

**Calculating Projected Disposable Income
And
Other Chapter 13 Case Administration Issues
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**ACBC Lunch Meeting
April 13, 2018**

As with everything involving the law, different parties can reach different conclusions about what the law requires and how issues are to be handled. Chapter 13 Trustees are no different and, while uniformity is valued to some degree, there will always be differences in the way Trustees Kerns, Brown, and Maney approach issues and administer their cases. One of the most significant differences seems to be the application of 11 U.S.C. §1325(b)(1) and, in particular, the calculation of the amount needed to pay to general unsecured creditors. The first part of these materials will outline how disposable income is calculated in Tucson and why it is done that way.

Following the enactment of BAPCPA in October 2005, the bankruptcy world was trying to figure out how to proceed under the new provisions of the Bankruptcy Code. Significant changes were brought about by BAPCPA and one of the most important in Chapter 13 involved the calculation of disposable income and the impact on distributions to general unsecured creditors.

Changes aimed at reducing the availability of Chapter 7 to consumer debtors, theoretically would push more debtors into Chapter 13 and realize greater dividends for general unsecured creditors. While BAPCPA may be falling short of those expectations, it nonetheless changed the Chapter 13 process.

While Congress is authorized to enact uniform laws of bankruptcy, U.S. Const. Art. 1, Sec. 8, Clause 4, bankruptcy practice (and interpretation by the courts) varies significantly across the country. The enactment of BAPCPA did not lessen those variations.

The differences between how Phoenix and Tucson calculate disposable income is representative of differences in practice across the nation. Many parts of the country reverted to pre-BAPCPA methods of calculation while others made efforts to implement the changes as written into BAPCPA.

Pre-BAPCPA, plan payments were calculated using the Schedule I calculation of net income less expenses on Schedule J. The difference became the plan payment and that payment over the course of the plan would provide full funding. Because Arizona uses the “pot plan” model, administrative claims, secured and priority claims are paid in full and then the general unsecured creditors share whatever is left in “the pot.” The more disposable income, the higher the dividend to general unsecured creditors. As a result, confirmation issues revolved primarily

around the reasonableness of Schedule J expenses. In Arizona these issues were generally worked out between the Trustee and debtors in a stipulated order confirming plan.

Following BAPCPA, many jurisdictions continued to utilize the Schedule I less Schedule J formula to calculate plans. Phoenix (and many other jurisdictions) apparently adopted this approach.

This approach is reflected in Trustee Maney's arguments in favor of using the I minus J formulation as being a more reality based approach in *In re Laura Kagenveama*, 05-28079-PHX CGC. There Judge Case noted:

"Several decisions conclude (consistent with the Trustee's position here) that the term "projected disposable income" in Section 1325(b)(1)(B) must have a different meaning from the term "disposable income" defined in Section 1325(b)(2) in order to give meaning to the word "projected." In this way, they conclude that the prior practice of "projecting" disposable income through reference to Schedules I and J is the appropriate measure of this critical Chapter 13 component.

The difficulty is that such an interpretation flies in the face of the plain words of the statute. Care was taken by Congress to modify the old definition of disposable income and to replace it with one based upon "current monthly income." Under Advisement Decision, Doc 27, 07/10/2006, pp 2-3.

Judge Case went on to say:

"There are, of course, practical difficulties with the conclusion that "projected disposable income" is necessarily defined by "current monthly income." The most obvious is that historical, current monthly income may or may not have any relationship to the actual income to be received by the debtors during the course of their Chapter 13 plan. For that purpose, the previous "I and J" approach would seem to yield a more reality-based number. However, Congress has chosen not to rely on I and J, notwithstanding their proven utility, and that is Congress' choice to make. But this case illustrates the problems caused by this approach. Debtor's Schedules I and J yield "disposable income" of \$1,523.89; however, "disposable income" as shown on Debtor's B22C form is a -\$4.04. Given the stated purposes of BAPCPA, it is both ironic and unfortunate that this Debtor with resources available to pay unsecured creditors will not be required to do so in this case." *Id.* at pp 3-4.

