

Operator Error in "Mechanical" Means Testing: Judicial Behavior in Chapter 13 Cases

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On October 30, 2009, the Supreme Court granted certiorari in *Hamilton v. Lanning* (*In re Lanning*), to address the question, what is the proper method for calculating "projected disposable income" in Chapter 13 cases after the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").¹ The Tenth Circuit Court of Appeals, in *Lanning*, adopted the so-called "forward-looking" approach in which "disposable income" - determined for a debtor with current monthly income greater than applicable median family income using BAPCPA's means test -- creates a starting point or presumption that can be adjusted based on consideration of financial circumstances going forward.²

The Tenth Circuit's decision in *Lanning* frames a fundamental tension in post-BAPCPA decisions regarding several important Chapter 13 issues: the legislative goal of eliminating judicial discretion through a mechanized legal process collides with another legislative goal of maximizing payments by above-median income debtors to unsecured creditors. Circuit Court decisions in both the Eighth and Ninth Circuits have addressed

these issues and wrestled with the competing legislative intents, using dramatically different approaches and reaching fundamentally inconsistent results. The Eighth Circuit decisions focus on policy considerations and the facts of individual debtors while the Ninth Circuit professes to hew scrupulously to the limiting language of the Code. These differing philosophical approaches can be analogized to competing theories of bankruptcy court behavior--whether courts should seek to follow the letter of the law, or whether courts should seek equitable outcomes.

This article will first examine recent disposable income cases from the Eighth and Ninth Circuits. The article will then compare the approaches taken by each circuit and discuss in light of *In re Lanning* what the Supreme Court ought to do to bring order to what is, at the moment, a completely unruly aspect of consumer bankruptcy practice.

Part I - Eighth Circuit Jurisprudence

In *In re Frederickson*, the Eighth Circuit considered whether an above-median income Chapter 13 debtor's plan must extend for sixty months -- the "applicable commitment period" under 11 U.S.C. § 1325(b) -- when the debtor has negative "disposable income" as defined by 11 U.S.C. § 1325(b)(2) and calculated using the "means test" Form 22C.³ In *Frederickson*, the debtor's average current monthly income over the six months prior to the month of filing, calculated as prescribed by 11

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U.S.C. § 1325(b)(3), classified him as an "above-median" debtor.⁴ The completed Form 22C reflected "disposable income" (defined at 11 U.S.C. § 1325(b)(2)) of negative \$95.49.⁵ However, the debtor's Schedules I and J (reflecting actual monthly income and actual monthly expenses at the petition) revealed net monthly income of \$606.⁶ The plan proposed to pay unsecured creditors \$600 per month for 48 months.⁷ The trustee objected because the proposed plan did not extend for the sixty-month "applicable commitment period" called for by 11 U.S.C. § 1325(b)(4)(A)(ii) (requiring a five-year minimum plan length for above-median debtors).⁸

The statutory language at 11 U.S.C. §1325(b)(1)(B) states that, if a trustee or holder of an allowed unsecured claim objects to confirmation, the court may approve a plan paying less than one hundred percent when "the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period...will be applied to make payments to unsecured creditors."⁹ The Eighth Circuit panel found this language to be vague in the factual situation in *Frederickson*—when the above-median debtor has no "disposable income" calculated using Form 22C. The *Frederickson* court recognized two possible statutory interpretations.¹⁰ One interpretation would hold that a debtor with no "disposable income" under §1325(b)(2) has no "projected disposable income" under §1325(b)(1)(B), and a plan can be confirmed without regard to the amount to be paid in or the plan length.¹¹ The competing interpretation is that the "applicable commitment period" is what the *Frederickson* court refers to as a "temporal requirement" that must be met regardless of the existence of projected disposable income.¹²

The Eighth Circuit acknowledged that neither interpretation precisely matches both the language of §1325(b) and the purpose of BAPCPA.¹³ The debtor argued that the "applicable commitment period" requirement does not apply when the debtor has no Form 22C "disposable income," even when the debtor does have net monthly income on Schedules I and J. This reasoning fails to comport with the congressional intent in passing BAPCPA, to "ensure that debtors repay creditors the maximum they can afford."¹⁴ On the other hand, the trustee's argument that the "applicable commitment period" is a purely temporal requirement could lead to what the court considered an absurd result in which a bankruptcy court, respecting the Form 22C definition of "disposable income," would confirm a plan paying \$1 a month over sixty months to unsecured creditors but would deny confirmation of a plan paying \$1000 per month for fifty-nine months.¹⁵

Congress stated the intent in passing BAPCPA that "increased payments would flow from above-median debtors to their unsecured creditors."¹⁶ To resolve the conflicting interpretations, the *Frederickson* court found that it must interpret not only the phrase "applicable commitment period," but also

define "projected disposable income."¹⁷ In defining "projected disposable income," the court held that "disposable income" calculated on Form 22C is merely a starting point for "*projected* disposable income."¹⁸ The final calculation may also take into account changes in the debtor's financial circumstances as well as the debtor's actual income and expenses reported on Schedules I and J.¹⁹ Quoting an earlier decision in *Kibbe*, the *Frederickson* court wrote that "the object is not to select the right form, but to reach a reality-based determination of a debtor's capabilities to repay creditors."²⁰

Having defined "projected disposable income," the court then determined that the debtor in fact had positive projected disposable income, and therefore was required to propose a plan extending the entire sixty-month period.²¹ The Eighth Circuit effectively sidestepped the original issue since it was mooted by the court's interpretation of "projected disposable income." While the court was not silent on the issue -- noting that "under this interpretation, the 'applicable commitment period' is logically a temporal requirement that does not lead to anomalous or absurd results"²² -- this conclusion was limited to the facts, since the court also noted that "our holding does not address the situation in which a debtor has no actual "projected disposable income" after taking into consideration Form 22C, Schedules I and J, and any changes to the debtor's financial circumstances."²³

In re Washburn came to the Eighth Circuit as an invitation to revisit the *Frederickson* distinction between "disposable income" and "projected disposable income."²⁴ The precise issue in *Washburn* was whether a Chapter 13 debtor could claim the full Local Standards Transportation Ownership Costs expense on Form 22C for a vehicle unencumbered by liens or lease. The bankruptcy court held that the debtor properly deducted the expense and the proposed Chapter 13 plan was confirmed over the objections of an unsecured creditor and the Chapter 13 Trustee.²⁶ According to the objectors, if the vehicle ownership expense were denied, the debtor's required plan payment would pay all unsecured creditors in full.²⁷

