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PRESUMPTION OF ABUSE WHERE YOU HAVE A NON-DEBTOR SPOUSE

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A CLE Presentation

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I. Introduction.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) resulted in a shift in law regarding the establishment of abuse where a debtor filing for bankruptcy has a non-filing spouse. Section 707(b)(2) under the BAPCPA establishes a formulaic approach, referred to as the “means test,” for determining “whether a debtor has the means available to repay his or her obligations.”¹ “[I]f a debtor’s income exceeds his or her necessary expenses by certain predetermined thresholds, a presumption” of abuse will arise.² “When performing the ‘means test’ calculation of § 707(b)(2), income is calculated by reference to the debtor’s ‘current monthly income.’”³ “With some limited exclusions, current monthly income is defined to include the debtor’s average monthly income received from all sources, including that of a non-filing spouse, for the six calendar months prior to the filing of the bankruptcy case.”⁴

However, case law has recently emerged which has established that, “in a single case, a debtor’s spouse’s income shall be included in the debtor’s current monthly income to the extent that it is paid ‘on a regular basis for the household expenses of the debtor or the debtor’s dependents.’”⁵ Therefore, “[i]f income is not (1) expended regularly (2) on household expenses, then it is not included in the debtor’s current monthly income,”⁶ and will not be used towards the calculation of whether a presumption of abuse arises under § 707(b)(2).

II. Relevant Bankruptcy Code sections.

The most relevant sections of the bankruptcy code regarding this issue fall under

11 U.S.C. §§ 707, and are as follows:

§ 707. Dismissal of a Case or Conversion to a Case under Chapter 11 or 13.

(b)(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, 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 non-priority 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 of the Family Violence Prevention and Services Act, 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.

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(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, 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.

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III. Current state of the law.

A. Current state of law, in general.

1. Calculation of the presumption of abuse under the "means test."

"Prior to BAPCPA, § 707(b) provided that a debtor's bankruptcy case could be dismissed if the court found that the granting of relief would be a 'substantial abuse.'"⁷ "By way of BAPCPA, however, Congress heightened this standard by dropping the adjective 'substantial.'"⁸ "Congress also eliminated in BAPCPA what had otherwise been a safeguard for the debtor: under the former § 707(b), there existed a presumption in favor of allowing the debtor's case to proceed."⁹

"In now providing that a debtor's Chapter 7 case may be dismissed for just "abuse," as opposed to "substantial abuse," § 707(b) sets forth two methods by which a court is to make such a determination."¹⁰ "First, § 707(b)(2) sets forth a formulaic approach whereby a debtor's ability to repay his or her debts is gauged," referred to as the "means test."¹¹ "If then, under this test, an ability to pay threshold is met, the statute provides that 'the court shall presume abuse exists.'"¹² "Although this presumption may be rebutted, § 707(b) goes on to set this bar extremely high, placing it effectively off limits for most debtors."¹³

"[I]f a debtor's income exceeds his or her necessary expenses by certain predetermined thresholds, a presumption" of abuse will arise.¹⁴ "When performing the 'means test' calculation of § 707(b)(2), income is calculated by reference to the debtor's 'current monthly income.'"¹⁵ "With some limited exclusions, current monthly income is defined to include the debtor's average monthly income received from all sources, including that of a non-filing spouse, for the six calendar months prior to the filing of the bankruptcy case."¹⁶

2. Case law establishing the amount a debtor's non-filing spouse's income to be added to the debtor's current monthly income.

