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A Means Test at Odds with Itself: The Secured Debt Expense in Chapter 7 Consumer Bankruptcy Cases After The Supreme Court's Decision in *Lanning* and *Ransom*

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I. INTRODUCTION

The availability of the secured debt expense[1] to debtors intending to surrender collateral as part of their chapter 7 bankruptcy case is a heavily debated question that has sharply divided bankruptcy courts since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005.[2] The question is a straightforward one: When completing the means test calculation, may a consumer debtor deduct payments due for secured debts on the petition date if the debtor intends to surrender or has surrendered the collateral securing the underlying obligation.[3]

Traditionally, a majority of the courts considering the question have allowed the deduction in chapter 7 cases irrespective of the debtor's plans for the collateral post-petition; a minority of bankruptcy courts interpret the expense using a "future oriented" or "forward-looking" approach.[4] Courts using the latter approach deny the chapter 7 debtor the benefit of the expense if the debtor intends to surrender the collateral and, therefore, will not in reality be making payments on the obligation post-petition.[5] On the heels of the United States Supreme Court's decisions in *Hamilton v.*

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1 The phrase "secured debt expense" or "secured debt deduction" refers to 11 U.S.C.A. § 707(b)(2)(A)(iii) (West 2018).

2 *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.); *see infra* Part III.

3 *See generally* Mark Goldman, *Leading Lawyers on Preparing a Chapter 7 Filing, Establishing Effective Client Strategies, and Understanding Recent Trends*, 2010 WL 1976163, at *7-8 (2010).

4 *In re* White, 512 B.R. 822 (Bankr. N.D. Miss. 2014) (recognizing the split in authority and summarizing the conflicting "snapshot" and "future oriented" approaches applied by the bankruptcy courts when interpreting section 707(b)(2)(A)(iii) of the Code); *In re* Rivers, 466 B.R. 558 (Bankr. M.D. Fla. 2012) ("[P]rior to 2010, the vast majority of courts to consider this issue [] concluded that the plain language of the statute permits a Chapter 7 debtor to deduct payments on secured debt even when the debtor plans to surrender post-petition the collateral underlying the debt."); *In re* Kogler, 368 B.R. 785 (Bankr. W.D. Wis. 2007) (stating that, since the implementation of BAPCPA, two distinctive lines of cases have emerged as courts struggle with the issue of whether to allow a debtor to deduct secured debt payments for collateral that will be surrendered).

5 *In re* Sterrenberg, 471 B.R. 131, 133 (Bankr. E.D.N.C. 2012); *In re* Fredman, 471 B.R. 540, 551 (Bankr. S.D. Ill. 2012); *In re* Krawczyk, No. 11-09596-8-JRL, 2012 WL 3069437, at *3-5 (Bankr. E.D.N.C. July 27, 2012).

Lanning[6] and *Ransom v. FIA Card Services*,[7] however, a new trend has emerged.[8] Spurred by the Court's dicta in these two decisions, a growing number of bankruptcy courts have begun to apply the forward-looking approach to deny debtors the benefit of this allowance in chapter 7 consumer liquidation cases.[9]

In sharp contrast to earlier cases where bankruptcy courts focused on determining the applicability of the secured debt expense by focusing on the Code's language, the newer cases that are representative of this trend notably lack analysis of the statutory text.[10] Instead, courts are willing to bypass the language of the statute or discernment of its plain meaning in favor of an interpretation that will, in their opinion, best conform to the "spirit" of BAPCPA.[11] Underlying the trend is the assumption that Congress made a mistake by drafting language into the means test that essentially allows debtors to pull one over on creditors: this language permits the consumer debtor to deduct phantom expenses that artificially decrease the amount of debtor's disposable income and, thereby, allow the debtor to escape his financial obligations through a chapter 7 bankruptcy case.[12] According to these courts, this amounts to a free pass, permitting the debtor to continue his chapter 7 case without getting caught by the means test's presumption of abuse.[13] To fix this and inject a much needed dose of realism into the chapter 7 means test, these courts posit that the expense must be given a forward-looking interpretation that focuses on whether the debtor will incur the expense post-petition and, therefore, allows the deduction from CMI only when the debtor reaffirms the obligation that is secured by the collateral.[14]

But, while this approach may seem more in line with the broad purposes underlying BAPCPA, it is not supported by the statute's language or the larger context of the chapter 7 dismissal statute.[15] More importantly, this trend has far reaching consequences for consumer debtors that raise concerns of equity and fairness. In chapter 7 cases where a debtor fails the means test as a result of being denied the use of the expense, this interpretation of the statute imposes an onerous and unfair

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6 Hamilton v. Lanning, 560 U.S. 505, 508-09 (2010).
7 Ransom v. FIA Card Servs., 562 U.S. 61, 65 (2011).
8 *Id.*; *see also infra* Part II(C).
9 *See infra* Part III.
10 *Id*.
11 *Id*.
12 Christopher W. Frost, *Nagging Problems under BAPCPA post Lanning and Ransom*, 32 No. 11 Bankruptcy Law Letter 1 (Nov. 2012).
13 *In re* Fredman, 471 B.R. 540, 555 (Bankr. S.D. Ill. 2012); *In re* Thompson, 457 B.R. 872, 880 (Bankr. M.D. Fla. 2011).
14 *See infra* Part III.
15 *See infra* Part III.

burden on the debtor who will have to disprove abuse in order to continue his chapter 7 case.[16] Conversely, this approach allows the bankruptcy trustee to benefit from an initial presumption of abuse without having to meet the evidentiary burden of proving abuse through the totality of circumstances or bad faith tests.[17] Such an absurd result cannot be what Congress intended when it created three separate and distinct tests in section 707(b)(2) for determining whether the dismissal of debtor's chapter 7 case for abuse is proper.

This new approach also raises a broader question regarding the use of judicial discretion after BAPCPA and whether bankruptcy courts should go beyond the statutory text, or bypass it completely, to fix what the courts perceive to be a broken means test – one that produces results that do not align with the courts' interpretation of the test's purpose. A careful analysis of the cases using this approach show that attempts to fix the perceived accuracy of the means test calculation through piecemeal judicial interpretation of its parts, creates a much larger problem and one that may ultimately jeopardize debtors' ability to obtain bankruptcy relief.[18]

This article examines the growing trend among bankruptcy courts to selectively adopt a new kind of forward-looking approach when determining the applicability of the secured debt expense to a chapter 7 case and the negative effects of this growing trend on consumer debtors. Part II of this article discusses the key distinctions between chapter 7 and chapter 13 bankruptcy cases and how those differences must inform the interpretation to be given by the bankruptcy courts to the secured debt expense statute, section 707(b)(2)(A)(iii) of the bankruptcy code. This section also analyzes the United States Supreme Court's opinion in *Hamilton v. Lanning* and *Ransom v. FIA Card Services*, the two cases to spark the trend toward a future-oriented or forward-looking means test in chapter 7 consumer cases. Part III begins by discussing what has been labeled the "majority approach," an approach focused on discerning the plain meaning of the statutory language in section 707(b)(2)(A)(iii), as well as the significance of that language in the broader context of the means test, including the purpose and effect of the other dismissal tests in section 707(b)(3) of the bankruptcy code. Part III then analyzes the most recent bankruptcy decisions interpreting the secured debt expense after the United States Supreme Court's decision in *Lanning* and *Ransom*, or what is referred to throughout this article as the "trend cases." It argues that a textual and contextual analysis of section 707(b)(2)(A)(iii)(I) supports the

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16 11 U.S.C.A. § 707(b)(2)(B)(i) (West 2018).
17 *See* 11 U.S.C.A. § 707(b)(2)(A)(i) (West 2018).
18 *See infra* Part III.

conclusion that means testing in chapter 7 bankruptcy cases is incompatible with the forward-looking approach being increasingly adopted by bankruptcy courts. Finally, part IV of this article discusses the negative effects of a means test that, although designed by Congress to be mechanical in its application, is interpreted to selectively incorporate one forward-looking element. It concludes that a mechanical means test with one select forward-looking element is inequitable and imposes a significant if not insurmountable evidentiary burden on the debtor when that element results in a presumption of abuse being triggered. This forces the debtor to make an initial show of proof that he deserves a fresh start – an approach at odds with the statutory text, inconsistent with the purposes underlying means testing, and contrary to longstanding bankruptcy policy.

II. THE MEANS TEST IN CHAPTER 7 AND CHAPTER 13 BANKRUPTCY CASES: COMPARING APPLES AND ORANGES

The means test is a mathematical calculation that in chapter 7 bankruptcy cases may trigger a presumption that the case is an abuse of the bankruptcy laws.[19] As codified in section 707(b)(2)(A)(i)-(iv) of the Bankruptcy Code, the means test is merely the first of three distinct methods through which the United States Trustee or other party in interest may prove "abuse" of the bankruptcy laws by the debtor and, accordingly, seek to have debtor's chapter 7 case dismissed.[20] This calculation is used to assess the debtor's income and expenses, allowing the bankruptcy court to easily determine whether the debtor should be eligible for chapter 7 relief based strictly on the numbers.[21] As such, the means test has been described as nothing more than a screening mechanism or objective litmus test to be applied as of the petition date to determine whether a chapter 7 proceeding is appropriate.[22]

The starting point for the means test calculation is debtor's "current monthly income," or CMI, a monetary amount that is determined by

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19 11 U.S.C.A. § 707(b)(2)(A)(i) (West 2018).

20 11 U.S.C.A. § 707(b)(2) (West 2018); § 707(b)(3) (West 2018); *see also In re* Rivers, 466 B.R. 558, 560 (Bankr. M.D. Fla. 2012) ("[T]he means test is only the first step of a two-tiered inquiry under section 707(b) of the Bankruptcy Code.").

21 *In re* Castillo, No. 08-10878-PGH, 2008 WL 4544467, at *4 (Bankr. S.D. Fla. Oct. 10, 2008).

22 *In re* White, 512 B.R. 822, 827 (Bankr. N.D. Miss. 2014) (noting that the means test is intended to determine the debtor's eligibility for chapter 7 relief as of the petition date); *In re* Rivers, 466 B.R. 558, 560 (Bankr. M.D. Fla. 2012) ("[T]he Means Test serves as a 'screening mechanism to determine whether a Chapter 7 proceeding is appropriate'"); *see generally* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 477 (2007).

looking retrospectively at the debtor's income from all sources during the six months preceding the filing of the bankruptcy case.[23] From that amount, the debtor may deduct certain monthly expenses; the type of expense a debtor may claim and its specific amount is set forth by statute.[24] Most of these expenses are based on National or Local Standards and, as such are applied uniformly throughout the geographic regions to which the expense is applicable.[25] With very few exceptions, these expense allowances will not accurately represent debtor's actual or current expenses.[26] When the result of this calculation, the debtor's disposable income, is above the statutory threshold set in section 707(b)(2)(A)(i) of the bankruptcy code, the debtor fails the means test and the case is presumed to be an abuse of the bankruptcy laws and must be dismissed.[27]

The secured debt expense, found in section 707(b)(2)(A)(iii) of the bankruptcy code, allows a debtor to subtract from his CMI an amount equal to the monthly payments contractually due to secured creditors in the sixty months following the petition date.[28] Its effect is to decrease a debtor's disposable income and, thereby, make it more likely that this amount will not trigger a presumption of abuse.[29] In some consumer cases, the secured debt expense may be the sole expense that keeps a debtor below the statutory threshold that will trigger a presumption of abuse.[30] In other cases, it may be the single largest allowance to reduce the debtor's CMI on the means test calculation. Irrespective, where this expense allows a debtor to pass the means test, the case will still be subject to dismissal for abuse upon a showing that the debtor filed the chapter 7 case in bad

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23 11 U.S.C.A. § 707(b)(2)(A)(i)-(iv) (West 2018); § 101(10A) (West 2018);

24 § 707(b)(2)(A)(ii)(I)-(V); (iii); (iv).

