

**INCOME AND EXPENSE ISSUES UNDER SECTION 707(b)(2)**  
**AND PROJECTED DISPOSABLE INCOME**  
**IN CHAPTER 13 CASES**

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**I. MEANS TESTING: APPLICATION OF IRS EXPENSE ALLOWANCES**

**A. Is the IRS Standard Ownership Allowance Contingent on Existence of a Loan or Lease Obligation?**

**1. Statutory analysis**

§707(b)(2)(A)(ii) states that the debtor's expenses shall be "the debtor's **applicable** monthly expense amounts" under the IRS Standards. (Emphasis added.) IRS Transportation Standards are divided into two components: the Ownership Expense and the Operating Expense. The Local Standards for Transportation provide for expenses associated with vehicle insurance, vehicle payment (lease or purchase), maintenance, fuel, state and local registration, required inspection, parking fees, tolls, driver's license, and public transportation. See IRS Financial Analysis Handbook at: <http://www.irs.gov/irm/part5/ch15s01.html#d0e176501>.

The Ownership Standard is specifically designed by the IRS to account only for expenses associated with the purchase or lease of a vehicle. Chapter 8 of the IRS Financial Analysis Handbook provides that the Ownership Expense is allowed only for the "purchase and/or lease of a vehicle." See Internal Revenue Manual, Part 5, (entitled Collecting Process), Chapter 8, § 5.8.5.5.2, Treatment of Non-Business Transportation Expenses, at page 12 of 16 which may be

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found at the IRS website at: <http://www.irs.gov/irm/part5/ch08s05.html>. Recent revisions to the Collection Financial Standards also clarify that the ownership expense is based on the “five-year average of new and used car financing data compiled by the Federal Reserve Board of Governors.” See IRS Website, at: <http://www.irs.gov/individuals/article/0,,id=96543,00.html>.

## **2. Cases Supporting Requirement of Loan or Lease Payment for Ownership Expense to be “Applicable.”**

**In re Ransom, 2007 WL 4625248 (B.A.P. 9th Cir. Dec. 27, 2007).** Bankruptcy Appellate Panel held that the language of 11 U.S.C. § 707(b)(2)(A)(ii)(I), the common meaning of “applicable,” and the overall scheme of the Bankruptcy Code each revealed that vehicle ownership expenses only apply if debtors actually have vehicle financing costs. The court noted that the word “applicable” modifies the meaning of the term “monthly expense amounts,” indicating that the deduction of the specified amount “becomes relevant to the debtor (*i.e.* appropriate or applicable to the debtor) when he or she in fact has such an expense.” The court further concluded that allowing nonexistent vehicle ownership expenses would read the word “applicable” out of the Code. Finally, the court determined that to hold otherwise would be “counterintuitive to one of the main objectives” of the BAPCPA: “to ensure that debtors repay as much of their debt as reasonably possible.” *Id.* at 17.

**In re Hartwick, 373 B.R. 645 (D.Minn. 2007).** The United States Trustee moved to dismiss the debtor’s chapter 7 case as a presumed abuse based on certain deductions the debtor claimed on her means test. The U.S. Trustee’s motion challenged the debtor’s ability to deduct the IRS Local Standard for Vehicle Ownership for a vehicle that she owned outright and to take secured debt deductions for mortgage payments on real property that she intended to surrender. The bankruptcy court ruled that the debtor was entitled to deduct vehicle ownership expenses even though she owned her vehicle free and clear, and held that she was entitled to claim secured debt deductions for surrendered property. On appeal, the district court ruled that the plain meaning of the word “applicable” in the phrase “monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the ... Local Standards,” means that, before the expense amount can be included in the debtor’s allowed monthly expenses, the expense itself must actually be applicable to the debtor. In other words, the debtor must actually have a loan or lease payment obligation. The court looked to the IRS Standards as additional support for its holding. The court also ruled that the plain language of § 707(b)(2)(A)(iii) dictates that a debtor

must be permitted to deduct secured payments on property even if that debtor intends to surrender that property post-petition.

**In re Ross-Tousey, 368 B.R. 762 (E.D. Wis. 2007).** The United States Trustee moved to dismiss the debtors' chapter 7 case as a presumed abuse, on the ground that the debtors were not entitled to deduct the IRS Local Standard for Vehicle Ownership for a vehicle they owned outright. The bankruptcy court denied the U.S. Trustee's motion, and the U.S. Trustee appealed. On appeal, the district court held that debtors must have an "actual" expense for vehicle ownership before the expense can be "applicable" to the debtor and thus allowable on the means test. The court looked to IRS guidelines as support for its holding and noted that disallowing the deduction in this case meets with BAPCPA's goal of requiring creditors to be repaid when possible.

**In re Masur, 2007 WL 3231725 (Bankr. D. S.D. Oct. 30, 2007).** The United States Trustee moved to dismiss the debtor's chapter 7 case as a presumed abuse on several grounds. First, the debtors claimed the IRS Local Standard for Vehicle Ownership for a 1991 Mitsubishi they owned free and clear. Second, the debtors claimed ownership and operating expenses for a second vehicle, even though they were surrendering it. Third, the debtors claimed secured debt deductions on Line 42 of Form 22A for their second vehicle and their home, both of which were being surrendered. Finally, the debtors claimed their 401(k) loans as secured debts on Line 42. On issue of vehicle ownership, the court adopted the majority line of cases and held that debtors may not claim ownership expenses for a vehicle owned free and clear. The court did not expound on its reasoning for following Hartwick and Ross-Tousey, among others, but instead adopted wholesale the reasoning of those courts.

**In re Canales, 377 B.R. 658 (Bankr. C.D. Cal. 2007).** Chapter 7 debtor who owned vehicle free and clear of loan or lease payments was not entitled to IRS Local Standard for vehicle ownership. Court noted that if it held otherwise and allowed debtors without loan or lease payments to claim vehicle ownership expenses, it would nevertheless consider that in evaluating whether to dismiss as an abuse under section 707(b)(3).

**In re Garcia, 2007 WL 2692232 (Bankr. D.Ariz. Sept. 11, 2007).** The United States Trustee moved for dismissal of the debtor's chapter 7 case based on the presumption of abuse. Among other things, the U.S. Trustee challenged the debtor's deduction of the IRS Local Standard for Vehicle Ownership for a vehicle she owned free and clear. The bankruptcy court

granted the motion, holding that the debtor “was not entitled to claim an ownership/lease expense deduction because she did not have such an expense to begin with and, therefore, she did not qualify for the deduction.” The court agreed with the United States Trustee that allowance of the ownership expense consists of consists of “two steps”: (1) first, the debtor must be eligible for an allowance because she is making a loan or lease payment on a vehicle; (2) second, if the debtor qualifies, then the amount of the allowable expense is calculated by looking to the “applicable” IRS Local Standards.

**In re Cole, 371 B.R. 454 (Bankr. W.D. Wash. 2007).** United States Trustee moved to dismiss chapter 7 case based on the presumption of abuse that arose as a result of the debtor claiming vehicle ownership expenses for a vehicle she owned outright. The bankruptcy court held that the debtor was not entitled to deduct the IRS vehicle ownership standard from her current monthly income. The court held that the language of § 707(b)(2)(A)(ii)(I) is ambiguous, and so did not adopt a “plain meaning” approach to interpreting the word “applicable” in the statute. Instead, the court based its ruling on the fact that Congress specifically referred courts to the IRS standards, and the court should thus be guided by how the IRS uses and employs those standards. Because the IRS would disallow the expense where no loan or lease payment exists, the court ruled that the same result should also occur when analyzing the applicability of the standard in bankruptcy cases.

