

Consumer Bankruptcy in Practice: A Webinar Series

Income, expenses, and related issues under BAPCPA

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Introduction

Courts have struggled to implement the complex and sometimes unclear provisions of BAPCPA. In particular, courts have not agreed on how to apply the complex provisions for dismissal of chapter 7 cases under §707(b), nor have they agreed on the meaning of §1325(b)'s requirement that all projected disposal income be paid into the chapter 13 plan for either three or five years.

A chapter 7 case may be dismissed under §707(b)(1) if it is an “abuse” of the provisions of chapter 7. Section 707(b)(2)(A) creates a presumption of abuse if the debtor’s “current monthly income” (defined in §101(10A)) is above the median and is sufficient—after deduction of monthly expenses, payments on secured debts, and expenses for payment of priority unsecured claims—to allow the debtor to pay \$10,950 on general unsecured claims over 60 months.¹ Section 707(b)(2)(B) provides the exclusive and very limited grounds for rebutting a presumption of abuse. If no presumption arises, or if the presumption is rebutted—that is, if the debtor has passed the “means test” or if the debtor is a below-median income debtor for whom the means test is inapplicable—then §707(b)(3) requires the court to consider two factors in determining whether the case still may be an abuse of chapter 7. The first factor is “[w]hether the debtor filed the petition in bad faith.” The second factor is whether “the totality of the circumstances ... of the debtor’s financial situation demonstrates abuse.” Although §707(b)(1) provides that the court “may” dismiss the case if abuse is found, rather than that the court “must” dismiss the case, only one case has been found in which a court determined that it had discretion to refuse to dismiss a case in which there was an un rebutted presumption of abuse, where the debtor did not convert the case to chapter 13.²

Key issues on which courts disagree in determining whether there is a presumption of abuse under §707(b)(2) include (1) whether payments on a secured debt are deductible where the debtor has surrendered or plans to surrender the collateral, so that the payments will not, in fact, be made and (2) whether the full amount for cost of ownership of a vehicle may be deducted where the debtor owns the vehicle free and clear. An additional important question that has arisen under §707(b)(2) is (3) whether unemployment insurance benefits are excluded from “current monthly income” as “benefits received under the Social Security Act;” thus far all the known court decisions have excluded such benefits, but some commentators argue that they

¹ The \$10,950 ability-to-pay threshold includes an inflation adjustment (effective April 1, 2007) to the \$10,000 figure originally included in §707(b)(2)(A)(i) under BAPCPA. Note that the text assumes that general unsecured claims in the case are at least four times the \$10,950 figure, or at least \$43,800. If general unsecured claims do not total that much, then the ability-to-pay threshold for abuse is lower than \$10,950; the threshold would be 25% of the amount of the general unsecured claims or \$6,575, whichever is greater.

² See *In re Skvorecz*, 369 B.R. 638 (Bankr. D. Colo. 2007). For the more typical approach, see, e.g., *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007) (noting the court’s view, where there was an un rebutted presumption of abuse, that “the law therefore now requires that the [debtors] proceed under Chapter 13, not under Chapter 7”).

should be included. Another key question is (4) whether an above-median income chapter 7 debtor's ability to make payments on debts can be a basis for dismissal under §707(b)(3), when there is no presumption of abuse under §707(b)(2).

Section 1325(b)(1) requires, if there is objection, that the chapter 13 plan either pay unsecured claims in full or else provide for payment to unsecured creditors of "all of the debtor's projected disposable income to be received in the applicable commitment period." The "applicable commitment period" is three years for a below-median income debtor and five years for an above-median income debtor. "Projected disposable income" is not defined in the statute, but "disposable income" is defined, and its definition uses—in two ways—the term "current monthly income," which is defined in §101(10A). The definition of "current monthly income" in §101(10A) is backwards looking; it is based on the six months preceding the bankruptcy filing. One key question on which courts have disagreed is (5) whether the word "projected" in the phrase "projected disposable income" indicates that "projected disposable income" is forward looking. If it appears that the debtor's income will be substantially higher or lower during the plan than it was during the six months preceding the bankruptcy petition filing, what level of income will be used in determining projected disposable income? Another key question is (6) whether confirmation of an above-median income debtor's plan may be denied on the basis of bad faith, due to failure of the plan to make sufficient payments to holders of general unsecured claims even if the plan provides for payment of all "projected disposable income" to such claim holders during the applicable commitment period.

Two additional issues (or groups of issues) that are included in these materials deal with (7) treatment of 401(k) loans, and (8) determination of household size.

Issue 1: Whether future payments on secured debt are deductible from current monthly income under §707(b)(2) if the debtor has surrendered or plans to surrender the collateral, so that the payments will not in fact be made?

Section 707(b)(2)(A)(i) provides that "the court shall presume that abuse exists if the debtor's currently monthly income reduced by the amounts determined under clauses (ii), (iii) and (iv), and multiplied by 60" is at least equal to a figure that in most cases will be \$10,950. Section 707(b)(2)(A)(iii) provides:

The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

Suppose the debtor had many months of payments yet to make on a secured debt—*e.g.*, for a second automobile—at the time the debtor filed a bankruptcy petition, but that the debtor has surrendered the collateral or plans to do so. Thus the debtor will not continue to make the monthly payments. Are the payments nevertheless included in the amount that the debtor may deduct under §707(b)(2)(A)(iii) because they are "scheduled as contractually due to secured creditors?"

Almost all the opinions in chapter 7 cases answer that question “yes.” Only four published opinions in chapter 7 cases were found that answer “no.” Several opinions in chapter 13 cases answer “no,” including an Oct. 10, 2007 opinion by Bankruptcy Judge Stinnett of the Eastern District of Tennessee. *See In re Spurgeon*, 378 B.R. 197 (Bankr. E.D. Tenn. 2007). Some of those chapter 13 opinions have been criticized by other chapter 13 opinions with respect to their general methodology, but only one chapter 13 opinion was located (an unpublished opinion) that answers this precise question with a “yes.” Note that §707(b)(2)(A) applies in chapter 13 cases because it is incorporated into §1325(b)(3) for purposes of determining an above-median income debtor’s reasonable expenses. Several of the chapter 13 opinions that answer “no” (including *Spurgeon*) go on to state that the result might be different if the case were in chapter 7, because the language of chapter 13 is forward looking. Note also that §1325(b)(3) looks to §707(b)(2)(A)-(B) for “[a]mounts reasonably necessary to be expended,” but that §707(b)(2)(A)(iii) does not by its terms provide an expense amount, but rather simply an average monthly payment amount. No opinion has been found in which a court determined that §707(b)(2)(A)(iii) therefore simply is not applicable in the §1325(b)(3) analysis, but such an argument could be made.