25 *Id.*

26 *In re* Rivers, 466 B.R. 558, 562 (Bankr. M.D. Fla. 2012) ("[T]he bulk of the allowable deductions are fixed amounts, based upon the IRS National Standards and Local Standards, not based on a debtor's actual expenses . . . ."); *In re* Ralston, 400 B.R. 854, 868 (Bankr. M.D. Fla. 2009); *In re* Castillo, No. 08-10878-PGH, 2008 WL 4544467, at *4 (Bankr. S.D. Fla. Oct. 10, 2008).

27 § 707(b)(2)(A)(i)(I)-(II) ("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 25 percent of the debtor's non-priority unsecured claims in the case, or $7,700, whichever is greater; or $12,850.").

28 § 707(b)(2)(A)(iii)(I).

29 *Id.*

30 *See generally In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011); *In re* Sterrenberg, 471 B.R. 131, 136 (Bankr. E.D.N.C. 2012); *In re* Fredman, 471 B.R. 540, 555 (Bankr. S.D. Ill. 2012).

faith or that a totality of circumstances proves that debtor can afford to pay at least some of his outstanding debts.[31]

When it enacted BAPCPA, Congress chose to incorporate the means test calculation into both chapter 7 and chapter 13 cases, giving the calculation a unique role in each chapter.[32] Accordingly, given the different types of bankruptcy relief offered by each chapter and their different policy objectives, the secured debt expense must be understood within the broader context of the means test itself and its unique function in chapter 7 and chapter 13 cases respectively.[33]

A. The Need for a Reality Based Means Test in Chapter 13 Cases.

In chapter 7 consumer cases a debtor's non-exempt assets are liquidated to pay unsecured creditors and the debtor is discharged from his personal liability on these claims. Accordingly, a debtor's post-petition earnings are wholly his own and part of debtor's bankruptcy "fresh start." In these cases, the means test functions as a kind of gatekeeper that ultimately determines whether an above-median debtor is eligible for this extraordinary remedy.

Although, in theory, the amount yielded by the means test calculation is what the debtor could presumably pay to creditors over the life of a hypothetical five-year Chapter 13 Plan, in reality, the figure is unlikely to

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31 § 707(b)(3) (West 2018) ("In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider – (A) whether the debtor filed the petition in bad faith; or (B) the totality of circumstances . . . of the debtor's financial situation demonstrates abuse.").

32 Ransom, 562 U.S. at 65 n.1 ("Chapter 13 borrows the means test from Chapter 7, where it is used as a screening mechanism to determine whether a Chapter 7 proceeding is appropriate."); *In re* Rivers, 466 B.R. 558, 566 (Bankr. M.D. Fla. 2012) (noting that the United States Supreme Court has recognized that the purpose of the means test in chapter 13 cases differs significantly from its purpose in chapter 7 cases); *In re* Ralston, 400 B.R. 854, 856 (Bankr. M.D. Fla. 2009) ("Radically different purpose of 'means test' as applied in chapter 7 as mechanical test of whether bankruptcy petition is presumptively abusive . . . .").

33 *See In re* Denzin, 534 B.R. 883, 887 (Bankr. E.D. Va. 2015) ("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."); *see also In re* Grinkmeyer, 456 B.R. 385, 388-89 (Bankr. S.D. Ind. 2011) (emphasizing that the chapter 13 means test, used to determine the debtor's projected disposable income, and the chapter 7 means test, used to determine if a presumption of abuse arises in chapter 7 cases, are based on distinctly different considerations); *In re* Norwood-Hill, 403 B.R. 905, 910 (Bankr. M.D. Fla. 2009) (stating that a "distinct analysis" of the means test must be undertaken in chapter 7 and chapter 13 cases because there are different considerations with respect to how issues arising under these respective chapters are handled).

accurately reflect debtor's actual repayment capacity. By congressional design the calculation does not use the debtor's actual or "real" income or expenses.[34] The income portion of the calculation is strictly backward looking; probable or actual increases in the debtor's income post-petition are not calculated into debtor's CMI in chapter 7 bankruptcy cases.[35] The type and amount of allowable expenses, with very few exceptions, is statutorily prescribed.[36] Even if a debtor's actual expenses exceed the amounts allowed by the statute, the debtor may claim an allowance only for the specified sum rather than for the debtor's real expenditures.[37] As with the income portion of the calculation, post-petition fluctuations in debtor's expenses are not considered.[38] Accordingly, although Congress

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34 *In re* Norwood-Hill, 403 B.R. at 910 ("Congress chose to base the means test on historic income and expense figures that are in effect on the petition date, as opposed to figures that may change with the passage of time or with a change in debtor's lifestyle."); *In re* Fredman, 471 B.R. 540, 545 (Bankr. S.D. Ill. 2012) ("The statute sets allowable expenses by means of several different methods, and, like section 707(b)(2)(A)(iii), many other provisions of the means test appear to operate contrary to the goal of accurately determining the amount of income that would actually be available for payments to unsecured creditors in a Chapter 13 case."); Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 477 (2007).

35 *See* 11 U.S.C. § 101(10A); *In re* Henebury, 361 B.R. 595, 602 (Bankr. S.D. Fla. 2007); *see also In re* Haman, 366 B.R. 307, 317 (Bankr. D. Del. 2007) ("Calculations under the means test are purposefully circumscribed and should not include foreseeable circumstances . . . ."); *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *6 (Bankr. N.D. Ga. May 1, 2006); *In re* Singletary, 354 B.R. 455, 465 (Bankr. S.D. Tex. 2006).

36 11 U.S.C.A § 707(b)(2)(A) (West 2018).

37 In fact, in chapter 7 cases, the statute allows the court to consider the debtor's real income and expenses, or post-petition fluctuations in debtor's income and expenses, only when the debtor seeks to rebut the presumption of abuse that results after the debtor "fails" the means test by establishing "special circumstances." Even then, the debtor must first prove that "special circumstances" warrant a downward or upward adjustment of the statutorily prescribed income and expense figures respectively–an evidentiary burden that is exceedingly difficult for a debtor to prove in most jurisdictions. Additionally, the debtor must then show that, once the income and expense figures are adjusted, debtor's disposable income falls below the statutory threshold that will trigger the presumption of abuse and that, therefore, debtor "passes" the means test due to his "special circumstances." *In re* Prestwood, 451 B.R. 180, 184 (Bankr. N.D. Fla. 2011).

38 *See In re* Haman, 366 B.R. at 317 (noting that, instead, such future circumstances are properly considered under the totality analysis of section 707(b)(3)); *see In re* Hartwick, 359 B.R. 16, 21 (Bankr. D.N.H. 2007) ("Congress did not remove the ability of bankruptcy courts to consider circumstances including postpetition developments, in determining abuse. On the contrary, Congress expressly incorporated the formerly judicially created totality of the circumstances test which permits consideration of circumstances both preceding and following the filing of the petition."); *In re* Singletary, 354 B.R. 455, 465 (Bankr. S.D. Tex. 2006) (The impact of postpetition events are not part of the means test. If the UST wishes the bankruptcy court to consider post-petition events, she may not rely on a presumption of abuse under the means test, but must bring her motion to dismiss under

sought to create a uniform test that would identify abuse of the bankruptcy process using a straightforward mathematical calculation that would be applied equally to all consumer debtors, the very nature of the calculation and the uniformity of its components militates against the means test being able to function as an accurate realistic measure of debtor's actual repayment capacity. As such, the means test is mechanical, based only superficially on debtor's financial reality, and merely creates a bright line presumptive test of eligibility for chapter 7 relief that is to be applied as of the filing of the bankruptcy petition.[39] In *In re Henebury*, for example, the court noted: "[T]he means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt."[40] At best, in chapter 7 cases, the means test can provide only a limited approximation of debtor's disposable income.

Accordingly, in chapter 7 cases, Congress designed section 707(b) so as to create a two-part abuse analysis.[41] Part one, the means test calculation, is mechanical and designed to look backwards at the state of debtor's financial affairs as of the petition date.[42] Part two, codified in section 707(b)(3), allows the court to consider debtor's real finances, including post-petition changes in income and expenses, to more

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section 707(b)(1) or (b)(3) and satisfy the burden of proof without the benefit of any presumption).

39 *See In re* Castillo, No. 08-10878-PGH, 2008 WL 4544467, at *4 (Bankr. S.D. Fla. Oct. 10, 2008); *In re* Henebury, 361 B.R. at 603 ("Congress has already determined the fairness of application of the means test, and a major objective of the legislation was to remove judicial discretion from the process."); *In re* White, 512 B.R. 822, 827 (Bankr. N.D. Miss. 2014) ("[T]he means test is intended to determine a debtor's eligibility for chapter 7 relief as of the petition date without regard to known future circumstances which impact a debtor's income or expenses."); *In re* Fredman, 471 B.R. 540, 545 (Bankr. S.D. Ill. 2012) ("[T]he means test is intended to determine a debtor's eligibility for chapter 7 relief at a specific point in time without regard to the accuracy of that determination.").

40 *In re* Henebury, 361 B.R. at 603; *see also In re* Hartwick, 352 B.R. 867, 870 (Bankr. D. Minn. 2006); Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing is Presumptive, but "Totality" is Determinative*, 45 HOUS. L. REV. 901, 907 (2008) ("[T]he means test is merely a presumption of abuse based on a snapshot at the moment of filing of the bankruptcy petition, and it is not necessarily indicative of the debtor's actual financial condition.").

41 *See In re* Denzin, 534 B.R. 883, 886 (Bankr. E.D. Va. 2015) ("If a prospective chapter 7 debtor satisfies the § 707(b)(2) means test, he must also satisfy a second test to qualify for chapter 7, § 707(b)(3)."); *In re* Haar, 373 B.R. 493, 497 (Bankr. N.D. Ohio 2007) ("§ 707(b)(3) is but one of two subordinate paragraphs used to determine whether a case should be dismissed for abuse pursuant to § 707(b)(1). The other, contained in § 707(b)(2), sets forth a formulaic approach, known as the 'means test' . . . .").

