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ABUSE OF INDIVIDUAL BANKRUPTCY LAWS:

CAN RUSSIA LEARN FROM THE EXPERIENCES OF THE US?

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ABSTRACT

This thesis examines the problem of abuses of individual bankruptcy laws in the US and Russia. Through looking at US regulations and case law it identifies how Russia can use US experiences for preventing abuses of individual bankruptcy laws. The thesis describes the major regulations on prevention of individual bankruptcy abuses in the US and provides a classification of types and criteria of abuses of the US individual bankruptcy laws. Through using a comparative method, this paper identifies which of the US regulations prevent abuses, as well as what criteria and types of abuses developed by the US case law can be used in Russia to tackle abuses of individual bankruptcy laws. It concludes that an analogue of a means test and a totality of circumstances test used in the US should be introduced to the Russian legislation in order to prevent abuses of bankruptcy laws. In addition to the introduction of these tests, Russian courts can use the criteria of abuse elaborated by the US courts as a guide while defining whether there was an abuse of individual bankruptcy laws.

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INTRODUCTION

Historically bankrupts were labeled as "deceivers," "frauds," "offenders," "cheaters," and "squanderers". This was explained by abuses that were met in bankruptcy proceedings, since bankruptcy was usually associated with concealment of assets and debtor's fraudulent behavior.[1] Early bankruptcy laws included many criminal law sanctions, whereas civil law alternatives were developed later. The most "traditional" bankruptcy crimes are concealment of assets and perjury[2]. While forms of economic activity changed throughout history, all bankruptcy fraud schemes have the same goal – to conceal the debtor's assets[3].

Between the years of 2006 - 2013 concealment of assets, bankruptcy fraud schemes, false statements and oaths constituted about ninety percent of the alleged bankruptcy crimes in the US[4]. The United States Code sets out criminal punishment (either fine or imprisonment for up to five years, or both) for bankruptcy crimes in case of concealment of assets, false oaths and claims, bribery[5]. In order to enforce this criminal statute the following elements shall be proved. Firstly, the existence of the bankruptcy proceeding under the Bankruptcy Code. Secondly, the concealment of property by the defendant in connection with this proceeding. Finally, the defendant should have concealed assets knowingly and fraudulently with the intent to defeat the provisions of the Bankruptcy Code[6]. The last element among these three is the most difficult to establish, which often leads to failure of a case[7]. As it has been noted by Ed Flynn and

[1] Rafael Efrat, *The Evolution of Bankruptcy Stigma,* 7 Theoretical Inquiries L. 365 (2006), p.1, 2.
[2] STEPHANIE WICKOUSKI, BANKRUPTCY CRIMES (3d ed. 2007), p. 8.
[3] Bankruptcy fraud schemes include inter alia "bustout", "looting", bleedout and "skeeming", which are jargons of bankruptcy-related crimes. Id. p. 10, 11, 12, 13.
[4] Ed Flynn, Charles Bowles, *Bankruptcy Crime and Punishment*, 34-1 ABIJ 24 (2015), p. 2.
[5] 18 US Code § 152.
[6] Tamara Ogier, Jack F. Williams, *Bankruptcy Crimes and Bankruptcy Practice*, 6 Am. Bankr. Inst. L. Rev. 317 (1998), p. 2.
[7] Id. p. 6.

Charles Bowles, criminal referrals made to the US Department of Justice for bankruptcy crimes often do not result in filing criminal charges[8].

It can be seen that criminal sanctions for bankruptcy-related crimes are insufficient and do not always meet one of the purposes of bankruptcy laws, which is repayment of debts to creditors[9], as well as do not stipulate measures for creditors to ensure that they were not defrauded by the debtor[10]. Moreover, not all abuses of bankruptcy laws, which are met in practice, fall under a crime from the legal perspective. Therefore, although criminal sanctions are still an option, civil law sanctions for violation of bankruptcy laws are regarded more effective from the practical point of view. First, imprisonment of a debtor does not not help creditors to get their money back, whereas civil proceedings refer to debtor's future earnings that are used for debt repayment[11]. Secondly, civil law sanctions can be used for those abuses of bankruptcy laws that are not regarded as crimes from the legal perspective.

This thesis examines civil law abuses of the US bankruptcy laws and gives an overview of the most typical forms of abuses, which are met in practice. While transactions, which can be avoided by trustee within bankruptcy proceedings may be associated with abuse, this thesis does not include analysis of these transactions, since it is another topic of itself. The research was made on individual's behavior that, on the one hand, meets formal requirements of bankruptcy laws, but on the other hand, taking into account all circumstances of the case it constitutes an abuse of bankruptcy laws.

The global financial crisis of 2008 added impetus to the introduction, in some countries, of individual bankruptcy laws. In Russia, individual bankruptcy laws came into force on October

[8] Ed Flynn, Charles Bowles, *Bankruptcy Crime and Punishment*, 34-1 ABIJ 24 (2015), p. 2.
[9] The purposes of bankruptcy laws are not only debt repayment, but also collecting assets, debt discharge and giving a fresh start to the debtor. For a detailed analysis of the purposes of bankruptcy law please refer to Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy's Social Insurance Function after BAPCPA,* 7 DePaul Bus. & Comm. L.J. 241 (2008-2009), p. 241-273.
[10] DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 35 (5th ed. 2010), p. 35.
[11] STEPHANIE WICKOUSKI, BANKRUPTCY CRIMES (3d ed. 2007), p. 5.

1, 2015. One of the main issues in Russia which bothers creditors, and which is now on the table, is how to prevent individuals' bankruptcy abuse. Since the individuals' debt threshold is not high, creditors are afraid that a debtor will use bankruptcy proceeding only to be discharged from his debts and obligations. Obviously, year by year there will be growing case law on examples of individual bankruptcy abuses, which will eventually lead to adoption of regulations on prevention of abuses in Russia. In the meantime, the experiences of the US on abuse of individual bankruptcy laws can be used in Russia in order to get a picture of possible abuses and the ways of combating these abuses.

The US core regulation of abuses of individual bankruptcy laws is the Bankruptcy Abuse Prevention and Consumer Protection Act that was adopted in 2005 as a reaction by Congress to the necessity of introducing effective measures for prevention of abuses by individuals in bankruptcy proceedings. The first chapter of the thesis describes the reasons for the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"), as well as the major amendments of the individual bankruptcy laws that were introduced by this act. It provides a classification and criteria of abuses of individual bankruptcy laws, as well as gives a summary of case law on abuses of bankruptcy laws by individuals after adoption of BAPCPA. In the second chapter, the focus is placed on the regulation of individual bankruptcy in Russia together with the available legal remedies for abuses. Finally, by means of a comparative method, the last chapter presents an analysis of the US experiences that Russia can learn from, with respect to regulation of individual bankruptcy abuses.

CHAPTER I. BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT (BAPCPA) AS A MAJOR REFORM FOR PREVENTION OF ABUSES

1.1 Reasons for adoption of BAPCPA

The enactment of the 1898 Bankruptcy Law denoted the first comprehensive American bankruptcy system, where both the corporations and the individuals were given right to resort to the system. Three bankruptcy laws were passed (in 1800, 1841 and 1867), before the 1898 Bankruptcy Law was adopted. In order to describe the life of previous bankruptcy laws the scholars refer to Thomas Hobbes words "nasty, brutish and short"[12]. The 1898 Bankruptcy Law became the first permanent federal bankruptcy legislation. Debtors used the bankruptcy laws for discharging from their debts either when they could not repay the debt or when they merely did not want to do it. Creditors alleged that most debtors purposely manipulated the law for their own financial gain, rather than "strapped families on their last straw of financial viability". Indeed, within five years after the Congress passed the 1898 Bankruptcy Law, there was a huge pressure from the creditors who argued that debtors were abusing bankruptcy laws by filing for bankruptcy over and over again[13], since the debtors had unconditional right to discharge from their debts. The US Bankruptcy laws have undergone significant changes since that time. Thus, in 1938 the Chandler Act revised substantially the 1989 Bankruptcy Law by introducing reorganization provisions, including, among others, Chapter XIII (the predecessor to Chapter 13 of the Bankruptcy Code) which provided for voluntary debt repayment plans[14]. The Bankruptcy Reform Act of 1978 preserved the principle of completely voluntary decision of

[12] David A. Skeel Jr., *The Genius of the 1898 Bankruptcy Act*, 15 Bankr. Dev. J. 321 (1999), p. 321-322.
[13] Greene S., *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers,* 89 Am. Bankr. L.J. 241 (2015), p. 242.
[14] Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. L.Rev. 5 (1995), p. 29-30.

the debtor to propose repayment plan and the dismissal of Chapter 7 case only for "cause"[15]. In 1984, the Bankruptcy Code was amended by authorizing bankruptcy court to dismiss a Chapter 7 case in case the relief would be a "substantial abuse" of bankruptcy proceedings[16]. The criteria of "substantial abuse" was very vague, which led to inconsistent interpretation of this ground for dismissal of a case by different courts[17]. The problem of abuse of bankruptcy laws remained and required a consistent and prudent solution.

From the perspective of our central topic, it was of key importance that the Bankruptcy Reform Act of 1994 provided for the establishment of the Bankruptcy Review Commission ("Commission"). The Commission's mission was, firstly, to investigate the problems relating to the Bankruptcy Code, taking into account the proposals and arrangements, which existed as of the date of the Commission's establishment. Secondly, the Commission was to evaluate the existing proposals of main issues arising from the Bankruptcy Code and to collect and analyze divergent views of all parties concerned with the operation of the bankruptcy system. Finally, the Commission's work should have resulted in preparation of the Report, which was to address the issues and problems revealed by the Commission. The Commission should have to present the Report to the Congress, the Chief Justice, and the President[18].

The establishment of the Commission "became the impetus for BAPCPA"[19]. As required by the Bankruptcy Reform Act of 1994 the Commission prepared the report and filed it on October 20, 1997. The report consisted of 1338 pages, including dissenting views and 172 recommendations[20] ("Report"). Among others, the report included the Recommendations for

[15] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 79 Am. Bankr. L.J. 485 (2005), p. 491.
[16] Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. L.Rev. 5 (1995), p. 36.
[17] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 79 Am. Bankr. L.J. 485 (2005), p. 493.
[18] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).
[19] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 79 Am. Bankr. L.J. 485 (2005), p. 486.
[20] Report of the National Bankruptcy Review Commission, 12 Com. L. Bull. 14 (1997).

Reform of Consumer Bankruptcy Law. From the perspective of our central topic, it is important to note that four Commissioners dissented with this part of the Report, stating "there is growing perception that bankruptcy has become a first resort rather than a last measure for people who cannot keep up with their bills".[21] This was explained by elimination of bankruptcy stigma and easiness of obtaining of the debt discharge within bankruptcy proceedings. They disagreed with the proposals included in the Report, arguing that these proposals do not solve the problem of abuse of the system, since they do not prevent the abuse of bankruptcy laws and do not penalize for such abuse. The dissenting Commissioners stated that, firstly, the proposals grant excessively generous exemptions, which protect the debtor's property from the creditors' claims in case of bankruptcy proceedings. These excessive exemptions are used by debtors as loopholes in order to discharge from the debts. Secondly, the proposals do not restrict the repeated filings or using the automatic stay with the only purpose to prevent forfeiture of property. Thus, debtors are granted the room for unjustifiable manipulation of bankruptcy laws. Thirdly, due to the existing options of manipulating of the system the proposals encourage Chapter 7 liquidations, rather than repayment under Chapter 13. Fourthly, the proposals provide for excessive restrictions on lenders with respect to debts under credit cards, reaffirmations, rent-to-own contracts and household goods, which focus mainly on the debtor's protection[22].

Another issue, which was discussed by the dissenting Commissioners, was the necessity of introduction of the proper means testing. Two dissenting Commissioners noted that lack of means testing allows the abusers to choose their own debt remedy[23]. They proposed that the Bankruptcy Code should be amended, firstly, by requiring the court to dismiss or convert the bankruptcy filing for Chapter 7 if it finds that the debtor is able to partially repay his debts in

[21] Id., p. 1044.
[22] Id., p. 1045-1046.
[23] Id., p. 1141, 1148.

accordance with Chapter 13 (e.g. repayment of 10% of unsecured debt within five years, or any other amount, which the Congress chooses)[24]. Secondly, the dissenting Commissioners proposed that if the debtor's family income exceeds $35,000 or $40,000 per year, the debtor should be permitted to file for Chapter 7 liquidation relief only if the panel trustee conducts the full bankruptcy at the debtor's expense. Thirdly, they proposed to define a presumptive income ceiling for the availability of Chapter 7 relief. Fourthly, the Commissioners proposed to use statistics from the Bureau of Labor Statistics in order to define the debtor's living costs[25].

