

# Standard

Operation  
& Lease



Loan



Rent



Mortgage,  
HOA, Tax & Ins.

# Past



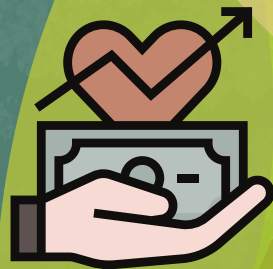
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# Continuing



# May Exceed



# Need



# MT Expense Chart

# The Malleable Means Test – Room to Move

By Michael Primus 2022©

The cases are replete with phrases such as "impossible choice," "dueling absurd results," "inconsistent provisions," and "unfortunate omissions." It is no secret that "the final version of BAPCPA has been roundly criticized as poorly crafted, containing a multitude of `typos, sloppy choices of words, hanging paragraphs, and inconsistencies. . . . [as well as] largely pointless but burdensome new requirements, overlapping layers of screening, mounds of new paperwork, and structural incoherence.

-Jeffery W. Cavender, U.S. Bankruptcy Court Judge

## ROOM TO MOVE – THE BIG IDEAS<sup>1</sup>

**The Non-Filing Spouse** – excluding all or a portion of the non-filing spouse's income which is not contributed to household expenses.

PRACTICE POINTER

This applies in chapter 7 and 13 and includes voluntary 401k contributions made by a non-filing spouse, cigarettes, and other personal expenses. See pages 7-8.

**Finance an efficient car** – The means test respects car payments but not high gas and maintenance costs.

PRACTICE POINTER

Time to trade-in that gas guzzler and get an EV or a Prius. See page 12.

**Clarify & Adjust budget with co-occupants of a house** – as between unmarried couples and roommates often the arrangements are undefined leaving room to move when clarifying things and completing the means test.

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<sup>1</sup> The Sniff Test – Some of the ideas here just do not feel right. Consider the following cases: Milavetz, Gallop & Milavetz V. United States, 559 U.S.229, 130 S. Ct.1324 (2010) (Supreme Court interprets section 526(a)(4) as allowing attorneys to advise clients to refinance a mortgage or purchase a reliable car prior to filing if doing so will reduce interest rates or improve ability to pay.); In re Welsh, 711, F. 3d 1120 (9<sup>th</sup> Cir. 2013) (Bad faith is not a basis to alter the express provisions of the means test); In re: Cavanaugh, 250 B.R. 107 ( 9<sup>th</sup> Cir. BAP 2000) (Endorsing eve of bankruptcy changes to charitable giving.)



PRACTICE POINTER

Avoid joint accounts and commingled funds. Remember co-occupants are not required to adhere to means test expenses. See page 15.

**Form a single member corporation or LLC** – this allows control over the distribution of income.



PRACTICE POINTER

As a separate legal entity, the business is not required to distribute all available money to the owner. Conversely, if value of the business (bank balance) causes exemption issues the business can distribute to the owner. See page 9.

**Student Loans** – Can be non-consumer and asking a few questions can make all the difference.



PRACTICE POINTER

Ask if the potential client had any experience in the field before incurring student loans? Was education expected to improve ability to earn? See page 4.

**Support kids and the elderly** – Caring for children and elderly family members is supported by the means test. This can include partial custody and/or people outside the home like family overseas.



PRACTICE POINTER

Household size has a huge impact on the means test. The official forms do not ask about shared custody of children and allow support for the elderly. There is no time requirement for being in the house. See pages 13-15.

**Support Charity** – This can be a new idea and still count, so that's room to move.



PRACTICE POINTER

Needs to be a tax-exempt charity. See page 13.

**The Converted Case** – many courts say the means test does not apply when a case is converted, and if it does, the 6 months is counted from the original filing, not the date of conversion.



PRACTICE POINTER

Do not file a new means test as of the date of conversion. See page 16. As an aside, always consider a hardship discharge before converting a case.

## DOES THE MEANS TEST APPLY?

In Chapter 7 - Yes, unless the debts are primarily non-consumer.<sup>2</sup> Non-consumer is a heading with several subsets. The means test is applicable in all chapter 13 cases.

Profit Motive Test to Determine Business Debt – some form of this is used by most all courts.

In Re Kelly 841 F.2d 908, 913 (9<sup>th</sup> Cir. 1987) (Purpose of debt determines consumer/non-consumer. Debt incurred for business ventures or other profit-seeking activities are plainly not consumer debt.)

In Re: Price, 353 F. 3d 1134, 1139 (9<sup>th</sup> Cir. 2004) (2<sup>nd</sup> mortgage taken to make home improvements on personal residence is consumer debt.)

In re Cox, 315 B.R. 850 (8<sup>th</sup> Cir. BAP 2004) (Debtors liquidated retirement accounts to purchase a lot and begin construction of a home they planned to live in, and did live in once completed. Belief that real estate represented a better investment opportunity did not render this non-consumer.)

In Re: Aspen Skiing Co. v. Cherrett (In re Cherrett), 873 F.3d 1060 (9<sup>th</sup> Cir. 2017) (Below-market interest rate condo loan offered by would-be employer to entice husband to relocate and accept a better job while wife and kids remained in the family home was for a business purpose.)

In re: Missick, 2019 WL 8756605 (Bankr. M.D. Fla 2019) (finding a rebuttable presumption student loans are consumer debts, presumption can be overcome by showing the debt is directly tied to advancement of a tangible and impending business opportunity and/or related to work the debtor was engaged in when the education was undertaken.)

Tax debts are non-consumer debts – Well settled

In Re Brashers, 216 B.R. 59 (Bankr. N.D. Okla 1998) (Income taxes are involuntarily imposed by the government for public purposes and are not consumer debts).

In Re: WestBerry, 215 F. 3d. 589 (6<sup>th</sup> Cir. 2000) (finding taxes debts are not consumer debts in the context of the co-debtor stay) (taxes arise from earning money whereas consumer debts arise from consumption).

In Re: Vicotoria, 389 B.R. 250 (Dist. M.D. Ala, 2008) (tax debts owed by a company wherein the debtor is the apparent responsible individual are non-consumer debts.)

