Concurrent Session

Projected Disposable Income: What Is Covered and What Is Not

Claire Ann Resop, Moderator | von Briesen & Roper, SC; Madison, Wis.

Krispen S. Carroll | Chapter 13 Trustee; Detroit

Mark A. Redmiles | Executive Office for the U.S. Trustees
Washington, D.C.

Hon. Steven W. Rhodes | U.S. Bankruptcy Court (E.D. Mich.); Detroit

Educational Materials

2011

Projected Disposable Income
What is Covered and What Is Not

Case Summary for Chapter 7 and 13

Claire Ann Resop, von Briesen & Roper, S.C., Madison, WI
Krispen Carroll, Chapter 13 Trustee, Detroit, MI

ABI Annual Spring Meeting
April 1, 2011, 2:15-3:15
National Harbor, MD

I. Chapter 13

A. Forward Looking v. Mechanical

1. *Hamilton v. Lanning (In re Lanning*), 130 S. Ct. 2464 (2010).

The so-called "forward looking" approach should be used in calculating projected disposable income under 11 U.S.C. § 1325(b)(1)(B). Courts have discretion to account for known or virtually certain changes in a debtor's income or expenses. Use of Chapter 13 debtor's current income, not a figure inflated by a prior one-time employee buyout, was affirmed.

2. *In re Johnson*, 382 Fed. Appx. 503 (7th Cir. 2010) unpublished.

The bankruptcy court appropriately excluded temporary workers compensation payments from debtors' projected disposable income and confirmed their Chapter 13 plan because to include the payments in projected disposable income would commit virtually all of their projected disposable income to the repayment plan and the payments had ended pre-petition. The court relied on Lanning in reaching its decision. The court had stayed its ruling following argument to see how Lanning was decided. Once Lanning was decided the Seventh Circuit swiftly ruled.

3. *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 25 (5th Cir. 2009).

"Projected disposable income" under 11 U.S.C § 1325(b)(1) embraced a forward-looking view such that a debtor's additional money after paying off a 401(k) loan had to be considered in calculating "projected disposable income," thus, the denial of confirmation of her Chapter 13 plan was affirmed.

4. *American Express Bank, FSB v. Smith (In re Smith),* 418 B.R. 359 (B.A.P. 9th Cir. 2009).

Chapter 13 debtors were not entitled to deduct mortgage payments that were scheduled as contractually due. The debtors intended to surrender the mortgaged property and therefore the claimed expense was not reasonably necessary for the debtors' maintenance and support.

5. *Morris v. Kilmer (In re Quigley*), 2009 U.S. Dist. LEXIS 76524 (N.D. WV 2009) (on appeal to 4th Cir. Case No. 09-2102).

11 U.S.C.S. § 707(b)(2)(A)(iii)(I) allowed a Chapter 13 debtor to take a secured debt reduction for collateral that the debtor intended to surrender, therefore trustee's request to reverse the bankruptcy court's finding that the debtor was entitled to deductions for the two all terrain vehicles and a truck was denied.

B. Changing Expenses

1. *Ransom v. FIA Card Services, N.A. (In re Ransom),* 131 S. Ct. 716 (2011).

Under 11 U.S.C. § 707(b)(2)(A)(ii)(I), an above median income debtor in Chapter 13 could not deduct ownership costs for a vehicle he owned free and clear from his projected disposable income.

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

The Bankruptcy Court should not have confirmed debtor's Chapter 13 plan because one debtor's new job was known or virtually certain event at the time of the confirmation and because debtors intended to surrender certain property, therefore their disposable income should have been higher.

3. *In re Turner,* 574 F.3d 349 (7th Cir. 2009).

Since the debtor would not have the mortgage expense during the plan period, the deduction for mortgage payments was not allowed.

4. *McCarty v. Lasowski (In re Lasowski*), 575 F.3d 815 (8th Cir. 2009).

Bankruptcy court erred in confirming a Chapter 13 debtor's plan because the court did not accurately determine the debtor's projected disposable income when it ignored the fact that the debtor's current payments for a 401(k) loan would reduce and then end, thereby increasing the amount available to pay creditors as required by 11 U.S.C § 1325.

5. *Burden v Seafort (In re Seafort),* 427 B.R. 204 (B.A.P. 6th Cir. 2010), appeal docketed, No. 10-6248 (6th Cir. Dec. 1, 2010).