"Prior to BAPCPA, several courts addressed the issue of whether a debtor's non-filing spouse's income should be considered when determining whether all of a debtor's disposable income is being applied to the debtor's Chapter 13 plan."¹⁷ "The majority of courts have held that the court must consider the income of a non-debtor spouse in calculating the debtor's disposable income."¹⁸

"However, Congress amended the definition of disposable income, in section 1325(b)(2), to state that disposable income means '*current monthly income* received by the debtor ... less amounts reasonably necessary to be expended-(A)(i) for the maintenance or support of the debtor or a dependent of the debtor....'"¹⁹ "According to section 101(10A), '[t]he 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 ... 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....'"²⁰

"The parenthetical stating that, in a joint case, a debtor's current monthly income shall include the debtor's spouse's income suggests that, in a single case, the spouse's income is not included in the debtor's current monthly income; otherwise, the parenthetical would be superfluous."²¹ "However, part (B) of section 101(10A), states that current monthly income also '*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)*....'"²²

Applying this reasoning, the courts to address the issue have established that, "in a single case, a debtor's spouse's income shall be included in the debtor's current monthly income to the extent that it is paid 'on a regular basis for the household expenses of the debtor or the debtor's dependents.'"²³

"Thus, based upon the explicit language of section 101(10A), current monthly income does not include *all* the income of the non-debtor spouse, but rather only amounts expended on a regular basis for household expenses."²⁴ "If income is not (1) expended regularly (2) on household expenses, then it is not included in the debtor's current monthly income,"²⁵ and will not be used towards the calculation of whether a presumption of abuse arises under § 707(b)(2).

It must be noted that "[p]roblems may arise with respect to determining the non-debtor spouse's contribution to household expenses."²⁶ For example, "[i]f the family maintains joint accounts, it may be difficult to determine what part of the income of the non-debtor spouse is used for household expenses and what part is used for that spouse's personal expenses or investments."²⁷

B. Relevant case law.

There are two prominent cases which have facilitated establishment of the current state of the law under BAPCPA regarding presumption of abuse under § 707(b)(2) in which a debtor has a non-filing spouse.

1. *In re Quarterman*.

The first of such cases is that of *In re Quarterman*, decided in March of 2006. In that case, "Paul Quarterman (the "Debtor") filed a Chapter 13 petition on January 5, 2006."²⁸ "According to Form B22C and Schedule I, the Debtor listed \$2,035.37 of gross monthly income and \$1,745.34 of net monthly income."²⁹ "As for the Debtor's spouse, the Debtor listed \$2,166.67 of gross monthly income and \$1,933.33 of net monthly income."³⁰ "Thus, the Debtor's total income from all sources, including that of his spouse, is \$4,202.04; the total net monthly income, including that of the Debtor's spouse, is \$3,678.67."³¹ "The Debtor did not list on Form B22C the extent to which his spouse's income was regularly applied toward household expenses."³²

The Debtor's currently monthly income was below the state median family income.³³ "On Schedule J, the Debtor listed monthly expenses of \$2,510.00" – "[t]he expenses on Schedule J do not reflect the secured claims that the Debtor is proposing to pay in his Chapter 13 plan."³⁴ "The Debtor's proposed Chapter 13 plan provides no payments to unsecured claims."³⁵ Thereafter, "[t]he Chapter 13 Trustee objected to confirmation of the Debtor's plan on the basis that the Debtor is not using disposable income to fund the plan."³⁶

In addition to other alterations made by Congress under BAPCPA to § 1325, Congress created an entirely new provision, section 1325(b)(3).³⁷ "It states that the '[a]mounts reasonably necessary to be expended under paragraph (2) [which defines disposable income] shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than ... [the state median family income].'"³⁸ "This means that if a debtor's current monthly income is above the state median family income (for the applicable number of household members), the Code requires that the 'amounts reasonably necessary to be expended' be determined under section 707(b), which lists the expenses adopted from the IRS for the means test analysis."³⁹ "If, however, the debtor's current monthly income is below the state median family income, then the 'amounts reasonably necessary to be expended' shall be determined according to section 1325(b)(2)(A) and (B)."⁴⁰

The Debtor proffered an argument "that if he is required to contribute disposable income to his Chapter 13 plan, his non-filing spouse's income should not be included in the disposable income calculation."⁴¹ "As a result, the Debtor will not have any disposable income to contribute."⁴²

