CHAPTER 7 and CHAPTER 13 ISSUES

by: Robert C. Meyer
Robert C. Meyer, P.A.
2223 Coral Way
Miami, FL 33145-3508
(305)285-8838

OUTLINE OF MATERIALS BELOW:

A. Determining Which Chapter to File
    1. Means Test Calculations
        I. Income
            A. Fluctuations
        II. Deductions
            A. If you don't have them, can you use them?
            B. Payments to Secured IRA
            C. Charitable Deductions not in IRS Rules
            D. Exorbitant Gasoline Prices
B. Filing in Bankruptcy Court
    1. Is the Debtor Eligible to File or Eligible for a Discharge?
    2. Can the Client file in Florida and Claim Homestead Exemption?
        The 730-Day Rule
        The 1215-Day Rule
        The Criminal Exception
        The Shrinkage Rule
    3. Will the Client Be Able to Stay "Other Matters" or Must You, the Attorney, File Papers to Invoke the Stay?
    4. How Affected is the Debtor to a Domestic Support Obligation?
    5. Duties of the Debtor
    6. Duties of the Attorney for the Debtor
C. Dismissal and Conversion Issues
D. Dischargeability of Debts
E. Requirements of Chapter 13
    1. Duration of Chapter 13 Plans
    2. Stripping of Auto Loans
    3. The Disaster?
    4. The Criminal
F. How to Compute a Chapter 13 Plan
G. Post-confirmation Default
    1. Modify the plan to cure the problem
    2. Convert the case to Chapter 7 (remember you must be eligible and the new law with requirements of CMI and other items may make this impossible)
    3. Request a hardship discharge under 1328(b) – look to list above as to how many of the otherwise dischargeable debts are *not* dischargeable for the debtor seeking a hardship discharge
    4. Dismiss – and is this automatic anymore?
H. Postpetition Debt

At the time of the enactment of the new law [BAPCPA]there were over 20 perceived changes to the new code which changed in the Chapter 7 or Chapter 13 environment. They were:

1. Means Test for Chapter 7 Eligibility
2. Mandatory Debt Counseling
3. Limitation of Auto Lien Stripping
4. Mandatory Education
5. Scope of Discharge
6. Serial Filings
7. Time Between Discharge
8. Homestead Exemption
9. Reaffirmations – No more "Ride Through"
10. Limit of the Automatic Stay
11. Notice to Creditors
12. Duration of Chapter 13 Plans
13. Dismissal for Failure to File Documents
14. Attorney Verification
15. Debtor's Statement of Intention
16. Domestic Support Obligations
17. Superdischarge reduction
18. Attorney defined as "debt Relief" agencies
19. Asset Protection Trusts
20. Tax Discharge is Altered
21. Tax Return Filing Mandatory
22. Eviction
23. Student Loan Nondischargeability Expanded

This portion of the review concentrates on chapter 7 and 13 issues which have been greatly affected by the above-referenced changes. The most obvious are:

MEANS TESTING
CHAPTER 13 ELIGIBILITY
MANDATORY LENGTH of PLANS
CHAPTER 13 DISCHARGE CHANGE
AUTO STRIPPING in CHAPTER 13
HANDLING OF DSO OBLIGATIONS IN CHAPTER 7 or CHAPTER 13 and
NOT-SO-AUTOMATIC STAY CHANGES

Unless indicated otherwise, references to Local Rules shall be exclusively the Local Rules for the Bankruptcy Court for the Southern District of Florida.

A. DETERMINING WHICH CHAPTER TO FILE

Some people can choose to be in Chapter 7, 11 or 13 [this section will ignore farming reorganization under chapter 12], others can file 11 or 13 only, and some should only look to chapter 7. The chart below briefly outlines the jurisdictional amount for the chapters – without taking into account the income of the debtor(s).

Debt Level	Chapter 7 eligible?	Chapter 11 eligible?	Chapter 13 eligible?

Unsecured debt less than $307,675	YES	YES	YES
Unsecured debt over $307,675	YES	YES	NO
Secured debt under $922,975	YES	YES	YES
Secured debt exceeding $922,975	YES	YES	NO

The chart above will be amended after review of the "Means Test" as income levels will also affect the eligibility of the debtor to file in one chapter, as opposed to others.

Prior to BAPCPA, the above chart was the exclusive concern – with the exception of 707(b) issues – for determining what chapter to file. Now, that simple criteria has been significantly altered by the Means Test.

1. MEANS TEST CALCULATIONS

I. INCOME:

Basics – what is income, what is current monthly income, what is median income?

INCOME is not a defined term in the Bankruptcy Code. Income with various modifiers is defined.

CURRENT MONTHLY INCOME is defined as:
101(10A) The term "current 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, 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 income required by section 521(a)(1)(B)(ii) [11 USCS § 521(a)(1)(B)(ii)]; or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii) [11 USCS § 521(a)(1)(B)(ii)]; 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), but excludes benefits received under the Social Security Act [42 USCS §§ 301 et seq.], 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 [18 USCS § 2331]) or domestic terrorism (as defined in section 2331 of title 18 [18 USCS § 2331]) on account of their status as victims of such terrorism.

MEDIAN FAMILY INCOME is defined as:
101(39A) The term "median family income" means for any year--

(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and

(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

According to the census bureau, Florida Median Family Income is:

Family of Two	45,446
Family of Three	51,001
Family of Four	62,269

Source: http://www.census.gov/hhes/www/income/statemedfaminc.html

QUESTION: If husband makes $25,000.00 in Miami, and wife makes 30,000 in Miami, but only husband files, is there a concern for chapter 13?

QUESTION: Would the answer be different for a Broward resident?

QUESTION: If debtor receives income from an exempt trust, is that included?

QUESTION: If Debtor receives income from an IRA, do you include that income?

QUESTION: If money from domestic terrorism is put into an annuity, is it still exempted from current monthly income?

Income, if it never fluctuated, would be easy to deliver to the court. Unfortunately, loss of jobs often is a factual context delivered to the debtor's attorney, and this makes the formulae for current monthly income become askewed.

A. FLUCTUATIONS:

Rule of Thumb: The Code requires that you look to the income for the past 6 months, average that income, and place it onto the Abuse Test – Form 22 [Form 22A for Chapter 7, Form 22C for Chapter 13]. Hence, if you are presently unemployed, but had a wonderful job that paid well the past 6 months, you would likely NOT be able to file as you would show income exceeding expenses although you have no income. Alternatively, the unemployed party who obtains a job just as he filed bankruptcy will show less income than he really has.

Confusion to the issue is increased by the nomenclature. The average income for the past six months is called "Current Monthly Income" or affectionately called CMI by practitioners. This is confusing as there is nothing "current" about the 6-month average in the above-recited hypothetical(s).

Issues arise – if the poor guy lost his job, can he slither around the confines of the CMI. Alternatively, if someone reaps the benefit of a recently obtained job, can he be forced to include his new income as substance over form arguments would disallow a potential inequity?

QUESTION: If the income in the past reflects too much for the present, will the court allow the party to slither out of the formulaic 707(b)?

YES
In re Pederson 2006 Bankr. LEXIS 2725,(Bankr. N.D. Iowa 2006) (The husband contended that his current income included overtime work which would no longer have been available to him. The court held that projected disposable income was anticipated income during the term of the plan. Thus, the husband's reduced overtime was a factor to be considered. However, the debtors should have, for instance, called the husband's employer as a witness to prove that they would receive less income, which they failed to do.)

NO
In re Jass 340 B.R. 411 (Bankr. Utah 2006)(The bankruptcy court concluded that under the clear meaning of 11 U.S.C.S. § 1325(b)(1)(B), a debtor was required to propose to pay the number resulting from Official Bankr. Form B22C unless the debtor could show that this number did not adequately represent the debtor's budget projected into the future. Thus, the court presumed that "disposable income" equaled "projected disposable income" unless the debtors could show otherwise. The analysis required by 11 U.S.C.S. § 707(b)(2)(B) would serve as guidance in determining whether a debtor met his or her burden to show a substantial change in circumstances. A debtor attempting to meet this burden was to present documentation similar to that required by § 707(b)(2)(B). In the instant case, the wife debtor testified that her husband had recently been hospitalized and incurred substantial medical bills. To rebut the presumption that "projected disposable income" was the number resulting from Official Bankr. Form B22C, the debtors were required to present specific evidence as to how the numbers reflected on Official Bankr. Form B22C were inadequate projections of their future finances. The debtors did not present such evidence.)

OTHER RULINGS:

PROJECTED DISPOSABLE INCOME IS DIFFERENT THAN DISPOSABLE INCOME

In re Teixeira, (Bankr. D.N.H. 12/21/06). Above-median debtor's income decreased after filing for Chapter 13 relief. The court followed *Jass* that there is a rebuttable presumption that the portrayed "disposable income" on B22C is what Congress identified as "projected disposable income." If a moving party seeks to rebut this presumption, there are a few rules: (1) for below-median debtors – use Schedule I to determine income and Schedule J to determine expenses, as set forth in *Kibbe*. And (2) for above-median debtors – use income from Schedule I to determine income, but continue to deduct the standard expenses permitted under sections 1325(b)(3) and 707(b).

In re Bossie, 2006 WL 3703203 (Bankr. D. Alaska 12/12/06). "The figure stated on Line 58 of Form 22C is *not the sole factor* to be utilized in determining [a debtor's] projected disposable income."

In re Casey, 2006 WL 3071401 (Bankr. E.D. Wash. 10/27/06). Above-median debtors must abide by dual review: B22C contrasted with I and J. "The conclusion is that for above-median income debtors, the disposable income calculated on Form B22C, as modified by any anticipated change in financial circumstances known at the time of confirmation [as listed on Schedules I & J], constitutes 'projected disposable income' for purposes of § 1325(b)(1)." However, the applicable commitment period for an above-median debtor is 60 months, which is the required length of the plan – temporal requirement by the statute..

In re Edmunds, 350 B.R. 636 (Bankr. D.S.C. 2006). Above-median debtors provide the court with representations of income and expenses beyond those in B22C. Therefore, the court may review the income and expenses on Schedules I & J to determine whether proposed return to unsecured creditors was made in good faith.

In re Nevitt, 2006 WL 2433491 (Bankr. N.D. Ill. 2006). Below-median debtors thought it was unfair to calculate projected disposable income by reviewing Schedules I & J, because if they were above-median, they would pay less under their plan because they could take the greater deductions allowed by Form B22C. [Q: Couldn't they have completed the form anyway and displayed the inequity of the argument of the statute?] The court held that the Code clearly limits B22C deductions to above-median debtors [and the form also kicks you out if the client is below-median debtor]. The appropriate rule for below-median debtors is allowing them to deduct court-allowed expenses on Schedule J and then deduct the plan payments on administrative and secured claims to arrive at projected disposable income to be paid to unsecured creditors (see *In re Quarterman* below). This result is fair because below-median debtors only have a three-year applicable commitment period – a temporal requirement.

In re McPherson, 350 B.R. 38 (Bankr. W.D. Va. 7/31/06). The word "projected" modifies both income and expenses of the statute, such that projected disposable income is calculated based on anticipated (future looking) income and expenses.

In re Domenica, 345 B.R. 895 (Bankr. N.D. Ill. 7/31/06). "Projected disposable income" is defined as something different than "disposable income." Projected disposable income is to be paid to unsecured creditors as reflected on Schedule I rather than the historical average on B22C.

In re Johnson, 2006 WL 2059078 (Bankr. S.D. Ga. 7/21/06). Contributions or loan repayments to 401(k) plans are not disposable income under §541(b)(7)(A) and (B) and §1322(f), and such are in made in good faith so long as they comply with nonbankruptcy law. Tax refunds received more than six months prepetition are not included as income on B22C.

In re Risher, 344 B.R. 833 (Bankr. W.D. Ky. 07/12/06). Relying on Hardacre and Jass, the court ruled that debtors must contribute postpetition tax refunds to their plan as projected disposable income: "The numbers resulting from the calculations on Form B22C represent a starting point for the Court's inquiry. It represents a floor, not a ceiling."

In re Dew, 344 B.R. 655 (Bankr. N.D. Ala. 6/21/06). For below-the-median debtors, Schedules I & J determine "projected disposable income," and the applicable commitment period requirement is a temporal requirement, meaning above-the-median debtors must be in 60-month plans.

In re Grady, 343 B.R. 747 (Bankr. N.D. Ga. 2006). Due to wife's heart condition, debtors' income substantially decreased during six months prior to bankruptcy filing. Attorney jumped on this and filed at appropriate time to reflect the least amount of income. What they could pay under Schedules I & J was different than B22C. "The Court recognizes that the Debtors are honestly attempting to repay their debts to the best of their abilities, … [and] this Court believes that Congress intended the Debtors to propose a monthly payment to unsecured creditors based on their financial situation as of the date when the first payment is due." [Q: Do you believe the heart condition led the court to rule in this manner?]

In re Fuller, 346 B.R. 472 (Bankr. S.D. Ill. 6/21/06). "Whether a debtor is above or below the median income, parties must determine 'projected disposable income' by looking at Schedule I to determine the debtor's income as of the petition date. The parties should look to Form B22C to determine which expenses to deduct – reasonable Schedule J expenses for below-median debtors, standardized expenses for above-median debtors. But for income, parties must look to actual income at the time the debtor filed the petition, not the average historical income from the six months before. In short, parties in all cases must use Form B22C and Schedule I to calculate 'projected disposable income.'"

In re Kibbe, 342 B.R. 411 (Bankr. D. N.H. 4/16/06). Debtor's new job "substantially increased" her income. Court held that "projected disposable income" for delivery to unsecured creditors under the plan had to be based on "anticipated" rather than "historical" income. To hold otherwise would

allow the debtor "to avoid paying any money to unsecured creditors despite having the ability to do so."

In re Quarterman, 342 B.R. 647 (Bankr. M.D. Fla. 2006). For below-median debtor, "amounts reasonably necessary to be expended" are calculated by using the allowed expenses on Schedule J and the monthly payment on secured debt under the plan.

In re Wiggs 2006 Bankr. LEXIS 1547 (Bankr. E.D. Ill. 2006)". . . because Schedule I sets forth a debtor's income at the time of filing and is amended if any change occurs, a debtor's schedule I should be used to determine 'projected monthly income' pursuant to § 1325(b) (1) (B). In re Demonica, 345 B.R. 895, 2006 Bankr. LEXIS 1466, 06 B 00094 (Bankr. N.D. Ill. July 31, 2006)."

Earlier we reviewed the terms "current monthly income" and "median income." The latest term utilized by the court ruling recited above is "projected disposable income." First, it appears to be synonymous with "projected monthly income" And, secondly this term is derived from the Bankruptcy Code as well. Under 11 U.S.C.S. § 1325(b)(1)(B) there use of the term which reads as follows:

1325(b) (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's *projected disposable income* to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

QUESTION: Increase in income discovered in Chapter 7 case. Does the concept of "projected disposable income" apply?

QUESTION: What is a motion for exigent circumstances?

QUESTION: If the income in the past reflects too little for the present, will the court compel the party to be reviewed outside of the formulaic 707(b)?

Yes
In re Domenica 345 B.R. 895 (Bankr.N.D.IL 2006) (The court found that a historical average of income, as contained on Form B22C, could not be used to determine "projected disposable income." Instead, Schedule I had to be used. In order to determine the proper expenses to be deducted from projected income, the debtor was allowed to take the full National and Local Standard amounts. Additional expenses for the categories specified by the Internal Revenue Service (IRS) were only proper if they fell within the additional expense provisions as specified by the IRS or as defined in the Bankruptcy Code. In order to claim Other Necessary Expenses, the debtor had to itemize, document and provide a detailed explanation of the special circumstances that rendered those expenses reasonable and necessary. Here, because the debtor did not take the proper deductions from his projected income, the court denied confirmation.)

