THE MEANS TEST – KEEP MOVING TO THE EGRESS©

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A. This Is Not The Old Debtor-Friendly Bankruptcy Code.

Remember the 'good old days'? When debtor's counsel walked into bankruptcy court and tossed out "this is a court of equity", presented a few favorable facts – maybe put your debtor on the stand to cry a little. And most of the time, that would do it, and you would win.

With the passage of the BAPCPA in 2005, and the Ransom decision interpreting those statutory changes, the bankruptcy landscape has changed significantly.

First, the BAPCPA had, as one of its intended purposes, removing discretion from bankruptcy judges. As the Sixth Circuit Court of Appeals noted in Shaw v. Aurgroup Fin. Credit Union: "In fact, granting judges discretion to confirm proposed plans under Chapter 13 would introduce needless uncertainties and inconsistencies in the confirmation process. Congress enacted BAPCPA precisely so that judges would have less, not more, discretion under the Bankruptcy Code. See Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What Was Advertised*, 24-7 A.B.I.J. 1, 69 (Sept. 2005) ("BAPCPA is packed with provisions intended to 'reduce the discretion' of bankruptcy judges.")." Shaw v. Aurgroup Fin. Credit Union, 552 F.3d 447, 461 (6th Cir. 2008); see also, Cousin Props. v. Treasure Isles HC, Inc. (In re Treasure Isles HC, Inc.), 2011 Bankr. LEXIS 3613 (6th Cir. BAP 2011)("The changes brought by BAPCPA, in particular, were designed to "remove the bankruptcy judge's discretion" in the timing of the assumption or rejection of executory contracts.) In re Musselman, 394 B.R. 801, 813 (E.D.N.C. 2008)("It is the result of a conscious choice by Congress to remove judicial discretion from the calculation of "disposable income" and "projected disposable income."); In re May, 390 B.R. 338, 349-350 (Bankr. S.D. Ohio 2008)("is in harmony with Congress's adoption of a more formulaic approach to expenses in order to level the playing field for debtors and stifle judicial discretion.").

On the other hand, these limits on judicial discretion do not necessarily apply to the enforcement of some of the more draconian provisions of BAPCPA: "The amendments to section 521 are part of an abuse-prevention package. With Congress's core purpose in mind, we are reluctant to read into the statute by implication a new limit on judicial discretion that would encourage rather than discourage bankruptcy abuse. It is safe to say that Congress, in enacting BAPCPA, was not bent on placing additional weapons in the hands of abusive debtors." See, In

re Amir, 436 B.R. 1, (6th Cir. BAP 2010), *quoting*, Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera), 557 F.3d 8, 13 (1st Cir. 2009).

Second, as the Sixth Circuit noted in the Baud decision, the Supreme Court has provided guidance on the interpretation of the BAPCPA in the Ransom decision:

> Regarding the purpose of the statutory provision, the Supreme Court stated:
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> > Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system. In particular, Congress adopted the means test . . . to help ensure that debtors who can pay creditors do pay them.
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> > . . . [C]onsideration of BAPCPA's purpose strengthens our reading of the [statute]. Congress designed the means test to measure debtors' disposable income and, in that way, to ensure that [they] repay creditors the maximum they can afford. This purpose is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor's ability to afford repayment. *Cf.* [Lanning, 130 S. Ct. at 2475-2476] (rejecting an interpretation of the Bankruptcy Code that "would produce [the] senseless resul[t]" of "deny[ing] creditors payments that the debtor could easily make").
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> > . . . Ransom's interpretation would run counter to the statute's overall purpose of ensuring that debtors repay creditors to the extent they can[.]
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> > . . . .
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> > Ransom . . . contends that his view of the means test is necessary to avoid senseless results not intended by Congress. At the outset, we note that the policy concerns Ransom emphasizes pale beside one his reading creates: His interpretation, as we have explained, would frustrate BAPCPA's core purpose of ensuring that debtors devote their full disposable income to repaying creditors.
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> [Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S. Ct. 716, 721-22, 178 L. Ed. 2d 603 (2011)] at 721, 725, 727, 729 (citations and internal quotation marks omitted).

See, Baud v. Carroll, 634 F.3d 327, 343 (6th Cir. 2011), *cert. denied*, Baud v. Carroll, ___ U.S. ___, 132 S.Ct. 997, 181 L.Ed.2d 732 (2012); see also, H.R. Rep. No. 109-31, pt. 1, p. 2-3 (2005)("The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ("needs-based bankruptcy relief" or "means testing"), which is intended to ensure that debtors repay creditors the maximum they can afford.").

In Baud, former bankruptcy judge Hon. R. Guy Cole weighed every argument that the debtor made against the intent of BAPCPA – that debtors repay creditors to the maximum extent they can afford. While Baud found that the language regarding social security income in Section 101(10A) was clear enough to permit its exclusion, the other debtor arguments were, if the intent of Congress was less clear, rejected in favor of a more creditor friendly interpretation.

B. The Means Test Is An Official Form.

In order to ensure that debtors repay creditors the maximum they can afford, the BAPCPA established a mathematical formula, known as a means test, by which some Chapter 7 cases are deemed presumptively abusive. The purpose of the means test is to distinguish between debtors who can repay a portion of their debts and debtors who cannot. In re Rudler, 576 F.3d 37, 40 (1st Cir. 2009); In re Ross-Tousey, 549 F.3d 1148, 1151 (7th Cir. 2008)

The Means Test is an Official Form, developed by the forms committee and approved by The Judicial Conference of the United States.

As an Official Form, the Means Test must be used in bankruptcy cases. Bankruptcy Rule 9009 specifically requires the use of Official Forms. More specifically, Fed. R. Bankr. P. 1007(b)(4) requires the use of the Form 22A in Chapter 7 cases unless §707(b)(2)(D) applies. As discussed below, the one exception may be the situation where it does not apply – a Chapter 7 debtor who does not have primarily consumer debts.

1. Official Forms vs. The Code And Rules.

While they are required to be used in bankruptcy cases, the Official Forms cannot override the Bankruptcy Code, or a Bankruptcy Rule. To the extent there is ever a conflict between an Official Form, like the Means Test, and a Code section or Rule, the Code Section or Bankruptcy Rule will prevail.

For example, the 9th Circuit Bankruptcy Appellate decision In re Wiegand, 386 B.R. 238 (9th Cir. BAP 2008) illustrates that the Bankruptcy Code controls over the Official Forms. The Form B22C 'Means Test' allows debtors with business income to deduct their business expenses before the determination of whether they are above-the-median or below-the-median debtors for

purpose of determining (among other things) the applicable commitment period. The Wiegand court stated: "The question is easily answered when Form 22C is directly at odds with §1325(b)(2)(B), the substantive Code provision that governs the deduction of business expenses. As aptly noted by another court in addressing this same question, when an Official Bankruptcy Form conflicts with the Code, the Code always wins. In re Arnold, 376 B.R. 652, 653 (Bankr. M.D. Tenn. 2007)." In re Wiegand, 386 B.R. at 241. See also, In re Compann, 459 B.R. 478, 483 (Bankr. N.D. Ga. 2010)(""because as we all know, the Bankruptcy Code always wins," no matter how poorly drafted."); In re Sharp, 394 B.R. 207 (Bankr. C.D. Ill. 2008); In re Bembenek, 2008 Bankr. LEXIS 3003, 2008 WL 2704289 (Bankr. E.D. Wis., July 2, 2008).

Similarly, the court in In re Law stated:

> [W]hen an official form is in conflict with statutory language, the court cannot choose to defer to the official form. The statute controls over the official form. . . . Congress did not create Form 22C. Congress drafted and passed BAPCPA, while the Judicial Conference of the United States created Form 22C. This Court thus rejects the notion that any instructions on that form can be used to divine congressional intent--especially when the language on the form directly conflicts with clear statutory language . . . .

In re Law, 2008 Bankr. LEXIS 1198, 2008 WL 1867971, at *7 (Bankr. D. Kan. Apr. 24, 2008); see also, In re Justice, 404 B.R. 506, 513 (Bankr. W.D. Ark. 2009); In re Napier, 2006 Bankr. LEXIS 2248, 2006 WL 4128358, at *2 (Bankr. D.S.C. Sept. 18, 2006)(holding "[t]o the extent that Official Form B22C indicates that Debtors may include the boarders in the means test calculation, it must yield to the plain language of §707(b)(2), which only allows Debtors to include dependents.").

There are cases where the status of the Official Forms is misstated. See e.g., In re Stasse, 438 B.R. 631, 641 (Bankr. W.D. Wisc. 2010)("According to this reasoning, Congress elected to use the broader term "household size" on line 14(b) of Form B22A . . .").

2. The Means Test Does Not Come With Official Instructions.

Most of the Official Forms that bankruptcy practitioners use every day – the Schedules, Statement of Financial Affairs, etc. – come with instructions on how to fill them out. You can find these instructions on the uscourts.gov website:

http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx

In contrast, the Means Test does not have separate instructions. Instead, the form itself has directions for filing out each line, describing what the criteria are for each line.

3. Courts May View Amendments To The Means Test With A "Jaundiced Eye".

"[W]here multiple amendments are made to bankruptcy forms, the Court necessarily views with a jaundice eye the changes contained in the later amendments when the changes are favorable to the party making the amendment." In re Smith, 436 B.R. 476, 481 (Bankr. N.D. Ohio 2010).

C. The Form 22A Means Test, For Chapter 7 Cases, And The Form 22C For Chapter 13 Cases – Structural Differences.

The Means Tests for Chapter 7 and Chapter 13 are different in two ways. One, they are different in the information that is being captured, because of Code difference between Chapter 7 and Chapter 13. Two, they are different on a line-by-line basis, because some of the deductions allowed in a Chapter 13 budget, are not permitted deductions on a Chapter 7 Form 22C.

1. The Chapter 7 Means Test – Only Applies If Debtors Have Primarily Consumer Debts.

The BAPCPA grafted the Means Test onto Section 707(b) of the Bankruptcy Code - a section that only applies to debtors who have primarily consumer debts. Section 707(b)(1) permits dismissal for "abuse" only of "a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . ." In re Adolph, 441 B.R. 909, 914 (Bankr. N.D. Ill. 2011); see also, United States Trustee v. Mohr, 436 B.R. 504, 509-10 (S.D. Ohio 2010)("To become involved in section 707(b), the debtor must first have primarily consumer debts."); In re Lapke, 428 B.R. 839, 842 (8th Cir. BAP 2010)(§707(b) applies only to debtors whose debts are primarily consumer debts); In re Baird, 456 B.R. 112, 119 (Bankr. M.D. Fla. 2010)(same); In re Lobera, 454 B.R. 824, 835 (Bankr.)("Section 707(b) applies only to consumer debtors and allows the court to dismiss for "abuse."); and cf., In re Falch, 450 B.R. 88, 92-93 (Bankr. E.D.Pa. 2011)(where debtor did not have primarily consumer debts, movants could only proceed under §707(a)).

The BAPCA was intended to lessen the number of debtors filing Chapter 7 bankruptcies. One change that was designed to accomplish this goal was the creation of a 'Means Test' that had to be "passed" or the filing of a Chapter 7 case would be presumed to be an "abuse" and

subject to dismissal. The other major change was the amending §707(b) of the Bankruptcy Code to relax the standard for dismissing a Chapter 7 case as abusive.

Prior to the effective date of the BAPCPA, a showing of "substantial abuse" was required for dismissal of a Chapter 7 case, and there was a presumption in favor of granting the relief sought by the debtor. As amended by the BAPCA, §707(b) dropped the qualifying word "substantial," permitting a bankruptcy court to dismiss a Chapter 7 proceeding brought by an individual debtor who has mostly consumer debts if the court finds that the granting of relief would be an "abuse'. See, 11 U.S.C. §707(b)(1)." In re Rudler, 576 F.3d 37, 40 (1st Cir. 2009); see also, In re Hilmes, 438 B.R. 897 (Bankr. N.D. Tex. 2010)(requiring 'substantial abuse' after BAPCPA was reversible error); In re Lipford, 397 B.R. 320, 339 (Bankr. M.D.N.C. 2008)(BAPCPA specifically reduced the standard to simple "abuse"); In re Tucker, 389 B.R. 535, 538 (Bankr. N.D. Ohio 2008) ("Congress has clearly lowered the dismissal standard" by changing it from substantial abuse to abuse).

a. General Criteria For Determining "Consumer Debt"

There are two major approaches to determining whether debts are primarily "consumer debts". One approach is that there are consumer debts, and other kinds of debts, all of which are non-consumer. For example, in In re Brasher, 216 B.R. 59 (Bankr. N.D. Okla. 1998), the court stated:

> This Court agrees with the analysis rendered in In re Stovall, 209 B.R. 849 (Bankr. E.D. Va. 1997), in concluding that there are (1) consumer debts which fall within the definition of Section 101(8); (2) business debts, or debts incurred with a "profit motive," which are non-consumer debts; and (3) other non-consumer debts that are not incurred with a motivation for making a profit.

See also, In re Strausbaugh, 376 B.R. 631, 637-638 (Bankr. S.D. Ohio 2007)(The profit motive analysis is used, and is clearly appropriate, to determine whether a debt falls outside the category of consumer debt. There is nothing inherent in this test, or direction from the Bankruptcy Code to suggest, that the test defines the only category of non-consumer debt. Therefore, while the profit motive analysis may assist in the determination of which debts are not consumer debt, it does not prohibit other debts from falling outside of the category of consumer debt."). See also, In re Marshalek, 158 B.R. 704, 708 (Bankr. N.D. Ohio 1993)("The profit motive test is normally applied to cases involving expenditures. . . . An inability to classify a particular debt as a business debt does not automatically relegate it to the status of a consumer debt.").

Other courts appear to focus on whether or not the debt was business related or incurred with a profit motive. For example, the Booth court stated: "The test for determining whether a

debt should be classified as a business debt, rather than a debt acquired for personal, family or household purposes, is whether it was incurred with an eye toward profit". In re Booth, 858 F.2d 1051, 1055 (5th Cir.1988); see also, In re Runski, 102 F.3d 744, 747 (4th Cir. 1996)(examining Section 101(8) in the context of Section 722, stating "debt incurred for a business venture or with a profit motive does not fall within the category of debt incurred for 'personal, family, or household purposes'" and is therefore not "consumer debt"); In re Sekendur, 334 B.R. 609, 618 (Bankr. N.D. Ill. 2005)("This is to be contrasted with "debt incurred for a business venture or with a profit motive," which is not consumer debt."); In re Manning, 126 B.R. 984 (D. Tenn. 1991)(under no circumstances could a loan procured by a debtor to purchase a limited partnership interest or commercial real estate for investment be held to be for a "consumer" purpose).

It appears that incurring a debt with a profit motive or business purpose is *sufficient* to make a debt "non-consumer". And it may be that courts like Runski are using that analysis to eliminate debts that are clearly non-consumer. However, if the logic of cases like Brasher, having a profit motive is not a *necessary* condition for a debt not to be properly classified as "consumer".

Of course, only a real human being can incur consumer debt. A business entity cannot. In re SWF, Inc., 83 B.R. 27 (Bankr. S.D. Cal. 1988)(a corporation is not an individual within the meaning of the Bankruptcy Code and cannot incur a consumer debt).

One dilemma for practitioners in this area – while a debtor's attorney might like to argue that, for §707(b) purposes, certain classes of debt should not be considered "consumer debts" – there is a down side to winning that argument. Only consumer debts are protected by the co-debtor stay. If, for example, medical bills are not consumer debts, co-debtors on those medical bills would not be protected from collection efforts in a Chapter 13. Student loans – same problem. So, pick your poison. . . wisely.

b. Meaning of "Primarily" Consumer Debts.

The majority of courts that have considered the issue have found that "primarily" means more than half of the total dollar amount owed. In re Stewart, 175 F.3d 796, 808 (10th Cir. 1999)("primarily means more than fifty percent of the amount of the debt); In re Kelly, 841 F.2d at 913, 916. n11 (9th Cir. 1988); United States Trustee v. Mohr, 436 B.R. 504, 509-10 (S.D. Ohio 2010); In re Baird, 456 B.R. 112, 119 (Bankr. M.D. Fla. 2010); In re Pollard, 296 B.R. 531 (Bankr. W.D. Okla. 2003)(in 10th Circuit, "primarily" means that the debts are over 50% consumer debts); In re Hall, 258 B.R. 45, 48 (Bankr. M.D. Fla. 2001); In re Shelley, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); In re Martens, 171 B.R. 43, 45 (Bankr. N.D. Ohio 1994); In re Martinez, 171 B.R. 264, 266 (Bankr. N.D. Ohio 1994)(Consumer debt is defined under 11

U.S.C. §101(8) as debt incurred by an individual primarily for a personal, family, or household purpose. The debtor has "primarily consumer debt" when more than one-half of the dollar amount owed is consumer debt.); In re Farrell, 150 B.R. 116 (Bankr. D.N.J. 1992)(50% of amount test).

A minority of courts have concluded that it is appropriate for the court to consider both the percentage of consumer debt as well as the number of consumer debts in deciding whether the debt is primarily consumer debt. In re Lamanna, 153 F.3d 1 (1st Cir. 1998)(The term "primary" refers to an overall ratio of consumer to nonconsumer debts of over fifty percent, and the consumer debts should be evaluated not only by amount, but by their relative number. – considering "number" of creditors appears to be a minority position); In re Booth, 858 F.2d 1051, 1055 (5th Cir. 1988)("The controlling inquiry, therefore, is whether or not the Booths' indebtedness is primarily consumer in nature in light of the fact that the amount of their consumer debt, though less than their business debt, is owed to more creditors. We hold that it is not. It has been noted, we believe correctly, that "primarily" suggests an overall ratio of consumer to nonconsumer debts of over fifty percent. Furthermore, the consumer debts should be evaluated not only by amount, but by their relative number."); In re Restea, 76 B.R. 728, 735 (Bkrtcy.D.S.D. 1987). The ratio of consumer to nonconsumer debt in the instant case, even allowing for $50,000 in additional taxes, is not great enough under these facts to justify dismissal under section 707(b)."); In re Bell, 65 B.R. 575, 577 (Bankr. E.D. Mich. 1986) (it is appropriate in defining "primarily consumer debt" to give more weight to the portion of total debt that is consumer debt and less weight to the portion of the total number of debts that are consumer debts).

c. Home Mortgages

The vast majority of recent decisions have held that a debt secured by real property used as a debtor's personal residence is a consumer debt because a personal residence is intended primarily for personal, family, or household use, rather than for profit. See, In re Price, 353 F.3d 1135, 1139 (9th Cir. 2004)("We specifically rejected this notion in Kelly, noting that "the statutory scheme so clearly contemplates that consumer debt include debt secured by real property that there is no room left for any other conclusion. Id. at 912. Price claims that this holding was *dicta* in Kelly that we may disregard. Clearly, it was not."); In the Matter of Booth, 858 F.2d 1051, 1055 (5th Cir. 1988); In re Kelly, 841 F.2d 908, 913 (9th Cir. 1988)(although bankruptcy debtors' debts were secured by real property, the debts constituted consumer debt); In re Cox, 315 B.R. 850, 855 (B.A.P. 8th Cir. 2004)(Consumer debt can be both secured and unsecured debt. With respect to debt secured by real property, if the debtor's purpose in incurring the debt is to purchase a home or make improvements to it, the debt is clearly for family or household purposes and fits squarely within the definition of a consumer debt under §101(8)); In re Morris, 385 B.R. 823, 829 (E.D. Va. 2008); In re Lowe, 109 B.R. 698, 699 (W.D. Va. 1990);

In re Hlavin, 394 B.R. 441, 445-46 (Bankr. S.D. Ohio 2008)(rejecting argument that security by real estate made mortgage debt non-consumer); In re Davis, 378 B.R. 539, 547 (Bankr. N.D. Ohio 2007); In re King, 362 B.R. 226, 230 (Bankr. D. Md. 2007)("A debt securing a debtor's principal residence qualifies as a consumer debt."); In re Hall, 258 B.R. 45, 49-50 (Bankr. M.D. Fla. 2001); In re Praleikas, 248 B.R. 140, 144-45 (Bankr. W.D. Mo. 2000); In re Bertolami, 235 B.R. 493, 496-97 (Bankr. S.D. Fla. 1999)("a note and residential mortgage may be consumer debt if they are executed primarily for personal, family, or household purposes." But, "Debts incurred on real property for business purposes cannot be consumer debts"); In re Dickerson, 193 B.R. 67, 70 (Bankr. M.D. Fla. 1996); In re Vianese, 192 B.R. 61, 68 (Bankr. N.D.N.Y. 1996); In re Gentri, 185 B.R. 368, 372 (Bankr. M.D. Fla. 1995); In re Harris, 203 B.R. 46, 50 (Bankr. E.D. Va. 1994)("Since the parties incurred the debt to purchase a family residence, a personal and household purpose, it is classified as consumer debt."); In re Tindall, 184 B.R. 842, 844 (Bankr. M.D. Fla. 1994); In re Nolan, 140 B.R. 797, 800-01 (Bankr. D. Colo. 1992)(mortgage a consumer debt); In re Goodson, 130 B.R. 897, 900 (Bankr. N.D. Okla. 1991); In re Bryant, 47 B.R. 21, 26 (Bankr. W.D.N.C. 1984); McDaniel v. Nationwide, 85 B.R. 69 (Bankr. D. Ill. 1988)(nothing in definition of consumer debt requires exclusion of a debt secured by real estate); and c.f., In re Hall, 258 B.R. 45, 49 (Bankr. M.D. Fla. 2001)(mortgage on debtor's former marital home, although a contingent debt, was a consumer debt and was considered in determining whether debts were primarily consumer debts.)

Debtors have argued that the subjective hope that their personal residence would appreciate in value makes the mortgage debt an 'investment', and therefore the debt should be considered "non-consumer." This argument has been rejected by the courts. See, In re Cox, 315 B.R. 850, 855 (B.A.P. 8th Cir. 2004); In re Naut, Case No. 07-20280, 2008 Bankr. LEXIS 175 at *18-*19, 2008 WL 191297 (Bankr. E.D. Pa. Jan. 22, 2008)("Debtor did not lease the Heather Lane home to a tenant or use it for any other business purpose. Although Debtor, like all other homeowners, apparently hoped that the Heather Lane home would appreciate in value, the objective evidence in the record shows that the Heather Lane home was purchased and used as Debtor's personal residence. I find that such use constitutes 'family or household purpose' under Section 101(8) of the Bankruptcy Code.").

Debtors have also been unsuccessful in arguing that the failure to sign certain loan documentation make a home loan something other than a consumer debt. See, In re Lapke, 428 B.R. 839, 842 (8th Cir. BAP 2010); In re Evans, 334 B.R. 148, 151 (Bankr. D. Md. 2004)(debt on debtor's home was consumer debt even though debtor did not sign the promissory note evidencing it).

Obviously, there are other types of real estate, and non-consumer loans secured by real estate may be classified differently than a residential mortgage. The Fifth Circuit Court of Appeals stated:

> Applying the profit motive test, we find that the district court misclassified some of appellants' debts. In regard to the three loans secured by the Booths' residence, the district court correctly looked to the use to which the money was put. Accordingly, the $11,000 loan and the $133,000 loan were properly classified as nonconsumer related debt. The district court erred, however, in its classification of the entire $152,507.99 as consumer debt. Only $75,000 was used to pay off the mortgage on the residence; the remainder, $77,507.99, was applied to the marina venture. Only the initial $75,000 may be properly characterized as consumer debt.

In re Booth, 858 F.2d 1051, 1055 (5th Cir. 1988); see also, In re Burge, 377 B.R. 573, 578-79 (Bankr. N.D. Ohio 2007)("income producing property would not appear to fit this mold [of consumer debts]"); In re Pedigo, 296 B.R. 485, 491 (Bankr. S.D. Ind. 2003)(loan to prepare property for tenant not a consumer debt).

However, the fact that the underlying use of the real estate has changed, does not alter the character of the debt. That is determined at the time the debt is incurred:

> Consumer debt" is defined in §101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." The operative word in that definition is incurred. The Debtor does not dispute that she and her husband originally incurred their obligation for the Bank's mortgage loan for personal, family and household purposes. The fact that the mortgaged property is no longer used for consumer purposes, or that the payment terms were modified does not turn back the clock and change the purpose for which the debt was incurred. A debt is "incurred" only once, and that is when a debtor becomes liable for its payment. With respect to the mortgage owing to Brantley Bank, that debt was incurred in 1998 for consumer purposes.

In re Victoria, 2011 Bankr. LEXIS 2505 at *10 (Bankr. N.D. Ala. June 22, 2011), citing, In re Bertolami, 235 B.R. 493, 496-97 (Bankr. S.D. Fla. 1999); In re Lemma, 393 B.R. 299, 302 (Bankr. E.D.N.Y. 2008).

Some older cases had adopted the position that debts secured by real property, including home mortgages, were not consumer debts: See, In re Ikeda, 37 B.R. 193, 194-95 (Bankr. D. Hawaii 1984)(" The intent of Congress that "consumer debts" not include mortgage liens secured by real property is clearly stated in the legislative history. To then include mortgage liens secured by real property used as debtors' principal residence within the definition of "consumer debts" would undermine this Congressional intent.); In re Nenninger, 32 B.R. 624,

626 (Bankr. W.D. Wis.1983); In re Randolph, 28 B.R. 811, 813 (Bankr. E.D. Va.1983)("A debt which is secured by real property is not a consumer debt. . .") ; In re Burgess, 22 B.R. 771, 772 (Bankr. M.D. Tenn. 1982)("The legislative history of 11 U.S.C. §101(7) states that the term consumer debt does not include any debt which is secured by real property. 124 Cong. Rec. H. 11,090 (Sept. 28, 1978) (remarks of Rep. Edwards). The definition of consumer debt in §101(7) does not, however, specifically exclude an unsecured debt obtained by an individual to purchase residential real property."); In re Stein, 18 B.R. 768, 769 (Bankr. S.D. Ohio 1982)("a consumer debt does not apparently include a debt to any extent the debt is secured by real property. See 124 Cong. Rec. H. 11,090 (Sept. 28, 1978) and S. 17,406 (Oct. 6, 1978)"). As reflected in the earlier citations, this approach has been overwhelmingly rejected by the last fifteen years of case law.

The 'legislative history' is based on statements made by two members of Congress that "[a] consumer debt does not include a debt to any extent the debt is secured by real property." 124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini). See, In re Hlavin, 394 B.R. 441, 445 (Bankr. S.D. Ohio 2008). The response has been that, to the extent the statement of two members of Congress even qualify as legislative history that a court can rely upon, "[l]egislative history, however, does not override the plain language of a statute.". Id.

d. Taxes

The majority view is that tax debts are not consumer debts. See, In re Westberry, 215 F.3d 589 (6th Cir. 2000)(in the context of §1301(a)'s co-debtor stay, held that income tax liabilities are not consumer debts); In re Brasher, 216 B.R. 59 (Bankr. N.D. Okla. 1998); In re Stovall, 209 B.R. 849 (Bankr. D. Va. 1997)(personal property taxes are not consumer debts); In re Greene, 157 B.R. 496 (Bankr. D. Ga. 1993)(majority view is that a tax liability is not a consumer debt); In re Reiter, 126 B.R. 961 (Bankr. D. Tex. 1991)(tax debt does not qualify as consumer debt); see also, In re Dye, 190 B.R. 566, 567 (Bankr. N.D.Ill. 1995); In re Goldsby, 135 B.R. 611, 613 (Bankr. E.D.Ark. 1992); In re Traub, 140 B.R. 286 (Bankr. D.N.M. 1992); In re Gault, 136 B.R. 736, 738 (Bankr. E.D.Tenn. 1991); In re Harrison, 82 B.R. 557, 558 (Bankr. D.Colo. 1987); In re Pressimore, 39 B.R. 240, 244-5 (N.D.N.Y. 1984).

The Westberry court distinguished income tax debt from consumer debt in four ways. First, income tax debt is not voluntarily incurred. In re Westberry, 215 F.3d 589, 591 (6th Cir. 2000). Second, a tax debt is incurred for a public purpose rather than a personal, family, or household purpose. Id. Third, it results from earning activities rather than from consumption. Id. Fourth, it does not involve the extension of credit. Id.; see also, In re Brasher, 216 B.R. 59, 60 (Bankr. N.D. Okla. 1998)(concluding income tax liability is not consumer debt for purposes

of §707(b) because it "is not 'incurred' as part of a consumption activity, but is involuntarily imposed in the course of earning income.").

e. Student Loans

It appears that the case law either looks at the individual circumstances associated with the student loan to determine if it is a consumer debt, or assumes that student loans are consumer debts. See, In re Stewart, 175 F.3d 796 (10th Cir. 1999)("we are unwilling to characterize the entire $218,000 as consumer debt. However, based on the evidence in the record, we can comfortably conclude a substantial portion of Dr. Stewart's student loan debt is indeed "consumer debt." * * * The record does, however, establish a substantial amount of Dr. Stewart's loans went toward his family's expenses. As to student loans received during their marriage, Dr. Stewart's testimony, read in its entirety, together with his brief on appeal, establishes he used a portion of the money on family expenses in addition to any direct educational costs. Specifically, in his brief, Dr. Stewart admits he used his student loan money during his marriage to pay for tuition and books as well as to support "his five dependents." Finally, the record shows during the two years following their divorce, Dr. Stewart obtained over $100,000 in student loans, paying Barbara $60,000 of it for support obligations and $3,000 on his children's medical expenses. Under these circumstances, an appreciable portion - $63,000 - of his student loans went toward family expenses, which fairly may be characterized as "consumer debt."); In re Dowleyne, 400 B.R. 840, 843 (Bankr. M.D. Fla. 2008)("The Debtors' debts are primarily consumer debts consisting of two home mortgages, a time-share mortgage, credit card debts, and student loans.").

A recent decision specifically holds that there is no *per se* rule that student loans are either consumer or non-consumer debts. In re Rucker, 454 B.R. 554 (Bankr. M.D. Ga. 2011). The Rucker court rejected the debtor's attempt to analogize student loans to tax obligations, citing the Westberry factors recited above. Rucker, 454 B.R. at 558. Instead, the Rucker decision held: "the Court must inquire into the purpose of the debt. Such an inquiry is consistent with the language of §101(8), which defines consumer debt according to its purpose. Furthermore, the Court cannot conclude that all student loans are incurred for the same purpose. Instead, the Court must consider all facts relevant to purpose when the characterization of student loans is in dispute." Id.

f. Tort Claims

The majority of courts have held that tort debts are not consumer debts. See, In re Thongta, 401 B.R. 363, 366 (Bankr. E.D. Wis. 2009); In re Melcher, 322 B.R. 1, 6 (Bankr. D.D.C. 2005)(a determination of consumer debt status under §523(d)); In re Marshalek, 158 B.R. 704 (Bnkr N.D. Ohio 1993)(Tort claims are not consumer debts); In re White, 49 B.R. 869

(Bankr. D.N.C. 1985)(judgment debt arising from automobile accident attributable to debtor's negligence was not a "consumer debt"); In re Alvarez, 57 B.R. 65 (Bankr. D. Fla. 1985).

g. Condominium Association Fees

In re Haugland, 199 B.R. 125 (Bankr. D.N.J. 1996)(condominium association fees are consumer debts); In re Galvan, Case No. 97 C 591, *unpublished*, 1998 U.S. Dist. LEXIS 7156 (N.D. Ill. April 30, 1998)(consumer debts). But, where the property was to be rented, the condominium association fees were not consumer debts. See also, In re Swartzentruber, Case No. 08-63666, *unpublished*, 2009 Bankr. LEXIS 2596 (Bankr. N.D. Ohio September 4, 2009).

h. Alimony and Child Support

Courts have held that alimony and child support are consumer debts. See, In re Stewart, 175 F.3d 796, 807 (10th Cir. 1999)(alimony constitutes a consumer debt); In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996)(alimony, child support, and lump-sum award are considered "consumer debt" as they were not incurred with a profit motive or in connection with a business transaction); In re Traub, 140 B.R. 286, 290 (Bankr. D. N.M. 1992)(property settlement owed ex-wife is consumer debt as it is a distribution of the net value of the community interest of the debtor's medical practice and not owed because of a profit-seeking activity); In re Palmer, 117 B.R. 443, 447 (Bankr. N.D. Iowa 1990)(lump-sum alimony award is consumer debt because the debt was created to allow the debtor to retain ownership of the home and his pension); In re Hall, 258 B.R. 45, 49 (Bankr. M.D. Fla. 2001)("the court will consider the unscheduled alimony debt in its determination of whether the debt is primarily consumer debt").

i. Medical Debts.

It appears that most courts assume (by lumping them with consumer debts) that medical bills are consumer debts. See, In re Thompson, 457 B.R. 872, 875 (Bankr. M.D. Fla. 2011)("Debtors' debts are primarily consumer debts consisting of two home mortgages on a property at 12351 Scottish Pine Lane, Clermont, Florida ("the Clermont Property"), medical bills, automobile loans, credit cards, and student loans."); In re Dickerson, 193 B.R. 67, 70 (Bankr. M.D. Fla 1996)(Nonconsumer debts included medical bills, student loans and IRS debt); In re Martinez, 171 B.R. 264, 267 (Bankr. N.D. Ohio 1994)(Medical Bills are consumer debts).

j. Gambling, and Speculative 'Investments'.

In re Vianese, 192 B.R. 61 (Bankr. N.D.N.Y. 1996)("The Court in a previous decision rendered in connection with this case concluded that gambling debts are consumer debts. See In re Vianese, Case No. 95-60060, Adv.Pro. No. 95-70066, slip op. at 9 (Bankr. N.D.N.Y.

November 3, 1995). The first mortgage on the Debtors' residence, as well as the home equity loan, are also to be considered debts incurred primarily for personal purposes. See Kelly, *supra*, 841 F.2d at 913. So too the student loans made in furtherance of the Debtors' sons' education were for "family purposes" and should be considered consumer debt. The Debtors testified that neither the credit card debt, the lines of credit or the monies borrowed against J. Vianese's annuity were used for anything but personal and/or family purposes, primarily gambling.")

In re Baum, 386 B.R. 649 (Bankr. N.D. Ohio 2008)(debtor had $40,000 in gambling debts and court found that her debts were primarily consumer debts – but there was no breakdown of her other debts in the decision).

Lind-Waldock & Co. v. Morehead, 1 Fed. Appx. 104 (4th Cir. 2001)("The Moreheads incurred the debt while speculating in the futures market. The debt is therefore not a consumer debt.").

2. The Chapter 7 Means Test – Determines If Debtors Are Above Median Income

"In 2005, the landscape for bankruptcy filings dramatically changed. Responding to a growing belief that "bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort," H.R. REP. NO. 109-31(I), at 4 (2005), and the prevalence of "opportunistic personal filings and abuse," id. at 5, Congress enacted the BAPCPA in order to require above-median income debtors to make more funds available for the payment of unsecured creditors. As a result, higher-income debtors with the ability to repay a substantial portion of their debts without significant hardship are now required to do so by filing under Chapter 13 rather than Chapter 7." Schultz v. United States, 529 F.3d 343, 347 (6th Cir. 2008).

The first part of the Chapter 7 Means Test determines whether the debtors are above or below the Median Income level for the state in which the debtor lives.

"The centerpiece of the Act is the imposition of a "means test" for Chapter 7 filers, which requires would-be debtors to demonstrate financial eligibility to avoid the presumption that their bankruptcy filing is an abuse of the bankruptcy proceedings. By its terms, the BAPCPA authorizes a bankruptcy court to dismiss a debtor's petition filed under Chapter 7 or, with the debtor's consent, to convert such a petition to Chapter 13 "if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]." 11 U.S.C. §707(b)(1). Under this test, the first step instructs the bankruptcy court to compare the debtor's annualized current monthly income to the median family income of a similarly sized family in the debtor's state of residence. If the debtor's current monthly income is equal to or below the median, then the presumption of abuse does not arise. 11 U.S.C. §707(b)(7). If, however, it exceeds the median, the Act directs

the court to recalculate the debtor's income by deducting certain necessary expenses specified by the statute. Id. §707(b)(2)(A)(ii)." Schultz v. United States, 529 F.3d 343, 347 (6th Cir. 2008).

The median income figures are provided by the Census Bureau, and calculated based on State and family size. These figures are updated each year, and thus may change depending on the particular petition date. See, In re Scarafiotti, 375 B.R. 618, 621 n.3 (Bankr. D. Colo. 2007).

3. Calculating Disposable Income And The Presumption Of Abuse In Chapter 7 Cases.

"The 'means test' of §707(b)(2) requires that a debtor having an annualized income above the state-median income for a like-size household to complete Form B22A by itemizing those expenditures allowed by statute." In re Rable, 445 B.R. 826, 827 (Bankr. N.D. Ohio 2011). However, some courts have suggested that only debtors with primarily consumer debts have this obligation in Chapter 7. See e.g., In re Goble, 401 B.R. 261, 265 (Bankr. S.D. Ohio 2009)("As every debtor with primarily consumer debts is required to do, the Debtor filed a Form B22A Statement of Current Monthly Income and Means Test Calculation (Chapter 7). . . .")

"If after deducting these necessary expenses and specified amounts, the debtor's current monthly income exceeds certain mathematical benchmarks, then the presumption of abuse arises. 11 U.S.C. §707(b)(2)(A)(i). This presumption may be rebutted only if the debtor demonstrates special circumstances justifying any additional expenses or adjustments to the debtor's income for which there is no reasonable alternative, and that those special circumstances reduce the debtor's income below the specified benchmarks. Id. §707(b)(2)(B). And even if the presumption of abuse does not apply, or has been rebutted by the debtor, the BAPCPA empowers a bankruptcy court to consider whether it believes "the debtor filed the petition in bad faith," or whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." Id. §707(b)(3)." Schultz v. United States, 529 F.3d 343, 347-348 (6th Cir. 2008). The debtor's 'financial situation' includes the debtor's ability to repay debts luxury goods with secured debt payments were given up. See, In re Witcher, ____ F.3d ____, 2012 U.S. App. LEXIS 25541 (11th Cir. December 13, 2012).

A debtor's monthly disposable income is calculated by taking the debtor's current monthly income, as defined in §101(10A) and subtracting the allowable monthly expenses delineated in §707(b)(2), consisting of the following five categories: 1) applicable monthly expense amounts specified under the IRS National Standards and Local Standards, 2) actual monthly expenses for the categories listed in the IRS Other Necessary Expenses, 3) various specified actual expenses, 4) monthly payments contractually due on secured debts, and 5) monthly payments on priority claims. 11 U.S.C. §707(b)(2)(A)(ii)-(iv). See, In re Ralston, 400 B.R. 854, 858 (Bankr. M.D. Fla. 2009); see also, In re Harmon, 446 B.R. 721, 725-26 (Bankr. E.D. Pa. 2011).

a. Some Means Test deductions are based on location.

Because of these deductions, eligibility under the new regime is calculated at least in part based on the state and county where the debtor resides. The housing expense deduction, for example, is governed by the county where the debtor resides. Internal Revenue Service's Financial Analysis Handbook §5.15.1.7(4)(A). Although the national standards, which identify amounts for "food, housekeeping supplies, apparel and services, and personal care products and services," and a fixed "miscellaneous" amount, Internal Revenue Service's Financial Analysis Handbook, §5.15.1.7(3), are mostly uniform throughout the United States, the local standards, which define amounts for housing and transportation, vary greatly. Schultz v. United States, 529 F.3d 343, 347 (6th Cir. 2008); see also, In re Pampas, 369 B.R. 290, 298 (Bankr. M.D. La. 2007)("The IRS's Local Standards provide for housing and utility deductions based upon location and family size.").

b. Deductions for secured debt obligations that are 'contractually due'.

In a Chapter 7 case, the fact that a debtor is going to surrender a home or vehicle that serves as collateral for a loan does not prevent the debtor from deducting the mortgage payment or the car payment on the Means Test. See, In re Rudler, 576 F.3d 37 (2009); In re Thomas, 395 B.R. 914, 920 (6th Cir. BAP 2008); In re Grinkmeyer, 456 B.R. 385, 387-88 (Bankr. S.D. Ind. 2011); In re Vecera, 430 B.R. 840 (Bankr. S.D. Ind. 2010); In re Phillips, 417 B.R. 30, 38 (Bankr. S.D. Ohio 2009); In re Norwood-Hill, 403 B.R. 905, 910 (Bankr. M.D. Fla. 2009); In re Goble, 401 B.R. 261, 270 (Bankr. S.D. Ohio 2009); In re Makres, 380 B.R. 30, 33-34 (Bankr. N.D. Okla. 2007); In re Benedetti, 372 B.R. 90 (Bankr. S.D. Fla. 2007); In re Kogler, 368 B.R. 785 (Bankr. W.D. Wis. 2007); In re Hayes, 376 B.R. 55 (Bankr. D. Mass. 2007); In re Kelvie, 372 B.R. 56 (Bankr. D. Idaho 2007); In re Wilkins, 370 B.R. 815 (Bankr. CD. Cal. 2007); In re Haar, 360 B.R. 759, 764 (Bankr. N.D. Ohio 2007); In re Randle, 358 B.R. 360 (Bankr. N.D. Ill. 2006); In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wis. 2006); In re Simmons, 357 BR 480 (Bankr. N.D. Oh 2006).

Most courts interpret the phrase "scheduled as contractually due" to mean "those payments that the debtor will be required to make on certain dates in the future under the contract." In re Rudler, 388 B.R. 433 (B.A.P. 1st Cir. 2008), aff'd, 576 F.3d 37 (1st Cir. 2009) (quoting In re Walker, 2006 Bankr. LEXIS 845, 2006 WL 1314125, at *3 (Bankr. N.D. Ga. 2006)). Under this interpretation, it does not matter whether the debtors intend to surrender the collateral rather than pay the secured debt. "[T]he filing of a petition for relief under the Bankruptcy Code does not relieve debtors of their contractual liability on the secured debt, regardless of their intention to surrender the collateral securing the debt." In re Makres, 380 B.R.

30, 33-34 (Bankr. N.D. Okla. 2007); see also, In re Haar, 360 B.R. 759, 764 (Bankr. N.D. Ohio 2007); In re Randle, 358 B.R. 360, 365 (Bankr. N.D. Ill. 2006), aff'd, 2007 U.S. Dist. LEXIS 54985, 2007 WL 2668727 (N.D. Ill. Jul. 20, 2007).

c. Failing The Chapter 7 Means Test.

In completing the 'means test' calculation on Form B22A, a debtor is directed to subtract his allowed expenditures from his annualized income so as to yield the debtor's "disposable income." If, after performing this calculation, the debtor's remaining income, as calculated over a five-year period, satisfies one of two conditions, the granting of relief in the case is then presumed to be abusive: (1) the debtor's income is greater than $11,725.00; or (2) although less than $11,725.00, the debtor's income is greater than $7,025.00 and that amount will pay more than 25% of the debtor's unsecured debt. 11 U.S.C. §707(b)(2)(A)(i). On a per month basis, these income thresholds total $195.42 and $117.08 respectively.

If, after subtracting the allowable monthly expenses from the debtor's current monthly income, the amount of monthly disposable income, multiplied by 60, the amount is greater than allowed by the statute, then the debtor 'fails' the Means Test. See, In re Ralston, 400 B.R. 854, 858 (Bankr. M.D. Fla. 2009).

"If the debtor cannot rebut the presumption, the court may dismiss the case or, with the debtor's consent, convert it into a Chapter 13 proceeding." Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S.Ct. 716, 722 n. 1, 178 L. Ed. 2d 603, 609 n.1 (2011).

d. The Chapter 7 Means Test – A Snap Shot. . . Or Not?

The Chapter 7 Means Test uses a backward-looking approach to income in determining whether a presumption of abuse arises in a Chapter 7 case. "The means test as set forth in §707(b)(1) and (b)(2) looks at income (six months of prepetition income) less expenses (fixed by reference to the Internal Revenue Service guidelines) and arrives at a "disposable income" figure for purposes of determining whether a filing is presumptively abusive." In re Thomas, 395 B.R. 914, 920 (6th Cir. BAP 2008).

In Chapter 7s, for purposes of Section 707(b)(1) and (2), the Means Test is mechanical, and strictly "backward looking" in determining "disposable income". The term that is often used to describe the Chapter 7 22A Means Test is that it is a "snapshot". See e.g., In re Anderson, 383 B.R. 699, 706 (Bankr. S.D. Ohio 2008)("The courts "essentially take a snapshot of the debtor's schedules on the petition date" to calculate the secured debt deduction on the means test form."); Fokkena v. Hartwick, 373 B.R. 645, 655 (D. Minn.2007)("the means test is aimed at capturing a 'snapshot' of the debtor's financial state as of the date the petition is filed," rather than at constructing a forward-looking analysis of the debtor's financial situation."); In re Perelman, 419

B.R. 168, 175 (Bankr. E.D.N.Y. 2009) ("§707(b)(2)(A)(iii) is patent in its calling for a "snapshot" of the debtor's obligations or circumstances on the date the bankruptcy petition was filed.").

So, for example, a deduction secured debt payments – either a mortgage or a car loan – would be deductible on the Chapter 7 Means Test based upon the "contractually due" language of Section 707(b)(2)(A)(iii)(I). See, Morse v. Rudler (In re Rudler), 576 F.3d 37, 45 (1st Cir. 2009)(citing cases); In re Grinkmeyer, 456 BR. 385 (Bankr. S.D. Ind. 2011); In re Sonntag, 2011 Bankr. LEXIS 3304, 2011 WL 3902999 (Bankr. N.D. W.Va. Sept. 6, 2011); In re Rivers, 466 B.R. 558, 569 (Bankr. M.D. Fla. 2012).

Of course, the approach to expenses is not strictly backward-looking – as debtor may not have, for example, actually paid their mortgage, or car payment, or court ordered payments, during the six months prior to filing. And yet, those "expenses" are deductible on the Chapter 7 Means Test, under the majority view because they remain contractually due.

Recently, this approach has been called into question through cases that engage in "creeping Lanningism". (Yup, I just made that up.) This new trend is to use a forward looking approach in evaluating the Chapter 7 Means Test in determining whether the presumption of abuse exists, or not. An alternate theory is that where property is being surrendered, there is no "applicable

The cases that have taken this approach are: In re Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); In re Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012); In re Krawczyk, 2012 Bankr. LEXIS 3466 (Bankr. E.D.N.C. July 27, 2012).

The cases are wrongly decided because they look at the problem from the wrong end of the telescope. The Means Test is IN Chapter 7, and it is structurally a snap-shot approach statute (for good, or for ill). Section 707(b) is grafted onto Chapter 13 through provisions like Section 1325. It is the specific language of Section 1325(b)(2)(B) that forms the basis for the forward looking approach in Chapter 13 cases – and Section 103(i) of the Code states that the "projected" disposable income provision – that appears only in Chapter 13 – does not apply to Chapter 7 cases. So, they are wrong – in my opinion - but those cases may provide a basis for a claim that the presumption of abuse should be held to arise, and debtors' counsel should be prepared to rebut such arguments. "There are two different rules in the different Chapters" should not be a legal argument that ultimately carries the day on this issue.

The argument that the expense is not "applicable" has some appeal – but is also not persuasive. There is a difference between not having an ownership expense for a vehicle, and having a contractually due payment on collateral that is being surrendered. If there is no

applicable contractually due payment, then there is no deduction – that is the Ransom holding. Expanding the Ransom holding to eliminate the words "contractually due" from the equation does not appear warranted by the language of the Supreme Court's decision.

Finally, there is the argument based upon the policies behind the BAPCPA: "Congress enacted [BAPCPA] to correct perceived abuses of the bankruptcy system. In particular, Congress adopted the means test . . . to help ensure that debtors who can pay creditors do pay them." Ransom v. FIA Card Services, N.A., ___ U.S. ___, 131 S.Ct. 716, 721, 178 L.Ed.2d 603, 608 (2011). This principle appears to be applied when the meaning of the statute is unclear – essentially, when there is no "plain meaning", the court should choose the interpretation that supports requiring debtors to repay the maximum they can afford. But, based upon Section 103(i) clear statutory prohibition against applying sections of Chapter 13 to Chapter 7, in this case the clear language of the relevant Code sections will probably be sufficient to overcome the general purpose of the BAPCPA. See generally, Baud v. Carroll, 634 F.3d 327, 347 (6th Cir. 2011), *cert denied*, Baud v. Carroll, ___ U.S. ___, 132 S.Ct. 997, 181 L.Ed.2d 732 (2012).

Of course, the standards are different for dismissal under Section 707(b)(3). The absence of an ongoing mortgage payment, or car loan, or any other obligation can be properly considered as part of the "totality of the circumstances". See, In re Sonntag, 2011 Bankr. LEXIS 3304 at *11 (Bankr. N.D.W.Va. Sept. 6, 2011); In re Goble, 401 B.R. 261 (Bankr. S.D. Ohio 2009)(although debtor 'passed' the Means Test by deducting home mortgage and arrearage claim payments, despite giving up her residence, her case was abusive under the totality of the circumstances test.). Similarly, the ability to pay can be considered, even if the debtor "passed" the Means Test. See, In re Witcher, ____ F.3d ____, 2012 U.S. App. LEXIS 25541 (11th Cir. December 13, 2012).

e. The presumption of abuse can be rebutted by the debtor(s) by arguing "special circumstances".

"If after deducting these necessary expenses and specified amounts, the debtor's current monthly income exceeds certain mathematical benchmarks, then the presumption of abuse arises. 11 U.S.C. §707(b)(2)(A)(i). This presumption may be rebutted only if the debtor demonstrates special circumstances justifying any additional expenses or adjustments to the debtor's income for which there is no reasonable alternative, and that those special circumstances reduce the debtor's income below the specified benchmarks. §707(b)(2)(B)." Schultz v. United States, 529 F.3d 343, 347-348 (6th Cir. 2008).

The statute provides a non-exclusive list of what qualifies as "special circumstances". The court in In re Barbutes, 436 B.R. 519, 524-525 (Bankr. M.D. Tenn. 2010) quoted a decision by Judge Speer on the meaning of the term:

The Bankruptcy Court for the Northern District of Ohio, Judge Speer, wrote an excellent analysis of what "special circumstances" section 707(b)(2)(B)(ii) requires:

> The Bankruptcy Code does not specifically define what constitutes a "special circumstance" as applied to §707(b)(2)(B)(i). This provision, however, does provide two examples: (1) a serious medical condition; or (2) a call to active duty in the Armed Forces. Although these conditions are not exclusive, this Court-applying the statutory interpretation canon of *ejusdem generis*, meaning literally "of the same kind,"-has found that a condition giving rise to a "special circumstance" should be similar in nature and have characteristics similar to the examples provided in §707(b)(2)(B)(i). In re Castle, 362 B.R. 846, 851 (Bankr. N.D. Ohio 2006). To this end, this Court has observed that the examples in §707(b)(2)(B)(i) "do show a commonality [in that] they both constitute situations which not only put a strain on a debtor's household budget, but they arise from circumstances normally beyond the debtor's control. Id.
>
> This is in line with jurisprudence formulated by the Sixth Circuit Court of Appeals. In the case of In re Krohn, the Sixth Circuit, when addressing the propriety of dismissing a case under §707(b), observed that a bankruptcy court should consider whether the debtor "was forced into Chapter 7 by unforeseen or catastrophic events." 886 F.2d 123, 126 (6th Cir.1989). See also In re Haman, 366 B.R. 307, 314 (Bankr. D. Del.2007) (expenses incurred merely at debtor's discretion are not a 'special circumstances; rather, there should exist no reasonable alternative but to incur the expense).
>
> Notwithstanding, nothing in §707(b)(2)(B)(i) absolutely requires that a 'special circumstance' arise as the result of an event beyond the debtor's reasonable control. Thus, the Court will not read into §707(b)(2)(B)(i) an involuntariness prerequisite. At the very least, however, it may be safely stated that a debtor who requests a finding of "special circumstances" seeks preferential treatment over other similarly situated debtors. In re Stocker, 399 B.R. 522, 531-32 (Bankr. M.D. Fla. 2008), citing S.Rep. No. 106-49, at 6-7 (1999).

> Thus, it follows that, where the circumstances are not involuntary, the "special circumstances" contemplated by §707(b)(2)(B)(i) must be highly unusual, and of the type not normally encountered by most debtors. As stated by one bankruptcy court:
>
> > Both a reading of the plain unambiguous language of 11 U.S.C. Section 707(b)(2)(B) and the BAPCPA legislative history lead to the same result: A debtor asserting "special circumstances" in support of additional expenses or income adjustment must establish the circumstances are extraordinary or exceptional, are unexpected or involuntary, and place the debtor in dire need of Chapter 7 relief.
>
> In re Stocker, 399 BR. at 532. In the end, however, any inquiry concerning the existence of 'special circumstances' is ultimately dependent on the particular facts of each debtor's situation, and thus must be conducted on a case-by-case basis. See, e.g., In re Vaccariello, 375 B.R. 809, 813; In re Siler, 426 B.R. 167, 172-173 (Bankr. W.D.N.C. 2010); In re Champagne, 389 B.R. 191, 200 (Bankr. D.Kan. 2008).

In re Conlee, 435 B.R. 490 (Bankr. N.D. Ohio 2010).

Of course, the “special circumstances” have to be sufficient, if accepted, to leave the debtor with less disposable income than the statutory amount that gives rise to the presumption of abuse. See e.g., In re Polinghorn, 436 B.R. 484, 490 (Bankr. N.D. Ohio 2010)(“the presumption of abuse would still not be rebutted. Section 707(b)(2)(B) requires that the adjustment to a debtors expenses warranted by the "special circumstances" must cause the debtor's disposable income to fall below the abuse thresholds of §707(b)(2). This would not occur in this case.”).

f. There is no specific “changed circumstances” exception in the statute.

A change in the debtor’s circumstances may be taken into account as part of the U.S. Trustee’s discretion to pursue dismissal (or not), but there is no statutory basis for rebutting a presumption of abuse by arguing that circumstances have changed, unless those changes rise to the level of “special circumstances. See, In re Karlstrom, 455 B.R. 370 (Bankr. W.D.N.Y. 2011)(change of circumstances could not be considered, even though finding of abuse was under totality of the circumstances).

g. If the debtor is below median, Schedules I and J are used for the totality of the circumstances test.

Where debtors are below the median, they are not required to complete the entire means test. In such cases, excess income as reflected in Schedules I and J is the appropriate figure to be used in examining her ability to pay as part of the totality of the circumstances test. See, In re Boule, 415 B.R. 1, 6 (Bankr. D. Mass. 2009).

4. Chapter 13 Means Test – The Form 22C Is Different.

"Chapter 13 borrows the means test from Chapter 7. In Chapter 13 proceedings, "the means test provides a formula to calculate a debtor's disposable income, which the debtor must devote to reimbursing creditors under a court-approved plan generally lasting from three to five years. §§1325(b)(1)(B) and (b)(4)" Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S.Ct. 716, 722 n.1, 178 L. Ed. 2d 603, 609 n.1 (2011).

