UTAH BANKRUPTCY LAWYERS FORUM
SALT LAKE CITY, FEBRUARY 10, 2009

CASE LAW AND EMERGING ISSUES AFTER BAPCPA: CALCULATION OF PROJECTED DISPOSABLE INCOME AND RELATED ISSUES IN CHAPTER 13

Gilbert B. Weisman
Becket & Lee LLP
Malvern, Pennsylvania

Materials prepared by:
Gilbert B. Weisman
William A. McNeal
Candice L. Marple

I. PROJECTED DISPOSABLE INCOME

BAPCPA did not alter 11 U.S.C. § 1325(b)(1)(B)'s requirement for a debtor to pay *projected* disposable income into the plan. What was added is a definition of *disposable income* in 11 U.S.C. § 1325(b)(2). This semantic difference has resulted in a variety of opinions interpreting the effect of the word "projected" or, more precisely, the absence of that word from the definition of "disposable income."

The Bankruptcy Code now explicitly defines *disposable income* as current monthly income (CMI),[1] less certain expenditures designed to allow the debtor to provide for himself and his dependents.[2] For debtors whose CMI is below the median income for their domiciles, BAPCPA still requires that an expense amount, to be allowed, be "reasonably necessary." For debtors whose CMI is above the state's median, the reasonableness of the expense amounts is determined by tests set forth in 11 U.S.C. § 707(b)(2).[3]

As a result of amendments to section 1325 and the new definition of disposable income, a split of authority has emerged over whether projected disposable income is distinguishable from disposable income for the purposes of compliance with 11 U.S.C. § 1325(b), and if so, how projected disposable income is to be calculated.

[1] The Code defines CMI in 11 U.S.C. § 101(10A).
[2] 11 U.S.C. § 1325(b)(2).
[3] 11 U.S.C. § 707(b)(2)(A)(ii)(I): "The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issue by the Internal Revenue Service …," given operation by 11 U.S.C. § 1325(b)(3).

A. "Projected" Disposable Income Is Consequentially Different From Disposable Income

According to a majority of courts examining this issue, the addition of the participial adjective "projected," as well as the particularization of income which is "to be received in the applicable commitment period," the Bankruptcy Code requires a determination of a debtor's anticipated income or **future** ability to pay.

1. Appellate Review: Forward View

***Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008).**

In *Hamilton v. Lanning*, the court found that, **for the purposes of calculating income,**[4] current monthly income is the presumptive starting point for projected disposable income, subject to a showing of substantial change of circumstances, to be determined by a bankruptcy court on a case by case basis. In calculating projected disposable income, it is permissible to adjust a debtor's "monthly disposable income," as shown on her Official Form 22C, to reflect her actual ability to pay as of the effective date of the plan, eschewing a mechanical application of the definitions of disposable income and current monthly income. The court found that forward looking statutory language, "as of the effective date of the plan," "to be received in the applicable commitment period," and "will be applied to make payments," outweighs difficulty with its income presumptive approach absent explicit statutory language providing for such presumption. The court also found that the legislative history in the House Report shows that the best and most important legislative purpose or intent was to require debtors to repay the maximum they can afford.[5] Lastly, a mechanical approach may deny bankruptcy protection for debtors who show disposable income but cannot propose a resultant feasible plan.

***Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008).**

In finding that the plan of an "above median" debtor whose projected disposable income is less than zero must extend for five years, the length of the applicable commitment period, the court determined that the calculation of projected disposable income begins with the disposable income found on Official Form 22C, but may take into consideration changes in financial circumstances, **both income and expenses**. The court resorted to two bases. First, such an approach, opined the court, best comported with congressional intent. Second, it was more closely aligned with reality, also providing a "workable" application of the disposable income test for "above median" debtors with either positive or negative projected disposable income. The court found its approach "realistically" determines a debtor's ability to pay.

[4] The Tenth Circuit Court of Appeals indicated explicitly that *Lanning* applies only to the income side of the projected disposable income calculation. *Lanning*, 545 F.3d at 1282.

[5] The most important purpose of the 2005 amendments to the Bankruptcy Code, as found in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, is "to ensure that debtors repay creditors the maximum they can afford." H.R. Rep. 109-31(I), at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Kibbe v. Sumski, 361 B.R. 302 (B.A.P. 1st Cir. 2007).

In *Kibbe v. Sumski*, the court affirmed a bankruptcy court's denial of confirmation of a debtor's Chapter 13 plan. The so-called "below median" debtor's plan faced a trustee's motion to dismiss (treated by the court as an objection to confirmation) for its failure to devote all of the debtor's projected disposable income to payments to unsecured creditors. More specifically, the trustee objected to the manner by which the debtor calculated her projected disposable income. Because of a job change, the debtor's income at the time of her petition was substantially greater than her current monthly income. The debtor argued that because her reasonably necessary expenses exceeded her current monthly income, she had neither disposable income nor projected disposable income to devote to her plan. The trustee argued that her income at the time of her petition, much higher than her statutorily derived current monthly income, provided substantial projected disposable income for payment to unsecured creditors. Her proposed plan, he argued, was therefore not confirmable.

