Honesty is the Best Policy: Why Good Faith Should Be Required in Chapter 7 Bankruptcies Under § 707(a)

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I. Introduction

The bankruptcy system’s purpose is to provide encumbered debtors with the ability to resolve their troubled finances while providing protection for the creditors who hold secured and unsecured debt.\(^1\) The primary objective of an individual bankruptcy proceeding is to give “the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.”\(^2\) However, many fear that this benevolent aspiration is exploited by some debtors who rely on this “fresh start”\(^3\) to stop collections of creditors and maintain a lifestyle that is beyond their means.\(^4\) To help prevent this misuse of the system, Congress and some courts have required a showing of good faith by a debtor to proceed with the bankruptcy process.\(^5\) However, whether this good faith requirement must be inferred in Chapter 7 bankruptcy petitions under §707(a)\(^6\) has created a sharp divide within the circuits—the Third, Fourth, Sixth, and Eleventh Circuits held that good faith is


\(^{2}\) Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citing Williams v. U.S. Fidelity & Guaranty Co., 236 U.S. 549, 554 (1915)).

\(^{3}\) See Chapter 7, Liquidation Under the Bankruptcy Code—Chapter 7 Eligibility, USCourts.Gov (last visited Oct. 18, 2013), http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter7.aspx (explaining that “[o]ne of the primary purposes of bankruptcy is to discharge certain debts to give an honest debtor a ‘fresh start.’”).

\(^{4}\) In re Zick, 931 F.2d 1124, 1129 (6th Cir. 1991) (quoting In re Jones, 114 B.R. 917, 926 (Bankr. N.D. Ohio 1990) (stating that the purpose of bankruptcy is not to allow debtors to maintain a lavish life at the expense of his creditors).

\(^{5}\) See Pamela C. Tsang, The Case Against “Bad Faith” Dismissals of Bankruptcy Petitions Under 11 U.S.C. § 707(a), 59 Am. U. L. Rev. 685, 694 (2010) (discussing how Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 in response to the public’s concern that debtors were filing unnecessary bankruptcies to escape manageable financial obligations); see also In re Zick, 931 F.2d at 1129 (finding that a requirement of good faith is inherent in bankruptcy even if it is not explicitly stated in the statute).

implied and the First, Second, Eighth, and Ninth Circuits have held that a lack of good faith when filing is not grounds for dismissal.⁷

To provide context, this Note begins with a general summary of the beginning steps in bankruptcy procedure. Second, it explains why the First, Second, Eighth, and Ninth Circuits do not infer bad faith as “for cause” for dismissal under § 707(a). Next, the reasoning for inferring a good-faith requirement in § 707(a) by the Third, Fourth, Sixth, and Eleventh Circuits is examined. Finally, this Note uses the reasoning of the Third, Fourth, Sixth, and Eleventh Circuits to show why the reasoning used by the First, Second, Eighth and Ninth Circuits is flawed and should not be followed.

II. Background

A. A Brief Look at Chapter 7 Bankruptcy Procedures.

Chapter 7 bankruptcies are by far the most common filing in U.S. Bankruptcy Courts.⁸ Chapter 7 is different from other forms of relief because under Chapter 7 a debtor is forced to liquidate his nonexempt property⁹ and distribute the proceeds from that liquidation to his

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⁷ Compare generally In re Piazza, 719 F.3d 1253, 1260-61 (11th Cir. 2013); McDow v. Smith, 295 B.R. 69, 75 (E.D.Va. 2003); Tamecki v. Frank (In re Tamecki), 229 F.3d 205, 207 (3rd Cir. 2000); In re Zick, 931 F.2d 1124, 1127 (6th Cir. 1991); with In re Linehan, 326 B.R. 474, 481 (Bankr.D.Mass. 2005); In re Horan, 304 B.R. 42, 45-46 (Bankr.D.Conn. 2004); Padilla v. Padilla (In re Padilla), 222 F.3d 1184, 1191 (8th Cir. 2000); Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829, 832 (8th Cir. 1994).

⁸ See The Third Branch News, Bankruptcy Filings Down in Fiscal Year 2012, United States Courts (Nov. 7, 2012), http://news.uscourts.gov/bankruptcy-filings-down-fiscal-year-2012 (showing that debtors filed for Chapter 7 Bankruptcy relief more than twice as often as those who filed for Chapters 11, 12, and 13 combined in every year from 2008-2012).

⁹ See Exempt vs. Non-exempt Property Under Chapter 11--FindLaw (last visited Oct. 26, 2013) http://bankruptcy.findlaw.com/chapter-7/exempt-vs-non-exempt-property-under-chapter-7.pdf (showing that common examples of nonexempt property are expensive musical equipment; stamp, coin, or other valuable collections; family heirlooms; cash, stocks, and other investments; a second vehicle; or a vacation home, and examples of exempt property including: vehicles up to
creditors to satisfy his outstanding, unsecured debts. Once a debtor has filed the petition with the court for Chapter 7 relief, he must submit lengthy and detailed paperwork describing (1) his assets and liabilities; (2) current income and expenditures; (3) a statement pertaining to his financial affairs; and (4) all executory contracts and unexpired leases. Once the petition is filed, the collection attempts by creditors are automatically stayed and the debtor will experience a break—at least temporarily—in his wage garnishments, collections calls, and creditors’ lawsuits. After this, the court appoints a trustee who establishes an estate that becomes the temporary, legal owner of all the debtor’s property. It is important to recognize that at this stage the trustee and the debtor have competing primary goals. The trustee’s primary goal is to liquidate as much of the debtor’s property as possible to maximize the payment to the debtor’s unsecured creditors. The primary goal of the debtor is to control the bleeding of his assets as much as possible by retaining the maximum amount of his exempt property and receiving a discharge of the remaining debt. This tension between the ambition of the trustee to repay the creditors and the debtor’s natural desire to keep as much of his property as possible gives birth to the issue of good faith in filing bankruptcy.

