

**The Complete Guide to Means Testing:
A Compendium of Cases and Other Authorities**

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**Means Testing in Chapter 7 and Chapter 13:
A Compendium of Cases and Other Authorities**

Considerations Before Completing Form B22

“Current monthly income.”

What is it?

§1:1 The statute. “[C]urrent monthly income’--(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive) without regard to whether such income is taxable income...and (B) 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)....” (11 U.S.C. §101(10A)(A)-(B))

Income.

§1:2 Debtor’s cases. Some courts construe “income” narrowly, including only monies received as a return on the Debtor’s labor or capital. (In re Zahn, 391 B.R. 840, 845-846 (BAP 8th Cir. 2008) (Chapter 13); see e.g., In re Marti, 393 B.R. 697 (Bankr. Neb. 2008) (Chapter 13) (money withdrawn from IRA); In re Breeding, 366 B.R. 21, 25 (Bankr. E.D. Ark. 2007) (Chapter 13) (proceeds from redemption of certificates of deposit); In re Burrell, 399 B.R. 620 (Bankr. C.D. Ill. 2009 (Chapter 13); see also, discussion at “Calculation of Monthly Income” §2:16-2:37)

§1:3 Creditor’s cases. Other courts perceive “income” more inclusively, defining it in one of two ways. One line of cases construes “income” as encompassing all monies received except Social Security benefits, war crimes reparations, crimes against humanity reparations, and domestic or international terrorism reparations. (In re DeThamplé, 390 B.R. 716, 719 (Bankr. D. Kan. 2008) (Chapter 13) (current monthly income includes “every dime the debtor gets during the relevant period, except for those amounts specifically excluded.”); see also, In re Royal, 397 B.R. 88 (Bankr. N.D. Ill. 2008) (Chapter 13) (earned income tax credits)) Another line of cases may not define it as expansively as all monies received by the Debtor but does include monies received that are intended to replace labor or capital income. (Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir. 2009) (Chapter 7) (replacement income); In re Hedge, 394 B.R. 463 (Bankr. S.D.

Ind. 2008) (Chapter 13) (VA disability payments) The Office of the United States Trustee also perceives “income” broadly, including all species of money received, except specifically enumerated sources and loan proceeds.¹ (See also, discussion at “Calculation of Monthly Income” §§2;16-2:37)

Regular contributions to household expenses.

§1:4 (See, discussion at “Regular contributions to household expenses” §2:28)

What is it not?

Statutory.

§1:5 The statute. Current monthly income excludes “benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.” (11 U.S.C. 101(10A)(B))

§1:6 Social Security act monies. Social Security monies are not income. (11 U.S.C. §101(10A)(B); see also, discussion of “Calculation of Monthly Income, Unemployment Compensation” §2:29-2:30)

§1:7 War crimes/crimes against humanity. Reparations for war crimes and crimes against humanity are not income. (11 U.S.C. §101(10A)(B)) No known published case discusses the war crimes/crimes against humanity exception to the definition of income.

§1:8 International/domestic terrorism. Payments to victims of international or domestic terrorism are not income. (11 U.S.C. §101(10A)(B)) No known published case discusses the international/domestic terrorism exception to the definition of income.

Non-Statutory.

Loans.

¹ Unless otherwise indicated, all citations to the position of the Office of the United States Trustee are taken from handouts by Antonia Darling, Assistant United States Trustee, Region 17, “Means Testing” (July 28, 2008) and from “Statement of the U.S. Trustee Program’s Position on Legal Issues Arising Under the Chapter 13 Disposable Income Test” http://www.justice.gov/ust/ea/bapcpa/docs/Disposable_Income_Ch13_UST_Policies.pdf.

§1:9 Debtor's cases. Proceeds from loans are not income. (In re Almonte, 397 B.R. 659 (Bankr. E.D. N.Y. 2008) (Chapter 13) (credit card advances). The Office of the United States Trustee agrees.

§1:10 Creditor's cases. No known published cases.

“Received” and “Derived.”

§1:11 The statute. “[C]urrent monthly income’--(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor’s spouse receive)...derived during the 6-month period ending on...” (11 U.S.C. §101(10A)(A))

When is income “received”?

§1:12 Debtor's cases. Income is “received” when it comes under the Debtor’s control. (In re Zahn, 391 B.R. 840 (BAP 8th Cir. 2008) (Chapter 13) (distributions from IRA); In re Curcio, 387 B.R. 278 (Bankr. N.D. Fla. 2008) (Chapter 7) (income tax refund); In re Wayman, 351 B.R. 808 (Bankr. E.D. Tex. 2006) (Chapter 13) (Debtor received retirement account when placed under her care, custody and control, not when the funds were removed))

§1:13 Creditor's cases. Income is “received” when it comes into the possession of the Debtor. (In re Burrell, 399 B.R. 620 (Bankr. C.D. Ill. 2009 (Chapter 13) (“derived” does provide an additional criterion))

When is income “derived”?

§1:14 Debtor's cases. “Derived” means earned. (In re Bernard, 397 B.R. 605 (Bankr. D. Mass. 2008) (Chapter 7) (wages); see also, discussion at “Calculation of Income, Income tax refunds” §§2:33-2:34)

§1:15 Creditor's cases. “Derived” has the same meaning as “received.” (In re Burrell, 399 B.R. 620 (Bankr. C.D. Ill. 2009 (Chapter 13) (“derived” does provide an additional criterion))

Must income be both received and derived within the six-month measuring period to be included in current monthly income?

§1:16 Debtor's cases. Income must be both received and derived during the six-month period prior to the petition to be included in current monthly income. In re Wayman, 351 B.R. 808 (Bankr. E.D. Tex. 2006) (Chapter 13) (See also, discussion at “Calculation of Monthly Income, Income tax refunds” §2:33)

§1:17 Creditor's cases. Income need only be received or derived during

the six-month period prior to the petition to be included in current monthly income. (In re Burrell, 399 B.R. 620 (Bankr. C.D. Ill. 2009 (Chapter 13) (income received within six months); (In re Bernard, 397 B.R. 605 (Bankr. D. Mass. 2008) (Chapter 7) (income derived within six months))

What is the measuring period for calculating current monthly income?

§1:18 The statute. “[C]urrent monthly income’ means the average monthly income from all sources....derived during the 6-month period ending on--(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current monthly income required by section 521(a)(1)(B)(ii); or (ii) the date on which the current income is determined by the court for purposes of this title if the debtor does not file the schedule of current monthly income required by section 521(a)(1)(B)(ii)...” (11 U.S.C. §101(10A)(A)(i),(ii))

The default rule.

§1:19 Undisputed. Current monthly income is calculated over the six full months immediately preceding the date of the petition. (11 U.S.C. §101(10A))

An alternate rule.

§1:20 Debtor’s cases. The Debtor may propose an alternate measuring period. (In re Dunford, 408 B.R. 489 (Bankr. N.D. Ill. 2009) (Chapter 13); In re Hoff, 402 B.R. 683 (Bankr. E.D. N.C. 2009) (Chapter 13); In re Beasley, 342 B.R. 280 (Bankr. C.D. Ill. 2006) (Chapter 13) (only the Debtor has standing to seek an alternate measuring period under Section 101(10A)(ii))

§1:21 Creditor’s cases. No known published case holds that the Debtor may not utilize the alternate measuring period of Section 101(10A)(A)(ii). The Office of the United States Trustee does not appear to recognize the alternate measuring period of Section 101(10A)(A)(ii))

Conversion.

To Chapter 7.

Is a Debtor who converts from Chapter 13 to Chapter 7 subject to the abuse provisions of Section 707(b)?

§1:22 Debtor’s cases. Section 707(b) does not apply to cases converted from Chapter 13. (In re Dudley, 405 B.R. 790 (Bankr. W.D. Va. 2009) (Chapter 7); In re Miller, 381 B.R. 736 (Bankr. W.D. Ark. 2008) (Chapter 7); In re Fox, 370 B.R. 639 (Bankr. D. N.J. 2007) (Chapter 7))

§1:23 Creditor's cases. Section 707(b) does apply to cases converted from Chapter 13. (In re Willis, 408 B.R. 803 (Bankr. W.D. Mo. 2009) (Chapter 7); In re Kellett, 379 B.R. 332 (Bankr. D. Or. 2007) (Chapter 7); In re Perfetto, 361 B.R. 27 (Bankr. D. R.I. 2007) (Chapter 7))

Must a Chapter 7 Debtor, who previously filed Form B22C, file Form B22A upon conversion?

§1:24 Debtor's cases. The Debtor need not file Form B22A upon conversion. (In re Dudley, 405 B.R. 790 n. 22 (Bankr. W.D. Va. 2009) (Chapter 7); (Chapter 7); In re Fox, 370 B.R. 639 (Bankr. D. N.J. 2007) (Chapter 7); In re Edwards, 367 B.R. 921 (Bankr. S.D. Ga. 2007))

§1:25 Creditor's cases. The Debtor must file Form B22A upon conversion. (In re Perfetto, 361 B.R. 27 (Bankr. D. R.I. 2007) (Chapter 7); In re Kellett, 379 B.R. 332 (Bankr. D. Or. 2007) (Chapter 7))

What is the correct measuring period for a Debtor who converts?

§1:26 Undisputed. Absent the designation of an alternate period under Section 101(10A)(ii), current monthly income is calculated over the six months prior to the petition and conversion does not re-set that period. (In re Dudley, 405 B.R. 790, n. 17 (Bankr. W.D. Va. 2009) (Chapter 7); In re Fox, 370 B.R. 639, 646 (Bankr. D. N.J. 2007) (Chapter 7); In re Kellett, 379 B.R. 332, 339 (Bankr. D. Or. 2007) (Chapter 7))

To Chapter 13.

Must a Chapter 13 Debtor, who previously filed Form B22A, file Form B22C upon conversion?

§1:27 Unresolved. No known published case holds that a Debtor who converts to Chapter 13 must file Form B22C. (FRBP 1007-I(b)(6); Cf., 11 U.S.C. §541(b)(7), 1322(f), 1325(b)(2), and Form B22C, Lines 54-55, authorizing additional deductions in Chapter 13 means testing)

What is the correct measuring period for a Debtor who converts?

§1:28 (See, discussion at “Conversion, To Chapter 7, What is the correct measuring period for a Debtor who converts?” §1:26)

Completing Form B22.

Which Debtors are subject to means testing?

Only individuals.

