

Means Test: Chapter 7 and Chapter 13 Form B22 Analysis

Diane P. Furr, Moderator
Poyner Spruill LLP; Charlotte, N.C.

Melissa J. Davey
Sites & Harbison, PLLC; Atlanta

Amanda M. Stofan
Clark & Washington, P.C.; Chattanooga, Tenn.

Hon. Michael G. Williamson
U.S. Bankruptcy Court (M.D. Fla.); Tampa

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MEANS TEST INTERPRETATION ISSUES

The bulk of the case reviews in these materials were written and compiled by:

Byron Meredith

Chapter 13 Trustee

Southern District of Georgia

They are reprinted here with his blessing with additions and deletions by:

Brian Shockley

Clark & Washington, LLC

Atlanta, Georgia

and

Amanda Stofan

Clark & Washington, LLC

Chattanooga, Tennessee

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I. *Lanning*: Projected disposable income is “forward looking”

The Supreme Court held that the court may account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation when calculating a Chapter 13 debtor’s projected disposable income. *Hamilton v. Lanning*, 130 S.Ct. 2464, 2478, 177L.Ed. 2d 23 (2010).

In *Lanning*, the debtor received a one-time buyout from her former employer in the six-month period prior to filing her Chapter 13 case. This resulted in greatly inflated gross income and monthly disposable income of \$1,114.98 on the Chapter 13 means test Form B22C, as opposed to \$149.03 as reported on Schedules I and J. The debtor’s plan proposed \$144 per month for 36 months. The Chapter 13 Trustee argued that the means test is mechanical, and the debtor must pay the disposable income on Form B22C, multiplied by the applicable commitment period of 60 months.

The Supreme Court declined to infer that Congress intended to eliminate the discretion that courts previously exercised when projecting disposable income to account for known or virtually certain changes. *Id.* at 2475. The Court also drew support from the direction in 11 U.S.C. § 1325(b)(1) that projected disposable income be determined as of the effective date of the plan, rather than the filing date. *Id.* at 2474. “Had Congress intended for projected disposable income to be nothing more than a multiple of disposable income in all cases, we see no reason why Congress would not have required courts to determine that value as of the *filing* date of the plan.” *Id.*

Lanning suggests that departure from the formula in Section 1325(b)(2) should be the exception, rather than the rule:

[A] court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor’s future income or expenses. *Id.* at 2475.

II. Ransom: Where auto owned outright, no ownership allowance deduction on means test

Ransom v. FIA Card Services, N.A., 131 S. Ct. at 716, 178 L. Ed. 2d 603 (2011) held that where a debtor owns a vehicle free and clear and does not make loan or lease payments, no ownership allowance may be claimed under 11 U.S.C. § 707(b)(2)(A)(ii)(I) because there is no “applicable” deduction. Thus, no such allowance can be deducted as a “reasonable and necessary” expense under 11 U.S.C. § 1325(b)(2). The debtor in *Ransom*, who was above median, owned his car free of debt but claimed a \$471 car-ownership deduction on the means test form, reducing the monthly disposable income from \$681.55 to \$210.55. The Court’s ruling was based in part upon its conclusion that Congress designed the means test to ensure debtors repay creditors the maximum they can afford. 131 S. Ct. at 721. Writing for an 8-1 majority, Justice Kagan referred to the means test as the “heart” of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), and intended “to help ensure that debtors who *can* pay creditors *do* pay them.” *Id.*

A. National and Local Standards. Section 707(b)(2)(A)(ii)(I) limits certain monthly expenses to the applicable monthly expense amounts specified under the National Standards and Local Standards. As *Ransom* noted, the National and Local Standards are tables prepared by the IRS listing standardized expense amounts for basic necessities, along with supplemental guidelines known as the Collection Financial Standards. 131 S. Ct. at 722. The *Ransom* Court consulted the “explanatory guidelines” contained in the Collection Financial Standards to support its decision. While acknowledging that the Bankruptcy Code did not incorporate the guidelines, the Supreme Court reasoned that courts may consult this material in interpreting the National and Local Standards, so long as the guidelines do not conflict with the statutory language. *Id.* at 726.

i. Additional Operating Expense under the Internal Revenue Manual See *In re VanDyke*, 450 B.R. 836 (Bankr. C.D. Ill. 2011), finding that “The National and Local Standards are the key elements in establishing a uniform formula to calculate a debtor’s

disposable income,” and the Manual’s guidance on the additional operating expense is a “separate adjustment which is not a part of the local standards.” Also *In re Hargis*, 451 BR 174 (Bankr. D. Utah 2011), holding that the debtors are not permitted to take the extra \$200 operating expense because it does not appear in the IRS standards, but in the manual which is not incorporated into the bankruptcy code or the IRS Standards. See also *In re Wilhite*, No. 11-53843, 2011 (Bankr. ND GA November 17, 2011), holding that “debtors with motor vehicles over six years old or with over \$75,000 miles may not claim an additional \$200 in operating expenses on line 27A of Form 22C.”

- B. Can attorneys advise debtors how to “pass” the means test?** After *Ransom*, what advice should debtor attorneys be providing, and is that advice restricted by *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2011)? In *Milavetz*, the Supreme Court upheld the prohibition in 11 U.S.C. § 526(a)(4), barring advice to incur additional debt in contemplation of filing bankruptcy, “when the impelling reason is the anticipation of bankruptcy.” 130 S. Ct. at 1338.

III. Income

- A. Private disability insurance benefits.** The Ninth Circuit ruled that private disability insurance benefits must be included as CMI. *In re Blausey*, 552 F.3d 1124 (9th Cir. 2009). Ms. Blausey was diagnosed with a permanent disability in 1996. She filed an insurance claim under her life insurance policy and receives \$4,000 per month in benefit payments. The U.S. Trustee sought dismissal of the Chapter 7 case filed by Ms. Blausey and her spouse on the grounds that it was presumptively an abuse under the means test. The U.S. Trustee argued that Ms. Blausey’s disability benefits should have been included in the debtors’ CMI because the benefits constitute “income” and an “amount paid by any entity other than the debtor ... on a regular basis for the household expenses of the debtor under

Section 101(10A)(A) and (B). The debtors argued that “income” should be defined by reference to the Internal Revenue Code. The Ninth Circuit held that according to the plain language of the Bankruptcy Code, the disability benefits constituted income that should have been included in the calculation of CMI. Section 101(10A) excludes only three types of payments from CMI: (1) benefits received under the Social Security Act, (2) payments to victims of war crimes or crimes against humanity on account of their status as such, and (3) payments to victims of international terrorism or domestic terrorism on account of that status. While the Internal Revenue Code’s definition of gross income does not include such disability payments, “[t]he phrase ‘without regard to whether such income is taxable income’ in 11 U.S.C. § 101(10A)(A) reflects Congress’ judgment that the Internal Revenue Code’s method of determining taxable income does not apply to the Bankruptcy Code’s calculation of CMI.” 552 F.3d 1124, 1132-1133. “Moreover, where Congress wishes to define a term in the Bankruptcy [C]ode by reference to the Internal Revenue Code, it clearly knows how to do so.” *Id.*

B. Social Security.

Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011). Observing that “nothing in *Lanning* suggests that bankruptcy courts may ignore the statutory definition of disposable income,” the Sixth Circuit held with those post-*Lanning* courts that exclude from the calculation of projected disposable income in Section 1325(b) the items excluded from CMI in Section 101(10A)(B), including Social Security benefits. 634 F.3d at 346.

C. Unemployment compensation. Recognizing sound arguments for the competing view, Judge Bonapfel determined that the better argument is that unemployment compensation is not excluded from CMI under Section 101(10A)(B). *In re Rose*, 2010 WL 2600591 (Bankr. N.D. Ga. May 12, 2010) (Bonapfel, J.).

The determinative factor for this Court is the Court's view that congress most likely used the term, "benefits received under the Social Security Act," in the same way that people ordinarily think of "Social Security benefits." In this Court's judgment, people generally think of "Social Security benefits," as referring to retirement, disability, and other payments that come through the program that is administered by the Social Security Administration and that is called "Social Security;" people usually do not think of unemployment benefits that are administered by a State agency as being a "Social Security benefit" or as being a part of "Social Security." This Court's assessment is that Congress used the term in this ordinary sense. 2010 WL 2600591 at *1 n. 3.

IV. The Applicable Commitment Period ("ACP")

Under Section 1325(b)(1)(B) requires a Chapter 13 debtor to contribute "all of the debtor's projected disposable income to be received in the applicable commitment period (ACP) beginning on the date that the first payment is due under the plan ... to make payments to unsecured creditors under the plan." Section 1325(b)(4) states that the APC for above-median debtors is "not less than 5 years" unless the plan provides for payment in full of all allowed unsecured claims over a shorter period.

A. ACP is a temporal term.

In re Tennyson, 611 F.3d 873 (11th Cir. 2010). The debtor was above median but reported negative disposable income on Form B22C. The debtor proposed a three-year plan, and the Chapter 13 Trustee objected on the ground that 11 U.S.C. § 1325(b)(4) requires above-median debtors to remain in the bankruptcy case for at least five years unless all claims are paid in full. The Eleventh Circuit examined the phrase "applicable commitment period," noting that "applicable" and "commitment" modified period, the "core substance of the term," the plain meaning of which denotes a period of time or duration. 611 F.3d at 877. ACP "at its simplest is a term that relates to a certain duration, and based on its presence in § 1325, it is a duration relevant to Chapter 13 bankruptcy." *Id.* "The modifier 'commitment' then reveals that 'applicable commitment period' is a

duration to which the debtor is obligated to serve.” *Id.* The Eleventh Circuit construed “applicable” to reflect that there are alternate “commitment periods” depending on the debtor’s classification as above or below median. *Id.* Noting the use of “shall” in Section 1325(b)(4), the Court concluded that the plain reading “indicates that an above median income debtor, such as Tennyson, is obligated to form a bankruptcy plan with an ‘applicable commitment period’ of no less than five years, unless his secured debts are paid in full.” *Id.*

Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011). After extensive analysis, the Sixth Circuit held that the ACP is a temporal requirement and applies even to above-median debtors who have zero or negative projected disposable income:

We believe it is now clear that, where each competing interpretation of a Code provision amended by BAPCPA is consistent with the plain language of the statute, we must, as the Supreme Court did in *Lanning* and *Ransom*, apply the interpretation that has the best chance of fulfilling BAPCPA’s purpose of maximizing creditor recoveries. Here, that interpretation is the one under which the applicable commitment period applies to all debtors facing a plan objection, even those who have zero or negative disposable income. Although this interpretation may not benefit creditors in all cases to a greater extent than the competing interpretation, although it may in certain circumstances lead to unfortunate situations in which some debtors will remain in Chapter 13 for no good reason, and although our interpretation could be undermined by a subsequent controlling interpretation of § 1329(a) [as to whether the phrase “completion of payments” has a temporal connotation], this does not appear to us to be a situation where our interpretation of the statute [would lead to patently absurd consequences not intended by Congress]. On balance, we conclude that applying the applicable commitment period to debtors with zero or negative projected disposable income would best serve BAPCPA’s goal of ensuring that debtors repay creditors the maximum amount they can afford. *Id.* at 356-357.

- B. Negative income results in no ACP.** The Bankruptcy Court in *In re Reed*, 2011 WL 2680938 (Bankr. D. Ore. Aug. 9, 2011), construed the Ninth Circuit’s decision in *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008). *Kagenveama*, which had adopted the mechanical approach to calculating projected disposable income overruled by *Lanning* also held that when there is no projected disposable income, there is also no ACP during which the plan must be held open. 541 F.3d at 876. *Reed* held that this portion of *Kagenveama* was not overruled by *Lanning*, which did not interpret ACP.
- C. Post-confirmation modification and ACP.** As the Sixth Circuit noted in *Baud v. Carroll*, there is a tension between the applicable commitment period in Section 1325(b)(4) and the ability to modify a plan under Section 1329 after confirmation but before the completion of payments. *Tennyson* also contemplated post-confirmation modification:

“...(A)llowing Tennyson to confirm a plan for less than five years would deprive the unsecured creditors of their full opportunity to recover on their claims from Tennyson by way of post confirmation plan modifications. *See* 11 U.S.C. § 1329. For example, if Tennyson’s projected disposable income were to increase to a positive number in years four or five, § 1329 would allow unsecured creditors to file for a plan modification. However, if Tennyson obtained confirmation of a three-year plan, unsecured creditors would be deprived of an opportunity to collect on their unsecured claims since Tennyson’s plan would have terminated prior to year four. The Congressional intent to make sure that debtors repay creditors up to their maximum ability would be contravened by permitting confirmation of a bankruptcy plan for less than five years when unsecured claims have not been paid in full. 611 F.3d at 879.

In re Buck, 443 B.R. 463 (Bankr. N.D. Ga. 2010) (Diehl, J.). Citing a post-confirmation loss of employment, the joint debtors sought modification of the plan term

from 60 months to 36 months. The case was confirmed as above median with an ACP of 60 months. Judge Diehl relied on the above language in *Tennyson*: “While *Tennyson* was not decided in the context of plan modification, the Eleventh Circuit clearly stated that the Congressional intent behind BAPCPA was to require above-median income debtors to remain in their plans for five years.” 443 B.R. at 467. The Court also held that *Tennyson’s* underlying rationale in ruling that ACP is a temporal concept “was that above-median income debtors must remain in their Chapter 13 plans for a sixty month time period to allow creditors to have the benefit of upward changes in income...This reasoning would be completely undermined if Debtors were allowed to modify their plans to shorten that period.” *Id.* at 470.

In re Heideker, 2011 WL 2432913 (Bankr. M.D. Fla. June 2, 2011). The Court addressed four proposed post-confirmation modifications, including three above median cases, with dividends to unsecured creditors ranging from 2.8% to 23.9%. After confirmation, each debtor moved to modify the confirmed plan to pay the plan off in one lump-sum payment, without paying unsecured creditors in full. The Court ruled that the ACP is a durational requirement, citing the language from *Tennyson* above. The court denied the modifications, reasoning that although *Tennyson* did not involve plan modification, its rationale compels the conclusion that the ACP is applicable to plan modifications. Thus, where a trustee objects to a proposed plan modification, a debtor cannot shorten the term below the ACP unless unsecured claims are paid in full.

In re Mattson, BAP No. WW-11-147 8-JUHKi (9th Cir. BAP April 5, 2012) Above median Debtors filed a Chapter 13 Plan proposing to pay \$150 per month for 60 months. Two months after the plan was confirmed, the Debtors filed amended Schedules I and J reflecting additional income and moved to modify their plan to increase their monthly

payments to \$1000 per month and to decrease their plan period to 36 months. Although the payout increased from \$4,000 to \$30,000, the unsecured creditors were still not paid in full. The Chapter 13 Trustee objected to the Debtor's motion, arguing that under the 9th Circuit's opinion in *Kagenveama* (541 F. 3d 868 (9th Cir. 2008)), the debtors were not permitted to seek a deviation from the 60 month ACP. The Bankruptcy Court evaluated the motion to modify using the good faith analysis in *In re Sunahara*, 326 BR 768 (9th Cir. BAP 2005) and required the debtors to show that there was a substantial unanticipated change in the debtors circumstances that correlated with the change in the plan. The Court held that the change in circumstances, the Debtor's increased income, did not correlate with shortening the term of their plan and denied the Debtor's motion. The BAP affirmed, and likened the substantial change requirement of the lower court to "simply another factor that may be considered under a totality of the circumstances approach" when determining good faith. The BAP set forth the good faith analysis utilized in *In re Goeb* 675 F.2d 1386 (9th Cir. 1982), which includes a review of whether the debtor has "unfairly manipulated the bankruptcy code," and found that the Debtors failed to satisfy the good faith analysis because there was no legitimate reason for shortening the length of their plan. The BAP also made clear that the "res judicata doctrine does not apply to plan modifications" and that "the continued absence from section 1329(b)(1) of any reference to section 1325(b) is conclusive as to whether a debtor may modify his or her plan to reduce the term below the applicable commitment period required for an original plan." Citing *In re Ewers*, 366 BR 139 (Bankr. D. Nev. 2007), both the Bankruptcy Court and the BAP acknowledged that a debtor's circumstances may justify a reduction in plan length.

IV. Household Size: Appropriate household number for means test purposes.

In re Morrison, 443 B.R. 378 (Bankr. M.D.N.C. 2011), discussed the three common approaches for determining a debtor's household size: (1) the "heads on beds" approach, which uses the Census Bureau definition; (2) the "IRS dependency approach," which limits household size to individuals the debtor can claim as a dependent; and (3) the "economic unit" approach, which includes any individuals living in the same economic unit. *Morrison* agreed with the economic unit approach, which falls between the other two approaches in scope. Under this approach, "a household will include individuals who are financially dependent on a debtor, individuals who financially support a debtor, and individuals whose income or expenses are inter-mingled or interdependent with a debtor." 443 B.R. at 386. As application is necessarily determined on a case-by-case basis, the Court listed seven possible factors for consideration. *Id.* at 388. The result in *Morrison* was a finding that the debtor and her boyfriend constituted a single economic unit because they shared a significant amount of their income and expenses, and notwithstanding the fact that they had no joint debt or joint financial accounts and filed separate tax returns. *Id.*

VI. Deduction for Secured Payments on Collateral to be Surrendered

Section 707(b)(2)(A)(iii)(I) allows a debtor to deduct "amounts scheduled as contractually due to secured creditors." This section is incorporated into the disposable income in Section 1325(b).

A. Chapter 7 cases.

In re Rudler, 576 F.3d 37 (1st Cir. 2009). The debtor indicated in his Statement of Intention that he would surrender his home, but deducted \$4,000 from his monthly disposable income on the means test form for two mortgages secured by the property. The Court declined to consider Congressional intent because it found the statutory language to be unambiguous. The First Circuit examined three aspects of Section 707(b)(2)(A)(iii)(I). First, the section refers to contracts "scheduled as contractually due." The court reasoned:

[E]ven if the debtor plans to surrender a house on which he is paying a mortgage, he will at that point still have “contractually due” payments that are “scheduled” to be paid during the upcoming months. This is so whether or not the debtor has already defaulted on the mortgage by failing to make such payments in previous months because the fact of default does not release him from the ongoing obligation. 576 F.3d at 45.