Student Loans – There is no per se rule that student loans are consumer debt

In re: Stewart, 175 F.3d 796, 806 (10<sup>th</sup> Cir 1999) (10<sup>th</sup> Circuit discussing standards for student loans as consumer/non-consumer, in the context of loans from in-laws to pay for living expenses and medical school expenses.)

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<sup>2</sup> The consumer/non-consumer debt issue can arise in the context of 707(b), co-debtor stay, 722 redemption, attorney fees under 523(d) and courts utilize the same tests and standards. Pre-BAPCPA law remains valid.

In Re: Stewart, 215 B.R. 456 (10<sup>th</sup> Cir., BAP 1997), affd 175 F.3d. 796 (10<sup>th</sup> Cir. 1999) - In some circumstances a student loan can be purely or primarily a business investment albeit an investment in herself or himself, much like a loan for a new business).

#### Student loan as a consumer debt

In re Ferreira, 549 B.R. 232 (Bankr. E.D. Cal. 2016) (Student loans for nursing school to “get a better job” were consumer debts, no tangible benefit to an existing job or business)<sup>3</sup>

In re: Valdivia, 2020 WL 4939161 (Bankr. E.D. N.C. 2020) (Student loans taken to go to nursing school as a mid-life career change and to increase income were not sufficiently profit motivated to make the loans non-consumer, no tangible benefit to an existing job or business.)

#### Student loans as non-consumer debt

In re: Palmer, 559 B.R. 746 (Dist. Colo 2016) (Court not required to find benefit to current employer or existing business to find student loans to be business debt, profit motive shown where debtor’s motive was to own his own business and education furthered that profit motive.)

In re: Missick, 2019 WL 8756605 (Bankr. M.D. Fla 2019) (Finding a rebuttable presumption student loans are consumer debts, presumption can be overcome by showing the debt is directly tied to advancement of a tangible and impending business opportunity and related to work the debtor was engaged in when the education was undertaken.)

In re: De Cuna, 2013 WL 6389205 (Bankr. S.D. Tex 2013) (Student loans are not consumer debt when used for "direct educational expenses with the intent that the education received will enhance the borrower's ability to earn a future living.")

#### Personal Guarantees

In re: Grillot, 578 B.R. 651 (Bankr. D. Kan 2017) (Guarantee of ex-wife’s business debt in return for a waiver of spousal support is found to be business debt.)

In Re: Garcia, 606 B.R. 98 (Bankr. New Mex. 2019) (Guaranteeing a business debt to help a family member is a business debt despite lack of profit motive.)

In Re: SFW, Inc. 83 B.R. 27 (Bankr. S.D. Cal. 1988) (Personal guarantee of a corporate debt by shareholders is not a consumer debt.)

#### Personal Injury claims

In re Peterson, 524 B.R. 808 (Bankr. S.D. Ind. 2015) (The act of improperly accessing medical information was voluntary but the resulting intentional tort judgment is not the type of debt a person would incur in her daily affairs and therefore non-consumer.)

In Re: Marshalek, 158 B.R. 704 (Bankr. N.D. Ohio 1993) (Claims from auto accidents are per se not consumer debts.)

#### Medical Debt

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<sup>3</sup> Opinion by Judge Jaime of the Eastern District of California. Judge Jaime is, in the author’s experience, is notoriously anti-debtor.

In re: Sijan, 611 B.R. 850 (Bankr. S.D. Ohio 2020) (Emergency medical treatment is not voluntary and is therefore not a consumer debt but routine medical debt is consumer debt.)

#### Attorney's Fees

In re: Kelly, 841 F.2d 908, 913(9<sup>th</sup> Cir. 1988) (Attorney's fees incurred to further a "family" or "household" purpose are consumer debt.)

In re: Renteria, 456 B.R. 444 (Bankr. E.D. Cal 2011)<sup>4</sup>, aff'd on other grounds 470 B.R. 838 (9<sup>th</sup> Cir. BAP 2012) (Attorney fees related to domestic violence and paternity are consumer debts.)

#### Other situations

In re: Durant, 586 B.R. 212 (Bankr. D. Maryland 2018) (Debtor misappropriated inheritance funds, court found actual damages to be consumer debt but punitive damages non-consumer debt.)

### **APPLICATION OF THE MEANS TEST IN CHAPTER 7 AND 13**

#### **Current Monthly Income**

##### Retirement distributions received during the 6 months

##### Considered income

In re: DeThample, 390 B.R. 716, 720 (Bankr. D. Kan 2008) (acknowledging split of authority, determining 401k disbursement is income for CMI purposes.)

##### Not Considered Income

In re: Cram 2009 WL 1188513 (Bankr. Idaho 2009) (CMI does not include 401k distributions received during the 6 months because the funds were received as income when earned and deposited in the account.)

In Re: Zahn, 391 B.R. 840 (BAP 8<sup>th</sup> Cir. 2008) (IRA distributions received during the 6 months are not considered income) (fun fact: the debtor objected to her own plan).

In re: Marti, 393 B.R. 697, 700 (Bankr. Neb. 2008) (stating in dicta retirement withdrawals are not income.)

##### Workers Comp/Personal Injury Proceeds

##### Considered income

Ortiz-Peredo v. Viegelahn, 587 B.R. 321 (Dist. W.D. TX 2018) (Workers comp claim settled prior to confirmation is disposable income.)

Adamson, 615 B.R. 303, 309 (Bankr. D. Colo 2020) (Discusses split in the cases, and finds net proceeds of personal injury action included in DMI to the extent not reasonably necessary for debtors future medical treatment.)

##### Not considered income

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<sup>4</sup> Eastern District of California

In re: Gosch, 627 B.R. 669, 677 (Bankr. Colo 2021) (Proceeds of personal injury claim received after the end of the 6<sup>th</sup> month and 4 days before filing are not disposable income in ch 13.)

In Re Daniels, 2018 WL 4836770 (Bankr. Mass 2018) (Proceeds of pre-petition exempt property are not included in CMI.)

In Re: Mobley, 2011 WL 6812551 (Bankr. E.D. Mich. Dec. 1, 2011) (Exempt proceeds of personal injury settlement received one month before filing is not income for means test purposes.)

In Re: Vargas, 2011 WL 4482005 (Bankr. D. R.I. 2011) (Proceeds of unliquidated pre-petition personal injury case were not known or virtually certain at the time of filing and were exempt. Not included in CMI.)

