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## Not "Special" Enough for Chapter 7: An Analysis of the Special Circumstances Provision of the Bankruptcy Code

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# NOT “SPECIAL” ENOUGH FOR CHAPTER 7: AN ANALYSIS OF THE SPECIAL CIRCUMSTANCES PROVISION OF THE BANKRUPTCY CODE

ROMA PEREZ\*

## ABSTRACT

The “special circumstances” provision of the Bankruptcy Code, Section 707(b)(2)(B), allows a consumer debtor to rebut the presumption of abuse that is triggered when debtor fails the means test. Congress enacted the statute as a procedural safeguard fully aware that means testing, as set-out in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, could lead to arbitrary results for some debtors. For consumer debtors, the provision functions as a type of escape-hatch. It allows a debtor to avoid dismissal of his Chapter 7 bankruptcy case by introducing documentary evidence that the means test calculation, and its attendant income and expense figures, is not representative of the debtor’s financial reality. The provision itself, however, offers courts little guidance on what is sufficient to constitute a “special circumstance.” Bankruptcy courts, therefore, are split on how strictly the statute should be interpreted. A number of courts construe the provision so strictly that they essentially require that debtor prove “extraordinary” circumstances before the court will allow an adjustment of debtor’s income or expense figures for means testing. As a result, the only safeguard that was put in place to protect debtors is broken. Honest debtors for whom the means test does not accurately yield their repayment capacity may be denied the benefit of a Chapter 7 discharge and its attendant financial fresh start.

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#### I. INTRODUCTION

On April 20, 2005, President George W. Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), the most comprehensive amendments to the federal bankruptcy code since the Bankruptcy Reform Act of 1978.<sup>1</sup> Since the enactment of BAPCPA, the “means test” has functioned as the proverbial gatekeeper to Chapter 7 bankruptcy relief for consumer debtors.<sup>2</sup> A debtor is foreclosed from going forward with his Chapter 7 bankruptcy case if his income is above the state’s median income and the means test calculation shows that the debtor has at least \$207.92, and in some cases as little as \$124.59, of monthly disposable income which can be used to pay unsecured creditors.<sup>3</sup> In such cases, the means test triggers a presumption of abuse—a conclusion that debtor’s bankruptcy case is an abuse of the bankruptcy process—and the debtor’s case must be dismissed.<sup>4</sup> A debtor wanting to continue in Chapter 7 only has one option: to prove “special circumstances” pursuant to Section 707(b)(2)(B) of the bankruptcy code.<sup>5</sup>

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<sup>1</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat 23 (codified as amended in scattered sections of 11 U.S.C.); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 485 (2005) (“Although [BAPCPA’s] genesis can be traced to the formation of a commission charged by Congress with a modest mandate to review the state of the bankruptcy law system, the end product represents one of the most comprehensive overhauls of the Bankruptcy Code in more than twenty-five years.”); Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 41 WEEKLY COMP. PRES. DOC. 641-42 (Apr. 25, 2005), available at <http://www.gpo.gov/fdsys/granule/WCPD-2005-04-25/WCPD-2005-04-25-Pg641/content-detail.html>.

<sup>2</sup> 11 U.S.C.A. § 707(b)(1)-(b)(2) (West 2013); see generally Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 665 (2005) (noting that the “means test guards the gates of chapter 7”).

<sup>3</sup> *Id.* § 707 (b)(2)(A)(i) (“In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or \$7,475, whichever is greater; or (II) \$12,475.”).

<sup>4</sup> A debtor subject to the presumption of abuse may also choose to convert his case to a case under chapter 11 or 13 of the bankruptcy code. *Id.* § 707(b)(1) (“After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.”).

<sup>5</sup> *Id.* § 707(b)(2)(B)(i) (“In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances.”); *In re Rieck*, 427 B.R. 141, 146 (Bankr. D. Minn. 2010) (“There is only one way to rebut the presumption of abuse . . . [a] debtor must demonstrate ‘special circumstances.’”).

Although much has been written about the means test, there has been relatively little analysis of the bankruptcy code's "special circumstances" provision even eight years after the enactment of BAPCPA.<sup>6</sup> Yet, for the debtor facing the inevitable dismissal of his Chapter 7 bankruptcy case, the special circumstances provision can mean the difference between obtaining the bankruptcy relief debtor desires, having to pursue a different form of bankruptcy relief, such as a Chapter 13 case, or having to forgo bankruptcy relief altogether. This provision is significant, not only because of its importance to the debtor, but also because it was intended to function as a procedural safeguard to ensure that debtors with little or no ability to pay their unsecured creditors are not wrongfully denied Chapter 7 bankruptcy relief as a result of formulaic means testing.<sup>7</sup> Through this provision, Congress recognized and anticipated that the means test calculation, although straightforward, could produce arbitrary results not in line with the reality of a debtor's financial situation.<sup>8</sup>

In practice, however, the special circumstances provision is not functioning as the procedural safeguard that it was intended to be.<sup>9</sup> Some courts have been overly strict in their interpretation and application of the provision, in effect, creating a standard that requires the debtor prove the existence of "extraordinary" circumstances in order to rebut the presumption of abuse triggered by the means test.<sup>10</sup> That standard is not only contrary to the plain language of the statute, but

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<sup>6</sup> See generally Jason J. Kilborn, *Still Chasing Chimeras but Finally Slaying Some Dragons in the Quest for Consumer Bankruptcy Reform*, 25 LOY. CONSUMER L. REV. 1, 4 (2012) (discussing the creditor lobbies' role in the 2005 bankruptcy reform and concluding that BAPCPA has been a "spectacular failure" in curbing bankruptcy abuse or achieving any of its objectives); Mark A. Neal & Sandra Manocchio, *Means Testing: The Heart of BAPCPA*, 40 MD. BAR JOURNAL 26 (2007); Robert J. Landry III & Nancy Hisey Mardis, *Consumer Bankruptcy Reform: Debtors' Prison Without Bars or "Just Desserts" for Deadbeats?*, 36 GOLDEN GATE U. L. REV. 91 (2006) (summarizing and discussing some of the most drastic amendments to the bankruptcy code as a result of BAPCPA).

<sup>7</sup> See *In re Edwards*, No. 12-00603-TOM-7, 2012 WL 3042233, at \*4 (Bankr. N.D. Ala. July 25, 2012) ("Congress recognized the need to avoid 'rigid and arbitrary application' of the means test and thus included in the statute a provision allowing debtors to demonstrate '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 justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative' as a means of rebutting the presumption of abuse."); *In re Stocker*, 399 B.R. 522, 531 (Bankr. M.D. Fla. 2008) ("The 'special circumstances' exception [to the means test presumption that debtor's chapter 7 filing is abusive] was intended to 'protect debtors from rigid and arbitrary application of a means test.'"); S. REP. NO. 106-49, at 8 (1999) (referring to the special circumstances provision as a "procedural safeguard" meant to "ensure that the individual circumstances of each bankrupt will be considered before he or she is dismissed or converted to chapter 13").

<sup>8</sup> See *In re Edwards*, 2012 WL 3042233, at \*4; *In re Stocker*, 399 B.R. at 522; S. REP. NO. 106-49, at 6-7 ("In order to protect debtors from rigid and arbitrary application of a means-test . . . in some cases where the presumption [of abuse] applies the debtor may be able to demonstrate 'special circumstances' that justify additional expenses or an adjustment to debtor's income.").

<sup>9</sup> See *infra* Part III.

<sup>10</sup> *In re Smith*, 436 B.R. 476, 481 (Bankr. N.D. Ohio 2010) (requiring debtor to show a "sudden or catastrophic event"); *In re Burggraf*, 436 B.R. 466, 472 (Bankr. N.D. Ohio 2010)

clearly conflicts with Congress's intent in enacting the special circumstances provision.<sup>11</sup> Furthermore, this interpretation of the statutory language creates an almost insurmountable evidentiary burden for the debtor even in cases where it is evident that the means test does not accurately yield debtor's true repayment capacity.<sup>12</sup> Because this provision is the only recourse that allows the debtor to rebut the statutory presumption of abuse, its overly strict interpretation or misinterpretation by the courts essentially removes the only safeguard that protects the debtor from an inequitable application of the means test and, consequently, unfairly forecloses the debtor from the possibility of obtaining a Chapter 7 discharge.

This article examines the special circumstances provision, Section 707(b)(2)(B) of the Bankruptcy Code, and concludes that the courts have interpreted this provision too strictly and too variably for it to properly function as the procedural safeguard that Congress envisioned. Part II of this Article briefly discusses the means test and analyzes the inherent inequities in the test that require that there be a workable safeguard in place to protect honest consumer debtors. Part III of this Article will examine the interpretation given to the special circumstances provision by the courts. It will explain how some courts' interpretation of Section 707(b)(2)(B) has created what essentially amounts to an irrefutable presumption of abuse that leaves some debtors, that have little or no ability to repay their debts, unable to obtain a Chapter 7 discharge and a fresh start. Finally, Part IV of this Article recommends that courts take a more moderate approach to their interpretation of the special circumstances standard to ensure that honest debtors are not unfairly foreclosed from continuing in Chapter 7 by a rigid mathematical calculation that is not representative of debtor's true financial condition.

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(noting that debtor must establish that circumstances are "extraordinary" or "exceptional"); *In re Stocker*, 399 B.R. at 522 (noting that the factors giving rise to additional expenses or adjustments of income must be "extraordinary or exceptional, are unexpected or involuntary, and place the debtor in dire need of Chapter 7 relief"); *In re Parulan*, 387 B.R. 168, 170 (Bankr. E.D. Va. 2008); *In re Pageau*, 383 B.R. 221, 226 (Bankr. D.N.H. 2008); *In re Witek*, 383 B.R. 323, 329 (Bankr. N.D. Ohio 2007).

<sup>11</sup> S. REP. NO. 106-49 (1999); *see infra* Part III.A.

<sup>12</sup> *In re Chambers*, No. 10-00856-als7, 2011 WL 4479690 (Bankr. S.D. Iowa June 7, 2011) (post-petition job change and decrease in income due to loss of overtime not considered a "special circumstance"); *In re Wise*, No. 10-32441, 2011 WL 2133843 (Bankr. S.D. Ill. May 27, 2011) (loss of child support payments shortly post-petition not a "special circumstance" even though it would decrease debtor's CMI and disposable income); *In re Pignotti*, No. 07-04109-lmj7, 2011 WL 1299616 (Bankr. S.D. Iowa Apr. 1, 2011) (high transportation cost due to debtor's long commute to and from work not a "special circumstance" requiring adjustment of allowable expenses); *In re Siler*, 426 B.R. 167 (Bankr. W.D.N.C. 2010) (debtor's repayment obligation on non-dischargeable student loan not a "special circumstances" absent any evidence in the record to indicate loan was necessary due to unforeseen injury or disability); *In re Cotto*, 425 B.R. 72 (Bankr. E.D.N.Y. 2010) (one-time pre-petition wage settlement raising debtor's CMI considerably not a "special circumstance" despite non-recurring nature of payment).

II. THE "SPECIAL CIRCUMSTANCES PROVISION: A NECESSARY MECHANISM TO SAFEGUARD THE CONSUMER DEBTOR FROM THE INEQUITIES OF MEANS TESTING

The special circumstances provision of the Bankruptcy Code, Section 707(b)(2)(B), must be understood in the context of the means test and the goals that Congress sought to achieve when it implemented means testing as the threshold to Chapter 7 bankruptcy relief. The provision itself functions as an "out" for the above-median debtor for whom the means test calculation triggers a presumption of abuse.<sup>13</sup> It is the only mechanism that will allow the debtor to prove to the bankruptcy court that there are unique circumstances in debtor's financial life, outside of what is reflected in the numerical figures of the test, that the court must consider when assessing debtor's means.<sup>14</sup> It allows a debtor to rebut the abuse presumption and continue his bankruptcy case by proving that debtor's particular circumstances are "*special*" and require a mathematical adjustment to the "current monthly income" (CMI) figure or expense figures of the means test.<sup>15</sup> The debtor must then prove that the adjustments are sufficient to reduce the debtor's disposable income below the statutory amount.<sup>16</sup> Only then may the debtor continue his Chapter 7 bankruptcy case.<sup>17</sup>

Accordingly, it is essential to understand whom Congress sought to exclude from Chapter 7 bankruptcy relief through the implementation of means testing in order to determine what types of debtors Congress sought to protect through the special circumstances provision and under what circumstances Congress wanted to ensure that those debtors could continue with their Chapter 7 bankruptcy case. Moreover, an analysis of the means test calculation reveals that the test is flawed and that, in some instances, because of how the income and expense figures of the test are calculated, the test will yield a disposable income amount that is greater than what would actually be available to debtor to fund a Chapter 13 repayment plan.<sup>18</sup> In those situations, the result of the means test formula is a financial fiction on which it would be unfair and inequitable to base the dismissal of debtor's Chapter 7 case. Given the rigidity of the test, therefore, an adequate and properly functioning safeguard is essential in order to ensure that the honest debtor is not unjustifiably foreclosed from obtaining Chapter 7 relief.

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<sup>13</sup> 11 U.S.C.A. § 707(b)(2)(B)(i)-(iv) (West 2013) ("[T]he presumption of abuse may only be rebutted by demonstrating special circumstances.").

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *In re Cribbs*, 387 B.R. 324, 332 (Bankr. S.D. Ga. 2008) (noting that because the means test is based on historical income and expenses it was not intended to produce the most accurate prediction of the debtor's actual ability to fund a chapter 13 plan); *In re Miller*, 361 B.R. 224, 235 (Bankr. N.D. Ala. 2007); *In re Walker*, No. 05-15010-WHD, 2006 WL 1314125, at \*6 (Bankr. N.D. Ga. May 1, 2006) (noting that the means test is not an accurate predictor of debtor's actual ability to pay debts in chapter 13).

