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# The Right to Convert: Where the First Circuit Went Wrong in *Marrama v. Citizens Bank of Massachusetts*

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## I. INTRODUCTION

With its opinion in *Marrama v. Citizens Bank of Massachusetts*,<sup>1</sup> the United States Court of Appeals for the First Circuit became the eye of a storm over the proper meaning and application of § 706(a)<sup>2</sup> of the Bankruptcy Code. The Supreme Court has granted certiorari in *Marrama* and will soon likely quiet this particular storm.<sup>3</sup> Given, however, the significant issues about the proper interpretation of statutes and the scope of the bankruptcy courts' presumptive authority and inherent power raised by the First Circuit's opinion, it is likely that the Supreme Court's resolution of *Marrama* will have implications well beyond the parochial issue of a Chapter 7 debtor's right to convert his or her case under § 706 of the Bankruptcy Code to a case under Chapter 13.

*Marrama* and other cases like it are paradigmatic of the tension between the desirable goal of preserving the integrity of the bankruptcy system and the proper limits of judicial function. In their attempt to protect the bankruptcy system, these cases create a specious ambiguity from statutory language that is painfully clear on its face as a predicate to allowing bankruptcy courts to exceed their power. Even where, as is often the case, a court's motivation in doing so is the laudable one of curtailing a debtor acting in bad (or at least not good) faith, it is neither appropriate nor, in the particular context of the right to conversion created by § 706(a), necessary for bankruptcy courts to exceed their proper limits as Article I courts.

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Myriad cases hold that § 706(a)<sup>4</sup> gives a debtor a one-time, absolute right to convert its case to a case under Chapter 13 provided only, as clearly stated in § 707(a), that the case has not been converted previously to Chapter 7 from another chapter and, as clearly stated in § 707(d),<sup>5</sup> the debtor is eligible to be a debtor under Chapter 13.

These cases rely on the obvious or plain meaning of § 706(a) and explicitly or implicitly recognize that the phrase “the debtor may convert” is wholly permissive, conferring on the debtor an absolute right to convert if the debtor so chooses.<sup>6</sup>

Congress said what it meant in § 706(a). That section’s absolute right to convert should not be viewed as a boon for bad faith debtors. Rather, it is a legislative recognition that Chapter 13 is better for creditors than Chapter 7 is. Creditors in a Chapter 13 case are certain to receive at least as much under a plan as they would receive in a Chapter 7 liquidation.<sup>7</sup> In BAPCPA, Congress overhauled both Chapter 7 and Chapter 13 to favor the latter over the former and thus to ensure that unsecured creditors of individual debtors would receive distributions from the debtor’s postpetition wages, which they would not receive in Chapter 7.<sup>8</sup> By precluding individuals with a monthly income above a rather low level from becoming debtors under Chapter 7, leaving Chapter 13 and repayment from postpetition wages as the alternative,<sup>9</sup> Congress leaves no doubt that it intends for Chapter 13, with its generally much greater recoveries, to be more accessible than Chapter 7. Interpreting § 706(a) the way that it is written fulfills Congress’s legislative determination to encourage Chapter 13 over Chapter 7.

*Marrama* joins the great number of cases holding that § 706(a) does not give the debtor an absolute one-time right to convert in the absence of a previous conversion to Chapter 7 from another chapter.<sup>10</sup> This line of cases implicitly or explicitly interprets the phrase “the debtor may convert” in § 706(a) to mean that “the right to convert is merely presumptive, and may be exercised only if the debtor meets the preconditions for eligibility established in Bankruptcy Code § 109(e), or even then only in the absence of other exceptional circumstances.”<sup>11</sup>

Like *Marrama*, these cases obfuscate or ignore the clear meaning and intent of § 706(a) in an admirable but ultimately misguided attempt to protect the integrity of the bankruptcy system and to prevent abuse by curtailing the absolute right granted to Chapter 7 debtors, rejecting conversion in cases of “exceptional circumstances” or “bad faith.” Whether somewhat covertly, like the First Circuit in *Marrama*, or expressly as in

other cases,<sup>12</sup> these courts ultimately rely on notions of “presumptive” or inherent power run amuck to “fix” a perceived problem. In so doing, they exceed whatever inherent power the bankruptcy courts may have and encroach on fundamental notions of separation of power.

The First Circuit’s opinion in *Marrama*, like other cases of its ilk, contorts the plain meaning of § 706(a) and instead relies on various overly expansive notions of inherent power—not properly used to circumvent clear statutory meaning and intent—to support an invisible, extra legislative, and exceedingly amorphous “good faith” requirement as a precondition to a debtor’s exercise of his or her right (conferred by Congress in § 706(a)) to convert his or her Chapter 7 case to a case under Chapter 13 of the Bankruptcy Code.

Of course, courts should not be intellectually dishonest, but given the egregious acts of the debtor in *Marrama* and in some of the other “no absolute right to convert cases”<sup>13</sup> these courts were likely struggling with a difficult tension: “how to treat a request made under a seemingly mandatory statute where the result may be damaging to the bankruptcy system or the creditors in the individual case.”<sup>14</sup> Courts should not resolve this tension by straying into the legislative branch’s bailiwick in a context like § 706(a), where the statute’s language and the legislature’s intent are clear, and particularly where the Bankruptcy Code contains other provisions that amply protect the bankruptcy system and creditors in this context without the need to judicially “fix” the statute in a way wholly at odds with the basic structure of our government.<sup>15</sup> The bankruptcy courts do not (and should not) have the inherent power to contravene a statutory right to convert. It should be axiomatic that whatever inherent power or equitable power the bankruptcy courts may have, such powers should not be used to countermand clear statutory mandate. And § 706(a)’s mandate is clear from the words used in it.

The Bankruptcy Code provides explicit remedies in Chapter 13 for a debtor who converted his or her case from Chapter 7 to Chapter 13 in bad faith. Though at first blush it may seem somewhat cumbersome to allow conversion in a case in which the debtor’s bad faith is obvious at the time he or she requests conversion, it is certainly not absurd that Congress intended this result in drafting § 706(a). Under BAPCPA, lack of good faith in commencing the case is an explicit bar to confirmation of a plan under § 1325(a)(7), and § 1307(c) allows for reconversion to Chapter 7 upon a showing of cause. These sections are best applied in the context of the Chapter 13 case itself. Indeed, because a Chapter 13 plan must provide creditors with at least as much as they would receive in a liquidation un-

der Chapter 7 of the Bankruptcy Code,<sup>16</sup> it is certainly conceivable that even where there was some type of misconduct or lack of good faith by the debtor in the Chapter 7 case or in connection with the conversion to Chapter 13 creditors would nonetheless choose to receive a greater recovery rather than penalize the debtor for his or her bad acts. Additionally, allowing the case to play out in Chapter 13 is consistent with the policy and intent underlying BAPCPA, i.e., to encourage Chapter 13 cases in preference to Chapter 7 liquidations and hence enhance distributions to creditors.<sup>17</sup> Courts have no business ignoring clear legislative intent expressed in plain statutory language.

As Bankruptcy Judge Clark stated in a case holding that § 706(a) confers on the Chapter 7 debtor whose case has not been converted previously an “absolute right”<sup>18</sup> to convert:

Legislation may be good or bad, far-sighted or improvident, useful or misguided. [Judges] are, like all citizens, entitled to our opinions. In our unique and special positions, we may even be especially qualified to voice those opinions, given that we see in practice whether or not a given statute actually works. We may even hope that the legislature will respond positively to our expressed opinions with modifications to statutes that do not work as well as intended.