The dissenting opinions of the Commissioners played an important role in the future amendment of the bankruptcy laws given that their arguments were used while working on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA[26])[27].

The necessity of reforming the bankruptcy regulation was connected, inter alia, with a sharp rise of bankruptcy filings, which jumped eleven percent during 1995 and another twenty seven percent during 1996[28]. Bankruptcy reform came "in response to a surge in consumer bankruptcy filings over the past twenty-five years, and the perception of excessive fraud and abuse in the consumer bankruptcy system"[29]. In 1979 annual filings constituted 250,000 as opposed to the year of 2004, when they amounted to over 1.5 million[30]. Congress attempted to reform the bankruptcy laws since 1998, but only in 2005 it resulted in passing the BAPCPA[31]. It was promoted mostly by banks, credit card companies and other creditor groups.[32] On 20

[24] Id., p. 1140.
[25] Id., p. 1142.
[26] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).
[27] Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 79 Am. Bankr. L.J. 485 (2005), p. 493.
[28] Report of the National Bankruptcy Review Commission, 12 Com. L. Bull. 14 (1997).
[29] Todd J. Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463 (2004-2005), p. 1464. For an overview of the causes of the consumer bankruptcy increase please also see: Todd J. Zywicki, *Institutions, Incentives, and Consumer Bankruptcy Reform*, 62 Wash. & Lee L. Rev. 1071 (2005), p. 1071 - 1136.
[30] Id.
[31] Elijah M. Alper, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay up*, 107 Colum. L. Rev. 1908 (2007), p. 1910.
[32] Stephen J. Spurr, Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy,* 87 Am. Bankr. L.J. 27 (2013), p. 2; Kathleen Murphy, Justin H. Dion, *"Means*

April, 2005 while signing the BAPCPA George W. Bush said: "In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them. This has made credit less affordable and less accessible [...]. To make the system more fair, the new law will also make it more difficult for serial filers to abuse the most generous bankruptcy protections."[33]

As it has been noted by Kathleen Murphy and Justin H. Dion, the purpose of the legislators while reforming the Bankruptcy Code was to stop the epidemic number of often outrageous abuses which existed in the bankruptcy system[34]. The BAPCPA was passed by Congress, in particular, to get rid of the loopholes used by wealthy individuals, and "opportunistic debtors," when they wanted to use bankruptcy proceedings for discharging from their debts while keeping their assets intact. These loopholes included exemptions on personal property that were provided by some states and which were sometimes unlimited or extremely large. This led to the absence of creditors' access to these assets for the forced sale in course of bankruptcy[35]. BAPCPA's congressional sponsors emphasized the role of "personal responsibility" in order to make it more difficult for individual debtors to get bankruptcy relief.[36]

1.2 Major amendments of BAPCPA aimed at prevention of individual bankruptcy abuse

Some of the proposals of the dissenting Commissioners were reflected in the BAPCPA. Before BAPCPA was passed due to technical rules there was a presumption in favor of debtors, which meant that the relief was granted whenever requested by the debtors. This resulted in

Test" or "Just a Mean Test": An Examination of the Requirement That Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B), 16 Am. Bankr. Inst. L. Rev. 413 (2008), p. 6.

[33] George W. Bush, *Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 41 Weekly Comp. Pres. Doc. 641, 642, April 25, 2005.

[34] Kathleen Murphy, Justin H. Dion, *"Means Test" or "Just a Mean Test": An Examination of the Requirement That Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B)*, 16 Am. Bankr. Inst. L. Rev. 413 (2008), p. 6.

[35] Elijah M. Alper, *Opportunistic Informal Bankruptcy: How BAPCPA May Fail to Make Wealthy Debtors Pay up*, 107 Colum. L. Rev. 1908 (2007), p. 1910.

[36] Stephen J. Spurr, Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy,* 87 Am. Bankr. L.J. 27 (2013), p. 2.

bankruptcy filings by debtors even when they were able to repay debts. The court or the trustee could oppose the relief of debtor by implementing the test for substantial abuse[37]. BAPCPA, firstly, changed the standard of proof from "substantial abuse" to plain "abuse". According to the US Bankruptcy Code, if an individual debtor with consumer debts files a Chapter 7 case, the court may dismiss this case. As an alternative, the court may convert such a case to a case under Chapter 11 or 13 of the Bankruptcy Code subject to the debtor's consent, if it finds that there will be an abuse of provisions of Chapter 7 in case of relief [38]. Although BAPCPA does not define the plain "abuse", this new standard is aimed to help courts to dismiss bankruptcy cases. Prior to BAPCPA the case law divided the interpretation of "substantial abuse" into four groups, ranging from most restrictive to most broad interpretation:

(1) Substantial abuse was found only where Chapter 7 debtors could both repay their debts and had engaged in some sort of bad conduct in connection with their bankruptcies;

(2) The ability to pay debts without difficulty was sufficient in itself to support a finding of substantial abuse, and that such an ability to pay was the only basis for § 707(b) relief, without any relevance of the debtor's bad conduct;

(3) There was no controlling factor (even the ability to repay the debt), and the court had to consider "the totality of the circumstances" test while determining whether a Chapter 7 discharge would be a substantial abuse;

(4) The majority of the decisions hold that substantial abuse could be based either on the debtor's ability to repay or on bad conduct in connection with the bankruptcy.[39]

[37] Kathleen Murphy, Justin H. Dion, *"Means Test" or "Just a Mean Test": An Examination of the Requirement That Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B)*, 16 Am. Bankr. Inst. L. Rev. 413 (2008), p. 7.
[38] The US Code, section 707(b)(1).
[39] Eugene R. Wedoff, *Means Testing in the New § 707(b),* 79 Am. Bankr. L.J. 231, 236 (2005), p. 235.

BAPCPA adopted the most broad interpretation of the abuse (the forth approach), since "passing" the means test does not preclude a discretionary finding of abuse by the court[40] .

Secondly, BAPCPA eliminated the presumption in favor of the debtor by introducing a "means test" which is designed "to replace the subjective standard of good faith by utilizing a complex mathematical formula that produces a straightforward presumption or non-presumption of abuse of the bankruptcy process."[41]

According to the US Bankruptcy Code[42] the means test includes two stages. First, the court looks at the debtor's "current monthly income". If it does not exceed a certain amount provided by the US Bankruptcy Code, then there is no presumption of abuse. If it exceeds the specified amount, the court moves to the second stage and calculates the debtor's "current monthly income" deducting from this income certain living expenses provided by the US Bankruptcy Code. If in the result of such deductions the debtor's "current monthly income" is more than the specified amount, the presumption of abuse arises.

According to the US Bankruptcy Code[43], "the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative".[44] As it has been noted by Eugene R. Wedoff, introduction of the means test will increase the cost of administering consumer bankruptcy cases, since means test introduces the need for substantial additional information to be collected, analyzed, and reported[45].

[40] Id., p. 236.
[41] Kathleen Murphy, Justin H. Dion, *"Means Test" or "Just a Mean Test": An Examination of the Requirement That Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B)*, 16 Am. Bankr. Inst. L. Rev. 413 (2008), p. 1; Stephen J. Spurr, Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy,* 87 Am. Bankr. L.J. 27 (2013), p. 3.
[42] The US Code, section 707(2).
[43] The US Code, section 707 (2) (B).
[44] The US Code, section 707.
[45] Eugene R. Wedoff, *Means Testing in the New § 707(b),* 79 Am. Bankr. L.J. 231, 236 (2005), p. 277.

The US Bankruptcy Code[46] provides that even if the presumption of abuse does not arise or is rebutted, the court may dismiss the Chapter 7 case if a debtor filed the petition in bad faith or the totality of the circumstances of the debtor's financial situation demonstrates abuse.[47] The scholars noted that "bad faith" and "totality of circumstances" of the debtor's financial situation are not defined in the amended US Bankruptcy Code and are new to the text of Chapter 7 of the US Bankruptcy Code. However, they are not without a history. Before BAPCPA was passed the "means test" was applied, and "bad faith" as long as the "totality of circumstances" were used in order to prove the substantial abuse of bankruptcy filings under former section 707(b) once determining the debtor's ability to pay.[48]

(A) Bad faith and Totality of circumstances test in BAPCPA

Bad faith is assessed on a case-by-case basis. Based on the case law, the relevant factors of bad faith may include, among many others: how the debtor's obligations arose; what was the timing after the debtor's obligations occurred for filing the bankruptcy petition; what was the nature of the debtor's obligations; what were the debtor's actions towards his creditors before and after filing of the bankruptcy petition; cooperation of the debtor with the court and the creditors.[49]

Relevant factors of the totality of circumstances of the debtor's financial situation might include "income not recognized by the "means test", large amounts of exempt assets, or payments on debt secured by luxury items"[50]. There was a debate between Judge Eugene Wedoff and Professors Marianne B. Culhane and Michela M. White regarding the application of totality

[46] The US Code, section 707 (3).
[47] Id.
[48] Kathleen Murphy, Justin H. Dion, *"Means Test" or "Just a Mean Test": An Examination of the Requirement That Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B)*, 16 Am. Bankr. Inst. L. Rev. 413 (2008), p.15.
[49] Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge,* 70 Mo. L. Rev. (2005), p. 671.
[50] Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 Am. Bankr. L.J. 231, 236 (2005), p. 236.

circumstances test. Judge Eugene Wedoff states that totality of circumstances shall be examined by court even if the debtor meets the means test requirement[51]. Whereas Professors Marianne B. Culhane and Michela M. White disagree and argue that the intention of Congress was to make the means test the only one to determine the ability to pay under the revised Bankruptcy Code. They underline that since there is a detailed means test, bad faith and totality of circumstances no longer authorize judges to define ability to pay. The Professors assert that these phrases shall be read as limited to serious debtor misconduct. They note that bad faith filing "covers such debtor offenses as serial filings and pervasive non-cooperation aimed at frustrating creditors, rather than seeking a discharge. Totality of the circumstances has a broader scope, including unjustified debtor attempts to "cheat" on the means test. However, judicial tests of ability to pay are no longer a primary component."[52] Bad faith should require a strong showing of debtor dishonesty, whereas the totality of circumstances should "encompass debtor actions before or during the case which, though honestly disclosed, not illegal or necessarily dishonest, are nonetheless manifestly unreasonable under the debtor's circumstances"[53].

Both Judge Eugene Wedoff and Professors Marianne B. Culhane and Michela M. White agree that bad faith and totality of circumstances is matter of the court's discretion and a tool to dismiss the bankruptcy filing for reasons other than the means test. John A. E. Pottow proposes "to focus on a debtor's financial assets when considering a 707(b)(3)(B) motion. This approach would give meaning to this provision of the Code in a way that grants judges the discretion they need but does not tread on Congress's clear occupation of the income scrutiny field"[54].

[51] Eugene R. Wedoff, *Interdisciplinary Perspectives on Bankruptcy Reform: Article: Judicial Discretion to Find Abuse Under Section 707(b)(3)*, 71 Mo. L. Rev. 1035 (2006), p. 1040.
[52] Marianne B. Culhane, Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only way?*, 13 Am. Bankr. Inst. L. Rev. 665 (2005), p. 666, 687.
[53] Id.
[54] John A. E. Pottow, *Interdisciplinary Perspectives on Bankruptcy Reform: Article: The Totality of the Circumstances of the Debtor's Financial Situation in a Post-Means Test World: Trying to Bridge the Wedoff/Culhane & White Divide*, 71 Mo. L. Rev. 1053 (2006), p. 1067.

(B) The effect of BAPCPA on filing system

Did the BAPCPA achieve one of its goals to reduce the number of bankruptcy filings, as well as to solve the problem of the repeated filings, being a part of abuse of bankruptcy system? Some time after the enactment of the BAPCPA several surveys were made in order to define whether the number of the bankruptcy filings was reduced after BAPCPA. In the result of the independent surveys different researchers came to the same conclusion that "Chapter 7 filing rate declined sharply after the enactment of BAPCPA, but increased continuously thereafter, which suggested an eventual return to the levels prevailing before BAPCPA. While there was an initial shift toward Chapter 13, it proved to be temporary, and the subsequent Chapter 13 filing rate remained close to what it would have been had BAPCPA not been enacted"[55]. As long as the BAPCPA failed to reduce the number of bankruptcy filings, it failed to solve the problem of the repeated bankruptcy filings. As it has been noted by Greene Sara Sternberg, 14.7% of all filers in 2007 were repeat filers[56]. Thirty five percent of all the 2007 repeat filers filed under Chapter 13 again. Sixty nine percent of this group filed a second petition less than 365 days after the dismissal of their previous Chapter 13 case[57].