The same forward looking approach based on I minus J to rebut a presumption that the disposable income calculation determines the calculation of plan payments argument was raised

at the U.S. Court of Appeals for the Ninth Circuit. While whole portions of *Kagenveama* were subsequently overruled, primarily as it related to whether the applicable commitment period was a temporal requirement—later found to be such, the use of I minus J has not been adopted by the 9th Circuit, nor by the U.S. Supreme Court.

The *Lanning* Supreme Court decision later provided a way to use a more forward looking approach, but did not default to an I minus J analysis. Rather, *Lanning* and later cases like *Drummond v Welsh (in re Welsh)* 711 F.3d 1120 (9th Cir. 2013) still used the formula based approach as the starting point in determining disposable income in plan calculation:

“Section 1325 states that disposable income is current monthly income —less amounts reasonably necessary to be expended—... for the maintenance or support of the debtor or a dependent of a debtor. 11 U.S.C. § 1325(b)(2) (2006). [711 F.3d 1134]

Section 1325 further provides that —[a]mounts reasonably necessary to be expended under paragraph (2) ... shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2). 11 U.S.C. § 1325(b)(3) (emphasis added). For its part, section 707(b)(2) provides that current monthly income shall be reduced by —[t]he debtor's average monthly payments on account of secured debts, 11 U.S.C. § 707(b)(2)(A)(iii); that section, however, does not include any qualification or limitation on the kind of secured debt that is deducted from current monthly income. As we recognized in *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 873 n. 2 (9th Cir.2008), overruled on other grounds by *Hamilton v. Lanning*, — U.S. —, 130 S.Ct. 2464, 2475, 177 L.Ed.2d 23 (2010), prior to the BAPCPA,

‘[d]etermining what was —reasonably necessary for the maintenance or support of the debtor was dependent on each debtor's individual facts and circumstances. This amorphous standard produced determinations of a debtor's —disposable income that varied widely among debtors in similar circumstances. BAPCPA replaced the old definition of what was —reasonably necessary with a formulaic approach for above-median debtors. 11 U.S.C. § 1325(b)(3). Again, in the BAPCPA, Congress chose to remove from the bankruptcy court's discretion the determination of what is or is not —reasonably necessary. It substituted a calculation that allows debtors to deduct payments on secured debts in determining disposable income. That policy choice may seem unpalatable either to some judges or to unsecured creditors. Nevertheless, that is the explicit choice that Congress has made. We are not at liberty to overrule that choice.’” 711 F.3d @1133-34.

Prior to BAPCPA, the Trustees in Phoenix put out guidelines for the various Schedule J expenses. If debtors stayed within those guidelines, there would be few objections raised and if a debtor presented a “righteous” I and J, at least the disposable income requirement of 11 U.S.C. §1325(b)(1)(B) would be met. If numbers exceeded the guidelines, counsel might be expected to provide justification for such expenses in order to obtain a stipulated order. After BAPCPA and Kagenveama, the guidelines approach remains in use in Phoenix.

In Tucson, we looked to the statute as amended by BAPCPA and use CMI as the starting point in the calculation of disposable income and in determining a dividend for general unsecured creditors.

RELEVANT STATUTES (with emphases added)

§101. Definitions

(10A) The term “**current monthly income**”—

(A) means the average monthly **income from all sources** that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, **derived during the 6-month period** ending on—

(i) the last day of the calendar month immediately **preceding** the date of the

commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or

(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii);

and

(B) **includes any amount paid by any entity other than the debtor** (or in a joint case the debtor and the debtor's spouse), **on a regular basis for the household expenses of the debtor** or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but **excludes benefits received under the Social Security Act**, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism

§1325. Confirmation of plan

(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.

Notably, Trustee Kerns files an objection/evaluation rather than a plan recommendation, specifically for the purpose of invoking §1325(b)(1).

