same forum addressing the debtor's overall financial condition, allowing the prompt resolution of a debtor's tax liability where that liability has not yet been adjudicated prior to the bankruptcy proceeding. Section 505(a) is available to all debtors under the Code, including chapter 13.

A debtor, as representative of the bankruptcy estate, is allowed to contest tax debts in the bankruptcy court even though its prior inaction would bar it from contesting them elsewhere. This remedy is permitted on the ground that taxes, with their special priority in a bankruptcy case, pose a special problem for creditors, and creditors should not be prejudiced by a debtor's inaction.

The broad jurisdiction grant under 505 does have some limitations, however. The bankruptcy court may not liquidate a tax liability that has already been adjudicated by a tribunal of competent jurisdiction before the bankruptcy petition is filed.¹

A proceeding under 505 is considered a proceeding to obtain a declaratory judgment and is an adversary proceeding governed by the rules within Part VII of the Bankruptcy Rules. Generally, a debtor or trustee should file a complaint under 505. However, there is authority to suggest that other creditors in a bankruptcy proceeding can bring such action.

Thus, if a debtor has significant federal, state or municipal tax obligations and has not fully objected to or adjudicated the propriety of those obligations, it would be wise to file a complaint under 505 in the debtor's bankruptcy case. The 505 complaint could result in a substantial reduction in the tax obligations, benefiting the debtor and its creditors.

Section 1129(d) of the Bankruptcy Code is one component of the confirmation inquiry that is rarely cited, less understood and not the subject of much court interpretation. It may factor into the confirmation and prospectively as taxable events inure to the reorganized debtor.

Section 1129(d) provides, in relevant part, that "on request of a party in interest that is a governmental unit, the court may not confirm a plan in the principal purpose of the plan is the avoidance of taxes." The government unit has the burden of proof on the issue of avoidance." Courts have been uniform in finding that for §1129(d) to apply, it must be raised by a governmental unit and not the debtor. Further, some courts believe that the court may, under its equitable powers in §105(a), raise the issue as part of the court's §1129 analysis in confirming a plan. Bankruptcy courts have finally recognized that for §1129(d) to apply, the principal purpose of the plan must be the avoidance of taxes. What the "avoidance of taxes" defined by §269 of the Bankruptcy Act, Section 1129(d)'s predecessor, provided that "where it appears that a plan has the avoidance of taxes, objection to its confirmation may be made...by the Secretary of the Treasury, or...State..."

§269 of the Bankruptcy Act §1129(d) stated that the court has to make a finding that the principal purpose of the plan was the avoidance of taxes before a plan could be denied confirmation under §269 of the Bankruptcy Act §1129(d). Little was written on §269 of the Bankruptcy Act §1129(d) until 1992, when the Internal Revenue Service (IRS) issued new regulations that provided that the IRS could review the tax consequences of a confirmed plan, such as the allowance of a net operating loss (NOL), even after a bankruptcy court has approved the plan. The IRS, however, through its regulations, believed that it had the final discretion to determine the tax consequences of a confirmed plan even after the court has previously approved the plan.

The reaction from at least one court (which is probably representative of many courts) was that the authority to judge any chapter 11 plan was within the sole provenance of the bankruptcy court, and that the IRS' regulations, while helpful in explaining the IRS's rationale and position on tax matters, were not binding on the court. The court examined the "factual frames of reference" in determining whether the NOLs that were being claimed at confirmation could be subject to IRS review post-petition. The court concluded that the IRS could not be stopped from making a §1129(d) which is to review the use of tax credits as they relate to plan confirmation, and determine whether their misuse is the sole purpose of reorganization. Further, it seems that the bankruptcy courts have concluded that, absent a government request, a court should determine the tax consequences of a proposed plan if the plan contemplates the use of tax benefits as a condition of confirmation.