But we may not arrogate to ourselves the legislative role. For when we do, we cross that line that assures appropriate separation of powers, and presume to ourselves a role that the Founding Fathers thought ought to be entrusted to men and women who would be answerable to the people for their actions. Judicial officers, by virtue of their appointments, are not answerable to the people—at least not in the sense that they can easily be removed should their decisions fail to meet with the approval of the people. They ought not legislate unless they are also prepared to stand for election. And that they cannot do unless they step down as judicial officers.<sup>19</sup>

## II. THE FACTS OF *MARRAMA* AND THE FIRST CIRCUIT’S ANALYSIS

As summarized by the First Circuit, the facts underlying *Marrama* are as follows<sup>20</sup>: “In August 2002, Marrama transferred residential real estate in York, Maine, having an unencumbered value of \$85,000, to a revocable spendthrift trust, for no consideration, and designated himself sole beneficiary and his girlfriend sole trustee,” with the acknowledged intent of

putting assets beyond the reach of creditors.<sup>21</sup> Seven months later, Marrama commenced a voluntary case under Chapter 7 of the Bankruptcy Code by filing a petition.<sup>22</sup> At the same time, he filed his statement of financial affairs, wherein he<sup>23</sup>:

- (i) disclosed that he was the trust's beneficiary,
- (ii) listed the value of its res as zero,
- (iii) denied making any property transfers within one year preceding the filing of the Chapter 7 petition, and
- (iv) asserted that the IRS owed him no tax refunds.<sup>24</sup>

Contrary to this last assertion, Marrama was due a tax refund exceeding \$11,000.<sup>25</sup>

In June 2003 the Chapter 7 trustee questioned Marrama regarding the apparent discrepancies in his petition and statement of financial affairs.<sup>26</sup> Marrama did not respond to the trustee inquiries, however.<sup>27</sup> Instead Marrama sought, pursuant to § 706(a), to convert his Chapter 7 case to a case under Chapter 13, contending that recently he had acquired additional rental income and gainful employment.<sup>28</sup> The Chapter 7 trustee opposed the conversion, contending, among other things, that Marrama intentionally failed to disclose in his schedules the preferential transfer of the Maine property into the trust about seven months prior to his Chapter 7 petition, as well as his anticipated federal tax refund.<sup>29</sup> Marrama claimed that these misstatements and omissions were inadvertent.<sup>30</sup>

The bankruptcy court held a nonevidentiary hearing<sup>31</sup> and refused to permit the conversion to Chapter 13 on the ground that the deceptive statement of financial affairs demonstrated Marrama's "bad faith."<sup>32</sup> Marrama appealed to the BAP, which affirmed, as did the First Circuit.<sup>33</sup>

### **Analysis**

The First Circuit's opinion in *Marrama*, like other courts curtailing a debtor's right to convert under § 706(a), purports to rely on the statute's plain meaning<sup>34</sup> but instead relies on what appears to be deliberately vague analysis to jettison the statute's obvious meaning and intent and ultimately resorts to overbroad notions of inherent power.

The court begins its analysis by quoting § 706 with emphasis added as follows:

The debtor *may* convert a case under this chapter [*viz.*, chapter 7] to a case under chapter 11, 12, or 13 of this title *at any time*, if the case has not been converted[.]<sup>35</sup>

and confines its discussion of the statute's meaning to the emphasized words "may" and "at any time." After discussing the two plainly expressed limitations on a debtor's right to convert under § 706(a),<sup>36</sup> the court states, and promptly ignores, the principal rule of statutory construction—"[a]s always, first we must inquire whether the plain language of subsection 706(a) resolves the interpretive issue, and, if so, its manifest meaning must control."<sup>37</sup> The court, however, then immediately posits that the court can (and, at least in the case of *Marrama*, presumably should) allow the plain or manifest meaning of the specific statute to be altered by an amorphous concept of judicially divined "overarching legislative policy." The court stated:

At the outset it must be noted that subsection 706(a) is to be viewed in light of a fundamental canon of the Bankruptcy Code: a bankruptcy court sitting in equity is duty bound to take all reasonable steps to prevent a debtor from abusing or manipulating the bankruptcy process to undermine the essential purposes of the Bankruptcy Code, including the principle that all the debtor's assets are to be gathered and deployed in a bona fide effort to satisfy valid claims. *See United States v. Mourad*, 289 F.3d 174, 178 (1st Cir. 2002) (noting that Bankruptcy Code § 105(a) enables the bankruptcy court to "tak[e] any action or mak[e] any determination necessary or appropriate to... prevent an abuse of [the bankruptcy] process"). Whether or not the Bankruptcy Code § 105(a) anti-abuse provision alone would warrant the bankruptcy court's decision to deny *Marrama* a subsection 706(a) conversion, that provision indeed looms large in determining whether Congress envisioned that subsection 706(a) be construed as withholding all discretion where the bankruptcy court is confronted with a patently abusive motion to convert....<sup>38</sup>

The First Circuit thus turns the plain meaning rule on its head—"[a]bsent plain language to the contrary in subsection 706(a), therefore, we would be loathe indeed to disregard such an overarching legislative policy"<sup>39</sup>—and presumes that the court can (and should) rely on this "overarching legislative policy" unless the court can "discern" from the statute's language "evidence that Congress intended to override the presumptive power and responsibility of the bankruptcy court to weed out abuses of

the bankruptcy process at any stage in the bankruptcy proceeding.”<sup>40</sup> The First Circuit’s description of §105(a)<sup>41</sup> of the Bankruptcy Code as the “anti-abuse” provision is patently incorrect and is itself based on an improperly expansive reading of that section.

The First Circuit continues its analysis by discussing the meaning of “may” in § 706(a), which, it says, has at least two connotations:

It can simply denote that a debtor has the option to convert, or not convert. On the other hand, “may” often suggests conditionality, signifying that the event or status described is in no sense to be considered a foregone conclusion. The phrase “may convert” may suggest that the right to convert is merely presumptive, and may be exercised only if the debtor meets the preconditions for eligibility established in Bankruptcy Code §109(c), or even then only in the absence of other exceptional circumstances.... the debtor “may” succeed in an attempted conversion, but not necessarily in all conceivable instances.<sup>42</sup>

The court then analogizes to § 1307(b), which provides in relevant part, with emphasis as added by the First Circuit:

[o]n request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter.<sup>43</sup>

Drawing the distinction between “may” as conditional and “shall” as absolute, the First Circuit reasons that § 1307(b) illustrates that Congress knows how to confer an absolute right and limit bankruptcy court discretion when it intends to, and hence,

The fact that subsection 706(a) contains no such imperative language strongly suggests that it confers a more restricted right upon the debtor, and that the bankruptcy court presumptively retains its discretionary prerogative to deny conversion in some circumstances.<sup>44</sup>

The First Circuit next turns to the phrase “at any time” in § 706(a) which, it explains, means “that the debtor may seek to convert at any time during the pendency of the bankruptcy case, or in other words, that no artificial time constraints should impede an election to convert.”<sup>45</sup> The court notes that, had Congress intended to make the debtor’s right to convert absolute, it could have used the more substantive phrase “regardless of the circumstances.”<sup>46</sup> While the court’s interpretation of “at any time” as

temporal rather than substantive is logical in itself, the comparison of a temporal phrase like “at any time” with the more general and more substantive “regardless of the circumstances” is not.

The First Circuit also considers, and quickly disposes of, Marrama’s contention that the second sentence in § 706(a), which states, “[a]ny waiver of the right to convert under a case under this subsection is unenforceable,” is evidence that Congress intended that a debtor cannot, under any circumstances, divest himself of the right to convert. Instead, the court explains that “that this sentence functions strictly as a consumer protection provision against adhesion contracts.”<sup>47</sup> It seems that the First Circuit is correct in rejecting Marrama’s contention in this regard—certainly the waiver provision cannot mean that there are no circumstances under which a debtor can divest himself of the right to convert to Chapter 13. He obviously could, for example, by incurring debt beyond the limits set forth in § 109(e), by converting to another chapter, or by dying. As discussed *infra*, however, the first sentence of § 706(a) independently confers the absolute right to convert as long as the conversion is not prohibited by the plain terms of § 706(a) and (d).<sup>48</sup>

The court of appeals’ opinion in *Marrama* next harkens back to its (faulty) premise that, absent express indication in the statute to the contrary, the right to convert is necessarily subject to the bankruptcy court’s “presumptive authority... to thwart debtor abuse of the bankruptcy process”<sup>49</sup> and examines the legislative history of § 706(a) and the underlying policies of that section. The court reasons:

The present controversy over the meaning of subsection 706(a) is traceable not to the plain language of subsection 706(a), but largely to its legislative history, which describes the debtor’s right to conversion as “absolute,” or as a “matter of right”: Subsection (a) of this section gives the debtor the one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from Chapter 11 or 13 to Chapter 7, then the debtor does not have that right. The policy of the provisions is that the debtor should always be given the opportunity to repay his debts.<sup>50</sup>

Focusing on the exceptions to the right to convert (i.e., § 706(a)’s proviso that the debtor may convert only “if the case has not previously been converted... to chapter 7” and § 109(e)’s debtor eligibility requirements), the First Circuit determines that “in context the term ‘absolute’ [in the legislative history] likely constitutes a recognition either that that the debtor may

convert *once* as an absolute right, but may not engage in successive conversions, or that the debtor's right to conversion cannot be waived by contract."<sup>51</sup> Again, the court relies on the absence of any explicit countermand to the bankruptcy courts' presumptive authority and concludes:

Nothing in the legislative history remotely negates nor undermines the overarching principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process in order to undermine the essential purposes of the Bankruptcy Code.<sup>52</sup>

Despite its ultimate reliance on the bankruptcy courts' inherent authority, the First Circuit never clearly articulates the source or scope of this purported authority.