**In re Slusher, 359 B.R. 290 (Bankr. D.Nev. 2007).** In a chapter 13 case, the trustee objected to confirmation of the debtor’s plan because, among other things, the debtor deducted the IRS Local Standard for vehicle ownership for a vehicle he owned free and clear of liens. The court ruled that the debtor was not entitled to claim an ownership expense on Official Form 22C because he owned his car free and clear of encumbrances and was therefore not eligible for the expense based on the IRS application of the Local Standards. The court reasoned that the manner in which the IRS applies the Local Standards governs because “it incorporated into the Bankruptcy Code an existing, administrative system that the IRS long had in place.” Accordingly, the court held that the qualifying term “applicable” in § 707(b)(2) does not mean that the debtor is to “cross-match [his] location and status against the [IRS] standards,” as the debtor claimed, and that the standards should instead be interpreted in the same manner as the IRS. Because the court noted that the IRS’ published position is that a loan or lease payment

obligation is required to be eligible for the ownership expense, the debtor was not eligible to claim the expense on his Official Form B22C.

**In re Devilliers, 358 B.R. 849 (Bankr. E.D. La. 2007).** In a chapter 13 case, the trustee objected to plan confirmation for failure to contribute all disposable income because, inter alia, the debtors' Official Form 22C contained an expense deduction for ownership of a vehicle, even though the debtors owned their vehicle free and clear of liens. As in Slusher, the court held that the word "applicable" in § 707(b)(2) means that "only the types of expenses allowed by the IRS and applicable to the specific debtor in question are deducted" on Official Form 22C.

Accordingly, because debtors owned their vehicle free and clear of liens, they were not entitled to claim an expense for ownership on Official Form 22C. The court noted that the ownership deduction "is not the equivalent of an allowance for depreciation or an invitation for a debtor to 'save' for the ultimate replacement of an existing vehicle."

**In re Wiggs, 2006 WL 2246432 (Bankr.N.D.Ill. 2006)** In a chapter 13 case, the trustee objected to confirmation and moved to dismiss based on the debtor's claimed vehicle ownership expense deductions from his disposable income on Official Form 22C. The Court held the ownership expense is not allowed when debtors own a vehicle free and clear. The Court did not look to the Internal Revenue Service Manual for guidance, but reviewed the statute, and to the extent necessary the legislative history and comments to the official forms. In finding the statute unambiguous, the court determined under §707(b)(2)(A)(ii)(I) that "applicable" modifies "amounts specified" to limit expenses to those that apply. Therefore, "debtors are not allowed to include the standard ownership expense for transportation ownership when they do not have a payment on a vehicle."

**In re Demonica, 345 B.R. 895 (Bankr.N.D.Ill. 2006).** In a chapter 13 case, the trustee objected to confirmation of debtor's plan where the debtor took expense deductions relating to a house and motor vehicle. The debtor was not liable on the mortgage for the home (grandmother liable on note) or on the motor vehicle (spouse liable on note). The court found In re McGuire, 342 B.R. 608 (Bankr. W.D.Mo. 2006) persuasive to prohibit ownership deduction if debtor does not own or lease vehicle. However, because debtor incurs a monthly expense for vehicle ownership, even if not obligated on the note, the ownership/lease expense was nevertheless authorized in the calculation of projected disposable income under §1325(b).

### **3. Cases Not Requiring a Loan or Lease Payment as a Prerequisite to Ownership Expense**

**In re Vesper, 371 B.R. 426 (Bankr. D.Alaska. 2007) (appeal pending).** In calculating her disposable income under the means test, chapter 7 debtor claimed IRS Local Standard for Vehicle Ownership for two vehicles owned free and clear of liens. One of the vehicles was owned by the debtor, while the other was in the name of her 18 year old son. The U.S. Trustee moved to dismiss, challenging the debtor's eligibility for the ownership expense on these vehicles. In denying the U.S. Trustee's motion, the bankruptcy court held that the debtor is entitled to deduct the Local Standard for vehicle ownership for both vehicles because the word "applicable," as used by Congress in formulating the means test, refers only to the number of vehicles owned by the debtor. The court held that, unlike the term "actual," which is used elsewhere by Congress in allowing the debtor to deduct only "actual monthly expenses" for Other Necessary Expenses, the word "applicable" does not require the debtor to actually have any vehicle ownership expense in order to take ownership expense deduction.

**In re Barrett, 371 B.R. 855 (Bankr. S.D.Ill. 2007).** In a chapter 13 case, a creditor objected to confirmation of the debtor's plan on the ground that the debtor incorrectly deducted from her projected disposable income the IRS Local Standard for Vehicle Ownership when she owned her vehicle outright. The bankruptcy court overruled the objection, holding that the plain language of § 707(b)(2)(A)(ii)(I) permits debtors to deduct vehicle ownership expenses even where the debtor has no actual expense. The court held that "applicable," as such term appears in the statute, references both the region of the country in which the debtor lives and the selection that must be made between the two columns that appear in the Local Standards, one for the first car and one for the second car. If the debtor has only one car, the court held that the "applicable" expense is the one found in the first column and that "it takes a tortured reading to make 'applicable' refer to anything else."

**In re Fowler, 349 B.R. 414 (Bankr.D.Del. 2006)**(case subsequently converted to chapter 13). The United States Trustee moved to dismiss the debtor's case based on the presumption of abuse that arose because the debtor deducted a vehicle ownership expense for a vehicle owned free and clear. The court reasoned that, because the IRS treats the Local Standards as "caps," rather than "fixed allowances," as the Bankruptcy Code does, Congress did not intend to apply the IRS Manual to §707(b)(2). Based on "plain reading of statute" the court held that the debtor

was entitled to take the IRS Transportation ownership expense Standard even without a payment obligation.

**In re Zak, 361 B.R. 481 (Bankr. N.D. Ohio 2007).** United States Trustee moved to dismiss chapter 7 debtors' case as a abuse of chapter 7 pursuant to § 707(b)(2) on the ground that debtors impermissibly claimed certain deductions on Official Form 22A, including the IRS Local Standard for vehicle ownership for two vehicles, even though the debtors owned their vehicles free and clear of liens. The court allowed the ownership expense deduction because the IRS applies the Local Standards as "caps," meaning that the taxpayer is allowed the standard amount or their actual expense, whichever is *less*, but the Bankruptcy Code does not cap the expenditure, meaning the Code allows the Standard expense as the "actual deduction to which the Debtor is entitled." The court cited In re Fowler, and reasoned that, because the means test treats the Local Standards as fixed allowances, rather than "caps," "it is more reasonable to permit a debtor to claim the Local Standard ownership expense based on the number of vehicles the debtor owns or leases, rather than on the number [of vehicles] for which the debtor makes payment."

**B. Is Allowance of Additional \$200 Operating Expense for Older/High Mileage Vehicles Without an Applicable Ownership Expense Consistent with the IRS Local Standards?**

**1. IRS Standard**

Where there is no loan or lease payment obligation on a vehicle owned by the debtor that is over six years old or has reported mileage of 75,000 or more miles, an additional operating expense of \$200 may be allowable. See Internal Revenue Manual ("IRM"), Part 5, Chapter 8, Section 5, at § 5.8.5.5.2, which may be found at the IRS website:

<http://www.irs.gov/irm/part5/ch08s05.html>. The vehicle must meet all requirements for the additional operating expense in order for the expense to be allowed: (1) there must be no loan or lease payment; (2) the vehicle must have 75,000 or more miles and/or be 6 or more model years in age (currently model year 2002 or older); and (3) the debtor must actually own the vehicle and pay operating expenses with respect to the vehicle.