§1129 is not limited simply to the considerations of tax consequences. Section 1129(d) can apply where the debtor manifests an intent to avoid the payment and treatment of pre-petition taxes and control the disposition of tax consequences not yet realized at the time of confirmation. As such, plan proponents should be mindful of addressing tax consequences in their plans to ensure that the bankruptcy court will conduct a §1129(d) inquiry and make the appropriate finding. Also, taxing authorities should use §1129(d) not only as a basis for objecting to a plan as to the issue of tax consequences of a plan, but also where the thrust of any plan is to avoid the required payment and treatment of taxes.

Amending Claims after the Bar Date

Creditors occasionally amend their claims. Other creditors should review each amendment to determine if it is proper or merely an "end run" around the bar date. Depending upon the reason for, and timing of, the amendment, it may be prohibited.

Unsecured creditors, being the last creditors in the payment line, suffer from increases in the amount and priority of others' claims. A priority claim removes money "from the pot" to pay unsecureds while another unsecured creditor's increasing its claim dilutes your *pro rata* "share of the pot."

Since filing an amended claim can include a "new" claim, the changed portion of the claim should initially be viewed as a totally new claim. Late-filed claims (filed after the bar date) are usually disallowed under §502(a)(9), and that portion of the claim not referenced in the original claim is eliminated.

Courts view amended claims quite differently depending on the status of the case. Generally, the first critical date is the bar date for filing proofs of claim. Amendments before the bar date are generally allowed, while amendments thereafter are **scrutinized**.

Another crucial date is the confirmation date of a plan of reorganization. A creditor's post-confirmation amendment faces even higher scrutiny since it would (most likely) have passed both the bar date and confirmation of a reorganization plan. The final critical date is the objection to the proof of claim.

The Seventh Circuit has been particularly active in ruling on the effects of amended claims. They identified the bar date and confirmation date as two milestones and said, "Once that milestone (confirmation) has been reached, further changes should be allowed only for compelling reasons." The Seventh Circuit also stated that permitting amendments to claims also extends the deadline for filing claims, and cautioned that bankruptcy courts need not allow "late amendments which are primarily used as a back-door route to secure bar-date extensions." It agreed that taxes for a different year were a new cause of action and that denying the incredible increase was not an abuse of discretion.

The Fifth Court stated, "Amendments do not vitiate the role of bar dates; indeed, courts that authorize amendments must ensure that corrections or adjustments do not set forth wholly new grounds of liability."

Perhaps the best summary of the criteria for evaluating an amendment is the following:

1. The proposed amendment must not be a veiled attempt to assert a distinctly new right to payment as to which the debtor estate was not fairly alerted by the original proof of claim.
2. The amendment must not result in unfair prejudice to other holders of unsecured claims against the estate.
3. The need to amend must not be the product of bad faith or dilatory tactics on the part of the claimant.

Courts frequently rely on the Federal Rule of Civil Procedure 15 regarding amended pleading when evaluating amended proofs of claim. This is particularly true if the amendment follows an objection.

Do Pre-existing Liens Really Pass through Bankruptcy Unaffected?

Sections 1141(c)² and 1327(c)³ of the bankruptcy Code set forth the status of the debtor's property upon confirmation of a plan of reorganization. Although property vests in the debtor, the majority of courts have upheld the general rule that pre-existing liens pass through bankruptcy unaffected. This allows a secured creditor to choose not to participate in the bankruptcy case and instead to look to its pre-existing lien for the satisfaction of its debt after the debtor has emerged from bankruptcy.

The Seventh Circuit states that, pursuant to §1141(c), liens do not pass through bankruptcy unaffected "unless they are brought into the bankruptcy case and dealt with there." The court holds that unless the plan of reorganization or order confirming the plan specifically states that the lien is preserved, the lien is extinguished upon confirmation. The court further states that if a creditor does not participate in the bankruptcy case, e.g., does not file a proof of claim, then his lien is not "property dealt with by the plan" and **§1141(c) does not apply**.

