

CHANGING EXEMPTIONS UNDER VIRGINIA LAW

Angela M. Scolforo, Trustee

1. Claim Exemption on Bankruptcy Schedule C
 - a. 34-6 and 34-14
 - b. Why waste it?
 - c. Amend down before dismiss case – too late?
 - d. Same property on prior Schedule C since July 1, 2020?
2. Cap is now 8 years
 - a. 34-21
3. Appreciation of Real Estate Value
 - a. 34-18
 - b. Any Improvements?
4. Additional \$25,000 Exemption for Principal Residence, or more
 - a. 34-4 and 34-13
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§ 34-6. How exemption of real estate secured; form to claim exemption of real property.

In order to secure the benefit of the exemptions of real estate under §§ [34-4](#) and [34-4.1](#), the householder, by a writing signed by him and duly admitted to record, to be recorded as deeds are recorded, in the county or city wherein such real estate or any part thereof is located or, if such property is located outside of the Commonwealth, in the county or city in the Commonwealth where the householder resides, shall declare his intention to claim such benefit and select and set apart the real estate to be held by the householder as exempt, and describe the same with reasonable certainty, affixing to the description his cash valuation of the estate so selected and set apart. However, if such real estate is claimed exempt in a case filed under Title 11 of the United States Code, the official Schedule of Property Claimed as Exempt filed in the United States Bankruptcy Court claiming such exemptions shall be sufficient to set apart such property as exempt. Equitable as well as legal estates may be so selected and set apart. The following form, or one which is substantially similar, shall be used and shall be sufficient for the writing required by this section:

HOMESTEAD DEED FOR REAL PROPERTY

Name of Householder _____

Name of title holder of record (if different) _____

Is the householder a disabled veteran entitled to claim the additional exemption under § [34-4.1](#)? _____

Address of Householder _____

Name(s) and age(s) of dependent(s) _____

County/city/state in which real property claimed as exempt is located _____

Description of property claimed as exempt _____

Value of property described above _____

Number of homestead deeds that have been filed by the Householder _____

Exemption amount previously claimed on prior homestead deeds _____

List the jurisdictions where previous homestead deeds were filed _____

(Signature of Householder)

[ACKNOWLEDGMENT]

Such writing or deed shall not be required to secure any exemption under this Code except those exemptions created by §§ [34-4](#) and [34-4.1](#).

Code 1919, § 6532; 1990, c. 942; 1993, c. 150; 1998, c. [331](#); 2008, c. [224](#); 2019, c. [492](#); 2020, c. [328](#).

§ 34-14. How set apart in personal estate; form to claim exemption of personal property.

Such personal estate selected by the householder under § [34-4](#), [34-4.1](#), or [34-13](#) shall be set apart in a writing signed by him. He shall, in the writing, designate and describe with reasonable certainty the personal estate so selected and set apart and each parcel or article, affixing to each his cash valuation thereof. Such writing shall be admitted to record, to be recorded as deeds are recorded in the county or city wherein such householder resides. However, if such personal estate is claimed exempt in a case filed under Title 11 of the United States Code, the official Schedule of Property Claimed as Exempt filed in the United States Bankruptcy Court claiming such exemptions shall be sufficient to set apart such property as exempt.

The following form, or one which is substantially similar, shall be used and shall be sufficient, when duly admitted to record in the county or city in which the householder resides, to exempt such described personal property from creditor process:

HOMESTEAD DEED FOR PERSONAL PROPERTY

Name of Householder _____

Is the householder a disabled veteran entitled to claim the additional exemption under § [34-4.1](#)?

Address of Householder _____

Name(s) and age(s) of dependent(s) _____

County/city in which householder
resides _____

Description of property claimed as exempt and its value

Number of homestead deeds that have been filed by the Householder

Exemption amount previously claimed on prior homestead deeds

List the jurisdictions where previous homestead deeds were filed

(Signature of Householder)

[ACKNOWLEDGMENT]

Such writing or deed shall not be required to secure any exemption under this Code except those exemptions created by §§ [34-4](#), [34-4.1](#) and [34-13](#).

Code 1919, § 6540; 1990, c. 942; 1993, c. 150; 2010, c. [186](#); 2020, c. [328](#).

§ 34-18. Rents and profits exempt; increase in value of estate set apart.

The rents and profits of the property set apart shall be exempt in the same manner as the corpus of such property and if the whole real and personal estate set apart be not of greater value than the amount the householder is entitled to exempt at the time it is so set apart, the exemption thereof shall not be affected by any increase in its value afterwards, unless such increase consists of permanent improvements placed upon real estate set apart by means derived from some source other than exempt property.

Code 1919, § 6544; 1975, c. 466; 1977, c. 496; 1990, c. 942.

§ 34-20. Proceeds of sale of estate exempt; how evidenced.

The estate or property in which proceeds of sale are invested, or which may be acquired in exchange, under any of the preceding sections of this chapter, shall be held exempt in like manner and to the like extent as the estate sold or exchanged was held. But such estate or property when acquired in exchange or otherwise than by investment under an order of court, or unless when set apart by a court, shall be set apart, if real estate, by such a writing as is prescribed by § [34-6](#); if personal estate, by such a writing as is prescribed by § [34-14](#); and such writing shall be recorded as provided by the same sections, respectively. In addition to the requirements of such sections, the writing shall state from what source the estate was derived and with what means acquired. When such estate is invested or set apart under an order of court, a copy of the order and of any report of a commissioner or other officer making the investment thereunder, if confirmed, and a copy of the order of confirmation, duly certified by the clerk of the court, shall be recorded in the deed book of the county or city wherein the writing, if the estate had been set apart by a writing, is required to be recorded.

§ 34-21. When householder's right to exemption is exhausted.

When an amount of property, whether real or personal, or both, has been set apart to be held by a householder as exempt under § [34-4](#), [34-4.1](#), or [34-13](#), such amount shall for a **period of eight years from such setting apart be applied against the maximum amount** to which the householder is entitled to set apart as exempt under § [34-4](#), [34-4.1](#), or [34-13](#).

VIRGINIA ACTS OF ASSEMBLY -- CHAPTER

An Act to amend and reenact §§ [8.01-512.4](#), [34-4](#), [34-13](#), and [34-26](#) of the Code of Virginia, relating to exemptions from garnishment and lien; householder; total value.