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11 Id.
14 Id.
15 Id.
Section 707(a) of the United States Code states that a Chapter 7 bankruptcy petition may be dismissed “only after notice and a hearing and only for cause.”\(^{17}\) Some examples of what constitutes “for cause” are found in the Code itself, and include an unreasonable delay caused by the debtor that prejudices his creditors,\(^ {18}\) the nonpayment of any fees or charges,\(^ {19}\) or when the debtor has failed to file required information.\(^ {20}\) The presence of any one of these deficiencies can result in a dismissal for the debtor.

However, since §707(a) only gives three examples of what constitutes “for cause,”\(^ {21}\) filing a Chapter 7 bankruptcy petition in bad faith may or may not be seen as “for cause,” depending on where the debtor files.\(^ {22}\) This ambiguity in the statute has caused a split in the law that is likely to affect creditors and debtors much differently depending on the jurisdiction in which they file their petitions.

III. The Two Competing View’s of § 707(a).

A. Bad Faith is Not Seen as a “For Cause” Reason to Dismiss The Debtor’s Chapter 7 Bankruptcy Petition.

\(^{17}\) 11 U.S.C. § 707(a).


\(^{21}\) 11 U.S.C. §§ 707(a)(1)-(3) (stating that the “for cause” conditions that a case may be dismissed under this section includes an “unreasonable delay by the debtor that is prejudicial to creditors; nonpayment of any fees or charges required under chapter 123 of title 28; and failure of the debtor in a voluntary case to file, within fifteen days or such additional time that the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on motion of United States trustee).

\(^{22}\) Cf. Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829, 832 (8th Cir. 1994) (holding that allowing bad faith as a for cause reason to dismiss a Chapter 7 bankruptcy petition will allow courts to punish debtors whose “values do not coincide precisely with those of the court.”); with, Indus. Ins. Servs., Inc. v. Zick (In re Zick), 931 F.2d 1124, 1129 (6th Cir. 1991) (holding that a good faith requirement is implied in the statute because the purpose of bankruptcy is to help the struggling debtor manage his financial obligations, not to allow irresponsible spenders to “preserve a comfortable standard of living of living at the expense of their creditors”).
The Eighth and Ninth Circuits were the first to find that a debtor who files his petition in bad faith should not have his claim dismissed under § 707(a).\textsuperscript{23} Bad faith “consist[s] of systematic and deliberate misstatements or omissions on bankruptcy schedules; knowingly false testimony at a meeting of creditors or a court hearing; and intentional acts to hinder the trustee in the administration of the estate and the investigation in connection to it.”\textsuperscript{24} These circuits also caution that dismissal should not be entered into lightly and it should not be employed for only one or two infractions.\textsuperscript{25} Other sanctions in the Code are better suited for a debtor who deviated in a minor way from an otherwise trustworthy and honest attempt to rectify his financial trouble.\textsuperscript{26} Further, these circuits find that dismissal for bad faith under § 707(a) is not supported through a statutory analysis and would be an abuse of judicial discretion.\textsuperscript{27} Finally, for policy reasons, bad faith dismissals are better analyzed under different sections of the Code.\textsuperscript{28}

\textit{i. The Argument That Statutory Construction Bars Bad Faith as a “For Cause” Dismissal.}

Sections 707(a) and 707(b) both address when a judge may dismiss a Chapter 7 petition.\textsuperscript{29} Section 707(a) is applicable to all petitions regardless of the type of debt amassed—

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  \item \textsuperscript{23} See In re Padilla, 222 F.3d 1184, 1191 (9th Cir. 2000); In re Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994).
  \item Id.
  \item In re Khan, 172 B.R. 613, 625 n. 23 (Bankr.D. Minn. 1994).
  \item In re Padilla, 222 F.3d at 1193.
  \item 11 U.S.C. § 707(a); 11 U.S.C. 707(b).
\end{itemize}
both consumer and non-consumer.\textsuperscript{30} Section 707(b), however, is only triggered when the debtor has primarily consumer debts.\textsuperscript{31} These circuits rely on the conviction that “[s]tatutory construction canons require that ‘[w]here both a specific and a general statute address the same subject matter, the specific one takes precedence regardless of the sequence of enactment, and must be applied first.’”\textsuperscript{32} And therefore, if a debtor has filed a petition in bad faith, these circuits hold that it is to be examined under the provision that specifically deals with bad faith petitions: § 707(b).\textsuperscript{33} However, if the debts are not primarily consumer debts, this analysis is impossible.

Section 707(a) and 707(b) give different examples of the types of abuses by the petitioner that may result in a dismissal of his case.\textsuperscript{34} Courts have repeatedly found that Congress’s use of the word “including” in both statutes indicates that neither list is meant to be exhaustive.\textsuperscript{35} The examples given in § 707(a) have been found to be “technical and procedural” causes for dismissal and therefore, do not include bad faith.\textsuperscript{36} And the “for cause” reasons in § 707(b) deal with the actual substantive petition filed by the debtor and his mindset when filing.\textsuperscript{37} Therefore, Congress never intended judges to infer bad faith as a “for-cause” reason for dismissal.\textsuperscript{38} Rather

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\textsuperscript{30} 11 U.S.C. § 707(a)
\textsuperscript{31} 11 U.S.C. § 707(b)(1) (stating that a court “may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . .”).
\textsuperscript{32} In re Padilla, 222 F.3d at 1192 (quoting In re Khan, 172 B.R. 613, 624 (Bankr. D. Minn. 1994)).
\textsuperscript{33} In re Padilla, 222 F.3d at 1192.
\textsuperscript{34} §§ 11 U.S.C. 707(a)-(b)(1).
\textsuperscript{35} E.g., In re Zick, 931 F.2d 1124, 1126 (6th Cir. 1991).
\textsuperscript{36} In re Padilla, 222 F.3d at 1192 (citation omitted).
\textsuperscript{37} See Id.
\end{flushright}
Congress only wanted procedural and technical aspects of the petition to be reviewed under § 707(a).\textsuperscript{39}