The *Washburn* panel of the Eighth Circuit recognized, as have other courts, that "projected disposable income" is not defined in the Code, and that the means testing process used in Chapter 7 cases is used to determine "disposable income" pursuant to 11 U.S.C. § 1325(b)(3).²⁸ The means test states that the debtor's monthly expenses (to be deducted from "current monthly income") include "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."²⁹ The transportation ownership expense is an "applicable monthly expense amount" specified in the Local Standards issued by the IRS.³⁰ The Eighth Circuit in *Washburn* stated the question as whether "applicable monthly expense amounts" means expens-

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es that the debtor incurs in fact or amounts set forth by the IRS as *applicable* in a geographic area.³¹ Noting that lower courts have split on the issue, the *Washburn* court concluded that the correct approach was a "plain language" reading that a debtor may deduct the vehicle ownership expense regardless of debt.³²

The Eighth Circuit's "plain language" interpretation of the statute focused on three points.³³ The first point was that the legislative language enacted by Congress uses the words "applicable" and "actual" in close textual proximity.³⁴ The two words would not be used so distinctly from each other if they were not intended to have separate meaning and effect.³⁵ Also, it would be illogical to treat the same statutory language, found in the same Code section, in one fashion in Chapter 7 cases and in another in Chapter 13 cases.³⁶ Thirdly, the *Washburn* court noted that elsewhere in the Code, when Congress intended to treat a deduction as conditional upon a debtor's actual expenditure, it did so unequivocally.³⁷ Thus, using widely accepted canons of statutory interpretation, "it was appropriate to treat 'applicable monthly expense amounts' in a categorical fashion based on a debtor's geographic location and number of vehicles rather than making such expense amounts available only on condition of a vehicle related debt."³⁸

The *Washburn* court moved on to discuss Congress's intent in passing the current version of the statute.³⁹ An important consideration was that Congress had considered, and failed to pass, a version of the statute that would have applied the methodology sought by the appellant creditor and trustee.⁴⁰ According to the court, "this change...supports the conclusion that courts should look only to the numeric amounts set forth in the Local Standards."⁴¹ The *Washburn* court also recognized that a driving purpose of BAPCPA was to reduce judicial discretion and introduce a mechanical method (through the means testing provisions) for determining a debtor's disposable income.⁴² While the court acknowledged that *Frederickson* emphasizes maximization of payments to creditors, it rejected the appellant creditor's contention that *Frederickson* was dispositive.⁴³

The *Washburn* court also found persuasive several policy-based arguments for granting the vehicle ownership deduction to debtors who own their vehicles free of debt.⁴⁴ First, the court recognized the basic reality that debtors who own unencumbered vehicles will likely need a replacement vehicle post-confirmation.⁴⁵ The second policy consideration stated by the court was that vehicle ownership expenses include more than just monthly vehicle payments.⁴⁶ Finally, and most persuasive from a public policy standpoint, the court recognized that "conditioning the vehicle-ownership expense on the existence of a pre-bankruptcy vehicle-related debt would punish debtors who elect to drive more modest vehicles or fully paid for vehicles prior to bankruptcy and reward debtors who incurred vehicle debt shortly before declaring bankruptcy."⁴⁷ In other words, debtors who, in a time of financial crisis, decided that it would

be prudent to not replace an aging vehicle with something new and more expensive would be punished for their frugality. Debtors who finance the purchase of a Lexus or BMW prior to filing, on the other hand, would be allowed to claim the full vehicle ownership deduction and thereby reduce their required disposable income commitment. The patent inequity of that incentive was obvious to the *Washburn* panel.

Finally, the *Washburn* court addresses why the arguments against allowing the deduction for unencumbered vehicles failed to persuade. As a general matter, the countervailing arguments "depend largely on broad statements of legislative intent," citing (ironically?) to the *Frederickson* decision which focused on the goal of maximizing payments to unsecured creditors as if that were the sole intent of Congress in passing the amendments.⁴⁸ The court noted that to disallow the deduction in Chapter 13 calculations of disposable income would inappropriately treat the same code section, § 707(b)(2)(A)(ii)(I), differently in Chapter 7 and Chapter 13 cases.⁴⁹

In *In re Lasowski*, the Eighth Circuit again considered an above-median Chapter 13 debtor who calculated negative disposable income under § 707(b)(2) – this time because 401(k) loan payments and contributions reduced disposable income below zero.⁵⁰ Specifically, the debtor calculated current monthly income to be \$3820.05, making her an above-median debtor.⁵¹ The debtor then listed Form 22C monthly expenses of \$3467.66.⁵² The debtor totaled amounts she was obligated to pay on a monthly basis for 401(k) loan payments and contributions as \$395.96.⁵³ When this amount was subtracted from Form 22C disposable income, the result was a monthly disposable income of negative \$43.57.⁵⁴ Based on this disposable income calculation the debtor proposed a plan that would result in only minimal payments to unsecured creditors.⁵⁵ The Trustee objected to confirmation, arguing that the proper way to account for the 401(k) expenses was to prorate the 401(k) obligation as the total amount owed divided by the sixty months of the plan, a calculation that resulted in monthly disposable income of \$81.73.⁵⁶

In *Lasowski* the Eighth Circuit again addressed the "disposable income" versus "projected disposable income" discussion.⁵⁷ The *Lasowski* panel reinforced the court's prior decision in *Frederickson*, holding that the disposable income calculation using Form 22C is only a starting point for determining projected disposable income, and that the final determination of projected disposable income can also account for other factors.⁵⁸ Based on *Frederickson*, the court concluded that the financial circumstances that courts are to consider beyond disposable income in determining a debtor's projected disposable income include "changes...that are reasonably certain to occur during the term of the debtor's proposed plan."⁵⁹ Thus the court agreed with the Trustee and concluded that the bankruptcy court could

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and should have considered that the debtor's loan repayments would cease during the term of the debtor's proposed plan.⁶⁰

In summation, these three cases from the Eighth Circuit demonstrate the court's lack of consistency in addressing BAPCPA issues in Chapter 13 cases. The discord is not obvious; the practical outcomes of each of these cases do not stand in diametrical opposition to one another. The approaches taken by the court in reaching each outcome, however, are muddled. In *Frederickson*, the court endorsed maximizing payments to creditors by above-median debtors as a legislative purpose overriding Congress's goal of eliminating judicial discretion. In *Washburn*, the same court placed the elimination of judicial discretion atop the pedestal of legislative intents, brushing aside the earlier *Frederickson* decision and its emphasis on maximizing payments. The same inconsistencies can be seen, much more dramatically, in decisions from the Ninth Circuit, discussed in the next section.

