Concurrent Session

Means Testing: Five Years Later

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Means Testing: Five Years Later[1]

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Section 707(b)(2) – Income

Unemployment Compensation

Cases finding unemployment compensation must be included in Current Monthly Income (CMI):

***In re Nance*, Case No. 09-05604, 2010 WL 2079653 (Bankr. S.D. Ind. May 21, 2010)**. Chapter 13 trustee objected to confirmation of debtors' proposed plan on basis that plan failed to commit all of debtors' projected disposable income to plan. The trustee argued that unemployment benefits received by debtors during six months prior to filing had to be included as part of debtors' CMI. The bankruptcy court, following *In re Kucharz*, 418 B.R. 635 (Bankr. C.D. Ill. 2009), held that unemployment compensation payments debtors received over six-month period preceding petition date were not "benefits received under the Social Security Act," and therefore had to be included in calculating CMI.

***In re Kucharz*, 418 B.R. 635 (Bankr. C.D. Ill. 2009)**. Chapter 13 trustee objected to confirmation of debtors' proposed plan on basis that plan failed to commit all of debtors' projected disposable income to plan. Trustee argued that unemployment benefits received by debtors during the CMI period had to be included in debtors' CMI. Court held that unemployment compensation payments debtors received during CMI period were not "benefits received under the Social Security Act," and had to be included in calculating CMI. In ruling, the Court found that "[i]t is not sufficient that [unemployment] benefits are merely 'related to' or 'envisioned by' or 'induced by' the [Social Security Act]. More is required. They must have been received *under* the [Social Security Act]." Thus, the bankruptcy court concluded that because unemployment benefits are paid as required under state law, they could not be characterized as benefits received under the Social Security Act. ***See also In re Baden*, 396 B.R. 617 (Bankr. M.D. Pa. 2008) and *In re Rose*, Case No. 09-70088, 2010 WL 2600591 (Bankr. N.D. Ga. May 12, 2010)**.

Cases finding unemployment compensation need not be included in CMI:

***In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007)**. U.S. Trustee moved to dismiss under section 707(b)(2). Court held that unemployment compensation payments debtors received over six-month period preceding petition date were "benefits received under the Social Security Act," that could not be included in calculating CMI.

***In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007)**. U.S. Trustee moved to dismiss under section 707(b)(2), alleging debtors did not include unemployment income in calculating CMI and when added the presumption arises. Debtors responded, arguing unemployment compensation received by debtor-

[1] Materials adapted from *"A Survey of Judicial Positions on the Current Monthly Income, Means Test, Totality of Circumstances and Bad Faith"* presentation given at 18th Annual Southwest Bankruptcy Conference, Las Vegas, Nevada - September 23-25, 2010 by Gail B. Geiger and David Gold, Executive Office for United States Trustees, Office of General Counsel.

wife should not be included in CMI. Court held that unemployment compensation payments debtor-wife received over six-month period preceding petition date were "benefits received under the Social Security Act" that could not be included in calculating CMI.

Disability Insurance

***Blausey v. U.S. Trustee (In re Blausey)*, 552 F.3d 1124 (9th Cir. 2009)**. U.S. Trustee moved to dismiss under section 707(b)(2), asserting that debtors improperly calculated CMI by failing to include private disability insurance payments received during the six-month period prior to filing. The bankruptcy court agreed and debtors initiated a direct appeal to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed, ruling that private disability insurance payments received during the six-month period prior to filing had to be included in the calculation of CMI.

Veteran's Benefits

***In re Hedge*, 394 B.R. 463 (Bankr. S.D. Ind. 2008)**. Unsecured creditor objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Court held that debtor's veteran's benefits had to be included in calculation of debtor's CMI as such benefits did not fall within an enumerated exception to CMI.

***In re Waters*, 384 B.R. 432 (Bankr. N.D. W. Va. 2008)**. Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's projected disposable income to plan. Court held that debtor's veteran's benefits had to be included in calculation of debtor's CMI as such benefits did not fall within an enumerated exception to CMI.

Retirement Distributions

***In re DeThample*, 390 B.R. 716 (Bankr. D. Kan. 2008)**. Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Debtor-wife received distribution from her employee retirement plan (401(k)) within the six-month period preceding petition date. Court held that debtors, in calculating their CMI, had to include income realized from 401(k) distribution.

***In re Wayman*, 351 B.R. 808 (Bankr. E.D. Tex. 2006)**. Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Debtor, as part of property settlement agreement with former spouse, obtained custody and control of former spouse's individual retirement account (IRA) prior to the six-month period preceding petition date. Debtor later received early distribution from IRA during the CMI period. Court held that debtor, in calculating her CMI, did not have to include income realized from IRA distribution because income was actually earned when debtor first obtained custody and control over the IRA.

***In re Sanchez,* Case Nos. 06-40886 and 06-40865, 2006 WL 2038616 (Bankr. W.D. Mo. July 13, 2006)**. Chapter 13 trustee objected to confirmation of debtors' proposed plans on basis that plans failed to commit all of debtors' disposable income to plans. Debtors received distributions from their employee retirement plans (401(k)) within the six-month period preceding petition date, but argued that the distributions were actually "earned" prior to that six-month period. Court held that debtors, in calculating their CMI, had to include income realized from 401(k) distributions because earnings contributed to a 401(k) plan are not actually "received" until withdrawn and a distribution takes place.

***In re Scholz*, 427 B.R. 864 (Bankr. E.D. Cal. 2010), *appeal pending*, Case No. 10-1153 (B.A.P. 9th Cir. 2010)**. Chapter 13 trustee objected to confirmation of debtors' chapter 13 plan based on debtors' alleged failure to properly calculate disposable income under section 1325(b). Specifically, the trustee alleged that debtors failed to include pension and retirement benefits received under the Railroad Retirement Act of 1974 ("RRA") as part of their CMI calculation. The bankruptcy court concluded that while the benefits in question were not "benefits received under the Social Security Act," and therefore not expressly excluded from CMI, they nevertheless had to be excluded from CMI because the anti-alienation provisions of the RRA shield such monies from the bankruptcy estate and from actions by debtors' creditors. Accordingly, the bankruptcy court overruled the trustee's objection.

Self-Employed Income

***Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238 (B.A.P. 9th Cir. 2008)**. Chapter 13 trustee objected to confirmation of debtors' plan, arguing that debtors improperly calculated CMI when they deducted business expenses from debtor-husband's self-employed income on Form 22C. The bankruptcy court overruled the trustee's objection, and entered an order confirming debtors' plan. On appeal, the bankruptcy appellate panel reversed, holding that a chapter 13 debtor engaged in business cannot deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI.

Contributions from Non-Filing Spouse

***In re Travis*, 353 B.R. 520 (Bankr. E.D. Mich. 2006)**. U.S. Trustee moved to dismiss under section 707(b)(2). Court held that only amounts regularly contributed by non-debtor spouse to debtor's household expenses had to be included in debtor's CMI.

