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cc
bcc
Subject Fw: Comments on Forms B22A and B33C

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To <interim_bk_rules@ao.uscourts.gov>
cc
Subject Comments on Forms B22A and B33C

Attached are comments on Forms B22A and B22C for submittal to the Committee.

If problems occur in transmission, please contact me and I will take immediate corrective action.

Thank you for the Committee's consideration of this submittal

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Comment on Forms B22A and B22C.pdf

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To: Hon. Thomas S. Zilly, Chair
Advisory Committee on Bankruptcy Rules

From: Alane A. Becket
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Date: February 15, 2007

RE: Bankruptcy Forms B22A and B22C

The following changes to the subject named forms are submitted for consideration by the Committee:

1. Form B22A, Line 42: The first sentence of the instruction should be amended to read, "For each of your debts that is secured by an interest in property that you own, the cost of which qualifies as an Other Necessary Expense pursuant to 11 U.S.C. § 707(b)(2)(A)(ii)(I), list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment."

2. Form B22C, Line 47: The first sentence of the instruction should be amended to read, "For each of your debts that is secured by an interest in property that you own, the cost of which qualifies as an Other Necessary Expense pursuant to 11 U.S.C. § 707(b)(2)(A)(ii)(I), list the name of the creditor, identify the property securing the debt, and state the Average Monthly Payment."

3. Form B22A, Lines 23 and 23b., and Lines 24 and 24b.: The phrase, "as stated in Line 42," should be deleted.

4. Form B22C, Lines 28 and 28b., and Lines 29 and 29b.: The phrase, "as stated in Line 47," should be deleted.

As a threshold matter, 11 U.S.C. § 707(b)(2)(A)(ii)(I) prohibits a debtor from expensing debt service: "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts." Such clear statutory language is determinative, unless ambiguous, contraindicated by legislative intent, or inconsistent with its policy objectives. The language here is plain. Of the greatest import is "notwithstanding". This word signals an exception to the allowable expense regime in the two sentences that precede it. Thus, it appears that regardless of, and in supersedure of any other provisions of 11 U.S.C. § 707(b)(2)(A)(ii)(I), a debtor's allowable monthly expenses shall not include any debt payments.

Reconciling the "notwithstanding" sentence's disallowance of expenses of debt service with the previous two sentences specifying allowable expenses, some of which may require payment of debt service, *e.g.*, home mortgage and automobile purchase loans, is accomplished by noting that the statutory language refers to the expense amounts specified under Internal Revenue Service standards, which are entitled, "Allowable Living Expenses". The word "debt" does not appear in "National Standards" or "Local Standards". Thus, the statute, while denying the payment of debt service, preserves a debtor's right to expense the costs to house, feed, clothe, transport, and otherwise provide for the needs of himself and his family, up to the maximum allowed by the Standards.

Contrastingly, the Internal Revenue Service's schedule of "Other Necessary Expenses", also given operation by 11 U.S.C. § 707(b)(2)(A)(ii)(I), includes two categories of debt, *i.e.*, secured and unsecured. According to the Internal Revenue Manual, the service of these debts meets the necessary expenses test, i.e., necessary for the health and welfare of the debtor or his or her family, or necessary for the production of income. Then, they are allowable "other necessary **expenses**", thus avoiding offense to the plain language of the prohibition of payments for **debts**.

Rather than contradicting the language of the "notwithstanding" sentence, 11 U.S.C. § 707(b)(2)(A)(iii) serves only to prescribe the computational methodology for expensing secured debt service, assuming such secured debt is properly classified as an allowable expense under the National or Local Standards or as an Other Necessary Expense. "The debtor's average monthly payments on account of secured debts shall be calculated ...." This contrasts with the language of the preceding four sections, stating, variously, that the debtor's monthly expenses "may include" additional items, assuming they are appropriately supported by evidence.

Additional commentary is attached, describing additional authorities for the reasoning above.

Thank you for the Committee's consideration of the above described recommended changes to Forms B22A and B22C.