LOOPHOLES:

Debt is not Primarily consumer debt: *In re Moates*, 338 B.R. 716 (Bankr. N.D.Tx 2006) (Debtors contended that the statement of monthly income [Form B22] was only relevant if they had primarily consumer debts thereby making them potentially subject to the means testing required under 11 U.S.C.S. § 707(b). The U.S. Trustee (UST) submitted that an individual debtor whose debts were not primarily consumer debts was not required to complete Form B22A, i.e., was not required to file a separate form that constituted a statement of monthly net income. Debtor's schedules I and J, which itemized debtor's current income and current expenditures, satisfied the requirement of 11 U.S.C.S. § 521(a)(1)(B)(v), according to the UST. The court agreed. Upon review of current forms I and J, they clearly provided a statement of debtor's monthly net income. The court noted that this result admitted of redundancy in the statute as § 521(a)(1)(B)(ii) required a debtor to file a schedule of current income and current expenditures (schedules I and J). It would have been absurd, however, to require a debtor to file essentially the same information twice at the same time.)
NOTE: In this case, the debtor lost. His monthly income at time of filing exceeded his 6-month average.

QUESTION: What if 20 creditors are consumer, but one is business, but the business debt amounts to 99% of the debt, is this a debtor whose debt is primarily consumer debt?

QUESTION: Do you think your court will look the other way if the debt is not primarily consumer debt?

II. DEDUCTIONS:

If your client is below the median income level, Form 22C or Form 22A do not even want you to go further. The issue of deductions is moot. But, if your clients are over the median income level, this is the next review to allow your client out of chapter 13. Or is it?

A. IF YOU DON'T HAVE THEM, CAN YOU USE THEM?

EXAMPLE: Debtor does not have a car loan, but wants Local Standard deduction (creates deduction for hypothetical debt).

> NOTE: The courts, which disallow the Local Standard amount where no debt is owing on a debtor's owned vehicle, rely upon IRS Manual § 5.15.1.7 (05-01-2004). ("If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense.") In taking this IRS directive into consideration, disallowing courts conclude that where there exists no car payment, "the debtor's applicable expense amounts specified under the... Local Standards." [NOTE: all of the IRS items are online. For instance, Chapter 5 of the IRS Manual can be found at: http://www.irs.gov/irm/part5/ch15s01.html]
>
> Or go to: www.usdoi.gov/ust/eo/bapcpa/meanstesting.htm.
>
> OTHER VIEW: All of the courts agree that BAPCPA provides that the Local Standards are to be used as a minimum allowance, trumped or increased if the actual expense is higher. If the applicable Local Standard amount is $ 471.00, that would be the amount allowed, unless the actual amount is greater. In which case, the deduction would be the actual amount.
> Form B22A – through the magic of the computer program – accommodates the

statutory mandate by accounting for an actual expense from 0 and the Standard amount, and reconciling the two to apply the higher expense as the allowable expense. A simple reading of the unambiguous 11 U.S.C. § 707(b)(2)(A)(ii) is that the debtor's applicable expense amounts specified under the Local Standards is the higher of the Standard amount or actual expense. This does not change where the actual expense is 0 – if it is 0, then the party is allowed the amount of $471 under our example.

NO
In re Barraza, 346 B.R. 724 (Bankr. N.D.Tx. 2006) The Trustee contended that, for purposes of the presumption of bankruptcy abuse under § 707(b)(2)(A), the debtor was not entitled to an allowance for the vehicle which the debtor did not finance or lease, and that the loan repayments to 401(k) accounts were not deductible as mandatory employment deductions. The debtor asserted that it would be unfair to permit a vehicle allowance only for debtors who made car payments, and that the 401(k) plans required the debtor to make loan repayments through payroll deductions. The bankruptcy court held that the debtor's bankruptcy was presumptively abusive since the debtor was not entitled to the vehicle allowance nor the loan payment deductions. Despite any hypothetical circumstances resulting in unfairness, it was clearly established that the debtor was not entitled to an allowance for his vehicle where the debtor had no car loan or lease. Further, the consequences of the debtor's default on his 401(k) loans was only treatment of the loans as taxable distributions, and employers' withholding of loan payments did not constitute the type of mandatory contributions which were required for the debtor's employment.
In re McGuire, 342 B.R. 608 (Bankr. W.D.Mo. 2006) The court held that debtors were not permitted to claim a vehicle ownership expense under the Internal Revenue Service (IRS) Standards, as incorporated into 11 U.S.C.S. § 707(b)(2)(A)(ii)(I), because they owed the vehicle free of liens. The court held that, if a debtor was not incurring expenses for the purchase or lease of a vehicle, the debtor could not claim a vehicle ownership expense under the IRS Standards. The court also held that, if at some point debtors did need to purchase a vehicle, they would be able to adjust their disposable income, and plan payment, accordingly. With respect to trustee's second objection, the court held that, because debtors' plan did not provide for payment in full of all allowed unsecured claims, the plan had to run for 60 months pursuant to 11 U.S.C.S. § 1325(b)(4)(B).
In re Thicklin, 2006 Bankr. LEXIS 2901 (Bankr. M.D.Ala. 2006) The debtor, whose annualized current monthly income was below the state median income for similarly sized households, claimed the Internal Revenue Service (IRS) standard expense for vehicle ownership under Schedule J despite the fact that nothing was owed on his vehicles. The court concluded that because his expenses for disposable income calculation purposes as a below median debtor were determined under 11 U.S.C.S. § 1325(b)(2)(A) and (B), the means test of 11 U.S.C.S. § 707(b) with the IRS expense standards was not implicated. Therefore, the debtor could not claim the IRS standard expense for vehicle ownership. However, this conclusion did not necessarily prevent the debtor from deducting a reasonably anticipated expense for replacement of his vehicles within the term of his Chapter 13 plan. Given the age of his vehicles, it was probable that one or both of them would need replacement during the course of the plan. Such an anticipated and projected expense, if within reason, could be properly deducted from the debtor's income to arrive at his disposable income. [Is this a YES and a NO?]
In re Harris, No. 05-87033, 2006 Bankr. LEXIS 3035, 2006 WL 2933891 (Bankr. E.D. Okla. Oct. 13, 2006); *In re Oliver*, 350 B.R. 294 (Bankr, W.D. Tex. 2006); In re McGuire, 342 B.R. 608 (Bankr. W.D. Mo. 2006)

In re Hardacre, 338 B.R. 718 (Bankr. N.D.Tex. 2006) Although allowable deductions under 11 U.S.C.S. § 707(b)(2)(A)(I) were phrased in the conjunctive, § 707(b)(2)(A)(i)(I) was construed to require the debtor to reduce the standard allowances by payments on secured debts, and allowing both deductions was contrary to the congressional intent that a debtor who was able to repay debts be required to do so. "Because the Local Standards only provide for a deduction for automobiles that are subject to lease or purchase, they do not permit a debtor to claim an ownership deduction for a vehicle owned free and clear by the debtor.
YES
In re Haley, (2006 BNH 40; 2006 Bankr. LEXIS 2857) The debtors could deduct ownership expenses for their second vehicle under 11 U.S.C.S. § 707(b)(2)(A)(ii)(I), even though they owned the car outright and did not make loan payments on it. Rather than acting as a cap, the Internal Revenue Service Local Standards set a fixed allowance for vehicle ownership deductions under § 707(b)(2)(A)(ii)(I).
In re Fowler 349 B.R. 414 (Bankr. Del. 2006) Based on the plain language of the statute, debtor was entitled to take a car ownership deduction in the amount set forth in the Local Standards for her ownership of one car, even though she had no car payment. The plain language of § 707(b)(2)(A)(ii)(I) provided that debtor's monthly expenses were the debtor's applicable monthly expense amount specified under the Local Standards, which did not require an actual car expense. As a result, there was no presumption of abuse under § 707(b)(3).
In re Hartwick, No. 06-31241, 2006 Bankr. LEXIS 2755, 2006 WL 2938700 (Bankr. D. Minn. Oct. 13, 2006)

Even if income is high, the net amount can be reduced by MORE than the IRS standards. A home mortgage or car loan is almost automatically a permissible deductible expense. But, some other SECURED creditors are not as easily deductible.

B. Payments for Secured Debts – Loan Against 401 Plan payments Allowed?

NO
In re Barraza, 346 B.R. 724 (Bankr. N.D.Tx. 2006)
In re Harshaw 345 B.R. 518 (Bankr. W.D. Pa. 2006) The debtors enjoyed a stable source of future income. Further, the debtors reduced some of their expenses after filing their petition and had additional disposable income in the form of voluntary contributions to a pension plan, and further reductions in expenses were available without depriving the debtors of necessities.
YES
In re Thompson, 2006 Bankr. LEXIS 255 (Bankr. N.D. Ohio 2006)
In re Haley, (2006 BNH 40; 2006 Bankr. LEXIS 2857) Although their 401k loan repayments would end in less than a year, the debtors properly deducted their monthly repayment amount on Official Bankr. Form B22C, l. 55. Amortizing those payments over five years, as suggested by the trustee, would materially alter the terms of the loan in violation of 11 U.S.C.S. 1322(f)

In re Thompson 2006 Bankr. LEXIS 2557 (Bankr. N.D. Ohio Sept. 26, 2006) More than nineteen months before filing for bankruptcy, the husband borrowed against his 401(k) plan to address financial difficulties. The loan was to be repaid through bi-weekly payroll deductions. Under the agreement, fifty percent of the husband's vested account balance was pledged as security for repayment of the loan. The court found that the payments were payments on account of secured debts for purposes of 11 U.S.C.S. § 707(b)(2)(A)(iii), thereby negating any presumption of abuse. In the alternative, the court found that, even if the presumption of abuse existed, the debtors rebutted the presumption by demonstrating special circumstances that justified additional expenses or adjustments of current monthly income under 11 U.S.C.S. § 707(b)(2)(B). The payments on the 401(k) loan were payments on account of secured debts under 11 U.S.C.S. § 707(b)(2)(A)(iii). The husband's 401(k) loan was not made in contemplation of bankruptcy, but in an effort to address the family's continued and worsening financial difficulties.

In re O'Connor, 334 B.R. 462 (Bankr. M.D.Fla. 2005) ("Although it is not binding in this case, the Court notes that the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, provides that a Chapter 13 Plan may not alter the terms of a loan such as the one at issue here and that any amount required to repay such loan shall not constitute "disposable income" under § 1325. 11 U.S.C. § 1322(f)" FN 2

If you really love this issue, become a member of the NACBA where you can read their amicus brief on this divisive issue.

The basic arguments are that the payments to the loan against the IRA are not "involuntary." Debtor will counter:

1. The payments are "necessary expenses" authorized under 707(b)(2)(A)(ii)(I) which must be deducted from debtor's "current monthly income" in determining whether a presumption of abuse arises.
2. The payments are involuntary deductions included on line 26 of Form 22A
3. Payments are involuntary deductions as defined as "necessary" by 5.10.1.10 of the Internal Revenue Manual
4. They payments are alternatively "other necessary expenses" for health and welfare of the debtor as defined under 707(b)(2)(A)(ii)(I)
5. Congressional intent was to preserve retirement plans
6. Deductions to plan are not "disposable income" as defined by the Bankruptcy Code
7. **Back door argument** - since the automatic stay excepts the collection for such plans
8. (§ 362(b)(19)(A)(B)), then intent was for the payments to be deemed permissible.

QUESTION: Is there ever a voluntary payment on 401(k) loan, or does plan merely charge against the payroll each month? Does this make a difference?

QUESTION: There can be a treatise about the tax disasters which the attorney may be introducing a client to when filing bankruptcy. One horrific event could occur under the following facts. If the wage deduction for the 401(k) is not allowed to pay off a prepetition loan, the employer very likely can and would liquidate the 401(k) to pay off the debt. Is this a taxable event?

C. CHARITABLE DEDUCTIONS (UNSECURED DEDUCTIONS NOT IN IRS RULES):

Issue arises often: The Code states --

1325(b)(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) **for charitable contributions** (that meet the definition of "charitable contribution" under section 548(d)(3) [11 USCS § 548(d)(3)] **to a qualified religious or charitable entity or organization** (as defined in section 548(d)(4) [11 USCS § 548(d)(4)]) **in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made**; and . . .

But, the Code then confuses the issue by stating:
1325(b)(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) [11 USCS § 707(b)(2)], if the debtor has current monthly income, when multiplied by 12, greater than [threshold amounts]

Then you drift over to section 707 which states in pertinent part:
707(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title [11 USCS §§ 1101 et seq. or 1301 et seq.], if it finds that the granting of relief would be an abuse of the provisions of this chapter [11 USCS §§ 701 et seq.]. In making a determination whether to dismiss a case under this section, the **court may not take into consideration whether a debtor has made**, or continues to make, **charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) [11 USCS § 548(d)(3)]) to any qualified religious or charitable entity or organization** (as that term is defined in section 548(d)(4) [11 USCS § 548(d)(4)]).

Now you should be confused. But, the issue that remains: are charitable deductions part of the means test, and if not, can they be included as deductions? In short, who wins, the creditors or the church?

THIS REQUIRES TWO QUESTIONS. IF YOU ANSWER IN THE AFFIRMATIVE TO THE FIRST, THEN YOU WILL NOT NEED TO PROCEED FURTHER

.

QUESTION 1: Is the debtor a below-median income debtor filer? If yes, then the issue of charitable donations is not an issue to review – *Drummond v. Cavanagh (In re Cavanagh)*, 250 B.R. 107 (9th Cir. BAP 2000): § 1325(b)(3) requires a separate analysis for above-median income debtors under § 1325(b)(3), but not for below median income filers.

QUESTION 2: Can you include a deduction for something under 1325 which is not an allowed deduction under 707?

CASE:: *In re Diagostino*, 347 B.R. 116, 118-119 (Bankr.N.D.N.Y. 2006) "Section 707(b)(2)(A) and (B) enumerate several "reasonably necessary" expenses that shall be allowed under the Code (i.e. health insurance, disability insurance, health savings account expenses, expenses to protect the debtor and the debtor's family from family violence, etc.). There is no mention of charitable contributions in either subsection. While charitable contributions are not deemed a reasonably necessary expense under § 707(b)(2)(A) and (B), they may be considered as an Other Necessary Expense pursuant to § 5.15.1.10 of the Internal Revenue Manual. Charitable contributions may be

included under the category of 'Other Expenses,' if they meet the necessary expense test:

> [T]hey must provide for the health and welfare of the taxpayer and/or his or her family or they must be for the production of income. This is determined based on the facts and circumstances of each case.
>
> Charitable Contributions (Donations to tax exempt organizations). Expense is necessary if: If it is a condition of employment or meets the necessary expense tests. Example: A minister is required to tithe according to his employment contract. Internal Revenue Manual § 5.15.1.10."

RESULT: Debtor had to cease making $100 per month charitable deduction.

QUESTION: Parochial school contract requires tithing and attendance to church. The tithing is part of a formula which reduces the parochial school education. Is this what IRM 5.15.1.10 would consider "necessary expense?"

CASE: *In re Cleary* 2006 Bankr. LEXIS 3235 (Bankr. S.C. 2006) "This aspect of the decision is limited very narrowly to the facts of this case. Mrs. Cleary is not a co-debtor. Her income would likely not be available if the children withdrew from private school because she would not work outside the home. It is only because of her religious convictions that she works outside the home and sends her children to private school. Debtor and his family sacrifice significantly in the purchase of food and clothing and in the areas of recreation and transportation expense. The expense of $ 1,513.00 for private school tuition is a reasonable and necessary expense." So nondebtors who pay the amount may be allowed to do so!

CASE: *In re Tranmer*, 2006 Bankr. LEXIS 3150 (Bankr. Mont. 2006) Can the debtor's $15 per month charitable deduction be allowed?