**2. Judicial Analysis**

In In re McGuire, 342 B.R. at 613-14, the court expressly agreed that since the debtors are not entitled to an ownership expense because they do not have a loan or lease payment obligation, allowing the debtors the \$200 additional operating expense for unencumbered older/high mileage

vehicles is “consistent with IRS Local Standards....” and that such additional allowance “is allowed for debtors with cars more than six years old, or having more than 75,000 miles.”

**a) *Cases incorporating IRM allowance of \$200 additional operating expense***

**In re Ransom, 2007 WL 4625248 (B.A.P. 9th Cir. Dec. 27, 2007).** Bankruptcy Appellate Panel rejected debtor’s argument that IRS Local Standards for vehicle ownership are allowed to debtors who do not have an applicable loan or lease payment because the Ownership expense accounts for the likelihood of major repairs that an old vehicle will require. Instead, court noted that debtors who own old or high-mileage cars free and clear are entitled to an additional \$200 per month in operating expenses.

**In re Slusher, 359 B.R. 290 (Bankr. D.Nev. 2007)** (following McGuire and progeny in holding that debtor is allowed an additional \$200 operating expense for unencumbered vehicle more than six years of age.)

**In re Oliver, 350 B.R. 294 (W.D.Tex. 2006)**(following McGuire).

**In re Carlin, 348 B.R. 795 (Bankr.D.Or. 2006)**(following McGuire).

**In re Barraza, 346 B.R. 724 (Bankr. N.D.Tex. 2006)**(following McGuire).

**b) *Cases noting that § 707(b)(2) does not include IRM allowance of additional \$200 operating expense***

**In re Johnson, 2006 WL 2883243 (Bankr. M.D. N.C. 2006)** While noting that McGuire and other courts have approved the \$200 additional operating expense, the court determined that the relevant language of §707(b)(2)(A)(ii)(I) refers only to the use of the tables in the IRS Local and National Standards in determining allowable deductions for transportation costs, not the IRS Manual. Thus, the \$200 allowance is prohibited. The court left open the question of whether it would follow Hardacre on the vehicle ownership issue.

**C. How Are Income Taxes Treated Under the Means Test?**

The majority of cases post-BAPCPA hold that the allowable amount of the debtor’s tax liability to be deducted on Line 25 of Official Form 22A (Line 30 of Official Form 22C) is the debtor’s *actual tax liability*, and not the *amount withheld* from the debtor’s paycheck.

**In re Hale, 2007 WL 2990760 (Bankr. N.D. Ohio Oct. 10, 2007).** U.S. Trustee moved to dismiss debtors’ case under § 707(b)(2), alleging debtors overstated the amount of their tax liability on Line 25 of Form 22A . The debtors claimed a deduction for taxes in the amount withheld from their monthly paycheck. The U.S. Trustee’s bankruptcy analyst, however, testified

that the debtors' actual tax liability is lower than the amount withheld from the debtors' paycheck. The court held that the proper deduction on Line 25 is the debtors' *actual tax liability*, which is not the same as the amount withheld from a debtor's paycheck because withholding can be manipulated to over withhold.

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

**In re Stimac, 366 B.R. 889 (Bankr. E.D. Wis. 2007).** Chapter 13 trustee objected, in separate chapter 13 cases, to confirmation of plans proposed by above-median-income debtors as failing to satisfy the "projected disposable income" requirement. Specifically, the trustee objected to deductions taken by debtors in calculating their disposable income for telecommunications and tax expenses. The bankruptcy court held that debtors were not entitled to deduct, as an average monthly tax expense, the amounts actually withheld from their paychecks, unless debtors were willing to dedicate 50% of any tax refunds that they received to payment of unsecured creditors. The court reasoned that the presumptively correct amount to be deducted is the amount of taxes that the debtor actually paid, as evidenced by the most recent tax return filed, divided by twelve and that to rebut this presumption, debtors had to adequately document any change in their circumstances.

**In re Raybon, 364 B.R. 587 (Bankr. D.S.C. 2007).** Chapter 13 trustee, relying on evidence of debtor's history of receiving substantial tax refunds, objected to debtor's proposed plan as not satisfying "projected disposable income" requirement. The bankruptcy court held that the mere fact that the debtor had historically received substantial tax refunds, in amounts of \$5,000 to \$6,000 per year, did not mean that she had to adjust her current tax withholdings to increase her take home pay and to permit increase in her monthly plan payments, in order to satisfy the "projected disposable income" requirement and to confirm a plan over the trustee's objection. The court found that the debtor had claimed only the exemptions to which she was entitled, and there was no evidence that debtor was purposefully over-withholding to create quasi-savings account, or that she was otherwise manipulating her withholdings to her advantage.

Because her tax liability for the coming year could not be determined the court confirmed the plan, even though the debtor's actual tax liability may be less than claimed as evidenced by the history of refunds.

**In re Lawson, 361 B.R. 215 (Bankr. D. Utah 2007).** Chapter 13 trustee objected to confirmation of debtors' plan because it did not provide for payment of future tax refunds into the plan as part of the debtors' projected disposable income. The debtor and the chapter 13 trustee disagreed on the correct amount to be included on the debtors' means test form for taxes (Line 30). The chapter 13 trustee argued that it should reflect the amount of the debtors' actual future tax liability for the year 2006. Debtors argued that it should be the amount *withheld* from debtor's paycheck, even though that amount may be over-withholding. The court ruled, first, that Form 22C is determinative of projected disposable income and that taxes on Form 22C should therefore be calculated based on the income earned in the six months prior to the bankruptcy filing, and not based on future income. The court also concluded, however, that the amount that should be entered on Line 30 is the *actual tax liability* for the six month period before the petition date, and not the *amount withheld* on the debtor's paycheck.

**In re Balcerowski, 353 B.R. 581 (Bankr. E.D. Wis. 2006).** Chapter 13 debtor had a negative disposable monthly income figure from Form 22C. This figure was calculated by subtracting the amount withheld from the debtor's wages, rather than the amount of income taxes the debtor would end up actually owing based on the applicable tax tables. The court held that, while §1325 and Form 22C require debtor "to subtract his *actual* tax expense from his *historical* income, the Trustee can't rely solely on resulting monthly disposable income figure" from Form 22C. The court determined that the trustee must also look at the amount that results when the debtor's actual tax expense (and other expenses) are subtracted from the debtor's Schedule I income to determine the correct amount of disposable income.

**In re Risher, 344 B.R. 833 (Bankr. W.D.Ky. 2006).** Chapter 13 trustee objected to provisions in debtors' plan that purported to exclude future tax refunds from distribution to unsecured creditors. The court noted that tax refunds are amounts overwithheld and therefore constitute additional income. Accordingly, Line 30 should reflect the taxes actually paid, and not the amount withheld.

**D. Retirement Contributions/Loan Repayments**

Section 707(b)(2)(A)(ii)(I) allows as monthly expenses 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. The Internal Revenue Manual includes categories for “involuntary deductions” if the deduction is a requirement for the debtor’s job. See <http://www.irs.gov/irm/part5/ch15s01.html#d0e178408>.

### **1. 401(k) Loan Repayments Claimed as Mandatory Payroll Deductions**

**In re Mordis, 2007 WL 2962903 (Bankr. E.D. Mo. Oct. 9, 2007).** Chapter 7 debtor claimed deductions on Form 22A for 401(k) loan repayment of \$520 per month and 401(k) contribution of \$181.48 per month. The U.S. Trustee moved for dismissal under § 707(b)(2), arguing that, after excluding the debtor’s 401(k) loans and contributions, the presumption of abuse arises. The debtor claimed that her 401(k) loan qualified as a “mandatory payroll deduction” or, alternatively, as a secured debt under § 707(b)(2)(A)(iii). Finally, the debtor claimed that both her 401(k) loan payment and contribution are allowable under the means test because they would be allowable in a hypothetical chapter 13 case. The court agreed with the U.S. Trustee that the debtor’s 401(k) loan payments are not “mandatory payroll deductions” because they are not a condition of the debtor’s continued employment. The court also agreed that the debtor’s 401(k) loans do not constitute “secured debts” under the Code, citing *In re Thompson*, 370 B.R. 762 (N.D. Ohio 2007). Finally, the court rejected the debtor’s claim that her 401(k) expenses should be allowed under the chapter 7 means test because they would be allowed in a chapter 13 plan. The court stated that, because Congress did not include the chapter 13 provisions allowing retirement expenses into the means test, Congress intended to allow those expenses only to debtors in chapter 13.