The Court also referred to the means test form, which instructs the debtor to provide current information for all secured debts. Second, the Court examined the phrase “following the date of the petition” and concluded that it did not contemplate a “forward-looking” analysis of the expenses as they will exist in the future. The First Circuit found the phrase to be “forward-looking only in the sense that the required *current* calculation is for debts that are scheduled into the future.” *Id.* at 48. Finally, the UST argued that once title to the property has been surrendered, future payments will no longer be “on account of secured debts.” The Court replied that the pertinent issue was the status of the loan at the time the means test calculation was performed, not at the time the loan is surrendered. *Id.* at 49. Thus, the First Circuit refused to examine congressional intent because it held that the language in the statute was not ambiguous, and literal application would not produce absurd results. *Id.* at 50. The Court found “nothing absurd about Congress’s choice to adopt a rigid formula.” *Id.*

***In re James*, 414 B.R. 901 (Bankr. S.D. Ga. 2008) (Davis, J).** Prior to filing, the debtor abandoned her home and ceased making mortgage payments. The debtor claimed a \$2033.50 secured debt deduction on the means test form. Following the plain language of the statute, Judge Davis found no dispute that the debtor was still contractually obligated to make the payments at the time the means test form was filed, and her intent to surrender the property did not affect the

debtor's contractual obligations. 414 B.R. at 908-909. The Court ultimately granted the United States Trustee's motion to dismiss for abuse, under the totality of circumstances test.¹

In re Walker, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006) (Drake, W.H.). The debtors' statement of intent proposed surrender of collateral – their residence and a motor vehicle – but they deducted the monthly installment payments contractually due to the secured creditors. Judge Drake concluded that the plain language of the statute permits deduction of these amounts from current monthly income (“CMI”). “If the intent were to permit only those payments that would actually be made in the post-petition period, Congress could have specified that the payments to be deducted are only those payments to be made on secured debts that the debtor intends to reaffirm.” 2006 WL 131425 at *4. The Court reasoned that a debtor's contractual liability is not eliminated upon the surrender of the collateral, and the debtor may eventually decide to amend the statement of intention to provide for reaffirmation or redemption of the property. *Id.* The decision was also based upon a finding that the means test is backward-looking:

Congress chose to base the means test on historic income and expense figures that are in effect on the petition date, as opposed to figures that may change with the passage of time or with a change in the debtor's lifestyle. This choice indicates an intent to

¹ Even if a Chapter 7 debtor “passes” the means test, the case may still be dismissed if a court determines under 11 U.S.C. § 707(b)(3) that (A) the debtor filed the petition in bad faith, or (B) the “totality of the circumstances ... of the debtor's financial situation demonstrates abuse.” Courts apply the same fact-intensive analysis employed prior to the enactment of BAPCPA to consider whether a case should be dismissed for bad faith or under the totality of circumstances. *See, e.g., In re Rudmose*, 2010 WL 4882059 (Bankr. N.D. Ga. Nov. 8, 2010) (Hagenau, J.); *In re Cribbs*, 387 B.R. 324, 335 (Bankr. S.D. Ga. 2008) (Davis, J.); *In re Walker*, 383 B.R. 830, 837 (Bankr. N.D. Ga. 2008) (Drake, W.H.). The totality of circumstances analysis includes, but is not limited to, consideration as to whether: (1) the bankruptcy filing was precipitated by an unseen catastrophic event such as illness or unemployment; (2) the debtor is eligible for chapter 13 relief; (3) there are non-bankruptcy remedies available to the debtor; (4) the debtor can obtain relief through private negotiations; (5) the proposed budget is excessive or unreasonable; (6) the debtor has a stable source of future income; (7) the debtor could provide a meaningful distribution in a Chapter 13 case; and (8) the debtor's expenses could be reduced significantly without depriving the debtor or dependents of necessities. Using this analysis, the court concluded that the debtors had the ability to pay a meaningful dividend to unsecured creditors considering the amount that the debtors were paying to support their college-age children. *In re Walker*, 383 B.R. at 837.

apply the means test to measure the debtor's need for Chapter 7 relief at the time of the filing, without regard to future events or relief that would be available under Chapter 7. For example, the starting point for the means test, the debtor's CMI, is the debtor's income for the six months prior to filing. If the debtor becomes unemployed the day he files his petition, the debtor's CMI is not decreased by the amount of salary lost by the debtor simply because it is more accurate to assume that the debtor will make less unemployed than he did during the six months prior to the filing. Similarly, the standard expenses that may be deducted by the debtor, as stated in the IRS collection standards, are the expenses in effect on the petition date, rather than those expenses that will be in effect during the sixty months following the filing of the petition. Congress chose to use fixed expenses for the entire sixty months, without regard to the fact that the IRS collection standards will surely be revised over the next five years and without regard to the debtor's actual expenses. When applying a test that essentially judges the debtor's financial situation as it exists at the time of filing, it would be inconsistent to consider post-petition events to determine whether the debtor is entitled to deduct secured debt payments.

Id. at *5.

***In re Thompson* 457 BR 872 (Bankr. M.D. Fla August 29, 2011)** Above median debtors claimed deductions for two mortgages on property they intended to surrender in their Chapter 7 bankruptcy, creating “no presumption of abuse” on their Means Test. The UST argued, and the court held that the “payments on loans secured by the (property being surrendered) are not actually-incurred expenses and do not meet the statutory definition of ‘payments on account of secured debts.’” 457 BR at 877.

***In re Rivers* Case No. 3:11-bk-2440-PMG (Bankr. MD Fla March 12, 2012)** An above median debtor claimed an expense on her Form 22A for a mortgage on a home she was surrendering. The UST sought to dismiss the case under 707(b)(1), (2), and(3). The UST argued the inclusion of the deduction for the mortgage payment should not be permitted because the debtor is surrendering the property. The court found that Section 707(b) provides a two tiered

analysis for determining abuse. In evaluating the first tier, the Means Test, the court found that the “Supreme Court decisions in *Lanning* and *Ransom* do not affect the deductions that a Chapter 7 debtor may claim under 707(b)(2) of the Bankruptcy Code.” *Lanning* and *Ransom* are both Chapter 13 cases, and the Means Test in a Chapter 7 serves a different purpose as a “screening mechanism to determine whether a chapter 7 proceeding is appropriate” by providing a snapshot of a debtor’s financial situation as of the petition date. The second tier under section 707(b)(3) is an assessment of the of the totality of the circumstances of the debtor and presents additional “broad, flexible review that encompasses any factors that are relevant to the debtor’s financial condition.” *In re Riley* 2010 WL 3718017 (Bankr. D. Mass). Upon review of the Debtor’s particular circumstances, (the number of dependants, her general health, lack of improper conduct) the court found that granting relief would not be an abuse of the provisions of Chapter 7.

B. Chapter 13 cases.

In re Darrohn, 615 F.3d 470 (6th Cir. 2010). The debtors’ Form B22C reflected their income during the six months prior to the bankruptcy filing. During that time, one of the debtors had been unemployed for 90 days but obtained a job with an annual salary of \$83,000. The combined monthly income on Form B22C was significantly less than the amounts listed on Schedule I. Form B22C also included deductions of more than \$2,700 for monthly mortgage payments on a home the debtors proposed to surrender, resulting in negative monthly disposable income. Based upon the recent decision in *Lanning*, the Circuit Court held that Form B22C should have accounted for changes in the debtors’ anticipated monthly income and expenses. 615 F.3d at 475-476. The Court found that *Lanning* applied equally to changes in income and expenses, including the bankruptcy court’s determination on the deduction for mortgage payments. *Id.* at 477.

In re Turner, 574 F.3d 349 (7th Cir. 2009). The debtor’s Chapter 13 plan proposed to abandon his home to the mortgagee, but subtracted monthly mortgage payments of \$1,521 for the property

on Form B22C. Judge Posner, writing for the majority, found that the plan provision “would have the same effect as foreclosure in canceling the mortgage,” and this would occur before the debtor was required to make any payments to his unsecured creditors under an approved Chapter 13 plan. 574 F.3d at 351. Judge Posner provided the following reasoning for adopting the forward-looking approach, rather than a mechanical one:

Since the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes them as possible, we cannot see the merit in throwing out undisputed information, bearing on how much the debtor can afford to pay, that comes to light between the submission and approval of a plan of reorganization. Sometimes as in this case the creditors will benefit from the new information. But in other cases it will be the debtor ... because the expenses that are deductible in determining his disposable income are as likely to rise unexpectedly between the dates of submission and approval as to fall *Id.* at 355-356

VII. Other Income and Expense Issues

A. 401(k) loan repayment.

In re Lasowski, 575 F.3d 815 (8th Cir. 2009). The above-median Chapter 13 debtor included a deduction of \$150 on her Form B22C, the current monthly amounts the debtor made toward repayment on a loan from her 401(k) retirement account. The loan repayments would be reduced after six months and would cease after thirteen months. The Chapter 13 Trustee objected that the debtor should have listed the prorated amount of the total loan obligation over a 60-month period. The Eighth Circuit held that the Bankruptcy Court should have taken this change into account when determining projected disposable income because this was a change in financial circumstances that was reasonably certain to occur.

In re Egebjerg, 574 F.d 1045 (9th Cir. 2009). The Ninth Circuit held that a Chapter 7 debtor could not deduct 401(k) loan payments from CMI. The Court construed Section 707(b)(2)(A)(iii), which allows debtors to deduct average monthly payments on account of “secured debts” and determined that the obligation is not a “debt” or “claim” as those terms are used in the Bankruptcy Code. The debtor is essentially repaying a debt to himself. 574 F.3d at 1049. The Court also rejected the debtor’s contention that the repayments could be deducted as an “Other Necessary Expense” under Section 707(b)(2)(A)(ii). That section refers to categories specified by the Internal Revenue Service, and 401(k) repayments do not fit into any of the listed categories in the Internal Revenue Manual. Finally, the court rejected the argument that the deductions should be allowed as “special circumstances” under Section 707(b)(2)(B). The debtor testified that he used the loan proceeds to pay off bills in the hope of avoiding bankruptcy. In the Ninth Circuit’s view, “if the original unsecured consumer obligation could not be considered a special circumstance, it would seem problematic to find ‘special circumstances’ for the 401(k) loan that merely replaced these debts.” *Id.* at 1053.

In re Cribbs, 387 B.R. 324 (Bankr. S.D. Ga. 2008) (Davis, J.). The Chapter 7 debtors argued that their repayment of a 401(k) loan constituted “special circumstances” under Section 707(b)(2)(B) that justified rebuttal of the presumption of abuse. Judge Davis held that the debtors’ mere obligation to reimburse their 401(k) plan was not sufficient to constitute special circumstances, “but the circumstances that led to taking that loan may be ‘special’ under § 707(b)(2)(B)(I).” 387 B.R. at 328. Those circumstances were present in this case, where the debtors had borrowed from their 401(k) plan in an effort to repay their debts without resorting to bankruptcy. The repayment was voluntary, but non-manipulative, arising “under circumstances affirmed by clear public policy.” *Id.* at 330.

In re Seafort, Case No. 10-6248, 2012 WL 469723 (6th Cir. Feb. 15, 2012) The court held that the income that becomes available after the debtors have fully repaid their 401(k) loans is “projected disposable income” to be paid to the unsecured creditors and may not be used to fund voluntary 401(k) plans.

B. Ownership of multiple vehicles.

In re Joest, 450 B.R. 381 (Bankr. N.D.N.Y. 2011). The Chapter 13 Trustee objected to the deduction of ownership costs on the means test form for two motor vehicles by an unmarried above-median debtor, contending the second vehicle was not “reasonably necessary” under Section 1325(b)(2). The debtor argued that “reasonably necessary” under that section is defined in Section 1325(b)(3) to be those expenses that are “applicable” to the debtor. On form B22C the debtor deducted (1) \$470 in operation cost deductions for two or more vehicles on line 27, (2) \$422.59 ownership expense on line 28 for the first car, (3) 276.25 on line 29 for the second car, and (4) deducted monthly payments of \$212.75 and \$66.41 for ongoing debt payments on line 47. 450 B.R. at 383-384. With the deductions for the second vehicle disallowed, the Debtor’s projected disposable income would have been \$460.32 per month rather than negative \$26.68 per month. The Bankruptcy Court relied on *Ransom*, reasoning that under that decision, “if a debtor qualifies for a deduction by actually incurring an expense under § 1325(b)(3), then under § 1325(b)(2) that expense *can be deducted from CMI as an amount ‘reasonably necessary to be expended’.*” *Id.* at 389-390 (quoting *Ransom*, 131 S.Ct. at 725). The Court also found that the IRS guidelines for this category did not focus on household size but permitted an allowance of “up to two vehicles.” *Id.* at 389. The Chapter 13 Trustee argued that the Court had the power to independently assess the reasonable need of an expense claimed by an above-median debtor under Section 1325(b)(3); while the Court found this argument attractive, it believed “such an interpretation is out of step with both the plain meaning of the statute and the intent of Congress in adding § 1325(b)(3) as part of BAPCPA’s shaping reform.” *Id.* at 390-392.

In re Carlton, 362 B.R. 402 (Bankr. C.D. Ill. 2007). The Bankruptcy Court overruled the Chapter 13 Trustee's objection to the Debtors' deduction on line 47 of Form B22C for secured payments on three automobiles:

The Trustee argues that, because the ownership deductions based on IRS standards are limited to two vehicles, the secured debt deductions should be limited in the same way. The Trustee does not, however, point to any statutory provision in support of his position.

The Trustee is, of course, correct that the ownership deductions based on IRS standards are limited to two. [H]owever, these standards are just part of the calculation. Secured debt payments are deducted out of the standards and addressed elsewhere—line 47. ...If Congress had wanted to limit the secured debts to be deducted for vehicles to only two such debts, Congress could have done so by expressly saying so at line 47. Congress said no such thing.

Average monthly payments on secured debts for boats, campers, kitchen appliances, furniture, computers, and other electronics are all deductible at line 47. Payments for first, second, and third mortgages are all deductible. Nowhere does the statute state that only two vehicle debts are deductible at line 47. Nowhere is a policy expressed that would allow payment on a boat or camper but disallow a modest payment on a third vehicle for a college student. This Court will not read into the statute any such provision and, accordingly, finds that the Debtors may deduct the average monthly payment for each of their three vehicles at line 47.

362 B.R. at 410-411.

The Court also rejected the Trustee's argument that one of the vehicles, a Cadillac Escalade, was a luxury vehicle that was not reasonably necessary:

That argument is irrelevant in determining whether the Debtors have correctly completed the CMI. For pre-BAPCPA cases and for current cases involving under-the-median-income debtors, expenses used in computing projected

disposable income are set forth on Schedule J and are reviewed under the subjective “reasonably necessary” standard. For BAPCPA cases with over-the-median-income debtors, however, reasonably necessary is specifically defined as those expenses set forth in § 707(b)(2). Section 707(b)(2), allows expenses based on charts, formulae, and some proven actual expenditures.... The Court does not use its own judgment on reasonableness or necessity but, rather, must determine whether a particular expense is allowed by § 707(b)(2). If an expense is allowed under § 707(b)(2), it meets the definition of “reasonably necessary” and no subjective review of the expense by the Court is permitted. This Court cannot disallow an expense otherwise allowable under § 707(b)(2) simply because it thinks the expense is unreasonable or unnecessary any more than this Court can allow expenses not set forth in § 707(b)(2) simply because it deems the expenses reasonable and necessary.

Id. at 411 (citation omitted).

In re Welsh, BAP No. MT-10-1465-PePaH, (9th Circ BAP February 17, 2012) Above median Debtors filed a Chapter 13 deducting expenses for secured debts that included two ATVs, a motor home, and three vehicles. The Chapter 13 Trustee objected to the calculation of their B22C, arguing that the court wrongly construed the good faith requirement and that the debtors should not be permitted to take deductions for unnecessary luxury items. The court found that the Means Test of Section 707(b)(2)(A) “allows a debtor to deduct from current monthly income payments on secured debts, averaged over sixty months...regardless of whether the collateral is necessary.”

VIII. Special Circumstances

- A. **Types of typical special circumstances.** Where abuse is presumed under the means test, Section 707(b)(2)(B) allows a Chapter 7 debtor to rebut the presumption only “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.” The debtor is required to itemize each additional expense or adjustment, providing documentation and a detailed explanation of the special circumstances and attest to the accuracy and necessity of these items.

- **401(k) loans.** Compare *In re Egebjerg*, 574 F.d 1045 (9th Cir. 2009) (loan incurred to pay bills in the hope of avoiding bankruptcy could not be considered a special circumstance) and *In re Cribbs*, 387 B.R. 324 (Bankr. S.D. Ga. 2008) (Davis, J.) (under the extraordinary circumstances present in this case, debtors’ repayment of 401(k) loan constituted special circumstances). See discussion in part V, *supra*.
- **Student loans.** Compare *In re Knight*, 370 B.R. 429 (Bankr. N.D. Ga. 2007 (Bonapfel, J.) (holding chapter 13 debtor may adjust projected disposable income downward to account for expenditures required by special circumstances) and *In re Lightsey*, 374 B.R. 377, 381 n. 3 (Bankr. S.D. Ga. 2007) (Davis, J.) (rejecting “the notion that student loan payment obligations can be utilized to adjust a debtor’s expenses upward to reduce net income and avoid the means test threshold because they are non-dischargeable debts).

B. Applying Special Circumstance argument in a Presumed Abuse Case

- *In re Lightsey*, 374 B.R. 377 (Bankr. S.D. Ga. 2007) (Davis, J.). The U.S. Trustee moved to dismiss the case for presumed abuse, taking into account the CMI of the debtor and her non-debtor spouse. The debtor argued that special circumstances should apply because her filing was precipitated by a garnishment on a deficiency claim for a motor vehicle she incurred during a prior marriage when she relied on her then-spouse to make the payments. The debtor argued that it would be inequitable for her case to be dismissed, or be forced into a Chapter 13 case in which her current spouse would be compelled to assist in paying a debt from a previous marriage for a vehicle which she no longer owns. Judge Davis found this argument compelling but

held that the special circumstances exception “does not permit every conceivable unfortunate or ‘unfair’ circumstance to rebut the presumption of abuse, but includes only those circumstances that cause higher household expenses or adjustments of income ‘for which there is no reasonable alternative,’ i.e., they are unforeseeable or beyond the control of the debtor. *Id.* at 381-382 (citations and footnotes omitted).

**STATEMENT OF THE U.S. TRUSTEE PROGRAM'S POSITION ON LEGAL ISSUES
ARISING UNDER THE CHAPTER 7 MEANS TEST**

Following is a line-by-line summary of Form 22A and various recurring disposable income issues likely to arise in chapter 7 under the BAPCPA provisions of 11 U.S.C. § 707(b). The summary gives the position of the United States Trustee Program (USTP) on these issues. For ease of reference, the USTP positions are listed in summary fashion without citation to legal authority. The referenced lines are those on the Form 22A. Unless a circuit court has decided an issue to the contrary, United States Trustees should, absent unusual circumstances, maintain these positions when interpreting section 707(b).

Line 1A, Declaration of Disabled Veterans

- Must have at least 30% disability from service or released/discharged due to disability.
- Debt primarily incurred during period of active duty/homeland defense activity.
- Only if BOTH conditions apply is debtor exempt from further completing Form 22A.

Line 1B, Declaration of Non-Consumer Debts

- Less than 50% of total scheduled debt was incurred for personal, household or family purposes.
- Purpose of debt is judged at the time the debt was incurred.
- Home mortgages are typically consumer debt.
- Most tax debts are not typically consumer debt.

Line 1C, Declaration of Reservists and National Guard Exclusion

- Must be either a member of a reserve component or National Guard; AND
- Must have been on active duty or performing a homeland defense activity for at least 90 days.
- Exclusion applies after the minimum 90 day period of service, and for 540 days after the service ends.
- Exclusion applies only to cases filed between December 19, 2008 and December 18, 2011, unless extended by Congress.

Line 2, Filing Status

- The only four options permitted are those listed on the Form 22A.
- No option for legally separated but filing joint case; joint cases generally should be treated as a single household for means test purposes.
 - May be asserted as special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
 - May be considered by the UST when stating the reasons under section 704(b)(2) that a motion to dismiss is not appropriate.

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- Information should be consistent with household size on Schedule I.

Line 3, Gross wages, salary, tips, bonuses, overtime, commissions.

- Includes pay/shift differentials.
- Includes income, whether or not taxable.
- Figures are gross amounts, before any deductions.

Lines 4 & 5, Business and real property income and expenses.

- Must be "ordinary and necessary," i.e., a reasonable operating expense.
- Depreciation is not included.
- Line "c" cannot be a negative number.

Line 6, Interest, dividends, and royalties.

- Includes automatic dividend reinvestment program.

Line 7, Pension and retirement income.

- Does not include Social Security payments.
- Includes all other retirement, including government, 401(k), and IRA.

Line 8, Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.

- Includes payments made monthly, quarterly, or annually.
- Includes payments regardless of written agreement with contributor.
- Includes payments from roommate, partner, parent, or relative, regardless of whether living with debtor.
- Includes payments made directly to creditors on behalf of debtor, e.g., rent, car, or insurance.
- Does not include payments from non-filing spouse (which are already included as income in Column B).

Line 9, Unemployment compensation.

- Unemployment compensation is not a "benefit under SSA" and should be included; USTP opposes any entry in the boxes to the left of Columns A and B.

Line 10, Income from all other sources.

- Includes net gambling, cash gifts, litigation proceeds, and trust income.
- Includes private disability income.
- Does not include SSA benefits.
- Does not include tax refunds.
- Does not include loan proceeds.
- Whether it meets IRS test for income could be relevant, but whether it is taxable income or non-taxable income is not a factor.

Line 14, Applicable median family income.