For above median Debtors, expenses to be deducted from CMI SHALL be:

(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)....

(4) For purposes of this subsection, the **“applicable commitment period”—**

(A) subject to subparagraph (B), **shall be—**

(i) **3 years** [for below median income debtors]. or

(ii) not less than 5 years [for above median income debtors].

and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

As referenced in §1325(b)(3) for above median income debtors, expenses to be deducted from CMI, shall be:

§707. Dismissal of a case or conversion to a case under chapter 11 or 13

“(b)(2)(A)(ii)(I) The **debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards**, and the **debtor's actual monthly expenses for the categories specified as Other Necessary Expenses** issued by the Internal Revenue Service for the area in which the debtor resides, as **in effect on the date of the order for relief**, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses **shall include reasonably necessary health insurance, disability insurance, and health savings account expenses** for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, **if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories** as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, 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 an elderly, chronically ill, or disabled household member or member of the debtor's immediate family** (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse

of the debtor in a joint case who is not a dependent) **and who is unable to pay for such reasonable and necessary expenses.**

(III) In addition, **for a debtor eligible for chapter 13, 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, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the **actual expenses for each dependent child less than 18 years of age, not to exceed \$1,500 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** referred to in subclause (I).

(V) In addition, 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 if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.**

(iii) The debtor's average monthly payments on account of **secured debts** shall be calculated as the sum of—

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

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

divided by 60.

(iv) The debtor's expenses for **payment of all priority claims (including priority child support and alimony claims)** shall be calculated as the total amount of debts entitled to priority, **divided by 60.**

(B)(i) In any proceeding brought under this subsection, the **presumption of abuse may only be rebutted by demonstrating special circumstances,** such as a serious medical condition or a call or order to active duty in the

Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is **no reasonable alternative**.

(ii) In order to establish special circumstances, the debtor shall be required to **itemize each additional expense** or adjustment of income and to **provide—**

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest **under oath** to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.”

Most of the relevant statutes shown above reflect changes brought about by BAPCPA. They are important in understanding how plans are calculated in Tucson.

Disposable income calculation and CMI. The Code states that it all starts with CMI, not Schedule I.

Current Monthly Income (CMI) is the foundation for calculation of plans, except for *Lanning* circumstances (which will be discussed below). CMI is the starting point for calculation of disposable income for both below and above median income debtor plans.

CMI is a statutorily defined gross income calculation. *See, 11 U.S.C. §101(10A)*. Because it is statutorily defined, and is used as the starting point for the calculation of disposable income in §1325(b)(2), our office uses that number, except in *Lanning* cases.

A wrinkle related to business cases: as noted, CMI is a gross income number. So in business cases, or cases where Debtors derive income from real estate (most commonly rents) we do not allow for deductions of business expenses that appear in Form 122C-1 (part of Lines 5 and 6) in the calculation of CMI. This aspect of the calculation of CMI was discussed in *In re Wiegand*, 386 B.R. 238 (9th Cir. BAP 2008). As a result, many business cases will end up as above median income cases (with a 5 year applicable commitment period). These deductions that appear on 122C-1 do not comport with the statutory definition of CMI.

We do allow those business expenses as deductions in 122C-2, frequently shown at line 43 as Special Circumstances deductions. We ask that you provide 6 months of profit and loss statements for the months prior to filing (noting that those statements should have been used as the basis for the calculation of CMI and the 122C-2 deductions for business expenses in the first instance). By local rule (LRBP Rule 2084-2(b)(2)), monthly operating reports must be filed. From the reports prepetition and post petition, we can generally track the expense claim at Line 43. If the numbers are off, we will raise that as an issue in our plan objection/evaluation.

Back to CMI. Section 1325(b)(2) provides that disposable income is CMI less reasonably necessary living expenses (for business debtors, it can also include amounts necessary for the operation and preservation of the business). Section §1325(b)(3) goes on to say that reasonably necessary expenses for above median income debtors ***shall*** be the deductions allowed on the means test of §707(b)(2)(A) and (B), reflected in Chapter 13 cases in Form 122C-2.

