

LEGAL ISSUES ARISING UNDER THE CHAPTER 7 MEANS TEST

Following is a line-by-line summary of Forms 122A-1, 122A-1 Supp and 122A-2 and various recurring disposable income issues likely to arise in chapter 7 under the BAPCPA provisions of 11 U.S.C. § 707(b).

Form 122A-1 Supp Part 1, Declaration of Non-Consumer Debts

- Less than 50% of total scheduled debt was incurred for personal, household or family purposes.
- Purpose of debt is judged at the time the debt was incurred.
- Home mortgages are typically consumer debt.
- Most tax debts are not typically consumer debt.

Form 122A-1 Supp Part 2, Line 2 Declaration of Disabled Veterans

- Must have at least 30% disability from service or released/discharged due to disability.
- Debt primarily incurred during period of active duty/homeland defense activity.
- Only if BOTH conditions apply is debtor exempt from further completing the form.

Form 122A-1 Supp Part 2, Line 3, Declaration of Reservists and National Guard Exclusion

- Must be either a member of a reserve component or National Guard; AND
- Must have been on active duty or performing a homeland defense activity for at least 90 days.
- Exclusion applies after the minimum 90 day period of service, and for 540 days after the service ends.
- Exclusion applies until December 2019, unless extended by Congress.

FORM 122A-1 STATEMENT OF YOUR CURRENT MONTHLY INCOME

Line 1, Marital & Filing Status

- The only four options permitted are those listed on the Form 22A.
- No option for legally separated but filing joint case; joint cases generally should be treated as a single household for means test purposes.
- May be asserted as special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
- Information should be consistent with household size on Schedule I.

Line 2, Gross wages, salary, tips, bonuses, overtime, commissions.

- Includes pay/shift differentials
- Includes income, whether or not taxable.
- Figures are gross amounts, before any deductions.

Line 3 & 4, Alimony and maintenance payments and any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support.

- Includes payments made monthly, quarterly, or annually.
- Includes actual payments regardless of written agreement with contributor.
- Includes payments from roommate, partner, parent, or relative, regardless of whether living with debtor.
- Includes payments made directly to creditors on behalf of debtor, e.g., rent, car, or insurance.
- Does not include payments from non-filing spouse (which are already included as income in Column B).

Lines 5 & 6, Business and real property income and expenses.

- Must be "ordinary and necessary," i.e., a reasonable operating expense.
- Depreciation is not included.
- Net income cannot be a negative number.

Line 7, Interest, dividends, and royalties.

- Includes automatic dividend reinvestment program.

Line 8, Unemployment compensation.

- Unemployment compensation is not a "benefit under SSA" and must be included.

Line 9, Pension and retirement income.

- Does not include Social Security payments.
- Includes all other retirement, including military, government, 401(k), and IRA.

Line 10, Income from all other sources.

- Includes net gambling, cash gifts, litigation proceeds, and trust income.

- Includes private disability income.
- Does not include SSA benefits.
- Does not include tax refunds.
- Does not include loan proceeds.
- Whether it meets IRS test for income could be relevant, but whether it is taxable or non-taxable income is not a factor.

Line 13, Applicable median family income.

- "Applicable state" is state of residence at filing.
- If married and two different households, residence is where most family members reside.
- If no plurality of family members are in any one state, use state of spouse with highest income.
- "Household size" is the debtor, debtor's spouse, and any dependents that the debtor could claim under IRS dependency tests. The USTP uses the same IRS test for the definition of both "household" and "family." IRS Publication 501 explains the IRS tests for "dependent."
- The USTP departs from the IRS dependent test (as does the IRS when it determines family size for collection purposes) in cases justifying "reasonable exceptions" (e.g. a long standing economic unit of unmarried individuals and their children). However, if an individual is counted as a family member for median income purposes, that individual's income should be included as income on Form 122A-2.

FORM 122A-2 MEANS TEST CALCULATIONS

Line 3, Marital adjustment.

- All income of the non-debtor spouse should be included, except the following expenses of the non-debtor spouse may be excluded:
 - withholding taxes;
 - student loan payments;
 - prior support obligations;
 - debt payments on which only the non-filing spouse is legally liable and where the consideration for the loan exclusively benefits the non-filing spouse. (Credit cards used to pay for household expenses may not be deducted on Line 17).

Line 6, National Standards: food, apparel and services, housekeeping supplies, personal care, and miscellaneous.

- The following expenses are covered by the National Standards and may not be counted separately elsewhere:
 - apparel and services (includes shoes and clothing, laundry and dry cleaning, and shoe repair);
 - meals at home or away (unless unreimbursed business expenses);
 - housekeeping supplies (includes laundry and cleaning supplies; other household products such as cleaning and toilet tissue, paper towels and napkins; lawn and garden supplies; postage and stationary; and other miscellaneous household supplies);
 - personal care products and services (includes hair care products, haircuts and beautician services, oral hygiene products and articles, shaving needs, cosmetics, perfume, bath preparations, deodorants, feminine hygiene products, electric personal care appliances, personal care services, and repair of personal care appliances)
 - miscellaneous personal expenses.
- National Standard amount that may be claimed is based on the debtor, the debtor's dependents, and the debtor's spouse in a joint case if the spouse is not otherwise a dependent.

