B22A / B22C

INSTRUCTIONS
FOR PROPER COMPLETION
OF THE MEANS TEST FORMS

or

THE 150 MOST COMMON MISTAKES

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The short list:

1. **Include all income from every source, except social security benefits.**

2. **Don't take expenses you are not entitled to.**

3. **Take every expense you are entitled to. Don't stop deducting expenses as soon as you get to "The presumption does not arise." If the means test shows $50 in disposable income and you made a $300 mistake, you have a problem. If the means test shows negative $400 in disposable income and you made a $300 mistake, your debtor still qualifies for Chapter 7 or has no disposable income [at least on B22C] for Chapter 13.**

4. **If the expense amount is a National Standard or Local Standard amount (Lines 19 through 24), fill in the correct, published amount. You don't get to "adjust" those numbers. Period. To find/link to the National Standards or Local Standards, go to www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.**

5. **If the expense is an "other necessary expense" (Lines 30 through 44), fill in the actual, allowable amount. (Just because it is allowable, it does not mean you get it if it is not actual. Just because it is actual, it does not mean you get it if it is not allowable.)**

6. **Don't double dip.**

7. **Be prepared to document everything, especially any expense that falls outside of the National or Local Standards.**

8. **Read the IRS collection guidelines. (It is actually called the "Financial Analysis Handbook.") They are available at www.irs.gov/irm/part5/ch15s01.html.**

   Be aware that the UST interpretation of the standards is, in many cases, **more generous** than the IRS interpretation. For instance, the IRS guidelines with respect to vehicle payments states: "When determining the allowable amounts, allow the full *ownership* standard amount, or the amount actually claimed and *verified* by the taxpayer, whichever is less. Allow the full *operating* standard amount, or the amount actually claimed by the taxpayer, whichever is less." [Emphasis in original.] Internal Revenue Service, Financial Analysis Handbook, Sec. 5.15.1.9. The UST allows the actual car payments reamortized or the guideline amount whichever is more, and allows the guideline amount for operating expense even if the debtor(s)' actual operating expense is less.

B22A - CHAPTER 7

The box at the top of the first page.

There are three choices:

- The presumption arises.
- The presumption does not arise.
- The presumption is temporarily inapplicable.

- This is pretty simple. The answer for which box to check comes from Lines 52 or 55 for the first two choices and from Line 1C for the third choice.

- Check the correct box. There is no room for "interpretation" or argument. It is what it is. If there is an argument for why the means test does not accurately reflect the debtor's financial situation (i.e., loss of income), that is the proper subject of an affidavit of special circumstances.

Line 1A - Veterans Declaration

- If the debtor is a disabled veteran whose debts were incurred primarily during a period while on active duty or while performing a homeland defense activity, the means test does not apply. This is about the dumbest thing I have seen on a government form. It doesn't apply if the debtor is just a disabled vet - his/her debts had to have been incurred while on active duty. So if the debtor ran up his/her credit cards at all of the Bagdad nightclubs or hitting the shopping scene in Mosul, 707(b)(2) doesn't apply. [But 707(b)(3) might.] (The way this works in real life is one spouse is away in Iraq and the other spouse is running up debt on joint credit cards while he/she is away to supplement household income.)

Line 1B - Declaration of non-consumer debts

- **This is THE significant exception. If the debtors debts are primarily non-consumer, 707(b)(2) <u>does not apply</u>. "Consumer debt" is ANY debt "incurred by an individual primarily for personal, family or household purposes." Section 101(8).**

- Remember to include the **secured** consumer debts (house note, car notes, etc) when you are adding up the consumer debt - it is not limited to Schedule F. In many small business proprietorship cases, you may be inclined to think it will be a "business" case, but the house note will make it a consumer case.

- **Taxes** owed to the IRS or state taxing agencies are non-consumer debts.

- **Guarantees** of business debts are non-consumer debts.

- If there is or was a business, ask. Credit card debt incurred to buy inventory or cash advances which were deposited into a business are non-consumer debt, even if the credit card is in the debtor's individual name.

- If the debtor is self-employed in construction, ask. The big truck he bought to haul around construction materials is probably non-consumer. (The test is whether the debt was "incurred....for" consumer or non-consumer purposes.)

- Don't forget **leases**. I have had several cases where the debtor signed or guaranteed a business lease that had many years left to run. Add it up - the debtor is on the hook for the whole thing. In lots of cases the lease all by itself makes it a non-consumer case.

- Whether **student loans** are consumer debt or not is unresolved under BAPCPA, but the answer can probably be found in pre-BAPCPA cases which have held that to the extent the loans were used to pay for actual education expenses, they are **not** consumer debts, but if the debtor used the loans for living expenses (food, rent, utilities, etc.), they are consumer debts. See, e.g., In re Stewart, 175 F.3d 796 (10th Cir.1999).

Line 1C - Reservists and National Guard Members

- If the debtor was a reservist or national guard member called for active duty or homeland defense activity and was on active duty for at least 90 days, then they are excluded from the means test for that 90 day period plus 540 days thereafter. (There is an exception to the exception. If the exclusion expires prior to the deadline to file a motion to dismiss due to the means test presumption, the debtor has to file the means test within 14 days after the exclusion ends.)

Line 2 - Marital/filing status

- You have four choices and **only four choices**:

  1. Unmarried.

     - This is **not currently married**. "Separated" is married. "Ugly divorce pending" is married.

     - Watch out for common law marriages. The standard in Texas is not real high and I get a lot of couples who live together and call each other "my spouse", but they don't think they are married. (Check the filing status on their tax returns.)

  2. Married, not filing jointly, with declaration of separate households.

    - Read the declaration. It says: "My spouse and I are legally separated under applicable non-bankruptcy law or my spouse and I are living apart **other that for the purpose of evading the requirements of Sec. 707(b)(2)(A)** of the Bankruptcy Code."

3. Married, not filing jointly, without declaration of separate households.

    - This is the case where the debtor is married and not separated, and the spouse has chosen not to file or is ineligible to file.

4. Married, filing jointly.

    - See comment on common law marriage above.

- The distinction between these four filing statuses is that for the first two you complete only column A ("Debtor's Income") for Lines 3 - 11, and for the last two you complete both column A and column B ("Spouse's Income") for Lines 3 -11.

Line 3 - Gross wages, salary, tips, bonuses, overtime, commissions.

- It is what it says. **Gross wages, before any deductions.**

- Debtors tend to focus on wages and salary and forget about bonuses and commissions. Enter everything straight from the pay stubs - not from what the client says the pay stubs say. Debtors will tell you that their pay stubs are always the same when they are not. (Close isn't the same as the same.)

- Don't forget to include income from part time jobs.

- In January through June, ask about Christmas bonuses. (Dell pays end of year bonuses in late March) For some reason, clients don't think this is income so they tend to leave it out and for some employers it does not show up on the pay stub under year to date income because it is paid from a separate account.

- Compare the year to date on the pay stubs to the amount of the check. If the year to date is higher, look for bonuses. If the year to date is lower, ask if there was a change, i.e. no more overtime.

- **Both the UST and the Chapter 13 Trustee say that income not matching the supporting documents (i.e., pay stubs) is one of the most common errors.**

Line 4 - Income from the operation of a business, profession or farm.

- List gross income **and actual** expenses. The fact that the debtor "doesn't really make anything" does not excuse you from the exercise.

- The net can never be less than zero.

- Operating expenses must be reasonable. (No strip clubs for "client entertainment.")

- Make sure the debtor is **not** including a draw for him/herself under "wages" or "contract labor." Paying yourself is income, not an expense. (I routinely have clients provide me with profit and loss statements which show $3,500 per month net income, but included in the $20,000 per month for "wages" is an owner draw of an additional $3,000 per month.) **This is a common error for self employed persons, both proprietorships and corporations.**

- Depreciation is **not** an expense.