Very truly yours,
BECKET & LEE LLP

By: _____ _____
Alane A. Becket Thomas A. Lee, III

1 encl:as

Secured Debt Service

Much has been written about the application to an "above-median" Chapter 13 debtor of the expenses regime found in 11 U.S.C. § 707(b)(2). Many variegated opinions have issued across the country interpreting the language of the Code and that of the Internal Revenue Service standards incorporated by reference in this statutory section.[1] Thus, in the frequent disputes over what amounts a debtor may expense for the commonplace needs for housing, transportation, and other household requirements, the law is emerging, district by district, across the country.

However, one category of expense, secured debt service, seems to have been left almost unchallenged despite extremely consequential changes in the language of the Code. This may be because Form B22C merely inventories, without challenge, future payments on secured claims (line 47), and because other allowable expenses are specified by the "imported" Internal Revenue Service standards, apparently vitiating the role of judicial discretion. But it seems unlikely that Congress intended that an "above median" Chapter 13 debtor must carefully compile his budget for providing for his and his family's needs for shelter, transportation, and other household expenses, but remain free to service, without constraint, other debts, even those for luxury items, that happen to be collateralized.

A likely construction of 11 U.S.C. § 707(b)(2)(A)(ii)(I) presents itself from the plain language of the statute itself, which may prohibit a debtor from expensing debt service: "Notwithstanding any other provision of this clause, the monthly expenses of the

[1] "The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issue by the Internal Revenue Service …." 11 U.S.C. § 707(b)(2)(A)(ii)(I).

debtor shall not include any payments for debts." "Debt" is defined very straightforwardly as "liability on a claim."[2] "Claim" includes any right to payment whether or not it is secured or unsecured.[3] Such clear statutory language is determinative, unless ambiguous,[4] contraindicated by legislative intent,[5] or inconsistent with its policy objectives.[6] Indeed, in an interpretation of an early bankruptcy statute, Chief Justice John Marshall opined, "[W]here great inconvenience will result from a particular construction, that construction is to be avoided, **unless** the meaning of the legislature be plain; in which case it **must** be obeyed."[7]

The language here is plain. Of the greatest import is "notwithstanding". This word signals an exception to the allowable expense regime in the two sentences that precede it. In the interpretation of "Notwithstanding the provisions of section 405(b)" found in section 318 of the then-new Immigration and Nationality Act of 1952, the United States Supreme Court found that the word connoted congressional intent to preserve a specific exception to the relevant savings clause in section 405(b) of the Act.[8] The use of the word showed that "[t[he congressional purpose must have been to have § 318 supersede rights stemming from [pre-Act] petitions [for naturalization, under section 405]."[9] Indeed, "the use of such a 'notwithstanding' clause clearly signals the drafter's

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[2] 11 U.S.C. § 101(12).
[3] 11 U.S.C. § 101(5)(A).
[4] *BedRoc Ltd., LLC*, 541 U.S. at 183; *see also United States v. Fisher*, 6 U.S. 358, 399 (1805) (Washington, J., dissenting).
[5] *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989).
[6] *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849).
[7] *United States v. Fisher*, 6 U.S. 358, 386 (1805) (emphasis added); *see also Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004) ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding.")
[8] *Shomberg v. United States*, 348 U.S. 540, 546 (1955).
[9] *Id.* at 545.

intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section."[10]

Thus, it appears that regardless of, and in supersedure of any other provisions of 11 U.S.C. § 707(b)(2)(A)(ii)(I), a debtor's allowable monthly expenses shall not include any debt payments.

There arises an apparent difficulty of reconciling the "notwithstanding" sentence's disallowance of expenses of debt service with the previous two sentences specifying allowable expenses, some of which may require payment of debt service, *e.g.*, home mortgage and automobile purchase loans. This is overcome by noting that the statutory language refers to the expense amounts specified under Internal Revenue Service standards, which are entitled, "Allowable Living Expenses". The word "debt" does not appear in "National Standards" or "Local Standards". Thus, the statute, while denying the payment of debt service, preserves a debtor's right to expense the costs to house, feed, clothe, transport, and otherwise provide for the needs of himself and his family, up to the maximum allowed by the Standards.

