MEANS TEST INCOME AND DEDUCTIONS

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A. The Means Test Generally

As any bankruptcy practitioner does (or should) know, the means test is the name commonly applied to the provisions of the BAPCPA that use a formula to determine the amount of disposable income available to a Chapter 7 debtor, for purposes of determining whether the debtor should be presumed to be abusing the bankruptcy system. *In re Ragle*, 395 B.R. 387, 390 (E.D. Ky. 2008). The purpose of making this determination is to decide whether the debtor can afford to pay his creditors more that they would receive on the liquidation of his estate: "The 'means test' consists of a statutory formula for determining whether the debtor's income in excess of his expenses is sufficient to permit him to pay a specified amount or percentage of his nonpriority unsecured debts during the five year period in a Chapter 13 bankruptcy proceeding." *In re Oliver*, 350 B.R. 294, 299 (Bankr. W.D. Tex. 2006). Use of a mathematical formula to determine the debtor's "means" results in a hypothetical determination of theoretically available income. *In re Hice*, 376 B.R. 771, 773 (Bankr. D.S.C. 2007).

The operation of this formula, and the real-world validity of the hypothetical results it provides, has caused considerable problems for bankruptcy practitioners. While courts compete with one-another to find new ways to excoriate the quality of the drafting of the Bankruptcy Abuse Prevention and Consumer Protection Act generally, *see, e.g., In re Buaghman*, 2008 WL 4487879 at * 3 (Bankr. N.D. Ohio Sept. 30, 2008 (noting the BAPCPA "may at time be a riddle wrapped in a mystery inside an enigma ..."); *In re Sorrell*, 359 B.R. 167, 172 (Bankr. S.D. Ohio 2007) ("one element legislation should provide — clarity of expression in the choice of language so that interested parties can have predictability in their proceedings — is frequently lacking in significant portions of the [BAPCPA]"); *In re TCR of Denver, L.L.C.*, 338 B.R. 494, 495-96 (Bankr. D. Colo. 2006) ("This is a case where the language of the BAPCPA passed by Congress tends to defy logic and clash with common sense"); *see also, generally*, Henry J. Sommer, TRYING TO MAKES SENSE OF NONSENSE: REPRESENTING CONSUMERS UNDER THE "BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005," 79 Am.Bankr. L.J. 191 (Summer 2005), they reserve special venom for the statutory provisions laying out the means test, perhaps because the means test is so common, and the issues raised must be wrestled with frequently.

"While the legislative purpose behind the [means test] are easy to discern, courts have struggled with its application," *In re Wilson*, 356 B.R. 114, 117 (Bankr. D. Del. 2006), and "most attorneys do not agree on how [the means test] should be applied in practice ..." *In re Bernales*, 345 B.R. 206, 223-24 (Bankr. C.D. Cal. 2006); *accord, In re Hennerman*, 351 B.R. 143, 151 (Bankr. D. Colo. 2006) (*citing and quoting Bernales*). The frustration of courts is sometimes evident. *See, e.g., In re Long*, 390 B.R. 581, 588 (Bankr. E.D. Tex. 2008) (discussing the interplay between the means test and Section 1325(b)(3); noting courts must "reconsider at times their initial interpretations of these often-confusing statutory changes"); *In re Davis*, 348 B.R. 449, 458 (E.D. Mich. 2006) (likening the means test to fitting a "square peg into a round hole"); *accord, In re McGillis*, 370 B.R. 720, 737 (W.D. Mich. 2007). Some courts go so far as to question whether the logic behind the means test is workable:

> Whether Congress has written, and whether it is possible to write, a clear statement in English that prescribes a formula that can be applied to a wide variety of complex financial situations in American society, and whether that game is worth the candle, are more difficult questions.
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> *In re Leary*, 2008 WL 1782636 at * 2 (Bankr. S.D. Tex. Apr. 16, 2008).

B. Mechanical Operation of the Means Test

That said, the broad outlines of how the means test required by Section 707(b)(2) of the Bankruptcy Code are reasonably clear. Generally, it requires above-median income debtors, 11 U.S.C. § 707(b)(7), with primarily consumer debts, 11 U.S.C. § 707(b)(2)(C),[1] to subtract his expenses from his current monthly income, and then multiply that number by 60. 11 U.S.C. § 707(b)(2)(A)(I). If the resulting number is greater either: (1a) 25% of the debtor's unsecured, nonpriority claims; or (1b) $6,000; or (2) $10,000, the court is to presume the debtor is abusing the bankruptcy system and should generally dismiss the debtor's case. 11 U.S.C. § 707(b)(2)(A)(I); *In re Kogler*, 368 B.R. 785, 786 (Bankr. W.D. Wisc. 2007). However, despite the apparently straightforward nature of the calculation, a number of questions have arisen.