Without discussing it in a meaningful way, the First Circuit makes a somewhat cryptic reference to § 105(a) of the Bankruptcy Code:

Whether or not the Bankruptcy Code § 105(a) anti-abuse provision alone would warrant the bankruptcy court's decision to deny *Marrama* a subsection 706(a) conversion, that provision indeed looms large in determining whether Congress envisioned that subsection 706(a) be construed as withholding all discretion where the bankruptcy court is confronted with a patently abusive motion to convert.<sup>53</sup>

The decision also contains various general references to "the overarching principle that the bankruptcy courts are duty bound to take all reasonable steps to preclude debtors from abusing or manipulating the bankruptcy process."<sup>54</sup>

As this article discusses, the court of appeals' *Marrama* decision not only ultimately fails to discern and apply the clear and correct meaning of § 706(a) but also applies the wrong method. By starting from the incorrect proposition that bankruptcy courts have a general, unexpressed presumptive or inherent power to act contrary to a statute's clear meaning and obvious congressional intent in order to advance what the court hopes will further the bankruptcy system's overarching goals except in those cases where this presumptive authority is "undermined" by the plain language of the statute, fundamental concepts of interpretation and bankruptcy courts' inherent authority are flipped on their heads.

The First Circuit's desire to protect the integrity of the process and to punish egregious debtor misconduct is laudable. Its tortured analysis and disregard of the obvious meaning and intent of § 706(a), as well as its ultimate reliance on inherent power to override it, is not.

### III. BANKRUPTCY COURTS' EXTRASTATUTORY POWER?

Courts and commentators have discussed various potential sources of the bankruptcy courts' extrastatutory power, and there has been much spirited debate among scholars and legion divergent decisions of courts of appeals, district courts, and bankruptcy courts dealing with whether such power exists at all and, if so, its proper scope and application.<sup>55</sup> While the Supreme Court has dealt with the bankruptcy courts' extrastatutory or equitable powers in various specific contexts,<sup>56</sup> the Court has not spoken to the general question of if and to what extent the bankruptcy courts have extrastatutory power (whether denominated "equitable powers," "inherent powers," or, à la *Marrama*, "presumptive authority") and whether there is or should be a federal common law of bankruptcy.<sup>57</sup> While anything approaching a comprehensive discussion of these issues is beyond the scope of this article, regardless of if and how the broader issue is eventually decided, the First Circuit's use of "presumptive authority" to curtail a debtor's absolute right to convert under § 706(a) is wrong.

While not specifically identified as such, it seems that the First Circuit presumes that the bankruptcy courts have "presumptive authority" and seems to find the source of this power in § 105(a), which the First Circuit incorrectly refers to as the Code's "anti-abuse" provision.

But section 105(a) is not a general "anti-abuse" provision as presumed by the First Circuit, nor is it a roving commission to do equity.<sup>58</sup> Rather, § 105(a) gives the bankruptcy courts specific enumerated powers<sup>59</sup>; it certainly does not "loom large" enough to serve as a proper predicate to override statutory mandate. Nor is there some other source of general equitable or extrastatutory power for bankruptcy courts.<sup>60</sup> Ultimately, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."<sup>61</sup>

### IV. FIRST PRINCIPLE OF STATUTORY INTERPRETATION

There are myriad maxims and canons of statutory interpretation,<sup>62</sup> but it is basic that the words used in a statute are fundamental to understanding it. Congress "says in a statute what it means and means in a statute what it says there."<sup>63</sup> Statutes should be read and understood as written, and should be applied as drafted except in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."<sup>64</sup> When "the statute's language is plain, 'the sole function of the courts'"—at least where the disposition required by the text is not absurd—"is to enforce it according to its terms."<sup>65</sup> "[T]he rules which are to aid doubtful meanings need no discussion" when the

statutory language is clear and unambiguous.<sup>66</sup> “[W]hen the terms of a statute are clear, its language is conclusive and courts are not free to replace that clear language with an un-enacted legislative intent.”<sup>67</sup> Certainly, courts are not free to replace clear language with unenunciated, mysteriously divined legislative intent.

Only on the rare occasions<sup>68</sup> when a literal reading of a statute produces an outcome that is clearly “demonstrably at odds” with clearly expressed congressional intent to the contrary<sup>69</sup>—and there is a “strong presumption that Congress expresses its intent through the language it chooses”<sup>70</sup>—or when the plain meaning results in an outcome that can truly be characterized as absurd, i.e., “so gross as to shock the general moral or common sense,”<sup>71</sup> should courts look beyond the statute’s language and attempt to divine legislative intent. Otherwise, courts should presume that the clear meaning expresses that intent.

As another court stated:

[S]tatutory terms are often “clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes [their] meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”<sup>72</sup>

#### V. THE MEANING OF § 706(a) IS CLEAR FROM ITS TEXT

Emphasizing “may” and “at any time” in § 706(a) and ignoring the more obviously fundamental “the debtor,” as the First Circuit did in *Marrama*, misses the point. “The debtor” is the subject of the operative sentence in § 706(a)—“The debtor may convert a case under this chapter...” This basic point of grammar is relevant to the correct interpretation of § 706(a).

Unlike § 706(b), which speaks to what the court “may” do by exercising its discretion in cases of involuntary conversion, and § 706(c), which speaks to what the court “may not” do—it may not convert a case under Chapter 7 to one under Chapter 12 or 13 unless the debtor requests such conversion—§ 706 (a) speaks to what *the debtor* may do, leaving the decision to convert to the debtor. The language itself confirms that any purported exercise of discretion by the court is improper.<sup>73</sup>

Some courts denying conversion under § 706(a) strangely find justification from the absence in that section of any reference to the court at all. These courts blithely reason that while § 706(a) “states that a debtor ‘may’ convert his case” it “does not state that the Court ‘shall’ honor his request.”<sup>74</sup> This glib contention is illogical and at odds with established principles.

The First Circuit in *Marrama* makes a less stark, though equally incorrect, contention:

the statutory interpretation proffered by the trustee is bolstered as well by a comparison between Bankruptcy Code § 706(a) and § 1307(b), for example, which provides that “[o]n request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court *shall dismiss* a case under this chapter.” (Emphasis added.) Subsection 1307(b) demonstrates that Congress well understood how to draft statutory language which left no (or at least considerably less) discretion in the bankruptcy court to deny a chapter 13 debtor’s request. The fact that subsection 706(a) contains no such imperative language strongly suggests that it confers a more restricted right upon the debtor, and that the bankruptcy court presumptively retains its discretionary prerogative to deny conversion in some circumstances.<sup>75</sup>

Because § 706(a) designates the debtor as the particular party who can take the specific action of converting, it is clear that the debtor alone makes the determination whether to convert. It is well-settled that when a statute specifies the party granted the right to invoke the provision only that party may act.<sup>76</sup> This principle was applied by the Supreme Court in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*<sup>77</sup>

In *Hartford Underwriters*, the Court interpreted § 506(c)<sup>78</sup> and held that administrative creditors do not have the right to recover their claims from a secured creditor’s collateral. Rather, the Court held that the right to surcharge collateral belongs exclusively to the trustee, because, among other things, the language of that statute specifies “the trustee” as the party that “may recover from property securing an allowed secured claim...” The Court explained:

Several contextual features here support the conclusion that exclusivity is intended. First, a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity. Where a statute names the parties granted [the] right to invoke its provisions, such parties only may act....

