



## THE MEANS TEST

*Projected Disposable Income  
(a/k/a Expected Unrecognizable  
Outcome)*

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## THE MEANS TEST

*Projected Disposable Income  
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**The Honorable Fredrick E. Clement**  
United States Bankruptcy Judge for the Eastern  
District of California (Fresno)



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With Special Guest



**Teresa Rhodd**  
Attorney Representing Chapter 13 Trustee  
Jan Hamilton (Topeka, KS)

## THE MEANS TEST

*Projected Disposable Income  
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**John Gustafson**  
Chapter 13 Trustee for the Northern District of Ohio,  
Western Division (Toledo)

## THE MEANS TEST

*Projected Disposable Income  
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### THE MEANS TEST – OVERARCHING ISSUES

- o Will there be new means test forms?
  - Advisory Committee on Bankruptcy Rules proposed drafts of new Means Test forms
  - Public comments on the new Means Test forms were due by February 15<sup>th</sup>, 2013
  - The Committee is reportedly working on some changes based on the comments



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### THE MEANS TEST – OVERARCHING ISSUES

- Applicable Commitment Period
  - Can it be reduced in modified plan?
    - Larger implications
    - Case that denies modification
      - *In re Heideker*, 455 B.R. 263 (Bankr. M.D. Fla. 2011)
    - Case allowing modification
      - *In re Tibbs*, 478 B.R. 458 (Bankr. S.D. Fla. 2012)




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### THE MEANS TEST – OVERARCHING ISSUES

- Applicable Commitment Period
  - *Kagenveama*: Does any portion of the decision survive?
  - The “mechanical approach” of *Kagenveama* was rejected by the Supreme Court in *Hamilton v. Lanning*.




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### THE MEANS TEST – OVERARCHING ISSUES

- Applicable Commitment Period
  - The “negative disposable/no applicable commitment period” will be decided soon:
    - *Danielson v. Flores* is up for re-hearing by the Ninth Circuit, *en banc*.
  - The holding on “negative disposable income” is also followed by Judge Leonard in North Carolina:
    - *In re Ballew*, 2013 Bankr. LEXIS 123 (Bankr. E.D.N.C. January 11, 2013)




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THE MEANS TEST – OVERARCHING ISSUES

- o Good Faith Objections
  - Courts (outside Ninth Circuit) apply good faith standard to deductions for secured debts that are held to be unnecessary
  - Example:
    - o Courts have rejected plans that propose a low monthly payment based upon a Means Test deduction for a very large house payment.
    - o See:
      - *Viegelahn v. Essex*, 452 B.R. 195 (W.D. Tex. 2011)
      - *In re Konowicz*, 470 B.R. 775 (Bankr. D.N.J. 2012)



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THE MEANS TEST – OVERARCHING ISSUES

- o Good Faith Objections – When the Plan payment is based upon a “correctly” completed B22C
- Drummond v. Welsh*, 2013 U.S. App. LEXIS 5880, 2013 WL 1192961 (9<sup>th</sup> Cir. March 25, 2013)**
  - o In most circuits “good faith” is based on criteria established prior to BAPCPA.
  - o Other courts have tougher standards:
    - o *In re Caldwell*, 895 F.2d 1123 (6<sup>th</sup> Cir. 1990)
    - o “the amount of the proposed payments and the amount of the debtor’s surplus”



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THE MEANS TEST – OVERARCHING ISSUES

- o When do we look to the future after *Lanning*?
  - In *Hamilton v. Lanning*, Supreme Court endorsed the “forward looking approach”
    - o But applies:
      - o “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)



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**THE MEANS TEST –  
OVERARCHING ISSUES**

o Looking forward after *Lanning*?

- Changes in income
- Changes in expenses
- Changes in eligibility for IRS deductions




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

o Income (Lines 2-9)

- Olly Olly Income Free!!
- Except you, Social Security. Um, you don't come in.