42 *See In re* Denzin, 534 B.R. at 886-87.

accurately reflect debtor's repayment capacity.[43] If a debtor "fails" the means test, it bestows on the bankruptcy trustee the benefit of a presumption of abuse that, when triggered, requires the dismissal of debtor's chapter 7 case without any additional proffer of evidence of debtor's "abuse" by the trustee.[44] By contrast, where the presumption of abuse is not triggered because debtor "passes" the means test, the trustee or a party in interest wanting to dismiss the debtor's chapter 7 case for abuse must seek dismissal under section 707(b)(3) and prove that a totality of circumstances shows that debtor's chapter 7 case is an abuse of the bankruptcy laws or that the debtor filed his petition in bad faith.[45]

An analysis of section 707(b) show that a forward-looking interpretation of the secured debt expense is inconsistent with the function, context, and purpose of the means test calculation in chapter 7 bankruptcy cases as such an interpretation effectively allows bankruptcy courts to pluck one allowable expense from the broader context of the means test calculation and single it out for special treatment–making it the only part of the means test calculation in a chapter 7 case selectively interpreted by the court to reflect post-petition changes to the debtor's expenses.[46] By extension, such an interpretation of the secured debt expense ignores the purpose and function of section 707(b)(3), a provision specifically added by Congress to the dismissal statute to give bankruptcy courts some discretion to assess debtor's real financial circumstances in cases where

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43 *See In re* Rivers, 466 B.R. 558, 561 (Bankr. M.D. Fla. 2012) ("§ 707(b) provides a two-step process to detect and deter abusive filers: the . . . objective means test prescribed in § 707(b)(2), and the more subjective test of [section] 707(b)(3) which requires an analysis of the facts of a particular case."); *In re* Denzin, 534 B.R. at 886-87.

44 11 U.S.C. § 707(b)(2); *In re* Ervin, No. 15-70467, 2016 WL 721043, at *7 (Bankr. W.D. Va. Feb. 23, 2016) (noting that BAPCPA expressly provides that, after a presumption of abuse has been established under section 707(b)(2), the burden of persuasion shifts to the debtor to demonstrate special circumstances to rebut the presumption); *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *8 (Bankr. N.D. Ga. May 1, 2006) ("In cases in which the presumption of abuse does not arise or is rebutted, the U.S. Trustee may pursue dismissal of a debtor's case under section 707(b)(3).").

45 *In re* Haar, 373 B.R. at 495; *In re* Perrotta, 390 B.R. 26, 31 (Bankr. D.N.H. 2008); *In re* Fredman, 471 B.R. 540, 545 (Bankr. S.D. Ill. 2012) (noting that a mechanical application of the means test is consistent with Congress's intent to limit the bankruptcy court's discretion and that the certainty of this approach over an "actual circumstances evaluation" in chapter 7 cases complements the totality of circumstances inquiry prescribed by section 707(b)(2)(B) which remains the backup option when the trustee is dissatisfied with the results of the means test); *In re* Perelman, 419 B.R. 168, 173 (Bankr. E.D.N.Y. 2009); *see generally* Ned W. Waxman & Justin H. Rucki, *Chapter 7 Bankruptcy Abuse: Means Testing is Presumptive, but 'Totality' is Determinative*, 45 HOUS. L. REV. 901, 905 (2008) (recognizing that the proper role of the means test in chapter 7 is simply as a mechanism for generating a presumption; it does not result in any final determination).

46 *See In re* Rivers, 466 B.R. at 563; *In re* Haman, 366 B.R. 307, 316-18 (Bankr. D. Del. 2007); *In re* Norwood-Hill, 403 B.R. 905, 911 (Bankr. M.D. Fla. 2009).

the debtor passes the means test or where the presumption of abuse is not triggered.[47]

In sharp contrast to the means test's function as a bright line test of eligibility in chapter 7 cases, in chapter 13 bankruptcy cases the calculation must allow the bankruptcy court to accurately determine, rather than merely approximate, the amount of debtor's post-petition disposable income that can feasibly be paid to unsecured creditors over the life of the Chapter 13 Plan.[48] Chapter 13 of the Bankruptcy Code enables an individual debtor to obtain a discharge of their debts if the debtor pays his creditors a portion of his monthly income in accordance with a court-approved debt repayment plan that lasts three to five years post-petition.[49] As a rule, the funding for creditor repayment is based on the debtor's anticipated future earnings.[50] To determine how much of his future earnings the debtor must commit to paying unsecured creditors under the plan, section 1325 of the Bankruptcy Code borrows the chapter 7 means test statutory formula.[51] In chapter 13 cases, however, the mathematical calculation of CMI minus allowable expenses is used to yield the debtor's "projected disposable income," or the amount that an above-median debtor must devote to reimbursing creditors under the plan.[52] Although the Bankruptcy Code does not define the term "projected disposable income," it defines "disposable income" as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended" for the debtor's maintenance or support.[53] For above-median debtors the "amounts reasonably necessary to be expended" for debtor's maintenance

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47 *See In re* Rivers, 466 B.R. at 563; *In re* Perelman, 419 B.R. at 173; *In re* Perrotta, 390 B.R. at 31; *In re* Hartwick, 359 B.R. 16, 21 (Bankr. D.N.H. 2007).

48 *See* 11 U.S.C. § 1325(b)(1)-(3) (West 2018); *see generally In re* Johnson, 503 B.R. 447, 450 (Bankr. N.D. Ind. 2013) ("[t]here is a significant difference between chapter 13, where the goal is to pay creditors out of projected disposable income, and chapter 7, where the goal is liquidation and discharge and the court is not required to project debtor's future resources.").

49 *See* 11 U.S.C. § 1301 (2018) et seq.; section 1306 (2018); Hamilton v. Lanning, 560 U.S. at 508-09 ("Unlike debtors who file for chapter 7 and must liquidate their nonexempt assets in order to pay creditors, Chapter 13 debtors are permitted to keep their property, but they must agree to a court-approved plan under which they pay creditors out of future income . . . .").

50 11 U.S.C. 1326(b)(1)-(3); Richard S. Stolker, *The Means Test in Chapter 13 After Hamilton v. Lanning and Johnson v. Zimmer*, MD. B.J., January/February 12, 2013.

51 *See* 11 U.S.C. § 1325(b)(1)-(3).

52 In a chapter 13 case, if the trustee or an unsecured creditor objects to the confirmation of the debt repayment plan, the debtor must commit of all debtor's "projected disposable income" to paying unsecured creditors over the life of the plan. 11 U.S.C. § 1325(b)(1)(B)(2)(2016). The term "projected disposable income" is undefined in the Code § 1325(b)(1)(B)-(3); s*ee also* Hamilton v. Lanning, 560 U.S. 505, 509.

53 § 1325(b)(3).

and support is calculated by using the means test calculation.[54] Notably, section 1325 borrows only the means test calculation itself and does not incorporate into chapter 13 either of the alternative abuse tests in section 707(b)(3) which, in chapter 7 cases, allow the bankruptcy court to consider post-petition fluctuations in income and expenses that impact debtor's repayment capacity.[55]

Often referred to as a "living chapter," bankruptcy courts have recognized that a Chapter 13 debtor's circumstances are constantly changing and evolving such that, throughout the life of a Chapter 13 Plan, it is often amended to reflect post-petition changes in the debtor's financial circumstances.[56] Because a Chapter 13 Plan requires that creditors be repaid using debtor's actual future earnings, rather than some approximate estimation based on debtor's pre-petition historical income, the United States Supreme Court has held that a forward-looking approach is appropriate in some cases for the purpose of determining debtor's "projected disposable income."[57] This approach, as described by the Court in the *Lanning* and *Ransom* cases, makes sense given that, in chapter 13 bankruptcy cases, section 707(b)(3) does not apply and, therefore, cannot function to allow a bankruptcy court to consider how post-petition fluctuations in debtor's income or expenses will affect his repayment capacity.[58] Accordingly, in those cases, post-petition changes to debtor's finances can only be considered or accounted for by modifying the amount of debtor's disposable income, so as to reflect the changes, or by modifying the Chapter 13 Plan itself after its confirmation. Even in chapter 13 cases, however, the Court has emphasized that the mechanical approach is the proper starting point for determining disposable income using the means test calculation.[59] Only when there are changes to debtor's income

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54 *Id.*; 11 U.S.C. § 707(b)(2)(A)(i)-(iv); *see also* Ransom, 562 U.S. at 65 (noting that this test supplanted the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations).

55 *See* § 1325(b)(3).

56 *In re* Ralston, 400 B.R. 854, 859 (Bankr. M.D. Fla. 2009).

57 Hamilton v. Lanning, 560 U.S. at 509 (stating that, in calculating a debtor's "projected disposable income" in a chapter 13 case a forward-looking approach must apply).

58 Section 1325 incorporates by reference only subparagraphs (A) and (B) of section 707(b)(2)'s means test and excludes any mention of section 707(b)(3)'s alternative abuse tests–the bad faith and totality of circumstances tests which allow a trustee to seek dismissal of the case for abuse based on post-petition changes to debtor's ability to pay. *See* 11 U.S.C. § 1325 ("Amounts reasonably necessary to be expended under paragraph (2) . . . shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) . . . .").

59 *See* Hamilton, 560 U.S. at 519 ("[A] court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court must go further and take into account other known or virtually certain information about the debtor's future income or expenses.").

or expenses that are known or virtually certain to occur at the time of confirmation, should a dynamic or forward-looking approach be used.[60]

The United States Supreme Court's opinions in *Hamilton v. Lanning* and *Ransom v. FIA Card Services* interpret section 1325 of the Bankruptcy Code and the function of the means test calculation for purposes of determining the amount of payments to be made to unsecured creditors during the life of a Chapter 13 Plan. In both of these cases, the Court recognizes that the nature of a chapter 13 case, and its attendant repayment to creditors through an ongoing plan of debt repayment, militate against a strictly mechanical approach to determine disposable income and may require bankruptcy courts to consider future changes to the debtor's income or expenses. [61] In neither case, however, does the Court state, or even allude, that a forward-looking means test is appropriate in chapter 7 cases.

B. Hamilton v. Lanning: Modifying the Means Test to Accurately Determine Debtor's Actual Repayment Capacity in Chapter 13 Cases

In *Hamilton v. Lanning*, the United States Supreme Court granted certiorari to specifically decide how a bankruptcy court should calculate a debtor's "projected disposable income" in a chapter 13 case.[62] The *Hamilton* case presented the unique scenario of an individual debtor whose "current monthly income" was inflated by a non-recurring payment received by the debtor shortly before the bankruptcy filing.[63] As a result of that payment, the Debtor's CMI did not accurately reflect debtor's actual post-petition earnings, the earnings that would be available to pay creditors under the Chapter 13 Plan, which were significantly lower.[64] The debtor's "current monthly income" was calculated as $5,343.70, well above the state-median, and her monthly disposable income was $1,114.98.[65] In reality, since filing her bankruptcy petition, the debtor had started a new job giving her monthly income totaling $1,922, an amount below the state-median, and a monthly disposable income amount of

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60 *Id.*

61 *See id.* at 520 ("In cases in which a debtor's disposable income during the 6-month look-back period is either substantially lower or higher than the debtor's disposable income during the plan period, the mechanical approach would produce senseless results . . . .").