[1] The characterization of the debtor's debts as "consumer" debts is rarely disputed, but requires more than 50% of the value of the debtor's debts to be consumer in nature, not 50% of the number of debts. *In re Hlavin*, 394 B.R. 441, 447-48 (S.D. Ohio 2008); *In re Beacher*, 358 B.R. 917, 920-21 (Bankr. S.D. Tex. 2007).

C. Determining Median Family Income

The first series of questions is related to whether the debtor is or is not an above-median income debtor. The term "median family income" is defined by statute in a circular manner, to mean "the median family income both calculated and reported by the Bureau of the Census in the most recent year," or, if no such report has been made, the same number from prior years adjusted for changes in the Consumer Price Index, i.e., adjusted for inflation. 11 U.S.C. § 101(39A). The Code then requires determination of the median income for the debtor's family, which is determined based on the size of the debtor's "household." 11 U.S.C. § 707(b)(6).

Household, in turn, is not defined by the Bankruptcy Code, *In re Ellinger*, 370 B.R. 905, 910 (Bankr. D. Minn. 2007), but the term conceptually focuses on the number of then-living people living with the debtor. The unborn may not be treated as a member of the household, *In re Fleishman*, 372 B.R. 64, 68 (Bankr. D. Or. 2007); *In re Pampas*, 369 B.R. 290, 292-93 (Bankr. M.D. La. 2007), but the idea of household size is not fixed at any particular point in time, and can change with the circumstances. *In re Anderson*, 367 B.R. 727, 731 (Bankr. D. Kan. 2007). Correct calculation of household size is important, because it directly affects the determination of the applicable median family income, and therefore whether the debtor will be more likely to be presumed to be abusing bankruptcy. *See, e.g., In re Swanson*, 3008 WL 4540181 at * 1 (Bankr. D. Neb. Oct. 7, 2008) (court noting its confusion over why the debtor would agree with trustee's claim that his proper household size was three, "since on the date of filing four individuals lived in the Debtor's home ...").

The lack of an explicit definition of what constitutes the household means the question of how many people are the in debtor's household (and therefore the applicable median family income for the state), is thrown into the laps of the Bankruptcy Court. Most courts note that the reference to calculations made by the Bureau of the Census in Section 101(39A) suggests the definition of household used by the Bureau of the Census should be used in bankruptcy, as well. This definition tends to be helpful to debtors, because it recognizes that members of a putative household do not have to be a nuclear family (i.e., parents and minor children), it does not require those persons to be related, and means that even "unrelated, non-dependant individuals should be treated as a household for purposes of the means test." *Ellinger*, 370 B.R. at 911; *accord, In re Smith*, 396 B.R. 214, 216-17 (Bankr. W.D. Mich. 2008).

It should come as no surprise that not all courts agree with this determination. Some courts, citing the purpose of the means test, refuse to accept any definition of "household" that results in people not dependant on the debtor for any support to be counted as members of a household. *In re Jewell*, 365 B.R. 796, 800 (S.D. Ohio 2007) (rejecting the Bureau of Census' "heads on beds" calculation of household size). However, these courts are often unwilling to accept another common (but far less charitable) definition of household proposed by the IRS, which defines the household to include only those listed on a single tax return, i.e., a married couple and any dependants. *Jewell*, 365 B.R. at 800-01. This intermediate definition results in a detailed facts and circumstances test, and asks who is realistically dependant on living with the debtor. *Id.* at 801-02 (finding debtor's adult daughter and her children were part of the debtor's household, but that debtor's adult son was not).

In addition to the number of people constituting a single household, the focus on median household income also means that the median incomes of households of a similar size will vary, depending on where the debtor lives. This fact has lead to a constitutional challenge to this provision of the BAPCPA, one that argues that different treatment of debtors in different states offends the constitutional "uniformity" requirement imposed on bankruptcy laws. This position has not fared well in the courts, with a circuit court holding that because the Supreme Court allows exemptions to vary depending on the state where the debtor lives, the median family income used in a particular case may also vary. *Schultz v. United States*, 529 F.3d 343, 351-56 (6th Cir.), *cert. denied*, ___ U.S. ___, 2008 WL 4819925 (Dec. 8, 2008).

