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PROJECTING THE IMPACT OF LANNING AND RANSOM: CALCULATING “PROJECTED DISPOSABLE INCOME” IN CHAPTER 13 REPAYMENT PLANS

*Theresa J. Pulley Radwan**

In 2005, Congress amended the United States Bankruptcy Code (the “Code”) through the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”).¹ In part, these amendments required a formulaic calculation of the “projected disposable income” a chapter 13 debtor must pay to unsecured creditors, which is based on the debtor’s prebankruptcy income and allowed expenditures.² In consecutive terms, the United States Supreme Court

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¹ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

² Section 102(h) of BAPCPA, entitled “Applicability of Means Test to Chapter 13,” amends § 1325(b) of the Code to define “disposable income”—but not “projected disposable income”—to include:

current monthly income received by the debtor (other than 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—

- (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
- (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, § 102(h)(1)–(2), 119 Stat. 23, 33–34. It then goes on to link expenses to the means test of § 707:

Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than—

- (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
- (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

considered the effect of changes to a debtor's income³ and then expenses⁴ in calculating a debtor's projected disposable income within a chapter 13 bankruptcy case.⁵ While the Court answered some questions about the calculation of "projected disposable income"—a phrase only partially defined by the BAPCPA amendments—the Court's decisions awakened a debate as to how a debtor may claim expenses in calculating projected disposable income when, in reality, the debtor incurs only a portion of the allowed expense. In the aftermath of the Supreme Court's decisions, *Ransom v. FIA Card Services, N.A.*⁶ and *Hamilton v. Lanning*,⁷ lower courts have used the opinions to support conflicting solutions to this dilemma.

The conflicting solutions vary based on how courts define expenses. To calculate disposable income, which is the funds available to repay creditors, a debtor must deduct listed expenses. Throughout the Code, phrases such as "reasonably necessary,"⁸ "actual,"⁹ and "applicable"¹⁰ modify expenses. In interpreting these modifiers, two approaches exist for dealing with a debtor whose actual expenses differ from the Code's allowed expenses. The "cap" approach limits the debtor's expense deductions to the lesser of the actual amount spent or the standard allowance (as defined by the Code); the "allowance" approach permits the debtor to take the entire standard allowance deduction regardless of whether the debtor actually incurs all of that allowance. Under either approach, if the debtor's expenses change during the three- to five- year term of the repayment plan, courts decide whether to adopt a "step-up" approach that limits a debtor's ability to claim expenses to only the time the debtor actually incurs such an expense. The fact that courts have used

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.

§ 102(h)(3), 119 Stat. 23, 34.

³ *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

⁴ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716 (2011). The Court decided both *Ransom* and *Lanning* 8–1, with Justice Scalia dissenting. *Id.* at 730 (Scalia, J., dissenting); *Hamilton*, 130 S. Ct. at 2478 (Scalia, J., dissenting).

⁵ BAPCPA modified the less structured definition for "disposable income," but retained the pre-BAPCPA requirement that the debtor include all "projected disposable income" for payment to unsecured creditors to confirm a chapter 13 plan. *Hamilton*, 130 S. Ct. at 2469–70.

⁶ 131 S. Ct. 716 (2011).

⁷ 130 S. Ct. 2464 (2010).

⁸ *See* 11 U.S.C. § 1325(b)(2)–(3) (2006).

⁹ *See id.* § 707(b)(2)(A)(ii)(I).

¹⁰ *See id.*

Ransom and *Lanning* to support a variety of these approaches highlights the inherent conflict between the two opinions and creates additional issues for the bankruptcy courts.

This Article considers two issues unresolved by *Ransom* and *Lanning* encountered in calculating projected disposable income: (1) a debtor's actual expenses are less than the expense allowance, and (2) a debtor's expense terminates during the bankruptcy repayment plan period. After considering the language of §§ 707(b) and 1325(b), the decisions in *Lanning* and *Ransom*, and the policies espoused by BAPCPA, the Article concludes that a debtor should only be permitted to deduct the amount of an expense actually used to determine projected disposable income devoted to repayment of creditors.

I. THE ROLE OF PROJECTED DISPOSABLE INCOME IN A CHAPTER 13 REPAYMENT PLAN

Chapter 13 allows an individual¹¹ debtor to repay creditors through a plan outlining the timing and amount of payment to each creditor.¹² Unlike a chapter 7 bankruptcy case, in which debtors pay creditor claims from the liquidation of prepetition assets,¹³ chapter 13 focuses primarily on the postpetition earnings¹⁴ of the debtor to support the repayment plan. A chapter 13 debtor must propose a plan of repayment within fourteen days of filing the bankruptcy petition.¹⁵ The court then determines whether to confirm the plan.¹⁶ Upon confirmation of the plan, the debtor pays the trustee who, in turn, pays creditors according to the dictates of the repayment plan.¹⁷ While the Code provides several bases for denying plan confirmation,¹⁸ *Lanning* and *Ransom*

¹¹ *Id.* § 109(e).

¹² *Id.* §§ 1322, 1325.

¹³ These prepetition assets become property of the estate upon entry of the order for relief, which in a voluntary bankruptcy case occurs upon the filing of the bankruptcy petition. *Id.* §§ 301(b), 541(a).

¹⁴ Debtors electing to file under chapter 13 must have regular income in order to support the repayment plan. *Id.* § 109(e). In a chapter 13 case, earnings during the bankruptcy plan period are also included as property of the estate and the debtor maintains possession of these assets except as provided for in the plan. *Id.* § 1306(a)–(b).

¹⁵ FED. R. BANKR. P. 3015(b).

¹⁶ 11 U.S.C. §§ 1324, 1325.

¹⁷ *Id.* § 1322(a)(1).

¹⁸ *See, e.g., id.* § 1322(a) (providing basic plan requirements, including providing sufficient resources to fund the plan, payment in full of priority claimants, and fair treatment of claims within a class.); *id.* § 1325(a) (allowing plan confirmation only if it meets a variety of requirements, such as: paying all fees, filing the bankruptcy petition and proposing the plan in good faith, paying unsecured claimants at least what the

involved denial of confirmation of the plan because the debtors allegedly failed to include all “projected disposable income” for the payment of unsecured claims.¹⁹

For debtors whose current monthly income²⁰ equals or exceeds the state median income,²¹ the Code defines “disposable income” as the difference between the debtor’s current monthly income and a set of defined expenses permitted by the Code.²² These expenses fall within the “means test” of § 707(b),²³ chapter 13 of the Code incorporates them by reference to the means test.²⁴ A court cannot confirm the debtor’s proposed plan in a chapter 13 bankruptcy case over the objection of a trustee or unsecured creditor if the

claimants would have received in a chapter 7 bankruptcy case, allowing secured claimants to retain the security interest, paying secured claimants in full, proposing a feasible plan, paying domestic support obligations, and filing tax returns).

¹⁹ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724–28 (2011); *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469 (2010). Interestingly, in *Ransom*, the Supreme Court never refers to “projected” disposable income. Instead, it focuses on how the term “applicable” affects the definition of “disposable income.” *Ransom*, 131 S. Ct. at 724–28. However, the Court’s focus on how “[i]n Chapter 13 proceedings, the means test provides a formula to calculate a debtor’s disposable income, which the debtor must devote to reimbursing creditors under a court-approved plan generally lasting from three to five years” provides the necessary reference to “projected” disposable income within a chapter 13 repayment plan. *Id.* at 721 (citing 11 U.S.C. § 1325(b)).

²⁰ Current monthly income equals the average of the debtor’s monthly incomes received during the six months prior to the month of filing the bankruptcy petition. *Id.* § 101(10A).

²¹ Debtors whose “current monthly income” annualized exceeds the state median income for a similarly-sized household must determine necessary support expenses by reference to “means test” data in § 707(b)(2). *Id.* § 1325(b)(3).

²² *Id.* § 1325(b)(2). These allowed expenses include postpetition domestic support obligations, qualified charitable deductions, necessary business expenses, and expenses necessary for support of the debtor and his or her dependents. *Id.*

²³ The means test includes those expenses allowed by the IRS as National or Local Standards; actual, reasonable, and necessary expenses for certain family or household members; actual expenses of administering the chapter 13 plan; actual, reasonable, and necessary educational expenses up to a designated amount for minor children; actual, reasonable, and necessary utility costs in excess of those provided for in the standards; and payment to secured and priority claimants. *Id.* § 707(b)(2)(A). Often debt payments fall in part within the standard expenses, and also fall within the *actual* expense sections of the means test. *See, e.g., In re Meek*, 370 B.R. 294, 308–12 (Bankr. D. Idaho 2007) (discussing judicial resolutions of potential “double-dipping” problem whereby a debtor could deduct certain secured debt under two different means test provisions). For example, debt owed to a mortgage lender or holder of a purchase money security interest in an automobile would constitute both a allowed expense under the Local Standards and a secured debt under § 707(b)(2)(A)(iii)(I). Courts considering what deductions to allow in such cases generally held that the debtor could deduct the standard allowance in calculating projected disposable income, but had to reduce that allowance by the debt payments already deducted as secured debt. *In re Meek*, 370 B.R. at 311. In essence, the debtor who actually incurred a mortgage or automobile expense could deduct the greater of the actual secured debt payment or the IRS allowance in calculating projected disposable income.

²⁴ *See* 11 U.S.C. § 1325(b)(3); *see also Ransom*, 131 S. Ct. at 721 n.1.

debtor fails to include all projected disposable income to fund the plan during the applicable commitment period.²⁵ But the Code fails to define either “projected” or “projected disposable income,” leaving open the question of how the term “projected” modifies the formulaic calculation of disposable income created by the means test. Fitting §§ 707(b) and 1325(b) together poses problems because

the definition of “disposable income” set forth in § 1325(b)(2) is strictly backward-looking in measuring the debtor’s income by virtue of its reliance on the statutorily defined concept of “current monthly income.” That which the “best efforts” test of § 1325(b)(1) is trying to measure (and ensure is going to creditor repayment), though, is the forward-looking “projected disposable income to be received during” the coming term of the plan.²⁶

This natural tension between these Code sections and the Code’s policies of maximizing creditor repayment,²⁷ minimizing judicial discretion,²⁸ and ensuring a fresh start for debtors²⁹ reached the Supreme Court in *Lanning* and *Ransom*.