- The UST notes an issue on **projected or budgeted expenses versus actual**, historical expenses. The means test is backward looking, not forward looking. If you are arguing that there is a change of circumstances, that is properly the subject of an affidavit of special circumstances, not an adjustment to the means test.

- **Avoid the double dip.** If there is a vehicle used in a business and you deduct the note and the operating expense here, you don't get the same vehicle on Line 23 or Line 42.

Line 5 - Rent and other real property income.

- **List gross rent then deduct** for the mortgage, taxes, insurance, etc. The fact that the property does not cash flow does not excuse you from the exercise.

- The net can never be less than zero.

- Depreciation is **not** an expense.

- **Debt service on secured debt on rental property goes here, not on Line 42.**

- **Avoid the double dip.** Do not subtract the mortgage payment here **and** on Line 42.

Line 6 - Interest, dividends, and royalties.

- Look at tax returns.

- It is the US Trustee's position that dividends in an automatic reinvestment program are still income.

Line 7 - Pension and retirement income.

- This includes retirement income from **any** source..

- This includes withdrawals from IRAs.

  - There is case law developing on this issue to the contrary. See,e.g., In re Wayman, 351 B.R. 808 (Bankr.E.D.Tex.2006). Judge Parker concludes that distributions from an IRA reflect income earner from an earlier period, notwithstanding that the funds were distributed during the six month loon back period. Because the distributions were not "income" received during the six months prior to filing, they are excluded from the means test.

- Look at tax returns and bank statements.

- **Social Security is NOT retirement income.**

Line 8 - Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.

- The issue here is what is **"regular."** Annually can be regular if it happens every year. I filed a case for a guy whose only income was an annual annuity payment of approximately $30,000, but he got the same amount once a year, every year. Sounds regular to me.

- "Help" from parents is common. We see lots of cases where the debtor's parents pay a car payment or a student loan payment or daycare. Although the parent may pay the bill directly to the creditor, it is still an amount contributed to the household expenses of the debtor or a dependent of the debtor.

- "Help" from kids is common. We see cases where one or more kids are helping mom make her house payment or paying her utilities.

- "Help" is only regular if it is regular. I filed a case for a guy who had a medical crisis and couldn't work for a few months. A bunch of his friends got together and chipped in about $5,000 to help him cover his living expenses. One time deal. Not "regular" in my opinion.

- Look at bank statements. If there are "regular" deposits that aren't pay checks, ask.

- Rent or other contributions from roommates are included. (Although this **may** change household size.)

- **Unmarried couples living together. These are as yet uncharted waters**. The problem here

is allocation of amounts paid. If the debtor pays the house note and the significant other pays the utilities, how much is listed here for the significant other's contribution? This is a very fact specific analysis and must be considered under the totality of the circumstances.

Line 9 - Unemployment compensation.

- If the debtor has started a new job in the last six months, ask. (I used to tell lawyers to look at the client's bank statements. Now Texas has a card like a credit card they load for you, so it would not show up on bank statements.)

- It is the US Trustee's position that unemployment benefits are **not** benefits under the Social Security Act. (I don't know, I'm just reporting.) I have filed several cases where there was a presumption of abuse based on a job that did not exist anymore and that income had been replaced by (lower) unemployment benefits. In those cases, we file an affidavit of special circumstances and the UST is usually satisfied. [They may track the debtor's employment status up to the 707(b)(3) deadline.]

Line 10 - Income from all other sources.

- This includes income from **all** other sources. (Except social security benefits.) Whether it is taxable or not for IRS purposes is not determinative. I have had several clients who are receiving annuity payments as a result of a personal injury settlement. The payments are not taxable, but they are income for the purposes of the means test.

  - See <u>In re Blausey</u>, 552 F.3d 1124 (9th Cir. 2009), which holds that private disability payments constitute "income" under 101(10A) which defines income to include income form any source "without regard to whether such income is taxable income." The court also notes that 101(10A) does exclude Social Security benefits and if Congress had meant to exclude other income sources, they could/have would/have said so.

  - See <u>In re Redmond</u>, 2008 WL 1752133 (Bankr.S.D.Tex.2008) which concludes (with minimal analysis) that VA disability payments are included in projected disposable income. (I'm not criticizing the court's conclusion, I just wanted a little more analysis. I think the answer is correct.)

- Social Security benefits are not income. See <u>In re Barfknecht</u>, 378 b.R. 154 (Bankr.W,D.Tex. 2007). See 101(10B).

- Child support. Make sure the client is actually receiving support. (Watch this on Schedule I, also.) If the debtor lists $30,000 in past due child support, that is a clue they are not actually receiving it.

- Foster care payments. According to the Texas Comptroller's website, **at least** 1/3 of foster

care payments are benefits under the Social Security Act. (I have not researched the issue specifically, but when I was looking at the foster care issue I saw something that seemed to indicate the same thing was true for adoption subsidy payments.)

- Look at the client's tax returns and bank statements for other sources of income not in one of the specified sources, i.e., stock sales. Ask. (I have had lots of cases where the debtor was day trading and had lots of stock sales on prior tax returns, but they stopped because it didn't work out so well, but don't assume.)

- Proceeds of asset sales **are** income. They will typically, however, be non-recurring so they may typically be excluded under an affidavit of special circumstances. (Technically, the "gain" is income under the IRC, not the net proceeds, but that is a fight for another day.)

- Tax refunds are **not** income.

- Loan proceeds are **not** income.

Line 11 - Subtotal of Current Monthly Income for Section 707(b)(7).

- Do the math.

Line 12 - Total Current Monthly Income for Section 707(b)(7).

- Do the math.

Line 13 - Annualized Current Monthly Income for 707(b)(7).

- Do the math.

Line 14 - Applicable median family income.

- If you use one of the major software programs, you have to fill in two spaces and it enters the correct amount for you. If you have to look up the median family income, go to www.usdoj.gov/ust and click on the box for "IRS Data Updated."

  - Debtor's state of residence.

  - **Debtor's household size. Both the UST and the Chapter 13 Trustee say using the wrong household size is one of the most common errors they see.**

- The issue here is what is "household size?" When BAPCPA first went into effect, the UST articulated a strict "if they aren't claimed as a dependent on the tax return, they are not a dependent for the purposes of the means test" approach, but they have since modified that stance to a more lenient (and realistic) "single economic unit" approach. The one I see all

the time is the debtor's fiancé/girlfriend and her child from a previous marriage live with him and his income is necessary for their living expenses. Are they members of his "household?" The UST generally seems to be willing to concede that they are. (I once had a person form the UST's office describe the test to me as: "Are they doing the nasty?")

The parameters of the single economic unit approach are still not clear. Most of the cases which applied this test were 523(a)(15) cases under pre-BAPCPA law. In most of those cases, the court looked to the extent of the relationship of the debtor and (usually) his live-in companion. The two primary factors considered were the length of time the individuals had lived together and whether (really to what extent) they had commingled their financial affairs. See, e.e., In re Short, 232 F.3d 1018 (9th Cir. 2000), In re Crosswhite, 148 F.3d 879 (10th Cir. 1998) and Hunt v. N.H. Higher Ed. Assistance Foundation, 1999 WL 813929 (D.N.H.1999) [A 523(a)(8) case.]

- **A common issue is how to account for children after a divorce.** The US Trustee is actually fairly understanding on this issue. Although the debtor may not "have custody," they understand that if the debtor is a single father and he has two daughters, he has to have a two bedroom apartment so he can exercise his visitation. (And he has to feed the kids while he has them, and......) There is no clear line here. This is one of those issues they look at to see if the amounts claimed are excessive. I have had a few cases where the debtor is a divorced father who has part time custody of two kids and I filed the case claiming a household of two and the UST did not argue the issue.
- The US Trustee has a position on state of residence, although I have never had this be an issue for means test purposes.

    - State of residence is the state of residence at the time of filing. (Is there am alternative position? "I'm thinking about moving to Connecticut, so I get to use their median family income." I don't see a debtor getting very far with that one.)