Here is a sampling of the many majority rule cases and a listing of the minority cases, including the opinions in chapter 13 cases. The author believes the list includes all published minority rule cases as of the date of writing. Note that *Singletary*, listed in both columns, takes a middle ground.

Yes: Included in “average monthly payments on account of secured debts” and thus deductible	No: Excluded from “average monthly payments on account of secured debts” and thus not deductible
<p>Chapter 7 cases:</p> <p><i>Fokkena v. Hartwick</i>, 373 B.R. 645 (D. Minn. 2007), <i>aff’g in relevant part In re Hartwick</i>, 352 B.R. 867 (Bankr. D. Minn. 2006).</p> <p><i>In re Makres</i>, __ B.R. __, 2007 WL 4345028 (Bankr. N.D. Okla. Dec. 7, 2007).</p> <p><i>In re Randle</i>, 2007 WL 2668727 (N.D. Ill. July 20, 2007), <i>aff’g In re Randle</i>, 358 B.R. 360 (Bankr. N.D. Ill. 2006).</p> <p><i>In re Hayes</i>, 376 B.R. 55 (Bankr. D. Mass. 2007).</p> <p><i>In re Maya</i>, 374 B.R. 750 (Bankr. S.D. Cal. 2007).</p> <p><i>In re Palm</i>, 2007 WL 1772174 (Bankr. D. Kan. June 19, 2007).</p> <p><i>In re Vartan</i>, 2007 WL 640006 (Bankr. E.D. Cal. Feb. 26, 2007).</p>	<p>Chapter 7 cases:</p> <p><i>In re Burden</i>, 2007 WL 4556906 (Bankr. W.D. Mo. Dec. 20, 2007).</p> <p><i>In re Ray</i>, 362 B.R. 680 (Bankr. D.S.C. 2007).</p> <p><i>In re Harris</i>, 353 B.R. 304 (Bankr. E.D. Okla. 2006).</p> <p><i>In re Skaggs</i>, 349 B.R. 594 (Bankr. E.D. Mo. 2006).</p> <p><i>In re Singletary</i>, 354 B.R. 455 (Bankr. S.D. Tex. 2006) (holding that payments are deductible where the collateral has not yet been surrendered at the time of the hearing, but are not deductible where the collateral has been surrendered as of the time of the hearing).</p> <p>Chapter 13 cases:</p> <p><i>In re Spurgeon</i>, 378 B.R. 197 (Bankr. E.D. Tenn. 2007).</p>

<p><i>In re Wilkins</i>, 370 B.R. 815 (Bankr. C.D. Cal. 2007).</p> <p><i>In re Kogler</i>, 368 B.R. 785 (Bankr. W.D. Wis. March 30, 2007).</p> <p><i>In re Galyon</i>, 366 B.R. 164 (Bankr. W.D. Okla. 2007).</p> <p><i>In re Sorrell</i>, 359 B.R. 167 (Bankr. S.D. Ohio 2007).</p> <p><i>In re Nockerts</i>, 357 B.R. 497 (Bankr. E.D. Wis. 2006).</p> <p><i>In re Simmons</i>, 357 B.R. 480 (Bankr. N.D. Ohio 2006).</p> <p><i>In re Singletary</i>, 354 B.R. 455 (Bankr. S.D. Tex. 2006) (holding that payments are deductible where the collateral has not yet been surrendered at the time of the hearing, but are not deductible where the collateral has been surrendered as of the time of the hearing).</p> <p>Chapter 13 case answering specific question “yes”:</p> <p><i>In re Oliver</i>, 2006 WL 2086691 (Bankr. D. Or. June 29, 2006) (noting, however, that “debtors themselves concede ‘Form B22C is only a first step to calculate the amount to be paid under debtor’s [sic] proposed plan.’ “).</p> <p>Chapter 13 cases critical of general approach of chapter 13 cases that answer specific question “no”:</p> <p><i>In re Winokur</i>, 364 B.R. 204 (Bankr. E.D. Va. 2007) (criticizing approach under which actual projected disposable income is used rather than projected disposable income based on statutory formula, and criticizing general approach of <i>Edmunds</i> on that ground).</p> <p><i>In re Hanks</i>, 362 B.R. 494 (Bankr. D. Utah 2007) (same).</p>	<p><i>In re Edmonson</i>, 371 B.R. 482 (Bankr. D.N.M. 2007).</p> <p><i>In re Love</i>, 350 B.R. 611 (Bankr. N.D. Ala. 2006).</p> <p><i>In re McGillis</i>, 370 B.R. 720 (Bankr. W.D. Mich. 2007).</p> <p><i>In re Crittenden</i>, 2006 WL 2547102 (Bankr. M.D. N.C. 2006).</p> <p><i>In re Edmunds</i>, 350 B.R. 636 (Bankr. D.S.C. 2006).</p>
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Issue 2: Whether the full IRS expense allowance for ownership of a motor vehicle can be taken under §707(b)(2)(A)(ii) where the debtor owns the vehicle free and clear?

Under §707(b)(2)(A)(ii)(I), the means test applicable to an above-median income chapter 7 debtor allows the debtor to take account of expenses in amounts equal to the “applicable monthly expense amounts specified under the National Standards and Local Standards ... issued by the Internal Revenue Service.” The section also makes clear that any such expenses “shall not include any payments for debts.” (Scheduled payments on secured debts are handled separately under §707(b)(2)(A)(iii).) The IRS standards for expenses of vehicle ownership (separate from costs of vehicle operation) assume that the debtor does not own the motor vehicle free and clear, and thus the amounts under the standards include an allowance for what the IRS considers to be an appropriate monthly payment on a vehicle. Line 23 of Official Form B22A (Statement of Current Monthly Income and Means Test Calculation for Use in Chapter 7) calculates the debtor’s cost of ownership of a vehicle, net of debt payments, by subtracting the debtor’s average monthly car payment from the amount of the IRS ownership cost allowance; the resulting figure (but not less than zero), is entered on line 23.