II. THE SUPREME COURT CASES

A. *Hamilton v. Lanning: Changed Income*

Lanning involved a debtor whose income rose above her prebankruptcy income due to a single payment from her former employer, termed a “buy-out,” that would not occur again in the future.³⁰ As a result, the debtor’s current monthly income, calculated according to the Code’s definition, exceeded the

²⁵ See 11 U.S.C. § 1325(b)(1)(B). The applicable commitment period, in turn, equals three or five years, depending upon whether the debtor’s current monthly income exceeds the state’s median monthly income. § 1325(b)(4)(B).

²⁶ Ralph Brubaker, *Supreme Court Adopts the Forward-Looking Approach to Projected Disposable Income in Chapter 13*, 30 BANKR. L. LETTER 2, Aug. 2010, available at Westlaw, 30 No. 8 BLL 2.

²⁷ *Ransom*, 131 S. Ct. at 721 (noting BAPCPA’s primary purpose of maximizing creditor repayment).

²⁸ See Mantas Valiunas, Comment, *Anything But Automatic: Dismissal under § 521*, 28 EMORY BANKR. DEV. J. 231, 237–38 (2011).

²⁹ *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991); see also *Hamilton v. Lanning*, 130 S. Ct. 2464, 2473–74 (2010) (noting that while BAPCPA served to maximize recovery for creditors, that purpose must be read in light of the history of the entire Code).

³⁰ *Hamilton*, 130 S. Ct. at 2470. While an employer buy-out may not be a frequent occurrence, other types of one-time payments could occur in the employment context, such as bonuses for promotions or extraordinary work, or salary adjustments based on equitable considerations.

income that she would likely receive during the term of the repayment plan.³¹ While the calculation of disposable income, and thus of projected disposable income, also includes expenditures, the only dispute in *Lanning* involved the income side of the calculation. In calculating projected disposable income, the debtor omitted the buy-out payment, resulting in a lower income and, thus, a lower disposable income to be included within the plan's provisions. The trustee argued against confirmation of the debtor's plan because the debtor failed to include *all* projected disposable income in the plan—here, the buy-out was excluded.³² The trustee advocated the mechanical approach, under which the debtor must include all disposable income into the plan, calculated using the formula provided by §§ 1325 and 707(b), multiplied by the number of months of the plan.³³ The debtor, arguing for the forward-looking approach, asserted that the term “projected” allows for postpetition changes from the formulaic calculation of disposable income.³⁴

The Court rejected the trustee's suggested method of calculating projected disposable income by merely multiplying the disposable income over the term of the bankruptcy plan. The Court considered the ordinary meaning of the term “projected,” finding that projections include more than simply “assumption[s] that the past will necessarily repeat itself.”³⁵ The Court noted that because other places within the Code expressly provide for multiplication, “projected” must mean something different than simple multiplication.³⁶ The Court also looked to language within other sections of the Code, noting that the debtor calculates projected disposable income “as of the effective date of the plan”—

³¹ *Id.* The calculation of current monthly income and disposable income uses data provided by the debtor in Form B22C. The debtor must also file Schedules I and J, indicating the anticipated income and expenses of the debtor during the bankruptcy case. STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL BANKRUPTCY FORM 6I (12/07), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006I_1207f.pdf; STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL BANKRUPTCY FORM 6J (12/07), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006J_1207f.pdf; STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL BANKRUPTCY FORM 22C (12/10), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Forms%201210/B_22C_1210.pdf.

³² *Hamilton*, 130 S. Ct. at 2470.

³³ *Id.* at 2470–71.

³⁴ *Id.* at 2471. The debtor's income, if calculated using the forward-looking approach, fell below the state median for a similarly-situated household. *Id.* at 2470. Such an income calculation could lead to other consequences, including modifying the debtor's applicable commitment period for the chapter 13 bankruptcy plan under § 1325(b)(4), or allowing the debtor to include all amounts necessary for “maintenance and support” rather than using the expenses allowed within §§ 707, 1325(b)(2)(A)(i), and 1325(b)(3)(A). *See supra* Part I; *infra* Part III.A.

³⁵ *Hamilton*, 130 S. Ct. at 2471.

³⁶ *Id.* at 2472.

implying that the income on that effective date might differ from prepetition income used for determining projected disposable income.³⁷ Finally, the Court considered the history of bankruptcy law and the BAPCPA amendments to conclude that Congress intended some flexibility in calculating disposable income for the purposes of funding a chapter 13 bankruptcy plan.³⁸ Ultimately, the Court held that projected disposable income allowed for “virtually certain” changes to income postpetition. However, the Court implied that absent near-certainty that future income would differ from prepetition “current monthly income,” a mechanical calculation is still the starting point for determining projected disposable income.³⁹

B. Ransom v. FIA Card Services: Allowable Expenses

One year after *Lanning*, the Court addressed the same issue of whether to apply the formulaic approach, but on the expense side of the projected disposable income equation. *Ransom v. FIA Card Services, N.A.* involved a debtor who owned a car outright, but sought to deduct the car ownership expense permitted under the Local Standards referred to by § 707(b).⁴⁰ As it did in *Lanning*, the Court eschewed the formulaic approach in favor of a more realistic picture of the debtor’s true situation during the chapter 13 bankruptcy plan repayment period. Specifically, the Court denied the debtor the ability to deduct anything but car maintenance expenses when the debtor did not make a loan or lease payment on the car.⁴¹

In its analysis, the Court first noted that the Code’s Local Standards follow the IRS’s Standards⁴² for taxpayers,⁴³ and that IRS Collection Financial

³⁷ *Id.* at 2474.

³⁸ *See id.* at 2472–74 (explaining that pre-BAPCPA cases teach not to erode past bankruptcy practice absent a clear congressional intention to do so).

³⁹ *See id.* at 2475 (“As the Tenth Circuit recognized in this case, a court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor’s future income or expenses.”); *see also* James Davis-Smith, *A Consensus Emerges on the Projected Disposable Income Test under Lanning: Modified “Disposable Income,” Not Actual Ability to Pay*, 9 NORTON BANKR. L. ADV. 1, Sept. 2011, at text accompanying notes 1–2 available at Westlaw, 2011 NO. 9 NRTN-BLA 1 (“[C]onsensus seems to be emerging . . . that *Lanning*’s forward-looking approach permits only limited adjustments to the ‘disposable income’ calculation on Official Form B22C.”).

⁴⁰ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 721 (2011).

⁴¹ *Id.* at 725–26.

⁴² *See* 26 U.S.C. § 7122(d)(2) (2006).

⁴³ *Ransom*, 131 S. Ct. at 722 (citing 11 U.S.C. § 707(b)(2)(A)(ii)–(iv)).

Standards tie ownership costs to “monthly loan or lease payments.”⁴⁴ Thus, to the extent that the debtor could deduct car ownership expenses, those expenses require the debtor to make a monthly payment toward ownership costs. In determining whether a debtor who did not incur such an ownership expense could nonetheless deduct a car ownership expense, the Court started with the language of the Code, noting that only “applicable” expenses fall within the means test calculation.⁴⁵ Because this debtor did not have any expense attributable to owning a car, either as a lease or finance payment, the Court concluded that such an expense did not apply to this debtor.⁴⁶ The Court emphasized that this conclusion comports with BAPCPA’s intent to maximize recovery for creditors in disallowing unnecessary deductions.⁴⁷

Consistent with *Lanning*, *Ransom* rejects the mechanical (or formulaic) approach for calculating disposable income when determining “projected disposable income” for a confirmable chapter 13 bankruptcy plan.⁴⁸

C. Principles from *Lanning* & *Ransom*

Read together, these decisions suggest that:

1. The starting point for determining projected disposable income involves the calculation of current monthly income based on the six

⁴⁴ *Id.* However, the Court distinguished the use of the Collection Standards for guidance from the complete inclusion of the Collection Standards within the Bankruptcy Code. *Id.* at 726 n.7 (“we emphasize again that the statute does not ‘incorporat[e]’ or otherwise ‘impor[t]’ the IRS’s guidance. . . . The IRS creates the National and Local Standards referenced in the statute, revises them as it deems necessary, and uses them every day. The agency might, therefore, have something insightful and persuasive (albeit not controlling) to say about them.”).

⁴⁵ *Id.* at 724 (citing § 707(b)(2)(A)(ii)(I)).

⁴⁶ *Id.* at 725–26.

⁴⁷ *Id.* at 725. See also Christopher W. Frost, *Inching Toward Workability: The Supreme Court Adds to Its BAPCPA Jurisprudence*, 31 BANKR. L. LETTER 1, Mar. 2011, at notes 25–26 and accompanying text, available at Westlaw, 31 No. 3 BLL 1 (“If one understands the use of the means test expenses as an effort to increase creditor recoveries, those expenses should be interpreted narrowly.”); Ned W. Waxman, *Final Score on “Projected Disposable Income”: Forward-Looking Approach (8), Mechanical Approach (1)*, 48 HOUS. L. REV. 315, 348 (2011) (arguing that *Lanning* correctly applied the forward-looking approach in reaching BAPCPA’s “goals of preventing bankruptcy abuse, making certain that debtors repay creditors the most that they can afford, and shifting can-pay debtors from a Chapter 7 liquidation to a Chapter 13 repayment plan.”).