Amounts Paid Regularly for Household Expenses

***In re Swanson*, No. 08-81388, 2008 WL 4540181 (Bankr D. Neb. Oct. 7, 2008)**. The U.S. Trustee moved to dismiss under sections 707(b)(2) and (3). The U.S. Trustee asserted that certain housing and support payment expenses debtor claimed on his means test were either improper, or were required to be offset by the very same amounts received by debtor's fiancé during the six month period prior to filing. Specifically, the U.S. Trustee asserted that because debtor's housing payments were being made by his fiancé at the time he filed his case, those expense deductions were either improper, or, if allowable, had to be offset as payments made by his fiancé on a regular basis for debtor's household expenses. Similarly, the U.S. Trustee asserted that to the extent debtor was making support payments to his fiancé those payments had to be included as income on debtor's Form 22A. The bankruptcy court agreed, holding that debtor's claimed housing and support payment expenses had to be offset by the same amounts received from debtor's fiancé for those expenses, and that dismissal was proper pursuant to section 707(b)(2).

Other Sources of Income

***In re Royal*, 397 B.R. 88 (Bankr. N.D. Ill. Nov. 7, 2008)**. Chapter 13 trustee objected to confirmation of debtor's proposed plan on basis that plan failed to commit all of debtor's disposable income to plan. Among other things, the trustee argued that debtor's "earned income tax credit" should be considered income for the purposes of CMI on debtor's Form 22A. The bankruptcy court agreed, ruling that because earned income tax credits were not specifically excluded from the plain language of section 101(10A), Congress intended it to be included in the calculation of CMI.

Section 707(b)(2) – Household Size

***In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). Court denied motion, ruling that section 707(b)(7) precluded the filing of a motion based on a presumption of abuse. The Court found that the term "household," for the purposes of section 707(b)(7), includes debtor and all other people living in debtor's living quarters, whether related to debtor or not. The Court utilized the Census Bureau's definition of household and rejected the Internal Revenue Service's position, which references dependents listed on a taxpayer's latest income tax return. Specifically, the Court found that because section101(39A)(A) utilizes the Census Bureau's definition of "household" in defining "median family income" it was appropriate to use that same definition in defining "household" for the purposes of section 707(b)(7).

***In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). Court held that debtors' daughter and her dependants were part of debtors' household, finding each was dependent upon debtors for their support during at least the six months prior to the filing, were unable to contribute any of their income to debtors after paying their expenses and they showed no evidence that their living arrangement was intended to be temporary. In making this determination, the Court rejected both the Census Bureau's definition, and the Internal Revenue Service's position regarding what constitutes a household.

Section 707(b)(2) – Expenses

Housing and Utility - Line 20B

***In re Sullivan*, 370 B.R. 314 (Bankr. D. Mont. 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). Court held that replacement costs for broken furnace and deck that posed safety threat to debtors and their family were allowable adjustments to local standard deduction for household expenses and utilities, but that other claimed adjustments – such as replacement of a fence, finishing a bathroom, and resurfacing a driveway – were not.

***In re Turner*, 376 B.R. 370 (Bankr. D.N.H. 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). Debtors successfully rebutted the presumption of abuse. However, in its ruling, the Court noted that the local standard deduction for household expenses and utilities takes into account amounts necessary for maintenance and repair such as pest control expenses.

Vehicle Operating Expenses – Line 22A

***In re Martinez*, 391 B.R. 424 (Bankr. E.D. Wis. 2008)**. U.S. Trustee moved to dismiss case under section 707(b)(2). Debtors owned two encumbered cars each over six years old. Debtors claimed an additional operating expense for each vehicle in the amount of $200, or in the alternative, a pro-rated operating expense for each vehicle of less than $200 (*i.e.,* 200/60 months) based on when debtors might extinguish encumbrances on the vehicles under a hypothetical Chapter 13 plan. The Court held that debtors were not entitled to claim the additional $200 vehicle operating expense because each vehicle was encumbered on the petition date, and indicated that any attempt to pro-rate the additional $200 vehicle operating expense would be speculative, and hence, inappropriate.

***In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006)**. Court expressly agreed that debtors who are not entitled to an ownership expense because they do not have a loan or lease payment are allowed the $200 additional operating expense for unencumbered older/high mileage vehicles. Court noted that this is "consistent with IRS Local Standards," and the additional expense "is allowed for debtors with cars more

than six years old, or having more than 75,000 miles."

***In re Slusher*, 359 B.R. 290 (Bankr. D. Nev. 2007)**. Chapter 13 trustee objected to confirmation of plan because debtor, among other things, deducted the IRS Local Standard for vehicle ownership for a vehicle owned free and clear of liens. The bankruptcy court ruled that while debtor was not entitled to claim an ownership expense for the unencumbered vehicle, he was entitled to claim an additional $200.00 operating expense for the vehicle because it was more than six years old.

Vehicle Ownership Expenses – Lines 23/24

***Cases Allowing Ownership Expense if debtor has no loan or lease payment*:**

***Neary v. Ross-Tousey (In re Ross-Tousey)*, 549 F. 3d 1148 (7th Cir. 2008)**. U.S. Trustee moved to dismiss case under section 707(b)(2). The U.S. Trustee challenged debtors' attempt to deduct the IRS Local Standard for vehicle ownership for a vehicle they owned outright. The bankruptcy court denied the U.S. Trustee's motion. The district court reversed and held that debtors must have an "actual" expense for vehicle ownership before the expense can be "applicable" to debtor and thus allowable on the means test. The 7th Circuit reversed, agreeing with the bankruptcy court that the plain language of the statute supports the allowance of a monthly ownership expense and that "applicable expense" cannot mean the same as "actual expense."

***Hildebrand v. Kimbro (In re Kimbro)*, 389 B.R. 518 (B.A.P. 6th Cir. 2008), *appeal pending*, Case No. 08-5871 (6th Cir. Aug. 24, 2008)**. Chapter 13 trustee objected to confirmation of plan because debtors deducted the IRS Local Standard for vehicle ownership for vehicle owned free and clear of liens. The bankruptcy court overruled the trustee's objection and entered an order confirming debtors' plan. On appeal the BAP affirmed, holding that above-median debtors were entitled to deduct an applicable monthly vehicle ownership expense for a vehicle that was not encumbered by a loan or lease payment.