> THE ARGUMENT:
>
> With respect to Debtors' charitable expense the Trustee argues that charitable contributions are not authorized under the means test by the language of 707(b)(2) or legislative history, or as a condition of the Debtors' employment as provided in the IRS Manual and Standards. Since 1325(b)(3) incorporates only sections 707(b)(2)(A) and (B) and not 1325(b)(2), the Trustee argues, Congress put into place the strict test appearing at 707(b)(2) and did not incorporate 1325(b)(2)'s allowance for charitable contributions. The Trustee seeks a holding that Debtors may not increase their transportation expenditures above the IRS Local Standards referenced in 1325(b)(3) and 707(b)(2), and may not include charitable contributions in calculating disposable income of above-median debtors under those sections.
>
> THE RULING: The court in *Diagostino* concluded that the failure to include a provision for charitable contributions in 1325(b)(3) "effectively closes the door for debtors who are above the median income from deducting charitable contributions as an expense unless they can establish the contributions fall under the IRS guidelines." *Diagostino*, 347 B.R. at 119-20. The court declined to follow *Drummond v. Cavanagh (In re Cavanagh)*, 250 B.R. 107, 110-11 (9th Cir. BAP 2000), a case originating in this Court, since *Cavanagh* is a pre-BAPCPA case decided after enactment of the Religious Liberty and Charitable Donation Protection Act of 1998. *Diagostino* 347 B.R. at 117. *Cavanagh* would still apply to below-median income debtors because the provisions of 11 U.S.C. 1325(b)(2)(A) and (B) would still apply.

OTHER CASES: *In re Thicklin,* 2006 Bankr. LEXIS 2901 (Bank. M.D. Ga. 2006)

GENERAL RULE: If client is an above-median filer, the deductions will be limited by the IRS guideline. See the NEW LEGISLATION that follows.

Diagostino created an uproar. Religion, one of the charitable donations which are hamstrung by the BAPCPA language, were affected. Hence, religion is now an exception to the rule recited above through legislation.

Before the legislation commenced a letter was written:

The following is a copy of the letter from Grassley, Hatch and Sessions to Gonzales.

September 15, 2006

The Honorable Alberto Gonzales
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Gonzales:

We would like to bring to your attention a bankruptcy case recently decided in New York, In re Diagostino, No. 06-10384, 2006 WL 2578172 (Bankr. N.D.N.Y. Aug. 28, 2006), which we believe inaccurately interprets how tithes are to be treated under the bankruptcy laws. In Diagostino, the court ruled that above-median income debtors in Chapter 13 repayment plans cannot deduct charitable contributions when calculating their disposable income under the means test. This case arose because a trustee objected to the inclusion of tithing in a proposed repayment plan.

We believe that this court decision was wrongly decided and runs counter to Congressional intent behind the Religious Liberty and Charitable Donation Protection Act of 1998 (PL 105-183) and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (PL 109-8). Because the Department of Justice has plenary authority over Chapter 13 trustees under Chapter 4 of the United States Trustee Manual, we ask that the Department of Justice specifically direct Chapter 13 trustees – the private parties who oversee repayment plans – not to object to the inclusion of reasonable charitable contributions in a repayment plan if the contribution at issue meets the requirements of Section 4 of PL 105-183.

For people of faith in America, the obligation to tithe presents a significant part of the free exercise of religion, which is guaranteed to all Americans under the First Amendment. In fact, Congress has acted to protect the exercise of religion from encroachment by bankruptcy courts and trustees. Congress enacted the Religious Liberty and Charitable Donation Protection Act of 1998 to specifically protect tithing in the context of bankruptcy law. Consequently, trustees may no longer demand that churches "refund" tithes to the bankruptcy courts. Similarly, debtors have a statutory right to include tithes in repayment plans under Section 4 of that law. In addition, nothing in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was intended to change this right to allow tithes in a bankruptcy repayment plan. As the lead sponsors of both these important bankruptcy statutes, we can assure you that Congress never intended to exclude reasonable tithing in bankruptcy repayment plans.

The Department of Justice has the power to remove this obstacle that has presented itself in this misguided interpretation of the bankruptcy laws. We urge the Department to file court papers in appropriate cases to correct this misinterpretation, as well as issue mandatory guidance to Chapter 13 trustees so that they not object to reasonable charitable contributions in Chapter 13 repayment plans.

Sincerely,

Chuck Grassley
Orrin Hatch
Jeff Sessions

cc: Acting Director Clifford J. White, III, Executive Office for U.S. Trustees

---

S. 4044 passed Monday, December 4, 2006 as sponsored by Orrin Hatch and Barrack Obama and reads:

> A BILL
>
> To clarify the treatment of certain charitable contributions under title 11, United States Code.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.
>
> SECTION 1. SHORT TITLE.
>
> This Act may be cited as the 'Religious Liberty and Charitable Donation Clarification Act of 2006.'
>
> SEC. 2. TREATMENT OF CERTAIN CONTRIBUTIONS IN BANKRUPTCY.

Section 1325(b)(3) of title 11, United States Code, is amended by inserting other than subparagraph (A)(ii) of paragraph (2), after paragraph (2).

D. EXORBITANT GASOLINE EXPENSES (ARE IRS AMOUNTS ENOUGH?):

The IRS has very firm amounts allotted to debtors for their cars – commonly referred to as transportation expenses.

In order to see what is allotted to your client, merely use an up-to-date software for filing, or go to: http://www.usdoj.gov/ust/eo/bapcpa/20061001/bci_data/IRS_Trans_Exp_Stds_SO.htm

The chart presently reflects the following:

IRS LOCAL TRANSPORTATION EXPENSE STANDARDS
South Census Region

Operating Costs & Public Transportation Costs
(Line 22, Form B22A)
(Line 27, Form B22C)

Region	**No Car**	**One Car**	**Two Cars**
South Census Region	$203	$260	$343
MSA Locations Within Census Region:			
Atlanta	$291	$238	$320
Baltimore	$233	$271	$353
Dallas-Ft. Worth	$317	$348	$430
Houston	$287	$338	$420
Miami	*$292*	*$348*	*$431*
Tampa	$264	$253	$336
Washington, D.C.	$299	$350	$433

QUESTION: Debtors, when paying as much as $3 per gallon, and having numerous car repairs as their jalopy is neither new nor under warranty, request an additional expense. Like the charitable deduction issue, the court must ask: is the bench given discretion to increase the deduction for the car?

CASE: *In re Tranmer*. This case involved a broken down truck and a debtor who drove 130 miles each day to and from work – thus requesting an additional $180.00 per month for transportation.

RULING: First, the statute must be read plainly--
Barr, 341 B.R. at 185, explains: "The use of 'shall' in section 1325(b)(3) is mandatory and leaves no discretion with respect to the expenses and deductions that are to be deducted in arriving at disposable income." The court found the

language of 1325(b)(3) unambiguous and enforced it according to its terms requiring that the expenses of above-median income debtors be determined under 707(b)(2)(A) and (B). Id., citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) ("When the language of a statute is plain, the sole function of the courts is to enforce the statute according to its terms unless the disposition required by the text is absurd"); see also *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917))). This Court concurs with *Barr* and *Hardacre* that, in the instant case, the above-median income Debtors' expenses must be determined in accordance with the "means test". Accord *Guzman*, 345 B.R. at 642-43.

Then what is the "test?"

[F]or above-median debtors, the statute breaks down allowable expenses into five general categories: (1) those that fit into the IRS' National Standards, which include food, clothing, household supplies, personal care, and miscellaneous expenses; (2) **those that fit into the IRS' Local Standards, which include housing and transportation**; (3) actual expenses for items categorized by the IRS as "Other Necessary Expenses," including such items as taxes, mandatory payroll deductions, health care, and telecommunications services; (4) actual expenses, without limitations, for certain other expenses specified by the Bankruptcy Code, such as care for disabled family members and tuition; and (5) payments on secured and priority debts.

In re McGuire, 342 B.R. 608, 612 (Bankr. W.D. Mo. 2006)

Then, what is the IRS local standard?

The IRS Financial Analysis Handbook in discussing Local Standards provides in 5.15.1.7, P 4 that "[t]axpayers will be allowed the local standard or the amount actually paid, *whichever is less*." (emphasis added)

RESULT: A strict reading of the codes (Bankruptcy and IRC) would limit the gasoline expenditure to the lesser of the amount allotted or the amount actually spent.

TO THE CONTRARY: *In re Pederson*, 2006 Bankr. LEXIS 2725 (Bankr. N.D Ia. 2006)
This court does not delve into the detailed statutory analysis handled by the Montana Court in *Tranmer*.

Instead, it states that there are vehicle expenses beyond repair and gasoline as the IRS book states:

The Financial Analysis handbook regarding IRS collection standards states that local standards include the following expenses.

Vehicle insurance, vehicle payment (lease or purchase), maintenance, fuel, state and local registration, required inspection, parking fees, tolls, driver's license,

> public transportation. Transportation costs not required to produce income or ensure the health and welfare of the family are not considered necessary.

The court then points out that, ". . .nowhere on form B22C does it say where to include the costs of motor vehicle insurance or license and registration costs. Nor does it say where the form includes the costs of debtors' drivers' licenses."

Hence, it allowed the parties to add these "other" expenses not mentioned as gas or wear – and which do not pop into the B22C form.

The only remaining test was, "[A] debtor also may make such a showing of special circumstances in order to depart from the IRS standards used in determining disposable income for purposes of chapter 13 plan confirmation."

In the end, the debtor was allowed to increase some expenses, but needed to redo some math – in short, this is a departure from the strict analysis of *Tranmer*.

PRACTICE POINTER:
Include in B22C line – entitled "Other Expenses" the following items (Note many programs will not find a place to "plug in" these numbers – as noted by the judge in *Pederson* – hence, you will have to be imaginative and find a way of including these expenses either in the form or include a separate filing entitled "Request for Reasonable Additional Expenses." The *Pederson* court has authorized the following:

- Driver's License Debtor
- Driver License Debtor's Spouse (if applicable)
- Driver License Debtor's dependant (if applicable)
- Parking fees (if applicable)
- Tolls (if applicable)
- Debtor's Car Registration
- Debtor's Spouse Car Registration (if applicable)
- Debtor's Dependant's Car Registration (if applicable)

Also remember, the Code provides for extenuating circumstances to allow a debtor to be relieved from the severe constraints of 707 and Form 22 – two most obvious are military service and health problems. Pursuant to section 707(b)(2)(B), debtors may rebut the presumption of abuse by demonstrating "special circumstances." Iowa Senator Grassley found the fluctuating costs of

gasoline to create an obvious third extenuating circumstance[1] *See* 147 Cong. Rec. S2362 (March 15, 2001)(colloquy between Sen. Levin and Sen. Grassley).

Now, that you have reviewed the numerous issues of Means Testing, you can see the woven idiosyncracies which affect the decision of what chapter to file. The chart at the start of this section looked to numbers without taking into consideration the means test. I have added a column to show the effect BAPCPA has made upon the original chart.

	Means Test Result (YES = above or presumed abusive, NO= below MFI, no presumption)	Chapter 7 eligible?	Chapter 11 eligible?	Chapter 13 eligible?
Unsecured debt less than $307,675	NO	YES	YES	YES
Unsecured debt less than $307,675	YES	NO	YES	YES
Unsecured debt over $307,675	NO	YES	YES	NO
Unsecured debt over $307,675	YES	NO	YES	NO
Secured debt under $922,975	NO	YES	YES	YES
Secured debt under $922,975	YES	NO	YES	YES
Secured debt exceeding $922,975	NO	YES	YES	NO

[1] FLUCTUATING GAS PRICES

Mr. LEVIN. Mr. President, as the Senator knows, gas prices have fluctuated significantly in the last year. In my own state of Michigan, gas prices went from .80 cents a gallon in October 1999 to a high of $1.46 a gallon by June 2000. The Internal Revenue Service, IRS, Local Standards for Operating Costs and Public Transportation Costs, which includes costs for gasoline, are revised in October of each year but are often based on statistics from as long as 2 or 3 years before that. The IRS standards for gasoline costs can be out of date in a fast changing economy.

In the event a debtor has experienced significant increases in the costs of buying gasoline for their car, how would the Means Test adjust for this?

Mr. GRASSLEY. Mr. President, under the special circumstances provision, the debtor could explain in the debtor's petition why an additional allowance in excess of the amounts allowed under the Internal Revenue Standards was reasonable and necessary. As a practical matter, if the costs for gas have increased significantly over the costs for gas used by the Internal Revenue Service, the excess costs of gasoline over the IRS standard should and would be allowed under the special circumstances provision.

147 Cong. Rec. S2362 (March 15, 2001)(colloquy between Sen. Levin and Sen. Grassley).

Secured debt exceeding $922,975	YES	NO	YES	NO

As you can readily see, wealthy people (those with incomes exceeding the Median Family Income and who have Current Monthly Income to pay creditors), are forced to file a Chapter 11 on a few occasions – and as will be noted they may have to lose their homestead! [Section E.3]

B. FILING IN BANKRUPTCY COURT

1. Is the Client Eligible to File or Eligible for Discharge?

Before the case is filed, the attorney must know much more about his client than he or she had to know in the past.

First, your major concern is to file in order to provide the client a discharge. Hence, the discharge issue arises long before you file. BAPCPA has retooled the numbers of eligibility to file. If your client has a prior bankruptcy filing, the new case may be one of three things;

1. Potentially worthless as there is no discharge to be obtained; [2]
2. Worse yet, case may be dismissed as the client is not eligible; or
3. Eligible.

Determining this is easy – if you have digested the various Code Sections. This answered by strict statutory analysis. The chart below outlines such an analysis.

SYNOPSIS	Can File?	Discharge CH 7?	Discharge CH 13	Comments
Ch 7 w/n 180 days and DISMISSED	NO	No – § 109(g)	No – § 109(g)	The dismissal has to be either: (1) willful failure to abide court orders; or (2) voluntarily dismissed after stay relief requested.
CH 7 w/n 180 days and DISCHARGED	YES	No – § 727(a)(8)	No - § 1328(f)(1)	Gives the client time to gather retainer.
Ch 7 181 days to 2 years and DISCHARGED	YES	No – § 727(a)(8)	No – § 1328(f)(1)	Rule of thumb – if less than 2 years, bankruptcy is not for discharge, but may be sued for right to reinstate mortgage and obtain stay.
Ch 7 or 11 w/n 2-4 years and DISCHARGED	YES	No – § 727(a)(8)[3]	NO – § 1328(f)(1)[4]	In Ch 13, the two years is measured from filing date of old case to filing date of new case.

[2] Sometimes you may file to save the home and care nothing about discharge.

[3] If you are thinking of filing a chapter 11 to get around this, § 1141(d)(3)(C) states that the rules for Chapter 7 apply to Chapter 11. Hence, there is no loophole.

[4] But, if you pay 100%, the issue is moot

Ch 7 or 11 w/n 4+ to 8 years and DISCHARGED	YES	NO – § 727(a)(8)	YES – § 1328(f)(1)	In Ch 13, filing to filing is measurement.
Ch 7 or 11 more than 8 years and DISCHARGED	YES	YES – § 727(a)(8)	YES – § 1328(f)(1)	Commencement from old case to date of filing new case must be 8 years under § 727(a)(8). If originally filed under another chapter and then converted – remember to look to the commencement date of the original filing and disregard the conversion order as being a "new commencement date" for purposes of the term "commencement" in § 727(a)(8)
Ch 12 or 13 w/n 180 days and DISMISSED	NO	NO – § 109(g)	NO – §109(g)	The dismissal has to be either: (1) willful failure to abide court orders; or (2) voluntarily dismissed after stay relief requested.
Ch 12 or 13 181 days to 2 years	YES	NO – § 727(a)(9)[5]	NO – § 1328(f)(2)	Still can file – but no discharge. Use to save the house or more importantly obtain a stay – but know the exceptions to the stay rule!
Ch 12 or 13 2+ to w/n 6 years	YES	NO – § 727(a)(9)[6]	YES § 1328(f)(2)	Looks like 13 is the only chapter to think about.
Ch 12 or 13 6-8 years	YES	YES – § 727(a)(9)[7]	YES – § 1328(f)(2)	Again, measurement is from date of commencement of old case to filing date of new case – if you are thinking of a chapter 7. If originally filed under another chapter and then converted – remember to look to the commencement date of the original filing and disregard the conversion order as being a "new commencement date" for purposes of the term "commencement" in § 727(a)(9)

[5] Unless 100% plan – § 727(a)(9)(A)

[6] Unless 100% plan – § 727(a)(9)(A)

[7] Doesn't matter at this point in time of payments were 100% or less.