- "Applicable state" is state of residence at filing.
- If married and two different households, residence is where most family members reside.
- If no plurality of family members are in any one state, use state of spouse with highest income.
- "Household size" is the debtor, debtor's spouse, and any dependents that the debtor could claim under IRS dependency tests. The USTP uses the same IRS test for the definition of both "household" and "family." IRS Publication 501 explains the IRS tests for "dependent."
- The USTP departs from the IRS dependent test (as does the IRS when it determines family size for collection purposes) in cases justifying "reasonable exceptions" (e.g. a long standing economic unit of unmarried individuals and their children). However, if an individual is counted as a family member for median income purposes, that individual's income should be included as income on Part II of Form 22A.

Line 17, Marital adjustment.

- All income of the non-debtor spouse should be included, except the following expenses of the non-debtor spouse may be excluded:
 - withholding taxes;
 - student loan payments;
 - prior support obligations;
 - debt payments on which only the non-filing spouse is legally liable and where the consideration for the loan exclusively benefits the non-filing spouse. (Credit cards used to pay for household expenses may not be deducted on Line 17).

Line 19A, National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.

- The following expenses are covered by the National Standards and may not be counted separately elsewhere:
 - apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair);
 - meals at home or away (unless unreimbursed business expenses);
 - housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies);
 - personal care products and services (includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances)
 - miscellaneous personal expenses.
- National Standard amount that may be claimed is based on the debtor, the debtor's dependents, and the debtor's spouse in a joint case if the spouse is not otherwise a dependent.

Line 19B, National Standards: health care.

- National Standard amounts may be claimed based on debtor, debtor's dependents, debtor's spouse, and the age of household members.
- Actual mounts expended by the debtor exceeding the National Standards that are required for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, which are not reimbursed by insurance or paid by a health savings account, may be claimed on line 31.

Line 20A, Local Standards: housing and utilities; non-mortgage expenses.

- Based on county of residence; see line 14 for resolving multiple residences.
- The following expenses are covered by the Local Standards and may not be counted elsewhere:
 - maintenance and repair;
 - homeowner association dues;
 - condominium fees;
 - gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning;
 - basic telephone and cell phone service.

Line 20B, Local Standards: housing and utilities, mortgage/rent expense.

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- Based on county of residence; see line 14 for resolving multiple residences.
- The following are included in the Local Standard and may not be counted elsewhere, except as provided on lines 42 and 43:
 - principal and interest on mortgage loan;
 - rent;
 - homeowners/renters insurance;
 - local property taxes.
- Line 20B(b) is the same figure as line 42 for house payments.
- Debtor may not "double dip," that is take the full amount of the Local Standard for mortgage/rent on line 20B(a) and then fail to deduct the monthly mortgage payment on line 20B(b). The overall effect of disallowing double-dipping is to allow the debtor to take only the higher of the actual mortgage payment or the Local Standard.
- If the home is being surrendered, the debtor may not include the mortgage payment on lines 42 and 43, and may not deduct the mortgage payment on line 20B(b). The debtor may, however, claim the full amount of the Local Standard for housing on line 20A.
- Debtors and joint debtors are entitled to only one Local Standard mortgage/rent payment, even if maintaining two separate households.
- Vacation homes do not entitle a debtor to the Local Standard on line 20B.
- Debtor may not claim a Local Standard on line 20B when the debtor:
 - is and has been living with a friend or relative for an extended period of time at no cost;
 - is and has been living in military or other employer-paid housing.

Line 21, Local Standards: housing and utilities; adjustment.

- This line is often used improperly by debtors to claim housing expenses in excess of the IRS standards; USTP policy is to object to that use of line 21.
- This line is occasionally used by debtors who claim that Form 22A incorrectly captures the separation of the IRS housing Local Standard into two components, a mortgage component and a non-mortgage component; the USTP will object to that use of line 21.

Line 22A, Local Standards: transportation, vehicle operation/public transportation expense.

- Based on metro area or region.
- See line 14 to resolve multiple residences.
- The Local Standard for vehicle operation may be taken when the debtor owns, leases, or pays the operating expenses on a vehicle.
- The Local Standard for vehicle operation for zero vehicles may be taken if the debtor does not own, operate, or pay operating expenses on any vehicle.
- A vehicle must be "street ready" and licensable.
- A vehicle designed without an engine does not qualify, e.g., camper or trailer.
- Debtors located outside of the Fifth, Seventh, and Eighth Circuits who operate

vehicles not subject to a loan or lease may deduct an additional \$200 if the vehicle is owned by the debtor, and is older than six (6) model years or has more than 75,000 miles.

Line 22B, Local Standards: transportation, additional public transportation expense.

- If debtor claims vehicle operating expense for one or more vehicles on Line 22A, debtor may only claim additional public transportation expense if reasonable and necessary for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, or for the production of income.
- If additional public transportation expense is applicable, it is capped by Local Standard amount for public transportation.

Lines 23 & 24, Local Standards: transportation ownership/lease expenses.

- Outside the Fifth, Seventh, and Eighth circuits, debtor cannot claim the vehicle ownership expense if the debtor does not have a secured loan or a lease on the vehicle.
- In the Fifth, Seventh, and Eighth circuits debtor may claim this expense if the debtor owns a vehicle regardless of whether the debtor has a loan or lease payment. However, if the debtor owns a vehicle free and clear the USTP position is that the lack of any actual ownership expense may be considered in determining whether the case constitutes an abuse under the totality of the debtor's financial circumstances pursuant to section 707(b)(3)(B).
- If the vehicle is being surrendered without replacement, the debtor may not claim the expense. *But see* discussion regarding line 42.
- If the vehicle is borrowed, the debtor may not claim the expense.
- Debtor may not "double dip," that is take the full amount of the vehicle ownership expense on line 23(a) and then fail to deduct the monthly lien payment on line 23(b). The overall effect is to allow the debtor to take the higher of the actual loan or lease payment and vehicle ownership expense.
- A debtor whose household contains a single driver is generally entitled to an ownership expense for only one vehicle.

Line 25, Other Necessary Expenses: taxes.

- Based on monthly amount of actual taxes owed, not taxes withheld.
- Includes FICA, Social Security, Medicare, state and local taxes.
- Non-debtor spouse's taxes is not included if "backed out" on line 17.

Line 26, Other Necessary Expenses: involuntary deductions for employment.

- Includes retirement, union dues, uniform costs, work shoes.
- Does not include voluntary 401(k) contributions, voluntary 401(k) loan repayments,

- or other voluntary retirement or profit sharing deductions.
- Does not include United Way or charitable contributions.
- Does not include elective insurance.

Line 27, Other Necessary Expenses: life insurance.

- Includes only amounts for term insurance on the debtor's life.
- If the policy is whole life, debtor must determine what portion of the premium is attributable to term coverage.
- Does not include premiums on policies for non-debtor spouse or children.

Line 28, Other Necessary Expenses: court-ordered payments.

- Includes the current monthly amount of support and alimony, not any past due amounts, which are entered on line 44.
- Does not include purely voluntary amounts for which there is no legal obligation.

Line 29, Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

- Employment education must be as a condition of employment.
- Expenses for challenged children must be for "health or welfare."
- Expenses for challenged children cannot be otherwise provided by public school system.
- Expenses for challenged children cannot be already included on line 30 or 38.

Line 30, Other Necessary Expenses: childcare.

- These are actual expenses only.
- Includes babysitting, nursery school, daycare, preschool.
- Premium daycare may be permitted, depending on the justification.
- May not be permitted if one parent is "stay at home;" depends on the circumstances.

Line 31, Other Necessary Expenses: health care.

- Includes only unreimbursed, out-of-pocket expenses, exceeding the National Standard amounts provided for at line 19B, including items traditionally reimbursable through a flexible spending or "cafeteria" medical saving plan. For example:
 - deductibles
 - medications
 - therapy
 - co-pays
- Does not include payments for health insurance or health savings account; those are

covered by line 34.

- Does not include elective or cosmetic surgery.
- May not duplicate items on line 34.

Line 32, Other Necessary Expenses: telecommunication services.

- Does not include basic phone or cell service, which is included in the Local Standards on line 20A.
- Pagers, call waiting, long distance, caller ID, and internet may be included, depending on amount and circumstance; test is whether "necessary for health and welfare or production of income."
- Does not include business expenses already deducted on line 4b or 5b.

Line 34, Health Insurance, Disability Insurance, and Health Savings Account Expenses.

- Includes actual expense for debtor, spouse, and dependents.
- Does not include flexible spending account or "cafeteria" medical saving plan contributions, which should be deducted as excess costs on line 31 to the extent they exceed to line 19B IRS standard amounts.

Line 35, Continued contributions to the care of household or family members.

- Includes only actual, not anticipated expenses.
- Family member must live with the debtor or be a member of the debtor's immediate family, i.e., parent, grandparent, sibling, child, grandchild.
- Elderly, chronically ill, or disabled person must be unable to pay the expense.

Line 36, Protection against family violence.

- Include only ongoing expenses related to a real threat.
- Legal costs related to a restraining order may qualify.
- Home security system costs will not qualify in all cases.
- Nature of expense, but not the amount, must be kept confidential by the court.

Line 37, Home energy costs.

- Insert the amount by which the twelve-month average home energy costs exceed line 20A.
- Amount claimed is unlimited, but must be documented.

Line 38, Education expenses for dependent children under 18.

- Includes public or private elementary or secondary education.
- Does not include college or preschool education.

- Child must be under 18 at filing.
- Amount may not exceed \$147.92 per child.
- Expenses must be documented.
- Cannot duplicate expenses claimed on line 30.
- Does not include school lunches, which are included in National Standards on line 19A.
- Can include home schooling expenses.

Line 39, Additional food and clothing expense.

- The USTP Web site breaks out the food/clothing standard for application of the 5 percent limit.
- Expenses must be actual, not merely anticipated.
- Special dietary and allergy restrictions can be covered.
- Documentation is required.

Line 40, Continued charitable contributions.

- Contribution is limited to 15 percent of gross income.
- The USTP position is that charitable contributions under section 707(b) are available to both below median and above median debtors. The Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439 clarifies the Bankruptcy Code to ensure that above-median debtors may make continued charitable contributions.

Line 42, Future payments on secured claims.

- Total all payments coming due in the 60 months following filing and divide by 60.
- In the case of a variable rate loan, use the loan rate in effect on the petition date to calculate the payments.
- In the case of a "balloon" payment within 60 months, use the full amount of the balloon to calculate the average payment.
- Does not include property subject to a lease rather than a loan.
- Includes all secured debt, even "toys" and luxury items. Although the USTP position is to allow secured payments for luxury items on this line, the Program believes that luxury expenses may demonstrate that a petition was filed in bad faith warranting dismissal of the case under section 707(b)(3)(A), and may be considered in determining the totality of the debtors financial circumstances under section 707(b)(3)(B).
- Includes a secured loan payment, even when the value of the collateral is less than the amount of the loan.
- Outside the First Circuit, does not include payments when the debtor intends to surrender the collateral securing the loan.
- In the First Circuit, debtor may include payments on line 42 when the debtor intends

to surrender the collateral securing the loan. However, the USTP position is that the failure of the debtor to continue to make the payments post-petition in surrendering the property may be considered in determining the totality of the debtor's financial circumstances under section 707(b)(3)(B).

Line 43, Other payments on secured claims.

- Does not include arrearage on luxury items; the item must be "necessary for the support of the debtor or dependents."
- See line 42 for a discussion of when the collateral is surrendered.

Line 44, Payments on prepetition priority claims.

- The total of priority debt includes only amounts due as of filing.
- Does not include figures already listed on line 28.

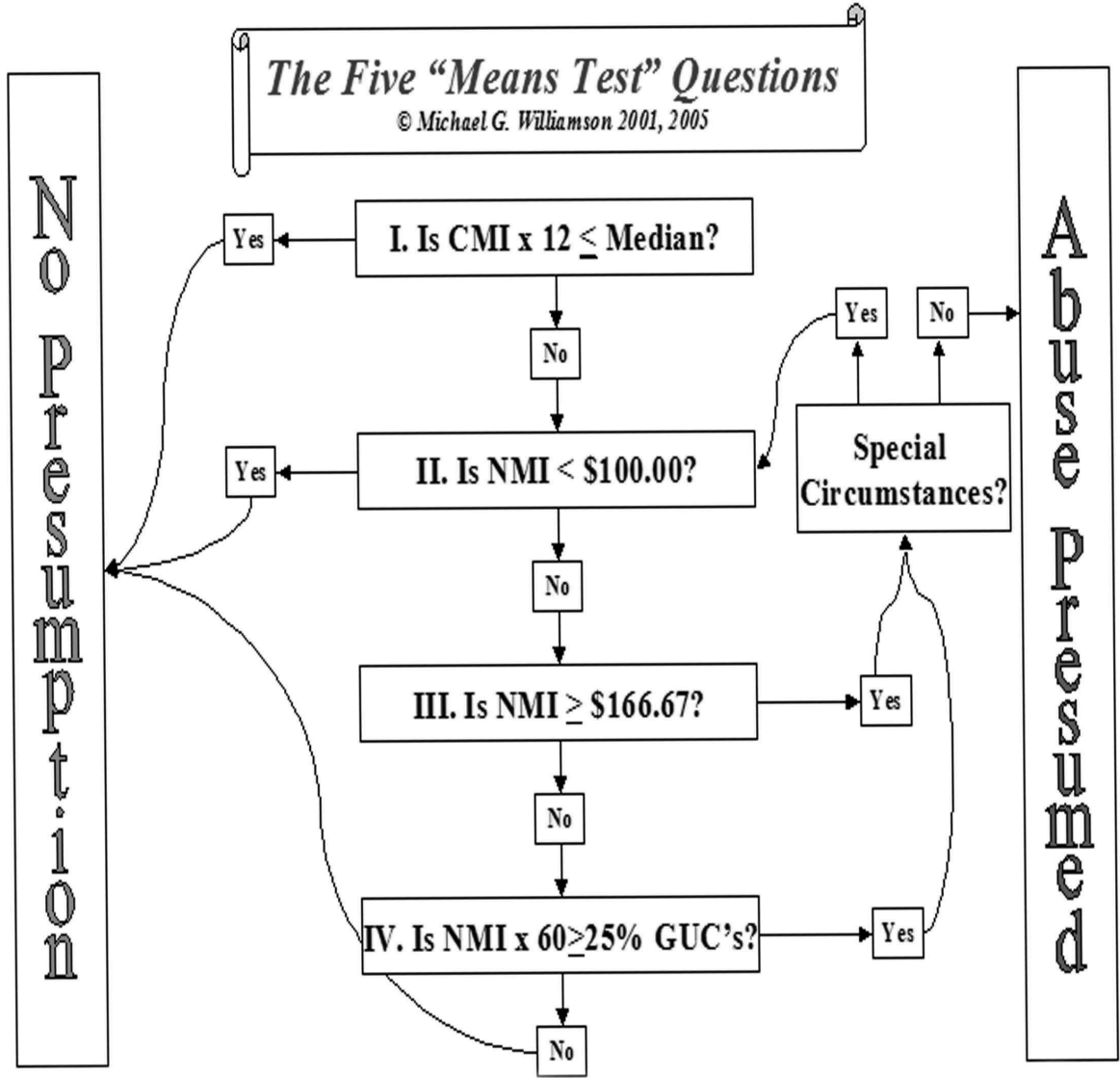
Line 45, Chapter 13 administrative expenses.

- Debtor must project a hypothetical chapter 13 plan payment to calculate the figure on line 45a. The USTP does not insist on mathematical exactitude and allows a reasonable estimation of the hypothetical chapter 13 plan payment.
- Generally the plan payment should be calculated based on the amount of monthly disposable income suggested by the completion of the means test, or shown on Schedules I and J.
- The multiplier for line 45b is found on the USTP Web site by state.

Line 56, Other Expenses.

- Generally this line should be used to assert special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
- Also may provide information for the UST to consider under section 704(b)(2) when determining whether a motion to dismiss is appropriate.
- Should not be included by debtor in calculating disposable income on line 51, or in determining whether the presumption of abuse arises on lines 52-55.

April 23, 2010



454 B.R. 882, 23 Fla. L. Weekly Fed. B 111
 (Cite as: 454 B.R. 882)



United States Bankruptcy Court,
 M.D. Florida,
 Tampa Division.
 In re Andrew Bush **JOHNSON**, Debtor.

No. 8:11-bk-00810-MGW.
 July 8, 2011.

Background: United States Trustee (UST) moved to dismiss debtor's Chapter 7 case as presumptively abusive under the “means” test after eliminating motor vehicle operating expense claimed by debtor for third motor vehicle used by his oldest daughter, on theory that debtor was categorically barred from claiming operating expenses for more than two vehicles.

Holding: The Bankruptcy Court, Michael G. Williamson, J., held that, in applying “means” test to determine whether case was presumptively subject to being dismissed as abusive, debtor was not necessarily barred from claiming operating expense allowance for third car used by his oldest daughter, if expense was necessary to provide for debtor's, or his family's, welfare or production of income.

Motion denied.

West Headnotes

[1] **Bankruptcy 51** **2264(1)**

51 Bankruptcy
 51III The Case
 51III(C) Voluntary Cases
 51k2259 Dismissal
 51k2264 Proceedings; Motion or Sua Sponte Action
 51k2264(1) k. In general. Most Cited Cases

“Means” test for whether Chapter 7 case is presumptively subject to being dismissed as abusive must be applied in light of debtor's actual circum-

stances. 11 U.S.C.A. § 707(b)(2).

[2] **Bankruptcy 51** **2264(1)**

51 Bankruptcy
 51III The Case
 51III(C) Voluntary Cases
 51k2259 Dismissal
 51k2264 Proceedings; Motion or Sua Sponte Action
 51k2264(1) k. In general. Most Cited Cases

“Means” test for whether Chapter 7 case is presumptively subject to being dismissed as abusive should be applied to give effect to its purpose, i.e., that debtors who can afford to pay their creditors should pay their creditors. 11 U.S.C.A. § 707(b)(2).

[3] **Bankruptcy 51** **2264(1)**

51 Bankruptcy
 51III The Case
 51III(C) Voluntary Cases
 51k2259 Dismissal
 51k2264 Proceedings; Motion or Sua Sponte Action
 51k2264(1) k. In general. Most Cited Cases

Flexibility provided in the Internal Revenue Service (IRS) guidelines for application of its expense standards did not give bankruptcy court discretion, under “means” test provision specifying that allowable motor vehicle operating expense “shall be the debtor's applicable monthly expense amounts specified under the Local Standards issued” by IRS, to vary actual expense amounts contained in IRS tables; however, it was for bankruptcy court to determine what monthly expense amounts were “applicable” to debtor's circumstances. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I).

[4] **Bankruptcy 51** **2264(1)**

51 Bankruptcy
 51III The Case

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51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In general. Most

Cited Cases

In applying “means” test to determine whether Chapter 7 case is presumptively subject to being dismissed as abusive, debtors may claim only the standard motor vehicle operating expense allowances contained in Internal Revenue Service (IRS) Table, rather than their actual expenses. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I).

[5] Bankruptcy 51 ↻2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In general. Most

Cited Cases

In applying “means” test to determine whether his Chapter 7 case was presumptively subject to being dismissed as abusive, debtor was not necessarily barred from claiming operating expense allowance for third car used by his oldest daughter to get to school and to provide transportation for her younger sisters to and from school, to medical appointments and other activities, if expense was necessary to provide for debtor's, or his family's, welfare or production of income; while Internal Revenue Service's (IRS's) Local Standards referenced allowances only for up to two cars, the IRS guidelines contained in the Internal Revenue Manual would permit allowance for third car under such circumstances. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I).

*883 Melanie Archer Newby, Esq., Bradenton, FL, for Debtor.

Benjamin E. Lambers, Esq., Tampa, FL, for U.S. Trustee.

**ORDER AND MEMORANDUM OPINION
DENYING UNITED STATES TRUSTEE'S MOTION FOR SUMMARY JUDGMENT**

MICHAEL G. WILLIAMSON, Bankruptcy Judge.

The Debtor has included operating expense allowances for three cars in his means test calculations. The U.S. Trustee has objected. While the IRS Local Standards only reference allowances for up to two cars, the IRS guidelines contained in the Internal Revenue Manual would permit an allowance for a third car if the operating expense was necessary to provide for the Debtor's (or his family's) welfare or production of income. Accordingly, the Debtor is not precluded from claiming *884 an operating expense allowance for the third car.