§2:1 Scope. Means testing applies only to individual debtors, and not to corporations or other entities. (11 U.S.C. §§707(b)(1), 109(e))

Chapter 7.

Disabled veterans. (Form B22A, Line 1A)

§2:2 Scope. No known published case discusses the “Disabled Veterans” exemption to the means test. But the Office of the United States Trustee contends that the exclusion applies only if the Debtor is “(a) disabled (30% or more disability; see 38 U.S.C. §3741(1) or discharge/release (sic) from active duty for a disability incurred or aggravated in line of duty; and (b) indebtedness occurred primarily during a period while on active duty/homeland defense.” (11 U.S.C. §707(b)(2)(D)(i)) (emphasis original)

Non-consumer Debtors. (Form B22A, Line 1B)

§2:3 Scope. Section 707(b) applies only to individual Debtors whose debts are “primarily consumer debts.” (11 U.S.C. §707(b)(1)) “‘Consumer debt’ means debt incurred by an individual primarily for a personal, family or household purpose.” (11 U.S.C. §101(8))

What does “primarily” mean?

§2:4 Defined. Some courts find that “primarily” means more than one-half in amount. (Zolg v. Kelly (In re Kelly), 841 F.2d 908, 913 (9th Cir. 1988)) Other courts require an evaluation of both the amount of the debt and of the number of debts. (In re Booth, 858 F.2d 1051, 1055 (5th Cir. 1988) (Chapter 7))

Specific instances.

§2:5 Income taxes. Income tax debts are not consumer debts. (In re Brashers, 216 B.R. 59 (Bankr. N.D. Okla.

1998) (Chapter 7)

§2:6 Mortgages. Most courts find mortgages to be consumer debt. (Zolg v. Kelly (In re Kelly), 841 F.2d 908, 913 (9th Cir. 1988) (Chapter 7) (funds used to purchase home); In re Price, 353 F.3d 1135, 1138-1139 (9th Cir. 2004) (Chapter 7); But see, In re Resta, 76 B.R. 728 (Bankr. D. S.D. 1987) (Chapter 7))

§2:7 Student loans. Courts split on whether student loans are consumer debts. (In re Dickerson, 193 B.R. 67 (Bankr. M.D. Fla. 1996) (Chapter 7) (student loan not consumer debt); In re Genti, 185 B.R. 368 (Bankr. M.D. Fla. 1995) (Chapter 7) (student loan not consumer debt); But see, In re Stewart, 215 B.R. 456, affd. 175 F.3d 796 (10th Cir. 1999) (Chapter 7) (student loan consumer debt))

§2:8 Torts. Tort debts are not consumer debts. (In re White, 49 B.R. 809 (Bankr. W.D. N.C. 1985) (Chapter 7); In re Marshalek, 158 B.R. 704 (Bankr. N.D. Ohio 1993) (Chapter 7))

When is the character of the debt determined?

§2:9 Unresolved. The character of the debt as either consumer or non-consumer appears to be determined at the time the funds were acquired. (See e.g., In re Booth, 858 F.2d 1051, 1054-1055 (5th Cir. 1999) (defining non-consumer debt as that “incurred” for business purpose))

Reservists and National Guard Members. (Form B22A, Line 1C)

§2:10 Scope. No known published case considers the “Reservists and National Guard Member” exemption to the means test. Applicable only to cases filed between December 19, 2008, and December 18, 2011, the National Guard and Reservist Debt Relief Act of 2008 exempts from Means Testing members of the reserve components of the Armed Forces or the National Guard who: (a) were called to active duty after September 11, 2001, for a period of at least 90 days and either remain on active duty or were released from active duty within 540 days of the petition; or (b) are currently performing homeland defense activity and have done so for the last 90 days or were performing homeland defense activity for a period of 90 days and were released from duty within 540 days of the petition. (11 U.S.C. §707(b)(2)(D)(ii); FRBP 1007-I(b)(4))

Chapter 13.

§2:11 Scope. Absent payment of all allowed unsecured claims, all Chapter 13 Debtors are subject to means testing. (11 U.S.C. §1325(b); But see, FRBP 1007-I(b)(6) (unless the court orders otherwise, all Chapter 13 Debtors must file Form B22C))

Marital/filing status.

(Form B22A, Line 2/Form B22C, Line 1)

What are the options for Marital/filing status?

Chapter 7.

§2:12 Scope. No known published case defines the “Marital/filing status” for Chapter 7 Debtors. But Forms B22A and B22C, as well as the Office of the United States Trustee, indicate that the Debtor must select one of four options: (1) Unmarried; (2) Married (but separated and not filing jointly--requires a representation of legal separation or that separation was not to beat the Means Test; (3) Married--not filing jointly; and (4) Married--filing jointly. (Form B22A, Line 2)

Chapter 13.

§2:13 Scope. No known published case defines the “Marital/filing status” for Chapter 13 Debtors. (See, Form B22C, Line 1, allowing Debtors only two choices: (1) Married; and (2) Unmarried)

Are joint Debtors who reside separately entitled to two sets of household expenses?

§2:14 Debtor’s cases. Debtors living separately are entitled to two sets of household expenses. (In re Graham, 363 B.R. 844, 849-850 (Bankr. S.D. Ohio 2007) (Chapter 7); see also, discussion at “Special Circumstances, Separate households” §3:48)

§2:15 Creditor’s cases. No known published case denies a second household to joint Debtors residing separately. But the Office of the United States Trustee contends that joint Debtors are entitled to only one deduction for household expenses, even if joint Debtors reside separately.

Calculation of monthly income.

Gross wages, salary, tips, bonuses, overtime, commissions.
(Form B22A, Line 3/Form B22C, Line 2)

§2:16 Undisputed. Current monthly income includes wages and pay/shift differentials, without regard to whether the income is taxable; the calculations should be made based on gross, not net, income. (In re Oliver, 350 B.R. 294 (Bankr. W.D. Tex. 2006) (Chapter 7) (bonus included) The Office of the United States Trustee agrees.

**Income from the operation of a business, profession or farm.
(Form B22A, Line 4/Form B22C, Line 3)**

What expenses are allowed?

§2:17 Debtor's cases. No known published case decides what expenses are deductible.

§2:18 Creditor's cases. No known published case decides what expenses are deductible. But the Office of the United States Trustee contends that expenses must be: ordinary and necessary; does not include depreciation; and is never a negative number.

Should business expenses be deducted in determining current monthly income, as opposed to disposable income?

§2:19 Debtor's cases. No known published case holds that the Debtor may deduct business expenses prior to Line 15 of Form B22A and Line 23 of Form B22C.

§2:20 Creditor's cases. Business expenses should be deducted in calculating disposable income (below Line 15 of Form B22A and Line 23 of Form B22C), rather than in current monthly income. (Drummond v. Wiegand (In re Wiegand), 386 B.R. 238 (BAP 9th Cir. 2008) (Chapter 13); In re Sharp, 394 B.R. 207 (Bankr. C.D. Ill. 2008) (Chapter 13); In re Arnold, 376 B.R. 652 (Bankr. M.D. Tenn. 2007 (Chapter 13); see generally, Redmiles and Salahuddin, *The Net Effect: Debtors With Business Income Are Permitted to Deduct Ordinary and Necessary Expenses in Calculating Current Monthly Income*, XXVII ABI Journal 8, 16, 56-57, October 2008))

**Rent and other real property income.
(Form B22A, Line 5/Form B22C, Line 4)**

What expenses are allowed?

§2:21 Debtor's cases. No known published case decides what expenses are deductible.

§2:22 Creditor's cases. No known published case decides what expenses are deductible. But the Office of the United States Trustee contends that expenses must be: ordinary and necessary; does not include depreciation; and is never a negative number.

Interest, dividends, and royalties.
(Form B22A, Line 6/Form B22C, Line 5)

§2:23 Unresolved. No known published case discussing interest as income. But the Office of the United States Trustee contends that there is no de minimis exception and that it includes dividends automatically reinvested, as well as cash dividends.

Pension and retirement income.
(Form B22A, Line 7/Form B22C, Line 6)

At retirement.

§2:24 Debtor's cases. No known published case addressing pension/retirement monies as "income" under the means test.

§2:25 Creditor's cases. No known published case addressing pension/retirement monies as "income" under the means test. But the Office of the United States Trustee contends that it includes annuities, state/local government, retirement, 401(k) and IRA payments, but excludes Social Security payments.

Premature distributions.

§2:26 Debtor's cases. Premature withdrawals from retirement accounts are not income. (In re Zahn, 391 B.R. 840 (BAP 8th Cir. 2008) (Chapter 13); In re Marti, 393 B.R. 697 (Bankr. Neb. 2008) (Chapter 13); In re Wayman, 351 B.R. 808 (Bankr. E.D. Tex. 2006) (Chapter 13); see generally, James W. McNeilly, Jr. and David P. Leibowitz, "Withdrawals from Tax-deferred Retirement Accounts: Included in Current Monthly Income? XXVII Am. Bankr. Inst. J. 12, 58-59 (June 2008))

§2:27 Creditor's cases. Premature distributions from retirement funds are income. (In re DeThamplé, 390 B.R. 716, 719 (Bankr. D. Kan. 2008) (Chapter 13); see generally, James W. McNeilly, Jr. and David P. Leibowitz, "Withdrawals from Tax-deferred Retirement Accounts: Included in Current Monthly Income? XXVII Am. Bankr. Inst. J. 12, 58-59 (June 2008)) The Office of the United States Trustee contends that it includes annuities, state/local government, retirement, 401(k) and IRA payments, but excludes Social Security payments.

Regular contributions to household expenses.
(Form B22A, Line 8/Form B22C, Line 7)

§2:28 Unresolved. Amounts paid by a third party “on a regular basis” for the household expenses of the Debtor or the Debtor’s dependents are income. (11 U.S.C. §101(10A)(B)) Existing case law is sufficiently fact-specific to be of useful precedential value. But the Office of the United States Trustee contends that it includes: “ amounts paid monthly, quarterly, annual,” and without regard to whether there is a written agreement or understanding with the person contributing; “payments from roommate, partner, parents or relative, regardless of whether living with the debtor” and payments made directly to creditors on behalf of debtor (rent, car payment, insurance, tuition” are included. This does not include payments from a non-filing spouse, whose income is already listed in column B of Form B22A and Form B22C.