Thanks to :
http://abiworld.net/newsletter/consumerbank/vol4num3/Discharge.html –
ABI **Committee Notes, Vol. 4, Number 3**, May 2006, *Discharge Calculations under the Code for Those Refiling,* Robert C. Meyer

2. Can the Client File in Florida and Claim Homestead Exemption?

First, exemptions are blind as to which chapter is filed, Hence, the exemptions are uniform among the chapters.

And, since the homestead is the major asset in the state of Florida, you MUST be aware of the Debtor's eligibility to claim the ENTIRE asset as exempt.

But that is not all to the issue of the determination. BAPCPA has decided magic exists with 2 years or 180 days (note it is not uniformly one-half year – but instead a gauge of 180 days) and 1215 days.

New 730-Day Rule

First, has your client lived in the state for the past 2 years – translated to 730 days (God forbid your client's calculations are affected by a leap year)?

If yes, you will still have to look to the 1215 day rule below.

If no, you will have to review 522(b)(3)(A) which states:

522(b)(3) Property listed in this paragraph is–

(A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or (3)

This is obscure, and that is an understatement. Your client's homestead or personal property exemption is dependant upon residency in Florida. If within the past 730 days, the client has resided in *another* state, then you look to an obscure review – where did the client reside 731 days ago to 910 days ago? And, if your client moves about, you must see where the client lived the most during that 180 period which is 731 days to 910 days prior to the filing.

Then there is the domiciliary requirement for exemptions. For instance, Florida requires that the exemptions of Chapter 222 be allocated to the benefit of residents, and no one else. But, the BAPCPA revisions proclaim that the debtor must use the exemptions of his nonresident state under the 730, 731-910, analysis outlined above. What happens when your client is a debtor without a state exemption plan?

The answer is another "hanging paragraph." This hanging paragraph lies beneath 522(b)(3)(C) and states, "If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d)."

So, Florida residents can use federal exemptions when their residency is less than 730 days and the "other" state's exemptions require residency.

CASES:
In re West, 20 Fla. L. Weekly Fed. B 19 (Bankr. M.D. Fla. 2006) – Debtor lived in Indiana during the 731-910 day period. Indiana only provides exemption for "domicile" of Indiana which debtor was not. Federal exemptions allowed.

In re Underwood, 342 B.R. 358, 361-62 (Bankr. N.D. Fla. 2006) – Debtor lived not in Florida 730 days prior, but did live in Colorado the entire 180 days prior to the 730th day, was entitled to use federal exemptions. Trustee wanted debtor to use Colorado exemptions. Debtor allowed to use choice of Colorado or federal as provided under 522(b),

In re Crandall, 346 B.R. 220 (Bankr MD Fla. 2006) – Debtor lived in NY the 731-910 period and claimed automobile exempt under NY exemption law. Trustee objected. NY exemptions only apply to residents of NY. Debtor was not a resident of NY. Court allowed federal exemption for automobile.

The 1215-Day Rule

New BAPCPA rule: If you have only resided in new state for 1215 days or LESS then your homestead exemption is limited to $125,000 per filer.

HOT ISSUE: Through a statutory reading, the "opt out" states could not be bound by this new law. *In re McNabb*, 2005 WL 1525101; 326 B.R. 785, (Bankr. Ariz. 2005) Then our local judges reviewed this case and – as gently as one can describe – tore it apart. *In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005) and *In re Wayrynen*, 332 B.R. 479 (Bankr. S.D. Fla. 10/14/05).

PRACTICE POINTER: Do not deliver this issue to this court again unless you know you are to take the issue to the 11th Circuit on appeal.

For detailed review of this now out-of-date issue, go to: NABTalk, Vol 22, No 2 as published 2006 "Homestead Protection is Devolving" Robert C. Meyer

Result outlined by Chart:

Residence Period	**1215+**	**730-1214**	**180-729**	**<180**
Exemptions	Florida – all	Florida, but homestead limited by 522(p) to $125,000	"Other" state under 731-910 review or federal exemption	Cannot file in Florida

QUESTION: Client resided in a state that does not require residency for state exemptions during the 731-910 period, which exemptions are allowed?

QUESTION: Does Florida require residency? And, if it does, and your client leaves to another state, what exemption will be provided to your client if they file within 730 days of the move out of state?

QUESTION: Debtor lived 731 days in Florida, owns property as tenancy by the entirety, and spouse is not a joint filer. Assume there are no joint creditors and each resides in the home. Equity in home is $300,000.00. Can trustee sell home, including nondebtor spouse, to obtain the equity which exceeds the $125,000.00 limit of 522(p)? Look to 363(b) and 363(h) and what is "property of the estate?"Look to 101 and find no definition. Look to 541 and find a large definition.

QUESTION: If debtor is nonresident alien, can this debtor use the hanging paragraph?

QUESTION: Debtor has home which is about $3,000.00 nonexempt under the less than 1215-day analysis (this includes any appreciation from purchase date to date of filing), what happens if the home appreciates post-petition by another $10,000.00?

In 9th Circuit Debtor loses: *In re Hyman*, 967 F.2d 1316 (9th Cir. 1992)[Note: California exemption derived from *proceeds* of sale of home as opposed to equity existing in homestead before sale. This is pint of contention by many courts that distinguish this case from their juridicational approach to exemption.]

The Criminal Exception:

New BACPA also states that homestead not extended beyond $125,00.00 for criminals.

Section 522(q)(1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $ 125,000 if--

(A) the court determines, after notice and a hearing, that the debtor **has been convicted** of a felony (as defined in section 3156 of title 18 [18 USCS 3156]), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; **or**

(B) the debtor owes a debt arising from--

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS 78c(a)(47)]), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 [15 USCS 78l or 78o(d)] or under section 6 of the Securities Act of 1933 [15 USCS 77f];

(iii) any civil remedy under section 1964 of title 18; or

(iv) (q) (1) As a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) which exceeds in the aggregate $ 125,000 if--

(A) the court determines, after notice and a hearing, that the debtor has been convicted of a felony (as defined in section 3156 of title 18 [18 USCS 3156]), which under the circumstances, demonstrates that the filing of the case was an abuse of the provisions of this title; or

(B) the debtor owes a debt arising from--

(i) any violation of the Federal securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS 78c(a)(47)]), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws;

(ii) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 [15 USCS 78l or 78o(d)] or under section 6 of the Securities Act of 1933 [15 USCS 77f];

(iii) any civil remedy under section 1964 of title 18; or

(iv) **any criminal act, intentional tort, or willful or reckless misconduct that caused serious physical injury or death to another individual in the preceding 5 years**.

(2) Paragraph (1) shall not apply to the extent the amount of an interest in property described in subparagraphs (A), (B), (C), and (D) of subsection (p)(1) is reasonably necessary for the support of the debtor and any dependent of the debtor. (Emphasis added)

QUESTION: Do you need to be convicted for the homestead conviction to apply?

NO – *In re Larson*, 340 B.R. 444 (Bankr. ED Ma 2006) "All of the forgoing authorities, including the one case from Massachusetts, recognize that the phrase "criminal act" does not require a conviction or a certain level of culpability. To read 11 U.S.C. 522(q)(1)(B)(iv) in this way is also consistent with a second applicable rule of statutory construction. That is,'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)" at 449.

The Shrinkage Rule

The Code provides windfall for some debtors who convert from chapter 13 to chapter 7 – a reduction in value of the assets: valuation for the converted case will be determined by the conversion date as opposed to the original petition date. A car's value from the date of petition would be dramatically changed after a case was two or more years in a chapter 13.

348(f)(1) Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title -

(A) property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

(2) *If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.*

QUESTION: Why does the bad faith converter get the new valuation, while the good faith converter does not? Is this punishment for appreciation a two-edged dagger for property which depreciates?

QUESTION: Will conversion be a disaster as the debtor's nonexempt property – which was immunized by the chapter 13 plan's payments – become the subject of trustee turnover orders?

EXEMPTION CHART QUICK OVERVIEW

Issue	**Homestead**	**Non-homestead**
Outstanding DSO order?	*Havoco* protected?	Objection to exemption
Fraudulent Conversion?	*Havoco* protected!	Not protected unless exempt to exempt

<1215 resident	*Rasmussen* calculation for exemption = TOTAL MARKET VALUE -($125,000 or $250,0000 + appreciation since purchase + proceeds from other "Florida" home delivered to this home	Irrelevant
Criminal	Probably would follow *Rasmussen*	Irrelevant

3. Will the Client Be Able to Stay "Other Matters" or Must You, the Attorney, File Papers to Invoke the Stay?

In the old days, you filed the case and an automatic stay was engaged and you could relax. Now, that is not the case. The debtor may well need to engage an attorney who can file a motion to employ a stay because of the many new exceptions. Some of this relates to topics above – but this section concentrates the issue in one place.

RULE 1: Filed a bankruptcy within one year: 362(c)(3) which states:
(c) Except as provided in subsections (d), (e), (f), and (h) of this section--

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor *was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]*--

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after *notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and*

(c) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption *may be rebutted* by clear and convincing evidence to the contrary)--

(I) as to all creditors, if--

(I) more than 1 previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title [11 USCS §§ 101 et seq.] or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case

under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] or any other reason to conclude that the later case will be concluded--

(aa) if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge; or

(bb) if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

Exception 1: Dismissed under 707(b) – and then the debtor lost a job or some other horrible reason affected the debtor. Running back to the bankruptcy court after being determined to be presumptively abusive, but can be overcome!.

Exception 2: Never filed – some of the 109(h) cases say the pro se debtors who failed to incur the financial education of 109(h) are deemed to have never been "filed" and therefore never were *pending within the preceding 1-year period*

Exception 3: TRAP not condoned – the language requires the motion be filed and the matter *heard* within the 30 days, or the stay will be gone. 362(c)(3)(B) Courts determine when motion timely filed. Problems arise when hearing held after the 30th day – *In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex. 2005); *In re Beasley*, 339 B.R. 472 (Bankr. E.D. Ark. 2006). Watch out, technically speaking they are wrong – *In re Whitaker*, 341 B.R. 336 (Bankr. S.D. Ga. 2006)

Exception 4: Several cases have held that §362(c)(3)(A) terminates the stay as to the debtor, but not as to property of the estate (as distinguished from the property of the debtor). *In re Jones*, 339 B.R. 360 (Bankr. E.D. N.C., 2006). *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio, 2006). *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn., 2006). *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio, 2006). Contra: *In re Jupiter*, 344 B.R. 754 (Bankr. D. S.C., 2006) holding that the stay terminates with respect to property of the estate, as well. *Id.* at 759-762.

QUESTION: Which judge is correct? And, when does the statutory construction argument (that when particular language is used in one section but not another, it is presumed that Congress acts purposefully in using the different language to signify different meanings) apply?

QUESTION: Debtor files motion on 29th day to reimpose the stay as there was a previously existing case within one year. Is this adequate?

In re Covert, 2006 LEXIS 2607 (Bankr. N.D. Fla 2006) says no!

RULE 4001-3 in Northern District of Florida Bankruptcy Court:

A motion to reimpose or extend the automatic stay under 11 USC 362(c) shall be filed within **five (5)** days of the filing of the petition. The debtor shall serve all interested parties . . .

NOTE: Expect a similar rule to arise in your jurisdiction.

RULE 2: The new 362(b)(21) or the INELIGIBLE TO BE A DEBTOR RULE:
(21) under subsection (a), of any act to enforce any lien against or security interest in real property--

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

Here, the stay never comes into effect, so no motion for relief needs to be filed.

QUESTION: Will the state court judge, as he or she eyes the Suggestion of Bankruptcy in his or her file, believe you that there is no stay in effect as the debtor violated section 109(h) of the Bankruptcy Code?

QUESTION: How is this different – 109(h) – from the 109(g) rule prohibiting implementation of the stay?

RULE 3: Nondiligence by the debtor – failing to file a statement of intentions, or perform on the same.

The BAPCPA's new 521(a)(2) requires a Chapter 7 debtor to file his statement of intention "within thirty days after the date of the filing of a petition under chapter 7 ... or on or before the date of the meeting of creditors, whichever is earlier" 40 and then to perform his stated intention "within 30 days after the first date set for the meeting of creditors." This is reviewed below in "Altogether New Issues."

The question is, what happens to the debtor who is not diligent? Does the case get dismissed, or is there a lesser penalty? The answer is 362(h) which states:

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and *such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)* [11 USCS § 521(a)(2)]--

(A) *to file timely any statement of intention required under section 521(a)(2) [11 USCS § 521(a)(2)] with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722 [11 USCS § 722], enter into an agreement of the kind specified in section 524(c) [11 USCS § 524(c)] applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p)* [11 USCS § 365(p)] if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

RULE 4: Trustee gloss on the personal property issue of Rule 3 described above.

If the trustee wants the stay to remain in effect when the debtor's lackadaisical attitude was to let the property go away, the trustee *must* act. Unless the trustee files a motion, the stay expires. 362(h)(2) states:

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2) [11 USCS §

521(a)(2)], after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

RULE 5: Assumption of PERSONAL PROPERTY Lease in Chapter 7 is 60 days or no stay. Pursuant to the new 365(p)(1) under BAPCPA, once an unexpired lease of personal property is rejected or not timely assumed, "the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated."

NOTE: This will have no practical application, as trustee extremely rarely even looks at such leases.

EFFECT: Just wait 60 days, and if nothing is done, on day 61 the lessor can proceed to attack as though no bankruptcy was filed (save a deficiency request).

RULE 6: Like Rule 1, the Multiple Filer (Distinguish from Rule 1 in that multiple here is beyond two filings)

The chart below emphasizes the main elements to each and highlights the differences of a 362(c)(4) or multiple filer stay relief from the multiple filer of 362(c)(3) [Just in bankruptcy for the second time].

ELEMENT	**362(c)(3) – one prior filing**	**362(c)(4) – one+ prior filing**
Prior filing	(1) a single or joint case is filed by or against an individual under Chapter 7, 11 or 13;	(1) a single or joint case is filed by or against an individual under Chapter 7, 11, **12** or 13;
How many priors	(2) that same individual had **one** other single or joint bankruptcy case that was pending within the preceding 1-year period	2) that same individual had **two** or more single or joint bankruptcy cases that were pending within the previous year;
How many dismissed	(3) the prior case was dismissed;	(3) those prior case**s** were dismissed
Terms of dismissal	(4) the later filed case is not a Chapter 11 or 13 case that is being refiled after dismissal under 707(b)	(4) the later filed case is not a Chapter 11, 12 or 13 case that is being refiled after dismissal under 707(b)
Apply to Involuntary?	YES	YES

QUESTION: Both 362(c)(3) and 362(c)(4) use the term “pending.” Where in the Code is “pending” defined, and does the definition fit?

QUESTION: Any Chapter 11, 12 or 13 case filed by an individual debtor after that same debtor's prior Chapter 7 case was dismissed pursuant to 707(b), should it be considered "refiled" for purposes of 362(c)(4)?

QUESTION: Does 363(c)(3) or (c)(4) concern itself with the cause of dismissal being for fraud as opposed to oversight, or failure to file tax returns, or some other lack of diligence reason recited above?

RULE 6: In rem relief is now codified

Prior to the new BAPCPA provision of 362(d), courts often entered orders which stated that any future filing by any person or entity which sought to stay the foreclosure on a property – which would be legally described in the bankruptcy court order – would not be subjected to the automatic stay of the Bankruptcy Code. This was referred to as an in rem order. BAPCPA states, in pertinent part:

362(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay–

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

. . .