Line 7, National Standards: health care.

- National Standard amounts may be claimed based on debtor, debtor's dependents, debtor's spouse, and the age of household members.
- Actual amounts expended by the debtor exceeding the National Standards that are required for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, which are not reimbursed by insurance or paid by a health savings account, may be claimed on Line 22.

Line 8, Local Standards: housing and utilities; non-mortgage expenses.

- Based on county of residence; see Line 13 for resolving multiple residences.
- The following expenses are covered by the Local Standards and may not be counted elsewhere:
 - maintenance and repair;
 - homeowner association dues;
 - condominium fees;
 - gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning;
 - basic telephone and cell phone service.

Line 9, Local Standards: housing and utilities, mortgage/rent expense.

- Based on county of residence; see line 13 for resolving multiple residences. The following are included in the Local Standard and may not be counted elsewhere, except as provided on lines 33 and 34:
 - principal and interest on mortgage loan;
 - rent;
 - homeowners/renters insurance;
 - local property taxes.
- Line 9b is the same figure as line 33a for house payments.
- Debtor may not "double dip," that is take the full amount of the Local Standard for mortgage/rent on line 9a and then fail to deduct the monthly mortgage payment on line 9b. The overall effect of disallowing double-dipping is to allow the debtor to take only the higher of the actual mortgage payment or the Local Standard. If the home is being surrendered, the debtor may not include the mortgage payment on lines 33 and 34, and may not deduct the mortgage payment on line 9b. The debtor may, however, claim the full amount of the Local Standard for housing on line 9a.
- Debtors and joint debtors are entitled to only one Local Standard mortgage/rent payment, even if maintaining two separate households.
- Vacation homes do not entitle a debtor to the Local Standard on line 9a.
- Debtor may not claim a Local Standard on line 9b when the debtor:
 - is and has been living with a friend or relative for an extended period of time at no cost; or
 - is and has been living in military or other employer-paid housing

Line 10, Local Standards: housing and utilities; adjustment.

- This line is often used improperly by debtors to claim housing expenses in excess of the IRS standards; USTP policy is to object to that use of line 10.
- This line is occasionally used by debtors who claim that Form 122A incorrectly captures the separation of the IRS housing Local Standard into two components, a mortgage component and a non-mortgage component; the USTP will object to that use of Line 10.

Line 11 and 12, Local Standards: transportation, vehicle operation/public transportation expense.

- Based on metro area or region.
- See line 13 to resolve multiple residences.
- The Local Standard for vehicle operation may be taken when the debtor owns, leases, or pays the operating expenses on a vehicle.
- The Local Standard for vehicle operation for zero vehicles may be taken if the debtor does not own, operate, or pay operating expenses on any vehicle.
- A vehicle must be "street ready" and licensable.
- A vehicle designed without an engine does not qualify, e.g., camper/ trailer.
- Debtors located outside of the Fifth, Seventh, and Eighth Circuits who operate vehicles not subject to a loan or lease may deduct an additional \$200 if the vehicle is owned by the debtor, and is older than 6 model years or has more than 75,000 miles

Lines 13, Local Standards: transportation ownership/lease expenses.

- Debtor cannot claim the vehicle ownership expense if the debtor does not have a secured loan or a lease on the vehicle.
- If the vehicle is being surrendered without replacement, the debtor may not claim the expense. But see discussion regarding line 33.
- If the vehicle is borrowed, the debtor may not claim the expense.
- Debtor may not "double dip," that is take the full amount of the vehicle ownership expense on line 13 and then fail to deduct the monthly lien payment on line 33(b)&(c). The overall effect is to allow the debtor to take the higher of the actual loan or lease payment and vehicle ownership expense.
- A debtor whose household contains a single driver is generally entitled to an ownership expense for only one vehicle.

Line 14 and 15, Local Standards: transportation, additional public transportation expense.

- If debtor claims vehicle operating expense for one or more vehicles on Line 11, debtor may only claim additional public transportation expense if reasonable and necessary for the health and welfare of the debtor, debtor's dependents, and debtor's spouse, or for the production of income.
- If additional public transportation expense is applicable, it is capped by Local Standard amount for public transportation.

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Line 16, Other Necessary Expenses: taxes.

- Based on monthly amount of actual taxes owed, NOT taxes withheld.
- Need to calculate based on last year's tax return
- Includes FICA, Social Security, Medicare, state and local taxes.
- Non-debtor spouse's taxes is not included if "backed out" on line 3.

Line 17, Other Necessary Expenses: involuntary deductions for employment.

- Includes retirement, union dues, uniform costs, work shoes.
- Does not include voluntary 401(k) contributions, voluntary 401(k) loan repayments, or other voluntary retirement or profit sharing deductions.
- Does not include United Way or charitable contributions.
- Does not include elective insurance.

Line 18, Other Necessary Expenses: life insurance.

- Includes only amounts for term insurance on the debtor's life.
- If the policy is whole life, debtor must determine what portion of the premium is attributable to term coverage.
- Does not include premiums on policies for non-debtor spouse or children.