[H 1339]

Approved 3/25/2024

Be it enacted by the General Assembly of Virginia:

1. That §§ [8.01-512.4](#), [34-4](#), [34-13](#), and [34-26](#) of the Code of Virginia are amended and reenacted as follows:

§ [8.01-512.4](#). Notice of exemptions from garnishment and lien.

No summons in garnishment shall be issued or served, nor shall any notice of lien be served on a financial institution pursuant to § [8.01-502.1](#), unless a notice of exemptions and claim for exemption form are attached. The notice shall contain the following statement:

Notice to judgment debtor

How to claim exemptions from garnishment and lien

The attached Summons in Garnishment or Notice of Lien has been issued on request of a creditor who holds a judgment against you. The Summons may cause your property or wages to be held or taken to pay the judgment.

The law provides that certain property and wages cannot be taken in garnishment. Such property is said to be exempted. A summary of some of the major exemptions is set forth in the request for hearing form. There is no exemption solely because you are having difficulty paying your debts.

If you claim an exemption, you should (i) fill out the claim for exemption form and (ii) deliver or mail the form to the clerk's office of this court. You have a right to a hearing within seven business days from the date you file your claim with the court. If the creditor is asking that your wages be withheld, the method of computing the amount of wages that are exempt from garnishment by law is indicated on the Summons in Garnishment attached. You do not need to file a claim for exemption to receive this exemption, but if you believe the wrong amount is being withheld you may file a claim for exemption.

On the day of the hearing you should come to court ready to explain why your property is exempted, and you should bring any documents that may help you

prove your case. If you do not come to court at the designated time and prove that your property is exempt, you may lose some of your rights.

It may be helpful to you to seek the advice of an attorney in this matter.

Request for hearing-garnishment/lien exemption claim

I claim that the exemption(s) from garnishment or lien that are checked below apply in this case:

MAJOR EXEMPTIONS UNDER FEDERAL AND STATE LAW

____ 1. Social Security benefits and Supplemental Security Income (SSI)(42 U.S.C. § 407).

____ 2. Veterans' benefits (38 U.S.C. § 5301).

____ 3. Federal civil service retirement benefits (5 U.S.C. § 8346).

____ 4. Annuities to survivors of federal judges (28 U.S.C. § 376(n)).

____ 5. Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 916).

____ 6. Black lung benefits.

Exemptions listed under 1 through 6 above may not be applicable in child support and alimony cases (42 U.S.C. § 659).

____ 7. Seaman's, master's or fisherman's wages, except for child support or spousal support and maintenance (46 U.S.C. § 11109).

____ 8. Unemployment compensation benefits (§ [60.2-600](#), Code of Virginia). This exemption may not be applicable in child support cases (§ [60.2-608](#), Code of Virginia).

____ 9. Portions or amounts of wages subject to garnishment (§ [34-29](#), Code of Virginia).

____ 10. Public assistance payments (§ [63.2-506](#), Code of Virginia).

____ 11. Homestead exemption of \$5,000, or \$10,000 if the debtor is 65 years of age or older, in cash, and, in addition, real or personal property used as the principal residence of the householder or the householder's dependents not exceeding ~~\$25,000~~ **\$50,000** in value (§ [34-4](#), Code of Virginia). This exemption may not be claimed in certain cases, such as payment of spousal or child support (§ [34-5](#), Code of Virginia).

____ 12. Property of disabled veterans — additional \$10,000 cash (§ [34-4.1](#), Code of Virginia).

____ 13. Workers' Compensation benefits (§ [65.2-531](#), Code of Virginia).

____ 14. Growing crops (§ [8.01-489](#), Code of Virginia).

____ 15. Benefits from group life insurance policies (§ [38.2-3339](#), Code of Virginia).

____ 16. Proceeds from industrial sick benefits insurance (§ [38.2-3549](#), Code of Virginia).

____ 17. Assignments of certain salary and wages (§ [8.01-525.10](#), Code of Virginia).

____ 18. Benefits for victims of crime (§ [19.2-368.12](#), Code of Virginia).

____ 19. Preneed funeral trusts (§ [54.1-2823](#), Code of Virginia).

____ 20. Certain retirement benefits (§ [34-34](#), Code of Virginia).

____ 21. Child support payments (§ [20-108.1](#), Code of Virginia).

____ 22. Support for dependent minor children (§ [34-4.2](#), Code of Virginia). To claim this exemption, the debtor shall attach to the claim for exemption form an affidavit that complies with the requirements of subsection B of § [34-4.2](#) and two items of proof showing that the debtor is entitled to this exemption.

____ 23. Other (describe exemption): \$ ____ Other (describe exemption): \$ _____

I request a court hearing to decide the validity of my claim. Notice of the hearing should be given me at:

(address)

(telephone no.)

The statements made in this request are true to the best of my knowledge and belief.

(date)

(signature of judgment debtor)

§ 34-4. Exemption created.

Every householder shall be entitled, in addition to the property or estate exempt under §§ 23.1-707, 34-26, 34-27, 34-29, and 64.2-311, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding \$5,000 in value or, if the householder is 65 years of age or older, not exceeding \$10,000 in value, and, in addition, real or personal property used as the principal residence of the householder or the householder's dependents not exceeding ~~\$25,000~~ **\$50,000** in value. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary obligations or liabilities due the householder, not exceeding \$500 in value for each dependent.

For the purposes of this section, "dependent" means an individual who derives support primarily from the householder and who does not have assets sufficient to support himself, but in no case shall an individual be the dependent of more than one householder.

On April 1, 2027, and at each three-year interval ending on April 1 thereafter, each monetary limit in effect under this section immediately before such April 1 shall be adjusted to reflect the change in the Consumer Price Index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor, for the most recent three-year period ending immediately before January 1 preceding such April 1, and rounded to the nearest \$25, the dollar amount that represents such change. Adjustments made in this section shall not apply with respect to bankruptcy cases commenced before April 1, 2027.

§ 34-13. Householder may set apart exemption in personal estate.

If the householder does not set apart any real estate as before provided, or if what he does or has so set apart is not of the total value which he is entitled to hold exempt, he may, in addition to the property or estate which he is entitled to hold exempt under §§ 34-26, 34-27, 34-29, and 64.2-311, in the first case select and set apart by the writing required by § 34-14 to be held by him as exempt under §§ 34-4 and 34-4.1, so much of his personal estate as shall not exceed the total value which he is entitled to hold exempt and, in the latter case, personal estate, the value of which, when added to the value of the real estate set apart, does not exceed such total value.