**In re Whittaker, 2007 WL 2156397 (Bankr. N.D. Ohio July 25, 2007).** Chapter 7 debtor claimed on his Form 22A, among other things, a \$285.53 deduction under “Other Necessary Expenses: mandatory payroll deductions” for a 401(k) loan repayment. The U.S. Trustee moved for dismissal under § 707(b)(2) and challenged the debtor’s deduction of his 401(k) loan as an “other necessary expense” on the ground it is not a mandatory payroll deduction. The debtor responded he properly deducted his loan repayments on line 26 since his 401(k) plan requires payments to be made through payroll deductions and, therefore, they are mandatory. The court granted the U.S. Trustee’s motion, holding that 401(k) loans are not mandatory payroll deductions required for employment. The court reasoned that the term

“mandatory retirement contributions” implies a situation where participation in a retirement plan is a condition of the job, *i.e.*, the original contributions are a deduction that an employer would take from all employees. The court held that this is consistent with the Internal Revenue Manual, which requires that an involuntary deduction “must be a requirement of the job.”

**In re Barazza, 346 B.R. 724 (Bankr.N.D.Tex. 2006).** The United States Trustee moved to dismiss the debtor’s chapter 7 case as presumptively abusive under the means test in §707(b)(2)(A). Among other things, the debtor deducted \$915 per month from current income, Line 26 of Official Form 22A (Other Expenses: mandatory payroll deductions), to account for loan repayments on two loans from the debtor’s 401(k) plans. Repayment of the loans was not a condition of debtor’s employment. Debtor argued, *inter alia*, that he would be allowed to deduct the 401(k) loan payments in a chapter 13 case, resulting in zero dollar plan for unsecured creditors and an absurd result. The court held that a 401(k) loan repayment is not an Other Necessary Expense, even if automatically withdrawn from debtor’s paycheck, if the only consequence to debtor is a taxable event. Examples of involuntary payroll deductions are work uniforms, union dues, and work shoes. The zero dollar plan argument was not addressed because required child support payments had only six months remaining, thus under §1325(b)(2) after averaging the payments over the life of 60 months (the applicable commitment period) debtor could confirm a chapter 13 plan with some repayment to unsecured creditors.

**In re Lenton, 358 B.R. 651 (Bankr. E.D.Pa. 2006)** (appeal pending). The United States Trustee moved to dismiss the debtor’s case as a presumed abuse because the debtor deducted payments for two 401(k) loan payments on Form 22A. The debtor had taken two loans on a voluntary 401(k) plan and was paying the loans through bi-weekly payroll deductions totaling \$836 per month. The loan documentation for the 401(k) loans stated that the monthly loan repayments are mandatory until the loan is repaid or, if the debtor was terminated from his job or took a leave of absence or otherwise was in a position where payroll deductions could not be made, the documentation required the debtor to continue making payments or be in default. In the event of default, the balance of the loans would be treated as a distribution from his account, subject to tax consequences. The debtor claimed the loan payments as a Mandatory Payroll Deduction at Line 26 of Form 22A. The court disallowed the expense, noting that the definition of a “mandatory payroll deduction” is a deduction that is “required for the job”. The court further observed that, while the instructions to Form 22A at Line 26 seek “mandatory retirement

contributions,” such language “implies a situation where participation in a retirement plan is a condition of the job, *i.e.*, the original contributions are a deduction that an employer would take from *all* employees.” The court also noted that it is not incongruous to allow the expense in a chapter 13 plan, but not in chapter 7, because such an approach “evidences a ‘wait and see’ approach that would channel debtors with such expenses into the longer period of bankruptcy supervision of chapter 13 rather than the relatively short tenure of a chapter 7 case, notwithstanding that doing so might result in a zero payment plan.”

## **2. 401(k) Loans held to be a Special Circumstance**

**In re Johns, 342 B.R. 626 (Bankr. E.D. Okla. 2006).** The United States Trustee moved to dismiss the debtors’ case based on the presumption of abuse. The debtors asserted that special circumstances existed that were sufficient to rebut the presumption of abuse. As a special circumstance, the debtors alleged that if they were in a chapter 13 case, the distribution to general unsecured creditors would be zero because among other things: (1) the monthly child support payment included in their current monthly income in a chapter 7 would not be included as income in a chapter 13; and (2) they would be allowed to deduct their 401(k) loan payments and 401(k) contributions in a chapter 13. The court also held that a potential payback of zero percent to unsecured creditors in a chapter 13 is not a special circumstance contemplated under §707(b)(2)(B).

**In re Lenton, 358 B.R. 651 (Bankr. E.D. Pa. 2006) (facts *supra*).** The court held that 401(k) loan repayments are a special circumstance sufficient to rebut the presumption of abuse. Following Thompson the court held that special circumstances must be evaluated on a case by case basis, but found it compelling that the debtor incurred the loans more than a year before filing his bankruptcy and used the loans to pay down his credit card debt, thereby reducing the unsecured debt that would otherwise be paid in a chapter 13 case. Further, the court found the fact that the debtor cannot stop making the payroll deductions as long as he is employed, and must quit or take leave of absence to stop the payments, to be sufficient to constitute special circumstances “for which there is no reasonable alternative.”

## **3. 401(k) Loans as Secured Debt Payments and/or Special Circumstance**

**Eisen v. Thompson, 370 B.R. 762 (N.D. Ohio 2007).** The district court reversed the bankruptcy court’s decision in In re Thompson, 350 B.R. 770 (Bankr. N.D. Ohio 2006), concluding that retirement plan loans are neither “debts” nor “secured debts” under the

Bankruptcy Code. The district court also found that assessing special circumstances requires the court to analyze whether the circumstances that led to taking the loan from the retirement account were “special” or whether they were not “special” and instead the result of the debtor’s longstanding inability to keep up with their obligations to creditors. Without more, an occurrence as common as a withdrawal from one’s retirement funds cannot be a “special circumstance.” In the absence of evidence indicating that the circumstances under which the debtor borrowed the retirement funds was “special,” it is an abuse of discretion for a court to hold a 401(k) loan or its repayment to be a “special circumstance.”

**McVay v. Otero, 371 B.R. 190 (W.D. Tex., 2007).** The district court reversed the bankruptcy court and held that 401(k) loan repayments are neither debt nor secured debt and, therefore, are not an allowed expense deduction on Form 22A.

**In re Masur, 2007 WL 3231725 (Bankr. D. S.D. Oct. 30, 2007).** Debtors claimed their 401(k) loans as secured debts on Line 42 of Form 22A. The court agreed with In re Thompson and In re Otero that 401(k) loans are neither a “debt” nor a “secured debt” and are thus not allowed as secured debt deductions on Line 42 of Form 22A.