Section 707(b) was amended significantly in 2005 under the Bankruptcy Abuse Prevention and Consumer Protection Act.\textsuperscript{40} Congress passed this act in response to a public fear that unscrupulous debtors were turning to bankruptcy after committing credit card “bust-out”\textsuperscript{41} as a way to avoid their obligations despite their ability to actually pay off the debt.\textsuperscript{42} Before Congress enacted § 707(b), debtors were free to walk away from their financial obligations and start over by simply liquidating their nonexempt assets.\textsuperscript{43} A change in legislation was lobbied for by retailers and consumer credit lenders to block debtors who would eventually be able to repay the amounts borrowed, but instead sought the asylum of Chapter 7.\textsuperscript{44} The new version of § 707(b) allows the creditors or trustee to move for dismissal more easily than they previously could.\textsuperscript{45} Also, dismissal or conversion to Chapter 11 or 13 may be granted once the creditor or trustee has shown by a totality of the circumstances test that the petition was an abuse of the bankruptcy system.\textsuperscript{46} However, when Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act, they did not amend any of the language in § 707(a).\textsuperscript{47} Therefore,

\begin{itemize}
  \item \textsuperscript{39} Id.
  \item \textsuperscript{41} In re Padilla, 222 F.3d at 1188 (defining the term credit card “bust-out” “to describe a person's accumulation of a consumer debt in anticipation of filing for bankruptcy.”).
  \item \textsuperscript{43} In re Haddan, 246 B.R. 27, 31 (Bankr. S.D.N.Y. 2000) (citing In re Krohn, 886 F.2d 123, 125 (6th Cir. 1989)).
  \item \textsuperscript{44} Id. (citing Green v. Staples (In re Green), 934 F.2d 568, 570 (4th Cir. 1991); First USA v. Lamanna, 153 F.3d 1, 4 (1st Cir. 1998)).
  \item \textsuperscript{46} Id.
  \item \textsuperscript{47} Id.
\end{itemize}
courts have held that Congress’s failure to amend the statute was intentional and reaffirms it did not intend for courts to consider the intention of the debtor when considering dismissal under § 707(a).48

ii. The Policy Behind Allowing Bad Faith Petitions to Survive § 707(a) Scrutiny.

In addition to the statutory-interpretation argument, courts have also found that policy considerations require that dismissal of a debtor’s bad faith petition should be handled in other areas of the statute.49 Courts want to consciously avoid classifying actions by the debtor as bad faith when they appear to be because “framing the issue in terms of bad faith may tend to misdirect the inquiry away from the fundamental principals and purposes of Chapter 7.”50 The post-filing relationship between the creditor and the debtor is different in cases where the debtor is forced to liquidate his nonexempt assets rather than simply reorganize his debt.51 Under a Chapter 11 or 13-reorganization proceeding, a debtor is permitted to retain title of his financed assets and continue the contractual relationship with his debtors.52 In exchange for keeping his property, the debtor must enter into the reorganized contractual relationship with his debtors in good faith.53 However, when a debtor elects to liquidate his assets under Chapter 7 to satisfy his debts, no post-filing relationship exists between the debtor and the creditor.54 Therefore, Chapter

48 Id.
49 See In re Huckfeldt, 39 F.3d at 832.
50 Id.
51 In re Padilla, 222 F.3d at 1193 (explaining that the relationship between a creditor and debtor is different in a Chapter 7 proceeding because there is no continued contractual relationship between the creditor and debtor after the bankruptcy case is over like there is in a Chapter 11 or a Chapter 13).
52 Id. (citations omitted).
54 In re Padilla, 222 F.3d 1184, 1193 (9th Cir. 2000) (citations omitted).
7 protection should be granted to all debtors whether their motivation is rooted in good faith or not, because they are willing to part with their nonexempt assets.\textsuperscript{55}

Courts also fear that interpreting § 707(a) broadly to include an implied requirement of good faith can lead courts to reject a debtor from bankruptcy because he does not appear to be “as deserving as other petitioners.”\textsuperscript{56} This roadblock to financial a safe harbor cuts against the maxim that bankruptcy should be available to all debtors who find themselves unable to meet their monthly expenses.\textsuperscript{57} Furthermore, courts want to guard against retaliatory judges who seek to punish the debtor through a bad faith inquiry because the debtor’s values differ from the courts.\textsuperscript{58} Therefore, the bad-faith inquiry is better suited for examination under sections of the Code other than § 707(a).\textsuperscript{59}

Those circuits that hold there is no implied good faith requirement in § 707(a) have come to that conclusion by considering several different factors in bankruptcy law. They have found that the canons of statutory interpretation\textsuperscript{60} compel a court to consider bad faith only under § 707(b) of the Code.\textsuperscript{61} Also these circuits have determined that Congress intentionally left the concept of bad faith inquiries out of § 707(a) when it revised the Code through the Bankruptcy


\textsuperscript{57} See id.

\textsuperscript{58} In re Huckfeldt, 39 F.3d at 832 (quoting In re Latimer, 82 B.R. 354, 364 (Bankr. E.D.Pa. 1998) (stating “[t]hey also fear that the bad faith inquiry will be ‘employed as a loose cannon which is to be pointed in the direction of a debtor whose values do not coincide precisely with those of the court.’.”).

\textsuperscript{59} See id.

\textsuperscript{60} See In re Padilla, 222 F.3d at 1192 (quoting In re Khan, 172 B.R. 613, 624 (Bankr. D. Minn. 1994) (holding that where both a specific and a more general statute apply, the more specific statute is to be favored over the more general one).

\textsuperscript{61} \textit{See supra} Part II.A.i.
Abuse Prevention and Consumer Prevention Act. Therefore, imposition of this requirement from the bench would be an abuse of judicial discretion. Next, these circuits rely on policy considerations. The contractual relationship between the debtor and his creditors is extinguished at the end of the proceedings. Therefore, courts find that the motivation for filing bankruptcy by a debtor who is willing to give up his assets to satisfy his unsecured debt is not relevant. And finally, courts want to ensure that § 707(a) is not used by judges as a tool to punish debtors who have conducted themselves in a way to which court objects.