Calculation of Disposable income for below median income debtors.

For below median income debtors, the calculation is CMI less reasonable living expenses, which expenses have traditionally been shown on Schedule J. Congress somehow got the idea of using a gross income figure, CMI, as the starting point and then allowed reasonable expenses to be deducted from that gross income figure. However, for a below median income debtor, there is the whole problem of how Schedule J is put together.

Schedule J in particular does not provide for the deduction of payroll taxes or payroll deducted insurance, because those are deducted on Schedule I. However, BAPCPA effectively eliminated Schedule I from the disposable income calculation. Under BAPCPA, we start with the gross income figure and jump to Schedule J for below median income debtors.

Ideally, the forms committee should have made changes to J, to allow the deduction of payroll taxes, payroll deducted insurance, mortgage cure payments, payments on autos being paid through the plan, priority claims (taxes, DSO arrearages and case administration expenses), but such changes would really only apply to below median income debtors. While a cumbersome proposition, Congress created the two track measure distinguishing between below and above median income debtors; it is up to us to figure out how to apply it to fit within the statutory structure.

The process in Tucson, and many other jurisdictions, is to allow the deduction on Schedule J of some expenses that do not ordinarily appear on J. They are deductions that appear on 122C-2 as Other Necessary Expenses. It is fair to allow those deductions for below median income debtors, as they are actual expenses and are expenses that above median income debtors are allowed to deduct on Form 122C-2. This is in part where Schedule I deductions “disappear” under BAPCPA’s formulation. CMI is a gross income figure. Schedule I is a net income figure and J was a form deducting from a net income starting point. Schedule J in its current form still deducts from I, but BAPCPA tells us that the calculation is between CMI and J so we need to recapture the deductions on I and reflect those on J.

In Tucson, we allow (and insist on) those deductions on J to level the playing field for below median income debtors and to comply with the formulation as written in the Code. While the form 106J says to not deduct payroll taxes and employer deducted health insurance (or HSAs or disability insurance), the statute cannot function without those deductions being allowed for below median income debtors. By recognizing their existence and allowing their deduction on Schedule J, it closes the gap between the CMI gross income figure and J in the calculation of disposable income.

That is why our plan objection/evaluations (“Recs” in Phoenician) for below median income debtors often require a seemingly impossible dividend to general unsecured creditors. That is because (like the statute says) CMI less J usually has at least the gap of payroll deductions. However, the difference between CMI and J also has additional gaps that would appear to require much higher dividends to general unsecured creditors if deductions are not allowed or taken. Things like contractually due (or plan modified) auto loans, mortgage payments, mortgage cure payments, and priority claims, including costs of administration.

Above median income debtors are allowed to deduct those actual expenses on Form 122C-2. Those same deductions need to be allowed for below median income debtors. BAPCPA takes Schedule I out of the disposable income equation, so the payroll taxes that are actually deducted from paychecks have to show somewhere. Otherwise, BAPCPA’s formula would require debtors to pay that amount to general unsecured creditors over 36 months. Also, amounts to pay autos in the plan, to cure mortgage arrears, pay DSO arrearages and pay priority claims need to be reflected somewhere or debtors would be called upon to pay double for the vehicle and pay the same amount to general unsecured creditors—a likely impossibility.

To summarize, Congress established CMI as the starting point in calculating disposable income. For below median income debtors, the calculation compares CMI to Schedule J. So when we have plan objections related to the spread between CMI and J, we often are looking for an amended Schedule J, especially to claim expense deductions for payroll taxes, payroll deducted insurance, priority tax and DSO arrearage claims that are being paid in the plan, administrative expenses being paid to the Trustee and mortgage cure claims. Those are deductions allowed to above median income debtors and to level the playing field because Congress requires the use of a statutorily defined gross income figure as the starting point in the calculation of disposable income.