Procedural and Factual Background

The U.S. Trustee has moved for summary judgment on his motion to dismiss the Debtor's chapter 7 case pursuant to Bankruptcy Code section 707(b)(2).^{FN1} The motion is based on the presumption of abuse that arises under section 707(b)(2) when the means test calculations conducted by the Debtor are recalculated to exclude the operating expense claimed by the Debtor with respect to one of the three vehicles that he owns.^{FN2}

FN1. Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

FN2. Doc. No. 24 at ¶¶ 1, 15 & 16; Doc. No. 19 at ¶¶ 6 & 11–15.

The Debtor owns three vehicles: a 2004 GMC Yukon, a 2007 Ford Mustang, and a 1998 Honda Accord. The Yukon and Mustang are driven by the Debtor and his non-filing wife and are subject to liens securing purchase-money obligations. The Honda is driven by the Debtor's oldest minor daughter and is owned free and clear. The Debtor and his wife both work full-time while raising three teenage daughters. They need the Yukon and the Mustang for transportation to and from work. The oldest daughter is enrolled in a dual high school/college program that requires transportation

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between schools. This daughter also uses the Honda to provide daily transportation for her two younger sisters to and from school, medical appointments, and other activities.^{FN3}

FN3. On summary judgment, all evidence and factual inferences must be viewed in the light most favorable to the party opposing the motion (in this case, the Debtor). *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1242 (11th Cir.2001). Accordingly, the Court accepts for summary judgment purposes only the allegations in the Debtor's opposing affidavit that the use of the Debtor's third car is necessary for the Debtor's household needs. (Doc. 27 at ¶ 1). Because the Court denies the U.S. Trustee's summary judgment motion, the Debtor will have the burden of establishing at a final evidentiary hearing in this matter that the operating expense for the third car is necessary to provide for the Debtor's (or his family's) welfare or production of income.

Because the Debtor's family income is above the median family income for their household size, the Debtor is required to fully complete Official Form B22A. The Debtor's Form B22A lists ownership expenses in the amount of \$496 for the Yukon and \$496 for the Mustang. The Debtor also lists expense allowances for the operation of all three vehicles in the amount of \$239 for each automobile. In addition, because the Debtor did not take an ownership expense for the Honda, the Debtor also claims an additional \$200 for operation of the Mustang because it is more than six years old and has been driven over 75,000 miles.^{FN4}

FN4. As discussed below, the U.S. Trustee does not take issue with the claim of an additional \$200 for operation expenses for the older Mustang. The U.S. Trustee's objection solely relates to the Mustang's being a third car.

The inclusion of the operating expense allowance for the Honda results in the Debtor having no monthly disposable income available for the payment of creditors. Thus, under the Debtor's calculation, no presumption of abuse arises under section 707(b)(2). But under the U.S. Trustee's recalculated means test (which excludes the operating expense for the third vehicle), the Debtor's monthly disposable income is well in excess of the \$10,950 limit established in section 707(b)(2)(A)(i)(II), and the presumption of abuse arises.

The issue before the Court with respect to the U.S. Trustee's motion for summary judgment is whether the Debtor is entitled to include the IRS expense allowances for the operation of the Debtor's third vehicle, the Honda.

Conclusions of Law

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

As noted, the issue before the Court is whether an above-median income chapter 7 debtor is limited to the expenses for two cars for purposes of the means test as applied under Form B22A. In resolving this issue, this opinion will first review generally the operation of the "means test" contained in section 707(b)(2). The opinion will then discuss the impact of the recent Supreme Court decisions in *Ransom*^{FN5} and *Lanning*^{FN6} on how a bankruptcy court should apply the means test formula and, in particular, the deference to be given to the manner in which the IRS applies its standards with respect to transportation expenses. The opinion will then consider whether the IRS would allow an expense for a third vehicle given appropriate circumstances. Based on this analysis, the opinion will conclude that the text, context, and purpose of section 707(b) do not preclude the Debtor from including the IRS expense amounts for operation of his third vehicle.

FN5. *Ransom v. FIA Card Servs., N.A.*, — U.S. —, 131 S.Ct. 716, 178 L.Ed.2d

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603 (2011).

FN6. *Hamilton v. Lanning*, — U.S. —, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010).

A. The Means Test.

The cornerstone of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) is the “means test” contained in section 707(b)(2).^{FN7} To analyze its application, we start with section 707(b)(1). Section 707(b)(1) provides that a court may dismiss a case filed by an individual debtor whose debts are primarily consumer debts if it finds that the granting of relief would be an abuse of the provisions of chapter 7.^{FN8}

FN7. *Ransom*, 131 S.Ct. at 721 (referring to the means test as the “heart” of BAPCPA’s consumer bankruptcy reforms).

FN8. 11 U.S.C. § 707(b)(1).

Section 707(b)(2)(A)(i) then provides that in considering whether the granting of a discharge to an over-median income debtor would be an abuse of chapter 7, “the court shall presume abuse exists” if the Debtor’s disposable income is enough to either pay at least \$10,950 over 60 months (\$182.50 per month) or 25% of the debtor’s general unsecured creditors over that time period. Section 707(b)(2)(A) then goes on to specify the specific allowable deductions that the Debtor may take for various categories of expenses.^{FN9}

FN9. 11 U.S.C. § 707(b)(2)(A)(i). The court cannot dismiss a case under section 707(b)(2) if the debtor is a below-median income debtor. 11 U.S.C. § 707(b)(7).

A key feature of the means test is that the allowable expense deductions are derived in substantial part from the amounts specified under the National Standards and Local Standards issued by the Internal Revenue Service.^{FN10} These standards are used by the IRS in calculating the repayment of delinquent taxes and were established by the IRS to

provide consistency in certain expense allowances for items such as groceries and household expenses, medical expenses, and housing and transportation expenses.^{FN11}

FN10. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

FN11. Internal Revenue Manual (“IRM”), § 5.15.1.1.5.

***886** In this case, the Debtor’s means test includes the IRS allowable expense deduction for the third car used by the Debtor’s daughter. As a result, the Debtor’s disposable income falls short of the amount that would trigger the presumption of abuse under the means test. If this expense allowance is not permitted, then the Debtor’s net monthly income will exceed the permitted amount, the filing will be presumed abusive, and the U.S. Trustee’s motion for summary judgment must be granted.

In his motion for summary judgment, the U.S. Trustee argues that the IRS table labeled “IRS Local Transportation Expense Standards” (“IRS Table”) has “the force of law,”^{FN12} and because the IRS Table only contains the options of “One Car” or “Two Cars,” the Debtor is limited to deducting expenses for two cars even if three cars are reasonably necessary. The Debtor relies on other language in the IRS’s Collection Financial Standards to support the deduction of the expenses for the third car. The U.S. Trustee dismisses the Debtor’s reliance on the Collection Financial Standards on the basis that the standards are at most “instructive.”^{FN13}

FN12. Doc. No. 31 at 3.

FN13. *Id.*

While bankruptcy courts have struggled with the proper interpretation and application of the means test since the enactment of BAPCPA, two recent Supreme Court cases provide direction to this Court in dealing with the issue presented in this case: *Hamilton v. Lanning*^{FN14} and *Ransom v. FIA Card Services, N.A.*^{FN15}

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FN14. 130 S.Ct. at 2475–76.

FN15. 131 S.Ct. at 721–25.

B. Lanning and Ransom.

In *Lanning*, the Supreme Court addressed the issue of whether a “mechanical approach,” as opposed to a “forward-looking approach,” should be used in calculating a debtor’s “projected disposable income” for purposes of confirmation of a chapter 13 plan.^{FN16} This issue arose from the reference to “current monthly income” as the starting point in calculating “projected disposable income.” The term “current monthly income” is defined in the Bankruptcy Code as the average of the debtor’s monthly income during the six months preceding the filing of the case.^{FN17} Lower courts had reached different results on this issue.

FN16. *Lanning*, 130 S.Ct. at 2469 (construing 11 U.S.C. § 1325(b)(1)).

FN17. 11 U.S.C. § 101(10A).

One line of cases applied this definition mechanically even where, due to a change of circumstances, the debtor’s income at the time plan payments were to start varied materially from the debtor’s actual income.^{FN18} The other line of cases agreed that the mechanical approach was a starting point, but found that the bankruptcy court had discretion to make an appropriate adjustment based on material changes in a debtor’s financial circumstances that had occurred after the petition date.^{FN19}

FN18. See, e.g., *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 872–75 (9th Cir.2008); *In re Austin*, 372 B.R. 668, 675–76 (Bankr.D.Vt.2007); *In re Kolb*, 366 B.R. 802, 815–16 (Bankr.S.D.Ohio 2007); *In re Hanks*, 362 B.R. 494, 497–502 (Bankr.D.Utah 2007); *In re Miller*, 361 B.R. 224, 229–34 (Bankr.N.D.Ala.2007).

FN19. *In re Turner*, 574 F.3d 349, 355–56 (7th Cir.2009); *Nowlin v. Peake (In re*

Nowlin), 576 F.3d 258, 265–66 (5th Cir.2009); *Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269, 1278–1282 (10th Cir.2008); *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 658–661 (8th Cir.2008).

*887 In rejecting the mechanical approach, the *Lanning* Court held: “[W]here, as in the present case, the debtor’s disposable income during the plan period is substantially lower, the mechanical approach would deny the protection of Chapter 13 to debtors who meet the chapter’s main eligibility requirements.”^{FN20} The Supreme Court concluded that if the Bankruptcy Code required the use of the mechanical approach in all cases irrespective of the debtor’s particular circumstances, “this strategy would improperly undermine what the Code demands.”^{FN21} Importantly, the Supreme Court in *Lanning* concludes that “the Code does not insist upon rigid adherence to the mechanical approach in all cases.”^{FN22}

FN20. *Lanning*, 130 S.Ct. at 2476.

FN21. *Id.* at 2476–77.

FN22. *Id.* at 2477.

In *Ransom*, the issue was whether a debtor who owned his car outright but who did not make loan or lease payments was nevertheless entitled to claim the IRS allowance for car ownership costs.^{FN23} In deciding this issue, the Supreme Court’s analysis starts with the language of section 707(b)(2)(A)(ii)(I), which states that the debtor’s monthly expenses “shall be the debtor’s applicable monthly expense amounts specified under the ... Local Standards ... issued by the Internal Revenue Service.” The Court notes that the key word in this provision is “applicable.”^{FN24} Because the Code does not define “applicable,” the Court then applies its ordinary meaning and concludes that an expense amount is “applicable” within the plain meaning of the statute when it is “appropriate, relevant, suitable, or fit.”^{FN25}

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FN23. *Ransom*, 131 S.Ct. at 721.

FN24. *Id.* at 724.

FN25. *Id.*

As in *Lanning*, the Supreme Court rejects a mechanical “one size fits all” approach and concludes that the appropriateness of allowing an expense amount must be determined in “correspondence to an individual debtor’s financial circumstances”:

A debtor may claim a deduction from a National or Local Standard table (like “[Car] Ownership Costs”) if but only if that deduction is appropriate for him. And a deduction is so appropriate only if the debtor has costs corresponding to the category covered by the table—that is, only if the debtor will incur that kind of expense during the life of the plan. The statute underscores the necessity of making such an individualized determination by referring to “the debtor’s applicable monthly expense amounts”—in other words, the expense amounts applicable (appropriate, etc.) to each particular debtor. Identifying these amounts requires looking at the financial situation of the debtor and asking whether a ... Local Standard table is relevant to him.^{FN26}

FN26. *Id.* (alteration and emphasis in original) (citation omitted).

The Supreme Court also draws from BAPCPA’s purpose. As noted above, Congress designed the means test to ensure that debtors repay creditors the maximum they can afford.^{FN27} “This purpose is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor’s ability to afford repayment.”^{FN28} As the Court observes, “[t]he heart of [BAPCPA’s] consumer bankruptcy*888 reforms” is intended “to help ensure that debtors who *can* pay creditors *do* pay them.”^{FN29}

FN27. *Id.* at 725 (citing H.R.Rep. No.

109–31, pt. 1, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89).

FN28. *Id.* (citing *Hamilton v. Lanning*, — U.S. —, 130 S.Ct. 2464, 2475–76, 177 L.Ed.2d 23 (2010)).

FN29. *Id.* at 721 (quoting H.R.Rep. No. 109–31, pt. 1, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89) (alteration and emphasis in original).

In *Ransom*, the debtor owned a car and, therefore, took a car ownership expense listed in the IRS Ownership Cost table. The only guidance contained in the table is a reference to “Ownership Cost,” a reference that the geographic location of the debtor for this cost is “National,”^{FN30} and a reference that the Ownership Costs are for “One Car” or “Two Cars.” The debtor’s approach, based solely on the debtor’s ownership and on the statutory reference in section 707(b) to “amounts specified under ... Local Standards” was logical and an approach supported by several cases.^{FN31} However, the Supreme Court disagreed with this approach, concluding that the “text, context, and purpose of the statutory provision” precluded that result.^{FN32} In reaching this conclusion, the Supreme Court went beyond the words contained in the table and focused on the text of the statute (*i.e.*, the meaning of “applicable”), the purpose of the statute (*i.e.*, that debtors who can pay, do pay), and the context, as discussed below.

FN30. By contrast, the Operating Cost listed in the IRS Local Standards vary across the 22 listed geographic regional areas. See IRS Local Transportation Expense Standards—South Census Region, available at http://www.justice.gov/ust/eo/bapcpa/20101101/bci_data/IRS_Trans_Exp_StdS_SO.htm.

FN31. See, e.g., *eCast Settlement Corp. v. Washburn* (In re Washburn), 579 F.3d 934 (8th Cir.2009).

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FN32. *Ransom*, 131 S.Ct. at 721.

With respect to context, *Ransom* turns to the role that the IRS Collection Financial Standards play in the process of determining how the Local Standards are to be applied. In this respect, the *Ransom* Court states: “The IRS also prepares supplemental guidelines known as the Collection Financial Standards, which describe how to use the tables and what the amounts listed in them mean.”^{FN33}

With respect to the issue before the Court in *Ransom*—whether a debtor without a car payment can take the ownership expense deduction—the *Ransom* Court notes that the “Collection Financial Standards further instruct that, in the tax-collection context, ‘[i]f a taxpayer has no car payment, ... only the operating costs portion of the transportation standard is used to come up with the allowable transportation expense.’”^{FN34}

FN33. *Id.* at 722.

FN34. *Id.* (quoting IRM, Financial Analysis Handbook, § 5.15.1.7 at ¶ 4) (alteration in original).

Thus, the specific and determinative interpretation of how the IRS would use the Ownership Cost table is only explicitly found in the Collection Financial Standards. As the Supreme Court later concludes,

The Collection Financial Standards—the IRS’s explanatory guidelines to the National and Local Standards—explicitly recognize this distinction between ownership and operating costs, making clear that individuals who have a car but make no loan or lease payments may claim only the operating allowance. Although the statute does not incorporate the IRS’s guidelines, courts may consult this material in interpreting the National and Local Standards.... The guidelines of course cannot control if they are at odds with the statutory language. But here, the Collection Financial Standards’ treatment of the car-ownership deduction reinforces our conclusion that, under the stat-

ute, a debtor seeking to *889 claim this deduction must make some loan or lease payments.^{FN35}

FN35. *Id.* at 726 (citation omitted).

Importantly, the *Ransom* Court’s interpretation of the word “applicable” does not render meaningless Congress’s use, in the same sentence, of the word “actual” when referring to the categories specified as Other Necessary Expenses. That is, in the context of Local Standards, the debtor will only get the ownership deduction if the debtor actually has finance or lease payments. However, the amount of those payments does not control the amount of the deduction. That amount is set forth in the IRS Table. This is to be contrasted to the “actual” expenses that are allowed with respect to items that fall within the category of Other Necessary Expenses.^{FN36} With respect to those kinds of expenses, the actual amount of the expenses controls rather than a predetermined amount.

FN36. *Id.* at 727.

[1][2] The common thread that can be derived from the Supreme Court’s analysis in *Lanning* and *Ransom* is that the means test must be applied in light of the debtor’s actual circumstances. It should be applied to give effect to its purpose—that is, that debtors who can afford to pay their creditors should pay their creditors. And because the means test is derived from the procedures followed by the IRS in dealing with delinquent taxpayers, “courts may consult this material in interpreting the National and Local Standards.”^{FN37} Accordingly, the Court will next consult those materials to determine what expenses the IRS would find “appropriate, relevant, suitable, or fit” to a taxpayer in similar circumstances to the Debtor.

FN37. *Id.* at 726.

C. What Would the IRS Do?

Because this analysis is conducted in the context of a motion for summary judgment filed by the U.S. Trustee, some further refinement of the issue

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before the Court is required. That is, the issue is not whether the IRS would allow the expense deduction for the third car in this case. Rather, the issue is whether or not the IRS Collection Financial Standards provide sufficient flexibility such that a third car expense might be allowed under any set of facts. If so, the U.S. Trustee's motion for summary judgment must be denied.

In the motion, the U.S. Trustee appropriately refers to the IRS Table in effect when the petition was filed.^{FN38} The IRS Table sets forth the specific Local Standard amounts of the permitted operating costs for the Southern Region. In interpreting the application of the IRS Table, the U.S. Trustee then cites to the Collection Financial Standards,^{FN39} which, according to *Ransom*, are the "IRS's explanatory guidelines to the National and Local Standards."^{FN40} Finally, the U.S. Trustee refers generally to the Internal Revenue Manual's Financial Analysis Handbook,^{FN41} also used by the Supreme Court in its analysis in *Ransom*.^{FN42}

FN38. Doc. No. 24 at 4–5, ¶ 9 (citing IRS Local Transportation Expense Standards—South Census Region, *available at* http://www.justice.gov/ust/eo/bacpca/20101101/bci_data/IRS_Trans_Exp_Std_SO.htm).

FN39. *Id.* at 5–7, ¶ 10 (citing Collection Financial Standards, *available at* <http://www.irs.gov/individuals/article/0,,id=96543,00.html> and <http://www.irs.gov/businesses/small/article/0,,id=104623,00.html>).

FN40. *Ransom*, 131 S.Ct. at 726.

FN41. Doc. No. 24 at 7–8, ¶ 11 (citing IRM, Financial Analysis Handbook, § 5.15.1.9, *available at* http://www.irs.gov/irm/part5/irm_05-015-001.html).

FN42. *Ransom*, 131 S.Ct. at 726–27.

*890 In each instance, the U.S. Trustee refer-

ences language in these IRS resources that support the position that "one can only claim an ownership expense of up to two vehicles."^{FN43} The U.S. Trustee then argues that "[a] reasonable inference is that one can at most claim an operation expense for up to two vehicles."^{FN44} The Court would agree with the logic of the U.S. Trustee's position if the references cited by the U.S. Trustee were the only ones relevant to the Debtor's circumstances.

FN43. Doc. No. 24 at 4–8, ¶¶ 9–11.

FN44. *Id.* at 6, ¶ 10.

But a review of the cited IRS resources reflects that there are additional relevant portions that must be considered in making a determination of the allowability under the IRS Local Standards of operation expenses for the Debtor's third car. First, the Collection Financial Standards set forth, under the heading "General," the following principles for determining allowable expenses:

Collection Financial Standards are used to help determine a taxpayer's ability to pay a delinquent tax liability. Allowable living expenses include those expenses that meet the necessary expense test. The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's (and his or her family's) health and welfare and/or production of income.

* * *

If the IRS determines that the facts and circumstances of a taxpayer's situation indicate that using the standards is inadequate to provide for basic living expenses, we may allow for actual expenses. However, taxpayers must provide documentation that supports a determination that using national and local expense standards leaves them an inadequate means of providing for basic living expenses.^{FN45}

FN45. Collection Financial Standards, General, *available at* <http://www.irs.gov/>

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individuals/ article/ 0., id= 96543, 00.html.