For the purposes of this section, the exemption under § 34-4, or unused portion thereof, that is limited by such section to real or personal property used as the principal residence of the householder or the householder's dependents may only

be used for such property, and its proceeds as provided under § 34-20, and no other property.

§ 34-26. Poor debtor's exemption; exempt articles enumerated.

In addition to the exemptions provided in Chapter 2 (§ 34-4 et seq.), every householder shall be entitled to hold exempt from creditor process the following enumerated items:

1. The family Bible.

1a. Wedding and engagement rings.

2. Family portraits and family heirlooms not to exceed \$5,000 in value.

3. (i) A lot in a burial ground; and (ii) any preneed funeral contract not to exceed \$5,000.

4. All wearing apparel of the householder not to exceed \$1,000 in value.

4a. All household furnishings including, but not limited to, beds, dressers, floor coverings, stoves, refrigerators, washing machines, dryers, sewing machines, pots and pans for cooking, plates, and eating utensils, not to exceed \$5,000 in value.

4b. Firearms, not to exceed a total of \$3,000 in value.

5. All animals owned as pets, such as cats, dogs, birds, squirrels, rabbits, and other pets not kept or raised for sale or profit.

6. Medically prescribed health aids.

7. Tools, books, instruments, implements, equipment, and machines, including motor vehicles, vessels, and aircraft, which are necessary for use in the course of the householder's occupation or trade not exceeding \$10,000 in value, except that a perfected security interest on such personal property shall have priority over the claim of exemption under this section. A motor vehicle, vessel, or aircraft used to commute to and from a place of occupation or trade and not otherwise necessary for use in the course of such occupation or trade shall not be exempt under this subdivision. "Occupation," as used in this subdivision, includes enrollment in any public or private elementary, secondary, or career and technical education school or institution of higher education.

8. Motor vehicles, not held as exempt under subdivision 7, owned by the householder, not to exceed a total of ~~\$6,000~~ \$10,000 in value, except that a

perfected security interest on a motor vehicle shall have priority over the claim of exemption under this subdivision.

9. Those portions of a tax refund or governmental payment attributable to the Child Tax Credit or Additional Child Tax Credit pursuant to § 24 of the Internal Revenue Code of 1986, as amended, or the Earned Income Credit pursuant to § 32 of the Internal Revenue Code of 1986, as amended.

10. Unpaid spousal or child support.

The value of an item claimed as exempt under this section shall be the fair market value of the item less any prior security interest.

The monetary limits, where provided, are applicable to the total value of property claimed as exempt under that subdivision.

The purchase of an item claimed as exempt under this section with nonexempt property in contemplation of bankruptcy or creditor process shall not be deemed to be in fraud of creditors.

No officer or other person shall levy or distrain upon, or attach, such articles, or otherwise seek to subject such articles to any lien or process. It shall not be required that a householder designate any property exempt under this section in a deed in order to secure such exemption.

On April 1, 2027, and at each three-year interval ending on April 1 thereafter, each monetary limit in effect under this section immediately before such April 1 shall be adjusted to reflect the change in the Consumer Price Index for all urban consumers (CPI-U), as published by the Bureau of Labor Statistics of the U.S. Department of Labor, for the most recent three-year period ending immediately before January 1 preceding such April 1, and rounded to the nearest \$25, the dollar amount that represents such change. Adjustments made in this section shall not apply with respect to bankruptcy cases commenced before April 1, 2027.

2. That not later than March 1, 2027, and at each three-year interval ending on March 1 thereafter, the Department of Planning and Budget shall submit the updated dollar amounts that will become effective on April 1 pursuant to the provisions of this act to the Virginia Code Commission for purposes of amending §§ 8.01-512.4, 34-4, and 34-26 of the Code of Virginia, as amended by this act.

Chapter 7 Presumption of Abuse and Chapter 13 Disposable Income Statutes

11 U.S.C § 707

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, 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. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(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 \$6,000, whichever is greater; or

(II) \$10,000.

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

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in

a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses. Such monthly expenses may include, if applicable, contributions to an account of a qualified ABLE program to the extent such contributions are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986) and if the designated beneficiary of such account is a child, stepchild, grandchild, or stepgrandchild of the debtor.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed \$1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

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

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

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

divided by 60.

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

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

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

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

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

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

(iv) 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 \$6,000, whichever is greater; or

(II) \$10,000.

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.

11 U.S.C. § 1325

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

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

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19), child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or

organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

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

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

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

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

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

(4) For purposes of this subsection, the "applicable commitment period"—

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

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

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

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

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525¹ per month for each individual in excess of 4; and

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

Chapter 13 Disposable Income: Class 102 Nuances and Special Considerations

Chris Micale, Chapter 13 Trustee

- I. For today's discussion we're going to assume a basic understanding of disposable income. One calculates current monthly income and then deducts "amounts reasonably necessary to be expended." 11 U.S.C. § 1325(b), *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469 (2010). As we (hopefully) prepare for the coming post-pandemic and inflation related filings, this discussion will review nuances and special considerations.
- II. *Lanning* and the Income side
 - a. The calculation of current monthly income is mechanical under 11 U.S.C. § 101(10A) as it requires income from "all sources...without regard to whether such income is taxable income..."
 - b. Chapter 13 alters this with the phrase "projected monthly income." 11 U.S.C. § 1325(b).
 - c. The starting point, as recognized by the Tenth Circuit and approved by the Supreme Court in *Lanning*, is to "begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further." *Hamilton v. Lanning*, 130 S. Ct. at 2475. An unusual case may account for "other known or virtually certain information." *Id.*
 - d. Points to consider about *Lanning*
 - i. Not every case can deviate.
 - ii. Deviation is saved for unusual cases. The basis for the deviation must be known or virtually certain.
 1. As in *Lanning*, a one-time retirement withdrawal required deviation.
 2. A debtor leaving a degree program during the plan and reentering the workforce
 3. Retirement
 4. What about the expense side?

- iii. When deviation is appropriate, can you abandon Form 22C and look solely to Schedule I and J?

1. Fourth Circuit would likely disagree.

Pliler v. Stearns, 747 F.3d 260 (4th Cir. 2014). While *Pliler* specifically considered whether an above-median debtor with negative disposable income may propose a Plan less than the 60 month applicable commitment period, a review of the dicta finds the Court criticizing the bankruptcy court for suggesting it is free to “abandon completely the Bankruptcy Code’s disposable income formula in favor of Schedules I and J.” *Id.* at 266.