At the end of the materials is an example of a plan objection related to disposable income and a proposed amended J that was sent to debtor’s counsel using actual numbers from the schedules (Schedule I is attached so you can see the numbers for payroll deductions being added to J) and plan to resolve the Trustee’s objection. Those examples are recommended to you to guide you in resolving a disposable income issue for your below median income debtors.

Calculation of disposable income for above median income debtors.

While Congress devised a different method of calculating disposable income for above median income debtors, the starting point is the same: CMI. The difference, as stated in §1325(b)(3) is that for above median income debtors, the allowed deductions **shall be** those provided in §707(b)(2)(A), rather than Schedule J. Those deductions consist of the IRS collection standards (local and national) in effect on the date of filing, other necessary expenses allowed by the IRS and other amounts that may be allowed under §707(b)(2)(A)(ii)(II)- (V), (iii) and (iv). Section 1325(b)(3) effectively reads Schedules I and J out of the calculation of disposable income for above median income debtors.

So the Code uses CMI as calculated in Form 122C-1 less the deductions in 122C-2. The result at line #45 is stated as “your monthly disposable income under §1325(b)(2).” And §1325(b)(1)(B) requires that if an objection is filed by the Trustee or the holder of an allowed unsecured claim, the court cannot confirm the plan unless all of the debtor’s disposable income to be received in the applicable commitment period is to be paid to unsecured creditors.

So when there is a positive number at line 45 on form 122C-2, that result multiplied by 60 is the dividend to be paid to general unsecured creditors over the 60 month commitment period. Note that since secured and priority claims have already been used as deductions on Form 122C-2 to arrive at the number at line 45, that dividend is intended solely for general unsecured creditors.

The number at Line 45 of 122C-2 multiplied by 60 is going to be what we are looking for as the dividend for general unsecured creditors over the life of the plan. A quick way of checking your work exists as the bottom of the plan form and you should make sure that the numbers circled in red are equal or that the bottom number is larger.

(J) Section 1325 analysis...

(2) Section 1325(b) Analysis:

(a) Monthly Disposable Income, Form B 122C-2 (if less than \$0, then state \$0.....	\$ _____
(b) Applicable Commitment Period.....	x 60
(c) Total of Line (2)(a) amount x 60.....	\$ <u> </u>
(3) Estimated Payment to Unsecured, Nonpriority Creditors Under Plan	\$ <u> </u>

If (3) is less than line (2)(c), you will receive a disposable income objection. Our office calculates the numbers separate from the plan analysis, so overriding the software or leaving ¶(J)(2) blank will not advance the case. ¹

Unfortunately, some practitioners respond to our objection with an amended Schedule J that has been filed to “resolve” the objection. While this is useful for below median debtors, the same is not true for above median debtors. As noted above, Congress effectively read Schedule J out of the calculation of disposable income for above median income debtors. So when we raise the objection and cite to the calculation of disposable income from Form 122C-2, we are looking possibly for an amended Form 122C-2 (if such is appropriate). We are not looking for an amended

¹ For those of you who use Best Case’s plan module (and likely the same arises with other software generated plans, like the fillable form on the Court’s Website), your software pulls the information from forms 122C-1 and 122C-2 and gives you the statutorily required dividend in the plan analysis at ¶J(2).

Schedule J, as Congress has determined that it is not to be used for calculating disposable income for above median income debtors.

To summarize, Congress established CMI as the starting point in calculating disposable income. For above median income debtors, the calculation compares CMI to Form 122C-2, which has deductions that **shall** be used for reasonably necessary expenses in the calculation of disposable income. So when we have plan objections related to the Line 45 result of the disposable income calculation (multiplied by 60) we are not looking for an amended Schedule J. We are either wanting an amended 122C-2 where appropriate, or your clients are going to be paying the Line 45 calculation multiplied by 60 as the dividend to general unsecured creditors.