The bankruptcy appellate panel agreed with the trial court that the debtor's plan was impermissible because it understated the debtor's projected disposable income by its **failure to account for the known substantial increase in the debtor's income**, as projected over the plan's applicable commitment period. Noting and describing the two disparate approaches adopted by bankruptcy courts, the panel agreed that the term "projected" must be given independent significance so as to distinguish "projected disposable income" from "disposable income," such that the former utilizes the debtor's anticipated actual income. Such an interpretation of the Code's language, so opined the panel, accorded with rules of statutory construction by avoiding the consigning of "projected" to impermissible surplusage and an absurd result distinctly discordant with congressional intent and common sense. Indeed, the panel observed that "life informs otherwise" than to assume that income is immutable after the inception of a case or during the applicable commitment period.

2. Appellate Review: Historical View

Maney v. Kagenveama, 527 F.3d 990 (9th Cir. 2008).

In *Maney v. Kagenveama*, the court affirmed a bankruptcy court's confirmation of a plan, over the objection of a Chapter 13 trustee. The reviewing panel opined, based on the statute's plain meaning, that the debtor's projected disposable income is no more than her disposable income, as defined in 11 U.S.C. § 1325(b)(2), projected out over the applicable commitment period. The court adopted the interpretation of *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006) drawn especially to the oft-quoted, "one simply takes the calculation . . . and does the math," and rejected those of *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006) and *In re Jass*, 340 B.R. 411 (Bankr. D. Utah 2006). The court determined that its interpretation of the Code was not absurd, and reminded that rectifying undesirable consequences of statutory drafting was the province of the Congress rather than the courts. In addition, the court pointed out that a trustee may seek modification of a plan if a debtor's income increases after its confirmation.

***Mancl v. Chatterton (In re Mancl)*, 381 B.R. 537 (W.D. Wis. 2008), *appeal docketed*, No. 08-1635 (7th Cir. Mar. 17, 2008).**

The *Mancl* appellate reviewer reversed the court below, adopted the *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006) view of projected disposable income allowing use of a lower CMI income figure rather than the much higher "real" income reported on Schedule I, and opined that the only reasonable interpretation of the phrase "projected disposable income" is the properly calculated current monthly income projected forward for each month of the applicable commitment period. The court noted that this will inevitably cause harsh results for both debtors and creditors but that it will also enhance consistency and predictability and limit the opportunities for manipulation of the bankruptcy process.

3. Bankruptcy Court Review: Forward View

In re Hardacre, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) ("Consequently, Congress must have intended 'projected disposable income' to be different than 'disposable income.'").

In re Jass, 340 B.R. 411, 416-18 (Bankr. D. Utah 2006). The *Jass* court, harmoniously with the textual and contextual approaches employed by the *Hardacre* court, found additional support for its statutory interpretation in its analysis of Congress' intent for a differentiation between "projected disposable income" and "disposable income" in its showing that such differentiation furthers the public policy goals of bankruptcy, and by showing that it avoids the surplusage construction attendant with equating the two.

In re Gonzalez, 388 B.R. 292 (Bankr. S.D. Tex. 2008) (opining that projected disposable income is not a financial "snapshot" taken on petition date or confirmation date, but, rather is a "moving saga" requiring a court to take a "motion-picture view," and criticizing *Kagenveama* as ignoring the future orientation of the statutory language surrounding the projected disposable income requirements, highlighting, *inter alia*, the words "projected," "to be expended," and "as of the effective date of the plan," and distinguishing between the uses of the means test expense regime found in 11 U.S.C. § 707(b)(2) in Chapter 7 and Chapter 13 cases).

4. Bankruptcy Court Review: Historical View

In re Hanks, 362 B.R. 494 (Bankr. D. Utah 2007) (adopting an admittedly "minority view" that was nevertheless most consonant with the plain language of the statute and finding that projected disposable income is the figure calculated on the debtors' Official Form 22C, unless a departure therefrom is justified by a showing of special circumstances); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006) (finding that projected disposable income is based on historical data).

B. <u>Expenses Issues Arising Under BAPCPA</u>

1. Expenses Must be Reasonably Necessary, Pursuant to 11 U.S.C. § 1325(b)(2)

Section § 1325(b)(2) provides that debtors are to deduct only "amounts reasonably necessary to be expended" from their income to arrive at disposable income.

In re McGillis, 370 B.R. 720, 727, 729-30 (Bankr. W.D. Mich. 2007) (opining, in denying confirmation of the debtors' plan, that they may not expense payments relating to real property, *i.e.*, a timeshare and a second mortgage, which they would not actually be making under their plan as the timeshare was to be surrendered and the second mortgage was to be avoided, because such payments did not accord with 11 U.S.C. § 1325(b)(3)'s requirement of reasonable necessity, and because "amounts claimed as expenses under *Section 1325(b)(3)* must in fact be ultimately expended.").