Bankruptcy court ruling that debtor could use income available upon completion of 401k loans to increase contributions to a 401k plan was reversed. Post-petition income that 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 to the chapter 13 plan under §1325(b)(1)(B) under Lanning. Funds available to the debtor upon completion of the loans constitute "income known or virtually certain" as of the time of confirmation and, as such, would be considered available to unsecured creditors.

6. *Blaies v. Carroll (In re Blaies)*, 436 B.R. 35 (E.D. Mich. 2010).

Debtors could not deduct mortgage payments on second mortgage they intended to strip.

7. *Yarnall v. Martinez, (In re Martinez),* 418 B.R. 347 (B.A.P. 9th Cir. 2009)

Debtors were not entitled to deduct mortgage payments on wholly unsecured junior mortgages they intended to strip.

8. *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.

C. Length of Plan

1. *Baud v Carroll*, __ F. 3d__, 2011 WL 338001, C.A. 6 (Mich), February 4, 2011 (NO. 09-2164)

Following the 8th, 9th and 11th Circuits, the 6th Circuit finds no exceptions exist to the temporal requirement set forth in §1325(b)(1) requiring all above median income debtors to commitment periods of 5 years regardless of positive, zero, or negative projected disposable income. The calculation of projected disposable income must exclude income not defined under §101(10A) as current monthly income (such as Social Security benefits), but the absence of positive projected disposable income does not allow for the proposal of shorter plan lengths. The Court follows the Supreme Court in Lanning and Ransom that the purpose of BAPCA was to maximize creditor recoveries and that the interpretation of the statute must follow that purpose.

2. *Maney v. Kagenveama (In re Kagenveama),* 527 F.3d 990, (9th Cir. 2010) (overruled as to definition of projected disposable income by Lanning).

Bankruptcy court properly confirmed debtor's Chapter 13 plan because her "projected disposable income" was zero or less and, therefore, the "applicable commitment period" did not apply. Because the debtor's voluntary payments came from money other than

"projected disposable income" there was no requirement that these payments occur for five years.

3. *Coop v. Frederickson (In re Frederickson),* 545 F.3d 652 (8th Cir. 2009).

Above-median Chapter 13 debtor's "projected disposable income" under 11 U.S.C § 1325(b)(1)(B) was not the same as his negative disposable income under § 1325(b)(2); the debtor's plan therefore could not be confirmed over the trustee's objection unless it extended for the entire 60-month applicable commitment period under § 1325(b)(4).

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

Because unsecured debts were not being paid in full, 11 U.S.C § 1325(b)(4) required that confirmation of an above median income debtor's 3-year plan be reversed; the applicable commitment period (ACP) had to be 5 years, as the ACP was intended to be a temporal requirement independent of § 1325(b)(1).

5. *Harman v. Fink (In re Harman),* 435 B.R. 596 (B.A.P. 8th Cir. 2010).

Married debtors are required to include both incomes in calculating applicable commitment period, even if they maintain separate households.

II. Chapter 7

1. *Perlin v. Hitachi Capital Am. Corp. (In re Perlin),* 497 F.3d 364 (3rd Cir. 2007).

In addressing a motion to dismiss a bankruptcy petition on bad faith grounds under 11 U.S.C.S. § 707(a), the bankruptcy court could have considered the debtors' income and expenses together with any other factors relevant to a debtor's good faith.

2. *Blausey v. United States Tr.*, 552 F.3d 1124 (9th Cir. 2009).

Debtors were required to include debtor wife's private disability insurance benefits in their calculation of "current monthly income" (CMI) under 11 U.S.C.S. § 101(10A).

3. *Schultz v. United States,* 529 F.3d 343 (6th Cir. 2007).

The Court rejected the debtors' argument that although their income was above the median income for their home state, it was below median for six states and they should therefore be treated as below median income debtors.

4. *Egebjerg v. Anderson (In re Egebjerg*), 574 F.3d 1045 (9th Cir. 2009).

Debtor improperly included repayment of a 401(k) loan as a deduction for purposes of the means test under 11 U.S.C.S. § 707(b)(2), making the Chapter 7 filing presumptively abusive, in that the obligation was not a debt as defined under 11 U.S.C.S. § 101(12) and was not an "other necessary expense" or a demonstration of special circumstances.

5. *Ross-Tousey v. Neary (In re Ross-Tousey),* 549 F.3d 1148 (7th Cir. 2008) (overruled by *Ransom*).