Sale of Assets During the 6 months – generally not considered income unless selling assets in the ordinary course of business.

In Re Featherson, 2008 WL 5217936 (Bankr. Mont. 2008) (Sale of cattle considered income.)

In Re Leach, 2009 WL 1010552 (Bankr. Mont. 2009) (Proceeds of sale of two personal, non-business, non-investment vehicles is not income for CMI purposes.)

### Inheritance

In Re Richardson, 2018 WL 11206274 (Bankr. M.D. Fla. 2018) (Inheritance funds do not represent disposable income.)

In re Melvin, 2011 WL 1303307 (Bankr. C.D. Ill 2011) (Inheritance funds are income which should be paid into the plan.)

### Bonuses

In Re Rivera 2020 WL 7333588 (M.D. Fla 2020) (Applying Lanning, annual bonus received outside the 6-month window can be added to CMI.)

In re: O’Neill Miranda, 449 B.R. 182, 190 (Bankr. D. P.R. 2011) (Christmas bonus received outside the 6-month window must still be factored in to determine disposable income.)

In re: Sterwalt, 601 B.R. 356 (Bankr. Colo 2019) (future bonus too speculative to count.)

### Loan Proceeds

In re: Almonte, 397 B.R. 659, 667 (Bankr. E.D.N.Y. 2008) (cash advances taken on a credit card are not income for CMI purposes.)

### Mileage and Expense Reimbursement

In Reinhart, 559 B.R. 217, 219-22 (Bankr. E.D. Wis. 2016) (Mileage and expense reimbursement paid by debtor’s employer are counted in CMI and used to determine plan length. The actual expenses can be deducted from PDI.)

In Re: Wareham, 553 B.R. 875 (Bankr. D. Utah 2016) (Debtor was a salesperson at Carmax and was given use of a car as “in-kind” income. In-kind income is not income for purposes of CMI because it does not provide her with money to fund a plan.)

In Re: Tinsley, 428 B.R. 689 (Bankr. W.D. Va 2010) (Mileage reimbursement paid by employer for use of personal vehicle is included as income in CMI.)

Non-filing spouse's income in Chapter 13 – is included even if they maintain separate households. See Section 1322(d)(1) and 1325(B)(4).

In Re: Rodgers, 2014 WL 4988388 (Bankr. 2014 WL 4988388) (Refusal to cooperate by non-filing spouse does not excuse disclosure.)

In Re: Carlyle, 2013 WL 3777096 (Bankr. S.D. Ga 2013) (Payments made by non-filing spouse on loan for truck owned and used by non-filing spouse are not included in CMI.)

In Re: Campbell, 2019 WL 722759 (Bankr. S.D. Fla. 2019) (Non-filing spouse uses income to pay property taxes on 6 parcels of vacant land, not contributed to household expenses so can be deducted using the marital deduction.)

In Re Moss, 591 B.R. 338 (Bankr. N.D. Ill 2018) (Discussing mortgage payments made by non-filing spouse where debtor not on title or on the mortgage, marital deduction and means test housing allowance for debtor with no mortgage, acknowledging spilt in the cases.)

In Re Baker, 580 B.R. 662, 665 (Bankr. E.D. Va. 2017) (Marital deduction includes payment for mortgage on the family home where only non-filing spouse is liable.)

In re Havens, 2018 WL 4801905 (Bankr. Mass 2018) (Payments made for mortgage, utilities, travel and other things by debtor's spouse and debtor's corporation are income for CMI purposes.)

In Re Pennington, 2013 WL 1176235 (Bankr. S.D. Tex 2013) (Payments by non-filing spouse for student loans of non-filing spouses separate children are excluded from CMI, payments for credit cards that may be debts for expenses of the debtor or debtor's dependents are included in CMI. Only regularly contributed income of non-filing spouse is included in CMI.)

In re: Taxvard, 485 B.R. 423, 430-39 (Bankr. D. Colo. 2013) (Ownership of an asset and liability for corresponding debt are outcome determinative when an expense is paid by a non-filing spouse. Mortgage paid on home owned by non-filing spouse with mortgage owed by non-filing spouse is excluded from debtor's CMI. Half of the utilities are excluded where debtor pays half and non-filing spouse pays half because spouse is not a debtor or dependent of debtor.)

In re: Vollen, 426 B.R. 359 (Bankr. D. Kan 2010) (Amount contributed by non-filing spouse should be used to determine Applicable Commitment Period despite the form being awkward or incorrect. 401k contributions made by a non-filing spouse are not included in CMI.)

In re: Shahan, 367 B.R. 732 (Bankr. D. Kan 2007) (Mortgage payments by non-filing spouse are included in CMI where home acquired during marriage for use by the debtor and the couple's daughter. Loan payments made by non-filing spouse on a signature loan are included in CMI when signature loan was used for household expenses. Loan payments for a home computer made by a non-filing spouse are included in CMI because the home computer is a household good. In contrast, 401k contributions and personal recreation expenses of a non-filing spouse are not included in CMI.)



In re: Trimarchi, 421 B.R. 914, 920-23 (Bankr. N.D. Ill 2010) (Payments made by non-filing spouse for home occupied by debtor, spouse and daughter are added to CMI. Payments made by non-filing spouse to heat and maintain a pool are added to CMI. It's irrelevant that debtor is not contractually obligated on the house mortgage.)

In re: McSparran, 410 B.R. 664 (Bankr. D. Mont. 2009) (Calculation of CMI requires consideration of non-filing spouse's income especially when debtor claims a California homestead and California is a community property state.)

In Re: Abisso, 490 B.R. 464 (Bankr. Mass 2013) (Exclusion of non-filing spouse's income can reduce the applicable commitment period.)

In re Paliev, 2012 WL 3564031 (Bankr. E.D. Va. Aug. 17, 2012) (Disallowing non-filing spouse's contribution to daughter's 529 College Savings plan because it is for the benefit of a dependent of the debtor.)

Non-filing spouse's income in Chapter 7 – if separated only report on line 10 money paid by the non-filing spouse for household expense. If not separated, report all non-filing spouse's income.