*A. A Means Test to Curtail Abuse of Bankruptcy Protection*

Among BAPCPA's most controversial amendments to the bankruptcy code was the implementation of a means test—the use of a mathematical formula to identify debtors that, despite having filed for bankruptcy relief, have some ability to pay their debts.<sup>19</sup> In the late 1990s and early 2000s when Congress was debating the bills that would eventually become the BAPCPA amendments, there was a strong push from the creditor lobbies to move the bankruptcy process for consumer debtors from one where it was presumed that debtors were entitled to the bankruptcy relief they sought, to one where debtors would have to offer concrete mathematical proof that they did not have any income from which to pay their creditors.<sup>20</sup> At the time, Congress sought to fix a bankruptcy system that they perceived to be “in a state of crisis”—a system that continued to see a skyrocketing number of consumer bankruptcies despite the unprecedented economic prosperity of the late 1990's which included decreasing unemployment rates and high wages.<sup>21</sup> This phenomenon, according to Congress, was attributable to the bankruptcy code's “generous” debt forgiveness provisions in Chapter 7 and the fact that debtors were no longer subject to the negative social stigmas that used to be associated with bankruptcy.<sup>22</sup> These

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<sup>19</sup> David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223 (2007); Landry & Mardis, *supra* note 6. See generally Judge Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 B.Y.U. L. REV. 177 (1999).

<sup>20</sup> Hon. Nancy C. Dreher, *Dismissal for Abuse and for Presumptive Abuse Under § 707(b)*, in BANKRUPTCY LAW MANUAL § 10:18 (2013) (noting the pre-BAPCPA presumption in favor of granting Chapter 7 relief to the debtor in § 707); Kilborn, *supra* note 6, at 4 (explaining how MBNA, a major credit card issuing bank, drafted the initial bankruptcy reform bill seeking to reduce the number of bankruptcy filings generally while identifying “can-pay” debtors); Kathleen Murphy & Justin H. Dion, “Means Test” or “Just a Mean Test”: An Examination of the Requirement that Converted Chapter 7 Bankruptcy Debtors Comply with Amended Section 707(B), 16 AM. BANKR. INST. L. REV. 413, 416 (2008) (“Before BAPCPA was passed, a debtor deciding to file chapter 7 was initially presumed to be acting in good faith. Fueled by rising bankruptcy rates and intense lobbying from credit business, Congress began to presume debtors were acting in bad faith.”); Charles J. Tabb & Jillian K. McClelland, *Living with the Means Test*, 31 S. ILL. U. L.J. 463 (2007); Landry & Mardis, *supra* note 6, at 95 (“The amendments to the Bankruptcy Code made by the enactment of BAPCPA in 2005 arguably represent a shift away from the policy of bankruptcy law favoring debtors.”).

<sup>21</sup> S. REP. NO. 106-49, at \*2 (1999), 1999 WL 300934 (“Surprisingly, the explosion in bankruptcy comes at a time of unprecedented prosperity, with low unemployment and high wages.”); Kilborn, *supra* note 6, at 3 (“Three factors converged to push an ill-conceived and poorly drafted reform bill through the legislative process: (1) the ebb and flow of politics had moved toward a more conservative position, (2) the general economic situation (especially investment asset values, such as home equity and stocks) was at all-time highs, and yet (3) annual personal bankruptcy filings had exceeded the psychologically important one million mark in 1996.”).

<sup>22</sup> S. REP. NO. 106-49, at \*2-3 (attributing sharp rise in bankruptcy filings to a decrease in the moral stigma associated with filing for bankruptcy and the bankruptcy code's “generous no-questions-asked policy of providing complete debt forgiveness under chapter 7 without serious consideration of a bankrupt's ability to repay”); Jones & Zywicki, *supra* note 19, at 180 (“[T]he evidence now available tends to suggest that the recent rise in personal bankruptcies has been significantly influenced by a decline in the personal shame and social

factors combined, Congress surmised, were fostering widespread abuse of the bankruptcy process by well-to-do debtors.<sup>23</sup> These "high-income" debtors could actually afford to repay their creditors but, instead, would file for bankruptcy, discharge most if not all of their unsecured debts, and continue to enjoy their income unencumbered by high credit card bills and other debt.<sup>24</sup> Supporters of implementing means testing as a part of the bankruptcy reform asserted that bankruptcy abuse was a "middle-class issue" and that the means test would only affect debtor's that were "well-off" or "higher income filers" that could and should be steered into repayment plans rather than be allowed to discharge their unsecured debt in a Chapter 7 bankruptcy case.<sup>25</sup> The motivation for implementing means testing, therefore, was clear: to stop well-to-do debtors from continuing to wrongfully take advantage of the bankruptcy process and force them, if they wanted any bankruptcy relief at all, into Chapter 13 repayment plans where the debtor must commit all of their disposable income to paying unsecured creditors for the life of the plan, usually sixty-months (five years).<sup>26</sup> The means test was simply a mechanism to mathematically identify or predict which debtors had extra income that should be used to pay creditors.<sup>27</sup> The challenge, however, was to achieve this goal without preventing honest debtors, those that really have no significant means from which to pay creditors, from being able to obtain a fresh start through Chapter 7. Unfortunately, the current embodiment of the means test in the bankruptcy code fails to achieve these goals for several reasons. Primarily, the test fails to take into account changes in debtor's financial life that can skew the calculation and make the debtor appear to have more disposable

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stigma traditionally accompanying bankruptcy, and by changes in the law and legal practice that have facilitated filing bankruptcy.").

<sup>23</sup> S. REP. NO. 106-49; Justin H. Rucki, *Looking Forward While Looking Back: Using Debtors' Post-Petition Financial Changes to Find Bankruptcy Abuse After BAPCPA*, 49 WM. & MARY L. REV. 335, 350 (2007) ("The legislative history accompanying the BAPCPA makes clear that Congress thought that fairness to creditors was drastically lacking in the existing version of the Bankruptcy Code, and, as a result, Congress sought to make it significantly harder for consumers to get bankruptcy relief, all in the name of curbing bankruptcy abuse.").

<sup>24</sup> S. REP. NO. 106-49, at \*3 ("[T]he concept of 'means testing' bankruptcy filers so that *higher income filers* are steered into repayment plans is the culmination of many Congressional efforts, by Republicans and Democrats, over 5 decades." (emphasis added)); Culhane & White, *supra* note 2, at 671 ("The basic idea of the means test is to identify a group of *higher-income* debtors for special scrutiny ."); Jones & Zywicki, *supra* note 19, at 178 (stating that means testing "embodies the concept that *well-off*, income-earning debtors should be required to repay what they can to their unsecured nonpriority creditors").

<sup>25</sup> Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 EMORY BANKR. DEV. J. 407, 407 (2009) ("When Congress debated the Bankruptcy Abuse Prevention and Consumer Protection Act ('BAPCPA'), most senators felt that the BAPCPA was mainly 'a middle-class issue,' leading to little debate involving the effects on the poor."); Jones & Zywicki, *supra* note 19, at 184 ("The only effect of means-testing is to prohibit *well-to-do debtors* who can make some repayment from walking away and sticking creditors and other consumers with the bill." (emphasis added)).

<sup>26</sup> Rucki, *supra* note 23; Culhane & White, *supra* note 2.

<sup>27</sup> S. REP. NO.106-49; Jones & Zywicki, *supra* note 19.

income than would actually be available to pay creditors.<sup>28</sup> If the debtor is unable to use the special circumstances provision of the code to account for those changes, the debtor may be forced to forgo bankruptcy relief based on a calculation that does not accurately evidence debtor's repayment capacity.

*B. The Myth that is "Current Monthly Income" and Other Inequities Created by the Means Test*

Part of the problem is created by the means test calculation itself. The test is designed to be a "snapshot" of the debtor's finances on the petition date.<sup>29</sup> The formula is straightforward and fairly easy to apply. It measures a debtor's "disposable income," the amount the debtor could pay unsecured creditors over the life of a Chapter 13 plan, by subtracting from debtor's "current monthly income," or CMI, certain allowable expenses enumerated in the bankruptcy code.<sup>30</sup> Abuse is presumed and debtor's Chapter 7 case must be dismissed or, at debtor's option, converted to a Chapter 13 case, if the debtor is an above-median debtor and has at least \$207.92 or more in monthly disposable income after subtracting the allowable expenses from debtor's CMI.<sup>31</sup> For some debtors, a disposable income figure of as little as \$124.59 will be sufficient to trigger the presumption of abuse depending on the amount of debtor's total unsecured debt.<sup>32</sup> A debtor with a monthly disposable income amount of \$124.58 or less will never trigger the means test's presumption of abuse.<sup>33</sup> The problem with the calculation, however, is that it is rigid and mechanical. As a "snapshot" of debtor's finances, the formula has no mechanism to allow the debtor to explain changes in debtor's income or expenses that occur shortly before or after the computation is completed.<sup>34</sup> Similarly, the test has no mechanism to modify

<sup>28</sup> *In re Hernandez*, No. 08-31588, 2008 WL 5441279, at \*9 (Bankr. N.D. Ohio Dec. 1, 2008) ("Future events and plans of a debtor are simply not taken into account in [the] 'means test' calculation. . . . For this and other reasons, the 'means test' has been criticized as 'a blind legislative formula that attempts to direct debtors to a [c]hapter that provides for at least some measure of repayment to unsecured creditors over a period of years.'"); *In re Cribbs*, 387 B.R. 324, 331 (Bankr. S.D. Ga. 2008); *In re Miller*, 361 B.R. 224, 234-35 (Bankr. N.D. Ala. 2007); *In re Walker*, No. 05-15010-WHD, 2006 WL 1314125, at \*6 (Bankr. N.D. Ga. May 1, 2006).

<sup>29</sup> *See generally In re Brady*, 419 B.R. 479 (Bankr. M.D. Fla. 2009) (discussing the means test as a "snapshot" of debtor's finances on the petition date). *In re Norwood-Hill*, 403 B.R. 905, 909 (Bankr. M.D. Fla. 2009); *In re Littman*, 370 B.R. 820, 828-29 (Bankr. D. Idaho 2007).

<sup>30</sup> 11 U.S.C.A. § 707(b)(2)(A) (West 2013). The type and amount of expenses that debtor is allowed to subtract from debtor's current monthly income (CMI) for purposes of means testing is statutorily prescribed by reference to the Internal Revenue Service's Collection Financial Standards, which are used by the IRS in calculating repayment of delinquent taxes. *See* COLLECTION FINANCIAL STANDARDS, available at <http://www.irs.gov/Individuals/Collection-Financial-Standards> (last visited on Oct. 15, 2013).

<sup>31</sup> 11 U.S.C.A. § 707(b)(2)(A) (West 2013).

<sup>32</sup> *See id.*

<sup>33</sup> *See id.*

<sup>34</sup> *In re Wise*, No. 10-32441, 2011 WL 2133843, at \*2 (recognizing that the United States Supreme Court has permitted known or virtually certain information about the debtor's future income or expenses to be taken into account when determining a debtor's "projected disposable income" in a chapter 13 case, but that no such provision exists in a chapter 7

the calculation to ensure that the disposable income amount yielded by the means test reflects those changes.<sup>35</sup> As a result, both the current monthly income figure, the cornerstone of means testing, and the allowable expense amounts may not accurately reflect debtor's true financial situation.<sup>36</sup> This is particularly true where the debtor has had a change in his income or expenses just prior or subsequent to the filing of the bankruptcy petition.<sup>37</sup>

The term "current monthly income" is defined in Section 101(10A) of the Bankruptcy Code.<sup>38</sup> The term itself, however, is a misnomer as there is nothing "current" about the income figure that is used as the basis for means testing under BAPCPA.<sup>39</sup> A debtor's CMI is defined as the average monthly income received by the debtor from all sources for the six month period preceding the date of filing the bankruptcy petition.<sup>40</sup> CMI, therefore, is based solely on the debtor's historical income—an average of the money debtor received during the six-month window preceding the filing for bankruptcy.<sup>41</sup> It is that CMI amount that is used as the basis for means testing and that will determine, first, whether debtor is subject to a presumption of abuse at all or whether debtor is "safe-harbored" pursuant to Section 707(b)(7)(A) and, second, whether debtor has too much disposable income to be

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bankruptcy case); *In re Littman*, 370 B.R. at 829 ("The best interpretation of § 707(b)(2) is to regard it as requiring a 'snapshot' of the debtor's finances at the time of filing.").

<sup>35</sup> *In re Wise*, 2011 WL 2133843, at \*2; *In re Littman*, 370 B.R. at 829.

<sup>36</sup> See *infra* Parts III.A-B; see also David W. Allard & Katherine R. Catanese, *The Means Test: Seeing Clearly the CMI*, 26 AM. BANKR. INST. JOURNAL 12, 12 (2007) ("CMI is the cornerstone of the means test because it alone determines . . . whether a debtor is forced to navigate his or her way through the morass of local and national deductions, eventually leading to a determination of whether a presumption of abuse arises."); *In re Littman*, 370 B.R. at 829 (noting that the means test "does not contain any provision which permits a court to review the debtors' actual finances" and that such an approach is "seemingly capable of reaching conclusions about a debtor's ability to pay divorced from reality").

<sup>37</sup> See *infra* Parts III.A-B.

<sup>38</sup> 11 U.S.C.A. § 101(10A) (West 2013). Section 101(10A) of the bankruptcy code defines the term as follows: "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." *Id.*

<sup>39</sup> *Id.*; Kilborn, *supra* note 6, at 7 ("The contrived legalese concept of CMI bears little relation to reality or common sense . . . as that term connotes the average of the debtor's monthly income over the past six months."); Allard & Catanese, *supra* note 36, at 12 ("[T]he exceedingly broad definition of current monthly income does not actually encompass 'current' income at all; instead, the definition imposes a six-month look-back period.").

<sup>40</sup> 11 U.S.C.A. § 101(10A)(B) (West 2013) (excluding from the definition of "current monthly income" only benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity, and payments to victims of international terrorism).