As part of the means test for Chapter 7 eligibility, bankruptcy debtors were entitled under 11 U.S.C.S. § 707(b)(2)(A)(ii)(I) to take a vehicle ownership deduction even though they had no monthly loans or leases on their vehicles; the "plain meaning approach" rather than the "Internal Revenue Manual approach" applied to § 707(b)(2)(A)(ii)(I).

6. *Morse v. Rudler (In re Rudler),* 576 F.3d 37 (1st Cir. 2009).

In calculating monthly income under the means test, Chapter 7 debtors were entitled to deduct payments due on secured debt on collateral they intended to surrender.

7. *Lynch v. Haenke,* 395 B.R. 346. (E.D.N.C. 2008).

The bankruptcy court properly permitted a Chapter 7 debtor to include her monthly mortgage payments on a home she intended to surrender for the purpose of calculating her current monthly income because the phrase "scheduled as contractually due" under 11 U.S.C.S. § 707(b)(2)(A)(iii) included payments that the debtor was under contract to make.

More Fact than Fiction: The Supreme Court Interprets the Means Test

Contributing Editor:
Mark A. Redmiles
Executive Office for U.S. Trustees
Washington, D.C.[1]

This article is a draft version of an article scheduled to be published in the April 2011 issue of the *ABI Journal*. Because the deadlines for conference material submission and article submission are different, this draft version may not be identical to the published article.

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to correct perceived abuses of the bankruptcy system.[2] Some BAPCPA supporters felt that consumer bankruptcy was no longer a last option escape valve providing a fresh start for individuals who were experiencing severe financial distress.[3] Rather, it was contended that consumer bankruptcy had become an abused device employed to get an unintended head start by individuals who could afford to repay some or all of their debts, but preferred not to.[4] As part of BAPCPA, Congress enacted the "means test" to address this perceived abuse, utilizing a formula with specified income and expense parameters and amounts mandated for calculating above median income debtors' monthly disposable income.[5]

The means test soon generated commentary and litigation that dissected a series of legal issues relating to how the means test, and its many sub-provisions, should be interpreted and

---

[1] Mark Redmiles is the Deputy Director for Field Operations in the Executive Office for U.S. Trustees. Mr. Redmiles guided the U.S. Trustee Program's implementation of the means testing provisions in BAPCPA, and together with Bankruptcy Judges Eugene Wedoff and Eric Frank, developed Official Bankruptcy Form 22 -- commonly known as the Means Testing Form. He wishes to thank David I. Gold and Thomas C. Kearns of the Executive Office for U.S. Trustees for their assistance with this article.

[2] *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329 (2010).

[3] H.R. Rep. No. 31, 109th Cong., 1st Sess. Pt. 1, at 2 (2005).

[4] *Id*.

[5] 11 U.S.C. § 707(b)(2)(A).

applied to the hundreds of thousands of consumer bankruptcy cases filed annually. Three primary issues soon emerged regarding the means test that controlled what relevance this statutory mechanism would have in consumer bankruptcy practice: (1) whether use of the means test in chapter 13 dictates a mechanical approach to calculating projected disposable income; (2) whether all debtors who possess a vehicle are eligible to deduct from their income, in addition to deducting the costs of operating and maintaining the vehicle, a monthly expense amount for vehicle acquisition costs regardless of loan or lease payments; and (3) whether debtors who have surrendered collateral in connection with a loan, and therefore have no obligation to continue making payments on that loan, may still deduct from their monthly disposable income the payments associated with the loan.

The first issue, which applies directly only in chapter 13 cases,[6] was resolved by the United States Supreme Court in *Hamilton v. Lanning*.[7] Subsequently, the Supreme Court decided the second issue in *Ransom v. FIA Card Services*.[8] And, while the Supreme Court has yet to weigh in on the third issue, this article examines how the means test is to be applied in accordance with *Ransom* and *Lanning*, and submits that the third issue has already been decided by *Ransom* and *Lanning* in the chapter 13 context, and early indications are that those decisions are guiding bankruptcy courts in the chapter 7 context as well.

Information about Future Income and Expenses is Relevant

In a chapter 13 bankruptcy case, a bankruptcy court may confirm a repayment plan only if the debtor commits either to pay unsecured creditors in full or to apply all of the debtor's

---

6 11 U.S.C. § 1325(b).

7 *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010) [hereinafter *Lanning*].

8 *Ransom v. FIA Card Services*, N.A., 131 S. Ct. 716 (2011) [hereinafter *Ransom*].