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

o Income (Lines 2-9)

- o Appellate decisions holding that Social Security income is excluded from income for Means Test purposes.
  - o *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220 (5<sup>th</sup> Cir. 2012)
  - o *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314 (10<sup>th</sup> Cir. 2012)
  - o *Baud v. Carroll*, 634 F.3d 327, 345 (6<sup>th</sup> Cir. 2011)
  - o *Drummond v. Welsh (In re Welsh)*, 2013 U.S. App. LEXIS 5880, 2013 WL 1192961 (9<sup>th</sup> Cir. March 25, 2013)

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### THE MEANS TEST – THE MECHANICS OF FORM B22C

o Income

- o Exclusion of Social Security has broader implications

The legal maxim – *expressio unius est exclusio alterius*

Meaning: the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded  
*Blausey v. United States Trustee*, 552 F.3d 1124, 1133 (9th Cir. 2009)

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### THE MEANS TEST – THE MECHANICS OF FORM B22C

o Income

- o §101(10A) states: Current monthly income is defined as "the average monthly income from all sources that the debtor **receives** . . . without regard to whether such income is taxable income, **derived** during the [preceding] 6-month period."




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### THE MEANS TEST – THE MECHANICS OF FORM B22C

o Income

- o What do "receives" and "derived" mean in the statute?
  - o Why are there two different terms used if the rule for the Means Test is just:
    - o "income received in the six months before filing"




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THE MEANS TEST –  
THE MECHANICS OF FORM B22C

- o Income
  - o Gross Income For Debtors With Business Income
    - *In re Wiegand*, 386 B.R. 238 (9<sup>th</sup> Cir. BAP 2008)
- o “When an Official Bankruptcy Form conflicts with the Code, the Code always wins.”




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THE MEANS TEST –  
THE MECHANICS OF FORM B22C

- o Income
  - o Do we use gross or net business income in determining the “applicable commitment period”?
  - o Majority view follows *Wiegand*:
    - Use gross income, the Form 22C is wrong
  - o *Contra*:
    - *In re Romero*, 2013 Bankr. LEXIS 256; 68 Collier Bankr. Cas. 2d (MB) 1733 (Bankr. S.D. Fla. Jan. 18, 2013).




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THE MEANS TEST –  
THE MECHANICS OF FORM B22C

- o Income
  - o Unemployment compensation
    - o Is it a benefit under the Social Security Act?
    - o Two older cases say ‘yes’
      - *Munger and Sorrell*
    - **At least 8, more recent cases say ‘no’**
      - *In re Washington*, 438 B.R. 348 (M.D. Ala. 2010)
        - o Unemployment is not a benefit received under the Social Security Act, and is income for Means Test purposes




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### THE MEANS TEST – THE MECHANICS OF FORM B22C

o Income

- o One time withdrawals from 401(k) or IRA




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### THE MEANS TEST – THE MECHANICS OF FORM B22C

o Marital Adjustment (Lines 13 and 19)

- The "marital adjustment" is 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



- o *In re Vollen*, 426 B.R. 359, 367-368 (Bankr. D. Kan. 2010).

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### THE MEANS TEST – THE MECHANICS OF FORM B22C

o Household Size (Line 16)

- Definition
  - o Code = No Definition
  - o 3 Approaches
    - o Heads on beds
    - o IRS Dependents
    - o "Economic Unit"




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THE MEANS TEST – THE MECHANICS OF FORM B22C

- Household Size (Line 16)
  - Leading case: *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012)



- discussing all three approaches before holding that the “economic unit” approach should be used and endorsing “fractional children”

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THE MEANS TEST – THE MECHANICS OF FORM B22C

- Household Size (Line 16)
  - The IRS Guidelines – How did that become the “law”?
  - Attacks based on the IRS standards not being “uniform laws” have been rejected.
    - See, *Schultz v. United States*, 529 F.3d 343, 347 (6th Cir. 2008)

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THE MEANS TEST – THE MECHANICS OF FORM B22C

- Household Size (Line 16)
  - Administrative Procedures Act “rule and comment” attacks have also – so far – failed
    - See, *In re Wedblad*, 67 Collier Bankr. Cas. 2d (MB) 276, 2012 Bankr. LEXIS 303 (Bankr. D. Or. Jan. 25, 2012)



John Gustafson

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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- o Household Size (Line 16)
  - o Caps v. Allowances
  - o Does the debtor get to deduct the full amount of the IRS standard or is the debtor limited to a lower actual expense deduction?
  - o The majority view: Allowances for vehicles, mortgage/lease expenses, etc.
  - o A case limiting the vehicle deduction when the loan would be paid off during the Chapter 13 Plan
    - o *In re Montihio*, 466 B.R. 539, (Bankr. D. Hawaii 2012).