See also In re Hoss, 392 B.R. 463 (Bankr. D. Kan. 2008) (citing *McGillis* and opining that "[t]he expense amounts deductible from current monthly income under § 1325(b)(2) are also modified by the phrase 'reasonably necessary . . . for the maintenance or support of the debtor . . .'"); *In re Koch*, 391 B.R. 230 (Bankr. N.D.N.Y. 2008) (citing *McGillis*).

2. Section 1325(b)(3) Provides that Expenses are to be Determined Under § 707(b)(2)(A) and (B)

The Bankruptcy Code, in 11 U.S.C. § 707(b)(2)(A), as directed by 11 U.S.C. § 1325(b)(3), sets forth that an "above median" debtor's expense amounts are to be reasonably necessary, as determined in § 707(b)(2)(A) and (B), which provides, *inter alia*, that allowable expenses are determined under the National, Local, and Other Necessary Expenses, issued by the Internal Revenue Service. Allowed expenses are shown on Official Form 22C, although authority for their deduction is founded in the Code.

See In re Meyer, 355 B.R. 837 (Bankr. D.N.M. 2006) (opining that "Congress essentially used *§ 707(b)(2)* as a sort of shorthand for the list of expenses that over-median debtors could deduct"); *see also In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006); *In re Edmondson*, 363 B.R. 212 (Bankr. D.N.M. 2007); *In re Lanning*, No. 06-41037, 2007 Bankr. LEXIS 1639 (Bankr. D. Kan. May 15, 2007); *In re Carlton*, 362 B.R. 402, 411 (Bankr. C.D. Ill. 2007); *In re Guzman*, 345 B.R. 640, 643 (Bankr. E.D. Wis. 2006); *In re Burmeister*, 378 B.R. 227, 230 (Bankr. N.D. Ill. 2007); *In re Gonzalez*, 388 B.R. 292 (Bankr. S.D. Tex. 2008).

3. Ownership Expense of a Vehicle Owned "Free and Clear"

A hotly litigated issue is whether a debtor may, in calculating his projected disposable income for his proposed plan, expense the full amount for transportation ownership set by the

Local Standards of the Internal Revenue Service for a vehicle unencumbered by a loan or lease, thereby reducing his projected disposable income to be paid to his unsecured creditors.

a. Appellate Review

i. May Not Expense

Ransom v. MBNA Am. Bank, N.A. (*In re Ransom*), 380 B.R. 799, 805 (B.A.P. 9th Cir. 2007), *appeal docketed*, No. 08-15066 (9th Cir. Jan. 15, 2008); *Babin v. Wilson* (*In re Wilson*), 383 B.R. 729 (B.A.P. 8th Cir. 2008), *rev'g In re Wilson*, 373 B.R. 638 (Bankr. W.D. Ark. 2007).

See also Wieland v. Thomas, 382 B.R. 793 (D. Kan. 2008); *Grossman v. Sawdy*, 384 B.R. 199, 203 (E.D. Wis. 2008) (vacating a bankruptcy court's order overruling a trustee's objection to confirmation and opining that "in order for the ownership expense to apply, a debtor must actually be making monthly ownership or lease payments."), *rev'g In re Sawdy*, 362 B.R. 898 (Bankr. E.D. Wis. 2007); *Fokkena v. Hartwick*, 373 B.R. 645, 650 (D. Minn. 2007) (finding that "debtor must actually have a loan or lease payment obligation" to deduct Local Standard for vehicle ownership); *United States Trustee v. Deadmond, Jr.* (*In re Deadmond*), No. CV 07-15-H-CCL, 2008 U.S. Dist. LEXIS 4426, at *6 (D. Mont. Jan. 22, 2008); *Meade v. McVay* (*In re Meade*), 384 B.R. 132 (W.D. Tex 2008) (opining that a debtor may expense car ownership only if the expense is "applicable" to him, which is demonstrated by his actually bearing a monthly expense for the ownership of his car, as shown by the language of the Bankruptcy Code, the IRS' Financial Analysis Handbook, and existing case law).

ii. May Expense

Ross-Tousey v. Neary (*In re Ross-Tousey*), 549 F.3d 1148 (7th Cir. 2008) (finding that a Chapter 7 debtor may deduct a vehicle ownership expense for a vehicle unencumbered by a loan or lease)

See Pearson v. Stewart (*In re Pearson*), 390 B.R. 706 (B.A.P. 10th Cir. 2008) (noting a split of authorities, the court allowed debtors to deduct expenses for unencumbered vehicles); *Hildebrand v. Kimbro* (*In re Kimbro*), 389 B.R. 518 (B.A.P. 6th Cir. 2008), *appeal docketed*, No. 08-5871 (6th Cir. July 16, 2008) (opining that "a debtor may deduct an ownership expense for a vehicle regardless of whether the debtor has a debt or lease payment on that vehicle" and relying on its interpretation of the language of 11 U.S.C. § 707(b)(2)(A)(ii)(I), legislative history, the language of the Internal Revenue Service standard, disparate intentions and applications of the standard in tax and bankruptcy contexts, and, finally, on what it observed to be "the economic realities of vehicle ownership"[6]);

---

[6] One panel member, the Honorable Thomas H. Fulton, United States Bankruptcy Judge, dissented. Characterizing, respectfully, the majority's holding as "a superb effort to weave a seemingly robust cloth from somewhat thin threads," he opined that to determine "applicable monthly expense amounts," a debtor must refer to IRS guidelines for the use of their expense tables; or else, "applicable" would be surplusage, unnecessary to signify the statutory meaning found by the court. Furthermore, he asserted that the panel overemphasized the distinction between "applicable" expenses and "actual" expenses, to the point where the terms were interpreted as opposites rather than merely different, as Congress intended. Finally, he opined that the majority's interpretation would lead to absurd results and run contrary to the drafters' intent.