***Babin v. Washburn (In re Washburn)*, 579 F.3d 934 (8th Cir. 2009).** Chapter 13 trustee and an unsecured creditor objected to plan on basis that debtor was inappropriately claiming a monthly vehicle ownership expense deduction in calculating his projected disposable income even though he had no loan or lease payment. In a 2-1 decision, the Eighth Circuit, following the Fifth Circuit in *Tate* and the Seventh Circuit in *Ross-Tousey*, described below, agreed with debtor's position and held that a chapter 13 debtor may claim a vehicle ownership expense deduction under section 707(b)(2)(A)(ii)(I) when debtor has no associated loan or lease payment. However, the Eighth Circuit failed to reach the merits of how its ruling allowed the vehicle expense deduction

***Tate v. Bolen (In re Tate)*, 571 F.3d 423 (5th Cir. 2009)**. The Fifth Circuit ruled that chapter 7 debtors may deduct vehicle ownership expense amounts in calculating the means test despite the absence of actual vehicle ownership expenses. Court relied extensively on the Seventh Circuit's decision in *Ross-Tousey*, including the rejection of the IRM. The court also specifically rejected the IRM guidelines, interpretations and methodologies in determining a chapter 7 debtor's permissible expenses under the means test. [Note: the IRM guidelines have since been incorporated into the IRS Transportation Standards, which are expressly referenced in section 707(b)(2)(A)(ii)(I) of the Code. *See* IRS Transportation Standard which may be found at the IRS website: http://www.irs.gov/individuals/article/0,,id=96543,00.html (visited on 7/16/10)].

Burbank v. Boyajian (In re Burbank)*, 401 B.R. 67 (Bankr. D.R.I. 2009) *(appeal dismissed.) The bankruptcy court overruled trustee's objection to chapter 13 plan because debtors had deducted, among other things, vehicle ownership costs on vehicles they owned outright in calculating the amount of money

they could devote to repaying unsecured creditors.

***Cases Denying Ownership Expense*:**

Ransom v. MBNA America Bank, NA (In re Ransom)*, 577 F.3d 1026 (9th Cir. 2009), petition for cert. *granted, 130 S.Ct. 2097 (Apr. 19, 2010) (Case No. 09-907). Unsecured creditor objected to confirmation of chapter 13 plan because debtor deducted the IRS Local Standard for vehicle ownership despite owning the vehicle free and clear of liens. The bankruptcy court sustained the creditor's objection and denied confirmation, and the bankruptcy appellate panel affirmed. The Ninth Circuit, citing the "statutory language, plainly read," ruled that an ownership cost "is not an expense" – either actual or applicable – "if it does not exist." The circuit court, relying extensively on the appellate panel's decision, held that the language of §707(b)(2)(A)(ii)(I), the common meaning of "applicable," and the overall scheme of the Bankruptcy Code each revealed that vehicle ownership expenses only apply if debtors actually have vehicle financing costs. The panel noted that the word "applicable" modifies the meaning of the term "monthly expense amounts," indicating that the deduction of the specified amount "becomes relevant to debtor (*i.e.* appropriate or applicable to debtor) when he or she in fact has such an expense." The panel further concluded that allowing nonexistent vehicle ownership expenses would read the word "applicable" out of the Code. Finally, the panel determined that to hold otherwise would be "counterintuitive to one of the main objectives" of BAPCPA: "to ensure that debtors repay as much of their debt as reasonably possible."

***Wieland v. Thomas (In re Thomas)*, 382 B.R. 793 (D. Kan. 2008).** The bankruptcy court allowed chapter 7 debtors who owned their vehicles outright to take ownership expenses for their cars, and the district court reversed on appeal. Examining the phrase "the applicable expenses amounts specified under the National and Local Standards," the district court held that the IRS Standards do not represent expense allowances; "rather, they represent *caps* on expense allowances, as the IRS intends the *lesser* of the Standard amount and the person's actual expense be used." Thus, the district court concluded that a debtor is not allowed his actual expenses in this category. The district court went on to hold that the word "actual" in section 707(b)(2)(A)(ii)(II) is used, not in connection with the IRS Standards, but in connection to uncapped existing expenses in the "Other Necessary Expense" categories.

Withholding Taxes – Line 25

***In re Hale*, Case No. 07-32744, 2007 WL 2990760 (Bankr. N.D. Ohio Oct. 10, 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2), challenging among other things, debtors' claimed expense deduction for payroll taxes. The bankruptcy court granted the motion, ruling that debtors' claimed expense deduction for payroll taxes was overstated. In doing so, the court noted that debtors were only entitled to deduct their actual tax liability, not necessarily the amounts withheld from their pay which was overstated due to over-withholding.

***In re Riggs*, 359 B.R. 649 (Bankr. E.D. Ky. 2007)**. Chapter 13 trustee objected to confirmation of plan because debtors' calculation of projected disposable income included a deduction for payroll taxes in the amount withheld from their paychecks, rather than actual tax liability. The bankruptcy court sustained the objection, ruling that debtors' tax deduction should reflect their actual tax liability and not the amount withheld from their paychecks.

Court Ordered Payments – Line 28

***In re Casey*, 356 B.R. 519 (Bankr. E.D. Wash. 2006)**. Chapter 13 trustee objected to confirmation of plan because debtor, among other things, failed to properly amortize court-ordered support payments that were due to expire on the 24th month of his plan. The bankruptcy court sustained the objection, ruling that debtor was required to amortize court ordered payments over a 60 month period per section 707(b)(2)(A)(iv) of the Code.

Family Care – Line 35

***In re Hicks*, 370 B.R. 919 (Bankr. E.D. Mo. 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2) challenging, *inter alia* debtor's claimed expense deduction for support of his healthy 21 year old son. The bankruptcy court granted the motion, ruling that debtor's claimed expense deduction was improper because debtor's son was not an elderly, chronically ill, or disabled person in need of support as required under section 707(b)(2)(A)(ii)(II) of the Code.

Payments on Secured Claims – Line 42 – Surrendered Collateral

***Morse v. Rudler, (In re Rudler)*, 576 F.3d 37 (1st Cir. 2009).** UST moved to dismiss under section 707(b)(2) challenging debtor's claimed secured debt expenses for a house to be surrendered. The bankruptcy court ruled that debtors were entitled to claim the expenses and the bankruptcy appellate panel affirmed. The First Circuit affirmed, holding that the plain language of the statute allows a debtor to claim the expenses notwithstanding the intent to surrender. Court noted that Congressional intent to encourage predictability and discourage judicial discretion also support its holding. Court limited its discussion to the application of section 707(b)(2) in chapter 7 cases, and expressly declined to address whether section 707(b)(2)(A)(ii)(I) should be given the same construction for purposes of the projected disposable income test in chapter 13, which incorporates section 707(b)(2) by reference.

***Randle v. Neary (In re Randle)*, Case No. 07-631, 2007 WL 2668727 (N.D. Ill. July 20, 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). The U.S. Trustee's motion challenged debtor's claimed secured debt repayment expense for a home she intended to surrender. The bankruptcy court ruled that debtor was entitled to claim the expense. The district court affirmed, holding that debtor could claim the expense notwithstanding her intent to surrender. The district court concluded that debtor's mortgage payments "were still contractually due . . . even if [she] had not been paying [the] monthly mortgage payments," and that filing of a Statement of Intent to surrender was "not an actual surrender."