1.3 Summary of the case law after adoption of BAPCPA

One of the goals of this thesis is to find out whether there was any effect of BAPCPA on prevention of abuses of the bankruptcy laws and what classifications of abuses of individual bankruptcy laws are used in the US. For this purpose, a research was made on the case law that was adopted after BAPCPA and where the trustee claimed that there was an abuse of the Bankruptcy code by the debtor. The research showed, firstly, that there are no model cases to

[55] Stephen J. Spurr and Kevin M. Ball, *The Effects of a Statute (BAPCPA) Designed to Make it More Difficult for People to File for Bankruptcy,* 87 Am. Bankr. L.J. 27 (2013), p. 4; Christian E. Weller, Bernard J. Morzuch, Amanda Logan, *Estimating the Effect of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 on the Bankruptcy Rate,* 84 Am. Bankr. L.J. 327 (2010), p. 328.
[56] Greene S., *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers,* 89 Am. Bankr. L.J. 241 (2015), p. 241.
[57] Id.

demonstrate abuses of individual bankruptcy laws, and secondly, that there are no established classifications of abuses of individual bankruptcy laws. Due to the large amount of case law found, this thesis includes only cases that demonstrate the most frequently met debtor's actions that constitute abuses of bankruptcy laws in the US[58], as well as cases when the court did not find any abuse of individual bankruptcy laws although absence of abuse may be argued. The thesis focuses on identifying the most typical abuses of individual bankruptcy laws and provides a classification of analyzed cases.

The examined case law can be classified based on several criteria. First, case law can be classified depending on what situations will be regarded as abuses both in the US and Russia. Secondly, case law can be classified based on the circumstances that are not regarded as abuses in the US, but will be regarded as abuses in Russia. Since individual bankruptcy regulation came into force in Russia only since October 01, 2015 and no case law on abuses has yet been formed, it occurs that currently these classifications will not be supported by the respective case law of the Russian courts and therefore at this stage such classifications will be inaccurate. Thirdly, a classification may include a general division of cases between those that constitute an abuse in the US and those that do not. In order to further expand the previous classification, case law can be divided based on the grounds that constitute abuse under the US law (e.g. acting in bad faith, abuse according to the totality of circumstances test, etc.). This classification shall also include cases where the court did not find any abuse although the circumstances of the case were similar to cases where an abuse was found. Finally, cases can be divided between those when filing a bankruptcy petition constitutes an abuse and those when there is an abuse by manipulating bankruptcy proceedings (by filing a petition to convert a case from one chapter to another). This thesis demonstrates the last two classifications, since it

[58] Although these actions constitute the most typical abuses of individual bankruptcy laws in the US, this may not be the case in Russia.

appears that they are most appropriate and consistent in view of the structure of this work. Since the thesis discusses the major amendments of BAPCPA that aimed to prevent abuses of individual bankruptcy laws, the effect of these amendments is reflected in the last two classifications.

1.4 Most typical forms of abuses of bankruptcy laws after adoption of BAPCPA

1.4.1 Filing bankruptcy petition in bad faith

(A) In re Booker[59]

On 19 June, 2008, Sylvester Everett Booker and Ella Mornett Booker (the Debtors) filed a petition for relief under Chapter 7 of the Bankruptcy Code, seeking a discharge of $247,845 in non-priority unsecured debt. United States Trustee filed motion to dismiss Chapter 7 case asserting that the petition was filed in bad faith and that the totality of circumstances test demonstrated that there was an abuse on the Debtors' side. The Trustee claimed that the Debtors could repay a significant part of their debt (36.8%) once their expenses were reduced. The Bankruptcy court granted the motion to dismiss the case, holding that the petition was filed in bad faith.

According to the amended schedule to the petition, the monthly net income of the Debtors was $5,898.35, whereas the expenses were $5,894. Monthly expenses included $1,268 payment on a personal car (2006 Lexus), $200 in cell phone expenses, $196.67 as contributions to the Debtors' 401k retirement plans, $1,610 housing expense, $198 payment on a debt secured by the Debtors' interest in a timeshare, $350 contribution to the Debtors' incarcerated son, as well as $210 in miscellaneous personal and household expenses[60].

[59] *In re* Booker, 399 B.R. 662 (Bkrtcy.W.D.Mo. 2009).
[60] Id.

The Bankruptcy court noted that after BAPCPA the courts need to find out whether there is an abuse of provisions of the Bankruptcy code without any proof of substantiality of such an abuse. The Court applied the totality of the circumstances test, assessing the Debtors' income and expenses and their ability to pay the debts. As noted by the Bankruptcy court "to decline to consider the debtors' actual ability to pay is not only unfaithful to the language of the statute but would grant debtors a safe harbor which is unwarranted"[61]. The Bankruptcy court stated that once the Debtors filed a Chapter 7 case they should demonstrate "belt tightening". At the time of filing the Debtors owned three vehicles, one of which was not operable as evidenced by the Debtors. The Debtors proposed to surrender a 2001 Chrysler and retain the 2006 Lexus, because it was "more dependable" for the Debtors. The Bankruptcy court found that the Debtors could use the Chrysler and thus save $1,000 per month and use this money for debt repayment. The Bankruptcy court found that $350 contribution to the Debtors' incarcerated son was an unnecessary expense, since this sum was used for their son's discretionary expenditures. The Court also found that the Debtors could not justify the retaining of timeshare and instead of paying for the timeshare, this money could be used for debt repayment to unsecured creditors. Moreover, the Bankruptcy court ruled that the cell phone expenses could be reduced from $200 to $100[62].

The Court stated that "in assessing whether the filing was made in bad faith, this Court should focus more on conduct", whereas "when assessing whether the case should be dismissed as an abuse based upon the totality of the Debtors' financial circumstances, the Court should consider primarily, if not exclusively, the Debtors' ability to pay".[63]

The Bankruptcy court granted the motion to dismiss the case under Chapter 7, holding that the Debtors acted in bad faith. They failed to minimize their expenses, kept luxury items that

[61] Id.
[62] Id.
[63] Id.

prevented them from repaying a significant part of their unsecured debt. Furthermore, the Debtors' original schedules to the bankruptcy petition were materially inaccurate and did not include information, which was important for defining their actual expenses. The Bankruptcy court noted that the Debtors could convert their case to Chapter 13 within twenty days[64].

(B) In re Mitchell[65]

On May 8, 2006, Silvia Elizabeth Mitchell (the Debtor) filed a Chapter 7 voluntary petition, seeking a discharge of $62,521 in non-priority unsecured debt.

United States Trustee filed a motion to dismiss this bankruptcy case as having been commenced in bad faith, since the Debtor's credit transactions, which led to the bankruptcy filing were abusive and were made contemplating this bankruptcy case. The Trustee also requested the court to enter an order barring the Debtor from refiling another Chapter 7 petition for 180 days.

Ernest M. Robles, the Bankruptcy Judge, ruled that the Debtor filed her bankruptcy petition in bad faith and dismissed the case for abuse imposing a bar against filing another petition for 180 days.

The Court summarized the factors[66] that it should take into account while deciding whether there was bad faith in the Debtor's actions. Firstly, the court should regard whether there is a possibility for a debtor for future income to fund a Chapter 11, 12, or 13 plan for repayment of a substantial portion of the debtor's unsecured claims. Secondly, the reason of filing of the petition should be determined: whether it was consequence of the debtor's illness, disability, unemployment, or some other calamity. Thirdly, it shall be found out whether it follows from the petition that cash advancements and consumer goods on credit were obtained by debtor beyond his ability to repay them. Fourthly, the debtor's proposed family budget should not be

[64] Id.
[65] *In re* Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006).
[66] The Court referred to prior BAPCPA cases: *In re* Price, 353 F.3d 1135 (9th Cir. 2004), *In re* Leavitt, 171 F.3d 1219 (9th Cir. 1999), *In re* Marshall, 298 B.R. 670 (Bankr. C.D. Cal. 2003).

excessive or extravagant. Fifthly, the debtor should not include in the petition inaccurate or misrepresentative information about his financial situation. Sixthly, the debtor should not be engaged in eve-of-bankruptcy purchases. Eighthly, the debtor's history of bankruptcy filings and case dismissals should be taken into account, as well as the debtor's intention to invoke the automatic stay for improper purposes, such as for the sole objective of defeating state court litigation. Finally, egregious behavior on the debtor's side shall be taken into account[67].

As it was demonstrated by the Trustee, the annual income of the Debtor when she was employed was $11,000. However, since 2004 she has been unemployed. In 2005 the Debtor spent a total of $15,386.32 on "dining out," "women's fashions and accessories," "electronics and personal property," and "beauty treatments and related products". In the first four months of 2006 (leading up to her bankruptcy filing in May 2006), the Debtor spent $13,531.52 on the same.[68] These amounts far exceeded her annual income while she was employed. As noted by Court, "all of these facts indicate that the Debtor has obtained consumer goods on credit exceeding her ability to repay them and that she engaged in several weeks worth of eve-of-bankruptcy purchases." [69]

1.4.2 Abuse under the totality of circumstances test

The cases below demonstrate the abuses under the totality of circumstances test[70]. In many cases more than one type of abuse is at stake, which in aggregate constitute a ground for dismissing a case.

(A) Applying for a relief when a debtor has excessive and unjustifiable monthly expenses (Calhoun v. U. S. Tr.[71])

[67] *In re* Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006).
[68] Id.
[69] Id.
[70] Bad faith and Totality of circumstances test in BAPCPA.
[71] Calhoun v. U.S. Tr., 650 F.3d 338 (4th Cir. 2011).

On February 27, 2008, John and Glenda Calhoun (the Debtors) filed a voluntary Chapter 7 bankruptcy petition looking for discharging from $106,707 in unsecured debt. As it was found out within the bankruptcy proceeding, Mr. Calhoun received total of $8,772 in monthly income, whereas Mrs. Calhoun did not receive any income. They lived in on a 3.5 acre property on Tennis Ranch Road in Jackson, South Carolina, with no dependents. The Calhouns accumulated debt on a second mortgage and five credit cards, and in the result of reducing their monthly expenses they paid their creditors a total of $2,638 per month within twenty-two months before bankruptcy filing. Afterwards they decided that with these payments they did not have any money for emergencies and therefore filed a petition under Chapter 7.

United States Trustee filed a motion to dismiss Chapter 7 bankruptcy proceeding, stating that there was an abuse on Calhouns side by filing a petition under Chapter 7. The United States Bankruptcy Court for the District of South Carolina granted motion, and Debtors appealed. The United States District Court for the District of South Carolina, Cameron McGowan Currie, J., affirmed, and Debtors again appealed.

The Court of Appeals affirmed the judgment of the Bankruptcy court, confirming that there was an abuse in Debtors' filing the petition under Chapter 7.

As noted by the Court of Appeals, the Debtors' expenses left a monthly net income that was insufficient to trigger a presumption of abuse under the Bankruptcy Code[72]. However, even if in the result of the means test the presumption of abuse does not arise or is rebutted, the court still should determine whether granting a debtor relief would be an abuse of the provisions of Chapter 7. The court should consider ''whether the debtor filed his petition in bad faith'' and/or by considering ''the totality of the circumstances of the debtor's financial situation".[73] The Bankruptcy court found that the Debtors were able to repay their debts based on the totality of

[72] Id.
[73] Id.

the circumstances of their financial situation. Firstly, twenty-two months before filing a Chapter 7 relief the Calhouns made monthly payments of $2,638 to their unsecured creditors. Secondly, it was found out that the petition for Chapter 7 relief was not filed because of unemployment, illness or disability or any other unanticipated event. Thirdly, the Debtors' monthly expenses were unjustifiable and could be reduced. Fourthly, although Mrs. Calhoun would receive 75% of Mr. Calhoun's monthly income from his retirement account in case of his death, the Calhouns' monthly expenses included $439 on two life insurance policies, including one that would provide for Mrs. Calhoun after Mr. Calhoun's death. Fifthly, the Debtors monthly expenses included $930 on food, which was excessive, since it did not include expenses for cable and internet, laundry and dry cleaning. Finally, the Calhouns did not justify their excessive monthly transportation expenses of $1,318 for their two vehicles. The Court of Appeals ruled that these facts evidenced that the relief under Chapter 7 would be an abuse of the provisions of that chapter and therefore the judgment of the Bankruptcy court was affirmed[74].