62 *Id.* at 509 (recognizing that, in determining whether to confirm a Chapter 13 Plan, some lower courts had taken a "mechanical approach" while some had adopted a forward-looking approach).

63 *Id.* at 511.

64 *Id.*

65 Hamilton, 560 U.S. at 511.

$149.03.[66] Accordingly, the debtor filed a Chapter 13 Plan that committed $144 per month of debtor's disposable income to paying unsecured creditors.[67]

The Chapter 13 trustee objected to the confirmation of the plan arguing that the debtor had not committed all of her projected disposable income to the repayment of creditors.[68] According to the trustee, the proper way to calculate projected disposable income was to use a mechanical approach and multiply the debtor's disposable income, as calculated on Form 22C using the means test calculation, by the number of months in the Plan commitment period.[69] Using that approach, the trustee argued, the debtor would be able to pay the unsecured creditors in full by making monthly plan payments of $756 for five years, the applicable commitment period for above-median debtors.[70] Given the inaccurate inflation of debtor's CMI due to the one-time pre-petition payment, however, the parties agreed that the debtor's actual monthly disposable income of merely $149.03, was insufficient to pay that amount.[71]

Stating that the statutory text of section 1325 was in itself inconsistent and contrary to the application of a strictly mechanical approach when determining the amount of projected disposable income to be paid to creditors over the life of a Chapter 13 Plan, the United States Supreme Court held that a bankruptcy court may consider post-petition changes to the debtor's finances, such as a decrease or increase to debtor's post-petition income or expenses, when calculating "projected disposable income" in chapter 13 cases.[72] The Court stated: "[W]e hold that when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation."[73] In so holding, the Court relied heavily on the statutory text of section 1325 stating, first, that in section 1325(b)(1)(B) the "reference to projected disposable income 'to be received in the applicable commitment period' strongly favor[ed] [a] forward looking approach."[74] A Chapter 13 Plan's applicable commitment period is necessarily forward-looking as plan payments are made by a

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66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 Hamilton, 560 U.S. at 511.
72 *Id.* at 517 ("The mechanical approach [] clashes repeatedly with the terms of 11 U.S.C. § 1325.").
73 *Id.* at 524.
74 *Id.* at 517 (quoting section 1325(b)(1)(B)).

debtor for three to five years post-petition.[75] Moreover, the Court noted that the mandate in section 1325(b)(1) that courts determine projected disposable income "as of the effective date of the plan" similarly calls for a forward looking approach to be applied in chapter 13 cases as the "effective date of the plan" is the date on which a plan is confirmed and becomes binding.[76] The Court noted that, because of the dynamic nature of a chapter 13 case, employing a strictly mechanical approach in calculating projected disposable income would produce a senseless result not intended by Congress. That approach would deny creditors payments that the debtor could easily make in cases where debtor's disposable income is higher during plan period than during the six-month lookback period while denying Chapter 13 protection to debtors, such as the debtor in *Hamilton*, where debtor's disposable income during the plan period is substantially lower than debtor's income pre-petition.[77]

C. *Ransom v. FIA Card Services: A More Realistic Measure of Debtor's Actual Expenses in Chapter 13 Cases*

After its decision in *Hamilton*, the United States Supreme Court once again had opportunity to interpret section 1325 of the Bankruptcy Code in the case of *Ransom v. FIA Card Services*.[78] In *Ransom*, the Court considered whether a chapter 13 debtor could deduct from debtor's current monthly income the amount allowed under the Local Standards for vehicle ownership costs even when the debtor was not making loan or lease payments on his vehicle.[79] Specifically, the question before the Court was how a bankruptcy court should calculate the expense for vehicle ownership costs, when determining the amount a debtor could deduct from

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75 The "applicable commitment period" for a Chapter 13 Plan is defined in section 1325(b)(4) as three years for below-median debtors or not less than five years if the debtor's income is above the median income for a family of similar size. *See* 11 U.S.C. § 1325(b)(4)(A)-(B).

76 Hamilton, 560 U.S. at 518 (quoting sections 1325(b)(1); 1327(a)).

77 *Id.* at 519 (agreeing with the United States Court of Appeals for Tenth Circuit's opinion that "a court taking the forward-looking approach should begin by calculating disposable income . . . It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses.").

78 Ransom, 562 U.S. at 61.

79 *Id.* at 64. The Local Standards allow a debtor with a vehicle to claim an allowance for certain costs of car ownership. The Transportation Expense Standards consists of two parts: nationwide figures for monthly loan or lease payments, referred to as ownership costs, and an additional allowance for monthly operating costs. The Operating Costs include vehicle maintenance, fuel, repairs, insurance, fuel, registrations, licenses, inspections, parking and tolls. The United States Department of Justice at https://www.justice.gov/ust/means-testing/20180501 (visited on Oct. 4, 2018).

his disposable income for "amounts reasonably necessary to be expended."[80]

The debtor proposed to pay creditors approximately 25 percent of his unsecured debt over the life of the Chapter 13 Plan.[81] FIA Card Services, one of debtor's unsecured creditors, objected claiming that the debtor's plan did not direct all of his projected disposable income to paying unsecured claims.[82] FIA argued that the debtor should not have claimed the car-ownership allowance as an expense because debtor was not making loan or lease payments on his car.[83] FIA noted that, without this expense, debtor's monthly disposable income would be significantly higher, amounting to a difference of approximately $28,000 over the life of the plan.[84]

The Court held that the debtor could not take the allowance for vehicle ownership, finding that a chapter 13 debtor could only claim a deduction under the National or Local Standards if the debtor would incur that kind of expense during the life of the plan.[85] Because Ransom owned his car outright, he could not take the deduction for car ownership.[86]

The Court focused first on the statutory language of section 707(b)(2)(A)(ii)(I) of the Bankruptcy Code.[87] It states: "The debtor's monthly expenses shall be the debtor's *applicable* monthly expense amounts specified under the National Standards and Local Standard . . . ."[88] The key word in this phrase according to the Court is "applicable" as it was added by Congress to act as a filter separating debtors who qualify for an allowance from those debtors that do not.[89] An expense is "applicable" within the plain meaning of the statute when the expense is appropriate or relevant, as is the case when a debtor has costs corresponding to that category.[90] The Court noted that because, in section 1325, Congress incorporated the means test into chapter 13 in order to approximate an above-median debtor's reasonable expenditures on

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80 Ransom, 562 U.S. at 64 ("This case concerns the specified expense for vehicle ownership costs. We must determine whether a debtor . . . who owns a car outright, and so does not make loan or lease payments, may claim an allowance for car-ownership costs (thereby reducing the amount he will repay creditors).").

81 *Id.* at 67 (noting that Ransom proposed a five-year plan that would have resulted in repayment of approximately 25% of his unsecured debt).

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* at 64.

86 Ransom, 562 U.S. at 73.

87 *Id.* at 65-66.

88 11 U.S.C.A. § 707(b)(2)(A)(ii)(I); *see also* 11 U.S.C. §§ 1325(b)(1)(B) and (b)(4).

89 Ransom, 562 U.S. at 69-70.

90 *Id*.

essential items, for purposes of determining the amount to be paid to unsecured creditors under the plan, a debtor should be required to qualify for an expense by incurring an expense in the relevant category.[91] According to the Court: "If Congress had not wanted to separate in this way debtors who qualify for an allowance from those that do not, it could have omitted the term 'applicable' altogether. Without that word, all debtors would be eligible to claim a deduction for each category listed in the Standards. Congress presumably included 'applicable' to achieve a different result."[92]

III. THE MEANS TEST AND THE SECURED DEBT EXPENSE: AN EXERCISE IN STATUTORY INTERPRETATION

To determine whether a debtor may deduct the secured debt expense on his chapter 7 means test when the debtor intends to surrender the collateral, a court must begin by examining the text of section 707(b)(2)(A)(iii) to arrive at its plain meaning.[93] When the statute's language is plain, the sole function of the court–at least where the disposition required by the text is not absurd–is to enforce it according to its terms.[94] The United States Supreme Court has stated that the plainness or ambiguity of statutory text is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.[95] Where the statutory language is not ambiguous, there is generally no need for a court to inquire beyond the plain language of the statute.[96]

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91 *See id.* at 65. The term "projected disposable income" is undefined in the Code, but the term "disposable income" is defined as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended[.]" § 1325(b)(1)(B)-(3). For above-median debtors the "amounts reasonably necessary to be expended" is calculated by using the means test. §§ 1325(b)(3); 707(b)(2)(A)-(B); *see also* Hamilton, 560 U.S. at 509.

92 *Id.* at 70.

93 Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("It is well settled that the starting point for interpreting a statute is the language of the statute itself."); Lamie v. United States Trustee*,* 540 U.S. 526, 534 (2004); Ransom, 562 U.S. at 69 ("Interpretation of the Bankruptcy Code starts where all such inquiries must begin, with the language of the statute itself.").

94 Lamie v. United States Trustee, 540 U.S. 526, 534 (2004); United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989) (stating that the plain meaning of the statute is conclusive unless literal application of the statute will produce a result "demonstrably at odds with the intentions of the drafters").

95 Ron Pair Enters., 489 U.S. at 242.

96 *In re* American Steel Product, Inc., 197 F.3d 1354, 1356 (11th Cir. 1999).

A. *The Secured Debt Expense in Chapter 7 Cases: Plain Meaning and Congressional Intent*

Section 707(b)(2)(A) provides that, in considering whether the granting of bankruptcy relief would constitute abuse, the court shall presume that abuse exists "if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv)" yields a monetary amount that is above the monetary threshold set by the statute.[97] Sub-section (ii) allows a debtor to deduct specific applicable monthly expenses under the National and Local Standards.[98] Sub-section (iii) allows a debtor to deduct from current monthly income "[t]he debtor's average monthly payment on account of secured debts [which] shall be calculated as the sum of 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[.]".[99]

At issue is the phrase "amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition . . . ."[100] The question is whether the language in this phrase, when considered within the context of the means test as a whole, creates a static test: one that allows the deduction when there are amounts due to secured creditors on the petition date irrespective of the intended surrender of the collateral.[101] Or, alternatively, whether it creates a dynamic or forward-looking test: one that, by looking to the post-petition future, disallows the expense when, although contractually bound to make payments to secured creditors on the petition date, the debtor surrenders the collateral so that, at some point in the future, that collateral may be sold thereby extinguishing debtor's contractual obligation to pay the claim.[102]

One of the earliest cases to interpret this statutory provision, *In re Walker*, analyzed the phrase giving each word its plain ordinary

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97 11 U.S.C. § 707(b)(2)(A)(i) (2012).

98 *See* 11 U.S.C. § 707(b)(2)(A)(ii) (2012).