Unemployment compensation.
(Form B22A, Line 9/Form B22C, Line 8)

§2:29 Debtor’s cases. Unemployment benefits are derived from the Social Security Administration and, therefore, are not income. (In re Munger, 370 B.R. 21, 22 (Bankr. D. Mass. 2007) (Chapter 7); In re Sorrell, 359 B.R. 167, 184-185 (Bankr. S.D. Ohio 2007) (Chapter 7))

§2:30 Creditor’s cases. Unemployment benefits are income. (In re Baden, 396 B.R. 617 (Bankr. M.D. Pa. 2008) (Chapter 13)) The Office of the United States Trustee contends that unemployment benefits are income and notes that even if the Debtor disagrees, that he or she must disclose unemployment benefits on Forms B22A and B22C.

Income from all other sources.
(Form B22A, Line 10/Form B22C, Line 9)

Disability payments.

§2:31 Debtor’s cases. Disability payments are not income. No known published cases.

2:32 Creditor’s cases. Disability payments are income. (In re Blausey vs. United State Trustee, 552 F.3d 1124 (9th Cir. 2009) (Chapter 7) (privately funded disability insurance); In re Hedge, 394 B.R. 463 (Bankr. S.D. Ind. 2008) (Chapter 13) (VA disability payments); In re Waters, 384 B.R. 432, 437 (Bankr. N.D. W. Va. 2008) (VA disability payments)) The Office of the United States Trustee agrees.

Income tax refunds.

§2:33 Debtor’s cases. Income tax refunds are not income. (In re Forbish, 414 B.R. 400 (Bankr. N.D. Ill. 2009) (Chapter 13); In re Curcio, 387 B.R. 278 (Bankr. N.D. Fla. 2008) (Chapter 7); In re Spraggins, 386 B.R. 221 (Bankr. E.D. Wis. 2008) (Chapter 13); In re Bardo, 379 B.R. 524 (Bankr. M.D. Pa. 2007) (Chapter 13); In re Johnson, 346 B.R. 256 (Bankr. S.D. Ga. 2006) (Chapter 13)) The Office of the United States Trustee concurs.

§2:34 Creditor’s cases. No known published case holds that income tax refunds are income.

Liquidation of an asset.

§2:35 Debtor’s cases. The proceeds obtained by the liquidation of an asset are not income. (In re Breeding, 366 B.R. 21, 25 (Bankr. E.D. Ark. 2007) (Chapter 13) (proceeds from redemption of certificates of deposit))

§2:36 Creditor’s cases. No known published cases holds that the proceeds from the liquidation of an asset are income.

Other.

§2:37 Unresolved. The United States Trustee contends “Income from all other sources” includes gambling winnings,² cash gifts, litigations proceeds, trust income; it does not include Social Security benefits or loan proceeds.

Is the Debtor above or below median income?

Applicable median family income.
(Form B22A, Line 14/Form B22C, Line 16)

State of residence.

§2:38 Neutral. No known published cases. But the Office of the United States Trustee uses three default rules. First, use the state of residence of the Debtor as of the date of filing. Second, if the Debtor has two households, use the median figures where most members of the household

² The position of the Office of the United States Trustee on gambling winnings is ambiguous. In Chapter 13 cases, the Office of the United States Trustee contends that only “net gambling” proceeds need be included. In Chapter 7 cases, the Office of the United States Trustee omits the qualifier “net” and leaves unclear whether the Debtor must report gross or net gambling proceeds.

reside. Third, if there is no majority for the purposes of the second rule, use the state of the spouse with the highest income.

Household size.

How is “household size” defined?

§2:39 Debtors’ cases. Cases favoring Debtors define household size in two ways. One line of cases incorporates the Census Bureau definition, “all of the people, related and unrelated who occupy a housing unit.” (*In re Epperson*, 409 B.R. 503 (Bankr. D. Ariz. 2009) (Chapter 7); *In re Smith*, 396 B.R. 214 (Bankr. W.D. Mich. 2008) (Chapter 13); *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007) (Chapter 7)) “Housing unit” is one with separate living and eating accommodations and direct access from the outside or through a common hallway. (*In re Bostwick*, 406 B.R. 867, 873 (Bankr. D. Minn. 2009) (Chapter 13)) A second line of cases defines a household as those who both live together and are financially dependent. (*In re Herbert*, 405 B.R. 165 (Bankr. W.D. N.C. 2008) (Chapter 7); *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007) (Chapter 7))

§2:40 Creditor’s cases. The Office of the United States Trustee contends that household means the Debtor, the Debtor’s spouse and those persons that the Debtor could claim as a dependent for tax purposes.³ But the Office of the United States Trustee has

³ “The Internal Revenue Code defines two types of dependents: qualifying children and qualifying relative. Qualifying child means an individual who (i) bears a relationship to the taxpayer, (ii) has the same abode for more than half the year, (iii) is less than 19, 24 (if a student), or any age, if disabled, and (iv) has not provided more than half his own support. ‘Bears a relationship’ means being the child, sub-child, sibling, step-sibling, descendent of a sibling or step-sibling....A qualifying relative is one who (i) bears a relationship with the taxpayer, (ii) has less gross income than the exemption amount, (iii) receives from the taxpayer over half of the individual’s support, and (iv) is not a qualifying child. ‘Bears a relationship’ means a child, sub-child, sibling, step-sibling, ancestor, step-parent, step-parent, niece or nephew, close in-law or any individual living in the household with the taxpayer.” (David Carlson, Means Testing: The Failed Bankruptcy Revolution of 2005, 15 Am. Bankr. Inst.L.Rev. 223, 271-272 (2007); see also, IRC §152; IRS Publication 501)

indicated they will recognize “reasonable exceptions” to the rule (e.g. a long standing economic unit of unmarried individuals and their children)

What is the correct date for measuring household size?

§2:41 Unresolved. Household size is measured on the date of the petition. (In re Stansell, 395 B.R. 457 (Bankr. D. Idaho 2008) (Chapter 13) (Debtor’s spouse died within six months before the petition); But see, In re Anderson, 367 B.R. 727 (Bankr. D. Kansas 2007) (Chapter 13) (determined on the effective date of the plan))

Unborn children.

§2:42 Debtor’s cases. No known published cases holds that unborn children may be counted in determining household size.

§2:43 Creditor’s cases. Unborn children are not counted in determining household size. (In re Fleishman, 372 B.R. 64 (Bankr. D. Or. 2007) (Chapter 13); In re Pampas, 369 B.R. 290 (Bankr. M.D. La. 2007) (Chapter 7))

Marital adjustment.

(Form B22A, Line 17/Form B22C, Lines 13 & 19)

§2:44 Unresolved. The Office of the United States Trustee contends that all of the non-Debtor spouse’s income should be included except withholding taxes, student loan payments, prior support obligations, debt payments on which only the non-filing spouse is liable, and car payments for the non-filer spouse if the vehicle is not included in the transportation expense.

Calculations of Deductions from Income

Deductions under Standards of the Internal Revenue Service.

May the Debtor “double dip” (deduct the same expense under both the IRS standards and either as an “Other Necessary Expense” or as a secured debt)?

§2:45 Undisputed. All courts that have considered the issue have held that the Debtor may not fully deduct the same expense twice, once under the Internal Revenue Service standards and once as either an Other Necessary Expense or a secured debt. (In re Skaggs, 349 B.R. 594, 597 (Bankr. E.D. Mo. 2006) (Chapter 7) (mortgage/ rent expense and secured debt); In re Lara, 347 B.R. 198, 202 (Bankr. N.D. Tex. 2006) (Chapter 13) (telephone as Other Necessary Expense); In re Demonica, 345 B.R. 895 (Bankr. N.D. Ill. 2006) (Chapter 13) (mortgage/ rent expense and secured debt); In re Hardacre, 338 B.R. 718, 724-728 (Bankr. N.D.

Tex. 2006) (Chapter 13))

Food, clothing and other items.
(Form B22A, Line 19A/Form B22C, Line 24A)

Household size.

§2:46 (See, discussion at “Is the Debtor above or below median income, Household size” §§2:39-2:40)

What is included?

§2:47 **Un resolved.** The Office of the United States Trustee contends that the standard for food, clothing and other items is very broad and covers school lunches, meals at or away from home (unless it is an un-reimbursed business expense), recreation and entertainment and miscellaneous personal expenses.

Health care.
(Form B22A, Line 19B/Form B22C, Line 24B)

Household members under 65 years of age.

§2:48 **Debtor’s cases.** Debtor is entitled to the national health care standard, even if he or she spends less than that amount. (In re Melancon, 400 B.R. 521 (Bankr. M.D. La. 2009) (Chapter 13))

§2:49 **Creditor’s cases.** No known published case limits the Debtor to the amount of health care expenses actually expended up to the amount of the national standard.

Household members 65 years of age or older.

§2:50 **Debtor’s cases.** Debtor is entitled to the national health care standard, even if he or she spends less than that amount. (In re Melancon, 400 B.R. 521 (Bankr. M.D. La. 2009) (Chapter 13))

§2:51 **Creditor’s cases.** No known published case limits the Debtor to the amount of health care expenses actually expended up to the amount of the national standard.

Housing and Utilities: Non-mortgage expenses.
(Form B22A, Line 20A/Form B22C, Line 25A)

Where is the Debtor’s residence?

§2:52 **Unresolved.** No known published case resolve the issue of the Debtor’s residence. (See, discussion at “Is the Debtor above or below

median income, State of Residence” §2:38 for position of the United States Trustee for Debtor’s with multiple residences)

What expenses are properly included in non-mortgage expenses?

§2:53 Unresolved. The Office of the United States Trustee contends that the housing--non-mortgage expense includes maintenance and repairs costs, homeowners association dues, condo fees, gas, electricity, water, fuel oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, and basic home telephone and long-distance service. (In re Stimac, 366 B.R. 889, 892 (Bankr. E.D. Wis. 2007) (Chapter 13) (includes basic home telephone service); In re Carlton, 362 B.R. 402, 411 (Bankr. C.D. Ill. 2007) (Chapter 13) (includes basic home telephone service))

**Housing and Utilities: Mortgage/Rent expenses.
(Form B22A, Line 20B/Form B22C, Line 25B)**

Where is the Debtor’s residence?

§2:54 Unresolved. No known published case decides the issue. (See, discussion at “Is the Debtor above or below median income, State of Residence” §2:38 for position of the United States Trustee for Debtor’s with multiple residences)

What expenses are properly included in mortgage expenses?

§2:55 Unresolved. No known published case has discussed what expenses are properly included in the Housing and Utilities: Mortgage/Rent expense. But the Office of the United States Trustee contends that it include principal and interest on a mortgage loan, rent, homeowners/renters insurance and local property taxes.