(B) Concealing debtor's true financial position and bearing excessive housing expenses (In re Grinkmeyer[75])

On September 30, 2010 Gerald Bruce Grinkmeyer and Joan Noonan Grinkmeyer (the Debtors) filed for relief under Chapter 7. United States Trustee filed a motion to dismiss the Debtors' Chapter 7 case as abusive either based on ''means test'' presumption of abuse or on totality of circumstances of their financial situation.

The Bankruptcy Court, Basil H. Lorch, III, J., granted the motion to dismiss the case under Chapter 7 holding that the case was abusive based on the totality of circumstances of the Debtors' financial situation.

[74] Id.
[75] *In re* Grinkmeyer, 456 B.R. 385 (Bkrtcy.S.D.Ind. 2011).

United States Trustee asserted that the Debtors should not have included in their disposable income, calculated within the means test, a mortgage expense on real property that they wanted to surrender.

Based on the case law, the Bankruptcy court held that Chapter 7 debtors were allowed to deduct mortgage payments on property to be surrendered. Therefore, the Court ruled that there was no presumption of abuse under the "means test". However, the Bankruptcy court addressed to the totality of circumstances of the Debtors' financial situation. The Court held that based on the facts of the case the Debtors were able to repay $75,532 nonpriority unsecured debt. Although Mr. Grinkmeyer was employed not long time ago, Mrs. Grinkmeyer has been employed by the same employer for eleven years as of the date of bankruptcy filing and had a stable income. They did not have any dependents. The Debtors' gross monthly income was $9,194 and net monthly income was $6,355. According to the schedule to the petition, the Debtors' monthly expenses constituted $6,827, which included a $2,986 mortgage payment on property, which was to be surrendered. As noted by the Bankruptcy court, once the Debtors surrender the property and have a lower housing expense, they would be able to repay the nonpriority unsecured debt[76]. Based on the above, the Court stated that the Debtors' housing expenses are excessive and that the petition did not reflect the true financial position of the Debtors, which constituted an abuse under totality of circumstances of the Debtors' financial position. The Court granted the Trustee's motion to dismiss the case under Chapter 7 and noted that the Debtors could file for Chapter 13 relief instead of Chapter 7 relief. Twenty days were granted to the Debtors to convert their case to one under Chapter 13 and propose a repayment plan [77].

(C) Applying for a relief when a debtor is able to repay debts (In re Freis[78])

[76] Id.
[77] Id.
[78] *In re* Freis, No. 06-30393, 2007 WL 1577752, at 1-3 (Bankr. W.D. Mo. May 18, 2007).

On September 28, 2006, David Allen Freis and Sara Delaine Freis (the Debtors) filed for relief under Chapter 7. Their debts were primarily consumer debts and their non-priority unsecured debt was $55,947.16. The Debtors had two dependents. In February 2003, David Freis borrowed $14,000 from his employer. According to the repayment plan with the employer, David Freis was supposed to repay the loan in less than one year from the date of the filing for relief. Since the loan was to be repaid within a short period, United States Trustee filed a motion on dismissal of the Debtors' Chapter 7 case based on the abuse under the totality of circumstances of the Debtors' financial situation. United States Trustee argued that after repayment of the loan the Debtors could repay a significant portion of their unsecured debt (at least $23,088, or 41 %) if there was a Chapter 13 plan.

The Bankruptcy court, Jerry W. Venters, agreed with the United States Trustee and granted a motion to dismiss the case under Chapter 7 holding that the case was abusive based on the totality of circumstances of the Debtors' financial situation[79].

The Bankruptcy court noted that "although some courts have held that the ability to repay factor must be coupled with other factors in order to find abuse under § 707(b)(3)'s totality of circumstances test, this Court believes that a debtor's ability to pay may, in some circumstances, be dispositive of the Debtors' abuse"[80]. In that case, the abuse was confirmed by the significant sum of money, which the Debtors would have the ability to pay in a Chapter 13 bankruptcy case.

As stated by the Bankruptcy Court, based on the totality of the circumstances of the Debtors' financial situation, this case should be dismissed, since there was an abuse of Chapter 7 of the

[79] Id.
[80] Id.

Bankruptcy Code[81]. The Bankruptcy court noted that within thirty days the Debtors could convert their case to one under Chapter 13 and propose a repayment plan[82].

(D) Applying for a relief and including inaccurate financial data (In re Hoffman[83])

On November 28, 2007, Brian K. Hoffman (the Debtor) filed a Chapter 7 petition. United States Trustee filed a motion to dismiss a Chapter 7 case asserting that the Debtor's bankruptcy filing under Chapter 7 constituted abuse of bankruptcy process under the totality of circumstances of the Debtor's financial situation. The Bankruptcy Court, Mary D. France, J., dismissed the case under Chapter 7 holding that filing a petition under Chapter 7 was abuse on the Debtor's side.

The Debtor did not have any dependents and lived with his girlfriend in a home that he owned in Hanover, Pennsylvania. This house was subject to first and second mortgages and on the date of the filing of the petition an aggregate balance due was $296,708, and he had an unsecured debt in the amount $139,638.09[84].

As noted by the Bankruptcy court, in order to determine whether there is an abuse of the bankruptcy process under Chapter 7, the court would use the totality of circumstances factors, which include[85]: (1) filing the bankruptcy petition because of calamity, sudden illness, disability, or unemployment; (2) making consumer purchases far in excess of the debtor's ability to repay; (3) proposing excessive or unreasonable family budget; (4) reflecting true financial condition of the debtor in the schedules and statements of current income and expenditures; (5) filing the bankruptcy petition in bad faith; (6) engaging in eve of bankruptcy

[81] Specifically the US Code, section 707(b)(3).
[82] *In re* Freis, No. 06-30393, 2007 WL 1577752, at 1-3 (Bankr. W.D. Mo. May 18, 2007).
[83] *In re* Hoffman, 413 B.R. 191 (Bankr. M.D. Pa. 2008).

[84] Id.
[85] While listing the factors of totality of circumstances, the Bankruptcy court referred to *In re* Miller, 302 B.R. 495 (Bankr.M.D.Pa.2003). Although this was a pre-BAPCPA judgment, the court noted that the factors listed therein were relevant as well after adoption of BAPCPA. Similar factors are listed in *In re* Walker, 383 B.R. 830 (Bankr. N.D. Ga. 2008).

purchases; (7) enjoying a stable source of future income; (8) debtor's eligibility for adjustment of his debts through Chapter 13 of the Bankruptcy Code; (9) availability of any state remedies with the potential to ease the debtor's financial difficulties; (10) obtaining relief through private negotiations; and (11) possibility of significant reduction of the debtor's expenses without depriving him of adequate food, clothing, shelter and other necessities.[86]

The Bankruptcy court ruled that this case constituted an abuse of Chapter 7, because the Debtor's schedules and statements of current income and expenditures did not reflect his true financial situation. The Debtor reported less income than there was in fact and did not include to the schedule tools and two toolboxes that he used in connection with his work, which were worth approximately $15,000. The Court also ruled that the Debtor's current monthly housing expense of $2,338 was excessive, because it was much more than the Internal Revenue Service standard monthly housing allowance for a single-person household in York County ($983 a month) and that the Debtor could use at least $800 from these housing expenses on debt repayment. The Court noted that the Debtor had a stable source of future income and was eligible for adjustment of his debts through Chapter 13[87].

As it is shown above, the courts actively implement the amendments introduced by BAPCPA. They do not apply only means test, but rather double check whether any abuse was involved in bankruptcy filing by applying either the totality of circumstances test or the bad faith while deciding whether the case should be dismissed. In most cases, the courts grant the motion to dismiss the case if there are sufficient grounds for it. However, there are few cases when the courts refused to dismiss a case holding that no abuse was found. Some of them are demonstrated below.

[86] *In re* Hoffman, 413 B.R. 191 (Bankr. M.D. Pa. 2008).
[87] Id.

1.5 Borderline cases

(A) Absence of abuse in case of keeping luxury items while applying for a bankruptcy relief (In re Jensen [88])

Although in Russia no case law on abuse of individual bankruptcy laws has been formed yet, it appears that in case, similar to In re Jensen, Russian court will find bad faith in the debtor's behaviour. According to Russian bankruptcy laws in case of applying for a relief all the property of a debtor, except for the ones exempt under law, is to be sold in order to pay outstanding amounts to the creditors[89]. Russian law lists the debtor's property that is not subject to sale and it explicitly excludes luxury items from that list[90]. Apparently, motor home and boat would be recognized by Russian court as luxury items. Therefore, debtor will not be entitled to keep these items not depending on debtor's financial situation as of the date of respective purchase. In re Jensen demonstrates a different approach of the US courts to this question.

In April 2008, Kirk Lee Jensen and Linda Jean Jensen (the Debtors) filed a petition under Chapter 7, seeking a discharge of $87,234 in unsecured debt. The Debtors claimed to retain their motor home, boat, and single family home, which they bought two years before filing for bankruptcy, when they had sufficient income to afford these items.

United States Trustee filed a motion to dismiss this bankruptcy case under Chapter 7 referring to the totality of circumstances of the Debtors' financial situation and claiming that it demonstrated the abuse.

[88] *In re* Jensen, 407 B.R. 378, 381 (Bankr. C.D. Cal. 2009).

[89] Federal'nyi Zakon RF o nesostoyatel'nosti (bankrotstve) [Federal law of the Russian Federation on insolvency (bankruptcy)], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No.43, item 4190, art. 213.25.

[90] Grazhdanskii Protsessual'nyi Kodeks Rossiiskoi Federatsii [GPK RF] [Civil Procedural Code] art. 446 (Russ.).

Ernest M. Robles, Bankruptcy Judge, ruled that there was no abuse on the debtors' side and that their choice to continue to pay on retained property was not a basis for dismissing the debtor's Chapter 7 petition under Bankruptcy Code [91].

The Debtors' average monthly income was reported in the amount of $8,622.51, whereas the average monthly expenses were $8,893. As of the date of filing, they owed $63,256 on the motor home, $30,423 on the boat, and $800,754 on the single family home. Monthly payments on the motor home were $396, on the boat $760, and $4,446 on the single-family home.

United States Trustee claimed that the Debtors' motor home and boat were luxury items and the Debtors' payments for these items were detriment to the unsecured creditors. As noted by the Trustee, if the Debtors surrender these luxury items they could have repaid approximately 28% of their unsecured debt within sixty months.[92]

While determining whether there was an abuse in the Debtors' actions, the Bankruptcy court noted that the "common forms of abuse include purchases made on the eve of bankruptcy and purchases that cause the debtor to become insolvent"[93]. In order to define whether the purchase was expensive, the court referred to the percentage of the debtor's monthly income necessary to fund the purchase. As an example, the court stated that if the debtor makes 40% of monthly income to the payments for the purchase, than it would be expensive, but if it is only 5% of monthly income, than it would not be considered expensive[94].

The Court ruled that the Debtors' petition was not abusive, since the Debtors bought motor home and a boat two years before bankruptcy filing, which was not shortly before this filing. At the time of purchase, the total monthly debt payments constituted 12% of the Debtors'

[91] The US Code, section 707(b)(3).
[92] *In re* Jensen, 407 B.R. 378, 381 (Bankr. C.D. Cal. 2009).
[93] The US Code, section 707(b)(3).
[94] The Bankruptcy court also referred to *In re* Worrel, 2007 WL 3374593, at *4 (Bankr.N.D.Iowa 2007), where the court found bankruptcy filing abusive, because the debtors bought two cars, one of which was bought twelve days before filing and another ninety days before filing. The total payments for these cars constituted 38% of the debtors' monthly income.

monthly income in 2006 and 9% of their monthly income in 2007 (due to the increase of their monthly income). Debtors were forced to file a bankruptcy petition due to deterioration of the economy that influenced on the salary of Debtor Kirk Jensen. The Court noted that one of the chief policies of the Bankruptcy Code is "advancing the availability of secured credit"[95]. If the Court adopted the position of the Trustee, a precondition for Chapter 7 relief for many debtors would be a default on their secured credit obligations. This would deteriorate the position of the secured creditors, since in most cases they would not be able to recover the entire obligation due to a lower value of the collateral compared with the debt. Additionally, the recovery of the secured creditors would be reduced due to the costs of repossessing and reselling the collateral.

