

ABI Northeast Consumer Forum Panel Four: Fables and Fairy Tales. How the Practice has Evolved.

William M. Gillen, Esq.

Section I Current Monthly Income

11 U.S.C. §101 (10A)

(10A) The term “current monthly income”—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521

(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521

(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor’s spouse), on a regular basis for the household expenses of the debtor or the debtor’s dependents (and in a joint case the debtor’s spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

Some basic issues to take into consideration regarding the calculation of “income” as defined under 11 § USC 101(10A).

1. Regularity: Questions may likely arise about the degree of “regularity” required for such contributions to fall within the definition of CMI.

2. Social Security: While § 101(10A) adds to CMI several items that are not income under the Internal Revenue Code, it also removes a number of items that are taxable income by excluding “benefits received under the Social Security Act.”

a. Remember that Social Security administers programs to provide supplemental income to World War II veterans, along with certain qualified foster care benefits which may not be considered income under the means test.

b. Unemployment benefits are provided for in Titles III, XII, XIII and XV of the Social Security Act .

3. Special Circumstances: A debtor may rebut the presumption by showing special circumstances that reasonably allow either an increase in expenses, or a reduction in income. The presumption will be rebutted if the adjustments created by the special circumstances reduce the debtor's monthly disposable income below the thresholds triggering the presumption of abuse § 707(b)(2)(B).

In re Pageau
Bkrcty.D.N.H.,2008.
383 B.R. 221

The substantive requirements of § 707(b)(2)(B) are set forth in § 707(b)(2)(B)(i), and they require a debtor (1) to demonstrate “special circumstances” that justify the additional expense or income adjustment; and (2) to demonstrate that there is “no reasonable alternative” to making the additional expense or income adjustment. *Haman*, 366 B.R. at 312. The term “special circumstances” is not defined in the Bankruptcy Code. *In re Martin*, 371.

Procedural Requirements Analysis

[1] The procedural requirements for establishing special circumstances are set forth in § 707(b)(2)(B)(ii), (iii), and (iv), and they require a debtor:

(1) to “itemize” each additional expense or income adjustment by setting forth the nature of the suggested adjustment, its amount, and its impact on the debtor's finances and the means test calculation;

(2) to provide “documentation” of the additional expense or income adjustment;

(3) to provide a detailed explanation” of the “special circumstances” that make the additional expense or income adjustment “necessary and reasonable;” and

(4) to “attest under oath” to the accuracy of the information the debtor provides.

Substantive Requirements Analysis

Whether student loans incurred in the normal course meet the level of special circumstance under § 707(b)(2)(B)(i).

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(2) to demonstrate that there is “no reasonable alternative” to making the additional expense or income adjustment. *Haman*, 366 B.R. at 312. The term “special circumstances” is not defined in the Bankruptcy Code.

The examples in § 707(b)(2)(B)(i), which provide guidance as to what may constitute special circumstances, do not identify specific expenses, but rather identify some circumstances that give rise to such expenses. *Turner*, 376 B.R. at 378. It is not the obligation to repay a loan itself that qualifies such an expense as a special circumstance under § 707(b)(2)(B)(i), but rather it is the circumstances that lead to incurring a loan that must be special and justify the inclusion of this additional expense item in the means test, as long as the debtor has no reasonable alternative but to make monthly payments on such loan. *Eisen*, 370 B.R. at 773. For that reason, the Court shall focus on the reasons the Debtor borrowed money for her education and incurred the Student Loan debt. See *Turner*, 376 B.R. at 379.

Conclusion

The debtor's student loan should not be included as an additional expense on the Means Test Form. The court looked at the facts and circumstances of the student loans themselves in making a determination if the loans mean the requirements of being a “special circumstance”.

In re Delunas
Slip Copy, 2007 WL 737763
Bkrcty.E.D.Mo.,2007.