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either--

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) *shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court,* except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. *Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording*.

NOTE: Pretty strong language, but if the Debtor wins the lottery and seeks to reimpose the stay, he can refile as, ". . . a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing."

QUESTION: What is the burden of proof of "changed circumstances?"

4. How Affected is the Debtor to a Domestic Support Obligation

§ 101. Definitions

In this title the following definitions shall apply:

(14A) The term **"domestic support obligation"** means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is--

(A) owed to or recoverable by--

(I) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;
(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of–
(I) a separation agreement, divorce decree, or property settlement agreement;
(ii) an order of a court of record; or
(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and
(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

You cannot discharge a debt which is,". . . for a domestic support obligation;" Sections 523(a)(5) or 1328(a)(2).

There is concurrent jurisdiction to enforce a domestic support obligation. Once an individual debtor is discharged, the holder of a domestic support obligation claim is not subject to the statutory injunction barring enforcement of the debt against the debtor as a personal liability. See 11 U.S.C. §§ 523(a)(5), 524(a)(2), & 727(b). And, when you seek to enforce the DSO, you may attach or levy against property which would be deemed otherwise exempt to the other bankruptcy creditors. *In re Covington*, 2006 Bankr. LEXIS 2485 (Bankr.E.D.Ca. 2006)

The debtor's domestic attorney is not protected by DSO language. If you represented the debtor in a divorce and are owed fees, you are not to be protected under 523(a)(5) as, "Creditor is not the spouse, former spouse, or child of the Debtor. Nor is she [the attorney for the debtor in the divorce proceeding] a parent, legal guardian, responsible relative or a governmental unit. Because Creditor's claim is not 'owed to' or 'recoverable by' the individuals or entities described under § 101(14A)(A), her claim cannot be a 'domestic support obligation.' The Court also notes that Creditor did not present sufficient legal authority demonstrating that her claim is entitled to be treated as a 'domestic support obligation' under § 101 (14A)." *In re Mupanduki*, 2006 Bankr. LEXIS 1283 (Bankr. S.Car. 2006)
Also see *Ashton v Dollaga (In re Dollaga)* 260 BR 493 (BAP9 2001), 2001 CDOS 2741, 2001 Daily Journal DAR 3449, 45 CBC2d 1537; *In re Smith*, 205 B.R. 612 (Bankr. E.D. Cal. 1997) and *In re Montgomery*, 310 B.R. 169 (Bankr. C.D. Cal. 2004).

Requires an evidentiary hearing. *In re O'Brien*, 339 B.R. 529 (Bankr.D.Mass.2006);

SECTION 523(A)(15) MAY BE GONE:
The language of 523(a)(5) is broader (as 101(14A) is broader) and because (a)(15) is to the exclusion of (a)(5), debt simply characterized as DSO will be immune from 523(a)(15) argument.
REMEMBER: (a)(15) states, " to a spouse, former spouse, or child of the debtor *and not of the kind described in paragraph (5)* that is incurred by the debtor in the course of a divorce or . . ." and all of the old language about "ability to pay" has been deleted
The old language, and certainly deleted language, read as follows:

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

And one more change – this issue once had to be handled by an adversary complaint, or the debt could be deemed discharged. The necessity of filing the adversary is gone!

PRACTICE POINTER: Do not rely on old cases about "ability to pay" and discharge associated with the same in relation to DSO.

CAN THE TRUSTEE MUDDY THE DSO WATERS?

Now, the bad news for the debtor beyond all of this – before the trustee could not liquidate exempt assets for the benefit of the DSO creditor. Theories to the opposite are now brewing.

It is step by step analysis:

Step 1: The incentive clause – 507(a)(1)(C) calls the trustees to duty – it states:

> (C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302 [**11 USCS § 701, 702, 703, 1104, 1202, or 1302**], the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) [11 USCS § 503(b)] shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee *administers assets that are otherwise available for the payment of such claims*. (Emphasis added)
>
> 503(b) includes 503(b)(1) which allows the trustees to be paid before the priority creditors as it states "(b) After notice and a hearing, there shall be allowed, administrative expenses, *other than* claims allowed under section 502(f) of this title [11 USCS § 502(f)],. . ."
>
> And a trustee receives fees under , " 503(b)(2) compensation and reimbursement awarded under section 330(a) of this title [11 USCS § 330(a)];"

Step 2: The problem for the ex-spouses or children of the deadbeat dad is that Congress tried too hard to make the DSO a priority. DSO is no longer just an unsecured creditor, the debt is now a priority creditor under the new section 507(a)(1) which reads as:

a) The following expenses and claims have priority in the following order:

> **(1) First**:
>
> (A) *Allowed unsecured claims for domestic support obligations* that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.
>
> (B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.
>
> (C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302 [11 USCS § 701, 702, 703, 1104, 1202, or 1302], the administrative expenses of the

trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) [11 USCS § 503(b)] shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

Step 3: The clause of 507(a)(1)(C) – to the extent that the trustee *administers assets that are otherwise available for the payment of such claims*. (Emphasis added) – does not say "nonexempt assets" – instead it allows the trustee to administer the "assets" that are otherwise available for the payment of such claims. Exempt property is available for payment of such DSO claims!!!.

QUESTION: Did Congress mean exempt property when it used the term "assets" in 507(a)(1)(C)?

Step 4: 522(c)(1) gives support to the trustee's argument as it states:

> **(c)** Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title [11 USCS § 502] as if such debt had arisen, before the commencement of the case, *except--*
>
> (1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) [11 USCS § 523(a)] (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, *such property shall be liable for a debt of a kind specified in section 523(a)(5)) [11 USCS § 523(a)(5)];*

It appears that property is exempt unless liable for a 523(a)(5) debt – a debt for a DSO.

RESULT: A trustee could seek to attack exempt property if the debtor owes DSO and then seek a surcharge against the spouse or DSO payee under 503 – as surcharge is charged against the creditor, not the estate.

QUESTION: If you file a chapter 7, and the debtor has $100,000 of equity in the home and $40,000 of DSO debt, can the trustee administer the asset for the estate?

As of publication cases:

In re Covington, 2006 Bankr. LEXIS 2485 (Bankr. E.D. Ca. 2006) "The trustee's objection to these exemptions will be overruled. Section 522(c)(1) does not provide for the disallowance of an exemption. Rather, it provides that property exempted by the debtor is nonetheless liable for a domestic support obligation. Disallowance of the exemption is not a predicate to the enforcement of a domestic support obligation against the property.
"The next issue is whether, by virtue of section 522(c)(1), the trustee may liquidate the exempt property in order to pay the domestic support obligation. The court concludes that he may not. The trustee's motion to sell the automobile will therefore be denied."

*David Ruppe*l, 06-60961-fra7 (Oregon) [Get from court's website]

5. DUTIES OF THE DEBTOR

BAPCPA created duties upon the debtor which have delivered some harsh consequences. Being a little lax may no longer be forgivable.

521(i) issue:
The Code reads:

521(i) (1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a) [11 USCS § 707(a)], if an individual debtor in a voluntary case under chapter 7 or 13 [11 USCS §§ 701 et seq. or 1301 et seq.] *fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case* ***shall be automatically dismissed*** *effective on the 46th day after the date of the filing of the petition.*

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

The emphasized language gives no discretion to the court. The case SHALL be dismissed on the 46th day. So debtor's counsel must know what 521(a)(1) requires:

Section of Code	**Translated into English**
(B)(i) a schedule of assets and liabilities;	Schedules A-H
(B)(ii) a schedule of current income and current expenditures	Schedules I & J
(B) (iii) a statement of the debtor's financial affairs and, if section 342(b) [11 USCS § 342(b)] applies, a certificate-- (I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1) [11 USCS § 110(b)(1)], indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b) [11 USCS § 342(b)]; or (II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;	Statement of Financial Affairs
(B)(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;	New Form which attaches copies of Paystubs
(B)(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated	This is the mystery Between Payment advices, Schedules I and J and Form 22 this should be responded to, but more is being requested

(B)(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;	This is on the Schedule I bottom portion

But, you still must know about 521(a)(2) which requires more items.

Section of the Code	**Translated in English**
(2)(A) within thirty days after the date of the filing of a petition under chapter 7 of this title [11 USCS §§ 701 et seq.] or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;	Statement of Intention A Form provided by software
(B) within 30 days after the first date set for the meeting of creditors under section 341(a) [11 USCS § 341(a)], or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and	Reaffirm or Redeem or Surrender There are some local forms for Reaffirmation LF-71 LF-81

Deadlines for the Chapter 7 Debtor [assume 341 is 30 days from date of filing]

DATE	**ITEM REQUIRED**
Filing	Bare Bones Petition, Matrix, Filing fee, and initial financial counseling completion form
15 days	All schedules, B22 forms, statement of payment advices
20 days	Tax documents to trustee and creditor; pay stubs to trustee (or copy of payment advices); bank statements to trustee; any other documents to trustee
23 days	Schedules to any creditor that requested the same
29 days	Tax to Creditor that requested the same
30 days	Statement of Intention
30 days	341 Meeting
60 days	Reaffirmation, or whatever statement of Intention states must be performed [GOOD IDEA TO REDEEM WITHIN 40 DAYS IF NO ASSET CASE]

30-60 days	Complete financial counseling [GOOD IDEA TO DO JUST BEFORE 341 meeting]
90 days	Deadline to object to Discharge
120 days	Deadline to file proof of claim (if applicable)

Deadlines for the Chapter 13 Debtor [assume 341 is 30 days from date of filing and confirmation is 60 days from date of filing]

DATE	**ITEM REQUIRED**
Filing	Bare Bones Petition, Matrix, Filing fee, and initial financial counseling completion form
5 days	Wage deduction order
15 days	All schedules, B22 forms, statement of payment advices, and
15 days	If business, fill out trustee's business form
20 days	Tax documents to trustee and creditor; pay stubs to trustee (or copy of payment advices); bank statements to trustee; any other documents to trustee [If earlier, the better]
20 days	Documentary proof, Affidavits by those aiding the debtor
23 days	Schedules to any creditor that requested the same
29 days	Tax Documents to Creditor that requested the same
29 days	If creditor – deadline to file objection to confirmation
30 days	First Payment on the Plan
30 days	341 Meeting
50 days	File fee application, if applicable
50-53 days	LF-67 ready for confirmation – earlier is better
59 days	Call trustee about confirmation
60 days	Confirmation
30-60 days	Complete financial counseling [GOOD IDEA TO DO JUST BEFORE 341 meeting]
90 days	Deadline to object to Discharge
120 days	Deadline to file proof of claim (if applicable)
Annually	Tax Returns to Trustee if requested

In short, the deadlines are short and severe if not complied with.

What happens if you are tardy? Payment advices requires filing within 45 days. If not filed, dismissal on 46th day. Operative word in code, the case *shall* be dismissed. Payment advices are

not really anything more than a burden. Just for payment advices not being filed (a really quaint requirement which does not have any earth breaking pertinence to the case but to which the Code addresses a failure as being punishable be dismissal) you can see how the courts are ruling against the attorney:

In re Lovato, 343 B.R. 268 (Bktcy D. N.M. 2006) (BAPCPA left court with no discretion and case must be dismissed); *In re Conner*, 2006 WL 1548620 (Bktcy N.D. Fla 2006) (Court has no discretion and case must be dismissed); *In re Ott*, 343 B.R. 264 (Bktcy D. Colo 2006) (No "excusable neglect" permitted court to discretionarily vacate order dismissing case for failure to timely file payment advices); *In re Wilkinson*, 2006 WL 2085990 (Bktcy D. Utah 2006) (No discretion to vacate automatic dismissal – debtor timely filed except one advice was for same pay period but wrong year); *In re Fawson*, 338 B.R. 505 (Bktcy D. Utah 2006) (Automatic dismissal by operation of statute upon 46th day after filing).

CONTRA In re Riddle, 344 B.R. 702 (Bktcy S.D. Fla 2006) ("I do not like dismissal automatic. On this point I am emphatic! I do not wish to be dramatic, but I can not endure this static. . . . As to this case, how should I proceed? Review of the record is warranted, indeed. A very careful record review, tells this Court what it should do. Was this case dismissed automatic? It definitely was NOT and that's emphatic."); *In re Jackson*, 2006 WL 2501440 (Bktcy S.D. Iowa 2006) (An alleged payment advice had been misnumbered by debtor's employer; court reinstated case).

THE TAX NUANCE

All duties are not equal. The tax duties for chapter 13 and chapter 7 are drastically different.

In chapter 7, the debtor must provide (7 days before the 341 meeting) a copy of the tax return "required under applicable law . . . for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed." 521(e)(2)(A)(i)

The penalty – dismissal of the case.

QUESTION: If the chapter 7 debtor is a tax protestor and does not file returns, what are his duties? *In re Ring*, 341 B.R. 387 (Bankr. Me 2006)

In chapter 13, the duties are much greater. The debtor *shall file all* tax returns for the FOUR years ending on the petition date with the taxing authority and give copies to the trustee before ONE DAY prior to the 341 meeting. 1308(a)

Can be tolled for the later of 120 days or the last date allowable for extension. 1308(b)(1)(B)

The penalty – probably no confirmation. But, there is no statement about automatic dismissal as recited in 521.

6. DUTIES OF ATTORNEY

Lawyers for debtors, not creditors, are debt relief agencies now. Or so it says in the Bankruptcy Code. 526(a)(4)

Ads by debtor lawyers must state they are, "A debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." Or something substantially similar. 528(a)((4) and 528(b)(2) And, "debt relief agency" is defined in 101(12A).

Sounds harmless enough. But, is it? Section 526 restrains what advice may be delivered by the attorney to the debtor – for instance how to prepare his or her debt for a contemplated bankruptcy. "Pre-bankruptcy planning" which usually gorges unsecured creditors – lobbyists' represent the credit card companies which represent the majority of such creditors – sought to curtail pre-bankruptcy planning.

So, what about violations of the First Amendment? Restraint on the speech between an attorney and the debtor is imparted in these provisions!

Debtors' attorneys can breath easier in Minnesota and Georgia now.

Milavetz, Gallop & Milavetz v. U.S., ____ B.R.__ (D.Mn. 2006) 05-CV-2626 (JMR/FLN)

In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga 2006).

FEAR FACTOR:

BAPCPA gave teeth for the courts to punish attorneys who are not ardent in preparing the papers for the trustee and the court.

If your client is being addressed in a 707(b) issue, he or she must know thata final outcome could entail sanctions – against the attorney! As 707(B)(4) through (b)(6) state [Also note the excape clause provided by (b)(7)]:

707(b)(4) (A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b) [11 USCS § 707(b)], including reasonable attorneys' fees, if--

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court--

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter [11 USCS §§ 701 et seq.] violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order--

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has--

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion--

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

(5) (A) Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable

costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if--

(i) the court does not grant the motion; and

(ii) the court finds that--

(I) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B) A small business that has a claim of an aggregate amount less than $ 1,000 shall not be subject to subparagraph (A)(ii)(I).

(C) For purposes of this paragraph--

(i) the term "small business" means an unincorporated business, partnership, corporation, association, or organization that--

(I) has fewer than 25 full-time employees as determined on the date on which the motion is filed; and

(II) is engaged in commercial or business activity; and

(ii) the number of employees of a wholly owned subsidiary of a corporation includes the employees of--

(I) a parent corporation; and

(II) any other subsidiary corporation of the parent corporation.

(6) Only the judge or United States trustee (or bankruptcy administrator, if any) may file a motion under section 707(b) [11 USCS § 707(b)], if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief, when multiplied by 12, is equal to or 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;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 525 per month for each individual in excess of 4.

(7) (A) No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38 [38 USCS § 101]), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than--

(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(ii) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(iii) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 525 per month for each individual in excess of 4.