D. Calculation of Current Monthly Income and Expenses

1. Generally

But the calculation of median monthly income is positively simple when compared to the calculation that is really at the heart of the means test, the determination of the debtor's "current monthly income." "Current monthly income" is a defined term, and means the average of the compensation and certain other support received in the six months prior to filing for bankruptcy. 11 U.S.C. § 101(10A). Broadly, current monthly income is gross income received, from which expenses are subtracted to arrive at a theoretical disposable income. *In re Spraggins*, 386 B.R. 221, 226 (Bankr. E.D. Wisc. 2008). This income is "theoretical" because it is based on a historical review of the income earned by the debtor before filing for bankruptcy, and therefore may bear no actual relationship to income the debtor actually receives in any given month. *In re Turner*, 384 B.R. 852, 855 (Bankr. D. Colo. 2008); *In re Balcerowski*, 353 B.R. 581, 589-90 (Bankr. E.D. Wisc. 2006); *see also In re Henebury*, 361 B.R. 595, 602 (Bankr. S.D.

Fla. 2007) (noting "current monthly income" is not current, but rather "an historical measure of average monthly income").[2]

The expenses the debtor is allowed to deduct from the income that he previously earned almost always include the amounts specified in the IRS's National and Local Standards (an IRS publication purporting to determine the amount of money it costs families of various sizes to live in different parts of the country), 11 U.S.C. § 707(b)(2)(B)(ii)(I), as well as the average amount the debtor will pay out on secured debts and priority claims over the next 60 months. 11 U.S.C. § 707(b)(2)(A)(iii), (iv).[3] Depending on the debtor's specific circumstances, the debtor may also ask for an additional allowance in excess of certain of these expenses, on proof that they are reasonably incurred and necessary, 11 U.S.C. § 707(b)(2)(A)(ii); *see also In re Johnson*, 346 B.R. 256, 265 (Bankr. S.D. Ga. 2006) (characterizing the IRS National Standards as "both a floor and a ceiling" on expenses, subject only to the possibility of upward adjustment as set forth therein), or he may argue that additional amounts should be allowed because of the existence of "special circumstances." 11 U.S.C. § 707(b)(2)(B).

2. Exclusions from Income

The first real wrinkle is that Congress itself excepted certain items that on their face seem to be income from the calculation of current monthly income. By definition, certain amounts received by a debtor are *not* included in determining current monthly income, including Social Security benefits, "payments to victims of war crimes or crimes against humanity ... and payments to victims of international [or] domestic terrorism." 11 U.S.C. § 101(10A)(B); *In re Fisher*, 2007 WL 1202997 at * 1 n. 1 (Bankr. N.D. Ohio Apr. 23, 2007). Interestingly, the exclusion for Social Security arguably extends to unemployment benefits, because the federal statute mandating states pay benefits to unemployed workers is part of the Social Security Act, *In re Munger*, 370 B.R 21, 24-25 (Bankr. D. Mass. 2007); *Sorrell*, 359 B.R. at 180-83, although not all courts agree. *In re*

[2] A case illustrating this point rather neatly involves a debtor whose income in the six months preceding bankruptcy included amounts earned by a now deceased spouse, who was obviously no longer in any position to contribute income to the household. *In re Stansell*, 395 B.R. 457, 463 (Bankr. D. Idaho 2008) (punting on the issue of whether this income had to be included in calculating current monthly income to give the debtor a chance to show how much, if any, of the deceased spouse's income was regularly used for the debtor's support).

[3] There are other specific provisions falling under the heading of "Congressional gimmies and goodies," provisions that will not affect the average debtor. *See, e.g.*, 11 U.S.C. §§ 707(b)(2)(A)(ii)(I) (amounts spent by debtor to "maintain the safety of the debtor ... from family violence"), (b)(2)(A)(iii)(II) (the "continuation" of actual expenses incurred in caring for an elderly, ill or disabled member of the debtor's immediate family who is unable to pay for their own care); (b)(2)(A)(iii)(IV) (up to $1,500 per year per child for private school tuition).

Baden, 396 B.R. 617, 619-22 (Bankr. M.D. Pa. 2008) (noting that, although provided for by the Social Security Act, unemployment insurance payments are a state program).