At the end of the materials is flowchart that summaries the steps in calculating disposable income.

SOME OBSERVATIONS

Because Phoenix Trustees do not use Form 122C-2 in the same manner as the Tucson Trustee, it is quite common for certain deductions to not make their way into Form 122C-2. As you are aware, the Chapter 7 means test and the calculation of disposable income for both below and above median income debtors in Chapter 13 is often a game of inches.

If a Chapter 7 means test jumps above \$10,000.00 payable over 60 months or if the result is greater than \$6,000.00 and that could pay more than 25% of unsecured claims, the presumption of abuse arises, inviting a possible motion to dismiss from the United States Trustee and a possible trip to Chapter 13.

In a below median income Chapter 13 case, every dollar that the CMI less J calculation yields is \$36.00 more going to general unsecured creditors. Disposable income (DI) over the applicable commitment period, or $DI \times 36$.

In above median income Chapter 13 cases, for every dollar where Line 45 on 122C-2 is positive, means \$60.00 is going to general unsecured creditors over the life of the plan. DI over the applicable commitment period, or $DI \times 60$.

The number one mistake we see in Phoenix cases is the failure to enter projected Trustee administrative expense on Form 122C-2. If you have a client making a payment of \$1,000.00 per month and the Trustee's calculation at filing is 7.5% per the United States Trustee, failing to deduct that expense on 122C-2 would require a minimum of \$4,500.00 to general unsecured creditors where the DI is positive. $\$1,000.00 \times 7.5\% = \$75.00 \times 60 = \$4,500.00$.

Another problem is how Schedule J is filled out in Phoenix. Certain expenses are left off (most commonly the housing mortgage and auto loan payments). In a below median income case, if the debtor has a \$1,000.00/mo. mortgage and that does not get listed on Schedule J, you will have a \$60,000.00 problem in a case administered in Tucson. So when you have a case

that is going to be filed in Tucson, remember to include the mortgage and auto loan payments on Schedule J for your below median income debtors.

LANNING SCENARIOS

There are many instances when a debtor's financial situation has changed prior to filing. It may be like Ms. Lanning where there was a dramatic drop in income prior to filing. It may be a postpetition, preconfirmation change in income.

The case *In re Darrohn*, 615 F.3d 470 (6th Cir. 2010) stands for the proposition that an increase in income or a loss of deductions from the surrender of collateral securing a claim can be considered by the court to **increase** the dividend to unsecured creditors. However, a drop in income most frequently triggers a *Lanning* request to have the court (and the Trustee) consider a virtually certain or known change in circumstance that would render the CMI based disposable income calculation inapplicable in a case, thus seeking to decrease the dividend to general unsecured creditors.

The expense deductions will remain the same. For below median income debtors, a Schedule J that incorporates payroll tax and insurance deductions, mortgage cure payments, priority tax and DSO claims and Trustee's fees (as appropriate) will be deducted from a recalculated "CMI." For an above median income debtor, the Form 122C-2 deductions will be taken from the recalculated "CMI."

Recalculated "CMI"

When there has been a change in income to consider, the concept in *Lanning* was that CMI did not accurately reflect debtor's financial circumstance at the time the case was filed. In our office, we ask that debtor file an amended Schedule I (or use the Schedule I at filing if the changed circumstance existed at filing). We also ask for four consecutive pay advices to verify the claimed gross income reflected on Schedule I.

We will use that top line gross income figure as a substitute for CMI, because CMI itself is a gross income figure and the current gross income is the most accurate comparison available to the CMI calculation. If there are other sources of income beside wages, we use the gross numbers for those components of "CMI." From there, we can compare recalculated "CMI" to schedule J (for below median income debtors) and Form 122C-2 deductions (for above median income debtors) for a calculation of disposable income based on the known changed circumstance that reflects the concept in *Lanning*.

For below median income debtors, the modified Schedule J concept will still pertain. Take deductions for payroll taxes, insurance, mortgage cures, priority tax and DSO claims, Trustee's fees.

