

Chapter 13 Means Test Case Summaries

Carolyn A. Bankowski
Chapter 13 Trustee
Boston, Mass.

Nicholas F. Ortiz
Boston, Mass.

LOCAL CASES

In re Kibbe, 361 B.R. 302 (1st Cir. B.A.P. 2007)

In Kibbe, the debtor obtained a higher paying job just prior to the petition date under Chapter 13. Therefore, the debtor's current monthly income on the B22C was significantly lower than the income listed on Schedule I. The debtor proposed a chapter 13 plan on the current monthly income listed on the B22C as opposed to the income listed on Schedule I. The Chapter 13 Trustee objected to the Plan.

The Bankruptcy Appellate Panel held that the income component of projected disposable income is the anticipated actual income of the debtor, subject to the income exclusions, during the plan commitment period. Kibbe at 314. The court in Kibbe recognized that Congress excluded certain categories of income when it defined "disposable income". Therefore, the court determined that the following types of income are not to be included in the income determination under Chapter 13:

1. benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity and payments to victims of terrorism;

2. 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.

As guidance for determining projected disposable income, the Court stated “in the event that a debtor’s ‘current monthly income’ as set forth by Form B22C is substantially the same as the actual current income at the time of confirmation of the plan, less the Income Exclusions, the inquiry begins and ends with Form B22C. But where, as here, the ‘current monthly income’ amount is not true to the debtor’s actual current income, courts should assume that Congress intended that they rely on what a debtor can realistically pay to creditors through his or her plan and not on any artificial measure.” Kibbe at 312. The BAP further determined “rigid adherence to a debtor’s prepetition income history would commonly produce results at odds with both congressional purpose and common sense. If a debtor’s prepetition averaged income was significantly higher than the debtor’s income at plan confirmation, statutory indifference to the change at confirmation would doom any chapter 13 plan. Conversely, if, as here, a debtor’s prepetition averaged income was significantly lower than his or her income at plan confirmation, the debtor would be granted a windfall.” Kibbe at 314.

In re Phillips, 382 B.R. 153 (Bankr.D.Mass. 2008)

In Phillips, the debtor was an above median income debtor. According to the B22C, the debtor’s monthly disposable income was \$212.40. However, according to

Schedule J, the debtor's net monthly income totaled \$861.00. The Trustee objected to the debtor's Chapter 13 Plan asserting that the plan did not satisfy the best efforts test set forth in 11 U.S.C. sec. 1325(b)(1)(B) because the debtor was not devoting all projected disposable income to unsecured creditors under the plan.

In Phillips, the Court concluded that the standardized expenses under Sec. 1325(b)(3) were applicable with exception. The Court adopted the conclusion in the case of In re Briscoe, 374 B.R. 1 (Bankr.D.D.C. 2007). Phillips at 172. The Briscoe court concluded that section 1325(b)(3) created "a mechanical, objective test" for determining expenses. The court, however, fashioned an exception: "an above-median income debtor's plan that proposes to pay the debtor's disposable income employing the National and Local Standards in computing expenses in accordance with sec. 1325(b)(3) might still be objectionable in *extraordinary circumstances* under sec. 1325(a)(3) on the basis of lack of good faith. See Phillips at 165. In Phillips, the Massachusetts Bankruptcy Court, concluded that "Briscoe strikes the right balance between interpreting the statute as written, while carving out an exception for those instances where a party in interest can demonstrate a change in circumstances giving rise to the applicable expense. Phillips at 172.

In re Mati, 390 B.R. 11 (Bankr.D.Mass. 2008)

In Mati, the Trustee objected to the Debtor's Plan for a number of reasons including the fact that the debtor claimed a transportation ownership/lease expense of

\$471 per month even though there was no lien on his automobile. The Court concluded that the debtor was entitled to the ownership deduction of \$471.00. Mati at 23. The court determined that its ruling was consistent with its ruling in Phillips wherein the court aligned itself with those courts that construe “applicable expense amounts” differently than “actual monthly expenses” that may be deducted. Mati at 23.