**In re Lewis, 2007 WL 2742854 (Bankr. N.D. Ohio Sept. 17, 2007).** Chapter 7 debtors claimed secured debt deductions for 401(k) loans totaling \$403.25 per month on their means test form 22A. The debtors’ deductions included \$198.80 per month on Line 42 as “future payments on secured claims,” and \$204.45 per month on Line 43 as “other payments on secured claims.” The U.S. Trustee moved for dismissal, arguing that the debtors’ 401(k) loan repayments are not “secured debts” and are therefore not allowed deductions on Lines 42 and 43 of Form 22A. Relying on In re Thompson, 370 B.R. 762 (N.D. Ohio 2007), the court held that 401(k) loans are not “secured debts” and granted the U.S. Trustee’s motion.

**In re Turner, 376 B.R. 370 (Bankr. D.N.H. 2007)** The Bankruptcy Court, Mark W. Vaughn, Chief Judge, held that: (1) amount which was deducted each month from debtor-wife’s paycheck in repayment of loans from her 401(k) employee retirement plan was not “mandatory payroll deduction,” such as she could subtract from her current monthly income (CMI) in applying “means test”; (2) expense for repayment of 401(k) plan loans was not in nature of “debt,” as not giving rise to claim by any third party against her, and could not be deducted as payment on secured debt; (3) debtors failed to show that this expense rose to level of “special circumstance”; (4) debtors did not engage in any impermissible “double dipping” in connection

with vehicle expense deductions; (5) excess business miles driven by debtor-husband were in nature of “special circumstances”; but (6) pest control expense and debtor-wife's uniform expense were not. Motion denied.

**E. Marital Adjustment for Non-Filing Spouse’s Income and Expenses Related to Food, Utilities, Clothing and Other Personal Items for the Non-Filing Spouse on Line 17 of the Means Test**

**1. Statutory analysis**

11 U.S.C. §101(10A)(B) includes in CMI amounts that a non-filing spouse contributes on a regular basis to the household expenses of the debtor and the debtor’s dependents. Section 101(10A)(B) states, in relevant part, that the term “Current Monthly Income”:

(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...

Form 22A, utilizing the definition in §101(10A)(B), and §707(b)(7)(A) and (B), includes the non-filing spouse’s income for means testing purposes.<sup>2</sup> See Official Form 22A, Lines 3-10.

However, the debtor is allowed to deduct, as a marital adjustment, the amount of the non-filing spouse’s income that was not regularly contributed to the household expenses of the debtor or the debtor’s dependents. See Form 22A, Line 17.

**2. Interpretive Case Law.**

**In re Sale, 2007 WL 3028390 (Bankr. M.D.N.C. Oct. 15, 2007).** Bankruptcy Administrator moved to dismiss chapter 7 case. Debtor claimed a marital adjustment of \$813.22 on Line 17 of Form 22A, consisting of debt for three vehicles owned by her non-filing spouse. The debtor also claimed vehicle ownership expenses on Lines 23 and 24 for two of those vehicles. The court held that debtors must own a vehicle in order to claim the vehicle ownership

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<sup>2</sup> The non-filing spouse’s income is not included in the calculation of CMI only if the Debtor declares under oath that he or she maintains a separate household from the debtor’s non-filing spouse. See 11 U.S.C. §707(b)(2)(A) and Official Form 22A, Line 2b

expense and, since her non-filing spouse owned the vehicles in question, the debtor was not entitled to claim vehicle ownership expenses. In addition, the court held that the debtor was in any event not entitled to claim *both* deductions for the debt on her non-filing spouse's vehicles in the Marital Adjustment on Line 17 *and* vehicle ownership deductions on Lines 23 and 24, because doing so would be impermissible "double dipping."

**In re Shahan, 367 B.R. 732 (Bankr. D. Kan. 2007)**

**In re Lightsey, 374 B.R. 377 (Bankr. S.D. Ga. 2007).** The debtor had divorced her first husband and remarried. The Debtor's non-filing spouse was not liable on any of debtor's debt. The court concluded that the non-filing spouse's contributions to the household constitute current monthly income, that no special circumstances existed, and that the case would have to be converted or dismissed.

**In re Travis, 353 B.R. 520 (Bankr. E.D. Mich. 2006).** The debtor included his non-filing spouse's income for means testing purposes but subtracted \$2,616 as a Marital Adjustment on line 17 of Form 22A. The UST objected to \$870 of the marital adjustment for food, clothing, utility and personal expenses of the non-filing spouse, concluding that the presumption of abuse arose without the \$870 adjustment, and moved to dismiss. In noting the impact of the Line 17 marital adjustment on a debtor's ability to remain in bankruptcy, the court recognized an obligation to scrutinize challenges to line 17 "very carefully." The court determined that to the extent the non-filing spouse "contributes income for food and utilities, these are clearly contributions to the household expenses of the debtor and the debtor's dependents" and should be not be included on Line 17. The court also found that taxes should not be deducted on Line 17 as the payroll taxes and Social Security were already accounted for by the non-filing spouse. However, the court held that the non-filing spouse's expenses for clothing and personal items should be included on Line 17, distinguishing between the debtor's expenses as fixed by the IRS Standards for living and housing expenses with the non-filing spouse's actual expenses regardless whether the non-filing spouse's expenses could also be generally categorized as household expenses. **Note:** Because the court determined that the debtor understated his withholding taxes by \$430, which alone put the debtor under the presumption of abuse threshold under §707(b)(2)(A)(I), the court's analysis relative to the Line 17 Marital Adjustment may be dicta.

**F. IRS Other Necessary Expenses**

**In re Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007).** Student loans are not “Other Necessary Expenses,” despite inclusion by the IRS in that category, because they are “payments for debts” that are excluded from a debtor’s expenses under §707(b)(2)(A)(ii)(I).

**In re Lara, 347 B.R. 198 (N.D.Tex. 2006)** (Other Necessary Expense: telecommunication and other expenses). Telecommunications expense – allows two cell phones (\$183). The court noted that the cell phone expense “seems high,” but that the trustee “failed to put on any evidence that the debtors could obtain comparable services at a higher amount.” The court also allowed high speed internet (\$26) as actual and necessary expenses, but denied (1) additional dial up access charge because of a lack of proof, and (2) local phone service because such expense is provided in Local IRS Standard. Although the debtors claimed recreation and gas/maintenance for their car above the IRS Standards as “Other Necessary Expenses,” the court denied those expenses because those expenses are not included by the IRS in its categories of Other Necessary Expenses.

**G. Surrender of Collateral: May Debtors Take Expense Allowances for Projected Average Secured Debt Payments Pertaining to Surrendered Collateral?**

**1. Bankruptcy Code**

Section 707(b)(2)(A)(iii) provides: “[t]he 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.” Section 704(b)(1) provides that the United States Trustee “shall review **all materials** filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor’s case would be presumed to be an abuse...”. Section 521(a)(2)(A) requires a debtor to file a statement of intention within 30 days of the earlier of the petition date and the date of the meeting of creditors. Section 521(a)(2)(B) then requires that the debtor perform that expressed intention within 30 days after filing the statement of intention.

**2. Judicial Analysis – Is the fact the debtor will not incur an expense relevant for means testing purposes?**

Two lines of case-law have emerged post-BAPCPA on the issue of whether debtors who state an intent to surrender secured property may deduct amounts “contractually due” to secured creditors regarding such property in each of the sixty months following the petition date. One

line of cases, characterized by In re Walker, 2006 WL 1314125 (Bankr. N.D.Ga. 2006), holds that debtors are entitled to claim secured payments on the means test form, even though they intend to surrender the property. The other line of cases is characterized by In re Skaggs, 349 B.R. 594 (Bankr. E.D.Mo. 2006), which holds that surrender eliminates the debtor's eligibility to claim secured debt payments on the means test.