For above median income debtors, you might need to file an amended 122C-2 if the change in circumstance occurs post-petition. If the change was prepetition, AS in the *Lanning*

case itself, the 122C-2 at filing should reflect the lower income tax deductions associated with lower income. If there has been a change in employment AND if insurance is deducted from pay, make sure the insurance deduction on 122C-2 reflects the current situation. If the insurance deduction is not accurate, an amended 122C-2 can update that change.

There may be other appropriate amended deductions for 122C-2. Most commonly, those will be amendments to reflect the actual deduction based on proofs of claim filed. The most common situations are estimated priority claims and mortgage arrearage claims shown in a plan. It is not uncommon for filed claims to show a higher amount than reflected in the plan. As those amounts will be paid through the plan, they should be deducted on Form 122C-2.

For above median income debtors in a *Lanning* case, we ask that you not submit an amended Schedule J for your expense deductions. Code section 11 U.S.C. §1325(b)(3) still utilizes Form 122C-2 as the deductions that **shall** be used in the calculation of disposable income. Many offices have contended that *Lanning* requires a default to schedule J expenses. However, the *Lanning* case itself utilized 122C-2 deductions when the case went back to the Bankruptcy Court and 9th Circuit case law consistently cites the language of §1325(b)(3) as written-reasonable expenses **shall** be the deductions under §707(b)(2)(B)(ii).

Examples of Plan Objections

Example Objections in Below Median Cases:

11. Plan Feasibility. Pursuant to Trustee's calculations, the Chapter 13 Plan is not feasible at this time, because it does not comply with 11 U.S.C. §1325(b)(1)(B). Comparing the Form B22C CMI \$5,646.00 and Debtor's reasonable expenses as shown in Schedule J \$4,526.00, the disposable income of \$1,120.00, multiplied by 36 months, results in a dividend to unsecured creditors of \$40,320.00. Pursuant to Trustee's calculations, the dividend to unsecured creditors under the current plan is \$7,173.68. However, Trustee reserves the right to file an amended evaluation requiring adjustments to the terms of the plan, including an increase in plan funding if necessary, in order to address all timely filed proofs of claims once the claims bar date has passed in this case.
12. 100% Plan due to Calculation of Projected Disposable Income. Trustee objects to confirmation of the plan because the plan is not a 100% plan. Debtor is a Below Median Income Debtor and the I22C calculation of current monthly income of \$3,518.82 minus Amended Schedule J expenses of \$2,200.00 provides a monthly disposable income of \$1,318.82. Projecting the disposable income over the applicable commitment period of 36 months indicates that \$47,477.52 must be made available for payment to general unsecured creditors. The plan does not propose to pay 100% of general unsecured claims and Trustee objects pursuant to 11 U.S.C. §1325(b). To date, the total amount due to unsecured creditors is \$15,056.32 and Debtor's plan currently funds -\$20,760.02 (includes amount to general unsecured claims of \$15,056.32 plus 10% Trustee fees) this may be due to proofs of claim that have been filed for more than the plan provides. The last day for claims to be filed August 3, 2017. This objection may be resolved by paying 100% of all claims. The Trustee advises counsel that it is possible that this situation might be capable of resolution by amending Schedule J to include secured payments being paid through the plan. In below median cases, projected disposable income is calculated by using the I22C-1 for CMI and Schedule J for expenses. The difference between the two is the projected disposable income that must be paid to general unsecured creditors.

Example Objections in Above Median Cases:

25. Plan Feasibility. Pursuant to Trustee's calculations, the Chapter 13 Plan is not feasible at this time because it does not comply with 11 U.S.C. §1325(b)(1)(B). According to Debtor's Form I22C, the disposable income of \$599.30, multiplied by 60 months, results in a dividend to unsecured creditors of \$35,958.00. Pursuant to Trustee's calculations, the dividend to unsecured creditors is -\$51,243.60 (includes projected disposable income \$41,291.40 plus 10% Trustee fees) this may be due to proofs of claim that have been filed for more than the plan allows. However, Trustee reserves the right to file an amended evaluation requiring adjustments to the terms of the plan, including an increase in plan funding if necessary, in order to address all timely filed proofs of claim once the claims bar date has passed in this case.

