

Fall 2011

BSI:

Bankruptcy Scene Investigation

**21st Annual DFW Area Chapter 13
Consumer Bankruptcy Conference
Monday, November 14, 2011
Arlington Convention Center
Arlington, Texas**

Follow a BSI team of experts who use both cutting-edge methods and old fashioned investigation to navigate the twists and turns of the practice of consumer bankruptcy. Starting with the EOUST and Washington, these experts will analyze evidence from a national standpoint and decipher the effect of new bankruptcy rules as they affect unsecured creditors, auto creditors, and home mortgage lenders. They will discuss technology used in the local bankruptcy clerks' office, IRS issues in bankruptcy, and lender liability litigation. Local bankruptcy judges will reveal procedural hints and express their views from the bench. The case law review will provide evidence of recent court decisions which can be useful in piecing together clues for future trends in bankruptcy law. The program will conclude with special issues facing debtors in bankruptcy and the elite team of Chapter 13 trustees. The Bankruptcy Scene Investigation promises to mix deduction, gritty facts, and excellent speakers.

**Registration form also available on Dallas and Fort Worth
Chapter 13 Trustees' websites through www.13network.com.**



Staff Attorney Speaks

by Jason Miller, Staff Attorney for
Alice Whitten

One of the most important requirements of confirmation of a Chapter 13 plan is calculating a debtor's disposable income. For most practitioners the calculation of disposable income is important because it determines if the debtor will have to pay a portion to their non-priority unsecured creditors ("unsecured creditors") out of an unsecured creditors' pool ("UCP") over and above the payments necessary to cover any mortgage arrearage, car payments, and/or governmental debts. UCP is the term commonly used to describe the total amount that a debtor's unsecured creditors are entitled to receive. It is calculated by multiplying the debtor's monthly disposable income by the number of months the debtor is required to be in his or her Chapter 13 plan. This period of time is known as the applicable commitment period ("ACP").

Disposable income, in its simplest term, is any money available for spending and saving after the payment of taxes and fixed costs such as rent/mortgage, food, car payments, insurance, etc. However, the bankruptcy code muddies the waters by defining "disposable income." It begins with current monthly income received by the debtor within 6 months prior to the bankruptcy petition. It excludes child support payments, foster care payments, and/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. Deducted are 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; and (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business. 11 U.S.C. § 1325(b)(2).

What may seem to be a relatively easy concept to understand has had some attorneys

and judges scratching their heads. Recently, the Supreme Court tackled the issue of disposable income in the case *Hamilton v. Lanning*. The Supreme Court held that a bankruptcy court may take into account changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation. *Hamilton v. Lanning*, 130 S.Ct. 2464, 2478 (2010). The Court reasoned that looking back to the previous 6 months in determining what a debtor had available at the time of confirmation to pay his unsecured creditors may lead to senseless results that Congress did not intend. The Court opted for the "forward-looking" approach, focusing on the current income and expenses of a debtor at the time of confirmation.

The first step in calculating disposable income is to determine what is current monthly income. In reading 11 U.S.C. §§ 101(10B) and 1325(b)(2) together, all income is current monthly income ("CMI") with the exception of child support payments, foster care payments, disability payments for a dependent child, benefits received under the Social Security Act, and payments to victims of war crimes or victims of international or domestic terrorism.

The next step is to determine what expenses are acceptable in order to reduce a debtor's current monthly income. The bankruptcy code tells us what expenses are deemed reasonable and necessary. 11 U.S.C. §§ 1325(b)(2) and (3); 11 U.S.C. § 707(b)(2)(A) and (B). These expenses are specified under the National Standards and Local Standards provided by the Internal Revenue Service. Most practitioners have bankruptcy software that will calculate the expenses based on a debtor's household size and the county in which they reside.

Although calculating the debtor's income and expenses are key, we must also determine if the debtor is an above-the-median income debtor ("above median") or a below-the-median income debtor ("below median"). The plan term for an above median debtor is 60 months and for a below median debtor, 36 months. This plan term, the ACP, is calculated by taking the average gross monthly income received in the 6 months

prior to the filing of the bankruptcy case multiplied by 12 to determine a debtor's annual median family income. The debtor's annual median income is then compared to the median income for households where the debtor resides. For example a debtor residing in Tarrant County with a 1 person household has an applicable median family income of \$38,940.00. If the debtor's gross income averaged over the 6 months prior to filing multiplied by 12 exceeds \$38,940.00, then the debtor is above median. If it is less, then the debtor is below median.

