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Comments on Bankruptcy Forms I and J.
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1. The changes to Schedule I and J do not appear to weigh the costs and benefits of changing the line number/letter designations for each income and expense item.

Specifically, the cost is the loss of the ability to search – using typical Lexis and Westlaw search terms - for previous judicial commentary on the listing of Schedule I income and Schedule J expenses. If I wanted to know what courts had said about "pension and retirement income" on Schedule I, I could use a search including a term like "Line w/1 12". By changing the numbering of budget items that have – for years – been listed using the same numbering system, you are making it more difficult for practitioners to find judicial commentary on the proper way to fill out these forms.

While there may be good reasons to numerically reorganize certain sections – why give "Describe Employment" a number? It has never had a number – and giving it a number means that you have had to change all the other Line numbers, making electronic searches more difficult, and citations more awkward: "In re Smith, 252 B.R. 222, 226 (Bankr. S.D. Ohio 2000)(interpreting 'union due' under former Line 4c on Schedule I which is now Line 5e)."

Is there really a good and sufficient reason to chuck the old numbering system?

Much of the old numbering system could be easily preserved. Don't make Schedule I,

Part 1 also “number 1”. In addition, in setting up the order of “List all payroll deductions” – which would still be Line 4 if you didn’t attach an extra number for Part I – keep the first three items, a) payroll taxes and social security payments; b) insurance; and c) union dues in the same order, rather than moving Insurance and Union Dues down to d and e to make room for Contributions to Retirement Plans and Required Repayments of Retirement Fund Loans, which are new, and are inserted earlier in the list for no apparent reason.

The incorporation of the Schedule I income items previously numbered 7 to 13, into new Line 8 also seems to be an arbitrary change to the numbering system for no apparent reason.

2. On Schedule J, there is a deduction under 17c for “Student loan payments”.

Say what?

If you are going to include student loan payments as a deduction, then to be consistent we need a deduction for restitution payments, payments to be made on nondischargeable debts for fraud, embezzlement or larceny debts, all co-signed loans, and monthly payments for credit cards the debtor would like to keep because having a credit card can be handy.

In other words – student loan payments should not be a deduction on the Schedule J.

Why does it matter?

Because the way your form is set up , paying student loans directly is being given the imprimatur of being endorsed by the Official Forms. And courts regularly take the language of Official Forms as authority.

Specifically, at the end Schedule J, at Line 22, the Form says: “the result is your monthly expenses”.

No. No it is not. The result is NOT your monthly expenses if the debtor(s) have responded to your invitation to include student loan payments as a deduction, particularly if those student loans are to be paid through the Plan, either as proposed in the original Plan or a later Amended Plan.

Accordingly, in my view, Line 17c should be stricken.

3. Schedule I: “Unless you are separated”.

I think “unless you are legally separated, or maintain separate households” would be a better way to phrase it.

Because of the positioning of that language as an instruction – not at the top of Schedule I where no one read it – I think you are going to get more spurious claims that couples are “separated”, when they really aren’t.

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Comments on Bankruptcy Means Test Form 22C-1 and 22C-2
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1. The problem of a new numbering system for the Means Test forms is even worse than it is for the Schedules I and J.

Look at the problem from the perspective of an attorney up for fee disgorgement because in filling out the Means Test, he or she ignored a clear holding of the court on the proper way to handle a particular deduction.

First, I will acknowledge that to the extent there is a holding in a Chapter 7 case on the same deduction that appears in a Chapter 13 case, adequate research would require finding the corresponding Line in the Chapter 7 Form 22A. That is a problem today – you need to either manually find the corresponding provision in the Means Test for the other chapter – 7 or 13 – and review the case law on that corresponding line.

But changing the numbers again makes finding and following precedent even more difficult – take the deduction for a motor vehicle operating expense. If these forms are adopted, you will have old Line 27A for pre-form change Chapter 13 cases, Line 22A for pre-form change Chapter 7 cases, Lines 11 and 12 on the new Form 22A-2, and Lines 7 and 8 on the Form B22C-2.

The original numbers system for these items will be rapidly forgotten, old forms won't be readily available, and unfortunately for the attorney standing before the court attempting to defend himself for his failure to follow "clear precedent", a defense of "The Forms Committee made researching for binding precedent extremely difficult by changing all the Line numbers for the deductions" may not be a winner.

There is a cost associated with changing the numbering system. There is a cost in terms of legal research efficiency and the ability of practitioners to tap into all the work that has been done by the courts in the past to interpret the meanings of these deductions. Why the deduction for "Alimony" has to move from Line 9 to Line 3 on the new form is unclear. Why the numbering system on "B22C-2" has to start again at 1 is unclear.

Perhaps a considered cost-benefit analysis of this was done. If so, I suggest that the weight given to the cost side was understated.