⁴⁸ Frost, *supra* note 47, at text accompanying notes 25–26 (“it seems as though the Court may be moving toward a general understanding of the means test and the test for projected disposable income that incorporates a significant dose of reality into what may appear to be fairly mechanical tests.”).

months preceding the petition date, reduced by the expenses permitted under § 707(b).⁴⁹

2. A debtor who does not incur any expense in a category may not deduct that expense.⁵⁰
3. Known or virtually certain changes from the calculation of disposable income under § 707(b) may be accounted for in projecting the disposable income for the term of the plan.⁵¹

The Court used the Code's language to develop each of these three principles. While the cases combined suggest an approach that lends weight to the debtor's economic realities, the Court refused to abandon the formulaic approach altogether. Instead, the Court attempted to balance the Code's formula with a more realistic assessment of a debtor's financial situation. This balancing of the congressional intent to create clear rules and reverence to bankruptcy policies left bankruptcy courts with several unresolved issues.⁵²

III. THE DEBTOR'S ABILITY TO CLAIM THE STANDARD DEDUCTION IF THE STANDARD DEDUCTION EXCEEDS ACTUAL EXPENSE OR ACTUAL EXPENSE TERMINATES BEFORE THE END OF THE CHAPTER 13 PLAN PERIOD

The issue of whether a debtor may claim a full deduction under the IRS National and Local Standards when the debtor incurs an actual expense, but not the full deduction, arises in two situations. In the first situation, assume that the Standards grant a debtor a \$200 monthly automobile ownership expense deduction pursuant to § 707(b)(2)(A)(ii)(I).⁵³ If the debtor actually pays only \$180 per month in loan repayment, may the debtor take the full \$200 monthly deduction, or only the \$180 actually used? In the other situation, if the debtor does actually spend \$200 per month on a loan payment, but that payment will end one year into the chapter 13 plan period, can the debtor take the deduction for the entire length of the bankruptcy plan, or must the disposable income change upon payment in full of the car loan?

⁴⁹ See *supra* note 39 and accompanying text.

⁵⁰ See *supra* note 46 and accompanying text.

⁵¹ See *supra* note 39 and accompanying text.

⁵² See Frost, *supra* note 47, at text accompanying notes 47–49 (noting the inherent problem of BAPCPA's competing purposes of maximizing creditor recovery and minimizing judicial discretion).

⁵³ Throughout this Article, references to "§ 707(b)(2)," "allowances," or the "standard deductions" refer to § 707(b)(2)(A)(ii)(I)'s deductions.

Ransom, referring to the IRS's standards, noted that the ownership expense deduction reflects the cost of financing the automobile, either through loan or lease payments.⁵⁴ The *Ransom* Court rejected taking a deduction for a non-existent expense in calculating projected disposable income. However, the Court declined to determine whether debtors who make *some* payment toward a car lease or loan may take the *entire* standard expense for the *entire* length of the plan or must take only the actual amount of the monthly payment for the actual period in which the debtors make payments in calculating projected disposable income.

A. *Forms Versus Schedules*

Upon petitioning for bankruptcy protection, the debtor completes Form B22C, which includes a calculation of current monthly income based on the six months preceding the bankruptcy filing date.⁵⁵ Prior to the enactment of BAPCPA and its means test, Schedules I and J⁵⁶ guided the calculation of projected disposable income.⁵⁷ These schedules list the debtor's anticipated future income and expenditures, respectively.⁵⁸ Since BAPCPA, the language of §§ 1325(b) and 707(b)(2) requires calculating disposable income by taking the information from Form B22C and deducting standard expenses, with little need to consider the information on Schedules I and J. However, the *Lanning* and *Ransom* decisions suggest that the information on Schedules I and J still plays a role in determining *projected* disposable income for chapter 13 plan confirmation. Furthermore, courts continue to respect bankruptcy practices prior to enactment of BAPCPA, absent a clear intent to modify those practices.⁵⁹

⁵⁴ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 725 (2011).

⁵⁵ STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL BANKRUPTCY FORM 22C (12/10), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK%20Forms%201210/B_22C_1210.pdf.

⁵⁶ STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL BANKRUPTCY FORM 6I (12/07), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006I_1207f.pdf; STATEMENT OF FINANCIAL AFFAIRS, OFFICIAL BANKRUPTCY FORM 6J (12/07), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006J_1207f.pdf.

⁵⁷ *In re Egbert*, 384 B.R. 818, 823 (Bankr. E.D. Ark. 2008).

⁵⁸ A debtor also provides other financial information including recent tax returns. 11 U.S.C. § 521(e)–(j) (2006).

⁵⁹ *Hamilton v. Lanning*, 130 S. Ct. 2464, 2473 (2010) (“Pre-BAPCPA bankruptcy practice is telling because we ‘will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.’”) (quoting *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007); *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004); *Cohen v. de la Cruz*, 523 U.S. 213 (1998)).

In one instance, the Bankruptcy Court for the District of Oregon relied on *Lanning* to reject a purely mechanical test based on Bankruptcy Form B22C and allowed debtors to use evidence, including, but not limited to, Schedules I and J, to modify the mechanical calculation.⁶⁰ In *In re Reed*, the debtors proposed a forty-three-month chapter 13 plan.⁶¹ The debtors in this case needed to calculate one component of disposable income—the current monthly income—to determine whether they could propose and confirm a plan of less than sixty months.⁶² Using Form B22C, the debtors' current monthly income would not require a sixty-month plan, but if Schedules I and J controlled, the debtors' current monthly income required a sixty-month plan.⁶³ The court

⁶⁰ *In re Reed*, 454 B.R. 790 (Bankr. D. Or. 2011).

⁶¹ *Id.* at 796.

⁶² *Id.* A debtor whose current monthly income (not projected disposable income) equals or exceeds the state median income for a similarly-situated household must propose a sixty-month plan. § 1325(b)(3)–(4). However, a circuit split exists regarding the length of the plan for a debtor whose current monthly income exceeds the state median, but who has no projected disposable income to pay to unsecured creditors. Compare *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873 (11th Cir. 2010) (holding that the applicable commitment period is inconsequential when disposable income is negative), with *Baud v. Carroll*, 43 F.3d 327 (6th Cir. 2011) (concluding that the debtor must propose a sixty-month plan despite the lack of projected disposable income), and *Timothy v. Anderson (In re Timothy)*, 442 B.R. 28 (B.A.P. 10th Cir. 2010) (same). See also *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008) (pre-*Lanning* case using the “multiplier” approach to determine that a debtor with no projected disposable income need not propose a five-year plan of repayment if secured and priority claims can be paid in shorter time period). While the Court in *Lanning* criticized *Kagenveama*, *Lanning*, 130 S. Ct. at 2475, courts continue to consider what impact *Kagenveama* has in determining how to calculate projected disposable income. See *Danielson v. Flores (In re Flores)*, 692 F.3d 1021, 1030–31 (9th Cir. 2012) (deciding that *Lanning* did not overrule *Kagenveama*, on the issue of determining applicable commitment period); *In re Henderson*, 455 B.R. 203, 208 (Bankr. D. Idaho 2011) (“Because the Supreme Court adopted the forward-looking approach, as opposed to the *Kagenveama* favored mechanical approach, *Kagenveama*’s instructions to bankruptcy courts for calculating debtors’ projected disposable income were effectively overruled. But, contrary to Trustee’s suggestion, it is clear the *Lanning* decision did not directly address the other issue resolved in *Kagenveama*: whether § 1325(b)(1)(B) requires an above-median-income debtor with no projected disposable income to make payments to debtors over the applicable commitment period.”).

⁶³ *In re Reed*, 454 B.R. at 794. *Reed* involved the calculation of disposable income, in the context of determining the “applicable commitment period” for a chapter 13 bankruptcy. The *Reed* court recognized that “[t]he questions of how to project disposable income and what ‘applicable commitment period’ is used when an above-median debtor has zero or negative projected disposable income have vexed debtors, trustees, and the courts since amendment of the statutory definition of ‘disposable income.’” *Id.* at 795. To the extent that the debtor has projected disposable income in excess of the state median for a similarly situated household, the debtor has a five-year “applicable commitment period”—thus requiring the debtor to have a sixty-month-long repayment plan. 11 U.S.C. § 1325(b)(4)(A)(ii). A debtor whose projected disposable income is less than the state median does not face the same requirement. *Id.* § 1325(b)(4)(A)(i). The debtors in *Reed* sought to establish a projected disposable income of less than the state median, which would in turn allow them the shorter repayment plan; the trustee argued that the debtors’ income exceeded the state median and, thus, their

rejected a purely mechanical test based upon Form B22C, but did not see the schedules as the only other option.⁶⁴ Rather, the court noted that Form B22C remains the starting point for determining current monthly income. The party wishing to modify that calculation⁶⁵ bears the burden of showing that such a calculation fails to reflect the debtor's postpetition financial situation. Schedules I and J may rebut the presumptions of the formulaic approach, but the schedules are "not sufficient alone to allow deviation from the Form B22C disposable income in calculating projected disposable income."⁶⁶ The party seeking to modify the calculation must show, per *Lanning*, certainty of those changes regardless of what the schedules anticipate as future income or expenses.⁶⁷ As the *Reed* court noted, this approach creates a burden-shift, rather than a bright line rule that focuses entirely on the Schedules I and J or Form B22C.⁶⁸ Such a burden-shifting approach ensures that the standard deductions provide the starting point for determining projected disposable income. It also allows parties to demonstrate a need for modification when the Standard Expenses do not apply because a debtor does not incur any expense in a category, or when the income or actual expenditures change in such a way that the Form B22C does not accurately reflect the debtor's financial situation. It also furthers the policy of limiting judicial discretion only to those situations in which a debtor or trustee can demonstrate a need to vary the income or actual expenditures—balancing creditor recovery and debtor fresh start.

forty-three-month plan of repayment failed to meet the Code requirements for the length of the plan. *In re Reed*, 454 B.R. at 795.

⁶⁴ *Id.* at 796–97.

⁶⁵ While in *Reed* the trustee sought to use Schedules I and J to calculate projected disposable income and the debtor sought to use the form and standard allowances for the calculation, the parties seeking to modify the form with the schedules might flip in other situations. *Id.* at 795. For an example of a situation in which the debtor sought to use the schedules to reduce projected disposable income because the Form B22C income included artificially inflated figures for income, see *Hamilton v. Lanning*, 130 S. Ct. 2464, 2471 (2010). For an example of a situation which would rebut the presumption of the form/standard approach, focusing particularly on *Lanning*-type examples, see *In re Reed*, 454 B.R. at 797.

⁶⁶ *Id.* at 797–98.

⁶⁷ *Id.* at 798.

⁶⁸ *Id.* at 796–97. The court explained how the burden will shift between the parties in making a determination of projected disposable income:

When the trustee seeks to rebut the presumption that the monthly disposable income shown in the Form B22C accurately reflects a debtor's projected disposable income, the trustee bears the initial burden to present evidence that the amounts used in the form do not adequately predict the debtor's disposable income into the future. . . . However, once the trustee makes an initial showing, debtors as proponents of the plan have the burden to show that the plan complies with all of the requirements for confirmation. *Id.* at 796.