If the debtor is below median, the court will only look at the debtor's current income reported on Schedule I minus the current expenses reported on Schedule J. This approach affords the court a wide latitude in determine what expenses reported on Schedule J are reasonable and necessary.

When calculating whether a below median debtor has any funds remaining to pay their unsecured creditors, you take Schedule I minus Schedule J and reduce that amount by the total debts to be paid through the plan including any administrative fees. An example of this would be a debtor that has a regular monthly net wage of \$3,000.00 per month and total monthly expenses of \$2,500.00 reported on Schedule J. The surplus of \$500.00 per month is to be used to reorganize the debts through the debtor's Chapter 13 plan. The debtor reports on his Chapter 13 plan that he owes \$3,000.00 for mortgage arrears, is "cramming down" a vehicle to \$5,000.00 with 4.25% interest, and is proposing to pay his attorney \$2,600.00 through his plan.

Because the debtor is below median, pursuant to 11 U.S.C. § 1325(b)(4) the debtor must remain in the plan for at least 36 months. Therefore, the debts he is trying to reorganize through his plan and to be paid by the trustee are divisible by 36. So we divide the mortgage arrears of $\$3,000.00/36 = \83.33 per month, car of $\$5,000.00 + \text{interest}/36 = \148.18 per month, attorney's fees of $\$2,600.00/36 = \72.22 per month, and add in the trustee's fee at 10% of the claims to be paid through the plan, which is approximately \$33.75 per month. According

to our example the debtor's surplus of \$500.00 per month is reduced by the above monthly amounts to be paid through the plan leaving the debtor with approximately \$162.52 in disposable income. This number is then multiplied by 36 to determine what is to be paid to the unsecured creditors, which in this example is \$5,850.72.

For an above median debtor, the Chapter 13 statement of current monthly income – official form 22C - (CMI statement) limits the court's discretion in determining if certain expenses are reasonable or necessary. The expenses reported on the CMI statement are defined by the IRS National and Local Standards. However, if the debtors elect to take expenses in excess of the IRS National or Local Standards, the court has the ability to determine the reasonableness of those expenses if there are special circumstances, or put another way, if there is no other reasonable alternative to incurring the expense scheduled.

When calculating disposable income for an above median debtor, you add all of the debtor's gross income from Schedule I and reduce that amount by Line 58 of the CMI statement. If there is any monthly disposable income after reducing the income by Line 58, then that number is multiplied by 60, the ACP for an above median debtor. An example of this would be a debtor who has Schedule I gross income of \$5,000.00 per month and allowed expenses from the CMI statement Line 58 of \$4,800.00. That debtor has a monthly disposable income of \$200.00. This amount is multiplied by 60, and the debtor must pay \$12,000.00 to his unsecured creditors.

Staff Attorney Speaks continued on page 7 . . .

The Thirteen Connection is a publication of the Dallas and Fort Worth Chapter 13 Trustees.
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Starting October 2011, issues of *The Thirteen Connection* will be available in pdf form on the Dallas and Fort Worth trustees' websites at www.13network.com.

Trustees Announce IRS Refund Policies

Section 521 of the Bankruptcy Code (Title 11, United States Code) sets out "debtor duties" to include: "(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

- (1) at the same time filed with the taxing authority, each federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter."

Paragraph 9 of General Order 2010-01 authorizes the trustees to receive IRS refunds issued to Chapter 13 debtors and to disburse those funds according to the terms of that paragraph.

The Chapter 13 trustees believe that any IRS refund received by a Chapter 13 debtor after the case is filed and before all payments have been paid to the trustee by the debtor according to the plan is "disposable income."

The Chapter 13 trustees believe that debtors should be entitled to keep the first \$2,000.00 of each year's IRS refund to pay for emergencies and other non-budgeted reasonable and necessary expenses as provided in paragraph 9 of General Order 2010-01. The \$2000.00 is per household, regardless of the number of tax returns filed or refunds received.

The Chapter 13 trustees believe that any "excess refund" over and above the first \$2,000.00 per household should be paid over by a debtor to the trustee for payment to allowed general unsecured claims and added to the unsecured creditors' pool and plan base amount.

Each year in January, beginning 2012, the Chapter 13 trustees will send to each debtor in an active Chapter 13 case a letter requesting a copy of the tax return for the previous calendar year AND the excess refund (amount over \$2,000.00 per household).

Complete copies of the tax return should be sent to the trustee as provided below at the same time as the originals are filed with IRS. The trustee does not need the full social security number of the debtors or their dependents, so please take care to black out or otherwise redact that information – particularly if mailing the document to the trustee. If a debtor was not required to file a return, an affidavit to that effect should be sent to the trustee.