These Eighth Circuit cases reveal the fundamental flaw of the BAPCPA amendments: courts cannot consistently interpret the terms of the Code as amended by BAPCPA in a way that signals practitioners how to act in the next case(s). BAPCPA has been an abject failure of legislative drafting. The "means test" -- the hallmark of the BAPCPA amendments and crucial to both Chapter 7 and (as discussed in this article) Chapter 13 determinations of disposable income -- "has thus far failed" as it "neither promotes fairness nor provides clear standards."⁶¹ The result, ironically, is that BAPCPA has provided more opportunities to exercise judicial discretion than ever before. It is as though another axis of discretion has been created. Pre-BAPCPA, courts operating without concern as to

their discretion needed only to decide each issue presented. Post-BAPCPA, the bankruptcy courts must first decide how much judicial discretion they are "permitted" to use by the statute, and then decide the actual issue presented.

The Eighth Circuit decisions illustrate this phenomenon. In *Frederickson*, the court gave mention to BAPCPA's goal of reducing or eliminating judicial discretion, then proceeded to recognize as, apparently more important, the goal of maximizing the amounts paid by above-median debtors to their unsecured creditors. *Frederickson*, by holding that "disposable income" is merely a starting point for determining "projected disposable income," essentially gave courts uninhibited discretion to determine the amount that above-median Chapter 13 debtors are required to pay to unsecured creditors with little regard to "disposable income" as defined by the statute. The means test, in Chapter 13 as well as Chapter 7 cases, was expressly designed to be mechanical; "it was meant to provide clear and consistent standards for debtors in order to promote fairness in the bankruptcy system."⁶²

It is bad enough when one decision embraces judicial discretion as *Frederickson* did; matters are muddled even more when a subsequent decision by the same court rejects it, as the Eighth Circuit did in *Washburn*. As discussed, in *Washburn* the Eighth Circuit elected to hold fast to BAPCPA's elimination of discretion and rely on the mechanical nature of the means test in allowing the vehicle ownership deduction from current monthly income under §707(b)(2).

Chapter 13 practitioners are left utterly confused by this inconsistency. It is difficult enough to counsel clients when

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judicial discretion is endorsed and exercised freely as it was in *Frederickson*. Unfortunately, as illustrated in the Ninth Circuit case law, a mechanical approach to a befuddled Code section can create even more chaos.

Part II - Ninth Circuit Jurisprudence

In 2008, with its opinion in *Maney v. Kagenveama* (*In re Kagenveama*), the Ninth Circuit became the first Court of Appeals to address the relationship between disposable income and projected disposable income and the role of the applicable commitment period.⁶³ In *In re Kagenveama*, Schedules I and J showed monthly net income of \$1,523.89 and Form B22C calculated disposable income of negative \$4.04.⁶⁴ The debtor proposed to pay unsecured creditors \$1,000 a month over a three-year commitment period.⁶⁵ The Trustee objected on the grounds that § 1325(b)(4)(A)(ii) required a five-year "applicable commitment period."⁶⁶ In addressing the question of projected disposable income, the Ninth Circuit panel in *Kagenveama* held that disposable income exists solely to define projected disposable income, so courts must mechanically apply the means test to above-median Chapter 13 debtors.

Just over a year after *Kagenveama*, in *Ransom v. MBNA Am. Bank* (*In re Ransom*), a different panel of the Ninth Circuit addressed whether an above-median income debtor could deduct "ownership cost" for his 2004 Toyota Camry owned free of debt or encumbrance.⁶⁷ The court held that debtors cannot deduct an "ownership cost" for cars owned free of debt.⁶⁸ The Ninth Circuit's holding in *Ransom* placed it as the lone minority in a circuit split.⁶⁹

Prior to the court's ruling in *Ransom*, there were two lines of argument as to whether debtors can take an ownership expense deduction for cars owned free of loans or leases.⁷⁰ What is generally referred to as the "plain meaning" approach focused on the distinction between "applicable" and "actual," both terms found in §707(b)(2).⁷¹ The other line of cases looked to the Internal Revenue Manual and congressional intent to find that ownership costs only apply when the debtor has a loan or lease payment.⁷²

In *In re Ransom* the Ninth Circuit affirmed its BAP by stating, "an 'ownership cost' is not an 'expense' - either actual or applicable - it if does not exist,"⁷³ Moreover, the Ninth Circuit panel expressly adopted the reasoning of the Ninth Circuit BAP which included the statement, "what is important is the payments that the debtors actually make, not how many cars they own, because the payments that debtors make are what actually affect their ability to make payments to their creditors."⁷⁴

The *Ransom* court applied what it described as a plain language approach.⁷⁵ Persuaded by the BAP's decision, the court held "the adjective 'applicable' modifies the meaning of the noun 'monthly expense amounts.'"⁷⁶ The court focused on the

"ordinary, common meaning," in which "applicable" means "capable of or suitable for being applied."⁷⁷ Based on this reading, the court held that a vehicle ownership expense allowance is not "*capable of being applied* to the debtor if he does not make any lease or loan payments on his vehicle[.]"⁷⁸ The court held that to allow for the deduction would read "applicable" out of § 707(b)(2)(A)(ii)(I).⁷⁹

While the Ninth Circuit panel's focus in *Ransom* on the debtor's *actual* financial situation is clearly inconsistent with *Kagenveama's* mechanical approach to calculating projected disposable income, the *Ransom* opinion is somewhat in line with the *Kagenveama* court's treatment of the applicable commitment period. In *Kagenveama*, the Ninth Circuit panel addressed whether the "applicable commitment period" in § 1325(b)(4)(A)(ii) was a temporal measurement or a monetary multiplier.⁸⁰ The Trustee argued that "applicable commitment period" is a temporal requirement that requires a five-year commitment from all above-median income debtors regardless of their projected disposable income.⁸¹ The debtor argued that it is a monetary multiplier, used simply to calculate the total amount of payment for unsecured creditors.⁸² The court concluded that, "based on the plain language of the statute," the applicable commitment period is a temporal requirement, but that it is inapplicable when there is no projected disposable income.⁸³ Similar to disposable income, the court held that §1325(b)(4) exists only to inform § 1325(b)(1)(B), projected disposable income.⁸⁴ Because "only 'projected disposable income' has to be paid out over the 'applicable commitment period[,]' [w]hen there is no 'projected disposable income,' there is no 'applicable commitment period.'"⁸⁵ Therefore, *Ransom* is consistent with *Kagenveama* in one important respect: in *In re Kagenveama* the debtor had no commitment period because there was no projected disposable income to apply it to; in *In re Ransom* the debtor had no ownership cost deduction because there was no expense to apply it to. Oddly, the Ninth Circuit panel in *Ransom* failed to make this connection, or for that matter, even mention *Kagenveama*.

