

## **MEANS TEST 2009** **CASE LAW UPDATE**

### **PROJECTED DISPOSABLE INCOME IN THE NORTHERN DISTRICT OF ILLINOIS**

#### **OWNERSHIP DEDUCTION FOR PAID-IN-FULL VEHICLE IS ALLOWED**

*In re Ross-Tousey*, 549 F.3d 1148 (7th Cir. 2008)

The Seventh Circuit became the first appeals court to address the issue of whether it is appropriate for a debtor to take the vehicle ownership deduction on the means test where the debtor has no loan or lease payment. The court discussed at length the two primary approaches to the issue applied by lower courts, which it refers to as the “plain language approach” and the “IRM approach”, and ultimately adopted the “plain language approach.” The court first looked to the meaning of the word “applicable” as used in §707(b)(2)(A)(ii)(I). The IRM approach defines this word as meaning “relevant” or “actual.” The plain language approach defines the word as meaning a selection from the local standard expense graph based on the number of vehicles and geographic location. The court, in rejecting the IRM definition of “applicable,” noted that the IRM approach definition of “applicable” is contrary to the canon of interpretation, which encourages courts to interpret language in such a way as to give effect to all words where possible. Under the IRM approach, “applicable” is synonymous with “actual.” Additionally, the court notes that the IRM approach to the definition of “applicable” is contrary to another provision in §707(b)(2)(A)(ii)(I) which indicates that monthly expenses should not include debt payments and the IRM approach would require a debt payment in order to take the deduction. (This was the dispositive factor in *In re Kimbro*, 389 B.R. 518 (6th Cir. BAP 2008).

In adopting the plain language approach, the court reasoned that else where in the means test provisions where Congress intended a deduction to rely on a debtor’s actual expenses it clearly so stated, failure to clearly state such an

intention here supports an interpretation not requiring evidence of an actual expense. Further, the court found that the legislative history showing that language including IRM methodology was deleted from final draft supports the conclusion that Congress did not intend to adopt IRM methodology in addition to the bare local standard figures.

Finally, the court found that the plain language approach is more consistent with the purpose of enacting the means test than the IRM approach and is more consistent with common sense. The court found that the purpose in enacting the means test was to create a bright-line rule. In applying the IRM methodology field officers have great discretion and if the court were to adopt that approach it would have to deal with each case on a case-by-case basis, which is contrary to the purpose of creating a bright-line rule. Further, the court found that common sense supports the notion that all vehicle owners have costs associated with ownership, not just those with debt or lease payments and those with no payment may need to save for a replacement vehicle. Therefore, limiting the ownership deduction to only those debtors with debt or lease payments would lead to arbitrary results that would punish debtors with older, more modest vehicles.

**DEDUCTIONS FOR SURRENDERED PROPERTY ARE NOT ALLOWED**  
*In re Turner*, 574 F.3d 349 (7th Cir. 2009)

The debtor in *Turner* deducted the mortgage expense for real estate he was surrendering on his means test form. The chapter 13 trustee objected to the plan because the debtor was not committing all of his disposable income. The bankruptcy court disagreed with the trustee, but certified the issue for direct appeal to the Seventh Circuit.

The Seventh Circuit held that the debtor was not entitled to deduct the expense. The court rejected the debtor's argument that §707(b)(2)(A)(iii)(I) permits the deduction simply because the amount was contractually due on the petition's filing date. The court noted that it agreed with *Fredrickson* in that pre-petition changes in expenses can be considered when calculating disposable income. The

Seventh Circuit recognized that the purpose of chapter 13 “is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes them as possible.” Allowing the debtor to deduct a “phantom” expense contradicts this policy. Therefore, the Seventh Circuit reversed the bankruptcy court’s ruling.

PROJECTED DISPOSABLE INCOME IS BASED ANTICIPATED INCOME  
*In re Johnson*, 400 B.R. 639 (Bankr. N.D. Ill. 2009)

The Johnsons were above the median debtors who used their actual income to calculate their projected disposable income. Instead of using their historical average, the debtors’ means test form reported the income they anticipated receiving during the next five years. The chapter 13 trustee objected to the debtors’ plan because they failed to use their “current monthly income” (CMI) as required by §1325(b)(2). The debtors’ CMI was significantly higher than their actual income, but the trustee maintained that the debtors’ approach was not supported by the Code.

The bankruptcy court confirmed the plan over the trustee’s objection. The court recognized the tension between using historical income to determine the disposable income that is “projected ... to be received” during the next five years. See §§101(10A) and 1325(b). In an effort to reconcile these inconsistent provisions, the court favored the specific instructions of §1325(b)(1) over the general definition of current monthly income is §101(10A). Since §1325(b)(1) states that debtors must commit the disposable income that will be received in the future, the court reasoned that post-petition income must be taken into account.

The court did not completely disregard the language in §1325(b)(2). According to *Johnson*, §1325(b)(2) is incorporated into the projected disposable income calculation to the extent that it does not include pre-petition earnings. For example, the excluded and included income categories of §101(10A) and §1325(b)(2) still apply under the *Johnson* approach. Since the debtors’ plan satisfied the

projected disposable income test, the trustee's objection was overruled and the plan was confirmed.

**INCOME TAX CREDITS CAN BE CONTRIBUTED TO THE PLAN**

*In re Royal*, 397 B.R. 88, (Bankr. N.D. Ill. 2008)

The debtor in *Royal* was a below the median debtor who received sizeable income tax credits each year. The chapter 13 trustee objected to the confirmation of the debtor's plan after the debtor refused to commit her post-petition tax credits to the plan. The trustee argued that the funds fit within the Code's definition of disposable income, and therefore, must be used to repay her debts. The *Royal* court agreed with the trustee's position for several reasons. First, the court recognized that the definition of disposable income under §1325(b)(2) excludes certain categories of income, one of which is not earned income tax credits. Therefore, the trustee's request was consistent with the Code's directives.

The *Royal* court's analysis of this issue continued with an examination of the meaning of "projected disposable income." Section 1325(b)(1) states the debtor's projected disposable income that is to be received during the applicable commitment period must be committed to unsecured creditors. Due to the verb tenses used in this section, the court concluded that "projected disposable income" is a forward-looking concept and is separate from "disposable income", which is defined in §1325(b)(2). Current monthly income, which is based on a debtor's pre-petition income, could not be used to determine the projected disposable income that is to be received in the future. Instead, anticipated income must be considered. As a result, the debtor's tax credits had to be dedicated to the plan to the extent the funds were not needed to support the debtor or her dependents.