Courts have also engaged in a limited expansion of items that may be excluded when calculating currently monthly income, mostly when they find the money received is not "income." *See, e.g., In re Curcio*, 387 B.R. 278, 283 (Bankr. N.D. Fla. 2008); *Spraggins*, 386 B.R. at 226-27 (both finding tax refunds do not qualify as income if they represent the repayment of a debt).[4] A similar result has been reached with respect to payments the debtor received from an IRA, at least to the extent they represent the return of an investment made with money earned more than six months before the debtor filed for bankruptcy, *In re Zahn*, 391 B.R. 840, 845-47 (8th Cir. B.A.P. 2008); *Simon v. Zittel*, 2008 WL 70346 at * 3 (Bankr. S.D. Ill. Mar. 19, 2008), although again not all courts agree. *In re DeThample*, 390 B.R. 716, 719-21 (Bankr. D. Kan. 2008) (because debtor did not have possession of funds from IRA until they were paid to her, amount of payment is included in calculating current monthly income).[5] Finally, payments received when property is sold that represents solely the return of capital (rather than a gain attributable to the sale) might also not qualify as income. *Curcio*, 387 B.R. at 284.

Perhaps the most difficult issue in calculating the income component of current monthly income is the question of how the debtor should count the income of a non-debtor (usually, but not always, a spouse) who resides in the same household as the debtor and who contributes to the operation of the household, an issue one court characterized as "complicated." *In re Travis*, 353 B.R. 520, 525 (Bankr. E.D. Mich. 2006). The issue is complicated because the first part of the definition of "current monthly income" suggests the income of a non-debtor is relevant only if he is a co-debtor, while the second part of the definition states it includes expenses paid on behalf of the debtor on a "regular basis," which would seem to encompass the income of a non-debtor spouse at least to the extent it is regularly expended on the household. 11 U.S.C. § 101(10A)(B).

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[4] *Curcio* also observes that an income tax refund is not "received" when it is paid to the taxpayer, as is required in order to be included in the calculation of current monthly income; rather, it is received when it is paid to him and then withheld from his wages. *Curcio*, 387 B.R. at 283.

[5] The case may also present issues of good faith, which can affect a debtor's right to relief. *See, e.g., In re Marti*, 393 B.R. 697, 699-701 (Bankr. D. Neb. 2008) (Chapter 13 case; unemployed debtor lived on withdrawals from his retirement plan, and then filed for bankruptcy immediately before taking a high-paying job; although court found retirement payments were not income, it also found debtor's plan was not proposed in good faith).

This issue has generated a significant split in the treatment of this income among the courts that have considered the issue,[6] with most courts agreeing that it should be counted in some fashion, but disagreeing as to how. Some courts blow right through the debtor-non-debtor issue, and ask whether the debtor and non-debtor act as if they are a single unit (household?), and if they do treat them as such. *See, e.g., In re Haney*, 2006 WL 3020961 at * 2 (Bankr. W.D. Ky. Oct. 19, 2006), *aff'd*, 2007 WL 781321 (W.D. Ky. Mar. 9, 2007) (debtor received $366 a month in Social Security, non-debtor spouse earned over $6,300 per month and evidence showed debtor and non-debtor acted as a "single financial unit"; in part based on discrepancies between debtor's schedules and testimony, court considered non-debtor spouse's income in finding debtor had filed in bad faith). Others take a more fact-intensive approach, and ask whether a non-debtor makes payments to a debtor and, if so, what portion of those payments are made both regularly and for the debtor's support. *See, e.g., In re Lightsey,* 374 B.R. 377, 380-81 (S.D. Ga. 2007) (debtor was required to include income of non-debtor spouse who "regularly" contributed to the debtor's household expenses); *Ellringer*, 370 B.R. at 911-12 (debtor who resided with joint tenant not her spouse had to include $360 a month received from non-debtor in her current monthly income because it was applied to debtor's car loan, but not remaining $340, which covered only non-debtor's expenses). Finally, some courts take an absolutist position, and find that the income of a non-debtor should not ever be considered in determining current monthly income of the debtor in bankruptcy. *In re Baldino*, 369 B.R. 858, 861-62 (Bankr. M.D. Pa. 2007).

3. Payments on Secured Debts

The other major component of the current monthly income calculation involves certain secured debts the debtor owes. The Code allows the debtor to subtract from his income the amount he will have to pay on certain secured debts over the next 60 months. Although it sounds straightforward enough, this calculation can also be complicated, and has spawned a great deal of litigation and very little resolution.