It is difficult to determine the amount of Debtor's disposable income in the present case because "the Debtor did not accurately state the amount of his current monthly income; he did not list on Form B22C the extent to which his spouse's income was regularly applied toward household expenses."⁴³

However, "[t]he burden is on the objecting party, here the Trustee, to provide satisfactory evidence in order for the Court to make a decision."⁴⁴ Therefore, "[d]ue to the absence of evidence before the Court as to the amount that the Debtor's spouse regularly contributed toward household expenses of the Debtor or the Debtor's dependants, the Court cannot presume that the Debtor's spouse regularly contributed nearly two-thirds of her income toward household expenses of the Debtor."⁴⁵ Consequently, the Court held "the Debtor is left with no disposable income to contribute to his plan, and "the Trustee's objection to confirmation of the Debtor's Chapter 13 plan is overruled."⁴⁶

2. In re Hall.

The second note-worthy case of *In re Hall*, decided in February of 2007, is one of the most recent cases to address the issues involving presumption of abuse where a debtor has a non-filing spouse. In this case, the Trustee objects to confirmation of the Debtor's amended plan because he claimed that the Debtor was not contributing all of her "projected disposable income" for the applicable commitment period to the Plan" under § 1325(b)(1)(B).⁴⁷ "The Debtor is married, but her husband did not join her in filing the bankruptcy petition."⁴⁸ "The Debtor's Statement of Financial Affairs shows that she had no income in 2004, 2005, or in the first nine months of 2006."⁴⁹

"The Debtor's original Schedule I showed her as unemployed and with no income."⁵⁰ "The Debtor's Amended Schedule I, dated December 13, 2006, shows the Debtor as having been employed as a clerk at Video Bank for two weeks, and she now has monthly gross income of \$812.50 and nets \$730.95 after deducting only mandatory income tax and Social Security withholdings."⁵¹ "Her husband, who has worked as a maintenance engineer at Illinois State University for 26 years, has gross monthly income of \$5,464.83 and nets \$4,038.06 per month."⁵²

"Despite the fact that the Debtor is paying into the Plan five cents more each month than she is actually netting, the Trustee has filed an objection to the Plan on the grounds that she is not contributing all of her projected disposable income to the Plan."⁵³ "The Trustee has made his own adjustments to the Debtor's CMI to reflect her new job."⁵⁴ "Based on these adjustments, the Trustee figures that the Debtor

has disposable income each month of \$1,167 and that the Debtor must contribute that \$1,167 each month in order to satisfy the projected disposable income requirements of § 1325(b)(2).⁵⁵ “Thus, the Trustee would require the Debtor to contribute \$436 more to the Plan than she actually nets each month.”⁵⁶

“The real thrust of the Trustee’s argument is that the income of the Debtor’s non-filing spouse should be considered in determining the Debtor’s disposable income.”⁵⁷ “There was support for this position prior to the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).⁵⁸ Under BAPCPA, however, only the amounts expended by the non-debtor spouse on a regular basis for household expenses are included in a debtor’s ‘current monthly income.’”⁵⁹

“In this case, the non-filing spouse has been paying all of the household expenses of the Debtor both before and after the petition date.”⁶⁰ “The specific amounts of the household expenses attributable to the Debtor are not itemized.”⁶¹ A “determination of the portion of the non-filing spouse’s income to be included at Part I of the CMI is based on the debtor’s available deductions for household expenses at Part IV of the CMI.”⁶² “Only the portions of the non-filing spouse’s income which are actually used to pay household expenses should be included in the Part I income calculation.”⁶³ “Other income of the non-filing spouse not used to pay household expenses is not considered in calculating either disposable income or projected disposable income.”⁶⁴ “[I]n this case, the Debtor’s husband pays all household expenses, and none of those expenses is alleged to be unreasonable or to exceed applicable national or local standards.”⁶⁵

Therefore, the court determined “[t]he Debtor’s projected disposable income is, her net income of \$730.95.”⁶⁶ Furthermore, the court held “[b]ecause the Debtor’s Plan proposes to pay \$731 per month, the Debtor is clearly contributing all of her projected disposable income to her Plan and the Plan should be confirmed.”⁶⁷ “[T]he Trustee’s objection to the Debtor’s Chapter 13 Plan was accordingly denied.”⁶⁸

¹ *In re Haar*, 360 B.R. 759, 761 (2007).