Absence of abuse under the totality of circumstances test in *In re* Jensen may be argued from the perspective of the Russian law, since luxury items are excluded from the exempt property and are not of prime necessity, as well as their absence doesn't deprive a debtor of adequate food, clothing, shelter and other necessities[96]. *In re* Jensen the court decided to switch from formal implementation of laws to an interpretation that rather relied on the underlying policy choice. This choice was made between, on the one side, the value and significance of secured transactions, and, on the other side, "equitable treatment to creditors who are competing for a debtor's assets" [97]. The court's concern was, firstly, to emphasize the aim of secured transactions, which is to have a guarantee of full recovery in case of debtor's default. Secondly, the court showed that this aim of the secured transactions survives even bankruptcy proceedings. Given that the interpretation of abuse of bankruptcy laws is subject to the court's discretion, the court encouraged using of secured transactions and preserved their importance and value.

[95] Id.
[96] *In re* Hoffman, 413 B.R. 191 (Bankr. M.D. Pa. 2008).
[97] KENNETH W. CLARKSON, ROGER LEROY MILLER, FRANK B. CROSS, BUSINESS LAW: TEXTS AND CASES (9th ed. 2003).

(B) Absence of bad faith in case of falsification of income information and unauthorized post-petition sale of the debtor's property (In re Nancy C. Armstrong[98])

On February 6, 2009, Nancy C. Armstrong (the Debtor) filed a Chapter 13 petition. The Debtor's petition included an ownership interest in her residence in Brookville, N.Y., which she owned as tenants with her husband. The value of the residence was listed $1.8 million, encumbered by a $905,800 first mortgage, plus $15,500 in county and village real property taxes. Besides these secured creditors, the Debtor's other scheduled creditor was the Internal Revenue Service with a priority claim of $23,000 arising from capital gains taxes assessed in 2002. At first, the Debtor claimed that she could repay the debt under Chapter 13. Later the Trustee requested the Debtor to provide him with certain documents related to her business in order to assure that the Debtor will be able to repay the debt. After this request, the Debtor told her lawyer that she did not want to proceed with Chapter 13 case, since she could not comply with the Trustee's request due to absence of business activity within past one year. The Debtor testified that at that time her lawyer told her to ''think about it'' and ''talk to a member of his staff,'' ''give it time'' and ''let [the case] ride to an automatic dismissal''.[99] Two weeks later on March 29, 2009 the Debtor sold her house for 1.5 million without seeking the permission of the Trustee or the authority of the Court. Later she testified that she informed her lawyer's assistant about this sale and the assistant told her husband that they did not need to do anything in this regard[100].

Since the Debtor failed to provide the Trustee with the requested documents, on March 31, 2009 the Trustee filed a motion to dismiss the case. The Debtor filed her own motion to voluntarily dismiss her case. On the hearing, the Trustee said that he learned from a third party that the Debtor sold the residence without permission of the Trustee or Court and therefore

[98] *In re* Nancy C. Armstrong, 409 B.R. 629 (Bkrtcy.E.D.N.Y. 2009).
[99] Id.
[100] Id.

withdrew his motion to dismiss and argued that the case should not be dismissed because of the Debtor's bad faith conduct in the case. The Trustee also claimed that the Debtor falsified her income in the petition. The Debtor admitted that her income was incorrect in the petition, but she said that she submitted the correct data to her lawyer and she had not checked the petition before filing. She testified that it was her lawyer's error, not hers. The Debtor argued that she acted in good faith since she relied on her lawyer's advice. Therefore, the Debtor claimed that there was no bad faith in her actions and the Court could not deny her in the dismissal of the case.

The Bankruptcy court granted the Debtor the motion to voluntarily dismiss this case. The Bankruptcy court applied the totality of circumstances test to the bad faith analysis for defining whether the debtor abused the ''provision, purpose or spirit'' of the Bankruptcy Code and whether the filing was ''fundamentally fair'' to creditors"[101].

As noted by the Bankruptcy court, the courts have enumerated certain factors in applying the totality of circumstances test. These include, inter alia, accurate statement of debts and expenses by the debtor; existence of any fraudulent representation to mislead the bankruptcy court; manipulation by the debtor the bankruptcy proceedings.[102] The Bankruptcy court did not find bad faith in the Debtor's actions while applying the totality of circumstances test. The Court took into account that it was the Debtor's first bankruptcy filing and noted that there was nothing ''extraordinary'' that the Debtor filed a Chapter 13 case in order to benefit from the automatic stay to avoid a foreclosure sale of real property. The court also took into account that the Debtor was advised by an experienced bankruptcy lawyer and attended the meetings with him. As noted by court "although the Debtor clearly was not authorized under the statute to enter into a postpetition contract to sell her real property, it appears to the Court that she sought

[101] Id.
[102] Id.

and relied upon the advice of her counsel in doing so."[103] As regards the inaccuracy of her income in the petition, the Bankruptcy court relied on the Debtor's testimony that it was her lawyer's error, but not hers.

Finally, the Bankruptcy court noted that even if the court found bad faith in this case, the conversion of the case to Chapter 7 would not be in the interests of creditors and estate.[104]

Absence of bad faith in *In re* Nancy C. Armstrong may be argued given that there was falsification of income information in the bankruptcy petition and that there was an unauthorized sale of assets within the bankruptcy proceedings. In this case the court relied on the petitioner's testimony that it was her lawyer's fault and error[105], although admitting a hypothetical possibility of bad faith on the debtor's side. As follows from the decision, the court was guided rather by one of the ultimate aims of bankruptcy regulation, which is protection of creditors' interests, than by facts of the case. Therefore, the court used its discretion in determining the debtor's bad faith in bankruptcy proceedings and interpreted it in favor of creditors providing them with a chance to get full payment.

1.6 Cases on manipulation of bankruptcy proceedings

The cases below demonstrate that there may be abuse not only by filing of a bankruptcy petition, but also by trying to convert a case from Chapter 7 to Chapter 13 of the Bankruptcy Code and vice versa or to dismiss the case. Depending on the outcome of hearings of the initial bankruptcy petition (e.g. on evidence presented by the trustee), the debtors may try to manipulate the bankruptcy proceedings in order to save their assets from creditors.

[103] Id.
[104] Id.
[105] Attorneys' errors may constitute a violation of Federal Rules of Bankruptcy Procedure. There is a large number of cases when attorneys were sanctioned due to mistakes in petition or falsification of information (e.g. *In re* Martinez, 393 B.R. 27 (Bankr. D. Nev. 2008*), In re* Bradley, 495 B.R. 747 (Bankr. S.D. Tex. 2013)).

(A) Conversion of a case from Chapter 7 to Chapter 13 with intention to conceal assets (Marrama v. Citizens Bank of Massachusetts[106])

Marrama v. Citizens Bank of Massachusetts is an important case that reached the US Supreme Court due to inconsistent approach of the courts to the question whether good faith principle should be applied to the debtor's conduct when he files a petition to convert a case from one chapter of the Bankruptcy Code to another. According to the Bankruptcy Code a debtor may convert a case under Chapter 7 to Chapter 13 and any waiver of this right is unenforceable. The only reason when the case cannot be converted is when the debtor may not be a debtor under Chapter 13[107]. Some courts relied on the plain language of the Bankruptcy Code, which does not include debtor's good faith as a condition for conversion a case from Chapter 7 to Chapter 13[108]. Others relied on debtor's good faith behavior as a condition to convert a case from one chapter to another[109]. Due to this inconsistent approach, the US Supreme Court granted certiorari to decide whether the Bankruptcy Code requires debtor's good faith behavior for conversion.

On March 11, 2003, Robert Marrama (the Debtor) filed a voluntary petition under Chapter 7, having the principal creditor Citizens Bank of Massachusetts (the Bank). The voluntary petition included a number of misleading or inaccurate statements about the Debtor's principal asset, a house in Maine, which was owned by the trust where Marrama was the sole beneficiary. For example, the value of the trust was listed as zero, although it had substantial value. Another

[106] Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 368-70, 127 S. Ct. 1105, 1108-09, 166 L. Ed. 2d 956 (2007).

[107] The US Code, section 706 (a) (b).

[108] E.g., *In re* Martin, 880 F.2d 857, 859 (C.A.5 1989); *In re* Croston, 313 B.R. 447 (9th Cir. BAP 2004); *In re* Miller, 303 B.R. 471 (10th Cir. BAP 2003).

[109] E.g., *In re* Alt, 305 F.3d 413, 418-419 (C.A.6 2002); *In re* Leavitt, 171 F.3d 1219, 1224 (C.A.9 1999); *In re* Molitor, 76 F.3d 218, 220 (C.A.8 1996); 1993).

example is that Marrama stated that there were no transfers of any property other than in the ordinary course of business during the year preceding the filing of his petition. However, in fact the Petitioner had transferred his house into the newly created trust for no consideration seven months prior to filing his Chapter 7 petition. Later Marrama admitted that the transfer was made for protection of the property from his creditors.[110]

The Trustee advised the Debtor's counsel about his intention to include the house in Maine to the estate. Afterwards Marrama filed a notice of conversion his filing from Chapter 7 to Chapter 13 referring to "scrivener's error" which led to misstatements about his property and to the fact that he had recently become employed and therefore could proceed under Chapter 13. Both the Trustee and the Bank filed objections to this motion of conversion. They claimed that due to the Debtor's intention to conceal the property the notice of conversion was made in bad faith and would constitute an abuse of the bankruptcy process.

The Bankruptcy Judge denied the request for conversion ruling that "there is no "Oops" defense to the concealment of assets and that the facts established a "bad faith" case"[111].

The Court of Appeals affirmed the judgment of the Bankruptcy Judge holding that the petitioner's right to convert from Chapter 7 to Chapter 13 is not absolute and by acting in bad faith Marrama forfeited his right to proceed under Chapter 13.[112]

On February 21, 2007, the US Supreme Court affirmed the judgment of the Court of Appeals ruling that fraudulent conduct by the Debtor is an implicit cause for dismissal of conversion petition under the Bankruptcy Code[113] and that by acting in bad faith Marrama forfeited his right to proceed under Chapter 13. The US Supreme Court referred to the Bankruptcy code,

[110] Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 368-70, 127 S. Ct. 1105, 1108-09, 166 L. Ed. 2d 956 (2007).
[111] Id.
[112] Id.
[113] The US Code, section 1307 (c).

which provides that "a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."[114] The Court ruled that in this case the Debtor could not be a debtor under Chapter 13, because he acted in bad faith, which constituted a cause for dismissal[115]. The US Supreme Court noted that ''the inherent power of every federal court to sanction abusive litigation practices might well provide an adequate justification for a prompt, rather than a delayed, ruling on an unmeritorious attempt to qualify as a debtor under Chapter 13.''[116]

Three justices of the US Supreme Court dissented with this holding. In the dissenting opinion the justices stated that a "good faith" condition for conversion from Chapter 7 to Chapter 13 is inconsistent with the Bankruptcy Code[117].

As it is shown below, after Marrama case the case law was still different as to whether the right of the debtor to convert a case from one chapter of the Bankruptcy Code to another is absolute or no. However, Andrew Harrell agreed with the approach of the US Supreme Court in Marrama case. He noted that the other finding would make the "substantial portions of the Bankruptcy code obsolete or irrelevant, which Congress clearly did not intend to do when it enacted either the original Code or the 2005 amendments"[118].

(B) Conversion of a case from one chapter to another in case of non-compliance with repayment plan (In re Taylor[119])

[114] The US Code, section 706(d).
[115] The US Code, section 1307 (c).
[116] Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 368-70, 127 S. Ct. 1105, 1108-09, 166 L. Ed. 2d 956 (2007).
[117] Id.
[118] Andrew Harrell, *Comment: Marrama v. Citizens Bank of Massachusetts: a Dishonest Debtor's Right to Convert to Chapter 13*, 33 Okla. City U.L. Rev. 861 (2008), p. 7.
[119] *In re* Taylor, 472 B.R. 570 (C.D. Cal. 2012).

On May 11, 2011, Lavarro Taylor and Teresa Delphine Taylor (the Debtors) filed a voluntary bankruptcy petition under Chapter 13 of the Bankruptcy Code. On October 4, 2011, the Debtors filed a notice of conversion of the case from Chapter 13 to Chapter 7 of the Bankruptcy Code, since they could not make the required payments under the proposed plan. The Bankruptcy court did not confirm the conversion of the case and dismissed the case due to the Debtors' failure to make payments and failure to timely file a secured debt payment history declaration. The Debtors appealed, claiming that the Bankruptcy court could not deny the effect of the Debtors' notice of conversion from Chapter 13 to Chapter 7 and dismiss the Debtors Chapter 13 case, because they have an absolute right of conversion of the cases under the Bankruptcy Code[120].