See also Brunner v. Armstrong (*In re Armstrong*), 395 B.R. 127 (E.D. Wash. 2008) (determining that "applicable" is synonymous with "appropriate" and identifies which standard to select and distinguishing "actual," as used for Other Necessary Expenses, from "applicable," as used for National and Local Standards, concluding that Congress did not intend to require a loan or lease payment as a prerequisite to a transportation ownership deduction); *Clippard v. Ragle* (*In re Ragle*) 395 B.R. 387 (E.D. Ky. 2008) (finding that Chapter 7 debtor may deduct the ownership expense for a car owned outright because the Code requires different application of National Standards, Local Standards, and Other Necessary Expenses in bankruptcy than the IRS does in tax).

b. Bankruptcy Court Review

i. May Not Expense

In re Canales, 377 B.R. 658, 665-66 (Bankr. C.D. Cal. 2007) ("[T]he Court reads the term 'applicable' in § 707(b)(2)(A)(ii)(I) to require that the debtor make some lease or loan payment on a vehicle in order to be entitled to claim a deduction for transportation ownership expenses."); *see also In re Bennett*, 371 B.R. 440 (Bankr. C.D. Cal. 2007); *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. 2006); *In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006); *In re Wiggs*, No. 06 B 70203, 2006 Bankr. LEXIS 1547 (Bankr. N.D. Ill. Aug. 4, 2006); *In re Lara*, 347 B.R. 198 (Bankr. N.D. Tex. 2006); *In re Carlin*, 348 B.R. 795 (Bankr. D. Or. 2006).

ii. May Expense

See In re Fowler, 349 B.R. 414 (Bankr. D. Del. 2006); *In re Grunert*, 353 B.R. 591 (Bankr. E.D. Wis. 2006); *In re Barrett*, 371 B.R. 855 (Bankr. S.D. Ill. 2007); *In re Hylton*, 374 B.R. 579 (Bankr. W.D. Va. 2007).

4. Applicability of Internal Revenue Manual: Actual Expenses or Allowed Expenses, Whichever is Less

An "above median" debtor's allowable expense amounts, as organized by the regime employed by the Internal Revenue Service, as shown in Internal Revenue Manual 5.15.1.7, item 2., and adopted by the Bankruptcy Code, 11 U.S.C. § 707(b)(2)(A)(ii)(I), fall into three categories: the amounts specified under the National Standards such as those for apparel and services, food, housekeeping supplies, personal care products and services, and miscellaneous; those specified under the Local Standards for housing and transportation; and those specified as Other Necessary Expenses. These are detailed in Internal Revenue Manual 5.15.1.7, items 3, 4, and 5; 5.15.1.8, 5.15.1.9, and 5.15.1.10.

Other allowable expenses include those reasonably necessary for the debtor's and his family's health and disability insurance, for health savings accounts, for those reasonably necessary to safeguard the debtor and his family from family violence, and an additional five

percent over the Internal Revenue Service amounts for food and apparel. 11 U.S.C. § 707(b)(2)(A)(ii)(I).[7]

The first two categories of expenses incorporated by reference by the Bankruptcy Code, *i.e.*, the Internal Revenue Service's National and Local Standards, are allowed to the above median debtor if they are applicable to him. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (given operation in a Chapter 13 filing by 11 U.S.C. § 1325(b)(3)). Amounts not expended by a debtor are not applicable to him, and are not allowed to him. This applies both if the debtor's cost is less than the standard allowance and if he bears no loan or lease cost at all (as when, for example, his vehicle is owned "free and clear").

a. <u>The Internal Revenue Manual Does Apply</u>

Wieland v. Thomas, 382 B.R. 793 (D. Kan. 2008) (holding that limiting an automobile ownership expense to the lesser of the actual expense or the standardized amount, as intended by the IRS in its Financial Analysis Handbook, is consonant with statutory language and legislative purposes).

In re Slusher, 359 B.R. 290, 309 (Bankr. D. Nev. 2007) (opining that a construction of 11 U.S.C. § 707(b)(2)(A)(ii)(I) that allows the deduction of **all** of the expense amounts listed in the Internal Revenue Service's National and Local Standards would discord with the plain language of the statute, which permits the deduction of only the debtor's **applicable** monthly expense amounts.).

In re McPherson, 350 B.R. 38, 45 (Bankr. W.D. Va. 2006) ("An amount the payment of which is never contemplated cannot be an amount that is to be paid in the future.").