(B) In a case that is not a joint case, current monthly income of the debtor's spouse shall not be considered for purposes of subparagraph (A) if--

(i) (I) the debtor and the debtor's spouse are separated under applicable nonbankruptcy law; or

(II) the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading subparagraph (A); and

(ii) the debtor files a statement under penalty of perjury--

(I) specifying that the debtor meets the requirement of subclause (I) or (II) of clause (i); and

(II) disclosing the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

C. DISMISSAL AND CONVERSION ISSUES

The issue is many parts:

1. Do you qualify after going through the means test? If you filed chapter 7 when you HAD to be in chapter 13 because of means test calculations, you will be the subject of a motion to convert or dismiss.
2. You just can't be in bankruptcy – see portion about being "too soon" in filing a new bankruptcy. [Section B.1.]
3. You really can't be in chapter 7 (make money over minimum provided by the means test – abuse is presumed) or chapter 13 (debt amounts exceed the ceilings provided) and need to be either out of bankruptcy or in chapter 11.
4. US Trustee is coming after you under 707(b)

Items 1-3 have already been reviewed. This portion will concentrate on 707(b), the debtor's nightmare.

RULE: Even when a debtor's income is below the means test for "median family income," the debtor could still be forced into chapter 13. As one judge wrote, "Because the Debtor was unemployed for the bulk of the six months preceding the filing , the "current monthly income," as defined by 11 U.S.C. § 101(10A), placed him below the median of income earners in the applicable geographical area. Thus, he was not subject to the "means test" for purposes of determining whether the case was abusive. See 11 U.S.C. § 707(b)(2) and (b)(7)(A). However, he was subject to the test for abuse set forth in 11 U.S.C. § 707(b)(3)(B)" *In re Pak*, 2006 Bankr. LEXIS 3437(Bankr. ND Ca 2006)

This section really previously provided all that was needed. But, legislators sometimes like to legislate for the sake of legislating. In short, bankruptcy was working just fine without BAPCPA. But, there are drastic changes to this provision. The following chart displays how drastic in volume the changes to this section are.

Pay particular heed to the differences between 707(b)(2) and 707(b)(3).

OLD	NEW
707(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of “charitable contribution” under section 548 (d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548 (d)(4)).	**707(b) (1)** After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title [11 USCS §§ 1101 et seq. or 1301 et seq.], if it finds that the granting of relief would be an abuse of the provisions of this chapter [11 USCS §§ 701 et seq.]. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) [11 USCS § 548(d)(3)]) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4) [11 USCS § 548(d)(4)]). **(2) (A) (I)** In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter [11 USCS §§ 701 et seq.], the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of-- (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $ 6,000, whichever is greater; or (II) $ 10,000. (ii) (I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 [320] of the Family Violence Prevention and Services Act [42 USCS § 10421], or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service. (II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses. (III) In addition, for a debtor eligible for chapter 13 [11 USCS §§ 1301 et seq.], the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 [11 USCS §§ 1301 et seq.] plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(OLD CONT'D)	NEW CONTINUED
	(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $ 1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I). (V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary. (iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of-- (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title [11 USCS §§ 1301 et seq.], to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts; divided by 60. (iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60. (B) (I) 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 a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. (ii) 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 for 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. (iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required. (iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of-- (I) 25 percent of the debtor's nonpriority unsecured claims, or $ 6,000, whichever is greater; or (II) $ 10,000. (C) As part of the schedule of current income and expenditures required under section 521 [11 USCS § 521], the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated. (D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if the debtor is a disabled veteran (as defined in section 3741(1) of title 38 [38 USCS § 3741(1)]), and the indebtedness occurred primarily during a period during which he or she was-- (i) on active duty (as defined in section 101(d)(1) of title 10 [10 USCS § 101(d)(1)]); or (ii) performing a homeland defense activity (as defined in section 901(1) of title 32 [32 USCS § 901(1)]).

	(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter [11 USCS §§ 701 et seq.] in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider-- (A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

Major concerns:

OLD	**NEW**
Only the US Trustee could file a motion to dismiss	Now, the motion may be filed by any other party in interest
Only against Debtors whose debts are primarily consumer debt	Still only against Debtors whose debt is primarily consumer debt
No presumptions of abuse	Abuse presumed under the means test formula reviewed above – National Standards which usually are less than actual expenses
Deductions only for Legally Obligated Dependants	Dependants include: "the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.."
Nothing said about rebuttable presumption	Presumption against debtor – it specifically states, "(B) (I) 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 a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. . .*"

So where has the case law gone? Fast and furious, it will be all over the gambit.

QUESTION: If you took the old statute and replaced the term "substantial abuse" for "abuse", would the old 707(b) – with the one change by deletion of one adjective – have become as rough on the debtors as the newly engineered and highly technical new version of 707(b)?

QUESTION: Can a debtor with primarily business debt be relieved from filing a Form 22A?[sometimes called a 521 form]
NO – *In re Copeland*, 2006 Bankr. LEXIS 2200 (Bankr. SD Tx. 2006)
YES – *In re Moates*, 338 B.R. 716 (Bankr. ND Tx. 2006)

QUESTION: Does section 707(b) apply to involuntary cases? Its text reads, ". . . may dismiss a case filed by an individual debtor under this chapter . . . "

QUESTION: Pre-BAPCPA, the courts took what was called a "snapshot" approach to reviewing a debtor's abuse – that is they looked at the debtor's predicament the moment of the filing of the petition. Did the post-BAPCPA version of 707(b) eliminate the "snapshot" concept or merely amend it? And, does the inclusion of one's economic advantage of 6 months prior to the filing really more accurately depict the current predicament of a debtor who experienced 5 consecutive months of hardship?

QUESTION: What is the magic of 6 months for CMI?

YES: *U.S. Trustee v. Cortez,* 457 F.3d 448 (5th Cir. July 20, 2006),
"Whether subsequent improvements in the debtor's earnings warrant dismissal is not directly the text itself." at 454 But, "Section 707(b) does not condition dismissal on the filing of bankruptcy being a 'substantial abuse' but rather on the granting of relief, which suggests that in determining whether to dismiss under § 707(b), a court may act on the basis of any development occurring before the discharge is granted." at 455 Hence, "Given that post-petition events should be considered up until the date of discharge, n12 we remand this case to the district court with instructions to return it to the bankruptcy court. See *In re Koch*, 109 F.3d at 1290 ("The final decision on a § 707(b) motion to dismiss should be made initially by the bankruptcy court."). On remand, the bankruptcy court should consider any post-petition events affecting the Cortezes' financial situation, including any post-petition improvements in income or, if still applicable, Mr. Cortez's unemployment." at 458-459

QUESTION: Does *Cortez* fly into the face of the practice of timing the filing of the debtor's case?

QUESTION: How about looking into the future? Without the "snapshot concept", can the court consider postpetition beneficial improvement?

This concept has been used by courts to also find for debtors who postpetition discover worse financial problems:

> Because the language of former section 707(b) is very broad and intended to give the Court substantial leeway to consider all aspects of a debtor's financial condition, the Court may consider this decrease in income from part-time employment when deciding the UST's Motion to dismiss. See, e.g., *In re Cortez*, 457 F.3d 448, 458-59 (5th Cir. 2006) (concluding that a court may consider post-petition events, including changes in financial circumstances, when determining substantial abuse under section 707(b)). Therefore, the Court will consider only the income that the Debtor is actually earning at this time.
>
> *In re Brooks*, 2006 Bankr. LEXIS 3296 (Bankr Del. 2006)

QUESTION: When the court follows *Cortez* to "consider only the income that the Debtor is actually earning at this time", has it not effectively deviated from looking to CMI and ignored the means test?
ANSWER: Yes, because the *Brooks* case was filed BEFORE the BAPCPA changes took effect

But, it appears that *Cortez* is good law for post-BAPCPA matters. And, that means the US Trustees' (and panel trustees') duties have increased!

PRACTICE POINTER: When you are confronted with the motion, and your client is not looking comfortable factually, can a conversion to chapter 13 aid your interest and the client's interest?

BASIC REVIEW:

Income Less than CMI	**Income Greater than CMI**
Not presumed	Presumed
707(b)(7) defense available	No 707(b)(7) defense allowed
Bad faith considered	Bad faith considered
Totality of the circumstances considered	Silent
25%/$6,000.00/$10,000.00 rule	25%/$6,000.00/$10,000.00 rule
Silent	Must file 521 forms

D. DISCHARGEABILITY OF DEBT

Only a few years ago, chapter 13 could discharge almost anything – including student loans. Then student loans were nondischargeable in chapter 13, followed by criminal restitution payments, and now BAPCPA has added so many more exceptions. The once ordained "Superdischarge" of chapter 13 has been wacked, hammered, whittled and reduced through numerous legislative caveats, most probably derived from lobbyists' efforts.

This is a creature of statute. The chart below shows you what used to be dischargeable, and what now is not dischargeable, and includes a list of the few remaining dischargeable debts in chapter 13.

Described debt	**Old Chapter 13, excepted?**	**New Chapter 13, excepted?**	**Hardship chapter 13, excepted?**
727(a)(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed— (A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition;			
727(a)(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;			**1328(e)** . . . the court may revoke such discharge

727(a)(4) the debtor knowingly and fraudulently, in or in connection with the case— (A) made a false oath or account; (B) presented or used a false claim; ©) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;			
727(a)(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;			
727(a)(6) the debtor has refused, in the case— (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify; (B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or ©) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;			
727(a)(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;			
727(a)(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;	**1328(f)**.	**1328(f)**.	**1328(f)**.
727(a)(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least— (A) 100 percent of the allowed unsecured claims in such case; or (B) (i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or			
523(a)(1) for a tax or a customs duty-- (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title [11 USCS § 507(a)(2) or 507(a)(8)], whether or not a claim for such tax was filed or allowed; (B) with respect to which a return, or equivalent report or notice, if required-- (i) was not filed or given; or (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;		**1328(a)(2)** for (1)(B) and (1)(C)	**1328(c)(2)**

523(a)(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by— (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; . . . ©) (I) for purposes of subparagraph (A)-- (I) consumer debts owed to a single creditor and aggregating more than $ 500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and (II) cash advances aggregating more than $ 750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and (ii) for purposes of this subparagraph-- (I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act [15 USCS § 1602]; and (II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor.		**1328(a)(2)**	**1328(c)(2)**
523(a)(2)(B) use of a statement in writing-- (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive; or		**1328(a)(2)**	**1328(c)(2)**
523(a)(3) neither listed nor scheduled under section 521(1) of this title [11 USCS § 521(1)], with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit-- (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;		**1328(a)(2)**	**1328(c)(2)**
523(a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;		**1328(a)(2)**	**1328(c)(2)**
523(a)(5) for a domestic support obligation;	**1328(a)(2)**	**1328(a)(2)**	**1328(c)(2)**

523(a)(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;		**1328(a)(4)** for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.	**1328(c)(2)**
523(a)(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty-- (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or (B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;			**1328(c)(2)**
523(a)(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for-- (A) (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 [26 USCS § 221(d)(1)], incurred by a debtor who is an individual;	**1328(a)(2)**	**1328(a)(2)**	**1328(c)(2)**
523(a)(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;	**1328(a)(2)**	**1328(a)(2)**	**1328(c)(2)**
523(a)(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title [11 USCS § 727(a)(2), (3), (4), (5), (6), or (7)], or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;			**1328(c)(2)**
523(a)(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;			**1328(c)(2)**

523(a) (12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency; or			**1328(c)(2)**
523(a) (13) for any payment of an order of restitution issued under title 18, United States Code;		**1328(a)(3)** for restitution or a criminal fine, *included in a sentence on the debtor's conviction of a crime*	**1328(c)(2)**
523(a) (14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);		**1328(c)(2)** [See 523(c)(1) above]	**1328(c)(2)**
523(a) (14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);			**1328(c)(2)**
523(a)(14B) incurred to pay fines or penalties imposed under Federal election law;			**1328(c)(2)**
523(a)(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;			**1328(c)(2)**
523(a) (16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;			**1328(c)(2)**
523(a)(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 [28 USCS § 1915] (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 [28 USCS § 1915(h)] (or a similar non-Federal law);			**1328(c)(2)**

523(a)(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986 [26 USCS § 401, 403, 408, 408A, 414, 457, or 501(c)], under-- (A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1108(b)(1)], or subject to section 72(p) of the Internal Revenue Code of 1986 [26 USCS § 72(p)]; or (B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5 [5 USCS §§ 8431 et seq.], that satisfies the requirements of section 8433(g) of such title [5 USCS § 8433(g)]; but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d) [26 USCS § 414(d)], or a contract or account under section 403(b) [26 USCS § 403(b)], of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or			**1328(c)(2)**
Instructional Course failure – in CH 7 it is **109(h)**		**1328(g)**	**1328(g)**

523(a) (19) that-- (A) is for-- (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [15 USCS § 78c(a)(47)]), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and (B) results, before, on, or after the date on which the petition was filed, from-- (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding; (ii) any settlement agreement entered into by the debtor; or (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor. For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986 [26 USCS § 6020(a)], or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986 [26 USCS § 6020(b)], or a similar State or local law. (b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A of the Higher Education Act of 1965, or under section 733(g) of the Public Health Service Act in a prior case concerning the debtor under this title or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title. (c) (1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section. (2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt. (d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor		**1328(a)(h)** The court may not grant a discharge under this chapter unless the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is no reasonable cause to believe that-- (1) section 522(q)(1) [11 USCS § 522(q)(1)] may be applicable to the debtor; and (2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) [11 USCS § 522(q)(1)(A)] or liable for a debt of the kind described in section 522(q)(1)(B) [11 USCS § 522(q)(1)(B)].	NO **1328(c)(2)**

E. REQUIREMENTS OF CHAPTER 13

1. Duration of Chapter 13 Plans

1325(b)(4)(A)(ii) is the pertinent provision:

(4) For purposes of this subsection, the "applicable commitment period"--
(A) subject to subparagraph (B), shall be--
(i) **3 years**; or
(ii) not less than **5 years**, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than--
(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 525 per month for each individual in excess of 4; and

Formula: if Current Monthly Income (CMI) is greater than Median Family Income (MFI), then 5 years. But, what is CMI?

101(10A) The term "current 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, 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 income required by section 521(a)(1)(B)(ii) [11 USCS 521(a)(1)(B)(ii)]; or
(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii) [11 USCS 521(a)(1)(B)(ii)]; 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), but excludes benefits received under the Social Security Act [42 USCS 301 et seq.], 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 [18 USCS 2331]) or domestic terrorism (as defined in section 2331 of title 18 [18 USCS 2331]) on account of their status as victims of such terrorism.

For practitioners, CMI is the number which is derived from Official Form 22C.

Median Family Income is also defined in the Bankruptcy Code:

(39A) The term "median family income" means for any year--
(A) the median family income both calculated and reported by the Bureau of the Census in the then most recent year; and
(B) if not so calculated and reported in the then current year, adjusted annually after such most recent year until the next year in which median family income is both calculated and reported by the Bureau of the Census, to reflect the percentage change in the Consumer Price Index for All Urban Consumers during the period of years occurring after such most recent year and before such current year.

And, there is a chart for those who do want to know the numbers:

http://www.usdoj.gov/ust/eo/bapcpa/20061001/bci_data/median_income_table.htm

For Florida the numbers are:

Family of 1	Family of 2	Family of 3	Family of 4	each additional
$36,796	$45,446	$51,001	$62,269	Add $6,300 for each individual in excess of 4.

So, if a married childless couple comes to you, and their tax returns and paystubs show income below $45,446, you can almost assuredly know they are – in a worst case scenario – in a chapter 13 only for 3 years.

And, do not forget, chapter 13 requires that there be a review of "disposable income" which is defined in the Code as:

1325(b)(2) For purposes of this subsection, the term "*disposable income*" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--
(A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) [11 USCS § 548(d)(3)] to a qualified religious or charitable entity or organization (as defined in section 548(d)(4) [11 USCS § 548(d)(4)]) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

QUESTION: Should a childless couple earning less than $45,000 be in chapter 13?