<sup>41</sup> *Id.*

allowed to continue his Chapter 7 bankruptcy case.<sup>42</sup> If a debtor has an unplanned or temporary increase in his income during the six months before filing for bankruptcy, therefore, that increase will have the effect of raising the amount of his CMI.<sup>43</sup> This occurs even where the increase of income was the product of a unique one-time event in debtor's financial life or due to cyclical changes in debtor's employment that will not continue post-petition.<sup>44</sup> The effect of including these unique or temporary increases of income in debtor's CMI is that it artificially raises the amount of debtor's disposable income, potentially enough to trigger a presumption of abuse, even in cases where the debtor has proof that the extra income will not repeat or will not be available to the debtor post-petition.<sup>45</sup> In these cases, the disposable income figure yielded by the means test is not an accurate predictor of how much money is available for the debtor to fund a Chapter 13 plan.<sup>46</sup> When one considers that a mere \$83.33 per month of income marks the difference between the monthly disposable income figure that will always trigger a presumption of abuse under the means test and the monthly disposable income figure that will never trigger such a presumption, it becomes clear that even very slight changes to debtor's income pre or post-petition, or to debtor's expenses, can have a devastating effect on debtor's Chapter 7 case.<sup>47</sup>

For example, assume that months before filing a bankruptcy petition, debtor has been working a few hours of overtime at her place of employment.<sup>48</sup> The availability of overtime at debtor's job is limited and additional hours are not offered regularly to employees. However, debtor has accepted some extra hours perhaps out of necessity, as a last ditch attempt to pay her bills, stave-off foreclosure of her home, avoid bankruptcy, or because it has simply been required by her employer. As a result, debtor's income from wages in the three months pre-petition has increased slightly by \$250.00 per month, raising her monthly income from \$3,500 to \$3,750 per month

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<sup>42</sup> *Id.* § 707(b)(2)(A)(i); *Id.* § 707(b)(7)(A) (the safe-harbor provision states that a below-median income debtor is not subject to the presumption of abuse that arises from the means test in § 707(b)(2) of the bankruptcy code).

<sup>43</sup> *See infra* Part III.A.

<sup>44</sup> *Id.*

<sup>45</sup> *In re Chambers*, No. 10-00856-als7, 2011 WL 4479690, at \*4 (Bankr. S.D. Iowa June 7, 2011); *In re Moore*, 446 B.R. 458 (Bankr. D. Colo. 2011); *In re Rieck*, 427 B.R. 141 (Bankr. D. Minn.); *In re Cotto*, 425 B.R. 72 (Bankr. E.D.N.Y. 2010); *In re Hernandez*, No. 08-31588, 2008 WL 5441279, at \*3 (Bankr. N.D. Ohio Dec. 1, 2008); *In re Parulan*, 387 B.R. 168 (Bankr. E.D. Va. 2008).

<sup>46</sup> *In re Chambers*, 2011 WL 4479690; *In re Moore*, 446 B.R. at 458; *In re Rieck*, 427 B.R. at 141; *In re Cotto*, 425 B.R. at 72; *In re Hernandez*, 2008 WL 5441279, at \*3; *In re Parulan*, 387 B.R. at 168.

<sup>47</sup> The court must presume that abuse exists if debtor's current monthly income is greater than the median family income of the applicable state for a family of the same or fewer individuals and such income, reduced by the amounts determined in 707(b)(2)(A)(ii), (iii), and (iv), and "multiplied by 60 is not less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims . . . , or \$7,475, whichever is greater; or (II) \$12,475." 11 U.S.C.A. § 707(b)(2)(A)(i)(I)-(II) (West 2013).

<sup>48</sup> This example is loosely based on the cases of *In re Chambers*, 2011 WL 4479690, and *In re Parulan*, 387 B.R. 168.

for the three months prior to the bankruptcy filing. Because of how CMI is calculated, when debtor files her Chapter 7 bankruptcy petition, debtor's CMI is \$3,625, an amount only modestly higher than the \$3,500 CMI debtor would have had without the overtime pay. If one assumes that debtor has allowable living and other expenses totaling \$3,419, the \$125 monthly increase in debtor's CMI due to the overtime pay is sufficient to trigger a presumption of abuse and foreclose the debtor from being able to continue her Chapter 7 bankruptcy case. By contrast, Debtor's CMI without the overtime pay would not have triggered the means test's abuse presumption and the debtor would have been able to proceed with her Chapter 7 case.<sup>49</sup> The unfairness of this result is particularly acute when one considers that the overtime available to Debtor is short-lived or a one-time occurrence and unavailable to Debtor as an additional source of income post-petition. In this case, because of a very slight change in Debtor's income pre-petition, the means test incorrectly identifies the debtor as a person with sufficient means to pay creditors a significant amount post-petition. Debtor's only recourse if she is to stay in Chapter 7, therefore, is to show that the temporary pre-petition overtime payments are a "special circumstance" that merit a reduction of Debtor's current monthly income figure in order to accurately yield Debtor's actual repayment capacity.<sup>50</sup> If such a circumstance is not considered *special* enough by the bankruptcy court, debtor will be denied Chapter 7 bankruptcy relief and may choose to convert the case to a Chapter 13 or be forced to forego bankruptcy relief altogether.<sup>51</sup>

Although some bankruptcy attorneys would advise a debtor in such a situation to wait to file his bankruptcy petition until his income level returns to normal, some debtors will not have the luxury of time and may have to file their bankruptcy petition immediately in order to avoid the foreclosure of their home or some other adverse economic event.<sup>52</sup> Furthermore, this type of result is not limited to cases where the debtor has received an atypical increase in income shortly pre-petition. The results of the means test will be skewed against the debtor in cases where the debtor has a change in employment either pre or post-petition that affects income, in cases where the debtor has received a one-time severance or other payment shortly before filing the petition, and in cases where the debtor has a change in expenses and that expense is either not considered an allowable expense for purposes of means testing or is capped by one of the applicable standards.<sup>53</sup> In each of those cases, the disposable income figure yielded by the means test is artificially inflated creating the illusion that debtor can pay his creditors more than what in reality is available for

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<sup>49</sup> In cases where a debtor is not subject to the means test presumption of abuse, either because the debtor is a below-median debtor or because the means test calculation yields that debtor's disposable income is below the statutory amount, the court may still dismiss debtor's chapter 7 case for abuse if the debtor filed the petition in bad faith or if the totality of the circumstances of the debtor's financial condition demonstrates abuse. 11 U.S.C.A. § 707(b)(3) (West 2013).

<sup>50</sup> *Id.* § 707(b)(2)(B).

<sup>51</sup> *Id.*

<sup>52</sup> *Hamilton v. Lanning*, 130 S. Ct. 2464, 2476 (2010) (recognizing that waiting to file a bankruptcy petition is not feasible for most debtors and, in some cases, may be indicative of bad faith).

<sup>53</sup> *See infra* Parts III.A-B.

debtor to fund a Chapter 13 plan.<sup>54</sup> By contrast, in cases where a debtor's disposable income is artificially low, because the debtor has timed his petition to take advantage of a lull in employment, for example, Section 707(b)(3) of the bankruptcy code provides two additional mechanisms that allow a bankruptcy court to dismiss debtor's case for bad faith or based on the totality of circumstances.<sup>55</sup> A bankruptcy court considering the dismissal of a case for abuse on these grounds must consider pre and post-petition changes to debtor's employment and income that show that the debtor's repayment capacity is actually higher than the amount yielded by the means test calculation.<sup>56</sup> Accordingly, in cases where the means test calculation inaccurately overestimates debtor's repayment capacity to the debtor's detriment, debtor's only recourse is to prove 'special circumstances.'<sup>57</sup> If the special circumstances standard is set extraordinarily high by the court, debtor will not meet that burden and the debtor's case will be dismissed. Where the means test inaccurately underestimates debtor's repayment capacity, however, the bankruptcy trustee may still seek the dismissal of debtor's case for abuse on two additional grounds both which require the bankruptcy court to consider and assess debtor's actual financial condition at the time of the request for dismissal.<sup>58</sup>

### III. WHEN "SPECIAL" REALLY MEANS "EXTRAORDINARY": THE INSURMOUNTABLE PRESUMPTION OF ABUSE AND ITS EFFECT ON CONSUMER DEBTORS

The special circumstances provision is complex and requires debtors who want to rebut the presumption of abuse to overcome multiple substantive and procedural hurdles.<sup>59</sup> The provision itself makes it clear that Congress did not intend "special circumstances" to be an easy or convenient way for debtors to circumvent means testing.<sup>60</sup> However, there is nothing in the statute indicating that the special

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<sup>54</sup> *Id.*

<sup>55</sup> Section 707(b)(3) states: "In considering under paragraph (1) whether granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." 11 U.S.C.A. § 707(b)(3)(A)-(B) (West 2013).

<sup>56</sup> Dreher, *supra* note 20 (noting that a debtor that purposefully manipulates income pre-petition may be found to be filing in bad faith and that a court may consider the debtor's ability to pay unsecured creditors when determining whether to dismiss case for abuse based on totality of circumstances); *In re Henenbury*, 361 B.R. 595, 607-08 (Bankr. S.D. Fla. 2007) (holding that the debtor's current financial situation had to be considered when determining whether to dismiss debtor's bankruptcy case for abuse when the debtor was unemployed at the time of filing the petition but got a job earning \$39,000 annually shortly after filing for bankruptcy); *In re Pak*, 343 B.R. 239, 245-46 (Bankr. N.D. Cal. 2006) (holding that the debtor's "actual and anticipated future income" must be used rather than debtor's current monthly income in deciding whether to grant or deny a motion to dismiss a chapter 7 case under section 707(b)(3)(B)).

<sup>57</sup> 11 U.S.C.A. § 707(b)(2)(B)(i)-(iv) (West 2013).

<sup>58</sup> *In re Henenbury*, 361 B.R. at 607-08; *In re Pak*, 343 B.R. at 245-46.

<sup>59</sup> 11 U.S.C.A. § 707(b)(2)(B)(i)-(iv) (West 2013).

circumstances standard should be extremely high or nearly insurmountable for consumer debtors.<sup>61</sup> Section 707(b)(2)(B) of the bankruptcy code states in relevant part:

(B)(i) [T]he 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.<sup>62</sup>

To rebut a presumption of abuse, therefore, the debtor must meet both the substantive and procedural requirements of the statute.<sup>63</sup> First, the debtor must prove that the substance of the situation that created the need for the adjustment to CMI or additional expenses is sufficiently "special" to warrant different treatment under the bankruptcy code.<sup>64</sup> Bankruptcy courts have broad discretion to determine whether the debtor's situation can be considered "special" or whether the debtor's Chapter 7 filing is abusive.<sup>65</sup> The debtor must then be able to prove that his "special circumstances" require a reduction to debtor's current monthly income or an increase of allowable expenses, for which there is no reasonable alternative, and explain why such adjustments are reasonable and necessary.<sup>66</sup> A debtor can only rebut the abuse presumption when these monetary adjustments cause debtor's monthly disposable income, when projected out over sixty months, to fall below the statutory threshold

<sup>60</sup> *In re Champagne*, 389 B.R. 191, 198 (Bankr. D. Kan. 2008) (stating that the multiple requirements of § 707(b)(2)(B)(i)-(iv) is linked to concerns that the rebuttal provision not be used as a convenient way for chapter 7 debtors to select a more expensive lifestyle); *In re Sparks*, 360 B.R. 224, 230-31 (Bankr. E.D. Tex. 2006).

<sup>61</sup> *In re Haman*, 366 B.R. 307, 313-14 (Bankr. D. Del. 2007); *In re Champagne*, 389 B.R. at 198; *In re Polinghorn*, 436 B.R. 484, 489-90 (Bankr. N.D. Ohio 2010).

<sup>62</sup> 11 U.S.C.A. §707(b)(2)(B)(i)-(iv) (West 2013) ("The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims, or \$7,475, whichever is greater; or (II) \$12,475.").

<sup>63</sup> *Id.* § 707(b)(2)(B); Tabb & McClelland, *supra* note 20, at 512; *In re Templeton*, 365 B.R. 213, 214 (Bankr. W.D. Okla. 2007) (stating that burden is on the debtor to prove that a requested adjustment qualifies as a special circumstance).

<sup>64</sup> 11 U.S.C.A. § 707(b)(2)(B) (West 2013); Tabb & McClelland, *supra* note 20, at 467-68.

<sup>65</sup> *In re Stocker*, 399 B.R. 522, 530 (Bankr. M.D. Fla. 2008); *In re Templeton*, 365 B.R. at 215.

<sup>66</sup> 11 U.S.C.A. § 707(b)(2)(B) (West 2013); Tabb & McClelland, *supra* note 20, at 499-500.

amounts in Section 707(b)(2)(A)(i).<sup>67</sup> Finally, to satisfy his procedural burden, debtor must itemize each additional expense or reduction of current monthly income and provide adequate documentation of the changes.<sup>68</sup> Debtor's failure to meet any of these requirements will result in the dismissal of debtor's Chapter 7 case or, with debtor's consent, to a conversion of the case to Chapter 13.<sup>69</sup>

Congress provided bankruptcy courts with very little guidance on how to interpret the special circumstances provision.<sup>70</sup> Congress did not define the term "special circumstances" in the Bankruptcy Code, but instead chose to provide two examples of what would satisfy the standard—a serious medical condition or a call to active military duty.<sup>71</sup> As a result, courts are divided on how strictly to construe the statute and whether the standard for finding "special circumstances" should require the debtor to meet a significantly high threshold or prove "extraordinary" circumstances.<sup>72</sup> While the Code expressly states that special circumstance

<sup>67</sup> 11 U.S.C.A. § 707(b)(2)(B)(iv) (West 2013).

<sup>68</sup> *Id.* § 707(b)(2)(B)(ii).

<sup>69</sup> *In re Taylor*, 417 B.R. 762, 762 (Bankr. N.D. Ohio 2009) ("Even if circumstances alleged by Chapter 7 debtor in attempt to rebut 'means test' presumption of abuse could be regarded as 'special circumstances,' debtor's failure to satisfy procedural requirements of 'special circumstances' provision, by itemizing each additional expense or adjustment of income, providing documentation for each such expense or adjustment to income, and offering detailed explanation of special circumstances that make such expenses or adjustments to income necessary and reasonable, prevented court from finding that presumption of abuse had been rebutted."); *see also* AM. BANKR. INST., CONSUMER PRACTITIONERS: HOW'S LIFE UNDER BAPCPA?: AN UPDATE ON POST-BAPCPA CONSUMER CASE LAW, CENT. STATES BANKR. WORKSHOP 1, 5 (2009) ("There is a substantial likelihood that a failure to provide evidentiary support of the special circumstances will cause the case to be dismissed without decision on the actual merits.").