Moreover, the statutory interpretation in *Ransom* aligns with the "forward-looking" examination of "projected disposable income" by other courts - in marked contrast to the Ninth Circuit's own earlier decision in *Kagenveama*.⁸⁶ In *Kagenveama*, the Ninth Circuit panel explicitly rejected the majority approach that treated disposable income as a *presumption* of projected disposable income and aptly noted that Congress knows how to write a presumption as it did in Chapter 7.⁸⁷ When Congress includes a phrase in one section and excludes it from another, courts are to assume that "Congress acted purposely in the disparate inclusion or exclusion."⁸⁸ Similarly, when Congress writes "applicable" in one phrase and "actual" in another, this distinction is deemed to be intentional.⁸⁹ In *Ransom*, the Ninth

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Circuit panel rejected this argument in favor of the "ordinary, common meaning of 'applicable,'" to find, incongruously, that applicable requires an actual expense.⁹⁰

The *Ransom* court's reliance on "the ordinary, common meaning" of "applicable" is analogous to forward-looking courts' emphasis on the ordinary, common meaning of "projected" to determine that projected disposable income is a forward-looking concept.⁹¹ The statutory construction of § 707(b)(2)(A)(ii)(I) in *Ransom* is the very analysis that the Ninth Circuit clearly rejected a year earlier in *Kagenveama*.⁹² Additionally, the court in *Ransom* buttressed its opinion by the congressional intent to ensure that debtors repay their creditors as much as they can afford.⁹³ The Ninth Circuit panel in *Kagenveama* expressly rejected that concern as a relevant factor in interpreting the new Code provision.⁹⁴

Finally, the holding in *Ransom* flies in the face of the Ninth Circuit's earlier holding in *Kagenveama*, in which the debtor was allowed to calculate a zero payment plan based on statutory expense deductions unrelated to actual expenses.⁹⁵ The expense deductions that produced negative disposable income in *Kagenveama* were no less "fictitious" than those of the debtor in *Ransom*. Ironically, the main consistency between the two opinions is the court's insistence that Congress should resolve these problems.⁹⁶

The inconsistencies between *Ransom* and *Kagenveama* have created anarchy in the disposable income jurisprudence of the Ninth Circuit. Recently, the Ninth Circuit BAP contributed mightily to the mess with concurrent decisions in *American Express Bank, FSB v. Smith (In re Smith)*⁹⁷ and *Yarnall v. Martinez (In re Martinez)*.⁹⁸

In *In re Smith*, husband and wife debtors deducted payments for two houses and a vehicle "which they were surrendering under their plan." The Chapter 13 trustee, U.S. Trustee and an unsecured creditor all objected to confirmation, arguing that the debtors failed to devote all of their projected disposable income to the plan, as required by § 1325(b), and that the plan was not proposed in good faith.⁹⁹

The bankruptcy court allowed the deductions, holding that § 707(b)(2), applied through § 1325(b)(3), permits debtors to deduct payments they were contractually obligated to make as of the petition date, regardless of their intent to surrender the collateral.¹⁰⁰ The bankruptcy court relied on *Kagenveama*'s backward-looking approach to income, to hold that courts cannot then apply a forward-looking approach to expenses.¹⁰¹ Consistent with the majority of bankruptcy courts in its circuit, and the holding in *Kagenveama*, the court held that under § 707(b)(2)(A)(iii), secured debt payment deductions for amounts "scheduled as contractually due" are measured as of the petition date, not as of the effective date of the plan.¹⁰²

When the bankruptcy court issued its decision, the Ninth

Circuit Court of Appeals had not yet decided *In re Ransom*. Even so, *Kagenveama* remains relevant authority. It should be clear to all that the bankruptcy court in *In re Smith* got it right.

In a 2-1 opinion, the Bankruptcy Appellate Panel reversed the bankruptcy court decision in *Smith*. The majority invented a novel two-part analysis of sections 1325(b)(2) and (b)(3), treating the two subsections as sequential. The BAP held that § 1325(b)(2) requires a "real-time, forward-looking" inquiry and § 1325(b)(3), incorporating § 707(b)(2), provides a "static, backwards-looking inquiry."¹⁰³ The majority ultimately avoided the expense-end of the means test and considered the debtors' actual post-petition expenses. Emphasizing financial realities, the majority dismissed *Kagenveama* as dicta and found statements in *Ransom* to support its holding. The majority stated: "Our conclusion is reinforced by a persuasive and compelling statement from our own court of appeals just a few weeks ago: 'Ironic it would be indeed to diminish payments to unsecured creditors in this context on the basis of a fictitious expense not incurred by a debtor.'"¹⁰⁴

Yet, instead of turning directly to the operative language of § 707(b)(2)(A), as the Ninth Circuit did in *Ransom*, the BAP majority in *Smith* undertook a sequential reading of §§ 1325(b)(2) and (b)(3), such that § 707(b)(2)(A) does not come into effect until the "necessary for maintenance and support" requirement of § 1325(b)(2) is first met. Thus, *In re Smith* holds that § 1325(b)(2) determines if the expense is deductible, and § 1325(b)(3) determines the amount of the expense that is deductible.¹⁰⁵ Under *Smith*, only if the expense is first deemed "reasonably necessary for the maintenance or support to the debtor or a dependent of the debtor," can a court then look to § 1325(b)(3) and § 707(b)(2)(A).¹⁰⁶ The majority concluded that, "to the extent that sections 1325(b)(2) and (b)(3) are ambiguous, this interpretation avoids an absurd result and is consistent with the intent of the statute's drafters."¹⁰⁷

The majority in *Smith* first considered whether the "debtors themselves" treat the expense as reasonably necessary under § 1325(b)(2).¹⁰⁸ The majority concluded that because the debtors surrendered their two houses and one vehicle to creditors, they must have found them unnecessary for their maintenance and support.¹⁰⁹ Holding surrender and necessity to be mutually exclusive, the court found there was no "expense" under § 1325(b)(2), and therefore no reason to move to § 1325(b)(3) and § 707(b)(2)(A)(iii) to determine the amount.