Second, the fact that the sole party named—the trustee—has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others. Indeed, had no particular parties been specified—had § 506(c) read simply “[t]here

may be recovered from property securing an allowed secured claim the reasonable, necessary costs and expenses, etc.”—the trustee is the most obvious party who would have been thought empowered to use the provision. It is thus far more sensible to view the provision as answering the question “Who may use the provision?” with “only the trustee” than to view it as simply answering the question “May the trustee use the provision?” with “yes.”<sup>79</sup>

In the same way, in the context of § 706(a) it is most sensible to view the provision as empowering the debtor and the debtor alone to make the determination whether to convert. Where a section of the Bankruptcy Code specifically denominates “the debtor” as the party that “shall” or “may” perform a certain act, that act must be performed by the debtor (in the case of “*the debtor shall*”)<sup>80</sup> or the right to perform the act belongs to the debtor alone to exercise or not as he or she chooses (in the case of “*the debtor may*”).<sup>81</sup>

That “the debtor” is the subject of § 706(a) shows the fallacy of the comparison made by the First Circuit in *Marrama* and by other courts between § 706(a) and § 1307(b) and other Bankruptcy Code sections that employ “the court” as the subject. In § 1307(b),<sup>82</sup> the subject of the operative sentence is “the court”—“the court shall dismiss”—not “the debtor.”<sup>83</sup> In § 706(a), the debtor is the subject, and as such, it is the debtor who performs the action of the predicate, i.e., the debtor is the one who “may convert.” The subject of § 1307(b) is “the court,” and it is the court that performs the action of the predicate, i.e., the court is the one that “shall dismiss.”

Interestingly, the First Circuit’s analogy to § 1307(b) seems driven, at least in part, by the BAP’s reliance<sup>84</sup> on *In re Ponzini*,<sup>85</sup> in which the court incorrectly recites that § 706(a) states that the “court ‘may’ convert a case at any time,”<sup>86</sup> before embarking on a comparison of § 706(a) and § 1307(b), which, in contrast to § 706(a), does say “the court may.” Section 706(a) does not even mention “the court.” The error in *Ponzini* helps to illustrate that interpreting § 706(a) as conferring an absolute right is not inconsistent with (and certainly not precluded by) the language of § 1307(b).

The bankruptcy court in *Ponzini* explained

most importantly, § 706(a) states that the court “may” convert a case at any time. The statute’s use of the verb “may” rather than “shall” supports the view that the right granted by § 706(a) is presumptive rather than absolute... In *Marcakis*, the Bankruptcy Court compared the permissive language of § 706(a) to the mandatory language of 11

U.S.C. § 1307(b) which provides that the court shall dismiss a case under Chapter 13 upon request of the debtor at any time provided the case has not previously been converted. *Id.* The *Marcakis* court concluded that, “[S]imply put, ‘shall’ means ‘must,’ something mandatory, and ‘may’ connotes the permissive, the possible; and when turning to section 706, subsections (b) and (c) of section 706 speak of what a court ‘may’ do concerning conversion.” *Id.* See also *In re Hauswirth*, 242 B.R. 95, 96 n. 2 (Bankr.N.D.Ga.1999) (“Congress demonstrated its ability to accord debtors a virtually absolute right in § 1307(b), The difference in the language in [§ 706(a) and § 1307(b)] supports a conclusion that they should be interpreted differently.”).<sup>87</sup>

If § 706(a) did provide that “the court may,” then it would make sense to reason that § 706(a)’s use of “may” rather than § 1307(b)’s use of “shall” (as in § 1307(b)’s “the court shall”) was intended to give the court discretion in respect of a motion to convert under § 706(a). Section 706(a) says “the debtor may,” however, making comparison with § 1307(b) irrelevant except to show the importance of correctly identifying the subject of the statute.<sup>88</sup>

“May” as indicating “permissive” and “shall” as indicating “mandatory” are not at odds with a plain meaning interpretation of 706(a) as conferring on the debtor an absolute right to convert. Changing “may” to “shall” in § 706(a)—“the debtor shall convert”—would require the debtor to convert, make conversion mandatory, and make the statute nonsensical.

## VI. THE RULES ARE CLEAR

The Federal Rules of Bankruptcy Procedure highlight the distinction between § 706(a) and other sections providing, subject only to enumerated statutory exceptions, an absolute right to the debtor to convert or dismiss<sup>89</sup> and provisions like § 706(b) dealing with a request for conversion by a “party in interest,” which may be granted by the court. Rule 1017(f) of the Federal Rules of Bankruptcy Procedure provides in relevant part:

- (f) Procedure for dismissal, conversion, or suspension
  - (1) Rule 9014 governs a proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§ 706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b).
  - (2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

Proceedings governed by Rule 9014<sup>90</sup> are denominated contested matters and are substantially more plenary than matters brought on by motion governed by Rule 9013 of the Federal Rules of Bankruptcy Procedure,<sup>91</sup> incorporating many of Part VII's (and the Federal Rules of Civil Procedure's) rules with respect to pleading, parties, and discovery. Mandating that the procedural tools and protections of contested matters do not apply to a debtor's motion to convert under § 706(a) is consistent with an "absolute right" reading of that provision.<sup>92</sup>

The First Circuit, while purporting to find the applicability of Rules "inconclusive" and rejecting the trustee's notion that "the fact that the debtor must file a 'motion,' rather than a mere 'notice,' suggests that the debtor's right to convert is conditional, not absolute,"<sup>93</sup> nevertheless observes that Rule 1017(f)(2) "is in no sense incompatible with an interpretation which includes debtor bad faith as among the conceivable contested matters to be addressed at the hearing."<sup>94</sup> The First Circuit has it exactly wrong in this connection. The Bankruptcy Rules "shall not abridge, enlarge, or modify any substantive right."<sup>95</sup> While it makes sense that conversion pursuant to § 706(a) requires a motion so that any question regarding eligibility of the debtor as specifically enumerated in § 706(a) and (d) can be dealt with, the requirement of a motion governed by Rule 9013 does not allow the court to unilaterally expand its power and modify the debtor's absolute substantive right to convert created by § 706.<sup>96</sup>

## CONCLUSION

The fate of the issue is in the hands of the Supreme Court.

## Research References

Norton Bankr. L. & Prac. 2d § 125:7; 8 Norton Bankr. L. & Prac. 2d 11 U.S.C. § 706; Bankr. Serv., L Ed §§ 37:172, 37:178, 37:179, 37:181, 37:183

West's Key Number Digest,  Bankruptcy 2332, 3591(1)

## NOTES

1. In re Marrama, 430 F.3d 474, Bankr. L. Rep. (CCH) P 80382 (1st Cir. 2005), cert. granted, 126 S. Ct. 2859, 165 L. Ed. 2d 894 (U.S. 2006). Argument before the Supreme Court was held on November 6, 2006. A transcript of the oral argument can be found at Marrama v. Citizens Bank of Massachusetts, 2006 WL 3230268 (U.S. 2006).

2. § 706(a) of the Bankruptcy Code (11 U.S.C.A. § 101, et seq.).

3. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) added § 1325(a)(7) to the Bankruptcy Code. That section requires that for a Chapter 13 plan to be confirmed, "the action of the debtor in filing the petition was in good faith."

4. Section 706(a) provides:

The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

5. Section 706(d) provides:

Notwithstanding any other provision of this section, 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.