"projected disposable income" during the plan period to repaying those creditors.[9] The means test is utilized in chapter 13 to calculate the amount of disposable income a debtor must devote to creditor repayment pursuant to a court-approved plan that typically lasts from three to five years.[10] "The statute defines 'disposable income' as 'current monthly income' less 'amounts reasonably necessary to be expended' for 'maintenance or support,' business expenditures, and certain charitable contributions."[11] For debtors whose income exceeds the median for their state, "the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.'"[12]

A significant issue in the chapter 13 plan confirmation process was whether the means test's disposable income calculation was controlling for all purposes, or whether a bankruptcy court could take into account relevant information about a debtor's future income or expenses that varied from the income or expenses utilized in the means test. In *Lanning*, the debtor proposed a repayment plan based on her income at the time of plan confirmation, which was less than income used in calculating her means test because her means test calculations included severance income from a previous employer.[13] The chapter 13 trustee argued that the only method of projecting disposable income under her plan was to multiply disposable income under

---

9 11 U.S.C. § 1325(b).

10 11 U.S.C. §§ 1325(b)(1)(B) and (b)(4).

11 *Ransom*, 131 S. Ct. at 721, *quoting* § 1325(b)(2)(A)(i) and (ii).

12 *Ransom*, 131 S. Ct. at 721-722.

13 *Lanning*, 130 S. Ct. at 2470.

the means test by the total number of months in the plan.[14] The Supreme Court rejected the argument that the means test had to be applied rigidly and controlled the disposable income calculation without exception.[15]

The *Lanning* Court noted that in the majority of chapter 13 cases the financial information used in calculating the means test remains constant, and in those cases the means test controls.[16] The Court recognized, however, that in some cases a debtor's financial circumstances have changed significantly, and in those cases financial information used in calculating the means test no longer strictly applies.[17] In order to determine the debtor's projected disposable income when the means test calculation of disposable income is a demonstrably unreliable predictor of the debtor's financial condition during the chapter 13 plan period, a court should account for "known or virtually certain information about the debtor's future income or expenses."[18] Hence, *Lanning* informs us that despite adoption of a more uniform formula and many standardized expense amounts, the means test is not to be applied inflexibly, but rather the factual circumstances of each individual debtor are legally relevant.

Vehicle Expense Deductions Must Correspond with Financial Circumstances

Under the means test, a debtor whose income is above the median for the debtor's state is directed to calculate monthly disposable income by deducting from the debtor's income

---

14 *Id.*

15 *Id.* at 2478.

16 *Id.* at 2474.

17 *Id.*

18 *Id.* at 2478.

"allowances for defined living expenses, as well as for secured and priority debt."[19] At issue in *Ransom* was the following expense-related provision of the means test:

> The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards issued by the Internal Revenue Service for the area in which the debtor resides. [20]

The National and Local Standards are expense categories and amounts[21] used by the Internal Revenue Service (IRS) to calculate a taxpayer's financial capacity to make installment payments to repay past due income taxes.[22] The transportation expense category in the IRS Local Standards is divided into two subcategories: (1) Vehicle "Ownership Costs"[23] and (2) Vehicle "Operating Costs." Vehicle Operating Costs cover the costs associated with owning and maintaining a vehicle including "vehicle insurance, maintenance, fuel, state and local registration, required inspection, parking fees, tolls, and driver's license."[24] Conversely, Vehicle Ownership Costs represent "nationwide figures for monthly loan or lease payments based on the five-year average of new and used car financing data compiled by the Federal Reserve Board."[25]

---

[19] *Ransom*, 131 S. Ct. at 722, *citing* §§ 707(b)(2)(A)(ii) and (B)(iv).

[20] 11 U.S.C. § 707(b)(2)(A)(ii)(I).

[21] The IRS uses data from the Census Bureau and the Bureau of Labor Statistics to update the Local and National Standards on an annual basis. *See* IRS Financial Analysis Handbook, available at http://www.irs.gov/irm/part5/irm_05-015-001.html#d0e1012 (visited Jan. 30, 2011) (hereinafter Handbook).

[22] 26 U.S.C. § 7122(d)(2).

[23] The term Vehicle Ownership Costs is actually a misnomer. By the IRS' own account, the expense category is more accurately described as one for loan or lease payments (*i.e.,* vehicle acquisition costs). *See* Handbook. Moreover, although it is located within the IRS Local Standards, the amount specified for Vehicle Ownership Costs is identical for vehicles in all areas of the country. *See* IRS Local Standards: Transportation, available at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html (visited Jan. 30, 2011) (hereinafter Standards).