Baud v. Carroll, 634 F.3d 327 (6th Cir. 2011). In this case the Chapter 13 Trustee sought to abandon the disposable income calculation in 11 U.S.C. § 1325(b)(2) and instead rely on the calculation in Schedule I and J because, among other things, Schedule I included social security income and would result in positive disposable income. The Court rejected this approach as nothing in *Lanning* suggests a court may ignore the statutory calculation. *Id.* at 346.

2. Other cases

In re Garrepy, 501 B.R. 14 (Bankr. D. Mass. 2013) The debtors deducted a 2nd mortgage on Form 122C while the Plan proposed to strip this mortgage. The Debtors asserted that because Schedule I and J, which did not deduct the 2nd mortgage payment, demonstrated different projected disposable income, Form 122C should be disregarded. *Id.* at 17. The court rejected this argument.

In re Koch, 391 B.R. 230 (Bankr. N.D.N.Y. 2008) A debtor deducted three monthly payments for three different vehicles that were to be surrendered under the Chapter 13 Plan. The Debtor argued that upon an objection under 1325(b), Schedule 122C should be disregarded and the court look solely to Schedule I and J. The court disagreed requiring consideration of both calculations. *Id.* at 233-34.

- e. Self-employed debtors and business expenses. Can you deduct a Chapter 13 self-employed or business debtor's expenses from current monthly income?

- i. *In re Wiegand*, 386 B.R. 238 (B.A.P. 9th Cir. 2008). A plain reading of 11 U.S.C. § 1325(b)(2) indicates that business expenses are deducted from current monthly income and not in its calculation.

In re Harkins, 491 B.R. 518 (Bankr. S.D. Ohio). Following *In re Wiegand* and also explaining why the phrase "engaged in business" was broader than an operation defined in 11 U.S.C. § 1304 and included self-employed debtors who incurred no trade debt. *In re Harkins*, 491 at 537-538.

But compare *In re Featherstone*, 07-60296-13 and 07-60441-13 (Bankr. D. Mon. Sept. 28, 2007) which allowed business deductions from the calculation of current monthly income but the business deductions were actually the costs to prepare business assets in a liquidation. The court reasoned that because the definition of current monthly income relies upon taxable income, the Internal Revenue Code was instructive. The IRC defines income includes gains on dealing with property. Because gains cannot be determined without deducting the expenses in the sale, the sales costs could be deducted from the current monthly income. *In re Featherstone* at 20. This seems to be distinguishable from *Wiegand* as Mr. Wiegand operated an ongoing business with monthly expenses.

- ii. Consider which case to raise this issue.

If the debtors' current monthly income, without deducting business expenses, results in classification as an above median debtor, the disposable income is negative, and the Plan still needs to be sixty months to feasibly repay secured, priority and administrative claims, is this the fact pattern to make this an issue?

If Form 122C results in disposable income, should you propose a 48 month plan which still provides the value of the disposable income calculation?

f. Household size

Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012). The Fourth Circuit considered what a household size means. It rejected the “heads on bed” approach and the income tax dependent approach. It adopted the “economic unit” approach. One analyzes the financial interdependence of individuals to determine whether someone is an economic part of the debtor’s household. *Id.* at 237.

Does *Johnson* require fractional members? I posit that *Johnson* does not require fractional members for part-time household members. The Fourth Circuit merely said the bankruptcy court’s analysis was not incorrect. The Fourth Circuit states the economic unit approach is flexible and seems to suggest that the analysis may turn on the facts of each individual case. *Id.* at 241.

If the Debtor lives in a blended family or a modern family, ensure the schedules reflect that all household members are so financially interdependent that they must be considered a full household member.

III. Expense side

a. Future secured debtor that won’t exist

Morris v. Quigley, 673 F.3d 269 (4th Cir. 2012) Debtor deducted monthly payments for two ATVs she would surrender. The Court, applying *Lanning*, held that the projected disposable income calculation required using the formula which reflects past events but must also consider future circumstances which are known or virtually certain.

b. Property exists but debt securing it does not exist

Ransom v. FIA Card Services, N. A., 562 U.S. 61 (2011) The debtor owned a car with no lien but still claimed the ownership deduction on Form 122C. The Court held that because § 707(b)(2)(A)(ii)(I) allowed a debtor to deduct applicable expenses, without a car payment, an ownership expense was therefore not applicable.

- c. For cars owned free and clear, can you deduct the “old car deduction?”

The Internal Revenue Manual allows a deduction if the car is owned free and clear, is older than a defined model year and exceeds mileage. Some courts allow the expense, however, in the Western District of Virginia, Judge Krumm disallowed the expense. *In re Sisler*, 464 B.R. 705 (Bankr. W.D. Va. 2012).

Can you assert a special circumstance deduction you can show historic maintenance expenses that exceed the Local Standard? Or can you just use the deduction since Judge Krumm retired?

- d. Can you deduct actual expenses or is the standard a cap?

Bledsoe v. Cook 70 F.4th 746 (4th Cir. 2023) The debtors monthly mortgage payment was \$2,233.34 and deducted this amount on Form 122C, however, the applicable mortgage/rent standard was only \$1,098.00. The Court held that § 707(b)(2)(A)(iii) required deduction of the amounts contractually due. *Id.* at 748.

- e. Taxes

A tax deduction based on the debtor’s historical paycheck amounts may be inaccurate. Debtors often claim more exemptions than the actually deduct on their taxes, may deduct at an inaccurate filing status or may simply deduct \$0 for income tax withholdings.

Much case law considers how to apply tax refunds offsetting the Taxes deduction. However, the solutions rarely seem to capture the forward looking nature of the tax deduction. As an alternative, consider consulting online sources like paycheckcity.com/calculator/salary which help estimate an appropriate withholding. Using this solution, the tax withholding for an amount equal to the current monthly income, which may not be representative of the projected income, can be used.

f. Special Circumstances

The bankruptcy code allows for special circumstances to be deducted in the disposable income calculation. Remember this cannot simply be claimed.

- i. The Bankruptcy Code suggests these may be related to a serious medical condition or a call or order to active duty in the Armed Forces. 11 U.S.C. § 707(b)(2)(B)(i). Does additional phone expenses qualify because the thirteen year old needs more data to access their Insta?

In addition to qualifying as a type, there must be no reasonable alternative.