Line 19, Other Necessary Expenses: court-ordered payments.

- Includes the current monthly amount of support and alimony, not any past due amounts, which are entered on line 35.
- Does not include purely voluntary amounts for which there is no legal obligation.

Line 20, Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

- Employment education must be as a condition of employment.
- Expenses for challenged children must be for "health or welfare."
- Expenses for challenged children cannot be otherwise provided by public school system.
- Expenses for challenged children cannot be already included on line 26 or 29.

Line 21, Other Necessary Expenses: childcare.

- These are actual expenses only.
- Includes babysitting, nursery school, daycare, preschool.
- Premium daycare may be permitted, depending on the justification.
- May not be permitted if one parent is "stay at home;" depends on the circumstances.

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Line 22, Other Necessary Expenses: health care.

- Includes only unreimbursed, out-of-pocket expenses, exceeding the National Standard amounts provided for at line 19B, including items traditionally reimbursable through a flexible spending or “cafeteria” medical saving plan. For example: deductibles, medications therapy, co-pays
- Does not include payments for health insurance or health savings account; those are covered by line 25.
- Does not include elective or cosmetic surgery.
- May not duplicate items on line 25.

Line 23, Other Necessary Expenses: telecommunication services.

- Does not include basic phone or cell service, which is included in the Local Standards on line 7.
- Test is whether "necessary for health and welfare or production of income."
- Does not include business expenses already deducted on Line 5 on Form 122A-1.

Line 25, Health Insurance, Disability Insurance, and Health Savings Account Expenses.

- Includes actual premiums paid by debtor for debtor, spouse, and dependents.

Line 26, Continued contributions to the care of household or family members.

- Includes only actual, not anticipated expenses.
- Family member must live with the debtor or be a member of the debtor’s immediate family, i.e., parent, grandparent, sibling, child, grandchild.
- Elderly, chronically ill, or disabled person must be unable to pay the expense.

Line 27, Protection against family violence.

- Include only ongoing expenses related to a real threat.
- Legal costs related to a restraining order may qualify.
- Home security system costs will not qualify in most cases.
- Nature of expense, but not the amount, must be kept confidential by the court.

Line 28, Home energy costs.

- Insert the amount by which the twelve-month average home energy costs exceed Line 8.
- Amount claimed is unlimited, but must be documented.

Line 29, Education expenses for dependent children under 18.

- Includes public or private elementary or secondary education.
- Does not include college or preschool education.
- Child must be under 18 at filing.
- Amount may not exceed \$160.42 per child.
- Expenses must be documented.
- Cannot duplicate expenses claimed on line 21.
- Does not include school lunches, which are included in National Standards on Line 6.
- Can include home schooling expenses.

Line 30, Additional food and clothing expense.

- The USTP Web site breaks out the food/clothing standard for application (5 % limit).
- Expenses must be actual, not merely anticipated.
- Special dietary and allergy restrictions can be covered.
- Documentation is required.

Line 31, Continued charitable contributions.

- Contribution is limited to 15 percent of gross income.
- Need documentation to support previous charitable giving
- The Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439 clarifies the Bankruptcy Code to ensure that above-median debtors may make continued charitable contributions.

Line 33, Future payments on secured claims.

- Total all payments coming due in the 60 months following filing and divide by 60. In the case of a variable rate loan, use the loan rate in effect on the petition date to calculate the payments.
- In the case of a "balloon" payment within 60 months, use the full amount of the balloon to calculate the average payment.
- Does not include property subject to a lease rather than a loan.
- Includes all secured debt, even "toys" and luxury items. However, luxury expenses may demonstrate that a petition was filed in bad faith, and may be considered in determining the totality of the debtors financial circumstances under section 707(b)(2)(B).
- Includes a secured loan payment, even when the value of the collateral is less than the amount of the loan.
- Does not include payments if debtor intends to surrender the collateral securing the loan.

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Line 34, Other payments on secured claims.

- Does not include arrearage on luxury items; the item must be "necessary for the support of the debtor or dependents."
- See Line 33 for a discussion of when the collateral is surrendered.

Line 35, Payments on prepetition priority claims.

- The total of priority debt includes only amounts due as of filing.
- Does not include figures already listed on line 19.

Line 36, Chapter 13 administrative expenses.

- Debtor must project a hypothetical chapter 13 plan payment to calculate the figure on line 36. The USTP does not insist on mathematical exactitude and allows a reasonable estimation of the hypothetical chapter 13 plan payment.
- Generally the plan payment should be calculated based on the amount of monthly disposable income suggested by the completion of the means test, or shown on Schedules I and J.
- The multiplier for line 36 is found on the USTP Web site by state. (3.4% for MDTN, 8% for WDTN, 4.9% EDTN)

Line 43, Other Expenses.

- Generally this line should be used to assert special circumstances to rebut the presumption of abuse under section 707(b)(2)(B).
- Also may provide information for the UST to consider under section 707(b)(2) when determining whether a motion to dismiss is appropriate.
- Should not be included by debtor in calculating disposable income on line 39, or in determining whether the presumption of abuse arises on Lines 40-42.