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- o Expenses (Lines 24-46)
  - Vehicle ownership expense (lines 28-29)
    - *Ransom* held – if there is no secured debt, there is no applicable expense for a motor vehicle
    - How far does the “applicable expense” analysis go?
    - Can the mortgage/rent expense be “inapplicable”?




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- o Expenses (Lines 24-46)
  - Vehicle ownership expense (lines 28-29)
    - What about lease expenses that exceed the IRS Standard?
      - o See, *In re Stubbs*, 58 Collier Bankr. Cas. 2d (MB) 1959, 2007 Bankr. LEXIS 4121 at \*12-\*13 (Bankr. D. Mont. Dec. 6, 2007)
        - o Allowing a higher lease expense for housing as a “special circumstance”




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THE MEANS TEST –  
THE MECHANICS OF FORM B22C

- Expenses (Lines 24-46)
  - Vehicle ownership expense (lines 28-29)
    - What is a vehicle?
      - Does it have to run?
    - Multiple vehicles




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THE MEANS TEST –  
THE MECHANICS OF FORM B22C




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THE MEANS TEST –  
THE MECHANICS OF FORM B22C

- Expenses (Lines 24-46)
  - Life Insurance (line 32)
    - Not specifically mentioned in Code
    - The life insurance deduction comes from IRS Standards
    - Only term insurance permitted
      - *In re Lipford*, 397 B.R. 320 (Bankr. M.D.N.C. 2008)
      - The case law followed the same rule for life insurance on Schedule J prior to BAPCPA
        - See e.g., *In re Williamson*, 296 B.R. 760, 765-66 (Bankr. N.D. Ill. 2003)




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- Expenses (Lines 24-46)
  - The Chapter 13 Means Test health care related deductions for:
    - Line 24B – the \$60 or \$144 allowances for "persons" who are tax deductions or are supported
    - Line 36 – the amount actually spent on health care
    - Line 39a – the cost of health insurance
    - Line 39c – the amounts put into a Health Savings Account




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- Expenses (Lines 24-46)
  - The Chapter 13 Means Test health care related deductions
    - Trustees check to make sure there is no double (or triple) counting of health care expenses




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- Expenses (Lines 24-46)
  - Telecommunication Services (line 37)
    - Should not include basic costs for a landline or cellphone
      - Those are "utility" expenses that are part of the Line 25A deduction
    - The cost of basic internet service can be deducted on Line 37




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- Expenses (Lines 24-46)
  - Charitable Contributions (line 45)
    - Is a historical basis required?
    - At least one court has said “yes”
      - *In re Steele*, 2010 Bankr. LEXIS 4117 at \*8-\*9 (Bankr. D. Wyo. Nov. 18, 2010)
  - The 15% of gross monthly income limit




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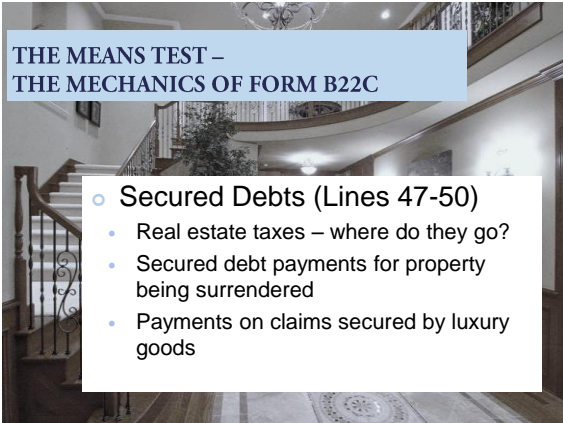
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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- Secured Debts (Lines 47-50)
  - Real estate taxes – where do they go?
  - Secured debt payments for property being surrendered
  - Payments on claims secured by luxury goods




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**THE MEANS TEST –  
THE MECHANICS OF FORM B22C**

- Priority Debts (Lines 49, 55, 57 & 60)
  - Line 49
    - Does a deduction here, preclude other deductions
  - Line 55
    - Voluntary retirement account deductions




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**THE MEANS TEST –  
ATTORNEYS FEES: LINE 59**

- What are Chapter 13 attorney fees?
  - Administrative expenses
  - Priority claims
  - General unsecured claims
  - Post-petition expenses

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