In Re: Persaud, 486 B.R. 251 (Bankr. E.D.N.Y. 2013) (Discussing marital deduction in the context of chapter 7 where non-filing spouse paid private school tuition and college expenses for the couple's children are payments made to support dependents of the debtor.)

In Re: Montalto, 537 B.R. 147 (E.D.N.Y. 2015) (Non-filing spouses income presumed to be used for household expenses but can be excluded for purely personal expenses of the non-filing spouse.)

In Re: Ellis, 499 B.R. 498 (Bankr. E.D. Va 2013) (Discussing non-filing spouse's car payment as a marital deduction in chapter 7.)

In Re: Rable, 445 B.R. 826 (Bankr. N.D. Ohio 2011) (Considering marital adjustment in chapter 7 and not allowing deduction where non-filing spouse is making mortgage payments on the family home which is a household expense.)

#### Joint Filing but Separate Households

Harman v. Fink (In re Harman), 435 B.R. 596 (8<sup>th</sup> Cir BAP 2010) (Joint debtors must file a single means test despite maintaining separate households.)

#### Calculation of the amount

Received – Income needs to be received during the 6-month period regardless of when earned  
In Re: Katz, 415 B.R. 512 (Bankr. CDCA 2011), In re: Mille, 519 B.R. 819, 823-24 (9<sup>th</sup> Cir. BAP 2014) .

Derived – Seems this would refer to a real estate agent with an escrow pending that might be derived prior receipt. Pro-ration might be a viable alternative. See generally *In re: Tully*, 202 B.R. 481 (9<sup>th</sup> Cir. BAP 1996) (real estate commission), In re Anderson, 572 B.R. 743 (9<sup>th</sup> Cir. BAP 2017) (real estate commission).

Derived & Received – Wages received after the 6-month period that were earned during the 6-month period are not counted. In re: Arnoux 442 B.R. 769 (Bankr. EDWA 2010).

Earned – the terms “received” and “derived” mean the same thing. Earned is the operative term for determining CMI. Payroll earned during the pay period despite payday being 10 or so days later. In Re: Schuldt, 527 B.R. 278, 279-88 (Bankr. W.D. Mich 2015.)

### Business Income & Expenses

#### Self-Employed

In Re: Weigand, 386 B.R. 238 (9<sup>th</sup> Cir BAP 2008) (Gross income is used to determine CMI and plan length with business expenses deducted after the determination of plan length.)

In Re Culcasi, 2011 WL 4005451 (Bankr. D. N.H. 2011) (Business expenses in excess of business income do not reduce projected disposable income.)

#### Corporation/LLC /Partnership

Gonzalez 597 B.R. 133 (Bankr. Colo 2018) (Questioning majority and minority views as applied to a sole member LLC, acknowledging small business owner has a great deal of discretion in paying expenses and distributing net income and concluding all business income must be listed regardless of legal form of the business.)

In Re Lafferty, 2019 WL 10431875 (Corp distributed money as loan repayment to debtor personally, not income and referred to as “Phantom Income.”)

In Re Havens, 2018 WL 4801905 (Bankr. Mass 2018) (Personal expenses paid by debtor’s corporation are income for CMI purposes.)

Daniels, 2018 WL 4836770 (Bankr. E.D. VA 2018) (Business expenses come after determination of CMI even though the business is a sole member LLC.)

In Re: Aslakson, 2013 WL 1304494 (Bankr. D. Or. 2013) (Medical, dental, and vacation benefits paid by debtor’s wholly owned Subchapter S corporation are included in CMI.)

In Re: Romero, 2013 WL 241742 (Bankr. S.D. Fla. 2013) (Income of a business is irrelevant if that income is not made available to cover household expense of the debtor.)

In re: Bond, 2012 WL 3867427 (Bankr. D. Ariz. 2012) (Business debtors need to include partnership profits in CMI, not just wages earned in the 6 months.)

In Re: Geiger, 2010 WL 2756760 (Bankr. N.D. Ohio 2010) (Owner of subchapter S corporation includes only wages, salary and flow-through income in CMI, not gross receipts of the corporation, marked as not for publication by the judge.)

In Re: Register, 2010 WL 2035601 (Bankr. D. Wyo. 2010) (Debtor is 50% owner of a LLC and is required to include income received from the LLC and to list the value of the LLC in schedule B. LLC is a separate entity and debtor not required to include profits of the LLC.)

### Miscellaneous Income Matters

In re: Cole, 548 B.R. 132 (Bankr. E.D. Va 2016) (CMI calculated based on actual income, allegations of voluntary underemployment are not sufficient.)

In re: Warren 2011 WL 2420323 (Bankr. Idaho 2011) (Courts have condoned use of W-2 income to approximate income where there are missing paystubs.)

In Re: Gosch, 627 B.R. 669, 677 (Bankr. Colo 2021) (Proceeds of personal injury claim received after the end of the 6<sup>th</sup> month and 4 days before filing are not disposable income in ch 13.)

#### Excluded Sources of income – 1325(b)

Child Support – included to the extent the amount received exceeds what is reasonably necessary to support the child.

In Re: Brooks, 498 B.R. 856 (Bankr. C.D. Ill 2013) (Child support included in CMI but may be excluded from DMI).

#### Social Security – is not considered income for means test purposes. BK code 101(10A)(B).

In Re: Blake, 565 B.R. 871, 875-77(Bankr. N.D. Ill 2017) (Social Security income of non-filing spouse is free from all bankruptcy restrictions.)

In Re: Dye, 495 B.R. 699, 701-03 (Bankr. E.D. Va 2013) (social security exclusion not limited to social security received by debtor. In this case social security received by non-filing spouse is excluded.)

In Re Miller, 445 B.R. 504, 507 (Bankr. D.S.C. 2011) (social security exclusion applies to all social security, not just the debtor's personal income.)

In Re Balcom, 2021 WL 5173337 (Idaho BK 2021) (Social Security for Debtor's grandson – Not considered income because trustee presented no proof the proceeds were used for household expenses and alternatively excluded as social security regardless of which household member receives the payment. Discussing split in cases regarding social security exclusion when a non-debtor is the recipient.)

In Re: Palcher, 2018 WL 481863 (Bankr. S.C. 2018) (Social Security of debtor's elderly mother is contributed to household expenses but it is not considered disposable income in son's bankruptcy because it is social security. Mother is a member of the household for means test purposes.)