12. 100% Plan due to Calculation of Projected Disposable Income. Trustee objects to confirmation of the plan because the plan is not a 100% plan. Debtor is an Above Median Income Debtor and the 122C-2 calculation for line 45 provides a monthly disposable income of \$853.57. Projecting the disposable income over the applicable commitment period of 60 months indicates that \$51,214.20 must be made available for payment to general unsecured creditors. The plan does not propose to pay 100% of general unsecured claims and Trustee objects pursuant to 11 U.S.C. §1325(b). To date, the total amount due to unsecured creditors is \$7,795.37 and the last day for claims to be filed was February 20, 20108. Debtor's plan currently funds -\$12,302.72 (includes amount to general unsecured claims of \$7,795.37 plus 10% Trustee fees) this may be due to proofs of claim that have been filed for more than the plan allows. This objection may be resolved by paying 100% of all claims.

GENERAL CASE ADMINISTRATION

When a case is filed, there is a lot of behind the scenes activity in the Trustees' offices. Trustees manage a huge amount of information. Each case has a lot of information in terms of the schedules, statements and form 122-C 1 and 2, the plan, claims, plan objections.

Cases need to be set up for administration. Things are set up to push towards confirmation in the first instance, then to see that cases move toward eventual completion, discharge and closing. All documents need to be processed and reviewed. All plans and claims need to be reviewed. Payments have to be logged and disbursements need to follow the terms of the plan as filed and the plan as confirmed.

There are two types of payments that go out prior to confirmation, adequate protection payments and conduit mortgage payments. There is a major difference between the two in the preliminary requirements to allow disbursement.

For adequate protection payments, the plan must provide for adequate protection payments, the creditor must file a proof of claim with evidence of a perfected security interest and the debtor or creditor needs to request the commencement of the payments. *See*, LRPB Rule 2084-6. We ask that the request be reflected on the docket to promote transparency. A sample form, which can be adapted for debtors, can be found here: <http://dcktrustee.com/forms.html>.

Conduit Mortgage Payments

While Tucson has operated under the Standing Order on conduit mortgage payments since October 1, 2008, conduits are a newer concept to Phoenix, with new LRPB Rule 2084-4(b). We have worked with Trustees Brown and Maney to flatten out the learning curve and hopefully, it has been a smooth process. Those that have dealt with conduits in your Tucson cases may be able to help smooth the way for others dealing with Conduits for the first time.

For conduit payments, the plan needs to provide for conduits and there needs to be an address for payments. Disbursements can commence without a proof of claim being filed. We can generally set up the conduit mortgage payments ahead of the first disbursement as long as we have the plan providing for conduit payments and payment address. Keep in mind, that the

mortgage payment in the plan may not be the mortgage payment the creditor requires under the loan agreement.

We frequently have a payment amount stated in the plan that varies from the payment reflected on the proof of claim (generally found in the right hand column at the top of the supplement to the mortgage proof of claim). It is not uncommon that the first conduit disbursement will be sent out based on the payment amount stated in the plan (when no POC has been filed before the first disbursement), so it is critical that you try to list the accurate payment amount in the plan. When the proof of claim comes in, we will disburse based on the amount of the payment shown on the claim. We provide notice of the change so that debtor can make the adjustment going forward. We also do a notice of payment change after a creditor files a notice of mortgage payment change. The payment change will effect an amendment or modification of the plan and plan payment amounts. We notice those changes out.

We will be making the noticed payment disbursement even when debtor objects to the noticed change. If an order is entered disallowing the noticed change, we will readjust the disbursements going forward. LRBP Rule 2084-4(b)(3)(E).