According to the Fourth Circuit Court, "a plan 'provides for' a claim or interest when it acknowledges the claim or interest and makes explicit provision for its treatment." The court also concluded that based on §506(d)(2), failure to file a proof of claim is not the basis for avoiding the lien of a secured creditor. The Fourth Circuit states that attempting to "provide for" liens and thereby obtaining a favorable result by "camouflaging" the treatment of a secured creditor's liens, is insufficient. An "appropriate affirmative step" must be taken by the debtor to avoid a lien. "In order to 'provide for' a creditor for purposes of §1327(c), the plan must, at a minimum, clearly and accurately characterize the creditor's claim throughout the plan."

The majority of the cases on the issue of whether pre-existing liens pass through bankruptcy support that a lien may be avoided or modified during the bankruptcy case without an adversary proceeding, thus providing exceptions to the general rule. However, the creditor must have participated in the proceeding or been provided adequate notice of the debtor's intent to modify the lien, and the plan of reorganization order must specifically "deal with" the lien. It is the debtor's obligation to state expressly that the secured creditor's liens are not passing through the plan unaffected and specify how the secured creditor's claims are being treated.

New Challenges for Attorneys Signing Reaffirmation Agreements: Meeting a Heightened Standard of Judicial Review

The attorney's declaration under Bankruptcy Code §524 that a reaffirmation agreement imposes no "undue hardship" on the debtor client has always carried the potential for conflict unique to bankruptcy law. Potentially, it pits the lawyer's duty to advocate for clients who wish to reaffirm pre-petition debt, usually to retain goods that secure the debt, against the totally independent duty under §524(c) to certify that a reaffirmation imposes "no undue hardship" on the client.

A new form of disclosure statement and reaffirmation agreement recently promulgated by the Administrative Office of the U.S. Courts (AOUSC) has provided attorneys with a useful tool for meeting their obligation. **New Form B240** not only facilitates judicial review of reaffirmation and acts as a checklist for counsel to consider before signing the §525(c) declaration. Form B240 has been adopted as an official local form in at least two jurisdictions, the Northern District of California and the District of Massachusetts.

While not vitiating the bankruptcy court's oversight of the reaffirmation process, amended §524(c) shifted the onus of reviewing a reaffirmation agreement to the debtor's attorney. It thus placed a debtor's attorney in a contradictory role - serving to advocate for her client's debtor's decision to reaffirm by not executing a supporting affidavit.

Section 521(2)(A) requires a debtor, within 30 days of the petition date, to file a statement as to whether he intends to surrender, reaffirm or redeem estate property securing pre-petition consumer debt. Section 521(2)(B) requires the debtor to perform his stated intention within 45 days. Four Circuit Courts of Appeal - the Second, Fourth, Ninth and Tenth - have held that a debtor who is current on payments has a fourth option under §521 of continuing to make payments without either reaffirming the debt or redeeming or surrendering the property, thereby, "riding through" the bankruptcy and converting the original obligation to a non-recourse loan.

However, the First, Fifth, Seventh and Eleventh Circuits have held that a debtor must elect and then perform only one of the three options listed in §521 - surrender, reaffirmation or redemption. If a debtor wishes to keep collateral and cannot afford to redeem for fair market value or persuade the creditor to "ride along," his sole option

is to reaffirm.

New Tax Regulations

Effective as of October 2, 1998, the IRS issued final regulations amending the existing income tax regulations under IRC §108 (income from the discharge of indebtedness) and §1017 (discharge of indebtedness basis adjustment in TD 8787). The new regulations make comprehensible many of the legislative changes to the income tax rules made since the enactment of the Bankruptcy Tax Act of 1980. The main thrust of the ordering rules for reducing the basis of assets when taxpayers exclude the cancellation of debt income under IRC §108.

IRC §108 excludes any cancellation of debts from gross income, which arises from 1) bankruptcy, 2) insolvency, 3) "qualified farm indebtedness" or 4) "qualified real property business indebtedness" of any taxpayer (other than a C corporation). The cost of such an exclusion is the reduction of any tax attributes the taxpayer might possess. The order of reduction is as follows:

- net operating losses
- general business credits
- alternative minimum tax credits
- capital loss carryovers
- asset basis reduction
- passive activity loss and credit carryovers
- foreign tax credit carryovers.