B. An Examination of the Circuits That Have Found There is an Implied Good Faith Requirement in § 707(a).

In contrast with the Eighth and Ninth Circuits, the Third and Sixth Circuits were the first to find that good faith is implied in § 707(a) and a court may dismiss a petition that has been filed in bad faith. These courts caution, however, that a dismissal for lack of good faith by the petitioner should not be overused and should “generally [be] utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.” Once another party has called the motivation of the debtor into question, the burden shifts to the debtor to prove he filed in good faith. Furthermore, each possible dismissal must be examined on an ad hoc basis. During this ad hoc analysis of the debtor’s Chapter 7 petition, courts must determine whether the debtor

62 See supra Part III.A.i
63 See supra Part III.A.i.
64 See supra Part III.A.ii.
65 See supra Part III.A.ii.
66 See generally In re Tamecki, 229 F.3d 205 (3rd Cir. 2000); In re Zick, 931 F.2d 1124 (6th Cir. 1994).
67 In re Zick, 931 F.2d at 1129.
68 In re Tamecki, 229 F.3d at 207.
69 See, e.g., In re Brown, 88 B.R. 280, 284 (Bankr. D.Haw. 1988)
has abused the “provisions, purpose, or spirit of bankruptcy law.”

Some factors the court uses to determine whether the debtor’s bad faith petition should be dismissed include whether the debtor tried to conceal income; if the debtor maintains a lavish lifestyle; whether the debtor consolidated his debts to a single creditor prior to filing; a lack of truthfulness when addressing the court or during creditor meetings; whether the debtor actually attempted to repay his creditors; the fundamental fairness of the debtor’s use of the Bankruptcy Code and whether the debtors is only attempting to frustrate his creditors; and whether the debtor repaid the debts owed to a preferred creditor prior to filing. And only upon meeting this heavy burden may a court dismiss a debtor’s Chapter 7 bankruptcy petition for cause under § 707(a).

   *i.* Courts Have Found § 707(a) Contains Implied Requirement of Good Faith Through Historical and Policy Considerations.

Courts have, in part, relied on the history of bankruptcy law to guide them to the conclusion that good faith is implied under § 707(a). A Fifth Circuit Court pointed out that “[e]very bankruptcy statute since 1898 has incorporated literally, or by judicial interpretation, a standard of good faith for the commencement, prosecution, and confirmation of bankruptcy proceedings.”

Courts have also found that good faith is required under § 707(a) because this requirement promotes the over-arching principal that bankruptcy seeks to achieve. The good-faith standard helps to ensure that the equitable remedies that are available to debtors who are

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70 In re Tamecki, 229 F.3d at 207.
71 McDow v. Smith, 295 B.R. 69, 79-80 n.22 (E.D.Va. 2003) (compiling a list of the most frequently weighed factors that courts considered when deciding if a debtor’s behavior rises to the level of a “for cause” bad faith dismissal or if his behavior is odd under the circumstances, but innocuous towards the spirit of the bankruptcy Code).
73 In re Little Creek Dev. Co. v. Commonwealth Mortg. Corp. (hereinafter In re Little Creek Dev. Co.), 779 F.2d 1068, 1071 (5th Cir. 1986).
trying to fix his bleak situations are not wasted on those less ethical debtors who intend to exploit the remedies with their unclean hands.\textsuperscript{74} The fundamental purpose of the:

[b]ankruptcy Code is intended to serve those persons who, despite their best efforts, find themselves hopelessly adrift in a sea of debt. Bankruptcy protection was not intended to assist those who, despite their own misconduct, are attempting to preserve a comfortable standard of living at the expense of their creditors. Good faith and candor are necessary prerequisites to obtaining a fresh start. The bankruptcy laws are grounded on the fresh start concept. There is no right, however, to a head start.\textsuperscript{75}

This implied requirement of good faith in a debtor’s petition for bankruptcy helps balance the competing interests of petitioning debtors and his creditors.\textsuperscript{76} This balance is seen throughout the Bankruptcy Code, and justifies the delayed payment to creditors and their increased costs associated with bankruptcy proceedings.\textsuperscript{77} It is this idea of fundamental fairness that drives the courts to require that a petition be filed in good faith or face possible dismissal. The Third and Sixth Circuits have relied heavily on the goal that they must find an outcome that is fair and just.\textsuperscript{78} The purpose of this requirement is both to protect the bankruptcy system’s integrity and to “highlight[] the importance of providing a fresh start only to the ‘honest but unfortunate debtor’ who has ‘clean hands and an honorable purpose.’”\textsuperscript{79}

\textsuperscript{74} Id.
\textsuperscript{75} In re Zick, 931 F.2d at 1129-30 (quoting In re Jones, 114 B.R. 917, 926 (Bankr. N.D.Ohio 1990).
\textsuperscript{76} In re Little Creek Dev. Co., 779 F.2d at 1072 (discussing the general principals of why good faith is required and applying them to a Chapter 11 bankruptcy).
\textsuperscript{77} Id.
\textsuperscript{78} See Tsang, The Case Against “Bad Faith” Dismissals of Bankruptcy Petitions Under 11 U.S.C. § 707(a), 59 Am. U. L. Rev. 685, 697-98 (2010) (discussing how the Third and Sixth Circuits have come to the conclusion that a § 707(a) has an implicit good faith requirement, but ultimately arguing that this conclusion is incorrect).
\textsuperscript{79} See supra Tsang, note 70 at 698 (quoting In re Jones, 114 B.R. 917, 926 (Bankr. N.D. Ohio 1990) (citing In re Brown, 88 B.R. 280, 284 (Bankr. D.Haw. 1988)).

The term “for cause” is not explicitly defined under § 707(a). Only three examples are supplied for judges to illustrate when they may use their discretion and grant the dismissal of a debtor who has filed a Chapter 7 petition. Since ambiguity exists for the precise meaning of “for cause,” “the sensibly settled [statutory] construction canon of ejusdem generis is a reliable guide to what other grounds may qualify as ‘cause’ under § 707(a).” Using ejusdem generis, the meaning of “cause” may be determined by a comparison to the other terms that are in the statute. And when specific words are mentioned and then followed by a more general word, the general word may be limited to the definition of the specific term.