- ii. Then there is a specific procedure to qualify the additional expenses. 11 U.S.C. § 707(b)(2)(B)(ii). Each expense or adjustment to income must be itemized, documented and detailed in an explanation.
- iii. The debtor must attest under oath to the accuracy of any information. 11 U.S.C. § 707(b)(2)(B)(iii)
- iv. There is a fourth component which appears to apply only in Chapter 7 as the special circumstances can only be used to rebut the presumption of abuse if the current monthly income, less expenses, when adjusted by the special circumstances is less than a percentage of the nonpriority unsecured claims or a specified dollar amount. 11 U.S.C. § 707(b)(2)(B)(iv).

IV. Plan term pitfalls

- a. Current monthly income explicitly excludes benefits received under the Social Security Act. 11 U.S.C. § 101(10A). When excluded it is very likely an analysis under 11 U.S.C. § 1325(b) will not yield any requirement for unsecured creditors to receive a dividend. Thus, many social security recipients qualify as a below-median debtor despite the fact that Schedule I and J may show a substantial amount of monthly net income. A below-median debtor may only extend the Plan term beyond thirty-six months “for cause.” 11 U.S.C. § 1322(d)(2). If the debtor generates substantial monthly net income what cause justifies a Plan term longer than thirty-six months?

The amount paid to unsecured creditors is not part of this analysis, rather it is akin to a time-value of money analysis. The Code appears to require a debtor pay the total funding as soon as possible and feasible.

Example: Schedule I and J state the monthly net income is \$1,000.00 per month. The debtor proposes a sixty-month Plan with total funding of \$10,000.00 or a monthly Plan payment of \$167.00. Why can the debtor not pay \$278.00 per month and complete the same Plan two years earlier?

- b. An above median debtor's disposable income calculation requires a monthly payment of \$500.00 to unsecured creditors. A court may only confirm a Plan if it provides: 1) the **value** of property to be distributed to the claim is not less than the claim **OR** 2) all of the debtor's projected disposable income. 11 U.S.C. § 1325(b)(1). It may be that this same debtor can pay 100% of the claims over sixty months with a Plan payment of only \$250.00 per month. Since the Plan does not provide all of the projected disposable income, it must provide the "value" of property. "Value" is a phrase used in the Code to connote interest to compensate for the time value of money. If the debtor in the example doesn't pay \$500.00 per month (which would complete the case sooner) why shouldn't the creditors be compensated with an interest component for delay in receiving its claim?

In re McKinney, No. 18-70417-BHL-13, 2018 WL 4378655 (Bankr. S.D. Ind. Sep. 13, 2018) This case held a debtor was not required to pay interest. This opinion does a thorough job of compiling cases holding that interest should be paid and those that hold it should not be paid.

V. 11 U.S.C. § 1329 is still a powerful tool for the debtors

Post-confirmation, a debtor can modify the dividend and term downwards because 11 U.S.C. § 1325(b) is no longer a factor. *In re Wilburn*, No. 14-70032 (Bankr. W.D. Va. Aug. 22, 2016). Note, *Wilburn* did not consider the implication of 11 U.S.C. § 1325(a)(3) and whether reduction of the term or dividend is proposed in good faith.

VI. Disposable Income Planning

Debtors routinely engage in exemption planning. Drawing down bank accounts to pay for legitimate living expenses prior to filing is not per se prohibited.

I rarely see debtors engage in disposable income planning. For example, a case may simply have an above median debtor no matter which way one times the current monthly income period. Often these debtors have been living paycheck to paycheck and rarely plan for long term financial goals or safety nets. For example, an above median family of four makes at least \$139,000. In many parts of southwest Virginia, this is a liveable household income, however, because the family may have been operating paycheck to paycheck they never contributed to retirement accounts. They may not participate in employer offered life, long-term disability, short-term disability or HSA accounts. If the goal of bankruptcy is to provide a debtor a fresh start, is it not appropriate to ensure the household use this opportunity to learn how to start planning for long-term needs as well as ensure they have adequate safety nets in place for catastrophes?

Gorman v. Cantu, No. 17-1034 (4th Cir. Dec. 18, 2017) (unpublished). The lower bankruptcy court (Eastern District of Virginia, Alexandria Division) adopted the majority rule which states “debtors are permitted to exclude post-petition retirement contributions from disposable income in any legal amount, so long as the contributions are made in good faith.” *Id.* at 5. The 4th Circuit reviewed the case under the clearly wrong standard applicable to a lack of good faith inquiry, and, while not adopting the lower bankruptcy court’s holding, found the lower court’s conclusion to not be clearly wrong and thus affirmed.

Presumption of Abuse

by Webb King, Esq.

I. Section 707(b)(2). The Chapter 7 Means Test.

- A. Timing. Under Section 704(b)(1)(A), the U.S. Trustee has ten days from the date of the first Section 341 meeting to file a statement as to whether the case is presumed to be abusive under the Means Test. **This deadline cannot be extended.**
- B. CM/ECF system allows the U.S. Trustee three choices.
 - i. File statement of presumed abuse.
 - ii. File statement that insufficient information has been provided to make determination.
 - iii. Take no action. Presumption does not arise.
- C. After the 10-day statement is filed, the U.S. Trustee has 30 days to file a motion to dismiss or file a statement setting forth the reasons the United States trustee . . . does not consider such a motion to be appropriate (a “Declination Statement.”). Section 704(b)(2). **This deadline also cannot be extended.**
- D. If a 10-day statement is filed, the U.S. Trustee will almost always ask for an interview of the debtor.
 - i. Voluntary.
 - ii. Very helpful to us in making determination as to whether to file a motion to dismiss or not.
- E. The Means Test is almost exclusively a “snap shot” of the debtor’s finances on the petition date. *See In re Dowd*, 607 B.R. 833, 837 (Bankr. E.D. Va. 2019) (Judge Kenney) (citing cases).
- F. Section 707(b)(3). Dismissal based on the totality of the circumstances.
 - i. Deadline is the same as the dischargeability objection deadline. Can be extended.
 - ii. Can be filed even if no Section 707(b)(2) Means Test motion is filed.
 - iii. Post-petition changes to a debtor’s financial situation are potentially relevant.