**NOWLIN, LANNING, FREDERICKSON AND THEIR PROGENY**

**APPEALS COURTS ADOPTING THE FORWARD-LOOKING APPROACH**

*Nowlin v Peake (In re Nowlin)*, No. 08-20066 (5th Cir. 2009); *In re Lanning*, 545 F.3d 1269 (10th Cir. 2008); *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008)

In *Lanning*, *Frederickson* and *Nowlin*, the appellate courts outlined their approach to defining “projected disposable income” in light of §1325(b)(2)’s new method of calculating “disposable income.” Although the facts in each case varied, all three courts found that “disposable income” and “projected disposable income” are not synonymous. The disposable income calculation begins with a debtor’s “current monthly income”, the average income during the six months prior to filing. Projected disposable income, however, is forward-looking, and therefore, must be based on anticipated income and expenses.

The debtor in *Frederickson* was an above the median debtor with no disposable income according to the means test. As a result, he proposed a forty-eight month plan where creditors would receive an estimated sixty-one percent dividend. The chapter 13 trustee maintained that the debtor had to propose a sixty month plan since he was an above the median debtor and was not paying all claims in full. The Eighth Circuit agreed with the trustee and found that the plan could not be confirmed. The *Frederickson* court also found that the means test is a “starting point”, and actual income and expenses can be considered in the projected disposable income calculation.

In *Lanning*, the debtor’s current monthly income was significantly higher than her actual scheduled income. So the debtor based her plan terms on her actual ability to pay and not her historical income. The chapter 13 trustee argued that the plan could not be confirmed because the debtor was not committing all of her disposable income as determined by the means test. The *Lanning* court found that the debtor’s projected disposable income calculation could not be linked to her pre-petition earnings since the change in her income justified departing from the mechanical means test formula.

The debtor in *Nowlin* relied solely on the means test calculation when drafting her plan. Although she had a 401K loan that would be repaid within two years, she was not proposing to dedicate those funds to her plan when the 401K loans were paid. For this reason, the chapter 13 trustee objected to the confirmation of the plan. According to the trustee, a debtor's projected disposable income must take into account foreseeable changes in expenses, such as the satisfaction of a loan obligation. The Fifth Circuit agreed with the trustee, *Lanning* and *Frederickson* and held that projected disposable income is not always defined solely by the means test calculation.

The issue analyzed in *Lanning*, *Nowlin* and *Frederickson* originates from the seemingly contradictory language in §1325(b)(2) and §1325(b)(1)(B). “Disposable income” is defined in §1325(b)(2) as the difference between “current monthly income” and reasonably necessary expenses. Although, “projected disposable income” is not defined in §1325(b)(1)(B), the phrase appears to have its own distinct meaning when read in its context.

Section 1325(b)(1)(B) states that a bankruptcy court may not approve a chapter 13 plan over an objection unless "as of the effective date of the plan", the plan "provides that all of the debtor's projected disposable income to be received in the applicable commitment period .... will be applied to make payments to unsecured creditors under the plan." The Code's requirement that the debtor's income “to be received” in the future must “be applied to make payments” suggests that the anticipated income and expenses are relevant to projected disposable income formula. In addition, the courts found that the phrase, “as of the effective date of the plan” meant that the amount of a debtor's projected disposable income must be based on circumstances that exist at confirmation, and not during the six months prior to filing. Therefore, a debtor's ability to pay debts over the duration of the plan had to be considered. While the facts in *Lanning*, *Nowlin* and *Frederickson* were different, each court agreed that a debtor's actual ability to pay creditors was pertinent to the projected disposable income calculation.

PROJECTED DISPOSABLE INCOME POST-*LANNING*

*In re Odom*, 406 B.R. 911 (Bankr. D.Colo. 2009)

An unsecured creditor objected to the confirmation of the debtor's plan alleging that the debtors were not committing all of their disposable income. The debtors' used their "current monthly income" (CMI) to calculate the amount unsecured creditors must receive. The objector argued that the debtors' actual income should be used since it was 7.5% higher than the CMI listed on the means test. The objector argued that the increase in income rebuts the presumption raised by the means test in accordance with the *Lanning* decision.

*Lanning* held that CMI is the starting point for calculating projected disposable income, but this presumption could be rebutted by a substantial change in circumstances. The *Lanning* court did not define what constituted a substantial change, and the *Odom* court did not concentrate on determining whether a 7.5% increase in income was substantial.

Instead, the *Odom* court distinguished the *Lanning* decision and concluded that a substantial change in circumstance is not always necessary. In *Lanning*, the debtor's actual income was lower than her CMI, so she could not afford to pay the amount required by the means test. As a result, the Tenth Circuit found that a substantial change in the debtor's circumstances was a plausible explanation for her inability to comply with the means test results.

Conversely, the debtors in *Odom* could afford to pay more than the means test required, so there was no need to rebut the presumption raised by the means test. Since the *Lanning* court's reasoning rested on the debtor's ability to pay, the *Odom* court agreed that the debtors' actual income should be considered. As a result, the court held that the *Odoms'* projected disposable income would be the difference between their actual scheduled income and their expenses as determined by the means test. Therefore, the court denied the debtors' motion to confirm the plan.

## 401K LOAN DEDUCTIONS POST-FREDERICKSON

*In re Lasowski*, 2009 WL 2448246 (8th Cir. 2009)

On the debtor's means test form, Ms. Lasowski deducted as an expense the amount she paid each month towards the repayment of his 401K loan. The chapter 13 trustee objected to this deduction because the expense would not continue during the full sixty-month plan term. The trustee argued that the loan amounts due should have been prorated over 60 months. In the *Frederickson* decision, the Eighth Circuit held that the means test calculation was "a starting point for determining the debtor's 'projected disposable income.'" Courts can consider differences between the means test calculation and a debtor's actual ability to pay. *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 658 (8th Cir. 2008). Therefore, in accordance with this decision, the *Lasowski* court found that the loan repayment amounts had to be committed as projected disposable income once the loans were repaid.

DEDUCTIONS FOR UNENCUMBERED VEHICLES IN THE EIGHTH CIRCUIT  
*In re Washburn*, 2009 WL 2634333 (8th Cir. 2009)

In *Washburn*, the bankruptcy court confirmed the debtor's plan over the objections of the chapter 13 trustee and an unsecured creditor. The objections were based on the above median debtor's calculation of his disposable income. Mr. Washburn owned a vehicle that was not encumbered by any liens, yet he deducted the IRS standard vehicle ownership on his means test form.