The ordering rule for an asset basis reduction (#5 above) is the following:

- Real property used in a trade or business held for investment, other than real property primarily held for sale in the ordinary course of business, that secured the discharged indebtedness immediately before the discharge.
- Personal property used in a trade or business or held for investment, other than inventory, accounts receivable and notes receivable that secured the discharged indebtedness immediately before the discharge.
- Remaining property used in a trade or business held for investment, other than inventory, accounts receivable, notes receivable and real property primarily held for sale in the ordinary course of business.
- Inventory, accounts receivable, notes receivable and real property primarily held for sale in the ordinary course of business.
- Property not used in a trade or business nor held for investment. When electing to reduce the basis of depreciable assets, the order of a basis reduction is the following:
 - For acquisition debt incurred to purchase specific property, whether or not the debt is secured by the property, the basis of the acquired depreciable property is reduced in an amount equal to the income excluded as a result of the discharge of the acquisition indebtedness.
 - For debt that is secured by a lien on specific property (other than inventory, notes or accounts receivable), basis in the encumbered property is reduced in an amount equal to the discharge of the debt secured by the lien.
 - Remaining depreciable property used in a trade or business or held for investment, other than inventory accounts receivable, notes receivable and real property held primarily for sale in the ordinary course of business.

In addition, the taxpayer may make another election to trust real property held primarily for sale in the ordinary course of business as depreciable real property for purposes of basis reduction.

The regulations also provide that for the refinancing of existing pre-1993 debt, as well as new indebtedness, incurred or assumed by a solvent taxpayer (other than a C corporation) in connection with real property used in a business, secured by that real property ("qualified real property business indebtedness") and that is discharged, that the amount excluded from the income may not exceed the excess (if any) of a) the outstanding principal amount (principal amount of debt plus all additional amounts owed before discharge - e.g., unpaid interest) of that debt immediately before the discharge over b) the net fair market value of the secured real property immediately before the discharge.

Under the regulations, a taxpayer must reduce the adjusted basis of real property to the extent of the cancellation of indebtedness income, which is excluded from gross income in proportion to the adjusted basis. This reduction is done on the first day of the tax year following the tax year in which the cancellation of debt income is excluded.

The basis reduction for this type of indebtedness is done in the following order:

- Any depreciable qualifying real property used in a trade or business other than real property (held primarily for sale in the ordinary course of business) that secured the discharged indebtedness immediately before the discharge;
- Any other depreciable real property (other than real property held primarily for sale in the ordinary course of business);
- Any remaining depreciable property used in a trade or business, (other than inventory, accounts receivable, notes receivable, and real property held primarily for sale in the ordinary course of business). Of paramount importance is that, whenever a taxpayer elects to reduce basis rather than reduce tax attributes, a complete Form 982 must be attached to a timely filed tax return for the year in which the taxpayer has cancellation of debt income excluded from income under IRC §108. A failure to timely file would require the taxpayer to seek discretionary relief from the IRS under Reg. §301.9100-3T, which entails a private letter ruling permitting a late election. However, judicial developments were not as friendly as the regulatory developments.

Barbieri v. RAJ Acquisition Corp.

Barbieri, Debtor-Appellant, v. RAJ Acquisition Corp., Appellee, Before: Leval, Carbanes, and Sack, Circuit Judges.
Decided Dec. 23, 1999

Appeal from an order of the United States District Court for the Eastern District of New York (Raymond J. Dearie, Judge) affirming an order of the Bankruptcy Court (Laura Taylor Swain, Judge) that (1) denied debtor's application to dismiss her voluntary Chapter 13 action, and (2) sua sponte converted the action to a Chapter 7 liquidation. Debtor maintains that there is an absolute right to dismiss voluntarily Chapter 13 petitions pursuant to 11 U.S.C. §1307(b). Reversed.