What is the proper amount of the mortgage/rent expense?

Homeowners.

§2:56 Debtor’s cases. The Internal Revenue Service standard is a fixed allowance, and not a cap. (In re Musselman, 394 B.R. 801 (E.D. N.C. 2008) (Chapter 13); In re Brisco, 374 B.R. 1 (Bankr. D.C. 2007) (Chapter 13); In re Farrer-Johnson, 353 B.R. 224, 230-231 (Bankr. N.D. Ill. 2006) (Chapter 13) (Debtor lived rent free in military housing); In re Demonica, 345 B.R. 895, 903 (Bankr. N.D. Ill. 2006) (Chapter 13)) The Office of the United States Trustee agrees.

§2:57 Creditor's cases. The Internal Revenue Service standard is a cap, not a fixed allowance. (In re Hardacre, 338 B.R. 718, 724-728 (Bankr. N.D. Tex. 2006) (Chapter 13))

Renters.

§2:58 Debtor's cases. The Internal Revenue Service standard is a fixed allowance, and not a cap. (In re Reinstein, 393 B.R. 838 (Bankr. E.D. Wis. 2008) (Chapter 13); In re Swan, 368 B.R. 12, 13-15 (Bankr. N.D. Cal. 2007) (Chapter 13); In re Naslund, 359 B.R. 781 (Bankr. D. Mont. 2006) (Chapter 13)) The Office of the United States Trustee agrees.

§2:59 Creditor's cases. The Internal Revenue Service standard is a cap, not a fixed allowance. (In re Rezendes, 368 B.R. 55 (Bankr. D. Haw. 2007) (Chapter 13))

Must the Debtor have a “going forward” expense to claim the mortgage/rent expense?

§2:60 (See, discussion at “Debtors with vehicles not encumbered by a lien” §§2:82-2:83) The Office of the United States Trustee contends that the Debtor must actually pay mortgage/rent expense on the date of the petition to claim this deduction.

May the Debtor claim more than one housing expense?

§2:61 (See, discussion at “Are joint Debtors who reside separately entitled to two sets of household expenses?” §§2:14-2:15)

Housing and Utilities: Adjustment. (Form B22A, Line 21/Form B22C, Line 26)

What expenses are properly included in the housing and utilities adjustment?

§2:62 Unresolved. Line 21 of Form B22A and Line 26 of Form B22 captures housing and utility expenses not fully captured by Lines 20A and 20B of Form B22A and Lines 25A and 25B of Form B22C. (Form B22A, Line 21 and Form B22C, Line 26) The Office of the United States Trustee agrees.

Is the housing and utilities adjustment the proper place to deduct mortgage and/or rent expenses that are in excess of IRS standards?

§2:63 Debtor's cases. Excess housing costs are properly captured in the “Housing and Utilities: Adjustment.” (In re Turner, 376 B.R. 370 (Bankr. D. N.H. 2007) (Chapter 7) (pest control to kill carpenter ants))

§2:64 Creditor's cases. Excess housing costs are not properly captured in the "Housing and Utilities: Adjustment." (In re Skaggs, 349 B.R. 594 (Bankr. E.D. Mo. 2006) (Chapter 7))

**Transportation: Vehicle Operation/Public Transportation.
(Form B22A, Line 22A/Form B22C, Line 27A)**

Where is the Debtor's residence?

§2:65 Unresolved. No known published case has decided the issue of the Debtor's state of residence. (See, discussion at "Is the Debtor above or below median income, State of Residence §2:38 for position of the United States Trustee for Debtor's with multiple residences)

What is a vehicle?

§2:66 Unresolved. No known published case defines "vehicle." (See, In re Casey, 356 B.R. 519 (Bankr. E.D. Wash. 2006) (Chapter 13) (assuming motorcycle a vehicle). The Office of the United States Trustee contends that the vehicle claimed must be one that is "licensable 'street ready'" and it must be self-propelled (e.g. campers or trailers designed without engines do not qualify).

How many operation expenses may be claimed?

General principles.

§2:67 Undisputed. The Debtor may claim a maximum of two vehicles. (Form B22A, Line 22A and Form B22C, Line 27A) The Office of the United States Trustee concurs.

Individual Debtors with more than one vehicle.

§2:68 Debtor's cases. A single Debtor may claim an operation expense for two vehicles. (In re Zaporski, 366 B.R. 758 (Bankr. E.D. Mich. 2007) (Chapter 7); Cf., Transportation: Ownership, Individual Debtor with more than one vehicle §§2:76-2:77)

§2:69 Creditor's cases. No known published case holds that a single Debtor may not deduct the expense of more than one vehicle. The position of the Office of the United States Trustee is not known. (But see, "Transportation: Ownership, Individual Debtors with more than one vehicle" §§2:76-2:77)

What is included in the operation allowance?

§2:70 Scope. No known published case defines the scope of the vehicle operation allowance. But the Office of the United States Trustee contends it includes “gas, oil, tires, etc.”

Debtors with no vehicles.

§2:71 Scope. A Debtor who owns a vehicle is entitled to an operating expense deduction. (Form B22A, Lines 22A and 22B and Form B22C, Lines 27A and 27B) The Office of the United States Trustee agrees.

\$200 for older or high mileage vehicles.

§2:72 Unresolved. Debtors not entitled to claim an “ownership” transportation expense, may take an additional \$200 “operating expense” for vehicles that are older than 6 model years and/or that have at least 75,000 miles. (In re Martinez, 391 B.R. 424 (E.D. Wis. 2008) (Chapter 7); In re Carlin, 348 B.R. 795 (Bankr. D. Or. 2006) (Chapter 13) The Office of the United States Trustee agrees.

Transportation: Additional Public Transportation Expense. (Form B22A, Line 22B/Form B22C, Line 27B)

§2:73 Scope. No known published case has decided a case involving the public transportation expense.

Transportation: Vehicle Ownership/Lease Expense. (Form B22A, Lines 23-24/Form B22C, Lines 28-29)

What is a vehicle?

§2:74 Scope. No known published case defines “vehicle.” (See, In re Casey, 356 B.R. 519 (Bankr. E.D. Wash. 2006) (Chapter 13) (assuming motorcycle a vehicle); See also, “Transportation: Vehicle Operation, What is a Vehicle” §2:66 for the position of the Office of the United States Trustee for the definition of a vehicle.

How many ownership expenses may be claimed?

General principles.

§2:75 Undisputed. The Debtor may claim a maximum of two vehicles. (Form B22A, Lines 23 and 24 and Form B22C, Lines 28 and 29) The Office of the United States Trustee concurs.

Individual Debtors with more than one vehicle.

§2:76 Debtor's cases. A single Debtor may claim an ownership expense for two vehicles. (In re Styles, 397 B.R. 771 (Bankr. W.D. Va. 2008) (Chapter 13); In re Comstock, 389 B.R. 888 (Bankr. N.D. Cal. 2008) (Chapter 7); In re Scurlock, 385 B.R. 814 (Bankr. M.D. N.C. 2008) (Chapter 13); In re Barrett, 371 B.R. 860, 863 (Bankr. S.D. Ill. 2007) (Chapter 13); In re Zaporski, 366 B.R. 758 (Bankr. E.D. Mich. 2007) (Chapter 7); See also, discussion at “Transportation: Vehicle Operation/Public Transportation Expense” §2:69)

§2:77 Creditor's cases. No known published case denies an individual Debtor more than one vehicle ownership expense. The Office of the United States Trustee contends that a single Debtor may only claim an ownership expense for one vehicle, at least in a Chapter 13.

What is included in the ownership expense?

§2:78 Scope. The ownership expense extends to vehicles encumbered by a lien, and possibly to vehicles not encumbered by a lien (See, discussion at “Transportation Ownership/Lease Expenses, Debtors with vehicles not encumbered by a lien” §2:82-2:83), as well as to leased vehicles. (Form B22A, Line 23 and Form B22C, Line 28)

What is the proper amount of the ownership expense?

Purchased vehicles.

§2:79 Debtor's cases. The Internal Revenue Service standard is a fixed allowance, and not a cap. (In re Kimbro, 389 B.R. 518 (6th Cir. BAP 2008) (Chapter 13); In re Musselman, 394 B.R. 801 (E.D. N.C. 2008) (Chapter 13))

§2:80 Creditor's cases. The Internal Revenue Service standard is a cap, and not a fixed allowance. ((In re Ransom, 577 F.3d 1026 (9th Cir. 2009) (Chapter 13) (holding a Debtor who owned a vehicle free and clear of liens was not entitled to an ownership expense); In re Slusher, 359 B.R. 290 (Bankr. Nev. 2007) (Chapter 13))

Leased vehicles.

§2:81 Unresolved. No known published cases limits the Debtor to the amount of the Internal Revenue Service standard, in instances where the Debtor spends less than the Internal Revenue Service standard. The Office of the United States Trustee agrees that the

standard is a fixed allowance, and not a cap

Who may claim an ownership expense?

Debtors with vehicles not encumbered by a lien.

§2:82 Debtor's cases. Debtors may claim an ownership expense without regard to whether the vehicle is encumbered by a lien or subject to a lease. (In re Washburn, 579 F.3d 934 (8th Cir. 2009) (Chapter 13); In re Tate, 571 F.3d 423 (5th Cir. 2009) (Chapter 7); In re Ross-Tousey, 549 F.3d 1148 (7th Cir. 2008) (Chapter 7); In re Kimbro, 389 B.R. 518 (BAP 6th Cir. 2008) (Chapter 13))

§2:83 Creditor's cases. Debtors may only claim an ownership expense if the vehicle is encumbered by a lien or subject to a lease. (In re Ransom, 577 F.3d 1026 (9th Cir. 2009) (Chapter 13); Babin v. Wilson (In re Wilson), 384 B.R. 729 (BAP 8th Cir. 2008) (Chapter 13); Grossman v. Sawdy, 384 B.R. 199 (E.D. Wis. 2008) (Chapter 13); Wieland v. Thomas (In re Wieland), 382 B.R. 793 (D. Kan. 2008) (Chapter 7); Fokkena v. Hartwick (In re Hartwick), 373 B.R. 645 (D. Minn. 2007) (Chapter 7)) The Office of the United States Trustee agrees.

Debtors with vehicles encumbered by a lien but which are to be surrendered.