II. Does the Chapter 7 Means Test Even Apply?

- A. For Means Test to apply in Chapter 7, debt must be “primarily consumer debt.” Section 707(b)(1).
- i. If you have a debtor with non-consumer debt, this is worth a careful review because you can avoid the Chapter 7 Means Test (and maybe Chapter 13) entirely.
 - ii. This is commonly referred to as “business” or “non-business” debt. But that’s not correct statutory language. “Consumer debt” means “debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. § 101(8).
 - iii. “Primarily” is probably talking about relative amount of debt, although the cases leave open the idea of looking at the number of creditors of each type. See *Matter of Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988).
 - iv. When is a debt consumer or non-consumer? Starting points for research.
 - v. *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996) (divorce settlement “not incurred with a profit motive or in connection with a business transaction” is a consumer debt.).
 - vi. *What are “primarily consumer debts,” under 11 U.S.C.A. § 707(b), authorizing dismissal of chapter 7 Bankruptcy case if granting relief would be substantial abuse of chapter’s provision*, 101 A.L.R. Fed 117 (1991).
 - vii. Secured debt counts. See *Harris v. Margretten & Co., Inc. (In re Harris)*, 203 B.R. 46, 50 (Bankr. E.D. Va. 1994).
- B. Particular Issues
- i. Taxes
 1. Income taxes are usually found to be non-consumer. See *IRS v. Westberry (In re Westberry)*, 215 F.3d 589, 591 (6th Cir. 2000) (federal income taxes not consumer debt. Among other things, tax debt is incurred for public purpose, not “personal, family, or household purpose.” Co-debtor stay case.)
 2. *In re Stovall*, 209 B.R. 849, 854 (Bankr. E.D. Va. 1997) (personal property tax on a personal vehicle is not a consumer debt – tax debt is not “incurred” by debtors, it is involuntarily imposed by government. Co-debtor stay case.). But see *Curtis v. Propel Property Tax Funding, LLC*, 915 F.3d 234, 236 (4th Cir. 2019)

(holding the debt incurred by an individual under a tax payment agreement (“TPA”) with a non-government third party was not a consumer debt even though the underlying obligation was local taxes) (non-bankruptcy case).

ii. Student Loans. Split in authority.

1. *In re Ferreira*, 549 B.R. 232, 239 (Bankr. E.D. Cal. 2016) (“[I]n order to show a student loan was incurred with a profit motive, the debtor must demonstrate a tangible benefit to an existing business, or show some requirement for advancement or greater compensation in a current job or organization.”)
2. *Palmer v. Laying*, 559 B.R. 746, 755 (D. Colo. 2016) (largely rejecting the tangible benefit and advancement components set out in *Ferreira*. “The important question is whether [debtor’s] education can be properly characterized as a business investment in himself.”).
3. *Townson v. Ruff (In re Ruff)*, 639 B.R. 772 (Bankr. N.D. Ga. 2022). “To the extent that a debtor incurs student loan debt to pay living expenses while pursuing a degree, the debt is consumer debt.” *Ruff* at 783. The loans in *Ruff* were for tuition and the court there followed *Palmer v. Laying* and found the student loans at issue were not consumer debt. See *Ruff* at 784.
4. *In re Valdivia*, No. 20-00369-5, 2020 WL 4939161 (Bankr. E.D.N.C. Aug. 21, 2020). Student loans were consumer debts. “The student loans funded additional vocational training that would allow for a higher salary, but the Debtor wanted to increase her income in order to benefit her family so they might ‘have a better life.’ The student loans were incurred to ultimately fund the Debtor’s household and benefit her family.” *Id.* at *5.
5. *In re Steiner*, No. 19-60062, 2020 WL 2027250 (Bankr. S.D. Ill. Jan. 29, 2020). Student loans are consumer debts. “Rather than adopting either a per se rule or the profit motive test, this Court believes that the appropriate way to determine whether a particular student loan constitutes consumer debt is to consider the totality of the circumstances on a case by case basis. While factors such as the debtor’s motive for incurring

the debt may be relevant consideration, the *purpose* of the loan is determinative.” *Id.* at *6.

iii. Tort Liability (car accidents).

1. A footnote in *Stovall* sets out other types of debt that are not consumer debt, including tort liability from car accidents. See *In re Marshalek*, 158 B.R. 704, 707 (Bankr. N.D. Ohio 1993) (debt from car accident not “consumer debt” as it was not voluntarily incurred). See also *In re White*, 49 B.R. 869, 872 (Bankr. W.D.N.C. 1985).
2. Did not find any Fourth Circuit or Virginia case law on this issue.

C. Median Family Income.

- i. Number of persons in debtor’s household determines what the applicable “median family income” is.
- ii. Threshold issue. Current median incomes (as of April 1, 2024).
 1. One person - \$75,756.
 2. Two people - \$95,482.
 3. Three people - \$116,903.
 4. Four people - \$139,667.
 5. Add \$9,900 for each additional individual.
 6. Can find this on the U.S. Trustee website for any particular date - <https://www.justice.gov/ust/means-testing>.
- iii. Household is not defined in the Bankruptcy Code.
- iv. Some factual situations are easy (married couple, two minor children), but family life is often more complicated than that.
- v. *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012) (2-1 decision), *cert. denied*, 568 U.S. 1087 (2013).
 1. Chapter 13 Means Test case.
 2. Requires the determination of fractional members of a household.
 3. *In re Roch*, No. 20-12792-KHK, 2021 WL 5177442 (Bankr. E.D. Va. Nov. 4, 2021) (Judge Kindred) (holding debtor whose minor daughter stayed with him one-third of the time did not count as a full person for the purpose of determining household size and debtor must round his household size down to one person and not up to two people) (chapter 13 case).

III. Income issues on the Chapter 7 Means Test

- A. Part 1 of the Means Test. Income portions of the Chapter 7 Means Test appear to be the same as the income portions of the Chapter 13 Means Test.
- B. If debtor is married and debtor's spouse does not file, then all of the non-debtor spouse's income should be included on lines 2 through 10.
 - i. Certain expenses are backed out on Part 1, Line 3. See discussion below.
 - ii. Exception on Part 1, Line 1 – if the debtor is living separately or legally separated, then the non-debtor spouse's income is not included. In this event the debtor must declare under penalty of perjury that debtor and non-debtor spouse are legally separated or are living apart for reasons that do not include defeating the Means Test.
- C. Part 1, Line 2 – Bonuses
 - i. *McDow v. Meade (In re Meade)*, 420 B.R. 291, 305-07 (Bankr. W.D. Va. 2009) (Judge Stone) (permitting annual bonus received during the 6-month CMI period to be prorated over 12 months for the purpose of the means test).
 - ii. Possible issue – What about a one-time payment that is not associated with a particular time period? For example – Debtor leaves a job and gets a payout of PTO or sick leave.
- D. Part 1, Line 3 – “Marital Adjustment”
 - i. Section 101(10A) defines “current monthly income” to include “any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents . . .”
 - ii. All of the non-debtor spouse's income should be included.
 - iii. Certain expenses of the non-debtor spouse may be deducted here.
Examples:
 - 1. Non-debtor spouse's domestic support obligations paid to another household.
 - 2. Non-debtor spouse's student loan payments.
 - 3. Non-debtor spouse's withholding taxes (but not to the extent of over withholding that generates significant tax refunds).

