

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re:

Case No.: 9:12-bk-17027-FMD
Chapter 7

Kris W. Thoemke
Marsha L. Thoemke,

Debtors.

**ORDER GRANTING DEBTORS' MOTION
FOR SUMMARY JUDGMENT, DENYING
UNITED STATES TRUSTEE'S MOTION
FOR SUMMARY JUDGMENT, AND
DENYING UNITED STATES TRUSTEE'S
MOTION TO DISMISS CHAPTER 7 CASE
PURSUANT TO 11 U.S.C. § 707(b)(1 and 2)
OR ALTERNATIVELY (b)(1 and 3)**

THIS CASE came on for hearing on January 22, 2014, on cross motions for summary judgment filed by the United States Trustee and the Debtors (Doc. Nos. 61 and 62) in connection with the United States Trustee's *Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(b)(1 and 2) or Alternatively (b)(1 and 3)* (Doc. No. 52). The motions address the threshold legal issue of whether 11 U.S.C. § 707(b) applies to a Chapter 7 bankruptcy case that was originally filed under Chapter 13. Although there is a significant split of authority on this issue, the Court is persuaded by the reasoning set forth in *In re Layton*¹ and holds that § 707(b) does not apply to a case initially filed under Chapter 13 and then converted to Chapter 7.

Debtors filed their bankruptcy petition under Chapter 13.² Before the final confirmation hearing on their Chapter 13 Plan, Debtors moved to convert their case to Chapter 7.³ This Court granted their motion.⁴ After conversion, the

United States Trustee filed a *Statement of Presumed Abuse under 11 U.S.C. § 707(b)(2)*⁵ and then moved to dismiss the Debtors' case pursuant to § 707(b).⁶

The parties disagree over whether § 707(b) applies to a converted case. Section 707(b)(1) states in relevant part:

After notice and a hearing, the court . . . on a motion by the United States trustee . . . 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 an abuse of the provisions of this chapter.⁷ (emphasis supplied).

Federal courts are divided on the issue of whether this provision applies in a case not originally filed under Chapter 7. Some courts, including *Layton*, have found that the "filed under this chapter" language requires the bankruptcy case to have been filed originally under Chapter 7 for § 707(b)(1) to apply.⁸ Courts adopting this "plain language" interpretation reason that because cases converted to Chapter 7 from a different chapter were not "originally filed" under Chapter 7, § 707(b)(1) does not apply. Other courts, however, have concluded that the word "debtor" modifies "filed."⁹ Under this interpretation, as long as the case was filed by an individual debtor with primarily consumer debts, § 707(b) applies both to cases filed originally under Chapter 7 and cases converted from Chapter 13 to Chapter 7.¹⁰ Yet another interpretation reasons that § 707(b) applies to

⁵ Doc. No. 49.

⁶ Doc. No. 52.

⁷ 11 U.S.C. § 707(b)(1) (2010) (emphasis added).

⁸ *Layton*, 480 B.R. at 400; *In re Ryder*, 2008 WL 3845246, *1 (Bankr. N.D. Cal. Aug. 18, 2008); *In re Fox*, 370 B.R. 639, 643 (Bankr. D.N.J. 2007); *In re Pate*, 2012 WL 6737814, *3 (Bankr. S.D. Tex. Dec. 28, 2012); *In re Dudley*, 405 B.R. 790, 801 (Bankr. W.D. Va. 2009).

⁹ *Justice v. Adv. Control Solutions, Inc.*, 2008 WL 4368668, *4 (W.D. Ark. Sept. 22, 2008).

¹⁰ *Layton*, 480 B.R. at 395 (describing the "last antecedent" grammatical rule).

¹ 480 B.R. 392 (Bankr. M.D. Fla. 2012).

² Doc. No. 1.

³ Doc. No. 37.

⁴ Doc. No. 41.

converted cases because the term “filed” includes the filing of a motion to convert to Chapter 7.¹¹ And finally, some courts find the language ambiguous and thus make their conclusions on grounds other than a reading of the language itself.¹²

Many courts that find § 707(b) applicable to converted cases are persuaded by the “common sense” argument described—but rejected—in *Layton*.¹³ The thrust of the “common sense” argument is that allowing debtors to avoid the means test by initially filing under Chapter 13 and then converting to Chapter 7 would make a mockery of the system.¹⁴ The fear is that finding § 707(b) *inapplicable* to converted cases creates a loophole for debtors to abuse. Essentially, a debtor could initially file under Chapter 13—with no intention of proceeding under that chapter—and then convert to Chapter 7. And once under Chapter 7, the debtor would not be subject to § 707(b) because the case is a converted case.

But, as *Layton* explains, this fear is easily assuaged by the variety of tools that courts have at their disposal to prevent a debtor from abusing this potential loophole.¹⁵ First, a bankruptcy court may dismiss a case pursuant to § 105(a).¹⁶ Second, § 707(a) permits a court to dismiss any Chapter 7 case, including a converted case, for cause.¹⁷ And finally, “even absent application of § 105, every federal court has the inherent power to sanction abusive litigation practices.”¹⁸

Due to these ample remedies, this Court, like *Layton*, concludes that the better view is to follow

the “plain language” approach and utilize the Court’s discretion to dismiss bad-faith filers on other grounds. Therefore, the Court holds that § 707(b)(1) applies only if a bankruptcy case is initially filed under Chapter 7.

Accordingly, it is

ORDERED:

1. The Debtor’s Motion for Summary Judgment (Doc. No. 62) is **GRANTED**;

2. The United States Trustee’s Motion for Summary Judgment (Doc. No. 61) is **DENIED**; and,

3. The United States Trustee’s Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(1 and 2) or Alternatively (b)(1 and 3) (Doc. No. 52) is **DENIED**.

Dated: February 4, 2014

/s/
Caryl E. Delano
United States Bankruptcy Judge

Attorney W. Justin Cottrell is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

¹¹ See, e.g., *In re Davis*, 489 B.R. 478, 481 (Bankr. S.D. Ga. 2013).

¹² *In re Willis*, 408 B.R. 803, 805 (Bankr. W.D. Mo. 2009); *Justice*, 2008 WL 4368668 at *4.

¹³ See *Layton*, 480 B.R. at 396-397 (discussing the “common sense” argument).

¹⁴ See, e.g., *In re Chapman*, 447 B.R. 250, 253 (B.A.P. 8th Cir. 2011); *In re Reece*, 498 B.R. 72, 81 (Bankr. W.D. Va. 2013).

¹⁵ *Layton*, 480 B.R. at 397-398.

¹⁶ *Id.* at 398; See also *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375 (2007).

¹⁷ *Dudley*, 405 B.R. at 800.

¹⁸ *Layton*, 480 B.R. at 398; *Marrama* 549 U.S. at 376; *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765 (1980).