In re McGillis, 370 B.R. 720, 730 (Bankr. W.D. Mich. 2007):

> Put differently, *Section 1325(b)(3)* imposes the same requirement upon an above-median-income debtor as it does upon all other debtors: amounts claimed as expenses under *Section 1325(b)(3)* must in fact be ultimately expended. However, *Section 1325(b)(3)* imposes upon an above-median-income debtor the further requirement that all planned expenditures must also agree with the expense limitations of *Sections 707(b)(2)(A) and (B)*. If that debtor's planned expenses exceed what is permitted, then the debtor must conform his *Section 1325(b)* deductions by reducing them to the amounts allowed by those subsections. **On the other hand, the converse is not true, for if the debtor's planned expenses are less, then his *Section 1325(b)* deductions must still be that lesser amount because that is all that he in fact plans to expend.**

[7] Sections 707(b)(2)(A)(ii)(II), (III), (IV), and (V) list additional permissible expenses, subject to various evidentiary showings.

In re Rains, No. 07-40472 EDJ, 2007 Bankr. LEXIS 3388, at **5-6 (Bankr. N.D. Cal. Oct. 2, 2007) (citing *In re Slusher*):

> [C]ourts, with which this court concurs, have reasoned that *§ 707(b)(2)(A)(ii)(I)* (via *§ 1325(b)(3)*) refers to the 'applicable' amounts to be deducted as expenses, and that expenses that are not the debtor's actual expenses that are reasonable and necessary (whether current or anticipated) are not 'applicable' and thus are not deductible for purposes of the calculation of the debtor's 'projected disposable income.'")
>
> ....
>
> ...[D]ebtors are not entitled to a fixed allowance of any expense that is in excess of their actual expenses that are reasonably necessary for their maintenance and support, even if such a fixed allowance might be included in the "means test" under § 707(b).

In re Rezentes, 368 B.R. 55, 62 (Bankr. D. Haw. 2007) (opining that debtors may expense their actual cost of housing or the IRS standard amount for their locale, whichever is less).

In re Boehlke, No. 07-26788-svk, 2008 Bankr. LEXIS 235, at **5, 8 (Bankr. E.D. Wis. Jan. 30, 2008) (finding that the presumption of abuse arose, unrebutted, because debtors' monthly transportation ownership expense was limited to the Local Standards allowance despite their lease payment's exceeding that amount).

In re Strickland, No. 07-10913-DHW, 2008 Bankr. LEXIS 701 (Bankr. M.D. Ala. Jan. 24, 2008) (finding that deduction of car ownership expenses must be consistent with debtors' expected costs for ownership over the term of the plan and denying confirmation of the debtor's Chapter 13 plan where debtors deducted the full amount of the Local Standards for ownership of two vehicles when they were actually spending less than the Local Standards).

b. <u>The Internal Revenue Manual Does Not Apply</u>

Musselman v. eCAST Settlement Corp. (*In re Musselman*), 394 B.R. 801 (E.D.N.C. 2008). Based on the language of the statute and a thorough review of relevant case law, the court found that a debtor who has housing or transportation ownership expenses may deduct the full amount provided by the IRS in its Standards.

In re Fowler, 349 B.R. 414 (Bankr. D. Del. 2006) (rejecting use of Internal Revenue Manual on basis that Code does not explicitly provide for its use).

5. Other Necessary Expenses

The third category of expenses incorporated by reference by the Bankruptcy Code includes those specifically listed by the Internal Revenue Service as Other Necessary Expenses. Internal Revenue Manual 5.15.1.10. *See In re Shahan*, 367 B.R. 732 (Bankr. D. Kan. 2007); *In re*

Barraza, 346 B.R. 724, 730 (Bankr. N.D. Tex. 2006); *In re Lara*, 347 B.R. 198, 201, 204 (Bankr. N.D. Tex. 2006).

a. These Expenses are Allowed to "Above Median" Debtor if He Actually Incurs Them. 11 U.S.C. § 707(b)(2)(A)(ii)(I)

In re Demonica, 345 B.R. 895, 902 (Bankr. N.D. Ill. 2006) ("However, in reference to the IRS standards, the term 'actual expenses' refers only to 'the categories specified as Other Necessary Expenses ....' *11 U.S.C. § 707(b)(2)(A)(ii)(I).*").

Babin v. Wilson (*In re Wilson*), 383 B.R. 729, 731 (B.A.P. 8th Cir. 2008), *rev'g In re Wilson*, 373 B.R. 638 (Bankr. W.D. Ark. 2007).

In re Ceasar, 364 B.R. 257, 260 (Bankr. W.D. La. 2007) ("The means test thus incorporates ... the debtor's *actual* monthly expenses for expenses falling into the IRS' 'Other Necessary Expenses.'").

b. As with Applicable Expense Amounts, Actual Other Necessary Expenses Must be Necessary.

"Other expenses may be considered if they meet the necessary expense test –they must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income." Internal Revenue Manual 5.15.1.10, item 1.