Contrastingly, the Internal Revenue Service's schedule of "Other Necessary Expenses", also given operation by 11 U.S.C. § 707(b)(2)(A)(ii)(I), includes two categories of debt, *i.e.*, secured and unsecured.[11] According to the Internal Revenue Manual,[12] the service of these debts meets the necessary expenses test, i.e., necessary for the health and welfare of the debtor or his or her family, or necessary for the production of income. Then, they are allowable "other necessary **expenses**", thus avoiding offense to the plain language of the prohibition of payments for **debts**.

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[10] *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993).
[11] Internal Revenue Manual 5.15.1.10.
[12] *Id.*

The argot of financial accounting elucidates the importance of the distinction between "debt" and "expense". An income statement summarizes revenues (or, for a consumer debtor, income) and expenses. A balance sheet summarizes assets and liabilities (or, for a consumer debtor, debts). The language of the Code, by incorporating by reference Internal Revenue Service standards, specifies a debtor's allowable **expenses**, essentially his permissible "budget" of income and expenses. Payment for debts, which are balance sheet liabilities, seems to be prohibited by the plain meaning of the statutory language.

Legislative history and intent, and public policy goals

Legislative history and intent appear to support such a precise reading of the Code's wording. "[T]he debtor's monthly expenses - exclusive of any payments for debts (unless otherwise permitted) - must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook as Necessary Expenses under the National and Local Standards categories and the debtor's actual monthly expenditures for items categorized as Other Necessary Expenses."[13] Regarding the intent of the legislature, BAPCPA sponsor Sen. Charles Grassley and cosponsor Sen. Jeff Sessions wrote thus: "In calculating repayment ability, PL 109-8 permits a debtor to deduct the allowances provided in the applicable IRS local standards for housing. Importantly, PL 109-8 also provides that the debtor's expenses in this category may not include any payment for secured debts, such as mortgage payments."[14]

Such a construction of the statute accords with the coincident policy goals of "ensur[ing] that debtors make a good-faith effort to repay as much as they can afford"

[13] H.R. Rep. No. 109-31(I), at 13-14 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 99-100.
[14] Letter from United States Senators Charles Grassley and Jeff Sessions to The Hon. Chief Justice John Roberts (March 13, 2006).

while affording "those who need it most ... a fresh start."[15] Debtors are denied a *carte blanche* to expense any and all debt service to the detriment of unsecured creditors, but also are assured that their plans will not leave them without an expense budget that is reasonably necessary for his and his family's support,[16] fulfills his domestic support obligations, addresses his charitable giving desires,[17] and maintains the continuity of his business if he operates one.[18]

11 U.S.C. § 707(b)(2)(A)(iii)[19]

There remains a reconciliation of the "notwithstanding" sentence with 11 U.S.C. § 707(b)(2)(A)(iii).[20] One commentator posits that this statutory provision serves to "set out" the deduction for secured debt.[21] The result is that "debt secured even by such items as luxury vehicles, pleasure boats, and vacation homes would be deductible.[22]

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[15] Presidential Signing Statement for BAPCPA of 2005, found at http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html. *See also* Senate Floor Statement of Senator Jeff Sessions (R. Ala.) "People who need a fresh start under this bill will get one. The people who can pay some of their debts back will have to do that." (March 10, 2005).

[16] The Code defines how much is reasonably necessary to accomplish these budgetary needs. Debtors are separated into two distinct groups. For those whose income stands below the median income for their domiciles, BAPCPA retains intact earlier case law approach. Contrastingly, for those whose income exceeds the median for their states, BAPCPA imposes a fairly prescriptive schema for reasonably necessary budgetary expenses. The drafters of the Act, rather than explicate the allowable expenses for such an "above-median" debtor, imported and imposed by reference, wholesale, the "means test" of 11 U.S.C. § 707(b)(2) as determinative of reasonably necessary.