99 11 U.S.C. § 707(b)(2)(A)(iii)(I) (2012).

100 *Id.*

101 The two most commonly adopted approaches by bankruptcy courts are referred to as the "snapshot approach" and the "future oriented" approach. The majority of cases reason that the plain language of 11 U.S.C. § 707(b)(2)(A)(iii), the secured debt expense, was meant to create a snapshot of the debtor's finances as of the petition date and that the bankruptcy court should not consider the debtor's future intention except under a totality of circumstances analysis. A minority of courts have adopted the "future oriented" approach which allows debtor to claim only those secured debt expenses which the debtor reasonably expects to pay post-petition. *In re* Norwood-Hill, 403 B.R. 905, 910 (Bankr. M.D. Fla. 2009) (explaining split in authority and compiling authorities).

102 *Id.*

meaning.[103] In *Walker*, the debtors argued that they could deduct from their current monthly income an amount equal to the payments due on their primary residence, subject to a first and second mortgage, and one of their vehicles, which was subject to a lien.[104] The debtors asserted that the statute's plain language allowed them to deduct these payments despite their intent to surrender the collateral because, on the petition date, they were contractually obligated to make these payments in the sixty months following the petition date.[105] The United States Trustee contended that the debtors should not be allowed to deduct the expense because, given their intent to surrender the collateral, they would not actually be making those payments post-petition.[106]

The court held that both the plain meaning of section 707(b)(2)(A)(iii)(I) and the text, structure, and context of the means test compelled the conclusion that debtors could deduct the payments, despite their intent to surrender the collateral, as they were legally obligated to make those payments on the petition date.[107] Turning first to the text of the statute, the court noted that the word "scheduled" in the phrase *"scheduled as contractually due to secured creditors,"* was commonly defined as "to plan for a certain date,"[108] while the phrase "as contractually due" referred to a debtor's legal obligation under contract law to make a payment in a certain amount.[109] The court concluded that the surrender of the collateral, whether intended prospectively or already effected, did not change the fact that, on the petition date, the payments were "contractually due" nor did it

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103 *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *3-4 (Bankr. N.D. Ga. May 1, 2006); *see also In re* Randle, No. 07C631, 2007 WL 2668727, at *5 (N.D. Ill. July 20, 2007) ("The United States Supreme Court and our United States Court of Appeals for the Seventh Circuit have consistently instructed us lower courts to accord statutory terms or words their ordinary, common meaning unless they are specifically defined by the statute or statutory context requires a different definition."); *In re* Ralston, 400 B.R. 854, 860 (Bankr. M.D. Fla. 2009) (stating that "[w]here the words in the statute are not defined terms, the court should look to their ordinary, dictionary-defined meaning.").

104 *In re* Walker, 2006 WL 1314125, at *1.

105 *Id.* at *2.

106 *Id.*

107 *Id.* at *4–6.

108 *Id.* at *3 (quoting *Random House Webster's Unabridged Dictionary* 1713 (2d ed. rev. 2001)).

109 *In re* Walker, 2006 WL 1314125, at *3 ("The common meaning of 'as contractually due' is that the debtor is legally obligated under the contract, in this case, a promissory note, to make a payment in a certain amount, with a certain amount of interest, for a set number of months into the future. Accordingly, payments that are 'scheduled as contractually due' are those payments that the debtor will be required to make on certain dates in the future under the contract."); In re Randle, No. 07C631, 2007 WL 2668727, at *5 (N.D. Ill. July 20, 2007).

eliminate the debtors' contractual liability for the debt.[110] Rejecting the Trustee's argument that this interpretation would give debtors a "free pass" not intended by Congress by allowing the debtor to deduct the expense without the attendant burden of having to make those payments post-petition, the court stated: "[W]hether debtor passes or fails the means test is relevant only to the question of whether the U.S. Trustee will benefit from the presumption of abuse. In cases in which the presumption of abuse does not arise or is rebutted, the U.S. Trustee may pursue dismissal of a debtor's case under section 707(b)(3), which provides that the court may consider whether the 'totality of the circumstances' of the debtor's financial situation demonstrates abuse."[111]

Similarly, in *In re Ralston*, the court undertook a step by step analysis to arrive at the plain meaning of section 707(b)(2)(A)(iii)(I).[112] Referring to the dictionary definition of the word "schedule" or "scheduled," the court stated that the word means "to place or include in a schedule[,] to make a schedule of [or] to plan for a certain time, while the word "contractual" or "contractually" means "of or having the nature of contract."[113] Together, the phrase "scheduled as contractually due" refers to the "planned" payments that are scheduled to be due pursuant to contract.[114] The court noted that, in the statute, this language is followed by the phrase "in each of the 60 months following the date of the petition." The court held that this phrase along with the subsequent language in the statute "divided by 60" provided the court with guidance on how to calculate the amount that debtor could deduct on the means test calculation and did not call for a forward-looking analysis of the expense: "Taken together, the meaning behind these provisions is . . . that the debtor will only be allowed to deduct monthly an amount equal to the total of such

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110 *In re* Walker, 2006 WL 1314125, at *4 ("When a debtor files the bankruptcy petition, the debtor is contractually due for payments on the outstanding secured debts for the length of the contract. The debtor's contractual liability for the debt is not eliminated upon the surrender of the collateral."); *see also In re* Nockerts, 357 B.R. 497, 500 (Bankr. E.D. Wis. 2006) (noting that "nothing the debtor does or does not do changes the fact that scheduled payments remain contractually due"); *In re* Randle, 2007 WL 2668727, at *7 ("The debtor's announced intent to surrender the property does not change the contractual obligation owed by the debtor.").

111 *In re* Walker, 2006 WL 1314125, at *8.

112 *In re* Ralston, 400 B.R. 854, 862 (Bankr. M.D. Fla. 2009).

113 *Id.* at 862 (quoting *Webster's New College Dictionary* 1281(Michael Agnes ed. 2007)); *see also* United States v. McNab, 331 F.3d 1228, 1237 (11th Cir. 2003) ([T]o determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance.").

114 *In re* Ralston, 400 B.R. at 862-63; In re Rivers, 466 B.R. 558, 560 (Bankr. M.D. Fla. 2012) ("Since a determination of the appropriate proceeding should be made as of the petition date, a debtor's deductions from income on the means test should also be determined as of the petition date.").

payments on secured debt due during the 60 months following the date of the petition, divided by sixty.[115] According to the court, the plain meaning of the statute calls for a snapshot of the debtor's contractual secured debt obligations on the date of the petition.[116] Like the court in *In re Walker*, the court in *Ralston* held that the debtor could take the expense when payment is contractually due on the petition date and emphasized that, while debtor's contractual obligation may be extinguished at some point in the process, it is not extinguished upon the filing of the Statement of Intention.[117] Because having an intent to surrender the property does not have any legal effect on the nature of the debt, in order to take into account the subsequent surrender of the collateral, the court would have to take post-petition events into consideration.[118] This, according to the court, is incompatible with the nature of the means test in chapter 7 cases.[119]

After the decision of the court in *In re Walker*, the majority of courts considering the issue have held that the language of the statute is clear, not ambiguous, and that the plain meaning of the statutory text allows a debtor to take a deduction for payments due to secured creditors on the petition date despite indicating an intent to surrender the collateral on debtor's statement of intention.[120] Moreover, a contextual analysis of section 707(b) that includes the additional abuse tests of section 707(b)(3), proves that means testing in chapter 7 cases is incompatible with any interpretation of the statute that selects a singular expense within the

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115 *In re* Ralston, 400 B.R. at 862. The *Ralston* court provides the following example to illustrate: "[I]f the debtor has a monthly secured debt payment of $600, but only 10 payments [contractually due on the petition date], the allowed deduction will be the total of those payments, or $6,000, divided by 60. Thus, the debtor would only be allowed $100 monthly deduction on account of secured debt under this provision, despite the fact that the actual monthly payment is $600." *Id.*

116 *Id.*

117 *Id.* at 863.

118 *Id.*

119 *Id.* ("The Means Test, as a whole, as it is applied in a Chapter 7 case, has the character of a mechanical formula that often relates very little to the actual financial circumstances of the debtor.").

120 *See In re* Navin, 526 B.R. 81 (Bankr. N.D. Ga. 2015); *In re* Rivers, 466 B.R. 558, 562 (Bankr. M.D. Fla. 2012); *In re* Hardigan, No. 12-40484, 2012 WL 9703097 (Bankr. S.D. Ga. Dec. 20, 2012); In re Grinkmeyer, 456 B.R. 385 (Bankr. S.D. Id. 2011); *In re* Sonntag, No. 10-1749, 2011 WL 3902999 (Bankr. N.D. W. Va. Sept. 6, 2011); *In re* Ng, No. 10-02001, 2011 WL 576067 (Bankr. D. Ha. Feb. 9, 2011); *In re* Perelman, 419 B.R. 168, 173 (Bankr. E.D.N.Y. 2009) (recognizing the split of authority and stating that the "vast majority of courts to consider this issue have concluded that the plain language of the statute permits a chapter 7 debtor to deduct payments on secured debt even when the debtor plans to surrender post-petition the collateral underlying the debt"); *In re* Haar, 360 B.R. 759, 768 (Bankr. N.D. Ohio 2007) (holding that a debtor who surrenders secured property is permitted to expense payments on that property when conducting the means test calculation of 11 U.S.C. § 707(b)(2)).

means test calculation for special forward-looking treatment–particularly when there is no language in the statute that limits the availability of that expense to debtors.[121]

B. A Mechanical Means Test Acquires a Forward-Looking Element: The Trend Cases

It is well established that, in determining whether a chapter 7 case is an abuse of the bankruptcy laws, post-petition changes to the debtor's income or expenses, including a reduction to debtor's expenses resulting from the surrender of collateral, must be considered using a totality of the circumstances analysis pursuant to section 707(b)(3).[122] In *In re Denzin*, the bankruptcy court recognized that the chapter 7 means test is not forward-looking and emphasized that Congress included "complementary dynamic chapter 7 abuse test[s]," the section 707(b)(3) bad faith and totality of the circumstances tests, that support the chapter 7 means test and allow the court to look at debtor's actual financial affairs and surrounding circumstances.[123] The court stated: "Together, they provide a straight-forward, bright-line test, [section] 707(b)(2), supported by a dynamic, customized test, [section] 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, a debtor who should not be in chapter 7 should be identified and redirected to chapter 13."[124]

Notwithstanding, cases interpreting section 707(b)(2)(A)(iii) post *Lanning* and *Ransom*, or the "trend cases," have increasingly denied chapter 7 debtors the ability to deduct secured debt payments on the means test when the debtor has indicated an intent to surrender the collateral post-

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121 *See In re* Rivers, 466 B.R. at 567-70; *In re* Singletary, 354 B.R. 455, 465 (Bankr. S.D. Tex. 2006); *In re* Haman, 366 B.R. 307, 316-18 (Bankr. D. Del. 2007); *In re* Brady, 419 B.R. 479, 486 (Bankr. M.D. Fla. 2009); *In re* Norwood-Hill, 403 B.R. 905 (Bankr. M.D. Fla. 2009).