While there is substantial "borrowing" from the , the statutes, rules and case law make it clear that the Chapter 13 Means Test serves a different purpose, is interpreted differently, and permits several deductions that are not permitted on the Chapter 7 Means Test.

a. The Sixth Circuit explains the source of the differences between the Chapter 7 and Chapter 13 Means Tests.

The Sixth Circuit Bankruptcy Appellate Panel, in Thomas, stated the primary reason that the Chapter 7 and Chapter 13 Means Tests are subject to different rules: "the requirement that a debtor calculate the debtor's "average monthly payments on account of secured debts" applies only in the calculation of *disposable income* under the means test and Congress gave no instruction as to how to integrate the chapter 7 "means test" into the calculation of *projected disposable income* as set forth in §1325(b)(1)." In re Thomas, 395 B.R. 914, 920 (6th Cir. BAP 2008). This distinction was the hook upon which the Supreme Court later hung its hat in the Lanning decision.

In Lanning, the Supreme Cout held that because the purpose of the Means Test in Chapter 13 is to determine "projected disposable income", and not just "disposable income", the Chapter 13 Means Test is 'forward looking'. Hamilton v. Lanning, ___ U.S. ___, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010). In rejecting the argument that a 'forward looking approach' made the definition of "disposable income" superfluous, the Lanning court stated: "As the Tenth Circuit recognized in this case, a court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses." Hamilton v. Lanning, ___ U.S. ___, 130 S. Ct. 2464, 2475, 177 L. Ed. 2d 23, 36 (2010).

This ‘forward looking’ approach has consequences on the Means Test. About a month and a half after the Lanning decision, the Sixth Circuit Court of Appeals addressed the same issue they decided in Thomas for Chapter 7 debtors – can secured claims that are not going to be paid in the future be deducted on the Means Test? The answer in Chapter 13, in contrast to the Chapter 7 Thomas decision, was “no”. In re Darrohn, 615 F.3d 470 (6th Cir. 2010).

As the Darrohn court stated:

> Beginning with the issue of the Darrohns' current monthly income, the bankruptcy court erred when it determined that it was required to use the income calculated on Form B22C, which was derived from the six-month look-back formula. In confirming the Darrohns' plan, the bankruptcy court stated that "the correct calculation of projected disposable income . . . is current monthly income determined in accordance with Section 101-10(a)." *Tr. of Bankruptcy Proceedings* at 46:22-25. The court then rejected the Trustee's arguments that the figures in Schedule I should have been the starting point for the Darrohns' monthly income. Yet because David Darrohn was unemployed for 90 days during the six-month look-back period, the figure used by the bankruptcy court was substantially less than the Darrohns' actual income at the time of confirmation. David Darrohn's new job - carrying an annual salary of $83,000 - was a "known or virtually certain" event at the time of confirmation. Therefore, the bankruptcy court had the authority to account for this change in calculating the Darrohns' projected disposable income. See Lanning, 177 L. Ed. 2d 23, 2010 WL 2243704 at *12. And by using amounts derived solely from the Darrohns' past income, rather than their projected income, the bankruptcy court's decision clashed with the mandates of Section 1325. See, 177 L. Ed. 2d 23, id. at *10.
>
> Moving to the issue of the Darrohns' reasonably necessary monthly expenses, the bankruptcy court also erred in failing to account for the Darrohns' intent to surrender properties securing the mortgages. In calculating their projected disposable income, the Darrohns' deducted over $2,700 in mortgage payments from their current monthly income, though they were no longer responsible for these payments. Responding to the Trustee's objection to these deductions, the bankruptcy court stated that "you have to determine these things at the petition" and "[a]t the petition three mortgages were contractually scheduled as due by this Debtor." *Tr. of Bankruptcy Proceeding* at 51:23-25, 52:1. The court then confirmed the Darrohns' plan, which was premised on a projected disposable income that included deductions for the mortgage payments. This

> calculation also clashed with the language of Section 1325. See Lanning, 177 L. Ed. 2d 23, 2010 WL 2243704 at *8.
>
> While much of the Court's analysis in Lanning focused on the income side of the projected disposable income formulation, the holding clearly applied to "changes in the debtor's income *or expenses* . . . ." 177 L. Ed. 2d 23, Id. at *12 (emphasis added). Further, the Court rested its holding on the meaning of the term "projected disposable income," which is calculated using a debtor's current monthly income and his reasonably necessary expenses. Thus, Lanning also governs the bankruptcy court's determination on the deduction for mortgage payments. Because it is undisputed that the Darrohns intended to surrender these properties, this represents a change in the Darrohns' "expenses that [was] known or virtually certain at the time of confirmation." Id. The bankruptcy court therefore should have accounted for this changed circumstance, and its failure to do so violated the requirements of Section 1325. See 177 L. Ed. 2d 23, id. at *8.

In re Darrohn, 615 F.3d 470, 476-477 (6th Cir. 2010)(Darrohn's citations to Lanning updated in brackets).

A similar issue arises in the context of 401(k) loan repayments. The Sixth Circuit Bankruptcy Appellate Panel held that the repayment of 401(k) loans is a event known with sufficient certainty to be a changed circumstance that must be taken into account in determining projected disposable income. See, Burden v. Seafort (In re Seafort), 437 B.R. 204 (6th Cir. BAP 2010). Subsequently, the Sixth Circuit Court of Appeals affirmed the Seafort decision, albeit on different grounds. Seafort v. Burden (In re Seafort), 669 F.3d 662 (6th Cir. 2012).

5. Why Chapter 13 Business/Non-Consumer Debtors Still Need To File A Means Test.

Federal Rule of Bankruptcy Procedure 1007(b)(6) requires:

> (6) A debtor in a chapter 13 case shall file a statement of current monthly income, prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, a calculation of disposable income made in accordance with §1325(b)(3), prepared as prescribed by the appropriate Official Form.

Section 1325(b)(3) states that "Amounts reasonably necessary to be expended under paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), . . . "

Also noteworthy is Section 1325(b)(2)(B)'s statement that: "(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business." Clearly, this provision contemplates that business debtors in Chapter 13 are to file a Means Test.

Thus, there is no statutory exclusion for Chapter 13 debtors who do not have primarily consumer debts – that is a Chapter 7 concept with no application in Chapter 13. See, In re Nogueira, 2008 Bankr. LEXIS 392 (Bankr. D.N.J. Feb. 13, 2008).

6. What About Below Median Income Debtors? How Are Their Expenses Properly Calculated in Chapter 13?

In Baud v. Carroll, the Sixth Circuit Court of Appeals stated:

> The appropriate method for calculating "amounts reasonably necessary to be expended" depends on whether the debtor's current monthly income is above or below the state median income. For debtors with current monthly income equal to or less than the applicable median family income, §1325(b) is silent on how to calculate these amounts, suggesting that they are to be based (as before BAPCPA) on the debtor's reasonably necessary expenses. See Schultz v. United States, 529 F.3d 343, 348 (6th Cir. 2008) (noting that expenditures for below-median-income debtors are to be calculated as they were pre-BAPCPA); 6 Lundin, supra, §466.1 ("Chapter 13 debtors with [current monthly income] less than applicable median family income remain subject to the familiar reasonable and necessary test for the deductibility of expenses in §1325(b)(2)(A) and (B).").

Baud v. Carroll, 634 F.3d 327, 332-333 (6th Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012).

The Baud court provided additional detailed guidance:

> For debtors with current monthly income exceeding the applicable median family income, however, §1325(b)(3) requires courts to determine the amounts reasonably necessary to be expended in accordance with the "means test," i.e., the statutory formula for determining whether a presumption of abuse arises in Chapter 7 cases. See 11 U.S.C. §1325(b)(3) (Supp. 2010) (requiring that "[a]mounts reasonably necessary to be expended under paragraph (2) . . . be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than [the applicable state median]"); Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 721-22, 178 L. Ed. 2d 603 (2011)("For a debtor whose income is above the

median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations."); Lanning, 130 S. Ct. at 2470 n.2 ("The formula for above-median-income debtors is known as the 'means test' and is reflected in a schedule (Form 22C) that a Chapter 13 debtor must file."). The result of determining these expenditures in accordance with the means test is that above-median-income debtors must use several standardized expenditure figures in lieu of their own actual monthly living expenses, see 11 U.S.C. §707(b)(2)(A)(ii)(I), a fact recognized by the Advisory Committee on Bankruptcy Rules when it promulgated Official Form 22C. See Official Form 22C, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, lines 24-29 (Dec. 2010). The standardized figures are derived from the IRS National Standards (for allowable living expenses and out-of-pocket health care) and IRS Local Standards (for housing, utilities and transportation expenses). See Means Testing: Census Bureau, IRS Data and Administrative Expenses Multipliers, http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm (last visited Jan. 31, 2011)(listing amounts for Local and National Standards). Above-median-income debtors also are allowed to deduct their "actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides[.]" See 11 U.S.C. §707(b)(2)(A)(ii)(I); Ransom, 131 S. Ct. at 727 ("For the Other Necessary Expense categories . . . the debtor may deduct his actual expenses, no matter how high they are."). These Other Necessary Expenses include certain taxes, involuntary employment deductions, life insurance on the debtor, certain court-ordered payments, certain educational expenses, childcare, unreimbursed health care and telecommunications services. See Official Form 22C, lines 30-37. Expenditures of above-median-income debtors for other items—including health and disability insurance, contributions to the care of certain household or family members, protection against family violence, home energy costs in excess of the allowance specified by IRS Local Standards, certain limited educational expenses, additional food and clothing expenses in excess of the applicable IRS National Standards and a certain amount of charitable contributions—are based on debtors' own reasonably necessary needs. See 11 U.S.C. §707(b)(2)(A)(ii)(I)—(V); Official Form 22C, lines 39-45. The means test and the Official Form allow certain deductions on account of ongoing payments contractually due on secured debts and priority claims without regard to whether those payments are reasonably necessary. See 11 U.S.C. §707(b)(2)(A)(iii)—(iv); Official Form 22C, lines 47-49. Because standardized expense figures are used in portions of the

> calculation, however, the amounts reasonably necessary to be expended by above-median-income debtors are unlikely to reflect these debtors' actual expenses. Cf. 6 Lundin, supra, §500.1 ("The amount of disposable income determined by the formula in §1325(b)(1) will bear no certain relationship to the debtor's actual financial ability to make payments . . . because the deductions from [current monthly income] to determine disposable income are artificial and not based on the debtor's actual financial circumstances . . . .").

Baud v. Carroll, 634 F.3d 327, 333-334 (6th Cir. 2011) *cert. denied*, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012); see also, White v. Waage, 440 B.R. 563, 566 (M.D. Fla. 2010)("For below median income debtors, the majority of courts have determined that Schedules I and J may be used to determine "projected disposable income."); In re Williams, 2012 Bankr. LEXIS 733 at *3 (Bankr. S.D. Ga. 2012); In re Renteria, 456 B.R. 444, 446 (Bankr. E.D. Cal. 2011)("The Debtor and her non-filing spouse are below the "median income" applicable to their family so her current monthly income is determined from schedules I and J."); In re Skougard, 438 B.R. 738, 740 (Bankr. D. Utah 2010); In re Tinsley, 428 B.R. 689, 692 (Bankr. W.D. Va. 2010); In re Forbish, 414 B.R. 400, 404 (Bankr. N.D. Ill. 2009); In re Hylton, 374 B.R. 579, 582 (Bankr. W.D. Va. 2007); In re Miller, 361 B.R. 224, 228 (Bankr. N.D. Ala. 2007); In Re Edmunds, 350 B.R. 636, 640 (Bankr. D.S.C. 2006); In re Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006); In re Schanuth, 342 B.R. 601 (Bankr. W.D. Mo. 2006)(using current monthly income less debtor's expenses on Schedule J); In re Kibbe, 342 B.R. 411 (Bankr. D.N.H. 2006).

7. Burden of Proof on the Means Test.

The District Court in Williams discussed the burden of proof for expenses deducted on the Means Test:

> In light of this statutory framework, one court has held that, at least with regards to claimed expenses that are debtor-specific, the debtors have the burden of proving that the amounts entered on Form 22A are accurate. In re Meade, 420 B.R. 291, 303 (Bankr. W.D. Va. 2009) (Stone, J.)(noting that "there seems to be little case authority on the issue of burden of proof on a post-BAPCPA motion to dismiss for abuse pursuant to §§707(b)(2) or (b)(3)" and holding that the debtor holds the burden of proof as to the expenses entered on Lines 25 through 44 of Form 22A). As the Meade court noted, not only is the relevant information much more readily available to the debtors than to any other party, but the line-item expenses also operate somewhat like "affirmative defenses to a motion to dismiss rather than elements of the presumption itself." Id. At the very least, it indeed appears that the operation of §707(b) unavoidably places some burden of production upon certain debtors, given that, if above-median-income debtors

failed to enter any expenses whatsoever on Form 22A, the UST would necessarily succeed in proving the presumption of abuse.

Regardless of whether the debtors have an initial burden of persuasion with relation to the line item expenses of Form 22A, it is evident that, at minimum, the UST's establishment of a prima facie case of presumptive abuse is enough to shift to the debtor the burden of going forward with evidence to controvert the prima facie case. See In re Perelman, 419 B.R. 168, 177 (Bankr. E.D. N. Y. 2009)("Once a prima facie case [under §707(b)(3)] is established by the UST, the burden of going forward with sufficient evidence to controvert the prima facie case is reposed in the non-moving party, the Debtor."). Thus, where the UST has produced evidence in support of its Form 22A line item calculations, and where the UST's calculations result in the debtor failing the means test, the burden of going forward shifts to the debtor to demonstrate that the particular line item expenses computed by the UST are in error. See In re Robrock, 430 B.R. 197, 209 (Bankr. D. Minn. 2010)(adopting the UST's figures in a dispute over the line item expense for taxes where "the Debtor produced no evidence at all to contradict the assumptions imposed by [the UST] on his inferences from all the documentation that the Debtor had provided to the U.S. Trustee."); Witek, 383 B.R. at 329 (adopting the UST's calculation of the debtor's CMI where the debtor had raised no evidence in support of his own proposed CMI calculation).

Williams v. McDow (In re Williams), 2010 U.S. Dist. LEXIS 85221 at *11-*13 (W.D. Va. Aug. 19, 2010).

D. The Form 22A Means Test By The Numbers - Chapter 7:

Line 1A: ***Disabled Veterans.*** *If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.*

☐ ***Declaration of Disabled Veteran.*** *By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. §3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. §101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).*

If the debtor meets the definition of a disabled veteran in 38 U.S.C. §3741(a), with debts incurred during active duty (as defined in 10 U.S.C. S §101(d)(1)), or while performing homeland defense duties (as defined by 32 U.S.C. §901(1)), the debtor can check the box on

Line 1A, and the "presumption does not arise box", and complete the verification in Part VIII. Nothing else needs to be completed. "[D]isabled veterans are permitted an exclusion in Form B22A, but not in Form B22C". In re Kerr, 2007 Bankr. LEXIS 2474 at *16 (Bankr. W.D. Wash. July 18, 2007).

Line 1B: ***Non-consumer Debtors.*** *If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.*

☐ ***Declaration of non-consumer debts.*** *By checking this box, I declare that my debts are not primarily consumer debts.*

If the debtor(s) debts are not primarily consumer debts, check the box on Line 1B, and complete the verification in Part VIII. Nothing else needs to be completed. If it applies – check the box!

The majority of courts that have considered the issue have found that "primarily" means more than half of the total dollar amount owed. In re Stewart, 175 F.3d 796, 808 (10th Cir. 1999)("primarily means more than fifty percent of the amount of the debt).

Home mortgages (unless taken out to finance a business) are generally considered consumer debts. In re Kelly, 841 F.2d 908 (9th Cir. 1988)(although bankruptcy debtors' debts were secured by real property, the debts constituted consumer debt); In re Cox, 315 B.R. 850, 855 (8th Cir. BAP 2004)(if the debtor's purpose in incurring the debt is to purchase a home or make improvements to it, the debt is clearly for family or household purposes and fits squarely within the definition of a consumer debt under §101(8)); In re Hlavin, 394 B.R. 441, 444-445 (Bankr. S.D. Ohio 2008)(rejecting argument that security by real estate made mortgage debt non-consumer).

Alimony and child support are generally held to be consumer debts. In re Stewart, 175 F.3d 796, 807 (10th Cir. 1999)(alimony constitutes a consumer debt); In re Kestell, 99 F.3d 146, 149 (4th Cir. 1996) (alimony, child support, and lump-sum award are considered "consumer debt" as they were not incurred with a profit motive or in connection with a business transaction).

Taxes are usually held NOT to be consumer debts. In re Westberry, 215 F.3d 589 (6th Cir. 2000)(income tax liabilities are not consumer debts); In re Brasher, 216 B.R. 59 (Bankr. N.D. Okla. 1998); In re Stovall, 209 B.R. 849 (Bankr. D. Va. 1997)(personal property taxes are not consumer debts); In re Greene, 157 B.R. 496 (Bankr. D. Ga. 1993)(majority view is that a tax liability is not a consumer debt); In re Reiter, 126 B.R. 961 (Bankr. D. Tex. 1991)(tax debt does

not qualify as consumer debt); see also, In re Dye, 190 B.R. 566, 567 (Bankr. N.D.Ill. 1995); In re Goldsby, 135 B.R. 611, 613 (Bankr. E.D.Ark. 1992); In re Traub, 140 B.R. 286 (Bankr. D.N.M. 1992); In re Gault, 136 B.R. 736, 738 (Bankr. E.D.Tenn. 1991); In re Harrison, 82 B.R. 557, 558 (Bankr. D.Colo. 1987); In re Pressimore, 39 B.R. 240, 244-5 (N.D.N.Y. 1984).

Line 1C: ***Reservists and National Guard Members; active duty or homeland defense activitiy.*** *Members of a reserve component of the Armed Forces and members of the National Guard who were called to active duty (as defined in 10 U.S.C. §101(d)(1)) after September 11, 2001, for a period of at least 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. §901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the verification in Part VIII. During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.*

☐ ***Declaration of Reservists and National Guard Members.*** *By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing because, as a member of a reserve component of the Armed Forces or the National Guard*

a. ☐ *I was called to active duty after September 11, 2001, for a period of at least 90 days and*

☐*I remain on active duty /or/*

☐ *I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed;*

OR

b. ☐ *I am performing homeland defense activity for a period of at least 90 days /or/*

☐ *I performed homeland defense activity for a period of at least 90 days Terminating on _____, which is less than 540 days before this bankruptcy case was filed.*

Under certain fairly complex circumstances, Reservists and Members of the National Guard can delay the filing of a fully completed Chapter 7 Means Test. Read the criteria carefully.

Part II. CALCULATION OF MONTHLY INCOME FOR §707(b)(7) EXCLUSION

Line 2: ***Marital/filing status:*** *Marital/filing status. Check the box that applies and complete the balance of this part of this statement as directed.*

a. ☐ *Unmarried.* ***Complete only Column A ("Debtor's Income") for Lines 3-11.***

b. ☐ *Married, not filing jointly, with declaration of separate households. By checking this box, debtor declares under penalty of perjury: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart other than for the purpose of evading the requirements of §707(b)(2)(A) of the Bankruptcy Code."* ***Complete only Column A ("Debtor's Income") for Lines 3-11.***

c. ☐ *Married, not filing jointly, without the declaration of separate households set out in Line 2.b above.* ***Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.***

d. ☐ *Married, filing jointly.* ***Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.***

All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	***Column A Debtor's Income***	***Column B Spouse's Income***

The debtor's options are: **a.** Unmarried. **b.** Married, not filing jointly, with a sworn declaration of separate households. Debtor to fill out only column A. **c.** Married, not filing jointly, without a declaration of separate households – debtor to fill out both columns A and B on the Chapter 7 Means Test. There are consequences to the choices made by married debtors on this line that should be carefully considered.

> Form B22A requires a debtor, when calculating their 'current monthly income,' to claim on line 2 the entirety of a non-filing spouse's income, but then allows a debtor to deduct on line 17 those amounts not regularly paid by the non-filing spouse toward the household expenses of the debtor. The allowance on line 17 is referred to as the "marital adjustment."

In re Sturm, 2102 Bankr. LEXIS 4383 (Bankr. N.D. Ohio Sept. 21, 2012).

Line 3: ***Gross wages, salary, tips, bonuses, overtime, commissions. $_____ $_____***

The key word is GROSS. Not "taxable gross". The numbers should be obtained from pay advices, and the amount used should be prior to any deductions. Using the numbers on a tax return as a surrogate doesn't work because, for example, 401(k) contributions are not included in gross taxable income.

Be careful to disclose the receipt of monies that you may claim are outside the applicable lookback period – the case law on when payments are received is not well defined. In re Cotto, 425 B.R. 72 (Bankr. E.D.N.Y. 2010)(union wage settlement should have been included on Line 3 when monies were received during the 6 month look back period); In re Meade, 420 B.R. 291 (Bankr. W.D. Va. 2009)(annual bonus received in 6 months before filing should have been included on Line 3, but could be "annualized" over 12 months). Similarly, even income the debtor no longer receives is included on Line 3. See, In re Leggett, 2011 Bankr. LEXIS 820 (Bankr. E.D.N.C. 2011); In re Barbour, 2009 Bankr. LEXIS 3006 (Sept. 18, 2009).

Generally speaking, if there is no period of unemployment, if a debtor is paid semi-monthly, the gross number should consist of 12 checks, If a debtor is paid bi-weekly, there should be 13 checks. If a debtor is paid weekly, there should be 26 checks.

A non-filing spouse's gross income must also be listed on Line 3. In re Kulakowski, 66 Collier Bankr. Cas. 2d (MB) 559, 2011 Bankr. LEXIS 3284 (Bankr. M.D. Fla. Sept. 2, 2011). Any "marital adjustment" deduction would go on Line 17. Id. Failing to list the income of a spouse living in the same household is grounds for dismissal of the Chapter 7 case. See, In re Kuhns, 2011 Bankr. LEXIS 3900 (Bankr. N.D. Ohio Oct. 7, 2011).

Not surprisingly – since the list explicitly includes "bonuses" – it has been held that bonuses have to be included as income on Line 3. See, In re Taborski, 2013 Bankr. LEXIS 214 at *7 -*10 (Bankr. W.D. Pa. January 18, 2013).

The Inghilterra decision discussed a debtor's "demo pay" – a subsidy for the use of demo cars that appeared on his pay check as income, but he was required to also pay the "demo deduct". The debtor argued that the demo car was more in the nature of a fringe benefit, and that he could not get the demo pay without the demo deduct (which exceeded the demo pay by about $60 a month). In holding that the "demo pay" was part of gross income, the court stated:

There is nothing absurd, however, about allowing demo pay to be treated as income for purposes of determining Debtors' eligibility to file under Chapter 7. "Congress designed the means test to measure debtors' disposable income and, in that way, 'to ensure that [they] repay creditors the maximum they can afford.'" Ransom v. FIA Card Servs. N.A., 131 S.Ct. 716, 725, 178 L. Ed. 2d 603 (201 l)(*quoting* H.R.Rep. No. 109-31, pt. 1, p.2 (2005)). "This purpose is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor's ability to afford repayment." Id. That requires a separate analysis of the income and expense amounts in each case. Related income and expenses cannot be netted to collapse that analysis. As above-median debtors, the Debtors are limited to the expense amounts set forth in the Local and National Standards as provided in 11 U.S.C. §707(b)(2)(A)(ii)(I). These Debtors, like all Debtors, have to make choices about how to expend the dollars allowed under the Local and National Standards.

Debtors here have chosen to accept the benefit of use of a "demo vehicle." In so doing, they have also chosen to accept the consequence of incurring an expense that exceeds the National Standard for transportation ownership costs. Debtors in Chapter 7 are, by definition, of limited means and without ability to repay their creditors. As Congress apparently intended, if a debtor can afford more than the standard expenses, it most likely suggests that the debtor does, in fact, have the ability to repay creditors to some extent and should not be proceeding in Chapter 7.

In re Inghilterra, 2012 Bankr. LEXIS 1460 at *20 - *21 (Bankr. D. Colo. April 4, 2012).

Line 4: ***Income from the operation of a business, profession or farm.*** *Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero.* ***Do not include any part of the business expenses entered on Line b as a deduction in Part V.***

a. Gross receipts	*$*_____	
b. Ordinary and necessary business expenses	*$*_____	
c. Business income	*Subtract Line b from Line a* *$*_____	*$*_____

The Means Test form is – according to the majority of the case law – wrong on this issue, at least for Chapter 13 cases. Gross income should be used to determine if a debtor is above or below the median income level, NOT net income. While most of the litigation on this issue has been in Chapter 13 cases [In re Wiegand, 386 B.R. 238 (9th Cir. BAP 2008)], it is unclear whether this distinction would be made in Chapter 7 cases. For example, with no discussion of

the Wiegand issues, the court Hageney deducted business expenses prior to determining whether the debtor was above or below the median. See, In re Hageney, 422 B.R. 254, 258-59 (Bankr. E.D. Wash. 2009).

If deductions for "ordinary and necessary operating expenses" are allowable on Line 4, it is important not to put any expenses in Line 4b that would also be deducted on other parts of the Means Test:

> The court agrees, however, that Smith's business expenses reported in the amount of $1,511 on line 4(b) are overstated. Debtors obtained the $1,511 figure from Smith's estimate of business expenses and taxes for 2005 in the amount of $18,128 ($18,128 / 12), the same calculations he used in reporting his income on Schedule I. However, on Form B22A, income tax expenses, along with social security and Medicare taxes, are reported separately on line 25 as a category under "Other Necessary Expenses." They are not properly included as a business expense on line 4(b) since the CMI calculation is of gross income, or income before taxes.

In re Smith, 2007 Bankr. LEXIS 2173 at *10 -*11 (Bankr. N.D. Ohio 2007)(Whipple, J.)

One court has held that, where bolstered by testimony (and perhaps as a general practice, even when not so supported) the business income from the debtor's tax return should be used for the Line 4(c) "business income" number. See, In re Babson, 2011 Bankr. LEXIS 4519 (Bankr. E.D.N.C. Nov. 1, 2011). The concerns in Babson appear to center on the costs of goods being sold by the business not being adequately reflected in the costs of goods purchased in the 6 month prior to filing, and that an average spent over the previous two years (as reflected on the tax returns for those years) was a more realistic number. Whatever the merits of that approach to the cost of goods, a wholesale use of tax returns over periods of time different from what the Bankruptcy Code directs, and the use of depreciation, IRS mileage deductions, tax loss carry forwards, etc., would be highly controversial.

In contrast, the Hageney decision looked at the business expenses actually incurred in the 6 months prior to filing. See, In re Hageney, 422 B.R. 254, 258-59 (Bankr. E.D. Wash. 2009).

The deductions on Line 4 for business expenses cannot be used where the debtor has only wage income. See, In re Patterson, 392 B.R. 497, 505-506 (Bankr. S.D. Fla. 2008)(truck driver receiving wage income could not deduct 'business expenses' on Line 4.)

Line 5: ***Rent and other real property income.*** *Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 5. Do not enter a number less than zero. Do not include any part of the operating expenses entered on Line b as a deduction in Part V.*

a. Gross receipts *$_____*

b. Ordinary and necessary operating expenses *$_____*

c. Rent and other real property income *Subtract Line b from Line a* *$____* *$____*

Again, the rent number should be a gross figure. Do not deduct, on line 5, the expense for mortgages that are deducted on Line 42 – there is no 'double counting' of expenses on the Means Test. Of course, if the rental property was being surrendered or foreclosed upon, the rent would not be projected disposable income available in a Chapter 13. Cf., In re Gordon, 2012 Bankr. LEXIS 221 at *6-*7 (Bankr. N.D. Ga. Jan. 23, 2012)(comment made in the context of a motion to convert under §706(b)). The burden of proof is on the debtor to show the loss of rental income, with documentation like foreclosure paperwork, or something showing an absence of renters. See, In re Miller, 2010 Bankr. LEXIS 2447 at *21 (Bankr. N.D. Ala. June 30, 2010).

Line 6: ***Interest, dividends and royalties.*** *$____* *$____*

If you list stock dividends, make sure you've listed the stock on Schedule B, Line 13.

Line 7: ***Pensions and retirement income.*** *$____* *$____*

Do not put social security income on this line.

There are reported cases where the debtor's pension has been understated – probably because of some amount that is withheld from the pension. See, In re Cotto, 425 B.R. 72, 76 (Bankr. E.D.N.Y. 2010)(pension stated at $2,519.46 on Line 7 was actually $3,082.50. The error was spotted by comparing Line 7 with the pension income listed on the debtor's tax return.).

If the debtor is receiving a pension, the pension should be listed on Schedule B, Line 12. If the pension is an older style defined benefits plan, without an account balance associated with it, the notation of "traditional pension" and/or "no account balance" may save everyone's time, rather than putting down "unknown" and making the trustee inquire about the account balance.

Line 8: ***Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.*** *Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed. Each regular payment should be reported in only one column; if a payment is listed in*

Column A, do not report that payment in Column B. *$____ $____*

Child support must be included as income on Line 8. In re Taborski, 2013 Bankr. LEXIS 214 at *10 -*13 (Bankr. W.D. Pa. January 18, 2013). Income from child support should go on Line 8, not on Line 10 of the Form 22A. In re Steinberg, 2010 Bankr. LEXIS 4001 at *4 n.2 (Bankr. D. Wyo. Oct. 8, 2010). "Child support" includes monies received by an adult daughter, living with the debtor, for her infant son. In re Justice, 404 B.R. 506, 518-521 (Bankr. W.D. Ark. 2009).

A roommate's monthly contribution to household expenses should be listed on Line 8. See, In re Epperson, 409 B.R. 503, 508 (Bankr. Ariz. 2009). Contributions by a domestic partner would also go on this line. See, In re Babson, 2011 Bankr. LEXIS 4519 at *4 -*5 (Bankr. Nov. 1, 2011). A fiancé's payment of half the mortgage should go on Line 8. See, In re Gilligan, 2007 Bankr. LEXIS 4706 at *4 (Bankr. E.D.N.C. Jan. 24, 2007)("Clearly, Ms. Davis' contribution to the mortgage must be included in Mr. Gilligan's current monthly income.").

The alimony or maintenance payments made by a debtor's spouse aren't included if the debtor(s) completed Column B, based upon their election on Line 2.

Line 9: ***Unemployment compensation.*** *Enter the amount in the appropriate column(s) of Line 9. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:*
Unemployment compensation claimed to be a benefit under the Social Security Act Debtor $ _____ Spouse $ _____ *$____ $____*

There was some early case law that held that unemployment compensation was a social security benefit. See, In re Munger, 370 B.R. 21 (Bankr.D.Mass. 2007); In re Sorrell, 359 B.R. 167 (Bankr.S.D.Ohio 2007). The more recent cases hold that unemployment benefits count as income for purposes of calculating CMI. See, In re Washington, 438 B.R. 348 (M.D. Ala. 2010); In re Gentry, 463 B.R. 526 (Bankr. D. Colo. 2011); In re Kucharz, 418 B.R. 635 (Bankr. C.D. Ill. 2009); In re Baden, 396 B.R. 617 (Bankr.M.D.Pa. 2008); In re Overby, Bankr. L. Rep. (CCH) P81,868, 2010 Bankr. LEXIS 8183 (Bankr. W.D. Mo. Sept. 24, 2010); In re Winkles, 2010 Bankr. LEXIS 2151, 2010 WL 2680895 (Bankr. S.D. Ill. July 6, 2010); In re Nance, 64 Collier Bankr. Cas. 2d (MB) 230, 2010 Bankr. LEXIS 1736, 2010 WL 2079653 (Bankr. S.D. Ind. May 21, 2010); In re Rose, 2010 Bankr. LEXIS 1851, 2010 WL 2600591 (Bankr. N.D. Ga. May 12, 2010); In re VanDyne, 2011 Bankr. LEXIS 3236, (Bankr. N..D. Ohio August 19, 2011).

Line 10: ***Income from all other sources.*** *Specify source and amount. If necessary, list additional sources on a separate page. Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.*

a. | |*$*_____

b. | |*$*_____

Total and enter on Line 10 *$*_____ *$*_____

$ $

This is the "catch-all" provision. But it isn't for income excluded under Section 101(10A)(B), such as benefits paid under the Social Security Act, nor is it for alimony or separate maintenance payments if you are including your spouse's income in column B.

Line 11: ***Subtotal of Current Monthly Income for §707(b)(7).***

Add Lines 3 thru 10 in Column A, and, if Column B is completed, add Lines 3 through 10 in Column B. Enter the total(s). *$*_____ *$*_____

This is the line where each column is subtotaled. Section 707(b)(7) is the subsection that makes the §707(b)(2) "presumption of abuse" only applicable to debtors with above median income levels, based on the Means Test..

Line 12: ***Total Current Monthly Income for §707(b)(7).***

If Column B has been completed, add Line 11, Column A to Line 11, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 11, Column A. *$*_____

This is the column A + column B number.

Part III. APPLICATION OF §707(b)(7) EXCLUSION

Line 13: ***Annualized Current Monthly Income for §707(b)(7).***

Multiply the amount from Line 12 by the number 12 and enter the result. *$*_____

This is column A, plus column B, times 12 months. In re Rable, 445 B.R. 826, 827 (Bankr. N.D. Ohio 2011)("As then required by Line 13 of Form B22A, the Debtor annualized this income, showing a yearly household income of $89,001.24.") This number will be compared to the applicable median income number for the household size reflected on Line 14.

Line 14: ***Applicable median family income.*** *Enter the median family income for the applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)*
a. Enter debtor's state of residence: ____ b. Enter debtor's household size: ____ $_____

This line is where you declare "household size", and based upon that household size, you (or more likely your computer program) plugs in the median income level for the debtor's state of residence.

There are two levels of controversy associated with Line 14. First, is the Official Form description of who qualifies to be a person listed on Line 14 consistent with the Bankruptcy Code? And, second, what is the appropriate test to determine if a person qualifies to be a household member.

The approach that limits the household size to just "dependents" relies upon the fundamental concept (discussed above) that an Official Form cannot override the Bankruptcy Code. Specifically, courts which adhere to the 'dependents' approach for determining household size hold that any definition of "household" used for means test calculations must be reconciled with the restrictions of 11 U.S.C. §707(b)(2). This stepping back from the language of the Form 22A is necessary because Line 14 just states: "Enter the debtor's household size."

In contrast to the term "household" used on Line 14, the Napier court, in a Chapter 13 case, noted:

> Section 707(b)(2)(A)(ii)(I) allows Debtors to reduce their income by "applicable monthly expense amounts specified under the National Standards and the Local Standards … issued by the Internal Revenue Service … for the debtor, the dependent of the debtor, and the spouse of the debtor…." Though the language in §707(b)(2)(A)(ii)(I) is awkwardly worded, it indicates that the expenses must relate to dependents of Debtors in order to allow Debtors to increase their applicable means test deductions. This interpretation is supported by the legislative history of §707(b), which also indicates that the standard deductions allowed by §707(b)(2)(A)(i) must be made with reference to Debtors' dependents. *See* H.R. Rep. No. 109-31(1), at 48 (2005).

The court in Napier held that "[t]o the extent that Official Form B22C indicates that Debtors may include [non-dependents] in the means test calculation, it must yield to the plain language of §707(b)(2), which only allows Debtors to include dependents." In re Napier, No. Civ. A. 06-02464-JW, 2006 Bankr. LEXIS 2248, 2006 WL 4128358, at *2 (Bankr. D.S.C. Sept.

18, 2006). Similarly, the court in In re Law held that, once the court is directed to 11 U.S.C. §707(b)(2)(A)(ii)(I) for above-median Chapter 13 debtors, "it becomes abundantly clear that [such debtors] may only claim expenses for themselves, their dependents, and their spouse (in a joint case) if the spouse is not otherwise a dependent." In re Law, No. 07-40863, 2008 Bankr. LEXIS 1198, 2008 WL 1867971, at *5 (Bankr. D. Kan. Apr. 24, 2008).

Because the expenses which a debtor can claim under the means test are primarily those included in various standards issued by the IRS, and because the standards may only be deducted for a debtor or his "dependents," bankruptcy courts following the IRS dependency approach have limited the definition of "household" for means test purposes to a person the debtor may claim as a dependent on his tax return. In re De Bruyn Kops, 2012 Bankr. LEXIS 775 at *12 -*13 (Bankr. D. Idaho Feb. 9, 2012). The De Bryun Kops decision considered these arguments (in a Chapter 7 case) and rejected them in favor of a different approach:

> The first step in determining the meaning of a federal statute's language is to look at the text's plain meaning. Father M. v. Various Tort Claimants (In re Roman Catholic Archbishop of Portland), 661 F.3d 417, 432-33 (9th Cir. 2011). Words in the text are to be given their ordinary meanings, unless otherwise defined. See id. Dictionary definitions may be used to determine specific language's plain, ordinary meaning. See id. Section 707(b)(2) does not assign a specialized definition or meaning to the word "dependent." Turning to the dictionary, "dependent" is defined as "[o]ne who relies on another for support." BLACK'S LAW DICTIONARY 503 (9th ed. 2009). Because that definition is much broader than a dependent for tax purposes only, the Court concludes the IRS dependency approach is not appropriate for use throughout the means test.

Looking at the case law a little differently, there are three main ways that courts look at what constitutes a “household”: “Courts have taken three main approaches to determining a debtor's household size. The "heads on beds" approach uses the Census Bureau definition, and includes any individuals occupying the debtor's housing unit. The IRS dependency approach limits household size to only those individuals who the debtor can claim as a dependent on his or her tax returns. The "economic unit" approach includes any individuals living in the same economic unit as the debtor.” In re Morrison, 443 B.R. 378, 384 (Bankr. M.D.N.C. 2011).

Cases following “Heads on Beds”, also known as the “Census Bureau Approach”, include in the calculation of household size for means test purposes, anyone living in a debtor's home at the time he or she files for bankruptcy. While the term "household" is not defined in the Code, "median family income" is, and means "the median family income both calculated and reported by the Bureau of the Census in the then most recent year." §101(39A)(A). Because of this provision's reference to the Census Bureau (the "Bureau"), bankruptcy courts have consulted

that agency for a definition of "household". See, e.g., In re Epperson, 409 B.R. 503, 506-07 (Bankr. D. Ariz. 2009); In re Ellringer, 370 B.R. 905, 910-11 (Bankr. D. Minn. 2007);

The criticism of this approach starts with the fact that §101(39A)(A) refers to the Bureau's calculated and reported figures for "median family income," not "median household income." The Bureau produces figures for both, and the methodology used in calculating either figure primarily hinges on the differences in the Bureau's definitions of "family" and "household." The Bureau's statistics on household income include not only the income of a dwelling unit's owner or renter, but also the income for "all other individuals 15 years old and over in the household, whether they are related to the [owner or renter] or not." Therefore, any time unrelated individuals live in a debtor's home, the Bureau's definition of "household" will produce a number greater than the "family" upon which the median family income figure is calculated, creating an inconsistency between that figure and the figure upon which the remaining means test calculations would be based. Because the Bureau's "household" definition, upon which the heads on beds approach is based, does not correlate to the Bureau's definition of "median family income," it should not, absent clear direction from Congress, be applied throughout the means test. See, In re De Bruyn Kops, 2012 Bankr. LEXIS 775 at *7 -*12 (Bankr. D. Idaho Feb. 9, 2012).

The "Economic Unit Approach" arose from criticism of the "Heads on Beds Approach. For example, the Jewell court observed:

> If a person lives in the home with the debtor but the debtor does not support that person, then inclusion of that person for purposes of calculating the applicable median family income and disposable income would give rise to a faulty calculation and would result in an inaccurate figure for both.

In re Jewell, 365 B.R. 796, 800 (Bankr. S.D. Ohio 2007).

Similarly, in In re Herbert, 405 B.R. 165, 169 (Bankr. W.D.N.C. 2008), the court concluded that while unrelated, non-dependent individuals may be part of a household, the "heads on beds" approach is too broad because it includes anybody who may be residing under the debtor's roof without regard to their financial contributions to the household or the monetary support they may be receiving from the debtor.

In response to the perceived deficiencies of the Head on Beds and IRS Dependents approach, courts developed a test that deems a person a member of a debtor's household if that person operates as a "single economic unit with the debtor." In re De Bruyn Kops, 2012 Bankr. LEXIS 775 at *7 -*12 (Bankr. D. Idaho Feb. 9, 2012).

Cases following the "economic unit" approach are: In re Robinson, 449 B.R. 473 (Bankr. E.D. Va. 2011); In re Morrison, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011); In re Gaboury, 2011 Bankr. LEXIS 4434 (Bankr. D.R.I. Nov. 18, 2011)(Using the Morrison factors, a 27 year old sporadically employed son living with debtors may be "a joy to have around", but was "not a part of the economic engine that drives the household." Accordingly, he could not be included in the household size on the Form 22C means test.); In re Johnson, 2011 Bankr. LEXIS 4636 at *4 - *8 (Bankr. E.D.N.C. July 21, 2011)(Although acknowledging that dividing children into fractions is not ideal, the court followed Robinson in using "fractional" dependents for children who reside with the debtor(s) on a part time basis – the court rounded up 2.59 members to 3);

The Morrison factors are:

1) the degree of financial support provided to the individual by the debtor;
2) the degree of financial support provided to the debtor by the individual;
3) the extent to which the individual and the debtor share income and expenses;
4) the extent to which there is joint ownership of property;
5) the extent to which there are joint liabilities;
6) the extent to which assets owned by the debtor or the individual are shared, regardless of title; and
7) any other type of financial intermingling or interdependency between the debtor and the individual.

In re Morrison, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011)(debtor and the boyfriend she lived with operated as a single economic unit, sharing a significant amount of their income and expenses, providing each other with financial support, and sharing the use of assets).

The recent decision in In re De Bruyn Kops generally followed the "Economic Unit Approach" but not the Morrison list of factors. The decision supported use of the Economic Unit Approach to the extent it was limited it to: "a unit consisting of a debtor and his dependents, such an approach is appropriate for use throughout the means test. In other words, the correct approach is one that determines household members based on a person's financial dependence upon, and residence with, a debtor." In re De Bruyn Kops, 2012 Bankr. LEXIS 775 at *16 (Bankr. D. Idaho Feb. 9, 2012).

Of course, regardless of the test used, debtors can't have it both ways. In re Hays, 2008 Bankr. LEXIS 1321, 2008 WL 1924233 at *2 (Bankr. D.Kan. 2008)(reasoning that "[i]f Debtors intend to claim this daughter as a dependent on the expense side of the means test equation, which would be to their benefit, they will also be required to acknowledge that she is a dependent on the income side of the equation, as well.").

Line 15: ***Application of Section 707(b)(7).*** *Check the applicable box and proceed as directed.*

☐ *The amount on Line 13 is less than or equal to the amount on Line 14. Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete Part VIII; do not complete Parts IV, V, VI or VII.*

☐ *The amount on Line 13 is more than the amount on Line 14. Complete the remaining parts of this statement.*

This line directs counsel to compare Lines 13 and 14, and check one of two boxes: Current Monthly Income ("CMI") is less than or equal to the median income level on Line 14; or 2) CMI on Line 13 is more than the median income level on Line 14.

Complete Parts IV, V, VI, and VII of this statement only if required. (See Line 15.)

Part IV. CALCULATION OF CURRENT MONTHLY INCOME FOR §707(b)(2)

Line 16: ***Enter the amount from Line 12****.* *$_____*

What is being entered on Line 16 is monthly, non-annualized CMI.

Line 17: ***Marital adjustment.*** *If you checked the box at Line 2.c, enter on Line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero.*

a. | | *$_____*
b. | | *$_____*
c. | | *$_____*
Total and enter on Line 17. *$_____*

This is one of the most difficult and controversial sections of the Means Test. The direction is to enter, as a deduction, any income listed on Line 11, Column B, for a non-filing spouse, that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Keep in mind, this deduction section is ONLY applicable if the debtor

checked Line 2.c: “Married, not filing jointly, without the declaration of separate households” on Line 2.b. See, Lynch v. Parrish, 382 B.R. 907, 909 n.2 (E.D.N.C. 2008).

> “A debtor's Current Monthly Income extends to a non-filing spouse's regular contributions to "the household expenses of the debtor *or the debtor's dependents*." 11 U.S.C. §101(10A)(B) (emphasis added). By contrast, Current Monthly Income in a joint filing includes regular contributions by "any entity" to the household expenses of both spouses. Id. This distinction indicates Congress sought to exclude, from the debtor's Current Monthly Income, the non-filing spouse's expenses to the extent such expenses are not shared by the debtor.”

Sturm v. United States Trustee, 455 B.R. 130, 135 (N.D. Ohio 2011).

> In both forms [Forms 22A and 22C], married, single-filing debtors must include their non-filing spouse's income before marital adjustments become available for sums not regularly contributed to the household expenses of the debtor or the debtor's dependents (Form B22A at line 17; Form B22C at line 19).

Sturm v. United States Trustee, 455 B.R. 130, 137 (N.D. Ohio 2011).

Thus, on remand, the Sturm bankruptcy court stated:

> Section 101(10A)(B), however, generally limits the scope of such income to only those amounts actually paid on a regular basis for the household expenses of the debtor or the debtor's dependents. In other words, a debtor is only required to include in their 'current monthly income,' money paid from a third party, such as a spouse, when the debtor receives a direct and reoccurring benefit from the payment. Based upon this limitation, Form B22A requires a debtor, when calculating their 'current monthly income,' to claim on line 2 the entirety of a non-filing spouse's income, but then allows a debtor to deduct on line 17 those amounts not regularly paid by the non-filing spouse toward the household expenses of the debtor. The allowance on line 17 is referred to as the "marital adjustment."

In re Sturm, 2012 Bankr. LEXIS 4383 (Bankr. N.D. Ohio Sept. 21, 2012).

The "'determination of the amount paid by a non-filing spouse on a regular basis for household expenses of the debtor or the debtor's dependents is necessarily fact specific and subject to interpretation.'" In re Sale, 397 B.R. 281, 287 (Bankr. M.D. N.C. Oct. 15, 2007) (quoting In re Travis, 353 B.R. 520, 526 (Bankr. E.D. Mich. 2006)).

For example, the Kulakowski case looks at the marital deduction law and the particular fact situation in some detail:

> In other words, the Debtor may not merely think up a theory for a marital adjustment, but must connect the adjustment to specific deductions and expenses. Not only must the debtor itemize, the burden is on the debtor to substantiate. As the court in In re Hickman, 2008 Bankr. LEXIS 3253, 2008 WL 2595182, *3 (Bankr. W.D. Wash. Jun. 27, 2008) explained:
>
> > Thus, if a debtor's non-filing spouse has income, that portion of the spouse's income not dedicated to paying household expenses normally is deducted from the CMI, under the "marital adjustment." The "'determination of the amount paid by a non-filing spouse on a regular basis for household expenses of the debtor or the debtor's dependents is necessarily fact specific and subject to interpretation.'" [Citations omitted.]
> >
> > In this case, prior to the hearing, the Debtor did not claim a marital adjustment on the Means Test Form. Moreover, the Debtor failed to present any evidence regarding funds from [the non-filing spouse's] income that were not regularly contributed to the household expenses of the Debtor or their children. Lastly, the Debtor made no argument in this respect in his post-evidentiary hearing brief. The Debtor has failed to establish the grounds for a marital adjustment in any amount.
>
> In the Debtor's Amended Official Form 22A, the Debtor characterizes her husband's regular contribution to household expenses as being limited to one-half of their combined household expenses. The Debtor calculates this to be $2,169.16. Although the Debtor does not claim that her husband only contributes $2,169.16 per month to their household, she contends that she should not be forced to recognize a contribution from her husband that exceeds one-half of the household expense. This argument runs counter to the reality - which is that all of Mr. Kulakowski's income has historically been available to support the Debtor and their household.
>
> Alternatively, the Debtor contends that her husband's contribution to the household is capped at one-half of the Debtor's household expenses. But the logic of this second alternative interpretation is entirely circular - under this reasoning,

Mr. Kulakowski's income could be unlimited, yet the Debtor would never, and could never, fail the means test. The Debtor has cited no authority for either of her interpretations.

The appropriate method is clear. The marital adjustment must reflect the reality of what has not been contributed to the household in the past, be itemized, and be factually supported. The marital adjustment should not merely reflect one-half of the household expenses or be capped by the Debtor's household expenses, but must reflect actual contributions.

In re Kulakowski, 66 Collier Bankr. Cas. 2d (MB) 559, 2011 Bankr. LEXIS 3284 at *14 -*16 (Bankr. M.D. Fla. Sept. 2, 2011).

The Persaud case also discusses the marital deduction in some depth:

Current monthly income includes, inter alia, "any amount paid by any entity other than the debtor...on a regular basis for the household expenses of the debtor or the debtor's dependents." §101(10A)(B)(emphasis added). Income of a non-filing spouse can therefore be excluded only to the extent it is not regularly contributed to household expenses. See Stapleton v. Baldino (In re Baldino), 369 B.R. 858, 860 (Bankr. M.D. Pa. 2007). An expense paid by the non-debtor spouse will be considered a household expense, and thus included in income on the means test, unless the expense is "purely personal" to the non-debtor spouse. See In re Rable, 445 B.R. 826, 829 (Bankr. N.D. Ohio 2011). Official Form 22A, which is used by Chapter 7 debtors to calculate the means test, incorporates this principle by including in debtor's income all of a non-debtor spouse's income, but allowing a debtor to deduct, as a "marital adjustment," any income of debtor's spouse that was not paid on a regular basis towards the household expenses of the debtor or the debtor's dependents. See Official Form 22A at Line 17. "The key inquiry for determining the propriety of a marital adjustment...is the extent to which a non-filing spouse's income is not regularly contributed or dedicated to the household expenses." In re Vollen, 426 B.R. 359, 370 (Bankr. D. Kan. 2010).

Here, the first disputed marital adjustment deduction is for college and private high school tuition expenses of three children of Debtor and her non-filing husband, totaling $2,458 per month. Debtor argues that because the payments were made from a checking account maintained solely in the name of her husband and only he is contractually liable for the tuition, those expenses should not be considered household expenses. The UST responds that payments for tuition are

clearly household expenses for Debtor's dependents, and thus cannot be included as part of the marital deduction.

Debtor's position regarding these tuition expenses is not supported by a plain reading of §101(10A)(B). That section provides that income includes "any amount paid by any entity other than the debtor...on a regular basis for the household expenses of the debtor or the debtor's dependents." §101(10A)(B) (emphasis added). It is undisputed that the tuition expenses in this case were paid on a regular basis by Debtor's spouse for the benefit of Debtor's dependents. As such, they are household expenses, rather than purely personal expenses of Debtor's spouse. The logic of this conclusion was explained in In re Vollen, 426 B.R. 359 (Bankr. D. Kan. 2010), where, as in this case, the debtor argued that expenses paid by her non-debtor spouse for their daughter's college expenses were not "household expenses." In concluding that a marital deduction was inappropriate for such expenses, the court explained that:

> A dependent's college expense, even when incurred by a person of majority, is a household expense. A dependent is one who is sustained by another or relies on another for support. The [ ] daughter clearly falls into that category and the family's expenses incurred subsidizing her higher education and providing her with a means of transportation while she is a dependent amount to support.

Id. at 373. Debtor's claim that the tuition is paid from an account maintained solely in the name of her husband, and that the contractual obligations are exclusively his, are irrelevant to determining whether the expenses are "household expenses of the debtor or the debtor's dependents."

Debtor argues that this court should reject the holding in Vollen, and instead rely on the Vollen court's earlier decision in In re Shahan, 367 B.R. 732 (Bankr. D. Kan. 2007). In that case, the court held that income paid by the non-debtor spouse for her daughter's college expenses could properly be deducted as a marital adjustment. However, as noted in Vollen, the daughter in that case was the child of the non-filing spouse from a previous marriage, and was not a dependent of the debtor. See Vollen, 426 B.R. at 370, 373. That distinction is decisive, because CMI only includes "expenses of the debtor or the debtor's dependents." §101(10A)(B) . Because the educational expenses here are for the benefit of children of both Debtor and her husband, they are squarely within the

definition of household expenses, and not subject to deduction as a marital adjustment.

In re Persaud, 2013 Bankr. LEXIS 490 at *29 -*33 (Bankr. E.D.N.Y. February 4, 2013).

The relationship between the deduction for "marital adjustment" and the standard IRS deductions - and the concept of double-dipping - is not entirely clear. Compare, In re Hammock, 436 B.R. 343, 349-350 (Bankr. E.D.N.C. 2010) and Sturm v. United States Trustee, 455 B.R. 130, 135 (N.D. Ohio 2011).

Line 18: ***Current Monthly Income for §707(b)(2).*** *Subtract Line 17 from Line 16 and enter the result.* *$_____*

In determining if the presumption of abuse applies, this is the monthly income figure that issued. In re Clary, 2012 Bankr. LEXIS 1077 (Bankr. M.D. Fla. March 14, 2012)("The monthly income figure to be utilized in Line 18 of the Debtor's Amended Means Test from which expenses are to be deducted is $17,397.05.").

Part V. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deduction under Standards of the Internal Revenue Service (IRS)

Line 19A: ***National Standards: food, clothing and other items.*** *Enter in Line 19A the "Total" amount from IRS National Standards for Food, Clothing and Other Items for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.* *$_____*

"[T]he deduction for food, clothing and other items in Line 19A is determined by the IRS national standard for the debtor's applicable household size." In re Morrison, 443 B.R. 378, 387 (Bankr. M.D.N.C. 2011).

Do not change the dollar figure from the IRS national standards to a dollar figure you like more – it is a fixed deduction. See, In re Jones, 2008 Bankr. LEXIS 4306 at *14 & *17 n.17 (Bankr. E.D. Cal. 2008)(use of Schedule J numbers in place of the IRS national standard was improper).

Courts have reached different results on household size in Chapter 7 cases when a pre-petition pregnancy results in a post-petition increase in the size of the household. The Inghilterra court stated:

> On the petition date, Debtors' household size was five. Thus, the parties' and the Court's presumption of abuse analyses reflect expenses for a household of five. Mrs. Inghilterra's pre-petition pregnancy, however, is a "special circumstance" that must be considered in determining the existence of abuse under section 707(b)(1). Specifically, because there is no reasonable alternative to incurring expenses for Debtors' fourth child, who must be clothed, fed, diapered, and cared for, it is appropriate to adjust Debtors' expenses to reflect those of a six-person household. See In re Martin, 371 B.R. 347, 355 (Bankr. CD. Ill. 2007)(holding that pregnancy at time of filing is special circumstance because there is no reasonable alternative to incurring expenses claimed for increase in household size). In this case, that means that Debtors' monthly expense for food, apparel, and so forth at line 19 of the Form B22A should be adjusted to $1,895 per month per the IRS Standard, their expense for health care at line 19B should be adjusted to $360 per month per the IRS Standard, and their expense for taxes at line 25 should be adjusted to $2,181.56.