§2:84 See, discussion at “Vehicle Ownership/Lease Expense, May the Debtor deduct a secured debt where he or she has declared an intention to surrender the collateral?” §§2:120-2:121) The Office of the United States Trustee contends that the Debtor may not claim an ownership expense where the Debtor has declared an intention to surrender the vehicle.

Taxes. (Form B22A, Line 25/Form B22C, Line 30)

What is included in the tax expense?

§2:85 Debtor's cases. No known published case defines the scope of the tax deduction. But the Office of the United States Trustee contends that it includes income taxes, Social Security, Medicare, state and local taxes. The Office of the United States Trustee contends that this deduction excludes the taxes paid by a non-filing spouse, which should be deducted under the Marital Adjustment.

§2:86 Creditor's cases. No known published case defines the scope of the tax deduction.

What is the proper measure of the tax expense: taxes incurred vs. taxes deducted?

§2:87 Debtor's cases. No known published case allows the Debtor to deduct taxes withheld from income, if those taxes exceed the Debtor's actual tax liability.

§2:88 Creditor's cases. All courts allow the Debtor to claim only the amount of tax incurred, not the amount of the tax withheld. (In re Stimac, 366 B.R. 889 (Bankr. E.D. Wis. 2007) (Chapter 13); In re Raybon, 364 B.R. 587 (Bankr. S.C. 2007) (Chapter 13); In re Balcerowski, 353 B.R. 581 (Bankr. E.D. Wis. 2006) (Chapter 13); Baxter v. Johnson (In re Johnson), 346 B.R. 256 (Bankr. S.D. Ga. 2006) (Chapter 13))

By what method should taxes be calculated?

§2:89 Unresolved. The Debtor is entitled to estimate taxes. (In re Raybon, 364 B.R. 587 (Bankr. S.C. 2007) (Chapter 13) (Debtor entitled to make a reasonable and good faith estimate of tax liability); In re Stimac, 366 B.R. 889 (Bankr. E.D. Wis. 2007) (Chapter 13) (rebuttable presumption that the amount of taxes actually paid, as evidenced by the most recent tax return, divided by twelve is an accurate estimate of taxes); In re Spraggins, 386 B.R. 221, 226 (Bankr. E.D. Wis. 2008) (Chapter 13) (the Debtor is entitled to make a reasonable and good faith estimate of the amount of the tax))

**Involuntary deductions for employment.
(Form B22A, Line 26/Form B22C, Line 31)**

What is included in the involuntary deductions from employment expense?

§2:90 Scope. Mandatory deductions are those of which the failure to pay is likely to result in loss of employment (In re Barraza, 346 B.R. 724, 730 (Bankr. N.D. Tex. 2006) (Chapter 7) Moreover, the claimed expense must actually be withheld from the Debtor's paycheck, and not merely be an expense that the Debtor incurs to pursue his vocation. (In re Turner, 376 B.R. 370 (Bankr. D. N.H. 2007) (Chapter 7) (work shoes and clothing purchased by the Debtor not allowed)) The Office of the United States Trustee contends that involuntary deductions from employment include such things as mandatory retirement contributions, union dues, and uniform costs.

Loans against retirement plans.

§2:91 Undisputed. Payment of a loan against a 401(k) is not an involuntary deduction, even though the Debtor's only method to stop the deduction is to quit his or her job. (In re Turner, 376 B.R. 370 (Bankr. D. N.H. 2007) (Chapter 7); In re Barraza, 346 B.R. 724, 730 (Bankr. N.D. Tex. 2006) (Chapter 7); In re Lenton, 358 B.R. 651, 658-660 (Bankr. E.D. Pa. 2006) (Chapter 7); see also, discussion at "Deduction for Debt Payment, Is a 401(k) loan a secured debt for which a deduction may be taken?" §§2:125-2:126) The Office of the United States Trustee agrees.

Life Insurance. (Form B22A, Line 27/Form B22C, Line 32)

What is included in the life insurance expense?

§2:92 Scope. No known published case has decided the scope of the life insurance deduction. But the Office of the United States Trustee contends that the Debtor may deduct the cost of term life insurance; investment or cash value life insurance (e.g. whole life or universal life policies do not qualify.) (See also, Form B22A, Line 27 and Form B22C, Line 32)

Whose life may be insured?

§2:93 Scope. No known published case has decided the scope of the life insurance deduction. But Forms B22A and B22C suggest that only insurance on the life of the Debtor may be deducted; no deduction may be taken for a non-filing spouse or dependents of the Debtor. (See, Form B22A, Line 27 and Form B22C, Line 32) The Office of the United States Trustee agrees.

Court-ordered Payments. (Form B22A, Line 28/Form B22C, Line 33)

§2:94 Scope. No known published decision has ruled on the scope of the "court-ordered payments" deduction. But Forms B22A and B22C indicated that the Debtor may deduct the ongoing amount of any domestic support obligation that has actually been ordered by a court of competent jurisdiction; voluntary contributions may not be deducted. (See, Form B22A, Line 28 and Form B22C, Line 33) The Office of the United States Trustee agrees.

Education. (Form B22A, Line 29/Form B22C, Line 34)

Employment.

§2:95 Scope. No known published case defines the scope of the education expense deduction. But Forms B22A and B22C indicate that the Debtor is entitled to deduct the amount actually expended for education that is a condition of employment. (See, Form B22A, Line 29 and Form B22C, Line 34) The Office of the United States Trustee agrees and add it that lifetime learning or enrichment education is insufficient.

Children.

Physically or Mentally Challenged Children.

§2:96 Scope. No known published case defines the scope of the education expense deduction. But Forms B22A and B22C indicate that the Debtor is entitled to deduct the amount actually expended for education that is actually expended for the a physically or mentally challenged dependent child, which is not provided by the public school system. (See, Form B22A, Line 29 and Form B22C, Line 34) The Office of the United States Trustee agrees, but also conditions the expense on the requirement that the expense be necessary for the “health and welfare” of the recipient and that Debtor may not “double dip” with the expenses on Form B22A, Lines 30 and 38 and Form B22C, Lines 35 and 43.

All Other Children.

§2:97 Scope. See, discussion at “Other Necessary Expense: Childcare” §2:98 and at “Education Expenses for Dependent Children under 18” §2:109.

Childcare.

(Form B22A, Line 30/Form B22C, Line 35)

§2:98 Scope. No known published case defines the scope of the “childcare” deduction. But Forms B22A and B22C indicate that the Debtor may deduct actual cost of childcare (e.g. baby-sitting, day care, nursery and pre-school. (See, Form B22A, Line 30 and Form B22C, Line 35) The Office of the United States Trustee agrees, but also conditions the expense on the requirement that the expense be necessary for “health and welfare” and may not be allowed if at least one of the Debtor is a “stay at home” parent.

Healthcare.

(Form B22A, Line 31/Form B22C, Line 36)

What is included in the healthcare expense?

§2:99 Scope. No known published case has decided the scope of the healthcare expense. But Forms B22A and B22C indicate that the Debtor

may deduct out of pocket medical expenses (not reimbursed by insurance or a health savings account) required for health and welfare in excess of the standard deduction (Form B22A, Line 19B and Form B22C, Line 24B); do not include the premiums for health insurance or health savings account listed on Form B22A, Line 34 or Form B22C, Line 39) (See, Form B22A, Line 31 and Form B22C, Line 36) The Offices of the United States Trustee agrees and adds that expenses in this category commonly include deductibles, medication, therapies and co-pays; elective and cosmetic procedures expenses are not included.

Whose expenses are included?

§2:100 Scope. The expense covers the Debtor and the Debtor's dependents. (See, Form B22A, Line 31 and Form B22C, Line 36; In re Haley, 354 B.R. 344 (Bankr. D. N.H. 2006) (Chapter 13) (Debtors not entitled to claim deduction for daughter not claimed as a dependent on Schedule I))

Telecommunication.
(Form B22A, Line 32/Form B22C, Line 37)

What is included in this deduction?

§2:101 Scope. The Debtor may deduct actually expended telecommunication expenses (other than basic home telephone and cell phone service) to the extent necessary for health and welfare. (In re Carlton, 362 B.R. 402, 411 (Bankr. C.D. Ill. 2007) (Chapter 13) (basic home telephone service is properly included in "Housing and Utilities; non-mortgage expense; see also, Form B22A, Line 32 and Form B22C, Line 37) The Office of the United States Trustee agrees and adds that cable/satellite television are not deductible unless necessary for health and/or welfare and that the Debtor may not "double dip" with business expenses (Form B22A, Lines 4b and 5b and Form B22C, Lines 3b and 4b).

Whose expenses are included?

§2:102 Scope. The expense covers the Debtor and the Debtor's dependents. (See, Form B22A, Line 32 and Form B22C, Line 37; In re Haley, 354 B.R. 344 (Bankr. D. N.H. 2006) (Chapter 13) (Debtors not entitled to claim deduction for daughter and parent not claimed as a dependent on Schedule I))

Health Insurance, Disability Insurance, and Health Savings Account Expenses.
(Form B22A, Line 34/Form B22C, Line 39)

What is included in this deduction?

§2:103 Scope. No known published case has decided the scope of the health insurance, disability insurance, and health savings account deduction. But Forms B22A and B22C indicate that the Debtor may deduct the amount reasonably necessary for health and disability insurance and a health savings account. (See, Form B22A, Line 34 and Form B22C, Line 39)

Whose expenses are included?

§2:104 Scope. No known published case has decided whose expenses may be deducted. But Forms B22 A and B22C indicate that the deduction is limited to the Debtor and dependents. (See, Form B22A, Line 34 and Form B22C, Line 39)

Contributions to Care of Household or Family. (Form B22A, Line 35/Form B22C, Line 40)

§2:105 Debtor's cases. No known published case holds that the family member to be supported must be either elderly, chronically ill or disabled or be unable to pay expenses.

§2:106 Creditor's cases. The family member to be supported must be both elderly, chronically ill or disabled and unable to pay for expenses. (In re Harris, 415 B.R. 756, 761 (E.D. Cal. 2009) (Chapter 13) (contribution to daughter, a college student who resided away from home); In re Walker, 383 B.R. 830 (Bankr. N.D. Ga. 2008) (Chapter 7); In re Hicks, 370 B.R. 919 (E.D. Mo. 2007) (Chapter 7)) The Office of the United States Trustee contends the expense must have a historical basis; be an actual, not anticipated, expense; be reasonable and necessary; for an elderly, chronically ill or disabled person unable to pay such expenses; and the family member must reside with the Debtor or be a member of the immediate family (e.g. parent, grandparent, sibling, child, or grandchild).