6. See *Matter of Martin*, 87 B.R. 20 (E.D. La. 1988), order aff'd, 880 F.2d 857, 19 Bankr. Ct. Dec. (CRR) 1143, Bankr. L. Rep. (CCH) P 73169 (5th Cir. 1989) (§ 706(a) gives Chapter 7 debtor the absolute right to convert to Chapter 13 so long as debtor has not previously converted case; court has no discretion to deny debtor's right to conversion); *In re Croston*, 313 B.R. 447, Bankr. L. Rep. (CCH) P 80155 (B.A.P. 9th Cir. 2004) (absolute one-time right to convert from Chapter 7 to Chapter 13, but if egregious facts exist, the case may be reconverted back to Chapter 7 for cause); *Pequeno v. Schmidt*, 307 B.R. 568 (S.D. Tex. 2004), aff'd, 126 Fed. Appx. 158 (5th Cir. 2005) (though explaining that there are "no simple answers in this area," the court held that the debtor had the right to convert his Chapter 7 case to Chapter 13 notwithstanding allegations of bad faith and concerns about protecting the integrity of the bankruptcy system); *In re Miller*, 303 B.R. 471 (B.A.P. 10th Cir. 2003) (reviewing cases discussing denial of conversion to Chapter 13 because of lack of good faith and concluding "that a bankruptcy court may not exercise its discretion and impose requirements upon the conversion process other than those delineated in the plain language of § 706 "one-time absolute right to convert from Chapter 7 to Chapter 13); *In re Hansen*, 316 B.R. 505, 52 Collier Bankr. Cas. 2d (MB) 1747 (Bankr. N.D. Ill. 2004) (Chapter 7 debtor has an absolute right to convert to Chapter 13 provided there has been no prior conversion; however, in this case, the debtor exceeded the eligibility limits and the conversion was denied); *In re Carrow*, 315 B.R. 8, 53 Collier Bankr. Cas. 2d (MB) 14 (Bankr. N.D. N.Y. 2004) (debtor had an absolute right to convert her Chapter 7 case to Chapter 13, notwithstanding the debtor's asserted bad faith in seeking to prevent the Chapter 7 trustee from selling her real property); *In re Gibbons*, 280 B.R. 833, 39 Bankr. Ct. Dec. (CRR) 246, 48 Collier Bankr. Cas. 2d (MB) 907 (Bankr. N.D. Ohio 2002) ("[t]he terms of § 706(a) are not ambiguous and the plain meaning of the section is that a debtor has the automatic right to convert to chapter 13 so long as the case has not previously been converted to a chapter 7 and the debtor is eligible for relief under chapter 13"; court noted that the parties may move to reconvert the case back to Chapter 7 for cause); *In re Widdicombe*, 269 B.R. 803, 38 Bankr. Ct. Dec. (CRR) 192, 47 Collier Bankr. Cas. 2d (MB) 965, Bankr. L. Rep. (CCH) P 78556 (Bankr. W.D. Ark. 2001) (debtor who had not previously converted her case had an absolute right to convert from Chapter 7 to Chapter 13 provided she met the eligibility requirements); *In re Little*, 245 B.R. 351 (Bankr. E.D. Mo. 2000) (appeal dismissed, *In re Little*, 253 B.R. 427 (B.A.P. 8th Cir. 2000)) (Chapter 7 debtor filed false and misleading information in her schedules; after the Chapter 7 trustee discovered this information, the debtor moved to convert to Chapter 13 before her discharge was granted; court permitted conversion because of debtor's "one time right to convert" and stated that the trustee could seek a reconversion as part of the Chapter 13 confirmation process); *In re Cavaliere*, 238 B.R. 247, 34 Bankr. Ct. Dec. (CRR) 1180, 42 Collier Bankr. Cas. 2d (MB) 1384 (Bankr. W.D. N.Y. 1999) (after a creditor filed a nondischargeability proceeding in a Chapter 7 case, debtor converted the case to Chapter 13; the bankruptcy court stated that the debtor properly exercised her absolute right to convert and did not manipulate the bankruptcy process by the conversion); *In re Estrada*, 224 B.R. 132, 40 Collier Bankr. Cas. 2d (MB) 1015, Bankr. L. Rep. (CCH) P 77819 (Bankr. S.D. Cal. 1998) (provided the case has not been converted previously to Chapter 7 from another chapter, absolute right of debtor to convert to Chapter 13).

7. 11 U.S.C.A. § 1325(a)(4).

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8. In re Meza, 467 F.3d 874, 877, Bankr. L. Rep. (CCH) P 80749, 98 A.F.T.R.2d 2006-7364 (5th Cir. 2006) (under Chapter 13, individual debtors may “amortize their debts out of future earnings” and thus avoid a complete discharge of those debts under Chapter 7).

9. In re Fuller, 346 B.R. 472, 474 (Bankr. S.D. Ill. 2006); In re Fuger, 347 B.R. 94, 99, Bankr. L. Rep. (CCH) P 80774 (Bankr. D. Utah 2006).

10. In addition to *Marrama*, cases on this side of the issue include: In re Copper, 426 F.3d 810, 54 Collier Bankr. Cas. 2d (MB) 1769, Bankr. L. Rep. (CCH) P 80376, 2005 FED App. 0417P (6th Cir. 2005) (bankruptcy court may deny a debtor’s request to convert from Chapter 7 to Chapter 13 when bad faith exists, e.g., the debtor has the ability to pay and has been dishonest; if a Chapter 13 petition may be dismissed for lack of good faith, it is logical to conclude that conversion to Chapter 13 may be denied in absence of good faith); In re Neely, 334 B.R. 863 (S.D. Tex. 2005) (although a Chapter 7 debtor has a one-time presumptive right to convert a previously unconverted case to Chapter 13, conversion may be denied due to the debtor’s bad faith; in this case, the appellate court remanded the matter to the bankruptcy court for a factual determination); *Gulley v. DePaola*, 301 B.R. 361 (M.D. Ala. 2003) (a debtor who is ineligible for Chapter 13 relief may not convert her Chapter 7 case; conversion was denied when the debtor did not have sufficient regular income); In re Porreco, 333 B.R. 310 (Bankr. W.D. Pa. 2005) (after a Chapter 7 trustee moved to settle a cause of action involving the debtor’s divorce proceeding, the debtor converted her case to Chapter 13; although the court agreed that conversion from Chapter 7 to Chapter 13 may be denied in appropriate circumstances, in this instance conversion was proper); In re Kuhn, 322 B.R. 377 (Bankr. N.D. Ind. 2005) (although a debtor does not have an absolute right to convert a Chapter 7 case to a Chapter 13 case, conversion should only be denied in extreme circumstances; the trustee’s request to reopen a previously dismissed Chapter 7 case of the debtor’s husband and consolidate it with the debtor’s Chapter 7 case did not warrant denial of the conversion request); In re Kuntz, 233 B.R. 580, 41 Collier Bankr. Cas. 2d (MB) 1029 (B.A.P. 1st Cir. 1999) (debtor’s right to convert from Chapter 7 to Chapter 13 may be denied in “extreme circumstances”; however, in this instance no evidence existed to support a conclusion that the debtor intentionally hid an asset); *Martin v. Cox*, 213 B.R. 571 (E.D. Ark. 1996), judgment aff’d, 116 F.3d 480 (8th Cir. 1997) (debtor’s bad faith in Chapter 7 filing, fraudulent representations to the court, and abuse of the Bankruptcy Code constituted “extreme circumstances” that prohibited conversion to Chapter 13); In re Wampler, 302 B.R. 601, 41 Bankr. Ct. Dec. (CRR) 257 (Bankr. S.D. Ind. 2003) (a bankruptcy court has discretion to deny a motion to convert from Chapter 13 to Chapter 7 in order to prevent an abuse of process by a dishonest debtor; if a party establishes bad faith by a preponderance of evidence, in this instance by showing the debtor’s refusal to turn over funds to the trustee, conversion may be denied); In re Brown, 293 B.R. 865, 41 Bankr. Ct. Dec. (CRR) 121, 50 Collier Bankr. Cas. 2d (MB) 860 (Bankr. W.D. Mich. 2003) (a debtor’s requested conversion from Chapter 7 to Chapter 13 may be denied when the request lacks good faith; if an initial Chapter 13 petition may be dismissed for lack of good faith, it is logical that a requested conversion to Chapter 13 may also be denied for lack of good faith); In re Carter, 285 B.R. 61, 40 Bankr. Ct. Dec. (CRR) 111 (Bankr. N.D. Ga. 2002) (a bankruptcy court has the discretion to deny a debtor’s request to convert from Chapter 7 to Chapter 13 if “extreme circumstances” exist; however, because the court was not persuaded that the debtor was “trying to escape her obligations,” the conversion was permitted); In re Gallagher, 283 B.R. 604 (Bankr. M.D. Fla. 2002) (the court may deny a debtor’s request to convert to Chapter 13; the court focuses on the debtor’s goal in seeking conversion and whether there exists an honest effort to repay creditors from future earnings); In re Ponzini, 277 B.R. 399, Bankr. L. Rep. (CCH) P 78648 (Bankr. E.D. Ark. 2002) (“a debtor’s right to convert is presumptive and should be granted if the court finds it is appropriate under the Bankruptcy Code”; however, extreme circumstances showing a debtor’s bad faith and abuse of the bankruptcy system will warrant denial of a requested conversion); In re Porter, 276 B.R. 32 (Bankr. D. Mass. 2002) (the debtor’s misrepresentations in her schedules, the uncertain contributions to be made by family members to fund the plan, and the pending adversary proceedings brought by the Chapter 7 trustee to object to the debtor’s discharge and to recover a fraudulent conveyance, are extreme circumstances that warrant denial of the debtor’s request to convert the case to Chapter 7); In re Krishnaya, 263 B.R. 63 (Bankr. S.D. N.Y. 2001) (debtor’s right to convert to Chapter 13 under § 706(a) is “presumptive” but not absolute; fact that debtor’s request for conversion was motivated by his desire to