The Eighth Circuit focused its opinion on the meaning of §707(b)(2)(A)(ii)(I) and the difference between the phrases "applicable monthly expense" and "actual monthly expense." Section 707(b)(2)(A)(ii)(I) states that:

[t]he debtor's monthly expenses shall be the debtor's *applicable monthly expense amounts* specified under the [IRS's] National Standards and Local Standards, and the debtor's *actual monthly expenses* for the categories specified as Other Necessary Expenses issued by the [IRS] for the area in which the debtor resides, as in

effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. . .

In light of the statute’s construction, the Eighth Circuit concluded that “actual” and “applicable” must have different meanings. Actual expenses are relevant with respect to “Other Necessary Expenses”, and ownership deductions are based on the IRS National and Local Standards. Therefore, the court reasoned that the correct interpretation is to base the ownership deduction on the region and number of automobiles that applies. The court also found that the legislative history and policy concerns supported its view.

The *Washburn* court also reconciled its holding with the holdings in *Lasowski* and *Frederickson*. The *Frederickson* court found that projected disposable income was forward-looking, and the means test calculation is a starting point. The focus in *Frederickson* was giving meaning to “projected disposable income”, a phrase found in §1325(b)(1). Conversely, the *Washburn* court had to rule on the appropriateness of an expense found in §707(b)(2)(A)(ii)(I), a completely different provision in the Code.

The court also refused to ignore the means test calculation in favor of the debtor’s real expenses. Although the *Lasowski* court permitted a departure from the means test calculation, the change in the debtor’s future expenses was certain. However, the *Washburn* court could not speculate about whether the debtor would have a vehicle expense in the future, and therefore, chose to leave the means test calculation intact.

## OPINIONS ADDRESSING MEANS TEST EXPENSES

DEDUCTIONS FOR SURRENDERED PROPERTY POST-*KAGENVEAMA*  
*In re Smith*, 401 B.R. 469 (Bank. W.D. Wash. 2008)

*Smith* is a post-*Kagenveama* decision that dealt with the appropriateness of certain expenses for above the median debtors. *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008). The United States Trustee, the chapter 13 trustee, and an unsecured creditor objected to the debtors' six-month, four percent plan on the grounds that the debtors were not committing all of their disposable income and the plan was not being proposed in good faith.

The debtors' means test calculations included deductions for loans secured by two homes and a car that were being surrendered. As a result, the debtors had no disposable income to commit to unsecured creditors. The debtors argued that §1325(b)(3) states that expenses for above the median are determined solely by §707(b)(2)(A) and (B). Therefore, since the loan payments were contractually due as of the petition's filing date, the expenses were permissible under §707(b)(2)(A)(iii).

However, the objectors argued that the expenses should not be allowed. According to the objectors, another condition exists. Expenses for above the median debtors must be reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor. See §1325(b)(2). If the court accepted the objectors' argument, the deductions would be prohibited, and unsecured claims would be entitled to full payment.

The *Smith* court found that expenses for above the median debtors were determined §1325(b)(3) only. The plain language of the Code is clear. Section 1325(b)(3) states that "[a]mounts reasonably necessary to be expended under paragraph (2) ... shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2)." Therefore, if the expense is included in §707(b)(2), the expense is reasonably necessary.

The next question for the court was the meaning of §707(b)(2)(A)(iii), which states that "[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.” The objectors argued that the debtors’ expenses “as of the effective date of the plan” had to be considered pursuant to §1325(b)(1)<sup>1</sup>.

The court was not persuaded by the objectors’ theory for several reasons. First, §707(b)(2)(A)(iii) states that the time for examining expenses is the petition’s filing date, not the confirmation date. Moreover, §1325(b)(1) does not allow for the recalculation of projected disposable income at confirmation; it just establishes the time when the plan must provide for the commission of the debtors’ disposable income.

The *Smith* court acknowledged that although *Kagenveama* only addressed the manner in which income should be calculated, its decision, which addressed the appropriateness of certain expenses, had to align with the Ninth Circuit’s rejection of the “forward-looking” approach. The *Smith* court recognized that it may appear inconsistent to base expenses on post-filing changes, while using the debtors’ historical average to determine income. For these reasons, the court held that above the median debtors could deduct expenses for surrendered property.

The court found the bad faith was not a valid objection either. The debtors’ plan met the requirements outlined in the Code, so good faith could not be used to deny confirmation. While actual expenses suggest that the debtors could afford to pay unsecured creditors more, the Code’s mandates did not require a higher dividend. Therefore, proposing a plan that complies with the projected disposable income test is not bad faith. Due to the guidance provided by the *Kagenveama* decision, the court found that it had no reason to deny the confirmation of the debtors’ plan.

## VEHICLE OWNERSHIP DEDUCTIONS FOR UNENCUMBERED AUTOS POST-KAGENVEAMA

In re Ransom, 2009 WL 2477609 (9th Cir. 2009)

---

<sup>1</sup>§ 1325(b)(1) states that [i]f 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— ...

(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.

The Ninth Circuit held in *Ransom* that above the median debtors are not allowed to deduct the standard ownership expense for unencumbered vehicles. Mr. Ransom owned an automobile free and clear of any loans or lease payment, yet he took the vehicle ownership expense deduction on his means test. MBNA, an unsecured creditor, objected to the confirmation of the debtor's alleging that the debtor had more disposable income since he was not entitled to the ownership deduction. The bankruptcy court and the bankruptcy appellate panel agreed with MBNA, and the debtor appealed to the Ninth Circuit.

The Ninth Circuit's decision was based on its analysis of the sentence "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National and the Local Standards...." §707(b)(2)(A)(ii)(I). The Court consulted Merriam-Webster's definition of "applicable", which is "capable of or suitable for being applied." In the Court's opinion, an expense is not suitable for being applied if the expense does not exist. The Court also relied on a policy behind BAPCPA, which is that debtors should repay their creditors as much as is reasonably possible. Allowing a debtor to deduct a fictional automobile expense contradicts one of the reasons for BAPCPA. Therefore, the Ninth Circuit affirmed the lower court's decision to deny the confirmation of the debtor's plan.

#### VEHICLE OWNERSHIP DEDUCTIONS IN THE FIRST CIRCUIT *In re Tate*, 571 F.3d 423 (1st Cir. 2009)

Relying heavily on the 7<sup>th</sup> Circuit's reasoning in *In re Ross-Tousey*, the court adopted the "plain language approach" and found that all vehicle owners are entitled to take the vehicle ownership deduction on the means test regardless of whether the debtor has a debt or lease payment on said vehicle.