B. Statutory Language

Sections 1325(b) and 707(b)(2) provide the parameters for determining a debtor's disposable income in a chapter 13 bankruptcy case. Combining these sections, disposable income equals current monthly income minus the debtor's reasonably necessary expenses, which "shall" include applicable national and local standards and other actual and necessary expenses.⁶⁹

Section 707(b)(2) of the Code provides:

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

⁶⁹ Section 1325(b) mandates that:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan 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.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than 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—

(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

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$625 per month for each individual in excess of 4.

11 U.S.C. § 1325(b)(2)–(3) (2006) (footnote omitted).

categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides⁷⁰

While *Ransom* helps tailor the definition of disposable income by noting that “applicable” refers to an expense that the debtor actually has incurred,⁷¹ there remains uncertainty in defining the parameters of the disposable income of a debtor who incurs some expense, but not the full National or Local Standard expense amount for the length of the plan. As *Ransom* noted, the term “applicable” does not itself mean “actual.”⁷² But can the *Ransom* holding be extended to mean that the modifiers “reasonable” and “necessary” indicate that the debtor cannot deduct more than the debtor actually uses? Or does the term “shall” indicate that the debtor may use the entire amount of the allowance as a deduction?

C. The Allowance Approach

Courts that adopt the allowance approach permit the debtor to deduct the full amount of any standard deduction, even if the debtor actually spends less than the allowed expense. In the consolidated case, *In re Scott*, the Bankruptcy Court for the Southern District of Illinois allowed debtors to deduct the entire allowance despite actually incurring less than the allowance. The *Scott* court allowed the debtors to deduct the full amount of the automobile expenses permitted by the Local Standards even though the debtors actually spent less than the allowance amounts.⁷³ In its analysis, the court focused on statutory construction. In particular, the court noted that § 707(b) divided means test deductions into “actual” expenses and “standard” deductions. Because the automobile expenses fell within the standard deductions of the means test, whether the debtor actually uses the *entire* expense does not matter.⁷⁴ In so deciding, the court found that neither *Lanning* nor *Ransom* interpreted the Code in a way that changed this analysis.⁷⁵ *Ransom* deemed a car expense inappropriate on the basis that a debtor who incurs no expense does not have an applicable expense. The *Ransom* Court declined to extend the term

⁷⁰ *Id.* § 707(b)(2)(A)(ii)(I) (emphasis added).

⁷¹ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 730 (2011).

⁷² *Id.* at 727.

⁷³ *In re Scott*, 457 B.R. 740 (Bankr. S.D. Ill. 2011).

⁷⁴ *Id.* at 746.

⁷⁵ *Id.* at 746, 748 (citing *In re Barrett*, 371 B.R. 855 (Bankr. S.D. Ill. 2007)).

“applicable” to modify the amount of the allowance for a debtor who incurs an applicable expense in the category.⁷⁶

The *Scott* court’s approach follows the canon of statutory construction that requires meaning be given to every word within a statute.⁷⁷ The Supreme Court used the same canon of construction in *Ransom*, when it considered the use of the term “applicable” versus “actual.”⁷⁸ If Congress intended § 707(b) to limit a debtor to using only the amount of the expense that the debtor actually incurred, such expenses would fall within the actual expenses⁷⁹ rather than in the applicable standard expenses. Although the *Scott* court did not consider *Ransom* as determinative in making its decision, *Scott* comports with *Ransom* because *Ransom* was decided based on the term “applicable.”⁸⁰ Combining the *Ransom* and *Scott* courts’ analyses of statutory construction, “applicable” refers to whether the debtor incurs an expense, and “actual” refers to the amount of the expense used by the debtor. Thus, the statutory construction of § 707(b)(2) suggests that as long as a debtor incurs *an* expense in the standard expense category, the debtor can deduct the entire standard expense in calculating disposable income.

While the *Scott* court determined that *Ransom* did not address the issue before the court,⁸¹ the Bankruptcy Court for the District of Puerto Rico reached the same conclusion as *Scott*, but found that *Ransom* dictated such a result.⁸² In *In re Miranda*, the debtor did not include annual Christmas bonuses in calculating income.⁸³ The debtor also deducted all standard expenses in

⁷⁶ See *Ransom*, 131 S. Ct. at 724; *infra* text accompanying notes 104–06.

⁷⁷ 3A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 70:6 (7th ed. 2008) (citing *In re Tennyson*, 611 F.3d 873 (11th Cir. 2010); *In re Ennis*, 558 F.3d 343 (4th Cir. 2009); *In re Kagenveama*, 541 F.3d 868 (9th Cir. 2008); *Miller v. U.S.*, 363 F.3d 999 (9th Cir. 2004); *Schlossberg v. Barney*, 380 F.3d 174 (4th Cir. 2004)).

⁷⁸ *Ransom*, 131 S. Ct. at 724.

⁷⁹ 11 U.S.C. § 707(b)(2)(A)(ii)(II)–(IV) (2006) (allowing actual expense deductions for medical care, administration of the estate, and educational expenses). Each of the actual expense provisions notes that the deductible expenses *may* include actual expenditures for the appropriate category. The standard deductions include different language, stating that “[t]he 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 issued by the Internal Revenue Service for the area in which the debtor resides.”) *Id.* § 707(b)(2)(A)(ii)(I) (emphasis added).

⁸⁰ *Ransom*, 131 S. Ct. at 724.

⁸¹ *In re Scott*, 457 B.R. at 746.

⁸² *In re Miranda*, 449 B.R. 182, 191–93 (Bankr. D.P.R. 2011).

⁸³ The debtors received annual Christmas bonuses of approximately \$2,000 per year, but argued that the bonuses were not part of income during the six months prior to the bankruptcy filing date. *Id.* at 186–87.

calculating projected disposable income, even though the debtor's actual expenses were less than the standard expense allowance.⁸⁴ Citing *Lanning*, the court held that the debtor must include Christmas bonuses that the debtor would likely receive during the chapter 13 commitment period because such bonuses were virtually certain based on the debtor's past experience.⁸⁵ But while the facts clearly fit within the *Lanning* precedent on the income side, the facts did not mirror the *Ransom* facts on the expense side. Nevertheless, the court allowed the standard deduction of expenses beyond the debtor's actual expenses, citing *Ransom* and other cases in noting that Congress passed BAPCPA in part to ensure "uniform application of a bright-line test, which was more important than accuracy and which limited judicial discretion."⁸⁶

Both the *Miranda* and *Scott* courts adopted an allowance approach for standard deductions. While the *Miranda* court did so based on *Ransom*, the *Scott* court chose a statutory construction approach that consistently read § 707(b)(2) with the *Ransom* court's reading of it.

D. The Cap Approach

Courts that adopt the cap approach limit the debtor's deductions to the lesser of the standard deduction and the actual expense incurred by the debtor. While the *Scott* court focused on the statutory distinction between actual and standard expenses,⁸⁷ another court's focus on § 1325(b)'s requirement of "reasonably necessary" expenses led it to adopt the cap approach. *In re McGillis*⁸⁸ preceded *Lanning* and *Ransom*, but neither of these Supreme Court decisions disturb its reasoning. In *McGillis*, the debtor's calculation of projected disposable income based on § 707(b)'s allowed deductions netted just \$140 per month of disposable income; using the debtor's actual expenses

Because the debtors filed for bankruptcy in January and had presumably received the latest bonus in the six months prior to the petition date, the court noted that the bonus should have been included under a mechanical approach calculation of projected disposable income. *Id.* The court then noted that *even if* the bonus had not actually been received in the six months prepetition, the debtors *still* would have been required to include it in their projected disposable income calculation. *Id.* at 190.

⁸⁴ *Id.* at 185.

⁸⁵ *Id.* at 190.

⁸⁶ *Id.* at 191–92, 194.

⁸⁷ *See, e.g.*, 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2006) ("the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support" of certain relatives and household members).

⁸⁸ *In re McGillis*, 370 B.R. 720 (Bankr. W.D. Mich. 2007).

increased projected disposable income to over \$1,500 per month.⁸⁹ In its analysis of the phrase “reasonably necessary,” the court noted that the only addition that Congress made was to require that the necessity “be determined in accordance with . . . section 707(b)(2).”⁹⁰ The *McGillis* court concluded that the reference to § 707(b)(2) merely provided guidance as to *which* expenses constitute “reasonably necessary” expenses, not to the *amounts* that fall within the categories of reasonable and necessary.⁹¹ After determining which expenses qualify as reasonably necessary expenses, the amount of those expenses is determined not by the statute, but by the actual use of those expenses. If the debtor’s actual use exceeds the allowance, only the allowance amount qualifies as a reasonably necessary expense. But if the actual use is less than the allowance, only the amount actually used is reasonably necessary for the debtor.⁹²

E. *Limitations of Plain Meaning*

Three different courts interpreted the same language of the Code—two post-*Ransom* and one pre-*Ransom*—to reach very different conclusions.⁹³ The *Miranda* court’s express reliance on *Ransom* to support the allowance approach is misguided because the *Ransom* Court looked at the definition of the term “applicable” and found that it referred only to:

an expense [that] is appropriate, relevant, suitable, or fit. . . . A debtor may claim a deduction from a National or Local Standard table . . . only if that deduction is appropriate for him. And a deduction is so appropriate only if the debtor has costs corresponding to the category covered by the table—that is, only if the debtor will incur that kind of expense during the life of the plan.⁹⁴

Nowhere in that language does the Court discuss the amount of the deduction, except when the amount actually used is zero.

⁸⁹ *Id.* at 727. While part of the difference came from allowances exceeding actual expenses, some of the difference was also attributable to debts that existed prepetition but would receive no distribution in a chapter 13 bankruptcy case. *Id.*

⁹⁰ *Id.* at 729 (emphasis added).

⁹¹ *See id.*

⁹² *Id.* at 730.

⁹³ *See In re Scott*, 457 B.R. 740 (Bankr. S.D. Ill. 2011); *In re Miranda*, 449 B.R. 182 (Bankr. D.P.R. 2011); *In re McGillis*, 370 B.R. 720; *supra* Parts III.C.–D.

⁹⁴ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011).