The Appellate court reversed the order of the Bankruptcy court and remanded the case for further proceedings, ruling that the Debtor's right to convert a Chapter 13 case to Chapter 7 is absolute. The Court held that Marrama's reasoning did not directly affect this case, because in this case "there is no cause for concern that a debtor may use that provision to 'escape the consequences of bad faith conduct or for abuse of process.''[121]

In re Defrantz[122] the Court also did not follow the Marrama's approach and allowed a conversion of a case from Chapter 13 to Chapter 7, following the plain language of the Bankruptcy Code[123] and justifying it by other mechanisms that exist to prevent a debtor from abusing Chapter 7 of the Bankruptcy Code[124].

(C) Conversion of a case by court from one chapter to another in case of including inaccurate information to the bankruptcy petition

[120] The US Code, section 1307 (a). According to § 1307(a) of the Bankruptcy Code "the debtor may convert a case under the chapter 13 to a case under chapter 7 at any time. Any waiver of the right to convert is unenforceable".
[121] *In re* Taylor, 472 B.R. 570 (C.D. Cal. 2012).
[122] *In re* Defrantz, 454 B.R. 108 (9th Cir.BAP 2011).
[123] The US Code, section 1307 (a).
[124] Id.

In re Jacobsen [125]

On May 25, 2007 Robert Jacobsen (the Debtor) filed a petition for relief under Chapter 13 of the Bankruptcy Code. As it was found out later, in his petition Jacobson included inaccurate information about his assets. Although Jacobson misspelled the name of his wife in the petition, on the meeting of creditors it was found out that there were numerous real properties in both Texas and California titled in his wife's name and that one of the properties' was proceeding to sale. The Bankruptcy court subsequently entered an order restraining the sale of that property and ruled that this property was equal or joint management community property and therefore it was property of Jacobsen's bankruptcy estate[126]. It was also revealed that several weeks before filing the petition under Chapter 13 Jacobson bought a house in Lafayette, California, which was titled to his wife's name. He failed to include another house in the petition, as well as six rental properties, which were also titled to his wife's name. Jacobson testified that he did not include the property held in the name of his wife due to the marriage contract, according to which all property acquired before or during the marriage is the separate property of the spouse in whose name it was acquired. Jacobsen suggested that his wife could have bought the house using her income from her hair styling business, but afterwards he refused from this suggestion, because she had not been engaged in that business until after the date his petition was filed[127]. Jacobsen also testified that he managed the properties titled in his wife's name, because she was from Afghanistan and speaks little English. The Debtor also failed to include information about his interests in some business ventures.

The Trustee filed a motion to convert Chapter 13 case to one under Chapter 7 and the Debtor responded by filing motion to voluntarily dismiss. The Bankruptcy Court granted Trustee's

[125] *In re* Jacobsen, 609 F.3d 647 (5th Cir. 2010).
[126] Id.
[127] Id.

motion, and denied the Debtor's motion, ruling that the Debtor acted in bad faith and this constituted a cause for converting the case to the one under Chapter 7.[128]

The Debtor appealed the judgment arguing that Jacobsen argues on appeal that there was no bad faith and the Bankruptcy court lacked the authority to convert a case from Chapter 13 to Chapter 7 in light of his motion to dismiss.

The Court of Appeals referred to Marrama case and its effect on bankruptcy decisions. It held that the Bankruptcy court has the discretion to grant a motion to convert for cause under Bankruptcy Code where the debtor has acted in bad faith or abused the bankruptcy process and requested dismissal. The Court of Appeals rejected "construction of the statute that would afford an abusive debtor an escape hatch, and we sanction the limited exception that lower courts within our boundaries have accorded the statute for nearly two decades."[129] The Court of Appeals affirmed the judgment of the Bankruptcy court, confirming that there was bad faith in the Debtor's actions, which was the cause for conversion a case to Chapter 7. The Court of Appeals ruled that the Debtor misspelled his wife's name for concealing assets in his wife's name and that the Debtor had made transfers that were not disclosed in his Statement of Financial Affairs. The Court of Appeals confirmed that this conversion was in the best interests of the creditors and the bankruptcy's estate.[130]

In re Mitrano[131]

In 2010, Peter Paul Mitrano (the Debtor) filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code. In 2011 the US Government filed a motion to convert or dismiss Chapter 13 proceeding. The US Government claimed that Mitrano did not properly report on the amount

[128] Id.
[129] Id.
[130] Id.
[131] *In re* Mitrano, 472 B.R. 706 (E.D. Va. 2012).

of his liabilities, which led to inability of the court to define whether the Appellant exceeded the debt limits provided by statute. For example, he did not indicate the amount and the date of debts incurred in favor of his family members. Moreover, the US Government stated that the repayment of Mitrano's debt was not feasible, since he proposed to repay only 10$ per month to his creditors, despite that there was $65,684.02 in priority claims to be paid in full. Additionally, the Debtor admitted that he wanted to avoid his child support restitution obligation. Mitrano objected this motion of the US Government requesting to dismiss the proceeding rather than to convert.[132]

The Bankruptcy Judge ruled that Mitrano acted in bad faith and converted his case to Chapter 7 proceeding. Mitrano appealed the judgment, arguing that under the Bankruptcy Code he had an absolute right to dismiss the Chapter 13 case regardless of whether or not he acted in good faith. The Court of Appeals affirmed the judgment of the Bankruptcy Judge referring to Marrama case and stating that the right to dismiss upon request under the Bankruptcy Code[133] is limited to debtors who act in good faith and that "the evidence in the present case strongly supports the bankruptcy court's finding of bad faith"[134].

1.7 Criteria and types of abuse

(A) Types of abuse

As follows from the Bankruptcy Code, granting of relief to a debtor may constitute an abuse of the bankruptcy proceedings in the following cases. Firstly, when it follows from the means test that the debtor's current monthly income reduced by certain expenses is not less than either "twenty five percent of the debtor's nonpriority unsecured claims in the case, or $6,000 whichever is greater; or $10,000"[135]. Secondly, even when the debtor passes the means test and

[132] Id.
[133] The US Code, section 1307 (b).
[134] *In re* Mitrano, 472 B.R. 706 (E.D. Va. 2012).
[135] The US Code, section 707 (2)(A)(i).

meets the requirements for bankruptcy filing, the court shall consider "whether the debtor filed the petition in bad faith; or the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse."[136]

Based on the above provisions of the Bankruptcy code, there can be distinguished the following types of abuses while looking for the relief from the debts:

a) deducting the means test's nondeductible amounts from the debtor's income in order to meet the means test requirements;

b) actual ability to repay debt revealed under the totality of circumstances test; or

c) acting in bad faith.

(B) Criteria of abuse

Besides providing for a presumption of an abuse if the debtor's income exceeds the one calculated under the means test, the Bankruptcy Code is silent on criteria of abuse under the totality of circumstances test or in case of acting in bad faith. Therefore, it became the matter of case law, which has developed these criteria. As the court noted in In re Booker[137] "in assessing whether the filing was made in bad faith, this Court should focus more on conduct", whereas "when assessing whether the case should be dismissed as an abuse based upon the totality of the Debtors' financial circumstances, the Court should consider primarily, if not exclusively, the Debtors' ability to pay"[138].

[136] The US Code, section 707(b)(3)(A).
[137] *In re* Booker, 399 B.R. 662, 670-71 (Bankr. W.D. Mo. 2009).
[138] Id.

When it comes to the abuse in case of the totality of circumstances test, case law[139] has elaborated the following criteria:

a) whether there is any unanticipated event, which triggered bankruptcy filing (unemployment, illness or disability). If none of the anticipated events occurred and a debtor has a stable source of income, bankruptcy filing may indicate, e.g. that a debtor made purchases knowing that he will not be able to pay (since he is aware of his future earnings and can calculate his income and expenses);

b) whether the debtor's monthly expenses (including food, transportation, internet, laundry, etc.) are justifiable and not excessive, and cannot be reduced since their reduction will deprive the debtor of adequate food, clothing, shelter and other necessities. While determining the debtor's monthly expenses the courts may refer to the Internal Revenue Service standards[140], as well as to the common sense, e.g. when the debtors have several vehicles and they decide to keep the one that is more expensive the court may doubt that such a choice is justifiable;

c) whether the debtor made purchases in the eve of bankruptcy or far in excess of the debtor's ability to repay;

d) whether the debtor's choice to keep the luxury items is justifiable;

e) whether the debtor provided inaccurate or misleading information about his assets and income;

f) whether the debtor has a stable source of future income;

[139] Calhoun v. U.S. Tr., 650 F.3d 338 (4th Cir. 2011), *In re* Miller, 302 B.R. 495 (Bankr.M.D.Pa.2003), *In re* Walker, 383 B.R. 830 (Bankr. N.D. Ga. 2008).
[140] *In re* Talley, 389 B.R. 741 (Bankr. W.D. Wash. 2008), *In re* Oliver, 350 B.R. 294 (Bankr. W.D. Tex. 2006), DOUGLAS G.BAIRD, THE ELEMENTS OF BANKRUPTCY, (5th ed. 2010), p.33.

g) whether the debtor is eligible to adjust his debts through Chapter 13 of the Bankruptcy Code; and

h) whether the debtor may obtain relief through private negotiations or may use any state remedies to ease the debtor's financial difficulties[141].

When it comes to the bad faith actions, case law[142] mostly repeats the criteria of the abuse in totality of circumstances test, adding the following criteria:

a) whether a debtor has a history of bankruptcy filings and case dismissals;

b) whether the debtor had an intention to invoke the automatic stay for improper purposes, such as for the sole objective of defeating state court litigation;

c) whether the debtor acted egregiously, e.g. when the debtor fails to list his assets in the bankruptcy petition and from the debtor's conduct it is obvious that he made a bankruptcy filing only for the purpose of his own benefit[143].

As it can be seen, the criteria of abuse under the totality of circumstances test and in case of acting in bad faith differ very slightly and in most part coincide. This may be explained by a very thin line between these two types of abuses. This may lead to confusion of these types of abuse and substitution the one by another. This happened, for example, in In re Booker[144], where the trustee filed a motion to dismiss the case under Chapter 7 asserting both the abuse by the debtor under the totality of circumstances test and acting in bad faith, without properly dividing the factual basis of these abuses. Based on the facts of the case, the court focused mostly on the debtor's conduct and ruled that the petition was filed in bad faith.

[141] Id.
[142] *In re* Mitchell, 357 B.R. 142 (Bankr. C.D. Cal. 2006), *In re* Booker, 399 B.R. 662 (Bkrtcy.W.D.Mo. 2009).
[143] E.g. *In re* Opper, 20 Mont. B.R. 123, 132 (Bankr.D.Mont.2002) the court found the debtor's conduct egregious when he proposed a $0 payment to unsecured creditors while making payments to the secured creditors in order to retain luxury items (a boat and snowmobile), as well as failed to list his assets.
[144] *In re* Booker, 399 B.R. 662 (Bkrtcy.W.D.Mo. 2009).

1.8 Is there a proper solution of individual bankruptcy abuse in the US?

Although the Bankruptcy code does not provide for a definition of the individual bankruptcy abuse leaving it to courts to determine on a case-by-case basis, case law has developed the criteria of abuse, which are applied now in practice.

Case law demonstrates that the courts apply these criteria with enthusiasm. In many cases, the courts find the abuse in applying for the Chapter 7 relief of the Bankruptcy code, whereas the individual could have filed a petition under Chapter 13. Courts also may find the abuse when the individual applies for a conversion of a case from one chapter of the Bankruptcy code to another. Although some judgments on the absence of abuse may be controversial, these constitute a minor part of case law.

It goes without saying, that courts play the most important role in developing and applying criteria of abuse in the US. Courts make a thorough analysis of facts of each bankruptcy case, and render detailed and reasoned judgment. Overall, I think that the US case law has elaborated proper solution of individual bankruptcy abuse in the US, which is successfully applied by courts.

CHAPTER II. REGULATION OF INDIVIDUAL BANKRUPTCY IN RUSSIA

2.1 An overview of adoption of individual bankruptcy regulation

Individual bankruptcy in Russia is regulated by Chapter 10 of the Bankruptcy Law[145], which was adopted in 2002. Initially the Bankruptcy Law provided for a very general regulation of individual bankruptcy, which was to come into force only after adoption of a separate law. The necessity of enforcing of Chapter 10 was discussed in the legal society and these discussions lasted for ten years. Scholars recognized the need for enforcing individual bankruptcy regarding it as an effective measure for discharging from debts and for a fresh start for honest debtors who face financial difficulties due to objective circumstances[146]. Draft of the respective individual bankruptcy law was prepared, but it was not adopted as a law due to lobbying from the banks' side that realized that their interests would be damaged once this law is adopted[147]. It became obvious that introduction of personal bankruptcy is rather a political, than a legal question.