The majority considered deductions for business expenses as an example of another expense which is provided for in § 1325(b)(2), but which doesn't require calculation under § 1325(b)(3) and § 707(b)(2)(A), and is not outlined in the Internal Revenue Service Handbook.¹¹⁰ However, as noted by the dissent, for above-median income debtors, business expense deductions are included in § 707(b)(2)(A)(ii) under a category

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of "Other Necessary Expenses." Unlike secured debt deductions and applicable monthly expenses specified under the National and Local Standards, it is generally recognized that courts can still exercise judicial discretion and inquire into whether the debtor's *actual* expenses listed under "Other Necessary Expenses" are "reasonably necessary."

The majority's opinion in *Smith* is likely to gain notoriety for its treatment of *Kagenveama*. It is clear that the majority understood that *Kagenveama* dictates a backward-looking mechanical application of the means test. It is equally evident that the majority disagreed with the holding in *Kagenveama*. The majority opinion contains a lengthy footnote spanning two pages, discussing the opinions of the four circuit courts of appeals that have rejected *Kagenveama*'s reasoning and holding. The majority treated *Kagenveama* as dicta, finding that *Kagenveama* only directs courts to look backwards to measure income, but gives no guidance on measuring expenses.¹¹¹ The majority dismissed the following rule from *Kagenveama* as providing only "a passing reference" to subsections §1325(b)(2) and (b)(3):

The revised 'disposable income' test uses a formula to determine what expenses are reasonably necessary. See 11 U.S.C. § 1325(b)(2)-(3). This approach represents a deliberate departure from the old 'disposable income' calculation, which was bound up with the fact's and circumstances of the debtor's financial affairs....¹¹²

In her Dissent, Judge Hollowell conceded that neither *Kagenveama* nor *Ransom* are binding on the specific issue before the court, but found that *Kagenveama* "provides important guidance for the interpretation of § 1325(b)(2) and (b)(3)." The dissent noted that the relationship between subsections 1325(b)(2) and (b)(3) is analogous to that of subsections 1325(b)(1) and (b)(2).¹¹³ The Ninth Circuit Court of Appeals in *Kagenveama* did not decouple the two and read them sequentially.¹¹⁴ Instead it held that the definition of "disposable income" in § 1325(b)(2) was only relevant to give meaning to the phrase "projected disposable income" in § 1325(b)(1)(B).¹¹⁵ While sympathetic to "the majority's desire for a common-sense solution," Judge Hollowell found that § 707(b)(2)(A) and (B) determine amounts "reasonably necessary to be expended" under § 1325(b)(2).¹¹⁶

The majority and dissenting opinions in *Yarnall v. Martinez* (*In re Martinez*) track almost verbatim the discussion in *Smith*. *Martinez* involved three separate Chapter 13 petitions, in which the debtors deducted payments on wholly unsecured junior mortgages that were stripped post-petition. The outcome determinative issue remained the same - whether debtors can deduct as secured debt, scheduled, contractually due payments on collateral that they surrender after filing their bankruptcy petition.¹¹⁷ Again, the BAP reversed the bankruptcy court opinions, which held that "post-petition events affecting income or expenses ([omitted]) should not be considered in

deciding whether an above-median income debtor has contributed all projected disposable income to a plan under § 1325."¹¹⁸ Additionally, in *Martinez*, the BAP found that *the debtors* considered the collateral unnecessary under § 1325(b)(2), in this case because the debtors obtained court orders stripping the liens.¹¹⁹

The majority's sequential reading of subsections 1325(b)(2) and (b)(3) in *Smith/Martinez* is directly contrary to Ninth Circuit authority. Both *Kagenveama* and *Ransom* are quite clear that § 1325(b)(3), incorporating § 707(b)(2), defines "reasonably necessary" under § 1325(b)(2).¹²⁰ Any inquiry into the relationship between §1325(b)(2) and § 1325(b)(3) is analogous to that of §1325(b)(1)(B) and §1325(b)(2). The Ninth Circuit in *Kagenveama* explicitly stated "we will not decouple 'disposable income' from the 'projected disposable income' calculation simply to arrive at a more favorable result for unsecured creditors, especially when the plain text and precedent dictate the linkage of the two terms."¹²¹ In examining the term "applicable commitment period," the court in *Kagenveama* again emphasized this point by stating, "Subsection (b)(2) ('disposable income') and (b)(3) ('amounts reasonably necessary to be expended') exist only to define terms relevant to the subsection (b)(1)(B) calculation. Subsection (b)(4), the term 'applicable commitment period' is no different."¹²² Moreover, in *Ransom* the debtor was above-median income and the Ninth Circuit panel looked straight to §707(b)(2), as directed by § 1325(b)(3) without even questioning whether § 1325(b)(3) is implicated.¹²³ Neither *Kagenveama* nor *Ransom* allow for the Ninth Circuit BAP's avoidance of § 707(b)(2)(A)(iii).¹²⁴

The Ninth Circuit BAP was not free to adopt a forward-looking approach to § 1325(b)(2) once the Ninth Circuit Court of Appeals had adopted a backward-looking approach under *Kagenveama*. There is no authority to warrant the *Smith/Martinez* majority's distinction between the income and expense sides of the disposable income calculation. *Kagenveama*'s holding does not isolate the income side of the disposable income calculation. The absurdity of looking backward for one part of the equation and forward for another was aptly recognized in the bankruptcy court opinion in *In re Smith*.

The Ninth Circuit BAP's reading of § 1325(b)(2) goes against Ninth Circuit precedent and the vast majority of courts' understanding of above-median income debtor expenses post-BAPCA. The majority's reading of § 1325(b)(2) reinstates the carte blanche judicial discretion exercised pre-BAPCA.¹²⁵ *Kagenveama* expressly declared that BAPCPA inserted the means test as a substitute for judicial discretion.¹²⁶ Even the Ninth Circuit panel in *Ransom* worked within the confines of the means test. BAPCPA's insertion of the means test removed much of courts' discretion to determine "reasonably necessary" expenses for above-median income debtors, in favor of objective

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standard allowance figures.¹²⁷ This is one point of recognition in which courts have remained relatively consistent.¹²⁸

The competing legislative purposes behind the insertion of the means test into Chapter 13 payment plans is even more apparent in the Ninth Circuit than in the Eighth Circuit. *Kagenveama* clearly held that the means test serves as a substitute for judicial discretion. When again confronted with a means test related issue, a separate Ninth Circuit panel, in *Ransom*, tacitly subsumed the purpose of eliminating judicial discretion to the purpose of maximizing payments to unsecured creditors. Finally, in *Smith* and *Martinez*, the Ninth Circuit BAP inserted a layer of judicial inquiry to subvert the means test, justifying this approach as "consistent with the intent of the statute's drafters."¹²⁹

Conclusion

The disposable income decisions from the Eighth and Ninth Circuits display two very different styles of bankruptcy court behavior. The Eighth Circuit decisions show the circuit court of appeals acting almost, for lack of a better shorthand term, as a court in equity. The decisions in each disposable income case to reach the Eighth Circuit seem driven by the urge to reach an equitable outcome. Thus, the court is brazen in its inconsistent interpretation of legislative intent in Chapter

13 cases under BAPCPA. In *Frederickson*, the overriding legislative purpose was found to be maximizing payments by above-median debtors to unsecured creditors. In *Washburn*, decided only shortly after *Frederickson*, the same court reached a result that is patently equitable, but did so by endorsing as BAPCPA's ultimate legislative purpose the elimination of judicial discretion. The different approaches are inconsistent from the standpoint of statutory interpretation, but totally consistent when the outcomes are examined.