This is, of course, only a rough approximation of the debtor’s cost of ownership of the vehicle, net of debt payments. It may leave the debtor with a larger or smaller allowed cost of ownership net of debt payments than the amount the IRS thought would be appropriate for costs other than debt payments. If the debtor’s car payments are more than the car payment assumed by the IRS, the debtor will be left with a low allowance; if the car payments are less, the debtor will be left with a high allowance. But when the debtor’s car payments then are deducted pursuant to §707(b)(2)(A)(iii), the debtor will end up with a total allowance for ownership of the vehicle at least equal to the total IRS allowance. (If the debtor’s car payment is more than the entire IRS allowance, the debtor’s total allowance will equal that payment amount.)

But what should a court do if the debtor owns the automobile free and clear? The IRS ownership expense allowance assumes that the debtor has a payment to make; the calculation on form B22A will allow the debtor the entire IRS standard amount even though the debtor has no such payment to make. Some courts have allowed the debtor to take the entire allowance; others have required debtors to subtract the amount of the car payment that the IRS assumed would be made, as an IRS manual requires its agents to do if they are applying the standards while trying to collect taxes. The manual is not explicitly incorporated into §707(b)(2)(A)(ii), but some courts look to the word “applicable” in §707(b)(2)(A)(ii) to justify elimination of the portion of the standard amount that, on the view of such courts, simply is not applicable to a debtor who has no car payment. (Note, however, that most automobiles owned free and clear will be somewhat old, and the IRS standards permit an extra \$200 operating expense allowance for car repairs on older cars (six years or 75,000 miles). See *In re Howell*, 366 B.R. 153, 156 (Bankr. D. Kan. 2007).)

Because of the incorporation by reference of §707(b)(2)(A)-(B) in the disposable income test of §1325(b)(3), this issue can arise both in chapter 7 and in chapter 13 (with respect to Official Form B22C, line 28).

Here is a sample of the cases on both sides of the issue:

Debtor is entitled to entire IRS allowance for cost of ownership even though debtor owns vehicle free and clear	Debtor is not entitled to entire IRS allowance where debtor owns vehicle free and clear
Chapter 7 cases: <i>In re Hice</i> , 376 B.R. 771 (Bankr. D.S.C. 2007).	Chapter 7 cases: <i>Fokkena v. Hartwick</i> , 373 B.R. 645 (D. Minn.

<p><i>In re Scarafioti</i>, 375 B.R. 618 (Bankr. D. Colo. 2007) (collecting cases).</p> <p><i>In re Vesper</i>, 371 B.R. 426 (Bankr. D. Alaska 2006).</p> <p>Chapter 13 cases:</p> <p><i>In re Moorman</i>, 376 B.R. 694 (Bankr. C.D. Ill. 2007).</p> <p><i>In re Wilson</i>, 373 B.R. 638 (Bankr. W.D. Ark. 2007).</p> <p><i>In re Watson</i>, 366 B.R. 523 (Bankr. D. Md. 2007).</p> <p><i>In re Grunert</i>, 353 B.R. 591 (Bankr. E.D. Wis. 2006).</p>	<p>2007), <i>rev'g in relevant part In re Hartwick</i>, 352 B.R. 867 (Bankr. D. Minn. 2006).</p> <p><i>In re Canales</i>, 377 B.R. 658 (Bankr. C.D. Cal. 2007) (collecting cases).</p> <p><i>In re Talmadge</i>, 371 B.R. 96 (Bankr. M.D. Pa. 2007) [collecting cases and determining that 20 opinions had allowed full IRS allowance but that 14 (or 15 after its own opinion) had not].</p> <p><i>In re Harris</i>, 353 B.R. 304 (Bankr. E.D. Okla. 2006).</p> <p>Chapter 13 cases:</p> <p><i>Ransom v. MBNA Am. Bank (In re Ransom)</i>, ___ B.R. ___, 2007 WL 4625248 (B.A.P. 9th Cir. Dec. 27, 2007).</p> <p><i>In re Howell</i>, 366 B.R. 153 (Bankr. D. Kan. 2007).</p> <p><i>In re Hardacre</i>, 338 B.R. 718 (Bankr. N.D. Tex. 2006).</p> <p><i>In re Slusher</i>, 359 B.R. 290 (Bankr. D. Nev. 2007).</p> <p><i>In re McGuire</i>, 342 B.R. 608 (Bankr. W.D. Mo. 2006).</p>
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Issue 3: Whether “current monthly income” as defined in §101(10A) includes unemployment insurance benefits received by the debtor, or whether such benefits are excluded from “current monthly income” as “benefits received under the Social Security Act?”

Many debtors will file bankruptcy petitions due to financial distress caused by loss of employment. Thus many debtors will have received unemployment insurance benefits during the six months prior to filing a petition, which is the period to which we look in calculating “current monthly income” under §101(10A). Calculation of current monthly income is foundational to determining whether the means test applies in a chapter 7 case, to determining whether the chapter 7 debtor passes the means test so that no presumption of abuse arises, and to determining, in chapter 13, the amount of the debtor’s projected disposable income that must be paid under the plan to holders of general unsecured claims. Thus whether unemployment insurance benefits are included in or excluded from current monthly income is an important issue.

Two bankruptcy court opinions take the position that unemployment insurance benefits are “benefits received under the Social Security Act” within the meaning of that phrase in §101(10A), and thus are excluded from any calculation of current monthly income. *See In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007); *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007). The official forms do not take a firm position on this issue; they ask debtors to include unemployment insurance benefits in the calculation of current monthly income but allow debtors to decline to do so, and to state the amount of unemployment insurance benefits separately, if they contend that such benefits should not be included in calculation of current monthly income. *See* Official Forms B22A, line 9, and B22C, line 8. Professor David Gray Carlson’s comment on *Sorrell* is illuminating, though perhaps it does not do justice to Judge Waldron’s extended analysis:

Unemployment compensation is a state-provided benefit. Yet, under the Social Security Act, grants are provided to the states if states choose to offer unemployment benefits, provided the state complies with federal mandates. Do the indirect subsidies authorized by the Social Security Act make state unemployment benefits excludible under the definition of “current monthly income”? Judge Thomas Waldron, in *In re Sorrell*, found these benefits excludible. His major point is a “knew how to” argument. In several sections of BAPCPA, Congress knew how to invoke limited portions of the Social Security Act. But in defining “current monthly income,” §101(10A) excludes “benefits received under the Social Security Act.” Congress must have intended, Judge Waldron concluded, that *indirect* benefits stemming from the Social Security Act were not to be included as currently monthly income under §101(10A).

David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 262-63 (2007) (footnotes omitted).