In re Inghilterra, 2012 Bankr. LEXIS 1460 at *25 - *26 (Bankr. D. Colo. April 4, 2012). But see, In re Pampas, 369 B.R. 290, 294 (Bankr. M.D. La. 2007)(debtor could not claim an unborn child as an additional household member on the means test form, Form B22A, but left open the possibility of arguing special circumstances to rebut the presumption).

Line 19B: ***National Standards: health care.*** *National Standards: health care. Enter in Line a1 below the amount from IRS National Standards for Outof-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Outof-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 19B.*

Persons under 65 years of age Persons 65 years of age or older

a1. Allowance per person |_____| *a2. Allowance per person* |_____|

b1. Number of persons |_____| *b2. Number of persons* |_____|

c1. Subtotal |_____| *c2. Subtotal* |_____| *$*_____

Line 19B provides the Debtors with a deduction based on the Internal Revenue Service ("IRS") National Standards for Out-of-Pocket health care. In re Leggett, 2011 Bankr. LEXIS 820 at *15 n.3 (Bankr. March 2, 2011). Debtors have a fixed (but not exclusive) deduction for health care expenses on Line 19B. Currently, for those under 65, the amount is $60, and for those over 65, it is $144. See generally, In re Hammock, 436 B.R. 343, 350 (Bankr. E.D.N.C. 2010).

Line 20A: ***Local Standards: housing and utilities; non-mortgage expenses.*** *Local Standards: housing and utilities; non-mortgage expenses. Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.* *$*_____

"Line 20A is for the deduction non-mortgage expenses for a debtor's applicable county and family size." In re Clary, 2012 Bankr. LEXIS 1077 at *22 (Bankr. M.D. Fla. March 14, 2012). The local non-mortgage housing and utilities allowance is found at the U.S. Department of Justice website. The BAPCPA's use of state median income standards, and local expense standards, have been held to not be unconstitutional by the Sixth Circuit Court of Appeals. Schultz v. United States, 529 F.3d 343, 347 (6th Cir. 2008). The Schultz decision rejected the contention that the BAPCPA was not a uniform law on the subject of bankruptcies throughout the United States.

Line 20B: ***Local Standards: housing and utilities; mortgage/rent expense.*** *Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 42; subtract Line b from Line a and enter the result in Line 20B. Do not enter an amount less than zero.*

a. IRS Housing and Utilities Standards; mortgage/rental expense *$*_____

b. Average Monthly Payment for any debts secured by your home, if any, as stated in Line 42 *$_____*

c. Net mortgage/rental expense _____ Subtract Line b from Line a. *$_____*

"Line 20B is for the deduction of mortgage or rent expenses for the debtor's applicable county and family size." In re Clary, 2012 Bankr. LEXIS 1077 at *22 (Bankr. M.D. Fla. March 14, 2012).

This is a three part calculation – on Line (a), the local IRS standard is input for the debtor's household size. Line (b) has the debtor input the average monthly payment for any debts secured by the home – if any. Line (c) is Line (a) minus Line (b).

Debtors cannot leave out the deduction-from-the-deduction on Line 20B(b), take the deduction on Line 20A(a), and then deduct the mortgage payments on Line 42. See, In re Linville, 446 B.R. 522 (Bankr. D.N.M. 2011)("When a debtor's actual expense for home mortgage payments exceeds the IRS Local Standards deduction for mortgage or rent expense, the debtor may not take both deductions.").

Because rent is not a "debt secured by the home" the amount for Line (b) would be zero. That means that in a rental situation, the deduction for the debtor on this line is capped at the amount of the IRS local standard, unless the excess can be deducted on Line 21.

On the other hand, to the extent the secured debt on the home is deductible on Line 42, the full amount of the secured debt is going to be a 22A Means Test deduction – just in a different place on the Form 22A.

The Ransom analysis for motor vehicle expenses has been extended, by at least a few courts, to include the Line 20B expense. In other words, if the debtor is paying no rent (and no mortgage), there is no deduction because this line is not applicable to the debtor. See, In re Wilson, 454 B.R. 155, 157 (Bankr. D. Colo. 2011); see also, In re Sturm, 2012 Bankr. LEXIS 4383 at *24 - *36 (Bankr. N.D. Ohio Sept. 21, 2012).

The issue of the propriety of the standard IRS deduction on Line 20B also arose in the Sonntag case. There, a high monthly rental for property that was being surrendered had been taken as a deduction on Line 21. In declining to address whether the deduction for the rent expense on the property being surrendered, the court noted that reaching a decision on that issue was not necessary because the debtors were entitled to the standard deduction on Line 20B, and that was sufficient to prevent a finding that the case was presumptively abusive under Section 707(b)(2). In re Sonntag, 2011 Bankr. LEXIS 3304 at *11 - *12 (Bankr. N.D.W.V. Sept. 6, 2011).

It should be noted that a minority position has developed in the Chapter 7 case law, where courts are taking a 'forward looking approach' to mortgage payments. See, In re Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012)(debtors who stated their intention to surrender a home, and who had not been paying the mortgage on that home for some time, could not deduct the phantom future monthly mortgage payments for purposes of the means test). At present, this is a minority position in Chapter 7 cases. The majority position is the "snap shot" approach that focuses on whether the mortgage payment remains contractually due. *See the discussion*, supra, at Section C(3)(d).

Line 21: ***Local Standards: housing and utilities; adjustment.***
If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:

_____
_____
_____ *$*_____

In the instructions, Line 21 states that it is for BOTH additional 20A and 20B expenses – non-mortgage housing and utility expenses, and mortgage/rent expenses.

A portion of the directions for this line item deduction are often ignored. Debtors are directed to "state the basis for your contention in the space below".

One court has observed that Line 21:

> ". . . does not invite debtors to increase their housing and/or utility expenses simply because they have higher expenses than allowed by the IRS Local Standard for housing." In re Rajender, 2007 Bankr. LEXIS 2849, 2007 WL 2345018 (Bankr. E.D. Cal. 2007).

In re Shinkle, 382 B.R. 85, 88 (Bankr. E.D. Ky. 2008).

In granting the U.S. Trustee's §707(b) motion, the Shinkle court held that, while the Bankruptcy Code allowed some flexibility in regard to the allowable amount the debtors could claim for housing expenses, the debtors had not demonstrated special circumstances pursuant to §707(b)(2)(B) that justified their claim for an additional housing allowance because their rent of $1,500 was more than was allowed by the IRS Standards.

The allowance of deductions on Line 21 are not automatic – the burden is on the debtor to show that a deduction on this line is reasonably necessary:

> Only expenses reasonably necessary for the maintenance or support of the debtor or a debtor's dependent are allowable for a Section 707(b)(3)(B) analysis. The Debtors claim expense deductions for flood insurance of $34.00 and condominium fees of $48.00 in Line 21 of their Second Amended Means Test. The Debtors, pursuant to the plain language of the Means Test form in Line 21, were required to substantiate why such costs were not covered by the Lines 20A and 20B IRS Housing and Utilities Standards and their entitlement to such costs. The Debtors did not substantiate the costs. The flood insurance expense relates to their surrendered home. The condominium fee appears to relate to their timeshare, but is an undocumented and unsubstantiated expense. The Debtors did not establish the Line 21 costs are reasonably necessary costs for their maintenance or support. The Line 21 costs totaling $82.00 are not allowable deductions.

In re Dowleyne, 400 B.R. 840, 844 (Bankr. M.D. Fla. 2008).

The result was the same in the Clary decision – a Florida case where the debtors' Line 21 deductions for $2,900 in rent on a second home in Maryland, and utilities of $1,2275, as well as additional expenses on their Florida property, such as $155 a month for law maintenance, were not allowed:

> Their claim of additional housing expenses of $3,301.50 in Line 21 is not allowable. They failed to justify their utilities and rent expenses for the Maryland Property that exceed the IRS standards. They failed to demonstrate there are no reasonable alternatives to the Maryland Property and that special circumstances justify the utilities and rent expenses for this property. The Debtors are not entitled to claim any expenses for the Florida Property because they surrendered the property. The Debtors are entitled to a $0.00 deduction on Line 21.

In re Clary, 2012 Bankr. LEXIS 1077 at *32 (Bankr. M.D. Fla. March 14, 2012).

A debtor living with his parents attempted to deduct an additional $328 a month as an additional housing expense for his hoped-for apartment in the future. This deduction on the Chapter 7 Means Test was disallowed. See, In re Ross, 65 Collier Bankr. Cas. 2d (MB) 302, 2011 Bankr. LEXIS 343 (Bankr. M.D. Ala. Feb. 7, 2011).

Line 22A: ***Local Standards: transportation; vehicle operation/public transportation expense.*** *You are entitled to an expense allowance in this category regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation. Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8.*

☐ *0* ☐ *1* ☐ *2 or more.*

If you checked 0, enter on Line 22A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 22A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) *$*_____

This is the "operation expense" deduction. This deduction is based on essentially local standards (by metropolitan area). The Supreme Court decision in Ransom did not change the rule that the deduction for the vehicle OPERATING EXPENSE (as opposed to the Ownership Expense) applies regardless of whether the vehicle is owned free and clear, or subject to a lien. If the debtor does not operate a motor vehicle, there is a deduction for public transportation.

Attempting to deduct more than one vehicle operating expense for each debtor will draw close scrutiny of your Means Test in both Chapter 7 and Chapter 13 cases. If joint debtors only have one car, it appears they only get the expense deduction for one vehicle. See, In re Foldenauer, 403 B.R. 801, 803 (Bankr. D. Minn. 2009)(U.S. Trustee's position, which appeared to be accepted by the court, was that the debtors only had one car, and were therefore only entitled to one vehicle operating expense). There is a case law allowing a deduction for a third vehicle, but it relies upon IRS guidelines permitting an allowance for a third car if necessary to provide for the debtor or his family's welfare. In re Johnson, 454 B.R. 882 (Bankr. M.D. Fla. 2011).

Your U.S. Trustee may – or may not – allow the $200 "old car deduction" for: a debtor who owns the vehicle when: the vehicle has no associated loan or lease payment, is not entitled to any ownership expense, and the vehicle is older than six years or has 75,000 or more miles. See, In re Koch, 408 B.R. 539, 545 (Bankr. S.D. Fla. 2009)(U.S. Trustee added $200 deduction to Line 22A in its calculations, debtor insisted he was entitled to both $200 and the vehicle ownership expense – judge ruled that the debtor was entitled to neither. Memo to counsel: Pigs, fed. Hogs, slaughtered.). Keep in mind that allowance of this deduction may change, depending on the controlling current case law regarding the applicability of IRS guidelines to the Means

Test. Many courts do not believe the IRS guidelines are a basis for altering the stated Means Test deductions.

In Chapter 7 cases, the preferred place to put that additional $200 "old car" deduction, if you are permitted to take it, is Line 22A.

Like many other Means Test deductions, the Line 22A operating expense deduction is fixed. Debtors cannot simply upwardly adjust the deduction on Line 22A if they believe their actual operating expenses are higher than the IRS standard deduction. See, In re Clary, 2012 Bankr. LEXIS 1077 at *33 (Bankr. M.D. Fla. March 14, 2012)(deduction of $600 on Line 22A reduced to the local IRS standard of $488).

Employer provided vehicles can raise difficult issues. The bankruptcy court in In re Meade held that because the debtor had to pay some expense for his company car, even though it was $501.06, total, for the previous year, and the expense was "bonused" to the debtor by his employer, he was entitled to take the IRS standard vehicle operating expense. In re Meade, 420 B.R. 291, 307-309 (Bankr. W.D. Va. 2009). The Meade decision is undercut, to some degree, by the fact that the judge felt compelled to follow the rationale of the holding in In re Hylton, 374 B.R. 579, 583-84 (Bankr. W.D. Va. 2007), allowing the ownership deduction for a free and clear vehicle – a holding that was overturned by the Supreme Court's decision in Ransom.

Contributions to the expense of vehicle operation by a significant other can also be a difficult issue. The court in In re Babson, 2011 Bankr. LEXIS 4519 at *5 (Bankr. E.D.N.C. Nov. 1, 2011) stated that: "the debtor testified that he pays 40% of the second vehicle's operational expenses. Based on his testimony, the line 22A value should be reduced by 60%. Therefore, line 22A should be amended to $95.60."

*Line 22B: **Local Standards; additional public transportation expense**.*

If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) *$*_____

If you use both a vehicle and public transportation, your public transportation expense goes here. Expect to be required to produce evidence of that expense if the debtor does not obviously "pass" the Means Test.

Clearly, "A debtor who does not own a vehicle is entitled to claim an allowance for public transportation." In re VanDyke, 450 B.R. 836, 839 (Bankr. C.D. Ill. 2011). The instructions appear to allow for a deduction if the debtor uses public transportation, even if a vehicle is owned.

***Line 23:* Local Standards: transportation ownership/lease expense; Vehicle 1.** *Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)*

☐ *1* ☐ *2 or more.*

Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. ***Do not enter an amount less than zero.***

a. IRS Transportation Standards, Ownership Costs $_____

b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 42 $_____

c. Net ownership/lease expense for Vehicle 1 Subtract Line b from Line a. $_____

This section operates the same way that Line 20B works for mortgage expenses – if there is a deduction-from-the-standard-deduction, the debtor 'gets it back' on Line 42, where secured debt expenses are deducted.

Prior to the Supreme Court's decision on Ransom, the case law on deducting an ownership expense for a free and clear vehicle on Line 23 of the Chapter 7 Means Test was split. Cases like In re Hunt, 400 B.R. 662, 666-669 (Bankr. S.D. Ind. 2008) denied the deduction. In re Koch, 408 B.R. 539, 544-545 (Bankr. S.D. Fla. 2009) is one of the cases that took the position that free and clear vehicles could be deducted on Line 23, pre-Ransom.

While Ransom v. FIA Card Servs., ___ U.S. ___, 131 S.Ct. 716, 725, 178 L. Ed. 2d 603 (2011) was decided in the context of a Chapter 13 case, it appears to be almost certainly applicable to cases under Chapter 7. Ransom held that that there is no deduction for an ownership expense if the vehicle is owned free and clear. The courts that operated under the same holdings by the Ninth Circuit BAP and the Court of Appeals – in Ransom, before the Supreme Court decision – had applied the holding to Chapter 7 cases. See, In re Watkins, 2008 Bankr. LEXIS 1881 (Bankr. D. Ariz. June 18, 2008). And the holding has been held applicable to Chapter 7 cases in other contexts: "Although the Ransom was a Chapter 13 case, this Court finds its holding equally applicable in a Chapter 7 case. The Supreme Court's analysis was

focused on the terms of §707(b)(2)(A)(ii)(I) and the overall purpose of the Means Test, which is obviously applicable to Chapter 7 cases as well as being incorporated in §1325." In re Wilson, 454 B.R. 155, 157 (Bankr. D. Colo. 2011). The U.S. Trustee also takes the position that Ransom applies in Chapter 7 cases.

One case addressing the issue of the deduction for a "company car" in Chapter 7 is In re Meade, 420 B.R. 291 (Bankr. W.D. Va. 2009):

> Line 22A of the Means Test specifically directs debtors to "[c]heck the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 8." Although there can be little question that Mr. Meade is receiving a valuable benefit from his employer by being permitted to use the company vehicle for his personal transportation needs, for which he is only obliged to pay the tax liabilities for the deemed value of such personal use, a relatively modest amount of $501.06 for an entire year, with the bulk of the actual cost of such vehicle obviously being allocated to his business use of it, still it cannot be denied that such amount is an operating expense paid by Mr. Meade, albeit from the compensation "bonused" to him for that purpose which is included in his current monthly income as determined for Means-Testing purposes. The statutory scheme devised by Congress makes no distinction, however, based on the actual amount of the operating expenses paid or the value of the vehicle owned or leased, so the question of actual ownership of the vehicle is not ultimately determinative.

Line 24: ***Local Standards; transportation/ownership expense;***
Vehicle 2. *Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the "2 or more" Box in Line 23.*
Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. Do not enter an amount less than zero.
a. | IRS Transportation Standards, Ownership Costs | $_____
b.| Average Monthly Payment for any debts secured|
| by Vehicle 2, as stated in Line 42 | $_____
c.| Net ownership/lease expense for Vehicle 2 | Subtract Line b from Line a.| $_____

If there is a second vehicle, with a secured loan on it, it goes here. If you are trying to deduct a second vehicle for a single debtor, expect to be challenged on that. Issues can also arise with the deduction even if the second vehicle is for a non-dependant that the debtor claims is part of his or her "household".

The discussion under Line 23 will apply to a second vehicles operating expense deduction taken under Line 24.

Line 25: ***Other necessary expenses: taxes.*** *Enter the total average monthly expense that you actually incur for all federal, state and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. Do not include real estate or sales taxes.* *$*_____

The text for Line 25 specifically directs debtors to enter the total average monthly expense actually incurred for for all federal, state and local taxes, other than real estate and sales taxes. That means that Chapter 7 debtors' counsel should NOT just use the amounts withheld if those amounts had previously resulted in tax refunds. In re Urban, 432 B.R. 302, 305 (Bankr. Wyo. 2010); In re Robrock, 430 B.R. 197, 208-209 (Bankr. D. Minn. 2010); In re Meade, 420 B.R. 291, 310-311 (Bankr. W.D. Va. 2009); In re Lipford, 397 B.R. 320, 332-335 (Bankr. M.D.N.C. 2008) In re Bernard, 397 B.R. 605, 608-610 (Bankr. D. Mass. 2008); In re Hale, 2007 Bankr. LEXIS 3516 (Bankr. N.D. Ohio October 10, 2007). You can either manually calculate the amount of taxes using tax tables, or reduce the Line 25 number based on historical taxes refunds, if income and tax rates have remained stable. See generally, In re Leggett, 2011 Bankr. LEXIS 820 at *11-*14 (Bankr. E.D.N.C. March 2, 2011)(average annual tax refunds divided by 12 and deducted from the amount withheld for taxes).

On the other hand, the court in In re Clary, 2012 Bankr. LEXIS 1077 *24-*25 (Bankr. M.D. Fla. March 14, 2012) stated that where the Line 25 deduction for taxes was greater than the amounts shown to be withheld on the pay advices, the pay advices were controlling for means test purposes.

The court in In re Williams disallowed the amount deducted for personal property taxes where the bills erroneously included a vehicle the debtor did not own, and the debtor testified that he didn't think he paid the bill. In re Williams, 2010 U.S. Dist. LEXIS 85221 at *21 - *26 (W.D. Va. August 19, 2010).

Line 26: ***Other Necessary Expenses: involuntary deductions for employment.*** *Enter the total average monthly payroll deductions that are required for your employment, such as retirement contributions*

union dues, and uniform costs. ***Do not include discretionary amounts, such as voluntary 401(k) contributions.*** *$_____*

On this line, the total average payroll deductions that are required by the debtor's employment, such as retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as voluntary 401(k) contributions.

Voluntary retirement contributions are generally not permitted on the Chapter 7 Means Test - and voluntary retirement contributions should never be listed on Line 26. See, Egebjerg v. Anderson, 574 F.3d 1045, 1052 (9th Cir. 2009); In re Lancaster, 2011 Bankr. LEXIS 478 at *14-*16 (Bankr. D.N.M. Feb. 3, 2011)(voluntary 401(k) and IRA contributions not deductible).

Similarly, the repayment of 401(k) loans are not deductions on this line. See, In re Polinghorn, 436 B.R. 484, 489 (Bankr. N.D. Ohio 2010); In re Brace, 430 B.R. 513 (Bankr. N.D. Ill. 2010); In re Speith, 427 B.R. 621, 625-26 (Bankr. N.D.Ohio 2009); In re Koch, 408 B.R. 539, 542-544 (Bankr. S.D. Fla. 2009).); In re Turner, 376 B.R. 370 (Bankr. D.N.H. 2007); In re Herbert, 2007 Bankr. LEXIS 1726 at *14-*17 (Bankr. D. Neb. May 21, 2007).

A TSP loan was similarly disallowed in In re Ethington, 2009 Bankr. LEXIS 1593 (Bankr. E.D.N.C. June 19, 2009)(note that the court misidentifies the Means Test as a "B22C" – but it is a Chapter 7, and Line 26 is the place for "involuntary deductions for employment" on a Form 22A).

Line 27: ***Other Necessary Expenses: life insurance.*** *Enter total average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.* *$_____*

The average monthly premium the debtor actually pays for term policies on the life of the debtor. Line 27 specifically instructs not to include premiums for insurance on non-debtor dependents, or for whole life policies, or for any other form of insurance. See, In re Lipford, 397 B.R. 320, 335-336 (Bankr. M.D.N.C. 2008)(disallowing whole life deductions).

Along the same line, the MacNamara court held:

> The monthly premium on the whole life policy insuring Mrs. MacNamara's life is an unreasonable expense. Whole life policies generally are investment vehicles, and the payment of premiums to maintain the policy is not a justifiable expense for a chapter 7 debtor. On two of the term policies, Debtors' children, in addition to Mrs. MacNamara, are beneficiaries on the policies. To the

extent that any of the policies benefit Debtors' adult children, they are unreasonable and unnecessary.

In re MacNamara, 2009 Bankr. LEXIS 1581 at *16-*17 (Bankr. M.D. Pa. June 5, 2009).

Line 28: ***Other Necessary Expenses: court-ordered payments.***
Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations included in Line 44. *$*_____

This deduction is for the amounts a debtor is required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. It is NOT for payments on past due obligations included on Line 44 (priority claims). See, In re Katz, 451 B.R. 512, 517-518 (Bankr. C.D. Cal. 2011).

It has been held that a child support payment that was incurred post-petition – even though made 'retroactive' by the state court – is not allowed as an expense deduction on the 22A Means Test. See, In re Littman, 370 B.R. 820 (Bankr. D. Idaho 2007).

In Clary, the debtors filed Chapter 7 in March, 2011. The child support obligation ended in June, 2011. The court held, in March, 2012, that no deduction for child support would be permitted. See, In re Clary, 2012 Bankr. LEXIS 1077 (Bankr. M.D. Fla. March 14, 2012)(this appears to be contrary to the usual "snapshot" approach under Section 707(b)(2) presumption of abuse cases in Chapter 7). More typically, where the wage order has terminated pre-petition, the deduction will not be allowed. See, In re King, 59 Collier Bankr. Cas. 2d (MB) 1547, 2008 Bankr. LEXIS 1494 at *10-*11 (Bankr. S.D. Tex. April 18, 2008).

Where the debtor has defaulted on domestic support obligations, courts take a dim view of attempts to augment the monthly obligation for Means Test purposes – in the Katz case, the debtor argued the deduction should be $14,606.51. The judge did not buy it, particularly since the debtor tried to deduct the same obligation a second time as a prepetition priority claim. See, In re Katz, 451 B.R. 512, 517-518 (Bankr. C.D. Cal. 2011).

Where a non-filing spouse with a child support obligation had no income, and the debtor had no legal obligation to pay the child support obligation of their spouse, the monthly payment could not be deducted on Line 28 – even though the non-filing spouse could jailed if the child support was not paid. See, In re Urban, 432 B.R. 302, 305 (Bankr. D. Wyo. 2010)("the Debtor's creditors should not be sacrificed to pay an obligation that is not the Debtor's legal obligation.

The deduction is disallowed."); see also, In re King, 59 Collier Bankr. Case 2nd (MB) 1547, 2008 Bankr. LEXIS 1494 *10- *12 (Bankr. S.D. Tex. April 18, 2008).

Garnishments, which should be terminated by the filing of the Chapter 7 case, have been held to not be proper deductions on Line 28. See, In re Chambers, 2011 Bankr. LEXIS 3594 at *7-*8 (Bankr. S.D. Iowa June 7, 2011).

Line 29: ***Other Necessary Expenses: education for employment or for a physically or mentally challenged child.*** *Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.* *$*_____

This deduction is for the total average monthly amount the debtor actually expends for education that is a condition of employment, or for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.

Like every other expense on the Means Test, this one can only be taken once. If there is a deduction on the Line 17 Marital Adjustment, it should not be taken again here.

This is not a place where a child's enrichment programs, in excess of the $147.92 limit on Line 38, can be deducted. It is only for mentally or physically challenged children, with no public alternative.

Courts have not allowed deductions on Line 29 for college expenses for the debtor's children, or student loans for the debtor. See, In re Clary, 2012 Bankr. LEXIS 1077 at *25-*26 & *30 (Bankr. M.D. Fla. March 14, 2012)(debtors' deduction for college expenses were denied because debtors did not establish that their daughters were physically or mentally challenged); In re Hammock, 436 B.R. 343 (Bankr. E.D.N.C. 2010)("deduction of the school loan expense of $330.00 per month is not an appropriate expense under Section 707(b)(2)(A)(ii)(I) on Line 29").

Line 30: ***Other Necessary Expenses: childcare.*** *Enter the total average monthly amount that you actually expend on childcare — such as baby-sitting, day care, nursery and preschool. Do not include other educational payments.* *$*_____

The total average monthly amount actually expended on childcare – such as baby-sitting, day care, nursery and preschool. Do not include other educational payments.

Remember, the childcare expenses must be not only actual, but reasonably necessary. Where a mother was unemployed, and the child was in school, childcare expenses of $333 a month have been held to be unreasonable. See, In re Reed, 422 B.R. 214, 234-235 (C.D. Cal. 2009). Under all of these "necessary expenses", the burden is on the debtor to establish that the payments are actual and necessary. See, In re Stocker, 399 B.R. 522, 527-528 (Bankr. M.D. Fla. 2008)(debtor failed to establish childcare expenses where debtor's parents cared for the child); and see generally, In re Foldenauer, 403 B.R. 801, 803-804 (Bankr. D. Minn. 2009).

There may be some flexibility in how child care expenses are calculated. See, In re Thelen, 431 B.R. 601 (Bankr. E.D.N.C. 2010)(averaging a Chapter 7 debtor's actual child care expenses over the six month current monthly income period was reasonable and uniquely appropriate because her income and child care expenses were linked).

Line 31: ***Other Necessary Expenses: health care.*** *Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. Do not include payments for health insurance or health savings accounts listed in Line 34.* *$*_____

This is for the total average monthly amount actually expended on health care that is required for the health and welfare of the debtor and debtor's dependents, that is not reimbursed by insurance or paid for from a health savings account, and that is in excess of the amount entered in Line 19B. This line does not include health insurance or health savings plan payments.

According to one court, if the amount actually expended is **not** in excess of the amount listed on Line 19B, the deduction on Line 31 is zero. See, In re Phillips, 417 B.R. 30, 35 (Bankr. S.D. Ohio 2009). If there is an amount spent in excess of the "standard" ($60 per person under age 65) amount, the full amount spent can be deducted. See, In re Leggett, 2011 Bankr. LEXIS 820 at *17 - *18 (Bankr. E.D.N.C. 2011)("Line 31 requires the actual average monthly amount that is actually expended on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. The actual amount expended monthly is $502.50, which has been reduced by the expected insurance payment, and this amount is in excess of amounts claimed in Line 19B. 5 Therefore, allowance of a deduction on Line 31 of the full amount of $502.50 is the correct computation."). It should be noted that this is a lightly

litigated question – and debtors may be able to deduct actual health care expenses without object, regardless of whether they exceed the amount deducted on Line 19B or not.

Where there is a failure to provide supporting documentation, deductions taken under this line may be disallowed in their entirety. See, In re Foldenauer, 403 B.R. 801, 803-804 (Bankr. D. Minn. 2009).

Some commentators raised the issue of whether or not the debtors health insurance expense can be deducted after the "heath care" category of other necessary expenses was eliminated from the Internal Revenue Manual issued May 9, 2008. See, Keith M. Lundin and William H. Brown, *Chapter 13 Bankruptcy, 4th Edition*, §477.8 at ¶4, Sec. Rev. Mar. 5, 2009, www.Ch13online.com. However, no published case has taken this omission as a basis for denying expenses for health care, and the health care deduction remains part of Official Form 22A.

Line 32:* *Other Necessary Expenses: telecommunication services.
Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service — such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents. Do not include any amount previously deducted. *$*_____

This deduction is for the total average monthly amount debtors actually pay for telecommunication services, other than basic home telephone and cell phone service – such as pagers, call waiting, caller ID, special long distance, or internet service – to the extent necessary for your health and welfare or that of your dependents. Do not include any amounts previously deducted.

The most common problem with this deduction is that debtors include telephone and cell phones, which are specifically excluded. The cost of basic telephone service is included in the Internal Revenue Service local standards for general living expenses. See, In re Lancaster, 2011 Bankr. LEXIS 478 at *16 (Bankr. D.N.M. Feb. 3, 2011)(Chapter 7 case); In re Cleaver, 426 B.R. 390, 396 n.1 (Bankr. D. N.M. 2010)(Chapter 13 case); In re Williams, 424 B.R. 207, 213 (Bankr. W.D. Va. 2010)(Chapter 7 case); In re Meade, 420 B.R. 291, 303-4 (Bankr. W.D.Va. 2009)(Ch. 7 case); In re Minahan, 394 B.R. 116, 124 (Bankr. W.D.Va. 2008)(Ch. 13 case). With respect to additional services on Line 32, the debtors will bear the burden of establishing that these expenses are necessary for their health and welfare or for the health and welfare of their dependents. In re Meade, 420 B.R. at 310; see also, In re Heinze, 2011 Bankr. LEXIS 187 at *9 (Bankr. D. Wyo. January 1, 2011)("Mrs. Heinze testified to the utility expenses. She testified

that the Verison Wireless bills were attributed to cell phones that the Debtors "were going to use." However "for the last couple years," the Debtors' sons used those cell phones at a considerable expense. The charges related to their use was for the sons' emails, download movies or music. Mrs. Heinze also testified that she has had to pay overage charges because of her son's calls to his girlfriend in the amount of $300-350 a month. The Court finds that these are excessive and not even utility charges used by the Debtors and should be disallowed.").

Expanded cable services are a tough sell to the courts:

> With respect to the cable television services, the Court finds that the Debtors have failed to establish that cable and satellite expenses are necessary for the health and welfare of themselves or their dependents. See In re Minahan, 394 B.R. at 125 (disallowing cable and satellite expenses based on the debtors' failure to establish that such expenses were necessary for the health and welfare of their family). While it is desirable to have additional viewing options available to the family through expanded cable services, these channels do not specifically improve the health and welfare of the family and there are alternative activities that the children can participate in with the family without the cable television expense. The services attributed to this expense are a luxury the Debtors are providing to their family and not a necessity required for their health and welfare. Therefore, the expanded cable and satellite expenses are disallowed on Line 32.

In re Leggett, 2011 Bankr. LEXIS 820 at *22 - *23 (Bankr. E.D.N.C. 2011).

Basic internet service is an easier sale:

> No evidence was provided to the Court regarding the cost incurred by the Debtors for their internet service. The Bankruptcy Administrator stipulated that $50.00 a month was an appropriate expense for such service. In essence, the Bankruptcy Administrator, at least based on the facts of this case, agrees that such service may be necessary for the health and welfare of the Debtors or their dependents. The male debtor also testified that this service is necessary for the health and welfare of his family in that his children regularly utilize the internet for projects and other related school assignments. Based on the Bankruptcy Administrator's proposed allowance and the male debtor's testimony, the Debtors are allowed a deduction of $50.00 on Line 32 of Form B22C.

In re Leggett, 2011 Bankr. LEXIS 820 at *23 (Bankr. E.D.N.C. 2011).

One other point that should be made in regards to the case law on this deduction: taking a $175 a month telecommunication deduction, including a $135 a month cable bill, without any explanation of why such an expense was necessary for the health or welfare of the Chapter 7 debtors or their dependents, was used to deny Chapter 7 debtors' discharge as a false oath. This finding – that the claimed deduction of $175 a month was a basis for denial of discharge - was upheld on appeal by the District Court. See, In re Moreo, 437 B.R. 40, 59-60 (E.D.N.Y. 2010).

Line 33: ***Total Expenses Allowed under IRS Standards.*** *Enter the total of Lines 19 through 32.* *$_____*

This line adds up the subtotal of Lines 19 through 32.

Subpart B: Additional Living Expense Deductions
Note: Do not include any expenses that you have listed in Lines 19-32

Line 34: *Health Insurance, Disability Insurance, and Health Savings Account Expenses. List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents.*

a.	*Health Insurance*	*$*
b.	*Disability Insurance*	*$*
c.	*Health Savings Account*	*$*

Total and enter on Line 34 *$_____*

If you do not actually expend this total amount, *state your actual total average monthly expenditures in the space below:*
$ _____

The monthly expenses for reasonably necessary insurance, in these categories, for the debtor(s) and their dependents are deductions on the 22A Means Test.

As always, the substantiation of these expenses is the debtor's burden, if the issue is raised regarding the accuracy and propriety of these deductions. Check the pay advices if insurance is deducted from the debtor's pay. See, In re Steinberg, 2010 Bankr. LEXIS 4001 at *3 (Bankr. D. Wyo. Oct. 8, 2010)("Ms. Steinberg lists $545.00 for health insurance on Line 34, although her pay advices compute to only $364.00 per month"); In re Clary, 2012 Bankr. LEXIS 1077 at *26 (Bankr. M.D. Fla. March 14, 2012)("Line 34: The Debtors claim on Line 34 a deduction of $1,122.57 for health (including dental and vision insurance) and disability insurance and contributions to a health savings account. This deduction is inconsistent with their prepetition payroll advices. Mr. Clary's payroll advices reflect average deductions of $59.90, $15.80, and $16.02, and Mrs. Clary's payroll advices reflect average deductions of $556.50 and

$91.67, resulting in an average monthly deduction of $739.89.19 The Debtors' actual expense for the Line 34 deduction is $739.89. They overstated their Line 34 expense by $382.68.").

Line 35: ***Continued contributions to the care of household or family members.*** *Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.* *$*_____

This deduction is for total monthly actual expenses paid for the support of elderly, chronically ill, or disabled members of your household or member of the debtor's immediate family who is unable to pay such expenses.

Courts are not receptive to allowing college expenses as a deduction on this line:

> On Line 35 of Debtor's Form 22A, Debtors claim a monthly expense deduction of $1,000.00 for contributions to the education of their children who attend college at the University of New Mexico in Albuquerque, New Mexico. 11 The Trustee asserts that expenses incurred for the Debtors' children to aid in their pursuit of post-secondary education are not allowable under 11 U.S.C §707(b)(2). The Trustee contends that the expenses reported on Line 35 of Form 22A are limited to expenses related to elderly, chronically ill, or disabled members of a debtor's household or immediate family, and therefore the expense deduction taken for the educational expenses of the Debtor's adult children should be disallowed.
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> * * * * *
>
> Here, the contributions to college expenses of the Debtors' adult children do not qualify as allowable expenses under 11 U.S.C. §707(b)(2)(A)(ii)(II) because the Debtors' children are not elderly and there is no evidence before the Court to support a finding that any of the children are chronically ill or disabled. They are simply college students who are unable to pay all of their expenses.

In re Linville, 446 B.R. 522, 527-529 (Bankr. D.N.M. 2011). See also, In re Patterson, 392 B.R. 497, 506 (Bankr. S.D. Fla. 2008)("Absent evidence that the Debtors' adult daughter is chronically ill or disabled as contemplated by the allowance for continued contributions for the care of family members on Official Form 22 A at Line 35, the Court must disallow the listed expense of $400.00 per month for Debtors' adult daughter's living expenses and must also

disallow the expense of $287.94 per month for servicing the student loan that funds their adult daughter's education."); In re Hicks, 370 B.R. 919, 923 (Bankr. E.D. Mo. 2007)("The Debtor may not end-run this statutory limitation [Line 38] on allowable education expenses by including at Line 35 over $8,000 in annual expenses to facilitate the education of an adult, nondependent child.").

The categories of support expenses for household or family members that are allowed should be kept in mind – "elderly, chronically ill, or disabled". Where a 40 year old daughter by a previous marriage had no diagnosed physical or mental impairment, a deduction of $200 a month had to be disallowed. See, In re Williams, 424 B.R. 207, 214-215 (Bankr. W.D. Va. 2010)(applying the Hicks criteria).

Line 36: ***Protection against family violence.*** *Enter the total average reasonably necessary monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.* *$*_____

The total average monthly expense reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or any other applicable Federal law.

Line 37: ***Home energy costs.*** *Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs.* ***You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.*** *$*_____

"Section 707(b)(2)(A)(ii)(V) allows a debtor to deduct expenses for utilities and other non-mortgage housing expenses in excess of the Local Standards, based on his or her actual expenses for home energy costs." In re Stewart, 410 B.R. 912, 918 (Bankr. D. Or. 200), *citing*, In re Simmons, 357 B.R. 480, 486 (Bankr. N.D. Ohio 2006)("The reporting requirements for §707(b)(2)(A)(ii)(V) are captured on line 37 of the Means Test Form.").

Here is a typical home energy deduction that was accepted by the court – not ideal, but enough in this case:

> The reporting requirements for §707(b)(2)(A)(ii)(V) are captured on line 37 of the Means Test Form. At line 37 of Debtor's Proposed Means Test Form debtor has claimed $235.00 in excess housing and utility costs. In the Motion to Dismiss, the UST takes issue with this $235.00 deduction given debtor's failure to present documentation to demonstrate that the additional amount is reasonable and necessary. See Initial Motion to Dismiss [docket # 27] at pg. 3. As to the required documentation of the "excessive" expenses, debtor attaches to his Response to the Initial Motion to Dismiss a copy of his February 2006 gas bill and requests that this Court "take judicial notice from the auditor's card attached to the debtor's schedule A that the size of the debtor's residence is 4,483 total square feet and the house was built in the year 1902, prior to the commencement of the common practice of installing insulation in dwellings." See Debtor's Response [docket # 36] at unnumbered pp. 6-7. Because the UST did not take issue with this proffered documentation in his Supplemental Motion to Dismiss or during the hearing on this matter the Court deems this issue to no longer be in dispute.

In re Simmons, 357 B.R. 480, 486-487 (Bankr. N.D. Ohio 2006).

This is a typical home energy deduction that was rejected by the bankruptcy court:

> The Debtor claimed a deduction of $200 for excess home energy costs. The Debtor claimed a deduction of $440 under the IRS Local Standard for utilities, which includes gas, electricity, water, fuel, oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and telephone. The Debtor claimed expenditures of $510 on Schedule J for utilities. The Debtor did not provide any documentation demonstrating that the deduction for excess home energy costs is reasonable and necessary.
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> * * * * * * *
>
> The Debtor is not entitled to the deduction for excess home energy costs because she did not provide any documentation demonstrating that the deduction for excess home energy costs is reasonable and necessary.

In re King, 59 Collier Bankr. Cas. 2d (MB) 1547, 2008 Bankr. LEXIS 1494 at *11 - *12 (Bankr. S.D. Tex. 2008); see also, In re Foldenauer, 403 B.R. 801, 803-804 (Bankr. D. Minn. 2009).

Line 38: ***Education expenses for dependent children less than 18.***
Enter the total average monthly expenses that you actually incur, not to exceed $147.92 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age.* ***You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.*** *$*_____

This expense is not automatically allowed:

Here, the Debtors claim almost a full allowance of $295.00, $147.50 per daughter, as a deduction. The male debtor testified that he and his wife spend an additional $35.00 per month on materials and projects related to the accelerated and gifted classes in which his daughters are enrolled. He also contends that the Debtors spend amounts related to his daughters' participation in school sponsored summer camps, dance lessons and/or dance classes, as well as, a local softball league, a travel softball league, a soccer league, and a volleyball league. The Court recognizes that all of these activities are beneficial for a child's self esteem and physical development and that the Debtors enrolling their daughters in such programs are well intentioned. However, such programs are not considered within the Line 38 deduction or the explicit statutory language of Section 707(b)(2)(A)(ii)(IV) of "actual expenses...to attend a private or public elementary or secondary school." These activities are not essential. Summer camp, dance lessons, softball team participation, travel softball team participation, soccer, and volleyball are electives and are extra curricular activities that are not required expenses necessary for a dependent child to attend a private or public elementary or secondary school in which the two daughters are enrolled.

Therefore, the Debtors are allowed a Line 38 expense deduction of $70.00 related to the amounts expended on the projects for the accelerated and gifted classes.

In re Leggett, 2011 Bankr. LEXIS 820 at *23 - *24 (Bankr. E.D.N.C. 2011).

A similar fact situations, and results, are found in Justice and Sullivan:

The Court finds that the expense for the minor daughter's trip to Europe was not reasonable and necessary, and the debtor provided no evidence or testimony to the contrary. Section 707(b)(2)(A)(ii)(IV) states that the debtor may

include the educational expense if the debtor provides documentation and a detailed explanation of why the expense is reasonable or necessary. At the hearing, the debtor did not show that he had done either and testified that the trip was not required. Because the debtor did not meet the requirements of §707(b)(2)(A)(ii)(IV), the debtor may not include the educational expense, and the educational expense is disallowed.

In re Justice, 404 B.R. 506, 518 (Bankr. W.D. Ark. 2009).

The other item of contention between the UST and Debtors is Debtors' line item expense of $285.00 for educational expenses. Line 38 specifically pertains to the expenses "in providing elementary and secondary education" for dependent children under the age of 18. Mark testified that the expenses asserted by Debtors pertain to daycare, school lunches, school supplies, extracurricular activities and the such. The Court agrees with the UST that under 11 U.S.C. §707(b)(2)(A)(ii)(IV), it is incumbent upon Debtors to show that their claimed expense on line 38 is for the purpose of attending a private or public elementary or secondary school, is reasonably necessary, and is not already accounted for in the National and Local standards or Other Necessary Expenses. Debtors have failed their burden on this claimed expense, and thus, the expense is disallowed except to the extent of $25.00 to which the UST has not objected.

In re Sullivan, 370 B.R. 314, 322 (Bankr. D. Mont. 2007).

The limitations on the amount that can be spent has been challenged on Constitutional grounds, as an infringement on the First Amendment right to free exercise of religion. That argument was rejected in In re Meyer, 2012 Bankr. LEXIS 1212 at *26-*27 (Bankr. E.D. Wisc. March 22, 2012)("The goal of balancing the rights of creditors with the fresh start of debtors imposes neither a diffuse burden on debtors in general nor an intrusive burden upon these debtors in particular. The difficulty, if any, that section 707(b)(2)(A)(ii)(IV) imposes on debtors by limiting their expenses for private tuition is not too great to be constitutionally unacceptable. Denial of a chapter 7 discharge under these circumstances does not infringe upon the ability of the debtors to practice their religion; especially when chapter 13 is an option.")

Line 39: ***Additional food and clothing expense.*** *Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the*

bankruptcy court.) You must demonstrate that the additional amount claimed is reasonable and necessary. *$*_____

This deduction is for the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, up to 5% of those combined allowances. The Debtor must demonstrate that the additional amount claimed is reasonable and necessary.

Note that there is a fixed dollar limit for this deduction of 5%. See, In re Meade, 420 B.R. 291, 312 (Bankr. W.D. Va. 2009)("The Debtors included a figure of $100 at Line 39, which provides for substantiated "Additional food and clothing expense." The United States Trustee points out that this amount is limited to a maximum allowable amount with respect to the facts of this case of $59 per month. Counsel for the Debtors correctly concedes this issue. Accordingly, the amount of the Debtors' disposable income must be increased by $41 over the amount originally claimed in their Means Test.").

When the issue of the application of this deduction is contested, this is a very typical result:

> The Debtor claimed a deduction of $1,368 under the IRS National Standards for food, clothing, household supplies, personal care, and miscellaneous. The IRS National Standards include $754 for food and $278 for clothing. The Debtor claimed a deduction of $52 for additional food and clothing expense. The Debtor did not provide any documentation demonstrating that the additional deduction for food and clothing expense is reasonable and necessary.
>
> * * * * * * *
>
> The Debtor is not entitled to the deduction for additional food and clothing expenses because she did not provide any documentation demonstrating that the deduction is reasonable and necessary.

In re King, 59 Collier Bankr. Cas. 2d (MB) 1547, 2008 Bankr. LEXIS 1494 at *12 - *13 (Bankr. S.D. Tex. 2008).

Line 40: ***Continued charitable contributions.*** *Enter the amount that you will continue to contribute in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. §170(c)(1)-(2).* *$*_____

The debtor must be able to establish that the charitable contributions were actually made. See, In re Goodall, 2007 Bankr. LEXIS 4490 at *2 (Bankr. D.N.D. 2007)("The U.S. Trustee also eliminated the deduction at Line 40 of $140.00 for charitable contributions because Debtor was unable to substantiate these contributions."); but see, In re Meade, 420 B.R. 291, 312 (Bankr. W.D. Va. 2009)(court accepted debtor's testimony in support of $10 a month to charity).

Line 41: ***Total Additional Expense Deductions under §707(b).***
Enter the total of Lines 34 through 40 *$_____*

This line is for the subtotal of the deduction taken in Subpart B.

Subpart C: Deductions for Debt Payment

Line 42: ***Future payments on secured claims.*** *For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 42.*

Name of Creditor	*Property Securing the Debt*	*Average Monthly Payment*	*Does payment include taxes or insurance*
a.		*$*	□***yes***□***no***
b.		*$*	□***yes***□***no***
c.		*$*	□***yes***□***no***
		Total: Add lines a, b, and c	

$_____

For each of the debts that is secured by an interest in property that is owned by the debtor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes and insurance. The Average Monthly Payment is the total amount that is scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60.

> As is often the case with provisions added by BAPCPA, this provision is ambiguous and courts have understandably come to differing conclusions as to whether it allows debtors to deduct monthly payments towards secured debt when the collateral has been or is to be surrendered in the bankruptcy case. See In re Norwood-Hill, 403 B.R. 905, 908-11 (Bankr. M.D. Fla. 2009)(describing the differing approaches to interpreting §707(b)(2)(A)(iii)(I)). However, the Sixth Circuit Bankruptcy Appellate Panel and bankruptcy judges in the Southern District of Ohio have espoused the majority view: that a debtor may deduct expenses on the means test form for payments on secured debt even when the collateral is surrendered as long as the debtor's continuing contractual obligations remain unextinguished on the date of the bankruptcy filing. See Hildebrand v. Thomas (In re Thomas), 395 B.R. 914, 922 (B.A.P. 6th Cir. 2008); In re Goble, 401 B.R. 261, 270 (Bankr. S.D. Ohio 2009) (J. Hoffman); In re Anderson, 383 B.R. 699, 707-08 (Bankr. S.D. Ohio 2008) (J. Humphrey); In re Graham, 363 B.R. 844, 849 (Bankr. S.D. Ohio 2007) (J. Preston); Sorrell, 359 B.R. at 187 (J. Waldron). Generally, these courts interpret the plain language "scheduled as contractually due to secured creditors" to mean that a debtor may deduct secured debts that are contractually owed by the debtor to secured parties as of the petition date. See, e.g., Anderson, 383 B.R. at 706; Sorrell, 359 B.R. at 184-87. The courts "essentially take a snapshot of the debtor's schedules on the petition date" to calculate the secured debt deduction on the means test form. Anderson, 383 B.R. at 706.

In re Phillips, 417 B.R. 30, 37-38 (Bankr. S.D. Ohio 2009); see also, In re Rivers, 2012 Bankr. LEXIS 1153 (Bankr. M.D. Fla. March 12, 2012)(Lanning and Ransom do not change the “snapshot” approach to the Chapter 7 Means Test); In re Grinkmeyer, 456 B.R. 385 (Bankr. S.D. Ind. 2011); In re Sonntag, 2011 Bankr. LEXIS 3304, 2011 WL 3902999 (Bankr. N.D. W. Va.).

Following the same line, the First Circuit Court of Appeals focused on the “contractually due” language in holding that the plain language of section 707(b)(2)(A)(iii)(I) allows debtors to deduct payments due on a secured debt notwithstanding the debtor's intention to surrender the collateral. In re Rudler, 576 F.3d 37 (1st Cir. 2009).

On the other hand, in situations where the debtor is no longer an owner of the property that secures the mortgage – for example, where the property was awarded to the wife in a divorce proceeding, pre-Petition – the debtor cannot take the deduction on Line 42. See, In re Robrock, 430 B.R. 197, 207-208 (Bankr. D. Minn. 2010).

While under the majority view, the "snapshot" approach used in Chapter 7 was not changed by Lanning, the issue regarding whether or not a Means Test deduction is "applicable" after Ransom appears to be finding favor in Chapter 7 cases, even beyond the motor vehicle deduction issue. See, In re Wilson, 454 B.R. 155, 156-157 (Bankr. D. Colo. 2011)(debtor did not pay any rent so, under Ransom, there was no applicable expense to take on 20B – but the mortgage expenses on a rental were allowed on Line 47); In re Thompson, 457 B.R. 872, 877 (Bankr. M.D. Fla. 2011)(payments ceased in 2010, moved to rental, and property surrendered, so no mortgage deduction – unclear when the property was actually surrendered or if the real estate was still in the debtors' names at the time of filing).

There is an emerging minority view, as discussed, *supra*, at Section C(3)(d), that grafts the Lanning forward looking approach onto Chapter 7 cases. While the statutory basis for this approach are shaky, there are courts that are adopting it. See, In re Fredman, 471 B.R. 540, 552-555 (Bankr. S.D. Ill. 2012); In re Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); In re Krawczyk, 2012 Bankr. LEXIS 3466 (Bankr. E.D.N.C. July 27, 2012). One of the post-Lanning cases that discusses the arguments and allows a Line 42 deduct for property being surrendered is In re Rivers, 466 B.R. 558 (Bankr. M.D. Fla. 2012). The only circuit court authority follows (or perhaps more properly, leads) the majority position that contractually due secured debts may be deducted. See, In re Rudler, 576 F.3d 37 (1st Cir. 2009).

Attempts to deduct 401(k) loan repayments on Line 42 have not been very successful:

> The obligation to repay a 401(k) loan is essentially an obligation to repay a debt to oneself. In the event of non-payment, the plan administrator will consider the non-payment a distribution and will proportionately reduce the balance of the account. This distribution has tax consequences, but a debtor-creditor relationship will not be created as is contemplated in the definition of a debt under the Bankruptcy Code. Therefore, this Court will join the majority of courts which have concluded that repayment of a 401(k) loan is not a debt which can be deducted in a Chapter 7 means test analysis. In re Mowris, 384 B.R. 235 (Bankr. W.D. Mo. 2008)(loans against qualified retirement accounts are not secured debts that are deductible from current monthly income under the means test as "payments on account of secured debts", nor do they qualify as "other necessary expenses" that could be deducted from current monthly income under the means test, nor are they special circumstances rebutting the presumption of

abuse arising under the means test, and because a debtor's retirement loan repayments would be deductible from disposable income in a Chapter 13 case does not establish special circumstances rebutting the presumption of abuse); Bolen v. Adams, 403 B.R. 396 (N.D. Miss 2009)(the debtor's obligation to repay a loan from the debtor's employee retirement plan was not a "debt" as that term was used in the Bankruptcy Code, so that debtor's payments on the loan were not "payments on account of secured debt," which can be deducted in performing a "means test" calculation); McVay v. Otero, 371 B.R. 190 (W.D. Tex. 2007); In re Egebjerg, 574 F.3d 1045 (9th Cir. 2009); see also In re Villarie, 648 F.2d 810 (2d Cir. 1981)(repayment of an advance from a retirement account is not a debt under the Bankruptcy Code and therefore cannot be discharged); Eisen v. Thompson, 370 B.R. 762 (N.D. Ohio 2007).

In re Wellington, 2012 Bankr. LEXIS 467 at *13-*15 (Bankr. E.D. Mo. Feb. 9, 2012; see also, Bolen v. Adams, 403 B.R. 396 (Bankr. N.D. Miss. 2009)(reversing the bankruptcy court's holding that the 401(k) loan could be deducted on Line 42); In re Harrison, 2010 Bankr. LEXIS 323 at *6 - *7 (Bankr. M.D.N.C. January 25, 2010)(discussing why the deduction would not be allowed, but debtor amended to claim the 401(k) as an "involuntary deduction from employment", so discussion is *dicta*).

Line 43: ***Other payments on secured claims.*** *If any of debts listed in Line 42 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any such amounts in the following chart. If necessary, list additional entries on a separate page.*

	Name of Creditor	*Property Securing the Debt*	*1/60th of the Cure Amount*
a.			*$*
b.			*$*
c.			*$*
			Total: Add Lines a, b, and c

*$*_____

If any property is secured by your primary residence, a motor vehicle, or any other property that is necessary for the support of the debtor and the debtor's dependents, the debtor may deduct 1/60th of the amount (the "cure amount") that you must pay the creditor in addition to the payments listed on Line 42, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure.

This is a more controversial section of the Chapter 7 Means Test. This discussion, from an Ohio bankruptcy case, appears to reflect the majority view:

> The UST contests the line 43 deduction, arguing as follows:
>
> > Section 707(b)(2)(A)(iii)(II), and Line 43 of the Means Test [Form,] [are] vastly different than §707(b)(2)(A)(iii)(I) and Line 42 as discussed in Sorrell. While Sorrell focused on payments "scheduled as contractually due[,]" the relevant code language for Line 43 focuses on additional payments to maintain possession of the real estate for purposes of a Chapter 13 plan. Said another way, this allows for payments of the arrearage on the secured debt if the [debtors] intend to maintain possession of the property.
> >
> > . . . It is, therefore, counter-intuitive to allow a Debtor the benefit of a deduction for an arrearage for property that she had no intention of maintaining possession of, and for which she is no longer paying.
>
> United States Trustee's Post-Trial Br. at 3 ("Post-Trial Br.") (Doc. 44) (footnotes omitted). During the Hearing, the attorney for the UST disclaimed knowledge of any case law regarding line 43 and thereafter failed to cite any in the UST's post-hearing brief. Debtor's counsel likewise was unaware of any authority and, as already noted, opted not to file a post-hearing brief. The Court's own research, however, uncovered four decisions containing holdings regarding line 43, including one decision from this district.
>
> Perhaps not surprisingly, in these decisions, as line 42 goes, so goes line 43. In the two decisions in which the courts disallowed the line 42 deduction, the courts, without any separate analysis, also disallowed

the line 43 deduction. See In re Masur, 2007 Bankr. LEXIS 3856, 2007 WL 3231725 at *4 (Bankr. D.S.D. Oct. 30, 2007) ("Debtors' monthly expenses must therefore be reduced by . . . the average monthly payments claimed on Line 42 . . . . For the same reasons, Debtors' monthly expenses must also be reduced by . . . the total 'cure amount' claimed on Line 43 of their Amended Official Form B22A for their home."); Skaggs, 349 B.R. at 600 (disallowing line 42 and line 43 deductions for future payments and cure payments on mobile home the Chapter 7 debtors intended to surrender).