***In re Ray*, 362 B.R. 680 (Bankr. D.S.C. 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). The U.S. Trustee's motion challenged debtors' claimed secured debt repayment expense for vehicles they intended to surrender. The bankruptcy court ruled that debtors were not entitled to claim the expense, noting that in considering the phrase "amounts scheduled as contractually due," Congress contemplated a forward looking calculation requiring consideration of events contemplated in debtors' Statement of Intent.

Payments on Secured Claims – Line 42 – 401(k) Loans

***Egebjerg v. Anderson (In re Egebjerg*), 574 F.3d 1045 (9th Cir. 2009)**. U.S. Trustee moved to dismiss debtor's chapter 7 case, arguing that he had improperly included his 401(k) loan repayment in his necessary expenses. The bankruptcy court dismissed the petition. On direct appeal, the Ninth Circuit

held that 401(k) loan repayments are not an "actual monthly expense for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service" under section 707(b)(2)(A)(ii).

***McVay v. Otero (In re Otero)*, 371 B.R. 190 (W.D. Tex. 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2), challenging debtors' claimed secured debt payment for a retirement plan loan repayment. The bankruptcy court ruled that debtors were entitled to claim the expense. The district court reversed, holding that debtors could not claim the expense because the loan payments in question were not "payments on account of a secured debt."

***Eisen v. Thompson (In re Thompson)*, 370 B.R. 762 (N.D. Ohio 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2). The U.S. Trustee's motion challenged debtor's claimed secured debt repayment expense for a retirement plan loan repayment. The bankruptcy court ruled that debtor was entitled to claim the expense. The district court reversed, holding that debtor could not claim the expense because the loan payments in question were not associated with a debt.

***Eisen v. Thompson (In re Thompson)*, 370 B.R. 762 (N.D. Ohio 2007)**. U.S. Trustee moved to dismiss case under section 707(b)(2), challenging debtor's claimed secured debt repayment expense for a retirement plan loan repayment. The bankruptcy court ruled that debtor was entitled to claim the expense. The district court reversed, holding that debtor could not claim the expense because the loan payments in question were not associated with a debt.

***In re Brace*, __ B.R. __, 2010 WL 2653635 (Bankr. N.D. Ill. June 25, 2010)**. U.S. Trustee moved to dismiss under section 707(b)(2) and (3). One issue addressed by the Court was whether debtor was entitled to deduct $572 per month for a 401(k) loan repayment as an involuntary deduction under section 707(b)(2)(A)'s "other necessary expense" category. The bankruptcy court found that, because repayment of the loan was not a requirement of debtor's employment, the deduction was not allowed.

***In re Turner,* 376 B.R. 370 (Bankr. D.N.H. 2007)**. U.S. Trustee moved to dismiss debtors' chapter 7 case because, among other things, they claimed a payroll deduction for debtor's 401(k) retirement plan loans. Court held that such deductions were not "mandatory payroll deductions" under section 707(b)(2)(A)(ii)(I). Court ruled that BAPCPA expressly gives chapter 13 debtors the ability to deduct 401(k) payments from the disposable income calculation, noting that BAPCPA did not include any similar exemption from income for chapter 7 debtors.

Statement of Presumed Abuse under Section 704(b)

***In re Draisey*, 395 B.R. 79 (B.A.P. 8th Cir. 2008)**. U.S. Trustee filed a motion to dismiss based on section 707(b)(3) within the 60 day deadline established under Fed. R. Bankr. P. 1017. Debtor challenged the motion, arguing the U.S. Trustee was required to file a statement indicating either a presumed abuse or a lack of a presumed abuse within the 10 day deadline established under section 704(b). The bankruptcy court denied the U.S. Trustee's motion, ruling that the U.S. Trustee's filing of a statement definitively stating whether the presumption of abuse arose within section 704(b)'s 10 day deadline was a prerequisite to filing a motion to dismiss based on section 707(b)(3). The bankruptcy appellate panel reversed, holding that under the plain language of section 704(b), the filing of a 10-day statement is not a condition precedent to filing a motion to dismiss under section 707(b)(3).

***Dolan v. United States*, No. 09-367, __S. Ct.__, 2010 WL 2346548 (Jun. 14, 2010)**. In a 5-4 decision, the Supreme Court agreed with the position of the United States that the 90 day deadline imposed under

18 U.S.C. § 3664(d)(5) for ordering restitution is not jurisdictional. The majority noted that where a statute "does not specify a consequence for noncompliance with "its" timing provisions...federal courts will not in the ordinary course impose their own coercive sanction." This supports those courts that have held that the failure to comply with the 10-day deadline established under section 704(b) of the Bankruptcy Code is not jurisdictional. *See Neary v. Ross-Tousey (In re Ross-Tousey)*, 549 F. 3d 1148 (7th Cir. 2008); *In re Jasper*, 414 B.R. 83 (Bankr. E.D. Va. 2009).

***In re Close*, 384 B.R. 856 (D. Kan. 2008)**. Debtors' section 341 meeting of creditors was continued and concluded later. U.S. Trustee filed a statement of presumed abuse within 10 days after the conclusion, and a motion to dismiss pursuant to sections 707(b)(2) and (3) within 30 days thereafter. Debtors challenged the (b)(2) portion of the motion, arguing that the presumed abuse statement was filed after the 10 day deadline established under section 704(b). The bankruptcy court entered an order denying the (b)(2) motion. The district court affirmed, ruling that the section 704's 10 day deadline runs 10 days after the originally-scheduled date of debtor's meeting of creditors even if the 341 meeting is continued.

***In re Molitor*, 395 B.R. 197 (Bankr. S.D. Ga. 2008)**. Debtors' section 341 meeting of creditors was continued, and concluded 28 days after originallyscheduled date. U.S. Trustee filed a statement of presumed abuse within 10 days of meeting conclusion, and a motion to dismiss pursuant to sections 707(b)(2) and (3) within 30 days thereafter. Debtors challenged the (b)(2) portion of the motion, arguing that the statement of presumed abuse was filed after the 10 day deadline established under section 704(b). The bankruptcy court denied debtor's objection, ruling that the 10 day deadline established under section 704(b) runs 10 days after conclusion of the creditors' meeting.

Section 707(b)(3)(A) – Bad Faith

***In re Oot*, 368 B.R. 662 (Bankr. N.D. Ohio 2007)**. Bad faith found in debtor's lack of candor in filing schedules, in funding of retirement plans prepetition, and in attempts to reaffirm luxury items after filing.

***In re O'Brien*, 373 B.R. 503 (Bankr. N.D. Ohio 2007)**. Dismissal justified under bad faith and totality of circumstances for debtors who purchased new home and vehicle within three months of filing, falsely characterized their unsecured debt as being "in collections," and listed their income on recent credit applications as being double what they listed on Form 22A.

***In re Felske*, 385 B.R. 649 (Bankr. N.D. Ohio 2008)**. Debtors' attempt to reaffirm new, expensive house at expense of other creditors found to be abusive.