The Collection Financial Standards also set forth under the heading “Local Standards: Transportation,” the following: “If the amount claimed for ... Operating Costs ... is more than the total allowed by the transportation standards, the taxpayer must provide documentation to substantiate those expenses are necessary living expenses.”^{FN46} In a similar vein, the Financial Analysis Handbook referred to by the U.S. Trustee contains the following preliminary note:

FN46. Collection Financial Standards, Local Standards: Transportation, *available at* [http:// www. irs. gov/ businesses/ small/ article/ 0., id= 104623, 00. html](http://www.irs.gov/businesses/small/article/0.,id=104623,00.html).

The standard amounts set forth in the national and local guidelines are designed to account for basic living expenses. In some cases, based on the taxpayer's individual facts and circumstances, it may be appropriate to deviate from the standard amount when failure to do so will cause the taxpayer economic hardship.... The taxpayer must provide reasonable substantiation of all expenses claimed that exceed the standard amount.

* * *

Economic hardship occurs when a taxpayer is unable to pay reasonable basic living expenses. The determination of a reasonable amount for basic living expenses will be made by the Commissioner and will vary according to the unique circumstances of the individual taxpayer. Unique circumstances, however, do not include the maintenance of an affluent or luxurious standard of living.^{FN47}

FN47. IRM, Financial Analysis Handbook, § 5.15.1.1, at ¶ 6, *available at* [http:// www. irs. gov/ irm/ part 5/ irm_ 05- 015- 001. html](http://www.irs.gov/irm/part5/irm_05-015-001.html).

*891 Later, the Financial Analysis Handbook deals specifically with allowable expenses and states, by way of overview:

Allowable expenses include those expenses that meet the necessary expense test. *The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income.* The expenses must be reasonable.^{FN48}

FN48. *Id.* at Allowable Expense Overview, § 5.15.1.7, ¶ 1 (emphasis in original).

* * *

National and local expense standards are guidelines. If it is determined a standard amount is inadequate to provide for a specific taxpayer's basic living expenses, allow a deviation. Require the taxpayer to provide reasonable substantiation and document the case file.^{FN49}

FN49. *Id.* at ¶ 5.

While not cited by the U.S. Trustee, the Court also considers relevant another portion of the Internal Revenue Manual that deals with the financial analysis to be conducted in connection with offers in compromise.^{FN50} This chapter of the Internal Revenue Manual provides instructions for analyzing a taxpayer's financial condition to determine reasonable collection potential. The Internal Revenue Manual instructs that this section should be used in conjunction with the Financial Analysis Handbook discussed above.^{FN51} With respect to Transportation Expenses, this chapter provides:

FN50. IRM, Financial Analysis, § 5.8.5, *available at* [http:// www. irs. gov/ irm/ part 5/ irm_ 05- 008- 005. html](http://www.irs.gov/irm/part5/irm_05-008-005.html).

FN51. *Id.* at § 5.8.5.1.

Transportation expenses are considered necessary when they are used by taxpayers and their famil-

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ies to provide for their health and welfare and/or the production of income. Employees investigating [offers in compromise] are expected to exercise appropriate judgment in determining whether claimed transportation expenses meet these standards. Expenses that appear excessive should be questioned and, in appropriate situations, disallowed.^{FN52}

FN52. *Id.* at § 5.8.5.20.3, ¶ 1.

Interestingly, it is only in this section that a provision is made for the allowance of additional operating expenses for older cars, such as the Debtor's Honda: "In situations where the taxpayer has a vehicle that is currently over six years old or has reported mileage of 75,000 miles or more, an additional monthly operating expense of \$200 will generally be allowed per vehicle."^{FN53} The U.S. Trustee has been quite reasonable in taking the position that this additional \$200 per vehicle expense should be allowed so long as it is not being taken with respect to a third vehicle,^{FN54} but nowhere in the IRS Table or the Collection Financial Standards does this allowance appear. Rather, this allowance is found buried in a section of the Internal Revenue Manual that deals with offers in compromise.^{FN55}

FN53. *Id.* at ¶ 5.

FN54. Doc. No. 31 at 5.

FN55. While the U.S. Trustee does not take issue with the \$200 per month old-car deduction, courts dealing with this issue are divided. *Compare In re Baker*, No. 10–61317–13, 2011 WL 576851, at *3 (Bankr.D.Mont. Feb. 9, 2011) with *In re VanDyke*, No. BKR–10–82902, 2011 WL 1833186, at *6–7 (Bankr.C.D.Ill. May 12, 2011) and *In re Koch*, 408 B.R. 539, 545 (Bankr.S.D.Fla.2009).

[3] The Court does not believe that the flexibility provided in the IRS guidelines for application of its expense standards gives the Court discretion to

vary the actual expense amounts contained in the IRS tables. In this respect, the *892 amount of the operating expense "shall be the debtor's applicable monthly expense amounts specified under the ... Local Standards ... issued by the [IRS] for the area in which the debtor resides." ^{FN56} But as in *Ransom*, it is for this Court to decide what is "applicable,"—that is, "appropriate, relevant, suitable, or fit," to the Debtor's circumstances. Simply put, do the Local Standards, as interpreted by the Collection Financial Standards, provide flexibility to allow an operating expense deduction for the Debtor's third car under any factual circumstances? Based on the foregoing analysis of the methodology employed by the IRS in applying the Local Standards, the Court concludes that the IRS would, given appropriate facts, allow such an expense allowance.

FN56. *Ransom*, 131 S.Ct. at 724 (quoting 11 U.S.C. § 707(b)(2)(A)(ii)(I)) (alteration in original).

D. "Means Test" Cases Dealing with Multiple Cars.

The U.S. Trustee has cited a number of bankruptcy court decisions for the proposition that a debtor is limited to taking operating expenses for at most two cars. A number of these cases were decided before the Supreme Court issued its opinion in *Ransom* on January 11, 2011.^{FN57} In none of these cases did the debtor actually claim a deduction for three cars. Nor did the courts in these cases consider the precise issue before this Court—that is, whether such an allowance would be proper if three cars were, in fact, reasonably necessary for the maintenance and support of a household consisting of the Debtor and multiple dependents.

FN57. *In re Predragovic*, No. 10–60259, 2010 WL 3239360, at *3–4 (Bankr.N.D. Ohio Aug. 16, 2010) (rejecting trustee's argument that the debtor should surrender his newer vehicle and be left with a seven-year-old car with over 100,000 miles on it, but nevertheless, dismissing the case based on bad faith); *In re Aprea*, 368 B.R. 558, 564

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(Bankr.E.D.Tex.2007) (disallowing debtors deduction for fiancée's car because it was "not an expense of the debtor or a legal dependent of the debtor"); *In re Johnson*, 346 B.R. 256, 266–67 (Bankr.S.D.Ga.2006) (noting that while the debtors had a total of three vehicles, they had correctly taken the allowances for just two of them).

In any event, the Court does not find persuasive cases handed down before *Ransom* because those courts did not have the benefit of the Supreme Court's analysis and reasoning in *Ransom* and *Lanning*, as discussed above. Accordingly, the Court's focus will be on decisions that have been entered after January 11, 2011, the date of the *Ransom* decision.

[4] In this respect, the U.S. Trustee has cited four cases that postdate *Ransom*. Two of these cases, *In re Thiel*^{FN58} and *In re Prestwood*,^{FN59} stand for the same proposition: that is, that debtors may only claim the standard allowance contained in the IRS Table, rather than actual expenses. This Court certainly concurs with this conclusion. However, the issue here is not the amount of the operating expenses that the Debtor will be allowed for each car. Rather, the issue is the appropriate number of cars for which such an allowance should be made given the Debtors' particular circumstances.

FN58. 446 B.R. 434, 440 (Bankr.D.Idaho 2011).

FN59. No. 4:11-cv-00154-MP-WCS, 2011 WL 1771051, at *2 (N.D.Fla. May 10, 2011).

The next case cited by the U.S. Trustee is *In re Hager*,^{FN60} in which the court notes that the debtors were only entitled to ownership and operation expenses for two of their three vehicles. However, in *Hager*, the debtors had failed to complete Schedule B22C and failed to advance any justification for

the necessity of three vehicles. *893 Clearly, *Hager* is distinguishable from this case.

FN60. 447 B.R. 876, 878 (Bankr.D.Minn.2011).

Finally, in *In re VanDyke*,^{FN61} the court notes that married debtors are only entitled to claim an operating deduction for two vehicles. However, the court did not have before it the issue in this case because the debtors only owned two vehicles. The only issue before the court in *VanDyke* was "whether a Chapter 13 debtor is allowed an additional operating expense of \$200 per vehicle when the vehicle is over six years old and/or the vehicle has over 75,000 miles."^{FN62}

FN61. No. BKR-10-82902, 2011 WL 1833186, at *7 (Bankr.C.D.Ill. May 12, 2011).

FN62. *Id.* at *1.

None of these cases are particularly helpful in deciding the issue before this Court. Rather, this Court is left to the analysis followed in *Ransom*, which focuses on the text of the statute, the purpose of the statute, and the context.^{FN63}

FN63. *Ransom*, 131 S.Ct. at 721.

E. Resolution of the Issue in Light of the Text, Context, and Purpose of Section 707(b).

[5] As discussed above, the means test supplants the pre-BAPCPA practice of calculating a debtor's reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations.^{FN64} The text of section 707(b) requires that set amounts—that is, Local Standards as set forth in the IRS Table—be used for various types of expenses, such as transportation expenses.^{FN65}

FN64. *Id.* at 721–22 & n. 2.

FN65. 11 U.S.C. § 707(b)(2)(A)(ii)(I).

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However, while the IRS Table is sufficient for establishing the amount of an expense, as in *Ransom*, in this case it is not sufficient to establish for which cars the expenses should be allowed. “One cannot really ‘just look up’ dollar amounts in the tables without either referring to the IRS guidelines for using the tables or imposing pre-existing assumptions about how [they] are to be navigated.”^{FN66} In this respect, context is provided by the IRS guidelines.

FN66. *Ransom* 131 S.Ct. at 728 (citing *In re Kimbro*, 389 B.R. 518, 533 (6th Cir. BAP 2008) (Fulton, J., dissenting)) (alteration in original).

It is clear from the IRS guidelines, as discussed above, that the means test is intended to approximate the debtor's reasonable expenditures on essential items. But as applied by the IRS, the means test requires a debtor to qualify for a deduction by actually incurring an expense in the relevant category. If the debtor will not have a particular kind of expense, the allowance is not reasonably necessary within the meaning of the statute.^{FN67} The converse is also true. Under the IRS guidelines, transportation expenses are considered necessary when incurred for cars used by taxpayers and their families to provide for their health and welfare.^{FN68}

FN67. *Id.* at 725.

FN68. IRM, Financial Analysis, at § 5.8.5.20.3.1, available at http://www.irs.gov/irm/part5/irm_05-008-005.html.

The approach taken in *Ransom* is not only consistent with the text of the means test as embodied in the statutory language and the context in which it is applied, it is also consistent with the purpose of the means test. Congress designed the means test to ensure that debtors repay creditors what they can afford to pay given their household income after allowing them set expense amounts as contained in the National and Local Standards.^{FN69} This purpose*894 is best implemented by interpreting the

means test, consistent with the statutory text, to accurately reflect the debtor's particular circumstances.^{FN70} In this way, the object of the means test—that is, that debtors who *can* pay creditors *do* pay them—can best be achieved.^{FN71}

FN69. *Ransom*, 131 S.Ct. at 725 (citing H.R.Rep. No. 109–31, pt. 1, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89).

FN70. *Id.* (citing *Hamilton*, 130 S.Ct. at 2475–76).

FN71. *Id.* at 721.

Conclusion

This Court concludes that while the IRS Table is determinative as to the set amounts for allowable transportation expenses, the IRS guidelines must be resorted to in determining whether such an expense would be allowed by the IRS for the third car if it was reasonably necessary for the care and support of the debtor and his dependents. Because the IRS guidelines do provide such flexibility, the U.S. Trustee's motion for summary judgment will be denied. The Debtor will be provided the opportunity to present evidence at a final evidentiary hearing with respect to whether or not the third car is reasonably necessary for the care and support of the Debtor and the Debtor's dependents.

Accordingly, it is

ORDERED:

1. The U.S. Trustee's motion for summary judgment is DENIED.

2. By separate order the Court will schedule a further pre-trial conference in this contested matter.

DONE and ORDERED.

Bkrtcy.M.D.Fla.,2011.

In re Johnson

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C

United States Bankruptcy Court,
Tampa Division.
M.D. Florida.

In re Misty D. **RALSTON** and Kevin C. **Ralston**,
Debtors.

No. 8:07-bk-09727-MGW.
Feb. 10, 2009.

Background: United States Trustee (UST) moved to dismiss Chapter 7 case as presumptively abusive under the “means test,” once debtors’ “means test” calculation was corrected to eliminate vehicle ownership deduction that they took for motor vehicle owned outright and to eliminate mortgage expense on home that they proposed to surrender. Both parties moved for summary judgment.

Holdings: The Bankruptcy Court, Michael G. Williamson, J., held that:

(1) debtors could deduct, as “amounts scheduled as contractually due to secured creditors,” the \$2,235.31 per month that they were contractually obligated to pay, on petition date, on home that they proposed to surrender, even though debtors, based on their stated intent to surrender home, would not actually be making these payments; and (2) debtors could deduct, as “applicable” monthly expense amount, the vehicle ownership expense to which they were entitled under Internal Revenue Service (IRS) guidelines, though debtors owned vehicle outright and had no lease or contract payments thereon.

UST’s motion denied; debtors’ motion granted.

West Headnotes

[1] Bankruptcy 51 3705

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan

51k3705 k. Claims and Assets; Propriety and Feasibility in General. Most Cited Cases

“Means test,” as applied in Chapter 13 case as measure of reasonably necessary expenses of above-median-income debtors for purpose of calculating “projected disposable income” available for payment of unsecured claims, should not be applied in same rigid manner that it was meant to be applied in Chapter 7, and does not allow debtors to deduct expenses which, due to their postpetition surrender of collateral, no longer exist as of time of plan confirmation. 11 U.S.C.A. §§ 707(b)(2), 1325(b)(1)(B), (b)(3).

[2] Bankruptcy 51 2264(1)

51 Bankruptcy
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(1) k. In General. Most Cited Cases

In applying “means test” to determine whether their Chapter 7 case was presumptively subject to being dismissed as abuse of provisions of that chapter, debtors could deduct, as “amounts scheduled as contractually due to secured creditors,” the \$2,235.31 per month that they were contractually obligated to pay, on petition date, on home that they proposed to surrender, even though debtors, based on their stated intent to surrender home, would not actually be making these payments, and though monthly housing expense that they were otherwise authorized to take was only \$906.00, far less than the mortgage deduction they were able to take based on fact that they had not surrendered their home prepetition. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I).

[3] Statutes 361 181(2)

361 Statutes

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361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(2) k. Effect and Consequences. Most Cited Cases

Statutes 361 ⚡190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

Statutory interpretation must always begin with language of statute itself, and when statute's language is plain, sole function of courts, at least where disposition required by statutory text is not absurd, is to enforce statute according to its terms.

[4] Statutes 361 ⚡184

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k184 k. Policy and Purpose of Act.

Most Cited Cases

Statutes 361 ⚡205

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k205 k. In General. Most Cited

Cases

Statutes 361 ⚡208

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k208 k. Context and Related Clauses. Most Cited Cases

Specific language of statute must be read in context, and in interpreting one part of statute, court must not be guided by single sentence or member of sentence, but must look to provisions of the whole law, and to its object and policy.

[5] Statutes 361 ⚡188

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k188 k. In General. Most Cited

Cases

When words in statute are not defined terms, court should look to their ordinary, dictionary meaning.

[6] Bankruptcy 51 ⚡2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

“Means test” provision authorizing Chapter 7 debtors, in calculating their disposable income for purpose of deciding whether their petition is presumptively subject to being dismissed as abusive, to deduct “amounts scheduled as contractually due to secured creditors” is not ambiguous, despite wide-ranging split between courts regarding whether a deduction is authorized in connection with debts secured by collateral that debtor intends to surrender. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I).

[7] Bankruptcy 51 ⚡2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

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51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

Phrase “scheduled as contractually due,” as used in “means test” provision authorizing Chapter 7 debtors, in calculating their disposable income for purpose of deciding whether their petition is presumptively subject to being dismissed as abusive, to deduct “amounts scheduled as contractually due to secured creditors,” should not be given any special, bankruptcy-specific meaning not compelled by plain language of provision, as somehow referring to debtor's bankruptcy schedules and as requiring court to consider debtor's stated intent with respect to collateral securing the claims of such creditors; rather, phrase had to be interpreted in accordance with common, dictionary definition of words used. 11 U.S.C.A. § 707(b)(2)(A)(iii)(I).

[8] Bankruptcy 51 ↪2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

Function of “means test,” as applied in Chapter 7, is to provide a mechanical formula for establishing a presumptive bar to obtaining relief in that chapter, and it is appropriate to treat “means test” deductions as bright line measurements. 11 U.S.C.A. § 707(b)(2).

[9] Bankruptcy 51 ↪2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

In Chapter 7 case, “means test” calculations for determining whether presumption of abuse exists are intended to represent a snapshot as of petition date, examined without regard to debtor's future intentions. 11 U.S.C.A. § 707(b)(2).

[10] Bankruptcy 51 ↪2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

In applying “means test” to determine whether their Chapter 7 case was presumptively subject to being dismissed as abuse of provisions of that chapter, debtors could deduct, as “applicable” monthly expense amount, the vehicle ownership expense to which they were entitled under Internal Revenue Service (IRS) guidelines, though debtors owned vehicle outright and had no lease or contract payments thereon; term “applicable” could not be equated with “actual.” 11 U.S.C.A. § 707(b)(2)(A)(ii)(I).

[11] Bankruptcy 51 ↪2264(1)

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

Radically different purposes of “means test,” as applied in Chapter 7 as mechanical test of whether bankruptcy petition is presumptively abusive, and the discretionary guidelines to which Internal Revenue Service (IRS) agents look to determine what taxpayers can pay, makes it inappropriate to look to

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Internal Revenue Manual as aid in interpreting “means test” provisions. 11 U.S.C.A. § 707(b)(2).

[12] **Bankruptcy 51** ↪ **2264(1)**

51 Bankruptcy

51III The Case

51III(C) Voluntary Cases

51k2259 Dismissal

51k2264 Proceedings; Motion or Sua Sponte Action

51k2264(1) k. In General. Most

Cited Cases

“Means test” for determining whether presumption of abuse exists is meant to be mechanically applied formula, into which bankruptcy judge should not insert his or her discretion. 11 U.S.C.A. § 707(b)(2).

***856** Melanie Archer Newby, Jodat Law Group P.A., Bradenton, FL, for Debtors.

MEMORANDUM OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

MICHAEL G. WILLIAMSON, Bankruptcy Judge.

The Bankruptcy Abuse and Consumer Protection Act of 2005 (“BAPCPA”) added 11 U.S.C. § 707(b)(1)-(2) (2008) (“the Means Test”) to Chapter 7 of the Bankruptcy Code.^{FN1} The Means Test is a formula for determining the amount of disposable income a Chapter 7 debtor could hypothetically contribute to a Chapter 13 plan. If the amount rises above a certain threshold, a presumption of abuse arises and the case must be dismissed or converted to Chapter 13. The Means Test is only applied to debtors whose income is above their state's median income for a family of the same size and whose debts are primarily consumer debts. The Means Test applies to the Debtors in this case, who “pass” the test under their own calculation. The United States Trustee has moved to dismiss the case, arguing that two of the expense deductions taken by the Debtors in this case are not permissible. If those two deductions are disallowed, the Debtors “fail”

the Means Test and the case must be dismissed or converted to a case under Chapter 13.

FN1. All references to “ § ” and “Section” refer to Title 11 of the United States Code unless otherwise specified.

Under the Means Test, a debtor is allowed to deduct payments “scheduled as contractually due” on account of secured debts. § 707(b)(2)(A)(iii) (“Secured Debt Deduction”). A question that has often arisen as courts attempt to interpret the Means Test, which has also arisen in this case, is whether such payments may be deducted in a Means Test calculation where, as here, the Debtors intend to surrender the collateral. A debtor is also allowed to deduct a monthly vehicle “Ownership Costs” amount pursuant to the Internal Revenue Service (“IRS”) Local Standards. § 707(b)(2)(A)(ii)(I) (“Ownership Costs Deduction”). The second question that has arisen in this case is whether ***857** these Debtors may deduct Ownership Costs where there is no monthly lease or loan payment on account of the vehicle. For the reasons stated herein, the Court concludes that these Debtors may include both the Secured Debt Deduction and the Ownership Costs Deduction in their Means Test calculation.