The fundamental problem arises because of the language of Section b(2)(A)(iii), which requires debtors to calculate the average monthly amount that are "scheduled as contractually due" to secured creditors in the five years after the petition. Debtors often calculate this amount and include it as an allowable deduction from their income even though they intend to surrender the collateral securing the debt (and therefore the payments will never be made, and any remaining obligation to the debtor transformed

[6] This issue is as likely to come up in connection with a motion brought under Section b(3) as it is a motion brought under Section b(2); if a non-debtor's income would significantly affect current monthly income calculations the omission of this income from the calculation is a circumstance likely to show either bad faith or the existence of abuse under the totality of the circumstances.

into unsecured debt), or at least will not be made for the next five years. Debtors have taken the position that the phrase "scheduled as contractually due" means exactly what it says, and since the statute does not require the debt actually be *paid* but rather merely that it be *due* means any debt owed may be considered in performing the means test. Not surprisingly, trustees and creditors take the opposite view, and argue that because the purpose of the means test is to give the court an accurate picture of the debtor's ability to pay his creditors, subtracting payments that will not be made from the debtor's income is misleading and improper. As is not unusual, the BAPCPA itself provides little guidance, with courts noting that the word "scheduled" can mean different things in a bankruptcy context, and Section b(2) does not make clear which meaning is intended. *In re Ray*, 362 B.R. 680, 684 (Bankr. D. S.C. 2007).

The courts that have been presented with this question have split into three distinct camps. A solid majority of courts find for debtors, and typically do so by applying the "plain meaning" test to find the statute means what it says, and the fact the debtor lacks the intent to actually pay the secured debt does not change the fact it is "scheduled as contractually due"; the fact there is no "actual payment" requirement appears to strongly affect this analysis. *See, e.g., In re Lynch*, 395 B.R. 346, 349-50 (E.D. N.C. 2008); *In re Willette*, 395 B.R. 308, 325-26 (Bankr. D. Vt. 2008); *In re Parada*, 391 B.R. 492, 498 (Bankr. S.D. Fla. 2008); *In re Quigley*, 391 B.R. 294, 300-02 (Bankr. N.D. W.Va. 2008); *In re Anderson*, 383 B.R. 699, 707 (Bankr. S.D. Ohio 2008); *In re Graham*, 363 B.R. 844, 849 (Bankr. S.D. Ohio 2007); *In re Hartwick*, 359 B.R. 16, 20-21 (Bankr. D. N.H. 2007); *Sorrell*, 359 B.R at 184-87; *In re Castillo*, 2008 WL 454467 at * 3-5 (Bankr. S.D. Fla. Oct. 10, 2008). This approach is sometimes called the "snapshot" approach; the debtor takes a snapshot of debts due on the date the petition is filed, and that picture determines which debts are "scheduled as contractually due," *Lynch*, 395 B.R. at 348-49; *In re Longo*, 364 B.R. 161, 165 (Bankr. D. Conn. 2007), a term understood to mean something like "a debt the debtor has contractually obligated himself to pay."

A minority of courts have reached a contrary conclusion, but in so doing they also claim to focus on the supposed purpose of the means test, which they generally identify as determining the debtor's true ability to pay. According to these courts, this purpose would be frustrated if the debtor is allowed to subtract payments he will not make because it reduces his current monthly income to account for "phantom" expenses. *In re Burden*, 380 B.R. 194, 198-203 (Bankr. W.D. Mo. 2007); *Ray*, 362 B.R. at 685; *In re Harris*, 353 B.R. 304, 307-09 (Bankr. E.D. Okla. 2006); *In re Skaggs*, 349 B.R. 594, 598-99 (Bankr. E.D. Mo. 2006). Under this line of cases, the courts believe *they* are interpreting the plain language of the statute correctly by considering the context in which the phrase "scheduled as contractually due" is used, *Ray*, 362 B.R. at 685, and the minority courts understand this phrase to mean something like "scheduled in the debtor's bankruptcy to be repaid by the debtor."