“Special circumstances” does not include a “desire to remain living wherever the debtors choose,” In re Tranmer, 355 B.R. 234, 251 (Bankr.D.Mont.2006), but should “rise to the same level as the statutorily recognized examples of a serious medical condition or a call to active duty.” In re Johns, 342 B.R. 626, 629 (Bankr.E.D.Okla.2006). In general, “special circumstances” are “circumstances beyond a debtor's reasonable control, such as [the examples given in § 707(b)(2)(B)(i)].” “ In re Tranmer, 355 B.R. at 251; see In re Tuss, 2007 WL 442051, at *15 (Bankr.D.Mont. Jan.5, 2007).

Unemployment Compensation as Income

In re Munger
370 B.R. 21
Bkrcty.D.Mass.,2007.

The Secretary of the Treasury is authorized and directed to receive and hold in the Fund all monies deposited therein by a State agency from a State unemployment fund ..." 42 U.S.C. § 1104; "The Secretary of the Treasury is authorized and directed to pay out of the Fund to any state agency such amount as it may duly requisition ..." 42 U.S.C. § 1104(f).

Pennington v. Didrickson,
22 F.3d 1376, 1378
(7th Cir.1994)

Although unemployment insurance is administered at the state level, the SSA [Social Security Act] makes federal funds available to the states to encourage them to enact unemployment insurance laws. However, before the federal government will provide funds for a state to administer its unemployment insurance programs, the Secretary of Labor must certify that a recipient state's program meets certain statutory requirements.

Section II Projected disposable income v. disposable income under 11 U.S.C. § 1325(b)(1) and (2)

(1) 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—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(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.

(2) For purposes of this subsection, the term "**disposable income**" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

In re Kibbe
361 B.R. 302
1st Cir.BAP (N.H.),2007.

This case is a below median case where a debtor projected disposable income was higher than the current monthly income as determined under B22C.

Form B22C will always be the starting point for the Court's inquiry into whether the debtor is complying with the “projected disposable income” requirement of § 1325(b)(1)(B). The Court will presume that the number resulting from Form B22C is the debtor's “projected disposable income” unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future.

Had Congress intended “projected disposable income” to be synonymous with section 1325(b)(2)'s “disposable income” Congress could have deleted the word “projected” from section 1325(b)(1)(B) or defined “projected gross income” rather than only “disposable income” in section 1325(b)(2) See In re Jass B.R, 2006 WL 871235 at*4 (Bankr. D.Utah 2006). As Congress did neither, the Court must give effect to the word “projected”. “To require all debtors to propose plans paying the number resulting from Form B22C would essentially ignore the word ‘projected’ and give meaning only to the term ‘disposable income’. The only way for the word ‘projected’ to have independent significance is if the word modifies the term ‘disposable income.’” *Id.* at *3. Recognizing that the term “projected disposable income” is forward-looking, the Court agrees with the conclusion of In re Hardacre that “projected disposable income” must be based upon the debtor's anticipated income during the term of the plan, not merely [on] an average of her prepetition income.

Disposable income in this case is determined by reference to Schedules I and J. To conclude otherwise would invite “anomalous results” when a debtor has had a change of circumstances during the six months immediately prepetition.

In re Teixeira,
358 B.R. 484
Bankr.D.N.H.2006

Teixeira was an over median case, where the debtor's projected disposable income dropped, and at the time of filing of the petition was significantly less than disposable income as listed on B22C.

In order to determine whether a Chapter 13 plan applies all of a debtor's “projected disposable income,” there shall be a presumption that there has been no substantial change in debtor's income and, therefore, that “disposable income” is the same as “projected disposable income,” but when the presumption of no change has been rebutted and there has been a showing that debtor's financial circumstances have changed, below-

median-income debtors will use Schedule I to determine income and Schedule J to determine expenses, while above-median-income debtors will use income from Schedule I to determine income but will continue to deduct the standard expenses permitted under the Bankruptcy Code. 11 U.S.C.A. §§ 707(b), 1325(b)(1)(B), (b)(2, 3).