<sup>70</sup> *In re Vaccariello*, 375 B.R. 809, 813 (Bankr. N.D. Ohio 2007) ("The code does not define 'special circumstances,' but merely provides some non-exclusive examples of what may be considered special circumstances."); *see In re Delbecq*, 368 B.R. 754, 757 (Bankr. S.D. Ind. 2007) ("Certainly, the plain meaning of 'special' provides some instruction to the Court. . . . However, given the myriad of possible scenarios—from the exceedingly rare to the slightly unusual—it is difficult for the Court to discern exactly what Congress intended by its use of the word.").

<sup>71</sup> 11 U.S.C.A. § 707(b)(2)(B)(i) (West 2013); *In re Vaccariello*, 375 B.R. at 813.

<sup>72</sup> *In re Smith*, 436 B.R. 476, 481 (Bankr. N. D. Ohio 2010) (holding that debtor failed to prove special circumstances where debtor could not show that there was a "sudden or catastrophic event" that caused a "sudden and precipitous rise in debt"); *In re Burggraf*, 436 B.R. 466, 471 (Bankr. N. D. Ohio 2010); *In re Stocker*, 399 B.R. 522, 522 (Bankr. M. D. Fla. 2008) ("[T]he factors giving rise to additional expenses or adjustments of income must be extraordinary or exceptional, unexpected or involuntary, and must substantially impact debtor's financial situation."). *But see In re Champagne*, 389 B.R. 191, 191 ("Burden on chapter 7 debtor of establishing 'special circumstances' sufficient to rebut 'means test' presumption of abuse is not particularly high; standard is special, not extraordinary circumstances."); *In re Delbecq*, 368 B.R. at 757-60 (stating that, based on BAPCPA's legislative history, "the term 'special circumstances' requires a fact-specific, case-by-case inquiry into whether the debtor has a 'meaningful ability' to pay his or her debts in light of an additional expense or adjustment to income not otherwise reflected in the means test calculation").

adjustments should only be allowed where it is “necessary and reasonable,” the word “extraordinary” is notably absent from the text of Section 707(b)(2)(B).<sup>73</sup> The plain meaning of the statute does not support an interpretation of the standard that would require the debtor to prove extraordinary or exceptional circumstances to rebut the means test’s presumption of abuse.<sup>74</sup> The term is similarly absent from BAPCPA’s legislative history.<sup>75</sup> In fact, the phrase “extraordinary circumstances” is only used in very early versions of the bankruptcy reform legislation and, notably, the language of the statute was later changed to “special circumstances” to specifically provide for a different standard.<sup>76</sup> In a Senate report accompanying Senate bill 625, a precursor to the bill that would later become BAPCPA, Senator Orrin G. Hatch emphasized the provision’s role as a safeguard within the bankruptcy reform and noted the significant change in the statutory language of the provision from its embodiment in prior bills.<sup>77</sup> Senator Hatch stated:

In order to protect debtors from rigid and arbitrary application of a means-test, section 102 also provides that in some cases where the presumption applies the debtor may be able to demonstrate ‘special circumstances’ that justify additional expenses or an adjustment to the debtor’s income. The Committee adopted the ‘*special circumstances*’ standard, rather than the ‘*extraordinary circumstances*’ standard included in the Conference Report to accompany H.R. 3150 to provide a different standard of when a debtor may overcome the presumption of abuse. In applying the ‘special circumstances’ test, it is important to note that a debtor who requests a special circumstances adjustment is requesting preferential treatment when compared to other consumers. . . . In order to ensure fairness with respect to the consumers who must pay the cost when others discharge debts in bankruptcy, it is essential that the ‘special circumstances’ test establish a significant, meaningful threshold which a debtor must satisfy in order to receive the preferential treatment.<sup>78</sup>

The change in the proposed statutory language from “extraordinary” circumstances to “special” circumstances is notable, particularly when considered in light of other congressional reports. In a 1999 House Report the Committee on the Judiciary criticized the proposed language for the special circumstances provision stating that “the multiple hurdles for rebutting the presumption of abuse . . . [were] conflicting and so strict as to effectively preclude the debtor from proving the

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<sup>73</sup> 11 U.S.C.A. § 707(b)(2)(B) (West 2013).

<sup>74</sup> *In re Delbecq*, 368 B.R. at 757-60; *In re Haman*, 366 B.R. 307, 313-15 (Bankr. D. Del. 2007).

<sup>75</sup> See *In re Delbecq*, 368 B.R. at 757-60 (summarizing the development of the “special circumstances” provision in BAPCPA’s legislative history); see also *In re Haman*, 366 B.R. at 313-15; S. REP. NO. 106-49, AT \*8 (1999), 1999 WL 300934.

<sup>76</sup> See also *In re Delbecq*, 368 B.R. at 757-60; S. REP. NO. 106-49, at \*7.

<sup>77</sup> S. REP. NO. 106-49, at \*7.

<sup>78</sup> S. REP. NO. 106-49, at \*6-7 (emphasis added); see also H.R. REP. NO. 106-126, at \*24 (1999), 1999 WL 269112 (changing the proposed statutory language from “extraordinary circumstances” to “special circumstances”).

existence of reasonable expenses that are not included within the IRS standards.”<sup>79</sup> Accordingly, the Committee suggested the deletion of the word “extraordinary” from the proposed language for Section 707(b)(2)(B).<sup>80</sup> Therefore, while the legislative history to BAPCPA shows that Congress intended that there be a significant threshold for the special circumstances standard, it is also clear that the threshold that Congress envisioned was not meant to be insurmountable.<sup>81</sup> Special circumstance adjustments should not allow debtors to choose a more expensive lifestyle, but should function to ensure that means testing does not arbitrarily deny debtors without a demonstrable ability to repay creditors the benefit of a Chapter 7 discharge.<sup>82</sup> Congress described the special circumstances provision as a “procedural safeguard[]” that would ensure that the “individual circumstances of each bankrupt [is] considered before [the case] is dismissed or converted to Chapter 13.”<sup>83</sup> If the provision is to properly function as the “safeguard” that Congress intended it to be, bankruptcy courts must adhere to a more moderate and consistent approach in their interpretation of “special circumstances” rather than holding the debtor to an heightened standard not supported by the text of the statute.

An analysis of case law shows that bankruptcy courts disagree on what types of situations or events in a debtor’s life are “special” enough to cause the financial impact that should be reflected in the means test calculation.<sup>84</sup> Courts generally agree that “special circumstances” are not limited to a medical condition or call to active military duty, the examples stated in the statute, and that canons of statutory construction require that debtor’s situation be similar in nature or share traits in common with the legislatively provided examples.<sup>85</sup> Courts cannot agree, however,

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<sup>79</sup> H.R. REP. NO. 106-123, at \*205 (1999), 1999 WL 306442 (suggesting that the words “only,” “extraordinary,” and “necessary” should be deleted from proposed § 707(b)(2)(B)).

<sup>80</sup> *Id.*

<sup>81</sup> S. REP. NO. 106-49, \*6.

<sup>82</sup> BAPCPA’s legislative history shows that Congress was concerned that a strictly mathematical means test could produce arbitrary results for some consumer debtors. *Id.* at \*8.

<sup>83</sup> *Id.* at \*8; *see also In re Cribbs*, 387 B.R. 324, 330 (Bankr. S.D. Ga. 2008) (“While Congress adopted a ‘special circumstance’ safety valve to [the] means test formula, judges should be mindful to honor the fundamental intent of the new statute.”).

<sup>84</sup> *In re Cribbs*, 387 B.R. at 329 (noting that courts have struggled to define the scope of what constitutes a “special circumstance” with one line of cases taking a “narrow view” of the exception limiting it to circumstances that are similar to the examples in the statute, while some courts take an “expansive view” finding that there are special circumstances when debtor lacks a “meaningful ability to repay” creditors).

<sup>85</sup> *In re Rieck*, 427 B.R. 141, 145 (Bankr. D. Minn. 2010); *In re Taylor*, 417 B.R. 762, 765 (Bankr. N.D. Ohio 2009) (noting that to qualify as a special circumstance, the situation presented by debtor must have “traits in common” with the examples of special circumstances given in the statute); *In re Tauter*, 402 B.R. 903, 906 (Bankr. M.D. Fla. 2009) (noting that special circumstances are not limited to those enumerated in the statute, but must be similar in nature); *In re Stocker*, 399 B.R. 522, 527 (Bankr. M.D. Fla. 2008); *In re Patterson*, 392 B.R. 497, 504 (Bankr. S.D. Fla. 2008); *In re Robinette*, No. 7-06-10585 SA, 2007 WL 2955960, at \*4 (Bankr. D.N.M. Oct. 2, 2007) (“[T]he two examples of special circumstances enumerated in the statute are not the only circumstances that debtors may cite, nor even archetypal circumstances.”); *In re Armstrong*, No. 06-31414, 2007 WL 1544591, at \*6 (Bankr. N.D. Ohio May 24, 2007) (“The examples of special circumstances in § 707(b)(2)(B)(i) are not

on how “similar” debtor’s circumstances must be to those examples to satisfy the standard in the statute.<sup>86</sup>

Some courts take a moderate approach emphasizing that the standard requires the debtor to prove special circumstances not extraordinary ones.<sup>87</sup> These courts generally find that the language in the statute does not lend itself to constructing a per se rule.<sup>88</sup> Instead, the court must engage in a fact-specific inquiry, using its discretion to determine whether debtor’s particular situation is a “special circumstance.”<sup>89</sup> In these cases, the burden on debtor is not especially high.<sup>90</sup> A debtor may rebut the abuse presumption if he can show that he lacks a “meaningful ability to repay” creditors in light of documented income or expense adjustments, not reflected in the means test formula, that would result in an economic unfairness to the debtor if not considered by the court when determining the debtor’s disposable

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exhaustive; they are merely illustrative of the type of circumstances that Congress found warranted an adjustment to the disposable income calculation under the means test. Applying the principle of *ejusdem generis*, a canon of statutory interpretation, the court must “interpret legislatively provided examples as typical of the general category covered.” (internal citations omitted).

<sup>86</sup> *In re Ross*, No. 10-81200-DHW, 2011 WL 482815, at \*3 (Bankr. M.D. Ala. Feb. 7, 2011) (stating that debtor’s circumstances must be similar to those in the statute—unanticipated, unavoidable, and beyond the debtor’s control); *In re Parulan*, 387 B.R. 168, 168 (“Though examples provided by Congress of what might constitute a ‘special circumstance,’ . . . i.e. a serious medical condition or call to active duty in the armed forces, were not meant to be exclusive, Congress clearly intended to set the ‘special circumstances’ bar extremely high, placing it effectively off limits for most debtors.”). *But see In re Littman*, 370 B.R. 820, 831 (Bankr. D. Idaho 2007) (noting that there is limited utility, in certain cases, in using the statutory examples as illustrations or as archetypal); *In re Delbecq*, 368 B.R. 754, 758 (Bankr. S.D. Ind. 2007) (“[T]he legislative history does not indicate that the explicit examples included in § 707(b)(2)(B) were intended to define, qualify or otherwise limit the meaning of ‘special circumstances.’”).

<sup>87</sup> *In re Champagne*, 389 B.R. 191, 191 (Bankr. D. Kan. 2008) (“Burden on Chapter 7 debtor of establishing ‘special circumstances’ sufficient to rebut ‘means test’ presumption of abuse is not particularly high; standard is special, not extraordinary, circumstances.”); *In re Martin*, 371 B.R. 347, 352 (Bankr. C.D. Ill. 2007); *In re Haman*, 366 B.R. 307, 313 (Bankr. D. Del. 2007); *In re Knight*, 370 B.R. 429, 437-38 (Bankr. N.D. Ga. 2007); *In re Delbecq*, 386 B.R. at 758-59.

<sup>88</sup> *In re Armstrong*, 2007 WL 1544591, at \*6-7; *In re Martin*, 371 B.R. at 352; *In re Delbecq*, 386 B.R. at 758-59.

<sup>89</sup> *In re Martin*, 371 B.R. at 352 (“[T]he term ‘special circumstances’ requires a fact-specific, case-by-case inquiry into whether a debtor has a ‘meaningful ability’ to pay his or her debts in light of an additional expense or adjustment to income not otherwise reflected in the means test calculation.”); *In re Littman*, 370 B.R. at 831 (noting that the court must undertake “an analysis of the specific ‘special circumstance’ alleged and an evaluation of whether a debtor has adequately shown all the elements needed to adjust the means test calculation, including itemization, documentation, reasonableness, necessity, and lack of reasonable alternative for each income adjustment or additional expense urged”); *In re Templeton*, 365 B.R. 213, 215 (Bankr. W.D. Okla. 2007) (“[S]pecial circumstances’ is a fact-specific consideration.”).

<sup>90</sup> *In re Champagne*, 389 B.R. at 198.

income.<sup>91</sup> The circumstance asserted by the debtor to be “special” must still be one that is “out of the ordinary” and that leaves the debtor “with no reasonable alternative” other than to incur the expense or modify his income.<sup>92</sup>

Other courts, however, have held that the provision must be construed strictly and that only the most exceptional of events or situations will require that the court modify the current monthly income or expense figures of the means test.<sup>93</sup> In these cases, in order to rebut a presumption of abuse, a debtor will need to prove that the circumstance necessitating an adjustment of the means test calculation is extraordinary and involuntary, or beyond the debtor’s control.<sup>94</sup> In the case of *In re Cribbs*, the court aptly summarized some of the most common words or terms used by these courts in assessing whether debtor’s circumstances are indeed sufficiently “special.”<sup>95</sup> These include circumstances that are: (1) “[u]nanticipated”; (2) “[t]ruly unavoidable”; (3) “[b]eyond the reasonable control of the debtor”; (4) “[o]ut of the ordinary”; and (5) “[u]nforeseeable.”<sup>96</sup> Yet, nothing in the plain text of the statute requires that the circumstances asserted by debtor to be “special” must be involuntary, completely unanticipated, or beyond the scope of debtor’s control to

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<sup>91</sup> *In re Cribbs*, 387 B.R. 324, 329 (Bankr. S.D. Ga. 2008) (noting that some courts take an expansive view of the provision finding “special circumstances” where the debtor lacks meaningful ability to repay in light of income or expense adjustments not reflected in the means test or where, if no adjustment occurs it “will result in economic unfairness to debtor.”); *In re Martin*, 371 B.R. at 352; *In re Knight*, 370 B.R. at 437-38 (“A special circumstance is one that, if the debtor is not permitted to adjust her income or expenses accordingly, results in a demonstrable economic unfairness.”); *In re Armstrong*, 2007 WL 1544591, at \*6-7; *In re Delbecq*, 368 B.R. at 758 (“[T]he term ‘special circumstances’ requires a fact-specific, case-by-case inquiry into whether the debtor has a ‘meaningful ability’ to pay his or her debts in light of an additional expense or adjustment to income not otherwise reflected in the means test calculation.”); see also *In re Haman*, 366 B.R. at 313-14; *In re Ross*, 2011 WL 482815, at \*2.