Still other courts have split the baby, holding it is proper to consider the fact the debtor intends to surrender the collateral securing a debt in applying the means test, but if the property has not actually been surrendered as of the date of the motion to dismiss (and therefore the payments are still due under the contract) the deduction for those payments would be allowed. *Nockerts*, 357 B.R. at 504-05; *Singletary*, 354 B.R. at 467-70, 473. In essence, this third line of cases holds the determination of whether a given debt is "scheduled as contractually due" until at least the hearing on the motion to dismiss, recognizing the debtor's post-petition acts can affect the answer, *Ray*, 362 B.R. at 684, and therefore conceptually lean towards the line of cases that do not allow the deduction of payments on surrendered property when calculating a debtor's current monthly income, if only because such a deduction could be denied by the court at least some of the time.[7] However, these cases suffer perhaps the most serious handicap; while they represent a logical attempt to understand the meaning of a confusing portion of the means test and appear to have reached a reasonable conclusion, their approach is unsupported by the language of the statute. *In re Kelvie*, 372 B.R. 56, 62 n. 13 (Bankr. D. Idaho 2007) ("The means test in chapter 7 calls for a snapshot, not a movie. Tying the analysis to events occurring after bankruptcy but before the date the UST's motion is filed ... is inconsistent with the language and the overall structure of the means test); *see also Kogler*, 368 B.R. at 791.

4. Deductions for Vehicle Expenses

a. Vehicle Ownership Costs

Another contentious issue, and one that comes up in most bankruptcies, is how much a debtor should be able to deduct from his current monthly income for vehicle expenses. As set forth above, Section b(2)(A)(ii) allows the debtor to deduct from his current monthly income amounts intended to cover his expenses that are allowed by the IRS under their National Standards and Local Standards governing the area where the debtor lives. One of the expenses allowed by the IRS is for vehicles, and the question has arisen whether a debtor may take this deduction if he owes his car(s) free and clear of any liens. Debtors (of course) advance the argument that allowing debtors who have car notes to deduct these expenses while not allowing debtors who own their cars to do so

[7] Although it has been pointed out this could lead to gamesmanship, with the debtor reaffirming a debt before the motion to dismiss is heard (thereby leaving the debt "on the books" and allowing the deduction of the payments when calculating current monthly income), but later rescinding the reaffirmation agreement. *Haar*, 360 B.R. at 767.

rewards those who can afford to finance a car and punishes the most poor.[8] As the parties are split, so too are the courts split on the issue, and once again this split is based on their differing understandings of the language of the BAPCPA.

Some of the courts that have looked at the issue hold these expenses are not deductible by the debtor if he owns his car outright, usually because they find that if the debtor does not owe on his vehicle there is no "applicable monthly expense amount" to deduct. *See, e.g., In re Wilson*, 383 B.R. 729, 732-34 (8th Cir. B.A.P. 2008); *Wieland v. Thomas*, 382 B.R. 793, 797-99 (D. Kan. 2008); *In re Meade*, 384 B.R. 132, 135-37 (Bankr. W.D. Tex. 2008); *Pampas*, 369 at 296-97; *In re Slusher*, 359 B.R. 290, 309 (Bankr. D. Nev. 2007); *In re Carlin*, 348 B.R. 795, 797-98 (Bankr. D. Or. 2006); *In re Barraza*, 346 B.R. 724, 727-29 (Bankr. N.D. Tex. 2006). In contrast, other courts (including the only Circuit Court to have considered the issue) focus on the fact the statute contains no exceptions for deductions it allows which will not be incurred and on the fact the statutes shows an ability to distinguish between "applicable" expenses and "actual" expenses, and so read the "applicability" requirement to mean its application depends solely on the number of cars the debtor owns and where the debtor lives regardless of whether any expenses are incurred or not, and so the deduction is allowable even if the debtor has no car note. *See, e.g., In re Ross-Tousey*, 2008 WL 5234070 at * 6-11 (7th Cir. Dec. 17, 2008); *In re Pearson*, 390 B.R. 706, 711-14 (10th Cir. B.A.P. 2008); *In re Kimbro*, 389 B.R. 518, 521-23 (6th Cir. B.A.P. 2008); *Ragle*, 395 B.R. at 400-01; *In re Hedge*, 394 B.R. 463, 466-67 (Bankr. S.D. Ind. 2008); *In re Pearl*, 394 B.R. 309, 311-14 (Bankr. N.D. N.Y. 2008); *In re Armstrong*, 370 B.R. 323, 327-32 (Bankr. E.D. Wash. 2007); *In re Billie*, 367 B.R. 586, 591 (Bankr. N.D. Ohio 2007); *see also In re Farrar-Johnson*, 353 B.R. 224, 230-31 (Bankr. N.D. Ill. 2006) (debtors were allowed to claim housing expense, even though they lived in military housing and paid no mortgage or rent). The issue appears to be one that will not be finally resolved until more of the circuits (and perhaps even the Supreme Court) step in.