In Re: McPhee, 2014 WL 4211068 (Bankr. E.D. Va 2014) (Canadian Old Age Security benefits are excluded from CMI because a treaty between the US and Canada requires reciprocal treatment of government retirement benefits.)

In re: Scott, 488 B.R. 246,252-56 (Bankr. M.D. Ga 2013) (Benefits under the social security act are excluded and the statute does not specify that the benefits must be payable to the debtor.)

In Re: Shaikh, 2020 WL 6867920 (10<sup>th</sup> Cir. BAP 2020) (not for publication but can be cited for persuasive value) (Debtor lives with his mother and sister in house owned by his sister. Debtor pays water, internet and utilities but otherwise keeps separate finances and was found to be a household of one. Court concerned about expansive definition of household which might include college students or other adults splitting expenses. Mother receiving social security and using it to pay some household expenses did not create income to debtor or an economic unit.)

In Re: Nadone, 2009 WL 9085534 (Bankr. E.D. Cal 2009)<sup>5</sup> (CMI includes contributions from parents notwithstanding that parents' only source of income is social security.)

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<sup>5</sup> Eastern District of California

In re Carpenter, 614 F.3d 930 (8th Cir. 2010) (Lump sum received as retroactive social security is excluded from the bankruptcy estate by 42 U.S.C. 407 but can be voluntarily used to fund a plan.)

#### Retirement loans – 1322(f)

In re Paliev 2012 WL 3564031 (Bankr. E.D. Va. Aug. 17, 2012) (401(k) loan taken shortly prior to filing and used to pay mortgage arrears and bankruptcy attorney is not taken in bad faith.)

Unemployment – Not considered income in NDCA but appears to be an open issue in the 9<sup>th</sup> Cir. See generally Adinolfi, 543 B.R. 612 (9<sup>th</sup> Cir. BAP 2016).

In re: Novak, 2017 WL 1104052 (Bankr. D. N.M. 2107) (unemployment benefits are not benefits under the Social Security Act and are included in CMI)

In re: Gentry, 463 B.R. 526, 530 (Bankr. D. Colo 2011) (Unemployment benefits are not benefits received under the Social Security Act and must be included in CMI.)

In re: Ormonde, 2010 WL 9498235 (Bankr. E.D. Cal 2010) (unemployment is not a benefit received under the Social Security administration, judge made a note this is unpublished.)

In Re: Kucharz, 418 B.R. 635 (Bankr. C.C. Ill 2009) (Unemployment is not a benefit received under the Social Security Act.)

In Re Rose, 2010 WL 2600591 (Bankr. N.D. Ga 2010) (CMI includes unemployment.)

In re: Baden, 396 B.R. 617, 621-23 (Bankr. M.D. Pa 2008) (Unemployment is not a benefit under the Social Security Administration.)

#### Adoption Assistance

In Re: Adinolfi, 543 B.R. 612 (9<sup>th</sup> Cir. BAP 2016) (Funded through the Social Sec Admin and not income for CMI.)

In Re: Isaacs, 605 B.R. 669, 674 (Bankr. M.D. Pa 2019) (Adoption assistance is distributed through the Social Sec Admin and is excluded).

#### Disability and Retirement

In re: Adinolfi, 543 B.R. 612 (9<sup>th</sup> Cir. BAP 2016). (State run programs that are funding in whole or in part with federal funds thru the SSA can be excluded.)

Blausey v. U.S. Trustee, 552 F.3d 1124 (9<sup>th</sup> Cir. 2009) (Private disability considered income regardless of whether it is taxable.)

In re: Charron, 2016 WL 3003144 (Bankr. E.D. Mich 2016) (City of Detroit police and fire pensions are income for CMI).

In re: Hedge, 394 B.R. 463, 466 (Bankr. S.D. Ind. 2008) (VA Disability Considered income for means testing purposes.)

In Re: Hite, 557 B.R. 451, 457 (Bankr. W.D. Va 2016) (Medicaid waiver benefits paid to debtor for caring for disabled adult son are excluded from CMI because they are paid through the Social Security Administration. Alternatively, such payments can be excluded as foster care payment.)

Meyer v. U.S. Trustee (In Re Scholz), 699 F.3d 1167 (9<sup>th</sup> Cir. 2012) (Railroad Retirement Act Benefits contain similar anti-alienation provisions to social security and are not included in CMI.)

In re Taylor, 212 F.3d 395 (8<sup>th</sup> Cir. 2000) (Pension income being exempt does not limit inclusion as disposable income.)

### **Deduction from Current Monthly Income**

#### Car payments

In re Rodrigues, 620 B.R. 94 (9<sup>th</sup> Cir. BAP 2020) (The full vehicle deduction is allowed despite the actual payment being different.)

In re Rodrigues, 620 B.R. 94 (9<sup>th</sup> Cir. BAP. 2020) (The Means Test creates a cap on vehicle operating expenses which includes commuting, and that amount is not adjusted based on the actual cost greatly exceeding the allotment.)

Ransom v. FIA Card Services, 577 F.3d 1026 (9<sup>th</sup> Cir. 2009) (aff'd 131 S.Ct. 716 (2011)) (The actual payment is allowed if only one monthly payment remains.)

In Re: Lopez, 574 B.R. 159 (Bankr. EDCA 2017.)<sup>6</sup> (Title loans and other non-purchase money loans count even if taken days before filing. Payments made by the debtor for a car being used by the debtor count, despite the loan not being in the debtor's name.)

In re: Luedtke, 508 B.R. 408 (9<sup>th</sup> Cir. BAP 2014) (The IRS collection manual contemplates an additional expense of \$200 for people with old cars but the expense is not included in the National Standards and Local Standards used in the means test.)

#### Purchases In Contemplation of Bankruptcy

Milavetz, Gallop & Milavetz V. United States, 559 U.S.229, 130 S. Ct.1324 (2010) (Supreme Court interprets section 526(a)(4) as allowing attorneys to advise clients to refinance a mortgage or to purchase a reliable car prior to filing because doing so will reduce interest rates or improve ability to pay.)