As much as the Eighth Circuit seeks equitable outcomes, the Ninth Circuit decisions demonstrate overriding concern with following the "letter of the law," i.e. the language of the Code. *Kagenveama* instructed that courts are to strictly adhere to the language of the Code, even when this approach leads to undesirable results. However, outcomes do matter. *Ransom* and *Smith/Martinez* were results-driven decisions in which the courts, still committed to "plain meaning" statutory analysis, simply manipulated the meaning of the words. The logic of *Kagenveama* was sound, but the outcome unsavory. Conversely, in *Smith* and *Martinez*, the result was arguably correct, but the logic clearly faulty. This type of adherence to the letter of the law, i.e. the language of the Code, proves equally problematic when the relevant provisions of the Code are muddled or downright oxymoronic.

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The tension here could be characterized as a species of the judicial discretion debate. Do bankruptcy courts have discretion to seek equitable outcomes based on the specific facts of individual cases, to deliberate purposively? Or must they act mechanically, applying the unyielding provisions of the Code as amended by BAPCPA? The Supreme Court's decision in *Lanning*, when it comes, could resolve this question and give guidance to all bankruptcy courts as to how they should behave with respect to many of the difficult issues of statutory interpretation created by BAPCPA.

If the Supreme Court holds that courts may consider post-petition circumstances in determining a Chapter 13 debtor's "projected disposable income," then the court at least tacitly (if not explicitly) will have indicated that bankruptcy courts can and should properly exercise at least some degree of judicial discretion in seeking equitable outcomes in cases; in other words, the Eighth Circuit approach. If, on the other hand, the Court holds that post-petition circumstances may not alter the disposable income amount determined on Form 22C by application of the means test, then the Court has endorsed the mechanical approach. In that case, it can only be hoped that the Court will offer guidance about what exactly the means test dictates and about how far means test figures can stray from reality. At the very least, there should be some guidance as to which congressional goal is to serve as courts' beacon when implementing the means test in Chapter 13 cases. Either way, a decision by the Supreme Court in *Lanning* should help to universalize the behavior of bankruptcy judges, and make practicing in the post-BAPCPA bankruptcy world at least slightly more predictable. 

Endnotes

- ¹ *Hamilton v. Lanning* (*In re Lanning*), 545 F.3d 1269, 1270 (10th Cir. 2009), cert. granted, No. 08-998 (U.S. Nov. 2, 2009). See Chelsey W. Tulis, *Get Real: Reframing the Debate over How to Calculate Projected Disposable Income in § 1325(b)*, 83 AM. BANKR. L.J. 345 (2009) (providing detailed analysis of the courts' treatment of "projected disposable income" in light of the new definition of "disposable income" enacted under BAPCPA, and arguing in favor of judicial discretion); Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J. 395 (2009) (arguing that courts should not try to fix Congress's mistakes, pointing to corrective mechanisms already provided in the Code, and outlining four approaches to the means test Congress can take if it revisits this issue).
- ² *In re Lanning*, 545 F.3d at 1270.
- ³ *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652 (8th Cir. 2008).
- ⁴ *Id.* at 654.
- ⁵ *Id.*
- ⁶ *Id.*
- ⁷ *Id.* Under the debtor's proposed plan unsecured creditors would receive about sixty-one percent of their claims. *Id.*
- ⁸ *Id.* A five-year plan was projected to have paid the debtor's unsecured creditors almost one hundred percent of their claims. *Id.* at 654-55.
- ⁹ 11 U.S.C. § 1325(b)(1) (2006).

- ¹⁰ *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652, 655 (8th Cir. 2008).
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Id.* at 656-57.
- ¹⁴ *Id.* at 657 (citing *In re Gonzalez*, 388 B.R. 292, 309 (Bankr. S.D. Tex. 2008)).
- ¹⁵ *Id.* (citing *In re Nance*, 371 B.R. 358, 371-72 (Bankr. S.D. Ill. 2007)).
- ¹⁶ *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652, 658 (8th Cir. 2008).
- ¹⁷ *Id.*
- ¹⁸ *Id.* at 659 (citing *In re Kibbe*, 361 B.R. 302, 314-15 (B.A.P. 1st Cir. 2007); *In re Lanning*, 380 B.R. 17, 24-25 (B.A.P. 10th Cir. 2007)).
- ¹⁹ *Id.* at 660.
- ²⁰ *Id.* (quoting *In re Kibbe*, 361 B.R. at 315).
- ²¹ *Id.*
- ²² *Coop v. Frederickson* (*In re Frederickson*), 545 F.3d 652, 660 (8th Cir. 2008).
- ²³ *Id.* at 660 n.6.
- ²⁴ *eCAST Settlement Corp. v. Washburn* (*In re Washburn*), 579 F.3d 934 (8th Cir. 2009).
- ²⁵ *Id.* at 935.
- ²⁶ *Id.*
- ²⁷ *Id.* at 936.
- ²⁸ *Id.* See generally 11 U.S.C. §707(b)(2) (2006) (Chapter 7 means testing provisions).
- ²⁹ 11 U.S.C. §707(b)(2)(A)(ii)(I).
- ³⁰ *eCAST Settlement Corp. v. Washburn* (*In re Washburn*), 579 F.3d 934, 936 (8th Cir. 2009).
- ³¹ *Id.* at 937.
- ³² *Id.*
- ³³ *Id.*
- ³⁴ *Id.* at 937-38.
- ³⁵ *Id.* (citing *In re Ross-Tousey*, 549 F.3d 1148, 1157-58 (7th Cir. 2008)). This logic is simply stated in *In re Chamberlain* as "Congress used two different terms to achieve two different results." 369 B.R. 519, 525 (Bankr. D. Ariz. 2007).
- ³⁶ *eCAST Settlement Corp. v. Washburn* (*In re Washburn*), 579 F.3d 934, 938 (8th Cir. 2009).
- ³⁷ *Id.*
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ *Id.*
- ⁴¹ *Id.*
- ⁴² *eCAST Settlement Corp. v. Washburn* (*In re Washburn*), 579 F.3d 934, 938 (8th Cir. 2009). The *Washburn* court cited the decision in *Frederickson* to support its conclusion regarding BAPCPA's goal of reducing judicial discretion. *Id.* at *12.
- ⁴³ *Id.* at 939 n.4.
- ⁴⁴ *Id.* at 939.
- ⁴⁵ *Id.* (citing *In re Ross-Tousey*, 549 F.3d 1148, 1161 (7th Cir. 2008)).
- ⁴⁶ *Id.*
- ⁴⁷ *Id.*
- ⁴⁸ *eCAST Settlement Corp. v. Washburn* (*In re Washburn*), 579 F.3d 934, 940 (8th Cir. 2009).
- ⁴⁹ *Id.*
- ⁵⁰ *McCarty v. Lasowski* (*In re Lasowski*), 575 F.3d 815 (8th Cir.