Go back to Part A about income and expenses. Even if they earn less than the median income, they may have excess to pay their creditors. For instance, if they live with a parent and do not have any rent to pay, there may be income to pay the creditors.

NUANCES:
- A nondebtor's income must be included.
- If parents help out, such gift must be included
  If parents pay for grandchildren's schooling, that should be a wash against the debt.

- Income from non-wage sources must be included
- Calculation delivers income which is neither current or monthly
  You must take the average income (including non-income delivery of aid from nondebtor or others) over a period of 6 months prior to the filing
  OBVIOUS ABUSIVE CASES WILL COME: Hypo 1: Debtor has no job for 6 months and days after filing gets great job making more money than the judge

  Hypo 2: Debtor has great job for 6 months, then files as he is laid off – so has tons of CMI, but in reality has no CMI.
- Exclude Social Security Income
- Exclude terrorism victim income or war crime victim income (lobbyists?)

EXCEPTION 1: Pay 100% to creditors and you move faster– no mandatory 3 or 5 years:

1325(b)(4)(B)
[the plan] may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

EXCEPTION 2: HARDSHIP DISCHARGE (Look to Section 6 below for Superdischarge limitations)

1328 Discharge
(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--
(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title [11 USCS §§ 701 et seq.] on such date; and
(3) modification of the plan under section 1329 of this title [11 USCS § 1329] is not practicable.

QUESTION: What happens if debtor – who is over the median family income and therefore required to have plan last 5 years – conceives of method to pay creditors the amount of a 5-year plan in a period of 3 years? E.G. – father will pay the difference to allow the kids and grandkids to get out of the bankruptcy morass faster.

QUESTION: If conversion would create problems for liquidation of assets under 348(f) as explained above [see The Shrinkage Rule] would it be wiser to move for hardship discharge as opposed to converting the case?

1325(b)(4)(A)(I) is temporal as opposed to monetary commitment period? *In re Zirtzman* 2006 LEXIS 2721 (Bankr. Ia. 2006)

QUESTION: Does the 5-year rule apply to "modified plans?"

As courts review that "applicable commitment period" means a commitment to stay in a plan for a period of time, expect above-median debtors who want to stay in a case for less than five years and cannot (or does not want to) pay 100 percent of the unsecured claims to move to modify their

5-year plan under §1329. That section was left relatively unchanged by the BAPCPA amendments.

ISSUE: does modification change the commitment from temporal to monetary?

QUESTION: Below median income debtor seeks to reinstate mortgage within 18 months and pay $0.00 to unsecured creditors. Debtor argues that the phrase "applicable commitment period" referred to in § 1325(b)(4)(A) is a multiplier which requires only a certain dividend to unsecured creditors, rather than a temporal requirement specifying a minimum number of payments. Debtor asserts that because she has zero disposable income according to Form B22C, a plan of 36 months is pointless. Payments of $ 0.00 per month times 36 months generates no income for the plan, so a shorter plan period is permitted. Is this valid?

QUESTION: In the prior question, will the Form 22C provide an answer? If yes, why? If not, why? The answer is easily handled when you apply the numbers to a form generated by the provider of Chapter 13 software.

One court poignantly stated, " . . . but there is no form or schedule for calculation of projected disposable income for below-median income debtors. Courts are divided as to the correct method for calculation of projected disposable income by below-median income debtors. Some courts hold that 1325(b)(2) requires the use of CMI, as calculated on Form B22C, Part I, less reasonably necessary expenses, with reliance on Schedule J. [*In re Schanuth*, 342 B.R. 601 (Bankr. W.D. Mo. 2006); *In re Girodes*, 350 B.R. 31 (Bankr. M.D. N.C. 2006).] Other courts utilize the same procedures as under the Code prior to BAPCPA, examining the debtor's budget based, at least in the first instance, upon the difference between Schedule I income and Schedule J expenditures. [*In re Hardacre*, 338 B.R. at 718; *In re Dew,* 344 B.R. 655 (Bankr. N.D. Ala. 2006); *In re Kibbe*, 342 B.R. at 413-15.] These courts reason that "projected disposable income" is a forward looking flexible amount and should be calculated using Schedule I, rather than the backward looking definition of CMI."

In re Daniel, 2006 Bankr. LEXIS 3456 (Bankr. Ks. 2006)

SO YOU HAVE ALTERNATIVE FORMULAE:
Formula 1: CMI less Schedule J (which is reasonable)
Formula 2: Schedule I less Schedule J (which is reasonable)

Now the problem: The courts have not decided which formula to follow – see the citations in the above quotation to display the split in authority.

In *Daniel*, the court chose Formula 2 (as cited by the chapter 13 trustee) which delivered a smaller amount to be paid in the plan!

QUESTION: Will creditors always voice objection citing the formula which reaps the greatest dividend?

2. STRIPPING OF AUTO LOANS (A CHAPTER 13 ISSUE)

Before NACBA, all chapter 13 debtors could think about stripping their car loan from the principal amount owed to the fair market value. Now there is the "hanging paragraph" issue. In grade school, you learned that hanging paragraph meant, "A paragraph in which the first line is set to the left margin, but all subsequent lines are indented."

In bankruptcy jargon, it means 1325(a)(5) as modified by (a)(9):

1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if--
(5) with respect to each allowed secured claim provided for by the plan--
(A) the holder of such claim has accepted the plan;
(B) (I) the plan provides that–
(I) the holder of such claim retain the lien securing such claim until the earlier of--
(aa) the payment of the underlying debt determined under nonbankruptcy law; or
(bb) discharge under section 1328 [11 USCS 1328]; and
(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
(iii) if–
(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
(C) the debtor surrenders the property securing such claim to such holder;
. . .
(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308. For purposes of paragraph (5), section 506 [11 USCS 506] shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day (**) preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49 [49 USCS 30102]) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

BASIC RULE: If the motor vehicle was purchased within 910 days, you cannot strip the car.

EXCEPTION 1: Car was bought for someone other than the debtor – *In re Lewis*, 347 B.R. 769; 2006 Bankr. LEXIS 1628, August 3, 2006

EXCEPTION 2: Car bought for cofiling spouse – *In re Press*, 19 Fla. L. Weekly Fed. B 382 (S.D. Fla. 2006);
Contra: *In re Vagi*, 351 B.R. 881 (Bankr. ND Ohio 2006)

QUESTION: Does 102(7) which reads, "§ 102. **Rules of construction**. . . In this title--(7) the singular includes the plural. . ." answer this issue?

EXCEPTION 3: Car bought for nonfiling spouse – *In re Jackson*, 338 B.R. 923 (Bankr. M.D. Ga. 2006); *In re Humphrey*, 2006 Bankr. LEXIS 2855, October 16, 2006;

EXCEPTION 4: Business use – *In re Hill*, 2006 Bankr. LEXIS 2641 (Bankr. W.D. La. 2006)

EXCEPTION 5: Cannot apply the amount of purchase associated with Extended Warranty Contract – *In re White*, 2006 Bankr. LEXIS 2552,(Bankr. E.D. La. 2006)
contra: *In re Murray*, 2006 Bankr. LEXIS 1842, August 22, 2006 (Bankr. M.D Ga. 2006)

EXCEPTION 6: A car purchased within 910 days by decedent whose estate still held title to car is not a 910-automobile under the hanging paragraph for beneficiary who is debtor. *In re Potter,* 2006 Bankr. LEXIS 3417 (Bankr. Ut 2006)

Then, if you lose, dump the metal on their laps and the deficiency is not allowed a claim as no 506 issue applies to 910-vehicles as stated under 1325(a)(9) – *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006); *In re Gentry,* 2006 Bankr. LEXIS 3281 (Bankr ED Tenn 2006); *In re Turkowitch*, 2006 Bankr. LEXIS 3152 (Bank ED Wisc 2006); *In re Feddersen*, 2006 Bankr. LEXIS 3135 (Bankr. SD Ill 2006)

Affectionate term in Chapter 13 plans: "Eat metal"

CONTRA: *In re Particka*, 2006 Bankr. LEXIS 3160 (Bankr. ED Mich 2006)
WHY? The drafting parties of 1325 state that the 910-vehicle's loan cannot be bifurcated, hence delivery of the collateral is delivery of the loan to the lender and the deficiency is NOT a claim against the estate.

One wacky case – *In re Carver*, 338 B.R. 521 (Bankr. S.D. Ga. 2006)

3. THE DISASTER

Your client files chapter 13, thinking that some of the debt is contingent or unliquidated, therefore allowing he or she to be a chapter 13 candidate. A hearing is held, and the court determines the debt to be liquidated and not contingent. Your client suddenly does not qualify for a chapter 13. And, your client cannot convert to chapter 7 as the monthly income prohibits him under the means test. You then must go into chapter 11. Your plan kindly tells the creditors what the chapter 13 was going to say – in a period of 5 years you will receive more than you would in liquidation: 'Take my nonexempt assets while I keep my homestead which has equity of $1,000,000.00.' The creditors protest. They say your client must give up the house. The debtor cannot keep 100% of the home while they are paid less than 100%. The "absolute priority rule" they proclaim. For a chapter 13 practitioner, the absolute priority rule is a nonissue. Same for a chapter 7. But, it is the creditor's magic wand in chapter 11.

QUESTION: Should you have dismissed when the going got tough?

QUESTION: Was the ability to dismiss while in Chapter 13 an automatic right?

ANALYSIS:
1129(b)(2) (B) With respect to a class of unsecured claims–
(I) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
(ii) *the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115 [11 USCS § 1115], subject to the requirements of subsection (a)(14) of this section.*
(C) With respect to a class of interests–
(I) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any *interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property*.

This forces you then to look to 1115 which states:
§ 1115. Property of the estate

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541 [11 USCS § 541]--

(1) all property of the kind specified in section 541 [11 USCS § 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 [11 USCS §§ 701 et seq., 1201 et seq., or 1301 et seq.], whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 [11 USCS §§ 701 et seq., 1201 et seq., or 1301 et seq.], whichever occurs first.

(b) Except as provided in section 1104 [11 USCS § 1104] or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate

And contrast this concept of after-acquired property and wages with 1129(a)(14) which states:

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

So, the rule of thumb is that if there is a plan – a junior claim can only be paid money or receive property for a percentage which is equal than or less than a class to which it is junior. The last class in an individual case is the individual. The person does not receive a payment. Instead, the individual is allowed to retain property. Including exempt property. As stated by the Tenth Circuit, the issue then become, "[w]hether the Chapter 11 debtors' ownership interest in exempt property is an interest that is "senior" to a class of unsecured creditors' claims that voted against the debtors' plan. If the bankruptcy court is correct, and such an ownership interest is senior to the interest of unsecured creditors, the debtors' retention of the exempt property under their Chapter 11 plan is not a violation of the absolute priority rule provided by 11 U.S.C. § 1129(b)(2)(B)(ii), n1 and the debtors' Chapter 11 plan is fair and equitable and may be confirmed." *In re Fross*, 233 B.R. 176 (BAP 10th Cir. 1999); 1999 Bankr. LEXIS 15, 16 Colo Bankr Ct Rep 40

The responses are varied:
YES:

In re Gosman, 282 B.R. 45, 2002 Bankr. LEXIS 862, 15 Fla. L. Weekly Fed. B 215, 39 Bankr. Ct. Dec. (LRP) 263, 48 Collier Bankr. Cas. 2d (MB) 1565 (Bankr. S.D. Fla. 2002)

In re Yasparro, 100 B.R. 91 (Bankr. M.D. Fla. 1989)

NO:

In re Henderson, 321 B.R. 550 (Bank. M.D. Fla. 2005) confirmation granted; corrected by: *In re Henderson*, 2005 Bankr. LEXIS 305, 18 Fla. L. Weekly Fed. B 143 (Bankr. M.D. Fla. Jan. 26, 2005)

RULING: individual debtor does not have to surrender all exempt assets to confirm a Chapter 11 plan under Section 1129(b), because individual's interest in exempt property can never be junior to the claims of dissenting unsecured creditors, who are unable to levy

on exempt property. Also, non-debtor spouse's contribution of cash was sufficient new value for the debtor's retention of exempt and non-exempt assets.

In re Egan, 142 B.R. 730, 733 (Bankr. E.D. Pa. 1992)
In re Shin, 306 B.R. 397, 404 n.17 (Bankr. D.C. 2004)

For those with an appetite for this issue: **Exempt Property and the Absolute Priority Rule in Individual Chapter 11s**, 21-9 ABIJ 26 (Nov. 1, 2002)

QUESTION: What would happen if your argument that the homestead is owned as tenancy by the entirety which is excluded, as opposed to exempt, from the estate?

LOOK TO:. Fed. R. Bankr. P. 4003(b) (express deadline set forth in the rules of court for the filing of objections to exemptions) and review of issue in *In re Wendt*, 320 B.R. 904, 907 (Bankr. D. Minn. 2005).

4. THE CRIMINAL ISSUE

Above, we reviewed the issue of the homestead being limited to $125,000.00 if there was a criminal liability. And, the cited case specifically stated that the Code's silence about a prerequisite conviction was interpreted as not requiring a criminal conviction for Section 522(q).

Contrast this fact scenario to filing a case *before* a conviction arises. Remember, the debt appears to be dischargeable as 1328(a)(3) excepts from discharge debt, ". . . for restitution, or a criminal fine, included in a sentence on the debtor's *conviction* of a crime. . ."

It is here where the question becomes twisted as the lack of conviction will not annul the reduction in the homestead ceiling, but the reduction may allow the debt to be discharged. But, how else does this affect the chapter 13 plan?

QUESTION: Debtor owes money for criminal act but *not* convicted. Would you prefer that the client file one chapter instead of another because there is no conviction? And, if the client is never convicted and ultimately discharged, does equity exceeding $125,000.00 change the formula for a chapter 13? Assume for purposes of this hypothetical that the CMI would deliver $40,000 to the creditors, but the homestead equity is $200,000.00. Look to 1325(a)(4)

F. HOW TO COMPUTE A CHAPTER 13 PLAN

Everything outlined in Part A applies here. You have to be concerned about whether you are to use the Form 22C numbers or Schedules I and J for your plan. There has been, as you can see above, great variances of opinion on the calculation. And, even in our court, there is no hard-and-fast rule which determines which method to use.

Moreover, in the same case, you may come to conclusions that one method may be the most applicable, but in another similar, but factually distinguishable case, determine another method is best.

As states above, if the clients income exceeds Median Family Income, you probably must file a **60-month** plan. That is the first thing you must be concerned with.

Second, with the client in bankruptcy for such a long period of time, you must be aware of the amount of debt and how to deliver it to the plan.

PRACTICE POINTER: You can no longer make a plan top heavy for the attorneys' fees. In old days the first several months paid the attorney, and maybe a secured creditor to reinstate a mortgage, and in the very end the unsecured creditors received something – usually less than 10% of their claims.

RULE 1: Unsecured creditor get paid from the beginning

The above-recited practice pointer is derived from 1325(b)(1)(B) which states:

> **(b) (1)** If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan–
>
> . . .
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period *beginning on the date that the first payment is due* under the plan *will be applied to make payments to unsecured creditors* under the plan.

Plan denied confirmation without paying unsecured in month 1. Alternative is to pay them in full. *In re Gress*, 344 B.R. 919 (Bankr. W.D. Mo. 2006)

RULE 2: Secured creditors must be cured *in equal monthly payments*, or surrender the collateral or adequate protection (for personal property only) as 1325(a) states:

1325(a)(5) with respect to each allowed secured claim provided for by the plan--
(A) the holder of such claim has accepted the plan;
(B) (I) the plan provides that--
(I) the holder of such claim retain the lien securing such claim until the earlier of--
(aa) the payment of the underlying debt determined under nonbankruptcy law; or
(bb) discharge under section 1328 [11 USCS § 1328]; and
(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
(iii) if–
(I) property to be distributed pursuant to this subsection is in *the form of periodic payments, such payments shall be in equal monthly amounts*; and
(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or
(C) the debtor surrenders the property securing such claim to such holder;

QUESTION: Is this "equal monthly amounts" rule "hard and fast?"