[24] *See* Standards.

[25] *Ransom*, 131 S. Ct. at 722 (quoting the IRS Collection Financial Standards that were submitted as an appendix to the *Ransom* respondent's brief).

The *Ransom* Court was called upon to interpret how the specified IRS Local Standard for Vehicle Ownership Costs was to be applied under bankruptcy's means test.

The debtor in *Ransom* owned a vehicle outright and consequently made no corresponding monthly loan or lease payment.[26] Nonetheless, he claimed entitlement to a monthly expense deduction of $471[27] under the IRS Local Standard for Vehicle Ownership Costs.[28] One of Mr. Ransom's creditors objected to plan confirmation because the plan did not provide that all of Mr. Ransom's disposable income would be paid to unsecured creditors.[29] In particular, the creditor asserted that Mr. Ransom was not eligible for the Vehicle Ownership Costs deduction because he did not make monthly installment payments to acquire his vehicle.[30] The creditor noted that by claiming the Vehicle Ownership Costs deduction, Mr. Ransom sought to shield approximately $28,000 from unsecured creditors over the 60-month life of his plan ($471 per month x 60 months).[31]

The Supreme Court rejected Mr. Ransom's position, holding that a debtor under chapter 13 or chapter 7 who does not make vehicle loan or lease payments is not entitled to take a vehicle ownership expense deduction under the means test.[32] To reach this result, the Supreme Court focused on the text, context and purpose of § 707(b)(2)(A)(ii)(I).[33] The *Ransom* Court

---

26 *Id.* at 723.

27 The debtor in *Ransom* filed his bankruptcy petition in July 2006. Since March 1, 2010, the Local Standard for Vehicle Ownership Costs has been $496 per month, per vehicle for up to two vehicles.

28 *Ransom*, 131 S. Ct. at 723.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 721, 730.

33 *Id.*

noted that the key word in § 707(b)(2)(A)(ii)(I) is "applicable," and that "applicable" means "appropriate, relevant, suitable or fit."[34] The Court concluded that "rather than authorizing all debtors to take deductions in all listed categories, Congress established a filter" so that a "[d]ebtor may claim a deduction from a National or Local Standard . . . only if that deduction is appropriate for him."[35]

By using the word "applicable," Congress limited eligibility for expenses under the Local Standards to debtors for whom the expenses actually *apply*.[36] The *Ransom* Court found it "insightful and persuasive (albeit not controlling)" to consult for interpretive guidance materials published by the IRS, the source of the expense Standards used in the means test.[37] The IRS guidance reinforced the *Ransom* Court's "conclusion that, under the statute, a debtor seeking to claim this deduction must make some loan or lease payments."[38] Therefore, debtors are not eligible for the Vehicle Ownership Costs deduction under the IRS Local Standards, and the deduction does not apply to them, unless in reality their disposable income will be reduced by an obligation to make a monthly loan or lease payment on their vehicle.

Interpretation of the Bankruptcy Code, as we all know, begins with the statutory text.[39] In *Ransom* and *Lanning*, a clear majority[40] of the Supreme Court made clear, however, that statutory text is not to be read in a vacuum. While the *Ransom* Court went to great pains to

---

34 *Id.* at 724.

35 *Id*.

36 *Id.* at 727.

37 *Id.* at n.7.

38 *Id.* at 726.

39 *Lanning*, 130 S. Ct. at 2471.

40 Justice Antonin Scalia is the only Justice who dissented in *Ransom* and *Lanning*.

avoid using the word "ambiguous," the means test is, without question, subject to more than one reasonable interpretation. In the Supreme Court's first opinion authored by Justice Elena Kagan, the *Ransom* Court insightfully noted that the statutory text must be given its meaning by consulting statutory context and purpose as well.[41]

In reference to the statutory context, the *Ransom* Court stated "[b]ecause Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category."[42] Regarding the statutory purpose, *Ransom* is best viewed as a logical offshoot of *Lanning*. Just as *Lanning* expressed a concern that adopting a mechanical application of the means test would "deny creditors payments that the debtor could easily make,"[43] *Ransom* expresses a concern that bankruptcy's means test is meant to ensure that debtors repay creditors the maximum they can afford.[44]

Extension of *Ransom*/*Lanning* to Surrendered Property

In light of *Ransom* and *Lanning*, the issue relating to expense deductions for surrendered collateral in calculating monthly disposable income may also be resolved, at least in chapter 13 cases. The question is whether a debtor is permitted to deduct payment obligations to creditors with claims secured by collateral that the debtor has surrendered or intends to surrender.