#### MEANS TEST SECURED DEBT PAYMENT DEDUCTION FOR WHOLLY UNSECURED JUNIOR MORTGAGE PAYMENTS

Each of the following four cases share the same procedural posture in that the Chapter 13 Trustee (hereinafter “Trustee”) objected to confirmation of debtor’s plan based on failure to provide all of debtor’s projected disposable income to plan. The alleged failure is based on debtor’s miscalculation of means test by deducting payments for a junior mortgage unsupported by any equity as “secured debt payments contractually due.”

*In re Reyes*, 401 B.R. 910 (Bankr. C.D. Ca. 2009)

In addressing this issue the court looked to court cases addressing the similar issue of whether a debtor may deduct payments on collateral to be surrendered in a Chapter 13. The court noted that the majority view is that in a Chapter 13, debtors may not deduct payments on secured debt where the collateral is to be surrendered. The court summarizes the various courts reasoning into four rationales: 1) timing, in Chapter 13 projected disposable income determination is made not at the time of the petition filing as in Chapter 7, but as of the effective date of the plan; 2) Chapter 13 creates a new contract between the creditor and the debtor; 3) such an interpretation promotes Chapter 13 policy; 4) contrary interpretation would lead to disparate results between above and below median debtors.

The court found that the same reasoning applies where there is a wholly unsecured junior mortgage on real estate the debtor intends to retain therefore the debtor is not entitled to deduct payments for wholly unsecured junior mortgages in Chapter 13.

The court further found that the debtor is only able to deduct the standard vehicle ownership expense or the actual lease payment, whichever expense is lower.

*In re Thissen*, 406 B.R. 888 (E.D. Ca. 2009)

The bankruptcy court previously ruled that since the junior mortgages at issue are wholly unsecured the holders of the junior mortgages are not “secured

creditors” within the meaning of the statutory language. The district court here affirms.

To determine the secured status of a junior mortgage, the court must look at §506(a)(1) where “a claim is secured only to the extent of the judicially determined value of the real property on which the lien is fixed.” *Dewsnup v. Timm*, 502 U.S. 410 (1992). Here, there is no value to support the junior lien, so the holders of the junior mortgages are unsecured creditors, and as such no means test deduction is allowed for payments required under their contracts. The court distinguishes this ruling from the court’s ruling in *Kagenveama*, which dealt with disposable income versus projected disposable income issues.

*In re Marshall*, 407 B.R. 1 (Bankr. D. Mass. 2009)

The court here finds that the debtor is allowed to deduct mortgage payments due on a wholly unsecured junior mortgage that would be stripped-off through a Chapter 13 plan. The court analogizes the situation to one where collateral is to be surrendered and relying on *Burbank* decisions finds that the “realistic” approach often applied in determining projected disposable income does not apply to the expense side. Therefore, the court found that the debtor is allowed to deduct the payments, but left the door open to post-confirmation motion to modify under §1329.

*In re Almonte*, 397 B.R. 659 (Bankr. E.D. N.Y. 2008)

Chapter 13 Trustee (hereinafter “Trustee”) objected to confirmation of debtor’s plan based on failure to provide all projected disposable income to the plan. Alleged miscalculation of disposable income here results from debtor’s failure to include money received from cash advances during the 6 months prior to the filing of his bankruptcy case as “income.” The Trustee argues that cash advances are not one of the exceptions listed under §101(10A)(B) and therefore money received from cash advances should be included in calculation of CMI. The debtor argues that

“income” should be defined as stated in Black’s legal dictionary or the Internal Revenue Code, either of which would exclude the cash advances.

The court reasons first that the CMI definition must be read within the context of §1325, which renders it a mere starting point. The court here assumed that cash advances are income and goes on to consider how that affects projected disposable income.

The court discussed the Tenth Circuit’s *Lanning* case summarized above, in which the appeals court rejected a mechanical application of the means test in favor of a forward looking approach relating to the income side of the analysis. The *Almonte* court next discussed the mechanical approach adopted in *Kagenveama* out of the Ninth Circuit. Ultimately, the court adopted the forward-looking approach under *Lanning* finding that that approach best agrees with the two fundamental bankruptcy principles of providing a fresh start and requiring a Chapter 13 debtor to repay what she can afford. Therefore, cash advances, even if technically income, are not projected disposable income and the Trustee’s objection was overruled.

#### DEDUCTIONS FOR UNNECESSARY AUTOMOBILES

*In re Styles*, 397 B.R. 771 (Bankr. W.D. Va. 2008)

The debtor in *Styles* was a single woman with no dependents who owned four vehicles. The chapter 13 trustee objected to the confirmation of the debtor’s plan because she deducted vehicle operation and ownership expenses for multiple automobiles. She owned four cars, one of which was being financed and the other three were owned free and clear. She deducted operation expenses for “2 or more vehicles”, and she deducted ownership expenses for “2 or more vehicles” although she had an ownership expense for only one car.

The court first looked to the statute, which read “[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and the Local Standards....” §707(b)(2)(A)(ii)(I). Since vehicle expenses are found under the IRS’s National and Local Standards, the

debtor's actual automobile expenses are of no import. The debtor simply must select the applicable category and deduct expenses accordingly. Based on the number of vehicles she owned, she was entitled to the claimed deductions. The fact that the debtor was single with no dependents was irrelevant also.

The trustee also lodged a good faith objection. The court reserved its decision until the conclusion of an evidentiary hearing. While the court concluded that the deductions were permissible, the court stated that its analysis of good faith is a separate issue, and it would apply a totality of the circumstances standard.

**SUPPORT FOR THE CARE OF FAMILY MEMBERS**  
*In re Clingman*, 400 B.R. 555 (Bankr. S.D. Tex. 2009)

The issue in *Clingman* was the reasonableness of support payments made to the joint debtor's parents. The Clingmans were above the median debtors who deducted \$613.44 on their means test as an expense "for care and support of an elderly member of debtor's immediate family." The debtors paid the mortgage and property taxes for the home inhabited by Mrs. Clingman's elderly parents. The chapter 13 trustee objected to this expense, but after an evidentiary hearing, the bankruptcy court confirmed the plan. The undisputed evidence the debtors presented persuaded the court. For example, the debtors proved that the Mrs. Clingman's parents could not afford their housing costs without the debtors' help. In addition, the debtors had been providing this support prior to the commencement of their case. Moreover, the debtors illustrated that no other relatives were able offer the needed support. As a result, the court found that the expenses were reasonable and allowed by §§707(b)(2)(A)(ii)(II) and 1325(b)(3) the Code.