I. Factual Background

The pertinent facts in this case are relatively straightforward. At the time of filing, the Debtors owned a home that was encumbered by a mortgage obligating them to make monthly payments of \$2,235.31 and a 1987 pickup truck with 117,000 miles, which was owned free and clear of any debt. The Debtors' Statement of Intention indicates that they intend to surrender their home. (Chapter 7 Individual Debtor's Statement of Intention, Doc. No. 1.) The Debtors' annualized current monthly income is above the median income for a family of four in the state of Florida, so they were required to fill out the entirety of Official Form 22A, the Means Test form (Chapter 7 Statement of Current Monthly Income and Means-Test Calculation, Doc. No. 1) (“Form 22A”). On Form 22A, the Debtors

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included in their Secured Debt Deduction the \$2,235.31 monthly mortgage payments on their home and included an Ownership Costs Deduction of \$332.00 for their 1987 pickup, which is owned free and clear. As a result of taking these deductions, the Debtors calculated their monthly disposable income as a *negative* \$819.39. The U.S. Trustee filed a motion to dismiss pursuant to § 707(b)(2), or, alternatively, § 707(b)(3) (Doc. No. 17) (“Motion to Dismiss”). The U.S. Trustee argues that these two deductions are improper.

If the Debtors were not allowed to deduct their monthly mortgage payments on the home that they intended to surrender, but instead were allowed to deduct only the IRS Local Standards amount for housing and utilities, which is \$906.00, their deductions would be reduced by \$1,329.31. If they were not allowed the Ownership Costs Deduction for their 1987 pickup truck, which is unencumbered, their deductions would be further reduced by \$332.00. As a result of disallowing these two deductions, the Debtors' monthly disposable income, instead of being a *negative* \$819.39 would be a *positive* \$841.92. Multiplied by 60, this would amount to \$50,515.20 that they could pay to their unsecured creditors.^{FN2} With that amount of disposable income, these Debtors would “fail” the Means Test, and the presumption of abuse would arise.

FN2. The numbers calculated by the U.S. Trustee are slightly different from the Court's calculation. The U.S. Trustee has added a hypothetical Chapter 13 administrative expense and made a couple additional minor adjustments to the Debtors' numbers, including allowing a \$200 deduction for an older vehicle based on the Internal Revenue Manual instructions. The U.S. Trustee calculates that the Debtors would have \$551.05 monthly disposable income and \$33,063.00 total during the life of a Chapter 13 plan. (See Notice of Filing Exhibits to the U.S. Trustee's Motion to Dismiss, Doc. No. 18, Ex. 2.)

If this Court finds that the Debtors may take these deductions, resulting in the Debtors passing the Means Test, the U.S. Trustee alternatively argues that their case should be dismissed as abusive pursuant to § 707(b)(3), under a totality of the circumstances analysis, arguing that the totality of the Debtors' financial situation demonstrates abuse. The Debtors and the U.S. Trustee have filed cross-motions for summary judgment (Doc. No. 26; Doc. No. 27) on the Motion to Dismiss.

II. Legal Analysis

This Court has jurisdiction under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(2)(A) and (O).

*858 A. Summary Judgment Standard

Federal Rules of Bankruptcy Procedure 7056 and 9014 make Federal Rule of Civil Procedure 56, which provides for summary judgment, applicable to adversary proceedings and contested matters within the context of a bankruptcy case. The contested matter before the Court is the U.S. Trustee's Motion to Dismiss. The parties have filed cross-motions for summary judgment on the Motion to Dismiss. It is appropriate for a court to grant summary judgment where “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c); see *Johnson v. Board of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1242 (11th Cir.2001). For purposes of granting a motion for summary judgment, all evidence and all actual inferences must be viewed “in the light most favorable to the party opposing the motion.” *Johnson*, 263 F.3d at 1243.

In this case, there is no genuine disagreement between the parties as to the material facts that underlie the dispute as to whether the Debtors “fail” or “pass” the Means Test. Their dispute relates to the application of BAPCPA to the undisputed facts of this case. Therefore, summary judgment is appropriate as to the question of whether the Debtors in this case pass or fail the Means Test. However, as the parties represented prior to the hearing on summary judgment, there is substantial disagree-

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ment as to the facts that might or might not support dismissal with respect to the U.S. Trustee's alternative argument under § 707(b)(3). Where the record exhibits such factual disagreements, summary judgment must be denied and the matter be set for trial. *Clemons v. Dougherty County, Ga.*, 684 F.2d 1365, 1369 (11th Cir.1982). Therefore, the Court will only address the Means Test issues. Because the Court decides these issues in the Debtors' favor, it will be necessary to set for final evidentiary hearing the question of whether the case should be dismissed pursuant to § 707(b)(3).

B. The Means Test

Under the Means Test, a debtor's monthly disposable income is calculated by taking the debtor's current monthly income, as defined in § 101(10A) ("CMI"), and subtracting the allowable monthly expenses delineated in § 707(b)(2), consisting of the following five categories: 1) applicable monthly expense amounts specified under the IRS National Standards and Local Standards, 2) actual monthly expenses for the categories listed in the IRS Other Necessary Expenses, 3) various specified actual expenses (e.g., costs to maintain the safety of the family from domestic violence; for care of an elderly, chronically ill, or disabled family member; educational expenses for dependent children; increased home energy costs), 4) monthly payments contractually due on secured debts, and 5) monthly payments on priority claims. 11 U.S.C. § 707(b)(2)(A)(ii)-(iv). If, after subtracting the allowable monthly expenses from the debtor's CMI, the amount of monthly disposable income, multiplied by 60, is greater than \$10,950, then the debtor "fails" the Means Test. If the amount is less than \$6,575, then the debtor "passes" the Means Test. If the amount is between \$6,575 and \$10,950,^{FN3} the debtor only fails the Means Test if the amount is greater than 25% of the debtor's non-priority unsecured claims. If the debtor fails the Means Test, absent a showing of special circumstances, which have not been alleged in this case, the court "shall presume*859 abuse exists" and the case must be either dismissed or converted to a case under

Chapter 13.

FN3. This number is regularly adjusted to comport with inflation.

C. Scheduled as Contractually Due

The Means Test has been the fodder for an inordinate number of written opinions over the course of the last three years. The first question in this case, whether secured debt payments may be deducted where the collateral will be surrendered, is itself responsible for a large number of the Means Test opinions. While a majority position is gradually emerging, to date, none of the courts of appeals have weighed in on this issue. The two bankruptcy appellate panels that have decided the issue have followed the emerging majority, holding that payments on account of secured debt may be deducted regardless of an intent to surrender the property. *In re Rudler*, 388 B.R. 433 (1st Cir. BAP 2008) (Chapter 7 case); *In re Thomas*, 395 B.R. 914 (6th Cir. BAP 2008) (holding that the means test applies in the same mechanical manner in a Chapter 13 case).

Two courts in the Middle District of Florida have addressed the question of whether the Secured Debt Deduction is allowed under the Means Test where the collateral will be surrendered, but only in the context of applying the Means Test deductions in a Chapter 13 case. First, Judge Paskay, in *In re Vernon*, 385 B.R. 342 (Bankr.M.D.Fla.2008), held that the debtors cannot deduct the monthly secured debt payments on collateral that is to be surrendered under a Chapter 13 plan. However, the court specifically noted that the result might be different in a Chapter 7 context. "[T]he Debtor's arguments for allowing deductions even when collateral is surrendered post-petition may be appropriate within the context of a Chapter 7 case where the court is determining whether the filing is an abuse of the Code through the means test, but are inapplicable in situations concerning 11 U.S.C. § 1325 due to the different policy goals of Chapter 13." *Id.* at 347. The court noted that using a "means test as a blunt measure of ability to pay" in the context of

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confirming a Chapter 13 plan, but without regard to a Chapter 13 plan that does not provide for such payments, “would lead to results that are illogical and sometimes produce a strange result.” *Id.*

[1] Several weeks after the case of *In re Ver-non* was decided, Judge Funk issued an opinion in *In re Holmes*, 395 B.R. 149 (Bankr.M.D.Fla.2008), in which he similarly held that a debtor could not deduct from her monthly income payments on a second mortgage that had been stripped and deemed entirely unsecured during the case. The court declared that the “‘snapshot’ approach” is “directly at odds with § 1325(b)(1)(B)[,] which requires a debtor to fund a plan with all of his or her disposable income.” *Id.* at 152. Further, “it would go against the very essence of Chapter 13 to allow a debtor to deduct an expense that is non-existent at the time of confirmation.” *Id.* at 153. This Court agrees with this interpretation of the Means Test as applied in a Chapter 13 case. Chapter 13 is a living chapter, constantly changing and evolving. Throughout the life of a Chapter 13 plan, it may be and often is amended to reflect a change in the debtor's circumstances. Therefore, it would be inapposite to apply the Means Test as it is partially incorporated into Chapter 13 in the same rigid manner as it is meant to apply in Chapter 7. *See In re Kalata*, No. 07–21710, 2008 WL 552856, at *5 (Bankr.E.D.Wis. Feb. 27, 2008); *In re Arsenault*, 370 B.R. 845 (Bankr.M.D.Fla.2007) (holding that in a Chapter 13, where *860 the Debtor's actual income is different from the amount calculated under § 101(10A), the actual amount should be taken into account when determining the amount that must be devoted to payments to unsecured creditors under the plan). No judges in the Middle District of Florida have issued opinions on the question of whether a debtor may claim the Secured Debt Deduction where the collateral is to be surrendered in the context of a Chapter 7 case.

[2] While the Middle District has remained silent, the Southern District of Florida has issued three opinions, all of which hold that when apply-

ing the means test to a Chapter 7 debtor, a deduction of monthly secured debt payments is allowed even if the collateral will be surrendered in the bankruptcy case. *In re Benedetti*, 372 B.R. 90 (Bankr.S.D.Fla.2007) (Cristol, J.); *In re Parada*, 391 B.R. 492 (Bankr.S.D.Fla.2008) (Isicoff, J.); *In re Castillo*, No. 08–10878, 2008 WL 4544467 (Bankr.S.D.Fla. Oct. 10, 2008) (Hyman, C.J.). For the reasons stated below, this Court will follow its colleagues in the Southern District and what it believes to be the growing majority position and hold that in the context of determining whether a Chapter 7 filing is to be presumed abusive, the Means Test allows a debtor to claim the Secured Debt Deduction without regard to whether the collateral will be retained or surrendered.

1. Plain Meaning of the Statute

[3][4][5] Statutory interpretation must always begin with the language of the statute itself. As the Supreme Court has instructed, “when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147 L.Ed.2d 1 (2000) (citation omitted). However, the specific language of a statute must be read in context. “In interpreting one part of a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *In re Welzel*, 275 F.3d 1308, 1317 (11th Cir.2001) (citation omitted). Where the words in the statute are not defined terms, the court should look to their ordinary, dictionary-defined meaning. *Consolidated Bank, N.A. v. U.S. Dep't of the Treasury*, 118 F.3d 1461, 1464 (11th Cir.1997) (“In the absence of a statutory definition of a term, we look to the common usage of words for their meaning.”). The statutory provision providing the Secured Debt Deduction reads, in relevant part, as follows:

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as

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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; ...

divided by 60.

11 U.S.C. § 707(b)(2)(A)(iii) (2007) (emphasis added). The amount that results from this calculation is deducted from the debtor's current monthly income in determining the debtor's disposable monthly income. *Id.* § 707(b)(2)(A)(i).

[6] Almost every court that has addressed this statute has determined that it is not ambiguous. *See, e.g., In re Randle*, No. 07–631, 2007 WL 2668727, at *3, 7 (N.D.Ill. July 20, 2007); *In re Turner*, 384 B.R. 537, 540–42 (Bankr.S.D.Ind.2008). However, at least one court has broken *861 from the crowd and determined that the statute is ambiguous, noting that “[t]he strained linguistic arguments of both the majority and minority camps to identify the ‘plain meaning’ of the phrase readily identify the ambiguity.” *In re Smale*, 390 B.R. 111, 115 (Bankr.D.Del.2008) (applying the interpretive principle of *noscita a sociis* (a word is known by the company it keeps)); *see also In re Palm*, 2007 WL 1772174, *2 (Bankr.D.Kan. June 19, 2007) (noting that there are many places in BAPCPA where “the plain meaning of the statute is not easily discerned, with at least two, and often times more, plain meanings appearing to different readers.”). While acknowledging the wide-ranging split between courts across the country on the “plain meaning” of this provision, it is this Court's conclusion that the statute's language is plain. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 536, 124 S.Ct. 1023, 1031, 157 L.Ed.2d 1024 (2004) (indicating a preference for finding the plain meaning of a statute in order to “avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history”). Those courts who find a different “plain meaning” only do so by looking outside the confines of the statutory provision.

[7] Several courts in the minority camp have held that the term “scheduled as” should be assigned a “bankruptcy-specific” meaning, as referencing items listed on the debtor's bankruptcy schedules and statements, including the statement of intention. *In re Burden*, 380 B.R. 194, 200–01 (Bankr.W.D.Mo.2007); *In re Ray*, 362 B.R. 680, 685 (Bankr.D.S.C.2007) (“It therefore seems that the better construction of ‘scheduled as contractually due’ would consider the debtors' intention to surrender the collateral and make no future payments to the creditor.”); *In re Skaggs*, 349 B.R. 594, 599 (Bankr.E.D.Mo.2006). The analysis presented by these courts has not held up to scrutiny, however. The court in *In re Nockerts* performed its own search of the Bankruptcy Code to determine whether “scheduled as” was a phrase only used in reference to the debtor's schedules. 357 B.R. 497, 502–03 (Bankr.E.D.Wis.2006). The court found several instances where a variation of the phrase was used in the Bankruptcy Code, and discovered that when the phrase referred to the debtor's bankruptcy schedules, the reference was crystal clear. *Id.* (for example, “neither listed nor scheduled under section 521(1),” in § 523(a)(3), and “scheduled under section 521(1),” in § 554(c)). Elsewhere in the Code, a similar phrase was used to refer to scheduled payments. *Id.* (for example, “describing the repayment schedule ... of payments scheduled to repay the debts reaffirmed,” in § 524(k)(3)(H)(ii)). Because no specific reference is made to the debtor's bankruptcy schedules in § 707(b)(2), the phrase “scheduled as contractually due to secured creditors” should not artificially be given a bankruptcy-specific meaning. *Id.*

Additionally, there is also no bankruptcy schedule on which the debtor is instructed to list “payments scheduled as contractually due to secured creditors.” *See In re Randle*, 2007 WL 2668727, at *6. The only place where “payments contractually due to secured creditors in the 60 months following the date of the petition” must be listed is on Form 22A. However, not only is Form 22A a “statement” and not a “schedule,” *see In re*

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Castillo, 2008 WL 4544467, at *2 (reasoning that the “Statement of Intention cannot be morphed into the ‘Schedules’”) (citation omitted), but it is merely an implementation of the statutory provision. An official form cannot change the meaning of a statute. See *862 Fed. R. Bankr.P. 9009; see *In re Rahman*, 400 B.R. 362, 2009 WL 205013, *7 n. 10 (Bankr.E.D.N.Y. Jan.23, 2009).

The First Circuit Bankruptcy Appellate Panel has adopted *Nockerts*’ statutory interpretation of the language of § 707(b)(2). *In re Rudler*, 388 B.R. at 438 (“We disagree with *Skaggs*, because as the court in *In re Nockerts* pointed out, the *Skaggs* exercise in statutory analysis actually compels the opposite conclusion.”). This Court joins *Nockerts* and *Rudler* in holding that, for the reasons stated above, the phrase “scheduled as” should be given its plain meaning, referring merely to scheduled payments, and should not be artificially assigned a special, bankruptcy-specific meaning where that result is not compelled by the plain meaning of the statute.

Therefore, since the phrase “payments scheduled as contractually due” must be given its ordinary meaning, it is appropriate to refer to the dictionary definition. See *United States v. McNab*, 331 F.3d 1228, 1237 (11th Cir.2003), cert. denied, 540 U.S. 1177, 124 S.Ct. 1406, 158 L.Ed.2d 77 (2004) (“[T]o determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance.”) (citation omitted). One dictionary definition of “to schedule” or “scheduled” is “1 to place or include in a schedule 2 to make a schedule of 3 to plan for a certain time.” *Webster’s New College Dictionary* 1281 (Michael Agnes, ed.2007). The word “contractual” or “contractually” means “of, or having the nature of, a contract.” *Id.* at 316. Therefore, “payments scheduled as contractually due” are “planned” payments that are scheduled to be due pursuant to a contract.

The phrase “scheduled as contractually due” is followed by the phrase “in each of the 60 months following the date of the petition.” §

707(b)(2)(A)(iii)(I). Some courts argue that the second phrase implicates a forward-looking analysis—that payments must actually be due in each of the 60 months following the date of the petition to be allowed as a deduction. See *In re Naut*, No. 07–20280, 2008 WL 191297, at *9 (Bankr.E.D.Pa. Jan. 22, 2008); see also *In re Love*, 350 B.R. 611, 614 (Bankr.M.D.Ala.2006) (arguing that “‘scheduled’ payments” indicates “a forecast of future events and not historic data”). This Court disagrees with that interpretation. At the end of the provision is the following: “divided by 60.” § 707(b)(2)(A)(iii). These provisions do not change the plain meaning of the statute as a snapshot of a debtor’s contractual secured debt obligations on the date of the petition. See *Fokkena v. Hartwick*, 373 B.R. 645, 656 (D.Minn.2007). Taken together, the meaning behind these provisions is rather that the debtor will only be allowed to deduct monthly an amount equal to the total of such payments on secured debt due during the 60 months following the date of the petition, divided by 60. See § 707(b)(2)(A)(iii). If the debtor has less than 60 months of payments due on the secured debt, the amount to be deducted will be less than the total amount of the monthly payment. For example, if the debtor has a monthly secured debt payment of \$600, but only 10 payments left, the allowed deduction will be the total of those payments, or \$6,000, divided by 60. Thus, the debtor would only be allowed a \$100 monthly deduction on account of secured debt under this provision, despite the fact that the actual monthly payment is \$600.

2. Legal Effect of Surrender

As many courts have noted, a payment is contractually due on the petition date *863 regardless of whether the debtor intends to reaffirm the debt or surrender the collateral. *In re Nockerts*, 357 B.R. at 500 (noting that “nothing the debtor does or does not do changes the fact that scheduled payments remain contractually due”); *In re Walker*, No. 05–15010, 2006 WL 1314125, at *4 (Bankr.N.D.Ga. May 1, 2006) (noting that even the “surrender of the collateral does not change the fact

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that the payments are ‘contractually due’ ”); *In re Randle*, 2007 WL 2668727, at *7 (“The debtor’s announced intent to surrender the property does not change the contractual obligation owed by the debtor.”).

The debtor’s contractual obligation may be extinguished at some point in the process, but it is not extinguished upon the filing of a Statement of Intention indicating an intent to surrender. *See In re Randle*, 2007 WL 2668727, at *7 (noting that “the ‘Statement of Intention’ filed at the time of the petition is not a self-executing document, that when filed, automatically extinguishes a contract”). Even after the collateral has been surrendered, sold, and the proceeds applied to the obligation, an unsecured deficiency claim will likely remain, based on the debtor’s liability under the contract. *See also In re Quigley*, 391 B.R. 294, 302 (Bankr.N.D.W.Va.2008) (“discharge ... only makes the pre-petition contractual obligation unenforceable as a personal liability of the debtor; the underlying debt is not extinguished and it continues to exist”); *In re Walker*, 2006 WL 1314125, at *4 (“The debtor’s contractual liability for the debt is not eliminated upon the surrender of the collateral. At the earliest, it may be eliminated by the entry of the discharge. At the latest, the contractual obligation may never actually be eliminated, but instead, the creditor would merely be enjoined from collecting the debt from the debtor *in personam*.”).