    - In a joint case where the debtors file together but have two separate households, residence is where the most family members reside.

    - In a joint case if no plurality of family members are in any one state, you use the state of the spouse with the highest income. (I'm not sure I agree, but until I get one of these cases, I'm not sure I care.)

Line 15 - Application of Section 707(b)(7).

- Check a box. If you check the first one, check the box for "The presumption does not apply" at the top of the first page and you are done with the form. If you check the second box, finish the rest of the form.

Line 16 - Enter the amount from Line 12.

- Enter the amount form Line 12.

Line 17 - Marital adjustment.

- The instructions for Line 17 say: "If you checked the box at Line 2.c, enter on line 17 the total of any income listed in Line 11, Column B that was NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents. Specify in the lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page. If you did not check box at Line 2.c, enter zero." [Line 2.c is "Married, not filing jointly, without the declaration of separate households set out in Line 2.b above."]

- **Both the UST and the Chapter 13 Trustee say that taking adjustments with no factual and/or legal basis is one of the most common errors.**

- Start with the obvious. Take the spouse's pay checks and itemize amounts which are deducted from the spouse's gross income, such as:

  Taxes
  - Withholding
  - Social Security
  - Medicare
  - State income tax (if applicable)

  Insurance
  - Medical
  - Dental
  - Vision
  - Life
  - Disability
  - Prepaid legal

  Retirement
  - Mandatory (for public employees)
  - 401(k) and similar plans
  - 401(k) loans

  Miscellaneous
  - Child support
  - Cafeteria plans (health savings accounts, dependent care accounts)
  - Parking

Gym
Union dues
Uniforms
Charity
Loans from employer

Be careful with cafeteria plan deductions (health savings accounts and dependent care savings accounts) as these amounts will typically be contributed toward the household expenses of the debtor or a dependent. This is an easy double or triple dip. Line 19B gives you the National Standard for out of pocket health care costs. Line 31 gives you out of pocket health care in excess of the National Standard. (Be prepared to document.) If the debtor has a health savings account (Line 34.c.), you would normally deduct the payroll deduction for that amount from Line 31. Dependant care expenses (daycare, after school care) are listed on Line 30. If you deduct a dependant care account from the pay stub, don't double dip on Line 30.

- Next, go the spouse's credit report. (The US Trustee will ask you to prove the amount of any debt payments which you are excluding from the spouse's income and this will have all of it in one place.)
  - Deduct any payments for secured installment debt (ie, car, boat, motorcycles, jet skis) which are **not** going to be listed on Line 42, payments on secured debt. (They do **not** go on Line 42 if the filing spouse is **not** liable for the debt.)
  - Deduct any payments for other installment debt (ie, student loans, installment agreements with the IRS).
  - Deduct at least the minimum monthly payments on revolving debt. If the spouse makes more than the minimum payments and you can document this from the monthly statements, use the higher amount.

Be careful with the spouse's credit card debt as some of the expenses charged on the cards may be "amounts regularly contributed to the household expenses of the debtor or the debtor's dependents." There may also be payments on secured debt that fit in this category, i.e., the car (and car loan) in the non-filing spouse's name only, but that is driven by the filing spouse. That sounds like it should be included in income as amounts regularly contributed to the household expenses of the debtor, but the filing spouse should **either** get the vehicle ownership expense deduction for the car payment on Line 42 and the vehicle operating expense deduction on Line 22 **or** should get to take that amount back out on Line 17. (You don't include the income if you don't include the expense.)

It is the US Trustee's position that debt payments may only be excluded from income if **only** the non-filing spouse is liable for those debts. I disagree. If both spouse's are liable, the non-filing spouse is still liable regardless of the debtor's bankruptcy. **Don't double dip**. If the debtor and spouse are liable for a car payment, don't list it on Line 42 **and** as a marital adjustment.

- Ask questions. I get a lot of cases where there are past due amounts owed to the IRS but no formal repayment plan and the spouse is sending in $200 per month. I get a lot of cases where child support is being paid without a court order. I see quite a few cases where there is a probation fee for DWI or bad checks.

Remember, the issue is "any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent)." Sec. 101(10B). Our local US Trustee's office frequently opines that certain expenses of the non-filing spouse are "not allowed" based upon what expenses are allowed ***for a debtor***. Its not the same. Congress says so. In my office we call this the "crack and hookers" deduction. (That was the most offensive thing I could come up with.) 101(10B) says you only include the non-filing spouse's income to the extent it is regularly contributed to the household expenses of the debtor or a dependent of the debtor. If the non-filing spouse spends his disposable income on crack and hookers it is not contributed to the debtor's household expenses.

I tried a 707(b)(3) with the US Trustee's office on the non-filing spouse issue and cited Judge Gargotta to several cases, including In re Baldino, 369 B.R. 858 (Bankr.M.D.Pa.2007). Judge Gargotta did not write an opinion but made a lengthy announcement on the record and stated that he thought Baldino reached the correct result.

See In re Charles, 375 B.R. 338 (Bankr.E.D.Tex.2007) for one of the leading Texas cases for analysis of disposable income and the non-filing spouse.

Line 18 - Current Monthly Income for Section 707(b)(2).

- Do the math.

Line 19A - National Standards: food, clothing and other items.

- These are the National Standards. Just plug in the numbers. They are available at www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.

- School lunches are included. There is no separate expense for this item.

- Meals away from home are included, unless they are un-reimbursed business expenses.

Line 19B - National Standards: health care.

- These are the National Standards. Just plug in the numbers. They are available at www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.

- You do have to know how old the family members are. If the debtors have a parent living with them, make sure to confirm how old they are. (They get a higher amount for persons 65

or over.)

Line 20A - Local Standards: housing and utilities; non-mortgage expenses.

- These are the Local Standards. Just plug in the numbers. They are available at www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.

- This includes maintenance and repairs. There is no separate expense for this item. See IRS Financial Analysis Handbook Sec. 5.15.1.9.1.A.

- Utilities includes home telephone **and** cell phones. See IRS Financial Analysis Handbook Sec. 5.15.1.9.1.A.

- Utilities include "gas, electricity, water, heating oil, bottled gas, trash and garbage collection, septic cleaning, telephone and cell phone." (Firewood is not on the list, so it is apparently a separate item.) See In re Oltgen, 2007 WL 2329695 (Bankr.W.D.Tex.2007). This is fact specific. Read it for what it is worth.

Line 20B - Local Standards: housing and utilities; mortgage/rent expense.

- These are the Local Standards. Just plug in the numbers. They are available at www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.

- See Line 42.

- If the total homeowners expense from Line 42 is **less** than the IRS standards, enter the difference here and the actual expenses(s) on Line 42. If the total from Line 42 is **more** than the IRS standard, enter zero here.

- Don't double dip. You get the greater of the actual mortgage expense on Line 42 or the IRS housing allowance, but you don't get both. See, In re Hardacre, 338 B.R. 718 (Bankr.H.D.Tex.2006)

- If the debtors are going to surrender the house, they get the IRS allowance, **not** the mortgage expense that would go on Line 42.

- It is the US Trustee's position that this includes HOA or condo owners association dues. (They are wrong.)

- The debtors are only allowed one household expense, even if they are separated and a divorce is pending. (This is not to say that they might not qualify separately, just that if they file together, they only get one set of household expenses.)

- It is the US Trustee's position that a debtor does not get a housing expense if they have been

living with a friend or relative for an "extended period." I assume this is where a debtor is not paying any rent to that friend or relative. If they are paying rent, they ought to be entitled to a housing expense.

- We occasionally see cases where one of the debtors is living away from the family residence for employment purposes. I have had cases where the US Trustee allowed a second housing expense essentially as a business expense, but it has to be a really cheap apartment.

- It is the US Trustee's position that you don't get expenses for a vacation home on this line. You do get it on Line 42, but it may be grounds for a 707(b)(3) motion.