Although in the absence of consensus it is impossible to know, courts might be influenced by the fact that allowing debtors to claim vehicle ownership and operating costs based on the amounts fixed by the IRS without regard to expenses actually incurred is the superior position for two basic reasons. First, while determinations of intent under the BAPCPA are difficult to make, if Congress wanted to limit debtors to actual costs incurred it could have easily done so by permitting a deduction for "actual costs or IRS amounts, whichever is lower," but it chose not to do so. Second, even if the debtor is

[8] This may seem counterintuitive, because a wealthy person is presumably able to pay cash for a car more readily than a poor person. However, wealthy people are also more readily able to get credit (and therefore not be forced to pay cash for a jalopy) and cars that are financed are almost always less than five years old, whereas cars that are paid for are often older and need more frequent repairs, and will likely need to be replaced sooner than a newer car.

permitted to take an amount in excess of his actual expenses, this does not insulate his case from dismissal, but rather merely from a presumption of abuse. If the court feels this deduction (probably in conjunction with other facts) means creditors are being treated too unfairly by the debtor it may still dismiss the case under Section b(3). A good overview of these arguments (made in a case allowing the debtor to take the full IRS deductions per vehicle) is found in *In re Zaporski*, 366 B.R. 758, 766-69 (Bankr. E.D. Mich. 2007).

5. Loans from Retirement Accounts

Another fertile area for dispute again relates to retirement accounts. This time, the question is not whether withdrawals from such accounts qualify as income, but whether debtors are permitted to deduct the amount they are required to withhold from their paycheck to repay a loan taken from their 401(k) retirement account in determining their current monthly income on the basis that it is a secured debt scheduled as due. Previously, there was at least some authority that an obligation to repay a loan from the debtor's 401(k) plan could be deducted in determining his current monthly income because the debt is secured by a lien on the debtor's vested interest in the plan, but this authority was recently reversed. *In re Thompson*, 350 B.R. 770, 775-76 (Bankr. N.D. Ohio 2006), *rev'd, Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007). Unfortunately for debtors, all this leaves on the books are decisions finding such payments cannot be deducted because a 401(k) loan is functionally a loan the debtor makes to himself, and so its repayment does not discharge a secured obligation to a third party but rather increases the debtor's own wealth by adding to his retirement account. *In re Smith*, 388 B.R. 885, 887-88 (Bankr. C.D. Ill. 2008); *McVay v. Otero*, 371 B.R. 190, 195-203 (W.D. Tex. Apr. 26, 2007); *In re Lenton*, 358 B.R. 651, 657-58 (Bankr. E.D. Pa. 2006). At best, debtors are reduced to arguing that the need to repay the loan from a retirement account is a "special circumstance" that the court may consider, although even that issue is unsettled. *See, e.g., In re Cribbs*, 387 B.R. 324, 330-32 (Bankr. S.D. Ga. 2008); *Lenton*, 358 B.R. at 661-62.

Barraza also highlights another of the BAPCPA's anomalies as it relates to 401(k) plans. If 401(k) loan repayments cannot be deducted from the debtor's income when performing the means test, this means these funds are available to pay creditors, which in turn means creditors have access to this money in a Chapter 7 bankruptcy but not in a Chapter 13 bankruptcy, where such repayments are not treated as part of the debtor's disposable income. *Barraza*, 346 B.R. at 731 (when asked why this was, the court answered it "confesses that it does not know"). At least one court has tried to posit an explanation for this differential treatment, *Lenton*, 358 B.R. at 660-61, but the author finds its reasoning unconvincing. In the absence of some good reason courts tend to frown upon the treatment of similarly situated parties differently, and at least one court has used this differential treatment to justify its refusal to dismiss pursuant to Section

b(2), because such a dismissal would merely allow the debtor to refile the case under Chapter 13 and receive more beneficial treatment, to the detriment of his creditors. *In re Skvorecz*, 369 B.R. 638, 640-41 (Bankr. D. Colo. 2007). The problem with this is that this way madness lies; if bankruptcy courts were able to ignore all the inconsistent and anomalous provisions of the BAPCPA, there would be very little of the statute left to enforce.