<sup>92</sup> *In re Martin*, 371 B.R. at 352; *In re Armstrong*, 2007 WL 1544591, at \*7.

<sup>93</sup> *In re Smith*, 436 B.R. 476, 480 (Bankr. N.D. Ohio 2010) (holding that debtor failed to prove special circumstances because debtor could not show that he was victim of sudden or catastrophic event); *In re Rieck*, 427 B.R. 141, 146 (Bankr. D. Minn. 2010) (“Although this presumption may be rebutted, [section] 707(b) goes on to set this bar extremely high, placing it effectively off limits for most debtors.”); *In re Schley*, No. 08-26146-svk, 2008 WL 3895562, at \*2 (Bankr. E.D. Wis. Aug. 22, 2008) (“Beyond the special circumstances expressly described in the statute, i.e., a serious medical condition or active duty in the Armed Forces, ‘debtors with lost jobs, domestic relations problems, children in trouble, natural disasters, [and] car wrecks’ may qualify.”); *In re Stocker*, 399 B.R. 522, 531 (Bankr. M.D. Fla. 2008).

<sup>94</sup> *In re Pignotti*, No. 07-04109-lmj7, 2011 WL 1299616, at \*5 (Bankr. S.D. Iowa Apr. 1, 2011) (additional expenses not special circumstance because undertaken voluntarily); *In re Stocker*, 399 B.R. at 531 (circumstances must be “unexpected” or “involuntary”); *In re Lightsey*, 374 B.R. 377, 382 (Bankr. S.D. Ga. 2007) (stating that to qualify as a “special circumstance,” the event must be “unforseeable” or “beyond the control of the debtor”); *In re Sparks*, 360 B.R. 224, 225 (Bankr. E.D. Tex. 2006) (explaining that “special circumstances exception must be strictly construed to allow only those expenses which are truly unavoidable to debtor”).

<sup>95</sup> *In re Cribbs*, 387 B.R. at 330.

<sup>96</sup> *Id.*

satisfy the standard.<sup>97</sup> The statute simply states that the special circumstances must “justify additional expenses or adjustments of current monthly income for which there is *no reasonable alternative*.”<sup>98</sup> The additional “involuntariness” and “unanticipated” requirements have been mistakenly imputed by some courts into the special circumstances standard as a result of the examples provided by Congress in the statute.<sup>99</sup> As several courts have aptly noted, however, a call to active duty in the Armed Forces or a medical condition are not events that are necessarily always unanticipated, involuntary, or outside debtor’s control.<sup>100</sup> Accordingly, these statutory examples cannot and should not be used to impute such requirements into

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<sup>97</sup> See 11 U.S.C.A. § 707(b)(2)(B) (West 2013); see also *In re Armstrong*, 2007 WL 1544591, at \*3 (recognizing that there is no language in § 707(b)(2)(B) that suggests that the special circumstance must be unanticipated or outside the control of the debtor); *In re Robinette*, No. 7-06-10585 SA, 2007 WL 2955960, at \*4 (Bankr. D.N.M. Oct. 2, 2007) (“Nothing in the language of the statute requires that the circumstances be an act outside of a debtor’s control.”); *In re Haman*, 366 B.R. 307, 313 (Bankr. D. Del. 2007) (“Congress’ use of the words ‘such as’ to introduce the examples indicate its intent to provide a non-exhaustive list of illustrations rather than to constrict any application of the statute.”); *In re Graham*, 363 B.R. 844, 850-51 (Bankr. S.D. Ohio 2007) (stating that “[n]othing in the statute suggests or mandates that ‘special circumstances’ be outside of the control of the debtor” and that Congress could have limited the statute in that way if that is what it intended); see *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) (Where “the statute’s language is plain, ‘the sole function of the courts is to enforce it according to its terms.’”).

<sup>98</sup> 11 U.S.C.A. § 707(b)(2)(B) (West 2013) (emphasis added).

<sup>99</sup> *In re DeJoy*, No. 11-10268, 2011 WL 5827319, at \*4 (Bankr. N.D.N.Y. Nov. 18, 2011) (interpreting the statute’s “no reasonable alternative language” as equivalent to a requirement that the circumstance be unforeseeable or beyond the debtor’s control); *In re Tranmer*, 355 B.R. 234, 251 (Bankr. D. Mont. 2006) (“[S]pecial circumstances’ contemplates circumstances beyond a debtor’s reasonable control, such as a ‘serious medical condition, or a call or order to active duty in the Armed Forces.’”); *In re Sparks*, 360 B.R. at 230 (noting that the two examples in the statute are the “type of unanticipated development which leaves a debtor with no reasonable alternative but to incur the expense or accept the income adjustment”); *In re Castle*, 362 B.R. 846, 851 (Bankr. N.D. Ohio 2006) (stating that the examples in the statute constitute situations that “arise from circumstances normally beyond the debtor’s control”). *But see In re Littman*, 370 B.R. 820, 831 (Bankr. D. Idaho 2007) (stating that “[t]he examples themselves are not key,” but rather that “compliance with the requirements to itemize, document, verify, establish reasonableness and necessity, and prove ‘no reasonable alternative’ are key”); *In re Haman*, 366 B.R. at 314; *In re Thompson*, 350 B.R. 770, 777 (Bankr. N.D. Ohio 2006) (noting that these examples do not necessarily indicate that the special circumstances must be involuntary, but rather the two examples “share the elements of a distinctive situation that justify] additional expenses or adjustment of income for which there is no reasonable alternative”).

<sup>100</sup> *In re Littman*, 370 B.R. at 831 (“The argument that a common trait in the examples is an act outside the debtor’s control is not compelling.”); *In re Armstrong*, 2007 WL 1544591, at \*3 (“A call to service on active duty in the Armed Forces might sometimes be anticipated.”); *In re Haman*, 366 B.R. at 313 (“[I]t is even open to question whether the examples provided imply circumstances incurred or developed involuntarily.”); *In re Templeton*, 365 B.R. 213, 217 (Bankr. W.D. Ok. 2007) (noting that neither example in the bankruptcy code—a serious medical condition or a call to active military duty—is necessarily entirely involuntary in nature because “[t]he serious health condition could stem from a self-inflicted injury, and an individual called to active duty could have voluntarily enlisted.”).

the standard.<sup>101</sup> In fact, the legislative history of BAPCPA indicates that the examples in the statute were not included to limit judicial discretion or to define special circumstances, but rather were added late in the legislative process to ensure that those debtors that could not pay their bills because of illness or military service would not be forced to do so.<sup>102</sup> In a recent case, one court noted that courts must be mindful that a legal presumption “serves only as a rule of evidence to assist in determining the ultimate finding of the court.”<sup>103</sup> A court should, therefore, “construe the statutory standard for rebuttal in a fashion that will allow a fair determination of whether abuse has occurred.”<sup>104</sup>

The overly strict interpretation of the special circumstances provision, therefore, is concerning because it can create a nearly insurmountable standard of proof which Congress did not intend. That standard leaves consumer debtors that have income just slightly above the state median without an “out” even in cases where it creates a demonstrable economic unfairness.<sup>105</sup> Additionally, it removes from the courts the flexibility and discretion that Congress sought to preserve through the inclusion of this provision in the bankruptcy code.<sup>106</sup> Moreover, in some cases, particularly where a debtor’s CMI is not representative of debtor’s actual income, it can create a catch-22 for the debtor that forecloses the possibility of proceeding with a Chapter 7 case where a Chapter 13 case may not be feasible.<sup>107</sup>

#### *A. Adjustments to “Current Monthly Income” (CMI)*

Bankruptcy courts undertaking a strict interpretation of Section 707(b)(2)(B), for example, will not allow a special circumstance adjustment to debtor’s CMI even when that amount does not accurately reflect debtor’s actual income or debtor’s real

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<sup>101</sup> *In re Delbecq*, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007); *In re Haman*, 366 B.R. at 313-14.

<sup>102</sup> *In re Delbecq*, 368 B.R. at 758-59 (summarizing BAPCPA’s legislative history and concluding that “the examples of ‘special circumstances’—added to the provision in 2005 by way of an amendment proposed by Senator Jeff Sessions of Alabama—were seemingly designed to explicitly protect military personnel from the effects of means testing” rather than to define, qualify or limit the meaning of special circumstances); *In re Haman*, 366 B.R. at 313-14.

<sup>103</sup> *In re Howell*, 477 B.R. 314, 316-17 (Bankr. W.D.N.Y. 2012) (“Presumptions provide convenient and shorthand paths to reach a proper finding of fact. Opportunities for rebuttal serve to correct those outcomes where the presumed conclusion deviates from an underlying goal or statutory intent.”).

<sup>104</sup> *Id.* at 316.

<sup>105</sup> *See infra* Parts III.A-B.

<sup>106</sup> *In re Castle*, 362 B.R. 846, 850 (Bankr. N.D. Ohio 2006) (“The effect of this section is to give the Court some discretion to . . . allow changes in the ‘means test’ equation.”); S. REP. NO. 106-49, at \*8 (1999), 1999 WL 300934 (“[T]he new section 707(b) contains numerous procedural safeguards in order to ensure that the individual circumstances of each bankrupt will be considered before he or she is dismissed or converted to chapter 13.”).

<sup>107</sup> *In re Wise*, No. 10-32441, 2011 WL 2133843 (Bankr. S.D. Ill., May 27, 2011); *In re Burggraf*, 436 B.R. 466 (Bankr. N.D. Ohio 2010); *In re Castle*, 362 B.R. 846 (Bankr. N.D. Ohio 2006); *In re Johns*, 342 B.R. 626 (Bankr. E.D. Ok. 2006).

ability to pay creditors.<sup>108</sup> Courts that are, in effect, using an “extraordinary circumstances” standard will likely not allow the debtor to rebut a presumption of abuse when the debtor’s CMI amount is artificially inflated by a one-time pre-petition payment or where there have been irregular changes in debtor’s wages or income shortly before or after the filing of the petition that, in effect, skew the debtor’s “current monthly income” making it appear higher.<sup>109</sup> The court may find that such circumstances are not “special” because the event is not unforeseeable or sufficiently uncommon, is not similar enough in nature to the “medical condition” or “call to active duty” examples provided in the statute, or because some aspect of the circumstance was voluntarily undertaken by the debtor.<sup>110</sup> In these cases, the debtor will be unable to continue in Chapter 7 even if debtor is just barely above the median income for his state or has insufficient income to make significant payments under a Chapter 13 plan.<sup>111</sup>

In *In re Cotto*, for example, the bankruptcy court dismissed debtors’ Chapter 7 case for presumed abuse because debtors’ CMI was \$57.50 above the statutory maximum—presumptively showing that debtors had the ability to repay their debts

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<sup>108</sup> *In re Wise*, 2011 WL 2133843; *In re Cotto*, 425 B.R. 72, 77-78 (Bankr. E.D.N.Y. 2010); *In re Hernandez*, No. 08-31588, 2008 WL 5441279 (Bankr. N.D. Ohio, Dec. 1, 2008); *In re Schley*, No. 08-26146-svk, 2008 WL 3895562, at \*8 (Bankr. E.D. Wis. Aug. 22, 2008).

<sup>109</sup> *In re Taborski*, No. 12-23966-CMB, 2013 WL 211116, at \*7 (Bankr. W.D. Penn., Jan. 18, 2013) (holding that a one-time pre-petition bonus was not a special circumstance warranting an adjustment of debtor’s “current monthly income”); *In re Wise*, 2011 WL 2133843, at \*2 (holding that debtor’s post-petition decrease in income due to loss of child support payments is not a special circumstance that requires adjustment of debtor’s “current monthly income” in a chapter 7 bankruptcy case); *In re Smith*, 436 B.R. 476, 481-82 (Bankr. N.D. Ohio 2010) (holding that debtor’s fluctuations in income were insufficient to constitute a special circumstance); *In re Cotto*, 425 B.R. at 77-78 (one-time wage settlement payment received by debtor pre-petition could not be excluded from CMI and was not a special circumstance requiring adjustment of debtor’s CMI); *In re Rieck*, 427 B.R. 141, 147 (Bankr. D. Minn. 2010) (holding that a one-time pre-petition liquidation of a savings bond by debtor was not a special circumstance); *In re Parulan*, 387 B.R. 168, 171-73 (Bankr. E.D. Va. 2008) (holding that debtor’s fluctuations in income due to loss of extra overtime payments were not special circumstance because reductions in overtime are not an “uncommon,” “unusual,” or “exceptional” event); *In re Hernandez*, 2008 WL 5441279, at \*4 (holding that debtor’s rise in income pre-petition due to working two jobs was not a special circumstance requiring adjustment of debtor’s CMI for purposes of chapter 7 means testing). *But see In re Robinette*, No. 7-06-10585 SA, 2007 WL 2955960, at \*4 (Bankr. D.N.M. Oct. 2, 2007) (holding that a one-time bonus received by wife required a special circumstance adjustment of CMI because debtor had no reasonable alternative to replacing this income); *In re Martin*, 371 B.R. 347, 353-54 (Bankr. C.D. Ill. 2007) (holding that debtor’s post-petition decrease in income due to loss of overtime was special circumstance because it significantly decreased the amount originally calculated as debtor’s CMI).