Line 21 - Local standards: housing and utility adjustment.

- This is kind of odd. It says: "If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you contend you are entitled, and state the basis for your contention...." Assuming you entered the correct numbers, it does, by definition, compute the amount to which you are entitled. I'm not sure how this would ever come up. (A Westlaw search does not find any reported cases.)

- What is the interplay between this line and Lines 20A and 37?

- The US Trustee notes that they see cases where debtors try to claim expenses in excess of the standards with no explanation why. You will get pointed questions, if not a motion to dismiss.

Line 22A - Local Standards: transportation; vehicle operation/public transportation expense.

- Check the box for how many vehicles the debtor operates. There are three choices and **only three choices**: "0", "1", and "2 or more." Three or seven are not options. It does not matter that the debtors have three teenagers at home or an adult child off in college driving one of their cars.

- If the debtor does not operate a car, they get an allowance for public transportation. Enter the Local Standard. I have had blind clients who get this expense. Occasionally, I get a client who does not have a car and rides a bicycle or a bus to get everywhere.

- If you check "1", enter the Local Standard for one vehicle. If you check "2 or more", enter the Local Standard for two vehicles. They are available at www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm.

- Make sure that this line and B.25 on the schedules match. If you try to claim two here, but there is only one car on B.25, you will have some explaining to do. We see cases where the debtor borrows a car from mom and dad on a more or less permanent basis and pays all of the

operating costs associated with that vehicle. The debtor is allowed an operating expense for that vehicle, even though he has no ownership interest in the vehicle.(The car should be disclosed on SOFA #14.)

- If the debtor owns a car **free and clear which is six model years old and/or has 75,000 miles on it, they are entitled to an additional operating expense of $200.** If they own two such vehicles, they are entitled to an additional operating expense of $200 **for each vehicle**. If they have more than two, they never get more than $400. **Taking the additional operating expense for an older vehicle when it is not paid for is a common error.**

- As a general rule, if the household only has one driver, there is only one vehicle operating expense. See IRS Financial Analysis Handbook Sec. 5.15.1.9.1.B. There might be exceptions, but they will be few and very fact specific.

- Vehicles which are not operational do not qualify for this expense. (You have to actually "operate" the vehicle to get the vehicle "operating" expense.)

- See <u>In re Oliver</u>, 350 B.R. 294 (Bankr.W.D.Tex.2006) in which Judge Monroe held that additional vehicle operating expense was allowed as a necessary expense for the debtor's employment as a "special circumstance".

Line 22B - Local Standards: transportation; additional public transportation expense.

- If the debtor operates a vehicle **and** uses public transportation, they get a reduced public transportation expense in addition to their vehicle operating expense. (This is the person who rides the bus to work everyday, but still has a car.) See IRS Financial Analysis Handbook Sec. 5.15.1.9.1.B.

Line 23 - Local Standards: transportation ownership/lease expense; Vehicle 1.

- Check the box for how many vehicles the debtor has a payment for, whether financed or leased. The choices are "1" and "2 or more."

- Enter the IRS Local Standard for a car ownership expense.
  Enter the average monthly payment for Vehicle 1 from Line 42.
  Subtract. If the amount from Line 42 is less than the Local Standard, enter the difference. If the amount from Line 42 is more than the Local Standard, enter zero.

  - See <u>In re Owsley</u>, 384 B.R. 739 (Bankr.N.D.Tex. 2008) for the proposition that a debtor in a Chapter 13 gets the higher of the actual expense reamortized over 60 months or the IRS ownership allowance, even if the IRS allowance exceeded the amounts actually spent.

- This is an issue which has seen a major change in the Fifth Circuit recently. On June 10,

2009, the Fifth Circuit issued an opinion in In re Tate, 2009 WL 1608890, (5th Cir. 2009). In that case, the court concluded that under the plain language of the statute, **a debtor is entitled to a vehicle ownership expense, even if the debtor's vehicle is owned free and clear of liens**. There are several Texas cases which held that a debtor does not get a vehicle ownership expense if the vehicle is paid for, but I did not cite these cases as they have been overruled by Tate. (See,e.g., Hardacre.)

- See also, In re Ross-Tousey, 549 F.3d 1148 (7th Cir. 2008) and In re Pearson, 390 B.R. 706 (10th Cir. BAP 2008), both of which hold that a debtor who owns a vehicle free and clear **does** get a vehicle ownership expense. There are also several district court opinions, most of which reach that conclusion.

- Borrowing a car without making payments does not qualify for an ownership expense.

- **Avoid the double dip.** If you take the actual car payment on Line 42, you only get the **difference**, if any, on Line 23, **not** the IRS auto ownership allowance on Line 23 **and** the car payment on Line 42. See In re Hardacre, 338 B.R. 718 (Bankr.N.D.Tex.2006).

- If the debtor is not obligated on the debt, the debtor does not get an ownership expense. See In re Aprea, 368 B.R. 558 (Bankr.E.D.Tex.2007).

- If the care is being surrendered, see Line 42.

Line 24 - Local Standards: transportation ownership/lease expense; Vehicle 2

- See Line 23.

- As a general rule, if the household only has one driver, there is only one vehicle ownership expense. allowed.

Line 25 - Other Necessary Expenses: taxes.

- **Watch for over-withholding**. If the debtor gets a $5000 tax refund every year, then his/her/their tax withholding does not represent their real tax liability. If the debtor gets a $5000 tax refund every year, adjust the withholding number down to compensate.

- **Both the UST and the Chapter 13 Trustee say this is one of the most common errors they see** so they look for it every time (and you will get busted.) The tax tables are available on the IRS website.

- The Chapter 13 Trustee says that **under-withholding** is fairly common, also. This is obviously a bigger issue for them because of plan feasibility issues. (If the debtor is under-withholding, there is going to be a 1305(a) claim to deal with at some point.)

- We see a lot of clients whose property taxes are not escrowed so they over-withhold as a kind of savings account to pay their taxes. I understand what they are doing, but it does not give them a higher number here. The property tax liability goes on Line 42.

- Watch for large changes in income. If the debtor was making $3000 per month and withholding $510 (17%) but just started a new job making $5000 per month, $510 per month will be too low..

- I have had a few odd cases where the UST contended that the debtor was over-withholding based on standard percentages, but the debtor never gets a refund. I don't know what the problem was, but don't just assume the UST is right. Look at prior tax refunds and the tax tables.

Line 26 - Other Necessary Expenses: involuntary deductions for employment.

- Only **mandatory** payroll deductions are allowed. ("Automatic" is not necessarily mandatory.)

- 401(k) contributions are **not** mandatory.

- 401(k) loan repayments are **not** mandatory. (Except in Chapter 13.)

- Common allowable mandatory deductions include:

    - Retirement for state, county, and municipal government employees.

    - Union dues.

    - Uniforms.

    - Parking.

- This does not include United Way or other charitable contributions from wages. (These are allowed on Line 40, not here.)

Line 27 - Other Necessary Expenses: life insurance.

- This is term life for the debtor and joint debtor, if any.

- **Term only**, no whole or universal life. Taking a deduction for whole life is apparently a fairly common error.

- No insurance for kids. (See Line 17 for non-filing spouses.)

-

Line 28 - Other Necessary Expenses: court-ordered payments.

- Read the divorce decree. Typically, there will be an order to pay a set amount per month for support **and** a requirement to provide health insurance. It is not uncommon for the decree to also order payment of one-half of out of pocket medical expenses and/or some amount for summer camps. I had a case where the debtor was required to pay into a 529 college fund.

- Look at probation fees, fines, etc.

- Does the debtor get this expense if he/she is not actually paying it? The form says "required to pay", it doesn't say anything about paying.

- Child support arrears go on Line 44, not here.

- This is only court ordered payments. I have had cases where the debtor was separated and paying child support without a court order and we deducted that amount as a special circumstances. (Make sure the amount being paid is roughly the amount required under the Texas Family Code.)