profit from broader discharge provisions under Chapter 13 and unlikelihood that debtor could propose a confirmable Chapter 13 plan did not create exceptional circumstances that would require denial of debtor's motion to convert); *In re Pakuris*, 262 B.R. 330, 37 Bankr. Ct. Dec. (CRR) 242, 46 Collier Bankr. Cas. 2d (MB) 456 (Bankr. E.D. Pa. 2001) (debtor's right to convert from Chapter 7 to Chapter 13 is not absolute; court must consider the "totality of the circumstances" when deciding whether conversion is appropriate in a particular case); *In re Johnson*, 262 B.R. 75 (Bankr. E.D. Ark. 2001) (misrepresentations in debtor's Chapter 7 financial statements and prima facie evidence showing that debtor made several fraudulent transfers and concealed assets constitute "extreme circumstances" that justify denial of debtor's motion to convert to Chapter 13); *In re Kelly*, 261 B.R. 785 (Bankr. M.D. Fla. 2001) (debtor's absolute right to convert from Chapter 7 to Chapter 13 will be limited only in instances where the conversion constitutes an "abuse of the system" or would "result in great prejudice to creditors"; although debtors' motion to convert was based solely on desire to avoid loss of nonexempt assets, conduct was not egregious enough to justify denial of right to convert); *In re Marcakis*, 254 B.R. 77, 44 Collier Bankr. Cas. 2d (MB) 1819 (Bankr. E.D. N.Y. 2000) (the language of § 706(a) does not give a debtor the absolute right to convert from Chapter 7 to Chapter 13; after a Chapter 7 discharge is received there are no dischargeable debts to be addressed by a Chapter 13 plan and conversion is futile and not in furtherance of the public policy underlying Chapter 13); *In re Mosby*, 244 B.R. 79, 35 Bankr. Ct. Dec. (CRR) 165, 43 Collier Bankr. Cas. 2d (MB) 1234, Bankr. L. Rep. (CCH) P 78108 (Bankr. E.D. Va. 2000) (conversion from Chapter 7 to Chapter 13 will be denied "only in the most egregious circumstances"; nothing in the Code prohibits converting a case to Chapter 13 after a Chapter 7 discharge is granted; although a discharge may be set aside under Bankruptcy Rule 9024, which incorporates Fed. R. Civ. P. 60(b), evidence did not support setting aside prior discharge order); *In re Dews*, 243 B.R. 337 (Bankr. S.D. Ohio 1999) (a debtor's right to convert to Chapter 13 is not absolute; a bankruptcy court should make a preliminary inquiry as to whether a debtor's proposed plan would meet the confirmation requirements before permitting the conversion); *In re Sully*, 223 B.R. 582 (Bankr. M.D. Fla. 1998) (right to convert from Chapter 7 to Chapter 13 is not absolute when debtor seeks to convert for improper purpose); *In re Thornton*, 203 B.R. 648 (Bankr. S.D. Ohio 1996) (court denies debtors' request to convert from Chapter 7 to Chapter 13 based upon lack of good faith; debtors were dishonest by failing to schedule assets and liabilities, testifying untruthfully regarding sale of jewelry and minimizing value of property on schedules); *In re Martin*, 199 B.R. 175 (Bankr. E.D. Ark. 1996) (court denies request to convert from Chapter 7 to Chapter 13 because of debtor's dishonesty and bad faith); *In re Safley*, 132 B.R. 397 (Bankr. E.D. Ark. 1991) (motion of debtor to convert case from Chapter 7 to Chapter 13 after all debts were discharged denied, as there were no debts to be dealt with); *In re Calder*, 93 B.R. 739 (Bankr. D. Utah 1988), order rev'd, (Nov. 14, 1989) (acknowledging that Chapter 7 debtor has one-time absolute right to convert to Chapter 13, nonetheless denies debtor's motion to convert to "prevent the debtor from further abuse of the system"; debtor was attorney who had been debtor in three prior Chapter 13 cases, two of which were dismissed for bad faith filing; Chapter 7 trustee had collected sufficient funds to satisfy creditors in full); *In re Blanchette*, 54 B.R. 890 (Bankr. D. R.I. 1985) (dismisses Chapter 7 case notwithstanding debtor's assertion of right to convert to Chapter 13; debtor's ineligibility for discharge in Chapter 7 case because of prior Chapter 7 discharge within six years is cause for dismissal of Chapter 7 case but does not affect debtor's right to seek further Chapter 13 relief).

11. *Marrama*, 430 F.3d at 478.

12. See, e.g., cases cited in note 11 *infra*.

13. The First Circuit observed that Mr. Marrama "comports in all material respects with the classic profile of playing fast and loose with the bankruptcy process." *Marrama*, 430 F.3d at 482. As iterated by that court:

First, Marrama engaged in prepetition transfers of valuable property with the acknowledged intention of insulating the transfers from creditors, submitted a chapter 7 petition, then omitted to mention these same assets and transfers in the bankruptcy schedules, presumably in the expectation that the chapter 7 trustee would not discover their concealment. As the effort at camouflage failed, Marrama moved to convert the case to chapter 13, predicated upon the uncorrobor-

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orated assertion that he was receiving regular income sufficient to entitle him to protection under chapter 13. Conveniently, the instant conversion (which Marrama characterizes as an “absolute” matter of right impregnable to challenge either by the trustee or the bankruptcy court) would divest the chapter 7 trustee of any authority to act in behalf of the estate to safeguard its assets. See Bankruptcy Code § 348(e), 11 U.S.C. § 348(e). Thus, in the event the debtor were to succeed in securing confirmation of a chapter 13 plan, he could reacquire his interest in “property of the estate,” *as well as the concealed property*.

Marrama, 430 F.3d at 482 (italics in original).

While the desire to protect the integrity of the bankruptcy process (and innocent creditors) from the “fast and loose” debtor is timeless, the First Circuit’s concern of the results of confirmation of a Chapter 13 plan under circumstances like those in *Marrama* is likely irrelevant after BAPCPA. See 11 U.S.C.A. § 1325(a)(7) (requiring good faith in commencing the case as a prerequisite to confirmation of Chapter 11 plan).

14. Pequeno, 307 B.R. at 578.

15. See The Federalist No. 51; In re Porras, 188 B.R. 375, 28 Bankr. Ct. Dec. (CRR) 155, 34 Collier Bankr. Cas. 2d (MB) 1123 (Bankr. W.D. Tex. 1995); Carrow, 315 B.R. 8.

16. 11 U.S.C.A. § 1325(a)(4).

17. See discussion in text at notes 8-10.

18. Absolute, subject only to § 706(a)’s proviso regarding previous conversion, and § 706(d)’s caveat regarding the debtor’s eligibility for the chapter to which it will convert.

19. Porras, 188 B.R. at 379, n.4; see also *Badaracco v. C.I.R.*, 1984-1 C.B. 254, 464 U.S. 386, 104 S. Ct. 756, 78 L. Ed. 2d 549, 84-1 U.S. Tax Cas. (CCH) P 9150, 53 A.F.T.R.2d 84-446 (1984) (courts are not authorized to rewrite a statute because they might deem its effect susceptible to improvement).

20. More detailed iterations of the facts can be found in the Petitioner’s Brief at 2006 WL 2317066 and at “liibulletin: Supreme Court Oral Argument Previews: *Marrama v. Citizens Bank of Massachusetts*” and “On the Docket- *Marrama, Robert v. Citizens Bank of Massachusetts, et al.*,” copies of which can found at <http://supct.law.cornell.edu/supct/cert/05-996.html> and <http://docket.medill.northwestern.edu/archives/003720.php>, respectively.