In re: Mitchell, 357 B.R. 124 (Bankr. CDCA 2006) (Case dismissed as an abuse of chapter 7 where debtor charged \$13,531 on non-essentials (fashion accessories, eating out and beauty products) in the four months prior to filing and had no substantial income but claimed substantial earning potential.)

In re: Hoskins 590 B.R. 842 (Bankr. S.D. Ind. 2018) (Court utilizes the same standard for finding a plan to be filed in bad faith as for dismissal of ch 7. Court considers ch 13 to cram down interest rate on a car purchased 18 days before filing. In dicta the courts says had the plan not sought to reduce the interest rate it would have been good faith.)

Rodriguez, 547 B.R. 272 (Bankr. N.D. Ill. 2016) (Debtor bought a car to use driving for Uber within 30 days of filing ch 7. When he did not reaffirm the creditor filed an AP. Debt discharged when court found debtor thought he would be able to make the payments.)

In re: Sharp, 608 B.R. 546 (Bankr. Kan. 2019) (Ch 13 debtor allowed to extend term and reduce interest rate on high interest vehicle loan taken 21 days before filing.)

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<sup>6</sup> Just to prove that even a broken clock can be right twice a day, the Eastern District ruled in favor of a debtor.

### Voluntary Retirement Contributions – disallowed

In re Acquino, 630 B.R. 499 (Bankr. D. Nev 2021) (collecting cases in a 136 page, exhaustive review, adopting Parks/McCullers and disallowing.)

In re: Parks, 475 B.R. 703 (BAP 9<sup>th</sup> Cir. 2012) (Means test does not allow any voluntary retirement contributions.)

In Re McCullers, 451 B.R. 498, 503 (Bankr. N.D. Cal 2011) (ch 13 debtor may deduct 401(k) loan payments only until the loan is repaid. Voluntary 401(k) contributions are not deducted in the means test.)

In re Seafort, 669 F.3d. 662, 674 (6<sup>th</sup> Cir. 2012) (adopting the reasoning in Parks and McCullers but see Davis, infra.)

### Voluntary Retirement Contributions - allowed

In re Davis, 960 B.R. 346, 357 (6<sup>th</sup> Cir. 2020) (Post-petition 401(k) contributions are excluded from disposable income so long as those contributions were regularly withheld prior to bankruptcy.)

In re: Bruce, 484 B.R. 387, 394 (Bankr. W.D. Wash 2012) (401k contributions are allowed for a below median debtor in the 9<sup>th</sup> Circuit despite Parks, 475 B.R. 703 (9<sup>th</sup> Cir. BAP 2012)).

In re: Glisson, 430 B.R. 920, 922 (Bankr. S.D. Ga 2009) (Neither 401k contributions or 401k loan repayments are DMI.)

Drapeau 485 B.R. 29 (Bankr. Mass 2013) (Good faith contributions to retirement are not DMI.)

In re Cantu, 553 B.R. 565 (Bankr. E.D. Va. 2016) aff'd 713F. App'x 200 (4<sup>th</sup> Cir. 2017)(As a result of section 362(b)(19) and 541 neither 401k contributions or 401k loan repayments are DMI.)

### Charitable Giving – 707(b)(1)

In re Cavanagh, 250 B.R. 107 (9<sup>th</sup> Cir. B.A.P. 2000) (Statute makes no distinction between past and future practices so long as charitable contribution does not exceed 15%. The statute does not limit eve of bankruptcy or after filing changes to charitable giving, but the plan must be filed in good faith when looking at the totality of the circumstances.)

In re Wade, 612 B.R. 70, 73–75 (Bankr. E.D.N.C. 2019) (Plan to begin donating to church shortly after filing when debtors had not donated in the past 2 years is not filed in good faith.)

In re Brady, 2019 WL 2764232 (Bankr. E.D. Cal. 2019) (Court requires evidence of historical charitable giving and uses a 36-month average to determine debtor's deduction on line 31, court fails to mention In Re Cavanagh, supra)<sup>7</sup> (Note: the case #is 19-10640)

### Household Size – 3 Approaches

The Means Test analysis starts with household size which is used to compute applicable median income. Unfortunately, the Bankruptcy Code does not define the term “household” and courts

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<sup>7</sup> This typical in the Eastern District of California.

have grappled with the issue as a result. One commentator discusses the issues and argues in favor of a substantial support test<sup>8</sup>. The courts have crafted three distinct approaches to household size.

Economic Unit Approach – This approach defines a household as all individuals who live and operate as a single economic unit. This approach has been used by many courts including, but not limited to, *Johnson v. Zimmer*, 686 F.3d 224, 236-37 (4<sup>th</sup> Cir, 2012); *In re Robinson*, 449 B.R. 473, 482-83(Bankr. E.D. Va. 2011); *In re: Morrison*, 443 B.R. 378, 387-88 (Bankr. M.D.N.C. 2011)

Census Bureau Approach – this approach counts “heads on beds” to determine household size and includes unrelated people and roommates in determining household size. This approach is used by many courts including, but not limited to, *In re: Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007); *In re Epperson*, 409 B.R. 503 (Bankr. D. Ariz. 2009), *In re: Smith* 396 B.R. 214 (Bankr. W.D. Mich. 2008), *In re Bostwick*, 406 B.R. 867, 872-73 (Bankr. D. Minn. 2009)

Income Tax Dependent Approach – This approach looks to the number of dependents shown on a tax return to ascertain the proper number of dependents for use in the means test. This approach is used by courts including but not limited to: *In re: Bridgeforth*, 556 B.R. 121 (Bankr. M.D. Pa. 2016), *In re Skiles*, 504 B.R. 871, 874-86 (Bankr. N.D. Ohio 2014) (applying economic unit test with a rebuttable presumption that dependents on a tax return are included in the household). But see *In re: Rodriguez*, 620 B.R. 92 (9<sup>th</sup> Cir. BAP 2020)(Court not bound by IRS sources when interpreting the means test.)

*In Re Collins*, 2021 WL 510200 (Bankr. M.D. Ala 2021) (Debtor residing with parents does not include parents’ income in CMI absent proof that parents regularly contribute to income to debtor.)

*In re: Coverstone*, 461 B.R. 629, 633-35 (Bankr. Idaho 2011) (Adult daughter and her 3 children lived with debtors and the household size was 6. Daughter was not employed during the 6 months prior to filing but got a job post-petition and began making some contributions to household expenses. Court applied Lanning to add daughter’s contributions to household expenses to CMI.)