2. Line 6 invites error and does not follow the clear weight of case law authority.

The Forms cannot be the product of the opinions of the members of the Committee on what the law should be. The Committee either needs to follow the majority view of the courts, or attempt to stay neutral on controversial issues.

Line 6 clearly champions a minority view of the law. It perpetuates the worst legal error in the Chapter 13 Means Test, and it continues to hinder practitioners who are required to follow the majority view from having a place to put business expense deductions "below the line".

The controversy I am speaking of is in determining whether debtors with business income are above or below median income levels. The majority view is that even where there is business income, whether a debtor is above or below the median income level is determined by GROSS, not net, income.

Line 3 of the current Means Test provides a box for gross income from the operation of a business, profession or farm. There is also a box for "ordinary and necessary operating expenses". The number that goes toward CMI ("Current Monthly Income") is a net figure. However, for purposes of determining whether a debtor is over or under the median income level, the majority view is that the **gross** figure should be used (even though the form isn't set up that way.) See, In re Wiegand, 386 B.R. 238 (9th Cir. BAP 2008); In re Galley, 2011 Bankr. LEXIS 1484 (Bankr. N.D. Ohio April 20, 2011); In re Compann, 549 B.R. 478, 481-483 (Bankr. N.D. Ga. 2010); In re Arnold, 376 B.R. 652, 654 (Bankr. M.D. Tenn. 2007); In re Sharp, 394 B.R. 207, 215 (Bankr. C.D. Ill. 2008); In re Bembenek, Case No. 08-22607-svk, 2008 Bankr. LEXIS 3003, 2008 WL 2704289 (Bankr. E.D. Wis. July 2, 2008); In re Cole, unpublished, Case No. 08-34090 (Bankr. N.D. Ohio March 6, 2009)(Whipple, J.)(available on the Northern District of Ohio Bankruptcy Website, Judge Whipple's Opinions.); and Cf., In re Ellsworth, 455 B.R. 904, 910 (9th Cir. BAP 2011)(bankruptcy court followed Wiegand); Mark A. Redmiles and Saleela Knanum Salahuddin, The Net Effect, American Bankruptcy Institute Journal, October 2008, 16, 56-57 ("With respect to chapter 13 debtors who are at or below the

median income, the need to avoid the double deduction of ordinary business expenses applies equally. The chapter 13 trustee is well-positioned to object if an above- or below-median income debtor claims a double deduction for any category of expenses."). But see, In re Roman, 2011 Bankr. LEXIS 4483 at *7 (Bankr. D.P.R. Nov. 16, 2011)(net business income used to determine applicable commitment period); In re Featherston, Case No. 07-60296-13, 2007 Bankr. LEXIS 4578, 2007 WL 2898705 (Bankr. D. Mont. Sept. 28, 2007); In re Biscoe, unpublished, Case No. 10-20177-NVA (Bankr. D. Md. April 12, 2012)(Alquist, J.).

The Wiegand view is the clear majority view. The deduction for business expenses should be contained in the Form 22C-2 (if we need to actually break up the Means Test into a Form 22C-1 and a 22C-2). Business expenses are clearly deductible – but under the majority view, only after the above/below median determination is made. At WORST, the 22C should allow the deduction of business expenses below the line so that those that follow the majority rule can point to line item deduction that can be used for business expenses, instead of having to adopt ad-hoc solutions like "just put it on Line 57".

The marital adjustment is done twice – both before and after the determination of whether the debtors are above or below the median income level. There should be some way that debtors can comply with the law, as set forth in the Wiegand majority view.

Moreover, the failure to use gross income for business income – when the majority view requires it – misinforms debtors' attorneys about their obligations to complete the Form 22C-2. If they use the calculation of net business income, when gross business income is required by the Code, they are then directed on Line 17 to NOT complete the rest of the Means Test. When, in fact, for most courts that have addressed the issue, debtors ARE required to complete the rest of the Means Test if they are over the median income level based on gross business income.

The Wiegand court directly addressed the role of the Official Forms:

"The question is easily answered when Form 22C is directly at odds with §1325(b)(2)(B), the substantive Code provision that governs the deduction of business expenses. As aptly noted by another court in addressing this same question, when an Official Bankruptcy Form conflicts with the Code, the Code always wins. In re Arnold, 376 B.R. 652, 653 (Bankr. M.D. Tenn. 2007)." In re Wiegand, 386 B.R. at 241. See also, In re Compann, 459 B.R. 478, 483 (Bankr. N.D. Ga. 2010)(""because as we all know, the Bankruptcy Code always wins," no matter how poorly drafted."); In re Sharp, 394 B.R. 207 (Bankr. C.D. Ill. 2008); In re Bembenek, 2008 Bankr. LEXIS 3003, 2008 WL 2704289 (Bankr. E.D. Wis., July 2, 2008).