Line 29 - Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

- Education expenses which are **required as a condition of employment** are deductible, i.e., CLE requirements not paid for by an employer are deductible.

- Education expenses for a physically or mentally challenged child for "whom no public education providing similar services is available." Is additional education expense available for a child who is ADHD? What are the limits?

- Don't double dip. Education expenses for a challenged child are not allowed here if already accounted for on Line 30 or Line 38.

Line 30 - Other Necessary Expenses: childcare.

- Look at how old the kids are. Look for after school care and costs of summer camps. Clients always seem to leave these out.

- Ask. I have had several cases where the debtor pays mom or grandmom to watch the kids after school (because it is cheaper than after school care), but doesn't list the payments.

- Generally, daycare will not be allowed where one of the parents is a stay at home parent. It depends on the facts. An unemployed parent who is seeking employment needs some daycare for interviews. A physically or medically challenged parent may not be capable of caring for a small child.

- “Premium” daycare may be allowed based upon justification, i.e., special needs.

Line 31 - Other Necessary Expenses: health care.

- If the debtor’s out of pocket expenses are more than the IRS allowance, be prepared to document the expense. If the expense is not on-going, you don’t get it going forward. If the expense is new, get an estimate from the doctor.
    - See, In re Graham, Case No. 07-41683 (Bankr.E.D.Tex.2008). In that case, the debtor’s amended I and J reflected 889.50 per month for out of pocket medical expenses, or over $50,000 over the term of a 60 month plan. After hearing on confirmation, the court concluded that the debtors had only established $11,833.20 in actual, projected, un-reimbursed medical expenses and denied confirmation of the plan.
- Watch for the double or triple dip. If the debtor has a health savings account (Line 34.c), you have to subtract that amount **and** the IRS allowance from the gross out of pocket to get the net out of pocket.
- Expenses for elective or cosmetic surgery are generally not allowed. (Be prepared to show special circumstances.)

Line 32 - Other Necessary Expenses: telecommunications services.

- This **used to** include cell phones, but they are now part of Line 20A. Be careful on this. (I think there may still be circumstances where this will be an allowable expense, but it will be an exception, not the rule.)
- The debtor still gets an allowance for internet.
- I don’t understand the interpretation on this. The argument is that home phone and cell phone are included in basic utilities. Why not internet? The form does allow for “pagers, call waiting, caller id, special long distance, or internet service - to the extent necessary for your health and welfare or that of your dependents.” Who has a pager anymore? Why would any of these be necessary for health and welfare but not cell phones? Whoever made up this nonsense obviously does not have kids.

Expenses which are NOT “other necessary expenses.”

- 401(k) loans are not other necessary expenses in Chapter 7. See In re Barraza, 346 B.R. 724 (Bankr.N.D.Tex.2006); In re Egebjerg, 2009 WL 1492138 (9th Cir. 2009). [They are, however, mandatory in Chapter 13. See 1332(f).].

- Judge Nelms concluded in In re Barraza, 346 B.R. 724 (Bankr.N.D.Tex.2006) that sums withheld from a debtor's paycheck for voluntary contributions to a retirement plan do not constitute disposable income pursuant to 541(b)(7). Judge Monroe reached the same conclusion in In re Mary Liles, Case No. 06-11888 (Bankr.W.D.Tex.2006) but did not write an opinion.

- Student loan payments are not other necessary expenses. This is a long standing, fundamental problem with the Bankruptcy Code. Student loans are (generally) non-dischargeable, but they have no priority status. Compare this to domestic support obligations, which are non-dischargeable, and taxes, which are (generally) non-dischargeable, and both of which have priority status.

    - As a note, the IRS collection guidelines allow payments on student loans if (1) they are "secured" by the federal government and (2) for the education of the debtor. See IRS Financial Analysis Handbook Sec. 5.15.1.10.

- $170 per month for tobacco products is not a necessary expense. In re Brown, 376 B.R. 601 (Bankr.S.D.Tex.2007).

Line 33 - Total Expenses Allowed under IRS Standards.

- Do the math.

Line 34 - Health Insurance, Disability Insurance, and Health Savings Account Expenses.

- In most cases, these are deductions from the debtor's pay stubs.

- Ask. Some debtors will have an insurance expense which is not a payroll deduction. This is most common for disability insurance, but some debtors have private pay or COBRA health insurance.

- There is a line at the end that says "IF YOU DO NOT ACTUALLY EXPEND THIS TOTAL AMOUNT, state your actual total average monthly expenditures in the space below:" I'm not sure where this would apply. These are expenses for insurance, not for health care. If I understand this, you list the debtor's expense for insurance and then if the debtor doesn't actually pay that much for insurance, you list the actual amount here. (Shouldn't his be on Line 31?)

Line 35 - Continued contributions to the care of household or family members.

- The form specifies expenses for "elderly, chronically ill, or disabled members" of the debtors household and/or "immediate family [member] who is unable to pay for such expenses."

- The US Trustee's position is that "immediate" includes parent, grandparent, sibling child or grandchild, but that list may not be exclusive.

- The ill or disabled person must not be able to pay their own expenses.

- The US Trustee notes this is only current, actual expenses. The debtor does not get a deduction because grandpa is **going to** come live with them at some unspecified date in the future.

Line 36 - Protection against family violence.

- Expenses "actually incurred" to maintain the safety of the debtor's family "under the Family Violence Protection and Services Act or other applicable federal law."

- Could somebody tell me what the "other applicable federal law is?

- This includes only ongoing costs for an existing threat. (If the guy is in prison, the expense may not be necessary.)

- Legal costs **may** qualify.

- Alarm systems **may** qualify.

Line 37 - Home energy costs.

- In theory, the means test allows for a claim for home energy costs in excess of the National Standards on Line 20A. The US Trustee notes that very few people ever triy to claim this. I spoke at a seminar with Tim O'Neal and he described this as "on of the most under-utilized deductions" on the means test. That sounds like an invitation. Henry Hobbs in Austin says they see it fairly regularly, but hat most of the debtors claiming it can't document the numbers they list. Be prepared to prove amounts **and** that the expense is necessary. Assuming you can prove the amount and necessity, there is no limit.

- The Chapter 13 Trustee says they get a lot of debtors who claim this and they never get supporting documentation.

- **Avoid the double dip.** Enter the amount by which expenses **exceed** the allowance on Line 20A, not the total of the utility costs.

Line 38 - Education expenses for dependent children less than 18.

- This one is ripe for exploitation. The debtor has the burden to show that the expense is "reasonable and necessary and not already accounted for in the IRS Standards." Be prepared to document the expense.

- This can be for public or private elementary or secondary schooling.
- Preschool goes on Line 30.(Line 30 is more generous, anyway.)
- This does **not** include college. (Sorry.)
- The child must be under 18 on the date of filing.
- Even if the child is under 18 on the date of filing, if the expense will cease in the very near term, expect to asked about it. Because we are concerned with projected income, this may be grounds for a 707(b)(3) motion.
- These are **actual** expenses and are subject to a fairly low cap.
- Home schooling **may** qualify.
- **Avoid the double dip**. Do not duplicate expenses from Line 29 or Line 30.
- School lunches do **not** qualify.
- **The Chapter 13 Trustee says they get a lot of debtors who claim this and they never get supporting documentation.**
- What about sports? Many public schools have eliminated sports and if the kids want to take sports they have to pay for it. With the epidemic of childhood obesity, getting the kids a little exercise seems reasonable and necessary, but the UST doesn't seem to have a lot of sympathy fr this. (I must confess, I have never had a case where this expense was make or break.)

Line 39 - Additional food and clothing expense.