In re Young, 392 B.R. 6 (Bankr.D.Mass. 2008)

In Young, an unsecured creditor, eCAST, objected to the debtor’s chapter 13 plan asserting that the debtor understated his projected disposable income by claiming expense deductions on the B22C to which he was not entitled. The debtor claimed an ownership expense for 2 vehicles. The Debtor owned 2 vehicles, a 1997 Ford F-150 Pickup truck and a 2006 Harley Motorcycle. However, there was no lien against the Ford F-150. In addition, the debtor claimed the full rental deduction on the B22C when his actual rent was less than the local standard.

The Court determined that the line of cases construing the Local Standards as fixed allowances to be persuasive. Young at 22. The Court noted that “ownership expense” is not shorthand for a vehicle loan or lease payment. Ownership expenses encompass a number of costs associated with owing a vehicle which do not include loan or lease payments. However, the court recognized that not all vehicles have ownership costs. While all operating vehicles incur some costs, a non-operational vehicle with no possibility of repair, due either to mechanical issues or the debtor’s lack of will, does not.

To be entitled to an ownership expense deduction, a debtor must first demonstrate that he does have some ownership costs. Young at 22. With respect to eCAST's assertion that the expenses must be reasonably necessary the Court cited Phillips and held that it would not further examine expenses expressly allowed under the means test absent extraordinary circumstances. Young at 22.

In re Lane, 394 B.R. 248 (Bankr.D.Mass. 2008)

In Lane, an unsecured creditor, eCAST, objected to the debtor's chapter 13 plan asserting that the debtor understated his projected disposable income by claiming an expense deduction for a vehicle on the B22C to which he was not entitled and misstating the debtor's current monthly income. The court overruled eCAST's objection and followed its decision in Young. The Court determined that the debtor was entitled to the vehicle ownership deduction.

CIRCUIT CASES

The Ninth Circuit was the first United States Court of Appeals to tackle the projected disposable income question. In re Kagenveama, 541 F.3d 868 (9th Cir.2008). Kagenveama involved an above-median income debtor with a surplus on his Schedule I and J but negative disposable income on his B22C. The Ninth Circuit held that the mechanical test governed and that the debtor need not pay more than what was required by the B22C over the life of his plan. Due to the negative projected disposable income,

the debtor was also allowed to successfully propose a plan of less than 60 months despite being “above median” income.

Next, the Eight Circuit took up the question and disagreed. See In re Frederickson, 545 F.3d 652 (8th Cir. 2008). Like in Kagenveama, Frederickson involved an above-median income Chapter 13 debtor proposing to commit to less than a 60 month plan. The debtor also had negative disposable income on his B22C and positive disposable income on his Schedules I and J. The Eight Circuit, citing Kibbe and other cases, held that projected disposable income was all but completely unconnected to the B22C, even in cases of above-median debtors. The court used language that B22C was the “starting point” for determining projected disposable income, but allowed deviation in cases of (1) changes in circumstances and (2) differences between B22C and Schedules I and J not based on any changes in circumstances. The Eight Circuit focused on what it deemed to be Congressional intent--to ensure that debtors paid all that they could afford--and less on the incorporation of the Section 707 expenses into Chapter 13 for above-median income debtors.

Finally¹, the Tenth Circuit weighed in on the issue, siding more with Frederickson than with Kagenveama. See In re Lanning, --- F.3d ----, 2008 WL 4879134 (10th Cir. 2008). Lanning concerned another above-median Chapter 13 debtor. This time, the debtor had a greater surplus on her B22C than on her Schedules I and J. This was due to a one-time payment from her employer during the time period used to calculate her current monthly income. The Chapter 13 trustee objected to confirmation of the debtor’s plan, which was

¹ As of this date, December 1, 2008.

based on the smaller Schedules I and J surplus. The Lanning court sided with the debtor, also citing Kibbe and others in support of a flexible, “forward-looking” approach to projected disposable income. However, Lanning did not go as far as Frederickson and suggest that Schedule J could replace the B22C expenses for above-median income debtors. It merely sided with the body of case law allowing bankruptcy courts discretion to depart from the CMI calculation in cases when there had been a substantial change in circumstances accounting for a difference between the B22C and Schedules I and J.