4. Non-debtor spouse's retirement contributions or retirement loan re-payments.
 5. Non-debtor spouse's debt payments for debts that only the non-debtor spouse is liable for (unless those debts were incurred for the household expenses of the debtor or the debtor's dependents).
- iv. These expenses should not be deducted anywhere else on the Means Test.

IV. Expense Issues on the Chapter 7 Means Test

A. Part 2, Lines 6 through 9

- i. Line 6 – Food, clothing, and other items.
- ii. Line 7 – Out of pocket health care allowance.
- iii. Line 8 – Housing and utilities – insurance and operating expenses.
- iv. Line 9 – Housing and utilities – mortgage or rent expenses.
- v. All of these are figures that are derived from the IRS National and Local Standards for collection purposes and are based on the debtor's household size, location, and age (for health care expenses).
- vi. A debtor is entitled to take the full amount of the expense authorized by the IRS standards even if the debtor actually incurs a lower amount. *See Lynch v. Jackson*, 853 F.3d 116, 122 (4th Cir. 2017) (“[W]e hold a debtor is entitled to the full National and Local Standard amounts for any category of expense in which they incur a cost.”).

B. Part 2, Line 10 – Housing expense

- i. Not just that the debtor spends more than the established amount for housing. *See In re Greer*, No. 10-63833-B-7, 2011 WL 10676936 (Bankr. E.D. Cal. Sept. 30, 2011).

C. Part 2, Line 12 – Vehicle operation expense

- i. Can be claimed even if the vehicle is owned free and clear.

D. Part 2, Line 13 – Vehicle ownership or lease expense

- i. Debtor gets the higher of the ownership expense from the IRS Local Standards or the secured payment.
- ii. Debtor must make a loan or lease payment on the vehicle to claim this deduction. *See Ransom v. FIA Card Services, N.A.*, 562 U.S. 61,

73 (2011). In other words, if the debtor owns the car free and clear or borrows a car, the debtor does not get this expense.

- iii. Note that the form states that a debtor may claim ownership or lease expenses for only two vehicles.

E. Part 2, Line 14 – Public transport expense

- i. Based on the language of the form, the debtor gets the amount of this expense from the IRS Local Standards if the debtor has no vehicle even if the debtor does not use public transport.

F. Part 2, Line 15 – Additional public transport expense

- i. Possible to get both a vehicle expense and a public transportation expense.
- ii. Debtor must, in fact, incur both expenses. Example – person that drives to a commuter rail station to get to work.

G. Part 2, Line 16 – Taxes

- i. Per the instructions, this is net of refunds. “[I]f you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.”
- ii. Case law supports this. See *In re Rudnik*, 435 B.R. 613, 614 (Bankr. D. Minn. 2010).

H. Part 2, Line 17 – Involuntary Deductions

- i. Is the payment voluntary or involuntary?
- ii. Retirement plans. Mandatory contributions for retirement are mostly in the public sector.
- iii. Contributions to 401(k) plans are not deductible because they are made voluntarily. See *In re Kogelman*, No. 18-60482, 2020 WL 974976 (Bankr. N.D. Ohio Feb. 26, 2020).
- iv. The form also mentions union dues and uniform costs.
- v. Note that the form speaks in the terms of “payroll deductions,” so not payments outside of a paycheck. For example – buying steel toe shoes.

- I. Part 2, Line 18 – Life insurance
 - i. Term only.
 - ii. Debtor(s) only. No premium for non-debtor spouse or children.
 - iii. Often this is a payroll deduction. Make sure your client gets credit for this.

- J. Part 2, Line 19 – Court ordered payments
 - i. Payments under this line must be ordered by a court or administrative agency. Does not include voluntary payments or payments made under a private agreement.
 - ii. The form says, “**such as** spouse or child support payments,” (emphasis added) leaving open the possibility of other types of payments. Restitution payments maybe?

- K. Part 2, Line 20 – Education
 - i. Monthly expense.
 - ii. Could include required licensing classes.
 - iii. Also applies for education that is required for a physically or mentally challenged dependent child if public education is not available. But, does not include amounts paid on other lines of the Means Test – for example Lines 21 or 29.

- L. Part 2, Line 21 – Childcare
 - i. Does not include elementary or secondary school.
 - ii. Could include afterschool care for older kids.

- M. Part 2, Line 22 – Additional health care expenses
 - i. Additional expenses. Watch double counting, particularly where debtor has wage deductions for a flexible spending account.
 - ii. This is the amount that is greater than the standard amount on Line 7.
 - iii. By its terms does not include payments paid by a health savings account (HSA).

- N. Part 2, Line 23 – Optional Phone service.
 - i. Not just the amount the debtor pays for phone service.
 - ii. Only “to the extent necessary for your health and welfare or that of your dependents or for the production of income.”

- O. Part 2, Line 25 – Health Insurance, Disability Insurance, Health Savings Accounts
- i. Insurance is straightforward.
 - ii. Only Health Savings Accounts (HSA). Not Flexible Spending Accounts (FSA) or other arrangement.
- P. Part 2, Line 26 – Continuing Contributions for Care of Household or Family Members
- i. Must include: “continued,” have historical basis.
 - ii. Actual expenses.
 - iii. “Reasonable and necessary,” not elective.
 - iv. For elderly, chronically ill or disabled person.
 - v. Person either living with the debtor or member of debtor’s immediate family.
 - vi. Person must be unable to pay such expenses.
- Q. Part 2, Line 29 – Education Expenses for Dependents under 18
- i. Currently capped at \$189.58 per child.
 - ii. Must give case trustee documentation of actual expenses.
 - iii. Must explain why amount is reasonable and necessary and not included in other parts of the Means Test.
 - iv. Can include homeschool expenses.
 - v. Does not include college expenses or preschool expenses. *See In re Goins*, 372 B.R. 824, 826-27 (Bankr. D.S.C. 2007).
- R. Part 2, Line 30 – Additional food and clothing expense.
- i. Cannot be more than 5% of the food and clothing allowances.
 - ii. Must show that the additional amount is reasonable and necessary.
- S. Part 2, Line 31 – Charitable contributions.
- i. Must be consistent with prior giving. *See In re Hallstrom*, No. 02-80013C7D, 2002 WL 1784500 (Bankr. M.D.N.C. Aug. 2, 2002).
 - ii. Must be able to establish contributions are actually made. *See In re Linn*, No. 04-13574C7G, 2005 WL 1307692 (Bankr. M.D.N.C. May 18, 2005).