In re Shahan, 367 B.R. 732 (Bankr. D. Kan. 2007); *In re Lara*, 347 B.R. 198, 204 (Bankr. N.D. Tex. 2006); *In re Crittendon*, No. 06-10322, 2006 Bankr. LEXIS 2172, at *11 n.4 (Bankr. M.D.N.C. Sept. 1, 2006) ("The enumerated 'other necessary expenses' must be 'necessary' in order to be deductible ...."); *In re Demonica*, 345 B.R. 895, 905 (Bankr. N.D. Ill. 2006) (opining that a debtor's claim for Other Necessary Expenses "must itemize, document and provide a detailed" showing that such expenses are reasonable and necessary.); *In re Stimac*, 366 B.R. 889, 892 (Bankr. E.D. Wis. 2007) (relying on the Internal Revenue Manual to require that Other Necessary Expenses be necessary for the health and welfare of the debtor and her family or for the production of income); *In re Saffrin*, 380 B.R. 191, 193 (Bankr. N.D. Ill. 2007) (limiting deduction as an Other Necessary Expense to that which is necessary and falls within the categories set forth in the Internal Revenue Manual).

6. Items Being Surrendered

An issue that arises with some frequency is whether a debtor, in calculating his projected disposable income, may expense the cost of debt service for collateral that she proposes to surrender, arguably artificially reducing her projected disposable income to be paid to unsecured creditors.

a. **May Not Expense**

Hildebrand v. Thomas, 395 B.R. 914 (B.A.P. 6th Cir. 2008) (holding that the plan may not expense the cost of debt service for collateral intended, in the plan, for surrender).

In re Suess, 387 B.R. 243 (Bankr. W.D. Mo. 2008) (noting that, and concurring with, "the majority of courts to consider the applicability of the secured debt deduction despite surrender of property in [the Chapter 13] context has [sic] held it improper").

In re Harris, 353 B.R. 304 (Bankr. E.D. Okla. 2006) (opining in a Chapter 7 matter "that monthly payments for secured debt cannot be included in the means test calculation when a debtor or debtors intend to surrender the corresponding collateral.").

In re Edmondson, 371 B.R. 482 (Bankr. D.N.M. 2007).

In re Hoss, 392 B.R. 463 (Bankr. D. Kan. 2008).

In re Kalata, No. 07-21710, 2008 Bankr. LEXIS 512 (Bankr. E.D. Wis. Feb. 27, 2008) (disallowing a deduction for surrendered collateral).

In re Van Bodegom Smith, 383 B.R. 441, 452-55 (Bankr. E.D. Wis. 2008) (opining that a permissible debt payment must be "scheduled as contractually due" as of the effective date of the plan, rather than the date of the petition, and is not contractually due if the confirmed plan provides for surrender of the collateral, and because expensing secured debt service for surrendered collateral is inconsistent with the forward or future oriented concepts inherent in statutory requirements to deduct only those amounts "to be expended" and to pay to unsecured creditors under the plan all of a debtor's "**projected** disposable income **to be received**") (emphasis added).

In re McPherson, 350 B.R. 38, 45-46 (Bankr. W.D. Va. 2006) (opining that because a Chapter 13 plan "constitutes a new agreement between the debtor and each secured creditor," and because the "'amounts' referred to in Paragraph 1325(b)(2) are amounts that a debtor will make in the future as provided in the debtor's plan"..., "[a]ny deduction from income based on a secured claim that no longer exists may not be allowed.").

b. **May Expense**

Fokkena v. Hartwick, 373 B.R. 645 (D. Minn. 2007) (affirming a bankruptcy court's order that a Chapter 7 debtor may expense secured debt payments for property intended for surrender).

Randle v. Neary (In re Randle), No. 07 C 631, 2007 U.S. Dist. LEXIS 54985 (N.D. Ill. July 20, 2007) (holding that the plain language of the Code allows the expensing of property intended for surrender and that a debtor's statement of intention does not extinguish her contractual obligation).

In re Burmeister, 378 B.R. 227, 229-30 (Bankr. N.D. Ill. 2007) (opining that 11 U.S.C. § 707(b)(2)(A) permits, even compels, deduction of mortgage payment for surrendered property because such payment was contractually due when petition was filed).

In re Turner, 384 B.R. 537, 541-42 (Bankr. S.D. Ind. 2008) (overruling a trustee's objection to confirmation and allowing an expense deduction for a mortgage for a property whose surrender is indicated in the debtor's plan).

7. Special Circumstances

Limits on expenses may be rebutted by demonstrating special circumstances pursuant to 11 U.S.C. § 707(b)(2)(B). Many courts find the statutory examples to be a non-inclusive list, and set a fairly high bar for a successful showing ("extraordinary"); others are less demanding ("special"). *In re Fonash,* No. 1:08-bk-01856MDF, 2008 Bankr. LEXIS 3378 (Bankr. M.D. Pa. Dec. 12, 2008).