<sup>110</sup> *In re Taborski*, 2013 WL 211116, at \*7; *In re Wise*, 2011 WL 2133843, at \*2; *In re Smith*, 436 B.R. at 481-82; *In re Cotto*, 425 B.R. at 77-78; *In re Rieck*, 427 B.R. at 147; *In re Parulan*, 387 B.R. at 171-73; *In re Hernandez*, 2008 WL 5441279, at \*4. *But see In re Robinette*, 2007 WL 2955960 at \*4; *In re Martin*, 371 B.R. at 353-54.

<sup>111</sup> *In re Rieck*, 427 B.R. at 143 (finding that the debtor’s chapter 7 case should be dismissed for presumed abuse although debtor ineligible for chapter 13 because of high unsecured debt amounts); *In re Hernandez*, 2008 WL 5441279; *In re Castle*, 362 B.R. at 846; *In re Johns*, 342 B.R. at 626; *see also Allard & Catanese*, *supra* note 36.

in a Chapter 13 plan.<sup>112</sup> Debtors' CMI, however, had been significantly raised by a one-time union wage settlement payment received shortly before the filing of the bankruptcy petition.<sup>113</sup> The debtors argued that the payment required a "special circumstance" adjustment to their CMI because it was non-recurring and, therefore, should not be used to determine what income would be available going forward to pay debtors' outstanding debts.<sup>114</sup> In addition, the inclusion of that payment skewed the CMI calculation significantly.<sup>115</sup> Accordingly, the debtors argued, the means test did not accurately gauge their ability to pay creditors.<sup>116</sup> Applying a strict reading of Section 707(b)(2)(B) and Section 101(10A) of the Code, the bankruptcy court held that the wage settlement payment would not be excluded from debtors' current monthly income, and that their CMI could not be adjusted downward, even though the amount was not reflective of debtors' future ability to repay creditors.<sup>117</sup> The court reasoned that "current monthly income," as defined by Section 101(10A) of the Code is a historical calculation and may not accurately represent debtor's future income.<sup>118</sup> The court noted that Congress had not chosen to expressly exclude one-time non-recurring payments in the statutory definition of "current monthly income" and that the special circumstances provision could not be used to subtract from debtors' CMI such a payment.<sup>119</sup> Furthermore, the bankruptcy court held that the nature of the one-time non-recurring payment received by the debtors pre-petition was not a "special circumstance" sufficient to rebut the presumption of abuse.<sup>120</sup> The court noted that the payment did not "resemble[] the examples provided in the statute" of what constitutes a special circumstance and that bankruptcy courts should not attempt to improve upon plain statutory language in order to "better carry out what they perceive to be the legislative purpose."<sup>121</sup> It should be noted that, had the bankruptcy court allowed the requested adjustment to debtors' CMI based on special

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<sup>112</sup> *In re Cotto*, 425 B.R. at 77 (presenting that with the one-time pre-petition wage settlement payment in the amount of \$10,711.14, included in debtor's CMI, debtors' monthly disposable income was \$252.50, a mere \$57.50 per month above the statutory presumption of abuse threshold).

<sup>113</sup> *Id.* at 74-75 (discussing that the debtor wife received a one-time union wage settlement in the amount of \$10,711.14 less than three months before filing a joint chapter 7 bankruptcy petition with her spouse).

<sup>114</sup> *Id.* at 75, 77-78.

<sup>115</sup> *Id.* at 75.

<sup>116</sup> *Id.* at 77-78.

<sup>117</sup> *Id.* at 75-76.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 75-77.

<sup>120</sup> *Id.* at 77-78 (noting that a one-time non-recurring payment is not one of the exceptions to "current monthly income" specifically provided by congress in § 101(10A) of the bankruptcy code).

<sup>121</sup> *Id.* at 77 ("[T]he [d]ebtors' argument that the Court should subtract a one-time payment from their CMI because the fact that the payment is non-recurring constitutes a 'special circumstance,' flies in the face of Congress' clear intent to include income from all sources in CMI, with certain specific statutory exceptions.").

circumstances, debtors would have been able to continue their bankruptcy case in Chapter 7 and the wage settlement payment would simply have been considered property of the estate to be distributed to creditors to the extent not exempted by applicable state or federal statute.<sup>122</sup>

Like the court in *In re Cotto*, other courts have similarly refused to find that one-time pre-petition payments are sufficient to constitute a "special circumstance" even while recognizing that such payments are generally of little practical significance in determining debtor's capacity to repay creditors over time.<sup>123</sup> In *In re Rieck*, for example, the court held that debtor could not obtain a special circumstance adjustment of his CMI when debtor voluntarily liquidated a savings bond in the six months before filing his bankruptcy petition.<sup>124</sup> Debtor's cash-out of the bond resulted in an increase of debtor's CMI in an amount of \$158.10 per month.<sup>125</sup> The court noted that such a payment could not be characterized as a "special circumstance," warranting an adjustment of debtor's CMI amount, because it did not rise above the "extremely high" special circumstances standard set by Congress and could not be interpreted as an unexpected critical development beyond the control of the debtor.<sup>126</sup>

Courts adhering to this stricter interpretation of the statutory provision have been similarly reluctant to find "special circumstances" where the debtor has had a change in employment or a change in wages close to the petition date even if those changes occurred in good faith.<sup>127</sup> If debtor was earning more during the six-month look-back period for determining debtor's CMI, for example, or debtor's wages decreased shortly post-petition, the bankruptcy court may not allow a special circumstances adjustment so that the debtor's means test will reflect this shift and more accurately gauge debtor's repayment capacity.<sup>128</sup> In the case of *In re Hernandez*, for example,

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<sup>122</sup> See 11 U.S.C.A. § 541(a) (West 2013).

<sup>123</sup> *In re Rieck*, 427 B.R. 141, 148 (Bankr. D. Minn. 2010).

<sup>124</sup> *Id.* at 143.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 148 (noting that "it is unlikely that a debtor's voluntary pre-petition liquidation of an asset would rise above the extremely high special circumstances bar, constitute an unexpected development, or be interpreted as a critical event beyond the control of the debtor to which there is or was no alternative").

<sup>127</sup> *In re Chambers*, No. 10-00856-als7, 2011 WL 4479690 at \*4 (Bankr. S.D. Iowa June 7, 2011); *In re Parulan*, 387 B.R. 168, 173 (Bankr. E.D. Va. 2008) (loss of opportunity to work overtime post-petition not a special circumstance because the reduction in income was not sufficiently "uncommon" or "unusual"); *In re Hernandez*, No. 08-31588, 2008 WL 5441279, at \*3 (Bankr. N.D. Ohio Dec. 1, 2008); *In re Schley*, No. 08-26146-svk, 2008 WL 3895562, at \*2 (Bankr. E.D. Wis. Aug. 22, 2008).

<sup>128</sup> *In re Chambers*, 2011 WL 4479690; *In re Hernandez*, 2008 WL 5441279, at \*8; *In re Schley*, 2008 WL 3895562, at \*8 (holding that debtor, who was an occupational therapist employed by a school system and paid only nine months of the year, had not established special circumstances requiring a downward adjustment to debtor's CMI, or that debtor's income be averaged over a twelve-month period, to account for the fact that debtor was paid each of the six months pre-petition because debtor had a "reasonable alternative" to only getting paid during the academic year such as working a summer job to supplement her income).

the debtor temporarily worked two jobs pre-petition in an effort to continue paying her creditors and stave-off bankruptcy.<sup>129</sup> As a result of the extra income from the second job in the six months preceding the filing of the bankruptcy petition, debtor's CMI put her slightly above the median income for her state and was sufficient to trigger the means test presumption of abuse.<sup>130</sup> Because the debtor had two minor children and could not continue to work two jobs permanently, debtor argued that her circumstances were "special" and that the court should modify the amount of her CMI because it was not representative of her true financial condition or her actual ability to pay creditors under a Chapter 13 plan.<sup>131</sup> Although the bankruptcy court recognized that "the 'means test's' one-size-fits-all approach means that it is based only superficially on a debtor's financial reality," the court held that the debtor had not proven special circumstances.<sup>132</sup> The court reasoned that debtor's circumstances were not sufficiently special to meet the standard because the reduction in her work hours in order to spend more time with her children was voluntary and not "exceptional" or out of the ordinary in any way.<sup>133</sup> Similarly, in *In re Chambers*, the court held that a debtor had not proven special circumstances sufficient to require an adjustment to debtor's CMI where debtor alleged that he could no longer work overtime as he had done in the months prior to filing for bankruptcy.<sup>134</sup> The debtor, a husband filing a joint bankruptcy petition with his wife, had worked large amounts of overtime that increased his earnings during the six months preceding the filing of their Chapter 7 case.<sup>135</sup> After debtors filed their petition, the husband changed jobs and overtime was no longer available to him.<sup>136</sup> Debtor testified that he now worked as an auto-body technician and that his wages varied because he was paid on commission and the amount of his pay changed depending on the amount of business in the shop, the number of hours he worked, and the duties he was assigned.<sup>137</sup> As a result, his income post-petition was lower than when debtors filed for bankruptcy.<sup>138</sup> Although the court recognized that there seemed to be a drop in

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<sup>129</sup> *In re Hernandez*, 2008 WL 5441279, at \*3.

<sup>130</sup> Because debtor was working two jobs in the months preceding the filing of her bankruptcy petition, her annual income based on CMI was a mere \$3,317.56 above the annual state median income for a family of her size. Without the increased income from her second job, debtor would have likely been subject to the safe-harbor of § 707(b)(7) of the bankruptcy code and, as a below-median income debtor, not subject to the means test presumption of abuse. 11 U.S.C.A. § 707(b)(7) (West 2010); *In re Hernandez*, 2008 WL 5441279, at \*2.

<sup>131</sup> *In re Hernandez*, 2008 WL 5441279, at \*3.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at\*4-5 (noting that the substantive and procedural requirements of the special circumstances provision "make the bar extremely high for any debtor seeking to rebut the presumption of abuse"); see also *In re Schley*, 2008 WL 3895562, at \*3.

<sup>134</sup> *In re Chambers*, No. 10-00856-als7, 2011 WL 4479690, at \*4 (Bankr. S.D. Iowa June 7, 2011).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at \*1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

debtor's income, the court held that cyclical or seasonal fluctuations in debtor's income were insufficient to prove special circumstances and that the payment advices submitted by the debtor were not enough to meet the debtor's evidentiary burden.<sup>139</sup>

The ultimate result in these cases is the same: despite the fact that debtors' current monthly income and, therefore, the means test calculation, does not reflect the debtor's financial reality, the debtors are foreclosed from proceeding in Chapter 7. Debtor's only option will be to convert his case to a Chapter 13 case even when the debt repayment plan will result in little to no distribution to unsecured creditors or where a Chapter 13 case is not even a viable alternative for the debtor due to eligibility requirements or the inability to confirm a Chapter 13 plan.<sup>140</sup> This result seems at odds with the stated congressional purpose for implementing means testing.<sup>141</sup> The incongruity is most apparent in light of the United States Supreme Court's opinion in *Hamilton v. Lanning*.<sup>142</sup>

In *Hamilton*, the Court held that, to properly calculate a debtor's "projected disposable income" in a Chapter 13 case, the court should make adjustments to a debtor's income or expenses when the debtor has atypical fluctuations in those amounts close to the petition date the effect of which are to skew debtor's CMI and disposable income figures.<sup>143</sup> In the *Hamilton* case, the debtor had received a one-time buyout from her former employer that "greatly inflated [debtor's] gross income" for the six-month period preceding the filing of her bankruptcy petition.<sup>144</sup> As a result of that one-time payment, the debtor's CMI, was \$5,343.70 and her disposable income, based on the means test calculation, was \$1,114.98.<sup>145</sup> Debtor's

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<sup>139</sup> *Id.* at \*4-5 ("The fact that [debtor's] income may be subject to seasonal fluctuations is insufficient to show that the Debtors are unable to make payments to creditors in the amounts set forth [in] section 707(b).").

<sup>140</sup> *In re Wise*, No. 10-32441, 2011 WL 2133843 (Bankr. S.D. Ill. May 27, 2011); *In re Burggraf*, 436 B.R. 466 (Bankr. N.D. Ohio 2010); *In re Rieck*, 427 B.R. 141, 143 (Bankr. D. Minn. 2010) (debtor ineligible for chapter 13 due to amount of unsecured debt); *In re Castle*, 362 B.R. 846, 846 (Bankr. N.D. Ohio 2006) (holding that child support payments increasing debtor's pre-petition CMI were not a special circumstance even though those payments would be excluded from income in chapter 13 yielding a "negligible" repayment to unsecured creditors in a chapter 13 plan); *In re Johns*, 342 B.R. 626, 628-29 (Bankr. E.D. Okla. 2006) (holding debtor could not adjust her CMI downward for income received as child support even though the exclusion of those payments from income in chapter 13 would yield zero distribution to unsecured creditors in a chapter 13 plan).

<sup>141</sup> S. REP. NO. 106-49, at 3 (1999), 1999 WL 300934 (noting that the proposed reform legislation requires "bankruptcy judges to dismiss a chapter 7 case, or convert a chapter 7 case to a chapter 13 *if a bankrupt has a demonstrable capacity to repay his or her debts*" (emphasis added)); *Culhane & White*, *supra* note 2, at 671-72 ("The basic idea of the means test is to identify a group of higher-income debtors for special scrutiny, allow them standardized deductions, and then see if enough disposable income remains to fund a workable chapter 13 plan.").

<sup>142</sup> *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).

<sup>143</sup> *Id.* at 2478.

<sup>144</sup> *Id.* at 2470.