CABRANES, Circuit Judge - The question is whether 11 U.S.C. §1307(b)⁴ provides a debtor an absolute right to dismiss a voluntary Chapter 13 bankruptcy petition.⁵ Debtor Nina Marie Barbieri appeals from an order of the United States District Court for the Eastern District of New York. Affirming an order of the Bankruptcy Court (Laura Taylor, Judge) that (1) denied debtor's application for dismissal of her voluntary Chapter 13 petition pursuant to §1307(b), and (2) converted the case to a Chapter 7 liquidation. Barbieri argues, *inter alia*, that §1307(b) grants a debtor an absolute right to dismiss a Chapter 13 petition. To hold otherwise, she maintains, would contravene the strictly voluntary nature of Chapter 13. We agree and therefore reverse the order of the District Court.

I. Barbieri was the owner of a multi-family apartment building located at 86 East Third Street in Manhattan. On

February 25, 1998, she entered into a contract to sell the property to appellee RAJ Acquisition Corp. ("RAJ") for \$585,000; less than one month later, she filed a petition for relief under Chapter 13 of the Bankruptcy Code. Her proposed Chapter 13 plan provided for the repudiation of her contract with RAJ, thus leaving RAJ with an unsecured claim against the bankruptcy estate for any damages incurred as a result of the repudiation. On July 7, 1998, Barbieri sought an order from the Bankruptcy Court authorizing the sale of the East Third Street property to New York Property Holding Corp. ("NYPHC"), which was willing to purchase the property for \$687,5000.

On July 22, 1999, the Bankruptcy Court held a hearing to consider Barbieri's application to sell the property to NYPHCRAJ opposed Barbieri's application, arguing that its contract with Barbieri provided for a greater yield to the estate than did the agreement with NYPHC because RAJ's contract provided for payment of back rent to the purchaser. At the conclusion of the July 22 hearing, the Bankruptcy Court indicated an intention to convert the case to one under Chapter 7. During a colloquy on the matter, Barbieri's counsel moved to dismiss the Chapter 13 petition voluntarily, at which point the Bankruptcy Court denied Barbieri's motion. The Court, determined that "conversion to Chapter 7 to investigate the debtor's assets and obligations is more appropriate than permitting a withdrawal or a debtor in possession status under Chapter 11." On appeal to the District Court, Judge Dearie rejected Barbieri's claim that §1307(b) affords a debtor an absolute right to dismiss a Chapter 13 petition and affirmed the Bankruptcy Court's conversion of Barbieri's petition into a Chapter 7 proceeding. This timely appeal followed:

II. Although this case raises a question of first impression in this Circuit, courts in other jurisdictions have considered the issue, with divided results. Compare *Molitor v. Eldson (In re Molitor)*, 76 F.3d 218 (8th Cir. 1996) (holding that a debtor's right to dismiss is qualified by §1307 (c)), with *In re Harper-Elder*, 184 B.R. 403 (Bankr. D.D.C. 1995) (holding that a debtor's right to dismiss is absolute). We hold that a debtor has an absolute right to dismiss a Chapter 13 petition under §1307(b), subject only to the limitation explicitly stated in that provision.

In holding that §1307(b) unambiguously requires that if a debtor "at any time" moves to dismiss a case that has not previously been converted, the court "shall" dismiss the action. The only limitation of the right to dismiss is stated in §1307(b) itself, which provides for dismissal "if the case has *not* been converted under section 706, 1112, or 1208 of this title."

The mandatory nature of §1307(b) becomes even clearer when the language of that provision is compared with the permissive language of §1307(c). It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another. When the same provision uses both 'may' and 'shall', the normal inference is that each is used in its usual sense - the one act being permissive, the other mandatory. For these reasons, it is concluded that §1307(b) gives a debtor an absolute right to dismiss a Chapter 13 petition, subject to the limitation set forth in that section - namely, that the case must not have "been converted under section 706, 1112, or 1208 of this title."