Protection Against Family Violence. (Form B22A, Line 36/Form B22C, Line 41)

§2:107 Scope. No known published case construes the family violence deduction. But Forms B22A and B22C indicate that the Debtor may deduct the expenses actually incurred to maintain the safety of the family under the "Family Violence and Prevention and Services Act" or other similar federal law. (See, Form B22A, Line 36 and Form B22C, Line 41) The Office of the United States trustee adds that it must be "ongoing," related to a "real threat," and includes legal fees and, in some cases, home security systems. The Office of the United States Trustee also adds the expense should be averaged, reasonable and necessary.

Home Energy Costs. (Form B22A, Line 37/Form B22C, Line 42)

§2:108 Scope. No known published case construes the home energy costs deduction. But Forms B22A and B22 C indicate that the Debtor may deduct actual and reasonably necessary home energy costs above the Internal Revenue Service standard in the “Housing and Utility” category. (See, Form B22A, Line 37 and Form B22C, Line 42) The Office of the United States trustee agrees and contends that the expense is unlimited but requires documentation and a twelve month average, to adjust for seasonal fluctuations.

**Education Expenses for Dependent Minor Children.
(Form B22A, Line 38/Form B22C, Line 43)**

§2:109 Scope. The Debtor may deduct the average monthly expenses actually incurred, not to exceed \$137.50 per child, for attendance at a private or public elementary or second school by a dependent children under 18 years of age. (See, Form B22A, Line 38 and Form B22C, Line 43) Amount must be reasonable and necessary. The Office of the United States agrees and notes that it requires documentation and may cover home schooling. (In re Goins, 372 B.R. 824 (Bankr. D. S.C. 2007) (Chapter 13) (Debtor’s 19 year old college student daughter))

**Additional Food and Clothing Expense.
(Form B22A, Line 39/Form B22C, Line 44)**

§2:110 Scope. No known published case construes the additional food and clothing expense. But Forms B22A and B22C indicate that the Debtor may deduct the average monthly amount, not to exceed 5%, of the combined Internal Revenue Service allowance for food and clothing. (See, Form B22A, Line 39 and Form B22C, Line 44) The Office of the United States Trustee agrees and adds that it must be actual, and not anticipated; is the exception, not the rule; and might include special dietary and allergy restrictions.

**Continued Charitable Contributions.
(Form B22A, Line 40/Form B22C, Line 45)**

Does the Means Test allow a charitable contributions expense?

§2:111 Undisputed. The Religious Liberty and Charitable Donation Clarification Act of 2006, which amended Section 1325(b)(2), authorized charitable contributions for above and below median income Debtors. (Pub. L. 109-439) (See, Form B22A, Line 34 and Form B22C, Line 45)

What is the proper amount of the deduction?

§2:112 Debtor's cases. The Debtor is entitled to deduct charitable deductions of up to 15% of gross annual income under Section 707(b)(1), 548(a)(2), (d)(4), 1325(b)(2)(A)(ii)

§2:113 Creditor's cases. The Debtor is entitled to the lesser of the amount of historical giving or 15%. (In re Bender, 373 B.R. 25 (Bankr. E.D. Mich 2007) (Chapter 7) The Office of the United States Trustee adds it must be "continuing" (historically supportable).

Deductions for Debt Payment.

Future Payments on Secured Debts. (Form B22A, Line 42/Form B22C, Line 47)

What is included in the future payments on secured debts deduction?

§2:114 Scope. This deduction applies only to secured debts, not leases. (See, Form B22A, Line 42 and Form B22C, Line 47) The Office of the United States Trustee agrees and adds that the Debtor may include secured debt payments on "toys" and "luxury" items. The United States Trustee also believes that the Debtor may deduct the entire amount of the secured debt, even if the collateral is worth less than the amount of the loan, except for secured loans that are to be stripped or crammed in Chapter 13 cases. (See, discussion at "Debt Payment, May the Debtor deduct the debt for a subordinate debt that he or she intends to stip in Chapter 13" §§2:122-2:123 and "Debt Payment, "Where the Debtor intends to cram down a secured debt , should the Debtor use the secured debt before or after it is crammed" §2:124)

What is the proper method for calculation of the secured debt deduction?

Loans with maturity dates more than 60 months from the date of the petition.

Fixed rate loans.

§2:115 Undisputed. No known published case. But Forms B22A and B22 C indicate that the Debtor may deduct the amount of the current monthly payment. (See, Form B22A, Line 42 and Form B22C, Line 47)

Variable rate loans.

§2:116 Unresolved. No known published case has ruled

on the appropriate deduction for a variable rate loan. But the Office of the United States Trustee contends that the Debtor should use the payment in effect on the date of the petition.

Loans with maturity dates less than 60 months from the date of the petition.

Fixed rate, no balloon payment loans.

§2:117 Unresolved. No known published case has decided how to resolve fixed rate loans with maturities no more than 60 months from the date of the petition. But Forms B22A and B22C seem to indicate that the Debtor should total all remaining payments due on the loan and divide by 60. (See, Form B22A, Line 42 and Form B22C, Line 47) The Office of the United States Trustee agrees.

Variable rate, no balloon payment loans.

§2:118 Unresolved. No known published case has decided how to resolve variable rate loans with maturities no more than 60 months from the date of the petition. But Forms B22A and B22C seem to indicate that the Debtor should total all remaining payments due on the loan and divide by 60. (See, Form B22A, Line 42 and Form B22C, Line 47) The Office of the United States Trustee contends that the Debtor should use the payment in effect on the date of the petition, multiplied by the remaining payments left and divided 60.

Balloon payment loans.

§2:119 Unsettled. No known published case has decided how to calculate the monthly secured debt deduction where the loan has a balloon payment within 60 months of the petition. But Forms B22A and B22C seem to indicate that the Debtor should add all payments coming due in the next 60 months (including the balloon payment) and divide the total by 60. (See, Form B22A, Line 42 and Form B22C, Line 47) The Office of the United States Trustee agrees.

May the Debtor deduct a secured debt where he or she has declared an intention to surrender the collateral?

§2:120 Debtor's cases. Secured debt payments for collateral to be surrendered may be deducted. (In re Rudler, 576 F.3d 37 (1st Cir. 2009) (Chapter 7); Hildebrand v. Thomas (In re Thomas), 395 B.R. 914, 922 (BAP 6th Cir. 2008) (Chapter 13); In re Lynch, 395 B.R. 346 (E.D. N.C. 2008) (Chapter 7); Fokkena v. Hartwick (In re Hartwick), 373 B.R. 645 (D. Minn. 2007) (Chapter 7))

§2:121 Creditor's cases. Secured debt payments for collateral to be surrendered may not be deducted. (In re Turner, 574 F.3d 349 (7th Cir. 2009) (Chapter 13); American Express Bank, FSB v. Smith (In re Smith), -- B.R. -- (9th Cir. BAP October 5, 2009) (Chapter 13) (holding limited to Chapter 13)) The Office of the United State Trustee agrees.

May the Debtor deduct the debt for a subordinate debt that he or she intends to strip in a Chapter 13?

§2:122 Debtor's cases. The Debtor may deduct payments to a junior lien holder that will be stripped. (In re Marshall, 407 B.R. 1 (Bankr. D. Mass. June 10, 2009) (Chapter 13))

§2:123 Creditor's cases. The Debtor may not deduct payments to a junior lien holder that will be stripped. (Yarnall v. Martinez (In re Martinez), --B.R. -- (9th Cir. BAP October 5, 2009) (Chapter 13); Thissen v. Johnson, 406 B.R. 888 (E.D. Cal. 2009) (Chapter 13); In re Holmes, 395 B.R. 149 (Bankr. M.D. Fla. 2008) (Chapter 13)) The Office of the United States Trustee agrees.

Where the Debtor intends to cram down a secured debt, should the Debtor use the secured debt before or after it is crammed?

§2:124 Unresolved. No known published case has decided whether the monthly secured debt deduction should be calculated before or after the debt is crammed. The Office of the United States Trustee contends that the Debtor must use the amount of the secured debt after it is crammed.

Is a 401(k) loan a secured debt for which a deduction may be taken?

§2:125 Debtor's cases. No known published case has held that a Debtor is entitled to deduct loans against his or her 401(k) as a secured debt.

§2:126 Creditor's cases. A Debtor is not entitled to deduct loans against his or her 401(k) as a secured debt. (In re Egebjerg, 574 F.3d 1045 (9th Cir. 2009) (Chapter 7); McVay v. Otero, 371 B.R. 190 (W.D. Tex. 2007) (Chapter 7); Eisen v. Thompson, 370 B.R. 762 (N.D. Ohio 2007) (Chapter 7))

May the Debtor deduct secured debt for luxury items?

§2:127 Debtor's cases. The Debtor is entitled to deduct luxury items as secured debt. (In re Martin, 373 B.R. 731 (Bankr. D. Utah 2007) (Chapter 7) (Chapter 13) (ski boat); In re Carlton, 362 B.R. 402, 411 (Bankr. C.D. Ill. 2007) (Chapter 13) (joint Debtors with three cars, including Cadillac Escalade); But see, 11 U.S.C. §707(b)(2)(A)(iii)(II), Form B22A, Line 43 and B22C, Line 48 limited "Other Payments on Secured Claims" to those necessary for the Debtor or the Debtor's dependents)

§2:128 Creditor's cases. No known published case has denied a Debtor the secured debt deduction for a luxury item.

May the Debtor deduct non-consensual secured debts?

§2:129 Debtor's cases. No known published case has allowed the Debtor to deducted non-consensual secured debt claims.

§2:130 Creditors' cases. Non-consensual secured debts may not be deducted as a secured debt. (In re Boyd, 414 B.R. 223, 228 (Bankr. N.D. Ohio 2009) (Chapter 13) (tax lien))

Other Payments on Secured Claims. (Form B22A, Line 43/Form B22C, Line 48)

What is included in the Other Payments on Secured Claims deduction?

§2:131 Scope. No known published case construes the scope of the "Other Payments On Secured Claims." But Forms B22A and B22C indicate that the Debtor may deduct arrears on secured debt payments necessary for the support of the Debtor and/or his or her dependents. (Form B22A, Line 43 and Form B22C, Line 48) The Office of the United States Trustee agrees.

May the Debtor deduct a secured debt where he or she has declared an intention to surrender the collateral?