In 2012 the Russian Government introduced a draft of a separate law on personal bankruptcy to the Parliament. The necessity of this draft was explained by interests of both debtors and creditors[148]. First, it was noted that there was a need to procure consumer credit. Although there

[145] Federal'nyi Zakon RF o nesostoyatel'nosti (bankrotstve) [Federal law of the Russian Federation on insolvency (bankruptcy)], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No.43, item 4190. Please note that federal laws are effective and apply on all territory of Russia without any exceptions.

[146] VITRYANSKY V.V. COMMENTARY TO FEDERAL'NYI ZAKON RF O NESOSTOYATEL'NOSTI (BANKROTSTVE) [Commentary to the Federal Law on insolvency (bankruptcy)] (1998); Popondopulo V.F., Slepchenko V.F., *Problems of improvement of bankruptcy legislation in terms of financial crisis*, Arbitrazhny spory, 2010 No.1; Karseeva Z.V., *Legal status of debtors-individuals, that participate in bankruptcy proceedings*, Jurist, 2012 No.1.

[147] Kirillovykh A.A., *Individual bankruptcy: innovations in the insolvency legislation*, Zakonodatel'stvo i Economika, 2015, No.6.

[148] Explanatory note to the draft of Federal'nyi Zakon RF o vnesenii izmeneyi v Federal'nyi Zakon o nesostoyatel'nosti (bankrotstve) i otdel'nyi zakonodatel'nyi akti RF v chasti regulirovaniya reabilitatsionnykh protsedur, primenyaemykh v otnoshenii dolzhnika-bankrota [Federal Law of the Russian Federation on amending the Federal law on insolvency (bankruptcy) and other legislative acts of the Russian Federation in relation to

was an increase of consumers' credit and growth of consumers' overdue indebtedness, the existing consumers' buying activity was not enough due to enforcement proceedings that left debtor-individual with minimum property. It was stressed that adequate regulation of personal bankruptcy was required in order to stimulate the consumers' buying activity[149]. As noted by scholars, this draft of law has a social aspect, since in terms of global financial crisis it allows reducing negative consequence suffered by consumers[150]. Secondly, it was noted that current laws did not correspond to the creditors' interests, because there was no alternative to enforcement proceedings for debt collection from individuals. This incurred, firstly, inability of satisfaction of claims of those creditors who were not aware about enforcement proceedings, and secondly, it incurred extra expenses for creditors and difficulties with debtors' monitoring. Therefore, the emphasis was to be made on debt restructuring and restoring debtor's solvency[151].

In 2014, after two years of discussions and amendments, Russian Parliament adopted a separate law[152] that introduced a more detailed regulation of individual bankruptcy, including debt restructuring. This law was to come into force from 1st of July 2015. However, the date of stepping into force of the individual bankruptcy rules was postponed until October 01, 2015.

rehabilitation procedures applicable to debtor-individual], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No.1, item 29.

[149] Id.

[150] Kirillovykh A.A., *Individual bankruptcy: perspectives of development of the legal institute*, Zakonodatel'stvo and Economika, 2011, No.3

[151] Explanatory note to the draft of Federal'nyi Zakon RF o vnesenii izmeneyi v Federal'nyi Zakon o nesostoyatel'nosti (bankrotstve) i otdel'nyi zakonodatel'nyi akti RF v chasti regulirovaniya reabilitatsionnykh protsedur, primenyaemykh v otnoshenii dolzhnika-bankrota [Federal Law of the Russian Federation on amending the Federal law on insolvency (bankruptcy) and other legislative acts of the Russian Federation in relation to rehabilitation procedures applicable to debtor-individual], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No.1, item 29.

[152] Federal'nyi Zakon RF o vnesenii izmeneyi v Federal'nyi Zakon o nesostoyatel'nosti (bankrotstve) i otdel'nyi zakonodatel'nyi akti RF v chasti regulirovaniya reabilitatsionnykh protsedur, primenyaemykh v otnoshenii dolzhnika-bankrota [Federal Law of the Russian Federation on amending the Federal law on insolvency (bankruptcy) and other legislative acts of the Russian Federation in relation to rehabilitation procedures applicable to debtor-individual], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No.1, item 29.

This was made by adopting of another separate law[153], which included individual bankruptcy provisions that were copied from the previous law. Enforcement of this law was followed by adoption of Plenary Ruling of the Supreme Court of Russia[154] that explained some aspects of implementation of the individual bankruptcy law[155].

2.2 Regulation of prevention of abuses of individual bankruptcy laws

Russian bankruptcy law establishes a formal requirement that is to be met in order to file a bankruptcy petition. There shall be an outstanding debt in the amount exceeding 500 000 rubles (equivalent to USD 7 128)[156], which has not been paid within three months as of the due date[157]. Russian law does not provide for any tests that are to be applied in course of bankruptcy proceedings in order to define whether a debtor is entitled to discharge from his debts. In the absence of any legal mechanisms that may help to determine actual possibility of debt repayment and in case of mechanical application of formal requirements of law there is a large room for abuses from the debtor's side.

According to the Russian Bankruptcy Law a debtor cannot be discharged from his debts in the following cases[158]. *Firstly*, if there is a court decision under which this debtor is subject to

[153] Federal'nyi Zakon RF ob uregulirovanii osobennostey nesostoyatel'nosti (bankrotstva) na territoriyakh respubliki Krim i goroda federal'nogo znacheniya Sevastopolya i o vnesenii izmenenii v otdel'niye zakonodatel'niye akti RF [Federal Law of the Russian Federation on regulation of peculiarities of insolvency (bankruptcy) on the territory of Crimea republic and Sevastopol federal city and on amending separate legislative acts of the Russian Federation], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2015, No.27, item 3945.

[154] Postanovlenie Plenuma Verkhovnogo Suda RF "O nekotorykh voprosakh, svyazannykh s vvedeniem v deistvie protsedur, primenyaemykh v delah o nesostoyatel'nosti (bankrotstve) grazhdan" ot 13 okryabrya 2015 g. [The Russian Federation Supreme Court Plenary Ruling on Selected Issues Arising From Bankruptcy Proceedings Applied To Individuals of Oct. 13, 2015], Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2015, No. 12.

[155] It shall be noted that although Russian legal system does not officially recognize case law as a source of law, in practice plenary rulings of the Russian Supreme Court are obligatory for implementation.

[156] According to the official exchange rate established by the Central Bank of Russia as of March 15, 2016 which is 1 USD=70,1542 rubles.

[157] Art. 213.3 of Federal'nyi Zakon RF o nesostoyatel'nosti (bankrotstve) [Federal law of the Russian Federation on insolvency (bankruptcy)], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No.43, item 4190.

[158] Id., art. 213.28.

criminal or administrative liability for illegal actions within bankruptcy, deliberate or sham bankruptcy. *Secondly*, if a debtor failed to provide required information or knowingly provided false information to administrator or to court and this fact is established by a court decision. *Thirdly*, if it is proved that a debtor acted illegally, including committing a fraud, avoiding debt or tax payment, knowingly providing creditor with false data in order to get a credit, concealing or knowingly destroying property.

Further to this regulation, the Supreme Court of Russia[159] underlined the purpose of certain provisions of the individual bankruptcy law, which is to prevent concealment of circumstances and information that can affect fulfilment of debtor's obligations and can lead to obstruction of court proceedings. The principle of good faith is named as the basic principle for the debtor's actions in course of bankruptcy proceedings[160]. This comes from the Civil Code of Russia[161] that sets out the basic principle of both civil and commercial relations[162], according to which while establishing, exercising and protecting rights and obligations the parties shall act in good faith[163]. If a party acted in bad faith, this behavior is regarded as an abuse and court refuses to protect rights of this party in full or partially and applies other measures provided by law[164]. Courts have a discretion while applying a good faith principle, therefore good faith behavior is decided by courts on a case-by-case basis.

The Supreme Court of Russia clarified that while defining whether a party acted in good faith or not courts shall proceed from behavior, which is expected from any party. Such party shall

[159] Postanovlenie Plenuma Verkhovnogo Suda RF "O nekotorykh voprosakh, svyazannykh s vvedeniem v deistvie protsedur, primenyaemykh v delah o nesostoyatel'nosti (bankrotstve) grazhdan" ot 13 okryabrya 2015 g., p. 42 [Section 42 of the Russian Federation Supreme Court Plenary Ruling on Selected Issues Arising From Bankruptcy Proceedings Applied To Individuals of Oct. 13, 2015], Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2015, No. 12.
[160] Id.
[161] Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code].
[162] Please note that in Russia the Civil Code of the Russian Federation regulates both civil and commercial relations.
[163] Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 1 (Russ.).
[164] Grazhdanskii Kodeks Rossiiskoi Federatsii [GK RF] [Civil Code] art. 10 (Russ.).

take into account rights and obligations of the other party, cooperate with the latter, including providing the required information[165]. Besides a party that can allege that another party acted in bad faith, the court itself can declare that a party acted in bad faith if there is an obvious deviation of the party's behavior from a good faith one. If a bad faith behavior is established, court refuses to protect party's rights partially or in full and applies other measures, which procure protection of interests of a bona fide party or third parties from a bad faith behavior of another party[166].

Since the Plenary Ruling of the Supreme Court was adopted immediately after individual bankruptcy law entered into force, there was no case law on breach of good faith behavior by individuals in bankruptcy proceedings and therefore no examples or guidelines were included to the Plenary Ruling. Therefore, as of today there is a need for directions as to what shall be regarded as abuses of individual bankruptcy laws.

2.3 The nature of first generation individual bankruptcy cases

As soon as individual bankruptcy was introduced in Russia, first bankruptcy petitions included those that were filed by major Russian banks with respect to rich businessmen. As commented by one of the largest Russian bank PAO "Sberbank Russia", as soon as individual bankruptcy law comes into force, the bank intended to file bankruptcy petitions with respect to individuals,

[165] Postanovlenie Plenuma Verkhovnogo Suda RF "O primenenii sudami nekotorykh polozhenii razdela i chasti pervoi Grazhdanskogo Kodeksa Rossiiskoi Federatsii" ot 23 iunya 2015 g., p. 1 [Section 1 of the Russian Federation Supreme Court Plenary Ruling on Application by Courts of Certain Provisions of Section One Part I of the Civil Code of the Russian Federation of June 23, 2015], Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2015, No. 8.
[166] Id.

who acted as sureties[167] of the companies that received credits from the bank. Usually these individuals are the companies' beneficiaries or top management.[168]

Thus, the same month when individual bankruptcy law stepped into force, in October 2015, PAO "Sberbank Russia" filed a bankruptcy petition with respect to Balakin M., a businessman which is in the Forbes list of Russian businessmen (No.50 in 2015) and whose fortune in 2015 was USD 1,7 billion[169]. Balakin Michael had an outstanding debt before PAO "Sberbank Russia" in the amount of appx. USD 6 million, since he acted as a surety for a credit line provided to one of companies owned by him. PAO "Sberbank Russia" got a court decision on repayment by the businessman of USD 6 million, and since he failed to pay the debt, the bank filed a bankruptcy petition[170]. Another petition with respect to this businessman was filed by PAO "Rosbank" in January 2016. The bank has a court decision according to which the businessman has to repay the amount of USD 58,1 million as a surety for credit lines provided to his companies[171]. The proceedings are currently postponed.

Another bankruptcy petition was filed in October 2015 by AO "Bank of Moscow" with respect to the businessman Ismailov T. (No.144 in 2015 in the Forbes list with fortune USD 600 million)[172]. The bank's claim amounts to USD 286,4 million. In December 2015, he was

[167] Surety arises from a suretyship, which means "the relationship among three parties whereby one person (the surety) guarantees payment of a debtor's debt owed to a creditor or acts as a co-debtor" BLACK'S LAW DICTIONARY 712 (9th ed. 2009). This definition is applicable to suretyships provided under Russian law. According to Russian law (article 363 of the Civil Code of Russia), the liability of a surety is joint and several, unless the parties explicitly agree on the subsidiary liability of a surety. In practice, the liability of a surety is usually joint and several.

[168] *Vladimir Kekhman is the first Sberbank's candidate for individual bankrupts* (09 March, 2016, 2.40 p.m.) http://www.vedomosti.ru/finance/articles/2015/10/02/611196-vladimir-kehman-kandidat-sberbanka-bankroti.

[169] *Mikhail Balakin* (09 March, 2016, 2.38 p.m.) http://www.forbes.ru/profile/mihail-balakin.

[170] *Sberbank filed a bankruptcy petition with respect to the owner of SU-155* (09 March, 2016, 2.30 p.m.) http://www.vedomosti.ru/realty/articles/2015/11/20/617637-sberbank-podal-zayavlenie-bankrotstve-vladeltsa-su-155.