The *Scott* and *McGillis* opinions highlight the difficulty of a plain interpretation of §§ 1325(b) and 707(b)(2). The *McGillis* decision interprets “reasonably necessary” to include a requirement of “actual” expenses.⁹⁵ As the *Scott* court noted, however, including the requirement of actual expenses takes meaning away from the term “actual” used in other sections of the Code. To the extent that Congress wrote part of the statute to reflect a particular idea, Congress would have used the same language to reach the same result elsewhere in the statute.⁹⁶ In the very section referred to in determining the allowed deductions—§ 707(b)—Congress referred to several expenses in which the debtor may take the lesser of a stated cap and the debtor’s actual expenses. This suggests that if Congress intended such an interpretation of the standard expense allowances in § 707(b)(2), Congress would have used the same language to effectuate that intent.⁹⁷

Scott correctly noted that interpreting § 707(b)(2)’s language to include an actual expenditure requirement for standard expenses would negate the meaning of the term “actual” elsewhere in that specific Code section.⁹⁸ Further, § 707(b)(2)’s use of mandatory language suggests that, after determining the applicable and actual expenses, those expenses *shall be* the debtor’s expenses for purposes of the means test.⁹⁹ The term “shall” connotes a requirement of use.¹⁰⁰ But the *Scott* approach fails to consider that the limitation on use of the full deductions when a debtor actually expends less than the deduction comes not from § 707(b)(2), but instead from § 1325’s “reasonably necessary”

⁹⁵ *In re McGillis*, 370 B.R. at 730.

⁹⁶ 2A SUTHERLAND, *supra* note 77, § 46.6 (“courts do not construe different terms within a statute to embody the same meaning”).

⁹⁷ *See, e.g.*, 11 U.S.C. § 707(b)(2)(A)(ii)(IV) (2006) (“the debtor’s monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,775 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses”) (footnote omitted).

⁹⁸ *In re Scott*, 547 B.R. at 745.

⁹⁹ *Id.*

¹⁰⁰ *See In re Owens*, 221 B.R. 199, 200–01 (Bankr. W.D. Tenn. 1998) (noting that while the term “shall” generally connotes a requirement, the court may utilize its equitable powers under 11 U.S.C. § 105 to waive such a requirement when the requirement fails to further the goals of the Code). The court agreed with the debtor’s argument that an exception to the requirement that a debtor attend a creditor’s meeting could be justified in some cases, but determined that this particular debtor’s need to care for an ill family member did not warrant such an exception. *See id.* at 201.

limitation on a debtor's expenditures in calculating *projected* disposable income.

The phrase "reasonably necessary" differs from the term "actual," explaining why Congress would use different terms in different contexts. A debtor can actually incur unreasonable or unnecessary expenses. Because the amount of an expense never actually incurred cannot constitute a necessary expense, the term "reasonably necessary" subsumes the word "actual." But the use of the broader term "reasonably necessary" in § 1325(b) does not render the use of the more narrow term "actual" in § 707(b)(2) superfluous in all situations because § 707(b)(2) applies to chapter 7 cases where § 1325(b)'s "reasonably necessary" qualification will not apply.¹⁰¹

With clear statutory language, interpreting the statute requires nothing more than applying that clear language.¹⁰² But when there is an ambiguous statute, clear language that contravenes clear legislative intent, or clear language that creates an absurd result, courts may consider extrinsic evidence in determining the meaning of the statutory language.¹⁰³ To be considered ambiguous, the language of the statute must support two or more reasonable interpretations.¹⁰⁴ The terms "reasonably necessary," "shall," "applicable," and "actual" create sufficient ambiguity in interpreting §§ 707(b) and 1325(b) because they

¹⁰¹ 11 U.S.C. § 103(a), (b), (i) (providing that provisions of chapter 7 apply only to cases filed under chapter 7 absent an express indication otherwise, and that provisions of chapter 13 apply only to cases filed under chapter 13). An individual debtor seeking to file a chapter 7 case must meet the means test standard. Because the means test does not itself include a "reasonably necessary" requirement for *all* expenses, removing the word "actual" from § 707(b) might allow a debtor subject to the means test to deduct several expenses the debtor never actually incurs. *See id.* § 707(b)(2)(A)(ii)(I) ("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 issued by the Internal Revenue Service for the area in which the debtor resides") (emphasis added); *id.* § 707(b)(2)(A)(ii)(III) ("the debtor's monthly expenses may include the *actual* administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments") (emphasis added); *id.* § 707(b)(2)(A)(ii)(IV) ("the debtor's monthly expenses may include the *actual* expenses for each dependent child less than 18 years of age, not to exceed \$1,775 per year per child, to attend a private or public elementary or secondary school") (emphasis added); *id.* § 707(b)(2)(A)(ii)(V) ("the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the *actual* expenses for home energy costs") (emphasis added).

¹⁰² *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (explaining that when the words of a statute are unambiguous, the cardinal canon requires a court begin by examining the language of the statute and that is also the last step of judicial inquiry); 2A SUTHERLAND *supra* note 77, § 46.1.

¹⁰³ 2A SUTHERLAND, *supra* note 77, § 45.2.

¹⁰⁴ *Id.*

provide several alternative and reasonable interpretations of apparently contradictory language. Thus, courts can consider extrinsic sources of guidance in assigning meaning to these provisions.

F. The Precedential Impact of Lanning & Ransom on Deductible Expense Calculation

1. Debtors Whose Expenses End During the Bankruptcy Plan Period

In dicta, the *Ransom* Court noted that its ruling might allow a “troubling anomaly” where a debtor could take the full ownership deduction for the entire length of the bankruptcy plan by simply having a few car payments remaining at the time of confirmation.¹⁰⁵ But the Court allowed such an anomaly because “Congress chose to tolerate the occasional peculiarity that a brighter-line test produces.”¹⁰⁶ This language suggests that if the Court had decided the issue, it would have allowed the full standard deduction for the *entire* length of the plan, even if the debtor did not actually make payments toward ownership of the vehicle during the full length of the plan.¹⁰⁷ The policy of maximizing creditor recovery promoted by both the *Lanning* and *Ransom* decisions and the realistic approach that both cases use suggest that a debtor should only deduct expenses for the time period that the expenses will actually be incurred by the debtor.

In 2012, the Bankruptcy Court for the District of Hawaii considered whether joint debtors in a chapter 13 case needed to step-up their disposable income upon payment in full of an automobile expense.¹⁰⁸ The court, held that

¹⁰⁵ *Ransom v. FIA Card Servs. N.A.*, 131 S. Ct. 716, 729 (2011).

¹⁰⁶ *Id.* Unfortunately, this opinion also leads to some ethical quandaries for a debtor’s counsel. As one observer noted, “[t]he advice that most easily flows from the lips of debtor’s attorneys is this: Go buy a new or used vehicle prior to filing. If the debtor has an older vehicle, it is better to buy the vehicle now when the debtor is more likely to be approved for credit and may receive a more favorable interest rate to boot.” Brian Rookard, *Vehicle Planning Decision Challenges After Ransom and Lanning*, 30 AM. BANKR. INST. J., May 2011, at 72, 72. Such advice violates the spirit of BAPCPA, which added a provision prohibiting debtor’s counsel from advising a client to incur additional debt on the eve of a bankruptcy filing. 11 U.S.C. § 526(a)(4) (prohibiting “debt relief agency” from advising client “to incur more debt in contemplation of such person filing a [bankruptcy] case”); see also *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1332 (holding that attorneys qualify as debt relief agencies).

¹⁰⁷ By contrast, some commentators suggest that *Ransom* will lead courts to follow the minority approach of “capping” a debtor’s expenses at the lesser of the allowance or the actual expense based on the realistic approach rather than on the Court’s dicta. WILLIAM C. HILLMAN & MARGARET M. CROUCH, PRACTISING LAW INSTITUTE: PLI BANKRUPTCY DESKBOOK § 13:3.4 (4th ed. 2007 & Supp. 2012).

¹⁰⁸ *In re Montho*, 466 B.R. 539 (Bankr. D. Haw. 2012).

an expense lacks applicability after a debtor makes the final car payment, guided by *Ransom's* reliance upon applicable expenses.¹⁰⁹ The court also considered *Lanning*, noting that the debtor should account for substantially certain changes in a chapter 13 repayment plan and the calculation of disposable income.¹¹⁰

The issue of step-up in disposable income upon satisfaction of a prepetition obligation exists outside of the automobile repayment scenario, and existed prior to the *Lanning* decision. Several courts have considered the issue in the context of calculating projected disposable income when a debtor completes repayments on a 401(k) loan and have determined that once a debtor completes repayment of a 401(k) loan, the debtor must step up disposable income and resulting payments to other creditors under the plan, due to the debtor's foreseeable increase in disposable income.¹¹¹

Despite the *Ransom* Court's dicta indicating that Congress envisioned allowing a debtor to take the full car ownership deduction during the entire plan term, even if a peculiar result arose, courts addressing the issue should hold that a debtor cannot take the car ownership deduction once the debtor completes payments on the actual ownership expense.¹¹² To hold otherwise

¹⁰⁹ *Id.* at 541–42 (citing *Ransom*, 131 S. Ct. at 728).

¹¹⁰ *Id.* The court rejected the debtors' argument for modification of the plan as a more appropriate option, but did not altogether foreclose the option for debtors who would pay the automobile ownership expense for a substantial portion of the plan period. *Id.* at 541 (stating a three month maturity on an auto loan is not enough). Prior to *Lanning*, courts adopted a more mechanical approach to calculating projected disposable income and denied step up payments. *See e.g., In re Williams*, 394 B.R. 550 (Bankr. D. Colo. 2008) (utilizing the mechanical approach to calculating projected disposable income prior to *Lanning*, and thus denying any need to step up payments following repayment of secured car debt); *In re McLain*, 378 B.R. 39 (Bankr. N.D.N.Y. 2007) (same); *In re Charles*, 375 B.R. 338 (Bankr. E.D. Tex. 2007) (same); *In re Barrett*, 371 B.R. 855 (Bankr. S.D. Ill. 2007) (same); *see also In re Hughey*, 380 B.R. 102 (Bankr. S.D. Fla. 2007) (denying requirement of step-up, but expressly rejecting the mechanical calculation used by other courts).