- This gives you up to an additional 5% for these categories, which for food is really a joke. If you need an excess food expense it will probably be more then 5%. What about a diabetic? What about an Orthodox Jew? What about an ethical vegetarian? If its reasonable and necessary and the debtor can prove it, take the 5%. If it is more than 5%, file an affidavit of special circumstances. The UST does seem te be understanding on this issue if it medical.
- **The Chapter 13 Trustee says they get a lot of debtors who claim this and they never get supporting documentation.**

Line 40 - Continued charitable contributions.

- Note the use of "continued." Look for the deductions on the debtor's tax returns.

- Make sure the deduction matches what they actually pay, not what they would pay if they had more money. Get a report from the charity.

  - See, e.g., In re Burks, Case No. 08-20346 (Bankr.N.D.Tex.2009). In that case, the debtors claimed $433.33 per month in continuing charitable contributions. They could only document $1,760 in cash charitable contributions over the last year with a commitment to the United Way of $100 per month in the future. The court noted that "A checklist for a tax return that is not corroborated with receipts or copies of checks does not constitute credible proof of charitable contributions." The court specifically notes that it is not deciding whether the contribution stated in the means test was "excessive", it simply concludes that by reducing the stated contribution to the actual contribution, the presumption of abuse arose and the debtor failed to rebut that presumption.

- "In kind" contributions (household goods) do not qualify because no money is being expended to make the contribution.

- The US Trustee's position is that the amount is limited to 15% of the debtor's gross wages. See Line 45 on B22C. (I'm not sure the cap applies in Chapter 7, but FYI.)

Line 41 - Total Additional Expense Deductions Under 707(b).

- Do the math. Add lines 34 through 40.

Line 42 - Future payments on secured claims.

- The consensus is that you don't get to claim the expense if the debtor is going to surrender the property.

  - See, In re Gonzalez, 388 B.R. 292 (Bankr.S.D.,Tex.2008). This was a Chapter 13 case and Judge Isgur concludes that the expense for a surrendered residence was not allowable under 1325(b)(3) which provides for "amounts reasonably necessary to be expended" determined in accordance with 707(b)(2). Note the "to be expended" language. If the debtor is surrendering the property, the expense is not "to be expended." See, also, In re Maffei, Case No. 08-40466 (Bankr.E.D.Tex.2008) and In re Leary, 2008 WL 1782636 (Bankr.S.D. Tex.2008).

  - See, In re Long, 390 B.R. 581 (Bankr.E.D.Tex.2008). This is a Chapter 13 case where the debtor surrendered a car post-petition. Judge Parker also focuses on the "to be expended" language of 1325(b)(3). In dicta, Judge Parker does opine that the result would be different in Chapter 7 based upon a lack of "to be expended" language in 707(b)(2)(A)(iii).

- See, also, <u>In re Meador</u>, 2008 WL 243673 (Bankr.S.D.Tex.2008). This is one of those bad facts cases. The Chapter 13 debtors amended their schedules I and J and their Form B22C several times and never managed to get them correct. For instance, they included a car payment for a car that had been repossessed prior to all four versions of Schedule J. All four versions of Schedule J listed a loan payment to a credit union that the debtor admitted was paid by his daughter and he had never made a payment on the loan. There is a certain tone of exasperation in Judge Clark's opinion and there is the near always fatal finding that: "Debtor's explanations were not credible."

- See, also, <u>In re Burks</u>, Case No. 08-20346 (Bankr.N.D.Tex.2009), a Chapter 7 case which kinda/sorta addresses a common fact pattern. In that case the debtor owned a vehicle which they originally proposed to reaffirm, but which they subsequently decided to surrender. The debtors stated their need to replace the vehicle. Judge Jones did not make specific findings on the issue, but basically accepted the fact that the vehicle would be replaced and that the debtors would at least be entitled to the $489 vehicle operating expense. (You gotta love a judge who understands/accepts the reality of life.) See, also, <u>In re Brown</u>, 376 B.R. 601 (Bankr.S.D.Tex.2007) in which Judge Bohm ruled that a debtor was not entitled to a projected vehicle ownership expense as the debtor had no current need for another car and could not be sure when another vehicle would become necessary.

- In the split the hairs as finely as possible department, see <u>In re Singletary</u>, 354 B.R. 455 (Bankr.S.D.Tex.2006). Judge Bohm held that the relevant date to make the presumption of abuse calculations is the date of filing of the motion (not the petition date, or the date of hearing). The debtor is not allowed an expense for property which has been surrendered, but is allowed an expense for property which the debtor retains possession of but intends to surrender.

- The consensus is that you don't get to claim the expense if the debtor is not liable for the debt, i.e., the car loan they are paying but did not sign the contract.

  - This usually comes up in the "buy for" situation where the parents bought the car for the kid because they had better credit, but the kid makes the payments.

  - We sometimes see cases where the debtor is buying car from parents, but there is no contract. This is easy to fix - get the kid to sign a note to the parents and have the lien recorded on the title.

- Line 42 does **not** apply to **leased real property**.

- Don't forget **all of the home mortgage related debt:**

  - House note.

- Second lien. (80/20, equity loan, improvement loan, etc.)

- Taxes and insurance, if they are not escrowed. (Avoid the double dip.)

- Home Owners Association and Condominium Owners Association dues. The US Trustee says this is not allowed as a secured claim, but they are wrong. HOAs are generally set up as part of the deed restrictions for a subdivision and provide for a lien in favor of the HOA that can be foreclosed upon if the owner fails to pay. It is also typically a breach of the terms of the deed of trust.

- If the debtor has an ARM and you can figure out the adjustments, use the adjusted numbers. The US Trustee's position is that if there is an ARM you use the rate in effect on the petition date. I beg to differ. The form says "the total of all amounts scheduled as contractually due" in the 60 months following filing. If the interest rate adjusts upward, the payment will, too. You will have to document that the rate **will**, in fact, increase.. The fact that it **might** is not good enough.

- If there is a balloon payment during the 60 month period, include the full amount of the balloon amount to calculate the 60 month average.

- Include **all** secured debt payments on Line 42.

  - This usually includes houses and cars, but it also includes furniture, jewelry ane electronics. You should always ask your clients if any of their credit cards are for RoomStore, Rooms To Go, Circuit City or Best Buy. These are all secured debts. The debts with the store names (Conn's, Lack's, Haverty's, Zales) are obvious. Even if you are going to redeem, you get to list the total of the payments due in the next 60 months.

  - List the payments for "luxury" items like boats and timeshares. The US Trustee's position is that although you get to/have to include these expenses, they may form the basis for a 707(b)(3) motion. (Ask me about four cars, two Harleys and a jet ski. Judge Monroe was not impressed.) See In re Brown, 376 B.R. 601 (Bankr.S.D.Tex.2007). Judge Bohm granted the UST's motion to dismiss, but held that the debtor's expenditure of $55 for a timeshare was not unreasonable given the debtor's otherwise frugal budget.

  - **401(k) loans are not payments on secured debt.** See, In re Otero, 371 B.R. 190 (D.W.D.Tex.2007). [Otero actually concludes that 401(k) loans are not "debts" so they can't be payments on secured debts.] In re Egebjerg, 2009 WL 1492138 (9th Cir. 2009).

- The amount on this line is the amount of the payments which are contractually due in the next 60 months divided by 60.

- The amount of the payment here may be the same as the payment, but not necessarily. If the debtor has 38 payments of $500 each, the amount here is $316.67, not $500. This carries back to Lines 23 and 24.

- The amount here is **not** the current payoff on the debt. The payoff does not include un-accrued interest.

- **Both the UST and the Chapter 13 Trustee say they get a lot of these basic math errors.**

Line 43 - Other payments on secured claims.

- Cure amounts for delinquent secured claims go here. It is not unusual for a debtor to be a month or two behind on the house or car note or a year or two behind on their property taxes. Don't forget these.

- **The amount here is the arrearage divided by 60. Both the UST and the Chapter 13 Trustee say they get a lot of basic math errors here.**

- The US Trustee's position is that cure payments for luxury items are not "necessary." (The fact that the debtor is delinquent on his $40,000 boat loan also just sounds bad.)