Prominent consumer bankruptcy lawyer and author Henry J. Sommer takes the position that unemployment insurance benefits are excluded as “benefits received under the Social Security Act.” *See* Henry J. Sommer, *Trying To Make Sense out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 Am. Bankr. L.J. 191, 194-95 (2005); 2 COLLIER ON BANKRUPTCY (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.) ¶ 101.10A (2007). But, as Judge Rosenthal pointed out in *Munger*:

Commentators disagree whether unemployment compensation is included in CMI. For example, Judge Wedoff argues that, to categorize unemployment compensation as a “benefit under the Social Security Act” would be a “strained interpretation ... since unemployed individuals receive no benefits ‘under the Social Security Act,’ but only under the programs adopted by their states, which may provide benefits beyond those that are federally funded.” Eugene R. Wedoff, *Means Testing in the New §707(B)*, 79 AM. BANKR. L.J. 231, 247 (Spring 2005). Moreover, he contends that interpreting the language in the entirety of §101(10A) provides more support for his view. He argues that the distinction in §101(10A) between “income from all sources” and “taxable income” should be interpreted similarly to the distinction between “gross income” and “taxable income” in the tax code. Under the tax code, unemployment compensation is included in gross income. According to Judge Wedoff’s analysis, unemployment compensation would be included in the calculation of CMI. *See also* Marianne Culhane & Michaela White, *Catching Can-Pay Debtors—Is the Means Test the Only Way?* 13 AM. BANKR. INST. L. REV. 665, 674 (Winter 2005) (suggesting that the presumed purpose for exclusion of benefits received under the Social Security Act was specifically “to protect retirement benefits at the expense of creditors”). ... Another commentator argues that the Supremacy Clause supports excluding unemployment compensation from CMI. As noted in an American Bankruptcy Institute article [*sic*], “regardless of whether a State may contribute to the Unemployment Trust Fund, Federal law governs, supporting the position that unemployment

compensation is ultimately a benefit received under the Social Security Act.” Allard, David W. *et al.*, *Means Test—Can it Work?*, American Bankruptcy Institute, 13th Annual Central States Bankruptcy Workshop (2006).

In re Munger, 370 B.R. 21, 24-25 (Bankr. D. Mass. 2007) (footnotes omitted).

Issue 4: Whether an above-median income chapter 7 debtor’s ability to make payments on debts can be a basis for dismissal under §707(b)(3), when there is no presumption of abuse under §707(b)(2)?

If a presumption of abuse does not arise under §707(b)(2)(A), or if a presumption of abuse does arise but is rebutted under §707(b)(2)(B), then the court is directed by §707(b)(3) to consider two factors in determining whether the chapter 7 case still might be an abuse of chapter 7’s provisions. First, the court is to consider whether the chapter 7 case was filed in bad faith. Section 707(b)(3)(A). Second, the court is to consider whether “the totality of the circumstances ... of the debtor’s financial situation demonstrates abuse.” Section 707(b)(3)(B).

Courts routinely state that the debtor’s ability to pay debts is relevant to whether a case is an abuse under §707(b)(3). *See, e.g., In re Barnett*, 2007 WL 4510277 (Bankr. N.D. Ohio 2007); *In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006). *But see In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006) (holding that ability to pay could not, by itself, demonstrate abuse under §707(b)(3)). Courts typically note (a) that ability to pay is part of the “totality of the circumstances” that may show abuse, *see, e.g., id.*, (b) that the §707(b)(2) means test is not the exclusive basis for consideration of ability to pay under §707(b), *see, e.g., id.*, and (c) that post-petition events (such as increases in income) may be considered as part of the “totality of the circumstances,” *see, e.g., In re Henebury*, 361 B.R. 595 (Bankr. S.D. Fla. 2007).³ The focus, with respect to ability to pay, is on the debtor’s ability to pay such debts *in a chapter 13 case*. *See, e.g., id.* at 611 (“In determining if the granting of relief would be an abuse of the provisions of chapter 7, courts are required to determine if the debtor has the ability to pay a substantial portion of their unsecured claims through a chapter 13 plan based upon the totality of the debtor’s financial circumstances.”); *In re Davis* 378 B.R. 539, 549 (Bankr. N.D. Ohio 2007).

The real question often may be the amount of such debts that the debtor would be able to pay *and required to pay* in chapter 13. If the debtor is forced to use chapter 13 to obtain bankruptcy relief (perhaps by way of conversion of the case to chapter 13 with the debtor’s consent), but would not be required to make substantial payments to holders of general unsecured claims in the chapter 13 case, it might seem that there is little point in dismissing the chapter 7 case. *See In re Skvorecz*, 369 B.R. 638 (Bankr. D. Colo. 2007). *But see In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007) (not deciding whether debtors would be required to make substantial payments in a chapter 13 case but dismissing their chapter 7 case under §707(b)(3) because “[i]f they do choose to seek relief under chapter 13, they certainly have

³ Note that the debtor’s ability to pay unsecured debts will be enhanced if the debtor surrenders property which secures a debt, because the debtor will not have to make payments on the secured claim. The majority view, as noted above in discussion of Issue 1, is that the debtor in a chapter 7 case nevertheless may deduct the payments that would have been due on the secured claim for purposes determining whether there is an abuse *under §707(b)(2)*, because such courts consider such payments to be “scheduled as contractually due” to the secured creditor. At least one court, however, took into account surrender of such property in determining whether the debtor’s ability to pay unsecured debts showed that there was an abuse *under §707(b)(3)*. *See In re Haar*, 373 B.R. 493 (Bankr. N.D. Ohio 2007).

the ability, even if not required to do so under §1325(b), to apply their actual excess income to plan payments for the benefit of their unsecured creditors”).

The amount the debtor would be required to pay in a chapter 13 case in turn depends on the approach the court takes to issues 1 and 2 above and to issues 5 and 6 below. In a chapter 13 case, a debtor’s plan must either pay holders of general unsecured claims in full or else pay holders of such claims all the debtor’s “projected disposable income” for the applicable commitment period (3 years or 5 years). If the court uses a mechanical, non-forward-looking approach to determining “projected disposable income” under §§1325(b)(1)(B) and 1325(b)(2) (which incorporates, at least to a substantial degree, the means test of §707(b)(2)), then a debtor who passes the means test would have little or no projected disposable income, and thus might not be required to pay any substantial amount to holders of general unsecured claims in a chapter 13 case. If so, then, as a practical matter, the above-median income chapter 7 debtor who passes the means test probably would not be likely to have the case dismissed under §707(b)(3) because of ability to pay nonpriority unsecured debts in a chapter 13 case, even if the debtor has the actual ability to make substantial payments on such debts in a chapter 13 case.