Payment of the excess refund (amount over \$2,000.00 per household) should be mailed to the trustee as provided below. The **case number** and the words "**IRS Excess Refund**" should appear on the face of the cashier's check or money order.

If the tax return and full excess refund are not timely received by the trustee, a Motion To Dismiss With Prejudice For 180 Days may be filed.

Send **Tax Returns** to the appropriate trustee as follows:

Tom Powers	Tim Truman	Alice Whitten
Email: powerstaxreturns@dal-lasch13.com	Email: trumantaxreturns@ch13ftw.com	Email: whittentaxreturns@fwch13.com
Fax: 214-969-0506	Fax: 817-770-8518	Fax: 817-916-4755
Mail: 125 E John Carpenter Fwy, Suite 1100 Irving, TX 75062	Mail: 6851 NE Loop 820 #300 Fort Worth, TX 76180	Mail: 6100 Western Place, Ste. 1050 Fort Worth, TX 76107

*Remember to black out or redact all full social security numbers on the return as those are not needed.

*Remember to include the **case number** on the face of the return.

Send **Excess Refund Payments by cashier's check or money order** to the appropriate trustee as follows:

Tom Powers	Tim Truman	Alice Whitten
P.O. Box 402 Memphis, TN 38101-0402	P.O. Box 961076 Fort Worth, TX 76161-0076	P.O. Box 1201 Memphis, TN 38101-1201

*Remember to include the **case number** and the words "**IRS Excess Refund**" on the cashier's check or money order.

More on New Bankruptcy Rules . . .

The amendments to Rule 3001 create new subparagraphs (c)(1) and (2) as follows:

(c) **SUPPORTING INFORMATION.**

(1) Claim Based on a Writing. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) Additional Requirements in an Individual Debtor Case; Sanctions for Failure to Comply. In a case in which the debtor is an individual:

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses, or other charges incurred before the petition was filed, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in property of the debtor, the proof of claim shall include a statement of the amount necessary to cure any default as of the date of the petition.

(C) If a security interest is claimed in property that is the debtor's principal residence, the attachment prescribed by the appropriate Official Form shall be filed with the proof of claim. If an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law.

(D) If the holder of a claim fails to provide any information required by this subdivision (c), the court may, after notice and hearing, take either or both of the following actions:

(i) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or

(ii) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(Underlined text indicates new text).

Case Decisions

by Tim Truman

Deficiency Claims

In re Roten, 07-45617-DML (Findings of Fact and Conclusions of Law by Judge Robert C. McGuire, Judge Presiding, August 29, 2011.)

Capital One Auto Finance (creditor) filed its original proof of claim in January 2008 for \$18,659.47 alleging it was fully secured by debtor's 2004 Dodge (the collateral). The plan, confirmed in April 2008, reflected creditor's scheduled amount as \$17,621.00, valued the collateral at \$17,931.41, and provided for payment over 60 months with 8.5% interest. The plan provided for no unsecured creditors' pool.

In May 2009, debtor modified the plan to surrender the collateral. The modification reflected creditor's scheduled amount as \$17,621.00 and the amount of creditor's secured claim as \$17,931.41 – the same amount as the value of the collateral provided in both the plan and the modification. The modification provided for an unsecured creditors' pool of \$2,012.97, an amount sufficient to pay all allowed unsecured claims 100%.

Creditor did not object. The modification was approved in June 2009. "The order approving the Modification did not determine the amount of Creditor's secured claim or the value of the Collateral to be other than as provided for in the Modification - \$17,931.41."

The creditor foreclosed and in April 2011 filed an amended proof of claim for an unsecured deficiency of \$11,659.14. The debtor and the trustee filed objections. At trial creditor contended that because the modification did not state that the collateral would be surrendered "in full satisfaction" of creditor's claim, it did not put creditor on notice that no unsecured deficiency claim would be allowed.

Held: "The value of the Collateral and the amount of Creditor's secured claim are therefore *res judicata*. Because the order confirming the Modification fixed both the value of the Collateral and the amount of Creditor's secured claim

at \$17,931.41, Creditor is fully secured and has no deficiency claim. Having failed to appeal the order confirming the Modification, Creditor may not now collaterally attack that order. The Amended POC must therefore be disallowed."

Alternatively, even assuming allowance of creditor's amended proof of claim is not barred by *res judicata*, creditor's request would likely be denied in any case because amendment of a claim after the bar date requires exercise of a court's equitable jurisdiction, citing *In re Dortch*, No. 07-45041, 2009 WL 6764538 (Bankr. N.D. Tex. 2009 - Judge D. Michael Lynn). In *Roten*, the nearly two year delay by the creditor and prejudice to other creditors (reducing recovery by other general unsecured creditors from 100% to 15%) weigh heavily against creditor.