Conversely, in the two decisions in which the courts--including a court in this district--allowed deductions on line 42 despite the debtors' surrender of the collateral, the courts also allowed deductions on line 43. See In re Kelvie, 372 B.R. 56, 62 (Bankr. D. Idaho 2007)("The Court therefore concludes that Debtors may deduct their monthly house and motor home payments. These obligations were contractual and remained outstanding at the time of filing. Upon calculating and deducting the monthly secured debt payments under §707(b)(2)(A)(iii) for the house and motor home, the expenses on lines 42 and 43 of the UST's Form 22A, Ex. 10, will increase . . . ."); In re Graham, 363 B.R. 844, 849 (Bankr. S.D. Ohio 2007) (Preston, J.)("This Court need not reiterate the discussion and conclusions of Judge Waldron [in Sorrell]; suffice it to say that for all of the reasons articulated and explained in his well-written and well-considered opinion, this Court finds that §707(b)(2)(A)(iii) requires that the Debtors include the contractual payments for the real estate in the calculation of disposable income on Form 22. The same applies to the entry on line 43 of Form 22 regarding past-due payments on secured claims.").

The Court will follow Kelvie and Graham and allow the Debtor's deduction on line 43. "[S]ome portions of the Means Test Form permit [debtors] to make deductions for only actual expenses they will continue to have in the future[.]" In re Simmons, 357 B.R. 480, 486 (Bankr. N.D. Ohio 2006).[9/] Section 707(b)(2)(A)(iii)(II), however, "is simply not one of those sections and this Court will not read into that statutory provision a forward looking element that Congress did not include." Id. (reaching the same conclusion in the context of §707(b)(2)(A)(iii)(I)). Rather, in the context of a Chapter 7 case of a debtor who, like this Debtor, owns a residence on the date she commences bankruptcy, line 43 permits a deduction based on a hypothetical situation--the retention of the debtor's

primary residence under a Chapter 13 plan. That the circumstances are hypothetical is evidenced by the incontrovertible fact that the Debtor is in Chapter 7; if she had intended to maintain possession of the Former Residence, she presumably would have filed a Chapter 13 case. See, e.g., In re Whitlock, 308 B.R. 917, 923 (Bankr. M.D. Ga. 2004)("One of the primary reasons why Congress created Chapter 13 of the Bankruptcy Code was to afford debtors an opportunity to save their residences."); In re Smith, 1999 WL 33582223 at *2 (Bankr. C.D. Ill. 1999) ("A primary purpose of Chapter 13 is to allow debtors to save their homes from foreclosure.").

FOOTNOTES

[9/] In this regard, the Simmons court specifically referenced, without ruling on, line 35 of the Means Test Form, which permits deductions of continued contributions to the care of household or family members under §707(b)(2)(A)(ii)(II). See Simmons, 357 B.R. at 486.

No one could reasonably argue that the Debtor should be denied the line 43 deduction under §707(b)(2)(A)(iii)(II) merely because she failed to file a Chapter 13 plan--a circumstance that, by definition is hypothetical in the context of a Chapter 7 case. Likewise, the Court finds no sound basis for requiring disallowance of the deduction for mortgage cure payments on line 43 merely because the Debtor did not intend to retain the Former Residence on the Petition Date and did not actually retain it thereafter. See In re Castillo, 2008 Bankr. LEXIS 2740, 2008 WL 4544467 at *3 (Bankr. S.D. Fla. Oct. 10, 2008)(stating in dictum that "[t]he Court does not agree that §707(b)(2)(A)(iii)(II) speaks to a debtor's intent to maintain possession of the debtor's 'primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts'" but that "[s]ection 707(b)(2)(A)(iii)(II) merely allows a deduction on the means test for payments necessary to cure any pre-petition arrearage for such property").

If the Debtor had filed her case under Chapter 13 and attempted to retain the Former Residence, she would have needed to cure, through her Chapter 13 plan, the mortgage arrearage payments for which she took the line 43 deduction. Thus, the line 43 deduction is "necessary for the

debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence . . . ." 11 U.S.C. §707(b)(2)(A)(iii)(II). The Debtor's line 43 deduction, therefore, is appropriate.

* * * * * * * *

In summary, the deductions taken by the Debtor on lines 43 and 44 of the Means Test Form are appropriate. As a result, the presumption of abuse does not arise.

In re Goble, 401 B.R. 261, 271-273 (Bankr. S.D. Ohio 2009).

Line 44: ***Payments on prepetition priority claims.*** *Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. Do not include current obligations, such as those set out in Line 28.* *$*_____

This deduction is the total amount, divided by 60, of the debtor's priority debt, as priority tax, child support, and alimony claims, for which the debtor was liable at the time of the bankruptcy filing. Do not include current obligations, such as those deducted on Line 28.

The Coble decision, quoted above, also discusses the Line 44 deduction:

This brings the Court to line 44. According to the UST:

[T]he Debtor should also not receive the benefit of a deduction for priority claims as they relate to surrendered real estate. Once [d]ebtors surrender the real estate, the obligation for the real estate taxes runs with the land and becomes the responsibility of the bona fide purchaser at a Sheriff's Sale. Upon surrender, the Debtor no longer has an obligation to pay the real estate taxes. As such, [d]ebtors should not receive a deduction on Line 44 of the Means Test for real estate taxes on real property which has been surrendered and will not be maintained.

Post-Trial Br. at 3-4 (footnote omitted). The UST is correct that Ohio real property taxes are not personal but instead run with the land. See S. Ohio Sav. Bank & Trust Co. v. Bolce, 165 Ohio St. 201, 135 N.E.2d 382, 387 (Ohio 1956) ("Under the taxation scheme of this state, real estate taxes run with the land, attach to the real estate itself, become direct and specific liens thereon, and

underlie the owner's interest therein."). For the reasons explained below, however, this rule of law does not win the day for the UST as to line 44.

The Debtor owned the Former Residence as of the Petition Date. A claim against property of the Debtor, such as the Former Residence, is a claim against the Debtor. See 11 U.S.C. §102(2); Glance v. Carroll (In re Glance), 487 F.3d 317, 321 (6th Cir. 2007)("Nor need the debtor be personally liable on a claim for it to be valid; the Code provides that a 'claim against the debtor' 'includes [a] claim against property of the debtor.'" (quoting 11 U.S.C. §102(2))). For purposes of the Bankruptcy Code, therefore, the taxing authority had a claim against the Debtor for the prepetition real estate tax listed on the Debtor's Schedule E. This claim is entitled to priority under §507(a)(8)(B), which provides priority status for "a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition[.]" 11 U.S.C. §507(a)(8)(B). And, under §707(b)(2)(A)(iv), which line 44 implements, the Debtor may deduct her "expenses for payment of all priority claims . . . calculated as the total amount of debts entitled to priority, divided by 60." 11 U.S.C. §707(b)(2)(A)(iv).

The UST disputes none of this. Rather, the UST relies on the fact that the claim likely will be satisfied out of the proceeds of the sale of the Former Residence at foreclosure, not by the Debtor. That may be true, but it is of no moment. The Debtor's expense on line 44 is to be "calculated as the total amount of debts entitled to priority" without regard to how the priority claim will be satisfied or even whether it will be satisfied. See In re Robinette, 2007 Bankr. LEXIS 3523 , 2007 WL 2955960 at *3 (Bankr. D.N.M. Oct. 2, 2007)("[The creditor] argues that, if the IRS and [the taxing authority] had offset the tax refunds, the priority debt would have been much smaller, entitling Debtors to a smaller deduction on line 44. The Court finds that it should not compute this offset. The fact is that on the petition date, Debtors owed [the tax]. Form 22A represents a snapshot of financial condition on the petition date."). For these reasons, the Court concludes that the Debtor is entitled to the deduction on line 44.

In summary, the deductions taken by the Debtor on lines 43 and 44 of the Means Test Form are appropriate. As a result, the presumption of abuse does not arise.

In re Goble, 401 B.R. 261, 271-273 (Bankr. S.D. Ohio 2009). But see, *discussion re: Line 43*, supra.

Of course, only priority claims are deductible as priority claims – and student loans are not priority claims:

> In doing so, on Line 44 of Form B22A, she took her monthly student loan payment of $565.64 as an allowable expense for a payment of a prepetition priority claim.
>
> * * * * * * *
>
> The concept of a "nondischargeable debt" is entirely distinct from the concept of a "priority debt." It is true that certain nondischargeable debts are also priority debts and therefore, are allowable expenses under the means test. See 11 U.S.C. §707(b)(2)(A)(iv). For example, payments of domestic support obligations and priority taxes are allowable expenses. See 11 U.S.C. §507(a)(1), (8) and §523(a)(1), (5). However, not all nondischargeable debts are priority debts. Had Congress intended to render payments on all categories of nondischargeable debts as allowable expenses under §707(b)(2)(A), it would have been simple enough to do so expressly.

In re Harmon, 446 B.R. 721, 726 & 729-730 (Bankr. E.D. Pa. 2011); see also, In re Thompson, 457 B.R. 872, 879 n.4 (Bankr. M.D. Fla. 2011))("Student loan debt is nonpriority debt and is not an expense allowed on Form 22A Means Test pursuant to either Section 707(b)(2)(A)(ii) or (iv)."); In re Lancaster, 2011 Bankr. LEXIS 478, at *17 (Bankr. D.N.M. February 3, 2011)("Debtors' Form 22A line 44 takes a $250 deduction for payments on priority claims. Debtors' Schedule E lists no priority debts. (Fact 3, above). Debtors' Schedule J lists $250 per month for student loans. Student loans are not priority debts. 11 U.S.C. §507."). See also, e.g., In re Williams, 253 B.R. 220, 232 (Bankr. W.D. Tenn. 2000)("Unlike claims for child and spousal support, student loan claims do not enjoy a statutory priority for distribution.").

Past due taxes that qualify as priority claims are to be listed on Line 44, not Line 25. See, In re Barbour, 2009 Bankr. LEXIS 3006 at *17 (Bankr. E.D.N.C. September 18, 2009)(bankruptcy administrator agreed that prepetition tax obligation could be moved from Line 25 and deducted on Line 44).

Line 45: ***Chapter 13 administrative expenses.*** *If you are Eligible to file a case under chapter 13, complete the following chart, multiply the amount in line a by the amount in line b, and enter the resulting administrative expense.*

a.	*Projected average monthly chapter 13 plan payment.*	*$*
b.	*Current multiplier for your district as determined under schedules issued by the executive Office for United States Trustee. (This information is available at www.usdoj.gov/ust/ or at the clerk of the bankruptcy court.)*	*x*
c.	*Average monthly administrative expense of chapter 13 case*	*Total: Multiply Lines a and b*

*$*_____

If you are eligible to file a case under Chapter 13, complete the following chart, multiply the amount in Line a, by the amount in Line b, and enter the resulting administrative expense.

Where the U.S. Trustee is claiming more disposable income than the debtor has on the Form 22A, this number will be higher. For example: "The Debtors list in Line 45 a projected monthly Chapter 13 plan payment of $181.62, which, when multiplied by the customary 10% Chapter 13 administrative expense, results in a monthly administrative expense of $18.16. The UST asserts the projected average monthly plan payment should be $6,914.50, which translates into an average monthly administrative expense of $691.45." In re Clary, 2012 Bankr. LEXIS 1077 at *27-*28 (Bankr. M.D. Fla. March 14, 2012): see also, In re Brady, 419 B.R. 479, 482-483 (Bankr. M.D. Fla. 2009)(debtor's Line 45 deduction - $0; U.S. Trustee's proposed deduction - $98.67).

Line 46: ***Total Deductions for Debt Payment.*** *Enter total of Lines 42 through 45.* *$*_____

This is a subtotal of the deductions taken under Subpart C: Deductions for Debt Payment.

Subpart D: Total Deductions from Income

Line 47: ***Total of all deductions allowed under §707(b)(2)).*** *Enter The totals of lines 33, 41, and 46* *$*_____

This is a subtotal of all of the deductions in Subparts A, B, and C.

Line 48: ***Enter the amount from Line 18 (Current monthly income for §707(b)(2))*** *$*_____

This is the baseline income figure from which the deductions will be subtracted. The number should be the same as the amount listed on Line 18.

Line 49: ***Enter the amount from Line 47 (Total of all deductions allowed under §707(b)(2))*** *$_____*

This line sets up the total deductions under the applicable income figure to do the subtraction.

Line 50: ***Monthly disposable income under §707(b)(2)).*** *Subtract Line 49 from Line 48 and enter the result.* *$_____*

This is the "monthly disposable income" figure for purposes of determining if the presumption of abuse will arise.

Line 51: ***60-month disposable income under §707(b)(2)).*** *Multiply the amount on Line 50 by the number 60 and enter the result.* *$_____*

This line gives you the annualized figure for the test of whether the presumption of abuse arises. See, In re Fredman, 471 B.R. 540, 555 (Bankr. S.D. Ill. May 31, 2012)("debtors have "60-month disposable income" of $104,754.00 at line 51 of the form. Since this figure far exceeds the $11,725 figure provided for comparison at line 52 of the B22A form, the presumption of abuse does arise.").

Line 52: ***Initial presumption determination.*** *Initial presumption determination. Check the applicable box and proceed as directed.*

☐ ***The amount on Line 51 is less than $7,025*.*** *Check the box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII. Do not complete the remainder of Part VI.*

☐ ***The amount set forth on Line 51 is more than $11,725*.*** *Check the box for "The presumption arises" at the top of page 1 of this statement, and complete the verification in Part VIII. You may also complete Part VII. Do not complete the remainder of Part VI.*

☐ ***The amount on Line 51 is at least $7,025*, but not more than $11,725*.*** *Complete the remainder of Part VI (Lines 53 through 55).*

This is the line where debtors self-report their Means Test results.

So, if the number is too big, the debtors must check the box reporting that the presumption of abuse arises. See, In re Fechter, 456 B.R. 65, 68 (Bankr. D. Mont. 2011)("Applying that amount on Line 52, Debtors were required to check the box at the top of page 1 of Ex. A which states: "The presumption arises."""); see also, In re Justice, 404 B.R. 506, 518 (Bankr. W.D. Ark. 2009)("According to line 52, because the debtor's 60-month disposable income is more than $6000.00 but less than $10,000.00, the debtor would have to complete the remainder of Part VI of the Amended Means Test to determine whether his 60-month disposable income is less than 25% of his total non-priority unsecured debt.).

Line 53: ***Enter the amount of your total non-priority unsecured debt.*** *$_____*

This is approached either as: 1) Schedule F unsecured debt; or 2) Schedule F debt and the undersecured portion of the debtor's secured debts.

This is an additional step in determining whether the presumption of abuse arises when income is between $7,025 and $11,725 (as adjusted).

> The $4589 total current monthly income is compared with the Debtor's total monthly deductions and expenses of $4478 (lines 48-49), resulting in $111 as monthly disposable income, which is then multiplied by 60, resulting in $6660 as the Debtors' 60-month disposable income (lines 50-51). That $6660 is then applied to the test at line 52, and because this number is at least $6000 but not more than $10,000, the Debtors must continue on through the Means Test. The Debtors then fill in their total non-priority unsecured debt of $69,281, and calculate 25% of this number, or $17,320 (lines 53-54). Because $6665 is less than $17,230, the Debtors have completed the Means Test, and there is no presumption of abuse (line 55). Thus, the Debtors' income, as adjusted is, below the means test thresholds contained in §707(b)(2)(B)(iv)(I) and (II), and the Debtors have rebutted the presumption of abuse.

In re Tamez, 2007 Bankr. LEXIS 2763 at *23 - *24 (Bankr. W.D. Tex. August 13, 2007).

Line 54: ***Threshold debt payment amount.*** *Multiply the amount in Line 53 by the number 0.25 and enter the result.* *$_____*

Line 55: ***Secondary presumption determination.*** *Check the applicable box and proceed as directed.*

☐ ***The amount on Line 51 is less than the amount on Line 54.*** *Check*

The box for "The presumption does not arise" at the top of page 1 of this statement, and complete the verification in Part VIII.

☐ ***The amount on Line 51 is equal to or greater than the amount on Line 54.*** *Check the box for "The presumption arises" at the top of page 1 Of this statement, and complete the verification in Part VIII. You may Also complete Part VII.*

There isn't much discussion of this "secondary test".

> Ms. Steinberg filed an Amended Means Test which appears to have amended and responded to many of the UST's objections. This Court, following the Kansas and Colorado Bankruptcy Courts, allows the inclusion of the mortgage for the purpose of determination of the means test under Chapter 7. The issue of Ms. Steinberg's additional student loan expenses does not need further consideration, as at Line 55 "Secondary presumption determination," reflects that the presumption does not arise. Therefore, Ms. Steinberg does not need to rebut the allegation. Therefore dismissal under §707(b)(1) and (2) will be denied.

In re Steinberg, 2010 Bankr. LEXIS 4001 at *8 (Bankr. D. Wyo. Octoer 8, 2010).

Part VII: ADDITIONAL EXPENSE CLAIMS

Line 56: ***Other Expenses.*** *List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under §707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.*

	Expense Description	*Monthly Amount*
a.		*$*
b.		*$*
c.		*$*
	Total: add Lines a, b and c	*$*

** Amounts are subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

Attempts to deduct 401(k) loan repayments have had no better luck on Line 56 than on the other lines of the Means Test. 401(k) loans are not a debt, and are not a deduction permitted on Line 56. See, In re Robrock, 430 B.R. 197, 209-210 (Bankr. D. Minn. 2010); In re Dejoy, 2011 Bankr. LEXIS 4435 (Bankr. N.D.N.Y. Nov. 18, 2011)(retirement loans listed on Line 56, held to not constitute "special circumstances"); In re Tauter, 402 B.R. 903 (Bankr. M.D. Fla. 2009)(TSP loans listed on Line 56 were not "special circumstances").

Student loan case law is divided into various "camps". The court in In re Sanders, 454 B.R. 855 (Bankr. M.D. Ala. 2011) discusses the case law, and the standards, and holds that the son's student loan listed on Line 56 was a special circumstance. In contrast, the Ross court held that tuition listed on Line 56 for additional education that was recommended, but not required, by debtors employer was not a special circumstance. In re Ross, 65 Collier Bankr. Cas. 2d (MB) 302, 2011 Bankr. LEXIS 343 (Bankr. M.D. Ala. Feb. 7, 2011); see also, In re Hammock, 436 B.R. 343 (Bankr. E.D.N.C. 2010)(student loans listed on Line 56 not special circumstances).

Excess transportation costs are often listed on Line 56. For example, excess and unreimbursed transportation costs of over $1,000 were listed on Line 56 in In re Pignotti, 2011 Bankr. LEXIS 1312 (Bankr. S.D. Iowa April 1, 2011). The court rejected those expenses as voluntary, based on the circumstances of the debtors' moving farther from the husband's job.

Part VIII: VERIFICATION

Line 57: *I declare under penalty of perjury that the information provided in this statement is true and correct. (If this is a joint case, both debtors must sign.)*

Date: _____ *Signature:* _____
(Debtor)

Date: _____ *Signature:* _____
(Joint Debtor, if any)

The signature requirement is discussed in In re Shiloh:

> Bankruptcy schedules are statements made under oath. Fed. R. Bankr. P. 1008 (providing that petitions, lists, schedules, statements and amendments shall be verified or contain an unsworn declaration under 28 U.S.C. §1746); 28 U.S.C. §1746 (providing that an unsworn declaration must be made under penalty of

perjury and shall have the same force and effect as an oath). Under 11 U.S.C. §521, debtors are required to disclose income information on two forms filed with the court. Both forms are submitted subject to an unsworn verification. Schedule I requires debtors to disclose their average or projected income at the time they file their bankruptcy cases. See Official Form 6. Official Form 22 A (the "Means Test Form") requires debtors to report current monthly income, which is average monthly income received from all sources during the six calendar months prior to the filing of the bankruptcy petition. See 11 U.S.C. §101(10A)(A). By filing these two forms, Debtor reported that she received no income during the six-month period before she filed her petition and that she did not expect to receive income after she filed her petition on September 23, 2009. By verifying her schedules and statements, Debtor attested that Schedule I and the Means Test Form were complete and accurate. On Schedule I, Debtor specifically indicated that she was unemployed and received no income from any source at the time the petition was filed.

In re Shiloh, 2011 Bankr. LEXIS 2938 at *6 - *7 (Bankr. M.D. Pa. July 26, 2011).

E. Special Circumstances In Chapter 7 Cases:

The debtor may rebut the presumption of abuse by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. See, 11 U.S.C. §707(b)(2)(B)(i); Calhoun v. United States Tr., 650 F.3d 338, 341 (4th Cir. 2011).

While there are two concrete examples of special circumstances, there is considerable debate regarding what other financial challenges will be sufficient to constitute “special circumstances”. "What constitutes a 'special circumstance' is by no means well settled." In re Cotto, 425 B.R. 72, 77 (Bankr. E.D.N.Y. 2010) (citing, In re Cribbs, 387 B.R. 324, 329 (Bankr. S.D. Ga. 2008)).

The court in Sanders discussed the various approaches courts have taken in determining whether “special circumstances” are present:

> Under 11 U.S.C. §707(b)(2), a chapter 7 debtor's bankruptcy must be dismissed or converted to a chapter 11 or 13 case when a presumption of abuse arises under §707(b)(2)(A)(i). 11 U.S.C. §707(b)(2). Under §707(b)(2)(A)(i)(II), the debtor's current monthly income, reduced by amounts stated in other parts of §707(b)(2)(A), and multiplied by 60 must be less than $11,725. If it is not, then the court "shall presume abuse exists." 11 U.S.C. §707(b)(2)(A)(i). However, the

presumption of abuse may be rebutted by the debtor's demonstration of "special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is *no reasonable alternative*." 11 U.S.C. §707(b)(2)(B)(i) (emphasis added).

It is the debtor's responsibility to prove there exist "special circumstances . . . for which there is no reasonable alternative." On the procedural side, the debtor must meet the requirements of §707(b)(2)(B)(ii), which require: (1) documentation for the expense or adjustment; (2) "a detailed explanation of the special circumstances that make the adjustments to income necessary and reasonable;" and (3) such information must be provided by the debtor under oath. In re Hammock, 436 B.R. 343, 352 (Bankr. E.D.N.C. 2010).

Once the procedural burden has been met, the courts then look to whether there exists a special circumstance creating an expense for which there is no reasonable alternative but to pay to rebut the presumption of abuse. This examination must be done on a "case-by-case basis." In re Fonash, 401 B.R. 143, 147 (Bankr. M.D.Pa. 2008); In re Champagne, 389 B.R. 191, 200 (Bankr. D.Kan. 2008).

In re Sanders, 454 B.R. 855, 857 (Bankr. M.D. Ala. 2011).

1. Student loans as special circumstances.

The Sanders decision discusses the various ways in which courts view claims that student loans are a “special circumstance” that can serve to rebut the presumption of abuse when it arises under the Chapter 7 Means Test:

[C]ourts have divided largely into three camps when it comes to addressing the issue of whether student loan repayment qualifies as a "special circumstance" under §707(b)(2)(B).

In the first camp are courts who have found that student loans can never qualify as "special circumstances" and therefore, cannot be considered as an "other necessary expense" for the purposes of determining abuse under the Means' Test. See Id. Those courts reason that a debtor's circumstances need to be "reasonable and necessary" to be similar to the examples provided by Congress in the Code in order to qualify as special. Id. at 354 (citing In re Siler, 426 B.R. 167, 172 (Bankr. W.D.N.C. 2010) (citation omitted). Thus, the expense ultimately needs to be the result of situation that is extraordinary, outside the control of a

debtor, or always unanticipated. Id. (citing Siler, 426 B.R. at 172). This creates a very high standard for a debtor to achieve.

In applying this high standard, the courts in camp one look at the particulars of student loan repayment. These courts note that debtors often advance the argument that the non-dischargeable nature of student loans is what triggers the special circumstances. Id. at 355. These courts find that simply being classified as non-dischargeable does not meet the high standard intended by Congress. Rather, if a student loan were provided this additional protection, it would essentially give a student loan a priority status not provided for in the Bankruptcy Code. Id. (citing Siler, 426 B.R. at 175; In re Vaccariello, 375 B.R. 809, 815 (Bankr. N.D. Ohio 2007)). These courts concluded that there is nothing "special" about student loans and therefore, they do not qualify as special circumstances.

A second camp of courts suggest that they are open to student loan repayments constituting special circumstances, but did not find special circumstances because of the facts before them or for procedural reasons. See In re Womer, 427 B.R. 334 (Bankr. M.D.Pa. 2010); In re Fonash, 401 B.R. 143 (Bankr. M.D.Pa. 2008). In Womer, the court noted the "exceptional burdens placed on the debtor by reason of the obligation of the student loan" as the crux for other courts finding student loan repayments constitute special circumstances. Id. at 336. However, the debtors in Womer did not provide any evidence of exceptional burdens or an inability to repay; rather they simply stated they had student loan obligations and a general difficulty in paying their expenses. The Womer court concluded that absent something more specific, the court could not find that special circumstances existed. Id. In Fonash, the court did not reach the substantive issue because it found that the debtor had not even met the procedural requirements under §707(b)(2)(B). Fonash, 401 B.R. at 148. Both courts recognized the need for the debtor to document the expense that would constitute special circumstances. Without this minimum showing, the courts did not need to further examine the trickier question of if that situation is a special circumstance.

In the third and final camp, the courts have found that depending on the facts, student loan repayments can constitute special circumstances. See In re Haman, 366 B.R. 307 (Bankr. D.Del. 2007); In re Templeton, 365 B.R. 213 (Bankr. W.D.Okla. 2007); In re Delbecq, 368 B.R. 754 (Bankr. S.D.Ind. 2007); In re Knight, 370 B.R. 429 (Bankr. N.D.Ga. 2007). These courts reasoned that "'special circumstances' requires 'a fact-specific, case-by-case inquiry into whether the debtor has a meaningful ability to pay his or her debts in light of an

additional expense or adjustment to income not otherwise reflected in the means test calculation.'" Knight, 370 B.R. at 437 (citing Delbecq, 368 B.R. at 758-59). To these courts, a special circumstance is one that if the additional expense is not taken into consideration it creates a "demonstrable economic unfairness" that prejudices the debtor. Id. at 437-38.

In support of their position, the courts in the third camp look first to the statutory language of §707(b)(2)(B) itself. See Haman, 366 B.R. at 313 ([W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)); Delbecq, 368 B.R. at 756. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'" Id. (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981))). In the event the statute is ambiguous, then the courts can turn to the legislative history to determine the intention of the drafters. Id. (citing Ron Pair, 489 U.S. at 242-43 (internal citations omitted)). Here, the term "special circumstances" is not defined in the Code, so the courts turn to the legislative intent.

First, these courts have noted that nothing in the plain language of §707(b)(2)(B) requires that the special circumstances be of an involuntary nature: the only clear requirements under §707(b)(2)(B) are that the debtor bears the burden to prove a special circumstance that leaves the debtor with no reasonable alternative but to incur the expense or have the income adjustment. Id. (citing In re Graham, 363 B.R. 844, 850-51 (Bankr. S.D. Ohio 2007)). Indeed, some of these courts have noted that even the involuntary nature of the examples provided in §707(b)(2)(B) is questionable — "[a] serious health condition could stem from a self-inflicted injury, and an individual called to active duty could have voluntarily enlisted as a reservist." Id. (quoting In re Thompson, 350 B.R. 770, 777 (Bankr. N.D. Ohio 2006). The focus is very much on whether circumstances and expenses exist to which the debtor has no reasonable alternative but to pay. The courts also focus on the words "such as." This signal is routinely used as an introduction to a list of examples. Id. (citing In re Sparks, III, 360 B.R. 224, 230-31 (Bankr. E.D.Tex. 2006; In re Lenton, 358 B.R. 651, 661-62 n.22 (Bankr. E.D.Pa. 2006)). Moreover, the words "such as" imply an intent to provide a non-exhaustive list of illustrations and not an intent to limit the application of the statute to just the list. Id.

> The legislative history of §707(b)(2)(B) further supports these courts view of the what the statute's language clearly says. According to the Congressional Record on the amendment, examples of special circumstances were not even provided until Senator Jeff Sessions "proposed the amendment to clarify 'that the special circumstances exception . . . includes a debtor with a serious medical condition or a debtor on active duty in the military.'" Id. at 314 (citing H.R. Rep. No. 109-31(I), at 9 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 96). Senator Sessions did not intend to limit judicial discretion or define special circumstances, but simply to protect those "incapable of paying back their debt due to military service or a serious medical condition" from being required to do so. 151 CONG. REC. S1834-01, S1845-46 (2005) (statement of Sen. Sessions). The court in Haman found that not only did the legislative history show that the examples are non-exhaustive, but also Senator Sessions' intent demonstrates that special circumstances do not have to be of an involuntary nature. Haman, 366 B.R. at 314.

In re Sanders, 454 B.R. 855, 857-859 (Bankr. M.D. Ala. 2011); see also, In re Campbell, 2012 Bankr. LEXIS 209 (Bankr. E.D. Ky. Jan. 18, 2012)(student loan debt of approximately $330,000 did not constitute a special circumstance, following In re Pageau, 383 B.R. 221 (Bankr. D. N. H. 2008)); In re Edwards, 2012 Bankr. LEXIS 3392 (Bankr. N.D. Ala. July 25, 2012)(following Sanders). But see, In re Howell, 477 B.R. 314 (Bankr. W.D.N.Y. 2012)(finding student loan debts a "special circumstance sufficient to rebut the presumption of abuse under a different analytical approach).

2. Traveling a long distance to work and aging vehicles.

Courts looking at this issue have recognized that their decisions turn on the specific facts and circumstances of each debtor's situation.

In Mansfield, the court found that a commute of 30 miles each way to work was not a special circumstance. The debtor drove a 2007 Chevy truck that got 22 miles per gallon highway and 18 miles per gallon in the city, because he used the truck to maintain his home and yard. The court did not find the reasons given for the low mileage truck to be persuasive because they did not relate to the reason for the asserted "special circumstances" – the drive to work.

The court also found unpersuasive the use of the IRS mileage rate of 55.5¢ to calculate expenses. The debtor agreed that this amount "may not be equal to his actual monthly commuting expenses". And the debtor did not provide "an itemized account for each additional expense to prove that special circumstances exist." In re Mansfield, 2012 Bankr. LEXIS 715 at *7-*11 (Bankr. E.D.N.C. Feb. 24, 2012); see also, In re Tranmer, 355 B.R. 234, 250 (Bankr. D. Mont. 2006)(finding high transportation costs for debtor's commute was not a special

circumstance); In re Sadler, 378 B.R. 780, 787 (Bankr. E.D. Tex. 2007)(finding debtors failed to prove costs of commuting were special circumstances).

In contrast, the court in In re Batzkiel, 349 B.R. 581 (Bankr. N.D. Iowa 2006) found the situation where debtors each commuted over 40 miles each way through high deer populated rural areas and were at risk of losing their automotive insurance coverage should they make a claim for another collision with a deer constituted special circumstances for allowing additional expenses of maintaining a spare vehicle.

A more complex situation is presented in In re Pignotti, 2011 Bankr. LEXIS 1312 (Bankr. S.D. Iowa April 1, 2011). There, the debtors demonstrated transportation expenses of at least $1,000. However, the debtors failed to show there was "no reasonable alternative" to the expense. The debtors had moved from Nebraska – closer to work – to Iowa for a bigger home for their children, which they substantially improved. While debtors' children were employed, they contributed nothing to the household expenses. The debtors had filed a prior Chapter 7, and the court found them to be sophisticated in the ways of bankruptcy – the combination of the increased secured debt to improve the home, free room and board for adult children, and the claim for driving expenses created by the move to the Iowa home, was too much for the court to find "no reasonable alternative".

The argument that "my car is old" has not been well received as a "special circumstance". The court in In re Dejoy held that:

> The Debtors claim that required repairs and anticipated maintenance for their older model vehicles demonstrate special circumstances. The court disagrees. Aging vehicles and car repairs are an ordinary occurrence for car owners and, consequently, cannot constitute special circumstances warranting an additional expense to the detriment of creditors. Cf. In re Palmer, 419 B.R. 162, 167-68 (Bankr. N.D.N.Y. 2009) (holding that vehicle needing repairs was not unanticipated, material change in circumstances, of kind required to modify confirmed chapter 13 plan and surrender vehicle).

In re Dejoy, 2011 Bankr. LEXIS 4435 at *12 (Bankr. N.D.N.Y. Nov. 18, 2011).

3. Pregnancy and/or the post-petition child.

Where a debtor is pregnant at the time of filing, the child that is on the way is not part of the household size. The questions is, does that additional household member count as a special circumstance?

In In re Inghilterra, 2012 Banrk. LEXIS 1460 (Bankr. D. Colo. April 4, 2012) the court was willing to view the additional child as a special circumstance, but the additional costs that were proven did not take the debtors disposable income below the "presumption of abuse" level. While the bankruptcy court was willing to increase certain expenses – like food and related expenses on Line 19 and health care – it appears that certain expenses, like taxes, were reduced.

> [As a "**practice pointer**" – it appears that the U.S. Trustee did not dispute an increase in child care expenses. However, the debtors did not put on evidence of that increased expense, and the court did not allow it. So, always put into evidence the increased expenses you want to court do to consider. The acquiescence of the U.S. Trustee may not be enough. See also, In re Katz, 451 B.R. 512 (Bankr. C.D. Cal. 2011)(The debtor did not rebut the statutory presumption of abuse because he failed to provide documentation to demonstrate that the additional housing rental, car, education, childcare, and healthcare expenses he claimed were caused by his special circumstances, and he also did not provide a detailed explanation of the special circumstances that made the expenses necessary and reasonable.)]

More conventionally, the court in In re Martin, 371 B.R. 347, 355 (Bankr. CD. Ill. 2007) held that pregnancy at the time of filing is special circumstance because there was no reasonable alternative to incurring expenses claimed for increase in household size.

4. 401(k) loans.

The general rule is that 401(k) loans are not deductible on the 22A Means Test. See, In re Egebjerb, 574 F.3d 1045 (9th Cir. 2009); In re Wellington, 2012 Bankr. LEXIS 467 (Bankr. E.D. Mo. Feb. 9, 2012); Bolen v. Adams, 403 B.R. 396 (N.D. Miss 2009)(the debtor's obligation to repay a loan from the debtor's employee retirement plan was not a "debt" as that term was used in the Bankruptcy Code, so that debtor's payments on the loan were not "payments on account of secured debt," which can be deducted in performing a "means test" calculation); McVay v. Otero, 371 B.R. 190 (W.D. Tex. 2007).

Similarly, courts have held that the existence of a 401(k) loan is not a "special circumstance". See, In re Mowris, 384 B.R. 235 (Bankr. W.D. Mo. 2008)(loans against qualified retirement accounts are not secured debts that are deductible from current monthly income under the means test as "payments on account of secured debts", nor do they qualify as "other necessary expenses" that could be deducted from current monthly income under the means test, nor are they special circumstances rebutting the presumption of abuse arising under the means test, and because a debtor's retirement loan repayments would be deductible from disposable income in a Chapter 13 case does not establish special circumstances rebutting the presumption

of abuse); In re Egebjerg, 574 F.3d 1045, 1049-50, 1053 (9th Cir. 2009)(repayment of retirement plan loans may not be included for purposes of the means test under §707(b)(2), and does not qualify as "Special Circumstances" under §707(b)(2)(B)(i)).

Retirement contributions are generally not considered a “special circumstance” that would rebut the presumption of abuse. See, In re Fechter, 456 B.R. 65, 73 (Bankr. D. Mont. 2011))("[c]ontributions to voluntary retirement plans are not a necessary expense. IRM §5.15.1.23"). Id. at 1052. Therefore, Debtors' expense claims on Line 60 of Ex. C for 401(K) and TSP contributions cannot be "special circumstances."”).

5. Speculative changes of income or expenses.

The mere possibility of income fluctuations, or increased expenses, have not been a very successful avenue for getting a bankruptcy court to find special circumstances.

For example, speculative increases in medical bills have been held to not be sufficient for an adjustment to the Means Test based on “special circumstances”. In re Thompson, 457 B.R. 872, 884 (Bankr. M.D. Fla. 2011)(Facts that are "unknown or highly speculative" are not relevant to the analysis. In re Parada, 391 B.R. at 502.”).

The same analysis appears to prevail on the income side of the equation. The fact that the husband's income may have been subject to seasonal fluctuations was insufficient to show that the debtors were unable to make payments to creditors in the amounts set forth at §707(b). In re Chambers, 2011 Bankr. LEXIS 3594 (Bankr. S.D. Iowa June 7, 2011). Similarly, the absence of itemization and documentation to support the debtor’s testimony about the unavailability of overtime was insufficient to show “special circumstances”. In re Parulan, 387 B.R. 168 (Bankr. E.D. Va. 2008).

6. Unavailability of Chapter 13 is not a special circumstance.

The argument that the debtor is not able to utilize Chapter 13 is a “special circumstance that would warrant allowing the debtor to proceed under Chapter 7 has been rejected.

Courts have been reluctant to “reward” debts who have piled on too much debt to be eligible for a Chapter 13. See, In re Burggraf, 436 B.R. 466, 474-475 (Bankr. N.D. Ohio 2010); In re Campbell, 2012 Bankr. LEXIS 209 at *16 (Bankr. E.D. Ky. Jan. 18, 2012)(“Likewise, that the Debtor is not eligible for a Chapter 13 proceeding does not constitute a "special circumstance."”).

The fact that the Chapter 13 Means Test may more beneficial to debtors has been rejected as a basis for finding special circumstances. See, In re Fechter, 456 B.R. 65, 70-71 (Bankr. D. Mont. 2011)(the ability to deduct some, or all, of the child support received for expenses associated with the child was not a basis for finding special circumstances); and Cf., McVay v. Otero, 371 B.R. 190, 204-205 (W.D. Tex. 2007)(bankruptcy court could not find special circumstances in every case where Chapter 13 Means Test allowed more advantageous deductions).

F. Section 707(b)(3) – A Brief Overview.

In cases where the presumption does not arise or is rebutted, the court still must determine whether granting a debtor relief would be an abuse of the provisions of Chapter 7 by considering "whether the debtor filed his petition in bad faith" and/or by considering "the totality of the circumstances . . . of the debtor's financial situation." Calhoun v. United States Trustee, 650 F.3d 338, 341 (4th Cir. 2011).

Thus, even if the debtor passes the "objective" Means Test, there is still the possibility of a motion to dismiss being filed under the "subjective" provision of §707(b) – Section 707(b)(3), which states:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider—
>
> (A) whether the debtor filed the petition in bad faith; or
>
> (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

Thus, under Section 707(b)(3), the court looks at the "totality of the circumstances" in determining if a Chapter 7 case is abusive.

While there is a debate as to whether post-petition changes should be used in the determination of whether the presumption of abuse arises under the Chapter 7 Means Test, there is little question that under Section 707(b)(3)'s "totality of the circumstances" test courts can look at post-petition events affecting income and expenses in evaluating whether the granting of relief would be an abuse. See, In re Cortez, 457 F.3d 448, 455-56 (5th Cir. 2006); Ng v. Farmer, 477 B.R. 118, 130-132 (9th Cir. BAP 2012); In re Crink, 402 B.R. 159, 170-76 (Bankr. M.D.N.C.

2009); In re Dowleyne, 400 B.R. 840, 846 (Bankr. M.D. Fla. 2008); In re Henebury, 361 B.R. 595, 607-611 (Bankr. S.D. Fla. 2007); In re Pennington, 348 B.R. 647, 651 (Bankr. D.Del. 2006).

A case decided prior to the passage of the BAPCAP, In re Krohn, is the Sixth Circuit's leading case for interpreting whether a petition is an abuse under §707(b)(3). In re Krohn, 886 F.2d 123 (6th Cir. 1989). In Krohn, the Sixth Circuit analyzed the provision of §707(b) which permitted the bankruptcy court to dismiss a petition as a substantial abuse of Chapter 7. The Krohn court also noted that "[s]ubstantial abuse can be predicated upon either lack of honesty or want of need." Id. at 126. "Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings." Id. The Sixth Circuit stated that the want of need "factor alone may be sufficient to warrant dismissal." In re Krohn, 886 F.2d at 126.

1. Social Security Income Under Section 707(b)(3).

Looking at one issue – Social Security income - demonstrates the difference between the Means Test presumption of abuse and the question of abuse under the totality of the debtor's circumstances.

There are two published decision that directly confront the consideration of Social Security benefits in deciding motions to dismiss a Chapter 7 case as a substantial abuse under 707(b) (3)'s "totality of the circumstances" test. Both decisions, In re Calhoun, 396 B.R. 270 (Bankr. D.S.C. 2008), aff'd, Calhoun v. United States Trustee, 650 F.3d 338 (4th Cir. 2011), and In re Booker, 399 B.R. 662 (Bankr. W.D. Mo. 2009), hold that it is proper to consider Social Security income as part of the totality of the debtors' circumstances, and both decisions grant the §707(b) (3) motions of the U.S. Trustee and dismiss the Chapter 7 cases.

In Calhoun, the debtor husband had $7,313 in pension income, and $1,459 in Social Security income. Calhoun, 396 B.R. at 272-273. With the Social Security income, there would be disposable income available of more than $1,500 a month. The court cited the specific language of §707(b) (3) (B), that makes the pertinent inquiry the "totality of the circumstances of the debtor's financial condition" in holding that the ability to pay, standing alone, is sufficient cause for dismissal under the post-BAPCPA standard of "abuse" without a presumption in favor of granting relief. Calhoun, at 275.

Looking at the structure of §707(b) (3):

> Income received under the Social Security Act is excluded from "current monthly income" in computing the means test for the purpose of determining whether a presumption of abuse arises under §707(b) (2). See §101(10A) (B). Social Security

> income is also excluded from the calculation of disposable income for above-median income chapter 13 debtors. See §§1325(b) (2); 101(10A) (B); In re Siegel, 2006 Bankr. LEXIS 3236, 2006 WL 3483987 (Bankr. D.S.C. Nov. 20, 2006). Congress clearly knew how to exclude benefits under the Social Security Act from consideration but did not do so in connection with the §707(b) (3) (B) totality of the circumstances test. Because this test was added to the Bankruptcy Code at the same time exclusions of Social Security Act income were added to other sections of the Bankruptcy Code the failure to exclude the benefits is even more significant. Such income should not therefore be excluded from consideration in analyzing ability to pay as a component of the totality of the debtor's financial circumstances under §707(b) (3).

Calhoun, 396 B.R. at 276.

While the Calhoun decision was affirmed by the Fourth Circuit Court of Appeal, the appellate court found that sufficient grounds had been stated for dismissal under Section 707(b) (3), even without the Social Security income being considered, that the panel did not need to reach that issue. Calhoun v. United States Trustee, 650 F.3d 338 at 342-343 (4th Cir. 2011).

The Booker opinion followed the bankruptcy court's rationale in Calhoun, and specifically held that it was proper to considered Social Security income as part of the totality of the debtors' financial circumstances. In re Booker, 399 B.R. 662, 667-668 (Bankr. W.D. Mo. 2009).

2. Deductions for contractually due payments secured by collateral being surrendered.

While the majority of courts hold that the 22A Means Test is a snap shot that permits deductions for contractually due payments in determining whether a presumption of abuse exists under Section 707(b)(1) and (2) – what the Means Test giveth, the "totality of the circumstances test" taketh away.

Courts hold that while the monthly payment for debts secured by property the debtor intends to surrender may be deducted for 22A purposes in determining whether there is a presumption of abuse, for purposes of §707(b)(3) the court may still consider the fact that those obligations will not actually be paid on a going forward basis. See, In re Sonntag, 2012 Bankr. LEXIS 1290 (Bankr. N.D.W.V. March 28, 2012); In re Thompson, 457 B.R. 872, 883 (Bankr. M.D. Fla. 2011)("Debtors' expense claims for mortgage payments for the Clermont Property are not allowable deductions. Debtors may not claim secured loan payments they will not actually make."); In re Grinkmeyer, 456 B.R. 385, 389-391 (Bankr. S.D. Ind. 2011); In re Parada, 391 B.R. 492, 502 (Bankr. S.D. Fla. 2008)("The U.S. Trustee argues that, in calculating the Debtors'

ability to pay their unsecured debt under 11 U.S.C. §707(b)(3), the Debtors may not take into account the payments associated with the surrendered home and car. I agree."); In re Maya, 374 B.R. 750, 754-755 (Bankr. S.D. Cal. 2007); In re Haar, 373 B.R. 493, 500-501 (Bankr. N.D. Ohio 2007); In re Henebury, 361 B.R. 595, 613-614 (Bankr. S.D. Fla. 2007).

3. 401(k) loans after Seafort.

The bankruptcy court in Fletcher held that a debtor's ability to fund Chapter 13 Plan after postpetition payoff of 401(k) loan warrants "abuse" dismissal of Chapter 7 case under §707(b)(3). In re Fletcher, 463 B.R. 9 (Bankr. E.D. Ky. 2011).

Although the case was decided before the Sixth Circuit's decision in In re Seafort, 669 F.3d 662 (6th Cir. 2012), affirming that 401(k) loan payments have to come into the Chapter 13 plan after the loan is repaid, the Fletcher decision appears even stronger after the issuance of the Sixth Circuit's opinion.

On the other hand, some courts have held that the existence of 401(k) loans may not be sufficient to mitigate a finding of abuse under Section 707(b)(3). See, In re Boyce, 446 B.R. 447 (D. Or. 2011)("it would not be inappropriate to refuse to consider the expense of the 401(k) loans under the totality of the circumstances because there would be no recourse for failure to repay such a loan.")

G. Can't We Just Use I and J In Chapter 13? What The Supreme Court Has Said About The Use Of The Means Test In Chapter 13 Cases.

While some bankruptcy courts continue to use Schedules I and J to determine projected disposable income for above-median debtors, it is difficult to reconcile that procedure with the Bankruptcy Code requirements, as those requirements have been explained by the United States Supreme Court in two Chapter 13 cases – Lanning and Ransom.

The Ransom decision stated:

> To determine how much income the debtor is capable of paying, Chapter 13 uses a statutory formula known as the "means test." §§707(b)(2) (2006 ed. and Supp. III), 1325(b)(3)(A) (2006 ed.). The means test instructs a debtor to deduct specified expenses from his current monthly income. The result is his "disposable income"--the amount he has available to reimburse creditors. §1325(b)(2).

* * * * * * *

In particular, Congress adopted the means test--"[t]he heart of [BAPCPA's] consumer bankruptcy reforms," H. R. Rep. No. 109-31, pt. 1, p. 2 (2005) (hereinafter H. R. Rep.), and the home of the statutory language at issue here--to help ensure that debtors who can pay creditors do pay them. See, e.g.,ibid. (under BAPCPA, "debtors [will] repay creditors the maximum they can afford").

* * * * * * *

In Chapter 13 proceedings, the means test provides a formula to calculate a debtor's disposable income, which the debtor must devote to reimbursing creditors under a court-approved plan generally lasting from three to five years. §§1325(b)(1)(B) and (b)(4). The statute defines "disposable income" as "current month"ly income" less "amounts reasonably necessary to be expended" for "maintenance or support," business expenditures, and certain charitable contributions. §§1325(b)(2)(A)(i) and (ii). For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as "amounts reasonably necessary to be expended." **The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis**, which led to varying and often inconsistent determinations. See, e.g., In re Slusher, 359 B. R. 290, 294 (Bkrtcy. Ct. Nev. 2007).

Ransom v. FIA Card Services, N.A., ___ U.S. ___, ___, 131 S.Ct. 716, 721-722, 178 L.Ed.2d 603, 608-609 (2011).

The Ransom decision continues:

Under the means test, a debtor calculating his "reasonably necessary" expenses is directed to claim allowances for defined living expenses, as well as for secured and priority debt. §§707(b)(2)(A)(ii)-(iv). As relevant here, the statute provides:

> 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 issued by the Internal Revenue Service [IRS] for the area in which the debtor resides." §707(b)(2)(A)(ii)(I).

These are the principal amounts that the debtor can claim as his reasonable living expenses and thereby shield from creditors.

Ransom v. FIA Card Services, N.A., ___ U.S. ___, ___, 131 S.Ct. 716, 721, 178 L.Ed.2d 603, 608 (2011).

The Ransom decision further states:

> The Code initially defines a debtor's disposable income as his "current monthly income . . . less amounts reasonably necessary to be expended." §1325(b)(2)(emphasis added). The **statute then instructs that "[a]mounts reasonably necessary to be expended . . . shall be determined in accordance with" the means test.** §1325(b)(3). Because Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category. If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not "reasonably necessary" within the meaning of the statute.
>
> Finally, consideration of BAPCPA's purpose strengthens our reading of the term "applicable." **Congress designed the means test to measure debtors' disposable income** and, in that way, "to ensure that [they] repay creditors the maximum they can afford." H. R. Rep., at 2. This purpose is best achieved by interpreting the means test, consistent with the statutory text, to reflect a debtor's ability to afford repayment. Cf. Hamilton, 560 U.S., at ___, 130 S. Ct. 2464, 177 L. Ed. 2d 23, 37 (rejecting an interpretation of the Bankruptcy Code that "would produce [the] senseless resul[t]" of "deny[ing] creditors payments that the debtor could easily make"). Requiring a debtor to incur the kind of expenses for which he claims a means-test deduction thus advances BAPCPA's objectives.

Ransom v. FIA Card Services, N.A., ___ U.S. ___, ___, 131 S.Ct. 716, 724-725, 178 L.Ed.2d 603, 612 (2011)(footnote omitted).

Because Schedules I and J do not have the same limits and categories as the Means Test, it is difficult to see how an appeal based upon a conflict between a result under Schedules I and J, and the amount required to paid to unsecured creditors pursuant to Line 59 would be resolved in favor of the use of Schedules I and J.

Some courts that use Schedules I and J seem to operate under the belief that the flexibility in Lanning allows courts to ignore the Means Test. The language in Lanning does not support that position:

> The arguments advanced in favor of the mechanical approach are unpersuasive. Noting that the Code now provides a detailed and precise definition of "disposable income," proponents of the mechanical approach maintain that any departure from this method leaves that definition " 'with no apparent purpose.' In re Kagenveama, 541 F.3d 868, 873 (CA9 2008). This argument overlooks the important role that the statutory formula for calculating "disposable income" plays under the forward-looking approach. As the Tenth Circuit recognized in this case, a court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. **It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses.**

Hamilton v. Lanning, 560 U.S. ___, ___, 130 S.Ct. 2464, 2474-2475, 177 L.Ed.2d 23, 25-26 (2010).

Lanning's reference to adjustments to be made in "unusual cases" where "virtually certain" information on changed circumstances does not appear to be an endorsement of the use of Schedules I and J in above-median cases, to determine the amount that is required to be paid into a plan in order to meet the "projected disposable income" requirement.

The holdings in Lanning and Ransom appear to be inconsistent with only using the Form B22C to determine the applicable commitment period. The Supreme Court appears to clearly state that the minimum payments required for confirmation of a Chapter 13 Plan filed by above-median debtors - when there is an objection based on "projected disposable income" - is to be determined using the Means Test categories and expense limits. . . even if the use of Schedules I and J for all debtors was a better system.

While this Outline includes many examples of situations where the Means Test is unfair to debtors or creditors (seemingly at random), the appropriate remedy would appear to be changing the law.

From one bankruptcy court's perspective, the Means Test and Schedules I and J are different, and the while I and J may provide evidence of changed circumstances, it would rarely (if ever) be dispositive:

> Thus, although Schedules I and J are evidence of a debtor's income and expenses, differences between the numbers on the Form B22C and those on the Schedules I and J do not by themselves establish a change in income or expenses that is known or virtually certain to occur. Differences may be a result of, among other things, errors (in which case the errors should be corrected), the inclusion in Schedule I of income that is excluded from the calculation of "current monthly income" as defined in §101(10A), a change in employment status, the use of IRS standardized expense figures on the Form B22C (as opposed to actual expenses on the Schedule J), or the use of different periods of time for the calculations used for the different forms. Differences may or may not indicate changes that are known or virtually certain and that may be used to more accurately project the debtor's disposable income over the life of the plan. The trustee cannot rely solely on the Schedules I and J to show that the monthly disposable income shown on the Form B22C should be adjusted to accurately project disposable income into the future. There must be evidence that the differences reflect predictable known or virtually certain changes.
>
> For example, as in Lanning, the income included in the Form B22C may include a one-time lump sum payment that skews the average income shown on the form. Other possibilities that come to mind, and are by no means intended to be comprehensive, are bonuses received annually that are certain but are not included in the Form B22C because of timing issues, recent salary raises, or seasonality that predictably results in income differences at different times of the year. Similarly, it might be appropriate to adjust standardized expenses if there is some known or virtually certain change that would affect the application of the standardized expenses, such as a change in family size. Where actual expenses are used in the Form B22C, those expenses should not be adjusted unless the trustee shows that changes in those expenses are known or virtually certain. Merely showing fluctuations over time or different amounts on the Schedule I or J is not enough.

In re Reed, 454 B.R. 790, 797 (Bankr. D. Or. 2011).

H. The Form 22C Means Test By The Numbers - Chapter 13:

The Form 22C instructions are reproduced as they appear in the Chapter 13 Means Test.

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only

Part I. REPORT OF INCOME

Line 1. Marital/filing status. *Check the box that applies and complete the balance of this part of this statement as directed.*

a. □ *Unmarried.* ***Complete only Column A ("Debtor's Income") for Lines 2-10.***
b. □ *Married.* ***Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.***

All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	***Column A Debtor's Income***	***Column B Spouse's Income***

Line 1 asks if the debtor is (a) Unmarried or (b) Married. The Form 22C does not allow the debtor to not fill out the Mean Test based on the debtor's status as a disabled veteran with debt incurred in active duty, or non-consumer debtor, or a reservist or national guard member on active duty. Chapter 13 debtors always have to complete the Means Test. See, Section C 4-5 supra. There are also less choices regarding how a debtor is filing – there is no ability to declare "separate households" on the Form 22C like there is on the Chapter 7 Means Test.

If the debtor is unmarried, only Column A is used. If the debtor is married, then both Columns A and B are filled out.

Line 1's directions are applicable to several other parts of the Means Test. For example:

> The instructions at Part I, line 1, of the amended Form B22C explains: "All figures must reflect average monthly income received from all sources, derived during the six months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the

six months, you must divide the six-month total by six, and enter the result on the appropriate line." Following this direction the Debtors entered $333.00 at line 9a for the sale of the Hyundai ($2,000 divided by 6 = $333.34), and $200.00 at line 9b for the sale of the Neon ($1,200 divided by 6 = $200).

In re Leach, 61 Collier Bankr. Cas. 2d (MB) 1555, 2009 Bankr. LEXIS 1097 at *6 - *7 n.4 (Bankr. D. Mont. 2009); see also, In re Cram, 414 B.R. 674, 675 n.5 (Bankr. D. Idaho 2009)("The original Form 22C (Doc. No. 30, filed Mar. 11, 2008) shows the figure of $1,518.43 on line 6, as "pension and retirement income" received." & "This is one-sixth of the $9,110.58 distribution. Form 22C indicates, at line 1, that "All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line."").