¹¹¹ *Burden v. Seafort (In re Seafort)*, 437 B.R. 204, 211–13 (B.A.P. 6th Cir. 2010) (citing *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010)); *see also In re Nowlin*, 576 F.3d 258 (5th Cir. 2009); *McCarthy v. Lasowski (In re Lasowski)*, 575 F.3d 815, 817–19 (8th Cir. 2009). Several bankruptcy courts require step-up plans by debtors who complete repayments on 401(k) loans. *See, e.g., In re Brann*, 457 B.R. 738, 739 (Bankr. C.D. Ill. 2011); *In re McCullers*, 451 B.R. 498, 501–02 (Bankr. N.D. Cal. 2011); *In re Cleaver*, 426 B.R. 390 (Bankr. D.N.M. 2010). Such loans can present other unique issues involving the definition of property of the estate and the protection of retirement funds. *See, e.g., In re Egan*, 458 B.R. 836, 849–50 (Bankr. E.D. Pa. 2011) (noting the conflicting BAPCPA policies of maximizing creditor recovery and protecting debtor's retirement contributions in rejecting trustee's argument that failure to increase plan payments after repayment to 401(k) plan in order to increase contributions to plan constitutes bad faith).

¹¹² The termination of the car payments and the resulting increase in projected disposable income could be reflected in the plan *at confirmation* or, potentially, as a modification to the already confirmed repayment plan. However, at least one circuit court determined that modification of a confirmed plan requires a "substantial

would contravene the *Lanning* ruling that allows modifications to the disposable income calculation to the extent that those modifications involve substantially certain changes to the calculation. While the *Ransom* Court did not specifically so hold, the Court focused on the term “applicable” in determining the meaning of “disposable income”—a concept measured as of the petition date.¹¹³ But the meaning of “disposable income” does not present an issue when the debtor actually has a car ownership payment at commencement of the plan because the disposable income as calculated by the *Ransom* Court accurately reflected the debtor’s reality as of the petition and confirmation dates.

The meaning of “projected” and how that term affects the calculation of disposable income presents the real issue in the 401(k) loan payoff scenario. Because the term “projected” modifies “disposable income,” not just “income,”¹¹⁴ and disposable income includes both income and expenses,¹¹⁵ *Lanning*’s interpretation allowing for modifications to the calculation of disposable income based on substantially certain changes during the plan term applies equally to changes in expenses and income. Few changes are as substantially certain as the termination of loan payments pursuant to a contract between the debtor and the lender. Thus, just as the income in *Lanning* would certainly decline during the plan period, the car ownership expense will certainly terminate during the bankruptcy plan and debtors must account for these changes under that analysis.

Modifying the calculation of disposable income to reflect the termination of payments complies with *Ransom*’s precedent. The *Ransom* Court’s holding focused on applicable expenses and noted a debtor who is not actually paying toward the ownership of the vehicle uses no applicable ownership expense.¹¹⁶

and unanticipated change” in the debtor’s circumstances, because to modify on the basis of known variances violates principles of res judicata. *Murphy v. O’Donnell* (*In re* *Murphy*), 474 F.3d 143, 150 (4th Cir. 2007). Thus, trustees in the Fourth Circuit cannot seek a modification to reflect greater disposable income when car payments terminated because the end of the car payments would be anticipated prior to confirmation. *But see In re* *Matson*, 468 B.R. 361, 368 (9th Cir. 2012) (each determining that modification does not require unanticipated changes); *Meza v. Truman* (*In re* *Meza*), 467 F.3d 874 (5th Cir. 2006) (same); *Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000) (same); *In re* *Witkowski*, 16 F.3d 739 (7th Cir. 1994) (same); *Ledford v. Brown* (*In re* *Brown*), 219 B.R. 191 (B.A.P. 6th Cir. 1998) (same); *In re* *Than*, 215 B.R. 430 (B.A.P. 9th Cir. 1997) (same).

¹¹³ See *supra* note 19 and accompanying text (noting that *Ransom* never uses term “projected”).

¹¹⁴ *Hamilton v. Lanning*, 130 S. Ct. 2464, 2479 (2010) (Scalia, J., dissenting).

¹¹⁵ 11 U.S.C. § 1325(b)(2) (2006).

¹¹⁶ *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724–26 (2011).

“Applicable” expenses as of the petition date, included in the disposable income calculation, may change during the term of the bankruptcy plan. To determine applicability only as of the date of the bankruptcy petition would return to the formulaic, multiplier-based approach that the Court rejected in both *Lanning* and *Ransom* because it would take the situation as of that date and simply allow it to continue throughout the term of the plan unchanged.

Allowing modification of projected disposable income to account for substantially certain changes also addresses the concern of a debtor who paid for a car in full prepetition but needs to purchase a new automobile during the bankruptcy plan.¹¹⁷ If the need for a new car appears with a strong degree of certainty as of the confirmation date, payments on that new car fall within the virtually certain changes under the *Lanning* analysis.¹¹⁸ To the extent that no such certainty exists, modification of the chapter 13 plan to account for post confirmation changes in circumstances provides an alternative remedy.¹¹⁹

Courts also face another scenario where prepetition payments to a creditor will not be paid during the entire length of the repayment plan. While the scenario discussed above involves the termination of the contractual repayment term, debtors may also terminate payments during a chapter 13 bankruptcy by choosing to surrender collateral to the secured creditor. Prior to the *Lanning* and *Ransom* decisions, courts frequently held that debtors *could* deduct a payment to a secured creditor to reduce projected disposable income even if the creditor received nothing in the chapter 13 plan.¹²⁰ The Sixth Circuit Court

¹¹⁷ See Brief of National Association of Consumer Bankruptcy Attorneys as Amicus Curiae Supporting Petitioner, *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716 (2011) (No. 09-907), 2010 WL 2662747 at *25–26; Oral Argument at 10:06, *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716 (2011) (No. 09-907), at 35–37, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-907.pdf (discussion between Justice Elena Kagan and attorney Deanne E. Maynard for Respondent); David M. Serafin, *Ramifications of U.S. Supreme Court's Ransom Decision for Colorado Bankruptcy Filers*, DAVIDSERAFINLAW.COM (Feb. 4, 2011), <http://www.davidserafinlaw.com/lawyer-attorney-1711958.html> (arguing that most debtors who have paid for a car in full prepetition will need to purchase a new car during five-year plan, and those that are most harmed by the *Ransom* decision).

¹¹⁸ *Lanning*, 130 S. Ct. at 2478 (requiring substantial certainty of changes as of confirmation of plan).

¹¹⁹ 11 U.S.C. § 1329(a)(1) (2006).

¹²⁰ See, e.g., *Lynch v. Haenke (In re Lynch)*, 395 B.R. 346 (E.D. Mich. 2008) (allowing debtor deduction for mortgage payments despite intent to surrender property); *In re Burbank*, 401 B.R. 67 (Bankr. D.R.I. 2009) (same); *In re Marshall*, 407 B.R. 1 (Bankr. D. Mass. 2009) (allowing debtor full deduction for mortgage payments despite intent to strip junior mortgage lien); *In re Anderson*, 383 B.R. 699, 706 (Bankr. S.D. Ohio 2008), *abrogated by Lanning*, 130 S. Ct. at 2478, *as recognized in In re McDonald*, 437 B.R. 278, 291 n.14 (S.D. Ohio 2010) (allowing the deduction despite surrender of property is the majority rule); *In re Hayes*, 376 B.R. 55 (Bankr. D. Mass. 2007) (allowing the debtor to use a deduction for surrendered property because

of Appeals and the Tenth Circuit Bankruptcy Appellate Panel, each relying on *Lanning*, held that the virtual certainty that the debtor would not make mortgage payments after surrendering real property to the mortgage holder meant that the debtor could exclude such payments to reduce projected disposable income.¹²¹ Since the Ninth Circuit issued its decision in *Ransom*,¹²² which the Supreme Court subsequently affirmed, at least one bankruptcy court has denied mortgage expense deductions from projected disposable income for surrendered property.¹²³ Though this scenario differs from the termination of car payment cases because the debtor rids himself or herself of the expense *at confirmation of the plan* rather than at completion of the debt obligation, *Lanning's* focus on the change from the debtor's prepetition reality and postpetition reality suggests that debtors whose expenses change during the plan period should likewise reduce their projected disposable income to reflect that change.¹²⁴

2. Debtors Whose Standard Allowances Exceed Actual Expenses

The *Ransom* Court also expressly declined to address the issue of how to calculate a payment that falls below the allowance provided by the IRS standards:

The parties and the Solicitor General as *amicus curiae* dispute the proper deduction for a debtor who has expenses that are *lower* than the amounts listed in the Local Standards. *Ransom* argues that a debtor may claim the specified expense amount in full regardless of his out-of-pocket costs. . . . The Government concurs with this view, provided (as we require) that a debtor has *some* expense relating to the deduction. . . . FIA, relying on the IRS's practice, contends to the

payments to the creditor were not due until discharge of debt). *But see* Hildebrand v. Thomas (*In re* Thomas), 395 B.R. 914 (B.A.P. 6th Cir. 2008) (disallowing deduction for surrendered property); *In re* Long, 390 B.R. 581, 589–90 (Bankr. E.D. Tex. 2008) (denying debtor deduction for car payments once property was surrendered); *In re* Holmes, 395 B.R. 149 (Bankr. M.D. Fla. 2008) (disallowing deduction for lien-stripped property).

¹²¹ Darrohn v. Hildebrand (*In re* Darrohn), 615 F.3d 470, 476–77 (6th Cir. 2010); Zeman v. Liehr (*In re* Liehr), 439 B.R. 179, 184–86 (10th Cir. B.A.P. 2010); *see also* *In re* Blaies, 436 B.R. 35 (E.D. Mich. 2010) (denying debtor's use of mortgage expenses for a second lien stripping under a chapter 13 plan); DeHart v. Smith (*In re* Smith), 438 B.R. 69 (Bankr. M.D. Pa. 2010) (same); *In re* Grant, 423 B.R. 320 (Bankr. S.D. Cal. 2010) (same).

¹²² *Ransom v. MBNA, Am. Bank, N.A.* (*In re* *Ransom*), 577 F.3d 1026 (9th Cir. 2009), *aff'd sub nom. Ransom*, 131 S. Ct. at 723.