***In re Haney*, Case No. 06-40350, 2006 WL 3020961 (Bankr. W.D. Ky. Oct, 19, 2006), aff'd., Case No. 06-150, 2007 WL 781321 (W.D. Ky. March 9, 2007)**. Case dismissed under bad faith and totality of circumstances where wife incurred substantial credit card debt shortly before filing and then did not list non-filing spouse's income despite the fact that the couple shared income and expenses.

***In re James*, 345 B.R. 664 (Bankr. N.D. Iowa 2006)**. Use of bonuses received shortly before filing to purchase luxury items rather than paying down debt constitutes bad faith.

***In re Mitchell*, 357 B.R. 142 (Bankr. C.D. Cal. 2006)**. Incurring substantial card debt shortly before filing without a meaningful ability to repay debt constitutes bad faith.

Section 707(b)(3)(B) – Totality of Circumstances

Ability to Repay

***In re Haar*, 360 B.R. 759 (Bankr. N.D. Ohio 2007)**. Court found that ability to pay may be exclusive factor in section 707(b)(3) analysis.

***In re dePellegrini*, 365 B.R. 830, (Bankr. S.D. Ohio 2007)**. Court found "passing" the means test is not a defense against a motion to dismiss based under section 707(b)(3).

***In re Richie*, 353 B.R. 569 (Bankr. E.D. Wis. 2006)**. Court found that removal of "substantial" from statute demonstrates Congressional intent to make it easier to dismiss cases; debtor who was voluntarily unemployed had ability to repay debt.

Payments on Secured Expenses

***In re Dumas*, 419 B.R. 704 (Bankr. E.D. Tex. 2009)**. U.S. Trustee moved to dismiss case under section 707(b)(3)(B) based on excessive mortgage expense (roughly 36% of debtors' gross income and almost 3 ½ times greater than the articulated IRS Local Housing Standard). The Court denied the U.S. Trustee's motion, finding that because debtors are allowed an unlimited mortgage expense amount under section 707(b)(2)'s means test, *see* 11 U.S.C. § 707(b)(2)(A)(iii), it was precluded from considering the mortgage expense under the totality of the circumstances test. ***See also In re Jensen,* 407 B.R. 378 (Bankr. C.D. Cal. 2009) (same); *In re Johnson*, 399 B.R. 72 (Bankr. S.D. Cal. 2008) (same).**

Standards for Dismissal

***In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007)**. Debtors' $300 per month excess income over expenses exceeded "abuse threshold" under section 707(b)(2) and was sufficient to indicate abuse under totality of circumstances.

***In re Croskey*, Case No. 06-33437, 2007 WL 1302571 (Bankr. N.D. Ohio May 1, 2007)**. The Court found that 401(k) contributions and loan repayments are not permissible deductions when determining a debtor's section 707(b)(3) ability to pay. The Court dismissed the case where, after the 401(k) allocations were excluded, debtors could pay 100% of unsecured claims in a 60-month plan.

***In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006)**, ***appeal pending,* Case No. 07-cv-178-ER (E.D. Pa. Dec. 26, 2006)**. Court looked to debtor's ability to repay over applicable chapter 13 commitment period in determining case was abusive.

***In re Campbell*, Case No. 06-01656, 2007 WL 1376226 (Bankr. N.D. Iowa May 7, 2007)**. Totality of circumstances demonstrated abuse where debtors had over $500,000 in 401(k) accounts, gross annual income of over $100,000, unsecured debt primarily consisted of "careless" credit card usage, and debtors had ability to repay over 25% of their unsecured debt in 60 months.

***In re Pennington*, 348 B.R. 647 (Bankr. D. Del. 2006)**. Debtor's net monthly income was sufficient to repay 25% of unsecured debt within five years. The Court found that the filing is abusive under totality of the circumstances test.

Does 707(b) Apply to Cases Converted from Another Chapter

***In re Dudley,* 405 B.R. 790 (Bankr. W.D. Va. 2009), *appeal pending*, Case No. 09-00336 (W.D. Va.**

2009). Debtors filed a chapter 13 and, after the trustee objected to their plan, debtors voluntarily converted to chapter 7. U.S. Trustee then moved to dismiss debtors' case under section 707(b)(2) as presumptively abusive. Debtors filed a motion for summary judgment, arguing that section 707(b)(2)'s means test does not apply to cases converted to chapter 7 from another chapter of the Bankruptcy Code. The bankruptcy court agreed with debtors, and the U.S. Trustee has appealed.

***In re Chapman,* __ B.R. __, 2010 WL 2380729 (Bankr. D. Minn. Jun. 10, 2010) and *In re Cruse*, Case No. 06-02892 (Bankr. S.D. Iowa Jun 8, 2010); *consolidated appeal pending*, Case No. 10-6046 (B.A.P. 8th Cir. 2010).** Debtors filed chapter 13 petitions in the District of Minnesota and the Southern District of Iowa. Debtors subsequently converted their cases to chapter 7. The U.S. Trustee then moved to dismiss each debtors' case under section 707(b). Both bankruptcy courts considered as a threshold issue whether section 707(b) applies to cases converted to chapter 7 from another chapter of the Bankruptcy Code. Each court found that it does not and denied the U.S. Trustee's motions. *See also In re Dudley*, 405 B.R. 790 (Bankr. W.D. Va. 2009) (similar holing), *appeal dismissed*, Case No. 09-00336 (W.D. Va. 2010); *In re Guarin*, Case No. 09-42294, 2009 WL 4500476 (Bankr. D. Mass. Dec. 3, 2009). The U.S. Trustee appealed both decisions to the Bankruptcy Appellate Panel for the Eighth Circuit, which is now considering the issue on a consolidated basis.

Chapter 13 Means Test Issues at the Supreme Court

Strict Mechanical Approach to the Means Test Overruled by the Supreme Court

Hamilton v Lanning, 130 S.Ct. 2464 (June 7, 2010)

A Chapter 13 debtor whose one-time buyout from a former employer caused her current monthly income for the six months prior to filing her 13 petition to exceed the median income for her state of residence. Based upon her new income, now below the state median, the debtor offered her best effort based upon Schedule I and J over 36 months. The Chapter 13 Trustee took the position that all of the debtor's "projected disposable income" as reflected on the Form 22B was not being offered to creditors under the plan and opposed confirmation. The Bankruptcy Court ordered that the above-median designation on the means test required a 60 month plan commitment, but that "projected" disposable income requires the court to consider the debtor's actual income vs. historical income. Both the Bankruptcy Appellate Panel for the 10th Circuit and the 10th Circuit upheld the lower court's order.

On June 7, 2010, the Supreme Court issued its own opinion affirming the holding of the 10th Circuit and effectively putting an end to the argument advanced by a line of cases that support a mechanical approach to the calculation of "projected disposable income" under §1325(b). The United States Supreme Court in *Lanning* explicitly adopted the forward looking approach in determining projected disposable income under 11 U.S.C. § 1325(b)(1)(B) and rejected the mechanical approach. According to the Supreme Court, Form 22C creates a presumptive calculation of disposable income that can be overcome by either a debtor, creditor, or trustee by presenting "documentation similar to that required by §707(b)(2)". The prerequisite set forth by the Supreme Court for deviating from the Form22C is a "change in the debtor's income or expenses that are known or virtually certain at the time of confirmation".