Line 2. Gross wages, salary, tips, bonuses, overtime, commissions. $_____ $_____

Line 2 asks for "Gross wages, salary, tips, bonuses, overtime and commissions." If that number is substantially different from the gross income number on Schedule I, the Chapter 13 Trustee is going to ask why. One of the most common responses, when the Means Test gross income number is higher than Schedule I, is that overtime was not estimated on Schedule I, and it makes up a substantial portion of the debtor's previous 6 months worth of income. Expect inquires about exactly how much the debtor makes, and why overtime was not estimated on Schedule I.

If the gross income number on Line 2 does not add up to 26 weekly checks, 13 bi-weekly checks, or 12 semi-monthly checks, expect your calculation methodology to be questioned. If you want to argue for one less pay check being included based on when it was received, or some other technicality – remember that same holding would be applicable to add an extra check if the pay dates fell a different way. Counting rules often work two ways. So, be careful what you ask for, to the extent it isn't an attempt to more accurately portray actual gross income. Arguments based upon when a check was actually received have been met, in at least one case, with an analysis of when the income was "derived". See, B22C Means Test, Line 1 ("income received from all sources, derived during the six calendar months prior to filing the bankruptcy case"); In re Bernard, 397 B.R. 605, 607 (Bankr. D. Mass. 2008)("the Court concludes that CMI includes income that resulted from employment during the relevant six month period even though the Debtor received the actual paycheck for that work after the end of the six month period. Income derived from employment prior to the beginning of the six month period but actually received

during the six month period should not be included. When CMI is adjusted to incorporate these changes, there is minimal if any impact on the Debtors' CMI.").

If the debtor has a non-filing spouse, there income must be listed on the Means Test (subject to adjustment using the "marital adjustment" on Lines 13 and 19). See e.g., In re McSparran, 410 B.R. 664 (Bankr. D. Mont. 2009)(unexplained failure to list non-filing spouse's income was fatal to confirmation).

Do not make your Lanning adjustments on Line 2 of the Means Test. While there is now flexibility in Chapter 13 to consider changed circumstances based on changes in income, the actual Means Test number is the presumptive minimum payment. Debtors can argue for a different number, but the number based on the actual income during the six month look-back period is he starting point. See, In re Leggett, 2011 Bankr. LEXIS 820 at *10 (Bankr. E.D.N.C. March 2, 2011)("Based on the definition of CMI, as set forth in Section 101(10A) of the Bankruptcy Code, *all* sources of income received during that six month period prior to the filing date is included in the calculation of CMI.")

Remember, it is not just the debtor who has the ability to argue for a different income number based on changed circumstances after Lanning – the Chapter 13 trustee has the ability to make the same argument, with the same burden of proof. See, In re Saleen, 2011 Bankr. LEXIS 4847 at *9-*14 (Bankr. D. Or. December 2, 2011)(trustee prevailed based on seasonality of income (husband) and new job with increased income (wife)); and see generally, In re Reed, 454 B.R. 790, 797 (Bankr. D. Or. 2011).

Line 3. Income from the operation of a business, profession, or farm. *Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero.* ***Do not include any part of the business expenses entered on Line b as a deduction in Part IV.***

a. Gross receipts *$*_____
b. Ordinary and necessary business expenses *$*_____
c. Business income *Subtract Line b from Line a* *$*_____

Line 3 provides a box for gross income from the operation of a business, profession or farm. There is also a box for "ordinary and necessary operating expenses". The number that goes toward CMI ("Current Monthly Income") is a net figure. However, for purposes of determining whether a debtor is over or under the median income level, the majority view is that the **gross** figure should be used (even though the form isn't set up that way.) See, In re Wiegand,

386 B.R. 238 (9th Cir. BAP 2008); In re Galley, 2011 Bankr. LEXIS 1484 (Bankr. N.D. Ohio April 20, 2011); In re Compann, 549 B.R. 478, 481-483 (Bankr. N.D. Ga. 2010); In re Arnold, 376 B.R. 652, 654 (Bankr. M.D. Tenn. 2007); In re Sharp, 394 B.R. 207, 215 (Bankr. C.D. Ill. 2008); In re Bembenek, Case No. 08-22607-svk, 2008 Bankr. LEXIS 3003, 2008 WL 2704289 (Bankr. E.D. Wis. July 2, 2008); In re Cole, *unpublished*, Case No. 08-34090 (Bankr. N.D. Ohio March 6, 2009)(Whipple, J.)(available on the Northern District of Ohio Bankruptcy Website, Judge Whipple's Opinions.); and Cf., In re Ellsworth, 455 B.R. 904, 910 (9th Cir. BAP 2011)(bankruptcy court followed Wiegand); Mark A. Redmiles and Saleela Knanum Salahuddin, *The Net Effect*, American Bankruptcy Institute Journal, October 2008, 16, 56-57 ("With respect to chapter 13 debtors who are at or below the median income, the need to avoid the double deduction of ordinary business expenses applies equally. The chapter 13 trustee is well-positioned to object if an above- or below-median income debtor claims a double deduction for any category of expenses."). But see, In re Roman, 2011 Bankr. LEXIS 4483 at *7 (Bankr. D.P.R. Nov. 16, 2011)(net business income used to determine applicable commitment period); In re Featherston, Case No. 07-60296-13, 2007 Bankr. LEXIS 4578, 2007 WL 2898705 (Bankr. D. Mont. Sept. 28, 2007); In re Biscoe, *unpublished*, Case No. 10-20177-NVA (Bankr. D. Md. April 12, 2012)(Alquist, J.).

Where a debtor receives income from an LLC, that income needs to be included as part of CMI. See, In re Weilnau, 2012 Bankr. LEXIS 1121 at *10 - *11 (Bankr. N.D. Ohio March 14, 2102)("In addition, it does not appear that Debtors' have filed an accurate Form B22C. Debtors' CMI includes only wages. It does not include any income received by Weilnau from the LLC, notwithstanding Weilnau's testimony that he did receive such income.").

Line 4. Rent and other real property income. *Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero.* ***Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.***

a. Gross receipts	*$_____*
b. Ordinary and necessary operating expenses	*$_____*
c. Rent and other real property income	*Subtract Line b from Line a $___ $___*

Line 4 is for "Rents and other real property income". Line 4 cannot be a negative number. The instructions specifically state: "Do not enter a number less than zero."

Where the rental property is being retained, the income should be used to calculate CMI. See, In re Leggett, 2011 Bankr. LEXIS 820 at *10 (Bankr. E.D.N.C. March 2, 2011)(rental income included in calculation by stipulation).

The same issues discussed in relation to Line 3, above, apply to Line 4 – only there is far less case law. Compann states (in *dicta*, because Line 4 was not actually in issue): "Line 4 of Form 22C contains a mechanism similar to line 3, which subtracts "ordinary and necessary operating expenses" from gross receipts of rents and other real property income received by a debtor." In re Compann, 459 B.R. 478, 481 n.5 (Bankr. N.D. Ga. 2010). If the majority view of the Wiegand line of cases on business income is followed, a gross rental number, not a net figure, for determining whether the debtor is above or below the median income level. See e.g., In re Wiegand, 386 B.R. 238 (9th Cir. BAP 2008); In re Compann, 459 B.R. 478 (Bankr. N.D. Georgia 2010); In re Sharp, 394 B.R. 207 (Bankr. C.D. Ill. 2008); In re Arnold, 376 B.R. 652, 654 (Bankr. M.D. Tenn. 2007); contra, In re Roman, 2011 Bankr. LEXIS 4483 (Bankr. D. P.R. November 16, 2011).

Regardless of whether the deduction is permitted "above the line", or has to be taken after a determination is made as to above/below median status, in no event may the debtor "double dip" by deducting the mortgage expense on Line 4b, and then deducting the same mortgage expense on Line 47 for secured debts.

A recent case discussed the question of what expenses can be deducted from the rental income, where the rental property is being retained. See, In re Paliev, 2012 Bankr. LEXIS 3801 (Bankr. E.D. Va. August 17, 2012). The Paliev opinion accepted the debtor's argument that the deductions for the rental property on the previous tax returns should be used to calculate the monthly expense deduction to offset rental income. The reason the Paliev court accepted the two-year average of the tax return deduction was because, in the court's view, that was the most realistic figure, looking forward.

In most jurisdictions, when a debtor surrenders real estate in a Chapter 13, the corresponding deduction for the mortgage payment is lost. If rental property is surrendered, it would appear that the deduction for the mortgage expense would be 'lost', whether that deduction is taken on Line 4(b) or Line 47. See generally, In re Quigley, 673 F.3d 269 (4th Cir. 2012); In re Darrohn, 615 F.3d 470, 477 (6th Cir. 2010).

If rental property is being surrendered, there are two issue regarding the income from the rental – one, is the viability of the deduction for offsetting expenses. The other issue is the treatment of the rents themselves in a situation where the rental property is being surrendered.

As a starting point, for purposes of determining the minimum monthly payment under the Means Test: if the debtor only has one rental property, and it is being surrendered, not only do expenses disappear as deductions, the income should as well. If the income is not going to be something the debtor is going to receive in the future, because the rental property is being surrendered, the loss of that income is a "known or virtually certain" change of circumstance that

can be accounted for in determining 'projected disposable income' under Hamilton v. Lanning, ___ U.S. ___, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010). Of course, it will be the debtor's burden to show that the rental income will not be received in the future because of the surrender of the property, but if that can be demonstrated, the income from the rental property during the six month period prior to bankruptcy should be deducted from the calculation of projected disposable income, the same as the expenses for the rental property are removed from the equation used to determine PDI.

Debtor's counsel's concern would be to make sure that these two changes – in rental income and rental expenses – stay "bundled" in calculating the debtor's projected disposable income, so they both have zero effect on the monthly payments.

The effect of the rental income that was received in the six months prior to filing on the applicable commitment period is a more difficult issue – it appears the majority of the reported decisions would allow the income actually received (either gross or net) to be used in determining the applicable commitment period.

If the question is directed at pulling the debtor out of "above median" status, courts have held that while Lanning is useful in setting the monthly Chapter 13 Plan payment based on forward looking considerations, the determination of whether the debtor is above or below the median income level has been held to be a strictly backward-looking calculation. See, In re Martin, 464 B.R. 798, 804 (Bankr. C.D. Ill. 2012)("[U]unlike the forward-looking plan payment determination, the above/below median determination is unambiguously based on the backward-looking approach that focuses on the historical income received prepetition. See 11 U.S.C. §101(10A). Hamilton v. Lanning is of no help to the DEBTOR as it applied the forward-looking approach to the plan payment issue only, not to the above/below-median determination.").

If Martin accurately states the law (there are not a lot of cases on this issue) the rental income is part of the above/below median determination, and the deduction for rental expenses would depend on whether the court followed the reasoning of Compann or Roman, cited above. If Compann were followed, the rental income would be part of the determination of the applicable commitment period, but the deduction for rental expenses would not.

Line 5. Interest, dividends, and royalties.

Line 5 is for "Interest, dividends, and royalties." If income is listed from these sources, be sure that the underlying asset is properly listed on Schedule B.

Line 6. Pension and retirement income.

Line 6 is for pension and retirement income. The strong majority view is that this does not include Social Security income.

Where there is a distribution of monies from a 401(k) or other retirement account prior to filing, Line 6 is one place that counsel may consider listing that "income". The other is Line 9, for income from all other sources. See, In re Cram, 414 B.R. 674 (Bankr. D. Idaho 2009). This issue is discussed more fully in the section dealing with Line 9. The bankruptcy court in In re DeThample, 390 B.R. 716, 718 (Bankr. D. Kan. 2008) specifically noted that a 401(k) distribution was not included on Line 6, and went on to hold that it was income that should have been included in CMI.

The claim that retirement income should be excluded from income because it is "exempt" has not been a winning legal theory. See, In re Soto, 2012 Bankr. LEXIS 2632 at *11 - *12 (Bankr. D. Idaho 2012)(looking at the 'exempt' argument from the perspective of §707(b)(3) – holding that: ""a debtor's right to claim that property is exempt is irrelevant to its status as disposable income under chapter 13." [*citing* In re Burgie, 239 B.R. 406 (9th Cir. BAP 1999)] Thus, income that is arguably exempt may nonetheless be considered when assessing a debtor's ability to fund a chapter 13 plan".)

Similarly, the argument that pension income was money the debtor was receiving back has been rejected in a case where the ability to trace directly trace the monies received to a debtor's pension contribution. See, In re Coverstone, 461 B.R. 629, 634 (Bankr. D. Idaho 2011)("Val's contributory benefit under the pension plan is calculated using a complex algorithm, of which his contributions are but one factor. See Ex. 214. Thus, while Val's contributions to the pension plan (totaling $20,939.02 plus $15,440.35 in interest, see Ex. 103) were put into the general retirement fund from which the benefits of all eligible plan participants and beneficiaries are paid, it is clear from the record that the majority of the contributory benefit Val received (and continues to receive) was contributed by Ford. See Ex. 214. Based on these facts, the Court concludes the contributory pension benefit received by Debtors during the six-month CMI period was "income" for purposes of §101(10A)(A).").

Remember, the amount listed should be gross retirement income – if monies are deducted from a pension for, for example, health insurance, the full gross pension income should be listed, with the health insurance deduction being listed as an expense on Line 39a.

Line 7. Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose. *Do not include alimony or separate*

maintenance payments or amounts paid by the debtor's spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B. *$_____* *$_____*

This line is for contributions made on a regular basis for household expenses by someone other than the debtor's spouse. The case law follows Line 7's direction: "Note that Line 7 of Form 22C includes in CMI amounts paid by another person for the household expenses of the debtor or debtor's dependents, *except for amounts paid by the debtor's spouse*." In re Vollen, 426 B.R. 359, 367 (Bankr. D. Kan. 2010). The same approach was followed in In re Stansell, 395 B.R. 457, 462 (Bankr. D. Idaho 2008)("This does not mean that the instructions on the Form are incorrect or at odds with the Code. It simply means that a different approach to completing the Form is required by unmarried debtors. Instead of including all income received by the debtor as well as the debtor's non-filing spouse, and then deducting on Line 13 that portion of the income which is not paid on a regular basis towards debtor's household expenses as a married debtor would do, an unmarried debtor must list his or her own income, and then add to it any amounts regularly received by the debtor from another entity for the household expenses of the debtor on Line 7."); In re Clemons, 62 Collier Bankr. Cas. 2d (MB) 617, 2009 Bankr. LEXIS 1959 at *13 - *14 (Bankr. C.D. Ill. June 16, 2009)("The means test forms, promulgated by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, treat contributions from a spouse differently from those by a third party. In Part I, line 7, a debtor is instructed to include any amounts regularly paid by a nonspouse for the household expenses of the debtor or the debtor's dependents. In contrast, all of the income of a spouse is included, in Part I, Column B, in calculating the debtor's current monthly income, but a deduction, referred to as a "marital adjustment," is permitted for that portion of a non-debtor spouse's income that is not paid on a regular basis for the household expenses of the debtor or the debtor's dependents.").

At least one court has stated that Line 7 tracks Section 101(10A)'s definition of current monthly income:

> Congress defined "current monthly income", in relevant part, to include "any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents . . .." 11 U.S.C. §101 [10A(B)]. That is what line 7 of Form B22C calls for, and what this debtor provided on her Form B22C. She has complied, and is not required to list her daughter's full income either as a line 7 contribution or as a line 1 income similar to a non-filing spouse.

In re Duran, 2010 Bankr. LEXIS 3533 at *5 (Bankr. S.D. Cal. Oct. 2010). But see, Keith M. Lundin and William H. Brown, *Chapter 13 Bankruptcy, 4th Edition*, §379.1 at ¶¶34 - 39, Sec. Rev. July 12, 2007, www.Ch13online.com (criticizing Line 7).

If a person is living with the debtor, and a contribution to household income is listed on Line 7, this may be a factor in favor of including that person in the debtor's household – permitting higher national and local standard deductions for living expenses. See, In re Plumb, 373 B.R. 429, 437 (Bankr. W.D.N.C. 2007).

Line 8. Unemployment compensation. *Enter the amount in the appropriate column(s) of Line 8. However, if you contend that unemployment compensation received by you or your spouse was a benefit under the Social Security Act, do not list the amount of such compensation in Column A or B, but instead state the amount in the space below:*

Unemployment compensation claimed to be a benefit under the Social Security Act	*Debtor $ ___ Spouse $ ___*	*| $____*	*$____*
			$_____

Line 8 is for unemployment compensation. Two early cases said that unemployment benefits were excluded as benefits paid under the Social Security Act: See, In re Munger, 370 B.R. 21 (Bankr..D. Mass. 2007); In re Sorrell, 359 B.R. 167 (Bankr.S.D.Ohio 2007). The more recent cases – and now the clear majority view - holds that unemployment benefits count as income. See, In re Gentry, 463 B.R. 526 (Bankr. D. Colo. 2011); In re Washington, 438 B.R. 348 (M.D. Ala. 2010); In re Kucharz, 418 B.R. 635 (Bankr. C.D. Ill. 2009); In re Baden, 396 B.R. 617 (Bankr. M.D. Pa. 2008); In re Overby, Bankr. L. Rep. (CCH) P81,868, 2010 Bankr. LEXIS 8183 (Bankr. W.D. Mo. Sept. 24, 2010); In re Winkles, 2010 Bankr. LEXIS 2151, 2010 WL 2680895 (Bankr. S.D. Ill. July 6, 2010); In re Nance, 64 Collier Bankr. Cas. 2d (MB) 230, 2010 Bankr. LEXIS 1736, 2010 WL 2079653 (Bankr. S.D. Ind. May 21, 2010); In re Rose, 2010 Bankr. LEXIS 1851, 2010 WL 2600591 (Bankr. N.D. Ga. May 12, 2010).

The court in In re VanDyne, 2011 Bankr. LEXIS 3236 (Bankr. N.D. Ohio August 19, 2011) cites Washington and notes that for many years the debtor's spouse's unemployment income functioned as a surrogate for a job and was not as a result of an unforeseen job loss, and grants the trustee's motion to modify based on increased income – but the actual holding on unemployment income issue is not explicitly stated. The inference can be drawn that Judge Kendig would follow Washington. Similarly, the court in In re Avellaneda, Bankr. LEXIS 4108, (Bankr. E.D. Va. Dec. 16, 2009) determined that the inclusion of unemployment benefits did not put the debtors over the median income level, and therefore the issue made no difference in the case, and so the court declined to give an advisory opinion on the issue.

The clear trend in the case law is that unemployment benefits are not "benefits received under the Social Security Act" as required for exclusion under Section 101(10A) (B).

Line 9. Income from all other sources. *Specify source and amount. If necessary, list additional sources on a separate page. Total and enter on Line 9.* ***Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance.*** *Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.*

a. *$*

b. *$* *$*_____ *$*_____

Line 9 is for income from all other sources – but not Social Security. Most courts hold that income the debtor (or the debtor's spouse, or children) receive under the Social Security Act is not included in gross income. See, 11 U.S.C. Section 101(10A); Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011) *cert. denied*, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012); Cranmer v. Anderson, 463 B.R. 548 (D. Utah 2011); Vandenbosch v. Waage (In re Vandenbosch), 459 B.R. 140 (M.D. Fla. 2011).

1. Some Transactions Held Not To Be Income:

a. Loans are not income.

Loans are generally not income. See, In re Murphy, 474 F.3d 143, 150 (4th Cir. 2007)("By any stretch, a loan, regardless of the size, is not income."); In re Brown, 332 B.R. 562, 568 (Bankr. N.D. Ill. 2005)("the refinance proceeds are accompanied by a new loan to the debtor, which significantly offsets the apparent increase to the debtor's balance sheet"); In re Altmonte, 397 B.R. 659, 667 (Bankr. E.D.N.Y. 2008)("If the Court were to include credit card cash advances taken within the six months preceding bankruptcy within this Debtor's "projected disposable income," it would commit to the plan funds which the Debtor would not reasonably be expected to have during the life of the case. It would be absurd to assume that the Debtor would continue to take cash advances in order to fund his chapter 13 plan, and the Court is not prepared to require that result.").

b. One-time withdrawals from a 401(k) or an IRA.

The majority of courts appear to hold that pre-retirement withdrawals from a 401(k) or IRA are not considered income for bankruptcy purposes. See, In re Cram, 414 B.R. 674 (Bankr. D. Idaho 2009) (401(k) distribution did not meet criteria of current monthly income under §101(10A)); In re Zahn, 391 B.R. 840, 845 (8th Cir. BAP 2008) (IRA distribution to non- spouse not income); In re Mendelson, 412 B.R. 75 (Bankr. E.D.N.Y. 2009) (one-time early withdrawal from a retirement account was not included in income); Simon v. Zittel, 2008 Bankr. LEXIS 834, 2008 WL 750346 (Bankr. S.D. Ill. Mar. 19, 2008)(voluntary withdrawals from the debtors' retirement accounts in the six months prior to filing the Chapter 13 petitions did not constitute "income from all sources" under §101(10A) and could not be included when calculating current monthly income); In re Wayman, 351 B.R. 808 (Bankr. E. D. Tex. 2006). But see, In re DeThample, 390 B.R. 716 (Bankr. D. Kan. 2008) (one time 401(k) withdrawal of $4,000 was required to be included in calculating CMI); In re Sanchez, 2006 Bankr. LEXIS 1381, 2006 WL 2038616 (Bankr. W. D. Mo. Jul. 13, 2006).

Remember that under Section 101(10A) ((B), "current monthly income" is defined as payments made "on a regular basis" from any entity. It could be argued that a one-time withdrawals from a 401(k), IRA or other retirement account are not made on a regular basis. That may distinguish annual (or monthly) withdrawals from 401(k)s that must be taken in order to avoid paying a penalty. On the other hand, §101(10A)(B)'s "regular basis" limitation is coupled with "for the household expenses of the debtor" or dependents – and although pension benefits are for household expenses, it can be argued that those funds can be used for other purposes, and therefore do not fit the exclusion.

The cases also discuss whether "one time" withdrawals are "income" because the money that is withdrawn was the debtor's money, albeit in a protected account. See generally, In re Coverstone, 461 B.R. 629, 633-634 (Bankr. D. Idaho 2011).

c. Sales of vehicles – in a non-business context.

There is also case law holding that "income" from the sales of vehicles by an individual – with the proceeds used to purchase a newer vehicles – is not "income" that needs to be included on Line 9. See, In re Leach, 61 Collier Bankr. Cas.2d (MB) 1555, 2009 Bankr. LEXIS 1097, at *26 (Bankr. D. Mont. Feb. 26, 2009)("By including the proceeds derived from the sale of Debtors' personal, nonbusiness, noninvestment, vehicles within six months of the filing of their bankruptcy case that were used to purchase two new vehicles prior to filing bankruptcy, Debtors would be overstating their income that would be available for plan payments. The proceeds from Debtors' two vehicles are not income for purposes of calculating CMI. Such proceeds are not

derived from capital, labor or a combination of both and are not derived from employment, investments, royalties, gifts, and the like. The proceeds are also not replacement income.").

d. Transitional bonus payment set off against loan.

In what appears to be a very fact specific case – that also canvasses broader income issues – the bankruptcy court in In re Killian, 422 B.R. 903 (Bankr. N.D. Ill. 2009) held that transitional bonuses that were set off against an employer advance reflected in a promissory note, were not income. The court found that the original transaction, although characterized as a loan, was actually an advance of income. And that advance of income occurred outside the 6 month look back period for the Form 22C Means Test.

2. Things That Have Been Held To Be Income:

These are some of the types of income that ARE to be included on Line 9 as income (or another Line on the B22C, if appropriate) according to the listed case law:

a. Veterans Benefits are Income:

In re Hedge, 394 463 (Bankr. S.D.N.Y. 2008); In re Waters, 384 B.R. 432, 437-38 (Bankr. N.D. W.Va. 2008); In re Redmond, 2008 Bankr. LEXIS 1495, (Bankr. S.D. Tex. April 14, 2008).

b. Government Aid and Food Stamps are Income:

In re Justice, 404 B.R. 506 (Bankr. W.D. Ark. 2009) (government assistance to non-debtor daughter and her infant son was income); Bibb County Dept. of Family & Children Services v. Hope (In re Hammonds), 729 F.2d 1391, 1395 (11th Cir. 1984); In re Rigales, 290 B.R. 401 (D. N.M. 2003) (food stamps).

c. Disability Payments (from sources other than Social Security) are Income.

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

d. Pension Monies Received by a Retiree are Income.

In re Briggs, 440 B.R. 490 (Bankr. N.D. Ohio 2010)(Chapter 7 case); In re Coverstone, 461 B.R. 629 (Bankr. D. Idaho 2011). See also, In re Taylor, 212 F.3d 395 (8th Cir. 2000); In re Rogers, 168 B.R. 806, 808 (Bankr.M.D.Ga. 1993).

e. Civil Service Retirement System ("CSRS") Pension.

In re Moose, 2012 Bankr. LEXIS 1175 (Bankr. M.D.N.C. March 20, 2012).

f. Single Parent Scholarship Fund Expense Payments are Income.

In re Justice, 404 B.R. 506, 519 (Bankr. W.D. Ark. 2009).

g. Life Insurance Proceeds are Income.

Proceeds from life insurance were held part of disposable income. In re Florida, 268 B.R. 875 (Bankr. M.D. Fla. 2001); contra, In re Richardson, 283 B.R. 783 (Bankr. D. Kan. 2002).

h. An Inheritance is Income.

In re Melvin, Case No. 10-92360, 2011 Bankr. LEXIS 1135, 2011 WL 1303307 (Bankr. C.D. Ill. April 6, 2011); In re Stanley, 438 B.R. 860, 863-864 (Bankr. D.S.C. 2010)("This section clearly requires Debtors to include all money they received from any source in the six months prior to their bankruptcy filing. Form B22A also uses very similar language to instruct the debtor in completing the form. However, Debtors omitted their $16,131.11 inheritance from their Form B22A. The inheritance was received in July 2009, during the six month period prior to Debtors' bankruptcy filing. As a result, it should be included in Debtors' means test calculation.").

i. The Earned Income Credit in a Tax Refund is Income.

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

j. One Time Payment Of Student Loan Debt By Third Party.

$50,000 one-time student loan payment made on debtor's behalf was properly included on the debtor's initial Form 22C, but it was properly excluded from an Amended Form 22C, to reflect the forward looking approach. In re Moore, 446 B.R. 458, 463-464 (Bankr. D. Colo. 2011).

k. Railroad retirement income.

In re Scholz, 699 F.3d 1167 (9th Cir. 2012). The Ninth Circuit Court of Appeals reversed the lower courts' holdings that railroad retirement income was not protected by the Railroad Retirement Act of 1974 from being considered part of both current monthly income and projected disposable income. It did not allow the debtors or their creditors to receive RRA annuity payments prematurely.

Line 10. Subtotal. *Add Lines 2 thru 9 in Column A, and, if Column B is completed, add Lines 2 through 9 in Column B. Enter the total(s).*

$_____ $_____

Line 10 subtotals columns A and B separately.

Line 11. Total. *If Column B has been completed, add Line 10, Column A to Line 10, Column B, and enter the total. If Column B has not been completed, enter the amount from Line 10, Column A.* *$_____*

Line 11 totals column A and column B, and provides a total that is used in calculating the §1325(b)(4) Commitment Period.

Part II. CALCULATION OF §1325(b)(4) COMMITMENT PERIOD

Part II of the Form 22C involves the calculation of the §1325(b)(4) commitment period.

Line 12. Enter the amount from Line 11.

Line 12 is the total of all income from the debtor, and the debtor's spouse (if applicable), reflected on Line 11.

Line 13. Marital adjustment. *If you are married, but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under §1325(b)(4) does not require inclusion of the income of your spouse, enter on Line 13 the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents and specify, in the lines below, the basis for excluding this income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If*

necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero.

Line 13 is the first marital adjustment provision. To figure the applicable commitment period, Line 13 instructs the debtor to take a "marital adjustment" for the portion of a non-debtor spouse's income that is not paid on a regular basis to the household expenses of the debtor or debtor's dependents. See, In re Vollen, 426 B.R. 359, 367-368 (Bankr. D. Kan. 2010)(citing cases in footnote 26); In re Toxvard, 2013 Bankr. LEXIS 82 (Bankr. D. Colo. January 9, 2013)(marital adjustment put debtor below-the-median); In re Grubbs, 2007 Bankr. LEXIS 4282 at *13 (Bankr. E.D. Va. 2007)("for purposes of determining the applicable commitment period for a married debtor filing individually the income attributable to the nonfiling debtor's spouse is considered only to the extent that the income is regularly contributed to the household expenses of the debtor and is, therefore, part of the debtor's current monthly income under §101(10A)(B) of the Bankruptcy Code. In cases where a married debtor files individually, a debtor's nonfiling spouse has no "current monthly income" as that term is defined in §101(10A) of the Bankruptcy Code. The Court finds that it was proper for the Debtor to take the marital adjustment on line 13 of Official Form B22C and that the applicable commitment period for this case is thirty-six months."). But see, In re Ariyaserbsiri, 2008 Bankr. LEXIS 3304 (Bankr. Sept. 17, 2008)(statute unambiguously required the debtor to use the full amount of the non-filing spouse's income in calculating the required length of the debtor's plan, and the statute could not be impermissibly modified to apply only in a case where the debtor and the spouse filed a joint bankruptcy petition).

"On Form B22C, if a debtor is married, and even if the spouse is not a filing debtor, the spouse's income is required to be disclosed on lines 1-10 and included in a debtor's total income at line 11. Then, at line 13, there may be adjustments from that joint income which might reduce it. But up to the point of "Marital Adjustment" at line 13, the full income of both is treated as the reported income." In re Duran, 2010 Bankr. LEXIS 3533 (Bankr. S.D. Cal.Oct. 1, 2010)(holding that an employed daughter's income was not treated the same way).

The instructions require the listing of each expense that the nonfiling has that the debtor contends are not contributed to household expenses.

Two specific examples are given for Line 13 deductions – payment of the spouse's separate tax liability, and payments for the support of a person other than the debtor or debtor's dependants. Courts have held that the "determination of the amount paid by a non-filing spouse on a regular basis for household expenses of the debtor is necessarily fact-specific and subject to interpretation." In re Sale, 397 B.R. 281, 287 (Bankr. M.D.N.C. 2007) (*quoting* In re Travis, 353 B.R. 520, 526 (Bankr. E.D. Mich. 2006)).

The court in Toxvard set up the issue as follows:

> The Court recognizes there are two conflicting lines of cases when a debtor's non-filing spouse is the only one liable on the mortgage. The first line of cases, cited by the Trustee, has adopted a payment "for the benefit of" the debtor approach. Courts applying this household-centric approach hold the mortgage payments must be included in a debtor's current monthly income because the payments benefit the debtor. [See, In re Paliev, 2012 Bankr. LEXIS 3801, 2012 WL 3564031 (Bankr. E.D. Va. Aug. 17, 2012); In re Rable, 445 B.R. 826 (Bankr. N.D. Ohio 2011); In re Sturm, 455 B.R. 130 (N.D. Ohio 2011); In re Trimarchi, 421 B.R. 914 (Bankr. N.D. Ill. 2010); In re Vollen, 426 B.R. 359, 373 (Bankr. D. Kan. 2010).] The second line of cases, cited by the Debtor, adopt a debtor-centric approach and hold such mortgage payments may be excluded from a debtor's current monthly income because the debtor does not possess an ownership interest in the home and is not liable on the mortgages which encumber the home. [See, In re Shahan 367 B.R. 732 (Bankr. D. Kan. 2007); In re Clemons, 2009 Bankr. LEXIS 1959, 2009 WL 1733867; In re Borders, 2008 Bankr. LEXIS 1639, 2008 WL 1925190 (Bankr. S.D. Ala. 2008).]

In re Toxvard, 2013 Bankr. LEXIS 82 at *27 -*28 (Bankr. D. Colo. January 9, 2013)(footnotes included parenthetically). Notably, Vollen and Shahan were written by the same bankruptcy judge (Hon. Robert E. Nugent) and Toxvard follows the early case (Shahan) and not the later decision (Vollen).

The statute appears to support looking at what has been paid historically for expenses that qualify as household expenses:

> (B) Current monthly income includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent) . . . [.]

See, Section 101(10A)(B); In re Persaud, 2013 Bankr. LEXIS 490 at *31 (Bankr. E.D.N.Y. February 4, 2013)(Chapter 7 case on the marital deduction).

"On a regular basis" appears to be the term that should control. However, several courts have taken a different view.

The court in Clemons discussed the treatment of debtor's spouse's payment of the mortgage and real estate taxes, where the debtor was not on the note and mortgage, but where the debtor and her daughter resided in the home:

> In this Court's view, it is not appropriate to construe the term "household expenses of the debtor or the debtor's dependents" as including mortgage related expenses on which the debtor has no contractual liability. In In re Shahan, 367 B.R. 732 (Bankr.D.Kan. 2007), the court determined that mortgage payments made by the debtor-husband's non-filing spouse on a home which was titled in her name alone and payments which she made on a vehicle which was titled only in her name, were neither payments on debts secured by assets of the estate nor claims against the debtor and were not in fact amounts paid on a regular basis for household expenses "of the debtor." Despite the fact that the house and the car were undoubtedly assets of the debtor's "household," the court noted that attributing the spouse's income for payment of those debts to the debtor would put the non-filing spouse in a worse financial position than if she had joined her spouse in the bankruptcy petition. The Court agrees with the court's reasoning in Shahan. See, also, In re Sale, 397 B.R. 281 (Bankr.M.D.N.C. 2007)(in a Chapter 7 case, allowing a marital adjustment for car payments made by the non-filing spouse on vehicles titled in her own name).
>
> Accordingly, the DEBTOR is entitled to a marital adjustment for the mortgage payments and real estate taxes on both lines 13 and 19 on Form 22C and the TRUSTEE'S objections to confirmation, to that extent, are overruled.

In re Clemons, 62 Collier Bankr. Cas. 2d (MB) 617, 2009 Bankr. LEXIS 1959 at *17-*18 (Bankr. C.D. Ill. June 16, 2009); see also, In re Toxvard, 2013 Bankr. LEXIS 82 (D. Colo. January 9, 2013); In re Borders, 60 Collier Bankr. Cas. 2d (MB) 327, 2008 Bankr. LEXIS 1639 (Bankr. S.D. Ala. April 30, 2008)(debtor spouse's insurance and individual debts could be excluded on Line 13).

Even if the marital deduction appears to apply, some courts hold that the taking of the deduction/exclusion is subject to additional scrutiny under "good faith":

> Even with the BAPCPA changes, the equity of allowing a non-debtor spouse to exclude income is an issue in the good faith analysis required at confirmation. In In re Waechter, 439 B.R. 253 (Bankr. D. Mass. 2010), the court held that even where the Bankruptcy Code did not require a debtor to include the income of her non-filing spouse where there was a pre-marital agreement specifying that he was not required to contribute to household expenses, the

> debtor's plan could not be confirmed because she could not demonstrate good faith where the entire household expenses were being deducted from her sole income. Id. at 257. Thus, the requirement that the court analyze whether the projected disposable income proposed as contribution to the plan is an accurate reflection of the parties' respective contributions to, and benefits from, the household finances, is found not only in Section 1325(b)(1)(B), but in Section 1325(a)(3).
>
> * * * * * * * * * *
>
> If a marital adjustment is taken upon a revised B22C, but confirmation is again challenged by the Trustee or a creditor asserting that all projected disposable income is not dedicated to the plan because the adjustment should not be allowed, Debtor will bear the burden of proof as a debtor does for all elements required to be demonstrated for confirmation of a plan. See, e.g., In re Stewart, 172 B.R. 14, 15 (W.D. Va. 1994)("The burden is on the debtor to prove that a proposed plan complies with Chapter 13."); In re Lewis, 170 B.R. 861, 865 ("The debtor, as plan proponent, bears the ultimate burden to prove that all confirmation criteria are met."). Generally such an adjustment, which in most cases will benefit an insider (spouse) of the debtor, should be strictly scrutinized by the court as it is susceptible to abuse. See H.R. Rep. 95-595 (1977)(in the context of a transfer "[a]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor... if the debtor is an individual, then a relative of the debtor. . . ."). Courts also have opined that in general, challenges to marital adjustments in the B22 forms should be strictly scrutinized because of their impact on a debtor's ability to qualify and receive bankruptcy relief. See In re Sale, 397 B.R. 281, 288 (Bankr. M.D.N.C. 2007) (citing In re Travis, 353 B.R. 520, 526 (Bankr. E.D.Mich. 2006)).

In re Simms, 2011 Bankr. LEXIS 2570 at *11-*12 & *15-*16 (Bankr. D. Md. June 30, 2011).

Can Line 13 be used for a debtor and another person who are not married? The answer is no – but the effect is the same as if it was used:

> In the case of debtors who are married at the time their petition is filed, the Form adequately addresses this point by instructing debtors to include all of the income of their spouses, and then by later instructing them to remove (i.e., "adjust") whatever portion of the non-filing spouse's income that is not regularly contributed to the debtor's household prior to determining the applicable

commitment period. This approach to completing the Form is unsatisfactory, however, in the case of unmarried debtors because the option of taking the marital adjustment does not apply to them.

This does not mean that the instructions on the Form are incorrect or at odds with the Code. It simply means that a different approach to completing the Form is required by unmarried debtors. Instead of including all income received by the debtor as well as the debtor's non-filing spouse, and then deducting on Line 13 that portion of the income which is not paid on a regular basis towards debtor's household expenses as a married debtor would do, an unmarried debtor must list his or her own income, and then add to it any amounts regularly received by the debtor from another entity for the household expenses of the debtor on Line 7.

In re Stansell, 395 B.R. 457, 462 (Bankr. D. Idaho 2008)(case holding that income contributed to household expenses remained part of the Form 22C calculation, even though the spouse had died prior to the filing of the Chapter 13 Petition).

The additional discussion of the marital adjustment in connection with Line 19, below, would also be applicable to Line 13.

Line 14. Subtract Line 13 from Line 12 and enter the result.

This is the line for the subtotaling of the debtors' income, minus the amount of the marital adjustment.

Line 15. Annualized current monthly income for §1325(b)(4). *Multiply the amount from Line 14 by the number 12 and enter the result.*

This is an annualized figure, post-marital adjustment (if any) that will be used to determine whether the debtor is above or below the median, based on the size of the household.

Line 16. Applicable median family income. *Enter the median family income for applicable state and household size. (This information is available by family size at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)*

a. Enter debtor's state of residence: _____

b. Enter debtor's household size: _____

To date, attacks on the means test based on the lack of national uniformity violating the "Bankruptcy Clause" of the Constitution, have not been successful. See e.g., Schultz v. United States, 529 F.3d 343 (6th Cir. 2008))(rejecting the concept that median-income calculations were based, at least in part, on the state and county in which the debtor resided, the BAPCPA was not a uniform law on the subject of bankruptcies throughout the United States).

Line 16 requires debtors to state the size of their "household". At least three separate tests for "household" size have found support in the case law. The three approaches are discussed in the Chapter 13 decision In re Robinson:

Census Bureau "Heads on Beds" Approach

The first of the three approaches that bankruptcy courts have utilized to determine household size is the definition employed by the Census Bureau. That definition provides that "[a] household consists of all the people who occupy a housing unit." U.S. Census Bureau, Current Population Survey (CPS) — Definitions and Explanations, http://www.census.gov/population/www/cps/cpsdef.html. This "heads on beds" approach depends solely on the number of residents in a structure and is unconcerned with the presence of a familial or economic relationship between the individuals. Several courts adhere to this method. See, e.g., In re Epperson, 409 B.R. 503, 507 (Bankr. D. Ariz. 2009); In re Bostwick, 406 B.R. 867, 872-73 (Bankr. D. Minn. 2009); In re Smith, 396 B.R. 214, 217 (Bankr. W.D. Mich. 2008); In re Ellringer, 370 B.R. 905, 910-11 (Bankr. D. Minn. 2007).

In Ellringer, the court held that the Census Bureau's definition of household should be used when conducting the means test because 11 U.S.C. §101(39A)(A) defines "median family income" by referring to the Census Bureau's statistics. Ellringer, 370 B.R. at 910-11. Furthermore, the court stated that Congress specifically used the term "household" rather than the term "family." Id. In Smith, the court found that it had to apply the plain meaning of "household" when Congress had not defined the term. Smith, 396 B.R. at 216. The court then turned to Webster's Third New International Dictionary (1986) and found that "household" could mean either "all of the persons who use a particular structure as their dwelling space" or "only those persons who live together and who are also related by blood or marriage." Id. The court in Smith concluded that the Census Bureau's definition of household was more appropriate, because 11 U.S.C. §522(d)(3) uses the terms "family" and "household" differently Id. at 217.

Internal Revenue Service Dependents Approach

The second approach utilized by bankruptcy courts for determining the size of a debtor's household relies on the limitations established by the means test set forth in Chapter 7 of the Bankruptcy Code. Section 707(b)(2)(A)(ii)(I) of the Bankruptcy Code provides that the above-median debtor's monthly expenses must be the amounts permitted by the Internal Revenue Service's National Standards, Local Standards, and Other Necessary Expenses tables for the area in which the debtor resides in effect on the date of the debtor's petition "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." 11 U.S.C. §707(b)(2)(A)(ii)(I).

Courts which adhere to this dependents approach for determining household size hold that any definition of "household" used for means test calculations must be reconciled with the restrictions of 11 U.S.C. §707. In In re Napier, the court held that "[t]o the extent that Official Form B22C indicates that Debtors may include [non-dependents] in the means test calculation, it must yield to the plain language of §707(b)(2), which only allows Debtors to include dependents." In re Napier, No. Civ. A. 06-02464-JW, 2006 Bankr. LEXIS 2248, 2006 WL 4128358, at *2 (Bankr. D.S.C. Sept. 18, 2006). Similarly, the court in In re Law held that, once the court is directed to 11 U.S.C. §707(b)(2)(A)(ii)(I) for above-median Chapter 13 debtors, "it becomes abundantly clear that [such debtors] may only claim expenses for themselves, their dependents, and their spouse (in a joint case) if the spouse is not otherwise a dependent." In re Law, No. 07-40863, 2008 Bankr. LEXIS 1198, 2008 WL 1867971, at *5 (Bankr. D. Kan. Apr. 24, 2008). The debtor is then limited to taking deductions on form B22C only for the persons the debtor claims as dependents on his or her tax return. Cf. In re Frye, 440 B.R. 685, 687 (Bankr. W.D. Va. 2010)("The Court . . . adopts the position that in order to determine whether a child qualifies as a dependent . . . a court should look at the IRS dependency test as stated in IRS Publication 501.").

Economic Unit Approach

The third method that bankruptcy courts have utilized to determine the size of a debtor's household is the economic unit approach. This methodology measures the size of the debtor's household by the number of individuals in the home who act as a single economic unit. As the court in In re Morrison explained:

> [A] household will include individuals who are financially dependent on a debtor, individuals who financially support a debtor, and individuals whose income or expenses are inter-mingled or interdependent with a debtor.

In re Morrison, 443 B.R. 378, 2011 Bankr. LEXIS 103, 2011 WL 65737, at *6 (Bankr. M.D.N.C. January 10, 2011). "In its breadth, the third approach falls between the first two approaches." Id. This approach aims to more accurately portray the economic situation of a given debtor, whether that leads to increasing or decreasing the size of the debtor's "household" for purposes of the form B22C calculations.

For instance, the court in In re Herbert permitted a debtor to claim a household size of eleven because for many years the debtor had financially supported his girlfriend, their daughter, and the girlfriend's eight other children. In re Herbert, 405 B.R. 165, 170 (Bankr. W.D.N.C. 2008). The court found that rather than being "contrived or concocted for the purpose of this bankruptcy filing," the financial support of these ten other individuals was "simply the fact of this debtor's life." Id. The court in Herbert criticized both the "heads on beds" approach and the IRS dependents approach for failing to accurately characterize family fiscal structures:

> While this court agrees with the Ellringer court to the extent it recognizes that there will be instances in which unrelated, non-dependent individuals should be treated as part of a household, the "heads on bed" approach adopted by that court is too broad because it includes anybody who may be residing under the debtor's roof without regard to their financial contributions to the household or the monetary support they may be receiving from the debtor. . . . On the other hand, the court declines to adopt the standards of the Internal Revenue Manual for purposes of determining household size because they do not account for the situation in which a debtor may be supporting an individual without declaring that person as a dependent on his tax return.

Id., at 169.

The court in In re Jewell took a similarly realistic view toward the debtor's true financial situation. In that case, the debtors lived with their four children: two dependent children, and two adult children. In re Jewell, 365 B.R. 796, 797-98

(Bankr. S.D. Ohio 2007). One of the adult children had three children of her own who also resided with the debtors. As this adult child was not working or otherwise contributing financially, the debtors provided these four individuals with food, shelter, and funds for medical care. Id. at 798. The other adult child lived in the home, but he neither contributed towards expenses nor received financial assistance from the debtors. Id. The court held that the debtors were entitled to claim a household size of eight, as the former adult child was part of the debtors' economic unit due to the debtors' support for her and her children, while the latter adult child was "merely a head on a bed." Id. at 801-02. The court in In re Jewell rejected both the heads on beds approach and the dependents approach advanced by most other bankruptcy courts as being inconsistent with the purpose of the Bankruptcy Code:

> [T]he purpose for which the Bureau of the Census determines a household is radically different (i.e., determining the number and demographics of those residing in particular areas of the United States) and bears no relationship to the purpose of the Official Form B22A. . . . [T]he purpose of the Internal Revenue Code is to create income for the government . . . [while t]he policy of the Bankruptcy Code is to provide the honest but unfortunate debtor with a fresh start.

Id. at 800-01.

III

This Court agrees with the analysis set forth in Morrison, Herbert, and Jewell and hereby adopts the economic unit approach. When interpreting the meaning of terms which Congress has not defined, a court must use the definition of the term which would best serve the goals of the statute in which the term is found. In this case, 11 U.S.C. §1325(b) (and form B22C, which applies it) seeks to insure that all of the debtor's projected disposable income is applied to making payments to unsecured creditors under the debtor's Chapter 13 plan. 11 U.S.C. §1325(b)(1)(B). The debtor's projected disposable income is calculated, in part, by deducting expenses tiered according to the size of the debtor's household. The appropriate definition of the debtor's "household" must be the one which leads to the most accurate and realistic calculation of the debtor's projected disposable income given the economic realities of the debtor's family circumstances.

In re Robinson, 449 B.R. 473, 478-480 (Bankr.)(footnote omitted); see also, Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012)(affirming use of the 'economic unit' approach, and the rounding up

of ‘fractional children’); In re Johnson, 2012 Bankr. LEXIS 5278 (Bankr. N.D. Ind. October 19, 2012)(following Johnson v. Zimmer and holding that debtor’s adult son, who had been incarcerated and could not find work, was part of the debtor’s household for Means Test purposes); In re Reinsch, 2013 Bankr. LEXIS 273 at *7 - *8 (Bankr. D. Neb. January 23, 2013)(following Robinson and allowing a 20 year old college student who returned home for weekends and breaks as an additional household member).

Sometimes, courts don’t have to choose because all three approaches yield the same result. See, In re Hayes, 2012 Bankr. LEXIS 2493 (Bankr. C.D. Ill. June 4, 2012)(result was the same under all three approaches – a household size of three).

Line 17. Application of §1325(b)(4). *Check the applicable box and proceed as directed.*

□***The amount on Line 15 is less than the amount on Line 16.*** *Check the box for “The applicable commitment period is 3 years” at the top of page 1 of this statement and continue with this statement.*

□***The amount on Line 15 is not less than the amount on Line 16.*** *Check the box for “The applicable commitment period is 5 years” at the top of page 1 of this statement and continue with this statement.*

The Form 22C aligns with the courts that have held that the applicable commitment period is determined by whether or not the debtor is over the median income level. See e.g., Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011) *cert. denied*, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012); In re Tennyson, 611 F.3d 873, 879 (11th Cir. 2010)(“ We find that the "applicable commitment period" is a temporal term that prescribes the minimum duration of a debtor's Chapter 13 bankruptcy plan. The only exception to this minimum period, if unsecured claims are fully repaid, is provided in §1325(b)(4)(B).”); In re Turner, 574 F.3d 349, (7th Cir. 2009).

The contrary position, which remains the law in the Ninth Circuit, is that where projected disposable income is negative, there is no applicable commitment period. See, In re Kagenveama, 541 F.3d 868 (9th Cir. 2008), *reaffimed by*, In re Flores, 692 F.3d 1021 (9th Cir. 2012), *rehearing, en banc, granted by* Danielson v. Flores (In re Flores), 2012 U.S. App. LEXIS 25928 (9th Cir., Dec. 19, 2012); In re Alexander, 344 B.R. 742 (Bankr. E. D. N. C. 2006); In re Mathis, 367 B.R. 629 (Bankr. N. D. Ill. 2007); In re Fuger, 347 B.R. 94 (Bankr. D. Utah, 2006).

Part III. APPLICATION OF §1325(b)(3) FOR DETERMINING DISPOSABLE INCOME

Line 18. Enter the amount from Line 11.

This is just a recapitulation of the income totals for Column A plus Column B – the pre-marital adjustment gross income figure. Which will be re-adjusted in Line 19.

Line 19. Marital adjustment. *If you are married, but are not filing jointly with your spouse, enter on Line 19 the total of any income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If the conditions for entering this adjustment do not apply, enter zero.*

"If a debtor's non-filing spouse has income, that portion of the spouse's income not dedicated to payment of household expenses is deducted from the debtor's current monthly income. This deduction is taken on Line 19 of Form 22C as a "marital adjustment" for amounts "not regularly contributed" to the household expenses and effectively reduces the amount an above-median debtor is required to pay unsecured creditors." In re VanDyke, 450 B.R. 836, 838 n. 2 (Bankr. C.D. Ill. 2011).

A deduction taken in another section of the Mean Test cannot be taken a second time as a marital deduction on Line 19. See generally, In re Hammock, 436 B.R. 343, 349-350 (Bankr. E.D.N.C. 2010)(Chapter 7 case).

To the extent the expense paid by the non-filing spouse is a household expense, it is not deductible on Line 19. For example, the bankruptcy court in Vollen discussed a few examples:

> As this Court noted in Shahan, [367 B.R. 732 (Bankr. D. Kan. 2007)] it is difficult to square allowing the marital deduction of payments made on the family home as something other than regular household expenses. The Court reached the conclusion it did in Shahan because of the non-debtor's exclusive legal ownership of the real estate acquired prior to the marriage. Here, the Vollens acquired an initial interest in the real estate during their marriage and it is their family home.

The Court continues to believe that its allowance of a marital adjustment on Line 19 of Form 22C was proper in Shahan on its facts. At the same time, the Court believes the factual distinction between Shahan and the case at bar warrants a different result here, where the property was acquired (and even owned briefly by the debtor) during the marital relationship for the purpose of housing Ms. Vollen and the couple's dependent daughter. In these circumstances, the Court concludes that debtor is not entitled to a marital adjustment for the mortgage payments made by the non-filing spouse on the marital home because such mortgage payments are for the household expenses of the debtor and the debtor's dependent daughter and are therefore to be counted as part of Ms. Vollen's CMI under §101(10A), not deducted on Line 19. Accordingly, the marital adjustment for the mortgage payments is disallowed.

2. College Expenses and Car Payment for Dependent Daughter

With respect to the college expenses ($266-$744) and car payments on the 2001 Honda ($109) that Mr. Vollen pays for the Vollens' daughter, the daughter is a dependent of the debtor and is included in the debtor's household on Form 22C. The daughter drives the 2001 Honda while at college. A dependent's college expense, even when incurred by a person of majority, is a household expense. A dependent is one who is sustained by another or relies on another for support. The Vollens' daughter clearly falls into that category and the family's expenses incurred subsidizing her higher education and providing her with a means of transportation while she is a dependent amount to support. Therefore, the Court concludes that the funds Mr. Vollen expends for their daughter's college expenses and the 2001 Honda payment are household expenses of the dependent daughter that may not be deducted as a marital adjustment on Line 19.

3. Loan Repayments on Non-Filing Spouse's Signature Loan and 2004 Honda CRV Loan

The Court next considers payments on the other loans for which only Mr. Vollen is liable. Mr. Vollen refinanced his credit card debt by borrowing against the family's 2004 Honda CRV, resulting in a monthly payment obligation of $241. The Court has carefully reviewed the various charges on the credit card statements and concludes that nearly all of these expenses were incurred for food, apparel, and other personal incidental expenses. These are typical household expenses. Mr. Vollen testified that he eats out frequently, both for lunch during the work day and in the evening when the family is pressed for time. This is no different than Mr. Vollen packing a lunch or cooking dinner at home, only more

> costly. Either would generate household expense. Similarly, credit card charges for clothing for his daughter are part of household expense. Therefore, repayment of the 2004 Honda CRV loan amounts to repayment of household expenses incurred on credit and may not be deducted from CMI on Line 19. Mr. Vollen's signature loan appears to have been taken out for car repairs and an additional refinancing of credit card debt. The Court similarly concludes that the signature loan repayment ($206) is an amount regularly contributed to household expenses and may not be claimed as a marital adjustment on Line 19.

In re Vollen, 426 B.R. 359, 372-374 (Bankr. D. Kan. 2010); see also, In re Trimarchi, 421 B.R. 914, 920 (Bankr. N.D. Ill. 2010)("The Court finds that the Debtor is not entitled to take both of the deductions on the B22C Form for the mortgage expense paid by her non-filing spouse. The Court finds that the Debtor improperly lists the mortgage expense on Line 19a as a marital adjustment. The Court further finds this expense is regularly paid for the household expenses of the Debtor and her son who reside in the home and benefit therefrom. The Court concludes that the plain language and directions for Line 19 preclude the Debtor from deducting the mortgage expense of her non-debtor spouse as a marital adjustment because the mortgage is an expense that is paid on a regular basis for the household expenses of the Debtor and her son, as well as the non-debtor spouse.").

The Vollen decision shows that the issue of the marital deduction is not settled by showing that the non-filing spouse pays for something – that "something" has to be a non-household expense in order for it to be excluded from the Form 22C calculation of projected disposable income. And, with the CRV loan, the court looked not just at the fact that Mr. Vollen was the only one liable on the loan, the court also looked at the source of the debt. In contrast, Mr. Vollen's tax withholdings "do not enter the household income stream and should therefore be deducted from CMI as a marital adjustment. Vollen, 426 B.R. at 374.

A final lesson from Vollen: where the debtor sought to deduct the $49 a month payment the husband made on a computer than he purchased on credit - and no evidence regarding the purpose and usage of the "home computer" was presented to the court - the marital adjustment was disallowed. Vollen, 426 at 374.