<sup>145</sup> *Id.*

actual income, however, was markedly lower than what her CMI reflected.<sup>146</sup> On Schedule I, the debtor reported income in the amount of \$1,922 per month which resulted in monthly disposable income of only \$149.03.<sup>147</sup> When debtor submitted a debt repayment plan which proposed to pay \$144 per month to unsecured creditors, the Chapter 13 trustee objected to the plan's confirmation arguing that, pursuant to the Section 1325(b)(1)(B) of the bankruptcy code, debtor had to commit the entire \$1,114.98 of monthly disposable income shown by the means test calculation to pay unsecured creditors.<sup>148</sup> The trustee conceded that the debtor's actual income was insufficient to make payments in that amount.<sup>149</sup> The Court rejected the trustee's argument and held that the decrease in debtor's income must be considered in calculating debtor's "projected disposable income" and the amount to be paid to unsecured creditors under the Chapter 13 plan.<sup>150</sup> The Court noted that "[i]n cases in which a debtor's disposable income during the 6-month look-back period is either substantially lower or higher than the debtor's disposable income during the plan period, the mechanical approach would produce senseless results that we do not think Congress intended."<sup>151</sup>

The incongruity arises when one considers that, other than the special circumstance provision, there is no comparable mechanism in Chapter 7 through which a debtor can modify debtor's income or expense amounts, similar to the *Hamilton* case, to arrive at a more accurate determination of debtor's actual repayment capacity.<sup>152</sup> As a result, an overly strict interpretation of the special

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<sup>146</sup> On Schedule I, debtor reported income from her new job in the amount of \$1,922 per month, a difference of \$3,421.70 per month from the amount of her pre-petition inflated CMI amount. Debtor's change in income brought her below the state-median income for her state of residence. *Id.*

<sup>147</sup> *Id.* (noting that, based on the income that debtor would be earning at her new job minus her allowable expenses, debtor's earnings were below the state median).

<sup>148</sup> The chapter 13 trustee argued that the court should adopt a "mechanical approach" to calculate debtor's "projected disposable income" simply taking debtor's "disposable income," as calculated on Bankruptcy Form 22C, and multiplying it by the number of months in the plan commitment period. The trustee asserted that debtor's "projected disposable income" amount should not be adjusted for either the pre-petition one-time payment that inflated debtor's CMI or the post-petition decrease in debtor's income, that was partly due to the inaccurate inflation of debtor's CMI pre-petition. *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2478 ("Consistent with the text of § 1325 and pre-BAPCPA practice, we hold that when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in debtor's income or expenses that are known or virtually certain at the time of conformation.").

<sup>151</sup> *Id.* at 2475-76 (noting that, if the court did not account for the inflation to debtor's CMI and the decrease in her actual income, the debtor could not file a confirmable plan pursuant to § 1325(a)(6) of the bankruptcy code because she would not be able to "make all payments under the plan and comply with the plan").

<sup>152</sup> *In re Wise*, No. 10-32441, 2011 WL 2133843, at \*2 (Bankr. S.D. Ill. May 27, 2011) (noting that there is no provision in chapter 7 through which the court could account for "known or virtually certain information about the debtor's future income or expenses" as in *Hamilton v. Lanning*); *In re Littman*, 370 B.R. 820, 829 (Bankr. D. Idaho 2007) (noting that

circumstance provision denies the debtor of the only procedural safeguard protecting him from the absurd results that the means test calculation sometimes yields.<sup>153</sup> If *Hamilton v. Lanning* had been a Chapter 7 bankruptcy case as opposed to a Chapter 13 case, for example, a bankruptcy court undertaking a strict interpretation of the special circumstance provision may not have considered the one-time proceeds received by the debtor pre-petition sufficient to constitute a special circumstance requiring modification of the debtor's CMI. Such was the situation in the *In re Cotto* and *In re Rieck* Chapter 7 cases where the debtors could not prove special circumstances despite the inflation of debtors' CMI due to a one-time pre-petition payment.<sup>154</sup> As a result, a debtor unable to proceed in Chapter 7 because of means testing may ultimately convert his bankruptcy case to a Chapter 13 only to find that, once his income or expenses are adjusted as per the Court's opinion in *Lanning*, the distribution to creditors will be minimal or debtor may be unable to produce a confirmable debt repayment plan.<sup>155</sup> Moreover, in some cases, because the means test calculation may overestimate the amount of disposable income that debtor would have available to pay unsecured creditors in a Chapter 13 case, the debtor may successfully confirm a Chapter 13 plan only to find that he cannot maintain his current plan payments.<sup>156</sup> If the debtor cannot make the required monthly payments under the Chapter 13 plan, the United States Trustee will file a motion to dismiss debtor's bankruptcy case or convert the case to a Chapter 7 case.<sup>157</sup> The courts are split on whether the means test applies to cases that are converted from Chapter 13 to Chapter 7.<sup>158</sup> Accordingly, in jurisdictions where means testing applies, the debtor

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the means test "does not contain any provision which permits a court to review the debtors' actual finances").

<sup>153</sup> *In re Littman*, 370 B.R. at 829 (stating that the means test "snapshot approach" is "capable of reaching conclusions about a debtor's ability to pay divorced from reality and potentially at odds with Congress' professed intent"); *In re Johns*, 342 B.R. 626, 628-29 (Bankr. E.D. Okla. 2006) (holding that amounts received by debtor as child support could not be excluded from debtor's CMI as special circumstance even when if debtor converted the case to a chapter 13 case, the distribution to general unsecured creditors would be zero).

<sup>154</sup> *In re Cotto*, 425 B.R. 72, 74-75 (Bankr. E.D.N.Y. 2010); *In re Rieck*, 427 B.R. 141, 143 (Bankr. D. Minn. 2010).

<sup>155</sup> *In re Wise*, 2011 WL 2133843; *In re Castle*, 362 B.R. 846, 846 (Bankr. N.D. Ohio 2006); *In re Johns*, 342 B.R. at 628-29.

<sup>156</sup> See generally *Murphy & Dion*, *supra* note 20, at 416-17 ("[I]t is often the case that the debtors will fall behind on their chapter 13 bankruptcy payments.").

<sup>157</sup> 11 U.S.C.A. § 1307(c)(6) (West 2010) (allowing conversion of a chapter 13 case to chapter 7 or dismissal of the bankruptcy case by the United States Trustee for "material default by the debtor with respect to a term of a confirmed plan").

<sup>158</sup> *In re Chapman*, 447 B.R. 250 (B.A.P. 8th Cir. 2011); *In re Willis*, 408 B.R. 803, 806 (Bankr. W.D. Mo. 2009) (recognizing that courts are split on the issue of whether means testing should apply in cases converted to chapter 7); *In re Sullivan*, 370 B.R. 314 (Bankr. D. Mont. 2007) (holding case converted from a chapter 13 to a chapter 7 must be dismissed for presumed abuse where debtor's means test calculation showed sufficient disposable income and debtors did not rebut the presumption of abuse through showing of special circumstances). See generally *Murphy & Dion*, *supra* note 20, ("Courts have not been consistent . . . regarding whether a means test is required when a debtor seeks to convert a case from chapter 13 to chapter 7.").

may be foreclosed from obtaining bankruptcy relief at all—unable to consummate a Chapter 13 plan and unable to proceed in Chapter 7 due to means testing and the presumption of abuse.<sup>159</sup>

*B. Adjustments to Allowable Expenses*

A debtor needing a modification in the type or amount of expenses allowed on the means test will likely encounter an even greater challenge when attempting to prove special circumstances. Bankruptcy courts undertaking a narrow interpretation of Section 707(b)(2)(B) will generally not allow a debtor to deduct, as part of debtor's means test calculation, any expenses outside of those expressly provided for in Section 707(b)(2)(A)(ii) and will rarely allow a debtor an upward modification of those allowable expenses.<sup>160</sup> This is particularly true where a debtor has incurred the expense voluntarily or has willingly undertaken the actions that caused or created the need for the particular expense.<sup>161</sup> This may include debtors that have changed jobs or relocated and, therefore, have higher transportation expenses than those permitted by the standard deduction due to longer commutes.<sup>162</sup> Bankruptcy courts have been slightly more inclined to find that debtor's circumstances are "special" in situations where the expense in question is created by the birth of a child or for the benefit of

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<sup>159</sup> *In re Willis*, 408 B.R. at 810 (stating that there are two "release valves" that will prevent a debtor from being caught in an endless cycle of failure in chapter 13 and threatened dismissal in chapter 7: (1) the United States Trustee can exercise its discretion and not pursue dismissal; or (2) the debtor may rebut the presumption of abuse by showing special circumstances).

<sup>160</sup> 11 U.S.C.A. § 707(b)(2)(A)(ii)(I)-(V) (West 2010).

<sup>161</sup> *In re Pignotti*, No. 07-04109-lmj7, 2011 WL 1299616 (Bankr. S.D. Iowa 2011) (finding no special circumstances where additional transportation expense was undertaken voluntarily by debtor when debtor chose to move a substantial distance away from work); *In re Shinkle*, 382 B.R. 85, 89 (Bankr. E.D. Ky. 2008) (holding debtors did not prove special circumstances allowing debtors an increase of their housing expense when debtors voluntarily chose to remain in their current home rather than relocate to a smaller home); *In re Burggraf*, 436 B.R. 466, 466 (Bankr. N.D. Ohio 2010) (noting that, when it comes to expenses as special circumstances, courts taking a stricter approach focus on the voluntariness of the situation that caused the expense and are unlikely to allow a special circumstance adjustment where the debtor has any degree of choice over whether to incur the expense); *In re Tuss*, 360 B.R. 684, 700-01 (Bankr. D. Mont. 2007) (holding that additional expenses incurred by debtor for food and personal care while traveling extensively for work was not a special circumstance because debtor did not prove that the expenses were circumstances beyond his control since debtor could prepare his meals at his place of lodging and, therefore, reduce these expenses); *In re Tranmer*, 355 B.R. 234, 251 (Bankr. D. Mont. 2006) (holding that debtor's increased gas and other transportation costs due to long commute to work was not a special circumstance where debtor chose not to relocate and, therefore, could not prove costs were "beyond debtor's reasonable control").

<sup>162</sup> *In re Pignotti*, 2011 WL 1299616, at \*3; *In re Tuss*, 360 B.R. at 700-01; *In re Sparks*, 360 B.R. 224, 230-31 (Bankr. E.D. Tex. 2006) (finding no special circumstances when, among other expense adjustments requested, debtor claimed an increase transportation expense because he had to travel forty miles round-trip to work); *In re Tranmer*, 355 B.R. at 251. *But see In re Batzkiel*, 349 B.R. 581, 586-87 (Bankr. N.D. Iowa 2006) (allowing debtor special circumstance modification of transportation expense arising from long commutes of debtor and spouse to work).

dependents that are minors, but, in these cases, debtors must take care to thoroughly document all additional expenses and specifically tie those expenses to the claimed special circumstance.<sup>163</sup>

The rift between bankruptcy courts applying a narrow interpretation of the special circumstances provision and those undertaking a broader approach to this Section is most apparent in the courts' treatment of student loan payments and whether to allow those payments as a special circumstance expense on the means test calculation.<sup>164</sup> The means test does not expressly include student loan repayment as an allowable expense.<sup>165</sup> Accordingly, debtors wanting to reflect those payments as an expense in the means test calculation to more accurately reflect their real repayment capacity must establish that student loan repayment constitutes a "special circumstance."<sup>166</sup> These arguments are usually premised upon the fact that student loans are not dischargeable in bankruptcy and that, therefore, the debtor has "no reasonable alternative" other than to make those payments.<sup>167</sup> A debtor that is not able to deduct his student loan payments as an expense on the means test calculation may have to convert his bankruptcy to a Chapter 13 case where debtor will either have to pay his loan in one lump sum or make payments on the student loan through the Chapter 13 plan.<sup>168</sup> The former option is impossible for the majority of debtors

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<sup>163</sup> *In re Willis*, 408 B.R. at 810-11 (holding additional childcare expense was not a special circumstance because debtor failed to proffer sufficient evidence of why expense was "reasonable and necessary" and failed to provide documentary evidence); *In re Littman*, 370 B.R. 820, 830-33 (Bankr. D. Idaho 2007) (holding that a child support obligation that became final post-petition was a special circumstance allowing debtor an expense adjustment on the means test); *In re Sullivan*, 370 B.R. 314 (Bankr. D. Mont. 2007); *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007); *In re Graham*, 363 B.R. 844 (Bankr. S.D. Ohio 2007).

<sup>164</sup> *In re Burggraf*, 436 B.R. 466; *In re Champagne*, 389 B.R. 191, 198-99 (Bankr. D. Kan. 2008) (recognizing the disagreement among bankruptcy courts about the focus of the special circumstances inquiry in student loan cases—i.e. whether the inquiry should focus on the characteristics of the student loans and resulting economic hardship or whether the inquiry should focus on the circumstances under which the debtor incurred the obligation).

<sup>165</sup> Student loan payments cannot be deducted as "Other Necessary Expenses," because § 707(b)(2)(A) of the code expressly excludes "payments for debts" from being a qualified expense deduction. 11 U.S.C.A. § 707(b)(2)(A)(ii)(I) (West 2013). *See generally* Anthony P. Cali, *The "Special Circumstance" of Student Loan Debt Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 52 ARIZ. L. REV. 473, 473 (2010) ("Whether by design or oversight, Congress failed to include student loan repayment as an express, allowable expense in the means test.").

<sup>166</sup> Cali, *supra* note 165, at 476 (noting that Congress' failure to include student loan repayment in the statutorily defined expenses "has the effect of making the means test inaccurate for those with legitimate student loan repayment expenses").

<sup>167</sup> Section 523(a)(8) of the bankruptcy code makes student loans non-dischargeable unless the debtor can prove that excepting the debt from discharge would impose an "undue hardship on debtor." Proving "undue hardship" for a debtor is extremely difficult and such exclusions from discharge are rarely granted. 11 U.S.C.A. § 523(a)(8) (West 2010). *See generally* Cali, *supra* note 165, at 478-79 ("In interpreting the undue hardship standard, most courts have set the bar for dischargeability fairly high. As a result, student loan debt is extremely difficult to discharge in bankruptcy proceedings.").