Excess Base

In re Wilkerson, 07-43662-DML (Opinion by Judge D. Michael Lynn, July 2011.)

Debtors' schedules I and J showed net monthly income of \$1,000.00. Form 22C showed current monthly income of \$271.00. The plan provided a base amount of \$60,000.00 (\$1,000.00 times 60 months). The plan provided for an unsecured creditors' pool of \$16,620.00 (\$271.00 times 60 months). The total amount needed to pay all allowed administrative, priority, and secured claims in full plus the \$16,620.00 unsecured creditors' pool was only approximately \$35,000.00. The discrepancy between the \$60,000.00 base amount and the \$35,000.00 total payments to be made to creditors under the plan (the excess base) was apparent from the plan's face.

Neither the trustee nor any creditor objected to the confirmation.

Approximately three years later, the trustee filed a modification to increase the unsecured creditors' pool by the excess base amount. Debtor objected.

Held: The first three of four elements needed to bar the trustee's action on the basis of *res judicata* were met: (1) the parties (the trustee and the debtors) must be identical in both suits (the plan confirmation and the modification approval.); (2) the prior judgment (confirmation

order) must have been rendered by a court of competent jurisdiction (the bankruptcy court); and (3) there must have been a final judgment on the merits (no appeal was taken from the confirmation order).

The fourth element is that the same cause of action must be involved in both cases, (i.e., the issue currently before the court could have and should have been addressed before entry of the prior judgment). Here, the excess base was apparent from the face of the plan. It could and should have been raised by the trustee prior to the entry of the confirmation order, and thus, all four parts of the *res judicata* test were met.

The court said § 1329(a), which is the modification section, does not overcome the *res judicata* bar, citing its prior holdings in *In re Braune*, 385 B.R. 167 (Bankr. N.D. Tex. 2008) and *In re Williams*, No. 05-47644, 2007 WL 4522326 (Bankr. N.D. Tex. 2007).

The court did point out, however, that the preclusive effect of *res judicata* does not extend to every proposed modification, but only to a modification respecting an issue that could and should have been addressed at confirmation.

The trustee's modification was denied.

Note: The Chapter 13 trustees believe that any excess base arising after confirmation is subject of a trustee modification to add such amount to the unsecured creditors' pool. Examples would include a home mortgage arrearage included in the plan where the debtor surrenders a house post-confirmation without reducing the base amount; total secured and priority claims provided by the plan for payment by the trustee are allowed on the trustee's recommendation concerning claims (TRCC) after confirmation for less than was included on form 22C and used in the calculation of projected disposable income; a creditor refund; a post-confirmation windfall such as an inheritance, insurance proceeds, lottery winnings, a lawsuit settlement or recovery for a post-confirmation injury; an income tax refund based on a return filed post-confirmation; and an increase in earnings or a bonus not disclosed prior to confirmation.

Judicial Estoppel

Diane G. Reed v. City of Arlington, 2011 WL 3506100 (Fifth Circuit 2011)

The Fifth Circuit *en banc* court held in an opinion August 11, 2011, that judicial estoppel does not bar a "blameless bankruptcy trustee from pursuing a judgment that the debtor – having concealed the judgment during bankruptcy – is himself estopped from pursuing."

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Staff Attorney Speaks

continued . . .

Although calculating disposable income may seem to some as advanced trigonometry, it can be relatively painless as long as you understand the basics of what income is included and what expenses are considered reasonable and necessary. More importantly, many will find that most debtors will have very little if nothing in the way of disposable income. My experience has been that debtors file for bankruptcy because they need financial relief due to a decrease in income, medical expenses, or a job loss. Therefore, their current monthly income may be of a level where they are just getting by, even after filing for bankruptcy. It is not the goal of the trustee to soak every last cent from a debtor's pocket, but it is the trustee's job to ensure that if a debtor can pay, they will pay.

Note: <http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm>, provides data for completing the Form 22C, also known as the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income in a Chapter 13 case.

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Registration 8:00 am
Program 8:30 a.m. - 4:45 p.m.
Lunch and parking fees included.

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Pre-registration: \$125.00, no CLE credit
\$175.00, CLE credit for attorneys
At the seminar: \$150.00, no CLE credit.
\$200.00, CLE credit for attorneys.

Registration fee pays for parking, continental breakfast, and lunch.
Fees not refundable. Register by November 4, 2011, to be included for lunch.
One attendee per form, please. 6.75 hours CLE applied for.

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