*In Re: Duran*, 2010 WL 3947318 (Bankr. S.D. Cal. 2010) (Adult daughter residing in the home is not treated like a non-filing spouse.)

*In re: Hays*, 2008 WL 1885768 (Bankr. N.D.N.Y. 2008) (If 22-year-old daughter, living at home, is considered a dependent for means testing purposes then any income she uses to pay for her own household expenses must be included in CMI.)

*In Re: Olguin*, 429 B.R. 346, 349-50 (Bankr. D. Colo 2010) (Social security benefits received by grandparents living in debtors house are included in CMI to the extent paid on a regular basis for household expenses of the debtor or debtor’s dependents. Social Security is not excluded unless the debtor is the recipient.)

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<sup>8</sup> Leah G. Sterling, *In the House but Out of the Household? Why Congress Needs to Codify a Substantial Support Test for Courts to Use When Calculating a Debtor’s Household Size* (2013). Available at [www.digitalcommons.law.msu.edu](http://www.digitalcommons.law.msu.edu)

In Re: Bostwick, 406 B.R. 867, 871-2 (Bankr. D. Minn. 2009) (Roommates sharing expenses. Separate leases so roommate's rent is not a household expense of the debtor and not included in CMI. Contribution to household utilities is included.)

In Re: Lofty, 437 B.R. 578, 585 (Bankr. S.D. Ohio 2010) (Plan fails projected income test where debtors are maintaining ownership and payments on property occupied by adult son and grandson who are not dependents.) *But see* Welsh, *supra*, which will alter the result in the 9<sup>th</sup> Cir.

In re Broadbent, 531 B.R. 840 (Bankr. Idaho 2015) (Nowhere does the code require that a live-in significant other's income be counted in analyzing a chapter 13 plan. Court declines to treat a live-in girlfriend like a non-filing spouse, failing to include such income is not bad faith.)

In Re: Shaikh, 2020 WL 6867920 (10<sup>th</sup> Cir. BAP 2020) (Marked not for publication but can be cited for persuasive value) (Debtor lives with his mother and sister in house owned but his sister. Debtor paid water, internet and utilities but otherwise kept separate finances and was found to be a household of 1. Court concerned about expansive definition of household which might include college students or other adults splitting expenses. Mother receiving social security and using it to pay some household expenses did not create income or an economic unit.)

In Re: Jewel, 365 B.R. 796 (Bankr. S.D. Ohio 2007) (Household includes debtor's daughter and her 3 children and daughter's income of \$881 was found not to be contributed to the household. Adult son living at home but paying his own expenses is not a dependent and his income is not included.)

#### **Bad Faith is Not An Issue In The Means Test**

In re Welsh, 711, F. 3d 1120 (9<sup>th</sup> Cir 2013) (Bad faith is not a basis to alter the express provisions of the means test.)

In re Cranmer, 697 F.3d 1314 (10th Cir. 2012) (Means test allows the exclusion of social security income, and allegations of bad faith do not override the express provisions of the means test.)

#### **The Official Form is wrong**

In Re: Wiegand, 386 B.R. 238, 242 (9<sup>th</sup> Cir. BAP 2008) (Form incorrectly provides for deduction of business expenses prior to determination of above/below median status.)

Dumas 608 B.R. 902, (Bankr. N.D. Ga. 2019) (collecting cases) (finding ch. 13 attorney fees can be paid from DMI thereby reducing funds available to general unsecured creditors despite form.)

Williams 394 B.R. 550, (Bankr. D. Colo 2008) (707(b) (Allows deduction of attorney fees even though the form omits such a deduction.)

In re: Vollen, 426 B.R. 359 (Bankr. D. Kan 2010) (Form seems wrong as to marital deduction and application to Applicable Commitment Period.)



## Conversion from Chapter 13 to Chapter 7

Detailed analysis: Harmonizing Conversion and the Means Test in Bankruptcy.<sup>9</sup>

### Means Test Does Not apply in Converted Cases

In Re: Ryder, 2008 Lexis 2220 (Bankr. N.D. Cal. 2008)<sup>10</sup> (Judge Jellen ruled the means test was not applicable in a converted case.)

In re Layton, 480 B.R. 392 (Bankr. M.D. Fla. 2012) (Plain meaning supports finding that means test applies only to cases filed under chapter 7, noting means test is tied to the 6 months prior to the initial filing and in a converted case may trigger a presumption of abuse based on financial information months or years old.)

In re Thoemke, 2014 LEXIS 451, (Bankr. M.D. Fla. 2014) (Acknowledging split of authority and following Layton, *supra*).

### Means Test Does Apply in Converted Cases

In re Chapman, 447 B.R. 250 (B.A.P. 8th Cir. 2011) (Acknowledging split in cases and finding means test applicable in converted cases.)

Pollitzer v. Gebhardt, 860 F.3d 1334 (11th Cir. 2017) (Means test applies to converted cases, debtor unable to sidestep means test by filing chapter 13 and immediately converting.)

In re Croft, 539 B.R. 122 (Bankr. W.D. Tex. 2015) (Finding 707(b) applicable in a converted case and dismissing the case under the totality of the circumstances which included high income, exorbitant house and car expenses and inability to account for expenditures.)

### **Below Median**

Ransom v. FIA Card Services, N.A., 131 S. Ct. 716 (2011) (The Supreme Court notes at footnote 5 that above-median debtors are not to be given preferential treatment over below-median.)

In re: Bruce, 484 B.R. 387, 394 (Bankr. W.D. Wash 2012) (401k contributions are allowed for a below median debtor in the 9<sup>th</sup> Circuit despite Parks, 475 B.R. 703 (9<sup>th</sup> Cir. BAP 2012)).

### **Fun Fact**

Judge Jamie of the Eastern District of California – In the Bankruptcy of Guevarra the 9<sup>th</sup> Circuit BAP vacated and remanded Judge Jamie's ruling disallowing a wildcard exemption in an unpublished decision. In Re: Guevarra, 2021 WL 1179619 (9<sup>th</sup> Cir. BAP 2021). After remand, Judge Jamie made further errors which lead the BAP to reverse in a published decision dated March 22, 2022.