6. Determination of the Existence of Special Circumstances

With so much uncertainty regarding what expenses and debts will and will not be allowed to a debtor under Section b(2), many debtors have chosen to make a fall-back argument, and assert that even if it improper to offset the expense or debt at issue against their current monthly income, the offset should nevertheless be allowed because they have been victimized by "special circumstances" that should be considered by the court. This assertion boils down to the question of what makes a circumstance sufficiently "special" to justify a departure from the mechanistic means test created by Section b(2), a fact specific determination. *In re Templeton*, 365 B.R. 213, 216 (Bankr. W.D. Okla. 2007) (the fact an outcome is "unfair" does not make it "special"). Rather, circumstances are "special" when they are "uncommon, unusual, exceptional, distinct [or] peculiar ..." *In re Martin*, 2007 WL 2043720 at * 3 (Bankr. C.D. Ill. July 16, 2007). Congress, ever helpful, has provided two examples of what it considered sufficiently "special": "a serious medical condition" or "a call or order to active duty in the Armed Forces ..." 11 U.S.C. § 707(b)(2)(B). Outside of these two examples, what authority there is on the issue is (once again) mixed.

In deciding whether special circumstances exist, some courts look at the examples of special circumstances enumerated in the statute — the occurrence of a serious medical condition or a call to active duty with the military — and find special circumstances involve circumstances beyond the debtor's reasonable control and place the burden squarely on the debtor to show there are no reasonable alternatives available to them. *Compare In re Heath*, 371 B.R. 806, 809-12 (Bankr. E.D. Mich. 2007) (case filed as Chapter 13 but converted to Chapter 7 when debtor was forced into early retirement for medical reasons and had her income cut in half; court found existence of special circumstances) *and Lenton*, 358 B.R. at 661-62 (obligation to repay 401(k) loan was a special circumstance; only means debtor had to avoid withdrawal of loan repayment from his paycheck was to repay the loan in full, which he could not do, or quit his job, which was financially irresponsible and would not benefit his creditors) *with Tranmer*, 355 B.R. at 250-51 (desire to keep their current jobs and not to move from their home did not make extra commuting cost a special circumstance; decision was voluntary and debtors made no showing that other alternatives like car-pooling were unavailable). Something which shows the debtor is not trying to negatively affect the interests of his creditors also does not hurt. *See, e.g., Cribbs*, 387 B.R. at 330-31 (loan from retirement account was given

to company which debtors believed would be able to settled debts without bankruptcy, which it proved unable to do).

Other courts note that even the statutory examples of special circumstances can involve voluntary choices made by the debtor (such as the choice to engage in behavior that results in a serious injury or the choice to join the military), and apply what a somewhat more flexible approach solidly grounded in the facts of the case. For example, where the evidence showed the debtor was unable to find a job where he lived and took a job in a different state, the court found the facts to be a special circumstance justifying allowing the debtor to claim the expenses of operating two households. *Graham*, 363 B.R. at 849-51. Legal separation of parties to a joint bankruptcy case is a special circumstance that justifies the additional expenses incurred in keeping two households, *In re Crego*, 387 B.R. 225, 228-29 (E.D. Wisc. 2008); *In re Armstrong*, 2007 WL 1544591 at * 3-4 (Bankr. N.D. Ohio May 24, 2007), as can the fact that moving to the state where the debtor's job is can cause the debtor's spouse to lose custody of children. *Graham*, 363 B.R. at 847

Evidence that the debtors had student loans which they had to pay and which they could not defer or consolidate because they could not be discharged was a special circumstance, even though the debtors did control whether or not they took student loans in the first place, *Templeton*, 365 B.R. at 216-17; *accord, In re Delbecq*, 368 B.R. 754, 756-60 (Bankr. S.D. Ind. 2007); *In re Haman*, 366 B.R. 307, 314-18 (Bankr. D. Del. 2007), although this is not necessarily the case. *In re Champagne*, 389 B.R. 191, 200 (Bankr. D. Kan. 2008) (fact students loans cannot be discharged or deferred does not *per se* mean the debtor is the victim of a special circumstance). Some courts have even proven willing to consider the argument that the fact the debtor's income in the six months prior to filing bankruptcy (i.e., the income used in determining current monthly income) is unnaturally high might be a special circumstance. *In re Tamez*, 2007 WL 2329805 at * 5 (Bankr. W.D. Tex. Aug. 13, 2007) (finding change in debtor's job to be a special circumstance, even though primary effect of the changes was to decrease the debtor's income).