¹²³ *In re* Amidon, 423 B.R. 546 (Bankr. D. Idaho 2010).

¹²⁴ *See, e.g.,* Baud v. Carroll, 634 F.2d 327, 349 (6th Cir. 2011).

contrary that a debtor may claim only his actual expenditures in this circumstance. . . . We decline to resolve this issue. Because Ransom incurs no ownership expense at all, the car-ownership allowance is not applicable to him in the first instance. Ransom is therefore not entitled to a deduction under either approach.¹²⁵

Prior to *Lanning*, the majority of courts considering what to do when a debtor's actual expense fell below the standard allowance used the "allowance approach,"¹²⁶ which allowed the debtor to deduct the full amount of the expense in calculating projected disposable income.¹²⁷ Both the trustee and debtor supported such an interpretation of the Code. However, a minority of courts used the alternative "cap" approach,¹²⁸ allowing the debtor to use the lesser of either the allowance or the actual amount of the debtor's applicable expense in that category.¹²⁹ Taking the *Ransom* and *Lanning* cases together, a few clear principles emerge:

1. The starting point for determining projected disposable income involves the calculation of current monthly income based on the six-months preceding the petition date, reduced by the expenses permitted under § 707(b).
2. A debtor who does not incur any expense in a category may not deduct that expense.
3. Known or virtually certain changes from the calculation of disposable income under § 707(b) may be accounted for in projecting the disposable income for the term of the plan.¹³⁰

While *Ransom* did not address the issue, the allowance approach that permits a debtor to take the full standard deduction for the length of the plan highlights

¹²⁵ *Ransom*, 131 S. Ct. at 727 n.8.

¹²⁶ See *supra* Part III.C.

¹²⁷ HILLMAN & CROUCH, *supra* note 107, § 13:3.4; see, e.g., *Musselman v. eCast Settlement Corp.*, 394 B.R. 801 (E.D.N.C. 2008); *In re Pearl*, 394 B.R. 309 (Bankr. N.D.N.Y. 2008); *In re Egbert*, 384 B.R. 818 (Bankr. E.D. Ark. 2008); *In re Phillips*, 382 B.R. 153 (Bankr. D. Mass. 2008); *In re Briscoe*, 374 B.R. 1 (Bankr. D.D.C. 2007); *In re Morgan*, 374 B.R. 353 (Bankr. S.D. Fla. 2007); *In re Chamberlain*, 369 B.R. 519 (Bankr. D. Ariz. 2007); *In re Barrett*, 371 B.R. 855 (Bankr. S.D. Ill. 2007); *In re Swan*, 368 B.R. 12 (Bankr. N.D. Cal. 2007); *In re Haley*, 354 B.R. 340 (Bankr. D.N.H. 2006).

¹²⁸ See *supra* Part III.D.

¹²⁹ *In re Rezentes*, 368 B.R. 55 (Bankr. D. Haw. 2007); see also *In re Egbert*, 384 B.R. 818, 828 (Bankr. E.D. Ark. 2008) (citing only *In re Rezentes* for the cap approach, but noting that at least five other courts have used the allowance approach).

¹³⁰ See *supra* Part II.A.

potential tension between the *Lanning* and *Ransom* cases.¹³¹ The conflict arises because *Lanning* allows modification of the formulaic disposable income calculation to account for “virtually certain” changes to the debtor’s calculation.

The *Lanning* Court did not specifically address the definition of the term “changes,” and courts differ as to whether to limit *Lanning* to changes in the debtor’s financial situation from prepetition to postpetition, or to include changes that occur during the postpetition repayment period.¹³² Changes interpreted broadly could include any situation in which the debtor’s formulaic

¹³¹ While the *Lanning* and *Ransom* decisions at first glance seem to agree, because both reject a purely formulaic approach for calculating projected disposable income, there is potential inconsistency between the decisions:

the *Lanning* Court’s rejection of the inference drawn by mechanical approach proponents, that Congress sought to eliminate judicial discretion in the determination of a debtor’s projected disposable income, could produce outcomes at odds with *Ransom*. An exercise of discretion could arguably permit a bankruptcy court to allow an expense not incurred by a debtor if she could show a known or virtually certain, substantial change to her expenses, such as, e.g., a virtually certain need, during the plan period, to replace a high mileage, aging vehicle. . . . *Lanning* afforded the Court the opportunity to avoid the Scylla and Charybdis of either forcing a debtor to propose an unfeasible plan or permitting her to deny easily affordable repayments to creditors. In contrast, *Ransom* forced the Court to make a choice: either prohibit a “fictitious expense” that the debtor does not pay or deny creditors repayment on the strength of statutory language that eschews a debtor’s financial reality. It chose the former.

Gilbert B. Weisman & William A. McNeal, *Projected Disposable Income Captures the Attention of the Supreme Court—Twice!*, 4 NORTON BANKR. L. ADV. 1, Apr. 2011, at text accompanying notes 107–11, available at Westlaw, 2011 NO. 4 NRTN-BLA 1.

¹³² The *Scott* court applied changes narrowly, only considering modifications from prepetition to postpetition expenditures. *In re Scott*, 457 B.R. 740, 748 (Bankr. S.D. Ill. 2011). In *Miranda*, the court used the fact that the debtor received bonuses regularly—clearly not a change from pre- to post-petition—to establish the need to include the additional income. *In re Miranda*, 449 B.R. 182, 185, 190, 196 (Bankr. D.P.R. 2011). Similarly, debtors who happen to file a bankruptcy petition shortly after receiving an annual bonus might have an artificially high income, while debtors who happen to file a bankruptcy petition shortly before receiving an annual bonus might have an artificially low income. But the debtor’s pre- and postpetition situation has not changed substantially in that the debtor holds the same position at the same pay scale. *In re Reed*, 454 B.R. 790, 798 (Bankr. D. Oregon 2011) (“Because there is no change in [debtor’s] income, but only different calculations depending on what period of time is used, the trustee has not established a known or virtually certain change in [debtor’s] income that should be used to adjust debtors’ disposable income calculation”). Even *Lanning* did not involve a change for the debtor, but instead a reflection of the problem that arises as a result of a formulaic calculation of income. The debtor in *Lanning* did not change jobs, and her regular income did not change between pre- to postpetition. Rather, the calculated current monthly income failed to accurately reflect the income that she regularly received because it happened to include a one-time payment. *Hamilton v. Lanning*, 130 S. Ct. 2464, 2470 (2010). However, because the debtor’s one-time payment would clearly not recur in the future, the *Lanning* scenario presents more of a change than the *Miranda* scenario. See *supra* text accompanying notes 83–86.

calculation of disposable income does not reflect reality postpetition, or interpreted narrowly, could require that a debtor's income or expenses postpetition *differ* in any way from income or expenses prepetition. For example, if a debtor earns an annual bonus of \$10,000 in the six months prepetition, a narrow construction of changes would not allow the debtor to reduce the formulaic calculation of current monthly income because nothing would change for the debtor postpetition—the debtor received a salary plus \$10,000 annual bonus prepetition and a salary plus \$10,000 annual bonus postpetition. Under a broad construction of changes, the debtor could reduce current monthly income to reflect the reality that the debtor does not actually receive a \$10,000 bonus every six months as the calculation suggests.

3. *Combining the Allowance and Cap Approaches with Lanning's Change Analysis*

On the expense side of the projected disposable income equation, four possibilities exist for combining the allowance versus cap approach and the narrow versus broad interpretations of change:

1. the allowance-approach-plus-broad-interpretation combination: the debtor may take the full deduction for standard allowances and change is interpreted broadly to consider any deviation from the debtor's financial reality in calculating projected disposable income;
2. the allowance-approach-plus-narrow-interpretation combination: the debtor may take the full deduction for standard allowances and change is interpreted narrowly to consider only changes in debtor's postpetition financial reality from debtor's prepetition situation in calculating projected disposable income;
3. the cap-approach-plus-broad-interpretation combination: the debtor may use the lesser of the amount actually used in expenses or the standard allowance and change is interpreted broadly to consider any deviation from the debtor's financial reality in calculating projected disposable income; or
4. the cap-approach-plus-narrow-interpretation combination: the debtor may use the lesser of the amount actually used in expenses or the standard allowance, and change is interpreted narrowly to consider only changes in debtor's postpetition financial reality from debtor's prepetition situation in calculating projected disposable income.

The allowance-approach-plus-broad-interpretation fails in its application because, if the debtor is permitted to take the full deduction under the allowance approach, the fact that the debtor does not, in reality, need the full deduction does not matter. For example, if a debtor's automobile expense allowance is \$200 per month, but she only expends \$180 per month, the broad interpretation of change would recognize that the debtor's use does not match the allowance, but the allowance approach ignores that very fact.

The allowance plus-narrow-interpretation fares only slightly better than the allowance approach plus broad interpretation, but still creates a potential difficulty. On the one hand, the approach suggests that changes to the debtor's financial situation do not matter because the calculation of disposable income never considered the debtor's financial situation in the first place. Alternatively, taken to the extreme, the allowance-approach-plus-narrow-interpretation combination could mean that a debtor who historically incurred \$100 in monthly car expenses, but whose monthly allowance totaled \$500, could take the entire \$500 allowance for the life of the plan. However, if the debtor's monthly car expenses doubled postpetition, the *change* in debtor's circumstances would reduce the amount that the debtor could deduct to \$200 per month. Such an "anomaly"¹³³ but it creates an odd result that borders upon absurdity.¹³⁴ While *Lanning* did not expressly consider how changed expenses would modify projected disposable income, an allowance approach would necessarily defeat *Lanning*'s holding allowing virtually certain changes to modify projected disposable income as to standard deductions regardless of how courts interpret the term "change."

Conversely, either of the cap approaches to defining "change" works under *Lanning* because the cap approach starts with the debtor's actual financial situation. The only question becomes how to define "change" to modify that calculation—the same question that arises on the income side of the projected

¹³³ See *supra* text accompanying notes 105–07 (discussing *Ransom*'s description, in dicta, of the anomaly).