Generally, a debtor has demonstrated bad faith when they filed their Chapter 7 petition and purposely acted or failed to act in a way that was meant to “misuse or abuse the provisions, purpose, or spirit of the Bankruptcy Code.” The three examples that are listed in the Code

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81 11 U.S.C. § 707(a)(1)-(3) (stating that “(1) unreasonable delay by the debtor that is prejudicial to creditors; (2) nonpayment of any fees or charges required under chapter 123 of title 28; and” (3) failure of a debtor to file required information within fifteen days and only by the motion of the United States trustee).  
82 Blacks Law Dictionary 594 (9th ed. 2009) (defining ejusdem generis to mean that “when a general word or phrase follows a list of specifics, the general word or phase will be interpreted to include only items of the same class as those listed.”) (in this case, the specific words and phrases are the three illustrations given in the Code and the general word is “including,” because it means everything else).  
86 McDow v. Smith 295 B.R. at 74; see also McDow v. Smith 295 B.R. at 74 n.7 (noting that the wording of this definition is not used in exactly the same way in other cases, but the language used is consistent with the finding that a debtor’s bad faith does constitute dismissal under § 707(a).
under § 707(a) each illustrate an intentional abuse of the bankruptcy Code. Therefore, the listed illustrations in § 707(a) and bad faith fall into the same category, because both are meant to “misuse or abuse the provisions, purpose, or spirit of the Bankruptcy Code.” Consequently, good faith must be implied in § 707(a) as a requirement through *ejusdem generis.*

Consistent interpretation within the Code of how similar provisions are applied to the different Chapters of bankruptcy is also important. Circuits have held this idea compels them to imply a good faith requirement in § 707(a). To maintain this consistency, circuits held that when the same words are used in different sections of the same provision, those words are intended to mean the same thing. Courts have consistently found that “for cause” dismissals include the debtor’s bad faith under §§ 1112(b) and 1307(c) despite the fact that “bad faith” is never mentioned as one of the examples in either of those statutes. Therefore, since the language in

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87 11 U.S.C. § 707(a) (illustrating that an unreasonable delay, failure of the debtor to pay his fees, or a failure to meet deadlines may be “for cause” for dismissal).
89 *See supra* note 82, at 13.
90 McDow v. Smith 295 B.R. at 74 (holding that “a debtor’s bad faith acts or omissions fall into the same class of such acts or omissions as do the three illustrative examples of ‘cause’ for dismissal set forth in § 707(a) . . .”).
91 Comm’r v. Lundy, 516 U.S. 235, 250 (1996) (holding that a taxpayers argument that Congress meant a “claim filed on a [tax] return” when they used the word “claim” in §§ 6511(a) and 6512 was unpersuasive because there was no indication that Congress intended the term to mean one thing in the preceding section and something different in the next section) (citations omitted).
92 11 U.S.C. 1112(b) (pertaining to Chapter 11 bankruptcy and when a judge may dismiss a debtor’s case or convert it into a Chapter 7 preceding, depending on what is best for the creditors and estate).
93 11 U.S.C. 1307(c) (pertaining to Chapter 13 proceedings and whether they may be dismissed by the judge or converted into a Chapter 7 bankruptcy, “whichever is in the best interest of the creditors and the estate . . .”).
94 In re Padilla, 222 F.3d 1184, 1192-93 (9th Cir. 2000) (stating that Chapter 11 and Chapter 13 both have an implied good faith requirement in their “for cause” dismissal provisions); In re Huckfeldt, 39 F.3d 829, 832 (8th Cir. 1994) (finding that Chapters 11 and 13 both have an implied good faith requirement in their “for cause” provisions, but Chapter 7 does not have the same requirement); Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989)
the statutes for “Chapters 7, 11, and 13 are all equally devoid of a specific ‘good faith’ filing requirement,” and the term “for cause” has been found to include good faith under Chapters 11 and 13, it too should be inferred under § 707(a) for Chapter 7 bankruptcy.95

iii. An Illustration of the Behavior That Will and Will Not Be Considered “For Cause” for Dismissal Under § 707(a) in Circuits That Imply a Good Faith Requirement.

Even in the circuits that have interpreted § 707(a) to allow judges to use their discretion to find that a debtor’s bad-faith filing amounts to “for cause” for dismissal the debtor’s petition do not enter into the decision lightly.96 A debtor’s lack of good faith by itself is only grounds for dismissal in the most “‘egregious cases”’97 under Chapter 7.”98 Traditionally, courts have defined egregious cases of bad faith to included “concealment or misrepresentation of assets and income, a lavish lifestyle.”99 Also the debtor’s intention to avoid a significant amount of debt or one large single debt through fraud, misconduct, or gross negligence is classified as an egregious case.100 This bad-faith burden is so difficult to meet that a debtor’s ability to repay his debts despite filing for bankruptcy is likely not enough of a showing of bad faith for the court to dismiss that debtor’s case in any of the circuits.101

(finding that a good faith requirement is implicit in several provision in the bankruptcy code, including Chapter 11).

95 McDow, 295 B.R. at 78.
97 Some courts have explained the meaning of “egregious cases” to mean abuses that violate the “provisions, purposes, or spirit of bankruptcy law.” In re Sudderth, No. 06-10660, 2007 WL 119141, at *2 (Bankr. M.D.N.C. Jan. 9, 2007).
98 Id.
100 Id.
101 See H.R. Rep. No. 95-595, at 380 (stating that the illustrative causes for dismissal in § 707(a) are not exhaustive, but that the ability of the debtor to repay the debts in part or in whole amounts to “adequate cause for dismissal.”).
The best illustration of the concept that a debtor’s ability to repay his debts is not automatic cause for dismissal is seen in *McDow v. Smith.* After earning his MBA from Stanford University, Smith (the Debtor) began a career developing commercial real estate. When the real estate market took a downturn in 1989, the Debtor’s home was foreclosed and he was forced to relinquish his equity interests in various real estate partnerships to satisfy his secured debts. When the Debtor sold back his shares to those partnerships, an income realization event was triggered and he incurred $3.2 million in federal income tax liability, which grew to $5.1 million after the penalties and interest accrued. Once the debtor became reemployed his pretax salary, including bonuses, totaled $454,000 a year, or about $37,833 a month. At the time the debtor filed for Chapter 7 bankruptcy his monthly expenditures totaled $31,993, which included $1,700 a month expense allotment for recreation, $6,618 per month to rent a home on two acres in affluent Great Falls, Virginia, and more than $5,600 per month for the private education of three of his four children. The Trustee filed for § 707(a) dismissal because the Debtor engaged in a “lavish lifestyle” that could be scaled back to allow him to meet his obligation to the IRS and other creditors. The court, however, found that despite the fact that bad faith constitutes a “for cause” reason to dismiss a petition under § 707(a), the debtor’s ability to meet obligations in the future does not by itself rise to the level needed for dismissal according to the legislative history of the statute. Relying on the legislative history, the court held that permitting dismissal on the grounds that a debtor had the ability to repay his debts

