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Issues Regarding the Means Test

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The means test was incorporated into the Bankruptcy Code with the passage of BAPCPA. Since that time, courts have struggled to interpret its terms and often disagree on its application. There are numerous decisions which not only conflict with each other, but also often find that Official Forms 122C-1 and 122C-2 diverge from the statutory text. This paper will highlight a few of the areas where the courts disagree with each other, have found that the official form used to implement the means test is deficient, or where local practices may influence completion of the forms. These areas include calculation of the applicable commitment period for debtors with a business, determination of household size, treatment of nonpurchase money secured debts, lease payments, voluntary retirement contributions, and over withholding of income taxes. These issues can be foundational and affect debtors' ability to qualify for relief under chapter 7 or cause wide variances in the amount of debtors' monthly disposable income.

APPLICABLE COMMITMENT PERIOD AND BUSINESS EXPENSES

When a debtor's chapter 13 plan does not provide for 100% payment of unsecured claims, the "applicable commitment period" shall be "not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than" the median family income of households of the same size in the applicable state.[1]

> The term "current monthly income"-- (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii)….[2]

Current monthly income also includes:

> any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)….[3]

An "entity" includes any "person, estate, trust, governmental unit, and United States trustee," and a "person" includes any "individual, partnership, and corporation…."[4] Likewise, the term "corporation" is broadly defined and includes associations, joint stock companies, limited liability associations, unincorporated companies and associations, and business trusts.[5] The only exclusions from "current monthly income" are:

> (I) benefits received under the Social Security Act (42 U.S.C. 301 et seq.);
> (II) payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes;
> (III) payments to victims of international terrorism or domestic terrorism, as those terms are defined in section 2331 of title 18, on account of their status as victims of such terrorism;
> (IV) any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title; and

[1] 11 U.S.C. § 1325(b)(4)(ii).
[2] § 101(10A)(A).
[3] § 101(10A)(B)(i).
[4] § 101(15) & (41).
[5] § 101(9).

> (V) Payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19).[6]

While payments and income from every conceivable source, whether taxable or not, are included in current monthly income, payment of expenditures necessary for the continuation, preservation, and operation of a business are not excluded, deducted, or referenced in the applicable code provisions defining current monthly income.

Expenditures necessary for the continuation, preservation, and operation of a business are deductible by a debtor when calculating disposable income. Under § 1325(b)(2), the term "disposable income" means:

> *current monthly income* received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19), child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) *less amounts reasonably necessary to be expended*--
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> (A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
> (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
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> (B) if the debtor is engaged in business*, for the payment of expenditures* necessary for the continuation, preservation, and operation of such business.[7]

Paraphrased, "disposable income" is "current monthly income" excluding Covid-19, child support, foster care and disability payments less reasonable expenses for the support of the debtor and debtor's dependents, charitable contributions, and necessary business expenses.

§ 101(10A) supports the conclusion that current monthly income includes gross business income and is not reduced by reasonably necessary business expenses. It includes payments received by a debtor from virtually every source, whether taxable or not. The Code's definition of current monthly income gives effect to the definition of disposable income rather than rendering a portion of the definition superfluous. If current monthly income were calculated by reducing the debtor's gross business income by reasonably necessary business expenses, there would be no need to reduce current monthly income by business expenses when calculating disposable income.

§1325(b)(1)(B) provides that "all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." When a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.[8] This forward-looking approach to disposable income keeps the focus on the debtor's business expenses going forward based on changes from the pre-filing period. Therefore, there is no need to litigate whether each of a debtor's past business expenditures was reasonably necessary. Rather than focusing on decisions made by a debtor running a

[6] § 101(10A)(B)(ii).
[7] § 1325(b)(2)(emphasis added).
[8] *Hamilton v. Lanning*, 560 U.S. 505, 524 (2010).

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