In *In re Templeton*, 365 B.R. 213 (Bankr. W.D. Okla. 2007), the court opined that "special circumstances" is a fact-specific consideration, wherein a court retains broad discretion in making such a determination, that the examples listed in 11 U.S.C. § 707(b)(2)(B) -- a medical condition and military service -- are not exhaustive, but are merely examples where Congress found there to be special circumstance "for which there is no reasonable alternative," that the language of the statute clearly requires a debtor to present documentation for each additional expense and attest under oath to its accuracy, and provide a detailed explanation.

See In re Zahringer, No. 07-30217, 2008 Bankr. LEXIS 1770 (Bankr. E.D. Wis. May 30, 2008) (sustaining a trustee's objection to confirmation and denying a debtor's resort to "special circumstances" for his plan's impermissible treatment of student loans because he failed to meet the statute's high bar for special circumstances and because he failed to show no reasonable alternative); *In re Champagne*, 389 B.R. 191 (Bankr. D. Kan. 2008) ("The burden to establish special circumstances was not set particularly high, making the presumption truly rebuttable. The standard for amendment is special, not extraordinary, circumstances."); *In re Demonica*, 345 B.R. 895, 903-04 (Bankr. N.D. Ill. 2006); *In re Crego*, 387 B.R. 225, 227-30 (Bankr. E.D. Wis. 2008) (finding that the maintenance of a separate household due to divorce or legal separation constitutes a special circumstance, but opining that the expenses associated therewith must be reasonable and may not exceed the National and Local Standards); *In re Delbecq*, 368 B.R. 754 (Bankr. S.D. Ind. 2007) (finding, in the matter of a U.S. Trustee's motion to dismiss a Chapter 7 petition, that the debtor lacked any reasonable alternative, but opining that the statute's examples of special circumstances are not intended to serve as a benchmark therefor).

See also In re Smith, 388 B.R. 885, 888 (Bankr. C.D. Ill. June 20, 2008) (finding that a Chapter 7 petitioner failed to rebut the presumption of abuse and opining that repayment of a 401(k) loan was not a life circumstance "that directly and unavoidably affect[ed] one's earning capacity or g[a]ve rise to necessary, additional expenses," these being the indicia of "special circumstances"); *In re Renicker*, 342 B.R. 304 (Bankr. W.D. Mo. 2006) (debtor must justify

excess expenses by documentation and detailed explanation of special circumstances showing the adjustment to be reasonable and necessary.); *In re Armstrong*, No. 06-31414, 2007 Bankr. LEXIS 1812 (Bankr. N.D. Ohio May 24, 2007) (a Chapter 7 case, court finding that special circumstance, as contemplated in 11 U.S.C. § 707(b)(2)(B), is one that is out of the ordinary for an average family and leaves the debtor with no reasonable alternative but to incur the expense.); *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007) (debtor must itemize, document, and provide detailed explanation of special circumstances in order to show such an expense is reasonable and necessary.); *In re Witek*, 383 B.R. 323 (Bankr. N.D. Ohio 2007) (debtor's special circumstances must share traits with the statutory examples, and must lack any reasonable alternative.).

C. "Step-up" Of Plan Payment When an Allowed Expense Expires

Some courts may require that a plan payment be "stepped up" at some point during the plan's duration to adjust the plan for an allowed expense that discontinues prior to the completion of the plan. A typical example is debt service payment that completes before the end of the plan such as pay off of a loan from a defined contribution retirement plan.

Coop v. Lasowski (In re Lasowski), 384 B.R. 205 (B.A.P. 8th Cir. 2008) (requiring a debtor to redirect to unsecured creditors funds made available by full repayment of 401(k) loan during pendency of the plan), *rev'g In re Lasowski*, 375 B.R. 526 (Bankr. E.D. Ark. 2007); *Eisen v. Thompson*, 370 B.R. 762, 771 (N.D. Ohio 2007) (opining, in *dicta*, that the pay off of a 401(k) loan during the applicable commitment period would enable a Chapter 13 trustee to direct the "newly available" monies to creditors); *In re Davis*, 378 B.R. 539 (Bankr. N.D. Ohio 2007) (finding relief under Chapter 7 abusive in part because of debtor's ability to pay unsecured creditors additional monies after repayment of loan from her Thrift Savings Plan.).

II. BANKRUPTCY FORMS LACK FORCE OF LAW

Many courts note that even though Debtors may have followed the instructions on Form 22C, this Form does not have the force or effect of the law.

Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (B.A.P. 9th Cir. 2008) (noting in the context of the deduction of business expenses from current monthly income before or after the determination of the applicable commitment period, "when an Official Bankruptcy Form conflicts with the Code, the Code always wins").

In re Arnold, 376 B.R. 652 (Bankr. M.D. Tenn. 2007) (addressing the issue of whether the deduction of business expenses from current monthly income occurs before or after the determination of the applicable commitment period and finding that "[t]his Chapter 13 case should be titled 'The Bankruptcy Code v. The Official Bankruptcy Forms.' The title portends the answer, because as we all know, the Bankruptcy Code always wins.").

Ransom v. MBNA Am. Bank, N.A. (In re Ransom), 380 B.R. 799 (B.A.P. 9th Cir. 2007), *appeal docketed*, No. 08-15066 (9th Cir. Jan. 15, 2008) (recognizing, in context of deductions for vehicles that are owned outright, that "forms are only valid to the extent that they conform to the

substantive provisions of the Bankruptcy Code. It is axiomatic that guidelines in a form cannot stand as independent authority in opposition to the Bankruptcy Code itself.").