Ransom provides some guidance. As noted above, because Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be

---

41 *Ransom*, 131 S. Ct. at 721, 730.

42 *Id.* at 725.

43 *Lanning*, 130 S. Ct. at 2476.

44 *Ransom*, 131 S. Ct. at 721, 725.

required to qualify for a deduction by actually incurring an expense in the relevant category.[45] Indeed, *Ransom* stated that "[e]xpenses that are wholly fictional are not easily thought of as reasonably necessary."[46] Under *Lanning*, a "court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."[47] Thus, the Supreme Court has clearly indicated, if not formally instructed, that only debtors who are making monthly payments in an expense category should be allowed an expense deduction in that category.

Two post-*Lanning* appellate decisions have already been issued that make projected disposable income adjustments in chapter 13 cases because the debtor would not be making monthly payments after surrendering the underlying property.[48] In *Darrohn v. Hildebrand*,[49] the Sixth Circuit Court of Appeals reversed a bankruptcy court order confirming the debtors' proposed chapter 13 repayment plan. The Sixth Circuit held that the debtors' projected disposable income calculation should include changes to both income and expenses that are known or virtually certain at the time of confirmation, and that the debtors' claimed deductions for surrendered mortgage payments clashed with limiting payments to reasonably necessary expenses.[50]

---

45 *Id*. at 725.

46 *Id.* at 727).

47 *Lanning*, 130 S. Ct. at 2478.

48 *Darrohn v. Hildebrand (In re Darrohn)*, 615 F.3d 470 (6th Cir. 2010); *Zeman v. Liehr (In re Liehr)*, 439 B.R. 179 (B.A.P. 10th Cir. 2010).

49 *Darrohn*, 615 F.3d at 470.

50 *Id.* at 476.

In *Zeman v. Liehr*,[51] the bankruptcy appellate panel for the Tenth Circuit reversed a bankruptcy court order confirming the debtors' proposed chapter 13 repayment plan. As in *Darrohn*, the plan relied upon a projected disposable income figure that did not accurately reflect the debtors' expenses at the time of confirmation because the debtors intended to surrender collateral associated with claimed secured debt expenses.[52] The appellate panel relied on *Lanning* and *Darrohn* to conclude that because the debtors' secured debt payment obligation was "disappearing . . . the change in circumstances should inure to the benefit of the unsecured creditors, not the [debtors]."[53]

The result in chapter 7 cases should be no different. Regardless of whether the debtor is allowed to take an expense deduction for property being surrendered under the means test,[54] section 707(b)(3)(B) requires a bankruptcy court to consider a debtor's total financial circumstances, including future income and expense information. Consequently, "[i]ncome made available to debtors as a result of surrendering encumbered assets are [sic] properly considered as part of a totality of circumstances analysis under § 707(b)(3)(B*)*."[55]

---

[51] *Liehr*, 439 B.R. at 179.

[52] *Id.* at 181.

[53] *Id.* at 187.

[54] Only one Circuit has considered the question, and that Court allowed the expense deduction. *See Morse v. Rudler (In re Rudler)*, 576 F.3d 37 (1st Cir. 2009); *but see In re Burden*, 380 B.R. 194 (Bankr. W.D. Mo. 2007) (collecting decisions on each side and concluding opposite of *Rudler)*.

[55] *In re Perelman*, 419 B.R. 168, 178 (Bankr. E.D.N.Y. 2009).

Conclusion

The decisions in *Ransom* and *Lanning* ensure that the means test will serve its purpose in consumer bankruptcy cases. By viewing the static means test calculations through the prism of current circumstance, the Supreme Court has effectuated the overarching statutory purpose of requiring debtors to devote maximum future income to creditor repayment. By balancing the bright-line means test that produces greater uniformity in the consumer bankruptcy process with case-specific flexibility to reasonably adjust for evidence of changed financial circumstances, the Supreme Court has definitively answered two key issues under the means test, and provided important insight on a third.

The Projected Disposable Income of Married Debtors

Hon. Steven Rhodes
United States Bankruptcy Judge
Eastern District of Michigan

Submitted for
ABI Annual Spring Meeting
March 31 – April 3, 2011
National Harbor, MD

I. The Bankruptcy Code

A. Section 302(a) provides that spouses may file a joint case:

> A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse.

B. Section 302(b) provides, "After the commencement of a joint case, the court shall determine the extent, if any, to which the debtors' estates shall be consolidated."