Line 44 - Payments on pre-petition priority claim.

- These are **past due** amounts as of the date of filing. Current obligations go on Line 28.

- Debtor's attorneys fees do not go here. (In a Chapter 13, attorneys fees are an administrative expense, not a pre-petition priority claim.)

- If you aren't sure what claims have priority, look at Section 507.

Line 45 - Chapter 13 administrative expenses.

- Enter the projected Chapter 13 plan payment.
  Enter the Chapter 13 trustee percentage for your district.
  Multiply the percentage time the projected plan payment.

Line 46 - Total Deductions for Debt Payment.

- Do the math.

Line 47 - Total of all deductions allowed under Sec. 707(b)(2).

- Do the math.

Line 48 - Enter the amount from Line 18 (Current monthly income for 707(b)(2)).

- Enter the amount from Line 18.

Line 49 - Enter the amount from Line 47 (Total of all deductions allowed under 707(b)(2).

- Enter the amount from Line 47.

Line 50 - Monthly disposable income under 707(b)(2).

- Do the math.

Line 51 - 60-month disposable income under 707(b)(2).

- Do the math.

Line 52 - Initial presumption determination.

- Check the appropriate box. There are three choices:
    - The amount on Line 51 is less than $6,575.
    - The amount set forth on Line 51 is more than $10,950.
    - The amount on Line 51 is at least $6.575, but not more than $10,950.

Line 53 - Enter the amount of your total non-priority unsecured debt.

- This is the total from Schedule F.

Line 54 - Threshold debt payment amount.

- Multiply the amount on Line 53 by .25 and enter the result.

Line 55 - Secondary presumption determination.

- Check the appropriate box. The choices are:
    - The amount on Line 51 is less than the amount on Line 54.
    - The amount on Line 51 is equal to or greater than the amount on Line 54.

Line 56 - Other Expenses.

- This is the debtors opportunity to claim expenses greater than the IRS allowances. My practice is to file an "Affidavit of Special Circumstances" that includes this information as the US Trustee generally needs a little more information than the space allows.

Line 57 - Verification.

- The debtor(s) have to sign the form under penalty of perjury.

B22C - Chapter 13

The box at the top of the first page.

There are four choices:

  - The applicable commitment period is 3 years.
  - The applicable commitment period is 5 years.
  - Disposable income is determined under Sec. 1325(b)(3).
  - Disposable income is not determined under Sec. 1325(b)(3).

- The first two boxes are determined by Line 17.
- The last two boxes are determined by Line 23 The only distinction between these boxes is that if the debtor checks "Disposable income is not determined under Sec. 1325(b)(3)", then the debtor does not have to fill in the form after Line 23.

Line 1 - Marital/filing status.

- Unlike B22A, which has four choices, Chapter 13 only has two:

  - Unmarried.
  - Married.

  The distinction between these two filing statuses is that for "Unmarried" you just fill in column A ("Debtor's Income") and for "Married" you also fill in column B ("Spouse's Income").

- This one gives me heartburn on occasion because I get clients who have been separated for some time and my client has no idea what their spouse's income is. In those cases, I just put

in the income for the debtor and leave the column for the spouse blank.

Line 9 - Income from all other sources.

- The difference with B22A is that instructions state: "Do not include alimony or separate maintenance payments paid by your spouse, but include all other payments of alimony or separate maintenance." "Support income", which is different in its scope, is disclosed on Line 54 on B22C.

- Under the terms of the instructions, what you include here is alimony or separate maintenance paid by an ex-spouse, but not by a spouse.

Line 13 - Martial adjustment.

- This is essentially the same as Line 17 from B22A, but there is a reference in the instructions to 1325(b)(4), which obviously does not apply in Chapter 7. This line determines the amount of income of the non-filing spouse that is included for determining the applicable commitment period.

Line 19 - Marital adjustment.

- This the same as Line 17 from B22A. This line determines the amount of income of the non-filing spouse that is included for determining the debtor's projected disposable income.

Line 24A - National Standards: food, clothing and other items.

- This is the same as Line 19A on B22A. (I think.) On B22A it is listed as including "food, clothing and other items" while on B22C it is listed as including "food, apparel and services, housekeeping supplies, personal care, and miscellaneous." The numbers are apparently the same, so I'm not sure what the difference is.

Line 50 - Projected plan payment

- **The Chapter 13 Trustee says they routinely get these with no plan payment or an incorrectly calculated plan payment.**

Line 54 - Support income.

- Spousal support paid by a separated spouse is not included in the scope of the instructions. Did it just fall through the cracks, or was there really a policy decision here?

- Enter the average amount of child support payments, foster care payments (see B22A, Line 10), or disability payments for a dependent child.

Line 55 - Qualified retirement deductions.

- **Enter the amounts of all voluntary retirement contributions or retirement loan payments withheld from the debtor's wages.** (Mandatory retirement contributions go on Line 31.)

- **The Chapter 13 Trustee says they routinely get amounts here which do not match the debtor's pay stubs.**

- Be careful on this one. **If the 401(k) loan(s) pay off during the term of the plan, the debtor's projected disposable income will increase by that amount.** (And it is clearly subject to projection.) This can be a problems we routinely see clients who have three loans which pay off at different dates. Be prepared to file a variable payment plan which increases the trustee payment when each loan pays off.

- See In re Oltgen, 2007 B.R. 2329695 (Bankr.W.D.Tex.2007). This is a good case for debtors. In that case, the debtor doubled her 401(k) contribution "right before she filed bankruptcy." The court allowed the higher deduction, based at least in part upon an analysis of the terms of the particular plan.

Line 59 - Monthly Disposable Income Under Sec. 1325(b)(2).

- Do the math.

- The key here is that ***this is the amount that has to be paid to unsecured creditors***. This is in addition to whatever has to be paid to secured debts through the plan or to cure arrears on secured claims being paid directly and priority claims and administrative expenses. (Debtor's attorney and Chapter 13 trustee.)

- **"Projected disposable income" under 1325(b)(1) may not be the same as "current monthly income."** The courts which have analyzed this issue have generally concluded that "projected" (which is forward looking) adds something to "disposable income" which, as determined by B22c, is backward looking. The means test is the starting point. If Schedule I and J show significantly greater disposable income than B22C, expect an objection to confirmation from the Chapter 13 Trustee.

  - Hot off the presses, see In re Nowlin, Docket No. 08-20066 (5th Cir. 2009). In that case, the debtor had a 401(k) loan which would payoff during the 5 years of the plan and free up an additional $1135 per month. Because the plan did not propose to increase the plan payments (and the distribution to unsecured creditors), the trustee objected to confirmation contending that the debtor was not paying all of her "projected" disposable income. The Court states: 'We interpret the phrase to allow consideration of reasonably certain future events by bankruptcy courts. Under this approach, an above-median Chapter 13 debtor's "projected disposable income"

presumptively consists of his statutorily defined "disposable income"mechanically projected into the future for the duration of the plan. This presumption may be rebutted during the confirmation hearing with evidence of present or reasonably certain future events that will affect the debtor's income or expenses.'

- See, In re Hardacre, 338 B.R. 718 (Bankr.N.D.Tex.2006), and In Re Maffei, Case No. 08-40466 (Bankr.E.D.Tex.2008).

- See, also, In re Louviere, Case No. 07-10529 (Bankr.E.D.Tex.2008). In that case the debtor retired from her teaching job about one month prior to filing. As a result, her monthly income decreased from $3,915 per month from her teaching job to $1,906 from teacher retirement. The court held that her decreased retirement income constituted her "projected disposable income" for the purposes of plan confirmation.

- See In re Meador, 2008 WL 243673 (Bankr.S.D.Tex.2008). This is a case where two 401(k) loans would pay off during the term of the plan, but the debtors failed to take this "projected" increase in income into account in proposing their plan.