**ABUSE, ABILITY TO PAY AND THE TOTALITY OF CIRCUMSTANCES**

**CHAPTER 7 DEBTOR CANNOT INCLUDE FUNDS PREVIOUSLY PAID ON SECURED DEBT IF ASSET SURRENDERED POST-PETITION**  
*In re Goble*, 401 B.R. 261 (Bankr. S.D. Ohio 2009)

Chapter 7 case is abusive where post-petition surrender of real estate reduced expenses from \$4,000 to \$1,665 per month at the time of the hearing (not as

of the petition date). The UST also had raised a §707(b)(2) presumption of abuse issue in connection with the surrender of the residence but the court disagreed and denied that part of the motion. Further, the UST had objected to deductions taken by the Debtor on Schedule I for contributions and loan repayments to a 401(K), but the court did not have to address this issue given its ruling on the expenses related to the surrendered residence. This case also contains a good brief history of §707(b)(3) in the Sixth Circuit.

#### CHAPTER 7 DEBTORS ARE PERMITTED TO DEDUCT EXPENSES FOR UNENCUMBERED AUTO AND SURRENDERED PROPERTY

*In re Ralston*, 400 B.R. 854 (Bankr. M.D. Fla. 2009)

United States Trustee (hereinafter “UST”) brought a motion to dismiss the Chapter 7 case based on abuse. The UST alleged that a presumption of abuse would arise had the debtor not miscalculated the means test by taking a secured debt deduction where the intention is to surrender the collateral and taking a vehicle ownership deduction where the vehicle is paid in full. The court found that the deductions at issue are permissible, and the UST’s motion was denied.

#### TOTALITY OF CIRCUMSTANCES CANNOT FOCUS ON THE AMOUNT OF THE MORTGAGE PAYMENT IN A VACUUM

*In re Johnson*, 399 B.R. 72 (Bankr. S.D. Cal. 2008)

In determining whether abuse exists in a Chapter 7 case under totality of circumstances, the court could not consider “reasonableness” of debtors’ mortgage payment. The court also evaluated the facts under Ninth Circuit pre-BAPCPA totality of the circumstances test. The mortgage payment to which the UST objected was \$6060. The debtors recently built the house when one debtor’s salary was reduced by \$60,000. UST argued that the debtors should have to find more reasonably priced housing but the court, after an analysis of the legislative history and practical alternatives, concluded that Congress did not intend that consumers would be denied access to Chapter 7 solely because of the amount of their mortgage payment on their principal residence.

**FAILURE TO MAKE FULL DISCLOSURE OF ACTUAL EXPENSES LED TO FINDING OF ABILITY TO PAY, BAD FAITH, AND DISMISSAL**

*In re Booker*, 399 B.R. 662 (Bankr. W.D. Mo. 2009)

If unnecessary and/or unreasonable expenses were eliminated, the debtors could afford to repay general unsecured creditors. The case was dismissed based on abuse via totality of the circumstances and the court also found the filing to have been in bad faith. The totality determination was based on ability to pay; the bad faith finding was based on the debtors' conduct, including failure to minimize expenditures (kept late model luxury car and sent incarcerated son \$350/month for spending money) and failure to accurately disclose the expense related to the incarcerated son.

**DEBTOR'S STUDENT LOANS AND ADULT DAUGHTER'S COLLEGE EXPENSES ARE NOT ALLOWED EXPENSES UNDER A TOTALITY ANALYSIS**

*In re Baker*, 400 B.R. 594 (Bankr. N.D. Ohio 2009)

Chapter 7 case dismissed for abuse under totality of circumstances analysis. The debtor's own student loan repayment may not be deducted from income and deductions for adult daughter's college and living expenses are not allowable when the debtor's creditors are receiving less than full satisfaction on their claims.

**DEBTORS WHO ATTEMPT TO MAINTAIN EXTRAVAGANT LIFESTYLE WERE DISMISSED UNDER A TOTALITY ANALYSIS**

*In re Castellaw*, 401 B.R. 223 (Bankr. N.D. Tex. 2009)

The dismissal was warranted based on a finding of abuse under a totality of the circumstances analysis because debtors could afford to repay some return to unsecured creditors if they engaged in belt-tightening. No catastrophic event precipitated the filing. The debtors purchased a new GMC Yukon shortly before filing, supported their 22-year-old son, lived in an expensive home and wanted to keep their boat. They also took a trip to Florida the month before they filed. The court held that a [d]ischarge in Chapter 7 is not meant for those enjoying a

substantial income and seeking to transfer the cost of an unnecessarily extravagant lifestyle to creditors. The debtors also failed to fully disclose all assets.

**MORE THAN AN ABILITY TO PAY IS REQUIRED IN ORDER TO DISMISS;  
UNIQUE FACTS BETWEEN TWO SEPARATE DEBTORS WHO WERE SAME  
SEX COUPLE NOT ALLOWED TO MARRY UNDER STATE LAW**

*In re Roll*, 400 B.R. 674 (Bankr. W.D. Wis. 2008)

More than mere ability to repay based on an analysis of household income was required to dismiss a case under Chapter 7 based on a totality of circumstances analysis. This case has very distinct facts pertaining to a same sex couple but two separate bankruptcy estates in a state that did not allow them to marry.

**AMOUNT OF SECURED DEBT ALONE WILL NOT SUPPORT DISMISSAL  
UNDER A TOTALITY ANALYSIS**

*In re Jensen*, 407 B.R. 378 (Bankr. C.D. Cal. 2009)

The amount of secured debt does not justify dismissal unless coupled with other flags of abuse, such as the timing of the purchase that created the secured debt and whether the purchase(s) rendered the debtor insolvent. Two years before filing, the debtors purchased a motor home, a boat, and their residence, all of which they committed to retain. The UST moved to dismiss because the boat and motor home were luxury items. The court, noting the policy of favoring secured over unsecured creditors, held that the amount or nature of item purchased would not, alone, establish a sufficient basis to dismiss. The court would also look to timing of the purchase and whether the purchase caused the debtor to be insolvent. Here, Court did not find that allowing debtors to retain their secured-debt property was abusive and denied the motion to dismiss. This case also has a good discussion of the impact of BAPCPA when debtors choose to retain and continue paying for an asset but without redeeming or reaffirming the debt.