Prior to *Lanning*, there was a split among the federal courts on this issue. The Ninth Circuit was alone in its rejection of the forward looking approach. The Fifth Circuit, Eighth Circuit, Tenth Circuit, and the First and Sixth Circuit Bankruptcy Appellate Panels all followed the forward looking approach. *In re Nowlin*, 576 F.3d 258, 265, 266, 2009 WL 2105356, 5, 6 (5th Cir. 2009) [referring to *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652, 658 (8th Cir.2008) and *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269, 1282 (10th Cir.2008) and Footnote 8 referring to *Hildebrand v. Petro* (*In re Petro*), 395 B.R. 369, 377 (6th Cir.BAP 2008) and *Kibbe v. Sumski* (*In re Kibbe*), 361 B.R. 302, 314-15 (1st Cir.BAP 2007)]

Although the Ninth Circuit Court of Appeals in *Kagenveama* held that the term "applicable commitment period" was by itself a "temporal" concept, it rejected the forward looking approach as it related to "projected disposable income" and created an exception to the application of the temporal nature of applicable commitment period. *Kagenveama* at 875. The Ninth Circuit was alone among the circuits in this line of reasoning.

Recent Circuit Court rulings interpreting the Supreme Court's ruling in Lanning

Whaley v Tennyson, 611 F.3d 873 (11th Cir 2010)

At issue in this case was whether a Chapter 13 debtor with above median income was required to commit to a 60 month plan pursuant to §1325(b)(4) without regard to whether the Form 22C Part IV produced a positive or negative number. The Eleventh Circuit held "that a plain reading of 11 U.S.C. §1325", the Supreme Court's ruling in *Lanning*, and congressional intent all mandate that an above median income debtor must remain in bankruptcy for a minimum of five years, unless all unsecured creditors are paid in full.

Darrohn v Hildebrand, 615 F.3d 470 (6th Cir 2010)

At issue in this case was whether a court could take into account changed circumstances (such as increased income and reduction in secured debt payments) for the purposes of determining debtor's "projected disposable income". Relying on *Lanning*, the 6th Circuit stated that "by using amounts derived solely from the [debtor's] past income, rather than their projected income, the bankruptcy court's decision clashed with the mandates of Section 1325". The Court further stated that while *Lanning* focused on the income side of the projected disposable income formulation, the holding clearly applied to changes in the debtor's expenses, as well.

Burden v Seafort, 2010 WL 3564709 (6th Cir. BAP, Sept. 14, 2010)

Chapter 13 Trustee appealed a ruling of the Bankruptcy Court for the Eastern District of Kentucky that debtor's could use income available upon the completion of 401(k) loans to increase contributions to a 401(k) plan. The Bankruptcy Appellate Panel reversed the finding of the lower court and found that such funds constituted income known or virtually certain as of the time of confirmation and, as such, would be considered available to unsecured creditors. Such post-petition income was not excluded from property of the estate under §541(a) or (b), is property of the estate under §1306(a) and is projected disposable income which must be committed the chapter 13 plan under §1325(b)(1)(B) under *Lanning*, and In re Nowlin, 576 F.3d 258 (5th Cir. 2009).

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT

In re:	Case No. 09-76184
DAVID L. ROACH,	Chapter 7
Debtor.	Hon. Walter Shapero

_____/

OPINION GRANTING MOTION TO DISMISS CHAPTER 7 CASE PURSUANT TO 11 U.S.C. § 707(b)(2)(A) AND (3)

This matter came before the Court upon the United States Trustee's Motion to Dismiss Chapter 7 Case Pursuant to 11 U.S.C. § 707(b)(2)(A) and (3). (Docket No. 13). Debtor filed a Response to the Motion and a Declaration of Special Circumstances for Determination of Disposable Income Under Form B22A. An evidentiary hearing was held and the parties were given the opportunity to submit post-hearing briefs.

BACKGROUND

The Debtor, David Roach, filed his voluntary chapter 7 petition on November 24, 2009. He is fifty-four years old, and married with no dependents. His spouse is not a debtor in this proceeding.

Debtor has been employed as a computer engineer since 1997 and grosses approximately $98,500 annually. His spouse is unemployed and is collecting unemployment compensation. As of the hearing date, that compensation was expected to be discontinued by the end of July 2010, although it might have been extended since then. Debtor's spouse is currently enrolled at Thomas M. Cooley Law School. There was no testimony or evidence to suggest that she is currently seeking employment. Debtor testified that his spouse has obtained student loans to attend law school and that a portion of such will be used for living expenses.

Debtor's Schedule J includes mortgage payments for two properties (each property is encumbered by two mortgages). One property is owned solely by the Debtor and is located at 457 Dexter Avenue, Ypsilanti, Michigan. The other is owned solely by the Debtor's spouse and is located at 454 Westlawn, Ypsilanti, Michigan. They both currently reside in the Westlawn

home. Prior to marrying his current spouse and moving to the Westlawn property, Debtor resided at the Dexter property. Contrary to what is indicated on his Schedule J, Debtor stated that he is no longer making mortgage payments on the Dexter property, which were $815.02 on a first mortgage and $97.41 on a second mortgage. Debtor is currently paying both mortgages on the Westlawn property, which are $1,400.00 and $91.28.

In addition to the normal joint living expenses such as food, utilities, etc., Debtor also pays certain obligations for which his wife alone is liable. These include monthly expenses for the mortgages on the Westlawn property ($1,491.28) and credit card payments ($300).

Debtor's Schedule J also includes an expense of $1,044 per month for the repayment of a 401(k) loan to Debtor. The loan was taken in December 2006 in the amount of $50,000 and it is expected to be paid off by January 2011. Debtor testified that, contrary to what is indicated on his Schedule I, the loan payments are being paid voluntarily from his bank account. He also testified that he used the loan proceeds to pay down some of his unsecured debt, which at the time the loan was taken was between $80,000 and $90,000. In addition to these 401(k) loan repayments, Debtor also contributes $819.86 per month to his 401(k). Debtor lists $95,156.00 in unsecured non-priority debts on his Schedule F.

The United States Trustee moved to dismiss this case asserting that it would be an abuse of chapter 7 to grant the Debtor a discharge. Debtor's Form B22A Means Test Calculation indicates that a presumption of abuse arises in this case under 11 U.S.C. § 707(b)(2). Debtor argues that his obligation to repay his 401(k) loans establishes "special circumstances" sufficient to rebut the presumption of abuse. The United States Trustee argues that Debtor's 401(k) loan repayment does not qualify as "special circumstances," and that Debtor has failed to rebut the presumption of abuse.