§2:132 See, discussion at "Deductions for Debt Payment, May the Debtor deduct a secured debt where he or she has declared an intention to surrender the collateral?" §§2:120-2:121)

May the Debtor deduct past due amounts on secured debt attributable to luxury goods?

§2:133 Scope. No known published cases decides whether a Debtor may deduct past due amounts on secured debts attributable to luxury goods. But Form B22A and B22C seem to indicate not, limited the deduction to the

primary residence, a motor vehicle or other property necessary for the Debtor's support or the support of his or her dependents. The Office of the United States Trustee agrees.

**Payments on pre-petition priority claims.
(Form B22A, Line 44/Form B22C, Line 49)**

What is included in the pre-petition priority claims deduction?

§2:134 Scope. The Debtor may deduct arrearage on priority debts (e.g. taxes and domestic support obligations). (Form B22A, Line 44 and Form B22C, Line 49) The United States Trustee agrees.

What is the proper method of calculating the pre-petition priority claims deduction?

§2:135 Undisputed. The amount of the monthly priority debt payment to be deducted is calculated by dividing the total arrearage on the date of the petition by 60. (*In re Casey*, 356 B.R. 519 (Bankr. E.D. Wash. 2006) (Chapter 13) The Office of the United States Trustee agrees.

**Chapter 13 administrative expenses.
(Form B22A, Line 45/Form B22C, Line 50)**

Who is entitled to take the administrative expense deduction?

§2:136 Scope. No known published case has construed the scope of the administrative expense. But the Office of the United States Trustee contends that for Chapter 7 means testing only persons eligible for Chapter 13 may take the administrative expense deduction.

May a Chapter 7 Debtor take the hypothetical expense of a Chapter 13 attorney?

2:137 Unsettled. A Chapter 7 Debtor may not deduct the cost of a hypothetical Chapter 13 attorney. (*In re Amato*, 366 B.R. 348, 351-352 (Bankr. N.J. 2007) (Chapter 13); David Carlson, "Means Testing: The Failed Bankruptcy Revolution of 2005," 15 Am. Bankr. Inst.L.Rev. 223, 288-289 (2007))

**Determination of Section 707(b)(2) Presumption.
(Chapter 7 only)**

Initial Presumption Determination.

(Form B22A, Line 52)

§2:138 Undisputed. Subtract Line 47 of Form B22A from Line 18 of Form B22A and multiply the difference by 60. If the product is less than \$6,575, the presumption never arises; if the product is more than \$10,950, the presumption arises. If the number is at least \$6,575, but not more than \$10,950, perform the “Second Presumption Determination” (See, discussion at “Determination of Section 707(b)(2) Presumption, Secondary Presumption Determination” §2:139)

Secondary Presumption Determination.

(Form B22A, Line 55)

§2:139 Undisputed. If the difference derived by subtracting Line 47 of Form B22A from Line 18 of Form B22A and multiplying that number by 60 is at least 25% of the non-priority secured debt, the presumption arises; otherwise not. The United States Trustee agrees and adds that manipulation of unsecured debt on Schedule F for the purposes of beating the Means Testing is “bad faith” and grounds to dismiss under Section 707(b)(3).

Determination of Disposable Income Under Section 1325(b)(2).

(Chapter 13 only)

Support income.

(Form B22C, Line 54)

§2:140 Undisputed. A Chapter 13 Debtor may deduct domestic support income. The Office of the United States Trustee agrees. (11 U.S.C. §1325(b)(2); Form B22C, Line 54)

Qualified retirement deductions.

(Form B22C, Line 55)

§2:141 Undisputed. A Chapter 13 Debtor may deduct amounts withheld by his employer from wages as contributions to qualified retirement plans under Section 541(b)(7) and all required repayments of loans from retirement plans, as specified in Section 362(b)(19). (Form B22C, Line 55) The amount of the deduction for a retirement loan is the total amount due on the date of the petition divided by 60. (In re Laskowski, 575 F.3d 815 (8th Cir. 2009) (Chapter 13))

Additional Expense Claims.

(Form B22A, Line 56/Form B22C, Line 60)

§2:142 Unresolved. Form B22A, Line 56 and Form B22C, Line 60 allow the Debtor to list other monthly expenses necessary for the health and welfare of the Debtor or the Debtor’s family that the Debtor contends “should be an additional deduction” from current monthly income under Section 707(b)(2)(A)(ii)(I). It is unclear whether these are additional deductions against Line 49 of Form B22A or Line 58 of Form B22C. The Office of the

United States Trustee contends not but that it will consider other reasonable and necessary expense for “health and welfare” in its decision-making process.

Considerations After Completing Form B22

Deadlines to complain.

Chapter 7-Section 707(b)(2).

10 Day Rule.

§3:1 The statute. “With respect to a debtor who is an individual in a case under this chapter--(A) the United States Trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor’s case would be presumed to be an abuse under section 707(b) and (B) not later than 7 days after receiving a statement under paragraph (A), the court shall provide a copy of the statement to all creditors.” (11 U.S.C. §704(b)(1)(A),(B))

When does the 10 days start to run?

§3:2 Debtor’s cases. The 10 day limitation of Section 704(b)(1)(A) runs from the date first set for the Meeting of Creditors. (In re Close, 384 B.R. 856 (D. Kan. 2008) (Chapter 7); In re Ansar, 383 B.R. 344, 347 (Bankr. D. Minn. 2008) (Chapter 7); In re Perotta, 378 B.R. 434, 438 (Bankr. D.N.H. 2007) (Chapter 7); In re Byrne, 376 B.R. 700, 703 (Bankr. W.D. Ark. 2007) (Chapter 7); In re Robertson, 370 B.R. 804 (Bankr. D. Minn. 2007) (Chapter 7))

§3:3 Creditor’s cases. The 10 day limitation of Section 704(b)(1)(A) runs from the conclusion of the Meeting of Creditors. (In re Molitor, 395 B.R. 197 (Bankr. S.D. Ga. 2008) (Chapter 7); In re Allen, 411 B.R. 913, 918 (Bankr. S.D. Ga. 2009) (Chapter 7))

Does a Statement of No Determination satisfy the 10 day rule?

§3:4 Debtor’s cases. A Statement of No Determination does not satisfy the 10 day limitation of Section 704(b)(1)(A). (In re Ansar, 383 B.R. 344, 347 (Bankr. D. Minn. 2008) (Chapter 7); In re Perotta, 378 B.R. 434, 438 (Bankr. D.N.H. 2007) (Chapter 7); In re Robertson, 370 B.R. 804 (Bankr. D. Minn. 2007) (Chapter 7))

§3:5 Creditor’s cases. A Statement of No Determination does satisfy the 10 day limitation of Section 704(b)(1)(A). (In re Jasper, 414 B.R. 83 (Bankr. E.D.Va. 2009) (Chapter 7))

Does the failure to satisfy the 10 day rule bar a Section 707(b)(2) motion?

By the United States trustee.

§3:6 Debtor's cases. The United States trustee's failure to satisfy the 10 day rule bars a motion to dismiss under Section 707(b)(2). (In re Draisey, 395 B.R. 79 (BAP 8th Cir. 2008) (Chapter 7) (dicta, but it does not bar a motion under Section 707(b)(3)); In re Perotta, 378 B.R. 434, 438 (Bankr. D.N.H. 2007) (Chapter 7); In re Robertson, 370 B.R. 804 (Bankr. D. Minn. 2007) (Chapter 7))

§3:7 Creditor's cases. The United States trustee's failure to satisfy the 10 day rule does not bar a motion to dismiss under Section 707(b)(2). (In re Jasper, 414 B.R. 83 (Bankr. E.D.Va. 2009) (Chapter 7))

By the Chapter 7 trustee or other creditors.

§3:8 Debtor's cases. No known published case holds that the Office of the United States Trustee's failure to file a 10 day statement bars others from pursuing a Section 707(b)(2) motion.

§3:9 Creditor's cases. The United States trustee's failure to satisfy the 10 day rule does not bar a motion to dismiss under Section 707(b)(2). (In re Byrne, 376 B.R. 700, n.1 (Bankr. W.D. Ark. 2007) (Chapter 7) (dicta))

30 Day Rule.

§3:10 The statute. "With respect to a debtor who is an individual in a case under this chapter--(A) the United States Trustee (or the bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under Section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States Trustee (or the bankruptcy administrator, if any) determines the debtor's case should be presumed to be an abuse under Section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than--(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or (B) in the case of a debtor in a household of 2 or more individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals." (11 U.S.C. §704(b)(2))

General principles.

§3:11 Debtor's cases. A motion to dismiss under Section 707(b)(2) must be made no later than 30 days after the filing of the Section 704(b)(1) Statement of Presumed Abuse. (In re Perotta, 378 B.R. 434, 438 (Bankr. D.N.H. 2007) (Chapter 7); In re Singletary, 354 B.R. 455, 466 (Bankr. S.D. Tex. 2006) (Chapter 7); In re DePellegrini, 365 B.R. 830, 831 (Bankr. S.D. Ohio 2006) (Chapter 7) (noting a Section 707(b)(3) motion may be brought within 60 days of meeting of creditors))

§3:12 Creditor's cases. No known published case holds the 30 day rule to be jurisdictional.

Is the deadline jurisdictional?

§3:13 Debtor's cases. No known published case has held the 30 day rule to be jurisdictional.

§3:14 Creditor's cases. The 30 day rule is not jurisdictional and may be waived. (In re Ross-Tousey, 549 F.3d 1148 (7th Cir. 2008) (Chapter 7))

Chapter 13-Section 1325(b).

§3:16 Unresolved. The due date for objections to plan confirmation is defined by local rule or practice, but in any event shall occur not later than plan confirmation. (FRBP 3015(f))

Motions.

Chapter 7.

Standing.

Above median income Debtors.

§3:17 Undisputed. The court, the United States Trustee, trustee or any party in interest. (11 U.S.C. §707(b)(1))

Below median income Debtors.

§3:18 Undisputed. The court or the United States Trustee. (11 U.S.C. §707(b)(6))

Burden of proof.

§3:19 Undisputed. The burden of proof rests on the moving party. (In re Crink, 402 B.R. 159 (Bankr. M.D. N.C. 2009) (Chapter 7); In re Sale, 397 B.R. 281 (Bankr. M.D. N.C. 2007) (Chapter 7))

Mandatory vs. discretionary.