¹³⁴ And, while the cap approach might prevent some unusual results, the *Ransom* dicta noted that a "bright-line rule" might have some unfortunate consequences, such as allowing a debtor with just a few car payments to use the deduction throughout the bankruptcy case. *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 729 (2011). If the *Ransom* Court had favored a broad interpretation of change and thus permitted modifications of the standard allowances to reflect actual expenses, no such consequences would have existed because the debtor's actual use would limit the hypothetical debtor's car payment allowance.

disposable income equation.¹³⁵ Use of the cap approach also supports use of the step-up doctrine.¹³⁶ The step-up doctrine suggests that when a debtor's actual expense terminates, the debtor must increase the disposable income attributable to the repayment of creditors. At the time that an expense terminates, there is a cognizable postpetition change in the debtor's expenses that causes the expense to be zero—certainly less than the allowance amount. As a result, the cap approach also requires application of the step-up doctrine when the debtor no longer pays a certain expense.

The cap approach meets the stated purposes of BAPCPA¹³⁷ and avoids the odd result of capping expenses for some debtors who do not use the full allowance because of a postpetition change in circumstances, but allows the full expense for other debtors whose circumstances do not change postpetition. However, *Lanning* may apply only to changes that occur prepetition. For calculating current monthly income, the debtor's actual income serves as the starting point. Likewise, for those expenses that are not within the allowances,¹³⁸ the debtor's incurring of the expense becomes the starting point. The cap approach meets the stated purposes of BAPCPA¹³⁹ and avoids the odd result of capping expenses for some but not all debtors who do not use the full allowance in the event of narrowly defined changed circumstances. However, *Lanning* may apply only to changes that occur prepetition. For calculating current monthly income, the debtor's actual income serves as the starting point. Likewise, for those expenses that are not within the allowances¹⁴⁰ *Lanning* supports this interpretation, noting that "projected"—the term at the heart of the opinion—recognizes that historical calculations might not repeat themselves.¹⁴¹ When those calculations focus not on the debtor's historical income but upon IRS standards, no concern exists regarding whether the debtor's historical numbers remain unchanged. *Lanning* also focused on the

¹³⁵ Under either a narrow or broad interpretation of the term "changes," a debtor who incurs an actual expense that equals or exceeds the standard deduction, but whose expense will terminate during the period of the repayment plan could be required to step up the amount of disposable income once the expense disappeared. Not only does the continued deduction of the no longer applicable expense fail to reflect the debtor's true situation, but it also represents a difference from the debtor's prepetition situation.

¹³⁶ See *supra* Part III.F.1.

¹³⁷ See *Ransom*, 131 S. Ct. at 725; *Lanning*, 130 S. Ct. at 2472–74.

¹³⁸ For example, a debtor must actually incur private school tuition expenses to deduct that expense. 11 U.S.C. § 707(b)(2)(A)(IV) (2006).

¹³⁹ See *Ransom*, 131 S. Ct. at 725; *Lanning*, 130 S. Ct. at 2472–74.

¹⁴⁰ For example, a debtor must actually incur private school tuition expenses to deduct that expense. 11 U.S.C. § 707(b)(2)(A)(IV).

¹⁴¹ *Lanning*, 130 S. Ct. at 2467.

use of the formulaic calculation as simply a starting point and specifically noted that at least some expenses could be modified to reflect a more realistic situation.¹⁴²

Thus, the *Lanning* decision provides little, and potentially conflicting, guidance as to whether it applies to standard deductions; the *Ransom* decision's statement regarding the allowance approach is mere dicta and not binding. This leaves both the statutes and the two Supreme Court cases interpreting the statutes lending little guidance in the ultimate resolution on whether the cap or allowance approach applies for a debtor with an actual expense of less than the IRS standard allowance.

G. BAPCPA's Policy of Creditor Protection

The policy considerations of both the Code and BAPCPA weigh in favor of limiting the debtor's use of the standard allowance to the actual amounts needed and to the actual time period needed by the debtor.¹⁴³ The *Ransom* Court highlighted one clear policy of BAPCPA—maximization of creditor recovery—by determining that a debtor may not deduct any expense in a standard deduction category if the debtor does not actually incur an expense. Some commentators have suggested that the Court's emphasis on maximizing recovery for creditors signifies that, given the opportunity, the Supreme Court would choose the cap approach in dealing with under utilization of standard allowances.¹⁴⁴ Limiting deductions to the lesser of actual or standard expenses

¹⁴² *Id.* at 2475.

¹⁴³ Arguably, some debtors may need a new car in order to promote the fresh start. However, a debtor with a paid-in-full car needs a new car for the fresh start more than a debtor still making car payments when bankruptcy begins because the latter debtor likely owns a newer car than the former debtor. *See supra* note 117 and accompanying text. If the *Ransom* Court accepted that denial of the automobile expense deduction did not unduly impede the debtor's fresh start when the debtor completed car ownership payments before filing for bankruptcy protection, it should not unduly impede the debtor's fresh start to have the deduction terminate when the expense terminates postpetition.

¹⁴⁴ W. HOMER DRAKE ET AL., CHAPTER 13 PRACTICE & PROCEDURE, § 9F:34, 1258 (2011-2 ed., 2011) ("Although the *Ransom* Court expressly declined to decide whether the 'allowance with payment' or 'cap' interpretations governs when the debtor's payment is lower than the amount the Transportation Standard permits, its rationale provides support for adoption of the 'cap' approach, which limits the deduction to the actual amount of the debtor's payment.") (footnote omitted); Anne Benton Hucker, Note, *Do I Own This Car?: The Supreme Court Creates a Standard for BAPCPA Car Ownership*, 76 MO. L. REV. 1239, 1256 (2011) (concluding that courts will likely use *Ransom* and the IRS standards to limit debtors to actual use, while arguing that BAPCPA's poor drafting led to an incorrect decision). *But see* Davis-Smith, *supra* note 39, at text accompanying notes 52–57 ("the fact that the [*Ransom*] Court decided a case concerning the details of the

and requiring debtors to increase projected disposable income upon completion of expense payments would further the policy of maximizing creditor recovery because it would necessarily increase the disposable income available for the plan.

However, while these approaches serve to maximize creditor recovery, BAPCPA and the remainder of the Code offer countervailing policies that favor a debtor's use of the full standard allowance for the entire term of the bankruptcy plan, regardless of actual need. In particular, BAPCPA serves to minimize judicial discretion and provide certainty for both creditors and the debtor in determining the assets that will be available for distribution to creditors.¹⁴⁵ To some extent, these approaches involve the discretion of the court, albeit only to the extent that a trustee or creditor provides evidence that the debtor actually spends less than the allowance in the standards or that the debtor will not need the allowance for the life of the plan. But these approaches have only a minimal effect on the amount of judicial discretion—certainly no more than the ability to modify income that the Supreme Court allowed in *Lanning*. The Code also furthers the policy of protecting the debtor's fresh start. Neither the cap approach nor the step-up approach would harm the debtor's fresh start because neither prevents the debtor from taking the expense needed to effectuate that fresh start. If the debtor actually spends only \$300, the cap approach will reduce the expense to \$300, but that amount should suffice to further the debtor's fresh start. Likewise, if the debtor's actual expense ends one year into the plan, the step-up approach gives the debtor the benefit of having the allowance when the debtor actually needs it. In fact, the most significant harm to the fresh start would come to the debtor whose actual expenses exceed the allowance—but that limitation on the fresh start applies under any approach.¹⁴⁶ For example, if the debtor incurs an \$800 per month

statutory 'disposable income' formula suggests that the Court did not view *Lanning* as having replaced the statutory formula with an actual-ability-to-pay test.").

¹⁴⁵ *Musselman v. eCast Settlement Corp.*, 394 B.R. 801, 812 (E.D.N.C. 2008) ("in enacting BAPCPA, Congress had more than one policy goal in mind. Beyond ensuring greater payouts by Chapter 13 debtors to their creditors, Congress, in its amendments to § 1325(b), also sought to impose objective standards on Chapter 13 determinations, thereby removing a degree of judicial flexibility in bankruptcy proceedings").

¹⁴⁶ Courts uniformly forbid the debtor from including expenses in excess of the allowance amounts. *See In re Thiel*, 446 B.R. 434 (D. Idaho 2011) (denying chapter 13 debtors' request to exceed allowed transportation expenses, and rejecting argument that *Lanning* and *Ransom* allow such modification); *In re Prestwood*, 451 B.R. 180 (Bankr. N.D. Fla. 2011) (denying chapter 13 debtors' request to exceed allowed expenses). Even though the *Lanning* Court refers to modifications to projected disposable income based upon "virtually certain information about the debtor's future income *or expenses*." Frost, *supra* note 47, at text accompanying note 31 (quoting *Lanning*, 130 S. Ct. at 2475) (emphasis added). Thus, the cap approach lacks consistency because it

automobile ownership expense, but a standard allowance of only \$500, all approaches limit the debtor to the \$500 expense in calculating projected disposable income. Thus, neither the cap nor the step-up approaches diminish the debtor's ability to enjoy a fresh start.

CONCLUSION: RECONCILING STATUTORY LANGUAGE, PRECEDENT, AND POLICY

Reconciling statutory interpretation, precedent, and policy in determining a debtor's ability to deduct expenses in calculating projected disposable income presents difficulties to bankruptcy courts. An approach that limits the debtor's use of standard allowances to the debtor's actual need and terminates the use of standard allowances upon full payment of relevant debt furthers the policy objective of maximizing creditor recovery. The cap and step-up approaches follow *Lanning* by allowing modifications of expenses when the disposable income formula fails to reflect the debtor's postpetition reality. The allowance approach follows the canons of statutory construction and *Ransom's* interpretation of the term "applicable." The allowance approach allows modifications to the disposable income formula only in cases with an actual change to the debtor's circumstances pre- and postpetition that serve as the basis for the calculation of projected disposable income

Ultimately, the statutory language and Supreme Court precedents fail to provide clear guidance on the "cap" versus "allowance" approach for debtors who use less than the standard allowance amounts. *Lanning* and *Ransom* do suggest that the step-up approach should apply when payments terminate during the plan period. For the cap versus allowance approach debate, policy favors the cap approach because it maximizes recovery for the creditors without unduly impacting the debtor's fresh start. Together, the cap and step-up approaches create an "actual use" approach that furthers policy and reconciles the Supreme Court precedents regarding the calculation of projected disposable income.

allows a creditor or trustee to decrease deductions to reflect reality, but fails to allow the debtor to increase deductions to reflect reality.