122 *In re* Denzin, 534 B.R. 883, 887 (Bankr. E.D. Va. 2015) ("There is no language in § 707(b) that is forward-looking as there is in § 1325(b)."); *In re* Haman, 368 B.R. at 316-18 (calculations under the means test are purposefully circumscribed and should not include foreseeable circumstances; instead, such future circumstances are properly considered under the totality analysis of section 707(b)(3)); *In re* Hartwick, 359 B.R. 16, 22 (Bankr. D.N.H. 2007) (finding that the "consideration of postpetition developments in the application of the means test would be contrary to Congressional intent as expressed in the amendments to § 707(b)"); *In re* Singletary, 354 B.R. at 465 ("To allow a movant to include the outcome of future events as part of the means test would eliminate the distinction between the presumption of abuse test and the totality of the circumstances test.").

123 *In re* Denzin, 543 B.R. at 887.

124 *Id.*

petition.[125] Most bankruptcy courts that disallow the expense usually do so relying on dicta from *Hamilton* or *Ransom* that is taken out of context and not directly relevant to the interpretation of the statutory language of section 707(b)(2)(A)(iii).[126] Instead, that dicta is relevant to the interpretation of section 1325 of the Code and the manner in which the bankruptcy court should arrive at a determination of a chapter 13 debtor's projected disposable income.[127] Some use that language to impute restrictions on the availability of the expense when the statute itself contains no such limitations.[128] Other courts deny the expense deduction based simply on the overarching congressional purpose underlying BAPCPA of making debtors repay creditors the maximum they can

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125 *See In re* Powers, 534 B.R. 207, 212 (Bankr. N.D. Fla. 2015); *see also In re* Hamilton, 513 B.R. 292 (Bankr. M.D.N.C. 2014); *In re* White, 512 B.R. 822 (Bankr. N.D. Miss. 2014); *In re* Clary, No. 6:11-bk-04556-ABB, 2012 WL 868717 (Bankr. M.D. Fla. Mar. 14, 2012); *In re* Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); *In re* Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012); *In re* Krawczyk, No. 11-09596-8-JRL, 2012 WL 3069437 (Bankr. E.D.N.C. July 27, 2012); *In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011); *In re* Wilson, 454 B.R. 155 (Bankr. D. Colo. 2011).

126 *See In re* Thompson, 457 B.R. at 880-81; *In re* Sterrenberg, 471 B.R. at 135 (noting that, when taken together, the most recent line of cases including *Ransom* and *Lanning* "depart[] from the strict formulaic approach to the means test and take into account what is likely to occur in the future"); *In re* Fredman, 471 B.R. at 550; *In re* Krawczyk, 2012 WL 3069437, at *4; In re Hamilton, 513 B.R. at 297-303. *But see In re* Hardigan, No. 12-40484, 2012 WL 9703097, at *4 (Bankr. S.D. Ga. Dec. 20, 2012) (stating that the holdings in *Lanning* and *Ransom* did not overrule precedent that allowed debtors to deduct secured debt expense despite surrender of collateral in chapter 7 case).

127 *In re* Rivers, 466 B.R. 558, 564 (Bankr. M.D. Fla. 2012) ("Clearly, *Lanning* and *Ransom* both arise in the context of Chapter 13 cases, and both involve a determination of projected disposable income and the question of how much the debtors were required to submit to their Chapter 13 Plans for payment to creditors."); *In re* Grinkmeyer, 456 B.R. 385, 387-89 (Bankr. S.D. Ind. 2011) (finding that *Lanning* and *Ransom* are applicable to chapter 13's concept of projected disposable income, which does not exist in chapter 7, and holding that a chapter 7 debtor may deduct mortgage payments on property he plans to surrender); *In re* Johnson, 503 B.R. 447, 450 (Bankr. N.D. Ind. 2013) ("[T]here is a significant difference between chapter 13, where the goal is to pay creditors out of projected disposable income, and chapter 7, where the goal is liquidation and discharge and the court is not required to project debtor's future resources.").

128 *See In re* White, 512 B.R. at 829 ("In order to deduct payments on secured debt . . . a debtor must intend to actually make the payments going forward . . . ."); *In re* Fredman, 471 B.R. at 550–51 (requiring that debtor show a secured payment arising out of a contractual relationship that is due and being paid post-petition); *In re* Krawczyk, 2012 WL 3069437, at *5 (stating that "despite the language of the statute, courts are to look at what is actually happening in these transactions and calculate deductions based on the debtor's actual expenses"); *In re* Thompson, 457 B.R. at 880 (stating that "'*a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category*'") (quoting Ransom, 131 S. Ct. at 725).

afford.[129] Finally, some bankruptcy courts mistakenly assume that an indication by the debtor that collateral will be surrendered, or the post-petition surrender of collateral itself, has the effect of extinguishing the underlying obligation thereby making the expense inapplicable to the debtor.[130] As a general rule, therefore, these courts refuse chapter 7 debtors the ability to claim the secured debt expense by comparing two very different sections of the bankruptcy code, section 707(b)(2) and section 1325, and treating those sections as if they were wholly interchangeable–essentially comparing apples and oranges.

These interpretations of the secured debt expense statute are not only strained, but unnecessary given that, in chapter 7 bankruptcy cases, Congress has already provided a mechanism that allows for the court to consider actual or probable post-petition changes to debtor's finances–the section 707(b)(3) totality of circumstances analysis.[131]

In one of the first cases to address the issue after *Lanning* and *Ransom*, the bankruptcy court in *In re Thompson* denied the debtors, a husband and wife, the ability to deduct from their means test calculation mortgage payments due on their primary residence.[132] The debtors had surrendered the home, but deducted an amount equal to the average of the mortgage payments due on the home for the sixty months following the petition date.[133] The trustee sought to dismiss the debtors' chapter 7 case on the grounds of presumed abuse, under section 707(b)(1) and, alternatively, pursuant to section 707(b)(3).[134] The bankruptcy court agreed with the trustee and dismissed the debtors' case for presumed abuse holding that

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129 *In re* Powers, 534 B.R. 207, 212-13 (Bankr. N.D. Fla. 2015) (quoting Ransom, 562 U.S. at 71); *see In re* Hamilton, 513 B.R. 292 (Bankr. M.D.N.C. 2014); *In re* White, 512 B.R. 822 (Bankr. N.D. Miss. 2014); *In re* Clary, No. 6:11-bk-04556-ABB, 2012 WL 868717 (Bankr. M.D. Fla. Mar. 14, 2012); *In re* Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); *In re* Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012); *In re* Krawczyk, 2012 WL 3069437; *In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011); *In re* Wilson, 454 B.R. 155 (Bankr. D. Colo. 2011).

130 *See In re* Powers, 534 B.R. 207, 212 (Bankr. N.D. Fla. 2015); *In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011).

131 *In re* Hartwick, 359 B.R. 16, 21 (Bankr. D.N.H. 2007) ("Congress did not remove the ability of bankruptcy courts to consider circumstances, including postpetition [sic] developments, in determining abuse . . . Congress expressly incorporated the formerly judicially created totality of the circumstances test which permits consideration of circumstances both preceding and following the filing of the petition."); *see also In re* Perrotta, 390 B.R. 26, 30-31 (Bankr. D.N.H. 2008).

132 *See In re* Thompson, 457 B.R.at 877, 880.

133 The debtors argued that they were entitled to list the payments on loans secured by the residence because those payments were contractually due to secured creditors in each of the 60 months following the date of the bankruptcy petition notwithstanding the surrender of the property. The debtors conceded that, without the deductions for the mortgage payments, the presumption of abuse arose. *Id.* at 875, 876-77.

134 *Id.* at 874-75.

the debtors could not deduct from the means test calculation any secured debt payments owed on the residence that the debtors had surrendered.[135] Without focusing on the statutory language of section 707(b)(2)(A)(iii), the bankruptcy court in *Thompson* held that debtors could not deduct the mortgage expense because these were not "actually-incurred expenses" given that the property had been surrendered and debtors would not be making payments on that loan post-petition.[136] The court reasoned that debtors had to "qualify" for the expense by actually incurring it in order to deduct the secured debt payment from the means test.[137] To support its reasoning, the court in *Thompson* directly quotes *Ransom* stating: "Because Congress intended the means test to approximate the debtor's reasonable expenditures on essential items, a debtor should be required to qualify for a deduction by actually incurring an expense in the relevant category."[138] The court in *Thompson* fails to recognize, however, that Congress intended the means test to approximate the debtor's reasonable expenditures in chapter 13 cases where it specifically made the means test calculation the mechanism for determining the reasonable expenditures for above-median debtors.[139] That statutory language, present in section 1325, is notably absent from section 707(b) and not relevant to the means test calculation as it functions in chapter 7 cases.[140] Even assuming that Congress did indeed intend the expenses in section 707(b) to approximate reasonable expenses for chapter 7 debtors as well, the court's interpretation of the secured debt expense statute in *Thompson* is misguided. Unlike in *Ransom*, where the expense statute at issue allowed the debtor to claim only the "debtor's *applicable* monthly expense amounts under . . . the National Standards and Local Standards . . . " (emphasis added),[141] the expense statute before the court in *Thompson*, the secured debt expense, has no such limitation in the statutory text as section 707(b)(2)(A)(iii) does not require the expense to be "applicable" or "actually-incurred" to entitle debtor to claim it.[142]

In *In re Fredman*, the bankruptcy court held that debtors could not deduct from their means test calculation mortgage payments for a home that the debtors indicated on their statement of intention would be surrendered.[143] Dismissing the debtor's chapter 7 case for presumed abuse

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135 *Id.* at 877, 880-81.
136 *Id.*
137 *Id.* at 880 (quoting Ransom, 562 U.S. at70-71).
138 *In re* Thompson, 457 B.R. at 880 (quoting Ransom, 562 U.S. at 70-71).
139 *See* 11 U.S.C. § 1325; *see also infra* Part II(B)-(C).
140 *Compare* 11 U.S.C. § 1325; § 707(b).
141 Ransom, 562 U.S. at 65–66.
142 *In re* Thompson, 457 B.R. at 879–80.
143 *In re* Fredman, 471 B.R. at 555.

the court stated that the debtors could not deduct "phantom" secured debt payments from their means test calculation when debtors would not actually be making those payments post-petition.[144] Relying on the Court's language in *Hamilton v. Lanning* the court stated: "[I]f a debtor's decision to surrender secured property is 'known or virtually certain,' that information should be taken into account."[145] In so holding, however, the court did not consider nor address why such post-petition changes to debtor's expenses would not be considered pursuant to section 707(b)(3)'s totality of the circumstances analysis.