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103 *Id.* at 71.
104 *Id.* at 72.
105 *Id.*
106 *McDow,* 295 B.R. at 72.
107 *Id.* at 72-73.
108 *Id.* at 73.
109 *Id.* at 78 (citations omitted).
would “‘enact a nonuniform [sic] mandatory Chapter 13, in lieu of the remedy of [Chapter 7] bankruptcy.’” 110 And without more aggravating circumstances accompanying the Debtor’s ability to repay his debts, the Debtor’s petition could not be dismissed.111

On the other side of the spectrum, the debtor in Tamecki112 provides a clear example of when a debtor’s ability to eventually repay his debts coupled with other bad faith intentions will result in a dismissed petition under § 707(a). The debtor in Tamecki sought the shelter of Chapter 7 bankruptcy for $35,000 of credit card debt that he owed solely to MBNA America.113 The Debtor’s only substantial asset was his share of a house, which he held as a tenant by the entirety with his estranged wife.114 The home had accrued over $100,000 in equity.115 The Trustee assigned to the debtor’s estate by the court found that the debtor was very close to filing for a divorce, where he would be entitled to approximately $50,000 of the equity in the home.116 After the Trustee filed for dismissal of the petition under § 707(a), the court discovered that the Debtor accumulated his $35,000 debt very quickly and shortly before filing his petition, all while earning “less than one-tenth this amount” and without any sign of a “marked calamity or sudden loss of income that precipitated this need to accrue such a comparatively large consumer

110 McDow, 295 B.R. at 78 (quoting In re Marks, 174 B.R. at 41) (citing H.R. Rep. No. 95-595, at 380) (stating further that the committee has rejected this idea that a debtor’s ability to repay his financial obligations is “for cause” bad faith for dismissal in the past and has not been shown convincing evidence that their position should be reversed).
111 Id. (explaining that in each case where other courts have approved the dismissal of a debtor’s petition because they continued to engage in a lavish lifestyle such as private schools and expensive housing there was also evidence that the debtor participated in misconduct consisting of misrepresenting asset to the court or committing fraud against his creditors).
112 229 F.3d 205 (3rd Cir. 2003).
113 Id. at 206.
114 Id.
115 Id.
116 In re Tamecki, 229 F.3d at 206.
debt.” The court found that because the Debtor was unable to explain both the circumstances relating to his divorce proceedings and his rapid accrual of unexplainable debt, dismissal of his petition was warranted despite the fact that he was be able to repay his debts.

The Third, Fourth, Sixth, and Eleventh Circuits that have held that § 707(a) does contain an implied requirement of good faith have come to this conclusion by combining several methods of legal interpretation. By examining the history of bankruptcy law in the United States, courts have found that every bankruptcy statute for the past one hundred fifteen years has required a showing of good faith, either impliedly through judicial interpretation or explicitly through stated provisions in the statute. Courts also find that requiring good faith squares with the fundamental principals behind bankruptcy. This requirement helps ensure that the equitable remedies that are available to a debtor who finds himself unable to meet his financial obligations are not wasted and abused by those debtors with less-than-admirable intentions for filing. Also the statutory construction canon of ejusdem generis directs courts to imply good faith under § 707(a), because it is implied in § 707(a)’s contemporary provisions under Chapters 11 and 13. Finally, those courts that have found an implied good faith requirement may not grant a dismissal without an egregious showing of bad faith that involves more than a simply a debtor’s ability to repay his debts.

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117 Id. at 207.
118 The debtor was not able to offer any showing of good faith for the accrual of the debt except for the testimony that the debt was incurred for “subsistence purposes.” In re Tamecki, 229 F.3d at 207, 208.
119 Id. at 208.
120 See generally supra Part III.B.
121 See supra Part III.B.i.
122 See supra Part III.B.i.
123 See supra Part III.B.i.
124 See supra Part III.B.ii.
125 See supra Part III.B.iii.
IV. Evaluation

The decision of a circuit whether to infer good faith or not in § 707(a) is one of great importance, because it will impact both a debtor’s financial outlook for the next several years—which will in turn affect almost every aspect of the debtor’s life—and how creditors interact with their debtors who have financed debt. Keeping in mind the gravity of what is at stake with this decision, and for the reasons cited by the Third, Fourth, Sixth, and Eleventh Circuits, courts should find that § 707(a) implies a requirement of good faith and when this requirement is unfulfilled, dismissal of the petition is appropriate.