C. Section 707(b)(2)(A)(ii)(I) states, "Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor or the dependents of the debtor."

D. Under § 707(b)(2)(A)(ii)(I), the "debtor's" monthly expenses shall be the amounts specified in the listed IRS Standards "for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case if the spouse is not otherwise a dependent."

E. Section 1325(b)(2) defines "disposable income":

> [I]ncome which is received by the debtor and which is not reasonably necessary to be expended—(A) for the maintenance or support of the debtor or a dependent of the debtor; and (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

F. Section 101(10A) defines "current monthly income":

> (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—
>
> > (i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

> (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and
>
> (B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)[.]

(Question: Who is the "debtor" and who is the "debtor's spouse" for purposes of the CMI calculation in § 101(10A)?)

II. The Bankruptcy Rules

Rule 1015(b), Fed. R. Bankr.P., provides:

> (b) If a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife . . . the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest.

III. The Case Law

A. When Married Individuals File a Joint Case

1. A joint petition filed by married debtors creates two separate estates. *Reider v. FDIC (In re Reider)*, 31 F.3d 1102, 1109 (11th Cir. 1994); *In re Morrison*, 403 B.R. 895, 900 (Bankr. M.D. Fla. 2009); *In re Shjeflo*, 383 B.R. 192, 195 (Bankr. N.D. Okla. 2008); *In re Bippert*, 311 B.R. 456, 462 (Bankr. W.D. Tex. 2004); *In re Estrada*, 224 B.R. 132, 135 (Bankr. S.D. Cal. 1998); *In re Stampley,* 437 B.R. 825, 828 (Bankr. E.D. Mich. 2010); *In re Fernandes*, 346 B.R. 521 (Bankr. D. Nev. 2006) ("Section 302 does not automatically consolidate estates. Rather, it provides for the coordinated administration of two presumably related cases. . . . [A]n order of joint administration under Section 302 and Bankruptcy Rule 1015 does not mingle or mix the assets or claims of each estate with the other. As a result, the filing of a joint case does not, without more, affect whatever rights creditors . . . have as against either spouse individually.").

But *see In re Shjeflo*, 383 B.R. 192 (Bankr. N.D. Okla. 2008) (By local rule, joint filing of spouses resulted in substantive consolidation.). [1]

2. Unless the joint debtors' estates are consolidated by the court pursuant to § 302(b) and Rule 1015(b), the two estates remain separate. *In re Toland*, 346 B.R. 444, 449 (Bankr. N.D. Ohio 2006); *In re Stampley*, 437 B.R. 825, 828 (Bankr. E.D. Mich. 2010).

B. When One Spouse Files an Individual Case

1. In a case where a married debtor files individually, "courts base their calculation of the debtor's disposable income on the debtor's family budget, including the income and expenses of the nondebtor spouse." *In re Carter*, 205 B.R. 733, 735 (Bankr. E.D. Pa.1996). *See also In re Welch,* 347 B.R. 247, 252 (Bankr. W.D. Mich. 2006); *In re McNichols*, 249 B.R. 160, 169 (Bankr. N.D. Ill. 2000); *In re Bottorff*, 232 B.R. 171, 173 (Bankr. W.D. Mo. 1999); *In re Stampley,* 437 B.R. 825, 828 (Bankr. E.D. Mich. 2010).

2. "Failure to consider the impact of the nondebtor spouse's income and proposed expenditures therefrom would leave the debtor's unsecured creditors to subsidize the spouse's expenses." *McNichols,* 249 B.R. at 173. See also *In re Williamson*, 296 B.R. 760, 764 (Bankr. N.D. Ill. 2003); *In re Schnabel*, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993); *In re Kern*, 40 B.R. 26, 29 (Bankr. S.D. N.Y. 1984); *In re Stampley,* 437 B.R. 825, 828 (Bankr. E.D. Mich. 2010).

3. A majority of cases conclude that when calculating the filing spouse's net disposable income, the joint expenses of the debtor and the non-filing spouse should be allocated in proportion to their income.

---

[1] See Lundin & Brown, CHAPTER 13 BANKRUPTCY (4th ed.) § 7.1[4], available at ch13online.com:

It is not routine in Chapter 13 practice for the debtor or trustee to move for substantive consolidation after the filing of a joint petition. Bankruptcy courts do not review every joint Chapter 13 petition filed by a husband and wife to determine whether the estates should be consolidated. Routinely, the joint petition is treated as a single case, and the assets and liabilities are administered as if substantively consolidated. In most Chapter 13 cases, the debts and assets of each spouse will be so similar that substantive consolidation has no adverse effect on creditors.