§3:20 Debtor’s cases. Even if the Debtor fails to show “special circumstances” the court has discretion to deny a Motion to Dismiss. (In re Mravik, 399 B.R. 202 (Bankr. E.D. Wis. 2008) (Chapter 7); In re Skvorecz, 369 B.R. 638, 643-644 (Bankr. D. Colo. 2007) (Chapter 7))

§3:21 Creditor’s cases. If the Debtor fails to show “special circumstances” the court has no discretion to deny a Motion to Dismiss. (In re Witek, 383 B.R. 323 (Bankr. N.D. Ohio 2007) (Chapter 7); In re Haman, 366 B.R. 307 (Bankr. D. Del. 2007) (Chapter 7); In re Wilson, 356 B.R. 114, 116 (Bankr. Del. 2006) (Chapter 7) (dicta))

Chapter 13.

Standing.

§3:22 Undisputed. The Chapter 13 trustee or the holder of an allowed unsecured claim may object to confirmation based on the Debtor’s failure to satisfy the Means Test. (11 U.S.C. §1325(b))

Burden of proof.

§3:23 Undisputed. The burden of proof rests on the moving party. (In re Quarterman, 342 B.R. 647 (Bankr. M.D. Fla. 2006) (Chapter 13))

Mandatory vs. discretionary.

§3:24 Unresolved. A Section 1325(b) objection is discretionary. (11 U.S.C. §1325(b))

Discovery rights.

Prior to motion or objection.

§3:25 Debtor’s cases. Section 707(b) does not provide the United States Trustee or creditors discovery rights beyond those enumerated in Section 521(a)(1)(B)(iv), (v), (e)(2)(A)(i). In re Perrotta, 378 B.R. 27 (Bankr. D. N.H. 2007) (Chapter 7); In re Robertson, 370 B.R. 804, 809 (Bankr. Minn. 2007) (Chapter 7))

§3:26 Creditor’s cases. No known published case gives the Office of the United States Trustee or creditors rights, beyond those enumerated in Section 521(a)(1)(B)(iv), (v), (e)(2)(A)(i), prior to the filing of a motion or objection.

Subsequent to motion or objection.

§3:27 Undisputed. Once a Motion to Dismiss or Objection to Confirmation has been filed, discovery rights attach. (FRBP 9014(c))

Special Circumstances.

Scope.

Chapter 7.

§3:28 Undisputed. Special circumstances is a defense to a Motion to Dismiss under Section 707(b)(2). (11 U.S.C. §707(b)(2)(B))

Chapter 13.

§3:29 Unresolved. Aside from the “projected disposable income” analysis of Section 1325(b)(1)(B) (compare, In re Kagenveama, 541 F.3d 868 (9th Cir. 2008), with In re Lanning, 545 F.3d 1269 (10th Cir. 2008), cert. granted, Hamilton v. Lanning, 78 U.S.L.W. 3010 (Nov. 2, 2009) (No. 08-998)), some courts perceive the “special circumstances” analysis as applicable to Chapter 13 cases and a separate defense to a Section 1325(b) objection. (In re Reis, 377 B.R. 777 (Bankr. N.H. 2007) (Chapter 13); In re Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007) (Chapter 13))

Procedural requirements.

§3:30 The statute. “In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—(I) documentation of such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses 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.” (11 U.S.C. §707(b)(2)(B)(ii)-(iii))

Substantive requirements.

§3:31 The statute. “In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or call or order to active duty in the Armed

Forces, to the extent such special circumstances justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.” (11 U.S.C. 707(b)(2)(B)(i))

Special circumstance defined.

§3:32 Debtor’s cases. The circumstance creating the strain on the Debtor’s budget need not be outside the Debtor’s control. (In re Graham, 363 B.R. 844, 849-850 (Bankr. S.D. Ohio 2007) (Chapter 7); In re Turner, 376 B.R. 370 (Bankr. D. N.H. 2007) (Chapter 7); In re Haman, 366 B.R. 307, 313 (Bankr. D.Del. 2007) (Chapter 7))

§3:33 Creditor’s cases. The circumstance creating the strain on the Debtor’s budget must be outside the Debtor’s control. (In re Egebjerg, 574 F.3d 1045, 1053 (9th Cir. 2009) (Chapter 7) (special circumstances “not only put a strain on a debtor’s household budget, but arise from circumstances beyond the Debtor’s control...”); In re Lightsey, 374 B.R. 377, 381-382 (Bankr. S.D.Ga. 2007) (Chapter 7); In re Delbecq, 368 B.R. 754, 756-757 (Bankr. S.D.Ind. 2007) (Chapter 7))

Justifies an additional expense or an adjustment to income.

§3:34 Undisputed. The special circumstance must justify and additional expense or an adjustment to income. (11 U.S.C. §707(b)(2)(B)(i); (In re Haman, 366 B.R. 307, 312 (Bankr. D.Del. 2007) (Chapter 7); In re Pageau, 383 B.R. 221, 225 (Bankr. N.H. 2008) (Chapter 7))

No reasonable alternative.

§3:35 Undisputed. Is one for which the Debtor has no reasonable alternative. (11 U.S.C. 707(b)(2)(B)(i); (In re Haman, 366 B.R. 307, 312 (Bankr. D.Del. 2007) (Chapter 7); In re Pageau, 383 B.R. 221, 225 (Bankr. N.H. 2008) (Chapter 7))

Exempli gratia.

Food expense.

§3:36 Debtor’s cases. No known published cases.

§3:37 Creditor’s cases. An unusually high food expense is not a special circumstance. (In re Patterson, 392 B.R. 497 (Bankr. S.D. Fla. 2008) (Chapter 7) (long haul trucker))

High rent expense.

§3:38 Debtor's cases. An unusually high rent expense is a special circumstance. (In re Scarafiotti, 375 B.R. 618 (Bankr. D. Colo. 2007) (Chapter 7) (Chapter 7))

§3:39 Creditor's cases. An unusually high rent expense is not a special circumstance. (In re Sparks, 360 B.R. 224 (Bankr. E.D. Tex. 2006) (Chapter 13))

High transportation expense.

§3:40 Debtor's cases. An unusually high transportation expense is a special circumstance. (In re Turner, 376 B.R. 370 (Bankr. D. N.H. 2007) (Chapter 7); In re Batzkiel, 349 B.R. 581 (Bankr. N.D. Iowa 2006) (Chapter 7))

§3:41 Creditor's cases. An unusually high transportation expense is not a special circumstance. (In re Sparks, 360 B.R. 224 (Bankr. E.D. Tex. 2006) (Chapter 13))

Mandatory 401(k) loan repayments.

§3:42 Debtor's cases. Mandatory 401(k) loan repayments are a special circumstance. (In re Lenton, 358 B.R. 651 (Bankr. E.D. Pa. 2006) (Chapter 7))

§3:43 Creditor's cases. Mandatory 401(k) loan repayments are not a special circumstance. (In re Egebjerg, 574 F.3d 1045, 1053 (9th Cir. 2009) (Chapter 7) (noting that underlying purpose to which funds were put might justify finding of special circumstance); McVay v. Otero, 371 B.R. 190 (W.D. Tex. 2007) (Chapter 7); Eisen v. Thompson, 370 B.R. 762 (N.D. Ohio 2007) (Chapter 7); In re Turner, 376 B.R. 370 (Bankr. D. N.H. 2007) (Chapter 7))

Non-dischargeable student loans.

§3:44 Debtor's cases. Student loans are a special circumstance. In re Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007) (Chapter 13); In re Haman, 366 B.R. 307 (Bankr. D. Del. 2007) (Chapter 7); In re Templeton, 365 B.R. 213 (Bankr. W.D. Okla. 2007) (Chapter 7); In re Delbecq, 368 B.R. 754, 756-757 (Bankr. S.D.Ind. 2007) (Chapter 7))

§3:45 Creditor's cases. Student loans are not a special circumstance. (In re Martellaro, 404 B.R. 548 (Bankr. D. Mont. 2008) (Chapter 13); In re Vaccariello, 375 B.R. 809 (Bankr. N.D. Ohio 2007) (Chapter 7); In re Champagne, 389 B.R. 191 (Bankr. D. Kan. 2008) (Chapter 7) (“It will be an unusual case where the circumstances of a student loan create a financial condition which justifies the inclusion of this expense in the means test.”))

Pregnancy.

§3:46 Debtor's cases. Pregnancy is a special circumstance. (In re Martin, 371 B.R. 347 (Bankr. C.D. Ill. 2007) (Chapter 7))

§3:47 Creditors' cases. Pregnancy is not a special circumstance. No known published cases.

Separate households.

§3:48 Debtor's cases. Joint Debtors who maintain separate households is a special circumstance. (In re Graham, 363 B.R. 844, 849-850 (Bankr. S.D. Ohio 2007) (Chapter 7); In re Crego, 387 B.R. 225 (Bankr. E.D. Wis. 2008) (Chapter 13))

§3:49 Creditor's cases. Joint Debtors who maintain separate households is not a special circumstance. No known published cases.

Zero percent Chapter 13 plans.

§3:50 Debtor's cases. A de minimus or zero percent dividend in a hypothetical Chapter 13 is a special circumstance. (In re Delbecq, 368 B.R. 754, 756-757 (Bankr. S.D.Ind. 2007) (Chapter 7))

§3:51 Creditor's cases. A de minimus or zero percent dividend in a hypothetical Chapter 13 is not a special circumstance. (In re Castle, 362 B.R. 846 (Bankr. N.D. Ohio 2006) (Chapter 7); In re Johns, 342 B.R. 626 (Bankr. E.D. Okla. 2006) (Chapter 7))

Ruling on the motion.

Is a hearing required?

§3:52 Debtor's cases. Some courts allow the Debtor to make his or her proof by declaration. (In re Haman, 366 B.R. 307, 312 (Bankr. D.Del. 2007) (Chapter 7))

§3:53 Creditor's cases. Other courts require an evidentiary hearing. (McVay v. Otero, 371 B.R. 190 (W.D. Tex. 2007) (Chapter 7))

Burden of proof.

§3:54 Undisputed. The burden of proof is on the Debtor to establish special circumstances. (In re Martin, 371 B.R. 347, 352-353 (Bankr. C.D. Ill. 2007) (Chapter 7))

Standard for ruling on the motion.

§3:55 Undisputed. The presumption of abuse will only be rebutted if the additional expenses or adjustment to income cause the product of the Debtor's current monthly income, reduced by deductions allowed under Section 707(b)(2)(A)(ii), (iii), and (iv) to be less than \$10,000 and less than the greater of 25 % of the unsecured debt or \$6,000. (11 U.S.C. §707(b)(2)(B)(iv))