- See, In re Frederickson, 545 F.3d 652 (8th Cir. 2008) which adopts this analysis. In that case, B22C reflected disposable income of <$95.49> per month, but I and J reflected disposable income of $606 per month. The debtor proposed a 48 month plan which the court rejected because the debtor had projected disposable income. It is significant that the court identifies situations where the debtors' projected disposable income may be less than their disposable income on B22C. (Allowing a downward adjustment in the plan from the amount reflected on B22C.)

- See, In re Lanning, 545 F.3d 1269 (10th Cir. 2008), which held that a debtor's "projected disposable income" is presumed to be the debtor's current monthly income as determined under B22C, subject to a showing of a "substantial" change of circumstances.

    - See, also, In re Knippers, 2007 WL 1239297 (Bankr.S.D.Tex.2007), which also states that the disposable income reflected on B22C creates a presumption of projected disposable income for the purposes of 1325(b)(1)(B), but that presumption may be rebutted. (Judge Clark did not articulate any kind of substantial change of circumstances standard.)

- But see, also, In re Kagenveama, 541 F.3d 868 (9th Cir. 2008), which concludes that "projected disposable income" cannot be divorced from "disposable income" as determined under the means test. In that case, the debtors disposable income as determined under B22C was <$4.04>. The debtor's Schedules I and J reflected net income of $1,523.89. The court approved the debtor's plan which provided for payments of $1,000 per month for 36 months.

- If Schedule J shows more disposable income than B22C and the difference is social security, that is not grounds for an objection. See, In re Barfknecht, 378 B.R. 154 (Bankr.W.D.Tex.2007).

- “Projected” adds to the definition of “disposable income” by making it forward looking. **If there is an identifiable future change in future expenses, take it into account.**

  - Paying off 401(k) loans is probably the most common. (See Line 55.)

  - Paying off direct pay secured debt (autos) is fairly common.

  - Child support obligations may end.

  - Probation fees may end.

  - If the debtor gets a large Christmas or other bonus every year, it should be included.

- Projected income may decline, as well.

  - Child support may end.

  - The debtor may have some form of note receivable that pays off.

- Payments to maintain ownership of luxury items or incurring significant secured debt on the eve of bankruptcy may be grounds for confirmation objections based on lack of good faith, particularly if the distribution to unsecured creditors is a low percentage. See In re Owsley, 384 B.R. 739 (Bankr.N.D.Tex.2008) which concludes that a Chapter 13 debtors’ deduction of $559.57 per month for an RV is not necessary for the support of the debtor and the debtor’s dependents.

- In In re Redmond, 2008 WL 1752133 (Bankr.S.D.Tex.2008), Judge Clark addresses the question of whether payments for three vehicles and student loan payments were reasonably necessary for the maintenance and support of the debtor or a dependent of the debtor. The court concluded that payments for three vehicles for the debtor and her roommate were not necessary. The debtor proposed to pay additional amounts to her student loans “outside” the Chapter 13. Because the debtor presented no evidence with respect to the necessity of the student loan payments, the court concluded that the expense was not necessary.

SCHEDULES I AND J

- **If the debtor is employed (i.e., they receive a W-2)**:

    - The income on Schedule I Line 1 should come from B22A Line 3 because it is the actual average for the last six months. (Assuming the debtor has had the same job for the last six months.) We get a lot of clients who fill in their income on our homework package and it does not match the six month average on Line 3. This goes both ways - some clients under report income (overtime is common) and some over report income. (They calculate their income on the homework package assuming 40 hours per week and they only average 37 hours. 3 hours per week at $15 per hour is $2340 per year.)

    - Make sure payroll deductions listed on Schedule I Line 4.a. through k. match what is actually being withheld. The deductions here should match the corresponding lines on B22A. (Taxes on Line 25, insurance on Line 34, union dues and other mandatory payroll deductions on Line 31, etc.)

    - **List all deductions from the debtor's paycheck**, including voluntary retirement contributions. The fact that they may not be allowable on the means test is not the issue. This is the debtor's actual income and expenses.

    - Expense reimbursements from employers should be disclosed on Schedule I even if they net out on Schedule J. (We see a lot of UT employees who get an amount for "premium sharing" added to their paycheck. It is intended to reimburse part of the health insurance cost. Include the premium sharing amount on Schedule I (and B22A Line 3) and show the insurance as a payroll deduction on Schedule I Line 4.d. (and B22A Line 34.c.)

- **If the debtor is employed on a contract labor basis**, (i.e., they get a 1099, not a W-2, but they do not operate a business):

    - List gross contract pay on Schedule I Line 1.

    - Since taxes are not deducted from the debtor's pay stubs, list them as self employment taxes on Schedule J, not as a deduction on Schedule I.

- **If the debtor is self employed:**

    - **List gross revenue on Schedule I Line 7, not net operating income.** ("regular income from operation of business or profession or farm (attach detailed statement"). Be prepared to provide the UST or Chapter 13 Trustee with six months of monthly profit and loss statements and a year to date profit and loss statement.

- **Do not list the debtor's net operating income as wages on Schedule I Line 1**.

- List business expenses on Schedule J Line 16 "regular expenses from operation of business or profession or farm (attach detailed statement.)"

    - Itemize expenses.

    - Make sure the debtor is **not** including a draw or salary as an expense.

    - Make sure the debtor is not expensing personal expenses out of the business. (This is a common problem. If the IRS catches them, the debtor is in big trouble.)

- If there is a non-filing spouse:

    - On I and J, a debtor must disclose all of the income and expenses of both the debtor and the non-filing spouse. Official Form 61, See, also, In re Louviere, Case No. 07-10529 (Bankr.E.D.Tex.2008). In that case, the debtor included only an amount of $2,643 as "husband's contribution to household." The court concluded, notwithstanding the debtor's "misguided" presentation of the numbers, that the non-filing spouse funded 69.5% of the household expenses of the family and that the percentage of household expenses was "substantially equivalent to the percentage of net income actually produced" by each spouse.

- Report **all income from any source** on Schedule I.

    - **This includes social security**. See Schedule I Line 11. The fact that it does not count as income for the purposes of the means test does not mean it does not exist. **Do not expense social security on Schedule J so it nets out.** If Schedule J shows disposable income and the amount of disposable income is less than the amount of the social security income, the UST will not file a motion to dismiss based solely on that income. The answer may be different if there are other, additional issues which indicate abuse.

    - The UST reports that this is a common problem.

- If the debtor has a rental property and it will not be surrendered, include the rental income on Schedule I Line 8 and the expenses associated with the property on Schedule J Line 13.b.. You do not get to list the net on I or ignore the property altogether because there is no net income.

- On Schedule J list the debtor's anticipated expenses going forward.

    - If the debtor is going to surrender a house (or car or boat or...) do **not** list the payment

on Schedule J.

- For the mortgage, list the actual payment, not the payment with the late fee.

- For utilities, use averages. Electricity will be higher in summer, lower in winter. Gas will be opposite.

- I don't understand why, but a lot of clients seem to have a real problem with averaging expenses. You don't spend $25 per month on tires, you spend several hundred every couple of years. You don't spend $20 per month on glasses, you spend whatever you spend when the old ones break, or you lose them, or... You have to try to explain it to them.

- Unless they live in their car, everybody has some home maintenance expense, even if it just $20 for cleaning supplies.

- Unless they are a committed nudist and they work at home and have their groceries delivered, everybody has clothing and laundry expenses.

- Everybody has some out of pocket medical expenses.

- Clients tend to underestimate transportation expenses. They tend to think in terms of $50 per week for gas. They forget about tires and batteries and tags and inspection stickers and oil changes and toll tags and wiper blades and ..... Remind them. The farther they drive to work, the higher all of their incremental costs will be. (The more you drive, the faster you have to change your oil, the faster your tires wear out, ...) Older cars tend to have higher maintenance costs.