DISCUSSION

Dismissal of a chapter 7 case is governed by 11 U.S.C. § 707. Section 707(b)(1) provides, in part,

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.

Section 707(b)(2)(A)(I) draws a bright line test by quantifying what is considered abuse. There is a presumption that a debtor is abusing chapter 7 if the debtor has a certain level of disposable income, after deducting specific expenses, sufficient to produce a benchmark dividend to unsecured creditors. Once a presumption of abuse arises, it may only be rebutted under § 707(b)(2)(B) upon a showing of "special circumstances." Even if the presumption of abuse is rebutted, pursuant § 707(b)(3), the Court may dismiss a case if the petition was filed in bad faith or if the totality of the circumstances of the debtor's financial situation demonstrates abuse.

In this case, the United States Trustee relies on both § 707(b)(2) and (3).

Presumption of Abuse under § 707(b)(2)

It is not in dispute that the presumption of abuse arose in this case. However, Debtor argues that his 401(k) loan repayment is a necessary additional expense that qualifies as a "special circumstance" sufficient to rebut the presumption of abuse.

Section 707(b)(2)(B)(I) provides, in relevant part:

> In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

Congress did not provide an exhaustive list of "special circumstances" but it did provide specific examples of such (serious medical condition and call to Armed Forces). "[B]oth examples given by Congress share 'a commonality; they both constitute situations which not only put a strain on a debtor's household budget, but they arise from circumstances normally beyond the debtor's control.'" *In re Egebjerg*, 574 F.3d 1045, 1054 (9th Cir. 2009) (quoting *In re Castle*, 362 B.R. 846, 951 (Bankr. N.D. Ohio 2006).

Courts disagree regarding whether or not 401(k) loan repayments are expenses that qualify as "special circumstances." Some courts have found that they do. *See In re Lenton*, 358 B.R. 651, 662 (Bankr. E.D. Pa. 2006) (allowing 401(k) loan repayment as a special circumstance, but ultimately dismissing under a totality of the circumstances because evidence showed that the loans would be repaid in full within the plan period allowing a substantial

amount to be paid to creditors); *In re Thompson*, 350 B.R. 770 (Bankr. N.D. Ohio 2006), *rev'd*, 370 B.R. 762 (N.D. Ohio 2007). Other courts have found that the mere obligation to repay a 401(k) loan is not itself a special circumstance. *See In re Egebjerg*, 574 F.3d 1045, 1053 (9th Cir. 2009); *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007), *rev'g* 350 B.R. 770 (Bankr. N.D. Ohio 2006); *In re Smith*, 388 B.R. 885, 888 (Bankr. C.D. Ill. 2008); *In re Mowris*, 384 B.R. 235, 240 (Bankr. W.D. Mo. 2008); *In re Turner*, 376 B.R. 370, 378 (Bankr. D. N.H. 2007).

This Court agrees with the line of cases finding that, "[w]ithout more, a situation as common as the withdrawal of one's retirement funds cannot be a 'special circumstance' within the accepted definition of this term." *Egebjerg*, 574 F.3d at 1053 (*quoting In re Thompson*, 370 B.R. 762, 773 (N.D. Ohio 2007)). If the withdrawal of such is not "special" or uncommon, its repayment cannot be. It has been indicated that there may be situations in which the underlying reasons for taking out a 401(k) loan may constitute special circumstances. *See In re Tauter*, 402 B.R. 903, 906-7 (Bankr. M.D. Fla 2009). In this case, Debtor testified that he withdrew the $50,000 from his 401(k) in order to pay down amounts owed on his credit cards. He testified that he had been using his credit cards each month to meet an approximately $1,000 deficit in his monthly budget and that he had accumulated between $80,000 and $90,000 in credit card debt. Appropriate to that set of facts is: "[T]he fact that [the debtor] borrowed from those retirement funds and now wishes to pay the loans back is not a life altering circumstance of the kind referenced in the statute. It is simply the consequence of a prior financial decision." *Egebjerg*, 574 F.3d at 1053 (*quoting In re Smith*, 388 B.R. at 888)). By that measure, the circumstances that led Debtor to borrow from his 401(k) were not special, but instead were the result of his general inability to live within his means and to keep up with his obligations to creditors.

It should also be noted that the facts of this case differ from those in the *Thompson* and *Lenton* cases, which the Debtor cites to support his position. In the *Thompson* and *Lenton* cases, the Courts found that the 401(k) repayments qualified as special circumstances because the loans were not taken on the eve of bankruptcy, the funds were used to address the debtors' financial difficulties, and the payroll deductions fro the 401(k) loan repayments were mandatory. In this case, although the loan was not taken on the eve of bankruptcy and the funds were used to pay down credit card debt, the 401(k) loan repayments are being made voluntarily from Debtor's bank account, not through mandatory payroll deductions. That latter fact is most significant because, unlike the Debtors in the *Thompson* and *Lenton* cases, whose only options to terminate the

obligation to repay the loan were to either quit their jobs or repay the loan in full, Debtor's failure to repay the 401(k) loan will not have a negative effect on his employment. In this case, Debtor has a reasonable alternative available to him to avoid the extra expense of the 401(k) loan payments, i.e.: he can choose to convert this case to chapter 13.

The statutory language talks about special circumstances "such as a serious medical condition or a call or order to active duty in the Armed Forces." The term "special" itself embodies a concept of rarity or unusualness. The given statutory examples are of a character that differ widely from the facts in this case. As a matter of statutory construction, this Court at least, concludes the use of those examples both explains and circumscribes the legislators' intentions to circumstances of similar importance. The statute also requires not only that the circumstances be "special," and of the indicated character, but also that they "justify additional expenses or adjustments of the current monthly income for which there is no reasonable alternative." In this Court's view, Debtor's arguments fail on all of these points and, as a result, the Debtor has not borne his burden of rebutting the presumption of abuse.

Section 707(b)(3)

In those cases where the presumption of abuse does not arise or is otherwise rebutted, and where bad faith is not a factor, the Court is directed to consider the totality of the circumstances in determining whether dismissal for abuse is warranted. 11 U.S.C. § 707(b)(3)(B).

Because the Debtor has failed the rebut the presumption of abuse under 707(b)(2) by showing "special circumstances," it is unnecessary for the Court to consider the totality of the circumstances to determine whether dismissal for abuse is warranted.

Were the Court to engage in that inquiry it is worth noting that if Debtor converted his case to chapter 13, the 401(k) loan could be paid in full through the chapter 13 plan and after the 401(k) loan is paid in full (which would be by about January 2011), $1,044 per month would be available as disposable income, allowing approximately $55,000 to be paid to unsecured creditors.

CONCLUSION

For the reasons set forth above, an order should be entered conditionally granting the United States Trustee's Motion to Dismiss pursuant to 11 U.S.C. § 707(b)(2) and (3) unless,

within 20 days from the entry of said order, Debtor converts to a chapter 13 proceeding. The United States Trustee shall present such an appropriate order.