² *Id.*

³ *Id.*

⁴ *Id.* (citing 11 U.S.C. § 101(10A)).

⁵ *In re Quarterman*, 342 B.R. 647, 651 (Bankr.M.D.Fla.2006).

⁶ *Id.*

⁷ *In re Haar*, 360 B.R. at 760.

⁸ *Id.* (citing 11 U.S.C. § 707(b)(1)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (citing 11 U.S.C. § 707(b)(2)(A)).

¹³ *Id.* (citing 11 U.S.C. § 707(b)(2)(B)).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (citing 11 U.S.C. § 101(10A)).

¹⁷ *In re Quarterman*, 342 B.R. at 650.

¹⁸ *Id.* (citing *In re Williamson*, 296 B.R. 760, 764 (Bankr.N.D.Ill.2003)(stating that the failure to consider the impact of the non-debtor spouse’s income would leave the debtor’s unsecured creditors to subsidize the spouse’s expenses); *In re McNichols*, 249 B.R. 160, 170 (Bankr.N.D.Ill.2000)(stating that the totality of the family’s income is appropriately considered in calculating a debtor’s disposable income); *In re Ehret*, 238 B.R. 85, 88 (Bankr.D.N.J.1999)(stating that the inclusion of a non-debtor spouse’s income is appropriate when determining a debtor’s disposable income); *but see In re Nahat*, 278 B.R. 108, 114 (Bankr.N.D.Tex.2002)(stating that section 1325(b)(2) defines disposable income as income “received by the debtor”).

¹⁹ *Id.* (citations omitted).

²⁰ *Id.*; (citing 11 U.S.C. § 101(10A) (2005)).

²¹ *Id.*

²² *Id.* at 650-51 (citing 11 U.S.C. § 101(10A)(B)).
²³ *Id.* at 651.
²⁴ *Id.*
²⁵ *Id.*
²⁶ *Id.*
²⁷ *Id.* (citing Eugene R. Wedoff, United States Bankruptcy Judge, Northern District of Illinois, *Means Testing in the New § 707(b)*, 79 Am. Bankr.L.J. 231 (2005)).
²⁸ *Id.* at 648.
²⁹ *Id.*
³⁰ *Id.*
³¹ *Id.*
³² *Id.*
³³ *Id.*
³⁴ *Id.*
³⁵ *Id.*
³⁶ *Id.*
³⁷ *Id.* at 649.
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Id.*
⁴¹ *Id.* at 650.
⁴² *Id.*
⁴³ *Id.* at 652.
⁴⁴ *Id.* (citing *In re Heath*, 182 B.R. 557, 561 (9th Cir. BAP 1995)(citing section 1325(b)(1)).
⁴⁵ *Id.*
⁴⁶ *Id.*
⁴⁷ *In re Hall*, 2007 WL 445517, 1 (Bkrcty.C.D.Ill.2007).
⁴⁸ *Id.*
⁴⁹ *Id.*
⁵⁰ *Id.*
⁵¹ *Id.*
⁵² *Id.*
⁵³ *Id.* at 2.
⁵⁴ *Id.*
⁵⁵ *Id.*
⁵⁶ *Id.*
⁵⁷ *Id.* at 3.
⁵⁸ *Id.*
⁵⁹ *Id.* (citing *In re Quarterman*, 342 B.R. 647, 650-51 (Bankr.M.D.Fla.2006)).
⁶⁰ *Id.*
⁶¹ *Id.*
⁶² *Id.*
⁶³ *Id.*
⁶⁴ *Id.*
⁶⁵ *Id.*
⁶⁶ *Id.* at 4.
⁶⁷ *Id.*
⁶⁸ *Id.*