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- 2009).
- ⁵¹ *Id.* at 817.
- ⁵² *Id.*
- ⁵³ *Id.* The \$395.96 per month figure is the total of a loan with a \$50.00 per month payment over six months, another to be repaid at \$100.00 per month over thirteen months, and a monthly \$245.96 regular 401(k) contribution. *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ *McCarty v. Lasowski (In re Lasowski)*, 575 F.3d 815, 817-18 (8th Cir. 2009).
- ⁵⁷ *Id.* at 818.
- ⁵⁸ *Id.* at 819 (citing *In re Frederickson*, 545 F.3d at 659).
- ⁵⁹ *Id.*
- ⁶⁰ *Id.*
- ⁶¹ Tulis, *supra* note 1, at 393.
- ⁶² *Id.*
- ⁶³ See generally Tulis, *supra* note 1, at 361-363.
- ⁶⁴ *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 871 (9th Cir. 2008).
- ⁶⁵ *Id.*
- ⁶⁶ *Id.*
- ⁶⁷ *Ransom v. MBNA Am. Bank (In re Ransom)*, 577 F.3d 1026, 1027 (9th Cir. 2009).
- ⁶⁸ *Id.* at 1027.
- ⁶⁹ Compare *Tate v. Bolen (In re Tate)*, 571 F.3d 423 (5th Cir. 2009) (allowing for ownership cost deductions for vehicles owned free and clear), and *Ross-Tousey v. Neary (In re Ross-Tousey)*, 549 F.3d 1148 (7th Cir. 2008) (same), with *In re Ransom*, 577 F.3d at 1026 (disallowing ownership cost deduction for vehicles owned free and clear of any encumbrance).
- ⁷⁰ See James P. Terpening III, Comment, *All or Nothing: Properly Deducting Vehicle Ownership Expenses Under § 707(b)(2)(A)(ii)(I)*, 25 EMORY BANKR. DEV. J. 565 (2009) (providing a detailed analysis on how this issue has been addressed by the courts).
- ⁷¹ *In re Ransom*, 577 F.3d at 1029; see also *supra* pp. 3-6 (discussing *eCAST Settlement Corp. v. Washburn (In re Washburn)*, 579 F.3d 934 (8th Cir. 2009)); Terpening III, *supra* note 14, at 576-78.
- ⁷² *Supra* note 75.
- ⁷³ *Ransom v. MBNA Am. Bank (In re Ransom)*, 577 F.3d 1026, 1030 (9th Cir. 2009).
- ⁷⁴ *Id.*
- ⁷⁵ *Id.*
- ⁷⁶ *Id.* at 1031.
- ⁷⁷ *In re Ransom*, 577 F.3d at 1031 (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 60 (11th ed. 2005)).
- ⁷⁸ *Id.*
- ⁷⁹ *Ransom v. MBNA Am. Bank (In re Ransom)*, 577 F.3d 1026, 1031 (9th Cir. 2009).
- ⁸⁰ *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 875 (9th Cir. 2008).
- ⁸¹ *Id.*
- ⁸² *Id.*
- ⁸³ *Id.* at 876
- ⁸⁴ *Id.*
- ⁸⁵ *Id.*
- ⁸⁶ See Tulis, *supra* note 1, at 363-67.
- ⁸⁷ *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 874-75 (9th Cir. 2008); 11 U.S.C. § 1325(b)(1) & (2) (2006); 11 U.S.C. § 707(b)(2)(A)(i) (2006) ("the court shall presume abuse exists if..."); 11 U.S.C. § 707(b)(2)(B)(i) & (iv) (2006) (allowing for ways to rebut the "presumption of abuse").
- ⁸⁸ *In re Kagenveama*, 541 F.3d at 874-75 (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 439-40 (2002)); accord *In re Fowler*, 349 B.R. 414, 418 (Bankr. D. Del. 2006) (citing *Duncan v. Walker*, 533 U.S. 167, 172 (2001)).
- ⁸⁹ *In re Fowler*, 349 B.R. at 418. See also discussion *supra* p. 4.
- ⁹⁰ *Ransom v. MBNA Am. Bank (In re Ransom)*, 577 F.3d 1026 (9th Cir. 2009).
- ⁹¹ See, e.g., Brief for the United States as Amicus Curiae, *Hamilton v. Lanning (In re Lanning)*, 129 S. Ct. 2820, 2009 WL 3162178, at * 9-10 (Sept. 29, 2009), cert. granted, No. 08-998 (U.S. Nov. 2, 2009); *In re Arsenault*, 370 B.R. 845, 850 (Bankr. M.D. Fla. 2007); *In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006); Thomas J. Izzo, Comment, *Projecting the Past, How the Bankruptcy Abuse Prevention and Consumer Protection Act Has Befuddled § 1325(b) and "Projected Disposable Income,"* 25 EMORY BANKR. DEV. J. 521, 538-39 (2009).
- ⁹² See *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 873-75 (9th Cir. 2008).
- ⁹³ *In re Ransom*, 577 F.3d at 1031.
- ⁹⁴ *In re Kagenveama*, 541 F.3d at 875.
- ⁹⁵ *Id.* at 871 (debtor's Schedule I and Form B22C listed gross income of \$6,168.21. Debtor's schedules calculated \$1,523.89 in monthly net income. "Because she was an above-median income debtor, § 1325(b)(3) required her to recalculate her expense pursuant to § 707(b)(2). This calculation produced a revised Form B22C list of her 'disposable income' as a negative number: -\$4.04.").
- ⁹⁶ *Id.* at 875 ("If the changes imposed by BAPCPA arose from poor policy choices that produced undesired results, it is up to Congress, not the courts, to amend the statute."); *Ransom v. MBNA Am. Bank (In re Ransom)*, 577 F.3d 1026, 1031 (9th Cir. 2009) ("Because the resolution of this issue rests with Congress, we have taken the unusual step of directing the Clerk of the Court to forward a copy of this opinion to the Senate and House Judiciary Committees."). See also Braucher, *supra* note 1, at 399 ("[C]ourts should not supplement formulaic means testing with broad discretionary means testing of their own design.... [I]t would be better for courts to leave the job to Congress, the only institution with the capacity to simplify the law.").
- ⁹⁷ *American Express Bank, FSB v. Smith (In re Smith)*, 2009 WL 3338406 (B.A.P. 9th Cir. Oct. 5, 2009).
- ⁹⁸ *Yarnall v. Martinez (In re Martinez)*, 2009 WL 3338405 (B.A.P. 9th Cir. Oct. 5, 2009).
- ⁹⁹ *In re Smith*, 2009 WL 3338406, at *1.
- ¹⁰⁰ *In re Smith*, 401 B.R. 469, 475 (Bankr. W.D. Wash. 2008).
- ¹⁰¹ *Id.* at 474 ("After *Kagenveama*, it would also be inconsistent to apply a backward-looking approach to income, yet adopt a forward-looking approach in determining expenses. It would be similar to having a business employ two different accounting systems."); See also *In re Smith*, 2009 WL 3338406, at *4 ("The [lower] court interprets *Kagenveama* as requiring symmetry such that if we look backward to calculate income, we should not look forward to measure expenses.").
- ¹⁰² *In re Smith*, 401 B.R. at 474-76.
- ¹⁰³ *American Express Bank, FSB v. Smith (In re Smith)*, 2009 WL 3338406, at *7 (B.A.P. 9th Cir. Oct. 5, 2009).
- ¹⁰⁴ *In re Smith*, 2009 WL 333840, at *1 (quoting *Ransom v. MBNA Am. Bank (In re Ransom)*, 577 F.3d 1026, 1030 (9th Cir. 2009)).
- ¹⁰⁵ *Id.* at *7.
- ¹⁰⁶ *Id.* at *6.
- ¹⁰⁷ *Id.* at *7.
- ¹⁰⁸ *Id.* at *1 (emphasis added).
- ¹⁰⁹ *American Express Bank, FSB v. Smith (In re Smith)*, 2009 WL 3338406, at *7 (B.A.P. 9th Cir. Oct. 5, 2009).
- ¹¹⁰ *Id.* at *7-8.
- ¹¹¹ *Id.* at *5.
- ¹¹² *Id.* (citing *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 874 (9th Cir. 2008) (emphasis added)). This seems more