Several courts have noted that the surrender of collateral, while it may not eliminate the debt entirely, does eliminate the secured portion of the debt. *In re Harris*, 353 B.R. 304, 309 (Bankr.E.D.Okla.2006); *In re Love*, 350 B.R. at 614. However, because having the intent to surrender property on the petition date, in itself, does not have any legal effect on the nature of the debt, *In re Randle*, 2007 WL 2668727, at *7, in order to take into account the subsequent surrender of the collateral, the Court would have to take post-petition events into consideration. *See In re Walker*, 2006 WL 1314125, at *5.

3. The Chapter 7 Means Test is a Snapshot

As noted above, when interpreting one provision of a statute, that provision should be considered in context, and the court should “look to the provisions of the whole law, and to its object and policy.” *In re Welzel*, 275 F.3d at 1317 (citation omitted). The Means Test, as a whole, as it is applied in a Chapter 7 case, has the character of a mechanical formula that often relates very little to the actual financial circumstances of the debtor. *In re Parada*, 391 B.R. at 497 (“[T]he means test is a mechanical test, based only superficially on a debtor’s reality, the purpose of which is to create a bright line presumptive test of eligibility.”). The amount of income is based on a historical formula, *see* § 101(10A), and the bulk of the allowable deductions are fixed amounts, based upon the IRS National Standards and Local Standards, not based on a debtor’s actual expenses, *see* § 707(b)(2)(A)(ii)(I).

[8][9] As the function of the Means Test is to be a mechanical formula for establishing a presumptive bar to obtaining relief in a Chapter 7 case, it is fitting *864 that the deductions should be bright line measurements. *See In re Thomas*, 395 B.R. at 919–20. Otherwise, courts would have to consider the facts and circumstances of each case, including post-petition events, such as the surrender of collateral, when conducting a Means Test analysis under Chapter 7. *See In re Benedetti*, 372 B.R. at 96–97 (holding that the Means Test involves an “evaluation of the Debtor’s financial condition on the petition date”). Requiring the court to inquire in every case “into each debtor’s intent and individual circumstances ... would be at odds with Congress’s purpose of creating a mechanical means test.” *Fokkena v. Hartwick*, 373 B.R. at 655–56. This Court agrees that in a Chapter 7 case, “the means test calculations are intended to represent a ‘snapshot’ as of the petition date, examined without regard to a debtor’s future intentions.” *In re Smale*, 390 B.R. at 115.

Some courts have stressed that the primary purpose of Congress in enacting the Means Test was to

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insure that those debtors who could afford to pay their creditors be required to do so. *See In re Skaggs*, 349 B.R. at 600 (“A primary intent of Congress in the passage of BAPCPA was to ensure that those debtors who can pay their debts do so.”). Allowing debtors to deduct from their CMI a payment that they will not in fact be making appears to run counter to that purpose. *See In re Burden*, 380 B.R. at 204. However, for the reasons stated above, it appears that is the result required by the plain language of the statute. Moreover, the Means Test must be considered in context. Even if a debtor “passes” the Means Test, the Court still may order the dismissal or conversion of a Chapter 7 case under § 707(b)(3). The Means Test is a bright line in the sand, not the final word on dismissal.

Therefore, under the plain meaning of this statutory provision and considering the Means Test as a whole, this Court holds that the “average monthly payments on account of secured debt” includes all payments that the debtor was obligated to make during the 60 months following the date of the petition, regardless of whether a debtor also intends to surrender the property securing the debt.

D. Applicable Monthly Expenses

[10] The Debtors in this case have subtracted, as an “applicable monthly expense amount specified under the National Standards and Local Standards,” the IRS Local Standards Ownership Costs Deduction for the Debtors’ second vehicle, a 1987 pickup truck, which is owned free and clear. The Means Test provision in question reads as follows:

(I) The debtor's monthly expenses shall be the debtor's *applicable monthly expense amounts specified under the National Standards and Local Standards*, and the debtor's *actual* monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, 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. Notwithstanding any other provision of this clause, the monthly expenses of the debtor *shall not include any payments for debts*.

11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). The IRS National Standards and Local Standards (together, “IRS Standards”) can be found on the IRS website.^{FN4} The U.S. Trustee website also posts the IRS Standards in effect for all dates since *865 October 2005. Because the Debtors filed for Chapter 7 relief on October 17, 2007, they are entitled, under the “IRS Local Transportation Expense Standards” to “Ownership Costs” in the amount of \$471 for a “First Car” and \$332 for a “Second Car.”^{FN5} This information is provided in the form of a chart. There is no explanation or elaboration in the Local Standards as to when a taxpayer may take a particular deduction.

FN4. Internal Revenue Service Website, Collection Financial Standards, at <http://www.irs.gov/individuals/article/0,,id=96543,00.html> (last visited January 26, 2009).

FN5. United States Trustee Website, IRS Local Transportation Expense Standards: South Census Region (Cases Filed Between October 15, 2007, and December 31, 2007, Inclusive), at http://www.usdoj.gov/ust/eo/bapcpa/20071015/bci_data/IRS_Trans_Exp_Std_SO.htm (last visited January 26, 2009).

The question of interpretation in this case is whether the “applicable monthly expense amounts” include the Ownership Costs Deduction for a car that is owned outright, on which the debtors make no lease or loan payment. Is the Ownership Costs deduction applicable if the debtor does not have a lease or loan payment? Four bankruptcy appellate panels have addressed this issue, in the context of Chapter 13 cases, and they are evenly split. The Tenth and Sixth Circuit Bankruptcy Appellate Pan-

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els have held that the debtor *may* take the deduction. See *In re Pearson*, 390 B.R. 706 (10th Cir. BAP 2008), *vacated as moot* by 2009 WL 205408 (10th Cir. Jan. 22, 2009); *In re Kimbro*, 389 B.R. 518 (6th Cir. BAP 2008). The Eighth and Ninth Circuit Bankruptcy Appellate Panels have held that the debtor may *not* take the deduction. See *In re Wilson*, 383 B.R. 729 (8th Cir. BAP 2008); *In re Ransom*, 380 B.R. 799 (9th Cir. BAP 2007). The Seventh Circuit recently became the first circuit court to consider the issue, holding that the debtor may take the deduction. *In re Ross-Tousey*, 549 F.3d 1148 (7th Cir.2008). Only one court in Florida has ruled on this issue, also holding that the debtor can take the deduction. *In re Morgan*, 374 B.R. 353 (Bankr.S.D.Fla.2007) (Cristol, J.). For the reasons stated below, this Court will follow the Seventh Circuit and will allow the Debtors to deduct, as an “applicable monthly expense amount,” the Ownership Costs allowance for their 1987 pickup truck, which is owned outright.

Where the language of the statute is plain, the Court must enforce it according to its terms. *Hartford Underwriters*, 530 U.S. at 6, 120 S.Ct. at 1947. The question here is what is meant by the word “applicable” in this statute. Reference to the common, dictionary definition of the word may again be helpful in this case. One definition of “applicable” is “that can be applied; appropriate.” *Webster's New College Dictionary* 68 (Michael Agnes, ed.2007). It is also useful to note that the word “applicable” is used in contrast to the term “actual.” The phrase “applicable monthly expense amounts” (which are determined under the IRS Standards) is followed by the phrase “actual monthly expense amounts” (which are determined under the IRS Other Necessary Expenses). Therefore, it is clear that the applicable monthly expense amounts are not a debtor's “actual” expenses, but rather “applicable” expenses to be determined by reference to the “National and Local Standards.”

[11] Many courts holding that debtors may not take the ownership costs expense for a car owned

outright with no lease or *866 loan payments rely heavily on the Internal Revenue Manual, which is an internal manual establishing the procedures for the Internal Revenue Service. See, e.g., *In re Wilson*, 383 B.R. at 733 (noting that “[t]he bankruptcy court's reading here is inconsistent with how the IRS applies its own standards”); *Fokkena v. Hartwick*, 373 B.R. at 650 (noting that “in order to determine whether the expense Standards issued by the IRS are ‘applicable,’ the most logical resource to consult is the IRS”). Under the Internal Revenue Manual, an internal revenue officer applies the Local Standards as caps on the taxpayer's expenses, not as set deductions. See *Internal Revenue Manual, Part 5: Collecting Process, Chapter 15: Financial Analysis Handbook*, available at <http://www.irs.gov/irm/part5/ch15s01.html> (“IRM”). Under the IRM, the National Standards, on the other hand, are not applied as caps; each taxpayer is allowed the total amount of those deductions. *Id.* The Ownership Costs expense is found in the Local Standards under “Transportation” and is applied under the IRM as a cap on the monthly lease or loan payment a taxpayer incurs on a vehicle. If there is no car payment, the taxpayer is not entitled to the Ownership Costs deduction. *Id.*; see also *Fokkena v. Hartwick*, 373 B.R. at 651.

There are several reasons why a court applying the Means Test to a debtor in bankruptcy should not apply the IRS Standards in the same way as they would be applied by an internal revenue officer under the IRM. First, the way in which the IRM is applied to a taxpayer is at odds with the clear language of the statute. The statute states that a debtor may deduct the “applicable” amounts specified under the Local Standards. § 707(b)(2)(A)(ii)(I). Because the term “applicable” is contrasted so neatly with the term “actual,” at a minimum, it is clear that the IRS Standards amounts are not meant to be used as caps. See *In re Fowler*, 349 B.R. 414, 418 (Bankr.D.Del.2006) (noting that “[t]he use of ‘actual’ with respect to Other Necessary Expenses and ‘applicable’ with respect to the National and Local Standards must mean that Congress intended

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two different applications.”); *see also In re Pearson*, 390 B.R. at 713 (quoting *Duncan v. Walker*, 533 U.S. 167, 173, 121 S.Ct. 2120, 2125, 150 L.Ed.2d 251 (2001), for the maxim of statutory construction that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

[12] Further, the IRM gives broad discretion to internal revenue officers in determining the amount a taxpayer is allowed to deduct under the IRS Standards as expenses. *See In re Ross-Tousey*, 549 F.3d at 1159; *In re Kimbro*, 389 B.R. at 527–28. It is clear by review of the legislative history and by viewing § 707(b)(2) in its entirety that the Means Test is meant to be a mechanically applied formula, into which the bankruptcy judge should not insert his or her discretion. *In re Ross-Tousey*, 549 F.3d at 1159; *In re Ragle*, 395 B.R. 387, 400–01 (E.D.Ky.2008). As stated aptly by the Sixth Circuit Bankruptcy Appellate Panel, “the process of applying the guidelines of the IRM for tax collection purposes is a highly discretionary process for a revenue officer. In reality, that process is much like the highly discretionary process that bankruptcy judges had utilized before the 2005 amendments to the bankruptcy code....” *In re Kimbro*, 389 B.R. at 530 (also noting that “[t]he clear *867 policies behind the means test were the uniform application of a bright-line test that eliminates judicial discretion. Plainly, Congress determined that these policies were more important than accuracy.”). Unlike the IRS Standards, the IRM itself was not incorporated into the statute. Therefore it is not appropriate to refer to the IRM as an aid to statutory interpretation, especially where the IRM would compel a result in direct contradiction to the plain meaning of the statute. *See In re Pearson*, 390 B.R. at 714; *In re Ragle*, 395 B.R. at 397.

Secondly, the legislative history of BAPCPA does not support the application of the IRS Stand-

ards by reference to the IRM. A prior version of the legislation that ultimately resulted in BAPCPA included in its means test a specific reference to the IRM. House Bill 3150, as introduced in the House of Representatives, read in part as follows:

(3) ‘Projected monthly net income’ means current monthly total income less—

(A) the expense allowances under the applicable National Standards, Local Standards and Other Necessary Expenses allowance ... as determined under the Internal Revenue Service financial analysis for expenses in effect as of the date of the order for relief;....

Consumer Bankruptcy Reform Act of 1998 (Introduced in House), H.R. 3150.IH, § 101, 105th Congress (1998). The legislation made its way through the House with this provision generally intact. Consumer Bankruptcy Reform Act of 1998 (Engrossed as Agreed to or Passed by House), H.R. 3150.EH, § 101, 105th Congress (1998) (the relevant language being changed to “as determined by the Internal Revenue Service allowance”). However, the version of House Bill 3150 that was agreed to by the Senate had this language removed. *See Consumer Bankruptcy Reform Act of 1998 (Engrossed as Agreed to or Passed by Senate)*, H.R. 3150.EAS, 105th Congress (1998). Clearly, BAPCPA as enacted does not in any way refer to the IRM, and that absence seems to indicate that Congress did not, in its final enactment, intend to incorporate the IRM into the § 707(b)(2) analysis. The idea was raised and discarded during the legislative process. Therefore, it is not fitting for this Court to insert the IRM back into the Means Test analysis. *See In re Fowler*, 349 B.R. at 419 (citing *Transcontinental & Western Air, Inc. v. Civil Aeronautics Board*, 336 U.S. 601, 605 n. 6, 69 S.Ct. 756, 758 n. 6, 93 L.Ed. 911 (1949), for the proposition that prior, unenacted legislation may be used to deduce Congressional intent); *see also In re Morgan*, 374 B.R. at 362.

If the Court is left with the plain language of

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the statute, and the IRS Standards standing alone without the interpretive aid of the IRM, it is clear that a debtor may deduct the “Ownership Costs” expense amount if that expense amount is “applicable” to the debtor. The use of the term “Ownership Costs” alone, in the IRS Standards, does not lead to the conclusion that it only represents lease or loan payments. It is only by reference to the IRM that courts have made that logical leap. The plain meaning of “Ownership Costs,” which is divided into two sub-categories of “First Car” and “Second Car,” is those costs concomitant with owning a first and second vehicle. As any vehicle owner can attest, the cost of ownership of a vehicle is much greater than one's lease or loan payments. See *In re Ross–Tousey*, 549 F.3d at 1160.

Additionally, this interpretation of the statute is sensible given the sentence at *868 the end of the statutory provision, which states as follows: “Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts.” § 707(b)(2)(A)(ii)(I). If only those debtors who had secured debt payments on their vehicles were allowed to take the deduction, it would be incongruent with this statutory language. See *In re Ross–Tousey*, 549 F.3d at 1158 (noting that “it is difficult to square this part of section 707(b)(2)(A)(ii)(I) with the IRM approach, which would only allow the vehicle ownership deduction on condition of a monthly debt payment.”). With the contemplation that a secured debt payment on a vehicle is meant to be *included* in “Ownership Costs,” Form 22A requires those debtors who have secured debt payments on their first or second vehicle to reduce the deduction by the amount of the secured debt payment on those vehicles. The debtor then includes the secured debt payment as a deduction under § 707(b)(2)(A)(iii). The result is that the debtor will deduct the higher of the Ownership Costs Deduction or their actual payments on secured debt related to the vehicle during the life of the plan. If only those debtors who had secured debt payments were allowed to take the deduction,

this roundabout method of calculating the deduction would be nonsensical.

Finally, policy considerations also support this interpretation of the statutory provision. Denying this expense deduction to debtors who own their cars outright would often lead to arbitrary and unfair results. Many such debtors may own older vehicles that may soon need to be replaced or may have delayed purchasing a new vehicle in order to try to meet their debt obligations. To disfavor such debtors is not a wise policy. See *In re Ross–Tousey*, 549 F.3d at 1161; *In re Ragle*, 395 B.R. at 399; *In re Pearson*, 390 B.R. at 715 (Thurman, J., specially concurring) (noting that “as a matter of fairness, it makes little sense to deny an ownership deduction to a frugal debtor who, although he has fully paid for his used car, finds himself in need of bankruptcy relief, while allowing the deduction to a more ‘aggressive’ debtor who has acquired a late model car by incurring a large secured debt.”). Also, to allow the deduction favors the uniform application of the Means Test, which was clearly meant to be more of a bright-line rule than an accurate measure of ability to pay. *In re Ragle*, 395 B.R. at 399–400.

It may seem that allowing the Ownership Costs deduction to debtors who own their vehicles outright goes against one of the main policy goals of BAPCPA—that those debtors “who can afford to repay some portion of their unsecured debts [be] required to do so.” *In re Hardacre*, 338 B.R. 718, 725 (Bankr.N.D.Tex.2006) (quoting 151 Cong. Rec. S2470 (Mar. 10, 2005)). However, most of the debtors who own a vehicle will need the extra disposable income regardless of whether they have lease or loan payments. In Florida, the exemption allowance for a vehicle is only \$1,000. Fla. Stat. § 222.25(1). Almost any car owned free and clear would have equity above that amount that is the property of the bankruptcy estate. 11 U.S.C. §§ 522, 541. Debtors who own their vehicles free and clear would likely need to devote this “extra” disposable income to make payments to the trustee un-

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der a buyback arrangement in order to keep their vehicle.

Finally, as the Seventh Circuit has pointed out, the fact that a debtor passes the Means Test does not “insulate [the] *869 case from dismissal. Instead, it simply means that the debtor’s petition is not presumed abusive.” *In re Ross–Tousey*, 549 F.3d at 1161; *see also In re Fowler*, 349 B.R. at 421. The U.S. Trustee, as has occurred in this case, may still seek to dismiss a case under § 707(b)(3), even where a debtor passes the Means Test.

Therefore, for the reasons stated herein, the Court will allow these Debtors to take the Ownership Costs Deduction for their 1987 pickup truck, despite the fact that they make neither lease nor loan payments on the vehicle.

Conclusion

For the reasons stated herein, the Trustee’s Motion for Summary Judgment is denied in full, and the Debtor’s Motion for Summary Judgment is granted in part as to the issues relating to 11 U.S.C. § 707(b)(2). As the Court indicated at the hearing on the Motions for Summary Judgment, the Court will schedule an evidentiary hearing on the remaining issue of whether this case should be dismissed as an abuse of Chapter 7 based on the totality of the circumstances, pursuant to § 707(b)(3). Accordingly, it is

ORDERED:

1. The United States Trustee’s Motion for Summary Judgment (Doc. No. 27) is denied.

2. The Debtor’s Motion for Summary Judgment (Doc. No. 26) is granted in part as stated herein.

3. A further pre-trial hearing will be scheduled for March 5, 2009, at 9:30 a.m., for the purposes of scheduling a final evidentiary hearing on the remaining issues in this contested matter.

Bkrtcy.M.D.Fla.,2009.

In re Ralston

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United States Bankruptcy Court,
M.D. Florida,
Tampa Division.
In re Michael P. **ARSENAULT** and Maria Terri
Arsenault, Debtors.

No. 06-05452-MGW.
July 3, 2007.

Background: Chapter 13 trustee objected to above-median-income Chapter 13 debtors' proposed plan, as not satisfying "projected disposable income" requirement. Specifically, trustee objected to debtors' use of their historically-based disposable income, which did not include substantial bonus paid to debtor-husband more than six months prepetition, in calculating "projected disposable income" that they had to devote to payment of unsecured creditors under plan.

Holding: The Bankruptcy Court, Michael G. Williamson, J., held that "projected disposable income," such as Chapter 13 debtor is required to devote to payment of unsecured creditors under plan in order for plan that provides less than a 100% payout on unsecured claims to be confirmed over objection of trustee or unsecured creditor, is forward-looking concept, that is not to be equated with "disposable income," as statutorily defined based on six-month average of what Chapter 13 debtor earned prepetition.

Objection sustained.

West Headnotes

[1] **Bankruptcy 51** **3705**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3705 k. Claims and Assets; Propriety
and Feasibility in General. Most Cited Cases

Bankruptcy 51 **3715(7)**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3715 Acceptance and Confirmation
51k3715(7) k. Evidence. Most Cited
Cases

"Projected disposable income," such as Chapter 13 debtor is required to devote to payment of unsecured creditors under plan in order for plan that provides less than a 100% payout on unsecured claims to be confirmed over objection of trustee or unsecured creditor, is forward-looking concept, that is not to be equated with "disposable income," as statutorily defined based on six-month average of what Chapter 13 debtor earned prepetition; debtor's historically based "disposable income" is merely starting point for determining "projected disposable income" that must be devoted to payment of unsecured creditors under plan, which gives rise to presumption rebuttable with evidence that this historical snapshot does not provide reasonable basis for projecting income forward over life of debtor's plan. 11 U.S.C.A. § 1325(b)(1)(B).