21. Marrama, 430 F.3d at 476.

22. Marrama, 430 F.3d at 476.

23. Marrama, 430 F.3d at 476.

24. Marrama, 430 F.3d at 476.

25. Marrama, 430 F.3d at 476.

26. Marrama, 430 F.3d at 476.

27. Marrama, 430 F.3d at 476.

28. Marrama, 430 F.3d at 476.

29. Marrama, 430 F.3d at 476.

30. Marrama, 430 F.3d at 476.

31. “Marrama neither requested an evidentiary hearing, nor has he *yet* identified what additional material evidence could or would have been adduced at such a hearing.” Marrama, 430 F.3d at 483.

32. Marrama, 430 F.3d at 477.

33. Marrama, 430 F.3d at 477. Marrama appealed from the order of the First Circuit, and cert. was granted, *Marrama v. Citizens Bank of Massachusetts*, 126 S. Ct. 2859, 165 L. Ed. 2d 894 (U.S. 2006). The BAP’s decision is reported at In re Marrama, 313 B.R. 525, Bankr. L. Rep. (CCH) P 80164 (B.A.P. 1st Cir. 2004), *aff’d*, 430 F.3d 474, Bankr. L. Rep. (CCH) P 80382 (1st Cir. 2005), cert. granted, 126 S. Ct. 2859, 165 L. Ed. 2d 894 (U.S. 2006). Following Mr. Marrama’s appeal, the Maine property was sold, see In re Marrama, 316 B.R. 418, 421-22, 52 Collier Bankr. Cas. 2d (MB) 1768 (B.A.P. 1st Cir. 2004) (holding that Marrama’s power to revoke the trust became property of the Chapter 7 estate, exer-

cisable by the Chapter 7 trustee), and Mr. Marrama was denied a Chapter 7 discharge, *In re Marrama*, 331 B.R. 10, 54 Collier Bankr. Cas. 2d (MB) 245 (D. Mass. 2005), *aff'd*, 445 F.3d 518, 55 Collier Bankr. Cas. 2d (MB) 1826, Bankr. L. Rep. (CCH) P 80497 (1st Cir. 2006) (finding that Marrama had “intent to defraud” creditors, see 11 U.S.C.A. § 727(a)(2)).

34. *Marrama*, 430 F.3d at 477 (“As always, first we must inquire whether the plain language of subsection 706(a) resolves the interpretive issue, and if so, its manifest meaning must control”).

35. *Marrama*, 430 F.3d at 476 (quoting 11 U.S.C.A. § 706(a)).

36. “Thus, section 706 imposes two plainly expressed limitations upon a debtor’s right to convert: the debtor (i) must not previously have converted the case; and (ii) must meet the eligibility requirements for the chapter to which he intends to convert, *see* 11 U.S.C. § 706(d).” *Marrama*, 430 F.3d at 476.

37. *Marrama*, 430 F.3d at 476.

38. *Marrama*, 430 F.3d at 477.

39. *Marrama*, 430 F.3d at 477.

40. *Marrama*, 430 F.3d at 478.

41. Section 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

42. *Marrama*, 430 F.3d at 478 (citations omitted).

43. *Marrama*, 430 F.3d at 478 (quoting statute).

44. *Marrama*, 430 F.3d at 478.

45. *Marrama*, 430 F.3d at 479.

46. *Marrama*, 430 F.3d at 479.

47. *Marrama*, 430 F.3d at 479.

48. The proper effect of the waiver language in § 706(a)’s second sentence is beyond the scope of this article.

49. *Marrama*, 430 F.3d at 480. Assuming, however, for the sake of argument, that “[§] 706(a) were ambiguous,” the First Circuit next discusses its “legislative history and the underlying policies that animate its provisions” and quickly disposes of the debtor’s contentions in this connection.

50. *Marrama*, 430 F.3d at 480 (citing H.R. Rep. No. 95-595, at 380 (1977); S. Rep. No. 95-989, at 94 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5880).

51. *Marrama*, 430 F.3d at 480.

52. *Marrama*, 430 F.3d at 480.

53. *Marrama*, 430 F.3d at 477.

54. *Marrama*, 430 F.3d at 480.

55. For an excellent and detailed discussions of the subject, see Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 Am. Bankr. L. J 1 (2006); Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 Am. Bankr. L. J 1 (2005); Nickles and Epstein, *Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code*, 3 Chap. L. Rev. 7 (2000).

56. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 Am. Bankr. L. J. 1 (2006); Ahart, *The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity*, 79 Am. Bankr. L. J. 1

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(2005); Nickles and Epstein, Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code, 3 Chap. L. Rev. 7 (2000).

57. Levitin, Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime, 80 Am. Bankr. L. J. 1 (2006).

58. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 108 S. Ct. 963, 99 L. Ed. 2d 169, 17 Bankr. Ct. Dec. (CRR) 201, 18 Collier Bankr. Cas. 2d (MB) 262, Bankr. L. Rep. (CCH) P 72186 (1988). See generally 1 Norton Bankr. L. & Prac. 2d § 4:5 (2006).

59. As explained by Ahart, many decisions purporting to rely on the bankruptcy court's inherent power (whether derived from § 105(a) or elsewhere) in fact are supported by explicit Bankruptcy Code provisions:

According to these cases a bankruptcy judge has inherent power to sanction parties, enforce a settlement, issue an injunction, direct disbursement of registry funds, set aside illegal assignments, reconsider an interlocutory order, review the actions of a state court and enjoin further proceedings, punish an abuse of process, dismiss a case, correct mistakes and errors, hold a party in contempt, suspend or disbar attorneys, control the court's dockets, preserve the court's integrity and insure that the court accomplishes its legislative purpose, and deny compensation to attorneys employed during a bankruptcy case. But in each of these instances either a statutory provision or a rule affords adequate grounds for the bankruptcy judge's ruling. For example, Bankruptcy Code § 105(a) sanctions each of these actions. Moreover, Bankruptcy Code §§ 326-330 authorize the bankruptcy court to deny compensation to attorneys, Fed. R. Bankr. P. 9023 and 9024 authorize the bankruptcy court to reconsider orders and to correct mistakes and errors, Fed. R. Bankr. P. 9029(b) authorizes a bankruptcy judge to regulate practice, Fed. R. Bankr. P. 7041 authorizes the bankruptcy court to dismiss an action, and Fed. R. Bankr. P. 9011 and § 1927 of Title 28 authorize the bankruptcy court to issue sanctions.

Ahart, The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity, 79 Am. Bankr. L. J. 1, 5 (2005) (footnotes omitted).

60. For example, as Article I courts, bankruptcy courts do not have whatever inherent or extra statutory authority may derive from Article III. See Ahart, The Limited Scope of Implied Powers of a Bankruptcy Judge: A Statutory Court of Bankruptcy, Not a Court of Equity, 79 Am. Bankr. L. J. 1, 4 (2005); *Matter of Grabill Corp.*, 967 F.2d 1152, 1156, 23 Bankr. Ct. Dec. (CRR) 297, 27 Collier Bankr. Cas. 2d (MB) 743, Bankr. L. Rep. (CCH) P 74752 (7th Cir. 1992) (bankruptcy courts "derive their authority solely from Congress, while district courts are accorded their inherent powers in Article III"); *In re Hessinger & Associates*, 192 B.R. 211, 215, Bankr. L. Rep. (CCH) P 76917 (N.D. Cal. 1996) ("[B]ecause the bankruptcy courts are creatures of Article I, they have no 'inherent' powers and their jurisdiction is limited to that expressly granted by Congress"); Plank, The Erie Doctrine and Bankruptcy, 79 Notre Dame L. Rev. 633, 668 (2004) (bankruptcy courts only have those equitable powers that Congress can grant them pursuant to the Bankruptcy Clause of the United States Constitution); see also *Natural Gas Pipeline Co. of America v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406, 26 Fed. R. Serv. 3d 1312 (5th Cir. 1993) ("The Constitution itself confers this authority [certain implied powers] upon all Article III courts as an incident to 'The judicial Power'"). To the extent that there might be a federal common law of bankruptcy, it does not encompass a general equitable power to override clear statutory provisions and legislative intent. See generally Levitin, Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime, 80 Am. Bankr. L. J. 1 (2006).