Similarly, in *In re Krawezyk*, debtors were not allowed to take the secured debt expense for properties they owned that were subject to mortgages.[146] In finding that the means test calculation triggered a presumption of abuse in the debtor's chapter 7 case the bankruptcy court stated: "[D]espite the language of the statute, courts are to look at what is actually happening in these transactions and calculate deductions based on the debtor's actual expenses."[147] The court noted that the most recent line of cases, referring to the Court's opinion in *Lanning* and *Ransom*, prohibited a debtor from deducting "phantom expenses to shelter income."[148] The court failed to acknowledge or attempt to reconcile its holding or its rationale with the fact that the majority of expenses deducted from CMI on the means test do not reflect the debtor's "actual expenses" or the reality of debtor's finances.

The bankruptcy courts' analysis of the secured debt expense in these cases, and other trend cases following this logic, is seriously flawed for several reasons. First, although the United States Supreme Court has stated that the first point of focus when construing a statute must be the statutory language, the courts' opinions in these cases show that little attention is given to the statutory language when interpreting the secured debt expense statute.[149] In *Thompson*, for example, the court appears to initially focus

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144 *Id.* (stating that "[w]here there is no actual cost reflected on the bankruptcy schedules, since the debtor is surrendering the property and not paying the debt, that fact must be recognized and the phantom payment excluded from the calculation of 'average monthly payments on account of secured debts.'").

145 *Id.* at 551.

146 *In re* Krawczyk, No. 11-09596-8-JRL, 2012 WL 3069437 (Bankr. E.D.N.C. July 27, 2012);

147 *Id.* at *5.

148 *Id.*

149 *See, e.g.*, *In re* Powers, 534 B.R. 207, 212 (Bankr. N.D. Fla. 2015); *In re* Hamilton, 513 B.R. 292 (Bankr. M.D.N.C. 2014); *In re* White, 512 B.R. 822 (Bankr. N.D. Miss. 2014); In *re* Clary, No. 6:11-bk-04556-ABB, 2012 WL 868717 (Bankr. M.D. Fla. 2012); *In re* Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); *In re* Fredman, 472 B.R. 540 (Bankr. S.D. Ill. 2012); *In re* Krawczyk, 2012 WL 3069437; *In re* Thompson, 457 B.R. 872 (Bankr. M.D. Fla. 2011); *In re* Wilson, 454 B.R. 155 (Bankr. D. Colo. 2011).

on construing the language of the statute but, in reality, concentrates on the phrase "actually-incurred expense," a term that does not appear anywhere in the text of section 707(b)(2)(A)(iii).[150] As a result, the bankruptcy court denies the debtors the ability to deduct the mortgage payments from their chapter 7 means test based on a phrase borrowed from the Court's opinion in *Ransom*, a case where the United States Supreme Court interprets a different expense statute and one that is wholly irrelevant to the applicability of the secured debt expense in section 707(b)(2)(A)(iii).[151] Notably, the court in *Thompson* does not cite authority, binding or otherwise, to support its reliance on the phrase "actually-incurred expense."[152] Presumably, as the court cites the *Ransom* case later in its opinion, the court relies on the language from *Ransom* where the Court interprets section 707(b)(2)(A)(ii), a different expense statute that allows the debtor to deduct "debtor's *applicable* monthly expense amounts specified under the National Standards and Local Standards" (emphasis added).[153] In interpreting that language, the Court in *Ransom* holds that to be considered an "applicable monthly expense," debtor must qualify for that deduction by "actually incurring an expense in the relevant category."[154] However, in imputing that requirement into its interpretation of the secured debt expense, the court in *Thompson* fails to recognize or explain that the statutory text of section 707(b)(2)(A)(iii) does not contain the word "applicable" nor the phrase "actually-incurred expense."[155] Several cases decided after *Thompson* have followed its lead denying chapter 7 debtors the ability to claim the secured debt expense and citing the case as support for its own analysis requiring that debtor actually incurs the secured debt payment post-petition to qualify for the expense.[156]

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150 *In re* Thompson, 457 B.R. at 877 (stating that "The payments on loans secured by the . . . [p]roperty are not actually incurred expenses and do not meet the statutory definition of 'payments on account of secured debts.'").

151 Ransom, 562 U.S. at 65-66 (basing the interpretation of § 707(b)(2)(A)(ii) on the presence of the phrase "debtor's applicable monthly expenses").

152 *In re* Thompson, 457 B.R. at 880.

153 *See infra* Part II.

154 Ransom, 562 U.S. at 65-66; *see also In re* Thompson, 457 B.R. at 880.

155 11 U.S.C. § 707(b)(2)(A)(iii); *see In re* Navin, 526 B.R. 81, 85 (Bankr. N.D. Ga. 2015) (highlighting the distinction in language between § 707(b)(2)(A)(ii) and (iii)); *In re* Perelman, 419 B.R. 168, 173 (Bankr. E.D.N.Y. 2009) ("There is no conditional language in section 707(b)(2)(A)(iii) that requires that a debtor must intend to continue to pay the contractually due amounts in order to claim the expense.").

156 *See In re* Powers, 534 B.R. 207, 212-13, 215 (Bankr. N.D. Fla. 2015); *see also In re* Hamilton, 513 B.R. 292 (Bankr. M.D.N.C. 2014); *see also In re* White, 512 B.R. 822 (Bankr. N.D. Miss. 2014); *see also In re* Clary, No. 6:11-bk-04556-ABB, 2012 WL 868717 (Bankr. M.D. Fla. Mar. 14, 2012); *see also* In re Sterrenberg, 471 B.R. 131 (Bankr. E.D.N.C. 2012); *see also In re* Fredman, 471 B.R. 540 (Bankr. S.D. Ill. 2012); *see also In*

A second flaw in these trend cases is that the bankruptcy courts do not account for the fact that, where Congress intended that the court consider the debtor's "actual monthly expenses" in the means test it expressly stated so in the statute.[157] A cardinal principle of statutory construction is that Congress "says in a statute what it means and means in a statute what it says."[158] In section 707(b) of the bankruptcy code, Congress uses the phrase "actual monthly expenses" or "actual expenses" five times; thereby, directing a debtor to deduct from his CMI only the actual amount spent on specific items or services.[159] For example, in subsection (2)(A)(ii)(I), the debtor is directed to deduct his "actual monthly expenses for the categories specified as Other Necessary Expenses."[160] In subsection (II), Congress directs a debtor to claim "the continuation of actual expenses paid by the debtor that are reasonable and necessary for the support of an elderly, chronically ill, or disabled household member . . . ."[161] Notably, the phrase "actual expenses" is used in subsections (I), (II), (III), (IV), and (V) of section 707(b)(2)(A)(ii); yet, the phrase is markedly absent from the very next subsection, subsection (iii), the portion of the statute that provides for the deduction of secured debt payments.[162] There is no conditional language in section 707(b)(2)(A)(iii) that requires that a debtor must intend to continue to pay the contractually due amounts in order to claim the expense.[163]

Moreover, where Congress intended to limit the deduction of those expenses to only those that are "reasonable" or "necessary," it again expressly incorporated that limitation into the statutory language.[164] The text of the secured debt expense statute, section 707(b)(2)(A)(iii) of the bankruptcy code, is close in proximity to each of these statutory provisions. Notably, however, the terms "actual monthly expense," "actual expense," and "reasonably necessary" are absent from the language of that statute.[165] This shows that had Congress wanted to limit the applicability of the secured debt expense to only those debtors that would actually be making payments on the secured debt post-petition, it could have easily

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re Krawczyk, No. 11-09596-8-JRL, 2012 WL 3069437 (Bankr. E.D.N.C. July 27, 2012); *see also In re* Wilson, 454 B.R. 155 (Bankr. D. Colo. 2011).

157 11 U.S.C. § 707(b)(2)(A)(ii)(I), (II), (III), (IV), (V).

158 Connecticut Nat. Bank v. Germain, 503 U.S. 249, 254 (1992).

159 11 U.S.C. § 707(b)(2)(A)(ii)(I), (II), (III), (IV), (V).

160 The bankruptcy code states that "Other Necessary Expenses" includes "reasonably necessary health insurance, disability insurance, and health savings expenses for the debtor, the spouse of the debtor, or the dependents of the debtor." 11 U.S.C. § 707(b)(2)(A)(ii)(I).

161 11 U.S.C. § 707(b)(2)(A)(ii)(II)(2016).

162 11 U.S.C. § 707(b)(2)(A)(iii)(2016).

163 *In re* Perelman, 419 B.R. 168, 174 (Bankr. E.D.N.Y. 2009).

164 *See* 11 U.S.C. § 707(b)(2016).

165 11 U.S.C. § 707(b)(2)(A)(iii)(2016).

and clearly stated that requirement in the text of the statute. Congress chose not to limit the applicability of the secured debt expense statute in this manner; accordingly, bankruptcy courts should not impute such limitations in an attempt to fix a perceived error in the means test or to better achieve some congressional purpose.[166]

Finally, when one considers the broader context within which the secured debt expense statute exists in section 707(b), it becomes clear that bankruptcy courts' reliance on the dicta of both *Hamilton v. Lanning* and *Ransom v. FIA Card Services* is misplaced in chapter 7 cases. A concern that features prominently in most of the trend cases, and that could be called the driving force behind the courts' decisions to deny chapter 7 debtors the benefit of the expense, is the apprehension that allowing the deduction would frustrate the legislative intent underlying the BAPCPA amendments and means testing generally; the Congressional dictate that debtors should be forced to pay creditors the maximum they can afford.[167] In short, bankruptcy courts are concerned that allowing the debtor to deduct secured debt payments that debtor will not in reality be making post-petition essentially permits him to pull one over on his creditors by enabling debtor to bypass the means test without being caught for abuse.[168] In *Fredman*, for example, the court noted that allowing debtors to deduct fictitious monthly payments would be senseless and contrary to the intent of Congress.[169] Other courts have referred to this type of expense as "phantom expenses" and have stated that allowing a debtor to deduct such expenses has the potential of "turning a debtor's fresh start into a free

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166 Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way*, 13 AM. BANKR. INST. L. REV. 665, 678 (2005) (disagreeing with the argument that a judge who thinks the means test is not effective may fix it by substituting his or her own more stringent standards of ability to pay).

167 Ransom, 562 U.S. at 725; *In re* Johnson, 454 B.R. 882, 889 (Bankr. M.D. Fla. 2011) ("[T]he means test must be applied in light of the debtor's actual circumstances . . . to give effect to its purpose – that is, that debtors who can afford to pay their creditors should pay their creditors."); *In re* Thompson, 457 B.R. 872, 880 (Bankr. M.D. Fla. 2011) ("Allowing debtors to claim expenses they will not actually pay frustrates legislative intent and creates an inaccurate picture of their financial reality."); *In re* Sterrenberg, 471 B.R. 131, 135 (Bankr. E.D.N.C. 2012) (noting that not allowing the deduction of a secured debt payment, that will not in reality be made in the future, furthers the purpose of the means test which was intended to ensure that those who can afford to repay some portion of their unsecured debt be required to do so); *In re* Krawczyk, 2012 WL 3069437, at *5 (Bankr. E.D.N.C. July 27, 2012) ("Essentially, the more recent line of case law prohibits a debtor from deducting phantom expenses to shelter income.").