III. GOOD FAITH

The Code requires that a plan shall be confirmed if, *inter alia*, it has been proposed in good faith. 11 U.S.C. § 1325(a)(3). A court may raise this criterion *sua sponte*, and need not rely on a creditor or trustee to object to confirmation on this basis. Because the good faith requirement is separately and discretely expressed, some have argued that a debtor's ability to pay, as shown by his projected disposable income applied to paying unsecured creditors, is immaterial to his good faith, or, at least, may not *ipse* defeat a debtor's good faith. Others have argued that the size of a plan payment is but one factor among many in examining a debtor's good faith. *See, e.g.*, *Hardin v. Caldwell* (*In re Caldwell*), 851 F.2d 852, 859 (6th Cir. 1988) (adopting and quoting with approval the good faith factors found in *In re Estus*, 695 F.2d 311, 317 (8th Cir. 1982) and adding four additional factors, among which was "whether the debtor is attempting 'to abuse the spirit of the Bankruptcy Code'").

Some courts maintain the position that BAPCPA retains the 1984 Act's removal of ability to pay or amount of payment from the consideration of a debtor's good faith. They include *Mancl v. Chatterton* (*In re Mancl*),[8] *In re Barr*,[9] *In re Johnson*,[10] at least to a degree; and the court in *In re Farrar-Johnson*,[11] which opined that disposable income is simple arithmetic based on 11 U.S.C. § 707(b)(2)(A) and (B) and that a debtor's good faith in claiming them cannot be relevant.

In re Martin, 373 B.R. 731 (Bankr. D. Utah 2007) (opining that a good faith inquiry is governed by a totality of the circumstances test, often described as "'smell test,'" and that the mere fact that an expense is allowable does not except it from good faith scrutiny).

In re Anderson, 367 B.R. 727 (Bankr. D. Kan. 2007) (opining that because a plan payment is made pursuant to 11 U.S.C. § 1325(b), a court does not consider the debtor's ability to pay in determining good faith pursuant to 11 U.S.C. § 1325(a)(3)).

IV. APPLICABLE COMMITMENT PERIOD

A clear majority of courts find that "applicable commitment period" is a requisite length of time set by statute, intended by Congress to determine the required duration of a debtor's plan and that its length is determined by a debtor's current monthly income rather than his projected disposable income, at least when projected disposable income is greater than zero.

---

[8] 381 B.R. 537 (W.D. Wis. 2008), *appeal docketed*, No. 08-1635 (7th Cir. Mar. 17, 2008)
[9] 341 B.R. 181, 184 (Bankr. M.D.N.C. 2006).
[10] 346 B.R.256, 261-62 (Bankr. S.D. Ga. 2006) ("The changes do not entirely eliminate a good faith inquiry into the sufficiency of income. However, they do narrow the scope of judicial discretion.")
[11] 353 B.R. 224, 232 (Bankr. N.D. Ill. 2006).

A. Appellate Review

Maney v. Kagenveama (*In re Kagenveama*), 527 F.3d 990 (9thCir. 2008) (finding applicable commitment period to be a period of time during which a debtor must pay her projected disposable income to her unsecured creditors, but that in the absence of projected disposable income, there is no applicable commitment period); *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652 (8th Cir. 2008) (finding applicable commitment period to be temporal if projected disposable income is positive); *Fridley v. Forsythe* (*In re Fridley*), 380 B.R. 538, 543-44 (B.A.P. 9th Cir. 2007) (finding nothing in statutory structure to suggest that Congress intended to alter pre-BAPCPA requirement of temporal plan duration); *In re Lanning*, No. 06-41037, 2007 Bankr. LEXIS 1639 (Bankr. D. Kan. May 15, 2007) ("The Code does not require a set dividend to unsecured creditors, only a minimum number of months for debtors to commit their projected disposable income to payment into their Chapter 13 plan."), *aff' d on other grounds*, 380 B.R. 17 (B.A.P. 10th Cir. 2007).

B. Bankruptcy Court Review

In re Sanchez, 394 B.R 574 (Bankr. D. Colo. 2008) (noting that, following the majority view, applicable commitment period is temporal, even if the projected disposable income is found to be $0.00); *In re Strickland*, No. 06-81060, 2007 Bankr. LEXIS 508 (Bankr. M.D.N.C. Feb. 13, 2007) (finding that if an objection to confirmation is filed "a specific plan duration of 60 months is required ... without regard to whether such debtor's Form B22C reflects positive disposable monthly income unless the plan provides for payment in full of all allowed unsecured claims over a shorter period."); *In re Casey*, 356 B.R. 519 (Bankr. E.D. Wash. 2006) (noting that "[i]t is irrelevant whether the projected disposable income is zero or $1,000 or some other amount. If unsecured claims are not to be paid in full, the plan must have a length of . . . five (5) years for above-median income debtors.").