Note that some courts take a forward-looking approach to determining projected disposable income. See discussion of issue 5 below. Some courts that use a non-forward-looking approach nevertheless consider actual ability to pay in determining whether the chapter 13 case was filed in good faith (or whether the chapter 13 plan was proposed in good faith). See discussion of issue 6 below. Similarly, some courts may permit debtors to take into account certain expenses or payments for purposes of the §707(b)(2) means test but not for purposes of §1325(b)(2). See discussion of issues 1 and 2 above. Under any of these three approaches, the courts could require an above-median income debtor who passed the §707(b)(2) test nevertheless to make substantial payments on general unsecured claims in a chapter 13 case. Such courts then might well dismiss an above-median income chapter 7 debtor’s case under §707(b)(3) because of ability to make substantial debt payments *that would be required* in a chapter 13 case, even though the debtor passed the §707(b)(2) means test.

As a result, the resolution of this issue—issue 4—may depend largely on the resolution of the other issues.

Issue 5: Whether the “projected disposable income” of an above-median income debtor that must be paid to holders of general unsecured claims under §1325(b)(1)(B) is determined by taking into account the actual post-petition disposable income that the debtor is likely to have, or whether it is determined mechanically by multiplying “disposable income” as calculated under §1325(b)(2)-(3) by the number of months in the applicable commitment period?

Courts have taken two approaches to determination of “projected disposable income” for purposes of §1325(b)(1)(B). Note that “disposable income” is determined under §1325(b)(2) by subtracting certain monthly expenses specified in §707(b)(2)-(3) from “current monthly income,” which in turn is defined in §101(10A) as the debtor’s average monthly income for the six months preceding the bankruptcy filing. The question is the effect of the word “projected” in “projected disposable income.” Is *projected* disposable income for a 60-month period, for example, just 60 times “disposable income,” which would be simply a historically and mathematically determined amount? Or does the word *projected* indicate that the court is to start with “disposable income” but then adjust it based on known or foreseeable or projected changes in income or expenses, so that projected disposable income is a forward-looking concept? Some

courts have taken the mathematical and historical approach. *See, e.g., Coop v. Frederickson (In re Frederickson)*, 375 B.R. 829 (B.A.P. 8th Cir. 2007); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006). Other courts have taken the forward-looking approach. *See, e.g., Pak v. eCast Settlement Corp. (In re Pak)*, 378 B.R. 257 (B.A.P. 9th Cir. 2007); *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302 (B.A.P. 1st Cir. 2007). As one bankruptcy court recently explained:

Bankruptcy courts are closely split as to the proper means for calculating projected disposable income of an above-median-income debtor. A growing minority of cases holds the amount computed on Form B22C is determinative. *In re Miller*, 361 B.R. 224 (Bankr. N.D.Ala. 2007); *In re Brady*, [361 B.R. 765] No. 06-18922, 2007 WL 549359 (Bankr. D.N.J. Feb. 13, 2007); *In re Kolb*, [366 B.R. 802] No. 06-32036, 2007 WL 960135 (Bankr. S.D. Ohio March 30, 2007); *In re Naslund*, 359 B.R. 781 (Bankr. D. Mont. 2006); *In re Barr*, 341 B.R. 181 (Bankr. M.D.N.C. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re Farrar-Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006) (only considering the relevance of Schedule J). The majority holds the court may consider Schedules I and J, although the cases offer varying opinions about the amount of weight given to the schedules. *In re Grant*, [364 B.R. 656] No. 06-32299, 2007 WL 858805 (Bankr. E.D. Tenn. March 19, 2007); *In re LaPlana*, [363 B.R. 259] No. 6:05 BK 17635, 2007 WL 431627 (Bankr. M.D. Fla. Feb. 9, 2007); *In re Clemons*, No. 05-85163, 2006 Bankr.Lexis 1366 (Bankr. N.D. Ga. June 1, 2006); *In re Grady*, 343 B.R. 747 (Bankr. N.D. Ga. 2006); *In re Watson*, [366 B.R. 523] No. 06-11948, 2007 WL 1086582 (Bankr. D. Md. April 11, 2007).

In re Berger, 376 B.R. 42, 46 (Bankr. M.D. Ga. 2007) (stating that “the plain language of §1325(b) requires an above-median-income debtor's projected disposable income to be determined in accordance with current monthly income minus expenses set forth in the means test in §707(b). In other words, debtors' are not obligated to pay more than the disposable income calculated on Form B22C. This applies regardless of any known changes in debtors' expenses, such as satisfaction of their two 401(k) loans.” (footnote omitted)).

For a recent opinion adopting the future-looking approach, at least with regard to income to be received by the debtors (one of whom, the debtor-husband, was unemployed during the six months prior to the filing), *see In re Mancl*, 375 B.R. 514 (Bankr. W.D. Wis. 2007). For an opinion holding that income may not be determined on a forward-looking basis but that expenses may be (and holding in particular that expenses for payments on secured debt are not allowable where the payments will not be made in the chapter 13 case), *see In re McGillis*, 370 B.R. 720 (Bankr. W.D. Mich. 2007).

Issue 6: Whether confirmation of an above-median income debtor’s chapter 13 plan may be denied for lack of good faith, due to failure of the plan to make sufficient payments to holders of general unsecured claims even if the plan provides for payment of all “projected disposable income” to such claim holders during the applicable commitment period?

Section 1325(a)(3) conditions confirmation of a chapter 13 plan on the debtor’s good faith in proposing the plan. Section 1325(a)(7), added by BAPCPA, conditions confirmation on the debtor’s good faith in filing the bankruptcy petition. The issue here is whether either of those provisions may require the debtor to pay more on general unsecured claims than is required under the projected disposable income requirement of §1325(b)(1)(B), particularly when the debtor is an above-median income debtor who actually is able to pay a substantially larger amount than the amount determined as projected disposable income under the non-forward looking mechanical approach. This issue is of practical importance when the court refuses to take

a forward-looking approach to determination of projected disposable income (or where a court determines that it must allow expenses to be deducted in determining projected disposable income that are substantially in excess of the debtor's actual expenses).