SECTION 707(b) DOES NOT APPLY TO CASES CONVERTED TO CHAPTER 7 FROM CHAPTER 13

*In re Dudley*, 405 B.R. 790 (Bankr. W.D. Va. 2009)

Section 707(b), which allows dismissal of Chapter 7 for abuse, does not apply to case converted from Chapter 13. The court acknowledged that the majority of courts disagreed with this conclusion but sided with minority, which the court viewed as better reasoned, based on wording of Section 707. If a converted case is believed to be abusive, the UST could file a 707(a) motion to dismiss for cause.

UNREBUTTED PRESUMPTION OF ABUSE DID NOT REQUIRE DISMISSAL UNDER EITHER 707(b)(2) OR (b)(3)

*In re Mravik*, 399 B.R. 202 (Bankr. E.D. Wis. 2008)

Dismissal or conversion is not mandatory in a case with an unrebutted presumption of abuse arising under means test when conversion to Chapter 13 would result in no payments to unsecured creditors. The debtor had a history of voluntary retirement contributions to a 401(K), which would not be considered as part of her disposable income in a Chapter 13. There were no other objectionable expenses. Under these facts, the court determined that it had the discretion to dismiss under §707(b)(2) and was not required to do so. UST also had argued that the debtor had an ability to pay and should be dismissed under 707(b)(3), but the court disagreed because the debtor could not be forced to reduce her retirement contribution to fund a Chapter 13 plan.

IMPRUDENT PURCHASES IMMEDIATELY BEFORE FILING, OVERWITHHOLDING OF TAXES AND MAINTENANCE OF EXPENSIVE LIFESTYLE SUPPORT FINDING OF ABILITY TO PAY AND DISMISSAL UNDER TOTALITY ANALYSIS

*In re Brenneman*, 397 B.R. 866 (Bankr. N.D. Ohio 2008)

Secured purchase of new vehicle and new lease for vehicle entered into just before filing, combined with stable employment, well above median earnings, and other excessive living expenses are grounds for dismissal based on totality of the

circumstances. The debtors argued that their student loans, which exceeded \$200,000 and their liability for a car accident of approximately \$190,000 would mean that their unsecured creditors would receive an insignificant distribution. Even though the court agreed that the debtors had a limited ability to pay, under these circumstance, it would be an abuse to allow them to receive a Chapter 7 discharge in light of their pre-petition conduct and their attempts to maintain their lifestyle without repaying anything to their unsecured creditors.

**PURCHASE OF RESIDENCE AND CAR WITHIN 1 YEAR PREPETITION THAT DEBTOR WAS NOT ABLE TO AFFORD SUPPORTED DISMISSAL UNDER TOTALITY ANALYSIS**

*In re Violanti*, 397 B.R. 852 (Bankr. N.D. Ohio 2008)

Chapter 7 case was dismissed because the debtor, in the year before filing, purchased an expensive house and car that were beyond her ability to pay, despite her salary, which was in excess of \$100,000 annually. The court found that since she sought to reaffirm those debts, the debtor sought to impermissibly use the bankruptcy process to retain this property to the direct detriment of her unsecured creditors. The debtor had a stable well paying job, over withheld for taxes and she was unwilling to adjust her budget to live within her ability to pay.

**DEBTORS' RETENTION OF RENTAL PROPERTY WITH NO EQUITY, CONTINUED PAYMENT ON A 401(K) LOAN AND OVERWITHOLDING OF TAXES WAS ABUSIVE UNDER TOTALITY ANALYSIS**

*In re Blankenship*, 398 B.R. 457 (Bankr. N.D. Ohio 2008)

The court dismissed a Chapter 7 case because the debtors had included in their budget \$519/month for their rental properties, which were vacant and had no equity, and \$400/month payments on a 401(K) loan. The debtors also over withheld taxes routinely and received refunds of approximately \$2400/year, which the court valued at \$200/month. The court found these debtors have the ability to pay a significant return to their unsecured creditors, even if the surrender of the rental property resulted in a deficiency, diluting further the return to unsecured creditors.

CHAPTER 7 PETITION DISMISSED UNDER TOTALITY ANALYSIS AFTER  
CONSIDERING AMOUNT OF DEBT AND NONFILING SPOUSE'S INCOME  
*In re Harter*, 397 B.R. 860 (Bankr. N.D. Ohio 2008)

The court dismissed case as abusive after considering the size of the unsecured debt (approximately \$30,000), her non-filing spouse's significant income and the fact that the debtor was attempting to keep a car that cost her more per month than she earned and had an otherwise very comfortable lifestyle. The bankruptcy judge referred to an Ohio statute that creates a duty of one spouse to support the other. The judge also noted that the debtor's financial information changed throughout the proceeding making it impossible to really determine what her disposable income was.

401(K) LOAN PAYMENTS ARE NOT DEDUCTIBLE AS SECURED DEBTS AND  
ARE NOT NECESSARILY "SPECIAL CIRCUMSTANCES" OR "OTHER  
NECESSARY" EXPENSES  
*In re Egebjerg*, 2009 WL 2357706 (9th Cir. 2009)

The Ninth Circuit, in a direct appeal, held that a debtor's 401(K) loan payment is not deductible on the Chapter 7 means test. The bankruptcy court dismissed the petition under §707(b)(3) but the Ninth Circuit upheld dismissal based on (b)(2)[unrebutted presumption of abuse]. The Ninth Circuit held that a 401(k) loan is not a "debt" under the Bankruptcy Code because there is no debtor/creditor relationship. The debtor had argued that the debt was secured, or in the alternative, that it was an "other necessary expense" or a "special circumstance." The bankruptcy court agreed that it was a secured debt and, therefore, no presumption of abuse arose. However, the Ninth Circuit disagreed, which made the presumption of abuse arise. The debtor argued it was an otherwise allowable expense. The Ninth Circuit did not expressly rule on whether a 401(k) payment could ever qualify for these types of deduction but it did rule that in this case, the 401(k) payment did not qualify for these deductions because the debtor did not present extraordinary facts that would support such a finding. Since the 401(K)

payment was disallowed as an expense, the presumption of abuse arose under §707(b)(2), the presumption was not rebutted and the dismissal of the case was affirmed.