Problems can also arise where the deduction is for a luxury item – like swimming pool maintenance:

> Next, the Trustee objects to confirmation of the Debtor's plan because the Debtor deducts $250 on the B22C Form on Line 19d as a marital adjustment for her spouse's additional utility bills for maintenance of a swimming pool. The Trustee contends that this deduction from the Debtor's income is not reasonably

necessary for the support of the Debtor and her dependents. In addition, the Trustee maintains that $250 per month to heat a swimming pool is more than the monthly heating bills for most homes in the winter. Thus, the Trustee argues that the deduction is unreasonable on its face. According to the Trustee, if this deduction is removed from Line 19, it increases the current monthly income on Line 20 and also increases the total current monthly income on Line 53 to $6,743. In turn, the monthly disposable income on Line 59 would increase to $319. As a result, the Debtor would be required to pay a dividend to the unsecured creditors of $19,140 ($319 x 60 = $19,140) or approximately 82% of their allowed claims, not the 22% proposed in her plan.

The Court agrees with the Trustee on both points with respect to the deduction of $250 for maintenance of the swimming pool. Expenses associated with a swimming pool are not reasonably necessary. In re Durczynski, 405 B.R. 880, 885 (Bankr. N.D. Ohio 2009); In re Shaw, 311 B.R. 180, 184 (Bankr. M.D. N.C. 2003), aff'd, Shaw v. United States Bankr. Adm'r, 310 B.R. 538 (M.D.N.C. 2004). The Court views a swimming pool as a luxury item that is not reasonably necessary for the support of the Debtor or her dependents. "Expenses may amount to an obvious indulgence in luxuries when a debtor is enjoying luxuries that are not enjoyed by an average American family." In re Nicola, 244 B.R. 795, 798 (Bankr. N.D. Ill. 2000). Moreover, it appears undisputed that the Debtor and her family reside in the Bensenville Property and have the use of the pool. It therefore follows that the Debtor's spouse pays this expense on a regular basis for the household expenses of the Debtor and her son. Thus, this expense item should not be claimed on Line 19 of the B22C Form per the instructions.

The Debtor argues that her spouse, who is not seeking Chapter 13 relief, should not be forced to give up his enjoyment in the swimming pool because of her financial situation. This argument fails. There is no evidence that anyone is or will be unable to use the pool if this line item deduction is not allowed. After all, the non-debtor spouse is paying that expense. When a debtor seeks Chapter 13 relief, "the entire family is affected by the sacrifices and special efforts required by the Code. This family may not continue its prepetition lifestyle to the detriment of creditors." In re Gleason, 267 B.R. 630, 635 (Bankr. N.D. Iowa 2001); see also In re McNichols, 249 B.R. 160, 168 (Bankr. N.D. Ill. 2000)("debtors may not maintain their pre-petition lifestyles at the expense of their creditors"). The Court finds that a swimming pool is not a basic need required by the average American family or this family. Rather, it is a luxury item that is not necessary for the support of the Debtor and her dependent. In addition, the Court agrees with the Trustee's point that $250 per month to heat the

> swimming pool is excessive. The Debtor's unsecured creditors should not have their dividend reduced in order to subsidize this luxury expense item for her family.
>
> Furthermore, "the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover [her] living expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes them as possible. . . ." Turner, 574 F.3d at 355. Here, the Debtor does not need to heat the pool. As the Trustee correctly points out, by removing this deduction from Line 19, it increases the current monthly income on Line 20 and also increases the total current monthly income on Line 53 to $6,743. The monthly disposable income on Line 59 thus increases to $319, and would result in a dividend to unsecured creditors of $19,140 ($319 x 60 = $19,140) or approximately 82% of their allowed claims. The Court finds that a higher dividend to the unsecured creditors far outweighs the Debtor's need to heat and maintain a swimming pool that she uses.

In re Trimarchi, 421 B.R. 914, 922-923 (Bankr. N.D. Ill. 2010).

Obviously, if the debtor does not list the marital adjustment, the court will not just "read it in" to the Form 22C – it has to be claimed:

> Debtor did not use a marital adjustment at Part II of the B22C form. There is some case law support for the adjustment to be made. See Grubbs, 2007 Bankr. LEXIS 4282, 2007 WL 4418146 at *5; In re Borders, 2008 Bankr. LEXIS 1639, 2008 WL 1925190 at *2-3 (Bankr. S.D. Ala.). However, because the Debtor did not claim a marital adjustment at Part II, the Court will not consider whether such an adjustment was available to him in recalculating the applicable commitment period.

In re Sharp, 394 B.R. 207, 217 n.4 (Bankr. C.D. Ill. 2008).

Where the debtor's spouse died just prior to filing, the amount of Debtor's deceased wife's income received during the six months prior to the filing of his bankruptcy case that was actually contributed to pay Debtor's household expenses is includable in his current monthly income. In re Stansell, 395 B.R. 457, 460-464 (Bankr. D. Idaho 2008).

Courts have held that the "reasonable and necessary" test is not applicable to the marital adjustment. See, In re Sharp, 394 B.R. 207, 214 (Bankr. C.D. Ill. 2008). But, the payment cannot be deducted if it is an expense paid for a dependent – thus, a contribution to a 529 College

Savings Plan as a "marital adjustment" was not permitted. See, In re Paliev, 2012 Bankr. LEXIS 3801 at *20 - *22 (Bankr. E.D. Va. August 17, 2012).

As previously discussed in connection with Line 13's marital adjustment deduction, above, the marital adjustment, is a difficult area. If you are going to deduct anything under that provision, be very clear what it is for. It will be closely scrutinized.

Line 20. Current monthly income for §1325(b)(3). *Subtract Line 19 from Line 18 and enter the result.*

Line 21. Annualized current monthly income for §1325(b)(3). *Multiply the amount from Line 20 by the number 12 and enter the result.*

Line 22. Applicable median family income. *Enter the amount from Line 16.*

Line 23. Application of §1325(b)(3). *Check the applicable box and proceed as directed.*

□ ***The amount on Line 21 is more than the amount on Line 22.*** *Check the box for "Disposable income is determined under §1325(b)(3)" at the top of page 1 of this statement and complete the remaining parts of this statement.*

□ ***The amount on Line 21 is not more than the amount on Line 22.*** *Check the box for "Disposable income is not determined under §1325(b)(3)" at the top of page 1 of this statement and complete Part VII of this statement.* ***Do not complete Parts IV, V, or VI.***

Part IV. CALCULATION OF DEDUCTIONS FROM INCOME

Subpart A: Deductions under Standards of the Internal Revenue Service (IRS)

Line 24A. National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous. *Enter in Line 24A the "Total" amount from IRS National Standards for Allowable Living Expenses for the applicable number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number*

that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.

The "Calculation of Deductions Allowed Under §707(b)(2)" is based on IRS national and local standards. Make sure the correct numbers are used – particularly if the Means Test is being filed later, or being amended. The numbers to use are those in place on the date of filing.

Some courts have looked to the Internal Revenue Manual for additional information on this deduction:

> ADDITIONAL FOOD AND CLOTHING EXPENSE
>
> Line 24A of Form 22C is titled "National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous." The Internal Revenue Manual §5.15.1.7 at P 1 and 3 states:
>
> > Allowable expenses include those expenses that meet the necessary expense test. The necessary expense test is defined as expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income. The expenses must be reasonable. The total necessary expenses establish the minimum a taxpayer and family needs to live.
> >
> > Food, Clothing and Other Items - These establish reasonable amounts for five necessary expenses: food, housekeeping supplies, apparel and services, personal care products and services, and miscellaneous. These standards come from the Bureau of Labor Statistics (BLS) Consumer Expenditure Survey. Taxpayers are allowed the total National Standards amount monthly for their family size, without questioning the amounts they actually spend. Note:
> >
> > All five standards are included in one total national standard expense.

In re Cleaver, 426 B.R. 390, 396-397 (Bankr. D.N.M. 2010); and see, Ransom v. FIA Card Services, N.A., ___ U.S. ___, 131 S.Ct. 716, 726, 178 L. Ed. 2d 603, 613 (2011)("Although the statute does not incorporate the IRS's guidelines, courts may consult this material in interpreting the National and Local Standards; after all, the IRS uses those tables for a similar purpose -- to determine how much money a delinquent taxpayer can afford to pay the Government. The guidelines of course cannot control if they are at odds with the statutory language.").

Attempts by debtors to deal with difficult household size questions by using different household sizes for Line 24A and 24B have not been well received. See, In re Robinson, 449 B.R. 473, 476 (Bankr. E.D. Va. 2011).

> In an attempt to accurately reflect the Debtor's atypical household composition, Debtor's counsel mixed and matched certain figures from the Standards of the Internal Revenue Service when completing Part IV of Form B22C. It is to the calculation of these deductions that the Trustee has objected. On Line 24A, counsel for the Debtor included a deduction of $1,633. This deduction is derived from the IRS National Standards for Allowable Living Expenses for a family of five. In contrast, on Line 24B, counsel for the Debtor included a deduction of $60. This deduction is derived from the IRS National Standards for Out-of-Pocket Health Care for a family of one.

The Robinson court resolved this issue by determining the proper household size (in that case, 3) and directing the debtor to file an Amended Means Test that uniformly reflected that household size:

> The Debtor variously used a household size of one and a household size of five in completing his Form B22C upon which his Plan is based and to which the Trustee objected. It would appear that reconfiguration of form B22C using a household of three, would generate a disposable income figure for this Debtor that would be substantially less than the amount of the payment the Debtor has proposed to make to his unsecured creditors in his proposed plan. Thus, the Debtor's proposed plan may very well satisfy the confirmation requirements of §1325(b) of the Bankruptcy Code in which case the Trustee's objection should properly be overruled.
>
> Nevertheless, the Court will order the Debtor to file an amended form B22C consistent with this memorandum opinion claiming a household of three. The Trustee will be given 14 days thereafter to renew his objection, file any further objections to the Debtor's proposed plan, or both. In the absence of any renewed objection or any further objections, the Debtor's proposed plan will be confirmed.

Robinson, 449 B.R. at 484.

In seeking to deviate from the Means Test due to changed circumstances, the evidence presented should be tied in with the deductions taken on the Means Test: “Mrs. Moore said that the family food bill had increased about $250 per month. But, her testimony was as to actual

expenditures rather than how that change related to the National Standard amount for food the Debtors had claimed on line 24A of their Form B22C. * * * These factors cannot, therefore, be considered in calculating the Debtors' projected disposable income." In re Moore, 2012 Bankr. LEXIS 5112 at *19 (Bankr. C.D. Ill. November 1, 2012)

Line 24B. National Standards: health care. *Enter in Line a1 below the amount from IRS National Standards for Outof-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Outof-Pocket Health Care for persons 65 years of age or older. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the applicable number of persons who are under 65 years of age, and enter in Line b2 the applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2. Add Lines c1 and c2 to obtain a total health care amount, and enter the result in Line 24B.*

Persons under 65 years of age	***Persons 65 years of age or older***	
a1. Allowance per person $_____	*a2. Allowance per person $_____*	
b1. Number of persons $_____	*b2. Number of persons $_____*	
c1. Subtotal $_____	*c2. Subtotal $_____*	*$_____*

Line 24(B) is in the "National Standards" section of the Means Test. It is a deduction for Health Care – every member of the household is entitled to this standard expense deduction. See e.g., In re Gregory, 452 B.R. 895, 899 (Bankr. M.D. Pa. 2011)(referring to the then $57 deduction for under-65 debtors as a "standard deduction"). For some reason, this deduction is greater for those over 65 (who are eligible for Medicare) versus those under 65, who may be uninsured. But, as they say: "it is what it is".

There is not much case law on the effect of this standard deduction for health care. What case law there is suggests that deductions under Line 36 "Other Necessary Expenses: health

care" should not be taken unless the expenses for health care that are not reimbursed by insurance exceed the amount deducted on Line 24B.

The court in In re Melancon, 400 B.R. 521, 524 (Bankr. M.D. La. 2009) stated:

> The chapter 13 trustee urges the court to conclude that Melancon cannot use the national standard IRS health care deduction for his projected health care expense on Schedule J or for purposes of determining the disposable income he must apply to plan payments, because his recent documented health care expenses are lower than the national standard for those expenses. The debtor argues that his use of the standard deduction on both the means test form and Schedule J is a reasonable and appropriate method of predicting future health care expenses in calculating his disposable income.
>
> The IRS Manual is unambiguous in its treatment of health care expenses. Section 5.15.1.7 of the Manual sets out national standards for health care expenses. It states that "[t]axpayers and their dependents are allowed the standard amount monthly on a per person basis, without questioning the amounts they actually spend." (Emphasis added.) In contrast, a taxpayer is only allowed an "other expense" in excess of the standard allowance if the taxpayer proves that the expense is necessary and reasonable. IRM 5.15.1.10 (2) and (3) (05-09-2008).
>
> The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States has issued consolidated Committee Notes for the official forms for the period 2005-2008. The committee notes acknowledge a national standard allowance for out-of-pocket health care expenses found in subpart A of the means test form but also observe that the various categories of "Other Necessary Expenses" deductible on lines 30-37 of subpart A exclude amounts deducted elsewhere on the form. Official Committee Notes, 2005-2008 PC(1). This comment supports the conclusion that the "Other Necessary Expenses" are those in excess of the national standard deductions.

Line 25A. Local Standards: housing and utilities; non-mortgage expenses. *Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and family size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court). The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.*

Line 25A is a standard deduction for non-mortgage expenses. "The Debtors are entitled to the [Line 25A] deduction regardless of whether their actual expenses in those categories are higher or lower than the standard." In re Carlton, 362 B.R. 402, 411 (Bankr. C.D. Ill. 2007); see also, In re Stimac, 366 B.R. 889, 892 (Bankr. E.D. Wis. 2007).

If the debtor's actual, reasonable and necessary housing and utility expenses are in excess of the standard deduction, an additional deduction may be available on Line 26.

The deduction on Line 25A varies based upon the household size of the debtor(s). Where the claimed household size is overstated, a reduction in the household size will mean a lower standard deduction on Line 25A. See, In re Crego, 387 B.R. 225, 229-230 (Bankr. E.D. Wis. 2008); In re Plumb, 373 B.R. 429, 436 (Bankr. W.D.N.C. 2007)(with two less people in the household, the Line 25A deduction would be reduced by $116).

Note that in the present incarnation of the Chapter 13 Means Test, the basic costs of cellphone and "land line" phone are included in the Line 25A deductions. See, Line 37; In re Stimac, 366 B.R. 889, 892 (Bankr. E.D. Wis. 2007)("basic home telephone service is included in the Line 25A deduction for Local Standards: housing and utilities" – decided before the Form 22C was amended to also include basic cellphone expenses.)

Also included in the Line 25A standard deduction is the cost of home maintenance and repairs. "[E]xpenses that fall within the National and Local Standards categories are 'capped' at the amount set forth in the IRS tables. Since expenses attributable to home maintenance and repair are already encompassed in the Local Standard amount, the Debtor may only claim the $472 standard amount attributable to all of her non-mortgage housing-related expenses on line 25A.". In re Mansfield, 2012 WL 877105 at *2 (Bankr. D. Colo. March 15, 2012).

Line 25B. Local Standards: housing and utilities; mortgage/rent expense. *Enter, in Line a below, the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county and family size (this information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court) (the applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support); enter on Line b the total of the Average Monthly Payments for any debts secured by your home, as stated in Line 47; subtract Line b from Line a and enter the result in Line 25B.* ***Do not enter an amount less than zero.***

a. IRS Housing and Utilities Standards; mortgage/rent expense $_____

b. Average Monthly Payment for any debts secured by your home, if any, as stated in Line 47 $_____

c. Net mortgage/rental expense |Subtract Line b from Line a.| $_____

Line 25B permits a standard deduction, less the amount of the monthly mortgage payments (on mortgages that are not being stripped on property not being surrendered).

"Official Form 22C directs a debtor to enter on Line 25B "the amount of the IRS Housing and Local Standards; mortgage/rent expense for your county and household size" and then to deduct from this amount "the total of the Average Monthly Payments for any debts secured by your home." This calculation avoids double-counting by allowing a debtor to further deduct only the difference between the Local Standards and actual expenses (as long as the Local Standards amount is higher than the amount actually spent)." In re Kwabena Osei, 389 B.R. 339, 354 (Bankr. S.D.N.Y. 2008).

If the amount of the actual mortgage payment exceeds the IRS standard deduction, the debtor should put down "$0" on Line 25B(c). See, In re Welsh, 440 B.R. 836, 841 n.6 (Bankr. D. Mont. 2010); In re Prigge, 441 B.R. 667, 670 (Bankr. D. Mont. 2010).

Courts have held that a debtor is entitled to the full deduction if they have some expense for mortgage or rent See, In re Miranda, 449 B.R. 182, 196 (Bankr. D. P.R. 2011)("The court finds that Debtors pursuant to Section 707(b)(2)(A)(ii)(I) may deduct the full amount of applicable expenses under the IRS's National and Local Standards if they provide evidence to the Trustee that they have some expense for that particular category, irrespective of the fact that their actual expenses for certain categories are lower."); In re Musselman, 394 B.R. 801, 815 (D.N.C. 2008)("The first §707(b)(2) issue presented is whether §707(b)(2)(A)(ii)(I) permits a debtor who has expenses for housing or transportation to include the full amount allowed by the IRS Local Standards for those expense categories when calculating his §1325(b)(2) "disposable income" even when his actual expenses are less than the IRS amounts. eCast contends that a debtor may not take the full amount allowed under the Local Standards unless the debtor actually expends such amount. The bankruptcy court in this case correctly concluded that a debtor may do so."); In re Morgan, 374 B.R. 353, 362 (Bankr. S.D. Fla. 2007)("Had Congress wished the Standards to act as a cap rather than an allowance, it knew what language to use.").

However, courts have held that if the mortgage expense on the debtor's residence on Line 25B, the non-debtor spouse cannot also deducted the mortgage payment as a "marital adjustment" on Line 19, because that would be double dipping. See, In re Trimarchi, 421 B.R.

914, 921 (Bankr. N.D. Ill. 2010)("In order to eliminate the Debtor's "double dipping" with respect to the mortgage expense, the Court finds that the appropriate place to remove the deductions is on Line 19 under the marital adjustment. The Debtor has appropriately claimed the standard housing and utilities deduction on Line 25B.").

One issue that has arisen after Ransom is the question of when is Line 25B's mortgage/lease expense "applicable"? If an ownership expense for a motor vehicle is not applicable when it is owned free and clear, is there an applicable expense for Line 25B purposes when a house is owned free and clear of liens? Do the expenses of real estate taxes and homeowners insurance suffice to make the mortgage/lease expense of Line 25B "applicable" under Ransom? Cf., In re Bermann, 399 B.R. 213, 218 (Bankr. E.D. Wis. 2009)(allowing deduction of homeowner's insurance and property taxes on Line 47).

Similarly, if a debtor lives with his or her parents, or a significant other, and does not pay rent – is there an applicable expense? See, In re Wilson, 454 B.R. 155 (Bankr. D. Colo. 2011)(debtor was not entitled to take rent expense deduction because, by paying no rent, expense was not applicable to him).

Where the debtor's rent exceeds the amount allowed as a standard deduction on Line 25B, the debtor has a problem. Unlike a mortgage payment in excess of the standard deduction, the debtor cannot deduct an excess lease payment on Line 47. Some courts have – on a proper showing of necessity – permitted a "special circumstances" deduction for the amount by which the debtor's rent exceeded the IRS standard deduction on Line 25B. See, In re Stubbs, 58 Collier Bankr. Cas. 2d (MB) 1959, 2007 Bankr. LEXIS 4121 at *12-*13 (Bankr. D. Mont. Dec. 6, 2007)("In considering special circumstances, this Court looks directly to §707(b)(2)(B), as specifically authorized by §1325(b)(3), requiring itemized documentation of expenses and a detailed explanation of the "special circumstances" that justify the additional expenses for which there is no reasonable alternative. In re Demonica, 345 B.R. 895, 903 (Bankr. E.D. Ill 2006). After much consideration, the Court concludes that Todd's evidence of special circumstances satisfies §707(b)(2)(B)."). At least one court has allowed an excess rent expense to be taken on Line 26. See, In re Steele, 2010 Bankr. LEXIS 4117 at *4 - *6 (Bankr. D. Wyo. November 18, 2010).

Line 26. Local Standards: housing and utilities; adjustment. *If you contend that the process set out in Lines 25A and 25B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention in the space below:*

Line 26 is for housing and utility adjustments – if you are going to seek an adjustment on this line, you will need to justify it. A deduction on Line 26 "requires a showing that the expense, with documentation, is reasonable and necessary. 11 U.S.C. §707(b)(2)(A)(ii)(V)." In re Gregory, 452 B.R. 895, 898 (Bankr. M.D. Pa. 2011). If you assert some additional deduction here, that assertion will be compared to the expenses listed on Schedule J, which in turn may be compared with the debtor's actual bills and checks in an appropriate case.

Line 26 has been called one of the areas where bankruptcy courts still retain the jurisdiction to depart from the mechanical approach of the Means Test. See, In re Johnson, 2011 Bankr. LEXIS 4636 at *7 (Bankr. E.D.N.C. July 21, 2011), aff'd, Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012)(the bankruptcy court also cited Line 36 for health care, and Line 60's "catchall" for monthly expenses not included in Form 22C). "The trustee is free to object to additional expenses that are "contrived or inappropriate" given a particular debtor's circumstances." Id.

Housing and utilities are referenced in the Internal Revenue Manual (IRM) as follows:

> **Housing and Utilities.** Housing expenses include: mortgage (including interest) or rent, property taxes, necessary maintenance and repair, homeowner's or renter's insurance, homeowner dues and condominium fees. The utilities include gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, telephone and cell phone. Usually, these expenses are considered necessary only for the primary place of residence. Any other housing expenses should be allowed only if, based on a taxpayer's individual facts and circumstances, disallowance will cause the taxpayer economic hardship.

IRM 5.15.1.9 at 1.a; In re Gregory, 452 B.R. 895, 898 (Bankr. M.D. Pa. 2011); and see, Ransom v. FIA Card Services, N.A., ___ U.S. ___, 131 S.Ct. 716, 726, 178 L. Ed. 2d 603, 613 (2011)("Although the statute does not incorporate the IRS's guidelines, courts may consult this material in interpreting the National and Local Standards; after all, the IRS uses those tables for a similar purpose--to determine how much money a delinquent taxpayer can afford to pay the Government. The guidelines of course cannot control if they are at odds with the statutory language.").

In the Gregory opinion, the court rejected an adjustment for "Television" and "Internet" on Line 26, as not qualifying as either a housing expense or a utiltity. The court also rejected utility expenses that were overstated. In re Gregory, 452 B.R. 895, 898-899 (Bankr. M.D. Pa. 2011).

The expense of $32 a month for the cost of grass cutting and snow removal on a two and a half acre property was allowed as a Line 26 deduction, based on debtor-husband's credible testimony, in In re Grabarczyk, 2012 Bankr. LEXIS 5226 at *8 (Bankr. N.D. Ohio November 6, 2012).

At least one court has allowed rent in excess of the local standard to be deducted on Line 26 upon an appropriate showing:

> On Form 22C, Line 26, the Debtors claim an adjustment for housing and utilities. Mr. Steele testified that the Debtors pay $1,500.00 a month for rent, which is substantially higher than the average allowance for housing and utilities allowed by the Local Standards. Mr. Steele testified that the Debtors have three children: a daughter - 16 years old; a son - twelve years old; and, a second daughter - seven years old. Due to their ages, it is difficult, if not impossible to put the daughters into one bedroom. The youngest daughter has an earlier bedtime, while the older daughter needs more privacy. This along with the fact that the Debtors do not want to put their son in with either of the girls, requires the family to have a four-bedroom house. Mr. Steele testified to the difficulty of finding an appropriate house in Casper. He testified that four bedroom apartments are not readily available and that housing is expensive. Additionally, the Debtors have found a house to rent in the neighborhood where the children attend school, lessening transportation costs. Mrs. Steele did not testify to the additional housing and utility expenses.
>
> [T]he debtor's monthly expenses may include an allowance for housing and utilities in excess of the allowance specified by the Local Standards...based upon the actual expense for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary." The Debtors testified and demonstrated to the Court that the actual rental expense is greater than the allowable standard and appropriate housing is difficult to find. The Debtors demonstrated to the Court that the actual rental expenses are reasonable and necessary for the health and well-being of their children. The expense is allowed.

In re Steele, 2010 Bankr. LEXIS 4117 at *4 - *6 (Bankr. D. Wyo. November 18, 2010)(footnote omitted).

Line 27A. ***Local Standards: transportation; vehicle operation/public transportation expense.*** *You are entitled to an expense allowance in this category*

regardless of whether you pay the expenses of operating a vehicle and regardless of whether you use public transportation.

Check the number of vehicles for which you pay the operating expenses or for which the operating expenses are included as a contribution to your household expenses in Line 7. □0 □1 □2 or more.

If you checked 0, enter on Line 27A the "Public Transportation" amount from IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 27A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

Line 27A's deduction is a standard allowance for motor vehicle operating expenses. "On Line 27A of Form B22C, debtors are permitted to deduct as a transportation expense the local standard vehicle operation allowance regardless of whether there is a debt owed on the vehicle." In re White, 393 B.R. 436, 442 (Bankr. N.D. Miss. 2008).

Most Chapter 13 trustees appear to take the position that one person is entitled to one vehicle expense, if they use a vehicle for transportation. Two debtors are entitled to two motor vehicle expenses, if they used two motor vehicles. Most Chapter 13 trustees take the position that one debtor is not entitled to two motor vehicle operating expenses, even if schizophrenic.

The courts have taken different views on "one debtor/one vehicle". Deductions for two vehicles for one debtor was allowed in In re Joest, 450 B.R. 381 (Bankr. N.D.N.Y. 2011)(but Chapter 13 trustee appears to have only objected to the ownership expense of the second vehicle); In re Styles, 397 B.R. 771 (Bankr. W.D. Va. 2008)(although a bankruptcy debtor was single, the debtor was entitled to claim operating and ownership expenses for two vehicles in formulating a bankruptcy plan, since 11 U.S.C.S. §707(b)(2)(A)(ii)(I) expressly allowed the debtor to claim applicable expenses under IRS standards, which included expenses for two or more vehicles); In re Scurlock, 385 B.R. 814 (Bankr. M.D.N.C. 2008) (permitting debtor to deduct expenses on two cars because one was used by dependant).

In contrast, courts did not allow a second operating expense in: In re Winslett, 2010 Bankr. LEXIS 4587, 2010 WL 5112171 (Bankr. D. S.C. Feb. 19, 2010) (finding that the ownership and operating expenses for a single debtor for more than one car on account of adult children should not be allowed); In re Broers, 2007 WL 4166144, 2007 Bankr. LEXIS 5017

(Bankr. E.D. Wash. Nov. 20, 2007)(finding the court does not retain authority to determine whether debtor's expenses are reasonably necessary under §707(b)(2), but that the means test, Form 22C and IRS standards all require interpretation and application and give the court the authority and discretion to deny the ownership expense for a second vehicle because it would be unreasonable to ask creditors to fund a second vehicle for a single debtor, for which there is no demonstrated need); In re Daniel-Sanders, 420 B.R. 102 (Bankr. W.D.N.Y. 2009)(stating, as dicta, "trustee correctly asserts that in most instances, for purposes of determining disposable income, a single debtor may expense only one automobile"); In re Styles, 397 B.R. 771, 775 (Bankr. W.D. Va. 2008)(allowing expenses for two vehicles on means test, but subjecting plan involving "nonessential assets" to review to determine whether "unsecured creditors are better off than they would be if the asset is excluded and the payments on the secured debt are added into a monthly plan payment" (citation omitted)); In re Aprea, 368 B.R. 558 (Bankr. E.D. Tex. 2007) (debtor was not entitled to claim expenses paid for his live-in fiancee's car).

Where a single debtor attempts to deduct expenses for two vehicles, there may also be good faith problems. See, In re Predragovic, 2010 Bankr. LEXIS 2719 (Bankr. N.D. Ohio August 16, 2010)("A single debtor claiming $750 in vehicle expenses . . . is not good faith.").

The Means Test does not appear to contemplate any additional operating expense for more than two vehicles. As the court noted in In re Paliev, 2012 Bankr. LEXIS 3801 at 26 n.14 (Bankr. E.D. Va. August 15, 2012): "Form B22-C, Line 27A, relating to vehicle operation expenses, allows vehicle operating expenses for "2 or more" vehicles. Lines 28 and 29, on the other hand, appear to allow only ownership expenses for "Vehicle 1" and "Vehicle 2."".

One recent case has looked at whether an operating expense should be allowed for a vehicle which was not operating at the time of filing. Although the holding is not entirely clear, because the debtor owned three vehicles, the court held that under Ransom an operating expense would not be "applicable", and at least one case has denied an operating expense for a non-operational vehicle. See, In re Reynolds, 2011 Bankr. LEXIS 3235 (Bankr. N.D. Ohio August 18, 2011)("a debtor who owns a car that does not run is not going to incur operating costs for the vehicle"); but see, In re Lang, 2012 Bankr. LEXIS 473 (Bankr. D. Wyo. Feb. 14, 2012)(allowing operating expense for a vehicle not operational at the time of the hearing).

Line 27A is the place many debtors take the "old car" allowance. When this issue is litigated, it appears that the majority of courts do not allow the deduction, at least on Line 27A:

> Since the Ransom decision was issued, there have been seven cases decided at the Bankruptcy Court level dealing with the $200 old car deduction. Of the seven cases, five of them reject the concept that the $200 old car deduction can be taken on Line 27A. See e.g. In re VanDyke, 450 B.R. 836, 843 (Bankr.

> C.D. Ill. 2011); In re Hargis, 451 B.R. 174, 179 (Bankr. D. Utah 2011); In re Wilhite, 2011 Bankr. LEXIS 4368, *7-8 (Bankr. N.D. Ga. Nov. 17, 2011); In re Dittrich, 2011 Bankr. LEXIS 3061, *9-10 (Bankr. W.D. Wash. Aug. 8, 2011); In re Schultz, 463 B.R. 492, 2011 Bankr. LEXIS 2192, *10-13 (Bankr. W.D. Mo. June 14, 2011). One of the two decided cases allowing the old car deduction, In re Baker, supra., [2011 Bankr. LEXIS 490, 2011 WL 576851 (Bankr. D. Mont. Feb. 9, 2011)] allowed the $200 old car deduction because that court had a pre-Ransom decision that upheld the deduction and the Court could find no explicit statutory language disallowing the deduction. See In re Baker, 2011 Bankr. LEXIS 490, at *10. The only other post-Ransom case to support the $200 old car deduction was based on a denied motion for summary judgment and only approved of the $200 old car deduction in theory. See In re Johnson, 454 B.R. 882, 884 (Bankr. M.D. Fla. 2011).

In re Sisler, 464 B.R. 705, 709-710 (Bankr. W.D. Va. 2012)(holding there is no statutory basis for an additional transportation expense to be taken on Line 27A). See also, In re O'Connor, 2008 Bankr. LEXIS 3629 (Bankr. D. Mont. Sept. 30, 2008)(pre-Ransom case allowing $200 deduction for older vehicle), and, In re Emerson, 2011 Bankr. LEXIS 5237 (Bankr. D. Mont. Nov. 8, 2011)(reaffirming the holding in the O'Connor decision post-Ransom).

Even courts that would consider allowing the "old car deduction" do not allow it where there is a deduction for an ownership expense – it can only be claimed if the vehicle is free and clear of liens. See e.g., In re Reedy, 2012 Bankr. LEXIS 2894 at *6 (Bankr. D. Wyo. June 26, 2012)("In the facts of the case before the court, the Debtor's vehicle is encumbered. He is not entitled to claim the $200.00 additional deduction until such time as the debt is retired.").

Where Chapter 13 trustees, and certain offices of the United States Trustee allow "old car" deductions, this policy is a decision not to base objections on the taking of the deduction when the Plan otherwise complies with the Disposable Income Test and is the debtor's best efforts. And it may be changed, based on evolving case law decisions.

Debtors may also attempt to deduct excess operating expenses on Lines 57 or 60 – but for courts that reject a Line 27A deduction, there would be an evidentiary burden on the debtor to show that the deduction reflected an actual expense, and should be allowed as a "special circumstance" or an "additional expense". See, In re Hargis, 451 B.R. 174 (Bankr. D. Utah 2011)(an additional operating expense may be claimed on Line 60 of Form 22C in appropriate circumstances and subject to review and objection by parties in interest); but see, In re Bronson, 65 Collier Bankr. Cas. 2d (MB) 885, 2011 Bankr. LEXIS 950 (Bankr. D. Idaho March 10, 2011)("the fact . . . that Debtors estimated transportation expenses on Schedule J at $1,005.00 per month is of no consequence. They are limited to the $472.00 as shown on line 27A of Form

22C."); In re Stitt, 403 B.R. 694, 705 (Bankr.)(debtor documented actual transportation expenses of over $800 a month, but the expense was due to a lifestyle choice, and so not allowed as a special circumstance); In re Thiel, 446 B.R. 434 (Bankr. D. Idaho 2011)(higher transportation expenses are not grounds to switch to using I and J, given the Supreme Court's directive in Ransom to use the Means Test in Chapter 13); In re Schultz, 463 B.R. 492, 498 n. 3 (Bankr. W.D. Mo. 2011)(concern expressed about the statutory basis for allowing an additional operating expense on Line 60).

Line 27B. Local Standards: transportation; additional public transportation expense. *If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 27B the "Public Transportation" amount from IRS Local Standards: Transportation. (This amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)*

Line 27B is new – it was added in 2010 for public transportation expenses. If your debtor doesn't regularly take public transportation, don't try to claim this allowance. The trustee will inquire to determine if the debtor is legitimately entitled to it. Like with specific questions about the bus routes the debtor regularly takes. . . .

Line 28. Local Standards: transportation ownership/lease expense; Vehicle 1. *Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)*

□*1* □*2 or more.*

Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 47; subtract Line b from Line a and enter the result in Line 28. ***Do not enter an amount less than zero.***

a. IRS Transportation Standards, Ownership Costs $_____

b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47 $_____

c. Net ownership/lease expense for Vehicle 1 Subtract Line b from Line a $_____

Line 28 and 29 are for motor vehicle ownership expenses. The allowance is now $517 for each vehicle (up to two). Most Chapter 13 trustees will challenge one debtor deducting two cars.

The Supreme Court's decision in Ransom decided the issue of whether or not debtors can take an ownership expense deduction for a vehicle that does not serve as collateral for a loan. The answer is: No, there is no applicable deduction where the vehicle is owned free and clear. Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S. Ct. 716, 721-22, 178 L. Ed. 2d 603 (2011).

Thus, where a vehicle has been surrendered, no Line 28 or 29 deduction is permitted because that ownership expense is not applicable to the debtors. See, In re Grabarczyk, 2012 Bankr. LEXIS 1435 at *11 (Bankr. N.D. Ohio March 15, 2012) following, Darrohn v. Hildebrand (In re Darrohn), 615 F.3d 470 (6th Cir. 2010).

Please be sure to read the instructions on how to take this deduction – it is the standard deduction (now $517) less the amount owed on the vehicle divided by 60. It is not just the monthly payment (although if you use a monthly payment less than $517, it will make no net difference on the B22C Means Test calculation.) If the deduction for the vehicle is more than $517, expect lots of questions about the vehicle ownership expenses.

Attempts to restrict the motor vehicle ownership deduction to just the actual amount of the car payment, rather than the full "standard deduction", have been rejected by most courts. See e.g., In re Scott, 457 B.R. 740 (Bankr. S.D. Ill. 2011)(allowing a vehicle ownership deduction of $496, over the Chapter 13 trustee's objection, when the secured debt payment was less). However, one recent decision held that where the transportation expense on Form B22C exceeded the actual expense by $255, the "presumption" that the debtors were entitled to deduct the full ownership allowance permitted under the IRS guidelines was rebutted, and the only deduction that should be allowed was the "actual ownership expense" – which was the monthly payment on the loan. See, In re Daniel, 2012 Bankr. LEXIS 2440, 2012 WL 3322438 (Bankr. M.D. Ala. May 30, 2012)(the case cites only Lanning and Ransom).

A slightly different wrinkle comes from a recent case out of Hawaii that is worth noting. The bankruptcy court in In re Montiho, 466 B.R. 539, (Bankr. D. Hawaii 2012) held that the payoff of a vehicle is like other payments that a debtor no longer has to make – like for surrendered property, a stripped junior mortgage, or the payoff of a 401(k) loan. If those changes require a debtor to step up payments, the payoff of a motor vehicle should also require

the debtors to step up their plan payment when that expense is no longer applicable. "[I]t is clear that the debtor will have no car payments after April 2012 and Ransom holds that, when the debtor's car payment is zero, the debtor is not entitled to any allowance for automobile ownership expense." Monitho, 466 B.R. at 541-542.

The Montiho holding was followed in the unreported decision, In re Grabarczyk, 2012 Bankr. LEXIS 5226 at *11 (Bankr. N.D. Ohio November 6, 2012):

> Finally, Debtors deduct from current monthly income $327.69 for a car payment that will be paid in full by November 2013 and $342.00 for amounts erroneously being withheld from Anthony Grabarczyk's wages for repayment of his 401(k) loans. To the extent that these funds will become available to Debtors during the life of their Chapter 13 Plan, their Plan must provide for a step up at that time in plan payments. See In re Montiho, 466 B.R. 539, 541 (Bankr. D. Haw. 2012)(agreeing with " most courts [that] have held that the plan payments must 'step up' when the debtors' payments on a secured loan cease, because that event is 'known or virtually certain at the time of confirmation'" and citing In re Darrohn, 615 F.3d 470 (6th Cir.2010)(denying an allowance for payments on a debt secured by property which the debtors intended to surrender)); Seafort v. Burden (In re Seafort),669 F.3d 662 (6th Cir. 2012)(holding post-petition income that becomes available to debtors after their 401(k) loans are fully repaid is "projected disposable income" that must be turned over to the trustee for distribution to unsecured creditors pursuant to §1325(b)(1)(B)).

The question then becomes – what if the Plan calls for the small remaining portion of the vehicle loan to be paid off over 60 months? Does the full deduction then run for 60 months?

In addressing a situation where the debtor attempted to "create" an applicable ownership expense by borrowing $513 four days before the bankruptcy was filed, the bankruptcy court held that deduction only applied to an expense related to the purchase or lease of a vehicle. So, the debtor was not entitled to the deduction, despite the pre-bankruptcy machinations of taking out a "loan" that may or not have been made, for reasons the debtor could not recall. See, In re Alexander, 2012 Bankr. LEXIS 3540, 2012 WL 3156760 (Bankr. W.D. Mo. August 1, 2012).

As discussed in connection with the Line 27A transportation expense deduction, a single debtor attempting to deduct more than one car payment creates issues on two fronts – 1) an issue as to whether the deduction is permitted on the Means Test; and 2) an issue as to whether there is "good faith" where a single debtor is seeking to have the unsecured creditors pay for a second vehicle, whether it be a second car, a motorcycle, a motor home, or a vehicle to be used by another person.

Because the deduction of “secured debts” is specifically permitted, the issues associated with Line 47 are a little different than the Line 27A issue of an IRS standard transportation expense.

The courts have taken different views on “one debtor/one vehicle” for the standard IRS ownership deduction. Ownership expense deductions for two vehicles were allowed in In re Joest, 450 B.R. 381 (Bankr. N.D.N.Y. 2011); see also, In re Styles, 397 B.R. 771 (Bankr. W.D. Va. 2008)(although a bankruptcy debtor was single, the debtor was entitled to claim operating and ownership expenses for two vehicles in formulating a bankruptcy plan, since 11 U.S.C.S. §707(b)(2)(A)(ii)(I) expressly allowed the debtor to claim applicable expenses under IRS standards, which included expenses for two or more vehicles); In re Scurlock, 385 B.R. 814 (Bankr. M.D.N.C. 2008)(permitting debtor to deduct expenses on two cars because one was used by dependant).

In contrast, courts did not allow a second ownership expense in: In re Winslett, 2010 Bankr. LEXIS 4587, 2010 WL 5112171 (Bankr. D. S.C. Feb. 19, 2010) (finding that the ownership and operating expenses for a single debtor for more than one car on account of adult children should not be allowed); In re Broers, 2007 WL 4166144, 2007 Bankr. LEXIS 5017 (Bankr. E.D. Wash. Nov. 20, 2007)(finding the court does not retain authority to determine whether debtor's expenses are reasonably necessary under §707(b)(2), but that the means test, Form 22C and IRS standards all require interpretation and application and give the court the authority and discretion to deny the ownership expense for second vehicle because it would be unreasonable to ask creditors to fund a second vehicle for a single debtor, for which there is no demonstrated need); In re Daniel-Sanders, 420 B.R. 102 (Bankr. W.D.N.Y. 2009)(stating, as dicta, "trustee correctly asserts that in most instances, for purposes of determining disposable income, a single debtor may expense only one automobile"); In re Mendelson, 412 B.R. 75 (Bankr. E.D.N.Y. 2009)(debtor was not entitled to a secured debt expense deduction for a vehicle which was driven exclusively by her former spouse and on which he was making the payments, even though the vehicle was jointly owned with the debtor and she was legally obligated on the debt); In re Styles, 397 B.R. 771, 775 (Bankr. W.D. Va. 2008)(allowing expenses for two vehicles on means test, but subjecting plan involving "nonessential assets" to review to determine whether "unsecured creditors are better off than they would be if the asset is excluded and the payments on the secured debt are added into a monthly plan payment" (citation omitted)); In re Aprea, 368 B.R. 558 (Bankr. E.D. Tex. 2007) (debtor was not entitled to claim expenses paid for his live-in fiancee's car).

Where a single debtor attempts to deduct expenses for two vehicles, there may also be good faith problems. See, In re Predragovic, 2010 Bankr. LEXIS 2719 (Bankr. N.D. Ohio August 16, 2010)(“A single debtor claiming $750 in vehicle expenses . . . is not good faith.”).

But see, Drummond v. Welsh (In re Welsh), 465 B.R. 843 (9th Cir. BAP 2012)(Dealing with the somewhat different issue of deductions on Line 47: "We conclude that the means test of §707(b)(2)(A), which is incorporated into chapter 13, allows a debtor to deduct from current monthly income payments on secured debts, averaged over sixty months as provided in §707(b)(2)(A)(iii), regardless of whether the collateral is necessary." The Welsh court held that a lack of good faith could not be predicated on taking a permitted expense deduction, no matter how unnecessary the payment for luxury good might be.).

While the older case law is interesting, the issues may now – post-Ransom – be framed a little differently for two reasons: 1) Ransom's directive that the purpose of the BAPCPA amendments was to require debtors to repay as much as they could afford, and that the statutory provisions should be interpreted with that purpose in mind; and 2) the statement that the IRS manual is not incorporated, but may be referred to for some guidance. See, Ransom v. FIA Card Services, N.A., ___ U.S. ___, 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011); and, Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011)(using Ransom's directives in analysis of BAPCPA provisions), *cert. denied*, 132 S. Ct. 997, 181 L. Ed. 2d 732 (2012).

There is no "standard deduction" for a third motor vehicle. Any attempt to deduct the expenses of a third vehicle would have to be pursued on other lines of the Form 22C – Lines 47, 57 and 60. See e.g., In re Lang, 2012 Bankr. LEXIS 473 (Bankr. D. Wyo. Feb. 14, 2012)(need for a third vehicle in the future for 15 year old daughter not a special circumstance).

Objections based on the Means Test form being wrong - in that Lines 28 and 29 allows the deductions for debt payments, contrary to §707(b)(2)(A)(ii)(I)'s "notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts" - have been rejected. See, In re Scott, 457 B.R. 740 (Bankr. S.D. Ill. 2012).

Line 29. Local Standards: transportation ownership/lease expense; Vehicle 2. *Check the number of vehicles for which you claim an ownership/lease expense. (You may not claim an ownership/lease expense for more than two vehicles.)*

□*1* □*2 or more.*

Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b

from Line a and enter the result in Line 29. ***Do not enter an amount less than zero.***

a. IRS Transportation Standards, Ownership Costs $_____

b. Average Monthly Payment for any debts secured by Vehicle 1, as stated in Line 47 $_____

c. Net ownership/lease expense for Vehicle 1 Subtract Line b from Line a $_____

The case law related to this line is found in the discussion for Line 28, supra.

*****A Note "On Other Necessary Expenses" – Lines 30 to 37***:**

"As opposed to the strict deduction for expenses covered by the Local Standards on Line 25B, Official Form 22C directs debtors making Other Necessary Expenses deductions in lines 30-37 to enter total monthly amounts or total average monthly amounts that debtors "actually pay for," "actually expend," "actually incur," or "are required to pay" for each expense." In re Kwabena Osei, 389 B.R. 339, 354 (Bankr. S.D.N.Y. 2008).

Line 30. Other Necessary Expenses: taxes. *Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes.* ***Do not include real estate or sales taxes.***

Line 30 is the deduction for taxes. If the amount withheld or otherwise paid over is in excess of the amount needed to pay the debtor's ongoing tax obligations, that excess is income that needs to go into the Plan through a turnover of the tax refunds. Most courts hold that amounts overwithheld for taxes are income, and must be part of the calculation of disposable income. In jurisdictions where tax refunds are turned over, there is still the issue of whether Line 30 reflects the actual amounts the debtor(s) are having withheld for taxes – if the amount on Line 30 is greater than is actually being put aside for taxes, the creditors will not get all that money back through tax refunds, because the overwitholding for taxes is overstated.

On the other hand, if overwithholding does not come back into the Chapter 13 estate through the turnover of tax refunds, then Chapter 13 trustees have to take a stronger position on Line 30. It will be important to taking steps to ensure that the amount deducted on Line 30 reflects **only** the amount necessary to pay taxes, not the amount the debtor was actually

withholding for taxes. Where the debtor has, historically, overwithheld for taxes, the reduced amount deducted for withholding will increase the monthly amount of the Chapter 13 Plan payment, and will correspondingly increase the amount going to unsecured creditors based on the amount reflected on Line 59. This higher monthly payment may require the debtor to actually reduce the amount withheld for taxes in order to afford the required minimum monthly payment based on Line 59.

Some debtors have argued that tax refunds are not projected disposable income because they are not virtually certain to be received, or if there is enough certainty to satisfy Lanning as far as receiving future refunds, it is the amount which is too uncertain for the refund to be part of projected disposable income. The issue is discussed in In re Murcheck, 479 B.R. 521 (Bankr. N.D. Iowa 2012)(rejecting debtor's argument that tax refunds did not have to be turned over. The trustee satisfied her burden by showing refunds had been received in the past, and the debtor failed to satisfy her ultimate burden of showing that, despite the receipt of refunds in prior years, exceptional circumstances that would occur during the plan made it known or virtually certain that a refund would or would not be received.).

Where the Chapter 13 trustee, or the court, requires that the deduction on Line 30 to be **only** the minimum amount necessary for the payment of taxes, one question that arises is the proper way to calculate the amount necessary for the payment of taxes. On appeal, the district court in In re Baldwin upheld the Chapter 13 trustee's objection to the debtors' use of www.paycheckcity.com to calculate the monthly taxes actually incurred for puposes of Line 30. See, In re Baldwin, 61 Collier Bankr. Cas. 2d (MB) 141, 2008 U.S. Dist. LEXIS 98352 (N.D.N.Y. Dec. 3, 2008).

The Baldwin court stated:

> The method of calculating the tax amount for Line 30 should provide an accurate, actual tax expense figure without proving too onerous to administer. The tax expense figure "must be the debtor's actual tax liability, no more or no less." In re LaPlana, 363 B.R. 259, 267 (Bankr. M.D. Fla. 2007). This figure is not "actual" in the sense of "being necessarily and permanently true"; it is an "educated estimate[] based on the best information available to the parties." In re Lawson, 361 B.R. 215, 223 n.26 (Bankr. D. Utah 2007).
>
> Other jurisdictions have adopted a variety of methodologies for calculating Line 30. In In re Lipford, a case dealing with an identical provision for a Chapter 7 debtor, the court proposed a calculation involving applicable tax rates for the months covering the period for which current monthly income is calculated. 397 B.R. 320, 2008 Bankr. LEXIS 1279, 2008 WL 1782640, at *10

> (Bankr. M.D.N.C. April 17, 2008). The court in In re Raybon held that the debtor's use of withholdings as an estimate of her taxes was not shown to be incorrect and could be used as long as the debtor submitted "all future state and federal income tax refunds to the Trustee during her applicable commitment period." 364 B.R. 587, 590, 592 (Bankr. D.S.C. 2007). In In re Stimac, the court held that "the amount to be deducted on Line 30 will be presumed to be the amount of taxes the debtor actually paid, as evidenced by the most recent tax return filed, divided by twelve," but the debtor can rebut this presumption by showing a change in circumstances that caused the taxes paid in the previous year to "constitute a materially insufficient or inaccurate deduction." 366 B.R. 889, 893-94 (Bankr. E.D.Wis. 2007); see also In re Gehrke, 2007 Bankr. LEXIS 2717, 2007 WL 2318479, at *1 (Bankr. E.D. Wis. Aug. 9, 2007).

In re Baldwin, 61 Collier Bankr. Cas. 2d (MB) 141, 2008 U.S. Dist. LEXIS 98352 at *7-*9 (N.D.N.Y. Dec. 3, 2008); see also, In re Saleen, 2011 Bankr. LEXIS 4847, *17 (Bankr. D. Or. Dec. 2, 2011)("Line 30 demands the best estimate of actual taxes going forward, not what is being withheld, which may or may not approximate a debtor's eventual tax liability. In re Balcerowski, 353 B.R. 581 (Bankr. E.D. Wis. 2006): accord In re Mullen, 369 B.R. 25, 35 (Bankr. D. Or. 2007).").

The Baldwin decision ultimately upheld the Chapter 13 trustee's method for calculating the Line 30 deduction:

> None of the methods used in these other jurisdictions significantly differs in its accuracy or ease of administration than the method proposed by Trustee in this case. This Court adopts the method put forth by Trustee and adopted by the Bankruptcy Court that "actual tax" on Line 30 should be computed by subtracting from the Debtors' monthly withholdings one-twelfth of the previous year's federal and state income tax refunds. Appellee's Br. at 4-5. The debtor may rebut this conclusion where he or she has experienced a material change in circumstances that would undermine the method's accuracy. Moreover, the Court agrees with Judge Littlefield that www.paycheckcity.com is not an appropriate method for calculating Line 30 tax expenses. The Court is "unwilling to promote a . . . website as an official mechanism for calculating actual tax." Order at 6.

In re Baldwin, 61 Collier Bankr. Cas. 2d (MB) 141, 2008 U.S. Dist. LEXIS 98352 at *9 (N.D.N.Y. Dec. 3, 2008).

A more case-by-case approach is advocated in Michaud:

> The issue for the Court is what is a permissible amount for debtors to retain. In the Court's view, the amount of an income tax refund that may be retained depends upon the particular circumstances in a particular case and may involve consideration of the amount of the debtor's tax refund, the amount of the refund in comparison to the total tax due, the debtor's yearly income and expenses, the debtor's overall budget, the number and nature of the debtor's dependents, the amount being paid into the debtor's plan, the dividend being paid to unsecured creditors, and the length of the debtor's plan. In other words, it will depend upon the facts of a specific case and must be reviewed on a case-by-case basis at the time of confirmation, much in the same way this Court made determinations pre-BAPCPA as to whether 401(k) contributions and repayments were reasonably necessary expenses or more properly considered part of a debtor's disposable income.

In re Michaud, 61 Collier Bankr. Cas. 2d (MB) 424, 2008 Bankr. LEXIS 3568 at *13-*14 (Bankr. D.N.H. Dec. 30, 2008).

Where the debtor has tax issues that require what might otherwise be "overwithholding" for taxes on Line 30, the debtor cannot "double-dip" and put an additional tax withholding amount on Line 57 for "special circumstances". See, In re Moore, 446 B.R. 458, 464 (Bankr. D. Colo. 2011).

At least one court has allowed personal property taxes to be included on this line. See, In re Paliev, 2012 Bankr. LEXIS 3801 at *3 - *4 & *25 - *26 (Bankr. E.D. Va. August 17, 2012).

A deviation from the deduction for taxes on Line 30 has been held to require the same type of showing as any other variance from the Means Test result. See, In re Reed, 454 B.R. 790, 799 (Bankr. D. Or. 2012)("I conclude that none of these four adjustments to expenses should be made. There is no evidence that the differences in taxes (line 30) or retirement (line 55) result from known or virtually certain changes rather than simple fluctuations in income.").

To the extent the Kagenveama decision remains viable in the Ninth Circuit, the appropriate way to calculate this deduction is more important than in other jurisdictions, where tax refunds may ameliorate the negative effects of over-withholding on creditors. As the Oregon bankruptcy court in Saleen noted:

> Line 30 demands the best estimate of actual taxes going forward, not what is being withheld, which may or may not approximate a debtor's eventual tax liability. In re Balcerowski, 353 B.R. 581 (Bankr. E.D. Wis. 2006): *accord* In re Mullen, 369 B.R. 25, 35 (Bankr. D. Or. 2007). This is important to do, because

actual taxes are part of the PDI equation and PDI not only establishes the amount payable to unsecured creditors but also the plan's length.

In re Saleen, 2011 Bankr. LEXIS 4847 at *17 (Bankr. D. Or. December 2, 2011).

Line 31. Other Necessary Expenses: involuntary deductions for employment. *Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as voluntary 401(k) contributions.*

Line 31 is for INVOLUNTARY deductions associated with employment. "On Line 31, a debtor may deduct mandatory payroll deductions such as union dues, mandatory retirement contributions and uniform costs." In re Rezentes, 368 B.R. 55, 58 n. 3 (Bankr. D. Hawaii 2007). This line is not, properly, the place for 401(k) loan repayments. See, In re Ethington, 2009 Bankr. LEXIS 1593 at *8 (Bankr. E.D.N.C. June 19, 2009)(Chapter 7 case stating - "The Debtor testified at the hearing that she would not lose her job if she stopped making payments on the TSP loan. Had the Debtor discontinued the TSP loan repayments, the only consequence for failing to pay back the loan is that she would have been taxed on the distribution. Because the repayment of the TSP loan is not a requirement of the Debtor's employment, it is not an involuntary deduction under "Other Necessary Expenses" of 11 U.S.C. §707(b)(2)(A)(ii) or the IRM."); In re Whitaker, 58 Collier Bankr. Cas. 2d (MB) 667, 2007 Bankr. LEXIS 2527 at *10-*11 (Bankr. N.D. Ohio July 25, 2007)(Chapter 7 case).