61. See note 56.

62. While there does not appear to be a standard precedent for application of various principles, and it appears that based on its composition at a given time (as well as the nature of the cases before it) the Supreme Court has applied different ones at different times, the primacy of statutory language as generally manifesting legislative intent seems established. See Gebbia-Pinetti, Inter-

preting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions, 3 Chap. L. Rev. 173 (2000).

63. Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) P 74457A (1992).

64. Caminetti v. U.S., 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

65. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989) (quoting Caminetti, 242 U.S. at 485).

66. Caminetti, 242 U.S. at 485.

67. U.S. v. Morison, 844 F.2d 1057, 1064, 15 Media L. Rep. (BNA) 1369, 25 Fed. R. Evid. Serv. 647 (4th Cir. 1988) (rejected by, U.S. v. McAusland, 979 F.2d 970 (4th Cir. 1992)) (internal quotation marks and alteration marks omitted).

68. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 187 n. 33, 98 S. Ct. 2279, 57 L. Ed. 2d 117, 11 Env't. Rep. Cas. (BNA) 1705, 8 Env'tl. L. Rep. 20513 (1978).

69. Ron Pair, 489 U.S. at 242.

70. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987). The Fourth Circuit Court of Appeals recently stated:

[A] court is obliged to apply the Plain Meaning Rule unless the party contending otherwise can *demonstrate* that the result would be contrary to that intended by Congress. Requiring a demonstration that the plain meaning of a statute is at odds with the intentions of its drafters is a more stringent mandate than requiring a showing that the statute's literal application is unreasonably in light of the bankruptcy policy.

In re Sunterra Corp., 361 F.3d 257, 269, 42 Bankr. Ct. Dec. (CRR) 222, 51 Collier Bankr. Cas. 2d (MB) 1276, Bankr. L. Rep. (CCH) P 80068 (4th Cir. 2004) (citing Ron Pair, 489 U.S. at 242). "The plain meaning of legislation should be conclusive, except in 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" In re Silvus, 329 B.R. 193, 214 (Bankr. E.D. Va. 2005) (quoting Ron Pair, 489 U.S. at 242).

71. Crooks v. Harrelson, 282 U.S. 55, 59-60, 51 S. Ct. 49, 75 L. Ed. 156, 2 U.S. Tax Cas. (CCH) P 616, 9 A.F.T.R. (P-H) P 571 (1930).

72. Rake v. Wade, 508 U.S. 464, 474-75 113 S. Ct. 2187, 124 L. Ed. 2d 424, 24 Bankr. Ct. Dec. (CRR) 533, 28 Collier Bankr. Cas. 2d (MB) 983, Bankr. L. Rep. (CCH) P 75275 (1993) (quoting United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988)).

73. Carrow, 315 B.R. 8.

74. In re Adler, 329 B.R. 406, 409, 45 Bankr. Ct. Dec. (CRR) 28, 54 Collier Bankr. Cas. 2d (MB) 1093, 96 A.F.T.R.2d 2005-5836 (Bankr. S.D. N.Y. 2005); Marcakis, 254 B.R. at 82.

75. Marrama, 430 F.3d at 479.

76. See Federal Election Com'n v. National Conservative Political Action Committee, 470 U.S. 480, 486, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985); 2A N. Singer, Sutherland on Statutory Construction § 47.23 (5th ed.1992).

77. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 120 S. Ct. 1942, 147 L. Ed. 2d 1, 36 Bankr. Ct. Dec. (CRR) 38, 43 Collier Bankr. Cas. 2d (MB) 861, Bankr. L. Rep. (CCH) P 78183 (2000).

78. Section 506(c) provides:

## THE RIGHT TO CONVERT

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

79. *Hartford Underwriters*, 530 U.S. at 7 (internal quotations and citations omitted).

80. For example, § 1321, which provides “The debtor shall file plan,” is interpreted to mean that “only a debtor may propose a Chapter 13 plan.” In *re Woods*, 257 B.R. 876, 877, 45 *Collier Bankr. Cas. 2d* (MB) 976 (Bankr. W.D. Tenn. 2000); In *re McNichols*, 255 B.R. 857, 879 (Bankr. N.D. Ill. 2000) (holding that it is not the function of the court to propose a Chapter 13 plan that will ultimately be confirmed); In *re Euler*, 251 B.R. 740, 745, 44 *Collier Bankr. Cas. 2d* (MB) 1128 (Bankr. M.D. Fla. 2000) (no authority under the Bankruptcy Code for either a Chapter 13 trustee or a creditor under any circumstances to file a plan).

81. For example, § 1323(a), which provides in relevant part, “the debtor may modify the plan,” has been interpreted to mean “only a debtor may amend a Chapter 13 plan prior to confirmation. *See* 11 U.S.C. § 1323(a).” In *re Muessel*, 292 B.R. 712, 715-16, 50 *Collier Bankr. Cas. 2d* (MB) 256 (B.A.P. 1st Cir. 2003); see also, e.g., 11 U.S.C.A. § 522(b) (stating in pertinent part, “an individual debtor may exempt from property of the estate”).

82. Section 1307(b) provides in relevant part: “On request of the debtor at any time, if the case has not been converted under 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter.”

83. The debtor is not the subject of the operative sentence of § 1307(b). It is a basic rule of grammar that the subject of a sentence is never in a prepositional phrase like “on request of the debtor...” See *Warriner, Warriner’s Grammar and Composition: Complete Course* (Franklin Ed.1982), at 26.

84. *Marrama*, 313 B.R. 52.

85. *Ponzini*, 277 B.R. 399.

86. *Ponzini*, 277 B.R. 399.

87. *Ponzini*, 277 B.R. 399.

88. See generally *Singer*, § 21: 7 *Southerland Statutes and Statutory Construction* (“The first responsibility of a draftsman is to determine which particular individuals must comply with the statutory directive. This requires precision of thought and exactness of expression”).

89. As well as § 1112(a) (“The debtor may convert a case under this chapter to a case under chapter 7”); § 1208(a) (“The debtor may convert a case under this chapter to a case under chapter 7”); § 1208(b) (“On request of the debtor at any time... the court shall dismiss”); § 1307(a) (“The debtor may convert a case under this chapter to a case under chapter 7”); and § 1307(b) (“On request of the debtor at any time... the court shall dismiss”). Cf. § 706(b) (“On request of a party in interest and after notice and a hearing the court may convert”); § 1112(b) (which prior to BAPCPA provided in relevant part “on request of a party in interest and after notice and a hearing, the court may convert... or dismiss a case under this chapter... for cause...” and which was amended by BAPCPA to change “may” to “shall”).

90. Rule 9014 provides:

- (a) **Motion.** In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.
- (b) **Service.** The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

- (c) Application of Part VII rules. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/ discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.
- (d) Testimony of witnesses. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.
- (e) Attendance of witnesses. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

91. Rule 9013 provides:

A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered *ex parte* shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.

92. *Pequeno*, 307 B.R. at 579 (S.D. Tex. 2004) (“Congress [has] taken great pains to exclude these conversion motions [enumerated in Rule 1017] from Rule 9014”); *Porrás*, 188 B.R. 375 (same).

Nor is requiring a motion somehow inconsistent with the notion that the right to convert is absolute subject only to the exceptions clearly set forth in § 706 (i.e., that the debtor is eligible to be a debtor under the chapter to which he seeks to convert and that the case has not yet been converted from another chapter). Seemingly, the purpose of such a motion would be to set forth that the debtor is eligible for relief under the chapter to which the case is to be converted and that the case has not previously been converted.

93. *Marrama*, 430 F.3d at 479 n.3.

94. *Marrama*, 430 F.3d at 479 n.3. Given that Rule 9014 (“contested matters”) governs motions to convert “except under § 706(a),” see Bankruptcy Rule 1017(f)(1), the author presumes that the First Circuit does not here use “contested matters” in the Rule 9014 sense.

95. 28 U.S.C.A. § 2075.

96. See *Carrow*, 315 B.R. 8, 17 (N.D.N.Y. 2004); *Miller*, 303 B.R. at 477. For another case misapplying the Rules in this regard, see *Marcakis*, 254 B.R. at 77.