Some courts that refuse to take a forward-looking approach to determination of projected disposable income under section will nonetheless consider the debtor's actual ability to make chapter 13 payments in determining whether to deny confirmation of the plan on the basis of bad faith. Others take the view that if the debtor is paying all projected disposable income into the plan for payment to holders of general unsecured claims, then there is no further role for consideration of whether the debtor's payments are sufficiently high. Here is one court's description of a middle ground approach:

A handful of courts interpreting §1325(a)(3) after the enactment of BAPCPA have concluded that a debtor need not commit any more funds to pay unsecured creditors than those required by §1325(b)(1) for the plan to be filed in good faith. I agree with this result as a general matter. Nevertheless, there may be times when a debtor commits so little income to creditors, relative to his true ability (for example, as a result of a windfall) to make payment to them based on his actual expenses, that his proffered plan suggests a subjective intent not to make a good-faith effort at repayment at all.

In re Briscoe, 374 B.R. 1, 21-22 (Bankr. D.D.C. 2007).

The following chart provides some of the opinions on each side of the issue.

No Role for Consideration of Amount of Plan Payments on General Unsecured Claims in Determining Good Faith Where All Projected Disposable Income Is Devoted To Paying Them	Confirmation of Ch. 13 Plan May Be Denied for Lack of Good Faith Due to Insufficient Payments on General Unsecured Claims Even If All Projected Disposable Income Is Devoted To Paying Them
<i>In re Winokur</i> , 364 B.R. 204 (Bankr. E.D. Va. 2007).	<i>In re McGillis</i> , 370 B.R. 720 (Bankr. W.D. Mich. 2007).
<i>In re Farrar-Johnson</i> , 353 B.R. 224 (Bankr. N.D. Ill. 2006).	<i>In re Devilliers</i> , 358 B.R. 849 (Bankr. E.D. La. 2007).
<i>In re Alexander</i> , 344 B.R. 742 (Bankr. E.D.N.C. 2006).	<i>In re Edmunds</i> , 350 B.R. 636 (Bankr. D.S.C. 2006).
<i>In re Barr</i> , 341 B.R. 181 (Bankr. M.D.N.C. 2006).	

Issue 7: How are 401(k) loans treated after BAPCPA?

Individuals facing financial difficulty often borrow from their 401(k) retirement plans (or from similar retirement plans). If they do not repay such loans, the amounts of the loans will be treated as taxable distributions and may be subject to early withdrawal penalties. *See Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007).

One key question here is whether monthly payments made to repay such loans may be deducted from current monthly income for purposes of the §707(b)(2) calculation of ability to pay unsecured claims. Debtors have claimed that such loans are secured debts, and that, as a result, the scheduled payments on such loans may be deducted pursuant to §707(b)(2)(A)(iii).

Debtors also have claimed that payments on such loans are “other necessary expenses” and thus deductible under §707(b)(2)(A)(ii)(I). In some cases the answer to this question will determine whether there is a presumption under §707(b)(2) that the granting of chapter 7 relief would be an abuse of chapter 7.

The second key question is whether the existence of such loans is one of the “special circumstances” that could justify deduction of an extra expense under §707(b)(2)(B). If so, then deduction of the monthly 401(k) loan repayment amount might allow the debtor to rebut a presumption of abuse.

The third key question is whether the court may refuse to dismiss a chapter 7 case despite an un rebutted presumption of abuse, where the existence of a 401(k) loan could justify the debtor in filing a chapter 13 plan that would pay nothing to unsecured claim holders. As discussed immediately below, §1322(f) requires a much different treatment of 401(k) loans in chapter 13 as opposed to chapter 7.

The 2005 BAPCPA added three provisions dealing with 401(k) loans and similar loans taken against retirement funds: §§362(b)(19), 523(a)(18), and 1322(f). Section 362(b)(19) provides an exception to the automatic stay for withholding from a debtor’s paycheck, where the debtor authorized the withholding to repay such a loan. Section 523(a)(18) makes such loans nondischargeable.⁴ Each of those sections also provides that nothing in the section may be construed to provide that certain loans (under “414(d)” “governmental plans” or under “403(b)”) are claims or debts for purposes of the Bankruptcy Code; this rule of construction does not seem to extend to 401(k) loans. Section 1322(f) prohibits chapter 13 plans from materially altering the terms of such a loan and provides that the amounts needed to make payments on such loans will not constitute disposable income for purposes of §1325.

(1a) Are payments on 401(k) loans payments on secured debts and thus deductible from current monthly income under §707(b)(2)(A)(iii)?

Before a 401(k) loan could be considered a secured debt, it would have to be a debt. Although §§362(b)(19) and 523(a)(19) do not seem to prohibit courts from construing 401(k) loans as debts for purposes of the Bankruptcy Code, the courts have refused to do so. *See, e.g., In re Masur*, 2007 WL 3231725 (Bankr. D.S.D. Oct. 30, 2007); *McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007); *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007) (rejecting argument based on §§362(b)(19) and 523(a)(18)); *cf. In re Mordis*, 2007 WL 2962903 (Bankr. E.D. Mo. Oct. 9, 2007) (noting that the text of §362(a)(19)—by which the court must have meant §362(b)(19)—explicitly prohibited construing the section to provide that a loan from a qualified pension plan, like the debtor’s Postal Service Thrift Savings Plan, was a debt). Such a loan is not, according to the courts, a claim under §101(5)—and thus any supposed liability on such a loan could not constitute a debt under §101(12)—because the loan does not create a “right to payment.” The retirement account belonged to the borrower, who is only repaying himself or herself by making payments on the loan, and no one has the right to require that such payments be made. In addition, the courts rely heavily on pre-BAPCPA case law holding that such loans are not debts, such as *New York City Employees’ Retirement System v. Villarie (In re Villarie)*, 648 F.2d 810 (2d Cir. 1981). *But see In re Buchferer*, 216 B.R. 332 (Bankr. E.D.N.Y. 1997) (holding, pre-BAPCPA, that obligation to repay a pension plan loan was a debt); *In re*

⁴ Although this exception to nondischargeability does not apply in chapter 13 cases, it appears that §1322(f) will, as a practical matter, prevent discharge of such loans in chapter 13.

MacDonald, 222 B.R. 69 (Bankr. E.D. Pa. 1998) (noting that there was “considerable merit” in *Buchferer*’s reasoning). (Note that the outcome supported by *Buchferer* and *MacDonald*—that amounts needed to repay pension loans could be excluded from disposable income in a chapter 13 case—was codified by BAPCPA’s addition of §1322(f).)