If 401(k) loan repayments are included on this line, or any other line, it has been held that the monthly payments for the 401(k) loan(s) must be added to the monthly Plan payment when the loan(s) are repaid. See, Burden v. Seafort (In re Seafort), 437 B.R. 204 (6th Cir. BAP 2010). Subsequently, the Sixth Circuit Court of Appeals affirmed the Seafort decision, albeit on different grounds. Seafort v. Burden (In re Seafort), 669 F.3d 662 (6th Cir. 2012).

Line 32. Other Necessary Expenses: life insurance. *Enter total average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.*

The Form 22C did little to alter the longstanding pre-BAPCPA bankruptcy distinction between term life insurance, which is generally held to be a valid expense, and "whole life" policies, which have a substantial savings component. See generally, In re Paliev, 2012 Bankr. LEXIS 3801 at *27 (Bankr. E.D. Va. August 17, 2012)("Term life insurance is,

generally speaking, an allowable expense."); In re Williamson, 296 B.R. 760, 765-66 (Bankr. N.D. Ill. 2003)(non-debtor spouse's whole life policy was an investment vehicle, as the policy builds cash value. Therefore, the whole life insurance policy was not reasonably necessary, and the amount for those premiums should be included in the debtor's disposable income); In re Presley, 201 B.R. 570, 575 (Bankr. N.D. Fla. 1996)(disability and life insurance expenses allowed because they were "not an investment asset"); In re Smith, 207 B.R. 888, 889 (9th Cir. BAP 1996); In re DeRosear, 265 B.R. 196, 211 (Bankr. S.D. Iowa 2001); Matter of McReynolds, 253 B.R. 54, 63 (Bankr. S.D. Iowa 2000).

While the Paliev court held that term insurance is generally an allowable expense, the court found that three term life insurance policies was more than necessary. The court denied a deduction for the debtor's largest policy – a term policy for $500,000 – meaning that there would be an additional $67 a month in disposable income. In re Paliev, 2012 Bankr. LEXIS 3801 at *28 (Bankr. E.D. Va. August 17, 2012).

The instructions for Line 32 follow the old rule and specifically state that amounts spent on whole life policies are NOT deductible. See generally, In re Lipford, 397 B.R. 320, 335-336 (Bankr. M.D.N.C. 2008)(disallowing whole life deductions as not deductible on the Chapter 7 means test).

An attempt to deduct what term life insurance "would have cost", when the debtor actually only had a whole life policy, was not successful in at least one Chapter 13 case. See, In re Narvais, 2011 Bankr. LEXIS 4104 (Bankr. D. Wyo. October 21, 2011).

Line 33. Other Necessary Expenses: court-ordered payments. *Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations included in Line 49.*

Line 33 is for "court ordered payments". However, not all "court ordered" payments are deductible. For example, a prepetition garnishment cannot be deducted on Line 33. See, In re Cleaver, 426 B.R. 390, 395-396 (Bankr. D.N.M. 2010)(deduction for garnishment of $528.44 a month disallowed in its entirety). A prepetition tax levy is also not a permitted deduction, particularly when it is deducted a second time on Line 49. In re Law, 2008 Bankr. LEXIS 1198 at *43-*51, 2008 WL 1867971 (Bankr. D. Kan. 2008).

The same problems associated with 401(k) loan repayments that complete during the 60 month Chapter 13 Plan apply to the deduction of court ordered payments that end during the Plan term. There are two ways to deal with the issue – 1) do a step up in the monthly payment as the obligation to make court ordered payments ends; or 2) take the total amount due during the 60

month Chapter 13 Plan period, and divide by 60. The decision in In re Casey, 356 B.R. 519, 525-526 (Bankr. E.D. Wash. 2006) required the debtor to amortize his court ordered payments by dividing the entire obligation by 60, resulting in a deduction lower than his current monthly payment when the obligation ended in month 24 of the Plan.

Like all deductions, it is the debtor's burden to show that the deduction (and the amount) is allowable. Testimony like this is not going to cut it:

> When questioned concerning dependent persons whom he is supporting, the Debtor stated he has not supported his wife, or ex-wife as the case may be, since the year 2000 when they separated. The Debtor did state that he has a ten-year-old child for whom, according to his income tax return, he pays $400.00 monthly in support. The record, however, is devoid of evidence to substantiate the claim that he pays this money, and the Debtor was unsure if he pays the money as a result of an amicable understanding between him and the child's mother, or pursuant to an order of a court. The only scintilla of evidence the Court finds is on Line 33 of the Form B22C, the Debtor lists $400.00 in the column requesting disclosure of court-ordered payments, without reference to whether this is spousal or child support. However, the Debtor offered no documentation to support this fact, nor did the Debtor claim it on his original Schedule E as domestic support obligations. He failed to furnish the Court with any information relating to the purpose for which this $400.00 is used, whether he pays this money to the child's mother or pays the child's expenses directly or even whether this amount is in fact regularly paid for the child's support.

In re Stevenson, 374 B.R. 891, 895-896 (Bankr. M.D. Fla. 2007).

Line 34. Other Necessary Expenses: education for employment or for a physically or mentally challenged child. *Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.*

Line 34 is a deduction limited by its terms – it is for education, either for employment or for a physically or mentally challenged child. The court in In re Gregory, 452 B.R. 895, 899 (Bankr. M.D. Pa. 2011) held that the debtors had justified a portion of their claimed deduction on Line 34 by showing an average monthly expense of $192 for "employer required and unreimbursed educational expense." An additional educational expense for a minor dependent child was not supported by adequate documentation and was disallowed. Id.

The Saffrin decision stated that educational expenses for a college student were not a deductible expense on Line 34:

> As far as the record shows, the expenses the Saffrins are incurring to send their daughter to the University of Illinois are not expenses related to the education of a physically or mentally challenged child, nor are they expenses for education required as a condition of employment. Line 34 of Form 22C in fact specifically allows a debtor to deduct an amount for "Other Necessary Expenses: education for employment or for a physically or mentally challenged child." On line 34, the Saffrins correctly entered "$0.00."

In re Saffrin, 380 B.R. 191, 193 (Bankr. N.D. Ill. 2007); see also, In re Clary, 2012 Bankr. LEXIS 1077 at *25-*26 & *30 (Bankr. M.D. Fla. March 14, 2012)(Chapter 7 debtors' deduction for college expenses were denied because debtors did not establish that their daughters were physically or mentally challenged).

Line 35. Other Necessary Expenses: childcare. *Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. Do not include other educational payments.*

Line 35 is for childcare expenses. The childcare expenses must be not only actual, but reasonably necessary. In a Chapter 7 case, the court held that where a mother was unemployed, and the child was in school, childcare expenses of $333 a month have been held to be unreasonable. See, In re Reed, 422 B.R. 214, 234-235 (C.D. Cal. 2009).

There may be some flexibility in how child care expenses are calculated. In a Chapter 7 case, the court looked at the relationship between childcare expenses and the debtor's income. See, In re Thelen, 431 B.R. 601 (Bankr. E.D.N.C. 2010)(averaging a Chapter 7 debtor's actual child care expenses over the six month current monthly income period was reasonable and uniquely appropriate because her income and child care expenses were linked).

Note that Line 35 does not have a specific documentation requirement. However, documentation can be helpful to the debtor because people who don't have young children – trustees, judges, staff attorneys, trustee staff – may have no idea what is a reasonable amount to pay for child care.

Line 36. Other Necessary Expenses: health care. *Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by*

insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. Do not include payments for health insurance or health savings accounts listed in Line 39.

Line 36 is for health care for debtors and their dependents, that is not reimbursed, with some additional limitations.

On May 9, 2008, the IRS changed the Internal Revenue Manual to eliminate the "health care" category. Keith M. Lundin and William H. Brown, *Chapter 13 Bankruptcy, 4th Edition*, §477.8 at ¶4, Sec. Rev. Mar. 5, 2009, www.Ch13online.com. This change appears to have had zero affect on how projected disposable income is calculated. Line 36 remains on the Form 22C, and the only court to mention the change did so in passing, and allowed fairly generous health care deductions. See, In re Gregory, 452 B.R. 895, 899 (Bankr. M.D. Pa. 2011). In Baud v. Carroll, 634 F.3d 327, 333 (6th Cir. 2011), the Sixth Circuit Court of Appeals states that health care is a deduction because it is on the Means Test: "These Other Necessary Expenses include certain taxes, involuntary employment deductions, life insurance on the debtor, certain court-ordered payments, certain educational expenses, childcare, **unreimbursed health care** and telecommunications services. See Official Form 22C, lines 30-37." (emphasis added).

The courts have interpreted the requirement that the health care expenses be for a debtor or a dependent of the debtor:

> Line 36 permits a deduction for unreimbursed health care expenses, instructing, "Enter the average monthly amount that you actually expend on health care expenses that are not reimbursed by insurance or paid by a health savings account." The Debtors list $310, explaining that the figure includes contributions to their daughter's health care expenses. However, Schedule I lists no dependents. Neither the instructions at Line 36 nor section 707 contain language extending permissible health care expenses beyond the Debtors or their dependents. This is not an oversight, as Congress uses more expansive language in section 707(b)(2)(A)(ii)(II), which authorizes the Line 40 deduction for "Continued contributions to the care of household or family members."

In re Haley, 2006 Bankr. LEXIS 2857 at *9-*11 (Bankr. D.N.H. Oct. 18, 2006).

The deduction is for "necessary" health care, not elective health care.

> Section 707(b)(2)(A)(ii)(I) discusses the allowance of "Other Necessary Expenses" by referencing the "categories" specified by the Internal Revenue Service. The IRM formerly included "health care" as a category of Other

> Expense. Currently, it may be classified as an item in the National Standards category. Actual non-elective dental expenses are allowable. The Debtors have included itemized statements in excess of their deduction. Debtors' Exhibits #2 and #4. While I suspect that some of the identified dental work was elective, in the absence of evidence of such, I will assume that the identified procedures were necessary.

In re Gregory, 452 B.R. 895, 899 (Bankr. M.D. Pa. 2011).

In a recent decision, the bankruptcy court held that Line 36 could take into account post-petition medical expenses that had been incurred:

> Mrs. Moore also testified that the Debtors have incurred post-petition medical bills not covered by insurance or the basic health care allowance on the Form B22C. The total of the bills was not yet known but, as of the confirmation hearing, the amount was at least $6392. Health care expenses of this type are properly deducted at line 36 of the Form B22C.

In re Moore, 2012 Bankr. LEXIS 5112 at *18 (Bankr. November 1, 2012).

Line 37. Other Necessary Expenses: telecommunication services. *Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service — such as pagers, call waiting, caller id, special long distance, or internet service—to the extent necessary for your health and welfare or that of your dependents.* ***Do not include any amount previously deducted.***

Line 37 is for other necessary telecommunication services OTHER THAN basic home telephone and cellphone services. The cost of basic telephone service is included in the Internal Revenue Service standards for general living expenses. In re Meade, 420 B.R. 291, 303-4 (Bankr. W.D.Va. 2009)(Ch. 7 case); In re Minahan, 394 B.R. 116, 124 (Bankr. W.D.Va. 2008)(Ch. 13 case); In re Stimac, 366 B.R. 889, 891 n.1 (Bankr. E.D. Wis. 2007)("The Internal Revenue Manual supports the trustee's position that the local standard deduction includes basic telephone expenses. See I.R.M. §5.15.1.9").

Bundled services should be "unbundled" to the extent the monthly bill includes home telephone services. See, In re Cleaver, 426 B.R. 390, 396 (Bankr. D. N.M. 2010)("The Debtors list $189.00 as an expense for telecommunications services. Form 22C's instruction for line 37 states "Enter the total average monthly amount that you actually pay for telecommunication

services other than your basic home telephone and cell phone service - such as pagers, call waiting, caller id, special long distance, or internet service - to the extent necessary for your health and welfare or that of your dependents." Exhibit 2 is a copy of the Debtors' cable bill. It shows that they have "bundled" phone, internet and cable services. The figure on Form 22C is the total. The Court finds that it should deduct that part attributable to basic telephone service, in the amount of $36.75. Debtors should amend line 37 to be $152.00.").

Telecommunication services the debtor has had in the past are not automatically "necessary" for the health and welfare of the debtors or their dependents. See, In re Minahan, 394 B.R. 116, 124 (Bankr. W.D.Va. 2008)(cable and satellite expense were not necessary).

The burden of proof on the claimed deduction of any telecommunication services is on the debtor. If the debtor fails to produce records, the deduction may be disallowed. See, In re O'Connor, 2008 Bankr. LEXIS 3629 at *37-*38 (Bankr. D. Mont. Sept. 30, 2008)(rejecting claim that $200 a month was required for additional phone services because debtor was a union representative, where debtor produced no records); In re Plumb, 373 B.R. 429, 440 (Bankr. W.D.N.C. 2007).

Similarly, it will be the debtor's burden to demonstrate that premium cable channels, higher-end cell phone plans, and the like, are "necessary for your health and welfare or that of your dependents." See, In re Scurlock, 385 B.R. 814, 816-17 (Bankr. M.D.N.C. 2008); see also, In re Stimac, 366 B.R. 889, 892 (Bankr. E.D. Wis. 2007)(("The Internal Revenue Manual provides that these Other Necessary Expenses "must provide for the health and welfare of the [debtor] and/or his or her family or they must be for the production of income.""); In re Lara, 347 B.R. 198, 204 (Bankr. N.D. Tex. 2006).

Deductible telecommunication expenses are limited to dependents. Where that requirement is not met, the expense will not be allowed. See, In re Oltjen, 2007 Bankr. LEXIS 2761 at *6 (Bankr. W.D. Tex. Aug. 13, 2007)("Debtor listed no dependents on her schedules. Although she may consider her younger sister to be like a daughter, this does not allow Debtor to pay for her sister's cell phone expense."); In re Haley, 2006 Bankr. LEXIS 2857 at *12 (Bankr. D.N.H. Oct. 18, 2006).

Line 38. Total Expenses Allowed under IRS Standards. *Enter the total of Lines 24 through 37.*

Line 38 is for subtotaling the deductions on Lines 24 through 37.

Subpart B: Additional Living Expense Deductions
Note: Do not include any expenses that you have listed in Lines 24-37

Line 39. Health Insurance, Disability Insurance, and Health Savings Account Expenses. *List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents.*

a. Health Insurance $_____

b. Disability Insurance $_____

c. Health Savings Account $_____

Total and enter on Line 39 *$_____*

If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below:

$ _____

Line 39 is for (a) health insurance, (b) disability insurance, and (c) health savings account expenses. Where health insurance is paid for by the employer, and the debtor does not include that health insurance payment as income, the debtor may not deduct the health insurance payment as an expense. See, In re Pagan, 443 B.R. 1, 4 (Bankr. N.D.N.Y. 2010)("To accept the Debtor's analysis and allow the deduction of an employer's contribution to a health insurance premium without otherwise accounting for that employee benefit as income would, in this court's opinion, improperly allow debtors to significantly reduce their disposable income contrary to the intent of the statute.").

In most cases, there does not seem to be much question about the deductibility of health insurance: "There is no question about the health insurance expense and the amount claimed of $730.34 is allowable in full." In re Minahan, 394 B.R. 116, 124 (Bankr. W.D. Va. 2008).

The Saleen decision deals with a somewhat different problem, where the debtors were separating post-petition after changing their health insurance coverage – essentially, it is a decision based upon the requirement that the Means Test numbers stand unless there is a "virtually certain" change that will happen in the future:

Line 39.a: Health Insurance:

Line 39.a lists a $567.74 health insurance expense, which was Debtors' combined outlay ($219.27 for Mr. Saleen and $348.47 for Mrs. Walls) when they filed their

chapter 13 petition. Post-petition, Mr. Saleen cancelled his insurance when Mrs. Walls picked up insurance for the whole family through her new employer, with premiums of $142.24/month. The Trustee argues that Line 39.a should be adjusted to this amount.

Debtors have now separated. They argue that it is likely Mr. Saleen will have to resume his own insurance and therefore Line 39.a should be adjusted down only to $361.51, which is the $142.24 Mrs. Walls is currently paying plus the $219.27 Mr. Saleen was paying at filing and that Debtors argue he will likely need to resume paying.

By showing Mr. Saleen's health insurance cancellation and Mrs. Walls's reduced premium through her new employer, the Trustee has rebutted the presumption that Line 39.a accurately reflects Debtors' health insurance expense going forward. Mr. Saleen testified that he anticipates having to resume insuring himself and his children but did not say when. Mrs. Walls testified that she would definitely insure herself over the next 60 months, but did not know if she would continue to insure Mr. Saleen's children over that time. I believe this evidence is insufficient to show that it is virtually certain Mr. Saleen will resume paying his own health insurance. Further, there is no evidence as to the amount Mrs. Walls would pay to insure just herself, as opposed to the whole family. Finally, there was no evidence as to whether or not Debtors would soon divorce, in which case Mr. Saleen would be forced to obtain his own insurance. Therefore, I will adjust Line 39.a to $142.24, which amounts to a $425.50 reduction in expenses.

In re Saleen, 2011 Bankr. LEXIS 4847 at *6-*8 (Bankr. D. Or. December 2, 2011)

Line 40. Continued contributions to the care of household or family members. *Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. Do not include payments listed in Line 34.*

Line 40 permits the deduction of monies used for the care of elderly, chronically ill, or disabled household or family members who are unable to for the expense themselves. In interpreting the same deduction in the Chapter 7 context, the Hicks court defined the elements of the statutory ability to take the deduction as follows:

> "(1) the expenses must be a continuation of actual expenses paid by the debtor; and (2) the expenses must be reasonable and necessary for care and support of an elderly, chronically ill, or disabled: (a) household member who is unable to pay for such expenses; or (b) member of the debtor's immediate family (as defined by the statute) who is unable to pay for such expenses."

In re Hicks, 370 B.R. 919, 922-23 (Bankr. E.D. Mo. 2007); see also, In re Harris, 415 B.R. 756, 762 (Bankr. E.D. Cal. 2009)(Chapter 13 case following Hicks and holding: "The chapter 13 Debtors' contribution to the support of a family member may not be deducted from the Debtors' CMI on line 40 of the Means Test unless that person is both "elderly, chronically ill, or disabled" and "unable to pay for such expenses."); In re Litt, 2012 Bankr. LEXIS 621 at *11 - *12 (Bankr. N.D. Ohio February 6, 2012)(citing Hicks test in holding that the court did not have enough information to determine if the deduction for expenses of daughter was allowable because: "Debtors have not demonstrated that their daughter is disabled and is unable to pay for the expenses. Consequently, the court cannot say that the expenses are reasonable and necessary.").

Attempts to use Line 40 to deduct college expenses have not been successful. See, In re Harris, 415 B.R. 756 (Bankr. E.D. Cal. 2009)("student deduction" not allowed on Line 40);

Line 41. Protection against family violence. *Enter the total average reasonably necessary monthly expenses that you actually incur to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.*

There do not appear to be any published cases interpreting this deduction in the context of Chapter 13 cases at this time.

***NOTE: Lines 42, 43, and 44** have specific requirements that the debtor affirmatively prove their entitlement to the amounts listed as additional expenses. Lines 42 and 43 require the debtor to provide the case trustee with documentation.

Line 42. Home energy costs. *Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities that you actually expend for home energy costs.* ***You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.***

"Lines 42 and 44 invite debtors to claim additional home energy expenses beyond what the allowance for nonmortgage/nonrent expenses permits for utilities. . . ." In re Rejender, 2007 Bankr. LEXIS 2849 at *5 (Bankr. E.D. Cal. August 15, 2007). In interpreting another Code section, the Carlton court noted: "the amounts claimed at line 42 must be proven to be amounts actually expended in excess of the standard amounts included at line 25A." In re Carlton, 362 B.R. 402, 412 (Bankr. C.D. Ill. 2007).

The documentation requirement for additional deductions is something the courts appear to take very seriously. In a Chapter 7 case, In re King, the court stated:

> **2. Excess home energy costs**
>
> The Debtor claimed a deduction of $200 for excess home energy costs. The Debtor claimed a deduction of $440 under the IRS Local Standard for utilities, which includes gas, electricity, water, fuel, oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and telephone. The Debtor claimed expenditures of $510 on Schedule J for utilities. The Debtor did not provide any documentation demonstrating that the deduction for excess home energy costs is reasonable and necessary.
>
> Section 707(b)(2)(A)(ii)(V) provides:
>
> (ii)(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.
>
> 11 U.S.C. §707(b)(2)(A)(ii)(V) (emphasis added).
>
> The Debtor is not entitled to the deduction for excess home energy costs because she did not provide any documentation demonstrating that the deduction for excess home energy costs is reasonable and necessary.

In re King, 59 Collier Bankr. Cas. 2d (MB) 1547, 2008 Bankr. LEXIS 1494 at *11-*12 (Bankr. S.D. Tex. April 18, 2008).

Similarly, in a Chapter 13 case, the court in In re Simms, 2008 Bankr. LEXIS 224 at *52-*56 (Bankr. N.D.W.V. Jan. 23, 2008) stated that it would set a hearing to allow the debtor to

produce evidence of excess home energy costs, and that failure to produce such evidence could result in a higher Chapter 13 Plan payment. In a Chapter 7 case, where there was a lack of supporting evidence, a $450 deduction for energy costs in excess of IRS standards was reduced to $0. In re Folednauer, 403 B.R. 801, 803-804 (Bankr. D. Minn. 2009).

Line 43. Education expenses for dependent children under 18. *Enter the total average monthly expenses that you actually incur, not to exceed $147.92 per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age.* ***You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.***

Line 43 is for "educational expenses for dependent children under 18". Courts that look to the Internal Revenue Manual §5.15.1.10 at Page 3 have held that "educational expenses are deemed 'necessary' only if the education producing the expenses 'is required for a physically or mentally challenged child and no public education providing similar services is available,' or if it is 'for the taxpayer and … [is] required as [a] condition of employment.'" In re Saffrin, 380 B.R. 191, 193 (Bankr. N.D. Ill. 2007); see also, In re Cleaver, 426 B.R. 390, 396 (Bankr. D.N.M. 2010)(disallowing a deduction of $137.50 for choir for a child in public school); and see, Ransom v. FIA Card Services, N.A., ___ U.S. ___, 131 S.Ct. 716, 726, 178 L. Ed. 2d 603, 613 (2011)("Although the statute does not incorporate the IRS's guidelines, courts may consult this material in interpreting the National and Local Standards; after all, the IRS uses those tables for a similar purpose--to determine how much money a delinquent taxpayer can afford to pay the Government. The guidelines of course cannot control if they are at odds with the statutory language.").

Because the statute, and the language in the Line 43 instruction, limit this deduction to children under 18, deductions for college expenses have not been permitted on Line 43. See, In re Goins, 372 B.R. 824, 827 (Bankr. D.S.C. 2007)("In this case, the Debtors are above median income debtors and disposable income is determined under §1325(b)(3). Educational expenses for students over the age of eighteen (18) and college expenses generally are no longer within the scope of "reasonable and necessary" expenses contemplated by the Bankruptcy Code. Because Congress expressed that debtor's expenses may include those of children under the age of eighteen (18) to attend elementary or secondary school, expenditures for children over the age of eighteen (18) and those outside the elementary or secondary school context are excluded.").

Of course, regardless of the legal merits of the deduction, if there is a failure of proof, the deduction will be disallowed:

> Both §707(b)(2)(A)(ii)(IV) and §707(b)(2)(B)(ii) require the debtor to provide documentation of additional expenses for education or as special circumstances, and a detailed explanation that justify such expenses. Debtors provided no supporting documentation in support of the $95 for their nephew's school activities, failed to explain why such expenses are reasonable and necessary and not already accounted for in the National and Local Standards or Other Necessary Expenses, and therefore failed their burden under the plain language of both subsections §707(b)(2)(A)(ii)(IV) and §707(b)(2)(B). Debtors failed their burden under §1325(b)(1)(B) to provide that all their disposable income will be applied to make plan payments and confirmation must be denied because of the $95 education expense on Line 43.

In re O'Connor, 2008 Bankr. LEXIS 3629 at *39 (Bankr. D. Mont. Sept. 30, 2008).

The debtor must also show that the expense is necessary and not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses. A failure to put forth arguments or evidence on this issue led to a disallowance of the deduction, even though a $55 a week tutoring expense for a daughter in public school was testified to by the debtor. See, In re Paliev, 2012 Bankr. LEXIS 3801 at *28 - *30 (Bankr. E.D. Va. August 17, 2012).

Counsel should think about what makes up the claimed Line 43 deduction, and be sure that those expenses are also included on Schedule J, or the absence of such expenses may be considered by the court:

> Because Debtors' current monthly income exceeds the applicable median family income in Ohio for Debtors' household size of five, they completed parts IV and V of Form B22C in order to calculate their disposable income. In doing so, they deducted, among other things, the following expenses. On line 26, they deducted as an adjustment to the Local Standards for housing and utilities a monthly payment of $32.00. [Id. at 10/15]. Debtors both testified that this represents the cost of gas for cutting grass and for snow removal on their two and a half acre homestead property. They deducted on line 43 a monthly payment in the amount of $443.76 for education expenses for dependent children. [Id. at 12/15]. However, their second amended Schedule J shows only $230.00 in monthly expenses that are arguably education expenses.
>
> * * * * * * * *

> With respect to the $443.76 education expense deduction on line 43 of the means test, the Trustee argues that the deduction is overstated by $213.76. The court agrees. As stated above, Debtors' amended Schedule J reports only $230.00 for monthly expenses that are even arguably education expenses. A deduction on the means test for education expenses are limited to those actually incurred. 11 U.S.C. §707(b)(2)(A)(ii)(IV). Therefore, Debtors' line 43 deduction is limited to $230.00.

In re Grabarczyk, 2012 Bankr. LEXIS 5226 at *3 - *4 & *9 (Bankr. N.D. Ohio November 6, 2012).

Line 44. Additional food and clothing expense. *Enter the total average monthly amount by which your food and clothing expenses exceed the combined allowances for food and clothing (apparel and services) in the IRS National Standards, not to exceed 5% of those combined allowances. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)* ***You must demonstrate that the additional amount claimed is reasonable and necessary.***

Line 44 allows a limited additional deduction for food and clothing expenses, but only if the additional amount is shown to be reasonable and necessary. If the deduction is challenged, the debtor(s) will need to produce evidence, or the deduction will be disallowed:

> 11 U.S.C. §707(b)(2)(A)(ii)(I) also provides: "In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service." Debtors did not prove that the $42.00 listed on line 44 was reasonable and necessary. The Debtors should amend line 44 to be zero.

In re Cleaver, 426 B.R. 390, 397 (Bankr. D.N.M. 2010); see also, In re Steele, 2010 Bankr. LEXIS 4117 at *7-*8 (Bankr. D. Wyo. Nov. 18, 2010)(“"If it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standard issued by the Internal Revenue Service." The Court's review of the record shows that the Debtors did not testify or provide evidence in support of the additional food and clothing expenses. Therefore, the expense is denied.”).

Where the debtors' evidence was testimony was that they have three growing children, but offered no other evidence justifying an additional expense deduction over and above the Internal Revenue Standards for a family of five, the deduction was denied. See, In re Grabarczyk, 2012 Bankr. LEXIS 5226 at *9 - * 10 (Bankr. N.D. Ohio November 6, 2012).

If there is evidence of higher food and clothing expenses, the debtor(s) must demonstrate that these higher expenses are both "reasonable and necessary" – and the 5% limit is, in fact, a limit on this deduction:

> The Debtors also claim to spend an average per month of $1,816.02 for food and clothing for their household of four members. The IRS Standard applicable to them at the time of filing provided $868 for food and $302 for apparel and services, a combined total of $1,170 monthly. Their financial records indicate that they dine out quite frequently in restaurants at various price levels. Of course they both work away from Big Stone Gap, the community in which they live, although Mrs. Minahan doesn't work very far from there, and therefore some greater level of dining in restaurants is to be expected. Nevertheless, the Court finds that the Debtors' evidence, even if their figures are accepted, falls far short of establishing that expenditures for food and apparel exceeding the applicable IRS Standards are "necessary" for their health and welfare and that of their dependents. The fact that the Debtors may spend at the level they claim, although the Court doesn't find that the evidence establishes even that, doesn't mean that spending at such level is in any reasonable sense "necessary." Furthermore, even if the Court were inclined to allow an additional deduction for food and clothing, the maximum additional amount that could be awarded in any circumstances, as is pointed out in footnote # 31, *infra*, would be limited to 5% of the IRS Standards, which would mean a maximum of $58.50 per month.

In re Minahan, 394 B.R. 116, 125 (Bankr. W.D. Va. 2008).

Line 45. Charitable contributions. *Enter the amount reasonably necessary for you to expend each month on charitable contributions in the form of cash or financial instruments to a charitable organization as defined in 26 U.S.C. §170(c)(1)-(2). Do not include any amount in excess of 15% of your gross monthly income.*

Line 45 is for charitable contributions. There was an early "glitch" in the Means Test that made the deduction of charitable contributions questionable. See e.g., In re Meyer, 355 B.R. 837 (Bankr. D.N.M. 2006); In re Diagostino, 347 B.R. 116 (Bankr. N.D.N.Y. 2006). This oversight was quickly remedied by Congress though a minor amendment that became effective

on December 20, 2006. See, In re Kolb, 366 B.R. 802, 811 n.13 (Bankr. S.D. Ohio 2007); In re Sorrell, 359 B.R. 167, 178 (Bankr. S.D. Ohio 2007).

If your debtors assert that they make substantial charitable contributions, you may want to look at their tax returns to see if they claimed a deduction for the amount they are telling you that they donate to charity. Most churches will provide a list of donations from the debtor claiming a charitable giving donation – the Chapter 13 Trustee may request that kind of documentation.

The burden is on the debtor to provide evidence regarding charitable contributions.

> Mr. Burks testified at the hearing; his testimony and the stipulations provide scant evidence of actual charitable contributions made prior to the bankruptcy filing that approximate the $433 amount now claimed. A "checklist" for a tax return that is not corroborated with receipts or copies of checks does not constitute credible proof of charitable contributions. No attempt was made to identify in-kind contributions. Mr. Burks' job obviously does not require that he contribute a tithe as a condition of employment. The Debtors' need or desire to make a $433 a month charitable contribution appears to have arisen post-petition. In short, the evidence does not allow the Court to conclude that the charitable contributions claimed here either promote the health and welfare of the Burks in any tangible way, or otherwise help in the production of income. The Debtors' charitable contributions cannot be included on the expense side of the means test. See id. It is undisputed that removing the Burks' charitable contribution from the means test calculation under subsection (b)(2) raises the presumption of abuse. The Debtors did not attempt to establish any special circumstances to rebut the presumption. See §707(b)(2)(B).

In re Burks, 61 Collier Bankr. Cas. 2d (MB) 349, 2009 Bankr. LEXIS 26 at *15-*16 (Bankr. N.D. Tex. Jan. 13, 2009)(Chapter 7 case).

One approach that has been used is to look at the charitable contributions made within the six months prior to filing:

> **Charitable contributions**
>
> Debtors claim a deduction for charitable contributions in the amount of $100.00 per month on Form 22C, Line 45. The Debtors presented evidence of their contribution to St. Patrick's Catholic Church for a total amount of $350.00 for the period of January 1, 2010 through June 30, 3010. Mrs. Steele also testified

> that the children give cash in the amount of $5.00 to $10.00, when they attend church. The testimony regarding attendance did not support the goal that the Debtors attend weekly, and thereby, the children contributed cash every week. The Debtors' exhibit indicated that they attended 12 times during the six-month period. Mrs. Steele also testified that the family had not attended every week. The amount of cash contribution was speculative and undetermined. The evidence shows Debtors actually contributed an average of $58.33 per month for the first six months of 2010. Therefore, the Debtors are allowed $58.00 a month for charitable contributions based on the testimony and evidence presented.

In re Steele, 2010 Bankr. LEXIS 4117 at *8-*9 (Bankr. D. Wyo. Nov. 18, 2010).

The limitation on a debtor deducting "up to 15% of gross income" depends, in part, on the definition of "gross income" for charitable deduction purposes. In one case, the court held that gross annual income did NOT include social security, because of the exclusion of social security from income in Section 101(10A). See, Wadsworth v. Word of Life Christian Center (In re McGough), 456 B.R. 682 (Bankr. D. Colo. 2011), *aff'd*, 467 B.R. 220 (10th Cir. BAP 2012)(a fraudulent transfer case in Chapter 7). The 15% issue also arose in Wolkowitz v. Breath of Life Seventh Day Adventist Church (In re Lewis), 401 B.R. 431 (Bankr. C.D. Cal. 2009)(a fraudulent transfer case in Chapter 7). The Lewis court held that gross annual income should not be defined by subtracting any costs or expenses (following business income cases like In re Wiegand, 386 B.R. 238, 242 (B.A.P. 9th Cir. 2008)).

Charitable contributions have to fit within §1325(b)(2)'s exceptions to "disposable income" – they must meet the definition of "charitable contribution" under section 548(d)(3), and be to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)). See, In re Seafort, 669 F.3d 662, 665 n.3 (6th Cir. 2012). In addition, not all payments to a charitable organization are deductible - for example, it has been held that parochial school tuition is not deductible as a charitable contribution. See, In re Meyer, 467 B.R. 451 (Bankr. E.D. Wis. 2012)(Chapter 7 case).

An additional question arises where the debtor has "loaded up" on charitable contributions prior to filing. One court has held that if the amount is less than the cap of 15%, the deduction should not be questioned. In re Gamble, Bankr. L. Rep. (CCH) P82,021, 2011 Bankr. LEXIS 2757 (Bankr. M.D.N.C. June 15, 2011). Other courts have been more skeptical of debtors who find increased religious fervor on the courthouse steps. See, In re Burks, 61 Collier Bankr. Cas. 2d (MB) 349, 2009 Bankr. LEXIS 26 at *16 (Bankr. N.D. Tex. Jan. 13, 2009)("The Debtors' need or desire to make a $433 a month charitable contribution appears to have arisen post-petition.").

Line 46. Total Additional Expense Deductions under §707(b). *Enter the total of Lines 39 through 45.*

This is a "totaling" line for Lines 39 though 45.

Subpart C: Deductions for Debt Payment

Line 47. Future payments on secured claims. *For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly Payments on Line 47.*

Name of Creditor	*Property Securing the Debt*	*Average Monthly Payment*	*Does payment include taxes or insurance?*
a.		*$_____*	*yes … no*
b.		*$_____*	*yes … no*
c.		*$_____*	*yes … no*
		Total: Add Lines a, b, and c	*$_____*

Line 47 should be the amount of the secured claim that becomes contractually due during the 60 month commitment period. So, it is either the monthly payment (for loans that continue longer than the 60 month Plan period, like a mortgage) or the amount that is due during the 60 month period divided by 60. So, if one $300 car payment remains due at the time of filing, the "average monthly payment" is closer to $5, rather than $300.

In a Chapter 7 case involving a deduction for future payments, the district court held that future payments for secured debts may only be deducted for debts that are secured by an interest in property owned by the debtor. See, Sturm v. United States Trustee, 455 B.R. 130, 137 (N.D. Ohio 2012)("Future payments for secured debt may only be deducted "[f]or each of your debts that is secured by an interest in property that *you own*" (Form B22A at line 42; Form B22C at line 47)")(emphasis in original).

Unlike Chapter 7 cases, where this deduction is based on a "snap shot", the Chapter 13 Means Test is forward looking. There is no deduction for loans secured by property that is being surrendered, or liens that are being avoided. See, In re Darrohn, 615 F.3d 470 (6th Cir. 2010); In re Turner, 574 F.3d 349, 356 (7th Cir. 2009) (reaching similar result prior to Lanning).

Accordingly, where an ATV is being surrendered, there is no deduction for that payment. In re Quigley, 673 F.3d 269 (4th Cir. 2012). And, where a lawn tractor is being surrendered, the debt secured by that lawn tractor may not be deducted on Line 47. In re Grabarczyk, 2012 Bankr. LEXIS 1435 at *12 (Bankr. N.D. Ohio March 15, 2012).

Similarly, where a wholly unsecured junior mortgage is being stripped, there is no deduction on Line 47 for that payment. Thissen v. Johnson, 406 B.R. 888, 893-894 (E.D. Cal. 2009); In re Smith, 438 B.R. 69 (Bankr. M.D. Pa. 2010); In re Sanchez, 2010 Bankr. LEXIS 1784 (Bankr. D. Colo. May 26, 2010).

There is also a question whether non-contractual debts – such as federal tax liens or judgment liens – can be deducted on Line 47 because there is no "amount contractually due" during the life of the Chapter 13 Plan. Specifically, the instruction for Line 47 states: "The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the bankruptcy case, divided by 60." For non-contractual debts, that amount – arguably – is zero. See generally, In re Boyd, 414 B.R. 223 (Bankr. N.D. Ohio 2009)(a pre-Lanning "mechanical approach" case); In re Kucera, 2009 Bankr. LEXIS 659 at *12 (Bankr.)("The expense deduction under §707(b)(2)(A)(iii)(I), however, is not for all amounts that a debtor is required to pay under the contract. Rather, the deduction is limited to those amounts that are "scheduled as contractually due to secured creditors. Section 707(b)(2)(A)(iii)(I), therefore, differentiates between voluntary secured debts, such as mortgage and security agreements, and involuntary secured debts, such as judgment liens and statutory liens. Under the statute, voluntary liens can be deducted but involuntary liens cannot.")(footnotes omitted).

If a secured debt deduction has already been taken on the Means Test, the debtor cannot take the same deduction again on Line 47. Thus, where the debtor had listed as income only the rent received, less the amount of the mortgage payment on Line 4 of Form 22C, the debtor could not "double count" and deduct the mortgage expense on the rental property again on Line 47. See, In re Grabarczyk, 2012 Bankr. LEXIS 1435 at *12-*13 (Bankr. N.D. Ohio March 15, 2012). Similarly, where a "cure" amount is listed as a deduction on Line 48, a monthly mortgage amount inflated to cure the arrearage cannot be taken on Line 47. See, In re Cleaver, 426 B.R. 390, 397 (Bankr. D.N.M. 2010)("Form 22C also allows a deduction for curing arrears on a primary residence by including, on line 48, 1/60th of the cure amount. Debtors listed Saxon

Mortgage on line 48 with a $70.54 cure amount. It should be obvious that Debtors cannot claim a monthly payment of $1,328.06, a figure that would cure the mortgage arrearages quickly, and claim a cure amount on line 48 for the same arrearage. And, because line 48 specifies how a mortgage arrearage is cured, the cure amount cannot be factored into line 47. Therefore, Debtors should amend line 47 to reflect the actual payment of $775.00.")(footnote omitted).

While there is no obvious place on the Form 22C to deduct property taxes and homeowner's insurance in situations where those obligations are not part of the mortgage payment, at least one court has held that Line 47 is the place to take the deduction:

> While I fully acknowledge that the solution is by no means clear or plain, I believe that a payment requirement in a mortgage that inures to the financial benefit of the lender is a payment "to" that lender, as that term is used in 11 U.S.C. §707(b)(2)(A)(iii). If the payment is not made, the mortgage undoubtedly allows the lender to make the payment to protect its security and add it to the debt. This would then convert the obligation into a payment "to" the secured creditor. The existence of an escrow is immaterial since payments are only funneled through the escrow account and are not actually a payment to or for the benefit of the creditor until they ultimately reach the insurance provider or the taxing authority. The debt is not reduced by the maintenance of an escrow account; it is only a protective device to keep the debt from increasing if the debtor does not pay the obligations directly. Such payments are required by the contract that creates the security interest, so they can be included in required payments on Line 47.

See, In re Bermann, 399 B.R. 213, 218 (Bankr. E.D. Wis. 2009).

Where a debt secured by the debtor's residence or vehicle is greater than the applicable IRS standard deduction, the argument has been made that the IRS deduction should be ceiling, and amounts in excess of that ceiling should not be deducted on Line 47. Those arguments have been rejected. See, In re McHenry, 2011 Bankr. LEXIS 3864 (Bankr. D. Mont. September 30, 2011).

The deduction of secured debts on Line 47 raises the question of what courts should do about deductions that are for unnecessary or luxury items that the debtor wishes to retain and pay, using monies that would otherwise go to unsecured creditors. Cases involving objections to confirmation based upon a debtor having "too much house" – a house that was not reasonably necessary for the support of the debtor or the debtor's dependants, were fairly common prior to the enactment of the BAPCPA. While the issue is sometimes raised, the allowance of secured

debt deductions – without a specific requirement that the debt be secured by something that was a necessity – has appeared to put a damper on those cases.

However, there are still a number of decisions being written that refuse to allow a debtor to retain (and deduct as an expense) a motor home, motorcycle or a boat, in addition to each debtor deducting the expense of the cost of a motor vehicle. See, In re Jacoby, 2011 Bankr. LEXIS 2714 (Bankr. N.D. Iowa July 21, 2011)(bankruptcy court refused to confirm a plan proposed by above-median-income Chapter 13 debtors which allowed the debtors to keep a pickup truck, a car, and a motorcycle. The plan could not be confirmed under 11 U.S.C.S. §1325(b)(1) because it diverted payments of $5,926 from unsecured creditors if the debtors kept the motorcycle.); In re Hicks, 2011 Bankr. LEXIS 2314, 2011 WL 2414419 at *3 (Bankr. N.D. Ala. June 15, 2011)(loan payment secured by motorcycle not reasonably necessary in addition to debtor's other car); In re Warren, 2010 Bankr. LEXIS 4644, 2010 WL 5174470, at *6 (Bankr. D. Idaho 2010)(questioning whether debtors were engaged in "meaningful belt-tightening" where they proposed to make payments on two vehicles and two motorcycles); In re McDonald, 437 B.R. 278 (Bankr. S.D. Ohio 2010)(confirmation was denied where debtors proposed to retain their two cars and a motorcycle); In re Allawas, 2008 Bankr. LEXIS 588 (Bankr. D.S.C. Mar. 3, 2008)(loan payment secured by motorcycle not reasonably necessary in addition to debtor's other car).

There are also decisions that hold that secured debts are deductible, without consideration as to whether the debt and/or the property is either reasonable or necessary. See, In re Welsh, 440 B.R. 836, 847-848 (Bankr. D. Mont. 2010), *aff'd*, In re Welsh, 465 B.R. 843 (9th Cir. BAP 2012)(bankruptcy court's confirmation of a Chapter 13 plan that proposed to pay only 8.5% to unsecured creditors - in part because of the expense of paying six secured vehicle loans on the "Airstream, two ATVs and three automobiles" was affirmed.) The bankruptcy court in Welsh stated: "This Court has adopted the analysis from In re Austin, 372 B.R. 668, 680-83 (Bankr. D. Vt. 2007), that where a debtor is current on a secured obligation that is provided for in Form 22C, the Court refrains from determining whether the expense is reasonable." Welsh, 440 B.R. at 848; see also, In re McSparran, 410 B.R. 664, 671 (Bankr. D. Mont. 2009)(Kirscher, J. – the same bankruptcy judge as in Welsh).

Line 48. Other payments on secured claims. *If any of debts listed in Line 47 are secured by your primary residence, a motor vehicle, or other property necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "cure amount") that you must pay the creditor in addition to the payments listed in Line 47, in order to maintain possession of the property. The cure amount would include any sums in default that must be paid in order to avoid repossession or foreclosure. List and total any*

such amounts in the following chart. If necessary, list additional entries on a separate page.

Name of Creditor	*Property Securing the Debt*	*1/60th of the Cure Amount*
a.		*$*_____
b.		*$* _____
c.		*$* _____
		*Total: Add Lines a, b, and c $*_____

Line 48 is for arrearages. Again, be sure to divide by 60. In Chapter 13, arrearages are not deductable on loans secured by property that is being surrendered, or the lien with the arrearages is being avoided. In re Darrohn, 615 F.3d 470 (6th Cir. 2010).

There are a couple of restrictions in Line 48 that are sometimes overlooked. One is that the secured property must be "property necessary for your support". This would weigh against a cure deduction applying to property that was being surrendered, and would also present a problem for debtors seeking to cure delinquencies on motor homes, boats, motorcycles, etc.

A second restriction flows from the requirement that the cure payment must be "in addition to the payments listed on Line 47". If a secured claim – like a federal tax lien – is not "contractually due", courts have held that the "cure" cannot be listed on Line 47. See generally, In re Boyd, 414 B.R. 223 (Bankr. N.D. Ohio 2009)(a pre-Lanning "mechanical approach" case). The question in Boyd was: To what extent would a deduction be allowed on a debt secured by a federal tax lien on Line 48? The court stated: "Under a plain reading of the statute, "scheduled as contractually due" means that the claim must be based on a contract." Boyd, 414 B.R. at 228. Thus, the Boyd court held: "The IRS claim listed on Form 22C is secured by a tax lien that is not based on a contractual obligation. Thus, the IRS claim is a nonconsensual secured claim, and the debtor may not claim any portion of this debt as an amount "scheduled as contractually due" on Line 47 of Form 22C. See In re Kucera, No. 08-17304, 2009 Bankr. LEXIS 659, 2009 WL 691000, at *4 (Bankr. D. Mass. March 12, 2009)(finding that "voluntary liens can be deducted but involuntary liens cannot"); see generally United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)(noting the difference between consensual and nonconsensual secured claims in the context of interpreting 11 U.S.C. §506(b), and characterizing a tax lien as a nonconsensual claim)." Boyd, at 228-229.

Because "cure" of a secured creditor's arrearage claim is made by way of Chapter 13 Plan payments made by the trustee, a deduction for an arrearage cure will have to be "added back" in determining the debtor's minimum monthly payment. See, In re Grandizio, 2010

Bankr. LEXIS 2130 at *10-*11 (Bankr. E.D. Va. June 28, 2010)(in discussing the amount deducted for "cure" on Line 48 – "what the projected disposable income test fixes is not the minimum plan payment, but rather the minimum amount that must be applied to the payment of unsecured claims. Desgrosseilliers, 2008 Bankr. LEXIS 2017 [at *11-*12], 2008 WL 2725808 at *3. Thus, in order to satisfy the test, the payment into the plan must be sufficient, after deduction of the trustee's commission (which is already accounted for in the means test computation), to pay at least $401 per month to the unsecured creditors. Since the present plan does not do so, the trustee's objection will be sustained.").

Line 49. Payments on prepetition priority claims. *Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. Do not include current obligations, such as those set out in Line 33.*

This line is where Chapter 13 debtors list the amount (divided by 60) needed to pay priority claims. Do not include non-priority claims (like student loans) on this line.

Note that Line 59 is the amount that must be paid to unsecured creditors - it is NOT the minimum Chapter 13 Plan payment. Accordingly, the deduction for priority claims on Line 49 must be added to Line 59 to calculate the proper minimum Chapter 13 Plan payment under the Means Test. See, In re Grabarczyk, 2012 Bankr. LEXIS 5226 (Bankr. N.D. Ohio November 6, 2012)("Grabarczyk II")("In addition, Debtors deduct $250.00 on line 49 of amended Form B22C for payments on prepetition priority claims. As this court previously determined in this case, the amount of Debtors' deduction on line 49 must be added to their projected disposable income to determine their Chapter 13 plan payment obligation"); In re Grabarczyk, 2012 Bankr. LEXIS 1435 at *14-*23 (Bankr. N.D. Ohio March 15, 2012)("Grabarczyk I")("In this case, Debtors deducted from CMI on Form B22C their monthly payment on prepetition priority claims in the amount of $314.31 and projected average monthly Chapter 13 administrative expenses in the amount of $20.70. Since projected disposable income may not be used to pay these expenses, they must add these amounts to their projected disposable income in determining their Chapter 13 plan payment."); In re Renteria, 420 B.R. 526, 530 (S.D. Cal. 2009)("the Court finds that the plain language of 11 U.S.C. §1325(b), when viewed in context, demonstrates that the term "unsecured creditors" under Section 1325(b)(1)(B) means only general (non-priority) unsecured creditors and does not, as Debtors argue, include priority unsecured creditors such as the tax claimants in this case."); In re Johnson, 408 B.R. 811, 816 (Bankr. W.D. Mo. 2009)(concluding that "[t]he plain language of the statute, considered in context, has only one permissible interpretation-the term 'unsecured creditors' refers to only non-priority unsecured creditors"); In re Williams, 394 B.R. 550, 564 (Bankr. D. Colo. 2008)("This Court agrees that the only sensible interpretation is one which allows the subtraction of priority claims for all debtors, "once, no

more, no less.""); In re Echeman, 378 B.R. 177, 181 (Bankr. S.D. Ohio 2007)("Even if this textual analysis did not so clearly yield such a logical result, the alternative view that both priority and nonpriority unsecured creditors are "unsecured creditors" who must be paid projected disposable income obtains an absurd result. Based on the statutory scheme, if a debtor is allowed to deduct priority unsecured claims before reaching the calculation of disposable income and then pay priority unsecured claims out of projected disposable income under §1325(b)(1)(B), the debtor would in effect be allowed to "double-count" or deduct the same priority claims twice before paying nonpriority unsecured creditors."); In re Puetz, 370 B.R. 386, 391 (Bankr. D. Kan. 2007)("Under Debtors' argument, debtors would deduct priority expenses twice. First, a debtor would allot a portion of his budget to pay prepetition priority claims as §707(b)(2)(A) expenses. If later the debtor includes prepetition priority claimants with unsecured creditors under §1325(b)(1)(B), prepetition priority claimants receive two allotments for payment within the debtor's budget, which is the double-counting described in Wilbur. This is an illogical result."); In re Wilbur, 344 B.R. 650, 654 & 655 (Bankr. D. Utah 2006)(observing that "the deductions allowed under Form B22C track the considerations that a debtor had to make pre-BAPCPA before paying non-priority unsecured creditors", therefore "[t]heir Form B22C requires them to return at least $19,854 to "unsecured creditors." As the Court interprets this term to exclude payments to priority unsecured creditors, they do not satisfy the requirements of §1325(b)(1)(B).)

Like other sections of the Means Test, most courts do not permit "double counting" on Line 49. As the court stated in In re Moore, 446 B.R. 458, 464 (Bankr. D. Colo. 2011):

> Fourth, and most significantly, the Debtor's B22C (Exhibit C) includes a $2,385.00 deduction for special circumstances on line 57. The continuation page breaks down the deduction as follows: $2,300.00 for post-petition tax liability, and $85.00 for professional licensing and professional associations. As to the $2,300.00 for tax liability, the Court finds that no special circumstance deduction is appropriate. The Debtor's pre-petition tax liability is sufficiently provided for on line 49, as the amount included, $165.39, when multiplied over the length of the plan, covers the additional taxes owed as a result of the $50,000.00 student loan payment. The Debtor's post-petition, ongoing tax liability is sufficiently provided for on line 30. Between line 49 and line 30, the Form B22C fully accounts for any liability the Debtor may have to the IRS or the Colorado Department of Revenue over the life of her plan. To include an additional deduction double-counts the amount listed on line 30. In effect, the Debtor is asking this Court to allow a $4,569.00 monthly expense for tax withholding, which number is wholly unjustified by the Debtor's income or financial circumstances.

Similarly, in Law, the debtor sought to "double dip" by claiming both the tax claim (on Line 47) and the garnishment for the tax claim (as a court ordered payment on Line 33). The court rejected the attempt to take two deductions for the same obligation:

> The Court finds the debt in question cannot be deducted as an allowable expense on Line 33 of Form 22C. First and foremost, a wage levy is not a court ordered payment, which fact Debtor readily admits. Second, the debt in question, which the parties agree is a priority claim that must be paid during this Chapter 13 case, has already been allowed on Line 49, where debtors are allowed to claim an expense for payments that must be made on priority claims. Third, to the extent the Court were to consider treating the IRS tax levy as it would a court ordered payment for debts such as child or spousal support, Line 33 specifically instructs debtors not to enter amounts that are dealt with as priority debts on Line 49. The whole point of this instruction is to make it clear that debtors cannot "double dip" on their expenses by including the same debt twice--once on Line 33 and again on Line 49. The purpose of completing Form 22C is to determine how much remains for payment to unsecured creditors after a debtor pays all expenses that the Code requires or permits be paid--including priority tax claims. Finally, to the extent the Court were to treat this levy similar to how it treats a future payment on a secured debt, as Debtor urges, the Court notes that secured debt is dealt with on Line 47 by taking the amount of the debt, and dividing that amount by 60 months to determine the monthly expense that a debtor can claim--which is precisely how the priority debt in this case is handled on Line 49.

In re Law, 2008 Bankr. LEXIS 1198 at *45-*46 (Bankr. D. Kan. April 24, 2008) (footnotes omitted)

Line 50. Chapter 13 administrative expenses. *Multiply the amount in Line a by the amount in Line b, and enter the resulting administrative expense.*

*a. Projected average monthly chapter 13 plan payment. $*_____

b. Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) *x*_____

c. Average monthly administrative expense of chapter 13 case

Total: Multiply Lines a and b

Line 50 is a deduction for the Chapter 13 Trustee's fees. But, this deduction is really a "zero sum" game for courts that hold that Line 59 is the amount that must be paid to general unsecured creditors – whatever is deducted has to be added back to calculate the Chapter 13 Plan payment. Because of the fact that this expense has to be paid from the payments made in the Chapter 13 Plan, and because the strong majority of cases hold that the Line 59 total is the minimum amount that must be paid to general unsecured creditors to meet the requirements of §1325(b)(1)(B), this deduction has no net effect on the debtor's payments. If the debtor makes an error on this deduction – it does not matter, because whatever the amount is that is listed on Line 50, it has to be added back to the number on Line 59 to calculate the Chapter 13 Plan payment. On the other hand, if the deduction is left off the Means Test – it does not hurt the debtor because the amount added back to calculate the Chapter 13 Plan payment will be zero. See, In re Grabarczyk, 2012 Bankr. LEXIS 1435 at *14-*23 (Bankr. N.D. Ohio March 15, 2012)("In this case, Debtors deducted from CMI on Form B22C their monthly payment on prepetition priority claims in the amount of $314.31 and projected average monthly Chapter 13 administrative expenses in the amount of $20.70. Since projected disposable income may not be used to pay these expenses, they must add these amounts to their projected disposable income in determining their Chapter 13 plan payment."); In re Amato, 366 B.R. 348 (Bankr. D.N.J. 2007)("This Court is persuaded . . . that claims for . . . trustee commissions do not fall within the class of "unsecured creditors" found in 11 U.S.C. §1325(b), as amended by BAPCPA."); In re McDonald, 361 B.R. 527, 531 (Bankr. D. Mont. 2007)("As Form B22C deducts the trustee's expense in line 50, Debtor would be double-counting the deduction if he again deducted it from the projected disposable income").