This conclusion reflects the intention of Congress to create an entirely voluntary chapter of the Bankruptcy Code. Congress has provided for another procedure by which a creditor may force an unwilling debtor into a Chapter 7 liquidation; an involuntary petition under 11 U.S.C. §303⁶. To force a debtor into bankruptcy under §303, however, creditors must comply with a number of requirements beyond simply showing cause⁷. Thus, "to allow a creditor to convert a Chapter 13 case to a Chapter 7 liquidation notwithstanding a pending motion to dismiss filed by the debtor would permit the creditor to effectuate an involuntary petition without the need to satisfy the requisites of §303,

It was found in the reasoning of the Eight Circuit in *Molitor* that an absolute right to dismiss under §1307(b) would render §1307 (c) a nullity unpersuasive. It is true that if a court grants a debtor's motion to dismiss under §1302(b), the court will be deprived of the option, afforded by §1307(c), of converting the case for cause. But that is no more significant than the fact that an order granting a creditor's motion to convert under §1307(c) would foreclose dismissal under §1307(b). In the event of competing motions filed under subsections (b) and (c), one subsection will inevitably prevail at the expense of the other. Accordingly, the assertion that an absolute right under §1307(b) would nullify §1307(c) "carries no weight since either party could make the same argument."

In addition, the District Court's reliance on 11 U.S.C. §105(a) is misplaced. Although §105(a) grants a Bankruptcy Court broad powers, it does not authorize the Court to disregard the plain language of §1307(b).

There are several provisions in the Bankruptcy Code that specifically authorize court action to prevent abuse. For example, notwithstanding a debtor's voluntary dismissal of Chapter 13 petition, the Bankruptcy Court has the power in appropriate cases, to impose sanctions. Under 11 U.S.C. §§349(b)⁸ and 362(c)⁹, a voluntary dismissal results in the debtor forfeiting the protections afforded by the automatic stay. In addition, under 11 U.S.C. §108(c), which tolls statutes of limitation during the pendency of a bankruptcy proceeding, there is no danger that a creditor would be barred from bringing a cause of action.

There are additional protections against abuse. For example, creditors may force a debtor into liquidation by filing an involuntary petition pursuant to §303. In addition, a Bankruptcy Court may take appropriate steps pursuant to §105(a) "to prevent an abuse of process" - provided, of course, that these steps do not contravene other provisions of the Code. Lastly, in appropriate cases, a debtor's conduct may be referred to the United States Attorney's Office for investigation and potential criminal prosecution for bankruptcy fraud under 18 U.S.C. §§151-57¹⁰. In short, depriving a Bankruptcy Court of the authority to convert a Chapter 13 petition when the debtor seeks dismissal under §1307(b) does not unduly limit the protections against abuse of the bankruptcy process¹¹.

Appellee RAJ argues that Barbieri's request for dismissal was made after the conversion to Chapter 7 and, thus, was ineffectual in any event. We disagree. First, the record of the Bankruptcy Court proceedings does not support RAJ's contention¹². As the transcript reproduced at the margin suggests, the Court did not issue the order for conversion until after debtor's counsel had requested to withdraw the petition. Moreover, Federal Rule of Bankruptcy Procedure 9021(a) specifies, in relevant part, that "a judgment is effective when entered as provided in Rule 5003." In turn, Rule 5003(a) provides in relevant part that "the clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case." In this case, the Bankruptcy Court's order had not been entered on the Clerk's docket pursuant to Rule 5003 at the time Barbieri moved to dismiss. Accordingly, the conversion had not become effective before Barbieri's request for voluntary dismissal was made.

III. For the reasons stated, we hold that the debtor had the right voluntarily to dismiss her Chapter 13 petition absent an actual order of conversion notwithstanding the clearly stated intention of the Bankruptcy Code to convert the case to Chapter 7 pursuant to §1307(c). Accordingly, we reverse the judgment of the District Court and remand with instructions that it direct the Bankruptcy to enter an order dismissing the action.