[171] Id.

[172] *The court declared Tel'man Ismailov a bankrupt* (09 March, 2016, 2.45 p.m.) http://www.rbc.ru/business/21/12/2015/5677c5ef9a7947c24392caad.

declared by court a bankrupt[173] and that resulted in the beginning of procedure of selling his property.

In October 2015 PAO "Sberbank Russia" filed a bankruptcy petition with respect to the Russian businessman Kekhman V., who has a debt before the bank in the amount of appx. USD 59, 9 million as a surety under credit agreements entered into by the bank with companies held by the businessman. Within the court proceedings, the businessman claimed that he had already been declared a bankrupt by the High Court of Justice of England and Wales in 2012 and therefore current proceedings should be terminated. The court refused to terminate the bankruptcy proceedings stating that the court order of the High Court of Justice of England and Wales is subject to recognition and enforcement in Russia, which shall be a matter of a different court proceeding. The court approved the beginning of debt restructuring and appointed an administrator[174]. Bankruptcy proceedings are currently pending. Although the court addressed the debtor to a different court proceeding with respect to recognition and enforcement of a court order of the High Court of Justice of England and Wales, such referral by debtor to a foreign court decision raises several questions. Firstly, a question of a cross-border individual bankruptcy[175] and, secondly, there may arise a question of abuse of individual bankruptcy laws. Debtor may use a foreign court decision, according to which he is declared a bankrupt, in courts of other countries. This may be done to get a discharge from debts incurred in countries where bankruptcy proceedings have not taken place. These questions constitute another topic of itself.

[173] Reshenie Arbitrazhnogo suda Moskoskoi oblasti po delu No.41-94274/15 ot dek. 21, 2015 [Decision of the Arbitrazh Court of Moscow region on the case No. 41-94274/15 as of December 21, 2015].

[174] Opredeleniye Arbitrazhnogo suda goroda Sankt-Peterburga i Leningradskoi oblasti po delu No. A56-71378/2015 ot dek.23, 2015 [Ruling of the Arbitrazh Court of Saint-Petersburg and Leningradsky region as of December 23, 2015].

[175] For approaches to cross-border insolvencies please see ANDREW KEAY, PETER WALTON, INSOLVENCY LAW: CORPORATE AND PERSONAL, (2nd ed. 2008), p. 386-387.

In January 2016, PAO "Sberbank Russia" filed a bankruptcy petition with respect to Islyamov L., former vice-president of Crimea republic, and his wife. The bank's claim amounts to appx. USD 30,5 million[176]. As mentioned by press, this petition can be connected with a credit line, which was provided to the company owned by the businessman's wife and secured by the surety of the businessman together with his wife. First hearings are scheduled in March 2016.

2.4 What the first months of operation of individual bankruptcy laws tell us?

As it can be seen Russian banks primarily filed individual bankruptcy petitions with respect to rich businessmen. It may be explained by a common way of financing a company by a bank in Russia. Usually a bank provides a company with a credit line and as a security bank gets a mortgage over the company's immovable property along with a surety of typically a company's beneficiary. Before introduction of individual bankruptcy in Russia, in case of failing to repay the debt banks filed bankruptcy petition with respect to companies-debtors. Now banks have an additional tool for getting their money back.

As follows from the Unified federal register of bankruptcy information[177] from October 01, 2015 until December 31, 2015 the total number of individual bankruptcy cases in Russia where the court adopted either a decision on debt restructuring or selling debtor's property was 843[178]. In 70% of cases, the court adopted a decision on selling debtor's property, and in 30% of cases, debt restructuring was adopted[179].

[176] *Bankruptcy for blockade* (09 March, 2016, 2.50 p.m.) http://www.kommersant.ru/doc/2906066.
[177] According to art. 213.3 of Federal'nyi Zakon RF o nesostoyatel'nosti (bankrotstve) [Federal law of the Russian Federation on insolvency (bankruptcy)], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No.43, item 4190, information about bankruptcy shall be included in the Unified federal register of bankruptcy information.
[178] *Courts of the RF adopted in 2015 more than 1200 decisions on bankruptcy proceedings of individuals* (09 March, 2016, 2.55 p.m.) http://bankrot.fedresurs.ru/NewsCard.aspx?ID=745.
[179] *Courts of the RF adopted in 2015 more than 1200 decisions on bankruptcy proceedings of individuals* (09 March, 2016, 2.55 p.m.) http://bankrot.fedresurs.ru/NewsCard.aspx?ID=745.

Since the individual bankruptcy law has been adopted only recently, there is no statistics available as per number of cases where bankruptcy petition was filed by debtor himself or by his creditor, as well as there are no examples or guidelines as to the forms and types of abuses of individual bankruptcy laws that can be met in practice.

CHAPTER III. WHAT THE US EXPERIENCES CAN BE USED IN RUSSIA?

Although individual bankruptcy law in Russia is in force for only six months now and as of the date of the conclusion of this thesis only a few cases have reached the courts, it is already now obvious that the problem of abuse of individual bankruptcy laws will be a major problem in Russia as well. Moreover, not necessarily in the distant future. One of the reasons are the loopholes in the Russian legislation that can be used for these abuses.

First, the requirements for filing bankruptcy petition and obtaining a discharge are extremely formal, which leads to a presumption in favor of a debtor once a bankruptcy petition is filed. There is no analogue of the means test or the totality of circumstances test, which are used in the US, neither there is any other test that may be applied to the debtor in order to determine whether he is able to repay debt. Thus, only good faith principle can be applied by Russian courts in order to dismiss a case. This may happen when a debtor meets formal bankruptcy requirements, but in fact is able to repay his debts. However, Russian courts do not frequently apply good faith principle when they have this discretion. This may be explained by a very formal application of law by Russian judges in general. Russian judges as opposed to the US judges very often mechanically apply the provisions of law and escape application of principles and concepts, as well as doctrine. Court decisions are usually a 3-5 pages document with citation of laws. Therefore, when it comes to application of a legal principle, judges prefer to find the exact provision of law rather than to apply a legal principle, since it is the court's discretion and it requires a proper reasoning. It seems that the only way to make the judges to apply a legal principle is to include a detailed explanation of the principle either to the laws or to plenary ruling of the Supreme Court of Russia with a number of examples as a guideline. As of today, individual bankruptcy law does not provide for a good faith principle (since it is stipulated by the Civil Code of Russia) and therefore the Supreme Court of Russia underlined

the principle of good faith as the basic principle for the debtor's actions in course of bankruptcy proceedings[180]. However, the Supreme Court of Russia did not include any cases on breach of a good faith principle in course of bankruptcy proceedings since the plenary ruling of the Supreme Court was adopted immediately after individual bankruptcy law entered into force and no case law was adopted at this time. Thus, implementation of a good faith principle with respect to abuses of bankruptcy laws will not be met frequently in practice. Apparently, other mechanisms shall be used in order to prevent abuses of bankruptcy laws. Analogue of the means test and the totality of circumstances test used in the US may be introduced in order to prevent abuses of bankruptcy laws in Russia.

Secondly, Russian bankruptcy laws - unlike the US Bankruptcy Code – do not provide for the right of court to convert a case from discharging from debts to debt restructuring if granting a relief will constitute an abuse. Moreover, Russian individual bankruptcy law provides for the *right* of a debtor, creditor or authorized body to prepare a debt restructure plan[181]. Neither administrator, nor the court have any explicit authority to compel the debtor to prepare this plan, as well as the administrator does not have any right to participate in preparation of this plan. Therefore, it is only up to a debtor, creditor or authorized bodies to decide on debt restructuring plan. Given that creditors and authorized bodies may not have a full picture of debts and debtor's assets as of the date by which a restructuring plan shall be prepared, apparently it is more up to a debtor to prepare this plan. Since Russian bankruptcy laws do not provide for any tests in order to define whether the debtor is actually able to repay debt, debtor has a large discretion as to preparing a restructuring plan and there is a large room for abuse in

[180] Postanovlenie Plenuma Verkhovnogo Suda RF "O nekotorykh voprosakh, svyazannykh s vvedeniem v deistvie protsedur, primenyaemykh v delah o nesostoyatel'nosti (bankrotstve) grazhdan" ot 13 okryabrya 2015 g., p. 42 [Section 42 of the Russian Federation Supreme Court Plenary Ruling on Selected Issues Arising From Bankruptcy Proceedings Applied To Individuals of Oct. 13, 2015], Biulleten' Verkhovnogo Suda RF [BVS] [Bulletin of the Supreme Court of the Russian Federation] 2015, No. 12.

[181] Art. 213.12 of Federal'nyi Zakon RF o nesostoyatel'nosti (bankrotstve) [Federal law of the Russian Federation on insolvency (bankruptcy)], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2002, No.43, item 4190.

this regard. Although theoretically the courts may apply a good faith principle and convert a case from discharging from debts to debt restructuring, as mentioned earlier the probability of application of this principle is quite low. Apparently, an explicit right of the court to convert a case from debt discharge to debt restructuring shall be introduced in law, as well as the right and obligation of the administrator to initiate preparation of the restructuring plan once it is evident that it is feasible.

Finally, since neither Russian bankruptcy laws, nor case law has not yet elaborated criteria of abuse of individual bankruptcy laws, these developed by the US case law can be used in Russia along with any other criteria that will be developed by the Russian case law in future. Apparently, criteria of abuse developed by the US case law in cases of the totality of circumstances test and bad faith actions reflect the principle of good faith applicable to debtor's behavior in bankruptcy proceedings. Since it is a basic principle of individual bankruptcy proceedings in Russia, these criteria can be very helpful in course of implementation of individual bankruptcy laws. As to the types of abuse elaborated by the US case law, two of three of types of abuse relate to application of either the means test or the totality of circumstances test, which are not provided by the Russian bankruptcy laws. Therefore, it seems that only acting in bad faith may be regarded as a type of abuse under current Russian legislation. However, this perception may change with developing of respective case law.

CONCLUSION

The US is a country with a long history of individual bankruptcy regulation. This history shows that one of the problems that is faced with respect to individual bankruptcy regulation is the problem of abuse of individual bankruptcy laws. BAPCPA was aimed at resolving this problem. Legislators made huge preparatory work before these amendments were adopted. A special commission was set up and it spent several years on the analysis of problems of operation of bankruptcy system. This resulted in preparation of a long report that included, inter alia, different views on the reform of individual bankruptcy laws that will prevent abuses. This report became the basis for BAPCPA that took into account the previous experience of abuses of individual bankruptcy laws. A means test and a totality of circumstances test were introduced in order to prevent abuse of individual bankruptcy laws. These tests appear to be a good solution for abuse prevention, since, firstly, a means test removed the presumption of the good faith of a debtor, and secondly, in order to prevent abuse, the court can apply a totality of circumstances test even if the debtor meets the requirements of a means test. The US case law confirmed that these tests play an important role in revealing abuses of individual bankruptcy laws. The research showed the usefulness of the tests for determining abuses. In addition, the thesis demonstrated that Russian individual bankruptcy laws in the absence of any tests provide for very formal requirements that makes it easy to get a relief. Therefore, it appears that analogue of a means test and a totality of circumstances test used in the US can be introduced to the Russian legislation in order to prevent abuses of bankruptcy laws in Russia.

The research and analysis have demonstrated that the US case law elaborated criteria of abuse of individual bankruptcy laws that are successfully implemented by the US courts. Analysis and summary of the criteria showed that they are based on the principle of good faith behavior from the debtor's side. Although the US is a common law country as opposed to Russia, which

belongs to continental legal system, the principle of good faith applies in both these legal families. Russian first individual bankruptcy law was enforced on October 01, 2015 and does not provide for any regulation or examples of abuses of individual bankruptcy laws, nor has any case law been yet elaborated in this regard. Russian courts apply good faith principle very cautiously, since application of this principle is a matter of the court's discretion and its application requires a detailed court reasoning, which is rarely met in the case law of Russian courts. Therefore, since the criteria of abuses elaborated by the detailed and reasoned judgments of the US courts are based on a common legal principle of good faith, it occurs that these criteria may be used in Russia as a guide while defining whether there was an abuse of individual bankruptcy laws from the debtor's side.

The research gave necessary pre-conditions for future analysis of further development of legislation and case law in both the US and Russia relating to abuses of individual bankruptcy laws. Developing this topic by also examining criminal abuses would allow getting a full picture of abuses of individual bankruptcy laws. This will be more informative for Russia while deciding what of the US experiences can be introduced to the Russian legislation.

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