For courts that treat the accuracy of the number deducted on this line as important, the distinction between the statutory Chapter 13 maximum trustee percentage, and the actual percentage, comes into play:

> Lines 50a-50c of Form 22C contain their own calculation of chapter 13 administrative expenses for purposes of determining monthly disposable income under §1325(b)(2). The percentage used on line 50 is statutorily mandated by §707(b)(2)(A)(III). Section 707(b)(2)(A)(III) provides that, for debtors eligible for chapter 13, monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to 10% of the projected plan payments, as determined under schedules issued by the Executive Office for the United States Trustees ("EO"). Line 50b of Form 22C states that the correct percentage for a district can be obtained from a listed Department of Justice website or the clerk's office. Currently, the listed percentage for Colorado is only 6.5%. According to the Trustee, the percentage

> on the schedules issued by the EO is based on historical data for each chapter 13 trustee's office. As a result, that percentage may change periodically.

In re Sharp, 2009 Bankr. LEXIS 3330 at *4-*5 (Bankr. D. Colo. Feb. 2, 2009); see also, In re Minahan, 394 B.R. 116, 132 (Bankr. W.D. Va. 2008)(explicitly tying the incorrect percentage to the monthly payment, meaning unsecured creditors would receive the amount on Line 59, minus the trustee's administrative percentage, which would come out of the debtors' monthly payment); In re Lane, 394 B.R. 248, 252 (Bankr. D. Mass. 2008)(similar to Minahan); In re Paliev, 2012 Bankr. LEXIS 3801 at *28 (Bankr. E.D. Va. August 17, 2012)(increase of $9 on Line 50 decreased "bottom line" by $9); In re O'Connor, 2008 Bankr. LEXIS 3629 at *40-*41 (Bankr. D. Mont. Sept. 30, 2008).

In jurisdictions where the deduction on Line 50 acts to change the minimum Chapter 13 payment, rather than being an "addback" as described in Grabarcyzk, the correct amount of the monthly Chapter 13 Plan payment is also important. If the amount of the monthly payment is changed – for example, through a proposed Amended Plan - the original number used on Line 50 may not be correct. Although the Form 22C provides a mathematical way to apply the deduction, under the statute, there is also a question as to whether, for example, the monthly payment is calculated at $1,500, and then the $150 is deducted, resulting in a $1,350 payment? Or whether the actual payment of $1,350 would be used – but that would result in a monthly payment of $1,350, with another 10% deducted from that amount, resulting in a monthly payment of $1,215? Or is there some number to be used somewhere in the middle?

Some attorneys have argued that attorney fees should be added to Line 50. This would be contrary to the Advisory Committee Notes:

> "The Chapter 13 form does not provide a deduction from disposable income for the Chapter 13 debtor's anticipated attorney fees. There is no specific statutory allowance for such a deduction, and none appears necessary. Section 1325(b)(1)(B) requires that disposable income contributed to a Chapter 13 plan be used to pay "unsecured creditors." A debtor's attorney who has not taken a security interest in the debtor's property is an unsecured creditor who may be paid from disposable income.

See also, In re Puetz, 370 B.R. 386, 391 (Bankr. D. Kan. 2007); In re Netting, 2008 Bankr. LEXIS 1771 (Bankr. E.D. Wis. May 30, 2008); cf., In re Smith, 2012 Bankr. LEXIS 5773 (Bankr. S.D. Ill. August 9, 2011)(rejecting putting attorney fees on Line 50, but not caring what method was used to pay them, provided there was no double counting). But see, 6 Collier on Bankruptcy ¶ 707.04[3][c], 707-39 (16th ed.)("Collier's reads the provision to include attorney's fees and to require the debtor's attorney to "construct a hypothetical chapter 13 plan and

determine the projected administrative expenses, but limited to ten percent." In re Smith, 2012 Bankr. LEXIS 5773 at *10 (Bankr. S.D. Ill. August 9, 2011)).

Line 51. Total Deductions for Debt Payment. *Enter the total of Lines 47 through 50.*

Subpart D: Total Deductions from Income

Line 52. Total of all deductions from income. *Enter the total of Lines 38, 46, and 51.*

Line 53. Total current monthly income. *Enter the amount from Line 20.*

Line 54. Support income. *Enter the monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child.*

Debtors often attempt to make all of the monies received for a child 'disappear' using this section. In many cases, these attempts are resisted by Chapter 13 trustees for a number of reasons.

First, the Means Test method of increasing allowed expenses based upon household size is intended to account for the cost of children. Single parents or married couples who are entitled to receive child support – but don't – have to raise children based on the budget imposed by the B22C Means Test. Similarly, children living with both parents, where no external sources of child support exist, get just the extra expense allowances associated with their applicable household size. Why should debtors who have children receiving child support be entitled to both the household size deductions *and* the deduction of all child support on Line 54?

One way to deal with this issue is to allow debtors to take either the child support, or the household size allowance, but not both.

An even more difficult issue arises where debtors claim: 1) the extra expense allowances for the child(ren) receiving child support as household members; 2) make all of the child support that is received 'disappear' on Line 54; and, 3) claim additional child-related expenses. Why should the child support disappear on Line 54 when a debtor is taking additional child-related deuctions like: Line 34 (physically or mentally challenged child); Line 35 (child care); Line 36 (health care, to the extent expended for the child(ren)); Line 43 (education expenses for a child

under 18); Line 44 (additional food and clothing expenses, to the extent expended for the child(ren)); or Line 59 or 60 for “Special Circumstances” or “Other Expenses” related to the child(ren).

The question would be: why do the child support payments ‘disappear’, instead of being applied to pay the additional expenses specifically associated the child? Isn’t that what child support is supposed to be used to pay?

While the case law has not addressed all of these issues in detail, there is some guidance from the courts on the criteria for a Line 54 deduction.

The court in In re Fechter, 456 B.R. 65, 73-74 (Bankr. D. Mont. 2011) discussed the issue of dismissal under Section 707(b) from the perspective of a hypothetical Chapter 13 case.

> Turning to the loss in child support in two years, the UST argues that there is no limitation on the Court's discretion to determine how much of Debtors' child support income should be excluded from current monthly income ("CMI") as "reasonably necessary to be expended for such child" under §1325(b)(2), *citing* In re Van Bodegom Smith, 383 B.R. 441, 448 (Bankr. E.D. Wis. 2008). On Ex. B, their hypothetical Chapter 13 Form B22C, at Line 54 the Debtors deducted from their CMI the entire amount of child support income, $1,364.00. Based on that, Debtors argue that they have a negative disposable income at Line 59 in the sum of ($384.16) available for plan payments, and that forcing them into a Chapter 13 case would be senseless.
>
> The explanation at Line 54 of Ex. B states: "Support income. Enter the monthly average of any child support payments . . . for a dependent child, reported in Part I, that you received in accordance with applicable nonbankruptcy law, to the extent reasonably necessary to be expended for such child." Debtors entered the entire amount of child support received, $1,364.00. The UST argues that it is not appropriate for the Court to decide the issue regarding child support based on the slender record developed at the hearing.
>
> The Ninth Circuit Bankruptcy Appellate Panel ("BAP") described its analysis of disposable income under §1325(b)(2) and (b)(3) in American Express Bank, FSB v. Smith (In re Smith), 418 B.R. 359, 368 (9th Cir. BAP 2009):
>
> > Under the statute, a debtor may deduct from income those expenses reasonably necessary "for the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C.

> §1325(b)(2)(A)(i). Thus, we read sections 1325(b)(2) and (b)(3) in sequence, as follows: if an expense is not reasonably necessary for the debtor's and/or dependants' maintenance and support, the inquiry ends at section 1325(b)(2) as there is no "amount" to determine in section 707(b)(2) via section 1325(b)(3). Stated otherwise, there is no corresponding amount to subtract from the income component to get to what is "disposable" for the above-median income debtor.
>
> If the expense is reasonably necessary for the debtor's and/or dependants' maintenance and support, then section 1325(b)(3) requires the court to determine the *amount* in accordance with section 707(b)(2). In other words, sections 1325(b)(2) and (b)(3) require a two-step inquiry.

Smith, 418 B.R. at 368. (Emphasis in original).

> In the instant case Debtors deduct all of Wendy's $1,364.00 in child support income at Line 54 of Ex. B, without providing enough detail for the Court to make its determination under Smith of the amount reasonably necessary, and without itemizing each expense to demonstrate special circumstances as required under §707(b)(2)(B)(ii). That lack of evidence weighs against the Debtors as the parties with the burden of rebutting the presumption of abuse.

The Fechter approach is supported by the language of the explanation of the Line 54 deduction. The deduction can be taken "*to the extent reasonably necessary to be expended for such child*". If the expense is taken elsewhere – for example, for child care on Line 35 – it would not appear to be "necessary" to take the same deduction again on Line 54 under the Fechter approach.

Some kind of itemization of the expenses justifying the amount deducted on Line 54 would appear to be required, at least if there is an object based upon the amount deducted. A recent case on this issue, In re Reinsch, 2013 Bankr. LEXIS 273 (Bankr. D. Neb. January 23, 2013) is not particularly helpful as precident, because what discussion there is of the issue is very superficial:

> Finally, Cousino argues that a deduction on Line 54 of the means test for the full amount of child support Debtor receives should not be allowed because Debtor has not presented evidence that the entire amount is reasonably necessary to be expended for such child. I disagree. The means test calculation clearly

> excludes child support income to the extent reasonably necessary to be expended. Here, Debtor has produced her amended Schedule J listing her actual monthly expenses. Debtor also offered into evidence her bank statements and utility bills. Under the circumstances of this case, Debtor's evidence is sufficient to allow Debtor a full deduction of child support on Line 54 of the means test. Cousino has not presented any evidence to the contrary. Therefore, his objection is overruled.

Reinsch, 2013 Bankr. LEXIS 273 at *8 -*9.

Line 55. Qualified retirement deductions. *Enter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in §541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in §362(b)(19).*

There are three different views on the deduction of voluntary retirement contributions in Chapter 13.

Many bankruptcy courts have held that the plain language of §541(b)(7) allows a Chapter 13 debtor to deduct voluntary post-petition contributions to a qualified retirement plan up to the maximum amount permitted under nonbankruptcy law, regardless of whether the debtor was making such contributions at the time of filing, subject only to the good faith requirement imposed by §1325(a)(3). See, In re Gibson, 2009 Bankr. LEXIS 2524, 2009 WL 2868445, at *2-3 (Bankr. D. Idaho Aug. 31, 2009); In re Mati, 390 B.R. 11, 15-17 (Bankr. D. Mass. 2008); In re Devilliers, 358 B.R. 849, 864-65 (Bankr. E.D. La. 2007); In re Leahy, 370 B.R. 620, 623-24 (Bankr. D. Vt. 2007); In re Shelton, 370 B.R. 861, 865-66 (Bankr. N.D. Ga.2007); In re Nowlin, 366 B.R. 670, 676 (Bankr. S.D. Tex. 2007), *aff'd on other grounds*, 576 F.3d 258 (5th Cir. 2009); In re Njuguna, 357 B.R. 689, 690 (Bankr. D.N.H. 2006); In re Oltjen, 2007 Bankr. LEXIS 2761 at *7-*9 (Bankr. W.D. Tex. Aug. 13, 2007); In re Johnson, 346 B.R. 256, 263 (Bankr. S.D. Ga. 2006).

In contrast, the decision of the Sixth Circuit Court of Appeals in Seafort v. Burden, 669 F.3d 662 (6th Cir. 2012) has given a boost to the concept that voluntary retirement contributions are not a deductible expense on the Form 22C Means Test, notwithstanding the existence of the language of Line 55. In footnote 7 of Seafort, the three judge panel – in what they acknowledged was *dicta* – disagreed with the Chapter 13 trustee's position that voluntary 401(k) payments were a deductible expense. Seafort, 669 F.3d at 674 n. 7. Specifically, the Seafort court stated: "The Trustee "concedes" that if a debtor is making voluntary retirement contributions when the bankruptcy petition is filed, such continuing contributions may be excluded from disposable

income. We do not agree with this assertion, for the reasons stated in Prigge. However, our view is not relevant here, because this issue is not presently before us."

There are now a number of decisions specifically holding – not in *dicta* – that what Section 541 actually does is protect from the disposable income calculation any amounts withheld by an employer as of the petition date, but does **not** allow the deduction of future voluntary retirement contributions from disposable income. See, In re Parks, 65 Collier Bankr. Cas. 2d (MB) 1697, 2011 Bankr. LEXIS 2405 (Bankr. D. Mont. June 22, 2011), aff'd, Parks v. Drummond (In re Parks), 475 B.R. 703 (9th Cir. BAP 2012)(§541(b)(7)(A) did not authorize Chapter 13 debtors to exclude voluntary postpetition retirement contributions in any amount for purposes of calculating their disposable income, following Pigge); In re McCullers, 451 B.R. 498 (Bankr. N.D. Cal. 2011); In re Prigge, 441 B.R. 667, 677 (Bankr. D. Mont. 2010)(Kirscher, J.)(If Congress had intended to exclude voluntary 401(k) contributions from disposable income it could have drafted 11 U.S.C.S. §1322(f) to provide for such an exclusion, or provided one elsewhere.).

A direct textually-based response to the Prigge line of cases is found in Drapeau:

> This Court agrees with the Debtors, however, that the minority's interpretation of §541(a)(1) as limiting the exclusions in §541(b) misconstrues §541 as a whole. While §541(a)(1) does provide that "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the estate, 11 U.S.C. §541(a)(1), the words "as of the commencement of the case" create a time limitation for that subsection only. They do not limit the remaining provisions of §541. As the Supreme Court has stated with regard to §541, "[a]lthough [§541(a)(1)] could be read to limit the estate to those 'interests of the debtor in property' at the time of the filing of the petition, we view [the statute] as a definition of what is included in the estate, rather than as a limitation." United States v. Whiting Pools, Inc., 462 U.S. 198, 203, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983)(*emphasis supplied*); see also Ragosa v. Canzano (In re Colarusso), 295 B.R. 166, 172 (B.A.P. 1st Cir. 2003).
>
> While the debtor's property interests at the time a case is filed often comprise the bulk of the bankruptcy estate's property, the additional provisions of subsection (a), as well as the provisions of §1306, add postpetition property to the estate. See §§541(a)(3)-(6); 1306(a). Thus, it cannot be said that the entirety of §541, including the exceptions specified by §541(b), is limited in scope to the date of case commencement. Rather, just as §541(a) defines the scope of both prepetition and postpetition property of the estate, the limitations found in subsection (b) relate to both prepetition and postpetition property of the estate.

In re Drapeau, 2013 Bankr. LEXIS 89 at *18 -*19 (Bankr. D. Mass. January 8, 2013).

The decision in In re Bruce, 2012 Bankr. LEXIS 5759 at *4 - *8 (Bankr. W.D. Wash. Dec. 11, 2012) limited the Parks holding, that voluntary 401(k) contributions were not deductible, to above-median debtors. **Below median** debtors were subject to the old case law, which made the question of whether contributions were "reasonably necessary" a factual determination for the trial court.

While there are few reported decisions, it appears that some bankruptcy judges are looking at the reasonableness of voluntary retirement contributions, based on the debtor's individual circumstances, on a case-by-case basis.

There appears to be no real case law dispute that INVOLUNTARY retirement contributions are fully deductible on Line 55.

In addition to retirement contributions, "Line 55 of Form 22C allows debtors to deduct required repayments to retirement plan loans. The text of Line 55 instructs the debtor to "[e]nter the monthly total of (a) all amounts withheld by your employer from wages as contributions for qualified retirement plans, as specified in §541(b)(7) and (b) all required repayments of loans from retirement plans, as specified in §362(b)(19)." See, In re Kofford, 2012 Bankr. LEXIS 5622 at *11 (Bankr. D. Utah December 3, 2012).

The majority of courts appear to require the repayment of 401(k) loans to be pro-rated over the 60 month plan term for above-median debtors, or the completion of the loan payments otherwise accounted for. See, In re Lasowski, 575 F.3d 815 (8th Cir. 2009); In re Nowlin, 576 F.3d 258 (5th Cir. 2009); In re Davis, 425 B.R. 317 (Bankr. S.D. Tex. 2010); Spalding v. Truman, 2008 U.S. Dist. LEXIS 81682, 2008 WL 4566459 (N.D. Tex. October. 14, 2008); In re Novak, 379 B.R. 908 (Bankr. D. Neb. 2007). Contra, In re Haley, 354 B.R. 340 (Bankr. D. N.H. 2006); In re Wiggs, 2006 Bankr. LEXIS 1547, 2006 WL 2246432 (Bankr. N.D. Ill. August 4, 2006).

The specific issue that was decided in Seafort v. Burden, 669 F.3d 662 (6th Cir. 2012) was whether a Chapter 13 debtor could, after paying off 401(k) loans, use those monies to fund voluntary retirement contributions that the debtor had not been making at the time of filing. The Seafort court answered that question with a "no". Funds available after the 401(k) loans were repaid constituted disposable income that must be contributed to the Chapter 13 Plan. Contra, In re Egan, 458 B.R. 836 (Bankr. E.D. Pa. 2011)(permitting post-petition increase in 401(k) voluntary contributions).

In the Kofford case, the debtor argued that being required to pro-rate the retirement loan payments over 60 months to arrive at the deduction on Line 55 would make the plan payments unfeasible. The bankruptcy court found the argument unpersuasive, because the Form 22C provides the amount that must be paid to unsecured creditors over the life of the plan – it does not determine the plan payment. Thus, a "step up" plan, increasing as the retirement loans were repaid would make the plan both feasible and confirmable. See, In re Kofford, 2012 Bankr. LEXIS 5622 at *11 (Bankr. D. Utah December 3, 2012). The Kofford court also rejected the debtor's argument that there should be a review when the loans paid off – it was appropriate to just require a step up as the loans were paid off.

Line 56. Total of all deductions allowed under §707(b)(2). *Enter the amount from Line 52.*

Line 57. Deduction for special circumstances. *If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57.* ***You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.***

Nature of special circumstances	*Amount of expense*
a.	*$*_____
b.	*$*_____
c.	*$*_____
	Total: Add Lines a, b, and c *$*_____

Line 57 of the B22C Means Test allows additional expense deductions for "special circumstances". The mechanics of what needs to be done to take this deduction was addressed in Lang:

> A debtor seeking to establish special circumstances must comply with the procedural requirements of §707(b)(2)(B)(ii) and (iii) which require: (1) the debtor shall itemize each additional expense or adjustment of income; (2) provide documentation for such expense or adjustment to income; and (3) provide a

> detailed explanation of the special circumstances that make such expense or adjustment to income necessary and reasonable. The Debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required. The debtor has the burden of proof to show special circumstances that justify additional expenses or adjustments of their current monthly income for which there is no reasonable alternative.

In re Lang, 2012 Bankr. LEXIS 473 at *6-*7 (Bankr. D. Wyo. Feb. 14, 2012); see also, In re Jackson, 2008 Bankr. LEXIS 3679 at *7 (Bankr. D. Kan., Dec. 5, 2008); In re Raulerson, 395 B.R. 157, 162 (Bankr. M.D. Fla. 2008); In re Sadler, 378 B.R. 380 (Bankr. E.D. Tex. 2007)(denying variance from the IRS standards for excess vehicle expenses based on failure of debtors to properly document them); In re Martin, 371 B.R. 347, 356-357 (Bankr. C.D. Ill. 2007)("Even if the Debtors may claim excess transportation expenses as "special circumstances," the Debtors here have failed to provide sufficient detail for the Court to consider and have failed to provide any evidence of the lack of reasonable alternatives to their high vehicle operating costs. The Debtors have alleged that their expenses exceed the standard allowance by $232 but provided no details on the costs to operate their vehicles, the total amount of miles driven, or any other information to assist the Court in understanding how the $232 figure was calculated. Further, the Debtors have provided no information about any efforts they may have made to reduce their travel expenses. Thus, the Court cannot determine whether the $232 is actually expended each month, nor can the Court determine whether there are reasonable alternatives to that expenditure. For these reasons, the Debtors claim of "special circumstances" with respect to excess travel costs is denied."); In re Ovalle, 2008 Bankr. LEXIS 1096 (Bankr. E.D. Cal. April 4, 2008)(failure to document claimed "special circumstances" food, clothing, continuing education, and storage expenses in Chapter 13 warranted denial of all of them.)

Line 57's deductions for special circumstances are closely scrutinized by both Chapter 13 trustees and the court. There is conflicting case law (shocking for that to happen in bankruptcy, I know) on what criteria to use to determine what constitutes "special circumstances":

> Although courts generally agree that whether special circumstances exist should be decided on a case-by-case basis, see, e.g., In re Champagne, 389 B.R. 191, 200 (Bankr. D. Kan. 2008), courts are divided over what constitutes a special circumstance. See In re Hammock, 436 B.R. 343, 354 (Bankr. E.D.N.C. 2010). Some courts have interpreted special circumstances narrowly, often relying upon the "plain meaning" of the word "special" and finding that there is a significant burden to overcome. See In re Siler, 426 B.R. 167, 172 (Bankr. W.D.N.C. 2010)(collecting cases); see also In re Haar, 360 B.R. 759, 760 (Bankr. N.D. Ohio 2007)(stating that Congress intended "to set this bar extremely high, placing it

effectively off limits to most debtors"). Some courts viewing the exception narrowly have inferred that the special circumstance should be of the same degree or seriousness of the two examples listed in the statute — that is, a call to military duty or serious medical condition — and compare those circumstances with the debtor's to determine whether the deduction is allowable. See, e.g., In re DeLunas, 2007 Bankr. LEXIS 803, 2007 WL 737763, at *2 (Bankr. E.D. Mo. Mar. 6, 2007)(finding that circumstances should "rise to the same level" as those mentioned in the statute and noting that the examples contemplate "circumstances beyond a debtor's reasonable control") citing In re Tuss, 360 B.R. 684, 701 (Bankr. D. Mont. 2007); see also In re Johns, 342 B.R. 626, 629 (Bankr. E.D. Okla. 2006)).

Other courts have adopted a broader approach to the interpretation of special circumstances and found that it does not necessarily mean the circumstances need be extraordinary, unanticipated or outside of the control of the debtor. See In re Graham, 363 B.R. 844, 850 (Bankr. S.D. Ohio 2007); In re Robinette, 2007 Bankr. LEXIS 3523, 2007 WL 2955960, at *4. (Bankr. D.N.M. Oct. 2, 2007); In re Turner, 376 B.R. 370, 378 (Bankr. D.N.H. 2007); See also In re Fonash, 401 B.R. 143, 146 (Bankr. M.D. Pa. 2008)(finding that the "burden to establish special circumstances was not set particularly high, making the presumption truly rebuttable. The standard...is special, not extraordinary"). Courts following this approach also conclude that the circumstances need not be of the same degree as the examples mentioned in the statute and have found that the procedural requirements of section 707(b)(2)(B) are of primary importance. See, e.g., In re Littman, 370 B.R. 820, 831 (Bankr. D. Idaho 2007)(noting the limited utility of using the examples as archetypal as they do not share a common, understandable trait and emphasizing that "compliance with the requirements to itemize, document, verify, establish reasonableness and necessity, and prove 'no reasonable alternative' [is] key.")

In re Davis, 2011 Bankr. LEXIS 4493 at *12-*15 (Bankr. N.D. Tex. Nov. 23, 2011).

The court in In re Litt questioned whether Line 57's "special circumstances" deduction applied in Chapter 13 cases:

Alternatively, the court observes that line 57 of Form B22C provides a place to itemize "special circumstance" deductions. This provision is apparently based on 11 U.S.C. §707(b)(2)(B)(i). The court notes that there may be grounds to limit application of §707(b)(2)(B)(i) to chapter 7 cases, but that question is not squarely before the court.

In re Litt, 2012 Bankr. LEXIS 621 at *12 (Bankr. N.D. Ohio February 6, 2012)

The term "special circumstances" has been used in other contexts in the case law – where actual income is different from the six-month look back period of the Means Test (and where "changed circumstances" would be the preferred term in Chapter 13, post-Lanning). This discussion of Line 57 is limited to expense adjustments - the use of additional deductions not specifically allowed under the Means Test. [As a point of interest, In re Louviere, 2008 WL 925824 (Bankr. E.D. Tex. Apr. 4, 2008) holds that only the expense side of "special circumstances" applies to Chapter 13. See also, In re Ross, 377 B.R. 599, 603 (Bankr. N.D. Ill. 2007)("The function of §707(b)(2)(B) in the context of a Chapter 13 case is to provide for special circumstances that justify expenses that were not previously deducted on the B22C Form. Line 59 of the B22C Form provides a category for these additional expenses."); In re Briscoe, 374 B.R. 1, 17-18 (Bankr. D.D.C. 2007); In re Riding, 377 B.R. 239, 241 fn. 3 (Bankr. W.D. Mo. 2007).]

For courts that look at the two examples in the statute – "a call to military duty or serious medical condition" - and follow the "similar level" reasoning, the standard for "special circumstances" deductions under §707(b)(2)(B) is a difficult one for debtors to meet. The bankruptcy court in In re Parulan, 387 B.R. 168, 172-173 (Bankr. E.D. Va. 2008) stated:

> A plain reading of the statute requires the debtor (1) to demonstrate "special circumstances, such as a serious medical condition or a call or order to active duty in the armed forces" that justify the additional expense or income adjustment; and (2) to demonstrate that there is no reasonable alternative to making the additional expense or income adjustment. Haman, 366 B.R. at 312. It is true that the phrase "such as" is not limiting, and that the two circumstances listed in the statute are not the only ones that would justify an adjustment. In re Vaccariello, 375 B.R. 809, 813 (Bankr. N.D. Ohio 2007). At the same time, it seems clear that Congress intended "to set this bar extremely high, placing it effectively off limits for most debtors." In re Haar, 360 B.R. 759, 760 (Bankr. N.D. Ohio 2007). See also In re Martin, 371 B.R. at 352 (stating that "special circumstances" must be construed as "uncommon, unusual, exceptional, distinct, peculiar, particular, additional or extra conditions or facts"). Whether a special circumstance exists must be made on a case-by-case basis, particularly because of the fact-specific nature of each issue. In re Turner, 376 B.R. 370, 378 (Bankr. D. N.H. 2007); In re Knight, 370 B.R. 429, 437 (Bankr. N.D. Ga. 2007).

Because of the high standards for showing "special circumstances", it can be difficult to get most courts to allow deductions for expenses listed on Line 57 in Chapter 13 cases.

Looking at one of the more heavily litigated "special circumstances" area, the decision in In re Zahringer, 2008 Bankr. LEXIS 1770 (Bankr. E.D. Wis. 2008) rejected student loans as a special circumstance expense. The opinion listed the divergent case law on attempts to deduct student loans on the Means Test:

> [S]everal courts have held that nondischargeable student loans do constitute special circumstances. See In re Haman, 366 B.R. 307 (Bankr. D. Del. 2007) (holding chapter 7 debtor's obligation as co-signer on her son's student loans qualified as "special circumstance" sufficient to rebut presumption of abuse); In re Martin, 371 B.R. 347 (Bankr. C.D. Ill. 2007)(holding chapter 7 debtors' obligation to pay their nondischargeable student loan debt constituted a "special circumstance"); In re Delbecq, 368 B.R. 754 (Bankr. S.D. Ind. 2007)(holding student loan debt constituted "special circumstance" sufficient to rebut chapter 7 presumption of abuse); In re Templeton, 365 B.R. 213 (Bankr. W.D. Okla. 2007)(holding student loan qualified as "special circumstance" sufficient to rebut presumption of abuse in chapter 7 case); In re Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007)(holding debtor's long-term, nondischargeable student loan obligations could constitute "special circumstances" in calculating disposable income that he would have to devote to payment of unsecured creditors under chapter 13 plan). Those cases all essentially found that student loan obligations constitute special circumstances essentially because the debtors have acknowledged the nondischargeability of their student loan debt and have no reasonable alternative other than to pay the debt.
>
> Other courts have concluded that student loans do not fall within the special circumstances provisions. See In re Vaccariello, 375 B.R. 809 (Bankr. N.D. Ohio 2007)(holding chapter 7 debtors' nondischargeable student loan debt was not "special circumstance" sufficient to rebut statutory presumption of abuse); In re Lightsey, 374 B.R. 377 (Bankr. D. Ga. 2007)(finding nondischargeable nature of student loan obligations did not warrant classifying them as "special circumstances" to rebut chapter 7 presumption of abuse); In re Pageau, 383 B.R. 221 (Bankr. D. N.H. 2008) (holding that presumption of abuse was not rebutted because chapter 7 debtor's monthly payments on student loans did not constitute "special circumstances"). These courts essentially found that the debtors' obligation to repay their student loans, standing alone, cannot constitute special circumstances.

Of course, there are many other types of expenses that have been litigated as "special circumstances" expenses in Chapter 13 cases. See, In re Crego, 387 B.R. 225 (Bankr. E.D. Wis.

2008)(Above-median-income Chapter 13 debtors' need to live apart, based on their post-filing divorce, was a "special circumstance" warranting an adjustment to CMI.); In re Sadler, 378 B.R. 380 (Bankr. E.D. Tex. 2007)(Chapter 13 debtors failed to establish special circumstances for the necessity of their additional vehicle operating expense deduction, totaling $880.); In re Tuss, 360 B.R. (Bankr. D. Mont. 2007)(additional amounts for food, clothing and personal care items based on employment away from home is not a "special circumstance" for Chapter 13 debtor); In re Stubbs, 2007 Bankr. LEXIS 4121 (Bankr. D. Mont. December 6, 2007)(higher rent in county where debtor lived was "special circumstance" in Chapter 13); See also, In re Witek, 383 B.R. 323 (Bankr. N.D. Ohio 2008)(Chapter 7 debtor failed to rebut presumption of abuse, even if debtor-wife's pregnancy was a "special circumstance".); In re Shinkle, 382 B.R. 85 (Bankr. E.D. Ky. 2008)(No 'special circumstances' existed to entitle Chapter 7 debtors to increase housing expenses on the Means Test over the standard amount allowed. Debtors have to show they have "no reasonable alternative".); In re Vaccariello, 375 B.R. 809 (Bankr. N.D. Ohio 2007)(non-dischargeable student loan debt not a special circumstance in Chapter 7 case); In re Martin, 371 B.R. 347, 356-357 (Bankr. C.D. Ill. 2007)(in Chapter 7 case, expense of child born post-petition and student loan allowed as special circumstances, transportation expenses not allowed); In re Haman, 366 B.R. 307 (Bankr. D. Del. 2007)(student loan guarantee obligation for son suffering from psychological disorders allowed as "special circumstance" in Chapter 7); In re Lang, 2012 Bankr. LEXIS 473 (Bankr. D. Wyo. Feb. 14, 2012)(providing a daughter a vehicle, or paying for a vehicle not titled in the debtors' names, is not a special circumstance).

One of the most liberal applications of the Line 57 deductions for "special circumstances" is found in In re Barbutes, 436 B.R. 519 (Bankr. M.D. Tenn. 2010), where the court allowed the debtors to claim expenses for utilities and maintenance on their house, the husband's contribution to a Roth IRA, and costs the debtors incurred to maintain a pool at their house and for gym membership. But see, In re Trimarchi, 421 B.R. 914, 922-923 (Bankr. N.D. Ill. 2010)(swimming pool a luxury that is not permitted under Line 19 as a marital adjustment even when paid for by the non-filing spouse).

Like other sections of the Means Test, there is no "double counting" permitted on Line 57. As the court stated in In re Moore, 446 B.R. 458, 464 (Bankr. D. Colo. 2011):

> Fourth, and most significantly, the Debtor's B22C (Exhibit C) includes a $2,385.00 deduction for special circumstances on line 57. The continuation page breaks down the deduction as follows: $2,300.00 for post-petition tax liability, and $85.00 for professional licensing and professional associations. As to the $2,300.00 for tax liability, the Court finds that no special circumstance deduction is appropriate. The Debtor's pre-petition tax liability is sufficiently provided for on line 49, as the amount included, $165.39, when multiplied over the length of

> the plan, covers the additional taxes owed as a result of the $50,000.00 student loan payment. The Debtor's post-petition, ongoing tax liability is sufficiently provided for on line 30. Between line 49 and line 30, the Form B22C fully accounts for any liability the Debtor may have to the IRS or the Colorado Department of Revenue over the life of her plan. To include an additional deduction double-counts the amount listed on line 30. In effect, the Debtor is asking this Court to allow a $4,569.00 monthly expense for tax withholding, which number is wholly unjustified by the Debtor's income or financial circumstances.

There is at least one case where a bankruptcy court addressed who may seek a deviation from Form 22C disposable income requirement based on special circumstances: "This Court does not find support in either §707(b)(2)(B) or §1325(b)(3) for the proposition that a trustee or a creditor may invoke the special circumstances exception." In re Williams, 394 B.R. 550, 561 (Bankr. D. Colo. 2008)(decided under the Ninth Circuit's Kagenveama decision).

Line 58. Total adjustments to determine disposable income. *Add the amounts on Lines 54, 55, 56, and 57 and enter the result.*

Line 59. Monthly Disposable Income Under §1325(b)(2). *Subtract Line 58 from Line 53 and enter the result.*

Line 59 is a very important number for courts that use the Form 22C to calculate the minimum Chapter 13 Plan payment for over-the-median debtors. But, for many courts, it is not the minimum Chapter 13 Plan payment, as discussed in In re Grabarczyk, 2012 Bankr. LEXIS 1435 at *14-*23 (Bankr. N.D. Ohio March 15, 2012):

> The Trustee also asserts that the deductions taken by Debtors on lines 49 and 50 of Form B22C for payments on priority claims and Chapter 13 administrative expenses should be added back into Debtors' monthly disposable income figure calculated on line 59 in determining whether the monthly plan payments proposed in their Amended Plan are sufficient to meet the requirement under §1325(b)(1)(B) that all of their projected disposable income be applied to make payments to "unsecured creditors." The Trustee's argument requires the court to determine whether payments on priority claims and for Chapter 13 administrative expenses deducted from CMI under the means test constitute payments to "unsecured creditors" within the meaning of §1325(b)(1)(B). For the reasons that follow, the court agrees that in order to satisfy the disposable income requirement of §1325(b)(1)(B), Debtors' monthly plan payments must include not

only projected disposable income, which is presumptively the line 59 amount, but also the priority claims and Chapter 13 expenses deducted on lines 49 and 50.

The starting point in construing a statute is always the existing statutory text, with the court's function to enforce the statute according to its terms. Lamie v. United States Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004); Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000). "The court must look beyond the language of the statute, however, when the text is ambiguous or when, although the statute is facially clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress." Vergos v. Gregg's Enters., Inc., 159 F.3d 989, 990 (6th Cir.1998); see United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242-43, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) (stating that in the "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' . . . the intention of the drafters, rather than the strict language, controls."). In determining whether the statutory language is clear, the court must take a holistic approach. Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60, 125 S. Ct. 460, 160 L. Ed. 2d 389 (2004). "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." Id.

On its face, the term "unsecured creditors" in §1325(b)(1)(B) is not ambiguous. An unsecured creditor is simply a creditor that does not have collateral for the debt. See 11 U.S.C. §506(a). The statute does not qualify or distinguish the term. A literal interpretation of the statute would thus permit Debtors to use their disposable income to pay both priority unsecured creditors, the claims for which a deduction has been taken in calculating their disposable income, as well as general unsecured creditors. However, courts that have addressed the application of §1325(b)(1)(B) under circumstances similar to those presented in this case have persuasively concluded that priority claims and Chapter 13 administrative expenses deducted from CMI on Form B22C cannot be paid from the pot of funds that constitute a debtor's disposable income. See, e.g. In re Wilbur, 344 B.R. 650 (Bankr. D. Utah 2006); In re McDonald, 361 B.R. 527 (Bankr. D. Mont. 2007); In re Amato, 366 B.R. 348 (Bankr. D.N.J. 2007); In re Echeman, 378 B.R. 177 (Bankr. S.D. Ohio 2007); In re Puetz, 370 B.R. 386 (Bankr. D. Kan. 2007); In re Williams, 394 B.R. 550 (Bankr. D. Colo. 2008); In re Renteria, 420 B.R. 526 (Bankr. S.D. Cal. 2009); In re Johnson, 408 B.R. 811

(Bankr. W.D. Mo. 2009). Although the analyses in these cases differ somewhat, these courts have generally found that a literal application of the statute would be at odds with the manifest intent of Congress and/or that it would produce an absurd result. This court agrees.

Congressional intent relating to the meaning of "unsecured creditors" as used in §1325(b)(1)(B) is demonstrated by examining the entire statute. Disposable income, which, under §1325(b)(1)(B), is to be paid to unsecured creditors, is defined in §1325(b)(2) as "current monthly income received by the debtor. . . less amounts reasonably necessary to be expended. . . ." For above-median income debtors, as Debtors are in this case, §1325(b)(3) directs that "amounts reasonably necessary to be expended" be determined in accordance with §707(b)(2). Among the deductions allowed under 707(b)(2)(A) are deductions for a debtor's payments on prepetition priority unsecured claims and for Chapter 13 administrative expenses. See 11 U.S.C. §707(b)(2)(A)(ii)(III) and (iv). Because this calculation yields the presumptive projected disposable income of the debtor to be applied to payment of unsecured creditors, courts have generally concluded that the only reasonable interpretation of this process is that it is designed to determine the amount available to pay nonpriority unsecured creditors and, thus, that Congress intended the term "unsecured creditors" in §1325(b)(1)(B) to refer to nonpriority unsecured creditors only. See, e.g., In re Wilbur, 344 B.R. at 654 (observing that "the deductions allowed under Form B22C track the considerations that a debtor had to make pre-BAPCPA before paying non-priority unsecured creditors"); In re Johnson, 408 B.R. at 816 (concluding that "[t]he plain language of the statute, considered in context, has only one permissible interpretation-the term 'unsecured creditors' refers to only non-priority unsecured creditors"); In re Renteria, 420 B.R. at 530 (stating that "given the carveout afforded to Debtors in calculating 'disposable income,'. . . the language of Section 1325(b)(1)(B), when read in context, makes it clear that the resulting projected disposable income is intended to be paid only to nonpriority unsecured creditors").

Further support for this conclusion is found in §1322(a)(2), which requires that a Chapter 13 plan "provide for the full payment, in deferred cash payments, of all claims entitled to priority. . . ." As one court stated, "[i]f a debtor is required to pay his priority claims in full, it would be illogical, if not contradictory, to read §1325(b)(1)(B) as permitting a debtor to pay only a portion of his priority claims, provided he devotes all of his disposable income to the plan." In re Johnson, 408 B.R. at 815.

Courts addressing the issue in cases where the debtor is an above-median income debtor have also found that an interpretation of §1325(b)(1)(B) that includes priority creditors in the definition of "unsecured creditors" who must be paid from projected disposable income "obtains an absurd result." In re Echeman, 378 B.R. at 181 (citing In re Wilbur, 344 B.R. at 654). As explained in In re Echeman:

> [I]f a debtor is allowed to deduct priority unsecured claims before reaching the calculation of disposable income and then pay priority unsecured claims out of projected disposable income under §1325(b)(1)(B), the debtor would in effect be allowed to "double-count" or deduct the same priority claims twice before paying nonpriority unsecured creditors. As noted by the bankruptcy court in Wilbur, "[a]llowing the debtor to double-count in this fashion would undermine the purpose and efficacy of §707(b)(2) and Form B22C ... [t]his would be an absurd result."

Id. (internal citations omitted); accord In re Johnson, 408 B.R. at 815.

Nevertheless, the §707(b)(2) expense deductions used in calculating disposable income, which include prepetition priority claims and projected Chapter 13 administrative expenses, only apply to above-median income debtors. In In re Williams, the court noted that below-median income debtors calculate their disposable income by subtracting their Schedule J expenses from their CMI and that Schedule J does not include lines for deducting payments to priority unsecured creditors and for Chapter 13 administrative expenses. In re Williams, 394 B.R. at 564. Thus, interpreting the term "unsecured creditors" in §1325(b)(1)(B) to categorically exclude priority unsecured claims would leave below-median income debtors' with no funds to pay those creditors. Addressing this dilemma, in In re Echeman, the court suggested that:

> [T]o avoid the dueling absurd results of either allowing above-median family income debtors to double-count their priority unsecured claim before paying nonpriority unsecured claims or making below-median family income debtors plans unfeasible because they have no source of income besides "disposable income" from which to pay priority unsecured claims . . . the effective result [should be] the same for all debtors—priority unsecured claims can be counted once, no more, no less, in determining which funds are left for nonpriority unsecured creditors.

In re Echeman, 378 B.R. at 182, n.7. Similarly, in In re Puetz, the court concluded that it should "logically and, in fact, plainly, read 'unsecured creditors' in §1325(b)(1)(B) as a catchall phrase to address creditors not specifically referenced elsewhere." In re Puetz, 370 B.R. at 392. The court in In re Williams agreed and found that interpreting the term "unsecured creditors" in this manner gives meaning to the term without making Chapter 13 unworkable for below-median income debtors. In re Williams, 394 B.R. at 564-65.

This court finds the reasoning in these decisions persuasive. It thus finds that the only reasonable interpretation of the term "unsecured creditors," as used in §1325(b)(1)(B), is one that refers to all unsecured creditors for whose claims the debtor has not included an expense deduction in calculating disposable income. Only if payments on an unsecured creditor's claim are not deducted as an expense in calculating projected disposable income may such claims be paid from projected disposable income.

In this case, Debtors deducted from CMI on Form B22C their monthly payment on prepetition priority claims in the amount of $314.31 and projected average monthly Chapter 13 administrative expenses in the amount of $20.70. Since projected disposable income may not be used to pay these expenses, they must add these amounts to their projected disposable income in determining their Chapter 13 plan payment.

See also, In re Grandizio, 2010 Bankr. LEXIS 2130 at *10-*11 (Bankr. E.D. Va. June 28, 2010)(in discussing the amount deducted for "cure" on Line 48 – "what the projected disposable income test fixes is not the minimum plan payment, but rather the minimum amount that must be applied to the payment of unsecured claims. Desgrosseilliers, 2008 Bankr. LEXIS 2017 [at *11-*12], 2008 WL 2725808 at *3. Thus, in order to satisfy the test, the payment into the plan must be sufficient, after deduction of the trustee's commission (which is already accounted for in the means test computation), to pay at least $401 per month to the unsecured creditors. Since the present plan does not do so, the trustee's objection will be sustained.").

A similar "add-back" needs to be made to calculate the Chapter 13 Plan payment when the debtor proposes to pay secured debt – deducted on Line 47 – through the Chapter 13 Plan distributions. If Line 59 reflects $500 that should go to unsecured creditors, a debtor cannot propose a $500 a month payment, with $250 a month of that payment going to pay off an auto loan. For example, the Spurgeon court stated:

> The plan provides for payments to the trustee of $125 per week. That works out to $541.67 per calendar month, assuming the debtor is paid for 52 weeks of work. This amount is more than the projected disposable income of $344.07 per month. Projected disposable income, however, is supposed to measure the amount of income the debtor will have available during performance of the plan for payments on unsecured claims after making payments on secured debts. Official Form B22C, Lines 25B, 28, 29, 57, 57, 58; 2 Keith M. Lundin, Chapter 13 Bankruptcy §163.1 (3rd ed. 2006). Thus, Mr. Spurgeon should have the $344.07 per month available for payments on unsecured debts. Most of Mr. Spurgeon's proposed payments -- $421 per month -- will be used to pay secured debts. That will leave about $120 per month for payment of unsecured claims. Thus, the proposed plan does not devote all of Mr. Spurgeon's projected disposable income to payments under the plan.

In re Spurgeon, 378 B.R. 197, 206 (Bankr. E.D. Tenn. 2007).

Some cases do hold that "unsecured debt" can include priority debt (thereby allowing a "double-dip" for priority claims on Line 49, with the disposable income – net of priority claims expenses – being used to pay both priority claims and unsecured creditors. However, there appear to be no cases in which courts have held that secured debts can be paid through the Chapter 13 Plan distributions using Line 59 as the minimum monthly payment.

And, where there are secured arrearages – previously deducted on Line 48 in arriving at the Line 59 number – that deduction also has to be "added back" to the number on Line 59 in arriving at the minimum Chapter 13 Plan payment based on the number listed on Line 59 that must go to unsecured creditors.

"The fact that the monthly net income figure on Schedule J is different from line 59 of the means test is, in and of itself, not a basis to use Schedule J to determine projected disposable income." In re Litt, 2012 Bankr. LEXIS 621 at *9 - *10 (Bankr. N.D. Ohio February 6, 2012).

Where the number on Line 59 is positive on a properly filled out Chapter 13 means test, all the appellate courts that have addressed the issue have held that Section 1325(b) is a temporal requirement that sets minimum plan duration. See, Baud v. Carroll, 634 F.3d 327, 350-357 (6th Cir. 2011); In re Tennyson, 611 F.3d 873, 876-880 (11th Cir. 2010); In re Frederickson, 545 F.3d 652 (8th Cir. 2008); In re Kagenveama, 541 F.3d 868, 875-876 (9th Cir. 2008). Of course, where Line 59 is a negative number, the Ninth Circuit Court of Appeals originally held that the "applicable commitment period" was not applicable, and there was no minimum period for a Chapter 13 plan. The viability of the Kagenveama decision is a bit up in the air right now, after the Flores decision was vacated, and will be reheard *en banc*. See, In re Flores, 692 F.3d 1021

(9th Cir. 2012), *rehearing, en banc, granted by* Danielson v. Flores (In re Flores), 2012 U.S. App. LEXIS 25928 (9th Cir., Dec. 19, 2012)(vacating the original Flores decision).

But, it should be noted that there is also case law holding that the applicable commitment period is only required if there is an objection to confirmation. See, In re Wirth, 431 B.R. 209, 215 n.8 (Bankr. W.D. Wis. 2010); In re Meadows, 410 B.R. 242, 247 (Bankr. N.D. Tex. 2009).

Part VI: ADDITIONAL EXPENSE CLAIMS

Line 60. Other Expenses. *List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under §707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.*

Expense Description	*Monthly Amount*
a.	*$*_____
b.	*$*_____
c.	*$*_____
Total: Add Lines a, b, and c	*$*_____

"Line 60 as a catchall for monthly expenses not included on the form." In re Johnson, 2011 Bankr. LEXIS at *7 4636 (Bankr. E.D.N.C. July 21, 2011); In re Robinson, 449 B.R. 473, 484 (Bankr. E.D. Va. 2011)("if these and the other expense exceptions built into form B22C prove to be insufficient to account for the Debtor's true economic needs, Line 60 of form B22C allows a debtor to list and describe any other monthly expenses not already included on the form. This line would be the appropriate place for dealing with any other fixed expenses the Debtor might routinely incur that are not otherwise captured in the household size allowance for his atypical household.").

Courts have approved of the use of Line 60 for expenses that, arguably, should go on other lines of the Chapter 13 Means Test. For example, the bankruptcy court in Hargis held: "this Court holds that above-median income chapter 13 debtors may claim an expense on Line 60 of Form 22C for additional vehicle operating expenses that they actually incur up to $200 per

vehicle subject to review and objection by the Chapter 13 Trustee and holders of allowed unsecured claims." In re Hargis, 451 B.R. 174, 180 (Bankr. D. Utah 2011). While the court explained its reasons – most of the litigation on the $200 "old car" deduction are under the operating expense deduction on Line 27A, or as an ownership expense on Lines 28 or 29.

The Barbutes court allowed expenses listed on Line 60 for a pool. In re Barbutes, 436 B.R. 519, 527-529 (Bankr. M.D. Tenn. 2010).

If the Chapter 13 trustee accepts the Line 60 deductions, and no one else objects, the court may just go along. See, In re Wirth, 431 B.R. 209, 210 ("they also claimed $813.24 in "additional expenses" on line 60 of the form. The chapter 13 trustee appears to have accepted the validity of these additional expenses and has not raised an objection to them.").

The Court in Litt expressed some confusion about how Lines 57, 60 and the pertinent subsections of §707(b) all line up:

> Similarly, line 60 also provides debtors an opportunity to list "other expenses" "required for the health and welfare of you and your family . . . under §707(b)(2)(A)(ii)(I)." Official Form B22C (Chapter 13) (12/10), line 60. Again, the court acknowledges that it is not clearly convinced that the form and statute are perfectly coherent but that is a question for a day when the issue is properly presented to the court.

In re Litt, 2012 Bankr. LEXIS 621 at *12 - *13 (Bankr. N.D. Ohio February 6, 2012).

Because Line 60 comes after Line 59, items deducted on Line 60 will not reduce the amount on Line 59. It may cause a Chapter 13 trustee (or a creditor) not to object if the debtor is proposing a Chapter 13 Plan payment that would pay unsecured creditors less than the amount computed on Line 59.

Part VII: VERIFICATION

I declare under penalty of perjury that the information provided in this statement is true and correct. (If this is a joint case, both debtors must sign.)

Date: _____ Signature: _____
(Debtor)

Date: _____ Signature: _____
(Joint Debtor, if any)

Yes, Chapter 13 debtors are required to sign the Form 22C Means Test, even though there is not a chance in hell that they will actually understand it.

"The debtor should sign the verification at Line 60. Declaring under penalty of perjury that all the information provided in Form B22C is true and correct is a tall undertaking given all of the uncertainties in this form. Not a signature to be taken lightly." See, Keith M. Lundin and William H. Brown, *Chapter 13 Bankruptcy, 4th Edition*, §380.1 at ¶112, Sec. Rev. July 14, 2007, www.Ch13online.com.

APPENDIX A

Means Test Comparison Charts For Chapter 7 (Form 22A) And Chapter 13 (Form 22C).

Why make a chart of how the Chapter 7 and Chapter 13 Means Tests line up? Because where lines are the same, or related, the case law from Chapter 13 may be persuasive in interpreting identical language on the Chapter 7 Means Test, and vice versa.

Line-by-line – How the Chapter 7 and Chapter 13 Means Tests Line Up:

Chapter 7	**Chapter 13**	Comments
Line 1A	N/A	No similar line on the B22C
Line 1B	N/A	No similar line on the B22C
Line 1C	N/A	No similar line on the B22C
Line 2	Line 1	Same directions on division by six, etc.
Line 3	Line 2	Same
Line 4	Line 3	Same
Line 5	Line 4	Same
Line 6	Line 5	Same
Line 7	Line 6	Same
Line 8	Line 7	Same
Line 9	Line 8	Same
Line 10	Line 9	Same
Line 11	Line 10	Same
Line 12	Line 11	Similar in function. (A subtotaling line).
Line 13	Lines 15 & 21	Lines for annualized CMI.
Line 14	Line 16	Applicable median income figures.
Line 15	N/A	No similar line on the B22C.
Line 16	Line 18	Both monthly income, without marital adjustment.
Line 17	Line 19	Similar marital adjustment deductions.
Line 18	Lines 14 & 20	CMI after deduction for marital adjustment.
Line 19A	Line 24A	Same
Line 19B	Line 24B	Same
Line 20A	Line 25A	Same
Line 20B	Line 25B	Same
Line 21	Line 26	Same
Line 22A	Line 27A	Same
Line 22B	Line 27B	Same
Line 23	Line 28	Same
Line 24	Line 29	Same
Line 25	Line 30	Same
Line 26	Line 31	Same
Line 27	Line 32	Same

Chapter 7	**Chapter 13**	Comments
Line 28	Line 33	Same
Line 29	Line 34	Same
Line 30	Line 35	Same
Line 31	Line 36	Same
Line 32	Line 37	Same
Line 33	Line 38	Subtotaling line for IRS Standards.
Line 34	Line 39	Same
Line 35	Line 40	Same
Line 36	Line 41	Same
Line 37	Line 42	Same
Line 38	Line 43	Same
Line 39	Line 44	Same
Line 40	Line 45	Same
Line 41	Line 46	Subtotaling line.
Line 42	Line 47	Same
Line 43	Line 48	Same
Line 44	Line 49	Same
Line 45	Line 50	Same
Line 46	Line 51	Subtotaling line.
Line 47	Line 52	Subtotaling line.
Line 48	Line 53	Reentry of CMI number.
Line 49	Line 56	Subtotaling line.
Line 50	Line 59	Similar
Line 51	N/A	No similar line on the B22C
Line 52	N/A	No similar line on the B22C
Line 53	N/A	No similar line on the B22C
Line 54	N/A	No similar line on the B22C
Line 55	N/A	No similar line on the B22C
Line 56	Line 60	Same

Switching to comparing the Form 22C Chapter 13 Means Test to the Chapter 7 Form 22A:

Chapter 13	**Chapter 7**	Comments
Line 1	Line 2	Same directions on division by six, etc.
Line 2	Line 3	Same
Line 3	Line 4	Same
Line 4	Line 5	Same
Line 5	Line 6	Same
Line 6	Line 7	Same
Line 7	Line 8	Same
Line 8	Line 9	Same

Chapter 13	**Chapter 7**	Comments
Line 9	Line 10	Same
Line 10	Line 11	Same
Line 11	Line 12	Similar in function.
Line 12	Line 20	Similar subtotaling line,
Line 13	Line 17	Similar marital adjustment provisions.
Line 14	Line 16	Both monthly income, without marital adjustment.
Line 15	Line 13	Lines for annualized CMI.
Line 16	Line 14	Applicable median family income.
Line 17	N/A	No similar line on the B22A.
Line 18	Line 16	Subtotaling line.
Line 19	Line 17	Similar marital adjustment provisions.
Line 20	Line 18	CMI after deduction for marital adjustment.
Line 21	Line 13	Lines for annualized CMI.
Line 22	Line 14	Similar – applicable median income number.
Line 23	N/A	No similar line on the B22A.
Line 24A	Line 19A	Same
Line 24B	Line 19B	Same
Line 25A	Line 20A	Same
Line 25B	Line 20B	Same
Line 26	Line 21	Same
Line 27A	Line 22A	Same
Line 27B	Line 22B	Same
Line 28	Line 23	Same
Line 29	Line 24	Same
Line 30	Line 25	Same
Line 31	Line 26	Same
Line 32	Line 27	Same
Line 33	Line 28	Same
Line 34	Line 29	Same
Line 35	Line 30	Same
Line 36	Line 31	Same
Line 37	Line 32	Same
Line 38	Line 33	Subtotaling line.
Line 39	Line 34	Same
Line 40	Line 35	Same
Line 41	Line 36	Same
Line 42	Line 37	Same
Line 43	Line 38	Same
Line 44	Line 39	Same
Line 45	Line 40	Same
Line 46	Line 41	Subtotaling line.
Line 47	Line 42	Same
Line 48	Line 43	Same

Chapter 13	**Chapter 7**	Comments
Line 49	Line 44	Same
Line 50	Line 45	Same
Line 51	Line 46	Subtotaling line for debt payments.
Line 52	Line 47	Subtotaling line.
Line 53	Line 48	CMI restated.
Line 54	N/A	No similar line on the B22A.
Line 55	N/A	No similar line on the B22A.
Line 56	Line 47	Similar subtotal of all deductions.
Line 57	N/A	No “special circumstances” on the B22A
Line 58	Line 49	Not a close similarity - restated total deductions.
Line 59	Line 50	Similar
Line 60	Line 56	Same