**In re Walker, 2006 WL 1314125 (Bankr. N.D.Ga. 2006).** On the petition date, the debtors owned a home and two vehicles that were subject to security agreements, and two additional vehicles that the debtors owned free and clear. The debtors stated their intention to surrender their home and one of the encumbered vehicles, and to retain the other encumbered vehicle by reaffirming the debt. On their Form 22A, the debtors took an expense allowance for the average payments due on secured claims for the surrendered home and surrendered vehicle, despite the fact that surrendering this property meant that they would not have any amounts due to secured creditors on account of this property in the 60 months following the petition date. The court noted that the UST's position was "sensible" and "more accurately ascertain[s] the debtor's post-petition financial condition." The court, however, held that debtors may deduct secured debt payments on Line 42 of Official Form 22A, even though they have committed to surrender the property. The court held that the plain language of §707(b)(2)(A)(iii) allows debtors to deduct secured debt payments that are "scheduled as contractually due" at the time of filing, and the debtor is not required to reaffirm the obligation as a prerequisite to taking the deduction. The court concluded that such interpretation gives meaning to the word "scheduled" which the court viewed to imply "the possibility that the payments may not be made as required under the contract, either because the debtor will surrender the collateral or because the payments might be modified..." The Walker court further found that, if Congress had wished to limit the deduction to payments on collateral the debtor intended to reaffirm, it would have done so.

**In re Skaggs, 349 B.R. 594 (Bankr.E.D.Mo. 2006).** Debtors owned a mobile home and two vehicles. The debtors had ceased making payments on the mobile home and the second vehicle pre-petition. The debtors stated their intention to surrender the mobile home and the second vehicle, a 2001 Ford Taurus, and to reaffirm the debt on their 2004 Dodge Stratus and washer/dryer. On their Official Form 22A, the debtors took an expense allowance for the average monthly payments on the secured claims for the mobile home and Taurus, despite the fact that surrendering this property meant that they would not have any amounts due to secured creditors

on account of this property following the petition date. The UST argued that debtor's commitment to surrender collateral eliminates any "payments on account of secured debt" and "amounts scheduled as contractually due to secured creditors" in each month of the 60 months following the date of the petition. As a result of surrendering the collateral, the debtor will not pay any amounts pertaining to the surrendered property during the 60 months following the petition date and secured creditors will hold only unsecured claims for any deficiency after the surrendered collateral is liquidated. See 11 U.S.C. § 506.

The court disagreed with Walker, finding that Walker reached its result only by applying the dictionary definition of the word "scheduled" to conclude that "payments that are 'scheduled as contractually due' are those payments that the debtor will be required to make on certain dates in the future on the contract. The court concluded that use of the phrase "scheduled as" in the Bankruptcy Code refers not to the common dictionary meaning of the word, but whether a debt is identified on debtor's schedules. The court found that it is the debtors' schedules and statement of affairs which form the basis from which the court determines whether a debt is "scheduled as contractually due". Thus, since the property scheduled was being surrendered by debtors post-petition, expense deductions for payments on the mobile home and for ownership and operation and payments on the 2001 Ford Taurus were disallowed from Official Form 22A.

### **3. Cases following Walker**

**In re Randle, 2007 WL 2668727 (N.D. Ill. July 20, 2007).** The District Court followed In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wis. 2006) and its progeny in affirming the bankruptcy court. The District Court held that the debtor may deduct secured debt payments on property the debtor intends to surrender post-petition. The District Court concluded that the debtor's mortgage payments "were still contractually due each month before and as of the filing of her chapter petition, even if Randle had not been paying these monthly mortgage payments and was in default," and regardless that debtor had filed a Statement of Intention to surrender the property because the Statement "is not an actual surrender".

**In re Hartwick, 2007 WL 2350560 (D.Minn. 2007).** Following In re Randle, the district court held that the debtor may deduct secured debt payments on property the debtor intends to surrender post-petition.

**In re Parada, 2008 WL 126626 (Bankr. S.D. Fla. Jan. 10, 2008).** Following Walker line of cases, but dismissing case under section 707(b)(3) because debtors had the ability to repay substantial portion of their unsecured debt.

**In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wis. 2006).** The United States Trustee moved to dismiss for presumed abuse on the ground that the debtors were not entitled to deduct secured debt payments for a home they intended to surrender. The court held that the reasoning of Walker is correct, and the phrase “scheduled as contractually due” means payments that will be due under the contract. The court reasoned that Congress could have expressly limited the deduction to payments on collateral that will be retained, but did not do so.

**In re Sorrell, 359 B.R. 167 (Bankr. S.D. Ohio 2007).** United States Trustee moved to dismiss debtors’ chapter 7 case based on the presumption of abuse and, alternatively, based on the totality of the circumstances demonstrating abuse under §707(b)(3). The United States Trustee asserted that the debtors incorrectly: (1) failed to include unemployment income in their CMI; and (2) claimed a deduction for the secured debt on a vehicle they intended to surrender. After ruling that unemployment compensation is excluded from CMI under § 101(10A), the court ruled that the debtors were entitled to deduct the secured debt payments on the vehicle they intended to surrender. The court disagreed with the United States Trustee, ruling that the phrase “scheduled as” in § 707(b)(2)(A)(iii)(I) “do[es] not refer to the bankruptcy schedules. The court cited to Nockerts, *supra*, for the proposition that the term “scheduled” may or may not refer to the bankruptcy schedules because some parts of the code use that term to mean only the bankruptcy schedules, while § 521(k)(3)(H)(ii) uses it to mean “a repayment schedule.” The court reasoned that § 707(b)(2)(A)(iii) has more in common with sections of the code that use the term “scheduled” to refer to a repayment plan, and therefore held that the term has that meaning in § 707(b)(2)(A)(iii)(I) as well. Accordingly, because the vehicle payments were “scheduled” as contractually due as of the petition date, they were allowed.

**Additional cases following Walker:**

**In re Ellringer, 370 B.R. 905 (Bankr. D. Minn. 2007)**

**In re Maya, 374 B.R. 407 (Bankr. S.D. Cal. 2007)**

**In re Mundy, 363 B.R. 407 (Bankr. M.D. Pa. 2007)**

**In re Palm, 2007 WL 1772174 (Bankr. D. Kan. 2007)**

**In re Hartwick, 359 B.R. 16 (Bankr. D.N.H. 2007)<sup>3</sup>**

**In re Hayes, 375 B.R. 65 (Bankr. D. Mass. 2007)**

**In re Guerriero, 2008 WL 321303 (Bankr. D. Mass.)**

#### **4. Cases following Skaggs**

**In re Ray, 362 B.R. 680 (Bankr. D. S.C. 2007).** The bankruptcy found that where a debtor has surrendered or intends to surrender collateral, the debtor may not deduct the monthly amounts owed on the secured obligations under the means test. The court determined that amounts scheduled as contractually due is for “average monthly payments on account of secured debts” and is calculated according to a formula that looks to the “60 months following the date of the petition,” i.e. they are construed together as contemplating a *forward looking* calculation. The court rejected the rationale espoused in Walker and its progeny, noting that a problem with this line of cases “is that they come to the same conclusion about the meaning of the statute as would result if the words scheduled as were not present [in the statute] but do so by focusing on those very words.” Rejecting the notion that the statement of intention should not be utilized in analyzing surrender because it can be amended, the court stated that “gamesmanship with the statement of intention could well impact the dismissal analysis under §707(b)(3) and certainly is not a sound basis for grounding an interpretation of the secured debt payment deduction under the means test.”

**In re Masur, 2007 WL 3231725 (Bankr. D. S.D. Oct. 30, 2007).** Debtors claimed secured debt deductions on Line 42 of Form 22A for their second vehicle and their home, both of which were being surrendered. The court agreed with In re Ray, and disagreed with In re Walker, and held that debtors may not claim secured debt deductions on Line 42 of Form 22A for property being surrendered. The court emphasized that the Walker court’s reading of “scheduled as” essentially renders that phrase superfluous and that the better construction would take into account the debtor’s intent to surrender the property. Accordingly, the court adopted the reasoning of Ray.