- *McNichols,* 249 B.R. at 172 (rejecting a 50/50 split of expenses when the parties' incomes are disparate, and holding "a more equitable and logical approach would be to have the Debtor and her spouse proportionally bear reasonable and necessary family expenses to maintain the family in the same relative ratio as their respective net incomes[.]").
- In *In re Blair*, 226 B.R. 502, 506 (Bankr. D. Me. 1998), the court found that the debtor-husband's income was sufficient to pay a significant dividend to his creditors. Instead he used that income to pay his wife's debts. The court denied the debtors' motion for substantive consolidation and found substantial abuse, explaining:

> Absent substantive consolidation, Rodney's creditors may look to Rodney's assets (and, in Chapter 13 or outside bankruptcy, Rodney's assets and earnings) for satisfaction of their claims. Darlene's creditors may look to Darlene. Since Rodney has almost $2,000.00 per month of income in excess of his living expenses, and since Darlene has only $100.00 per month in gross income, substantive consolidation would result in Rodney's dollars going to pay Darlene's (unliquidated but substantial) individual debts. As a consequence, Rodney's creditors' repayment potential would be diluted significantly.

- In *In re Stampley*, 437 B.R. 825, 828 (Bankr. E.D. Mich. 2010), the court stated:

> The debtor earns approximately 66% of the household income. Accordingly, the debtor's fair share of the joint expenses should be 66% of $4,946, or $3,264. When her sole expenses of $640 are added, her total expenses become $3,904. As noted, her net monthly income is $4,706. As a result, her net disposable income ought to be $802. A chapter 13 plan at $802 per month for 36 months totals $28,872. Schedule F discloses unsecured debt of $25,403.98. Thus the debtor's chapter 13 plan could be a 100% plan, less trustee fees and attorney fees, assuming all of the creditors file claims.
>
> However, the debtor's stated net disposable income is significantly lower because the debtor and her husband allocate a large portion of her monthly net disposable income for his sole expenses. This is unfair to the debtor and even more unfair to the

> debtor's sole creditors. For all practical purposes, the excess is a gift, and it is a gift from the spouse who is in bankruptcy and insolvent to the spouse who is not in bankruptcy and to that spouse's creditors.

- In *In re Cox*, 2005 WL 681464 (Bankr. N.D. Iowa 2005) (To determine the available projected disposable income, nonfiling spouse's income must be considered and one way to do that is to allocate expenses to the nonfiling spouse's income in the proportion that each spouse contributes to the family income. Because debtor's income is 85% of the family income, 15% of the family expenses will be allocated to the nonfiling spouse.).

4. A minority of cases hold otherwise:

- *In re Boatright,* 414 B.R. 526 (Bankr. W.D. Mo. 2009) (declining to allocate expenses in proportion to income).
- *In re Pattison,* 2006 WL 2086585, at *1 (Bankr. S.D. Ohio 2006) (Nonfiling spouse's income and expenses are considered for disposable income test purposes; apportioning based on ratio of incomes is not appropriate when there is substantial disparity between income of debtor and income of nonfiling spouse. Debtor's only income was $467 per month of child support. Debtor's nonfiling spouse had monthly gross income of $8,621. Proposed plan payment was $75 per month, resulting in a 14% dividend. The court stated:

> The majority of cases hold that the income of the non-debtor spouse must be included in computing the debtor's disposable income. . . . These decisions are based on the rationale that a portion of the non-debtor spouse's income is likely to be applied to the cost of the debtor's needs, thereby potentially increasing the share of the debtor's own income that is not reasonably necessary for support and, hence, available as disposable income. . . . [T]he cases further hold that the expenses of the non-debtor spouse must also be included in the computation. . . . A few courts have adopted a mechanical analysis, apportioning the payment of household expenses by the debtor and non-debtor spouse to match

the apportionment of their respective incomes. . . . [W]hen there is a great disparity between the two incomes, a mechanical apportionment is not at all reflective of the payment of the family expenses. . . . The Debtor could not possibly support herself, much less her dependents, on $467 a month. . . . [T]he non-debtor spouse is paying virtually all of the Debtor's expenses, thus freeing up all of the Debtor's monthly income as disposable income. To hold otherwise would allow the Debtor to live relatively 'high on the hog' while her unsecured creditors receive virtually nothing.