#### DEDUCTION FOR SECURED DEBT PAYMENTS WHERE THE INTENT IS TO SURRENDER COLLATERAL

*In re Rudler*, 2009 WL 2385469 (1st Cir., 2009)

In this Chapter 7 case, the United States Trustee (hereinafter “UST”) made a motion to dismiss the debtor’s case as abusive challenging the debtor’s means test deduction for secured debt payment where debtor’s stated intent was to surrender the collateral. The bankruptcy court denied the UST’s motion and the BAP affirmed finding that the means test is a “snap shot” as of petition date, not forward looking. The UST appealed here to the first circuit which affirmed the ruling of the BAP and became the first circuit court to address the issue. The court here found, in the context of a Chapter 7 case, that such a deduction is allowed.

The court started its analysis by citing the standard for dismissal under bankruptcy code §707(b) which allows for dismissal of a case in the presence of “abuse” rather than “substantial abuse” as required pre-BAPCPA. The means test establishes certain cases that are presumptively abusive. To determine if the case is presumptively abusive under the means test, the court looked first to the language of §707(b)(2)(A)(ii)(IV) which describes the deduction as “the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition,” divided by 60.

The court noted that the vast majority of lower courts that have addressed the issue uphold the ability of a debtor to deduct secured debt payments even where debtor’s stated intent is to surrender the collateral. The lower court’s analysis has focused primarily on two aspects of the statutory language, first, “scheduled as contractually due” and, second, “following the date of the petition.” The court found that the debtor must complete the means test at the time of filing her petition and

at that time the debtor has not yet surrendered any collateral and therefore is still obligated to make future payments on the secured debts, even if the debtor is currently in default on those secured debts. The court found support for this interpretation in the language of the instructions accompanying Form B22A and that the language in both the statute and instructions is in the present tense.

“Scheduled As Contractually Due”

The court addresses the issue of defining “scheduled” as used in the statute. The court finds that the word “scheduled” is used in its common meaning, not as a term of art meaning so listed on a bankruptcy schedule contemplating the fact that the payments may not actually be made and if Congress had intended to base the deduction on amounts actually paid it could have so stated. The UST argued that “scheduled as” is rendered mere surplusage by the court’s interpretation, but the court found that that along does not warrant an alternative interpretation that would find present-tense language to require looking forward.

“Following the Date of the Petition”

The UST argued that “following” is a forward looking word and other deductions within the means test are forward looking and so the secured debt deduction should be treated consistently with those. The court rejected this argument finding that Congress employed many various methods for calculating deductions and not all are dependent on accurately determining the amount, which is actually expended by the debtor, and therefore, the possible future inaccuracy of a methodology is not sufficient to condemn that method.

“On Account of Secured Debt”

The UST argued that where a debtor’s intent is to surrender that the debt is either irrelevant in the future or is an unsecured debt the future. The court dismissed this argument by the UST, finding it irrelevant because the means test clearly requires a pre-surrender calculation.

The court found that the language of the statute is unambiguous and therefore it is not necessary to reach Congressional intent. However, the court steam rolled ahead to consider Congressional intent and found that it supports its

interpretation contrary to the UST's argument. The UST argued that allowing a deduction for secured debt payments actually made is a better method for achieving Congressional goals in enacting the statute. The court found that the UST may be right, but that it is irrelevant, because that is not the method that Congress chose to implement. Congress instead chose to implement the "snap shot" approach, which is not absurd, but reasonable in light of the benefits of having a bright-line rule. Therefore, the court found that this case is not abusive based on the debtor's deduction for secured debt payments where the debtor's intention is to surrender the collateral.

The court expressly left the door open to motions to dismiss in such cases under §707(b)(3)(B) based on totality of the circumstances rather than §707(b)(2) abuse as is at issue here.

*In re Norwood-Hill*, 403 B.R. 905 (Bankr. M.D. Fla. 2009)

In this Chapter 7 case, the United States Trustee (hereinafter "UST") moved for dismissal of the case as abusive and/or based on the totality of the circumstances due to the debtor's deduction of secured debt payments due on collateral the debtor intends to surrender and the deduction of contributions to retirement plans, respectively.

The court aligned itself with the majority of other courts, which have reached the issue of deductions on secured debt payments where debtor intends to surrender collateral in the context of a Chapter 7 case by adopting the "snap shot" approach. As discussed above, the snap shot approach allows means test deductions for secured debt payments where debtor intends to surrender the collateral because the means test is calculated as of the petition date when no property has been surrendered yet. The court found such deductions appropriate and therefore does not find such cases abusive in the context of a Chapter 7 case. The court noted it reached a contrary conclusion in *In re Holmes*, 395 B.R. 149 (Bankr. M.D. Fla. 2008) but that was in the context of a Chapter 13 and §1325 provided the support for

looking forward beyond the means test, and §1325 is not relevant to Chapter 7 cases. The court noted, that although the deduction of such amount does not lead to a finding of abuse, the door is open to challenge the case based on the totality of the circumstances.

The UST did argue in the alternative that the case should be dismissed based on the totality of the circumstances but changes strides to point instead at the debtor's retirement contributions, without which, the UST argues, the debtor could afford to make substantial repayment to unsecured creditors. The court found that the pre-BAPCPA standards apply despite the new standard and that although ability to pay is primary issue, it is not conclusive factor. Here the court found, after analysis of several factors, that the UST did not meet its burden for dismissal of the case based on totality of the circumstances.

### **REPORTING HOUSEHOLD SIZE AND CURRENT MONTHLY INCOME**

#### **CASH ADVANCES AS CURRENT MONTHLY INCOME AND PROJECTED DISPOSABLE INCOME**

*In re Burrell*, 399 B.R. 620 (Bankr. C.D. Ill., 2008)

Chapter 13 Trustee (hereinafter "Trustee") objected to confirmation of debtor's plan alleging debtor inaccurately calculated his current monthly income (hereinafter "CMI"). CMI is defined by §101(10A) as "the average monthly income from all sources that the debtor receives...without regard to whether such income is taxable income, derived during the 6 month period." The debtor in this case argued that use of the words "received" *and* "derived" in the definition requires that only income both received and earned during the six-month period are to be included in CMI. The Trustee argued that the two terms are synonymous.

Ultimately, the court found that all income received during the period is CMI, regardless of when it was earned. In reaching this conclusion, the court looked first to the plain language of the statute and the various dictionary definitions of the term "derived." The court found that depending on the dictionary used the definition can be read as to support either argument. Next, the court discusses several cases

relying on both dictionary definitions in analyzing CMI regarding other issues. The court therefore determined that the statute is ambiguous and looks next to the legislative history. The court found that the legislative history refers only to when income is received not earned and therefore “derived” is mere surplusage and the Trustee’s objection was sustained.