NO: *Americredit Fin. Servs. v. Nichols (In re Nichols),* 440 F.3d 850 (6th Cir. 2006)
In re Davis, 343 B.R. 326 (M.D. Fla. 2006). Doesn't apply to home mortgages (could apply to any secured claim for "long term debt").
YES: *In re Lemieux,* 347 B.R. 460 (Bankr. Ma. 2006) Prohibits balloon payment to secured creditor.
In re Wagner, 342 B.R. 766 (Bankr. E.D. Tenn. 2006).

YES and NO: *In re Blevins*, Case 2006 Bankr. LEXIS 2422, September 21, 2006 (Bankr. E.D. Ca. 2006) – Had to be equal, but could delay when payments start. And, payments do not have to be for the entire term of the plan.

In re DeSardi, 340 B.R. 790 (S.D. Tex. 2006). Not for life of the plan.

RULE 3: Plan cannot exceed 3 years without motion for those BELOW Family Median Income. Section 1322(d)(2) states:

1322(d)(2) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is 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;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $ 525 per month for each individual in excess of 4,

the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years.

QUESTION: Your debtor is flat broke [below median family income for your jurisdiction], and is behind on the mortgage. The debtor can never reinstate the mortgage within 3 years. But, can reinstate in 4 years. Can you ask for 5 years to reinstate? Or can the court limit it to 4 years, so that 100% goes to the secured creditor and nothing to unsecured creditors?

PRACTICE POINTER: Rule 2 is not enforced as much as one might think, Rule 3 is not important to most of those concerned, and Rule 1 is hard to get around. And, if you enter the world of modification, all the Rules seem flexible. It is still common practice to see motions to refinance exempt homestead and pay creditors from proceeds and have discharge order entered.

RULE 4: The amount paid to creditors must exceed the liquidation amount.
1325(a)(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title [11 USCS §§ 701 et seq.] on such date;

RULE 5: The amount paid to unsecured creditors must exceed (CMI)(Months required to be in plan) Hence, if CMI is $212 and you have to be in plan 60 months, then you must pay unsecured creditors $12,720.

1325(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's *projected disposable income* to be received in the *applicable commitment period* beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

And, “applicable commitment period” is defined later in the same subsection as, “. . . current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended.” 1325(b)(4)

QUESTION: Are fees to debtor’s counsel considered unsecured for purposes of this formula? And, what about priority claim of IRS?

RULE 6: Good faith. And, Congress means it!! They made this a requirement on two occasions: **1325(a)(3)** the plan has been proposed in good faith and not by any means forbidden by law;

and

1325(a)(7) the action of the debtor in filing the petition was in good faith;

This issue has been resolved in our jurisdiction. Although term "good faith" is not defined in the Code, it is a term which "broadly speaking . . . whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [Chapter 13] in the [proposed plan]." *Kitchens v. Ga. RR Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885, 888 (11th. Cir. 1983) (citing 9 COLLIER ON BANKR., P 9.20, at 319 (L. King 14 th ed. 1978)).

In *Kitchens*, the Eleventh Circuit Court of Appeals adopted a "totality of the circumstances" test for determining the good faith of a Chapter 13 debtor. To guide this analysis, the Eleventh Circuit provided a list of 13 non-exhaustive factors:
1. the amount of the debtor's income from all sources;
2. the living expenses of the debtor and his dependents;
3. the amount of attorney's fees;
4. the probable or expected duration of the debtor's Chapter 13 plan
5. the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. the debtor's degree of effort
7. the debtor's ability to earn and the likelihood of fluctuation in his earnings
8. special circumstances such as inordinate medical expenses;
9. the frequency with which the debtor has sought relief under the [Bankruptcy Code];
10. the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of the same, in dealing with his creditors;
11. the burden which the plan's administration would place upon the trustee;
12. the substantiality of repayment; and
13. the potential nondischargeability of debt in a Chapter 7 proceeding.

This may be evolving, as First Circuit Case is being reviewed by Supreme Court. First Circuit relied upon a smaller test of “In applying the totality of the circumstances test, "bankruptcy courts generally consider the following factors: (1) debtor's accuracy in stating her debts and expenses, (2) debtor's honesty in the bankruptcy process, including whether she has attempted to mislead the court and whether she has made any misrepresentations, (3) whether the Bankruptcy Code is being unfairly manipulated, (4) the type of debt sought to be discharged, (5) whether the debt would be dischargeable in a Chapter 7, and (6) debtor's motivation and sincerity in seeking Chapter 13 relief." *Sullivan v. Solimini (In re Sullivan)*, 326 B.R. 204, 212 (1st Cir. B.A.P. 2005) as followed by *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 430 F.3d 474, 482 (1st Cir. 2005), writ of certiorari granted *Marrama v. Citizens Bank,* 126 S. Ct. 2859, 165 L. Ed. 2d 894, 2006 U.S. LEXIS 4528, 74 U.S.L.W. 3685 (U.S. 2006)

RULE 7: Keep up to date with divorce court obligations.
1325(a)(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation

RULE 8: File tax returns
1325(a)(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308
NOTE: 1308 applies to *prepetition* tax returns.

G. POST-CONFIRMATION DEFAULT

There are so many ways to default in a chapter 13. The list below is but a few:
- Fail to pay as Plan promised
- Fail to pay DSO
- Fail to file Tax returns
- Income problems (loss of job or worse)
- Bad Faith ruled

The procedure is a report filed by the trustee referred to as the Notice of Delinquency. The debtor either pays up, moves for some kind of relief, or the case will be dismissed without a hearing. Local Rule 307 for the Southern District of Florida outlines the procedure.

If you file a motion to vacate the dismissal, you must post in the motion tat you are holding the money in deposit. LOCAL RULE 9013-1(E)(3)(A).

Your recourse is to do one of the following:
1. Modify the plan to cure the problem
2. Convert the case to Chapter 7 (remember you must be eligible and the new law with requirements of CMI and other items may make this impossible)
3. Request a hardship discharge under 1328(b) – look to list above as to how many of the otherwise dischargeable debts are *not* dischargeable for the debtor seeking a hardship discharge
4. Dismiss – and is this automatic anymore?
5. Beg and grovel

1. MODIFY THE PLAN TO CURE THE PROBLEM

This is a creature of statute. Section 1329 allows it.

§ 1329. Modification of plan after confirmation
(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to–
(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
(2) extend or reduce the time for such payments;
(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or
(4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent

does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that--

(A) such expenses are reasonable and necessary;

(B) (i) if the debtor previously paid for health insurance, the amount is not materially larger than the cost the debtor previously paid or the cost necessary to maintain the lapsed policy; or

(ii) if the debtor did not have health insurance, the amount is not materially larger than the reasonable cost that would be incurred by a debtor who purchases health insurance, who has similar income, expenses, age, and health status, and who lives in the same geographical location with the same number of dependents who do not otherwise have health insurance coverage; and

(C) the amount is not otherwise allowed for purposes of determining disposable income under section 1325(b) of this title [11 USCS § 1325(b)];

and upon request of any party in interest, files proof that a health insurance policy was purchased.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title [11 USCS §§ 1322(a), 1322(b), and 1323(c)] and the requirements of section 1325(a) of this title [11 USCS § 1325(a)] apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) [11 USCS § 1325(b)(1)(B)] after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

The best method of handling this is to go to the web pages of the Chapter 13 trustees who instruct you on how to handle this.

QUESTION: Do some of the rules of 1325(a) not apply to modified plans?

There is a procedure that Trustee Herkert has outlined in her web page which utilizes a Modification Worksheet. The method and worksheet can be found at:

http://www.flsb.uscourts.gov/web_folder/Ch_13_suggestions_Herkert.pdf

Similarly for Trustee Weiner at:

http://www.flsb.uscourts.gov/web_folder/Ch_13_suggestions_Weiner.pdf

2. CONVERT THE CASE TO CHAPTER 7 (REMEMBER YOU MUST BE ELIGIBLE AND THE NEW LAW WITH REQUIREMENTS OF CMI AND OTHER ITEMS MAY MAKE THIS IMPOSSIBLE)

§ 1307. Conversion or dismissal

(a) The *debtor* may *convert a case under this chapter* [11 USCS §§ 1301 et seq.] *to a case under chapter 7* of this title [11 USCS §§ 701 et seq.] *at any time.* Any waiver of the right to convert under this subsection is unenforceable

Language seems simple enough. Consider the right to be absolute.

But, nothing is as automatic as it seemed.

Marrama v. Citizens Bank (In re Marrama), 430 F.3d 474 (1st Cir. 2005) has been sent to the Supreme Court. Basically, a debtor whose schedules and behavior were questioned by the court, creditors and the trustee, sought to convert under 706(a) which states, "The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case

has not been converted under section 1112, 1208, or 1307 of this title." This language mirrors 1307(a). See chart below.

706(a)	**1307(a)**
(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.	(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

So, when the debtor sought to convert in *Marrama*, the court surprisingly denied the request irrespective of the language that the debtor may convert to chapter "at any time" so long as the case was not previously converted and the debtor is eligible to be in the converted chapter [have debt below the ceiling amount of 109(e) referenced above]. The debtor lost.

WHY? First, the court stated, "The present controversy over the meaning of subsection 706(a) is traceable not to the plain language of subsection 706(a), but largely to its legislative history, which describes the debtor's right to conversion as 'absolute,' or as a 'matter of right'"*Id.* at 480. But, since the debtor had shown bad faith from his actions in the chapter 7, he could never be a debtor in chapter 13 as he could never meet the "good faith" criteria of 1328(a).

Also see *Copper v. Copper (In re Copper)*, 426 F.3d 810 (6th Cir. 2005)

3. REQUEST A HARDSHIP DISCHARGE UNDER 1328(B) – LOOK TO LIST ABOVE AS TO HOW MANY OF THE OTHERWISE DISCHARGEABLE DEBTS ARE *NOT* DISCHARGEABLE FOR THE DEBTOR SEEKING A HARDSHIP DISCHARGE

1328(b) Subject to subsection (d), at any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title [11 USCS §§ 701 et seq.] on such date; and

(3) modification of the plan under section 1329 of this title [11 USCS § 1329] is not practicable.

Most of the case law derived from this is what happened to the debt – is it dischargeable? And, as outlined above, unfortunately little is.

NOTE: This may deliver the same results as a conversion – but may entail more expense if motion for the request is contested.

4. DISMISS – AND IS THIS AUTOMATIC ANYMORE?

The right appears automatic as the code states the court "shall dismiss" when requested by the debtor. Amazingly, this language mirrors 706(a) – which is before the Supreme Court – and 1307(a) as it states:

1325(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title [11 USCS § 706, 1112, or 1208], the court shall dismiss a case under this chapter [11 USCS §§ 1301 et seq.]. Any waiver of the right to dismiss under this subsection is unenforceable.

Because courts know the dismissal will allow creditors to prey upon the debtors as though no bankruptcy existed, the dismissal will ordinarily be allowed. Also, the new effects of dismissal as to the time period for refiling would make dismissal much less attractive to a debtor if he or she contemplates refiling in the near future.

Right deemed absolute until a 1307(c) motion filed: *Zeman v. Dulaney (In Re Dulaney)*, 285 B.R. 10 (D. Colo. 2002).

QUESTION: If motion to dismiss is filed before 1307(c) motion but after discovery of large asset for the estate which would not be an asset outside of bankruptcy [e.g. preferential transfer or fraudulent transfer which is beyond state limitations period but within bankruptcy limitations period] would court follow *Marrama* and rule against the dismissal as party is not acting in good faith?

QUESTION: Do statutory rights subordinate to creditors' interests when the debtor has behaved in what the court would describe as "bad faith?"

H. POSTPETITION DEBT

Can It Be Discharged?

Postpetition debt is an issue or Chapter 13. In chapter 13, it just is not discharged. In chapter 13, it can become a dischargeable debt. But only after hoops are jumped through. As one court stated:

> [I]f the debtor is to obtain a discharge of a postpetition consumer debt, two prerequisites are mandated by § 1328: (1) the debt must be provided for by the plan, i.e., "the plan must make a provision for it, i.e., deal with it, or refer to it"; and (2) if "practicable," prior approval by the trustee of the debtor's incurring such debt must have been obtained. Further, the postpetition consumer debt still will not be discharged unless the creditor voluntarily chooses to file a proof of claim..
>
> *In re Trentham*, 145 B.R. 564, 568 (Bankr. E.D. Tenn. 1992), cited by *In re Cleveland*, 349 B.R. 522, 527 (Bankr. E.D. Tenn 2006)

Simply translated: A postpetition claim may not be paid and discharged in a chapter 13 case unless all of the following are true:

- The plan provides for postpetition claims.
- The entity holding the postpetition claim files a proof of claim; and
- The claim is a tax claim, or a claim for a consumer debt necessary for the debtor's performance under the plan and meets the requirements of section 1305(c).
  8 COLLIER ON BANKRUPTCY ¶ **1322.10** (15th ed. rev. 2005).

A little statutory analysis is as follows:

§ 1329 specifically applies § 1322(b) of the Code permitting that the postconfirmation modification of a Chapter 13 plan may "provide for the payment of all or any part of any claim allowed under section 1305." 11 U.S.C. §§ 1329(b)(1), 1322(b)(6).

1305(a)(1) provides that "[a] proof of claim may be filed by any entity that holds a claim against the debtor for taxes that become payable to a governmental unit while the case is pending." Additionally, when filed such a claim is then "allowed or disallowed under § 502." 11 U.S.C. § 1305(b). When proof of a claim is filed in accordance with the Code the "claim is deemed allowed unless a party in interest ... objects." 11 U.S.C. § 502(a). If a party in interest objects to a claim the court determines whether the claim is allowed or disallowed. 11 U.S.C. § 502(b); Fed.R.Bankr.P. 3007. Finally, a discharge granted under § 1328(a), as was granted to the Debtors, discharges "all debts provided for by the plan or disallowed under section 502." 11 U.S.C. § 1328(a).

So, you may ask, when would this issue arise? Most commonly with the IRS. If the debtor has debt owed for a prepetition year but files the return *after* the filing, the debt often is deemed postpetition. So the debtor can resolve this a few way:

1. Nip it at the bud and file the return before filing so the debt is absolutely prepetition;
2. If the debtor has a clue, but a total knowledge of the tax liability is uncertain, elect a short year for taxes [more complex and usually best for debtor who earns significant income];
3. File the tax return postpetition and have the IRS file a return; or
4. File the tax return postpetition and file a claim for the IRS postpetition and hope the court will consider your claim to be satisfactory.

There are absolutely two steps required:

1. Get the party to file a claim – either they will do it or your filing of a claim for them may be deemed satisfactory for this element; and
2. Make the plan have language to address this issue.

If the claim is filed, you can address it in the plan (modified or amended) and the debtor would be capable of discharging the debt.

The Chapter 13 conversion to Chapter 7 Trick

368(d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

So, if the debtor converts, and had engaged in debt between the filing date and the conversion date, the Bankruptcy Code states the debt is treat as though it was prepetition.

QUESTION: If client does not need Chapter 13, and means test will not prohibit Chapter 7 conversion, can you use this provision as leverage against postpetition creditor to have debt discharged?

PRACTICE POINTER: Your lovely client delivers a financial statement and tax returns to the party handling the refinancing of the home or the handling of the new car loan, and these documents reveal much more income and many more assets than the lovely schedules represent. The trustees are very savvy about this and ask for those loan documents. And, not surprisingly, many of the refinancings and new loans become your worst nightmare.

PRACTICE POINTER: Include language in your retainer that your services are exclusively engaged to seek discharge of prepetition debt and that any and all services which require discharge of post-petition debt will require an additional retainer.

Y:\Clients\11111\Articles\NBI\CH 7 13 Issue\OUTLINE.wpd