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<sup>3</sup> The United States Trustee’s appeals of rulings denying the United States Trustee’s Motion to Dismiss under 11 U.S.C. §707(b)(2) based on the Hartwick analysis are currently pending before the Bankruptcy Appellate Panel for the First Circuit in two unrelated cases: In re Hagerty, Chapter 7, Case No. 06-10809MWV and In re Rudler, 06-10982MWV.

**In re Harris, 353 B.R. 304 (Bankr.E.D.Okla. 2006).** The United States Trustee filed a motion to dismiss for presumed abuse under § 707(b)(2), on the ground that debtors may not deduct IRS Local Standard for ownership of a vehicle without a loan or lease payment, and that monthly payments for secured debt cannot be included in the means test calculation when a debtor intends to surrender the collateral. The court agreed with the United States Trustee on both grounds for dismissal. On the surrender issue, the court followed Skaggs, holding that Walker was incorrectly decided.

**5. In re Singletary**

**In re Singletary, 354 B.R. 455 (Bankr. S.D.Tex. 2006).** In taking an approach somewhere between the holdings of Walker and Skaggs, and relying on In re Cortez, 457 F.3d 448 (5<sup>th</sup> Cir. 2006), the court found that post-petition events should be considered under the test for presumption of abuse. In a modification of the approach utilized in Skaggs and Harris, the Singletary court found that property must actually be surrendered to disallow the expense for the property. The date the Motion to Dismiss is filed is the relevant date to assess whether the collateral has in fact been surrendered. Also, that the debtor has filed a notice of intent to surrender or indicated an intent to surrender on the bankruptcy schedules was an insufficient basis to disallow the secured debt expense in calculating disposable income.

## II. How is Projected Disposable Income Calculated for Purposes of Section 1325(b)(1)

### A. Statutory Analysis

If a trustee or unsecured creditor objects to the confirmation of a chapter 13 plan, the court may not approve the plan unless it “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.” 11 U.S.C. §1325(b)(1)(B).

The requirement that a debtor apply all “projected disposable income” to plan payments predates BAPCPA, but both the definition of “disposable income” in section 1325(b)(2) to include “current monthly income” and the means test-based determination of amounts “reasonably necessary to be expended” for above-median debtors in section 1325(b)(3) were added to the Code by BAPCPA.”

While “projected disposable income” is not defined in the Code, section 1325(b)(2) defines “disposable income” as “current monthly income received by the debtor less amounts reasonably necessary to be expended” for the maintenance or support of the debtor or debtor’s dependants, for charitable contributions, and for the continuation and operation of a business in which the debtor is engaged. 11 U.S.C. §1325(b)(2). Within this definition, “current monthly income” is itself a new defined term in the Bankruptcy Code that was added by BAPCPA. “Current monthly income” means, in relevant part, “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” preceding the filing date. 11 U.S.C. §101(10A)(A).

Section 1325(b)(3), an entirely new BAPCPA provision, applies only to debtors with household incomes above the median family income for the applicable state.<sup>4</sup> See 11 U.S.C. §1325(b)(3). For above-median debtors, section 1325(b)(3) provides that amounts “reasonably

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<sup>4</sup> For below median income debtors, the determination of amounts “reasonably necessary to be expended” was not changed by BAPCPA, and is generally determined by the court in accordance with debtor’s Schedule J expenses. See, e.g., *In re Meek*, 370 B.R. 294, 308 (Bankr. D. Idaho 2007); *In re Henebury*, 361 B.R. 595, 611 (Bankr. S.D. Fla. 2007).

necessary to be expended” under section 1325(b)(2) are determined in accordance with sections 707(b)(2)(A) and (B), part of the means-testing formula for chapter 7 debtors.

The BAPCPA amendments to section 1325(b) have created important questions about how to interpret "projected disposable income. Three different approaches have developed in light of the BAPCPA amendments, as the case law outlined below reflects.

## **B. Judicial Analysis**<sup>5</sup>

### **1. Projected Disposable Income as forward looking**

Form 22C is the starting point for determining projected disposable income, subject to adjustment when the debtor is likely to experience (or actually has experienced) either a significant increase or decrease in income after the filing of the chapter 13.

**In re Kibbe, 361 B.R. 302 (B.A.P. 1<sup>st</sup> Cir. 2007)**<sup>6</sup>. Below-median Debtor was employed during the six-month pre-petition period, but procured a higher paying job just prior to filing bankruptcy. Thus, the debtor’s “current monthly income” was almost \$4,000 lower than her actual monthly income. The Bankruptcy Appellate Panel for the First Circuit concluded that Form 22C must be the starting point for any determination of “projected disposable income,” but if the parties establish that “current monthly income” set forth on Form 22C is not an accurate reflection of debtor’s current financial condition, the debtor’s “anticipated *actual* income,” subject to the income exclusions in the definition of “current monthly income,” is used to calculate “projected disposable income.” Kibbe, 361 B.R. at 314 (emphasis in original). The appellate panel reasoned that “[a]ttaching the word ‘projected’ to a historical calculation assumes,

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<sup>5</sup> The following cases are a small fraction of published case law analyzing the “projected disposable income” issue under BAPCPA. By volume, the majority of cases have viewed projected disposable income as forward looking, utilizing Form 22C as the starting point subject to adjustment based on debtor’s actual or anticipated income. Included herein are appellate decisions and representative bankruptcy court case decisions adopting each approach to “projected disposable income.”

<sup>6</sup> The Bankruptcy Appellate Panel for the First Circuit affirmed the Bankruptcy Court’s Order denying confirmation. See In re Kibbe, 342 B.R. 411 (Bankr. D. N.H. 2006)(Vaughn, C.J.)(Determination of Chapter 13 debtor’s “projected disposable income,” had to be based on debtor’s anticipated income over term of plan rather than on average of debtor’s prepetition income).

without justification, that a debtor's circumstances will not change after the date of the case commencement or during the plan commitment period." *Id.*, at 312.

***In re Lanning*, – B.R. –, 2007 WL 4348055 (B.A.P. 10th Cir. Dec. 13, 2007).** The debtor was terminated from her job as part of a “buy out” in the six months preceding her petition date, and therefore had much higher “current monthly income” than her actual income at the time of her bankruptcy filing. In calculating the debtor’s “projected disposable income” under 11 U.S.C. § 1325(b)(1)(B), the trustee argued that the word “projected” was a mere multiplier of the historically calculated amount of Form 22C “disposable income.” As *amicus*, the United States Trustee argued that “disposable income” was only the starting point in determining “projected disposable income” under section 1325(b)(1)(B), subject to adjustment based on significant changes in income post-petition. The appellate panel affirmed the bankruptcy court’s order confirming the plan, holding that where it is shown that Form 22C disposable income fails to accurately predict a debtor’s actual ability to fund a plan, that figure may be subject to modification, but that deviation from the Form 22C determination of disposable income will be the exception rather than the rule. The Chapter 13 Trustee has filed a Notice of Appeal with the 10<sup>th</sup> Circuit Court of Appeals.