Signed on August 25, 2010

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:
MICHAEL D BLAIES and
ANGELLE M BLAIES,
Debtors.

Case No. 10- CV-11887

_____/

MICHAEL D. BLAIES and
ANGELLE D. BLAIES,

Honorable John Corbett O'Meara

Appellants,

v.

KRISPEN S. CARROLL
Chapter 13 Trustee,

Appellee.
_____/

MEMORANDUM OPINION AND ORDER AFFIRMING BANKRUPTCY COURT'S FINAL ORDER CONFIRMING PLAN

This matter came before the court on appellants Michael D. Blaies and Angelle D. Blaies's May 25, 2010 appeal of the bankruptcy court's April 24, 2010 order to confirm Chapter 13 Plan. Appellee Krispen S. Carroll, Chapter 13 Trustee, ("Trustee") filed her brief June 8, 2010. Debtors filed a reply June 22, 2010. No oral argument was heard.

BACKGROUND FACTS

On September 4, 2009, debtors Michael D. Blaies and Angelle M. Blaies filed for relief under Chapter 13 of the United States Bankruptcy Code. On September 21, 2009, Debtors filed a Chapter 13 plan proposing a 60-month duration, their Summary of Schedules, their Schedules

A-J, and their Chapter 13 Statement of Current Monthly Disposable Income and Calculation of Commitment Period and Disposable Income- Form 22C ("Form 22C").

Debtors' Form 22C utilized deductions on Lines 47 and 48 for payments and cure amounts relating to a second and third mortgage that were being stripped of their liens by the filing of an adversary case. On October 28, 2009, Trustee filed her original objections to these deductions on the grounds that the mortgage debts were wholly unsecured.

Debtors' "current monthly income" as reflected on Form 22C was $9,516.24, the equivalent of an annualized income of $114,194.88. The applicable median family income for a household of four is $76,312.00. Debtors' annual income exceeded the applicable family income. Debtors acknowledge that Form 22C states that the applicable commitment period for Debtors with above-median income level is five years and completed the remainder of Form 22C based upon that fact. The original plan proposed was 60 months.

On January 6, 2010, Debtors filed a first amended Chapter 13 plan reducing the plan length to 36 months. Debtors suggest that this is the appropriate length of the plan since "Monthly Disposable Income Under §1325(b)(2)," Line 59 of Form 22C, reflects negative $573.83. Debtors' first amended plan did not propose full payment of all allowed unsecured claims. The first amended plan offered a $15,573.31 pro-rata base amount to unsecured creditors. This figure represents 12% of Debtors' scheduled unsecured claims totaling $129,524.47. The Trustee, relying on 11 U.S.C. §1325(b)(4), filed Supplemental Objections to Debtors' Proposed First Amended Chapter 13 Plan on February 1, 2010, objecting to the reduction of the plan length from 60 to 36 months on the grounds that Debtors' income is above the median level and less than payment in full was offered to unsecured creditors.

Due to a decrease in income, Debtors filed a second amended plan on February 16, 2010. The second amended plan provided for a 36-month plan offering a $103.03 pro-rata base amount. This figure represents effectively 0% of Debtors' scheduled unsecured claims. A 60-month plan would have yielded $4,953.86 to unsecured creditors.

At the February 17, 2010, Adjourned Confirmation Hearing, the bankruptcy court sustained the Trustee's objections to confirmation regarding the deductions for second and third mortgages on Form 22C. The court also sustained Trustee's objections concerning the applicable commitment period. The court relied on its previous ruling in In re Yoshikawa, No. 09-68268 (Bankr. E.D. Mich. 2009) *appeal docketed,* holding that where debtors were above the median income level, even if they have negative disposable income, the "applicable commitment period" applies.

Debtors amended their Form 22C and Chapter 13 Plan, deleting deductions for the second and third mortgages and extending plan length to 60 months. Debtors then objected to their Third Amended Chapter 13 Plan. The bankruptcy court subsequently overruled the Debtors' Objection to the Third Amended Chapter 13 Plan and entered an Order Confirming Plan.

STANDARD OF REVIEW

A district court reviews a bankruptcy court's legal conclusions *de novo*. In re The Gibson Group, Inc., 66 F.3d 1436, 1440 (6th Cir. 1995).

LAW AND ANALYSIS

Debtors appeal the confirmation of the bankruptcy plan, alleging the bankruptcy court reached an incorrect legal conclusion by (1) rejecting Debtors' argument that they could deduct monthly mortgage payments for second and third mortgages although they obtained orders to

strip the liens by filing an adversary case, and (2) determining that the "applicable commitment period" applies to above median income Chapter 13 Debtors with no projected disposable income.

The deductions on Lines 47 and 48 correspond to 11 U.S.C. §707(b)(2)(A)(iii), which states:

> (iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—
>
> > (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and
> >
> > (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

Lines 47 and 48 are titled "Future payments on secured claims" and "Other payments on secured claims," respectively.

Debtors argue that payments on the second and third mortgages were secured claims contractually due at the time of filing and should be deductable. In support of their argument, Debtors further contend that the language of the orders for default judgment against a creditor in an adversary proceeding does not strip the lien from the property until the discharge order is entered in the Chapter 13 case after completion of the plan.

Debtors' arguments fail to take into account the unsecured nature of the second and third mortgages. Under the bankruptcy code, a lien and secured interest are not synonymous. In re Lane, 280 F.3d 663, 665 (6th Cir. 2002). "Whether a lien claimant is the holder of a 'secured claim' or an 'unsecured claim' depends, thanks to § 506(a), on whether the claimant's security interest has any actual 'value.'" In re Lane, 280 F.3d at 669. The second and third mortgages on

Debtors' homestead are valueless since the value of the home is less than the total amount owed on the first mortgage. Lines 47 and 48 of Form 22C, corresponding to 11 U.S.C. § 707(b)(2)(A)(iii), apply only to secured debts; therefore, Debtors are not entitled to take the deductions for the second and third mortgages. The Debtors' reliance on In re Thomas, 395 B.R. 914 (6th Cir. B.A.P. 2008), In re Marshall, 407 B.R. 1 (Bankr. D. Mass. 2009), and other cases which discuss the ability to deduct payment for collateral which the debtor is to surrender is unpersuasive.

Prohibiting Debtors from taking deductions on Lines 47 and 48 for payments on a second and third mortgage, "Monthly Disposable Income Under §1325(b)(2)," Line 59 of Form 22C, would have reflected a positive number. This court, therefore, declines to reach the issue of whether or not the "applicable commitment period" applies to above median income debtors whose forms reflect negative projected disposable income.

ORDER

It is hereby **ORDERED** that the April 24, 2010 order of the bankruptcy court is **AFFIRMED**.

Date: August 11, 2010

s/John Corbett O'Meara
United States District Judge

I hereby certify that a copy of this order was served upon the parties of record on August 11, 2010, using the ECF system and/or by ordinary mail.

s/William Barkholz
Case Manager