If the Forms Committee doesn't like what the Code says – or what the courts interpret

that it says - they should take that up with Congress, not ignore the majority view of the courts.

3. To the extend Wiegand is right about the use of gross income to determine whether a debtor is above or below median income levels, the deduction on Line 6 for income from rental and other real estate is also contrary to the provisions of the Code.

4. Line 8 continues to follow two very early cases that held that unemployment income was a "social security benefit". It is hard to say if that view even continues as a minority position. Yet, the Form 22C invites error by allowing debtors to not list their unemployment income on the Chapter 13 Means Test.

There was some early case law that held that unemployment compensation was a social security benefit. See, In re Munger, 370 B.R. 21 (Bankr.D.Mass. 2007); In re Sorrell, 359 B.R. 167 (Bankr.S.D.Ohio 2007). The more recent cases hold that unemployment benefits count as income for purposes of calculating CMI. See, In re Washington, 438 B.R. 348 (M.D. Ala. 2010); In re Gentry, 463 B.R. 526 (Bankr. D. Colo. 2011); In re Kucharz, 418 B.R. 635 (Bankr. C.D. Ill. 2009); In re Baden, 396 B.R. 617 (Bankr.M.D.Pa. 2008); In re Overby, Bankr. L. Rep. (CCH) P81,868, 2010 Bankr. LEXIS 8183 (Bankr. W.D. Mo. Sept. 24, 2010); In re Winkles, 2010 Bankr. LEXIS 2151, 2010 WL 2680895 (Bankr. S.D. Ill. July 6, 2010); In re Nance, 64 Collier Bankr. Cas. 2d (MB) 230, 2010 Bankr. LEXIS 1736, 2010 WL 2079653 (Bankr. S.D. Ind. May 21, 2010); In re Rose, 2010 Bankr. LEXIS 1851, 2010 WL 2600591 (Bankr. N.D. Ga. May 12, 2010); In re VanDyne, 2011 Bankr. LEXIS 3236, (Bankr. N..D. Ohio August 19, 2011).

After the decision in Washington, it is hard to see how any argument can be made that unemployment is a social security benefit. If debtors want to argue that – perhaps an option could be given to preserve the ability to challenge it. But they should not be permitted – really, encouraged – to leave out unemployment income. It puts a burden on the trustees and interested creditors to redo the math when there isn't a case since 2007 that has supported the position that unemployment is a Social Security benefit.

5. Personally, I think it is ridiculous to have debtors signing the 22C Means Test. There is no reasonable belief that they have any understanding of the form. It is far too complicated for debtors to understand. If you want debtors to sign – at the very least, also require debtors' counsel to sign it. The only one with any hope of understanding the Means Test is an experienced bankruptcy practitioner.

6. On the Form 22C-2 (again – I don't see the reason to split the Means Test up, and start with a new numbering system at "1") the form appears to take a position that appears to follow what is probably now a minority position.

The form appears to follow the line of cases that hold that the IRS national standards are only applicable to dependents – not to household members.

The case law views the household size (and therefore, in most cases) the applicable IRS deduction in three ways: 1) heads on the beds; 2) the IRS deductibility test; and 3) the "economic unit approach".

At present, it appears that the "economic unit" approach is the majority view, particularly after it was the view adopted by Johnson v. Zmmer, 686 F3d 224 (4th Cir. 2012). See also, In re Robinson, 449 B.R. 473, 478-480 (Bankr. E.D. Va. 2011); In re Johnson, 2012 Bankr. LEXIS 5278 (Bankr. N.D. Ind. October 19, 2012)(following Johnson v. Zimmer and holding that debtor's adult son, who had been incarcerated and could not find work, was part of the debtor's household for Means Test purposes); In re Reinsch, 2013 Bankr. LEXIS 273 at *7 - *8 (Bankr. D. Neb. January 23, 2013)(following Robinson and allowing a 20 year old college student who returned home for weekends and breaks as an additional household member).

This does not appear to be consistent with the requirement that the 22C-2 deductions to be based on a new calculation of: "the number of people who could be claimed as exemptions on your federal income tax return, the number of any additional dependents whom you support. This number may be different from the number of people in your household."

All the deductions are based on the number in "Line 1". The number, under what appears to be the majority view, should be the number of household members listed on 22C-1, Line 16b. The fight over household size and the amount of the applicable IRS deductions is one fight, based on household size. Not two fights – one over median income levels, and a second fight over a separate calculation of the amounts of the IRS deductions based on the second separate calculation of dependents/household size on Line 1 of the 22C-2.

7. The inclusion of insurance in Line 4 of the 22C-2 creates a bit or a forms preparation headache, and increases the amount that debtors much pay under the Means Test. Most debtors, in listing their secured mortgage payment on the previous Line 47, included their real estate taxes and insurance – at least if they were included in the mortgage payment. This appears to reduce the amount that is deductible for the secured debt, by requiring the homeowners insurance to be left out of the secured debt payment deduction.