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like a clear and definitive statement as to the law than a passing reference.

¹¹³ *In re Smith*, 2009 WL 3338406, at *9.

¹¹⁴ *Id.*

¹¹⁵ American Express Bank, FSB v. Smith (*In re Smith*), 2009 WL 3338406, at *9 (B.A.P. 9th Cir. Oct. 5, 2009); *In re Kagenveama*, 541 F.3d at 873; *see also* Tulis, *supra* note 1, at 368-370.

¹¹⁶ *In re Smith*, 2009 WL 3338406, at *10-11.

¹¹⁷ Yarnall v. Martinez (*In re Martinez*), 2009 WL 3338405 (B.A.P. 9th Cir. Oct. 5, 2009).

¹¹⁸ *In re Martinez*, 2009 WL 3338405, at *3.

¹¹⁹ *Id.* at *4.

¹²⁰ *See, e.g.*, Ransom v. MBNA Am. Bank (*In re Ransom*), 577 F.3d 1026, 1028 (9th Cir. 2009) ("Because Ransom is an above-median income debtor, the 'amounts reasonably necessary to be expended,' is to be determined 'in accordance with the means test set forth in 11 U.S.C. § 707(b)(2). See 11 U.S.C. § 1325(b)(3)."); *In re Kagenveama*, 541 F.3d at 875 ("we 'will not override the definition and process for calculating disposable income under §1325(b)(2)-(3) as being absurd simply because it leads to results that are not aligned with the old law.'") (citing *In re Alexander*, 344 B.R. 742, 747 (Bankr. E.D.N.C. 2006) (emphasis added); *Id.* at 871 ("Because she was an above-median income debtor, § 1325(b)(3) required her to recalculate her expense pursuant to § 707(b)(2). This calculation produced a revised Form B22C list of her 'disposable income' as a negative number: -\$4.04."); *Id.* at 873 n.2 ("BACPA replaced the old definition of what was 'reasonably necessary' with a formulaic approach for above-median income debtors. 11 U.S.C. § 1325(b)(3)."); *Id.* at 874 ("The revised 'dis-

posable income' test uses a formula to determine what expenses are reasonably necessary. *See* 11 U.S.C. § 1325(b)(2)-(3).").

¹²¹ Maney v. Kagenveama (*In re Kagenveama*), 541 F.3d 868, 875 (9th Cir. 2008).

¹²² *Id.* at 876.

¹²³ *In re Ransom*, 577 F.3d at 1028.

¹²⁴ Moreover, the question of whether debtors may deduct payments for collateral they have surrendered or intend to surrender has been thoroughly addressed by the courts. Almost all courts that have accepted that § 707(b)(2)(A)(iii)(I) determines whether debtors can deduct as secured debt, payments on collateral they intend to or have surrendered. For further discussion of the treatment under the means test of collateral to be surrendered, *see* Adam Herring, *Fixing the Broken Machine: Means Testing and Secured Debt Payments Under BAPCPA*, 18 J. BANKR. L. & PRAC. 1 ART. 5 (2009).

¹²⁵ *See generally* Tulis, *supra* note 1, at 350-51.

¹²⁶ *In re Kagenveama*, 541 F.3d at 873-74 (noting that the insertion of a formulaic calculation for above-median income debtors' expenses represents a "deliberate departure" from the old method in which courts determined whether expenses were "reasonably necessary" for maintenance or support based on each debtor's individual circumstances).

¹²⁷ *See* Tulis, *supra* note 1, at 354-58.

¹²⁸ *Id.* at 372 n.176.

¹²⁹ American Express Bank, FSB v. Smith (*In re Smith*), 2009 WL 3338406, at *7 (B.A.P. 9th Cir. Oct. 5, 2009).



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