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<sup>9</sup> Garrett Pratt, Daniel Graves & Michelle A. Cecil, Harmonizing Conversion and the Means Test in Bankruptcy, 3 Bus. Entrepreneurship & Tax L. Rev. 36 (2019).

<sup>10</sup> This was my case! Here's the case # Case No. 07-40192 EDJ

# Means Test - Calculating Income

Carl R. Gustafson, Lincoln Law, LLP

- **Do I need to calculate income on Form 122?**
  - Is this a chapter 13? If Yes, then the Debtor must input income on form 122. If no, continue.
  - Is the filing entity an individual? If Yes, continue.
  - Is the majority of the debt [consumer debt](#)? If Yes, continue.
  - Has the Debtor had any military experience?
    - If yes, then see question below
    - If no, then the Debtor must complete income on form 122

[MILITARY QUESTIONS](#) to determine if Debtor is Exempt

- Is the Debtor a disabled veteran? If No, continue
  - Is or has the Debtor been a Reservist or member of the National Guard? If yes, see Form 122 1Supp for options. If no, D must complete Form 22.
- **Remember the Big Picture**

Remember that what you are trying to do on the means test is determine how much the Debtor has made in the 6 calendar months prior to filing. Keep that in mind to avoid getting lost in the weeds.

- **Determine the easiest way to Calculate 6 Mo. Income**

Here are some ways to calculate the income from easiest to hardest. You may have to use a different way for each income source.

Method Description
<b>6 individual months</b>
Same income every month
Same income every month (undated)
Year to date total subtraction

- **Non-DMI Income.** If the Debtor only earns income from non-DMI sources (payments based from Social Security Act, Haven Act re: certain veterans benefits, some others), then the DMI calculation is fairly simple and does not use any calculator.
- **Salary.** You will note the same income every period. Then input into the form as “same income every month, undated”  
*WARNING: Make sure that the Debtor was employed during all 6 months.*
- **YTD subtraction.** The Gross YTD must be listed on the stubs and we must have the last stub from the prior month and the last from the 7 months ago stub.

*TIP: You can sometimes make up for a missing stub if you have the nex stub in sequence. Take that YTD and subtract the amount for the pay period listed on the stub.*

*WARNING: Make sure that the Debtor was employed during all 6 months.*

- **Monthly addition by month.** We will need all of the stubs in the 6 prior months, or else use the tip above to fill in any blanks.

*TIP: We typically only need to do this if we are missing a final stub and have to deal with estimates, or if the stub does not have YTD.*

- **Estimated income.** Sometimes payment advices do not exist or cannot be obtained. In this case the Debtor must estimate. Prepare a declaration to support this and verify the net deposit on a deposit account if available.
- **Profit and Loss Income.** Debtors who run a business must list their gross income over the prior 6 months on form 122. For CA chapter 13 cases, the business expenses are not listed in line 5, but must only be listed in line 43. *In re Wiegand*, 386 BR 238 (9th Circuit BAP) 2008.

## 4. Is the Form 122 Income the same as Sch I?

This is where you remember the big picture! The point of Form 122 is to show exactly what the debtor earned in the 6 prior calendar months.

The point of Schedule I is to show what the debtor will be earning in the future.

If the Debtor's income has been steady, then put the average monthly income from Form 122 into Schedule I! You've just saved a lot of time.

If there is a reason to believe that the Debtor's future income will not be similar to the prior 6 months, then take a note and you'll have to think about how to reflect income in Schedule I.

## 5. Determine the Debtor's Household Size and Marital Status

### Separated Debtors

Form 22 has 2 options for married couples in chapter 7 but only 1 in 13. The Debtor is required to disclose the non-filing spouse's income in Chapter 13 regardless of whether they are separated.

1. Marital and Filing status; 13. Filing status

Not Married.

Married and Spouse is filing.

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Married, NOT filing jointly. (Spouse income in CMI & DMI, edit Marital Adjustment to reduce DMI.)

Married, not filing jointly, separate households. (Chapter 7 Only)

Do not show \$0.00 Spouse Income on form, leave Column B blank

If the Debtor does not have access to a separated spouse's income, sometimes the Trustee will waive the need on the declaration of the Debtor. Talk to the attorney about the situation, but only after you try to get the separated spouse's income information.

## Live-in boyfriend-girlfriend & family member

Even where a Debtor is not married, Form 122 requires disclosure of all regular contributions to the Debtor's household expenses.

Calculation of 6 Month Average Income for 707(b)(7)				Debtor (a)	Spouse (b)
2. Gross wages, salary, tips, bonuses, overtime, commissions				5,575.09	0.00
3. Alimony and maintenance payments				0.00	0.00
4. Regular contributions to the household expenses ...				0.00	0.00
5. Income from operation of business, profession or farm	I&E			0.00	0.00
6. Rents and other real property income	I&E			0.00	0.00
7. Interest, dividends and royalties				0.00	0.00
8. Unemployment compensation	Debtor	Spouse		0.00	0.00
UEC Claimed as SSA Benefit:				0.00	0.00

Note the "...". The actual form says:

4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Do not include payments from a spouse. Do not include payments you listed on line 3.

This is pretty inclusive. If other people are paying regularly for an expense then they should be listed. But this can get really confusing when the person contributing is not in the household. Or if they are in the household earning money but not contributing.

**WARNING:** *If a Debtor has a live-in family member or boyfriend, girlfriend, ask them if they are on their significant other's bank account. If they are, the Trustee will require all net income that hits that account to be listed as a household contribution.*

## Marital Adjustment

Where a Debtor is married but not filing jointly and has listed the non-filing spouse's income, the Debtor can deduct income from the non-filing spouse that is NOT contributing to the household expenses and that is not deducted elsewhere on Form 122. Some common examples are:

Common examples of marital adjustments include the non-filing spouses:

- Student loan payments
- Minimum or interest payments on unsecured debt
- Payments to 401K plans for non-filer, and insurance that is not deductible on the means test
- Payments on other required debts or expenses that the non-filer chooses

## 6. Is the Debtor Over Median?

If the Debtor is under median, then you are probably done with Form 122.

If the Debtor is over median, then you will need to look into the Debtor's expenses. This will be treated in the next section.