1. If litigation relating to a tax obligation is pending in another tribunal when the bankruptcy petition is filed and no decision has yet been rendered, that proceeding would be stayed, and the bankruptcy court could technically hear the matter 505 provides that a bankruptcy court may determine a debtor's tax liability. In some situations, bankruptcy courts have declined to adjudicate a debtor's tax liabilities in spite of their unquestioned jurisdiction to do so. The most common reasons for abstention are: (i) situations where uniformity of assessment is of significant importance, and (ii) circumstances where judicial economies come into play.
2. Section 1141 of the Bankruptcy Code provides: Except as provided in subsection (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of the plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders and general partners in the debtor. 11 U.S.C. §1141(c).
3. Similarly, §1327(c) of the Bankruptcy Code provides: Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan. 11 U.S.C. §1327(c).

4. Section 1307(b) states: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable."
5. Title 11, like many other titles of the United States Code, is divided into various chapters. Chapter 1, 3, and 5 contain provisions that are generally applicable to all bankruptcy cases. The remaining chapters set out particular procedures for different kinds of bankruptcy cases. Chapter 7, for example, deals with debtors whose assets are to be liquidated. By contrast, "Chapter 13 allows debtors to keep their existing assets and gives them a discharge if they pay creditors what they can out of their disposable income over a period of three to five years."
6. Section 303(a) provides in relevant part: "An involuntary case may be commenced only under Chapter 7 or 11 of this title, and only against person that may be a debtor under the chapter under which such case is commenced."
7. For example, §303(b) provides in relevant part: An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute if such claims aggregate at least \$10,775 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; (2) if there are fewer than 12 such holders by one or more of such holders that hold in the aggregate at least \$10,775 if such claims.
8. Section 349(b) states in relevant part: Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title (3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.
9. Section 362(c) states in relevant part: Except as provided in subsections (d), (e), and (f) of this section (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and (2) the stay of any other act under subsection (a) of this section continues until the earliest of (A) the time the case is closed; (B) the time the case is dismissed; or (C) the time a discharge is granted or denied.
10. Faced with individual debtors filing and dismissing multiple Chapter 13 petitions in order to take advantage repeatedly of the Code's automatic stay provisions, some courts have imposed conditions upon future filing when granting these debtors' motions to dismiss. We take no positions on whether such conditions are permissible or whether they infringe on a debtor's absolute right to dismiss Chapter 13 petitions voluntarily. We note, however, that such conditions, if permissible, would serve as an additional powerful tool in preventing abuse.
11. We recognize that an absolute right of a debtor to withdraw her Chapter 13 petition raises the possibility that creditors may lose the benefit of the preference period under 11 U.S.C. §547 and the fraudulent transfer period under 11 U.S.C. §548 established by the filing of that petition. We also acknowledge that although creditors might well be able to protect themselves against this result, "by filing an involuntary chapter 7 or 11 petition against the debtor in response to the debtor's voluntary chapter 13 petition." While the consequence of an absolute right to withdraw is a matter of concern, it does not, in our view, permit us to ignore the plain language of §1307(b).
12. In the course of the hearing the following exchange occurred: THE COURT: Actually, I've made a determination. The debtor doesn't have options here. I will not permit withdrawal. I'm going to convert this case to Chapter 7 now. [DEBTOR'S COUNSEL]: Judge, can the debtor move to convert Chapter 11? THE COURT: No. The debtor can move to convert to Chapter 11 once she's in 7, but it's going to 7 today. Given everything that I have heard today, given my review of the petition and what I've heard from counsel for

debtor today, I'm going to use my Section 105 power to the extent it's necessary to deny any request to voluntarily convert directly to Chapter 11. [DEBTOR'S COUNSEL]: And also, the debtor would then request to withdraw her petition. THE COURT: That request is also denied. The Court, pursuant to Section 105 of the Code and Section 1307(c) is today sua sponte converting this Chapter 13 case to a case under Chapter 7. So accordingly, I will enter an order today converting this case to Chapter 7.