A. Consistency Within the Code Compels Circuits to Imply Good Faith Under § 707(a).

Circuits that have found no implied requirement of good faith in § 707(a) have failed to apply the ordinary meaning of the term “cause.” When a word or term lacks a definition within the Code, that term must be interpreted using its ordinary meaning. Determining the ordinary meaning is simply done by looking to the dictionary definition. When § 707(a) was codified in 1978, “Black’s Law Dictionary defined ‘cause,’ in relevant part, simply as ‘reason’ or ‘justification.’” That definition has remained essentially unchanged since Congress passed § 707(a) thirty-five years ago, and reads today as “a legal reason or ground.” Since Congress placed no limitations on the use of “for-cause” dismissals in § 707(a), the plain-language

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126 See generally supra Part III.B.
128 Id. (citing Ransom v. FIA Card Servs., N.A., 131 S.Ct. 716, 724 (2011); Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 362 (1905)).
129 Id. (quoting Blacks Law Dictionary 279 (4th ed. 1968)).
meaning must be interpreted to mean giving “legal reason” for courts to dismiss a debtor’s petition when it has been filed in bad faith.\textsuperscript{131}

The Eighth and Ninth Circuits have found (and other Circuits have since followed\textsuperscript{132}) that because § 707(a) is read as a general statute pertaining to dismissals of a debtor’s petition and § 707(b) is read as a specific provision of dismissal pertaining to bad faith, a court must defer to the use of § 707(b) when considering bad faith dismissals.\textsuperscript{133} While many courts have anchored themselves to this idea, the statutory canon of \textit{ejusdem generis} is more appropriate when examining these provisions and deciding whether a showing of good faith is required. Sections 1112(b) and 1307(c) are § 707(a)’s contemporaries, dealing with a dismissal of a debtor’s petition “for cause.” Good faith has been found by all courts to be required under §§ 1112(b) and 1307(c).\textsuperscript{134} Using the statutory canon of \textit{ejusdem generis} and finding good faith is also required in 707(a), continuity is maintained within the code, the same words share the same meaning within sister provisions.\textsuperscript{135}

Furthermore, this specific-statute argument fails because §§ 707(a) and 707(b) are concerned with different debts.\textsuperscript{136} Section 707(b) is only applicable to debtors who have

\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{E.g., see} In re Horan, 304 B.R. 42, 45 (Bankr.D. Conn 2004) (adopting that Eighth and Ninth Circuit’s view of § 707(a)); In re Linehan, 326 B.R. 474, 477-81 (Bankr.D.Mass. 2005) (adopting the Eighth and Ninth Circuit’s interpretation of § 707(a) and finding that transferring their assets to son prior to the petition and omitting assets from their schedules was not dismissible under §707(a) for bad faith).
\textsuperscript{133} \textit{See} In re Padilla, 222 F.3d 1184, 1192 (8th Cir. 2000) (quoting In re Khan, 172 B.R. 613, 624 (Bankr. D.Minn. 1994) (stating that “[s]tututory construction canons require that ‘[w]here both a specific and a general statute address the same subject matter, the specific one takes precedence . . . ’.”).
\textsuperscript{134} \textit{See supra} note 93, at 14.
\textsuperscript{135} \textit{See supra} Part B.III.ii.
\textsuperscript{136} In re Piazza, 719 F.3d at 1266.
“primarily consumer debts.”137 However, § 707(a) is applicable in all Chapter 7 cases, because Congress has not placed any limitation on the situations where it may be employed.138 The two provisions also differ in their remedies, further underscoring their differences and the deficiency of viewing them simply as a general and specific statute pertaining to the same situation.139 Besides dismissing the debtor’s petition, § 707(b) provides for converting a Chapter 7 petition into a Chapter 11 or Chapter 13 proceeding when the debtor consents to such a conversion.140 The only available remedy under § 707(a), however, is dismissal of the debtor’s petition.141 Therefore, §§ 707(a) and 707(b) are not simply general and specific statutes dealing with the same issue, they are independent of each other and each needs to be viewed separate from the other. Since these statutes must be viewed separate from one another, good faith should be inferred under § 707(a).

Next, the Eighth and Ninth Circuits’ finding that § 707(a) deals only with procedural causes for dismissal142 takes an unnecessarily narrow view of the word “including.” Because Congress chose to use the word “including” is it well settled that the examples in the provision are meant to be illustrative and not meant to be exhaustive.143 This narrow interpretation of the word “including” unjustifiably limits “the settled meaning of ‘for cause’ [and] runs counter to both the original understanding of that term in § 707 as well as more than a century of federal

137 11 U.S.C. § 707(b) (stating that a court “may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter.”).
139 See In re Piazza, 719 F.3d at 1266-67.
142 See supra Part III.A.i.
143 See supra note 35 at 6.
bankruptcy law and policy.”  

Historically, the ability of a bankruptcy court to dismiss a petition “for cause” under § 707 has been used as a tool to prevent “manifestly inequitable result[s].” Therefore, interpreting the word “including” narrowly to only encompass procedural and not substantive illustrations of “for cause” reasons for dismissal places a gratuitous limit on the courts’ use of § 707(a).

Last, the failure of Congress to amend the language used in § 707(a) when it passed the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 does not reaffirm that it meant to keep bankruptcy courts from considering the debtor’s intentions when filing a Chapter 7 petition. Rather, this lack of legislative activism shows that Congress does not intend to limit the reach of § 707(a). The BAPCPA was passed in reaction to consumers’ and creditors’ fear that shameless debtors would seek safe harbor under Chapter 7 and avoid the consequences of their irresponsible spending. A large increase in bankruptcy filings in the early part of the decade was cited as a major motivating factor for Congress to act and pass the BAPCPA. This upward trend in bankruptcy filings continued until 2010 and the floodwaters have only slightly subsided. This lack of action during this period of bulging dockets for bankruptcy courts shows that Congress did not intend to limit the court’s ability to filter out

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144 In re Piazza, 719 F.3d at 1264.
147 See supra note 42, at 7.
those petitions that seek Chapter 7 protection for less than legitimate reasons.\textsuperscript{150} If Congress intended a limit on § 707(a), Congress would have enacted that limit when it overhauled the bankruptcy Code in 2005.