8. Line 21 for Health insurance, disability insurance, and health savings account expenses is an invitation to creative expense padding. While it is a nice idea that debtors can deduct more than they actually spend on health insurance, disability insurance and health savings accounts – you are asking them what they would like to have if the unsecured creditors were footing the bill, not what they would actually spend if they were spending their own money.

This approach to an non-reality based number appears contrary to the holding in Ransom – that did not favor non-existent ownership expenses, and which stated that "the statute's overall purpose of ensuring that debtors repay creditors to the extent they can". Ransom v. FIA Card Servs., N.A., ___ U.S. ___, 131 S. Ct. 716, 721-22, 178 L. Ed. 2d 603 (2011).

If you want to give debtors some opportunity to say that they don't have adequate health coverage, or they'd like a bigger disability policy – maybe. But this change makes the number that the debtors would LIKE to spend, for the level of coverage they would LIKE to have, be the one that is used in producing the Projected Disposable Income number.

That can't be right.

The approach of debtors counsel is going to be find out what really good, no-deductible private health insurance policies would cost, along with terrific disability policies, and then those numbers will be plugged in and used in the initial calculation. In every such case, the Chapter 13 trustee is going to have to recalculate the Means Test, using the figures the debtor actually spends.

What is – if possible – even more disturbing than the ability to make income disappear based on an insurance wish list, is that unlike other provisions where debatable expenses are claimed, the Committee didn't even include a requirement that the debtors document the necessity and the source of the number they put down as a deduction on Line 21. You find instructions like: "You must show that the additional amount claimed is reasonable and necessary" under other provisions. But, debtors can just figure out what they think they need to spend to get reasonably necessary and health and disability coverage – with some extras for the health savings account – and there is no requirement contained in Line 21 that the debtors tell the Chapter 13 trustee how they arrived at that number they want to deduct, but don't actually pay.

This is the unsecured creditors get nothing in every case deduction – and it doesn't appear to be what Congress intended when they passed BAPCPA. At least that's not what the Supreme Courth thought they meant to do in passing the 2005 Amendments.

9. The new Means Test forms are replete with statements that debtors can consult a website, "or ask for help at the clerk's office of the bankruptcy court."

The current Means Test forms have different language – merely stating that information can be obtained from the clerk of the bankruptcy court – to me, that means a printout of what is on the website, if a debtor didn't have computer access.

My understanding the bankruptcy court funding problems makes me skeptical that the clerk's office is going to be able to respond to debtors and debtors' attorneys being encouraged to just stop on by the clerk's office for unspecified "help".

I also believe that the clerk's office is prohibited from giving legal advice. . . .

With the deep clerk's office staff reductions that are going on right now, that seems to be an increase in the work load being put on the clerk's office that is unwarranted.

10. Line 27 changes the language of the deductions for charitable contributions. The new language is not just "charitable contributions", it is contributions to "a religious or charitable organization".

This opens up a can of worms.

While Congress clearly limited the amount that could be spent on private education, the case law has pretty much rejected claims that debtors should be able to pay whatever they want for private religious education – in excess of the $147.92 per month for education allowed on Line 43 of the present 22C Means Test.

This change in the scope of the deduction opens up that fight again – why is a payment to a private religious school not a religious contribution, even if it is not a charitable contribution?

This is a huge change in debtors' ability to require their unsecured creditors to pay for their children's private religious schooling.

Whatever this change is intended to address – if it isn't intended to allow all above median debtors to have their kids attend religious schools while paying their unsecured creditors nothing, then it is poorly drafted.

The new language does do one laudable thing – it makes it clear that only contributions of cash or financial instruments are deductible. Charitable deductions for the value of old clothing – which are tax deductible – are not the kind of deductions that should be allowed on the Means Test.

11. Notably, Lines 29d, 29e and 29f allow additional secured debt deductions – without

any guidance that it is improper to, for example, deduct for a second time the mortgage payment previously deducted as an operating expense on new 22C-1 Line 6, “Net income from rental and other real property”.

Such a prohibition should be explicit, because as at least one court has stated:

“As an initial matter, this Court finds the Trustee's "double-dip" construct unhelpful in resolving the issues presented here. To the extent that other courts have employed such language in reviewing Chapter 7 means-tests or objections to Chapter 13 plan confirmation, 2 they have done so only to describe legal conclusions reached on grounds other than permissible or impermissible "double-dipping," and for good reason — the statute says nothing of "double-dipping."

In re Sturm, 455 B.R. 130, 135 (N.D. Ohio 2011).

12. Line 42 is, presumably, where debtors will list changes such as the ending of a payment obligation - like the property will be surrendered, or the lien will be avoided, or the secured claim will be crammed down, or a 401(k) loan repayment ending, or the like.

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