Courts could have taken the position that if an employer requires such loans to be repaid by payroll deduction, then the employer has a right to have the employee-borrower repay the funds to the trust that holds the retirement funds, so long as the employee remains with the company, and thus the loan would be at least a contingent claim (contingent on continued employment). Or courts could have construed §362(b)(19) and particularly §523(a)(18) as providing that such 401(k) loans are debts. But courts have not done so. In some cases it is not clear whether the debtor could have instructed the employer to cease deducting loan payments from his or her paycheck. *See, e.g., In re Turner*, 376 B.R. 370, 374 (Bankr. D.N.H. 2007) (noting that debtor would not lose her job if she did not repay the loan but also that the terms of the employer-sponsored retirement plan required her to repay the loan “through automatic payroll deductions”). It is possible that if an employer would refuse to terminate such deductions, such that the only way they could be terminated would be for the debtor to leave the employment, a court might take a different view.

Even if a 401(k) loan were a debt, it still might not be a secured debt, even though by its terms such a loan probably would be secured by the debtor’s interest in the 401(k) plan. *See Eisen v. Thompson*, 370 B.R. 762, 770 (N.D. Ohio 2007) (noting that for a claim to be a secured claim under §506(a) it must be secured by a “lien on property in which the estate has an interest” and pointing out that retirement accounts typically are exempt). *But see In re Mordis*, 2007 WL 2962903 (Bankr. E.D. Mo. Oct. 9, 2007):

The district court in *Thompson* also held that even if the debtor's obligation to repay the 401(k) loan was a “debt” it was not a secured debt for purposes of the Code. *Thompson*, 370 B.R. at 770. The court is somewhat dubious of this conclusion given that under §506(a)(1), the plan administrator's right of setoff would be a secured claim if the plan administrator had a claim in the first place. *See* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 Am. Bankr.Inst. L.Rev. 223, 285-86 (2007).

2007 WL 2962903, at *4 n. 1

(1b) Are payments on 401(k) loans deductible from current monthly income under §707(b)(2)(A)(ii)(I) as “Other Necessary Expenses?”

“Involuntary deductions” from wages are one of the categories of “other necessary expenses” provided for in the IRS’s *Internal Revenue Manual*. Debtors sometimes argue that 401(k) loan payments paid through payroll withholding are “involuntary deductions” within the meaning of the *Internal Revenue Manual*. If so, they would be deductible from current monthly income under §707(b)(2)(A)(ii)(I). Courts have rejected this argument. *See In re Mordis*, 2007 WL 2962903 (Bankr. E.D. Mo. Oct. 9, 2007) (“The undisputed fact here is that the loan repayment is not a condition of debtor's continued employment. Thus, while debtor may face adverse tax consequences if she fails to make the loan repayment, it is not an ‘involuntary deduction’ under the IRM and is, therefore, not a type of expense specified in §707(b)(2)(A)(ii).”); *In re Whitaker*, 2007 WL 2156397 (Bankr. N.D. Ohio July 25, 2007) (“Debtor's participation in the General Motors Savings-Stock Purchase Program is discretionary,

as is his taking a loan against his plan account. Neither are requirements of his job with General Motors. As in *Lenton*, the court construes ‘requirement of the job’ as contemplated in the involuntary deductions category specified in the IRM to mean a requirement imposed on anyone performing that job. As repayment of a 401(k) plan loan is not such a requirement, he is not entitled to deduct his 401(k) plan repayment expenses as a mandatory payroll deduction on line 26 of Form B22A.”); *In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006).

(2) May a 401(k) loan constitute “special circumstances” under §707(b)(2)(B) so as possibly to rebut a presumption of abuse?

Debtors have had more success arguing that the existence of mandatory payroll deductions for 401(k) loan payments may constitute “special circumstances” under §707(b)(2)(B) for purposes of rebutting a presumption of abuse. *See In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006) (holding that because debtor could avoid such payroll deductions only by quitting job, there was no reasonable alternative to making the payments, and thus “special circumstances” justified deduction of the expenses under §707(b)(2)(b), which resulted in rebuttal of presumption of abuse—but nevertheless finding abuse under totality of circumstances standard in §707(b)(3)); *cf. McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007) (holding that mere different treatment of 401(k) loan payments in chapter 7 versus chapter 13 could not be special circumstances, but remanding for further evidentiary hearing on factual question whether loan payment obligations constituted special circumstances); *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007) (holding that loan payment requirement could not be special circumstances unless the reason for taking out the 401(k) loan showed special circumstances); *In re Scarafiotti*, 375 B.R. 618 (Bankr. D. Colo. 2007) (refusing to consider expense of 401(k) repayments to be special circumstances because debtors did not show “a special need to repay that would not be true for every debtor” and did not “establish[] that there are no reasonable alternatives to repayment”).

(3) May a court refuse to dismiss a chapter 7 case where there is an un rebutted presumption of abuse but where exclusion of 401(k) loan payments from projected disposable income could justify the debtors in filing a chapter 13 that would pay nothing to unsecured claim holders?

In chapter 13, the debtor’s projected disposable income must be devoted to paying unsecured claims. Payments due on 401(k) loans are excluded from projected disposable income, and the chapter 13 plan may not materially alter the terms of the 401(k) loan. *See* §1322(f). As a result, payments to unsecured claim holders may be reduced in chapter 13 due to the existence of a 401(k) loan. It may not seem consistent for the Code to provide a means test to determine whether the debtor is abusing chapter 7—largely because the debtor may have the means to make substantial payments on unsecured debt in a chapter 13 plan—and not to allow the debtor to deduct 401(k) loan payments under that chapter 7 test, but then for the Code to allow the payments to be deducted if the debtor converts the case to chapter 13. The result may be that the chapter 7 means test indicates an ability to pay on unsecured debts and forces the debtor to convert to chapter 13 if the debtor wants bankruptcy relief, but then that the Code does not require any payment on unsecured debts in the resulting chapter 13 case!

Courts refuse, though, to see this as an absurd enough result to justify allowing deduction of 401(k) loan payments for purposes of the chapter 7 means test. Often courts note that 401(k) loans may be paid off before the end of a chapter 13 plan, and thus additional funds may be available for payment on unsecured claims. *See McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007); *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007); *In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006); *cf. In re Nowlin*, 366 B.R. 670 (Bankr. S.D. Tex. 2007) (refusing to confirm chapter 13 plan that did not provide for increase in amounts paid to creditors during period of plan after 401(k) plan would have been paid off). Sometimes courts simply note that “[t]he potential payback of zero percent to unsecured creditors in a chapter 13 is not a special circumstance” that would rebut a presumption of abuse. *In re Johns*, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006).