**B. The Eighth and Ninth Circuits’ Policy Arguments For Allowing Bad Faith Petitions to Survive § 707(a) Scrutiny Are Not Justified.**

The Eighth and Ninth Circuits partially rely on the incorrect assumption that because the post-filing relationship between a debtor and his creditors is different under a Chapter 7 bankruptcy a bad faith petition is justified.\textsuperscript{151} These circuits feel that bad faith is acceptable because a Chapter 7 debtor is willing to give up his unsecured assets in exchange for a chance to start over.\textsuperscript{152} While this position may be warranted in theory, it lacks justifiability in practical application. In order to file Chapter 7 petition, the debtor must fill out a series of lengthy schedules that detail, among other things, his assets.\textsuperscript{153} Among these schedules is one that allows the debtor to “exempt” certain property from the liquidation.\textsuperscript{154} If a court determines that all of the debtor’s assets qualify as exempt or are secured to valid liens, the appointed trustee will file a

\textsuperscript{150} See In re Piazza, 719 F.3d at 1262 (quoting In re Little Creek Dev. Co., 779 F.2d at 1072) (stating that the increased frequency of bankruptcy filings does not indicate that courts should be limited in the use of the tools Congress has provided them “to protect ‘jurisdictional integrity.’

\textsuperscript{151} See supra Part III.A.ii.

\textsuperscript{152} See supra Part III.A.ii.

\textsuperscript{153} See supra note 11, at 3. For a completed example of the required schedules for a Chapter 7 petition see Chapter 7 Toolkit, Sample of Completed Forms for John and Jane Doe, (last visited Nov. 16, 2013), http://sites.lawhelp.org/documents/515951Sample%20Bankruptcy%20Forms%20of%20John%20and%20Jane%20Doe.pdf.

“no asset” report with the court.155 The result for the unsecured creditors is they will not receive any payments, because there are no unsecured assets to liquidate.156 “Most [C]hapter 7 cases involving individual debtors are no asset cases.”157 And a bankruptcy petition is almost thirty times more likely to be filed by an individual debtor than by a business.158 Therefore, the policy consideration that good faith is not required in a Chapter 7 petition because the debtor is willing to give up his nonexempt assets is not applicable in the vast majority Chapter 7 cases.

Finally, circuits do not infer a good faith requirement in § 707(a) because they are afraid that inferring such a requirement will cause judges to punish debtors whose values do not square with those of the court.159 These Circuits are also afraid that this requirement of good faith will cause courts to reject debtors who do not appear to deserve the equitable remedies of bankruptcy when compared to other petitioners.160 But this concern is unfounded, because courts have continuously held that dismissal under § 707(a) is not a remedy that a court may use liberally.161 Because courts may only dismiss a debtor’s petition for bad faith under § 707(a) in the most egregious cases,162 judges are simply not free to inject their own values into an inquiry of a debtor’s intentions for filing their petition. Further, the purpose of § 707(a) is to rid the

156 Id.
157 Id.
158 See The Third Branch News, Bankruptcy Filings Down in Fiscal Year 2012, United States Courts (Nov. 7, 2012), http://news.uscourts.gov/bankruptcy-filings-down-fiscal-year-2012 (showing that the total business bankruptcy filings in 2012 was 42,008 while the total non-business bankruptcy filings was 1, 219, 132).
159 See supra note 57, at 9.
160 See supra note 55, at 9.
161 See supra note 96, at 15.
bankruptcy system of Chapter 7 debtors who are not justified in being there.\textsuperscript{163} Therefore, purposefully limiting the intended function of a provision, without an indication from Congress that the limitation is warranted, needlessly inhibits a court’s ability to function efficiently and impedes its ability to quickly adjudicate those cases that truly belong.

The Eighth and Ninth Circuits have held that § 707(a) does not imply any requirement of good faith by the debtor by examining both statutory interpretations and policy reasons.\textsuperscript{164} However, when compared side-by-side with the findings of the Third, Fourth, Sixth and Eleventh Circuits that good faith is implied, the Eighth and Ninth Circuits’ reasoning falls short.\textsuperscript{165} When considering the plain meaning of the term “for cause” courts must find that this term implies a showing of good faith.\textsuperscript{166} Interpreting the word “including” in the statute narrowly is improper because it limits the plain meaning of “for cause.”\textsuperscript{167} Congress’s lack of action in amending § 707(a) shows that it had no intention of limiting its use as a tool for courts in dismissing bad-faith petitions.\textsuperscript{168} Furthermore, the policy consideration that good faith is not implied in § 707(a) because a debtor is willing to give up his assets for a chance to start over is not applicable in most Chapter 7 situations because most are no-asset cases.\textsuperscript{169} And finally, since a court can only dismiss a case for bad faith in the most egregious situations, the risk of a judge punishing a petitioner whose values differ from the court’s would be highly unlikely.\textsuperscript{170}

\begin{align*}
\textsuperscript{163} & \text{See 11 U.S.C. § 707(a).} \\
\textsuperscript{164} & \text{See generally Part III.A.} \\
\textsuperscript{165} & \text{See generally Part IV.} \\
\textsuperscript{166} & \text{See Part IV.A.} \\
\textsuperscript{167} & \text{See Part IV.A.} \\
\textsuperscript{168} & \text{See Part IV.A.} \\
\textsuperscript{169} & \text{See Part IV.B.} \\
\textsuperscript{170} & \text{See Part IV.B.}
\end{align*}
V. Conclusion

The absence of explicit language in § 707(a) either including or excluding bad faith as “for cause” for dismissal has sparked a split in the circuits. Because of this split, debtors’ petitions with the exact same facts and surrounding circumstances could have much different fates, depending on where the debtor files the paperwork. If the debtor files in the First, Second, Eighth or Ninth District, he will be able to successfully use bankruptcy to fix his financial situation and get a “fresh start,”171 no matter what his subjective intention was for filing. But if the debtor files his petition in the Third, Fourth, Sixth, or Eleventh Circuits and the court finds that the reason for filing was in bad faith, the petition may be dismissed “for cause.” This means that the debtor will have to once again deal with the collection attempts of his creditors, without the safety net of bankruptcy to protect him. Inferring good faith under § 707(a) is proper, however, because when the two competing ideologies are directly compared to one another, the justification for inferring good faith is superior. Moving forward, this inference of good faith in § 707(a) should be adopted by all courts because it maintains the integrity of the bankruptcy system. Also, inferring good faith helps ensure that unscrupulous debtors cannot use creditors to bankroll their purchases and then walk away from their obligations once the bills come due.

Justin Forcier

171 See supra note 3, at 1.