[2] **Bankruptcy 51** **3705**

51 Bankruptcy
51XVIII Individual Debt Adjustment
51k3704 Plan
51k3705 k. Claims and Assets; Propriety
and Feasibility in General. Most Cited Cases

Chapter 13 debtors whose "disposable income," as statutorily defined based on six-month average, did not include the substantial bonuses, in average amount of \$20,000, that debtor-husband received outside this six-month "lookback" period could not satisfy "projected disposable income" requirement merely by making monthly payments on their unsecured debt in amounts equal to their historically-based "disposable income." 11 U.S.C.A. § 1325(b)(1)(B).

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[3] Statutes 361 ↪ 206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. Most Cited Cases

In construing statute, court should give meaning and effect, whenever possible, to every word of statute, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.

[4] Statutes 361 ↪ 195

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k195 k. Express Mention and Implied Exclusion. Most Cited Cases

It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of statute, but omits it in another.

[5] Bankruptcy 51 ↪ 2022

51 Bankruptcy

51I In General

51I(B) Constitutional and Statutory Provisions

51k2021 Construction and Operation

51k2022 k. Purpose. Most Cited Cases

Reforms instituted to the Bankruptcy Code by the Bankruptcy Abuse Prevention Consumer Protection Act (BAPCPA) were intended to ensure that debtors will repay creditors the maximum that they can afford. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 1 et seq., 11 U.S.C.A. § 101 note.

[6] Bankruptcy 51 ↪ 3705

51 Bankruptcy

51XVIII Individual Debt Adjustment

51k3704 Plan

51k3705 k. Claims and Assets; Propriety and Feasibility in General. Most Cited Cases

To determine expenses of above-median-income Chapter 13 debtors, for purpose of deciding whether debtors were devoting all of their “projected disposable income” to payment of unsecured creditors under plan, bankruptcy court could not look to debtors' actual, anticipated expenses, as set forth on bankruptcy schedule; while figures on bankruptcy form were merely the presumptive starting point for making determination of debtors' income, and while reasonably anticipated additional income had to be included in calculating their “projected disposable income,” calculation of debtors' expenses on form, as derived from application of the “means test,” was determinative of expenses of above-median-income Chapter 13 debtors. 11 U.S.C.A. § 1325(b)(3).

*847 James C. McClendon, II, Weaver & McClendon PA, Lake Wales, FL, for debtor.

ORDER SUSTAINING TRUSTEE'S OBJECTION TO CONFIRMATION OF AMENDED CHAPTER 13 PLAN

MICHAEL G. WILLIAMSON, Bankruptcy Judge.

In determining a debtor's “projected disposable income” under section 1325(b)(1)(B) of the Bankruptcy Code,^{FN1} the presumptive starting point is the disposable income number obtained from the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (“Form B22C”). The disposable income number on Form B22C is calculated using the historic six-month “current monthly income” as defined in section 101(10A).^{FN2} The projected disposable income derived from that calculation may be rebutted, however, by evidence that Form B22C's historic snapshot does not form a reasonable basis for projecting income forward over the life of the Chapter 13 plan.

FN1. References to “section” shall be to

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the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, unless otherwise specified.

FN2. Section 101(10A) defines “current monthly income” as the “average monthly income ... derived during the six-month period ...” preceding the date of the bankruptcy filing.

In this case, the preceding six-month historic income reflected in Form B22C does not take into account the Debtor husband's past or future annual bonuses. Therefore, the evidence overcomes the presumption created by Form B22C, and the Debtors' plan may not be confirmed because it does not commit all of the Debtors' “projected disposable income to be received in the applicable commitment period” to be paid to unsecured creditors over the term of the plan. 11 U.S.C. § 1325(b)(1)(B). Accordingly, the Chapter 13 Trustee's objection to confirmation is sustained.

I. Facts

Michael P. Arsenault and Marie Terri Arsenault (“Debtors”) filed a joint petition under Chapter 13 of the Bankruptcy Code on October 6, 2006. Along with the petition, the Debtors filed their Schedules, Form B22C, and their Chapter 13 plan.

According to Form B22C, the Debtors' annual income is \$96,533.16, which exceeds the median income for a family of four in Florida. After completing the form's deduction calculations, the Debtors were left with monthly disposable income of \$482.73.

At the section 341 meeting of creditors on November 14, 2006, the Debtors testified that the Debtor husband received an annual bonus. In 2005, the annual bonus totaled about \$17,000, while the 2006 bonus was more than \$23,000. Because the Debtors did not receive the 2006 annual bonus in the six months prior to the month in which their case was filed, they did not include this income on Form B22C. The Debtors also did not include the

annual bonus in their calculation of income on Schedule I. On February 23, 2007, the Debtors filed an amended plan, which proposed to pay unsecured creditors an estimated dividend of 16 percent. It, too, excluded the annual bonus from the amounts available to pay unsecured creditors.

The chapter 13 trustee, Terry Smith (“Trustee”), objected to confirmation of *848 the plan, asserting that the Debtors' Chapter 13 plan violated section 1325(b)(1)(B) of the Bankruptcy Code because it did not provide that all of the Debtors' projected disposable income be paid over the applicable commitment period to the unsecured creditors. Specifically, the Trustee asserted that the Debtors' income was understated because it did not include the Debtor husband's annual bonus, which had averaged \$20,000 in the last two years.

II. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. sections 157(b)(2)(L) and 1334. This is a core proceeding under 28 U.S.C. section 157(b)(2)(L).

III. Issue

Whether the Debtors' “projected disposable income” should be determined solely by Form B22C's calculation of monthly disposable income, or whether the Court should take into account the Debtor husband's future annual bonuses to determine the Debtors' “projected disposable income to be received” during the term of the plan.

IV. Conclusions of Law

A. Projected Disposable Income— Section 1325(b)(1)(B)

[1][2] This case hinges on the interpretation of “projected disposable income” as used in section 1325(b)(1)(B). Section 1325(b)(1)(B) provides as follows:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan

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....

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Thus, section 1325(b)(1)(B) requires debtors to use all of their "projected disposable income to be received" during the life of the plan to pay their unsecured creditors. Section 1325(b)(1)(B) is immediately followed by section 1325(b)(2), which states in pertinent part, "[f]or purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor ... less amounts reasonably necessary to be expended...."

"Current monthly income" is defined in new section 101(10A), which was added by the Bankruptcy Abuse Prevention Consumer Protection Act of 2005 ("BAPCPA"), as a debtor's average monthly income for the six-month period preceding bankruptcy. Therefore, current monthly income—and in turn disposable income under section 1325(b)(2)—is simply a compilation of a debtor's historical income data. After current monthly income is computed, above-median-income debtors must subtract reasonably necessary expenditures calculated in accordance with Bankruptcy Code section 707(b)(2), and the total yields a debtor's disposable income.

The Trustee argues that the word "projected" in section 1325(b)(1)(B) modifies the term "disposable income" and thus mandates that the Court look forward to the income the Debtors are reasonably anticipated to receive over the five-year applicable commitment period of their plan, which, in this case, would include the Debtor husband's expected annual bonuses.

The Debtors, on the other hand, argue that they need only pay their disposable income as calculated on Form B22C. The Debtors contend, in essence,

that their disposable income calculated in the six *849 months prior to the petition date is a fixed determination of their obligations during the life of the plan regardless of any changes in circumstance, such as the receipt of future annual bonuses.

Since the passage of BAPCPA, courts have grappled with the issue of whether the new definition of current monthly income is meant to limit the amount of a debtor's projected disposable income. In general, two lines of cases dealing with this issue have emerged.

One line of cases,^{FN3} typified by *In re Alexander*, 344 B.R. 742 (Bankr.E.D.N.C.2006), holds that disposable income means currently monthly income as defined in section 101(10A) and that disposable income is the same as projected disposable income. The determination of a debtor's projected disposable income is, therefore, basically a mechanical test using historic income data. *See id.* at 749 (stating that "in order to arrive at 'projected disposable income,' one simply takes the calculation mandated by § 1325(b)(2) and does the math.>").

FN3. *See, e.g., In re Miller*, 361 B.R. 224 (Bankr.N.D.Ala.2007); *In re McGillis*, 370 B.R. 720, 2007 WL 1549071 (Bankr.W.D.Mich. May 15, 2007); *In re Kolb*, 366 B.R. 802 (Bankr.S.D. Ohio 2007); *In re Hanks*, 362 B.R. 494 (Bankr.D.Utah 2007); *In re Tranmer*, 355 B.R. 234 (Bankr.D.Mont.2006).

The second line of cases,^{FN4} typified by *In re Hardacre*, 338 B.R. 718 (Bankr.N.D.Tex.2006), stands for the proposition that the word "projected," to be given meaning, must modify disposable income such that the term "disposable income" in section 1325(b)(2) is not the same as the term "projected disposable income" in section 1325(b)(1)(B). Projected disposable income, therefore, "must be based upon the debtor's anticipated income during the term of the plan, not merely an average of her prepetition income." *Id.* at 722.

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FN4. See, e.g., *In re Kibbe*, 361 B.R. 302 (1st Cir. BAP 2007); *In re LaPlana*, 363 B.R. 259 (Bankr.M.D.Fla.2007); *In re Lanning*, 2007 WL 1451999 (Bankr.D.Kan. May 15, 2007); *In re Watson*, 366 B.R. 523 (Bankr.D.Md.2007); *In re Jass*, 340 B.R. 411 (Bankr.D.Utah 2006).

There is one case squarely on point with this case, and it follows the *Hardacre* line of cases. In *In re Foster*, 2006 WL 2621080 (Bankr.N.D.Ind. Sept.11, 2006), the court addressed the issue of “the debtors’ failure to include annual bonuses in their Plan.” *Id.* at *1. The trustee objected to confirmation of the proposed plan on the ground that “the requirement of 11 U.S.C. § 1325(b)(1)(B) was not met because the debtors’ projected disposable income did not include the annual bonus.” *Id.* at *2. Relying on *Hardacre* and its progeny, the court sustained the trustee’s objection and determined that the proper calculation of projected disposable income must take into account annual bonuses received in the past and anticipated in the future. *Id.* at *8.

[3] After much consideration, this Court agrees with *Foster* and finds that the better-reasoned line of cases on this narrow issue is the *Hardacre* line of cases. Two tenets of statutory construction support this ruling. First, a court should give meaning and effect, whenever possible, to every word of a statute, *United States v. Menasche*, 348 U.S. 528, 538–539, 75 S.Ct. 513, 99 L.Ed. 615 (1955), “and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.” *In re Kibbe*, 361 B.R. 302, 313 (1st Cir. BAP 2007) (quoting *Lopez–Soto v. Hawayek*, 175 F.3d 170, 174 (1st Cir.1999)). Therefore, the Court should give meaning to the word “projected” in section 1325(b)(1)(B); to disregard it would deprive the word of any *850 significant meaning and effect, rendering “projected” superfluous.

The meaning of the term “projected” cannot be found in the Bankruptcy Code. It is, therefore, ap-

propriate to look to the word’s ordinary meaning. *In re Devilliers*, 358 B.R. 849, 858 (Bankr.E.D.La.2007) (citing *Rousey v. Jacoway*, 544 U.S. 320, 330, 125 S.Ct. 1561, 161 L.Ed.2d 563 (2005)). “Projected” is defined as “to plan, figure, or estimate for the future.” *Merriam–Webster’s Collegiate Dictionary* 932 (10th ed.1999). See also *In re Jass*, 340 B.R. 411, 415 (Bankr.D.Utah 2006) (stating that “[t]he word ‘projected’ means ‘[t]o calculate, estimate, or predict (something in the future), based on present data or trends.’ ” (citing *The Am. Heritage College Dictionary* 1115 (4th ed.2002))). In this respect, the ordinary meaning of “projected” lends further support to a forward-looking interpretation of section 1325(b)(1)(B) and the conclusion that the Court should consider not only the Debtors’ historical finances, but it should also consider what the Debtors expect to receive in the course of the applicable commitment period.

[4] The second tenet of statutory construction is that “[i]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994)). Congress chose to use the word “projected” to modify “disposable income” in section 1325(b)(1)(B), indicating its intent to distinguish “projected disposable income” from the phrase “disposable income” in section 1325(b)(2). See, e.g., *In re Hardacre*, 338 B.R. at 723.

The Court also agrees with *Hardacre* in that the reference to “to be received” in section 1325(b)(1)(B) lends further support to the conclusion that “projected” as used in that section is a forward-looking term. *Id.* Additionally, “projected disposable income” is tied to the applicable commitment period, which begins on the date of the first payment to general unsecured creditors following confirmation, not to the date of the petition. Projec-

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ted disposable income, therefore, is the future income debtors are required to pay over the duration of the plan.

[5] Inasmuch that the forward-looking interpretation of “projected disposable income” and the backward-looking definition of “disposable income” create any ambiguity, it is well settled that the court may look “beyond the naked text for guidance” and consider legislative intent. *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 454–455, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). Although the legislative record on this particular statute is not illuminating, *In re Jass*, 340 B.R. at 416, it is clear that BAPCPA’s reforms were intended “ ‘to ensure that debtors repay creditors the maximum they can afford.’ ” *In re Zimmerman*, 2007 WL 295452, at *6 (Bankr.N.D. Ohio Jan. 29, 2007) (citing H.R. Rep. No. 109–31, Pt. 1, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89)).

In addition, rigid adherence to a debtor’s pre-petition income history would produce results at odds with both Congressional intent and common sense. For example, if a debtor’s pre-petition income is higher than his or her post-petition income, the debtor may be forced into a plan doomed to fail. On the other hand, if the debtor’s pre-petition income is lower than his or her post-petition income, it could lead to a windfall for the debtor.

It should also be noted that this interpretation does not render section 101(10A) *851 irrelevant. To the contrary, section 101(10A) provides the source of payment and excludes certain income, such as social security and child support. It also provides a starting point for making the projection required by section 1325(b)(1)(B).

This construction also gives effect and meaning to sections 521(a)(1)(B)(vi) and 521(f), which respectively require debtors to file post-petition financial information and annual income tax returns. It only makes sense to require debtors to comply with these obligations if the debtors’ projected disposable income is tied to income earned in the future.

See In re Davis, 348 B.R. 449, 458 (Bankr.E.D.Mich.2006) (stating that “[i]f a debtor’s only responsibility is to pay the amount determined by an arithmetic formula under 1325(b)(1)(B) based upon the debtor’s current monthly income and her disposable income as calculated by that section of the Bankruptcy Code on the confirmation date, then what purpose is served by requiring that debtor to also disclose any reasonably anticipated increase in income or expenditures in the 12 months following the period of the debtor’s petition?”).

Accordingly, the Court finds that the income component of projected disposable income as set forth in section 1325(b)(1)(B) is the anticipated income of the Debtors during the applicable commitment period, including future annual bonuses.

B. Expenses—Section 707(b)(2)

[6] This opinion has dealt with the issue of whether a debtor’s disposable income—as calculated in Form B22C utilizing the six-month historic current monthly income as defined in section 101(10A)—is the same as “projected disposable income” for purposes of section 1325(b)(1)(B). As set forth above, it is the Court’s conclusion that Form B22C is the presumptive starting point for making that determination and that reasonably anticipated additional income should be included in calculating the debtor’s projected disposable income.

Of course, for above-median-income debtors, Form B22C also is used to calculate the expenses that must be deducted from current monthly income to arrive at the amount available to pay unsecured creditors under the debtors’ Chapter 13 plans. It may be inferred that a similar analysis would also result in this court utilizing Schedule J in determining the expenses to be deducted from a debtor’s income to arrive at the amount left over as projected disposable income to fund a Chapter 13 plan’s payments to unsecured creditors. In fact, it appears from a review of the cases, that courts generally either follow the Form B22C calculations or alternatively, apply the numbers set forth in Schedules I

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and J, in deriving both income and expenses for purposes of calculating projected disposable income.^{FN5}

FN5. Compare *Miller*, 361 B.R. at 234 (finding Form B22C dispositive in calculating above-median-income debtor's projected disposable income); *In re Kolb*, 366 B.R. at 817–818 (stating that “the plain meaning of 1325(b)(2) and 1325(b)(1)(B) demands recourse to prepetition income (as adjusted by the calculation of CMI), minus the allowed expenses of 707(b)(2)(A), as the best estimate for a debtor's future income and expenses.”); *Hanks*, 362 B.R. at 502 (concluding that “Form B22C is determinative of the return to general unsecured creditors for above-median income debtors unless ‘special circumstances’ can be shown under § 707(b)(2)(B)”); *Alexander*, 344 B.R. at 747 (stating that section 1325(b)(2) and (3) “plainly set forth a new definition and method for calculating disposable income, and Form B22C is the tool for arriving at that disposable income under the new law.”) with *Watson*, 366 B.R. at 529 (holding disposable income calculated on Form B22C should be adjusted based on projected earnings and projected reasonably necessary expenses); *In re Upton*, 363 B.R. 528, 532 (Bankr.S.D. Ohio 2007) (using Schedules I and J to determine projected disposable income); *In re Edmunds*, 350 B.R. 636, 647 & 649 (Bankr.D.S.C.2006) (finding courts may consider actual income and expenses on schedules I and J and other evidence during confirmation); *Jass*, 340 B.R. at 418 (stating that “[i]f the Court finds adequate evidence to rebut the presumption in favor of Form B22C, the Court will allow the debtor to use a projected budget in the form of Schedules I and J to determine the debtor's ‘projected disposable income.’”).

*852 Contrary to the trend of the cases cited above, it is the view of this Court that the reasons for looking beyond the calculations set forth in Form B22C for calculating income have no applicability to the calculation of expenses. In determining expenses for above-median debtors, courts must deal with a different subsection: section 1325(b)(3). Thus, the calculations for above-median-income debtors must be done under Form B22C without resort to Schedule J.

Section 1325(b)(3) states that for above-median income debtors the “[a]mounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) ...” (emphasis added). Here, there is no ambiguity at all; it is clear that Congress, on the deduction side, meant to take away all judicial discretion in the specific deduction areas set forth in section 707(b)(2)(A) and (B) and in those areas in which the Internal Revenue Service (“IRS”) standards apply. As discussed in *In re Barr*, 341 B.R. 181, 185 (Bankr.M.D.N.C.2006), “[t]he use of ‘shall’ in section 1325(b)(3) is mandatory and leaves no decisions with respect to the expenses and deductions that are to be deducted in arriving at disposable income.” Moreover, the legislative history indicates that Congress knew that new section 1325(b)(3)'s substitution of IRS standards for the debtor's actual expenses substantially changed the calculation of disposable income. See *id.* (citing Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H.R.Rep. No. 109–31, pt. 1., p. 553, 109th Cong., 1st Sess. (2005)).

The ambiguity seen between section 1325(b)(1)(B) and section 1325(b)(2) does not exist here. Rather, just as the IRS standards apply for the calculation of expenses for means test purposes for above-median-income debtors, section 1325(b)(3) mandates that the exact same standards are to apply for purposes of calculating projected disposable income under section 1325(b)(1)(B).

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Accordingly, the Court finds that it has no discretion in determining what expenses are reasonably necessary for a debtor's support, but must strictly follow section 1325(b)(3)'s directive that expenses be determined under section 707(b)(2) when calculating disposable income for above-median-income debtors.^{FN6}

FN6. This does not mean that the plan is fixed for its duration in terms of expenses based on those calculated under B22C as of the date of the petition. The plan is still subject to being modified under section 1329 to increase or reduce payments if circumstances change resulting in different expense calculations under section 707(b)(2).

V. Conclusion

Form B22C will be the basis for projected disposable income unless there is evidence that simply using the historic six-month snapshot does not form a reasonable basis for projecting income forward. In this case, the evidence shows that the historic income data is not reasonable because the Debtors expect to receive annual bonuses during the five-year applicable commitment period. Therefore, the Debtors' projected disposable income must include *853 their anticipated annual bonuses. Accordingly, it is

ORDERED that the Trustee's Objection is sustained.

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