V. Part 2, Special Circumstances

A. Section 707(b)(2)(B)(ii)

- i. Allows the debtor to rebut the presumption of abuse.
- ii. Procedural requirements
 1. Set out in the Statute.
 - a. Itemize additional expenses and adjustments to income.
 - b. Provide supporting documentation.
 - c. Provide “detailed explanation” of the special circumstances.
 2. Starting point for research – *In re Parulan*, 387 B.R. 168 (Bankr. E.D. Va. 2008) (Judge Mitchell). Discusses procedural requirements at length.
- iii. Substantive requirements
 1. Are your circumstances “special”? Just because the debtor has expenses does not make them special.
 2. Statute says “serious medical condition” or being called to active duty in the Armed Forces.
 3. Starting point for research – *In re Burdett*, No. 12-12066-BFK, 2013 WL 865575 (Bankr. E.D. Va. March 7, 2013) (Judge Kenney). Discussing the “narrow view” and the “broad view” used by courts in analyzing what is a “special circumstance.”
 4. Western District Cases.
 - a. *Robbins v. Alther (In re Alther)*, 537 B.R. 262, 267 (Bankr. W.D. Va. 2015) (Judge Connelly). Special circumstances must be “unusual, yet necessary.” Voluntary 401(k) contributions are not “special circumstances.”
 - b. In *Alther*, Judge Connelly states that the payments that the debtor would make in a chapter 13 are not considered “special circumstances” under the chapter 7 means test. See *Alther*, 537 B.R. at 270 (“Section 707(b)(2)(B)(iv) requires that the presumption of abuse be rebutted by circumstances which lead to an adjustment in the current monthly income that when multiplied by sixty would produce a figure below the

statutory threshold. The potential dividend to unsecured creditors to be paid pursuant to a chapter 13 plan has no effect on the amount of a debtor's current monthly income. Under a plain reading of section 707(b)(2)(B)(iv), therefore, a potential dividend is unable to serve as a circumstance to rebut the presumption of abuse.”).

- c. *Robbins v. Ervin (In re Ervin)*, No. 15-70467, 2016 WL 721043 (Bankr. W.D. Va. Feb. 23, 2016) (Judge Black). Discusses the procedural requirements and analyzes four categories of expenses. “[The Court] takes a middle road [on the issue of what is a special circumstance] . . . special circumstances should be addressed on a case-by-case basis. . . circumstances must be of a more severe nature than ordinary job changes or income fluctuations.” *Id.* at *12 (quotation omitted). Holds that maintaining two residences not a “special circumstance” but certain medical expenses were.

5. Eastern District Cases.

- a. *Parulan*, 387 B.R. at 173 (holding that a reduction in overtime is not a “special circumstance” because “[b]y its very nature, overtime tends to fluctuate”).
- b. *In re Dowd*, 607 B.R. 833, 838 (Bankr. E.D. Va. 2019) (Judge Kenney) (buying a different car with a higher monthly payment would not be a “special circumstance”).

Differences between Chapter 7 Means Test and the Chapter 13 Means Test

The chapter 7 means test in § 707(b)(2) and the chapter 13 means test in § 1325(b) do not necessarily result in the same amount. This is understandable because they serve two different purposes, one to guard the door to chapter 7 relief and the other to determine how much should be paid to creditors in chapter 13. The chapter 13 means test uses the phrase “projected disposable income” while the chapter 7 means test uses only the phrase “disposable income.” The one phrase allows for adjustments for known or virtually certain future changes. The other does not. The chapter 7 means test is not forward-looking but is a static snapshot. The snapshot chapter 7 means test is supported by a complementary dynamic chapter 7 abuse test that looks not only to the debtor's actual financial affairs but also surrounding circumstances. Together, they provide a straight-forward, bright-line test, § 707(b)(2), supported by a dynamic, customized test, § 707(b)(3). The first looks to a debtor's hypothetical budget; the second emphasizes the debtor's actual budget. Between the two of them, debtors who should not be in chapter 7 should be identified and redirected to chapter 13.

In re Denzin, 534 B.R. 883, 887 (Bankr. E.D. Va. 2015) (Judge Mayer).

I. Surrendering a Vehicle

Under the chapter 7 means test, a debtor is entitled to include payments on a motor vehicle that he or she intends to surrender. *See In re Harvey*, 407 B.R. 867, 873 (Bankr. W.D. Va. 2009) (Judge Krumm) (“This Court holds that a debtor may deduct all payments on secured debts pursuant to § 707(b)(2)(A)(iii)(I) regardless of whether the debtor exhibits an intent to surrender the property on the Statement of Intention.”) (case involving real property).

The rule is the opposite under the chapter 13 means test. *See in re McPherson*, 350 B.R. 38, 45 (Bankr. W.D. Va. 2006) (Judge Anderson) (in a chapter 13 plan the calculation of the deduction for a payment for a secured debt must be based on the amount actually being paid under the plan, not the amount due under the pre-petition contract).

II. Voluntary Retirement Contributions

Under the chapter 7 means test, only involuntary retirement contributions are permissible deductions from income. Part 2, Line 17. This is relatively rare and usually involves only debtors employed by a government entity.

The chapter 13 means test includes this same provision regarding involuntary retirement contributions. Also at Part 2, Line 17.

The chapter 13 means test also provides that a debtor may deduct “qualified retirement deductions.” Part 2, Line 41. That provides as follows:

41. Fill in all qualified retirement deductions. The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in 11 U.S.C. § 362(b)(19).

III. Business Income Deduction

In chapter 13, gross income from a business is included “above the line” to determine if a debtor has an above median income. But business expenses are deducted “below the line” to determine the appropriate amount of the disposable income, and thus the monthly payment. See *Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238 (9th Cir. B.A.P. 2008).

In chapter 7, only the net business income is included in the income calculation on the means test (line 5).

Of course, in both chapters, other issues regarding business expenses are possible. For example, if the business owner debtor deducts his vehicle as a business expense, he or she cannot also include the same expense on Schedule J. Or, could a business owner deduct expenses that are not permitted by IRS rules for small business owners?