***Pak v. eCast Settlement Corp. (In re Pak)*, 378 B.R. 257 (B.A.P. 9th Cir. 2007).** This case was originally filed as a Chapter 7, but was converted to chapter 13 after the court determined that the filing was abusive based on the totality of the circumstances under section 707(b)(3). The debtor was unemployed during four of the six months prior to filing his petition, but obtained employment two months prior to filing with an annual salary of \$104,000. The debtor’s “current monthly income” was \$2666.67, while his actual monthly net income at the time of his bankruptcy filing was \$5,530. In calculating “projected disposable income” under section 1325(b)(1)(B), debtor argued that the word “projected” was a mere multiplier of the historically calculated amount of “disposable income.” The United States Trustee and various creditors objected to confirmation of the debtor’s plan on the ground that he had not committed all of his projected disposable income to the plan. The bankruptcy court denied confirmation, finding that “the number resulting from Form 22C is the debtor's ‘projected disposable income,’” unless it is shown “that there has been a substantial change in circumstances such that the numbers contained in Form 22C are not commensurate with a fair projection of the debtor's budget in the future.” *In re Pak*, 378 B.R. at 266-67. The appellate panel affirmed, finding “that in interpreting ‘projected disposable income’ in § 1325(b)(1)(B), ‘disposable

income,’ as defined in § 1325(b)(2), is the starting point for determining ‘projected disposable income,’ subject to adjustment, based on evidence, to reflect reality going forward.” *Id.* at 268.

**In re Devilliers, 358 B.R. 849 (Bankr. E.D. La. 2007).** This case addresses several section 707(b)(2) expense issues, in addition to projected disposable income under section 1325(b). The court stated that “[n]o statute can anticipate every factual circumstance, and this Court does not believe that Congress intended to attempt such a feat. Instead it set forth a framework within which bankruptcy courts could operate, using a combination of historical and statistical data to derive the level of payment required to confirm a plan. To hold otherwise would create an unworkable system for both claimant and debtor alike.” *In re Devilliers*, 358 B.R. at 858. The court found that “[b]y viewing the historical calculations of disposable income through the prism of current circumstance, the Court may both ‘project’ debtor's future disposable income and give effect to the entirety of the Code's provisions.” *Id.* at 859.

**2. Projected Disposable Income as forward looking** – *But* court must take into account the debtor’s actual income as reported on Schedule I:

**In re Fuller, 346 B.R. 472 (Bankr. S.D. Ill. 2006).** The court found that in determining projected disposable income for purposes of § 1325(b)(1)(B), Form 22C does not end the inquiry for below-or above-median debtors. “Whether a debtor is above or below the median income, parties must determine ‘projected disposable income’ *by looking at Schedule I to determine the debtor's income* at the date the petition was filed. The parties should look to Form 22C to determine which expenses to deduct—reasonable Schedule J expenses for below-median debtors, standardized expenses for above-median debtors. But for income, parties must look to actual income at the time the debtor filed the petition, not the average historical income from the six months before. In short, parties in all cases must use Form 22C and Schedule I to calculate ‘projected disposable income.’” *In re Fuller*, 346 B.R. at 485 (emphasis added).

**In re Demonica, 345 B.R. 895 (Bankr. N.D. Ill. 2006).** In analyzing projected disposable income, the court noted that “§1325(b)(1)(B) refers to ‘projected disposable income’ while subsection (b)(2) defines ‘disposable income.’” *In re Demonica*, 345 B.R. at 900. To equate the terms, and thus use Form 22C to calculate projected disposable income, “would be to render the term ‘projected’ superfluous.” *Id.* The court deduced that “‘projected disposable income’ must mean something other than the income as computed on Form 22C,” and concluded that “a debtor's Schedule I, which reflects

current income as opposed to a historical average, should be used to determine ‘projected disposable income.’” Id.

**In re Teixeira**, 358 B.R. 485 (Bankr. D.N.H. 2006) The Bankruptcy Court, Mark W. Vaughn, Chief Judge, held that in order to determine whether a Chapter 13 plan applies all of a debtor's “projected disposable income,” there is a presumption that there has been no substantial change in debtor's income, so that “disposable income” is the same as “projected disposable income,” but when debtor's financial circumstances have changed, an above-median debtor must use income from Schedule I to determine income, but will continue to deduct the standard expenses permitted under the Bankruptcy Code.

### **3. Projected Disposable Income is the mechanical application of Form 22C**

To “project” disposable income means to use the income data for the full six months prior to filing, *i.e.* “current monthly income,” and multiply that amount over the applicable commitment period.

**Maney v. Kagenveama**, USCA Docket No. 06-17083 (9<sup>th</sup> Cir. Court of Appeals)(**case pending**). This appeal directly from the United States Bankruptcy Court for the District of Arizona has been briefed and argued. The Chapter 13 trustee is appealing the bankruptcy court’s determination that “projected disposable income” under section 1325(b)(1)(B) is calculated solely from the disposable income figure on Form 22C multiplied by the applicable commitment period. The Chapter 13 Trustee argues that “projected disposable income” is a forward looking concept, and should be based on the amounts contained in Schedules I & J. In an *amicus* filing, the UST agreed that “projected disposable income” is a forward looking concept, but argued that it is based on the “disposable income” calculation derived from Form 22C, subject to adjustment to account for any significant increases or decreases in the debtor’s income that are likely in particular cases.

**In re Frederickson**, 375 B.R. 829 (8<sup>th</sup> Cir. B.A.P. Sept. 24, 2007). The appellate panel addressed the projected disposable income issue in dicta, in the context of an appeal based on the chapter 13 plan applicable commitment period under section 1325(b)(4). The court stated that “projected disposable income” is the disposable income calculated on Form 22C extrapolated over the applicable commitment period. In re Fredrickson, 375 B.R. at 833-34.

**In re Nance**, 371 B.R. 358 (Bankr. S.D.Ill. 2007). The bankruptcy court found the “strict, plain meaning approach...to be the most persuasive on the question of how to calculate ‘projected

disposable income.” In re Nance, 371 B.R. at 364. The court noted that had “Congress intended for ‘projected disposable income’ to mean something different than ‘disposable income,’ it certainly could have provided a separate definition of the term,” and concluded that “‘projected’ merely explains the treatment of ‘disposable income.’” Id. at 365. The court therefore held that “under § 1325(b)(1)(B), a debtor's disposable income is calculated, according to the statutory definition, and then projected or extrapolated over the plan's term of years.” Id.

**In re Hanks, 362 B.R. 494 (Bankr. D. Utah 2007).** The debtor’s Form 22C listed approximately \$4,000 in monthly severance pay and unemployment benefits. These payments were temporary, however, and Schedules I and J later filed with the court revealed that the debtor’s monthly income was less than \$2,000. The court held that Form 22C is dispositive for an above-median debtor even though a debtor’s income is substantially reduced from pre-filing income. “A harsh or even illogical result is not the same thing as an absurd result,” the court maintained. Id. at 502.

**In re Ries, 377 B.R. 777 (Bankr. D.N.H. 2007).** Holdings: The Bankruptcy Court, Michael Deasy, J., held that: (1) debtors properly deducted from their current monthly income (CMI) the secured debt payments for which they were obligated on date their petition was filed, notwithstanding that debtors had since surrendered the collateral securing this debt; (2) any alleged “special circumstances,” whether relied upon to rebut presumption of abuse arising in Chapter 7 case or to calculate “disposable income” of above-median-income Chapter 13 debtors, must exist prior to and on the petition date; and (3) while debtors’ “disposable income,” as calculated in accordance with “means test,” was presumed to equal the projected disposable income that they had to devote to payment of unsecured creditors under plan, this presumption was rebuttable. Objection sustained; confirmation denied.

**In re Phillips**, 382 B.R. 153 (Bankr. D. Mass. 2008) Above median debtor entitled to take standard housing deduction for which she qualified based on area in which she lived and size of her household as being the “applicable monthly expense amount” specified in IRS’s local standards, though debtor’s monthly rental expense of \$250 was considerably less. Chapter 13 trustee’s objection to confirmation overruled.