THE CHAPTER 13 MEANS TEST: LINE-BY-LINE©

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The Form 22C instructions are reproduced as they appear in the current 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.***

	Column A Debtor's Income	***Column B Spouse's Income***
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 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, Federal Rule of Bankruptcy Procedure 1007(b)(6). 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, 2012)("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.