It seems that most courts will dismiss a chapter 7 case for abuse under the §707(b)(2) means test even if—due to the differing treatment of 401(k) loan payments in the two chapters—the debtor would have no projected disposable income to pay to unsecured claim holders in a chapter 13 case. The only case found to the contrary is *In re Skvorecz*, 369 B.R. 638 (Bankr. D. Colo. 2007).

Issue 8: How (and as of what date) is household size determined for purposes of sections 707(b)(6)-(7) and 1325(b)(3)-(4)?

Median income levels for the applicable state are used in several Bankruptcy Code tests to determine what may be required of a debtor. In each case, the relevant median income level is based on the size of the debtor’s household.

Section 707(b)(6)-(7) will in some circumstances protect a debtor from a §707(b) motion to dismiss a chapter 7 case. Where the debtor’s current monthly income (or that of the debtor and the debtor’s spouse in a joint case) is less than or equal to a certain median income level for the applicable state, §707(b)(6) strictly limits who can raise the issue of abuse of chapter 7; only the judge or the U.S. Trustee (or the bankruptcy administrator for those districts not covered by the U.S. Trustee system) may do so. Independently, where the debtor’s current monthly income (combined in most cases with that of the debtor’s spouse, if the debtor has one) is less than or equal to that median income level, no one may file a motion to dismiss under §707(b)(2); thus the below-median income debtor is not subject to the means test.

Although the current monthly income figure that a debtor must use for paragraph (6) may differ from the current monthly income figure that the debtor must use for paragraph (7) (because the rules are not the same in each paragraph with respect to whether the debtor’s spouse’s income is included), the median income levels are identical for any particular debtor. And in each case the relevant median income level depends on the size of the debtor’s “household.” The larger the size of the household, the higher the median income level, and thus the better the chance that the debtor will receive protection under paragraph (6) or paragraph (7).

In a chapter 13 case, §1325(b)(2) specifies how the debtor’s “disposable income” is calculated. Disposable income in turn either determines or helps to determine the amount of the “projected disposable income” that §1325(b)(1) requires to be devoted to payments to unsecured creditors. (See discussion of Issue 5 above.) Disposable income is determined by subtracting reasonable expenses from the “current monthly income received by the debtor.” *See* §1325(b)(2). If the debtor’s current monthly income exceeds certain median income levels—the same median income levels for the applicable state that are used in §707(b)(6)-(7)—then §1325(b)(3) requires

use of expense figures taken from the §707(b) means test for purposes of the §1325(b)(2) calculation of disposable income. The larger the debtor's household, the higher the median income level, and the better the chance that the debtor will be entitled (and required) to use actual reasonable expenses rather than the expense figures from the chapter 7 means test.

Note also that a chapter 13 debtor whose current monthly income exceeds the same median income figure will have an applicable commitment period of five years, rather than three years (assuming the plan does not pay unsecured creditors 100 percent). See §1325(b)(4). If there is an objection, then debtor's plan cannot be confirmed unless it either is a 100 percent plan or else "provides that all of the debtor's projected disposable income to be received in the applicable commitment period ... will be applied to make payments to unsecured creditors under the plan." Section 1325(b)(1). Thus the size of the debtor's household may determine whether the debtor must have a five-year plan or may instead have a three-year plan.

"Household" is not a defined term under the Code. Nor does the Code explicitly state a date as of which the size of the debtor's household should be determined for purposes of chapter 7 or chapter 13. It appears that the relevant date in a chapter 7 case is the date of filing of the petition. See *In re Ellringer*, 370 B.R. 905, 910 (Bankr. D. Minn. 2007) ("The means test is not meant to be continually updated as debtors' circumstances change. Thus, although Pamela moved out after [Kimberly] filed her petition, the debtor's [Kimberly's] income and expenses remained unchanged from the day she filed for purposes of the means test. Likewise household size should also be determined on the same day that the other elements of the means test are fixed.").

Courts have held, however, that because §1325(b)(1) requires determinations "as of the effective date of the plan," the date as of which the size of the debtor's household should be determined for purposes of chapter 13 is the effective date of the plan. Several courts have determined that the effective date of the chapter 13 plan in this context is the date of confirmation. See *In re Fleishman*, 372 B.R. 64 (Bankr. D. Or. 2007) (holding that unborn child did not count as member of household but also permitting debtors to amend schedules up to date of confirmation to reflect any change in household size); *In re Anderson*, 367 B.R. 727 (Bankr. D. Kan. 2007) (holding that where debtors' household size increased from two to six between petition filing date and plan confirmation date, debtors were entitled to use higher median income levels for household of six in determining applicable commitment period).

The remaining question is how to determine whether a person is a member of the debtor's household. There is little authority on this question, but consider the court's analysis in *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007). The debtor couple lived with two dependent children and one adult son who neither contributed support to their expenses nor looked to them for support. Six months or more before the debtors filed their chapter 7 petition, their adult daughter moved in, along with her three children. The debtors apparently provided most of the support for the adult daughter and her children; the adult daughter did not work and thus did not contribute to the debtor's expenses, except perhaps for sharing the benefits of her food stamps. The court noted that as of the time of the filing of the petition there was no indication that the adult daughter did not intend to stay or that she and her children were not part of an economic unit together with the debtors and their two dependent children. The adult son, and the adult daughter and her three children, all moved out of the debtor's home a few months after the debtors filed their petition.

The court held that the debtors were entitled to claim a household size of eight, including the adult daughter and her three children, but not including the adult son. The court held that the *Internal Revenue Manual's* definition of a household (under which only the debtor's dependents

for purposes of income taxation would be considered members of the debtor's household) was not binding, rejected the U.S. Trustee's suggested standard (under which persons who lived together for a year, pooled income, and acted as an economic unit would be the members of a household), and also refused to use a "heads-on-beds" standard, under which everyone who occupied the same dwelling unit (or at least everyone who was part of a family and occupied the same dwelling unit) would be considered part of the household. It seems that the apparent intent of the court to stay together as of the petition date, the support given by the debtors to the adult daughter and her children, and their making up of an economic unit all were important to the court, though no clear analysis is provided. The court also suggested that where someone is supported by the debtors during the six-month period over which current monthly income is determined, it would make sense to include that person in the household size.