<sup>168</sup> Cali, *supra* note 165, at 497-500.

while the latter option will often leave the debtor with more debt at the completion of the Chapter 13 plan as a result of accrued interest on the loans.<sup>169</sup> Such a scenario would effectively deny the debtor a chance at a “fresh start” even when the debtor has made all the required payments under the plan.<sup>170</sup>

Courts undertaking a strict interpretation of Section 707(b)(2)(B) have overwhelmingly held, with very few exceptions, that such an expense is not a “special circumstance.”<sup>171</sup> These courts have taken two distinct approaches: Some consistently hold that student loan payments are never “special” enough to fall within the exception because these expenses are of the type normally encountered by most debtors and are, therefore, not “highly unusual.”<sup>172</sup> A larger subset of these courts has held, however, that student loan payments could conceivably meet the standard depending on the circumstances that led the debtor to acquire the student loan debt.<sup>173</sup> These courts have emphasized that it is not the obligation to repay the loan itself and its non-dischargeability in bankruptcy that qualifies such an expense as a special circumstance, but rather the reasons why the loan was acquired that must be considered to be “special.”<sup>174</sup> Student loan obligations incurred by the debtor in the regular course of obtaining an education, therefore, are generally deemed entirely too common to meet the high special circumstances threshold set by these courts.<sup>175</sup>

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<sup>169</sup> See generally *id.*; see also *In re Delbecq*, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007).

<sup>170</sup> See generally *Cali*, *supra* note 165, 497-500.

<sup>171</sup> *In re Edwards*, No. 12-00603-TOM-7, 2012 WL 3042233 (Bankr. N.D. Ala. July 25, 2012) (holding that two school principals could not deduct their student loan payments as an expense on the means test when the loans were acquired to finance their undergraduate, masters, and doctoral degrees); *In re Burggraf*, 436 B.R. 466 (Bankr. N.D. Ohio 2010); *In re Hammock*, 436 B.R. 343, 355-56 (Bankr. E.D.N.C. 2010) (holding that debtor that acquired student loan debt to obtain degree and secure her position with her employer amidst a corporate restructuring did not prove special circumstances); *In re Pageau*, 383 B.R. 221 (Bankr. D.N.H. 2008) (noting that student loans incurred solely to secure more advantageous income or different vocation are not special circumstances).

<sup>172</sup> *In re Sanders*, 454 B.R. 855, 857 (Bankr. M.D. Ala. 2011) (recognizing the division among the bankruptcy courts on this issue and noting that, for some courts, “the expense ultimately needs to be the result of [a] situation that is extraordinary, outside the control of a debtor, or always unanticipated”); *In re Martellaro*, 404 B.R. 548, 562 (Bankr. D. Mont. 2008) (“[S]tudent loan debt among bankruptcy debtors is a common and ordinary circumstance, not a ‘special’ circumstance.”); *In re Vaccariello*, 375 B.R. 809, 816 (Bankr. N.D. Ohio 2007) (“[F]unding higher education through the use of student loans is becoming ubiquitous. It cannot be argued that having a student loan is rare or unusual; therefore, Debtors’ obligation to repay their student loans, standing alone, cannot constitute special circumstances.”).

<sup>173</sup> *In re Edwards*, 2012 WL 3042233, at \*5-6 (noting that, even applying a strict construction of the statute, student loan payments may constitute special circumstances depending on the facts of each case); *In re Champagne*, 389 B.R. 191, 200 (Bankr. D. Kan. 2008) (“The circumstances which gave rise to the loan are an important, if not the determinative, factor.”)

<sup>174</sup> *In re Pageau*, 383 B.R. 221, 228 (Bankr. D.N.H. 2008); *In re Hammock*, 436 B.R. 343 (Bankr. E.D.N.C. 2010) (student loan payment was not special circumstance merely because the obligation was non-dischargeable); *In re Champagne*, 389 B.R. at 200.

<sup>175</sup> *In re Edwards*, 2012 WL 3042233, at \*6-7 (holding that two school principals could not deduct their student loan payments as an expense on the means test when the loans were

Only when the obligation was incurred by the debtor in order to learn a new trade due to some unforeseen injury, disability, or similar unexpected situation will the court find that the debtor has proven "special circumstances".<sup>176</sup> Some courts also seem to consider whether the amount of student loan debt amassed by the debtor is significant and whether a totality of the circumstances show that debtor did not attempt to mitigate his expenses overall, including the amount of student loan debt acquired, pre-petition.<sup>177</sup> One court noted that student loan payments will not constitute a special circumstance where "the debtors have not made an effort to live more modestly or have not made financial sacrifices in an effort to repay their debts on their own or through a Chapter 13 case."<sup>178</sup>

Bankruptcy courts adhering to a broader reading of the special circumstances provision take a more moderate and better-reasoned approach, allowing the debtor a special circumstance expense adjustment for student loan payments. These courts will generally hold that student loan payments are a special circumstance because the obligation is non-dischargeable and the debtor has "no reasonable alternative" other than to make those payments.<sup>179</sup> The courts have reasoned that allowing for this

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acquired to finance their undergraduate, masters, and doctoral degrees); *In re Carrillo*, 421 B.R. 540 (Bankr. D. Ariz. 2009) (repayment of student loan obligation not a special circumstance where debtors incurred the debt in the ordinary course of obtaining their college education); *In re Pageau*, 383 B.R. 221 (student loan payment not a special circumstance when incurred in the ordinary course of acquiring education).

<sup>176</sup> *In re Harmon*, 446 B.R. 721, 730 (Bankr. E.D. Pa. 2011) (holding that student loan payments were not a special circumstance because there was no evidence that debtor incurred the educational expenses due to a life adversity such as "a job loss or disability"); *In re Johnson*, 446 B.R. 921, 924-25 (Bankr. E.D. Wis. 2011) (holding that debtor who acquired student loans to obtain law degree because debtor's increasing weight had made her career as a nurse more difficult, did not prove special circumstances); *In re Siler*, 426 B.R. 167 (Bankr. W.D.N.C. 2010) (repayment on student loan obligation not a special circumstance absent evidence to indicate that loan was necessitated by some unforeseen injury, disability, or the like); *In re Pageau*, 383 B.R. 221 (noting that student loan payments could be a special circumstance where events leading to the acquisition of obligation are outside debtor's control such as when further education is necessitated by permanent injury, disability, or an employer closing debtor's place of employment); *In re Womer*, 427 B.R. 334, 336 (Bankr. M.D. Pa. 2010) (student loan payments not a special circumstance without a more significant explanation by debtors as to how the loan debt would have "grave consequences" for them going forward).

<sup>177</sup> *In re Edwards*, 2012 WL 3042233, at \*7 (holding that student loans were not special circumstances where the debtors borrowed funds in excess of the value of their home and incurred debts for two motor vehicles while knowing they had substantial student loan debt).

<sup>178</sup> *Id.*

<sup>179</sup> *In re Martin*, 371 B.R. 347, 356 (Bankr. C.D. Ill. 2007); *In re Delbecq*, 368 B.R. 754, 759 (Bankr. S.D. Ind. 2007) (holding that student loan was special circumstance because the obligation was non-dischargeable and deferring payment of the loan was not a "reasonable alternative"); *In re Haman*, 366 B.R. 307, 315 (Bankr. D. Del. 2007) (holding that student loan was special circumstance because the only way debtor could stop paying the obligation was to pay it in full which was impossible based on debtor's finances); *In re Templeton*, 365 B.R. 213, 216 (Bankr. W.D. Okla. 2007) (holding that debtors' non-dischargeable student loan obligations were a special circumstance because debtors were not eligible for consolidation or deferment of the loans and there was no other course of action they could take "to reduce or otherwise avoid the additional expense of the student loans").

expense more accurately gauges debtor's true repayment capacity and avoids leaving the debtor in a worse financial position at the end of a Chapter 13 plan.<sup>180</sup> In *In re Delbecq*, for example, the court held that debtor's student loan payments were a special circumstance that required an expense adjustment on debtor's means test.<sup>181</sup> The court noted that allowing such an adjustment in the amount of debtor's student loan payment clearly showed that debtor did not have "a meaningful ability to pay her debts."<sup>182</sup> The court reasoned that debtor had "no reasonable alternative" to making these payments because the obligation was non-dischargeable and deferring the loans, if debtor's case was dismissed for presumed abuse, would have required debtor to incur additional debt in the form of interest payments.<sup>183</sup> The court also noted that under a Chapter 13 plan, the debtor's plan would likely not provide a distribution to unsecured creditors, but would instead provide only for the ongoing payment of debtor's student loan.<sup>184</sup> In such a situation, given the costs of administering a Chapter 13 case, the student loan payments that debtor would make pursuant to the Chapter 13 plan would be less than what the debtor was currently paying.<sup>185</sup> Accordingly, the debtor would find herself in a worse position financially at the end of the hypothetical Chapter 13 case.

#### IV. CONCLUSION

Bankruptcy courts taking a more moderate approach to the interpretation of Section 707(b)(2)(B) of the bankruptcy code present a better-reasoned analysis of the special circumstance provision. This interpretation produces results more in line with Congress' reasons for implementing means testing and is truer to the statute's plain statutory language. The heightened "exceptional circumstance" standard being used by some bankruptcy courts, effectively denies consumer debtors the *only procedural safeguard* that can protect them from a means test calculation that is flawed and that, at times, does not accurately reflect debtor's capacity to repay creditors. For some debtors, this means that they are unfairly denied the ability to continue their case in Chapter 7 and obtain a discharge that will give them a fresh financial start. Those debtors that choose to convert their bankruptcy to a Chapter 13 case will have their "fresh start" delayed for five years until the completion of the debt repayment plan. For some of these debtors, those with student loans for example, the consummation of the Chapter 13 plan may leave them in a worse financial position than where debtors found themselves at the start of the bankruptcy case. Still for other debtors,

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<sup>180</sup> *In re Martin*, 371 B.R. at 356 (holding that a chapter 13 case was not a reasonable alternative for the debtor because it would result in only a partial payment of the student loan during the term of the plan and a substantial balance would likely still be due upon completion of the chapter 13 case); *In re Delbecq*, 368 B.R. at 759.

<sup>181</sup> *In re Delbecq*, 368 B.R. at 759.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (noting that the debtor would incur additional debt in the form of interest payments at a rate of nine percent in order to pay off her other unsecured debts).

<sup>184</sup> *Id.* ("In this jurisdiction, the Court has historically allowed debtors to classify separately student loan indebtedness pursuant to 11 U.S.C. § 1322(b)(5).").

<sup>185</sup> *Id.* at 760 (stating that under the circumstances, "the only parties who [stood] to benefit from conversion [were] Debtor's attorney and the Chapter 13 trustee").

the impossibility of being able to prove "special circumstances" may mean that they will be in a proverbial catch-22—unable to obtain a discharge in Chapter 13 because of their inability to fund a plan or sustain plan payments and unable to obtain bankruptcy relief in Chapter 7 because of the means test presumption of abuse. In those cases, the debtor will find himself at the mercy of the United States Trustee's discretion to not pursue dismissal of debtor's bankruptcy case. These results cannot be what Congress intended when it implemented means testing and included the special circumstance provision in that test as a safeguard for debtors.

Accordingly, bankruptcy courts should adhere to the more moderate interpretation of the statute when determining whether the circumstances alleged by debtor to be "special" are in fact special enough to rebut the abuse presumption. Doing so would not require that the court simply allow any modification of CMI or expenses sought by the debtor. Instead, the court should undertake a fact-specific inquiry to determine whether the circumstance asserted by the debtor is one that is out of the ordinary and one that leaves the debtor with no reasonable alternative but to modify his income or expenses. Where a demonstrable economic unfairness would result to the debtor if those changes were not reflected in the means test calculation, the court should allow the debtor a special circumstance modification. If that modification is sufficient to bring the debtor's disposable income figure below the statutory threshold, and debtor has the necessary documentary evidence to prove the need for the change, debtor will have rebutted the presumption of abuse.

There is no merit to the argument that a standard requiring anything less than extraordinary circumstances would, in effect, "eviscerate[] the means test calculation" or require a "subjective judge-driven 'smell test'" in every Chapter 7 case.<sup>186</sup> Special circumstance adjustments are only sought in a small percentage of bankruptcy cases. Moreover, even a moderate interpretation of Section 707(b)(2)(B), would still require a debtor seeking the protection of this safeguard to meet multiple procedural and substantive burdens. Bankruptcy courts could not disregard the means test and use their unfettered discretion to determine whether a debtor, in fact, has the ability to pay creditors. Debtors seeking a special circumstance adjustment to the means test would still have to prove that there were circumstances outside of those that are common for the average debtor, that had financial impact on either debtor's income or expenses, and that are not reflected in the means test calculation. Furthermore, those adjustments must still be sufficient to bring the debtor's disposable income below the statutory threshold amount. While such an interpretation would, in limited cases, introduce some judicial discretion into the means test, the exercise of that discretion could effectively reduce or eliminate the incongruent results that a strict interpretation of the provision creates. The fact that the means test incorporates a special circumstance provision at all, shows that Congress intended to preserve the ability of bankruptcy courts to exercise some discretion in cases where debtor's current monthly income or expenses do not fit neatly into the means test calculation.

Similarly, a moderate interpretation of the statute would not make it more likely that debtors could easily circumvent the means test through careful bankruptcy

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<sup>186</sup> *In re Cribbs*, 387 B.R. 324, 329 (Bankr. S.D. Ga. 2008) ("[T]he 'meaningful ability to repay' standard for finding that there are 'special circumstances' eviscerates the means test calculation by reintroducing, in every case, a more subjective judge-driven 'smell test' to decide whether debtors can afford to repay.").

planning or manipulation of debtor's pre-petition income or expenses. The statute requires detailed documentary proof of the circumstance that debtor claims is "special" and of the financial impact attendant to that circumstance. Furthermore, one must note that while a consumer debtor only has one procedural safeguard from the inequities of means testing—the United States Trustee has three separate and distinct grounds pursuant to which it can seek dismissal of debtor's Chapter 7 bankruptcy case for abuse. In cases where the facts indicate the possible manipulation of income or expenses on the part of the debtor, the United States Trustee may still seek dismissal of debtor's case based on "bad faith" or if a totality of the circumstances of the debtor's financial situation indicate abuse.<sup>187</sup> The fact that only a small percentage of debtors may ultimately be affected by how strictly the courts construe this provision is irrelevant. For those honest debtors that are inequitably denied Chapter 7 relief, the decision is critical.

Accordingly, to function as the safeguard that Congress intended and aid in avoiding some of the absurd results produced by means testing, the special circumstances provision should be interpreted to require the debtor to prove exactly that - circumstances that are "special" and not necessarily circumstances that are extraordinary, involuntary, or wholly out of debtor's control.

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<sup>187</sup> 11 U.S.C.A. § 707(b)(3) (West 2010).