[17] This has been additionally buttressed by the recent enactment of the Religious Liberty And Charitable Donation Clarification Act Of 2006.

[18] 11 U.S.C. § 1325(b)(2).

[19] The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

[20] *In re Lenton*, No. 06-10520DWS, 2006 Bankr. LEXIS 3649, at *7 (Bankr. E.D. Pa. Dec. 15, 2006) ("Indeed, when statutory construction involves two statutory provisions, it is important to have a construction that carries out Congress' goals by harmonizing both provisions, if possible.") (citing *HSBC Bank USA v. Handel* (*In re Handel*), 253 B.R. 308, 311 (B.A.P. 1st Cir. 2000)).

[21] Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 Am. Bankr. L.J. 231, 274 (2005).

[22] *Id.*

Such a result is patently inconsistent with the already discussed plain meaning of 11 U.S.C. § 707(b)(2)(A)(ii)(I), legislative history and intent, and the policy goals of the Code. That writer's remedy for such a viscerally unappealing construction is to look to the totality of the circumstances test for abuse found in 11 U.S.C. § 707(b)(3).[23] Unfortunately, this remedy is unavailable to an objector to a Chapter 13 plan, which needs to conform to 11 U.S.C. § 707(b)(2)(A) and (B) only.[24] Furthermore, even in a Chapter 7 filing, this construction incorrectly effectively shifts evidentiary burdens from the debtor, who bears the burden to overcome a presumption of abuse,[25] to the creditor.[26]

Rather than contradicting the language of the "notwithstanding" sentence, 11 U.S.C. § 707(b)(2)(A)(iii) serves only to prescribe the computational methodology for expensing secured debt service, assuming such secured debt is properly classified as an allowable expense under the National or Local Standards or as an Other Necessary Expense. "The debtor's average monthly payments on account of secured debts **shall be calculated** ...."[27] This contrasts with the language of the preceding four sections, stating, variously, that the debtor's monthly expenses "**may include**" additional items, assuming they are appropriately supported by evidence.[28]

Conclusion

The U.S. Bankruptcy Court for the Western District of New York sustained a chapter 13 trustee's objection to confirmation of a plan that, according to the trustee, understated the debtors' projected disposable income.[29] The court opined that BAPCPA

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[23] *Id.*
[24] 11 U.S.C. § 1325(b)(3).
[25] 11 U.S.C. § 707(b)(2)(A)(i).
[26] *In re Nockerts*, No. 06-24480-svk, 2006 Bankr. LEXIS 3435, at *21 (Bankr. E.D. Wis. Dec. 14, 2006).
[27] 11 U.S.C. § 707(b)(2)(A)(iii).
[28] *See* 11 U.S.C. §§ 707(b)(2)(A)(II) through (V).
[29] *In re LaSota*, No. 05-70085, 2006 Bankr. LEXIS 2345 (Bankr. W.D.N.Y. Sept. 19, 2006).

left unchanged a finding that "a debtor could not reduce the payout to unsecured creditors in order to support the debt on a nice $10,000 sailboat that the debtor enjoys racing in a fleet on summer evenings ...."[30] To comply with the statutory requirement to devote all "projected disposable income", a plan "often requires surrender of those luxuries to repossession or foreclosure, if confirmation of a less-than-100% Plan is to be won."[31]

Many observers have decried, as resulting in confusion and inconsistency, the drafters' attempts to reduce discretion by their formulaic approach. This criticism seems misplaced, at least in an analysis of the treatment of debts of an "above-median" Chapter 13 debtor. A careful textual analysis, illuminated by legislative history and intent, and tested by public policy, clears away the confusion. Debtors may not expense, without limit or question, any and all secured debt service to the detriment of unsecured creditors.

[30] *Id.*, at *8.
[31] *Id.*, at *17.