#### PRIVATE DISABILITY INSURANCE BENEFITS MUST BE INCLUDED IN CALCULATION OF CURRENT MONTHLY INCOME

*Blausey v. U.S. Trustee*, 552 F.3d 1124 (9th Cir. 2009)

The debtors argued that “current monthly income” should be interpreted as consistent with “gross income” as defined in the Internal Revenue Code, which expressly excludes such benefits. The Ninth Circuit held that the plain language of the Bankruptcy Code does not support that interpretation, especially since other types of “income” were specifically excluded and private insurance benefits were not included in the exclusions. The Ninth Circuit concluded that private disability insurance benefits are part of current monthly income. The case also contains a thorough discussion of the direct appeal procedure.

#### HOUSEHOLD SIZE

*In re Bostwick*, 406 B.R. 867 (Bankr. D. Minn., 2009)

In this case, a Chapter 13 Trustee (hereinafter “Trustee”) objected to confirmation of the debtor’s plan due to failure to dedicate all projected disposable income to the plan stemming from a discrepancy of how to determine the debtor’s household size.

The court looked first to the language of the code under §1325 where confirming a plan over the Trustee’s objection the plan must either pay all claims in full or dedicate all debtor’s projected disposable income to the plan. In this case, the plan does not provide for payment in full of all claims, so the debtor must dedicate all projected disposable income to the plan. To determine the debtor’s projected

disposable income, the court must calculate the debtor's current monthly income and deduct all reasonably necessary expenditures.

At issue in this case is a living situation where the debtor shares as single-family home with a roommate. Each roommate has their own room, parking spot and storage space, but share all other household areas. Each tenant has an individual lease agreement with their third-party landlord and therefore are not jointly and severally liable for the rent. However, the tenants do split the utilities which are maintained in the landlord's name. The debtor and her roommate do not have independent access to and from the housing unit, but share a common entrance.

#### Current Monthly Income

The court found that the debtor must include the roommate's contribution to the support of the debtor or the debtor's dependants and that that contribution includes the amount the roommate pays towards the common utilities for which the debtor would be solely responsible but for the roommate, but not the roommate's contribution to rent for which the debtor would not be responsible but for the roommate. This is determined by the court based on the definition of CMI contained in §101(10A)(B).

#### Reasonably Necessary Expenditures

The Bankruptcy Code does not define "reasonably necessary expenditures" for below median debtors and so the court must look to the debtor's actual expenses. The court found that the debtor lives in a household of two by relying on the definition of household put forth by the Census Bureau, a.k.a. adopting the "heads on beds" approach to determination of household size. The court noted that the Census Bureau definition of household does provide criteria for subdividing single housing units, but that those criteria are not met in this case because the debtor and here roommate have no independent direct access from outside and share substantial living space.

The court further found, based on earlier calculation of CMI that the debtor is below the median, and therefore, the court must look to her actual expenses as

listed on Schedule J to which no objection has been raised by the Trustee which when modified to deduct the full amount of the utilities results in a difference of \$138.00, less than the \$270.00 the debtor proposes to pay to the Trustee monthly, therefore the debtor is complying with the requirement that all of her projected disposable income be dedicated to the plan.

Finally, since the debtor is below the applicable median income for a household of two, the commitment period is 36 months, not 60 as suggested by the Trustee.

*In re Justice*, 404 B.R. 506 (Bankr. W.D. Ark. 2009)

A creditor made a motion to dismiss case for abuse. The debtor calculated his means test based on a household of five, which includes the debtor's adult daughter and her son as dependents. The creditor objected to inclusion of the debtor's adult daughter and her son in determining household size because the debtor did not claim them as dependents on his federal income taxes. The court here found that with proper calculation of the means test, the presumption of abuse arises and accordingly the case is dismissed.

Section 707(b)(2)(A)(ii)(I) defines and above median debtor's expenses as those specified under the National and Local Standards for the debtor's geographic area for the debtor and debtor's dependents. The official means test form instructs the debtor to base the standard deductions on his family size. The court found that where there is a conflict between the statutory language and the official form, the statutory language must control, therefore the term "dependents" controls in determining family size.

The court noted that the Bankruptcy Code does not provide a definition for the term "dependent" and so the court resolved to give the term its ordinary meaning. The court looks first to the definition provided in Black's law dictionary "one who relies on another for support; one not able to exist or sustain oneself without the power or aid of someone else" but found it too broad in light of the purpose of §707(b)(2) to ensure that those who can afford to repay some of their

debts do so. With the statutory purpose in mind, the court found the definition in *In re Dunbar*, 99 B.R. 320 (Bankr. M.D. La. 1989) instructive in that for an individual to be a dependent the debtor must have a reason to provide the support and that reason must be evaluated on a case by case basis.

In this case, the court found that the debtor's adult daughter and her infant son are properly considered dependents of the debtor where she lived with the debtor for 1 year prior to the filing of this case during which time she was pregnant and had her baby, was unemployed and was a full time student.

The court further found that the debtor's \$125 per month deduction for his minor daughter's school trip to Europe was non-necessary and therefore not allowed and that the adult daughter's scholarships and support received to help pay for her living expenses must be included in the debtor's CMI. Based on these two modifications the presumption of abuse arises, despite the household size of five and the court accordingly dismisses the case.

#### ALTERNATIVE TO DISPOSABLE INCOME VS. PROJECTED DISPOSABLE INCOME DEBATE

*In re Dunford*, 408 B.R. 489 (Bankr. N.D. Ill. 2009)

The Chapter 13 Trustee sought to dismiss case based on debtor's failure to file required documents. The debtor sought to be excused from filing a schedule I and for the court to exercise its discretion under §101(10A)(A)(ii) to change applicable dates for determining current monthly income. The court cited recent decisions relating to the disposable income versus projected disposable income debate and suggested that the debate is unnecessary in light of the discretion afforded to delay the time period for filing Schedule I and reset the applicable six month period for calculating current monthly income. The court here found that the totality of the circumstances support granting the debtor's motion to be excused from filing Schedule I and resetting the applicable six month period for calculating the debtor's current monthly income to more accurately reflect the debtor's true income. The Trustee's motion to dismiss was denied.

*In re Hoff*, 402 B.R. 683 (Bankr. E.D. N.C. 2009)

The debtor brought a motion to excuse the filing of Schedule I and set an alternative date for calculating current monthly income. The court found that the case is a good faith filing and the circumstances support resetting the dates for calculating CMI.

Authored By:

Ariane Holtschlag  
Keisha Hooks  
Gretchen Silver