168 *See generally* Johnson, 454 B.R. at 889; *In re* Thompson, 457 B.R. at 880-81; *In re* Sterrenberg, 471 B.R. at 135-36; *In re* Fredman, 471 B.R. at 540, 555; *In re* Krawczyk, 2012 WL 3069437, at *4-5.

169 *In re* Fredman, 471 B.R. 540, 555.

pass."[170] Yet other courts have highlighted that applying *Ransom* and *Lanning* in chapter 7 cases will give the means test a more real-world view as opposed to having the calculation yield a hypothetical or unrealistic result.[171] This interpretation of the secured debt expense, however, takes too narrow of a view of the statute and fails to consider the entirety of the dismissal statute in chapter 7 consumer cases. The United States Supreme Court has stressed that statutory construction must be a holistic endeavor.[172] In interpreting one part of a statute, a court must look to the provisions of the whole law and must also consider the object of the law and its policy.[173] In interpreting the means test and each of its parts, therefore, a court must look at the entire statutory structure of section 707(b) and consider, not only the purpose behind Congress's enactment of BAPCPA or means testing generally, but also give due import to each part of the statute.[174]

When section 707(b) of the bankruptcy code is analyzed as a whole, it becomes apparent that no such danger exists in chapter 7 cases.[175] In section 707(b)(3), Congress specifically provided a second test designed to allow the bankruptcy court to consider post-petition changes to debtor's income or expenses that impact the debtor's capacity to pay creditors.[176] It is through the section 707(b)(3) totality of the circumstances or bad faith test that post-petition fluctuations in debtor's finances must be considered in chapter 7 cases; not through piece-meal adjustments by the bankruptcy court of the monetary income and expenses figures reported on the means test calculation.[177] In cases where the debtor is not subject to the means test, passes the means test, or effectively rebuts the presumption of abuse, a debtor's chapter 7 case may still be dismissed for abuse where the case was filed in bad faith or where a totality of circumstances demonstrate that debtor is able to pay some or all of his debts.[178] This second test, looks at the chapter 7 debtor's actual post-petition income and expenses, as well as

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[170] *In re* White, 512 B.R. 822, 830 (Bankr. N.D. Miss. 2014); *In re* Powers, 534 B.R. 207, 210-13 (Bankr. N.D. Fla. 2015).

[171] *In re* Campbell, No. 15-13426-BFK, 2016 WL 4150663, at *7 (Bankr. E.D. Va. Aug. 3, 2016).

[172] *See generally* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

[173] *See* Beck v. Prupis, 529 U.S. 494, 506 (2000) (stating that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous).

[174] *Id.*

[175] *See* 11 U.S.C.A. § 707(b) (West 2018).

[176] *Id.*

[177] *See generally In re* Haar, 373 B.R. 493 (Bankr. N.D. Ohio 2007).

[178] 11 U.S.C.A. § 707(b)(3) (West 2018).

other factors, and whether debtor's actual or real financial circumstances show that debtor has the ability to pay creditors.[179]

In *In re Haar*, for example, the bankruptcy court held that income made available to the debtors post-petition as a result of the surrender of their residence, must be considered to determine whether a totality of circumstances showed that debtors had the capacity to repay creditors.[180] Debtors, a husband and wife, had deducted as an expense on their means test mortgage payments due on their residence on the petition date.[181] The court stated that the debtor's ability to repay a meaningful portion of their unsecured debt is a prime consideration in a totality of the circumstances analysis under section 707(b)(3).[182] The court held that because the surrender of debtor's residence provided the debtors with an additional $1,200 per month of additional income, the totality of debtor's finances indicated that debtors could pay at least some of their debt in a Chapter 13 Plan.[183]

By comparison, chapter 13 or, more specifically, section 1325 does not have a statutory provision comparable to section 707(b)(3) in place nor was that portion of section 707 selected by Congress for inclusion into section 1325 of the bankruptcy code.[184] Accordingly, in a chapter 13 case, in order for the bankruptcy court to accurately determine how much of the debtor's disposable income debtor can pay to unsecured creditors over a five year plan, the court must take into account, as *Hamilton v. Lanning* holds, changes in the debtor's income or expenses that are known or virtually certain on the petition date.[185] Otherwise, employing a strictly mechanical approach to determine projected disposable income could deny creditors payments that the debtor could easily make in cases where debtor's income is higher during the post-petition plan period than it was on the petition date.[186]

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179 *In re* Rivers, 466 B.R. 558, 564 (Bankr. M.D. Fla. 2012); *In re* Perelman, 419 B.R. 168, 173 (Bankr. E.D.N.Y. 2009); *In re* Norwood-Hill, 403 B.R. 905, 911 (Bankr. M.D. Fla. 2009).

180 *In re* Haar, 373 B.R. 493, 495 (Bankr. N.D. Ohio 2007).

181 *In re* Haar, 373 B.R. 493, 497 (in addition, debtors had deducted an amount equal to their monthly payments for real estate taxes on the property).

182 *Id.* at 498.

183 *In re* Haar, 373 B.R. 493, 500; *see also In re* Perelman, 419 B.R. 168, 173 (Bankr. E.D.N.Y. 2009) (holding that the debtor could take the secured debt deductions on his means test despite his intention to surrender the collateral, but that the fact that the debtor was not making payments on the secured debts could be considered by the court under section 707(b)(3)).

184 11 U.S.C.A. § 1325 (West 2018).

185 Hamilton, 560 U.S. at 509.

186 *Id.* at 519 (agreeing with the United States Court of Appeals for Tenth Circuit's opinion that "a court taking the forward-looking approach should begin by calculating disposable income . . . It is only in unusual cases that a court may go further and take into

The fact that section 1325 of the bankruptcy code incorporates by reference the means test calculation for the purpose of determining a debtor's disposable income and that the United States Supreme Court has held that, in certain limited chapter 13 cases, a bankruptcy court must account for changes in the debtor's finances that are known on the petition date does not, by extension, give rise to the inference that the secured debt expense should be given a forward-looking application in chapter 7 cases. Just as post-petition changes to a debtor's income are not considered in chapter 7 cases by simply having a bankruptcy court adjust the debtor's CMI on the section 707(b)(2) means test, neither should post-petition changes to debtor's expenses be accounted for in this manner. In chapter 7 cases, Congress provided and built into the dismissal statute the exclusive mechanism through which post-petition changes to the debtor's finances must be considered–the additional abuse tests of section 707(b)(3).

IV. CONCLUSION

Careful analysis of the statutory text of section 707(b)(2)(A)(iii)(I) shows that the language of the statute is clear. Its plain meaning allows a debtor the benefit of the secured debt expense in chapter 7 bankruptcy cases irrespective of debtor's intent to surrender the collateral post-petition.[187] Moreover, a contextual analysis of section 707(b) proves that means testing in chapter 7 bankruptcy cases is incompatible with the forward looking or reality based application increasingly being given to the statute by some bankruptcy courts. Having anticipated that the results of the means testing in chapter 7 cases may not always accurately reflect debtor's real repayment capacity, Congress provided additional mechanisms, specifically the totality of the circumstances and bad faith tests of section 707(b)(3), through which the United States Trustee could look beyond the numbers in the means test calculation to assess debtor's real finances and more accurately gauge debtor's ability to pay creditors.[188] The inclusion of these tests in section 707 allows bankruptcy courts to more aptly use its judicial discretion to assess the reality of debtor's financial situation and its impact on debtor's ability to pay.[189]

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account other known or virtually certain information about the debtor's future income or expenses.").

187 *See In re* Ralston, 400 B.R. 854, 860-61 (Bankr. M.D. Fla. 2009) ("Almost every court that has addressed this statute has determined that it is not ambiguous.").

188 *See In re* Denzin, 534 B.R. at 886-87.

189 *In re* Perrotta, 390 B.R. 26, 30-31 (Bankr. D.N.H. 2008); *In re* Hartwick, 359 B.R. 16, 21 (Bankr. D.N.H. 2007).

When viewed as a whole, the structure of section 707(b) clearly conveys congress's intent to create three separate and distinct tests for abuse in chapter 7 cases: The means test, which directs a court to presume that abuse exists when debtor's disposable income is above the statutory threshold; the totality of circumstances test, pursuant to which a court may dismiss debtor's case for abuse when the facts of the case show debtor's ability to pay his debts; and a bad faith test pursuant to which a court may dismiss a bankruptcy case for abuse when there is evidence that a debtor has manipulated the bankruptcy process in some illicit way including evidence that debtor has tried to maliciously thwart a creditor's efforts to collect on a debt.[190] When the statutory structure of chapter 7's dismissal provision is considered as a whole, it becomes clear that allowing a debtor the benefit of the secured debt expense on the means test calculation even when that expense will not be actually incurred post-petition does not give debtor a free pass or allow the debtor to impermissibly game the system. Instead, it allows the means test calculation to be used by the bankruptcy courts as Congress intended: as a screening mechanism to determine whether a chapter 7 proceeding is appropriate on the petition date, while holding the United States Trustee to his evidentiary burden of having to prove abuse through a totality of circumstances analysis where factors outside of the means test calculation, such as post-petition changes in debtor's income or expenses, indicate that debtor may have the ability to pay some or all of his debts.[191]

Furthermore, bankruptcy courts need not disregard congressional intent when interpreting the dismissal provision applicable to chapter 7 cases; courts need only consider the statute in its entirety giving due import to each of the abuse tests created by Congress to ensure that, while debtors pay the maximum they can afford, honest debtors are afforded access to the bankruptcy protection they seek. When this is done, the apparent

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190 *In re* Haar, 373 B.R. 493, 496 (Bankr. N.D. Ohio 2007) ("As its introductory language imparts, [section] 707(b)(3) is a subordinate paragraph, utilized when determining whether a case should be dismissed under [section] 707(b)(1), the primary provision governing dismissal. In this way, [section] 707(b)(3) is but one of two subordinate paragraphs used to determine whether a case should be dismissed for abuse pursuant to [section] 707(b)(1). The other, contained in [section] 707(b)(2), sets forth a formulaic approach, known as the 'means test,' whereby a court is directed to presume that abuse exists if an ability to pay threshold is met."); *In re* Rivers, 466 B.R. 558, 567 (Bankr. M.D. Fla. 2012) ("[T]he Means Test is only the first step of a two-tiered inquiry under [section] 707(b) of the Bankruptcy Code, and the two-tiered process shows that a debtor's deductions on the Means Test should be determined as of the petition date.").

191 *See generally In re* Rivers, 466 B.R. 558, 560 (Bankr. M.D. Fla. 2012) ("Since a determination of the appropriate proceeding should be made as of the petition date, a debtor's deductions from income on the means test should also be determined as of the petition date.").

incongruity between the statutory language of the chapter 7 dismissal statute and the congressional intent of ensuring that debtors that can afford to pay their debts do so, disappears.